

## **IFPI Comments on Hong Kong's Consultation on Proposed Subsidiary Legislation under the Copyright Ordinance (Cap. 528)**

April 2024

### **I. INTRODUCTION**

IFPI is the voice of the recording industry worldwide, representing over 8,000 record company members across the globe. We work to promote the value of recorded music, campaign for the rights of record producers and expand the commercial uses of recorded music around the world.

IFPI has provided a number of substantive recommendations to the Hong Kong Government in the past in order to assist with the development of Hong Kong's copyright regime, including in response to the major consultations and amendment bills introduced in 2011, 2014, and 2022. We welcome the Government for its efforts to ensure the scope of the permitted acts in relation to copyright works is in keeping with the limits prescribed by the three-step test. In particular, we welcome the steps taken by the Hong Kong Government to limit the scope of the permitted acts of libraries under sections 47, 48, and 50 of the Copyright Ordinance, and of the permitted acts of libraries, museums and archives under 51, 51A, 52, 52A and 53 of the Copyright Ordinance, and thank the Government for the opportunity to provide our comments to the Consultation Paper.

### **II. COMMENTS**

We welcome the references in the Consultation Paper that permitted acts in relation to copyright works must comply with the three-step test, which is in line with the WPPT and other international treaties, including the Berne Convention. Further, we welcome section 37(3) of the Copyright Ordinance, which states that *"In determining whether an act specified in this Division may be done in relation to a copyright work notwithstanding the subsistence of copyright, the primary consideration is that the act does not conflict with a normal exploitation of the work by the copyright owner and does not unreasonably prejudice the legitimate interests of the copyright owner."*

To ensure that the proposed new copyright exceptions are adequately scoped and in compliance with the three-step test, we make the following additional comments:

**1. The exceptions for libraries, museums and archives should be limited to those operating for non-commercial purposes.**

We support the limitation of sections 47, 48, and 53 of the Copyright Ordinance to apply only to institutions that do not operate for profit. We also support the limitation of sections 50 and 51 of the Copyright Ordinance such that supplies of copies of works (from any applicable institution, whether for profit or not) may only be supplied to institutions operating for non-commercial purposes.

**2. Exceptions permitting e-lending of sound recordings should be avoided due to the existence of existing digital markets for licensing.**

We note that the Consultation Paper proposes the introduction of additional conditions for the supply of “electronic copies” under sections 47, 48, 50, 51 and 52 of the Copyright Ordinance including how “*the copy must not be further reproduced, communicated or otherwise disseminated without license of the copyright owner or where no applicable permitted act applies*”. However, we recommend that the exceptions only apply to the lending of physical copies of works and not e-lending. Permitting such exceptions would undermine digital markets where the licensed provision of access to sound recordings is now the key driver of recorded music industry revenues and would therefore render the exception incompatible with the three-step test.

**3. Copies of sound recordings should not be made available on terminals within libraries, museums or archives.**

Further, we note that section 51A of the Copyright Ordinance, which states that copyright in a work is not infringed by a library, museum or archive where it is made available to the public online to be accessed through use of a “*computer terminal installed within the premises of the library, museum or archive*”. Exceptions like this are open to abuse and libraries, museums and archives should be encouraged to negotiate licences that would allow access to licensed online music services.

**4. Under section 48 of the Copyright Ordinance, “a reasonable proportion of a work” should remain undefined.**

The exception under section 48 of the Copyright Ordinance for the copying by librarians of parts of published works covers a variety of works beyond written works, encompassing “*literary, dramatic, musical or artistic work (other than an article in a periodical), or of part of a published sound recording or film*”, with one of the conditions for its application being “*that no person is furnished with more than one copy of the same material or with a copy of more than a reasonable proportion of any work*”. We note that the Consultation Paper recommends adopting a percentage formulation of “*no more than ten per cent of a work*”, instead of the previously used word count as stated in Regulation 6(2) of the Copyright (Libraries) Regulations (Cap. 528B) to determine whether there had been the copying of a reasonable proportion of the work.

For the recorded music industry, it would be inappropriate to adopt a percentage formulation of “no more than ten per cent of a work”, as even a “reasonable proportion” of a sound recording would constitute “sampling”. Sampling refers to using parts of an existing sound recording in the process of creating a new recording. This would undermine the existing market and harm right holders whose recordings are used commercially and for whom the licensing of sampling constitutes a “normal exploitation” of sound recordings, and who therefore have a “legitimate interest” in being able to control uses of samples of sound recordings.

**5. The definition of “permanent collection” under section 51 of the Copyright Ordinance, as it pertains to sound records, should be limited to non-commercial purposes and not be made available to the public.**

We support the inclusion of a definition of “permanent collection” in relation to section 51 of the Copyright Ordinance as: *“(i) [a] collection of cultural or historical significance or importance, and maintained by a specified library, museum or archive wholly or mainly for the purpose of reference on the premises of the library, museum or archive; or (ii) [a] collection of cultural or historical significance or importance, of a specified library, museum or archive, which are available on loan only to other libraries, museums or archives.”*

However, we recommend, that with respect to sound recordings, the archiving and preservation of historic sound recordings should be limited to non-commercial purposes and not be made available to the public, in which case they should be licensed.

### **III. CONCLUSION**

We thank you for the opportunity to make this submission and stand ready to assist with further information on any of the above points.

**For further information, please contact:**

**Guo Biao**      Regional Director Greater China  
**Jing Jie**      Legal Assistant Greater China

#### **IFPI Greater China Office**

Room 3011, F3, Tower A, Huahui Building | No. 388 Beihuayuan Village | Gaobeidian Town, Chaoyang District | Beijing, 100024 | China | T: + 8610 8794 5111