

Letterhead of Concern Group of Music Copyright Ordinance

Review of Copyright Ordinance Urged by Concern Group

The Concern Group of Music Copyright Ordinance (the Group) which represents eight industries - hotel, restaurant, movie, cinema, karaoke, hospital and clinic, retail and shopping arcades - has called for a thorough review of the Copyright Ordinance to ensure that the music royalties paid by users such as hotels, theatres, restaurants and clinics are fair, transparent and accountable.

The Group fully supports that intellectual property should be protected. On the other hand, it is also important to get the Ordinance right to fit in with the actual conditions.

The two main royalties collecting agencies (RCA) in Hong Kong are the Composers and Authors Society of Hong Kong Limited (CASH) and the International Federation of the Phonographic Industry (IFPI).

Current Deficiencies

I. Lack of Monitoring over the RCA.

RCA are allowed to abuse the system by charging the exempted sectors copyright fees. i.e. education, charity and religion sectors, without interference from Government notwithstanding contravention to the Ordinance.

II. Copyright Consumers lacks of confidence in using the Copyright Tribunal

- i. The composition of the Tribunal of not balance. The majority of the members are from copyright field, academics and lawyers. There is less than 1/6 from copyrighted music users.
- ii. Also there is lack of guidelines which makes the trades hesitated to appeal to the Tribunal.

III. Double Standard of Government Authorities

Recently the second draft on **TradeMark Rules Bill** has been released. The Bill proposes a compulsory registration system before a trademark can claim priority. This is a very similar case to the copyright of musical works. However, Government authorities insist that copyright work registration is a voluntary system and there is very limited regulation governing the copyright societies.

Music Copyright Users Appeal

Since there is very limited consumer protection for those copyrighted music users, users are in a disadvantageous position in negotiation with the copyright societies.

Five main concerns of the Group:

I. The tariff system is not open, uniform or accountable with different rates applying to similar establishments with similar businesses. For example, different shopping malls using the same piece of music may be charged differently by CASH.

II. The music Industry is at risk of being monopolised with users having no choice but to pay the unfair tariffs imposed by fee collecting agencies. For example, CASH claims to represent more than 1,800 local authors and 120 overseas music repertoires.

III. No proper authorization. Subject to Article 48 of the Memorandum and Articles of CASH, all moneys received by CASH shall be allocated and distributed amongst its members and affiliated societies. However, a spokesman of CASH has once admitted that Iran is not its affiliated member, but CASH still collects royalties from theatres for showing Iran movies. It proved that CASH has acted contrary to its Association Memorandum and Article.

IV. Double charging. TV and radio stations have paid for copyright already but commercial establishments need to pay again for public broadcast. The HKSAR Government claims that this is international practice and the common understanding of the scope of copyright protection. However, this is not the case in the United States where more than 70% of small restaurants, bars and retail stores are exempted from copyright infringement for using radio and TV music only. Also in Australia, complimentary licenses are released for those businesses employ less than 20 people, using radio, TV and music which is not intended to be used by customers or the public.

V. Question of integrity. Under the pressure of the Concern Group, CASH has conducted a review of the exemption clause in Section 76 of the Copyright Ordinance. CASH has agreed to waive the fee for all charities, including clubs, societies and other organizations whose main objects are charitable or otherwise concerned with the advancement of religion, education or social welfare with retrospective effect from 27 June 1997, the date on when the relevant provision came into operation. This includes, for example, public hospitals. CASH will refund those royalties already received to the relevant parties. This action made us question the integrity of CASH in charging royalties first and then giving a refund. Also, this shows that the government has not done a good job in monitoring the royalties collecting agencies.

Oversea Counterparts Copyright Practice

Through our extensive research, we find that countries like Japan, Australia and the United States are concious about their Copyright Law updating. Also their consumer protection is much better than Hong Kong's. We would like to draw your attention to some examples, which we admire.

- **Japan**

- i. **The Copyright Law 1999 was amended.** The bill for the amendment passed in the Diet on June 15, 1999. One of the major items is as follows:
Reproduction of music from recording media and use of it as background music at hotels and restaurants are currently **exempted from copyright infringement**. Such exemption will be abandoned if hotels and restaurants directly use copyrighted music sources for their business; just Karaoke joints and discos.
- ii. Any copyright society is **required to seek authorization** from the Commissioner of the Agency for Cultural Affairs. (similar to register system)
- iii. Any revision of the articles of association or change in terms of a copyright trust agreement, as well as any enactment or revision of a regulation, is subject to authorization and/or **approval by the Minister of Education** and/or the Commissioner of the Agency for cultural Affairs.
- iv. **Fees or royalties** payable by the licensees to the copyright society shall be calculated in accordance with the rates determined by the society **with the approval of the competent Government authorities**.

- **Australia**

- i. There is **no requirement for** a Phonographic Performance Company of Australia **license**, (which is similar to IFPI in Hong Kong), for **public performances occurring by radio or television**.
- ii. **Complimentary licenses** were issued from June 1, 1998 to some small business employ fewer than 20 people and use radio or television music which is not intended to be heard by customers for the business or by the general public. (Law does not require this, but the copyright society initiates this programme voluntarily.)

- **The United States**

- i. **Fairness in Music Licensing Act** in 1998, the new law expands the exemption from copyright infringement for more than 70% of small restaurants, bars & retail stores using radio and television music only.
- ii. **Settling disputes**, both parties appoint their own arbitrator and appoint an agreeable third arbitrator to settle disputes.

Recommendations

Given the concerns of the Group, there are four key recommendations it urges the Legislative Council and the Hong Kong Government to accept:

1. A thorough review of the Copyright Ordinance.
 - i. There is no subsidiary legislation in the Copyright Ordinance.
 - ii. There is no mechanism to monitor copyright issues.
 - iii. The said voluntary register system is ambiguous.
 - iv. Consumer protection is far from enough.

2. Subsidiary legislation should be drafted that:
 - i. Sets a mechanism to monitor copyright issues. An advisory board with members from different backgrounds could be set up.
 - ii. Provides a compulsory licensing system to regulate the royalty collecting societies.
 - iii. Forces royalty-collecting agencies to provide proper authorization upon request.
 - iv. Increases collecting agencies' transparency and accountability.

As far as we understand that, a detailed and technical subsidiary legislation is quite common in Hong Kong. For example, there is a Technical Memorandum (技術性備忘錄) under Water Pollution Control Ordinance (水污染管制條例). The Memorandum lists out every detail for water testing and many other water matters. Hence we believe that to draft a subsidiary to govern the copyright society in collecting royalties is necessary.

3. Consult the Concern Group when the subsidiary legislation is ready.

4. Enlarge the composition of Tribunal Members of the Copyright Tribunal with more copyrighted work users representatives to make it more representative and balanced.

Conclusion

The Concern Group urges an immediate review of the Copyright Ordinance to ensure music royalties paid by users is fair, open and accountable as well as in line with international standards.