



**Submission by CASBAA (Cable and Satellite Broadcasting Association of Asia)
To the Bills Committee on the Copyright (Amendment) Bill 2014
Legislative Council of the Hong Kong SAR
October 17, 2014**

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 Bills Committee for the opportunity to present our organization's views.

Headquartered in Hong Kong, CASBAA is an industry association with members and activities in 17 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 120 corporations, which deliver TV programming to more than 500 million Asian households. (Further information on CASBAA can be found at www.casbaa.com.)

Summary:

In our view, the Amendment Bill on the table is far from perfect. The 10 years of delay in formulating and passing these amendments mean that online piracy problems have grown and changed far beyond the expectations of those who began this process, including both government and industry. Copyright-based industries – and the television industry in particular – are already suffering huge harm from online piracy unrestrained by the existing inadequate laws. The imbalance in the current laws, and the massive infringements of copyright taking place online in Hong Kong are plain to see for anyone with the will to have open eyes. The Bill will not in itself solve these problems.

However, as the Bill embodies Hong Kong's first right of copyright owners to authorize electronic communication of their works, it represents a significant step forward toward improving the environment for creative industries. These amendments, which will bring the law into conformity with Hong Kong's international obligations under the WIPO Internet Treaties, are long overdue.

Therefore, we urge the Legislative Council to move as quickly as possible to pass the Bill now on the table. And we urge the government to move quickly to implement – through subsidiary legislation, Codes of Practice, or further improvements to the laws – further measures to stem the massive increase in online piracy of television programming.

With respect to the rampant misunderstandings of the Bill's effects on civil liberties and freedom of expression: Our Association is active throughout Asia, and our member companies are active all over the world; we are aware of no other copyright regime with exceptions and limitations that are more protective of freedom of political expression than the proposed Hong Kong approach. The right to authorize making copyrighted works available online is protected by the 93 other countries and regions which are contracting parties to the WIPO Copyright Treaty; these include most of the world's great democracies and in none of them has the right of communication conflicted with freedom of political expression. Concerns that this Copyright Amendment Bill represents some sort of threat to free and open political expression are fundamentally misplaced.

Our members include globally-renowned broadcasters and news organizations which have a strong vested interest in protecting creative and political expression. We believe that there are two pillars that support true creative industries:

- Freedom of expression without government regulation and oversight is required to engender the creativity that entertains and informs; and
- Effective copyright protection is needed so that entrepreneurs and creators can monetize their content, to fuel more creation.

The Broadcasting Industry, Hong Kong, and Asia

Hong Kong is a hub of the Asian broadcasting industry. Channels are packaged from here and legitimate content is streamed from here to supply all the markets of Asia. 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 1,500 high-paying posts in the international sector and another 10,000 jobs in local distribution platforms. 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 and TV channels based on Chinese content are packaged and sold worldwide from Hong Kong; Hong Kong's pay-TV players are selling their products in other markets, and TVB -- a pillar of Hong Kong's free-to-air broadcasting industry -- is also the world's leading exporter of paid Chinese-language programming.

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

Unauthorized online distribution of TV programming has grown massively during the ten 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 programming.

The television industry in particular is beset by a new type of piracy, which has become a huge factor just in the two years since the Legislature last considered proposed copyright amendments. Real-time streaming of entire packages of pirated TV channels has become an unfortunate reality, leading to job destruction in the legitimate content creation, syndication and distribution sectors. Cheap streaming media circumvention boxes coupled with illicit pirate “apps” bring this content to millions of homes with payment only to multinational piracy syndicates, denying fair compensation to the many thousands of people actually working to create the content. With pirated television program streams readily available online for free, we are witnessing a decreased willingness of consumers to pay a fair price for programming. Subscription revenue growth in the pay-TV industry is turning negative, and jobs are already being affected. There is no time to lose in implementing solutions.

The presence of this type of piracy in Hong Kong was underlined just a few months ago when HK Customs raided sites in the city and broke up a conspiracy to capture Hong Kong pay-TV programming and divert it over the internet to a global piracy network. These arrests were possible because the acts of “uploading” the program streams were taking place within Hong Kong; most frequently such uploads take place in other jurisdictions. It is noteworthy that, faced with this rapidly growing problem of piracy using streaming media players, Hong Kong’s own enforcement officers acknowledge the problem, admit that piracy is rampant and growing, and state that their ability to take action against this wave of piracy is hampered because the law in Hong Kong has not kept up with the technological developments. This must change, and it must change fast, if the jobs associated with this industry are to survive.

Hong Kong is already suffering both directly and indirectly from the increase in piracy. 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 unauthorized distribution 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 their work. The legislature must take cognizance of the fact that Hong Kongers are losing out, because of inadequate copyright protection.

International Obligations

Along with 93 other countries and regions, Hong Kong is a contracting party to the WIPO Copyright Treaty, concluded in 1996. The treaty was formally, legally extended to Hong Kong through a deposition by the People’s Republic of China in 2008. (Hong Kong was involved in the treaty negotiations from the beginning in the 1990s.)

Among other things, the treaty requires member countries/regions to implement in their copyright law a “Right of Communication”, envisaged as an “umbrella right”, which could cover the various aspects of communicating and distributing works in the digital environment. Hong Kong’s

existing copyright law does not meet its obligations under this, and other, international treaties. The law as it stands is inadequate to meet current international standards.

Hong Kong is now way “behind the curve.” Its Asian neighbors and competitors have implemented the treaty, including Japan, Korea, Malaysia, Singapore and the Philippines. Therefore, since 2008, Hong Kong has been in violation of its and China’s international treaty commitments. The bill now before Legco is necessary to remedy that. The bill should be passed as soon as possible.

Apart from the question of treaty obligations, it is notable that Hong Kong is increasingly falling behind nations that were formerly its peers in creating a positive environment for intellectual property. Other governments (such as in the UK and Korea) have sought, and implemented, creative approaches to deal with streaming piracy. Like Hong Kong, there are substantial creative industries in these places, which those governments have deemed worthy of real promotion, progression and protection. Sadly, in Hong Kong, ten years of stasis have taken a heavy toll.

The Government’s Proposals

While we strongly support rapid passage of this Bill, we must note that the Bill alone will not put in place effective deterrence against online piracy, or bring Hong Kong up to international best practices.

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 and audiovisual content. The very limited criminal penalties it calls for will not have any deterrent effect on the vast majority of downloaders of infringing material.

Unfortunately, during the past five years, the government has consistently rejected, for various reasons – none of which are persuasive to us – several steps that could have made concrete contributions to effective deterrence. The rejected measures include 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 Online Service Providers

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 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.

Notice-and Notice

A particular weakness of the Government’s approach is its reliance purely on a system of “notice-and-notice” to deal with users who are consuming vast quantities of streamed television programming. (In such a system, when a copyright owner detects that a user is engaging in authorized downloads, the ISP merely sends a notice to the user, no matter how many times the activity is repeated.) We see no possibility that such a system will be effective.

The Administration indicates that it understands the weaknesses of such an approach in the current streaming media environment, and states that the “notice and notice” system can be improved after it is introduced. This process of seeking further improvements should not be delayed; rather, we urge the Administration to move as soon as practicable to add further measures to the Code that will provide effective deterrents against such activities.

Indeed, given the manifest weaknesses of the current policy framework in thwarting online streaming piracy, we believe that passage of the current Amendment Bill can only be seen as the first of several steps required. Beyond this legislation, the government must begin immediately the process of taking further steps. The industry is ready to cooperate; we have proposed several times to the government cooperative discussions aimed at finding solutions but the government has demurred and delayed. We hope that the Legislature will quickly pass the bill, and send a signal that consideration of additional measures should not wait any longer.

Such additional measures could, and should, include:

- Institution of a more effective system to deal with repeat infringers, as has been implemented in numerous other jurisdictions.
- Requiring search providers to de-list or lower results for known infringing sites.
- Recommending that ISPs block access to the small number of streaming sites which are the most flagrant infringers. (We understand that mandatory site blocking is regarded as unacceptable by Hong Kong, but a less coercive approach could be tried.)

- Requiring advertising servers and payment processors located in Hong Kong to cease servicing flagrant infringing sites.
- Promoting Codes of Practice within the advertising industry, to avoid having revenues from Hong Kong go to support websites promoting illegal activities, including copyright violations and also activities such as gambling, fraud, and other cybercrimes.

Conclusion

With respect to the online environment, there is much to be done in Hong Kong to redress the huge imbalance of interests that has developed with respect to maintaining a healthy copyright environment. Passage of the current amendment bill is a necessary but insufficient first step. It has been too long delayed by ancillary issues that have nothing to do with maintaining the SAR as a jurisdiction with modern legal infrastructure to support a healthy business environment – which should be the primary goals. We urge the Bills Committee, and the Legislature, to pass the bill as soon as possible.