

- (6) Copyright does not subsist in a broadcast which infringes, or to the extent that it infringes, the copyright in another broadcast or in a cable programme.

[cf. 1988 c 48 s 6 U.K.]

[8.01] Enactment history

Subsection (5) was amended pursuant to s 28 of the Telecommunication (Amendment) Ordinance 2000 (36 of 2000).

[8.02] England

Cf s 6 of the Copyright, Designs and Patents Act 1988 c 48 [Eng].

[8.03] Subsection (1): Broadcast

Television broadcasts and sound broadcasts are both included. To be capable of being lawfully received, the transmission must have been licensed in accordance with the relevant statutory provisions. For television broadcasting licences, see ss 8–11 of the Broadcasting Ordinance (Cap 562); for sound broadcasting licences, see Part IIIA of the Telecommunications Ordinance (Cap 106). For 'reception', see sub-s (5).

[8.04] Members of the public

In line with the liberal qualification requirements in s 177 below, the public may be that in Hong Kong or elsewhere. 'Public' is not further defined, but see s 27 below regarding infringement of copyright by public performance and s 81 below as to free public showing or playing of broadcasts.

[8.05] Subsection (3)

Only persons providing or having responsibility for the contents of a programme shall have the rights and liabilities in relation to a broadcast. Carriers are excluded.

[8.06] Subsection (4)

This is wider than its corresponding English provision, s 6(4) of the Copyright, Designs and Patents Act 1988 c 48 [Eng], which refers to satellite transmission only. It is the transmission, not reception, of programme-carrying signals that requires a licence.

[8.07] Subsection (5)

Relay is an electrical arrangement or apparatus receiving and passing on messages.

[8.08] Subsection (6)

In contrast with ss 6(2) and 7(4) above, this subsection does not refer to copies. Instead it precludes the subsistence of copyright (see [2.03] above) in a broadcast which infringes the copyright in another broadcast or in a cable programme. A repeat broadcast is not excluded and may enjoy copyright protection provided that it is broadcast before the expiry of the copyright in the original broadcast: see s 20(3) below.

[8.09] Definitions

For 'copyright', see s 2 above; for 'cable programme', 'sounds' and 'visual images', see s 9 below; for 'making available ... of copies', see s 26 below; for 'performance', see s 27 below; and for 'telecommunications system' and 'wireless telegraphy', see s 198(1) below.

9 Cable programmes

(1) In this Part-

"cable programme" (有線傳播節目) means any item included in a cable programme service;

"cable programme service" (有線傳播節目服務) means a service which consists wholly or mainly in the lawful sending by any person, by means of a telecommunications system (whether run by himself or by any other person), of sounds, visual images, other information or any combination of them either- (Amended 36 of 2000 s 28)

(a) for lawful reception, otherwise than by wireless telegraphy, at 2 or more places in Hong Kong or elsewhere, whether they are so sent for simultaneous reception or at different times in response to requests made by different users of the service; or

(b) for lawful reception, by whatever means, at a place in Hong Kong or elsewhere for the purposes of their being presented there either to members of the public or to any group of persons,

and includes such a service that has as a component a multipoint microwave distribution system, but does not include the services excepted under subsection (2);

"interconnection" (互相連接) includes interconnection that involves a change of technical characteristics, format or parameters;

"sounds" (聲音), for the purposes of the exclusion in subsection (2)(a), means speech or music or both except

that they do not include, in relation to any telecommunications system, speech providing information for the purpose of facilitating the use of a telecommunications service provided by means of that system; (Amended 36 of 2000 s 28)

“visual images” (影像), for the purposes of the exclusion in subsection (2)(a), means visual images which are such that sequences of them may be seen as moving pictures.

(2) The following are excepted from the definition of ‘cable programme service’-

- (a) a service (such as the services commonly known as video conferencing and video telephony) which consists wholly or mainly in the transmission of sounds or visual images or both by any person if it is an essential feature of the service that, while they are being transmitted, there will or may be transmitted from each place of reception, by means of the telecommunications system or (as the case may be) the part of it by means of which they are transmitted, sounds or visual images or both for reception by that person; (Amended 36 of 2000 s 28)
- (b) a service for making available to the public of copies of works or fixations of performances, but excluding a service in which the transmission of moving visual representational images is an essential feature (such as the service commonly known as video-on-demand);
- (c) the running by a broadcaster of a telecommunications system in the case of which every transmission made by it is either- (Amended 36 of 2000 s 28)
 - (i) a transmission, by wireless telegraphy, from a transmitting station for general reception of sounds, visual images or signals serving for the impartation (whether as between persons and persons, things and things or persons and things) of any matter otherwise than in the form of sounds or visual images; or
 - (ii) a transmission within a single set of premises of sounds, visual images or such signals which are to be or have been so transmitted;
- (d) the running of a telecommunications system in the case of which the only agency involved in the

transmission of things thereby transmitted is light and the things thereby transmitted are so transmitted as to be capable of being received or perceived by the eye and without more; (Amended 36 of 2000 s 28)

- (e) the running by a person of a telecommunications system which is not connected to another telecommunications system and in the case of which all the apparatus comprised therein is situated either- (Amended 36 of 2000 s 28)
 - (i) on a single set of premises in single occupation (other than a service operated as part of the amenities provided for residents or inmates of premises run as a business); or
 - (ii) in a vehicle, vessel, aircraft or hovercraft or in 2 or more vehicles, vessels, aircraft or hovercraft mechanically coupled together;
- (f) the running by a single individual of a telecommunications system which is not connected to another telecommunications system and in the case of which- (Amended 36 of 2000 s 28)
 - (i) all the apparatus comprised therein is under his control; and
 - (ii) everything transmitted by it that is speech, music and other sounds, visual images, signals serving for the impartation (whether as between persons and persons, things and things or persons and things) of any matter otherwise than in the form of sounds or visual images, or signals serving for the actuation or control of machinery or apparatus is transmitted solely for his domestic purposes, and references in paragraph (e) and this paragraph to another telecommunications system do not include references to such a system as is mentioned in paragraph (c) (whether run by a broadcaster or by any other person); or (Amended 36 of 2000 s 28)
- (g) in the case of a business carried on by a person, the running, for the purposes of the business, of a telecommunications system which is not connected to another telecommunications system and with respect to which the following conditions are satisfied- (Amended 36 of 2000 s 28)

- (i) that no person except the person carrying on the business is concerned in the control of the apparatus comprised in the system;
 - (ii) that nothing that is speech, music and other sounds, visual images, signals serving for the impartation (whether as between persons and persons, things and things or persons and things) of any matter otherwise than in the form of sounds or visual images, or signals serving for the actuation or control of machinery or apparatus is transmitted by the system by way of rendering a service to another;
 - (iii) that, in so far as sounds or visual images are transmitted by the system, they are not transmitted for the purpose of their being heard or seen by persons other than the person carrying on the business or any employees of his engaged in the conduct thereof;
 - (iv) that, in so far as signals serving for the impartation (whether as between persons and persons, things and things or persons and things) of any matter otherwise than in the form of sounds or visual images are transmitted by the system, they are not transmitted for the purpose of imparting matter otherwise than to the person carrying on the business, any employees of his engaged in the conduct thereof or things used in the course of the business and controlled by him; and
 - (v) that, in so far as signals of speech, music and other sounds are transmitted by the system, they are not transmitted for the purpose of actuating or controlling machinery or apparatus used otherwise than in the course of the business.
- (3) The Chief Executive in Council may by order amend subsection (2) so as to remove exceptions, subject to such transitional provision as appears to him to be appropriate. (Amended 22 of 1999 s 3)
- (4) References in this Part to the inclusion of a cable programme

or work in a cable programme service are to its transmission as part of the service; and references to the person including it are to the person providing the service.

- (5) Copyright does not subsist in a cable programme if-
- (a) it is included in a cable programme service by reception and immediate re-transmission of a broadcast; or
 - (b) it infringes, or to the extent that it infringes, the copyright in another cable programme or in a broadcast.

[cf. 1988 c 48 s 7 U.K. & 1956 c 74 s 14A U.K.]

[9.01] Enactment history

Subsections (1) and (2)(a), (c), (d), (e), (f) and (g) were amended pursuant to s 28 of the Telecommunication (Amendment) Ordinance 2000 (36 of 2000).

Subsection (3) was amended pursuant to s 3 of the Adaptation of Laws (No 8) Ordinance 1999 (22 of 1999).

[9.02] England

Cf s 7 of the Copyright, Designs and Patents Act 1988 c 48 [Eng] and s 14A of the Copyright Act 1956 c 74 [Eng] c 74 [Eng].

[9.03] Cable programme

It was in 1985 that cable programmes began to be recognised as a new and separate category of copyright work in England. By virtue of the Cable and Broadcasting Act 1984 c 46 [Eng] (now repealed), a new s 14A was added to the Copyright Act 1956 c 74 [Eng] to confer copyright on cable programmes made after 1 January 1985.

[9.04] Cable programme service

To take account of the advancement in technology, the definition of 'cable programme service' in this section is more elaborate than its counterpart in s 7(1) of the Copyright, Designs and Patents Act 1988 c 48 [Eng].

[9.05] Wholly or mainly

This phrase further extends the scope of this category of copyright work.

[9.06] Interconnection

Cf s 36A(3E) of the Telecommunications Ordinance (Cap 106) which defines interconnection as any connection between systems or services or elements of systems or services for the delivery of any communication, message or signal over the connection, including interconnection to a system, to a service, between systems, between services and between a system and a service.

[9.07] Sounds

Referring specifically to speech and music, this is narrower than the meaning of sounds in s 6 above, which may include natural as well as mechanical sounds. Such a narrow definition is appropriate in the context of video conferencing or video telephony: see sub-s (2) below.

[9.08] Visual images

The limitation to moving pictures is appropriate in the context of video conferencing or video telephony: see sub-s (2) below.

[9.09] Subsection (2)

Referring to new types of service, such as video conferencing and video telephony in para (a), and video-on-demand in para (b), this subsection is clearer and more up-to-date than s 7(2) of the Copyright, Designs and Patents 1988 Act c 48 [Eng]. To ensure that the definition reflects the current state of the industry, the exceptions may be removed if necessary: see sub-s (3).

[9.10] Premises

The word 'premises' is defined differently for different purposes. It is, for instance, defined in s 81 of the Interpretation and General Clauses Ordinance (Cap 1), s 2 of the Organized and Serious Crimes Ordinance (Cap 455) and s 2 of the Trade Descriptions Ordinance (Cap 362) as including, inter alia, any vessel, vehicle or aircraft. Such a broad definition is, however, unnecessary in the present context given that para (e)(ii) to the definition of 'cable programme service' has already separately referred to a vehicle, vessel or aircraft. It is therefore suggested that the simple definition of 'premises' as including any place, but excluding any vessel, as is provided in s 2 of the Fire Services Ordinance (Cap 95), is to be preferred.

[9.11] Chief Executive in Council

This was inserted to substitute for 'Governor in Council' pursuant to s 3 of the Adaptation of Laws (No 8) Ordinance 1999 (22 of 1999). It means the Chief Executive acting after consultation with the Executive Council; the Interpretation and General Clauses Ordinance (Cap 1) s 3.

[9.12] Definitions

For 'copyright', see s 2 above; for 'broadcast', see s 8 above; for 'making available ... of copies', see s 26 below; and for 'business', 'employee', 'telecommunications system', 'wireless telegraphy', see s 198(1) below.

For 'telecommunications service', see the Telecommunications Ordinance (Cap 106) s 2.

10 Published editions

- (1) In this Part "published edition" (已發表版本), in the context of copyright in the typographical arrangement of a published edition, means a published edition of the whole or any part of one or more literary, dramatic or musical works.
- (2) Copyright does not subsist in the typographical arrangement of a published edition if, or to the extent that, it reproduces the typographical arrangement of a previous edition.

[cf. 1988 c 48 s 8 U.K.]

[10.01] England

Cf s 8 of the Copyright, Designs and Patents Act 1988 c 48 [Eng].

[10.02] General note

The law was unclear under the Copyright Act 1956 c 74 [Eng], which in s 15(1) provided that copyright shall subsist in every published edition of any literary, dramatic or musical work without specifying which component of the edition is being protected. Now, it is clear that copyright subsists in the typographical arrangement of a published edition, provided that such arrangement does not merely reproduce the typographical arrangement of a previous edition: see sub-s (2). In the case of a newspaper, it has been held that the typographical arrangement refers to that of the whole newspaper, not of each article published therein: see *Newspaper Licensing Agency Ltd v Marks and Spencer Plc* [2000] 4 All ER 239, [2000] 3 WLR 1256, [2001] RPC 5 (p 76), [2000] EMLR 704 (CA).

[10.03] Published edition

The term 'publication' is defined in s 196(1) below as the issue or making available of copies of a work to the public, and 'published' is to be construed accordingly. Note that s 10(1) refers specifically to the published edition of a literary, dramatic or musical work. Artistic works are not included because their publication does not entail any typographical arrangement.

[10.04] Definitions

For 'copyright', see s 2 above; and for 'dramatic work', 'literary work' and 'musical work', see s 4(1) above.

11 Authorship of work**Authorship and ownership of copyright**

- (1) In this Part "author" (作者), in relation to a work, means the person who creates it.
- (2) That person is taken to be-
 - (a) in the case of a sound recording, the producer;
 - (b) in the case of a film, the producer and the principal director;
 - (c) in the case of a broadcast, the person making the broadcast (see section 8(3)) or, in the case of a broadcast which relays another broadcast by reception and immediate re-transmission, the person making that other broadcast;
 - (d) in the case of a cable programme, the person providing the cable programme service in which the programme is included;
 - (e) in the case of the typographical arrangement of a published edition, the publisher.
- (3) In the case of a literary, dramatic, musical or artistic work which is computer-generated, the author is taken to be the person by whom the arrangements necessary for the creation of the work are undertaken.
- (4) For the purposes of this Part a work is of "unknown authorship" if the identity of the author is unknown or, in the case of a work of joint authorship, if the identity of none of the authors is known.
- (5) For the purposes of this Part the identity of an author is regarded as unknown if it is not possible for a person to ascertain his identity by reasonable inquiry; but if his identity is once known it shall not subsequently be regarded as unknown.

[cf. 1988 c 48 s 9 U.K.]

[11.01] England

Cf s 9 of the Copyright, Designs and Patents Act 1988 c 48 [Eng].

[11.02] Author

Authorship and ownership are two different concepts in copyright law. The author of a work is the one who creates it whereas its owner is the one who has the exclusive right to do the acts stipulated in s 22 below, including the right to copy, to issue copies to the public, and so on. To facilitate the identification of the author, any person who is named as the author on the surface of the work or its copies is so presumed until the contrary is proved: see ss 115 and 116 below. Generally speaking, the author of a work is the first owner of any copyright in it: see s 13 below. However, this general principle is subject to exceptions: see ss 14, 15 and 16 below.

[11.03] Computer-generated

A computer as such cannot be the author of a copyright work. It was so held in *Express Newspapers Plc v Liverpool Daily Post & Echo Plc* [1985] 3 All ER 630, [1985] FSR 306, although the Copyright Act 1956 c 74 [Eng] did not refer specifically to computer-generated works.

[11.04] Definitions

For 'dramatic work', 'literary work' and 'musical work', see s 4(1) above; for 'artistic work', see s 5 above; for 'sound recording', see s 6 above; for 'film', see s 7 above; for 'broadcast', see s 8 above; for 'cable programme', see s 9 above; for 'published edition', see s 10 above; for 'joint authorship', see s 12 below; and for 'computer-generated' and 'producer', see s 198(1) below.

12 Works of joint authorship

- (1) In this Part a "work of joint authorship" (合作作品) means a work made by the collaboration of 2 or more authors in which the contribution of each author is not distinct from that of the other author or authors.
- (2) A film is treated as a work of joint authorship unless the producer and the principal director are the same person.
- (3) A broadcast is treated as a work of joint authorship in a case where more than one person is to be taken as making the broadcast (section 8(3)).
- (4) References in this Part to the author of a work are, except as otherwise provided, construed in relation to a work of joint

authorship as references to all the authors of the work.

[cf. 1988 c 48 s 10 U.K.]

[12.01] England

Cf s 10 of the Copyright, Designs and Patents Act 1988 c 48 [Eng].

[12.02] Work of joint authorship

This refers to a single work resulting from the joint effort of two or more authors, such as a symphony written by two composers or a picture painted by two artists. To be joint authors, the two composers or artists must have worked in collaboration with each other in such a way that the contribution of one is not distinct from that of the other: see *Cala Homes (South) Ltd v Alfred McAlpine Homes East Ltd* [1995] FSR 818 and *Robin Ray v Classic FM Plc* [1998] FSR 622. See also *Godfrey v Lees* [1995] EMLR 307; *Flyde Microsystems Ltd v Key Radio Systems* [1998] FSR 449; *Brighton v Jones* [2004] EMLR 26 (p 507); *Cyprotex Discovery Ltd v The University of Sheffield* [2004] RPC 44 (p 887) (CA). There is no further requirement that the parties intend the other to be a joint author in order for the work to be a work of joint authorship: see *Beckingham v Hodgens* [2003] FSR 14 (p 238) (Ch D), [2003] EMLR 18 (p 376) (CA). *Beckingham v Hodgens* was cited in *Fisher v Brooker* [2009] FSR 25 (p 919) (HL), where the appellant, who was responsible for the organ solo of a song, made his contribution as part of a collaborative effort with the first respondent and the other band members without anyone at the time considering what, in copyright terms, the consequence was of his so doing. It was held that the appellant qualified as a joint author of what resulted: *ibid* at para 63.

Given that copyright exists, not in ideas, but in expressions of ideas, a joint author must participate in the actual creation and share the responsibility for the form of expression in the relevant work. It is not enough that he simply contributed ideas to an author, such as thinking up the plot of a play or making suggestions for a comic routine to be included: see *Tate v Thomas* [1921] 1 Ch 503, following *Tate v Fullbrook* [1908] 1 KB 821. See also *Levy v Rutley* (1871) LR 6 CP 523; *Bagge v Miller* [1917–23] MCC 179; *Evans v E Hulton & Co Ltd* [1923–28] MCC 51. Cf *Kenrick & Co v Lawrence & Co* (1890) 25 QBD 99, where someone who supplied an idea for a sketch and suggested detailed alterations might be treated as a joint author with the artist.

A work of joint authorship is to be distinguished from a composite work with different components, each produced by a different person, such as the lyrics and music of a song, in which case each author will have his own distinct copyright: see *Chappell & Co Ltd v Redwood Music Ltd* [1981] RPC 337 (HL); *Hadley v Kemp* [1999] EMLR 589.

As to the nature of joint authorship, the prevailing view seems to be that joint authors hold as tenants in common: see *Lauri v Renad* [1892] 3 Ch 402; *Prior v Landsdowne Press Pty Ltd* [1977] RPC 511; *Redwood Music Ltd v B Feldman & Co Ltd* [1979] RPC 1, [1979] RPC 385 (CA). See also *Stuart v Barrett* [1994] EMLR 448, cited in *Beckingham v Hodgens* [2003] FSR 14 (p 238) (Ch

D), [2003] EMLR 18 (p 376) (CA). Cf *Mail Newspapers Plc v Express Newspapers Plc* [1987] FSR 90. As to the rights of joint authors *inter se*, see [194.03] below.

[12.03] Definitions

For 'film', see s 7 above; for 'broadcast', see s 8 above; for 'author', see s 11 above; and for 'producer', see s 198(1) below.

13 First ownership of copyright

The author of a work is the first owner of any copyright in it, subject to sections 14, 15 and 16.

[cf. 1988 c 48 s 11(1) U.K.]

[13.01] England

Cf s 11(1) of the Copyright, Designs and Patents Act 1988 c 48 [Eng].

[13.02] General note

For the meaning of 'owner of the copyright', see [3.03] above. As to the distinction between authorship and ownership in copyright law, see [11.02] above.

[13.03] Definitions

For 'copyright', see s 2 above; and for 'author', see s 11 above.

14 Employee works

- (1) Where a literary, dramatic, musical or artistic work, or a film, is made by an employee in the course of his employment, his employer is the first owner of any copyright in the work subject to-
 - (a) any agreement to the contrary; and
 - (b) subsection (2).
- (2) Subject to any agreement to the contrary, where such work is exploited by his employer or by someone else with the employer's permission in a way that could not reasonably have been contemplated by the employer and the employee at the time of making the work, the employer shall pay an award to the employee in respect of such exploitation at such amount as agreed between the employer and the employee

or failing an agreement, as determined by the Copyright Tribunal.

[cf. 1988 c 48 s 11(2) U.K.]

[14.01] England

Cf s 11(2) of the Copyright, Designs and Patents Act 1988 c 48 [Eng].

[14.02] General note

This section is different from its English counterpart, which does not contain any express provision for an employee's compensation in the case of the work being exploited by or with the permission of the employer in a way that could not reasonably have been contemplated by the employer and the employee at the time of creation.

[14.03] In the course of employment

It is often easy to recognise a contract of service when you see it, but difficult to say where the difference between a contract of service and a contract for services lies: see *Stephenson (or Stevenson), Jordan and Harrison Ltd v MacDonald and Evans* (1952) 69 RPC 10 at 22, [1952] 1 TLR 101 (CA) at 111, per Denning LJ. It is necessary to look at the terms of the contract as a whole concentrating on the substantive rights and obligations of the parties and decide whether they are more or less strongly indicative of one form of relationship than the other: see *Robin Ray v Classic FM Plc* [1998] FSR 622 at 638, per Lightman J. One of the traditional tests for a contract of service was the so-called control test: if the employer can order or require not only what is to be done, but how it shall be done, then it is more likely to be a contract of service: see *Collins v Herefordshire County Council* [1947] KB 598 at 615, [1947] 1 All ER 633 at 638, per Hilbery J. However, this test is not an absolute one and has been criticised as not being universally correct: see *Cassidy v Ministry of Health* [1951] 2 KB 343 at 352, [1951] 1 All ER 574 at 579, per Somervell LJ. A lot should depend on the circumstances of the case, in particular, the amount of skill required for the employee's work. Usually the greater the skill required, the less significant is control as a factor for determining whether the employee is under a contract of service: see *Beloff v Pressdram Ltd* [1973] 1 All ER 241, [1973] RPC 765, [1973] FSR 33, per Ungood Thomas J. A more widely accepted approach is to ask whether the person is employed as part of the business and his work done as an integral part of the business: see *Stephenson (or Stevenson), Jordan and Harrison Ltd v MacDonald and Evans* (1952) 69 RPC 10 at 22, [1952] 1 TLR 101 at 111 (CA), per Denning LJ. In *Ultraframe UK Ltd v Fielding* [2004] RPC 24 (p 479), a case on ownership of design right, the Court of Appeal cited, at para 21, *Montgomery v Johnson Underwood Ltd* [2001] ICR 819 where Buckley J in turn quoted what MacKenna J said in *Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance* [1968] 2 QB 497 at 515:

A contract of service exists if these three conditions are fulfilled: (i) The servant agrees that, in consideration of a wage or other remuneration, he

will provide his own work and skill in the performance of some service for this master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service.

[14.04] Any agreement to the contrary

The courts have been liberal in finding contrary agreements, which may be inferred from the conduct of the employer and the employee, the employer's past practice, and other relevant circumstances. For instance, a doctor who has written a medical handbook in the course of his employment may still be able to claim the copyright in it because all other employees at the same establishment have been able to do so: see *Noah v Shuba* [1991] FSR 14. To obviate the application of sub-s (1), the agreement must be one where, notwithstanding the existence of a contract of employment, the title to copyright in works created during the course of employment shall not vest in the employer: see *Robin Ray v Classic FM Plc* [1998] FSR 622 at 639, per Lightman J. Thus, an express term that a contract of employment shall not be created would not suffice: *ibid*. Moreover, such a term would be legally ineffective if the substantive provisions of the agreement in law do give rise to the existence of a contract of employment: *ibid*.

[14.05] Copyright Tribunal

The Tribunal is established under s 169(1) below. As to its functions, see [155.02] below. For its jurisdiction to determine the award to an employee under the present section, see s 173 below.

[14.06] Definitions

For 'copyright', see s 2 above; for 'dramatic work', 'literary work' and 'musical work', see s 4(1) above; for 'artistic work', see s 5 above; for 'film', see s 7 above; for 'first owner', see s 13 above; for 'Copyright Tribunal', see s 169 below; and for 'employee', 'employer' and 'employment', see s 198(1) below.

15 Commissioned works

- (1) Where a work is made on the commission of a person and there is an agreement between the author and the commissioner of the work which expressly provides for the entitlement to the copyright, copyright in the commissioned work belongs to the person who is entitled to the copyright under the agreement.
- (2) Notwithstanding subsection (1) and sections 13 and 103, the person who commissioned the work-
 - (a) has an exclusive licence to exploit the commissioned

work for all purposes that could reasonably have been contemplated by the author and the person who commissioned the work at the time the work was commissioned; and

- (b) has the power to restrain any exploitation of the commissioned work for any purpose against which he could reasonably take objection.

[15.01] England

There is no corresponding legislation in England but there used to be an express provision in relation to commissioned works in three specific cases, namely, the taking of a photograph, the painting or drawing of a portrait, and the making of an engraving: see s 4(3) of the Copyright Act 1956 c 74 [Eng].

[15.02] General note

In contrast with s 14 above, which confers the copyright of an employee's work on the employer provided that it is made in the course of employment, this section does not lay down any principle for determining the ownership of the copyright of a commissioned work. Instead, sub-s (1) seems to have made it a case-by-case decision, dependent upon the express terms of any agreement that may have been reached between the author and the commissioner. No explicit guidance is provided for the situations in which no such agreement has been reached, though it may be inferred from the reference to s 13 at the outset of sub-s (2) that the general principle laid down in s 13 above is to be applied in such cases. Also, it could be inferred from the words 'notwithstanding subsection (1)' that whoever owns the copyright, the one who commissioned the work would have an exclusive licence by virtue of sub-s (2) to exploit the work for all purposes within the contemplation of the parties. Section 15 is unique to Hong Kong, and the Hong Kong Court of Appeal, when asked to determine the scope of a commissioner's exclusive licence, answered the question on the basis of the evidence before the court: see *Jet Tone Films Ltd v Lau Yuen Chui* [2005] 3 HKLRD 631 (CA).

In the case of commissioned works where part of the process is sub-contracted, it is the person who commissioned the ultimate article and is to pay ultimately for the process who is the commissioner: see *James Arnold & Co Ltd v Miafern Ltd & Ors* [1980] RPC 397 at 404, cited in *Guangdong Foodstuffs Import & Export (Group) Corp & Anor v Tung Fook Chinese Wine (1982) Co Ltd & Anor* [1999] 3 HKLRD 545 at 636. Commissioning means ordering, and connotes an obligation to pay — not just to pay for the finished products if and when they are purchased, but to pay for the very article in which the copyright resides irrespective of whether any of the finished products are purchased: see *Ultraframe UK Ltd v Fielding* [2004] RPC 24 at para 31, quoting what Pritchard J said in the *New Zealand High Court decision Plix Products Ltd v Frank M Winstone (Merchants)* [1986] FSR 63 at 86.

In England, where the Copyright, Designs and Patents Act 1988 c 48 [Eng] does

not contain any provision in respect of the ownership of commissioned works, it has been held that the author of such a work is entitled to retain the copyright in the absence of an express or implied term to the contrary: see *Robin Ray v Classic FM Plc* [1998] FSR 622. What the commissioner has will usually be an implied licence to use the work for the purposes contemplated by the parties at the time of commissioning. Whether any further rights can be implied, such as an exclusive licence or even assignment of the copyright to the commissioner, depends upon whether the circumstances are such that such rights are necessary to fill a lacuna in the contract: see *Liverpool City Council v Irwin* [1977] AC 239 at 253–254 per Lord Wilberforce, followed in *Robin Ray v Classic FM Plc* (above) at 642. See also *Griggs Group Ltd v Evans* [2005] FSR 31 (p 706), where *Robin Ray v Classic FM Plc* (above) was cited with approval. See also *Lucasfilm Ltd v Ainsworth* [2009] EWCA Civ 1328, [2010] EMLR 12 (p 301), where the English Court of Appeal held that the judge was right in applying what Lightman J said in the *Robin Ray* case:

circumstances may exist when the necessity for an assignment of copyright may be established ... these circumstances are, however, only likely to arise if the client needs in addition to the right to use the copyright works the right to exclude the contractor from using the work and the ability to enforce the copyright against third parties. Examples of when this situation may arise include: (a) where the purpose in commissioning the work is for the client to multiply and sell copies on the market for which the work was created free from the sale of copies in competition with the client by the contractor or third parties; (b) where the contractor creates a work which is derivative from a pre-existing work of the client, eg when a draughtsman is engaged to turn designs of an article in sketch form by the client into formal manufacturing drawings, and the draughtsman could not use the drawings himself without infringing the underlying rights of the client; (c) where the contractor is engaged as part of a team with employees of the client to produce a composite or joint work and he is unable, or cannot have been intended to be able, to exploit for his own benefit the joint work or indeed any distinct contribution of his own created in the course of his engagement ... In each case it is necessary to consider the price paid, the impact on the contractor of assignment of copyright and whether it can sensibly have been intended that the contractor can retain any copyright as a separate item of property.

The English Court of Appeal also referred to the *Griggs Group* case, where a freelance designer was commissioned to create a logo for a client, and the court, following Lightman J's analysis, held that the client would need some right to prevent others from reproducing the logo, in which case a licence from the designer to the client, even an exclusive licence, was not sufficient. Likewise, in the *Lucasfilm* case, it was reasonable in the circumstances of the case to 'confer the primary copyright interests on the commissioning party'. In other words, an obligation to assign was necessarily to be implied.

[15.03] Definitions

For 'copyright', see s 2 above; for 'author', see s 11 above; and for 'exclusive

[56.06] Subsection (3)

An example of material falling within this subsection would be a patent specification. Note, however, that only those parts containing information of general interest may be copied under this provision.

[56.07] Definitions

For 'copyright', see s 2 above; for 'copying', see s 23 above; for 'issue ... of copies', see s 24 above; for 'making available to the public of copies', see s 26 above; and for 'international organisation', see s 198(1) below.

57 Material communicated to the Government in the course of public business

- (1) This section applies where a work has in the course of public business been communicated to the Government for any purpose, by or with the licence of the copyright owner and a document or other material thing recording or embodying the work is owned by or in the custody or control of the Government.
- (2) The Government may, for the purpose for which the work was communicated to it, or any related purpose which could reasonably have been anticipated by the copyright owner, copy the work, or issue or make available copies of the work to the public without infringing any copyright in the work.
- (3) The Government may not copy a work, or issue or make available copies of a work to the public, by virtue of this section if the work has previously been published otherwise than by virtue of this section.
- (4) In subsection (1) "public business" (公務) includes any activity carried on by the Government.
- (5) This section has effect subject to any agreement to the contrary between the Government and the copyright owner.
[cf. 1988 c 48 s 48 U.K.]

[57.01] England

Cf s 48 of the Copyright, Designs and Patents Act 1988 c 48 [Eng].

[57.02] With the licence

As to meaning, see [22.12] above.

[57.03] Copyright owner

As to meaning, see [3.03] above.

[57.04] Definitions

For 'copyright', see s 2 above; for 'copy', see s 23 above; for 'issue ... copies of the work to the public', see s 24 above; for 'making available copies of the work to the public', see s 26 above; and for 'published', see s 196 below.

58 Public records

- (1) Material which is comprised in public records which are open to public inspection may be copied, and a copy may be supplied to any person without infringement of copyright.
- (2) In this section "public records" (公共紀錄) means the records of any nature or description which have been made, received or acquired in the course of proceedings of the Legislative Council, judicial proceedings or executive transaction, together with the exhibits and other material evidence which form part of or are annexed to or are otherwise related to any record, which are or are required to be in the custody of, or which may be transferred to or be acquired by, any department of the Government.

[cf. 1988 c 48 s 49 U.K.]

[58.01] England

Cf s 49 of the Copyright, Designs and Patents Act 1988 c 48 [Eng].

[58.02] Definitions

For 'copyright', see s 2 above; for 'copy', see s 23 above; and for 'judicial proceedings', see s 198(1) below.

59 Acts done under statutory authority

- (1) Where the doing of a particular act is specifically authorized by an Ordinance, whenever enacted, then, unless the Ordinance provides otherwise, the doing of that act does not infringe copyright.
- (2) Nothing in this section is to be construed as excluding any

defence of statutory authority otherwise available under or by virtue of any Ordinance.

[cf. 1988 c 48 s 50 U.K.]

[59.01] England

Cf s 50 of the Copyright, Designs and Patents Act 1988 c 48 [Eng].

[59.02] Definitions

For 'copyright', see s 2 above.

60 Lawful user may make back-up copy of computer program

Computer programs: Lawful users

- (1) A lawful user of a copy of a computer program may make a back-up copy of the program without infringing the copyright in the program if it is necessary for him to have the back-up copy for the purposes of his lawful use.
- (2) For the purposes of this section and section 61 a person is a lawful user of a computer program if he has a contractual right to use the program.
- (3) This section has effect subject to any agreement to the contrary.

[cf. 1988 c 48 s 50A U.K.]

[60.01] England

Cf s 50A of the Copyright, Designs and Patents Act 1988 c 48 [Eng].

[60.02] General note

'Lawful use' is not further defined in the present Ordinance, but 'lawful user' is defined in sub-s (2) as a person having a contractual right to use a computer program. The purchaser of a computer program is certainly such a person, but whether those claiming through him are also lawful users depends upon the terms of the contract in question. If the contract expressly limits the licence to use the program to the purchaser alone, then any other person would not be regarded as a lawful user under this section. See further s 118A below, which was added pursuant to the Copyright (Amendment) Ordinance 2003 (27 of 2003) as from 28 November 2003.

[60.03] Definitions

For 'copyright', see s 2 above.

61 Lawful user may copy or adapt computer program

- (1) A lawful user of a copy of a computer program may copy or adapt the program without infringing the copyright in the program if the copying or adapting is necessary for his lawful use.
- (2) A lawful user of a copy of a computer program may, in particular, if it is necessary for the lawful use of the program, copy the program or adapt it for the purpose of correcting errors in it.
- (3) This section does not apply to any copying or adapting permitted under section 60.

[cf. 1988 c 48 s 50C U.K.]

[61.01] England

Cf s 50C of the Copyright, Designs and Patents Act 1988 c 48 [Eng].

[61.02] General note

For the meaning of 'lawful user', see s 60(2) above. See further s 118A below, which was added pursuant to the Copyright (Amendment) Ordinance 2003 (27 of 2003) as from 28 November 2003.

[61.03] Definitions

For 'copyright', see s 2 above; for 'copy', see s 23 above; for 'adapt', see s 29 above; and for 'lawful user', see s 60 above.

62 Use of typeface in ordinary course of printing

Typefaces

- (1) It is not an infringement of copyright in an artistic work consisting of the design of a typeface-
 - (a) to use the typeface in the ordinary course of typing, composing text, typesetting or printing;
 - (b) to possess an article for the purpose of such use; or

- (c) to do anything in relation to material produced by such use,
and this is so notwithstanding that an article is used which is an infringing copy of the work.
- (2) However, the following provisions of this Part apply in relation to persons making, importing, exporting or dealing with articles specifically designed or adapted for producing material in a particular typeface, or possessing such articles for the purpose of dealing with them, as if the production of material as mentioned in subsection (1) did infringe copyright in the artistic work consisting of the design of the typeface—
section 32 (secondary infringement: making, importing, exporting, possessing or dealing with article for making infringing copy);
section 109 (order for delivery up); and
section 118(4) (offence of making or possessing such an article).
- (3) The references in subsection (2) to 'dealing with' an article are to selling, letting for hire, or offering or exposing for sale or hire, exhibiting in public, or distributing.

[cf. 1988 c 48 s 54 U.K.]

[62.01] England

Cf s 54 of the Copyright, Designs and Patents Act 1988 c 48 [Eng.]

[62.02] Possess

As to meaning, see [31.06] above.

[62.03] Selling, letting for hire ... exposing for sale or hire

As to meaning, see [31.07] above.

[62.04] Definitions

For 'copyright', see s 2 above; for 'artistic work', see s 5 above; for 'infringing copy', see s 35 above; and for 'typeface', see s 198(1) below.

63 Articles for producing material in particular typeface

- (1) This section applies to the copyright in an artistic work consisting of the design of a typeface where articles specifically designed or adapted for producing material in that typeface have been marketed by or with the licence of the copyright owner.
- (2) After the period of 25 years from the end of the calendar year in which the first such articles are marketed, the work may be copied by making further such articles, or doing anything for the purpose of making such articles, and anything may be done in relation to articles so made, without infringing copyright in the work.
- (3) In subsection (1) "marketed" (推出市場) means sold, let for hire or offered or exposed for sale or hire, in Hong Kong or elsewhere.

[cf. 1988 c 48 s 55 U.K.]

[63.01] England

Cf s 55 of the Copyright, Designs and Patents Act 1988 c 48 [Eng.]

[63.02] Adapted

As to meaning, see [32.08] above.

[63.03] With the licence

As to meaning, see [22.12] above.

[63.04] Copyright owner

As to meaning, see [3.03] above.

[63.05] Sold, let ... exposed for sale or hire

As to meaning, see [31.07] above.

[63.06] Definitions

For 'copyright', see s 2 above; for 'artistic work', see s 5 above; for 'copy', see s 23 above; and for 'typeface', see s 198(1) below.

64 Transfers of copies of works in electronic form**Works in electronic form**

- (1) This section applies where a copy of a work in electronic form (other than such a copy which was made available to the public) has been purchased on terms which, expressly or impliedly or by virtue of any rule of law, allow the purchaser to copy the work, or to adapt it or make copies of an adaptation, in connection with his use of it.
- (2) If there are no express terms-
 - (a) prohibiting the transfer of the copy by the purchaser, imposing obligations which continue after a transfer, prohibiting the assignment of any licence or terminating any licence on a transfer; or
 - (b) providing for the terms on which a transferee may do the things which the purchaser was permitted to do,

anything which the purchaser was allowed to do may also be done without infringement of copyright by a transferee; but any copy, adaptation or copy of an adaptation made by the purchaser which is not also transferred is to be treated as an infringing copy for all purposes after the transfer.
- (3) Subsection (2) also applies where the original purchased copy is no longer usable and what is transferred is a further copy used in its place.
- (4) The above provisions also apply on a subsequent transfer, with the substitution for references in subsection (2) to the purchaser of references to the subsequent transferor.

[cf. 1988 c 48 s 56 U.K.]

[64.01] England

Cf s 56 of the Copyright, Designs and Patents Act 1988 c 48 [Eng].

[64.02] Definitions

For 'copyright', see s 2 above; for 'copy', see s 23 above; for 'made available to the public', see s 26 above; for 'infringing copy', see s 35 above; and for 'electronic form', see s 198(1) below.

65 Certain acts permitted where works made available to the public

Notwithstanding section 23, copyright in a work is not infringed by the making of a transient and incidental copy which is technically required for the viewing or listening of the work by a member of the public to whom a copy of the work is made available.

[65.01] England

There is no corresponding legislation in England.

[65.02] General note

Like s 26 above, which deals with the making available of copies to the public through the Internet, this section is drafted in such a way that the technological advances in communication may be catered for. In particular, the reference to the public 'to whom a copy of the work is made available' should be read in the light of s 26 above. Since this section is said to apply notwithstanding s 23 above, the equivalent of s 17 of the Copyright, Designs and Patents Act 1988 c 48 [Eng], its effect is to reverse the position in England where the making of transient or incidental copies in electronic form is regarded as copying and thus an infringement of copyright: see [23.06] above.

[65.03] Definitions

For 'copyright', see s 2 above; and for 'copy of the work is made available', see s 26 above.

66 Anonymous or pseudonymous works: acts permitted on assumptions as to expiry of copyright or death of author**Miscellaneous: Literary, dramatic, musical and artistic works**

- (1) Copyright in a literary, dramatic, musical or artistic work is not infringed by an act done at a time when, or in pursuance of arrangements made at a time when-
 - (a) it is not possible by reasonable inquiry to ascertain the identity of the author; and
 - (b) it is reasonable to assume-
 - (i) that copyright has expired; or
 - (ii) that the author died 50 years or more before the beginning of the calendar year in which the act is done or the arrangements are made.

- (2) Subsection (1)(b)(ii) does not apply in relation to—
- (a) a work in which Government copyright subsists; or
 - (b) a work in which copyright originally vested in an international organization by virtue of section 188 and in respect of which a regulation under that section specifies a copyright period longer than 50 years.
- (3) In relation to a work of joint authorship—
- (a) the reference in subsection (1) to its being not possible to ascertain the identity of the author is to be construed as a reference to its being not possible to ascertain the identity of all of the authors; and
 - (b) the reference in subsection (1)(b)(ii) to the author having died is to be construed as a reference to all the authors having died.

[cf. 1988 c 48 s 57 U.K.]

[66.01] England

Cf s 57 of the Copyright, Designs and Patents Act 1988 c 48 [Eng].

[66.02] Copyright has expired

The duration of copyright in a literary, dramatic, musical or artistic work is normally the life of the author plus 50 years: see s 17 above.

[66.03] Copyright subsists

As to meaning, see [2.03] above.

[66.04] Work of joint authorship

As to meaning, see [12.02] above.

[66.05] Definitions

For 'copyright', see s 2 above; for 'dramatic work', 'literary work' and 'musical work', see s 4(1) above; for 'artistic work', see s 5 above; for 'author', see s 11 above; for 'work of joint authorship', see s 12 above; for 'Government copyright', see ss 182(2) and 183(3) below; and for 'international organisation', see s 198(1) below.

67 Use of notes or recordings of spoken words in certain cases

- (1) Where a record of spoken words is made, in writing or otherwise, for the purpose of—
- (a) reporting current events; or
 - (b) broadcasting or including in a cable programme service the whole or part of the work,
- it is not an infringement of any copyright in the words as a literary work to use the record or material taken from it (or to copy the record, or any such material, and use the copy) for that purpose, if the conditions in subsection (2) are met.
- (2) The conditions are that—
- (a) the record is a direct record of the spoken words and is not taken from a previous record or from a broadcast or cable programme;
 - (b) the making of the record was not prohibited by the speaker and, where copyright already subsisted in the work, did not infringe copyright;
 - (c) the use made of the record or material taken from it is not of a kind prohibited by or on behalf of the speaker or copyright owner before the record was made; and
 - (d) the use is by or with the authority of a person who is lawfully in possession of the record.

[cf. 1988 c 48 s 58 U.K.]

[67.01] England

Cf s 58 of the Copyright, Designs and Patents Act 1988 c 48 [Eng].

[67.02] Subsection (1)

This subsection should be read together with the requirement of fixation in s 4(2) above. If spoken words are recorded, in writing or otherwise, then there are two separate copyright works, one in the speaker's words and the other in the record, and whether the record is made by or with the permission of the speaker is immaterial: see s 4(3) above. By virtue of sub-s (1) of the present section, if the record is made for the purpose of (a) reporting current events; or (b) broadcasting or including in a cable programme service the whole or part of the work, then the record or material taken from it may be used or copied for that purpose without infringing the copyright in the spoken words, provided that the conditions in sub-s (2) are satisfied. For the meaning of 'reporting current events', see [39.05] above. Though both referring to the purpose of reporting current events, the present section

is actually wider than, and thus a useful alternative to, s 39 above which further requires that the dealing with the work be fair and that there be sufficient acknowledgment. If either of these requirements cannot be fulfilled, which is not uncommon, then the reporter can only rely upon the present section as a defence.

[67.03] Subsection (2)

This subsection defines the scope of the defence provided in sub-s (1). Firstly, the defence applies only to a direct record of the spoken words, but not to a record taken from a previous record. Thus, a reporter may use his own record of a speech for the purpose of reporting current events, but if he wishes to use a published record of the speech, he has to apply to the copyright owner of that record for his permission. Secondly, the section applies only if the making of the record was not prohibited by the speaker and, where copyright already subsisted in the work, did not infringe the copyright. The latter part seems to refer to the case where the speaker was reading from his own script or reciting extracts from another's copyright work. In either case, the making of the record must not infringe the copyright in the work from which extracts have been quoted. Thirdly, the use made of the record or material taken there from must not be of a kind prohibited by or on behalf of the speaker or copyright owner. A speech may be recorded in writing or on tape, and the material taken from a written record may be recorded again on tape and vice versa. In either case, if the speaker or copyright owner had made it clear, before the record was made, that such further use was prohibited, the defence will not apply. Fourthly and finally, the use must be by or with the authority of a person who is lawfully in possession of the record.

[67.04] Copyright ... subsisted

As to meaning, see [2.03] above.

[67.05] Copyright owner

As to meaning, see [3.03] above.

[67.06] Definitions

For 'copyright', see s 2 above; for 'literary work', see s 4(1) above; for 'broadcasting', see s 8 above; for 'cable programme service', see s 9 above; for 'copy', see s 23 above; and for 'writing', see s 198(1) below.

68 Public reading or recitation

- (1) The reading or recitation in public by one person of a reasonable extract from a published literary or dramatic work does not infringe any copyright in the work if it is accompanied by a sufficient acknowledgement.
- (2) Copyright in a work is not infringed by the making of a sound

recording, or the broadcasting or inclusion in a cable programme service, of a reading or recitation which by virtue of subsection (1) does not infringe copyright in the work, if the recording, broadcast or cable programme consists mainly of material in relation to which it is not necessary to rely on that subsection.

[cf. 1988 c 48 s 59 U.K.]

[68.01] England

Cf s 59 of the Copyright, Designs and Patents Act 1988 c 48 [Eng].

[68.02] General note

As said in [67.03] above, a speaker may recite extracts from another's copyright work. Subsection (1) of the present section provides that the reading or recitation in public by one person of a reasonable extract from a published literary or dramatic work does not infringe any copyright in the work if accompanied by a sufficient acknowledgment. Furthermore, sub-s (2) provides that such a reading or recitation may be made in a sound recording, broadcast or included in a cable programme service if the recording, broadcast or cable programme consists mainly of material in relation to which it is not necessary to rely on sub-s (1). What is meant by 'mainly' and what constitutes a 'reasonable extract' seem to depend on the circumstances of the case.

[68.03] Definitions

For 'copyright', see s 2 above; for 'dramatic work' and 'literary work', see s 4(1) above; for 'sound recording', see s 6 above; for 'broadcasting', see s 8 above; for 'cable programme service', see s 9 above; for 'published', see s 196 below; and for 'sufficient acknowledgment', see s 198(1) below.

69 Abstracts of scientific or technical articles

- (1) Where an article on a scientific or technical subject is published in a periodical accompanied by an abstract indicating the contents of the article, it is not an infringement of copyright in the abstract, or in the article, to copy the abstract or issue or make available copies of it to the public. [cf. 1988 c 48 s 60(1) U.K.]
- (2) This section does not apply if, or to the extent that, licences under licensing schemes are available authorizing the act in question and the person so acting knew or ought to have been aware of that fact.

sentencing: see *HKSAR v Chan Hon Fai* [2005] HKCU 812 (unreported, HCMA 426 and 430/2005, 22 June 2005). In *HKSAR v Hua Guihong & Anor* [2009] 4 HKLRD 431 (CA), the fact that the appellant came to Hong Kong from the Mainland pursuant to an arrangement to take part in the piracy, and her consequential involvement in cross-border criminal activities were held to be aggravating factors. The prevalence of copyright offences and the effect they would have on the reputation of Hong Kong in the international community have been emphasised in sentencing: see *HKSAR v Tsui Sang Fong* (unreported, HCMA 537/2001, 27 July 2001); *HKSAR v Chan Cheong Kit* [2010] 2 HKLRD 641 (CA). In *HKSAR v Chan Nai Ming* [2005] 4 HKLRD 142, the first prosecution for sharing through BitTorrent (see [118.03] above), the learned magistrate, in imposing an immediate three-month custodial sentence, relied upon what the Court of Appeal in *Choi Sai Lok* quoted with approval from *R v Ng Wai Ching* [1999] 4 HKC 334 (unreported, MA 1309/1996):

The victims are the proprietors of the intellectual property whose rights are being violated. There is international pressure upon Hong Kong to stamp out traffic in pirated goods. Failure to attack the illegal activity which is carried out openly and in defiance of the law in certain notorious locations in Hong Kong would be perceived as a default on the part of the government on its international obligations.

See also *HKSAR v Chan Nai Ming* [2007] 1 HKLRD 95, [2007] 2 HKC 1 (CFI), at para 87. For sentencing statistics in relation to copyright offences, see *HKSAR v Lam Shuen Shuen & Anor* [2004] HKCU 796 (unreported, HCMA 435/2004, 6 July 2004). As to the difference between sentencing for copyright offences and sentencing for trade description offences, see *Secretary for Justice v Lam Chi Wah* [1999] 4 HKC 343 (CA).

[119.04] Definitions

For 'infringing copy', see s 35 above.

119A Offence in relation to possession of infringing copies in a copying service business

(1) In this section-

"copying service business" (複製服務業務) means a business, conducted for profit, that includes the offering of reprographic copying services to the public and, in the case of a business that includes the offering of reprographic copying services to the public at more than one place, means any part of the business carried on at such a place;

"reward" (報酬) means reward other than reward of a nominal value.

(2) A person commits an offence if, for the purpose of or in the course of a copying service business, he possesses a

reprographic copy of a copyright work as published in a book, magazine or periodical, being a copy that is an infringing copy of the copyright work.

- (3) In proceedings for an offence under subsection (2), it is a defence for the person charged to prove that the infringing copy of a copyright work in question was not made for the purpose of and was not made in the course of the copying service business.
- (4) In proceedings for an offence under subsection (2), it is a defence for the person charged to prove that the infringing copy of a copyright work in question was not made for profit and was not made for reward.
- (5) In proceedings for an offence under subsection (2), it is a defence for the person charged to prove that he did not know and had no reason to believe that the copy of a copyright work in question was an infringing copy of the copyright work.
- (6) A person who commits an offence under subsection (2) is liable on conviction on indictment to a fine at level 5 in respect of each infringing copy and to imprisonment for 4 years.
- (7) Sections 115, 116 and 117 (presumptions as to various matters connected with copyright) do not apply to proceedings for an offence under subsection (2).

(Added 4 of 2004 s 3)

[119A.01] Enactment history

This section was added pursuant to s 3 of the Copyright (Amendment) Ordinance 2004 (4 of 2004) as from 1 September 2004.

[119A.02] England

There is no corresponding legislation in England.

[119A.03] General note

Even before the enactment of this section, any person or shop that made an infringing copy for sale or hire without the permission of the copyright owner of the work in question would be criminally liable under s 118(1)(a) above. Section 119A was enacted in order to relieve the prosecution of the burden to prove the making of the infringing copy. Under this new section, any person who possesses a reprographic copy, which is an infringing copy, of a copyright work for the purpose of or in the course of a copying service business could be charged. It seems

that both the owner and an employee of a shop providing copying service could be caught. As to whether copies could be made on behalf of a student for the purposes of research or private study, see s 38 above. Note, in particular, the restrictions in s 38(2) above. As to reprographic copying made by or on behalf of educational establishments, see s 45 above. See also the 'Guidelines for Photocopying of Printed Works by Not-for-Profit Educational Establishments' issued by the Intellectual Property Department of the Hong Kong SAR Government in September 2002.

[119A.04] A person commits an offence

In the case of a body corporate committing an offence under this Ordinance, the director, manager, secretary or other similar officer with whose consent or connivance the relevant act was committed may also be separately liable: see s 125(1) and (2) below. Similar provisions are also stipulated for offences committed by a partnership: see s 125(3) below.

[119A.05] Possesses

As to meaning, see [31.06] above. While s 118(1)(f) above requires the possession to be 'for the purpose of or in the course of any trade or business' (see [118.07] above), s 119A(2) is more specific in providing that the possession must be 'for the purpose of or in the course of a copying service business'. As to the meaning of 'copying service business', see s 119A(1). On the other hand, it might be easier to lay a charge under s 119A than under s 118(1)(f), as the latter requires the possession of an infringing copy to be with a view to its being sold or let for hire, exhibited in public or distributed for the purpose of or in the course of any trade or business which consists of dealing in infringing copies.

[119A.06] Did not know and had no reason to believe

Same as s 118 above, this section places the burden on the person charged with an offence to prove his lack of knowledge or reason to believe: see [118.03] above.

[119A.07] Definitions

For 'copyright work', see s 2(2) above; for 'copy', see s 23 above; for 'infringing copy', see s 35 above; for 'published', see s 196 below; and for 'business' and 'reprographic copy', see s 198(1) below.

119B Offence in relation to making for distribution or distributing on a regular or frequent basis infringing copies of copyright works in printed form contained in books, etc.

- (1) A person commits an offence if he does any of the following acts on a regular or frequent basis for the purpose of or in the course of any trade or business—

- (a) without the licence of the copyright owner of a copyright work described in subsection (2), makes an infringing copy of the work for distribution, resulting in a financial loss to the copyright owner; or
 - (b) without the licence of the copyright owner of a copyright work described in subsection (2), distributes an infringing copy of the work, resulting in a financial loss to the copyright owner.
- (2) The copyright work referred to in subsection (1)(a) and (b) is a copyright work in a printed form that is contained in—
- (a) a book;
 - (b) a magazine;
 - (c) a periodical; or
 - (d) a newspaper.
- (3) Subsection (1) does not apply in the circumstances described in Schedules 1AA and 1AB. (Replaced 15 of 2009 s 3)
- (4) Subsection (1) does not apply to an educational establishment of any of the following descriptions—
- (a) an educational establishment specified in section 1 of Schedule 1;
 - (b) an educational establishment exempt from tax under section 88 of the Inland Revenue Ordinance (Cap 112); or
 - (c) an educational establishment receiving direct recurrent subvention from the Government.
- (5) Subsection (1) does not apply to the distribution through a wire or wireless network of an infringing copy to which access is not restricted by procedures of authentication or identification.
- (6) Subsection (1) does not apply if the infringing copy—
- (a) forms part of the special collection of a library or archive owned by the Government, or a library or archive designated under subsection (10)(a); and
 - (b) is distributed solely—
 - (i) for on-the-spot reference use in, or during an activity organized by, a library or archive referred to in paragraph (a); or
 - (ii) for loan to other libraries or archives for the purpose of exhibition or research.
- (7) Subsection (1) does not apply to the making or distribution

by a library or archive referred to in subsection (6)(a) of a single copy of any item forming the special collection for the purpose of preserving or replacing the item against loss, deterioration or damage, but the copy may only be distributed for the use referred to in subsection (6)(b).

(8) In subsections (6) and (7), "special collection" (特別收藏品) —

(a) in the case of a library or archive owned by the Government, means a collection consisting primarily of works or articles, or copies of works or articles, donated or given by the public that are, in the opinion of the Director of Leisure and Cultural Services, of cultural, historical or heritage importance or value;

(b) in the case of a library or archive designated under subsection (10)(a), means a collection consisting primarily of works or articles, or copies of works or articles, donated or given by the public that are, in the opinion of the head or controlling body (by whatever name called) of the library or archive, of cultural, historical or heritage importance or value.

(9) For the purposes of the exception under subsections (6) and (7), an archive owned by the Government includes a museum owned by the Government.

(10) The Secretary for Commerce and Economic Development may, having regard to the advice of the Director of Leisure and Cultural Services —

(a) by notice published in the Gazette designate for the purposes of subsection (6)(a) any library or archive that is exempt from tax under section 88 of the Inland Revenue Ordinance (Cap 112); and

(b) by regulations prescribe the conditions that a library or archive designated under paragraph (a) must comply in order to be eligible for the exemption provided by subsections (6) and (7).

(11) Without prejudice to section 125, where a body corporate or a partnership has done an act referred to in subsection (1), the following person shall, unless there is evidence showing that he did not authorize the act to be done, be presumed also to have done the act —

(a) in the case of the body corporate —

(i) any director of the body corporate who, at the time when the act was done, was responsible for the internal management of the body corporate; or

(ii) if there was no such director, any person who, at the time when the act was done, was responsible under the immediate authority of the directors of the body corporate for the internal management of the body corporate;

(b) in the case of the partnership —

(i) any partner in the partnership who, at the time when the act was done, was responsible for the internal management of the partnership; or

(ii) if there was no such partner, any person who, at the time when the act was done, was responsible under the immediate authority of the partners in the partnership for the internal management of the partnership.

(12) A defendant charged with an offence under subsection (1) by virtue of subsection (11) is taken not to have done the act in question if —

(a) sufficient evidence is adduced to raise an issue that he did not authorize the act to be done; and

(b) the contrary is not proved by the prosecution beyond reasonable doubt.

(13) For the purposes of subsection (12)(a) —

(a) the defendant shall be taken to have adduced sufficient evidence if the court is satisfied that —

(i) the defendant has caused the body corporate or partnership concerned to set aside financial resources, and has directed the use of the resources, for the acquisition of appropriate licences, in accordance with the needs of the body corporate or partnership, to make or distribute, or to make and distribute, copies of the copyright work to which the proceedings relate for the use of the body corporate or partnership;

(ii) the defendant has caused the body corporate or partnership concerned to set aside financial resources, and has directed the use of the

- resources, for the acquisition of a sufficient number of copies of the copyright work to which the proceedings relate, which are not infringing copies, for the use of the body corporate or partnership;
- (iii) the body corporate or partnership concerned has incurred expenditure for the acquisition of appropriate licences, in accordance with the needs of the body corporate or partnership, to make or distribute, or to make and distribute, copies of the copyright work to which the proceedings relate for the use of the body corporate or partnership; or
- (iv) the body corporate or partnership concerned has incurred expenditure for the acquisition of a sufficient number of copies of the copyright work to which the proceedings relate, which are not infringing copies, for the use of the body corporate or partnership;
- (b) subject to paragraph (a), in determining whether sufficient evidence is adduced, the court may have regard to, including but not limited to, the following—
- (i) whether the defendant has introduced policies or practices against the making and distribution of infringing copies of copyright works by the body corporate or partnership;
- (ii) whether the defendant has taken action to prevent the making or distribution of infringing copies of copyright works by the body corporate or partnership.
- (14) It is a defence for the person charged with an offence under subsection (1) to prove that—
- (a) he has taken adequate and reasonable steps to obtain a licence from the copyright owner in question but failed to get a timely response from the copyright owner;
- (b) he has made reasonable efforts but failed to obtain commercially available copies of the copyright work in question and the copyright owner in question has refused to grant him a licence on reasonable commercial terms;
- (c) he did not know and had no reason to believe that

- the copies made or distributed are infringing copies; or
- (d) he cannot, after making reasonable enquiries, ascertain the identity and contact details of the copyright owner in question.
- (15) It is a defence for the person charged with an offence in respect of an act under subsection (1) to prove that—
- (a) he did the act in the course of his employment; and
- (b) he did the act in accordance with the instruction given to him by or on behalf of his employer in the course of his employment.
- (16) Subsection (15) does not apply to an employee who, at the time when the infringing copy in question was made or distributed, was in a position to make or influence a decision regarding the making or distribution of the infringing copy.
- (17) A person who commits an offence under subsection (1) is liable on conviction on indictment to a fine at level 5 in respect of each infringing copy and to imprisonment for 4 years.
- (18) Sections 115 and 117 (presumptions as to various matters connected with copyright) do not apply to proceedings for an offence under subsection (1).
- (19) (Repealed 15 of 2009 s 3)
- (20) (Repealed 15 of 2009 s 3)
- (21) (Repealed 15 of 2009 s 3)
- (22) The Secretary for Commerce and Economic Development may, by notice published in the Gazette, amend Schedules 1AA and 1AB. (Added 15 of 2009 s 3)
- (Added 4 of 2004 s 33)

[119B.01] Enactment history

This section was added pursuant to s 33 of the Copyright (Amendment) Ordinance 2007 (15 of 2007), which did not come into effect upon enactment. Subsection (3) was amended, sub-ss (19) to (21) repealed, and sub-s (22) added, pursuant to s 3 of the Copyright (Amendment) Ordinance 2009 (15 of 2009). The section as amended took effect on 16 July 2010 (LN 68 of 2010).

[119B.02] England

There is no corresponding legislation in England.

- performance is fixed, give consent in a case where that person cannot, after making reasonable enquiries, ascertain the identity or whereabouts of the person entitled to the rental right.
- (2) Consent given by the Tribunal has effect as consent of the person entitled to the rental right for the purposes of the provision of this Part relating to performers' rental right and may be given subject to any conditions specified in the Tribunal's order.
 - (3) The Tribunal shall not give consent under subsection (1) except after the service of such notices as may be required by rules made under section 174 (general procedural rules) or as the Tribunal may in any particular case direct.
 - (4) Where the Tribunal gives consent under this section, it shall, in default of agreement between the applicant and the person entitled to the rental right, make such order as it thinks fit as to the payment to be made to that person in consideration of consent being given.

(Added 15 of 2007 s 53)

[213A.01] Enactment history

This section was added pursuant to s 53 of the Copyright (Amendment) Ordinance 2007 (15 of 2007), which came into effect on 25 April 2008 (LN 48 of 2008).

[213A.02] England

There is no corresponding legislation in England.

[213A.03] Definitions

For 'sound recording', see s 6 above and s 238(1) below; for 'copy' (in relation to a sound recording), see s 23 above; for 'Copyright Tribunal', see s 169 above and s 238(1) below; for 'fix', 'performance' and 'performer', see s 200 above; and for 'rent' and 'rental right', see s 207A above.

214 Duration of rights

- (1) The following provisions have effect with respect to the duration of the rights conferred by this Part.
- (2) The rights conferred by this Part in relation to a performance expire-

- (a) at the end of the period of 50 years from the end of the calendar year in which the performance takes place; or
 - (b) if during that period a fixation of the performance is released, 50 years from the end of the calendar year in which it is released,
- subject as follows.
- (3) For the purposes of subsection (2) a fixation is "released" when it is first published, played or shown in public, broadcast, included in a cable programme service or made available to the public; but in determining whether a fixation has been released no account shall be taken of any unauthorized act.

[cf. 1988 c 48 s 191 U.K.]

[214.01] England

Cf s 191 of the Copyright, Designs and Patents Act 1988 c 48 [Eng].

[214.02] Definitions

For 'broadcast', see s 8 above and s 238(1) below; for 'cable programme service', see s 9 above and s 238(1) below; for 'published', see s 196 above and s 238(1) below; for 'unauthorized', see s 198(1) above; for 'fixation' and 'performance', see s 200 above; and for 'made available to the public', see s 205 above.

215 Performers' economic rights

- (1) The following rights conferred by this Part on a performer are property rights ("a performer's economic rights")-
 - (a) the right of reproduction (section 203);
 - (b) the right of distribution (section 204);
 - (c) the right of making available to the public (section 205);
 - (d) the rental right (section 207A). (Replaced 15 of 2007 s 54)
- (2) References in this Part to the consent of the performer are to be construed in relation to a performer's economic rights as references to the consent of the rights owner.
- (3) Where different persons are (whether in consequence of a partial assignment or otherwise) entitled to different aspects

of a performer's economic rights in relation to a performance, the rights owner for any purpose of this Part is the person who is entitled to the aspect of those rights relevant for that purpose.

- (4) Where a performer's economic rights (or any aspect of them) is owned by more than one person jointly, references in this Part to the rights owner are to all the owners, so that, in particular, any requirement of the licence of the rights owner requires the licence of all of them.

[cf. 1988 c 48 s 191A U.K.]

[215.01] Enactment history

Subsection (1) was amended by adding 'rental right', pursuant to s 54 of the Copyright (Amendment) Ordinance 2007 (15 of 2007), which came into effect on 25 April 2008 (LN 48 of 2008).

[215.02] England

Cf s 191A of the Copyright, Designs and Patents Act 1988 c 48 [Eng].

[215.03] General note

If an exclusive licence is granted in respect of the performer's economic rights, the exclusive licensee will have concurrent rights and remedies with the rights owner, and references to the rights owner will be construed accordingly; see ss 218 and 222 below.

[215.04] Definitions

For 'performer', see s 200 above.

216 Assignment and licences

- (1) A performer's economic rights are transmissible by assignment, by testamentary disposition or by operation of law, as personal or moveable property.
- (2) An assignment or other transmission of a performer's economic rights may be partial, that is, limited so as to apply-
 - (a) to one or more, but not all, of the things requiring the consent of the rights owner;
 - (b) to part, but not the whole, of the period for which the rights are to subsist.

- (3) An assignment of a performer's economic rights is not effective unless it is in writing signed by or on behalf of the assignor.
- (4) A licence granted by the owner of a performer's economic rights is binding on every successor in title to his interest in the rights, except a purchaser in good faith for valuable consideration and without notice (actual or constructive) of the licence or a person deriving title from such a purchaser; and references in this Part to doing anything with, or without, the licence of the rights owner are to be construed accordingly.

[cf. 1988 c 48 s 191B U.K.]

[216.01] England

Cf s 191B of the Copyright, Designs and Patents Act 1988 c 48 [Eng].

[216.02] General note

As to the meaning of rights owner, see s 215(3) and (4) above. An exclusive licensee has rights concurrent with those of the rights owner; see [215.03] above.

[216.03] Definitions

For 'writing', see s 198(1) above; and for 'performer's economic rights' and 'rights owner', see s 215 above.

217 Prospective ownership of a performer's economic rights

- (1) This section applies where by an agreement made in relation to a future fixation of a performance, and signed by or on behalf of the performer, the performer purports to assign his performer's economic rights (wholly or partially) to another person.
- (2) If on the rights coming into existence the assignee or another person claiming under him would be entitled as against all other persons to require the rights to be vested in him, they shall vest in the assignee or his successor in title by virtue of this subsection.
- (3) A licence granted by a prospective owner of a performer's economic rights is binding on every successor in title to his interest (or prospective interest) in the rights, except a purchaser in good faith for valuable consideration and without

notice (actual or constructive) of the licence or a person deriving title from such a purchaser.

References in this Part to doing anything with, or without, the licence of the rights owner are to be construed accordingly.

- (4) In subsection (3) 'prospective owner' (準擁有人), in relation to a performer's economic rights, means a person who is prospectively entitled to those rights, by virtue of such an agreement as is mentioned in subsection (1).

[cf. 1988 c 48 s 191C U.K.]

[217.01] England

Cf s 191C of the Copyright, Designs and Patents Act 1988 c 48 [Eng].

[217.02] General note

As to the meaning of rights owner, see s 215(3) and (4) above. An exclusive licensee has rights concurrent with those of the rights owner; see [215.03] above.

[217.03] Definitions

For 'fixation', 'performance' and 'performer', see s 200 above; and for 'performer's economic rights' and 'rights owner', see s 215 above.

218 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 owner of a performer's economic rights authorizing the licensee to the exclusion of all other persons, including the person granting the licence, to do anything requiring the consent of the rights 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.

[cf. 1988 c 48 s 191D U.K.]

[218.01] England

Cf s 191D of the Copyright, Designs and Patents Act 1988 c 48 [Eng].

[218.02] General note

As to the meaning of rights owner, see s 215(3) and (4) above. An exclusive licensee has rights concurrent with those of the rights owner; see ss 222 and 223 below.

[218.03] Definitions

For 'writing', see s 198(1) above; and for "performer's economic rights" and 'rights owner', see s 215 above.

219 Performer's economic right to pass under will with unpublished original fixation

Where under a bequest (whether general or specific) a person is entitled beneficially or otherwise to any material thing containing an original fixation of a performance which was not published before the death of the testator, the bequest is, unless a contrary intention is indicated in the testator's will or a codicil to it, to be construed as including any performer's rights in relation to the fixation to which the testator was entitled immediately before his death.

[cf. 1988 c 48 s 191E U.K.]

[219.01] England

Cf s 191E of the Copyright, Designs and Patents Act 1988 c 48 [Eng].

[219.02] Definitions

For 'published', see s 196 above and s 238(1) below; and for 'fixation', 'performance' and 'performer', see s 200 above.

220 Infringement actionable by rights owner

- (1) An infringement of a performer's economic rights or of any right conferred by this Part on a person having fixation rights is actionable by the rights owner.
- (2) In an action for infringement of a performer's economic rights or of any right conferred by this Part on a person having fixation rights 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.

- (3) This section has effect subject to the following provisions of this Part.

[cf. 1988 c 48 s 191I U.K.]

[220.01] England

Cf s 191I of the Copyright, Designs and Patents Act 1988 c 48 [Eng].

[220.02] General note

As to the meaning of 'person having fixation rights', see [209.02] above.

[220.03] Definitions

For 'fixation', see s 200 above; and for "performer's economic rights" and 'rights owner', see s 215 above.

221 Provisions as to damages in infringement action

- (1) Where in an action for infringement of a performer's economic rights or of any right conferred by this Part on a person having fixation rights it is shown that at the time of the infringement the defendant did not know, and had no reason to believe, that the rights subsisted in the fixation 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 a performer's economic rights or of any right conferred by this Part on a person having fixation rights 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 191J U.K.]

[221.01] England

Cf s 191J of the Copyright, Designs and Patents Act 1988 c 48 [Eng].

[221.02] General note

As to the meaning of 'person having fixation rights', see [209.02] above.

[221.03] Did not know, and had no reason to believe

As to meaning, see [108.02] above. This subsection has the same effect as s 108 above, which limits only the copyright owner's right to claim damages without affecting his entitlement to other remedies; see [108.03] above. See also ss 202(3) and 209(2) above, each containing a similar restriction.

[221.04] Definitions

For 'fixation', see s 200 above; and for "performer's economic rights", see s 215 above.

222 Right and remedies for exclusive licensee

- (1) An exclusive licensee has, except against the owner of a performer's economic rights, 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 rights owner; and references in the relevant provisions of this Part to the rights owner are to 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 rights owner.

[cf. 1988 c 48 s 191L U.K.]

[222.01] England

Cf s 191L of the Copyright, Designs and Patents Act 1988 c 48 [Eng].

[222.02] General note

As to the meaning of an exclusive licence and the rights of an exclusive licensee; see s 218 above. As to the meaning of rights owner, see s 215(3) and (4) above.

[222.03] Definitions

For "performer's economic rights" and 'rights owner', see s 215 above.

223 Exercise of concurrent rights

- (1) Where an action for infringement of a performer's economic rights brought by the rights owner or an exclusive licensee relates (wholly or partly) to an infringement in respect of which they have concurrent rights of action, the rights 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 plaintiff or added as a defendant.
- (2) A rights 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.
- (3) The above provisions do not affect the granting of interlocutory relief on an application by the rights owner or exclusive licensee alone.
- (4) Where an action for infringement of a performer's economic rights is brought which relates (wholly or partly) to an infringement in respect of which the rights 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 to either of them in respect of the infringement;
 - (b) no account of profits shall be directed 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 the profits between them as the court considers just, subject to any agreement between them,

and these provisions apply whether or not the rights owner and the exclusive licensee are both parties to the action.
- (5) The owner of a performer's economic rights shall notify any exclusive licensee having concurrent rights before applying for an order under section 228 (order for delivery up); and

the court may on the application of the licensee make such order under section 228 as it thinks fit having regard to the terms of the licence.

[cf. 1988 c 48 s 191M U.K.]

[223.01] England

Cf s 191M of the Copyright, Designs and Patents Act 1988 c 48 [Eng].

[223.02] General note

As to the meaning of rights owner, see s 215(3) and (4) above. An exclusive licensee has rights concurrent with those of the rights owner; see [215.03] above.

[223.03] Definitions

For "performer's economic rights" and 'rights owner', see s 215 above.

224 Performers' non-economic rights
Non-economic rights

- (1) The rights conferred on a performer by-
 - section 202 (consent required for fixation, etc. of unfixed performance);
 - section 206 (infringement of performer's rights by use of fixation made without consent); and
 - section 207 (infringement of performer's rights by importing, exporting, possessing or dealing with infringing fixation),

are not assignable or transmissible, except to the following extent.

They are referred to in this Part as "a performer's non-economic rights".
- (2) On the death of a person entitled to any such right-
 - (a) the right passes to such person as he may by testamentary disposition specifically direct; and
 - (b) if or to the extent that there is no such direction, the right is exercisable by his personal representatives.
- (3) References in this Part to the performer, in the context of the person having any such right, are to be construed as references to the person for the time being entitled to exercise those rights.

- (4) Where by virtue of subsection (2)(a) a right becomes exercisable by more than one person, it is exercisable by each of them independently of the other or others.
- (5) Any damages recovered by personal representatives by virtue of this section in respect of an infringement after a person's death devolves as part of his estate as if the right of action had subsisted and been vested in him immediately before his death.

[cf. 1988 c 48 s 192A U.K.]

[224.01] England

Cf s 192A of the Copyright, Designs and Patents Act 1988 c 48 [Eng].

[224.02] Definitions

For 'performer', see s 200 above.

225 Transmissibility of rights of person having fixation rights

- (1) The rights conferred by this Part on a person having fixation rights are not assignable or transmissible.
- (2) This does not affect section 208(2)(b) or (3)(b), so far as those provisions confer rights under this Part on a person to whom the benefit of a contract or licence is assigned.

[cf. 1988 c 48 s 192B U.K.]

[225.01] England

Cf s 192B of the Copyright, Designs and Patents Act 1988 c 48 [Eng].

[225.02] General note

As to the meaning of 'person having fixation rights', see [209.02] above.

[225.03] Definitions

For 'fixation', see s 200 above.

226 Consent

- (1) Consent for the purposes of this Part by a person having a performer's non-economic rights, or by a person having fixation rights, may be given in relation to a specific performance, to a specified description of performances or to performances generally, and may relate to past or future performances.
- (2) A person having fixation rights in a performance is bound by any consent given by a person through whom he derives his rights under the exclusive fixation contract or licence in question, in the same way as if the consent had been given by him.
- (3) Where a performer's non-economic right passes to another person, any consent binding on the person previously entitled binds the person to whom the right passes in the same way as if the consent had been given by him.

[cf. 1988 c 48 s 193 U.K.]

[226.01] England

Cf s 193 of the Copyright, Designs and Patents Act 1988 c 48 [Eng].

[226.02] General note

As to the meaning of 'person having fixation rights', see [209.02] above.

[226.03] Definitions

For 'fixation' and 'performances', see s 200 above; for 'exclusive fixation contract', see s 208 above; and for "performer's non-economic rights", see s 224 above.

227 Infringement actionable

Remedies for infringement

An infringement of a performer's non-economic rights is actionable as a breach of statutory duty owed to the person entitled to the rights.

[227.01] England

There is no corresponding legislation in England.

[227.02] Definitions

For “performer’s non-economic rights”, see s 224 above.

228 Order for delivery up**Delivery up of infringing fixation**

- (1) Where a person has in his possession, custody or control for the purpose of or in the course of any trade or business an infringing fixation of a performance, a person having performer’s rights or fixation rights in relation to the performance under this Part may apply to the court for an order that the fixation be delivered up to him or to such other person as the court may direct. (Amended 64 of 2000 s 14; 15 of 2007 s 55)
- (1A) It is immaterial for the purpose of subsection (1) whether or not the trade or business consists of dealing in infringing fixations. (Added 64 of 2000 s 14)
- (2) An application may not be made after the end of the period specified in section 230; and the court shall not make an order unless the court also makes, or it appears to the court that there are grounds for making, an order under section 231 (order as to disposal of infringing fixation).
- (3) A person to whom a fixation is delivered up in pursuance of an order under this section shall, if an order under section 231 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 195 U.K.]

[228.01] Enactment history

Subsection (1) was amended, and sub-s (1A) added, pursuant to s 14 of the Intellectual Property (Miscellaneous Amendments) Ordinance 2000 (64 of 2000). Subsection (1) was further amended pursuant to s 55 of the Copyright (Amendment) Ordinance 2007 (15 of 2007), which came into effect upon enactment on 6 July 2007.

[228.02] England

Cf s 195 of the Copyright, Designs and Patents Act 1988 c 48 [Eng].

[228.03] General note

As to the background to the adoption of the phrase ‘in the course of any trade or business’, see [31.03] above and [118.03] above. As to the meaning of ‘person having fixation rights’, see [209.02] above.

[228.04] Definitions

For ‘business’, see s 198(1) above and s 238(1) below; for ‘fixation’, ‘performance’ and ‘performer’, see s 200 above; for ‘infringing fixation’, see s 229 below; and for ‘dealing in’, see s 238(1A) below.

229 Meaning of “infringing fixation”

- (1) In this Part “infringing fixation” (侵犯權利的錄製品), in relation to a performance, is to be construed in accordance with this section.
- (2) For the purposes of a performer’s rights, a fixation of the whole or any substantial part of a performance of his is an infringing fixation if it is made, otherwise than for private purposes, without his consent.
- (3) For the purposes of the rights of a person having fixation rights, a fixation of the whole or any substantial part of a performance subject to the exclusive fixation contract is an infringing fixation if it is made, otherwise than for private purposes, without his consent or that of the performer.
- (4) Except as provided in section 229A, a fixation of a performance is also an infringing fixation if- (Amended 15 of 2007 s 56)
 - (a) it has been or is proposed to be imported into Hong Kong; and
 - (b) its making in Hong Kong would have constituted an infringement of the rights conferred by this Part in the performance in question, or a breach of an exclusive licence agreement relating to that performance.
- (5) For the purposes of Division III (proceedings relating to importation of infringing fixations) “infringing fixation” (侵犯權利的錄製品) does not include a fixation of a performance-
 - (a) that was lawfully made in the country, territory or area where it was made;

- (b) that has been or is proposed to be imported into Hong Kong; and
 - (c) its making in Hong Kong would have constituted an infringement of the rights conferred by this Part in the performance in question, or a breach of an exclusive licence agreement relating to that performance.
- (6) Where in any proceedings the question arises whether a fixation is an infringing fixation and it is shown-
- (a) that the fixation is a fixation of the unfixed performance; and
 - (b) that rights conferred by this Part subsist in the performance or have subsisted at any time,
- it shall be presumed until the contrary is proved that the fixation was made at a time when rights conferred by this Part subsisted in the performance.
- (7) In this Part, "infringing fixation" (侵犯權利的錄製品) includes a fixation which is to be treated as an infringing fixation by virtue of any of the following provisions-
- (a) section 229A(5) (imported fixation not an 'infringing fixation' for purposes of section 229(4));
 - (b) section 242A(3) (fixations made for purposes of giving or receiving instruction);
 - (c) section 243(3) (fixations made for purposes of instruction or examination);
 - (d) section 245(3) (fixations made by educational establishments for educational purposes);
 - (e) section 246A(3) (fixations made for purposes of public administration);
 - (f) section 251(2) (fixations of performance in electronic form retained on transfer of principal fixation); or
 - (g) section 256(3) (fixations made for purposes of broadcast or cable programme). (Replaced 15 of 2007 s 56)
- (8) In subsection (5)(a), "lawfully made" (合法地製作), in relation to a fixation of a performance made in a country, territory or area-
- (a) means that the fixation was made by-
 - (i) the performer;

- (ii) a person having fixation rights in relation to the performance in the country, territory or area, as the case may be; or
 - (iii) a person having the consent of the performer or the person referred to in subparagraph (ii) to make the fixation in the country, territory or area, as the case may be; but
- (b) does not include a fixation that was made in a country, territory or area where there is no law protecting rights in performances in the performance or where the rights in performances in the performance has expired. (Replaced 15 of 2007 s 56)
[cf. 1988 c 48 s 197 U.K.]

[229.01] Enactment history

Subsection (4) was amended by adding 'Except as provided in section 229A', and sub-ss (7) and (8) replaced, pursuant to s 56 of the Copyright (Amendment) Ordinance 2007 (15 of 2007), which came into effect upon enactment on 6 July 2007.

[229.02] England

Cf s 197 of the Copyright, Designs and Patents Act 1988 c 48 [Eng].

[229.03] General note

As to the meaning of 'person having fixation rights', see [209.02] above.

[229.04] Definitions

For 'imported', see s 198(1) above; for 'fixation', 'performance' and 'performer', see s 200 above; for 'exclusive fixation contract', see s 208 above; and for 'exclusive licence', see s 218 above.

229A Imported fixation not an "infringing fixation" for the purposes of section 229(4)

- (1) A fixation of a performance to which this subsection applies is not-
- (a) in relation to the person who imports it into Hong Kong, an infringing fixation for the purposes of section 229(4) if-