

立法會 *Legislative Council*

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Paper for the House Committee meeting on 16 April 2004 Report of the Bills Committee on Broadcasting (Amendment) Bill 2003

Purpose

This paper reports on the deliberations of the Bills Committee on Broadcasting (Amendment) Bill 2003 (the Bill).

Background

2. Subscription television services offer a wide range of programmes catering to the interests of different viewers. At present, the major source of income for subscription television operators is the fees paid by viewers. However, the unauthorized access to such services without payment of subscription by means of illicit decoders has affected not only the revenue and economic viability of the operators but also Hong Kong's attractiveness as a regional broadcasting hub. The problem has been attributed partly to the easy availability, both within Hong Kong and across the border, of low-cost illicit decoders which enable users to view subscription television programmes, as well as the lack of sanction under existing legislation against the act of unauthorized reception of subscription television programme services per se.

3. In late 2001, the Administration conducted a review on certain provisions of the Copyright Ordinance (Cap. 528) in response to public concern about end-user criminal liability for copyright piracy. The opportunity was also taken to consult the public on issues related to the unauthorized reception of subscription television programme services. Having considered the findings and outcome of public consultation, the Administration has proposed to provide for both civil remedy and criminal sanction against the possession or use of unauthorized decoders for commercial purposes; and to introduce civil remedy only against any person who possesses or use an unauthorized decoder to view television programmes without payment of the necessary subscription.

The Bill

4. The main purpose of the Bill is to amend the Broadcasting Ordinance (Cap.562) ("BO") to provide for the following :

- (a) to introduce criminal sanction and civil remedy against the possession or use of unauthorized decoders for the purpose of, or in connection with, trade or business;
- (b) to provide civil remedy against any person who possesses or uses an unauthorized decoder to view subscription television programmes without payment of a subscription;
- (c) to strengthen the enforcement powers of the Telecommunications Authority (TA) in relation to decoder-related offences; and
- (d) to revise the definition of "unauthorized decoder".

The Bills Committee

5. Members agreed at the House Committee meeting on 16 May 2003 to form a Bills Committee to study the Bill. Hon SIN Chung-kai was elected chairman of the Bills Committee and the membership list of the Committee is at **Appendix I**. The Bills Committee has held a total of nine meetings to examine the Bill. The organizations which have submitted views to the Bills Committee are listed in **Appendix II**.

Deliberations of the Bills Committee

6. In general, members of the Bills Committee support the Administration's proposal to introduce both criminal sanction and civil liability for the possession or use of unauthorized decoders for business or commercial purposes. However, they have exchanged views extensively with the Administration and deputations on whether criminal sanction should be extended to domestic or private pirated viewing of pay television programmes. The Bills Committee's major areas of deliberation include:

- (a) policy and legal issues relating to the proposed criminal and civil liabilities for decoder-related offences for business purposes (paragraphs 8 to 22);
- (b) issues examined in conjunction with the question of whether criminal sanctions should be introduced for domestic or

private pirated viewing of pay television programme services (paragraphs 23 to 41);

- (c) efficacy and possible enhancement of enforcement actions (paragraphs 42 to 44); and
- (d) issues arising from the new definition of "unauthorized decoder" (paragraphs 45 to 51).

Possession or use of unauthorized decoders for commercial or business purposes

7. Under the existing provisions of BO, control against the unauthorized reception of subscription television programme services is effected at the supply level by prohibiting the import, export, manufacture, sale or letting for hire, of unauthorized decoders in the course of trade or business. Members agree in principle that control against the possession or use of unauthorized decoders for commercial purposes should be strengthened. They have also examined a number of legal and policy issues arising from the proposed provisions.

Scope of the offence under proposed section 6(1)(b)

8. Under proposed section 6(1)(b), a person shall not, for the purpose of, or in connection with, trade or business, possess or use, or authorize another person to possess or use an unauthorized decoder. Contravention of the proposed section is an offence liable on conviction to a fine and imprisonment .

9. In this connection, the Hong Kong Bar Association has submitted to the Bills Committee that proposed section 6(1)(b) has been drafted in similar terms as the amendments to the Copyright Ordinance contained in the Intellectual Property (Miscellaneous Amendments) Ordinance 2000. As the amendments were met with enormous community outcry, they were suspended shortly afterwards by the enactment of the Copyright (Suspension of Amendments) Ordinance 2001 (Cap. 568). Subsequently, the Administration has proposed in the Copyright (Amendment) Bill 2003 to remove the phrase "in connection with" 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 so as to restrict the scope of the criminal offence of possessing an infringing copy of certain categories of copyright works. Given that any slightest association between the presence or use of the unauthorized decoder with a trade or business will be caught under proposed section 6(1)(b) of the Bill, the Association has questioned whether the scope of the offence under the proposed section is too wide.

10. On whether it is justified that the mere possession of an unauthorized decoder may constitute an offence under proposed section 6(1)(b) even if the

person has no intention of using the device to view pay television programmes, the Administration explains that its intention is to prohibit the act of "possession" in addition to "use" of unauthorized decoders for commercial purposes in order to facilitate enforcement and achieve greater deterrence. Moreover, the Administration does not contemplate any situation under normal circumstances where a person merely possesses an unauthorized decoder without the intention of using it to view pay television programmes. Even if there is, the person can come up with the necessary defence in court.

11. Members note that the Administration has proposed to introduce a Committee Stage Amendment (CSA) to add "any" before "trade or business" under proposed section 6(1)(b). Thus, the expression "for the purpose of, or in connection with, any trade or business" will cover any act of possession or use of unauthorized decoders for the purpose of or in connection with a trade or business if it is connected with, subserving or ancillary to the trade or business. However, there must be some nexus between the act and the carrying on of the trade or business and one must look at the main purpose of the act. The Administration considers that the proposed amendments will serve the purpose of catching all commercial users or unauthorized decoders. Nevertheless, to avoid penalizing innocent commercial operators like recycling businessmen or scrap metal dealers who may come into possession of an unauthorized decoder, the Administration has proposed another CSA to proposed section 6(1)(b) to add the element of "without lawful authority or reasonable excuse" to the offence under the proposed section.

12. In general, members have not indicated any strong view against the scope of the offence under proposed section 6(1)(b). They do not object to the Administration's CSAs to proposed section 6(1)(b) but have urged the Administration to ensure that the proposed amendment will not result in any loophole which may be open to abuse.

Interpretation of the term "business"

13. The expression "trade or business" is used in the proposed provisions dealing with decoder-related offences. In this connection, some members have enquired whether the term "business" as used in the Bill should receive a restrictive interpretation to mean commercial activities aimed at making a profit, or a liberal interpretation to include all activities irrespective of whether they are commercial or profit-making in nature. Noting that a definition of "business" has been proposed in the offence in relation to possession of infringing copies by a copying service in the Copyright (Amendment) Bill 2003 to provide expressly that "business" means business conducted for profit, some members have asked the Administration to consider whether it is necessary to define the term "business" in the current Bill to clarify the Administration's policy intent.

14. In response, the Administration confirms that at this stage, its policy intent is to criminalize commercial activities and dealings involving unauthorized decoders while non-business and domestic offenders will only be subject to civil liability. It has considered that the term "business" as used in the Bill, which appears in the expression "trade or business", is sufficiently clear to reflect the narrow sense of commercial transactions rather than the general sense of all activities.

15. Members have not raised any objection to the Administration's proposal. However, there is a suggestion that policy-wise, pirated viewing should not be condoned in business and non-business establishments alike. In the longer run, the Administration should consider extending the scope of criminal liability for pirated viewing of pay television programmes to all types of institutions even if the offence has not been committed for any commercial or profit-making purpose.

Presumption clauses

16. Clause 3(b) and clause 4 of the Bill introduce two sets of identical presumptions and defences for offences under proposed section 6(1) of the Bill and existing section 7 of the BO which deal with unauthorized decoders and Television Receive Only System (TROS) decoders respectively. In short, the prosecution can rely on these provisions to presume that the defendant (being a licensee, tenant or lessee etc of the premises) has knowledge of and is in possession of the unauthorized decoder, unless there is evidence to the contrary. The Bills Committee has noted the query raised by the Hong Kong Bar Association that the presumptions and defences in clause 3(b) and clause 4 of the Bill may have the effect of reversing the burden of proof from the prosecution to the defendant and therefore, may not be consistent with the presumption of innocence guaranteed under Article 87 of the Basic Law and Article 11(1) of the Hong Kong Bill of Rights (HKBOR).

17. The Administration has advised that case law has established that the presumption of innocence can be limited under appropriate circumstances. Referring to the presumption under proposed section 6(3) that the person knows that the decoder in question is an unauthorized decoder, the Administration considers the presumption appropriate because whether or not the person has paid the required subscription to obtain the decoder is a matter likely to be within his knowledge. Regarding proposed section 6(5) which presumes that unauthorized decoders on premises are in the possession of the licensee, tenant, lessee etc of the premises, the Administration has assured members that the prosecution will have to prove that the person is the licensee, tenant or lessee before the presumption of possession can be triggered.

18. On concerns about reversing the burden of proof, the Administration has referred to the statutory language used in the phrase "unless there is

evidence to the contrary" which, in its view, only imposes an evidential burden, not a legal burden, on the defendant. The person will only need to adduce sufficient evidence to rebut the presumption. The onus remains with the prosecution to prove all the elements of the offence beyond reasonable doubt. Having regard to all relevant factors, the Administration considers that the proposed presumptions satisfy the tests of rationality and proportionality and are unlikely to infringe Article 87 of the Basic Law and Article 11(1) of the HKBOR.

Defence clauses

19. In respect of the decoder-related offences under the Bill, a number of defences have been provided under proposed sections 6 and 7. In essence, if an employer is charged, it will be a defence if he shows that he has taken all practical steps to prevent the commission of the offence. If the employee is charged, it will be a defence if he was acting in accordance with his employer's instructions and he had no reasonable grounds to believe that the device in question was an unauthorized or illicit decoder.

20. Some members have expressed concern about whether it is fair to charge employees, instead of employers, for the decoder-related offences committed in the course of employment. They have also pointed out that the burden of establishing the defence by the employee charged with an decoder-related offence appears more onerous than that under the Copyright (Amendment) Bill 2003 dealing with copyright infringement. Under the current Bill, the employee has to prove the second limb that he had no reasonable grounds to believe that the decoder in question was an unauthorized decoder.

21. The Administration has submitted that the Bill seeks to impose criminal liability on any person who has committed a decoder-related offence under proposed section 6(1) or existing section 7(1) of BO. There is no question of the employee and employer bearing different degrees of criminal liability. Whether the employer or the employee, or both of them, would be charged would depend on the circumstances of the case. Regarding the second limb of the defence which the employee needs to establish, the Administration has explained that the proposed provision is consistent with the Administration's approach in presuming, as provided under proposed section 6(3) and section 7(3A), that a person who possesses or uses an unauthorized decoder knew that the decoder in question was an unauthorized one, unless there is evidence to the contrary.

22. While some members find the Administration's proposal by and large acceptable, some are concerned about its implications on employment relations. The Bills Committee has suggested that the Administration may consider consulting employees through such forums as the Labour Advisory Board. In this connection, the Administration has advised that similar defence clauses are

found in local and overseas legislation such as the Water Pollution Control Ordinance (Cap. 358), the Dutiable Commodities Ordinance (Cap. 109), as well as a number of UK legislation such as the Food and Environment Protection Act 1985. The Administration considers that the defence clauses in the Bill, which are modeled on relevant existing provisions, are reasonable, appropriate and balanced for both employers and employees.

Domestic or private pirated viewing of pay television programmes

23. One of the most contentious issues arising from the Bill is whether criminal sanction should also be imposed on domestic or private pirated viewing of pay television programmes through the possession or use of unauthorized decoders, in addition to the civil remedy proposed under the Bill. The Bills Committee has examined, inter alia, the effectiveness or otherwise of digitization in containing pirated viewing, possible options to tackle domestic or private pirated viewing of pay television programmes, as well as the arguments for and against criminalization at this stage.

Effectiveness of digitization in containing the problem of pirated viewing

24. On the extent of the problem, the Bills Committee has been informed by Hong Kong Cable Television Limited (HKCTV), the major local pay television programme service licensee, that there are at least 100 000 unauthorized decoders, as compared to 560 000 authorized decoders, in use in Hong Kong for viewing HKCTV's programmes. This has resulted in an estimated loss in subscription revenue of about HK\$390 million for the company. The revenue of content providers and the Government's tax revenue have also been affected as a result. HKCTV has also cautioned that rampant pirated viewing will deter investment and jeopardize Hong Kong's position as a regional broadcasting hub.

25. The Administration has submitted to the Bills Committee that the problem of pirated viewing of pay television programmes in Hong Kong has stemmed largely from HKCTV's analogue transmission, which is vulnerable to unauthorized access. According to the Administration's information, most of the unauthorized decoders seized during operations could only access HKCTV's analogue service. Considering the advent in technology and operators' responsibility in deploying reliable technology to safeguard their services, such as by changing the encryption digital key periodically, the Administration has encouraged and mandated HKCTV to complete digitization of its transmission by May 2005. The Administration has nevertheless stressed that it has not ruled out the option of criminal sanction in addition to civil remedy. If domestic pirated viewing remains rampant after completion of digitization by HKCTV, the Administration will consider introducing criminal liability on domestic end-users.

26. As HKCTV's digitization project will likely be completed in the third quarter of 2004 which is ahead of schedule, members are keen to find out how far digitization of HKCTV's analogue service will help contain the problem of pirated viewing. The Bills Committee has considered the detailed submissions from HKCTV that technology alone cannot solve the problem as no security system can prove to be risk-free. Members have also been informed that the digital encryption systems of certain broadcasters in Europe and the United States have been hacked into soon after their deployment as manufacturers of illicit devices also seek to upgrade their technology, thereby creating an endless cycle of attacks and counter-attacks. HKCTV has drawn members' attention to widespread promotions on the sale, installation and use of cheap unauthorized decoders, many of which being programmed with an "auto-roll" function to circumvent HKCTV's periodic changes of its digital key.

27. Having regard to the information submitted by both sides, the Bills Committee has noted that at this stage, the Administration and the major industry player do not share a common view on how far digitization can help contain the problem of pirated viewing of pay television programmes.

28. On a related technical issue, members note that unauthorized access to HKCTV's service may be possible under the current in-building network systems in many buildings. On the feasibility of disconnecting all drop cables (i.e. the wiring connecting individual households to the network of HKCTV) of non-subscribers from HKCTV's network so that non-subscribers cannot make use of such cables to gain unauthorized access to HKCTV's services, HKCTV has informed the Bills Committee that under the mandatory interconnection requirement, the signals of other television and telecommunications operators are transmitted to individual households via the same drop cables of HKCTV. Hence, disconnection of these drop cables will deny non-subscriber households of other television and telecommunications services.

Regulatory practice in overseas jurisdictions

29. Members are concerned whether the Administration's current proposal is in line with the prevailing practice in other advanced economies. In response, the Administration has highlighted that its proposed approach of targeting enforcement action at the upstream dealer level is in line with international practice. For example, the Australian Copyright Amendment (Digital Agenda) Act 2000 introduces remedies and offences in relation to the manufacture, sale and other dealings with broadcast decoding devices that facilitate unauthorized access to encoded broadcasts. The provisions do not prevent the personal use of illicit decoding devices. The Administration has informed the Bills Committee that even in jurisdictions such as the United States, the United Kingdom and Canada where private pirated viewing is criminalized, the relevant sanctions are not actively enforced and enforcement action is targeted at dealers of illicit devices instead of at end-users.

30. Members have also referred to relevant extracts of the Report on the Implementation of the European Commission Directive on Conditional Access 98/84/EC (the EC Report) and noted that the Directive imposes sanctions only on commercial activities favouring unauthorized reception, not on unauthorized reception as such. Nevertheless, they also note that the Directive introduces only a minimum level of legal protection against piracy and allows member states a lot of flexibility and discretion in tailoring their national anti-piracy regime to their own needs and policies. The EC Report has mentioned that a minority of member states prohibit the personal use and/or private possession of illicit devices. Having considered information on overseas practice, members are aware that the levels and types of sanction, if any, against private pirated viewing of pay television programmes vary. In 12 overseas jurisdictions including the United States, Canada, United Kingdom, France and Italy, domestic end-users are subject to criminal sanction, while the majority of member states of the European Union and Australia do not impose such criminal sanction.

Other options of criminal punishment

31. Members have examined the joint proposal of six local free and pay television services licensees to make domestic pirated viewing a summary offence punishable by a fixed penalty. They have also considered the analysis of the Bills Committee legal adviser and the views of the Administration on various options of criminal sanctions to deal with the problem.

32. Members reckon that the fundamental issue at stake is whether domestic pirated viewing should be made an offence, before consideration can be given to the criminal punishment to be imposed, no matter how light it would be. They note that the lesser punishment of a fixed penalty as proposed by the broadcasters may not make enforcement easier or less intrusive because the law enforcement officer is still required to catch a person committing the offence "red-handed" before he can issue him a fixed penalty notice. Notwithstanding, members still urge the Administration to continue to explore other options of criminal punishment to deter end-users from acquiring unauthorized decoders locally and across the border. Such options, which are to be implemented at public places such as points of sale and border check-points, may include a fixed penalty for the possession or purchasing of an unauthorized decoder and the immediate confiscation of the decoder upon detection.

33. On the option of imposing a fixed penalty against the mere possession of unauthorized decoders, the Administration has advised that, having regard to case law, penalizing a private end-user for the mere physical possession of a device without proving the mental element of knowledge that the device is an unauthorized decoder which enables the viewing of pay television programmes without payment of a subscription may be inconsistent with the presumption of

innocence guaranteed under Article 11 of HKBOR. The Bills Committee also notes the advice of its legal adviser that there is no precedent under existing legislation which makes the offence of importing or possession of an object punishable by a fixed penalty.

34. On members' suggestion of immediate confiscation of unauthorized decoders irrespective of their intended purposes, the Administration has submitted that such outright confiscation of properties where no criminal activities are involved and without any procedural safeguards might be in breach of the constitutional protection of property rights under Articles 6 and 105 of the Basic Law. The Administration therefore stresses that the alternatives of fixed penalty and confiscation must be studied with great care.

Arguments for and against criminal sanctions

35. The Bills Committee has examined in detail the arguments for and against criminalizing domestic pirated viewing of pay television programmes. In the Administration's view, the criminality or public harm of the act in question may not justify criminal punishment at this stage. Another major concern is the enforcement difficulties arising from the need to enter domestic premises to collect evidence and the possible intrusion into privacy. The Administration has also reported that the views collected during public consultation in 2001 have not indicated majority support for imposing criminal liability on domestic end-users. Having regard to the progress in HKCTV's digitization and drawing reference to the policies and practice of other jurisdictions, the Administration has come to the view that criminal sanction is only justifiable as the last resort if pirated viewing is still rampant after completion of digitization of HKCTV's service. The Bills Committee has noted that the Administration's gradual approach of introducing civil remedy as the first step has the support of the Consumer Council and some industry and professional associations.

36. Members have also examined the grave concern of HKCTV and other television broadcasters that civil remedy alone as proposed in the Bill cannot effectively deter domestic pirated viewing. In their joint submission, the six local free and pay television services licensees take the view that unauthorized reception of subscription television services is analogous to abstraction of electricity or fraudulent use of a public phone with intent to avoid payment and is by nature a misdemeanour of theft or dishonest appropriation of property which should attract criminal liability, irrespective of whether the act is committed at commercial or domestic premises. Based on the legal opinion it has obtained, HKCTV has submitted that the implementation of criminal sanctions against domestic end-users is not necessarily intrusive if proper safeguards such as the need to obtain a court warrant for entry into domestic premises are stipulated clearly in law.

37. In the course of deliberation, most members of the Bills Committee have agreed that it may not be desirable to criminalize domestic pirated viewing per se in consideration of enforcement difficulties such as possible intrusion into privacy arising from the need to enter domestic households. Nevertheless, they share the concern about the rampancy of domestic pirated viewing and urge that even if criminal sanction is not contemplated at this stage, the Administration should explore other suitable measures to address the problem.

38. The Administration has pointed out that it has not proposed any time limit for civil action against the person in breach of the relevant sections relating to the use or possession of unauthorized decoders under proposed section 7B of the Bill. By not stipulating a time limit, the Administration considers that the deterrent effect of the legislation can be enhanced. In this regard, members note that the Copyright Ordinance (Cap. 528) does not provide a time limit for civil action against copyright infringement while section 4 of the Limitation Ordinance (Cap. 347) provides a six-year period for actions for tortious infringements. On balance, members have accepted the Administration's current proposal.

Members' stance

39. Hon MA Fung-kwok has stated his support for the imposition of criminal liability for domestic or private pirated viewing of pay television programmes. Drawing on the preliminary findings of a survey recently conducted by him, he does not see any objection from the majority of respondents against criminalization. He also casts doubt on the effectiveness of digitization since cheap unauthorized decoders which can access HKCTV's digital services are already available on sale in areas such as Apliu Street. Mr MA 's view is that on top of civil remedy, criminal sanction is necessary to achieve a deterrent effect for the purposes of upholding the importance of intellectual property rights and enhancing the development of creative industries in Hong Kong. He considers that the Administration has always lagged behind in enacting legislation to safeguard intellectual property rights. To extend criminal liability to private end-users, Hon MA Fung-kwok has proposed to move a set of CSAs to the Bill to make it an offence for a person to possess or use, without lawful authority or reasonable excuse, an unauthorized decoder to view any pay television programme service provided under a licence with intent to avoid payment of any subscription applicable to the viewing of the service. A person who commits the said offence is liable on summary conviction to a fine at level 2 (\$5,000).

40. Having considered Hon MA Fung-kwok's draft CSAs, the Administration's preliminary comments are that although the proposed CSAs would create a criminal offence, potentially involving an increase in administrative costs, this would be achieved without new and distinct

expenditure. As such, the Administration considers that the proposed CSAs would not have a charging effect on general revenue. Nevertheless, the Administration maintains its policy stance and objects to the proposed CSAs.

41. While members fully agree with Hon MA Fung-kuok on the need to combat pirated viewing and promote the development of creative industries in Hong Kong, some of them have stated their reservation on his proposed CSAs. Given the profound implications of criminalization, enforcement difficulties and the possible interference which may be caused to the general public, these members consider it difficult to support the proposed CSAs at this stage. Nevertheless, some members have indicated that they will monitor the problem of pirated viewing and support criminalization should future circumstances so warrant. At the request of Hon Mrs Selina CHOW and Hon SIN Chung-kai, the Administration has agreed to review the situation in about a year's time having regard to the effectiveness of digitization, the new statutory provisions and other measures and revert to Members in due course.

Law enforcement

42. The Bills Committee notes that proposed section 7A of the Bill seeks to confer a new power of arrest on TA and any public officers authorized by him in writing, as well as to make it an offence for any person who wilfully obstructs an authorized public officer in the exercise of his powers conferred by the Bill. On whether the new arrest power is necessary, the Administration has explained that the proposed provision is modeled on a similar power under section 35(1)(a) of the Telecommunications Ordinance (Cap. 106). Past experience has indicated that without such arrest power, TA could only rely upon the Police, or in joint actions with the Police, to arrest suspects. Since the Police is occupied with many other priority tasks, enforcement action against decoder-related offences might sometimes have been hampered.

43. On the enforcement of existing sections 6(1) and 7(1) of BO to target the supply of unauthorized decoders and illicit devices, members have noted that during the period January 2001 to September 2003, OFTA and Police mounted 14 special operations and seized around 2 400 unauthorized decoders. A total of 44 persons were arrested or invited to assist in further investigation and 12 persons were successfully convicted in court. Members share the concern of some deputations including HKCTV that the supply of unauthorized decoders is far more rampant than what has been revealed in the enforcement statistics of the Administration, particularly in some areas such as Aплиu Street in Shamshuipo. Referring to the rampant sale of low-price unauthorized decoders across the border, members have urged that the governments of both places should strengthen cooperation in combating the manufacture, sale and import of these illicit devices.

44. Hon Mrs Selina CHOW has cast serious doubt on the efficacy of the current enforcement actions and urges the Administration to step up

enforcement, particularly at points of sale. In expressing disappointment at current enforcement efforts, Hon SIN Chung-kai has specifically requested the Administration to consider reviewing the sentences imposed by courts in respect of decoder-related offences, in particular lenient sentences, and take appropriate actions so as to achieve greater deterrence against offenders. The Administration has taken on board members' concerns.

Definition of "unauthorized decoder"

45. Under proposed section 2(1) the Bill, an "unauthorized decoder" is defined as "a decoder by means of which encrypted television programmes or encrypted television programme services provided under a licence can be viewed in decoded form without payment of a subscription where a subscription is required to be paid". Some members and deputations have questioned the scope of the proposed definition and whether it can deal with certain misuses of decoders.

46. The Bills Committee notes that according to the Motion Picture Association (MPA) and the Cable and Satellite Broadcasting Association of Asia (CASBAA), there has been a growing trend of importing into Hong Kong decoders obtained in overseas territories by legitimate subscriptions. These imported decoders are then sold to local consumers on an one-off payment to enable them to view overseas television programmes which are not authorized to be broadcast in Hong Kong. MPA and CASBAA consider that the dealings in and/or use of such decoders, even if obtained lawfully, should be sanctioned in Hong Kong. Otherwise, such practice will jeopardize the legitimate rights and interests of overseas pay television channel owners and their appointed distributors as they have not authorized the transmission of the programmes in question in Hong Kong.

47. In following up the two associations' concern, the Bills Committee notes that this situation, often known as the satellite TV grey market, is also found in Europe and North America. The Administration considers that as the decoder referred to by MPA and CASBAA has been lawfully obtained through the payment of subscription, the decoder is not one which enables the viewing of encrypted television services "without payment of a subscription". As such, the decoder in question will be outside the scope of the proposed definition of "unauthorized decoder". However, the Administration stresses that although the end-user of the decoder will not be held liable, the sellers or dealers of these decoders are caught under the existing section 7 of BO which stipulates, inter alia, that it is an offence for a person to import, export, manufacture and sell any decoder for use by a Television Receive Only System to receive a broadcasting service which is not licensed on a subscription basis.

48. Some members of the Bills Committee do not subscribe to the Administration's view. They consider that the Administration has inappropriately handled the subject as a matter of parallel imports, instead of an

issue where intellectual property right is at stake. A member has pointed out that some domestic viewers have no choice but to resort to using the decoders referred to by MPA and CASBAA because for years, HKCTV has not extended service coverage to their districts and hence, denied them of the means to view overseas programmes such as major soccer matches.

49. On possible remedies against the use of such decoders in Hong Kong, the Administration has advised that if a person uses such a device to receive and show programmes for commercial purposes (e.g. in a pub) without the licence of the copyright owner of the programmes in question, the person may have infringed the copyright of the copyright owner under section 27(3) of the Copyright Ordinance (Cap. 528) and be liable to the civil action brought by the copyright owner. The Administration has pointed out that many overseas jurisdictions also rely on civil remedies provided under their copyright-related legislation to bring an action against the infringer.

50. Some members have pointed out that the sales and marketing practices of individual operators may cause uncertainty over the proposed scope of "unauthorized decoder" as defined under the Bill. They have referred to the examples of decoders provided to customers as a premium gift or as part of a bundled telecommunications service the fees for which are integrated, as well as other types of reception devices for which the subscription fees are waived. In response, the Administration has re-affirmed that where the relevant subscription fee has been waived or subsumed under an integrated service fee payment, the decoder in question would not be regarded as a device which circumvents encryption technology to avoid payment of a subscription fee. Hence, it will not fall within the proposed definition of "unauthorized decoder".

51. The Bills Committee has noted the concern of HKCTV about decoders legitimately obtained through domestic subscription but subsequently being used in commercial premises, thereby evading the payment of a higher commercial subscription. In this regard, the Administration considers that the wrongdoing in question is a contractual matter between the HKCTV as the service provider and the subscriber concerned and as such, should be resolved by the contracting parties themselves.

Future review

52. To address members' concerns, the Administration has undertaken to review the effectiveness or otherwise of digitization, the implementation of the new statutory provisions and enforcement actions 12 months after the commencement of the Bill, if enacted. The Administration has also been requested to consider reviewing the levels of penalty imposed by courts and take any follow-up action as appropriate. The Administration will report the outcome of its review to Members for consideration of the way forward for dealing with the problem of pirated viewing of pay television programme services. The Administration has confirmed that the Secretary for Commerce,

Industry and Technology will give an undertaking on the Administration's follow-up actions in his speech during the resumption of the Second Reading debate on the Bill. The Panel on Information Technology and Broadcasting will follow up the outcome of the Administration's review in due course.

Committee Stage Amendments

53. The full set of CSAs to be moved by the Administration is at **Appendix III**. The Bills Committee have no objection to the proposed CSAs and will not move any CSA in its name. The CSAs proposed by Hon MA Fung-kwok will be issued to Members after they have been finalized.

Recommendation

54. Members of the Bills Committee have no objection to the Administration's proposal to resume the Second Reading debate on the Bill on 5 May 2004.

Advice sought

55. Members are invited to note the recommendation of the Bills Committee in paragraph 54 above.

Council Business Division 1
Legislative Council Secretariat
15 April 2004

Bills Committee on Broadcasting (Amendment) Bill 2003

Membership list

Chairman	Hon SIN Chung-kai
Members	Dr Hon David CHU Yu-lin, JP Hon NG Leung-sing, JP Hon Mrs Selina CHOW LIANG Shuk-ye, GBS, JP Hon CHAN Kwok-keung, JP Dr Hon Philip WONG Yu-hong, GBS Hon Howard YOUNG, SBS, JP Hon Abraham SHEK Lai-him, JP Hon Albert CHAN Wai-yip Hon Audrey EU Yuet-mee, SC, JP Hon MA Fung-kwok, JP

(Total : 11 Members)

Clerk Miss Polly YEUNG

Legal Adviser Miss Connie FUNG

Date 7 July 2003

Bills Committee on Broadcasting (Amendment) Bill 2003

**Organizations which have submitted views to the
Bills Committee on the Broadcasting (Amendment) Bill 2003**

Television broadcasters

1. Asia Television Limited
2. Television Broadcasts Limited
3. Hong Kong Cable Television Limited
4. Galaxy Satellite Broadcasting Limited
5. TV Plus (HK) Corporation Limited
6. Yes Television (Hong Kong) Limited
7. Nagravision SA

Law association

8. Hong Kong Bar Association

Industry organizations/trade associations

9. Cable and Satellite Broadcasting Association of Asia
10. The Chinese General Chamber of Commerce
11. Hong Kong Kowloon & New Territories Motion Picture Industry Association Ltd
12. Motion Picture Association

Other

13. Consumer Council

BROADCASTING (AMENDMENT) BILL 2003

COMMITTEE STAGE

Amendments to be moved by the Secretary
for Commerce, Industry and Technology

Clause

Amendment Proposed

3

(a) By deleting paragraph (a) and substituting -

"(a) by adding -

"(1A) A person shall not,
without lawful authority or
reasonable excuse, for the purpose
of, or in connection with, any trade
or business, possess or use, or
authorize another person to possess
or use an unauthorized decoder.";

(b) By adding -

"(aa) in subsection (2), by adding "or (1A)"
after "subsection (1)";".

(c) In paragraph (b) -

(i) in the proposed section 6(3)(b), by
adding "any" before "trade";

(ii) in the proposed section 6(4), by deleting
"(1)(a) or (b)" and substituting "(1) or

(1A)";

(iii) in the proposed section 6(5), by deleting "持牌" and substituting "特許持有";

(iv) in the proposed section 6(6), by deleting "(1)(a) or (b)" and substituting "(1) or (1A)";

(v) in the proposed section 6(7)(a), by deleting "(1)(a) or (b)" and substituting "(1) or (1A)".

4 In the proposed section 7(3C), by deleting "持牌" and substituting "特許持有".

5 (a) In the proposed section 7A -

(i) by deleting "6(1)(a) or (b)" wherever it appears and substituting "6(1) or (1A)";

(ii) in subsection (1)(a)(ii), by adding "any" before "trade";

(iii) by adding -

"(1A) Where a public officer referred to in subsection (1) arrests a person under paragraph (b) of that subsection, the public officer shall, without delay, take him to a police station to be dealt

with there in accordance with the
Police Force Ordinance (Cap. 232) or
deliver him into the custody of a
police officer for that purpose.";

(iv) in subsection (3), by deleting "an
unauthorized decoder or a decoder" and
substituting "anything liable to seizure
under subsection (1)(d)".

(b) In the proposed section 7B(1) and (2), by deleting
"6(1)(a) or (b)" and substituting "6(1) or (1A)".