

Battle against cable piracy in the Philippines

INTELLECTUAL-PROPERTY protection and enforcement are major points of discussion in trade negotiations. This is particularly true when negotiating parties are between governments of a developing and a developed country. It is common that the government of a developed country would seek assurances from the developing country that intellectual-property rights of the goods and services that will be imported into the developing country will be protected.

In recent years, television programming has become one of the services imported by developing countries from developed ones. In the Philippines, foreign channels like HBO, Star, AXN, National Geographic, ESPN, CNN, BBC and Bloomberg, among others, can now be viewed through the medium of cable and satellite broadcasts. Local cable operators and direct-to-home satellite providers (CATV operators) license the foreign programs and offer them to their subscriber-customers. With the use of satellite head-ends, a CATV operator is able to receive the foreign-channel program and offer it to households for a fee. However, the reception and distribution of a foreign-channel program is not always authorized by the foreign provider.

Enterprising CATV operators, after securing a license to operate from the National Telecommunications Commission, are able to purchase the necessary decoder boxes from the open market that would allow them to receive the usually encrypted foreign channels and include them on the list of channels that they offer to their subscribers. The more foreign channels they receive, the more attractive their service is to the public, which translates to greater revenue. And when they receive the channels without having to contract with the foreign provider for royalty payments, the income is a windfall.

This business model, which is aptly described as cable piracy, has become prevalent in the Philippines that foreign-



ON FIRM GROUND
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channel providers have began lobbying their governments to raise this as an issue in their trade negotiations with our country.

The cost of piracy

The Cable and Satellite Broadcasting Association of Asia, which is comprised, among others, of the different foreign-channel providers in the Asia-Pacific region, provides regular submissions to other international intellectual-property lobby groups on the situation of the pay-TV industry in Asia with regard to intellectual-property protection. In 2005, statistics show that the Philippines had the second-highest number of illegal cable and satellite TV subscribers among Asian countries, with revenue losses of the local cable industry amounting to more than P5 billion.

In 2007, it was estimated that revenue losses to the legitimate pay-TV industry from all forms of piracy amounted to \$85 million, a 5.4-percent increase from the previous year. Illegal cable subscribers ran to 2.5 million, outnumbering the

1.6 million legal subscribers. Because of this, the government is losing P1 billion annually in tax revenues.

Current measures to fight cable piracy

It is noteworthy that despite billions of pesos lost in the form of business and government revenue due to cable piracy, Philippine laws have yet to define and penalize the act of cable piracy; hence the difficulty of prosecuting offenders of cable piracy.

A criminal complaint for theft under the Revised Penal Code is not a remedy. The Supreme Court has been clear that only movable properties which have physical or material existence and susceptible of occupation by another are proper objects of theft. In the context of the Penal Code, only those movable properties which can be taken and carried from the place they are found are proper subjects of theft. (*Laurel v. Abrogar* [483 SCRA 243]). Thus, television signals, being intangible and without physical property capable of being taken away from their location, cannot be the subject of the crime of theft.

Notwithstanding, channel providers who are victims of cable piracy are not without recourse. The Intellectual Property Code (IP Code) gives them protection as copyright owners and as broadcasting organizations. TV programs produced by a channel provider may be classified as a literary and artistic work under the IP Code under the classification of audio-visual and cinematographic works.

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Further, the entire selection of programs in a channel, whether individually produced by the channel provider, may be considered a derivative work, the same being original by reason of their selection and arrangement. Thus, as copyright owners, channel providers may file civil, criminal or administrative cases against the pirates on the ground of infringement of copyright.

Moreover, a channel provider may also file a case of violating its rights as a broadcasting organization as defined in the IP Code. Channel providers, as broadcasting organizations (defined in the IP Code as any natural or juridical person duly authorized to engage in broadcasting), have the exclusive right to carry out, authorize or prevent the rebroadcasting of their broadcast, the recording in any manner of their broadcasts for the purpose of communication to the public of television broadcasts of the same, and the use of such records for fresh transmissions or for fresh recording. Any violation of these rights may be a ground for the filing of similar cases of infringement under the IP Code.

In a recent case against an unauthorized CATV distributor for criminal infringement under the IP Code, the defense of the absence of any crime punishing cable piracy was raised at the preliminary-investigation stage of the complaint.

The defendants, in fact, pointed out that the pendency of legislative bills in Congress seeking to define and punish the crime of cable piracy is evidence of the absence of a crime. The Department of Justice resolved the issue by holding that channel providers, even as broadcasting organizations, have copyright ownership over the programs they carry, and, as such, may exercise their right to the exclusive right to carry

out, authorize or prevent others from reproducing their works or communicating to the public a work by wire or wireless means.

Any violation of this right is an infringement of copyright under the IP Code. This conclusion was, likewise, made by the Court of Appeals in a related case involving the same parties and the same act of cable piracy. Thus, channel providers have the option of suing either as a copyright owner or as a broadcasting organization.

Pending bills in Congress against cable piracy

Although the IP Code provides for remedies against cable piracy, the Supreme Court has not had the occasion to stamp its imprimatur on the conclusion reached by the Department of Justice and the Court of Appeals. As a legal principle, said conclusion would be limited in application to the parties involved and under the same circumstances that gave rise to the complaint.

Without a Supreme Court decision on the issue, each case of cable piracy will be decided independently, with little persuasion from decisions of the Department of Justice and the Court of Appeals. Recognizing this deficiency, our Congress has several pending bills that seek to address the situation and provide a clear basis to fight cable piracy.

Three of these bills are identical in title and content. These bills are House Bill 1409, Senate Bill 2180 and Senate Bill 2588. All bills, if passed into law, shall be entitled The Anti-Cable Television and Cable Internet Pilferage Act of 2008.

Among the acts punishable under the bills are i) the interception or reception, or the assistance thereof, of any signal or service offered over a cable television through tapping, making or causing to be made any unauthorized connection to existing wired or wireless facilities

or through the use of electronic equipment; and ii) the unauthorized importation, sale, lease, distribution or possession of electronic equipment, such as digital or analog receiver-decoder boxes, set-top and converter boxes, modern or any equivalent circumvention devices that allow the unauthorized access or decoding of unencrypted or encrypted satellite-program signals or other electromagnetic signals.

With the wide coverage of the bills on acts punishable for cable piracy, their passage as law may well be a deterrent to cable piracy. Unauthorized CATV distributors can no longer raise the defense of the absence of a crime punishing cable piracy. Moreover, even the unauthorized sale or possession of electronic equipment that is indispensable in the perpetration of cable piracy is, likewise, punishable.

The unauthorized tapping into the systems of cable operators poses grave and severe threats to the existence and survival of the cable-television industry. Cable piracy not only causes huge operational losses on the part of legitimate CATV operators, it also greatly affects the signal and standard of service, prejudicing legitimate subscribers.

A clearer and determined effort, therefore, of our government through Congress and the Supreme Court may finally put an end to the stigma of the Philippines as the country in Asia with the second-highest number of illegal cable and satellite-TV subscribers.

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