

Bills Committee on Shenzhen Bay Port Hong Kong Port Area Bill

Examples to illustrate the operation of clause 8

Purpose

Pursuant to the discussion at the meeting on 16 March 2007, this paper provides examples to illustrate the operation of clause 8.

Background

2. The general approach adopted in the Bill is that the territorial limit of pre-existing rights and obligations would not be affected by the enactment of the Bill. The only exceptions are those that are covered by clauses 9¹ and 10², which are listed in Schedule 2 and Part 2 of Schedule 4. Clause 8 clarifies that clause 5(4)³ cannot lend support to the contention that the territorial limit of a pre-existing right or obligation is extended to include the Hong Kong Port Area (“HKPA”).

¹ Clause 9 deals with the extension of the territorial limit of certain pre-existing rights or obligations arising from the exercise or performance of statutory powers or duties. Such pre-existing rights and obligations are set out in Schedule 2 to the Bill (e.g. deportation orders, removal orders, certain licences, etc.).

² Clause 10 deals with the extension of the territorial limit of the rights and obligations imposed by certain pre-existing court orders. Such pre-existing court orders are set out in Part 2 of Schedule 4 to the Bill (e.g. prohibition orders, warrants for the arrest of a person, court orders admitting a person as a barrister or as a solicitor, certain detention orders, certain injunction orders, etc.).

³ Clause 5(4) provides that for the purpose of applying the laws of Hong Kong in the HKPA, the HKPA is regarded as an area lying within Hong Kong.

3. Clause 8 avoids any unnecessary argument in any civil, criminal or other proceedings (e.g. disciplinary proceedings) that the territorial limit of a particular pre-existing right or obligation is extended on the basis of clause 5(4), which provides that for the purposes of applying the laws of Hong Kong to the HKPA, the HKPA is regarded as lying within Hong Kong.

Examples to illustrate the operation of clause 8

4. By virtue of clause 8, it may not be argued (for example) that a pre-existing copyright licence that enables the sale of copies of a copyright work in Hong Kong only will enable the sale of copies of the copyright work in the HKPA on the basis of clause 5(4).

5. Similarly, in any criminal proceedings for an offence under section 118(1) of the Copyright Ordinance (Cap. 528) (which, *inter alia*, prohibits the sale in Hong Kong of infringing copies of a copyright work without the licence of the copyright owner) (see copy **at Annex**), the defendant may not raise the argument that a pre-existing licence granted to him that enables the sale of copies of the copyright work in Hong Kong only is also a licence that enables him to sell the infringing copies in the HKPA on the basis of clause 5(4).

Security Bureau

21 March 2007

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Chapter: 528 Title: COPYRIGHT ORDINANCE Gazette Number: L.N. 46 of 2001
 Section: 118 Heading: **Criminal liability for making or dealing with infringing articles, etc.** Version Date: 01/04/2001

Expanded Cross Reference:
115, 116, 117

Remarks:

The Copyright (Suspension of Amendments) Ordinance (Cap 568) provides for the suspension of the operation of certain amendments in relation to this section effected by the Intellectual Property (Miscellaneous Amendments) Ordinance 2000 (64 of 2000).

Offences

(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, in the course of, or in connection with, any trade or business with a view to committing any act infringing the copyright; (Amended 64 of 2000 s. 7)
- (e) for the purpose of, in the course of, or in connection with, any trade or business- (Amended 64 of 2000 s. 7)
 - (i) sells or lets for hire;
 - (ii) offers or exposes for sale or hire;
 - (iii) exhibits in public; or
 - (iv) distributes; or
- (f) distributes (otherwise than for the purpose of, in the course of, or in connection with, any trade or business) to such an extent as to affect prejudicially the owner of the copyright, (Amended 64 of 2000 s. 7)

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, in the course of, or in connection with, any trade or business. (Amended 64 of 2000 s. 7)

(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 copies for sale or hire or for use for the purpose of, in the course of, or in connection with, any trade or business. (Amended 64 of 2000 s. 7)

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

- (a) he had made reasonable enquiries sufficient to satisfy himself 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) 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, in the course of, or in connection with, any trade or business. (Amended 64 of 2000 s. 7)

(8A) It is immaterial for the purpose of subsections (1)(d) and (e), (4) and (8) whether or not the trade or business consists of dealing in infringing copies of copyright works. (Added 64 of 2000 s. 7)

(9) Sections 115 to 117 (presumptions as to various matters connected with copyright) do not apply to proceedings for an offence under this section. < * Note - Exp. X-Ref.: Sections 115, 116, 117 * >

[cf. 1988 c. 48 s. 107 U.K.]

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