

Bills Committee on Broadcasting (Amendment) Bill 2003

**Administration's Response to Issues Raised at the Meeting on
30 October 2003**

Purpose

This paper sets out the Administration's response to the issues raised at the Bills Committee meeting on 30 October 2003 as summarised in paragraph 3 of the Minutes of the meeting (Minutes).

Policy objectives

2. The Government does not condone pirated viewing because, among other things, it deprives licensed pay television operators of their legitimate revenue. We consider that the operators also have a role to play in combating piracy. They ought to adopt effective measures to protect their services from unauthorized reception. The existing problem in Hong Kong largely stems from Hong Kong Cable Television Limited's (HKCTV's) analogue transmission. Digital transmission makes piracy difficult and costly. Hence we have encouraged and mandated HKCTV to complete digitisation of its transmission by May 2005.

3. At the same time, the Government needs to enact appropriate law to protect legitimate pay television licensees. The existing legislation has already imposed criminal liability on dealers of unauthorized decoders for commercial purposes. This is in line with the European Union (EU)'s approach, which targets only commercial activities as it is considered "that the most effective way of thwarting piracy is to concentrate on commercial activities enabling illegal access".

4. The purpose of the Bill is to tighten the control of pirated viewing by extending the restriction to the end-user level. Based on the public consultation outcome, we propose to target commercial end-users at this stage. We will consider criminalising domestic end-users when piracy is still rampant after HKCTV has completed digitization. Industry associations like Cable and Satellite Broadcasting Association of Asia and Motion Picture Association, the Consumer Council and some chambers of commerce and professional bodies support the Government's approach. The TV broadcasters have recently advocated making pirated viewing a summary offence with fixed penalty as the

punishment. Members have requested the Administration to consider the broadcasters' suggestion and explore options of criminal punishment to enhance the deterrent effect of the proposed legislation.

Options of criminal punishment

5. In short, to criminalize a certain kind of conduct means inflicting a punishment on a person committing the conduct. Possible options of punishment against pirated viewing, in descending order of severity, include imprisonment, fine and confiscation of the device. Members asked if imposing fixed penalty or confiscation as sanctions against the possession or use of unauthorized decoders are possible options.

Monetary punishment

6. Monetary punishment can include a fine imposed by the court upon conviction summarily or on indictment, and fixed penalty. Both summary conviction and conviction on indictment involve the judicial process but the maximum fine that may be imposed by the court on a summary conviction is less than that on conviction on indictment.

7. Fixed penalties, on the other hand, do not involve the judicial process if the case is not contested. Fixed penalties mainly apply to situations where evidence is almost incontrovertible and liability is strict, as in the case of certain traffic offences. For implementation, an enforcement agent who catches a wrongdoer "red-handed" will issue a ticket on the spot. The wrongdoer may choose to pay the fine to discharge his/her liability or dispute his/her liability in court. If the defendant is convicted by the court, he/she may have to pay a fine in addition to the fixed penalty plus costs. No criminal record will be entered for fixed penalties or summary convictions with fines only. Hence, there will be no impact on the issue of a Certificate of No Criminal Conviction.

Confiscation of goods

8. The law may empower an enforcement agent to seize¹ an object if he/she reasonably believes that an offence has been committed and that the object forms part of the evidence of the offence. The law may also empower the enforcement agent to apply to the court to confiscate the object irrespective of whether any person has been prosecuted. Confiscation will not leave a criminal record. If the court is not satisfied that the object should be confiscated under the law, the object will be returned to the legal owner who may subsequently claim damages from the Government.

Response to specific questions

Options of sanctions against domestic users [Paragraph 3(a)(i)] of Minutes]

9. If domestic pirated viewing is to be sanctioned, enforcement agents have to enter domestic premises in order to collect evidence (e.g. seizure of the unauthorized decoder used). That renders intrusion of private domestic premises inevitable. As explained in paragraph 7 above, the implementation of fixed penalty requires law enforcement officers to catch the wrongdoer possessing or using an unauthorized decoder in domestic premises “red-handed”. The introduction of such lesser punishment will therefore not make enforcement easier or less intrusive in our case. We consider that such sanctions should only be introduced as a last resort when feasible alternative measures, such as digitisation and enhanced encryption technology, fail to contain the problem. We also wish to reiterate that in jurisdictions where there are criminal sanctions against end-users, such as the US and Canada, there are no active enforcement actions.

The question of double penalty if domestic users of unauthorized decoders were held liable to both statutory fines and civil remedies [Paragraph 3(a)(ii)] of Minutes]

10. We have proposed, in the Bill, to introduce civil remedy against domestic possessors or users of unauthorized decoders. A civil claim is not a penalty and therefore the question of double penalty does not arise. The criminal sanction is to punish the illegal act of

¹ In simple terms, seizure refers to the act of temporarily taking away an object by an enforcement officer while confiscation involves court proceedings to take possession of property from a person.

pirated-viewing for a commercial purpose whereas the civil remedy is to remedy the loss incurred as a result of the pirated-viewing. For example, a careless driver in a personal injury case is liable for both criminal and civil sanctions. The criminal sanction is to punish the driver for his/her sub-standard driving manner whereas the civil claim is to remedy the results of his/her driving manner. The purposes are different.

11. If statutory fines were to be introduced, probably \$500 to \$1,000 would be appropriate of an offence of this nature. However, the fine will have to be raised substantially to achieve a deterrent effect, like the recent increase of fines to \$1,500 for spitting in public places etc. If both statutory fines and civil remedy were provided, then a licensee could bring a civil action against an offender independently of prosecution, irrespective of whether a prosecution is brought against the offender. The standard of proof for the prosecution is “proof beyond reasonable doubt” while that for the plaintiff in a civil action is “proof on balance of probabilities”.

Enforcement actions against persons bringing unauthorized decoders into Hong Kong [Paragraph 3(b) of Minutes]

12. The existing law targets import and export of unauthorized decoders for commercial purposes only. According to the Customs and Excise Department, no commercial import and export of unauthorized decoders have been reported at border check-points. We do not rule out the possibility that individuals may bring small quantity of unauthorized decoders across the border. As the import and export of unauthorized decoders by individuals for personal use are not criminal offences at the moment, the Customs and Excise officers have not been taking monitoring or enforcement actions.

Possible sanction against private purchasers of unauthorized decoders or those who brought them into Hong Kong [Paragraph 3(c)(i) of Minutes]

Criminalizing purchasers of unauthorized decoders

13. In terms of policy, we consider it more appropriate to target vendors rather than purchasers or users of unauthorized decoders. Introducing criminal sanctions against purchasers of unauthorized decoders is difficult as it may be necessary to include mens rea in the offence, i.e. the acquisition must be with intent to use the unauthorized decoders. We have explored the option of introducing fixed penalties against possession of unauthorized decoders so that an enforcement

officer witnessing a person who purchases a suspected unauthorized decoder may issue him/her a fixed penalty ticket for possessing the device. However, case law has clearly established that mere physical possession of an object without any mental element cannot constitute possession. The mental element in our case is the knowledge that the device is an unauthorized decoder enabling the viewing of pay television without payment of a subscription. Allowing an enforcement officer to issue a fixed penalty ticket to a person in mere physical possession of a suspected unauthorized decoder is a presumption of guilt without proof of the mental element. This could violate Article 11 of the Hong Kong Bill of Rights (HKBOR), which provides, inter alia, that “[e]veryone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law”².

Confiscation of unauthorized decoders

14. Imposing the sanction of immediate confiscation of unauthorized decoders on those who purchased them or brought them into Hong Kong irrespective of their purpose needs to be studied with great care. The imposition of such sanction would need to be authorized by legislation consistent with the Basic Law.

15. Article 6 of the Basic Law provides that the HKSAR shall protect the right of private ownership of property in accordance with law. Article 105 further provides, among other things, that the HKSAR shall, in accordance with law, protect the right of individuals and legal persons to the acquisition, use, disposal and inheritance of property and their right to compensation from lawful deprivation of their property.

16. Outright confiscation of properties where no criminal activities are involved and no procedural safeguards are present would be open to attack as being in breach of the constitutional protection of property rights under articles 6 and 105 of the Basic Law. Hence, we need to make the possession or use of unauthorized decoders for domestic viewing of licensed pay television services without payment of a subscription a criminal offence, and then introduce procedure which takes into account the degree of fault and care of the owners in question, and afford them a reasonable opportunity of putting their case to the responsible authorities. The procedure may require an enforcement

² Even though a person who has received a fixed penalty ticket may still dispute his/her liability in court, the consequences of failing that dispute will likely to be a fine in addition to the fixed penalty plus costs. The adverse financial consequences may force a person to abandon his/her right to presumption of innocence, thus compromising Article 11 of the HKBOR.

officer to seize the decoder in question if he has reasonable grounds to believe that it is an unauthorized decoder. Without the provision for the above criminal offence and procedure, immediate confiscation of unauthorized decoders from those who purchased them or brought them into Hong Kong irrespective of their purpose does not appear to be compatible with the Basic Law.

Stepping up enforcement against the supply of unauthorized decoders [Paragraph 3(c)(ii) of Minutes]

17. Enforcement action will be stepped up. Joint operations will be mounted by OFTA, the Police and the Customs and Excise Department when necessary.

Interpretation of proposed section 7B(2) as to whether a person who was in breach of proposed section 6(1)(a) or (b) would be liable to both criminal sanction and civil remedies [Paragraph 3(d)(i) of Minutes]

18. The proposed section 7B(2) provides to the effect that a licensee may bring a civil action even though the person against whom the action is brought has not been charged with or convicted of an offence by reason of a contravention of proposed section 6(1)(a) or (b). A person who is in breach of proposed section 6(1)(a) or (b) is thus liable to both criminal sanction and civil remedies.

19. Our policy intent is that the person in breach of the relevant provisions should be subject to both criminal and civil liabilities. The proposed section 7B(2) makes it clear that even in the cases where no criminal proceeding is brought against the person or the person is not convicted by a court, a licensee is still entitled to institute a civil action on its own. A licensee may bring a civil action at any time independently of the prosecution process.

Sanction against persons bringing unauthorized decoders into Hong Kong irrespective of the purpose or use of the decoder [Paragraph 3(d)(ii) of Minutes]

20. Given the problems of introducing the possible options of sanctions as discussed above, we have proposed that we should consider if there is a need to criminalise the possession or use of unauthorized decoders for domestic viewing after assessing the extent of the problem of pirated viewing upon HKCTV's completion of its digitisation project.

Whether the scope of the offence under proposed section 6(1)(b) is too wide [Paragraph 3(d)(ii) of Minutes]

21. Our policy is to prohibit all commercial activities connected with the trading or use of unauthorized decoders which enable illegal access to pay television services without payment of subscription fee. The proposed section 6(1)(b) makes it an offence for any person who, for the purpose of, or in connection with, trade or business³, to possess or use, or authorize another person to possess or use an unauthorized decoder. We think the scope of the offence is appropriate and the provision will catch proprietors of pubs, restaurants or other commercial premises where unauthorized decoders are found, unless they can provide reasonable defence under the law.

Conclusion

22. We consider that it is more appropriate to confine the criminal sanction to business-related activities involving unauthorized decoders at this stage. We will consider introducing the options of criminal sanctions discussed above if pirated viewing is still rampant after HKCTV has completed its digitization project.

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Communications and Technology Branch
Commerce, Industry and Technology Bureau

³ We have accepted the advice of the Assistant Legal Adviser of the Legislative Council to add “any” before “trade or business”.