RESPONSE TO THE PUBLIC CONSULTATION ON UPDATING HONG KONG'S COPYRIGHT REGIME

Presented by the Music Publishers Association of Hong Kong Ltd. (MPA HK)

Date: 22nd February, 2022

INTRODUCTION

Music Publishers Association of Hong Kong Ltd. (MPA HK) was established in 1981 by a group of music publishers who own and/or control a large number of music copyrights (both musical works and/or literary works.) which cover most of the local Cantonese songs, Mandarin songs as well as international songs. MPA HK currently comprises 26 members as below:

-Better Music Publishing Ltd.
-BMG Rights Management (Hong Kong) Ltd.
-BMG Production Music (Hong Kong)
-BMA Music Publishing Ltd.
-Capital Artists Ltd.
-Crown Music Publishing (HK) Ltd.
-East Asia Music Publishing Ltd.
-EEG Music Publishing Ltd.
-EMI Music Publishing Hong Kong
-Fujipacific Music (S.E. Asia) Ltd.
-Kobalt Music Publishing Asia Ltd.
-Hugo Productions (HK) Ltd.
-Music Nation Publishing Company Ltd.
-One Asia Music Hong Kong Ltd.
-P&P Music
-peermusic (S.E. Asia) Ltd.
-Sony Music Publishing (Hong Kong) Ltd.
-Stars Shine Music Publishing Ltd.
-Sun Entertainment Publishing Ltd.
-Sun Fung Music Publishing Ltd.
-Touch Music Publishing (HK) Ltd.
-Universal Music Publishing Ltd.
-Universal Production Music Asia
-Warner Chappell Music, Hong Kong Ltd.
-Wing Hang Music Publishing Company Ltd.
-Worldstar Music International Ltd.

MPA HK aims to protect the interest of its members and strives to strengthen the music publishing business in both the economic growth and the cultural development, as music plays an important role in various business and cultural sectors in our daily life. Besides, MPA members exploit the works of their songwriters to various commercial uses, and license such works so as to procure a proper remuneration to the songwriters for their copyright creation. This licensing for royalty remuneration is essential to sustain creativity.

RESPONSE TO UPDATING HONG KONG'S COPYRIGHT REGIME

MPA HK refers to the recent public consultation on "Updating Hong Kong's Copyright Regime", and would like to respond as follows:

1. Parody exception

   It has come to our notice that the proposed parody exception covers a wide range of exceptions such as satire, caricature and pastiche…etc. In our daily licensing practice, making use of an extracted part of musical and/or literary work with other material is considered as an act of adaptation. In the general copyright licensing of music publishers, adaptation is more restrictive than a re-recording without any change. For example, if a person records a song without any change, the act of his/her re-recording does not fall into the proposed exception. On the contrary, if a person adapts a song and/or mix-and-match several songs into another creation for the purpose of parody, satire, caricature or pastiche, then this new creation may fall into the proposed exception. If such an exception is allowed, not only will it have a great impact on how music publishers exercise their rights, but also cause loop holes and gray area in the copyright licensing.

   In addition, the proposed exception may be in conflict with the moral right as the songwriter holds the integrity and the spirit of his/her copyright creation. For example, a person may create a song to express his/her belief, perception, religion or certain faith, and such spirit in his/her copyright creation should be well respected, his/her work should not be adapted in a way which is against the original author's belief, faith or religion. Adaptation of a copyright work for the purpose of parody, satire, caricature or pastiche could potentially amount to distortion or mutilation of the work or is otherwise prejudicial to the honour or reputation of the author.

   Understanding the government's intention to introduce certain new fair dealing exceptions to accommodate certain common, widespread activities, we do not object to a fair dealing exception for "parody" only (but we oppose extending such exception to satire or other works that do not comment on the underlying copyright work). The parody concerned would have to be a parody of the underlying work that it uses, as opposed to using that work as a tool to make an unrelated comment, or to criticize or make fun of something else. If one wants to use a copyright work, for instance, in a satire attacking a particular political figure or to mock a particular event, the justification for using that particular work as opposed to some work in the public domain or some work for which one can obtain a licence, or even creating an original work, is not apparent. In other words, there is no reason why one needs to use any particular work in order to comment on something entirely separate from that work, and it is doubtful whether an exception for such uses would satisfy the "Three-Step Test".

2. Communication Right

   In the proposed draft section 28A in the previous round of consultation, certain provisions would create a problematic carve-out. For instance, sub-section (5) provided that "A person does not communicate a work to the public if the person does not determine the content of the communication." This clause might have been drafted at the time when there were no

digital operators like Youtube, Facebook and Tiktok which provide a platform for making available a large number of user-uploaded contents. Those operators may not determine the content of the communication. However, they are making huge profits from such platforms and yet they have been obtaining licences from publishers. We hope that the concerned clause could be rewritten to avoid the loophole.

3. Safe Harbour

Likewise, the original drafting of Safe Harbour might not reflect the current digital business. We would like to propose to specify that only those digital service providers which provide their services in a neutral, passive mode, e.g. computer server and cloud processing companies, are eligible for protection under the Safe Harbour provision, but not those that take an active role in making available the content or generate substantial income from it. There should also be clear liability for such online service providers in the first place to ensure that if they do not meet the conditions for safe harbour, they will be liable for the infringement taking place on their platforms, otherwise there is no incentive for them to comply with the conditions. We would also like to point out that the "notice and takedown" mechanism proposed in the previous consultation has proven to be ineffective in dealing with infringing content, which could easily come up again after they are taken down. We hope the government will consider adopting a "notice and staydown" approach so that notified unlicensed music will be kept out of the platform.

4. Copyright Term

Apart from the above, MPA HK would like to propose for the Copyright Term to be extended to 70 years. It has been noted in many territories like Japan Singapore, South Korea, UK, US and Australia that 70 year copyright term has been adopted. To be in line with the international practice, we hope the creators of Hong Kong can benefit from the same. Furthermore, there are a number of renowned songwriters whose works will be expiring in the next few decades under the current 50 year term. Most remarkably, they are 王福齡 (expiring in 2039), 陳百強/黃家駒 （expiring in 2043）, 羅文(expiring 2052), 張國榮 (expiring in 2053). Cantonese songs made a golden era in the 70's and 80's we hope to protect all those precious works in a longer period of time as they are vital to be part of the creative business of Hong Kong.

5. Fair dealing

We support the government's position to maintain the current exhaustive approach of fair dealing by setting out all copyright exceptions based on specific purposes or circumstances, which will give more certainty to copyright owners and users in the exploitation of copyright works.