

Proposed Committee Stage Amendments to

Copyright (Amendment) Bill 2006

(Clauses 25 to 53 - revised 16/1/2007)

25. Making infringing copies outside Hong Kong, etc.

Section 120(2) is amended by repealing "for the purpose of, in the course of, or in connection with, any trade or business" and substituting "for the purpose of or in the course of any trade or business".

26. Time limit for prosecutions

Section 120A is amended by repealing everything after "commission of the offence" and substituting a full stop.

27. Affidavit evidence

(1) Section 121(1) is amended by repealing "An affidavit" and substituting "For the purpose of facilitating the proof of subsistence and ownership of copyright, and without prejudice to the operation of sections 11 to 16 (authorship and ownership of copyright) and sections 17 to 21 (duration of copyright), an affidavit".

(2) Section 121(1)(b) is repealed and the following substituted -

"(b) the name of the author of the work;

(ba) where the author of the work is an individual -

- (i) the place of domicile of the author;
- (ii) the place of residence of the author; or
- (iii) the place where the author has a right of abode;

(bb) where the author of the work is a body corporate -

- (i) the place of incorporation of the author; or
- (ii) the principal place of business of the author;".

(3) Section 121(2) is amended by repealing "Without prejudice to subsection (1), an affidavit" and substituting "For the purpose of facilitating the proof of subsistence and ownership of copyright, and without prejudice to subsection (1) and the operation of sections 11 to 16 (authorship and ownership of copyright) and sections 17 to 21 (duration of copyright), an affidavit".

(4) Section 121 is amended by adding -

"(2A) For the purposes of facilitating the establishment of the matter referred to in section 35(3)(b), an affidavit which purports to have been made by or on behalf of the owner of a copyright work and which -

(a) states the name of the owner of the work;

(b) states that a copy of the work exhibited to the affidavit is a true copy of the work;

(c) states -

(i) that the copy of the work exhibited to the affidavit was made in a place

outside Hong Kong by the owner; or

(ii) that the copy of the work exhibited to the affidavit was made in a place outside Hong Kong by a person who has been granted with a licence of the owner to make copies of the work in that place, and that person has not been granted with a licence of the owner to make copies of the work in Hong Kong; and

(d) states the name and address of the person (if any) referred to in paragraph (c)(ii), shall, subject to the conditions contained in subsection (4), be admitted without further proof in any proceedings under this Ordinance.

(~~2A~~2B) For the purposes of any proceedings instituted under section 118(1), an affidavit which purports to have been made by or on behalf of the owner of a copyright work and which -

- (a) states the name of the owner of the work; and
- (b) states that ~~the owner has not granted a person named in the affidavit a licence~~ the person named in the affidavit has not been granted with a licence of the owner to do an act referred to in section 118(1)(a), (b), (c), (d), (e), (f) or (g) in respect of the work,

shall, subject to the conditions contained in subsection (4), be admitted without further proof in those proceedings.

(~~2B2C~~) For the purposes of any proceedings instituted under section 118(2A), an affidavit which purports to have been made by or on behalf of the owner of a copyright work and which -

- (a) states the name of the owner of the work; and
- (b) states that ~~the owner has not granted a person named in the affidavit a licence~~ the person named in the affidavit has not been granted with a licence of the owner to do an act referred to in section 118(2A) in respect of the work,

shall, subject to the conditions contained in subsection (4), be admitted without further proof in those proceedings.".

(5) Section 121 is amended by adding -

"(~~2E2D~~) For the purposes of any proceedings instituted under section 119B(1), an affidavit which purports to have been made by or on behalf of the owner of a copyright work and which -

- (a) states the name of the owner of the work; and
- (b) states that ~~the owner has not granted a person named in the affidavit a licence~~ the person named in the affidavit has not been granted with a licence of the owner to do an act referred to in section 119B(1) in respect of

the work,

shall, subject to the conditions contained in subsection (4), be admitted without further proof in those proceedings."

(6) Section 121(3) is amended by repealing "subsection (1) or (2)" and substituting "subsection (1), (2), (2A), (2B), ~~or (2C)~~ or (2D)".

(7) Section 121(4) is amended by repealing "subsection (1) or (2)" and substituting "subsection (1), (2), (2A), (2B), ~~or (2C)~~ or (2D)".

(8) Section 121(7) is amended by repealing "subsection (1) or (2)" and substituting "subsection (1), (2), (2A), (2B), ~~or (2C)~~ or (2D)".

(8A) Section 121(8)(b) is repealed and the following substituted -

"(b) the court may of its own motion or, if the defendant who has served a notice under subsection (5) in relation to an affidavit satisfies the court -

(i) that the ownership or subsistence of the copyright in a work is, insofar as that matter is stated in the affidavit, genuinely in issue;

(ii) that whether a person has been granted with a licence of the owner of a work to do a particular act is, insofar as that matter is stated in the affidavit,

genuinely in issue; or
(iii) where the affidavit is made under
subsection (2A), that any matter stated
in the affidavit, other than those
referred to in subparagraphs (i) and
(ii), is genuinely in issue,
either before or during the hearing, require the
deponent to the affidavit to attend before the
court and give evidence.".

(9) Section 121(13)(a) is amended by repealing "subsection (1) or (2)" and substituting "subsection (1), (2), (2A), (2B), ~~or~~ (2C) or (2D)".

28. Seized articles, etc. liable to forfeiture

(1) Section 131(1) is amended by adding ", 119B" after "119A".

(2) Section 131(7) is amended by adding ", 119B" after "119A".

29. Disposal of articles, etc. where a person is charged

Section 132 is amended by adding ", 119B" after "119A".

30. Determination of application for forfeiture

(1) Section 133(5) is amended by adding ", 119B" after "119A".

(2) Section 133(6) is amended by adding ", 119B" after "119A".

31. Licensing schemes to which sections 155 to 160 apply

Section 154(b) is repealed and the following substituted -

"(b) renting copies of the work to the public;".

32. Licences to which sections 162 to 166 apply

Section 161(b) is repealed and the following substituted -

"(b) renting copies of the work to the public;".

33. Constitution for purposes of proceedings

(1) Section 172 is amended by adding -

"(1A) Notwithstanding subsection (1), any proceedings specified for the purposes of this subsection in rules made under section 174 (general procedures rules) may be heard and determined by any of the following persons sitting alone -

- (a) the Chairman of the Tribunal;
- (b) the Deputy Chairman of the Tribunal; or
- (c) a suitably qualified ordinary member of the Tribunal appointed by the Chairman of the Tribunal."

(2) Section 172(5) is amended by repealing "subsection (4)(b)" and substituting "subsection (1A) or (4)(b)".

34. Groundless threat of proceedings in relation to parallel import

Section 187(1) is amended by adding "and which was lawfully made in the country, territory or area where it was made" after "section 35(3)".

34A. Folklore, etc.: anonymous unpublished works

The heading of section 189 is amended, in the Chinese text, by repealing "民間傳說" and substituting "民間文學藝術".

34B. Meaning of "publication" and "commercial publication"

Section 196(4)(b)(i) is amended, in the Chinese text, by repealing "展覽" and substituting "陳列".

34C. Requirement of signature: application in relation to body corporate

(1) Section 197(1) is amended, in the Chinese text, by repealing "體現" and substituting "宣示".

(2) Section 197(2) is amended, in the Chinese text, by repealing "體現" and substituting "宣示".

35. Minor definitions

(1) Section 198(1) is amended by repealing the definition of "business" and substituting -

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

(2) Section 198(1) is amended by repealing the definition of "rental right" and substituting -

"rental right" (租賃權) means the right of a copyright owner to authorize or prohibit the rental of copies of any of the following works -

- (a) a computer program;
- (b) a sound recording;
- (c) a film;
- (d) a literary, dramatic or musical work included in a sound recording;
- (e) a literary or artistic work included in a comic book; or
- (f) the typographical arrangement of a published edition of a comic book;".

(3) Section 198(1) is amended by adding -

"specified course of study" (指明課程) means a course of study of any of the following descriptions -

- (a) a course of study which is provided for the delivery of a curriculum (however described) developed on the basis of curriculum guidelines issued or endorsed by the Curriculum Development Council; or
- (b) a course of study which consists of an assessment of a pupil's competence in the area covered by the course, and leads to the award of a qualification;".

(4) Section 198(2) is amended by repealing ", 118(8A)".

(5) Section 198(3) is repealed and the following substituted

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"(3) In this Part, "lawfully made" (合法地製作), in relation to a copy of a work made in a country, territory or area -

(a) means that the copy was made by

(i) a person who is entitled to the

copyright in the work in the country, territory or area, as the case may be;

or

(ii) a person who is authorized by the

person referred to in subparagraph (i);

but

(b) does not include a work 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."

36. Index of defined expressions

Section 199 is amended, in the Table, by adding -

"specified course of study section 198(1)".

37. Rights conferred on performers and persons having fixation rights

(1) Section 200(1)(a) is amended by repealing "207" and substituting "207A".

(2) Section 200(2) is amended, in the definition of "performance", by adding -

- "(ca) a performance of an artistic work (which includes every production in the artistic domain, whatever may be the mode or form of its expression);
- (cb) an expression of folklore; or".

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

Section 207(1)(b) is amended by repealing "for the purpose of, in the course of, or in connection with, any trade or business" and substituting "for the purpose of or in the course of any trade or business".

39. Section added

The following is added immediately after section 207 -

"207A. Infringement of performers' rights by renting copies to the public without consent

(1) A performer's rights are infringed by a person who, without the performer's consent, rents to the public copies of a sound recording in which the whole or any substantial part of a qualifying performance is fixed.

(2) In this Part, "rent" (租賃), in relation to a sound recording -

- (a) subject to paragraph (b), means making a copy of the sound recording available for use, on

terms that it will or may be returned, for direct or indirect economic or commercial advantage;

(b) does not include -

(i) making a copy of the sound recording available for the purpose of public performance, playing or showing in public, broadcasting or inclusion in a cable programme service;

(ii) making a copy of the sound recording available for the purpose of exhibition in public; or

(iii) making a copy of the sound recording available for on-the-spot reference use.

(3) A reference in this Part to the renting of copies of a sound recording includes the renting of the original.

(4) The right of a performer under this section to rent copies of a sound recording to the public is referred to in this Part as "rental right".

40. Infringement of fixation rights by importing, exporting, possessing or dealing with infringing fixation

Section 211(1)(b) is amended by repealing "for the purpose of, in the course of, or in connection with, any trade or business" and substituting "for the purpose of or in the course of

any trade or business".

41. Section added

The following is added immediately after section 213 -

"213A. Power of Tribunal to give consent on behalf of owners of performers' rental right in certain cases

(1) The Copyright Tribunal may, on the application of a person wishing to rent a copy of a sound recording in which a performance is fixed, give consent in a case where that person cannot, after making reasonable enquiries, ascertain the identity or whereabouts of the person entitled to the rental right.

(2) Consent given by the Tribunal has effect as consent of the person entitled to the rental right for the purposes of the provision of this Part relating to performers' rental right and may be given subject to any conditions specified in the Tribunal's order.

(3) The Tribunal shall not give consent under subsection (1) except after the service of such notices as may be required by rules made under section 174 (general procedural rules) or as the Tribunal may in any particular case direct.

(4) Where the Tribunal gives consent under this section, it shall, in default of agreement between the applicant and the person entitled to the rental right, make such order as it thinks fit as to the payment to be made to

that person in consideration of consent being given."

42. Performers' economic rights

Section 215(1) is repealed and the following substituted -

"(1) The following rights conferred by this Part on a performer are property rights ("a performer's economic rights") -

- (a) the right of reproduction (section 203);
- (b) the right of distribution (section 204);
- (c) the right of making available to the public (section 205);
- (d) the rental right (section 207A)."

43. Order for delivery up

Section 228(1) is amended by repealing "for the purpose of, in the course of, or in connection with, any trade or business" and substituting "for the purpose of or in the course of any trade or business".

44. Meaning of "infringing fixation"

(1) Section 229(4) is amended by repealing "A fixation" and substituting "Except as provided in section 229A, a fixation".

(2) Section 229(7) is repealed and the following substituted -

"(7) In this Part, "infringing fixation" (侵犯權利的錄製品) includes a fixation which is to be treated as an infringing

fixation by virtue of any of the following provisions -

- (a) section 229A(5) (imported fixation not an "infringing fixation" for purposes of section 229(4));
- (b) section 242A(3) (fixations made for purposes of giving or receiving instruction);
- (c) section 243(3) (fixations made for purposes of instruction or examination);
- (d) section 245(3) (fixations made by educational establishments for educational purposes);
- (e) section 246A(3) (fixations made for purposes of public administration);
- (f) section 251(2) (fixations of performance in electronic form retained on transfer of principal fixation); or
- (g) section 256(3) (fixations made for purposes of broadcast or cable programme).".

(3) Section 229(8) is repealed and the following substituted

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"(8) In subsection (5)(a), "lawfully made" (合法地製作), in relation to a fixation of a performance made in a country, territory or area -

- (a) means that the fixation was made by -
 - (i) the performer;
 - (ii) a person having fixation rights in relation to the performance in the

country, territory or area, as the case
may be; or

(iii) a person who is authorized by the
performer or the person referred to in
subparagraph (ii); but

(b) does not include a fixation that was made 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."

45. Section added

The following is added immediately after section 229 -

**"229A. Imported fixation not an "infringing
fixation" for the purposes of
section 229(4)**

(1) A fixation of a performance to which this
subsection applies is not, in relation to the person who
imports it into Hong Kong or acquires it after it is imported
into Hong Kong, an infringing fixation for the purposes of
section 229(4) if -

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

(b) it is not imported or acquired by the person
with a view to its being dealt in by any
person for the purpose of or in the course of
any trade or business.

(2) Subsection (1) applies to a fixation of any performance except a fixation of a performance -

(a) that is -

- (i) a musical sound recording;
- (ii) a musical visual recording;
- (iii) a television drama; or
- (iv) a movie; and

(b) that is, or is intended to be, played or shown in public.

(3) Notwithstanding the exception in subsection (2), subsection (1) applies to a fixation of a performance that is referred to in subsection (2)(a) and that is, or is intended to be, played or shown in public -

- (a) by an educational establishment for the educational purposes of the establishment; or
- (b) by a specified library for use of the library.

(4) For the purposes of subsection (3)(b), a library is regarded as a specified library if it falls within the description of any library specified under section 46(1)(b).

(5) Where a fixation of a performance which is not, in relation to the person referred to in subsection (1), an infringing fixation by virtue of that subsection is subsequently dealt in for the purpose of or in the course of any trade or business, it is to be treated, in relation to that dealing and the person who deals in it, as an infringing fixation.

~~(6) In this section, "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.~~

(6) In this section, "lawfully made" (合法地製作), in relation to a fixation of a performance made in a country, territory or area -

(a) means that the fixation was made by -

(i) the performer;

(ii) a person having fixation rights in relation to the performance in the country, territory or area, as the case may be; or

(iii) a person who is authorized by the performer or the person referred to in subparagraph (ii); but

(b) does not include a fixation that was made 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.

(7) Subject to subsection (6), expressions used in this section have the same meaning as in section 35B."

46. Jurisdiction of Copyright Tribunal

Section 233(1) is amended by adding -

"(aa) section 213A (application to give consent on behalf of owners of performers' rental right);".

47. Index of defined expressions

Section 239 is amended, in the Table, by adding -

"rental right section 207A(4)".

48. Section added

The following is added -

"242A. Fair dealing for purposes of giving or receiving instruction

(1) Fair dealing with a performance or fixation by or on behalf of a teacher or by a pupil for the purposes of giving or receiving instruction in a specified course of study provided by an educational establishment does not infringe any of the rights conferred by this Part.

(2) In determining whether any dealing with a performance or fixation is fair dealing under subsection (1), the court shall take into account all the circumstances of the case and, in particular -

(a) the purpose and nature of the dealing, including whether the dealing is for a non-profit-making purpose and whether the dealing is of a commercial nature;

(b) the nature of the performance or fixation;

- (c) the amount and substantiality of the portion dealt with in relation to the performance or fixation as a whole; and
- (d) the effect of the dealing on the potential market for or value of the performance or fixation.

(3) Where a fixation which apart from this section would be an infringing fixation is made in accordance with this section but is subsequently dealt with, it is to be treated as an infringing fixation -

- (a) for the purpose of that dealing; and
- (b) if that dealing infringes any of the rights conferred by this Part, for all subsequent purposes.

(3A) Where any dealing with a fixation involves the making available of copies of the fixation through a wire or wireless network wholly or partly controlled by an educational establishment -

- (a) if the educational establishment fails to -

(i) adopt technological measures to restrict access to the copies of the fixation through the network so that the copies of the fixation are made available only to persons who need to use the copies of the fixation for the purposes of giving or receiving

instruction in the specified course of study in question or for the purposes of maintaining or managing the network;

or

(ii) ensure that the copies of the fixation are not stored in the network for a period longer than is necessary for the purposes of giving or receiving instruction in the specified course of study in question or, in any event, for a period longer than 12 consecutive months,

the dealing is not fair dealing under subsection (1); and

(b) if the educational establishment -

(i) adopts technological measures to restrict access to the copies of the fixation through the network so that the copies of the fixation are made available only to persons who need to use the copies of the fixation for the purposes of giving or receiving instruction in the specified course of study in question or for the purposes of maintaining or managing the network;
and

(ii) ensures that the copies of the fixation are not stored in the network for a period longer than is necessary for the purposes of giving or receiving instruction in the specified course of study in question or, in any event, for a period longer than 12 consecutive months,
subsection (2) applies in determining whether the dealing is fair dealing under subsection (1).

(4) Expressions used in this section have the same meaning as in section 41A."

49. Playing or showing sound recording, film, broadcast or cable programme at educational establishment

(1) Section 244(1) is amended by repealing "for the purposes of instruction" and substituting "for the purposes of giving or receiving instruction".

(2) Section 244(1) is amended by repealing "other persons directly connected with the activities of the establishment" and substituting "the near relatives or guardians of the pupils".

(3) Section 244(2) is repealed.

50. Recording of broadcasts and cable programmes by educational establishments

Section 245(2) is repealed.

51. ~~Section~~ Sections added

The following ~~is~~ are added -

"246A. Fair dealing for purposes of public administration

(1) Fair dealing with a performance or fixation by the Government, the Executive Council, ~~the Legislative Council,~~ the Judiciary or any District Council for the purposes of efficient administration of urgent business does not infringe any of the rights conferred by this Part.

(2) In determining whether any dealing with a performance or fixation is fair dealing under subsection (1), the court shall take into account all the circumstances of the case and, in particular -

- (a) the purpose and nature of the dealing, including whether the dealing is for a non-profit-making purpose and whether the dealing is of a commercial nature;
- (b) the nature of the performance or fixation;
- (c) the amount and substantiality of the portion dealt with in relation to the performance or fixation as a whole; and
- (d) the effect of the dealing on the potential market for or value of the performance or fixation.

(3) Where a fixation which apart from this section

would be an infringing fixation is made in accordance with this section but is subsequently dealt with, it is to be treated as an infringing fixation -

- (a) for the purpose of that dealing; and
- (b) if that dealing infringes any of the rights conferred by this Part, for all subsequent purposes.

(4) Expressions used in this section have the same meaning as in section 54A."~~-~~

246B. Legislative Council

(1) The rights conferred by this Part are not infringed by anything done for the purposes of the proceedings of the Legislative Council or for the purposes of reporting such proceedings, or by anything done by the Legislative Council for the purposes of exercising its powers and functions.

(2) Expressions used in this section have the same meaning as in section 54B."

51B. Legislative Council and judicial proceedings

(1) Section 247 is amended by repealing the heading and substituting "**Judicial proceedings**".

(2) Section 247(1) is amended by repealing "the proceedings of the Legislative Council or".

52. Section added

The following is added -

**"258A. Playing of sound broadcasts
inside vehicles**

(1) The playing of a sound broadcast inside a vehicle for the purpose of affording the driver of the vehicle access to public information (including but not limited to news reports, weather forecasts and information relating to road traffic) does not infringe any of the rights conferred by this Part.

(2) Expressions used in this section have the same meaning as in section 81A."

53. Part IIIA added

The following is added after Part III -

"PART IIIA

PERFORMERS' MORAL RIGHTS

Introductory

272A. Moral rights conferred on certain performers

(1) This part confers the following moral rights on a performer of a live aural performance or a performer whose performance is fixed in a sound recording -

(a) the right to be identified as a performer (section 272B); and

(b) the right not to have his performance subjected to derogatory treatment (section

272F).

(2) The moral rights are conferred on the performer only if the performance is a qualifying performance.

(3) The moral rights conferred on the performer are in addition to any other rights in relation to the performance that the performer or any other person may have under this Ordinance.

(4) In this Part -

"aural performance" (聲藝表演) -

(a) means a performance which may be perceived by the human ear; or

(b) where part of a performance may be perceived by the human ear, means that part of the performance,

and includes a musical performance, a spoken performance and a performance in any intermediate forms between singing and speaking;

"make available to the public live" (即場向公眾提供), in

relation to a performance, means to make available of the unfixed performance, by wire or wireless means, in such a way that members of the public in Hong Kong or elsewhere may access the performance from a place individually chosen by them;

"performership" (演出) means participation in a performance,

as the performer or one of the performers;

"sound recording" (聲音紀錄) -

(a) subject to paragraph (b), has the same meaning as in Part II (copyright);

(b) does not include a film sound-track which accompanies a film within the meaning of Part II.

(5) The following expressions have the same meaning in this Part as in Part II (copyright) -

broadcast;

business;

cable programme;

cable programme service; and

published.

(6) The following expressions have the same meaning in this Part as in Part III (rights in performances) -

fixation;

performance;

performer; and

qualifying performance.

(7) For the purposes of this Part, if a performance of a musical work is conducted by a conductor, the sounds of the performance are treated as having been made by the conductor and the person who actually made those sounds, and a reference to a performer includes a reference to the conductor.

(8) Section 204(2), (3) and (4) applies, with the necessary modifications, to references in this Part to the

issue to the public of copies of a sound recording, as it applies to references in Part III to the issue to the public of copies of a fixation.

(9) Section 205(2), (3) and (4) applies, with the necessary modifications, to references in this Part to the making available to the public of copies of a sound recording, as it applies to references in Part III to the making available to the public of copies of a fixation.

Right to be identified as performer

272B. Right to be identified as performer

(1) A performer of a live aural performance or a performer whose performance is fixed in a sound recording has the right to be identified as a performer in the performance whenever -

- (a) the performance is staged in public, made available to the public live, broadcast live or included live in a cable programme service; or
- (b) copies of the sound recording in which the performance is fixed are issued or made available to the public, broadcast or included in a cable programme service.

(2) The right of the performer under this section is, in the case of the issue or making available to the public of

copies of a sound recording in which the performance is fixed, the right to be identified in or on each copy or, if that is not appropriate, in some other manner likely to bring his identity to the notice of a person acquiring a copy.

(3) The right of the performer under this section is, in any case other than the case referred to in subsection (2), the right to be identified in a manner likely to bring his identity to the notice of a person hearing the performance, broadcast or cable programme in question.

(4) The rights of the performer referred to in subsections (2) and (3) include the right to be identified in a clear and reasonably prominent or audible manner.

(5) If the performer in asserting his right to be identified specifies a pseudonym, initials or some other particular form of identification, that form must be used; otherwise any reasonable form of identification may be used.

(6) If a performance is presented by performers who use a group name, identification by using the group name is sufficient identification of the performers in the group.

272C. Requirement that right under section 272B be asserted

(1) A person does not infringe the right conferred by section 272B (right to be identified as performer) by doing any of the acts referred to in that section unless the right has been asserted in accordance with the following provisions so as to bind him in relation to that act.

(2) The right may be asserted generally, or in relation to any specified act or description of acts -

- (a) on an assignment of a performer's economic rights conferred by Part III in a live aural performance that has taken place or is to take place or in a performance that has been fixed or is to be fixed in a sound recording, by including in the instrument effecting the assignment a statement that the performer asserts in relation to that performance or that performance fixed in the sound recording his right to be identified; or
- (b) by instrument in writing signed by the performer.

(3) The persons bound by an assertion of the right under subsection (2) are -

- (a) in the case of an assertion under subsection (2)(a), the assignee and anyone claiming through him, whether he has notice of the assertion;
- (b) in the case of an assertion under subsection (2)(b), anyone to whose notice the assertion is brought.

(4) In an action for infringement of the right the court shall, in considering remedies, take into account any delay in asserting the right.

272D. Exceptions to right under section 272B

(1) The right conferred by section 272B (right to be identified as performer) does not apply where it is not reasonably practicable to identify the performer.

(2) The right does not apply in relation to a performance given for the purposes of reporting current events.

(3) The right does not apply in relation to a performance given for the purposes of advertising any goods or services or making announcements of matters of public interest.

(4) The right is not infringed by an act which by virtue of any of the following provisions would not infringe any right conferred by Part III -

- (a) section 241 (fair dealing for certain purposes), insofar as it relates to the reporting of current events by means of a sound recording, broadcast or cable programme;
- (b) section 242 (incidental inclusion of performance or fixation);
- (c) section 243(2) (examination questions);
- (d) section 247 (Legislative Council and judicial proceedings);
- (e) section 248 (statutory inquiries).

Right to object to derogatory treatment

272E. Right to object to derogatory treatment

(1) A performer of a live aural performance or a performer whose performance is fixed in a sound recording has the right not to have his performance subjected to derogatory treatment.

(2) The right is infringed by a person who does any of the following acts -

(a) in relation to a live aural performance, causes to be heard in public, broadcasts, includes in a cable programme service or makes available to the public live a derogatory treatment of the performance;

(b) in relation to a performance fixed in a sound recording -

(i) causes to be heard in public, broadcasts or includes in a cable programme service the performance by means of the sound recording in a manner which subjects the performance to derogatory treatment; or

(ii) makes available to the public copies of the sound recording in a manner which subjects the performance to derogatory treatment; or

(c) in relation to a performance which has been subjected to derogatory treatment and is fixed in a sound recording -

(i) causes to be heard in public, broadcasts or includes in a cable programme service the sounding recording; or

(ii) makes available to the public copies of the sound recording.

(3) For the purposes of this section -

(a) "treatment" (處理) -

(i) in relation to a live aural performance, means any addition to, deletion from, alteration to or adaptation of the performance; or

(ii) in relation to a performance fixed in a sound recording, means any addition to, deletion from, alteration to or adaptation of the sound recording; and

(b) the treatment of a live aural performance or a performance fixed in a sound recording is derogatory if it amounts to distortion, mutilation or other modification that is prejudicial to the reputation of the performer.

**272F. Infringing of right under section
272E by possessing or dealing
with infringing articles**

(1) The right conferred by section 272E (right to object to derogatory treatment) is also infringed by a person who -

(a) possesses for the purpose of or in the course of any trade or business; or

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

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

(2) In this section -

"infringing article" (侵犯權利物品) means a performance fixed in a sound recording which -

(a) has been subjected to derogatory treatment within the meaning of section 272E; and

(b) has been or is likely to be the subject of any of the acts referred to in that section in circumstances infringing that right.

**272G. Exceptions to right under section
272E**

(1) The right conferred by section 272E (right to object to derogatory treatment) does not apply in relation to any performance given for the purposes of reporting current events.

(2) The right is not infringed by modifications made to

a performance which are consistent with normal editorial or production practice.

(3) Subject to subsection (4), the right is not infringed by an act done for the purpose of -

- (a) avoiding the commission of an offence; or
- (b) complying with a duty imposed by or under an enactment.

(4) Where a performer is identified at the time of the relevant act under subsection (3) or has previously been identified in or on published copies of sound recordings in which the relevant performance is fixed, subsection (3) has effect only if there is a sufficient disclaimer.

(5) In subsection (4), "sufficient disclaimer" (足夠的卸責聲明) means a clear and reasonably prominent indication -

- (a) given at the time of the relevant act under subsection (3); and
- (b) if the performer is then identified, appearing along with the identification,

that the live aural performance or the performance fixed in a sound recording has been subjected to treatment to which the performer has not consented.

Supplementary

272H. Duration of rights

The rights conferred by section 272B (right to be

identified as performer) and section 272E (right to object to derogatory treatment) continue to subsist so long as the performer's rights conferred by Part III subsist in the sound recording in which the performance is fixed.

272I. Consent and waiver of rights

(1) It is not an infringement of any of the rights conferred by section 272B (right to be identified as performer) and section 272E (right to object to derogatory treatment) to do any act to which the person entitled to the right has consented.

(2) Any of the rights referred to in subsection (1) may be waived by instrument in writing signed by the person giving up the right.

(3) A waiver may relate to a specific performance, to performances of a specified description or to performances generally, and may relate to existing or future performances.

(4) A waiver may be conditional or unconditional, and may be expressed to be subject to revocation.

(5) If a waiver is made in favour of the owner or prospective owner of the right in the performance, it is presumed to extend to his licensees and successors in title unless a contrary intention is expressed.

(6) Nothing in this Part is to be construed as excluding the operation of the general law of contract or estoppel in relation to an informal waiver or other

transaction in relation to any of the rights referred to in subsection (1).

(7) In this section, "performance" (表演) means a live aural performance or a performance fixed in a sound recording.

272J. Application of provisions to joint performers

(1) The right conferred by section 272B (right to be identified as performer) is, in the case of joint performership, a right of each joint performer to be identified as a joint performer and must be asserted in accordance with section 272C by each joint performer in relation to himself.

(2) The right conferred by section 272E (right to object to derogatory treatment) is, in the case of joint performership, a right of each joint performer and his right is satisfied if he consents to the treatment in question.

(3) A waiver under section 272I of those rights by one joint performer does not affect the rights of the other joint performer or performers.

(4) If there are 2 or more performers in a live aural performance or a performance fixed in a sound recording, the performers may enter into a joint performership agreement in writing by which each of them agrees not to exercise his right conferred by section 272E (right to object to derogatory treatment) in respect of the live aural

performance or the performance fixed in a sound recording, as the case may be, except jointly with the other performer or performers.

272K. Application of provisions to part of performance

(1) The right conferred by section 272B (right to be identified as performer) applies in relation to the whole or any substantial part of a live aural performance or a performance fixed in a sound recording.

(2) The right conferred by section 272E (right to object to derogatory treatment) applies in relation to the whole or any part of a live aural performance or a performance fixed in a sound recording.

272L. Moral rights not assignable

The rights conferred by section 272B (right to be identified as performer) and section 272E (right to object to derogatory treatment) are not assignable.

272M. Transmission of moral rights on death

(1) On the death of a person entitled to the right conferred by section 272B (right to be identified as performer) or section 272E (right to object to derogatory treatment) -

(a) the right passes to such person as he may by

testamentary disposition specifically direct;

(b) if there is no such direction but the performer's economic rights conferred by Part III in respect of the performance in question form part of his estate, the right passes to the person to whom the economic rights pass; and

(c) if or to the extent that the right does not pass under paragraph (a) or (b), the right is exercisable by his personal representatives.

(2) Where a performer's economic rights conferred by Part III and forming part of his estate pass in part to one person and in part to another, as for example where a bequest is limited so as to apply -

(a) to one or more, but not all, of the things the owner has the exclusive right to do or consent; or

(b) to part, but not the whole, of the period for which the rights subsist,

any right which passes with the performer's economic rights by virtue of subsection (1)(b) is correspondingly divided.

(3) Where by virtue of subsection (1)(a) or (b) a right becomes exercisable by more than one person, the following provisions have effect with respect to the right -

(a) it may, in the case of the right conferred by section 272B (right to be identified as

performer), be asserted by any of them;

(b) it is, in the case of the right conferred by section 272E (right to object to derogatory treatment), a right exercisable by each of them and is satisfied in relation to any of them if he consents to the treatment or act in question; and

(c) any waiver of the right in accordance with section 272I by any of them does not affect the rights of the others.

(4) A consent or waiver previously given or made binds any person to whom a right passes by virtue of subsection (1).

(5) Any damages recovered by personal representatives by virtue of this section in respect of an infringement after a person's death devolve as part of his estate as if the right of action had subsisted and been vested in him immediately before his death.

272N. Remedies for infringement of performers' moral rights

(1) An infringement of the right conferred by section 272B (right to be identified as performer) or section 272E (right to object to derogatory treatment) is actionable as a breach of statutory duty owed to the person entitled to the right.

(2) In proceedings for infringement of the right

conferred by section 272E, the court may, if it thinks it is an adequate remedy in the circumstances, grant an injunction on terms prohibiting the doing of any act unless a disclaimer is made, in such terms and in such manner as may be approved by the court, dissociating a performer from the treatment of a live aural performance or a performance fixed in a sound recording.

2720. Presumptions relevant to sound recordings in which performances are fixed

In proceedings brought by virtue of this Part with respect to a sound recording in which a performance is fixed, where copies of the sound recording as issued or made available to the public bear a statement -

- (a) that a named person was a performer in the performance; or
- (b) that a named group of performers were the performers in the performance,

the statement is admissible as evidence of the facts stated and is presumed to be correct until the contrary is proved.".