

PART V

Voice of Affiliated Music Copyright Organisations



Since not only the interests of local CASH members but also those of overseas composers will be affected by the proposed exemption, CASH has sought the opinions of our affiliated music copyright organisations abroad. The respondent-organisations' opinions mainly revolve around the following 3 questions posed to them:

1. Does your copyright law exempt the public performance of music and lyrics by means of turning on the free radio or TV programmes?
2. If exempted, in your opinion, what are the rationales behind and do you consider that the exemption violates the TRIPS Agreement and the Berne Convention?
3. If not exempted, do you license the said premises? And, if you exercise your discretion not to license the said premises, what are your rationales?

In summary, all the respondent organisations are opposed to the proposed exemptions as spelled out in paragraphs 4.9(a) & (b) of the Consultation Document both on the grounds of copyright principle and of international obligations.

The respondent-organisations enclosed herein are :

Country	Organisation	Organisation's full name	Founding Year	No. of Writer Members	No. of Publisher Members	Total no. of Members
Europe	GESAC	European Grouping of Societies of Authors and Composers	1990	N/A	N/A	N/A
Ireland	IMRO	Irish Music Rights Organisation	1989	3,363	133	3,496
U.K.	PRS	The Performing Right Society Limited	1914	34,000	2,500	36,500
Canada	SOCAN	Society of Composers, Authors and Music Publishers of Canada	1990	60,000	10,000	70,000
Australia	APRA	Australasian Performing Right Association Limited	1926	32,066	300	32,366
Spain	SGAE	Sociedad General de Autores de Espana	1899	58,666	751	59,417
Switzerland	SUISA	Societe suisse pour les droits des auteurs d'oeuvres musicales	1923	15,852	1,182	17,034
Germany	GEMA	Gesellschaft Fur Musikalische Auffuhrungs – Und Mechanische Vervielfaltigungsrechte	1903	49,255	4,166	53,421
Italy	SIAE	Italian Society of Authors and Publishers	1882	56,400	1,870	58,270
Holland	BUMA	Vereniging BUMA		13,043	664	13,707
Sweden	STIM	The Swedish Performing Right Society	1924	37,360	1,934	39,294
Finland	TEOSTO	Finnish Composers' Copyright Society	1928	13,129	428	13,557

PART VI

Copies of Submission by Affiliated Music Copyright Organisations



A total of 10 overseas organisations have already submitted their opinions to the HKSAR Government, namely :

Country	Organisation	Organisation's full name	Founding Year	No. of Writer Members	No. of Publisher Members	Total no. of Members
Worldwide	CISAC	International Confederation of Societies of Authors and Composers	1926	N/A	N/A	N/A
Europe	GESAC	European Grouping of Societies of Authors and Composers	1990	N/A	N/A	N/A
Ireland	IMRO	Irish Music Rights Organisation	1989	3,363	133	3,496
Canada	SOCAN	Society of Composers, Authors and Music Publishers of Canada	1990	60,000	10,000	70,000
U.K.	PRS	The Performing Right Society Limited	1914	34,000	2,500	36,500
Australia	APRA	Australasian Performing Right Association Limited	1926	32,066	300	32,366
Spain	SGAE	Sociedad General de Autores de Espana	1899	58,666	751	59,417
Malaysia	MACP	Music Authors' Copyright Protection (MACP) Berhad	1989	1,506	68	1,874
Finland	TEOSTO	Finnish Composers' Copyright Society	1928	13,129	428	13,557
Italy	SIAE	Italian Society of Authors and Publishers	1882	56,400	1,870	58,270

In summary, all of the submissions express objection to the exemptions spelled out in paragraphs 4.9(a) and (b) of the Consultation Document. These submissions are enclosed.



Paris, December 6th, 2001

The Commerce and Industry Bureau
For the attention of Ms Laura TSOI
Assistant Secretary for Commerce and Trade
Level 29
One Pacific Place
88 Queensway
HONG-KONG

Dear Ms Tsoi

The Confédération Internationale des Sociétés d'Auteurs et Compositeurs ("CISAC") is an international organisation based in Paris, formed in 1926 and charged with co-ordinating the affairs of copyright societies around the world. These societies collect and distribute royalties for composers, authors and publishers, thereby encouraging creativity and enriching the cultural life of the countries in which they are based.

CISAC has almost two hundred members in some one hundred territories, between them collecting and distributing close to six billion dollars annually and administering rights in many millions of copyright works. CASH is CISAC's member in Hong Kong and an elected member of our Administrative Council. CASH has been successfully representing the creative community and serving the music users in Hong Kong for many decades.

It has come to CISAC's attention that the Government has published a Consultation Document. CISAC understands that one of the proposals contained in this document is a proposal to amend the Copyright Ordinance by introducing an exemption of liability in respect of the public performance of music and lyrics by means of a radio or TV apparatus ("Proposal").

CISAC respectfully objects to the Proposal on three major grounds.

1. It would unreasonably prejudice the legitimate interests of the creative community. CISAC fully accepts that all copyright laws must maintain an equitable balance between the interests of the creator and user of copyright works. However, the Proposal is such that this balance would be tipped inequitably in favour of the user, thereby eliminating a vital source of income for those creators who depend on copyright royalties to survive.

2. By eliminating a vital source of income for the creative community, the Proposal would thereby undermine the very *raison d'être* of any copyright regime, namely the provision of an economic incentive to create. Without the necessary economic incentive, creators will simply not create. If creators do not create, the culture of any society will inevitably be adversely affected.
3. The Proposal would be in violation of the WTO Agreement on Trade and Related Aspects of Intellectual Property Rights ("TRIPS"). As you will be aware, this Agreement stipulates that WTO members are obliged to comply with the substantive provisions of the Berne Convention for the Protection of Literary and Artistic Works, as revised by the Paris Act of 1971 ("Berne"). In particular (but without limitation) Article 9(1) of TRIPS imposes an obligation on WTO members to comply with Articles 1 to 21 of Berne. It follows from the above that if a WTO Member fails to comply with Berne, it also is in breach of its obligations under TRIPS.

In CISAC's respectful view, the Proposal does not comply with the provisions of Berne, including, but not limited to, Article 11 bis (1) (iii). As you will be aware, the above-mentioned Article grants the rightsholders of (inter alia) musical works the exclusive right of authorising the broadcasting and other wireless communication of their works; the public communication of a broadcast of their works either by wire or by rebroadcast and the public communication of a broadcast of their works by loudspeaker or analogous instrument.

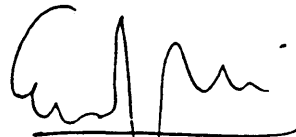
By allowing music users to use music without a licence from the relevant rightsholders and without the payment of royalties, the Proposal would deprive rightsholders of the protection to which they are entitled under the aforementioned Article when broadcasts of their works are publicly communicated by loudspeaker or analogous instruments. The Proposal would accordingly constitute a breach of TRIPS. In this regard, CISAC would respectfully draw your attention to the WTO ruling of July 2000. This ruling declared that sections of the US copyright legislation (which are similar in nature to the provisions of the Proposal) breached US obligations under the WTO Agreement.

CISAC also understands that CASH has all along been licensing premises where music is publicly performed by means of radio or TV apparatus. If this Proposal were adopted, such licensing activity can no longer continue. The legitimate interests of composers and authors around the world, which could have been protected, will be unreasonably prejudiced. Furthermore, the public performance of music can be by all means. The fact that it is via radio or TV apparatus does not free the music users from copyright liability. On the contrary, such a means does conflict with the normal exploitation of music and lyrics. Accordingly, the HKSAR would not be able to apply Article 13 of the TRIPS Agreement to impose any exemption as contained in the Proposal since all the specified conditions thereunder cannot be fulfilled.

In view of the above, we respectfully submit that *HKSAR should apply the international copyright standards in their entirety in order to uphold Hong Kong's international image.*

CISAC would be pleased to expand on the above arguments if so required. Please do not hesitate to contact us should you have any queries.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Eric Baptiste', written over a horizontal line.

Eric Baptiste
General Secretary

G E S A C

GROUPEMENT
EUROPÉEN
DES SOCIÉTÉS
D'AUTEURS
ET COMPOSITEURS

The Secretary General

Brussels, 13 December 2001
327ML01

Via fax

Ms Laura Tsoi
Assistant Secretary for Commerce &
Industry
Government of Hong Kong Special
Administrative Region
Commerce & Industry Bureau
HKSAR – Level 29
One Pacific Place – 88 Queensway
Hong Kong

**Exemption concerning "public performance of music and lyrics by means of turning on
free radio and TV programmes"**

Dear Ms Tsoi,

Created in 1990, the European Grouping of Societies of Authors and Composers (GESAC) is an association that groups 24 of the largest authors' societies in the European Union, Norway and Switzerland. As such, GESAC represents nearly 480 000 authors or their successors in title in the area of music, audiovisual, graphic and plastic arts, literary and dramatic works and music publishers. All the European Music Authors Societies are represented in GESAC. The object of the Grouping is to ensure effective copyright protection for European right holders in Europe and elsewhere.

GESAC has been informed that a consultation is being organized by the Hong Kong Special Administrative Region concerning the review of certain provisions of the Copyright Ordinance. It is proposed, in particular, to extend the current exemption as regards sound recordings and broadcasts where they are shown or played for free.

GESAC has followed carefully a similar case brought up by the European Union (EU) before the WTO against the USA, concerning section 110 (5) (B) of the US Copyright Act.

Although there are some differences between this particular case and the proposed amendment of the Hong Kong Copyright Ordinance, some elements of the WTO ruling could be of interest for you.

- This case originated in a complaint lodged by IMRO the Irish collective management organization with the unanimous support of GESAC to the EU. The latter, after an investigation, decided to challenge the exemptions foreseen in Section 110 (5) of the US Copyright Act, as they were believed to cause unreasonable prejudice to European right holders.

During summer 2000, the WTO Dispute Settlement Body adopted a WTO panel report. Section 110 (5) (A) covering the traditional "homestyle exemption" was considered as valid due to the fact that its scope is limited to dramatic works. Due to the very limited diffusion of dramatic works on American televisions and radios, the panel considered in particular that the economic impact of this provision is of negligible importance.

However, Section 110(5) (B) of the US Copyright Act was condemned. Under this provision, commercial establishments such as bars, shops, and restaurants which do not exceed a certain size (2,000-3,750 square feet) or which meet certain equipment requirements may play radio and TV music without paying any royalty fees to collecting societies.

The report of WTO can be found at the following address :

http://www.wto.org/english/tratop_e/dispu_e/distabase_e.htm

(panel reports 2000 – doc. 00-2284 part 1 & 2 – symbol WT/DS160/R dated 15/06/2000)

On January 2001, the WTO determined that the US had to amend its Copyright legislation by 27 July 2001, in order to implement the findings in the panel report.

- **The WTO panel main conclusions**

- 1) Under Article 9 (1) of the WTO Agreement on Trade Related Intellectual Property Rights (TRIPS), members must comply with Articles 1 to 21 of the Berne Convention (1971).

Article 11bis (1) grants the rights holders of literary and artistic works (which include musical works) the exclusive right of authorising not only the broadcasting and other wireless communication of their works, but also the public communication of a broadcast of their works by loudspeaker or analogous instrument (Art. 11 bis (1) (iii)). According to the preparatory works of the Berne Convention (1948 Brussels Conference in particular), Article 11 bis (1) (iii) was intended to cover places "above all where people meet : in the cinema, in restaurants, in tea rooms, railway carriages..". The preparatory works also refer to places such as factories, shops and offices.

Article 11bis (2) provides that, while countries may place conditions on the exercise of the exclusive rights set out in Article 11bis (1), such conditions may not be prejudicial to the right holders' right to obtain equitable remuneration.

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Like Section 110 (5) of the American Copyright Act, the proposed Hong Kong Copyright Ordinance's amendment seems to fall under the scope of Article 11bis (1) and (2).

- 2) The WTO panel also reviewed the US Copyright provision from the point of view of Article 13 of the TRIPS Agreement (Limitations and exceptions) related to "minor reservations". According to this provision, "Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder" (three steps test).

The WTO panel underlines in its report that the three conditions apply on a cumulative basis, each being a separate and independent requirement that must be satisfied. Failure to comply with any one of the three conditions results in the Article 13 exception being disallowed. In addition, Article 13 cannot have more than a narrow or limited operation.

Interpretation by the WTO panel of the three conditions can be found in the above mentioned report (page 31 to 68). The main elements of it are the followings:

a) "certain special case"

The term "certain" means that, under the first condition, an exception or limitation in national legislation must be clearly defined. However, there is no need to identify explicitly each and every possible situation to which the exception could apply, provided that the scope of the exception is known and particularised. This guarantee a sufficient degree of legal certainty.

The term "special" means that more is needed than a clear definition in order to meet the standard of the first condition. In addition, an exception or limitation should be limited in its field of application or exceptional in its scope. In other words, an exception or limitation should be narrow in quantitative as well as qualitative sense.

The first condition of Article 13 requires that a limitation or exception in national legislation should be clearly defined and should be narrow in its scope and reach.

A law that exempt a major part of the users covered by the provision of Article 11 bis (1) (iii) could not be considered as a "special case" in the sense of the first condition of Art. 13 of the TRIPS Agreement.

The WTO panel concludes that Section 110(5)(B) does not comply with the first condition and consequently does not satisfy the requirement of Art. 13, given that the three conditions are cumulative. However, Section 110(5)(A) which is very well defined and limited does comply with the first condition.

b) "not conflict with the normal exploitation of the works"

The WTO panel considers that an exception or limitation to an exclusive right in domestic legislation rises to the level of a conflict with a normal exploitation of the work if uses, that in principle are covered by that right but exempted under the exception or limitation, enter into economic competition with the ways that right holders normally extract economic value from that right to the work (i. e.; the copyright) and hereby deprive them of significant or tangible commercial gains.

Section 110 (5)(B) also conflict with a normal exploitation of the work while it is not the case of Section 110 (5)(A).

c) "Not unreasonably prejudice the legitimate interest of the right holder"

The crucial question is which degree or level of prejudice maybe considered as unreasonable. The actual as well as potential prejudice have to be taken into consideration.

The business exemption of Section 110(5)(B) does not meet the requirement of this third condition while Section 110(5)(A) does.

This ruling is an important precedent as it creates an incentive for WTO Member States applying or planing to introduce similar exemption not to do so. Luxembourg that intended to introduce an exemption comparable to the sanctioned one has, for example, finally decided not to do so.

We respectfully suggest that the Hong Kong Government decides not to introduce into its law such an exemption which does not comply with the requirement of the TRIPS Agreements and would definitely unreasonably prejudice the legitimate interest of right holders in Hong Kong and elsewhere.

I remain at your disposal for further information if needed.

Yours sincerely,



Véronique Desbrosses

Cc: Mr Timothy Yuen, CASH

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IRISH MUSIC RIGHTS ORGANISATION
EAGRAS UM CHEARTA CHEOLTA

Copyright House, Pembroke Row, Lr. Baggot Street, Dublin 2. Phone: 661 4844. Fax: 676 3125
E-mail: info@imro.ie Internet: www.imro.ie

ETS6809I/hl

22 November 2001

Ms Laura Tsoi
Assistant Secretary for Commerce & Industry
Commerce & Industry Bureau
Hong Kong Special Administration Region
Level 29
One Pacific Place
88 Queensway
Hong Kong

Re: Proposed Copyright Exemptions

Dear Ms Tsoi

The Irish Music Rights Organisation (IMRO) administers the performing right in music on behalf of composers, authors and publishers of music. Such rights arise by virtue of Article 11 of the Berne Convention for the protection of literary and artistic works.

We have been informed by the Composers' and Authors' Society of Hong Kong (CASH) that there is a proposal before you to limit the right of authors and their collective representatives, to control their performing right in your territory. This proposal refers specifically to the right of authors to control the public performance of their works by way of radio and TV broadcasts.

CASH administers the performing right of our members, on our behalf, in Hong Kong and we are extremely concerned to learn of the proposed exemptions.

You should be aware that the World Trade Organisation (WTO) has already ruled that such exemptions are in breach of the obligations of Member States of that organisation.

The case in question involved United States of America and, in particular, exemptions under Section 110(5) of the US Copyright Act 1976.

This organisation lodged a formal complaint with the European Commission in 1997 regarding the existence of these unjustified exemptions. In 2000, the Dispute Settlement Body of the WTO ruled in our favour and declared that the substantive provisions of the US legislation affecting the rights of authors to control the performing right in their music were breached.

Irish Music Rights Organisation Limited. Registered in Ireland Number 133321
Directors: Mike Hanrahan (Cathaoirleach), Barbara Galavan (Leaschathaoirleach), Paul Brady, Noel Cullen, Keith Donald, Darragh Kettle, Donagh Long, Donal Lunny, Patrick Lyons, Eleanor McEvoy, Liam Ó Maonlaí, Michael O'Riordan, Niall Toner

Full details of this decision and subsequent rulings by the WTO on this issue are available on the WTO web site at the following URL:-

http://www.wto.org/english/tratop_e/dispu_e/dispu_status_e.htm

The document reference is DS160.

A significant number of our authors, who are also performers, visit and perform their works in your territory. We are also aware that such works are regularly broadcast there. In the event of the proposed exemptions being proceeded with, we may have to seriously consider invoking the now established WTO procedure against the HKSAR Government.

Yours sincerely
for IRISH MUSIC RIGHTS ORGANISATION LIMITED



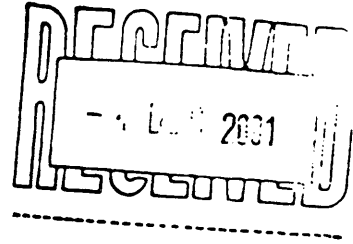
E T Shackleton
Director of Services
eamon.shackleton@imro.ie

c.c. Composers and Authors Society of Hong Kong Limited



Society
of Composers,
Authors and
Music Publishers
of Canada

Société canadienne
des auteurs,
compositeurs
et éditeurs
de musique



November 28, 2001

Ms. Laura Tsoi
Assistant Secretary for Commerce and Industry
Commerce and Industry Bureau
- HKSAR
Level 29, One Pacific Place
88 Queensway, Hong Kong

Dear Ms. Tsoi:

Re: HKSAR Copyright Ordinance: Proposed Exemption of the Public Performance of Music by Means of Broadcast Radio and Television Receiving Sets.

This letter is written in support of the submission of CASH with respect to the above matter.

SOCAN in Canada, like CASH in its territory administers the public performance of musical works.

SOCAN has reviewed the proposed exemption and is of the view that this proposal (exempting the secondary use of musical works forming part of a broadcast signal by virtue of its public performance) is inconsistent with the provisions of the *Berne Convention* and of the provisions of the *WTO (Trade Related Aspects of Intellectual Property Rights)*.

In addition to the above legal reasons, SOCAN submits that such secondary uses or subsequent uses by another party should not be exempt for the following reasons:

Radio, television, satellite and cable broadcasters all earn revenue either from the sale of advertising time or from subscriptions from the exploitation of programming containing musical works that are carried on the signals they transmit to members of the public. Likewise, public places (restaurants, nightclubs etc.) earn revenue when they utilize the same musical works but for their own purposes (i.e. public performance for their patrons).

Rather than earn money from advertising, public places of business that perform music, earn revenue from the sale of food, merchandise or services. The performance of music at these places of business enhances their ability to sell. The value of the performance of music coming from a radio does indeed accrue to a radio broadcaster from advertising, but it does not accrue to a place of business except through enhanced sales and other benefits that the performance of music provides.

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Sales of goods or services at places of business are, in fact, enhanced by the provision of music contained on broadcast signals. The value of the provision of music, however, is not captured by the royalties paid by broadcasters based on their advertising revenue or subscription fees.

For example, when customers wait in line for a service, they are often entertained by the radio so as to make their waiting time more enjoyable. Restaurants also use music to create an "ambiance" or mood to assist in the enjoyment of the food and services they provide. Stores use music to make shopping seem more enjoyable and conducive to increased sales. Many studies demonstrate this phenomenon.

Therefore, the authors of the music used in public places, irrespective of how it may be delivered, (e.g. via a radio) should benefit from the exploitation of their music by those parties who use their music in a different way than the broadcasters. In the one case, the broadcaster earns money for the transmission to persons in their homes (primarily private and domestic) while businesses earn money from the further or secondary public performance of music to their patrons or customers.

Secondly, the means used by a music user to deliver music for public performance should not be a factor that exempts them from payment of a royalty.

If a place of business were to use a CD or tape player to publicly perform a particular musical work, a royalty must be paid. The fact that they use a radio rather than a CD or tape player is used by that business to play the same musical work should not absolve them of liability. The technical means of delivery of music should not determine the liability for its exploitation.

To summarize, the license fee paid by one music user who exploits music in one way (sells advertising time or subscriptions) should not cover or pay for the exploitation by another business that makes a secondary or subsequent use of that music.

If SOCAN can be of any further assistance in this matter, we would be pleased to respond if required.

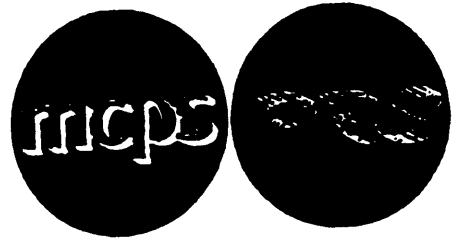
Yours very truly,

A handwritten signature in black ink, appearing to read "C. Paul Spurgeon", is written over a large, scribbled-out area of the document.

C. Paul Spurgeon
Vice President, Legal Services
& General Counsel

CPS/jb

cc: Timothy Yueng, CASH
André LeBel, CEO, SOCAN



Our ref: DEH 061201

THE MUSIC ALLIANCE

Government of Hong Kong Special Administrative Region
FAO: Ms Laura Tsoi
Assistant Secretary for Commerce & Industry
Commerce & Industry Bureau
HKSAR
Level 29
One Pacific Place
88 Queensway
Hong Kong.

Please reply to:

Dawn Hutton
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29-33 Berners Street
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W1T 4AB
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6 December 2001

Dear Ms. Tsoi

The Performing Right Society ('PRS') is an association of composers, authors and publishers of copyright musical works which administers on behalf of its members certain non-dramatic performing, broadcasting and cable diffusion rights. PRS currently has over 40,000 members in the UK and through reciprocal agreements administers the performing right in the UK for authors and publishers from all over the world including those in Hong Kong and mainland China. PRS has been involved in the copyright field for over 80 years.

PRS was informed last month that a consultation document had been issued by the Hong Kong Special Administrative Region on a review of certain provisions of the Copyright Ordinance. We are writing in connection with regard to one of the proposed amendments; to extend the current exemption as regards sound recordings and broadcasts where they are shown or played for free.

Our response to the two questions stated in paragraph 4.9 are stated below and address the general points made in chapter 4 of the consultation document.

- (a) should the statutory exemption in paragraph 4.2. of the consultation be extended to cover all underlying copyright works included in the broadcast or cable programme?

Whilst it may appear inconsistent that the current exemption only applies to the broadcast or cable programme itself or any sound recording or film within it (including a performance) and not the underlying musical and literary works it should be noted that musical and literary works are specifically protected by the Berne Convention.



INVESTOR IN PEOPLE

Article 11 of the Berne Convention provides:

(1) Authors of dramatic, dramatico-musical works shall enjoy the exclusive right of authorising:

- (i) the public performance of their works, including such public performance by any means or process.

The author's exclusive right of public performance is not limited to a public performance for which there has been a direct payment. Quite simply if there is a performance of a work in public (as opposed to in private) it is part of the author's exclusive right. As such the public performance of an author's work does form part of the normal exploitation of his work and therefore we reject the suggestion in the consultation document that it does not.

In the UK there is established legal precedent on the point of public performance as regards what constitutes an element of the 'public' and such cases have considered areas where no payment is made for the music as such e.g. music in record shops and at work. The legal precedent demonstrates that there is most definitely a value to such use of the music; a value to the shop owner and a value to the employer, and that such use forms part of an author's legitimate exploitation. Therefore it is incorrect to state that this does not conflict with the normal exploitation of a work or prejudice the copyright owner. Indeed PRS licenses shop owners, employers and others for the use of musical works for such public performances. A significant amount of PRS members income is generated through the licensing of establishments where no admission fee is payable. For example, PRS collected in excess of £20m in relation to public houses in 2000, in the same year over £10m was collected from shops and stores. These are just two of a number of areas which would be affected by the proposed exception but the figures give some indication of the value of such public performance and the negative impact that the exception would have on an author's legitimate expectations.

Therefore such an exemption should clearly not apply to the underlying works as this would be in conflict with the rights given to an author by virtue of the Berne Convention. Indeed if the music users are concerned that all works are treated in the same way we would suggest that there is no exemption at all.

Furthermore, Article 11bis of the Berne Convention confirms the separate and distinct exclusive rights of a copyright owner to authorise the broadcasting and inclusion in a cable programme service of their works. These rights are then in addition to the exclusive right of public performance and distinct from it and therefore it is not correct to say that in authorising the use of their works in a broadcast or cable programme the copyright owner automatically consents to the public performance of his work and indeed to do so would deprive him of a right granted by the Berne convention and the Agreement on Trade Related Aspects of Intellectual Property ('the TRIPs Agreement').

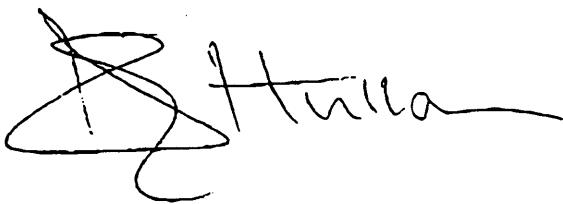
(b) should the exemption be extended to cover all public places where the broadcast or cable programme is shown or played except where goods or services are supplied at prices which are substantially attributable to the facilities afforded for seeing or hearing the broadcast or programme?

The suggestion that the exemption be extended to cover the situation where an admission fee of some sort is charged because the broadcast is available free if watched in the home is very dangerous as this undermines the whole basis of the public performance right as contained in the Berne Convention and endorsed by the TRIPs Agreement. The fact that the broadcast could be heard and/or viewed at home for free does not mean that this should result in it being free when it is in public as this is then within the exclusive right of the copyright owner. Furthermore as stated above the direct link of a fee paid by the audience is misguided as the key issue is not whether the audience pay a directly attributable fee for the music but that there is a value in the use of that music whether that is in a restaurant, shop or place of work, and therefore within the scope of the author's normal exploitation of his copyright work.

The Hong Kong Government will no doubt be aware of the recent complaint made to the WTO by the European Communities against the United States in respect of its exemption for public performance as regards certain 'small establishments' who use 'homestyle' apparatus. In July 2000, the WTO Dispute Settlement Body decided that the US exemption was in breach of TRIPs and recommended that the US Government amend their legislation. As such we respectfully suggest that the Hong Kong Government does not implement such an exemption into its law.

Please do not hesitate to contact us should you require further information.

Yours sincerely



Dawn Hutton
Legal Division
The MCPS-PRS-Alliance

Monday 17 December 2001



Ms Laura Tsoi
Assistant Secretary for Commerce and Industry
Hong Kong SAR
Level 29, One Pacific Place
Queensway
HONG KONG

Dear Madam

REVIEW OF COPYRIGHT ORDINANCE (HK) – PERMITTED ACTS RELATED TO FREE PUBLIC SHOWING OF PLAYING OF BROADCAST OR CABLE PROGRAMME

The Australasian Performing Right Association Ltd (APRA) is a non-profit company founded in 1926 to administer the performing right in copyright on behalf of composers, lyricists, music publishers and other music copyright owners. Currently, we represent over 32,000 such members in Australia, New Zealand and the Pacific. In 1983, APRA entered into a Reciprocal Representation Agreement with the Composers and Authors Society of Hong Kong (CASH). Under that agreement, CASH represents and administers the performing rights in APRA repertoire in the territory of the Hong Kong SAR in the same way that we represent CASH repertoire in our territories.

We were therefore interested to learn that the HK SAR Government has issued a "Consultation Document - Review of Certain Provisions of Copyright Ordinance". However, we are very concerned about the proposal under Chapter 4 of that document to extend to all underlying works the statutory exemption relating to free public showing or playing of a broadcast or cable programme.

We believe that any such an amendment, if enacted, would not meet the requirements of Article 13 of the TRIPS Agreement and would be inconsistent with Article 11bis of the Berne Convention as incorporated into the TRIPS agreement by Article 9.1. Article 11 bis of Berne makes it clear that the Berne Convention applies to public performance of musical works which occur by means of radio or television broadcasts. It provides that authors of works have the exclusive right to authorise "the public communication by loudspeaker or any other analogous instrument transmitting, by signs sounds or images, the broadcast of the work." A similar provision in the US Copyright Act, the "Fairness in Music Licensing Act" of 27 October 1998, was found to be inconsistent with WTO obligations by a Disputes Panel under the provisions of the WTO DSU and TRIPS.

Indeed, the Australian Government undertook a similar inquiry in 1997 and the House of Representatives Standing Committee on Legal and Constitutional Affairs published a report titled "Don't Stop the Music". I have copied the section on International Obligations for your reference [paras 2.16 to 2.25]. Note particularly the comments in [para 2.19] regarding Article 11bis and the WIPO Guide to the Berne Convention. The Committee concluded that enacting an exemption for the payment of a licence fee for small business "would not be an equitable outcome" and may be "in breach of international trade agreements". (See page 60 of the Report, [para 4.39]).

With respect to the argument regarding the exemption for neighbouring rights (sound recording and performers), this may be acceptable under the Rome Convention which governs these rights. In Australia, we have had a similar exception in section 199(2) of the *Copyright Act 1968 (Cwth)*. This provides that a person causing music to be performed via radio or television broadcasts does not infringe copyright in the sound recording, but they still require the licence of the copyright owners in the underlying music. From a policy point of view, it is immaterial if the performance of the music takes place by a broadcast or by playing a sound recording, it is still a performance of the music. This is particularly the case now where there are radio broadcast channels that design play lists of particular genres which are attractive for retail establishments to play. A broadcast on radio or television of a sound recording is a much more indirect performance of the sound recording, in our view. The international minimum rights for copyright materials to protect and encourage the creativity of the authors are set at a higher standard than the minimum rights for neighbouring rights, which are designed to encourage the investment in dissemination of the underlying works.

The shops that are playing music by way of broadcast are doing so for the benefit of their customers and it is immaterial that the public may not pay to enter the premises. The UK and Australian precedents of the definition of "in public" have been summarised in a recent decision of the High Court of Australia, *Telstra Corporation Ltd v APRA Ltd* 146 ALR 649. Kirby J referred to "three broad principles relevant to the characterisation" [at 690]:

1. Whether the performance is taking place in a 'domestic and private' setting – 'were the people who made up the audience bound together by a domestic or private tie, or by an aspect of their public life?'
2. Whether the performance occurs as 'an adjunct to a commercial activity', and
3. Whether the audience form a part of 'the copyright owners' public' – the relationship between the audience and the copyright owner is emphasised, as well as whether the copyright owner would be entitled to expect payment for the performance of the work.

Justices Gaudron and Dawson in this case observed:

"What is important is the nature of the audience constituted by those who receive music on hold. Lying behind the concept of the copyright owner's public is recognition of the fact that where a work is performed in a commercial setting, the occasion is unlikely to be private or domestic and the audience is more appropriately to be seen as a section of the public ... it is the preparedness of those who wish the music on hold to be played to bear the cost of the arrangement which provides the key, for it reveals the commercial character of the broadcast and the commercial deprivation suffered by the copyright owner."


This case would have persuasive precedential value in the Hong Kong SAR. It therefore follows that businesses and shops play music in their premises because it has commercial value for them. I enclose a copy of a study by Dr Stephanie Wilson, examining the value of the performance of different genres of music in a commercial setting, "The Effect of Music on Perceived Atmosphere and Purchase Intentions in a Restaurant".

We believe the proposals to amend the Hong Kong Copyright Ordinance to extend the exemption to works performed publicly in a broadcast or cable programme would be in breach of your international obligations, as outlined above. I have copied our submission to the Trade Division of our Department of Foreign Affairs and Trade.

We would urge the HK SAR to respect and support the work of our sister society CASH in helping develop the local music industry. CASH has developed a licensing system for persons that publicly perform music by means of broadcast or otherwise which is efficient and reasonable. It is usual for "users" of copyright materials to try and obtain use of the copyright materials without payment. Further, it is APRA's experience that copyright users greatly outnumber copyright creators. APRA firmly believes that it is the task of government to enact provisions that support the public interest of protecting and encouraging creativity.

I am happy to answer any further queries and/or provide any additional information that you may require.

Yours sincerely,



Scot Morris

Director of International Relations

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cc. Mr Elton Yeung, Chief Executive Officer, CASH;

Mr Ang KT, Regional Director, International Confederation of Societies of Authors and Composers, (CISAC), Singapore;

Ms Toni Harmer, International Intellectual Property Section, Trade Negotiations Division, Department of Foreign Affairs and Trade.

PART VII

Voice of Local CASH Members

Immediately upon the release of the Consultation Document, CASH has relayed the message to all of our members. In response, **588** CASH members, comprising of **504** writer members and **84** publisher members, have sent in their opinions addressed to the Commerce and Industry Bureau. Upon consolidation, CASH presents herein these letters of our members in the Appendix Section.

Together, these letters represent a unified and concerted voice against the proposal to grant royalty exemption for the public performance of musical works and lyrics by means of turning on free radio or TV programmes, no matter admission fees are charged or not for entering the relevant premises.

The names and relevant information of our most prominent members who have expressed their views are listed below, followed by a list of our other CASH members (in alphabetical order) who unitedly wish to have their voice taken heed by the Government.

Prominent Members:

Name	Year Joined CASH	Specialised Music Genre
顧嘉輝 Joseph Koo	1977 (Founding Member)	Popular Music
黃霑 James Wong	1977 (Founding Member)	Popular Music
林夕 Lin Xi	1986	Popular Music
林振強 Lam Chun Keung	1980	Popular Music
鄭國江 Cheng Kok Kong	1978	Popular Music
向雪懷 Jolland Chan	1980	Popular Music
周華健 Chau Wa Kin	1994	Popular Music
雷頌德 Mark Lui	1992	Popular Music
梁芷珊 Canny Leung	1991	Popular Music
盧國沾 Jimmy Lo	1978	Popular Music
潘源良 Poon Yuen Leung	1983	Popular Music
陳少琪 Chan Siu Kei	1986	Popular Music
周禮茂 Chow Loy Mow	1983	Popular Music
陳蝶衣 Chan Yuen Tung	1983	Popular Music
茵葵 Loak Him Yau	1986	Popular Music
金培達 Kam Pui Tat	1991	Movie Music
周耀輝 Chow Yiu Fai	1989	Popular Music
張美賢 Chang Mei Yin	1990	Popular Music
黃邦賢 Wong Bon Yin	1984	Movie Music
陳光榮 Chan Kwong Wing	1988	Popular Music

Name	Year Joined CASH	Specialised Music Genre
甄健強 Yan Kin Keung	2000	Popular Music
麥皓輪 Mak Ho Lun	1988	Popular Music
候淞耀 Hau Chung Yiu Ankh	1997	Popular Music
羅堅 Lo Jien	1996	Movie Music
陳國樑 Chan Kwok Leung	1993	Popular Music
范景能 Fan King Nang	1992	Advertising Music
戴樂文 Romeo Diaz	1983	Advertising Music
黎彼得 Peter Lai	1997	Popular Music
劉以達 Lau Yee Tat	1985	Popular Music
劉卓輝 Gene Lau	1986	Popular Music
雷有輝 Lui Yau Fai	1982	Popular Music
雷有耀 Lui Yau Yiu	1982	Popular Music
藍奕邦 Nan Yik Pong	2001	Popular Music
彭家麗 Angela Pang	1999	Popular Music
彭羚 Peng Ling	1991	Popular Music
包以正 Eugene Pao	1987	Advertising Music
泰迪羅賓 Teddy Robin	1979	Movie Music
杜琪峰 To Kei Fung	1996	Movie Music
蔡國權 Tsoi Kwok Kuen	1981	Popular Music
徐日勤 Tsui Yat Kun	1984	Popular Music
黃尚偉 Conrad Wong	1989	Popular Music
黃家強 Wong Ka Keung	1986	Popular Music
閻惠昌 Yan Hui Chang	1998	Serious Music
葉紹德 Yip Shiu Tuck	1990	Cantonese Opera
于粦 Yu Lin	1978	Popular Music
袁卓凡 Richard Yuen	1987	Movie Music
翁月華 Yung Yuet Wah Linda	1997	Popular Music
陳永良 Chan Wing Leung	1982	Popular Music
陳美琪 Chen Mei Qi	1989	Popular Music
陳永華 Chan Wing Wah	1980	Serious Music
陳能濟 Chen Ning Chi	1977 (Founding Member)	Serious Music
鄭瑞芬 Cheng Shui Fan	2000	Popular Music
張國忠 Cheung Kwok Chung	1987	Serious Music
張達明 Cheung Tat Ming	1998	Popular Music
夏韶聲 Danny Summer	1984	Popular Music
方樹樑 Fong Shu Leung	1989	Popular Music
馮鏡輝 Fung Kang Fai	1985	Popular Music

Name		Year Joined CASH	Specialised Music Genre
馮添枝	Fung Tim Chee	1977 (Founding Member)	Popular Music
詹惠風	Chim Wai Fung	1978	Popular Music
簡寧	Kennie Lau	1986	Popular Music
江志仁	Kong Chi Yan	1991	Popular Music
關聖佑	Kwan Sing Yau	1979	Popular Music
黎允文	Henry Lai	1978	Popular Music
林奕華	Edward Lam	1996	Popular Music
林燕妮	Lam Yin Nei	1982	Popular Music
劉諾生	John Laudon	1989	Popular Music
羅永暉	Law Wing Fai	1977 (Founding Member)	Serious Music
李永雄	Lee Wing Hung	1994	Popular Music
盧永強	Lo Wing Keung	1983	Popular Music
Millward Peter Stephen		1991	Advertising Music
區新明	Ou Sun Ming	1986	Popular Music
蕭凌	Siu Ling	1983	Popular Music
程理高	Adrian Tsing	2000	Advertising Music
王國潼	Wang Guo Tong	1994	Serious Music
黃英華	Wong Ying Wa	1994	Movie Music