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**SUBMISSION TO LEGISLATIVE COUNCIL PANEL ON TRADE AND INDUSTRY
MEETING ON 1 FEBRUARY 1999 REGARDING
FEES FOR THE USE OF COPYRIGHT WORKS
SUBMITTED BY
INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY**

We are delighted to have this opportunity to present our views in Legco Panel Meeting on Trade and Industry on 1 February 1999. We hereby submit our comments and elaboration of our assessment basis.

I. IFPI/PP (SEA) L/IFPI (HONG KONG GROUP)

International Federation of the Phonographic Industry (IFPI) is the representative organization of a majority of producers of both sound recordings and music/karaoke videos worldwide. It is a non-profit making organization registered in Zurich with a secretariat based in London. IFPI has a membership of more than 1,300 recording companies in over 70 countries, representing over 10,000 different labels and more than 95 per cent of all commercially released recorded music and a substantial amount of music/karaoke videos.

IFPI is empowered by its members to control the broadcasting and public performance of their recordings and to issue licences to the public for these purposes. It set up Phonographic Performance (South East Asia) Ltd. to carry out its responsibilities in this aspect.

Phonographic Performance (South East Asia) Ltd [PP(SEA)L] was incorporated in 1984 and had been a wholly-owned subsidiary of IFPI. On 1 November 1998, PP(SEA)L was transferred to the IFPI (HK Group) as its subsidiary company.

IFPI (HK Group) is a national group of IFPI and it represents over 50 recording companies in Hong Kong which includes all the major local recording companies.

II. COPYRIGHT LICENSING

Copyright are private property rights and it is an international trend for collective administration of public performance rights. The charging of royalties is a means to exercise such a right. We take the view that copyright licensing is a commercial matter between the copyright owners and the users of their products which market forces will ultimately determine the right pricing (rate of royalties payment).

Under the existing Copyright Ordinance, the Copyright Tribunal is established to handle copyright licensing disputes. Any users with genuine concerns regarding the tariffs charged of particular uses are free to make appropriate reference to the Tribunal. We understand that members of the Tribunal are from different private sectors of the community to enhance the representativeness and to ensure the balance of interest. IFPI recognises the role of the Copyright Tribunal in striking the balance between the interests of the creators and users of copyright materials.

In fact, in 1989 several hotels had referred to the Performing Right Tribunal in regard to the basis of assessment of Discotheques Tariff (using recorded music for the purpose of dancing). However, the hotels came into agreement with PP(SEA)L in 1990 before the judgement was made. This will be mentioned in the paragraph of "Performing Right Tribunal Case".

III. PP(SEA)L TARIFF RATES

Phonographic Performance (South East Asia) Ltd has been established by IFPI in August 1984 to undertake the responsibility of issuing licences for the public performance of sound recordings, music/karaoke videos in Hong Kong.

All the tariff rates are freely available to public upon enquiry since their introduction. Currently, PP(SEA)L has over 36 standard tariffs to cope with various types of usage of sound recordings and music/karaoke videos in Hong Kong. Most of the tariff rates have been in existence since 1984. The rates have not been increased but adjusted annually in accordance with the Consumer Price Index (B) calculated by the Government. We have given our information and brochures to Intellectual Property Department, Home Affairs Department, and Business Licence Information Centre of Industry Department, as such the public can also make general enquiry with them about our existence and rights.

When PP(SEA)L established its tariff rates, it had made comparison and references to overseas collecting societies regarding their royalty charges and assessment basis, with modifications to suit the local circumstances. The most important element for evaluating the licence fee is the commercial value of the recorded music to the user's business. The calculation of royalty for the public performance of the sound recordings, music/karaoke videos of IFPI members is based on the true value of the recordings to the establishments using these recordings.

Licenses are granted either on an annual basis or to cover "one-off" single events. These tariff rates have been open to the public since their introduction. In the recent years, PP(SEA)L issued an average 4,000 to 4,500 number of licences each year to the public.

Licence fees collected are distributed among the record companies themselves after deduction of administration costs. The basis of distribution are determined by the Board of Directors. Directors are elected by members to sit on the Board.

When interested members of the public have doubt about the repertoire that under our members' control, they are allowed to inspect our members list and label list at our office. Authorisation documents are also available for examination when necessary.

IV. RIGHTS OF IFPI & CASH

IFPI & CASH administer two different types of copyright works and we individually represent an extensive number of members whose rights and interests are different. It should be understood that the copyright in sound recordings and music/karaoke videos are entirely separate and distinct from the copyright in the musical works performed and reproduced on records. Thus, while Composers and Authors Society of Hong Kong Ltd (CASH) represents the authors and composers is to authorise the use of their members' music, the paying of such charges does not confer the right on anybody to cause the sound recordings or music/karaoke videos containing this music to be heard in public. There is no overlapping of charges by the two collecting societies.

V. NEGOTIATION WITH HOTELS

PP(SEA)L is open to negotiation with representative association in regard to licensing matters and to reach an agreement. According to our records, we started to approach the hotels for license application in 1984. In 1988, we began a lengthy negotiation with hotel industry regarding the license fee charged for discotheques and establishments using sound recordings for the purpose of dancing. During the negotiation, we had explained very clearly of our legal position and basis of assessment of licence fee.

Tariff A is the applicable tariff to discotheques and other establishments using recorded music for the purpose of dancing which was first published in 1987. Establishment are divided into 4 bands depending on their capacity. The annual licence fee payable is 3% of turnover of the establishment for the financial year immediately proceeding the licence year with a minimum licence fee. The minimum licence fees are adjusted annually according to the Consumer Price Index (B).

VI. PERFORMING RIGHT TRIBUNAL CASE

In July 1989, four hotel which operated discotheques inside their premises joined together to refer the Discotheques Tariff to the Performing Right Tribunal. The hotels disagreed about the percentage of turnover basis and they requested the PRT to vary the licensing scheme relating to Tariff A.

The hotels had obtained licence from CASH for the mechanical performance of music and live performance music but not from PP(SEA)L. At that time, the hotels did not refer to the Tribunal the other PP(SEA)L tariffs such as bars & lounges, restaurants & coffee shops, health/fitness centres, but none of them have taken out the licences in respect of these activities.

In 1990, before the judgement was made the four hotels formed the Hong Kong Hotel Entertainment Associate Trade Ltd and came into agreement with PP(SEA)L. They accepted the basis of assessment of licence fee by percentage of turnover. The agreement was prepared based on the foundation of Tariff A. Since then, the number of members of HK HEAT has increased and the agreement has been renewed in 1995.

Thereafter, we continued to contact the hotels in regard to licence application for annual and single event permits. However, *we have never collected licence fee for public performance of sound recordings in hotel guestrooms.*

VII. EXPLANATION OF RELEVANT TARIFFS

See attached table.

VIII. HOTEL LICENSEES

According to our records, around 22 hotels had taken out our annual licence and single event permits in 1997/98 which is less than 50% of the total number of existing hotels in Hong Kong. The total amount collected is about HK\$1,443,531.

Based on our findings, some hotels do not use sound recordings, music/karaoke videos in their premises. They offer only live performance or use sound recordings not belonging to IFPI members and thus do not need to obtain our license.

IX. SELLING PRICE INCLUDE LICENSE FEE

We do not agree to charge the public performance licence fees at the time of buying and selling as the nature of sales of recordings are for private use, not for business. It is clearly stated on the inlay card or the recording itself that all rights are reserved and unauthorised public performance, broadcasting or copying of the recording is prohibited. The recordings sold at retail outlets are thus solely for private entertainment.

X. CONCLUSION

- As copyrights are private property rights, it is indisputable that rightholders and their representing collecting societies should be able to fix and negotiate fees. We take the view that the existing legal framework has taken into consideration the importance of public interests and likewise provided a mechanism that can balance all relevant commercial interests. It means that the determination of tariffs, though strictly a commercial matter, is not entirely unregulated. It is not always necessary or appropriate for Government to impose control on the exercise of a private right.
- We are always willing to explain to the public and hotel owners about how PP(SEA)L determine the standard tariff rates and how licenses fees are being assessed. We are able to conclude all negotiations in the past and reach amiable agreements with industry representatives on license fees. Indeed, many hotels have accepted our assessment of license fees and reached agreements with PP(SEA)L accordingly. However, there is currently no negotiation between PP(SEA)L and the Federation of Hong Kong Hotel Owners Limited, and we are not aware of any outstanding dispute.
- Meanwhile, it is worth noting that hotels can choose other alternatives such as to use sound recordings not belonging to our members or offer live performances, thus do not need to obtain our license. Currently, not all hotels are paying license fees to PP(SEA)L as some of them do not use our members sound recordings, music/karaoke videos in their premises.
- We are of the view that PP(SEA)L has adequate transparency in regard to its tariff rates and licensing information. Information on all 36 standard tariffs is freely available to the public since their introduction in 1984. We have in many occasions explained to individual hotel management and industry representatives on standard tariffs (such as tariffs for playing sound recording in bars, restaurants and discotheques for the purpose of dancing) that are relevant to the hotel sector.
- It is worth noting that PP(SEA)L has never collected license fee for public performance of sound recording in hotel guestrooms. We would like to clarify that Hotel Tariff “Tariff B” (see attached table) is for the use of sound recording in common areas of hotels.
- Conclusively, the current licensing practice has been efficiently in place since 1984. Instead of contacting all the copyright owners to obtain the authorization, users of copyright works can apply for the license through the collecting society. The usefulness of collective copyright management, where appropriate, is widely accepted in international practice for the administration of public performance rights.

Relevant Tariffs for Hotel

****All the tariff rates are adjusted annually according to CPI(B)***

1. Hotels (Tariff 'B')

Effective Date: 1 January 1992

Description:	<ul style="list-style-type: none"> ◆ For the public use of sound recordings solely as background music in the common areas of hotels, such as hotel lobbies, elevators, corridors etc. excluding the shopping arcades, hotel outlets (e.g. karaokc lounges, discotheques, coffee shops etc.) or other hotel premises (e.g. swimming pools, health/fitness centres etc.) ◆ This tariff was established in 1984 and revised on 1 January 1992 	
Basis of Calculation:	Less than 500 guest rooms Above 500 guest rooms	HK\$62 per room per annum HK\$35 per room per annum
Explanation:	<ul style="list-style-type: none"> ◆ License fees are calculated based on number of guest rooms which simply reflects the size of hotels as the exact measurement of common areas is difficult to define. ◆ Normally, the bigger the hotel, the more guests can it accommodates and enjoy the recorded music. 	

2. Restaurants and Coffee Shops (Tariff 'F')

Effective Date: 1 January 1992

Description:	<ul style="list-style-type: none"> ◆ For the public use of sound recordings solely as background music in restaurants and coffee shops. ◆ This tariff was established in 1984 and revised on 1 January 1992 	
Basis of Calculation:	HK\$52 per seat per annum	
Explanation:	<ul style="list-style-type: none"> ◆ Direct relationship between the no. of seats with the commercial value of the recorded music generated to the establishment. 	

3. Bars and Lounges (Tariff 'H')

Effective Date: 1 January 1992

Description:	<ul style="list-style-type: none"> ◆ For the public use of sound recordings solely as background music in bars and lounges but excluding the use of recorded music for the purpose of dancing. ◆ This tariff was established in 1984 and revised on 1 January 1992 	
Basis of Calculation:	HK\$95 per seat per annum with a minimum fee \$2,600 per annum.	
Explanation:	<ul style="list-style-type: none"> ◆ Direct relationship between the no. of seats and commercial value of the recorded music generated. ◆ Bars playing recorded music attract their customers to come to meet friends, to hear the popular recordings performed by some particular artists. The recordings are important to create the atmosphere that attract the customers to talk and drink. The commercial value to bars and lounges is comparatively greater than that to restaurants and coffee shops. 	

4. **Karaoke (Tariff 'X-6')**

Effective Date: 14 November 1994

Description:	<ul style="list-style-type: none"> ◆ For the public use of karaoke and/or music videograms in establishments divided into 4 categories: <ul style="list-style-type: none"> A) Establishments where karaoke facilities are offered as one of the main entertainment activities. B) Establishment where karaoke facilities are offered as a secondary entertainment activities. C) Establishments where karaoke facilities are offered on a non-profit basis. D) Events where karaoke facilities are offered on an ad hoc basis. ◆ This tariff was established in 1994 and revised on 14 November 1994.
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(Tariff 'X-6A')

Basis of Calculation:	HK\$52 per seat per annum (with Jan 1992 CPI(B) as base) 1 st -10 th TV Monitors HK\$2500 per monitor per annum 11 th -20 th TV Monitors HK\$500 per monitor per annum 21 st and above HK\$300 per monitor per annum
Explanation:	<ul style="list-style-type: none"> ◆ It is based on the true value of the recordings for the establishments using these recordings, there is direct correspondence between the number of TV monitors and seats in the premises.

(Tariff 'X-6B')

Basis of Calculation:	1 st TV monitor HK\$2500 per monitor per annum 2 nd -10 th TV monitor HK\$500 per monitor per annum 11 th and above HK\$300 per monitor per annum
Explanation:	<ul style="list-style-type: none"> ◆ For those establishment offering karaoke facilities as secondary entertainment, the commercial value of karaoke videos to their business is not as much as the category A (e.g. karaoke boxes and karaoke lounges); and usually they have a small number of TV monitors or equipments available.

(Tariff 'X-6C')

Basis of Calculation:	HK\$500 per monitor per annum
Explanation:	<ul style="list-style-type: none"> ◆ Establishments where karaoke facilities are offered as non-profit making purpose, a token amount is charged accordingly.

(Tariff 'X-6D')

Basis of Calculation:	HK\$1,500 per day
Explanation:	<ul style="list-style-type: none"> ◆ For events using karaoke facilities for entertainment, sometimes do not generate profit. The commercial value generated is not as significant as category A & B.

5. *Discotheques (Tariff 'A')*

Effective Date: 1 January 1993

Description:	<ul style="list-style-type: none"> ◆ Discotheques and other establishments using sound recordings for the purpose of dancing ◆ This tariff was established in 1987 and revised on 1 January 1993. 			
Basis of Calculation:	Band	Max. Permitted Capacity		min. licence fee HK\$
	1	Below 50 persons	3% of turnover for the	50,000
	2	51-100 persons	financial year	75,000
	3	101-200 persons	preceding	100,000
	4	above 200 persons	the licence year and subject to a min. licence fee	120,000
Explanation:	<ul style="list-style-type: none"> ◆ The playing of sound recordings is the essential and central feature at all discotheques. It is the foundation upon which the commercial enterprise is based and is the principal attractive force which generates the income. ◆ Turnover (and consequential profitability) has direct correspondence with the size (measured by the max. permitted capacity) of the establishment. ◆ Customers go to discotheques specifically to dance to the latest sound recordings, to meet friends and to drink. ◆ Sound recordings is the principal factor which determines the ability of discotheque operators to make profits. 			
Remarks:	<p>Most of the discotheques operated by hotels are under by the agreement between PP(SEA)L and HK HEAT (Hong Kong Hotel Entertainment Associate Trade Ltd) which was first signed in 1990 and renewed in 1995.</p>			