

2-22-2022

Copyright Licensing and the Regulation of China's Music Market: Searching for Transactional Efficiency and Fair Compensation

Chien-Chih (Jesse) Lu

Follow this and additional works at: <https://digitalcommons.law.uw.edu/wjlta>



Part of the [Computer Law Commons](#), [Entertainment, Arts, and Sports Law Commons](#), [Intellectual Property Law Commons](#), and the [Internet Law Commons](#)

Recommended Citation

Chien-Chih (Jesse) Lu, *Copyright Licensing and the Regulation of China's Music Market: Searching for Transactional Efficiency and Fair Compensation*, 17 WASH. J. L. TECH. & ARTS 88 (2022).

Available at: <https://digitalcommons.law.uw.edu/wjlta/vol17/iss1/3>

This Article is brought to you for free and open access by the Law Reviews and Journals at UW Law Digital Commons. It has been accepted for inclusion in Washington Journal of Law, Technology & Arts by an authorized editor of UW Law Digital Commons. For more information, please contact lawref@uw.edu.

COPYRIGHT LICENSING AND THE REGULATION OF CHINA'S MUSIC MARKET:
SEARCHING FOR TRANSACTIONAL EFFICIENCY AND FAIR COMPENSATION

Chien-Chih (Jesse) Lu *

ABSTRACT

China's music copyright collecting society and its new music platforms, find points of commonality through constructing more efficient and profitable systems to generate more users and greater income. By undertaking a comparison of the various copyright regulations, cases, and statistics, this research aims to contribute to academic science by extracting frameworks and solutions from the United States and European licensing models and examining them in the context of China's music market. It aims to discover rational approaches to connect rising technology and emerging economic incentives.

Appropriate solutions are proposed based on the influence of international treaties and legislative progress driven by technological innovation and historical conditions in China. In particular, this research provides answers for facing the risks related to competitive markets, transactional efficiency, and compensation fairness. Consequently, the conclusion anticipates further progress to be made in China's music market. The regulatory engagements, such as compulsory licensing and extended collective licensing, can provide considerable answers for China's issues.

* Chien-Chih (Jesse) Lu, Doctor of Judicial Science (J.S.D.), Master of Laws (LL.M.), School of Law, University of California, Berkeley; Assistant Professor, College of Communication, National Chengchi University; Adjunct Assistant Professor, College of Law, National Chengchi University; Council Members, Taiwan Culture Law Association. I am grateful for Professor Robert Merges, Robert Berring, Thomas Gold, Peter Menell, Laurent Mayali, Mark Cohen, Joseph Wetzell, Daniel Schacht, William Fernholz, Li-Hsin Kuo, Chien-San Feng, Kuo-Feng Tseng, Peng Yun, Trisha Tsui-Chuan Lin, Chiung-Wen Hsu, Hui-Hui Sun, Ming-Yan Shieh, Shiow-Ming Wu, Chung-Lun Shen, Wen-Chieh Wang, Shin-Yi Peng, Chien-Liang Lee, Chen Li and Guo-Bin Cui—I have been profoundly inspired from your insightful guidance and our discussions. I would like to present my sincere appreciations to the faculty and staff at National Chengchi University for the endless support. Many thanks to Max Planck Institute for Innovation and Competition, and Universität Tübingen's European Research Center on Contemporary Taiwan (ERCCT) for the warm assistance during my visiting research in 2018 and 2019. I also thank conference participants at the University Pennsylvania Symposium on Contemporary China, Hong Kong University Intellectual Property Junior Scholar Forum and American Association for Chinese Studies (AACS).

TABLE OF CONTENTS

Introduction.....	91
I. Historical Background: Shaping the Ideology of Intellectual Property Rights.....	92
A. Modernization Under External and Internal Pressure.....	92
B. External Pressure: Wars and International Treaties.....	93
C. Internal Incentives: Legal and Cultural Consensus.....	95
D. Noticeable Consumer Behavior and Econimoc Potentials.....	98
II. Establishing Effective Copyright Protection, Enforcement, and Licensing Systems.....	102
III. Critical Controversies in China's Music Market.....	104
A. Copyright Amendment and Compulsory Licensing System.....	104
B. Licensing Royalties and Collective Management.....	107
C. Fair Opportunities and Competition on Music Streaming Sevices.....	109
1. Abuse of Dominant Position.....	112
2. Threats of Monopolies and Debatable Definition of Related Market.....	113
IV. Legislative Progress.....	115
A. The First Amendment.....	115
1. Statutory Licensing System.....	116
2. Collective Management Organization.....	116
3. Governmental Administration and Enforcement.....	117
B. The Second Draft Amendment.....	117
C. The Third Draft Amendment and Further Developments.....	118
D. New Lessons: Transnational Experiences, Aspirations and Challenges.....	118
E. Compliance with International Treaties: The Berne Convention's Three-Step Test.....	121
F. Thorny Problem: Common Law Traditions and Moral Rights.....	123
Conclusion.....	124
A. Inevitable Weakness: Legislative Delay and Inflexible Regulation.....	124
B. Stimulating Transactional Efficiency.....	126
C. Ensuring Fair Compensation: Transparency and Accountability.....	128

INTRODUCTION

Music market policy makers in the United States and Europe are devoting themselves to copyright reform by making music licensing more functional. In particular, countries concentrating on the music business are all suffering dramatic quakes¹ associated with the sharp acceleration of infringements by information technology evolution. Diverse approaches to modernization have introduced various legislative and commercial dispensations.²

The conceptualization of new approaches involves:

- (a) Free system, with copyright immunity or exemptions such as fair use and public domain, which tolerate the public adopting the copyrighted subjects in the absence of creators' permission and any compensation.
- (b) Mandatory systems, based on governmental intervention, where creators lose their rights to reject a licensing grant on their copyrighted works. However, creators may acquire copyright compensation within the authorities' price-setting process. For example, the "Compulsory Licensing" model for the mechanical right of a sound recording and public copyright levies are within this category.
- (c) Opt-in system, based on conventional exclusive copyright rules, where the users should obtain a license from the copyright holders before operating or adopting the originators' copyrighted subjects.

An Opt-out system, where the creators initially grant the licenses to the paid users on the condition that the creators retain a right to carry out a specific move to revoke the license. For example, the "Extended Collective Licensing ("ECL")" framework, safe harbor (limited liability under "notice-and-take-down" procedure), and copyright formalities³ are included in this system. The "Compulsory Licensing" and ECL models is significantly discussed in North American, Asian, and European countries.⁴ These two models provide answers to problems in digital music and internet technology.

The latest evolutions provoked by these two possibilities offer the modern music industry a favorable moment to assess new copyright reforms and licensing models to stimulate and collaborate with the new digital music scene. These two emerging operations vigorously respond to accelerating mass digitalization and decreasing transactional costs by distributing impartial remuneration.

¹ Robert P. Merges, *Compulsory Licensing vs. the Three "Golden Oldies" Property Rights, Contracts, and Markets*, 508 CATO INST. POL'Y ANALYSIS, 1 (2004); Christopher J. Sprigman, *Reform(alizing) Copyright*, 57 STAN. L. REV. 486-87 (2004); Jessica Litman, *Real Copyright Reform*, 96 IOWA L. REV. 1, 1 (2010).

² Peter C. Dicola, *Money from Music: Survey Evidence on Musicians' Revenue and Lessons About Copyright Incentives*, 55 ARIZ. L. REV. 1, 3-5 (2013); Kembrew Mcleod & Peter C. Dicola, *Creative License: The Law and Culture of Digital Sampling*, DUKE UNIV. PRESS, 1-5 (2011).

³ Sprigman, *supra* note 2, at 486-90.

⁴ Fuxiao Jiang & Daniel Gervais, *Collective Management Organizations in China: Practice, Problems and Possible Solutions*, 15 J. WORLD INTELL. PROP. 221-222 (2012); Jiarui Liu, *Copyright Reform and Copyright Market: A Cross-Pacific Perspective*, 31 BERKELEY TECH. L.J. 1461, 1478 (2017).

According to present legislative mechanisms, artistically expressive creations are regularly guarded by the copyright regime.⁵ Prospective consumers of creative works should acquire a license from the owners of the copyright before employing the original works in a new creative and transformative process.⁶ The idea of compensating copyright owners for unlicensed conduct originated in property rights.⁷

In contrast, the compulsory license model is built for different purposes and goals. In this model, the owners of copyright lack the advantageous power to counteract unlicensed uses. Prospective users can skip obtaining the rightsholders' permission and prevail with an adequate license by committing to the designated rate.⁸

In China, the 2012 Copyright Reform Proposal led to an adverse reaction. The local music community expressed concerns that the new compulsory licensing model would be likely to dishonor the exclusivity of copyright and remove the rights of compensation on copyrighted material.⁹ On the other hand, technological enterprises such as Tencent, Baidu, and Alibaba tend to support this copyright reform.¹⁰

Although the press and public information are governed by the central administration, surprisingly, these disputes around governmental copyright legislation were widely discussed in the mass media.¹¹ Chinese news articles and reports described this opposition to copyright reform by the public sector as "arguable, fervent criticism, and urgent requests by the community."¹²

This article aims to deal with three issues given this legislative background: (1) would further expansions of compulsory licensing or extended collective licensing cement the road to a convincing solution in Chinese copyright law to the issue of inefficient remuneration? (2) Should such reforms be demonstrated? And (3) how should such reforms be built in China's music market?

⁵ Merges, *supra* note 1, at 1-2.

⁶ Diane Leenheer Zimmerman, *Copyrights as Incentives: Did We Just Imagine That?*, 12 THEOR. INQ. IN LAW 40-42 (2011).

⁷ Merges, *supra* note 1 at 1, 2-3.

⁸ *Id.* at 3.

⁹ Xianjin Tian, Fuxiao Jiang, Katherine C. Spelman, Daniel Gervais, Mark H. Wittow, & Trevor M. Gates, *Copyright Law of China*, IP PROTECTION CHINA, A.B.A., 242-43 (2017); Liu, *supra* note 4, at 1473-74. The Chinese amendment in 2012 was criticized and regarded as a "too narrow-minded, short-sighted, geeky and insensitive to authors' interests" proposal. (not sure what this sentence in the footnote is saying, should we just delete after short sighted).

¹⁰ Liu, *supra* note 4, at 1486.

¹¹ *Id.*

¹² Xianjin Tian et al., *supra* note 9, at 243-44.

I. HISTORICAL BACKGROUND: SHAPING THE IDEOLOGY OF INTELLECTUAL PROPERTY RIGHTS

A. Modernization Under External and Internal Pressure

Scholars debate whether the notion of copyright has been in existence throughout China's historical progression. The Chinese law professor William Alford urges that, according to historical and cultural viewpoints, copyright in China is not the same as the abstraction of copyright in foreign countries.¹³ On the other hand, several academics in China assert that early archives suggest that age-old China established a concept of copyright similar to that of the western countries' intellectual expression and protection.¹⁴ Yet other Chinese law experts bridge this divide by understanding copyright legacy as two separate issues: (1) the safeguarding of creators' property and moral rights; and (2) protecting the technology and business of manuscripts printing, reproduction and distribution.¹⁵ Accordingly, the evidence of copyright protection in ancient China's history is vague, haphazard, and highly related to governmental controls instead of humanity and consciousness.¹⁶

Generally, the Chinese emperor authorized privileges on official and private publishing assignments to maintain centralized and feudal administration, censor heretical thoughts and dissenting voices, and educate the public on correct and permissible ideology.¹⁷ In terms of modern legal philosophy, receiving this publishing privilege from Chinese royalty is contrary to authorizing rights and protection to intellectual property.¹⁸ The faint copyright consciousness schooled by the Chinese monarchy is comparable to that of Great Britain, prior to the Statute of Anne.¹⁹ The ancient Chinese empire shared the similar approach as faraway Great Britain in manipulating free expression and strengthening the monarchy's political governance through controlling the privilege of nationwide publishing.²⁰

Great Britain shook off the feudal system of publishing privilege with its first copyright act, the Statute of Anne (Copyright Act 1710).²¹ In doing so, Great Britain reshaped intellectual protection and brought a notable modernization to

¹³ WILLIAM P. ALFORD, *TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION* 22-23 (1995).

¹⁴ *Id.* at 23-24.

¹⁵ *Id.* at 22-26; Liu, *supra* note 4, at 1473-74; Tian et al., *supra* note 9, at 152-57.

¹⁶ *Id.*; ALFORD, *supra* note 13, at 25.

¹⁷ *Id.* at 26; Zhao Xiao-sheng (趙曉生). *Zhongguo Gudai Zuizao de "Yinle Dachen" Shi Shui?* (Who was the earliest "Music Minister" in ancient China?) [中國古代最早的“音樂大臣”是誰?], MUSIC LOVER (音樂愛好者), Vol. 3, 8-9 (1993).

¹⁸ RICHARD E. CAVES, *CREATIVE INDUSTRIES: CONTRACTS BETWEEN ART AND COMMERCE* 310 (1st ed. 2000).

¹⁹ AL KOHN & BOB KOHN, *KOHN ON MUSIC LICENSING* 4-5 (4th ed. 2010).

²⁰ Molly Shaffer Van Houweling, *Author Autonomy and Atomism in Copyright Law*, 96 VA. L. REV. 549, 560 (2010).

²¹ *Id.* at 561-62.

western copyright institutions.²² Even so, because of geographical boundaries and cultural gaps, such new reform of the intellectual cordon was not transported and incorporated into monarchical Chinese society.²³ As a result, ancient China retained its weak and inadequate system to safeguard authors' intellectual property.²⁴

B. External Pressure: Wars and International Treaties

Following the two Anglo-Chinese Wars initiated by Great Britain and France in 1840 and 1856, respectively, Chinese society was forced to accept a number of discriminatory international treaties due to foreign invasion.²⁵ The asymmetrical treatment of China as a result of these treaties further subsumed several ancient Chinese states and cities into colonial territories and subjugated their sovereignty.²⁶ In particular, the establishment of "extraterritoriality" and "most favored nation treatment" generated extraordinary trading pressure and openness to the previously restricted feudal Chinese market.²⁷ Foreign countries agreed to leave China on the condition that the monarchy constructed competent and constructive mechanisms of legal protection and enforcement more in line with their own.²⁸

It is generally believed that because of "external" and "internal" pressure from the western power, the first Chinese copyright law was established in 1910.²⁹ Although this initial proposal made a limited first move, the impact of foreign influence arbitrarily broke China's closed system by imposing international treaties linking China to the global market economy.³⁰

The extensive invasions reminded China how advanced the western modern weapons were at that time and spurred Chinese society to improve its conventional education and outdated science and technology.³¹ Under the external and internal pressure, the Chinese empire of the Qing Dynasty launched a series of modernizations, known as the Self-Strengthening Movement (自強運動) and the Wuxu Reform (戊戌變法), emphasizing economic, educational, military, political, social, and administrative frameworks.³² The modernizations also aimed to facilitate mental permanence and state power.³³ The essential foundation to continue these reforms would be efficient, competent, and advanced legal

²² David Herlihy & Yu Zhang, *Music Industry and Copyright Protection in the United States and China*, 1 GLOBAL MEDIA AND CHINA 390, 391-93 (2016).

²³ Tian et al., *supra* note 9, at 152-53.

²⁴ ALFORD, *supra* note 13, at 27.

²⁵ Herlihy & Zhang, *supra* note 22, at 395.

²⁶ Tian et al., *supra* note 9, at 153.

²⁷ Herlihy & Zhang, *supra* note 22, at 394.

²⁸ Tian et al., *supra* note 9, at 152-53.

²⁹ ALFORD, *supra* note 13, at 22-23.

³⁰ *Id.* at 23-24.

³¹ *Id.* at 24-25.

³² Herlihy & Zhang, *supra* note 22, at 394.

³³ *Id.* at 394-95.

institutions. Therefore, against the background of a sharp evolution in printing and the spread of technology, the concept of intellectual property protection and enforcement in Chinese society can be traced from the late Qing Dynasty. This concept started to shield copyright of composers and performers. The Great Qing Copyright Law formed a nascent copyright institution. This was a crucial beginning in the Chinese copyright chronicle.³⁴

After the Chinese Revolution of 1911 (辛亥革命), the monarchical and feudal Chinese society was transformed into the modern and democratic Republic of China (ROC). In 1928, the Kuomintang of China (KMT) ratified the Copyright Law, which was approximately comparable to the Great Qing Copyright Law.³⁵ After the Chinese Civil War (國共內戰), as the KMT failed to maintain its governance in mainland China, the People's Republic of China (PRC) took over and built its communist legal institutions but did not put its energy towards modernizing the copyright law at first.³⁶ Once Deng Xiaoping (鄧小平) started to reconnect China to the global market, a series of Chinese Economic Reforms (改革開放) were implemented and were driven by the international supply chain.³⁷ At this stage of modernization, as requested by the U.S. government to comply with the Universal Copyright Convention (UCC), China participated in the Convention Establishing the World Intellectual Property Organization.³⁸ In 1985, China announced it would establish the National Copyright Administration of the People's Republic of China (NCAC) to implement and enforce modern copyright protection.³⁹

China's international impact and economic progress motivated the legislation and administration and made its' copyright system more modern. The first Copyright Law of the People's Republic of China entered into force in 1990.⁴⁰ Generally, it is believed that the PRC Copyright Law was shaped and inspired by continental Europe's civil law system.⁴¹ Uniquely, the PRC copyright law system includes both moral rights and economic rights, considering both the author's rights to the original work and their related rights (neighboring rights) regarding performances, phonograms and broadcasts.⁴² At the same time, China began to engage with international copyright organizations. In 1992, China joined UCC and the Berne Convention.⁴³ In response to a thriving global market of phonogram sales, in 1993, China joined the Convention for the Protection of

³⁴ Tian et al., *supra* note 9, at 153.

³⁵ *Id.* at 153-54.

³⁶ Tian et al., *supra* note 9, at 152-53; Herlihy & Zhang, *supra* note 22, at 394-95.

³⁷ Tian et al., *supra* note 9, at 154; Herlihy & Zhang, *supra* note 22, at 395.

³⁸ Herlihy & Zhang, *supra* note 22, at 395; Tian et al., *supra* note 9, at 154.

³⁹ Tian et al., *supra* note 9, at 153-54.

⁴⁰ *Id.* at 154-55.

⁴¹ *Id.*

⁴² *Id.* at 155.

⁴³ *Id.* at 155-56; Stephanie L. Sgambati, *China's Accession to the Berne Convention: Bandaging the Wounds of Intellectual Property Piracy in China*, 3 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 139, 140 (1992).

Producers of Phonograms.⁴⁴ Since December 11th, 2001, China has been a member of the World Trade Organization (WTO).⁴⁵ In order to comply with the minimum standards of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the international trading exercises, China launched a series of reforms on copyright legislation and practices.⁴⁶ As a result of their international involvement, the Chinese government enacted the first copyright amendment in 2001 and a second amendment in 2010.⁴⁷

C. Internal Incentives: Legal Litigations and Cultural Consensus

Although China's population is 1.411 billion, the largest of any country in the world, its music market is relatively small and undeveloped. For example, according to the 2019 International Federation of the Phonographic Industry (IFPI) Annual Global Music Report, China ranked only as the seventh largest music market in 2018 in spite of rising internet usage and an established online payment systems which contributed indirectly to China's digital music market growth.⁴⁸ While streaming businesses have become the biggest players in the United States music market,⁴⁹ Chinese QQ Music's valuation per subscriber was five times that of Spotify in 2016.⁵⁰ To put QQ Music's valuation in context, the total Chinese transaction market is 41% of the total United States transaction market whereas the Chinese music market is merely 1.5% of the United States' market.⁵¹

Table 1 : 2018 Top Ten Music Markets⁵²

01	USA	06	South Korea
02	Japan	07	China
03	UK	08	Australia
04	Germany	09	Canada
05	France	10	Brazil

It is also worth noting that China's GDP is about 60% of that of the United States, whereas the Chinese music market is merely 10% of the United States

⁴⁴ Tian et al., *supra* note 9, at 155-56.

⁴⁵ *Id.*; Herlihy & Zhang, *supra* note 22, at 395.

⁴⁶ Tian et al., *supra* note 9, at 156.

⁴⁷ *Id.*; Xiao Xiong-lin (蕭雄淋), *Zhongguo Dalu Zhezuoquanfa Xiuzheng Caoan Di 2 Gao de Ruogan Wenti (Some Issues Concerning the Second Amendment Draft of the Copyright Law in China)* [中國大陸著作權法修正草案第二稿的若干問題], *INTELLECTUAL PROPERTY RIGHTS JOURNAL (智慧財產權月刊)*, Vol. 173, 5-6 (2013).

⁴⁸ INT'L FED'N OF THE PHONOGRAPHIC INDUS., *IFPI GLOBAL MUSIC REPORT 2019: STATE OF THE INDUSTRY 13* (2019) [hereinafter *IFPI REPORT 2019*].

⁴⁹ THE RECORDING INDUS. ASS'N OF AM., *2015 U.S. CONSUMER MUSIC PROFILE* (2015).

⁵⁰ Mark Mulligan, *Is QQ Music Worth \$10 Billion?*, *MIDIA* (Sep. 7, 2017), <https://www.midiaresearch.com/blog/is-qq-music-worth-10-billion>.

⁵¹ *Id.*

⁵² *IFPI REPORT 2019, supra* note 48.

market.⁵³ The Chinese music market is remarkably incommensurate with the entire market economy, although it is growing continuously in recent years.⁵⁴

Figure 1: Annual GDP in the United States and China from 2015 to 2018⁵⁵
(US\$ Billions)

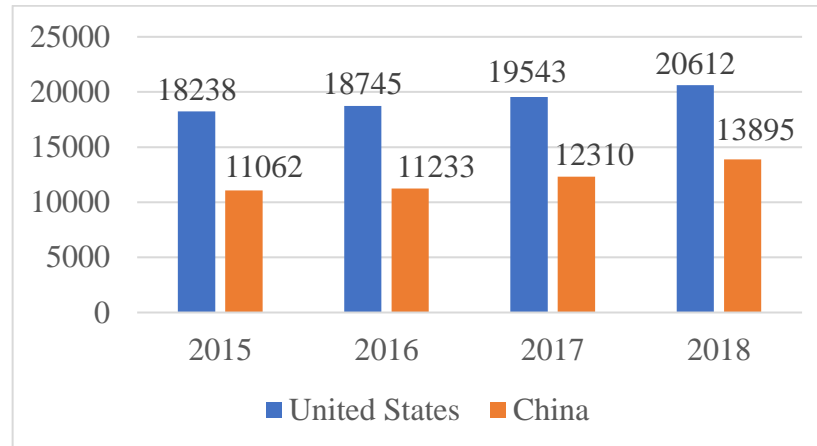
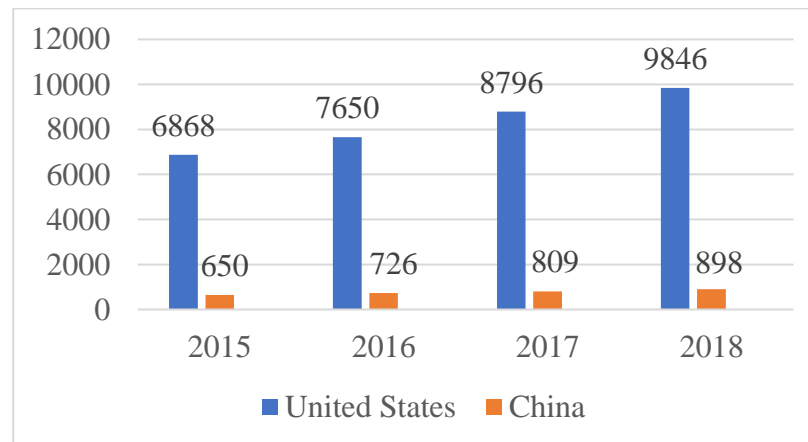


Figure 2: Music Industry Revenue in the United States and China from 2015 to 2018⁵⁶
(US\$ Millions)



⁵³ Jiarui Liu, *Copyright for Blockheads: An Empirical Study of Market Incentive and Intrinsic Motivation*, 38 COLUM. J.L. & ARTS 474, 543 (2015).

⁵⁴ *Id.*

⁵⁵ U.S. and China annual GDP from 2014 to 2017, THE WORLD BANK DATA BANK, <https://databank.worldbank.org/reports.aspx?source=2> (under Variables select “World Development Indicators” under Database; “United States” and “China” under Country; “GDP (current US\$)” under Series; and “2014,” “2015,” “2016,” and “2017” under Time; then click the “Apply Changes” option).

⁵⁶ THE RECORDING INDUS. ASS’N OF AM. (RIAA), *supra* note 52; PWC CN, CHINA ENTERTAINMENT AND MEDIA OUTLOOK 2016-2020 55 (Nov. 2016), <https://www.pwccn.com/en/entertainment-media/em-china-outlook-nov2016.pdf> (Statistics recompiled by author).

When discussing the completely different development of the music markets of the United States and China, it is meaningful to review both the empirical results as to whether copyright law protects music creators and the practical legal problems now faced by the Chinese music market. Recent statistics by King & Wood Mallesons Legal Miner (金杜律師事務所法律研究院) suggest an increasing number of disputes around copyright ownership and commercialization of audiovisual works.⁵⁷ There was a considerable leap in the number of copyright ownership disputes in 2017.⁵⁸ Between 2013 and 2016, there were less than 10 cases per year; however, in 2017, the number of cases rose suddenly to 130.⁵⁹ Moreover, copyright licensing disputes make up the largest category of cases related to copyright contracts, constituting 55.75% of the total cases, while the growth rate of copyright ownership issues is 524%, making it the most frequently cited cause of action.⁶⁰ This phenomenon points out that disputes regarding copyright ownership in the audiovisual industry have been upgraded to a crisis level. In addition, this report indicates that digital technology has made the trend of collective works turn into a complicated issue for the judicial courts in China. Thus, strengthening the accuracy of information about copyright ownership will be essential for the efficient functioning of the licensing process. Helping judges draw a clear line to identify the accurate copyright owners and safeguard their copyright remuneration will be a valuable task for the current Chinese audiovisual industry.⁶¹

The most common types of infringement claims are over information network dissemination rights of other works (4,593 cases), downloading or forwarding of videos of others without prior consent (2,397 cases), and the failure of a platform to comply with the rule of “Notification-Remove” or the “Red Flag Principle” (1,466 cases).⁶² Between 2013 and 2017, the overall copyright damage awards concerning audiovisual programs reached 715,928,667 RMB.⁶³ The greatest damage awarded to an individual case is 27,426,152 RMB, however, the average damage awarded by the courts is merely 15,665.49 RMB.⁶⁴ The three courts awarding the greatest average damages are the Third Intermediate People's Court of Beijing, the Tianjin First Intermediate People's Court, and the High People's

⁵⁷ KING & WOOD MALLESONS LEGAL MINER (金杜律師事務所法律研究院), *Shiting Jiemu Zhezuoquan Sifa Baohu Shiwu Zongshu ji Daziliao Fenxi Baipishu*, (視聽節目著作權司法保護實務綜述及大資料分析白皮書) [White Paper for a Practical Overview and Big Data Analytics of Judicial Precedent for Copyright Disputes in Audiovisual Programs], 1-3 (Mar. 7, 2019),

⁵⁸ *Id.* at 3-4.

⁵⁹ *Id.* at 4-5.

⁶⁰ *Id.* at 5-6.

⁶¹ *Id.* at 6; Beijing IP House Network Technology Co., Ltd.(北京知產寶網路科技發展有限公司), *Yingshi Hangye Zhihui Caichanquan Anjian Ziliao Fenxi Baogao* (*Statistical Analysis Report on Intellectual Property Cases in the Film and Television Industry*) [影視行業智慧財產權案件資料分析報告 (2016.7-2017.6)], 6, 8 (2017).

⁶² *Id.* KING & WOOD MALLESONS LEGAL MINER, at 6-7.

⁶³ *Id.* at 7.

⁶⁴ *Id.* at 8-9.

Court of Shaanxi Province.⁶⁵

Overall, the importance of increasing the commercialization of intellectual property and pushing for copyright reform around technological impacts on audiovisual media is revealed in several previously discussed articles: the New State Council Decision on Intellectual Property Strategy For China as a Strong IP Country and Forecasting the Impact of the Third Plenum on IP Adjudication.⁶⁶ The substantial increase of copyright infringement disputes over audiovisual media demonstrates continuing problems with on-line infringements of User-generated Content (UGC), Generated Content (GC), Professional User Generated Content (PUGC), and Internet Service Providers (ISP). It also demonstrates that the legal arguments over copyright categories, attribution, mechanisms for addressing copyright infringement and liability, and the burden of proof and evidence are still the most notable fundamental aspects of the legal system for Chinese courts and relevant audio-visual media businesses in China.

D. Noticeable Consumer Behavior and Rising Economic Potentials

The consistent growth of the music market in the 21st Century necessitates essential legal reform and continuous, innovative breakthroughs of digital technologies.⁶⁷ Based on the ethical and, historically, political controls, musical expression and production in the Chinese market is primarily for preserving cultural traditions and passing meaningful rhythm across generations. Nevertheless, dramatic developments in technology and the global economy have spurred the Chinese music market to consider increased copyright protection.

For the Chinese music market, two important current phenomena are the noticeable changes in consumer behavior and a technology-led boost in economic potential for the market. In some future trend assessments, China is predicted to create about 25% revenue growth in the coming five years.⁶⁸ As the main digital music format changes all around the world, annual music revenue from downloads will stay steady and even decrease slightly and gradually.⁶⁹ In contrast, streaming music has become the more profitable and prevalent method of music distribution, which means developments in digital technology have twisted habits of receiving music content dramatically, and China is not an exception. As the shift towards digital distribution, particularly streaming, continues, China, as the

⁶⁵ *Id.* at 9-10.

⁶⁶ National Intellectual Property Administration, *Chronicle of Intellectual Property Strategies for China in Ten Years* (Jun. 6, 2018), <http://www.sipo.gov.cn/ztzl/gjzscqzlgbybsszn/sznjdbd/1125007.htm>; *Forecasting the Impact of the Third Plenum on IP Adjudication*, CHINA IPR (Dec. 10, 2013), <https://chinaipr.com/2013/12/10/forecasting-the-impact-of-the-third-plenum-on-ip-adjudication/>.

⁶⁷ John Fangjun Li & Guy Morrow, *Strategic Leadership in China's Music Industry: A Case Study of the Shanghai Audio Visual Press*, in *ARTS LEADERSHIP: INTERNATIONAL CASE STUDIES* 83-95 (Jo Caust ed., 2013); Liang Chen, *China's Creative Industries: Copyright, Social Network Market and the Business of Culture in a Digital Age*, 15 *NEW MEDIA & SOC'Y*, 157, 157-58 (2013); Sgambati, *supra* note 43, at 150-53.

⁶⁸ IFPI REPORT 2019, *supra* note 48.

⁶⁹ *Id.*

largest source of end consumers, will require a reasonable licensing system protective of the rights of its musical creators. Moreover, China continually has more consumers of digital music than other regions, and that means that the establishment of a reasonable licensing system will deeply affect Chinese creators' music copyright protections.

Figure 3: Major Channels for Music Access in China⁷⁰

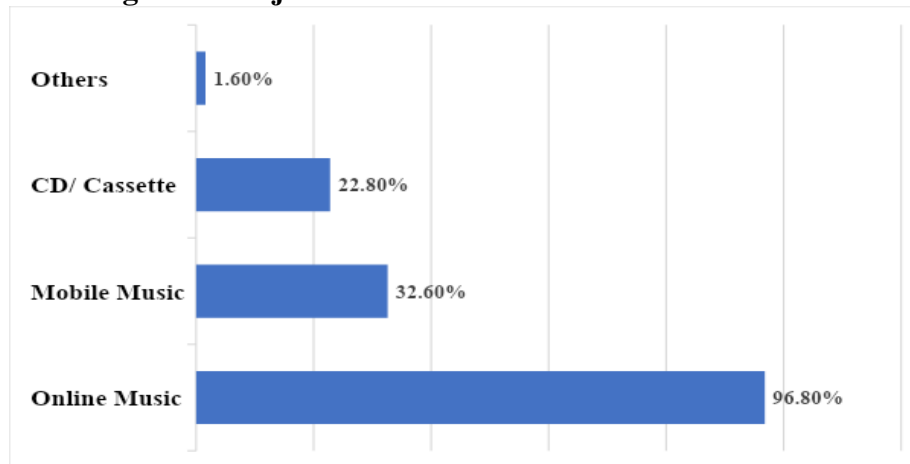
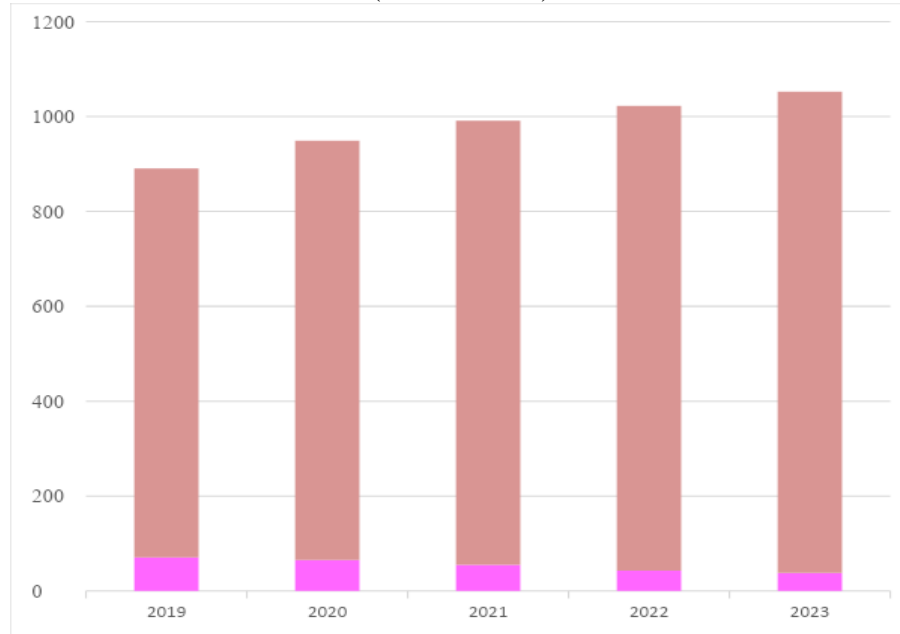


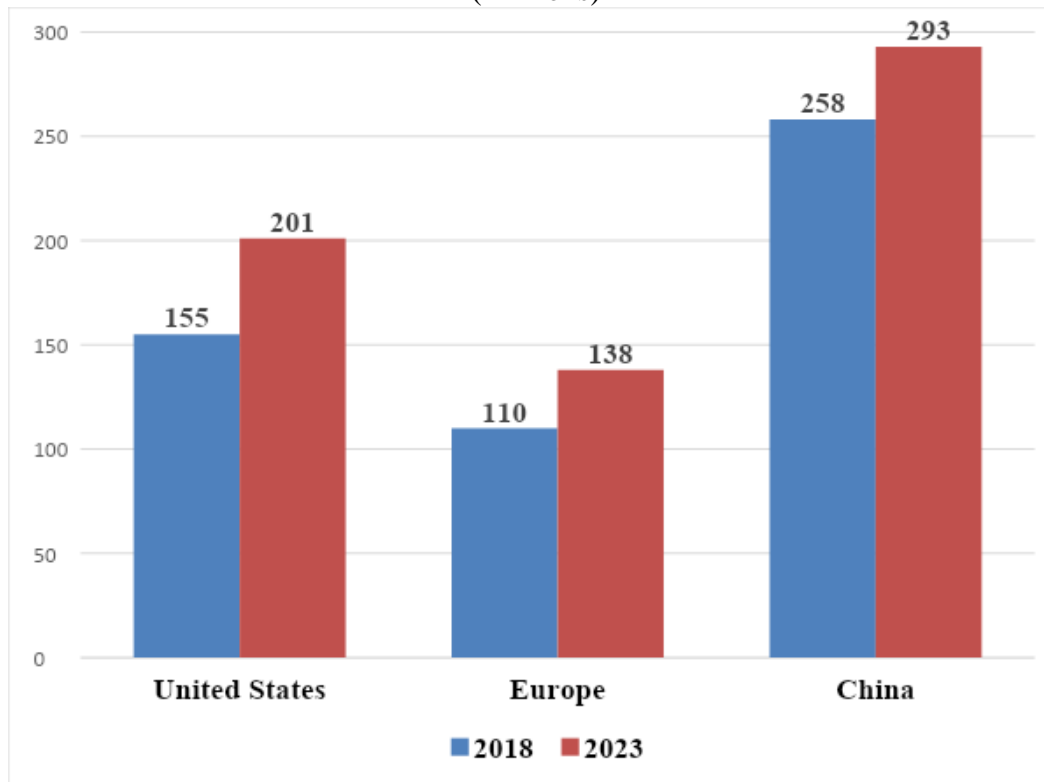
Figure 4: Forecasted Digital Music Revenue in China from 2019 to 2023⁷¹
(CN¥ Millions)



⁷⁰ Liu, *supra* note 53, at 467, 543 (Figure 19).

⁷¹ *Digital Media Report 2019 –Digital Music*, STATISTA, 1, 5 (Apr. 2019), <https://www.statista.com/study/44526/digital-media-report/>.

Figure 5 : Forecasted Number of Music Streaming Users by 2023⁷²
(Millions)



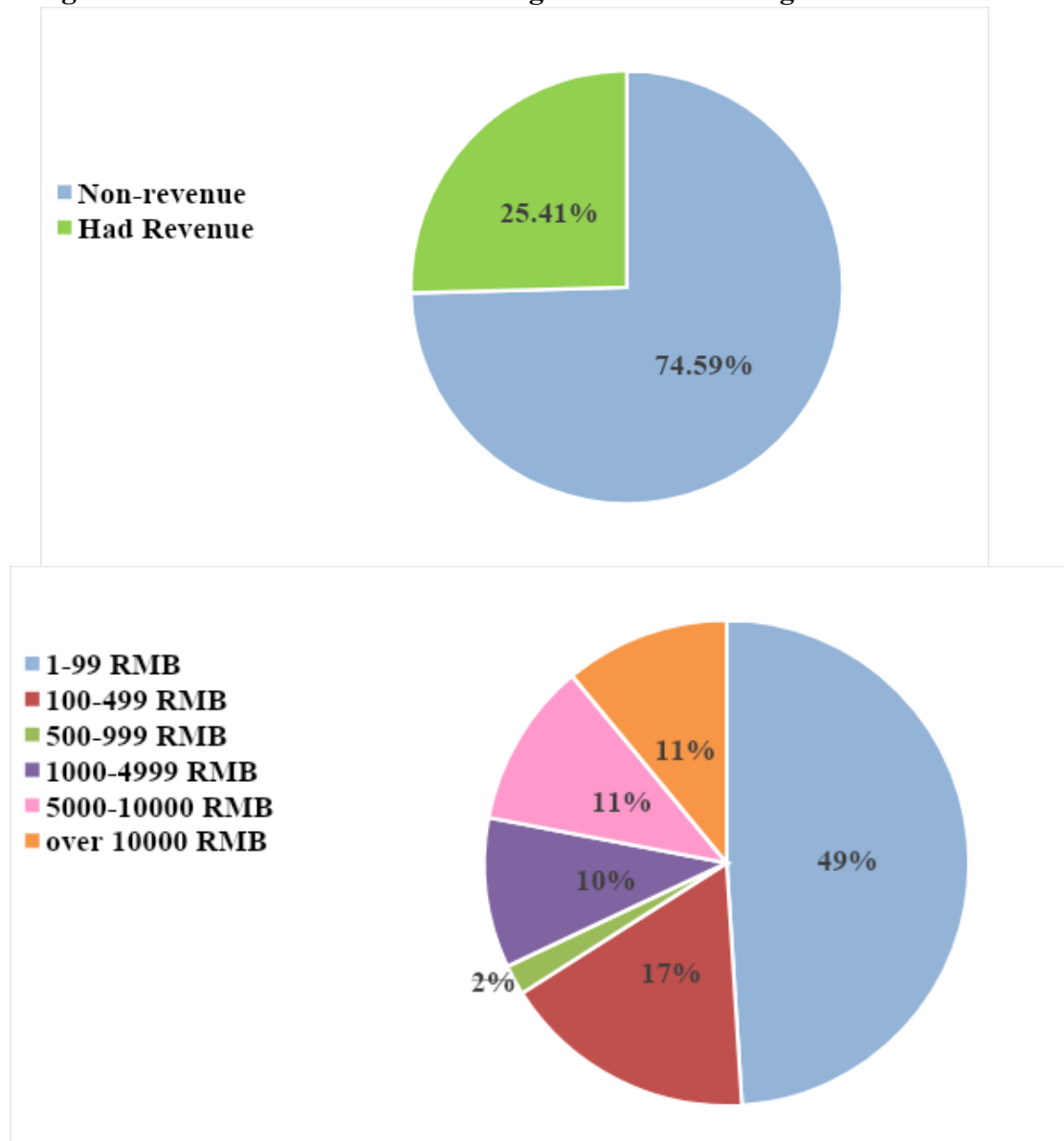
With an extensive consumer base for musical content, music creators in China should have higher expected revenue from the licensing system. However, music management organizations in China seem to lack an effective and reliable licensing and economic incentive procedure. Around 70% of Chinese musicians presently have experience with technological approaches, such as digital platforms and the internet,⁷³ but about 75% of them never received copyright-based profit from digital platforms, or from an agent.⁷⁴ Among those who did earn money from the digital approach, almost half received less than 100 RMB (about 15 USD) per year.⁷⁵ In other words, when digital platforms (streaming media, music downloads, and Apps) become the main access mode for music creators and consumers, the environment of the music business and the licensing system will be faced with a new situation. It will require novel perspectives to encourage culturally creative behaviors with proper incentives and useful licensing models.

⁷² *Id.* at 10.

⁷³ Jhang Fong-Yan (張豐豔), *Yinlaren Shengcun Xiankuang yu Banquan Renzhi Zhuangkuang Diaocha Yanjiu Baogao* (音樂人生存現況與版權認知狀況調查研究報告) [Research Team, the Status of Musicians' Survival and Copyright Cognition Report], COMMUNICATION UNIVERSITY OF CHINA (中國傳媒大學) SCHOOL OF MUSIC AND RECORDING ART (音樂與錄音藝術學院), 32-33 (2018).

⁷⁴ *Id.*

⁷⁵ *Id.*

Figure 6 : Chinese Musicians' Earnings Position from Digital Platforms⁷⁶

Several significant players in China like Tencent, Alibaba, and NetEase, continue to be criticized for the shortage of copyright categories, such as the robust protection of performance and broadcast rights for sound recordings.⁷⁷ Record labels and the Mandarin music industry consider these protections to be great economic compensation and incentive.⁷⁸ In particular, Tencent, China's

⁷⁶ *Id.* at 33.

⁷⁷ China Intellectual Property Information Network, *Record Labels Propose Copyright Law Amendment Again: Recording Producers Should Own Broadcasting and Public Performance Rights* (Mar. 29, 2018), http://www.iprchn.com/Index_NewsContent.aspx?NewsId=107036.

⁷⁸ IFPI REPORT 2019, *supra* note 48.

biggest music streaming company, represents the cutting edge of Chinese technological enterprises, and is also the mothership of three national music streaming companies, QQ Music (QQ 音樂), Kuwo (酷我音樂) and Kugou (酷狗音樂).⁷⁹ In 2018, it had a strong grip on the market, claiming 800 million users, three times more than Spotify; however, only about four percent of those users pay for a subscription, as compared with 45 % on Spotify.⁸⁰

Market leader Tencent solidified its position when it dramatically consolidated the market by merging its repertoire with NetEase (網易), the other prevailing competitor in the Chinese digital music market. This collaboration will actually strengthen the dissemination and communication of the Mandarin music market's musical works and sound recordings since Tencent has also connected its music with other sizeable participants in Chinese music market, including iTunes,⁸¹ Alibaba Music (阿里巴巴音樂),⁸² Taihe Music Group (太合音樂集團),⁸³ Changba (唱吧),⁸⁴ and Taiwan's KKBOX.⁸⁵

II. ESTABLISHING EFFECTIVE COPYRIGHT PROTECTION, ENFORCEMENT AND LICENSING SYSTEMS

Theories of how to establish effective copyright protection, enforcement, and licensing systems move as quickly as the underlying technology fuels systemic change. The more thriving the Chinese digital music market is, the greater the gap between the encouraging music scene and real received economic payback. As some empirical investigations show, the main reason that over half of Chinese consumers search for free music sources instead of paid-for sources is that payment functions and procedures are not appealing or convenient.⁸⁶

⁷⁹ INT'L FED'N FEDERATION OF THE PHONOGRAPHIC INDUS. (IFPI), Focus on China, *Global Music Report 2018: Annual State of the Industry*, 34 (2018); Herlihy & Zhang, *supra* note 22, at 396-97.

⁸⁰ *China's Tencent Music Jumps on U.S. Launch*, BBC NEWS.COM, (Dec. 12, 2018), <https://www.bbc.com/news/business-46544204>.

⁸¹ Herlihy & Zhang, *supra* note 22, at 396-97; IFPI REPORT 2019, *supra* note 79.

⁸² *Id.*

⁸³ *MIUI Music Reaches a Licensing Agreement with Taihe Music Group*, CHINA MUSIC BUSINESS NEWS.COM (Mar. 4, 2018), <http://chinamusicbusinessnews.com/?p=1927>.

⁸⁴ CHANGBA, <https://changba.com/> (last accessed Mar. 23, 2021).

⁸⁵ INT'L FED'N FEDERATION OF THE PHONOGRAPHIC INDUS. (IFPI), *supra* note 79.

⁸⁶ *Id.*

Figure 7: Consumer Behavior When Required to Pay for Music that They Want to Listen to in China in 2016⁸⁷

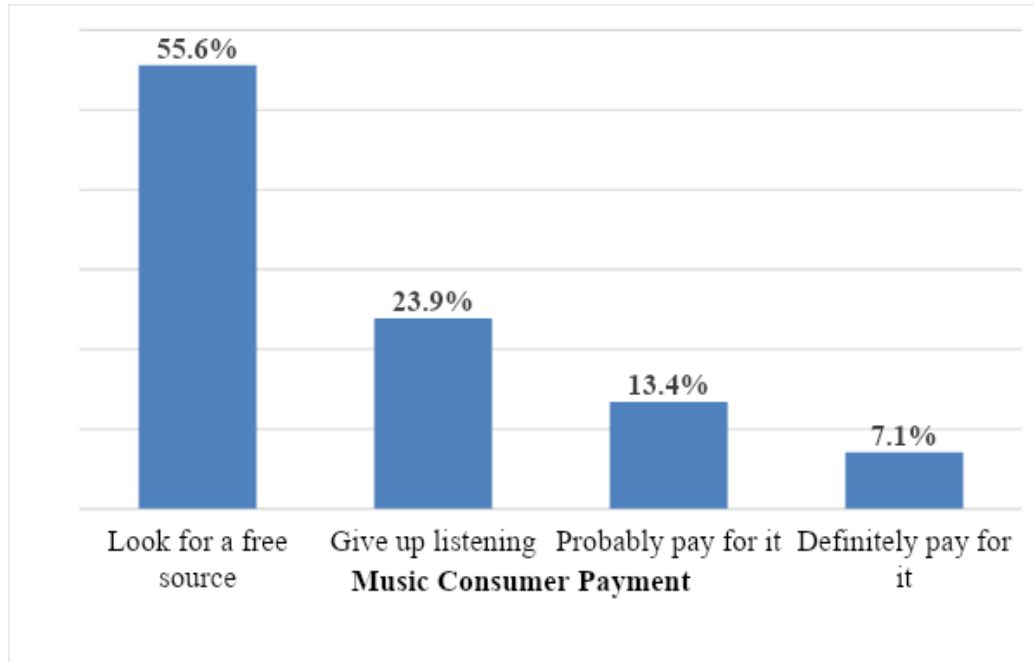
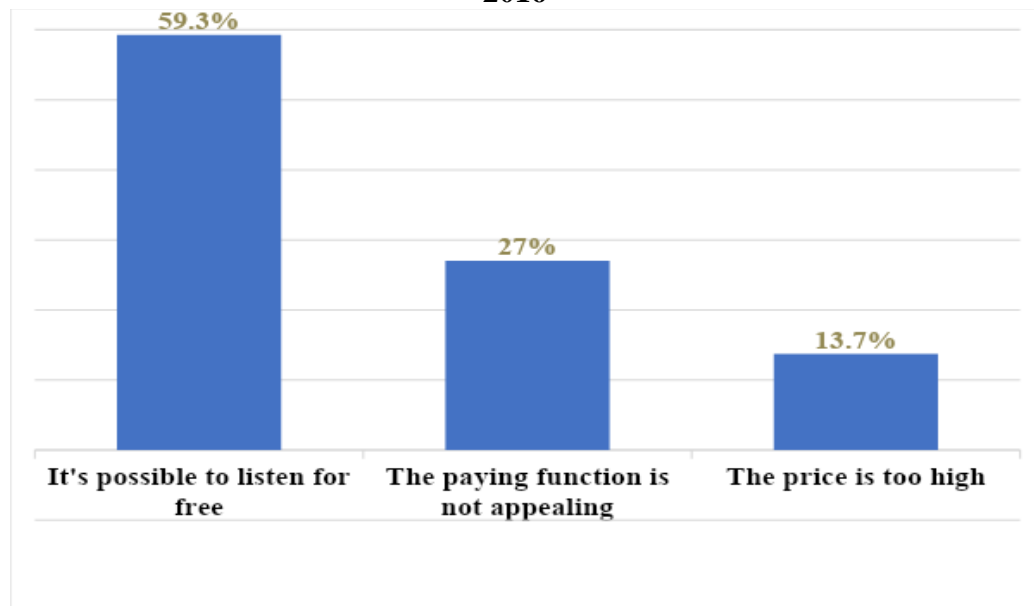


Figure 8: Reasons for Consumers Not to Pay for Online Music in China in 2016⁸⁸



⁸⁷ *Shuwei Yinle Daziliao Baogao : Zhongguo Xianmin Shouji Tingge Hangwei Jiemi* (數位音樂大資料報告：中國線民手機聽歌行為揭秘) [Digital Music Big Data Report: Chinese Music Users' Behaviors], CHINA BIG DATA INDUSTRIAL OBSERVATION (CBDIO, 中國大資料產業觀察) (May 20, 2016), http://www.cbdio.com/BigData/2016-05/20/content_4950507.htm.

⁸⁸ *Id.*

The Chinese music market has become highly globalized and diverse. A paradox exists, as most Chinese music is produced for its domestic market, but it also interests audiences in the wider Asian and international spheres.⁸⁹ As we see, future music copyright issues are transnational and multicultural. Gigantic tech companies in China are working to make a virtual environment for music consumers to access interactive experiences with diverse audiences.⁹⁰ Compared to traditional music services, these new innovations will keep the audience in contact with each other, not just purely listening to music.⁹¹ However, this new fashion will make the music market a more comprehensive and complicated industry. More issues related to young people and the regulations of digital content will be incorporated into the traditional music business.

No one doubts that the music business in the Mandarin language is a significant part of the global market, which is characterized by dramatic expansion, confrontation, engagement, and changes. Mandarin music appeals to a divergent worldwide market, in contrast to the limited vision of the past several decades. Over the past decade, from the perspective of culture and technology, Chinese society has experienced a notable modernization movement regarding the importance of copyright protection and monetary reward, and this is powered by the execution of public policy, law, and regulation with the support of the musical community (i.e., music publishers, record labels, creators, collecting societies, and all related musical units).⁹²

III. CRITICAL CONTROVERSIES IN CHINA'S MUSIC MARKET

A. Copyright Amendment and Compulsory Licensing System

2012 was a critical year for the Chinese music industry. The National Copyright Administration of the People's Republic of China (NCAC) announced a preparatory sketch for adding articles 46 and 48.⁹³ The new amendment of these two articles aims to enhance the efficiency of music licensing within the scope of China's copyright system.⁹⁴ In light of these two articles, music production companies were allowed to utilize music compositions and transfer them into sound recordings, provided that these music compositions have been published for more than three months.⁹⁵ This licensing progress can also be considered to be a "compulsory license" because it needs no approval from the individual music copyright holders or CMOs and has a fixed price set by the NCAC.⁹⁶ These two

⁸⁹ INT'L FED'N OF THE PHONOGRAPHIC INDUS. (IFPI), *supra* note 79.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

⁹³ Tian et al., *supra* note 9, at 240-42.

⁹⁴ *Id.*

⁹⁵ Regulations on the Copyrights Collective Administration (RCCA), CHINA PATENT AGENT (H.K.) LTD. (promulgated by the State Council, Dec. 22, 2004, effective March 1, 2005) Art. 46 & 48.

⁹⁶ Tian et al., *supra* note 9, at 242.

new articles of amendments can be regarded as a further improvement in the foundation of the current article 40(3) of China's copyright act, and is comparable to section 115 of the US copyright law. In the new 2012 amendment, an Extended Collective License (ECL) is manifested in the specific article 60 of the Chinese Copyright Act.⁹⁷ This new step could be seen as a budding advancement of music licensing in the Chinese music industry. The ECL's opt-out system might also overturn the traditional licensing model in the Chinese music market and, therefore, facilitates discussions and negotiations between users and rights holders.⁹⁸

Currently, there are several collecting societies taking charge of separate categories of copyrights. In terms of music works, the Music Copyright Society of China (MCSC) began in 1992 by specializing in the music composition license.⁹⁹ MCSC has been designed as a non-profit organization representing musical artists and rightsholders, serving to collect and distribute copyright-based revenue.¹⁰⁰ The MCSC is also the earliest established CMO approved by the Chinese government and the PRC Copyright Law Act.¹⁰¹ The MCSC had obtained its membership in the International Confederation of Author and Composers Societies (CISAC) from 1994 and was a representative of the International Standard Musical Work Code (ISWC) for the entire Chinese music market in 2009.¹⁰² This is not surprising because the approval of establishment from the Chinese government allows the MCSC to delegate in the China region from CISAC and ISWC respectively.¹⁰³ By 2009, membership of the MCSC reached 5,798, including 355 new members containing 139 lyricists, 200 music composers, and 5 music publishers.¹⁰⁴ In 2009, the overall royalties were 42.57 million RMB.¹⁰⁵ As the numbers of royalties collected by MCSC continue to increase, it is undoubted that MCSC has become a crucial intermediary for the Mandarin music market and the global music economy.¹⁰⁶

⁹⁷ *Id.*

⁹⁸ Fuxiao Jiang & Daniel Gervais, *Collective Management Organizations in China: Practice, Problems and Possible Solutions*, 15(3) J. WORLD INTELL. PROP. 221-22 (2012).

⁹⁹ *Id.* at 223; Music Copyright Society of China (MCSC) Official Website, <http://www.mcsc.com.cn/about/situation.html> (last visited Mar. 23, 2021).

¹⁰⁰ Jiang & Gervais, *supra* note 98, at 223.

¹⁰¹ *Id.*; Cui Guobin (崔國斌), *Zhezuoquan Jiti Guanli Zuzhi de Fanlongduan Kongzhi (Anti-monopoly Control of Copyright Collective Management Organizations)* [著作权集体管理组织的反垄断控制], 6(1) TSINGHUA L. REV. (清華法學) 110 (2005).

¹⁰² Fuxiao Jiang & Daniel Gervais, *supra* note 98.

¹⁰³ *Id.* at 223; Music Copyright Society of China (MCSC) Official Website, <http://www.mcsc.com.cn/about/situation.html> (last visited Mar. 23, 2021); CISAC in China to boost cooperation with government, societies and artist federations, <https://www.cisac.org/Newsroom/articles/cisac-china-boost-cooperation-government-societies-and-artist-federations> (last visited Mar. 23, 2021).

¹⁰⁴ Fuxiao Jiang & Daniel Gervais, *supra* note 98.

¹⁰⁵ *Id.*

¹⁰⁶ Fuxiao Jiang & Daniel Gervais, *supra* note 98, at 222-23; Xiong Qi (熊琦), *Yinle Zhezuoquan Xuke de Zhidu Shiling yu Falu Zaizao (Institutional Failure and Legal*

The China Audio-Video Copyright Association (CAVCA) was founded in 2008.¹⁰⁷ Its main mission is to cluster and distribute the copyright revenue for creators or rightsholders of audiovisual works.¹⁰⁸ As discussed later, it has particular relevance to applied audiovisual works, such as karaoke. Based on the China Copyright Act, with the permission of NCAC, the CAVCA also became the only CMO responsible for the licensing affairs of audiovisual works.¹⁰⁹ In particular, CAVCA deals with many categories of rights, including:

- (1) the right of public performance; (2) the right of public presentation; (3) the right of broadcasting; (4) the right of rental; (5) the right of communication, through information network; (6) the right of reproduction and distribution; and (7) other copyright and related rights of audiovisual works.¹¹⁰

In 2011, CAVCA's repertoire database included more than 120,000 works, and the total financial benefits from CACVA have reached 117 million RMB.¹¹¹ CAVCA brings significant influence to the entire Chinese music industry because its main task is to provide more efficient licensing services for the karaoke industry.¹¹² The licensing profits made by a karaoke business can be a major revenue source for more established and stylish musical artists.¹¹³ The economic value of the karaoke market accounts for a noteworthy proportion for the plenary music copyright revenue in the whole Chinese region. In 2007, the tariff per karaoke box was 12 RMB and it was deemed that the royalties of karaoke licenses should be allocated between MCSC and CAVCA.¹¹⁴ Specifically, the fundamental function of a music CMO is comparable to the general CMOs in individual types of industries.¹¹⁵ Based on the China Copyright Law, the establishments of Chinese CMOs should be approved and supervised by the

Reconstruction of Music Copyright Licensing) [音樂著作權許可的制度失靈與法律再造], DANG DAIFA XUE (當代法學), Vol. 26 No. 5, 6-8 (2012).

¹⁰⁷ Fuxiao Jiang & Daniel Gervais, *supra* note 98, at 223-24.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*; Zhezuoquan Jiti Guanli jiushi Ge Jiaoi Syhichang [*Collective copyright management is a trading market*] [著作權集體管理就是個交易市場], Netease [網易科技], <http://news.163.com/special/reviews/copyright0406.html?from=newstalk3> (last visited Mar. 23, 2021).

¹¹⁰ Fuxiao Jiang & Daniel Gervais, *supra* note 98, at 223-24.

¹¹¹ Fuxiao Jiang & Daniel Gervais, *supra* note 98, at 224.

¹¹² *Id.*

¹¹³ *Id.*; Yifei Tan (譚翊飛), "Zhongwenfa" Jie Kala OK Jianguan Pingtai Huoli: KTV Banquan Liyi Fenpei Fuchu Shuimian [*"Zhongwenfa" Profits from the Karaoke Supervision Platform- Discovering the Distribution Scheme of KTV Revenues*] ["中文發"借卡拉 OK 監管平臺獲利, KTV 版權利益分配浮出水面], INFZM.com [南方週末] (Mar. 25, 2010), <http://tech.sina.com.cn/i/2010-03-25/12233985506.shtml>.

¹¹⁴ Fuxiao Jiang & Daniel Gervais, *supra* note 98, at 223.

¹¹⁵ *Id.*; Xiong Qi (熊琦), Zhezuoquan Jitiguanli Zhong de Jizhong Xuke Jiangzhi Guize (著作權集體管理中的集中許可強制規則) [*Prohibition Rules for Copyright Collective Management*], 4 J. OF COMPAR. L. [比較法研究], 46, 50-53 (2016).

governmental commission, NCAC.¹¹⁶ This background caused all Chinese CMOs to keep their cordial connections with the government and officials.¹¹⁷

According to a sensible and functional licensing framework, music CMOs should take responsibility to gather royalties from exploiters and allocate them to copyright holders based on the rate plan and conditions agreed to by both sides.¹¹⁸ Building reliable data is a fundamental foundation to locate copyright information, especially when confirming licensing proprietorship and objects and verifying the proportion of music compositions or lyrics the users exploit.¹¹⁹

In line with China's Regulations on the Copyrights Collective Administration (RCCA), music CMOs such as MCSC and CAVCA should offer effective databases to users to look for copyright information within CMOs' individual collections.¹²⁰ For the licensing process, the copyright information in this database should include: (1) applicable licensing types of copyright; (2) the name of the music works or sound recordings; (3) the contact information of the right owners (for economic rights licensing); (4) designation or identification of composers and lyricists (for moral rights licensing); and (5) the specific time period of permitted collective management licenses to CMO.¹²¹ Simultaneously, as exploiters appropriate music works or sound recordings, it is necessary to define the precise way their activities should be reported to CMOs, and how the compensation should be calculated and paid to copyright holders through CMOs.¹²² In China's music market, the repertoire and manageable proficiency of MCSC for music works and CAVCA for audiovisual is highly influential and relevant to the function and development of the overall music licensing ecosystem.¹²³

B. Licensing Royalties and Collective Management

MCSC's licensing royalties have represented a considerable part of musical artists' copyright earnings.¹²⁴ On the basis of MCSC's annual report, until 2017, the total collected revenue achieved pretax was 216 million RMB. From 2016 to

¹¹⁶ Fuxiao Jiang & Daniel Gervais, *supra* note 98, at 223.

¹¹⁷ *Id.*; Xiong Qi (熊琦), *Yinle Zhezuoquan Zhidu Tixi de Shengcheng yu Jishou [The Formation and Succession of Music Copyright System] [著作权集体管理制度本土价值重塑]*, 3 *Legislation & Social Development* (法制与社会发展), 103 (2016).

¹¹⁸ Tian et al., *supra* note 9, at 209.

¹¹⁹ *Id.* at 210.

¹²⁰ *Id.*

¹²¹ Regulations on the Copyrights Collective Administration (RCCA), art. 24.

¹²² Tian et al., *supra* note 9, at 210.

¹²³ *Id.*

¹²⁴ Music Copyright Society of China (MCSC) (中國音樂著作權協會), 2020 Zhongguo Yinle Zhezuoquan Xiehui Niandu Baogao (2020 中國音樂著作權協會年度報告) [2020 MCSC Annual Report, The Chapter of Documentation] (Apr. 28, 2020), <http://www.mcsc.com.cn/upload/other/20201112/6e0c2c538df7d2b3b8b141a12c20a9b6.pdf>; Dmitry Pastukhov, Music Market Focus: China Streaming and Recording Business, Soundcharts (2019), <https://soundcharts.com/blog/chinese-recording-market-streaming>.

2017, revenues grew 17%.¹²⁵ This income growth of MCSC originated from the licensing of performance rights.¹²⁶

As an example, the remuneration offered by the Shanghai Disney Resort had acted as a strong boost for MCSC's licensing business.¹²⁷ Initially upon gaining this contract, MCSC researched the business models built by its partnership societies, CASH (Composers and Authors Society of Hong Kong Limited), JASRAC (Japanese Society for Rights of Authors, Composers and Publishers), BMI (Broadcast Music Inc.), ASCAP (American Society of Composers, Authors and Publishers) and SACEM (Society of Authors, Composers and Publishers of Music), and achieved a consensus after over six months of discussions.¹²⁸ The MCSC's cooperation with Disney group brought China a unique opportunity for leveling up its business strategy by further connecting to the international market. In addition, the lessons it obtained from this collaboration with Disney group will stimulate its global vision and allow more transnational licensing in the following decades.¹²⁹

Likewise, MCSC is finding a new approach to reinforce the information infrastructure in response to the rise of the mass digitalization era.¹³⁰ In addition, MCSC is considering designing its own coding and data system to establish a unique music management and licensing culture with Chinese characteristics.¹³¹ These developing phenomena in the Chinese internal market could be expanded to the whole Mandarin market and equipped to be an influential factor in the global digital music market.¹³²

Underneath the positive appearances, there still are some challenges MCSC faces with regard to insufficiency of economic incentives and copyright protection for music creators. According to an academic questionnaire, "the Status of Musicians' Survival and Copyright Cognition Report" (音樂人生存現況與版權認知狀況調查研究報告) published in 2018 by Communication University of China (中國傳媒大學), of the 406 local musicians interviewed, over 60.06% had never licensed their music works to copyright agencies.¹³³

Surprisingly, although MCSC is the only music collective management organization in Mainland China, only 12% of respondents were MCSC members at that time.¹³⁴ Furthermore, for the respondents who were not members, about 46% were unaware of the existence of the MCSC, and 35% were unmotivated to participate in the MCSC.¹³⁵ This investigation showed that the MCSC had to

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ INT'L FED'N OF THE PHONOGRAPHIC INDUS. (IFPI), *supra* note 79.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ MUSIC COPYRIGHT SOCIETY OF CHINA (MCSC), *supra* note 124.

¹³¹ *Id.*

¹³² INT'L FED'N OF THE PHONOGRAPHIC INDUS. (IFPI), *supra* note 79.

¹³³ JHANG, *supra* note 73, at 34-35.

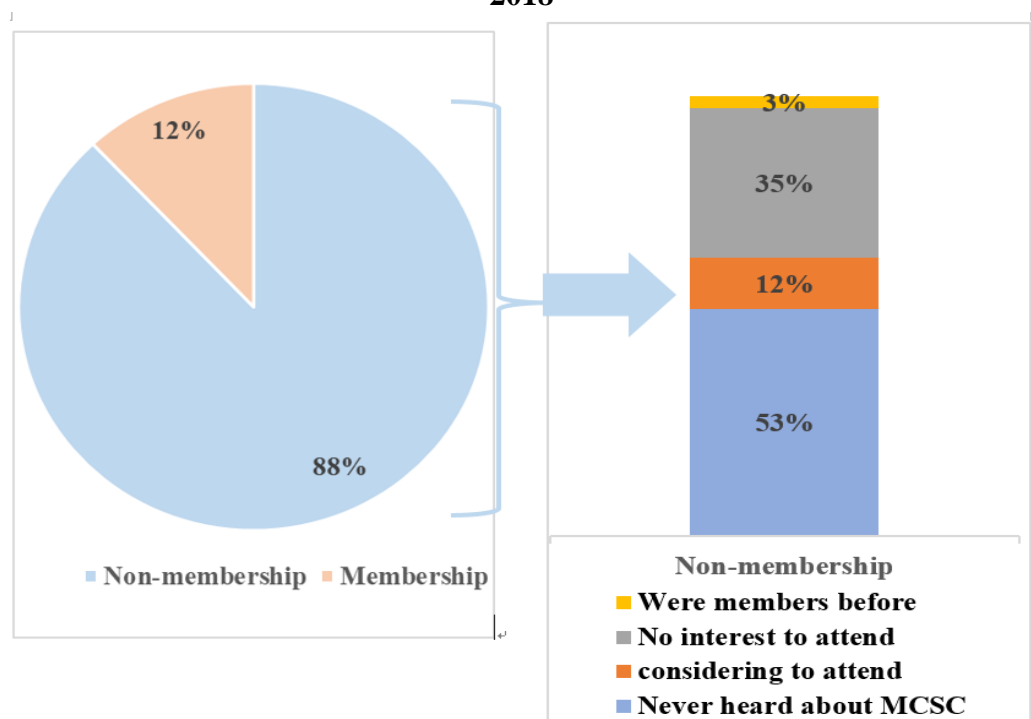
¹³⁴ *Id.* at 35

¹³⁵ *Id.*

reconsider how to promote its services and establish effective communication to improve its attractiveness to potential members.

Despite growth in the promising and large Chinese music market, MCSC's lack of publicity results in a great gap in the number of members relative to other main CMOs in the world. The regions which have mature and historic music licensing mechanisms enjoy at least a tenfold membership advantage over MCSC.¹³⁶ For example, ASCAP and BMI have over 70,000 and 90,000 members respectively, including songwriters, composers and music publishers, while MCSC merely has about 8,900 members.¹³⁷ Membership deeply affects CMOs' efficiency, so MCSC should reconsider how to be a useful agency that connects musicians and consumers, especially given accessibility to content through digital platforms.

Figure 9: Relationship between MCSC and Music Creators in China in 2018¹³⁸



C. Fair Opportunities and Competition on Music Streaming Services

Because of China's large population, it is uncontroversial that China could form a sustainable, remunerative market for music creators. In numerous ways,

¹³⁶ *Id.*; Shiyu Chengshi Jiti Dizhi KTV BanquanFei, Lianhe Qianming Shengyuan Guangzhou (10 余家协会反对 KTV 版权收费 集体签字坚决抵制) [Karaoke Industry In China Stand Up And Go Against to the Rate Setting By CAVCA And NCAC], Netease(网易科技) (Nov. 23, 2006), <https://yule.sohu.com/20061122/n246548080.shtml>

¹³⁷ *Id.*

¹³⁸ MUSIC COPYRIGHT SOCIETY OF CHINA (MCSC), *supra* note 124.

Chinese music service companies are combating the accumulated “culture of free use” and suffering from the difficulties of collecting copyright royalties.¹³⁹ The “free use culture” is established when exploiters can simply approach or download digital songs for free through illegal forums, websites or software.¹⁴⁰ Despite this, irritated by expected market expansion, the three biggest players and enterprises in the Chinese technological markets, including Baidu (百度), Alibaba (阿里巴巴) and Tencent (騰訊) (sometimes known as “BAT”), are mutual rivals for the digital music marketplace. By contracting with leading music publishers and record labels in China, BAT is constructing an individual music repertoire database for use by over 600 million online consumers in China.¹⁴¹ Moreover, BAT is aiming to expand their market to digital services related to films, TV series, programs and on-line game productions, similar to what Google, Amazon and Apple undertake in the United States.¹⁴² However, their interface leads to questions of market competition: how to retain their consumers inside the interior brand structure and how this collective service system inhibits consumers from reaching the services provided by market competitors outside their service. The closed model in the Chinese digital music market raises issues of antitrust threats and hindering the function of a competitive market.¹⁴³

¹³⁹ Liu, *supra* note 4, at 1486-87.

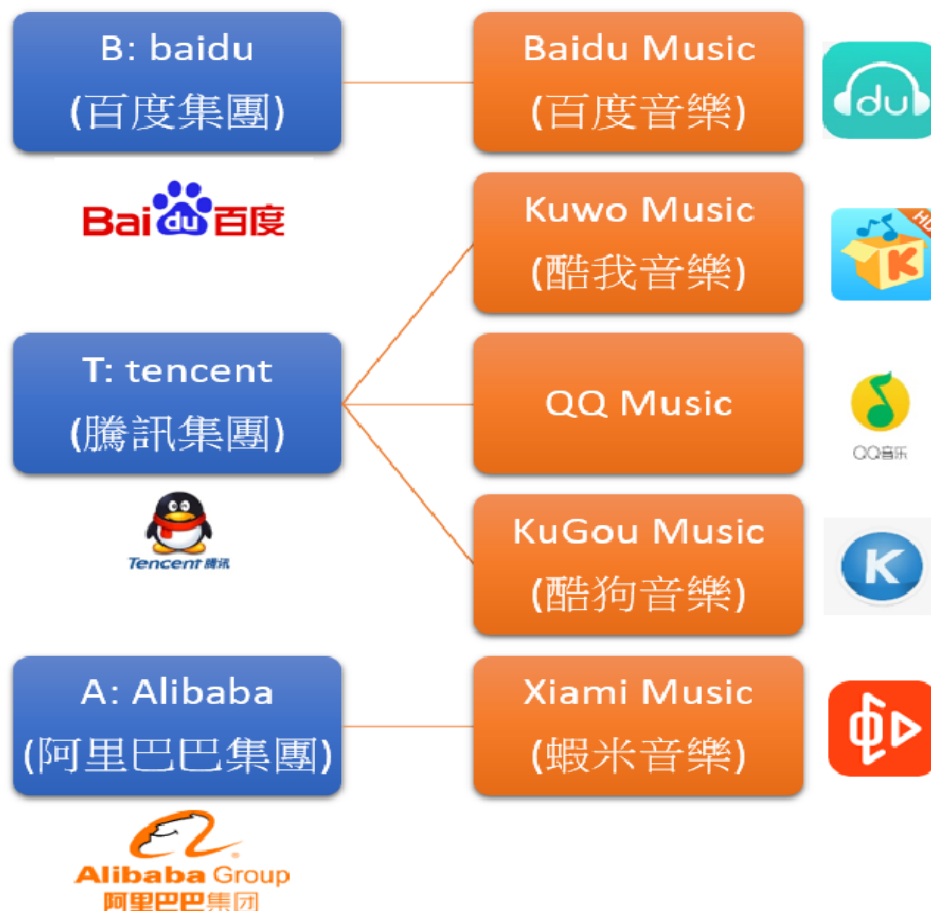
¹⁴⁰ XIUQIN LIN, *Music Individual Licensing Models and Competition Law*, in REMUNERATION OF COPYRIGHT OWNERS: REGULATORY CHALLENGES OF NEW BUSINESS MODELS, 189-92 (Kung-Chung Liu & Reto M. Hilty eds., 2017)(ebook); CHINA BIG DATA INDUSTRIAL OBSERVATION (CBDIO, 中國大資料產業觀察), Shuwei Yinle Daziliao Baogao : Zhongguo Xianmin Shouji Tingge Hangwei Jiemi (數位音樂大資料報告：中國線民手機聽歌行為揭秘) [Digital Music Big Data Report: Chinese Music Users' Behaviours] (May 20, 2016), http://www.cbdio.com/BigData/2016-05/20/content_4950507.htm.

¹⁴¹ LIN, *Music Individual Licensing Models and Competition Law* at 189-92.

¹⁴² *Id.*; Chen Guan-Rong (陳冠榮), Tengxun Zai Qude Suoni Yinle Shuwei Banquan, Xieshou Tuozhan Chuanliu Yinle Fuwu [Tencent Obtained Digital Copyrights from Sony Music. This Cooperation will Expand the Music Streaming Services] [騰訊再取得索尼音樂數位版權，攜手拓展串流音樂服務], Tech News (科技新報), <https://technews.tw/2014/12/18/tencent-signs-china-deal-with-sony-music/> (last visited Mar. 23, 2021).

¹⁴³ *Id.*; Kao Ching-Yuan(高敬原), Zuoyong Zhongguo 9 Cheng Yinle Banquan, Tengxun Yinle Xiayue Fu Mei Shangshi, Guzhi yu 300 Yi Meiyuan (The Shares of Tencent Music will be listed in the U.S.'s Stock Market. The Value Could Be Over \$30 Billion) [坐擁中國9成音樂版權，騰訊音樂下月赴美上市，估值逾300億美元], Business Next (數位時代), <https://www.bnext.com.tw/article/50514/tencent-music-us-ipo> (last visited Mar. 23, 2021).

**Figure 10: Primary Chinese Online Music Services Belong to BAT
(Organized by Author)**



In China, QQ Music is the most dominant service provider, with over 200 million consumers and over 40 million active subscribers.¹⁴⁴ QQ Music is comparable to Spotify. This music licensing model and interface are built by its mother company, Tencent (騰訊), which offers the leading internet technology in China.¹⁴⁵ QQ Music is supported by its 2-layer membership. The songs of several big international record labels such as Warner Music, Sony Music Entertainment, Universal Music, Taiwan's JVR Music and South Korea's YG Entertainment have been added to QQ Music's repertoire database.¹⁴⁶ In contrast to other participants in music market, QQ Music has more ability to keep and increase subscribers because its mother company, Tencent, manages the most influential Chinese communication apps, WeChat (微信) and Tencent QQ (騰訊 QQ).¹⁴⁷ They

¹⁴⁴ *Id.*

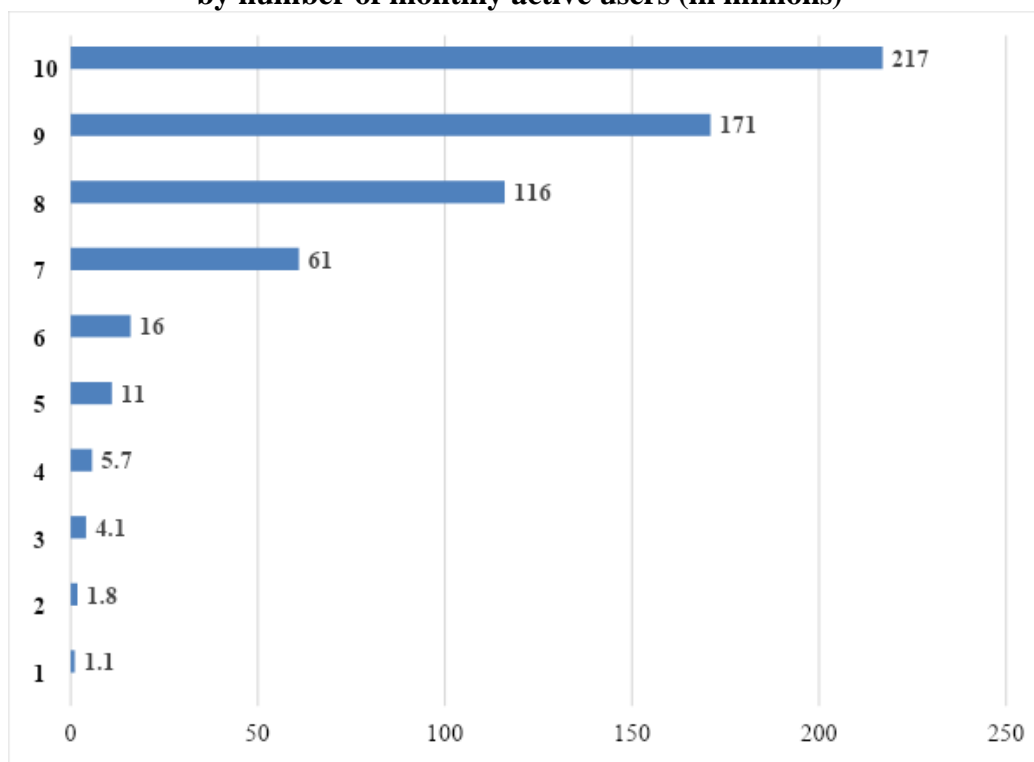
¹⁴⁵ *Id.*; IIMEDIA RESEARCH (艾媒諮詢), Zhongguo Wuxian Yinle Shichang Niandu Yanjiu Baogao (中國無線音樂市場年度研究報告) *China Wireless Music Market Annual Research Report*, 39 (2012).

¹⁴⁶ See Chen, *supra* note 142; Kao, *supra* note 143.

¹⁴⁷ LIN, *supra* note 141, at 189-92.

respectively have over 500 million active subscribers.¹⁴⁸

Figure 11: Leading mobile music platforms in China as of December 2017 by number of monthly active users (in millions)¹⁴⁹



1. Abuse of Dominant Position

As stated, the model of QQ Music corresponds to the United States market of Spotify. Nevertheless, unlike Spotify, Tencent is the leader in Chinese information technology and holds influential strength on diverse interface and business fields.¹⁵⁰ Tencent's market position is comparable to the United States' Apple because Tencent can combine its market strength in different commercial fields, e.g., Tencent QQ and WeChat, to back QQ Music's business model. This market power could possibly cause antitrust issues. For example, in 2015's Chinese New Year, Netease Cloud Music (網易音樂), TTPOD Music Small Shrimp Music (蝦米音樂) and Alipay "red envelope" (阿里紅包) were kept off the most popular online communication interface, WeChat.¹⁵¹ In this case, WeChat apparently assisted its brother company, QQ Music, to reach a better

¹⁴⁸ *Id.* at 192-95.

¹⁴⁹ Analysis (易觀博閱), 2018 Zhongguo Yidong Yinle Shichang Niandu Zonghe Fenxi (2018 中國移動音樂市場年度綜合分析) (2018 China Mobile Music Market Annual Comprehensive Analysis)], <http://www.199it.com/archives/733475.html>.

¹⁵⁰ LIN, *supra* note 141, at 192.

¹⁵¹ LIN, *supra* note 141, at 197-99.

market position by beating QQ Music's contestants and stopping Alibaba's "red envelope" rewarding and payment systems, which provides services to distribute the financial rewards of online companions.¹⁵² Consequently, Tencent asserted that Alibaba relied on WeChat's interface to strengthen Alibaba's market position.¹⁵³ Additionally, Tencent decided to shut down two of Alibaba's music services on the WeChat portal.¹⁵⁴ The Chinese government did not intervene in this dispute to manage this critical issue.¹⁵⁵ This conflict between Tencent and Alibaba Group raised serious discussions by commentators in the region. Tencent's block of Alibaba's music services was criticized and regarded as a harmful form of market competition.¹⁵⁶ Additionally, the legality of Tencent's conduct was also questioned.¹⁵⁷ Tencent's conduct of blocking Alibaba's music service cannot pass the antitrust principle's "reasonableness" test, so this block may be illegal.¹⁵⁸

2. Threats of Monopolies and Debatable Definition of Related Market

Lawmakers should consider a more modern circumscription of "relevant market." The torch bearers of information technology, such as China's Tencent and the United States' Apple, Amazon, and Google, hold robust strength in diverse business areas and hold considerable amounts of data about their user populations. In China, Tencent's QQ Music, possesses superior force in the digital music business, because Tencent can engage its influence on related technical or business matters, serving to obstruct other market participants and avoid effective market competition.¹⁵⁹

¹⁵² *Id.*

¹⁵³ *Id.*, at 203-04; Liu, *supra* note 4, at 1486; Adam Lashinsky, *Alibaba v. Tencent: The Battle for Supremacy in China*, FORTUNE (Jun. 21, 2018), <http://fortune.com/longform/alibaba-tencent-china-internet/>.

¹⁵⁴ LIN, *supra* note 141, at 204-04.

¹⁵⁵ Compare *Id.*; David Smith, *New Antitrust Frontier—The Issue Closing Partisan Divides In The Name Of Policing Big Tech*, THE GUARDIAN (Feb. 2019), <https://www.theguardian.com/us-news/2019/feb/02/a-new-antitrust-frontier-the-issue-closing-partisan-divides-in-the-name-of-policing-big-tech>. (discussion of United State's handling of large tech companies).

¹⁵⁶ *Id.*; see generally Frank Hersey, *Alibaba and Tencent Collaborate on Music Copyright*, TechNote (Sep. 12, 2017), <https://technode.com/2017/09/12/alibaba-and-tencent-collaborate-on-music-copyright/>.

¹⁵⁷ LIN, *supra* note 141, at 197-99.

¹⁵⁸ *Id.* at 203-204.

¹⁵⁹ See generally Christine Chou, *Alibaba Netease Strike Chord on Music Streaming*, ALIZILA NEWS: ALIBABA GROUP (Mar. 7, 2018), <https://www.alizila.com/ali-music-netease-strike-chord-on-music-streaming/> (last accessed Mar. 23, 2021); Leo Sun, *Meet China's Top 3 Music Streaming Platforms: Tencent, JD, and Baidu could all be great contrarian bets next year*, THE MOTLEY FOOL (Nov. 27, 2018), <https://www.fool.com/investing/2018/11/27/these-3-chinese-tech-stocks-could-rebound-in-2019.aspx> (last accessed Sep. 23, 2020); Sarah Dai, *Alibaba, Tencent collaborate on music streaming, with potential to remake industry*, SOUTH CHINA MORNING POST (Sep. 12, 2017), <https://www.scmp.com/business/companies/article/2110837/alibaba-and-tencent-enter-rare-cooperation-which-expert-says> (last accessed Mar. 23, 2021); Frank Hersey, *Alibaba and Tencent collaborate on music copyright*, TECHNOTE (Sep. 12, 2017), <https://technode.com/2017/09/12/alibaba-and-tencent-collaborate-on-music-copyright/> (last accessed Mar. 23, 2021);

As was observed, “whether Tencent can dominate online music in China—and get more users to pay—may depend on how well it can take advantage of the popularity of its messaging and social-networking service.”¹⁶⁰ Moreover, in the absence of diverse and vast related market power, it would be unfair to let a prevailing participant take advantage of the cooperative interaction among its related enterprises to gain a privileged position toward opportunities to engage in a competitive market. This dominance by prevailing market players could block the function of market competition and cause a severe threat to efficiency. It would be appropriate to clarify the meaning of “relevant market” by using a more modern and updated approach, which also considers the market participant’s substantial influence on the whole social network.¹⁶¹

The trend of “solo or exclusive license model” generated by the technological giant Tencent had dramatically shocked the music licensing market in China and caused negative effects to China’s collective management system. Tencent’s possible abuse of market power from 2016 was threatening China’s national on-line music business policies by disrupting the structure of the competitive market.¹⁶² Then, in March 2017, the only Chinese music copyright collecting society, MCSC, decided to report these anti-competitive behaviors to the authority, NCAC.¹⁶³ At several public events, MCSC lodged complaints to the corresponding official sectors to reveal the serious harm and dangers to the fair market and the economic incentives of musical artists, resulting from the “solo or exclusive licensing model” in this digital era.¹⁶⁴ Finally, in September 2017, NCSC released an administrative instruction for addressing the issues about the “solo or exclusive license model” and announced that music on-line platforms such as Tencent should follow these economic orientations.¹⁶⁵ MCSC keeps aiming to strengthen the accuracy and reliability of the copyright database and coding system to build a more efficient and competent workflow.¹⁶⁶

Kevin Zhou, *Tencent and Alibaba Announces a Music Copyright Cooperation*, PANDAILY (Sep. 13, 2017), <https://pandaily.com/tencent-and-alibaba-announces-a-music-copyright-cooperation/> (last accessed Mar. 23, 2021); Staff Writer, *Chinese tech giants Alibaba and Tencent to swap music licensing – Will It Grow The Fast-Expanding Market?* THE MUSIC NETWORK (Sep. 13, 2017), <https://themusicnetwork.com/chinese-tech-giants-alibaba-and-tencent-to-swap-music-licensing-will-it-grow-the-fast-expanding-market/> (last accessed Mar. 23, 2021); Zen Soo, *Tencent to merge QQ Music service with China Music Corp to create streaming giant*, SOUTH CHINA MORNING POST (Jul. 15, 2016), <https://www.scmp.com/business/companies/article/1990254/tencent-merge-qq-music-service-china-music-corp-create-streaming> (last accessed Mar. 23, 2021); Adam Lashinsky, *Alibaba v. Tencent: The Battle for Supremacy in China*, FORTUNE (Jun. 21, 2018), <http://fortune.com/longform/alibaba-tencent-china-internet/> (last accessed Mar. 23, 2021); Joshua Franklin, Julia Fioretti, *China’s Tencent Music raises nearly \$1.1 billion in U.S. IPO*, REUTERS (Dec. 12, 2018), <https://www.reuters.com/article/us-tencent-music-ipo-idUSKBN10A2GR1> (last accessed Mar. 23, 2021).

¹⁶⁰ LIN, *supra* note 141, at 203-05; Xiong, *supra* note 106, at 6-8.

¹⁶¹ LIN, *supra* note 141, at 205.

¹⁶² *Id.*

¹⁶³ *Id.* at 203-05.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 205-06.

NCAC justified the compulsory license regime on the basis of anti-monopoly activity, asserting superiority over the copyright function in the exclusive rights licensing regime.¹⁶⁷ Nevertheless, this response provoked severe remonstrance from musical artists and publishers.¹⁶⁸ For the Chinese music market, the compulsory license mechanism possibly imposes a serious monopolistic issue because the most influential musical platforms, such as Baidu, Alibaba and Tencent (BAT), will obtain more controlling market power, since the compulsory license will enhance their current vast bargaining power.¹⁶⁹ Thus, it makes fair negotiation impossible due to the impaired competitive market and dominant positions.¹⁷⁰ The future risks for the Chinese music market are that compulsory licensing will strengthen BAT's market power to a higher level and make their dominance more stable and fixed. This will cause demonstrable harm to the prospective income and autonomy of musical artists and worsen the market failure and the problematic anti-competition situation in the Chinese music market.¹⁷¹

IV. LEGISLATIVE PROGRESS

A. *The First Amendment*

Given China's contemporary copyright history, it is apparent that the 2001 and 2010 amendments attracted less controversy and less critical disapprobation through external pressure.¹⁷² In 2001's version, the copyright reform aimed to achieve compliance with the qualification of the World Trade Organization (WTO), while the 2010 modification targeted easing the conflicts between the U.S. and China within the WTO order.¹⁷³ Unlike the 2001 and 2010 copyright regulations' WTO orientations, the 2012 reform aimed to reconcile the imbalance between China's copyright law and the contemporary movements of commerce, culture and technology in the digital era. It was expected to shift China's market economy to a stronger level appropriate for the new era.¹⁷⁴

The first draft of the copyright amendment made remarkable modifications to

¹⁶⁷ *Id.*

¹⁶⁸ Xu Ci (徐詞), *Zhezuoquanfa Xiugai Caoan Xianru Zhengyi Xuanwo* (著作權法修改草案陷入爭議漩渦) (The draft amendment of the Copyright Law caused controversies), SINATECH (新浪科技) (Apr. 20, 2012), <http://tech.sina.com.cn/i/2012-04-20/15286992204.shtml> (last accessed Mar. 23, 2021); Xiao Xiong-lin (蕭雄淋), *Zhongguo Dalu Zhezuoquanfa Xiuzheng Caoan Di 2 Gao de Ruogan Wenti* (中國大陸著作權法修正草案第二稿的若干問題) [*Some Issues Concerning the Second Amendment Draft of the Copyright Law in China*], 173 INTELL. PROP. RTS J. (智慧財產權月刊) 5 (2013).

¹⁶⁹ LIN, *supra* note 141, at 205-06.

¹⁷⁰ *Id.*

¹⁷¹ *Id.*

¹⁷² ALFORD, *supra* note 13, at 22-26.

¹⁷³ Tian et al., *supra* note 9, at 236.

¹⁷⁴ *Id.*; PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY: FROM GUTENBERG TO THE CLOUD* 53 (2019).

the existing music copyright law.¹⁷⁵ Because of technological advancement and market expansion, China's governmental authority proposed to transform the previous context, structure and approach of the copyright regime into a modern version of protection and enforcement for the new creative economy.¹⁷⁶ While the existing copyright law merely includes 6 chapters and 61 articles, the first draft of the copyright amendment incorporated 8 chapters and 88 articles.¹⁷⁷

1. Statutory Licensing System

As is common within the wider music industry, statutory licensing aims to generate more exploitation and the spread of musical creation.¹⁷⁸ However, in terms of realistic operations, because of inefficiencies and non-functionality in the NCAC copyright clearance mechanism, the current licensing system cannot ensure musical artists' copyright compensations will be fully collected and distributed.¹⁷⁹ Thus, the amendment's first draft requests the exploiters to document—using reports first—and then deliver royalty fees into and out of copyright collecting societies with precise clarification of the users' content and purpose.¹⁸⁰ In addition, this first draft offers NCAC the power to execute sanctions or fines on exploiters who fail to carry out its orders.¹⁸¹ Article 46 of this first draft specifies that “[a]fter three months from the first publication of a sound recording, other sound recording producers may use it under the condition set for statutory license by Article 48.”¹⁸² Article 47 of this first draft stipulates that “[r]adio and television stations may broadcast published works, except audiovisual works, under the condition set for statutory licenses by Article 48.”¹⁸³

2. Collective Management Organizations

In order to enhance the prosperous exploitation of the music market, this initial draft advocates China should establish extended collective licenses (ECL).

¹⁷⁵ Tian et al., *supra* note 9, at 236-37.

¹⁷⁶ KOHN & KOHN, *supra* note 19, at 4-5.

¹⁷⁷ Jhang, *supra* note 73, at 30.

¹⁷⁸ *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1 (1908); Paul Goldstein, *Copyright, LAW AND CONTEMPORARY PROBLEMS* 55, 86 (1992); Skyla Mitchell, *Reforming Section 115 : Escape from the Byzantine World of Mechanical Licensing*, 24 CARDOZO ARTS & ENT. L. J. 1239, 1256 (2007).

¹⁷⁹ Henry E. Smith, *Institutions and Indirectness in Intellectual Property*, 157 U. OF PA. L. REV. 2083-89 (2009); Xiong, *supra* note 115, at 90-93; Mark A. Lemley, *Contracting Around Liability Rules*, 100 CAL. L. REV. 464, 470-75 (2012); Tian et al., *supra* note 9, at 240; Zhiqiang Yin & Congyun Zheng, *Study on Digital Music Industry Operation in China*, 3RD INTERNATIONAL CONFERENCE ON MANAGEMENT, EDUCATION, INFORMATION AND CONTROL (2015).

¹⁸⁰ Article 48 of the first draft amendment indicates “The recorded music works to make sound recordings without permission from the copyright owner.”

¹⁸¹ Tian et al., *supra* note 9, at 240.

¹⁸² *Id.*

¹⁸³ *Id.*

In particular, this initial draft allows artists to opt out, to comprehend the non-affiliated artist's licensing arrangements,¹⁸⁴ especially through the managerial function of collecting societies to gather and allocate remuneration.¹⁸⁵ Moreover, within the mechanism of ECL, the price-setting should be administered by a governmental agency,¹⁸⁶ e.g., NCAC and collecting societies such as MCSC and CAVCA, who exercise the operation of ECL with considerable governmental supervision. Also, this initial draft suggests launching a specific dispute settlement system (DSS) for addressing the CMO or user's petition on setting the licensing fee.¹⁸⁷ The counterargument against the governmental benchmark of remuneration should be delivered to a specialized governmental body, such as the U.S.'s copyright royalty board (CRB), for further consideration.¹⁸⁸ Consequently, the decision approved by the specialized governmental body would be conclusive and, once the process of assessment starts, the procedure cannot be terminated until the closing determination.¹⁸⁹

3. Governmental Administration and Enforcement

This first draft proposes the modifications below regarding the enforcement of music infringements. It also advocates that, in cases where the exploiter should have delivered royalties to a CMO, the binding exploiters are granted immunity from actual damages of legal litigation.¹⁹⁰ These exploiters should keep submitting remuneration to the CMO in accordance with the established rate plan set through governmental administration.¹⁹¹ This modification aims to stimulate music creators to assign their copyright management to specialized CMOs and to avoid the troublesome issues of overwhelming and massive legal litigation, with the potential for variable outcomes, in China's music marketplace.¹⁹²

B. The Second Draft Amendment

Surprisingly, the first draft of the copyright amendment of 2012 provoked intense debate. Until the end of May, 2012, the governmental authority had obtained over 1,600 responses, many of which were delivered by foreign

¹⁸⁴ Hamish Porter, *European Union Competition Policy: Should the Role of Collecting Societies Be Legitimised?*, 18 EUR. INTELL. PROP. REV. 672, 676 (1996); H. Lund Christiansen, *The Nordic licensing systems— extended collective agreement licensing*, 13 EUR. INTELL. PROP. REV. 346-49 (1991).

¹⁸⁵ Article 60 of the first draft amendment.

¹⁸⁶ Maria Pallante, *Orphan Works, Extended Collective Licensing and Other Current Issues*, 34 COLUM. J. OF L. & THE ARTS 23, 24-28 (2010).

¹⁸⁷ Tian et al., *supra* note 9, at 240.

¹⁸⁸ Tarja Koskinen-Olsson, *Collective Management In The Nordic Countries*, in COLLECTIVE MGMT. OF COPYRIGHT AND RELATED RTS. 292 (Daniel Gervais Ed., 2010).

¹⁸⁹ Tian et al., *supra* note 9, at 241.

¹⁹⁰ Merges, *supra* note 1, at 10-11.

¹⁹¹ *Id.*

¹⁹² *Id.*

companies, artists and organizations.¹⁹³ In connection to the long-lasting hassle in China's music market, these letters and messages mainly focused on arguments related to the reforms of collecting societies' statutory licensing, fair remuneration, exclusive license, on-line platform and steaming services and precise copyright information and database.¹⁹⁴ In response to further examination of professional research, practical views and open advice from the whole music community, NCAC arranged the second version of the reform proposal to be issued in July 2012 and sought further feedback.¹⁹⁵ This subsequent draft amendment offered modifications of the most controversial issues in the music industry: the modern operation of collective management and the statutory license (compulsory license), located in Articles 46, 47, 48, 60 and 70 of the second draft.¹⁹⁶

C. The Third Draft Amendment and Further Developments

In reaction to the aforementioned reform proposals, the government drafted a new version with a more comprehensive and satisfying view of China's music market.¹⁹⁷ In order to compile a more convincing draft—as compared to the weak acceptance seen in early-stage public feedback at the end of 2012—China's copyright administration, NCAC, chose to present its self-drafted proposal to the State Council Legislative Affairs Office (國務院法制辦公室), SCLAO, for preliminary internal evaluation.¹⁹⁸ In the summer of 2014, after completing the preparatory examination and confirmation by SCLAO, the draft initiated by China's copyright administration was offered to the music community for public assessment.¹⁹⁹ However, by this time it had been a while since widespread discussion in the public media terminated, so this third version of the copyright reform is still pending, awaiting approval of the highest policy-making institution, the Standing Committee of the People's Congress of China (全國人民代表大會).²⁰⁰

D. New Lessons: Transnational Experiences, Aspirations and Challenges

Musicians in China had great concerns about Article 46 of the initial draft of the copyright amendment, since it would allow rightsholders to exploit musical

¹⁹³ Tian et al., *supra* note 9, at 242.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 242-43.

¹⁹⁶ *Id.*; Sun Li-ping, Huang An-qi, Luo Zheng-guang (孫麗萍、黃安琪、羅爭光), Zhezuquanfa "Da Xiu" Re Zhengyi "Jiti Guanli" Shi Liangyao Haishi "Si Xue" *The Amendment of Copyright Law provokes controversy. "Collective Management" is A Good Medicine or a "Dead Hole"* [著作權法“大修”惹爭議 “集體管理”是良藥還是“死穴”], XINHUA NEWS AGENCY (新華社) (Apr. 25, 2012), <https://www.chinacourt.org/article/detail/2012/04/id/511154.shtml> (last visited Mar. 23, 2021).

¹⁹⁷ Tian et al., *supra* note 9, at 156.

¹⁹⁸ *Id.* at 156-57.

¹⁹⁹ *Id.* at 157.

²⁰⁰ *Id.*

compositions or lyrics based on a previously published sound recording released to the public market for more than three months.²⁰¹ Specifically, China's music community argued that the proposed phase of three months was too limited for music copyright holders and it would harm the competence of exclusivity on which musical creators rely.²⁰² In addition, Chinese musicians argued that their property rights would be impaired under the punitive terms of the proposed Article 46.²⁰³ Furthermore, musicians argued that funding to support the continuing creation of musical compositions and lyrics would shrink due to the lack of copyright protection.²⁰⁴

On the other hand, a considerable number of academics and professionals in copyright law presented opposing opinions to counter the music community's assertions about the proposed Article 46.²⁰⁵ Academics' professional analysis identified other countries in which statutory licenses functioned satisfactorily to avert antitrust issues in the digital age, notably issues caused by record labels and music publishers.²⁰⁶ However, the pressure from China's music community was overwhelming and the proposed Article 46 of the statutory license was abandoned.²⁰⁷

Musicians also voiced objections to the second draft's possible establishment of an ECL.²⁰⁸ From their perspective, an ECL would empower societies' controls over their copyrights and continue narrowing musicians' autonomy in managing their property rights.²⁰⁹ To compromise with the music community, the second draft restricted the implementation of ECL to published musical works broadcast over radio and television stations and published musical works disseminated through private karaoke equipment.²¹⁰

The ECL system might be defeated entirely if a musician's intention to opt-out of the system is firm. This weakness of the ECL system might be raised in court when approving comparatively higher compensations to non-affiliated artists than they would be able to seek from the ECL system. This negative

²⁰¹ Liu, *supra* note 4, at 1485; Jiang, *supra* note 4, at 222; Xiong, *supra* note 106, at 30-32.

²⁰² Liu, *supra* note 4, at 1485-86.

²⁰³ *Id.* at 1486.

²⁰⁴ *Id.*; Xin Zhezuquanfa Shi Guli Yinzhexie Shou Heiqian, *Does The New Copyright Law Encourages MCSC to Collect Black Money?* [新著作權法是鼓勵音著協收黑錢?], Netease (網易科技) (Apr. 6, 2012), <https://web.archive.org/web/20170222084811/http://news.163.com/12/0406/14/7UDPOEVI00012Q9L.html> (last visited Mar. 23, 2021).

²⁰⁵ Jiang & Gervais, *supra* note 4, at 222; Liu, *supra* note 4, at 1485.

²⁰⁶ Liu, *supra* note 4, at 1485-1486.

²⁰⁷ *Id.* at 1486; Xiong, *supra* note 115, at 86-88.

²⁰⁸ Liu, *supra* note 4, at 1481.

²⁰⁹ Liu, *supra* note 4, at 1481; Xiong Qi (熊琦), *非法著作權集體管理司法認定的法源梳理* [Elaboration on the Judicial Interpretation of the Illegal Collective Licensing] 5 J. OF THE E. CHINA UNIV. OF POL. SCI. AND LAW (華東政法大學學報), 84 85-88 (2017).

²¹⁰ Liu, *supra* note 4, at 1481; 唱片公司再次為著作權法修法建言：錄音製作者應享有廣播權和公開表演權 [Record Labels Propose Copyright Law Amendment Again: Recording Producers Should Own Broadcasting and Public Performance Rights], 中國知識產權資訊網 [China Intellectual Property Information] (Mar. 29, 2018), http://www.iprchn.com/Index_NewsContent.aspx?NewsId=107036.

outcome might result in a failure to keep the ECL system robust. It also results in “an opting-out trend” and “a collapse of the ECL system.”²¹¹ Therefore, to issue actual damages in court, or to compensate the rightsholders as if they are affiliated to CMOs, it will be necessary to maintain the ECL system, thereby reinforcing the health of the music ecosystem. This is exactly what the Nordic nations have tried very hard to achieve over the last few years.²¹² In the United States, Sound Exchange seems to address similar issues through a system like the ECL system.²¹³ The difference is that the United States created a separate organization to manage licensing affairs related to non-affiliated artists of CMOs.²¹⁴ Whether looking to ECL, Sound Exchange, or MCL, all provide a new way of thinking to enhance the current licensing system in the Chinese music market. A more advanced licensing mechanism like ECL or Sound Exchange should be adopted in China to move the traditional licensing philosophy forward and reduce the massive amounts of litigation by non-affiliated artists.²¹⁵

In terms of efficiency, compulsory licenses might be regarded as a temporary pathway, because they could cause the deformation of the competitive market, in which case no other means could be applied.²¹⁶ In this situation, the government might need to act to avoid market failure. However, at present, it seems that digital music dissemination does not inherently cause market failure. Thus, supporting conduct from the governmental administration (such as compulsory licensing) is unnecessary. The preservation of the foundation of copyright, property and contract doctrine, can build and shape positive market function without government intervention. This could be a more reasonable approach than any government conduct to reregulate market interference by the exclusive right of intellectual property law. There is no doubt property rights retain a considerable amount of exclusiveness and dominance, even if limits have been designed against abuse. However, the shadow of comprehensive control is what threatens the public community.

The government’s control mechanism will be counter-effective if it inhibits artists from drawing inspiration from an original creation to establish a new work or prohibits artists from drawing extensive reference to the plot or content of an artistic work for discussion and critique purposes. The expression divide or idea-expression dichotomy principle should apply.²¹⁷

Using modern technology, it is believed that the digital format of music and sound recording can be confined, but it is impossible to avoid all meta-level discussion about digital content within commentary, appreciations, and social

²¹¹ Liu, *supra* note 4, at 1474.

²¹² *Id.* at 1481; Xiong, *supra* note 115, at 90-93.

²¹³ Liu, *supra* note 4, at 1474; Xiong Qi (熊琦), 美國音樂版權制度轉型經驗的梳解與借鑒 [*Combing and Learning from the Transformation Experience of American Music Copyright System*], 3 環球法律評論 [GLOBAL L. REV.], 142, 145-148 (2014).

²¹⁴ Merges, *supra* note 1, at 11.

²¹⁵ Jiang & Gervais, *supra* note 4, at 228.

²¹⁶ Merges, *supra* note 1, at 11-12.

²¹⁷ See Polk Wagner, *Information Wants to Be Free: Intellectual Property and the Mythologies of Control*, 103 COLUM. L. REV., 995, 998 (2003).

discourse.²¹⁸ Without a doubt, as technology keeps advancing, the authority will be capable of putting all efforts to inspect all users' works to deter any possible illegal conduct, and to maintain an enhanced environment for copyright protection.²¹⁹ This excessive control, like compulsory licensing, will surely cause overwhelming costs and cannot be afforded by the market economy. Therefore, this kind of excessive control is impractical, given its relative cost compared to the cost of production and the margins earned by rightsholders during commercial exploitation of their works.²²⁰

E. Compliance with International Treaties: The Berne Convention's Three-Step Test

The ECL bill of China presumably engages a change to breach the three-step test,²²¹ found in the discussion of exclusive rights of reproduction under Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works in 1967:

Right of Reproduction: 1. Generally; 2. Possible exceptions; 3. Sound and visual recordings - (1) Authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form. (2) It shall be a matter for legislation in the countries of the Union to permit the reproduction of such works in certain special cases, provided that such reproduction does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author. (3) Any sound or visual recording shall be considered as a reproduction for the purposes of this Convention.²²²

In addition, the test as included in Article 13 of TRIPs reads: "Members shall confine limitations and exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder."²²³

As the body of the WTO illustrates, regarding the primary stage of the three-step test, "certain special cases" demand irregularity and the barrier should be clarified and controlled within the appropriate and reasonable range and filed.²²⁴ In particular, the commercial immunity subordinate to the United States representing copyright law was notified to counter the initial requirement

²¹⁸ Merges, *supra* note 1, at 11-12.

²¹⁹ *Id.*

²²⁰ *Id.* at 5-6.

²²¹ Jane C. Ginsburg, *Extended Collective Licenses in INT'L TREATY PERSPECTIVE: ISSUES AND STATUTORY IMPLEMENTATION*, COLUMBIA PUBLIC LAW RESEARCH PAPER, No. 14-564, 1,1 (Nov. 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3068997.

²²² Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works in 1967.

²²³ Article 13 of TRIPs.

²²⁴ Liu, *supra* note 4, at 1474.

restricting “certain cases.”²²⁵ In particular, Chinese music CMO and MCSC enrolled only 9% of total Chinese creators as affiliates. Broadening identification is enforced for creators in the Chinese music market.²²⁶ This legal conduct could be capable of exploiting the authorship exclusivity in over 90% of nonaffiliated creators.²²⁷ For that reason, it is believed that the lion’s share cannot be counted as constituting “certain special cases.”²²⁸

Moreover, according to the 1909 Chinese Copyright Act, diffusion of copyrighted sound recordings by TV and radio signals is a non-commercial use and, consequently, is excluded from being the basis of a copyright infringement allegation.²²⁹ This immunity was incompatible with the three-step test subject to the Berne Convention and the TRIPs Agreement.²³⁰ In 2001, the Chinese administration shifted this exclusion to the compulsory license regime of copyright law.²³¹ This amendment was enacted just prior to the date of December 11, when China’s WTO accession was announced.²³² It states that “[r]adio and television stations may broadcast published sound recordings without the permission of copyright owners but shall pay remunerations, unless the relevant parties have agreed otherwise. Detailed measure shall be formulated by the State Council.”²³³

Nevertheless, after the ratification of the involuntary license proposal, the PRC’s broadcasting associations had been pressured to prevent the establishment of a practical scheme that specifies explicit regulations and operations.²³⁴ Throughout this process, the PRC’s TV and radio stations continued to broadcast musical works and sound recording without charge.²³⁵ In 2010, radio and TV stations of the PRC finally initiated licensing bargaining with the record labels, the music collective management organizations, and the MSCS.²³⁶ This background serves as a lesson for the music market by showing the ineffectiveness of a compulsory licensing regime under the reality of politics.²³⁷

Due to formidable protest from musical creators, publishers, and record labels in the Chinese market, the 2012 Chinese copyright amendment completely abrogated the compulsory licensing mechanism within PRC’s copyright law, notwithstanding the rights of musical works or any current living articles.²³⁸ In

²²⁵ Liu, *supra* note 4, at 1480; Xiong, *supra* note 213, at 150-52.

²²⁶ Liu, *supra* note 4, at 1480-87; Xiong, *supra* note 115, at 100-02.

²²⁷ Liu, *supra* note 4, at 1480-87.

²²⁸ *Id.* at 1480-81.

²²⁹ *Id.* at 1486-87; Xiong, *supra* note 115, at 90-93.

²³⁰ Liu, *supra* note 4, at 1486-87.

²³¹ *Id.* at 1487.

²³² *Id.*; World Trade Organization, Member Information, China and the WTO, https://www.wto.org/english/thewto_e/countries_e/china_e.htm (last visited Mar. 23, 2021).

²³³ Copyright Law of the People’s Republic of China, Art. 44 (2010).

²³⁴ Liu, *supra* note 4, at 1487; Liu, *supra* note 107, at 102-03.

²³⁵ Liu, *supra* note 4, at 1487.

²³⁶ MCSC, 2010 Annual Report 3, http://www.mcsc.com.cn/pdf/phplK0X7_ (last visited Mar. 23, 2021).

²³⁷ Liu, *supra* note 4, at 1487.

²³⁸ *Id.*

light of the United States' Music Modernization Act,²³⁹ the notion of compulsory licensing has reached the public eye and has been a recurring topic in the music industry.²⁴⁰

Even though these copyright rewards are the product of local and overseas creators, merely local creators are offered a route to access these resources.²⁴¹ However, this outcome causes protectionism to occur within the structure of international trade and contravenes the essence of national treatment on the basis of the TRIPS agreement and the Berne Convention.²⁴²

F. Thorny Problem: Common Law Traditions and Moral Rights

It is crucial for this analysis to distinguish between the United States' and China's copyright systems. This study has identified essential points of divergence and demonstrates how individual solutions could be meaningful and practical to address similar circumstances by treating analogous cases alike in the United States and China.²⁴³ On the basis of European law tradition, China adopts a moral rights system to form and regulate one side of its copyright law structure, in contrast to the United States more purely economic rights system.²⁴⁴ This distinction results in several substantive differences between the United States' and China's respective copyright regimes.²⁴⁵

First, in China's copyright law, the idea of moral rights can be exerted for all types of copyrightable works, indicated in Article 3.²⁴⁶ Were it otherwise, the notion of a moral right would be comparatively narrowed only to specific creation categories in visual art.²⁴⁷

Second, in China's copyright system, the rights of integrity, revision, authorship, and publication are all incorporated in the moral rights framework, whereas, in the United States copyright system, the concept of moral rights is barely considered and focuses exclusively on the rights of integrity and attribution.²⁴⁸ Compared to the United States' economic rights system, and simply by design, the ECL and compulsory licensing fits less naturally into China's moral rights system. With more rights to incorporate, it is more challenging to incorporate compulsory licensing and the ECL system in China.

Since PRC's governance transformed ancient China from a dispersed and divided amalgam to a centralized and ordered union, China has expressed not just

²³⁹ Music Modernization Act, Pub. L. 115-264, 132 Stat. 3676 (2018) (codified as 17 USC § 101) at 1-5.

²⁴⁰ Ginsburg, *supra* note 221, at 9.

²⁴¹ Liu, *supra* note 4, at 1487.

²⁴² *Id.*; Xiong, *supra* note 106, at 30-32.

²⁴³ Tian et al., *supra* note 9, at 187.

²⁴⁴ Houweling, *supra* note 21, at 549, 560; Henry E. Smith, *Inst. and Indirectness in Intell. Prop.*, 157 U. PA. L. REV., 2083, 2089 (2009).

²⁴⁵ Tian et al., *supra* note 9, at 187.

²⁴⁶ *Id.* at 155.

²⁴⁷ *Id.* at 187-88.

²⁴⁸ *Id.* at 188; Xiong, *supra* note 213, at 150-52.

its ambition against western powers, but also a desire to integrate Asia's economy.²⁴⁹ Externally and internally motivated, China is continuously adjusting its copyright to harmonize with international requirements and local demands.²⁵⁰ China revised its communist economic system through efficient political and administrative reconstruction.²⁵¹ The modernization of legal institutions encouraged Chinese governmental authorities to execute logical and systematic policy-making and law enforcement.²⁵² Subsequently, new technology and business models transferred expeditious innovation to digital and virtual products and services.²⁵³ The internet has intensively remodeled the culture and society of creation and use, contrary to printing and reading in the traditional printed manner. China's broader copyright law is influenced and increasingly altered by modern civilization.

However, despite two crucial reforms in 2001 and 2010, the narrow local vision limited the amendment's potential and possibilities of the future amendments. Essentially, the copyright reform in 2001 was aimed to force the PRC into compliance with the WIPO Performance and Phonograms Treaty (WPPT) and World Copyright Treaty (WCT).²⁵⁴ This international IP movement equipped and empowered the PRC with a protective and strong IP structure, allowing it to adhere to worldwide trade prerequisites and communicate and open global export and import markets. Nevertheless, facing dramatic social, political, and economical transformation, the Chinese music community expressed concern about the long-existing copyright protection mechanism.²⁵⁵ Many feel that it cannot react and absorb continual technological impacts and challenges.²⁵⁶ Music copyright enforcement is unable to deter increasing infringements, resulting in lower motivation and less innovation and creativity.²⁵⁷ Therefore, under the pressure of external and internal provocation, new modernization of copyright laws represents a fundamental driver towards equity between composers, performers, producers, distributors, and broadcasters.²⁵⁸

CONCLUSION

A. Inevitable Weakness: Legislative Delay and Inflexible Regulation

Without the support and flexibility of the free market, compulsory licenses are a static model that can produce an awkward issue: outmoded (i.e., fixed) and

²⁴⁹ Tian et al., *supra* note 9, at 153-54.

²⁵⁰ *Id.* at 156; Xiong, *supra* note 106, at 30-32.

²⁵¹ Tian et al., *supra* note 9, at 154-55.

²⁵² *Id.*; Liu, *supra* note 107, at 98-100.

²⁵³ Tian et al., *supra* note 9, at 153-55.

²⁵⁴ *Id.* at 157; Xiong, *supra* note 106, at 32.

²⁵⁵ Liu, *supra* note 4, at 11463-64; Xiong, *supra* note 117, at 115.

²⁵⁶ Liu, *supra* note 4, at 1463-64.

²⁵⁷ *Id.* at 1464.

²⁵⁸ ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS, 135 (2012).

unintended consequences.²⁵⁹ Specifically, lawmaking makes the legislation turn to persistent and stubborn agreements or contracts, precluding the possibility of negotiations. The inflexibility and irreversibility within the compulsory license results in few adjustments to new developments in the market economy.²⁶⁰ Market entrants are left to contend with obsolete rate arrangements or “legislative delay.”²⁶¹

Legislative delay illustrates why the price-setting process within the compulsory license system cannot react to immediate changes in the market economy. Rates built on a compulsory license may be way below a price linked to the free market.²⁶² For instance, the government rate on compulsory license of sound recording resulted in no differences between the 1909 Copyright Act and the 1976 Copyright Act. Yet, throughout the mass medium boom, there was a large increase in the music production market.²⁶³ The compulsory license has depressed the value of the musical compositions and sound recordings market.²⁶⁴ Consequently, by providing less compensation than users and creators generally expect, this tendency to underestimate value has generally decreased people's desire to create musical and recorded works.²⁶⁵

If the intention to opt out of the system was firm, the ECL system might be defeated. Creators' reluctance to resist may disappear when the court approves higher compensations for non-affiliated artists than could be earned under the ECL system.²⁶⁶ This might result in failure to keep the ECL alive. Nordic nations have tried very hard over the past years to maintain the health of the musical ecosystem.²⁶⁷ The ECL will need to be run stably to issue actual damages to rightsholders as if they were affiliated with CMOs.²⁶⁸

In terms of efficiency, compulsory licenses might be regarded as a possible and temporary pathway. Serious problems cause the deformation of the competitive market if no other means could be applied, given the unresponsiveness to market factors.²⁶⁹ At its extreme, the government might need to execute actions to avoid market failure. However, it seems that the circumstance of digital music dissemination has not inherently induced market failure.²⁷⁰ And, thus, supporting conduct from the governmental administration

²⁵⁹ Felix Trumpke, *Effects and Potential of Extended Collective License Systems*, in REMUNERATION OF COPYRIGHT OWNERS, 90-93 (Kung-Chung Liu & Reto M. Hilty eds., 2017).

²⁶⁰ Merges, *supra* note 1, at 9-10.

²⁶¹ RETO M. HILTY & JOSEF DREXL, MUNICH STUDIES ON INNOVATION AND COMPETITION 23-25 (2015).

²⁶² Merges, *supra* note 1, at 9-10.

²⁶³ Robert P. Merges, *Autonomy and Independence: The Normative Face of Transaction Costs*, 53 ARIZ. L. REV., 145, 150-53 (2011).

²⁶⁴ Merges, *supra* note 1, at 8.

²⁶⁵ *Id.* at 6.

²⁶⁶ Liu, *supra* note 4, at 1464; Xiong, *supra* note 106, at 6.

²⁶⁷ Liu, *supra* note 4, at 1475-76; Merges, *supra* note 1, at 8-10.

²⁶⁸ Liu, *supra* note 4, at 1475-76; Jiang & Gervais, *supra* note 4, at 228.

²⁶⁹ Robert P. Merges, *Contracting into Liab. Rules: Intell. Prop. Rights and Collective Rights Org.*, 84 CAL. L. REV., 1376-78 (1996).

²⁷⁰ *Id.*

(such as a compulsory license) is unneeded.²⁷¹ The preservation of the effectual foundations of property rights and contracts are able to build and shape positive market function.

This pathway can be a more reasonable approach than any governmental market conduct to reregulate the market interference by the exclusive right of intellectual property law. It is no doubt that property rights retain a considerable amount of exclusiveness and dominance, even if limits have been designed against the abuse.²⁷² However, the shadow of comprehensive control is what threatens the public community.²⁷³

Because of the control, it will be extremely costly to try to design and manage a social system for copyright owners to prohibit users from referring to the plot or content of artistic works in a discussion with non-users or imitating general ideas from an original creation to establish a new work due to the idea-expression divide or idea-expression dichotomy principle.²⁷⁴ Modern technology makes it possible to confine the digital format of music works and sound recordings, but it is impossible to censor and avoid all the sharing about references or imitations of these digital contents within commentary, appreciations and intercourse.²⁷⁵ Without a doubt, as technology keeps advancing, diverse authorities will be capable of putting all efforts into inspecting all users to deter any possible illegal activities and aiming to maintain a spotless environment for copyright protection (as per the relevant government rules and laws.²⁷⁶ This excessive control, like compulsory licensing, will surely incur extensive costs and cannot be afforded by the market economy.²⁷⁷ Therefore, this kind of excessive control is obviously costly and impossible.²⁷⁸

B. Stimulating Transactional Efficiency

In the spirit of fair rewards, the two emerging regimes, “Compulsory License and Extended Collective License,” are considered to uphold the middle class and close the divide between content suppliers and musical creators in the digital era.²⁷⁹ Having said that, statistics indicates that individuals continue to bargain contracts with copyright holders toward compulsory license.²⁸⁰ Notwithstanding 17 U.S.C. § 115 (Compulsory Licenses on Mechanical Rights), the Harry Fox Agency (HFA), a primary supplier of mechanical rights on sound recordings and collecting intermediary and allocator of mechanical royalties on behalf of the

²⁷¹ *Id.* at 1293.

²⁷² Merges, *supra* note 1 at 11.

²⁷³ *Id.* at 6.

²⁷⁴ Wagner, *supra* note 217, at 995-98.

²⁷⁵ Merges, *supra* note 1, at 1-3.

²⁷⁶ *Id.* at 1, 3-4.

²⁷⁷ *Id.* at 1, 5-6.

²⁷⁸ *Id.* at 5-6.

²⁷⁹ Justin Hughes & Robert P. Merges, *Copyright and Distributive Justice*, NOTRE DAME L. REV., Vol. 92, 24, 48 (2016); Liu, *supra* note 4, at 1465-66.

²⁸⁰ Lemley, *supra* note 179, at 463-66; Merges, *supra* note 1, at 10-11.

United States' music publishers, is a renowned case in point. In numerous respects, in addition to the compulsory license system in the United States, the music market finds a deficient situation in wiping out transactional costs, but this licensing approach still results in extravagant rent-seeking by trying to persuade the Senate and House of Representatives for advantageous price and conditions.²⁸¹ Therefore, in comparison to contract negotiation in the free market, the accumulation of the expenditure of rent-seeking and unremoved transactional costs can possibly make the model of compulsory licensing bothersome, troublesome and costly.²⁸²

The rate formula processed and approved by the administration and legislature cannot generate impartial compensations for musical creators to access specific gravity on the price within the market competition.²⁸³ In support of individual creators, the latter information and communication advances have lowered economic barriers to enter the music fostered a diverse and open environment for building multiple and mixed commercial channels.²⁸⁴

Specifically, the Nordic countries, such as Denmark, Finland, Iceland, Norway, and Sweden, initially framed the ECL system.²⁸⁵ Compared to the compulsory license structure launched by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs Agreement)²⁸⁶ and the Berne Convention for the Protection of Literary and Artistic Work,²⁸⁷ the ECL mechanism is a substitute for empowering a recognition linking a collective management organization and its licensees to be obligatory on nonaffiliated creators.

Hypothetically, if the representation of a collective management organization is widespread, comprehensive, and competent, the ECL mechanism could have the least influence on the competitive economy. Controversially, the advocates for the ECL are usually the fledgling and immature collecting societies which still have not gathered adequate registers, and so far, been situated in a market share monopolized through the considerable quantity of overseas or nonaffiliated subjects.²⁸⁸ Presently, by means of upgrading competitive markets and lowering

²⁸¹ Liu, *supra* note 4, at 1466; Xiong, *supra* note 213, at 212.

²⁸² Liu, *supra* note 4, at 1461; Liu, *supra* note 107, at 102-05; Xiong, *supra* note 213, at 155-58.

²⁸³ Liu, *supra* note 4, at 1466.

²⁸⁴ *Id.* at 1466-67; Xiong, *supra* note 106.

²⁸⁵ Liu, *supra* note 4, at 1471.

²⁸⁶ Ginsburg, *supra* note 221, at 9.

²⁸⁷ Berne Convention for the Protection of Literary and Artistic Works (1886) ("The right to make reproductions in any manner or form (with the possibility that a Contracting State may permit, in certain special cases, reproduction without authorization, provided that the reproduction does not conflict with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author; and the possibility that a Contracting State may provide, in the case of sound recordings of musical works, for a right to equitable remuneration)") https://www.wipo.int/treaties/en/ip/berne/summary_berne.html.

²⁸⁸ Liu, *supra* note 4, at 1475, 1482; Xiong, *supra* note 213, at 155-58.

transactional costs, the ECL channel has represented concrete answers to back extensive utilization of authorized musical creation.²⁸⁹

Within the United States' competitive economy, the music copyright collectives (e.g., BMI, ASCAP and SESAC (PRO), HFA and SoundExchange), convey essential free expression to their reuse.²⁹⁰ According to the blanket license, the bundling mechanism efficiently transits the right of secondary exercises to musical creators by streamlining transactional costs.²⁹¹ In China's market, indemnification provisions are typically covered in the copyright collectives' licenses for safeguarding and keeping affiliated members sheltered from the economic harm caused by legal actions of non-affiliated copyright holders.²⁹² Consequently, the essential concern regarding the ECL model, the goal of China's, is that by persuading the congress and administration, turns into a negative skill, potentially achieving abuse of monopoly power.²⁹³ However, the merits of enhancing considerably the quantity of memberships for improving the administration and fostering the competence of functioning could remain in vain.

C. Ensuring Fair Compensation: Transparency and Accountability

Three principal reasons cause the abuse of monopoly power in music market: (1) a turndown to authorize specific exploitation of copyright, in the absence of rational grounds; (2) arbitrarily determining licensing fees and terms, unescorted by adequate and legal negotiation processes; and (3) inappropriate prejudice regarding two separate applications of identical licensing objects.²⁹⁴

It is probably troublesome to think that when copyright management markets were forming, collecting societies were achieving significant market power, and this could result in abuse through denial of licenses, or prejudice toward exploiters. Additionally, it is also hard to define if licensing fees and terms have been decided arbitrarily or deprived of sensible circumstances. In China's music market, it is unnatural that the price proposed by copyright collecting societies is constantly corresponding to the one approved by the governmental authority

²⁸⁹ Liu, *supra* note 4, at 1482.

²⁹⁰ Unlike the 3 PROs in America," SoundExchange is the only organization in America that collects performance royalties for "non-interactive" digital sound recordings (not compositions). "Non-interactive" means you can't choose your song. So, Pandora radio is non-interactive, whereas Apple Music and Spotify are "interactive." Beats 1 (within Apple Music) is digital radio (non-interactive). Spotify's Pandora-like radio service is also non-interactive, but more on that in a sec. "Like the PROs, SoundExchange issues blanket licenses to digital radio (non-interactive) platforms (like iHeartRadio and Sirius/XM) which gives these outlets the ability to play any song they represent. Like the PROs, the outlets pay an annual fee for the blanket license." See Ari Herstand, *How to Get All Your Music Royalties: ASCAP, BMI, PRS, SoundExchange, PROs and the Rest*, <https://aristake.com/post/what-is-soundexchange-ascap-bmi-pros-hfa-mechanicals-and-how-to-get-all-your-royalties>.

²⁹¹ Ginsburg, *supra* note 221, at 7-9.

²⁹² Liu, *supra* note 4, at 1474-75; Xiong, *supra* note 213, at 160-62.

²⁹³ Liu, *supra* note 4, at 1486; Tian et al., *supra* note 9, at 241.

²⁹⁴ Tian et al., *supra* note 9, at 212.

NCAC.²⁹⁵ For instance, the copyright licensing tariff of Chinese karaoke businesses, affirmed by NCAC, was routinely matching the amount proposed by the music copyright collecting society, Music Copyright Society of China (MCSC), and the audiovisual copyright collecting society, China Audio-Video Copyright Association (CACVA).²⁹⁶

This coincidence reveals the forming of a licensing tariff, in the absence of “due process,” risks harming the music ecosystem, due to inadequate transparency and the failure of competitive market function. In fact, in China, the criterion of a licensing tariff declared and approved by NCAC is eventually a formalization and accreditation of copyright collecting societies’ motions.²⁹⁷ The capability of governmental supervision is deficient, and this leads to the high probability of market power abuse.²⁹⁸ The occurrence of abuse therefore causes inefficiency in the Mandarin music free market. Moreover, compared to the global level, the music licensing rate in China appears to be depressed.²⁹⁹ Specifically, in China, the price policy for broadcast rights licenses leans toward supporting the extensive exploitation facilitated by the TV and radio stations, and results in lower licensing rates than the global level. In addition, the implementation of “sub-entrusting” also leads to a severe enlargement of transactional costs.³⁰⁰ Greater complexity transpires through such a licensing process, since “sub-entrusting,” though arbitrary manipulations on licensing terms and rate, possibly causes monopoly power abuse.³⁰¹

“Transparency” and “openness” will be essential factors to enhance licensing efficiency in China’s music market. When specifying the licensing tariff of musical works and sound recordings, public hearings will be necessary for the interest groups, users, copyright holders and intermediaries to speak out about their opinions and concerns. Open discussions and interaction will also be helpful for governmental authorities to gather positive or negative feedback to improve and reexamine its tariff proposal. On-line surveys, e-mails and web conferences will be practical methods to obtain diverse ideas and suggestions from the public music community. The communication among users, artists and middlemen can play a significant role to ease the intense between copyright owners and users and promote pragmatic copyright policy. Thus, rebuilding “due process” and “open discussions” on the process of price-setting will be imperative for a more transparent and efficient music ecosystem.

At this point, the focus shifts to why the Chinese government should generate sufficient supervision toward a collective copyright management system. Competent supervision will bring transparency and openness to China’s music and audiovisual collecting societies. Consequently, reaching future modernization on music copyrights, China can confidently build an efficient licensing system to

²⁹⁵ Jiang & Gervais, *supra* note 4, at 225, 230.

²⁹⁶ *Id.*

²⁹⁷ *Id.* at 230; Xiong, *supra* note 106, at 55-58.

²⁹⁸ Jiang & Gervais, *supra* note 4, at 230; Xiong, *supra* note 213, at 112.

²⁹⁹ Jiang & Gervais, *supra* note 4, at 230; Xiong, *supra* note 106, at 15-18.

³⁰⁰ Jiang & Gervais, *supra* note 4, at 230; Guobin, *supra* note 105, at 138.

³⁰¹ Liu, *supra* note 4, at 1478; Xiong, *supra* note 115, at 95-98.

foster a thriving music market, affording transparent domestic and international access to producers and consumers.