

# Hong Kong



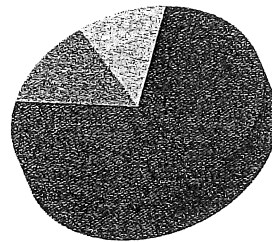
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## >>The Music Business

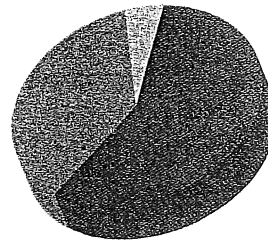
Music sales in Hong Kong are predominantly in the form of physical CD sales at retail outlets, comprising 76% of the value of music sales, as compared to 58% for the Asia Pacific region. Digital sales are relatively low at only 13% of total sales (versus 37% for the region).

Hong Kong recorded Music sales breakdown



- Physical 76%
- Digital 13%
- Other 11%

Asia recorded Music sales breakdown



- Physical 58%
- Digital 37%
- Other 5%

*Notes: Asia here is the People's Republic of China, Hong Kong, India, Indonesia, Malaysia, Philippines, Singapore, Korea (Republic—South Korea), Taiwan and Thailand. 'Other' includes ad-supported revenues and other digital amounts.*

**Table 1. Recorded Music Sales**

Recorded Music Sales (USD)	Hong Kong	%	Asia	%
Physical	42,400,000	76%	385,400,000	58%
Digital	7,200,000	13%	242,800,000	37%
Online	400,000	6%	57,900,000	24%
Mobile	3,500,000	49%	152,800,000	63%
Subscriptions	3,000,000	41%	28,100,000	12%
Other	300,000	4%	4,000,000	2%
Performance Rights	6,200,000	11%	35,400,000	5%
<b>Total</b>	<b>55,800,000</b>		<b>663,800,000</b>	

Source: IFPI 2009

**>>Piracy Before and After the Internet**

In the early 1970s Hong Kong was the largest music pirate in East Asia. To help address the problem, the International Federation of the Phonographic Industry (IFPI) set up a regional office in Hong Kong in the early 1970s.

In the 1990s Hong Kong became a significant centre for both CD and VCD piracy. In an attempt to address the CD piracy problem, the recording industry teamed up with the local movie industry in 1999, to rally for the support of the Chief Executive of the Hong Kong Special Administrative Region (SAR), C. H. Tung, in taking action to prevent the demise of the Hong Kong contents industries. It was answered with swift government action that drove the pirate outlets down from more than 800 to fewer than 100. The industry celebrated a brief recovery in 2000, with recorded revenue of HK \$1 billion for music.

A new millennium saw a new era of music piracy. Being a technologically advance

"It is suggested that the Hong Kong Government should not sacrifice these [core] values in the name of copyright protection"

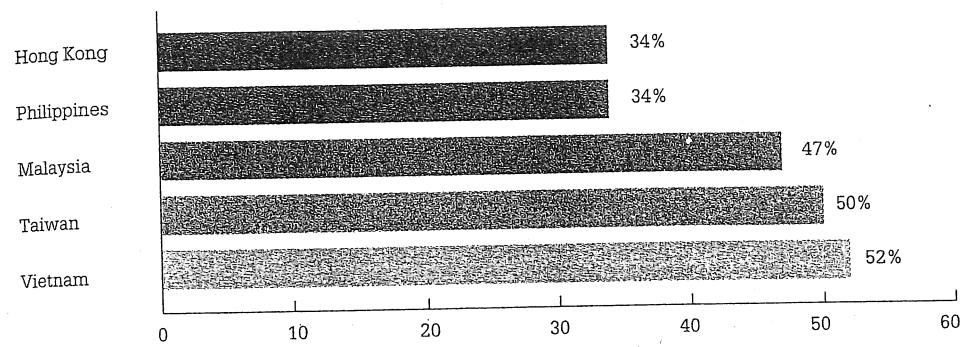
territory, peer-to-peer (P2P) sharing services offered new options for copyright piracy in Hong Kong. During the early stages of P2P internet music, piracy thrived as users were of the view that there were no repercussions from downloading and uploading music contents on the internet, since they were doing it from behind a network of internet connections which was difficult to trace. Improvement in internet connection speeds plus the ease of attaining 'free' music content from the comfort of one's home means that piracy has now reached unprecedented levels. In addition, Hong Kong is still struggling with physical piracy. Even today, seizures of pirate optical media products continue at a high rate[\*1]. High-profile enforcement efforts against optical disc piracy continue. For instance, in 'Operation Torpedo' in late September 2008, 120 Hong Kong Customs officers raided 19 retail shops and a warehouse, arrested 16 persons and seized over 63,000 pirated optical discs. The 'Operation Codebreaker' raids in June 2008 led to 21 arrests and seizure of HK \$1.2 million (US \$155,000)-worth of pirated goods and assets.[\*2]

#### >>Downloading Music and Mobile Devices

While Asia's youth use multiple devices to listen to music, the personal computer is still the preferred device over mobile phones and MP3 players. Across the region, 27% said they preferred MP3 players to listen to music and only 23% said that they used mobile phones as a music device. As a percentage of total music sales in Hong Kong, online sales account for only 1%, while for the region as a whole it has already reached 9%. Subscription-based sales in Hong Kong are similar to that in the rest of Asia, accounting for 4%–5% of total music sales.

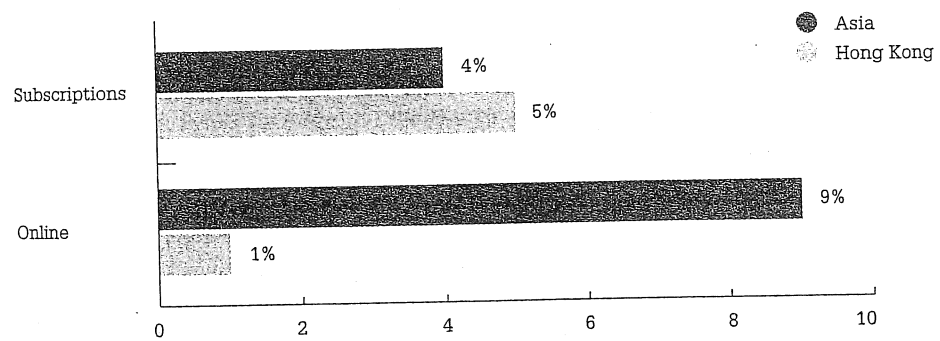
A combination of recent technological advancements, including fast broadband internet access and the rising popularity of portable digital music players, have made the download and streaming of music in the region a viable alternative to physical media. Internet penetration in Hong Kong has already reached 78% of households, far exceeding the average of 21% in Asia and 32% in China. However, given the widespread access to high-speed internet in Hong Kong, digital sales remain proportionally low compared with other countries in Asia.

### User who listen to music using their PCs

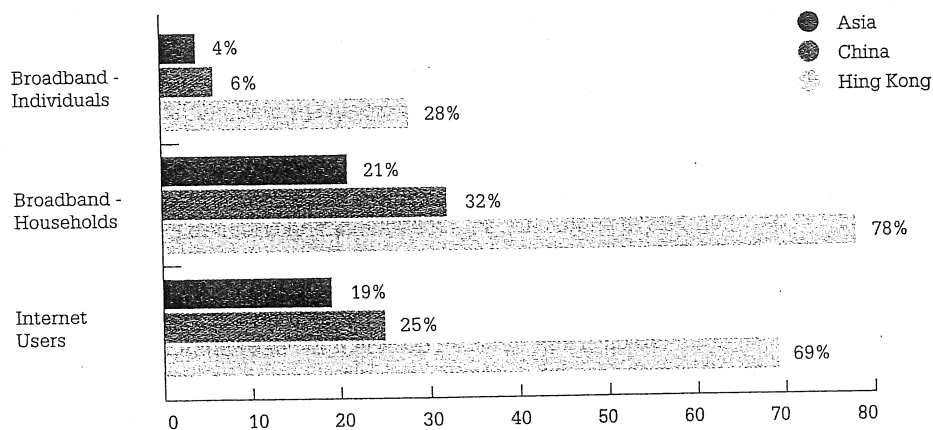


Source: Synovate/Music Matters 2009

### Digital Sales of Music



Source: IFPI 2009

Asia Internet Penetration

Source: Microsoft Advertising, ITU, MIT (China), Strategy Analytics

Despite this, online transactions for downloading music content have increased in recent years, with the introduction of various legitimate digital music providers. Digital media providers in Hong Kong are as listed in Table 2. While legitimate online download and streaming services of music have grown in recent years, illegal music downloads still predominate.

"Given the widespread access to high-speed internet in Hong Kong, digital sales remain proportionally low compared with other countries in Asia"

Table 2. Digital Media Providers [\*3]

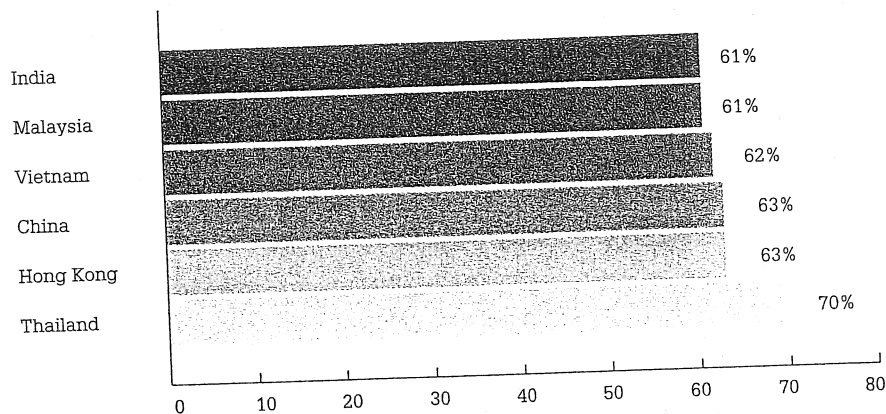
Service Providers	Music Service	Format	Pay Scheme (HKD)	Streams (2007)
EOLAsia.com Limited	EOL Asia	Download	À-la-Carte download 5.00 to 9.00 per song	-
Hutchison	3 Music Station	Download	15.00 per week for unlimited download	-
PCCW	MOOV	Stream	50.00 per month for unlimited streaming	8,805,000
Smartone	MusicXS	Download	48.00 per month for unlimited download	-
CSL	Musicholic	Download	48.00 per month for unlimited download	-

Source: Hutchison, PCCW, Smartone-Vodafone, CSL and EOL Asia website and annual reports

Mobile phones have opened up a whole new market for the music industry, and in some markets in Asia they are the principal legitimate option for consumption of music. All major mobile service providers in Hong Kong offer a music service, with a variety of options through which music can be accessed wirelessly on the mobile phone. However, Hong Kong is still lagging behind the region, as mobile music sales as a percentage of total music sales were only 6% in 2008, compared with other countries in Asia where mobile music sales averaged 23%.

"A new millennium saw a new era of music piracy"

**Mobile owners who listen to music using mobile phones**



Source: Synovate/Music Matters 2009

Most people in Hong Kong have access to mobile phones. In fact, mobile phone penetration in Hong Kong is 169%, which includes 5 million pre-paid phone numbers. Even when excluding pre-paid figures, mobile phone penetration is over 85%, far exceeding 37% average across Asia and 53% in China. However, given the widespread access to mobile phones, the proportion of music sales sold via mobile phone are relatively low.

There are five mobile phone network providers in Hong Kong, of which four provide high-speed 3G networks. All four of these networks provide online music download services, as particularised in Table 3. Income from these mobile music service providers in Hong Kong is generated through their digital online music stores and subscription-based streaming services.

Hong Kong 3G Networks

Service Providers	Music Service	Format	Pay Scheme (HKD)	Streams (2007)
Hutchison	3 Music Station	Download	12.00 per week for unlimited download	-
PCCW	MOOV	Stream	50.00 per month for unlimited streaming	8,805,000
Smartone	MusicXS	Download	48.00 per month for unlimited download	-
CSL	Musicholic	Download	48.00 per month for unlimited download	-

Source: Hutchison, PCCW, Smartone-Vodafone and CSL website and annual reports

With the launch of these music services by mobile phone providers, direct mobile downloads and streams are slowly gaining traction. However, side-loading[\*4] is still considered the dominant method of delivering content to mobile devices, as there are no mobile network restrictions or geographic limitations on delivery via side-loadings. Direct mobile downloads are also considered too slow as compared with fixed broadband. According to Synovate, 46% of young users across Asia download music and transfer tracks to their phone, while only 21% download music directly to their phone. (Side-loading is achieved in three ways: over a standardised USB connection, by Bluetooth or via a memory card. These options allow users to choose their own suitable and convenient form of file transfer, thus making side-loading the preferred method.)

As a technologically advanced city in Asia, there is clearly a viable market for mobile music in Hong Kong. The popularity of sophisticated mobile devices is increasing due to the convenience of incorporating both telecommunication and media needs into one



device. Some handset manufacturers, such as Nokia, now offer music services bundled with its mobile phones. The Nokia 5800 XpressMusic was the first device to offer one year of unlimited access to the entire Nokia Music Store[\*5] catalogue. Strangely, however, this service is currently only available to Singapore in Asia, as well as to European and US consumers.

It is clear that Hong Kong does not suffer from lack of technology. It boasts some of the highest mobile and internet penetration rates, and access to the newest devices offered by handset manufacturers. However, use of mobile music is low and will continue to be such until access to music content becomes more widespread and with the same services that are offered abroad by handset manufacturers such as Nokia and Apple also made available in Hong Kong.

#### >>The Applicable Law

As early as 1996, the Copyright Ordinance of Hong Kong (cap. 528) was amended to incorporate the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS) of the World Trade Organization. From 1 October 2008 onwards, the World Intellectual Property Organization (WIPO) Copyright Treaty (WCT) and the WIPO Performances and Phonograms Treaty (WPPT), or so-called Internet Treaties, applied to Hong Kong. The Internet Treaties update and improve the protection of copyright and other related intellectual property rights in light of new digital technological development. The requirements of the Internet Treaties have now been incorporated in the Ordinance.

Section 2 of the Ordinance protects the copyright of literary works, musical works and sound recordings. In relation to downloading and streaming music online/through mobile, section 22 of the Ordinance stipulates that the copyright owner has the exclusive right to issue and rent copies of the work to the public, make available of copies of the work to the public by wire or wireless means, and to perform, show or play the work in public.

Section 118(1)(g) of the Ordinance provides that a person commits an offence if he,

without the licence of the copyright owner, distributes an infringing copy of the work, otherwise than for the purpose of or in the course of any trade or business which consists of dealing in infringing copies of copyright works, to such an extent as to affect prejudicially the copyright owner. An offender faces up to a fine of HK \$50,000 and four years' imprisonment.

Section 161 of the Crimes Ordinance (cap. 200) provides that any person who obtains access to a computer (i) with intent to commit an offence, (ii) with a dishonest intent to deceive, (iii) with a view to dishonestly gain for himself or another or (iv) with a dishonest intent to cause loss to another commits an offence and faces up to five years' imprisonment.

#### >>The Case Law

HKSAR v. Chan Nai Ming [HKSC] 1. In late 2005 Chan Nai Ming's conviction for uploading three Hollywood movies using the BitTorrent software made international headlines. His conviction is believed to be the first of its kind in the world. The defendant was charged with attempting to distribute an infringing copy of a copyright work, other than for the purpose of or in the course of any trade or business, to such an extent as to affect prejudicially the rights of the copyright owner (now section 118(1)(g) of the Ordinance—see above). The defendant also faced alternative charges of obtaining access to a computer with dishonest intent, contrary to section 161(1)(c) of the Crimes Ordinance.

The prosecution alleged that the defendant was responsible for distributing three films on the internet using BitTorrent software (which allows fast and efficient downloading of large digital files such as films). The defendant was alleged to have been the principal 'seeder'—he loaded the films into his computer and created the .torrent files, he advertised the existence of the .torrent files on the internet and he kept his computer connected and the BitTorrent software active to enable others to download them. The defendant argued that he simply made the films available for others to download. However, the magistrate took the view that the acts of the defendant were positive acts

that led to distribution of the data and convicted him of the charges. The defendant was sentenced to three-month term of imprisonment. The magistrate also concluded that the defendant's act of publishing the .torrent file on the newsgroup computer amounted to obtaining access to a computer with a view to a dishonest gain for another.

His conviction was upheld by the High Court and by the Hong Kong Court of Final Appeal in 2006 and 2007, respectively. More arrests of infringers for uploading movies and TV dramas followed in 2008 and 2009, with the help of the internet service providers (ISPs—see below). Although HKSAR v. Chan Nai Ming relates only to movies, the relevant legal principles would equally apply to internet piracy of music contents.

Cinepoly Records Co Ltd & Ors v. Hong Kong Broadband & Ors [2006] HKLRD 255. Another landmark decision was given by the High Court of Hong Kong in early 2006, and it shook the notion of many copyright infringers that they could remain anonymous. In this case, seven leading music producers took an unprecedented move and issued a discovery proceeding against four ISPs for the names and details of 22 alleged online copyright infringers, under the Norwich Pharmacal principles. In early November 2005 the plaintiffs, together with the IFPI, conducted online investigations and targeted 22 uploaders of various music files. The plaintiffs took the action in the hope of going behind the cloak of anonymity and tracking down the true identity of those uploaders.

The judge was satisfied that copyright infringements of the plaintiffs' sound recordings had taken place by the acts of the 22 uploaders, that they were subscribers to internet services with the defendants and that the defendants, by providing the internet service, had innocently been caught up in or had become involved in the uploading of the music works in question. In considering whether or not such disclosure would violate the protection of personal data, the judge was satisfied that information sought by the plaintiffs was for the prevention or remedying (including punishment) of unlawful or seriously improper conduct by persons, and thus could invoke the exemptions provided in the Personal Data (Privacy) Protection Ordinance (cap. 486). The High Court thus ordered that the plaintiffs were entitled to the Norwich Pharmacal relief, and remarked that since the disclosure was ordered by the court, there would be no breach

"Given the widespread access to mobile phones, the proportion of music sales sold via mobile phone are relatively low"

of the defendants' duty of confidentiality warranted in their licences granted by the Telecommunications Authority.

The disclosure of the information allowed the IFPI to issue 55 civil proceedings against online infringers in February and September 2006.

### How Will the Law Develop?

In late 2006 the Government conducted a public consultation exercise as to how to strengthen copyright protection in the digital environment. In its preliminary proposals, published in April 2008, the Government proposed to introduce an all-embracing right of communication, which could encompass future developments in electronic transmission. The Government also proposed to introduce criminal sanctions against: (i) making/initiating unauthorised communication made to the public for the purpose or in the course of business; and (ii) unauthorised communication made by streaming the copyright work to the recipients, other than for the purpose or in the course of business, and such communication is made to such an extent as to affect prejudicially the copyright owner.

After consultation, the Government opined that it would refrain from introducing new criminal liability pertaining to unauthorised downloading and P2P filesharing activities. As a matter of fact, the Government has been consulting public opinion on criminalising unauthorised downloading since 2000. Unfortunately, even after almost a decade-long discussion and the increasingly rampant internet piracy, the Government is still unwilling to take this major step, citing that the issues pertaining to criminalising unauthorised downloading are controversial. Of course, the issues are controversial and the community is highly unlikely to reach a consensus on this issue, given the conflicting interests of the end users and copyright owners. Yet, it is undeniably the most effective way to combat internet piracy—to attack the demand for infringing works.

The Government seems equally unwilling to prosecute downloaders and only focuses

its resources on prosecuting uploaders. Prosecuting unauthorised downloading is understandably difficult, given the innumerable number of internet users and the possible extra-jurisdictional issues (such as the domicile of downloaders, etc.). However, as discussed above, the High Court in Hong Kong has allowed copyright owners to rely on the Norwich Pharmacal discovery procedure to obtain a court order demanding disclosure from the relevant ISP on the details of any suspected infringers. If the Government is determined to combat internet piracy, it should allocate sufficient resources to investigate cases of unauthorised downloading, with the assistance of ISPs.

Advocates for the imposition of liability on ISPs for online piracy activities argue that the ISPs are well placed to help combat internet piracy and such imposition would provide incentives for the ISPs to co-operate in preventing massive infringement. In fact, the Government proposed putting in place a voluntary code of practice for the ISPs in combating internet piracy; and to provide incentive for the ISPs to comply with the code of practice, the law of Hong Kong will be amended such that compliance with the code of practice would be a factor that the court shall take into account in determining whether or not an ISP has authorised an infringement committed on its networks. The proposed content of the Code of Conduct remains unknown, but the Government has proposed establishing a tripartite forum comprising representatives from the ISPs, copyright owners and internet users to explore the merits of different systems, such as a 'notice and notice' system—if a copyright owner finds that a copyright infringement occurs on an ISP's network, it may issue a notice in a prescribed form to the ISP concerned, which would then relay the notice or issue a warning notice to the alleged infringer.

Although ISPs have extensive technical ability to control the traffic on their networks, it is felt that the Government must not unreasonably burden the ISPs in the war against internet piracy. Given the enormous traffic on the internet every day, it is argued that it would be extremely difficult and costly for the ISPs actively to monitor the web content. Also, it is suggested that society will have to sacrifice the rights of privacy in the name of copyright protection. More importantly, the ISPs will be made the scapegoats for the wrongdoings of uploaders and downloaders of music content online (and the Government is unwilling to prosecute the latter), which is simply unfair.

Under the 'three strikes' rule that is being considered in other jurisdictions (such as Japan and South Korea—see separate chapters below), internet subscribers who illegally share copyrighted materials would receive warning notices and their internet access would be suspended after the third warning. The Hong Kong and Singapore Governments have ruled out such a hard-line approach in the coming copyright law amendments. In their view, not only does such legislation violate the right to privacy, but also it is contrary to the presumption of innocence, the core principle in the criminal justice system in Hong Kong. It is suggested that the Hong Kong Government should not sacrifice these values in the name of copyright protection. Indeed, elsewhere in the world, after the National Assembly enacted such legislation, the Constitutional Council of France in June 2009 ruled that the 'three strikes' rule was unconstitutional. In November 2009 the legislators of the European Union, in response to the 'three strikes' rule proposed by the French Government, provided safeguards for internet users. Such a rule would be imposed only 'if they are appropriate, proportionate and necessary within a democratic society' and 'due respect for the principle of presumption of innocence and the right to privacy' and as a result of 'a prior, fair and impartial procedure' guaranteeing 'the right to be heard' and 'the right to an effective and timely judicial review'. Such safeguards apparently would kill any deterrence effect of the 'three strikes' rule.

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- [1] Nearly 1 million DVDs and VCDs, and half a million DVD-Rs and CD-Rs, had been seized by the end of November 2008.
- [2] From the IIPA's 2009 Special 301 Report on Copyright Protection and Enforcement, 'Recommendations' for the year (February 2009).
- [3] [www.eolasia.com](http://www.eolasia.com), [www.3music.com.hk/web/musicstation/](http://www.3music.com.hk/web/musicstation/), [moov.hk/](http://moov.hk/), [www.musicxs.hk](http://www.musicxs.hk) and [www.musiccholic.com.hk](http://www.musiccholic.com.hk).
- [4] This is the process of transferring data, such as music, between two local devices; in particular, between a computer and a mobile device by USB, Bluetooth or memory cards.
- [5] [musicstore.nokia.com/](http://musicstore.nokia.com/).