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

Chien-Chih (Jesse) Lu

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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.

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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 quakes associated with the sharp acceleration of infringements by information technology evolution. Diverse approaches to modernization have introduced various legislative and commercial dispensations. 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 formalities are included in this system. The “Compulsory Licensing” and ECL models is significantly discussed in North American, Asian, and European countries. 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.

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

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?

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\(^5\) 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 in sentive 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. 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. 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. 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.

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. In terms of modern legal philosophy, receiving this publishing privilege from Chinese royalty is contrary to authorizing rights and protection to intellectual property. The faint copyright consciousness schooled by the Chinese monarchy is comparable to that of Great Britain, prior to the Statute of Anne. 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.

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

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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).
21 *Id.* at 561-62.
western copyright institutions. 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. As a result, ancient China retained its weak and inadequate system to safeguard authors’ intellectual property.

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. 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. In particular, the establishment of “extraterritoriality” and “most favored nation treatment” generated extraordinary trading pressure and openness to the previously restricted feudal Chinese market. 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.

It is generally believed that because of “external” and “internal” pressure from the western power, the first Chinese copyright law was established in 1910. 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.

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. 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. The modernizations also aimed to facilitate mental permanence and state power. The essential foundation to continue these reforms would be efficient, competent, and advanced legal

23 Tian et al., *supra* note 9, at 152-53.
24 ALFORD, *supra* note 13, at 27.
26 Tian et al., *supra* note 9, at 153.
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.
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

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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.
Producers of Phonograms.\textsuperscript{44} Since December 11th, 2001, China has been a member of the World Trade Organization (WTO).\textsuperscript{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.\textsuperscript{46} As a result of their international involvement, the Chinese government enacted the first copyright amendment in 2001 and a second amendment in 2010.\textsuperscript{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.\textsuperscript{48} While streaming businesses have become the biggest players in the United States music market,\textsuperscript{49} Chinese QQ Music’s valuation per subscriber was five times that of Spotify in 2016.\textsuperscript{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.\textsuperscript{51}

<table>
<thead>
<tr>
<th>Rank</th>
<th>Country</th>
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<tbody>
<tr>
<td>01</td>
<td>USA</td>
<td>06</td>
<td>South Korea</td>
</tr>
<tr>
<td>02</td>
<td>Japan</td>
<td>07</td>
<td>China</td>
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<tr>
<td>03</td>
<td>UK</td>
<td>08</td>
<td>Australia</td>
</tr>
<tr>
<td>04</td>
<td>Germany</td>
<td>09</td>
<td>Canada</td>
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<tr>
<td>05</td>
<td>France</td>
<td>10</td>
<td>Brazil</td>
</tr>
</tbody>
</table>

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

\textsuperscript{44} Tian et al., suprana note 9, at 155-56.
\textsuperscript{45} Id.; Herlihy & Zhang, supra note 22, at 395.
\textsuperscript{46} Tian et al., supra note 9, at 156.
\textsuperscript{47} Id.; Xiao Xiong-lin (蕭雄淋), Zhongguo Dalu Zhezuquanfa 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).
\textsuperscript{51} Id.
\textsuperscript{52} IFPI REPORT 2019, supra note 48.
The Chinese music market is remarkably incommensurate with the entire market economy, although it is growing continuously in recent years.\footnote{Jiarui Liu, \textit{Copyright for Blockheads: An Empirical Study of Market Incentive and Intrinsic Motivation}, 38 \textit{COLUM. J.L. & ARTS} 474, 543 (2015).}

\textbf{Figure 1: Annual GDP in the United States and China from 2015 to 2018}\footnote{Id.}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure1.png}
\caption{Annual GDP in the United States and China from 2015 to 2018 (US$ Billions)}
\end{figure}

\textbf{Figure 2: Music Industry Revenue in the United States and China from 2015 to 2018}\footnote{U.S. and China annual GDP from 2014 to 2017, \textit{THE WORLD BANK DATA BANK},} \footnote{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).}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure2.png}
\caption{Music Industry Revenue in the United States and China from 2015 to 2018 (US$ Millions)}
\end{figure}

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 (金杜律师事务所法律研究院) 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 Court.

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57 KING & WOOD MALLESONS LEGAL MINER (金杜律师事务所法律研究院), Shiting Jiemu Zhezuquan 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.
62 Id. KING & WOOD MALLESONS LEGAL MINER, at 6-7.
63 Id. at 7.
64 Id. at 8-9.
Court of Shaanxi Province.  

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. 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. 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. 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. 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

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65 Id. at 9-10.  
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 China**

<table>
<thead>
<tr>
<th>Channel</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Others</td>
<td>1.60%</td>
</tr>
<tr>
<td>CD/Cassette</td>
<td>22.80%</td>
</tr>
<tr>
<td>Mobile Music</td>
<td>32.60%</td>
</tr>
<tr>
<td>Online Music</td>
<td>96.80%</td>
</tr>
</tbody>
</table>

**Figure 4: Forecasted Digital Music Revenue in China from 2019 to 2023**

(CNY Millions)

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

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, but about 75% of them never received copyright-based profit from digital platforms, or from an agent. Among those who did earn money from the digital approach, almost half received less than 100 RMB (about 15 USD) per year. 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.

Figure 5: Forecasted Number of Music Streaming Users by 2023

(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, but about 75% of them never received copyright-based profit from digital platforms, or from an agent. Among those who did earn money from the digital approach, almost half received less than 100 RMB (about 15 USD) per year. 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.
74 Id.
75 Id.
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. Record labels and the Mandarin music industry consider these protections to be great economic compensation and incentive. In particular, Tencent, China's

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76 Id. at 33.
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). 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.

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, Alibaba Music (阿里巴巴音樂), Taihe Music Group (太合音樂集團), Changba (唱吧), and Taiwan’s KKBOX.

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.

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81 Herlihy & Zhang, supra note 22, at 396-97; IFPI REPORT 2019, supra note 79.
82 Id.
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 2016

- Look for a free source: 55.6%
- Give up listening: 23.9%
- Probably pay for it: 13.4%
- Definitely pay for it: 7.1%

Figure 8: Reasons for Consumers Not to Pay for Online Music in China in 2016

- It's possible to listen for free: 59.3%
- The paying function is not appealing: 27%
- The price is too high: 13.7%

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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. 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. Compared to traditional music services, these new innovations will keep the audience in contact with each other, not just purely listening to music. 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).

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. The new amendment of these two articles aims to enhance the efficiency of music licensing within the scope of China’s copyright system. 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. 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. These two

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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.
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. 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.

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. MCSC has been designed as a non-profit organization representing musical artists and rightsholders, serving to collect and distribute copyright-based revenue. The MCSC is also the earliest established CMO approved by the Chinese government and the PRC Copyright Law Act. 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. 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. By 2009, membership of the MCSC reached 5,798, including 355 new members containing 139 lyricists, 200 music composers, and 5 music publishers. In 2009, the overall royalties were 42.57 million RMB. 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.

97 Id.
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.
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.\textsuperscript{107} Its main mission is to cluster and distribute the copyright revenue for creators or rightsholders of audiovisual works.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{112} The licensing profits made by a karaoke business can be a major revenue source for more established and stylish musical artists.\textsuperscript{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.\textsuperscript{114} Specifically, the fundamental function of a music CMO is comparable to the general CMOs in individual types of industries.\textsuperscript{115} Based on the China Copyright Law, the establishments of Chinese CMOs should be approved and supervised by the

\textit{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).}
\textsuperscript{108} Id.
\textsuperscript{109} Id.; Zhezuoquan Jiti Guanli jiushi Ge Jiaoi Syihichang [Collective copyright management is a trading market] [著作權集體管理就是個交易市場], NetEase [网易科技], http://news.163.com/special/reviews/copyright0406.html?from=newstalk3 (last visited Mar. 23, 2021).
\textsuperscript{111} Fuxiao Jiang & Daniel Gervais, \textit{supra} note 98, at 224.
\textsuperscript{112} Id.
\textsuperscript{114} Fuxiao Jiang & Daniel Gervais, \textit{supra} note 98, at 223.
\textsuperscript{115} Id.; Xiong Qi (熊琦), Zhezuoquan Jiti Guanli Zhong de Jizhong Xuke Giangzhi Guize (著作權集體管理中的集中許可強制規則) [Prohibition Rules for Copyright Collective Management], \textit{4 J. OF COMPAR. L. [比較法研究]}, 46, 50-53 (2016).
governmental commission, NCAC. This background caused all Chinese CMOs to keep their cordial connections with the government and officials.

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. 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.

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. 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. 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. 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.

B. Licensing Royalties and Collective Management

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

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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 Developement. (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.
revenues grew 17%. This income growth of MCSC originated from the licensing of performance rights.

As an example, the remuneration offered by the Shanghai Disney Resort had acted as a strong boost for MCSC’s licensing business. 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. 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.

Likewise, MCSC is finding a new approach to reinforce the information infrastructure in response to the rise of the mass digitalization era. In addition, MCSC is considering designing its own coding and data system to establish a unique music management and licensing culture with Chinese characteristics. 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.

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” 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.

Surprisingly, although MCSC is the only music collective management organization in Mainland China, only 12% of respondents were MCSC members at that time. 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. This investigation showed that the MCSC had to

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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.\textsuperscript{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.\textsuperscript{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.

\textbf{Figure 9: Relationship between MCSC and Music Creators in China in 2018}\textsuperscript{138}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure9.png}
\end{figure}

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,

\textsuperscript{136} \textit{Id.}; Shiyu Chengshi Jiti Dizhi KTV BanquanFei, Lianhe Qianming Shengyuan Guangzhou (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
\textsuperscript{137} \textit{Id.}
\textsuperscript{138} MUSIC COPYRIGHT SOCIETY OF CHINA (MCSC), \textit{supra} note 124.
Chinese music service companies are combating the accumulated “culture of free use” and suffering from the difficulties of collecting copyright royalties. The “free use culture” is established when exploiters can simply approach or download digital songs for free through illegal forums, websites or software. 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. 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. 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.

139 Liu, supra note 4, at 1486-87.
142 Id.; Chen Guan-Rong (陳冠榮), Tengxun Zai Qude Suoni Yinle Banquan, Xieshou Tuozhan Chuanliu Yinle Fuwu [Tencnet 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).
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

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144 Id.  
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.\textsuperscript{148}

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{figure11.png}
\caption{Leading mobile music platforms in China as of December 2017 by number of monthly active users (in millions)\textsuperscript{149}}
\end{figure}

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.\textsuperscript{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.\textsuperscript{151} In this case, WeChat apparently assisted its brother company, QQ Music, to reach a better

\begin{itemize}
\item \textsuperscript{148} \textit{Id.} at 192-95.
\item \textsuperscript{150} LIN, \textit{supra} note 141, at 192.
\item \textsuperscript{151} LIN, \textit{supra} note 141, at 197-99.
\end{itemize}
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.\footnote{152} Consequently, Tencent asserted that Alibaba relied on WeChat’s interface to strengthen Alibaba’s market position.\footnote{153} Additionally, Tencent decided to shut down two of Alibaba’s music services on the WeChat portal.\footnote{154} The Chinese government did not intervene in this dispute to manage this critical issue.\footnote{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.\footnote{156} Additionally, the legality of Tencent’s conduct was also questioned.\footnote{157} Tencent’s conduct of blocking Alibaba’s music service cannot pass the antitrust principle’s “reasonableness” test, so this block may be illegal.\footnote{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.\footnote{159}

\footnote{152} Id.
\footnote{154} Lin, supra note 141, at 204-04.
\footnote{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/.
\footnote{157} Lin, supra note 141, at 197-99.
\footnote{158} Id. at 203-204.
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.” 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.

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. Then, in March 2017, the only Chinese music copyright collecting
society, MCSC, decided to report these anti-competitive behaviors to the
authority, NCAC. 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. 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. MCSC keeps
aiming to strengthen the accuracy and reliability of the copyright database and
coding system to build a more efficient and competent workflow.

Kevin Zhou, Tencent and Alibaba Announces a Music Copyright Cooperation, PANDAILY (Sep.
(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,
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
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,
Joshua Franklin, Julia Fioretti, China's Tencent Music raises nearly $1.1 billion in U.S. IPO,
110A2GRl (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. Nevertheless, this response provoked severe remonstrance from musical artists and publishers. 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. Thus, it makes fair negotiation impossible due to the impaired competitive market and dominant positions. 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.

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. 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. 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.

The first draft of the copyright amendment made remarkable modifications to

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167 Id.
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.
the existing music copyright law. 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. 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.

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. 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. 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. In addition, this first draft offers NCAC the power to execute sanctions or fines on exploiters who fail to carry out its orders. 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.” 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.”

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).

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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.
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, especially through the managerial function of collecting societies to gather and allocate remuneration. Moreover, within the mechanism of ECL, the price-setting should be administered by a governmental agency, 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. 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. 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.

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. These exploiters should keep submitting remuneration to the CMO in accordance with the established rate plan set through governmental administration. 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.

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


\[185\] Article 60 of the first draft amendment.


\[187\] 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. 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. 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. 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.

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. 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. 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. 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).

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

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193 Tian et al., supra note 9, at 242.
194 Id. at 242-43.
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.\textsuperscript{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.\textsuperscript{202} In addition, Chinese musicians argued that their property rights would be impaired under the punitive terms of the proposed Article 46.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{206} However, the pressure from China’s music community was overwhelming and the proposed Article 46 of the statutory license was abandoned.\textsuperscript{207}

Musicians also voiced objections to the second draft’s possible establishment of an ECL.\textsuperscript{208} From their perspective, an ECL would empower societies’ controls over their copyrights and continue narrowing musicians’ autonomy in managing their property rights.\textsuperscript{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.\textsuperscript{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

\textsuperscript{201} Liu, supra note 4, at 1485; Jiang, supra note 4, at 222; Xiong, supra note 106, at 30-32.
\textsuperscript{202} Liu, supra note 4, at 1485-86.
\textsuperscript{203} Id. at 1486.
\textsuperscript{205} Jiang & Gervais, supra note 4, at 222; Liu, supra note 4, at 1485.
\textsuperscript{206} Liu, supra note 4, at 1485-1486.
\textsuperscript{207} Id. at 1486; Xiong, supra note 115, at 86-88.
\textsuperscript{208} Liu, supra note 4, at 1481.
\textsuperscript{209} Liu, supra note 4, at 1481; Xiong Qi (熊琦), 非法著作權集体管理司法认定的法源梳解 [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).
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.” 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. In the United States, Sound Exchange seems to address similar issues through a system like the ECL system. The difference is that the United States created a separate organization to manage licensing affairs related to non-affiliated artists of CMOs. 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.

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. 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.

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鑑 [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.
discourse. 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. 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.

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, 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.

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.”

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. In particular, the commercial immunity subordinate to the United States representing copyright law was notified to counter the initial requirement

\[ \text{\textsuperscript{218} Merges, supra note 1, at 11-12.} \]
\[ \text{\textsuperscript{219} Id.} \]
\[ \text{\textsuperscript{220} Id. at 5-6.} \]
\[ \text{\textsuperscript{222} Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works in 1967.} \]
\[ \text{\textsuperscript{223} Article 13 of TRIPs.} \]
\[ \text{\textsuperscript{224} Liu, supra note 4, at 1474.} \]
restricting “certain cases.”

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. This legal conduct could be capable of exploiting the authorship exclusivity in over 90% of nonaffiliated creators. For that reason, it is believed that the lion’s share cannot be counted as constituting “certain special cases.”

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. This immunity was incompatible with the three-step test subject to the Berne Convention and the TRIPs Agreement. In 2001, the Chinese administration shifted this exclusion to the compulsory license regime of copyright law. This amendment was enacted just prior to the date of December 11, when China’s WTO accession was announced. It states that “[t]he 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.”

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. Throughout this process, the PRC’s TV and radio stations continued to broadcast musical works and sound recording without charge. 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. This background serves as a lesson for the music market by showing the ineffectiveness of a compulsory licensing regime under the reality of politics.

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. 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.
234 Liu, supra note 4, at 1487; Liu, supra note 107, at 102-03.
235 Liu, supra note 4, at 1487.
237 Liu, supra note 4, at 1487.
238 Id.
light of the United States’ Music Modernization Act,\textsuperscript{239} the notion of compulsory licensing has reached the public eye and has been a recurring topic in the music industry.\textsuperscript{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.\textsuperscript{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.\textsuperscript{242}

\textit{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.\textsuperscript{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.\textsuperscript{244} This distinction results in several substantive differences between the United States’ and China’s respective copyright regimes.\textsuperscript{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.\textsuperscript{246} Were it otherwise, the notion of a moral right would be comparatively narrowed only to specific creation categories in visual art.\textsuperscript{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.\textsuperscript{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

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\textsuperscript{240} Ginsburg, supra note 221, at 9.
\textsuperscript{241} Liu, supra note 4, at 1487.
\textsuperscript{242} Id.; Xiong, supra note 106, at 30-32.
\textsuperscript{243} Tian et al., supra note 9, at 187.
\textsuperscript{245} Tian et al., supra note 9, at 187.
\textsuperscript{246} Id. at 155.
\textsuperscript{247} Id. at 187-88.
\textsuperscript{248} Id. at 188; Xiong, supra note 213, at 150-52.
\end{flushright}
its ambition against western powers, but also a desire to integrate Asia’s economy.\textsuperscript{249} Externally and internally motivated, China is continuously adjusting its copyright to harmonize with international requirements and local demands.\textsuperscript{250} China revised its communist economic system through efficient political and administrative reconstruction.\textsuperscript{251} The modernization of legal institutions encouraged Chinese governmental authorities to execute logical and systematic policy-making and law enforcement.\textsuperscript{252} Subsequently, new technology and business models transferred expeditious innovation to digital and virtual products and services.\textsuperscript{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).\textsuperscript{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.\textsuperscript{255} Many feel that it cannot react and absorb continual technological impacts and challenges.\textsuperscript{256} Music copyright enforcement is unable to deter increasing infringements, resulting in lower motivation and less innovation and creativity.\textsuperscript{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.\textsuperscript{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

\begin{itemize}
  \item \textsuperscript{249} Tian et al., \textit{supra} note 9, at 153-54.
  \item \textsuperscript{250} \textit{Id.} at 156; Xiong, \textit{supra} note 106, at 30-32.
  \item \textsuperscript{251} Tian et al., \textit{supra} note 9, at 154-55.
  \item \textsuperscript{252} \textit{Id.}; Liu, \textit{supra} note 107, at 98-100.
  \item \textsuperscript{253} Tian et al., \textit{supra} note 9, at 153-55.
  \item \textsuperscript{254} \textit{Id.} at 157; Xiong, \textit{supra} note 106, at 32.
  \item \textsuperscript{255} Liu, \textit{supra} note 4, at 11463- 64; Xiong, \textit{supra} note 117, at 115.
  \item \textsuperscript{256} Liu, \textit{supra} note 4, at 1463-64.
  \item \textsuperscript{257} \textit{Id.} at 1464.
  \item \textsuperscript{258} Robert Cooter & Thomas Ulen, \textit{Law and Economics}, 135 (2012).
\end{itemize}
unintended consequences. 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. Market entrants are left to contend with obsolete rate arrangements or “legislative delay.”

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. 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. The compulsory license has depressed the value of the musical compositions and sound recordings market. 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.

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. 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. The ECL will need to be run stably to issue actual damages to rightsholders as if they were affiliated with CMOs.

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. 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. And, thus, supporting conduct from the governmental administration

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260 Merges, supra note 1, at 9-10.
262 Merges, supra note 1, at 9-10.
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.
270 Id.
(such as a compulsory license) is unneeded. 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. However, the shadow of comprehensive control is what threatens the public community.

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. 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.

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. This excessive control, like compulsory licensing, will surely incur extensive costs and cannot be afforded by the market economy. Therefore, this kind of excessive control is obviously costly and impossible.

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. Having said that, statistics indicates that individuals continue to bargain contracts with copyright holders toward compulsory license. 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.
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.\textsuperscript{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.\textsuperscript{290} According to the blanket license, the bundling mechanism efficiently transits the right of secondary exercises to musical creators by streamlining transactional costs.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.

\textbf{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.\textsuperscript{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 denial 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.

\textsuperscript{289} Liu, \textit{supra} note 4, at 1482.

\textsuperscript{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.” \textit{See} Ari Herstand, \textit{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.

\textsuperscript{291} Ginsburg, \textit{supra} note 221, at 7-9.

\textsuperscript{292} Liu, \textit{supra} note 4, at 1474-75; Xiong, \textit{supra} note 213, at 160-62.

\textsuperscript{293} Liu, \textit{supra} note 4, at 1486; Tian et al., \textit{supra} note 9, at 241.

\textsuperscript{294} Tian et al., \textit{supra} note 9, at 212.
NCAC. 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).

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. The capability of governmental supervision is deficient, and this leads to the high probability of market power abuse. 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. 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. Greater complexity transpires through such a licensing process, since “sub-entrusting,” though arbitrary manipulations on licensing terms and rate, possibly causes monopoly power abuse.

“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.