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I N T R O

ICMP is the **global trade body** representing the music publishing industry worldwide.

ICMP's membership spans the '**Majors**', several thousand '**Indies**' and **67 national trade bodies** across **6 continents**.

We defend the rights surrounding approximately **90% of the world's music** (more than **100 million works**, of more than **5,000 genres**) from Beethoven to Beyoncé, Schubert to Ed Sheeran, NWA to BTS, folk to fado, techno to hip-hop and all else.

As of 2022, our industry is an approximately USD 10 billion one. Our members are the **innovators, creators**, **employers** and **multi-million dollar annual investors who** bring the world's music to **an audience of billions**, via **every format**, from streaming to vinyl, movie to concert stage, public performance to the next new technology.

Among ICMP's missions are to defend the **value** and **rights** of the **world's songs and compositions**; advocate to **international institutions**; consolidate **global positions** on industry issues; provide an **expert network** and realise **optimum environments for music to thrive**.

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ICMP Response to the Public Consultation on Updating Hong Kong's Copyright Regime

FAO: Commerce and Economic Development Bureau
Central Government Offices
2 Tim Mei Avenue, Tamar, Hong Kong

23 February 2022

ICMP

ICMP is the global trade body representing the interests of music publishing industry worldwide.

Our members include the 'Majors', more than 1,000 'Indies' and 64 national associations across 6 continents. We defend the interests of more than 90% of the world's published music – more than 100 million musical works, of more than 5,000 genres.

Our industry's global annual revenue exceeds 80 billion Hong Kong Dollars and its core purpose is to reinvest this annually in songwriters and composers, then license the world's music to an audience of billions - via every format including digital streaming services, broadcast TV, physical sales, radio, NFTs; general performance.

Our member companies are commercial operators, investors and employers established in Hong Kong and many more are direct investors, supporting Hong Kong's social and economic needs.

The update to Hong Kong's copyright framework is crucial to the future of the sector and we look forward to supporting Hong Kong's move to being a regional intellectual property trading centre, as proposed by '*The Outline of the 14th Five-Year Plan for National Economic and Social Development of the People's Republic of China and the Long-Range Objectives Through the Year 2035*' ("National 14th Five-Year Plan")

Below is an overview of our recommendations on the provisions of direct importance to this update.

ICMP also formally endorses the paper submitted by our national colleagues at the *Music Publishers Association of Hong Kong* ('*MPA HK*'), whose voice continues to be crucial in this process.

KEY PROVISIONS

- Extension of Copyright Term of Protection
- Communication to the Public
- Safe Harbour and Enforcement Thresholds
- Parody Exception to Copyright

A. Extension of Copyright Term of Protection

Our industry is among this who continue to appeal for Hong Kong to increase its legal term of protection for copyright from fifty years post-mortem auctoris ('p.m.a.'), to that of 70 years from the death of the author.

ICMP welcomes the decision of Hong Kong authorities to cite the possibility of such an extension of term of copyright protection.

We note that in the consultation paper, the Bureau refers to other foreign jurisdictions – including Australia, Japan, Singapore, South Korea – who in recent years have successfully extended their copyright term regimes to 70 years from the death of the author. It is clearly evidenced that a similar extension in Hong Kong would lead to positive circular benefits to Hong Kong's economy and cultural reinvestment.

In contrast, it would be economically counter-productive to leave the copyright protection term as is, as it would create a disparity between Hong Kong's primary main trading partners, especially those in the Asia-Pacific region.

Any such inconsistency also places creators from Hong Kong at a clear disadvantage in that their potential royalty earnings for use of their work is unduly limited.

Inaction will mean the works of prominent songwriters from Hong Kong will shortly fall into public domain, for example 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).

Our business is an internationally interwoven sector. International harmonisation is crucial for effective copyright protection and business clarity. All the more so as today works by Hong Kong creators can be freely distributed and made available instantly.

A longer term of protection would positively influence the future creation of works. Such a pro-creativity stimulus ensures the development of creativity in the interest of authors, cultural industries, consumers and society as a whole.

Recommendation – Extend the term of copyright protection of the use of musical works to that of the life of the author, plus 70 years, with retrospective effect.

B. Communication to the Public

i) Avoid ambiguity as to licensing liabilities

The proposed draft 'section 28A' would create serious legal problems, which the ongoing update should take the opportunity to address and avoid. Certain provisions would create a problematic carve-out on copyright liability and the need for users to take copyright licenses with our industry.

More specifically, sub-section (5) provides that *"A person does not communicate a work to the public if the person does not determine the content of the communication."*

Such a provision does not take account of the current digital market in Hong Kong, wherein Digital Service Providers (DSPs) such as YouTube, Facebook and TikTok make millions of works available to billions of viewers and listeners and provide the means for 'User-Uploaded Content' services.

Those operators are users of protected works and their liability for licenses for the use of works should not be put in doubt.

DSPs and any user of protected works should not be the determiner of whether the content/music used is a legal communication or not.

They are already generated enormous profits from the use of works and our local industry's experience is one in which it can be challenging to ensure full and fair licences are taken with music publishers.

Recommendation - We urge the Government to take the opportunity to revise Section 28A and sub-section (5) in order that a loophole in copyright liability for the use of protected works is avoided.

ii) Illicit Streaming Services

We recommend that the Government of Hong Kong take the opportunity to eliminate the existing grey zone within the definition of the 'communication to the public' right which is exacerbating the industry's serious problems in relation to illicit streaming devices (ISDs),

ISDs - namely the use of certain set-top boxes and mobile digital Apps to provide unauthorized and illegal content - are a daily and profound problem for our sector.

The present wording of Clause 9(4) of the 2014 Bill stipulates that when a court is determining whether a communication of a copyright protected work (such as music) amounts to a copyright infringement or an authorised exploitation, the court may take into account all the circumstances of the case and in particular:

a) the extent of the power (if any) to control or prevent an infringement;
b) the nature of the relationship (if any) between the persons between whom the communication was made;
c) whether any reasonable steps were taken to limit or stop an infringement.

Such a broad meaning of authorisation risks reducing the liability of Digital Service Providers (DSPs), especially operators providing User Generated Content (UGC), for copyright infringements.

By consequence, it also reduces rightholders, creators and our sector's ability to enforce their licenses and copyrights.

In our experience, similar proposals in other jurisdictions that a person/operator who does not determine the content of the communication to the public shall be cleared for any infringement have led to legal harm and have been demonstrated to be conclusively counter-productive.

We recommend Hong Kong's authorities to refer to recent steps taken by the European Union in Article 17 of the 2019 EU Copyright Directive[1], which clarified the liability of online content-sharing service providers for unauthorised content made available on their platform when it is uploaded by users. The platform operator performs an act of communication to the public and/or an act of making available to the public when it provides uploads of copyright-protected works. It is therefore clear in law that it must seek to obtain an authorisation from the appropriate rightholders for instance by concluding a licensing agreement, or else ensure the non-availability of the work.

This legislation sets an appropriate industry standard of professional diligence to safeguard copyright protection in the online environment, one which Hong Kong could find a useful and productive comparative precedent.

C. Safe Harbour

The 2014 Bill proposes to introduce a 'safe harbour' regime for 'Online service Providers 'OSPs'. The justifying rationale is that this could help facilitate cooperation by OSPs with copyright owners and combat online piracy – the latter by introducing a "Notice and Takedown" regime for unauthorised/illegal content.

It is our industry's experience that Safe Harbour liability exemptions are crucial to digital marketplaces – if appropriately defined[2] and limited to passive services.

[1] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (EU/2019/790) Link to legislative text.
[2] A well worded example is that of Article 14 of the e-Commerce Directive which limits Safe Harbour exemptions to "technical, automatic and passive" intermediary services.

When such Safe Harbour exemptions are either overly broad in scope[3] or misused by service providers[4] they cause serious legal, economic and by consequence cultural, damage.

The global 'Value Gap' of music, has been directly caused by the misuse and abuse of such provisions in several jurisdictions by active role digital services such as YouTube, Facebook, TikTok, Triller, Amazon etc. who claim to rightholders that they are passive and refuse to take full and fair licenses for works.

A safe harbour regime for OSPs in Hong Kong would replicate such damage and regress the existing copyright framework.

Furthermore, a requirement on OSPs to merely "take down" infringing materials is inadequate mitigation for today's music market of more than 100 million works, which are annually uploaded billions of times and viewed trillions of times across all relevant services.

Such a notice and take down threshold has been in operation for more than 20 years in the US, the UK and EU and has been a growing problem. (The EU has now addressed this standard in its recent copyright legislation. See note on Article 17.)

We would strongly recommend that Hong Kong authorities look to a higher threshold than this 20 year-old problematic standard of notice and take down. The ongoing update provides a perfect opportunity to strengthen protection of copyright by introducing a 'notice and stay down' mechanism. ICMP supports the Government's consideration of a requirement to "disable access" to infringing content on OSPs.

Disabling all future public access to unauthorised content once the service has been notified by rightholders is the future of successful copyright protection regimes.

A 'disabling access' (via preventative blocking and notice and stay down) obligation precedent is available in many courts worldwide[5] and in Article 17.4 of the 2019 EU Copyright Directive. In that case, ODPs are now obliged to make "best efforts to ensure the unavailability of specific works...for which the rightholders have provided the service providers with the relevant (information)."They must "act expeditiously to disable access to, or to remove from their websites, the notified works and made best efforts to prevent their future uploads."

We urge the authorities of Hong Kong not to miss this unique legislative opportunity and to ensure copyright liability is fairly respected *de jure* by those platforms who *de facto* engage with copyright protected content and subject-matter.

[3] See s.503 of the Digital Millennium Copyright Act (DMCA) in the United States of America.
[4] As has been the global industry's extensive experience in the US, in Europe via the services' misuse of Article 14 of the 2001 EU e-Commerce Directive, or those Safe Harbor provisions pushed in US trade policy (most recently see the trilateral trade deal between the US, Mexico and Canada, USMCA).
[5] For example, the Supreme Court of Italy's judgment in *Reti Televisive Italiane SpA v Yahoo! Inc* (Link) and Mediaset v. Vimeo (Link).

Recommendations:

i) **The Bureau and Government should suitably define the applicability of any 'Safe Harbour' regime for Online Service Providers (OSPs) - Specifically this means it should only be possible for truly "technical, automatic and passive" services, and unavailable to active services.**

ii) **In terms of copyright enforcement standards, the Bureau and Government should oblige OSPs to a clear "disabling access" and 'notice and stay down' requirement, following notification by rightholders of unauthorised uses. This obligation should be for any unauthorised use of the work itself - not limited to specific URLs or requiring more than the standard basic metadata of the work(s)/repertoire in question.**

D. Parody Exception to Copyright

Hong Kong's existing framework for exceptions to copyright is broad by international standards. Furthermore, it is already legally capable of facilitating users' creation of parodies, caricatures, mash-ups, doujinshi, image/video capture, streaming of video game playing, homemade videos and use or rewriting of lyrics for songs. Indeed these activities have been at the unhindered core of music lovers' use of digital content in Hong Kong for many years – with no significant legal obstacles to such engagement.

The law of Hong Kong – precisely Article 39 of the Copyright Ordinance (CO) – allows fair dealing with a copyright-protected work for the purpose of criticism or review. If it is accompanied by a sufficient acknowledgement, it does not infringe any copyright in the work. This is a robust established framework for legitimate and permitted uses of protected works.

We have not seen the suitably evidenced need for a significant expansion of the existing legal regime in Hong Kong. More than that, doing so would be antithetical to the central aims of the *National 14th Five-Year Plan* to support Hong Kong's establishment as a regional intellectual property trading centre.

If the intention of Hong Kong's lawmakers is to make further specifications around uses of a protected work for the purpose of caricature, parody or pastiche, then in order to ensure such efforts do not harm, reduce or regress the key copyrights of reproduction or communication to the public they should be done in close accordance with 'the 3-Step Test' standard[6].

[6] See:

- Article 9 (2) of The Berne Convention for the Protection of Literary and Artistic Works;
- Article 13 of The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) convened by the World Trade Organization (WTO) 1995;
- Article 10 of The World Intellectual Property Organisation (WIPO) Copyright Treaty;
- The WIPO Performances and Phonograms Treaty.

Article 9.2 of the Berne Convention for the Protection of Literary and Artistic Work states that any exception to copyright being considered for introduction must be delimited to certain special cases, without a harm to normal exploitation of the work(s) and not unreasonably prejudice the legitimate interests of the author(s).

Given the existing legal framework, introducing a new 'parody' exception risks contravening a proportionality test. For reference, the Court of Justice of the European Union (CJEU) in the *Deckmyn* case[7] held that the use of a parody exception shall be limited only to "proportionate uses" of a protected work. The jurisprudential meaning of "proportionate exploitation" in this case was:

a) for the legitimate statutory purpose of a parody;
b) not exceeding what is necessary to achieve its purpose;
c) excluding the breach of any other fundamental rights or interests, including those of a copyright holder.

Recommendation – Our sector supports the Government's position to maintain the current exhaustive approach of 'fair dealing' and set out that all copyright exceptions should be based on specific purposes or circumstances. This approach is what will give certainty to copyright owners and users in the exploitation of copyright works.

[7] Judgment of the Court (Grand Chamber), 3 September 2014 *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others,* C-201/13.

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