

**LETTERHEAD OF Composers and
Authors Society of
Hong Kong Ltd.**

Ms Leung Siu-kum
Clerk to LegCo Panel on Trade and Industry
Legislative Council
8 Jackson Road
Central, Hong Kong

19 January 1999

Dear Ms Leung

LegCo Panel on Trade and Industry-Meeting on 1 February 1999

Re: “Fees for the use of copyright works”

Thank you for your letter of January 5, in which you have invited our comments on the Hotel Industry’s position paper regarding the Copyright Ordinance (“the Ordinance”).

CASH is a non-profit-making society which distributes all income after payment of overheads to the composers/authors/music publishers for whom it provides collective management services in respect of *performing rights in musical works*.

The fees payable under CASH’s licensing schemes represent reasonable remuneration for the creators of the musical works. They are not fixed arbitrarily. They take into account equivalent schemes in other territories and/or are the product of negotiations with industry organisations, eg the Hong Kong Hotels Association in respect of music performed in hotels.

The Ordinance protects copyright owners against unauthorised use of their musical works and provides limited exemptions in relation to private study, news reporting, legal proceedings and some educational uses. There are no exemptions for commercial exploitation; nor should there be.

The Ordinance does not lay down guidelines for the fees to be charged by licensing bodies (nor does any other ordinance in respect of pricing by the commercial sector including hotels). However, it does provide a mechanism for resolving disputes between licensing bodies and users, namely the Copyright Tribunal which has power to determine all issues including the fees to be paid.

The *rights in sound recordings* are administered by Phonographic Performance (S E Asia) Limited for the record companies. Section 78 of the Copyright Ordinance (previously Clause 81 of the Consultation Bill) provides an exemption for free public showing or playing (to an audience who have not paid for

admission to the place where they are seen or heard) of broadcasts or cable programmes, including any *sound recordings* or films included in them. It also provides that persons are not regarded as having paid admission if they are admitted as residents or inmates of a place which is operated by a charity or for charitable purposes etc.

Section 78 does not apply to the *performing rights* administered by CASH.

Enclosed is our submission (in Chinese and English) in response to the Hotel Industry paper, which we shall be grateful if you will circulate to the Chairman and each Member of the LegCo Panel together with this letter.

CASH will be represented at the meeting by Leslie Ching (General Manager), Timothy Yuen (Licensing Manager) and Malcolm Barnett (Chairman). We shall be pleased to answer any queries or provide such further information as may be required.

Yours sincerely

Leslie Ching
General Manager CASH

Encl.

cc Hon Chan Kam-lam, Chairman of LegCo Panel on Trade and Industry Members of
LegCo Panel on Trade and Industry

**Submission by the
Composers and Authors Society of Hong Kong Limited (CASH)
to LegCo Panel on Trade and Industry**

Meeting on 1 February 1999

Position of CASH in Response to Hotel Industry's Position Regarding Copyright Ordinance

A. Introduction

A.1 Collective Management

In most territories of the world, including Hong Kong, music copyright owners have chosen to assign their performing rights exclusively to a collective management society which is equipped to negotiate and collect royalties on their behalf and enforce their rights. This collective management system is well-established and in several regions has been in place for over a hundred years. After all, how could a composer of a successful song possibly expect to monitor each performance or collect the royalties on his own?

A.2 CASH and its status

CASH was incorporated in 1977 as a company limited by guarantee and not having a share capital. It is a non-profit-making company and its function is to control and administer in Hong Kong the performing rights in musical works and lyrics originating in Hong Kong and overseas. CASH has over 1,800 members; they are the composers, lyric authors and music publishers of Hong Kong.

A.3 CASH and its entitlement to performing rights

Through assignment by its members, CASH controls and manages the performing rights in Hong Kong music repertoire. Through reciprocal agency arrangements with its affiliated societies representing copyright owners in more than 120 territories, CASH is empowered to control the performing rights in overseas music repertoire. Thus any party wishing to perform copyright music in public in Hong Kong can do so upon obtaining a licence from CASH; in so doing the licensee has available to it virtually the total global music repertoire.

A.4 CASH and its distributions

All the royalties which CASH collects are distributed after payment of overheads. Distributions are made to its members in respect of Hong Kong music and to the members of its affiliated societies in respect of overseas music.

B. Hotel Industry Position and CASH Response

1. a. *“The Ordinance itself in many areas is unfair to the Hotel industry. There is no “guideline” for fee-collecting societies on how fees are charged.”*

The Copyright Ordinance (“the Ordinance”) was enacted in 1997. Its purpose was to restate the law on copyright. It provides that the owners of copyright in musical works have the exclusive right to do certain specified restricted acts. Without the owners’ consent no third party can do a restricted act and any such act will constitute an infringement. These restricted acts include inter alia:

to perform, show or play the work in public (known as “the performing right”).

As mentioned in para A.3 of the Introduction above, the performing rights in copyright music are vested in CASH. Accordingly, licences are required to be obtained from CASH for the public performance of music in any hotel in Hong Kong.

It is correct that the Ordinance does not lay down “guidelines” for fee-collecting societies on how fees are to be charged. (N.B. In the same way, there are no legislative or regulatory guidelines for hotels on how room rates are to be charged or on the pricing to be adopted in their restaurants or other outlets).

In the event of a dispute between a licensing body and a user on a licensing scheme, the Ordinance does provide in Division IX a mechanism for independent resolution and that is by reference to the Copyright Tribunal, which has the power to determine all issues including the fees to be paid.

The fees payable under CASH’s licensing schemes for public performance of musical works are intended to represent the level of remuneration the copyright owners of the musical works worldwide would require for granting authorisation to the users to perform their works in public. These fees are not fixed by CASH arbitrarily. Careful reference is made both to equivalent schemes applied in other territories and to relevant local factors; in some instances, they are the product of negotiations with representative users or industry organisations.

CASH’s licence fees for hotels in Hong Kong over the last 21 years have been negotiated with the Hong Kong Hotels Association; the most recent major negotiations took place in 1992.

The Ordinance contains in Division VIII provision for voluntary registration of licensing bodies with the Registrar of Copyright Licensing Bodies. CASH fully intends to register once the rules have been issued.

b. ***“Hotels are vulnerable to overcharging and double charging by any fee-collecting society which sets its own fee standards on an item by item basis.”***

Member hotels of the Hong Kong Hotels Association have a long history of being licensed for public performance of copyright musical works. Since the early 1960's, they were licensed by the UK Performing Rights Society (PRS). In 1977, when CASH was established, the licences were transferred to CASH and from that time CASH took over the administration. Licence fee schemes were negotiated and agreed with the Hong Kong Hotels Association in 1974, 1982, 1985 and 1992. The latest agreement is still in force.

The item by item fees which CASH charges to hotels, as agreed by the Hong Kong Hotels Association, are to cater for different values of music performance in different situations such as live music performance, performance in lounges, discotheques, lobbies and corridors, restaurants, and so on.

This is the most appropriate way to assess royalty fees among different hotels as they are of different sizes, have different kinds of music performance and on different scales. This method of charging has been adopted internationally and is generally recognised as fair and reasonable by both users and fee-collecting societies the world over.

N.B. There is another fee-collecting society (Phonographic Performance (S E Asia) Limited) which is responsible for administering copyright in sound recordings on behalf of the record companies. They are entitled to enforce their rights under the Ordinance and collect fees from users such as hotels. This is quite separate and distinct from CASH's right to collect fees for performing the original musical works. There is no double charging.

c. ***“Fee-collecting societies are not transparent. Trades and industries do not know how they come up with the tariff calculations nor how the royalties are distributed.”***

CASH's status as a non-profit-making company, its entitlement to control performing rights in musical works in Hong Kong and its distribution systems are described in paras A.2, A.3 and A.4 of the Introduction above.

The operations of CASH are supervised by a Council of Directors which comprises Directors who are either democratically elected by the members at general meetings or appointed by the Council. The accounts of CASH are audited by the largest international Certified Public Accounting firm each year, published with the auditors' report in the Annual Report and filed with the Inland Revenue Department.

Members of the public are welcome to seek information about CASH, including the Annual Reports, tariffs, musical works, fee collections and distributions. **CASH**

publishes information leaflets and periodic magazines which are widely distributed to music users, public libraries, schools and universities, interested parties, media and overseas affiliates. Every District Office in Hong Kong holds a file on CASH containing information for public inspection and enquiry.

d. ***“The industry recommends that a token amount for each hotel is to be paid to those fee-collecting societies which would share the fees by themselves.”***

We strongly disagree that a token amount should be paid for each hotel for the public performance of musical works within hotel premises. The amount paid to copyright owners for commercial exploitation of their works should represent fair remuneration for their intellectual creations and reflect the added value of the entertainment thereby provided by a hotel to its patrons.

As mentioned in para B.1.b. above, different fee-collecting societies administering copyrights in different kinds of works are entirely independent of each other. The copyright owners represented by different societies are different, likewise the values of copyrights in different kinds of work. For example, copyright in the musical work is quite distinct from copyright in the sound recording or copyright in the film in which the musical work has been incorporated. It is unreasonable and would be entirely unworkable for the hotels to pay a token fee and leave it to the different fee-collecting societies to apportion it.

2. a. ***“There is no clear “definition” on “public” and “private” performance. As the law presently stands, a public performance can be defined as music played in a hotel guest room, which, according to international hotel industry’s norms and practices, is regarded as a “private” area.”***

It is true that there is no definition of “public” performances in the Copyright Ordinance. However, there is ample authority to show that “in public” covers all performances before an audience unless the audience is domestic or quasi-domestic. Clearly, hotel audiences are neither domestic nor quasi-domestic.

b. ***“Copyright Ordinance should be restricted to performance of a public nature where admission fee is charged.”***

We strongly object to the suggestion that public performance of musical works should only be protected where an admission fee is charged. Copyright in a musical work is the private property of the copyright owner; it must be safeguarded by the Ordinance against third-party exploitation. Exemptions should only be provided for very special circumstances, such as private study, news reporting, legal proceedings and some educational uses. These have all been adequately covered in the Ordinance.

c. ***“Royalty should be charged only from the “source” i.e. at the time of buying and selling.”***

It is impracticable to have the royalties charged at “source”. In the case of hotels, CASH currently licenses three categories of performance of musical works:

- i) live music performance by bands and singers, where there is no “source” of buying and selling;
- ii) reception of radio and television broadcasts, where the “source” would be the radio and television stations. It is not reasonable for the radio and television stations to pay additional royalties due to the performance in hotels. The benefits and values gained by the hotels through the performance should only be borne by the hotels. This would also involve copyright in broadcasts and cable programmes in addition to musical works; and
- iii) playback of sound carriers like compact discs, cassettes, video tapes, etc. in lounges, restaurants, discotheques, etc., where the “source” would be the buying and selling of the sound carriers. Such sound carriers are available for sale to the public. One can buy the same carrier for either private enjoyment or public performance. If public performance royalties are to be paid when any sound carrier is bought, the selling price would definitely be much higher in order to cater for the potential “public performance” use. As it would not be possible to distinguish between buyers for “private” use or “public” use, the higher price would have to be applied across all goods for retail sale. This would also involve copyright in sound recordings, films or other works in addition to musical works.

4. ***“The industry recommends restore Clause 78 of the Draft Copyright Bill which provides residents and inmates of the hotel to be excluded from the definition of “having paid for admission.”***

Clause 78 of the Consultation Draft/Copyright Bill, subsequently re-numbered 81 in the Ordinance, does not relate to the copyright in musical works administered by CASH. It applies to broadcasts, cable programmes and any sound recordings or films included in them. However, CASH can see no cause to extend the current charity-related exemption to commercial establishments such as hotels.

5. a. ***“There is no way of knowing how legitimate the claims is to collecting fees and royalties by the fee-collecting societies as authors/composers cannot be traced or have died many hundred years ago.”***

Any members of the public are welcome to contact CASH for explanation of our legal rights and for information relating to the authors/composers of musical works. Under the Ordinance, copyright protection ceases 50 years after the death of the author/composer. Information can similarly be requested as to whether a particular work has fallen out of copyright or otherwise.

b. ***“Fee-collecting societies claim represent authors/composers. The hotel***

industry is not in possession of any authentic documents to confirm who these copyright holders actually are. Whether there is any official registration mechanism for authors/composers certifying they are authentic copyright owners.”

CASH is the only fee-collecting society in Hong Kong representing authors and composers of musical works in respect of performing rights. Please see para A.3 of the Introduction above for a description of **CASH**'s entitlement to control the performing rights. Generally, the author (ie the creator) is the first owner of the copyright in a musical work. Copyright arises automatically by law and in most territories there is no registration system (unlike patents and trade marks). However, each society maintains records of the author/composer and publisher of each musical work which it administers and can access the same records from relevant affiliates in respect of overseas works. Any specific query can be readily addressed.

c. *“Composition of the Copyright Tribunal is mainly composed of lawyers and members directly or indirectly related to copyright fee-collecting societies. There are no representatives from other trades and industries including the hotel industry which are affected by the Ordinance.”*

Members of the Copyright Tribunal were appointed by the Chief Executive of the Hong Kong Special Administrative Region pursuant to the Copyright Ordinance. There are currently 9 members. It may be fair to say that 5 are either practising lawyers or directly related to copyright fee-collecting societies. However, 4 of them are clearly not; these include 1 member of the Legislative Council, 1 related to the retail trade, 1 related to consumer rights (being also an academic lawyer) and 1 accountant.

6. *“The hotel industry recommends, as a first step, to review the Copyright Ordinance and then introduce appropriate amendments.”*

There was an extensive period of public consultation before the Ordinance was finally enacted in June 1997. Whilst flexible in its approach, **CASH** does not consider that any compelling reason has been shown to warrant an amendment to the Ordinance in respect of use of copyright works in hotels and similar premises. Why should commercial exploitation of copyright musical works be permitted without payment of reasonable compensation to the authors?

CASH / 19.1.99