Broadcasting (Amendment) Bill 2003

Administration's Response to the comments of the Legal Advisor to LegCo Bills Committee dated 16 August 2003

1. Is it more appropriate to use "receive" instead of "view" to describe "television programme services" in the proposed definition of "unauthorized decoder"?

We consider it more appropriate to use "view" instead of "receive" in relation to "television programme services" in the proposed definition of "unauthorized decoder". A pay TV operator uses encryption and conditional access technology to restrict access to the service by subscribers only. The TV operator will provide a subscriber with a decoder which allows access to the TV service. An unauthorized decoder itself is usually not a receiving device but an illicit device that circumvents the encryption and conditional access measures to allow access to (viewing of) the service without payment of a subscription. Thus, it is more appropriate to use "view" in the definition.

For your additional background information, in some cases, a person plugging a TV set to the in-building TV reception system or a reception device (e.g. an antenna dish) may receive the pay TV signals. However, the received signals are distorted and not viewable due to encryption and conditional access measures. This is the case in buildings where Hong Kong Cable Television Limited is providing its pay TV service in the analogue format.

We note your observation that the term "receive" is used instead of "view" in section 7(1) of the Broadcasting Ordinance (Cap. 562) (BO). Please note that the term "receive" in section 7(1) is used in relation to a Television Receive Only System. The system, as its name applies, is a receiving device and therefore it is appropriate to use "receive" in this context.

2. What is the difference between the ambits of the references of "in the course of trade or business" in proposed section 6(1)(a) and "in connection with trade or business" in proposed section 6(1)(b)?

Section 6(1)(a) is to reinstate the existing section 6 of the Broadcasting Ordinance. The policy intent of the provision is to impose sanction against **commercial** manufacturing, distribution and marketing of unauthorized decoders. We therefore consider that "in the course of trade or business" is appropriate to reflect the policy intent.

The policy intent of proposed 6(1)(b) is to extend the scope of the existing criminal sanction to cover the use and possession of unauthorized decoders for commercial purposes. For example, if a pub owner uses an unauthorized decoder at his/her pub to show football matches for the purpose of charging a "football night" entrance fee of $150 per person, he is using the unauthorized decoder for the purpose of business. In another scenario, when a physician uses an unauthorized decoder at his/her clinic to show TV programmes to entertain his patients waiting for medical consultation, he/she is using the device in connection with his medical consultation business. The users in both scenarios are caught by proposed section 6(1)(b).

3. Why does the Government propose to retain "in connection with business" when the reference does not exist in Copyright (Amendment) Bill 2003?

We are aware that one of the legislative proposals under the Copyright (Amendment) Bill 2003 is to impose criminal sanction against copyright infringing act concerning four categories of works for the purpose of trade or business. It is proposed in the Copyright (Amendment) Bill 2003 that the wording "in connection with" should be deleted from the expression "for the purpose of, in the course of, or in connection with, any trade or business" where it appears in the Copyright Ordinance. This is a conscious decision to reduce the scope of criminal liability. For the Broadcasting (Amendment) Bill 2003, the wrongdoing in question is the use of an unauthorized decoder to avoid payment of a subscription in commercial premises. The continuous use of the decoder will bring recurrent loss of legitimate subscription revenue to the licensed pay TV service provider, no matter the usage is in direct course of business or marginally connected with the business. We therefore suggest that the act committed in commercial premises in both circumstances should be sanctioned. Hence, we propose retaining "in connection with" in the Broadcasting (Amendment) Bill 2003.

4. Is there a need to define the term "business" in the Bill?

We do not consider it necessary to define "business" to include "business conducted otherwise than for profit" as in the Copyright (Amendment) Bill 2003. Our intended criminal offences are meant to target normal businesses which trade or make use of unauthorized decoders for profit by avoiding payment of subscription fee. It is our policy intent that non-business and domestic offenders be subject to civil liabilities at this stage.

5. Is it more appropriate to make dishonest or unauthorized reception an offence instead of possession or use of unauthorized decoders as proposed in section 6(1)(b)?

We consider a strict liability, qualified by applicable defence provisions, more appropriate for our purposes. Our legal advice is that there may be enforcement difficulties if we introduce a requirement of "dishonesty", which is more difficult to prove. Moreover, when responding to the public consultation in 2001, the Walt Disney Studios Asia Pacific Limited also considered that the requirement of "dishonesty" would make enforcement difficult.

6. Is the presumption provided in proposed section 6(5) consistent with Article 11(a) of the Hong Kong Bill of Rights (HKBOR)?

We consider that the presumption provided in the proposed section 6(5) is compatible with the rationality and proportionality test advocated by the Court of Appeal in *Sin Yau-ming* [1992] 1 HKCLR 127. The human rights implications of reverse onus clauses has been discussed by the Privy Council in *Lee Kwong-kut* [1993] AC 951. There Lord Woolf pointed out that there was "an implicit degree of flexibility" in constitutional guarantees protecting the presumption of innocence. His Lordship agreed that there are situations where it is clearly sensible and reasonable that derivations should be allowed from the strict application of the principle of presumption of innocence and to shift the burden of proof onto the defendant. One example put forward by his Lordship is an offence involving the performance of some act without licence. In *R v Lambert* [2001] 3 WLR 206, the House of Lords in their discussion of a reverse onus clause in the Misuse of Drugs Act held that the imposition of an evidential burden on the defendant would not be incompatible with the right to be presumed innocent under Article 6(2) of the European Convention of the Human Rights.

Applying *Sin Yau-ming*, *Lee Kwong-kut* and *Lambert* to the present case, we are of the view that the presumed fact under section 6(5) of the Bill, that is, the possession of the unauthorized decoder, is rationally and realistically connected with the proved fact, that is, the finding of the unauthorized decoder on the premises. It should be noted that this is only a presumption of fact which can be easily rebutted by the defendant adducing "evidence to the contrary" without proving the defence on the balance of probabilities. As such, an innocent landlord would only need to produce evidence of the tenancy agreement to rebut the presumption. As the burden of proving the commission of the offence remains with the prosecution, it is very unlikely that the proposed section 6(5) would infringe the HKBOR.

The Hong Kong Bar Association has raised similar concerns on the presumption clauses in its representation to the Bills Committee. I attach our response addressing its concerns at **Annex** for your information. The response will be sent to the Clerk to the Bills Committee in the next few days.

7. As proposed section 6(1)(a) does not relate to possession of unauthorized decoders, is it appropriate to apply the presumption to proceedings under that section?

Although the offences created by the proposed section 6(1)(a) do not relate to possession, the prosecution may have to rely on the presumption under the proposed section 6(5). Whether it is appropriate to rely on the presumption depends on the evidence and the status of the defendant. For example, a company rented a premises and an employee of the company sold an unauthorised decoder on the premises. The proprietor of the company was not present at the time of the sale and the number of similar decoders on the premises is small. It is not necessary for the prosecution to rely on the presumption in prosecuting the employee. However, in prosecuting the employer under the proposed section 6(6), the presumption may have to be relied on in order to counter the employer's arguments that the decoder belonged to the employee and that the sale was not sold in the course of the company's business. It should be noted that a defence is provided in the proposed section 6(7) for the employer under such circumstances.

8. Will the operation of proposed sections 6(1)(b), 6(3)(b) and (5) together incriminate an innocent trade or business operator if a mere presence of an authorized decoder is found in his/her place of business?

The proposed section 6(1)(b), together with proposed sections 6(3)(b) and 6(5) will not incriminate innocent trade or business operators. In particular, a mere physical possession of an unauthorized decoder inadvertently left behind by a customer, in your quoted example, will not render the pub or restaurant operator in possession of it for the purpose of, or in connection with, a trade or business. It should be noted that the underlined phrase appears in both the proposed sections 6(1)(b) and 6(3)(b).

9. Please explain how and why an employee should be held criminally liable when the trade or business is in fact carried on by his employer. If it is intended that the offences can be committed by an employee, should this be stipulated expressly in the Bill?

A person referred to in the proposed section 6(1) may include an employee. We cannot preclude employees from committing an offence under these proposed sections, in particular the proposed section 6(1)(b). At the same time, we provide for defences for employers and employees under the proposed section 6(6), (7), (8) and (9). From a drafting point of view, these provisions already clearly state that the offences may be committed by an employee:

Proposed section 6(6): "Where an offence against subsection (1)(a) or (b) is **committed by an employee in the course of his employment** …"

Proposed section 6(7): "Where a prosecution is brought against the employee referred to in subsection (6) by virtue of this section **in respect of an offence committed by his employee**…"

Proposed section 6(8): "In proceedings for an offence under this section, it is a defence for the person charged to prove that he was acting in accordance with the instructions given to him by his employer **in the course of his employment**…"

Proposed section 6(9): This section disapplies the proposed section 6(8) in certain cases. The reference to "in the course of his employment" is still valid.

10. Should "or on behalf of" be added before "his employer" in proposed section 6(8) to cover the situation that that instructions may be given by other people authorized by the employer?

We think it is implicit in the proposed section 6(8) that "the instructions given to him by his employer" includes both direct and indirect instructions, hence no need to insert "on his behalf" before "his employer".

11. Why is it necessary to provide for a presumption of possession in proposed section 7(3C) when the offence under section 7(1) relates to acts other than possession? Will there be human rights implications?

The presumption in s.7(3C) can avoid the argument, which is quite foreseeable, that the decoders belong to the employee (especially when the number of decoders in the shop is small and the proprietor is not present), do not relate to the business of the employer howsoever and therefore are not, say, offered for sale in the course of employment. Hence the proposed s.7(3C) needs to be retained. Otherwise the employer cannot be prosecuted under s.7(3D) unless there is other evidence which points to the employer's ownership of the decoders. The presumption of possession under section 7(3C) does not relate to an essential element of the offence. More importantly as the subsection only imposes an evidential burden on the defendant, it is unlikely that it would infringe Article 11(1) of the HKBOR. Please refer to our response to question 6.

12. Is it necessary to catch employees in proposed section 7(3D), (3E) and (3F) when section 7(1) appears to target at persons committing the offence in the course of trade and business?

Section 7(1) prohibits a person from engaging in certain activities, i.e. import, export, manufacture, sale or let for hire the described decoders "in the course of trade or business". It does not restrict such activities to employers only. Hence, there is a need to provide the presumption and defences for employers and employees, where applicable.

13. Please consider adding "or on behalf of" before "his employer" in section 7(3F) to cover the situation where the instructions were given under the authority of the employer?

Please see our response to question 10.

14. Why does the Government seek to confer a new power of arrest on the Telecommunications Authority (TA) and should provisions be made to require TA or the officer concerned to give the person so arrested forthwith into the custody of a police officer?

The arrest power, which facilitates TA in enforcement actions, is modeled on a similar power under section 35(1)(a) of the Telecommunications Ordinance (Cap.106). Past experience shows that, without the power, TA could not carry out enforcement actions on its own. TA could only rely upon the Police, or in joint actions with the Police, to arrest suspects. Since the Police is burdened with many more other duties of higher priorities, this has hampered our actions against offenders trading in unauthorized decoders in the past. As a matter of standard procedure, TA will give the person so arrested forthwith into the custody of a police officer. We do not consider it necessary to spell this out in the law given that such a procedure is also not specified in provisions in relation to the enforcement of similar duties under the Telecommunications Ordinance.

15. Is it sufficiently clear that "possessed or used" describes "any domestic premises" in proposed 7A(3)?

In the clause "an unauthorized decoder or a decoder in any domestic premises possessed or used by a person", we think it is sufficiently clear that the words "possessed or used" refer to domestic premises, since they follow immediately after "domestic premises", rather than "an unauthorized decoder or a decoder". The subject matter here is the domestic premises, which the magistrate needs to decide whether he should issue a warrant authorizing the officer to enter and search.

16. In proposed section 7A(3), is it intended that the warrant issued would authorize TA or any other public officer to seize or remove any unauthorized decoder or decoder found on or in the premises?

It is indeed our intention that the warrant issued under the sub-section would authorize TA or any other public officer to seize or remove any unauthorized decoder or decoder found on or in the premises but we see no need to make express provision to cover this as TA is already empowered to do so under section 7A(1)(d). In an application for the warrant, officers of TA will expressly ask for the authorization to seize, remove or retain unauthorized decoders found and all these will be included in the warrant issued. TA has not encountered any enforcement

problem in adopting this approach in handling illegal radio equipment under section 35(1) of the Telecommunications Ordinance. As the new section 7A is modeled upon section 35(1) of the Telecommunications Ordinance, we expect that the same can be applied and no further amendments are required.

17. In proposed section 7A(4)(b), is it necessary to add "or authorized" after "empowered" to make the provision consistent with subsections (4)(a) and (c)?

The word "authorized" in the context of the proposed section 7A(4)(a) and (c) refers to the authorization of a magistrate by warrant for a designated enforcement agent to enter and search a domestic premises under the proposed section 7A(3). The proposed section 7A(4)(b) confers power on an enforcement agent to remove by force any person or thing obstructing him or resisting any arrest, detention, search, inspection, seizure or removal that he is empowered, but not "authorized" to make or carry out. Of the various powers mentioned in the proposed section 7A(4)(b), only a "search" can be empowered (under the proposed section 7A(1)(c)) or authorized (under the proposed section 7A(3)). Hence, by adding the words "or authorized" after "empowered" in the proposed section 7A(4)(b), we will be conferring an additional power for the enforcement agent to remove by force any person or thing resisting any "authorized" search in a domestic premises. At present, both the Broadcasting Ordinance (Cap. 562) (section 6(7)(b)), the Telecommunications Ordinance (Cap. 106) (section 35(3)(c)), as well as other ordinances (e.g. s. 10(3)(c) of Cap. 324, s. 15(2)(c) of Cap. 362) do not confer such power. Hence, we are inclined to maintain status quo and propose no change to the present wording of the proposed section 7A(4)(b).

18. What is the intended time limit for bringing an action under proposed section 7B(1) and (3)?

We do not propose a time limit for bringing an action under proposed section 7B(1) and (3). This will enhance the deterrent effect of the provisions.

However, we are open-minded about specifying the time limit in the law if LegCo Members consider it necessary. In the relevant provision under the Australian Copyright Amendment (Digital Agenda) Act 2000, a civil action cannot be brought against a person after the expiration of 6 years from the time when the person did the act (section 7 of 135ANA *Actions*

in relation to the use of broadcast decoding devices for commercial purposes of the Act).

19. In proposed section 7B(3), should "view" be replaced by "receive"?

Please refer to our explanation in the response to question 1 above.

20. Should "任何" be deleted in the Chinese text of the proposed section 6(1)(b) and (3)(b) and section 7A(1)(a)(ii)?

We think "任何" is already implied in the English version whether or not the words are actually used in the proposed section 6(1)(b) and (3)(b).

21. Is it appropriate to use "持牌人" as the Chinese rendition for "licensee" given that "licensee" as used in those provisions refers to a person who has been granted a licence or permission to use or occupy the premises?

We agree that both the English and Chinese terms for "licensee" as used in sections 6(5) and 7(3C) are not appropriate as the term "licensee" is a defined term under section 2(1) of the Ordinance. We will amend it to refer to a person who has been granted permission to use or occupy the premises. Thank you for pointing out the problem.

September 2003

Annex

Hong Kong Bar Association's Comments on Broadcasting (Amendment) Bill 2003 (the Bill)

The Administration's response to Hong Kong Bar Association's comments on the Bill are set out below.

Bar Association's comments

2. The Bar Association questioned whether the presumptions and defences in clauses 3 (b) and (4) of the Bill are compatible with Article 87 of the Basic Law (BL) and Article 14(2) of the International Convention on Civil and Political Rights (ICCPR), by reference to case law, including *A-G of Hong Kong v Lee Kwong-kut*[1] and *R v Lambert*[2]. In particular, the Bar Association was concerned about the presumption contained in the proposed s. 6(b) and s. 6(5) of the Bill. According to the Bar Association, "[t]he person in charge would have to rebut those presumptions by putting forward evidence to the contrary to the standard of proof of on balance of probabilities."[3] The Bar may need to appreciate the real effect of the statutory language of the proposed sections and the opinion of their Lordships in *Lambert*. In light of *Lee Kwong-Kut*, *Edwards*[4] and *Lambert*, our view is that the proposed sections are not inconsistent with Article 87 of the BL and Article 14(2) of the ICCPR.

The presumption of innocence

3. The presumption of innocence is frequently referred to as the golden thread of the criminal law. The right to be presumed innocent is protected by both Article 14(2) of the ICCPR and Article 11(1) of the Hong Kong Bill of Rights (HKBOR), the latter has incorporated the former in our domestic law and provides that "[e]veryone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law." The presumption is also recognised in BL87(2) which reads as follows:

> "Anyone who is lawfully arrested shall have the right to a fair trial by the judicial organ without delay and shall be presumed innocent until convicted by the judicial organs."

4. However it is equally well established in case law that the presumption of innocence is never absolute. The starting point of the ambit of this presumption can perhaps be taken from the cardinal case of *Woolmington v*

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[1] [1993] AC 951.
[2] [2001] 1 3 WLR 206.
[3] See para. 11 of the Bar Association's comments.
[4] *R v Edwards* [1975] QB 27.

Director of Public Prosecutions[5]. There Viscount Sankey LC stated that:

> "Throughout the web of English Criminal Law one golden thread is always to be seen, that is the duty of the prosecution to prove the person's guilt subject…also to any statutory exception."

5. The statement contains a powerful declaration of one most celebrated principle of English criminal law. But of equal note is the recognition of the possibility of statutory exceptions. This point was clarified by Lord Reid in *Sweet v Parsley*[6]. According to his Lordship:

> "…there are many kinds of case where putting on the prosecutor the full burden of proving mens rea creates great difficulties and may lead to many unjust acquittals. But there are at least two other possibilities. Parliament has not infrequently transferred the onus as regards mens rea to the accused, so that, once the necessary facts are proved, he must convince the jury that on balance of probabilities he is innocent of any criminal intention. I find it a little surprising that more use has not been made of this method: but one of the bad effects of the decision of this House in *Woolmington v DPP* [1935] AC 462 may have been to discourage its use."

6. The ambit of the presumption received further discussion in *R v Edwards*. There the Court of Appeal concluded that there was an exception to the fundamental rule of criminal law that the prosecution must prove every element of the offence charged. Having examined a line of authority dating from the 17th century, Lawton LJ said that[7]:

> "…this line of authority establishes that over the centuries the common law, as a result of experience and the need to ensure that justice is done both to the community and to defendants, has evolved an exception to the fundamental rule of our criminal offence that the prosecution must prove every element of the offence charged. This exception … is limited to the offences arising under enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities. Whenever the prosecution seeks to rely on this exception, the court must construe the enactment under which the charge is laid. If the true construction is that the enactment prohibits the doing of acts, subject to provisos, exemptions and the like, then the prosecution can rely upon the exception."

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[5] [1935] AC 462, at 481.
[6] [1970] AC 132, at 149-150.
[7] See Note 4 above, at 39-40.

7. The above passage was quoted with approval by the Privy Council in *Lee Kwong-kut*[8] and was discussed more recently by the Court of Appeal in *Slinery v London Borough of Havering*[9]. In this case, the defendant was charged with an offence under the Trade Marks Act 1994, s. 92(1). Section 92(5) of the Act provides that "it is a defence for a person charged with an offence under this section to show that he believed on reasonable grounds that the use …was not an infringement of the …trademark." Giving the judgment of the court, Lord Justice Rose said[10]:

> "In our judgment, having regard to the authorities and, indeed, to the general principle, as a matter of English law it is open to Parliament to provide that, in criminal proceedings in a given context, a legal (persuasive) burden be imposed upon an accused; but, if, that is to be so, that is to be regarded as an exceptional course and sufficiently clear language is required. Ultimately, however, all depends on the interpretation of the particular statutory provision in question."

Despite the fact that a defendant convicted under s. 92(1) may face up to 10 years imprisonment, the court concluded that the imposition of a legal burden on the defendant did not infringe the right to be presumed innocent under Article 6(2) of the European Convention on Human Rights (Convention).

Legal verses evidential burden

8. In *Lambert*, the House of Lords distinguished a legal/persuasive burden from an evidential one. Whilst the imposition of a legal burden on the accused would likely be inconsistent with the presumption of innocence, the imposition of an evidential burden would not have similar effect. A legal burden of proof requires the defendant to prove, **on the balance of probabilities**, a matter which is essential to determine his guilt or innocence. An evidential burden, on the other hand, only requires the defendant to adduce sufficient evidence to raise an issue before it has to be determined as one of the facts of the case. The prosecution does not need to lead any evidence about it. But if it is put in issue, the burden of proof remains with the prosecution[11].

9. The classification of statutory presumptions is not an exact science. Lord Hope held that it might be useful to consider the following questions:

(1) What does the prosecution have to prove in order to transfer the onus to the defence?
(2) What is the burden on the defendant – does it relate to something which is likely to be difficult for him to prove, or does it relate to

[8] See Note above, at 962.
[9] [2002] EWCA Crim 2558.
[10] Ibid, para. 17
[11] See Note 2 above, at 230-232..

something which is likely to be within his knowledge or to which he readily has access?

(3) What is the nature of the threat faced by society which the provision is designed to combat?[12]

10. Lord Hope's approach received support from the Privy Council in *Brown v Procurator Fiscal*[13]. With the exception of the mandatory presumption of guilt, Lord Hope adopted a flexible approach to the other kinds of presumption. According to his lordship, **the Article 6(2) right "is not absolute and unqualified, the test to be applied is whether the modification or limitation of that right pursues a legitimate aim and whether it satisfies the principle of proportionality"**[14]. (emphasis added)

Presumption of knowledge

11. Clause 3(a) creates a new s. 6(1)(b) which criminalizes the possession or use or authorising the possession or use, for the purpose of, or in connection with trade or business, an unauthorised decoder[15]. Where it is proved that a person has, for the purpose of, or in connection with, trade or business, possessed or used, or authorised another person to possess or use an unauthorised decoder, the proposed s. 6(3)(b) provides that "unless there is evidence to the contrary, it shall be presumed that the person knew that the decoder was an unauthorised decoder." Where a company/body corporate/partnership has done the prohibited act under s. 6(1), "unless there is evidence to the contrary", the director/partner would be presumed to have authorised the act.

12. The situation under s. 6(1)(b) and (3)(b) bears a close resemblance to the exceptions stipulated in *Edwards* discussed in paragraph 6 above. In Hong Kong, it is common knowledge that one has to pay the required subscription to the licence holder in order to watch pay television programmes. The licence holder, upon receipt of payment, would provide a decoder to enable the payee to watch the encrypted television programmes. A person would not be convicted under the proposed section unless his decoder is an unauthorised one, that is, "a decoder by means of which encrypted television programmes or encrypted television programs services provided under a licence can be viewed in decoded form without payment of a subscription where a subscription is required to be paid"[16]. In the circumstances, it is submitted that whether the defendant has paid the required subscription is a matter likely to be within the knowledge of the defendant or a matter which he has ready access. It is very unlikely that a defendant who is not possessing or

[12] *R v DPP ex parte Kebelin*e [1999] 3 WLR 972, 1000.
[13] 5th December 2000.
[14] *Lambert*, see Note 2 above, at 237.

[16] See the proposed definition of "unauthorised decoders" in clause 2 of the Bill.

using an unauthorised decoder would have any difficulty to rebut the presumption. In our view, the provision falls within the excepted situations stipulated in *Edwards*.

13. As far as the presumption under s. 6(4) is concerned, our view is that the use of an unauthorised decoder in business is most likely to benefit the proprietor. Without his instructions, it is unlikely that an employee would use an unauthorised decoder for the purpose of trade and business in the course of employment[17]. It is submitted that whether the decoder is an unauthorised one is within the peculiar knowledge of the proprietor. Since the policy intent of the section is to combat the possession or use of unauthorised decoders for commercial purpose, it would defeat the purpose of the Bill if traders are able to hide themselves behind the employees. The presumption appears to flow logically from the use of the unauthorised decoder in the business context. Further, as discussed below, it is unlikely that the burden imposed on the defendant would be considered as a legal one.

Presumption of possession

14. In proceedings under the proposed s. 6, it is further provided that "unless there is evidence to the contrary", unauthorised decoders found on the premises are presumed to be in the possession of the licensee, tenant, lessee, occupier, person in charge and owner of the premises. The presumed fact of possession flows logically from the proved fact, the finding of unauthorised decoders on the premises. More importantly, the defendant can easily rebut the burden by adducing sufficient evidence to raise the defence. In his much celebrated article, *The Logic of "Exceptions"*, G. Williams raised the following question: Why should not the concluding words "unless the contrary is proved" be taken to mean "unless sufficient evidence is given to the contrary"? In the opinion of the learned author, if the latter phrase was employed, it would point to an evidential burden[18]. Relying on this statement of Williams, the House of Lords in *Kebilene* and *Lambert* even held that it is possible to read "to prove" as imposing merely an evidential burden. Lord Cooke of Thorndon said[19]:

> "…for evidence that it is a possible meaning one could hardly ask for more than the opinion of Professor Glanville Williams in 'The Logic of "Exceptions"' [1988] CLJ 261, 265 that 'unless the contrary is proved' can be taken, in relation to a defence, to mean 'unless sufficient evidence is given to the contrary;' and the statute may then be satisfied by "evidence that, if believed, and on the most favourable view, could be taken by a reasonable jury to support the defence'."

[17] Of course if the employee is not possessing or using an unauthorised decoder in the course of employment, the employer would not be liable.
[18] Williams, G., The Logic of "Exceptions", *The Cambridge Law Journa*l, 1988, 261, at 264-265.
[19] *Kebilene* [2000]2 AC 326, 373.

This statement was quoted with approval by Lord Hope in Lambert[20].

15. In light of House of Lords' view as expressed in the two decisions, our view is that the natural and ordinary meaning of the phrase "unless there is evidence to the contrary" in clauses 3(b) and 4 only requires the defendant to adduce sufficient evidence to raise the defence. The onus remains with the prosecution to prove all aspects of the offence beyond reasonable doubt. As such, the contention that the clauses require the defendant to put "forward evidence to the contrary to the standard of proof of on balance of probabilities" should be rejected.

Conclusion

16. On the basis of the above discussion, our view is that the presumption and the defences contained in s. 6(3)(b), s. 6(4) and (5) are unlikely to infringe BL 87 and Article 11(1) of the HKBOR.

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[20] See Note 2 above, 235-236.