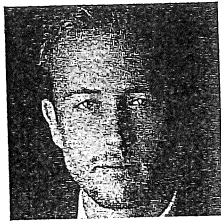


Development of Licensing Practice in Asia



Author: John McLellan

>> Asia

To state the obvious, Asia is not one country; it is a collection of highly diverse countries and territories from a cultural, legal and linguistic perspective, which factors have had a significant bearing on the evolution of licensing practices. True, there are some groupings which can be made but it is a region which, I believe, is more divided by its differences than united by similarities.

>> Evolution of the issue of societies

As in the West, the management of the rights in the musical works is divided between music publishing companies and performing rights organisations - the latter are organised on the basis of national/territorial responsibility and generally on the basis of one Performing Rights Organisation ("PRO") in each territory which would be affiliated to CISAC (the international organisation of PROs). Traditionally (and this is changing), the PROs administered rights in the performance of the musical works and licensed radio stations, bars, dance halls, radio and TV stations for their consumption of music. The music publishers administered the rights in all other forms of exploitation - recorded music, synchronisation of music with films and advertisements etc.

In the West, the business of music publishing became pretty well structured and money flowed under a system of licensing of rights from the owners/controllers of the rights to licensees of the rights through the various media of exploitation through to the ultimate

consumers of music - financial terms were set, sometimes under compulsory rates fixed by legislation, sometimes under rates fixed by the PROs with input from the industry.

In Asia, the structure has not been quite as good. With the exception of Hong Kong, Singapore, India and Malaysia, the legal framework on which the licensing regime would sit didn't really exist. As we are all aware, copyright was not (is not?) widely respected in the region and so the publishing industry bore no relation to that in the West. Even as more standardised copyright laws began to come into legislation in the region as driven by WIPO, the licensing regimes did not. Even into the mid-1990s the payment of mechanical royalties was not always respected, even by the major record companies in the region (and certainly not by the significant independent sector). That changed with the signing of a Memorandum of Understanding, initially between the major record companies and the major publishing companies, under which, regardless of the legislative framework or industry practice in the region, they agreed to establish a licensing regime amongst themselves for the payment of mechanical royalties. This was gradually extended territory-by-territory across the region to include the independent sector, shepherded by the local industry associations.

There were various iterations of the MOU over the years but as the digital music industry began to take shape, pointedly, each version specifically excluded digital rights - both sides agreed to disagree on rates.

The publishing industry has signed limited digital MOUs within the region to create so-called "one-stop-shop" licensing processes whereby the PRO in the territory would manage all rights required for digital licensing. That system exists in Hong Kong and Malaysia (and a little differently in Korea) and works very well, but for it to work in other territories, you need close co-operation between the PROs and the publishers and well-managed PROs (sadly, in short supply in the region).

In the context of Digital Service Providers ("DSPs"), the position has become, sadly, more complex. As in the West, very often, there is a lack of consensus between the

music industry and the DSPs as to the rights attached to the service offerings and very certainly the value attached to those rights. Issues of particular concern now include: Is there a reproduction in a stream (what is a stream, when is a stream a tethered download)? Is there a performance in a download? From a legal perspective, certainly with pure streaming, there seems to be a good argument to suggest there is no download in a stream. There is, however, the so-called "server copy" which has no independent economic value in the transaction but is, technically, a reproduction of the musical work. The copyright legislation in most territories in the region, however, contains exemptions for "transient and incidental copies" which are technically required for the viewing or listening of the work. Certainly, the position taken by DSPs in the West has been quite aggressive on these issues. In Asia, however, the publishing industry seems to be standing firm – unlike the US which has the Digital Millennium Copyright Act, most jurisdictions in the region do not provide for compulsory licensing, which means that a DSP has no choice but to secure licences from publishers. When I have sought to engage publishers on the issue, rather than getting into specifics, the answer seems to be "this is the economic value we attach to our rights." As a rule of thumb, the royalty rates currently range from 8.25% to 9% of the licensee's gross income for mechanical rights and 2.75% to 3% of licensee's gross income for performance rights.

The above is some background with regards to publishing and its evolution (or not!) in the region. I would like now to look at the situation in specific countries.

>> Hong Kong and Malaysia

I am grouping these territories together simply because the licensing regimes are similar in that they are "one-stops" from a publishing perspective - MACP and CASH license mechanicals and performance and do a pretty good job. In my experience, Hong Kong and Malaysia are some of the better jurisdictions for digital licensing.

>> The Philippines

A very similar story here: FILSCAP administers the performance rights and MCAP administers the mechanical rights.

"The licensing monopoly of JASRAC has been broken and two new licensing bodies have emerged. However, JASRAC still controls over 90% of the market"

However, MCAP have agreed to a "one-stop" for particular licensees to be administered by FILSCAP. Short footnote here about performers rights as the Philippines is a jurisdiction which has a society to act for performers (the Performers Rights Society of the Philippines (PRSP) set up in 2010). Not to be confused with performance rights, performers' rights do not fall within the remit of the publishing industry and are often referred to as "neighbouring rights" (also known as "related rights," these are rights under copyright awarded to persons other than the author, such as performers, phonogram producers, broadcasting organizations and, at least in some territories including the European Union, film producers and database creators). Some jurisdictions have recognised by law that performers in copyright works (recorded music, cinematic works) have rights in those works which need to be licensed (and rewarded). In many jurisdictions (and it would seem that the Philippines is such a jurisdiction) performers' rights can be waived or assigned as a matter of contract without attracting any additional remuneration - as such, it remains to be seen just how much business will be flowing to PRSP.

Japan

The licensing monopoly of JASRAC has been broken and two new licensing bodies have emerged, e-License Inc and Japan Rights Clearance. However, JASRAC still controls over 90% of the market.

The three PROs are one-stops, able to grant both mechanical rights and performance rights. To assist licensees in managing the clearance of rights, the Copyright Data Clearinghouse was established in 2009 through which licensees can identify ownership and rights owners track usage. I think it would be fair to say that issues of DSPs in gaining traction in the Japanese market have had nothing to do with the licensing structure but more to do with some rights owners taking a protectionist view of existing domestic service offerings. However, there seems to have been a shift in attitudes such that foreign DSPs now will have easier access to content.

>> Taiwan

Great music market but a pain from a licensing perspective

Three PROs (MUST, MCAT, TMCS of which MUST is the largest and the CISAC affiliate) and over 30 individual publishers (similar situation for labels) grouped in an organisation, the Music Publishers Association (MPA) at Taiwan. There were discussions for a one-stop headed by MUST but it has yet to come to pass in a formal sense. Mechanical rights are approved by the MPA publishers; but when the licensing terms are agreed by all MPA publishers, the MPA publishers may, on a case-by-case basis, collectively delegate their mechanical rights to MUST for licensing. As a side note, the music industry in Taiwan is heavily reliant on incumbent domestic DSPs (KK Box and EZ Peer) for survival. As such, there is some wariness as to the entry of foreign DSPs which might disturb these services and the flow of funds therefrom.

>> Indonesia

And this is where the story starts to get a little messier. KCI had been the incumbent PRO, but in 2012 lost its CISAC affiliation to WAMI. However, the international publishing community appears not to have embraced WAMI so that CASH (the Hong Kong PRO) administers digital performance rights for the majority of CISAC members (including two of the three American PROs - ASCAP and BMI - and the UK's PRS). Although WAMI represents a large portion of domestic repertoire, it appears that KCI still represents about 15% of the market. From a mechanical rights perspective, Indonesian repertoire rights are largely controlled by the large domestic independents; whereas the international rights are licensed by CASH and APRA/AMCOS with SONY/ATV-EMI licensing directly ... as I said, messy.

>> Korea

Take a highly-connected market, high GDP, stellar broadband and mobile penetration, strong music industry, and therefore a bonanza for DSPs, right? wrong. The easy stuff is the licensing regime (in theory!) - KOMCA (one-stop) and FKMP (performers rights cannot be contracted away and legally mandated to collect).

But a problem has arisen from a struggle between a powerful group of aggregators and the industry which has seen the aggregators artificially depress the value of music by price fixing – “all you can eat” models for ridiculously low prices. The situation got so bad the government investigated and formed a commission to hear submissions from all sides, the result of which has been a move to mandate by law minimum prices for the consumption of music which has pleased neither side. The industry is still finding its way with this but regulations issued by the Ministry of Culture, Sports and Tourism on 1st May 2013 addressed minimums for both volume (subscription) offerings and per track offerings.

Please note that there may be a new PRO in the making. The Korean Ministry of Culture announced in April 2013 that they would allow for a new royalty collection society to compete with KOMCA. Four consortium applicants (all of which have close connections with the media business) have submitted bids to the Korean Ministry of Culture; but the authority failed to announce the winning consortium by the deadline (end of June). Speculation was that the delay in announcing the winning bidder was due to controversy surrounding the suitability of the four consortium applicants as well as strong resistance from KOMCA.

» Singapore

In my view, never has a territory got it so wrong with its licensing framework. All should be good - affluent society, highly connected, multi-cultural, politically stable, good system of law, etc. The long established PRO, COMPASS, was a one-stop. However, it held a very different view from every other PRO in the region as to the relative value of a stream ... by a factor of over 100%. In 2012, the major publishers withdrew mechanical rights from COMPASS and were working to establish their own one-stop through Music Publishers (Singapore) Ltd (MPS). A referral was made to the competition authority of Singapore (some suggested by COMPASS) on the grounds that such a licensing regime would be anti-competitive; and, whilst no final ruling has been received, it would appear that the referral may be upheld. As such, licensees must go to COMPASS for the performance rights and to the major

publishers individually for the mechanical right. COMPASS is maintaining its position as to the value of the stream and so licensees are faced with the choice of skipping Singapore, sucking up and paying the higher fee, launching un-licensed by COMPASS, or a referral to the Copyright Tribunal. I have tried to engage with COMPASS on the issue many times for different clients and they will not be drawn.

China

The licensing landscape of China is far from clear. Its PRO MCSC claims to act as a "one-stop" and administer a wide range of rights including the rights to use musical works for public performance, public transmission, mechanical reproduction, producing radio and television programs, producing background music of films, television, video recordings and any other audio-visual materials, etc. However, it is questionable as to the scope of authority of MCSC in practice, as it seems that the major publishers have not assigned the rights in their catalogue to MCSC, certainly not for reproduction.

AMPE Publishers

As discussed in the introductory paragraph of this article, publishers usually retain their digital rights in terms of licensing. Therefore, save for the territories where the "one-stops" administer both performance and mechanical rights (i.e. Hong Kong, Malaysia, Korea), a DSP will need to seek licences from the major publishers (EMI Music Publishing, Sony/ATV, Universal Music Publishing, Warner/Chappell, Fujipacific, Peer) direct.

This was the case until fairly recently, however, there have been some recent changes (indeed, by the time the IAEL book is published, this piece may already be outdated in some respects!) The Australasian APRA/AMCOS have struck an agreement to represent Universal Music Publishing in licensing the publishing giant's digital rights throughout Asia, excluding Japan. Further, Warner/Chappell and Fujipacific have also struck regional digital licensing deals with CASH (the PRO of Hong Kong) covering a number of Asian countries (but excluding Hong Kong, Malaysia, Singapore, Korea and Japan). As matters stand now, instead of reaching separate deals with

the AMPS publishers, a DSP now only needs to approach APRA/AMCOS, CASH, EMI Music Publishing, Sony/ATV and Peer to digitally license the mechanical rights of the AMPS publishers. The trend seems to be that APRA/AMCOS and CASH may assume more rights from the publishers and other PROs, which can only be welcomed – less time (and cost) for a DSP in negotiating digital licensing deals for the region.

Despite the recent positive news with these AMPS deals, sadly, we have a very fractured “old world” licensing structure which is still based on a territorial model when the digital industry does not respect national boundaries; in which there are no transparent licensing tariffs; in which licensees in Asia have to address upwards of 20 countries and contract with literally hundreds of licensors to be able to launch a viable service, which can take upwards of a year to complete and many hundreds of man hours. The licensing process for any DSP looking to launch in Asia is fractured, opaque, time consuming and expensive. I would like to say it is getting easier but I don't believe that it is. I am not sure lessons from Napster have been learned as the industry continues to move at a snail's pace away from an “old world” licensing model to something more realistic for the present times.

Territory	Rights	Entities
Hong Kong	Communication to the public	The Composers and Authors Society of Hong Kong Limited ("CASH")
	Mechanical	
	Master	Individual labels
Malaysia	Communication to the public	Music Authors' Copyright Protection (MACP) Berhad ("MACP")
	Mechanical	
	Master	<ul style="list-style-type: none"> • One Stop Music (OSM) Berhad ("OSM"); • Individual labels
The Philippines	Communication to the public	Filipino Society of Composers, Authors and Publishers, Inc. ("FILSCAP")
	Mechanical	Music Copyright Administrators of the Philippines ("MCAP")
	Master	Individual labels
	Performer	Performers Rights Society of the Philippines ("PRSP")

Territory	Rights	Entities
Japan	Communication to the public	<ul style="list-style-type: none"> • Japanese Society for rights of Authors, Composers and Publishers ("JASRAC") • e-License Inc
	Mechanical	<ul style="list-style-type: none"> • Japan Rights Clearance ("JRC")
	Master	Individual labels
	Performer	Center for Performers' Rights Administration ("CPRA")
Taiwan	Communication to the public	<ul style="list-style-type: none"> • Music Copyright Intermediary Society of Chinese Taipei ("MUST") • Music Copyright Association Taiwan ("MCAT") • Music Copyright Intermediary Society of Taiwan ("TMCS")
	Mechanical	Individual publishers
	Master	Individual labels
Indonesia	Communication to the public	<ul style="list-style-type: none"> • PT. Wahana Musik Indonesia ("WAMI") [for Indonesian repertoire] • CASH [ASCAP, BMI, APRA, PRS, MACP (Malaysia), CASH] [for international repertoire] • Karya Cipta Indonesia (Indonesian Creation Foundation) ("KCI") [for Indonesian repertoire]

Territory	Rights	Entities
Indonesia	Mechanical	<ul style="list-style-type: none"> • Individual labels (clear directly with most local labels to be included with master rights) [for Indonesian repertoire] • Asosiasi Pengusaha Musik Indonesia (Indonesian Music Publisher Association) ("APMINDO") • CASH [For Warner/Chappell, Peer, Fujipacific] • APRA/AMCOS [For Universal Music Publishing] • Sony/ATV and EMI
	Master	Individual labels
Korea	Communication to the public	Korea Music Copyright Association ("KOMCA")
	Mechanical	
	Master	<ul style="list-style-type: none"> • Individual labels • Korean Association of Phonogram Producers ("KAPP")
	Performer	Federation of Korean Music Performers ("FKMP")

Territory	Rights	Entities
Singapore	Communication to the public	The Composers and Authors Society of Singapore ("COMPASS")
	Mechanical	Individual publishers
	Master	Individual labels
China	Communication to the public	Music Copyright Society of China ("MCSC")?
	Mechanical	
	Master	

AMPS Publishers

AMPS publishers (EMI Music Publishing, Sony/ATV, Universal Music Publishing, Warner/Chappell, Fujipacific, Peer) administers the digital licences for the mechanical rights in their catalogue throughout Asia; subject to the following:

- APRA/AMCOS administers mechanical rights in the repertoire of Universal Music Publishing throughout Asia excluding Japan
- CASH administers mechanical rights in the repertoire of Warner/Chappell and Fujipacific throughout Asia excluding Hong Kong, Malaysia, Singapore, Korea and Japan