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COMMISSION]

***Insights on Copyright licensing and enforcement
policy for an increasingly borderless digital
environment***

Ladies and gentlemen, good afternoon.

It is now seven (7) months since the Broadcasting Commission issued a directive, in April of this year, for the removal of 19 unauthorized channels from cable packages.

Since then, there has been considerable public disquiet about the removal of the channels. It is also clear from the public comments that many people do not understand the role and powers of the Broadcasting Commission with regard to the management of cable companies.

I hope to shed some light on these matters today.

It is now common knowledge that a number of unauthorized channels have been available to the public for some time. For many years those channels were listed on most cable guides as “free” or “test” channels but more recently they have been included in packages with little or no distinction from the authorized channels.

Other than copyright citations from the Broadcasting Commission, the practice did not pose a business risk for cable operators because rights enforcement in Jamaica did not appear to be a priority for most foreign channel owners. This was probably because our market is relatively small and the cable industry was not yet mature.

Here, I must remind you that any copyright holder may, if they wish, choose to overlook infringements against their intellectual property rights. So the right to intellectual property is not inviolable, which means that it does not always have to be absolutely protected.

However, things have now changed. Gone are the days when the owners of foreign channels showed little or no interest in our market. This is because the content and communication ecosystem is now very different.

When cable was introduced in Jamaica there was no Youtube or Over the Top operator such as Netflix and Hulu. Now, the major foreign channels are facing strong competition from these substitutes. Partly as a result, the traditional channels are now trying to monetize their content, in every way possible, wherever in the world they can. And since cable is now a big business in Jamaica, with the participation of multinational telecommunications companies, it is attracting more international attention to the island.

In addition, local television stations have begun to invest a great deal of money to acquire some of the popular content which was available only on cable, and they too are now defending those rights aggressively.

These changes have led to a new and unprecedented focus on copyright protection and enforcement. This requires a different business intelligence and regulatory response.

In the case of those who seek to enforce their copyright, once they make a complaint to the Broadcasting Commission, we are duty bound to take appropriate measures to prevent or reduce any further infringements.

It is, however, true to say that over the years, successive governments have treated the matter of unauthorized channels with forbearance, largely because there are real challenges in getting clearance for some of the channels that are in very strong demand by Jamaicans.

It is also true to say that the Broadcasting Commission has always sought to apply the principle of proportionality and strike a fair balance between the protection of intellectual property rights and the protection of subscribers who may have taken out subscriptions in good faith and are then affected by remedial measures. This is why our directive for channel removal is incremental. All changes are to be phased in over time, in a carefully-planned process.

I turn now to what I consider to be a particularly important part of the debate on the removal of unauthorized channels; whether there should be rebates to subscribers.

Jamaica is not alone in having to deal with this challenge. Trinidad and Tobago is now in a similar position. Four months after the Broadcasting Commission issued its directive, the Telecommunications Authority of Trinidad and Tobago (TATT) directed cable television providers to remove 16 unauthorized channels from their channel line-ups. Subsequent to issuing the directive, Mr. Selby Wilson, Chairman of the Telecommunications Authority of Trinidad and Tobago (TATT), expressed concern that consumers had not been offered rebates in spite of reduced cable offerings. He also pointed out that Trinidadian legislation did not permit the Authority to regulate cable prices or to invoke any change in the prices.

The situation is the same in Jamaica. The Broadcasting Commission has an obligation to enforce copyright compliance, but it has no legal authority to regulate cable prices or intervene in the business transactions between cable companies and their subscribers with regard to matters such as pricing, packaging and rebates.

An Ethical Case to Answer

Having said that, I acknowledge that the removal of unauthorized channels has clearly been a source of great annoyance, caused considerable confusion and has left many cable subscribers feeling that an injustice has been done.

The key question, to my mind, is not whether the price paid for cable channels was proportionate to the number of channels which were being offered in packages but whether there was adequate subscriber information and education over the period leading up to the removals.

Were subscribers ever made to understand that some channels were 'purportedly' free? Were they made to understand how their cable bills are computed? Did anyone share with them the real cost of each channel which was being offered? Was it explained that the foreign channels that we love to consume are paid for in US dollars? Was it explained that sports rights are among the most expensive content rights worldwide (and becoming even more costly)? Were they told that immediate enjoyment of the most recent episode of popular shows was not a right and that although there is immediacy on the internet, in most cases it is illegal - and that internet piracy is also now receiving litigation attention from rights holders? Were they told that the days of free content or cheap content were, inevitably, coming to an end? Were they encouraged to support and appreciate local content or content from other, good-quality and cheaper sources (such as Africa) - a substitute for expensive American dramas and entertainment? Did subscribers receive clear and convincing explanations (with apologies) for the channel disruptions and the remedial measures which would be implemented?

At root, the problem is one of an inadequate and ineffective communication and customer engagement strategy.

I say this because a full six (6) months before the Commission issued the directive, we met with the cable operators to call their attention to the impending action in relation to unauthorized channels. That was in September 2014. The Commission did not issue a directive until April 2015.

There were also one-on-one meetings with the largest cable operator. The industry established a special committee to work with the Commission on the channel problem and it was partially through the work of that industry committee that we eventually decided on the strategy of phased removal of channels.

Throughout all these discussions, the cable operators were strongly encouraged to urgently develop a communications strategy to inform their subscribers about the reality of unauthorized channels and the imminent changes.

So, it is quite clear that when the Broadcasting Commission made its announcement in April, 2015, no cable operator was taken by surprise. And I remind you that even after the announcement in April, there was an agreed extension of a further three (3) months to September 2015.

So there should have been ample time to put in place a proper strategy to manage communications and subscriber relations. Obviously, that did not happen in every case.

Let me illustrate two of the actual, polar opposite responses by cable operators.

Cable operator A provides service to a rural community. When they were told about the Commission's intention to deal with unauthorized channels, months ahead of the Commission's formal announcement, cable operator A hired a town crier, rented a town hall and held a town hall meeting with his subscribers. I was invited to that Town Hall meeting to explain copyright to the subscribers. The cable operator laid out for his customers the US dollar cost of paying for channels; He told his subscribers that he was aware that the Broadcasting Commission would, in the future, require the removal of a number of unauthorized channels and that he wanted to alert them even before the Commission made its announcement. He outlined to them the options that were available to the company and told them to prepare for changes to their packages and pricing. More importantly, he invited them to work with him to identify their favourite programs and committed to make every effort to source authorized channels which would carry those programmes, even if not at the regular times they were accustomed to. He also told them about substitute channels he was exploring and sought their feedback; and he assured them that the changes would be carried out in close consultation with his customers.

In sharp contrast, Cable company B, despite prior knowledge that the Broadcasting Commission was intent on having unauthorized channels removed, went ahead and launched a new package with the very problematic channels included. That was disingenuous, to put it mildly.

I am not saying that the subscribers to cable company A were happy with the removal of channels but they certainly could not legitimately complain that increase in price and change in packages were sudden and inexplicable; or that there was lack of inclusion and stakeholder engagement.

I will not say anything today about the legal position on whether, generally, there had been any breach of law for misleading advertising, breach of the consumer law or breach of contract law. Each case will turn on its own particulars. But I will say that there is a clear ethical case to answer. Some cable operators have got some explaining to do to their customers.

I must emphasize that I am not saying that the ethical answer has to be a rebate, compensation, discount, free channels or anything of the like. That is a business consideration which will be dependent on the nature of their contracts, customer engagement, and business realities.

I will say, however, that it is entirely appropriate for this matter to be committed to further and deeper consideration by some cable companies; and in particular, Flow, whose customers are the majority of those most significantly affected. Contrary to what some persons think, the Broadcasting Commission has definitely not washed its hands of the matter and I assure you that we are in correspondence with the company about these issues.

There is a need for serious thinking about customer relations, and the need to restore public confidence about whether the price being paid for cable represents a fair deal. Any cable company which fails to do so is likely to see more of their customer base migrating to internet channels, and bypassing them entirely in the future.

Future outlook

In conclusion, I wish to make some observations on the future outlook.

We have a responsibility to ensure that the cable market remains open, fair and competitive at all times.

Subscribers must always have options, as this greatly reduces the risk of poor-quality “take it or leave it” customer service. We are therefore committed to maintaining an environment in which customers can always make a choice.

To that end, the Broadcasting Commission is set to release a licence which will see significant expansion by a second cable operator at the national level, and there is now an evaluation underway which could see a major third player emerge at the national level.

Digital Television Switch-over will also play a part in refashioning the competitive landscape. Apart from the distribution of the existing free-to-air television stations, the

owner of the digital multiplex will also be able to offer additional channels on a subscription basis, as another option to consumers. That switch-over is targeted to begin in 2018.

I assure Jamaicans that the Broadcasting Commission will continue to use a mix of regulatory action and quiet diplomacy to resolve the copyright and access to channels problem. These are complex matters of business, trade and law, spanning different spheres of influence – and areas of authority- including the cable operators, local and international rights holders, CARICOM and most importantly, the consumers of digital content.

Our goal is to be an enabling partner in the creation of new models for easier access to in-demand content, and to provide Jamaicans with a competitive environment where they are free to choose the television content that meets their needs, budgets and other realities, in the new global digital space.

Thank You.