



**Submission by CASBAA
(Cable and Satellite Broadcasting Association of Asia)
To the Bills Committee on the Copyright Amendment Bill 2011
Legislative Council of the Hong Kong SAR
July 20, 2011**

Strengthening Copyright Protection in the Digital Environment

This submission is made on behalf of CASBAA, the apex organization of the Asia-Pacific Pay-TV industry; we thank the Chairman and the Committee for the opportunity to present our organization's views.

Headquartered in Hong Kong, CASBAA is an industry association with members and activities in 16 Asia Pacific markets. The Association is dedicated to the promotion of multi-channel television via cable, satellite, broadband and wireless video networks across the Asia-Pacific region and represents some 130 corporations, which deliver TV programming to than 360 million Asian households. (Further information on CASBAA can be found at www.casbaa.com.)

The Broadcasting Industry, Hong Kong, and Asia

Hong Kong is a hub of the Asian broadcasting industry. The ongoing growth and development of this industry brings major economic benefits to the SAR. We estimate that companies in this sector are responsible for creating around 2,000 high-paying posts in the international sector and another 10,000 jobs in local distribution platforms. With a forecast average growth of about 12% per annum over the next five years, this is a dynamic, high-tech industry that will continue to make a very important contribution to Hong Kong's economic growth for the foreseeable future – as long as the SAR continues the policies which have favored the industry's growth.

Hong Kong also plays a major role in creation of Chinese-language content for the television industry. TV dramas made in Hong Kong are sold and distributed worldwide; TVB -- a pillar of Hong Kong's free-to-air broadcasting industry -- is also a major pay-TV player in other markets, and the world's leading exporter of paid Chinese-language programming.

Digital Piracy is a Major Problem, Continuing to Grow in the Face of Inaction

Unauthorized online distribution of TV programming has grown massively during the six years that the government has had this issue under consideration. Increased availability of bandwidth and propagation of more efficient peer-to-peer transmission software has resulted in a huge increase in availability of unauthorized and uncompensated TV programming online. In recent years, a multitude of for-profit pirate websites have begun streaming unauthorized premium pay-TV programming¹. A recent APEC seminar on signal piracy and an OECD study last year both noted that a series of international website providers have found very profitable business models in facilitating propagation of the software and streaming of the copyrighted material, so the growth of this pirate distribution has been driven both by consumer demand for unpaid content and by some online service providers' hunger for profits.

Hong Kong suffers from this increase both directly and indirectly. As a regional hub, Hong Kong loses economic benefits when the growth of the TV industry in general is impaired by unauthorized distribution of TV content. And as content creators in their own right, Hong Kong's authors, directors, actors and technicians all suffer huge direct losses from piracy of their work. A simple web search for "TVB Series streaming" produces dozens of links to unauthorized sources for Hong Kong-made content, whose creators are not receiving appropriate remuneration for this distribution of their work.

The Government's Proposals

Unfortunately, the government's current approach to this issue, as embodied in the Amendment Bill, does not propose to put in place effective deterrence against online piracy.

The government has proposed creation of a new all-embracing "right of communication." This is a positive step, but it will not in itself do much to deter further rapid growth in online piracy of television content. The very limited criminal penalties it calls for will not have any deterrent effect on the vast majority of downloaders of infringing material.

The government has rejected, for various reasons – none of which are persuasive to us – several steps that could have made concrete contributions to effective deterrence, including establishment of statutory damages for copyright piracy, creation of an efficient mechanism for disclosure by ISPs of the identities of infringers to replace the burdensome "Norwich Pharmacal" mechanism, and/or comprehensive, mandatory and effective measures against online piracy such as those that have been introduced in countries like Korea.

Statutory Limitation of Liability for OSPs

However, the government does propose to create a statutory limitation of liability for OSPs. We support a limitation of liability for OSPs who participate in a system of measures

¹ Such sites are generally located outside the territorial jurisdiction of the Hong Kong SAR, and their operations are unlikely to be significantly impeded by Hong Kong's current legislative proposals.

designed to strengthen copyright protection (the government's goal) in a meaningful and effective way.

As a condition of qualifying for this limitation of liability, the government proposes to require OSPs to comply with certain prescribed conditions. A Code of Practice is to outline such provisions. We believe it is essential that the prescribed conditions include adoption and implementation of a policy to address persistent misuse of accounts by repeat infringers. (A requirement for a repeat infringer policy would be best included in the proposed legislation; however it could also be implemented through the planned Code of Practice.) Repeat infringer policies are of particular importance to the television industry because they are effective even in cases where the pirated content does not reside on a server, including infringement of "live" content via peer-to-peer networks or from websites located outside the SAR.

Such policies are not new; they are being implemented in an increasing number of advanced economies overseas. Most recently, the ISP industry in the United States – under threat of legislative action – moved on its own to implement a repeat infringer policy involving a series of warnings and notices before action is taken to restrain the repeat infringer's internet access.

We do not see the need to provide the details of such a mechanism in the legislation. As in the United States, in Hong Kong it could be left for ISPs themselves to determine their repeat infringer policy. But the legislative intent must be clear that for ISPs to qualify for "safe harbor" treatment, they must take concrete steps to avoid use of their services for multiple acts of infringement.

In other jurisdictions, it is clear that such a system meets the often-expressed need for more public education. Individuals receive a number of separate notices and warnings (in the USA, the number is four, in France it is two, etc.) urging them to cease infringing and acquire their audio or video content from authorized sources, before any concrete action is contemplated. This would be appropriate in Hong Kong. Indeed, we believe that the vast majority of Hong Kong people will alter their behavior when they understand that infringing activities are not anonymous and not cost-free. Experience has shown that the vast majority of consumers respond positively to such messages, particularly where they have the expectation that repeat offenses will result in concrete disadvantages to them.

Conclusion

We believe the net effect of the government's current set of proposals will be small, and in our view it is now too late for small measures to have any meaningful effect. It is regrettable to see Hong Kong, formerly an Asian leader in adopting firm measures to protect intellectual property, become a passive follower, which will consider such measures only after they have been adopted, and "fully tested" (the government's own words) in overseas jurisdictions. In the meantime, Hong Kong's own creative industries are withering, and the SAR's role as a leader in the global system of trade and services is eroding.

After six years of consideration, the need for serious action – and not further years of study – is now urgent. Hong Kong is falling behind, as other jurisdictions in this hemisphere and elsewhere implement serious measures to deter the growth of digital copyright infringement. We urge the Legislative Council to help close the gap which is already separating Hong Kong from online policy leaders, by including a “repeat infringer” policy as a requirement for OSP “safe harbour.”

We are most grateful for this opportunity to give our view of the situation to the Legislative Council; we will be pleased to convey further information as appropriate to the Legislature or the Administration in the coming weeks and months.