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Secretary for Commerce, Industry and Technology
(Attention: Mr Eddie Cheung, Prin AS(ITB)A)
Information Technology and Broadcasting Branch
Commerce, Industry and Technology Bureau
1-2/F Murray Building,
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Central
Hong Kong

10 October 2003

BY FAX

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Dear Mr Cheung,

Broadcasting (Amendment) Bill 2003

Thank you for your letter of 29 September 2003 which sets out the Administration's response to my letter of 16 August 2003. My comments on the Administration's response and further observations on the Bill are set out below for your consideration:

Scope of proposed section 6(1)(b)

- (a) The examples quoted in paragraph 2 of the Administration's response relate to using an unauthorized decoder for commercial purposes. However, proposed section 6(1)(b), as drafted, would also catch mere possession of an unauthorized decoder for commercial purposes even though the person concerned might not have the slightest intention of using it. According to the LegCo Brief, the legislative intent for the proposed section is to impose criminal sanction against the use of unauthorized decoders for commercial purposes. As such, to punish mere possession of unauthorized decoders before they are actually used for commercial purposes appears to be wider than what was intended by the Administration. Will the Administration consider amending the *actus reus* of the offence under proposed section 6(1)(b) to "possess and use" an unauthorized decoder to reflect the legislative intent more accurately? If, however, it is intended that possession should be made an offence, please consider narrowing its scope to, say, possession of an unauthorized decoder with intent to use it for commercial purposes.

- (b) Please re-consider the need to define "business" as used in proposed section 6(1)(b). As you are aware, the term carries a general and narrow sense. The word "business" might, in the narrow sense, refer to commercial transactions or in the general sense to activities. There have been a number of cases in which the courts were asked to rule on the meaning of "business" as used in different Ordinances. If the policy intent is, as stated in paragraph 4 of the Administration's response, to impose criminal sanction on businesses which trade or make use of unauthorized decoders for profit by avoiding payment of subscription fee, should this intent be made clear in proposed section 6(1)(b)?
- (c) While the Chinese text of proposed section 6(1)(b) refers to "任何營商或業務的目的", the meaning of "任何" is not reflected in the corresponding English text. Please clarify whether "trade or business" is intended to mean any trade or business rather than confining to the defendant's own trade or business. If it is intended to cover any trade or business, please consider adding "any" before "trade or business" in proposed section 6(1)(b) and (3)(b) and section 7A(1)(a)(ii).

Presumption provided in proposed section 6(5)

- (a) It is noted from paragraph 6 of the Administration's response that the Administration considers the presumed fact under proposed section 6(5), 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. In fact, there are two proved facts instead of one under the proposed provision. Apart from the finding of the unauthorised decoder on the premises, the other proved fact is that a person is the licensee, tenant, lessee, occupier, person in charge or owner of the premises. You may wish to note that in *R v Sin Yau-ming* [1992] 1 HKCLR 127, a similar presumption of possession in the repealed section 47(1)(c) of the Dangerous Drugs Ordinance (Cap. 134) was held to be inconsistent with the presumption of innocence protected by Article 11(1) of the Hong Kong Bill of Rights as the prosecution has failed to prove in relation to the presumption that the fact to be presumed followed from or was realistically connected with the fact to be proved. The Court of Appeal further held that the relevant presumption of possession of dangerous drugs failed the rationality and proportionality tests as it catches and forces to rebuttal the innocent landlord or tenant of premises. In the light of *R v Sin Yau-ming*, please explain how and why the Administration comes to the view as stated in paragraph 6 of the Administration's response.
- (b) According to paragraph 7 of the Administration's response, the presumption of possession may have to be relied on in prosecuting an employer for importing, exporting, manufacturing, selling, etc. an unauthorized decoder by virtue of proposed section 6(6). As I understand it, a rebuttable presumption of fact

operates to assist the prosecution to prove an ingredient of an offence, not to counter any possible defences which may be raised by a defendant. Since possession is not an ingredient of the offence under proposed section 6(1)(a), please consider the relevance and appropriateness of applying the presumption to that offence. It would seem that the presumption of possession might become relevant if the offence concerned is amended to include possession of an unauthorized decoder for the purpose of importing, exporting, selling, etc.

New power of arrest

While it may be a matter of standard procedure that the Telecommunications Authority will give the person arrested forthwith into the custody of a police officer, there is no express provision requiring this to be done. Would it be better to provide for this requirement expressly? As you know, some existing legislation contains such a provision. Please refer to section 4(4) of the Fixed Penalty (Public Cleanliness Offences) Ordinance (Cap. 570) and section 18(2) of the Chemical Weapons (Convention) Ordinance (26 of 2003).

Warrant issued under proposed section 7A(3)

To make it clear that proposed section 7A(1)(d) will apply to proposed section 7A(3), should the reference to "an unauthorized decoder or a decoder" in proposed section 7A(3) be replaced by "anything liable to seizure under subsection (1)(d)". As you know, the latter reference has been adopted in a similar section (i.e. section 35(2)) of the Telecommunications Ordinance (Cap. 106).

I would appreciate it if you could let me have a reply in both languages on or before *24 October 2003* so that your reply can be circulated to members of the Bills Committee before the next meeting scheduled for 30 October 2003.

Yours sincerely,

(Connie Fung)
Assistant Legal Adviser

cc: DoJ (Attention: Mr Vidy Cheung, SGC)
LA