

CB(1)762/05-06(01)



Workshop C&D, 1<sup>st</sup> Floor, Lerry Plaza,  
15 Cheung Shun Street, Cheung Sha Wan  
Kowloon, Hong Kong  
Tel (852) 2750 5595 Fax: (852) 2750 5609

**The Hon Sophie LEUNG LAU yau-fun, SBS, JP**

Panel Chairperson

Panel on Commerce and Industry

( By Fax 21210420 and By Post)

Legislative Council

Hong Kong.

Dear the Hon. Sophie Leung, Panel Chairperson.

**Re The Proposed Directors/Partners/Officers Criminal Liability**

We wish to refer to the Legco Panel meeting held on 15<sup>th</sup> November 2005 in which there were certain members expressed the concern over the above matter as referred to in paragraph 1.1 at page 4 of the Refined Proposals On Various Copyright-Related Issues submitted to Legco Panel on Commerce by Commerce, Industry & Technology Bureau under reference CB (1) 260/05-06(03) in a purported response to our earlier submission on this important issues.

With the greatest respect, we **do not agree with** the views as expressed by the said paper and by the **CITB** officers in that meeting. We **support** the views as expressed by the Honourable Legco members, Mr. Jeffrey Lam, Mr. Chim Pui-chung and MR. Wong Ting-kwong and Dr. Lui Ming-wah expressed in the said legco panel meeting.

Without appearing to be too contentious, it appears that CITB has tried to bury the real issue under the legal jargons. The real issue, in our view, is that the proposed newly created criminal offence is what we commonly called a "Status Offence" and a **person is presumed to commit an offence by virtue of his status to a business entity** and that offence is a very serious one which carries a maximum term of 4 year imprisonment and level 5 fine. This is inconsistent with the presumption of innocence prescribed by article 11(1) of the Hong Kong Bill of Rights Ordinance, article 14.2 of the International Covenant of Civil and Political Rights ("ICCPR"), and article 39 of the Basic Law, and with the right to a fair trial protected by article 10 of the Hong Kong Bill of Rights Ordinance, article 14.1 of the ICCPR, article 39 of the Basic Law, and



Workshop C&D, 1<sup>st</sup> Floor, Leroy Plaza,  
15 Cheung Shun Street, Cheung Sha Wan  
Kowloon, Hong Kong  
Tel (852) 2750 5595 Fax: (852) 2750 5609

article 87 of the Basic Law<sup>1</sup>. **This is unconstitutional and will be subject to legal challenge by an interested group on the date the bill is passed into law.**

We have been advised legally on the technicality of the legal burden and evidential burden prior to our earlier submission in February 2005. Our legal advice was and has always been as follows:

A. The Legal Framework of the Presumption of Innocence

1. The presumption of innocence is guaranteed by article 11(1) of the Hong Kong Bill of Rights Ordinance, and by article 14.2<sup>2</sup> of the ICCPR as incorporated by article 39 of the Basic Law.
2. This represents a very important and fundamental right of Hong Kong citizen in order to protect the innocent against the prejudice that is apt to arise from mere assertion attendance arrest and arraignment, against the danger of wrongful conviction,
3. The Hong Kong legal system must guard against any wrongful deprivation of liberty and any wrongful deprivation of liberty is unacceptable. The wrongful conviction would inevitably bring shame and grave damage to reputation to the accused which would ruin that person's personal and working life.
4. The presumption of innocence serves not only to protect a particular individual on trial, but also to maintain public confidence in the enduring integrity and security of the legal system.
5. The necessary corollary of the presumption is that in a criminal trial the duty lies upon the prosecutor to prove **all the elements of the offence** and that if, after the presentation of all the evidence, there remains a reasonable doubt about the accused's guilt, he must be acquitted.

B. **Legal Burden (or Persuasive Burden), Special Defence and Evidential Burden.**

---

<sup>1</sup> Article 87(2) of the Basic Law provides that 'Anyone who is lawfully arrested shall have the right to a fair trial by the judicial organs without delay and shall be **presumed innocent** until convicted by the judicial organs';

<sup>2</sup> Article 14.2 of the ICCPR provides that: 'Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.' Article 11(1) of the Hong Kong Bill of Rights Ordinance is in the same terms.



Workshop C&D, 1<sup>st</sup> Floor, Leroy Plaza,  
15 Cheung Shun Street, Cheung Sha Wan  
Kowloon, Hong Kong  
Tel (852) 2750 5595 Fax: (852) 2750 5609

6. Legal burden or persuasive burden is the burden upon the prosecution to prove all elements of an offence beyond reasonable doubt. However very often, there may be a statutory defence available to an accused to an offence, then it is **the legal burden upon the accused that**

“: ... requires the accused to prove on a balance of probabilities an ultimate fact necessary to the determination of guilt or innocence. Such a presumption may relate to an essential element (of greater or lesser importance) making up either the actus reus or the mens rea of the offence; and may be either mandatory or discretionary in its operation. Where a mandatory persuasive burden of proof is placed on the accused, it is possible for a conviction to be returned, even where the tribunal of fact entertains a doubt as to his guilt. Such provisions require close scrutiny, in order to determine their compatibility with [the presumption of innocence].”<sup>3</sup>

7. The evidential burden

The evidential burden has been described as one which ‘requires only that the accused must adduce sufficient evidence to raise an issue before it has to be determined by the tribunal of fact’.<sup>4</sup>

An evidential burden is not in truth a burden of *proof* and it is this that primarily distinguishes it from a persuasive burden: the persuasive burden requires proof.<sup>5</sup>

8. Provisions that place an onus of proof on an accused fall within three groups, although the first necessarily imports the third:
- (i) the special defence;
  - (ii) the evidential burden; and
  - (iii) persuasive burden (legal burden).

---

<sup>3</sup> ‘Human Rights and Criminal Justice’ Emmerson and Ashworth para 9-03.

<sup>4</sup> see ‘Human Rights and Criminal Justice’, Emmerson and Ashworth (2001) para 9-04.

<sup>5</sup> Emmerson and Ashworth para 9-03.



Workshop C&D, 1<sup>st</sup> Floor, Leroy Plaza,  
15 Cheung Shun Street, Cheung Sha Wan  
Kowloon, Hong Kong  
Tel (852) 2750 5595 Fax: (852) 2750 5609

9. The special defence is the recognized exception described by Lawton LJ in *R v Edwards* [1975] QB 27, 40. It is:

‘... limited to offences arising under enactments which prohibit the doing of an act save in specified circumstances or by persons of specified classes or with specified qualifications or with the licence or permission of specified authorities.’

In such cases the statute places upon the accused the legal burden, or persuasive burden as it is now more commonly called, to show, on a balance of probabilities, that he acts within a specified circumstances or fits within the specified class or qualification or has a licence or permission, as the case may be.

10. The significance of the difference between the persuasive and evidential burden was highlighted in *Lambert*<sup>6</sup> by Lord Steyn at page 572:

“A transfer of a legal burden amounts to a far more drastic interference with the presumption of innocence than the creation of an evidential burden on the accused. The former requires the accused to establish his innocence. It necessarily involves the risk that, if the jury are faithful to the judge’s direction, they may convict where the accused has not discharged the legal burden resting on him but left them unsure on the point. This risk is not present if only an evidential burden is created.”

C. Legal Burden On The Prosecution To Prove Elements Of A Copyright Offence In Other Jurisdictions :

10. United Kingdom

A person commits an offence who, without the licence of the Copyright owner, does any of the acts with commercial purpose as defined in the United Kingdom Copyright, Designs and Patents Act 1988 (“U.K. 1988 Act”), which is, and which he knows or has reasons to believe is, an infringing copy of a copyright work<sup>7</sup>.

*In short, the prosecution must prove both the actus reus* ( the infringing act itself) and *mens rea*, i.e the state of mind of the defendant, namely knowledge or reason to believe that the copy is an infringing one

11. Australia

Likewise, the *prosecution must prove both the actus reus* ( the infringing act itself) and *mens rea*, i.e the state of mind of the defendant, namely, if the person knows, or ought reasonably to know, the article to be an infringing copy of the work.<sup>8</sup>

<sup>6</sup> *R v Lambert* [2002] 2 AC

<sup>7</sup> Section 107 of the U.K. 1988 Act

<sup>8</sup> section 132 of the Australia Copyright Act 1968



Workshop C&D, 1<sup>st</sup> Floor, Leroy Plaza,  
15 Cheung Shun Street, Cheung Sha Wan  
Kowloon, Hong Kong  
Tel (852) 2750 5595 Fax: (852) 2750 5609

12. United States of America

The prosecution must prove both the actus reus and the mens rea ( "willfully committed") and **Section 506 of the United States Copyright Act is reproduced verbatim for easy reference as follows:**

**Criminal offenses**

(a) Criminal Infringement. - Any person who infringes a copyright willfully either -

(1) for purposes of commercial advantage or private financial gain, or

(2) by the reproduction or distribution, including by electronic means, during any 180-day period, of 1 or more copies or phonorecords of 1 or more copyrighted works, which have a total retail value of more than \$1,000,

shall be punished as provided under section 2319 of title 18, United States Code. **For purposes of this subsection, evidence of reproduction or distribution of a copyrighted work, by itself, shall not be sufficient to establish willful infringement**

13. Singapore

The *prosecution must prove both the actus reus* ( the infringing act itself) and *mens rea*, i.e the state of mind of the defendant, namely, **if the person knows, or ought reasonably to know, the article to be an infringing copy of the work**<sup>9</sup>

14. New Zealand

The *prosecution must prove both the actus reus* ( the infringing act itself) and *mens rea*, i.e the state of mind of the defendant, namely, **if the person knows is an infringing copy of a copyright work**<sup>10</sup>.

**D. The Legal Burden On the Prosecution to Prove the Elements of a Copyright Offence in Hong Kong**

15. The Prosecution only needs to prove the actus reus<sup>11</sup>( the infringement act) but not the mens rea. The mens rea<sup>12</sup>is now become a reverse onus provision for defence.

Section 118 (3) of the Hong Kong Copyright Ordinance provides that "it is a defence for the person charged with an offence under subsection (1), to **prove that he did not know**

<sup>9</sup> Section 136 of the Singapore Copyright Act

<sup>10</sup> Section 131 of the New Zealand Copyright Act 1994

<sup>11</sup> Section 118 (1)

<sup>12</sup> Section 118 (3)



Workshop C&D, 1<sup>st</sup> Floor, Leroy Plaza,  
15 Cheung Shun Street, Cheung Sha Wan  
Kowloon, Hong Kong  
Tel (852) 2750 5595 Fax: (852) 2750 5609

**and had no reason to believe** that the copy in question was an infringing copy of the copyright work.

In other words, there is a **legal burden** ( not evidential burden) on the accused, on the balance of probability, that to **prove** his mens rea in relation to actus reus as his defence. Whereas, in other jurisdictions, it is the legal burden on the prosecution to prove both the actus reus and the mens rea.

16. A reverse onus provision that imposes a persuasive burden on an accused is, on the other hand, one that requires further examination. Whether a provision does or does not make a true inroad upon the presumption of innocence, and if so whether that inroad is justified, is not a matter that can be measured with precision.

E. **Directors/ Partners/ Officers liability**

17. Section 125 of the Hong Kong Copyright Ordinance provides that “Where a body corporate commits an offence under this Ordinance in respect of any act **which is shown to have been committed with the consent or connivance of, or to be attributable to any act on the part of, any director, manager, secretary or other similar officer** of the body corporate or any person purporting to act in any such capacity he, as well as the body corporate, **commits the offence**”.
18. This means that the present Hong Kong copyright law as it now stands, **the legal burden is on the prosecution to prove** both the mens reus and actus reus, namely that a copyright offence has been committed and that the officer or director has all the mental elements to take part in the offence before that officer or director may be convicted. The prosecution must prove both the actus reus and the mens rea in the case of directors, partners and officers.
19. The **present criminal offences** aim at those offenders who infringe copyright on a commercial scale which causes a greater harm to the copyright industry than corporate endusers, **the directors/partners are presumed innocence** until they prove otherwise by way of persuasive evidence.
20. However, the present proposed criminal sanction against the director/partner of enduser has introduced an unnecessary unjustifiable and unconstitutional reverse onus provision for a copyright offence which is not of commercial scale (being an enduser of the copyrighted materials and not a simple minded trader).
21. The status offence usually is introduced for the offence of regulatory in nature and not for alleged serious crime. If other jurisdictions consider that it is necessary for the prosecution to prove both the actus reus and mens rea for copyright offences, it would be oppressive. In this connection, we would like to borrow the words of the judgment of the court Dickson CJC of the Canadian Supreme Court observed in *R v Whyte* (1988) 51 DLR (4<sup>th</sup>) 481, at p 493:



Workshop C&D, 1<sup>st</sup> Floor, Leroy Plaza,  
15 Cheung Shun Street, Cheung Sha Wan  
Kowloon, Hong Kong  
Tel (852) 2750 5595 Fax: (852) 2750 5609

**'The real concern is not whether the accused must disprove an element or prove an excuse, but that an accused may be convicted while a reasonable doubt exists.** When that possibility exists, there is a breach of the presumption of innocence. The exact characterisation of a factor as an essential element, a collateral factor, an excuse, or a defence should not affect the analysis of the presumption of innocence. It is the final effect of a provision on the verdict that is decisive. If an accused is required to prove some fact on the balance of probabilities to avoid conviction, the provision violates the presumption of innocence because it permits a conviction in spite of a reasonable doubt in the mind of the trier of fact as to the guilt of the accused.'

22. The reverse onus provision on the proposed STATUS OFFENCE will inroad upon the presumption of innocence and is necessarily unconstitutional.

G. **Recommendation**

23. In summary, we would like to point out that there is no need to change the "status quote" as laid down in section 125 in respect of the directors/partners' criminal liability and that there is no need to propose the reversed onus of proof of guilt provision by introducing either evidential (presumptions of fact) or persuasive (presumptions of law) burden on the accused directors/partners.
24. The Status Offence is unnecessary, unwarranted, unjustifiable and unconstitutional. It creates a legal burden (not evidential burden as may have been perceived by CITB) on the accused to prove on a balance of probability, that he did not have all the mental elements of the offence and that there is a real risk that the accused may be convicted even a reasonable doubt exists.

For and on behalf

HONG KONG VIDEO FOUNDATION LTD

A handwritten signature in black ink, appearing to read 'Chu Fung Mui', is written over a horizontal line.

Chu Fung Mui  
Vice Chairman

Cc. Ms Mary Chow of CITB