Submission by

to

LegCo Panel on Commerce and Industry

on

Permitted Acts related to Free Public Showing or Playing of Broadcast or Cable Programme (Chapter 4 of Consultation Document)

24 December 2001

CONTENTS

Composers and Authors Society of Hong Kong Ltd.
香港作曲家及作詞家協會

PART I

About


Composers and
Authors
Society of
Hong Kong Ltd.
香港作曲家及作詞家協會

Background

Composers and Authors Society of Hong Kong Ltd. ("CASH") is a company registered as a company limited by guarantee under the Companies Ordinance. CASH is a non-profit making organization formed in Hong Kong in 1977 by a group of local music composers and lyrics authors in order to collectively administer and protect the performing rights in their musical works and literary works (lyrics) as provided in the copyright law. CASH's objective is to act as the bridging point between copyright owners and music users so that relevant copyright obligations can be efficiently and economically cleared to the mutual benefit of both parties.

Membership

By means of Deeds of Assignment, more than 2,200 local members, being composers, authors and music publishers, have assigned their performing rights to CASH. Internationally, CASH has signed Reciprocal Representation Agreements with over 60 performing right societies around the world. This effectively empowers CASH to administer the performing rights of more than 1.65 million composers and authors in 137 territories/countries worldwide.

Royalty Distribution

All royalties collected are distributed to our local members and affiliated overseas societies after deduction of actual administrative cost of around 20%. Such distribution is governed by the Distribution Rules of Performing Royalties approved by the Council of Directors of CASH. All major music users such as broadcasters, concert organizers, Leisure and Cultural Services Department (LCSD) performing venues and airlines are required to provide CASH with music usage information for this royalties distribution purpose. The key factors taken into account include performance frequency and duration.

For music users who cannot realistically be required to provide music usage information (e.g. retailing outlets, hair salons and restaurants), the royalties collected will be distributed by utilising information provided by other sources (e.g. radio broadcasters) which can best resemble the performance in question. However, if a licensee can provide a performed song list, the royalty collected will be distributed accordingly.

Public Performance Licensing

The main criteria in determining royalty charges are (a) value of music to the business

and (b) potential audience size. It is the objective of CASH to establish fair, reasonable and standardised royalty charges, as well as to strike a balance between a proper remuneration for our members and an acceptable level of fees for music users.

At present, there are 28 standard tariffs for various industries including retail shops, hi-fi shops, shopping centres, restaurants, department stores, discotheques, bars & pubs, nightclubs, passenger buses, music fountains, and skating rinks.

Listed below are 4 examples of royalty payable for playing audio background music:

Industry	Floor Area/ Maximum Accommodation	Annual Royalty	Per-day Royalty
Clinic	Not more than 10 seats at waiting area	$670.80	$1.8
Boutique	Under 200 sq.ft.	$708.79	$1.9
Beauty salon	Not more than 2 beds	$734.61	$2.0
Hi-fi shop	Under 200 sq.ft.	$848.80	$2.3

PART II

CASH's Response to Specific Statements of the Consultation Document

Composers and Authors Society of Hong Kong Ltd.
香港作曲家及作詞家協會

Para 4.3 of Consultation Document
"For example, the playing of a radio music programme in a shopping mall or a showroom for audio equipment may not infringe the copyright in the radio broadcast or the sound recording included in it, or the performers' right in the sound recording. This exemption, however, does not extend to other underlying works such as the music and lyrics of a song included in the radio programme. Thus, the copyright holders of the music and lyrics of the song may demand the payment of royalty by the shopping mall and showroom operators, whereas the radio broadcaster and performers cannot do so. This appears to be an inconsistency."

Para 4.4 of Consultation Document
"Some copyright users have expressed the view that the exemption should be extended to cover all underlying copyright works included in the broadcast or cable programme. They argue that all the works in the broadcast or programme should be treated the same."

1. Response of CASH on para 4.3/4.4 above

1.1 Broadcasts, cable programmes, sound recordings, original musical works and original literary works (referred as "lyrics" hereinafter) are all copyright works as spelled out in Section 2 of the Copyright Ordinance. Nevertheless, there is a fundamental difference between the first 3 types of works as a group and the last 2 types of works as a group – The former group is commonly known as derivative work or secondary work while the latter group is the primary work. Strictly speaking, it is not precise to describe the latter group as the "underlying" work. Rather, original musical works and original lyrics are the corner stones without which there can be no sound recordings at all. Even the broadcasts and cable programmes will have their lustre and appeal much downgraded if our works were taken away. It is therefore not unreasonable for a higher level of protection be afforded to the primary musical works and lyrics in order to encourage intellectual creativity in this arena.

1.2 Different copyright works are subject to protection of different international treaties. Suffice it to say that the international protection for musical works and lyrics is the highest as compared to that for broadcasts, cable programmes and sound recordings. Please refer to the Section A of "Implications on Hong Kong's International Obligations" in PART III of this Submission and paragraphs 5 and 6 of Irish Music Rights Organisation ("IMRO")'s response in PART V of this Submission.

1.3 Commercially speaking, a broadcaster may not care her free-to-air programmes are shown at commercial premises without royalty in return. In fact, the broadcaster may welcome such acts. This is because the free-to-air broadcaster's revenue all depends on advertising. The bigger her audience size, the higher air-time charges she can levy on advertisers. In another word, the broadcaster's give-up on royalty income will be more than compensated in the form of handsome advertising dollars. But this is not the case for music composers and CASH. If music composers and CASH have to let go royalty payable by commercial premises for performing music embodied in a free broadcast, there is no alternative way for us to be compensated like the broadcaster does. Some

music users may then suggest us charge broadcasters more for the subsequent public performances. It is however unreasonable for us to do so for reasons stated in Section 2.4 below.

1.4 Should there be any concerns about inconsistency of protection among different types of copyright works, we respectfully submit that the Government should consider removing the exemption in Section 81 of the Copyright Ordinance. Our view is echoed by Performing Right Society ("PRS") of the United Kingdom. Please refer to paragraph 5 of PRS' response in PART V of this Submission.

Para 4.4 of Consultation Document

Moreover, when the copyright holders of the underlying works licensed their works to the radio or television network operators, they should have been aware that their works would be accessible to the general public by way of the broadcast or cable programme. They should not therefore expect to be paid any royalty for the showing or playing of their works in public to an audience who has not paid for admission to the place where the works are to be shown or played.

2. Response of CASH on para 4.4 above

2.1 The context has to be taken into account when scrutinising the above claims. If the context is non-commercial domestic premises, the claims are justified. Because it is within the contemplation of music composers and CASH for our music to be received by the general public at home for their personal and non-commercial enjoyment in granting licences to the broadcasters. It is, however, beyond our contemplation and intention for the subsequent exploitation of our works in connection with third party business activities. It should be noted that the context in question is premises where commercial activities are conducted for the benefit of the business owners. As exemplified in *paragraph 4.3 of the Consultation Document*, we are talking about premises like shopping mall or a showroom for audio equipment. When musical works and lyrics are performed in such commercial premises, it does not matter by what means they are performed. The only thing that matters is that music is performed and the business owners gain the benefit in performing music. For example, their customers find the shopping environment more amusing or the patients at a clinic find the waiting time less intolerable. Undoubtedly, our music provides added value to the business. To support our stance, we would like to conclude with *Paragraph 11.8 of the Report on Reform of the Law Relating to Copyright (Topic 22) by The Law Reform Commission of Hong Kong 199*4, which says "It is important to distinguish reception from public performance. Domestic reception may be permitted, but the communication of the programme to a wider audience may amount to the restricted act of public performance".

2.2 By its very nature, the value of music lies in performance. Music is valueless if it is not performed. Music is not supposed to be read or touched. It has to be made audible to our ears before we can enjoy it. For it to be audible, it has to be performed. Being a versatile "commodity", music can however be performed by a number of means. It can be performed by means of (a) live band, (b) playing CDs, (c) turning on radio or TV or (d) streaming music from the Internet and having the music played via loudspeakers. There can be different means to achieve the same end which is the performance of music. With the advancement of technology, the means may even proliferate further beyond our present contemplation. It is therefore of utmost importance to have Hong Kong's copyright law remains neutral to technology or means. The fact that music is performed by means of turning on radio or TV cannot nullify the value of music brought to commercial premises described in Section 2.1 above. This view is supported by Society of Composers, Authors and Music Publishers of Canada ("SOCAN") in her letter to European Commission dated 10 October 1997 (last paragraph of page 5 of the said letter in PART V of this Submission refers). Accordingly, reasonable royalty should be paid

to the copyright owners in order to remunerate their works' contribution to the commercial activities in question.

2.3 It follows from Sections 2.1 and 2.2 above that admission fee cannot be the criteria in determining whether royalty is payable. It is absolutely a commercial decision whether admission fee is charged or not. This decision does not, however, prejudice the fact that music embodied in a broadcast creates added value for the commercial premises as illustrated in Section 2.1 above. If admission fee were the criteria, exemption can be expanded without boundary. Music users can then claim that playing CDs in public premises charging no admission fee should not incur royalty as their customers do not pay for listening to the CD-music.

2.4 Distinction has to be made between (a) the licensing of radio or television network operators and (b) the licensing of public places. The former broadcast music and need to obtain CASH licences for this restricted act under the Copyright Ordinance of broadcasting. On the other hand, the latter perform music in public and need to obtain different CASH licences for this different restricted act of public performance. These 2 rights are distinctive from and independent of each other. The CASH licences are clearly defined in the way that the broadcasters are only granted the right to broadcast music but not the right to have the music embodied in their programmes performed in public. Because it is not the broadcasters who cause the subsequent performance of music embodied in their programmes and such subsequent performance is beyond their knowledge. It will therefore be unfair and unreasonable to charge the broadcasters royalties which stem from liabilities not caused by themselves. Accordingly, music composers and CASH do not expect and therefore cannot accept our music to be subsequently exploited upon reception by a commercial entity, which commits a totally independent restricted act of public performance. Our view is echoed by SOCAN in the same letter mentioned in Section 2.2 above (last paragraph of page 4 and first paragraph of page 5 of the letter in PART V of this Submission refers).

Para 4.5 of Consultation Document

Another issue is whether the existing condition for exemption – that the audience has not paid for admission to the place where the broadcast or cable programme is to be seen or heard – is too restrictive. Based on this condition, for example, the showing of a television broadcast to in-patients in a private hospital or to customers in a restaurant, the provision of a television set in a hotel room for the use of guests, or the playing of a radio programme in a taxi carrying passengers may not qualify for exemption.

Para 4.6 of Consultation Document

Some copyright users have suggested that the showing or playing in public of a non-encrypted broadcast or cable programme such as those set out in paragraph 4.5 above should be exempted even where an admission fee is charged. They point out that such broadcast or programme is generally accessible to the general public free of charge, and that almost every home in Hong Kong is equipped with television sets and radios to receive such broadcast or programme. They argue that in those cases set out in paragraph 4.5, the showing or playing of the broadcast or programme does not conflict with a normal exploitation of the related works by the right holders, or unreasonably prejudice their legitimate interests. In addition, they hold the view that the admission charge in those cases (i.e. charge for room and treatment in private hospitals, charge for food and service in a restaurant, hotel room charge, and fare for taxi journey) is not substantially attributable to the facilities afforded for seeing or hearing the broadcast or programme. Furthermore, if a royalty is paid to the right holders, the cost is likely to be passed on to the end-user ultimately who would not need to pay anything had he seen or heard it, say, at home.

Para 4.7 of Consultation Document

On the other hand, there may be situations where goods or services supplied at the premises in which the broadcast or cable programme is shown or played are charged at prices which are substantially attributable to the facilities provided for seeing or hearing the broadcast or programme. In such cases, right holders may arguably have good justification to demand a royalty.

Para 4.8 of Consultation Document

One option to address the issue is to confine the meaning of 'paid for admission to the place' (see paragraph 4.2 above) to the situation where goods or services are supplied at that place at prices which are substantially attributable to the facilities afforded for seeing or hearing the broadcast or programme.

3. Response of CASH on para 4.5-4.8 above

3.1 We cannot emphasise more it is the context and the value of music that count. The means of performance and whether admission fees are levied or whether there are charges substantially attributable to the facilities provided for seeing or hearing the broadcast or programme should never be the reasons in limiting the legitimate ambit of rightowners. Nevertheless, we do recognise the value of music to a business will be much higher if audience have to pay admission fee in order to enjoy music. This recognition is reflected in our standard tariff structure.

3.2 The in-patients in a private hospital, the customers in a restaurant, the hotel guest in a hotel room or the passenger in a taxi can never enjoy music had it not been performed to them by means of the radio or TV reception. Do the private hospital, restaurant, hotel and taxi driver not gain any benefit in performing music by means of playing broadcast programmes ? All of these contexts are completely different from a home environment and no comparison can be drawn in between. The case is particularly obvious for the provision of a television set in a hotel room. In most cases, hotel guests are from abroad and the free broadcast programmes originating from Hong Kong are never accessible by them in their home country.

3.3 It is therefore our strenuous dispute against the saying in *paragraph 4.6 of the Consultation Document* that "in those cases set out in paragraph 4.5, the showing or playing of the broadcast or programme does not conflict with a normal exploitation of the related works by the right holders, or unreasonably prejudice their legitimate interests".

3.3.1 As explained in Section 2.4 above, public performance by means of turning on radio or TV does conflict with a normal exploitation of musical works and lyrics because the right granted to broadcasters is limited to the right to broadcast only and does not extend to the right to publicly perform the music embodied in the broadcast. In no circumstances have music composers and CASH expected or agreed to the subsequent commercial exploitation of our music.

3.3.2 CASH has all along been licensing commercial premises where music is publicly performed by this means. If there were any exemption in this aspect, such premises can exploit our music for free. And the royalties which have been distributing to our members will suddenly come to a halt. It follows that the legitimate interests of composers and authors around the world, which could have been protected, will be unreasonably prejudiced.

3.3.3 CASH does not have on hand the exact royalty figure collected from commercial premises where music is performed by the means in question as there has been no need to differentiate performance by means of playing CDs and by means of turning on radio or TV. However, we estimate the potential loss , coupled with the implication spelled out in Section 4.2 below, will absolutely lead to unreasonable prejudice against the legitimate interests of composers and authors.

3.4 Music, like any other business elements, does cost. The fact that it costs cannot be a basis for exemption, otherwise many all other more expensive elements should be free ?! As a matter of fact, all costs (including but not limited to rental and salary) incurred by a business entity would doubtlessly be passed on to the end-user ultimately. When compared to these other cost items, music performing royalty is minimal. We illustrate this claim by pointing out that at present it is mostly small commercial establishments are playing music by means of turning on radio or TV. In our standard tariff, the licence fee for a 200 square feet retail outlet is only HK$708/annum or less than HK$2/day ! Given such a low royalty, the saying that "if a royalty is paid to the right holders, the cost is

likely to be passed on to the end-user ultimately" cannot be more exaggerated and unrealistic.

4. Practical difficulties and implication

4.1 Abuse of exemption

Public performance licensing is a laborious work, which requires physical manpower surveying the territory to observe where music is performed. If the exemption were in place, music users can play tricks with us by switching to "radio or TV music performance" when we approach them. But as soon as our licensing staff is gone, they may switch back to "CD music performance" and play the CDs of their favourite choice. By doing so, they can get away from royalty payment and yet be able to perform music by a means which are not exempted at all. This practical difficulty will prove to be beyond our control. And our interests will be unreasonably and unfairly prejudiced.

4.2 Potential loss in royalty

It cannot be ruled out that commercial premises may actually choose to perform music by turning on radio or TV if this means were exempted from royalty payment. If a huge number of premises do so, the loss of royalty can be immense and devastating to CASH. It is our estimation that the potential loss can be as much as HK$20 million, representing 43 % of our public performance royalty income.

5. Conflict with international obligations

It is our respectful view that the exemptions mentioned in *paragraphs 4.9(a) and 4.9(b) of the Consultation Document* are bound to conflict with the Berne Convention and the Trade Related Intellectual Property Rights ("TRIPS") section contained in the World Trade Organisation ("WTO") Agreement, to both of which Hong Kong has acceded. This will immediately tarnish Hong Kong as an international city and diminish all the past efforts of the Government in upholding intellectual property rights. More seriously, Hong Kong may attract criticism from abroad or even complaint at the WTO level. For the basis of this view, please refer to the "Implications on Hong Kong's International Obligations" in PART III of this Submission.

PART III

Implications on Hong Kong's International Obligations

This part focuses on the implications of the proposed exemptions in Chapter 4 of the Consultation Document on Hong Kong's international obligations.

A. Paragraph 4.3 of the Consultation Document

1. The first part of paragraph 4.3 of the Consultation Document says,

> "…the playing of a radio music programme in a shopping mall or a showroom for audio equipment may not infringe the copyright in the radio broadcast or the sound recording included in it, or the performers' right in the sound recording."

This correctly states how the existing exemption is provided under Section 81 of the Copyright Ordinance ("**the Existing Exemption**").

However, the latter part of paragraph 4.3 says,

> "This exemption, however, does not extend to other underlying works such as the music and lyrics of a song included in the radio programme. … *This appears to be an inconsistency*."

2. This latter part, in particular the last sentence, is misconceived. Broadcasts, sound recordings and performances are derivative works, as they are derived from underlying or primary works such as music and lyrics. Rights in such derivative works are referred to as "neighbouring rights". Neighbouring rights should not be compared with the rights in underlying works for the following reasons:

   (a) The rights of authors and composers are governed internationally by the Berne Convention[1] for the Protection of Literary and Artistic Works while neighbouring rights are governed by the Rome Convention[2]. Rights in underlying works and rights in derivative works are subject to different levels of protection under different international conventions. Most importantly, in the case of Hong Kong, the Berne Convention applies to Hong Kong but Hong Kong is not yet a contracting party to the Rome Convention.

   (b) With the incorporation of the provisions of the Berne Convention, namely Articles 1 to 21, into the TRIPS Agreement[3], the minimum standard of protection for the

[1] The Berne Convention for the Protection of Literary and Artistic Works (1971)

[2] The Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (1965)

[3] Agreement on Trade-Related Aspects of Intellectual Property Rights (1994). This Agreement constitutes Annex 1C of the Marrakesh Agreement establishing the World Trade Organisation ("WTO"). The TRIPS Agreement binds all members of the WTO including Hong Kong who became a member of the WTO in January 1995. Paragraph 1 of Article 9 of the TRIPS Agreement provides, "*Members shall comply with Articles 1 through 21 of the Berne Convention (1971) and the Appendix thereto...* "

performing rights of authors and composers in music and lyrics is explicitly provided[4]. However, the provisions of the Rome Convention are not similarly incorporated into the TRIPS Agreement.

(c) Even if the Rome Convention were incorporated into the TRIPS Agreement, the level of protection given to performers, producers of phonograms and broadcasters under the Rome Convention would have been much lower than the level of protection given to authors and composers under Article 9 of the TRIPS Agreement. For example, the rights under the Rome Convention are non-exclusive; the right of the broadcasters in respect of the communication to the public of their television broadcasts is limited to places accessible to the public against payment of an entrance fee; and the right given to performers is not absolute[5]. In the circumstances, the presence of the Existing Exemption will not violate the Rome Convention. However, if the Existing Exemption is extended to cover underlying works, the provisions of the Berne Convention, and the TRIPS Agreement, will be violated.

(d) Although the Rome Convention has not been incorporated into the TRIPS Agreement, the TRIPS Agreement has its own provisions, namely Article 14, for the protection of performers, producers of phonograms and broadcasters. However, the level of protection given to performers, producers of phonograms and broadcasters under Article 14 is much lower than that given to authors and composers under Article 9. Firstly, the rights conferred to performers, producers of phonograms and broadcasters under Article 14 are non-exclusive. Secondly, for performers, the rights conferred to them in relation to public communication are not absolute and are only limited to live performances[6]. For producers of phonograms, there is even no provision in Article 14 regarding their performing rights[7]. For broadcasters, their performing rights are also not absolute[8]. Finally, the requirements concerning the introduction of conditions and limitations under Article 14[9] for the protection of performers, producers of phonograms and broadcasters are not so restrictive as those set out in Article 13 for the protection of composers and authors.

3. In light of the above, we fail to see why the performing right of authors and composers in the underlying works have to be *consistent* with the performing right of broadcasters, producers of sound recording or performers, as <u>there is no such international requirement so imposed</u>.

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[4] See Article 11 and Article 11*bis* of the Berne Convention (1971) in Annexure 2

[5] Note the sentence "The protection provided for performers by this Convention shall include the *possibility* of *preventing*..." in Article 7. See Annexure 4.

[6] Note the sentence "Performers shall also have the *possibility* of *preventing* ... the broadcasting by wireless means and the communication to the public of their *live performance*" in Article 14(1). See Annexure 3.

[7] The right conferred to producers of phonograms under Article 14(2) is limited to the *reproduction* of their phonograms.

[8] Note the sentences "Broadcasting organizations shall have the right to *prohibit* ... the communication to the public of television broadcasts of the same. *Where Members do not grant such rights* to broadcasting organizations, they shall provide..." in Article 14(3). See Annexure 3.

[9] See paragraph 6 of Article 14 of the TRIPS Agreement.

B. Paragraph 4.9(a) of the Consultation Document

1. Paragraph 4.9(a) asks, "whether the statutory exemption in paragraph 4.2 above should be extended to cover all underlying copyright works included in the broadcast or cable programme."

2. The answer to this question is definitely negative. The reason is that the extension of the exemption to cover music and lyrics included in a broadcast or cable programme ("**the Extension**") will no doubt violate the TRIPS Agreement. The exclusive rights of public performance and communication to the public of a performance of music and lyrics are explicitly conferred by Articles 11 and 11*bis* of the TRIPS Agreement.

3. Under Article 11(1), authors of musical works shall enjoy the exclusive right of authorizing (i) the public performance of their works, including such public performance by any means or process (whether the works are performed via radio or by playing CDs is not the authors' concern, their only concern is whether their works have been performed or not); and (ii) any communication to the public of the performance of their works.

4. Under Article 11*bis*(1)(iii), authors of literary work shall enjoy the exclusive right of authorizing the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.

5. The Government may argue that under Article 11*bis*(2) and Article 13[10], reservations and conditions on the exclusive rights of the authors may be imposed. However, all such reservations and conditions shall *not*, in any circumstance, be *prejudicial* to the rights of the authors to obtain equitable remuneration. Please note that this prerequisite is irrespective of the degree of prejudice. In other words, even if the detriment is very minimal, it will still be regarded as prejudicial.

6. Since the introduction of the Extension would, in any circumstance, affect the right holders' income detrimentally, we respectfully submit that the Extension should not be introduced.

7. Dispute between the EC and the US in 1999

In fact, this issue has been well considered and determined by the panel established by the WTO in May 1999 ("Panel") to examine the dispute initiated by the European Communities ("EC") about Section 110(5) of the US Copyright Act. The Panel published its report[11] ("Report") on 5 May 2000.

[10] See Annexure 2.

[11] Report of the Panel on *United States – Section 110(5) of the US Copyright Act* (Report WT/DIS160/R), WTO, 15 June 2000.

7.1 Allegations of the Dispute

The EC alleged that the exemptions provided in subparagraphs (A) and (B) of Section 110(5) of the US Copyright Act[12] were in violation of the US' obligations under the TRIPS Agreement together with Articles 11(1)(ii) and 11*bis*(1)(iii) of the Berne convention (1971). However, the US contended that by virtue of Article 13 of the TRIPS Agreement, the US was allowed to impose limitations on the exclusive rights of copyright owners and the exemptions provided in subparagraphs (A) and (B) fall within Article 13[13] standard.

7.2 The Two Exemptions

7.2.1 The exemption provided in subparagraph (A) of the said US Act was referred to as "homestyle exemption." Such exemption was largely based on a decided case, Twentieth Century Music Corp. v. Aiken, 422 U.S.151 (1975).[14] The effect of the introductory phrase "except as provided in subparagraph (B)", was that the operation of subparagraph (A) was limited to such musical works as not covered by subparagraph (B), i.e. works other than "nondramatic musical works." The rationale of the exemption provided under subparagraph (A) was "to exempt those small commercial establishments which were not of sufficient size to justify, as a practical matter, a subscription to a commercial background music service."[15]

7.2.2 The exemption provided in subparagraph (B) of the said US Act concerned the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of a work. This exemption was referred to as "business exemption."

7.3 The related articles of the Berne Convention

Article 11(1)(ii) provides an exclusive right to authorize the communication to the public of performances of works in general. Article 11*bis*(1)(iii) provides an exclusive right to authorize the public communication of the broadcast of a work by loudspeaker, on a television screen, or by other similar means. Such communication involves a new public performance of a work contained in a broadcast, which requires a licence from the right holder. The Guide to the Berne

[12] Section 110(5) of the US Copyright Act of 1976, as amended by the Fairness in Music Licensing Act of 1998 ("the 1998 Amendment"), which entered into force on 26 January 1999. See Annexure 1 for the two subparagraphs. In this submission, "Subparagraph (A)" and "subparagraph (B)" refer to subparagraph (A) and subparagraph (B) of Section 110(5) of the US Copyright Act respectively.

[13] In this submission, "Article 13" refers to Article 13 of the TRIPS Agreement.

[14] The United States Supreme Court held that an owner of a small fast food restaurant was not liable for playing music by means of a radio with outlets to four speakers in the ceiling; the size of the shop was 1,055 square fee, of which 620 square feet were open to the public. This exemption became known as the "homestyle" exemption.

[15] See Annexure 5, paragraph 2.5.

Convention[16] gives the following explanation on the situation covered by Article 11bis(1)(iii):

> " This case is becoming more common. In places where people gather (cafés, restaurants, tea-rooms, hotels, large shops, trains, aircraft, etc.) the practice is growing of providing broadcast programmes. … The question is whether the licence given by the author to the broadcasting station covers, in addition, all the use made of the broadcast, which may or many not be for commercial ends. … The Convention's answer is 'no'. Just as, in the case of a relay of a broadcast by wire, an additional audience is created (paragraph (1)(ii)), so, in this case, too, the work is made perceptible to listeners (and perhaps to viewers) other than those contemplated by the author when his permission was given. Although, by definition, the number of people receiving a broadcast cannot be ascertained with any certainty, the author thinks of his licence to broadcast as covering only the direct audience receiving the signal within the family circle. Once this reception is done in order to entertain a wider circle, often for profit, an additional section of the public is enabled to enjoy the work and it ceases to be merely a matter of broadcasting. The author is given control over this new public performance of his work."

7.4 Article 13 of the TRIPS Agreement

7.4.1 According to the Report, since the US acknowledged that subparagraphs (A) and (B) of Section 110(5) implicate Articles 11(1)(ii) and 11*bis*(1)(iii) of the Berne Convention (1971), the core question in this case was whether the exemptions provided in subparagraphs (A) and (B) fell within the Article 13 standard.

7.4.2 Article 13 of the TRIPS Agreement *provides:*

> " 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."

7.4.3 Article 13 states that limitations or exceptions to exclusive rights can only be made if three conditions are met. Failure to fulfil any one of the three conditions will have the application of Article 13 forbidden. The three conditions are as follows:

(1) the limitations or exceptions are confined to *certain special cases*;
(2) they do not conflict with a *normal exploitation* of the work; and
(3) they do not *unreasonably prejudice* the legitimate interests of the right holder.

[16] WIPO, *A Guide to the Berne Convention*, 1978, p.68-69.

8. Application of Article 13 of the TRIPS Agreement

8.1 For the US to apply Article 13 of the TRIPS Agreement, the burden to prove the fulfilment of the three conditions for invoking the exemptions was rested on the US.

8.2 Likewise in Hong Kong, if the Existing Exemption is to be extended to cover all underlying copyright works included in the broadcast or cable programme, Article 13 of the TRIPS Agreement has to be invoked. The Government of the HKSAR thus has to bear the burden of proof concerning whether all of the three conditions set out in Article 13 are fulfilled.

8.3 By the illustration in Sections 8.4 and 8.5 below, we submit that it is highly unlikely for the HKSAR Government to fulfil all these three conditions.

8.4 First condition: the limitations or exceptions are confined to *certain special cases*

8.4.1 To determine whether the coverage of the exemption is sufficiently limited to qualify as a "special case", the scope in respect of potential users is relevant. If the Extension is given, not only those users who play music via radio or television sets would be exempted from payment of royalties, the establishments that have been using recorded or "CD" music may decide to switch to "broadcast" music in order to avoid paying royalties. The impact on the use of other substitutable sources of music is substantial. The Extension would in effect exempt a substantial number of users that were specifically intended to be covered by Articles 11(1)(ii) and 11*bis*(1)(iii) of the Berne Convention (1971). In the circumstances, we fail to see how the Extension could be considered as a "*special case*" so as to meet the first condition of Article 13 of the TRIPS Agreement.

8.4.2 Even if the first condition could be established, which is very unlikely, the other two conditions, in particular the third one, will be difficult to establish.

8.5 Third condition: the limitations or exceptions do not *unreasonably prejudice* the legitimate interests of the right holder

From the Panel's decision, we can see that their way of looking at legitimate interests was based on the economic value of the exclusive rights conferred. To examine whether the prejudice caused by the exemptions to the legitimate interests of the right holder is of an unreasonable level, the Panel considered both the actual and the potential prejudice caused by the exemptions. By the illustration in Section 9 below, it will be impossible for this third condition to be fulfilled in the situation of Hong Kong.

9. The Panel's Decisions

From the Panel's different decisions[17] on the two exemptions (the “homestyle exemption” and the “business exemption”), we may draw a reference, albeit not absolute, on the degree or the extent of prejudice that it is of an unreasonable level.

9.1 Decision on “Homestyle Exemption”

9.1.1 In making the decision, the facts considered by the Panel included:

(a) The Panel had not been given any evidence suggesting that the right holders would have licensed, or attempted to license, the public communication[18] of broadcasts of performances embodying dramatic renditions of "dramatic" musical works either before the enactment of the original homestyle exemption or after the 1998 Amendment;

(b) The playing of music by the small establishments covered by the “homestyle exemption” has never been a significant source of revenue collection for collective management organizations ("**CMOs**")[19]; and

(c) As regards the exemption as amended in 1998 to exclude nondramatic musical works from its scope, the EC had not explicitly claimed that the exemption would cause any prejudice to right holders.

9.1.2 The Panel therefore concluded that the “homestyle exemption” contained in subparagraph (A) did not cause unreasonable prejudice to the legitimate interests of the right holders within the meaning of the third condition of Article 13.

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[17] The Panel concluded that:

(a) Subparagraph (A) of Section 110(5) of the US Copyright Act meets the requirements of Article 13 of the TRIPS Agreement and is thus *consistent* with Articles 11*bis*(1)(iii) and 11(1)(ii) of the Berne Convention (1971) as incorporated into the TRIPS Agreement by Article 9.1 of that Agreement.

(b) Subparagraph (B) of Section 110(5) of the US Copyright Act does not meet the requirements of Article 13 of the TRIPS Agreement and is thus *inconsistent* with Articles 11*bis*(1)(iii) and 11(1)(ii) of the Berne Convention (1971) as incorporated into the TRIPS Agreement by Article 9.1 of that Agreement.”

[18] Within the meaning of Article 11(1)(ii) or 11*bis*(1)(iii) of the Berne Convention (1971).

[19] In this case, the US submitted that the economic effect of the original homestyle exemption of Section 110(5) of 1976 was minimal. Its intent was to exempt from liability small shop and restaurant owners whose establishments would not have justified a commercial licence. Given that such establishments are not a significant licensing market, they could not be significant sources of revenue for right holders. Even in the absence of an exception, no licences would be justified to be sought or issued. Therefore, there was literally no economic detriment to the right holder from an explicit exception. Given their size and that the playing of music is often incidental to their services, these establishments are among those most likely simply to turn off the radio if pressed to pay licensing fees. Furthermore, the 1998 Amendment has only decreased the economic relevance of the exemption by reducing its scope to "dramatic" musical works.

9.1.3 In the US, the reason why the "homestyle exemption" caused *no significant* economic effect to the right holder was that it was not feasible, practical, nor cost-effective for the CMOs in the US to collect royalties from the small establishments in their country. The CMOs could not or would not even attempt to collect such kind of royalties in reality, irrespective of the nature of the legislation in place.

9.1.4 However, it is an entirely different situation in Hong Kong. In Hong Kong, it is an accepted fact that most of the establishments are small ones and it is a compact place connected by an efficient transportation network. It is never infeasible, impractical or cost-ineffective for CASH (Section 9.1.3 above refers) to exercise our performing right. Most importantly, unlike the CMOs in the US, CASH has been and is exerting its best efforts to collect royalties from users who perform music in public by means of turning on radio or TV programmes. The economic effect of introducing the Extension will thus be exceedingly significant. An estimation of the financial impact on CASH is detailed in Section 9.2.3 below. In the circumstances, any "homestyle exemption" in the context of Hong Kong will be ruled prejudicial to the legitimate right of authors.

9.2 Decision on Business Exemption

9.2.1 In making the decision, the facts considered by the Panel included:

(a) An exemption that made the use of music from one source free of charge was likely to significantly affect, not only the number of establishments that opted for sources of music that required the payment of a licensing fee, but also the price for which the protected sources of music could be licensed[20];

(b) It was difficult to quantify the economic value of potential prejudice. The fact that neither the EC[21] nor the US[22] was in a position to provide

[20] According to the Report, it was evident that establishments that were playing recorded music might at any time decided to switch to music broadcast over the air to avoid paying licensing fees.

[21] The EC has argued that the unreasonableness of the prejudice caused to the right holder becomes fully apparent when 73 per cent of all drinking establishments, 70 per cent of all eating establishments and 45 per cent of all retail establishments are unconditionally covered by the "business exemption", while the rest of the establishments may also be exempted under conditions which are easy to meet.

[22] The US contended that the figures provided by the EC were not useful for estimating the economic impact or prejudice caused by the subparagraph (B) to right holders. In order to obtain a reasonable estimate of the number of establishments from which copyright owners have truly lost revenue as a result of the business exemption, the US subtracts from these figures those establishments that:

(i) do not play music at all;

(ii) rely on music from some source other than radio or TV (such as tapes, CDs, commercial background music services, jukeboxes, or live music);

(iii) were not licensed prior to the passage of the 1998 amendment and which the CMOs would not be able to license anyway;

more direct information on the revenues collected from the establishments affected by the business exemption did not help the estimation of the immediate effect of the exemption in terms of annual losses to the right holders; and

(c) The US had failed to prove that the "business exemption" did not unreasonably prejudice the legitimate interests of the right holder.

9.2.2 To apply this case to Hong Kong's situation, if the Extension is introduced, in addition to the right holders' loss of revenue from the users who will be newly exempted under paragraph 4.9(a), it is likely that the Extension will cause music users who were not performing music by means of turning on radio or TV to switch to such a means and thereby significantly reduce the amount of income that may have been generated from those establishments.

9.2.3 We estimate that the potential impact on the annual loss of revenue would be about HK$13 million, representing about 28% of the total annual public performance income. This loss is significant enough to be qualified as an "unreasonable prejudice". As stated above, it would be the HKSAR Government's burden of proof that the Extension of the Existing Exemption meets all three conditions of Article 13 of the TRIPS Agreement. It is however our opinion that such proof cannot be established. We therefore respectfully submit that the Extension should never be put into practice.

(iv) would take advantage of the NLBA agreement, whose terms are practically identical to subparagraph (B), if the statutory exemption were not available; and

(v) would prefer to simply turn off the music rather than pay the fees demanded by the CMOs.The US concedes that it is impossible to estimate these figures, but assumes that there is ample reason to believe that they represent a substantial number of establishment.

C. Paragraph 4.9(b) of the Consultation Document

1. Regarding the question whether the Existing Exemption should 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, our answer is also firmly negative.

2. The HKSAR Government should note paragraph 6 of Article 14[23] of the TRIPS Agreement. This paragraph explicitly provides limitation on the exemption to the extent permitted by the Rome Convention, i.e. in places accessible to the public against payment of an entrance fee[24].

3. On the assumption that the Extension under paragraph 4.9(a) is introduced, this further extension suggested in paragraph 4.9(b) will further constrict the performing right of the right holders of music and lyrics, causing a further reduction of their income. We estimate that the potential annual loss of revenue stemming from the aggregate effect of both extensions would be increased to HK$20 million, representing approximately 43% of the total annual public performance income. This even more severe loss will certainly amount to an "unreasonable prejudice" and will serve to have detrimental effect on the performing income, and consequently the livelihood, of composers and authors. Once again, the HKSAR Government has to prove that this further extension, if introduced, meets all three conditions of Article 13 of the TRIPS Agreement. As illustrated above, it is our opinion that such proof cannot be established. We therefore respectfully submit that the further extension should never be put into practice.

[23] See Annexure 3.
[24] See paragraph (d) of Article 13 of the Rome Convention) in Annexure 4.

D. Conclusion

1. It is essential for Hong Kong, being an international centre of trade and finance as well as an advocate on intellectual property rights, to continue to apply international copyright standards to the utmost.

2. If the Extension were introduced, Hong Kong would be in breach of her obligations under the TRIPS Agreement. In that case, not only would Hong Kong have her international image tarnished but also be subject to complaints by other members of the WTO.

3. Last but not least, we would like to draw the attention of the Government to the *Introduction* of the *Report on Reform of The Law Relating To Copyright* issued by the Law Reform Commission of Hong Kong in November 1993. Paragraph 40 of the *Introduction* says, "*Copyright legislation is dependent not only upon local considerations but must also have regard to international legal obligations. Of these the most important arise from the International Convention for the Protection of Literary and Artistic Works ("the Berne Convention) and the Universal Copyright Convention, which prescribe minimum standards for the local laws of states which are party to these conventions. These standards must be met in Hong Kong if Hong Kong copyright owners are to secure protection of their work in other member countries.*"

Annexure 1 – Extracts from Section 110(5) of the United State Copyright Act

*Section **110(5)*** provides:

"**110**. Limitations on exclusive rights: Exemption of certain performances and displays
Notwithstanding the provisions of section 106, the following are not infringements of copyright:
…

(5)(A) except as provided in subparagraph (B), communication of a transmission embodying a performance or display of a work by the public reception of the transmission on a single receiving apparatus of a kind commonly used in private homes, unless —
(i) a direct charge is made to see or hear the transmission; or
(ii) the transmission thus received is further transmitted to the public;

(B) communication by an establishment of a transmission or retransmission embodying a performance or display of a nondramatic musical work intended to be received by the general public, originated by a radio or television broadcast station licensed as such by the Federal Communications Commission, or, if an audiovisual transmission, by a cable system or satellite carrier, if—

(i) in the case of an establishment other than a food service or drinking establishment, either the establishment in which the communication occurs has less than 2,000 gross square feet of space (excluding space used for customer parking and for no other purpose), or the establishment in which the communication occurs has 2,000 or more gross square feet of space (excluding space used for customer parking and for no other purpose) and—

(I) if the performance is by audio means only, the performance is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space; or
(II) if the performance or display is by audiovisual means, any visual portion of the performance or display is communicated by means of a total of not more than 4 audiovisual devices, of which not more than 1 audiovisual device is located in any 1 room, and no such audiovisual device has a diagonal screen size greater than 55 inches, and any audio portion of the performance or display is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space;

(ii) in the case of a food service or drinking establishment, either the establishment in which the communication occurs has less than 3,750 gross square feet of space (excluding space used for customer parking and for no other purpose), or the establishment in which the communication occurs has 3,750 gross square feet of space or more (excluding space used for customer parking and for no other purpose) and—

(I) if the performance is by audio means only, the performance is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space; or

(II) if the performance or display is by audiovisual means, any visual portion of the performance or display is communicated by means of a total of not more than 4 audiovisual devices, of which not more than 1 audiovisual device is located in any 1 room, and no such audiovisual device has a diagonal screen size greater than 55 inches, and any audio portion of the performance or display is communicated by means of a total of not more than 6 loudspeakers, of which not more than 4 loudspeakers are located in any 1 room or adjoining outdoor space;

(iii)no direct charge is made to see or hear the transmission or retransmission;

(iv) the transmission or retransmission is not further transmitted beyond the establishment where it is received; and

(v) the transmission or retransmission is licensed by the copyright owner of the work so publicly performed or displayed; and ..."

Annexure 2 – Articles 11 and 11bis of the Berne Convention (1971)

Article 11

[Certain Rights in Dramatic and Musical Works: 1. Right of public performance and of communication to the public of a performance; 2. In respect of translations]

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

(i) the public performance of their works, including such public performance by any means or process;
(ii) any communication to the public of the performance of their works.

(2) Authors of dramatic or dramatico-musical works shall enjoy, during the full term of their rights in the original works, the same rights with respect to translations thereof.

Article 11bis

[Broadcasting and Related Rights: 1. Broadcasting and other wireless communications, public communication of broadcast by wire or rebroadcast, public communication of broadcast by loudspeaker or analogous instruments; 2. Compulsory licenses; 3. Recording; ephemeral recordings]

(1) Authors of literary and artistic works shall enjoy the exclusive right of authorizing:

(i) the broadcasting of their works or the communication thereof to the public by any other means of wireless diffusion of signs, sounds or images;
(ii) any communication to the public by wire or by rebroadcasting of the broadcast of the work, when this communication is made by an organization other than the original one;
(iii) the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sounds or images, the broadcast of the work.

(2) It shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights mentioned in the paragraph 1 may be exercised, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.

(3) In the absence of any contrary stipulation, permission granted in accordance with paragraph (1) of this Article shall not imply permission to record, by means of instruments recording sounds or images, the work broadcast. It shall, however, be a

matter for legislation in the countries of the Union to determine the regulations for ephemeral recordings made by a broadcasting organization by means of its own facilities and used for its own broadcasts. The preservation of these recordings in official archives may, on the ground of their exceptional documentary character, be authorized by such legislation.

Article 13

[*Possible Limitation of the Right of Recording of Musical Works and Any Words Pertaining Thereto:* 1. Compulsory licenses; 2. Transitory measures; 3. Seizure on importation of copies made without the author's permission]

(1) Each country of the Union may impose for itself reservations and conditions on the exclusive right granted to the author of a musical work and to the author of any words, the recording of which together with the musical work has already been authorized by the latter, to authorize the sound recording of that musical work, together with such words, if any; but all such reservations and conditions shall apply only in the countries which have imposed them and shall not, in any circumstances, be prejudicial to the rights of these authors to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.

(2) Recordings of musical works made in a country of the Union in accordance with Article 13(3) of the Conventions signed at Rome on June 2, 1928, and at Brussels on June 26, 1948, may be reproduced in that country without the permission of the author of the musical work until a date two years after that country becomes bound by this Act.

(3) Recordings made in accordance with paragraphs (1) and (2) of this Article and imported without permission from the parties concerned into a country where they are treated as infringing recordings shall be liable to seizure.

Annexure 3 – Extracts from Articles 4 and 14 of the TRIPS Agreement (1994)

Article 4
Most-Favoured-Nation Treatment

With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members. Exempted from this obligation are any advantage, favour, privilege or immunity accorded by a Member:

(a) deriving from international agreements on judicial assistance or law enforcement of a general nature and not particularly confined to the protection of intellectual property;
(b) granted in accordance with the provisions of the Berne Convention (1971) or the Rome Convention authorizing that the treatment accorded be a function not of national treatment but of the treatment accorded in another country;
(c) in respect of the rights of performers, producers of phonograms and broadcasting organizations not provided under this Agreement;
(d) deriving from international agreements related to the protection of intellectual property which entered into force prior to the entry into force of the WTO Agreement, provided that such agreements are notified to the Council for TRIPS and do not constitute an arbitrary or unjustifiable discrimination against nationals of other Members.

Article 14
Protection of Performers, Producers of Phonograms (Sound Recordings) and Broadcasting Organizations

1. In respect of a fixation of their performance on a phonogram, performers shall have the possibility of preventing the following acts when undertaken without their authorization: the fixation of their unfixed performance and the reproduction of such fixation. Performers shall also have the possibility of preventing the following acts when undertaken without their authorization: the broadcasting by wireless means and the communication to the public of their live performance.

2. Producers of phonograms shall enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms.

3. Broadcasting organizations shall have the right to prohibit the following acts when undertaken without their authorization: the fixation, the reproduction of fixations, and the rebroadcasting by wireless means of broadcasts, as well as the communication to the public of television broadcasts of the same. Where Members do not grant such rights to broadcasting organizations, they shall provide owners of copyright in the subject matter of broadcasts with the possibility of preventing the above acts, subject to the provisions of the Berne Convention (1971).

...

6. Any Member may, in relation to the rights conferred under paragraphs 1, 2 and 3, provide for conditions, limitations, exceptions and reservations to the extent permitted by the Rome Convention. However, the provisions of Article 18 of the Berne Convention (1971) shall also apply, *mutatis mutandi*s, to the rights of performers and producers of phonograms in phonograms.

Annexure 4 – Extracts of provisions of the Rome Convention (1961)

Article 7

[Minimum Protection for Performers: 1. Particular Rights; 2. Relations between Performers and Broadcasting Organizations]

1. The protection provided for performers by this Convention shall include the possibility of preventing:

   (a) the broadcasting and the communication to the public, without their consent, of their performance, except where the performance used in the broadcasting or the public communication is itself already a broadcast performance or is made from a fixation;

   (b) the fixation, without their consent, of their unfixed performance;

   (c) the reproduction, without their consent, of a fixation of their performance:

      (i) if the original fixation itself was made without their consent;

      (ii) if the reproduction is made for purposes different from those for which the performers gave their consent;

      (iii) if the original fixation was made in accordance with the provisions of Article 15, and the reproduction is made for purposes different from those referred to in those provisions.

2. (1) If broadcasting was consented to by the performers, it shall be a matter for the domestic law of the Contracting State where protection is claimed to regulate the protection against rebroadcasting, fixation for broadcasting purposes and the reproduction of such fixation for broadcasting purposes.

   (2) The terms and conditions governing the use by broadcasting organisations of fixations made for broadcasting purposes shall be determined in accordance with the domestic law of the Contracting State where protection is claimed.

   (3) However, the domestic law referred to in sub–paragraphs (1) and (2) of this paragraph shall not operate to deprive performers of the ability to control, by contract, their relations with broadcasting organisations.

Article 10
[Right of Reproduction for Phonogram Producers]

Producers of phonograms shall enjoy the right to authorize or prohibit the direct or indirect reproduction of their phonograms.

Article 12
[Secondary Uses of Phonograms]

If a phonogram published for commercial purposes, or a reproduction of such phonogram, is used directly for broadcasting or for any communication to the public, a single equitable remuneration shall be paid by the user to the performers, or to the producers of the phonograms, or to both. Domestic law may, in the absence of agreement between these parties, lay down the conditions as to the sharing of this remuneration.

Article 13
[Minimum Rights for Broadcasting Organizations]

Broadcasting orgainsations shall enjoy the right to authorise or prohibit:
(a) the rebroadcasting of their broadcasts;
...
(d) the communication to the public of their television broadcasts if such communication is made in places accessible to the public against payment of an entrance fee; it shall be a matter for the domestic law of the State where protection of this right is claimed to determine the conditions under which it may be exercised.

Article 19
[Performers' Rights in Films]

Notwithstanding anything in this Convention, once a performer has consented to the incorporation of his performance in a visual or audio–visual fixation, Article 7 shall have no further application.

Annexure 5 – Extracts from
Report of the Panel on United States – Section 110(5) of the US Copyright Act

2.4 Subparagraph (A) of Section 110(5) essentially reproduces the text of the original "homestyle" exemption contained in Section 110(5) of the Copyright Act of 1976. When Section 110(5) was amended in 1998, the homestyle exemption was moved to a new subparagraph (A) and the words "except as provided in subparagraph (B)" were added to the beginning of the text.

2.5 A House Report (1976) accompanying the Copyright Act of 1976 explained that in its original form Section 110(5) "applies to performances and displays of all types of works, and its purpose is to exempt from copyright liability anyone who merely turns on, in a public place, an ordinary radio or television receiving apparatus of a kind commonly sold to members of the public for private use". "The basic rationale of this clause is that the secondary use of the transmission by turning on an ordinary receiver in public is so remote and minimal that no further liability should be imposed." "[The clause] would impose liability where the proprietor has a commercial 'sound system' installed or converts a standard home receiving apparatus (by augmenting it with sophisticated or extensive amplification equipment) into the equivalent of a commercial sound system."[10] A subsequent Conference Report (1976) elaborated on *the rationale by noting that the intent was to exempt a small commercial establishment "which was not of sufficient size to justify, as a practical matter, a subscription to a commercial background music service*".[11]

[10] These quotations are from the Report of the House Committee on the Judiciary, H.R. Rep. No. 94-1476, 94th Congress, 2nd Session 87 (1976), as reproduced in Exhibit US-1. The Report adds that "[f]actors to consider in particular cases would include the size, physical arrangement, and noise level of the areas within the establishment where the transmissions are made audible or visible, and the extent to which the receiving apparatus is altered or augmented for the purpose of improving the aural or visual quality of the performance".

[11] Conference Report of the House Committee on the Judiciary, Subcommittee on Courts and Intellectual Property, H.R. Rep. No. 94-1733, 94th Congress, 2nd Session 75 (1976), as reproduced in Exhibit US-2.

PART IV

External Legal Opinion
BY
WILKINSON & GRIST
Solicitors & Notaries

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SOLICITORS & NOTARIES • AGENTS FOR TRADEMARKS & PATENTS

Our Ref. : AC:an:C3064-2
Date : 12th December 2001

Composers and Authors Society of Hong Kong
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Universal Trade Centre **BY HAND**
3 Arbuthnot Road
Central
Hong Kong

Dear Sirs,

Legal Opinion on the Consultation Document on Review of Certain Provisions of Copyright Ordinance

We refer to your instructions to provide a legal opinion on the impact of Paragraph 4.9 of the Consultation Document on Review of Certain Provisions of Copyright Ordinance (the "**Consultation Document**") published by the Commerce and Industry Bureau of the Government of the Hong Kong Special Administrative Region on 1st November 2001, and summarize our view on the Consultation Document hereinbelow.

The following opinion is specifically addressed to Paragraph 4.9 of the Consultation Document:

(a) *whether the statutory exemption in paragraph 4.2 of the Consultation Document should be extended to cover all underlying copyright works included in the broadcast or cable program; and*

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

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Paragraph 4.9(a) of the Consultation Document

Inconsistency Between the Protection of Broadcast and the Protection of Literary and Musical Works

1. It is mentioned in Paragraph 4.3 of the Consultation Document that there appears to be inconsistency between the protection of broadcast and cable programme and the protection of the underlying works such as literary and musical works embodied in such broadcast and cable programme.

2. There is no mandatory requirement worldwide to offer the same level of protection since the universal standard for the protection of broadcast and that of underlying literary and musical works are entirely different.

3. Article 11(1) of Berne Convention for the Protection of Literary and Artistic Works ("**Berne Convention**"), which is applicable to the HKSAR, provides that

   > *Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing:*
   >
   > *(i) the public performance of their works, including such performance by any means or process;*
   > *(ii) any communication to the public of the performance of their works.*

   Article 11*bis*(1)(iii) of Berne Convention further provides that authors of literary and artistic works shall enjoy the **exclusive right** of authorizing the **public communication** by loudspeaker or any other analogous instrument transmitting, **by** signs, sound or images, **the broadcast of the work**.

   The expression "literary and artistic works" referred to in Berne Convention is defined in its Article 2(1) to cover **musical compositions with or without words**.

   It could be seen from the above that exclusive rights in public communication of the broadcast of literary and musical works are specifically accorded to the authors of such works.

4. On the other hand, Berne Convention does not give specific protection to broadcasting organizations in relation to rights in broadcast or cable programme. Their rights are rather governed internationally by the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations ("**Rome Convention**").

   Article 14(d) of Rome Convention stipulates that:

   > *Broadcasting organizations shall enjoy the right to authorize or prohibit the* ***communication to the public of their television broadcasts*** *if such communication is made in places accessible to the public against payment of an entrance fee; it shall be the matter for the domestic law of the Contracting State where protection of this right is claimed to determine the conditions under which it may be exercised.*

Although Rome Convention was ratified by and came into force in the United Kingdom, it had not been declared to apply to the HKSAR. Further, the People's Republic of China (the "**PRC**") is not a signatory to Rome Convention. Hence, Rome Convention and, in particular, the abovementioned obligation is not applicable to the HKSAR.

5. The possibility of protecting such exclusive rights in the public communication of broadcast is addressed by Article 14.3 of the Agreement of Trade-Related Aspects of Intellectual Property Rights (the "**TRIPs Agreement**") of World Trade Organization ("**WTO**") of which the HKSAR is a member. Article 14.3 of the TRIPs Agreement provides, inter alia, that

> *Broadcasting organizations shall have the right to prohibit the following acts when undertaken without their authorization : the fixation, the reproduction of fixations, and the rebroadcasting by wireless means of broadcasts, as well as the communication to the public of television broadcasts of the same.* ***Where Members do not grant such rights to broadcasting organizations, they shall provide owners of copyright in the subject matter of broadcasts with the possibility of preventing the above acts****, subject to the provisions of the Berne Convention.*

6. Since there is no mandatory requirement for offering to broadcasting organizations exclusive rights in the public communication of broadcast, it is the choice of the legislature of the HKSAR to consider whether such exclusive rights shall be granted to broadcasting organizations.

7. Even if such exclusive rights were not granted to broadcasting organizations, the HKSAR would still be bound by the obligations under both the TRIPs Agreement and Berne Convention to protect authors of literary and musical works their exclusive rights in communication to the public of their works embodied in the broadcast.

8. In light of the above and, in particular, the difference in the universal standard for protection of broadcast and cable program and that of the underlying literary and musical works embodied in the broadcast or cable program, it would not be right to extend the statutory exemption to the underlying works simply for the sake of **achieving such kind of unnecessary consistency despite violation of international obligations**.

Difference Between Broadcasting Right and Public Performance Right

9. We note the argument in Paragraph 4.4 of the Consultation Document that when copyright holders of the underlying works in the broadcast or cable programme licensed their works to radio or television network operators, they should have been aware that their work would be accessible to the general public by way of the broadcast or cable programme and therefore they should not expect to be paid any royalty for the showing or playing of their works in public.

10. However, such a view is contrary to the very fundamental principles of copyright law.

11. Authors of musical and literary works enjoy exclusive **broadcasting rights** and **performing rights** (being two separate and distinct rights) in their works, and broadcasting and public performance of their works are two independent restricted acts under copyright law.

12. The use of musical and literary works by broadcasters is one kind of commercial exploitation of the works, the exclusive rights of which are granted to the copyright owners. Accordingly, the broadcasters are required to obtain a licence for broadcasting from the authors of musical and literary works.

13. The use of musical and literary works embodied in broadcast or cable programme emanating from radio receiving sets or television sets in a public place of business to entertain customers, clients or staff in that place is an additional and distinct commercial use of the musical and literary works so embodied. Therefore, operators of public places of business are required to obtain a licence for public performance from the authors of the musical and literary works embodied in the broadcast or cable programme.

14. Broadcasters and operators of the public places of business are two distinct users of two distinct kinds of exploitation of the works involving two distinct rights, being broadcasting right and public performance right respectively, granted to the copyright owners of musical and literary works.

15. The licence granted to broadcasters covers only the exploitation by broadcasting of the musical and literary works and nothing else. The exploitation of the musical and literary works by public performance of the broadcast or cable programme involves another separate and distinct exclusive right for another commercial purpose and thus separate compensation to the copyright owners is required.

16. The argument that once the works are licensed to broadcasters for broadcasting purpose, the exclusive rights in public performance of the works embodied in the broadcast by communicating the broadcast to the public can no longer be exercised by authors of such embodied works is not supported by any legal or economic principle.

17. If such exclusive rights in public performance were to be deprived of after licensing the works to broadcasters, it would essentially mean that any royalty to be borne by the broadcasters has to include also the compensation for the loss of the exclusive rights in public performance of the works. However, requiring broadcasters to be responsible for compensation incurred from use of copyright works by other users is not justified or supported by any legal principle. In the absence of such legal basis, authors of musical and literary works are not entitled to recover from broadcasters their loss of legitimate interests by exploitation in public performance of their works by other users if the broadcasters refuse to be responsible for such loss resulting from acts of other users.

18. As public performance right of literary and musical works is separate and distinct from broadcasting right of such works, we cannot find anything to support the argument that public performance right could be lost or specifically deprived by legislation once broadcasting right is licensed. Further, we fail to see any strong or compelling reason why operators of business establishment should enjoy free public performance of copyright works of others when the establishment is operated for profit and such performance in the establishment helps to attract business or adds value to the service provided.

Breach of Obligations in International Treaties

19. Both Berne Convention and TRIPs Agreement are applicable to the HKSAR, and therefore obligations under both treaties have to be strictly observed.

20. In particular, the following provisions address on the exclusive rights in public performance of literary and musical works:-

Article 11(1) of Berne Convention:

> *Authors of dramatic, dramatico-musical and musical works shall enjoy the exclusive right of authorizing:*
> *(i) the public performance of their works, including such performance by any means or process;*
> *(ii) any communication to the public of the performance of their works.*

Article 11*bis*(1)(iii) of Berne Convention:

> *Authors of literary and artistic works (including musical compositions with or without words) shall enjoy the exclusive right of authorizing the public communication by loudspeaker or any other analogous instrument transmitting, by signs, sound or images, the broadcast of the work.*

Article 11*bis*(2) of Berne Convention:

> *It shall be a matter for legislation in the countries of the Union to determine the conditions under which the rights in the Article 11bis(1) may be exercised, but these conditions shall apply only in the countries where they have been prescribed. They shall not in any circumstances be prejudicial to the moral rights of the author, nor to his right to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.*

21. Although members of WTO may impose limitations or exceptions to the exclusive rights, such limitations or exceptions can be imposed only within the perimeters of Article 13 of the TRIPs Agreement. Article 13 of the TRIPs Agreement provides, inter alia, that 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.

22. The limitations or exception permissible under Article 13 of the TRIPs Agreement have been thoroughly examined in the decision of the Dispute Settlement Body ("**DSB**") of WTO on the action brought by the European Communities and their member states ("**European Communities**") against the United States regarding failure of compliance with the TRIPs Agreement. The European Communities claimed that Section 110(5) of the United States Copyright Act was in violation of Article 11(1)(ii) and Article 11*bis*(1)(iii) of Berne Convention which are incorporated into the TRIPs Agreement by reference pursuant to Article 9(1) of the TRIPs Agreement.

23. Section 110(5)(B) of the United States Copyright Act provides statutory exemption to business establishments meeting the prescribed threshold on gross area or equipment requirement and where direct admission charge is not required in that public performance of radio and television broadcast in such establishments is not treated as infringement of exclusive rights in public performance of literary and musical works.

24. The European Communities claimed that such statutory exemption was in violation of the obligations of the United States under the TRIPs Agreement, and that the violation caused prejudice to the legitimate interests of composers, authors and publishers in the European Communities to licence their exclusive rights in public performance of their works embodied in broadcast, and thus nullifying or impairing the rights of the European Communities.

25. Such statutory exemption was held by the DSB of WTO to be in violation of the obligations of the United States under Article 11(1)(ii) and Article 11*bis*(1)(iii) of Berne Convention which are incorporated into the TRIPs Agreement by reference. The DSB of WTO also held that the statutory exemption was not justified by any limitations or exceptions permissible under Article 13 of the TRIPs Agreement. The United States was therefore requested to bring Section 110(5)(B) into conformity with its obligations under the TRIPs Agreement.

26. An arbitral award in relation to the assessment of the nullification or impairment to the benefits of the European Communities as a result of the operation of Section 110(5)(B) of the United States Copyright Act was made and subsequently announced on 9th November 2001 and such benefits were assessed at the amount of US$1.1 million per year.

27. In coming to the decision, the DSB of WTO specifically ruled that Article 13 of the TRIPs Agreement expressly requires that limitations or exceptions to exclusive rights
    (1) shall be confined to certain special cases; and
    (2) do not conflict with a normal exploitation of the work; and
    (3) do not unreasonably prejudice the legitimate interests of the right holder.

    The three conditions are required to be applied on a **cumulative basis**, each being a separate and independent requirement that must be satisfied. Hence, failure to comply with any one of the three conditions would result in Article 13 exception being disallowed.

28. In relation to the first condition, the DSB of WTO concluded that the statutory exemption allowed under Section 110(5)(B) did not qualify as a "certain special case" on the ground that a major part of the users that were specifically intended to be covered by Article 11*bis*(1)(iii) of Berne Convention would have been exempted under Section 110(5)(B).

29. With regard to the second condition, the DSB of WTO considered that the provision of Article 11*bis*(1)(iii) of Berne Convention contemplated the use of amplification of broadcasts to customers in commercial establishments and therefore specifically conferred rights on copyright owners in respect of the amplification of broadcasts. In respect of musical works, the DSB of WTO considered that normal exploitation of such works would be affected not only by the users who could use them without licence from the copyright owners due to exemption, but also by the users who might be induced to switch to the exempted use. Accordingly, the DSB of WTO concluded that the statutory exemption provided by Section 110(5)(B) conflicts with the normal exploitation of the work in relation to the exclusive rights conferred by Article 11*bis*(1)(iii) of Berne Convention.

30. If the statutory exemption mentioned in Paragraph 4.2 of the Consultation Document were to be extended to cover underlying literary and musical works embodied in the broadcast or cable programme, such statutory extension would have breached the obligations of the HKSAR under Article 11(1)(ii) and Article 11*bis*(1)(iii) of Berne Convention and thus Article 9(1) of the TRIPs Agreement, and would have fallen outside the limitations or exceptions permissible under Article 13 of the TRIPs Agreement.

31. Such extension of statutory exemption could not be regarded as confined to "certain special case" as places where audience are not charged for admission would cover a major part of users contemplated to be covered by Article 11*bis*(1)(iii) of Berne Convention.

32. Further, copyright owners of the underlying literary and musical works embodied in broadcast and cable programme would be deprived of their rights to license public performance to the concerned places of business and thus their right to receive royalty from the granting of such licence.

33. One direct and immediate consequence which may follow from extending the statutory exemption to underlying literary and musical works embodied in broadcast or cable programme is driving commercial users from playing recorded music (which is not exempted under the Copyright Ordinance) to playing music received from broadcast, which would be free of charge. Royalty to be received from granting licence for public performance by authors of literary and musical works embodied in sound recordings would be substantially reduced. In response to such reduction, licensing fees for recorded music may have to be lowered so as to provide incentive to commercial users not to switch to using music from broadcast. The result may be a further reduction in receivable royalty. Authors of literary and musical works would be the victims suffering losses resulting from the extension of statutory exemption.

34. Accordingly, such extension of statutory exemption would not only conflict with the normal exploitation of the works in relation to the exclusive rights conferred by Article 11(1)(ii) and Article 11*bis*(1)(iii) of Berne Convention but also prejudice the legitimate interests of the copyright owners.

35. In this regard, extension of statutory exemption to cover underlying literary and musical works embodied in broadcast or cable programme is not justified by the limitation or exception permissible under Article 13 of the TRIPs Agreement.

Exposure to Dispute Resolution and Enforcement Measures of WTO.

36. The detriment to copyright owners of literary and musical works that would follow from the extension of statutory exemption would affect not only local composers, authors and publishers, but also foreign composers, authors and publishers. We understand **foreign composers, authors and publishers** are currently receiving distribution of royalty derived from granting licence for public performance through the **reciprocal arrangement** between Composers and Authors Society of Hong Kong ("CASH") and its overseas affiliated collecting societies. The direct consequence of depriving foreign copyright owners of their rights to receive royalty from local users in the HKSAR in breach of mandatory international obligations under the TRIPs Agreement is to **expose the HKSAR to possible dispute resolution and enforcement measures of WTO**.

37. In view of the action brought by the European Communities against the United States in respect of the same kind of breach of Article 11(1)(ii) and Article 11*bis*(1)(iii) of Berne Convention which are incorporated into the TRIPs Agreement by reference, it is foreseeable that overseas collecting societies responsible for administration of licence for public performance of musical and literary works may consider lobbying their government to institute the same kind of action against the HKSAR at WTO if the HKSAR were to extend the statutory exemption to underlying literary and musical works embodied in broadcast or cable programme in violation of international obligations.

Paragraph 4.9(b) of the Consultation Document

38. The following opinion is based on the assumption that the statutory exemption is extended to underlying copyright works in broadcast and cable programme as referred to in Paragraph 4.9(a) of the Consultation Document.

39. The proposal to extend the coverage to all public places where the broadcast or cable program 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, is effectively to grant special exemption to numerous operators of public places of business where audience have paid for admission to the place.

40. Such extension of the coverage of statutory exemption would unjustly enrich operators of public places of business. In particular, we cannot find any legal principle to support the argument that operators of public places of business shall be entitled to free use of intellectual creations of others on the one hand and benefited from charging admission fees from the audience on the other hand.

41. The effect of extension of coverage would drive users of recorded music and films to switch to use the exempted broadcast and cable programme, and therefore receivable royalty from granting of licence by the authors of literary and musical works would be severely reduced. As a result, such extension of coverage would not only conflict with the normal exploitation of the copyright works but also prejudice the legitimate interests of authors of literary and musical works.

42. The use of copyright works in broadcast and cable program could create mood or ambiance, and thus would make the public place of business more conducive to the sale of goods and services. Operators of the public places of business would therefore be benefited from the use of such copyright works.

43. Accordingly, we fail to see any strong or compelling reason why operators of public places of business who are benefited from the use of copyright works of others should not contribute part of the benefit to creators of those copyright works. Such sharing of benefit in return for use of copyright works of others is the essence of copyright law.

Conclusion

44. To summarize, we take the view that extension of the statutory exemption to cover underlying musical and literary works embodied in broadcast or cable program would **violate the obligations** of the HKSAR under both Berne Convention and the TRIPs Agreement. The direct consequence of such violation is to **expose the HKSAR to possible dispute resolution and enforcement measures of the WTO**.

45. Besides, the extension of coverage of statutory exemption to more public places of business would not only **conflict with normal exploitation of the copyright works** but also **prejudice the legitimate interests of authors of literary and musical works**.

46. In these circumstances, the extension of statutory exemption mentioned in both Paragraph 4.9(a) and (b) are entirely inappropriate.

Yours faithfully,

Wilkinson & Grist

PART VIII

Conclusion

A. CASH is strongly against any proposal to have the statutory exemption in *paragraph 4.2 of the Consultation Document* extended to cover all underlying copyright works included in the broadcast or cable programme; and

B. CASH is strongly against any proposal to have the exemption in *paragraph 4.2 of the Consultation Document* 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.

C. CASH respectfully submits that Section 81 of the Copyright Ordinance should remain as it is.

工商局助理局長
蔡亮 女士

蔡助理局長：

有關免費公開放映或播放廣播或有線傳播的節目的允許行爲

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一. 豁免若落實，將會根本性地嚴重違反音樂公開演奏權的精神及原則，這實是香港版權保障的倒退。

二. 音樂使用者若以上述方式利用本人的創作而無需付出任何代價，這是完全不合理及不可接受。毫無疑問，音樂使用者以上述方式利用本人的創作絕非爲家居或個人享受，乃是於他們的範疇裡提供附加價值(added value)。 若非如此，他們大可選擇不利用本人的知識產權。

三. 豁免若落實，本人的公開演奏版稅收入將受到嚴重影響。

因此，本人堅決反對給予透過上述方式播放音樂的使用者任何版權稅豁免，無論有關的場所會否收取入場費用。本人謹敦促政府重視本人的深切關注，並停止考慮此項豁免。

顧嘉煇

簽署

姓名：顧嘉煇

日期：2001/11/27

Commerce and Industry Bureau
Level 29, One Pacific Place
88 Queensway, Hong Kong

Attention : Ms Laura Tsoi
Assistant Secretary for Commerce and Industry

Dear Sir / Madam,

Permitted acts related to
free public showing or playing of broadcast or cable programme

I notice that the Government is seeking the public's views on whether the public performance of music and lyrics by means of turning on free radio or TV programmes should be exempted from paying performing royalty or not. Being a creator in the music industry, I hereby respectfully express the following :

a. The exemption, if introduced, will fundamentally and seriously violate the spirit and principle of the right to perform music and lyrics in public, signalling a backtrack in Hong Kong's copyright protection.

b. It is utterly unreasonable and unacceptable for music users to exploit my creative works in the aforesaid manner without paying for the usage. Clearly, the usage is NOT for domestic or personal enjoyment. It creates added value for the music users in their context. If this is not so, they can simply choose not to exploit my intellectual property.

c. If the exemption is granted, my performing royalty income will be adversely affected.

It is therefore my steadfast opposition to any move by the Government that seeks to exempt music users who play music in the aforesaid manner, no matter admission fees are charged or not for entering the relevant premises. I hereby urge the Government to take heed of my serious concern and refrain from considering this exemption any further.

Yours sincerely,

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Name in print :
Date :

工商局助理局長
蔡亮 女士

蔡助理局長：

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黃霑

簽署

姓名： 黃霑

日期： 17-11-2008

Commerce and Industry Bureau
Level 29, One Pacific Place
88 Queensway, Hong Kong

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Assistant Secretary for Commerce and Industry

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c. If the exemption is granted, my performing royalty income will be adversely affected.

It is therefore my steadfast opposition to any move by the Government that seeks to exempt music users who play music in the aforesaid manner, no matter admission fees are charged or not for entering the relevant premises. I hereby urge the Government to take heed of my serious concern and refrain from considering this exemption any further.

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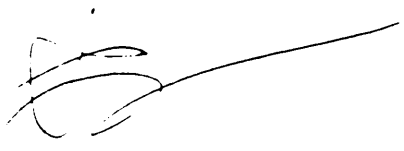

Name in print : [illegible]
Date : [illegible]

工商局助理局長
蔡亮 女士

蔡助理局長：

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本人留意到政府正就透過播放免費電台或電視台節目的形式，將音樂公開播放的行爲應否豁免繳付版權稅諮詢公眾意見，作爲音樂行業的創作人，本人謹將意見表達如下:

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三. 豁免若落實，本人的公開演奏版稅收入將受到嚴重影響。

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簽署

姓名：林振強

日期：Nov 8, 2001

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Name in print :
Date :

Submission by

Composers and Authors Society of Hong Kong Ltd.
香港作曲家及作詞家協會

to

LegCo Panel on Commerce and Industry

on

Chapters 5 – 7
of Consultation Document
on Review of Certain Provisions
of Copyright Ordinance

27 December 2001

CONTENTS

PART I

About


Composers and
Authors
Society of
Hong Kong Ltd.
香港作曲家及作詞家協會

Background

Composers and Authors Society of Hong Kong Ltd. ("CASH") is a company registered as a company limited by guarantee under the Companies Ordinance. CASH is a non-profit making organization formed in Hong Kong in 1977 by a group of local music composers and lyrics authors in order to collectively administer and protect the performing rights in their musical works and literary works (lyrics) as provided in the copyright law. CASH's objective is to act as the bridging point between copyright owners and music users so that relevant copyright obligations can be efficiently and economically cleared to the mutual benefit of both parties.

Membership

By means of Deeds of Assignment, more than 2,200 local members, being composers, authors and music publishers, have assigned their performing rights to CASH. Internationally, CASH has signed Reciprocal Representation Agreements with over 60 performing right societies around the world. This effectively empowers CASH to administer the performing rights of more than 1.65 million composers and authors in 137 territories/countries worldwide.

Royalty Distribution

All royalties collected are distributed to our local members and affiliated overseas societies after deduction of actual administrative cost of around 20%. Such distribution is governed by the Distribution Rules of Performing Royalties approved by the Council of Directors of CASH. All major music users such as broadcasters, concert organizers, Leisure and Cultural Services Department (LCSD) performing venues and airlines are required to provide CASH with music usage information for this royalties distribution purpose. The key factors taken into account include performance frequency and duration.

For music users who cannot realistically be required to provide music usage information (e.g. retailing outlets, hair salons and restaurants), the royalties collected will be distributed by utilising information provided by other sources (e.g. radio broadcasters) which can best resemble the performance in question. However, if a licensee can provide a performed song list, the royalty collected will be distributed accordingly.

Public Performance Licensing

The main criteria in determining royalty charges are (a) value of music to the business and (b) potential audience size. It is the objective of CASH to establish fair, reasonable and standardised royalty charges, as well as to strike a balance between a proper remuneration for our members and an acceptable level of fees for music users.

At present, there are 28 standard tariffs for various industries including retail shops, hi-fi shops, shopping centres, restaurants, department stores, discotheques, bars & pubs, nightclubs, passenger buses, music fountains, and skating rinks.

Listed below are 4 examples of royalty payable for playing audio background music:

Industry	**Floor Area/ Maximum Accommodation**	**Annual Royalty**	**Per-day Royalty**
Clinic	Not more than 10 seats at waiting area	$670.80	$1.8
Boutique	Under 200 sq.ft.	$708.79	$1.9
Beauty salon	Not more than 2 beds	$734.61	$2.0
Hi-fi shop	Under 200 sq.ft.	$848.80	$2.3

PART II

The comments of

Chapter 5 of Consultation Document
Parallel importation of copyright works other than computer software

a. If parallel importation is allowed without any measure to safeguard the interests and investments of copyright owners and exclusive distributors, it acts against the general principle of copyright and nullifies the exclusivity of exclusive distributorship.

b. The differential in pricing of copyright works among different markets lies in many reasons including but not limited to living standard, market demand and cost of production. Depending on factors like these, the pricing of copyright works is set accordingly in each market. In another word, such pricing reflects the interaction of market forces in the individual local territories.

c. If parallel importation is allowed, copyright works produced in a territory of different pricing mechanism will flow into HK having no regard to the particular market forces in play here. And if the importation is purely on the ground of undercutting price, the local copyright owners and exclusive distributors will suffer both in the short and long term.

d. One cannot rule out the possibility that parallel importers may only import into HK the most popular copyright works on a "cherry-pick" basis. But for a piece of copyright work to be popular here, the copyright owner or the exclusive distributor has to incur considerable marketing expenses. Such investment will be unfairly and unjustly taken advantage by parallel importers as they can "free-ride" on these marketing efforts.

e. There are, however, cases that parallel importation is necessary to fulfil certain niche market demand not satisfied by the local supply. Given the local copyright owners and exclusive distributors do not provide such a supply but a demand exists, CASH considers it justified for parallel importation to take place. Looking at the current Copyright Ordinance, we find Section 36 has already catered for such a situation.

f. With this balance provided in the Copyright Ordinance, CASH does not see the need to lift the civil liability and criminal sanction against parallel importation of and subsequent dealing in copyright works, which serve to safeguard the legitimate interests of copyright owners and exclusive distributors.

g. As regards the current 18-month threshold for criminal sanction, we suggest detailed consultation be conducted with the representatives of different copyright works, of which the product life cycle or release "window" may vary considerably.

h. Given our support to maintain the civil liability and criminal sanction against parallel importation, we consider it inconsistent in principle if end-users of parallel imported copies of copyright works in business are relieved from the same treatment.

- End of comments on Chapter 5 –

Chapter 6 of Consultation Document
Unauthorised reception of subscription TV programmes

a. All copyright works are private intellectual property which must be protected to the utmost in a well developed economy like HK. Subscription TV programmes certainly is no exception.

b. Illegal exploitation or reception of subscription TV programmes, be it for commercial purposes or private and domestic purposes, must be eradicated in order to uphold the principle of copyright.

c. As opposed to free TV service, a subscription TV service makes it absolutely clear that subscription fees have to be charged in order to have its service received. The public have no justification at all to receive it for free. Any persons who fraudulently receive a subscription TV service surely know a wrongful act is committed. And it is crystal clear that such an act is criminally wrong.

d. In the capacity of copyright owner in the field of music, CASH can feel the pain suffered by subscription TV operators. It is no exaggeration at all to equate fraudulent reception as theft or even robbery, as the intellectual property of the subscription TV operators does get stolen and robbed by fraudulent reception.

e. As a matter of fact, subscription TV programmes embody a lot of our musical repertoire. The theft and robbery therefore not only afflicts the subscription TV operators but also local as well as international music composers represented by this Society.

f. Given the Theft Ordinance does criminally penalise acts such as fraudulent abstraction of electricity or the fraudulent use of a public telephone with intent to avoid payment, we see no rationale why pirate-viewing of subscription TV programmes can be exempted from similar penalty. We thus consider it appropriate and necessary to send a clear deterrent message to any persons who fraudulently receive subscription TV services by imposing criminal sanction against such an act.

g. Paramount protection for intellectual property rights, be it those of TV programmes, movies or music, has to be in place in order to foster HK as a leading broadcasting and entertainment centre.

- End of comments on Chapter 6 –

Chapter 7 of Consultation Document
Licensing Bodies

In response to paragraph 7.13 (a) of the Consultation Document as to whether the Copyright Tribunal should be replaced with an arbitration system to adjudicate disputes between copyright users and licensing bodies, CASH submits as follows:

a. Composers and Authors Society of Hong Kong Limited ("CASH") does not see a major cost difference between arbitration and Copyright Tribunal. Assuming legal representation is still desirable for arbitration, the employment of arbitrator(s) may even add to the total costs.

b. We disagree that Copyright Tribunal is biased towards copyright owners. On the contrary, we are satisfied with the fact that members of the Tribunal have been appointed from a wide spectrum of the community and that either the applicant or the respondent can raise reasonable objection to the appointment of a certain member in the hearing of a particular case.

c. CASH therefore does not see any imminent need to get rid of the Copyright Tribunal system which is well governed by the Copyright Ordinance.

In response to paragraph 7.13 (b) of the Consultation Document as to whether licensing bodies should be mandated to be registered and to publish their scales of royalty charges, CASH submits as follows :

a. CASH welcomes the introduction of a registration system for copyright licensing bodies in the Hong Kong SAR.

b. We believe a registration system would provide official recognition for and increase the transparency of licensing bodies in the eyes of the general public. At the same time, it is expected that public awareness of copyright and its perceived significance in a knowledge based economy like Hong Kong can be promoted. Over time, a better understanding can be fostered between licensing bodies and licensees. All these in turn should facilitate licensing activities in the marketplace to the benefit of both parties.

c. As far as publication of royalty charges are concerned, CASH has already made public our standard tariffs at our web site "www.cash.org.hk". As a matter of fact, we always provide the public with such information via other convenient means upon request.

d. Given this practice is already up and running, we see no major problems in complying with the registration requirement of the Government. In fact, CASH is prepared to formally apply for registration as directed by the relevant regulation and aims to submit the application by the first half of year 2002.

e. CASH, however, has a concern on the need to publish the tariffs "in an English language newspaper and a Chinese language newspaper" as required under Section 149(1)(b)(iii) of the Copyright Ordinance. Take CASH for example, our current number of standard tariffs amounts to 28. It will at least require more than 1 full page each to fulfill the said requirement. Such costs will be excessive for a non-profit making organisation like CASH. Coupled with the short-lived circulation for one day, we do not consider the cost is justified. CASH instead submits that a notice be published in one English and one Chinese language newspaper to announce the successful registration together with a

brief introduction of CASH. It should also be stated in the notice that all standard tariffs are publicised at our web site and are available upon request by other means or alternatively be inspected at our office or at relevant place(s) as designated by the Registrar of the registration system.

f. As to the question whether the registration should be mandatory or not, CASH agrees with the Government's concerns and viewpoints expressed in the Consultation Document:

i) Hong Kong's international obligation (i.e. the exercise of copyright by right holders shall not be subject to any formality) should not be conflicted with;
ii) Given the limited benefits in terms of protecting the interests of copyright users and the substantial resources involved, it may not be justified to set up a compulsory registration regime;
iii) In terms of protecting the interests of authors represented by a licensing body, there does not appear to be any particular problems in the Hong Kong context that justify the introduction of a compulsory registration scheme at this stage.

g. It is therefore the opinion of CASH to maintain the registration regime on a voluntary basis.

- End of comments on Chapter 7 –