



21st June, 2006

Clerk to the Bills Committee
Bills Committee on the proposed Copyright (Amendment) Bill 2006
Legislative Council
Legislative Council Building
8 Jackson Road, Central, Hong Kong

via email: slchan@legco.gov.hk

Dear Sir,

Re: The Copyright (Amendment) Bill 2006 and the Right of Silence And the Liability of Directors/Partners

We refer to bills committee' meeting on 8th June 2006 in which we are pleased to learn that a number of concerns have been raised on this issue by the learnt Legco councillors.

We also would like to refer to the detailed submission by CITB to Legco in May this year in respect of the legal and evidence burden on the liabilities of directors/ partners under your reference: CB (1) 635/05-06 (01).

We wish to point out that the real issue before your consideration is that the proposed new liability on partners/directors amounts to a **person is presumed to commit an offence by virtue of his status to a business entity.** The relevance of the legal and evidential burden may therefore be read in this context.

Paragraph 16 of the said CITB submission is clearly problematic for the business entity. The **right of silence has always** invited an adverse inference against the Defendant in a number of the copyright infringement cases. The proposed new directors/ partners' liability will, in a practical term, remove the right of silence which the directors are now enjoying under the current Section 125 of the Copyright Ordinance. It is not the true "**full right of silence**" in the way that a layman understands because of the burden to be imposed on the director/ partner defendant to discharge his evidential burden by other means (the penultimate sentence of Paragraph 16 of the said CITB submission refers).

We wish to point out to your attention that, in our real life situation, a director may face the following scenarios:

1. **Section 118 offences are strict liability** ones: see *HKSAR v Mega Laser Products (HK) Ltd & Ors* [1999] 3 HKC 161 and *HKSAR v Winners Laser Production Limited & Ors*, CACC 620/1999, unreported, at P 5, and the prosecution does not need to prove that the defendant knew that VCDs were infringing copies. (It does not need to prove 'mens rea'). **The mens rea is now become a reverse onus provision for defendant).**

2. It is **the legal burden upon the defendant to prove** that¹ he, on the balance of probability, **did not know or had no reason to believe** that the copy in question was an infringing copy of the copyright work.

3. In short, the Defendant needs to **prove his mens rea** (knowledge of infringement) **in relation to an actus reus** (the act of infringement) as his defence.

4. **Right of Silence under Section 118**

a. In the Court of Final Appeal Case *Li Defan v HKSAR*²[2002] 5 HKCFAR 320. The Honourable Lord Hoffmann at Paragraph 32 said:

“This evidence plainly called for some explanation of why the money had been paid and the appellants, in offering explanations to ICAC, were well aware of this. In the circumstances I consider that **the judge**, having rejected those explanations as a pack of lies, was **perfectly entitled to regard the failure of the accused to give any explanation on oath as strengthening the inference to be drawn from the prosecution case.**”

b. As observed in Paragraph 11(d) of the Judgment of the case of *Li Cheung*³, the Court of Appeal said that “under S118, the applicant has a tactical if not legal burden to testify in his defence but **under S125, the applicant is entitled to remain silent.**”

c. As the Defendant selected not to give any evidence at trial, the court is entitled to find the Defendant was in possession of the infringing copy which is supported by strong evidence in respect of which he proffered no explanation at all⁴.

d. In another copyright infringement case, the Court of Appeal observed that part of the standard direction related to Section 118, if the Defendant elects not to give evidence, is that⁵,

“On the other hand, it means that there is no evidence from the Defendant to undermine, contradict or explain the evidence put before you by the prosecution.”

e. The Court of Appeal went on to say that “...And the evidentiary role of an accused electing not to give evidence is that in some circumstances, this will go to how the decision-maker (whether the jury or single judge) evaluates the other evidence in the case or draws inferences arising therefrom.”⁶

¹ Section 118 (3) of the Hong Kong Copyright Ordinance

² *Li Defan* FACC 000005/2001

³ CACC000375/2004

⁴ Paragraph 33 of the judgment refers

⁵ Paragraph 11 (6) of the Judgment of *Tsang Chi Hung* case CACC000440/2002. Also Paragraph 11(7)—“This standard direction was expressly approved by the Court of Final Appeal in *Li Defan & Anor. v. HKSAR* [2002] 1 HKLRD 527.”

⁶ Paragraph 11(8) of the judgment of *Tsang Chi Hung* case refers

- f. In yet another copyright infringement case⁷ in which the first defendant gave evidence but the second defendant elected not to give evidence, Paragraphs 39-42 of the judgment of that case, the Court of Appeal said that “

“We must not ignore that the 2nd applicant elected not to give evidence. She also called no witness. The evidence of her husband, the 1st applicant was also rejected. (Para.39)

*An accused of course is not obliged to give evidence. But **the fact that an accused elects not to give evidence would strengthen the adverse inference to be drawn against him on the prosecution evidence.** (see the judgment of Lord Hoffmann NPJ in *Li Defan & Fan Ying Chao v HKSAR FACC No. 5 of 2001* at Para. 32.) (Para. 40)*

*In our views, **on the prosecution evidence and in the absence of an acceptable explanation from the 2nd applicant, the judge was entitled to infer that she was also engaging in the production of infringing copies of copyright works in the flat at the material time.** The judge was also entitled to infer that the 272 infringing copies found from D1 were manufactured in the flat for which the 2nd applicant was also responsible. (Para. 41)*

The 2nd applicant was rightly convicted of all the charges. There is nothing unsafe or unsatisfactory about the conviction. (Para. 42)

5. In other words, the Defendant’s **right of silence** may be used as an adverse inference drawn against him because he has the legal burden to discharge under and by virtue of the defence provisions under the Copyright Ordinance.
6. As the law now stands, the practical effect of S118 and S125 of the Copyright Ordinance is that a director may be charged with the offences personally and as a director of a company.
7. The legal burden of reverse onus of proof is upon that director to prove that he did not know or had no reason to believe that the copy in question is an infringing copy if he is charged personally under Section 118. His **right of silence** may be used as an adverse inference against him after the prosecution has proved that an act of copyright of infringement was committed by his company.
8. However, under Section 125, the legal burden of proof is upon the prosecution to prove, **beyond reasonable doubt**, that the defendant was a director of the company and that the offences were committed by the company with the consent or connivance of that director.

⁷ CACC000228/2002

That legal burden of proof relates to the required mental element for the commission of the offences.

9. The director may then simply rely on his **right of silence** and let the prosecution prove its case against him without any adverse inference may be drawn against him as a result of his exercise of his **right of silence if he is charged under Section 125 only**.
10. However, the purported proposed amendment to the liability of directors/partners will take away the practical effect of the **right of silence** as the court will be able to draw an adverse inference against the director as a result of his exercise of his **right of silence**.
11. As rightly pointed out in the penultimate sentence of Paragraph 16, **the director** may still be able to discharge his evidential burden in many ways if he elects not to give evidence. The practical effect is that if he fails to discharge or satisfy the court in any way that burden, he **goes to jail even though the prosecution has failed to prove beyond reasonable doubt that the director has actually committed the offence with the necessary intent**.
12. Therefore we support the views as expressed by other concern groups that the proposed liability of directors/partners does not afford the “full **right of silence**” to the defendant. Under the proposed amendment, the director may not be compelled to give evidence during investigation but if he elects to exercise his right of silence by not giving evidence at trial, he will be at risk of conviction.

In this connection, we wish to borrow the words of the learned Bokhary, the Honourable Permanent Justice of Final Appeal, at Paragraph 3 of the judgment of *Li Defan and Another v HKSAR* that “the fact that he has not given evidence proves nothing, one way or the other. It does nothing to establish his guilt. On the other hand, it means that there is no evidence from the defendant to undermine, contradict or explain the evidence put before you by the prosecution.”

13. This is part of our law now that the **right of silence** may invite adverse inference against us depends on the nature of the offence the Defendant is facing.
14. This is the reality of our daily life in business, a director or partner may face a serious criminal offence carrying heavy fine and a 4-year’s term of imprisonment if he exercises his right of silence, he will end up in jail even though the prosecution has failed to prove beyond reasonable doubt that he has committed a criminal act with the necessary mental element for a criminal offence committed by a third party. An adverse inference will likely be drawn against him as a result of his exercise of his **right of silence** as in a number of other copyright infringement cases.
15. There is no equivalent criminal sanction against the directors/ partners in the criminal copyright protection regime in other jurisdictions and **the integrity and business ethnics of our business entity in Hong Kong are high compared to other jurisdictions, there is no justification whatsoever to put such heavy onus or burden on our SMEs** which

have always been and are still the building blocks of our economy. After all, **we have Section 125 which covers the director's liability already.**

16. **Our view is that the new liability of directors/ partners is unjustifiable and unwarranted. However, we must emphasis that there is a much bigger than life and death issue in the proposed amendments**, and if the amendments of certain permitted acts were to be allowed for educational establishments, **our school system will become the safest haven for piracy in the world** and our children will be grown up and fed with the ideas that intellectual property right can be disregarded ignored and disrespected. This has been the attitude of our education sector as reflected from the wide spread uploading and downloading activities among our students. **They have done far more evil than the SMEs have been allegedly accused of wrongdoings.**
17. The consequence of the proposed amendments to the content providers/creators in Hong Kong is catastrophic and the long-term damages caused to our education and our children will be beyond our comprehension. **These are the live and real issues which deserve the special attention of both local and international communities.**
18. We believe that the rightly minded educators who do respect and protect copyright will agree with us that the use of the infringing copies of a work shall not be allowed in our school and that the proper licensing scheme must be in place which will facilitate the clearance of rights for teaching and learning process so that teachers will use whatever copyrighted materials within the scope of the licence schemes for their teaching without any worry of being sued for copyright infringement. The school will have the proper and adequate digital rights management systems for controlling and managing the use of copyrighted materials in the new era of digital environment for educational objectives. These benefit both for the schools, the students and the copyright providers/creators and they work together in a harmonious way.

For and on behalf of
Hong Kong Video Development Foundation Ltd.



Chu Fung Mui, Clera

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