



Australian Recording Industry Association Ltd.
ABN 72 002 692 944 ACN 002 692 944
Level 4, 11-17 Buckingham Street
Surry Hills NSW 2010
PO Box Q20
Queen Victoria Building
NSW 1230
Telephone: (02) 8569 1144
Facsimile: (02) 8569 1181
Website: www.aria.com.au

21 July 2017

Australia - Hong Kong Free Trade Agreement
Office of Trade Negotiations
Department of Foreign Affairs and Trade
RG Casey Building
John McEwen Crescent
BARTON ACT 0221

a-hkfta@dfat.gov.au

Australia – Hong Kong Free Trade Agreement: Submission by ARIA

Thank you for the opportunity to make a submission to this important review.

It may be helpful to explain the role of the Australian Recording Industry Association (**ARIA**). ARIA is the peak trade body for the recorded music industry in Australia. It is a national industry association proactively representing the interests of its members.

ARIA has more than 100 members ranging from small "boutique" labels typically run by 1-5 people, to medium sized organisations and very large companies with international affiliates.

ARIA is active in many key areas of the music industry:

- acting as an advocate for the industry, both domestically and internationally;
- supporting Australian music, and creating opportunities to help it be heard;
- playing an active role in protecting copyright and making submissions to government on copyright reform, piracy, regulation and other issues where it has the information and expertise to do so;



- collecting statistical information from members and retailers and compiling numerous ARIA charts with data provided by over 1,100 retailers and data suppliers;
- providing, in certain cases, a reproduction licensing function for various copyright users; and
- staging the highly prestigious annual ARIA Music Awards.

ARIA's primary objective is to advance the interests of the Australian recording industry. The role of ARIA is not to monitor, supervise or intervene in the pricing or other commercial decisions of its members

The proposed Australia-Hong Kong Free Trade Agreement

Overview

ARIA welcomes the launch of Australia - Hong Kong free-trade agreement (the "FTA") negotiations.

International markets, including Hong Kong and the Greater China region, are a destination for Australian music exports and for investment in music production by Australian companies as well as co-productions with the participation of Australian and foreign artists. With recorded music licensed to some 380 online music services in over 150 territories, thousands of broadcasters and millions of business venues around the globe, music companies have proved their ability to create globally competitive content and commercialise it. However, the legal and regulatory environment encountered by Australia's music exporters in developing countries is often challenging. The music sector is outward looking and has a proven record of global export success stories, and thus, we look forward to working with Australia's trade negotiators to create the best possible opportunities for the music sector, diverse and competitive as it is, in its export markets, both current and future.

As highlighted by DFAT on its website introducing the launch of negotiations ¹, Hong Kong was Australia's 12th largest trading partner overall in 2015-2016, with total two-way trade in goods and services worth AU\$15.3 billion, and the Australian goods and services exported to Hong Kong in 2015-2016 were worth AU\$8.9 billion and AU\$2.4 billion respectively. The social and cultural exchanges between the two territories are also frequent and close². The potential FTA presents an opportunity to remove various trading barriers and to create better investment incentives that can help further strengthen the economic, social and cultural ties between the two territories and boost the outward growth of Australian businesses,

¹ <http://dfat.gov.au/trade/agreements/a-hkfta/Pages/default.aspx>

² For example, the Australia-China Council of the DFAT has funded and promoted exchange programmes in China covering Hong Kong.



including the recording industry.

IPR chapter. Copyright protection is fundamental to the sustainability and development of the recording industry. Music companies remain the principal investors in music production, reinvesting around 27% of their revenues back in artist and repertoire development and promotion. This investment is dependent on the existence of comprehensive copyright protection and the ability to have these copyrights effectively enforced. Thus, any prospective HK-Australia FTA should ensure that the Australian market players may enjoy at least the same level of protection in Hong Kong as in Australia.

SME interest. Copyright is equally important for big and small record companies. When it comes to foreign markets and trade negotiations all Australian companies have the same interest in securing comprehensive protection for their music, thus the best way of supporting the music sector SMEs in their international commercial efforts is through the relevant music rights in trade negotiations and economic discussions and to secure commitments to their protection.

Digital trade. Last but not least, it is hoped that potential HK-Australia FTA commitments relating to digital trade will reflect the modern reality of the music industry, in which the majority of revenues come from digital commerce channels (64% of industry revenues in Australia come from licensing digital sales and services, and 53% in Hong Kong, though the shares are bound to increase as streaming revenues continue to grow, with a 60.4% year on year growth in 2016)³. Music is an integral part of the online economy and drives the uptake of digital services and growth of the broader digital economy throughout the world. For the music business to continue to thrive online, governments need to ensure adequate coherence between “digital trade” commitments and the robust rules on copyright protection and enforcement online in the IPR chapter. Thus, we look forward to working with the negotiators on the best possible content and sequencing of any trade commitments in this area.

Potentials of the Hong Kong market

According to the Global Music Report 2017⁴ Hong Kong was ranked 20th for physical sales and 30th for digital sales of sound recordings globally in 2016. In that year, the total revenue for the music record industry in Hong Kong reached US\$40.7 million, and is expected to grow even further as digital growth continues. Digital revenues surpassed physical

³ <http://www.ifpi.org/news/IFPI-GLOBAL-MUSIC-REPORT-2017>

⁴ <http://www.ifpi.org/news/IFPI-GLOBAL-MUSIC-REPORT-2017>



revenue in Hong Kong for the first time in 2016⁵ and accounted for around 53% of the total revenue. Moreover, Hong Kong serves as a gateway to mainland China and for many music companies, including international companies, it is the base for their operations across Greater China. Thus, the commercial and legal environment for recorded music in Hong Kong has importance beyond the city itself.

International music is popular in Hong Kong due to its bilingual Chinese-English population and the presence of hundreds of thousands of expatriates (including Australians⁶).

Internationally successful Australian artists, such as Sia, Vance Joy, Troye Sivan and Gotye have a following with Hong Kong audiences.

The copyright regime in Hong Kong

Historically, Hong Kong adopted the common law system and the copyright legislation largely followed the English model before the city was handed over to China in July 1997. Currently the Copyright Ordinance (Cap. 528) (the “Copyright Ordinance”) is the governing legislation in Hong Kong.

Hong Kong is also a member of the World Trade Organisation and a signatory to international agreements concerning intellectual property including the Berne Convention, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.

In the last decade, the Hong Kong Government made two attempts to introduce reforms to the Copyright Ordinance⁷. Both were unsuccessful for a range of reasons. Currently Hong Kong’s copyright regulation has fallen behind many other modern jurisdictions.

Issues in the Hong Kong copyright regime concerning the recording industry

(A) Term of protection for sound recordings

Currently in Hong Kong, copyright in sound recordings is given 50 years of protection under Section 18 of the Copyright Ordinance⁸. In Australia, the term of copyright in sound

⁵ Hong Kong digital revenue is around US\$21.7 million and physical revenue is about US\$18.5 million in 2016.

⁶ According to the 2016 Population By-Census Results, there were around 14,700 Australian nationals in Hong Kong, amongst around 690,000 non-Hong Kong domiciled people.

⁷ The Copyright (Amendment) Bill 2011 and the Copyright (Amendment) Bill 2014, both tabled at the Legislative Council and subsequently withdrawn by the Hong Kong Government.

⁸ Section 18(2) of the Copyright Ordinance: Copyright expires (a) at the end of the period of 50 years from the end of the calendar year in which it is made; or (b) if during that period it is released, 50 years from the end of the calendar year in which it is released.



recordings is 70 years⁹.

Other territories, including the United States and the European Union, South Korea and Singapore have now adopted a 70-year term or longer for sound recordings. We submit that the term of protection for sound recordings in Hong Kong should be extended to at least 70 years, in line with the developing international standard.

We therefore respectfully ask the Australian Government to seek to include an obligation to provide a term of protection for sound recordings of at least 70 years in the FTA.

(B) Ensuring criminal penalties for all forms of piracy on a commercial scale, including for pirate streaming services

Currently, the Copyright Ordinance in Hong Kong gives copyright owners certain exclusive rights including the right to copy the work (which, by definition, includes a sound recording¹⁰), issue copies of the work to the public, rent copies of the work to the public, make available copies of the work to the public, perform, show or play the work in public, and broadcast a work or include it in a cable programme service¹¹. However, the criminal provisions do not adequately cover the unlicensed exploitation of such exclusive rights on a commercial scale, in particular the making available of infringing works. This is particularly problematic when pirate websites and other digital platforms provide infringing content. For instance, right holders made official complaints about websites providing unlawful streaming services which make available unlicensed music or other copyright content, but the Hong Kong Customs and Excise Department determined they could not act to stop this because the making available of infringing works is not a criminal offence under the current Copyright Ordinance. Currently the criminal provisions only catch the unauthorized “distribution” of an infringing copy of the work and so there is a concern that “making available” a work to the public by streaming is not a criminal offence in Hong Kong.

In Australia, the broader communication to the public right has been recognised as one of the exclusive rights of copyright owners of sound recordings and it is an offence if a person’s conduct infringing such right has a substantial prejudicial impact on the copyright owner and the infringement occurs on a commercial scale.

We urge the Australian Government to seek to include an obligation to introduce the broader exclusive communication to the public right as well as the corresponding criminal offences for infringement of such right on a commercial scale in the FTA, so as to facilitate

⁹ Section 93 of the Australian Copyright Act 1968: Copyright subsisting in a sound recording by virtue of this Part continues to subsist until the end of 70 years after the end of the calendar year in which the recording is first published.

¹⁰ Section 2(1)(b) of the Copyright Ordinance.

¹¹ Section 22(1) of the Copyright Ordinance.



the amendments in the Hong Kong Copyright Ordinance to allow right holders (including Australian record companies who have businesses in Hong Kong) to address online copyright infringement.

(C) Website blocking

In Australia, the website blocking law came into effect in 2015. The law introduced a judicial procedure whereby right holders can apply for injunctive relief against ISPs in respect of “online locations” (e.g. websites) outside Australia whose primary purpose is to infringe, or to facilitate the infringement of copyright¹². There have been successful cases lodged by right holders including the recent decision for the case *Universal Music Australia Pty Limited v. TPG Internet Pty Ltd*¹³ handed down on 28 April 2017 in which an injunction was granted requiring the named carriage service providers to take reasonable steps to disable access to the bit torrent website Kickass Torrents and related proxy sites.

Additionally, in the APAC region, website blocking has been undertaken in Malaysia, South Korea, Indonesia, Singapore and India via court or administrative procedures. The effectiveness of website blocking in curbing access to illegal services has been proven¹⁴.

Website blocking is not a remedy under the current Copyright Ordinance, nor was it proposed by the Hong Kong Government in the copyright reforms referred to above.

Digital music is now a major source of revenue for the global music industry. In 2016 it accounted for 64% and 53% of total music revenue in Australia and Hong Kong respectively and record companies rely heavily on revenues generated from online modes of consumption¹⁵. Consequently, it is essential for record companies and the recorded music industry generally to have the benefit of effective measures to tackle online piracy and

¹² Section 115A(1) of the Copyright Act 1968: The Federal Court of Australia may, on application by the owner of a copyright, grant an injunction referred to in subsection (2) if the Court is satisfied that: (a) a carriage service provider provides access to an online location outside Australia; and (b) the online location infringes, or facilitates an infringement of, the copyright; and (c) the primary purpose of the online location is to infringe, or to facilitate the infringement of, copyright (whether or not in Australia).

¹³ [2017] FCA 435.

¹⁴ For example, a report has found that the blocking of 53 piracy websites in the UK in November 2014 resulted in (i) a 90% drop in visits to the blocked sites while causing no increase in usage of unblocked sites; (ii) a 22% decrease in total piracy for all users affected by the blocks; (iii) a 6% increase in visits to paid legal streaming sites like Netflix; and (iv) a 10% increase in videos viewed on legal ad-supported streaming sites like BBC and Channel 5 (BRETT DANAHER / MICHAEL D. SMITH / RAHUL TELANG: Website Blocking Revisited: The Effect of the UK November 2014 Blocks on Consumer Behaviour, 2016).

¹⁵ Digital share of global revenues reached 50% in 2016. In 25 markets, digital revenues now amount for more than half the recorded music market (IFPI’s Global Music Report 2017).



enable legitimate services to have sustainable growth. Piracy remains a serious problem globally with more than one third (35%) of internet users accessing unlicensed music content.¹⁶ If the online piracy issue is not effectively managed in Hong Kong, infringing music will become more prevalent and legitimate online music services will struggle to compete and this will jeopardise further investment and expansion of Australian rights holders in the Hong Kong market.

Website blocking procedures have been found to be effective in curbing online piracy, and to be consistent with the rights of users and internet service providers.¹⁷ These measures would help to ensure a level playing field for the creative industries. We therefore urge the Australian Government to seek to include in the FTA an obligation to introduce suitable website blocking procedures so that the legitimate interests of right holders can be effectively protected.

Other issues and conclusion

Apart from the specific legislative amendments suggested above, we would certainly welcome strengthened administrative cooperation between the two governments. This would include anti-piracy enforcement cooperation, information exchange, simplified import and export procedures and trade facilitation which would assist the Australian recording industry to better protect its copyright so it can continue to expand into the Hong Kong and Asian markets.

Sincerely,

A handwritten signature in black ink, consisting of a stylized 'D' followed by a horizontal line that extends to the right.

Dan Rosen
Chief Executive Officer

¹⁶ Music Consumer Insight Report 2016

(<http://www.ifpi.org/downloads/Music-Consumer-Insight-Report-2016.pdf>)

¹⁷ The Court of Justice of the European Union in the “kino.to” case (CJEU C-314/12) held that website blocking measures are consistent with fundamental rights of users and Internet service providers.