

# MUSIC PUBLISHERS ASSOCIATION OF HONG KONG

## SUBMISSION IN RESPONSE TO CONSULTATION DOCUMENT REVIEW OF CERTAIN PROVISIONS OF HONG KONG COPYRIGHT ORDINANCE 1997 (ORDINANCE)

### 1. Introduction

- 1.1 The Music Publishers Association of Hong Kong Limited (**MPA**) is a company that was formed in 1981 to represent the interests of its members, who are local music publishers. Music publishers own, control or administer the copyright in songs and other musical compositions and their associated lyrics. Every commercial use of these works involves the exploitation of these rights. Accordingly, the MPA is in a unique position in the Hong Kong music industry to comment on the potential impact on the industry of changes to Ordinance provisions.
- 1.2 The MPA welcomes the opportunity to make a submission in response to the consultation document. The MPA has no objection to the Government reproducing or publishing the views of the MPA expressed in this submission, so long as the MPA is quoted accurately. The MPA would also be pleased to make further submissions or representations to the Government on the matters contained in this submission.
- 1.3 As the strength of reaction to the introduction of the *Intellectual Property (Miscellaneous Amendments) Ordinance 2000 (Amending Ordinance)* in April 2001 demonstrated, the issues dealt with in the consultation document are of concern to many interests in the Hong Kong copyright sector. The MPA congratulates the Government on its commitment to formulate a long term solution after wide consultation with the community.
- 1.4 Three of the issues dealt with in the consultation document are of particular concern to the MPA:
- (a) criminal provisions related to end-user piracy (insofar as these affect the reproduction of printed music);
  - (b) permitted acts related to free public showing or playing of a broadcast or cable programme; and
  - (c) parallel importation of copyright works other than computer software.
- 1.5 The MPA confines its submission to these specific issues, in response to the consultation document. In general, the MPA notes that developments in digital technology will continue to affect copyright practice and law, but submits that in this context, it is more important than ever that the Government strike the right balance between protection of, and access to, copyright material.
- 1.6 In particular, the MPA notes that the 30<sup>th</sup> accession to the *WIPO Copyright Treaty (WCT)* occurred on 6 December 2001. This means that the WCT will enter into force on 6 March 2002. While Hong Kong is yet to accede to the WCT, the MPA encourages the Government to initiate a review of the Ordinance to ensure compliance with the treaty, in the interests of the international harmonisation of copyright principles, in both its legislation and commerce.

- 1.7 In any case, any amendment to the Ordinance should, of course, comply with the Government's existing international obligations, under the *Berne Convention* and *Trade Related Intellectual Property* and the WTO's *Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS)*.

## 2. Summary

### *General comments*

- 2.1 The MPA submits that the Ordinance should be amended at this stage only if a very clear case for doing so presently exists - for example to remedy an unintended consequence of its drafting. The Ordinance is a relatively new law, operating in a new political context. An assessment of the workability of the Ordinance in these circumstances requires time.
- 2.2 Further, the MPA is concerned that Hong Kong should be, and should be seen to be, a responsible copyright territory. This is in the interests of both its international standing in matters relating to copyright practice and enforcement, and of encouraging the domestic economy. Indeed, the two are inextricably linked: an intellectual property regime that gives solid protection (and encouragement) to its creators indicates a sophisticated economy.

### *Criminal provisions related to end-user piracy*

- 2.3 The MPA is concerned that the Ordinance must contain piracy provisions that protect the commercial value of the copyright of its members. Accordingly, the MPA does not advocate criminal provisions for possession of infringing works for domestic or private purposes. Further, the MPA acknowledges that there may be good grounds for treating differently copying in certain settings – such as by educational institutions, or for government purposes. However, choosing the mechanism for ensuring responsible copyright practice in these contexts should involve an appraisal of the solutions that have been adopted in other jurisdictions – for example, the establishment of an educational statutory licence regime for educational copying supervised by the Copyright Tribunal.
- 2.4 In the interests of clarity, internal consistency and particularly in light of the uncertainty which has been caused by the introduction of the words “for the purposes of, in the course of, or in connection with, any trade or business” by the Amending Ordinance, the MPA **recommends** that section 118(1)(d) of the Ordinance be amended to read:

possesses for the purpose or in the course of trade or business to such an extent as to affect prejudicially the owner of the copyright

- 2.5 In the view of the MPA, this definition will clarify the meaning of the expression “for the purpose of trade or business” in the section, and will achieve the appropriate level of protection for owners of copyright works.

### *Permitted acts relating to free public showing or playing of broadcast or cable programme*

- 2.6 In accordance with the *Berne Convention*, any exemption to the rights of copyright owners should not derogate from the owners' legitimate interests. As a matter of principle, every commercial use of copyright should be paid for.
- 2.7 The playing in public of musical works and their associated lyrics where they are underlying works in a broadcast or cable programme, is nonetheless a public performance of the works themselves and, if done for a commercial purpose, should be paid for.
- 2.8 There is no inconsistency in the drafting of the provision – it recognises the distinction between works and other subject matter. However, the operation of the provision on the basis of non payment of an admission fee is flawed. In effect, it gives the commercial provider of the material, such as a hair salon proprietor, a commercial benefit for no outlay, to the detriment of the copyright owner who is deprived of a legitimate interest.
- 2.9 The MPA urges the Government not to extend the statutory exemption provided in section 81, on either of the bases suggested, or at all.

*Parallel importation*

- 2.10 The MPA strongly opposes any relaxation of the existing restrictions against parallel importation insofar as they relate to the local movie and music industries. In the view of the MPA, the provisions currently demonstrate a balanced consideration of the public benefits of protecting the local cultural industry, and of ensuring consumer access to cultural material, by imposing criminal sanctions for parallel importation of copyright works for the relatively limited period of 18 months.
- 2.11 If the Government does not agree, the MPA suggests that the Government appoint an expert to inquire and report on the question, as the next stage in its consultation process.

**3. Chapter 1: Criminal Provisions related to end-user Piracy**

- 3.1 In striking a balance between the rights of owners and users of copyright, the MPA believes that the primary aim of copyright legislation is to ensure that maximum access is granted so long as that access does not impinge on the commercial potential of copyright material for its owners.
- 3.2 Further, as is shown in jurisdictions whose copyright regimes include criminal provisions, the availability of piracy actions provide an effective (if expensive for copyright owners) deterrent and educational purpose. Indeed, any legislative amendment which sought to confine piracy offences to copyright works “afflicted by rampant piracy” would quickly fall into disrepute, implying a tacit condoning of piracy in certain copyright industries and not others.
- 3.3 The protection against, and prosecution of, copyright piracy is, of course, a continuing and particular concern for Hong Kong on economic grounds.
- 3.4 Subject to the matter set out at paragraph 3.5(e) below, the MPA believes that this balance is appropriately struck in the Ordinance, by reason of the:

- (a) criminal burden which must be satisfied in relation to any matter brought under section 118(1);
- (b) qualifications to a finding of criminal liability for possession and distribution under sections 118(1)(d) and (f); and
- (c) defence of innocence provided under section 118(3).

3.5 Accordingly, in the view of the MPA:

- (a) business activities of government, educational and not for profit entities should respect the obligation to obtain a licence for the use of material protected by copyright. It is simply not true that “activities undertaken by these entities involve no commercial advantage or private financial gain”<sup>1</sup>. There is not prohibition on a non profit organisation or government body from earning a profit; these entities are only constrained as to the way in which their profits may be distributed. It may be the case that commercial gain is discounted because of the nature of the entity, but this is a matter for negotiation on a case by case basis, to be reflected in the quantum of the negotiated licence fee and not as a discount to be borne by the copyright owner alone, however altruistic the overall concerns of the entity;
- (b) employees should be potentially liable, subject to the defence available to all persons charged with the offence of possession of an infringing article provided in section 118(3). The criminal actions of an employer should never be condoned, not even out of concern for employees who may well be in a vulnerable position, and whistle blowers should be protected;
- (c) end-user piracy provisions should apply to all copyright works and subject matter, regardless of the extent to which piracy may affect a class of works or subject matter from time to time. The MPA strongly objects to the option which, it is noted with some alarm, is said to have been “generally acceptable to the community”<sup>2</sup> when last debated in the Legislative Council, that copyright material apart from computer programs, films, television dramas and musical recordings will be exempt from the end user criminal provisions;
- (d) the Ordinance is confined to prosecuting copyright possession for a commercial purpose – and the copyright owner has the burden of proving that commercial purpose. This is a sufficient limitation on criminal liability; and
- (e) the expression “for the purpose of any trade or business” should be given the meaning which will best protect the legitimate commercial interests of the copyright owner. In the view of the MPA, on the grounds of principle, practice and, in particular, the call for clarity that has come from a range of sectors following the passing of the Amending Ordinance, this will best be achieved by amending section 118(1)(d) to read:

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<sup>1</sup> Consultation Document page 2

<sup>2</sup> Consultation Document page 3

possesses for the purpose or in the course of trade or business to such an extent as to affect prejudicially the owner of the copyright

#### **4. Chapter 4: Permitted Acts related to Free Public Showing or Playing of Broadcast or Cable Programme**

- 4.1 Copyright licence fees should be payable for any use of copyright material in which the user derives a commercial benefit. The issue should not be whether admission prices are charged by a venue that provides such amenities.
- 4.2 The decision by, for example, a fitness centre proprietor to show a cable programme, or of a hair salon proprietor to play a radio station's music programme is a commercial one. Its purpose is to attract consumers to its premises, to improve their experience of the venue, or to create a particular atmosphere for the customer, and thereby to produce a commercial benefit to the person who facilitates the enhancement that copyright material provides.
- 4.3 The consultation document notes an "inconsistency"<sup>3</sup> in the way that the Ordinance currently treats rights holders in this circumstance. In the view of the MPA there is no inconsistency, and the provision should not be amended: the section currently deals with the matter in a fair way, which is consistent with the distinction between works and other subject matter.
- 4.4 Section 81(1) currently recognises the distinction, by providing exemptions for infringement in relation to broadcasts and cable programmes, and sound recordings and films.
- 4.5 Being the means by which copyright material may be transmitted, broadcasts and cable programmes enjoy less protection under the Ordinance than do works. For example, the duration of copyright in broadcasts and cable programmes is 50 years from the end of the year in which the broadcast was made or the programme was included in a cable transmission service: section 20(2). In the case of a copyright work, copyright generally subsists for the life of its author plus 50 years. In short, and contrary to the views apparently expressed by copyright users, all copyright is not the same.
- 4.6 The MPA's concern with section 81 of the Ordinance is the focus on non payment of an admission fee as the determining factor as to whether a copyright licence fee is payable. In the view of the MPA, for the reasons set out above, non payment of admission to a place that shows a broadcast or cable programme does not mean that there is no commercial benefit to the provider of that material.
- 4.7 Accordingly, the question should be, whether the material is played or shown in public<sup>4</sup> and no other exemption applies under the Ordinance<sup>5</sup>. If so, a fee should be payable. The level of that fee will be a matter of negotiation in each case.

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<sup>3</sup> page 14

<sup>4</sup> For the meaning of "public" for copyright purposes, see *Telstra Corporation Limited v Australasian Performing Right Association Limited* 146 ALR 649, a decision of the High Court of Australia

<sup>5</sup> section 76, for example, permits non profit clubs and societies to perform copyright works without payment of fee.

- 4.8 In each case that a copyright licence fee is properly payable, it is a decision of the user to determine whether the cost should be passed on to its customers or clients in some way, or absorbed – or, indeed, that the price sought by the copyright owner is too high.
- 4.9 However, in practice, copyright owners require the assistance of organisations such as the Composers and Authors Society of Hong Kong (**CASH**). MPA supports the submissions made by CASH in response to the consultation document. The members of MPA represent the interests of songwriters, who are also members of CASH. Owners of copyright in musical works depend on the royalties they receive from the commercial use of their copyright. They do not, subject only to the most famous exceptions, earn significant income.

## **5. Chapter 5: Parallel Importation of Copyright Works other than Computer Software**

- 5.1 Copyright is a proprietary right granted to creators of certain material in recognition of the value of this material to society generally, and as a means of encouraging the further creation of such material. Fundamental to the value of copyright (both to its creators and to society as a whole) is its capacity to be exploited by its owner on a territorial basis.
- 5.2 There is not one single market for copyright material. Whilst the borders of such markets vary from time to time (for example, the new trading block of the European Union), the economic value of the rights – to both their owners and to society, both culturally and economically - depends on their owners' ability to negotiate sales or exclusive licences by territory.
- 5.3 The MPA acknowledges that digital technology, and in particular internet distribution and trade, are relevant considerations at this time. However, it is the MPA's position that it is not the role of legislation to predict the way that markets will behave, or commercial practices will develop. Judicial decisions will inevitably precipitate legislative change. It is the role of the legislation in the meantime to provide a principled foundation for the resolution of commercial disputes. As has been the experience in foreign jurisdictions, the sensible approach is to make the Ordinance as technologically neutral as possible, and then “wait and see” how the marketplace behaves, and new markets emerge.
- 5.4 Supporters of the easing of restrictions against parallel importation argue that this is in the interests of consumers – that is, that the ability of copyright owners to enter into licences according to geographical territory leads to higher prices. In the view of the MPA, this is neither:
- (a) borne out by experience in the jurisdictions which allow parallel importation;
  - (b) a sound economic argument; nor
  - (c) legally justifiable.

*Experience in other jurisdictions*

- 5.5 In our view, Legco should examine very closely the experience in other jurisdictions. It appears that the benefits to consumers which legislators have in the past anticipated for such provisions have not always occurred.
- 5.6 As the bureau would be aware, the United Kingdom in fact strengthened its anti parallel importation laws in 1988. When, in 1993, the Monopolies and Mergers Commission was asked to investigate the pricing practices of record companies, the MMC concluded that any weakening of the parallel importation provisions would:
- (a) be contrary to the EC Rental Directive;
  - (b) result in an increased risk of piracy;
  - (c) weaken copyright protection generally; and
  - (d) bring few benefits to consumers<sup>6</sup>.
- 5.7 In Australia, where parallel importation of sound recordings was legitimated by amendments made to its copyright legislation in 1998, it is still not clear what, if any, effect the amendments have had on retail prices.<sup>7</sup>
- 5.8 In Singapore, where parallel importation is allowed, anecdotal evidence suggests that there has been no impact on the price of commercially available recordings of musical works. We would be pleased to make detailed further submissions on this point if required.
- 5.9 In New Zealand, parallel importation was banned (for any purpose other than personal or domestic use) until 1998. At that time, the New Zealand government removed the ban on parallel imports in an effort to achieve low prices and greater competition. This amendment has been under government review since February 2000 in relation to the book, film, music and software industries<sup>8</sup>. Despite an extensive consultation process and the publication of several reports, the government has recently called for further submissions on the issue.
- 5.10 Although legislatures take differing approaches to the question, legislation in each jurisdiction varies in substantive ways and economic considerations vary according to the industry affected, the benefits of the relaxation of prohibitions on parallel importation have not been proven. The MPA recommends, if the Hong Kong government is not convinced after this round of submissions that the parallel importation provisions should be retained as they are, that it undertakes exhaustive consultation and investigation of the matter, which focuses on the issues which are of particular concern in the Hong Kong market.

*Economic arguments*

- 5.11 The MPA acknowledges the public good in cheaper prices for consumers. But this benefit to society should not come at too great a cost, and in the view of the MPA the legislature needs to take a broad perspective on the question of the economic

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<sup>6</sup> *The Supply of Recorded Music* Monopolies and Mergers Commission (UK) 1994 paras 1.11 and 2.97

<sup>7</sup> Submission of the Australian Copyright Council to *Senate Legal and Constitutional Legislation Committee on Copyright Amendment (Parallel Importation) Bill 2001* April 2001

<sup>8</sup> See [www.med.govt.nz](http://www.med.govt.nz).

effect of the introduction of parallel importation provisions. In any event it is by no means certain, as the experience of other jurisdictions has shown, that the removal of restrictions on parallel importation has the effect of lowering prices.

- 5.12 The creation and exploitation of Hong Kong copyright material makes a significant contribution to its economy. In an economy as sophisticated as that of Hong Kong, this contribution – and its potential to increase - must not be underestimated. This is particularly the case given Hong Kong's international status.
- 5.13 The protection and enforcement of domestic intellectual property is a particularly significant economic issue for Hong Kong at this time for several reasons, including:
- (a) the accessibility of Hong Kong to imports, in light of its relative lack of import tariffs and duties;
  - (b) its importance to the United States as an export market for manufactured goods; and
  - (c) the relatively recent improvement in international standing that the Government has achieved in its attack on copyright piracy, in particular of CDs and videos<sup>9</sup>.

*Legal concerns*

- 5.14 As the Bureau is aware, copyright legislation is almost 300 years old. At its source is the encouragement of learning<sup>10</sup> - that is, a benefit to society as a whole. The diminution of the rights of copyright owners by means of denying them the capacity to exploit their proprietary rights on a territorial basis not only undermines the private legal rights of the copyright owner; it threatens the encouragement of the creation of further such material, which is of cultural, economic and educational value.
- 5.15 To restrict the law against parallel importation would be to legitimate what would otherwise be piracy – that is, a criminal act. The MPA contends that a legislative amendment which would have this effect, can be justified only on compelling legal grounds. In the view of the MPA, there are none.

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<sup>9</sup> The Office of the U.S. Trade Representative removed Hong Kong from its Special 301 list of intellectual property rights violators in early 1999

<sup>10</sup> *Statute of Anne 1709*