CT 2/2010

IN THE COPYRIGHT TRIBUNAL OF THE HONG KONG SPECIAL ADMINISTRATIVE REGION APPLICATION NO. 2 OF 2010

Between

NEWAY MUSIC LIMITED **Originator**

and

HONG KONG KARAOKE LICENSING ALLIANCE LIMITED **Respondent**

Before: Mr. Huen Wong BBS, JP (Chairman)
Ms. Grace Chu (Member)
Mr. Kenneth Wong (Member)

Dates of Hearing: 9 and 11 August 2017; 6, 8, 11 and 13 September 2017; 30-31 October 2017; 1-3 and 20 November 2017; 22, 28-30 November 2017 and 1, 4, 6 and 12 December 2017; 26 January 2018; 13 February 2018; 12, 13, 18 and 20 April 2018; 2, 9, 15 and 16 May 2018; 29 June 2018; 3, 4, 5, 10 and 11 July 2018; 14 March 2019

Date of Decision: 23 December 2019

DECISION

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A. Introduction

1. By this reference, Neway Music Limited (the "**Originator**" or "**Neway**") refers to the Tribunal a licence scheme of Hong Kong Karaoke Licensing Alliance Limited (the "**Respondent**" or "**HKKLA**") for reproduction of karaoke music videos ("**KMVs**").

2. The subject licence scheme – **HKKLA K-Server Licensing Scheme** commenced operation on 1 July 2010. HKKLA was a licensing body authorized by Sony Music Entertainment Hong Kong Limited **("Sony**"), Warner Music Hong Kong Limited ("**Warner**")[1] and Universal Music Limited ("**Universal**") (collectively the "**Record Companies**") to negotiate and grant reproduction licences of their approved KMVs to physical outlets or establishments providing karaoke entertainment services in Hong Kong and Macau ("**K-Server licence or licences**") and collect licence fees from the licensees. The activity of negotiating and granting k-server licences will be described below as "**K-Server licensing**".

3. At all material times, Neway Group was a group of limited companies engaged in operating different karaoke outlet businesses under the trade names "Neway", "CEO" or "CEO Neway". It was the largest karaoke chain in Hong Kong. Neway was a

[1] The repertoire of KMVs of Warner included the repertoire of KMVs of EMI Group pursuant to a licence and distribution agreement between Warner and the EMI Group entered in September 2008.

member of the Neway Group and was responsible for obtaining music licences for the karaoke outlet operators within the group.

B. The Reference

4. Neway issued a Notice of Application on 9 August 2010.

5. In its Statement of Case filed with the Tribunal on the same date, Neway raised the complaint that the terms of the HKKLA K-Server Licensing Scheme were unreasonable, and sought the relief from the Tribunal to vary the terms of the HKKLA K-Server Licensing Scheme as the Tribunal might determine to be reasonable in the circumstances pursuant to section 155(3) and/or section 156(3) of the Copyright Ordinance, Cap. 528 of the Laws of Hong Kong SAR (the "**Ordinance**").

C. The Issues

6. In the early stage of the proceedings, Neway had raised complaints in respect of the following terms of the k-server licences under HKKLA K-Server Licensing Scheme:

   (1) Neway did not have the right to select which KMVs it would like to obtain a K-Server licence for.

   (2) HKKLA's K-Server licence should include KMVs of concert versions of Chinese songs and KMVs of non-Chinese songs.

(3) The determination of when the KMV of a "new song" would become the KMV of an "old song" should be made by reference to the date of the first release of the KMV instead of HKKLA's "Scheme Year".

In its written closing submissions dated 2 October 2018, Neway no longer continued with these complaints.

7. In the Order dated 5 September 2013, after hearing the parties, the Chairman of the Tribunal directed that the reports of the parties' experts should be confined to the following issues:

(1) Whether the tariff of licence fees proposed to be charged by the Respondent under its licensing scheme in respect of the repertoire of "back catalogue" KMVs covered by such scheme (and having regard to the terms upon which the licences for such repertoire were being offered and granted) was unreasonable.

(2) If the answer to Question (1) above was affirmative, what the reasonable tariff should be.

(3) Whether the tariff of licence fees proposed to be charged by the Respondent under its licensing scheme in respect of the package of up to 150 "new" KMVs offered under such scheme (and having regard to the terms upon which the licences for such repertoire were being offered and granted) was unreasonable.

(4) If the answer to Question (3) above was affirmative, what the reasonable tariff should be.

(5) Whether the tariff of licence fees proposed to be charged by the Respondent under its licensing scheme in respect of the package of up to 150 "new" KMVs and the repertoire of "back catalogue" KMVs covered by such scheme offered under such scheme (and having regard to the terms upon which the licences for such repertoire are being offered and granted) was unreasonable.

(6) If the answer to Question (5) above was affirmative, what the reasonable tariff should be.

8. However, it has now transpired that not all the issues in the preceding paragraph are required to be determined by this Tribunal. In its written closing submissions, Neway stated its latest position as follows:

> "4. As HKKLA's Licensing Scheme ceased operation on 30 June 2015, the Originator ("Neway") would not be able to obtain any new licence under the said scheme beyond 30 June 2015. However, this Tribunal has power to make an order under Section 156(4) of the Copyright Ordinance (Cap.528) ("the Ordinance") to protect Neway against any claim for infringement of copyright brought by any of the record companies whose repertoire is included under the HKKLA K-Server Licensing Scheme in respect of use of the copyright works of such record companies beyond 30 June 2015 (*see §§7-10 below*).

5. As HKKLA has not provided a single new KMV to Neway from 1 July 2010 to 31 October 2013 and as Neway had elected not to have any new KMVs from HKKLA from 1 November 2013 onwards, it is not necessary for the Tribunal to determine whether the licence fees charged by HKKLA under the HKKLA Licensing Scheme for new KMVs are reasonable.

   Judgment of Hon L Chan J dated 7 November 2013 §40 [I8981]

   Judgment of Hon L Chan J dated 8 May 2014 §§16-24 [I8988-8990]

6. The focus of the Tribunal should accordingly be on the reasonableness of the licence fees charged under the HKKLA Licensing Scheme in respect of back catalogue KMVs."

9. We should mention that Neway's position stated in paragraphs 5 and 6 of its written closing submissions quoted above had not been stated before since the commencement of these proceedings. It was stated for the first time in its written closing submissions after the close of both parties' case on evidence.

10. Given Neway's latest change of position, the only issue that is now required to be determined by the Tribunal is whether the Respondent's tariff of licence fees under HKKLA K-Server Licensing Scheme in respect of the repertoire of "back catalogue" KMVs covered by such scheme, and having regard to the terms upon which the licences for such repertoire were being offered and granted, was unreasonable; and if the tariff was found to be unreasonable, what the reasonable tariff should be.

11. The Tribunal shall also deal with the question raised in paragraph 4 of Neway's written closing submissions quoted above, namely, whether the Tribunal has power to make an order under Section 156(4) of the Ordinance to protect Neway against any claim for infringement of copyright brought by any of the record companies whose repertoire was included under the HKKLA K-Server Licensing Scheme in respect of use of the copyright works of such record companies beyond 30 June 2015, notwithstanding that HKKLA K-Server Licensing Scheme had ceased operation since 30 June 2015.

D. <u>The Legal Framework</u>

D(1) Relevant Provisions in the Ordinance

12. The definition of "film" in the Ordinance covers KMVs. Section 7 of the Ordinance provides that "film" means any medium from which a moving image may by any means be produced, and that the sound-track accompanying a film is to be treated as part of the film.

13. There is no dispute that HKKLA was a licensing body within the meaning of section 145(4) of the Ordinance.

14. There is also no dispute that the HKKLA K-Server Licensing Scheme was a licensing scheme within the meaning of section 145(1) of the Ordinance.

15. Section 154 of the Ordinance provides, inter alia, that sections 155 and 156 apply to licensing schemes operated by licensing bodies which cover works of more than one author, so far as they relate to licences for copying the work.

16. Section 155 of the Ordinance refers to reference of a proposed licensing scheme to the Tribunal. In its Statement of Case, in addition to section 156 of the Ordinance, Neway also relied on this section in making the reference to the Tribunal. This reliance is not correct. Neway lodged the reference by the Notice of Application on 9 August 2010. On that date, HKKLA K-Server Licensing Scheme was no longer a proposed scheme. It had already commenced operation since 1 July 2010.

17. Under section 156 of the Ordinance, after Neway had referred HKKLA K-Server Licensing Scheme to the Tribunal, the Tribunal should consider the matter in dispute and make such order either confirming or varying the scheme "as the Tribunal may determine to be reasonable in the circumstances". Section 156(4) provides that the order may be made so as to be in force indefinitely or for such period as the Tribunal may determine.

18. As to the effect of an order of the Tribunal, section 160(1) & (2) provides as follows:

> "(1) A licensing scheme which has been confirmed or varied by the Copyright Tribunal – …
>
> (b) under section 156 or 157 (reference of existing scheme to Tribunal),

is in force or, as the case may be, remains in operation, so far as it relates to the description of case in respect of which the order was made, so long as the order remains in force.

(2) While the order is in force a person who in a case of a class to which the order applies –

(a) pays to the operator of the scheme any charges payable under the scheme in respect of a licence covering the case in question or, if the amount cannot be ascertained, gives an undertaking to the operator to pay them when ascertained; and

(b) complies with the other terms applicable to such a licence under the scheme,

is in the same position as regards infringement of copyright as if he had at all material times been the holder of a licence granted by the owner of the copyright in question in accordance with the scheme."

19. Section 167 of the Ordinance sets out specific matters which the Tribunal is required to take into account when determining what is reasonable in relation to a licensing scheme. It reads as follows:

"(1) The Copyright Tribunal shall, in every case before it, have regard to public interest, and in determining what is reasonable on a reference or application under this Division relating to a licensing scheme or licence, the Tribunal shall have regard to –

(a) the availability of other schemes, or the granting of other licences, to other persons in similar circumstances;

(b) the terms of those schemes for licences;

(c) the nature of the work concerned;

(d) the relative bargaining power of the parties concerned; and

(e) the availability to the licensees or prospective licensees of relevant information relating to the terms of the licensing scheme or licence in question.

(2) The Copyright Tribunal shall exercise its powers so as to secure that there is no unreasonable discrimination between licensees, or prospective licensees, under the scheme or licence to which the reference or application relates and licensees under other schemes operated by, or other licences granted by, the same person or any other person.

(3) The mention in subsections (1) and (2) of specific matters to which the Tribunal is to have regard does not affect the general obligation of the Tribunal to have regard to all relevant considerations and in particular, to whether the exercise of its power will result in a conflict with a normal exploitation of the work or will unreasonably prejudice the legitimate interests of the copyright owner."

20. Section 167 of the Ordinance is similar to sections 129 and 135 of the English Copyright, Designs and Patents Act 1988 (the "**English 1988 Act**").

21. Section 129 of the English 1988 Act reads as follows:

> "General considerations: unreasonable discrimination.
>
> In determining what is reasonable on a reference or application under this Chapter relating to a licensing scheme or licence, the Copyright Tribunal shall have regard to –
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> (a) the availability of other schemes, or the granting of other licences, to other persons in similar circumstances, and
>
> (b) the terms of those schemes or licences,
>
> and shall exercise its powers so as to secure that there is no unreasonable discrimination between licensees, or prospective licensees, under the scheme or licence to which the reference or application relates and licensees under other schemes operated by, or other licences granted by, the same person."

22. Section 167(1)(a) & (b) of the Ordinance are the same as section 129(a) & (b) of the English 1988 Act.

23. There are two differences between section 167(1) & (2) of the Ordinance and section 129 of the English 1988 Act.

24. Firstly, section 167(2) ends with the words "or any other person", which do not appear in section 129. Therefore, the requirement of no unreasonable discrimination in section 129 is narrower than section 167(2), in that the scope of comparison in the English 1988 Act is limited to the subject licensing scheme and other schemes operated by the same

person. Nonetheless, given the requirement of the English Copyright Tribunal to have regard to all relevant considerations in section 135 of the English 1988 Act as mentioned below, this distinction appears not significant.

25. Secondly, the matters specified in section 167(1)(c) - (e) of the Ordinance does not find their places in section 129 of the English 1988 Act.

26. Section 135 of the English 1988 Act reads as follows:

> "Mention of specific matters not to exclude other relevant considerations.
>
> The mention in sections 129 to 134 of specific matters to which the Copyright Tribunal is to have regard in certain classes of case does not affect the Tribunal's general obligation in any case to have regard to all relevant considerations."

27. It is apparent that the ending part of section 167(3) of the Ordinance, namely "and in particular, to whether the exercise of its power will result in a conflict with a normal exploitation of the work or will unreasonably prejudice the legitimate interests of the copyright owner", does not appear in section 135 of the English 1988 Act.

28. In short, in addition to the general obligation of the Tribunal to have regard to all relevant considerations, the Tribunal is also required to take account of particular matters stipulated in section 167 of the Ordinance.

29. There has not yet been any decision of the Tribunal on the reasonableness of the terms of a licensing scheme under the Ordinance. Reference may be made to the English decisions under sections 129 and 135 of the English 1988 Act, bearing in mind the differences between the Ordinance and the English 1988 Act as identified above.

D(2) Relevant Legal Principles

30. There was no material disagreement between the parties as to the general principles applicable in the present case, although there was notable difference in the emphasis that each party laid on the relevance and weight of certain English decisions which the Tribunal should attach to the present case. We have considered the decisions referred to us by the parties but would record that we do not consider the Tribunal is bound to follow any of them. It would be helpful to set out below the guidance which can be found from the English decisions and other references, with no particular order.

31. To start with, paragraph 28-120 of Copinger and Skone James on Copyright, 17th ed. describes the general approach of the Tribunal towards the task of determining what is reasonable. It reads as follows (footnotes skipped):

> "**General approach of the Tribunal.** In exercising its task to set terms which are "reasonable in the circumstances", the Tribunal has a discretion in the widest possible terms. Its job is to favour neither copyright owners nor users, but to maintain a balance between them. In the case of an existing or proposed scheme, the Tribunal's function is not limited to one of review. Rather it has to form its own judgment as to whether the referred scheme is reasonable in all the

> circumstances. Accordingly, there is no presumption for or against an existing scheme. On the other hand, where the parties have argued the case on a particular basis, it would be a rare case where the Tribunal (although not bound by their agreement) should depart from that basis. It has been said that ultimately what the Tribunal has to determine is how much of the licensee's total profit should be paid by way of licence fee. In so doing, the Tribunal has to arrive at a figure from the total receipts which is both fair to the licensor in terms of the value of the licensee having access to the copyright works and fair to the licensee in giving him a proper reward for the effort put into the exploitation of the licensor's intellectual property rights.[2]"

32. The classic test is "willing buyer and willing seller". In assessing whether a tariff is reasonable, the English Copyright Tribunal has frequently addressed the matter on the basis that the proper rate is that which would be negotiated and agreed upon between a willing licensor and a willing licensee of the copyright repertoire. A helpful description of this exercise is set out in paragraph 49 of the Interim Decision of the English Copyright Tribunal in *The British Phonographic Industry Limited & ors v Mechanical-Copyright Protection Society Limited*, CT84-90/05, 19 July 2007, [2008] E.M.L.R. 5:

> "Before examination of the relevant circumstances to be taken into account in this notional exercise, it is however common practice to identify an existing tariff as a starting point. If such a licence exists (and particularly, if it is recent) and addresses comparable subject matter - and even better, if it was freely

[2] The last two sentences of this passage was summarized from *AEI Rediffusion Music Limited v Phonographic Performance Limited* [1998] R.P.C. 335, in a passage which the English Copyright Tribunal approved in *Candy Rock Recording Ltd v Phonographic Performance* [1999] E.M.L.R. 155 at 168.

> negotiated (rather than being as it were, 'imposed' by the Tribunal), that may be particularly relevant and helpful in determining the right tariff (and other terms) of a licence. Such an agreement it has been said, is the best record of the market value of the relevant rights at the time (see below 'Comparators')."

33. In relation to a licensing scheme administered by a licensing body, the Originator added that the question to be asked should not be how much a licensee should pay the licensor under a licensing scheme if he had to choose between having a licence or not having a licence at all, citing the English Copyright Tribunal in *British Sky Broadcasting Ltd v The Performing Right Society Limited* [1998] R.P.C. 467 at paragraphs 5.26 and 5.27 in support. While we agree with the Originator on this submission, we would point out that the English Copyright Tribunal in that decision also stressed the need to take into account the benefits of the availability of the full scope of the repertoire and the collective administration of the rights by the licensing body. Therefore, it was in their view also not correct to ask how much would the licensee have to pay if the licensee negotiated separate agreements in a free market with each copyright owner. As explained by the Tribunal at paragraph 5.27:

> "We think the basic proposition, that we should not assume that the broadcaster would pay a ransom price, it is a sound one. However, whilst that is the wrong question, we do not think that the alternative question advanced by Sky [i.e. the broadcaster and the licensee] and Dr Bishop is the right one either. Whilst the PRS [the licensing body and the licensor] undoubtedly have an overwhelming strong bargaining position, the fact that their repertoire is all encompassing and the fact that the collective administration which they offer avoids individual

licensing arrangements are facts which have long been recognized as conferring benefits on the licensee. Sky's argument does not recognize this benefit. Nevertheless, the Tribunal's duty is to moderate the monopolistic aspects of the PRS's position by setting a reasonable royalty. This Tribunal came to the same view in *Association of Independent Radio Companies Ltd v Phonographic Performance Ltd* [1993] E.M.L.R. 181 at 228. Thus, we think it would be fair to take into account, if one could, the extent to which the licensee needs the full scope of the repertoire, and the extent to which he benefits from the collective administration of the rights. These are, however, somewhat vague and non-quantitative considerations."

34. Comparators are important in this exercise. Section 167(1)(a) requires the Tribunal to take into account schemes and licences "to other persons in similar circumstances". Paragraphs 50 and 51 of *The British Phonographic Industry Limited* are instructive:

> "50. **Comparators.** As noted above, s. 129 of the Act requires the Tribunal to take into account schemes and licences 'to other persons in similar circumstances.' Mr Richard Boulton, the Applicants' principal expert, put the position with admirable clarity in his first Report, thus:
>
> > 'The comparable royalties approach is often regarded as the best approach to use in circumstances where the parties do not agree on the level of royalty. Negotiations between a willing licensor and a willing licensee, in the circumstances, will provide, in

> theory, the best available information about the level of a reasonable royalty.'

51. In Association of Independent Radio Companies v Phonographic Performance Limited [1993] E.M.L.R. 181, the Tribunal stressed the importance of comparators:

> 'It is for the Tribunal in assessing the transactions cited as comparable to decide to what extent the rights licensed are of the same **or a similar kind**, whether the transactions were concluded at arm's length with neither side affected by stress, and whether they were affected by legal factors which do not apply in this case. It is then for the Tribunal to adapt any relevant comparators to the case under review.' [Emphasis added]

Thus, starting with a cited comparator, it is open to the Tribunal to take notice of it (or of parts of it) and to use it (or reject it entirely) as the case may require. The authorities show that whilst the utility of comparators has frequently occupied the Tribunal's time, in practice they appear to have been more of a legitimate quarry (or template) for particular terms and figures rather than as full precedents for a particular licence. In a few cases, comparators, particularly comparators from overseas, have proved to possess very little probative value whatever." (footnotes skipped)

35. In deciding whether a scheme or a licence can be relied upon as comparator, the driving consideration should be commercial reality. This was pointed out by the English Copyright Tribunal in *AEI Rediffusion Music Limited v Phonographic Performance Limited*, *supra* at 348, line 30:

> "AEI suggest that in the *AIRC* case the Tribunal held that licences of different legal rights cannot be relied upon as comparators. We do not read the decision as having decided this as comparators. The Tribunal in our view was merely holding that, for the reasons given in the preceding paragraph, they could not see how they could "adapt such a royalty to the facts of this case with amy confidence". **In our view, the Tribunal is entitled to find a licence of a different legal right to the one in dispute as being relevant as a comparator if, in all the circumstances, this is appropriate**. **Likewise, it can disregard a licence of the same legal right if it is inappropriate as a comparator. The task of the Tribunal is to settle rates of remuneration for the use of copyright material, and it seems to us that the driving consideration should be commercial reality.**" (our emphasis in bold)

36. When considering the comparability of any schemes or licences which are the outcome of certain particular negotiation, the Tribunal should also consider carefully the circumstances surrounding such particularly negotiated tariff and see whether there were any special considerations which might deprive a particular negotiated rate of its cogency in support of the tariff under review, see *Working Men's Club and Institute Union Limited v The Performing Right Society Limited* [1992] R.P.C. 227 at 238 line 5.

37. If the Tribunal is satisfied that there exist other licences which are sufficiently comparable to the licence they are going asked to settle, the Tribunal should adopt a similar rate absent any special circumstances, see *AEI Rediffusion Music Limited, supra* at 347 line 30, which was approved by the English High Court in *CSC Media Group Ltd v Video Performance Ltd*, [2011] R.P.C. 139 at 144, paragraph 16, *per* Floyd J.

38. The other important factor that the Tribunal should take into account is that the tariff should be simple and workable, as said by the English Copyright Tribunal in *The British Phonographic Industry Limited* at paragraph 57:

> "The tariff should be simple and workable having regard to the service being licensed – "*with a straightforward rate structure based on straightforward definitions*". Most tariffs can be shown to produce anomalies in certain circumstances but a complex rate structure will be more likely to produce anomalies (and thus problems) particularly at the margins of its rates: AIRC v PPL [1993] EMLR 181 at 229. Simplicity of operation and clarity of expression should always be a desideratum. In Universities UK v CLA [2002] RPC 693, the Tribunal said:
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> > 'Overall we have been seeking to achieve a simple, economic, universal system promoting good education for the benefit of staff and students whilst at the same time achieving fair and reasonable remuneration for the owners of the rights.' (at p726)"

39. We should also make a mention on the relevance of revenue and profits. In cases where the licensing body seeks to base payment for a licence on the revenue or profits of the licensee there must be a sufficient causal link between the use by the licensee of the copyright work in question and the revenue or profits of that licensee. As stated by the English High Court in *CSC Media Group Ltd*, *supra* at 144, paragraph 17:-

> "A revenue-based royalty system may be justified in some cases. After a review of the cases in *British Sky Broadcasting Ltd v The Performing Right Society Limited* [1998] R.P.C. 467, [1998] EMLR 193, the Tribunal concluded at para. 6.10 that:
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> > 'What the decided cases show is that, before one can use revenue as a measure of the value of music to a broadcaster, one must be satisfied that there is an adequate nexus between the use of music and the revenues earned.'

40. Regarding profits, paragraph 28-131 of Copinger and Skone James on Copyright, 17th ed. is instructive. It reads:

> "Even where the basis of the payment is not in issue the available profits of the licensee may be taken into account in order to ensure that the impact on the licensee's business is not disproportionate. This does not mean that rich licensees should pay more or that licensees who make a loss should pay nothing but is a cross check to ensure that the royalty is not too high."

41. It should also be mentioned that the absolute amount of the licence fee provides no indication of fair or reasonable value. See *Phonographic Performance Limited v The British Hospital Association &* others, CT 91/05, 92/05 and 93/05, 18 September 2009, at paragraph 86, where the English Copyright Tribunal said:

> "A monopoly supplier of flowers, eggs or milk would not be justified in trebling its prices on the ground that the absolute amount was not very much or amounted to only a few pounds a week. The question is not how the licence fees compare with the overall turnover of particular licensor, any more than it is appropriate to compare any other input (such as electricity) as a percentage of turnover in order to assess the value of that input."

42. At the end of the day, the task of this Tribunal is to determine how much the Originator has to pay and to ensure that the amounts of money determined to payable to the Respondent are reasonable in all the relevant circumstances. We find helpful in the observation made by the English Copyright Tribunal in *AEI Rediffusion Music Limited, supra* at 343 line 15:

> "It is notoriously difficult to arrive at a decision as to an appropriate royalty (in the absence of equivalent consensual licences) in that there are no fixed guidelines and at the end of the day it is ultimately a "judgment call" taking into account a large number of factors."

E. Relevant Background of Karaoke Industry & K-Server Licensing in Hong Kong

43. Before examining the reasonableness of the subject licensing scheme, it is necessary to look at the relevant background of the karaoke industry and K-Server licensing in Hong Kong. The following is mainly taken from the Respondent's written closing submissions, which we have cross-checked with evidence before the Tribunal.

44. Generally speaking, karaoke is a form of interactive music entertainment in which amateur singers sing along with recorded music or music videos using microphones and audio-visual equipment system. The music is typically a well-known pop song minus the lead vocal. Lyrics are displayed and synchronized on a video screen, along with a moving symbol or changing colour and/or music video images, to guide the singer. In the early 1990s, karaoke was a popular form of entertainment in Hong Kong. Since 2010, as compared to the 1990s, karaoke has become less popular.

45. From 1984 when PPSEAL[3] commenced its licensing scheme for the granting of public performance licences and prior to the introduction of PPSEAL's K-Server licensing scheme in 2005, KMVs were manufactured and sold in physical formats such as LD (laser disc), VCD (video compact disc), DVD (digital video disc). At that time, in order to provide karaoke service to their patrons, karaoke establishments had to purchase KMVs in the form of physical discs.

[3] PPSEAL – Phonographic Performance (South East Asia) Limited is a licensing body of musical sound recordings, music videos and KMVs.

46. As such, at that time, karaoke establishments had to maintain a large library of KMVs in their premises, because they had to make available to their patrons a sufficient selection of KMVs. They also had to keep replenishing the physical discs of such KMVs because of heavy wear and tear as a result of substantial usage. In addition, they were required to employ disc jockeys for playing and maintaining the KMVs.

47. Concerning compliance of the copyright law, at that time, when a KMV was played in public at a karaoke establishment, only a public performance licence was required from PPSEAL[4]. This public performance licence was used in conjunction with legitimate physical discs of KMVs purchased from the record companies.

48. At that time, record companies generated substantial profits from the sale of physical discs of KMVs.

49. However, until about 2005 the business of the record industries was badly hit by plummeting album sales. This was partly caused by the widespread availability of music for downloading on the internet. Further, due to technology advancement, karaoke establishments no longer used physical discs to play KMVs. Instead, the KMVs were loaded into and stored in a central server and then made available to be played on individual screens in rooms or boxes of the karaoke establishments. This is what is known as karaoke server, or k-server system.

[4] A public performance licence is a licence to play or show the KMVs in public. This is within the meaning of section 27(3) of the Ordinance, which provides that the playing or showing of the work in public is an act restricted by the copyright in a sound recording or film. The sound recording and film contained in a KMV is usually owned by the record companies. In addition, there were other public performance licences required in respect of the underlying copyright works embedded in a KMV such as the music composition and the lyric. They were separately licensed by the Composer and Authors Society Hong Kong Limited (CASH).

50. According to the evidence of Mr. Suek Chai Kit Christopher ("**Mr. Suek**"), a director of Neway Karaoke Box Limited, which is the parent company of the Originator and the Neway Group, roughly since the year 2000, the Neway Group stopped using physical discs for its karaoke outlets and started using the system of "computerised song requests". Instead of purchasing physical discs of KMVs from record companies, the Neway Group installed big servers, which stored a lot of KMVs, in its karaoke outlets. KMVs were loaded onto those big servers. Some of these KMVs were provided by record companies and some were found by Mr. Suek's colleagues "from the outside". Mr. Suek did not explain what "from the outside" meant. The Respondent's evidence suggested that KMVs were copied in the k-server system without copyright owners' consent.

51. Putting aside whether the loading of certain KMVs "from the outside" in the k-server system was legitimate or not, there is no doubt that the k-server system benefitted the karaoke establishments a great deal. This is because the k-server system enabled karaoke establishments to have a massive repertoire of KMVs with instant access to the KMVs selected by patrons in their rooms with no waiting time. Moreover, a copy of a KMV loaded in the system could be immediately made available to their patrons in all of their karaoke rooms and boxes.

52. On the other hand, according to the Respondent, record companies did not receive any similar or other financial benefits following the advent of the k-server system. They then resorted to arranging K-Server licences with the karaoke operators. According to the evidence of Mr. Ronnay Botejue ("**Mr. Botejue**"), the General Manager of the Respondent, one objective for K-Server licensing was to compensate the copyright

owners with the K-Server licence fees for the drop of the sales of physical discs brought by the k-server system.

53. Due to market demand and the prevalence of k-server system in the karaoke industry, PPSEAL, a licensing body for and on behalf of most if not all record companies in Hong Kong at that time, introduced the K-Server licensing scheme for the granting of K-Server licence of KMVs which had been released for 6 months or more ("**Old KMVs**") in around 2005. PPSEAL's licence fee schedule was first published on 1 January 2005.

54. The K-Server licences granted under the PPSEAL's scheme was in the form of a blanket licence. The licensee, i.e. the karaoke operator, had no right to select any specific KMVs to be licensed. The blanket licence gave the licensee the right to reproduce in its server all the KMVs in the licensed repertoire for a single stated fee, which did not vary and did not depend on how many KMVs from the repertoire the licensee actually used or how frequent the KMVs were used. PPSEAL did not provide any list of licensed KMVs to its licensees. It did not even provide the licensed KMVs to them. Hence, these KMVs could have been copied in the k-server system by the licensees from sources which might or might not be legitimate. The licence fees were quite cheap considering that in the previous practices the karaoke operators had to hire a disc jockey or purchase a karaoke robot machine and use physical KMV discs for each karaoke room or box. With the k-server system, the karaoke premises would only need to acquire one set of digital KMV contents, saving costs and time in acquiring KMVs from different sources.

55. Since PPSEAL was not authorised to grant K-Server licence in respect of ‘new release' KMVs (“**New KMVs**”), karaoke operators negotiated directly with the record companies to obtain a licence for such New KMVs.

56. The tariff of PPSEAL's K-Server licensing scheme, effective from January 2007 (up to March 2012) for establishments whose main entertainment business was karaoke is set out below:

    (1) Up to 3 rooms: HK$16,000 x CPI(B) (i.e. Consumer Price Index (B)) per location per annum; or

    (2) 4 to 50 rooms: HK$32,000 x CPI(B) per location per annum; and

    (3) Each additional room in excess of 50 rooms: HK$160 x CPI(B) per room per annum.

57. The tariff of PPSEAL's K-Server licensing scheme was increased with effect from 11 April 2012 as follows:

    (1) Up to 3 rooms: HK$18,000 x CPI(B) (i.e. Consumer Price Index (B)) per location per annum; or

    (2) 4 to 50 rooms: HK$36,000 x CPI(B) per location per annum; and

(3) Each additional room in excess of 50 rooms: HK$180 x CPI(B) per room per annum.

58. There is no evidence before the Tribunal on how the tariff was set, why the tariff was so set, the rationale behind its structure and the basis for a "blanket" licence. There is also no evidence before the Tribunal on the basis of the aforesaid increase in April 2012.

59. After the commencement of the PPSEAL's K-Server licensing scheme in January 2005, starting from July 2005, a significant number of record companies (including the Record Companies) began to withdraw from PPSEAL. They ceased to authorize PPSEAL to represent them via PPSEAL's K-Server licensing scheme. It was the evidence of Mr. Botejue that some record companies were not satisfied with the income generated by PPSEAL's K-Server tariff and therefore were unwilling to stay with PPSEAL. The record companies which withdrew from PPSEAL included Neway Star Ltd ("Neway Star"), a member of the Neway Group. It was Mr. Botejue's evidence that the income generated by PPSEAL's K-Server licensing scheme was not satisfactory to the record companies as the amount of licence fees collected by PPSEAL under the tariff of its scheme was regarded as low. According to Mr. Botejue, since the total revenue generated from PPSEAL's K-Server licensing scheme was low, the share received by each record company was correspondingly low.

60. It would be relevant to list out the record companies which withdrew their authorisations from PPSEAL:

Record companies	Date of withdrawal
Emperor Entertainment (HK) Ltd ("**EEG**")	19 July 2005
Music Icon Records Ltd	19 July 2005
Catalyst Action	18 December 2006
Gold Label Entertainment Ltd ("**Gold Label**")	1 January 2008
BMA Records Ltd	6 January 2008
Cinepoly Records Co Ltd	1 March 2008
Go East Entertainment Co Ltd	1 March 2008
IPS Records Ltd	1 March 2008
SONY BMG Music Entertainment (HK) Ltd	1 March 2008
Universal Music Ltd	1 March 2008
Warner Music International Ltd	1 March 2008
Worldstar Music International Ltd	1 March 2008
Neway Star Ltd	15 June 2008
Silly Thing Records Co Ltd	31 July 2008
EMI Group Hong Kong Ltd	20 October 2008
East Asia Music (Holdings) Ltd ("**East Asia Music**")	15 December 2008
Capital Artists Ltd	23 December 2008
Rock (HK) Co Ltd	1 June 2009
Hummingbird Music Ltd	3 July 2009
Music Nation Records Co Ltd	19 August 2009

61. The Tribunal notes that after they had withdrawn from PPSEAL's licensing scheme, many record companies substantially increased their K-Server licensing fees. These record companies either entered into direct licensing agreements with the Neway Group

or granted K-Server licences through licensing bodies such as the K-Net Group and Music Link Limited ("**Music Link**")[5].

62. As stated above, the first record company which withdrew from PPSEAL's licensing scheme was EEG. It withdrew its authorization to PPSEAL on 19 July 2005. Very soon after it left PPSEAL, EEG executed a Joint Promotion Agreement dated 30 July 2005 with Twin Success Development Limited ("**Twin Success**")[6], Neway Karaoke Box Limited (a member of the Neway Group) and California Red Limited (a member of the CR Group) granting its K-Server licences in respect of its Old KMVs and 150 New KMVs for HK$26 million for a period of twenty-eight months from 1 August 2005 to 30 November 2007. On 26 June 2007, EEG entered into another agreement, which continued granting the same parties its K-Server licences in respect of Old KMVs and 150 New KMVs for HK$13.5million[7] during a period of around two years from the first delivery of a KMV or 1 August 2007 whichever was earlier until 31 July 2009.

63. Gold Label left PPSEAL on 1 January 2008. On 1 September 2007, which was before its withdrawal of authorization to PPSEAL, it had signed an agreement with Music Link granting K-Server licence in respect of its Old KMVs. It then entered into certain further agreements with Music Link. The net effect of the series of agreements appeared to be that Gold Label granted K-Server licences in respect of its Old KMVs for HK$1.9 million for some 11 months commencing from 1 September 2007. The

[5] Music Link was a company incorporated by and a member of the Neway Group in October 2006 and started operation in about March 2007.
[6] Twin Success was a company formed by the Neway Group and California Red Group (which was another group owning a chain of karaoke establishments under the trade name of California Red) ("**CR Group**") to secure the exclusive use of KMVs of new songs for use at the karaoke outlets of the CR Group and the Neway Group. In March 2010, the business of California Red's karaoke establishments was bought out by the Neway Group.
[7] It is noteworthy that alongside the sum of HK$13,500,000 in the agreement, "HK$90,000 per KTV" (i.e. KMV) was stipulated in bracket.

licence was terminated with effect from 1 July 2008. The parties then entered into another agreement dated 1 July 2008 whereby a further K-Server licence was granted from 1 July 2008 to 30 November 2008.

64. As already mentioned, Neway Star was a record company which was part of the Neway Group. It withdrew its authorization to PPSEAL in June 2008. Prior to that on 1 December 2007, it had entered into an agreement with Music Link authorizing Music Link to grant K-Server Licences of its KMVs and Music Link should pay Neway Star a licence fee of HK$8,000 for each KMV.

65. East Asia Music left PPSEAL on 15 December 2008. On 31 December 2008 it signed an agreement with Music Link granting to Music Link K-Server licence and the right to sub-license to karaoke chain stores in respect of its Old KMVs and New KMVs at a flat fee of HK$16.6 million for 3 years. It transpired that on 20 September 2007 and before its withdrawal from PPSEAL, East Asia Music had signed an agreement with Music Link granting Music Link such rights from that date for two years at a minimum licence fee of HK$600,000 per year.

66. The K-Net Group was another licensing body set up to compete with PPSEAL for K-Server licensing business. The group had two members. K-Net Music Entertainment Limited ("**K-Net Music**") was incorporated in June 2006 and the other one K-Net Entertainment Int'l Limited in April 2007 ("**K-Net Int'l**"). Apparently, K-Net Music was responsible for K-Server licensing for non-chain karaoke outlets such as karaoke bars, whereas K-Net Int'l was responsible for K-Server licensing for chain karaoke outlets.

67. As of 7 May 2009, K-Net Music represented twelve record companies in granting K-Server licences in respect of both Old KMVs and New KMVs to non-chain karaoke outlets. Its tariff with effect from 1 November 2007 was as follows:

(1) 1 to 3 rooms = HK$8,000 per month

(2) 4 to 9 rooms = HK$13,000 per month

(3) 10 to 20 rooms = HK$18,000 per month

(4) more than 20 rooms = HK$500 per month

68. With effect from 1 March 2008, the said tariff of K-Net Music's licensing scheme was changed to:

(1) 1 to 3 rooms = HK$8,800 per month

(2) 4 to 9 rooms = HK$13,800 per month

(3) 10 to 20 rooms = HK$18,800 per month

(4) More than 20 rooms = HK$600 per month

69. The Tribunal notes that K-Net Music's tariff was much higher than PPSEAL's tariff. Mr. Suek's evidence was that if payment were to be made strictly according to K-Net Music's licensing scheme, the Neway Group would have to pay around $20,736,000 million in 2013 for both Old KMVs and New KMVs.

70. The Neway Group operated Neway's chain karaoke outlets. On 11 June 2008, on behalf of the Record Companies, K-Net Int'l signed a K-Server licence agreement ("**the June 2008 Agreement**") with the Originator, granting the Neway Group, for the then existing 24 Neway's karaoke outlets in Hong Kong and Macau, a K-Server licence in respect of the Record Companies' repertoire of Old KMVs for an annual fee of HK$5 million, for 2 years. The total licence fee was therefore HK$10 million.

71. Subsequently on 31 October 2008, K-Net Int'l offered granting a 12-month non-exclusive K-Server licence for 50 New KMVs from each of the three Record Companies (i.e. Universal, Sony and Warner, totalling 150 New KMVs) at the licence fee of HK$15 million to the Neway Group (the "**October 2008 Offer**"). The Neway Group later accepted the offer and tendered a cheque of HK$15 million for payment. However, the cheque was not accepted and was returned to the Neway Group. It was said that the acceptance came too late and by the time of the Neway Group's payment, K-Net Int'l had already entered into exclusive K-Server licence arrangement with the CR Group. In the meantime, K-Net Music's licensing scheme came to an end on 30 June 2010; whereas HKKLA K-Server Licensing Scheme commenced on 1 July 2010.

72. Music Link's licensing scheme came into operation on 1 November 2007. In the beginning, Music Link granted K-Server licences for both what was known as "**Second**

Tier New KMVs" (i.e. for the period from the fourth month to the sixth month after the first commercial exploitation of those KMVs in the market) and Old KMVs (i.e. after six months after the first commercial exploitation of the KMVs in the market) in respect of the repertoire of the three record companies, namely Gold Label, East Asia Music and East Asia Record Production Company Limited.

73. By February 2008, Music Link was representing nine record companies in granting K-Server licences. In addition to Gold Label, East Asia Music and East Asia Record Production Company Limited, Neway Star, Star Entertainment (Universe) Ltd, BMA Record Ltd, Wow Music, Silly Thing and Snazz Music joined Music Link's scheme. The tariff of Music Link's K-Server licences was accordingly adjusted to reflect such increase in the size and popularity of its repertoire.

74. By the last quarter of 2008, the K-Server licences of Music Link had further grown to cover the repertoire of KMVs of ten record companies, with Worldstar Music joining the scheme. Its tariff was further increased.

75. Music Link ceased the K-Server licensing business from 1 May 2009. Various termination agreements between Music Link and those record companies were entered in around July and August 2009.

76. Thereafter, the licensing activities of the Neway Group was continued by Music & Video Copyright Management (HK) Limited ("**MVCM**"), which was part of the Neway Group. In the same way as what Music Link did, it entered into agreements with various record companies to acquire rights to use and sub-license their KMVs in

September and December 2009. The licence fees that MVCM charged were the same as charged by Music Link. MVCM ceased operation in around 2011.

77. In February and March 2015, the Respondent received notices from the Record Companies respectively informing that they would not renew the term of the mandates given to the Respondent for the K-Server licensing upon expiry of the original mandates on 30 June 2015. Accordingly, HKKLA K-Server Licensing Scheme was terminated on 30 June 2015.

78. Notwithstanding the termination of HKKLA K-Server Licensing Scheme on 30 June 2015, the Respondent is authorized by the Record Companies to have the conduct of these proceedings for determination of the applicable terms and tariffs of the scheme during the relevant period and recovery of the payment of the licence fees from the Neway Group accordingly.

79. It appears that after the cessation of HKKLA K-Server Licensing Scheme, Neway obtained licences from two of the Record Companies – Warner and Sony directly for use of their Old KMVs and New KMVs. There is no evidence before the Tribunal on the terms of these licences.

80. We should mention that there have been a number of references to the Copyright Tribunal issued but not yet determined, which concern Music Link's K-Server licensing scheme and the K-Net Music's licensing scheme. There is also a High Court Action concerning the June 2008 Agreement. Since these proceedings remain unresolved and undetermined, we do not consider necessary or appropriate to take the issues raised by

the parties therein into account in the determination of the issues in question in the present proceedings.

F. K-Server System & K-Server Licence

81. It is necessary to explain some basic concepts and elements of K-Server licences. They are essential when the Tribunal considers the value of the k-server system and the K-Server licences.

82. According to the evidence of Mr. Botejue in his first witness statement, KMV is

> "A music audio-visual recording which has the following features:-
>
> (a) It primarily features a sound recording of a particular musical work;
>
> (b) It is usually identified by reference to the title of such particular musical work, i.e. song title and, as the case may be, the name of the recording artist(s);
>
> (c) It embodies two soundtracks, namely, one with, and the other without, the original vocal track of the recording artist(s) of such particular musical work as performed by that recording artist(s); and
>
> (d) It is used as a form of entertainment to allow members of the public to view and sing along in synchronization with the visual images thereof, with the option of disabling the playback of the original vocal track of the recording artist(s), whether or not the related lyrics will be played or shown in the visual images thereof."

83. Therefore, KMVs fall within the definition of "film" in section 7 of the Ordinance. As such, copyright subsists in KMVs, and the owners, which are usually record companies, of KMVs are entitled to copyright protection pursuant to the Ordinance.

84. Also, according to the evidence of Mr. Botejue in his first witness statement, a k-server system in Hong Kong is a closed computer network or local area network or an intranet in which a main computer will be used to serve as the server in the network with copies of all digital ICMV files used in the network being uploaded onto and stored, and thus reproduced, in that local karaoke server.

85. The local karaoke server is connected to karaoke terminals located in different karaoke rooms or boxes of the karaoke premises where the KMVs would be played and sung by patrons on demand.

86. These karaoke terminals in the various connected karaoke rooms will also be connected to other audio equipment such as a mixer, speakers and microphones to enable the on-demand playback of KMVs to be sung by patrons.

87. When a patron selects a particular KMV to be played and sung, a copy of the digital file of that KMV will be transmitted from the karaoke server to the karaoke terminal and stored as a transient or cache copy, i.e. reproduced in the karaoke terminal's system memory or system storage. The digital copy of the KMV selected by the patron on demand allows playback in the karaoke room.

88. For some karaoke establishments of a smaller scale, such as a karaoke bar within one or a few rooms, instead of a k-server system, there are usually standalone computers with digital copies of KMVs copied into the hard disks. These hard disks storing digital copies of KMVs are also generally called k-server in the industry. Audio equipment is connected to these computers, together KMVs are allowed for playback on demand.

89. Thus, a K-Server licence is required to enable the k-server system to lawfully reproduce the KMVs in the aforesaid manner. This is within the meaning of "copying" under section 23 of the Ordinance, the relevant part of which reads as follows:

> "23. **Infringement of copyright by copying**
>
> (1) The copying of the work is an act restricted by the copyright in every description of copyright work; and references in this Part to copying and copies are construed as follows.
>
> (2) Copying of a work means reproducing the work in any material form. This includes storing the work in any medium by electronic means. …
>
> (6) Copying in relation to any description of work includes the making of copies which are transient …"

90. An important feature of a K-Server licence granted in Hong Kong is that it is in the form of a blanket licence, i.e. a licence which gives the licensee the right to reproduce in its k-server all the KMVs in the licensed repertoire for a single stated fee. This fee does not vary depending on how much the KMVs from the repertoire the licensee actually uses.

91. Hence the Tribunal accepts the Respondent's submission that K-Server licence grants licensees the right to upload and copy KMVs onto the servers of karaoke establishments. In other words, the value inherent in such licence is the right to upload the entire catalogue of KMVs onto the servers in enabling karaoke premises to provide services to their patrons. This is a key difference between a k-server system and KMVs in physical discs.

92. The Tribunal also accepts the Respondent's submission that k-server system enables simultaneous access of one single copy of a KMV by multiple karaoke patrons at any one time. It enables many KMVs to be automatically uploaded and reproduced to the video system and shown on the video screen in any individual karaoke box from the server installed on the karaoke establishment immediately upon demand. Requests for KMVs are digitally entered by the patrons in their own karaoke rooms or boxes. The service of karaoke disc jockeys or karaoke disc robot machines is no longer required. As the k-server system allows simultaneous use of any KMV by more than one user in the same karaoke establishment due to its ability to immediately reproduce a copy of the KMV, the karaoke establishment's operator needs only to store a copy of a single KMV of a particular title on its central server which can then be made immediately available to patrons in multiple rooms in its establishment.

93. The Tribunal therefore also accepts the Respondent's submission that the right to use, the immediate access to and the ability to play KMVs of an extensive library of KMVs from different periods of times by a variety of artists so as to cater for diverse tastes, preferences; it coupled with meeting demands of different patrons simultaneously,

instantly and conveniently all constituted important benefits to the licensee, i.e. the karaoke establishment's operator. These benefits derived from the K-Server licence. This is a factor, in our view, which the Tribunal should attach significant weight in assessing the reasonableness of the tariff in question.

G. HKKLA K-Server Licensing Scheme

94. As mentioned above, the Originator no longer challenges the tariff of HKKLA K-Server Licensing Scheme for the New KMVs. Hence it is only necessary for us to consider the reasonableness of HKKLA's tariff for what are called "back catalogue" KMVs.

95. "Back catalogue" KMVs are KMVs of old songs. Essentially, they are KMVs which have already been commercially released in physical copy in Hong Kong market for at least a certain period of time. The exact period and the precise definition would depend on the agreements with the corresponding record companies and the terms of the relevant licences or licensing schemes. In the General Terms and Conditions of the HKKLA Karaoke Video Licence Agreement under the HKKLA K-Server Licensing Scheme, "Back Catalogue" is defined as, in a nutshell, those KMVs which are not New Releases, i.e. KMVs which are first commercially published at any time during a scheme year by HKKLA, concert KMVs or those KMVs which have been expressly excluded.

96. HKKLA K-Server Licensing Scheme's tariff for "Back Catalogue" only is as follows:

Tariff Table – For Karaoke Music Video (KMV)	
No. of room per shop	For Back Catalogue only (not less than 8,000 KMVs)
	Per room per annum (HK$)
1 to 10	14,760
11 to 15	13,800
16 to 20	13,800
21 to 25	13,800
26 to 30	13,680
31 to 35	13,560
36 to 40	13,440
41 to 45	13,200
46 to 50	13,080
51 to 55	12,960
56 to 60	12,720
61 to 65	12,600
66 to 70	12,360
71 to 75	12,240
76 to 80	12,120
81 to 85	11,880
86 to 90	11,760
91 to 95	11,520
95 to 100	11,400
above 100	11,160

97. It can be seen that the tariff was calculated by reference to number of rooms with karaoke facilities. According to the Respondent, number of rooms as the basis of calculation is administratively workable with relatively lower administration costs. The same basis had also been adopted by the K-Server licensing schemes of PPSEAL, K-Net Music, Music Link and MVCM. As mentioned in paragraph 38 above, one of the factors that the Tribunal should take in account the need for a simple and workable

tariff. The Originator did not dispute the calculation of the tariff by reference to the number of rooms with karaoke facilities.

98. The Respondent submitted that the more rooms a karaoke outlet had installed, the more licensed KMVs would be used. It is also noted that Mr. Suek during cross-examination also agreed that when there were more rooms, there would be more usage of KMVs. The Tribunal accepts this contention. It follows logically then the higher the usage of the copyright work, more fee should be paid.

99. As to how the rates from HK$14,760 down to HK$11,160 were derived, Mr. Botejue gave the following account in his evidence:

(1) The starting point was the licence fee of HK$28,500 per room set (for "1 to 10" rooms) for both Old KMVs and New KMVs – described as "Up to 150 New KMVs + Back Catalogue (not less than 8,000 KMVs)".

(2) The amount of HK$28,500 comprises two sums: HK$16,000 and HK$12,500.

(3) HK$16,000 was derived from the tariff of PPSEAL's K-Server licensing scheme, which was Old KMVs, for up to 3 rooms per location per annum.

(4) HK$12,500 was derived from the October 2008 Offer, by dividing the annual licence fee of HK$15 million offered for 150 New KMVs, which was accepted by the Neway Group, by estimated number of rooms of the

Neway Group, i.e. 1,200 rooms; hence, HK$15,000,000/1,200 = HK$12,500.

(5) The sum of HK$28,500 was then applied with a mark-up of around 15% for administrative fee as well as watermarked costs, i.e. the costs for imprinting watermark on the KMVs in order to distinguish licenced KMVs from those which were not licenced; hence, HK$28,500 x (100%+15%) = HK32,775.

(6) Out of the sum of HK$32,775, it was decided that around 45% of which was attributable to Old KMVs because New KMVs were considered to be more attractive to karaoke patrons. Rounding the odd figures, the licence fee for Old KMVs was decided to be HK$14,760 (for 1 to 10 rooms).

(7) For the licence fees for karaoke outlets of more than 10 rooms, bulk discount on a sliding scale of 6.5% to 24.4% was offered to medium-sized and big-sized karaoke operators because they used more of the licensed KMVs. Since the sizes of karaoke operators ranged from installing only 1 room to over 100 rooms, the marginal difference between each sliding level must not be great. Accordingly, 1-2% in general was considered to be reasonable.

(8) The proposed tariff was then cross-checked with reference to the revenue of karaoke operators to see if it would be too high for karaoke establishments.

(9) According to an article of Next Magazine, the Neway Group's estimated annual revenue was HK$1 billion. Since Neway did not challenge this evidence[8] or produce any evidence to the contrary, the Respondent estimated that HKKLA's tariffs were around 3% of the annual revenue of the Neway Group of karaoke outlets. Mr. Suek admitted that he did not dispute this 3% estimation in his supplemental witness statement.

(10) Assuming the estimated revenue of the Neway Group were to be reduced by 50%, i.e. down to HK$0.5billion, the percentage of licence fee to revenue would be 6% which would still be below 10%, which was considered by the Respondent to be reasonable.

100. It should also be noted that HKKLA's K-Server licence, same as PPSEAL's licence and the K-Net Music's licence, were all blanket licences. In other words, the level of licence fee did not depend on the frequency of usage of the KMVs. Once the licence was granted, the very popular KMVs, be they old or new, might be used without limit and without any increase in the licence fee.

[8] Neway submitted that this was a figure not verified. However, clearly Neway should know what its revenue was. Despite the Respondent's request, it refused or failed to reveal any information about its revenue. In light also that Neway did not challenge that this figure of HK$1 billion was not correct, or its witnesses did not give any evidence to the contrary, this Tribunal takes the view that the Respondent is justified in assuming that this figure is correct.

101. We find it incontrovertible that the repertoire offered by HKKLA to its licensee was highly valuable to the karaoke operation of the Neway Group because:

(1) The Record Companies (including EMI) were the local companies of the four largest multinational business groups of record labels in the world. Each of these groups consisted of many record companies and record labels serving different regions and markets. Apart from the international repertoire of their associated companies within their respective groups worldwide, which was in the control of the Record Companies in Hong Kong, they also owned a strong Cantonese-Chinese repertoire of local artists which included well-known back catalogue of many local artists. The Record Companies also controlled a substantial Mandarin-Chinese repertoire in Hong Kong which included works of local, Mainland Chinese and Taiwanese artists.

(2) The artists who had performed in the repertoire of the Record Companies were very well-known and popular. The Record Companies' artists had received more than 80% of the top ten songs awards (“十大中文金曲”) presented by Radio Television Hong Kong (RTHK), which enjoyed the longest history and was one of the most reliable awards in reflecting the popularity of artists in the past 37 years. The repertoire of HKKLA included famous local and international artists of the Record Companies such as:

(a) Warner and EMI:

Sammi Cheng (鄭秀文), Aaron Kwok (郭富城), Khalil Fong (方大 同), Fiona Sit (薛凱琪), Chau Pak Ho (周柏豪), Shiga Lin (連詩雅), Sun Yan-zi (孫燕姿), Jolin Tsai (蔡依林), Jam Hsiao (蕭敬騰), Sandy Lam (林憶蓮), Beyond, Tai Chi (太極), George Lam (林子祥), Sally Yip (葉蒨文), Danny Chan (陳百強), Wang Chieh (王傑), Julie Su (蘇芮), Tsai Ching (蔡琴), F.I.R. (飛兒樂團), Tiger Huang (黃小琥), Amber Kuo (郭采潔);

(b) Universal:

Eason Chan (陳奕迅), Alan Tam (譚詠麟), Hacken Lee (李克勤), Jacky Cheung (張學友), Andy Lau (劉德華), Faye Wong (王菲), Miriam Yeung (楊千嬅), Kelly Chen (陳慧琳), Kay Tse (謝安琪), MR, Hins Cheung (張敬軒), Priscilla Chan (陳慧嫻), Prudence Liew (劉美君), Jordan Chan (陳小春), Eric Suen (孫耀威), Kelvin Kwan (關楚耀), Patrick Tang (鄧健泓), Rachel Liang (梁文音), Sam Hui (許冠傑), Teresa Teng (鄧麗君), Michael Kwan (關正傑), Kary Ng (吳雨霏); and

(c) Sony:

Leo Ku (古巨基), Leon Lai (黎明), Cass Pang (彭玲), Candy Lo (盧 巧音), Ekin Cheng (鄭伊健), Jason Chan (陳柏宇), Leehom Wang (王力宏), Rainie Yang (楊丞琳), Harlem Yu (庾澄慶), Jeff Chang Shin-Che (張信哲), F4, and Jenny Tsang (甄妮), Paula Tsui (徐小鳳), Phil Lam (林奕匡)

(3) The fame or popularity of artists is highly relevant as it directly affects the commercial value of KMVs, both old and new.

(4) The number of HKKLA's old songs reached 8,833 by 30 June 2015 and the Record Companies published through HKKLA not less than 150 new KMVs annually. Therefore, the quantity of HKKLA's repertoire was very substantial. It was Mr. Suek's oral evidence to this Tribunal that "the copyrights of songs, of these three or four companies [i.e. the Record Companies] are very important".

102. HKKLA implemented a discount system for licensees whose primary business was not karaoke entertainment. The licence fee for one room would be waived if one of the following four criteria was fulfilled, i.e. in respect of their karaoke business:

(1) the number of seats was less than 150;

(2) the opening hours for a week were less than 70 hours;

(3) the floor area was less than 9,500 square feet; or

(4) there were less than 30 servers.

103. Each karaoke operator was entitled to a maximum waiver of licence fees for four rooms. If a potential licensee's business fell within the above criteria, the licensee's

primary business would not be considered as karaoke entertainment. The said four criteria were related to the usage of KMVs, as less usage justified a discount. The rationale behind the said four criteria was to reflect low exploitation of karaoke entertainment in the premises and low impact of karaoke entertainment to patrons.

104. In implementing the waiver system, HKKLA adopted an honour system. Mr. Botejue explained that HKKLA did not send people to physically go into each karaoke room to count the number of seats in it. Out of 300 plus applications for waiver, 17 were successful and offered a discount.

105. The Respondent submitted that there were costs for operating HKKLA's K-Server licensing business. They included costs of watermarking, promotion and marketing, administration and enforcement:

(1) Watermarking was a means to combat copyright infringement and to trace leakage of licensed materials. It made the task of verifying HKKLA's KMVs easier. HKKLA would deliver hard discs with licensed KMVs with watermarks to their licensees. The cost of watermarking was $1 per KMV. HKKLA authorized such works to be carried out by K-Net Music.

(2) K-Net Music was also responsible for promoting HKKLA K-Server Licensing Scheme and procuring HKKLA's K-Server licences, such as paying personal visits to karaoke premises, corresponding with karaoke operators, advertising and distributing publicity materials.

(3) In addition, K-Net Music handled HKKLA's paper works and enforcement work such as publishing announcements of HKKLA, issuing HKKLA's notices, sending investigators to karaoke operators to collect evidence and issuing letters to karaoke operators regarding unauthorized use of HKKLA's KMVs.

(4) According to the agreement between HKKLA and K-Net Music dated 25 October 2010, for any new K-Server licence procured by K-Net Music, subject to the licensee's full payment of the licence fee, HKKLA should pay K-Net Music an administration fee of HK$500 per month for each K-Server licence during the term of the licence.

Therefore, the perceivable cost of HKKLA in operating the licensing scheme for Back Catalogue might be quantified to the extent of (a) the watermarking cost of HK$1 x 8,000 plus old songs per licence, which was a lump sum cost, and (b) the administration fee of HK$500 per month (i.e. HK$6,000 per annum) per licence.

H. Valuation Approaches & their application to the issues in these proceedings

106. There are various approaches in assessing the reasonable level of the tariffs of a K-Server licensing scheme. The parties refer to us three approaches:

(1) the economic benefits approach;

(2) the cost of substitution approach; and

(3) the comparables approach.

H(1) Economic Benefits Approach

107. Under the economic benefits approach, a part of the profits which the licensee is expected to make out of the licence is to be identified as the reasonable licence fee.

108. In the present case, therefore, the first essential element would be the profits which Neway, or rather the Neway Group which it represented, would be expected to make out of the use of the licensed right of HKKLA's K-Server licence, i.e. the Record Companies' Old KMVs.

109. Mr. Wynn[9] explained that it could be difficult to assess objectively the amount of the said Neway Group's profits, for example, whether past profits could be used as a guide to future profits. It could also be difficult to determine the suitable criteria for allocating the profits between the licensor and the licensee. If independent benchmarks for the allocation of profits were not available, this approach would require a subjective assessment of the contribution of each party to generating these profits.

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[9] Mr. Andrew Wynn ("**Mr. Wynn**") is the Originator's expert. He is a Senior Managing Director in the Economic and Financial Consulting practice of FTI Consulting, based in London. In the earlier stage of these proceedings, Mr. Andrew J. Mainz ("**Mr. Mainz**") was engaged as the Originator's expert. He had produced two reports respectively dated 5 January 2016 and 26 July 2016. Unfortunately, his deteriorating health rendered him unable to testify at the substantive hearing of this reference. Mr. Wynn was instructed to act as the Originator's expert in place of Mr. Mainz. Mr. Wynn has produced a report dated 14 June 2017. In essence, in his report Mr. Wynn confirmed that he agreed with the views expressed and the conclusions reached by Mr. Mainz in his two reports and adopted the contents of the two reports as his own opinions and expert evidence. Since the Respondent had no opportunity to cross-examine Mr. Mainz, we shall only consider the evidence of Mr. Wynn, although it included the contents of Mr. Mainz's two reports which Mr. Wynn adopted as his own opinions and expert evidence.

110. He further explained that the economic benefits approach was to identify the incremental profits associated with the intellectual property, and then split that incremental revenue between the licensor and the licensee.

111. Mr. Wynn rejected outright applying the economic benefits approach. He did not even attempt to make any assessment basing on this approach. In his explanation:

(1) It was very common not to apply the economic benefits approach when there were comparables available. He pointed out that the economic benefits approach had not had much traction before the English Copyright Tribunal which had virtually always relied on the comparables approach.

(2) In appropriate cases, the economic benefits approach could be adopted.

(3) Given the challenges of applying this approach, he did not consider it possible to apply it in the context of the present case reliably. One would need to perform a relatively sophisticated piece of analysis in order to apply the approach, some sort of analysis that looked at the effect of different bundles of repertoire. This could be done either on a sort of analytical basis, looking at the effect of introducing different bundles of repertoire into different businesses, or potentially one could use some sort of survey approach where customers were asked how they reached to different bundles of repertoire.

(4) To apply the approach, one would need what is often called a natural experiment, which is to look at the performance of a business without the repertoire, and look at the performance of the business with some repertoire. Critically, what was so challenging was that one needed to understand what benefit was associated with the particular repertoire. It was different from, for example, a patent licence in which the patent was the single key piece of intellectual property. Business like Neway was reliant, just in terms of repertoire, on all kinds of different repertoires.

(5) It was a significant analytical challenge to identify the part of the profits that the licensee was expected to make out of the licence. In case of Neway, there were many drivers of the profits of the business and it was difficult to disentangle the various different drivers of Neway's profits.

(6) Even in respect of licences for using the various repertoires, there were four different kinds of licences required and it was difficult to work out an appropriate proportion amongst these licences. Without such apportionment, it would not be possible to work out the incremental profits associated with one particular licence. There was also no benchmark to determine whether any particular percentage of the revenue of the licensee adopted was too high or too low.

(7) As a matter of practice, this approach involved two problems. First, it was difficult to do the analysis. Second, it ended up with quite a lot of subjective judgments. Even assuming that one had hypothetically identified the

incremental profit associated with the intellectual property, one still had to make a judgment on how to split that between the licensor and the licensee.

112. Mr. Wynn rejected the approach at a theoretical level. However, the explanations he provided were all concerning practical difficulties that might be encountered by the expert during the actual assessment (such as difficulties in making various apportionments and the risk of being subjective in the exercise) of the aforesaid Neway Group's profits. It also transpired during cross-examination that he (or Mr. Mainz whose reports he adopted) was in fact not provided with any financial information of Neway or the Neway Group including particularly profits which Neway or the Neway Group derived from their karaoke operation. Mr. Wynn appeared to suggest that he (or Mr. Mainz) did not even ask for this information, because Mr. Mainz had rejected this approach in the first place "at a principle level" and he agreed with Mr. Mainz.

113. The Tribunal finds this position taken by Mr. Wynn not satisfactory. The duty of an expert is to provide a credible assessment doing the best he can. Whilst it is uncertain whether an assessment under this approach will reach a credible answer, we doubt whether the approach should be discarded outright without making any attempt to give it a try. Even with all the difficulties that Mr. Wynn mentioned, it would certainly be helpful if he (or Mr. Mainz) had undertaken a trial assessment and commented on the result – whether it could be used as a check to substantiate their findings under the comparable approach which they clearly prefer, or whether it should indeed be ignored completely as such a result was wholly incredible or unrealistic. To

abandon the approach completely in the very beginning without even undertaking any trial assessment is, in our view, putting the cart before the horse and is premature.

114. It should be noted that in 2014, the Respondent had written to the Originator requesting disclosure of financial documents of the karaoke outlets of the Neway Group for the purpose of preparing the Respondent's expert evidence. The Originator refused the request and did not disclose any financial documents to the Respondent[10]. In their reply letter to the Respondent's solicitors effectively refusing the request, the Originator's solicitors said they failed to see how the financial documents and information sought by the Respondent were relevant to the reasonableness of the tariff of licence fees proposed to be charged by HKKLA under its Licensing Scheme which was not one specifically tailored for the Originator but rather generally applicable to all licensees[11].

115. Whilst Mr. Leslie Ching ("**Mr. Ching**"), the Respondent's expert, agreed that application of this approach might be difficult where the intellectual property rights to be licenced were only one of several related sources of profits for the licensee, we agree with the Respondent's submission that the economic benefits approach could have been considered by the parties' respective experts if it was not for the Originator's failure to disclose the relevant financial information.

[10] As such, there was no financial information of the Neway Group's karaoke operation before this Tribunal.

[11] In our view, the financial documents and information are clearly relevant to the issues required to be determined in these proceedings. They are relevant not only to any assessment under the economic benefits approach, but will be very useful as the basis for general reference – see paragraphs 31 and 40 above. Particularly as mentioned in paragraph 40 above, even where the basis of the payment is not in issue, the Tribunal may take into account the available profits of the licensee in order to ensure that the impact on the licensee's business is not disproportionate. It is regrettable that there is no such evidence adduced to assist the Tribunal.

H(2) Cost of Substitution Approach

116. Under this approach, a licence fee is determined by reference to the cost of obtaining alternative intellectual property rights. In the present case, such cost would be the cost of obtaining licences from the Record Companies for reproduction licences or synchronization licences and the cost of production of the KMVs in question by the Neway Group. According to Mr. Mainz's report adopted by Mr. Wynn, this approach could only be used if alternative intellectual property rights could become available by investing in their development; hence, it had no relevance in the present proceedings.

117. It appeared that Mr. Ching shared the same view. He acknowledged that if Neway were to produce its own KMVs, there would be an essential shortcoming in that the KMVs would not have the original artists participating in the videos. So there was no proper "substitution".

118. Both Mr. Wynn and Mr. Ching did not apply the Cost of Substitution approach. There was no evidence adduced before the Tribunal that could form the basis of assessing the reasonable level of licence fees under this approach. Further, there was no suggestion to the Tribunal that this approach should be adopted or preferred or that an assessment according to this approach should be undertaken.

119. In a nutshell, since there is no evidence of alternative intellectual property rights before the Tribunal, the cost of substitution approach cannot be deployed.

H(3) Comparables Approach

120. There is no controversy that assessment under the comparables approach should be considered in the present case. This is in line with the previous experience of the English Copyright Tribunal, as mentioned in paragraph 34 above. The key questions however are (1) which scheme(s) is/are the appropriate comparable(s), and (2) whether adjustments should be made to the tariff(s) of the comparable scheme(s) and, if so, how.

I. Comparables Approach

121. Mr. Wynn expressed the view that PPSEAL's K-Server licensing scheme was the only comparable which the Tribunal should rely on in determining the reasonable K-Server licence fees that HKKLA should charge for back catalogue KMVs.

122. The Respondent relied on each of the starting rates (but not the structure) of:

(1) PPSEAL's K-Server licensing scheme,

(2) K-Net Music's K-Server licensing scheme,

(3) Music Link's K-Server licensing scheme, and

(4) the June 2008 Agreement.

In addition, the Respondent also relied on the amount offered and accepted in the October 2008 Offer.

I(1) Comparability of PPSEAL's K-Server licensing scheme

123. As mentioned in paragraphs 56 and 57 above, the starting rate of PPSEAL's K-Server licensing scheme was HK16,000, with effect from January 2007. It was increased to HK$18,000, with effect from April 2012. This starting rate was for Old KMVs for up to 3 rooms per location per annum.

124. Both parties agreed that this starting rate was reasonable. Both Mr. Suek and Mr. Wynn placed great emphasis on the reasonableness of this rate in their evidence. On the other hand, HKKLA adopted this rate in formulating the licence fee in arriving at its starting rates of the tariff, see paragraph 99 above. The Originator's counsel, in their written reply submissions, confirmed the position:

> "79. The Tribunal should however note that the starting figure (i.e. for the first room) for HKKLA's Licensing Scheme for back-catalogue KMVs (HK$14,760 for the first room [F3/4712]) is not so much in dispute, as the figure is comparable to that charged under PPSEAL K-Server Licensing Scheme (HK$16,000 for the first room [E1/1755])."

125. Less than 2 years after the commencement of the HKKLA K-Server Licensing Scheme, PPSEAL's starting rate of HK$16,000 was increased to HK$18,000 effective from 11 April 2012. It should be noted that by that time in 2012 PPSEAL no longer represented the Record Companies and those record companies which withdrew the authorization to PPSEAL, as set out in paragraph 60 above.

126. We should also reiterate here that as mentioned in paragraph 97, there is no challenge that the tariff might be calculated by reference to the number of rooms with karaoke facilities.

127. The Respondent challenged the structure of PPSEAL's tariff as unreasonable, for the following reasons:

(1) The tariff's structure did not provide for a linear increase in licence fee as the number of karaoke boxes or rooms with karaoke facilities increases.

(2) The structure of PPSEAL's tariff was irrational, unreasonable and arbitrary, and was biased in favour of big karaoke establishments and chains like Neway since it failed to reflect the difference in usage of KMVs between a large and a small karaoke operator.

(3) It followed from sub-paragraph (2) above that PPSEAL's tariff had also unfairly discriminated against smaller operators, which the Tribunal was obliged to avoid under Section 167(2) of the Ordinance.

(4) The tariff was irrational because one simply could not discern any sensible or reasonable rationale out of its structure, which should not be treated as a springboard, see *The Association of Independent Radio Companies Limited & Anor v. Phonographic Performance Limited & The British Broadcasting Corporation (Intervener)* [1994] RPC 143 at 175 Lines 42-49.

(5) The failure of PPSEAL's tariff to account for the higher usage of copyright works by the large karaoke operators like Neway resulted in a conflict with a normal exploitation of the copyright works and unreasonably prejudiced the legitimate interest of the copyright owners under Section 167(3) of the Ordinance.

128. To substantiate the above reasons, the Respondent submitted the following analysis concerning the structure of PPSEAL's licensing scheme:

(1) There was no explanation why under the scheme, a karaoke operator with 4 rooms would pay the same licence fee as a karaoke operator with 50 rooms. As mentioned in paragraph 98 above, the more rooms there was, the more usage there would be. It was unexplained why big karaoke operators, having premises with say 50 karaoke rooms, would enjoy the same licence fee as a small karaoke operator with 4 rooms.

(2) The Originator had shown to the Tribunal a table setting out the amounts of licence fees paid by the Neway Group of karaoke outlets to PPSEAL in 2007-08 (Annex A to Mr. Suek's Witness Statement). According to this table, Century Advance Limited, which was one of Neway's karaoke operators and ran 50 karaoke rooms, paid HK$27,762. On the other hand, Wonderful Limited, which was another Neway's karaoke operator running 112 rooms, paid HK$36,363. The Neway Group at the time did not run any karaoke operation with 4 rooms or less. The Respondent calculated the average licence fees "per room" as follows:

(a) For a karaoke operator running 4 rooms or less, the licence fee payable by:

(i) a karaoke bar with 1 room was HK$16,000 per room;

(ii) a karaoke bar with 2 rooms was at HK$8,000 per room (i.e. dividing HK$16,000 by 2);

(iii) a karaoke bar with 3 rooms was HK$5,333.333 per room (i.e. dividing HK$16,000 by 3); and

(iv) a karaoke bar with 4 rooms was HK$8,000 per room (i.e. dividing HK$32,000 by 4).

(b) This was in sharp contrast with the average licence fees per room paid by the said two operators in the Neway Group:

(i) Century Advance Limited (with 50 rooms) paid an average of HK$555.24 per room (i.e. dividing HK$27,762 by 50).

(ii) Wonderful Limited (with 120 rooms) paid an average of HK$324.67 per room (i.e. dividing HK$36,363 by 112).

(3) The above demonstrated that the structure of PPSEAL's tariff failed to reflect the extent of usage between different sizes of karaoke operators resulting in a conflict with a normal exploitation of the copyright works and prejudicing the legitimate interests of the copyright owner, and that such a structure also unfairly discriminated against those with lesser number of karaoke rooms.

(4) Since higher usage of copyright works should attract higher licence fees (see paragraph 98 above), if such a tariff (i.e. higher usage, higher fee) was to be presented in a chart, logically, such a chart should provide a linear progression, showing that as the number of rooms increased, the amount of licence fee should also increase. However, this was not the case with PPSEAL's tariff. Exhibit R1 produced to the Tribunal during the hearing showed that the average licence fee per room under PPSEAL's tariff did not increase linearly but rather decreased sharply from the fourth room onwards. Contrast to a linear increase in licence fees, PPSEAL's tariff highlighted a rather abrupt volume discount with "different trenches and different levels".

(5) The structure of PPSEAL's tariff was overly simplified when compared to HKKLA K-Server Licensing Scheme. PPSEAL's tariff mainly catered for two groups of karaoke operators: the first group having up to 3 rooms and the second group having 4 to 50 rooms. An insignificant fee of HK$160 per room per annum would be charged for those operators with more than 50 rooms. The PPSEAL's tariff had also failed to reflect the value of KMVs in accordance with different sizes of karaoke establishments, and unreasonably favoured big chains like Neway.

129. The Respondent also drew to the Tribunal's attention that that there had been material changes of circumstances between the introduction of the PPSEAL's licensing scheme in 2005 and the introduction of the HKKLA K-Server Licensing Scheme in 2010. These relevant changing circumstances included the exodus (what the

Respondent called) of the Record Companies together with a number of other record companies from PPSEAL's licensing scheme from July 2005 onwards, and the granting of direct licences by some record companies to the Neway Group from 2005 onwards. There were also the introduction of K-Net Music's K-Server licensing scheme in 2006, the introduction of Music Link's K-Server licensing scheme in 2007 and the June 2008 Agreement reached between Neway and K-Net Int'l[12]. As the circumstances since the introduction of PPSEAL's licensing scheme had materially changed, the Tribunal should look at HKKLA's tariff structure afresh without reference to PPSEAL's tariff structure. The Respondent relied on *The Association of Independent Radio Companies Limited*, *supra* at 175 lines 40-45; 176 lines 1-2 & 30; 182 lines 7 &15.

130. The Respondent therefore submitted that the PPSEAL's tariff structure should be rejected by the Tribunal outright since it was contrary to ss.167(2) and 167(3) of the Ordinance, in that it "unreasonably discriminated" against small karaoke outlets and "unfairly prejudiced the legitimate interests of the copyright owner" by charging large karaoke establishments an exceptionally low fee.

131. In disagreement, the Originator submitted that the proper approach is for the Tribunal to examine the evidence of the factual situation and circumstances prevailing at the time when the structure of the PPSEAL's K-Server licensing scheme was being formulated and also evidence of the factors and considerations taken into account by those who designed such structure. The Tribunal should then ask itself whether, taking into account all such evidence, the structure of the PPSEAL's K-Server licensing scheme resulted in a tariff which did not properly reflect the value of the use of K-

[12] These events have been described in section E above.

Servers to karaoke operators and whether such a structure was unreasonable by being "irrational, unreasonable and arbitrary" and "biased in favour of big establishments and chains like Neway. It failed to reflect the difference in usage of KMVs between a large and a small karaoke operator and unfairly discriminated against smaller operators" as contended by HKKLA.

132. In our view, the Originator's submission was not helpful, because, as mentioned in paragraph 58 above, there was no evidence before the Tribunal on how PPSEAL's tariff was set, why it was so set, the rationale behind its structure and the basis for a "blanket" licence.

133. The Originator then submitted that it was the Respondent whom should be blamed for the absence of the evidence, hence negative inference should be drawn against the Respondent from the absence of witness to explain the PPSEAL's tariff. This submission was also not helpful. First of all we do not consider that the Tribunal should conduct an investigation on whom should be blamed for the absence of the evidence. The statutory task of the Tribunal is to consider the reasonableness of the Respondent's licensing scheme. It is not a blame allocation or fault-finding exercise.

134. Moreover, the inference that the Originator requested the Tribunal to draw was that had "someone" from the Record Companies been called to testify on what facts, circumstances, factors and considerations had been taken into account in formulating and designing or at least approving the structure of the PPSEAL's licensing scheme in 2005, his/her testimony would not have supported HKKLA's contentions. We refuse this request from the Originator. In our view, it is far too remote and speculative for us

to draw such inference as sought. The Originator suggested "someone" from the Record Companies should be called. That "someone" was not identified. His or her position and current whereabouts was unknown. Whether that "someone" possessed relevant information, the basis for saying that he or she had that information, and exactly what evidence he or she might be able to give were all unknown. With all these unknown, we do not consider that that "someone" was a witness whom the Respondent might reasonably be expected to call, see *Li Sau Keung v Maxcredit Engineering Ltd*, [2004] 1 HKC 434, paragraph 28.

135. The Originator submitted that, since "PPSEAL is, and was at the material times, a body under the IFPI [i.e. International Federation of Phonographic Industry] umbrella with the IFPI (Hong Kong Group) immediately above it", and the Record Companies "were most influential in PPSEAL and at all levels of the IFPI hierarchy", they, together with three other independent record companies (EEG, East Asia and BMA), were involved in designing and formulating the PPSEAL's licensing scheme and its tariffs. That being the case, they should have known the identity of that "someone" (or "some ones") who should give evidence. And since the Record Companies had the means, the dominance and the influence in IFPI and hence PPSEAL, they should have ascertained who in PPSEAL were responsible for designing the PPSEAL's licensing scheme and its tariff.

136. The Respondent rebuked the Originator's submission as speculative. It pointed out that according to the evidence of Mr. Botejue, because of possible conflict of interest the directors of PPSEAL who were representatives of the record companies (including the Record Companies, as well as the said three independent record

companies which HKKLA did not represent) would want to distant themselves from this conflict. In order to eliminate this conflict, the board of any Copyright Management Organization ("**CMO**") such as PPSEAL should not formulate the tariff or exert too much control of the tariff (except for approving or reviewing the tariff). That was why it was the management who decided the tariff. It was also Mr. Botejue's evidence that in order to protect the CMO, it was the usual practice that the management would give minimal sensitive information to its directors.

137. The Respondent also pointed out that after HKKLA K-Server Licensing Scheme ended in June 2015, Neway entered into direct licensing agreements separately with Sony and Warner. Since this happened before the filing of any of the witness statements in this Reference, Neway could also have the opportunity of finding the answer from Mr. Ariel Fung, the Managing Director of Sony. However, as the Respondent submitted, not only Neway mentioned that it had not taken any step to find out more of the rationale of the formulation and design of the PPSEAL's tariff, Neway had not disclosed to the Tribunal any of the licensing terms Neway agreed with Sony and Warner in this reference, which took place after the cessation of HKKLA K-Server Licensing Scheme in June 2015 but before the filing of witness statements in January 2016. Equally, the Respondent said the Originator could have applied to the Tribunal to require the responsible individuals from the Record Companies identified by Mr. Botejue in his witness statements and statutory declarations to attend as witnesses and/or to order them to answer any question or produce any documents, but Neway did not do so. The Respondent went further to submit that there was also no reason why the Originator should not have made enquiries with the said three independent record companies or at least two of them, namely, EEG and East Asia, as their representatives

were also directors of PPSEAL, and as EEG and East Asia were well known to and had long and substantial business relations with Neway even to this present day, having entered into numerous K-Server licensing agreements with the Neway Group and Twin Success over the years.

138. The Tribunal considers unnecessary, for the determination of the main issue (i.e. the reasonableness of HKKLA K-Server Licensing Scheme), to make any findings out of the parties' very contentious submissions summarized above.

139. It is important to bear in mind that the relevant information that the Originator refers to is complicated. It includes evidence of the factual situation and circumstances prevailing at the time when the structure of the PPSEAL's K-Server licensing scheme was being formulated, designed and approved, evidence of the factors and considerations taken into account by those who designed, formulated and approved such structure, whether the value of the use of k-servers to karaoke operators had been taken into account and reflected in the PPSEAL's tariff, and whether the value and enhanced benefits of the use of the k-servers over the use of physical discs had been taken into account and reflected in the PPSEAL"s tariff, etc. These matters involve questions of very detailed explanation of the rationale and structure of PPSEAL's tariff and its structure. Clearly only "someone" who was deeply involved in the formulation, design and approval of the tariff could answer. There was no evidence on whether there was only one person who has knowledge of all these matters; and if not, how many persons possessed knowledge of these matters; and whether he or she or all of them was or were readily available to be called as witness(es) in these proceedings. In any

event, it would be over-simplistic, and in our view unfair, that the Tribunal should draw any inference based on such absence of evidence.

140. We should also add that the Originator relied on *Ip Man Shan Henry v Ching Hing Construction Co Ltd (No.2)* [2003] 1 HKC at paragraph 155 where Deputy High Court Judge Johnson Lam (as the Vice President of the High Court then was) summarized the relevant legal principles applicable to civil proceedings when a party elects not to call factual evidence on a particular point. We find the reliance not apposite. This is because firstly, the first requirement for drawing adverse inference is that the prima facie case has been made out against the party who may adduce the contrary evidence to displace the prima facie case. In the present case, in our view, no prima facie case has been established against the Respondent. We consider that the Originator has not even identified what that prima facie case is. As shall be explained below, we consider that the Respondent has established that the structure of PPSEAL's tariff is unreasonable. Secondly, as explained above and in particularly in paragraph 139 above, the primary task of the Tribunal is to determine the reasonableness of HKKLA K-Server Licensing Scheme. It is in our view not appropriate for the Tribunal to assess the reasonableness of a licensing scheme by basing on an inference drawn as invited by the Originator.

141. Further, the Tribunal does not see why the reasonableness of the structure of PPSEAL's tariff cannot be assessed from analysing the contents of the structure. The Originator relied on a remark in *The Working Men's Club & Institute Union Ltd, supra* that, "There was no evidence of any contemporary document or in any other source to suggest that the rates negotiated in 1983 were unduly low …". It commented that the

analysis should not be done and the aforesaid negative inference should be drawn against the Respondent. This comment is, in our view, not apposite. The said remark in *The Working Men's Club & Institute Union Ltd* was dealing with the rate of the tariff, whether it was too low as contended. In the present case, the issue in question was whether the structure, not the rate, of the tariff was reasonable, rational or discriminating. Contrary to the Originator's submission, we consider such an analysis is relevant. Clearly the Tribunal should pay regard to it.

142. Instead of engaging the Respondent's reasons and analysis as set out in paragraphs 128 and 129 above, the Originator relied on speculation. On the one hand, the Originator largely accepted that there were advantages in using the k-server system, and there could be an uplift in the royalties associated with such advantages. On the other hand, however, the Originator said since the use of k-servers had started in around the year 2000, which was some five years before the launch of the PPSEAL's K-Server licensing scheme, there was no evidence that those responsible for formulating and approving the tariffs and the structure thereunder had not already taken into account the value and enhanced benefits of the use of k-servers over the use of physical discs and reflected the same in the PPSEAL's K-Server licensing scheme's tariff and structure. The Originator went further to suggest that given the immense experience of IFPI, PPSEAL and the Record Companies in collective licensing, it is inconceivable that these factors would not already have been taken into account and reflected in the PPSEAL's K-Server licensing scheme. This is in effect the same submission basing on absence of evidence discussed above. For the same reasons explained above, we do not accept this submission either.

143. Apart from the submissions basing on absence of evidence, the Originator submitted that in arguing that the structure of PPSEAL's tariff had failed to address the differences in the extent of usage between different sizes of karaoke operators, the Respondent had overlooked the fact that there were two aspects of "usage" for which karaoke operators paid and obtained licences from PPSEAL.

144. The Originator submitted that the first aspect was the usage in terms of usage of physical discs of KMVs which was what the k-server system replaced. The second aspect was usage in terms of the actual playing and performance of the KMVs. It elaborated the submission as follows:

(1) The first type of usage was paid for under a K-Server licence which was to compensate the record companies for loss of sales of physical discs whilst the second type of usage was paid for under the public performance licence.

(2) In considering the K-Server licence, the number of physical discs which were being displaced by the k-server system should be considered, and in considering the public performance licence, the amount or extent of playing or performing of the KMVs should be considered.

(3) The second type of usage was reflected by PPSEAL's public performance licence, for which fees were calculated by reference to the number of screens and the number of seats.

(4) Thus, whilst the playing of the KMVs, which was licensed under the public performance licence, was directly correlated to the number of rooms, what was licensed under the K-Server licence was not correlated as much with the number of rooms.

(5) It followed that using the example of Wonderful Limited, Neway paid HK$89,693 for a public performance licence from PPSEAL for the year 2007-2008, in addition to paying PPSEAL HK$36,363 for the K-Server licence for that same year.

(6) As Neway had all along been obtaining and paying for public performance licences from PPSEAL, long before PPSEAL introduced the K-Server licence in 2005, it must have been in the minds of those formulating the PPSEAL's K-Server licensing scheme and its tariff that large karaoke operators like Neway were already paying substantial amounts for the public performance licence under a tariff which reflected the sizes of the licensed karaoke outlets and the amounts of usage through the actual playing and performance of the KMVs.

(7) Further, since the K-Server licence was introduced to compensate the record companies for loss of sales of physical discs containing KMVs, those formulating the PPSEAL's K-Server licensing scheme and its tariff must have sought to formulate and design the PPSEAL K-Server licensing scheme, in particular, its structure, so as to best achieve this. There was therefore nothing illogical or absurd in PPSEAL formulating and designing the structure of the tariffs under PPSEAL K-Server licensing scheme in the way it did.

145. We do not accept the Originator's submission above.

146. Firstly, we accept the Respondent's reply submission that the Originator's characterisation of usage under the K-Server licence (that the usage under the K-Server Licence would be a matter of compensation for the loss of sales of physical discs) is misconceived. This is because such characterisation has disregarded the value and enhanced benefits of k-server systems over physical discs, namely (1) the uploading and enabling of potential access to the entire catalogue of KMVs and (2) the enabling of simultaneous access of the entire catalogue of KMVs by patrons in multiple rooms. The Respondent relied on the admission by Mr. Wynn that the value of and the costs and benefits associated with a K-Server licence were not equivalent to that of KMVs discs. Although the Tribunal noted that Mr. Wynn did not agree that the value of the K-Server licence was independent of the use of physical discs which were replaced, because of the so-called "disc replacement theory" that he advanced, we rejected the theory for reasons explained in section L(2) below. We consider the emphasis and the significant weight that we have attached to the factors as explained in paragraphs 91-93 above are significant for the discussion here.

147. Secondly, public performance licence is not relevant to the determination of the reasonableness of the tariff of HKKLA K-Server Licensing Scheme. Firstly, during the hearing Neway, the Originator confirmed through their leading counsel that they would not be arguing that the HKRIA's[13] public performance licence was a comparable in

[13] HKRIA (Hong Kong Record Industry Alliance Limited) is a company established in October 2008 and a not-for-profit copyright management organization. It is a copyright licensing body registered with the Copyright Licensing Bodies Registry of Hong Kong since 2010. It has been acting as a licensing body for its record company members for the granting of broadcasting and public performance licences in respect of sound recordings and music videos. The founding members of HKRIA are the Record Companies and EMI. Presently, according to Mr. Botejue, there are 15 members.

considering whether or not the HKKLA K-Server Licence was reasonable. The Originator's position is again confirmed in its written reply submissions. Secondly, the Tribunal notes that the HKRIA's public performance licensing scheme is currently the subject matter of a separate reference in CT 1/2011.

148. Lastly, the Originator took issue that it was not open for the Respondent to contend in its written Closing Submissions that the failure of PPSEAL's tariff to account for the higher usage of copyright work by the large karaoke operators like Neway "results in a conflict with a normal exploitation of the copyright work and unreasonably prejudices the legitimate interest of the copyright owners under Section 167(3)" as that was an entirely new case which the Respondent was seeking to slip in through its Closing Submissions. The Originator said although the Respondent had cited the whole of Section 167 in its Opening Submission, this new case which the Respondent sought to slip into its written Closing Submissions had not been pleaded, made or addressed to in any of the factual witness statements and expert reports, made or addressed in HKKLA's Opening, or had not been put to any of Neway's factual or expert witnesses in cross-examination.

149. Apart from the submission that it had not been pleaded, the Originator did not deal with or engage the contents of the Respondent's said argument (namely, that the failure of PPSEAL's tariff to account for the higher usage of copyright works by the large karaoke operators like the Neway Group resulted in a conflict with a normal exploitation of the copyright works and unreasonably prejudiced the legitimate interest of the copyright owners under Section 167(3) of the Ordinance) in any way. The Originator raised no counter-argument. The Originator did not mention that this

argument required any evidence to substantiate or to rebut. No prejudice or substance of any prejudice was mentioned. Therefore, the Tribunal does not agree that the Respondent should be barred from making this argument.

150. Lastly, the Originator submitted that the Respondent's aforesaid argument on material changes of circumstances between the introduction of the PPSEAL's K-Server licensing scheme in 2005 and the introduction of the HKKLA K-Server Licensing Scheme in 2010 should be rejected. As mentioned in paragraph 129 above, given the material changes of circumstances, the Respondent asked the Tribunal to look at HKKLA's tariff structure afresh and not to have regard to PPSEAL's tariff structure.

151. The Originator submitted that there was no merit in the Respondent's said submission on material changes of circumstances. The Originator pointed out that the changes referred to by English Copyright Tribunal in *The Association of Independent Radio Companies Limited*, *supra* at p.176, lines 28 to 33 were structural changes[14] which had occurred in the licensees' industry and were matters which had relevance to and would affect the tariff structure. As the Respondent has failed to provide any explanation as to or demonstrate how such changes are material to the HKKLA K-Server Licensing Scheme's tariff structure, the Originator contended that there was no justification for the Tribunal to wholly ignore the structure of the PPSEAL's K-Server licensing scheme and to look at the matter afresh. Furthermore, the Originator submitted that unlike the matters referred to in *The Association of Independent Radio*

[14] The changes were "the structural changes in the commercial radio industry since 1986, not least in the increase in the number of stations, some of them small and of marginal profitability, the emergence of the incremental stations, the increasing competition between stations for shares of the available advertising revenue and the increasing competition facing the whole industry". The English Copyright Tribunal took the view that these changes required it to take a fresh look at the tariff structure.

Companies Limited, *supra* (see Footnote 14), the changes referred to by the Respondent had nothing to do with any changes in the karaoke industry itself.

152. The Tribunal takes the view that it should not ignore the tariff of PPSEAL's licensing scheme altogether just because of the changes referred to by the Respondent.

153. As mentioned in paragraph 124 above, both parties accept that the starting rate of PPSEAL's licensing scheme is reasonable, and HKKLA had adopted this rate in formulating the licence fee in arriving at its starting rates of the tariff. If its starting rate was accepted as reasonable and adopted in the subject scheme, we find it hard to explain why its structure should be ignored altogether.

154. Furthermore, the Tribunal is entitled to take into account all relevant considerations under section 167(3) of the Ordinance. The Tribunal does find it necessary, in assessing the reasonableness of HKKLA K-Server Licensing Scheme's tariff, to consider the comparability of the tariff structure of PPSEAL's licensing scheme.

155. Having taken into account all the matters mentioned above, the Tribunal has come to a conclusion that the structure of the tariff of PPSEAL's K-Server licensing scheme is not reasonable, for the following reasons:

(1) The Tribunal cannot discern any reasonable explanation on why under the scheme, a karaoke operator with 4 rooms would pay the same licence fee as a karaoke operator with 50 rooms.

(2) The Tribunal cannot fathom any reasonable basis of charging a 4-room, or 5-room, or 6-room karaoke establishments and a 50-room, or 40-room, or 30-room karaoke establishment all at the same lump-sum licence fee of HK$32,000.

(3) Such a structure deviated disparagingly the accepted norm of the more usage the licensee was using the copyright work, the higher the licence fee it should pay.

(4) Such a structure also encroached upon the boundary of discrimination, against those 4-room, or 5-room, or 6-room karaoke establishments and in favour of those 50-room, or 40-room, or 30-room karaoke establishments. There was no reasonable explanation on why a 50-room karaoke establishment should pay the same licence fee of HK$32,000 as a small 4-room karaoke establishment.

(5) By the same token, regarding the rate of HK$160 per room per annum for each additional room in excess of 50 rooms, the Tribunal notes that the more rooms a karaoke establishment contained, the less average rate of licence fee per room the karaoke establishment was charged. Using the illustrations referred to in paragraph 128(2)(b) above, Century Advance Limited (a 50-room karaoke establishment) would pay an average of HK$555.24 per room, whereas Wonderful Limited (a 120-room karaoke establishment) paid an average of HK$324.67 per room.

(6) Again, there was no good reason to explain why a 120-room karaoke establishment should pay less licence fee per room on average than a 50-room karaoke establishment. There was also no reason to explain why a large-sized

karaoke establishment presumably having more usage of the copyright work should be charged less than the middle-sized karaoke establishment on an average per room basis. The difference is, taking the above example of Century Advance Limited (with 50 rooms) and Wonderful Limited (with 120 rooms), as high as 41.53% (i.e. [(HK555.24 – HK$324.67.67) / HK$555.24] x 100%). We have thought of the possibility of bulk purchase, but such a great disparity still looks very unreasonable to us.

(7) With such a great disparity, but without any good explanation, again we find that it amounted to unreasonable discrimination against those karaoke establishments with 50 rooms or less and in favour of those karaoke establishments with more than 50 rooms. The more rooms the karaoke establishments operated, the more serious the discrimination there existed.

156. As can be seen from paragraphs 131-149 above, the Originator has not offered any valid analysis or reason to explain the items of unreasonableness identified above.

157. Therefore, having paid regard to all the relevant features and considerations, the Tribunal determines to hold the structure of PPSEAL's licensing scheme to be unreasonable. It should not be adopted or used as an appropriate comparable in assessing the reasonableness of the structure of HKKLA K-Server Licensing Scheme.

I(2) Comparability of K-Net Music's licensing scheme

158. The Respondent submitted that only the starting rate of K-Net Music's licensing scheme should be used as a comparable but not its structure.

159. The Respondent relied on Mr. Wynn's evidence during his cross-examination that the starting rate of the tariff of K-Net Music's licensing scheme could be used as a comparable for benchmarking the initial part of HKKLA K-Server Licensing Scheme. It also relied on Mr. Botejue's mention during his cross-examination that when drafting the tariffs for HKKLA K-Server Licensing Scheme, the tariffs under K-Net Music's licensing scheme might have been considered.

160. In respect of the subsequent progression of licence fees under the K-Net Music's tariff, the Respondent asked the Tribunal to disregard it, for the reason that the tariff was not intended to and did not apply to karaoke chains like Neway. As mentioned in paragraphs 66-68 above, K-Net Music was tasked with operating a licensing scheme that granted K-Server licences in respect of Old KMVs and New KMVs only for non-chain karaoke establishments.

161. This was not a fact challenged by the Originator. Instead, the Originator submitted that the only significant point arising out of the K-Net Music's K-Server licensing scheme was that it adopted a structure which was similar to the structure of the PPSEAL's K-Server licensing scheme. Unlike the HKKLA K-Server Licensing Scheme, K-Net Music's licensing scheme adopted, as the Originator contended, a "non-linear' structure. That was the reason why the Respondent said the structure of K-Net Music's licensing scheme should be disregarded.

162. It appears to the Tribunal that the Originator did not deal with, and might have missed, the Respondent's argument that since K-Net Music's tariff was expressly stated

to be applicable to "non-chain" karaoke establishments, i.e. small to mid-sized karaoke bars or outlets, it logically follows that the tariff structure of K-Net Music was designed and provided for up to 20 karaoke rooms with additional rooms being charged at a low rate. K-Net Music's tariff is recapitulated as follows:

(1) 1 to 3 rooms: HK$8,800 per month

(2) 4 to 9 rooms: HK$13,800 per month

(3) 10 to 20 rooms: HK$18,800 per month

(4) >20 rooms: HK$600 per room per month

(with effect from February 2008, see paragraphs 67-69 above)

163. It is inapt, in our view, to test the reasonableness of the structure of HKKLA K-Server Licensing Scheme by comparing it with the structure of K-Net Music's licensing scheme. The inappropriateness is well explained by the Originator's expert, Mr. Wynn. During cross-examination, Mr. Wynn testified as follows:

> "Q. You don't consider it [K-Net Music's licensing scheme] a comparable?
>
> A. No.
>
> Q. Because of what?
>
> A. There were two reasons. The first reason is my understanding that it wasn't understood to be a scheme that applied to chains, …

…

Because if you think about the primary debate that we've had, which is really about how the fees should vary with the number of rooms, if there's a danger that the K-Net scheme didn't have establishments of the size of Neway's in mind, when it was designed, then it won't provide a basis for testing how the fees should vary with the number of rooms, for establishments of the size of Neway.

…

my point is that if it wasn't designed for chains, then it won't account for establishments of the size of Neway's."

164. In other words, Mr. Wynn was of the view that the structure of K-Net Music's licensing scheme should not be considered as a suitable comparable of the structure of HKKLA K-Server Licensing Scheme.

165. Having considered the structure of K-Net Music's licensing scheme, the Tribunal accepts Mr. Wynn's reasoning in this regard, and finds that the progression of K-Net Music's tariff after the starting rate is not relevant to the assessment of the reasonableness of the linear progression of HKKLA K-Server Licensing Scheme.

166. We make a note that during his re-examination Mr. Wynn mentioned for the first time in these proceedings the structure of CASH's K-Server licensing scheme – that it did not increase linearly with the number of rooms and was relatively flat. However, the Tribunal cannot take any serious account of this scheme. No evidence was adduced prior to Mr. Wynn's re-examination. There was no document before the

Tribunal showing the tariffs, the structure and the terms of the licence under this CASH's scheme. Mr. Wynn, who introduced this scheme to the Tribunal, told the Tribunal that he could not remember what the figures were in the tariffs. If Mr. Wynn took this scheme seriously, he should have included it in his report. He did not. And the Respondent did not have any opportunity to adduce evidence in relation to this scheme or deal with it in any way. For these reasons, the Tribunal cannot discern any use out of the point that Mr. Wynn tried to make of this scheme.

167. The Tribunal also notes and take account of the difference in the repertoire covered by the two schemes. K-Net Music's licensing scheme covered both Old KMVs and unlimited New KMVs of the Record Companies and other record companies which had given the authorization to K-Net Music, whereas HKKLA K-Server Licensing Scheme offered four choices: (a) "Up to 150 New KMVs + Back Catalogue (not less than 8,000 KMVs)"; (b) "In excess of 150 New KMVs"; (c) "For New KMVs only (up to 150 KMVs)"; (d) "For Back Catalogue only (not less than 8,000 KMVs)".

168. For the present purpose, as mentioned in paragraph 10 above, since it is only the back catalogue KMVs of HKKLA K-Server Licensing Scheme in issue, the Tribunal takes account of the starting rate of K-Net Music's tariffs, i.e. HK$8,800 per month (i.e. HK$105,600 per annum) for the first to third rooms[15], which were comparable to the starting rate of HKKLA K-Server Licensing Scheme's "For Back Catalogue only (not less than 8,000 KMVs)" at HK$14,760 per room per annum (for "1 to 10" rooms)[16].

[15] Noting that K-Net Music's repertoire covered both Old KMVs and unlimited New KMVs of the Record Companies and other record companies, as mentioned in paragraph 167 above.
[16] The licence fee for 3 rooms would be HK$14,760 x 3 = HK$44,280, and for 10 rooms would be HK$14,760 x 10 = HK$147,600 per annum

I(3) Comparability of Music Link's licensing scheme

169. As mentioned in paragraphs 72 to 74 above, after its incorporation in October 2006, Music Link commenced licensing its repertoire of three record companies on 22 November 2007. Its repertoire was then expanded to cover the repertoire of six record companies on 21 January 2008, then eight record companies on 15 March 2008, then nine record companies in the last quarter of 2008, and lastly ten record companies in early 2009. The Tribunal notes that these record companies did not include the four major Record Companies although they included Gold Label (Gold Typhoon) and East Asia Music.

170. It is common ground that Music Link was a licensing body running a licensing scheme, and that its licensing scheme did not apply to karaoke chains[17].

171. Mr. Wynn agreed, during cross-examination, that, same as K-Net Music's licensing scheme, notwithstanding it was not intended for karaoke chains, Music Link's licensing scheme could be used as a comparable for benchmarking the initial part of HKKLA K-Server Licensing Scheme.

172. As mentioned in paragraph 169 above, according to a leaflet of Music Link's tariff, where its repertoire consisted of ten record companies, different rates were provided for karaoke establishments with 0-3 rooms, depending on the floor area of the

[17] The only exception is that Music Link granted K-Server licences to Neway's karaoke outlets. This was obviously because Music Link was part of the Neway Group, and one of the objectives of Music Link securing the rights from the record companies was to ensure that Neway would be able to use such KMVs. Neway did not pay any licence fees to Music Link.

establishment and different rates were provided for karaoke bars with 4-6 rooms with different floor areas:

(1)	2,000 sq. ft. or less, with not more than 3 rooms:	HK$6,800 per month
(2)	3,000 sq. ft. or less, with not more than 3 rooms:	HK$7,300 per month
(3)	4,000 sq. ft. or less, with not more than 3 rooms:	HK$7,800 per month
(4)	5,000 sq. ft. or less, with not more than 3 rooms:	HK$8,300 per month
(5)	2,000 sq. ft. or less, with 4-6 rooms:	HK$8,000 per month
(6)	3,000 sq. ft. or less, with 4-6 rooms:	HK$8,500 per month
(7)	4,000 sq. ft. or less, with 4-6 rooms:	HK$9,000 per month
(8)	5,000 sq. ft. or less, with 4-6 rooms:	HK$9,500 per month

(9) Total floor area of less than 5,000 sq. ft., with 7-10 rooms: HK$1,800 per room per month

173. In one of Mr. Lam Ka Wah Gary's ("**Mr. Gary Lam**")[18] witness statements, Music Link's tariff was in recognition of the fact that most karaoke bars had only up to 3 rooms, and this was so in order to qualify under the exemption for "bona fide" restaurants under section 3(2) of the Karaoke Establishments Ordinance. Therefore, Music Link's tariff was designed to specifically cater for K-Bars but not chains. According to Mr. Gary Lam's evidence, no sub-licence was ever granted by Music Link or subsequently MVCM to any karaoke bars (or commonly known as K-Bars) operating more than 6 rooms.

174. Therefore, the Tribunal accepts the Respondent's submission that while the starting rate of Music Link's tariff can be used as a comparable in assessing the reasonableness of the initial part of HKKLA K-Server Licensing Scheme, the structure of Music Link's licensing scheme is of no relevance in assessing the reasonableness of the structure of HKKLA K-Server Licensing Scheme. We consider the analysis above in paragraphs 163-165 in relation to the structure of K-Net Music's licensing scheme is also applicable here in relation to the structure of Music Link's licensing scheme.

175. The Originator did not dispute that the structure of Music Link's licensing scheme was not comparable to the structure of HKKLA K-Server Licensing Scheme. It also did not dispute the reasonableness of the starting rate of Music Link's licensing scheme. The Originator however submitted that, as Mr. Wynn opined during cross-examination, the key issue was not the starting rate but how the rate should vary with the number of rooms, and that as Music Link's scheme did not contemplate to cover

[18] Mr. Gary Lam is the Originator's witness, a Director of Neway Karaoke Box Limited (the sole shareholder of the Originator) and was responsible for overseeing the sub-licensing activities of Music Link.

outlets of the size like Neway, it did not constitute the evidence on how the fees should vary with the number of rooms.

176. Relying on Mr. Wynn's evidence, the Originator submitted that the nature of rights granted and the repertoire covered by Music Link's licensing scheme was very different from that of HKKLA K-Server Licensing Scheme – in particular, HKKLA K-Server Licensing Scheme covered both back catalogue and New KMVs, whereas Music Link's licensing scheme covered both back catalogue and Second Tier New KMVs (see paragraph 72 above).

177. The Originator also pointed out under Music Link's licensing scheme there were certain additional benefits such as provision of karaoke server at a nominal rental of HK$1 per month (but as it transpired during his cross-examination, Mr. Gary Lam admitted that the rental of k-servers of some licensees were increased to HK$700 per server and HK$800 per server respectively) and provision of copies of licensed KMVs.

178. Both the Originator and the Respondent accept that the above differences can be accounted for by way of adjustments, although the Originator submitted that this exercise of actual adjustment was not done by any expert witnesses before the Tribunal. In this connection, the Tribunal considers that although the actual adjustment was not made in arriving at a figure, the Tribunal may still compare the starting rate of Music Link's tariff with the starting rate of HKKLA's tariff and take account of such comparison in considering the reasonableness of the starting rate of HKKLA's tariff.

179. The last point we should mention is Mr. Wynn's suggestion that another reason why he had not relied on Music Link's licensing scheme as a comparable was because when the scheme was designed, the people designing the scheme did not appreciate that it would be constrained by the auspices of this Tribunal. He explained that the ignorance of the people who designed the Music Link's licensing scheme that the scheme would fall within the jurisdiction of this Tribunal would affect the weight one could place on the comparable. It means that the people who designed the tariffs could have set the fees arbitrarily as they wanted without having to worry that such fees would be subject to the scrutiny of this Tribunal.

180. The Tribunal rejects Mr. Wynn's said suggestion. Firstly, it is hard to believe that Music Link could have wholly ignored the jurisdiction of the Copyright Tribunal. Music Link was part of the Neway Group, the largest karaoke operator in Hong Kong. The Neway Group had entered into numerous licence agreements with record companies. Secondly, and in any event, we take the view that such ignorance is irrelevant to the Tribunal taking into account other schemes and indeed all relevant circumstances under section 167 of the Ordinance. Thirdly, the evidence of Mr. Gary Lam clearly showed that everything that Music Link did, in fact, had its own commercial considerations. His evidence was that the tariffs of Music Link's licensing scheme were set by reference to the amount of the licence fees Music Link paid to record companies under their respective agreements with Music Link. He also told the Tribunal that the fees Music Link paid to the record companies were high in order to entice them away from PPSEAL, that Music Link existed purely for the benefit of the Neway Group, and that the income from the sub-licensing activities of Music Link was intended to be used to recoup part of the costs for obtaining K-Server licences for use

by Neway's own karaoke outlets. Therefore, Mr. Gary Lam told the Tribunal that Music Link's licence fees were set with the object of maximising such income. On the one hand, these matters are exactly the commercial reality which the Tribunal is entitled to, and in our view should take into account as mentioned in paragraph 35 above. On the other hand, with all these rational commercial considerations in its mind, we cannot see how Mr. Wynn could say Music Link had set its licence fees arbitrarily.

I(4) Comparability of the June 2008 Agreement

181. As mentioned in paragraph 70 above, K-Net Int'l and the Originator entered into the June 2008 Agreement for the K-server licence of the Record Companies' repertoire of Old KMVs for an annual fee of HK$5 million, for 2 years at a total licence fee of HK$10 million.

182. There are a lot of factual disputes over the June 2008 Agreement. The Respondent's position is that the execution of the June 2008 Agreement was a commercial decision readily and willingly made by the Neway Group at that time, and as such, it should be regarded as a comparable for the Old KMVs of the Record Companies in HKKLA K-Server Licensing Scheme. The Originator's position is that the evidence before the Tribunal shows that the June 2008 Agreement had not been entered into willingly by Neway; and as such, it should not be regarded as comparable. In this connection, the Tribunal notes that both parties' experts did not rely on the June 2008 Agreement as a comparable.

183. Whether the June 2008 Agreement had been entered into willingly and whether the licence fee of $5 million per annum had been agreed willingly is a matter of fact and evidence. The Tribunal has taken the view that it is not necessary to make a finding. It has formed the view that the June 2008 Agreement is not a suitable comparable in any event.

184. The June 2008 Agreement is not an appropriate comparable to HKKLA K-Server Licensing Scheme. The licence fee under the June 2008 Agreement was HK$5,000,000 per annum for two years. This was a lump sum for all Neway's karaoke establishments, and for the entire repertoire of the back catalogue of the Record Companies. This was not a tariff with a scale of charges. There was no starting rate and the fee did not progress with the increase in the number of karaoke rooms. There was no evidence on how the lump sum of HK$5,000,000 was derived. Both parties did not adduce any evidence on how the lump sum may be compared to the starting rate and progressing rates as the number of rooms increases in HKKLA's tariff. Therefore, the Tribunal does not see fit, and in fact cannot see in what way, to compare the two.

185. Therefore, the Tribunal finds it not necessary to make the factual determination on whether the June 2008 Agreement was entered into by Neway willingly or not. It is not a suitable comparable after all.

I(5) Comparability of Neway's acceptance of K-Net Int'l's offer of HK$15 million for 150 new KMVs in December 2008

186. This topic concerns the October 2008 Offer as mentioned in paragraph 71 above. K-Net Int'l's offer was accepted by Neway in December 2008, when Neway tendered a cheque of HK$15 million for payment of the licence fee as offered.

187. The Originator submitted that since the reasonableness of the licence fees charged under HKKLA K-Server Licensing Scheme in respect of New KMVs is no longer in issue (see paragraph 8 above), Neway makes no submission in response to the points made in HKKLA's closing submissions on the October 2008 Offer.

188. Nonetheless, as mentioned in paragraph 99(4), the annual licence fee of HK$15 million in the October 2008 Offer was constituted in the derivation of the starting rate "For Back Catalogue only (not less than 8,000 KMVs)" under the subject HKKLA K-Server Licensing Scheme. The figure of HK$15 million was used in obtaining the starting rate for the "Up to 150 New KMVs + Back Catalogue (not less than 8,000 KMVs)" category, i.e. HK$28,500. The sum of HK$28,500 was then used to determine the starting rate of HK$14,760 for the said back catalogue only category of HKKLA's scheme.

189. The Originator did not challenge the use of HK$15 million under the October 2008 Offer in this part of the derivation. The Tribunal sees no unreasonableness in the process. In any event, since the October 2008 Offer was not a tariff, it cannot be used as a comparable for the structure of HKKLA's tariff.

J. Whether HKKLA's Tariff for Old KMVs is reasonable

190. The Originator did not dispute that the starting rate of HK$14,760 for the Old KMVs only under HKKLA K-Server Licensing Scheme is reasonable. It however disputed that the structure of HKKLA's scheme for the Old KMVs was unreasonable.

191. The Respondent submitted that the structure of HKKLA K-Server Licensing Scheme was reasonable for the following reasons:

(1) The structure of the tariff gave due consideration to the extent of usage of KMVs across different sizes of karaoke operators.

(2) It did not discriminate against smaller karaoke operators with fewer rooms nor did it favour larger karaoke operators with more rooms by charging larger operators disproportionately smaller amount of licence fees per room.

192. To illustrate, the Respondent submitted as follows:

(1) Under its tariff, the total licence fees increased linearly as the number of karaoke rooms increased. A karaoke outlet would pay HK$14,760 per annum for the Old KMVs with 1 room, HK$654,000 with 50 rooms (i.e. HK$13,080 x 50), and HK$1,140,000 with 100 rooms (i.e. HK$11,400 x 100). In contrast, under PPSEAL's tariff for the Old KMVs, a karaoke outlet would pay HK$16,000 per annum with 1 room, HK$32,000 with 50 rooms, and HK$40,000 (i.e. HK$32,000 + $160 x 50) with 100 rooms.

(2) There was a gradual sliding scale in the licence fees per room. Under the HKKLA's tariff for Old KMVs, a karaoke outlet with 1 - 10 rooms would pay HK$14,760 per room per annum and one with over 100 rooms would pay HK$11,160 per room per annum. As such, there was a bulk discount on a gradual sliding scale from 5.6% to 23.9% for karaoke operators of medium to big sizes who would likely use correspondingly more of the licensed KMVs. In contrast, under PPSEAL's scheme, a karaoke outlet would pay HK$16,000 with 1 room, HK$5,333.33 per room with 3 rooms, HK$8,000 per room with 4 rooms, HK$640 per room with 50 rooms – a huge discount of 96% from HK$16,000 with 1 room, and HK$400 per room with 100 rooms – another huge discount of 97.5%.

193. The Tribunal accepts the Respondent's submissions. HKKLA's tariff aligned with the principle that the more one used the copyright work the more licence fee one should pay. As mentioned in paragraph 98 above, the higher the usage of the copyright work, more fee should be paid. And as accepted by Mr. Suek, the more karaoke rooms a karaoke establishment operated, the more usage of KMVs there would be. There was no valid reason why the same licence fee should be set for a karaoke establishment with 4 rooms and a karaoke establishment with 50 rooms as under PPSEAL's tariffs. The Originator did not provide any valid justification on why this was reasonable, where it was so obvious that a karaoke establishment with 4 rooms would use more (and possibly much more) KMVs than a karaoke establishment with 50 rooms. While bulk discount might reasonably account for a lower average licence fee per room, it could not explain why exactly the same amount of licence fee should be charged for large

karaoke establishments with 50 rooms and small karaoke establishments with 4 rooms. Therefore, we agree that HKKLA's tariff for Old KMVs was reasonable as it reflected the difference in usage amongst different sizes of karaoke operators both in terms of total licence fees payable and per room licence fee.

194. Both parties invited the Tribunal to look at the amount of total licence fees payable by Neway under HKKLA's tariff and consider if it was reasonable. Based on Mr. Botejue's calculations, the total licence fee payable by Neway Group for Old KMVs would be around HK$15 million in 2018. The Originator said this figure was not correct. It submitted a table comparing the licence fees payable by each of the Neway Group's companies in 2007-2008 under PPSEAL's tariffs and under HKKLA's tariffs for Old KMVs only. The Originator came up with the figures of HK$912,214 (being the total licence fees payable by the Neway Group under PPSEAL's tariff) and HK$18,293,160 (being the total licence fees by the Neway Group under HKKLA's tariffs). It appeared to the Tribunal that this was mainly due to the difference between the number of Neway's outlets existing at the time.

195. The Tribunal takes the view that the comparison sought by the Originator is not helpful in our assessment of the reasonableness of the structure of HKKLA's tariffs. For the reasons set out in section I(1) above, we have already concluded in paragraph 157 that we find the structure of PPSEAL's licensing scheme to be unreasonable, and that it should not be adopted or used as an appropriate comparable in assessing the reasonableness of the structure of HKKLA K-Server Licensing Scheme.

196. The Respondent further submitted that the total licence fees payable by the Neway Group for Old KMVs was reasonable in light of:

(1) the aggregate of the licence fees which should have been payable by Neway to EEG, East Asia and Gold Typhoon in 2013 (the so-called "**implied licence fees**"); and

(2) Neway's individual licensing agreements entered with other local record companies on a per song basis.

197. Regarding the first point in paragraph 196 above on the aggregate of the implied licence fees, the Respondent submitted that according to Mr. Mainz's first report adopted by Mr. Wynn, the implied licence fees were $7.6 million, $5.5 million and $2.3 million respectively. The total implied licence fees were HK$ 15.4 million.

198. The Tribunal considers that while the implied licence fees may not be used as a basis for adjustment for derivation of a reasonable figure, it can be appropriately used as a reference point, or a check point, on the reasonableness of the fees payable by Neway to HKKLA under HKKLA's scheme. This is because:

(1) There was no challenge or evidence to the contrary that the K-Server licences granted to Neway by these three record companies were entered into unwillingly.

(2) In his report, Mr. Mainz considered that an assessment of the appropriate licence fees based on the fees paid to these three record companies was unlikely to understate the fee payable to HKKLA.

(3) There was no evidence before the Tribunal on the total number of Old KMVs licensed by the said three record companies to Neway. In particular, we were not informed whether the number would exceed the Record Companies' Old KMVs' repertoire of over 8,000. This is also the reason why we do not consider it can be used for adjustment to derive an actual figure of reasonable licence fee.

(4) In his report, Mr. Mainz suggested that the hit rates for HKKLA's Old KMVs were broadly similar to those of the said three local record companies. He relied on the hit rate data supplied to him by Neway. We should mention here that we reject the accuracy and reliability of the hit rate data prepared by Neway, for the reasons explained in section L(1) below. On Mr. Mainz's suggestion, we share the scepticism expressed by the Respondent. As mentioned in paragraph 101 above, (a) the Record Companies and EMI were major international record companies, (b) most of the artists of the Record Companies were renown artists receiving many music awards including the top ten songs awards presented by RTHK and (c) their repertoires of Old KMVs were very substantial, consisting over 8,833 Old KMVs by 2015.

199. The Originator submitted that according to Mr. Wynn in re-examination, he and Mr. Mainz did not rely on the agreements with the said three local record companies mainly because there were different and additional rights granted under those

agreements and it was very difficult to "unpack" so as to find out the value associated with the back catalogue KMVs. We do not accept this submission for the reason mentioned in paragraph 198(3) above. Since there is no evidence before the Tribunal on the total number of Old KMVs licensed by the said three record companies to Neway, it cannot be used as comparables to make adjustment so as to derive an actual figure of reasonable licence fee. However, as mentioned in the beginning of paragraph 198 above, we consider useful to use them as a reference point or check of the reasonableness of HKKLA's tariff.

200. Regarding the second point in paragraph 196 above, the Respondent prepared a calculation on the licence fee per Old KMV, i.e. on a per song basis. Under this per song approach, HKKLA effectively charged a fee of around HK$1,698 per Old KMV (i.e. HK$15 million (see paragraph 194 above) / 8,833 (see paragraph 198(4) above) = HK$1,698). The Originator said the total licence fee should be HK$18,293,160, as mentioned in paragraph 194 above. Based on this figure, the licence fee per Old KMV would be HK$2,071 per Old KMV (i.e. HK$18,293,160 / 8833 = HK$2,071). The Tribunal notes that even comparing with this higher figure of HK$2,071 per Old KMV, the licence fees charged against Neway by those local record companies under the following individual licensing agreements were much more expensive:

(1) Under a licensing agreement between Sony BMG Music Entertainment (Hong Kong) Limited and Neway Music Limited dated 19 December 2008, Neway agreed to pay Sony BMG the licence fee of HK$20,000 per annum for each Old KMV of Jay Chou, a famous artist (i.e. HK$240,000 for 12 songs).

(2) Under a licensing agreement between Sony Music Entertainment Hong Kong Limited and Neway Music Limited dated 24 December 2010, Neway agreed to pay Sony Music the licence fee of HK$16,500 for each Old KMV of Jay Chou and other artists (i.e. HK$495,000 for 30 songs) and HK$5,000 for each non-Jay Chou's Old KMV (i.e. HK$10,000 for 4 songs for 6 months only).

(3) It is therefore obvious that even the lowest licence fee of non-Jay Chou and unknown artists at HK$5,000 was still more than twice as expensive as HKKLA's per song rate of HK$2,071.

(4) If the said per song rate of non-Jay Chou's Old KMVs at HK$5,000 per Old KMV were charged by HKKLA for its Old KMVs' repertoire, the total licence fees would be HK$44.17 million.

201. The Respondent submitted that whilst in his report Mr. Mainz had adopted the per KMV basis as the methodology in assessing the reasonableness of HKKLA's tariff for New KMVs, he did not adopt the same approach in assessing the reasonableness of HKKLA's tariff for Old KMVs. Mr. Wynn who adopted Mr. Mainz's report agreed that Mr. Mainz did not give any explanation in his report. Mr. Wynn said he would "imagine" that it was because in the licence agreements it was generally new songs that were licensed on a per song basis. We cannot take this answer as Mr. Wynn had "imagined" seriously. This is because firstly, it was Mr. Wynn's pure speculation without any factual support; besides, we note that in appendix 5-1 of Mainz's first report, there were a number of licence agreements for Old KMVs, in which licence fees were

charged on per KMV basis[19]. Whilst the Originator's counsel argued in their submission that Mr. Ching, the Respondent's expert did not use the per song approach for Old KMVs, the Tribunal notes that Mr. Ching did not use the per song approach for New KMVs either. We consider that since it was the Originator's experts (Mr. Mainz and Mr. Wynn who adopted Mr. Mainz's reports) who adopted the per song approach for the New KMVs, a reasonable expert would have considered that he should provide an explanation on why he did not use the same approach for the other main category in the subject repertoire in these proceedings.

K. Licence Fees proposed by Neway

202. Neway's case is that the entire HKKLA's tariff for Old KMVs should be discarded. Its proposal to the Tribunal is to rely on the PPSEAL's K-Server licensing scheme as the basis to arrive at the reasonable level of licence fee that Neway should pay to HKKLA for a K-Server licence in respect of HKKLA's back catalogue repertoire, and used the hit rate data adduced by Neway as a check. The result is a proposed licenced fee of HK$0.5 million per year for the entire repertoire of HKKLA's Old KMVs.

203. It should be noted that Neway did not ask the Tribunal to replace HKKLA's tariff with another more reasonable tariff. It simply relied on its expert's opinion and asked the Tribunal to assess a lump sum licence fee on a per year basis. We summarize

[19] For example, in an agreement dated 1 January 2008 between Star Entertainment (Universe) Limited and Music Link Limited for Old KMVs, a licence fee of HK$10,000 was charged per KMV.

how Mr. Mainz (whose opinion was adopted by Mr. Wynn) came up with the proposal as follows:

(1) He started off by determining the total amount of K-Server licence fee Neway should pay for the use of the back catalogue KMVs of all the record companies in 2013. To arrive at that figure, Mr. Mainz opined that one should consider the amount of K-Server licence fee Neway paid to PPSEAL prior to the withdrawal of the record companies (see paragraph 60 above), which included the Record Companies). For the year 2007/2008, the total K-Server licence fee paid by Neway to PPSEAL before the withdrawal of those record companies was approximately HK$770,000.

(2) Mr. Mainz then adjusted the figure to deduce the approximate hypothetical amount of the K-Server licence fee Neway would have paid to PPSEAL had those record companies remained in PPSEAL in 2013. In making the adjustment, he took into account the increase in the number of rooms by Neway across all its outlets between 2007 and 2013 and the increase in inflation (as represented by Hong Kong Consumer Prices Index (B)) over the same period.

	% Adjustment	Amount (HK$)
K-Server licence fee Neway paid to PPSEAL in 2007/2008 (before the Record Companies withdrew from PPSEAL)		770,000
Uplift for increase in no. of rooms from 2007 to 2013	2.4%	
Uplift for inflation from 2007 to 2013	23.2%	
Hypothetical K-Server licence fee		971,000

Neway would have paid to PPSEAL in 2013 had the Record Companies and other record companies remained with PPSEAL ($770,000 x 102.4% x 123.2%)		

(3) Mr. Mainz then rounded off the figure and deduced that the K-Server licence fee Neway would have paid to PPSEAL in 2013 (had the Record Companies and the other local record companies remained in PPSEAL) would be about HK$1 million.

(4) This hypothetical amount of HK$1 million represented the K-Server licence fee Neway should hypothetically have paid in 2013 for the use of the back catalogue KMVs of all the record companies PPSEAL represented before the withdrawal of various record companies including the Record Companies in 2008.

(5) Mr. Mainz then made use of a piece of information, namely that after the withdrawal of the Record Companies and a number of local record companies from PPSEAL in 2008 (see paragraph 60 above), Neway was offered by PPSEAL a discount of 50% on the K-Server licence fee[20]. Solely relying on this 50% discount (and nothing else), Mr. Mainz interpreted such a discount to mean that that the PPSEAL comparable indicated that the appropriate K-Server licence fee for HKKLA's back catalogue repertoire should be no more than 50% of the said hypothetical amount of HK$1 million. (At this juncture, we should mention that we have reservation on this step. There was neither evidence nor

[20] It was said that in a letter issued by PPSEAL to Neway dated 5 March 2008, PPSEAL stated that those record companies which withdrew in 2008 (which included the Record Companies and some other local record companies) represented about 50% of the total catalogues of PPSEAL, and hence 50% discount would be offered to Neway in the next licence year for the K-Server licence. However, there was no evidence before the Tribunal to support the basis of such a 50% apportionment.

convincing analysis before the Tribunal explaining the basis of the 50% discount. Equally there was neither evidence nor analysis explaining why just because of the 50% discount offer, the appropriate licence fee should then be no more than 50% of the said hypothetical amount of HK$1 million. The casual link was not explained. Nonetheless, in view that we have rejected PPSEAL's licensing scheme as an appropriate comparable, it is not necessary for us to express a definite determination on whether this step done by Mr. Mainz (adopted by Mr. Wynn) should be rejected.)

(6) Mr. Mainz and Mr. Wynn accordingly allocated approximately HK$500,000 as being the K-Server licence fee Neway should pay for the use of the back catalogue repertoire of the Record Companies in 2013.

(7) By way of verification, Mr. Mainz compared the popularity between the repertoire of PPSEAL and the repertoire of HKKLA by the hit rate data adduced by Neway. The result of the comparison was, according to him, that for 2013, PPSEAL's K-Server licence's repertoire was sung as frequently as that of the Record Companies by Neway's customers. Hence Mr. Mainz considered that $500,000, which was also about the same amount Neway had paid to PPSEAL in 2012/2013, represented a reasonable level of licence fee Neway should pay for the use of HKKLA's back catalogue repertoire. For 2014 and 2015, HKKLA's back catalogue repertoire appeared to be sung two to three times more frequently than PPSEAL's back catalogue repertoire. Therefore, Mr. Mainz considered that from 2014 onwards, HKKLA should have been able to command an increase in the K-Server licence fee for the use of its back

catalogue repertoire. He therefore adjusted the proposed K-Server licence fee from 2014 onwards to HK$1.25 million (i.e. HK$500,000 x 2.5) to reflect the increase in the hit rates from HKKLA's back catalogue repertoire.

(8) In summary, the Orignator's proposed reasonable licence fees were as follows:-

Period	***K-Server Licence Fee***
1 July 2010 to 30 June 2011	HK$500,000
1 July 2011 to 30 June 2012	HK$500,000
1 July 2012 to 30 June 2013	HK$500,000
1 July 2013 to 30 December 2013	HK$250,000 (being HK$500,000/2)
1 January 2014 to 30 June 2014	HK$625,000 (being HK$1,250,000/2)
1 July 2014 to 30 June 2015	HK$1,250,000
For any subsequent period the Tribunal may order under s.156(4) of the Ordinance	HK$1,250,000 per annum (or on pro rata basis)

204. The Tribunal rejected the Originator's above proposal. For the reasons stated in section I(1) above, we have concluded at paragraph 157 above that the structure of PPSEAL's licensing scheme was not reasonable, and should not be adopted or used as an appropriate comparable in assessing the reasonableness of the structure of HKKLA K-Server Licensing Scheme. As the Originator's proposal is derived from PPSEAL's scheme, it must be rejected. Further, the derivation of the Originator's proposed licence fees from 2014 onwards was based on the hit rate data. As we have also rejected the accuracy and reliability of the hit rate data adduced by the Originator, for the reasons explained in section L(1) below, the Originator's proposal in that regard should also be rejected (in addition to the reason that PPSEAL's scheme should not be relied on).

L. Miscellaneous Topics

205. We shall deal with below some miscellaneous topics raised by the parties.

L(1) Accuracy & Reliability of Neway's Hit Rate Data

206. In the Originator's submission, the significance of the hit rate data in the present reference has substantially reduced as the reasonableness of the level of licence fees in respect of New KMVs is no longer in issue. For assessment of the reasonable level of licence fees for Old KMVs, the hit rate data was relied upon by Mr. Mainz in his report (adopted by Mr. Wynn) for verification only.

207. We accept the Respondent's submission that the hit rate data adduced by Neway were neither accurate nor reliable, for the following reasons:

(1) There was no reliable witness from Neway verifying before the Tribunal the accuracy and reliability of the process of extraction of the hit rates from Neway's k-servers. Originally, it was Mr. Gary Lam who confirmed in his witness statement that he retrieved the hit rate data from the k-servers of Neway's karaoke outlets. However, he accepted during cross-examination he in fact did not do that. He said he only gave instructions to another person to do so. He said the task was in fact carried out by a Ben Sze, a colleague from Neway's IT department using the Neway song selection system. However, Neway did not call Ben Sze as a witness to provide the verification.

(2) There was no reliable witness from Neway verifying before the Tribunal the accuracy and reliability of the compilation of the hit rate tables adduced before the Tribunal. Originally, it was Mr. Gary Lam who confirmed in his witness statement that he complied the hit rate tables exhibited to his witness statement as GL-1 to GL-28. However, he accepted during cross-examination he in fact did not do that. He said it was a colleague of his called Erica who was responsible for the classification of the data as well as the compilation of the tables. He did not even recall the full name of "Erica". In any event, Neway did not call this "Erica" as a witness to provide the verification.

(3) Mr. Gary Lam told the Tribunal during cross-examination that he did not check the accuracy of the hit rate data.

(4) He also accepted during cross-examination that there was no independent audit of the hit rate data and the hit rate tables, and that figures could be manipulated during preparation of Excel file compiled from the hit rate data.

(5) Against the aforesaid evidence, the Tribunal would expect Mr. Gary Lam to provide the factual basis to explain why the hit rate data adduced were accurate and reliable. When he was asked how he would know the hit rates were correct, Mr. Gary Lam relied on two facts: firstly, the data were saved in different outlets; and secondly, he did not explain to his staff what the purpose of gathering the data was. He said that for these two reasons, he believed the data to be true and accurate. In our view, these two facts were grossly insufficient to substantiate

that assertion that the data were accurate and reliable. They were too remote to be related to the issue of accuracy and reliability of the data.

(6) He also accepted during cross-examination that if a patron accidentally selected a particular KMV when in fact he meant to select a different KMV to be played, such a mistake would still be counted as a hit. He would not know how many hits in the hit rate data were so mistakenly made.

(7) The classification in the hit rate tables of each KMV in Neway's k-servers into the correct licensing body currently administering its copyright was not reliable. It was unreliable for Neway to rely only on (a) PPSEAL's website and (b) copyright information shown on the KMVs to classify KMVs stored in its k-servers according to their respective licensing bodies. This was because only the names of the record companies could be found on PPSEAL's website (and the same applied equally to HKKLA's website), thus the copyright ownership could not be ascertained. Moreover, since PPSEAL and local record companies had not provided a list of their licensed KMVs titles to Neway, it was not possible for Neway's staff to verify the information shown on the KMVs. Mr. Gary Lam told the Tribunal that he had personally checked each and every item in the tables by relying solely on his personal knowledge in the subject matter. However, the Tribunal has reservation on this assertion as thousands of songs were involved in the exercise. In any event, he admitted that he did not carry out any verification on those songs which might have been made into different KMVs and owned by different record companies. It transpired that when being

further questioned, Mr. Gary Lam incorrectly identified certain songs to be within HKKLA's repertoire, where in fact they were not.

(8) There were likely errors in the categorisation of HKKLA's Old KMVs and New KMVs. In relation with the ascertaining of the commercial release date of KMVs, Mr. Gary Lam told the Tribunal that if a KMV was not supplied by HKKLA, the commercial release date would be the date when Neway came to know about when that KMV was first sold in the market. It appeared obvious to the Tribunal that this assumption might not be correct. There was no explanation why Neway would not take any step to ascertain the commercial release date of each KMV from the relevant licensing body. Another possible error concerned the cut-off date between Old KMVs and New KMVs. It appeared that Mr. Gary Lam had erroneously adopted a 6-month cut-off date (under PPSEAL's scheme) to determine whether a KMV was an Old KMV or New KMV, where in fact, and he knew, HKKLA had adopted a different "scheme year" system. Clearly, wrong classification of New KMVs and Old KMVs would lead to inaccuracy of the hit rate tables.

(9) Neway did not load all HKKLA's Old KMVs onto its servers.

(10) There were discrepancies between the sum of the hit rates in the 2014 quarterly tables and the 2014 yearly table. Such discrepancies were not satisfactorily explained.

(11) There were also some other mistakes or inaccuracies which could not be satisfactorily explained. For example, a song "it's not that simple" 沒那麼簡單

was not included in the yearly hit rate table when the total sum of hit rates according to the quarterly tables was 89,527. This was quite a high figure. Take another example, there was no explanation why there would be two different dates under two different columns recorded as 20 November 2003 and 7 June 2003 respectively for the same song "I am not sad" 我不難過. Mr. Gary Lam responded that there might have been a clerical mistake.

We therefore do not consider that the hit rate data adduced by Neway should be relied on.

L(2) Mr. Wynn's Disc Replacement Theory

208. In support of its contention that the tariff structure of PPSEAL's K-Server licensing scheme was reasonable and should be used as the comparable in the assessment of HKKLA K-Server Licensing Scheme, the Originator relied on one aspect of Mr. Wynn's opinion. However, that part of Mr. Wynn's opinion was not mentioned in his or Mr. Mainz's reports. Mr. Wynn only testified it for the first time during cross-examination. We set out the details as follows:

(1) As the K-Server licence came into existence when the karaoke industry moved from using physical discs to operating k-servers, one needed to think about the copies of physical discs being displaced by the new mode of operating karaoke business.

(2) A large karaoke establishment would have been required to purchase more copies of physical discs. However, the number of copies actually required would not have to be equal to the number of rooms in the establishment[21]. Accordingly, in thinking about the number of copies of physical discs being displaced by the K-Server L\licence, one could not proceed on the basis that that number would be equal to the number of rooms in the establishment.

(3) In considering the number of physical discs being displaced, one needs to bear in mind that the large karaoke establishments would enjoy the advantage of having economies of scale so that they needed only a relatively smaller number of physical discs of each particular KMV.

(4) Whilst there were advantages to using a k-server, and there could be an uplift associated with such advantages, one cannot detach oneself wholly from the what the k-server was replacing.

(5) In considering the advantage offered by a k-server by making a KMV available to all rooms in a karaoke establishment and removing the need to wait for the availability of a particular physical disc, one needs to bear in mind that there is another constraining factor in each room which gave rise to the need for a patron to wait to sing his/her chosen song – that there was only the possibility of only one song being sung in a room at any one time.

[21] Mr. Suek during re-examination mentioned that before the advent of the K-Server systems, it was sufficient in his experience to buy around four to five identical copies of each physical disc of KMVs for the Neway Group's very large outlets such as the ones in Mongkok and Sugar Street in Causeway Bay with over 100 rooms; and that for one location with 50 rooms, Neway would only buy two copies of each physical disc of KMVs. On the other hand, Mr. Wynn said during cross-examination that an outlet with 100 rooms would not need 100 copies, but the copying of KMVs was not correlated nearly as much with the number of rooms.

(6) The above considerations are consistent with the structure of the PPSEAL's K-Server licensing scheme.

209. We do not consider this theory to be helpful in assisting us to assess the reasonableness of PPSEAL's tariff structure and the appropriateness of adopting it as a comparable (and in fact in Neway's case, the sole comparable) for the assessment of HKKLA's tariff, for the following reasons:

(1) As mentioned in paragraph 58 above, there was no evidence before the Tribunal on how the PPSEAL's tariff was set, why the tariff was so set and the rationale behind its structure. Evidentially, there was no proof that this theory of Mr. Wynn had been taken into account when the PPSEAL's tariff was formulated.

(2) There was no evidence to verify Mr. Suek's assertion (see Footnote 21 above) that four to five identical copies for every physical disc were purchased and were sufficient for a very large outlet with 100 karaoke rooms. Mr. Wynn said not 100 copies were required for 100 rooms. It would be logical for a reasonable man to consider that a very popular KMV, or a very popular artist, or a very popular album would require more copies to be bought for a karaoke outlet with many rooms, because of the expected popular demand. By the same token, fewer copies would be required for unpopular KMVs, less popular artists or less popular albums. These matters would have required more in-depth analysis to be supported by cogent evidence so as to allow the Tribunal to come to any conclusion. In the proceedings, no such evidence was forthcoming.

(3) Mr. Wynn mentioned large karaoke establishments enjoying the advantage of having economies of scale so that they needed only a relatively smaller number of physical discs of a particular KMV. However, Mr. Wynn did not develop this theory which he only brought up during cross-examination. The Tribunal would expect him to explain how the economies of scale were or could be derived from the purchase of physical discs of KMVs, bearing in mind that KMVs were not homogeneous products – different KMVs enjoyed different popularity and demand.

(4) As we have concluded in paragraph 93 above, when we consider the reasonableness of the tariff in question, we have taken into account the right to use, the accessibility and availability of KMVs of an extensive library from different periods of times and by a variety of artists so as to cater for the tastes, preferences and demands of different patrons. We have also taken into account the fact that patrons could enjoy KMVs simultaneously, immediately and conveniently. These factors constituted important benefits to a karaoke operator to which the Tribunal should attach significant weight. While Mr. Wynn said there could be an uplift associated with these advantages, he did not give any explanation on what the uplift should be, how the uplift should be derived or assessed or quantified one way or another, or what weight should be attached to these advantages and on what basis.

(5) Instead, Mr. Wynn only mentioned a fact, which he termed as a constraint, that only one song could be sung in a room at one time. We do not find Mr. Wynn's

mention of this "constraint" helpful. It should be noted that whether a karaoke establishment operated k-servers or used physical discs, one would have thought at any one time only one song could be sung in a room. Mr. Wynn's point relating to a constraint was neither here or there. During the era before k-servers were deployed, as accepted by Mr. Wynn, the usage of copyright work by a karaoke outlet with physical discs would invariably be restricted by the number of discs. On the other hand, a karaoke outlet utilising a k-server system would encounter no such restriction since it enabled simultaneous access of repertoire by all karaoke boxes. Therefore, we accept the Respondent's submission that usage, in the context of K-Server licence, does not mean actual use but rather the potential to access all KMVs granted under the K-Server licence across all karaoke boxes.

(6) Mr. Wynn's emphasis was on the past. He said one could not detach oneself wholly from what the K-Server was replacing. We do not find this suggestion helpful. The nexus between the past and the present was not explained. He did not explain how the PPSEAL's tariff structure was connected with this inability to detach. He seemed to suggest that as the cost of buying physical disc was cheap in the past before the K-Server era, licensee like Neway would prefer to pay a cheap K-server licence fee as in the heyday. This suggestion, in our view, is self-serving at best. This suggestion ignored the market situation of the karaoke industry after the k-server was introduced. It also failed to take account of the changes in the karaoke market that had taken place in between (see Section E above). There had been no analysis on how the negotiation between the willing licensor and the willing licensee for the K-Server licence of the

Record Companies' repertoire would have taken place given all these changes, and how in Mr. Wynn's suggestion this anchoring into the past would have affected such negotiation.

210. For the above reasons, we cannot accept Mr. Wynn's afore-described theory (which the Respondent called "Disc Replacement Theory") as a proper basis, foundation or reference for the ascertainment of the reasonable licence fee of HKKLA K-Server Licensing Scheme.

L(3) Discount/ Waiver System under HKKLA K-Server Licensing Scheme

211. The discount/ waiver system (the "waiver system") for licensees whose primary business is not karaoke entertainment under HKKLA K-Server Licensing Scheme has been described in paragraphs 102 – 104 above.

212. The Originator relied on this waiver system and argued that because of this system HKKLA was in fact operating its licensing scheme under a de facto two-level tariff structure – the same as PPSEAL's K-Server licensing tariffs.

213. We do not accept this argument.

214. The Originator submitted that what HKKLA did was to introduce an unpublished set of waivers which had the effect of reducing the number of rooms taken into account for calculating the licence fee payable, under the purported justification that the karaoke operators granted such waivers had claimed low usage of karaoke

entertainment and that they were just putting karaoke entertainment in their premises for added service. However, as the Originator's counsel submitted, the true reason why HKKLA had to introduce the waiver system was because it was experiencing difficulties trying to get karaoke operators to accept its very high licence fees. The Originator relied on Mr. Botejue's evidence that it had been difficult to get licensees to sign up to the HKKLA K-Server licence because the fees involved were much more than what was demanded for HKRIA's public performance licence. The Originator further relied on the example of the waiver of a nightclub called Crystal, where the licence fees for five rooms were waived.

215. Assuming there was indeed such a difficulty for HKKLA to obtain more subscriptions of its K-Server licences, there was no evidence showing that there was a connection between the difficulty of obtaining more subscriptions and the granting of the waiver. The Originator's counsel put two pieces of what Mr. Botejue said at two different times during his cross-examination side by side and submitted that because of the difficulty, the waiver was granted. However, the Tribunal was not shown with any evidence showing the causal link.

216. The Originator's counsel further submitted that with the introduction of the waiver system, most of HKKLA's licensees having one to five rooms in their establishments were paying the tariff for premises with only one room; thus, in order to get the small karaoke establishments to take up licences under its licensing scheme, HKKLA had in fact divided up the karaoke establishments into two tiers – the first tier consisted of those with 1 to 5 rooms, and the second tier consisted of those with more than 5 rooms. The Originator's counsel concluded that those in the first tier then paid

the same licence fee of HK$28,500 irrespective of whether they had 1, 2, 3, 4 or 5 rooms. Therefore, in their submissions, HKKLA in fact created the two-tiered structure same as PPSEAL's scheme and required those in the first tier to pay the same flat licence fee – in much the same way that PPSEAL's licensing structure had always divided the karaoke market into two tiers and required the small operators in the first tier to pay a flat licence fee.

217. There was no factual basis for the Tribunal to make that finding as submitted by the Originator's counsel. Firstly, there was no evidence showing that waiver was granted across the board to all karaoke establishments with 1-5 rooms. Secondly, as mentioned in paragraph 104 above, out of 300 plus applications for waiver, only 17 were successful and offered discount. So it was only less than 6% (17/300 x 100%) of the licensees had been granted discount. If the waiver was in fact granted across the board to all licensees with 5 rooms or less, given the vast majority of HKKLA's licensees were karaoke operators with one to five rooms (according to Mr. Botejue's testimony during cross-examination), then the percentage of granting of waiver should be much more than 6%.

218. For completeness, we should deal with the Originator's last argument on the waiver system. According to the Originator, as a result of the effective creation of the two-tiered structure in its licensing scheme, and by allowing those karaoke establishments in the first tier, i.e. those karaoke establishments with 1 to 5 rooms, to pay a flat licence fee of HK$28,500 whilst requiring Neway to pay in accordance with its ostensibly linear licensing tariff structure, HKKLA was unfairly and unreasonably discriminating against Neway. Given our finding that there was no or no sufficient

evidence showing that there was in fact such a two-tiered structure in HKKLA K-Server Licensing Scheme, this last argument of the Originator must fall away.

L(4) Relevancy of Music Awards

219. As mentioned in paragraph 101 above, the Respondent relied on the numerous music awards, specifically the top ten songs awards (“十大中文金曲”) presented by RTHK, to illustrate that the Record Companies’ artists were very well-known and popular.

220. While the Tribunal would not expect this piece of evidence to be controversial, the Originator in its written submissions appeared to belittle the significance of these awards. The Originator submitted various points such as (1) neither HKKLA nor Mr. Ching has conducted any analysis to determine the relative popularity between PPSEAL’s repertoire and HKKLA’s repertoire by reference to the music awards; (2) the music awards were in respect of the relatively new songs in any particular year, and there was no evidence to show that they could reflect the relative popularity of the back catalogue KMVs; (3) Mr. Botejue’s claim that there were more than 80% of the top ten song awards presented in the past 37 years to artists who had performed in the repertoire of HKKLA, did not mean that 80% of the top ten songs awards had been presented to songs included in the repertoire of HKKLA. Artists might move from one record company to another; (4) Mr. Gary Lam’s evidence that different media often set their own subjective criteria and agenda in deciding whether to give awards to particular artists or to artists of particular record companies; and (5) Mr. Wynn’s explanation that there were advantages of using hit rate data over annual music awards to determine the

relative popularity of KMVs in a karaoke establishment. It was because there was no evidence to show that a song which had received an award would necessarily be one which patrons in karaoke establishments would like to sing. The hit rate data must be a more direct indication as to the popularity of a song in the context of karaoke.

221. The Tribunal accepts Mr. Botejue's evidence that since RTHK is a public body and unrelated to either of the parties in this reference, and its award the top ten songs awards(十大中文金曲) has the longest history and is one of the most reliable awards in reflecting popularity of artists. As the Respondent relied on it only as general information to show that the Record Companies' artists were very well-known and popular, we do not think that it is necessary to get bogged down with a detailed analysis on the relative popularity between PPSEAL's repertoire and HKKLA's repertoire by reference to the music awards as suggested by the Originator. And given that we have rejected the reliability of the hit rate data adduced by Neway, it is not necessary for us to make a finding on whether the hit rate data or the music awards should be relied on to determine the relative popularity between the repertoires of different licensing bodies. In any event, as the Originator contended in its replying submissions, both parties' experts had not relied on the awards of RTHK to conduct any analysis in their expert reports.

L(5) The Tribunal's Power under Section 156(4) of the Ordinance

222. As mentioned in paragraph 11 above, the Tribunal will now deal with the Originator's submission that it has power to make an order under Section 156(4) of the Ordinance to protect Neway against any claim for infringement of copyright brought

by any of the record companies whose repertoire was included under the HKKLA K-Server Licensing Scheme in respect of use of the copyright works of such record companies beyond 30 June 2015, notwithstanding that HKKLA K-Server Licensing Scheme has ceased operation since 30 June 2015.

223. The Originator submitted as follows:

(1) The present reference is one brought under Section 156(1) of the Ordinance. The power of the Tribunal on a reference brought under Section 156(1) is provided for under Section 156(3) and (4) which provide as follows :-

"(3) The Tribunal shall consider the matter in dispute and **make such order**, either **confirming or varying the scheme so far as it relates to cases of the description to which the reference relates**, as the Tribunal **may determine to be reasonable in the circumstances**.

(4) The order may be made so as to be **in force indefinitely** or **for such period as the Tribunal may determine**."

(2) Section 160(1) and (2) then provide that the effect of an order made by the Tribunal is as follows :-

"(1) A licensing scheme which has been confirmed or varied by the Copyright Tribunal—

(a) …..

(b) under section 156 or 157 (reference of existing scheme to Tribunal), **is in force or, as the case may be, remains in operation**, so far as it relates to the description of case in respect of which the order was made, **so long as the order remains in force.**

(2) **While the order is in force** a person who in a case of a class to which the order applies—

(a) pays to the operator of the scheme any charges payable under the scheme in respect of a licence covering the case in question or, if the amount cannot be ascertained, gives an undertaking to the operator to pay them when ascertained; and

(b) complies with the other terms applicable to such a licence under the scheme,

is in the same position as regards infringement of copyright <u>as if</u> he had at all material times been the holder of a licence granted by the owner of the copyright in question in accordance with the scheme."

(3) Accordingly, pursuant to Section 156(3), the Tribunal has power on this reference to make an order confirming or varying HKKLA K-Server Licensing Scheme. Further, by virtue of Section 156(4), the order made by the Tribunal can be in force indefinitely or for such period as the Tribunal may determine.

(4) The effect of the order made by the Tribunal is that for the period as the Tribunal directs that its order is to remain in force, HKKLA K-Server Licensing Scheme remains in operation (by reason of Section 160(1)). Further, by virtue of Section

160(2), so long as Neway pays HKKLA the licence fees as ordered by the Tribunal and complies with the terms of the HKKLA K-Server Licensing Scheme as ordered by the Tribunal, Neway would be protected against any claim for infringement of copyright brought by any of the record companies whose repertoire is included under the HKKLA K-Server Licensing Scheme.

224. The Originator has essentially made the same points as they did in the Court of First Instance in HCCT 45/2012 when the Court ordered the Originator to make interim payment of licence fees pending the determination of this Tribunal in the present proceedings. The Court rejected the Originator's arguments. The Honourable Mr. Justice Louis Chan, in his Decision dated 6 January 2017, stated as follows, at paragraphs 28, 29, 90 and 93.

"28. Mr Yan [i.e. Leading Counsel for Neway] emphasised that the Tribunal [i.e. the Copyright Tribunal] has exclusive jurisdiction under s. 156(3) to confirm or vary the terms of a licensing scheme and to determine under s. 156(4) that the order should last indefinitely or only for a definite period. Whether the Tribunal should make an order in CT2/2010 that the scheme as referred should remain in force beyond 30 June 2015 when the authorization by the record companies to the plaintiff was terminated is a matter that should be left to the Tribunal and not to be decided by this court in the discharge summons.

29. I think Mr Yan, in making this submission, has misunderstood the meaning of s. 156(4) as he equated the order of the Tribunal to be made under s. 156(4) with the scheme that has been referred to the Tribunal. S. 156(4)

merely gives the Tribunal power to provide that the order made under s. 156(3) may be in force indefinitely or for such period as the Tribunal may determine. S. 156(4) empowers the Tribunal to determine the duration of the order and not the longevity of the scheme. Even when the scheme should have lapsed, been superseded, or otherwise terminated, it may still be necessary to have the order in force so as to deal with the aftermath. I do not think the legislature should have given the Tribunal the power under s. 156(4) to dictate that the operator should continue a scheme indefinitely if the operator cannot or does not want to do so. …

90. In the light of the above analyses, I am of the following view on the interpretation of s. 156(2). S. 156(1) governs the reference to the Tribunal of a scheme that is "in operation". The scheme referred is one that is "in operation". It is not a scheme "proposed to be operated" which is governed by s. 155. Nor is it a scheme that has already been lapsed. Since it is a scheme "in operation", there is no need to provide for its continuation after the reference is made. However, if for any reason, the scheme cannot continue to operate, then it can come to an end. The reference of it to the Tribunal will only be up to its cessation and not beyond. S. 156(2) does not require the operator to continue its operation if the operator does not desire or is not in a position to do so. If however the scheme, which is in operation when referred to the Tribunal, should continue to operate after the making of the reference, then s. 156(2) requires that it shall remain (or it remains) in operation in the same terms and conditions as and when the reference was made until the conclusion of the reference. The

function of s. 156(2) is to preserve the totality of the scheme as referred pending its resolution by the Tribunal. …

93. On my interpretation of s. 156(2), the scheme that has been referred to the Tribunal in CT2/2010 can come to an end despite its having been referred to the Tribunal under s. 156(1). Since the plaintiff's authorizations had been withdrawn by U [Universal], W [Warner] and S [Sony] and had ceased on 30 June 2015, the licence to the plaintiff under the scheme could not have continued beyond 30 June 2015."

225. This point was debated again in *Universal Music Limited v Neway Music Limited & others* [2018] HKCFI 2403, where Mr. Justice Louis Chan granted summary judgment that Neway and other members of the Neway Group has since 1 July 2015 been infringing its copyright in its KMVs[22]. The Court again rejected the Originator's arguments. It referred to the said paragraphs 28 and 29 in the Decision in HCCT 45/2012 quoted above, and held as follows in paragraphs 32-35:

"32. Mr Yan does not dispute this conclusion, but he submitted that on a proper reading of the discharge decision, I have not rejected Neway Group's argument on the interpretation of s 156(3) and (4). He further submitted in §17 that the order to be made by the tribunal [i.e. the Copyright Tribunal] under s 156(4) will not compel HKKLA to perform the terms of the scheme, as the scheme has been terminated (based on the discharge decision). The effect of the

[22] According to paragraph 12 of the Judgment, the Neway Group has admitted in this action that it had been using Universal's KMVs from 1 July 2015 to 2 October 2018 and stopped the usage on 3 October 2018.

order under s 156(4) will only prevent Neway from being liable for infringement provided that it complies with the terms of the order as per s 160(2).

33. I do not think the tribunal can make an order under s 156(3) and (4) to allow Neway Group to use Universal's KMVs in return for its payment to Universal thereof otherwise then in the context of a licence. I am unable to understand how the tribunal can order that Neway Group can continue using Universal's copyright works when HKKLA's scheme had already been put to an end. I also cannot understand how Neway Group can be immune from Universal's suit of infringement if its use of Universal's KMVs is not pursuant to a licence granted either by HKKLA pursuant to its licensing scheme or by Universal. Neway Group can only lawfully use Universal's KMVs if it is licensed to do so. For there to be a licence, there must be a licensor and a licensee.

34. I also agree with Mr Wong [i.e. Leading Counsel for Universal] that any order to be made under s 156(3) is predicated upon the existence of a scheme under which a licence can be granted. If there is no scheme, there is nothing for the tribunal to confirm or vary under s 156(3). Since HKKLA's scheme had already ended on 30 June 2015, the tribunal cannot make any order under s 156(3) to confirm or vary its terms.

35. I also hold that the tribunal cannot make any order under s 156(4) in the CT2 proceedings that can protect Neway Group from an infringement claim

brought by Universal in respect Neway Group's use of Universal's KMVs from 1 July 2015 in the absence of any licence from Universal."

226. The Copyright Tribunal is a tribunal established by the Ordinance. We feel incumbent to follow the holding of the Court of First Instance, which is a court of law.

227. In any event, we should record that we respectfully agree with the holding of the learned judge in the two decisions quoted above and His Lordship's reasoning.

228. In the premises, this Tribunal rejects the Originator's submissions. Following the aforesaid Court of First Instance's decisions, we hold that the Tribunal has no power to make an order under Section 156(4) of the Ordinance to protect Neway against any claim for infringement of copyright brought by any of the record companies whose repertoire is included under the HKKLA K-Server Licensing Scheme in respect of use of the copyright works of such record companies beyond 30 June 2015, where HKKLA K-Server Licensing Scheme has ceased operation since that date.

229. Accordingly, the Tribunal will only make a determination of the licence fees payable for HKKLA's Old KMVs for the period from 1 July 2010 (i.e. commencement of the scheme) to 30 June 2015 (i.e. termination of the scheme).

L(6) The Respondent's complaint of the Originator's change of case

230. Since the Originator initiated the subject reference in 2010, for most of the past eight years these proceedings were conducted by the parties on the basis that the

Tribunal was required to assess the reasonableness of the licence fees of HKKLA K-Server Licensing Scheme in respect of both Old KMVs (i.e. back catalogue KMVs) and New KMVs. Discovery, expert and factual witnesses' evidence, written opening submissions and even the oral substantive hearing were all prepared on this basis.

231. Only by its written closing submissions dated 2 October 2018 did the Originator change its position. It no longer asks for determination in respect of New KMVs. As mentioned in Section C and particularly paragraph 8 above, the Originator now only requests this Tribunal to determine the reasonableness of the licence fees charged by HKKLA under its K-Server Licensing Scheme for the back catalogue KMVs.

232. As recorded in paragraph 8 above, the Originator explained that because the Respondent had not provided a single new KMV to Neway from 1 July 2010 to 31 October 2013 and as Neway had elected not to have any new KMVs from HKKLA from 1 November 2013 onwards, it is not necessary for the Tribunal to determine whether the licence fees charged by HKKLA under the HKKLA K-Server Licensing Scheme for New KMVs were reasonable. In essence, what the Originator has suggested is that since the Originator did not use, and had elected not to use, any New KMVs from the Respondent, there is no need for the Tribunal to make any determination in relation to the licensing of New KMVs.

233. The Respondent complained against this change of position. It referred to various past conducts of the Originator, and submitted that in the circumstances, it is wholly inequitable for Neway to resile from its original position as evidenced in its Statement of Case, the Answer to Further and Better Particulars of the Statement of

Case and its conduct throughout the entire proceedings when such outstanding fees are owing and need to be paid. HKKLA asked this Tribunal to reject Neway's attempt to disregard the determination of the reasonableness of HKKLA's New KMVs tariffs which must be paid to HKKLA.

234. The Tribunal understands the Respondent's grievance. On the other hand, the Tribunal needs to recognize that its jurisdiction is to determine reasonable terms of a licensing scheme under a reference. It has no jurisdiction to make any determination in relation to illegitimate use of copyright works.

235. As the Respondent has not provided a single new KMV to Neway from 1 July 2010 to 31 October 2013, as mentioned by Mr. Justice Louis Chan at paragraph 41 of His Lordship's Judgment dated 7 November 2013 in HCCT 45/2012, any use of New KMVs of HKKLA's repertoire by the Originator was usage without consent and was not legitimate. In other words, such use by the Originator might constitute copyright infringement. It would be up to the Respondent to take legal action in another venue. It is not a licensing situation for the Tribunal to determine the reasonable level of the licence fee payable under HKKLA's scheme.

236. Similarly, Neway said it had elected not to have any new KMVs from HKKLA from 1 November 2013 onwards. Any use of New KMVs of HKKLA's repertoire from 1 November 2013 by the Originator would equally not be legitimate and might constitute copyright infringement on its part. It is therefore also not a licensing situation for the Tribunal to determine the reasonable level of the licence fee payable under HKKLA's scheme.

237. No doubt the parties' conducts, as well as whether there are any costs wasted as a result of the Originator's change of its position, are relevant to this Tribunal's determination of costs in these proceedings. The Tribunal will make directions in section N below.

M. Determination

238. For the above reasons, having regard to the matters referred to in section 167 of the Ordinance and all relevant considerations, the Tribunal finds and confirms that the structure and the rates of the back-catalogue repertoire (more precisely described as "For Back Catalogue only (not less than 8,000 KMVs)") of HKKLA K-Server Licensing Scheme are reasonable. The Tribunal does not consider necessary to make any variation to the scheme.

N. Direction

239. As mentioned in paragraph 229 above, the Tribunal will therefore make an order for payment of the licence fees payable by the Originator to the Respondent for HKKLA's back catalogue KMVs only for the period from 1 July 2010 to 30 June 2015. Since the parties have not submitted any calculation on the amount of licence fees payable on the basis that we have determined, the Tribunal directs the parties to, basing on the determination set out in paragraph 238 above, provide to the Tribunal a set of agreed calculations and amounts payable within 28 days from the date of this Decision. The Tribunal also gives the parties liberty to apply for further directions in the event

that the parties cannot agree on the amount of licence fees payable in accordance with our determination.

240. In respect of the costs of these proceedings, the Tribunal will hear the parties, and makes the following directions:

(1) The question of the costs of these proceedings shall be dealt with by the Tribunal on paper unless the Tribunal decides otherwise.

(2) The parties do submit and serve their respective written submissions on costs within 28 days from the date of this Decision.

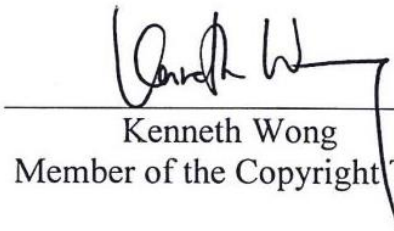
(3) The parties do submit and serve their respective written reply submissions on costs within 28 days thereafter.

(4) No further written submission shall be submitted without the leave of the Tribunal.

241. Lastly, the Tribunal expresses its gratitude towards the parties' counsel and solicitors for their helpful assistance in this lengthy and complicated reference.

Huen Wong
Chairman of the Copyright Tribunal

Grace Chu
Member of the Copyright Tribunal



Kenneth Wong
Member of the Copyright Tribunal

Mr. John M.Y. Yan S.C. and Mr. Philips B.F. Wong, instructed by Messrs. Tony Au & Co, for the Originator

Mr. Andrew Liao S.C., Mr. Norman Hui and Mr. William Tse, instructed by Messrs. Cheung & Choy, for the Respondent