Paper No. CB(2)1702/99-00(01)

Submission to the Bills Committee on Broadcasting Bill, Legislative Council
The Government of the Hong Kong Special Administrative Region

SUPPLEMENTARY SUBMISSION ON THE BROADCASTING BILL

1. INTRODUCTION

The following supplementary submission is made on behalf of all members of the International Federation of the Phonographic Industry - Hong Kong Group (IFPI HKG) regarding the Broadcasting Bill (referred to as "the Bill") and the attached Legislative Council Brief (referred to as "the Brief"). IFPI HKG is a local group of IFPI and it represents over 50 recording companies in Hong Kong, including all the major local and international recording companies. IFPI has a membership of over 1,300 recording companies in over 70 countries/territories, representing more than 10,000 different labels.

IFPI HKG has submitted a paper [PAPER NO. CB(2)1504/99-00(02)] regarding our views on the Broadcasting Bill. As requested by members of the Bills Committee in the meeting held on 31 March, 2000, regarding our submission, the following is our supplementary comments for your reference. We again appreciate this opportunity to present our views to members of the Bills Committee.

In the Bills Committee meeting held on 31 March, 2000, representatives of IFPI HKG were asked by members of the Committee to clarify two points:

- Our opinions on the meaning of *"Co-dependent relationship"* in our proposed amendments to Clauses 13 and 14. (see Point 2 below at page 2)

- Our opinions on the exemption of "person from using or exploiting his artistic talent or ability" from competition clauses in Clause 13(5)(a). (See Point 3 in page 4)

- Our opinions on the meaning of *"distortion"* in our proposed amendments to Clause 13(1).
  (see point 4 below at page 5)

Besides clarifying the above two points, IFPI HKG would like to take this opportunity to re-emphasise our concerns on several issues relating to the existing draft of the Broadcasting Bills, which were also discussed in the last Bills Committee meeting:

- "Broadcasting" on the Internet (see point 5 at page 6)

- The powers and composition of the Broadcasting Authority (see point 6 at page 7)

2. CO-DEPENDENT RELATIONSHIP

We have proposed in our previous submission to include "a market with *co-dependent relationship* with a television programme service market" to be included in Clauses 13 and 14 in order to extend the two competition clauses to cover markets that are "vertically" related to the television service market. The need to regulate anti-competition activities of licensees, especially of license holders of the traditional free access television sector [i.e. "Domestic Free Television Programme (Domestic Free) Service", referred to as "DFTPS"], has become more imminent as different media sectors are, driven by new technology, converging. Thus it has become necessary to prevent, for example, a dominant licensee of DFTPS, which enjoys enormous market power and viewership because of limited spectrum, to enter "vertically" into another market by prejudicing its competitors in that particular sector.

As stated in the submission, the record industry has a close and mutually dependent relationship with television broadcasters. Both audio and audiovisual products released by members of IFPI are important contents to broadcasters and music is usually prevalently integrated in their programmes. The main source of incomes for record companies is the selling of their products in the market (CDs, VCDs, etc). Television, especially the traditional free access television sector, is a major avenue for record companies to promote their products.

However, unlike other programme suppliers that produce and sell programmes exclusively for broadcasting, record companies do not rely on broadcasters as their major customers and sources of incomes. Instead, there is a co-dependent relationship between the two sectors-television broadcasters wish to air music contents from record companies because of the viewers' demand (music as a popular form of entertainment), while record companies need to promote their artists and products on television.

From this prospective, a dominant licensee of DFPTS, which controls one of the most important promotion channels of the record industry, can seriously undermine fair competition in the market of sound recording products by, for example, favouring a particular record company that it has vested interests. More importantly, if a dominant free television broadcaster can enter the recording industry without restriction, with the enormous market power it has and is conferred by the license, it can seriously undermine competition by adopting anti-competition and foreclosure strategies.

It is based principally on the above reason that "programme suppliers" are being classified as a class of "disqualified person" under Section 2(1) of the current Broadcasting Ordinance. Actually, past experiences between the record industry and a dominant free television broadcaster in the early 1980s have demonstrated that the latter could seriously undermine (and in our opinion had indeed undermined) competition in the former market.

As "programme suppliers" have been proposed to be removed as one among the class of "disqualified persons" that are restricted from holding a broadcasting license (which also have the effect of allowing television broadcasters to own record companies), IFPI HKG strongly urges the Government to strengthen the two competition clauses by preventing dominant license holders from engaging in anti-competition in other "co-dependent markets". It is the only redress that the record industry (and other "co-dependent" industries) has against anti-competition behaviours effected by dominant television broadcasters.

Other than "programme suppliers" such as record companies that would fall within the definition of "co-dependent", it should in principle cover markets that have the some of the following characters and relationships with broadcasters:

- *Their sources of incomes are separated or significantly distinguishable.*

  While the incomes of, for example, DFPTS licensees would be mainly from advertising, the incomes of their "co-dependent" sectors should come from different sources such as, for record companies, the selling of audio/audiovisual products.

- *A dominant licensee can affect competition in a co-dependent market by prejudicing its competitors in the co-dependent market in one of the following areas:*

  - *Access to "air-time" and Programming*

    "Air-time" (or spectrum), which is strictly under the control of a television broadcaster, is the most important asset granted by a television broadcasting license. Excluding advertising, there are a large number of opportunities in which a broadcaster can affect consumers' tastes and consumption pattern in another market. Take the record industry as an example, dominant licensees can seriously affect competition in the market for sound recordings by giving more "air-time" to a particular company that it has vested interests in favour of its competitors in the record industry.

  - *Dictating trading conditions and pricing*

    A dominant licensee can seriously affect competition in a co-dependent market by applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage. For example, as "air-time" of a dominant broadcaster is valuable, it can compromise competition in another market by giving more favourable trading terms (such as more favourable for advertising terms and product placement, etc) to a particular company in that market.

The above are some of the criteria in applying competition regulations in a market that are "co-dependent" with the television market. It should again be emphasised that the Government must not allow a dominant licensee to extend their market power conferred by the license (in particularly in the case of DFPTS) into separate markets by using anti-competition and foreclosure strategies. It is in particularly important in the new technology-driven and converged environment, in which dominant market power can be easily transferred to and abused in other markets.

IFPI HKG believes that our proposed amendments to the two competition clauses - Clauses 13 and 14 - should provide the flexibility that would allow the Broadcasting Authority (and courts) to apply anti-competition regulations in situations where a dominant licensee is abusing its market power in markets that are "vertical" to the television service market.

3. EXEMPTION IN CLAUSE 13(5)(b)

As stated in our previous submission, IFPI HKG agrees that talents are major assets of broadcasters, in particularly for those producing a large portion of their own programmes. As contracted employees, talents should be able to negotiate with broadcasters of terms of employment. And as employers, broadcasters should be able to negotiate and set terms for hiring their talents. However, the "exclusivity" of talents will become a competition issue when a dominant broadcaster uses "exclusive contracts" as a means to compromise competition in other co-dependent markets.

As mentioned earlier, television is a major promotion avenue for the record companies, which puts dominant broadcasters, especially licensee of DFPTS, in an advantageous bargaining position in negotiations with recording artists. This "advantageous bargaining position" can be abused as market power in the market of sound recordings as a co-dependent market, for example, by requesting recording artists to sign as "exclusive artists" as a condition for giving them opportunities to appear in television programmes.

Meanwhile, if a dominant broadcaster is allowed to enter the record industry without restriction, it can compete unfairly with other record companies by not giving "air-time" to other recording artists, who are exclusively signed to the broadcaster as their "talents". The consequence is that an exclusively signed recording artist will not only be denied of the opportunity to promote his/her sound recordings (or gain media exposure) in programmes of the dominant broadcaster, he/she will also be forbidden by the contract to appear in programmes of other broadcasters.

At present, we understand that "exclusive contracts" currently signed between recording artists (in conjunction with their managers and/or record companies as the case may be) and local free television service broadcasters include a restrictive term that forbids "exclusively" signed artists from appearing in other local television broadcasting channels. This term covers programmes that are produced by other local and foreign television broadcasters or, in the case of recording artists, music videos produced by record companies.

Such restriction, which is extremely uncommon in other markets, is seriously affecting competition in the television as well as sound recording markets. For example, a licensee of DFTPS can go to the extent of forbidding music videos of exclusively signed local recording artists, though released and produced by record companies, from being included in programmes not only of other local broadcasters but also extraterritorial broadcasters having a footprint in Hong Kong.

Such restrictive term, if not regulated as in the current Broadcasting Bill, can potentially cover the Internet or other web-based activities. The business interests of record companies can be seriously affected if their artists, who are exclusively signed to a broadcaster, are forbidden from appearing even in their own company web sites. It is in particularly important in the online environment, in which sound recordings can be sold and distributed via the Internet. If the current exemption of Clause 13(5)(b) is to be passed by the Legislative Council, we fear that dominant licensees could abuse their dominant powers in the following anti-competitive manners:

- "Exclusivity" could be extended to apply in other sectors such as Internet websites, etc.

- Apply restriction to appear in other broadcasters that hold a different class of license.

- "Exclusivity" could be extended to cover programmes that are not produced by broadcasters themselves. For example, the exclusive contract could forbid music videos of an exclusively signed recording artist produced by his/her record company to be included in programmes of other broadcasters. Music videos are not only a major marketing tool for record companies to promote their sound recordings - they are also "contents" that could be sold directly to consumers.

IFPI HKG, therefore, urges the Government once again to seriously consider deleting Clause 13(5)(b), which we believe will have the effect of exempting contractual relationships between "talents" and broadcasters completely from anti-competition regulations. While "programme suppliers" have been proposed to be removed from the Broadcasting Bill as "disqualified persons", it is now more important to make sure that dominant broadcasters, especially licensees of DFTPS, cannot abuse their competitive powers in both the television as well as other related sectors by restricting the movement of "talents" and locking in desirable contents that are not produced by the broadcasters themselves.

4. ADDING THE WORD "DISTORTING" IN CLAUSE 13(1)

IFPI HKG has suggested in our previous paper to the Bills Committee to amend Clause 13(1) as follow:

(1) Subject to subsections (4) and (5), a licensee shall not engaged in conduct which, in the opinion of the Broadcasting Authority, has the purpose or effect of preventing or substantially restricting competition in a television programme service market.	(1) Subject to subsections (4) and (5), a licensee shall not engage in conduct which, in the opinion of the Broadcasting Authority has the purpose or effect of preventing, *Distorting or* restricting competition - (a) in a television programme service market, or (b) in *a market with co-dependent relationship with a television programme service market..*

Besides the part concerning "co-dependent" relationship, which we have explained in details in the above sector, we have suggested to include the word *"distorting"* and take out the word *"substantially"* from Clause 13(1). The reasons for the amendment is as follows:

- The proposed amendment is modelled on Section 2(1)(b) of the *UK Competition Act* and Article 81(1) of the *EC Treaty*. Legally, as far as UK laws are concerned, nothing turns on which of these expressions - "preventing", "distorting" and "restricting" - applies to a particular form of anti-competition agreement. In many cases the word *"restriction"*, in its natural sense, were used in respect of a "horizontal" agreement. In other cases that involve "vertical" arrangements, it may be more appropriate to adopt the notions of *"prevention"* and *"distortion"*[1].

1 See 1/97 of Butterworths Competition Laws, Issue 33.

For example, an agreement by a supplier to charge discriminatory prices to different customers might be better described as a *"distortion"* of competition, as the pattern of competition at the customer's level (i.e. at another "vertical" level) of the market will differ from what it would have been in the absence of the agreement[2]. We speculate that it might have been the Government's intention to omit the word *"distorting"* from the clause because it only aims to regulate anti-competition behaviours within the television service market. As we have proposed to extend the Broadcasting Authority's power to regulate anti- competition behaviours of a dominant licensee in other "co-dependent" markets, we think that it is necessary to re-introduce the notion of market *"distortion"* in Clause 13.

- We believe that it may be unwise to add the quantifier *"substantially"* in Clause 13(1) before the word "restricting". The notion of substantially restricting competition is ambiguous and confining. It has placed an enormously burden on the Broadcasting Authority to prove that a dominant licensee is "substantially restricting" competition before it can take actions against it. We therefore recommend that the word *"substantially"* to be deleted from Clause 13(1).

5. "BROADCASTING" ON THE INTERNET

The issue relating to whether the Broadcasting Bill should be amended so that it could cover "broadcasting" on the Internet was discussed in the previous Bills Committee. IFPI HKG holds the view that issues surrounding "broadcasting" on the Internet are, both technically and legally, extremely complicated and we are concerned that the existing Broadcasting Bill may not be the most appropriate legislation to address those issues. IFPI HKG urges the Government to work out first on policy level how to define and regulate "broadcasting" activities on the Internet.

More importantly, IFPI HKG urges the Government and members of the Bills Committee to carefully distinguish the different meanings of *"distribution"* and "broadcasting" in the context of electronic commerce on the Internet, in which the former should not fall within any regulatory regime that is meant for the latter. In the online environment, many contents (such as music and music videos) can now be compressed into digital formats that can be transmitted via the Internet. For example, sound recordings and even music videos can now be conveniently compressed into digital formats, which can then be downloaded and listened to/viewed through "streaming" technology by Internet users. This kind of activities, which is strictly not broadcasting, should be completely out of the regulatory regime of the existing Broadcasting Bill.

Many record companies (and will eventually be common practice also among movie producers) are now distributing or selling sound recordings in digital compressed formats via the Internet. Even more are now providing "clips" or sound recordings for free sampling or downloading via the Internet to promote their products. In the imminent future, the portion of

[2] While there is no relevant UK cases on the notion of "distortion", there are a number of European Commission cases are our reference. In *X/Open Group* [Commission Decision (87/69/EEC) OJ [1987] L35/36, [1988] 4 CMLR 542], it was held that the establishment by major producers of computers of common standards for their products led to a "distortion" of competition as some competitors would be excluded from the system and placed at a competitive disadvantage. In another case *EATE Levy* [Commission Decision (85/383/EEC) OJ [1985] L219/35, [1988] 4 CMLR 698, it was concluded that the charging of discriminatory levies for the use of inland waterways "distorted" the pattern of competition.

sound recordings sold via the Internet will become a significant part of record companies' incomes.

Therefore, IFPI HKG urges the Government to take into account the development of electronic commerce and new technology in future discussions regarding "broadcasting" on the Internet. More importantly, the Government should recognise that we must not apply the mindset of the analog broadcasting regulatory regime in the digital and online environment.

6. THE POWERS AND COMPOSITION OF THE BROADCASTING AUTHORITY

Powers entrusted to the Broadcasting Authority

As stated in our previous submission, IFPI HKG does not agree with the extensive discretionary power entrusted to the Broadcasting Authority in exempting a licensee from Clause 13(1). In order to maintain an acceptable level of transparency and accountability, IFPI HKG suggests the Clause 13(4) to be amended so that the following points can be incorporated in the Bill:

- The Broadcasting Authority should, either in the form of Guidelines or a Schedule of the Bill, spell out with a high degree of clarity on grounds that a licensee may be exempted from Clause 13(1);

- As mentioned earlier, "exclusive contracts" with talents should not be exempted from anti-competition clauses, as stipulated in Clause 13(5)(b);

- Any such application for exemption made by a licensee (in particularly a licensee of DFTPS) should be publicised. A procedure to hear other licensees' and the applying licensee's trading partners' objections, if any, to the application should be incorporated in a Guideline or a Schedule.

- The Broadcasting Authority should determine, in accordance to proper guidelines, firstly, whether the exemption, if granted, may affect the interests of any objecting parties or put them in a competitive disadvantage position with the licensee. If the answer is affirmative, the Broadcasting Authority should consider their views before reaching a decision to exemption in accordance to Clause 13(4).

- An administrative procedure for appeal should be established for an applying licensee and the objecting parties on a decision made by the Broadcasting Authority in accordance to Clause 13(4).

- Finally, if an exemption is granted, the Broadcasting Authority should be empowered to cancel it if there has been a material change of circumstance. IFPI HKG suggests that a subsection similar to Section 5(1) of the *UK Competition Act 1998* should be inserted in Clause 13. A subsection with wordings similar to the those listed below can be considered:

  "If the Broadcasting Authority has reasonable grounds for believing that there has been a material change of circumstance since he granted an individual exemption, it may by notice in writing-

(a) cancel the exemption;

(b) vary or remove any condition or obligation; or

(b) impose one or more additional conditions or obligations."

Composition of the Broadcasting Authority

IFPI HKG agrees with views expressed by some representatives in the previous Bills Committee meeting regarding the composition of the Broadcasting Authority. As the current Broadcasting Authority is composed of part-time members drawn mainly from the general commercial and education sectors, and its primarily function in the past has been to regulate television programme contents, it is unreasonable to vest with them the significant discretionary powers to regulate competition.

IFPI HKG supports the idea to widen the membership of the Broadcasting Authority to include competent legal experts and professionals from other related sectors. We also recommend that the Government to consider hiring legal professionals to sit as Chairman or other official positions in the Broadcasting Authority.

7. CONCLUSION

IFPI HKG again appreciates the Bills Committee to further solicit views from the record industry on the Broadcasting Bill. We hope the above clarifications would facilitate future discussions in the Bills Committee. Meanwhile, although the current debate is focusing on television, IFPI HKG would like to stress that the same anti-competition principles should also be applicable on radio broadcasters.

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