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## **IFPI Comments on the Consultation Paper on Copyright Tribunal Rules in Hong Kong**

**September 2009**

IFPI welcomes the opportunity to submit its views on the Hong Kong government's Consultation Paper on Copyright Tribunal Rules.

IFPI, the International Federation of the Phonographic Industry, represents the recording industry worldwide with over 1450 members in 72 countries and national groups in 48 countries. Our memberships include the major multinational recording companies and hundreds of independent record companies of all sizes located throughout the world, including in Hong Kong.

The issues addressed in the consultation paper concern IFPI's member companies both as licensees and licensors of copyright. Our members license their repertoire collectively through Music Licensing Companies (MLCs), under license schemes that may be subject to the tribunal's review. MLCs representing IFPI members operate in over 30 countries, including Hong Kong. IFPI member companies are also licensees of copyright and often obtain licenses under schemes operated by collective management organisations acting on behalf of authors. An efficient and functional tribunal in Hong Kong is therefore of vital importance for IFPI, its member companies and affiliated MLCs.

IFPI commends Hong Kong's initiative to modernize the rules relating to tribunal practices and procedures. We support the stated aim of the consultation to establish efficient, cost-effective and flexible procedural rules for the tribunal. Removing unnecessary and burdensome procedural requirements, and allowing an efficient and enhanced adjudication process, would benefit the local licensing market and all stakeholders involved. It is for this reason that we take this opportunity to propose additional measures and safeguards that would help ensure that tribunal proceedings in Hong Kong are not abused to avoid or delay payment to rightholders.

### ***(a) Application of the relevant principles of the Civil Justice Reform***

We support the proposal that any new rules on tribunal adjudication be set in accordance with the underlying objectives of the Civil Justice Reform, as stated in the consultation paper. In particular, we support the objectives to maximize cost-effectiveness, ensuring expeditious proceedings, ensuring fairness and facilitating the settlement of disputes.

To enhance efficient resolution of disputes, and to maintain tribunal proceedings that are cost-effective and accessible, we recommend introducing additional specific rules, aimed at preventing applications that are not genuine from reaching the tribunal. These rules would ensure that proceedings are not abused as a tactic to avoid or delay payment to

rightholders and would protect the legitimate interests of parties to these proceedings.

- (i) *The tribunal should be empowered to order potential licensees to pay the full license fees or deposit them with the tribunal*

In disputes relating to the level of tariffs under a licensing scheme (under section 155 to 157 of the Copyright Ordinance), the entitlement to license under a licensing scheme (under section 158 and 159 of the Copyright Ordinance), and the application to licenses which are granted by a licensing body otherwise than in pursuance of a licensing scheme (under section 162, 163 and 165 of the Copyright Ordinance) the tribunal should have powers to order the party challenging the fees and seeking the relevant licenses to pay the full amount of the license fee, whether such fee is in dispute or under a licensing scheme, as a condition for hearing the case.

The tribunal should be able to order that payment be made directly to the licensor, or that the fees be deposited with the Tribunal in escrow until a final decision is made. By requiring payment of the license fees, the procedural rules would ensure that only genuine applications are dealt with by the tribunal and that the process is not abused by those who wish to evade payment for no genuine reason. The ability to order payment would also ensure that the interests of rightholders are not undermined by any delays resulting from the resolution process.

- (ii) *The tribunal should be empowered to order the user to stop using the content until the dispute is resolved*

To ensure that tribunal applications are not viewed by potential licensees or licensees under a license which is due to expire as a way to continue using copyright works without authorisation before obtaining the relevant licence or upon expiry of the licence, the tribunal should have specific powers to order applicants not to use the works until a final decision is reached. These powers will prevent bad actors from using tribunal procedures as a tool to delay payment for no reason, and would discourage bad-faith applications. As a result, the licensor will be able to safeguard its interest without taking the onerous and costly recourse to seek an interlocutory injunctive relief under separate court proceedings.

**(b) A standard procedure and form for all types of applications/references**

IFPI supports the principle of standardised procedure for all applications, as proposed in the paper, with minimum complexities for the parties.

- (i) *A procedural rule placing the burden of proof on the party claiming that the license terms are unreasonable should be introduced*

To complement the principles on standardized procedure stipulated in the paper, we urge the introduction of a specific procedural rule relating to the burden of proof in dispute concerning proposed licenses or tariffs. In such disputes, it should be stipulated that the burden to prove that the license terms are unreasonable, or that the tariff is unreasonable, shall be placed on the applicant. This rule would prevent bad-faith applications and any unnecessary delays in the adjudication of genuine matters that stand before the tribunal.

***(c) Active case management***

IFPI supports the introduction of principles of active management as suggested in the paper.

***(d) Promotion of alternative dispute resolution***

IFPI does not support nor objects the use of mediation to expedite dispute resolution.

Resort to mediation or other forms of dispute resolution as an alternative to tribunal adjudication should not be compulsory and should require the consent of both parties.

***(e) Empowering a single member of the Tribunal to exercise certain adjudication powers***

IFPI supports the grant of powers to a single tribunal member to decide on interlocutory applications.

***(f) Use of practice directions to regulate proceedings where appropriate***

IFPI does not object to the grant of new powers to the tribunal to issue Practice Directions to regulate administrative measures.

***(g) Prescribing self-contained rules***

IFPI supports the clarification of arbitration rules relating to the tribunal and the introduction of a set of self contained rules, as proposed.

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For further information, please contact:

**May SeeY Leong**, IFPI Asian Regional Office, 22/F Shanghai Industrial Investment Building, No. 48-62, Hennessy Road, Wanchai, Hong Kong, Tel: (852) 2866 6862 / 2866 5467; Fax: (852) 2865 6326; email: [leongmayseev@ifpi.org](mailto:leongmayseev@ifpi.org)

**Benjamin Ng**, IFPI Asian Regional Office, 22/F Shanghai Industrial Investment Building, No. 48-62, Hennessy Road, Wanchai, Hong Kong, Tel: (852) 2866 6862 / 2866 5467; Fax: (852) 2865 6326; email: [benjamin.ng@ifpi.org](mailto:benjamin.ng@ifpi.org)

**Gadi Oron**, IFPI London, 10 Piccadilly Street, London W1J 0DD, United Kingdom, Tel: +44 (0)20 7878 7900; Fax: +44 (0)20 7878 6832; e-mail: [gadi.oron@ifpi.org](mailto:gadi.oron@ifpi.org)