Copyright Buyout in the Music Industry: A Comparative Study of the Asia-Pacific Region

(The first study for the territories; Australia, Hong Kong, Indonesia, Japan, Macau, South Korea, Thailand and Vietnam)

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Executive Summary

This study focuses on the buyout of copyright in music and songs (both melody and lyrics included). Music and songs that are used in cinematographic works, audio-visual works, television programmes or games are also covered. Composers and lyricists who author these copyright works will be referred to collectively as "creators".

"Copyright buyout" means the transfer or assignment of ***all*** economic rights in a work from its creator to another party. The consequence of such transfer or assignment is that the creator no longer owns any copyright in his or her work. For the purposes of this study, copyright buyout is also considered to have been carried out when an employer is presumed by law to own the copyright in an employee work, and where a commissioning party is presumed by law to own the copyright in a work created by a commissioned party pursuant to a commissioning agreement. Licensing, however, is not included in the concept of copyright buyout because the copyright owner still retains copyright ownership of the work.

8 jurisdictions from the Asia-Pacific region, namely Australia, Hong Kong, Indonesia, Japan, Macau, South Korea, Thailand and Vietnam are selected to be studied in detail because of certain distinctive features in their copyright laws and policies, and practices in their music industries.

The following features can be identified from current copyright buyout practices in the music industry in each of the selected jurisdictions:

1. <u>Australia</u>

   Australasian Performing Right Association Limited and Australasian Mechanical Copyright Owners Society Limited (APRA AMCOS) is an influential collective management organisation ("CMO") in Australia. It is commonplace for creators to assign the performing rights in their works to APRA AMCOS before transacting with other parties. As a result, copyright buyout agreements usually state that the parties' rights are "subject to the prior rights vested in APRA AMCOS".

2. <u>Hong Kong</u>

   There are not many documented cases of copyright buyout in Hong Kong's music industry. Among the documented cases, many involve creators being commissioned by film production companies to compose music and/or write songs for their films. Usually, it is agreed between the parties that the film production company shall own copyright in the works. Cases involving government departments can be found as well. It is commonly agreed between the creator and the department that copyright in the works shall belong to the department.

3. Indonesia

Copyright buyout transactions in Indonesia often involve music and/or songs to be used in advertisements, films or television programmes. Advertising agencies and film production companies commonly ask creators to transfer all economic rights in the music and/or songs to them for a perpetual term. Meanwhile, many television broadcasting companies chose to enter into agreement with creators for the transfer of performing rights in their music and/or songs only. However, perhaps due to a misunderstanding of the scope of the transfer, some television broadcasting companies wrongly assumed that they also owned synchronisation rights in the works, and have played the music and/or songs in some of their sportainment and infotainment programmes.

4. Japan

In Japan, copyright buyout transactions usually involve music and/or songs that are intended to be used in films, television programmes, television advertisements and games. It is prevalent that film production companies and television broadcasting companies commission creators to compose music and/or write songs for their films and television programmes respectively.

On the contrary, game design companies mostly employ creators to compose music and/or write songs which are to be included in their game products.

5. Macau

Copyright buyout transactions usually take place between film production companies and creators, as well as between television stations and creators in Macau. Typically, creators are commissioned or employed to compose music and/or write songs for a particular film or television programme. Some local government departments also tend to employ or commission creators to compose music for use in special events. An example is the Macau Light Festival 2017.

6. South Korea

A number of issues relating to copyright buyout transactions and copyright management arose in South Korea recently. For example, a large television broadcasting company was found to have exploited the composers it hired by making them transfer all economic rights in their works to the company against their will, and not paying them for many of the songs they have written. The approval of the Ministry of Culture, Sports and Tourism for the establishment of a new CMO in 2015 has also been heavily criticised.

7. Thailand

Copyright buyout is prevalent in the music industry in Thailand. Since the Copyright Act, B.E. 2537 (1994) came into force, more employers and commissioning parties have entered into written agreements with their employees and the commissioned parties for the buyout of

copyright in employee works and commissioned works respectively. Nonetheless, cases where the parties have not entered into any written contracts can still be found. Sometimes, even if there are written agreements, the terms relating to copyright ownership have not been properly drafted. The problem that creators do not receive decent remuneration from copyright buyout transactions also still exists.

8. Vietnam

Two problems in relation to copyright buyout transactions in Vietnam can be identified. One is that parties involved in the copyright buyout transactions are often ignorant of the effect of the transactions. Another concerns the lack of effective communication and coordination between the Vietnam Center for Protection of Music Copyright (VCPMC) and its members. VCPMC said that it would advise creators to be more involved in the drafting of copyright buyout agreements; and help review the transaction documents in order to ensure that the creators' rights are well-protected in the future.

Laws and policies that regulate copyright buyout in selected jurisdictions are also critically reviewed and compared based on the following issues:

1. Are there any unwaivable rights under copyright law?

"Unwaivable rights" are rights that cannot be contracted out or given up by their owners. If a contract or a contract term purports to assign or transfer unwaivable rights, it shall be rendered unenforceable.

In a majority of the selected jurisdictions, moral rights are unwaivable. Moral rights are personal rights in a copyright work which its creator is entitled to, such as the right to be identified as author of the work and the right to integrity of the work. On the other hand, creators are allowed to transfer or assign economic rights in their works to third parties freely. There are, however, inadequate safeguards to protect creators from being exploited when transferring or assigning their copyright to third parties.

2. Is there any legislation that regulates unfair copyright buyout contracts?

Laws that regulate the formation of contracts can be found in all selected jurisdictions, but the sources of such laws in common law jurisdictions and civil law jurisdictions are different.

Very few of the jurisdictions have laws that regulate unfair contract terms. Only Australia and Thailand have implemented general provisions that regulate unconscionable conduct in trade practice, albeit the actual scope of application of the provisions is rather narrow. In Japan, new legislative provisions that regulate unfair standard form contracts are promulgated, but how they can be applied to copyright buyout contracts in practice remains unclear. In the rest of the jurisdictions, there are only statutes that regulate unfair terms in consumer contracts, which do not cover copyright buyout contracts.

3. Do creators enjoy the right to equitable remuneration?

   The right to equitable remuneration ensures that creators receive fair, just and reasonable remuneration for the rights transferred or assigned. Regrettably, no such requirement can be found in copyright laws of the selected jurisdictions except Macau.

   In some of the selected jurisdictions, certain persons are entitled to equitable remuneration in situations which fall short of copyright buyout. Meanwhile, Macau has elaborate provisions regarding requirements of equitable remuneration than all the other selected jurisdictions. They offer insight into the formulation of laws and policies that can better protect creators' interests.

4. Under what circumstances can a copyright buyout contract be legally revoked?

   It is often the case that the circumstances under which a contractual party can legally revoke a contract depends on what have actually been agreed between the parties when the contract is entered into. A party who revokes a contract when he or she is entitled to do so under the contract will not be held in breach. The effect of such revocation is to vest the rights back in the creator and discharge the parties from further performance.

   In Indonesia and Thailand, if copyright in a work has been assigned in whole or in part for an unlimited duration, the assignment will be automatically revoked after a certain period of time.

   There are similar provisions on automatic revocation for contracts of cinematographic productions in Macau, but what makes Macanese copyright law more distinguished is that it allows an author to revoke a publishing contract within 3 months after being informed of the transfer if the transfer has caused him or her "a considerable prejudice".

   In Japan and South Korea, although there are no provisions on automatic revocation of copyright transfer and assignment, the owner of the right of publication in a literary work can revoke a publishing contract on the ground of non-exploitation of publication rights.

   In the remaining jurisdictions, a party can revoke a copyright buyout contract legally only when he or she is entitled to do so under the contract. Nonetheless, given creators, in particular independent composers and lyricists, usually do not enjoy as much bargaining power as music publishers and record labels do, whether creators can ask for such entitlement under the agreements in the first place is questionable.

5. Are there any provisions that govern the copyright ownership of employee works and/or commissioned works?

   In all selected jurisdictions, there are legal presumptions governing copyright ownership of employee works and commissioned works. Nonetheless, there are substantial variations among them in terms of how the presumptions apply.

6. Are there any provisions that regulate the government's copyright ownership and copyright buyouts that involve the government?

   Unlike private companies, governments may acquire and enjoy copyright ownership of copyright works through means other than assignments by individuals. Copyright buyout transactions that involve the government are also different in nature from those which only involve private companies and individuals because the former may touch upon legal, policy and administrative issues. Nonetheless, only half of the selected jurisdictions have implemented laws that the government's copyright ownership and copyright buyouts that involve the government.

7. Are public campaigns regularly held to increase public awareness of copyright issues?

   In light of how sophisticated copyright laws and policies are, it is vital that stakeholders involved in copyright buyout transactions are conscious of their legal rights and obligations. Holding public awareness campaigns is a means to enhance the public's understanding and vigilance of regulations governing copyright buyout. Except Hong Kong, Japan and South Korea, in all the other selected jurisdictions, public campaigns were held regularly.

Based on the findings above, the following five recommendations are given:

1. Regulate unfair terms in copyright buyout contracts

   In most of the selected jurisdictions, there is no regulation of unfair contract terms. Creators who enjoy less bargaining power than music publishers and record labels may be pressured to sign copyright buyout contracts that contain unfair terms. In order to protect creators, particularly independent composers and lyricists from exploitation, there is a need to regulate unfair contract terms. The Australian Competition and Consumer Act 2010 can serve as a good reference in this respect.

2. Grant creators the right to equitable remuneration

   In addition to regulating unfair contract terms, granting creators the right to equitable remuneration ensures that creators receive a fair share in copyright buyout transactions. The Macanese copyright law, as well as the recently published "Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/19/EC" ("EU Copyright Directive") may provide helpful guidance.

3. Require parties to a copyright buyout contract to include an option for the creator to revoke the contract in case of non-exploitation

   Creators should be allowed to revoke the copyright buyout contract when transferees or assignees fail to exercise the economic rights transferred or assigned. Japan, Macau and South Korea only give certain persons the right to revoke contracts involving the transfer of

economic rights on the ground of non-exploitation. The coverage of the EU Copyright Directive is more extensive as the right to revoke in case of non-exploitation is intended to apply to all authors and performers. The EU's approach is also to be contrasted with that of Indonesia and Thailand. In the latter two jurisdictions, their copyright laws provide that a copyright assignment will be revoked automatically after a certain period of time. It is submitted that the EU's approach is preferred not only because it manages to strike a balance between the interests of different parties, but also because it is more consistent with the freedom of contract.

4. <u>For employee works and commissioned works: encourage fair and transparent dealings between parties</u>

   In order to ensure fairness and transparency in the dealings between employers and employees, as well as between commissioning parties and commissioned parties, the recommendations given above regarding regulation of unfair contract terms, granting creators the right to equitable remuneration, and requiring parties to a copyright buyout contract to include an option for the creator to revoke the contract in case of non-exploitation should apply equally to employee works and commissioned works.

5. <u>Organise public campaigns to increase public awareness of copyright issues</u>

   There is much room for manoeuvre in terms of how public campaigns can be held. Local CMOs should take the initiative in organising public education activities and events given their familiarity with copyright laws and policies.

1. Introduction

The music industry in the Asia-Pacific region has experienced significant growth in recent years. However, despite the increase in revenue and business opportunities, the development of copyright law has been confronted with unprecedented challenges. Many composers, lyricists, music publishers and other stakeholders in the music industry are demanding for better protection of their intellectual property rights.

This study critically reviews and compares copyright laws and policies in 8 jurisdictions from the Asia-Pacific region, namely Australia, Hong Kong, Indonesia, Japan, Macau, South Korea, Thailand and Vietnam. The following issues will be considered in assessing the extent to which the respective legal frameworks in the selected jurisdictions effectively regulate copyright buyout transactions in the music industry:

(1) Are there any unwaivable rights under the copyright law?

(2) Is there any legislation that regulates unfair copyright buyout contracts?

(3) Do creators enjoy the right to equitable remuneration?

(4) Under what circumstances can a copyright buyout contract be legally revoked?

(5) Are there any provisions that govern the copyright ownership of employee works and/or commissioned works?

(6) Are there any provisions that regulate the government's copyright ownership and copyright buyouts that involve the government?

(7) Are public campaigns regularly held to increase public awareness of copyright issues?

Based on findings with respect to each of the issues identified above, recommendations will be given accordingly towards the end of this study.

2. Focus of Study

This study focuses on the buyout of copyright in music and songs (both melody and lyrics included). Music and songs that are used in cinematographic works, audio-visual works, as well as television programmes and games are also covered. Composers and lyricists who author these copyright works will be referred to collectively as "creators".

"Copyright buyout" means the transfer of ***all*** economic rights in a copyright work. Economic rights in music and/or songs (both melody and lyrics included) encompass performing rights, reproduction rights and synchronisation rights. After a creator transfers all economic rights in his or her work to a third party, who can be a music publisher or a record label, the creator does not retain any copyright ownership of the work. Transfer of such kind may be known as "assignment" in some jurisdictions.[1] However, in any event, the concept of copyright buyout does not include "licensing", which means giving a third party the permission to use a copyright work. A copyright licence can be exclusive or non-exclusive. When a copyright owner, who may or may not be the creator of the work, grants a copyright licence to a third party, he or she still retains copyright ownership of the work.

For the purposes of this study, copyright buyout is also considered to have been carried out when an employer is presumed by law to own the copyright in a work created by an employee in the course of employment; or when a commissioning party is presumed by law to own the copyright in a work created by a commissioned party pursuant to a commission agreement, even though the employee or the commissioned party has never legally "owned" any copyright in the respective works in the first place. A work created by an employee in the course of employment will be referred to as an "employee work", whereas a work created by a commissioned party pursuant to a commissioning agreement will be referred to as a "commissioned work".

[1] Examples are Australia: see Copyright Act 1968, s 196; Hong Kong: see Copyright Ordinance (Cap 528), s 101; and India: see Copyright Act, 1957, s 19.

3. Background and Context for this Study

This part aims to provide the background and context for this study by outlining the general characteristics of the music industry and related industries.

3.1 Music industry

Notwithstanding that the music industry in different jurisdictions has its own rules and practices, Hull's "three revenue streams model"[2] (Figure 1 below) provides an apt framework for one to understand how the music industry is generally structured. The model not only shows how revenue of the music industry is generated by live appearances, recordings and song-writing, it also shows how creators, music publishers, record labels and other stakeholders in the music industry work together in the production and distribution of music and songs.

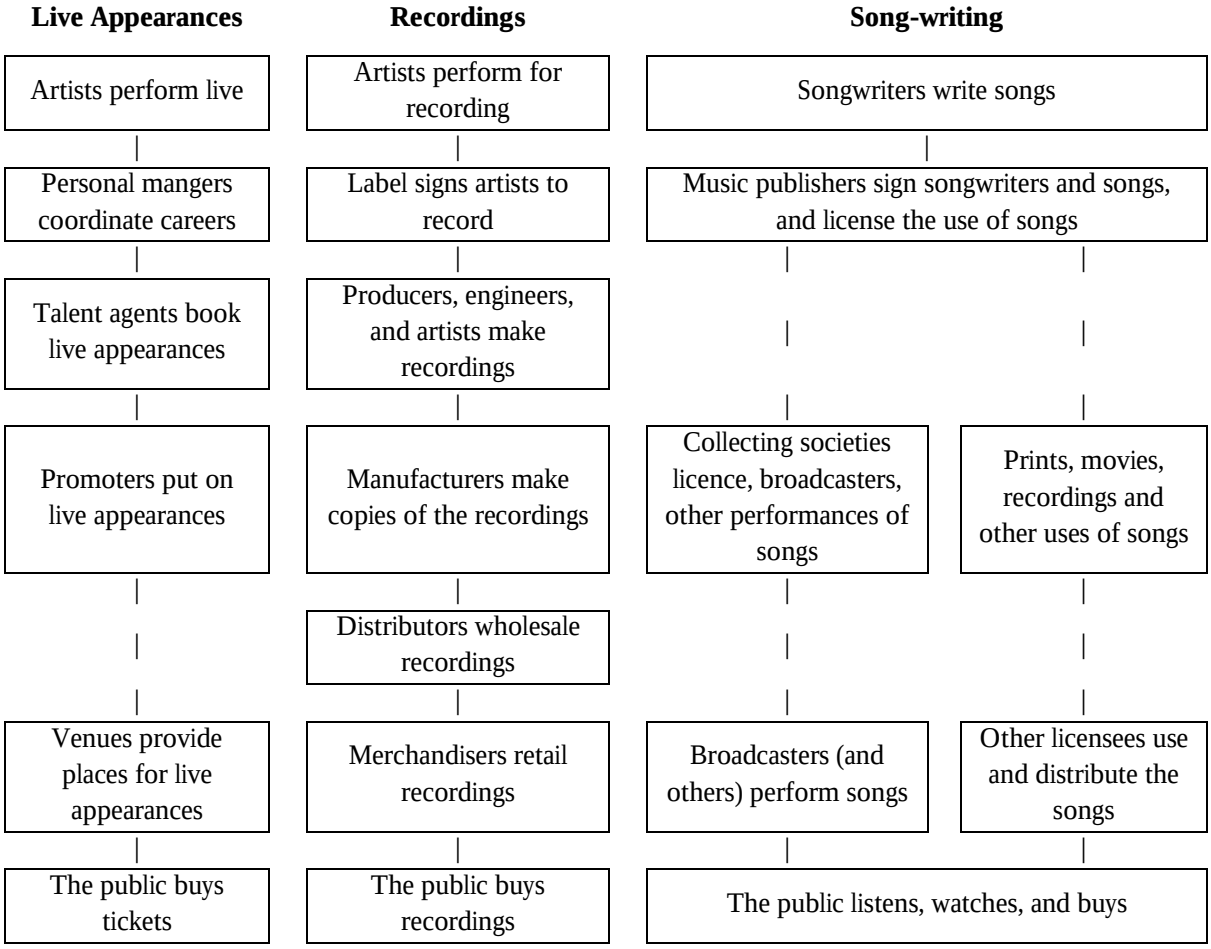

Figure 1. Three revenue streams model[3]

[2] Geoffrey P Hull, *The Music Business and Recording Industry* (Routledge 2011), 42.
[3] *ibid*.

The major source of revenue for live appearances is ticket fees paid by the audience. After the costs of hiring the venue and other expenses have been paid, the profit may be shared among the performing artist; personal managers; talent agents; and promoters.

As for recordings, revenue is generated by the public's buying them. When compared to live appearances, a lot more parties involved in the production of recordings. As soon as a record label signs with an artist, music producers, engineers and the artist will start producing the recordings. The manufacturers will make copies of the recordings, before distributors and merchandisers put the copies on sale. Profit may be shared among merchandisers; distributors; producers; engineers; record labels; and the artist.

Similar to recordings, revenue for songs is generated by the public's buying them, whether they are in the form of tapes, CDs, or digital copies. However, the way in which songs reach the public is different from recordings. After a songwriter finishes writing a song, he or she may assign or license some rights in the song to a music publisher. Subject to what has been agreed between the parties, the music publisher may further distribute licences of the work through collective management organisations ("CMOs"), which are also known as "performing rights organisations" in some jurisdictions. That said, a songwriter can choose to assign or license the rights in his or her work directly to a CMO instead of a music publisher. Eventually, the song may reach members of the public through broadcasters, performers, or other licensees. The profit earned, which is usually in form of royalties, will then be distributed by CMOs to songwriters and/or music publishers according to what have been agreed among them. Different CMOs may have reached different agreements with their members as to how royalties should be divided. For instance, music publishers who are members of any of CISAC's associations can receive at most 50% of the share.

It shall be noted that the three revenue streams model only provides guidance for understanding the relationship among different stakeholders in the music industry and how revenue is generated. What happens in reality can be more complicated than what the model shows. For example, music publishers can be record labels as well, or they can collaborate with record labels in the use of any music and/or songs. A creator can also contract with a record label instead of a music publisher, thereby allowing the former to use his or her work. It is equally possible for a performing artist to record his or her own work and then assign or license the work to record labels or music publishers.

3.2 Related industries

Music and/or songs can also be used in films, broadcasts or games. This section briefly discusses how the film industry, broadcasting industry and gaming industry operate and interacts with the music industry respectively.

3.2.1 Film industry

Music is often synchronised with films. If a film production company, sometimes known as a "studio", wishes to include a piece of music and/or a song in a film, it has to obtain permission from the creator. Usually, the creator will be asked to assign the copyright in his or her work to the film production company. The film production company will then engage a distributor to distribute the film to cinemas and/or other parties for the purpose of producing DVDs or distributing the films online. Finally, revenue will be generated by box-office sales, sale of DVDs and payment of online streaming services.

3.2.2 Broadcasting industry

The broadcasting industry comprises the television industry and the radio industry. When a broadcasting company wishes to use a piece of music and/or a song in a broadcast, again, it has to obtain permission from the creator. The creator may assign or licence rights in his or her work to the broadcasting company, after which the company will distribute the song to its audience or listeners through a variety of broadcasting networks and/or syndicators. Revenue of the broadcasting industry mainly comes from two sources: for broadcasting service which is free-of-charge, revenue is generated by advertisements; for broadcasting service which charges its audience or listeners, revenue is generated by the subscriptions.

3.2.3 Gaming industry

Creators may also assign or license the rights in their works to game design companies. These companies may then include the works in their gaming products and distribute them. Depending on the types of game involved, other parties such as online retailers and hardware manufacturers may be involved as well. Revenue may be generated by the sale of gaming products and shared among retailers, game design companies and creators.

4. Research Methodology

This study was conducted through both primary and secondary research. The purpose of employing these research methods is to collect information relating to regulation of copyright buyout in the music industry in the Asia-Pacific region and other overseas jurisdictions.

Due to limited time and resources, only 8 jurisdictions from the Asia-Pacific region are selected for this study, namely Australia, Hong Kong, Indonesia, Japan, Macau, South Korea, Thailand and Vietnam. These jurisdictions are selected because of certain distinctive features in their copyright laws and policies, and practices in their music industries. It shall be noted that only Australia and Hong Kong are common law jurisdictions, while others are civil law jurisdictions. For common law jurisdictions, court decisions enjoy authoritative status and are one of the sources of law. Decisions by courts in overseas common law jurisdictions may also have referential values. Whereas for civil law jurisdictions, legislation is the only main source of law, and court decisions may only serve as references.

4.1 Questionnaires

Questionnaires have been distributed to CMOs in the Asia-Pacific region in order to collect data regarding the current trend and features of copyright buyout transactions in their respective jurisdictions. Responses have been collected from the following CMOs:

(a) Australasian Performing Right Association Limited and Australasian Mechanical Copyright Owners Society Limited ("APRA AMCOS") in Australia and New Zealand;

(b) Composers and Authors Society of Hong Kong Limited ("CASH") in Hong Kong;

(c) Wahana Musik Indonesia ("WAMI") in Indonesia;

(d) Japanese Society for Rights of Authors, Composers and Publishers ("JASRAC") in Japan;

(e) Macau Association of Composers, Authors and Publishers ("MACA") in Macau;

(f) Music Copyright Society of China ("MCSC") in Mainland China;

(g) Korea Music Copyright Association ("KOMCA") in South Korea;

(h) Music Copyright Society of Chinese Taipei ("MÜST") in Taiwan;

(i) Music Copyright Thailand Limited ("MCT") in Thailand;

(j) Myanmar Performance Rights Organization ("MPRO") in Myanmar; and

(k) Vietnam Center for Protection of Music Copyright ("VCPMC") in Vietnam.

Upon receipt of the responses, the author asked some of the CMOs follow-up questions to seek clarification and/or further elaboration. The author would like to take this opportunity to thank the above CMOs for their assistance in providing useful data and information regarding copyright buyout in their respective jurisdictions.

Although questionnaire responses were also collected from CMOs in Mainland China, Taiwan and Myanmar, these jurisdictions are not covered in detail for two reasons. First, in all three jurisdictions, while the respondent CMOs do note that copyright buyout takes place in their respective music industries, there has been little indication that these practices have raised specific issues beyond those reflected in the 8 selected jurisdictions, except where the respondent CMO in Myanmar remarked that most creators in the jurisdiction engage in buyout arrangements without any written contract. This renders it impossible to assess such arrangements or identify any possible imbalances of power, and should be addressed by raising awareness among creators, publishers, record labels and producers on the need for written contracts. On the other hand, the 8 selected jurisdictions present more specific issues which could be discussed and disseminated with a detailed analysis of their practices.

There is also an absence of special features in the laws and policies of Mainland China, Taiwan and Myanmar about copyright buyout. For instance, in Mainland China, as in most of the selected jurisdictions, moral rights are unwaivable. On the other hand, its laws do not have any provisions on aspects such as termination rights, equitable remuneration or the like. In Taiwan, similarly, these provisions are not found. Also, its laws invalidate any unfair contractual provisions in standard form contract only, as in certain other selected jurisdictions. In Myanmar, creators lack rights such as termination or equitable remuneration, and the country does not offer any measures on top of what has been observed in the other jurisdictions. In this regard, it is believed that a detailed analysis of the 8 selected jurisdictions would highlight the most salient features which warrant reference, and aspects which require reforms, on copyright buyout in the Asia Pacific region.

4.2 Literature review

Additionally, local statutes, court decisions, publications by government authorities and non-government organisations, and academic writings in relation to copyright buyout in the music industry in the Asia-Pacific region have been reviewed. Legal materials from some other overseas jurisdictions are also looked into where appropriate.

5. Key Features of Current Copyright Buyout Practices in the Music Industry in Selected Jurisdictions

Before studying the copyright laws and policies in selected jurisdictions in detail, it would be helpful to get an overview of the key features of current copyright buyout practices in the music industry in each of the jurisdictions.

5.1 Australia

APRA AMCOS is an influential CMO in Australia. It is commonplace for creators to assign the performing rights in their works to APRA AMCOS before transacting with other parties. As a result, copyright buyout agreements usually state that the parties' rights are "subject to the prior rights vested in APRA AMCOS". Any royalties generated by the exploitation of performing rights in the works will be distributed by APRA AMCOS to its members according to what have been among them. For example, Audio Network, which is a music publisher, does not charge sync fees from producers who use its music and only relies on pipeline CMO royalties.

Recently, Soundreef Ltd,[4] which is an organisation based outside Australia, is approaching the members and licensees of APRA AMCOS. Although these organisations carry out similar functions like traditional CMOs, they tend to operate unconventional royalty distribution systems in order to attract new members. In response, APRA AMOCS has supplied a long list of copyright-free background music services in its territories.

5.2 Hong Kong

There are not many documented cases of copyright buyout in Hong Kong's music industry. Among the documented cases, many involve creators being commissioned by film production companies to compose music and/or write songs for their films. Usually, it is agreed between the parties that the film production company shall own the copyright in the works. In some agreements, it will also be stated that the creator waives "all rights to which [the creator] may be entitled as the author of any of the works created or contributed by [the creator] in connection with the [film] and any other moral rights … in relation to the production and exploitation of the [film]…"

Cases involving government departments can be found as well. It is commonly agreed between the creator and the respective department that copyright in the works shall belong to the department (and in effect the Hong Kong government).

5.3 Indonesia

Copyright buyout transactions in Indonesia often involve music and/or songs (both melody and lyrics included) to be used in advertisements, films or television programmes.

[4] "Soundreef Ltd is an Independent Management Entity (Directive 2014/26/EU) publicly registered with the Intellectual Property Office of the United Kingdom, Spain and the Czech Republic": see Sounreef Ltd <http://www.soundreef.com/en/about-us/> accessed 29 October 2019.

It is found that advertising agencies and film production companies commonly ask creators to transfer all economic rights in the music and/or songs to them for a perpetual term.

Meanwhile, many television broadcasting companies chose to enter into agreement with creators for the transfer of performing rights in their music and/or songs. However, perhaps due to a misunderstanding of the scope of the transfer, some television broadcasting companies wrongly assumed that they also owned synchronisation rights in the works, and played the music and/or songs in some of their sportainment and infotainment programmes.

5.4 Japan

In Japan, copyright buyout transactions usually involve music and/or songs (both melody and lyrics included) that are intended to be used in films, television programmes, television advertisements and games.

Film production companies often commission creators to compose music and/or write songs for their films. Invariably, the commissioning agreement provides that upon initial payment by the film production company to the creator, only performing and synchronisation rights in the copyright work shall be transferred; and the creator shall retain the right to receive royalties. Where these parties are members of JASRAC, JASRAC will distribute licences and collect royalties on their behalf.

Similar trend can be found in the television broadcasting industry. Back then in early 1960s, it was common for television broadcasting companies to commission creators to compose music and/or write songs for their television programmes or advertisements, and creators were often asked to transfer all economic rights in their works to the companies. For example, in 1964, Takashi Miyata was commissioned by NHK, a Japanese public broadcasting company, to write the song "Tokyo Gorin Ondo". At that time, NHK bought out all economic rights in the song, and Takashi Miyata did not retain any rights to receive royalties. However, things have begun to change since the 1990s. Commissioning was still prevalent, but commissioning agreements usually provided that upon initial payment by the television broadcasting company to the creator, only performing and synchronisation rights in the copyright work shall be transferred; and the creator shall retain the right to receive royalties. That said, where a television broadcasting company intended to use the music and/song in television advertisements and for other purposes, it is usually agreed that the creator only enjoys the right to royalties when the music and/or song is used for non-advertising purposes.

In the meantime, copyright buyout transactions in the gaming industry are usually carried out in a different manner. Instead of commissioning creators, game design companies would employ creators to compose music and/or write songs for their game products. The result is that subject to agreements to the contrary, these companies, as employers are presumed by law to be the first copyright owner of the works created by their employees.[5] For example, Nobuo Uematsu was

[5] Copyright Law of Japan, Art 15. See also discussion in Part 6.5 below.

employed to compose music for the video game "Final Fantasy", but he did not own any copyright in the music at all. Copyright was actually vested in his employer, Square Enix, which is a game design company. Still, there are a few game design companies that prefer commissioning creators to compose music and/or write songs for them. For these cases, it is usually agreed that the company shall obtain mechanical reproduction and synchronisation rights in the copyright work; and the creator shall retain the right to receive royalties. Again, where these parties are members of JASRAC, JASRAC will distribute licences and collect royalties on their behalf.

It is noted that the enactment of the Act on Copyright, etc. Management Service (Act No 131 of 2000) in 2000 has led to the emergence of new CMOs such as e-License Inc. and Japan Rights Clearance Inc. in Japan. While JASRAC has always played a significant role in the market, its blanket collection of broadcast royalties was alleged to have the effect of making entry into the market difficult for other business operators. In 2015, the Supreme Court of Japan, upholding the Tokyo High Court's decision, suggested that JASRAC should take into account non-JASRAC repertoire share in its broadcast royalty calculation method.[6] When e-License and Japan Rights Clearance merged into a new organisation called NexTone in 2016, it was predicted that JASRAC's market power would be diluted.[7]

5.5 Macau

In Macau, copyright buyout transactions usually take place between film production companies and creators, as well as between television stations and creators. Typically, creators are commissioned or employed to compose music and/or write songs for a particular film or television programme.

Some government departments also tend to employ or commission creators to compose music for use in special events. An example is the Macau Light Festival 2017. The creators engaged are often required to assign their economic rights to the Macanese government.

5.6 South Korea

A number of issues relating to copyright buyout transactions and copyright management arose in South Korea recently. For example, there was a case that featured Roy Entertainment, a television broadcasting company who holds a large market share in the broadcast music industry, and dozens of young composers in South Korea.[8] Roy Entertainment has employed the young composers to compose music for their television dramas and other television programmes. Some of these composers later complained that they have been asked to sign agreements which have the effect of permanently transferring all of their rights, including both moral and economic rights, in their works to Roy Entertainment against their will. And according to these composers, if they refuse

[6] Supreme Court Decision H26 (Gyo-Hi) No. 75.
[7] Daisuke Kikuchi, "Stranglehold on music copyrights is loosening in Japan" *TheJapanTimes* (Japan, 27 December 2015) <https://www.japantimes.co.jp/culture/2015/12/27/music/stranglehold-music-copyrights-loosening-japan/#.XbjoYi-cbX9 > accessed 29 October 2019.
[8] 남은주 기자, "TV 속 배경음악마저 '열정 페이'의 결과물이었나" *The Hankyoreh* (South Korea, 19 August 2015) <http://www.hani.co.kr/arti/culture/culture_general/705125.html> accessed 17 October 2019.

to sign the agreement, Roy Entertainment will still use the music as if it owns the copyright in it without informing the composers. Moreover, in fact, the composers were not paid for many of the songs they have written.[9]

The approval given by the Ministry of Culture, Sports and Tourism for the establishment of a new CMO called Korean Society of Composers, Authors and Publishers ("KOSCAP") in 2015 has also aroused much public attention in South Korea. As expected, KOMCA, which has been the most influential CMO for many years in the country, resented the Ministry's decision. Additionally, around 50 singers and composers, who were also members of KOMCA, held a press conference to complain about the Ministry's decision.[10] These members viewed that the establishment of KOSCAP would dilute KOMCA's market share, thereby reducing the amount of royalties they were able to receive under KOMCA's royalty distribution system.[11]

Meanwhile, in the gaming industry, it is not uncommon for game design companies to commission creators to compose music and/or write songs for their game products. The commissioning agreement usually provides that creators do not retain any rights to receive royalties following the transfer of copyright in the music and/or songs (both melody and lyrics included) to the game design company.

5.7 Thailand

Copyright buyout is prevalent in the music industry in Thailand. Before the enactment of the Copyright Act, B.E. 2537 (1994), many agreements between creators and music publishers or record labels did not state clearly who shall own the copyright in the music and/or song (both melody and lyrics included) concerned. Neither did they specify the terms and conditions of the copyright buyout. In particular, for employee works and commissioned works, given employees and commissioned parties are presumed by law to be the first copyright owners of their works,[12] only some music publishers or record labels would purchase copyright from their employees or the commissioned parties. Again, the terms and conditions of the copyright buyout transaction were usually poorly drafted. For example, the contract might not specify the duration of the transfer and the kind of rights to be transferred. What eventually happened was that music publishers or record labels would consider themselves to not only own the copyright for an unlimited period, but also enjoy unlimited power to exploit the copyright work.

Since the Copyright Act, B.E. 2537 (1994) came into force, more employers and commissioning parties have entered into written agreements with their employees and the commissioned parties for the buyout of copyright in employee works and commissioned works respectively. Nonetheless, cases where the parties have not entered into any written contracts can still be found. Sometimes,

[9] Jin-Woo Jeong, and Soo-Jin Peck, "Art Pundits Protest Unfair Working Conditions." *Korea JoongAng Daily* (South Korea, 17 March 2016) <http://koreajoongangdaily.joins.com/news/article/article.aspx?aid=3016300> accessed 17 October 2019.
[10] Yim, Seung-Hye. "Divided Royalties Engage Musicians" *Korea JoongAng Daily* (South Korea, 28 July 2015) <http://koreajoongangdaily.joins.com/news/article/article.aspx?aid=3007112> accessed 17 October 2019.
[11] *ibid.*
[12] See also discussion in Part 6.5 below.

even if there are written agreements, the terms relating to copyright ownership have not been properly drafted. Example of an ill-drafted agreement is an agreement which provides that the creator and other parties shall be "co-owners" of all economic rights in the work, but without indicting clearly how the rights shall be divided between and exercised by the parties. For such cases, it often turns out that the music publisher or record label would exploit and exercise most economic rights in the work.

Moreover, the problem that creators do not receive decent remuneration from copyright buyout transactions still exists. Music publishers and record labels were reluctant to offer high prices to creators, for they claimed that high investment costs and risks were involved in the distribution and promotion of music products. More unbelievably, if a creator who has contracted away copyright in his or her work wishes to use or perform the work subsequently, he or she has to pay the new copyright owner a significant sum of money, which usually ranges from ฿20,000 to ฿50,000 (approximately US$640 to US$1,600) for each song per event. The CMO in Thailand, MCT, has already expressed concerns about unfair copyright buyout transactions to the Department of Intellectual Property for a number of times, but no significant action has been taken by the government.

On the other hand, it is observed that some creators in Thailand were unaware of the legal presumptions governing the copyright ownership of employee and commissioned works. Recently, Ford Sobchai Kraiyoolsen ("Ford"), a Thai singer-composer and former employee of RS Public Company Limited, performed a song composed by him when he was still the company's employee during a public event. Both Ford and the responsible event organiser were sued by RS Public Company Limited. Since the song concerned was written by Ford in context of employment, it was held that RS Public Company Limited, as the employer, shall enjoy the right to communicate the work to the public,[13] and the defendants should compensate for the company's loss.[14]

5.8 Vietnam

Two problems in relation to copyright buyout transactions in Vietnam can be identified. One is that parties involved in copyright buyout transactions often fail to fully appreciate the effect of the transactions. The other concerns the lack of effective communication and coordination between VCPMC and its members.

These problems can be illustrated through the case which involved a song called "Cùng Nhau Ta Thắp Sáng". This song was written by two composers, Thanh Bùi and Khánh Linh, who then sold all of their rights in the song to Novel Production, which was both a music production company and television broadcasting company. Although the composers were members of VCPMC, they

[13] The Copyright Act B.E. 2537 (1994), s 9 provides that "In the case of a work created by an author who is an employee in the course of employment, in the absence of a writing to the contrary, copyright shall vest in the author, provided that the employer has a right to communicate such work to the public in accordance with the purpose of the employment." For more discussion on the regulation of copyright ownership of employee works and commissioned works, see Part 6.5 below.

[14] Insranews Agency, "อาร์เอสฯ แจ้งความคดีลิขสิทธิ์ผู้จ้างวาน"ฟอร์ด" ร้องเพลงตัวเองในงานแต่ง" *Insranews* (Thailand, 17 January 2015) <https://www.isranews.org/isranews-news/item/35865-news05_35865.html> accessed 17 October 2019.

did not inform VCPMC of the copyright buyout transaction. Due to its absence of knowledge about the transaction, VCPMC continued to distribute licences for use of the song to others, including a television broadcasting company that wishes to include the song in one of their advertisements. Upon discovery, the composers accused VCPMC of licensing the song without seeking their permission in advance. While the composers were more to blame because of their failure to inform VCMPC of the transaction in the first place, this case showed that VCPMC lacked power to check the status of copyright ownership of the works it manages. This can cause serious consequences such as unauthorised licensing and damages to the new copyright owner's business.

In fact, there are several other instances which reflect the communication and coordination problems between VCPMC and its members:

- Wendy Thào, a member of the VCPMC, intended to transfer the right to reproduce the music she composed in digital form to companies such as Nam Việt Media and NhacPro.VN. Their written agreement however did not reflect that intention. It was instead stated that the creator shall transfer all of her rights to these companies. Strangely, the parties did not act according to the agreement but according to what they initially agreed. Since VCPMC was not aware of the practice between the parties themselves, it has been distributing royalties based on their written agreement.

- Zơ Râm Hữu Danh, a songwriter and also a VCPMC member, transferred copyright in a song which he wrote, "Dream of Where You Are" to Keeng, an online film and music streaming platform. The songwriter informed VCPMC of the copyright buyout transaction but did not inform VCPMC of the terms and conditions of the transfer. Eventually, VCPMC found that under the agreement, as part of the remuneration, the songwriter had been entitled to retain his rights in the work for two years before transferring them for an unlimited period to Keeng.

In response to existing problems, VCPMC indicated that it would advise creators to be more involved in the drafting of copyright buyout agreements; and help review the transaction documents in order to ensure that the creators' rights are well-protected in the future.

6. Laws and Policies that Regulate Copyright Buyout in Selected Jurisdictions

This part compares and evaluates laws and policies that regulate copyright buyout in selected jurisdictions, namely Australia, Hong Kong, Indonesia, Japan, Macau, South Korea, Thailand and Vietnam based on the following issues:

(a) Are there any unwaivable rights under the copyright law?

(b) Is there any legislation that regulates unfair copyright buyout contracts?

(c) Do creators enjoy the right to equitable remuneration?

(d) Under what circumstances can a copyright buyout contract be legally revoked?

(e) Are there any provisions that govern the copyright ownership of employee works and/or commissioned works?

(f) Are there any provisions that regulate the government's copyright ownership and copyright buyouts that involve the government?

(g) Are public campaigns regularly held to increase public awareness of copyright issues?

The significance of each issue is explained in detail below. Table 1 summarises the laws and policies that regulate the buyout of copyright in music and songs (both melody and lyrics included) in selected jurisdictions.

Table 1 – Laws and policies that regulate the buyout of copyright in music and songs (both melody and lyrics included) in selected jurisdictions

	Any unwaivable rights?	Any legislation that regulates unfair copyright buyout contracts?	Any right to equitable remuneration?	Under what circumstances can a copyright buyout contract be legally revoked?	Any provisions that govern copyright ownership of employee works and/or commissioned works?	Any regulation of government's copyright ownership and copyright buyouts that involve the government?	Any public campaigns?
Australia	Yes (moral rights: s 195AN(3), Copyright Act 1968)	Formed unfairly: yes (Contract Reviews Act 1980, common law); Unfair terms: yes (Competition and Consumer Act 2010)	No	Depends on what have been actually agreed between the parties	Yes (employee's work: s 35(6), Copyright Act 1968; commissioned works: ss 35(1)&(3), 97 and 98 Copyright Act 1968)	Yes (s 176(2), Copyright Act 1968)	Yes (e.g. legal advice sessions, copyright seminars)
Hong Kong	No (NB: moral rights can be waived by a written instrument, but they are not assignable to third party: s 105, Copyright Ordinance)	Formed unfairly: yes (common law, Misrepresentation Ordinance); Unfair terms: no	No	Depends on what have been actually agreed between the parties	Yes (employee's work: s 14, Copyright Ordinance; commissioned works: s 15, Copyright Ordinance)	Yes (s 182, Copyright Ordinance)	No

Indonesia	Yes (moral rights: Art 5, Law No. 28 of 2014 on Copyrights)	Formed unfairly: yes (Indonesian Civil Code); Unfair terms: no	No	Depends on what have been actually agreed between the parties; or if the contract is for unlimited period, when it reaches 25 years (Art 18, Law No. 28 of 2014 on Copyrights)	Yes (employee's work and commissioned works: Art 36, Law No. 28 of 2014 on Copyrights)	No	Yes (e.g. legal clinics, panel discussions on practices in the music industry)
Japan	Yes (moral rights: Art 59, Copyright Law of Japan)	Formed unfairly: yes (Civil Code); Unfair terms: unclear, note recent amendments of the Civil Code	No	Depends on what have been actually agreed between the parties; or in case of non-exploitation of publication rights (Art 84, Copyright Law of Japan)	Yes (employee works: Art 15, Copyright Law of Japan)	No (but in practice, government usually commission creators and require them to assign copyright in their works to the government)	No
Macau	Yes (moral rights: Art 41, Republication of the Regime of Copyright and Related Rights ("Macanese copyright law")	Formed unfairly: yes (Commercial Code); Unfair term: no	Yes (Art 12, Macanese copyright law)	Depends on what have been actually agreed between the parties; or if the contract (for cinematographic productions) is for unlimited period,	Yes (employee works: Art 12, Macanese copyright law; commissioned works: Arts 151 (photograph) and 168 (computer	No (but in practice, government usually commission creators and require them to assign copyright	Yes (e.g. copyright fair, camps for songwriters,

				when it reaches 25 years (Art 111, Macanese copyright law); or when the creator suffers from considerable prejudice (Art 87(2), Macanese copyright law)	program), Macanese copyright law)	in their works to the government)	open days of CMOs)
South Korea	Yes (moral rights: Art 14, Copyright Law of Korea)	Formed unfairly: yes (Civil Act of Korea); Unfair terms: no	No	Depends on what have been actually agreed between the parties; or in case of non-exploitation of publication rights (Art 60, Copyright Law of Korea)	Yes (employee works: Art 9, Copyright Law of Korea)	No	No
Thailand	Yes (moral rights: s 18, Copyright Act, B.E. 2537 (1994))	Formed unfairly: yes (Civil and Commercial Code of Thailand); Unfair terms: yes, but only in standard form contracts (Unfair Contract Terms Act)	No	Depends on what have been actually agreed between the parties; or if the contract is for unlimited period, when it reaches 10 years (s 17, Copyright Act, B.E. 2537 (1994))	Yes (employee works: s 9, Copyright Act, B.E. 2537 (1994); commissioned works: s 10, Copyright Act, B.E. 2537 (1994))	Yes (s 14, Copyright Act, B.E. 2537 (1994))	Yes (e.g. annual meetings)

Vietnam	Yes (moral rights, but except the right of publication: Art 45(2), Law on Intellectual Property)	Formed unfairly: yes (Civil Code); Unfair terms: no	No	Depends on what have been actually agreed between the parties	Yes (employee works and commissioned works: Art 39, Law on Intellectual Property)	Yes (Art 42(1), Law on Intellectual Property)	Yes (e.g. copyright seminars, legal advice sessions)

6.1 Are there any unwaivable rights under the copyright law?

"Unwaivable rights" are rights that cannot be contracted out or given up by their owners. If a contract or a contract term purports to assign or transfer unwaivable rights, it shall be rendered unenforceable.

Moral rights are unwaivable in Australia, Indonesia, Japan, Macau and South Korea.[15] Moral rights are personal rights in a copyright work which its creator is entitled to, such as the right to be identified as author of the work and the right to integrity of the work.[16] What moral rights actually comprise varies from jurisdiction to jurisdiction. However, it is important to note that moral rights are different from copyright, which comprises a bundle of economic rights.

In Australia, "a moral right in respect of work is not transmissible by assignment",[17] subject to certain exceptions. One of them being that if "(a) a cinematographic film; or (b) a literary, dramatic, musical or artistic work as included in a cinematographic film; has 2 or more authors, the author may enter into a written co-ownership agreement by which each of them agrees not to exercise his or her right of integrity of authorship in respect of the film or work, as the case may be, except jointly with the other author or authors."[18] Copyright, on the other hand, is transmissible by assignment.

In Indonesia, moral rights "cannot be transferred as long as the Author is alive",[19] whereas copyright "may be transferred, either in whole or in part by: a. inheritance; b. grant; c. waqf; d. testament; e. written agreement; or f. other justifiable reasons in accordance with the provisions of laws and regulations."[20] Likewise, in Macau, economic rights are transferrable,[21] while moral rights "shall be independent of his economic rights, inalienable, unrenounceable and imprescriptible."[22]

Provisions in Japan and South Korea are largely similar. Under their copyright laws, an author's moral rights belong exclusively to the author and cannot be assigned,[23] but copyright can be transferred in whole or in part.[24]

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[15] See Table 1.
[16] Nicholas Caddik QC, Gillian Davies and Gwilym Harbottle, *Copinger and Skone James on Copyright* (Sweet & Maxwell 2017), 1-14. See also Kenny Wong and Alice Lee, *Intellectual Property Law and Practice in Hong Kong* (Sweet & Maxwell 2017), 3.102. When the copyright work is an employee work or a commissioned work, the creator, who is an employee or commissioned party, may not be entitled to moral rights because he or she is not the copyright owner of the work, see Part 6.5 below for further discussion.
[17] Copyright Act 1968, s 195AN(3).
[18] Copyright Act 1968, s 195AN(4).
[19] Law of the Republic of Indonesia No. 28 of 2014 on Copyrights, Art 5.
[20] Law of the Republic of Indonesia No. 28 of 2014 on Copyrights, Art 16.
[21] Republication of the Regime of Copyright and Related Rights, approved by Decree-Law no. 43/99/M, of August 16 ("Republication of the Regime of Copyright and Related Rights"), Art 28.
[22] Republication of the Regime of Copyright and Related Rights, Art 41.
[23] Copyright Law of Japan, Art 59; Copyright Law of Korea, Art 14(1).
[24] Copyright Law of Japan, Art 61(1); Copyright Law of Korea, Art 45(1).

Meanwhile, in Thailand, although copyright is assignable,[25] a creator "shall be entitled to identify himself as the author and to prohibit the assignee or any person from distorting, shortening, adapting or doing anything detrimental to the work to the extent that such act would cause damage to the reputation or dignity of the author."[26] Since nowhere in the Act expressly provides that a creator can transfer or assign the right to be identified as author and the right to prohibit third parties from damaging the integrity of his or her work to a third party, or waive them by any other means, the reasonable inference is that moral rights are unwaivable.

Vietnam differs slightly from all the above jurisdictions in that moral rights, also known as "personal rights" under Vietnamese copyright law, cannot be assigned except for the right to publication,[27] while copyright can be assigned.[28]

Hong Kong is an outlier in this respect. Just like many of its counterparts, copyright is transmissible.[29] However, for moral rights, although they are not assignable,[30] they can be waived "by instrument in writing signed by the person giving up the right."[31] Waiver of such kind can be revoked only if it is expressly stated to be subject to revocation.[32] This means that while a creator in Hong Kong cannot assign his or her moral rights to a third party, he or she can still give up the right to enforce them in the future.

The findings above show that in a majority of the selected jurisdictions, creators are allowed to transfer or assign economic rights in their works to third parties freely. However, such freedom being unrestrained by any regulations may leave creators at the risk of being exploited.[33] The case of Macau is worth mentioning here because under Macanese copyright law, "[t]ransfer or assignment of copyright in future works may only apply to works to be produced by the author within a maximum period of seven years."[34] In addition, "where a contract specifies a longer period, it shall be considered limited to the period specified in the preceding paragraph and the remuneration provided for shall be reduced accordingly"[35], and "[a]ny transfer or assignment of economic rights in future works without limitation in time shall be null and void."[36] Notwithstanding that these provisions apply to transactions involving copyright in future works only, they manifest attempts to balance between the interests of creators and assignees or transferees by mandating timely execution of the assignment or transfer. Protection alike cannot be found in other jurisdictions.

[25] Copyright Act B.E. 2537 (1994), s 17.
[26] Copyright Act B.E. 2537 (1994), s 18.
[27] Law on Intellectual Property (No. 50/2005/QH11), Art 45(2).
[28] Law on Intellectual Property (No. 50/2005/QH11), Art 45(1).
[29] Copyright Ordinance (Cap 528), s 101(1), which provides that "Copyright is transmissible by assignment, by testamentary disposition or by operation of law, as personal or moveable property."
[30] Copyright Ordinance (Cap 528), s 105.
[31] Copyright Ordinance (Cap 528), s 98(2).
[32] Copyright Ordinance (Cap 528), s 98(3).
[33] See Parts 6.2 and 6.4 below respectively for further discussion on regulation of unfair copyright buyout contracts and legal termination of copyright buyout contracts.
[34] Republication of the Regime of Copyright and Related Rights, Art 35(1).
[35] Republication of the Regime of Copyright and Related Rights, Art 35(2).
[36] Republication of the Regime of Copyright and Related Rights, Art 35(3).

6.2 Is there any legislation that regulates unfair copyright buyout contracts?

Unfair contracts can arise in two scenarios. First, a contract can be formed in an unfair manner, in that one of the parties entered into the contract because his or her consent has been improperly obtained. For example, a party may have been coerced, unduly influenced, or induced by another party's misrepresentation to enter into the contract. Second, even if a contract is formed with proper consent of all parties, the terms therein may be unfair to one or more of the parties. Accordingly, unfair contracts can be regulated in two ways, namely by preventing contractual parties from obtaining one another's consent through misconduct, and by ensuring that the contract terms are fair to all parties.

In all selected jurisdictions, there are laws that regulate formation of unfair contracts, which include copyright buyout contracts.[37] Nonetheless, only very few of them have also implemented laws that regulate unfair contract terms.[38]

6.2.1 Regulation of contracts that are formed unfairly

Laws that regulate formation of contracts can be found in all selected jurisdictions, but the sources of such laws in common law jurisdictions and civil law jurisdictions respectively are different.[39]

In common law jurisdictions, i.e. Australia and Hong Kong, some legal principles of contractual formation are established by precedents. For instance, contracts can be rendered void because illegitimate pressure has been applied to a party to induce him or her to enter into the contract.[40] Contracts can also be rendered voidable because a party has been subject to undue influence when entering into the contract;[41] or because a party has been induced to enter the contract by a misrepresentation.[42]

Meanwhile, common law jurisdictions can codify the law for certain areas. The effect of such codification is that the legislation shall be the applicable law for those areas. To give an example, in Hong Kong, the laws governing misrepresentation have been codified and can be found in the Misrepresentation Ordinance (Cap 284). A contractual party who alleges that he or she has been induced to enter into the contract by another party's misrepresentation shall rely on the corresponding provisions under the Ordinance in making the claim.[43] Case laws shall be referred to only when necessary for the purpose of statutory interpretation.

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[37] See Table 1.
[38] *ibid.*
[39] See also discussion in Part 4 above.
[40] *Universe Tankships Inc of Monrovia v International Transport Workers Federation (The Universe Sentinel)* [1983] 1 AC 366 (HL); *Huyton SA v Peter Cremer GmbH & Co Inc* [1999] 1 Lloyd's Rep 620.
[41] *Allcard v Skinner* (1887) LR 36 Ch D 145 (CA); *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773 (HL); *National Commercial Bank (Jamaica) Ltd v Hew* [2003] 2 AC 709 (PC).
[42] *Derry v Peek* (1889) 14 App Cas 337 (HL); *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465; *Esso Petroleum Co Ltd v Mardon* [1976] QB 801 (CA); *Royscot Trust Ltd v Rogerson* [1991] 2 QB 297 (CA).
[43] Misrepresentation Ordinance (Cap 284), s 4.

In fact, in civil law jurisdictions such as Indonesia, Japan and South Korea, a contract may be vitiated on the grounds of coercion, undue influence and misrepresentation as well. However, statutes or codified laws are their main source of law. In practice, if a party wishes to vitiate a contract by relying on any of the grounds just mentioned, he or she has to show that the conditions set out in the corresponding provisions have been satisfied. For instance, under the Civil Act of Korea, "[a] juristic act which has conspicuously lost fairness through strained circumstances, rashness, or inexperience of the parties shall be null and void."[44] No definition of "juristic act" has been provided in the Act. Whether or not this provision can be relied on by a party to a copyright buyout contract depends on whether entering into such contract constitutes a "juristic act", and if so, whether the contract "has conspicuously lost fairness through strained circumstances, rashness, or inexperience of the parties." The act of entering into a contract, which includes a copyright buyout contract, is probably a "juristic act" because such an act confers certain legal rights and obligations on the contractual parties. When a contract shall be considered to have lost fairness is however context specific. Unfortunately, since this provision has not been relied on in any cases involving copyright buyout, how fairness of copyright buyout contracts can be assessed is still undecided.

6.2.2 Regulation of unfair contract terms

The findings for this issue are disappointing. Only Australia and Thailand have implemented provisions that regulate unconscionable conduct in trade practice, albeit the scope of application of those provisions is rather narrow. In Japan, new legislative provisions that regulate unfair standard form contracts are promulgated, but how they can be applied to copyright buyout contracts in practice remains unclear. In the rest of the jurisdictions, there are only statutes that regulate unfair terms in consumer contracts, which do not cover copyright buyout contracts.

In Australia, under the Competition and Consumer Act 2010, "A person must not, in trade or commerce, engage in conduct that is unconscionable, within the meaning of the unwritten law from time to time."[45] According to Australian case law, a transaction is unconscionable if a party to the transaction is, by reason of some conditions or circumstances, "placed at a special disadvantage vis-à-vis another and unfair or unconscientious advantage is then taken of the opportunity thereby created."[46] When would a party be considered as being placed at a special disadvantage? It is insufficient to show that there is unequal bargaining power between the parties, or that the weaker party is subject to one of the conditions of "special disadvantage", i.e. sickness, age, sex, illiteracy or lack of education. It must also be shown that the condition has 'impact[ed] the [weaker party's] ability to conserve his or her own interest' and 'render him or her vulnerable to exploitation' as well.[47] In this regard, while the provision is broad enough to cover unfairness that arises out of the inclusion of unfair contract terms in copyright buyout contracts, it seems that

[44] Civil Act of South Korea, Art 104.
[45] Sch 2 to the Competition and Consumer Act 2010, s 20(1). This section does not apply to unconscionable conduct "in trade or commence, in connection with: (a) the supply or possible supply of goods or services to a person (other than a listed company); or (b) the acquisition or possible acquisition of goods or services from a person (other than a listed company)": Sch 2 to the Competition and Consumer Act 2010, ss 20(2) and 21.
[46] *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447, 462; *Kakavas v Crown Melbourne Ltd* (2013) 250 CLR 392, [18].
[47] *Tillett v Varnell Holdings Pty Ltd* [2009] NSWSC 1040, para 54.

in reality, its application is confined to very limited circumstances.[48] Given the lack of judicial guidance as to how the provision can be applied to copyright buyout contracts, whether the provision is helpful to parties involved in copyright buyout transactions in the music industry remains uncertain. Ultimately, if the Act is not applicable to copyright buyout contracts, the parties can resort to the Contract Reviews Act 1980 and contractual principles at common law.

In Thailand, under the Unfair Contract Terms Act, "[t]he terms in a contract between the consumer and the business, trading or professional operator or in a standard form contract or in a contract of sale with right of redemption which render the business, trading or professional operator or the party prescribing the standard form contract or the buyer an unreasonable advantage over the other party shall be regarded as unfair contract terms, and shall only be enforceable to the extent that they are fair and reasonable according to the circumstances."[49] In particular, standard form contracts shall be interpreted against the interests of the party who drafted the contract in case of doubt.[50] When assessing the extent to which the contract terms are fair and reasonable, a list of matters shall be taken into account.[51] However, copyright buyout transactions are rarely carried out through standard form contracts, and so far no cases that involve copyright buyout have relied on the above provisions.

In Japan, the Civil Code was amended in 2017 to regulate standard form contracts. Under the new law, any terms in a standard form contract that are not made in good faith and thus contrary to fair dealing in light of the nature of the transaction and customary practice will be rendered void.[52] The amended Code will come into effect three years after its enactment, i.e. in June 2020. It therefore remains to be seen how the new law will be applied in practice.

In the remaining jurisdictions, there are only statutory provisions that regulate unfair terms in consumer contracts, which do not include copyright buyout contracts.[53] Parties to copyright buyout contracts can only resort to general contract law in case dispute arises. Protection in this sense however is not enough. At the stage of pre-contractual formation, creators and music publishers or record labels may not be able to engage in fair negotiations due to imbalance in bargaining power. Often creators have little or even no influence in the drafting of contract terms.

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[48] Rick Bigwood, "Still Curbing Unconscionability: *Kakavas* in the High Court of Australia" (2013) 37 *Melbourne University Law Review* 463.

[49] Unfair Contract Terms Act, s 4.

[50] *ibid.*

[51] According to s 10 of the Unfair Contract Terms Act, such matters include:

"1. good faith, bargaining power, economic status, knowledge and understanding, adeptness, anticipation, guidelines previously observed, other alternatives, and all advantages and disadvantages of the contracting parties according to actual situation;
2. ordinary usages applicable to such kind of contract;
3. time and place of making the contract or performing of the contract; and
4. the much heavier burden borned [sic] by one contracting party when compared to that of the other party."

[52] Yoshiaki Satake, "Japan: Civil Code reform" *International Financial Law Review* (11 December 2017) <https://www.iflr.com/Article/3774419/Japan-Civil-Code-reform.html?ArticleId=3774419> accessed 25 September 2019; Yasuyuki Kuribayashi and Yuichi Tanaka, "The amendment of part of the Civil Code (law of obligations) was enacted and will be enforced within three years from June 2, 2017 (Part 1 – Pre-formulated Terms and Conditions (teikei yakkan))" (City-Yuwa Partners, June 2017) <http://www.city-yuwa.com/english/legalupdate/shared/pdf/cy_japan_legalupdate_2017_07.pdf> accessed 25 September 2019.

[53] See Table 1.

Creators who are in dire financial situations may still be inclined to enter into the agreement even though the contract terms turn out to be unfair. In the recommendations, whether unfair contract terms should be regulated, and if so, how they should be regulated will be discussed in greater detail.[54]

6.3 Do creators enjoy the right to equitable remuneration?

The right to equitable remuneration ensures that creators receive fair, just and reasonable remuneration for the rights transferred or assigned. Regrettably, no such requirement can be found in copyright laws of the selected jurisdictions except Macau.

In some of the selected jurisdictions, certain persons are entitled to equitable remuneration in situations which fall short of copyright buyout. For example, the Copyright Law of Japan requires that any person who broadcasts copyright works under certain circumstances shall pay the copyright owner "a reasonable amount of compensation".[55] Under Australian copyright law, a person who purports to reproduce a copyright work for the purpose of broadcasting has to pay equitable remuneration to the work's copyright owner.[56]

Remarkably, Macau has elaborate provisions regarding requirements of equitable remuneration than all the other selected jurisdictions. Under the Republication of the Regime of Copyright and Related Rights, "Where the economic rights have been assigned to the person for whom the work was made, the intellectual creator shall be entitled to special remuneration in addition to his agreed remuneration, whether or not the work is actually disclosed or published: (a) when the intellectual creation has clearly gone beyond the limits of even zealous discharge of the responsibility or task assigned; (b) when uses are made of the work or benefits derived from it that were not included among those envisaged when the remuneration was agreed."[57] This provision is perhaps designed to redress possible injustice resulted from the transfer or assignment of copyright in employee works or commissioned works.[58]

Another provision under Macanese copyright law provides that "Where the intellectual creator or his successors, having transferred or assigned the economic rights in the work for a consideration, suffer a grave economic prejudice as a result of manifest disproportion between their income and the receipts earned by the beneficiary of the transfer or assignment, they may demand additional compensation from the beneficiary according to the results of the economic exploitation."[59] Two questions concerning this provision remain unresolved. First, what amounts to "grave economic prejudice"? Second, how can "the results of the economic exploitation" be ascertained? To date, the provision has not been applied to any cases that involve copyright buyout, neither has any judicial decisions laid down the meaning of those phrases. The provision itself seems to have offered some guidance as to what "manifest disproportion between their income and the receipts

[54] See Part 7 below.
[55] Copyright Law of Japan, Art 34(2).
[56] Copyright Act 1968, s 47(3).
[57] Republication of the Regime of Copyright and Related Rights, Art 12(4).
[58] To be discussed in detail in Part 6.5 below.
[59] Republication of the Regime of Copyright and Related Rights, Art 36(1).

earned by the beneficiary of the transfer or assignment" means. It provides that "Where the price of the transfer or assignment of the economic rights in the work is calculated as a proportion of the income derived by the beneficiary from exploitation, the right to additional compensation shall apply only where the percentage established is clearly lower than that customarily paid in transactions of the same nature."[60] Accordingly, copyright buyout transactions which have been carried out in the music industry can be determinative in assessing whether the price of a particular transfer or assignment of copyright in music and/or songs (both melody and lyrics included) is manifestly disproportionate. However, due to the lack of precedent in this area, it remains to be seen how customary practices are discerned and assessed in practice.

That said, the Macanese provisions on the creators' right to equitable remuneration offer an insight into the formulation of laws and policies that can better protect creators' interests.[61]

6.4 Under what circumstances can a copyright buyout contract be legally revoked?

It is often the case that the circumstances under which a contractual party can legally revoke a contract depend on what the parties have agreed to when they enter the contract. A party who revokes a contract when he or she is entitled to do so under the contract will not be held in breach. The effect of revocation is to vest the rights back in the creator and discharge all parties to the contract from further performance. In some of the selected jurisdictions, their copyright laws have prescribed circumstances under which a copyright buyout contract can be revoked.

Examples are Indonesia and Thailand. Under the copyright laws of these jurisdictions, if copyright in a work has been assigned in whole or in part for an unlimited duration, the assignment will be automatically revoked after a certain period of time. In Indonesia, copyrighted books or other written works, songs or music with or without text that are transferred in a sold flat agreement and/or indefinite transfers shall be reverted to the author when the agreement reaches a period of 25 years.[62] A "sold flat" agreement is an agreement that requires the Author to hand over his Work through a full payment by the purchaser so that the economic rights in the Work are entirely transferred to the purchaser without a time limit.[63] Since this piece of legislation was introduced in Indonesia only in 2014, it remains to be seen how these provisions will be administered in practice. Whereas in Thailand, if copyright has been assigned in whole or in part for an unlimited period of time, the assignment shall be deemed to only last for 10 years.[64]

[60] Republication of the Regime of Copyright and Related Rights, Art 36(3).
[61] See Part 7 below for recommendations in this respect.
[62] Law of the Republic of Indonesia Number 28 of 2014 on Copyrights, Art 18.
[63] Elucidation of Law of the Republic of Indonesia Number 28 of 2014 on Copyrights, Art 18.
[64] Copyright Act B.E. 2537 (1994), s 17, which provides that "The owner of copyright may assign his copyright in whole or in part and may assign it for a limited duration or for the entire term of copyright protection. The assignment of copyright by other means, except by inheritance, must be made in writing with the signatures of the assignor and assignee. If the duration is not specified in the assignment contract, the assignment shall be deemed to last for 10 years."

There are similar provisions on automatic termination for contracts of cinematographic productions in Macau. Under Macanese copyright law, "[u]nless otherwise agreed, the authorization given by an author for cinematographic production of a work, whether specifically created for that form of expression or adapted, shall imply the grant of exclusive rights."[65] Where the parties are silent as to the duration of the agreement, "the exclusive rights granted for cinematographic production shall lapse 25 years after the conclusion of the corresponding contract."[66] Meanwhile, what makes Macanese copyright law more distinguished is that it allows an author to revoke a publishing contract within 3 months after being informed of the transfer if the transfer has caused him or her "a considerable prejudice".[67] However, the definition of "considerable prejudice" is not statutorily defined, and there is no judicial guidance as to what the term means.

In Japan and South Korea, although there are no provisions on automatic revocation of copyright transfer and assignment, the owner of the right of publication in a literary work can revoke a publishing contract on the ground of non-exploitation of publication rights. Under the Copyright Law of Japan, where the owner of the right of publication in a copyright work has not discharged certain obligations under the publishing contract, which include publishing the work within 6 months from receiving the work from the creator, and publishing the work "continuously in conformity with business practice",[68] the copyright owner may revoke the contract by notifying the owner of the right of publication.[69] Likewise, under the Copyright law of Korea, if the owner of the right of publication in a copyright work fails to "publish the work within the period of nine months after the date when he received from the owner of the right of reproduction manuscripts or other similar materials which are necessary for the reproduction of the work",[70] or "continue to publish the work in its original form in accordance with customary practice",[71] the copyright owner "may call on him to fulfill his obligation in a prescribed period of not shorter than six months".[72] If the owner of the right of production has failed to fulfil his or her obligation during the prescribed period, the copyright owner may revoke the contract by notifying the owner of the right of production.[73] When it is "impossible for the owner of the right of publication to publish the work, or it is obvious that he has no intention to do so", the copyright owner can revoke the publishing contract immediately by notifying the owner of the right of publication.[74]

In the remaining jurisdictions, a party can revoke a copyright buyout contract legally only when he or she is entitled to do so under the contract.[75] However, given creators, in particular independent

[65] Republication of the Regime of Copyright and Related Rights, Art 111(1).
[66] Republication of the Regime of Copyright and Related Rights, Art 111(2).
[67] Republication of the Regime of Copyright and Related Rights, Art 87(2).
[68] Copyright Law of Japan, Art 81.
[69] Copyright Law of Japan, Art 84.
[70] Copyright Law of Korea, Art 58(1).
[71] Copyright Law of Korea, Art 58(2).
[72] Copyright Law of Korea, Art 61(1).
[73] *ibid*.
[74] Copyright Law of Korea, Art 61(2), which provides that "The owner of the right of reproduction may immediately notify the owner of the right of publication of the termination of the right of publication, notwithstanding the provision of Paragraph (1), when it is impossible for the owner of the right of publication to publish the work, or it is obvious that he has no intention to do so."
[75] See Table 1.

composers and lyricists, usually do not enjoy as much bargaining power as music publishers and record labels do, whether creators can ask for such entitlement under the agreement in the first place is questionable.[76] Injustice may occur when a transferee or assignee fails to exploit the copyright work according to the understanding of the parties. This is because in such a case, the creator cannot reassign or retransfer the rights in his or her work. Neither can he or she revoke the contract unless he or she is allowed to do so under the contract. In this regard, judicial intervention may be needed to remedy the situation.[77]

6.5 Are there any provisions that govern the copyright ownership of employee works and/or commissioned works?

There are legal presumptions governing copyright ownership of employee works and commissioned works in all selected jurisdictions. Nonetheless, there are substantial variations among them in terms of how these presumptions apply.

In Vietnam, where a work is created in the context of employment or pursuant to a commissioning agreement, the employer or the commissioning party shall be the owner of any copyright subsisting in it, unless the agreement specifies otherwise.[78]

Meanwhile, in Japan and South Korea, employers are presumed to be copyright owners of employee works as well, but there are no provisions governing commissioned works.[79] For commissioned works, the general rule that the creator shall be the copyright owner of his or her work applies.[80]

The provisions in Australia, Hong Kong and Macau differ from the jurisdictions mentioned above. In Australia, where a literary, dramatic, artistic or musical work is created by an employee in the context of employment, the employer shall own the copyright subsisting in the work.[81] There is no general provision that governs copyright ownership of commissioned works. Where the commissioned work is a "photograph for a private or domestic purpose",[82] a "painting or drawing of a portrait",[83] "an engraving",[84] sound recording,[85] or cinematographic work,[86] the commissioning party is presumed by law to own the copyright in the work, unless there is agreement to the contrary. For other cases, copyright shall vest in the commissioned party (the creator) of the work.[87] In Hong Kong, while employers are presumed to be the copyright owner

[76] See also Part 6.2.2 above for discussion on how the lack of regulation of unfair contract terms may leave creators at risk of being exploited.
[77] For more discussion see Part 7 below.
[78] Law on Intellectual Property, Art 39
[79] Copyright Law of Japan, Art 15; Copyright Law of Korea, Art 9.
[80] Copyright Law of Japan, Art 14; Copyright Law of Korea, Art 8(1).
[81] Copyright Act 1968, s 35(6).
[82] Copyright Act 1968,s 35(5).
[83] *ibid.*
[84] *ibid*.
[85] Copyright Act 1968,s 97.
[86] Copyright Act 1968,s 98.
[87] Copyright Act 1968, s 35(1).

of employee works,[88] there is no legal presumption alike for commissioned works. The copyright owner of commissioned works shall be "the person who is entitled to the copyright under the agreement".[89] If the commissioning agreement is silent, the author of the work, i.e. the commissioned party, shall be the copyright owner.[90] In Macau, there is no legal presumption as to who shall enjoy copyright ownership of employee works, so copyright ownership shall be determined according to what has been actually agreed.[91] For commissioned works, there are only specific provisions governing copyright ownership of computer programs,[92] and the use of commissioned photographs.[93]

At the other end of the spectrum, in Indonesia, copyright ownership of an employee work and a commissioned work shall vest in the employee and commissioned party respectively unless the agreement specifies otherwise.[94] In Thailand, the copyright ownership of employee works "shall vest in the employee unless otherwise agreed in writing, provided that the employer shall be entitled to communicate such work to the public in accordance with the purpose of the employment."[95] For commissioned works, the commissioning party is presumed to be the first copyright owner subject to agreement to the contrary.[96]

Employees and commissioned parties apparently enjoy more control over their work when they are presumed to be the first copyright owners. However, in reality, there are always other factors that tilt the balance. For example, it is not uncommon that employers and commissioning parties would like to obtain all economic rights in the copyright works. These parties who often enjoy higher bargaining power may make their employees or the commissioned party into agreeing with unfavourable terms in the transfer or assignment of copyright in the works. Therefore, selected jurisdictions are recommended to carry out measures that aim to protect creators from being exploited.[97]

[88] Copyright Ordinance (Cap 528), s 14.
[89] Copyright Ordinance (Cap 528), s 15.
[90] Copyright Ordinance (Cap 528), s 13.
[91] Republication of the Regime of Copyright and Related Rights, Art 12.
[92] Republication of the Regime of Copyright and Related Rights, Art 168(2), which provides that "Where the computer program has been produced for another person or on commission, it shall be presumed that the rights in it have been assigned to the person for whom it was made or who commissioned it, unless expressly agreed otherwise or unless the contrary should emerge from the contract, and without prejudice to the provision of Article 12(4)."
[93] Republication of the Regime of Copyright and Related Rights, Art 151(1), which provides that "Unless otherwise agreed, a commissioned photograph may be reproduced or its reproduction authorized by the person portrayed or by his successors independently of authorization by the photographer."
[94] See Table 1 for corresponding legislative provisions.
[95] Copyright Act, B.E. 2537 (1994), s 9.
[96] Copyright Act, B.E. 2537 (1994), s 10.
[97] See Part 7 below.

6.6 Are there any provisions that regulate the government's copyright ownership and copyright buyouts that involve the government?

Unlike private companies, governments may acquire and enjoy copyright ownership of copyright works through means other than assignments by individuals. Copyright buyout transactions that involve the government are also different in nature from transactions which only involve private companies and individuals because the former may give rise to not just legal, but also policy and administrative issues. Nonetheless, only half of the selected jurisdictions have implemented laws that the government's copyright ownership and copyright buyouts that involve the government.

There are provisions that regulate the government's copyright ownership and copyright buyouts that involve the government in Australia, Hong Kong, Thailand and Vietnam. Under the copyright law in Australia, the Commonwealth or a state is generally the copyright owner of "an original literary, dramatic, musical or artistic work made by, or under the direction or control of, the Commonwealth or the State, as the case maybe."[98] Similar provisions can be found in Hong Kong. Under the Copyright Ordinance (Cap 528), for a work that is made by government official in the course of his or her duties, the government is the first copyright owner of the work.[99] Likewise, in Thailand, "[t]he Ministries, Bureaus, Departments or any other governmental or local agency shall own copyright in a work which is created in the course of their employment, under their instruction or in their control, unless otherwise agreed in writing."[100] And in Vietnam, the State is the copyright owner of anonymous works; "[w]orks, of which terms of protection have not expired but their copyright holders die in default of heirs, heirs renounce succession or are deprived of the right to succession"; and "[w]orks, over which the ownership right has been assigned by their copyright holders to the State."[101]

For the remaining jurisdictions, namely Indonesia, Japan, Macau and South Korea, there are no special laws or policies in this respect. In these jurisdictions, it is common for governments to employ or commission creators to compose music and/or write songs. The general provisions that govern copyright ownership shall apply accordingly.[102] Perhaps it is because the government is involved, it is found that even though there are no specific legislative provisions that regulate government copyright or copyright buyout by governments, creators' interests are given adequate protection under the existing legal frameworks.

6.7 Are public campaigns regularly held to increase public awareness of copyright issues?

In light of how sophisticated copyright laws and policies are, it is vital that stakeholders involved in copyright buyout transactions are conscious of their legal rights and obligations. Holding public campaigns is a means to enhance the public's understanding and vigilance of regulations governing

[98] Copyright Act 1968, s 176(2).
[99] Copyright Ordinance (Cap 528), s 182(1).
[100] Copyright Act, B.E. 2537 (1994), s 14.
[101] Law on Intellectual Property, Art 42(1).
[102] See Part 6.5 above.

copyright buyout. If creators, particularly independent creators, become more aware of potential issues in copyright buyout transactions, they can take steps to protect their own rights before the transfer or assignment takes effect. Except Hong Kong, Japan and South Korea, in all the other selected jurisdictions, public campaigns were held regularly.[103]

Examples of public campaigns include copyright seminars, conferences, panel discussions and legal clinics. These events are often initiated by local CMOs, and governments only occasionally organise such campaigns on their own or in collaboration with CMOs. In Australia, copyright seminars, and workshops on music composition are regularly held by local CMOs and the Australian Copyright Council.[104] In 2018, APRA AMCOS held an event called "High Score", which brought together creators, developers and experts from the gaming industry.[105] There were conferences as well as question and answer sessions covering industry practices and contemporary copyright issues. Networking sessions were also organised so that various stakeholders could express their thoughts of and concerns about copyright laws and policies. The event successfully raised awareness of copyright related issues in the industry. In Vietnam, authorities such as the Ministry of Culture, Sports and Tourism, the Copyright Office and the Department of International Cooperation have organised seminars on copyright on regular basis. VCPMC has also collaborated with its members and the Legal Department in offering legal advice to creators on a case-by-case basis. All these instances can serve as good references for other jurisdictions which do not hold public awareness campaigns.

[103] See Table 1.

[104] For more information about the customised in-house trainings, webinars and symposiums which were previously held by the Australian Copyright Council: see Australian Copyright Council, "Learning & Events" <https://www.copyright.org.au/ACC/Seminars/Customised_Inhouse_Training/ACC/Seminars/Customised_In-house_training.aspx?hkey=48cb42c8-9017-42cb-a950-d4f0416a1c7a> accessed 29 October 2019.

[105] For more information about the event: see Australasian Performing Right Association and Australasian Mechanical Copyright Owners Society Limited (APRA AMCOS), "High Score 2018 Composition and Sound Art for Gaming" <http://apraamcos.com.au/events/2018/october/vic-high-score-composition-and-sound-art-for-gaming/> accessed 12 September 2019.

7. Recommendations

In this part, suggestions as to how existing legal frameworks in selected jurisdictions can be improved will be given. Admittedly, some recommendations are not applicable to all countries, but it is hoped that they can encourage more discussions on regulation of copyright buyout transactions in the music industry and incentivise responsible authorities to design better measures.

For jurisdictions in which members of the public have minimal awareness of their rights and obligations under current copyright laws and policies, it is suggested that their governments focus on holding public campaigns.[106] On the contrary, for jurisdictions in which members of the public already had a basic understanding of copyright law, it is suggested that their governments focus on the rest of the recommendations.

7.1 Regulate unfair terms in copyright buyout contracts

As observed previously, in most of the selected jurisdictions, there is no regulation of unfair contract terms.[107] Creators who enjoy less bargaining power than music publishers and record labels may be pressured to enter into unfair copyright buyout contracts. A music publisher can, for example, threaten not to contract unless the composer agrees to assign all economic rights in the copyright work for an unlimited period. In such a scenario, since the pressure imposed falls short of an illegitimate pressure, the composer will not be able to argue that the contract has been formed illegally. In the absence of laws regulating unfair contract terms, an argument that the contract term is unfair also will not work. Hence, to protect creators, particularly independent composers and lyricists from exploitation, there is a need to regulate unfair terms in copyright buyout contracts.

The Competition and Consumer Act 2010 in Australia demonstrates how unfair contract terms can be regulated. The catch-all provision that prohibits people from engaging in conduct that is unconscionable in trade or commerce,[108] if read literally, is wide enough to cover the inclusion of unfair terms in any contracts. However, in practice, its scope of application has been greatly reduced by the narrow definition of unconscionability laid down by Australian courts.[109]

Given the complexities of the commercial world, a flexible approach should be adopted in determining whether a term of a copyright buyout contract is fair, and whether inclusion of such a term amounts to an unconscionable conduct. In fact, there is another provision under the Competition and Consumer Act 2010 which regulates terms of consumer contracts and small business contracts.[110] Although this provision does not apply to copyright buyout contracts

[106] See Part 7.5 below.
[107] See Part 6.2.2 above.
[108] Sch 2 to the Competition and Consumer Act 2010, s 20(1), which provides that "A person must not, in trade or commerce, engage in conduct that is unconscionable, within the meaning of the unwritten law from time to time."
[109] See discussion in Part 4.2.2 above. See also Rick (n 38).
[110] Sch 2 to the Competition and Consumer Act 2010, s 23(1), which provides that "A term of a consumer contract or small business contract is void if:
(a) the term is unfair; and

because copyright buyout contracts are not "consumer contracts"[111] or "small business contracts"[112], it is referable for present purposes because its approach in assessing fairness of contract terms is more flexible and inclusive. Under this approach, the extent to which the term is transparent, as well as the contract as a whole must be considered when the assessment is being performed.[113] A term of a consumer contract or small business contract would be considered unfair if "(a) it would cause a significant imbalance in the parties' rights and obligations arising under the contract; and (b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and (c) it would case detriment (whether financial or otherwise) to a party if it were to be applied or relied on."[114] Allowing for flexibility in the determination of what amounts to an unfair contract provides safeguards for creators against various kinds of exploitation.

7.2 Grant creators the right to equitable remuneration

In addition to regulating unfair contract terms, creators should be given the right to equitable remuneration so that they can receive a fair share in copyright buyout transactions. The Macanese copyright law, as well as the recently published "Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/19/EC" ("EU Copyright Directive") provide helpful guidance in this respect.[115] The EU Copyright Directive is the focus here, as relevant provisions under Macau's Republication of the Regime of Copyright and Related Rights have already been discussed.[116]

Adopted and came into force on 7 June 2019, the EU Copyright Directive aims to lay down three kinds of rules, namely "rules which aim to harmonise further Union law applicable to copyright and related rights in the framework of the internal market, taking into account, in particular, digital

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(b) the contract is a standard form contract."

[111] Sch 2 to the Competition and Consumer Act 2010, s 23(3), which provides that "A ***consumer contract*** is a contract for:

(a) a supply of goods or services; or
(b) a sale or grant of an interest in land;

to an individual whose acquisition of the goods, services or interest is wholly or predominantly personal, domestic or household use or consumption."

[112] Sch 2 to the Competition and Consumer Act 2010, s 23(4), which provides that "A contract is a ***small business contract*** if:

'(a) the contract is for a supply of goods or services, or a sale or grant of an interest in land; and
(b) at the time the contract is entered into, at least one party to the contract is a business that employs fewer than 20 persons; and
(c) either of the following applies:
    (i) the upfront price payable under the contract does not exceed $300,000;
    (ii) the contract has a duration of more than 12 months and the upfront price payable under the contract does not exceed $1,000,000."

[113] Sch 2 to the Competition and Consumer Act 2010, s 24(2). According to s 24(3), a term is "transparent" if it is:

"(a) expressed in reasonably plain language; and
(b) legible; and
(c) presented clearly; and
(d) readily available to any party affected by the term."

[114] Sch 2 to the Competition and Consumer Act 2010, s 24(1).

[115] COM/2016/0593 final – 2016/0280 (COD).

[116] See Part 6.3 above.

and cross-border uses of protected content", "rules on exceptions and limitations to copyright and related rights, on the facilitation of licences", and "rules which aim to ensure a well-functioning marketplace for the exploitation of works and other subject matter."[117] Within two years starting from the date on which the EU Copyright Directive came into effect, EU member states have to implement the Directive through their national laws.

With a view to ensuring that authors and performers receive fair remuneration when they license or transfer copyright in their works, the EU Copyright Directive requires EU member states to carry out the following three obligations:

- First, EU member states are obliged to "ensure that where authors and performers license or transfer their exclusive rights for the exploitation of their works or other subject matter, they are entitled to receive appropriate and proportionate remuneration."[118] As to what "appropriate and proportionate remuneration" actually means, the EU Directive provides that "[t]he remuneration of authors and performers should be appropriate and proportionate to the actual or potential economic value of the licensed or transferred rights, taking into account the author's or performer's contribution to the overall work or other subject matter and all other circumstances of the case, such as market practices or the actual exploitation of the work."[119] That said, EU member states are "free to use different mechanisms and take into account the principle of contractual freedom and a fair balance of rights and interests."[120]

- Second, EU member states are obliged to "ensure that authors and performers receive on a regular basis, at least once a year, and taking into account the specificities of each sector, up to date, relevant and comprehensive information on the exploitation of their works and performances from the parties to whom they have licensed or transferred their rights, or their successors in title, in particular as regards modes of exploitation, all revenues generated and remuneration due."[121] This is also known as the "Transparency Obligation" under the EU Copyright Directive.[122] The purpose of keeping authors and performers informed of the exploitation of their works is to enable them to accurately assess the economic value of their rights in their works.[123]

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[117] Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/19/EC ("EU Copyright Directive"), Art 1.
[118] EU Copyright Directive, Art 18(1).
[119] EU Copyright Directive, Recital (73). The Recital goes on and states that "A lump sum payment can also constitute proportionate remuneration but it should not be the rule. Member States should have the freedom to define specific cases for the application of lump sums, taking into account the specificities of each sector. Member States should be free to implement the principle of appropriate and proportionate remuneration brought through different existing or newly introduced mechanisms, which could include collective bargaining and other mechanisms, provided that such mechanisms are in conformity with applicable Union law."
[120] EU Copyright Directive, Art 18(2).
[121] EU Copyright Directive, Art 19.
[122] *ibid.*
[123] EU Copyright Directive, Recitals (74) and (75).

- Finally, EU member states are obliged to "ensure that, in the absence of an applicable collective bargaining agreement providing a mechanism comparable to that set out in [Article 20], authors and performers or their representatives are entitled to claim additional, appropriate and fair remuneration from the party with whom they entered into a contract for the exploitation of their rights, or from the successors in title of such property, when the remuneration originally agreed turns out to be disproportionately low compared to all the subsequent relevant revenues derived from the exploitation of the works or performances."[124] Actually, "contracts for the exploitation of rights harmonised at Union level [that] are of long duration" are what this obligation is concerned about.[125] EU member states are expected to permit authors and performers, and their contractual counterparts or their successors-in-title to renegotiate "in the event that the economic value of the rights turns out to be significantly higher than initially estimated."[126] In assessing whether the remuneration is "disproportionately low", the EU Directive provides that "specific circumstances of each case" should be taken account, "including the contribution of the author or performer, as well as of the specificities and remuneration practices in the different content sectors, and whether the contract is based on a collective bargaining agreement."[127]

This is the first time a right to equitable remuneration for authors and performers is introduced in EU copyright law.[128] The rationale behind the introduction is to protect authors and performers, who "tend to be in the weaker contractual position when they grant a licence or transfer their rights, including through their own companies, for the purposes of exploitation in return for remuneration", so that they can "fully benefit from the rights harmonised under Union law."[129] How the new laws will affect the cultural industry remains to be seen, but they certainly reflect the EU's growing concern for creators and its effort to protect them from exploitation.

Jurisdictions from the Asia-Pacific region are therefore recommended to keep an eye on the development of EU copyright law and consider granting creators the right to equitable remuneration as well.

7.3 Require parties to a copyright buyout contract to include an option for the creator to revoke the contract in case of non-exploitation

[124] EU Copyright Directive, Art 20(1).
[125] EU Copyright Directive, Recital (78).
[126] *ibid.*
[127] *ibid.* The Recital added that "Representatives of authors and performers duly mandated in accordance with national law in compliance with Union law, should be able to provide assistance to one or more authors or performers in relation to requests for the adjustment of the contracts, also taking into account the interests of other authors or performers where relevant. Those representatives should protect the identity of the represented authors and performers for as long as that is possible. Where parties do not agree on the adjustment of the remuneration, the author or performer should be entitled to bring a claim before a court or other competent authority."
[128] EU Commission, "Digital Single Market: EU negotiators reach a breakthrough to modernize copyright rules" (Strasbourg, 13 February 2019) <https://europa.eu/rapid/press-release_IP-19-528_en.htm> accessed 29 September 2019.
[129] EU Copyright Directive, Recital (72). Note it is stated in the Recital that "That need for protection does not rise where the contractual counterpart acts as an end user and does not exploit the work or performance itself, which could, for instance, be the case in some employment contracts."

A creator should be allowed to revoke the copyright buyout contract when the transferee or assignee fails to exercise the economic rights transferred or assigned. As soon as the revocation becomes effective, economic rights in the copyright work shall be vested in the creator again, and the transferee or assignee shall be discharged from further performance. Japan, Macau and South Korea only give certain persons the right to revoke contracts involving the transfer of economic rights on the ground of non-exploitation.[130] The coverage of the EU Copyright Directive is more extensive as the right to revoke in case of non-exploitation is intended to apply to all authors and performers.[131]

Under the EU Copyright Directive, the importance of balancing the authors/performers' interest vis-à-vis the licensees/transferees' interest has been emphasised. On one hand, the Directive recognises the need to give authors and performers the right to revoke exploitation agreements in case their works turn out not to have been exploited at all.[132] On the other hand, the Directive acknowledges concerns about abuse of the revocation mechanism and advises that "authors and performers should be able to exercise the right of revocation in accordance with certain procedural requirements and only after a certain period of time following the conclusion of the licence or the transfer agreement." The EU's approach is to be contrasted with that of Indonesia and Thailand. In the latter two jurisdictions, their copyright laws provide that where copyright in a work has been assigned for an unlimited duration, the assignment will be revoked automatically after 25 years and 10 years respectively.[133] It is submitted that the EU's approach is preferred not only because it manages to strike a balance between the interests of different parties, it is also more consistent with the freedom of contract.

Meanwhile, it shall be noted that the EU Copyright Directive does not specify the means which EU member states shall adopt in achieving the intended outcome. Instead, the Directive provides that "[s]pecific provisions for the revocation mechanism … may be provided for in national law, taking into account … (a) the specificities of the different sectors and the different types of works and performances; and (b) where a work or other subject matter contains the contribution of more than one author or performer, the relative importance of the individual contributions, and the legitimate interests of all authors and performers affected by the application of the revocation mechanism by an individual author or performer."[134] In this regard, the EU Copyright Directive can at best serve as a guide for other jurisdictions. When deciding whether or not to extend the right to revoke on the ground of non-exploitation to all authors and performers, responsible authorities are advised to first consult different stakeholders in the cultural industry.

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[130] See Part 6.4 above.
[131] EU Copyright Directive, Article 22(1), which provides that "Member States shall ensure that where an author or a performer has licensed or transferred his or her rights in a work or other protected subject matter on an exclusive basis, the author or performer may revoke in whole or in part the licence or the transfer of rights where there is lack of exploitation of that work or other protected subject matter."
[132] EU Copyright Directive, Recital (80).
[133] See Part 6.4 above.
[134] EU Copyright Directive, Art 22(2).

As mentioned before, Macau has introduced the right to revoke a publishing contract on the ground of "considerable prejudice" being caused to the creator.[135] However, given existing uncertainties as to what the term "considerable prejudice" actually means, and its overlap with the concept of unfairness, it is submitted that it is not practically feasible or necessary to examine Macau's approach.

7.4 For employee works and commissioned works: encourage fair and transparent dealings between the parties

Legal presumptions governing copyright ownership of employee works and commissioned works are rebuttable by evidence.[136] In this regard, the presumptions only provide a starting position for the parties to determine who owns the copyright of the work in question and do not automatically lead to unfairness. To ensure fairness and transparency in the dealings between employers and employees, as well as between commissioning parties and commissioned parties, the recommendations given above regarding regulation of unfair contract terms, granting creators the right to equitable remuneration, and requiring parties to a copyright buyout contract to include an option for the creator to revoke the contract in case of non-exploitation should apply equally to employee works and commissioned works.[137]

Fair negotiations between employers and employees, and commissioning parties and commissioned parties should be encouraged so as to protect employees and commissioned parties from exploitation. For fair contractual negotiations to take place, all parties to the contract should be conscious of their legal rights and obligations in the first place. This can be achieved by increasing their awareness of copyright issues and understanding of copyright law.[138]

7.5 Organise public campaigns to increase public awareness of copyright issues

There is much room for manoeuvre in terms of how public campaigns can be held. It is suggested that local CMOs should take the initiative in organising public education activities and events given their familiarity with copyright laws and policies, and especially existing copyright issues.

The instances of Australia, Macau and Vietnam can serve as good references.[139] Some events such as academic conferences and legal advice sessions were catered for a specific industry or a particular group of stakeholders. By all means, it would be better if the target audience of these events can be extended to more industries and parties, and even members of the public.

[135] See Part 6.4 above.
[136] See Part 6.5 above.
[137] See Parts 7.1 to 7.3 above.
[138] See Part 7.5 below.
[139] See Part 6.7 above.

8. Conclusion

Despite rapid growth of the music industry in the Asia-Pacific region, there are increasing concerns about regulation of copyright buyout transactions. In order to assess the extent to which the interests of various stakeholders in the music industry are protected and well-balanced under existing legal frameworks, this study has critically reviewed and compared the copyright laws and policies, as well as industry practices in the music industry in 8 jurisdiction from the Asia-Pacific region, namely Australia, Hong Kong, Indonesia, Japan, Macau, South Korea, Thailand and Vietnam.

The findings suggest that in a majority of the jurisdictions, there is room for improvement in the following aspects: regulation of unfair contract terms; protection of creators from being deprived of the right to equitable remuneration and the right to revoke copyright buyout contracts under justifiable circumstances; and organisation of public campaigns which aim to raise public awareness of copyright issues. To redraw the balance among creators, music publishers and record labels, it is recommended that unfair terms in copyright buyout contracts should be regulated; creators should be granted the right to equitable remuneration; parties to a copyright buyout contract should be required to include an option for the creator to revoke the contract in case of non-exploitation; and for employee works and commissioned works, fair and transparent dealings should be encouraged. It is also suggested that public campaigns should be held regularly in order to educate the public about copyright law.

While different jurisdictions in the Asia-Pacific region follow distinct legal systems and that each of their music industry engages in diverse industry practices, it is hoped that this study has provided an account of copyright buyout that is sufficient to raise public awareness and encourage discussion of the issues at stake.