

Bills Committee on Copyright (Amendment) Bill 2006 Directors'/Partners' Liability

Introduction

At the Bills Committee meeting on 12 May 2006, Members requested the Administration to provide justifications for introducing the proposed directors'/partners' liability (i.e., the proposed sections 118(2F) and 119B(6) in clauses 22 and 24 respectively of the Copyright (Amendment) Bill 2006), to address the concerns of some stakeholders (including the Consumer Council) about the shift in the burden of proof for the proposed offence and to set out similar provisions and the associated penalty level in other existing Ordinances. This paper provides the required information.

Justifications for the proposed directors'/partners' liability

2. The nature of business end-user piracy is very different from other types of copyright infringement where Customs can gather evidence through different investigation means, e.g. surveillance and observation, circumstantial evidence, etc, to pin down the person who has committed the offence. Business end-user piracy offences invariably occur within the confines of a company and Customs cannot conduct prior investigation to ascertain the liability of a director/partner of the company concerned or any of its senior personnel before it takes enforcement action to search the company. When infringing copies of computer software are found installed in a computer for use in the business operation of the company, very often the staff using the computer will claim that the computer was given by the company to them for use with software installed and they do not know who authorized the installation of the infringing copies. At the same time, the directors/partners or senior personnel of the company will usually refuse to answer questions during Customs enquiries. It is also hardly possible that other evidence can be obtained in this respect.

3. As a result, many cases of business end-user piracy would only result in the company, as a legal entity, being convicted and subjected to only a fine. The management of the company concerned may treat such fines as one element of the company's operational cost and have no incentive to put in place proper management measures to ensure that infringing copies would not be used in their business. The proposed directors'/partners' liability aims to promote corporate accountability and responsible governance to prevent business end-user piracy. It should be emphasized that the proposed liability only imposes an evidential burden on the directors and partners.

Right to presumption of innocence

4. During the discussion at the Bills Committee meeting on 12 May 2006, some Members were very concerned that the proposed directors'/partners' liability would be inconsistent with the right to be presumed innocent and the right to remain silent in criminal cases. The Consumer Council has also submitted to the Bills Committee that it has grave reservation over the reversed burden of proof and considers that the provision is too harsh on directors and partners and fundamentally changes the element of the criminal justice system. We have clarified with the Consumer Council and understand that they are concerned about the right to be presumed innocent.

5. The right to be presumed innocent is protected by both Article 14(2) of the International Covenant on Civil and Political Rights (ICCPR) and Article 11(1) of the Hong Kong Bill of Rights (HKBOR). The latter has incorporated the former in our domestic law and provides that "everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law". The presumption is also recognized in Article 87(2) of the Basic Law which states 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."

Legal versus evidential burden

6. Case law has established that when a statutory presumption imposes a legal burden, its consistency with Article 14(2) of ICCPR has to be examined having regard to the rationality and proportionality test. However, if a presumption only imposes an evidential burden on the defendant, it would **not** be objectionable on the ground of presumption of innocence. In *R v Lambert*¹, the House of Lords distinguished a legal/persuasive burden from an evidential one. Whilst the imposition of a legal burden on the accused would raise an issue of presumption of innocence, the imposition of an evidential burden would **not** have a similar effect. A legal burden of proof requires the defendant to prove, on the balance of probabilities, a matter which is essential to determine his guilt or innocence. An evidential burden, on the other hand, only requires the defendant to adduce sufficient evidence to raise an issue before it has to be determined as one of the facts of the case. The prosecution does not need to lead any evidence about it. But if it is put in issue, the burden of proof remains with the prosecution².

¹ [2001] 1 3 WLR 206.

² See Note 1 above, at 230-232

7. The case of *HKSAR v Lam Kwong Wai and Lam Ka Man* (CACC 213/2003) also considered the differences between evidential burden and the persuasive/legal burden in the light of section 20 of the Firearms and Ammunition Ordinance (Cap. 238) –

“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’ ...An evidential burden is **not** (emphasis added) in truth a burden of *proof* and it is this that primarily distinguishes it from a persuasive burden: the persuasive burden requires proof. The persuasive burden of proof is one 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].”Emmerson and Ashworth para 9-03.”

8. Lord Hope in *R v DPP Ex p Kebilene* [2000] 2 AC 326 made the following remarks –

“Statutory presumptions which place an ‘evidential’ burden on the accused, requiring the accused to do no more than raise a reasonable doubt on the matter with which they deal, do not breach the presumption of innocence (emphasis added). They take their place alongside the common law evidential presumptions which have been built up in the light of experience. They are a necessary part of preserving the balance of fairness between the accused and the prosecutor in matters of evidence. It is quite common in summary prosecutions for routine matters which may be inconvenient or time-consuming for the prosecutor to have to prove but which may reasonably be supposed to be within the accused’s own knowledge to be dealt with in this way. It is not suggested that statutory provisions of this kind are objectionable.”³

³ Quoted from paragraph 26 of the court ruling on *HKSAR v Lan Kwong Wai and Lam Ka Man*

9. Furthermore, the Court of Appeal in its decision in *HKSAR v Hung Chan Wa*⁴ made the following remarks about the reverse of evidential burden –

“The evidential burden requires that there is adduced sufficient evidence to raise an issue for the determination of the tribunal of fact. What is required to discharge the evidential burden has been the subject of different formulae. **The imposition of an evidential burden is not inconsistent with the presumption of innocence** (emphasis added). See *R v DDP ex parte Kebilene* [2002]2 AC 326, 379. That is because such a burden does not create the risk of a conviction in the face of a reasonable doubt as to an essential element of the crime.”

Proposed section 118(2F) and 119B(6)

10. We would like to reiterate that the proposed sections 118(2F) and 119B(6) in clauses 22 and 24 respectively of the Copyright (Amendment) Bill only impose an evidential burden on the concerned directors and partners. As mentioned in paragraph 7 above, in the case *HKSAR v Lam Kwong Wai and Lam Ka Man*, the court observed that “[t]he 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’”. This expression has been adopted in section 4(5) of the Prevention of Child Pornography Ordinance (Cap. 579) to clearly indicate the policy intention to impose an evidential burden (but not legal burden) on the defendant. Section 4(5) of the Prevention of Child Pornography Ordinance reads as follows –

“A defendant charged with an offence under section 3(3) is to be taken to have established any fact that needs to be established for the purpose of a defence under subsection (3)(c), (d) or (e) if—

- (a) sufficient evidence is adduced to raise an issue with respect to the fact; and
- (b) the contrary is not proved by the prosecution beyond reasonable doubt.”

11. The wording in the proposed sections 118(2G) and 119B(7) is modeled on section 4(5) of the Prevention of Child Pornography Ordinance. It is therefore absolutely clear **that the two proposed sections in the Bill only impose an evidential burden on the defendant.** Given the case law as

⁴ CACC 411/2003, 23 June 2005

elaborated above, it is considered that the two proposed sections are **not** inconsistent with the right to presumption of innocence.

12. To further clarify the type of evidence that the defendant may adduce, we have included in the proposed sections 118(2H) and 119B(8) a list of non-exhaustive factors for the court to consider (e.g. whether the defendant has introduced policies or practices against the use of infringing copies). The defendant only needs to adduce sufficient evidence to raise an issue with respect to the fact that he did not authorize the infringing act to be done. He does not need to establish the truth of that fact beyond reasonable doubt, or even on a balance of probabilities. If the court is satisfied that the defendant has adduced sufficient evidence to raise an issue with respect to that fact, the burden of proof is then shifted back to the prosecutions which will be required to prove beyond reasonable doubt the fact that the director or partner has authorized the infringing act to be done.

Local legislation imposing evidential burden on defendant

13. Our research indicates that there are other examples of local legislation imposing an evidential burden on the defendant in criminal cases. Apart from the wording adopted in the Prevention of Child Pornography Ordinance, the expressions “in the absence of evidence to the contrary” and “unless there is evidence to the contrary” are also used in a number of legislative provisions to impose an evidential burden on the defendant. The following are some relevant cases in which the expressions are construed by the court to have the said effect –

(a) **S.12(8) of the Banking Ordinance Cap. 155**

HKSAR V Chan Ying Ming Simon (DCCC No.677 of 1998)

S.12(8) provides that “For the purposes of any proceedings for an offence under subsection (6), if it is proved that a person took deposits on at least 5 separate occasions within any period of 30 days, that person shall, in the absence of evidence to the contrary, be deemed to have been carrying on a business of taking deposits.”

The court considered the threshold of 5 occasions within a 30 days’ period as rational and proportional. “**If a person triggers it, inadvertently or otherwise, it may be rebutted merely by ‘some evidence to the contrary’** (emphasis added). I think it strikes a justifiable balance. I therefore decline the defence application under the Bill of Rights to disregard section 12(8) of Cap.155.”

(b) **On s.121(3) Copyright Ordinance Cap. 528**
Tse Mui Chun V HKSAR (FACC No.4 of 2003)

S.121(3) provides that “The court before whom an affidavit which complies with the conditions in subsection (4) is produced under subsection (1)... shall presume, in the absence of evidence to the contrary,(a) that the statements made in the affidavit are true; and (b) that it was made and authenticated in accordance with subsection (4).”

On whether s.121(3) shifts the burden of proof, the court observed the following -

“As for the presumption in s.121(3) which only shifts the evidential burden, we are satisfied that it is a reasonable and proportionate response to a real need and that it is consistent with the presumption of innocence under our constitutional arrangements.

It is to be borne in mind that the evidential presumption under subsection (3) only persists “in the absence of evidence to the contrary” (emphasis added). In our opinion, a liberal meaning should be given to the word “evidence”. If a defendant is able to place any material before the trial court which casts doubt on the truth of the subsection (1) statements, the trial court is entitled, if the weight of the hearsay statements is relatively unimpressive, to treat the subsection (3) presumption as rebutted.”

14. Some criminal provisions in the local legislation containing the expressions “in the absence of evidence to the contrary” and “unless there is evidence to the contrary” and the penalty level of the respective offences are listed at Annex A. It should be noted that without the court interpretation on *each* of the provisions set out at Annex A, we cannot conclude if all of the provisions impose evidential burden on the defendant. In deciding whether a particular provision imposes an evidential burden or persuasive burden on a defendant, the court will consider a number of matters such as whether the offence is triable summarily or on indictment, the intent of the legislature in passing a particular provision, the nature of the offence and the mischief which the offence was aimed at, and the practical considerations of the ease or difficulty in the respective parties of discharging the burden of proof.

15. We have earlier submitted a paper to the Panel on Commerce and Industry regarding overseas practices on the liability of directors/partners for the misconduct of their corporate/partnership. That paper is attached at Annex B for Members’ reference.

Right to remain silent

16. As regards the concern that the proposed directors'/partners' liability is not consistent with the defendant's right to remain silent, we would like to point out that the proposed liability does not in any way compel the defendant to answer questions of the enforcement agency during the investigation. Nor does it compel the defendant to appear in the witness box and be cross-examined by the prosecution during the trial. Even with the proposed evidential burden on the defendant, the defendant himself could still refuse to give evidence personally. The evidential burden on the defendant may be discharged in many other ways e.g. the defendant may rely on documentary evidence or evidence by other witness or he may point to circumstantial evidence or evidence in the Prosecution's case in order to raise doubt. We do not think that the proposed directors'/partners' liability is inconsistent with the right to remain silent.

Commerce and Industry Branch
Commerce, Industry and Technology Bureau
May 2006

**Provisions containing the expression
“in the absence of evidence to the contrary”**

| Cap. No. | Ordinance | Section No. | Nature of the Presumption | Maximum Penalty Level* |
|-----------------|--|--------------------|---|--|
| Cap. 392 | Film Censorship Ordinance | s.21(3C) | in relation to the presumption of possession of videotape or laserdisc for publication | a fine at level 5 and imprisonment for 6 months |
| Cap. 390 | Control of Obscene and Indecent Articles Ordinance | s.32(b) | presumption of possession of an obscene article for publication | a fine of \$1,000,000 and imprisonment for 3 years |
| Cap. 464 | Timber Stores Ordinance | s.13(2) | in relation to whether the defendant operated, kept, managed or had control of a timber store | a fine at level 5 and imprisonment for 6 months |

* Note: The maximum penalty level for the business end-user possession offence (s.118(2A) and the proposed business end-user copying/distribution offence (s.119B) is a fine at level 5 (i.e. \$50000) in respect of each infringing copy and to imprisonment for 4 years.

| Cap. No. | Ordinance | Section No. | Nature of the Presumption | Maximum Penalty Level* |
|----------|-------------------------|------------------------|--|---|
| Cap. 34 | Money Changer Ordinance | s.11(5) s.11(6) | <ul style="list-style-type: none"> • presumption that the employer of the person who committed the offence to have not taken reasonable steps to prevent the commission • presumption that a partner of a money changer in partnership with another money changer who committed the offence to have not taken reasonable steps to prevent the commission | <ul style="list-style-type: none"> • for offence of not giving the written note to customer as required: a fine of \$5,000 and imprisonment for 6 months • for making false or misleading representation: a fine of \$5,000 and imprisonment for 6 months • for offences regarding transaction note: a fine of \$2,000 for a first offence, and a fine of \$5,000 and imprisonment for 6 months for a second or subsequent offence • for contravening advertising requirements: a fine of \$5,000 and imprisonment for 6 months |
| Cap. 406 | Electricity Ordinance | s.20(2) s.29(3) | <ul style="list-style-type: none"> • presumption of defendant's knowledge that his connection to electrical installation was likely to cause electrical accident • presumption of defendant's knowledge that an electrical product is prohibited | a fine of \$50,000 on a first conviction, and a fine of \$100,000 on a subsequent conviction for the same offence, and in either case imprisonment for 6 months |

| Cap. No. | Ordinance | Section No. | Nature of the Presumption | Maximum Penalty Level* |
|----------|----------------------|-------------|---|--|
| Cap. 151 | Societies Ordinance | s.28(2) | presumption that a person assists in the management of unlawful society where books, accounts, member lists, etc. of or relating to any unlawful society found in his possession | On conviction on indictment: a fine of \$100,000 and to imprisonment for 3 years |
| Cap. 51 | Gas Safety Ordinance | s.30(2) | presumption that offence committed by employee of a registered person was committed with knowledge and consent of the registered person and the registered person did not exercise all due diligence to prevent the commission of the offence | <ul style="list-style-type: none"> • for person who contravenes any direction specified in an improvement notice: a fine of \$25,000 and imprisonment for 6 months and, in the case of a continuing offence, a daily penalty of \$2,000 • for a person who puts a notifiable gas installation into service, or supplies gas to the installation which has been decommissioned by the Authority: a fine at level 4 and to imprisonment for 6 months and, in the case of a continuing offence, a daily penalty of \$2,000 • for person who remove or mark, or damage or destroy, a notice concerning decommissioned installation: a fine at level 2 |

| Cap. No. | Ordinance | Section No. | Nature of the Presumption | Maximum Penalty Level* |
|----------|-----------|-------------|---------------------------|---|
| | | | | <ul style="list-style-type: none">• for person who contravenes any requirement specified in a notice under section 14: a fine of \$10,000 and, in the case of a continuing offence, a daily penalty of \$1,000 • for person who contravenes section 15(1): a fine of \$25,000 and imprisonment for 6 months • for person who contravenes any requirement specified in a notice under section 21, or contravenes any requirement under section 23(2)(b): a fine of \$5,000 and imprisonment for 3 months • for person who-<ul style="list-style-type: none">(a) wilfully obstructs, resists or delays the Authority or an inspector in the exercise of his functions under the Ordinance; (b) fails, without reasonable excuse, to comply with any lawful requirement of the Authority or an inspector under the Ordinance; or |

| Cap. No. | Ordinance | Section No. | Nature of the Presumption | Maximum Penalty Level* |
|----------|---|-------------|---|---|
| | | | | <p>(c) makes a statement which he knows to be false or recklessly makes a statement which is false where the statement is made-</p> <p>(i) in purported compliance with a requirement under this Ordinance to furnish any information; or</p> <p>(ii) for the purpose of obtaining the issue of a document under this Ordinance to himself or another person:</p> <p>a fine of \$25,000 and imprisonment for 6 months</p> |
| Cap. 560 | Entertainment Special Effects Ordinance | s.50(4) | presumption that offence committed by employee or agent of a licence holder was committed with his knowledge and consent and the licence holder did not exercise all due diligence to prevent the commission of the offence | <ul style="list-style-type: none"> • for offence of using special effects material without a licence – (a) on a first conviction: a fine at level 6 and imprisonment for 6 months; and (b) on a second or subsequent conviction: a fine of \$200,000 and imprisonment for 12 months |

| Cap. No. | Ordinance | Section No. | Nature of the Presumption | Maximum Penalty Level* |
|----------|-----------|-------------|---------------------------|--|
| | | | | <ul style="list-style-type: none">• for offence of discharging special effect material not according to permit –<ul style="list-style-type: none">(a) on a first conviction: a fine at level 6 and imprisonment for 6 months; and(b) on a second or subsequent conviction: a fine of \$200,000 and imprisonment for 12 months• for offences of supply of special effects materials –<ul style="list-style-type: none">(a) for contravention of s.18(1) –<ul style="list-style-type: none">(i) on a first conviction: a fine at level 6 and imprisonment for 6 months; and(ii) on a second or subsequent conviction: a fine of \$200,000 and imprisonment for 12 months(b) for contravention of s.18(2) – |

| Cap. No. | Ordinance | Section No. | Nature of the Presumption | Maximum Penalty Level* |
|----------|-----------|-------------|---------------------------|---|
| | | | | <p>(i) on a first conviction: a fine at level 5 and imprisonment for 1 month; and</p> <p>(ii) on a second or subsequent conviction: a fine at level 6 and imprisonment for 3 months</p> <p>(c) for contravention of s.18(3) –</p> <p>(i) on a first conviction: a fine at level 4;</p> <p>(ii) on a second or subsequent conviction: a fine at level 5 and imprisonment for 1 month</p> <p>• for offence of not labelling special effects materials –</p> <p>(a) on a first conviction: a fine at level 5 and imprisonment for 3 months; and</p> <p>(b) on a second or subsequent conviction: a fine at level 6 and imprisonment for 6 months</p> |

| Cap. No. | Ordinance | Section No. | Nature of the Presumption | Maximum Penalty Level* |
|----------|---------------------------------|-------------|---|---|
| | | | | <ul style="list-style-type: none"> • for offence of storing special effects materials not according to licence – <ul style="list-style-type: none"> (a) on a first conviction: a fine at level 6 and imprisonment for 6 months; and (b) on a second or subsequent conviction: a fine of \$200,000 and imprisonment for 12 months |
| Cap. 456 | Consumer Goods Safety Ordinance | s.25 | presumption that consumer goods found in Hong Kong are not in transit or transshipment or manufactured for export | <ul style="list-style-type: none"> • for offence under section 22(1), (3) or (4) – <ul style="list-style-type: none"> (a) on first conviction: a fine at level 6 and imprisonment for 1 year; and (b) on subsequent conviction: a fine of \$500,000 and imprisonment for 2 years (c) for continuing offence: in addition to the fine, a fine of \$1,000 for each day during which it is proved to the satisfaction of the court that the offence has continued |

| Cap. No. | Ordinance | Section No. | Nature of the Presumption | Maximum Penalty Level* |
|-----------|--|-------------|---|--|
| | | | | <ul style="list-style-type: none"> • for offence under section 22(5), (6) or (7) or 23: a fine at level 3 and imprisonment for 1 year |
| Cap. 571 | Securities and Futures Ordinance | s.163(3) | presumption that an accused who destroyed any documents related to any audit required under the Ordinance did so with intent to prevent, delay or obstruct the carrying out of the audit | <ul style="list-style-type: none"> • on conviction on indictment: a fine of \$1,000,000 and imprisonment for 7 years • on summary conviction: a fine of \$500,000 and imprisonment for 1 year |
| Cap. 476A | Marine Parks and Marine Reserves Regulation | s.3(3) | presumption that a person in possession of fishing/hunting device in marine park in circumstances that give rise to reasonable suspicion that an offence of fishing/hunting without licence has been committed, committed the offence | a fine at level 4 and imprisonment for 1 year and, where the offence is a continuing offence, an additional fine of \$400 for each day during which it is proved to the satisfaction of the court that the offence has continued |
| Cap.95F | Fire Services (Fire Hazard Abatement) Regulation | s.19(3) | presumption that a person who offers for sale a controlled substance on the premises in circumstances that give rise to a reasonable belief that the controlled substance is to be transferred to the fuel tank of | <ul style="list-style-type: none"> • on a first conviction: a fine at level 6 and imprisonment for 6 months • on a subsequent conviction: a fine of \$200,000 and imprisonment for 1 year |

| Cap. No. | Ordinance | Section No. | Nature of the Presumption | Maximum Penalty Level* |
|----------|-------------------|-------------|--|--|
| | | | motor vehicle, possesses the controlled substance on the premises for the purpose of a business of supplying it for transferring to the fuel tank of a motor vehicle | |
| Cap. 155 | Banking Ordinance | s.12(8) | a person deemed to be carrying on a business of taking deposit if he took deposits on at least 5 occasions within 30 days | for carrying on a business of deposit taking without authorization – <ul style="list-style-type: none">• on conviction upon indictment: a fine at tier 8 and imprisonment for 5 years• on summary conviction: a fine at tier 5 and imprisonment for 6 months |

**Provisions containing the expression
“unless there is evidence to the contrary”**

| Cap. No. | Ordinance | Section No. | Nature of the Offence | Penalty Level* |
|-----------------|--------------------|--------------------|---|--|
| Cap. 148 | Gambling Ordinance | s.19(1), (2) & (3) | presumption that the place is a gambling establishment; that a person found in a gambling establishment has been gambling therein; that money found in such premises has been used in unlawful gambling | <ul style="list-style-type: none">• for person who operates or manages or otherwise controls unlawful gambling in any place whatsoever, a fine of \$50,000 and imprisonment for 2 years• for person who gambles unlawfully in any such place or in any street –<ul style="list-style-type: none">(a) on first conviction: a fine of \$10,000 and imprisonment for 3 months;(b) on second conviction: a fine of \$20,000 and imprisonment for 6 months;(c) on third or subsequent conviction: a fine of \$30,000 and imprisonment for 9 months |

| Cap. No. | Ordinance | Section No. | Nature of the Offence | Penalty Level* |
|----------|------------------------|--|--|--|
| Cap. 562 | Broadcasting Ordinance | s.6(3),(4), (5) s.7(3A), (3B), (3C) | <p>S.6 criminalizes the commercial dealing (i.e. in the course of trade or business, import, export, manufacture, sell, offer for sale or let for hire) and possession for business use or business use of an unauthorised decoder. S.7 criminalizes the commercial dealing of decoders and reception equipment for television programme service on subscription basis without licence.</p> <p>The presumption at s.6(3) and s.7(3A) concerns presumption of knowledge, i.e. the person possessing the decoder knew that the decoder was an unauthorized decoder or decoders restricted under section 7.</p> | <p>for offences under s.6 –</p> <ul style="list-style-type: none"> • on summary conviction: a fine at level 6 and imprisonment for 2 years • on conviction on indictment: a fine of \$1,000,000 and imprisonment for 5 years <p>for offences under s.7 –</p> <ul style="list-style-type: none"> • on summary conviction: a fine at level 6 and imprisonment for 2 years • on conviction on indictment: a fine of \$1,000,000 and imprisonment for 5 year |

| Cap. No. | Ordinance | Section No. | Nature of the Offence | Penalty Level* |
|-----------------|------------------|--------------------|---|-----------------------|
| | | | <p>The presumption at s.6(4) and s.7(3B) presumes that, where a body corporate / partnership has done an offending act under section 6 or 7, a director/ partner of the body corporate/ partnership shall be presumed also to have done the offending act.</p> <p>S.6(5) and s.7(3C) concern presumption of possession, i.e. the unauthorized decoders/ decoders restricted under section 7 on premises are presumed to be in the possession of the licensee, tenant, lessee, occupier, person in charge and owner of the premises.</p> | |

Legislative Council Panel on Commerce and Industry

Liability of directors and partners

Purpose

At the meeting of the Panel on 15 November 2005, the Administration was asked to prepare a paper on overseas practices on the liability of directors/partners for the misconduct of their corporate/partnership. This paper sets out the results of our research regarding the laws of other jurisdictions.

Background

2. Under the existing section 125 of the Copyright Ordinance, a director or partner may be liable if he has given consent or connivance to an infringing act committed by his corporate or committed by another partner in the partnership. Enforcement experience reveals that it is not easy for the prosecutions to prove that the offence had been committed with the consent or connivance of, or to be attributable to any act on the part of, the director or the partner concerned. As a result, many cases of business end-user piracy would only result in the company, as a legal entity, being convicted and subjected to only a fine. The management of the companies concerned may treat such fines as one element of the company's operational cost and have no incentive to put in place proper management measures to ensure that infringing copies would not be used in their business.

3. To promote corporate accountability and responsible governance to prevent business end-user piracy, the Administration proposes to introduce a new offence under the Copyright Ordinance (Cap. 528) to the effect that if a body corporate or partnership has done an act attracting the business end-user criminal liability, the directors or partners responsible for the internal management of the body corporate or partnership would be liable unless they can show that they have not authorized the infringing act to be done. If there is no such director or partner, the persons responsible for the internal management of the body corporate or partnership under the immediate authority of the directors or partners would be liable. Under this proposal, the concerned directors, partners or senior officers might be personally liable for corporate misconduct in consequence of the positions they held or the managerial functions they performed in their corporations or partnerships.

4. When the proposal was discussed at the meeting of this Panel on 15 November 2005, Members were concerned about the implied shift of burden of proof to the directors/partners under the proposed offence. Noting that the Broadcasting Ordinance (Cap. 562) also contained similar provisions on the liability of directors and partners for the use of unauthorized decoders in business, Members requested the Administration to also draw reference from overseas practices.

Overseas practices

5. The Administration has studied the legislation in the United Kingdom, Singapore, the United States and Australia. As the issue of directors' and partners' liability for the misconduct of their companies could cover a broad range of subjects, the information set out in the ensuing paragraphs represent the available information that we could identify with our best efforts.

Intellectual property related offences

6. Provisions similar to the existing section 125 of the Copyright Ordinance can be found in the intellectual property legislation in the United Kingdom and Singapore⁵. Under these provisions, the prosecution has to prove that the offence had been committed with the consent or connivance of, or to be attributable to any act on the part of, the director or the partner concerned. Besides, there are also provisions in the intellectual property legislation in the United Kingdom and Singapore imposing liability on partners for offences committed by the partnership. The concerned provisions⁶ have the effect that where a partnership is guilty of an offence under the relevant legislation, every partner, other than a partner who is proved to have been ignorant of or to have attempted to prevent the commission of the offence, is also guilty of the offence and liable to be proceeded against and punished accordingly. However, no similar liability is imposed on the directors of body corporate.

⁵ The concerned provisions are –

(a) section 110(1) and (2) of UK Copyright, Designs and Patents Act 1988, section 113(1) of the UK Patents Act 1977 and section 101(5) of the UK Trade Marks Act 1994; and
(b) section 201B(4) of Copyright Act, section 107(4) of Trade Marks Act and section 102(1) of Patents Act of Singapore.

⁶ The concerned provisions are section 101(4) of the Trade Marks Act 1994 of the United Kingdom, as well as section 201B(3) of the Copyright Act, section 107(3) of the Trade Marks Act and section 102(5) of the Patents Act of Singapore.

Offences in other areas

7. Liability provisions on directors and other officers having managerial functions are found in certain Commonwealth, State and Territory legislation in Australia concerning environmental protection, occupational health and safety, hazardous goods and fair trading. Some provisions impose liability on the directors of a body corporate which committed an offence; some provisions impose liability on the executive officer who is concerned with, or has taken part in, the corporation's management, whatever the person's position is called and whether or not the person is a director of the corporation. Some provisions impose a legal burden on a defendant to prove on balance of probabilities any defence that has been raised. Details of the relevant provisions are at Annex.

8. Separately, Courts in the United States have developed a "responsible corporate officer" doctrine in the context of food and drug legislation. Under this doctrine, the liability of a corporation under certain statutes concerning the health and well-being of an individual could be imputed to a corporate officer by reason of his position in the corporation. The courts take the view that persons vested with the necessary responsibilities and power in business enterprises whose services and products affect the health and well-being of the public should assume more stringent responsibilities. That is, such persons should not only have a positive duty to seek out and remedy violations when they occur but also a duty to implement measures that will ensure the violations will not occur, otherwise the persons concerned may be liable for the misconduct of the corporation.

Commerce and Industry Branch
Commerce, Industry and Technology Bureau
April 2006

Derivative liability in Australia

Environmental legislation

Section 91(1) of the Waste Management and Pollution Control Act 1988 (Northern Territory) provides that where a body corporate commits an offence under the Act, every person who is a director of or who is concerned in the management of the body corporate is to be taken to have committed the same offence. Section 91(2) provides that it is a defence if the defendant establishes that –

- (a) the body corporate had, under this Act, a defence to the offence that the defendant is, apart from this section, to be taken to have committed;
- (b) the act or omission that constituted the offence took place without the defendant's authority, permission or consent;
- (c) the defendant did not know, and ought not reasonably be expected to have known, that the offence was to be or was being committed and took all reasonable steps to prevent or stop the commission of the offence; or
- (d) the defendant could not by the exercise of reasonable diligence have prevented the commission of the offence by the body corporate.

Section 493 of the Environmental Protection Act 1994 (Queensland) provides that if a corporation commits an offence under any provision of the Act, each of the executive officers of the corporation also commits an offence, namely, the offence of failing to ensure that the corporation complies with the Act. However, it is a defence for an executive officer to prove –

- (a) if the officer was in a position to influence the conduct of the corporation in relation to the offence – the officer took all reasonable steps to ensure the corporation complied with the provision; or

- (b) the officer was not in a position to influence the conduct of the corporation in relation to the offence.

Occupational health and safety

Section 26 of the Occupational Health and Safety Act 2000 (New South Wales) provides that if a corporation contravenes any provision of the Act, each director of the corporation, and each person concerned in the management of the corporation, is taken to have contravened the same provision unless the director or person satisfies the court that –

- (a) he or she was not in a position to influence the conduct of the corporation in relation to its contravention of the provision, or
- (b) he or she, being in such a position, used all due diligence to prevent the contravention by the corporation.

Section 167 of the Workplace Health and Safety Act 1995 (Queensland) provides that if a corporation commits an offence under any provision of the Act, each of the corporation's executive officers¹ also commits an offence, namely, the offence of failing to ensure that the corporation complies with the provision. However, it is a defence for an executive officer to prove –

- (a) if the officer was in a position to influence the conduct of the corporation in relation to the offence—the officer exercised reasonable diligence to ensure that the corporation complied with the provision; or
- (b) the officer was not in a position to influence the conduct of the corporation in relation to the offence.

¹ Schedule 3 of the Act defines executive officer of a corporation, to mean a person who is concerned with, or takes part in, the corporation's management, whether or not the person is a director or the person's position is given the name of executive officer.

Hazardous goods

Section 42(5) of the Road and Rail Transport (Dangerous Goods) Act 1997 (New South Wales) provides that if a body corporate commits an offence under the Act, a person who is a director, secretary or manager of the body corporate or who is otherwise concerned in the management of the body corporate is liable to be punished as an individual who has been found guilty of the offence unless the person satisfies the court that –

- (a) the person did not know that the offence was committed, or
- (b) the person was not in a position to influence the conduct of the body corporate in relation to the offence, or
- (c) the person took reasonable precautions and exercised due diligence to prevent the commission of the offence.

Section 173 of the Dangerous Goods Safety Management Act 2001 (Queensland) provides that if a corporation commits an offence under any provision of the Act, each of the corporation's executive officers also commits an offence, namely, the offence of failing to ensure that the corporation complies with the provision. However, it is a defence for an executive officer to prove –

- (a) if the officer was in a position to influence the conduct of the corporation in relation to the offence—the officer exercised reasonable diligence to ensure the corporation complied with the provision; or
- (b) the officer was not in a position to influence the conduct of the corporation in relation to the offence.

Fair trading legislation

Section 96 of the Fair Trading Act 1989 (Queensland) provides that if a body corporate commits an offence under the Act, each director or member of the governing body of the body corporate shall, subject to

section 97, be taken also to have committed the offence and is liable to be proceeded against and punished accordingly. Under section 97, it is a defence if the defendant establishes –

- (a) that the contravention in respect of which the proceeding was instituted was due to reasonable mistake; or
- (b) that the contravention in respect of which the proceeding was instituted was due to reasonable reliance on information supplied by another person²; or
- (c) that –
 - (i) the contravention in respect of which the proceeding was instituted was due to the act or default of another person, to an accident or to some other cause beyond the defendant’s control; and
 - (ii) the defendant took reasonable precautions and exercised due diligence to avoid the contravention.

² Section 97(2) provides that “another person” does not include a person who was—(a) a servant or agent of the defendant; or (b) in the case of a defendant being a body corporate—a director, servant or agent of the defendant; at the time when the contravention occurred.