

## Copyright (Amendment) Bill 2003

### 30. Secondary infringement: importing or exporting infringing copy

(1) ~~The copyright in a work is infringed by a person who, without the licence of the copyright owner, imports into Hong Kong or exports from Hong Kong, otherwise than for his private and domestic use, a copy of the work which is, and which he knows or has reason to believe to be, an infringing copy of the work.~~

~~(2) The copyright in a work is not infringed for the purposes of subsection (1) if –~~

~~(a) the infringing copy is an infringing copy by virtue only of section 35(3), and was lawfully made in the country, territory or area where it was made; and~~

~~(b) the person importing the infringing copy does so other than for the purpose of –~~

~~(i) selling or letting for hire; or~~

~~(ii) distributing for profit or financial reward, or to such an extent as would affect prejudicially the owner of the copyright,~~

~~the infringing copy.~~

[cf. 1988 c. 48 s. 22 U.K.]

### 31. Secondary infringement: possessing or dealing with infringing copy

(1) ~~The copyright in a work is infringed by a person who, without the licence of the copyright owner-~~ (Amended 64 of 2000 s. 2)

~~(a) possesses for the purpose of, in the course of, or in connection with, any trade or business for the purpose of or in the course of any trade or business;~~ (Replaced 64 of 2000 s. 2)

~~(b) sells or lets for hire, or offers or exposes for sale or hire;~~

~~(c) exhibits in public or distributes for the purpose of, in the course of, or in connection with, any trade or business for the purpose of or in the course of any trade or business;~~ or (Replaced 64 of 2000 s. 2)

~~(d) distributes (otherwise than for the purpose of, in the course of, or in connection with, any trade or business otherwise than for the purpose of or in the course of any trade or business) to such an extent as to affect prejudicially the owner of the copyright,~~ (Amended 64 of 2000 s. 2)

a copy of a work which is, and which he knows or has reason to believe to be, an infringing copy of the work.

~~(2) It is immaterial for the purpose of subsection (1)(a) and (c) whether or not the trade or business consists of dealing in infringing copies of copyright works.~~ (Added 64 of 2000 s. 2)

~~(3) The copyright in a work is not infringed for the purposes of subsection (1)(a) if –~~

~~(a) the infringing copy is an infringing copy by virtue only of section 35(3), and was lawfully made in the country, territory or area where it was made; and~~

~~(b) -the person possessing the infringing copy does so other than for the purpose of –~~

~~(i) -selling or letting for hire; or~~

~~(ii) -distributing for profit or financial reward, or to such an extent as would affect prejudicially the owner of the copyright, the infringing copy.~~

~~(4) -The copyright in a work is not infringed for the purposes of subsection (1)(c) by reason of the exhibiting in public of an infringing copy of the work if –~~

~~(a) -the infringing copy is an infringing copy by virtue only of section 35(3), and was lawfully made in the country, territory or area where it was made; and~~

~~(b) -the person exhibiting in public the infringing copy does so other than for the purpose of selling or letting for hire the infringing copy or any other infringing copy of a copyright work.~~

~~(5) -The copyright in a work is not infringed for the purposes of subsection (1)(c) by reason of the distributing of an infringing copy of the work if –~~

~~(a) -the infringing copy is an infringing copy by virtue only of section 35(3), and was lawfully made in the country, territory or area where it was made; and~~

~~(b) -the person distributing the infringing copy does so other than for profit or financial reward, or to such an extent as to affect prejudicially the owner of the copyright.~~

[cf. 1988 c. 48 s. 23 U.K.]

### **32. Secondary infringement: providing means for making infringing copies**

~~(1) -Copyright in a work is infringed by a person who, without the licence of the copyright owner-~~

~~(a) -makes;~~

~~(b) -imports into Hong Kong or exports from Hong Kong;~~

~~(c) -possesses ~~for the purpose of, in the course of, or in connection with, any trade or business for the purpose of or in the course of any trade or business;~~ or (Amended 64 of 2000 s. 3)~~

~~(d) -sells or lets for hire, or offers or exposes for sale or hire, an article specifically designed or adapted for making copies of that work, knowing or having reason to believe that it is to be used to make infringing copies.~~

~~(2) -Copyright in a work is infringed by a person who, without the licence of the copyright owner, transmits the work by means of a telecommunications system (otherwise than by broadcasting or inclusion in a cable programme service), knowing or having reason to believe that infringing copies of the work will be made by means of the reception of the transmission in Hong Kong or elsewhere.~~

~~(3) -It is immaterial for the purpose of subsection (1)(c) whether or not the trade or business consists of dealing in articles specially designed or adapted for making copies of copyright works. (Added 64 of 2000 s. 3)~~

[cf. 1988 c. 48 s. 24 U.K.]

### 35. Meaning of "infringing copy"

(1) In this Part "infringing copy" (侵犯版權複製品), in relation to a copyright work, is to be construed in accordance with this section.

(2) A copy of a work is an infringing copy if its making constituted an infringement of the copyright in the work in question.

(3) Except as provided in section 35A, a copy of a work other than a copy of an accessory work is also an infringing copy if-

- (a) it has been or is proposed to be imported into Hong Kong; and
- (b) its making in Hong Kong would have constituted an infringement of the copyright in the work in question, or a breach of an exclusive licence agreement relating to that work.

(4) For the purposes of sections 118 to 133 (criminal provisions) "infringing copy" (侵犯版權複製品) does not include a copy of a work-

- (a) that was lawfully made in the country, territory or area where it was made;
- (b) that has been or is proposed to be imported into Hong Kong at any time after the expiration of 18 months beginning on the first day of publication of the work in Hong Kong or elsewhere; and

(c) its making in Hong Kong would have constituted an infringement of the copyright in the work in question, or a breach of an exclusive licence agreement relating to that work,

or a copy of an accessory work-

- (i) that was lawfully made in the country, territory or area where it was made;
- (ii) that has been or is proposed to be imported into Hong Kong; and
- (iii) its making in Hong Kong would have constituted an infringement of the copyright in the work in question, or a breach of an exclusive licence agreement relating to that work.

(5) For the purposes of Division VII (proceedings relating to importation of infringing articles), "infringing copy" (侵犯版權複製品) does not include a copy of a work or a copy of an accessory work-

- (a) that was lawfully made in the country, territory or area where it was made;
- (b) that has been or is proposed to be imported into Hong Kong; and
- (c) its making in Hong Kong would have constituted an infringement of the copyright in the work in question, or a breach of an exclusive licence agreement relating to that work.

(6) Where in any proceedings the question arises whether a copy of a work is an infringing copy and it is shown-

- (a) that it is a copy of the work; and
  - (b) that copyright subsists in the work or has subsisted at any time,
- it shall be presumed until the contrary is proved that the copy was made at a time when copyright subsisted in the work.

(7) -In this Part "infringing copy" (侵犯版權複製品) includes a copy which is to be treated as an infringing copy by virtue of any of the following provisions-

- section 41(5) (copies made for purposes of instruction or examination);
- section 44(3) (recordings made by educational establishments for educational purposes);
- section 45(3) (reprographic copying by educational establishments for purposes of instruction);
- section 46(4)(b) (copies made by librarian or archivist in reliance on false declaration);
- section 64(2) (further copies, adaptations, etc. of work in electronic form retained on transfer of principal copy);
- section 72(2) (copies made for purpose of advertising artistic work for sale); or
- section 77(4) (copies made for purpose of broadcast or cable programme).

(8) -For the purpose of subsections (3), (4) and (5), "accessory work" (附屬作品) means a work incorporated in or consisting of-

- (a) -a label affixed to, or displayed on, an article;
  - (b) -the packaging or container in which an article is packaged or contained;
  - (c) -a label affixed to, or displayed on, the packaging or container in which an article is packaged or contained;
  - (d) -a written instruction, warranty or other information incidental to an article and provided with the article on its sale; or
  - (e) -an instructional sound recording or film incidental to an article and provided with the article on its sale,
- and the economic value of the article (inclusive of the label, packaging, container, instruction, warranty, other information, sound recording or film, as the case may be) is not predominantly attributable to the economic value of the work.

[cf. 1988 c. 48 s. 27 U.K.]

**35A. -—Copy of a computer program, or of certain other works embodied in the same article as a computer program, not an "infringing copy" for the purposes of section 35(3)**

(1) -A copy of a work to which this subsection applies is not an infringing copy for the purposes of section 35(3) if it was lawfully made in the country, territory or area where it was made.

(2) -Subsection (1) applies to –

- (a) -a copy of a computer program; or
- (b) -except as provided in subsection (3) or (4), a copy of a work other than a computer program, which copy is embodied in an article that also embodies a copy of a computer program, that, but for subsection (1), would be an infringing copy for the purposes of section 35(3).

(3) -Subsection (1) does not apply to any copy of a work described in subsection

(2)(b) –

- (a) – that is a copy of the whole or substantially the whole of a movie or a television drama; or
- (b) – that is a copy of a part of a movie or a television drama if –
  - (i) – all those parts of the movie or television drama copies of which are embodied in the article together constitute the whole or substantially the whole of the movie or television drama; or
  - (ii) – the viewing time of all those parts of the movie or television drama copies of which are embodied in the article is, in the case of a movie, more than 15 minutes in aggregate or, in the case of a television drama, more than 10 minutes in aggregate,
 and in paragraphs (a) and (b)(i), reference to a television drama, in the case of a television drama comprising one or more episodes, is reference to an episode of the television drama.

(4) – Subsection (1) does not apply to any copy of a work described in subsection (2)(b) that is –

- (a) – a copy of a movie or a television drama (other than a copy to which subsection (3) applies);
- (b) – a copy of a musical sound recording or a musical visual recording; or
- (c) – a copy that forms part of an e-book, (a "specified copy of a work") if the article in which the specified copy is embodied is likely, in being acquired by a person for his own use, to be acquired for the purpose of acquiring the specified copies of works that are embodied in it more so than for the purpose of acquiring the copies of works other than specified copies that are embodied in it.

(5) – For the purposes of subsection (4), in considering the extent to which an article is likely to be acquired for the purpose of acquiring a particular copy of a work that is embodied in it, a copy of those parts of any computer program the function of which is to provide a means of –

- (a) – viewing or listening to a specified copy of a work that is embodied in the article (or, where that work is in encrypted form, a means of decrypting it so as to enable such viewing or listening); or
  - (b) – searching for any specific part of a specified copy of a work that is embodied in the article,
- shall be regarded as part of the specified copy of a work.

(6) – In this section, "e-book" (電子書) means a combination of copies of works embodied in a single article and comprising –

- (a) – one or more copies of each of –
  - (i) – a computer program; and
  - (ii) – a literary work (other than a computer program), a dramatic work, a musical work or an artistic work ("main work"), so arranged as to provide for the copy of the main work to be presented in the form of an electronic version of a book, magazine or periodical; and
- (b) – where a main work is accompanied for illustrative purposes by any copy or copies of films or sound recordings, that copy or those copies.

(7) For the avoidance of doubt, reference in this section, other than subsection (6), to a copy of a work is reference to a copy of the whole or a substantial part of a work.

## 62. Use of typeface in ordinary course of printing

(1) It is not an infringement of copyright in an artistic work consisting of the design of a typeface-

- (a) to use the typeface in the ordinary course of typing, composing text, typesetting or printing;
- (b) to possess an article for the purpose of such use; or
- (c) to do anything in relation to material produced by such use, and this is so notwithstanding that an article is used which is an infringing copy of the work.

(2) However, the following provisions of this Part apply in relation to persons making, importing, exporting or dealing with articles specifically designed or adapted for producing material in a particular typeface, or possessing such articles for the purpose of dealing with them, as if the production of material as mentioned in subsection (1) did infringe copyright in the artistic work consisting of the design of the typeface-

- section 32 (secondary infringement: making, importing, exporting, possessing or dealing with article for making infringing copy);
- section 109 (order for delivery up); and
- section ~~48(4)~~[118D\(1\)](#) (offence of making or possessing such an article).

(3) The references in subsection (2) to "dealing with" an article are to selling, letting for hire, or offering or exposing for sale or hire, exhibiting in public, or distributing.

[cf. 1988 c. 48 s. 54 U.K.]

## 95. Infringement of right by possessing or dealing with infringing article

(1) The right conferred by section 92 (right to object to derogatory treatment of work) is also infringed by a person who-

- (a) ~~possesses for the purpose of, in the course of, or in connection with, any trade or business for the purpose of or in the course of any trade or business;~~  
(Replaced 64 of 2000 s. 4)
- (b) sells or lets for hire, or offers or exposes for sale or hire;
- (c) exhibits in public or distributes ~~for the purpose of, in the course of, or in connection with, any trade or business for the purpose of or in the course of any trade or business;~~ or (Replaced 64 of 2000 s. 4)
- (d) distributes ~~(otherwise than for the purpose of, in the course of, or in connection with, any trade or business)~~ ~~otherwise than for the purpose of or in the course of any trade or business~~ so as to affect prejudicially the honour or reputation of the author or director, (Amended 64 of 2000 s. 4)

an article which is, and which he knows or has reason to believe is, an infringing article.

~~(1A) It is immaterial for the purpose of subsection (1)(a) and (c) whether or not the trade or business consists of dealing in infringing articles. (Added 64 of 2000 s. 4)~~

- (2) ~~An "infringing article" (侵犯權利物品) means a work or a copy of a work which-~~
- ~~(a) has been subjected to derogatory treatment within the meaning of section 92; and~~
  - ~~(b) has been or is likely to be the subject of any of the acts mentioned in that section in circumstances infringing that right.~~

[cf. 1988 c. 48 s. 83 U.K.]

## 96. False attribution of work

- (1) ~~A person has the right in the circumstances mentioned in this section-~~
- ~~(a) not to have a literary, dramatic, musical or artistic work falsely attributed to him as author; and~~
  - ~~(b) not to have a film falsely attributed to him as director,~~
- and in this section an "attribution" (署名), in relation to such a work, means a statement (express or implied) as to who is the author or director.

- (2) ~~The right is infringed by a person who-~~
- ~~(a) issues or makes available to the public copies of a work of any of those descriptions in or on which there is a false attribution; or~~
  - ~~(b) exhibits in public an artistic work, or a copy of an artistic work, in or on which there is a false attribution.~~

- (3) ~~The right is also infringed by a person who-~~
- ~~(a) in the case of a literary, dramatic or musical work, performs the work in public, broadcasts it or includes it in a cable programme service as being the work of a person; or~~
  - ~~(b) in the case of a film, shows it in public, broadcasts it or includes it in a cable programme service as being directed by a person, knowing or having reason to believe that the attribution is false.~~

(4) ~~The right is also infringed by a person who issues or makes available to the public or displays in public material containing a false attribution in connection with any of the acts mentioned in subsection (2) or (3).~~

(5) ~~The right is also infringed by a person who for the purpose of, in the course of, or in connection with, any trade or business for the purpose of or in the course of any trade or business - (Amended 64 of 2000 s. 5)~~

- ~~(a) possesses or deals with a copy of a work of any of the descriptions mentioned in subsection (1) in or on which there is a false attribution; or~~
- ~~(b) in the case of an artistic work, possesses or deals with the work itself when there is a false attribution in or on it, knowing or having reason to believe that there is such an attribution and that it is false.~~

(6) ~~In the case of an artistic work the right is also infringed by a person who for the purpose of, in the course of, or in connection with, any trade or business for the purpose of or in the course of any trade or business - (Amended 64 of 2000 s. 5)~~

- (a) ~~deals with a work which has been altered after the author parted with possession of it as being the unaltered work of the author; or~~
- (b) ~~deals with a copy of such an altered work as being a copy of the unaltered work of the author,~~  
knowing or having reason to believe that that is not the case.

~~(6A) It is immaterial for the purpose of subsections (5) and (6) whether or not the trade or business consists of dealing in~~

- ~~(a) works or copies of works in or on which there are false attributions; or~~
- ~~(b) altered works or copies of altered works. (Added 64 of 2000 s. 5)~~

(7) ~~References in this section to dealing are to selling or letting for hire, offering or exposing for sale or hire, exhibiting in public, or distributing.~~

- (8) ~~This section applies where, contrary to the fact-~~
  - ~~(a) a literary, dramatic or musical work is falsely represented as being an adaptation of the work of a person; or~~
  - ~~(b) a copy of an artistic work is falsely represented as being a copy made by the author of the artistic work,~~  
as it applies where the work is falsely attributed to a person as author.

[cf. 1988 c. 48 s. 84 U.K.]

## 109. Order for delivery up

- (1) ~~Where a person-~~
  - ~~(a) has an infringing copy of a work in his possession, custody or control for the purpose of, in the course of, or in connection with, any trade or business for the purpose of or in the course of any trade or business; or (Amended 64 of 2000 s. 6)~~
  - ~~(b) has in his possession, custody or control an article specifically designed or adapted for making copies of a particular copyright work, knowing or having reason to believe that it has been or is to be used to make infringing copies, the owner of the copyright in the work may apply to the court for an order that the infringing copy or article be delivered up to him or to such other person as the court may direct.~~

~~(1A) It is immaterial for the purpose of subsection (1)(a) whether or not the trade or business consists of dealing in infringing copies of copyright works. (Added 64 of 2000 s. 6)~~

(2) ~~An application must be made before the end of the period specified in section 110 (period after which remedy of delivery up not available); and the court shall not make an order under this section unless the court also makes, or it appears to the court that there are grounds for making, an order under section 111 (order as to disposal of infringing copy or other article).~~

(3) ~~A person to whom an infringing copy or other article is delivered up in pursuance of an order under this section shall, if an order under section 111 is not made, retain it pending the making of an order, or the decision not to make an order, under that section.~~

(4) ~~Nothing in this section affects any other power of the court.~~

[cf. 1988 c. 48 s. 99 U.K.]

Remarks:

The Copyright (Suspension of Amendments) Ordinance (Cap 568) provides for the suspension of the operation of certain amendments in relation to this section effected by the Intellectual Property (Miscellaneous Amendments) Ordinance 2000 (64 of 2000).

**118. ~~Criminal liability for making or dealing with infringing articles, etc.~~**

~~(1) A person commits an offence if he, without the licence of the copyright owner—~~  
~~(a) makes for sale or hire;~~  
~~(b) imports into Hong Kong otherwise than for his private and domestic use;~~  
~~(c) exports from Hong Kong otherwise than for his private and domestic use;~~  
~~(d) possesses for the purpose of, in the course of, or in connection with, any trade or business with a view to committing any act infringing the copyright;~~  
~~(Amended 64 of 2000 s. 7)~~

~~(e) for the purpose of, in the course of, or in connection with, any trade or business—(Amended 64 of 2000 s. 7)~~  
~~(i) sells or lets for hire;~~  
~~(ii) offers or exposes for sale or hire;~~  
~~(iii) exhibits in public; or~~  
~~(iv) distributes; or~~

~~(f) distributes (otherwise than for the purpose of, in the course of, or in connection with, any trade or business) to such an extent as to affect prejudicially the owner of the copyright, (Amended 64 of 2000 s. 7)~~  
~~an infringing copy of a copyright work.~~

~~(2) Subsections (1)(b) and (c) and (4)(b) and (c) do not apply to an article in transit.~~

~~(3) It is a defence for the person charged with an offence under subsection (1), to prove that he did not know and had no reason to believe that the copy in question was an infringing copy of the copyright work.~~

~~(4) A person commits an offence if he—~~

~~(a) makes;~~

~~(b) imports into Hong Kong;~~

~~(c) exports from Hong Kong;~~

~~(d) possesses; or~~

~~(e) sells or lets for hire, or offers or exposes for sale or hire,~~

~~an article specifically designed or adapted for making copies of a particular copyright work which article is used or intended to be used to make infringing copies of the copyright work for sale or hire or for use for the purpose of, in the course of, or in connection with, any trade or business. (Amended 64 of 2000 s. 7)~~

~~(5) It is a defence for the person charged with an offence under subsection (4) to prove that he did not know and had no reason to believe that the article was used or was intended to be used to make the infringing copies for sale or hire or for use for the purpose of, in the course of, or in connection with, any trade or business. (Amended 64 of 2000 s. 7)~~

~~(6) For the purpose of subsections (1)(b) and (3), where a person is charged with an offence under subsection (1) in respect of a copy of a copyright work which is an infringing copy by virtue only of section 35(3) and not being excluded under section 35(4), if he proves that~~

- ~~(a) he had made reasonable enquiries sufficient to satisfy himself that the copy in question was not an infringing copy of the work;~~
  - ~~(b) he had reasonable grounds to be satisfied in the circumstances of the case that the copy was not an infringing copy;~~
  - ~~(c) there were no other circumstances which would have led him reasonably to suspect that the copy was an infringing copy;~~
- ~~he has proved that he had no reason to believe that the copy in question was an infringing copy of the copyright work.~~

~~(7) In determining whether the person charged has proved under subsection (6) that he had no reason to believe that the copy in question was an infringing copy of the work, the court may have regard to, including but not limited to, the following~~

- ~~(a) whether he had made enquiries with a relevant trade body in respect of that category of work;~~
- ~~(b) whether he had given any notice drawing attention of the copyright owner or exclusive licensee to his interest to import and to sell the copy of the work;~~
- ~~(c) whether he had complied with any code of practice that may exist in respect of the supply of that category of work;~~
- ~~(d) whether the response, if any, to those enquiries made by the defendant was reasonable and timely;~~
- ~~(e) whether he was provided with the name, address and contact details of the copyright owner or exclusive licensee (as the case may be);~~
- ~~(f) whether he was provided with the date of first day of publication of the work;~~
- ~~(g) whether he was provided with proof of any relevant exclusive licence.~~

~~(8) A person commits an offence if he has in his possession an article knowing or having reason to believe that it is used or is intended to be used to make infringing copies of any copyright work for sale or hire or for use for the purpose of, in the course of, or in connection with, any trade or business. (Amended 64 of 2000 s. 7)~~

~~(8A) It is immaterial for the purpose of subsections (1)(d) and (e), (4) and (8) whether or not the trade or business consists of dealing in infringing copies of copyright works. (Added 64 of 2000 s. 7)~~

~~(9) Sections 115 to 117 (presumptions as to various matters connected with copyright) do not apply to proceedings for an offence under this section.~~

[cf. 1988 c. 48 s. 107 U.K.]

**118. —Offences in relation to infringing copies generally**

(1) -A person commits an offence if, without the licence of the copyright owner –

- (a) -he makes for sale or hire, or makes for profit or financial reward, an infringing copy of a copyright work;
- (b) -he imports an infringing copy of a copyright work into Hong Kong otherwise than for his private and domestic use;
- (c) -he exports an infringing copy of a copyright work from Hong Kong otherwise than for his private and domestic use;
- (d) -he –
  - (i) -sells or lets for hire;
  - (ii) -offers or exposes for sale or hire;
  - (iii) -transports or stores for profit or financial reward;
  - (iv) -distributes for profit or financial reward; or
  - (v) -for the purpose of selling or letting for hire any infringing copy of a copyright work, exhibits in public, an infringing copy of a copyright work;
- (e) -he possesses an infringing copy of a copyright work with a view to –
  - (i) -selling or letting for hire;
  - (ii) -transporting or storing for profit or financial reward; or
  - (iii) -distributing for profit or financial reward,the infringing copy;
- (f) -he distributes (otherwise than for profit or financial reward) an infringing copy of a copyright work to such an extent as to affect prejudicially the owner of the copyright.

(2) -A person does not commit an offence under subsection (1)(b) if –

- (a) -the infringing copy is an infringing copy by virtue only of section 35(3), and was lawfully made in the country, territory or area where it was made; and
- (b) -he imports the infringing copy other than for the purpose of –
  - (i) -selling or letting for hire; or
  - (ii) -distributing for profit or financial reward, or to such an extent as would affect prejudicially the owner of the copyright,the infringing copy.

(3) -Subsection (1)(b), (c), (d)(iii) and (e)(ii) does not apply to an article in transit.

(4) -For the purposes of any proceedings for an offence under subsection (1)(d)(iii), where a person transports or stores an infringing copy of a copyright work in circumstances that give rise to a reasonable suspicion that the person is transporting or storing the infringing copy for profit or financial reward, the person is presumed in the absence of evidence to the contrary to be transporting or storing the infringing copy for profit or financial reward.

(5) -For the purposes of any proceedings for an offence under subsection (1)(e)(ii),

where a person possesses an infringing copy of a copyright work with a view to transporting or storing the infringing copy in circumstances that give rise to a reasonable suspicion that the person is possessing the infringing copy with a view to transporting or storing the infringing copy for profit or financial reward, the person is presumed in the absence of evidence to the contrary to be possessing the infringing copy with a view to transporting or storing the infringing copy for profit or financial reward.

**118A. —Offences in relation to infringing copies of particular categories of works**

(1) -A person commits an offence if, without the licence of the copyright owner –

- (a) -for the purpose of or in the course of any trade or business, he possesses an infringing copy of a copyright work that is a computer program, feature film, musical sound recording, musical visual recording or television drama; and
- (b) -he so possesses the infringing copy with a view to the copyright work being used in doing any act for the purpose of or in the course of the trade or business.

(2) -Subsection (1) does not apply in relation to an infringing copy that is an infringing copy by virtue only of section 35(3) and was lawfully made in the country, territory or area where it was made.

(3) -In proceedings for an offence under subsection (1), it is a defence for the person charged to prove that his possession of the infringing copy occurred in the course of his employment and that the infringing copy was provided to him by or on behalf of his employer for use in the course of his employment.

(4) -Subsection (3) does not apply in the case of an employee who –

- (a) -where the employer is a body corporate, is a director, manager, secretary or other similar officer of the body corporate or is a person purporting to act in any such capacity or, where the affairs of a body corporate are managed by its members, is a member with functions of management as if he were a director of the body corporate;
- (b) -where the employer is a partnership, is concerned in the management of the partnership;
- (c) -where the employer is a sole proprietorship, is concerned in the management of the proprietorship; or
- (d) -in any other case, is concerned in the management of the employer's business.

(5) -This section does not apply to a copy of a copyright work that is a computer program if –

- (a) -the copy is in a printed form; or
- (b) -the computer program incorporates the whole or any part of another work, not being a computer program itself, and is technically required for the viewing or listening to of the other work by a member of the public to whom a copy of that work is made available.

**[118A. -Application of sections 60 and 61 to offences under section 118(1)**

For the purpose of any proceedings for an offence under section 118(1) –

- (a) ~~a person is a lawful user of a computer program for the purposes of sections 60 and 61 if he has a contractual right to use the program in any place in or outside Hong Kong, and section 60(2) shall have effect accordingly; and~~
- (b) ~~sections 60 and 61 apply in relation to a copy of a work other than a computer program to which section 35A(1) applies as they apply in relation to a copy of a computer program and, accordingly, any act that may under section 60 or 61 be done in relation to a copy of a computer program without infringing the copyright in the program may be done in relation to a copy of a work other than a computer program to which section 35A(1) applies without infringing the copyright in the work.] [Added by 2003 Ordinance]~~

### **118B. —Defences to criminal liability under sections 118 and 118A**

(1) -In proceedings for an offence under section 118(1) or 118A(1), it is a defence for the person charged to prove that he did not know and had no reason to believe that the copy in question was an infringing copy of the copyright work.

(2) -For the purposes of subsection (1), where the charge relates to an offence in respect of a copy of a copyright work which is an infringing copy by virtue only of section 35(3), and not being excluded under section 35(4), a person charged has proved that he had no reason to believe that the copy in question was an infringing copy of the copyright work if he proves that –

- (a) -he had made reasonable enquiries sufficient to satisfy himself that the copy in question was not an infringing copy of the work;
- (b) -he had reasonable grounds to be satisfied in the circumstances of the case that the copy was not an infringing copy; and
- (c) -there were no other circumstances which would have led him reasonably to suspect that the copy was an infringing copy.

(3) -In determining for the purposes of subsection (2) whether a person charged has proved any of the matters specified in paragraphs (a), (b) and (c) of that subsection, and without limiting the effect of that subsection, the court may have regard to the following matters, namely –

- (a) -whether the person charged had made enquiries with a relevant trade body in respect of that category of work;
- (b) -whether the person charged had given any notice drawing to the attention of the copyright owner or exclusive licensee his interest in importing and selling the copy of the work;
- (c) -whether the person charged had complied with any code of practice that may have existed in respect of the supply of that category of work;
- (d) -the reasonableness and timeliness of the response, if any, to enquiries made by the person charged;
- (e) -whether the person charged had been provided with the name, address and contact details of the copyright owner or exclusive licensee (as the case may be);

- (f) -whether the person charged had been provided with the date of the first day of publication of the work;
- (g) -whether the person charged had been provided with proof of any relevant exclusive licence.

**118C. —Offence in relation to possession of infringing copies by a copying service**

(1) -In this section –

"business that includes the providing of a copying service" (包括提供複製服務的業務) means business, conducted for profit, that includes the offering of reprographic copying services to the public.

(2) -A person commits an offence if, for the purpose of or in the course of a business that includes the providing of a copying service, he possesses 2 or more substantially identical reprographic copies of a copyright work as published in a book, magazine or periodical, being copies that are infringing copies of the copyright work.

(3) -In proceedings for an offence under subsection (2), it is a defence for the person charged to prove that he did not know and had no reason to believe that the copies in question were infringing copies of the copyright work.

(4) -In proceedings for an offence under subsection (2), it is a defence for the person charged to prove that –

- (a) -he possessed the infringing copies by virtue only of the fact that he possessed reprographic copies of another work ("principal work"), in which reprographic copies the copyright work to which the charge relates forms part of the principal work; and
- (b) -works as published in a book, magazine or periodical constitute not more than 20% of the contents of each of the reprographic copies of the principal work.

(5) In proceedings for an offence under subsection (2), it is a defence for the person charged to prove that copies of the book, magazine or periodical in question (not being infringing copies) are available free of charge to members of the public who wish to acquire their own copy.

**118D. —Offences in relation to articles for use in making infringing copies**

(1) -A person commits an offence if he –

- (a) -makes;
- (b) -imports into Hong Kong;
- (c) -exports from Hong Kong;
- (d) -sells or lets for hire;
- (e) -offers or exposes for sale or hire; or
- (f) -possesses,

an article specifically designed or adapted for making copies of a particular copyright work, which article is used or intended to be used to make infringing copies of the copyright work for sale or hire or for profit or financial reward.

(2) -A person commits an offence if he has in his possession an article knowing or having reason to believe that it is used or is intended to be used to make infringing copies of any copyright work for sale or hire or for profit or financial reward.

(3) -Subsection (1)(b) and (c) does not apply to an article in transit.

(4) -In proceedings for an offence under subsection (1), it is a defence for the person charged to prove that he did not know and had no reason to believe that the article was used or was intended to be used to make infringing copies of the copyright work, or to make the infringing copies for sale or hire or for profit or financial reward.

### **119. Penalties for offences under section 118**

(1) -A person who commits an offence under section 118(1), ~~118A(1) or 118C(2)~~ is liable on conviction on indictment to a fine at level 5 in respect of each infringing copy and to imprisonment for 4 years. (Amended 64 of 2000 s. 8)

(2) -A person who commits an offence under section ~~118(4) or (8)~~118D(1) or (2) is liable on conviction on indictment to a fine of \$500000 and to imprisonment for 8 years.

### **120. Making infringing copies outside Hong Kong, etc.**

Remarks:

The Copyright (Suspension of Amendments) Ordinance (Cap 568) provides for the suspension of the operation of certain amendments in relation to this section effected by the Intellectual Property (Miscellaneous Amendments) Ordinance 2000 (64 of 2000).

(1) -A person commits an offence if he makes outside Hong Kong, for export to Hong Kong otherwise than for his private and domestic use, any article that he knows would, if it were made in Hong Kong, constitute an infringing copy of a copyright work.

(2) -A person commits an offence if he makes outside Hong Kong an article specifically designed or adapted for making copies of a particular copyright work knowing or having reason to believe that it is to be used or is intended to be used in Hong Kong ~~for making an infringing copy of the copyright work for sale or hire or for use for the purpose of, in the course of, or in connection with, any trade or business. (Amended 64 of 2000 s. 9)~~for making an infringing copy of the copyright work for sale or hire or for profit or financial reward.

~~(2A) It is immaterial for the purpose of subsection (2) whether or not the trade or business consists of dealing in infringing copies of copyright works. (Added 64 of 2000 s. 9)~~

(3) -A person commits an offence if he makes outside Hong Kong or exports from Hong Kong an article specifically designed or adapted for making copies of a particular copyright work, knowing or having reason to believe that-

- (a) -the article is to be used or is intended to be used outside Hong Kong for making another article for export to Hong Kong; and
- (b) -the latter article mentioned in paragraph (a) would, if it were made in Hong

Kong, constitute an infringing copy of the copyright work.

(4) ~~-~~A person who, in Hong Kong or elsewhere, aids, abets, counsels or procures the commission by another person of an offence under subsection (1), (2) or (3) commits that offence as a principal.

(5) ~~-~~The offences under subsections (1), (2) and (3) are without prejudice to the offences under ~~section 118~~[section 118, 118A, 118C or 118D](#).

(6) ~~-~~A person who commits an offence under subsection (1), (2) or (3) is liable on conviction on indictment to a fine of \$500000 and to imprisonment for 8 years.

(7) ~~-~~For the purpose of this section, "article" (物品) does not include an article in transit.

~~(8) Sections 115 to 117 (presumptions as to various matters connected with copyright) do not apply to proceedings for an offence under this section.~~

#### **120A. ~~-~~Time limit for prosecutions**

~~\_\_\_\_\_~~ No prosecution for an offence under this Ordinance shall be commenced after the expiration of 3 years from the date of commission of the offence or 1 year from the date of discovery of the offence by the prosecutor, whichever is the earlier.  
(Added 22 of 1998 s. 44)

#### **120B. ~~-~~Presumptions in relation to offence provisions**

~~\_\_\_\_\_~~ [Sections 115, 116 and 117 \(presumptions as to various matters connected with copyright\) do not apply to proceedings for an offence under sections 118, 118A, 118C, 118D and 120.](#)

#### **131. ~~-~~Seized articles, etc. liable to forfeiture**

(1) ~~-~~Any article, vessel, aircraft, vehicle or thing seized or detained by an authorized officer under section 122 is liable to forfeiture in accordance with the following provisions whether or not any person has been charged of an offence under ~~section 118 or 120~~[section 118, 118A, 118C, 118D or 120](#).

(2) ~~-~~The Commissioner shall, subject to subsection (3) and not later than 30 days beginning on the date of the seizure or detention of the article, vessel, aircraft, vehicle or thing serve notice of the seizure or detention on a person who was to the knowledge of the Commissioner at the time of, or immediately after seizure or detention, an owner of the article, vessel, aircraft, vehicle or thing.

(3) ~~-~~Subsection (2) does not apply if the article, vessel, aircraft, vehicle or thing was seized or detained in the presence of-

(a) ~~-~~an owner, or an employee or agent of the owner, of the article, vessel, aircraft,

vehicle or thing;

- (b) ~~the person whose offence or suspected offence gave rise to the seizure or detention; or~~
- (c) ~~in the case of a vessel, aircraft or vehicle, the master or person in charge.~~

- (4) ~~A notice given under subsection (2) is deemed to have been duly served if-~~
  - (a) ~~it is delivered to the person on whom it is served;~~
  - (b) ~~it is sent by registered post addressed to such person at the place of residence or business of such person, if any, known to the Commissioner; or~~
  - (c) ~~where it cannot be served in accordance with paragraph (a) or (b), the notice is exhibited at the Customs and Excise Department, in a place to which the public have access, for a period of not less than 7 days commencing within 30 days from the date of the seizure or detention of the article, vessel, aircraft, vehicle or thing.~~

(5) ~~If an article, vessel, aircraft, vehicle or thing is liable to forfeiture under subsection (1), the owner or the authorized agent of the owner thereof, or a person who was in possession thereof at the time of seizure or detention, or a person who has a legal or equitable interest in it, may within 30 days beginning-~~

- (a) ~~on the date of the seizure or detention; or~~
- (b) ~~where the notice under subsection (2) is-~~
  - (i) ~~served by delivery to the person to be served, on the date of service; or~~
  - (ii) ~~sent by registered post, 2 days after the date of posting; or~~
  - (iii) ~~exhibited as described in subsection (4)(c), on the first day it is so exhibited,~~

~~give notice in writing to the Commissioner of his full name and address for service in Hong Kong and claim that the article, vessel, aircraft, vehicle or thing is not liable to forfeiture.~~

(6) ~~A claimant may withdraw a notice of a claim at any time by notice in writing to the Commissioner.~~

(7) ~~Except where a person is charged with an offence under [section 118 or 120](#) [section 118, 118A, 118C, 118D or 120](#) in connection with the seized or detained article, vessel, aircraft, vehicle or thing, if on the date of the expiration of the appropriate period of time specified in subsection (5) for the giving of a notice of claim no such notice has been given in writing to the Commissioner, the article, vessel, aircraft, vehicle or thing is forfeited forthwith to the Government.~~

(Amended 22 of 1999 s. 3)

### **132. ~~\_\_\_~~—Disposal of articles, etc. where a person is charged**

Without prejudice to section 131, where a person is charged with an offence under ~~[section 118 or 120](#)~~ [section 118, 118A, 118C, 118D or 120](#) the court may, if it is satisfied that any article, vessel, aircraft, vehicle or thing seized or detained by an authorized officer under section 122 in connection with the offence-

- (a) ~~is an infringing copy of a copyright work;~~
- (b) ~~is an article specifically designed or adapted for making copies of a particular~~

- copyright work which article has been used, or is intended to be used, for making infringing copies of any such work; or
- (c) ~~has been used in connection with any offence under this Ordinance,~~ order that the article, vessel, aircraft, vehicle or thing be-
- (i) ~~forfeited to the Government; (Amended 22 of 1999 s. 3)~~
  - (ii) ~~delivered up to the person who appears to the court to be the owner of the copyright concerned; or~~
  - (iii) ~~disposed of in such other way as the court may think fit, whether or not the person charged is convicted of the offence with which he was charged.~~

### **133. —Determination of application for forfeiture**

(1) ~~Where a notice of claim is given under section 131, the Commissioner or an authorized officer shall apply to a magistrate, the District Court or the Court of First Instance for the forfeiture of the article, vessel, aircraft, vehicle or thing unless the Commissioner is satisfied, within a reasonable period after the receipt of the notice of claim, that, on the basis of the evidence of the case, the article, vessel, aircraft, vehicle or thing concerned should be delivered to the claimant. (Amended 25 of 1998 s. 2)~~

(2) ~~The Commissioner or authorized officer shall state in the application the name and address of the claimant.~~

(3) ~~Where an application under subsection (1) is made to a magistrate, the magistrate shall issue a summons to the claimant, requiring him to appear before a magistrate upon the hearing of the application, and shall cause a copy of such summons to be served upon the Commissioner.~~

(4) ~~Where an application under subsection (1) is made to the District Court or the Court of First Instance, it may be begun by motion. (Amended 25 of 1998 s. 2)~~

(5) ~~Where the claimant is the defendant in criminal proceedings under [section 118 or 120](#) ~~section 118, 118A, 118C, 118D or 120~~ in connection with the seized or detained article, vessel, aircraft, vehicle or thing and there is no other claimant, on an application made in that behalf by the Commissioner, the court may hear the forfeiture application immediately following the criminal proceedings and for the purposes of a hearing under this subsection, any requirement in respect of the issue or service of a summons or any notice of the hearing under or by virtue of subsection (3) or (4), as the case may be, does not apply.~~

(6) ~~Where there is more than one claimant and one of them is the defendant in criminal proceedings under [section 118 or 120](#) ~~section 118, 118A, 118C, 118D or 120~~ in connection with the seized or detained article, vessel, aircraft, vehicle or thing, on an application made in that behalf by the Commissioner, the court may hear the forfeiture application immediately following the criminal proceedings.~~

(7) ~~If, upon the hearing of an application under subsection (1), the claimant or some other person who, though not the claimant, was, or would have been, entitled to make a claim under section 131(5), appears before a court, the court shall hear the application.~~

(8) ~~A court may, at the hearing of a forfeiture application, or at an adjourned hearing, hear a person-~~

- (a) ~~who has not been served with a notice of seizure or detention and was not present when an article, vessel, aircraft, vehicle or thing, was seized or detained or whose identity was not known to the Commissioner at the time of, or immediately after, seizure or detention; and~~
- (b) ~~who appears to the court to have a right to claim ownership of, or a legal or equitable interest in, the article, vessel, aircraft, vehicle or thing, on his claim as to why it should not be forfeited.~~

(9) ~~If, upon the hearing of an application under subsection (1), neither the claimant nor any person who, though not the claimant, was, or would have been, entitled to make a claim under section 131(5), appears before a court and the court is satisfied-~~

- (a) ~~that the summons or the notice of the hearing (if any) required to be served under subsection (3) or (4), as the case may be, was served;~~
- (b) ~~that a person at the address for service or a solicitor nominated to accept service on behalf of a claimant has refused to accept service of the summons or notice of the hearing referred to in paragraph (a); or~~
- (c) ~~that the address for service given to the Commissioner is inadequate for the purpose of effecting service of the summons or the notice of hearing referred to in paragraph (a),~~  
~~the court shall hear and determine the application without requiring further inquiry as to the whereabouts of the claimant.~~

(10) ~~An application under subsection (1) to a magistrate is deemed to be a complaint for the purposes of section 8 of the Magistrates Ordinance (Cap 227).~~

(11) ~~Without prejudice to section 132, upon the hearing of an application under subsection (1) a court shall order that the article, vessel, aircraft, vehicle or thing, as the case may be, be forfeited to the Government where the court is satisfied that it is liable to forfeiture, and, if appropriate, that-~~ (Amended 22 of 1999 s. 3)

- (a) ~~the person who appears before the court fails to satisfy the court that he was, or would have been, entitled to make a claim under section 131(5) in respect of the seized or detained article, vessel, aircraft, vehicle or thing; and~~
- (b) ~~no other person appears before the court and satisfies that he was, or would have been, entitled to make such claim.~~

(12) ~~Without prejudice to section 132, upon the hearing of an application under subsection (1), in any case other than a case referred to in subsection (11) a court may, if it is satisfied-~~

- (a) ~~that a person is, or would have been, entitled to make a claim under section 131(5) in respect of the seized or detained article, vessel, aircraft, vehicle or thing; and~~
- (b) ~~that the article, vessel, aircraft, vehicle or thing is liable to forfeiture, order that the article, vessel, aircraft, vehicle or thing-~~
  - (i) ~~be forfeited to the Government; (Amended 22 of 1999 s. 3)~~
  - (ii) ~~subject to subsection (13), be delivered to the claimant subject to any condition which it may specify in the order; or~~
  - (iii) ~~be disposed of in such manner and subject to such condition as it may specify in the order.~~

(13) ~~The court shall not make an order under subsection (12)(ii) in respect of an article unless the claimant satisfies the court that the article is not an infringing copy of any copyright work or, as the case may be, is not an article specifically designed or adapted to make copies of any particular copyright work which article is used or is intended to be used, for making infringing copies of any such work.~~

(14) ~~If, after a court has ordered that an article, vessel, aircraft, vehicle or thing be delivered to a person, that person cannot be found or refuses to accept it, the Commissioner may apply to a court which may-~~

- ~~(a) order that the article, vessel, aircraft, vehicle or thing be forfeited to the Government; or (Amended 22 of 1999 s. 3)~~
- ~~(b) make any such other order as the court considers fit in the circumstances.~~

(15) ~~Unless the context otherwise requires, a reference to a court in this section or section 132 includes a reference to a magistrate.~~

#### **196. ~~—~~Meaning of "publication" and "commercial publication"**

(1) ~~In this Part "publication" (發表), in relation to a work, means the issue or making available of copies of the work to the public; and related expressions are construed accordingly.~~

(2) ~~In this Part "commercial publication" (商業發表), in relation to a literary, dramatic, musical or artistic work means issuing or making available copies of the work to the public at a time when copies made in advance of the receipt of orders are generally available to the public, and related expressions are construed accordingly.~~

(3) ~~In the case of a work of architecture in the form of a building, or an artistic work incorporated in a building, construction of the building is treated as equivalent to publication of the work.~~

(4) ~~The following do not constitute publication for the purposes of this Part and references to commercial publication are construed accordingly-~~

- ~~(a) in the case of a literary, dramatic or musical work-
 
  - ~~(i) the performance of the work; or~~
  - ~~(ii) the broadcasting of the work or its inclusion in a cable programme service;~~~~
- ~~(b) in the case of an artistic work-
 
  - ~~(i) the exhibition of the work;~~
  - ~~(ii) the issue or making available to the public of copies of a graphic work representing, or of photographs of, a work of architecture in the form of a building or a model for a building, a sculpture or a work of artistic craftsmanship;~~
  - ~~(iii) the issue or making available to the public of copies of a film including the work; or~~
  - ~~(iv) the broadcasting of the work or its inclusion in a cable programme~~~~

service ;

- (c) -in the case of a sound recording or film-
- (i) -the work being played or shown in public; or
  - (ii) -the broadcasting of the work or its inclusion in a cable programme service.

(5) -References in this Part to publication or commercial publication do not include publication which is merely colourable and not intended to satisfy the reasonable requirements of the public.

(6) -No account is taken for the purposes of this section of any unauthorized act.

[cf. 1988 c. 48 s. 175 U.K.]

### **196A. —Meaning of "for the purpose of or in the course of trade or business"**

In this Part, a reference to a person doing an act for the purpose of or in the course of a trade or a business is a reference to –

- (a) –a person who is engaged in a trade or a business of any description or nature whatsoever, who does the act for the purpose of or in the course of the trade or business in which he is engaged; or
- (b) –an employee of a person who is engaged in a trade or a business of any description or nature whatsoever, who does the act for the purpose of or in the course of that employment.

### **198. —Minor definitions**

(1) -In this Part- (Amended 64 of 2000 s. 10)

"article" (文章), in the context of an article in a periodical, includes an item of any description;

"article in transit" (過境物品) means an article which-

- (a) -is brought into Hong Kong solely for the purpose of taking it out of Hong Kong; and
- (b) -remains at all times in or on the vessel or aircraft in or on which it is brought into Hong Kong;

"authorized officer" (獲授權人員) means any public officer authorized in writing by the Commissioner to exercise any of the powers and perform any of the duties conferred or imposed on an authorized officer under this Ordinance;

"business" (業務) includes a trade or profession;

"business" (業務) includes business conducted otherwise than for profit;

"collective work" (匯集作品) means-

- (a) -a work of joint authorship; or

(b) a work in which there are distinct contributions by different authors or in which works or parts of works of different authors are incorporated;

"Commissioner" (關長) means the Commissioner of Customs and Excise and any Deputy or Assistant Commissioner of Customs and Excise; (Replaced 22 of 1999 s. 3)

"computer-generated" (電腦產生), in relation to a work, means that the work is generated by computer in circumstances such that there is no human author of the work;

"electronic" (電子) means actuated by electric, magnetic, electro-magnetic, electro-chemical or electro-mechanical energy, and "in electronic form" (電子形式) means in a form usable only by electronic means;

"employed" (受僱), "employee" (僱員), "employer" (僱主) and "employment" (僱用) refer to employment under a contract of service or of apprenticeship;

"export" (輸出) means to take, or cause to be taken, out of Hong Kong any article;

"facsimile copy" (精確複製品) includes a copy which is reduced or enlarged in scale;

"feature film" (電影片) means a film of the kind commonly known as a movie;

"import" (輸入) means to bring, or cause to be brought, into Hong Kong any article;

"international organization" (國際組織) means an organization the members of which include one or more countries, territories or areas;

"judicial proceedings" (司法程序) includes proceedings before any court, tribunal or person having authority to decide any matter affecting a person's legal rights or liabilities;

"movie" (電影) means a film of the kind commonly known as a movie;

["musical sound recording" (音樂聲音紀錄) means a sound recording the whole or a predominant part of which consists of the whole or any part of a musical work or a musical work and a related literary work;] [**Added by 2003 Ordinance**]

"musical sound recording" (音樂聲音紀錄) means a sound recording the whole or a predominant part of which consists of a musical work and any related literary work;

["musical visual recording" (音樂視像紀錄) means a film with an accompanying sound-track, the whole or a predominant part of which sound-track consists of the whole or any part of a musical work or a musical work and a related literary work;]  
**[Added by 2003 Ordinance]**

"musical visual recording" (音樂視像紀錄) means a film with an accompanying sound-track, the whole or a predominant part of which sound-track consists of a musical work and any related literary work;

"producer" (製作人), in relation to a sound recording or a film, means the person by whom the arrangements necessary for the making of the sound recording or film are undertaken;

"rental right" (租賃權) means the right of a copyright owner to authorize or prohibit the rental of copies of a computer program or sound recording (see section 25);

"reprographic copy" (翻印複製品) refers to a copy made by means of a reprographic process;

"reprographic process" (翻印程序) means a process-

- (a) \_for making facsimile copies; or
- (b) \_involving the use of an appliance for making multiple copies,

and includes, in relation to a work held in electronic form, any copying by electronic means, but does not include the making of a sound recording or film;

"sufficient acknowledgement" (足夠的確認聲明) means an acknowledgement identifying the work in question by its title or other description, and identifying the author unless-

- (a) \_in the case of a published work, it is published anonymously;
- (b) \_in the case of an unpublished work, it is not possible for a person to ascertain the identity of the author by reasonable inquiry;

"sufficient disclaimer" (足夠的卸責聲明), in relation to an act capable of infringing the right conferred by section 92 (right to object to derogatory treatment of work), means a clear and reasonably prominent indication-

- (a) \_given at the time of the act; and
- (b) \_if the author or director is then identified, appearing along with the identification,

that the work has been subjected to treatment to which the author or director has not consented;

"telecommunications system" (電訊系統) means a system for transmitting visual images, sounds or other information by electronic means;

"television drama" (電視劇或電視電影) means a film of the kind commonly known as a television drama.

"typeface" (字體) includes an ornamental motif used in printing;

"unauthorized" (未經授權), as regards anything done in relation to a work, means done otherwise than-

- (a) ~~by or with the licence of the copyright owner;~~
- (b) ~~if copyright does not subsist in the work, by or with the licence of the author or, in a case where section 14(1) would have applied, the author's employer or, in either case, persons lawfully claiming under him; or~~
- (c) ~~in pursuance of section 57 (copying, etc. of certain material by the Government);~~

"wireless telegraphy" (無線電訊) means the sending of electro-magnetic energy over paths which are not provided by any material substance constructed or arranged for that purpose;

"writing" (書面) includes any form of notation or code, whether by hand or otherwise and regardless of the method by which, or medium in or on which, it is recorded, and "written" (寫出) is construed accordingly.

~~(2) In sections 31(2), 32(3), 95(1A), 96(6A), 109(1A), 118(8A) and 120(2A), "dealing in" (經營) includes buying, selling, letting for hire, importing, exporting and distributing. (Added 64 of 2000 s. 10)~~

~~[(3) For the purposes of this Part, "lawfully made" (合法地製作), in relation to a copy of a work, does not include a copy that was made in a country, territory or area where there is no law protecting copyright in the work or where the copyright in the work has expired.]~~  
**[Added by 2003 Ordinance]**

~~(3) A copy of a work that is made in a country, territory or area where there is no law protecting copyright in the work or where the copyright in the work has expired is not a copy that is lawfully made for the purposes of this Part.~~

[cf. 1988 c. 48 s. 178 U.K.]

## **199. — Index of defined expressions**

The following Table shows provisions defining or otherwise explaining expressions used in this Part (other than provisions defining or explaining an expression used only in the same section) - acts restricted by copyright section 22(1)

adaptation	section 29(3)
archivist (in sections 46 to 53)	section 46(5)
article (in a periodical)	section 198(1)
article in transit	section 198(1)
artistic work	section 5
author	sections 11 and 12(4)
authorized officer	section 198(1)
broadcast (and related expressions)	section 8
building	section 5

business section 198(1)  
 cable programme, cable programme service (and related expressions) section 9  
 collective work section 198(1)  
 commencement (in Schedule 2) paragraph 1(2) of that Schedule  
 commercial publication section 196  
 Commissioner section 198(1)  
 computer-generated section 198(1)  
 copy and copying section 23  
 copyright (generally) section 2  
 copyright (in Schedule 2) paragraph 2(2) of that Schedule  
 copyright owner sections 112(2) and 194  
 Copyright Tribunal section 169  
 copyright work section 2(2)  
~~dealing in (Added 64 of 2000 s. 11) section 198(2)~~  
 detention order section 135  
 dramatic work section 4(1)  
 educational establishment section 195(1)  
 electronic and electronic form section 198(1)  
 employed, employee, employer and employment section 198(1)  
 exclusive licence section 103(1)  
 export section 198(1)  
 facsimile copy section 198(1)  
[feature film section 198\(1\)](#)  
 film section 7  
 future copyright section 102(2)  
 Government copyright sections 182(2) and 183(3)  
 graphic work section 5  
 import section 198(1)  
 infringing copy section 35  
 international organization section 198(1)  
 issue of copies to the public section 24  
 joint authorship (work of) section 12  
 judicial proceedings section 198(1)  
 lawfully made — section 198(3)  
 Legislative Council copyright sections 184(2) and 185(5)  
 librarian (in sections 45 to 52) section 46(5)  
 licence (in sections 158 to 162) section 161  
 licence of copyright owner sections 101(4), 102(3) and 194  
 licensing body (in Division VIII) section 145(2)  
 licensing scheme (generally) section 145(1)  
 licensing scheme (in sections 151 to 156) section 154  
 literary work section 4(1)  
 made (in relation to a literary, dramatic or musical work) section 4(2)  
 make available copies to the public section 26  
 movie section 198(1)  
 musical sound recording section 198(1)  
 musical visual recording section 198(1)  
 musical work section 4(1)  
 on behalf of (in relation to an educational establishment) section 195(3)  
 performance section 27(2)

photograph section 5  
 prescribed conditions (in sections 46 to 52) section 46(2)(a)  
 producer (in relation to a sound recording or film) section 198(1)  
 programme (in the context of broadcasting) section 8(3)  
 prospective owner (of copyright) section 102(2)  
 publication and related expressions section 196  
 published edition (in the context of copyright in the typographical arrangement)  
 section 10  
 pupil section 195(2)  
 rental right section 198(1)  
 reprographic copies and reprographic copying section 198(1)  
 reprographic process section 198(1)  
 right holder section 135  
 sculpture section 5  
 signed section 197  
 sound recording section 6  
 specified library or archive (in sections 46 to 52) section 46(2)(b)  
 sufficient acknowledgement section 198(1)  
 sufficient disclaimer section 198(1)  
 teacher section 195(2)  
 telecommunications system section 198(1)  
 television drama section 198(1)  
 typeface section 198(1)  
 unauthorized (as regards things done in relation to a work) section 198(1)  
 unknown (in relation to the author of a work) section 11(5)  
 unknown authorship (work of) section 11(4)  
 wireless telegraphy section 198(1)  
 work (in Schedule 2) paragraph 2(1) of that Schedule  
 work of more than one author (in Division VIII) section 145(3)  
 writing and written section 198(1)

(Amended 64 of 2000 s. 11)

[cf. 1988 c. 48 s. 179 U.K.]

**207. — Infringement of performer's rights by importing, exporting, possessing or dealing with infringing fixation**

(1) — A performer's rights are infringed by a person who, without the performer's consent-

- (a) — imports into Hong Kong or exports from Hong Kong, otherwise than for his private and domestic use; or
- (b) ~~for the purpose of, in the course of, or in connection with, any trade or business~~ for the purpose of or in the course of any trade or business-
  - (i) — possesses;
  - (ii) — makes available to the public;
  - (iii) — sells or lets for hire;
  - (iv) — offers or exposes for sale or hire; or

(v) distributes, (Replaced 64 of 2000 s. 12)  
a fixation of a qualifying performance which is, and which that person knows or has reason to believe is, an infringing fixation.

~~(1A) It is immaterial for the purpose of subsection (1)(b) whether or not the trade or business consists of dealing in infringing fixations. (Added 64 of 2000 s. 12)~~

(2) Where in an action for infringement of a performer's rights brought by virtue of this section a defendant shows that the infringing fixation was innocently acquired by him or a predecessor in title of his, the only remedy available against him in respect of the infringement is damages not exceeding a reasonable payment in respect of the act complained of.

(3) In subsection (2) "innocently acquired" (不知情地取得) means that the person acquiring the fixation did not know and had no reason to believe that it was an infringing fixation.

[cf. 1988 c. 48 s. 184 U.K.]

## **211. — Infringement of fixation rights by importing, exporting, possessing or dealing with infringing fixation**

(1) A person infringes the rights of a person having fixation rights in relation to a performance who, without the latter's consent or, in the case of a qualifying performance, that of the performer-

- (a) imports into Hong Kong or exports from Hong Kong, otherwise than for his private and domestic use; or
- (b) ~~for the purpose of, in the course of, or in connection with, any trade or business for the purpose of or in the course of any trade or business -~~
  - (i) possesses;
  - (ii) makes available to the public;
  - (iii) sells or lets for hire;
  - (iv) offers or exposes for sale or hire; or
  - (v) distributes, (Replaced 64 of 2000 s. 13)  
a fixation of the performance which is, and which that person knows or has reason to believe is, an infringing fixation.

~~(1A) It is immaterial for the purpose of subsection (1)(b) whether or not the trade or business consists of dealing in infringing fixations. (Added 64 of 2000 s. 13)~~

(2) Where in an action for infringement of those rights brought by virtue of this section a defendant shows that the infringing fixation was innocently acquired by him or a predecessor in title of his, the only remedy available against him in respect of the infringement is damages not exceeding a reasonable payment in respect of the act complained of.

(3) In subsection (2) "innocently acquired" (不知情地取得) means that the person acquiring the fixation did not know and had no reason to believe that it was an infringing

fixation.

[cf. 1988 c. 48 s. 188 U.K.]

## 228. — Order for delivery up

(1) ~~Where a person has in his possession, custody or control for the purpose of, in the course of, or in connection with, any trade or business for the purpose of or in the course of any trade or business~~ an infringing fixation of a performance, a person having performer's rights or fixation rights in relation to the performance under this Part may apply to the court for an order that the fixation be delivered up to him or to such other person as the court may direct. (Amended 64 of 2000 s. 14)

~~(1A) It is immaterial for the purpose of subsection (1) whether or not the trade or business consists of dealing in infringing fixations. (Added 64 of 2000 s. 14)~~

(2) ~~An application may not be made after the end of the period specified in section 230; and the court shall not make an order unless the court also makes, or it appears to the court that there are grounds for making, an order under section 231 (order as to disposal of infringing fixation).~~

(3) ~~A person to whom a fixation is delivered up in pursuance of an order under this section shall, if an order under section 231 is not made, retain it pending the making of an order, or the decision not to make an order, under that section.~~

(4) ~~Nothing in this section affects any other power of the court.~~

[cf. 1988 c. 48 s. 195 U.K.]

## 229. — Meaning of "infringing fixation"

(1)            In this Part "infringing fixation" (侵犯權利的錄製品), in relation to a performance, is to be construed in accordance with this section.

(2)            For the purposes of a performer's rights, a fixation of the whole or any substantial part of a performance of his is an infringing fixation if it is made, otherwise than for private purposes, without his consent.

(3)            For the purposes of the rights of a person having fixation rights, a fixation of the whole or any substantial part of a performance subject to the exclusive fixation contract is an infringing fixation if it is made, otherwise than for private purposes, without his consent or that of the performer.

(4)            A fixation of a performance is also an infringing fixation if—  
(a)            it has been or is proposed to be imported into Hong Kong; and

(b) its making in Hong Kong would have constituted an infringement of the rights conferred by this Part in the performance in question, or a breach of an exclusive licence agreement relating to that performance.

(5) For the purposes of Division III (proceedings relating to importation of infringing fixations) "infringing fixation" (侵犯權利的錄製品) does not include a fixation of a performance-

(a) that was lawfully made in the country, territory or area where it was made;

(b) that has been or is proposed to be imported into Hong Kong; and

(c) its making in Hong Kong would have constituted an infringement of the rights conferred by this Part in the performance in question, or a breach of an exclusive licence agreement relating to that performance.

(6) Where in any proceedings the question arises whether a fixation is an infringing fixation and it is shown-

(a) that the fixation is a fixation of the unfixed performance; and

(b) that rights conferred by this Part subsist in the performance or have subsisted at any time,

it shall be presumed until the contrary is proved that the fixation was made at a time when rights conferred by this Part subsisted in the performance.

(7) In this Part "infringing fixation" (侵犯權利的錄製品) includes a fixation falling to be treated as an infringing fixation by virtue of any of the following provisions of Division II-

section 243(3) (fixations made for purposes of instruction or examination);

section 245(3) (fixations made by educational establishments for educational purposes);

section 251(2) (fixations of performance in electronic form retained on transfer of principal fixation); or

section 256(3) (fixations made for the purposes of broadcast or cable programme),

but otherwise does not include a fixation made in accordance with any of the provisions of Division II.

(8) For the purposes of subsection (5)(a) "lawfully made" (合法地製作) does not include the making of a fixation in a country, territory or area where there is no law protecting rights in performances in the performance or where the rights in performances in the performance has expired.

[cf. 1988 c. 48 s. 197 U.K.]

### 238. ~~\_\_\_~~—Expressions having same meaning as in copyright provisions

(1) ~~\_\_\_~~—The following expressions have the same meaning in this Part as in Part II (copyright)—

article in transit;  
 authorized officer;  
 broadcast;  
 business;  
 cable programme;  
 cable programme service;  
 Commissioner;  
 Copyright Tribunal;  
 export;  
 film;  
 import;  
 literary work;  
 published; and  
 sound recording.

~~[\(1A\) In sections 207\(1A\), 211\(1A\) and 228\(1A\), "dealing in" \(經營\) includes buying, selling, letting for hire, importing, exporting and distributing. \(Added 64 of 2000 s. 15\)](#)~~

~~[\(1A\) In this Part, a reference to a person doing an act for the purpose of or in the course of a trade or a business shall be construed in the manner provided for in section 196A.](#)~~

(2) ~~\_\_\_~~—The provisions of section 8(3) to (5), sections 9(4) and 27(4) (supplementary provisions relating to broadcasting and cable programme services) apply for the purposes of this Part, and in relation to an infringement of the rights conferred by this Part, as they apply for the purposes of Part II and in relation to an infringement of copyright.

[cf. 1988 c. 48 s. 211 U.K.]

### 239. ~~\_\_\_~~—Index of defined expressions

The following Table shows provisions defining or otherwise explaining expressions used in this Part (other than provisions defining or explaining an expression used only in the same section)—

broadcast (and related expressions) section 238 (and section 8)

business (Amended 64 of 2000 s. 16) section 238(1) (and section 198(1))

cable programme, cable programme service (and related expressions) section 238 (and section 9)

consent of performer (in relation to performer's economic rights) section 215(2)

copy and copying section 203

~~[dealing in \(Added 64 of 2000 s. 16\) section 238\(1A\)](#)~~

exclusive fixation contract section 208(1)

exclusive licence section 218

film section 238(1) (and section 7)

fixation (of a performance) section 200(2)

fixation rights (person having) section 208(2) and (3)

infringing fixation section 229

literary work section 238(1) (and section 4(1))

performance section 200(2)

performer section 200(2)  
 performer's economic rights section 215(1)  
 performer's non-economic rights section 224(1)  
 published section 238(1) (and section 196)  
 qualifying performance section 201  
 qualifying person section 234  
 right of distribution section 204(5)  
 right of making available to the public section 205(5)  
 right of reproduction section 203(4)  
 rights owner (in relation to performer's  
 economic rights) section 215(3) and (4)  
 sound recording section 238(1) (and section 6)

[cf. 1988 c. 48 s. 212 U.K.]

### 273. \_\_\_—Devices designed to circumvent copy-protection

- (1) ~~—~~This section applies where-
- (a) ~~—~~copies of a copyright work are issued or made available to the public; or
  - (b) ~~—~~an unfixated performance is made available to the public or copies of a fixation of a performance are issued or made available to the public, by or with the licence of the copyright owner, the performer or the person having fixation rights in relation to the performance, as may be appropriate, in any form which is copy-protected.
- (2) ~~—~~The person issuing or making available the copies or the unfixated performance to the public has the same rights and remedies against a person who, knowing or having reason to believe that it will be used to make infringing copies or infringing fixations-
- (a) ~~—~~makes, imports, exports, sells or lets for hire, offers or exposes for sale or hire, advertises for sale or hire, or possesses ~~for the purpose of, in the course of, or in connection with, any trade or business~~ for the purpose of or in the course of any trade or business, any device or means specifically designed or adapted to circumvent the form of copy-protection employed; or (Amended 64 of 2000 s. 17)
  - (b) ~~—~~publishes information intended to enable or assist persons to circumvent that form of copy-protection, as a copyright owner has in respect of an infringement of copyright.
- (3) ~~—~~Further, the person issuing or making available the copies or the unfixated performance to the public has the same rights and remedies under section 109 (delivery up) in relation to any such device or means which a person has in his possession, custody or control with the intention that it should be used to make infringing copies of copyright works or infringing fixations of performances, as a copyright owner has in relation to an infringing copy.
- (4) ~~—~~References in this section to copy-protection include any device or means specifically intended to prevent or restrict copying of a work or fixation of a performance or to impair the quality of copies or fixations made.
- (5) ~~—~~Sections 115 to 117 (presumptions as to certain matters relating to copyright) apply in relation to proceedings under this section as they do in relation to proceedings under Part II (copyright), and section 111 applies, with the necessary modifications, in relation to

the disposal of anything delivered up by virtue of subsection (3). <\* Note - Exp. X-Ref.: Sections 115, 116, 117 \*>

~~(6) It is immaterial for the purpose of subsection (2)(a) whether or not the trade or business consists of dealing in devices or means specifically designed or adapted to circumvent forms of copy protection. (Added 64 of 2000 s. 17)~~

~~(7) In subsection (6), "dealing in" (經營) includes buying, selling, letting for hire, importing, exporting and distributing. (Added 64 of 2000 s. 17)~~

~~(7) In this section, a reference to a person doing an act for the purpose of or in the course of a trade or a business shall be construed in the manner provided for in section 196A.~~

[cf. 1988 c. 48 s. 296 U.K.]

## 281. ~~\_\_\_~~ — Repeals

The enactments specified in Schedule 5 are repealed to the extent specified.

## [282. Transitional provisions and savings

Schedule 6 contains transitional provisions and savings in relation to certain amendments made to this Ordinance.] **[Added by 2003 Ordinance]**

[SCHEDULE 6

[s. 282]

### TRANSITIONAL PROVISIONS

### AND SAVINGS

Transitional provisions and savings in relation to amendments effected by

the Copyright (Amendment)

Ordinance 2003

( of 2003)

#### 1. Interpretation

(1) In this Schedule, unless the context otherwise requires –  
"amendment Ordinance of 2003" (《2003 年修訂條例》) means the Copyright (Amendment) Ordinance 2003  
( of 2003);

"Suspension Ordinance" (《暫停條例》) means the Copyright (Suspension of Amendments) Ordinance 2001 (Cap. 568).

(2) In this Schedule, a reference to this Ordinance as it applied immediately before the commencement of the amendment Ordinance of 2003 is a reference to this Ordinance as

read together with the Suspension Ordinance, as those Ordinances applied immediately before that commencement.

**2.— Application of section 35A of this Ordinance to previously imported copies**

(1) This section applies to a copy of a work that is an infringing copy for the purposes of section 35(3) of this Ordinance as it applied immediately before the commencement of the amendment Ordinance of 2003, and is such an infringing copy by virtue only of an importation or proposed importation into Hong Kong that occurred before that commencement.

(2) For the purpose of any act done after the commencement of the amendment Ordinance of 2003 in relation to a copy of a work to which this section applies (including any act alleged to constitute an infringement of copyright or an offence under this Ordinance), section 35A of this Ordinance shall have effect as if it had been enacted before the occurrence of the importation or proposed importation referred to in subsection (1) and, accordingly, the copy is not to be regarded as an infringing copy unless, having regard to section 35A of this Ordinance, it would also be an infringing copy for the purposes of section 35(3) of this Ordinance if the importation or proposed importation into Hong Kong had occurred immediately after that commencement.

(3) For the avoidance of doubt, nothing in this section or in the amendment Ordinance of 2003 affects any right of action in relation to an infringement of copyright that occurred before the commencement of the amendment Ordinance of 2003.

**3.— Exemption from criminal liability previously incurred in respect of "parallel-imported" copies of works to which section 35A of this Ordinance applies**

(1) This section applies to a copy of a work that is an infringing copy for the purposes of section 35(3) of this Ordinance as it applied immediately before the commencement of the amendment Ordinance of 2003, and is such an infringing copy by virtue only of an importation or proposed importation into Hong Kong that occurred before that commencement.

(2) As from the commencement of the amendment Ordinance of 2003, a person shall not be liable to conviction for an offence under section 118(1) of this Ordinance, as that section applied immediately before that commencement, in respect of an act done before that commencement in relation to a copy of a work to which this section applies unless, having regard to section 35A of this Ordinance, the copy would also be an infringing copy for the purposes of section 35(3) of this Ordinance if the importation or proposed importation into Hong Kong had occurred immediately after that commencement.

**4. Exemption from criminal liability previously incurred in respect of a back-up copy of, or necessary copying or adapting of, a copy of a work to which section 35A of this Ordinance applies**

(1) This section applies to a copy of a work to which section 35A of this Ordinance applies, where the copy –

(a) was made before the commencement of the amendment Ordinance of 2003;

and

- (b) is an infringing copy by virtue only of the fact that it was made by a person who did not have a contractual right to use the work for the purposes of sections 60 and 61 of this Ordinance.

(2) As from the commencement of the amendment Ordinance of 2003, no person shall be liable to conviction for an offence under section 118(1) of this Ordinance, as that section applied immediately before that commencement, in respect of a copy of a work to which this section applies unless, for the purposes of proceedings for an offence under section 118(1) of this Ordinance, and having regard to section 118A of this Ordinance, the same copy made immediately after that commencement would be a copy made by a person who did not have a contractual right to use the work for the purposes of sections 60 and 61 of this Ordinance."."] **[Added by 2003 Ordinance]**

## **282. —Transitional provisions and savings**

Schedule 6 contains transitional provisions and savings in relation to certain amendments made to this Ordinance.

### SCHEDULE 6

[s. 282]

#### TRANSITIONAL PROVISIONS AND SAVINGS

Transitional provisions and savings in relation to amendments effected by the Copyright (Amendment) Ordinance 2003 ( \_\_\_\_\_ of 2003)

#### 1. — Interpretation

(1) -In this Schedule, unless the context otherwise requires –

"amendment Ordinance of 2003" (《2003 年修訂條例》) means the Copyright (Amendment) Ordinance 2003 ( \_\_\_\_\_ of 2003);

"Suspension Ordinance" (《暫停條例》) means the Copyright (Suspension of Amendments) Ordinance 2001 (Cap. 568).

(2) -In this Schedule, a reference to this Ordinance as it applied immediately before the commencement of the amendment Ordinance of 2003 is a reference to this Ordinance as read together with the Suspension Ordinance, as those Ordinances applied immediately before that commencement.

(3) -A copy of a work that is made in a country, territory or area where there is no law protecting copyright in the work or where the copyright in the work has expired is not a copy that is lawfully made for the purposes of this Schedule.

#### 2. – Exemption from certain criminal liability previously incurred

(1) -As from the commencement of the amendment Ordinance of 2003, no person

shall, by virtue of the importing of an infringing copy into Hong Kong before that commencement, be liable to conviction for an offence under section 118(1)(b) of this Ordinance as that section applied immediately before that commencement unless the importing of the same infringing copy into Hong Kong immediately after the commencement would, having regard to section 118(2) of this Ordinance, constitute an offence under section 118(1)(b) of this Ordinance.

(2) -As from the commencement of the amendment Ordinance of 2003, no person shall, by virtue of any act done before the commencement of the amendment Ordinance of 2003 in respect of a copy of a work that –

(a) -was an infringing copy by virtue only of section 35(3) of this Ordinance;  
and

(b) -was lawfully made in the country, territory or area where it was made, be liable to conviction for an offence under section 118(1)(d), (e)(iii) or (e)(iv) of this Ordinance as that section applied immediately before that commencement, unless the doing of the same act in relation to the same infringing copy on or after that commencement would constitute an offence under section 118(1)(d), (e) or (f) of this Ordinance.

(3) -For the avoidance of doubt, nothing in this section affects any conviction for an offence that was entered before the commencement of the amendment Ordinance of 2003.

### **3. Retrospective application of the defence as provided under section 118A(3) and (4) of this Ordinance**

(1) -This section applies to proceedings for an offence under section 118(1)(d) of this Ordinance as that section applied immediately before the commencement of the amendment Ordinance of 2003, in a case where the infringing copy to which the charge relates is an infringing copy of the kind described in section 2(2), (3), (4) or (5) of the Suspension Ordinance.

(2) -Except as provided in subsection (3), section 118A(3) and (4) of this Ordinance applies in proceedings specified in subsection (1) (being proceedings for an offence committed before the commencement of the amendment Ordinance of 2003) as it applies in proceedings for an offence under section 118A(1) of this Ordinance (being proceedings for an offence committed after that commencement).

(3) -Subsection (2) does not apply in proceedings –

(a) -for an offence committed before 1 April 2001; or

(b) -in which the prosecution relies on allegations that, if proved in relation to the period after the commencement of the amendment Ordinance of 2003, would constitute an offence under section 118(1)(e) of this Ordinance.

(4) -For the avoidance of doubt, it is irrelevant for the purposes of subsection (2) whether the proceedings specified in subsection (1) were begun before or after the commencement of the amendment Ordinance of 2003.