

間接侵犯版權

30. 間接侵犯版權：輸入或輸出侵犯版權複製品

任何人未經作品的版權擁有人之特許，將該作品的複製品輸入或輸出香港，而他知道或有理由相信該複製品是該作品的侵犯版權複製品，而且他輸入或輸出該複製品並非供自己私人和家居使用，即屬侵犯該作品的版權。

[比照 1988 c. 48 s. 22 U.K.]

31. 間接侵犯版權：實有侵犯版權複製品或進行侵犯版權複製品交易

任何人未經作品的版權擁有人之特許，就該作品的複製品作出以下作為，而他知道或有理由相信該複製品是該作品的侵犯版權複製品，即屬侵犯該作品的版權——

- (a) 為交易或業務的目的而管有該複製品；
- (b) 將該複製品出售、出租、要約出售或要約出租，或為出售或出租而展示該複製品；
- (c) 為交易或業務的目的而公開展覽該複製品或分發該複製品；或
- (d) 並非為交易或業務的目的而分發該複製品並達到損害版權擁有人之程度。

侵犯版權複製品

35. “侵犯版權複製品”的涵義

- (1) 在本部中，“侵犯版權複製品”(infringing copy)就版權作品而言，須按照本條解釋。
- (2) 如果作品的複製品的製作構成侵犯有關作品的版權，則該複製品即屬侵犯版權複製品。
- (3) 如——
  - (a) 某作品的複製品(附屬作品的複製品除外)已輸入或擬輸入香港；及

Secondary infringement of copyright

30. Secondary infringement: importing or exporting infringing copy

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

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

31. Secondary infringement: possessing or dealing with infringing copy

The copyright in a work is infringed by a person who, without the licence of the copyright owner—

- (a) possesses for the purpose of trade or business;
- (b) sells or lets for hire, or offers or exposes for sale or hire;

(c) for the purpose of trade or business, exhibits in public distributes; or

(d) distributes otherwise than for the purpose of trade or business such an extent as to affect prejudicially the owner of the copyright,

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

Infringing copy

35. Meaning of "infringing copy"

(1) In this Part "infringing copy" (侵犯版權複製品), in relation to 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 infringement of the copyright in the work in question.

(3) 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) 該複製品(附屬作品的複製品除外)假使是在香港製作即會構成侵犯有關作品的版權,或違反關於該作品的專用特許協議。
- 該複製品(附屬作品的複製品除外)亦屬侵犯版權複製品(附屬作品的複製品除外)。
- (4) 就第 118 至 133 條(附屬條文)而言,“侵犯版權複製品”(infringing copy)並不包括符合以下說明的某作品的複製品——
- 是在某國家、地區或地方製作而它在該處是合法地製作的;
  - 已於自該作品在香港或其他地方發表的首天起計 18 個月屆滿之後的任何時間輸入香港或擬於該 18 個月屆滿之後的任何時間輸入香港;及
  - 假使是在香港製作即會構成侵犯有關作品的版權,或違反關於該作品的專用特許協議,
- 亦不包括符合以下說明的某附屬作品的複製品——
- 是在某國家、地區或地方製作而它在該處是合法地製作的;
  - 已輸入或擬輸入香港;及
  - 假使是在香港製作即會構成侵犯有關作品的版權,或違反關於該作品的專用特許協議。
- (5) 就第 VII 分部(關於輸入侵犯版權物品的法律程序)而言,“侵犯版權複製品”(infringing copy)並不包括符合以下說明的某作品的複製品或某附屬作品的複製品——
- 是在某國家、地區或地方製作而它在該處是合法地製作的;
  - 已輸入或擬輸入香港;及
  - 假使是在香港製作即會構成侵犯有關作品的版權,或違反關於該作品的專用特許協議的。
- (6) 凡在任何法律程序中出现某作品的複製品是否侵犯版權複製品的問題,並且證明——
- 該複製品是該作品的複製品;及
  - 版權存在於該作品或曾在任何時間存在於該作品,
- 則須推定該複製品是在版權存在於該作品時製作,直至相反證明成立為止。
- (7) 在本部中,“侵犯版權複製品”(infringing copy)包括憑藉任何下列條文而被視為侵犯版權複製品的複製品——
- 第 41(5)條(為教學或考試的目的而製作的複製品);
- 第 44(3)條(由教育機構為教育的目的而製作的紀錄);

- (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—
- that was lawfully made in the country, territory or area where it was made;
  - 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 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—
- that was lawfully made in the country, territory or area where it was made;
  - that has been or is proposed to be imported into Hong Kong; and
  - 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—
- that was lawfully made in the country, territory or area where it was made;
  - that has been or is proposed to be imported into Hong Kong; and
  - 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—
- that it is a copy of the work; and
  - 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);

- 第 45(3) 條 (由教育機構為教學的目的而翻印進行複製);  
 第 46(4)(b) 條 (由圖書館館長及檔案室負責人倚賴虛假之聲明而製作的複製品);  
 第 64(2) 條 (在作品的主體複製品轉移時留下的電子形式的另一份複製品、改編本等);  
 第 72(2) 條 (為宣傳售賣的藝術作品而製作的複製品); 或  
 第 77(4) 條 (為廣播或有線傳播節目的目的而製作的複製品)。
- (8) 就第 (3)、(4) 及 (5) 款而言, "附屬作品" (accessory work) 指以下作品——
- (a) 則貼於某物品上或在某物品上展示的標籤所包含或構成的作品;
  - (b) 包裝或盛載某物品的包裝物或盛器所包含或構成的作品;
  - (c) 附貼於包裝或盛載某物品的包裝物或盛器上或在該等包裝物或盛器上展示的標籤所包含或構成的作品;
  - (d) 某物品所附帶並在賣賣時與該物品一併提供的書面指示、保證書或其他資料所包含或構成的作品; 或
  - (e) 某物品所附帶並在賣賣時與該物品一併提供的具指示性質的聲音紀錄或影片;
- 而該物品 (包括標籤、包裝物、盛器、指示、保證書、其他資料、聲音紀錄或影片, 視屬何情況而定) 的經濟價值並非主要歸因於該作品的經濟價值。
- (9) 就第 (4) 及 (5) 款而言, "合法地製作" (lawfully made) 並不包括在沒有保障作品版權的法律或在作品版權已屆滿的國家、地區或地方製作任何作品的複製品。  
 [比照 1988 c. 48 s. 27 U.K.]

免責辯護

36. 就第 30 及 31 條而言的免責辯護

- (1) 現聲明如有某作品的複製品僅憑第 35(3) 條而屬侵犯版權複製品, 則就第 30 及 31 條而言以及為免生疑問, 在根據第 30 或 31 條而就某作品的複製品進行的侵犯版權訴訟中, 如被告人證明——
- (a) 她已作出合理查究足以使他自己信納該已輸入或擬輸入香港的該作品的複製品並非該作品的侵犯版權複製品;

- 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.
- (9) For the purpose of subsections (4) and (5), "lawfully made" (合法地製作) does not include the making of a copy of a work 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.
- [cf. 1988 c. 48 s. 27 U.K.]

Defences

36. Defences for the purposes of sections 30 and 31

- (1) For the purposes of sections 30 and 31 and for the avoidance of doubt, it is declared that if in an action for infringement of copyright under section 30 or 31 in respect of a copy of a work which is an infringing copy by virtue only of section 35(3), the defendant proves that—
- (a) he had made reasonable enquiries sufficient to satisfy himself that the copy of the work imported or proposed to be imported into Hong Kong was not an infringing copy of the work;

01-OCT-1998 14:59 P.011 TD 0523:002

- (b) 他基於合理理由而曾於在有關個案的情況下，該複製品並非侵犯版權複製品；及
- (c) 沒有其他本會致使他合理地懷疑該複製品是侵犯版權複製品的情況，則他已證明他沒有理由相信該複製品是侵犯版權複製品。
- (2) 法院在裁定被告人是否已根據第(1)款證明他沒有理由相信該複製品是侵犯版權複製品時，可顧及的因素包括(但不限於)以下事項——
- (a) 他是否已就有關類別作品向有關的行業團體作出查究；
- (b) 他是否已給予通知促請有關的版權擁有人或專用特許持有人注意他在輸入和出售該作品的複製品方面的權益；
- (c) 他是否已遵從就該類別作品的供應而可能存在的實務守則；
- (d) 對被告作出的該等查究的回應(如有的話)是否合理和及時；
- (e) 他是否已獲提供有關的版權擁有人或專用特許持有人(視屬何情況而定)的姓名或名稱、地址及其聯絡之詳細資料；
- (f) 他是否已獲提供有關作品首次發表之日期；
- (g) 他是否已獲提供任何有關專用特許之證明。
- (3) 凡某人一如第 30 或 31 條所述般侵犯版權，在針對該人侵犯版權的訴訟中，如該人證明以下事項，即可以此作為免責辯護——
- (a) 他已向版權擁有人或專用特許持有人(視屬何情況而定)訂購該作品的複製品，以獲得該作品的複製品的供應；
- (b) 他已向某人作出訂購，但該人基於不合理理由而不作出提供或在不合理的條款下始同意提供，故此其作為並不合理；及
- (c) 有關輸入是在版權擁有人或專用特許持有人作出該不合理行為之後並且是在第 35(4)(b)條規定的期間屆滿之後進行的。
- (4) 法院在裁定版權擁有人或專用特許持有人是否已作出合理行為時，須將例例行業為有秩序地分發該類別作品的複製品而既有的慣常做法列為考慮因素，尤其須考慮該訂單如獲履行，會否與版權擁有人或專用特許持有人的正常利用有所抵觸，或會否不合理地損害版權擁有人或專用特許持有人的合法權益。

- (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.
- he has proved that he did not have reason to believe that the copy was an infringing copy.
- (2) In determining whether a defendant has proved under subsection (1) that he did not have reason to believe that the copy 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.
- (3) In an action against a person for infringement of copyright under section 30 or 31, it is a defence for that person to prove that—
- (a) he had placed an order with the copyright owner or the exclusive licensee, as the case may be, for the supply of copies of the work;
- (b) the person with whom he placed the order had acted unconscionably by either withholding supply on unreasonable grounds or by agreeing to supply on unreasonable terms; and the import took place after that unconscionable act by the copyright owner or exclusive licensee and after the expiration of the period referred to in section 35(4)(b).
- (4) In determining whether the copyright owner or exclusive licensee had acted unconscionably, the court shall take into consideration the established practices of the particular trade for the orderly distribution of copies of that category of work and, in particular, whether the order, if fulfilled, would conflict with a normal exploitation of the work by the copyright owner or the exclusive licensee, or would unreasonably prejudice the legitimate interests of the copyright owner or exclusive licensee.

(5) 法院在裁定是否基於“不合理理由”而不作出提供或在“不合理的條款下”同意提供時，須考慮到行業或個別公眾的合理需求，包括但不限於價格及提貨時間。該行業對在香港存貨之處理、該行業對個別媒體、類別或語言的產品之一般處理、訂單之大小、已作之查詢以及有無任何人士以前曾經向個別供應商訂貨而未得到兌現。

## 第 V 分部

### 進行版權作品的權利的交易

#### 版權

#### 101. 轉讓及特許

- (1) 版權可作為非土地財產或動產，藉轉讓、遺囑性質的遺囑或法律的施行而轉傳。
- (2) 版權的轉讓或以其他方式的轉傳可以是局部的，即具局限適用於——
- 版權擁有人具有獨有權利可作出的一項或多於一項的事情，但並非版權擁有人具有獨有權利可作出的全部事情；
  - 版權存在的期間的一部分，而非該期間的整段。

#### 103. 專用特許

- (1) 在本部中，“專用特許”(exclusive licence)指由版權擁有人簽署或由他人代其簽署的專面特許，授權特許持有人在摒除所有其他人(包括批出該特許的人)的情況下行使本應屬該版權擁有人可行使的獨有權利。
- (2) 在專用特許下的特許持有人所具有的相對於受特許約束的所有權繼承人而言的權利，與其所具有的相對於批出該特許的人而言的權利相同。

## 第 VI 分部

### 侵犯權利的補救

#### 版權擁有人權利和補救

#### 107. 版權擁有人可就侵犯版權提起訴訟

- 版權擁有人可就侵犯版權提起訴訟。
- 在就侵犯版權進行的訴訟中，原告人可得損害賠償、強制令、交出利潤或其他形式的濟助，與就侵犯任何其他產權而可得者相同。
- 本條在本分部的以下條文的規限下具有效力。

(5) In determining whether supply is withheld on “unreasonable grounds” or whether the agreement to supply is on “unreasonable terms” the court shall have regard to the reasonable requirements of the particular trade or particular public, including but not limited to price and delivery times, the practice of the trade with existing stocks in Hong Kong, the practice of the trade generally for the product in its particular medium, category or language, the size of the order, enquiries made and whether or not any person has previously had unfulfilled orders with the particular supplier.

## DIVISION V

### DEALINGS WITH RIGHTS IN COPYRIGHT WORKS

#### Copyright

#### 101. Assignment and licences

- (1) Copyright is transmissible by assignment, by testamentary disposition or by operation of law, as personal or moveable property.
- (2) An assignment or other transmission of copyright may be partial, that is, limited so as to apply—
- to one or more, but not all, of the things the copyright owner has the exclusive right to do;
  - to part, but not the whole, of the period for which the copyright is to subsist.

#### 103. Exclusive licences

- (1) In this Part an “exclusive licence” (專用特許) means a licence in writing signed by or on behalf of the copyright owner authorizing the licensee to the exclusion of all other persons, including the person granting the licence, to exercise a right which would otherwise be exercisable exclusively by the copyright owner.
- (2) The licensee under an exclusive licence has the same rights against a successor in title who is bound by the licence as he has against the person granting the licence.

## DIVISION VI

### REMEDIES FOR INFRINGEMENT

#### Rights and remedies of copyright owner

#### 107. Infringement actionable by copyright owner

- An infringement of copyright is actionable by the copyright owner.
- In an action for infringement of copyright all such relief by way of damages, injunctions, accounts or otherwise is available to the plaintiff as is available in respect of the infringement of any other property right.
- This section has effect subject to the following provisions of this Division.

## 108. 關於侵犯版權訴訟中的損害賠償的規定

(1) 在就侵犯版權進行的訴訟中，如證明在侵犯版權時，被告人不知道和沒有理由相信該訴訟所關乎的作品有版權存在，則原告人無權向被告要求損害賠償，但任何其他補救則不受影響。

(2) 在就侵犯版權進行的訴訟中，法院在關及案件的所有情況，尤其是以下情況後——

(a) 該等權利受侵犯的昭彰程度；

(b) 因侵犯版權行為而歸於被告人的利益；及

(c) 被告人的業務帳目和紀錄的完整程度、準確程度及可靠程度，

可在該案件達致公正所需而判給額外損害賠償。

[比照 1988 c. 48 s. 97 U.K.]

## 109. 交付令

(1) 凡任何人——

(a) 為交易或業務的目的而管有、保管或控制某作品的侵犯版權複製品；或

(b) 管有、保管或控制某物品，而該物品是屬特定設計或改良，用以製作某版權作品的複製品的，而該人知道或有理由相信該物品曾經或將會用作製作侵犯版權複製品，

則該作品的版權的擁有人可向法院申請命令，規定該等侵犯版權複製品或該物品須交付予他或法院所指示的其他人。

(2) 任何申請必須在第 110 條(期限過後不得以交付作補救)指明的期限結束前提出；除非法院亦根據第 111 條(處置侵犯版權複製品或其他物品的命令)作出命令，或法院認為有理由根據第 111 條作出命令，否則法院不得根據本條作出命令。

(3) 如法院沒有根據第 111 條作出命令，則依據一項根據本條作出的命令而獲交付侵犯版權複製品或其他物品的人須保留該侵犯版權複製品或該物品，以聽候法院根據該條作出命令或裁定不根據該條作出命令。

(4) 本條並不影響法院的任何其他權力。

[比照 1988 c. 48 s. 99 U.K.]

## 108. Provisions as to damages in infringement action

(1) Where in an action for infringement of copyright it is shown that at the time of the infringement the defendant did not know, and had no reason to believe, that copyright subsisted in the work to which the action relates, the plaintiff is not entitled to damages against him, but without prejudice to any other remedy.

(2) The court may in an action for infringement of copyright having regard to all the circumstances, and in particular to—

(a) the flagrancy of the infringement;

(b) any benefit accruing to the defendant by reason of the infringement; and

(c) the completeness, accuracy and reliability of the defendant's business accounts and records,

award such additional damages as the justice of the case may require.

[cf. 1988 c. 48 s. 97 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 trade or business; or

(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.

(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.]

## 110. 期限過後不得以交付作為補救

- (1) 除本條以下條文另有規定外，任何人不得在自有關的侵犯版權複製品或物品的製作日期起計的 6 年期間完結後，根據第 109 條（在民事法律程序中的交付令）提出申請。
- (2) 如在上述期間的整段或任何部分，版權擁有人——
- 無行為能力；或
  - 因欺詐或隱瞞事實而使他不能夠發現令他有權申請該命令的事實，則在自他不再無行為能力或在自他假使付出合理的努力便應可發現該等事實（視屬何情況而定）的日期起計的 6 年期間完結之前的任何時間，均可提出該申請。
- (3) 在第 (2) 款中，“無行為能力”（disability）的涵義與《時效條例》（第 347 章）中該詞的涵義相同。

[比照 1938 c. 48 s. 113 U.K.]

## 111. 處置侵犯版權複製品或其他物品的命令

- (1) 凡有依據一項根據第 109 條作出的命令而交付的侵犯版權複製品或其他物品，則可向法院申請命令，以將該等複製品或其他物品——
- 沒收歸予版權擁有人所有；或
  - 銷毀或按法院認為合適的其他方法處置。
- 或向法院申請不應作出該等命令的裁決。
- (2) 在考慮應作出甚麼命令（如有的話）時，法院須考慮就侵犯版權進行訴訟可獲得的其他補救是否足以補償版權擁有人和保護該版權擁有人權益。
- (3) 根據《最高法院條例》（第 4 章）第 54 條訂立法院規則的權力，包括為施行本條而訂立法院規則的權力。
- (4) 為施行本條而訂立的法院規則，可包括送達通知予對複製品或其他物品具有權益的人的規則，而任何該等人士均有權——
- 在為根據本條作出命令而進行的法律程序中出庭（不論他是否獲送達通知）；及
  - 提出上新反對任何已作出的命令（不論他是否曾出庭）。
- (5) 根據本條作出的命令，在給予上新通知的期限完結時始生效，如上新通知在該期限完結前妥為給予，則在上訴的法律程序獲最終裁定或擱置時始生效。

第 34 條

經司法覆核，由香港特別行政區政府印務局及製印

## 110. Period after which remedy of delivery up not available

- (1) An application for an order under section 109 (order for delivery up) may not be made after the end of the period of 6 years from the date on which the infringing copy or article in question was made, subject to the following provisions of this section.
- (2) If during the whole or any part of that period the copyright owner—
- is under a disability; or
  - is prevented by fraud or concealment from discovering the facts entitling him to apply for an order, then an application may be made at any time before the end of the period of 6 years from the date on which he ceased to be under a disability or, as the case may be, could with reasonable diligence have discovered those facts.
- (3) In subsection (2) “disability” (無行為能力) has the same meaning as in the Limitation Ordinance (Cap. 347).

[cf. 1938 c. 48 s. 113]

## 111. Order as to disposal of infringing copy or other article

- (1) An application may be made to the court for an order that an infringing copy or other article delivered up in pursuance of an order under section 109 should be—
- forfeited to the copyright owner; or
  - destroyed or otherwise dealt with as the court may think fit or for a decision that no such order should be made.
- (2) In considering what order (if any) should be made, the court must consider whether other remedies available in an action for infringement of copyright would be adequate to compensate the copyright owner and protect his interests.
- (3) The power to make rules of court under section 54 of the Supreme Court Ordinance (Cap. 4) includes power to make rules of court for the purposes of this section.
- (4) The rules of court made for the purposes of this section may include rules as to the service of notice on persons having an interest in the copy or other article, and any such person is entitled—
- to appear in proceedings for an order under this section, whether or not he was served with notice; and
  - to appeal against any order made, whether or not he appeals against the order.
- (5) An order under this section does not take effect until the end of the period within which notice of an appeal may be given or, if before the end of that period notice of appeal is duly given, until the final determination or abandonment of the proceedings on the appeal.

Authorized Loose-leaf Edition, Printed and Published by the Government Printer, Hong Kong Special Administrative Region

- (6) 凡多於一人對複製品或其他物品享有權益，法院可作出其認為公正的命令，並尤可指示將該複製品或物品出售或作其他處置，並將收益分配。
- (7) 如法院裁定不應根據本條作出命令，則在複製品或其他物品交付之前暫有保管或控制該複製品或該其他物品的人，具有獲發還該複製品或物品的權利。
- (8) 在本條中，凡提述對複製品或其他物品享有權益的人，即包括可根據本條或第 231 條（該條就侵犯在表演中的權利訂立類似的條文）就該複製品或該等其他物品作出命令而惠及的任何人士。

[比照 1988 c. 48 s. 114 U.K.]

#### 專用特許持有人的權利和補救

##### 112. 專用特許持有人的權利和補救

- (1) 專用特許持有人就特許批出之後所發生的事項，具有在猶如該項特許是一項轉讓的情況下相同的權利和補救，但相對於版權擁有人而言，則屬例外。
- (2) 專用特許持有人的權利和補救與版權擁有人具有的權利和補救是同時具有的；而在本部的有關條文中，凡提述版權擁有人，亦據此解釋。
- (3) 在專用特許持有人憑藉本條而提起的訴訟中，被告人可引用的免責辯護，與在假使該訴訟是版權擁有人提起的情況下被告人可引用的免責辯護相同。

[比照 1988 c. 48 s. 101 U.K.]

##### 113. 行使同時具有的權利

- (1) 在符合第 (2) 款的規定下，凡版權擁有人或專用特許持有人就侵犯版權提起訴訟，而該版權擁有人及專用特許持有人就該訴訟（全部或部分）所關乎的侵犯版權同時具有訴訟權，則除非另一方加入作為原告人或被告人，否則該版權擁有人或專用特許持有人（視屬何情況而定）如沒有法院許可，不得進行該訴訟。
- (2) 凡專用特許持有人就侵犯版權提起訴訟，而該訴訟（全部或部分）關乎第 35(3) 條所指的侵犯版權複製品所涉的侵犯版權，則除非版權擁有人加入作為原告人，否則專用特許持有人如沒有法院許可，不得進行該訴訟。

22-01101 由香港特別行政區政府印務局代印及發售

- (6) Where there is more than one person interested in a copy or other article, the court may make such order as it thinks just and may (in particular) direct that the copy or article be sold, or otherwise dealt with, and the proceeds divided.

(7) If the court decides that no order should be made under this section, the person in whose possession, custody or control the copy or other article was before being delivered up is entitled to its return.

(8) References in this section to a person having an interest in a copy or other article include any person in whose favour an order could be made in respect of it under this section or under section 231 (which makes similar provision in relation to infringement of rights in performances).

[cf. 1988 c. 48 s. 114 U.K.]

#### Rights and remedies of exclusive licensee

##### 112. Rights and remedies of exclusive licensee

(1) An exclusive licensee has, except against the copyright owner, the same rights and remedies in respect of matters occurring after the grant of the licence as if the licence had been an assignment.

(2) His rights and remedies are concurrent with those of the copyright owner, and references in the relevant provisions of this Part to the copyright owner shall be construed accordingly.

(3) In an action brought by an exclusive licensee by virtue of this section a defendant may avail himself of any defence which would have been available to him if the action had been brought by the copyright owner.

[cf. 1988 c. 48 s. 101 U.K.]

##### 113. Exercise of concurrent rights

(1) Subject to subsection (2), where an action for infringement of copyright brought by the copyright owner or an exclusive licensee relates (wholly or partly) to an infringement in respect of which they have concurrent rights of action, the copyright owner or, as the case may be, the exclusive licensee may not, without the leave of the court, proceed with the action unless the other is either joined as a plaintiff or added as a defendant.

(2) Where an action for infringement of copyright brought by an exclusive licensee relates (wholly or partly) to an infringement in respect of an infringing copy within the meaning of section 35(3), the exclusive licensee may not, without the leave of the court, proceed with the action unless the copyright owner is joined as a plaintiff.



- (3) 如專用特許持有人根據第(2)款申請在沒有版權擁有人加入作為原告人的情況下進行訴訟的許可，則除非有其他非版權擁有人或專用特許持有人所能控制的特別情況，而該等情況並非為訟費方面的考慮，否則法院不得批出許可。
- (4) 依據第(1)款加入作為被告人的版權擁有人或專用特許持有人，除非參與法律程序，否則無須對訴訟的任何訟費負上法律責任。
- (5) 本條的條文不影響法院應版權擁有人或專用特許持有人的單獨申請而批予非正式審判。
- (6) 凡就侵犯版權提起訴訟，而版權擁有人及專用特許持有人不論是在或過去就該訴訟(全部或部分)所關乎的侵犯版權同時具有訴訟權，則——
  - (a) 法院在評估損害賠償時須考慮——
    - (i) 特許的條款；及
    - (ii) 版權擁有人或專用特許持有人已就侵犯版權判給或可得的金錢上的補救；
  - (b) 如法院已就侵犯版權向他們當中的另一方判給損害賠償，或已指示交出所得利潤予另一方，則法院不得指示交出所得利潤；及
  - (c) 如有交出所得利潤的指示，法院須在他們之間的協議的規限下按法院認為公正而將利潤分攤給他們。
- (7) 版權擁有人或專用特許持有人是合時時是訴訟的一方，此等條文仍然適用。

不論版權擁有人或專用特許持有人是合時時是訴訟的一方，此等條文仍然適用。

(7) 版權擁有人或專用特許持有人是合時時是訴訟的一方，此等條文仍然適用。

(7) 版權擁有人或專用特許持有人是合時時是訴訟的一方，此等條文仍然適用。

具有權利的任何專用特許持有人；而法院可應專用特許持有人的申請，在該及該特許的條款及根據第 109 條作出其認為合適的命令。

[比照 1989 年 c. 28 s. 102 U.K.]

罪行

118. 製作侵犯版權物品等或進行侵犯版權物品等交易的刑事責任

- (1) 任何人如在沒有有關版權持有人的特許下，就版權作品的侵犯版權複製品作出下列事情，即屬犯罪——
  - (a) 製作該複製品作出售或出租之用；
  - (b) 將該複製品輸入香港，但並非供他私人和家居使用；
  - (c) 將該複製品輸出香港，但並非供他私人和家居使用；
  - (d) 為交易或業務的目的而作有該複製品，以期作出任何侵犯版權的行為；
  - (e) 為交易或業務的目的——
    - (i) 出售或出租該複製品；

(3) In an application for leave under subsection (2) to proceed with joining the copyright owner as plaintiff, the court shall not grant leave if there are exceptional circumstances, other than costs considerations, beyond the control of the copyright owner or exclusive licensee.

(4) A copyright owner or exclusive licensee who is added as a defendant in pursuance of subsection (1) is not liable for any costs in the action unless he takes part in the proceedings.

(5) The provisions of this section do not affect the grant of interlocutory relief on an application by a copyright owner or exclusive licensee alone.

(6) Where an action for infringement of copyright is brought which relates (wholly or partly) to an infringement in respect of which the copyright owner and an exclusive licensee have or had concurrent rights of action—

- (a) the court shall in assessing damages take into account
  - (i) the terms of the licence; and
  - (ii) any pecuniary remedy already awarded or available either of them in respect of the infringement;
- (b) the court shall not direct an account of profits if an award of damages has been made, or an account of profits has been directed, in favour of the other of them in respect of the infringement; and
- (c) the court shall if an account of profits is directed apportion profits between them as the court considers just, subject to any agreement between them,

and these provisions apply whether or not the copyright owner and exclusive licensee are both parties to the action.

(7) The copyright owner shall notify any exclusive licensee having concurrent rights before applying for an order under section 109 (order for delivery up); and the court may on the application of the licensee make an order under section 109 as it thinks fit having regard to the terms of the licence.

Offences

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 trade or business with a view to committing any act infringing the copyright;
  - (e) for the purpose of trade or business—
    - (i) sells or lets for hire;

UFC01-1989 14-11 FROM TO 24/3/02 P. 17

- (ii) 要約出售或要約出租該複製品，或為出售或出租而展示該複製品；
  - (iii) 公開展覽該複製品；或
  - (iv) 分發該複製品；或
  - (f) 並非為交易或業務的目的而分發該複製品，達到損害版權的擁有人的權利的程度。
- (2) 第(1)(b)及(c)及(4)(b)及(c)款並不適用於過境物品。
- (3) 任何被控第(1)款所訂罪行的人如證明他不知道亦無理由相信有關的複製品是版權作品的侵犯版權複製品，即可以此作為免責辯護。
- (4) 如任何人——
- (a) 製作任何物品；
  - (b) 將任何物品輸入香港；
  - (c) 將任何物品輸出香港；
  - (d) 管有任何物品；或
  - (e) 出售、出租、要約出售或要約出租任何物品，或為出售或出租而展示任何物品，
- 而該物品是經特定設計或改裝以供製作某版權作品的複製品，並且是用作或擬用作製作版權作品的侵犯版權複製品，以供出售或出租或用於交易或業務的目的，該人即屬犯罪。
- (5) 任何被控第(4)款所訂罪行的人如證明他不知道亦無理由相信該物品是用作或擬用作製作侵犯版權複製品，以供出售或出租或用於交易或業務的目的，即可以此作為免責辯護。
- (6) 如某版權作品的複製品係憑藉第 35(3)條而屬侵犯版權複製品，並且包括在第 35(4)條之內，則就第(1)(b)及(3)款而言，任何就該版權作品的複製品而被控第(1)款所訂罪行的人如證明——
- (a) 他已作出合理查實足以使他自己信納有關的複製品並非該作品的侵犯版權複製品；
  - (b) 他基於合理理由而信納在有關個案的情況下該複製品並非侵犯版權複製品；
  - (c) 沒有其他本會致使他合理地懷疑該複製品是侵犯版權複製品的情況，則他已證明他沒有理由相信有關的複製品是該版權作品的侵犯版權複製品。
- (7) 法院在裁定被控人是否已根據第(6)款證明他沒有理由相信有關的複製品是該作品的侵犯版權複製品時，可顧及的因素包括(但不限於)以下事項——
- (a) 他是否已就有關類別作品向有關的行業團體作出查實；

- (ii) offers or exposes for sale or hire;
- (iii) exhibits in public; or
- (iv) distributes; or
- (f) distributes otherwise than for the purpose of trade or business such an extent as to affect prejudicially the owner of the copyright 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 trade or business.

(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 copy for sale or hire or for use for the purpose of trade or business.

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

- (a) he had made reasonable enquiries sufficient to satisfy him 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) 他是否已給予通知促請有關的版權擁有人或專用特許持有人注意他在輸入及出售該作品的複製品方面的權益；
- (c) 他是否已遵從就有關類別作品的供應而可能存在的實務守則；
- (d) 對該控人作出的該等查究的回應(如有的話)是否合理和及時；
- (e) 他是否已獲得提供有關版權擁有人或專用特許持有人(視乎屬何情況而定)之姓名、地址及其聯絡之詳細資料；
- (f) 他是否已獲得有關作品首次發表之日期；
- (g) 他是否已獲得任何有關專用特許之證明。
- (8) 任何人如管有任何物品，而他知道或有理由相信該物品是用作或擬用作製作任何版權作品的侵犯版權複製品，以供出售或出租或用於交易或業務的目的，該人即屬犯罪。
- (9) 第 115 至 117 條(與版權有關的各種事宜的推定)不適用於就本條所訂罪行而提起的法律程序。

[比照 1988 c. 48 s. 107 U.K.]

#### 119. 第 118 條所訂罪行的罰則

- (1) 任何人犯第 118(1) 條所訂罪行，一經定罪，可就每份侵犯版權複製品處第 5 級罰款及監禁 4 年。
- (2) 任何人犯第 118(4) 或 (8) 條所訂罪行，一經循公訴程序定罪，可處罰款 \$500,000 及監禁 8 年。

- (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 trade or business.
- (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.]

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

- (1) A person who commits an offence under section 118(1) is liable on conviction to a fine at level 5 in respect of each infringing copy and to imprisonment for 4 years.
- (2) A person who commits an offence under section 118(4) or (8) is liable on conviction on indictment to a fine of \$500,000 and to imprisonment for 8 years.