Title
Evaluating New Copyright Reforms in the Mandarin Music Market: Assessing How Collective Management and the Licensing Systems Afford Economic Incentives for Artists

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Abstract

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China's music copyright collecting society (the Music Copyright Society of China (MCSC)) and its new music platforms (e.g. Tencent, NetEase, Alibaba's Xiami Music, Baidu Music and QQ Music), find points of commonality through constructing more efficient and profitable systems, so as to generate more users and greater income. These new perspectives can provide artists in the Mandarin music market with a more flexible and profitable pathway to construct their licensing infrastructure. It can also be observed how technology facilitates this breakthrough.

In the relevant scholarly literature, articles on music licensing have mostly focused on music licensing issues within a single jurisdiction, or new approaches to music licensing issues discovered by concentrating on international norms.

This research advocates the notion that the new licensing models and regulations in the U.S. and Europe deserve closer examination. 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 U.S. and European licensing models, and examining them in context of the Mandarin music market.

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I. INTRODUCTION

To strengthen the current music licensing system in China, the main principles are:(1) To equitably reward artists' hard works on music creation; (2) To boot the efficiency and competence of music copyright licensing; (3) To provide credible database for the track to music copyright details and the process of empowered licensing; (4) To maintain due process on building transparent clearance and price setting procedure.[1] With these approaches to accomplish a fairer, more efficient, and more rational licensing environment for all musical artists, music income will thrive and gradually grow.

The first chapter of this research presents a general background of this research. A roadmap toward an efficient music licensing system with copyright reform is delivered via a literature review, initial presentations of economic freedom and incentive theory and statistical findings applied to resolve the research questions and achieve the outcome.

The second chapter delivers the methodology of this research. It comprises comparative research, document analysis and empirical studies. The significance of the outcome of this research is the discovery of new approaches to connect new technology and new economic incentives and licensing models.

The third chapter overviews the history of the Mandarin music industry and legal transformation. This historical preface indicates the relationship between Confucian ideology and music, the establishment of the Mandarin Music Industry, the occurrences of war and governmental censorship, the influence of international treaties and globalization and, in the end, the legal reform and development provoked by innovative technology and the international and historical conditions previously mentioned.

In the fourth chapter, this research aims to address the critical challenges in the existing music markets through the analysis of the issues associated with the nature of collective licensing, monopoly and competitive markets, standing to file a lawsuit, introduction of a compulsory licensing system and copyright information and database.

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[1] United States Copyright Office, Copyright and the Music Marketplace: Report of The Register Of Copyrights, p.11-15 (Feb. 2015), *available at* https://copyright.gov/docs/musiclicensingstudy/copyright-and-the-music-marketplace.pdf (last visited Mar. 3, 2019).

In the fifth chapter, the possible solutions to the issues raised in this study are submitted. Especially, this research provides answers for facing the risks related to monopoly, standing, data interoperability, the compulsory licensing and extended collective license (ECL). Additionally, it points out continuing modernization progress in China since it is believed that the U.S.'s new music modernization and European ECL can provide considerable answers for China's issues.

The sixth chapter considers future concerns and difficulties in the Mandarin music society. It demonstrates the issues relevant to abuse of dominant position and related market power and introduces how modern concept of art affects the existing copyright mechanism. From political, cultural and social perspectives, this chapter also demonstrates how exterior incentives imposes substantial impacts on Chinese music society and the internal pressure stimulates a modern creative environment.

Finally, in the last chapter, the conclusion includes final comments and remarks in accordance with the improvement of a collective management system, licensing system in technological era, new points of view from the Modernization of Music Art and European ECL system, the administration, enforcement and licensing pattern of copyright law practices and reforms and illustrates how international and cross-strait perspectives generate restrictions and possibilities to the Mandarin music industry. In the end, this research concludes by offering a direction toward further copyright reforms and prosperity in the Mandarin music market economy.

In the past, research articles on music licensing mostly focused on the transactional issues of collecting societies within a single jurisdiction. or new approaches to music licensing issues by concentrating on the international norms and competition perspectives. However, this research has brought awareness that the new licensing models and regulations in the U.S. and Europe deserve further and more extensive discussion. In accordance with the comparison of the copyright regulations, cases and statistics, this research aims to a contribution to academic science by proposing solutions for applying western licensing models to the Mandarin music industry.

A. Economic Freedom: The Ability to Participate in a Market

The most critical issue between copyright and artistic freedom is the connection between creativity and remuneration. “Art for art’s sake” is a classic sentence expressed by many artists to explain that the purpose of their creations is not about wealth. It is no doubt that many creators devote themselves to the arts for non-monetary reasons.[2]By appreciating folk legend Bob Dylan’s breezy realistic poems on “Blowin in the Wind” or African-American jazz composer and civil rights activist Charles Mingus’s concrete statements on the album "The Black Saint and the Sinner Lady", it is obvious that artists might express their emotional feelings and social reflections without considering financial income. Not to mention that many art masterpieces - such as van Gogh’s paintings - had no relationship to monetary profit.[3] However, much creativity doesn’t emerge from the purpose of gaining profit, monetary compensation still represents a meaningful motivation for artistic creation. When the financial budgets limit the creators’ time and expense required to finish their works, it is undeniable that economic factors form a considerable scope for artistic acts. Therefore, the existing crucial question is mainly focused on “How can the budget achieve this level of artistic work?” Hence, it can be seen that in order to secure economic freedom in the market, the principle of copyright addresses this question.[4]

Under the U.S.’s intellectual property concept, when copyright is a property right formed by its more unique nature and quality than tangible property rights, we have to realize these differences structure copyright as a specific type of property right.[5]Naturally, copyright is firmly a solid right and must be protected and secured. Additionally, property rights are core elements for economic freedom and the free market. The property right, such as copyright, constructs the artistic environment for protecting a creation’s value by hard-working creators. Therefore, by further enhancing the property right nature of copyright, it brings us the most significant spot is property rights, as copyright contributing to constitute diverse business models for creators’ applications, and supports them to manage profits and continue crafting artistic works by productive labors with a financial basis.[6] In terms

[2] *See* Matthew Barblan, *Copyright as a Platform for Artistic and Creative Freedom*, George Mason Law Review, V. 23, No. 4, pp. 796 (May 6, 2016).
[3] *Id.*
[4] *Id.*, at 796-797
[5] *Id*, at 797
[6] *Id*, at 797-798

of exclusive right,[7] copyright as a type of property right giving creators legal capability to implement ownership over their artistic works. For instance, based on copyright clauses, artists have ownership of their creations by exclusive right to (1) reproduction (2) derivative works (3) distribution to the public (4) public performance (5) public display. It is reasonable that creators should have the right to exercise and own the artistic pieces they produce by their own labor. Artistic works are completed from authors' originality and creativity. These artistic contributions with economic values and a moral basis come from expressions of artists' external ideas, emotions and identities.[8]

To comprehend copyright topics in the music market one must focus on discussions of both music works and sound recordings. The function of music creators, including composers and lyricists, and the duty of recording professionals who perform musical works and make recordings, is common knowledge to all in the music industry. However, there are still many influential units lying between the musical creators and recording professionals. The diagram below portrays the diverse rights in connection with musical works and sound recordings and the influential units that execute each tasks.[9]

For rock and roll music, the recording artists mostly write and perform the song by themselves. In this situation, the creators more commonly assume the management of the copyright licensing process with by their own company. However, in the country music scene, it is more general that the recording artists play and record other creators' musical compositions and, therefore, the mission to market the original musical creation belongs to the music publishers in particular.[10]

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[7] Under Section 106 of the U.S. Copyright Act, the owner of a copyright has certain "exclusive rights." This section provides the copyright owner with the right to "(1) reproduce the copyrighted work, (2) prepare derivative works, (3) distribute copies of the copyrighted work, (4) publicly perform the copyrighted work, (5) publicly display the copyrighted work, and (6) perform the copyrighted work by means of a digital audio transmission, in the case of sound recordings." Stated more succinctly, only the copyright owner can create and sell copies of the copyrighted work, create related works, such as sequels, and perform or display the work in public. Under U.S. law, copyrights last for the author's lifetime plus 70 additional years. Copyrights may be acquired through a work completed for hire, a jointly-created work, or an entirely independently created work, each providing unique rights. Julie E. Cohen, Lydia P. Loren, Copyright in A Global Information Economy, New York: Aspen Publishers, p.197, 313-314, 365-368, 382-387 (2nd ed. 2006).

[8] *supra* note 2, at 798.

[9] Julie E. Cohen, Lydia Pallas Loren, Ruth L. Okediji & Maureen A. O'Rourke, Copyright in A Global Information Economy, New York: Wolters Kluwer, p.409-410 (4th ed. 2015).

[10] Julie E. Cohen, Lydia Pallas Loren, Ruth L. Okediji & Maureen A. O'Rourke, Copyright in A Global Information Economy, New York: Wolters Kluwer, p.411 (4th ed. 2015).

B. Incentive Theory: Motivation for Producing Valuable Artistic Works

The formation of US Copyright Law could be traced back to the establishment of the Statute of Anne in the early 17th century. This Copyright Act 1710 (8 Ann. c. 21 or as 8 Ann. c. 19) was authorized by the Parliament of the United Kingdom.[11] The identification of utilitarianism[12], property rights and moral rights, constructed by theories of John Locke[13] and Georg Hegel[14], cultivated the nature and dimension of copyright.

Utilitarianism underlies a conscientious philosophy of the gregarious wellbeing and sentient entities of artistic creation. This principle defines the formation of continuing innovation economically stimulated by exclusive monopoly, whereas Locke's view advocates the ownership of property as rooted in the proposition of moral considerations and corresponded to the meritorious accomplishments of a labor force.[15]

The announced aspiration of copyright in light of the Anne Statute symbolizes the nature of the legislation

> "Whereas Printers, Booksellers, and other Persons, have of late frequently taken the Liberty of Printing, Reprinting, and Publishing, or causing to be Printed, Reprinted, and Published Books, and other Writings, without the Consent of the Authors or Proprietors of such Books and Writings, to their very great Detriment, and too often to the Ruin of them and their Families: For Preventing therefore such

[11] "Parliament of Great Britain: The Parliament of Great Britain was formed in 1707 following the ratification of the Acts of Union by both the Parliament of England and the Parliament of Scotland. The Acts created a new unified Kingdom of Great Britain and dissolved the separate English and Scottish parliaments in favour of a single parliament, located in the former home of the English parliament in the Palace of Westminster, near the City of London. This lasted nearly a century, until the Acts of Union 1800 merged the separate British and Irish Parliaments into a single Parliament of the United Kingdom with effect from 1 January 1801", David Herlihy, Yu Zhang, *Music industry and copyright protection in the United States and China*, Global Media and China, Vol 1, Issue 4, p.391 (Dec. 2016).

[12] Robert P. Merges, Justifying Intellectual Property, Cambridge, MA: Harvard University Press, p.31-35 (2011).

[13] Robert P. Merges, Justifying Intellectual Property, Cambridge, MA: Harvard University Press, p.31(2011).

[14] *Id.* at 70-75.

[15] "Jeremy Bentham, the founder of utilitarianism, described utility as the sum of all pleasure that results from an action, minus the suffering of anyone involved in the action. Utilitarianism is a version of consequentialism, which states that the consequences of any action are the only standard of right and wrong. Unlike other forms of consequentialism, such as egoism and altruism, utilitarianism considers the interests of all beings equally." Robert P. Merges, Justifying Intellectual Property, Cambridge, MA: Harvard University Press, p.31-20 (2011).

> Practices for the future, and for the Encouragement of Learned Men to Compose and Write useful Books; May it please Your Majesty, that it may be Enacted [...]"

Meanwhile, the Intellectual Property Clause of the US Constitution (Article I, Section 8, Clause 8, also recognized as the Progress Clause) outlines that the US Congress shall hold strength "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries".

In light of incentive theory, it is found that the current copyright law system does not actually encourage new music creativity well.[16] This is because if works subject to copyright protection are freely appropriable to the public, incentive for creation will be lacking; on the other hand, as private rights are granted to the creators and authors, the ideas will emerge at a more rapid pace. In addition, the institutions for collective management will emerge in an environment that enforces strong intellectual property rights, in order to evolve in response to changes in the asset values. If the copyright license of copyright law is effective in a country, it will increase the creative output of the music industry.[17]

The copyright's incentive theory as developed in the U.S. focuses on giving economic incentives and freedom for creators and intermediaries, two influential players in the free market. Why does the incentive theory work? Exclusive rights are granted by copyright for artists' creative and original expression which is fixed to a physical medium. In the music business, the copyrightable works include two categories of creations which are compositions and lyrics and sound recordings.[18] Authors can release their copyright to the public. However, in order to increase efficiency and reduce transaction costs, a significant numbers of creators will choose to license their copyrights to intermediaries for public or

[16] "According to the "incentive theory "of copyright, financial rewards are what the public trades for the production of creative works. Based on an original, nationwide survey of more than 5,000 musicians. For most musicians, copyright does not provide much of a direct financial reward for what they are producing currently." Peter C. Dicola, *Money from Music: Survey Evidence on Musicians' Revenue and Lessons About Copyright Incentives*, 55 Arizona Law Review, p.301 (2013); Kembrew McLeod & Peter Decola, *Creative License: The Law and Culture of Digital Sampling*, Durham: Duke University Press(2011). Jessica Litman, *Real Copyright Reform*, Iowa Law Review, Vol. 96, Issue 1, (Nov. 2010).

[17] Peter S. Menell, *Adapting Copyright for the Mashup Generation*, University of Pennsylvania Law Review, Vol. 164, Issue 2, p.441 (Jan. 2016).

[18] Peter C. DiCola, *Money from Music: Survey Evidence on Musicians' Revenue and Lessons About Copyright Incentives*, 55 Arizona Law Review, p.306 (2013).

private distributions by business contracts. Meanwhile, within this ecosystem, after composers finish original works, music intermediaries, such as publishers, record labels and collecting societies, help them to license the musical works to audiences and users.[19]

Interestingly, intermediaries in the music market provide marketing management such as commercial promotion, financial analyses and database establishments, which may stimulate considerable supplemental and ancillary revenues, and thus afford profitable opportunities beyond creators' personal investments. For this purpose, the artists may need to transmit copyright ownerships or management or pay administrative fees to the intermediaries. For instance, in the music business, professionals in the recording studios generally submits their copyrights of sound recordings to the music labels.[20]Therefore, the intermediaries typically earn their commission and administrative fees by holding management rights, and facilitating music copyright licensing, while the creators can obtain revenues, distribute their works and cultivate their audience markets. This transactional cost charged by intermediaries is still alive, and this process represents its unique function.[21]

Consequently, the incentive theory built by U.S. scholars believes in a sequence of value in the market, as the interaction has mentioned, from authors to intermediaries to the public audiences. This consuming and productive chain also exists in the contrary, from the public audiences to intermediaries to authors. These two opposite directions form an association and communication circle between the cultivation of creativity, distribution and purchase. In accordance with the marginal-reward approach, copyright establishes the circumstance supporting musical artists to obtain simultaneous monetary compensation for every musical composition or sound recording under copyright protection.[22]

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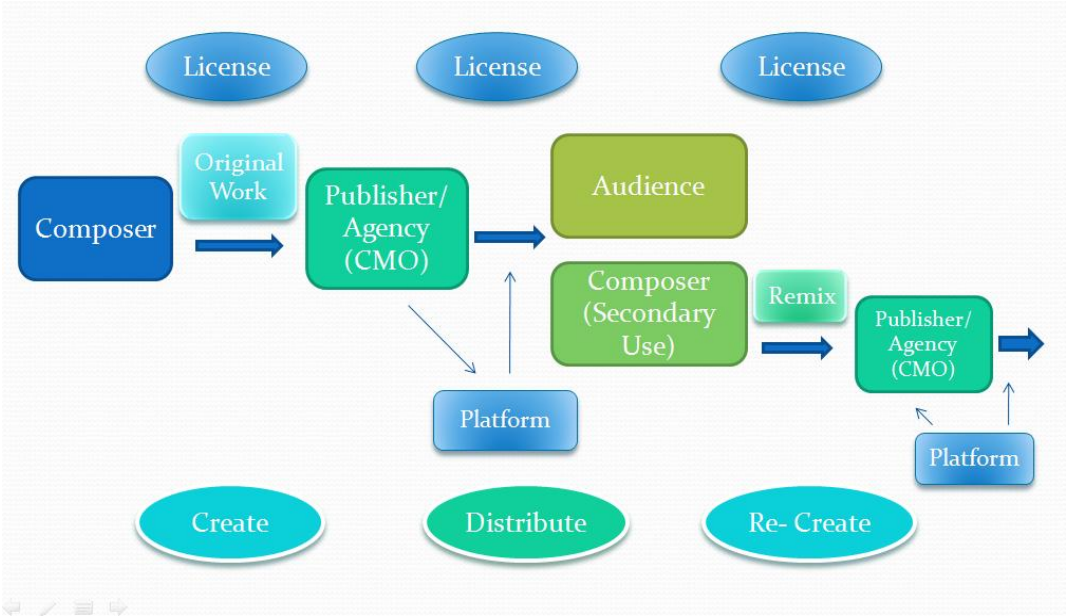
[19] Peter C. DiCola, *Money from Music: Survey Evidence on Musicians' Revenue and Lessons About Copyright Incentives.* 55 Arizona Law Review, p.306 (2013); Jessica Litman, *Real Copyright Reform*, Iowa Law Review, Vol. 96, Issue 1, p10-12 (Nov. 2010).

[20] Peter C. DiCola, *Money from Music: Survey Evidence on Musicians' Revenue and Lessons About Copyright Incentives,* 55 Arizona Law Review, p.306 (2013); Kembrew McLeod & Peter Decola, Creative License: The Law and Culture of Digital Sampling, Durham : Duke University Press, p79-82 (2011); Jessica Litman, *Real Copyright Reform*, Iowa Law Review, Vol. 96, Issue 1, p18-19 (Nov. 2010).

[21] Peter C. DiCola, *Money from Music: Survey Evidence on Musicians' Revenue and Lessons About Copyright Incentives*, 55 Arizona Law Review, p.306 (2013); Kembrew McLeod & Peter Decola, Creative License: The Law and Culture of Digital Sampling, Durham : Duke University Press, p79-82 (2011); Jessica Litman, *Real Copyright Reform*, Iowa Law Review, Vol. 96, Issue 1, p18-19 (Nov. 2010).

[22] Peter C. DiCola, *Money from Music: Survey Evidence on Musicians' Revenue and Lessons About Copyright Incentives*, 55 Arizona Law Review, p.306 (2013); The other observation connects incentive

Figure 1：Music Copyright: Licensing Ecosystem



Organized by the Author

However, in some "grey areas" of copyright regulations, it is tolerated that some audiences with special talents recreate the original works into a new creation. We call this secondary use as mash-up or appropriation. The Campbell *v.* Acuff-Rose Music in the U.S. Supreme Court stated, within copyright regulation, "transformative use" is a potential ground that use of a copyrighted work may be eligible for "fair use".[23] Just like Pablo Picasso said "Good artists copy, great artists steal", it points out how the transformative use of traditional works plays an influential in the artistic history. This ecosystem keeps cycling and producing new creativity by adopting fresh ideas and combining them with traditional concepts into a new expression. This type of new creativity should also be secured by freedom of expression under the copyright regime. This is how the music licensing ecosystem works and circulates.

theory to the lottery approach. *See* Diane Leenheer Zimmerman, *Copyrights as Incentives: Did We Just Imagine That?*, Theoretical Inquiries in Law, Vol. 12, Issue 1, p41-42 (Jan. 2011).

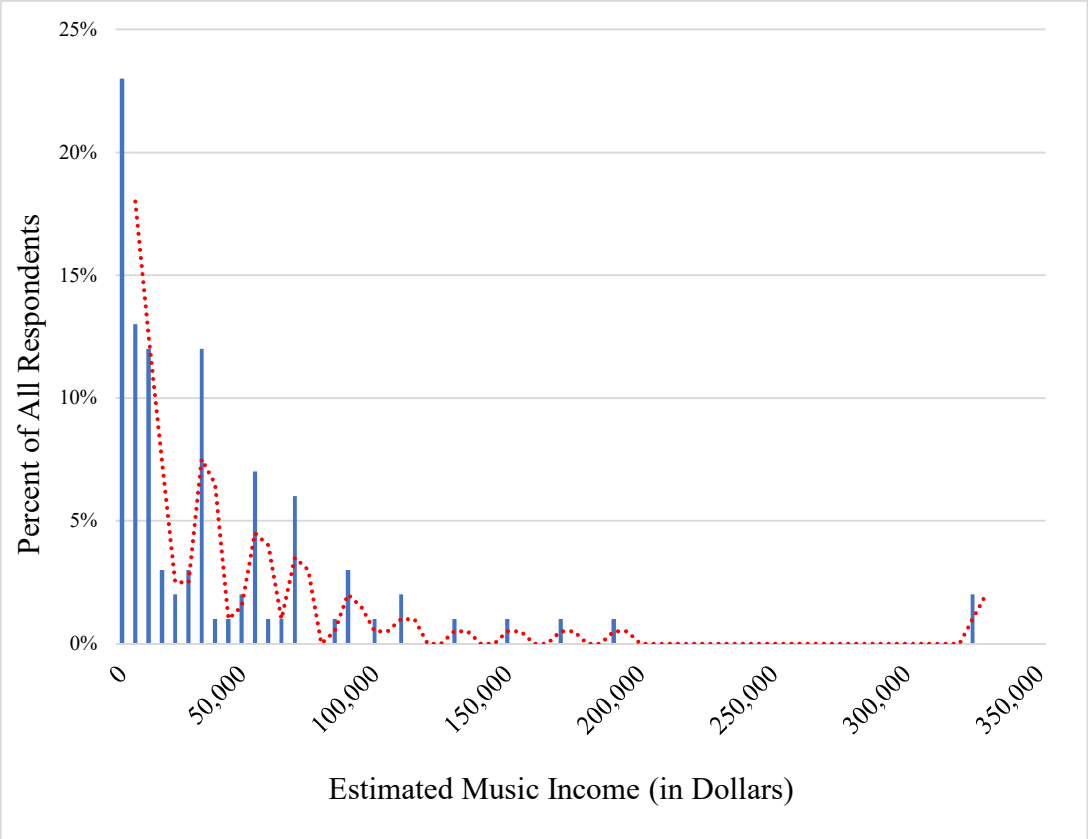
[23] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994).

C. Applying Incentive Theory: The Music Industry in Statistics

Music is the most popular and powerful culture in the world, but few musical artists can make a living wage under the existing system. Music users are complaining about the complexity of the licensing process and the inaccessibility of copyright information while the artists and publishers are still expecting that strict governmental regulations and enforcement can deter massive copyright infringements. The intense debates between users and rights-holders are continuing and harmful for the music business. As the technology keeps stimulating new musical arts, and the music licensing and copyright system seems outdated and can't catch up the current trends of digital music, copyright law needs reform for delivering a better system to secure the economic freedom of musical artists and to enhance the whole music economy.

1. Economic Incentives

Figure 2：Distribution of Estimated Annual Music-Related Income

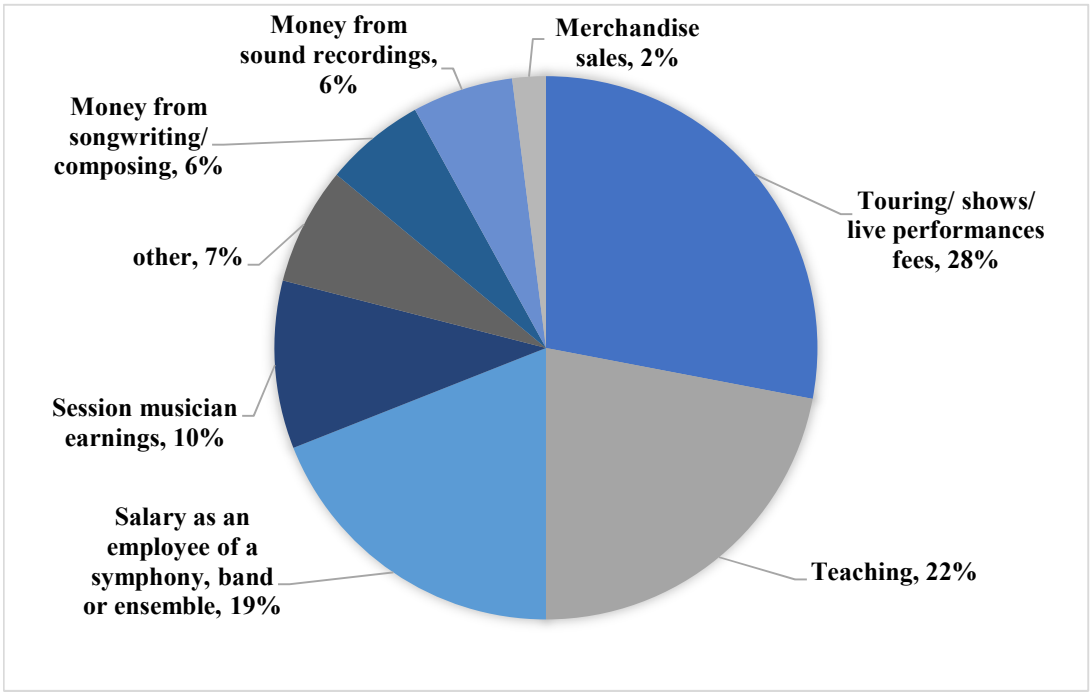


By Peter DiCola, Money from Music: Survey Evidence on Musicians' Revenue and Lessons About Copyright Incentives[24]

On the basis of incentive theory research, it is found that, in the music market, more than 50% of artists obtained less than US $50,000 income per year and about 28% of artists earned lower than US $100,000 income per year; while a very small fraction of artists can acquire more than US $320,000 income per year. This result indicated that the current music income market is a "winners-take-all market" for a specific group of musical artists.[25] Further, according to statistical data, it indicates that the particular group of artists accomplishing more than US $320,000 per year is categorized as "senior composers." Surprisingly, on the basis of average share of music income from major revenue streams, money from songwriting and composing represents a mere 6%, but touring/show/live performance fee constitutes 28%, teaching accounts for 22%, salary as an employee of a symphony, band or ensemble occupied 19% and session musician earnings included 10%. In accordance with these statistics, it is also found that music income in connection with copyright barely constitutes 12% while the music income unrelated to copyright accounts for a significant 78%.[26]

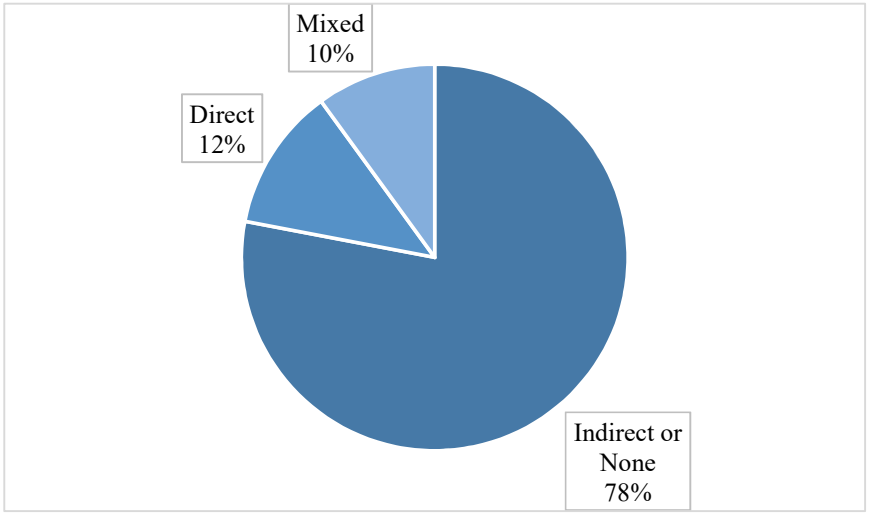
[24] Peter C. Dicola, *Money from Music: Survey Evidence on Musicians' Revenue and Lessons About Copyright Incentives*, 55 Arizona Law Review, p.349 (2013).
[25] *Id.* at 306, 349.
[26] *Id.* at 352.

Figure 3：Average Share of Music Income from Major Revenue Streams[27]



By Peter DiCola, Money from Music: Survey Evidence on Musicians' Revenue and Lessons About Copyright Incentives[28]

Figure 4：Average Share of Music Income from Major Revenue Streams, Categorized by Relation to Copyright Law, All Respondents[29]



By Peter DiCola, Money from Music: Survey Evidence on Musicians' Revenue and Lessons About Copyright Incentives

[27] *Id.*
[28] *Id.*
[29] *Id.*

2. Technological Development

The 2014 IFPI (International Federation of the Phonographic Industry, IFPI) Digital Music Report points out that compared to last year, the category of subscription streams had increased 51.3 %, the category of ad-supported streams had grown 17.6 % and the category performance rights had increased 19%, while the category of downloads had reduced 2.1% and the category of physical CDs had considerably shrunk by 11.7% in 2013. This information exposes the higher profitability of music streaming was foreseeable in 2013. Specifically, the subscription streams and ad-supported streams showed the potential to bring concrete benefits to the music business.[30]

In light of the 2015 RIAA (Recording Industry Association of America, RIAA) U.S. Consumer Music Profile, from 2010 to 2015, the proportion of physical CD sales had appreciably dropped, whereas the proportion of music on-demand (streaming services) and digital radio had progressively expanded. Specifically, in 2015, the income of music on-demand had constituted a notable share in the whole market. On the basis of 2016 Mid-Year RIAA Shipment and Revenue Statistic, the proportion of U.S. music revenues from streaming had gradually grown from 9% to 51% between 2011 and 2016. In 2016, music streaming subscriptions and other music streaming had reached US $2.48 billion and US $1.45 billion respectively. Further on, the revenue of music streaming subscriptions had exceeded physical sales, downloads and synchronization royalties. These two charts revealed that as technology pushed the transformation of the music medium, digital music has succeeded in becoming a considerable part of the whole market share. In particular, the business model of music streaming has become the biggest player in the U.S. music market.[31]In the meantime, the MIDIA's statistic research[32] in 2016 also shows the Chinese QQ Music's, a main freemium music streaming service platform in China, valuation per subscriber is five times that of Spotify.[33]

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[30] International Federation of the Phonographic Industry (IFPI), IFPI DIGITAL MUSIC REPORT 2014 (Mar. 18, 2014), *available at* http://www.ifpi.org/downloads/Digital-Music-Report-2014.pdf (last visited Mar. 10, 2019).

[31] The Recording Industry Association of America (RIAA), 2015 U.S. Consumer Music Profile, available at https://www.riaa.com/reports/2015-u-s-consumer-music-profile-musicwatch-inc/ (last visited Mar. 10, 2019).

[32] MIDiA Research is a startup company focusing on media and technology analysis. *See* https://www.midiaresearch.com/ (last visited Apr. 29, 2019).

[33] Mark Mulligan, *IS QQ MUSIC WORTH $10 BILLION?*, Music and Streaming (MEDiA) (Sep. 7, 2017), *available at* https://www.midiaresearch.com/blog/is-qq-music-worth-10-billion/ (last visited Apr. 10, 2019).

Turning to the observation of music consumer behaviors: taking the U.S. market, for instance (the most thriving music market region in the world now), it is necessary to see how technology application and new business models affect diverse music categories of profits. In light of the newest RIAA Music Industry Revenue Statistics (*see* Table 1), which presents more detailed information than the IFPI report does. From 2017 to 2018, over 80% of the recording remunerations in the U.S. through digital formats, mainly from digital streaming, subscription and permanent download, and this revenue approach continually keeps growing. Simultaneously, approximately 90% of the revenue obtained from subscription streams and on-line radio, and about 10% from ad-supported music and ad-supported video streams. Moreover, as digital music gains the most revenue in the music market, both the numbers of permanent download and the amount of revenue decreased about a quarter. In contrast, subscription streaming and its revenue elevated dramatically. Such change of consuming behavior strongly demonstrates that technological development and application influenced music access and revenue-earned sources deeply.

Especially, the business model of music streaming has become the biggest player in the U.S. music market.[34]In the meantime, the MIDIA's statistic research in 2016 also shows the Chinese QQ Music's valuation per subscriber is five times that of Spotify.[35] Consequently, the music market, industrial operations, licensing and profit distribution models around the world are facing new challenges/opportunities due to technological transformation.

As these evolving markets stimulated by the new digital technology continue to be developed, it is crucial that music copyright protection and enforcement should be emphasized and built, and the music being enjoyed in its increasingly varied formats must be valued fairly, because the foundation of property rights is in place to support their sustainable, long-term development.

Specifically, IFPI's Global Music Report 2019 shows the international recording market increased about 10% in 2018, the fourth subsequent year of expansion. The total revenues

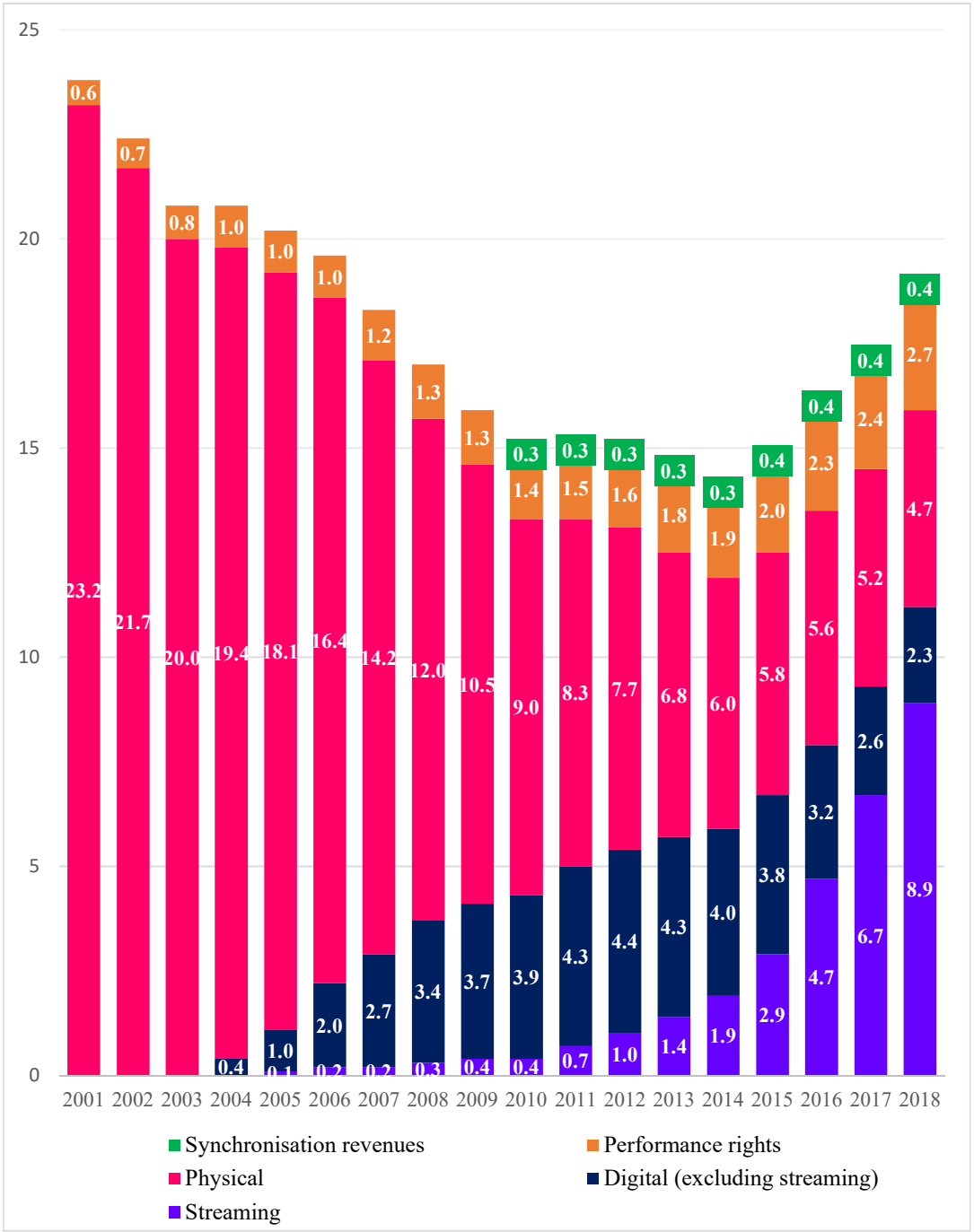
[34] The Recording Industry Association of America (RIAA),2015 U.S. Consumer Music Profile, *available at* https://www.riaa.com/reports/2015-u-s-consumer-music-profile-musicwatch-inc/(last visited Mar. 10, 2019).

[35] Mark Mulligan, *IS QQ MUSIC WORTH $10 BILLION?* Music and Streaming (MEDiA) (Sep. 7, 2017), *available at*https://www.midiaresearch.com/blog/is-qq-music-worth-10-billion/ (last visited Apr. 10, 2019).

for 2018 were approximately US$20 billion. Overall, record global revenues kept rising in recent years while it had a considerably higher growth rate than in the previous year (+7.4%). In light of annual revenue in 2018, streaming revenue increased about 34.0% and accounted for almost half of global revenue, spur by a probably 33% growth in paid subscription streams. Arriving late 2018, there were over 250 million subscribers of paid subscription streams, which accounts almost 37% of overall sound recording income[36]. Such information suggests the higher profitability of music streaming would continue. However, into 2018, the revenue of physical sources caught sight of sustained reduction in 2018, which drop roughly 10% and this moment represents nearly a quarter of the entire market. In summary, it can be claimed that the significant increase in streaming services can counteract a nearly 10% reduction in physical sales and a close to 21% decrease in download sales. The amazing development of digital music is expected to continue to thrive and prosperous.

[36] International Federation of the Phonographic Industry (IFPI), IFPI GLOBAL MUSIC REPORT 2019: STATE OF THE INDUSTRY (2019), *available at*https://www.ifpi.org/downloads/GMR2019.pdf (last visited Apr. 12, 2019).

Figure 5：Global Recorded Music Industry Revenues 2001-2018 (US$ Billions)[37]



[37] International Federation of the Phonographic Industry (IFPI), IFPI GLOBAL MUSIC REPORT 2019: STATE OF THE INDUSTRY (2019), *available at*https://www.ifpi.org/downloads/GMR2019.pdf (last visited Apr. 12, 2019).

Table 1：2018 American Music Industry Revenue Statistics[38]

United States Estimated Retail Dollar Value (In Millions, net after returns)

DIGITAL SUBSCRIPTION & STREAMING	2017	2018	% CHANGE 2017-2018
Paid Subscription	(Units) 35.3 (Dollar Value) $3,500.5	50.2 $4,656.0	42.4% 33.0%
Limited Tier Paid Subscription	$591.6	$747.1	26.3%
On-Demand Streaming (Ad-Supported)	$658.6	$759.5	15.3%
SoundExchange Distributions	$652.0	$952.8	46.1%
Other Ad-Supported Streaming	$261.8	$251.4	-4.0%
Total Streaming Revenues	$5,664.5	$7,366.8	30.1%
DIGITAL PERMANENT DOWNLOAD			
Download Single	(Units) 553.5 (Dollar Value) $678.5	399.8 $490.4	-27.8% -27.7%
Download Album	66.4 $668.5	49.7 $499.7	-25.1% -25.3%
Ringtones & Ring backs	14.3 $35.5	10.0 $24.9	-29.8% -29.8%
Other Digital	2.7 $21.9	2.2 $24.1	-18.2% 9.7%
Total Digital Download Revenues	$1,404.5	$1,039.1	-26.0%
TOTAL DIGITAL VALUE	$7,069.0	$8,405.8	18.9%
Synchronization Royalties	$232.1	$285.5	23.0%

[38] The Recording Industry Association of America (RIAA), RIAA 2018 YEAR-END MUSIC INDUSTRY REVENUE REPORT (2019), *Available at* https://www.riaa.com/wp-content/uploads/2019/02/RIAA-2018-Year-End-Music-Industry-Revenue-Report.pdf (last visited Apr. 20, 2019).

PHYSICAL			
CD (Units Shipped)	(Units Shipped) 87.7 (Dollar Value) $1,057.3	52.0 $698.4	40.7% -33.9%
LP/EP	15.6 $388.5	16.7 $419.2	7.2% 7.9%
Music Video	1.9 $38.6	1.4 $27.6	-25.7% -28.6%
Other Physical	0.6 $11.0	0.5 $9.6	-21.8% -12.6%
Total Physical Units Total Physical Value	105.7 $1,495.5	70.5 $1,154.8	-33.3% -22.8%
TOTAL DIGITAL AND PHYSICAL			
Total Units Total Value	742.6 $8,796.6	532.3 $9,846.1	-28.3% 11.9%
% of Shipments Physical Digital	2017 17% 83%	2018 12% 88%	

3. Musical Works and Compulsory License

The establishment of a compulsory licensing system can be traced back to the 1900s, as the pianola (also called player piano, a self-playing piano) was starting to thrive.[39] Before,

[39] In terms of exclusive licensing on the collective management contract, the U.S. courts have presented their opinions in several cases. For example, the opposite oppinions had been revealed at In re Pandora Media, Inc, 6 F. Supp. 3d 317 (S. D. N. Y. 2014), Pandora Media v. American Society of Composers, Authors & Publishers, No. 14-1158 (2d Cir. 2015) At the hearing process, PROs, such as ASCAP and BMI, and the music streaming service, Pandora, had also provided their individual statements. In addition, at these settlements, the U.S. Department of Justice (DOJ) stepped in to present its opinions and research outcome. Hearing on Music Licensing Under Title 17, Before the U. S. House of Representatives Committee on the Judiciary Subcommittee on Courts, Intellectual Property and the Internet (2014)；U. S. Department of Justice, Public Comments on ASCAP and BMI Content Decree(July 2014); Xiong Qi (熊琦), *Zhezuoquan Jitiguanli*

the market of handwritten or printed form of music notation (Sheet music)[40] had served as the main income for the copyright holders of musical composition and lyrics. At the beginning, the manufacture of pianola music sheet rolls and phonorecords did not pay any licensing fee when incorporating the musical creation in the sheet reels and copies. After a failed suit in the U.S. Supreme Court dealing with this unreasonable custom in the music industry, the U.S. Congress passed an amendment to approve he reproduction rights of the mechanical use to the copyright holder of musical works. Nevertheless, because the Congress was distrusting of the only Aeolian player piano company's dominant market power, and initially applied the involuntary licensing system to the music industry. This action actually initially brought compulsory licensing mechanism into the Copyright Act. From then on, producers of musical sheet rolls didn't need to go through price bargaining and contract negotiation to seek approval from the copyright holders of the musical creation. In this licensing regime, the decretory fee was fixed at 2 cents for each mechanical publication sold.[41]

In the present day, the compulsory license keeps approving the authorization of mechanical reproduction from recording artists to produce "cover songs", in other words, musical creations composed by other creators and already published through other labels. Systematized by the Section 115 of the US Copyright Act, not just the music sheet rolls of the player piano can be reproduced through the compulsory licensing model, but also the compact disc, cassette tape and other forms of "phonorecord"[42] which mechanically duplicates voices and sounds containing in the musical creation.

In light of the worldwide standard, the international intellectual property treaties and organizations explicitly categorize the compulsory license as one type of regulatory tool and licensing pattern. Specifically, Article 13 of the Berne Convention for the Protection of Literary and Artistic Works enables signatories to empower the sound recording of at

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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], Journal of Comparative Law(比較法研究), Vol.4, 2016, p.46.

[40] "Musical works refers to written musical scores in the form of sheet music, broadsheets or other notation." *See* University of Melbourne, Copyright Office, "Information, What is Copyright? Musical Works" Column, *available at*https://copyright.unimelb.edu.au/information/what-is-copyright/musical-works (last visited Apr. 15, 2019).

[41] Julie E. Cohen, Lydia Pallas Loren, Ruth L. Okediji & Maureen A. O'Rourke, Copyright in A Global Information Economy, New York: Wolters Kluwer, p.413 (4th ed. 2015).

[42] "Phonorecord" definition *See* U.S. Copyright Office Definitions, *available at* https://www.copyright.gov/help/faq/definitions.html (last visited Apr. 29, 2019).

musical compositions that had been fixed to medium regarding the approval of musical creators, conditioned upon the prerequisite that this approval, in any circumstances, should not be "be prejudicial to the rights of these authors to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority."[43]

In 1998, through the Digital Millennium Copyright Act (DCMA), the US Congress, revised Section 115 to confirm that the compulsory licensing system can be applied to the release of phonorecords through the medium of digital downloads. In this amendment of 17 U.S. Code § 115 (d), the phrasing of "digital phonorecord delivery (DPD)" is adopted and specified as:

> "Each individual delivery of a phonorecord by digital transmission of a sound recording which results in a specifically identifiable reproduction by or for any transmission recipient of a phonorecord of that sound recording, regardless of whether the digital transmission is also a public performance of the sound recording or any nondramatic musical work embodied therein.[44]"

Particularly, in this revision, it is obvious that the interpretation of DPD intentionally excludes streaming services, such as real- time and non-interactive subscription dissemination. As discussed regarding 17 U.S. Code § 115(d):

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[43] Article 13, Berne Convention for the Protection of Literary and Artistic Works:
"(1) Each country of the Union may impose for itself reservations and conditions on the exclusive right granted to the author of a musical work and to the author of any words, the recording of which together with the musical work has already been authorized by the latter, to authorize the sound recording of that musical work, together with such words, if any; but all such reservations and conditions shall apply only in the countries which have imposed them and shall not, in any circumstances, be prejudicial to the rights of these authors to obtain equitable remuneration which, in the absence of agreement, shall be fixed by competent authority.
(2) Recordings of musical works made in a country of the Union in accordance with Article 13(3) of the Conventions signed at Rome on June 2, 1928, and at Brussels on June 26, 1948, may be reproduced in that country without the permission of the author of the musical work until a date two years after that country becomes bound by this Act.
(3) Recordings made in accordance with paragraphs (1) and (2) of this Article and imported without permission from the parties concerned into a country where they are treated as infringing recordings shall be liable to seizure."

[44] 17 U.S. Code § 115 (d) – "Scope of exclusive rights in nondramatic musical works: Compulsory license for making and distributing phonorecords." Cornell Legal Information Institute, *available at* https://www.law.cornell.edu/uscode/text/17/115(last visited Apr. 29, 2019).Also can refer to 37 CFR (Code of Federal Regulations of the United States) 255.4 - Definition of "digital phonorecord delivery" *See* Cornell Legal Information Institute, *available at* https://www.law.cornell.edu/cfr/text/37/255.4(last visited Apr. 29, 2019).

> "A digital phonorecord delivery does not result from a real-time, non-interactive subscription transmission of a sound recording where no reproduction of the sound recording or the musical work embodied therein is made from the inception of the transmission through to its receipt by the transmission recipient in order to make the sound recording audible.[45]"

There are still limitations for compulsory licensing which is demonstrated within 17 U.S. Code § 115 (a) (2). The musical creation, fixed to a phonorecord accomplished within the copyright holders' approval, has to be already published to the general public. Additionally, the recording creators are able to build a different adaptation to correspond to and reveal their unique personality. However, within the line drawn by 17 U.S. Code § 115 (a) (2), they cannot alter the music creation's "basic melody" or "fundamental character". Furthermore, the new established recording is not eligible to gain copyright safeguard based on the notion of "derivative works", but, for the altered new recording with the copyright holders' permission.

These limitations are indicated in 17 U.S. Code § 115 (a) (2):

> "A compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work, and shall not be subject to protection as a derivative work under this title, except with the express consent of the copyright owner."

Further, as a result of a 2009 decision, the decretory fee of compulsory licensing for the production and publication of a phonorecord is the greater of 1.75 cents per minute, or 9.1 cents for a full composition. The judges of the Copyright Royalty Board (CRB)[46] take charge of the rate-setting in this compulsory licensing system.

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[45] Julie E. Cohen, Lydia Pallas Loren, Ruth L. Okediji & Maureen A. O'Rourke, Copyright in A Global Information Economy, New York: Wolters Kluwer, p.413-414 (4th ed. 2015).

[46] "The Copyright Royalty and Distribution Reform Act of 2004 (CRDRA) established the Copyright Royalty Judges program in the Library of Congress. The Copyright Royalty Judges (Judges) oversee the copyright law's statutory licenses, which permit qualified parties to use multiple copyrighted works without obtaining separate licenses from each copyright owner. The Judges determine and adjust royalty rates and terms applicable to the statutory copyright licenses. They also oversee distribution of royalties deposited with the Copyright Office by certain statutory licensees and adjudicate controversies relating to the distributions."

Even so, in practice, Section 115 of compulsory license is not a common approach that recording artists depend on for seeking authorization from musical work artists. For instance, if a recording professional is thinking to record a version of expression including an existing musical creation, *i.e.,* one which has already been recorded and released, these recording artists in fact won't carry out the prerequisites of Section 115, but will consult with the Harry Fox Agency (HFA)[47] to gain its professional assistance on mechanical licensing of sound recording.

In 1927, formed by the National Music Publishers' Association (NMPA), HFA acts as a supplier, on behalf of the copyright holders of musical works affiliated to it, and manages music copyright licensing services for collecting and allocating royalties for mechanical licenses to reproduce and distribute musical creations for fixing on phonograph records-vinyl, CDs, cassettes, ringtones, lasting digital downloads, interactive streaming and complementary digital standard serving diverse business prototypes, consisting of online music storage services (Cloud Music Services/ Music Locker Services)[48] and bundled music offerings[49]. These mechanical services by HFA are provided to musical creators and

See the US. Copyright Royalty Board, About Us, *available at* https://www.crb.gov/ (last visited Apr. 29, 2019).

[47] "HFA is the leading provider of rights management, licensing, and royalty services for the U.S. music industry and was established in 1927 by the National Music Publishers' Association (NMPA) as an agency to license, collect, and distribute royalties on behalf of musical copyright owners.""HFA issues mechanical licenses for products manufactured and distributed in the U.S. A mechanical license grants the rights to reproduce and distribute copyrighted musical compositions (songs) for use on CDs, records, tapes, ringtones, permanent digital downloads, interactive streams and other digital formats supporting various business models, including locker-based music services and bundled music offerings. Publishers that affiliate with HFA have access to a range of licensing, collection, distribution, and royalty compliance services, as well as to various online tools, to assist with catalog administration. In addition, HFA provides affiliated publishers with the opportunity to participate in other types of licensing arrangements including lyrics, guitar tablatures, background music services and more. These opportunities are circulated to publishers for participation on an opt-in basis. *See*Harry Fox Agency, " What does HFA do?, *availablet at* https://twww.harryfox.com (last visited Apr. 29, 2019).

[48] "This is a comparison of online music storage services (Cloud Music Services), Internet services that allow uploads of personally owned or licensed music to the cloud for listening on multiple devices. There were three large services—Amazon Music, Apple's iTunes Match, and Google Play Music- each incorporating an online music store (see comparison), with purchased songs from the associated music store not counting toward storage limits. Other than additional storage space, the main additional feature provided with an annual fee by Apple (and formerly Amazon.com) is "scan-and-match", which examines music files on a computer and adds a copy of matched tracks to the user's music locker without having to upload the files. Google provides both a large amount of storage space and the scan-and-match feature at no cost." Mark Harris, *What Are They and How Do You Get One?*, Lifewire, Tech Untangled (Sep. 10, 2018), *available at* https://www.lifewire.com/what-is-a-music-locker-2438568 (last visited Apr. 29, 2019).

[49] *See* Mark Mulligan and Keith Jopling, Building the New Business Case for Bundled Music Services: A MIDiA Consulting report commissioned by Universal Music (July 2013), *available at*

publishers in light of "opt-in" orientation. In addition to HFA, if a musical creator has not liaison any publisher of musical works, Songtrust[50] is another copyright management platform for digital music with an agreement with HFA, assisting composers and lyricists with their publishing and other licensing services.

In reality, the establishment of the compulsory licensing causes influential effects on the price-setting between the HFA and music copyright holders. Because of governmental intervention in the music market, the compulsory licensing system presents a fixed standard to decide the price. This governmental involvement in the free market infers that it is uncommon to achieve a licensing fee higher than the one announced by the judges of Copyright Royalty Board (CRB). Many music artists also lack a desire to join HFA when the implied price built on compulsory licensing had ruined the functioning of a competitive market. And also it eliminates the complete flexibility of contract negotiation and results in a price lock-in.[51]

The statement of Marybeth Peters, the Registrar of Copyrights, before the Subcommittee on Intellectual Property, Committee on the Judiciary, United States House of Representatives 109th Congress, 1st Session (2005), about the "Evolution of the Compulsory Mechanical License", indicated:[52]

> " Such stringent requirements for use of the compulsory license did not foster wide use of the license. It is my understanding that the "mechanical" license as structured under the 1909 Copyright Act was infrequently used until the era of tape piracy in the late 1960s. During this period, the "pirates" inundated the Copyright Office with

https://musicindustryblog.files.wordpress.com/2013/10/building-the-new-business-case-for-bundled-music-services.pdf (last visited Apr. 29, 2019).

[50] "Songtrust, a Billboard Magazine Top 10 Music Start-Up, provides a technology platform for royalty collection services to music business professionals. Our industry-leading online solutions help songwriters, artists, managers, labels and publishers simplify music rights management including the administration of music publishing assets, performing rights, and digital licensing. Launched by Downtown Music Publishing in 2011, Songtrust provides efficient and accountable royalty collection service in over 50 major music markets worldwide." *See* Songtrust, Introduction, *available at* https://www.songtrust.com (last visited Mar. 30, 2019).

[51] *See* Julie E. Cohen, Lydia Pallas Loren, Ruth L. Okediji & Maureen A. O'Rourke, Copyright in A Global Information Economy, New York: Wolters Kluwer, p.415-416 (4th ed. 2015).

[52] Evolution of the Compulsory Mechanical License, Statement of Marybeth Peters the Register of Copyrights before the Subcommittee on Intellectual Property, Committee on the Judiciary, United States House of Representatives109th Congress, 1st Session (2005). *See* the United States Copyright Office, Music Licensing Reform (July 12, 2005), *available at* https://www.copyright.gov/docs/regstat071205.html (last visited Apr. 18, 2019).

> notices of intention to utilize the compulsory license, many of which contained hundreds of song titles. The music publishers refused to accept such notices and any proffered royalty payments since they did not believe that reproduction and duplication of an existing sound recording fell within the scope of the compulsory license. After this flood of filings passed, the use of the license appears to have again become almost non-existent; up to this day, the Copyright Office receives very few notices of intention."

The Copyright Royalty Board's, Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding, January 26th, 2009, highlighted pointed about the viewpoint on the compulsory license of Dr. Steven Wildman, Professor of Telecommunication Studies and Co-Director of the Quello Center for Telecommunications Management and Law at the Michigan State University:[53]

> "[A]s witnesses for both record companies and music publishers have explained, essentially no one uses the compulsory license process—licenses for mechanical royalties for sales of sound recordings are negotiated in the market on a voluntary basis. * * * The fact that they enter into voluntary agreements is not itself evidence that transaction costs [in such agreements] are low. It simply means that the transaction costs of voluntary agreements are lower than those associated with using the compulsory license."

The copyright protection of sound recording shield the disparate types of primitive compositions that are essentially fixed in an established transcription of acoustics, no

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[53] Copyright Royalty Board, Mechanical and Digital Phonorecord Delivery Rate Determination Proceeding, (CFR: 37 C. F. R.pt.385), p.4520 n.32, (01/26/2009).As an economist, Dr. Steven Wildman provided his testimony for RIAA:" *Under this argument, made by Dr. Landes and others, recording companies have no incentive to pay above the compulsory royalty rate in a voluntary agreement because they can always pay the compulsory rate if they are willing to comply with the compulsory licensing process. See, for example, Landes WRT at 39. The evidence in the record suggests that most are not. See, for example, Tr. 2/14/08 at 3325-6 (A. Finkelstein). RIAA's expert economist supplies another view of the compulsory license process compared to that offered by Dr. Landes. See Wildman WDT at 31 and n.39 ("[a]s witnesses for both record companies and music publishers have explained, essentially no one uses the compulsory license process—licenses for mechanical royalties for sales of sound recordings are negotiated in the market on a voluntary basis. * * * The fact that they enter into voluntary agreements is not itself evidence that transaction costs [in such agreements] are low. It simply means that the transaction costs of voluntary agreements are lower than those associated with using the compulsory license. * * *")*." *See* National Archives, The Office of the Federal Register, *available at* https://www.federalregister.gov/documents/2009/01/26/E9-1443/mechanical-and-digital-phonorecord-delivery-rate-determination-proceeding (last visited Apr. 28, 2019).

matter whether they are recordings of spoken voice, singing, instrumental music, or sound effects. In general, the sound recordings are installed in material objects named as "phonorecords" which are defined in 17 U.S. Code § 101:

> "Phonorecords are material objects in which sounds, other than those accompanying a motion picture or other audiovisual work, are fixed by any method now known or later developed, and from which the sounds can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.[54]

As the copies of sound recordings are produced and released to the public consumers, one fundamental point is that the compulsory licensing of mechanical reproduction merely ratified the duplications and outgivings of musical compositions and lyrics, not including the reproductions of sound recordings.[55]

Such "phonorecords" carrier type is comprehensively applied to the format of physical music recordings. Some research classified commercially recorded music as five periods chronologically defined by the main revenue approach of the music market and the music delivery format, we're currently in a new generation of music technology, called "interactive stream period", through the generations of LP records, cassette, compact discs and on-line MP3 The invention of MP3 and Internet technology raise the digital music epoch. However, the history shows peer-to-peer downloads is just an interim period in the middle of compact discs and music streams.

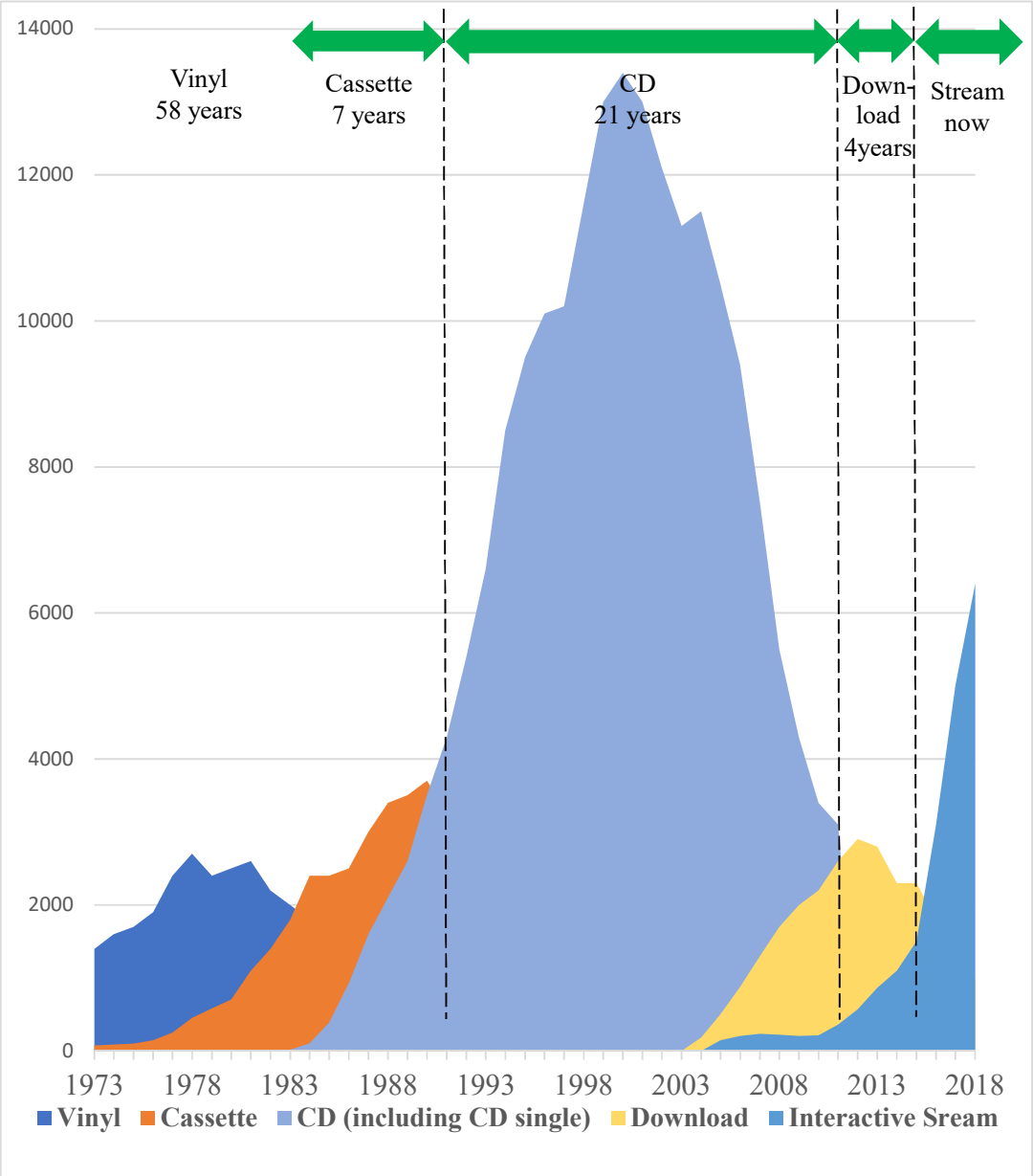
In the late 90's, very few downloads were legal, so the music and sound record companies refuse to provide investments to back that aimed to interrupt the prosperity of the CD recorded-music format with at least18 years of rapid escalation (from 1983 to 2001) and as the most lucrative recorded-music format about 21 years (from 1991 to 2011). The music companies were particularly frightened to promote products or services which would be able to duplicate or reproduce in the absence of permission. Thus, massive litigations were filed to deter the development of music downloads. In contrast to advance the technology of peer-to-peer sharing, many enterprises more concentrated on their potential market

[54] Julie E. Cohen, Lydia Pallas Loren, Ruth L. Okediji & Maureen A. O'Rourke, Copyright in A Global Information Economy, New York: Wolters Kluwer, p.416 (4th ed. 2015).
[55] *Id.* at 416-417.

about information and communications technology (ICT) industry. Consequently, the epoch of music downloads just continued for 4 years regarding the most prominent model of income within music market, seen as the shortest music business era.

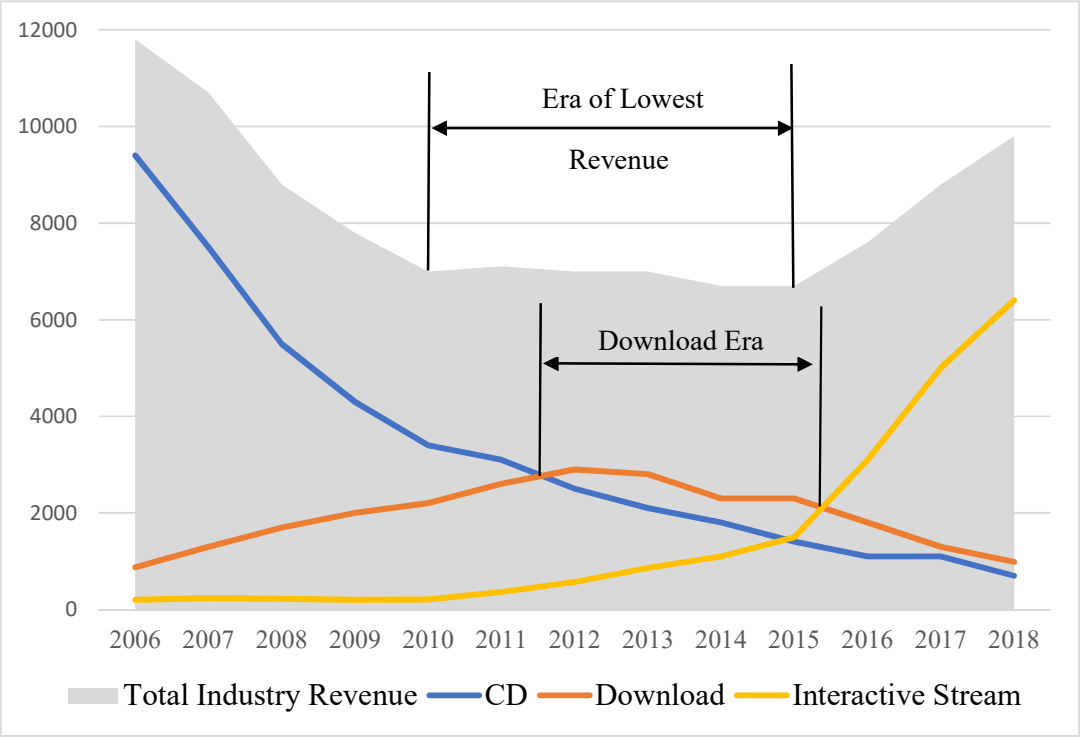
Figure 6：The Five Eras Main Revenue Sources of Recorded Music in the U.S.[56]

（From 1973 to 2018, revenue in $millions）



[56] Statistics recompiled by author, original source from: Recording Industry Association of America (RIAA), U.S. SALES DATABASE, *available at* https://www.riaa.com/u-s-sales-database/ (last visited Apr. 2, 2019).

Figure 7：CD, Download and Digital Stream Music Revenues& Total Industry Revenue from 2006 to 2018 in the U.S.[57]

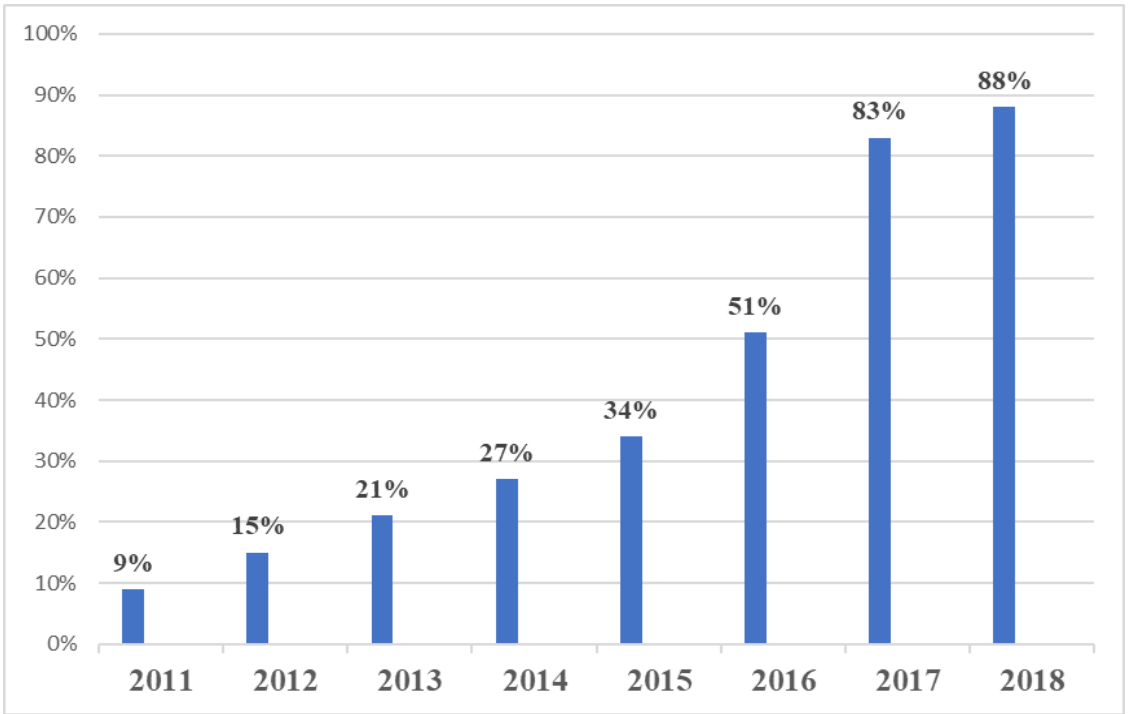


In contrast, interactive streaming is now growing more rapidly in popularity than CDs or digital downloads at the height of their popularity. It is reasonable to expect this format will be the dominant source of revenue for the coming future. Compared with downloaded music, when consumers bought separated downloaded-music units, they didn't have the actual feelings of really owning something. Although people can build different categories or "libraries" of digital music, these libraries lack tangibility—consumers couldn't enjoy holding things in their hand, or filling them of shelves. Therefore, it seems to be less attractive to have downloaded music which can be copied freely and easily, not to mention it might become a hassle to keep all digital music files synced across owners' devices. For example, analysists identify this as one of the main reasons why digital music has been slow to take off in Japan, in favor of purchased physical product from stores, or loaned from libraries.

[57] Statistics recompiled by author, originally from: Recording Industry Association of America (RIAA), U.S. SALES DATABASE, *available at*https://www.riaa.com/u-s-sales-database/(last visited Apr. 2, 2019).

However, the appearance of interactive streaming services signaled a turnaround in the popularity of digital music. As long as consumers kept their subscriptions active, they could access, without limit, a massive library of music, enhancing the perception, reality and flexibility of subscribing to and using digital music Interactive streaming services. Many of these services, such as Rhapsody, had been around since the early 2000s. Three later developments served to catalyze the shift towards interactive streaming services: smart phones (2007), 3G wireless services (2007-2010) and the massive hype that accompanied the mainstream streaming services, like Spotify, Apple Music and Pandora that launched in the U.S. market. Accordingly, download revenue started to fall in 2012. Instead, music consumers replaced the download format, looking instead for music files from interactive streaming media because of the extensive selection and convenience it provided. Since 2011, U.S. music industry revenue from streaming increased sharply by over half (from 2011 to 2016), and continually shows an upward trend.

Figure 8：Percentage of U.S. Revenues from Streaming (2011-2018)[58]



[58] Statistics recompiled by author, originally from: Recording Industry Association of America (RIAA), from 2011 to 2018 RIAA Revenue Statistics, *available at* https://www.riaa.com/ (last visited Apr. 2, 2019).

Nowadays, when interactive streaming has become the main approach for people to access music creations, a controversial problem has gradually appeared: songwriters and music publishers complain that streaming services had routinely fail to properly acquire mechanical licenses (namely the permission to reproduce a piece of music for sale or consumption, this term can be traced back to the days of player pianos). In the United States, it is compulsory to obtain a mechanical license, which means that users (any person or company) wishing to reproduce a composition must follow the guidelines in Section 115 of the United States Copyright Act to serve a "Notice of Intent" on the copyright owner and pay said owner the compulsory license fee. However, streaming companies said that there was no authoritative database identifying who owned what and some music compositions were even not affiliated with a mechanical rights agency. Copyright law must ensure that all services engaging in distributing music online, regardless of their mode of operation, negotiate licenses with rightsholders on fair terms. This controversy vividly revealed how the music work format change affected not only the music market trend but also the copyright legal system.

Regarding China's domestic music market and copyright law system: 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 IFPI Annual Global Music Report, China ranked only as the seventh largest music market in 2018[59] in spite of a rising internet population and established online payment system which contributed indirectly to China's digital music market growth.

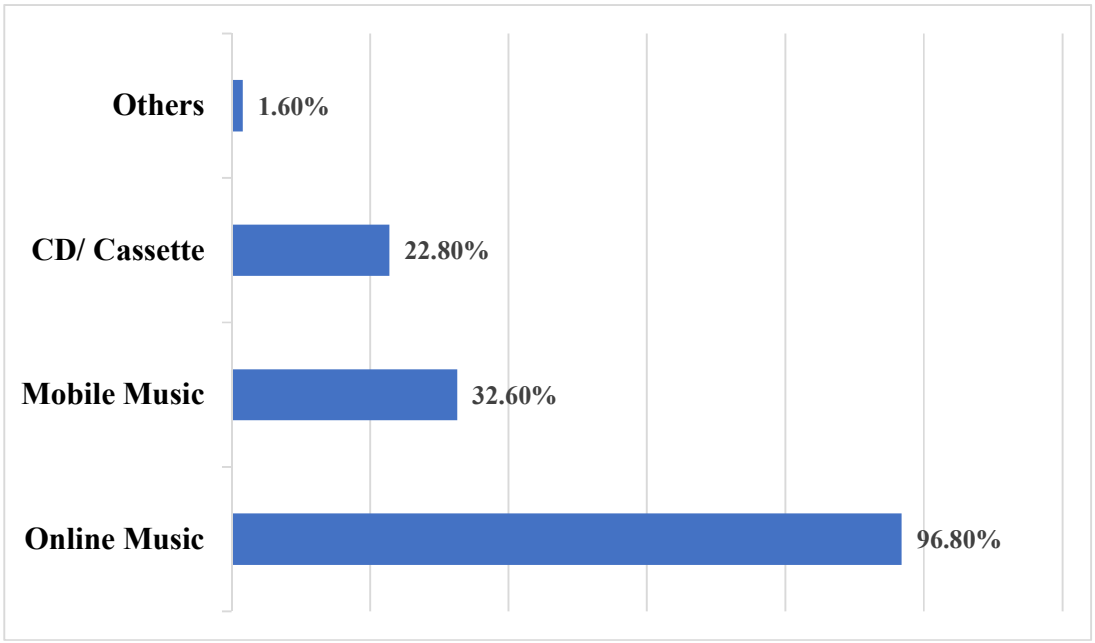
Table 2：2018 Top Ten Music Markets 2018[60]

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

[59] International Federation of the Phonographic Industry (IFPI), IFPI GLOBAL MUSIC REPORT 2019: STATE OF THE INDUSTRY (2019), *available at*https://www.ifpi.org/downloads/GMR2019.pdf (last visited Apr. 12, 2019).

[60] International Federation of the Phonographic Industry (IFPI), IFPI GLOBAL MUSIC REPORT 2019: STATE OF THE INDUSTRY (2019), *available at*https://www.ifpi.org/downloads/GMR2019.pdf (last visited Apr. 12, 2019).

Figure 9：Major Channels for Music Access in China[61]

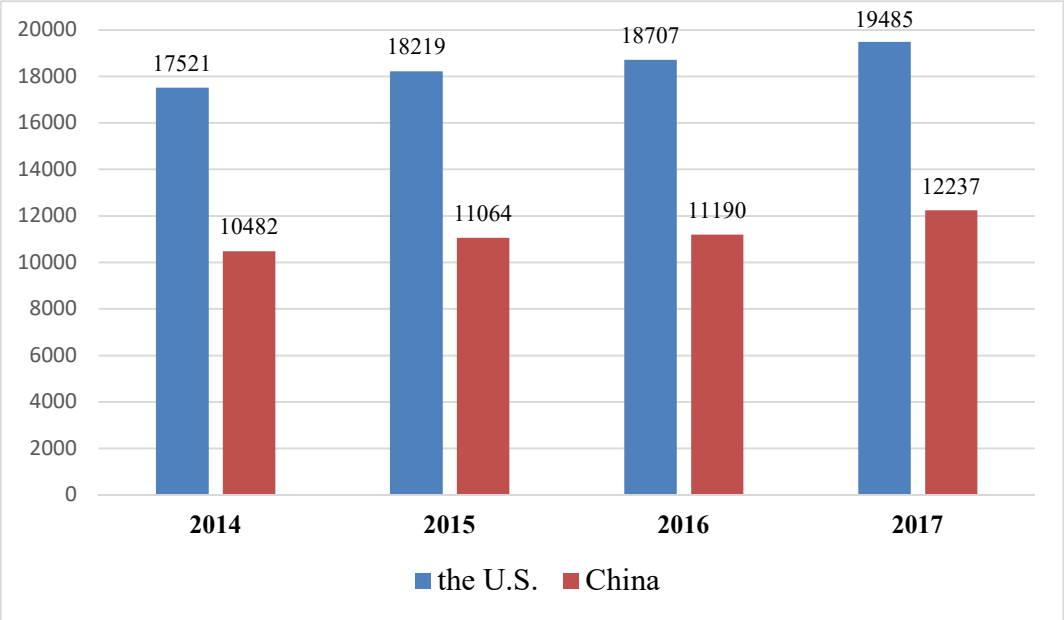


[61] Jiarui Liu, *Copyright for Blockheads: An Empirical Study of Market Incentive and Intrinsic Motivation*, Columbia Journal of Law & the Arts, Vol. 38, Issue 4, p.543 (Figure 19)(2015).

It is also worth noting that China's GDP is about 60% of that of the U.S., whereas the Chinese music market is merely 10% of the U.S. market. The Chinese music market is remarkably incommensurate with the entire market economy, although it is growing continuously in recent years.

Figure 10：the U.S. and China Annual GDP from 2014 to 2017[62]

(US$ Billions)



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, the total Chinese transaction market is 41% of the total U.S. transaction market whereas the Chinese music market is merely 1.5% of the U.S.'s market. The Chinese music market is remarkably incommensurate with the entire market economy.[63]

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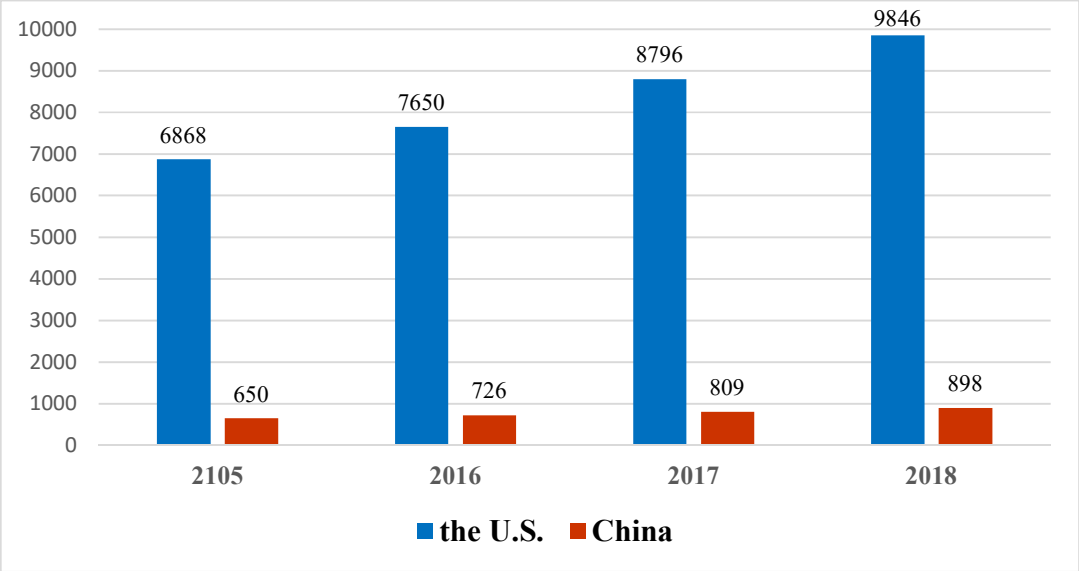
[62] Statistics recompiled by author, originally from: THE WORLD BANK, World Development Indicators, *available at* https://databank.worldbank.org/data/reports.aspx?source=2&type=metadata&series=NY.GDP.MKTP.CD# (last visited Apr. 16, 2019).

[63] Jiarui Liu, *Copyright for Blockheads: An Empirical Study of Market Incentive and Intrinsic Motivation*, Columbia Journal of Law & the Arts, Vol. 38, Issue 4, p.474, 543 (2015).

Figure 11：the U.S. and China Music Industry Revenue from 2015 to 2018[64]

(US$ Millions)



With regard to the completely different development of the music markets of the U.S. and China, it is meaningful to review a) the empirical results as to whether copyright law protect music creators and b) the legal problems the Chinese music market faces now. King & Wood Mallesons's Legal Miner(金杜律師事務所法律研究院)recently published a "White Paper for a Practical Overview and Big Data Analytics of Judicial Precedent for Copyright Disputes in Audiovisual Programs (視聽節目著作權司法保護實務綜述及大資料分析白皮書)" The report focuses on litigation trends in audiovisual programs between 2013 and 2017.During this period, the majority of disputes associated with audiovisual programs are mainly related to copyright infringements. Copyright infringement cases increased to 45,293 over this time period and constituted 99.11% of the entire copyright docket in China. In 2017, copyright infringement in the audiovisual industry had a dramatic expansion reaching15,320 cases in an individual year, and exhibiting a rise of 5,510 cases as compared to the number in 2016[65].

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[64] Statistics recompiled by author, originally from: Recording Industry Association of America (RIAA), RIAA 2018 YEAR-END MUSIC INDUSTRY REVENUE REPORT (2019), *available at*https://www.riaa.com/wp-content/uploads/2019/02/RIAA-2018-Year-End-Music-Industry-Revenue-Report.pdf (last visited Apr. 20, 2019); PWC, China entertainment and media outlook 2016-2020 (2016), *available at* https://www.pwccn.com/en/entertainment-media/em-china-outlook-nov2016.pdf (last visited Apr. 20, 2019).

[65] KING & WOOD MALLESONS LEGAL MINER (金杜律師事務所法律研究院), *Shiting Jiemu Zhezuoquan Sifa Baohu Shiwu Zongshu ji Daziliao Fenxi Baipishu,(視聽節目著作權司法保護實務綜述及*

The data also suggests an increasing number of disputes around copyright ownership and commercialization. There was a considerable leap in the number of copyright ownership disputes in 2017. Between 2013 and 2016, there were merely has less than 10 cases per year, the year of 2017 suddenly reached 130 cases. Moreover, copyright licensing disputes make up the main category related to copyright contract, constituting 55.75% of the total cases, while the growing rate of copyright ownership issues is 524%, which makes it the most frequently cited cause of action. 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, strengthing the accuracy of information about the copyright ownership of audio-visual works will be essential for the efficient functioning of the licensing process. Moreover, how the technology and judges can 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.

The China Audio Visual Copyright Collective Management Association (CAVCA)is perhaps the most litigious IP organization in the world, having launched up to 34,793 copyright disputes as the plaintiff, accounting for 76.13% of all the relevant cases. Regarding copyright disputes in general, the longest period at the trial court level is 878 days, while the shortest is 7 days, with an average of 107.75days; the longest period at the appellate court level is 873 days, while the shortest is 1 day, with an average of 86.67 days; the longest period for retrial is 756 days, while the shortest is 32 days, with an average of 443 days.

Statistics illustrate that, in the case of copyright ownership and infringement disputes, the most common types of evidence delivered by the parties to the court are licensing agreements (28,431 cases), notarial certificates issued by the notary office (13,727 cases), and legal publications (12,962 cases).The most fundamental types of infringement are those of the information network dissemination rights of other works (4,593 cases), downloading or forwarding videos of others without prior consent (2,397cases) and the failure of platform to comply with the rule of “Notification-Remove” or the “Red Flag

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], (Mar. 7, 2019), *available at* https://www.legalminer.com/ (last visited Apr. 23, 2019).

Principle (1,466 cases). Between 2013 and 2017, the overall copyright damage awards concerning audiovisual programs reach CNY 715,928,667.30. The greatest damage awarded to an individual case is CNY 27,426,152 and the average damage awarded by the courts is merely CNY 15,665.49. 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 of Shaanxi Province.

Overall, the data suggests an increasing importance of commercialization of IP and a copyright reform toward the technological impacts on the adjudication of audiovisual programs, as revealed by several previous discussions, the New State Council Decision on Intellectual Property Strategy For China as a Strong IP Country[66] and Forecasting the Impact of the Third Plenum on IP Adjudication[67]. The substantial rate of increase of copyright infringement disputes related to audio programs demonstrates the large numbers of litigation and continuing problems with on-line infringements, corresponding to User-generated Content (UGC), Professionally, Generated Content (PGC), Professional User Generated Content (PUGCP) and Internet Service Provider (ISP). Meanwhile, it shows that, the commercialization of IP, the legal arguments connected to the copyright categories and attribution, copyright infringement and liability and the burden of proof and evidence are still the most notable fundamentals for the courts and relevant businesses of audiovisual programs in China.

D. New Global Involvement of the Mandarin Music Market

No doubt, the music business in the Mandarin language is considered to be as a significant part of the global market, which is characterized by dramatic expansion, confrontation, engagement and changes. Essentially, these energetic factors keep the Mandarin music of prospects and possibilities on an integrated commerce being carried out through the efforts from domestic and international participants. Emphatically, there is immensely divergent

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[66] *See* National Intellectual Property Administration, PRC (國家知識產局), *Guojia Zhihui Caichanquan Zhanlue Gangyao Shishi Shinian Dashji (《國家智慧財產權戰略綱要》實施十年大事記) [Chronicle of Intellectual Property Strategies for China in Ten Years]*, (Jun 6, 2018), *available at* http://www.sipo.gov.cn/ztzl/gjzscqzlgybbssszn/sznjdbd/1125007.htm (last visited Apr. 15, 2019).

[67] CHINA IPR, *Forecasting the Impact of the Third Plenum on IP Adjudication* (Dec. 10, 2013), *available at*https://chinaipr.com/2013/12/10/forecasting-the-impact-of-the-third-plenum-on-ip-adjudication/ (last visited Apr. 15, 2019).

worldwide outlook for the Mandarin music market in contrast to the limited vision of the past several decades. In the most recent ten years, obviously from the perspective of culture and technology, the Chinese society has experienced a notable modernization movement regarding the importance of copyright protection and monetary reward, which is powered by the execution of public policy, law and regulation or the support of the musical community. including the overall hard work of music publishers, record labels, creators, collecting societies, and all related musical units.[68] However, difficult tasks remain

For instance, many interested groups continue to be criticized for the shortage of copyright categories, such as the solid protection of performance right and broadcast right for sound recordings,[69] which is considered to be great economic compensation and incentives in the viewpoint of the record labels in the Mandarin music industry. In particular, Tencent, China's biggest music streaming company, represents the cutting edge of the 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).[70]In 2018, it had a strong grip on the market, claiming 800 million users, three times more than Spotify, but less than four percent of those users pay for subscription compares with 45 percent on Spotify[71], so that, revenue growth is to be highly expected in the Mandarin music market.

In addition to Tencent's own market share, this leading tech titan newly achieved a collaboration with NetEase (網易), which is the other prevailing competitor in the Chinese digital music market. In accordance with this bilateral cooperation, the two of them will convincingly combine their repertoires and build enormous market power in the Chinese music digital industry. This collaboration will actually strengthen and make concrete the dissemination and communication of the musical works and sound recordings in the Mandarin music market since Tencent had also connect its music with other considerable

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[68] International Federation of the Phonographic Industry (IFPI), Global Music Report 2018: Annual State of the Industry (2018), *available at* https://www.ifpi.org/downloads/GMR2018.pdf (last visited Apr. 27, 2019).
[69] *See Changpian Gongsi Zaici Wei Zhezuoquanfa XiuFa Jianyan：Luyin Zhizuozhe Ying Xian you Guangboquan he Gonkai Biaoyanquan* (唱片公司再次為著作權法修法建言：錄音製作者應享有廣播權和公開表演權) [*Record Labels Propose Copyright Law Amendment Again: Recording Producers Should Own Broadcasting and Public Performance Rights*], China Intellectual Property Information (中國知識產權資訊網), Mar. 29, 2018, *available at* http://www.iprchn.com/Index_NewsContent.aspx?NewsId=107036 (last visited Apr. 2, 2019).
[70] International Federation of the Phonographic Industry (IFPI), Global Music Report 2018: Annual State of the Industry (2018), *available at* https://www.ifpi.org/downloads/GMR2018.pdf (last visited Apr. 27, 2019).
[71] BBC NEWS, *China's Tencent Music jumps on US launch* (Dec. 12, 2018), *available at* https://www.bbc.com/news/business-46544204 (last visited Mar. 30, 2019).

participants in Mandarin music market, including iTune, China's Alibaba Music (阿里巴巴音樂), Taihe Music Group (太合音樂集團)[72], Changba (唱吧)[73] and Taiwan's KKBOX.[74]

According to the 2018 IFPI annual report, Global Music Report 2018: Annual State of the Industry, the Vice President of Tencent Music Entertainment Group, Andy Ng pointed out globalization's significant influence on the diversity of the Mandarin music market:

> "The styles of music enjoyed in China are now very diverse. There is a market here for hip-hop, punk, country and much more. Fans have a higher than ever demand for more elaborate works and different genres."[75]

The Executive Vice President (EVP) of Universal Music's Market Development, Adam Granite, also mentioned:

> "There is considerable focus now on the evolution of the Chinese music market. It's impossible not to be excited at the opportunity – although it will take time and concerted effort to move a significant part of the population onto paid services", "The opportunity to bring the Chinese repertoire to the world is definitely ramping up. That sort of global impact is a clear goal for our Chinese artists over the next few years."[76]

EVP for Market Development, Universal Music, Adam Granite: "The opportunity to bring the Chinese repertoire to the world is definitely ramping up. That sort of global impact is a clear goal for our Chinese artists over the next few years."[77] The founder of Billy Koh, Amusic Rights Management (ARM), an emerging digital music company establishing in Singapore and China[78], indicated:

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[72] China Music Business News, *MIUI Music reaches a licensing agreement with Taihe Music Group*(Mar. 4, 2018), *available at* http://chinamusicbusinessnews.com/?p=1927 (last visited Apr. 3, 2019).
[73] *See* Changba (唱吧) official website, *available at* https://changba.com/ (last visited Apr. 10, 2019).
[74] *See* International Federation of the Phonographic Industry (IFPI), Global Music Report 2018: Annual State of the Industry (2018), *available at* https://www.ifpi.org/downloads/GMR2018.pdf (last visited Apr. 27, 2019).
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] Amusic Rights Management Ltd (ARM),(奇大音樂), is "a young international music company in the digital music era. Set up in Singapore and China, it is expanding to the regions with alliances from Taiwan, Hong Kong, Malaysia, Indonesia, US & Europe. Founded by Billy Koh, one of the most instrumental and

> "China is now very open to Western artists, particularly younger music fans, and they are not restricted by genre. Last year the two most popular songs across all platforms by Western artists were Shape of You by Ed Sheeran and Faded by Alan Walker, one pop, one electronic dance music. In China, if you have a really good song with a strong hook, fans don't care about the genre."[79]

The Vice President of Tencent Music, Andy Ng, concurred: "The styles of music enjoyed in China are now very diverse. There is a market here for hip-hop, punk, country and much more. Fans have a higher than ever demand for more elaborate works and different genres."[80] The Chairman & CEO, Australia & New Zealand and President, Asia Sony Music Entertainment, Denis Handlin AO, sums up:

> "There is no doubt Chinese music fans are incredibly enthusiastic and are very much driving the diversity of the artists and the genres the industry is signing and promoting. We have had a long history of developing local artists in Greater China and now there are even more opportunities to export them regionally and globally."[81]

In general, the Executive Vice President (EVP) of Universal Music's Market Development, Adam Granite, confirms that the escalation of copyright maturation in the Mandarin music market will advance the domestic music business to global prosperity:

> "China is opening up and the opportunity to bring Chinese repertoire to the world is definitely ramping up. That sort of global impact is a clear goal for our Chinese artists over the next few years."[82]

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influential figures in the C-Pop, ARM aims to lift the music business model to a new level of the digital age. It is not a traditional music publisher nor a record label. It is a rights management business - publishing rights of the musical works and all other rights resulting from the reproduction of it. ARM groom and market potential artists and songwriters, new or on-the-road, to the next level of their career by engaging in the digital era of 21st century." *See* Midem, About Amusic Rights Management Ltd., *available at* https://www.midem.com/en/Contributors/504904/Koh-Billy (last visited Apr. 16, 2019); Amusic Rights Management Ltd (ARM), available at http://amusicrights.com/ (last visited Apr. 16, 2019).

[79] International Federation of the Phonographic Industry (IFPI), Global Music Report 2018: Annual State of the Industry *"Focus on China"* (2018), *available at* https://www.ifpi.org/downloads/GMR2018.pdf (last visited Apr. 27, 2019).

[80] *Id.*

[81] *Id.*

[82] *Id.*

Currently, the music market has become highly globalized and diverse. According to the aforementioned discussions, China's market has connected its domestic market to the whole Asian and International Market. Thus, future music copyright issues will be transnational and multicultural.

1. Building Active Communication through Music Streaming community

The International Federation of the Phonographic Industry (IFPI)'s Annual Report, Global Music Report 2018: Annual State of the Industry presents several fantastic interviews to illustrate how the gigantic tech companies will aim to build empires via more communication to music streaming users. This dream will mean a revolutionary breakthrough to the music audience and the whole music ecosystem. In the past, to listen to music was a more personal activity and provided a space to be alone. Because of the new technology, it will also turn music service to a vast multimedia market.

The Vice President of Tencent Music, Andy Ng, made the following comments on howTencent Music would spread its involvement in multifunctional streaming to fascinate new subscribers and create commercial profits:

> "Tencent's future lies with fans not only listening to music, but also watching video, singing along and even creating their own music to share. Music is at the core of what we do, but we are building a 'pan-music entertainment' ecology. "We are always improving the paid experience, with higher quality products and services and rich, interactive and innovative offers, such as digital albums and live music. Through this we are constantly expanding our paid user base."[83]

Apart from Tencent Music, Xiami Music is another most influential music streaming service in Chinese music market. In 2013, Xiami Music merged with the Alibaba Digital Media & Entertainment Group and belonged to the current Ali Music. Since Alibaba believes technology is the crucial component to digital music services, the CEO of Ali Music, Zhangyu, stated:

[83] *Id.*

> "We have made great efforts to innovate and improve our platform, for example we have created 'virtual party rooms' that enable users to have more interaction within Xiami. They enrich the environment, make it more 'human' and create a conversation between the music and the fans."[84]

Additionally, the President of Warner Music Asia, Simon Robson, underlined that another powerful music platform in China, NetEase(網易), is aiming at the same goal by inserting interactive and inventive approaches to connect its users and simultaneously enlarge its market share toward its biggest competitor, Tencent:

> "What they've done is very interesting. They've managed to unlock the social aspect of music and they have huge numbers of people commenting on songs. They've been really successful in turning their music service into a social network, so they're not just following a Western model, they're coming up with something innovative and new."[85]

In general, the 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 audience is in contact with each other and 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 contents will be incorporated into the traditional music business.

2. New Future: Open and Diverse Internet World

Overall, in spite of the coming of a new age aroused by new technology, the matter of how to establish effective copyright protection, enforcement and licensing systems to help music creators get reasonable economic incentives means there is no time to lose. Especially, the more thriving the China digital music market is, the greater the gap between the encouraging music scene and real received economic payback. As some empirical investigations show, over half of Chinese consumers are used to searching for free music sources instead of paid-for sources, and one of the main reasons is that payment functions or procedures are not appealing or convenient.

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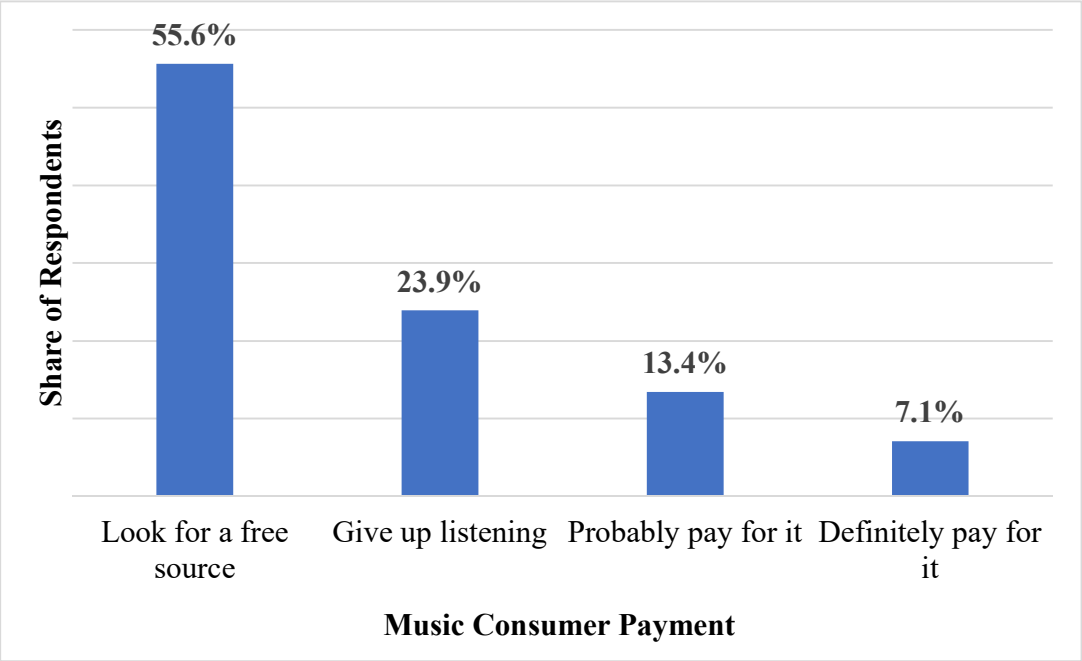
[84] *Id.*
[85] *Id.*

Figure 12：Consumer behavior when required to pay for music that they want to listen to in China in 2016[86]



Regarding the record industry, the CEO of China and Taiwan in Sony Music, Samuel Chou, mentioned "investing more than ever before locally, developing our own artists". Mr. Chou has confidence that now it is an opportune moment for Mandarin music creators to build up their career from a local to a global perspective under sufficient copyright protections and enforcement.

> "For 30 or 40 years, Hong Kong or Taiwanese artists have been successful in China, because the copyright laws were stronger there and it was worthwhile recording original material. Now, Chinese artists have an opportunity, their work and their copyrights will be protected, their music will be part of a properly monetized ecosystem and through this we will generate homegrown success and, eventually, a Chinese superstar artist."[87]

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[86] China Big Data Industrial Observation (CBDIO,中國大資料產業觀察), *Shuwei Yinle Daziliao Baogao：Zhongguo Xianmin Shouji Tingge Hangwei Jiemi (數位音樂大資料報告：中國線民手機聽歌行為揭秘) [Digital Music Big Data Report: Chinese Music Users' Behaviours]*, (May 20, 2016), *available at* http://www.cbdio.com/BigData/2016-05/20/content_4950507.htm(last visited Apr. 28, 2019).

[87] International Federation of the Phonographic Industry (IFPI), Global Music Report 2018: Annual State of the Industry *"Focus on China"* (2018), *available at* https://www.ifpi.org/downloads/GMR2018.pdf (last

The Vice President of Tencent Music, Andy Ng, is convinced:

> "The entire music industry in China is developing rapidly and soundly. The copyright protection environment is greatly improved, users' awareness of the value of music is also greatly strengthened and high-quality music is emerging from Chinese artists. We believe that 2018 will see another significant turning point for Chinese music and it will play an increasingly important role on the world stage." "The styles of music enjoyed in China are now very diverse. There is a market here for hip-hop, punk, country and much more. Fans have a higher than ever demand for more elaborate works and different genres.*"*[88]

At the same time, the CEO of China and Taiwan in Sony Music, Samuel Chou, summarized the new trends and possibilities of monetary compensation from subscription streaming services in China:

> "The demand for music here has always been huge, but what we are seeing now, and what needs to continue, is digital music platforms encouraging people towards payment models. The key to that process is providing reasons and incentives to switch, possibly through exclusive new content, more choice and higher quality of audio and service."[89]

The President of Chia Tai Music Group, Jiang Tao,[90] particularly explained the considerable connection between the stronger copyright and the arising wave of Chinese young musical talents and their creative works:

> "The rights situation surrounding music has improved considerably. Previously, songwriters and record producers weren't interested in creating new songs because the laws weren't perfect enough to protect them, but that is improving and we will see more and more new music over the next five to 10 years."[91]

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visited Apr. 27, 2019).

[88] *Id.*

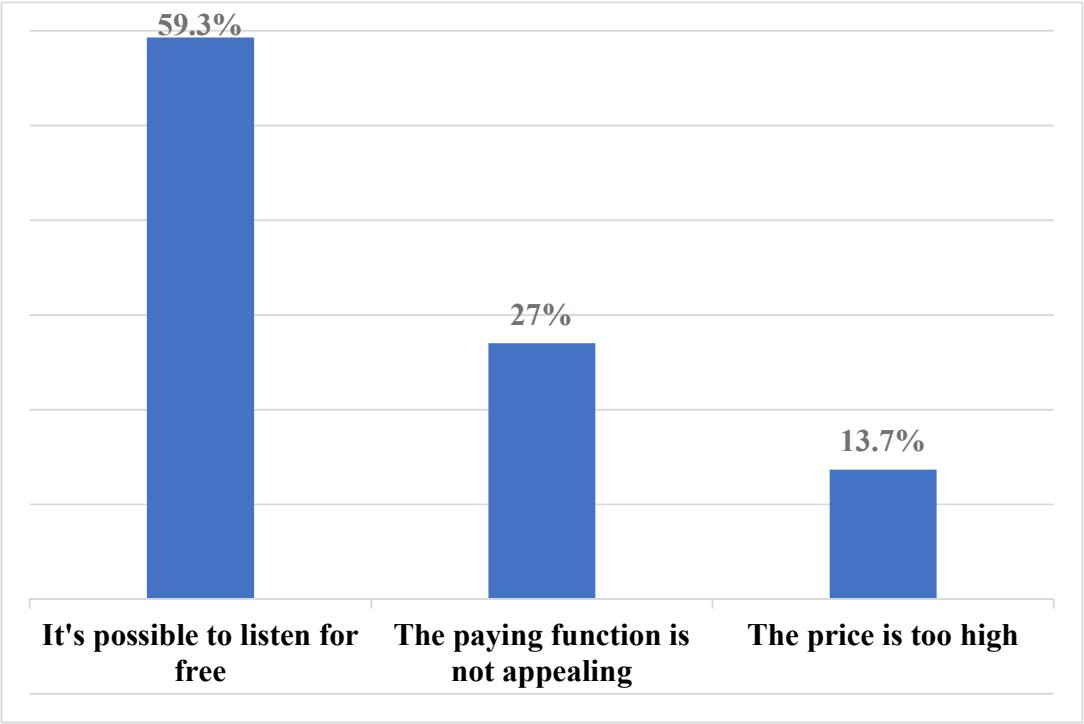
[89] *Id.*

[90] *See* Chia Tai Music Group(正大音樂), *available at* http://www.chiataimusic.cc/ (last visited Apr. 27, 2019).

[91] International Federation of the Phonographic Industry (IFPI), Global Music Report 2018: Annual State of the Industry *"Focus on China"* (2018), *available at*https://www.ifpi.org/downloads/GMR2018.pdf (last visited Apr. 27, 2019).

The CEO of Xiami Music, Zhangu, comments on the constructive progression of music copyright: "We are focused on encouraging the development of original music in China and have recently launched a Xiami Music project 'Looking for the Unseen Originality', which is helping to discover and launch new Chinese artists."[92]The Vice President of Tencent Music, Andy Ng, asserted: "The Chinese music industry is ushering in an unprecedented era of creativity with more and more outstanding musicians and musical works emerging from within China."[93]

Figure 13：Reasons for Consumers not to Pay for Online Music in China in 2016[94]



According to the statistical data, it is found that the technology and selling models and platforms can represent essential parts for music transactions. For the music market in

[92] *Id.*
[93] *Id.*
[94] China Big Data Industrial Observation (CBDIO,中國大資料產業觀察), *Shuwei Yinle Daziliao Baogao：Zhongguo Xianmin Shouji Tingge Hangwei Jiemi (數位音樂大資料包告：中國線民手機聽歌行為揭秘) [Digital Music Big Data Report: Chinese Music Users' Behaviours]*, (May 20, 2016), *available at* http://www.cbdio.com/BigData/2016-05/20/content_4950507.htm (last visited Apr. 28, 2019).

China, the copyright and licensing system should concretely devote themselves to increasing the numbers of transactions and reducing transactional costs. Their aims should focus on stimulating the incentives for creativity and transaction, as opposed to assuming a merely protective approach, which, as we increasingly can observe, can stifle the licensing process. By reforming the copyright protection, enforcement and licensing system, the Chinese music industry can anticipate greater economic incentives.

In China, on-line music is regarded as the most primary channel for music access. This means that the development of internet and digital technology brings a conclusive influence to the evolution of the Chinese music market. The new technology drives the Chinese and U.S.'s markets to the same points of the compass and destination. They are exactly the "online music era" and open and diverse income sources.

II. METHODOLOGY

In terms of methodology, this research will first include comparative studies of copyright law and regulations of the U.S., Europe and Mandarin music markets. To illustrate the pros and cons in three different jurisdictions, I will apply prominent U.S. and European cases and practical foundations to analyze current issues in the Mandarin music market. In addition to the relevant jurisprudence, this research will also include empirical studies in order to examine matters *de lege ferenda,* and will respond to such questions. My past experience and connections in this industry will be best utilized to collect statistical data in the U.S., Europe and Mandarin music markets.

My research goals will be attained by:

1. Taking a high-end approach that considers practical solutions to interactions among the U.S and European licensing models and Mandarin music society, *inter alia* through a comparative analysis of specialized utilities for management and licensing.
2. Bearing in mind the global vision that a music licensing system in the Mandarin music market can substantially be constructed as an open and diverse ecosystem with significant economic incentives, flexibility, efficiency and global vision.
3. Rethinking copyright's incentive theory to seek a way for securing musical artists' economic freedom, drawing on "The Evolution and Equilibrium of Copyright in the Digital Age","Money from Music: Survey Evidence on Musicians' Revenue and Lessons About Copyright Incentives" and "Justifying Intellectual Property", by Professor Susy Frankel and Daniel Gervais, Professor Peter DiCola and Professor Robert Merges respectively.

A. Comparative Research

The methodology of comparative research is regarded as practical, *i.e.,* seeking to link regulations to outcome, which possibly builds causation by contrasting divergence and resemblance, to exclude irrelevant elements. This methodology presents a remarkable outlook for legal reform, and can be seen as a likely prospect for law amendments and legislation.

The function of comparative law includes the application of foreign law, improvement of

the domestic legal order, the establishment of the common law of different States and the improvement of legal theory development. The main function is to enrich and develop the theory of the law, refer to legislative policy in the legislative process, refer to the interpretation of the law, find the essence of the legal issues, import fundamental values of law and refer to legal principle.

In order to achieve thorough, comparative research, it is important to analyze the interrelationships between substantive law and procedure, because variations between the two may further identify the differences which affect the outcome. To further analyze the research question under the "incentive" theory, the comparative research method will be applied to examine the similarities and difference between the U.S. and the Mandarin music markets. The music industry in the U.S. is robust and influential, but it is not the same in the Mandarin music markets. The focus of this research is to explore the fact copyright protection is fundamental to the success of the U.S. and European music industry. Instead, the copyright expansion was highly correlated to the development of the Mandarin music industry, and some case studies even believe that copyright protection is the principal cause of the music industries in the U.S., Europe and Mandarin markets being completely different.

Although Hong Kong and Taiwan both represent small markets compared to China, the combination of economic growth, vigorous technology innovation, a robust entertainment industry, and crucial geographical location has established a unifying role within the East Asian region. In addition, for the huge population of China music consumers, Chinese songs are not only the most popular type they access but also mainly originate from Taiwan and Hong Kong music artists, so business cooperation and cultural interaction are very common among such "same language and same race' regions. Therefore, China, Taiwan, and Hong Kong provide an interesting comparative study subjects in the music industry and copyright licensing fields.

Some scholars are concerned that comparative research methods may not wholly reflect reality, due to a language barrier, and may have reliability issues related to secondary materials. Since I am a native speaker of Mandarin Chinese, there will not be any language barrier in this research. As for reliability issues of secondary materials, I have managed to collect firsthand data from sources in the Mandarin music industry and the legal profession. The data were used to apply the triangulation method to improve validity and reliability.

China and Taiwan both utilize the civil law system, whereas the U.S. and Hong Kong follow the common law system. These countries illustrate divergent approaches and effects on copyright law and music licensing models. To better resolve the research question under the "Incentive Theory", comparative research will be utilized to observe the difference between the U.S. and Chinese-speaking countries.

B. Empirical Research

Empirical Legal Studies(ELS) emphasizes the study of law by means of experimental research, which in recent years has undertaken the same focus on experimental truths from legal realism. It has laid more stress on the understandings of law by refined social sciences research methods, especially paying more attention on the results of statistical analysis or case analysis. The method mainly tends to explore the "gap" between law-in-action and law-in-books in order to analyze the reasons, impacts and the relations among law, society and culture.

In my opinion, traditional doctrinal studies of law seem insufficient to discuss how the digital era influences the music industry, the legal model of the music licensing system, whether the copyright law protection and economic incentives really promote music creation, and other issues related to the law system and social results. Instead, the ELS should apply the results of legal implementation and contemporary social phenomena specifically to conduct empirical observations in order to strengthen research persuasiveness.

In this research, I will collect literatures related to the research topics in order to review and establish how technology innovation leaves impacts on the music industry, creators/copyright owners and the licensing system and, then specify the positive and negative effects that digital technology progress leaves on film consumer behaviors and the changes of industrial business models.[95] Using this method, this research will focus on the social, historical, economic and cultural contexts of integrations and conflicts between music work's copyright protection and technology applications.

[95] *See* Glenn A. Bowen, *Document Analysis as A Qualitative Research Method*. Qualitative Research Journal, Qualitative Research Journal, vol. 9, No. 2, 2009, p27-40 (2009).

The collected information includes news reports, periodicals, papers, research reports, government publications, special books, web pages and other materials to analyze and compare the above-mentioned legal management and policies, with a view to preliminary understanding and analysis of the subject of this study.[96]

This research will incorporate "copyright licensing statistical data" and "music industry statistical data". I will gather and compile statistical data from international institutions, governmental mechanisms, and music industry organizations. The data will further converge and seek to display knowledge such as music industry background, and the potential licensing model. The roots of the data will be discovered from the National Bureaus of Statistics, Intellectual Property Offices, National Copyright Administrations, Ministries of Culture, Copyright Collecting Societies, Music Publishers, Record Labels and International Music Organizations in the Mandarin music market, Copyright licensing statistics can assist us in comprehending how the law is framed to affect copyright transaction. Industry statistics will also demonstrate the advancement of the music business in the Mandarin music market.

Although the current statistical data provided by China may not always be considered reliable, the data still provide meaningful information for analysis purposes. The quantitative data are useful for designing interview questions. For example, questions will be designed to find out whether the statistics were accurate enough to reflect the reality in the industry: What elements stimulate authors to generate new creation? How do creators evaluate the function and purpose of the copyright safeguard and enforcement? Would musical creators proceed their artistic professions in an environment in the absence of copyright protection and an effective licensing model? Furthermore, the licensing statistics and music industry development statistics could be analyzed together with the copyright amendment historical timeline. This could indicate how changes in law affect licensing models and further impacts on the music industry and musical artist careers.

C. Significance of Research Outcome

Music is the most popular and powerful culture in the world, but few musical artists can make a living wage under the existing system. Music users complain about the complexity

[96] *See* Zina O'Leary, The Essential Guide to Doing Your Research Project, Thousand Oaks, CA: SAGE Publications Ltd, (3rd ed. May 5, 2017).

of license processes, and the inaccessibility of copyright information, while artists and publishers still expect strict governmental regulations and enforcements to deter massive copyright infringements. The intense debate between users and rights- holders continues, and can be harmful for the music business. While the technology keeps stimulating new musical arts, the music licensing and copyright system seems outdated and can't catch up to current trends in digital music, Copyright law needs reform to deliver a better system to secure the economic freedom of musical artists, and to enhance the whole music economy.

Table 3：2017 MCSC Statement of Income & Expenditure

(the following figures in "Others" include compensation fees by litigation, etc.)

Category-Income	2017 income Ten Thousand (USD)	Compared to fiscal 2016(%)
Performing Rights	1048.21	26.2
Broadcasting Rights	680.45	17
Internet & New Media	1015.85	6.1
Overseas Revenue	118.68	36.5
Mechanical/Reproduction	156.79	30
Others	7.27	15.3
Total Income	3027.25	17.2
Category-Expenditure	2017 income Ten Thousand (USD)	Compared to fiscal 2016(%)
Administrative Expenditure	517.67	21.4
Surplus	2509.58	16.4
Distributable Amount	2509.58	16.4

Organized by the author (The Data originated from 2017 MSCS Annual Report)

As the current "free culture"[97]trend in music transactions continues, U.S. music platforms, such as Amazon, Google, YouTube, Pandora, Spotify and Apple Music, seek to bypass music publishers, record companies and copyright collective management organizations

[97] "Copyright Wars: Describes the disjuncture between the availability and relative simplicity of remix technologies and copyright law. Professor Lawrence Lessig insists that amateur appropriation in the digital age cannot be stopped but only 'criminalized'. Thus most corrosive outcome of this tension is that generations of children are growing up doing what they know is "illegal" and that notion has societal implications that extend far beyond copyright wars." Lawrence Lessig, Free Culture: How Big Media Uses Technology and The Law to Lock Down Culture and Control Creativity, New York: Penguin Press, p.28-29 (2004).

(CMO), by locating and working directly with artists, or with independent record labels and publishing companies. By inserting themselves into an age-old industry through such a new business model of direct licensing or 360° deal,[98] the artists are able to exclude the middlemen, music publishers, record companies or CMOs, grow their audiences more quickly, and reap profits earlier. In this period, the music CMOs and new music platforms in China, Music Copyright Society of China (MCSC) and Alibaba's Xiami Music,[99] Baidu Music[100] and QQ Music,[101] are aiming to construct a more efficient and profitable system, when this new wave will be meaningful to their future by fostering more new usages and income.

According to the International Federation of the Phonographic Industry (IFPI) 2018 Annual Report, the President of Warner Music Asia, Simon Robson, provided his observation about the investment environment in Chinese music market: "In the role of a promising land for global professionals and talents and an attractive stage to dig out future starts, "investing very heavily in China".[102]

Mr. Robson observed: "Consumer taste is changing and there is now more appetite for a wider range of genres than ever before." Also, Mr. Robson raised several cases about how to overcome the difficulties in locating the developing market and the unpredictable climate in China:

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[98] "Currently, several kinds of business models exist in the music licensing market. First, there are artists, who, whether alone or in combination with other players, create and perform the musical content. Second, there are record labels, such as Warner Music Group, Sony BMG, Universal Music Group, and EMI, which primarily are tasked with developing and marketing the artists. Although artists likely have business and talent agents, record labels have the expertise and connections to effectively manage artists' brands and contracts. Third, there are publishing companies. A publishing company, which may also be a record label, looks after the artist's rights, such as by collecting royalties and licensing fees. Finally, there are CMOs, such as ASCAP and BMI, which also look after the rights of artists, but do so on behalf of a large collective of artists. In addition, the companies with direct license such as Google music, YouTube cut out the unnecessary transact costs from the traditional middleman. They bring new breakthroughs to music business." *See* United States Copyright Office, Copyright and the Music Marketplace: Report of The Register Of Copyrights, p.11-15 (Feb. 2015), *available at* https://copyright.gov/docs/musiclicensingstudy/copyright-and-the-music-marketplace.pdf (last visited Mar. 3, 2019).

[99] Alibaba's Xiami Music (阿里巴巴集團蝦米音樂), *available at* http://www.xiami.com/ (last visited Mar. 23, 2019).

[100] Baidu Music (百度音樂), *available at* http://music.baidu.com/pc/index.html (last visited Mar. 23, 2019).

[101] QQ Music (QQ 音樂), *available at* https://y.qq.com/ (last visited Mar. 23, 2019).

[102] International Federation of the Phonographic Industry (IFPI), Global Music Report 2018: Annual State of the Industry *"Focus on China"* (2018), *available at* https://www.ifpi.org/downloads/GMR2018.pdf (last visited Apr. 27, 2019).

> "More and more artists and managers are seeing the opportunity and we're working with them to help them make an impact here. Charli XCX is one of our artists who's doing a phenomenal job in China. She's been here a number of times, she's done endorsement events and she recorded a Mandarin version of Boys. She's really embracing China." "She's also done a live streamed interview with Tencent, which attracted 150,000 fans. A Danish singer, Christopher, did one that got an audience of 600,000 people and Linkin Park had 750,000. So, if people are having trouble trying to find room for China in their schedule, we can still find ways for them to engage with their fans."[103]

In these experiences, it can be found that information technology is actually connecting and expanding China to a more spacious stage, which brings the international artists to Mandarin music market through the Internet and streaming services without geographical boundaries.

Nowadays, the music companies supported by tech giants such as Google Music and YouTube are devoting themselves to new licensing arrangements, as these structures could provide more incentive and decrease unnecessary transactional costs of managing their own copyrights. These new perspectives can provide authors in the Mandarin music market with a more flexible and profitable pathway to construct their licensing maps. It can be observed how technology facilities this breakthrough.

This research believes that economic incentives are fundamental stimulations for musical artists' creations. Typically, sufficient financial support makes creators focus on their working process and attempt to complete masterpieces. The arguments above reveal the music intermediaries in the Mandarin music market may be focusing on something other than on strengthening music licenses and facilitating financial transactions.[104]Because the different proportionality of licensing types exists in the Mandarin music market, the

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[103] International Federation of the Phonographic Industry (IFPI), Global Music Report 2018: Annual State of the Industry *"Focus on China"* (2018), *available at* https://www.ifpi.org/downloads/GMR2018.pdf (last visited Apr. 27, 2019).

[104] The CMOs' essential function should be to enhance the music licensing between authors and uses and represents a transaction platform. Ye Jiang, *Changing Tides of Collective Licensing in China*, Michigan State International Law Review, Vol. 21, Issue 3, p.736 (2013); Mihály Ficsor, Collective Management of Copyright and Related Rights, Geneva ; New York: World Intellectual Property Organization, p.18-22 (2002).

inefficiency results in distribution issues in several jurisdictions. Especially, to reconstruct proportionality in the Mandarin music business will be helpful in defending the creator's profit. Artists might need an intermediary like Collective Management Organizations (CMO), Mechanical License Collective (MLC) or Extended Collective License (ECL) to secure their licensing revenue.

Specifically, in the past, research articles on music licensing have mostly focused on the music licensing issues within a single jurisdiction, or new approaches to music licensing issues by concentrating on the international norms. My doctoral research lends credence to the thought that the new licensing models and regulations in the U.S. and Europe deserve further and more extensive discussion. In accordance with the comparison of the copyright regulations, cases and statistics, this research aims to contribute to academic science by proposing solutions for applying the U.S. and European licensing models in the Mandarin music market.

III. THE HISTORY OF THE MANDARIN MUSIC INDUSTRY

A. Confucian Ideology and Music Creativity

The ideology of Chinese cultural tradition forms a basic foundation for the copyright protection system. The Zhuxiang Clan (朱襄氏) period of 4800 years ago, is believed to be as the beginning of the music business in China. At that time, the melodic sound performed by bone flutes and panpipes represented most parts of traditional music.[105] From then on, the music culture became a fundamental element for the whole Chinese society. Thus, also, music advanced to an instrument for social education. Therefore, powerful educational instrument assisted the ancient authority to govern and regulate the communities.[106]

The legal aspect in ancient China does not draw a distinct line between civil law and criminal law. The substance of civil law was defined and supported by the virtues expressed by Confucius, while the ideology of copyright was comprehended in the identical value of morality.[107] By organizing approximately three hundred individuals to perform ritual music, Confucius edited the Chinese masterpiece "Poetry" (詩經, the Book of Odes and Hymns). He had faith that intelligent wisdom of the music in the Poetry was Chinese community legacy and belonged to the public. From the perspective of Confucius's cogitation, the ideology of copyright had to build on conscientious apprehension rather than regulatory rules.[108]

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[105]*See* Meng Fan-yu (孟凡玉)& Zhu Jie-qiong (朱潔瓊), *Shensheng de Yule: Zhongguo Minjian Jisi Yishi ji Qi Yinle de Renleixue Yanjiu (Sacred Entertainment: An Anthropological Study of the Popular Rites and the Related Music in China) [神聖的娛樂—中國民間祭祀儀式及其音樂的人類學研究]*, Journal of the Central Conservatory of Music (中央音樂學院學報), Vol. 4, p.99-102 (2005); 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, p.8-9 (1993)

[106]*See* David Herlihy, Yu Zhang, *Music industry and copyright protection in the United States and China*, Global Media and China, Vol 1, Issue 4, p. 393 (Dec. 2016).

[107]John Alan Lehman, *Intellectual property rights and Chinese tradition section: Philosophical foundations*, Journal of Business Ethics, Volume 69, Issue 1, p.1-9 (Nov. 2006).

[108] Sampsung Xiaoxiang Shi, *Chinese Copyright Law, Peer Production and the Participatory Media Age: An Old Regime in a New World, in* Copyright Law, Digital Content and the Internet in the Asia-Pacific p.257-304 (Brian Fitzgerald, Fuping Gao, Damien O'Brien, & Sampsung Xiaoxiang Shi eds., 2008).

Chinese copyright legislation had not been set up until the early 20th Century. The reason was that, the technology and music market were not well established. Even, from the Song Dynasty (Anno Domini 960) to the 1890s, the performing aspect of goulan wasi (勾欄瓦肆) had incorporated a live musical program with folk dance and theatrical works, and been held in at a public site. But the scale of the music industry was still limited. Such a rough market economy lacked sufficient strength for provoking the conception of copyright regulation.[109]

B. The Establishment of the Modern Music Industry

In the 1900s, the Chinese emperors in the Qing late dynasty were provoked into fighting with Western countries. After serious military and cultural invasion in China, foreign countries begin to advocate the notion of a copyright system to the Chinese community. At the outset, the Qing Dynasty was forced to sign international agreements and treaties with foreign nations for ensuring their copyright. From that point, the foreign music economy inserted itself into the Chinese music market and affected Chinese norms on copyright protection.[110] Meanwhile, Western recording technology and music business practices and culture had a significant impact on the Chinese music industry.

The Beijing Opera of China was firstly recorded and published by the American record company and phonograph manufacturer, Victor Talking Machine Company (勝利留聲機公司), in late-Qing China of 1904. From then on, recorded music had begun representing its leading role in the Chinese music economy until the 1970s. However, this sound record trend had occurred a half-decade later than in Western countries.[111]

In Qing China, the copyright code first served to simply secure works through registration. In the early 20th Century, the establishment of "Copyright Code of Great Qing Dynasty"

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[109] *See* Liang Shu-fen (梁淑芬), *Beisong Dongjing Goulan Wazi Yanjiu (北宋東京勾欄瓦子研究)[A study on Washi and Goulan in Dongjing Northern Song dynasty]*(2009) (unpublished Master dissertation, Henan University, China); David Herlihy, David Herlihy, Yu Zhang, *Music industry and copyright protection in the United States and China*, Global Media and China, Vol 1, Issue 4, p.394 (Dec. 2016).

[110] *See* Li, John Fang-jun, *The development of China's music industry during the first half of the 20th century*, Journal, Neo: journal for higher degree research students in the social sciences and humanities, Vol, p.1-20 (2011).

[111] Li, John Fang-jun, *The development of China's music industry during the first half of the 20th century*, Journal, Neo: journal for higher degree research students in the social sciences and humanities, Vol, p.3 (2011).

started to reveal the new advancement influenced by the wave of cultural and technological progression.[112] The articles, including in total five chapters, included general principles, the duration of protection, registration, the limitation of rights and supplementary regulations, and furnished related principles in terms of the definition of copyright, the categories of works and rights.[113]In 1911, the Xinhai Revolution (辛亥革命, also known as the Revolution of 1911) overturned the Qing Dynasty and built the new democratic country, the Republic of China (R.O.C.). After this revolution, several divisions of Copyright Code of Great Qing Dynasty were adopted by the R.O.C. president's order.[114]

"Songs of the era" (時代曲) is a genre of Mandarin folk/jazz fusion music that initiated in Shanghai in the 1920s. The Mandarin Chinese popular songs showed up in the 1930s of Shanghai. The first neoteric popular song in Mandarin, "The Drizzle" (毛毛雨), was written by Li Jinhui (黎錦暉) around 1927 and performed by his daughter and a vocalist, Li Minghui (黎明暉).This music genre is based on a traditional pentatonic folk scale, but the orchestration and arrangement of the music are comparable to the style of an American jazz orchestra.[115] At that period, the music industry in China launched a technological and cultural integration with other creative businesses, consisting of radio programs and motion picture production and distribution.[116]

C. Civil War and Governmental Censorship

At the time of the World War II and Internal War (國共內戰, Chinese Civil War) between the Kuomintang (KMT)-led government of the Republic of China (ROC) and the Communist Party of China (CPC)-led government of People's Republic of China (PRC), even if the music market of live performance and recording production had still been alive,

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[112] China Intellectual Property (中國知識產權) , *The dust-laden history revisited—the story of the Copyright Code of Great Qing Dynasty* (Mar. 16, 2011), *available at* https://ipr.chinadaily.com.cn/2011-03/17/content_12188711.htm (last visited Mar. 16, 2019).

[113] China Intellectual Property (中國知識產權) , *The dust-laden history revisited—the story of the Copyright Code of Great Qing Dynasty* (Mar. 16, 2011), *available at* https://ipr.chinadaily.com.cn/2011-03/17/content_12188711.htm (last visited Mar. 16, 2019).

[114] *See* AiYong-Ming, *Why Did the Attempt to Modernise the Legal System in Late Qing China Fail—A Sino-Japanese Comparative Study*, Bond Law Review, Vol. 16, Issue 1, p69-92 (2004).

[115] *See* Li, John Fang-jun, *The development of the digital music industry in China during the first decade of the 21st century with particular regard to industrial convergence*, International Journal of Music Business Research,Vol. 2, Issue 1, p.63-86 (2013).

[116] *See* Li, John Fang-jun, *The development of China's music industry during the first half of the 20th century*, Journal, Neo: journal for higher degree research students in the social sciences and humanities, Vol, p.1-20 (2011).

the music technology and market in China was growing slowly. Under the governance of the PRC, from 1949 to 1978, the production of music content had been subject to more censorship by the government.[117] Given the existence of martial law in Taiwan, the ROC government enforced more strict ideological controls on content review. During this period, music composition and lyrics were mainly focused on being a promotion of governmental policies and political cogitation. Until the announcement and execution of the open-door economic policy in mainland China around 1978, and the abolishment of martial law in Taiwan in 1987, the PRC and ROC governments started to progressively propose an all-around policy on musical cultural development.[118] In the late 1980's and early 1990's, a tide of popular music and rock and roll music was exposed in the Mandarin music market. With a more open orientation on musical content production and business, the music creative industry enjoy prosperity.[119]

D. International Treaties and Globalization

In 1990, the State Council of the PRC launched the "Copyright Law of PRC'. This newly-enacted copyright law is a more modern and well-structured legal protection system for musical compositions and lyrics in mainland China.[120]Otherwise, after the ROC faced a series of lost battles in the Chinese Civil War against the CPC in 1949 and retreated to Taiwan, the "Copyright Law of ROC" has been another parallel legal system and culture of the Mandarin music market. In 1992, the PRC accepted two principal international conventions protecting copyright, the Berne Convention and the Universal Copyright Convention (UCC). In 2001, the PRC joined the membership of the World Trade Organization (WTO) and, in 2017, agreed to sign the new amendment of the Trade Related Intellectual Property Rights Agreement (TRIPS). Simultaneously, the ROC received membership in the WTO in 2002.[121] These international conventions and agreements brought substantial development of legislation, judiciary and governmental administration

[117]*See* Wai-Chung Ho, *The Political Meaning of Hong Kong Popular Music: A Review of Sociopolitical Relations between Hong Kong and the People's Republic of China Since the 1980s*, Popular Music, Vol. 19, No. 3, p.341–353(Oct., 2000).
[118] David Herlihy, Yu Zhang, *Music industry and copyright protection in the United States and China*, Global Media and China, Vol 1, Issue 4, p.395 (Dec. 2016).
[119] David Herlihy, Yu Zhang, *Music industry and copyright protection in the United States and China*, Global Media and China, Vol 1, Issue 4, p.395 (Dec. 2016).
[120] *See* Wenqi Liu, Evolution of intellectual property protection in post-Mao China: Law and enforcement (2014) (Unpublished doctoral dissertation, Erasmus University Rotterdam, Rotterdam, The Netherlands).
[121] David Herlihy, Yu Zhang, *Music industry and copyright protection in the United States and China*, Global Media and China, Vol 1, Issue 4, p.395 (Dec. 2016).

to both PRC (China) and ROC (Taiwan). Consequently, from then on, the outlook of international business and economic expansion was applied to the Mandarin music market, while the advancement of the legal system was stimulated and raised to facilitate local and global commercial transactions. In 2001, the first amendment to the 1990's version of "Copyright Law of the PRC" was proposed. This new bill suggested 13 types of property right, incorporating the rights of: "reproduction, distribution, rental, exhibition, performance, screening, broadcasting, making cinematographic works, and communication through an information network".[122]

E. Collective Management System

Collective management organizations (CMOs) in the Mandarin music market have accomplished significant contributions in the previous decade. That said, several critically

[122] The bill in 2001 founded the current article 10 of PRC Copyright Law: The term "copyright" shall include the following personality rights and property rights:
(l) the right of publication, that is, the right to decide whether to make a work available to the public; (2) the right of authorship, that is, the right to claim authorship and to have the author's name mentioned in connection with the work; (3) the right of alteration, that is, the right to alter or authorize others to alter one's work; (4) the right of integrity, that is, the right to protect one's work against distortion and mutilation; (5) the right of reproduction, that is, the right to produce one or more copies of a work by printing, photocopying, lithographing, making a sound recording or video recording, duplicating a recording, or duplicating a photographic work or by any other means; (6) the right of distribution, that is, the right to make available to the public the original or reproductions of a work though sale or other transfer of ownership; (7) the right of rental, that is, the right to authorize, with payment, others to temporarily use cinematographic works, works created by virtue of an analogous method of film production, and computer software, except any computer software that is not the main subject matter of rental; (8) the right of exhibition, that is, the right to publicly display the original or reproduction of a work of fine art and photography; (9) the right of performance, that is, the right to publicly perform a work and publicly broadcast the performance of a work by various means; (10) the right of showing, that is, the right to show to the public a work, of fine art, photography, cinematography and any work created by analogous methods of film production through film projectors, over-head projectors or any other technical devices; (11) the right of broadcast, that is, the right to publicly broadcast or communicate to the public a work by wireless means, to communicate to the public a broadcast work by wire or relay means, and to communicate to the public a broadcast work by a loudspeaker or by any other analogous tool used to transmit symbols, sounds or pictures; (12) the right of communication of information on networks, that is, the right to communicate to the public a work, by wire or wireless means in such a way that members of the public may access these works from a place and at a time individually chosen by them; (13) the right of making cinematographic work, that is, the right to fixate a work on a carrier by way of film production or by virtue of an analogous method of film production; (14) the right of adaptation, that is, the right to change a work to create a new work of originality; (15) the right of translation, that is, the right to translate a work in one language into one in another language; (16) the right of compilation, that is, the right to compile works or parts of works into a new work by reason of the selection or arrangement; and (17) any other rights a copyright owner is entitled to enjoy. *See* David Herlihy, Yu Zhang, *Music industry and copyright protection in the United States and China*, Global Media and China, Vol 1, Issue 4, p.395 (Dec. 2016).

difficult topics still await further discussions and answers. This chapter observes the existing exercises of collective licensing in the Mandarin music industry, and seeks to propose possible solutions.[123] Collective management organizations (CMOs) represent their members, which could be composers, lyrists or performers, and deliver copyright licenses to users. CMOs negotiate rates and terms of use with users, and collect and distribute royalties.[124]Within the scope of repertoire, this organization facilitates the license for a bundle of users' rights. In essence, a CMO is an intermediary in the licensing process. It links a group of rightsholders with a group of users, and, in theory, operates with efficiency.[125]

The origin of collective licensing could be tracked back to France in the 18th century. The first CMO was a French music collecting society named Société des auteurs, compositeurs et éditeurs de musique (SACEM).[126] At the late 19th century, the forming of composers' organizations had become established in Europe. The U.S.'s first music CMO, was also founded at that moment.[127]

However, surprisingly, the notion of collective license was a very modern concept to China as the first Chinese CMO wasn't built until the late 20th century.[128] This background is comparatively uncommon among the most age-old countries.[129] In the Chinese music

[123] Fuxiao Jiang, Daniel Gervais, *Collective Management Organizations in China: Practice, Problems and Possible Solutions*, The Journal of World Intellectual Property Vol. 15, No. 3, p. 221 (May. 2012).
[124] Mihály Ficsor, Collective Management of Copyright and Related Rights, Geneva: World Intellectual Property Organization. p.17 (2002); Gervais, Daniel, Collective Management of Copyright, Netherlands:Wolters Kluwer, p.4 (3rd ed. Nov. 19, 2015).
[125] Fuxiao Jiang, Daniel Gervais, *Collective Management Organizations in China: Practice, Problems and Possible Solutions*, The Journal of World Intellectual Property Vol. 15, No. 3, p. 221 (May. 2012).
[126] Mihály Ficsor, Collective Management of Copyright and Related Rights, Geneva: World Intellectual Property Organization. p.18-19 (2002).
[127] In the U.S., the main music CMOs are American Society of Composers, Authors and Publishers (ASCAP), *available at* http://www.ascap.com (last visited Apr. 10, 2019); Broadcast Music, Inc. (BMI),*available at* http://www.bmi.com (last visited Apr. 10, 2019) and Society of European Stage Authors and Composers (SESAC),*available at* https://www.sesac.com (last visited Apr. 10, 2019); Fuxiao Jiang, Daniel Gervais, *Collective Management Organizations in China: Practice, Problems and Possible Solutions*, The Journal of World Intellectual Property Vol. 15, No. 3, p. 221 (May. 2012).

[128] In 1992, the initial collective management organization in China was established. This music CMO is called Music Copyright Society of China (MCSC). *See* Music Copyright Society of China (中國音樂著作權協會), General Introduction, *available at* http://www.mcsc.com.cn/Id-28.html# (last visited Mar. 12, 2019).
[129] Fuxiao Jiang, Daniel Gervais, *Collective Management Organizations in China: Practice, Problems and Possible Solutions*, The Journal of World Intellectual Property Vol. 15, No. 3, p.221 (May. 2012).

market, there is only Music Copyright Society of China (MSCS) for the licensing of musical works; while the China Audio-Video Copyright Association (CAVCA)[130] is the only CMO in the field of music videos and other audio-video works. The rights practiced by MCSC and CAVCA are: the right of public performance, the right of public presentation, the right of broadcasting, the right of rental, the right of communication through information networks, the right of reproduction and distribution, and other copyright and related rights of musical works or audio-video works.[131]

On the basis of the Chinese copyright law's Chapter 1, General Provisions, CMOs can basically have a significant role in collecting and distributing copyright royalties within a licensing system. Article 8 indicates how the CMO will assist copyright holders and users to process the licensing procedure.

> "Copyright owners and the obligees related to copyright may authorize a collective management organization of copyright to exercise the copyright or the rights related to copyright. The collective management organization of copyright may, after being authorized, claim rights in its own name for the copyright owners and the obligees related to copyright, and may, as a party concerned, participate in the litigation and arbitration activities involved with copyright or the rights related to copyright." "A collective management organization of copyright shall be a non-profit organization, and the method of its establishment, its rights and obligations, the collection and distribution of the royalty for copyright licensing, as well as the supervision and management over it shall be separately provided by the State Council."

Until 2017, MCSC's total pretax remunerations of licenses had achieved over 216 million yuan RMB (approximately USD 32.088 million) and kept increasing. There was 17.2% growth compared the annual remuneration of over 0.18 billion in 2016.[132]Between 2017 and 2018, a sum of 405 fresh members affiliated to MCSC, incorporating 252 composers, 130 lyricists, 17 heirs, 3 publishers and 3 others. Before the start of 2018, the overall

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[130] China Audio-Video Copyright Association (CAVCA), *available at* http://www.cavca.org/enindex.php (last visited Apr. 2, 2019).

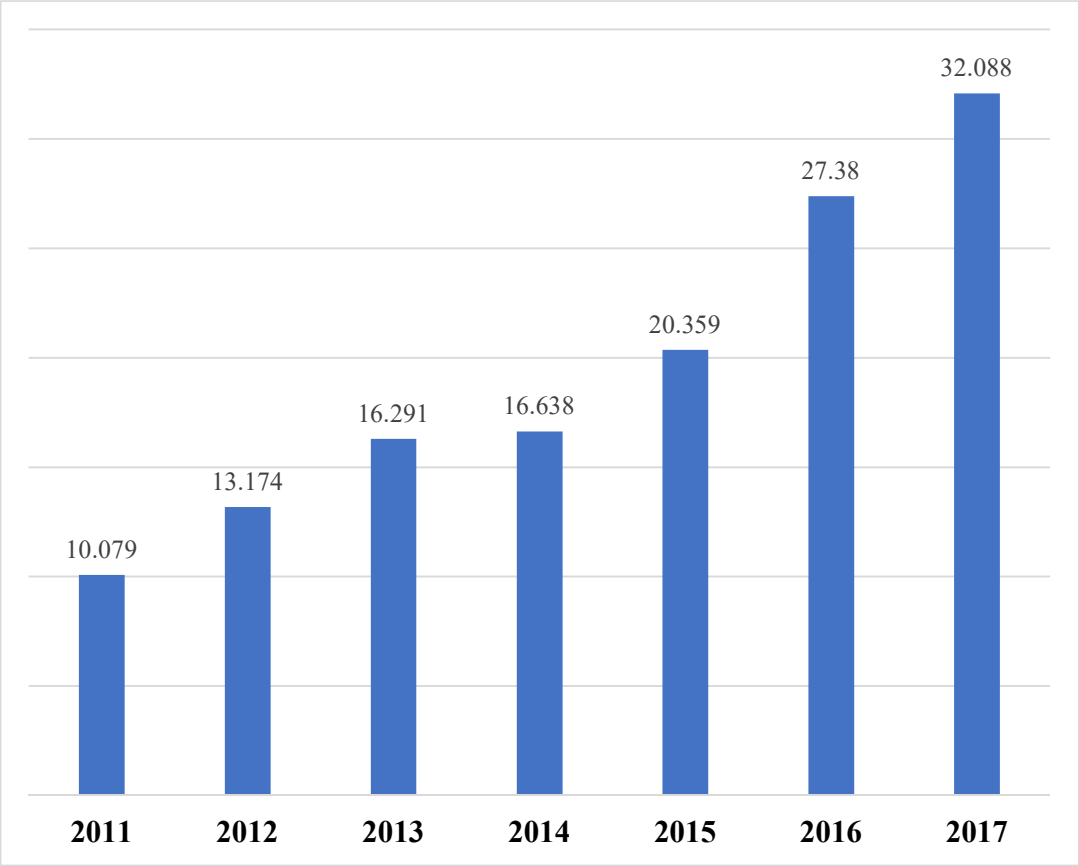
[131] Fuxiao Jiang, Daniel Gervais, *Collective Management Organizations in China: Practice, Problems and Possible Solutions*, The Journal of World Intellectual Property Vol. 15, No. 3, p.223 (May. 2012).

[132] MCSC (中國音樂著作權協會), 2017 Zhongguo Yinle Zhezuoquan Xiehui Niandu Baogao (2017 中國音樂著作權協會年度報告) [2017 MSCS Annual Report, The Chapter of Documentation], p9 (Apr. 28, 2018), *available at*http://www.mcsc.com.cn/infom-4-1.html (last visited Apr. 2, 2019).

numbers of MCSC members had arrived at 8,907, comprising 5,244 composers (59%), 3,269 lyricists (37%), 308 heirs (3%), 76 publishers (1%).[133]

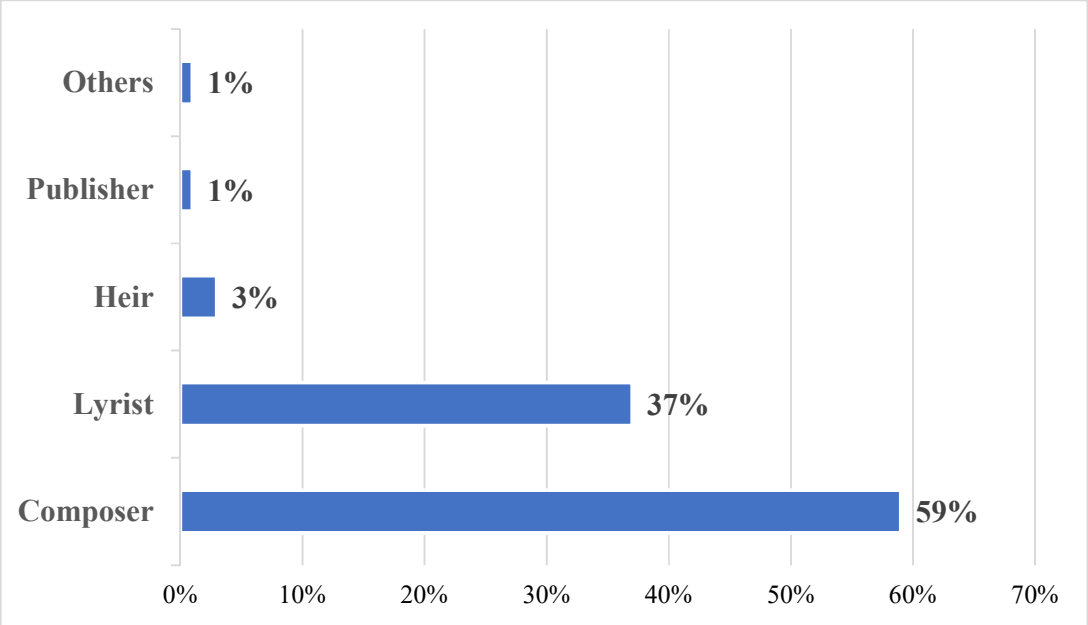
Figure 14：Total Licensing Revenue Trend of MCSC from 2011 to 2017

(Unit: million USD)[134]



[133] *Id.*
[134] *Id.*

Figure 15：The Membership composition of Music Copyright Society of China (Statistics of Dec. 31st, 2017, MCSC)[135]

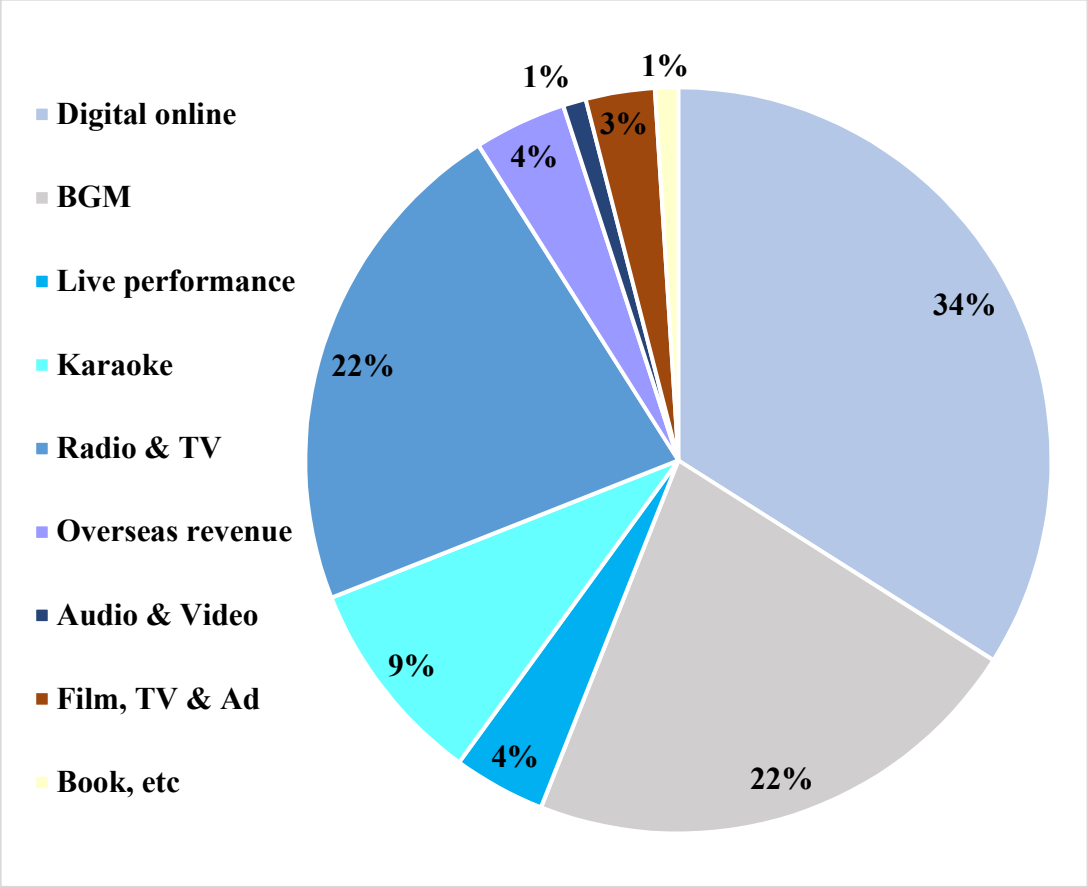


	Composer	Lyrist	Heir	Publisher	Others
Quantity	5244	3269	308	76	10

Amazingly, at year-end 2017, the overall licensing remuneration achieved US $32 million, an increase of 17% over the annual sum in 2016. The number of memberships continues to increase, since 405 new musical creators participate in MCSC including 252 composers and 130 lyricists.[136] Simultaneously, online music has become the most important part of revenue resource for MCSC.[137]

[135] *Id.*
[136] *Id.* at 8.
[137] *Id.* at 9.

Figure 16：Total Licensing Revenue Sources of MCSC in 2017



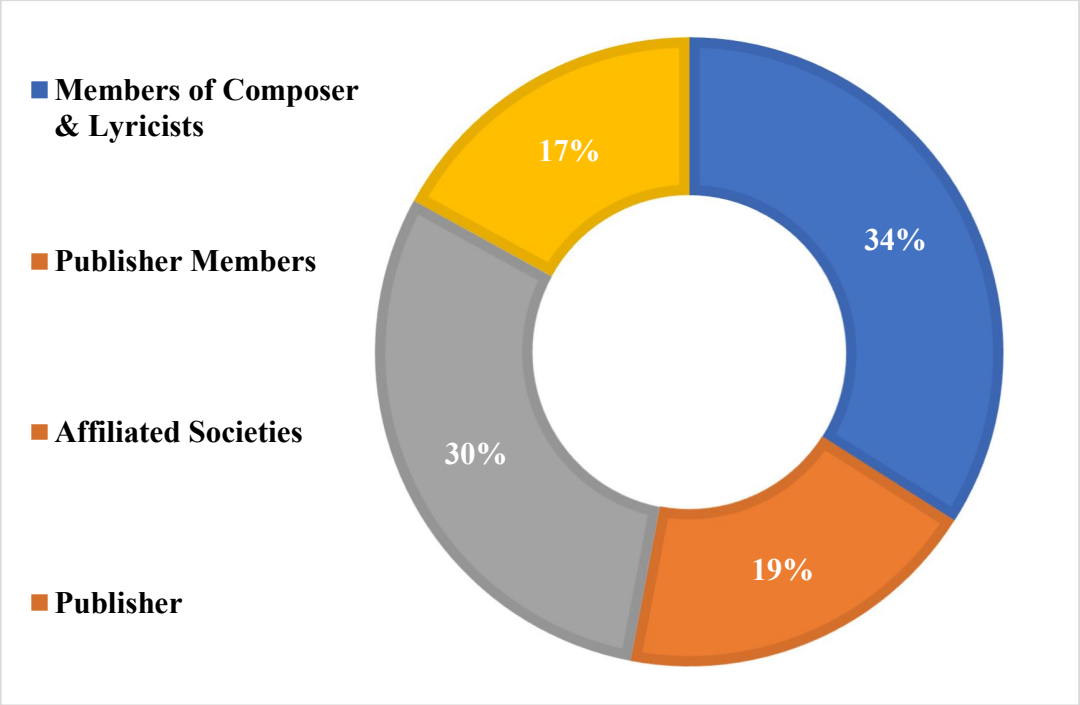
In 2017, the category of digital online music has become the main source of total revenue, representing 34%. Additionally, the other revenue sources in 2017 included Background Music (BGM, 22%), Radio & TV (22%), Karaoke (9%), Live Performance (4%), Overseas Revenue (4%), Film, TV & Advertisement (3%), Audio and Video (1%) and Book (1%).

In 2017, the headquarters of MCSC filed 53 civil lawsuits, incorporating an overall expenditure of 0.4 million yuan RMB. Over 4.76 million yuan RMB of royalty fee and compensation had been awarded by the courts; additionally, the prospective payment of 3.12 million yuan RMB was awaiting clearance in the near future. Moreover, via 28 legal settlements between MCSC's headquarter and infringers, an amount of 830,000 yuan RMB was retrieved.[138]

[138] *Id*. at 14.

Simultaneously, under the guidance of MCSC's headquarter, its regional branches filed 46 litigations relating music copyright infringement. With the legal affairs' expenditure of 0.3 million, 1.17 million yuan RMB of royalty fee and compensation had been awarded by the courts and the prospective payment, 0.22 million yuan RMB, was awaited for clearance in the near future. In addition, due to 16 legal settlements between MCSC's headquarters and infringers, an amount of 0.19 million yuan RMB was collected.[139]

Figure 17： Distribution by MCSC in Percentage in 2017



Organized by the author (The Data originated from 2017 MSCS Annual Report)

MCSC's licensing royalties have represented a considerable part of the musical artists' copyright earnings. On the basis of MCSC's annual report, until 2017, the total collected revenue had achieved pretax 216 million yuan RMB. From 2016 to 2017, there was an escalation of 17% in contrast to 2016's development. These years, the income growth of MCSC originated from the licensing of performance rights. Specifically, the remuneration offered by the Shanghai Disney Resort had acted as a strong boost for MCSC's licensing business. In the operation of Shanghai Disney Resort's licenses, at the initial stage, MCSC

[139] *Id.* at 14.

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. In fact, the MCSC's cooperation with Disney group brought China a very precious opportunity for leveling up its business strategy by further connecting to the international market, while the lesions it obtained from this collaboration with Disney group will stimulate its global vision and allow more transnational licensing in the following decades.[140]

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 MCSC's business arrangement. Moreover, Tencent's possible abuse of market power was actually threatening China's national on-line music business policies within the structure of the competitive market starting from 2016. Then, in March 2017, MCSC decided to report these anti-competitive behaviors to the authority, NCAC. Additionally, at several public events and by different approaches, MCSC lodged complaints to the corresponding official sectors to reveal the serious harms and dangers to the fair market and the economic incentives of musical artists, resulted from the "solo or exclusive licensing model" in this digital era.[141] Finally, in September 2017,NCSC released an administrative instruction for addressing the issues about the "solo or exclusive license model" and announced that the music on-line platforms such as Tencent should follow these economic orientations. In light of the copyright database and coding system, MCSC keeps aiming to strengthen the accuracy and reliability of them for building a more efficient and competent work flow.[142]

Likewise, through adopting DIVA system operated by Hong Kong's CASH, MCSC is finding a new approach to reinforce the information infrastructure for responding to the dramatic happenings of the mass digitalization era. In addition, MCSC is considering designing its own coding and data system for establishing a unique music management and licensing culture and circumstances with Chinese characteristics. These developing

[140] *Id.* at 5.
[141] *Id*.
[142] *Id*.

phenomena in the Chinese internal market could be expanded to the whole Mandarin market and equipped to be an influential factor in the modern digital music market in the global vision.[143]

Underneath the positive appearances, there still are some struggling challenges MCSC faces with regard to insufficiency of economic incentives and copyright protection for music creators. According to an academic questionnaire " the Status of Musicians' Survival and Copyright Cognition Report"(音樂人生存現況與版權認知狀況調查研究報告), interviewing 406 local musicians, and published by Communication University of China (中國傳媒大學) in 2018, over 60.06% respondents had never licensed their music words to copyright agencies[144].

Surprisingly, although MCSC is the only music collective management organization in Mainland China, the percentage of respondents who were MCSC member at that time was a mere 12 %, furthermore, for the respondents who are non-members, up to over a half of them have never heard MCSC (namely about 46% respondents didn't know the existence of MCSC), and 35% of the group have are not willing to attend MCSC. This investigation showed that MCSC had to reconsider how to promote its services and establish effective communication to access potential members.

In spite of a leap in the promising and large Chinese music market, lacking a blaze 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 memberships advantage over MCSC. For example, ASCAP and BMI have over 70,000 and 90,000 members respectively including songwriters, composers and music publishers, while MSCS merely has about 8,900 Memberships affect CMOs' efficiency deeply, so MCSC should think over how to be a useful agency to connect musicians and consumers, especially in this digital age when accessing works of music becomes easier and quicker than before.

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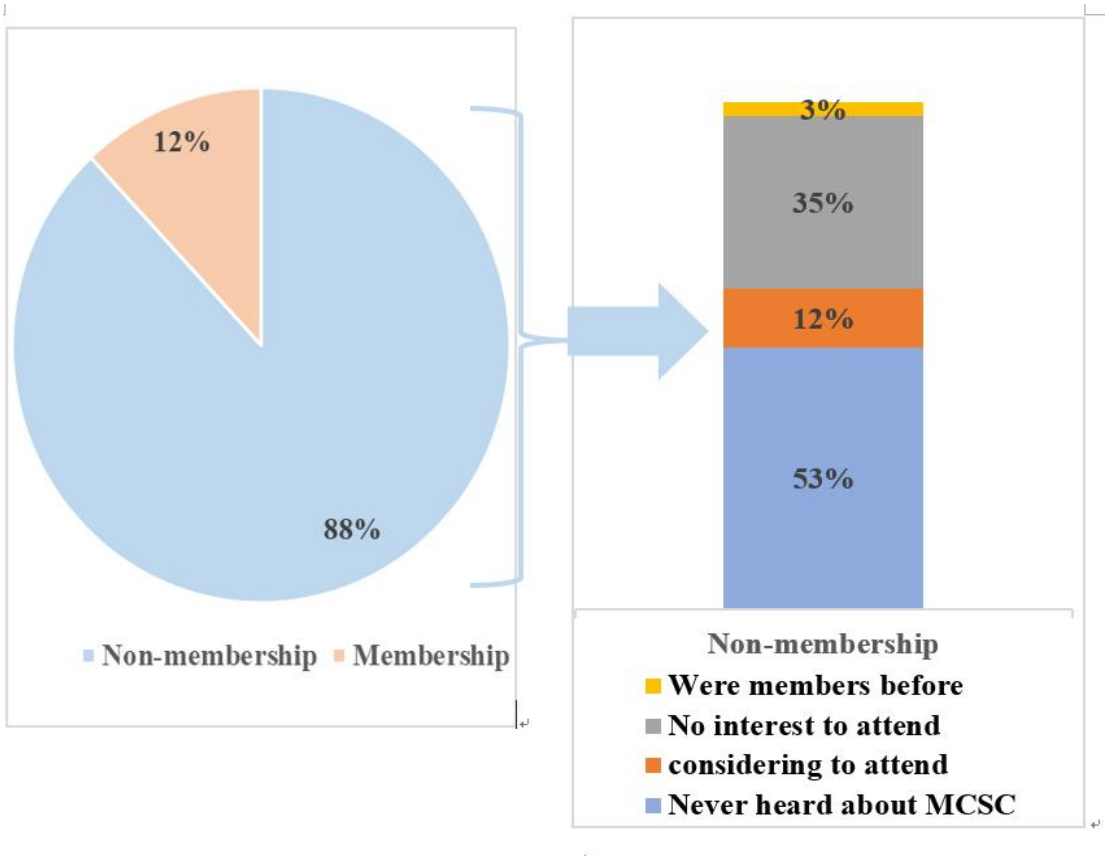
143 *Id.*

144 JHANG,FONG-YAN(張豐豔), *Yinleren Shengcun Xiankuang yu Banquan Renzhi Zhuangkuang Diaocha Yanjiu Baogao (音樂人生存現況與版權認知狀況調查研究報告) [Research Team, the Status of Musicians' Survival and Copyright Cognition Report]*, Communication University of China (中國傳媒大學) School of Music and Recording Art(音樂與錄音藝術學院), p34-35 (Sep. 2018).

Figure 18：Relationship between MCSC and Music Creators in China in 2018



F. Modern Implications: Innovative Technology and Legal Reform

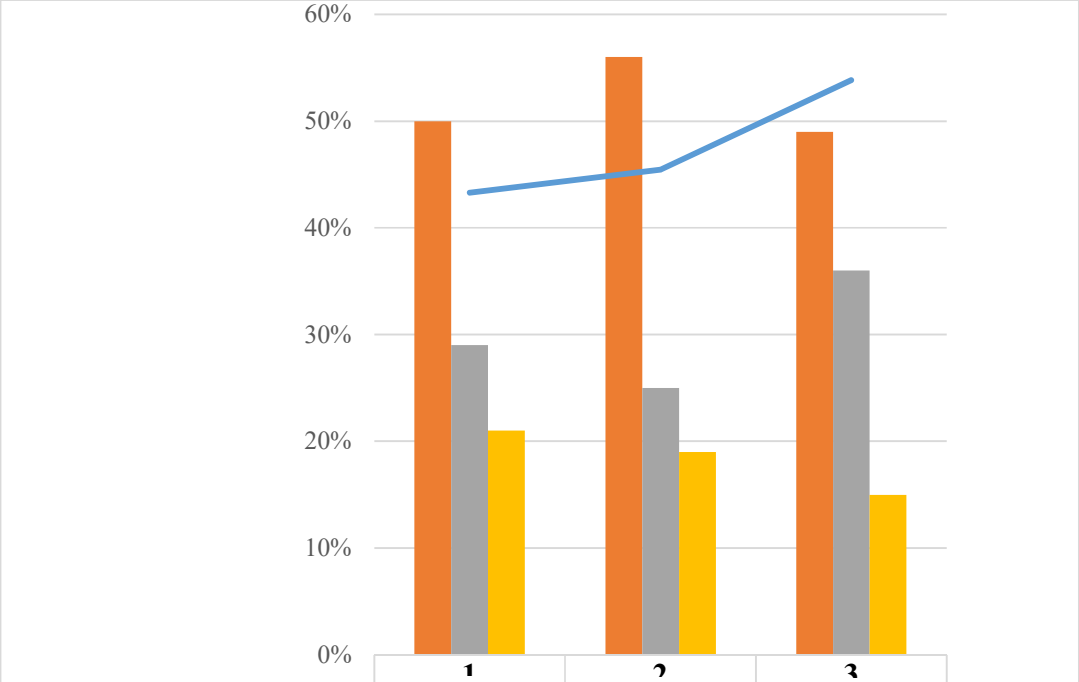
In terms of the technological and digital era in the 21st Century, the consistent growth of the music market necessitates essential legal reform and continuous innovative breakthroughs.[145] Based on the ideology of ethics and, historically, political controls, musical expression and production in Taiwanese and Chinese markets serves a primary

[145] *See* John Fang-jun Li & Guy Morrow, *Strategic leadership in China's music industry: A case study of the Shanghai Audio Visual Press, in* Arts leadership: International Case Studies, p.83-95 (Jo Caust ed., 2013); Liang Chen, *China's creative industries: Copyright, social network market and the business of culture in a digital age*, New Media & Society,Vol. 15 Issue 1, p.157-158 (Feb. 2013). John Fang-jun Li (李方軍), *Gaige Kaifang Yilai Zhongguo Yinle Chanye YanjiuHuodong ji Qi XiangGuan Wenti de Yanjiu (改革開放以來中國音樂產業研究活動及其相關問題的研究) [Research on the Music Industry Research Activities in China with Related Issues in China Since Reform and Opening]*, Journal of Wuhan Conservatory of Music China (黃鐘-武漢音樂學院學報), Vo2., p.150-153 (2012).

function for educational purposes. Nevertheless, the dramatic developments in technology and the global economy have spurred the Taiwanese and Chinese music markets to give more consideration to music copyright protection.

Music collective management organizations on both sides of the Taiwan Straits seem to be not well-prepared to face the new market transformation in the technological and digital era. In Taiwan, MÜST, being the main music copyright collective management organization and having the most members, received gradually increasing revenue in recent years, but the leading revenue source was still the traditional usage. Additionally, "Public Performance" taking more than 50%. In contrast, economic profits from digital music licensing fees didn't have obvious growth.

Figure 19：Annual Revenue and Sources of MÜST from 2015 to 2017[146]

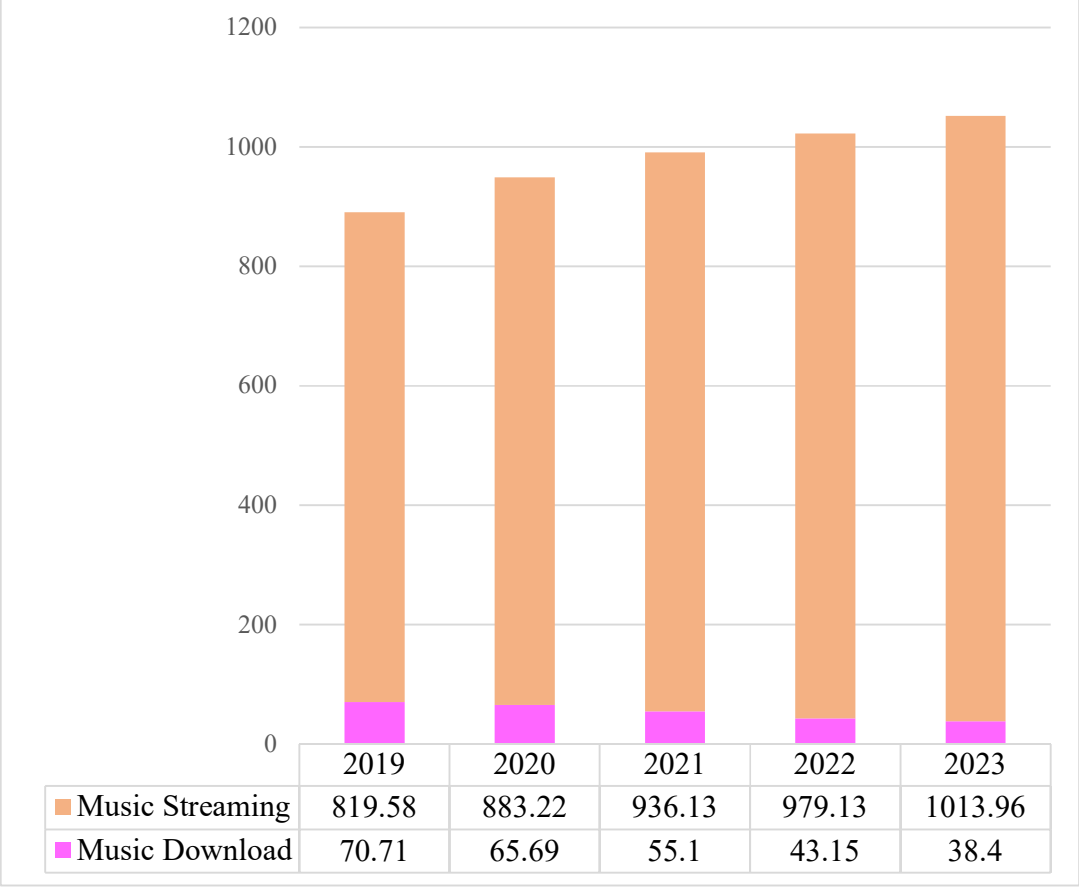


[146] Statistics recompiled by author, originally from: MÜST, , Shiyong Baochou Fenpei Gaishu (Overview of Compensation Distribution) [使用報酬分配概述], *available at* https://www.must.org.tw/tw/about/11.aspx (Apr. 14, 2019).

For the China music market, noticeable consumer behavior changes and an economic potential boost led by technology are two important current phenomena. In some future trends assessments, China was predicted to create about 25% revenue growth in the coming five years. Just as the main digital music format changed all around the world, annual download music revenue will keep steady and even decrease slightly and gradually, in contrast, streaming music has become the most profitable and prevalent, which means digital technology developments have twisted music-received habits dramatically, and China is not an exception. Moreover, China continually has more digital music consumers than other regions, and that means that whether or not a reasonable licensing system is established and run will deeply affect Chinese creators' music copyright protections.

Figure 20：Forecasted Digital Music Revenue in China from 2019 to 2023[147]

(in million USD)

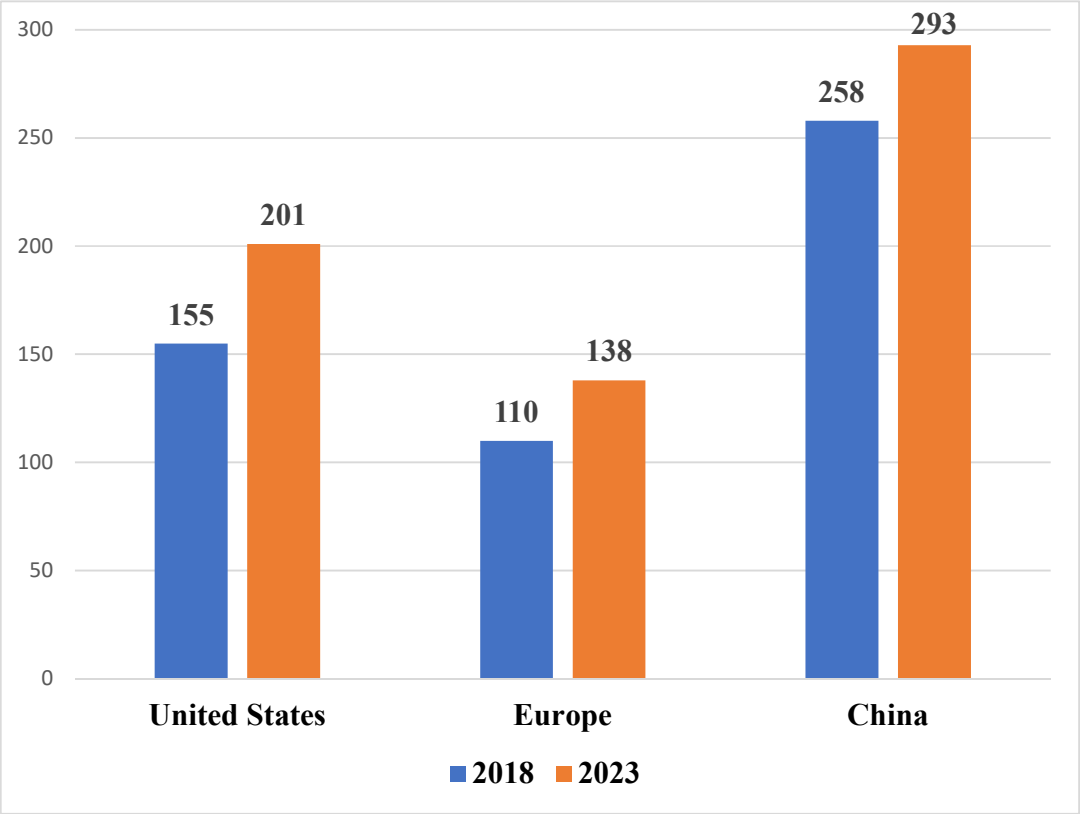


	2019	2020	2021	2022	2023
Music Streaming	819.58	883.22	936.13	979.13	1013.96
Music Download	70.71	65.69	55.1	43.15	38.4

[147] Statista Digital Market Outlook– Market Report, *Digital Media Report 2019 –Digital Music*, p.5 (April, 2019), *available at* https://www.statista.com/study/44526/digital-media-report/ (last visited Apr. 28, 2019).

Figure 21：Forecasted Number of Music Streaming Users by 2023[148]

(in millions)



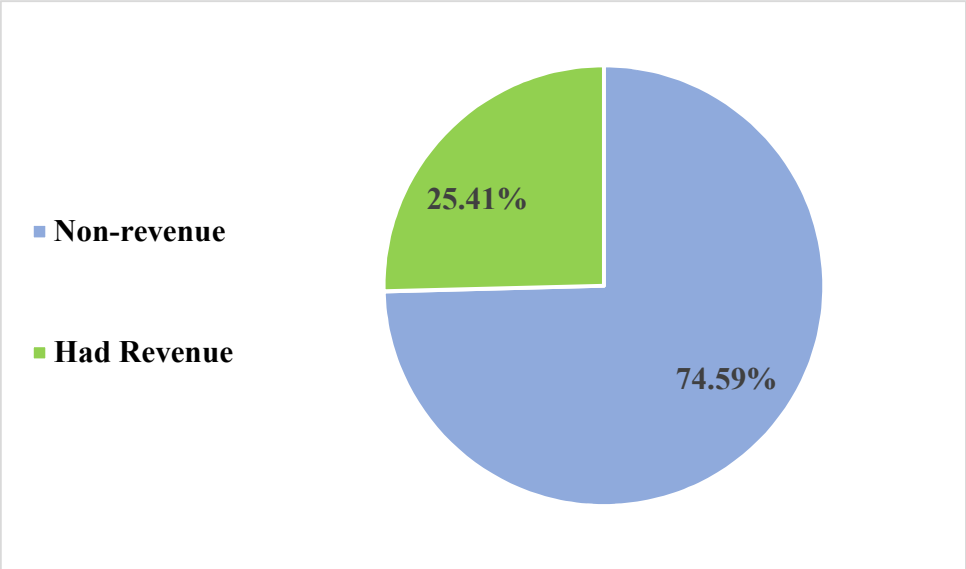
With an extensive base of consumers using the music format, music creators in China should have higher expected revenue from the licensing system, while music management organizations in China seem to lack of an effective and reliable licensing and economic incentive procedure. Especially, nowadays around 70% of Chinese musicians have experience in using of technologic approach, such as digital platforms and internet[149], to gain fame for themselves or their songs, but about 75% of them never received copyright written profit from digital platforms or any agent. Among those who had earned some money from the digital approach, almost a half got less than 100 RMB (about 15 USD) per

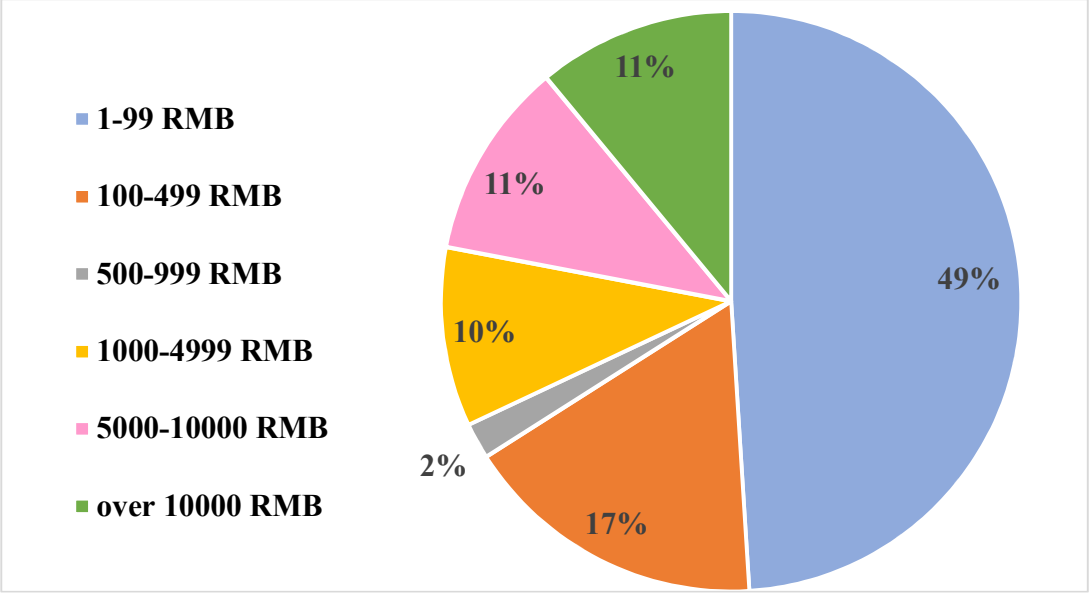
[148] *Id.* at 10.

[149] JHANG,FONG-YAN(張豐豔), Yinleren Shengcun Xiankuang yu Banquan Renzhi Zhuangkuang Diaocha Yanjiu Baogao (音樂人生存現況與版權認知狀況調查研究報告) [Research Team, the Status of Musicians' Survival and Copyright Cognition Report], Communication University of China (中國傳媒大學) School of Music and Recording Art(音樂與錄音藝術學院), p32-33 (Sep. 2018).

year. In other words, when digital platforms (streaming media, download music and App) become the main access mode for both music creators and consumers, not only the music business environment but also the licensing system confront a new situation which needs novel perspectives to encourage culturally creative behaviors with proper incentives and useful licensing models.

Figure 22：Chinese Musicians' Earnings Position from Digital Platforms[150]





[150] *Id.* at 33.

IV.CRITICAL CHALLENGES IN COPYRIGHT AND MUSIC LICENSING

A. Monopolies and Competitive Markets

1. Legal System and Tradition

The two diverse philosophies on regulating Collective Management Organizations (CMOs) on the basis of civil law (European System) and common law (U.S. System) traditions are opposite and contrary. In the European system, it is frequently found that only one CMO is allowed in an individual product market, and the supervision from the government is formed to control this specific market arrangement. In this pathway, two stages of procedures should be facilitated. The first stage is to frame and confirm the CMO's monopoly power by governmental regulations. The second stage is to implement sufficient administration for overseeing and preventing the happening of market abuse on the ground of CMO's *de facto* (in fact) or *de jure* (legal) monopoly. In this model, the CMO's given monopoly is based on the performance of governmental controls and regulations.[151]

Compared to the European style channel, the U.S. creates an antitrust approach to form a fair and competitive market within the scope of the Sherman Antitrust Act. CMOs in the U.S. market are governed by the regulations originated for the formation of corporate and antitrust law environment.[152] The competition among CMOs of music performing rights is regarded as a very successful model within the U.S. antitrust law doctrine.[153]

The distinctions of these two models reveal the contrary ideologies and theories behind these two separate market and copyright mechanisms. The European model (Civil Law Tradition) originates from the foundation of human rights (which concentrated on the essence of moral right) whereas the U.S. model (Common Law Tradition) is nurtured by the value of economic right (which focused on the function of utility and

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[151] *See* Adolf Dietz, *Legal Regulation of Collective Management of Copyright (Collecting Societies Law) in Western and Eastern Europe*, Journal of Copyright Society of the United States of America, Vol. 49, Issue 4,p.897–903 (Jun. 2019).

[152] Michael A. Einhorn, *Intellectual Property and Antitrust: Music Performing Rights in Broadcasting*, Columbia: VLA Journal of Law & the Arts, Vol. 24 Issue 4,p.349, 354 (2001); Xiong Qi (熊琦), *Zhezuoquan Jitiguanli 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]*, Journal of Comparative Law (比較法研究), Vol.4, 2016, p.46 (2016).

[153] *See* Daniel Gervais, *The Landscape of Collective Management Schemes*, Columbia Journal of Law & the Arts, Vol. 34, Issue 4, p.600-610 (2011).

practice).[154]However, it is believed that the diversity of regulatory models is connecting and relevant to the unique domestic humanity and market culture. That is why history always reminds us to be humble about thinking for others. This "humility precept" should also be applied when we find the answers for the issues in China.

2. Legal Design of Monopoly Position

On the basis of civil law tradition, the Chinese legal system seems to greatly succeed the legal philosophy of European countries. These clues can be found in the Regulations on the Copyrights Collective Administration (RCCA) and further examples are proved in the following explanations.

For the purpose of the affirmation of a monopoly position, China designs several regulatory methods to exercise its controls in the music market. First, according to the RCCA article 5, the CMOs in China are all administered and supervised by the governmental copyright institution, the National Copyright Administration of the People's Republic of China (NCAC). Second, in China, there is a comparatively high entry barrier to found a CMO. According to the RCCA article 7, for the establishment of an organization for collective administration of copyright, the conditions below should be fulfilled:

> "(1) There shall be no less than 50 obligees who promote the establishment of the organization for collective administration of copyright; (2) The scope of business of the organization for collective administration of copyright shall not overlap with that of another lawfully registered organization for collective administration of copyright; (3) The organization for collective administration of copyright may represent the benefits of relevant obligees throughout the country."[155]

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[154] *See* Adolf Dietz, *Legal Regulation of Collective Management of Copyright (Collecting Societies Law) in Western and Eastern Europe*, Journal of Copyright Society of the United States of America, Vol. 49, Issue 4, p.897–903 (Jun. 2019).

[155] Article 7 Chinese citizens, legal persons or other organizations that lawfully enjoy copyright or a copyright-related right, may promote the establishment of an organization for collective administration of copyright. For the establishment of an organization for collective administration of copyright, the following conditions shall be fulfilled:(1) There shall be no less than 50 obligees who promote the establishment of the organization for collective administration of copyright;(2) The scope of business of the organization for collective administration of copyright shall not be overlapped with that of another lawfully registered organization for collective administration of copyright;(3) The organization for collective administration of copyright may represent the benefits of relevant obligees throughout the country;(4) The organization for collective administration of copyright has formulated a draft of its articles of association, a draft of royalty

This standard is comparatively high and not easy to fulfill. Third, according to the RCCA article 20, an "exclusive license" is formed between the CMO and the member, during the time of establishing a contract with a CMO while an obligee shall not perform by himself/herself to license others to use the copyrights that are specified in the contract to be performed by the organization for copyright collective administration.[156]

Moreover, let us assume it is controversial when the music CMOs in the Chinese music market possesses exclusive rights to manage members' copyright. The CMOs in China do not allow its members to make these direct licenses, strictly prohibiting members from "self-licensing" in their representation agreement. This restriction limits how artists can license in China, often choking efficiency and flexibility in terms of copyright management. In China, the music copyright is granted by the National Copyright Administration of the People's Republic of China (NCAC). If the members want to license music on their own, it must first be permitted by the authorities. Although this restriction possibly has the danger of violating the competition laws, Chinese music CMOs and the NCAC think this clause will ensure the functionality of these CMOs.[157]

3. Regulation of Monopoly Abuses

In the considerations for the safeguard of "monopoly abuse", several regulatory measures are inserted into the RCCA. First, according to the RCCA Article 23, a "non-exclusive license" basis is exercised between the CMO and the user.

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rates to be charged, and a draft of the measures for transferring royalties to the obligees (hereinafter referred to as royalty transfer measures).

[156]RCCA Article 20.

[157] The fact that CMOs in Mandarin music market have an exclusive right to manage their members' copyrights is a very controversial topic in Mandarin music market. China and Taiwan differ slightly on this topic. In China, music copyrights are granted by the National Copyright Administration of the People's Republic of China (NCAC). If the members want to license music on their own, it must first be permitted by the authorities. In Taiwan, the music CMOs entirely prohibit theirs members from direct license by the clauses in the membership contract. Although this restriction may violate competition laws, the CMOs greatly benefit from these clauses and seek to maintain them. By contrast, in the U.S., CMOs such as ASCAP, BMI and SESAC only hold non-exclusive rights in managing their members' copyrights. In other words, U.S. artists can directly license their music rights to others. United States v. American Society of Composers, Authors and Publishers (ASCAP) et al., No. 09-0539, 2010 WL 3749292 (2nd Cir. 2010); Council of Better Business Bureaus (BBB, founded in the U.S.), *Music in the Marketplace*, *available at* http://www.bbb.org/council/for-businesses/toolkits/bbb-brochure-music-in-the-market-place (last visited Apr. 2, 2019).

> "The CMO shall not conclude with any user a contract of license for exclusive use. Where any user requests with reasonable conditions to conclude with the CMO for a copyright license, the CMO shall not refuse such request."[158]

Second, according to the RCCA Article 25,

> "The CMO shall negotiate with the user according to the royalty charging rates announced by the copyright administration department under the State Council (NCAC), so as to stipulate the specific amount of chargeable royalties with the user.[159]"

Third, according to the RCCA Article 38,

> "The CMO shall lawfully accept the supervision of "the civil affairs department under the State Council and other relevant departments" (Article 38)."[160]

Particularly, in others' views of the RCCA Chapter V (Supervision over CMO), they also show that, The CMO shall lawfully launch "financial and accounting systems", as well as "asset management systems", and shall also install "accounting books" according to "relevant provisions of the State" (Article 30),[161] "the use and financial management of the assets of the CMO" shall be under the governance of "the copyright administration department, NCAC, and the department of civil affairs under the State Council" (Article 31)[162] and "the copyright administration department under the State Council" may supervise CMO and shall "make records on the supervision activities" (Article 37)[163]

[158] RCCA Article 23
[159] RCCA Article 25
[160] RCCA Article 38
[161] RCCA Article 30
[162] RCCA Article 31
[163] RCCA Article 37: "The copyright administration department under the State Council may supervise CMO and shall make records on the supervision activities:(1) Inspecting whether the business activities of the organizations for collective administration of copyright conform to this Regulation and their respective articles of association; (2) Checking the accounting books, annual budget reports, final accounting reports and other relevant business materials of the organizations for collective administration of copyright; (3) Sending its staff members to attend the important meetings of the general assemblies and councils, etc. of the organizations for collective administration of copyright."

4. Due Process on Price Setting: Seeking Transparency and Accountability

The consequences of monopoly abuse usually come out within certain conditions: First, inappropriate prejudice to users in identical status; Second, to decline the license in the absence of legal reasons; Third, to stipulate price and licensing terms on an arbitrary basis. As a matter of fact, generally for an expanding market, at the initial period, it is relatively hard to urge that CMOs have faults to result in monopoly abuses on account of prejudice to licensees, or deciding to decline to offer licenses. Nevertheless, the arbitrary decision on price and contractual terms could be connected to the problems of evidence (burden of proof) or accountability (transparency). The licensees commonly dispute the high price setting, while the standard for fairness seems always changing and unpredictable.[164]

The governmental regulation administers music market in three parts: access, pricing and competition. The largest music economy in the world, the U.S., has established an administrative tribunal, the Copyright Royalty Board (CRB), which decides the fee plan for the music license. In comparison, China still relies on the government administration to review and set up the rate plan. However, when China's music market is also extraordinarily huge, the current rate-setting pattern causes considerable transactional costs and seems unreasonable.[165]

In China, the CMO's price setting may generally not contradict the version announced by the NCAC. However, the possibility of discord between the CMO and NCAC cannot be excluded. This is why we have to maintain the function of the competitive market, and why the abuse should be restricted and regulated. This issue will be harmful to the Chinese market.

To explain, in 2006, the price setting announced and confirmed by the NCAC was exactly the one advocated by the MCSC and CAVCA.[166] This complexity of price setting on

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[164] Fuxiao Jiang, Daniel Gervais, C*ollective Management Organizations in China: Practice, Problems and Possible Solutions*, The Journal of World Intellectual Property Vol. 15, No. 3, p. 230 (May. 2012).

[165] *Id.*

[166] Shiyu Chengshi Jiti Dizhi KTV BanquanFei,Lianhe Qianming Shengyuan Guangzhou (十餘城市集體抵制 KTV 版權費聯合簽名聲援廣州) [Karaoke Industry In China Stand Up And Go Against to the Rate Setting By CAVCA And NCAC], Netease(網易科技), (Nov. 23, 2006), *available at* http://tech.163.com/06/1123/08/30JNSHO8000915BD.html(last visited Apr. 6, 2019).

karaoke licenses makes the coincidence unreasonable. In this issue, it seems the supervision of government fails its competence. Alternatively speaking, it is assumed the general price setting approved by the NCAC is only the reconfirmation of the proposal.[167]How to design a better system to avoid this potential risk of abuse, therefore, becomes a crucial mission for the Chinese music market. Due process for deciding the price setting needs an environment the accomplishment of transparency.

B. Civil Law Tradition: Questions of Juridical Standing to File Lawsuits

In China's CMO system, one of the primary issues is how to interpret the term of "standing" on the basis of a transplant legal history in China. The primary question is whether the CMOs or rightsholders in China have the standing, *locus standi*, to file lawsuits? It is believed that the commercial foundation between sellers and buyers is credence and reliance. With the assistance of the middlemen, the faith of trust cements the cooperation between right-holders, CMO and users. [168] In a sense, the CMO is an agency comprehending member' interests and managing the members' licensing affairs on behalf of its own name. According to the Regulation on the Collective Administration of Copyright (RCCA), Article 2 indicates:

> "Collective administration of copyright, which is mentioned in this Regulation, shall mean the following activities carried out by the organizations for collective administration of copyright in their respective own names upon authorization of the obligees, so as to exercise the obligees' relevant rights in a centralized way: (1) Concluding with the user a license contract of copyright or of a copyright-related right (hereinafter referred to as license contract); (2) Charging royalties from the user; (3) Transferring royalties to the obligee; (4) Participating in litigation or arbitration, etc. involving copyright or a copyright-related right."[169]

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[167] China Audio-Video Copyright Association (CAVCA), official information about the rate setting, *available at* www.cavca.org/news_show.php?un=xhxw&id=303&tn=%D0%AD%BB%E1%D0%C2%CE%C5 (last visited Apr. 2, 2019).

[168] *See* Jia Wang, *Should China Adopt an Extended Licensing System to Facilitate Collective Copyright Administration: Preliminary Thoughts*, European Intellectual Property Review, Vol. 32, No. 6, p.283–289 (2010).

[169] RCCA Article 2

Even though, the legal notion of "fiduciary relation" in the Chinese legal institution has its distinct meaning in common law tradition, Article 2 of the Trust Law of China demonstrates a clue which is "according to the will of the settler and in the name of the trustee".[170]This vague interpretation or legal design about the word of "trust" in this article implies the Chinese legal tradition probably situates in a mixture of legal culture between Common Law and Civil legal institutions.[171] From this viewpoint, the Chinese legal institution merges the classical ideology from common law tradition with the agency oriented approach of civil law tradition. The sole ownership from common law tradition is assumed conflicting with the dual ownership (incorporating legal and equitable ownership) from civil law tradition.[172]

Table 4：The Top10 Non-Natural Person Plaintiffs and Their Respective Number of Cases in China[173]

	Name of Legal person	Numbers
1	China Audiovisual Copyright Collective Management Association (中國音像著作權集體管理協會)	34,793
2	Shenzhen Caizhiniao Records Co., Ltd. (深圳菜之鳥唱片有限公司)	1,714
3	Guangzhou KuGou Computer Technology Co., Ltd. (廣州酷狗電腦科技有限公司)	514
4	Beijing Shengshijiaoyang Culture Communication Co., Ltd. (盛世驕陽_北京智新文化傳播有限公司)	493

[170] *See* Jia Wang, *Should China Adopt an Extended Licensing System to Facilitate Collective Copyright Administration: Preliminary Thoughts*, European Intellectual Property Review, Vol. 32, No. 6, p.283–289 (2010).

[171] Trust Law of the People's Republic of China (Adopted at the 21st Meeting of the Standing Committee of the Ninth National People's Congress on April 28, 2001 and promulgated by Order No. 50 of the President of the People's Republic of China on April 28, 2001), *see* CHINA.COM (中國網), *available at* http://www.china.org.cn/china/LegislationsForm2001-2010/2011-02/12/content_21907980.htm (last visited Apr. 6, 2019).

[172] *See* Fuxiao Jiang, Daniel Gervais, *Collective Management Organizations in China: Practice, Problems and Possible Solutions*, The Journal of World Intellectual Property Vol. 15, No. 3, p. 221-237 (May. 2012).

[173] KING & WOOD MALLESONS LEGAL MINER (金杜律師事務所法律研究院), *Shiting Jiemu Zhezuoquan Sifa Baohu Shiwu Zongshu ji Daziliao Fenxi Baipishu, (視聽節目著作權司法保護實務綜述及大資料分析白皮書) [White Paper for a Practical Overview and Big Data Analytics of Judicial Precedent for Copyright Disputes in Audiovisual Programs]*, p.15 (Mar. 7, 2019), *available at* https://www.legalminer.com/ (last visited Apr. 23, 2019).

5	Shenzhen Shengying Network Technology Co., Ltd.(深圳市聲影網路科技有限公司)	464
6	Fuzhou Dade Culture Communication Co., Ltd. (福州大德文化傳播有限公司)	427
7	Taobao (China) Software Co., Ltd (淘寶（中國）軟體有限公司)	378
8	Beijing Youpengpule Technology Co., Ltd. (北京優朋普樂科技有限公司)	337
9	Letv Mobile and Intelligent Information Technology (樂視網資訊技術（北京）股份有限公司)	332
10	Shenzhen Xunlei Networking Technologies Ltd (迅雷網路技術有限公司)	317

Organized by the author (Legal Miner, Big Data Analytics of Judicial Precedents for Copyright Disputes in AV Program)

Table 5：The Top10 Non-Natural Person defendants and Their Respective Number of Cases in China[174]

	Name of Legal person	Numbers
1	Yantai Leishi Electroacoustic Trading Co.,Ltd. (煙臺雷石電聲商貿有限公司)	566
2	Wuhan Ledi Bear Music Entertainment Co.,Ltd. (武漢樂迪熊音樂娛樂有限公司)	421
3	A Shenzhen certain Entertainment Co., Ltd. (深圳市某娛樂有限公司)	345
4	Alibaba (Hangzhou) Cultural and CreativeCo., Ltd. (阿里巴巴（杭州）文化創意有限公司)	330
5	Heyi Information Technology (Beijing) Co., Ltd.(合一資訊技術（北京）有限公司)	241
6	Zhongshan Xingtiandi Entertainment Co., Ltd. (中山市星天地娛樂有限公司)	233
7	Shanghai Shuidushi Information TechnologyCo., Ltd. (上海水渡石資訊技術有限公司)	221
8	Guangzhou KuGou Computer TechnologyCo., Ltd. (廣州酷狗電腦科技有限公司)	210

174 *Id.*

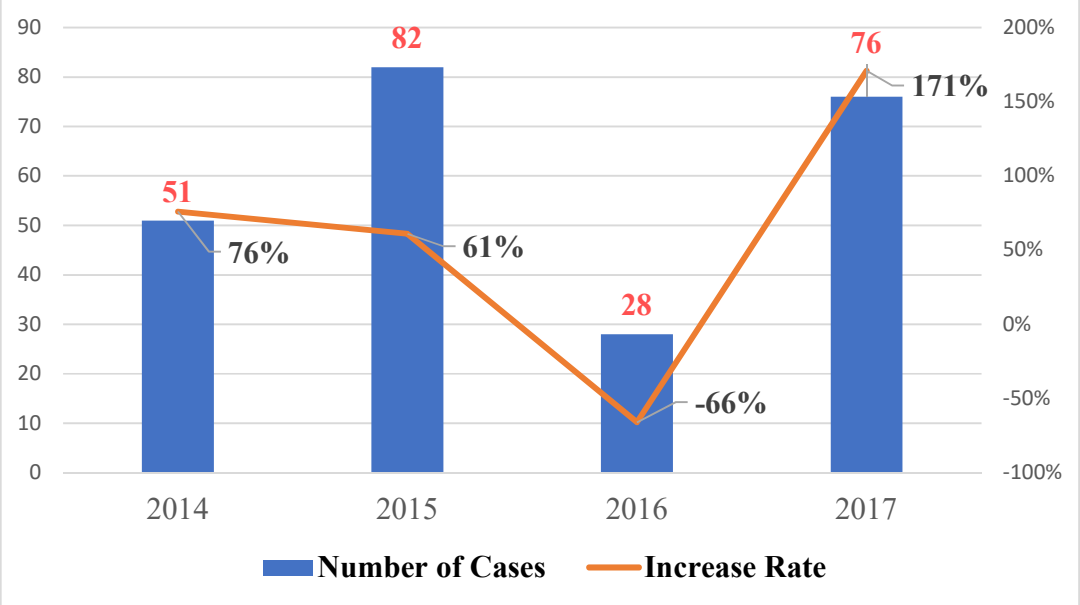
9	Hangzhou Haoledi Fanxing EntertainmentCo., Ltd. (杭州好樂迪繁星娛樂有限公司)	208
10	Kuliu network (Beijing) Information TechnologyCo., Ltd. (酷溜網（北京）資訊技術有限公司)	205

Organized by the author (Legal Miner, Big Data Analytics of Judicial Precedents for Copyright Disputes in AV Program)

C. Potential for Massive Lawsuits Affect the Karaoke Industry

In these past few years, the quantity of judicial cases going against the infringements of karaoke machines through non-membership in CMOs has grown. However, the revenue of karaoke licensing fees collected by CMOs does not substantially be secured in the meaning time. In 2009 and 2010, there were just 10 and 39 karaoke cases, respectively, raised by nonmember of CMOs. Surprisingly, in 2011, the number of karaoke cases through nonmembers of COMs had reached over 350.[175]

Figure 23：Copyright Contract Disputes Related to Audiovisual Programs[176]

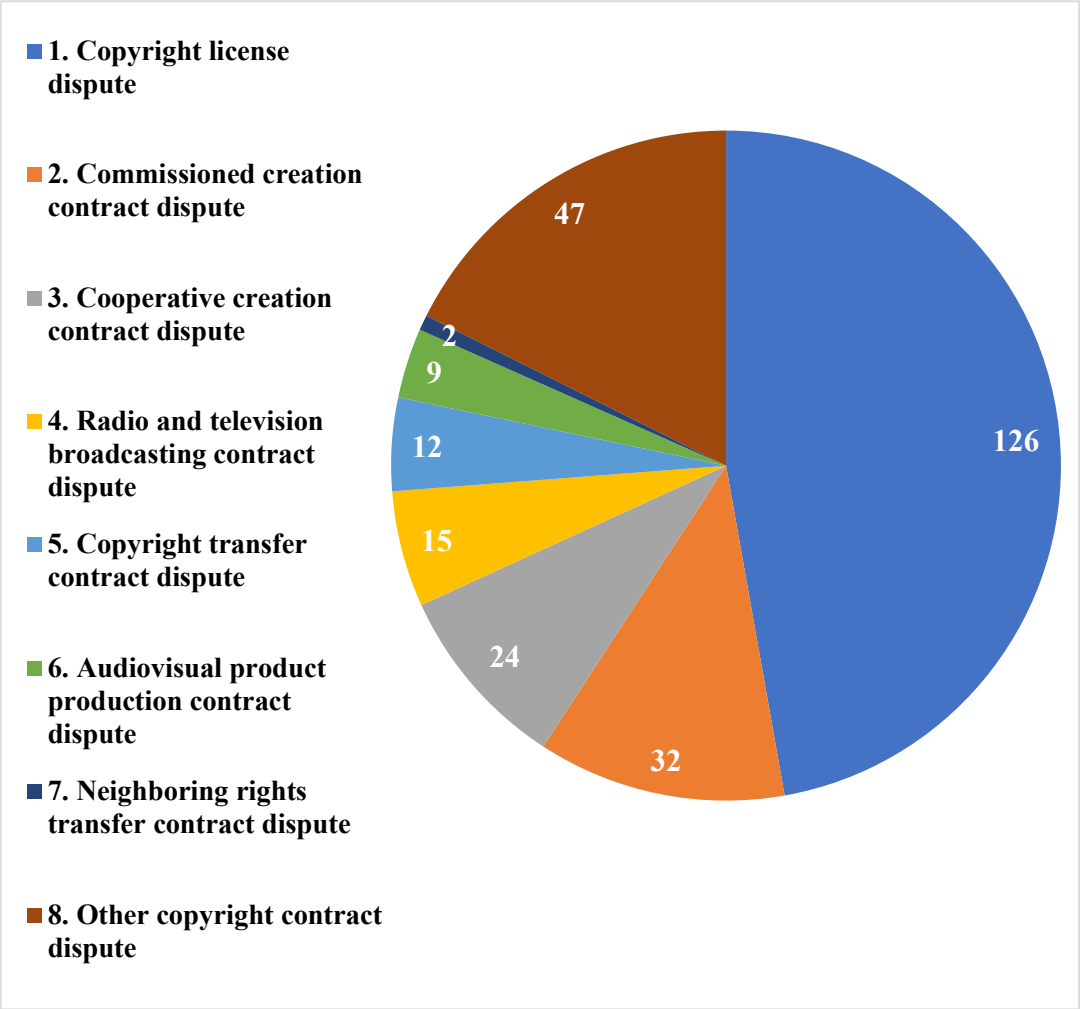


[175] Fuxiao Jiang, Daniel Gervais, *Collective Management Organizations in China: Practice, Problems and Possible Solutions*, The Journal of World Intellectual Property Vol. 15, No. 3, p. 227 (May. 2012).

[176] KING & WOOD MALLESONS LEGAL MINER (金杜律師事務所法律研究院),*Shiting Jiemu Zhezuoquan Sifa Baohu Shiwu Zongshu ji Daziliao Fenxi Baipishu, (視聽節目著作權司法保護實務綜述及大資料分析白皮書) [White Paper for a Practical Overview and Big Data Analytics of Judicial Precedent for Copyright Disputes in Audiovisual Programs]*, p.8 (Mar. 7, 2019), *available at* https://www.legalminer.com/ (last visited Apr. 23, 2019).

Organized by the author (Legal Miner, Big Data Analytics of Judicial Precedents for Copyright Disputes in AV Program)

Figure 24：Causes of Copyright Contract Disputes concluded by court in Audiovisual Programs from 2013 to 2017 (Number of Cases)

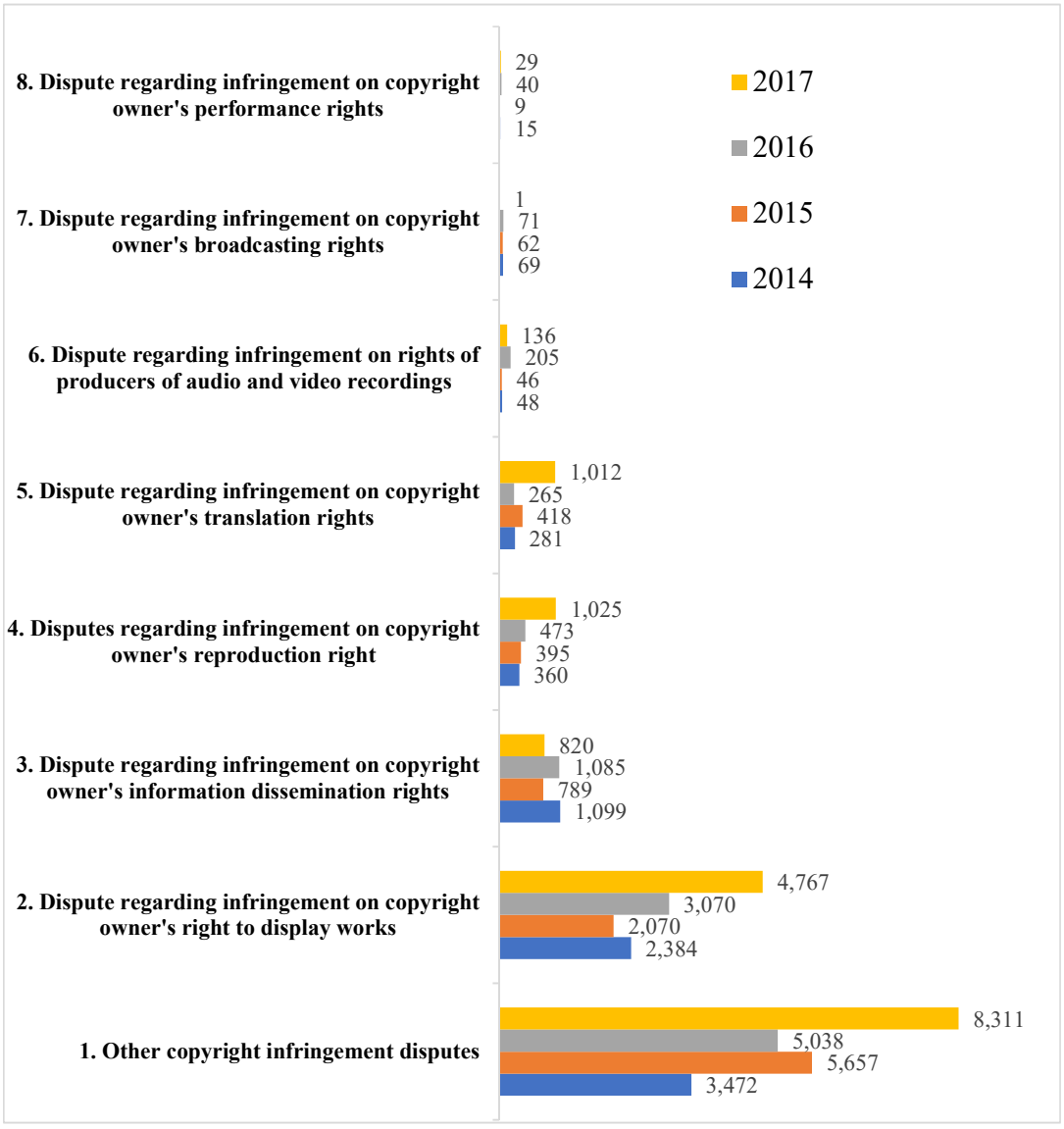


Organized by the author (Legal Miner, Big Data Analytics of Judicial Precedents for Copyright Disputes in AV Program)

The non-members generally deny consigning their copyright to the corresponding CMOs such as Music Copyright Society of China (MCSC) or China Audio-Video Copyright Association (CAVCA). Therefore, litigation between karaoke corporations and CMOs becomes a genuine business for law firms in China. In fact, the boom of lawsuits by nonmembers substantially moves the fixed profits of CMOs when karaoke corporations start to ignore the necessity to hand in licensing fees for CMOs. Karaoke corporations in China found to commit licensing fees to CMOs do not avoid the massive lawsuits by

nonmembers of CMOs.[177] The distortion made by the boom of lawsuits from nonmembers is resulting in disruptive consequences to the music CMOs and even the whole music remuneration system in China.

Figure 25：Copyright Infringement Disputes under Specific Causes of Action in Audiovisual Programs in China (from 2014 to 2017)



Organized by the author (Legal Miner, Big Data Analytics of Judicial Precedents for Copyright Disputes in AV Program)

[177] Fuxiao Jiang, Daniel Gervais, *Collective Management Organizations in China: Practice, Problems and Possible Solutions*, The Journal of World Intellectual Property Vol. 15, No. 3, p. 227-228 (May. 2012).

It is believed that the incomprehensive collections in the CMOs' repertoires result in the lawsuit boom raised by nonmembers. In particular, even on the basis of a blanket license, the karaoke corporations have just been permitted to employ the songs included in the repertoires of CMOs. If the CMOs don't cluster all valuable songs in their repertoires, karaoke corporations take legal risks of copyright infringement to provide their play-along tracks to the consumers.

D. Expansion of the Compulsory Licensing Arrangement

Under the U.S. structure, ASCAP and BMI's consent decrees are censored by a Federal rate court in New York City. It is generally regarded as a rate court. The consent decrees actually put government restrictions on ASCAP and BMI's implements.[178] Otherwise, when users request licensing, ASCAP and BMI should grant a license to them under the rate plan formed by negotiation or litigation in the rate court.[179] As sales of CDs continue to diminish, mechanical licensing revenues for the reproduction and distribution of musical works under section 115 of the US Copyright Act likewise continue to decline.[180]

The Compulsory Licensing Provisions (Section 115 of the Copyright Act) states:

> "This section provides a compulsory license to make and distribute phonorecords once a phonorecord of a work has been distributed to the public in the United States under authority of the copyright owner, subject to certain terms and conditions of use. Such a license includes the right of the compulsory license to distribute or authorize the distribution of a phonorecord of a nondramatic musical work by means of a digital transmission, which constitutes a digital phonorecord delivery.

[178] Joan M. McGivem, *A Performing Rights Organization Perspective: The Challenges of Enforcement in the Digital Environment*, The Columbia Journal of Law & the Arts, Volume 34, No. 4p.631, 642-643 (2011); Xiong Qi (熊琦), *Zhezuoquan Jitiguanli 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]*, Journal of Comparative Law (比較法研究), Vol.4, 2016, p.50-53 (2016).

[179] United States v. ASCAP, 1940-1943 Trade Cas.(CCH) 156104 (S. D. N. Y. 1941);United Statesv.BMI, 1940-43 Trade Gas. (CCH) 56096 (S. D. N. Y. 1941); United States v. ASCAP, No. 41-1395, 2001 WL 1589999 (S. D. N. Y. 2001).

[180] *supra* note 2, at 5-8.

> The Copyright Office's regulations set out in detail the procedures that must be followed when seeking a compulsory license."[181]

The first issue of music composers, lyrists and publishers is that the compulsory license does not empower them to overmaster the use of their copyrightable works, or look for a unreasonable price in the negotiation. On the other hand, rightsholders also grumble about the shortage of an audit power and pragmatic inability to enforce reporting or payment obligations under section 115, resulting in inefficiency and vagueness in the licensing process.

One critical issue thus revealed is should section 115's compulsory licensing be carried out on a musical work's license? Can the compulsory license rate only be executed on sound recording licensing, when the current blank in section 115 is just left to the musical work's licensing? Music publishers and writers keep arguing for the lower price on the regulated sound recording market and urge they should benefit more from a free market system. That is why most musical work owners hope to avoid the regulations of section 115 designed by recording labels. From the US Copyright Office's perspective, the compulsory licensing should be merely applied to tackle "market failure". Therefore, U.S. Copyright Office actually disagrees to apply the section 115 regulation to musical works. For the Chinese music market, whether the U.S.'s section 115 can be applied to musical works is also a critical issue.[182]

Specifically, like the U.S., China is one of the biggest countries in the world. China's huge territory brings the inefficiency and impossibility of collecting vast revenues from each division. The same problem happens to China and a compulsory license might a useful treatment for this disparity.

E. Database and Coding System: Benefits and Challenges

Accurate, comprehensive and accessible databases bring licensing efficiency and transparency to the music licensing process. To establish efficiency and transparency, reliable transaction and payment records should be also fundamentally provided to both

[181] U.S. Copyright Office, Notice of Intention to Obtain a Compulsory License Section 115, *available at* https://www.copyright.gov/licensing/sec_115.html (last visited Apr. 27, 2019).
[182] *supra* note 1, at 162-174.

sides.[183] The U.S. Copyright Office had believed that to construct an authoritative public database would increase incentives for music licensing. This database is not necessarily established by the government. However, the database could be built by industry under the scope of government's regulatory levels and expectations. By constructing this public database, private entities could devote their effort and profession to communicate and integrate each other's knowledge.[184]

Recalling our previous discussion, the litigation-oriented nature of CMO revenue boosting can easily serve to cause conflicts between users and creators. Thus, benefits would be achieved in that the CMO should represent a more neutral role to manage copyright transactions. When litigation replaces transaction, the uncertainty of the eventual result translates into a specific transactional cost. Particularly, both sides have to bear expenses for hiring attorneys and spending time addressing litigation. This reality can bring substantial delays for music licenses to be effectuated in the Mandarin music market.

The CMOs in the Mandarin music market have argued that the establishment of a comprehensive database structure can be impossible and impracticable when the information is not clear and complete enough. Moreover, the platform and code can't efficiently connect to partner organizations' system. For instance, when these CMOs in the Taiwanese and Chinese music markets do not integrate their internal database system to those of western countries', it takes time to search for information on Mandarin music. This results in higher transactional cost for collecting copyright information and participating in the licensing process.

[183]Mihály Ficsor, Collective Management of Copyright and Related Rights, Geneva ; New York : World Intellectual Property Organization, p.45 (2002).
[184] *supra* note 1, at 183-189.

Table 6：Type of Evidence Most Frequently Submitted by Parties as Ownership Proofs in China[185]

Type of Evidence	Numbers
License agreement	28,431
Notarial certificates issued by notary institutions regarding ownership of the work	13,727
Lawful publications	12,962
Payment vouchers of notarial certificates and expenses	9,677
Copyright registration certificate	7,649
Certificates issues by related authentication institutions	7,544
Cooperation agreements	4,006
Copyright statements or copyright-proving documents issued by the party	3,063
Copyright transfer agreements	1,267
Signatures at the beginning or the end of the video	1,034
Permits for public projection	546
Permits for distribution	393

Organized by the author (Legal Miner, Big Data Analytics of Judicial Precedents for Copyright Disputes in AV Program)

[185] KING & WOOD MALLESONS LEGAL MINER (金杜律師事務所法律研究院), *Shiting Jiemu Zhezuoquan Sifa Baohu Shiwu Zongshu ji Daziliao Fenxi Baipishu, (視聽節目著作權司法保護實務綜述及大資料分析白皮書) [White Paper for a Practical Overview and Big Data Analytics of Judicial Precedent for Copyright Disputes in Audiovisual Programs]*, p.29 (Mar. 7, 2019), *available at* https://www.legalminer.com/ (last visited Apr. 23, 2019).

V. POSSIBLE ANSWERS

A. Adopt Antitrust Law System

1. Specialized Supervision

In the U.S., the Copyright Royalty Board (CRB) is constructed by section 803 of the U.S. Copyright Act, which facilitates and administers the set-up of rate plans. The procedure contains evidence and discovery issues, and settlements. The federal system doesn't usually get involved in pointing out the detail of procedure. It is more common to leave it to the regulatory or administrative tribunal. Currently, it is argued that the CRB is inefficient and pricey. The rate set-up procedure includes two different pathways, which are the direct and the rebuttal phrase.[186]

However, the different pathways belongs two diverse implementations. Both sides can edit and adjust their proposal after the discovering. Therefore, it is believed that these two separate trial proceedings result in more time and cost when the arguments and evidence would be more complicated and doubled. The overlapping parts eventually cause unnecessary inefficiency. Therefore, the U.S. copyright office also supports the modification of the CRB procedure and advocates that this special proceeding should be harmonized with the traditional litigation. Especially, it should be based on the Rules of Civil Procedure and Rules of Evidence to adjust its disadvantages. In order to streamline the rate set up procedure and save time and expense, CRB should direct both sides to concentrate on the most essential fee issues of the cases.[187] "Early settlement" is also a crucial topic for the current CRB procedure. Many CRB participants thought this should become a compulsory step in the whole procedure. Most participants feel obligated to finish litigation before a settlement is facilitated. Thus, the system seems inefficient without the channel of early settlement in advance.[188]

For the Mandarin music market, specifically, in order to address the prospective abuses of monopoly status from the Chinese music CMO, the first answer is to construct an independent agency with accountable and credible experienced members from various

[186] *supra* note 1, at 10-11, 102.
[187] *supra* note 1, at 93-95.
[188] *supra* note 1, at 119-121.

research areas.[189] This agency should include adjudicatory members with cultural, economic and constitutional vision. Its mission should comprehend expert profession incorporating the capability of price-setting and other factors related to the specific market. In views of current research results, it is found that the functional regulatory strategy or the general court system may be far from a specialized agency on solving the problems of monopoly abuses in the civil law model. In particular, the decision by this agency should focus on fostering public interests and go beyond the field of, merely, competition law and market economy.[190] This specialized agency should supervise the whole exercise of the CMOs, from the formation deep into the management reports, financial arrangements, audit and rate plans. Reflecting the diverse perspectives in light of culture, economic and constitutional outlooks is important for this adjudicatory, specialized and independent agency.[191]

Moreover, in order to shorten the pricing process and avoid consuming unnecessary time and costs, the specialized body in China should guide both parties to focus on the most primary price topics of the legal arguments. The NCAC should also advocate that the requests of "early settlements" at the ongoing proceeding should be added and clarified in the statutory provisions.

2. Antitrust Law Approach

Another solution for monopoly abuses is to apply the antitrust law pattern into the Chinese CMO system. This model has obviously functioned smoothly for avoiding monopoly abuses in the big scale countries, specifically, the U.S. music market. As China is one of the largest nations in the world, the similar market regulation in the U.S. might be workable and sufficient for dealing with abuses.

An antitrust legal framework and a competitive market are necessary and essential functions in order to successfully exercise this model.

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[189] *See* CuiGuobin (崔國斌), *Zhezuoquan Jiti Guanli Zuzhi de Fanlongduan Kongzhi (Anti-monopoly control of copyright collective management organizations) [著作權集體管理組織的反壟斷控制]*, Tsinghua Law Review (清華法學), Vol. 6, No. 1, pp.110–138.

[190] Daniel Gervais, *Collective Management of Copyright: Theory and Practice in the Digital Age, in* Collective Management of Copyright and Related Rights, Kluwer Law International BV, The Netherlands, p. 6–10 (2nd, Daniel Gervais ed. 2010).

[191] *See* Daniel Gervais, *The Landscape of Collective Management Schemes*, Columbia Journal of Law & the Arts, Vol. 34, Issue 4, p.423-429 (2011).

The RCCA article 7[192] indicates that,

> "Establishing a CMO's business shall not be overlapped with that of another lawfully registered CMO."

And, additionally, article 20[193] mentions that,

> "An obligee shall not exercise by himself or permits others to exercise the rights that are stipulated in the contract to be exercised by another CMO."

It will be more practical, by amending the RCCA Article 7 and 20, to build up a competitive market and commercial atmosphere surrounded by several rival CMOs.

Even more, in accordance with Chinese Antitrust Law Article 12,[194] the regulated subjects should be natural persons, judicial persons and other "business operators" associated with "the production or business of commodities or services". However, in light of Chinese Copyright Article 8,[195] CMOs should be non-profit sectors. Accordingly, CMOs may not fit the definition of business operators and be regulated within the scope of Chinese Antitrust Law. That said, in recent years, there is a judicial wave to make exceptions and to put CMOs into the Chinese Unfair Competition law regime. As a result, judicial interpretations by the Supreme People's Court could possibly be a solution to overcome

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[192] RCCA article 7: "Chinese citizens, legal persons or other organizations that lawfully enjoy copyright or a copyright-related right, may promote the establishment of an organization for collective administration of copyright. For the establishment of an organization for collective administration of copyright, the following conditions shall be fulfilled for four factors."

[193] RCCA article 20: "An obligee shall not, after concluding a contract for collective administration of copyright with the organization for collective administration of copyright, and within the time limit stipulated in the contract, exercise by himself or permits others to exercise the rights that are stipulated in the contract to be exercised by the organization for collective administration of copyright."

[194] Article 12, Anti-Monopoly Law (promulgated by Order No. 68 of August 30, 2007, of the President of the People's Republic of China). *See* World Intellectual Property Organization (WIPO), Knowledge, WIPO Lex (China): http://www.wipo.int/wipolex/en/details.jsp?id=6543 (last visited Apr.13, 2019).

[195] Article 8:" The copyright owners and copyright-related right holders may authorize an organization for collective administration of copyright to exercise the copyright or any copyright-related right. After authorization, the organization for collective administration of copyright may, in its own name, claim the right for the copyright owners and copyright-related right holders, and participate, as an interested party, in litigation or arbitration relating to the copyright or copyright-related right. The organization for collective administration of copyright is a non-profit organization. Provisions for the mode of its establishment, rights and obligations, collection and distribution of the royalties of copyright licensing, and supervision and administration thereof shall be separately established by the State Council."

this barrier. In addition, to propose a new amendment of Chinese Antitrust Law could be another answer. It is clear that the Chinese CMO system is ripe for reform.

3. Consent Decree

The U.S. government expects to prevent markets from become affected by monopoly power. That is why the U.S. Congress avoided the dominant position of the Aeolian piano roll company in 1909 by facilitating the compulsory license under section 115. Additionally, monopoly issues are concerned when competitors decide the prices of products and services at the same time beyond potential competitors. For example, the music could be licensed by multiple competitors such as ASCAP or BMI. The U.S. Supreme Court has known the social benefits of collective management and devotes itself to prevent per se unlawful monopoly under a "rule of reason".[196]

However, on the other side, the government has also authorized ASCAP and BMI to operate extensive regulations under the consent decree structure. This causes some opinions from the U.S. Department of Justice (DOJ) when the modern DOJ guideline, since 1979, had thought these consent decrees should be terminated.[197] In 2014, the DOJ implemented the new policy to rethink and terminate decrees. From the perspective of the public interest, the DOJ will suggest the court should not agree to the decrees. Although there is an exception in limited circumstance, the facilitating of decrees is just tolerated when a strong reliance is established under a long period exercise between industry competitors. Therefore, the new version of U.S. DOJ's policy actually allows the consent decrees facilitated by ASCAP and BMI.[198]

For the Chinese market, the concept of consent decree has not been applied to the music licensing process. In the future, it might be a possible choice for China to apply consent decrees to music copyright licensing agreements or settlements between CMO and right-holders. This type of agreement or settlement might possibly bring the Chinese market a

[196] *supra* note 1, at 150-153.
[197] United States v. BMI, 275 F.3d 168, 171-72 (2d Cir.2001).
[198] *supra* note 1, at 155-160.

more efficient and stable structure on music transactions within its enormous quantity of licensed music.

B. Standing to File the Lawsuit

Apparently, the main reason for this issue is the vagueness in the legislative design of the RCCA Article 2. Article 2 indicates that CMOs, on their own behalf, can perform their rights, within this article. However, it does not further explain that the rights enforcement by the CMOs can be facilitated by the rightsholders in the meantime. However, this non-rigorous interpretation and analysis could be just subjective speculation. Consequently, the illumination by the legislation or jurisdictions would be the solid answer for understanding the line and territories between CMOs and their members.

This research asserts that tackling this issue by a functional approach would be more practical and realistic for the music industry. Thus, this research would like to advocate the concept of trust relations with the Chinese CMOs. By inserting the paths below into the current collective licensing system in China, a better equilibrium to harmonize the conflicts between right holders, CMOs and users would likely be built up.

To illustrate: first, a CMO can exclusively file litigation, on behalf of its own designation, when the copyright is confided to that CMO, either in the situation or a contractual silence about the matter, or when a bilateral contract is established for shifting the standing of litigation to the CMO. Second, the rightsholder has standing merely once the standing is explicitly on hold for rightsholders in the established contract between the CMO and the rightsholder. Third, both the CMO and rightsholder have standing since this has been explicitly established in the contract between the CMO and the rightsholder. Fourth, the rightsholder recovers its standing once the membership in the CMO is revoked.[199]

In China, the present litigation-oriented policies in CMOs make them ignore their mission of building efficient licensing models between users and creators. As a general observation, these music CMOs tend to “protect” copyright by warning against possible infringement,

[199] *supra* note 70, at 231-232.

rather than providing structures for the onward "licensing" of copyright.[200]However, its task of encouraging or boosting the numbers or revenue of music licensing is still their secondary mission. In particular, they focus their mission towards targeting people who possibly violate the copyright. When they rely on litigation to enforce the settlement, ongoing litigations result in tension between users and creators. It actually produces a greater transaction cost outside the internal system of the collective licensing, and ends up producing a greater burden on musical society as a whole.[201]

C. Extended Collective License

It is believed that the incomprehensive collections in the CMOs' repertoires result in the lawsuit boom raised by nonmembers. In particular, even on the basis of a blanket license, karaoke corporations have been permitted to employ the songs included in the repertoires

[200] In Taiwan, there are three Music CMOs in the domestic music market. Music Copyright Society of Chinese Taipei (MÜST), *available at* http://www.must.org.tw/ (last visited Apr. 30, 2019); Music Copyright Intermediary Society of Taiwan (TMCS), *available at* http://www.tmcs.org.tw/ (last visited Apr. 30, 2019), Music Copyright Association of Taiwan (MCAT)*(Bankrupted)*. The fact that CMOs in the Taiwanese and Chinese music markets have an exclusive right to manage their members' copyrights is a very controversial topic in Asia. China and Taiwan differ slightly on this topic. In China, music copyrights are granted by the National Copyright Administration of the People's Republic of China (NCAC). If the members want to license music on their own, it must first be permitted by the authorities. In Taiwan, the music CMOs entirely prohibit their members from direct license by the clauses in the membership contract. Although this restriction may violate competition laws, the CMOs greatly benefit from these clauses and seek to maintain them. By contrast, in the U.S., CMOs such as ASCAP, BMI and SESAC only hold non-exclusive rights in managing their members' copyrights. In other words, U.S. artists can directly license their music rights to others. United States *v.* American Society of Composers, Authors and Publishers (ASCAP) et al., No. 09-0539, 2010 WL 3749292 (2nd Cir. 2010).;Council of Better Business Bureaus (BBB, founded in the U.S.), Music in the Marketplace, *available at* http://www.bbb.org/council/for-businesses/toolkits/bbb-brochure-music-in-the-market-place (last visited Apr. 2, 2019).

[201] In the Taiwanese case, *see:* prosecutors of MÜST v. Inyuan Karaoke Technology Inc., Zhihuicaichan Fayuan Civil Decision99 Niandu Ta ShangGeng (1) Di 1Hao (臺灣智慧財產法院民事判決 99 年度民他上更(一)第 1 號) (Intell. Prop. Ct. May. 5, 2011) (Taiwan); MÜST represents its Japanese partnership, JASRAC, to suit Inyuan (音圓) Karaoke Technology Inc. Because there is only a management agreement between MÜST and JASRAC but not any license、exclusive license、sole license、non-exclusive license relationship, the court think MÜST actually doesn't have any right to complain. The court think Inyuan Karaoke Technology Inc. depend a wrong basis to suit Inyuan Karaoke Technology Inc.. However, under substantial calculation, this case causes damage about NT$ 2 million, when this litigation harms Inyuan Karaoke Technology Inc.'s selling and reputation. This litigation produces really high transactional costs. In the prosecutors of MÜST v Jingo Record., Taiwan Shihlin Difang Fayuan Criminal Decision 100 NianduZhi Yi Zi Di 19Hao (臺灣臺北地方法院刑事判決 100 年度智易字第 19 號) (Taiwan Taipei Dist. Ct. May 24, 2012) (Taiwan); MÜST fillies a lawsuit to Jingo Record company when it provide partial free music listening to promote MÜST's members' music. This law suit actually doesn't increase the profit of creators. However, it limits the record companies' method to enhance the sales. In fact, this makes disadvantages to authors' revenue.

of CMOs. If the CMOs don't cluster all valuable songs in their repertoires, karaoke corporations take legal risks of copyright infringement to provide their play-along tracks to the consumers.

One considerable answer for this question will be to extend the collection of repertoire and apply the "extended collective license (ECL)" mechanism to the Chinese music market.[202] Within the mechanism of ECL, the copyrights of songs composed by nonmembers of CMOs can be permitted and approved to the users such as karaoke corporations, only in the case that those non-affiliated copyright holders "opt out". In essence, the ELC mechanism transfers the pattern of collective management from "opt-in" to "opt out". In the Nordics, the ECL system has been executed in a very efficient and organized way.[203] Canada is also considering the application of the ECL model into its copyright transaction of music and sound recording. Therefore, it is believed that China could learn from these nations that for considering ECL would be a suitable model to follow to update its copyright laws and related regulations concerning music and sound recording licensing.[204] When the blowout of litigations by non-members causes controversial issues for the CMO system, the ECL could be considered as a functioning way to avoid the market distortion by massive lawsuits. In my opinion, the revenue from two categories of economic rights might be suitably concreted by the ECL model for the modern music industry.

1.Promising Responses to Massive Lawsuits

To examine this concept: first, when the karaoke machine and boxes have become an influential trend for music business in China, the reproduction and adaptation right should

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[202] "The mechanism of the extended collective license can be summarized as follows: as soon as a CMO is able to show, among other things, that it represents a substantial number3 of those authors or other relevant rights holders whose rights one would anticipate it to administer for the type of use needed, that collective would have the right under the law to apply to represent all relevant rights holders in that category on a non-exclusive basis,4 except for those who expressly decline to be represented. In other words, unlike the classic collective management system that follows an "opt-in" formula in which rights holders must choose to participate, the extended collective license system is based on the opposite principle: an "opt-out" formula." *See* Daniel J. Gervais, *Application of an Extended Collective Licensing Regime in Canada: Principles and Issues Related to Implementation,* Vanderbilt Public Law Research Paper No. 11-26 (June 1, 2003).

[203] Tarja Koskinen-Olsson & Nicholas Lowe, Educational Material on Collective Management of Copyright and Related Rights — Module 6, World Intellectual Property Organization & Norwegian Copyright Development Association, p.5-15 (Aug. 31, 2012), *available at* http://norcode.no/wp-content/uploads/2013/03/WIPO-Module-6.pdf (last visited Apr.29, 2019).

[204] *See* Daniel J. Gervais, *Application of an Extended Collective Licensing Regime in Canada: Principles and Issues Related to Implementation,* Vanderbilt Public Law Research Paper No. 11-26 (June 1, 2003).

be considered as a subject of the ECL model.[205] Second, while music streaming has played a crucial role for the income of musical artists, I would say the communication right through information networks should be considered as the other category and should be included in the ECL model.[206]In theory, when the ECL model would be applied to the Chinese music market, these non-affiliated artists and rightsholders would not own the standing of litigation against karaoke companies and only when they choose to opt out of the ECL model. Alternatively, these non-affiliated artists and rightsholders would be able to obtain licensing revenue only if they opted out from the ECL model. Consequently, on the basis of ECL system, the non-affiliated artists will obtain revenue instead of filing massive lawsuits.

However, a tricky problem might occur if the courts decide the amount of compensation corresponding to the amount of revenue the non-affiliated artists are able to acquire from the ECL system. The non-affiliated artists might need to make a decision if they choose to rely on ECL system, or seek a potential lawsuit in the court for receipt of their profits. From my observation, when the lawsuits in the courts might cause high expenditure and also take more time to hire attorneys and other administrative procedures, the non-affiliated artists would prefer ECL to obtain their revenue. Not to mention that to rely on lawsuits would be an economic risk for the artists, especially, if the artists lose the cases. In this way, it is believed that the ECL will be a substantially better pathway for artists to secure their compensation, than more hazardous litigations. Therefore, we can imagine the ECL will be helpful to address the current issues of non-affiliated artists' massive litigations in the Chinese music market. [207]

Otherwise, the ECL system might be defeated if the intention to opt out from the system is firm. This weakness might be raised when the court approves comparatively higher compensations to the non-affiliated artists than they would be able to seek from the ECL system. This negative outcome might have implications for the ECL. It also results in "an opting-out trend" and "a collapse of the ECL system". Therefore, to issue actual damages

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[205] Peter S. Menell, *Adapting Copyright for the Mashup Generation*, University of Pennsylvania Law Review, Vol. 164, Issue 2, p441, 456-461 (Jan. 2016).

[206] Regulation for the protection of the Right of Communication through Information Network(資訊網路傳播權保護條例)(2006). *See* People's Republic of China, China Patent Agent (H.K.) Ltd. (CPA),Statues & Rules, China Patents & Trademarks, No.3, 2006, *available at* http://www.cpahkltd.com/UploadFiles/20100315165559735.pdf (last visited Apr. 30, 2019).

[207] Fuxiao Jiang, Daniel Gervais, *Collective Management Organizations in China: Practice, Problems and Possible Solutions*, The Journal of World Intellectual Property Vol. 15, No. 3, p. 227-228 (May. 2012).

in the courts or compensations, rightsholders can obtain as if they were affiliated to CMOs; it will be necessary for maintaining the ECL system to run in a stable way and also secure at healthier music ecosystem. This is just as the Nordic nations have tried to achieve in recent years. However, in the U.S., the Sound Exchange seems to address the similar issue through a similar perspective. The difference is that the U.S. created another organization to manage the licensing affairs related to the non-affiliated artists of CMOs. Whether depending on ECL or Sound Exchange, both might provide new thinking to enhance the current licensing system in Chinese music market. Compared to massive litigation in China by non-affiliated artists, a more advanced licensing mechanism like ECL or Sound Exchange should be added for moving the traditional licensing philosophy forward.

2. Malformation of Compulsory License

Actually, §115 of the U.S. Copyright Act has been compromised into the Chinese copyright law as listed below,

> "A producer of sound recording may use a musical work that has been legally recorded in a sound recording to produce another sound recording without permission of the copyright owner, provided that she pays statutorily set royalties.[208] Nevertheless, such a use is not permitted for any work for which the copyright owner had declared that the use is prohibited."[209]

The Chinese version allows the creators to opt out from the rigid compulsory license model. Owing to this exception, the Chinese edition's compulsory license system is actually similar to the ECL operation and has a substantial difference with the conventional compulsion and inflexibleness on of the U.S. practices.[210] In reality, since, generally, Chinese musical creators choose to opt out from the compulsory license mechanical rights, the Chinese model has not brought essential influence and further discussions to the music

[208] Howard B. Abrams, *Copyright's First Compulsory License*, Santa Clara Computer & High Technology Law Journal, Vol. 26, Issue 2, p.215-216 (2009).
[209] 17 U.S.C. 115 (b)(1); Article 40, Chinese Copyright Law.
[210] Digital Performance Right in Sound Recordings Act of 1995, Pub. L. No.104-39, 109 Stat.336(1995); Digital Millennium Copyright Act of 1998, Pub. L. No.105-304, 112 Stat.2860(1998); Music Modernization Act of 2018, Pub. L. No.115-264(2018).

market until the 2012 version proposal of Copyright Amendment emerged.[211]

Therefore, the initial proposal of 2012 Chinese copyright amendment advocated geting rid of the existing opt-out exception regarding to the compulsory license of mechanical rights. Overwhelming and excessive criticism was triggered and supported by massive musical professionals and talents. In particular, crowds of musical artists spoke out about their anxiety and worries that compulsory licensing could become an approval of unlawful uses and stimulate more music adaptations with a low price.[212] Even more, as the main agency for managing the licensing affairs for film directors and video producers, CAVA also backed the resistant protest and made an official announcement about how this new copyright law amendment would steal musical creators' economic rights and income and, additionally, impair the function of the music ecosystem, and worsen the merit and virtue of compensating artists with fair remuneration and sufficient incentives.[213]

D. New Approaches from the Music Modernization Act

According to H.R. 1511, the U.S. copyright law is going to be modernized through framing a fresh licensing system for digital music and sound recording, overhauling the rate formula for music licensing and adjusting the course of price decisions in the United States District

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[211] *See* United States Government Printing Office, Register of Copyright, Report on Copyright Implications of Digital Audio Transmission Services (Oct. 1991), *available at* https://digitalcommons.law.scu.edu/monographs/13/ (last visited Mar. 29); Bruce A. Lehman, Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights, Washington, D.C. : Information Infrastructure Task Force (Sep. 1995); United States Copyright Office, Copyright and the Music Marketplace: Report of The Register of Copyrights, p.11-15 (Feb. 2015), *available at* https://copyright.gov/docs/musiclicensingstudy/copyright-and-the-music-marketplace.pdf (last visited Mar. 3, 2019).

[212] Ludan Buen (呂丹布恩),*Cong Yinlejie de "Huo "Kan Zhezuoquan Xiufa de Yulun "Re "(Seeing the Disscussion of Copyright Revision from the "Hot" of the festival)[從音樂節的"火"看著作權修法的輿論"熱"]*, China Intellectual Property (中國知識產權雜誌), No.63 (May. 2012),*available at* http://www.chinaipmagazine.com/journal-show.asp?1301.html (last visited Mar. 30, 2019).

[213] *See Zhezuoquan Jiti Guanli jiushi Ge Jiaoi Syhichang (Copyright Collective Management is a Trading Market) [著作權集體管理就是個交易市場]*, Netease(網易科技), (Apr. 6, 2012), *available at* http://news.163.com/special/reviews/copyright0406.html?from=newstalk3 (last visited Apr. 6, 2019); *Xin Zhezuoquanfa Shi Guli Yinzhexie Shou Heiqian ?(Does The New Copyright Law Encourages MCSC to Collect BlackMoney?) [新著作權法是鼓勵音著協收黑錢？]*, Netease(網易科技), (Apr. 6, 2012), *available at* http://news.163.com/12/0406/14/7UDPOEVI00012Q9L.html (last visited Apr. 6, 2019); Sun Li-ping, Huang An-qi,Luo Zheng-guang(孫麗萍、黃安琪、羅爭光), *Zhezuoquanfa "Da Xiu "Re Zhengyi "Jiti Guanli "Shi Liangyao Haishi "Si Xue "(The Amendment of Copyright Law provokes controversy."Collective Management" is A Good Medicine or a "Dead Hole") [著作權法"大修"惹爭議"集體管理"是良藥還是"死穴"]*, XINHUA NEWS AGENCY (新華社),(Apr. 25, 2012), *available at* https://www.chinacourt.org/article/detail/2012/04/id/511154.shtml (last visited Apr. 6, 2019).

Court for the Southern District of New York. The initial headline of H.R. 155 is a revised edition of the primary release of the "Music Modernization Act" with reference to 17 U.S. Code § 115, scope of exclusive rights in nondramatic musical works: Compulsory license for making and distributing phonorecords. [214]

The Music Works Monetization Act (MWM Act), virtually ensures the essential arrangements for the present compulsory mechanical license, aside from the *"digital phonorecord delivery"*. Individuals hunt for employing the compulsory license won't need to lodge a "notice of intention" with respect to the U.S. Copyright Office, in line with 17 U.S.C. §115(b)(2)(A). However, the MWM Act will offer a solid substance of blanket license, by which any suppliers of digital musical contents will be able to acquire a compulsory mechanical license "to make and distribute digital phonorecord deliveries of musical works" through one or more "covered activities", in conformity with the 17 U.S.C. §115(d)(1). The denotation of "to make and distribute digital phonorecord deliveries of musical works" is demonstrated in the role of permanent download, limited download, or interactive stream", which originated from 17 U.S.C. §115(e)(7). In particular, on the basis of the previous 17 U.S.C. §115(d), the present circumscription on "digital phonorecord delivery *explicitly inhibits* non-interactive music streaming", while the up-and-coming interpretation of 17 U.S.C. §115(e)(10) manifestly comprise the interactive music streaming. The MWM Act definitely brings new implementations to unifying the licensing arrangements by expanding the scope of digital licensing categories.

According to 17 U.S.C. §115(a)(1)(A), the eligibility for a compulsory license is,

> "A person may obtain a compulsory license only if the primary purpose in making phonorecords of the musical work is to distribute them to the public for private use, including by means of digital phonorecord delivery (DPD)."

In this research, it indicates dual separate factors can be examined for non-dramatic musical works qualified as the objects of compulsory license: (i) the musical works in accordance with:

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[214] H.R. 1551 (115th): Orrin G. Hatch-Bob Goodlatte Music Modernization Act (2018), *available at* Congress.gov (United States Congress Legislative Information), https://www.congress.gov/bill/115th-congress/house-bill/1551/text, (last visited Apr. 14, 2019).

> "Phonorecords of such musical work have previously been distributed to the public in the United States under the authority of the copyright owner of the work, including by means of digital phonorecord delivery", as well as, (ii) the music works "for which clause (i) does not apply."

In particular, the latter factor's substance should be merely limited to:

> "In the case of a digital music provider seeking to make and distribute digital phonorecord deliveries of a sound recording embodying a musical work under a compulsory license for which clause (i) does not apply."

Specifically, as a matter of fact, the text of the second factor is blurred and horrible since the phrase "for which clause (i) does not apply" includes the indefinite explanation and does not further specify the terms of "digital music provider," "digital phonorecord deliveries," "sound recording," "musical work," or "compulsory license" within the clause (i) and construes how to apply them to realistic circumstances.

On the basis of contextual relationship, for the reason that the 17 U.S.C. §115(a)(1)(A) is control for the de facto, non-tangible prerogative existing in law within the bounds of musical objects, it is crucial to illustrate the modern circumscription of musical works in a detailed way. Furthermore, in line with 17 U.S.C. §115(a)(1)(A)(ii), the latter factor actually consists of multiple supplemental requirements. The first requirement is:

> "The first fixation of such sound recording was made under the authority of the musical work copyright owner," and "The sound recording copyright owner has the authority of the musical work copyright owner to make and DPD embodying such work to the public in the United States".

Additionally, the second requirement is:

> "The sound recording copyright owner or an authorized distributor … has authorized the digital music provider to make and distribute DPD of the sound recording to the public in the United States."

Alternatively, we can say that in the U.S., the mechanical recording of musical

compositions or lyrics had been openly published, yet the musical creation can be qualified as an object to establish its compulsory license for the transformation of mechanical recording into a digital format, especially, even in the circumstance where in the music publisher or musical creator has granted a license to the record label to produce mechanical recordings in digital format and openly publish them to the audiences.

From the new perspectives of legislative interpretation, the indication within the 17 U.S.C. §115(a)(1)(A) (ii), "in the situation in which a digital music provider is the first person to make and distribute digital phonorecord deliveries (DPDs) of a sound recording embodying a musical work.", fits the new announcement of "Goodlatte Report of Oct. 19, 2018", which clearly disclosed:

> "Under the current language of section 115(a)(1), a compulsory license is available to "any other person" after a sound recording embodying a musical work has been distributed to the public in the United States under the authority of the musical work copyright owner. The new language is intended to eliminate any ambiguity under existing law as to whether a digital music provider may obtain a compulsory license when the digital music provider is the first person to distribute digital phonorecord deliveries of such musical work. The new language makes clear that a digital music provider may obtain a compulsory license in those instances in which the digital music provider is the first person to make and distribute digital phonorecord deliveries of a sound recording embodying a musical work."

This new clarification will fundamentally erase the vagueness about the situation that a supplier of digital music can acquire a compulsory license and qualify as the initial user to produce digital format deliveries of sound recordings mechanically transformed from musical works.

1. Availability and Scope of Compulsory Licenses

In line with the present § 115, the music copyright holders have the power to license the opening mechanical production of sound recording originating from their music creation,

which is regarded as the right of first-use mechanical license.[215] The first-use license exhausts the initial production of sound recording by transforming music works into this foremost sound recording, which receives this authorization from the musical creators or publishers, and issues the phonorecords embodying sounds recording, called "phonogram", other than those attaching to audio-visual recordings, for instance cassette tapes and compact discs (CDs). In clause (i), a record company is eligible to keep requesting a compulsory license, as this is starting recording and release of the musical creation.[216]

Compared to clause (i), the clause (ii) clarifies the condition that a digital music supplier is the starter to demonstrate and publish DPDs (digital phonorecord deliveries) initiated from sound recordings incorporating musical creation. As this circumstance is not included in clause (i), clause (ii) reveals three tests to confirm whether the digital music suppliers would be able to request a compulsory license: or not.
These examinations are:

> "(1) the initial sound recording attaching a musical creation is produced within the approval of the copyright holders of musical creation; (2) the sound recording copyright owner who first fixes such sound recording has the authority of the musical work copyright owner."[217]

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[215] The right of first-use mechanical license "(1) When phonorecords of a nondramatic musical work have been distributed to the public in the United States under the authority of the copyright owner, any other person, including those who make phonorecords or digital phonorecord deliveries, may, by complying with the provisions of this section, obtain a compulsory license to make and distribute phonorecords of the work. A person may obtain a compulsory license only if his or her primary purpose in making phonorecords is to distribute them to the public for private use, including by means of a digital phonorecord delivery. A person may not obtain a compulsory license for use of the work in the making of phonorecords duplicating a sound recording fixed by another, unless: (i) such sound recording was fixed lawfully; and (ii) the making of the phonorecords was authorized by the owner of copyright in the sound recording or, if the sound recording was fixed before February 15, 1972, by any person who fixed the sound recording pursuant to an express license from the owner of the copyright in the musical work or pursuant to a valid compulsory license for use of such work in a sound recording. (2) A compulsory license includes the privilege of making a musical arrangement of the work to the extent necessary to conform it to the style or manner of interpretation of the performance involved, but the arrangement shall not change the basic melody or fundamental character of the work, and shall not be subject to protection as a derivative work under this title, except with the express consent of the copyright owner." H.R. 1551 (115th): Orrin G. Hatch-Bob Goodlatte Music Modernization Act (2018), *available at* Congress.gov (United States Congress Legislative Information), p3-8 https://www.congress.gov/bill/115th-congress/house-bill/1551/text, (last visited Apr. 14, 2019).

[216] H.R. 1551 (115th): Orrin G. Hatch-Bob Goodlatte Music Modernization Act (2018), *available at* Congress.gov (United States Congress Legislative Information), p3-8 https://www.congress.gov/bill/115th-congress/house-bill/1551/text, (last visited Apr. 14, 2019).

[217] *Id.* at 5-9.

The modernization music act revises the current Section 115, licensing mechanism of mechanical right on phonorecord for reproducing and distributing musical creations. In the past, the authorization of compulsory licensing within Section 115 is given on a track by track oriented licensing model. In this new act, a fresh blanket license is built to the supplier of digital music services consisting of permanent music downloads, music downloads with specific restrictions and interactive music streams. The license in light of the sound recording attaching to tangible mediums, such as gramophone records (vinyl), compact discs (CDs) and cassette tapes, will continually be executed on a respective license and separate approval basis. In the circumstances above, it frames a named "willing buyers/ willing sellers" price-setting structure which maintains the precious free market function in the licensing process. Under this new amended Section 115 of mechanical license, this rate formation designed for market competition purpose will be implemented to every user for music composition and lyrics.[218]

2. The New Operation of Compulsory License

Compared to the sound recording's distribution, it is observed that music works are more diffusely licensed by multiple companies, labels and independent composers. Generally, a sound recording is usually owned by one specific entity. However, musical works are executed by many unions. The joint ownership relationship complicates the licensing process, and can have the effect of making music publishers feel restricted in licensing their works. Consequently, negotiations in the music licensing market seem more restricted and limited when the complexity of ownership blocks the freedom of communication.[219]

In this issue, China and Taiwan left the same lacuna about the compulsory licensing of musical works. From the U.S. experiences, according to Chevron U.S.A., Inc. *v.* Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), it will be challenging to reply to the two-step analysis, in interpreting the scope of authority under the section 115 of the US Copyright Act will be a challenge, as the copyright act itself is vague and actually has left

[218] *Id.* at 9-12.
[219] *supra* note 1, at 162-165, 174.

a vacancy in the regulations.[220] How to address this issue in an appropriate manner will also be meaningful for the future Mandarin music market.

Logically, content providers such as Spotify and Pandora would not appreciate the licensing system under individual negotiations with a large number of music owners. Therefore, it might be true that many supporters who go against section 115 won't contradict that it will be extremely hard to license content with smaller-scale music copyright holders. Some specific type of collective system will be still necessary for assembling the negotiations with smaller-scale copyright owners. However, how to adjust the current collective management system or create a new mechanism to face the negotiations with myriad right owners will be essential for the music licensing market. How this collective structure can be regulated and implemented with appropriate trust will be the most crucial challenge? To strike a balance between the values of free market negotiation and collective management is likely to prove challenging. In addition, the task of accomplishing fair compensation for artists and efficiency in the licensing process is strict. Both methods should be considered and applied in order to form the most complete strategy.[221]

It is questioned that the Congress should involve itself in the establishment of music licensing structures. From the viewpoint of the U.S. Copyright Office, it will be more appropriate and enforceable to leave the details to the regulations, and the legislation just drafts a structure for their administration. Under this system, the legal mechanism will be more realistic and practical for the music industry, when the music licensing actually includes numerous complicated sides.[222] It is impossible for Congress to cover the whole regulatory implementation process. In addition to the legislative authorization, the general approaches will leave more flexibility and autonomy for music businesses.[223] When the

[220] According to Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), the Court, in an opinion by Justice John Paul Stevens, upheld the EPA's interpretation. A two-part analysis was born from the Chevron decision (Chevron two-step test), where a reviewing court determines:
"First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute . . . Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."

[221] *supra* note 1, at 150-155.

[222] *Id.*

[223] BMI v. DMX Inc., 683 F. 3d 32 (2d Cir. 2012); In re Pandora Media, Inc., No. 12 CIV. 8035 (DLC)，2013 WL 5211927(S. D.N.Y. 2013); In re Pandora Media, Inc., 6 F. Supp. 3d 317 (S. D. N. Y. 2014); Pandora

regulations can be amended to account for current advances and unpredictable risks, leaving more space for administration is more reasonable for the regulation of music enterprises.[224]

3. Drawbacks of Compulsory Licensing

(1) Failure of Antitrust Function

On the basis of 17 U.S. Code § 115 (d)(11)(A), the MWM Act will be able to stretch the current antitrust exemption toward,

> "Negotiations and agreements between and among copyright owners and persons entitled to obtain a compulsory license for covered activities," comprising the field of "administrative assessment".

Under the construct of copyright collective license, according to 17 U.S. Code § 115 (d)(11)(C), exemption from antitrust further outstretches to compulsory licenses, with the exception that the price-setting and conditions should be negotiated respectively between the copyright holders and users. Apart from governmental intervention by acting on prices and conditions,

> "Neither the mechanical licensing collective nor the digital licensee coordinator shall

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Media, Inc. v. ASCAP, Nos. 14-1158-CV (L)(2d Cir. 2015); Xiong Qi (熊琦), *Meiguo Yinle Banquan Zhidu Zhuanxing Jingyan de Shujie yu Jiejian (Combing and Learning from the Transformation Experience of American Music Copyright System) [美國音樂版權制度轉型經驗的梳解與借鑒]*, Global Law Review (環球法律評論), No.3, p.145-148 (2014).

[224] *See* In re Pandora Media, Inc., No. 12 CIV. 8035(DLC), 2013 WL 5211927, 7 (S. D. N. Y. 2013). Ben Sisario, *Pandora Suit May Upend Century-Old Royalty Plan*, The New York Times, (Feb. 14, 2014), *available at* https://www.nytimes.com/2014/02/14/business/media/pandora-suit-may-upend-century-old-royalty-plan.html (last visited Apr. 12, 2019); United States v. Broadcast Music, Inc., 275 F. 3d 168，175 (2d Cir. 2001); Pandora Media, Inc. v. *ASCAP, Nos.*14-1158, 17 (2d Cir. 2015); Major League Baseball Properties, Inc. v. Salvino, Inc., 542 F. 3d 290, 321 (2d Cir. 2008)；In re Application of Karmen, 32 F. 3d 727，728 (2d Cir. 1994)；Gershwin Pub. Corp. v. Columbia Artists Mgmt., Inc., 443 F.2d 1159, 1160 (2d Cir. 1971); The Second Amended Final Judgment, United States v. ASCAP, No. 41-1395, 2001 WL 1589999, §II(U), §VI, §IX(E)(S. D. N. Y. 2001); *Xiong Qi (熊琦), Yinle Zhezuoquan Xuke de Zhidu Shiling yu Falu Zaizao(Institutional Failure and Legal Reconstruction of Music Copyright Licensing) [音樂著作權許可的制度失靈與法律再造]*, (當代法學), Vol. 26 No.5, p6-8 (Sep. 2012).

serve as a common agent with respect to the establishment of royalty rates or terms under this section" (Limitation on common agent exemption).[225]

Within this structure, it is essential that, first, it indicates,

"Each copyright owner shall establish the royalty rates and material terms of any such voluntary license individually and not in agreement, combination, or concert with any other copyright owner".

Second, it mentions,

"Each person entitled to obtain a compulsory license under this section shall establish the royalty rates and material terms of any such voluntary license individually and not in agreement, combination, or concert with any other digital music provider."

Third, it points out,

"The mechanical licensing collective shall maintain the confidentiality of the voluntary licenses in accordance with the confidentiality provisions prescribed by the Register of Copyrights under 17 U.S. Code § 115 (d)(12)(C)."

And lastly, in accordance with17 U.S. Code § 115 (d)(12)(A)(B), the Register of Copyrights may "conduct such proceedings and adopt such regulations as may be necessary or appropriate to effectuate the provisions", conditionally upon "judicial review" in line with 5 U.S. Code Chapter 7,

[225] 17 U.S. Code § 115 (d)(11)(C), "Antitrust exemption for administrative activities.—Notwithstanding any provision of the antitrust laws, copyright owners and persons entitled to obtain a compulsory license under this section may designate the mechanical licensing collective to administer voluntary licenses for the reproduction or distribution of musical works in covered activities on behalf of such copyright owners and persons, subject to the following conditions: (i) Each copyright owner shall establish the royalty rates and material terms of any such voluntary license individually and not in agreement, combination, or concert with any other copyright owner;(ii) Each person entitled to obtain a compulsory license under this section shall establish the royalty rates and material terms of any such voluntary license individually and not in agreement, combination, or concert with any other digital music provider; (iii) The mechanical licensing collective shall maintain the confidentiality of the voluntary licenses in accordance with the confidentiality provisions prescribed by the Register of Copyrights under paragraph (12)(C)."

> "Except for regulations concerning proceedings before the Copyright Royalty Judges to establish the administrative assessment, which shall be adopted by the Copyright Royalty Judges".

Overall, governmental intervention made by the compulsory licensing system is harmful to the competitive market. It possibly brings considerable transnational costs and administrative burdens to decide the "appropriate measures" on avoiding contract negotiations. Thus, this governmental control is regarded as negative as it breaks the music licensing ecosystem and makes more troublesome issues about inefficiency.

Apart from empowering musical creators and copyright holders to confer licensing conditions for employing their creations, a compulsory license drives copyright holders to permit employment of their creations within the structure of legislative rate plan and limitation on adoption.[226] While one side advocates new legal reform over redundant copyright restraint, the opposite side asserts a more conservative position, which affords solid economic incentives for artists. It seems compulsory license could be a reconciliation between two sides.[227] However, there are grounds resisting compulsory licensing being a route to better diversity. Specifically, a compulsory licensing system entail dual drawbacks: (1) The Complication and Inefficiency of Fixed Price-Setting Module; (2) Trouble resulting from the rigidity and the legislative lag.

(2) Complications and Inefficiencies of the Fixed Price-Setting Module

According to present legislative mechanisms, the consequent artistic expressive creations are regularly guarded by the copyright regime. It signifies that the prospective consumer of creative results should acquire a license from the owners of the copyright before employing the original works in a new creative and transformative process. In case the prospective consumers do not achieve sufficient licensing and engage and distribute their new creative works, the rightsholders can seek a cease and desist decree from the unlicensed adoption or implantation. and request financial rewards and remedies. On the basis of legal foundations and philosophy, the remuneration contrary to unlicensed conduct

[226] Robert P Merges, *Compulsory Licensing vs. the Three "Golden Oldies" Property Rights, Contracts, and Markets*, Cato Policy Analysis, No.508, p.1 (Jan. 25, 2004).
[227] *Id.* at1-2.

is the tangible or intangible substance originated from the nature property right.[228] In addition to the traditional licensing model, another design, compulsory license, is built for different purposes and goals. In particular, in light of the compulsory license, the owners of copyright are missing the advantageous power to counteract unlicensed uses, while, prospective uses would be able to skip the rightholders' permission and prevail with an adequate license by committing to the legitimate, designated rate.[229]

(3) Legislative lag under the rigidity of Compulsory License

An awkward issue associated with compulsory licenses is that this static model can rashly turn to outmoded and unintended consequences,[230]without the support and adjustments of the free market. Specifically, lawmaking makes the legislation transform to persistent and stubborn agreements or contracts precluding the possibility to return to negotiations. The inflexibility and reversibility within the compulsory license results in no probable adjustments and updates in response to new happenings in the market economy. Therefore, the market entrants have to contend with obsolete rate arrangements. This is what is called "legislative lag".[231]

Legislative lag actually illustrates why the price-setting process within the compulsory license system cannot react to immediate changes in the market economy. In a result, rates built on a compulsory license may be way below a price linked to the free market. For instance, it is easily seen that the government rate on compulsory license of sound recording results in no differences between the 1909 Copyright Act and the 1976 Copyright act, notwithstanding there was a large increase in the music production market throughout the mass medium bloom.[232] Specifically, the compulsory license has possibly depressed the value of the musical compositions and sound recordings market. Consequently, by providing less compensation than the users and creators generally expect, this tendency to

[228] *Id.* at 2-3.
[229] *Id.* at 3.
[230] Felix Trumpke, *Effects and Potential of Extended Collective License Systems, in* Remuneration of Copyright Owners, p.90-93 (Kung-Chung Liu & Reto M. Hilty ed. 2017).
[231] Reto M. Hilty and Josef Drexl, Munich Studies on Innovation and Competition, Springer: Heidelberg; Berlin, p.23-25 (2015).
[232] Robert P. Merges, *Autonomy and Independence: The Normative Face of Transaction Costs*, Arizona Law Review, Vol. 53, Issue 1, p.150-153 (2011).

underestimate has caused a negative effect, decreasing the desire to create musical and recording works.[233]

Otherwise, the ECL system might be defeated if the intention to opt out of the system is firm. This weakness might be raised when the court approves comparatively higher compensations to the non-affiliated artists than they would be able to seek from the ECL system. This negative outcome might result in failure to keep the ECL robustly alive. It also results in "an opting - out trend" and "a collapse of the ECL system". Therefore, to issue actual damages in the courts, or compensation the rightsholders can obtain as they were affiliated to CMOs, it will be necessary for maintaining the ECL system to be run in a stable way, reinforcing the health of the music ecosystem. This is just exactly what the Nordic nations tried very hard to achieve these past years. However, in the U.S., the Sound Exchange seems to address similar issues through similar perspectives. The difference is that the U.S. created another organization to manage the licensing affairs related to the non-affiliated artists of CMOs. Whether depending on ECL, Sound Exchange or MCL, all might provide a new way of thinking to enhance the current licensing system in the Chinese music market. Compared to the massive litigations in China by non-affiliated artists, a more advanced licensing mechanism like ECL or Sound Exchange should be added for moving the traditional licensing philosophy forward.[234]

In terms of efficiency, compulsory licenses might be regarded as a possible and temporary pathway as serious problems cause the deformation of the competitive market and no other means could be applied. In this situation, the government might need to execute actions to avoid market failure. However, until present, it seems that the circumstance of digital music dissemination does not inherently incur market failure. And, thus, supporting conduct from the governmental administration (such as compulsory license) is unneeded.[235] The preservation of the effectual foundations of property rights and contract 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 precious market interference by the exclusive right of intellectual property law. It is no doubt that property right retains a

[233] Robert P Merges, *Compulsory Licensing vs. the Three "Golden Oldies" Property Rights, Contracts, and Markets*, Cato Policy Analysis, No.508, p.6 (Jan. 25, 2004).
[234] Fuxiao Jiang, Daniel Gervais, *Collective Management Organizations in China: Practice, Problems and Possible Solutions*, The Journal of World Intellectual Property, Vol. 15, No. 3, p. 228 (May. 2012).
[235] Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 California Law Review, p.1293 (1996).

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.[236]

In light of control, it will be extremely costly if we 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 imitate general ideas from an original creation to establish a new work due to the idea–expression divide or idea–expression dichotomy principle.[237] On the basis of modern technology, it is believed that the digital format of music works and sound recording can be confined, but it is harshly 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 the technology keeps being advanced, the authority will be capable of putting all efforts to inspect all users to deter any possible illegal conducts and aiming to maintain a spotless environment for copyright protection. In whatever way, this excessive control, like the compulsory license, will surely cause overwhelming costs and cannot be afforded by the market economy. Therefore, this kind of excessive control is obviously costly and impossible .[238]

E. Interoperability: Mechanical Licensing Collective

The MMA empowered the U.S. Copyright Office to initiate an advanced collecting society, “Mechanical Licensing Collective (MLC)”, for the operation of this fashionable blanket mechanical license on digital recording. In addition, this MMA indicates the scheme and procedures to establish and manage this new modernization to collecting society. According to 17 U.S.C. §115(d)(3), the collecting society ought to be a non-profit organization, entirely financed and backed through “the free licensing market of musical works”, which, in professional practice, connotes the economic supports and investments from the “powerful three of the music publishing market”, Universal Music Publishing, Sony/ATV and Warner/Chappell. Furthermore, in accordance with 17 U.S.C. § 115 (d)(3)(A), the MLC has to prove its executive and operational ability is competent and

[236] Robert P Merges, *Compulsory Licensing vs. the Three "Golden Oldies" Property Rights, Contracts, and Markets*, Cato Policy Analysis, No.508, p.6 (Jan. 25, 2004).
[237] R. Polk Wagner, *Information Wants to Be Free: Intellectual Property and the Mythologies of Control*, Columbia Law Review, Vol. 103, p.995-998 (May 2003).
[238] Robert P Merges, *Compulsory Licensing vs. the Three "Golden Oldies" Property Rights, Contracts, and Markets*, Cato Policy Analysis No.508, p.5-6 (Jan. 25, 2004).

fulfills its essential duty and commitment.

On the basis of 17 U.S. Code § 115 (d)(3)(C)(i), in which the MLC's functions are illustrated, the new MLC is authorized to:

> "(I) Offer and administer blanket licenses, including receipt of notices of license and reports of usage from digital music providers; (II) Collect and distribute royalties from digital music providers for covered activities; (III) Engage in efforts to identify musical works (and shares of such works) embodied in particular sound recordings, and to identify and locate the copyright owners of such musical works (and shares of such works); (IV) Maintain the musical works database and other information relevant to the administration of licensing activities under this section; (V) Administer a process by which copyright owners can claim ownership of musical works (and shares of such works), and a process by which royalties for works for which the owner is not identified or located are equitably distributed to known copyright owners; (VI) Administer collections of the administrative assessment from digital music providers and significant nonblanket licensees, including receipt of notices of nonblanket activity; (VII) Invest in relevant resources, and arrange for services of outside vendors and others, to support the activities of the mechanical licensing collective; (VIII) Engage in legal and other efforts to enforce rights and obligations under this subsection, including by filing bankruptcy proofs of claims for amounts owed under licenses, and acting in coordination with the digital licensee coordinator; (IX) Initiate and participate in proceedings before the Copyright Royalty Judges to establish the administrative assessment under this subsection; (X) Initiate and participate in proceedings before the Copyright Office with respect to activities under this subsection; (XI) Gather and provide documentation for use in proceedings before the Copyright Royalty Judges to set rates and terms under this section; (XII) Maintain records of the activities of the mechanical licensing collective and engage in and respond to audits described in this subsection; (XIII) Engage in such other activities as may be "necessary or appropriate" to fulfill the responsibilities of the mechanical licensing collective under this subsection."

In addition, according to 17 U.S. Code § 115 (d)(3)(C)(ii), which indicates,

> "Restrictions concerning licensing and administrative activities", the MLC will merely "issue and administer blanket licenses for reproduction or distribution rights in musical

works for covered activities, including collecting and distributing royalties".

In line with 17 U.S. Code § 115 (d)(3)(C)(iii), the mechanical licensing collective may also administer,

> "Including by collecting and distributing royalties, voluntary licenses issued by, or individual download licenses obtained from, copyright owners only for reproduction or distribution rights in musical works for covered activities, for which the mechanical licensing collective shall charge reasonable fees for such services."

Apart from conduct in front of the U.S. Copyright Royalty Board and Copyright Office, the MLC will not be allowed to carry out lobbying activity on governmental motions, even if the matters which Board members of MLC stand for will be not prevented.

It is crucial for the CMOs in Mandarin music markets to enhance their ability on database infrastructure. They should provide an efficient platform and construction to document transactions. Currently, the MCSC builds a platform called the MORP license service center to operate music registration and transactions. However, the MCSC should integrate its copyright information and learn from international institutions for further development. Particularly, under the structure of the World Intellectual Property Organization (WIPO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO), MCSC is a member of the International Confederation of Societies of Authors and Composers (CISAC).[239] CISAC can provide resources and technology for MCSC to coordinate copyright information.[240] based on the ISWC system to code their musical works and construct a more precise information database. In light of the CISAC system, music CMOs in the Chinese market can connect their database with international standards and harmonize their different coding system. Additionally, it makes copyright holders and users more involved in an efficient licensing process. According to the pathway of open information by CISAC, it will help music CMOs approach more transparency on copyright licensing.[241]

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[239] International Confederation of Authors and Composers Societies (CISAC) official website, *available at* https://www.cisac.org/ (last visited Apr. 3, 2019).
[240] Ang Kwee-Tiang, *Collective Management in Asia, in* Collective Management of Copyright and Related Rights, Kluwer Law International BV, The Netherlands, p. 425-430 (2nd, Daniel Gervais ed. 2010).
[241] This began to change in the landmark case *Hush-A-Phone v. United States*, 238 F.2d 266 (D.C. Cir. 1956), "which allowed some non-Bell owned equipment to be connected to the network, and was followed by a

1.New Music Works Database

In the MWM act, the articles about the establishment of a new “Musical Works Database” for digital mechanical license represent a meaningful part of future compulsory arrangements. This adjunction is specified in 17 U.S. Code § 115 (d)(3)(E)(i), which designates,

> “To establish and maintain a database containing information relating to musical works (and shares of such works) and, to the extent known, the identity and location of the copyright owners of such works (and shares thereof) and the sound recordings in which the musical works are embodied.”

The promised database will be an organized collection of the musical work’s name, the copyright holder (musical publishers or individuals), the proportion of ownership, contact details of the copyright holder and,

> “To the extent reasonably available”,”the international standard musical code (ISWC)”, a unique identifier for musical works, and “identify information for sound recordings in which the musical work is embodied”,

This article indicates to incorporating names, line up of musical artists, sound engineers and producers, the copyright holder of sound recording (record labels) and the international standard recording code ((ISRC), through17 U.S. Code § 115 (d)(3)(E)(ii). For the explanation of “[T]o the extent practicable”, following the context of 17 U.S. Code § 115 (d)(3)(E)(iv), it is believed that the copyright holder of musical creations should make commitments to,

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number of other cases, regulatory decisions, and legislation that led to the transformation of the American long distance telephone industry from a monopoly to a competitive business.” “Outside of the U.S., Interconnection or "Interconnect regimes" also take into account the associated commercial arrangements. As an example of the use of commercial arrangements, the focus by the EU has been on "encouraging" incumbents to offer bundles of network features that will enable competitors to provide services that compete directly with the incumbent. Further the interconnect regime decided upon by the regulator has a major impact on the development/rate of growth of market segments.” *See* Telecom Antitrust Handbook, Chicago, Illinois: ABA Section of Antitrust Law, p.381-382 (2nd, 2013).

> "Engage in commercially reasonable efforts" via offering reliable and detailed copyright information to the musical works datable. In addition, the theme of this article considers the issues of "unmatched works', or "co-authorship and collaboration works".

For instance, orphan creation or mass digitalization, the precise musical creators and copyright holders can't be tracked or spotted. In these circumstances, the database will still have responsibilities to maintain the most advantageous information for connecting the communication between copyright holders and users. This is what presented by 17 U.S. Code § 115 (d)(3)(E)(iv).

Furthermore, within the database of a mechanical license collective, in accordance with17 U.S. Code § 115 (d)(3)(E)(v),

> "[T]he musical works database shall be made available to members of the public in a searchable, online format, free of charge." In light of this sentence, the copyright information inside the database should be simultaneously "in a bulk, machine-readable format, through a widely available software application," open to the Register of Copyright at the U.S. Copyright office, digital musical content suppliers, users unaffiliated to blanket license, content retailers with permission, most essentially without any billings to the employers above and "any other person or entity for a fee not to exceed the marginal cost of providing the database." On top of that, the MLC should "maintain a current, publicly accessible list of blanket licenses" and a further adoption for "notices of nonblanket activity" though users not associated with a blanket license, in which sufficient copyright information should be provided as well.

In the following copyright amendment under the Modernization Music Act, in accordance with Section 115 (d)(3), the US Copyright Office will specify an up-to-date Mechanical Licensing Collective (MLC) to gather and allocate remuneration, on behalf of musical artists and publishers, and operate a blanket license. This freshly established MLC will be assigned the mission of constructing an open database comprising the copyright information of musical works and sound recordings.[242]

[242] "Title I—Music Licensing Modernization, among other things, modifies the existing section 115 "mechanical" license for reproduction and distribution of musical works in phonorecords (which was previously obtained by licensees on a per-work, song-by-song basis) to establish a new blanket license for digital music providers to engage in specific covered activities (namely, permanent downloads, limited downloads, and interactive streaming). Licensing of physical configurations (*e.g.*, CDs, vinyl) will still

An advanced blanket license system will be assembled in the new revision. By restricting the scope of copyright infringement, empowering the licensing scope of digital music helps digital music companies and platforms to build a new music future since, in accordance with good faith, legitimate labors to seek and target the copyright holders of musical creation will have been undertaken. The new amendment, simultaneously, adjusts the course for choosing federal judges in the United States District Court for the Southern District of New York (S.D.N.Y.), who make decisions on the controversies of price design concerning copyright collecting societies (CMOs) of music performance rights, including BMI and ASCAP, within the structure of consent decrees with respect to the Department of Justice (DOJ).[243]

High levels of interoperability in music licensing will increase users' choice, flexibility and convenience in competitive markets.[244] This advance will build more access, diversity and openness. It stimulates the efficiency of transactions between users, CMOs and authors. Especially, common and overlapping affairs should be harmonized. For instance, in the future, the music user should be able to rely on one platform to process music licensing

operate on a per-work, individual song license, basis. Title I establishes a market-oriented "willing buyer, willing seller" rate standard that will apply to all licensees of musical works under the section 115 mechanical license. Pursuant to section 115(d)(3), as amended, the Register of Copyrights will designate an entity as the mechanical licensing collective to administer the blanket license and distribute collected royalties to songwriters and music publishers. The newly created mechanical licensing collective will be tasked with developing and maintaining a database of musical works and sound recordings, which will be publicly available and is expected to become the most comprehensive database in the music industry. There will be a transition period to move to the new blanket license, allowing digital music providers to limit copyright infringement liability so long as the provider engages in good-faith, commercially reasonable efforts to identify and locate musical work copyright owners. The legislation also modifies the process for selecting federal district court judges to adjudicate rate-setting disputes regarding performance rights organizations that are subject to consent decrees with the Department of Justice (*i.e.*, ASCAP and BMI)." *See* U.S. Copyright Office, Orrin G. Hatch–Bob Goodlatte Music Modernization Act, *available at* https://www.copyright.gov/music-modernization/ (last visited Mar. 30, 2019).

[243] Julie E. Cohen, Lydia Pallas Loren, Ruth L. Okediji & Maureen A. O'Rourke, *Copyright in A Global Information Economy*, New York: Wolters Kluwer, p.409-411, 413-417 (4th ed. 2015).

[244] "A continued lack of interoperability could frustrate consumers and ultimately slow down the development of digital content. It is generally acknowledged that online distribution creates efficiency gains by drastically reducing transaction costs, a feature that in turn leads to greater access to music at lower prices." *See*Urs Gasser & John Palfrey, DRM-Protected Music Interoperability and Innovation, Berkman Publication Series,p.28 (Nov. 2007); "IP rights and trade secrets over music DRM technologies have the potential to give rise to competition concerns in the near future. In the absence of structural remedies, resort to compulsory licensing of DRM technology should be limited to the exceptional circumstances. The owner of the dominant (or standard) DRM technology would thereby have an incentive to widely license its technology in such a way that compulsory licensing would ever actually become necessary."*See* Giuseppe Mazziotti, *Did Apple's refusal to license proprietary information enabling interoperability with its iPod music player constitute an abuse under Article 82 of the EC Treaty?"*, World Competition, Vol. 28, Issue 2, p33-34 (Jun. 2005).

and distribute the licensing fee to different CMOs in each field. This "one-stop shop" should be encouraged in Multi-CMOs countries. For the Mandarin music market, depending on rising interconnections, the unnecessary time wasted and transactional costs between copyright holders and users can be prevented. Under the framework of cooperation, the transparency of music CMOs could also be enhanced.[245]

2. Digital License Coordinator

At the same time, in line with 17 U.S. Code § 115 (d), the MMA ratifies the U.S. Copyright Office's Register of Copyrights to enforce an appointment of a "digital license coordinator", who will engage in particular conduct related to music licensing. According to 17 U.S. Code § 115 (d)(5)(A)(i), the digital licensee coordinator shall be "a single non-profit entity, which is not owned by any other entity." Regarding the 17 U.S. Code § 115 (d)(5)(A)(ii), "over the preceding three full calendar years", this entity should be "endorsed by and enjoys substantial support from digital music providers and significant nonblanket licensees that together represent the greatest percentage of the licensee market for uses of musical works in covered activities."

Unusually, referring to the 17 U.S. Code § 115(d)(5)(A)(iii), different from the construction of Mechanical Licensing Collective (MLC), in case,

> "The Register of Copyrights is unable to identify an entity that fulfills each of the qualifications described in the clauses, the Register may decline to designate a digital license coordinator."

Corresponding to this situation, in light of the adoption of voluntary agreements of the 17 U.S. Code § 115(d)(7)(D)(v), it points out that the digital license coordinator could be overlooked and, alternatively, the MMA permits "interested digital music providers and significant nonblanket licensees representing more than half of the market for uses of musical works" to take over covered activities that originally should have been facilitated by the digital license coordinator.

[245] Robert P. Merges, *Justifying Intellectual Property*, Cambridge, MA: Harvard University Press, p. 222, 230 (2011).

In general, the MMA appoints and permits the coming establishment of digital license coordinator, which mainly executes the undermentioned duties within 17 U.S. Code § 115(d)(5)(C)(i).

> "(I) Establish a governance structure, criteria for membership, and any dues to be paid by its members;(II) Engage in efforts to enforce notice and payment obligations with respect to the administrative assessment, including by receiving information from and coordinating with the mechanical licensing collective; (III) Initiate and participate in proceedings before the Copyright Royalty Judges to establish the administrative assessment under this subsection; (IV) Initiate and participate in proceedings before the Copyright Office with respect to activities under this subsection; (V) Gather and provide documentation for use in proceedings before the Copyright Royalty Judges to set rates and terms under this section; (VI) Maintain records of its activities; (VII) Assist in publicizing the existence of the mechanical licensing collective and the ability of copyright owners to claim royalties for unmatched musical works (and shares of works) through the collective;(VIII) Engage in such other activities as may be necessary or appropriate to fulfill its responsibilities under this subsection."

F. Continuing Modernization Progress in China

1.The First Amendment

In light of China's contemporary copyright history, it is apparent that the established amendments of 2001 and 2010 have attracted less controversy as well as critical disapprobation through external pressure.[246] In 2001's version, the copyright reform aimed to achieve compliance with the qualification of World Trade Organization (WTO) while the modification in 2010 targeted easing the conflicts between the U.S. and China within the WTO order and regime. Unlike the 2001 and 2010 copyright regulation's WTO orientations, the new reform in 2012 was specified to reconcile the imbalance between China's copyright law and the contemporary movements of cutting-edge commerce, culture and technology in the digital era, and was expected to shift China's market economy to a stronger and more exquisite level.[247]

[246] William Alford, To Steal a Book Is an Elegant Offense: Intellectual Property Law in Chinese Civilization, Calif.: Stanford University Press, p.22-26 (1995).
[247] Xianjin Tian, Fuxiao Jiang, Katherine C. Spelman, Daniel Gervais, Mark H. Wittow and Trevor M. Gates,

The first draft of the copyright amendment made remarkable modifications to the existing music copyright law.[248] 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.[249] 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 .[250]

(1) Statutory Licensing System

In accordance with the music industry, statutory licensing is aimed at generating more exploitation and the spread of musical creation .[251] Having said that, in terms of realistic operations, the current licensing system cannot ensure musical artists' copyright compensations to be fully collected and distributed.[252] From the perspective of the governmental authority in the Chinese music market, the National Copyright Administration of the People's Republic of China (NCAC), these difficulties were possibly provoked by an inefficient and unfunctional copyright clearance mechanism.[253] Thus, in

Copyright Law of China, in IP Protection in China, American Bar Association (Donna Suchy ed.) p.236 (June 7, 2017); Paul Goldstein, Copyright's Highway: From Gutenberg To The Cloud, Stanford, California: Stanford University Press,p.53 (2nd 2019).

[248] Xianjin Tian, Fuxiao Jiang, Katherine C. Spelman, Daniel Gervais, Mark H. Wittow and Trevor M. Gates, *Copyright Law of China, in* IP Protection in China, American Bar Association (Donna Suchy ed.) p.237 (June 7, 2017).

[249] Al Kohn ＆ Bob Kohn, Kohn on Music Licensing, Austin : Wolters Kluwer Law & Business ; New York, NY : Aspen Publishers, p.4-5 (4th ed.2010).

[250] JHANG,FONG-YAN(張豐豔), *Yang "Yinle Wenhua Daguo" zhi Fan, Di "Yinle Chanye Daguo" zhi An(ShowingFlag as A "Music and Cultural Power", and Reaching the shore of the "Music Industry Power") [揚"音樂文化大國"之帆，抵"音樂產業大國"之岸]*, CHINA COPY RIGHT (中國版權), Vol 1,p.30 (2015).

[251] White-Smith Music Publishing Co.v. Apollo Co., 209 U. S.1(1908); Paul Goldstein, *Copyright*, Law and Contemporary Problems, Vol. 55, Issue2, p.86(1992); Skyla Mitchell, *Reforming Section 115：Escape from the Byzantine World of Mechanical Licensing*, Cardozo Arts & Entertainment Law Journal, Vol. 24, Issue 3,p.1239, 1256 (2007).

[252] *See* Henry E. Smith, *Institutions and Indirectness in Intellectual Property*, University of Pennsylvania Law Review, Vol. 157, Issue 6, p.2083-2089. (June 2009); Xiong Qi (熊琦), *Yinle Zhezuoquan Zhidu Tixi de Shengcheng yu Jishou (The Formation and Succession of Music Copyright System) [音樂著作權制度體系的生成與繼受]*, Law Science (法學雜誌), Vol. 12, p.90-93 (2013); Mark A. Lemley, *Contracting around Liability Rules*, California Law Review, Vol. 100, Issue 2, p.470-475 (April 2012).

[253] Xianjin Tian, Fuxiao Jiang, Katherine C. Spelman, Daniel Gervais, Mark H. Wittow and Trevor M. Gates, Copyright Law of China, in IP Protection in China, American Bar Association (Donna Suchy ed.) p.240 (June

the first draft amendment, it 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.[254] In addition, this first draft offers NCAC the power to execute sanctions or fines on the exploiters who fail to carry out its orders .

Article 46 of this first draft specifies:

> "After 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 48, the recorded music works to make sound recordings without permission from the copyright owner.)

Article 47 of this first draft stipulates:

> "Radio and television stations may broadcast published works, except audiovisual works, under the condition set for statutory licenses by Article 48."

(2) Copyright Collective Management

In order to enhance the prosperous exploitation of music market, only if the artists choose to opt out, this initial draft advocates China should establish extended collective licenses (ECL) to comprehend the non-affiliated artist's licensing arrangements[255], especially through the managerial function of collecting societies to gather and allocate remuneration.[256] Moreover, within the mechanism of ECL, the price setting should be administered by a governmental agency[257], NCAC, and collecting societies such as MCSC

7, 2017); Zhiqiang Yin & Congyun Zheng, *Study on Digital Music Industry Operation in China*, (in 3rd International Conference on Management, Education, Information and Control (MEICI 2015), p.3-4 (2015).

[254] Article 48.

[255] *See* Hamish Porter, *European Union Competition Policy: Should the Role of Collecting Societies Be Legitimised?* European Intellectual Property Review, Vol.18, p.672, 676 (1996); H. Lund Christiansen, *The Nordic licensing systems— extended collective agreement licensing*, European Intellectual Property Review, Vol.13, No.9, p.346-349 (Sep. 1991).

[256] Article 60 of the first draft amendment.

[257] *See* Maria Pallante, *Orphan Works, Extended Collective Licensing and Other Current Issues*, Columbia Journal of Law & the Arts, Vol. 34, Issue 1, p.24-28 (2010).

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 the setting of the licensing fee.[258] 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. [259] Consequently, the decision approved by the specialized governmental body would be conclusive and, once the process of assessment starts, the procedure can not be terminated until the closing determination.[260]

(3) Copyright Enforcement

This first draft proposes the below-mentioned modifications regarding the enforcement of music infringements. On the basis of the legislation or binding agreement in the company of copyright collective management, in case the exploiter should have delivered royalties to a CMO, the binding exploiters are granted immunity from actual damages of legal litigation.[261] Still and all, these exploiters should keep submitting remuneration to the CMO in accordance with the established rate plan set through governmental administration. This modification is aiming to stimulate music creators to assign to their copyright management to specialized CMOs and to avoid the troublesome issues of overwhelming and massive legal litigation in China's music marketplace.[262]

2. 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 even delivered by foreign companies, artists and organizations.[263] In

[258] Xianjin Tian, Fuxiao Jiang, Katherine C. Spelman, Daniel Gervais, Mark H. Wittow and Trevor M. Gates, Copyright Law of China, in IP Protection in China, American Bar Association (Donna Suchy ed.) p. 240 (June 7, 2017).
[259] Daniel Gervais (Ed.),Tarja Koskinen-Olsson, Collective Management In The Nordic Countries, In Collective Management Of Copyright And Related Rights 292(2010).
[260] Xianjin Tian, Fuxiao Jiang, Katherine C. Spelman, Daniel Gervais, Mark H. Wittow and Trevor M. Gates, *Copyright Law of China, in* IP Protection in China, American Bar Association (Donna Suchy ed.) p.241 (June 7, 2017).
[261] *Id.*
[262] *Id.*
[263] *Id.* at 242.

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.[264] According to further examination of professional research, practical views and open advice from the whole music community, NCAC arranged the second version of reform proposal to be issued in July, 2012, and sought feedback again.[265] This subsequent draft amendment offered modifications of the most controversial issues in music industry: the modern operation of collective management and the statutory license (compulsory license), which was located in Article 46,47,48, 60 and 70 of the second draft.[266]

3. The Third Draft Amendment and Further Developments

In reaction to the aforementioned reform proposals, the governmental authorities organized a new version with more comprehensive and satisfying views of China's music market.[267] In order to arrange a more convincing draft - as compared to the weak acceptance based on public feedback at an early stage (the end of 2012) - China's copyright administration, NCAC, chose to present its self- drafted proposal to the State Council Legislative Affair Office (國務院法制辦公室), SCLAO, for preliminary internal evaluation.[268] By 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 assessments.[269] However, since it had been a while after widespread discussion in the public from, this third version of the copyright reform is still in pending status, awaiting the concluding examination and official announcement through the 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).[270]

4. Lessons from the U.S. and Europe's Licensing Models

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264 *Id.*
265 *Id.* at 243.
266 *Id*
267 *Id.* at 243.
268 *Id.* at 244.
269 *Id.*
270 *Id.*

(1) Statutory License (The U.S.'s Compulsory Licensing Approach)

On the one hand, in light of the statutory licensing debates, music artists in China's music market had great concerns about Article 46 of the initial draft, when this article aimed to allow the record label to exploit musical compositions or lyrics on the basis of a previous published sound recording, which in particular had been released to the public market above three months.[271] In view of this apprehension, China's music community argued that the proposed phase of three months is too limited for music copyright holders and this governmental restriction would harm the competence of exclusivity that musical creators can rely on.[272] In addition, Chinese music artists argued that their property rights will be impaired under the evil of this draft article. The funding to support the continuing creation of musical compositions and lyrics would be shrinking due to the lack of copyright protection.[273]

On the other hand, a considerable number of academics and professionals in copyright law presented their opposite opinions and tried to counter the music community's false impression on the drafted Article 46.[274] Basically, academics' professional analysis pointed out satisfactory foreign experiences and the function of the statutory license in averting antitrust issues in the digital age, notably caused by record labels and music publishers. Notwithstanding that, the pressure from China's music community was seriously overwhelming and the drafted Article 46 of the statutory license was finally struck out and abandoned.[275]

(2) Extended Collective License (Nordic ECL)

However, simultaneously, music artists voiced their objections to the second draft and went against the possible establishment of an ECL. From their perspective, ECL would enlarge collecting societies' controls on their copyright and continue narrowing down music artists' autonomy in managing their property rights.[276] Hence, owing to a compromise with the

[271] *Id.* at 243.
[272] *Id.*
[273] *Id.* at 243.
[274] *Id.*
[275] *Id.*
[276] *Id*

public's resistance, the second draft restricted the implementation of ECL to the situation of published musical works broadcast in radio and television stations and published musical works disseminated through private karaoke equipment.[277]

[277] *Id.*

VI. SUBSEQUENT CONTROVERSIES IN MANDARIN MUSIC MARKET

A. New Developments of Chinese CMOs

It is considered that 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 the articles 46 and 48. The new amendment of these two articles is aiming to enhance the efficiency of music licensing within the scope of China's copyright system. In the light of these two articles, in summary, music production companies were allowed to utilize music compositions and transfer them into sound recordings, if these music compositions have been published for more than three months.[278] 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 engaged into the fixed price-setting by the NCAC. These two new articles of amendments can be regarded as a further improvement in the foundation of the current article 40(3) in China's copyright act. This new amendment is comparable to the section 115 of the US copyright law. In the new 2012 amendment, the extended collective license (ECL) is manifested in the specific article 60 of the Chinese Copyright Act. This new step could be seen as an up-to-coming 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, is bringing discussions and negotiations between users and rightsholders.[279]

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 on the music composition license. MCSC has been designed as a non-profit organization representing the musical artists and rightsholders for collecting and distributing their revenue on the grounds of copyright. The MCSC is also the earliest established CMO approved via the PRC government and the PRC Copyright Law Act. The MCSC had obtained its membership in the International Confederation of Author and

[278] RCCA 46 and 48.
[279] Fuxiao Jiang, Daniel Gervais, *Collective Management Organizations in China: Practice, Problems and Possible Solutions*, The Journal of World Intellectual Property, Vol. 15, No. 3, p. 220 (May. 2012).

Composers Societies (CISAC) from 1994 and been a representative of the International Standard Musical Work Code (ISWC) for the entire Chinese music market in 2009. This is not surprising because with the approval from the PRC government, MCSC actually holds the exclusive membership and delegate in China region from CISAC and ISWC respectively. By 2009, the memberships of MCSC have reached 5798, comprising 355 new members of 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.[280]

The China Audio-Video Copyright Association (CAVCA) is founded in 2008. Its main mission is to cluster and distribute the copyright revenue for the creators or rightsholders of audiovisual works. In the basis of China Copyright Act, with the permission of NCAC, CAVCA also become the only CMO responsible for the licensing affairs of audiovisual works. In particular, CAVCA embarks upon many categories of rights, including: "the right of public performance, the right of public presentation, the right of broadcasting, the right of rental, the right of communication, through information network, the right of reproduction and distribution and other copyright, and related rights of audiovisual works".[281] Until 2011, CAVCA's repertoire database included more than 120,000 works, and the total financial benefits from CACVA have reached 117 million RMB.[282]

In fact, CAVCA brings significant influence to the entire Chinese music industry because its main task is to provide more efficient licensing service for the karaoke industry. The licensing profits made by a karaoke business can be a major source for the established and stylish musical artists. It can be assumed that 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 of per karaoke box is 12 RMB and the royalties of karaoke license should be allocated between MCSC and CAVCA.[283] Specifically, the Executive Outcome of Music CMO: The fundamental function of a music CMO is comparable to the general CMOs in individual types of industries. It is believed that on the basis of the China Copyright Law, the establishments of Chinese CMOs should be

[280] *Id.*at 222-223.
[281] *Id.* at 223.
[282] *Id.* at 224.
[283] *Id.* at 223.

approved and supervised by the governmental commission, NCAC. This background caused all Chinese CMOs to keep their cordial connection 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 on the basis of the rate plan and conditions agreed by both sides.[284] Building reliable data is a fundamental foundation to locate copyright information, especially, precisely confirming licensing proprietorship and objects, and to verify the proportion of music compositions or lyrics the users exploits.[285] In line with China's RCCA, music CMOs such as MCSC and CAVCA should offer an effective database to users to look for copyright information within CMOs' individual collections.[286] For the purpose of the licensing process, this copyright information in the database should include, but not be limited to, applicable licensing types of copyright, the name of the music works or sound recordings, the contact information of the right owners (for economic rights license), designation or identification of composers and lyrists (for moral rights license), and the specific time period of permitted collective management licenses to CMOs.[287] Simultaneously, as exploiters consume music works or sound recording, it is necessary to define the precise way their activities should be reported to CMOs, and the compensation should be calculated and paid to copyright holders through CMOs.[288] In China's music market, the repertoire and manageable proficiency of MCSC for music works and CAVCA for audiovideo is highly influential, and relevant to the function and development of the overall music licensing ecosystem.[289]

B. A New Topic of Fair Opportunities: Chinese Online Music Services

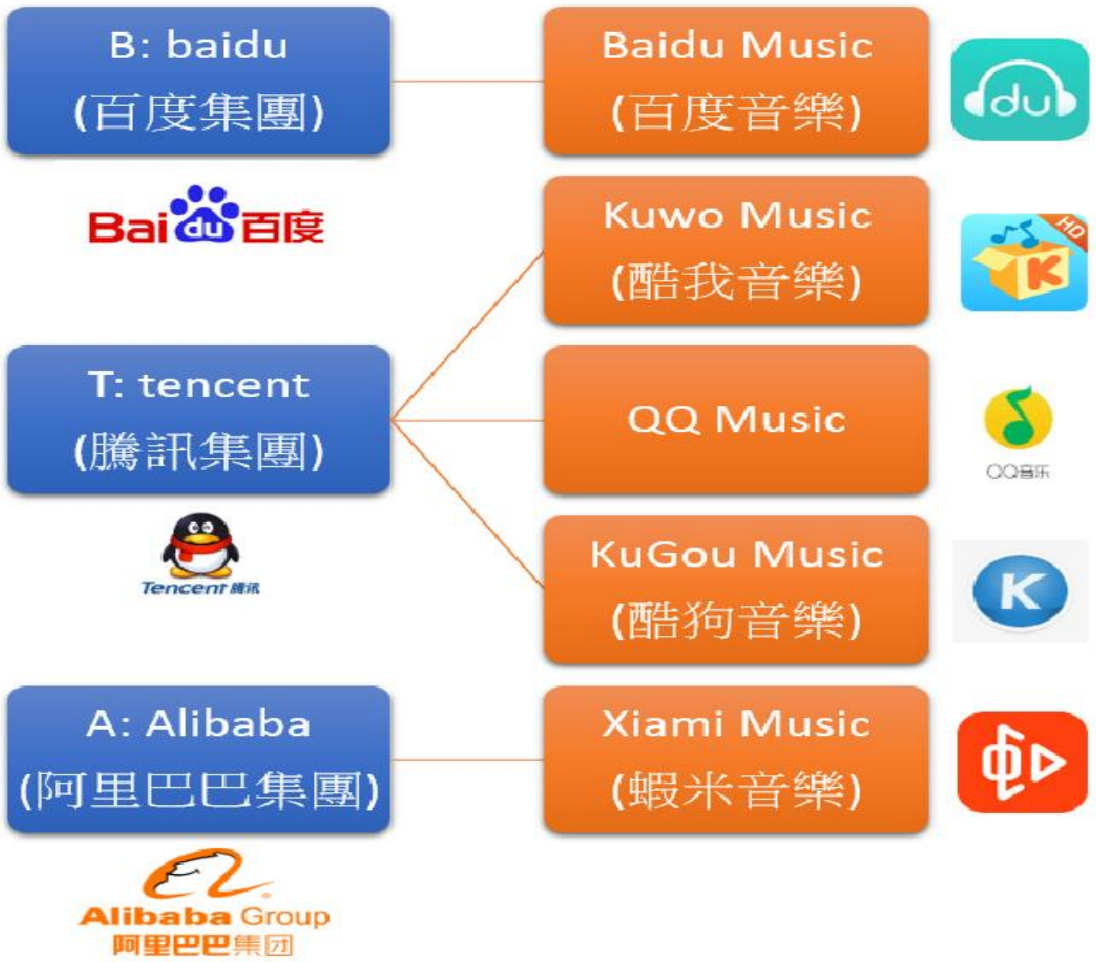
Because of China's large population, it is uncontroversial that China could form a sustainable, remunerative market for music creators. In whatever way, Chinese music

[284] Xianjin Tian, Fuxiao Jiang, Katherine C. Spelman, Daniel Gervais, Mark H. Wittow and Trevor M. Gates, *Copyright Law of China, in* IP Protection in China, American Bar Association (Donna Suchy ed.) p.209 (June 7, 2017).
[285] *Id.* at 210.
[286] *Id.*
[287] RCCA Article 23
[288] Xianjin Tian, Fuxiao Jiang, Katherine C. Spelman, Daniel Gervais, Mark H. Wittow and Trevor M. Gates, *Copyright Law of China, in* IP Protection in China, American Bar Association (Donna Suchy ed.) p.210 (June 7, 2017).
[289] *Id.*

service companies are combating the accumulated "culture of free use", and suffering from the difficulties of collecting copyright royalties. The habit of the implication for free is established when exploiters can simply approach or download digital songs for free though illegal forums, websites or software. In spite of this, irritated by expected market expansion, 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 inserting leading music publishers and record labels in China under licensing contracts, BAT is constructing an individual music repertoire database for comprehending 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 U.S. Otherwise, in terms of market competition, their interface leads to questions of how to retain their consumers inside the interior brand structure, and how this collective service system inhibits consumers from reaching the service provided by the market competitors outside their service. The closed model in the Chinese digital music market raises issues of antitrust threats, and retarding the function of a competitive market.[290]

[290] Xiuqin Lin, *Music Individual Licensing Models and Competition Law, in* Remuneration of Copyright Owners, p.189-192 (Kung-Chung Liu & Reto M. Hilty ed. 2017).

Figure 26：Primary Chinese Online Music Services Belong to BAT



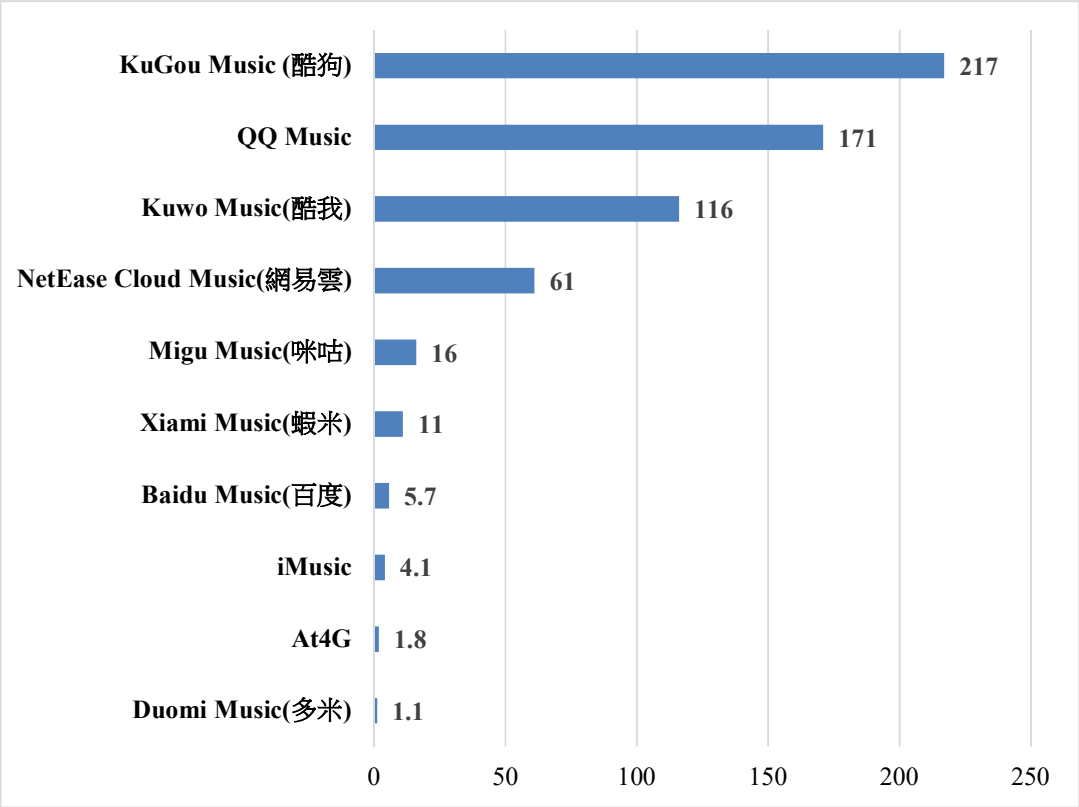
Organized by author

In China, QQ Music is the most dominant service provider, with over 200 million consumers and over 40 million active subscribers. The framework of QQ Music is comparable to Spotify. This music licensing model and interface are built by its mother company, Tencent (騰訊), which offers the most leading internet technology in China. Within its two different membership types, QQ Music is supported by 2-layer membership: For enhancing the numbers of subscribers, 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[291] have been included into QQ Music's

[291] *See* Kao Ching-Yuan(高敬原), *Zuoyong Zhongguo 9Cheng Yinle Banquan, Tengxun Yinle Xiayue Fu Mei Shangshi, Guzhi yu 300Yi Meiyuan(The Shares of Tencent Music will be listed in the U.S.'s Stock Market. The Value Could Be Over $30 Billion) [坐擁中國 9 成音樂版權，騰訊音樂下月赴美上市，估*

repertoire database. In contrast to other participants in music market, QQ Music has superior competition on keeping and increasing subscribers when its mother company, Tencent, manages the most influential Chinese communication apps, WeChat (微信) and Tencent QQ (騰訊 QQ). They respectively have over 500 million active subscribers.[292]

Figure 27：Leading mobile music platforms in China as of December 2017[293]
by number of monthly active users (in millions)



值逾 300 億美元], Business Next (數位時代) , (2010), *available at* https://www.bnext.com.tw/article/50514/tencent-music-us-ipo (last visited Apr. 10, 2019);
Chen Guan-Rong (陳冠榮), *Tengxun Zai Qude Suoni Yinle Shuwei 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), (2004), *available at* https://technews.tw/2014/12/18/tencent-signs-china-deal-with-sony-music/ (last visited Apr. 10, 2019).

[292] Xiuqin Lin, *Music Individual Licensing Models and Competition Law,in* Remuneration of Copyright Owners, p.192-195 (Kung-Chung Liu & Reto M. Hilty ed. 2017).

[293] Analysys (易觀博閱), *2018 Zhongguo Yidong Yinle Shichang Niandu Zonghe Fenxi (2018 China Mobile Music Market Annual Comprehensive Analysis)[2018 中國移動音樂市場年度綜合分析]*, *available at* http://www.199it.com/archives/733475.html (last visited Apr. 10, 2019).

1. Abuse of Dominant Position

As stated, the model of QQ Music corresponds to the U.S.'s Spotify. Nevertheless, contracting to Spotify, Tencent is the promising leader on Chinese information technology and holds influential strength on diverse interface and business fields. On the basis of this approach, Tencent's market position is comparable to the U.S.'s Apple, because Tecent can combine all its market strength in different commercial fields, consisting of Tencent QQ and WeChat, to back QQ Music's business model. This market power could possibly cause antitrust issues. A obvious example is that, 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.[294] In this case, WeChat apparently assisted its brother company, QQ Music, to reach a better 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. In this case, Tencent asserted that Alibaba relied on WeChat's interface to strengthen Alibaba's market position.

Thus, Tencent decided to shut down two of Alibaba's music services on the WeChat portal. Even the authority of Chinese government did not step in this dispute and manage this critical issue. This conflict between Tencent and Alibaba Group raised serious discussions by commentators in the region. In general, the block operated by Tencent was criticized and regarded as a harmful form of market competition. Additionally, the legality of Tecent's conduct were also questioned. In the light of the principle of antitrust, Tecent's conduct of blocking Alibaba's music service cannot go through the "reasonableness" examination, so this block can be seen as being illegal.[295]

2. Absence of Diverse and Vast Related Market Power

In whatever way, it will be meaningful that a more modern circumscription of "relevant market" should be considered when the torch bearers of information technology such as

[294] Xiuqin Lin, *Music Individual Licensing Models and Competition Law, in* Remuneration of Copyright Owners, p.197-199 (Kung-Chung Liu & Reto M. Hilty ed. 2017).
[295] *Id.*at 199-205.

China's Tencent and the U.S.'s Apple, Amazon and Google hold robust strength in diverse business areas, and also hold considerable amounts of data about their user populations. In a result, in China, the subsidiary of Tencent group, QQ Music, possesses superior force on the digital music business, because Tencent can engage its influence on related technical or a business profession, to obstruct other market participants and avoid the function of a competitive market.[296.]

As was observed, "*w*hether Tencent can dominate online music in China—and get more users to pay—may depend on how well it can take advantage of popularity of its messaging and social-networking service".[297] Moreover, in case a prevailing participant would take advantage of the cooperative interaction among its relationship enterprises and play a role in the market, in the absence of diverse and vast related market power, it could be harsh to let the competitors retain a privileged position towards opportunities, and to operate from that position to engage the competitive market. This dominance by prevailing market players could block the function of market competition and cause a severe threat to efficiency. Consequently, it would be significant that to clarify the meaning of "relevant

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[296] *See* CHRISTINE CHOU, *ALIBABA, NETEASE STRIKE CHORD ON MUSIC STREAMING*, Alizila.com: Latest news and updates of Alibaba Group, (Mar. 7, 2018), *available at* https://www.alizila.com/ali-music-netease-strike-chord-on-music-streaming/ (last visited Apr. 15, 2019); Leo Sun, *Meet China's Top 3 Music Streaming Platforms: Tencent, JD, and Baidu could all be great contrarian bets next year*, The Motley Fool News & Analysis (Nov. 27, 2018), *available at* https://www.fool.com/investing/2018/11/27/these-3-chinese-tech-stocks-could-rebound-in-2019.aspx (last visited Apr. 15, 2019); Sarah Dai, *Alibaba, Tencent collaborate on music streaming, with potential to remake industry*, South China Morning Post (Sep, 2017), *available at* https://www.scmp.com/business/companies/article/2110837/alibaba-and-tencent-enter-rare-cooperation-which-expert-says (last visited Apr. 15, 2019); Frank Hersey, *Alibaba and Tencent collaborate on music copyright*, TechNote (Sep. 12, 2017), *available at* https://technode.com/2017/09/12/alibaba-and-tencent-collaborate-on-music-copyright/ (last visited Apr. 15, 2019); KEVIN ZHOU, *Tencent and Alibaba Announces a Music Copyright Cooperation*, Pandaily (Sep. 13, 2017), *available at* https://pandaily.com/tencent-and-alibaba-announces-a-music-copyright-cooperation/ (last visited Apr. 15, 2019); STAFF WRITER, *Chinese tech giants Alibaba and Tencent to swap music licensing – Will It Grow The Fast-Expanding Market?* The Music Network (Sep. 13, 2017), *available at* https://themusicnetwork.com/chinese-tech-giants-alibaba-and-tencent-to-swap-music-licensing-will-it-grow-the-fast-expanding-market/ (last visited Apr. 15, 2019); Zen Soo, *Tencent to merge QQ Music service with China Music Corp to create streaming giant*, South China Morning Post (Jul. 15, 2016), *available at* https://www.scmp.com/business/companies/article/1990254/tencent-merge-qq-music-service-china-music-corp-create-streaming (last visited Apr. 15, 2019); Adam Lashinsky, *Alibaba v. Tencent: The Battle for Supremacy in China*, Fortune (Jun. 21, 2018), *available at* http://fortune.com/longform/alibaba-tencent-china-internet/ (last visited Apr. 15, 2019); Michael K. Spencer, *Tencent Music leads Chinese IPO Golden Age*, Medium (Oct. 10, 2018), *available at* https://medium.com/futuresin/tencent-music-leads-chinese-ipo-golden-age-6636d962ec9d (last visited Apr. 15, 2019).

[297] Xiuqin Lin, *Music Individual Licensing Models and Competition Law, in* Remuneration of Copyright Owners, p.203-205 (Kung-Chung Liu & Reto M. Hilty ed. 2017).

market", by using a more modern and updated approach, should also take into consideration the market participant's substantial influence on the whole social network.[298]

In terms of compulsory license on musical works, a response presented by the governmental authority of copyright affairs in China, NCAC, justified, for the purpose of anti-monopoly, the regime of compulsory license could avoid the negative effects of unfair competition brought by the traditional copyright function of exclusive rights. Nevertheless, this response provoked severe remonstrance from musical artists and publishers.[299] In fact, for the Chinese music market, the compulsory license mechanism possibly imposes a serious monopolistic issue is that the most influential musical platforms, such as Baidu, Alibaba and Tencent (BAT), will obtain more controlling market power, since the compulsory license will definitely enhance their current vast bargaining power and, thus, cause the impossibility of fair negotiation due to the impaired competitive market and dominant positions. Incontrovertibly, the future risks for the Chinese music market might be that compulsory license will strengthen BAT's market power to a higher level and make their dominance more stable and fixed. This result will cause demonstrable harm to the prospective income and autonomy of musical artists, and make market failure and the problematic anti-competition situation in Chinese music market even worse.

C. Appropriation Art as a Cornerstone of Modern Music

On the basis of the history of art, appropriation is a significant essence and form for cultural comments and derivative works. Under this historic foundation, a "mash-up" is a musical appropriation, which has found prevalence in any style of music, but in particular rap, funk, hip-hop and jazz. It can be found how the copyright ecosystem should paint a line in the middle of incentivizing the progress of culture, and attracting fans to appreciate the creative

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298 *Id.* at 205.

299 *See* Xu Ci (徐詞), *Zhezuoquanfa Xiugai Caoan Xianru Zhengyi Xuanwo (The draft amendment of the Copyright Law caused controversies) [著作權法修改草案陷入爭議漩渦]*, SinaTech (新浪科技), (Apr. 20, 2012), *available at* http://tech.sina.com.cn/i/2012-04-20/15286992204.shtml (last visited Mar. 20, 2019); Xiao Xiong-lin (蕭雄淋), *Zhongguo Dalu Zhezuoquanfa Xiuzheng Caoan Di 2 Gao de Ruogan Wenti (Some Issues Concerning the Second Amendment Draft of the Copyright Law in China) [中國大陸著作權法修正草案第二稿的若干問題]*，Intellectual Property Rights Journal(智慧財產權月刊), Vol. 173, p.5-24 (May. 2013).

works. The legal mechanism has to offer an environment for nurturing and developing appropriation of art, and securing the creators' rights.[300]

By way of example, in the Mandarin music market, a prestigious producer, Adia (阿弟仔), combines Lenny Kravitz's song "Are You Gonna Go My Way" with a traditional Chinese folk song "Yangming Chunxiao (陽明春曉)". By his talent on harmonizing Western and Eastern culture, he creates a remix song called "Introduction" (序) on his album "Balance" (平衡), which has won numerous prizes and respect from music professionals. Furthermore, a young music composer, Lala Hsu (徐家瑩), has written a Mandarin song which integrates a classical Taiwanese opera "Love Amongst War" (薛平貴與王寶釧) into her original creation "Riding A White Horse" (身騎白馬). This tune won professionals' applause, and even the Golden Melody award, is was performed on one of the most popular Chinese TV program, I Am A Singer (我是歌手), when this track cleverly appropriates traditional cultural concepts for modern content.

Mash-up music greatly influences the music market, and leads to a new trend in Taiwanese music creativity. Furthermore, an aboriginal talent, from the Amis tribe, Difang (郭英男), attracted international attention by his soulful voice and extraordinary composition, Elders Drinking Song (老人飲酒歌). The German band Enigma remixed it, and incorporated it into its renowned song, Return to Innocence. This tune was used for remixing and became the theme song for the 1996 Atlanta Olympic Games, without receiving any license from Difang. The resulting lawsuit and court settlement brought broad discussions about how the legal mechanism has to offer a suitable environment for fostering and developing appropriation of art, as well as protecting the music creators' copyright. Mash-up music greatly influences the music market in China and leads to a new trend in Mandarin music creativity.

However, a moment of difficulty arises, in that there are still no specific provisions in the Copyright Law of the PRC regarding mash-up. The most relevant existing article is about "Quotation". Article 22(2) of the Chinese Copyright Act indicates that, "appropriate

[300] Peter S. Menell, Adapting *Copyright for the Mashup Generation*, University of Pennsylvania Law Review, Vol. 164, Issue 2, p452-458 (Jan. 2016).

quotation from another person's published work in one's own work for the purpose of introducing or commenting a certain work, or explaining a certain point.[301]

The "transformative use" doctrine adopted by the current U.S. court. However, in the Chinese context, it may be difficult to define the context of "appropriate" or "for the purpose of introducing or commenting a certain work, or explaining a certain point". Therefore, mash-up issues may find a legal framework that is impractical, and difficult to imagine. From the article itself, and current judicial opinion, there is no existing judicial framework for the mash-up, for instance by inserting copyrighted music materials to comment on something other than the former work.[302] How to define the term of "appropriate" in the court? Specifically, there is no precise criterion about what proportion should be inappropriate. As a result, if an entire work was appropriated, it is not *strictu sensu* affirmative that it causes copyright infringement, as long as it can be considered as "essential". (北京市第二中級人民法院民事判決書（2012）二中民終字第 16700 號).[303]

1. Vague Standards Exist for Appropriating Existing Music

Obtaining a license by negotiation is a necessary approach for mash-up music. According to this license, mash-up artists can implement copyright and use copyrighted works, and based on this authorization, the mash-up artist is allowed to incorporate an original segment

[301] PRC Copyright Law, Section 4 Limitations on Rights, Article 22. "In the following cases, a work may be exploited without permission from, and without payment of remuneration to, the copyright owner, provided that the name of the author and the title of the work shall be mentioned and the other rights enjoyed by the copyright owner by virtue of this Law shall not be prejudiced: (2) appropriate quotation from a published work in one's own work for the purposes of introduction to, or comments on, a work, or demonstration of a point."

[302] Tianxiang He, *The Future Model of Copyright Exception and Parody Protection in China A Modest Proposal for Reform*, IPScholars Asia Conference(held by SMU), (2018).

[303] *See* ZY v. Global Times Case; "Nevertheless, in some situation, it is declared that the proportion that was adopted should not be a primary or substantial section of the original work." Tianxiang He, *The Future Model of Copyright Exception and Parody Protection in China A Modest Proposal for Reform*, IPScholars Asia Conference (held by SMU), 2018; Zhou Yan-ming yu "Huanqiu Shibao She" Qinfan Zhezuoquan Jiufen An (周雁鳴與《環球時報社》侵犯著作權糾紛案) [Zhou Yan-ming v. Global Times (Beijing) Case], Bei jing Shi Di Er Zhongji Renmin Fayuan（2012）Er Zhong Min Zhong Zi Di 16700 Hao Panjue (Beijing Second Intermediate People's Ct. No. 16700 Judgment, 2010, China) [北京市第二中級人民法院（2012）二中民終字第 16700 號判決] & Beijing Shi Gao ji Renmin Fayuan （2014） Gao Min Shen Zi Di 1342 Hao Caiding (Beijing Higher People's Ct. No. 1342 Ruling, 2010, China) [北京市高級人民法院（2014）高民申字第 1342 號裁定].

into new creative works. From the U.S.'s experience, although the landmark case, Bridgeport Music, Inc. *v.* Dimension Films, 410 F.3d 792,[304] brings a victory to copyright holders, the bright-line rule, "get a license or do not sample", does not necessarily address mash-up music cases. In particular, mash-up artists don't totally depend on sound recording to create a new work. Sampling is not the only method for mash-up music. However, they may rely on arranging or covering compositions to build up different versions of originals. The license to use music compositions and lyrics is still necessary.[305]

Moreover, even in the Bridgeport Music, Inc. *v.* Dimension Films, the U.S. Court of Appeals for the Sixth Circuit had confidence that a functioning free market would ensure the rational charge. However, this fairness will not be as evident as long as the mash-up artists needs to obtain multiple licenses in a single song, and cannot get partial licenses on individual songs. Consequently, the extremely high transactional costs for mash-up music are inappropriate.[306]

That said, under current fair use mechanism, even the "transformative use" doctrine from Campbell *v.* Acuff-Rose Music, 510 U.S. 569 (1994),[307] exists on uncertainty. As the fair use defense is totally unpredictable, and therefore risky in the court, the expense for attorneys and litigation procedure can produce burdensome costs. Especially in the Chinese market, the court has arguments on applying the "statutory limitation" and the "fair use doctrine". Some opinions consider how the establishment of statutory limitations should combine with the fair use doctrine. These two sets of legal principles cause difficulties to defend the concept of fair use in China. As a result of this ambiguity, mash-up artists may choose to give up producing mash-up music, to avoid violating the copyright laws.

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[304] Bridgeport Music, Inc. v. Dimension Films, 410 F.3d 792 (6th Cir. 2005), "This decision effectively eliminates the de minimis doctrine for digitally sampling recorded music in the Sixth Circuit, and has affected industry practice. However, the court expressly noted that the decision did not preclude the availability of other defenses, such as fair use, even in the context of "sampling." Thus, in the Sixth Circuit, defendants who digitally sampled may not rely on the de minimis doctrine to say that they copied such a small amount that they are not liable for copyright infringement."

[305] Peter S. Menell, *Adapting Copyright for the Mashup Generation*, University of Pennsylvania Law Review, Vol. 164, Issue 2, p.464-465 (Jan. 2016).

[306] *Id.*

[307] Campbell v. Acuff-Rose Music, 510 U.S. 569 (1994), "The District Court granted summary judgment for 2 Live Crew, holding that their song was a parody that made fair use of the original song under § 107 of the Copyright Act of 1976 (17 U.S.C. § 107). The Court of Appeals reversed and remanded, holding that the commercial nature of the parody rendered it presumptively unfair under the first of four factors relevant under § 107; that, by taking the "heart" of the original and making it the "heart" of a new work, 2 Live Crew had taken too much under the third § 107 factor; and that market harm for purposes of the fourth §107 factor had been established by a presumption attaching to commercial uses."

However, this grey area contributes to extra expense and risk for mash-up creators. By causing a threat to the development of mash-up music and a possible harm to freedom of expression.[308]

2. High Transactional Costs Inhibit Use Cases

In negotiating copyright usages for mash-up artists, transactional costs lead to critical difficulties. Broadly speaking, issues become complicated when mash-up creators always need to search for the copyright holders, and then obtain a license from diverse locations. Specifically, despite requests to rightsholders for licenses, it is possible that these requests are rejected. This inhibits further development of existing copyright and increases transactional costs.[309]

In view of the ubiquity of the mash-up form in modern music, this tortuous licensing mechanism, with its harsh transactional costs, is troublesome, discouraging to performers, and may be seen by music producers as being unreasonable. Therefore, some mash-up artists may take a more laissez-faire approach towards licensing existing works, which can run considerable risks.

Nowadays, the rejection and high bargaining power of a copyright holder's side can cause unreasonable exclusiveness on music licenses. This inconvenience also applies to the Chinese music market. When the transactional cost in the licensing process is too high, there will be no substantial incentive for mash up creators to contribute to new uses of licensed music that can bear financial fruits..[310]

3. Dangers of Settlements Lead to ad hoc Solutions, Impeding Structural Reform

A method for mash-up creators to prevent the expense in lawsuits is to depend on bilateral settlement. On the basis of out-of-court agreement, legal mechanisms structure a probability to economize time and financial costs as opposed to raise a court action.

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[308] *See* Robert P. Merges, Justifying Intellectual Property, Cambridge, MA: Harvard University Press, p.249, 254-266 (2011).
[309] *Id.* at 249-251.
[310] Emily Harper, *MusicMashups: Testing the Limits of Copyright Law as Remix Culture Takes Society by Storm*, Hofstra Law Review, Vol. 39, Issue 2, p.28-30 (Winter 2010).

Unfortunately, this pathway is only appropriate in limited cases. Moreover, it conventionally has delayed the conclusion of ambiguities in lawmaking. As a result, this extensive settlement eventually constrains efficiency of licensing process and jeopardize legislative and juridical progress.[311]

Furthermore, the presence of "grey areas" has resulted in the implantation of "gap fillers" and "arbitrary explanation" while the shortage of precise regulations is associated with remix cases.[312] Such inappropriate explanation of ambiguity presumably cause "chilling effects" on artistic freedom. In addition, contrary to "chilling effects", the term of "warming phenomenon" incites extra instability and troubles to the social community. (e.g., young artists will engage in executing and supporting the "general value" among friends and audiences unaccompanied by thinking over such conducts are either respectable and reasonable to noble public interests and social justice.[313] Consequently, because of insufficient transparency and clarity on legislation, the "warming phenomenon" will be turned into as a significant factor of gap filler. Overall, under this circumstance, the act of sharing and remix would prevail the music market through the so-called "gray areas" in law-making which the original creators still gain nothing. Thus, most importantly, the future legislation and licensing models should make sure the proportion of legislative flexibility be reasonable and appropriate. It is not allowed that the court can rely on ambiguity to arbitrary explain the laws when the gray area is dangerous and destructive[314].

4. Non-Visual Product Placement as The Next Wave of Music Monetization

Product placement in musical art is an aspect of reference in which advertisers interpose branded products or services into music creation in trade for sponsorship.[315] The overall amount of profits gained by musical artists annually for lyric and music compositions and videos increases year-on-year. A interesting example is that McDonald's hired the Maven

311 *Id*. at 55-58.
312 *See* Peter S. Menell, *Adapting Copyright for the Mashup Generatio n*, University of Pennsylvania Law Review, Vol. 164, Issue 2, p.464-468 (Jan. 2016).
313 Emily Harper, *Music Mashups: Testing the Limits of Copyright Law as Remix Culture Takes Society by Storm*, Hofstra Law Review, Vol. 39, Issue 2, p.62-65 (Winter 2010).
314 Robert P. Merges, Justifying Intellectual Property, Cambridge, MA: Harvard University Press, p. 247-249 (2011).
315 George Eric Rosden and Peter Eric Rosden, The Law of Advertising : A Treatise,Matthew Bender and Company Inc, p.90 (1997).

Agency, and instructed its consulting service to seek rappers who agree to link the McDonald's food to their music.[316]

The advertising market in music business is retains its growth and influence. The ad-supported stream also has become a considerable trend of the new business models. A new media report related to business strategies indicates that 60% of total music consumers were keen to chase merchandise related to their music preferences. Brand marketers aim to advantage from purchasing for production integration into musical lyrics and achieve more followers and fans.[317]

That said, many people go against product placement because they think it blurs the line between substance and advertising.[318] Some believe that this may cause harm to our creativity and culture. When product placement also is included in the music composition, or lyrics become a commercial speech, there is simultaneously less protection in constitutional law for to this type of musical art. In the US, the FTC and the FCC present different requirements for sponsorship disclosure and fair trading and deceptive practices regulations to deal with these issues.[319]

The FCC enforces this, and asks the sponsorship disclose when sponsors have purchased music compositions or embedded lyrics in their branded products or services. However, FCC's regulations don't precisely reveal the required sponsorship disclosure. The general principle is "the listening and viewing public must be able to understand the nature and source of the material they are hearing and seeing and place it in its proper context."

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[316] Doreen Carvajal, *ADVERTISING; Placing the Product in the Dialogue*, Too, The New York Times, (Jan. 17, 2006), *available at* https://www.nytimes.com/2006/01/17/business/advertising-placing-the-product-in-the-dialogue-too.html (last visited Apr. 1, 2019). In fact, in this type of promoting strategy, McDonalds' contract would specify that the brand controlled the mentions so that they wouldn't end up with the slam which Will Smith gave them in his 1997 track "Just Cruisin'" where he claimed that a meal at the Golden Arches had left him with digestive problems.

[317] Gail Schiller, *Industry seeks formula to value product integration*, Hollywood Reporter (Jul. 28, 2005). You could follow their lead and your brand could be then placed in the product integration pantheon alongside House of Dereon (Beyonce), Rocaware (Jay-Z), Sean John (Diddy Combs), Reebok (50 Cent), Courvoisier (Busta Rhymes), Moschino (Kool G Rap), Coca-Cola (Kanye West).

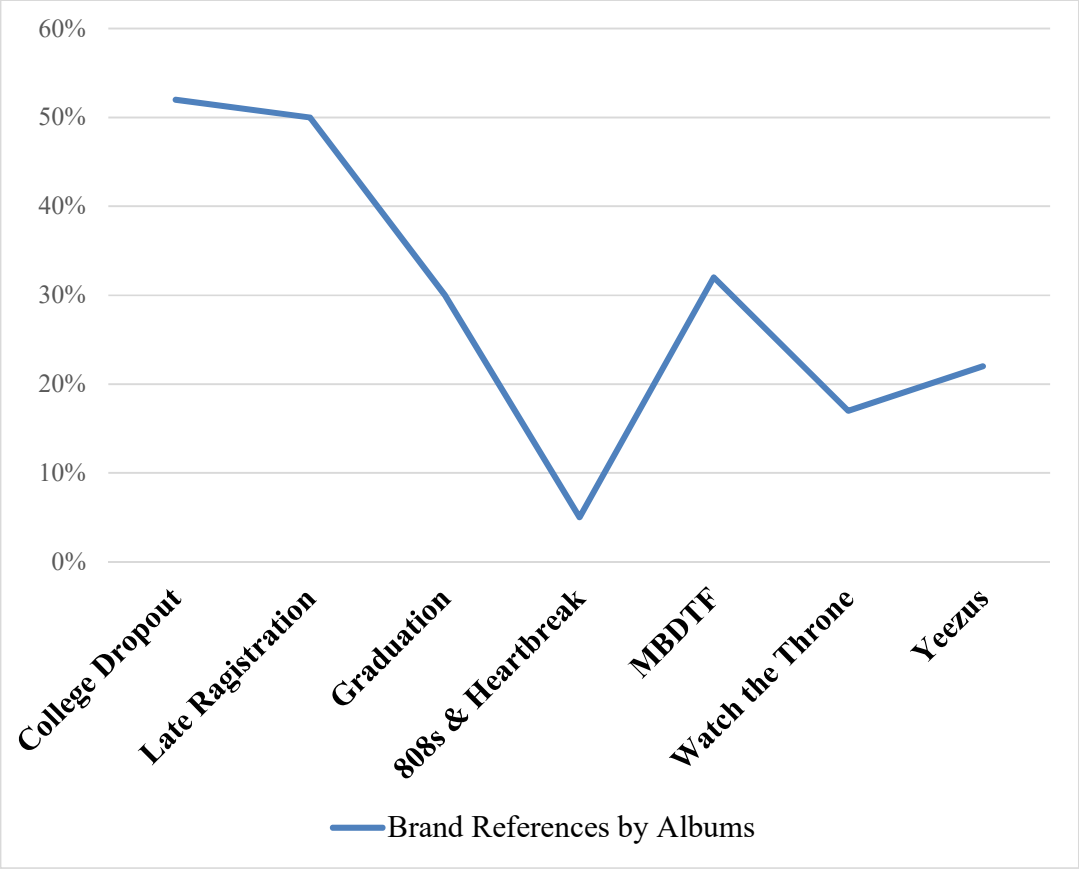
[318] The most recent complaints, filed by consumer watchdog group Commercial Alert, petition both the Federal Communications Commission (FCC) and the Federal Trade Commission (FTC) to promulgate regulations requiring disclosure of product placements as they occur.

[319] George Eric Rosden and Peter Eric Rosden, The Law of Advertising : A Treatise,Matthew Bender and Company Inc, p.92 (1997).

Product placement may consist of merely visual placement, merely non-visual placement, or an integration of the two.[320] In this digital era, funding the advertising market size is increasing on TV advertising and Internet advertising. When the music streaming businesses such as Spotify, Pandora and iTunes play a more important role, in the near future, it is believed that the non-visual product placement will become considerably influential for the whole advertising market.[321] Non-visual placement involves a product, brand name, or company alluded to either orally or in writing. For instance, AdAge.com pointed out that “McDonald's Corp. had hired an entertainment marketing firm" to seek hip-hop artists willing to intimate "Big Mac" in their lyrics. Artists would not be paid upfront, but would receive $1 to $5 per radio play. Additionally, McDonalds would have "final content approval of any lyrics incorporating the Big Mac to ensure that it's in an appropriate setting."[322]

[320] Raghu Seshadri, *"Did You Want Fries With That?" The Unanswered Question of Federal Product Placement Regulation*, Vanderbilt Journal of Entertainment and Technology Law, Vol. 9 Issue 2, p.480-483 (Winter, 2006).
[321] Len Glickman & Anita Kim,*Product Placement And Technology, Developments, Opportunities, And Challenges*, The Entertainment and Sports Lawyer. Spring, 2012, Vol. 30 Issue 1, p.55-57 (2012).
[322] Gail Schiller, *Industry seeks formula to value product integration*, Hollywood Reporter (Jul. 28, 2005).

Figure 28：The Hip-Hop Artist: Jay Z's Brand References on the Albums

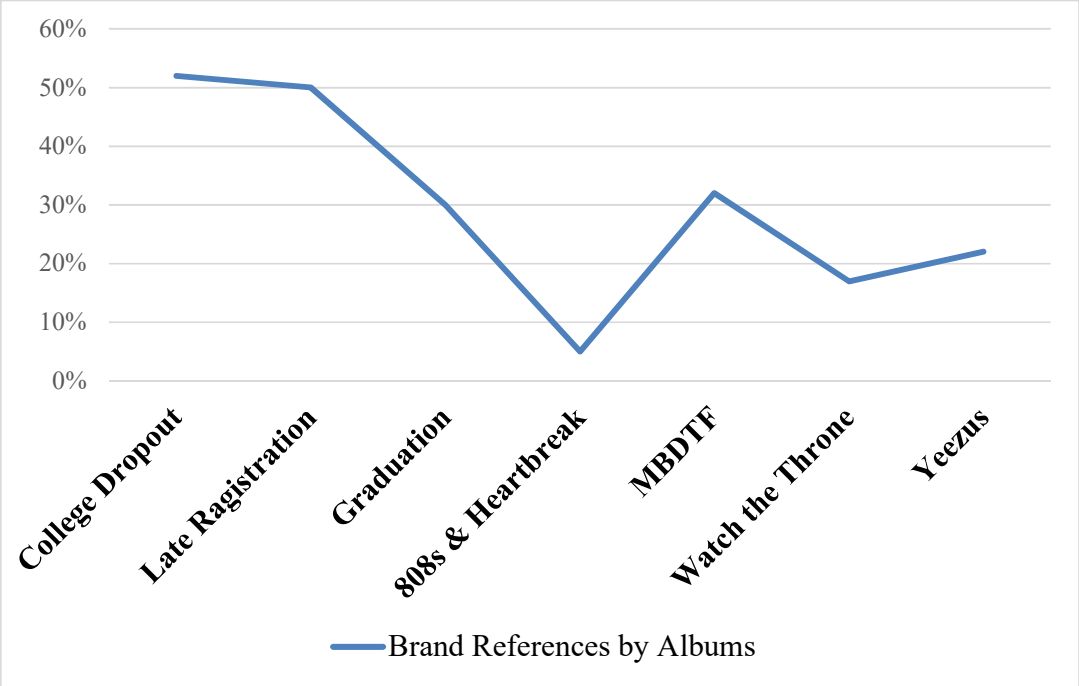


By Gail Schiller, Report: Product Placements on Rise, The Hollywood Report (2005)

However, the marketing firm responsible, Maven Strategies, had previously brokered a deal "with Seagram's, where the title of its gin was worked into rap songs by such artists as Kanye West and Petey Pablo." In Petey's immense 2004 hit "Freek-A-Leek," he comprehends the sentence, "Now, I got to give a shout-out to Seagram's Gin. Cause I drink it, and they payin' for it.'" According to the chart above, it can be seen that Jay Z makes constant reference to brands in his albums such as College Dropout, Late Registration, Graduation, 808s & Heartbreak, MBDTF, Watch Throne and Yeezus. Or consider how the rap music group Run-DMC mentioned Adidas 22 times in one track, which also gave them an opportunity to endorse Adidas merchandise. However, according to the statistics above, it shows that the new music medium is keeping developing and transitioning into new ways. Music streaming companies such as Pandora and Spotify have become the most essential part in the whole market. Intermediaries provide marketing management, such as commercial promotion, financial analyses and database establishments, which may

stimulate ancillary revenues and profitable opportunities beyond creators' personal initiatives. This consuming and productive chain also exists in the contrary, from the public audiences to intermediaries to authors. How to adjust our regulation about non-visual products, including the regulation into these new music platforms, will be a crucial issue in this digital era. It must also be considered how to increase the efficiency and positive effects in disclosing the sponsorship.

Figure 29： Kanye's Most Referenced Brands



By Gail Schiller, Report: Product Placements on Rise, The Hollywood Report (2005)

5. Possible New Approaches to Reforming the Licensing Ecosystem

(1) Compulsory Licensing: Critically Examining U.S. Copyright Act Section 115

Under a compulsory licensing mechanism (Section 115 of the Copyright Act), the U.S. Congress will grant a mash-up creator the right to use copyrighted elements (musical works or sound recording) only if they compensate the original artists and rightsholders reasonable remuneration. Moreover, one of the most fascinating side of the compulsory

licensing is that mash-up artist can be blessed with allowed access and use to all musical works and sound recordings only when the original artists and rightsholders had opted out of the compulsory system. However, according to the Chevron U.S.A., Inc. *v.* Natural Resources Defense Council, Inc., 467 U.S. 837 (1984), when the legislative design is formulated so as to incorporate precise regulations in the Article 115 of the U.S. Copyright Act and the free market will bring more fair competition to the music market, this research agrees that section 115 about the compulsory licensing of sound recording should not apply to musical work. Thus, we can avoid the deliberate governmental control in music licensing. As the U.S. DOJ's report mentioned, the consent decrees in copyright licensing have been an exception, reflecting an extreme example in modern antitrust doctrine.[323] We should not allow more involvement and over-interpretation of copyright law to violate the current balance and nature in the music market.

In terms of a compulsory license, the music CMO is top choice for entitling this service. In particular, the music CMOs have the strongest expertise on calculating, collecting licensing fees and designing rate plans in the music market. It is meaningful that when the registrations power tries to adjust originals' partial copyright by compulsory licensing, Congress should design a "termination right" system for composers.[324] For instance, if a mashup music song infringes an original essential moral right and autonomy, the composer should be capable of terminating the compulsory licensing.[325] Therefore, according to this kind of "flexibility", the copyright law system can establish an equilibrium between users and composers and avoid tension between licensees and licensors.[326]

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[323] Robert P Merges, *Compulsory Licensing vs. the Three "Golden Oldies" Property Rights, Contracts, and Markets*, Cato Policy Analysis, No.508, p.5-9 (Jan. 25, 2004).

[324] *See*J. Roger Shull, *Collecting Collectively: ASCAP's Perennial Dilemma*, ASCAP Copyright L. Symp., Vol.7, No.2,p.37-38 (1954); Xiong Qi (熊琦), *Feifa Zhezuoquan Jiti Guanli Sifa Rending de Fayuan Shujie (Elaboration on the Judicial Interpretation of the Illegal Collective Licensing)[非法著作權集體管理司法認定的法源梳解]*, Journal of the East China University of Political Science and Law (華東政法大學學報), Vol.5, p.84-91 (Sep. 2017).

[325] United States v. ASCAP, 1940-1943 Trade Cas. (CCH) 156104 (S. D. N. Y. 1941).; United States v. BMI,1940-43 Trade Case (CCH) 56,096 (S.D.N.Y.1941); United States v. ASCAP, No.41-1395,2001 WL 1589999 (S.D.N.Y.2001).

[326]J. Roger Shull, *Collecting Collectively: ASCAP's Perennial Dilemma*, ASCAP Copyright L. Symp., Vol.7, No.2,p.39-40 (1954); Xiong Qi (熊琦), *Feifa Zhezuoquan Jiti Guanli Sifa Rending de Fayuan Shujie (Elaboration on the Judicial Interpretation of the Illegal Collective Licensing) [非法著作權集體管理司法認定的法源梳解]*, Journal of the East China University of Political Science and Law (華東政法大學學報), Vol.5, p.87-90 (Sep. 2017).

(2) Blanket Licensing Promoting Harmonious Solutions

In the music industry, the CMO system is regarded as an essential way to reduce transaction costs. Specifically, because blanket licensing systems can save time and administrative expense, transactional costs can considerably be decreased. In the U.S., BMI, ASCAP and SESAC collect royalties from users and then distribute revenues to their members. This CMO business model is a more efficient way to leverage profits and license music for mass use.[327]

From the perspectives of mash-up artists, based on different scale of businesses, the rate plans can be designed separately. The factors for different rates also involve e.g. "the length of the mash-up part" and "the popularity of the originals". In contrast to the current copyright mechanism, a blanket licensing structure would be more practical and useful for mash-up culture. In particular, when the mash-up artists usually combine several parts of songs into their arrangements and compositions, a blanket licensing system can provide those substantial incentives with lower transaction costs. Therefore, as a whole, blanket licensing would be likely to contribute to fewer infringement cases and would promote greater harmonization between copyright holders and mash-up creators.

(3) Multi-Functional CMOs Should Take New Licensing Arrangements Seriously

The compulsory licensing and blanket licensing system would be able to furnish pragmatic approaches to address the mash-up music issues. In addition, it can also assist to found more creative environment and licensing ecosystem for appropriation art community. In the future, the Mandarin music market should build up suitable compulsory and blanket licensing systems to regulate mash-up creativity.[328] A pre-audio notice of all brand names and companies placed on the music platforms or intermediary could be a reasonable way for sponsorship disclosure in this technological and massive information era. For instance,

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[327] Columbia Broadcasting System v. American Sociey of Composers, Authors & Publishers (ASCAP), 400 F. Supp. 737,742 (S. D. N. Y. 1975); Broad. Music, Inc. v. DMX Inc, 683 F. 3d 32, 36 (2d Cir. 2012); Xiong Qi (熊琦), *Feifa Zhezuoquan Jiti Guanli Sifa Rending de Fayuan Shujie (Elaboration on the Judicial Interpretation of the Illegal Collective Licensing) [非法著作權集體管理司法認定的法源梳解]*, Journal of the East China University of Political Science and Law (華東政法大學學報), Vol.5, p.87-90 (Sep. 2017).

[328] Mihály Ficsor, *Collective Management of Copyright and Related Rights*, Geneva ; New York : World Intellectual Property Organization, p.127-131 (2002).

music containing diverse brand-names would be noted. It is unreasonable to assume that an audience would be willing or able to absorb and recall a lengthy notice identifying various sponsors.[329] As was observed above, Kanye West and Jay Z's music also linked to many branded names on each song. However, the most effective approach for addressing potential deception in non-visual placement requires targeted and specific disclosure rules for more efficiency. Thus, instead of an alert system, building a database for product placement would the best solution to disclose the sponsorship.

For the Mandarin music market, this license-oriented regime would encourage mash-up creators to obtain authorization from copyright owners, and would therefore likely serve to reduce the frequency of infringement. Generally speaking, establishing a compulsory and a blanket licensing system can provide mash-up creators an affordable means of music license. This structure also can fairly appreciate, and therefore compensate, copyright owners. Based on delicate and various rate plans, these licensing models could achieve successful reform and new possibilities. When the compulsory and blanket licensing system helps the copyright holder earn more profits and keep litigation away, this license-oriented approach will take the mash-up music market to a new level.

More specifically, the current CMOs in the Mandarin music market don't manage reproduction rights licenses of musical works, and this causes ambiguity and insufficiency. For musical artists, it is believed that much revenue diversity also assists with affirming such bargaining power against middlemen.[330] In the near future, CMOs in the Mandarin music market might include reproduction rights licenses in their services for both musical works and sound recording. As the technology and management expertise continues to develop, music CMOs should take more responsibility in view of the free licensing categories, and connect to the wider Asian market. These new changes will help to alleviate the existing licensing obstacles for mash-up artists.

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[329] Richard Kielbowicz & Linda Lawson, *Unmasking Hidden Commercials in Broadcasting: Origins of the Sponsorship Identification Regulations*, Federal Communications Law Journal, Vol. 56 Issue 2,p.329, 336-56 (Mar. 2004); Len Glickman & Anita Kim, *Product Placement And Technology, Developments, Opportunities, And Challenges*, The Entertainment and Sports Lawyer. Spring, 2012, Vol. 30 Issue 1, p.60-62 (2012).

[330] USPTO and Renmin University Copyright Protection Program Highlights Importance of Copyright Reform for China, *available at* https://chinaipr.com/tag/eric-priest/ (last visited Mar. 29, 2019); Robert P. Merges, Justifying Intellectual Property, Cambridge, MA: Harvard University Press, p. 267 (2011).

D. Advanced Licensing Mechanism

Many nations had launched the compulsory license as a legal response to matters of orphan creations, by carefully identifying which rights owners and originators are infeasible to define or approach. A licensee may acquire a compulsory license from the authorities for exploiting orphan creations. Under the present music licensing mechanism, licenses would be issued on the strength of the clearance to copyright collectives, under the rate plan stipulated by the copyright administrators.[331] In any event, the pattern of compulsory licensing is evidently not as cost-effective in comparison to the liability limitation model projected by the US copyright office (USCO). Under this model, as long as the actual copyright proprietor is proved to be the case, the liability limitation model tolerates the adopters to freely exercise orphan creations unaccompanied by licensing charges.[332]
First and foremost, in view of the fact that the model of compulsory license entails considerable transaction costs[333] involving the regulatory and bureaucratic operations for confirming the copyright ownership of orphan creations, and executing the rate formula of lessening fee. Specifically, it is troublesome to logically and proficiently regulate the standard of equitable remuneration considering that, genuinely, the reasonable price is not fixed in the existing dynamic competitive market. Moreover, the establishment of a compulsory licensing system possibly stimulates the collective management organizations to arbitrarily rely on the profits, which are based on the use of orphan creations. Supposing the compulsory license arrangement empowers the collective management organizations to preserve non-distributed portion, in order to cover management expense and subsidize the spending of administrative development, this unjustifiable incentive will definitely deter collective license system from achieving the accurate copyright ownership.[334]

When the drawbacks of compulsory license are applied in accordance with the collective license, subsequent users need to pay significant royalties to adopt orphan creations, while

[331] Robert P Merges, *Compulsory Licensing vs. the Three "Golden Oldies" Property Rights, Contracts, and Markets*, Cato Policy Analysis, No.508, p.3-5 (Jan. 25, 2004).
[332] Jiarui Liu, *Copyright Reform and Copyright Market: A Cross-Pacific Perspective*, Berkeley Technology Law Journal, Vol. 31, Issue 3, p.1468 (2017).
[333] "In economics and related disciplines, a transaction cost is a cost in making any economic trade when participating in a market." *See* Douglass Cecil North, Transaction Costs, Institutions and Economic Performance, San Francisco, Calif. : ICS Press, p.10 (Sep. 1, 1992).
[334] Jiarui Liu, *Copyright Reform and Copyright Market: A Cross-Pacific Perspective*, Berkeley Technology Law Journal, Vol. 31, Issue 3, p.1468-1469 (2017).

the original copyright owners won't be able to obtain any financial compensation. This is because in these circumstances, original creators do not earn a return on the economic incentives, and the users are faced with limited access to secondary use. The consequence absolutely turns the music ecosystem into an awkward and potentially unfortunate circumstance.[335]

The significance of this research does not just propose to detail the present issues revealing in the US and China's music copyright modernization. Otherwise, it would be meaningful to analyze and consider the reasonableness to apply an Extended Collective License (ECL) or compulsory license to the legal and commercial system in the neoteric Mandarin music market. Moreover, the debates in this research illustrate the societal observations for comprehending the reasons about for what purpose the Chinese community holds to dramatically oppose the recent revision proposal concerning the adoption of a compulsory license.[336]

1. Avoid Anti-Competitive Concerns

Considering that the mechanism of compulsory license was initially mobilized to the U.S. music market in regard to the Copyright Act of 1909,[337] the legislature anticipates to avert the outgrowth of monopolistic competition and oligopoly.[338] During the beginning of 20 Century, in view of the fact that the player piano (pianola) was regarded as fashionable and marketable entertainment for the general public,[339] the U.S. Supreme Court confronted problematic debates about what would happen if the unlicensed mechanical generations would be based on musical works which commit violations of copyright law. According to the White-Smith Music Publishing Company *v.* Apollo Company case[340], the judicial decision indicates that, according to US Copyright Law, the course that a pianola identifies

[335] *See* Robert P Merges, *Compulsory Licensing vs. the Three "Golden Oldies" Property Rights, Contracts, and Markets*, Cato Policy Analysis, No.508, p.3-6 (Jan. 25, 2004).
[336] Jiarui Liu, *Copyright Reform and Copyright Market: A Cross-Pacific Perspective*, Berkeley Technology Law Journal, Vol. 31, Issue 3, p.1468-1469 (2017).
[337] ASCAP is founded, February 13th, 1915 (Dec. 13, 2018), available at HISTORY: Watch Full Episodes of Your Favorite Shows https://www.history.com/this-day-in-history/ascap-is-founded (last visited Apr. 10, 2019).
[338] H. R. Rep. No.60-2222 at 8(1909).
[339] Brian Dolan, Inventing Entertainment: The Player Piano and the Origins of a American Musical Industry, Lanham, Md.: Rowman & Littlefield Publishers, p. 53 (Jan. 2009).
[340] White-Smith Music Publishing Company v. Apollo Company, 209 U.S. 1 (1908).

and processes the record on the piano trundle is different than a real person identifying the notes on the music sheet.[341] In addition, the making of the piano trundle dose not achieve the meaning of "copying" with the references of the US copyright law.[342]

Although in this US Supreme Court's decision the majority opinion determined the mechanical reproduction on the piano trundle is not considered as the violation of copyright law,[343] a vigorous concurring opinion supported by Justice Oliver Wendell Holmes Jr. is requesting to the parliamentary law-making on mechanical duplication.[344] Actually, prior to the Supreme Court's decision on the White-Smith Music Publishing Company *v.* Apollo Company, possible governmental interference to mechanical reproduction from musical artists and companies has been advocated and petitioned to the House of Representatives.[345] In opposition to this circumstance, the player piano company initiated the establishment of a mechanical duplication right originated on musical works. Simultaneously, the Congress was actually preparing to declare a proposed law for adopting the newly-launched mechanical right.[346] Otherwise, as the most powerful player piano manufacturer, on the basis of a series of registered patent[347] on the production, the Aeolian company carried out strategies to increase its market share and market's total sales by offering beneficial terms of service to its consumers.[348] These actions were, as a matter of fact, aiming to avoid the risks from the unpredictable legislative outcome in the light of

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[341] Paul Goldstein, Copyright's Highway: From Gutenberg To The Cloud, Stanford, California : Stanford University Press, p.53 (2nd ed. 2019); Russell Sanjek, American Popular Music and Its Business: The First Four Hundred Years Volume II: From 1790 to 1909, Oxford University Press, p. 383 (Oct. 1988); Brian Dolan, Inventing Entertainment: The Player Piano and the Origins of a American Musical Industry, Lanham, Md.: Rowman & Littlefield Publishers, p. 53-54 (Jan. 2009).

[342] Jiarui Liu, *Copyright Reform and Copyright Market: A Cross-Pacific Perspective*, Berkeley Technology Law Journal, Vol. 31, Issue 3, p.1487 (2017).

[343] Barbara Ringer, The Unauthorized Duplication of Sound Recordings, Study No.26 in Copyright Law Revision, Studies Prepared for the Committee on Patents, Trademarks and Copyrights of the Comm. on the Judiciary, U. S. Senate, 86th Cong., 2d Sess.(Comm. Print 1961) , *available at* U.S. Copyright Office, History and Education Copyright Law Revision Studies 31, https://www.copyright.gov/history/studies/study31.pdf (last visited Apr. 15, 2019).

[344] White-Smith Music Publishing Company v. Apollo Company, 209 U.S. 1 (1908).

[345] H. R. Rep. No.60-2222 at 8(1909), and S. Rep. No.60-1108 at 8(1909).

[346] Julie E. Cohen, Lydia Pallas Loren, Ruth L. Okediji & Maureen A. O'Rourke, Copyright in A Global Information Economy, New York: Wolters Kluwer, p.420 (4th ed. 2015)

[347] U. S. Patent No.765, 645(filed Nov.16, 1899).

[348] S.6330, 59th Cong.§1(g)(1906); H. R.19853, 59th Cong.§1(g)(1906). Harry G. Henn, The Compulsory License Provisions of the U. S. Copyright Law, Copyright Law Revision, Senate Comm. on the Judiciary, 86th Cong., 1st Sess., Studies Prepared for the Subcomm. on Patents, Trademarks, and Copyrights of the Comm. on the Judiciary 3(Comm. Print 1960)(Study No.5), *available at* U.S. Copyright Office, History and Education Copyright Law Revision Studies 5, https://www.copyright.gov/history/studies/study5.pdf (last visited Apr. 15, 2019).

ensuing mechanical rights. Under this ambience, approximately eighty creators affiliated to the U.S. Music Publishers Association (MPA) signed agreements to authorize exclusive licenses, which constitute over forty percent of the overall sales, and speak on behalf of over 38 million musical works.[349]

The business exercises led by the Aeolian company are indeed intending to refrain or shrink the market competition. This improper conduct against the competition doctrines were addressed by the legislature and administration in the early 1900s. Consequently, the ruling of White-Smith Music Publishing Company *v.* Apollo Company was overturned by the Copyright Act of 1909.[350] Meanwhile, this newly-initiated Act in 1909 authorized originators the exclusivity to replicate musical creations on the material objects, which is defined as phonorecords by the US Copyright Act of 1976. Moreover, under the up-to-date construction of the US Copyright Act of 1976, a specialized approach of compulsory licensing was framed to avoid the associations of anti-competitive behaviors and to legitimize the successive mechanical reproductions of musical creations in the pianola production market.[351]

The essence of the antitrust law regime is to order the exercise and mechanism of commercial associations. In essence, this serves to facilitate fair competition for the welfare of the public in the market.[352] From the perspectives of contemporary economic theories, the antitrust legitimacy for compulsory licensing serves to critique this regime as being formed on weak stand and unstable grounds, regardless of whether the concrete hazards by the Aeolian Company's anti-competitive operations did severely affect the market function. Generally, compared to the muscular strength of a patent, copyright hardly offer the equal level of exclusivity to the authors,[353] since, principally, "copyright do[es] not prevent

[349] Jiarui Liu, *Copyright Reform and Copyright Market: A Cross-Pacific Perspective*, Berkeley Technology Law Journal, Vol. 31, Issue 3, p.1488-1489 (2017).
[350] Copyright Act of 1909, Pub. L. No.60-349, §1(e), 35 Stat.1075, 1075-76(1909).
[351] Jiarui Liu, *Copyright Reform and Copyright Market: A Cross-Pacific Perspective*, Berkeley Technology Law Journal, Vol. 31, Issue 3, p. 1489 (2017).
[352] Robert P Merges, *Compulsory Licensing vs. the Three "Golden Oldies" Property Rights, Contracts, and Markets*, Cato Policy Analysis, No.508, p.11 (Jan. 25, 2004).
[353] Edmund W. Kitch, *Elementary and Persistent Errors in the Economic Analysis of Intellectual Property*, Vanderbilt Law Review, Vol. 53, Issue 6, p. 1727, 1730 (Nov. 2000); Paul Goldstein, *Copyright*, Law and Contemporary Problems, Vol. 55, Issue 2, p.79, 86 (1992).

competitors from creating works with the same functional characteristics" and "one author's expression will always be substitutable for another's".[354]

The considerable feasibility of transmutability of copyrighted works is rooted in various solid legislative foundations. Primarily, the idea-expression divide narrowly designates the scope of the copyright safeguard, which merely comprises the expressions of creative works, as opposed to their underlying ideas.[355] This justification eventually signified that a later adopter is allowed to simulate an originator's composition on the highest level basis when this simulation is within the finite boundary of exposed ideas. Furthermore, according to the central requirement of plagiarism, copyright safekeeping, in all respects, reflects an existent imitation on expression. Through the rules revealed in *Sheldon v. Metro-Goldwyn Picture Corp.(2nd Cir. 1936)*,[356] this basis clarified how the factor of "access" plays a significant role on considering the affirmation of plagiarism.[357]

Additionally, creations standing on the author's own two feet, nevertheless analogous to another existent craft, would not breach the copyright law. As it happens, in the light of the originality in the following imitation, it would be surely regarded as a copyrighted subject accompanied by its individual protection of copyright.[358] In consequence, the legislative of copyright law setup on the exceptions of "measured boundary" (Idea-expression Divide) and "serendipitous copying" (the factor of access). In contrary to the stricter exclusivity on patent law system, it is obvious that the copyright legislation leaves more space for succeeding authors on transferring the previous creation into new derivative works.[359]

Moreover, in 2012, the Federal Trade Commission (FTC) concurred with the acquisition of EMI by Universal even they are competitors in the same market of music products and services. In the U.S., three leading music publishers, Universal Music Publishing Group (UMPG), Sony/ATV Music Publishing and Warner/Chappell Music separately account for

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354 Edmund W. Kitch, Elementary and Persistent Errors in the Economic Analysis of Intellectual Property, Vanderbilt Law Review, Vol. 53, Issue 6, p. 1729-1730 (Nov. 2000).
355 17 U.S.C.§102(a)-(b) (2012); TRIPS Agreement, Article 9(2).
356 Sheldon v. Metro-Goldwyn Pictures Corp., 81 F.2d 49, 54(2nd Cir.1936) (But if by some magic a man who had never known it were to compose a new Keats s Ode on a Grecian Urn, he would be an "author" and, if he copyrighted it, others might not copy that poem, though they might of course copy Keats's).
357 Sheldon v. Metro-Goldwyn Picture Corp., 81F.2d 49,54 (2nd Cir. 1936)
358 Jiarui Liu, *Copyright Reform and Copyright Market: A Cross-Pacific Perspective*, Berkeley Technology Law Journal, Vol. 31, Issue 3, p.1491-1492 (2017).
359 Robert P Merges, *Compulsory Licensing vs. the Three "Golden Oldies" Property Rights, Contracts, and Markets*, Cato Policy Analysis, No.508, p.9-10 (Jan. 25, 2004); Article 9(2), the TRIPS Agreement.

28.9%, 22.4% and 17.4% of the total market sales for publishing.[360] Since the barrier to enter the music production market has been deceased, the cheaper spending on music manufacturing and licensing royalties allocation caused the three main music publishers to confront the critical challenges and threats from individual creators and small companies through digital innovation.[361]

In terms of sound recording, the market share of the recording industry is also dominated by these three big record labels. These three leading companies including Universal Music Group (UMG), Sony Music Entertainment, Inc. (SME) and Warner Music Group (WMG), severally constitute 27.5%, 22% and 14.6% of total sales for recordings.[362] On top of that, in the U.S., the three influential record labels occupied considerable proprietary of the music publishing market or had strong corporate connection with music publishers, since Warner/Chappell Music is a part of WMG, UMPG is controlled by UMG, and Sony/ATV and SME are both originated and managed by Sony Corporation.[363] These details indicate,

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[360] Statista, Revenue Market Share of the Largest Music Publishers Worldwide from 2007 to 2016 (Feb. 2017), *available at* https://www.statista.com/statistics/272520/market-share-of-the-largest-music-publishers-worldwide/ (last visited Apr. 29, 2019).

[361] Jiarui Liu, *Copyright Reform and Copyright Market: A Cross-Pacific Perspective*, Berkeley Technology Law Journal, Vol. 31, Issue 3, p.1488-1489 (2017).; FTC, Sony/EMI, *available at* https://www.ftc.gov/enforcement/cases-proceedings/closing-letters/sonyemi.last (last visited Apr. 20, 2019); FTC, Proposed Acquisition by Vivendi, S. A.of EMI Recorded Music, *available at* https://www.ftc.gov/enforcement/cases-proceedings/closing-letters/proposed-acquisitionvivendi-sa-emi-recorded-music (last visited Apr. 20, 2019); Ed Christman, *Sony Completes Acquisition Of EMI Music Publishing Despite Indie Objections*, Billboard (Nov. 04, 2018), *available at* https://www.billboard.com/articles/business/8484938/sony-music-emi-music-publishing-acquisition-complete-details (last visited Apr. 20, 2019).

[362] Ed Christman, *Music in 2014: Taylor Takes the Year, Republic Record on Top, Streaming to Rescue*, Billboard (Jan. 9, 2015) *available at* https://www.billboard.com/articles/business/6436399/nielsen-music-soundscan-2014-taylor-swift-republic-records-streaming (last visited Apr. 19, 2019); Jiarui Liu (劉家瑞), *Lun Meiguo Shuwei Yinle Banquan Zhidu ji Qishi (Discussions on the U.S. Digital Music Copyright Regime and Inspirations) [論美國數位音樂版權制度及啟示]*, Intellectual Property (知識產權), Vol.3, p.95 (Apr. 2019).

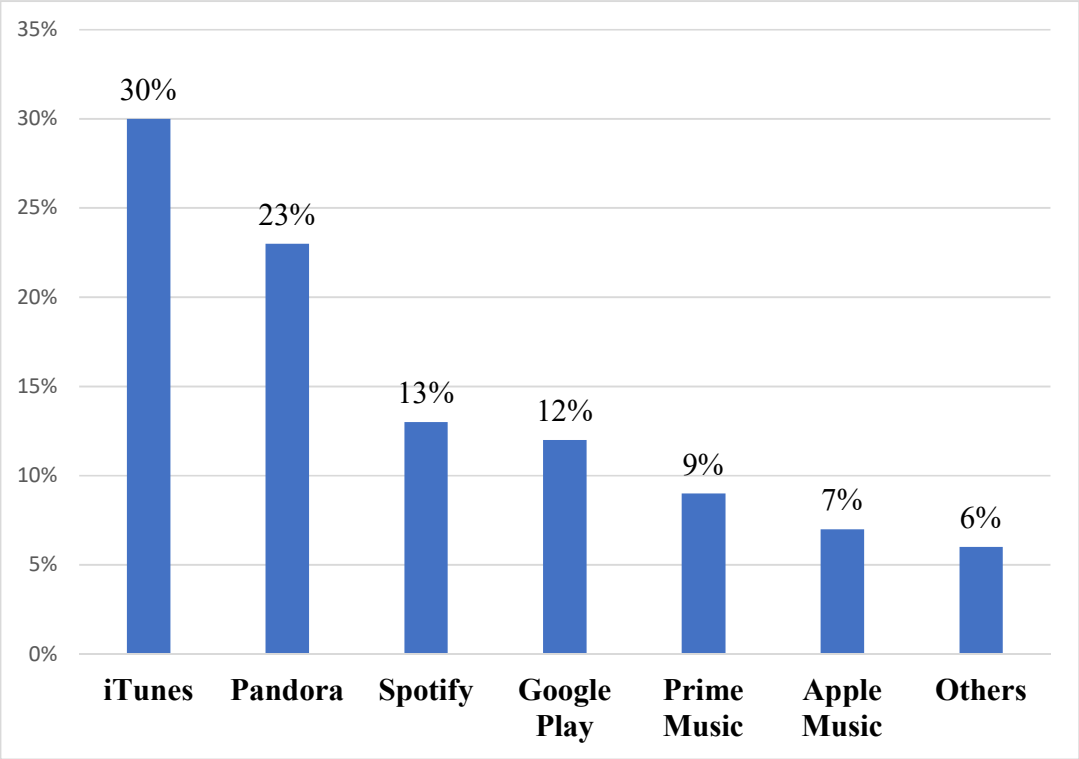
[363] Ed Christman, *Publisher s Quarterly: Sony/ATV Widens Lead as Nearest Competitors Lose Ground in Q3*, Billboard (Nov. 1, 2018), *available at* https://www.billboard.com/articles/business/8482768/publishers-quarterly-q3-sonyatv-kobalt-umpg-warner-chappell (last visited Apr. 20, 2019); Sebastian Torrelio, *Jody Gerson Appointed Chairman and CEO of Universal Music Publishing Group*, VARIETY (Aug. 1, 2014), *available at* http://variety.com/2014/biz/news/jody-gerson-appointed-chairman-and-ceo-of-universal-music-publishing-group-1201273829 (last visited Apr. 20, 2019); Profile: Sony Corp, REUTERS, *available at* http://www.reuters.com/finance/stocks/companyProfile?symbol=SNE.N (last visited Apr. 20, 2019); Warner Chappell Music, About Us, available at http://www.warnerchappell.com/about (last visited Apr. 20, 2019).

during the transaction of mechanical authorization, the record labels might usually hold forceful standing to persuade and collaborate with musical publishers.[364]

Furthermore, the technological giants such as Google, Amazon, Facebook, Microsoft and Apple possess huge bargaining chips to compromise the music publishing companies. Especially, in the present digital world, these business titans are demonstrably increasing their economic leverage of operation platforms to command participants in the music industry.[365] In particular, download music is still popular (for example, iTunes is the most favorite paid music in the U.S. market), even though music downloads have actually been on the decline gradually, in favor of streaming music. At the same time, Google's YouTube and Facebook had constituted at least 60% of online video views in the U.S. and investigated European countries.[366] The current market dominance of online content intermediaries, and the controlling market influence of record labels, is gradually narrowing the bargaining power of music publishing companies, and might result in the abusive of monopoly power in the near future.

[364] Jiarui Liu, *Copyright Reform and Copyright Market: A Cross-Pacific Perspective*, Berkeley Technology Law Journal, Vol. 31, Issue 3, p.1490 (2017).
[365] David Smith, *New Antitrust Frontier– The Issue Closing Partisan Divides In The Name Of Policing Big Tech*, The Guardian (Feb. 2019), *available at* https://www.theguardian.com/us-news/2019/feb/02/a-new-antitrust-frontier-the-issue-closing-partisan-divides-in-the-name-of-policing-big-tech (last visited Apr. 21, 2019); Kashmir Hill, *Goodbye Big Five: Life Without the Tech Giants*, Gizmodo Media Group (Jan. 22, 2019), *available at* https://gizmodo.com/life-without-the-tech-giants-1830258056 (last visited Apr. 21, 2019).
[366] Audience Project, INSIGHTS 2019: Traditional TV, online video & streaming, p.27-33, *available at* https://www.audienceproject.com/wp-content/uploads/audienceproject_study_tv_video_streaming.pdf (last visited Apr. 26, 2019).

Figure 30：Paid Digital Music popularity among U.S. Music Lovers[367]



Anti-competitive practices are harming the free market by connecting competition market issues to music copyright protection.[368] In whatever way, compared to the creativity and innovation oriented focus of the copyright law operation, the system of competition law embraces more thorough and cultivated institutions on antitrust legal and economic matters.[369] Consequently, it emerges how the intensifying difficulties of compulsory licensing administrations propose an integrated music industry with a possible

[367] PayPal Digital Media Consumer Study, American Digital Media Consumers—Movies, TV, and Music: Sentiments and behaviours, p.12 (Feb. 2, 2017), *available at* https://www.paypalobjects.com/digitalassets/c/website/marketing/global/shared/global/media-resources/documents/paypal-digital-media-consumer-study-pt2.pdf (last visited Apr. 20, 2019).
[368] Lydia Pallas Loren, *Untangling the Web of Music Copyrights*, Case Western Reserve Law Review, Vol. 53, Issue 3, p.673, 682 (Spring 2003).
[369] Radio Music License Comm., Inc.v. SESAC, 29 F. Supp.3d 487(E. D. Pa.2014); Meredith Corp.v. SESAC, LLC, F. Supp.3d, 2015 WL 728026(S. D. N. Y.2015).

governmental intervention on the grounds of rehabilitating market failure within the fragile structure of copyright communication and trade.[370]

Through broadening the copyrighted musical works and the influence of music CMOs, actually, the ECL still reinforces the dominant standing and monopoly control for the musical CMOs among the consumer, creators and the whole musical licensing market. In the late 20th Century, in view of the fact that SACEM, the musical collecting society in France, requested a licensing fee from nightclubs that was fifteen times higher than its partners' societies, e.g. PRS and GEMA, SACEM was accused of the violation of anti-trust laws in the light of the cartel's price fixing,[371] and unfair trade practices.[372]

From 1992 to 1998, the MTV Europe brought a lawsuit against price fixing from Video Performance Limited (VPL), a UK-based music videos collecting society founded in 1984. With the aid of VPL, the UK record labels collectively held MTV Europe to commit 15% of the gross profits, while MTV indicated the major labels and VPL to the European Commission, stating "they had violated Articles 85 and 86 of the Treaty of Rome, which deal with free trade and abuse of dominant position in the market." Meanwhile, MTV has submitted the primary German music TV channel, Viva, to the European Commission in line with unfair competition. MTV asserts that Viva—raised by four leading antitrust concerns—is awarded more favorable clauses than MTV on account of its ownership and market power.[373]

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[370] Jiarui Liu, *Copyright Reform and Copyright Market: A Cross-Pacific Perspective*, Berkeley Technology Law Journal, Vol. 31, Issue 3, p.1492 (2017); Robert P Merges, *Compulsory Licensing vs. the Three "Golden Oldies" Property Rights, Contracts, and Markets*, Cato Policy Analysis, No.508, p.11 (Jan. 25, 2004); H. R. Rep. No.94-1476, at 89(1976), reprinted in 1976 U.S.C. C. A. N.5659, 5703; NBC v. Copyright Royalty Tribunal, 848 F.2d 1289, 1291(D. C. Cir.1988); Al Kohn & Bob Kohn, Kohn on Music Licensing, Austin: Wolters Kluwer Law & Business; New York, NY: Aspen Publishers, p.772 (4th ed.2010).

[371] "Price fixing is an agreement between participants on the same side in a market to buy or sell a product, service, or commodity only at a fixed price, or maintain the market conditions such that the price is maintained at a given level by controlling supply and demand. The intent of price fixing may be to push the price of a product as high as possible, generally leading to profits for all sellers but may also have the goal to fix, peg, discount, or stabilize prices. The defining characteristic of price fixing is any agreement regarding price, whether expressed or implied." available at https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-competitors/price-fixing (last visited Apr. 29, 2019).

[372] Jiarui Liu, *Copyright Reform and Copyright Market: A Cross-Pacific Perspective*, Berkeley Technology Law Journal, Vol. 31, Issue 3, p.1478-1479 (2017).

[373] In 1993, the president and CEO of PolyGram, Alain Levy, said *"We had positioned PolyGram as a provider of entertainment. We believe that retail distribution and broadcasting are a different business." "There is a need of any market fir an alternative. In that sense, [MTV] poses a threat. Video are becoming more important in artist development. If we have only one channel [for them], then we're putting the whole industry at risk."* Dominic Pride, *MTV Europe's Suit Gets Court Hearing: Channel Battling Majors Over*

In reality, since payola emerged as historical convention in the broadcasting industry, the respective music companies or record labels might give contrary compensations to the radio or television stations for securing the frequent airplay of their musical establishments. Consequently, the actual arrangements of overall profits within the music and broadcasting markets would be indeed fixed at an unfavorable rate, in the absence of an effective collective management system. Theoretically, the blanket license offers a more efficient business operation for collecting societies, and assists to cluster the musical copyright royalties at a certain rate plan, on the basis of the venue's space or the commercial implementation's countries and times, in addition to the particular numbers of performed musical works. This licensing mechanism launches a regular rate model corresponding to a legitimate cartel and governmentally restricts the function of the contract negotiation within the structure of free and competition market.[374]

Particularly, the government-mandated legal prices set, *i.e.,* public price control, had been implemented in a number of different commercial categories. In terms of the entertainment industry, it is notable in use of copyright collective to shield consumers from the probable "*supra-competitive pricing*" by building a governmental mechanism to oversee the procedure of rate designing, such as could be observed though the Copyright Tribunal in Hong Kong, the Copyright Tribunal in the U.K., the Copyright Licensing Tribunal in Denmark and the rate court in U.S. Federal Court in the Southern District of New York.[375]

Since the collective management organization's market power could be elevated by the ECL system, theoretically, it is supposed that the collective societies confronting vigorous competitors in the open market would hold strong stimulation to enhance their competence and proficiency. For instance, in the U.S. music market, due to the market competition within diverse collecting societies, BMI and ASCAP separately cost 11.7%[376] and

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Rights, Viva, Billboard, Arts & Music, p.18 (Mar. 26 1994); Jeff Calrk-Meads, *MTV Europe, VPL Resolve Years-Long Licensing Dispute*, Billboard, p.1 (May 16, 1998); Hamish Porter, *European Union Competition Policy: Should the Role of Collecting Societies be Legitimised?* European Intellectual Property Review, Vol.18, p.672,676 (1996); MTV Europe (A Firm) v BMG Records (UK) Ltd & Ors, Court of Appeal - Civil Division, March 10, 1998, [1998] EWCA Civ 430.

[374] Ronald Harry Coase, *Payola in Radio and Television Broadcasting,* The Journal of Law & Economics, Vol. 22, No. 2, p. 267, 315 (1979). Mark A. Lemley, *Contracting around Liability Rules*, California Law Review, Vol. 100, Issue 2, p.463 (April 2012).

[375] United States v. BMI, 275 F.3d 168, 171-72(2d Cir.2001).

[376] ASCAP, Where Does the Money Go? *available at* http://www.ascap.com/licensing/licensingfaq.aspx#general (last visited Apr. 23, 2019); Jiarui Liu (劉家

11.3%[377] of their overall income to cover their executive expense. In comparison, in the early days, while almost all music collecting societies in Europe kept *de jure* monopoly inside their domains, they normally hold approximately over 30% of the whole earnings in the role of operational spending, and as late as 1998, the royalty lawsuits from musical artists caused a substantial reduction in overhead and operating expenses to around 15%.[378]

Lately, a directive is carried out by the European Union (EU) to address this competition law issues among CMOs within the EU's member states.[379] Likewise, according to the specific deign of legal circumstances, the monopolistic status of the collecting society has been applied to each copyright category of the Chinese market. For example, the only music colleting society, MCSC, holds a *de jure* monopoly within the whole Chinese music market. However, this Chinese-style of legitimate monopoly results in other completion law and fair trade issues, since the collecting societies in China retain considerable financial support from central government, due to its specific character of quasi-official agencies.[380] That notwithstanding, the Chinese collecting society of audio-visual works, CAVCA, was disclosed that it allocates merely 46% of the total income to its members and was questioned about its organizational transparency in the light of its high administrative fee.[381]

瑞), *Lun Meiguo Shuwei Yinle Banquan Zhidu ji Qishi (Discussions on the U.S. Digital Music Copyright Regime and Inspirations) [論美國數位音樂版權制度及啟示]*, Intellectual Property (知識產權), Vol.3, p.94 (Apr. 2019).

[377] BMI, BMI Tops $900 Million Mark in Revenues, *available at* http://www.bmi.com/news/entry/bmi_tops_900_million_mark_in_revenues (last visited Apr. 23, 2019); Jiarui Jiarui Liu (劉家瑞), *Lun Meiguo Shuwei Yinle Banquan Zhidu ji Qishi (Discussions on the U.S. Digital Music Copyright Regime and Inspirations) [論美國數位音樂版權制度及啟示]*, Intellectual Property (知識產權), Vol.3, p.94 (Apr. 2019).

[378] Jeff Clark-Meads, *U2 Settles Royalty Suit with U. K.'s PRS*, Billboard, p.4 (Apr.18, 1998); Jiarui Liu, *Copyright Reform and Copyright Market: A Cross-Pacific Perspective*, Berkeley Technology Law Journal, Vol. 31, Issue 3, p.1479-1480 (2017).

[379] Directive 2014/26/EU, of the European Parliament and of the Council of 26 February 2014 on Collective Management of Copyright and Related Rights and Multi-Territorial Licensing of Rights in Musical Works for Online Use in the Internet Market; Jiarui Jiarui Liu (劉家瑞), *Lun Meiguo Shuwei Yinle Banquan Zhidu ji Qishi (Discussions on the U.S. Digital Music Copyright Regime and Inspirations) [論美國數位音樂版權制度及啟示]*, Intellectual Property (知識產權), Vol.3, p.94 (Apr. 2019).

[380] Ye Jiang, *Changing Tides of Collective Licensing in China*, Michigan State International Law Review, Vol. 21, Issue 3, p.729-730, 744-745 (2013).

[381] Yifei Tan (譚翊飛), *"Zhongwenfa" Jie Kala OK Jianguan Pingtai Huoli: KTV Banquan Liyi Fenpei Fuchu Shuimian ("Zhongwenfa" Profits from the Karaoke Supervision Platform- Discovering the Distribution Scheme of KTV Revenues) ["中文發"借卡拉 OK 監管平臺獲利: KTV 版權利益分配浮出水面]*, INFZM.com (南方週末), March 25, 2010, *available at* http://www.infzm.com/content/42972/0 (last visited Apr. 10, 2019).

2.PeculiarExtended Collective Licenses in China

The dispute corresponding to the bill of ECL in China is considered that there is a significant disparity between the structure initiated in the drafted act of the 2012 Chinese Copyright Reform and the framework facilitated in the Nordic countries. Primarily, the application of Chinese version's ECL is not limited to any particular boundaries and circumstances. Under this establishment, both of MCSC (from 1992) and CAVCA (from 2008) would be able to seek for the authorization from NCAC and execute its lawful actions to enforce the ECL amid the confines of its commercial operations. Their service and products comprehend almost complete function of copyrighted musical subjects, except for the sound recording belonging to record labels. Compared to the range engaged by the Nordic ECL, the Chinese version of ECL is considerably immense and rigid. In consequence, the prospective shake of prevailing power brought by the Chinese type of ECL could be overwhelming and irresistible.[382]

Moreover, in China, even if the initiated scheme of ECL allows an opt-out system for musical artists unaffiliated to MCSC or CAVCA, this exception of opting out is practically redundant, and therefore practically useless. The initial edition of the 2012 Chinese Copyright Reform Proposal concurrently adopts the model of "limitation on liability". This design would actually dilute the intention and economic motivation for unaffiliated artists of collecting societies to opt out from the ECL.

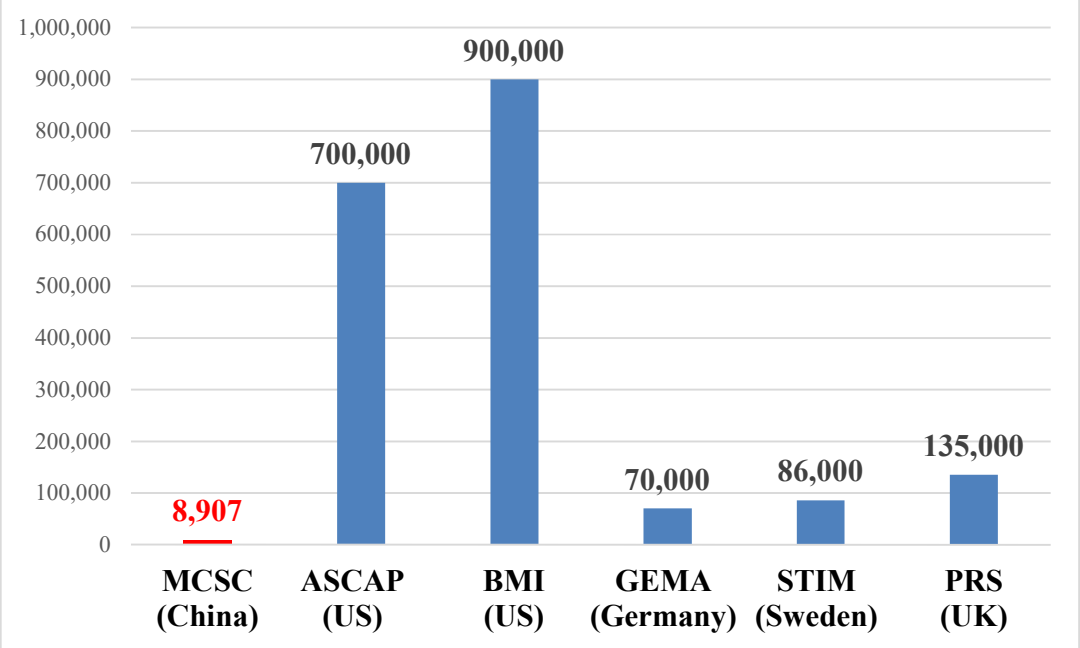
Generally, musical artists choosing to opt out from the ECL system perhaps have confidence in that they are competent to cluster satisfactory remuneration due to their individually specific contract negotiation ability or the extraordinary market worth of their musical works. Nevertheless, the construction of limitation on liability possibly restricts the amount a musical artist would be able to gather. Although a musical creator decided to escape from the ECL system, the individual creator could only claim the same price he/she would able to request under the structure of the copyright collective management. In this consequence, there is no reason that musical artists would decide to leave the ECL, causing the ECL to remain a fastened and exclusive regime, potentially losing its flexibility and

[382] MCSC, Several Versions of Responses to the Chinese Copyright Law Amendment announced through MCSC's website, *available at* http://www. mcsc.com.cn/lmS-13-994.html (last visited Apr. 18, 2019).

efficiency.

Furthermore, there is an essential contrast between the Nordic ECL and the Chinese version. We should figure out that if the degree of representativity within the Chinese music collecting society is lacking and inadequate since these issues would decide whether the Nordic ECL could be practical and beneficial to the Chinese music market. In 2015, the MSCS, only music collecting society for all of China, has only 6,500 members. At the time, this number is just approximately 10% corresponding to the size of the Germany's GEMA and the U.S.'s ASCAP and BMI while it emerges even insufficient in class with the UK's PRS-music and Sweden's STIM. This statistic illustrates that the unfavorable preference and short degree of representativity is seriously not commensurate with the size of Chinese music market and overall population.[383]

Figure 31：Memberships of Various Collecting Societies[384]



[383] Jiarui Liu, *Copyright Reform and Copyright Market: A Cross-Pacific Perspective*, Berkeley Technology Law Journal, Vol. 31, Issue 3, p.141476-1479 (2017).

[384] Membership data was obtained from collecting society websites and recompiled by author, originally from: 2017 MSCS Annual Report, *available at* http://www.mcsc.com.cn/pdf/phpmEB0Ez.pdf (last visited May 4, 2019); ASCAP, About Us, *available at* http://www.ascap.com/about/ (last visited May 4, 2019); BMI, About, *available at* http://www.bmi.com/about (last visited April 30, 2019); GEMA, About Us, *available at* https://www.gema.de/en/music-authors/become-a-member/ (last visited April 30, 2019); STIM, https://www.stim.se/en (last visited April 30, 2019); Press, PRS FOR MUSIC, *available at* https://www.prsformusic.com/press/2019/uk-songwriters-generate-record--746m-music-royalties (last visited May 2, 2019).

The insufficiency of representativity strikingly provokes the problems essentially connecting to the ECL system. The Chinese version of ECL arrangements could substantially weaken the required exclusivity authorized by copyright mechanism and impair the economic incentives to the musical artists unaffiliated to collecting societies. Consequently, a number of scholars notice the performance of the ECL system is actually achieving an indistinguishable function with what the compulsory license accomplished. One noticeable example is, the Nordic ECL had actually enforced thoroughly compulsory effect on the transmission of cable TV in the absence of the opt-out exception for the creators.

Over and above that, unaffiliated artists of collecting societies, specifically overseas artists, can't be usually well-informed that their creations are introduced by the ECL system.[385] In case, the musical artists do not participate in the local CMO or connect to the overseas CMO according to the international cooperation of the reciprocity. This specific group of musical artists is excluded from the right to request copyright royalties or opt out from the ECL system. Generally speaking, there is no legitimized accountability to enforce music CMOs to locate unaffiliated artists and determine whether their works had been exploited. Supposing that the copyright remuneration, clustered by the music CMOs, stays in the circumstance of requested by no creators for a considerable time, the remuneration would be transformed as financial reserves to indemnify management and organizational expense, or even rewards to the current affiliated artists. These "pennies from heaven" represent that the music CMOs could take great advantages from the ECL system by cultivating the copyright rewards belonging to the unaffiliated musical artists, even if this stipend is aiming for establishing the social and cultural grounds and scholarship for the overall collective management.

[385] Jane C. Ginsburg, *Extended Collective Licenses in International Treaty Perspective: Issues and Statutory Implementation*, Columbia Public Law Research Paper, No. 14-564, p.1 (Nov. 2017), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3068997 (last visited Apr. 13, 2019).

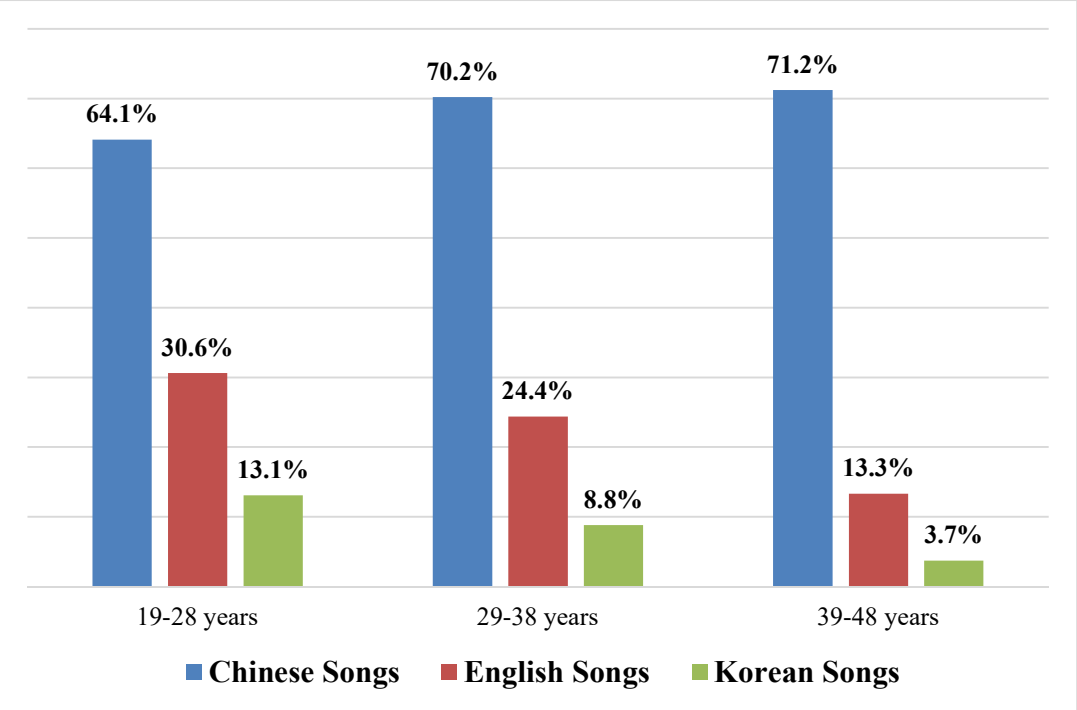
E. Exterior Incentives and Boundaries

1. Taiwan's Impacts: Cultural Modernity and Soft Power

In China, audiences still more prefer to listen to songs in Mandarin than in English or even Korean. For audiences between 30 and 48 years old, 71.2% of the audience is enthusiastic on Mandarin songs. Compared to the younger generations, they also have less interest in music written in foreign language. Otherwise, audiences between 19 and 28 years old have more desire to listen to Mandarin songs, although they do show considerable interest on English and Korean songs. Overall, in China, local audiences still concentrate on Mandarin music, and are most likely to consume Mandarin-speaking artists.

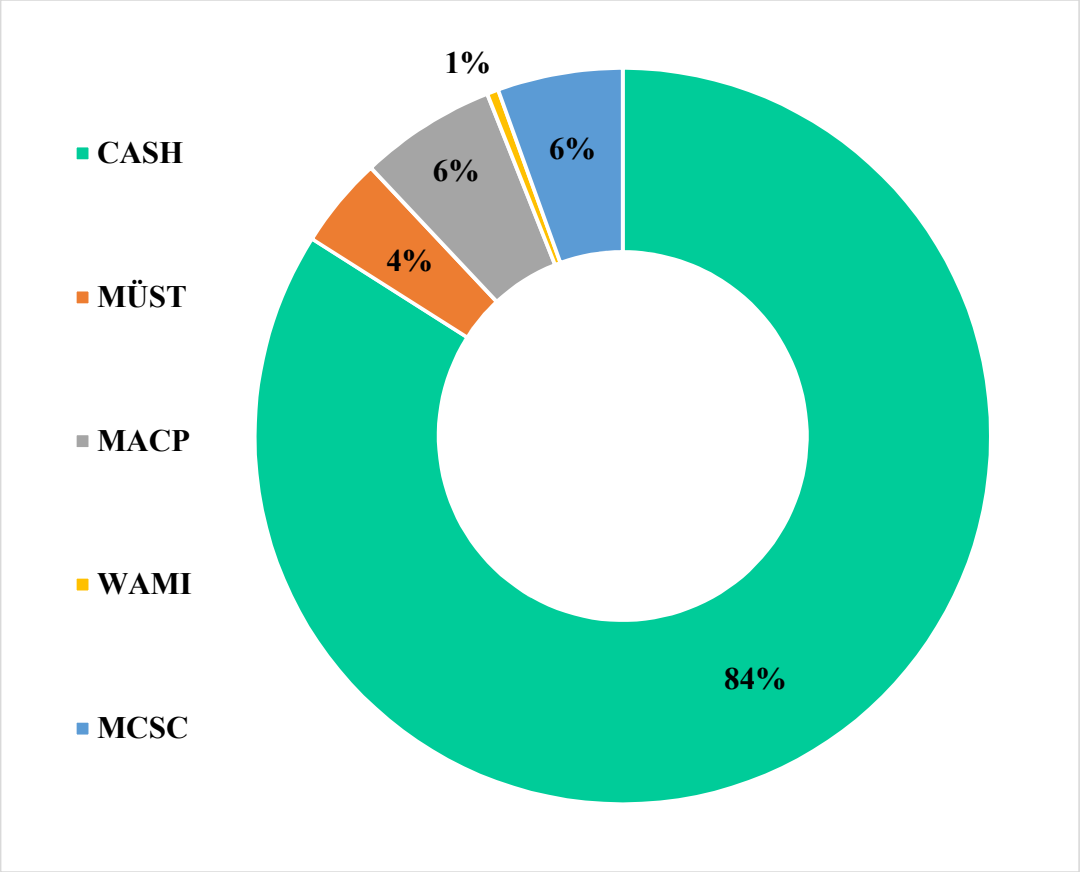
Figure 32：Music frequently listened by mobile users in China as of 2016[386]

(by language & age group**)**



[386] China Big Data Industrial Observation(CBDIO, 中國大資料產業觀察), *Shuwei Yinle Daziliao Baogao：Zhongguo Xianmin Shouji Tingge Hangwei Jiemi (數位音樂大資料報告：中國線民手機聽歌行為揭秘) [Digital Music Big Data ReporFt: Chinese Music Users' Behaviours]*, (May 20, 2016), *available at* http://www.cbdio.com/BigData/2016-05/20/content_4950507.htm (last visited Apr. 28, 2019).

Figure 33：MCSC Music Works Statistics in 2017 (Inside DIVA System)[387]



	CASH	MÜST	MACP	WAMI	MCSC
Quantity	7,087,052	204,063	517,485	29,851	411,814

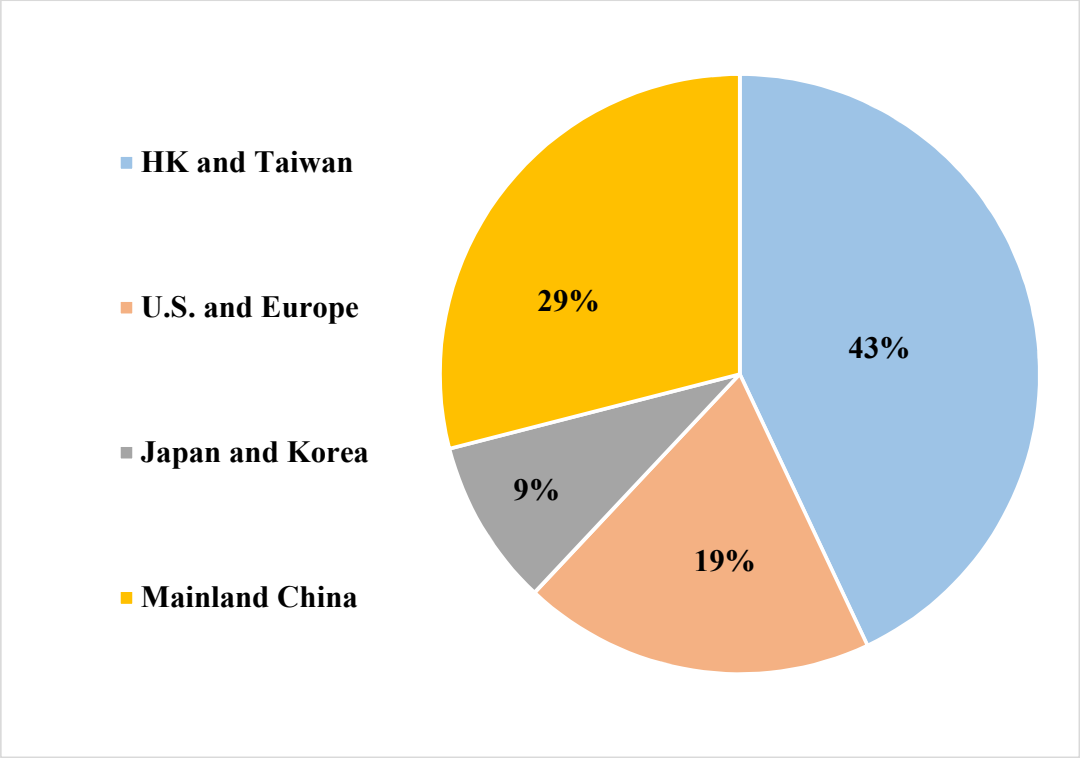
In terms of copyright database, DIVA is a powerful Mandarin music copyright database managed by Hong Kong's music collecting society, the Composers and Authors Society of Hong Kong (CASH). Until 2017, the DIVA program had embraced over 8.25 million musical works in the Asian music market, of which approximately 7.09 million works belong to CASH outright, 0.51 million works belong to MACP (Music Authors Copyright Protection, Malaysia), about 0.2 million works belong to MÜST (Music Copyright Society of Chinese Taipei), 29,851 works belong to WAMI (Wahana Musik Indonesia) and in excess of 0.41 million works belonging to MCSC. The DIVA program contained 325,152

[387] MCSC (中國音樂著作權協會), *2017 Zhongguo Yinle Zhezuoquan Xiehui Niandu Baogao (2017 中國音樂著作權協會年度報告) [2017 MSCS Annual Report, The Chapter of Documentation]*, p.13, (Apr. 28, 2018), *available at* http://www.mcsc.com.cn/infom-4-1.html (last visited Apr. 2, 2019).

musical works in association with MCSC, consisting of 73,440 audio visual works, 7,928 arranged works and 5,294 adapted works, within that over 0.134 works embodied ISWC code. Although Taiwan is limited by its compact territory, the percentage of Taiwan's musical works had been still ranked at the fourth in this database. This shows Taiwan's musical works represents a quite influential role in Asian music market.

Moreover, surprisingly, on the basis of statistical analysis, mobile music users in China are most favor of pop music made in Hong Kong and Taiwan. This illustrates how Taiwan's music is attractive to and stands up robustly to audiences in mainland China. According to this result, it is also reveals Mainland China is a potential market for Taiwan. Since Taiwan's music market is comparatively limited relative to its geographical stature, the bigger market size, given the enormous population in China, actually provides a prospective marketplace for Taiwan's artists to draw more fans and music sales.

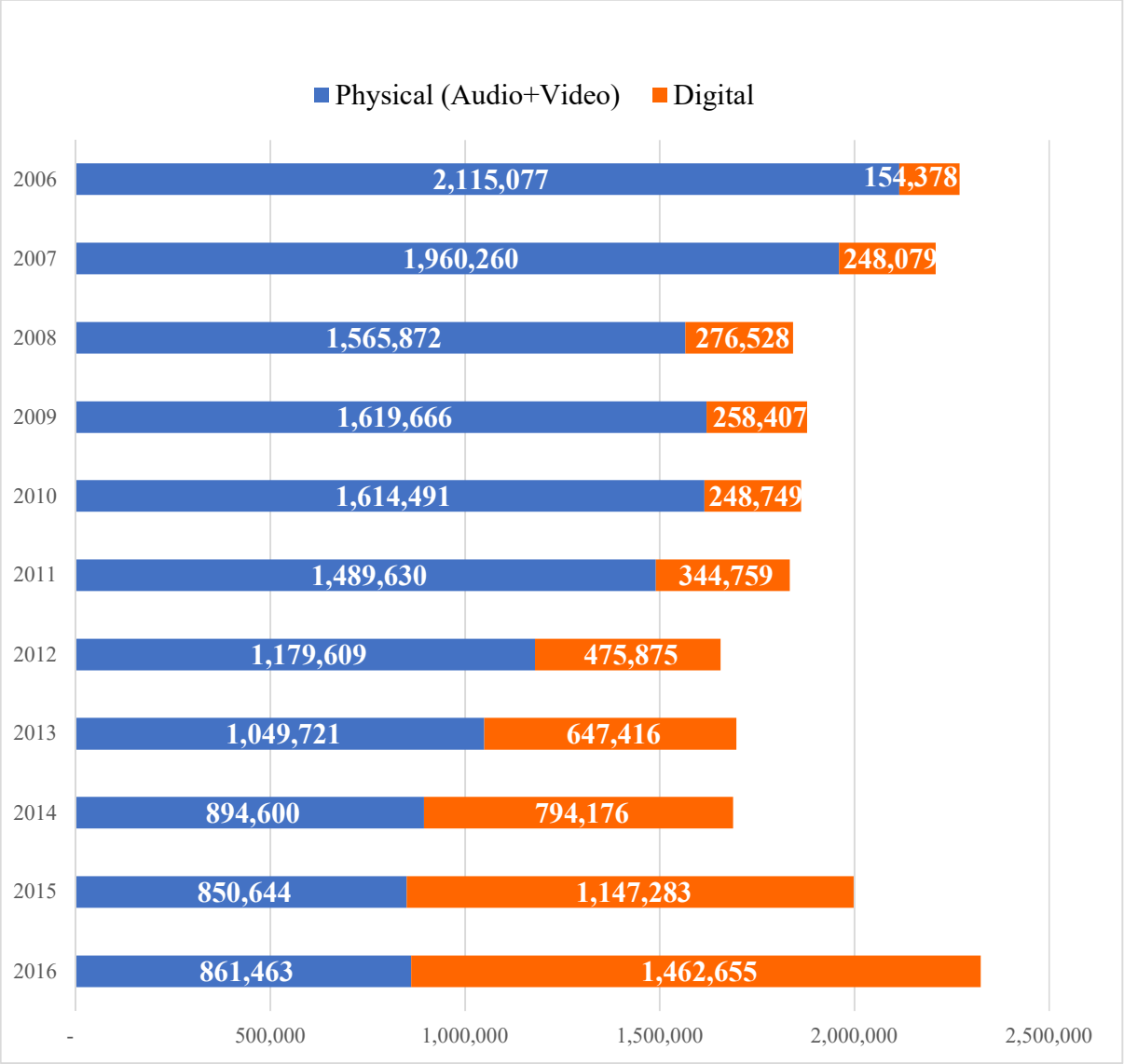
Figure 34：Origins of Pop Music that Mobile Music User Favor in China[388]



[388] iiMEDIA Research Group(艾媒諮詢集團), *Zhongguo Wuxian Yinle Shichang Niandu Baogao (China Wireless Music Market Annual Research Report) [中國無線音樂市場年度報告]*, p.39 (2012).

The Music Copyright Society of Chinese Taipei (MÜST), as the main music copyright collective management organization, having the most members in Taiwan, received gradually-increasing revenue in recent years. According to the MÜST's annual report, after 2010, since the music technology is substantially developed to monetize on-line products and services, it can be observed how Taiwan started to increase its sales and profits in the digital music market, while simultaneously the traditional physical music products were obviously replaced by digital music commodity since 2016. In 2006, physical audio and video's market share was 93%, while digital music's market share was 7%. There has been a serious rearrangement from 2006 to 2016. Particularly, in 2016, the market shares of digital music had reached 63%, while the physical's market share was 37%. It is becoming less controversial to assume that physical music products are outdated (or niche products), and are no longer commonly accepted by the consumers and audiences.

Figure 35：Taiwan Music Market Distribution from 2006 to 2016 (NTD)[389]

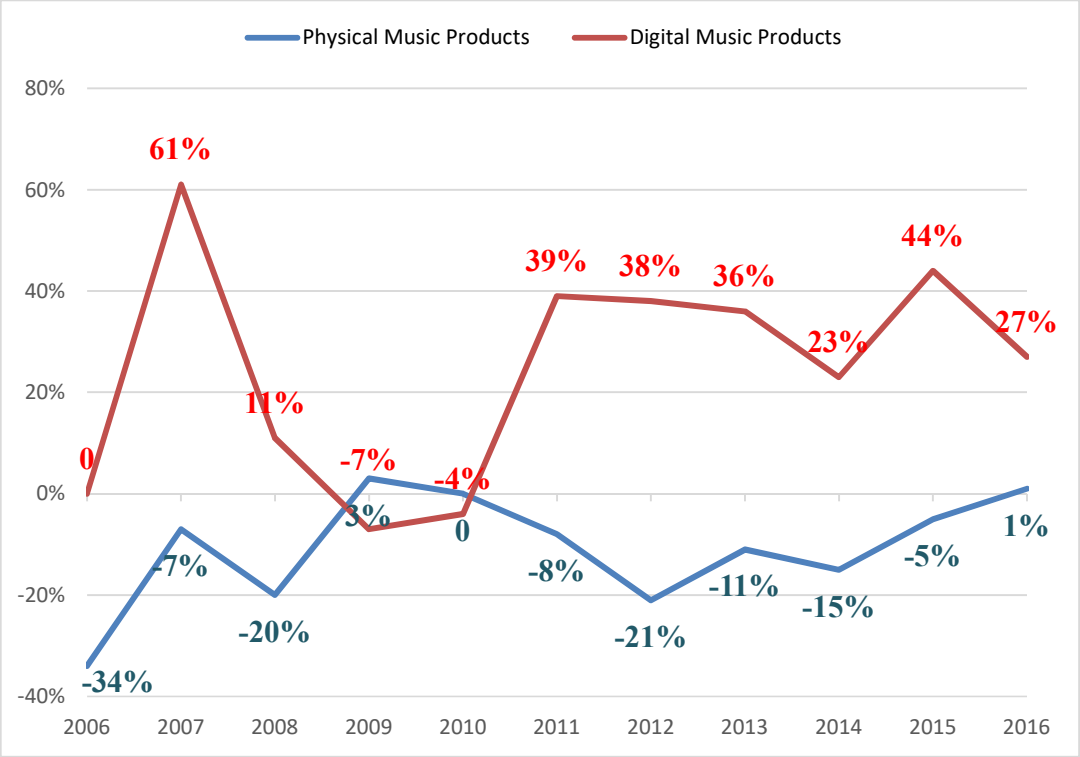


	2006	2007	2008	2009	2010
Physical (Audio+Video)	2,115,077	1,960,260	1,565,872	1,619,666	1,614,491
Market Share	93%	89%	85%	86%	86%

[389] Statistics recompiled by author, originally from: Recording Industry Foundation in Taiwan (財團法人台灣唱片出版事業基金會), Taiwan Music Sales Report (台灣音樂市場銷售統計), *available at* https://www.rit.org.tw/index.php/our-business/2-5/2-5-2 (last visited Apr. 20, 2019).

Digital	154,378	248,079	276,528	258,407	248,749	
Market Share	7%	11%	15%	14%	14%	
Total Revenue	2,269,455	2,208,338	1,842,400	1,878,073	1,863,241	
	2011	2012	2013	2014	2015	2016
Physical (Audio+Video)	1,489,530	1,179,609	1,049,721	894,600	850,644	861,463
Market Share	81%	71%	62%	53%	43%	37%
Digital	344,759	475,875	647,716	794,176	1,147,283	1,462,655
Market Share	19%	29%	38%	47%	57%	63%
Total Revenue	1,834,289	1,655,484	1,697,138	1,688,776	1,997,927	2,324,118

Figure 36：Growth Rate of Music Product Sales Distribution in Taiwan Market[390]



Statistics recompiled by author

Additionally, Taiwan's music market has dramatically shrunk between 2008 and 2014. The reason for this negative change is possibly the occurrence of peer to peer sharing technology and on-line download. Specifically, from 2015, MÜST's sales distribution of digital music noticeably overtook physical music sales. Until 2016, the sales of digital music continued to increase, and its sales distribution was moving forward. Not to mention when one examines the revenue sources of MÜST from 2015 to 2017, it shows the revenue of public transformation is impressively increasing in 2017. This further implies the audience is having a positive response to the rise digital music through paying subscription fees. Such a phenomenon can also be shown in statistics about growth rate of music product sales distribution in the Taiwan market; digital purchases grew steadily, with at least a 23% growth rate from 2011, as contrasted with the dramatic decline of physical music.

390 *Id.*

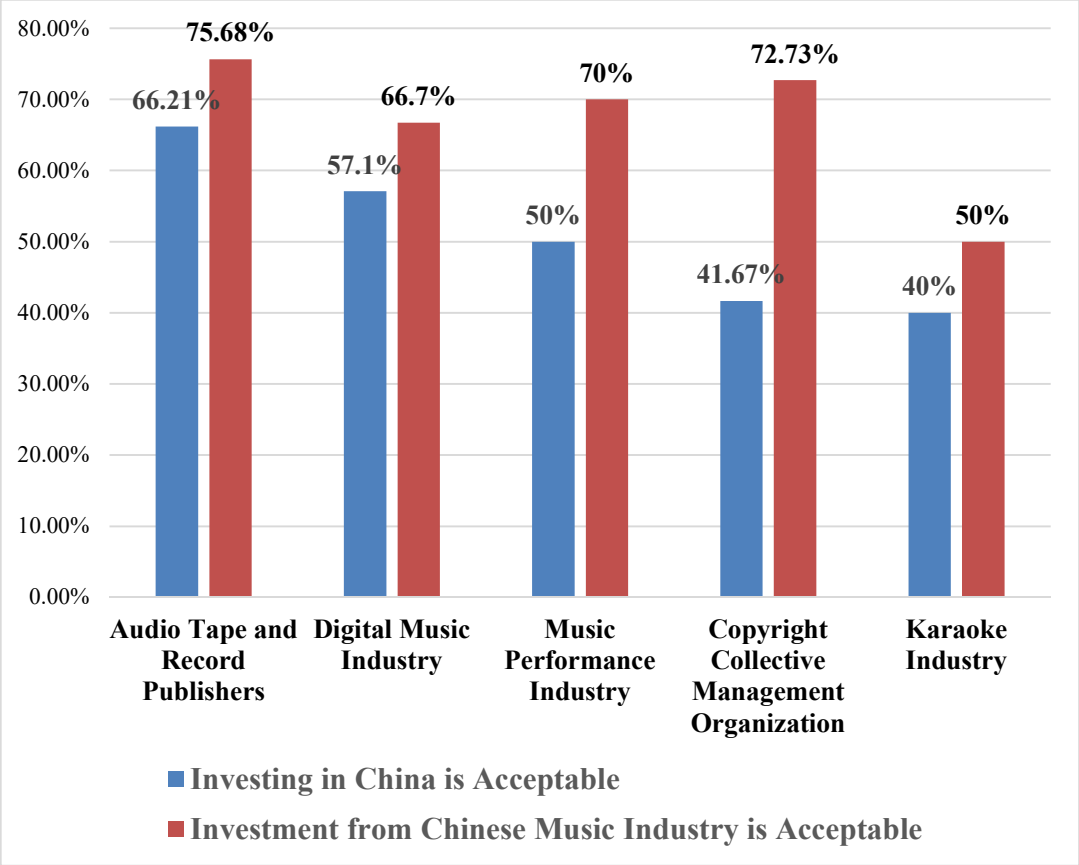
However, Taiwan's domestic music market had not actually expanded obviously when we examined the distribution figures in 2006 and 2015. This observation explains Taiwan's music market could be important within Mandarin music market, albeit limited on the number of sales. Thus, corresponding to the discussions before, since, geographically, Taiwan is close to China and shares the same language with China, Taiwan's artists could obtain more opportunities to build fans and influence on Mandarin music market. Compared to other countries, the inseparable relation between Taiwan and China can present a platform to nurture Taiwan's talent and music business.

The cross-strait cooperation not just stimulates Chinese audiences to appreciate Mandarin songs from Taiwan and also helps to launch more new music start-ups and investments in China. Consequently, the future interaction of Taiwan and China is actually promising and practicable, especially in Mandarin music culture.

To further investigate, on the basis of the "Taiwan Pop Music Industry Survey" published by the Taiwanese Ministry of Culture, over 50% of different music industry segment expressed a willingness to invest or make business deals in China. This survey also demonstrates the cross-strait music culture could benefit audiences, music businesses and entrepreneurs in China, since record labels, digital music enterprises, music performance companies, copyright collective management organizations and karaoke companies in Taiwan expressed their interest to connect to the Chinese music market. either through investing in China's music industry or accepting investments from China.

In the other respect, one finding shows that although up to about 60% Taiwan music copyright collective management organization had cooperated with China music market before, half of them encountered difficulties during their cooperation. The primary reasons were Chinese copyright regulation was not formed to protect right owners and ensure reasonable economic rewards. This result reminds one how crucial the copyright law protection and enforcement in China is. A market with a comprehensive copyright law system can always attract more funding and talent.

Figure 37：Taiwan's Music Organization Intention Survey about Cooperation with China[391]



In terms of compulsory licensing, Taiwan's copyright law initially engaged this concept in its recording industry. According to the section related to property rights in Taiwan's copyright law, it indicates the use of copyright through the channel of compulsory licensing. Specifically, it has been pointed out in the existing Article 69 of Taiwan's copyright law:

> "Where a sound recording of a musical work recorded for sale has been published for six months, a person who wishes to exploit the aforementioned musical work to record and produce other sound recordings for sale may apply to the specialized agency in charge of copyright matters for a compulsory license, and after paying

[391] Ministry of Culture, Bureau of Audiovisual and Music Industry Development (文化部影視及流行音樂產業局), *104 Liuhang Yinle Chanye Diaocha (104 TAIWAN POP MUSIC INDUSTRY SURVEY) [104 流行音樂產業調查]*, Taipei: Ministry of Culture, p.179 (Sep. 2016).

compensation, may exploit such musical work and record and produce other sound recordings.

Regulations governing the compulsory license for a musical work referred to in the preceding paragraph, the method for calculating the *compensation* for exploitation, and other requisite matters shall be prescribed by the competent authority."

Moreover, this existing Article 69 has been modified as Article 79 in the new amendment draft of Taiwan's Copyright Law. This new amendment will expand the part of "may exploit such musical work and record and produce other sound recordings*"*to not just *"*record*"* and *"*produce*"* other sound recording but also *"*distribute*"* the sound recordings made through recording and production process.

In addition, on the basis of Article 70 of Taiwan's copyright law, it limits the geographical boundary to export the copies of sound recording thought compulsory licensing.

Article 70:

"Copies of sound recordings which exploit musical works pursuant to the provisions of the preceding article shall not be sold outside of the territory under the jurisdiction of the Republic of China."

Article 71:

"The specialized agency in charge of copyright matters shall void approval for a compulsory license obtained in accordance with the provisions of Article 69 if the application is found to contain misrepresentations. […] The specialized agency shall void approval for a compulsory license obtained in accordance with the provisions of Article 69 if the work is not exploited in the manner approved by the specialized agency."

However, even though Taiwan's intellectual property office proposed to incorporate advance reforms of compulsory licensing or extended collective license based on the U.S. or Europe's experiences, it faced protest from sectors in the music community, or oppositions from professional experts. Thus, in the future, China's experiences on the third copyright law reforms would be a possible inspiration to Taiwan and make Taiwan's music society to rethink the possibility to apply a western approach again, or modify China's proposal as a Taiwanese version of the modernization act.

2. Taiwan's Collaboration with China

Following China's gradual influence to global market, one possible strategy for Taiwan's continuing economic growth would be to collaborate with China's market, by supplying Taiwan's unique Mandarin culture products and services. However, by the perspectives of economic analysis, one is reminded how, in William Alford's *to Steal a Book Is an Elegant Offense: Intellectual Property Law in Chinese Civilization,* it points out Taiwan's or international intellectual impacts on China's economic developments can only be formed through considerable protection of intellectual property. The present analysis starts from the viewpoint that illegal intellectual property infringements in Taiwan remain until economic incentives and increasing export markets exists, with demand for the product. Specifically, the demonstrable levels of progression Taiwan has achieved have established that Taiwan has revolutionized itself from a state of piracy to a marketplace with comprehensive intellectual property protection and enforcement. Taiwan's progression displays that the expressive external pressures irritated by economic incentives and soaring export markets would be able to transform, with regard to domestic intellectual property protection and enforcement.

(1) Taiwan as a Model of Modernization

Through obtaining internal motivations, Taiwan is a model for China's reforms. In Taiwan's transformation, it illustrates copyright amendments are not just ignited by the pressure of wars and international treaties. Taiwan's modernization is turned to being stimulated by the community of artists, music companies, record labels and copyright holders with the assistance of government. Taiwan's modernizations including external and internal incentives means Taiwan had shaken off the title of "piracy kingdom" and become a self-motivated power to protect its foreign creators and connect to the global market. This courage and change represents how Taiwan is confident in its intellectual competence and creativity, which is what China has been short of in the past.

(2) Taiwan's Soft Power on Musical Art

Through the extensive accomplishments of Taiwanese widespread intellectuals,

fashionable creativity and profound literature and culture approachable, the progress of Taiwanese evolution brings significant influence to the Chinese society. Although the communication and transportation between Taiwan and China was restricted, Taiwan's impetus is still keeping moving through the strait and stimulating mainland Chinese to follow the island's trends. Existing research[392] has illustrated how Taiwanese leading singers and authors thrived on musical expression and literary works to engage, correspond and transform Chinese tradition. The popularity of Deng Lijun (鄧麗君)'s songs was actually earlier on the open policy starting from Deng Xiaoping's economic modernization and pragmatic strategies in the late 20th Century. Since then, romantic stories weaved by Qiong Yao (瓊瑤), the verses framed by Xi Murong(席慕容) and the touching melodies and artistic phrasings demonstrated by Deng Lijun have reinforced interconnection on each side of the Taiwan Strait, and have become cherished by mainland China.

In reality, the audience in mainland China was not focused on by Qiong and Xi's exertion. The graceful and splendiferous sentences, cultivated though their considerate thoughts and observations have discovered and achieved a harmonization comprehending the contemporary and traditional Chinese mind into overall interpretations and understandings. Additionally, this correspondence actually externalizes curiosity and fantasy, seen as enchanting to Chinese market. These three precedents expose, by means of soft power, the modernity of Taiwanese culture captures cherished by the Chinese society.

In particular, the soft power shaped by Taiwanese creators actually generated substantial influence to mainland China since their artistic works had transformed China's modern civilization and elevated the inner existence of Chinese people. Taiwanese intellectual achievement essentially inputs significant energy and inspirations to China's social progression. Recognizing Taiwan's sizable dedication towards cultural development does not signify Taiwan's contribution is unequal to its contributions on China's economic advancement. The extensive financial association between Taiwan and China had been established and formed a solid infrastructure to stimulate Mandarin-speaking services and products. It is obvious that Taiwan's massive funding, technology transfer and commercial trade initiated China's economic growth and accelerate the Mainland's market to get rid of the ground.

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[392] *See* Michelle Yeh, *The Impact of Taiwanese Popular Literature on China, in* Taiwan's Impact on China, Why Soft Power Matters More than Economic or Political Inputs, Palgrave Macmillan, Cham, p,149-177 & Pei-yin Lin, *How China is Changed by Deng Lijun and Her Songs*, p,179-202 (Steve Tsang ed., Feb. 7, 2017).

Through overall demonstration on Taiwan's economic development[393] and explicit research on Taiwan electronic industry[394], Taiwanese technological knowledge and administrant proficiency has incentivized mainland China to shake off the conservatism of the conventional market under Maoist totalitarianism. Taiwanese impacts have influenced Mainland China to escape inflexible protectionism, and embrace the global economy and, in accordance with Mainland China's policy of re-emergence and opening up, represent a distinguished factor to shift from post-Mao export focus on Deng Xiaoping administration to a convincing, prosperous modernization.

In general, through apposite externalizations of different conventional Chinese traditions and paradigm of modernity, Taiwan's prosperously builds prominent cross-strait momentum over China. However, the torrent of China's financial reconstruction and swift commercial escalation, which empowers China boom and capacitates its vigorous economic leverage toward the global marketplace, needs contextualization in the context of the impact of Taiwanese soft power. Taiwan's significant influence on China's economic growth is especially highlighted to drag China out of impoverished financial situation, remarkably through promoting transfer of technology (TOT), fostering essential infrastructure and connecting China's domestic production market to international supply operations. Nevertheless, after the 21 Century, Taiwan's impact is obviously undermining since China's immerse labor strength, which has broken Taiwan's soft power away by dialoguing with international trading institutions and generating its own curriculum of economic development to plug into the global economy. From then onward, China's influence on the global economy has gone through the roof, and its products and services have spread dramatically over the world.

Overall, in the current market, the legal strategy on copyright protection and licenses had developed fundamental concerns to avoid the costs of litigation and infringement defense. The governmental institutions in Taiwan and China are also making considerable efforts to construct a fairer compensation system and a more efficient licensing process. Building a creative environment with the equilibrium between "free information and open access to

[393] *See Id.* at 95-123. Shelley Rigger, *Gunter Schubert, Taiwan's Contribution to China's Economic Rise and Its Implications for Cross-Strait Integration*.
[394] *See Id.* at 125-148. Chun-yi Lee, *Taiwan and China in a Global Value Chain: The Case of the Electronics Industry*.

the social community" and "the protection of artistic expression and intellectual property" is a necessary foundation for Taiwanese and Chinese music industries.[395]

2. International Treaties: Berne Convention's Three-Step Test

The ECL bill of China presumably engages a change to breach the three-step test, initially founded in corresponding to the exclusive right of reproduction under Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works in 1967:[396]

> "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."[397]

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."[398]

Since the body of the WTO illustrates, regarding the primary stage of the three-step test, "certain special cases" demand the irregularity and barrier should be clearly clarified and controlled within the appropriate and reasonable range and filed. In particular, the

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[395] David Herlihy, Yu Zhang, *Music industry and copyright protection in the United States and China*, Global Media and China, Vol 1, Issue 4, p. 397 (Dec. 2016).
[396] Jane C. Ginsburg, *Extended Collective Licenses in International Treaty Perspective: Issues and Statutory Implementation*, Columbia Public Law Research Paper, No. 14-564, p.1 (Nov. 2017), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3068997 (last visited Apr. 13, 2019).
[397] Jiarui Liu, Copyright Reform and Copyright Market: A Cross-Pacific Perspective, Berkeley Technology Law Journal, Vol. 31, Issue 3, p.1478 (2017).
[398] Jane C. Ginsburg, *Extended Collective Licenses in International Treaty Perspective: Issues and Statutory Implementation*, Columbia Public Law Research Paper, No. 14-564, p.1-3 (Nov. 2017), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3068997 (last visited Apr. 13, 2019).

commercial immunity subordinate to the U.S. Copyright Law was noticed to counter the initial requiring stage of without the restricted existence of "certain cases", owing to the fact that its exception had skillfully excused approximately 70% of the entire U.S. food merchandise. A similar circumstance related to the Chinese music CMO, MCSC, which enrolled probably only 9% of total Chinese creators in the role of affiliates. A broadening is enforced to the whole creators in Chinese music market. In fact, this legal conduct could be able to exploit the authorship exclusivity of the over 90% of nonaffiliated creators. For that reason, it is obviously believed that the lion's share can not be counted as the condition of "certain special cases".[399]

Moreover, according to the 1909 Chinese Copyright Act, to diffuse the copyrighted sound recordings by the signal of TV and radio facility is regarded as being on a non-business basis and, consequently, has the benefit of a comprehensive exclusion against any copyright allegation. This immunity was plausibly incompatible with and grossly opposed to the three-step test subject to the "Berne Convention" and the "TRIPs Agreement".[400]

Consequently, in 2001, the Chinese administration also shifted this exclusion to the compulsory license regime of copyright law. This amendment occurred just prior to the date of December 11, when China's WTO was announced.[401] It states: "Radio and television stations may broadcast published sound recordings without the permission of copyright owners but shall pay remunerations, unless the relevant parties have agreed otherwise. Detailed measure shall be formulated by the State Council."[402]

Nevertheless, at the starting stage, subsequent to the ratification of the involuntary license proposal, the PRC's broadcasting associations had been powerfully pressurized to prevent a practical scheme to specify explicit regulations and operations. Throughout this process, the PRC's TV and radio stations continued to employ the musical works and sound recording without charge. As late as 2010, the radio and TV stations of the PRC would

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[399] Jiarui Liu, *Copyright Reform and Copyright Market: A Cross-Pacific Perspective*, Berkeley Technology Law Journal, Vol. 31, Issue 3, p.1480-1481 (2017).
[400] Jane C. Ginsburg, *Extended Collective Licenses in International Treaty Perspective: Issues and Statutory Implementation*, Columbia Public Law Research Paper, No. 14-564, p.1-12 (Nov. 2017), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3068997 (last visited Apr. 13, 2019).
[401] Jiarui Liu, *Copyright Reform and Copyright Market: A Cross-Pacific Perspective*, Berkeley Technology Law Journal, Vol. 31, Issue 3, p.1487 (2017); World Trade Organization, Member Information, *China and the WTO*, *available at* https://www.wto.org/english/thewto_e/countries_e/china_e.htm (last visited Apr. 20, 2019).
[402] Article 44, PRC Copyright Law (2010 Version).

initiate licensing bargaining with the record labels and the music collective management organization, MSCS. This background indeed gives a lesson to the music market by pointing out the incapability and inefficiency of compulsory licensing regime under the reality of politics.[403]

Owing to formidable protests of musical creators, publishers and record labels in the Chinese market, the tertiary proposal of the 2012 Chinese copyright amendment completely deletes the compulsory license mechanism within the whole PRC's copyright law, regardless of the mechanical rights of musical works or any current living articles. In light of the US Music Modernization Act,[404] the notion of compulsory licensing has eventually reached the public eye and been a catchy topic in the music industry.[405]

In spite of the fact that these extra copyright rewards come from the musical works of local and overseas creators, merely local creators are offered route to approach these gravies, this outcome actually causes protectionism within the structure of international trade and, accordingly, contravene the essence of national treatment on the basis of the TRIPS agreement and the Berne Convention.

[403] Jiarui Liu, *Copyright Reform and Copyright Market: A Cross-Pacific Perspective*, Berkeley Technology Law Journal, Vol. 31, Issue 3, p.1487-1488 (2017).
[404] H.R. 1551 (115th): Orrin G. Hatch-Bob Goodlatte Music Modernization Act, p,1-5 (2018).
[405] Jane C. Ginsburg, *Extended Collective Licenses in International Treaty Perspective: Issues and Statutory Implementation*, Columbia Public Law Research Paper, No. 14-564, p.1-9 (Nov. 2017), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3068997 (last visited Apr. 13, 2019).

Table 7：Copyright Collectives and Music Platforms in the U.S., Taiwan and China

	Phonograph Record		Music Streaming	
Taiwan	Composition	Sound Recording	Composition	Sound Recording
	Reproduction: Music Publisher	Reproduction: Record Label	Reproduction: Music Publisher	Reproduction: Record Label
			Transmission: Music Publisher MÜST, TMCS, MCAT(Bankrupted)	Transmission: ARCO
China	Composition	Sound Recording	Composition	Sound Recording
	Reproduction: Music Publisher	Reproduction: Record Label	Reproduction: Music Publisher, MCSC	Reproduction: Record Label
			Transmission: Music Publisher, MCSC	Transmission: Record Label
U.S.	Composition	Sound Recording	Composition	Sound Recording
	Reproduction: Music Publisher	Reproduction: Record Label	Reproduction: Music Publisher	Reproduction: Record Label
			Transmission: Music Publisher, ASCAP, BMI, SESAC, Sound Exchange	Transmission: Sub (Spotify, Apple Music): Record Label, RIAA Non-sub(Pandora, Sirius XM):Record Label (Compulsory Licensing)

Organized by the Author

3. Moral Rights System in Mandarin Music Market

It is crucial for this analysis to distinguish between the differences of the U.S. and China's copyright systems. This study has identified essential points of divergence, and has demonstrated how individual solutions could be meaningful and practical to address a similar issue in the U.S. and China.[406] On the basis of European law tradition, China extensively adopts a moral rights system to form and regulate one side of its copyright law structure, which is an addition and distinction against the U.S.'s nearly pure economic rights system in its copyright regime.[407] Consequently, it results in several contradictions between the substance of the U.S. and China's copyright regimes.[408]

First, in China's copyright law, the conception of moral rights can be exerted to every type of copyrightable works indicated in Article 3. Otherwise, the notion of a moral right is comparatively narrowed and merely relevant to specific creation categories on visual art.[409]

> Article 3:"Works" mentioned in this Law shall include works of literature, art, natural science, social science, engineering technology and the like made in the following forms: (1) written works; (2) oral works; (3) musical, dramatic, quyi, choreographic and acrobatic art works; (4) works of fine art and architecture; (5) photographic works; (6) cinematographic works and works created in a way similar to cinematography; (7) drawings of engineering designs and product designs, maps, sketches and other graphic works as well as model works; (8) computer software; (9) other works as provided in laws and administrative regulations."

Second, in China's copyright system, the rights of integrity, revision, authorship and publication are all incorporated in moral rights framework, whereas in the U.S. copyright system, the concept of moral rights is barely considered, and is exclusively related to the

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406 Xianjin Tian, Fuxiao Jiang, Katherine C. Spelman, Daniel Gervais, Mark H. Wittow and Trevor M. Gates, Copyright Law of China, Donna Suchy (Editor), IP Protection in China, ABA Book Publishing (2015), p.187.
407 Molly Shaffer & Van Houweling, *Author Autonomy and Atomism in Copyright Law*, Virginia Law Review, Vol. 96, Issue 3, p.560 (May 2010); Henry E. *Smith, Institutions and Indirectness in Intellectual Property*, University of Pennsylvania Law Review, Vol. 157, Issue 6, 2089 (June 2009).
408 Xianjin Tian, Fuxiao Jiang, Katherine C. Spelman, Daniel Gervais, Mark H. Wittow and Trevor M. Gates, Copyright Law of China, Donna Suchy (Editor), IP Protection in China, ABA Book Publishing (2015), p.187.
409 *Id.* at.187-188.

rights of integrity and attribution.[410] Compared to the U.S.'s economic rights system, China's moral rights system is more difficult to apply compulsory licensing and the ECL system, since it will incorporate more types of rights.

4. Modernization under External and Internal Pressure

It has been a critical issue concerning if the notion of copyright has been in existence of China's historical progression. In the one hand, the prestigious Chinese law professor William Alford[411] urges, according to historical and cultural viewpoints, that copyright in China does not remain any equivalent to the abstraction of copyright in foreign countries.[412] On the other hand, several academics in China assert that, on the basis of old and early archives, age-old China had established the conception of copyright similar to the formation of intellectual expression and protection in western countries' civilization.[413] Nevertheless, a number of Chinese law experts contend this understanding by stating the authentic recognition of copyright legacy should be proved by substantial safeguard of creators' property and moral rights, and not merely the technology and business of manuscripts printing, reproduction and distribution. Thus, the evidence of copyright protection in ancient China's history is actually vague and haphazard, and highly related to governmental controls instead of humanity and consciousness.[414]

Overall, it is generally believed the reason regarding the Chinese emperor's privilege assignments on official and private publishing was aimed to maintain centralized and feudal administration, censor heretical thoughts and dissenting voices and educate the public on correct and permissible ideology.[415] In terms of modern legal philosophy, this publishing privilege from Chinese royalty is contrary to authorize exclusive right and protection to intellectual property.[416] In the light of this mindset, the faint copyright consciousness schooled by Chinese monarchy is comparable to the pre-Anne Statute's

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[410] *Id.* at 188.
[411] William Alford, To Steal a Book Is an Elegant Offense: Intellectual Property Law in Chinese Civilization, Calif.: Stanford University Press, p.22-23(1995).
[412] *Id.* at 23
[413] *Id.* at 23-24
[414] *Id.* at 25
[415] *Id.* at.26
[416] Richard E. Caves, Creative Industries： Contracts between Art and Commerce, Harvard University Press, p. 310 (2000).

Britain.[417] In the same way, the ancient Chinese empire shares the same approach with the faraway Britain to manipulate the free expression and strengthen monarchy's political governance through controlling the privilege of nationwide publishing.[418] However, Britain shakes off the feudal system of publishing privilege since the first copyright act, the Statute of Anne, was enacted by Parliament in 1710.[419] Concurrently, this new reshaping of intellectual protection brought a notable modernization to western copyright institutions. Even so, because of geographical boundaries and cultural gap, such new reform of intellectual cordon has been transported and incorporated into monarchial Chinese society.[420] As a result, ancient China still remained its weak and inadequate system to safeguard authors' intellectual property.[421]

(1) External Pressure: Wars and International Treaties

Past the two Anglo-Chinese Wars initiated by Britain and France respectively in 1840 and 1856, the ancient Chinese society was forced to accept a number of discriminatory international treaties due to foreign invasion. These asymmetrical treatments further pushed several states and cities of old-age China to colonial territories regarding their fragile sovereignty.[422] Especially, the establishment of "extraterritoriality" and "most favored nation treatment" generates extraordinary trading pressure and openness to the past restricted feudal Chinese market. Foreign countries agree to render their "extraterritoriality" on the condition that Chinese monarchy constructed competent and constructive mechanism of legal protection and enforcement on the basis of international vision.[423]

Specifically, arriving in the more modern Chinese era, it is observed how both "external"

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[417] Al Kohn & Bob Kohn, Kohn on Music Licensing, Austin : Wolters Kluwer Law & Business; New York, NY : Aspen Publishers, p.4-5 (4th ed.2010).
[418] Molly Shaffer & Van Houweling, *Author Autonomy and Atomism in Copyright Law*, Virginia Law Review, Vol. 96, Issue 3, p.560 (May 2010).
[419] *Id.* at 561-562.
[420] Xianjin Tian, Fuxiao Jiang, Katherine C. Spelman, Daniel Gervais, Mark H. Wittow and Trevor M. Gates, Copyright Law of China, in IP Protection in China, American Bar Association (Donna Suchy ed.) p.152-153 (June 7, 2017).
[421] William Alford, To Steal a Book Is an Elegant Offense: Intellectual Property Law in Chinese Civilization, Calif.: Stanford University Press, p.27 (1995).
[422] Xianjin Tian, Fuxiao Jiang, Katherine C. Spelman, Daniel Gervais, Mark H. Wittow and Trevor M. Gates, Copyright Law of China, in IP Protection in China, American Bar Association (Donna Suchy ed.) p.153 (June 7, 2017).
[423] *Id,* at 152-153.

and “internal” pressure and motivation stimulated new formation of the first Chinese copyright law in 1910. Although this initial proposal made just a limited first move, the foreign attacks and social impact arbitrary broke China’s closed system and imposed international treaties on China to the connect global market economy. The extensive failures 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 modernization, Self-Strengthening Movement (自強運動) and Wuxu Reform (戊戌變法), emphasizing economic, educational, military, political, social and administrative frameworks. The purposes of the modernization were targeted to facilitate mental permanence and state power. The essential foundation to continue these reforms would be efficient, competent and advanced legal institutions. Therefore, on the background of sharp evolution on printing and spreading technology, the conception of in terms of intellectual property protection and enforcement was born and raised in China society from the late Qing Dynasty, and started to shield the copyright of composers and performers. The Great Qing Copyright Law formed a nascent copyright institution. This was a crucial beginning in Chinese copyright chronicle.[424]

After the Chinese Revolution of 1911 (辛亥革命), the monarchial and feudal Chinese society was transformed to modern and democratic Republic of China (R.O.C.). During 1928, the governance of Kuomintang of China (KMT) ratified the Copyright Law, which was approximately comparable to the Great Qing Copyright Law.[425] Even so, 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 (P.R.C.) took over the governance of mainland China and built its communist legal institutions, but did not put its energy towards modernizing the copyright law at first. Until Deng Xiaoping (鄧小平) started to connect China to the global market, a series of Chinese Economic Reforms (改革開放) was implemented, and was driven by the international supply chain.[426] At the stage of modernization, under the U.S. government’s request to comply with Universal Copyright Convention (UCC), China participated in the Convention Establishing the World Intellectual Property Organization. During 1985, China announced it would establish the National Copyright Administration of the People’s Republic of China (NCAC). NCAC’s authorized strength constitutes

[424] *Id*, at.153.
[425] *Id*, at 153.
[426] *Id*, at 154.

concrete fundamentals for modern copyright protection and enforcement in China.[427]

The international impact (internal pressure) and economic progression (external pressure) motivates the legislative and administrative modernization of China's copyright system. The first Copyright Law of People's Republic of China (PRC) entered into force in 1990.[428] Generally, it is believed that the PRC Copyright Law was shaped and inspired by continental Europe's civil law system. Specifically, one unique character in the PRC copyright law system includes both moral rights and economic rights approaches. The other character is the PRC copyright law comprehends both author's rights and related rights (neighboring rights) related to the rights of performers, phonogram producers and broadcasting organizations.[429] During this period, China embarked on engaging in international copyright organizations. During 1992, China had joined the Universal Copyright Convention (UCC) and the Berne Convention. In corresponding to a thriving global market of phonogram sales, in 1993, China acceded to the Convention for the Protection of Producers of Phonograms in 1993. Since 11th December 2001, China has been a member of the World Trade Organization (WTO).[430] Meanwhile, for compliance with the minimum standard of the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) and the international trading exercises, China launched a course of reforms on copyright legislation and practices. This Chinese government's global arrangements ignited the first copyright amendment in 2010.[431]

(2) Internal Incentives: Proceeding Evolution by Cultural Community

Since PRC's governance transformed ancient China from a boorish and disperse divisions to a centralized and ordered unison, China had expressed not just its ambition against western powers and but also a desire to integrate Asia economy. On the basis of external and internal motivations, China is continuing to adjust its copyright to be harmonized with international requirements and local demands.[432] Primarily, according to Economic Reforms, China revised its communist economic system through efficient political and

[427] *Id*, at 154.
[428] *Id*, at.155.
[429] *Id*, at 155.
[430] *Id*, at 155-156.
[431] *Id*, at 156.
[432] *Id*, at 156.

administrative reconstruction. The modernization of legal institutions encouraged Chinese governmental authorities to execute logical and systematic policy-making and law enforcement. Subsequently, new technology and business models combust expeditious innovation to digital and virtual products and services. The Internet has intensely remodeled the culture and society of creation and use, contrary to traditional printing and reading though more massive information circulation and reproduction. China's copyright law is influenced by this progress of modern civilization, and finding its position.

However, in despite of two crucial reforms in 2001 and 2010, the pliant and narrow local vision bound the positive potential and possibilities of these amendments. Basically, the copyright reform in 2001 was aimed to capacitate PRC to in compliance with the WIPO Performance and Phonograms Treaty (WPPT) and World Copyright Treaty (WCT).[433] This international IP movement equipped and empowered the PRC to adhere to worldwide trade prerequisite and support the PRC to communicate and open up global export and import markets with a substantial structure of pragmatic IP protection and enforcement. Nevertheless, facing dramatic social, political, and economical transformation, the Chinese music community expresses concern about the long-existing copyright protection mechanism and can't react and absorb intense challenges under cutting-edge technological impact. Moreover, the present music copyright enforcement is unable to deter and control the growth of infringements, correlating with inferior motivation of new innovation and creativity. Therefore, under the pressure of external and internal provocation, new modernization of copyright law represents a fundamental driver to deliver significant messages for further accomplishments of fair compensation and sufficient incentives.[434]

[433] *Id*, at 157.
[434] Robert Cooter & Thomas Ulen, Law and Economics, Boston: Pearson/Addison-Wesley, p. 135 (6th ed. 2012).

VII. CONCLUSION

A. Reforms of Collective Management System

When it comes to the nature of music CMOs, in the Mandarin music market, music CMOs should mainly concentrate on copyright transactions than litigation for producing profits. They should adjust and correct their core business from mere protection to license management. This benefits authors to increase their profit, and the numbers of licenses serves not to restrict artists' secondary creation methods. In terms of competition, despite the fact that the MCSC is the only one authorized music CMO by the Chinese government and it cannot provide complete license management to all urban and rural areas, for the antitrust law purpose, more accrediting licensing agencies under the MCSC and the government's permission should be envisaged and affirmed. As a result, district royalties can be fully collected and administered, and the negatives of statutory monopoly can be tackled. As a result, the authors' revenue can be raised and stimulated.

In basis of special political background and history, the Chinese government expects centralized management to bring more efficient operation and administrative censorship. The "only one" CMO policy exists in each specific field. e.g. MSCS for music composition and CAVCA for audiovisual works. However, this can't fully support the whole market. Despite the fact that China possesses a huge territory, it is assumed MCSC and CAVCA may be incapable of providing its service to each district effectively, as it is the only CMO in separate field for the entire nation. The statutory monopoly may serve to stifle potential competition in Chinese music CMO market, which would obstruct efficiency, and would therefore be contrary to the stated purpose of a CMO.

From the viewpoint of economies of scale, when the CMOs hold more advanced technology, information and expertise to exercise their business, they simultaneously raise their status to negotiate the licensing contract. However, when copyright holders don't possess an equal status to negotiate with a CMO, it can lead to an arbitrary price being set by the CMO. In addition, when a CMO has more professional knowledge, the unequal clauses in the licensing agreement are more likely to be provided arbitrarily. To explain,

because the bargaining power between copyright holders and CMO has imbalance, the licensee stays at the weaker side and causes injustice. Particularly, the members affiliated to CMOs in the U.S., such as ASCAP and BMI, can directly license their copyright by a number of established methods, such as royalty-free performances, works for hire, employee work contracts and one-off contract for a fee. In contrast, the CMOs in China don't allow their members to make any exception, and have literally prohibited members from self-licensing in their representation agreement. This imbalance avoids members implementing their own copyrights when there are more efficient ways to achieve the economic purpose. In addition, it chokes the flexibility of copyright management.

In accordance with the U.S. experiences on administrative regulations, firstly, the governmental authorities in Mandarin music market should aim to repair the market failure and secure reasonable remuneration for musical artists. Secondly, when it comes to government's role in the music market, the authorities should refrain from overcontrol in the competitive market. On the other hand, a reasonable monopoly such as a consent decree should be allowed to solidify the stability in the licensing process. In the future amendment of copyright law, the CRB in the Mandarin music market should also prevent pre-involvement before the negotiation between CMO and rightsholders for a more efficient licensing structure. Additionally, these two separate trial proceedings consume more time and costs consuming in the price setting procedure, and should be harmonized. Specifically, it should be adjusted by the Rules of Civil Procedure and Rules of Evidence to mitigate the conflicts. Moreover, the early settlement function in the rate setting should be revealed. The ongoing proceeding should have immediate opportunity to claim. The addition of statutory provision will be necessary. Most importantly, the legislation in China should erase some inappropriate procedural detail on statutes and leave them to regulations. On the other side, the Copyright Office should take the main regulatory responsibility when new changes for exercising an updated statutory are necessary.

The contradiction between legal monopoly under the economies of scale and inefficiency results in serious difficulties to China's CMOs and music industry. In terms of China's copyright collective management system, economies of scale are considered as an essential foundation to achieve efficiency and reduction of transactional costs in the light of microeconomic regime. According to the scale of performance, companies can receive cost

advantages with expense per unit of production shrinking by the size of growing scale.[435] At the same time, the extension of scale occurs the considerable monopoly power and cause antitrust issues to result in less competition and inefficiency. Accordingly, in China's music market, it will be crucial to address anti-competition matter brought by the legal monopoly within the established economies of scale.[436]

The disparate legal culture of copyright between civil law system and common law system actually places distinct effects on China's music licensing environment. Civil law systems originated from continental Europe and present traditions that a solitary collecting society manages single category of copyrighted work.[437] The CMOs developed under the civil law tradition are basically to be substantially arranged and overseen by governmental authorities for maintaining their efficient and transparent operation. Dual governmental measures should be built to implement the specific civil law style of regulatory design.[438]

The initial measure is to construct and safeguard the status of dominant position for the solitary CMO by fixed copyright articles and regulations. The next measure is to practice competent administration and overseeing on guarding against solitary CMO's abuse on each category of copyright work by its unfair and improper either *de jure* or *de facto* monopoly power.[439] Compared to the governmental regulatory approach under civil law tradition, in conformity with the common law tradition, the U.S. adopts an antitrust approach in order to maintain fair competition in the music market and enhance the efficiency of a functional market. In the light of this antitrust approach, the U.S. government basically regulates the market of music licensing through the anti-competition function of the Sherman Act instead of additional law and regulations related to copyright collective management.[440]

Accordingly, under the common law tradition, the operations of CMOs in the U.S. market are primarily comprehended within the umbrella significance of commercial and antitrust law, in which the function of an open and fair economic market is not intervened by

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[435] Xianjin Tian, Fuxiao Jiang, Katherine C. Spelman, Daniel Gervais, Mark H. Wittow and Trevor M. Gates, Copyright Law of China, in IP Protection in China, American Bar Association (Donna Suchy ed.) p.210 (June 7, 2017).
[436] *Id*
[437] *Id*
[438] *Id*, at 211.
[439] *Id*.
[440] *Id*

governmental involvement and peculiar administrative enforcement.[441] Due to the economies of scale and the civil law tradition, China's copyright collective management market acts in accordance with continental Europe's approach. Through the practice of RCCA, China is keeping implementing this market operation, simultaneously facing several considerable difficulties, and seeking possible solutions.[442]

By trial and error, it is observed how CMOs' abuse of monopoly standing is a significant issue for China's music industry. This consequence shows it is even reasonable to initially afford a solitary CMO the monopoly ground in a single category of copyright work via governmental intervention However, it is still a problematic issue to prevent the CMO from abusing its market power on the basis of capable and competent administrative supervision.[443] This drawback is comparable to the problem caused by compulsory licensing since to oversee the legal monopoly, which conventionally requests more extraordinary articles and regulations to shake off abuse.[444] As to get rid of the improper or unfair abuse incited by *de jure* or *de facto* monopoly leads to long legislative process and extra governmental administration, it actually produces immense transactional cost to the whole licensing ecosystem and make the commercial circulation on music offers and demands less efficient. As a result, it is logical to posit that the legal monopoly, in conformity with high expense on abuse prevention, really incurs notable transactional costs and financially harms the economic incentives of artists in music market.[445]

B. Licensing Systems in a Technological Era

The copyright ecosystem allowed artists fixed exclusivity of property rights, monopolies and financial remuneration at certain period of time to stimulate the advancement of creativity and innovation. Simultaneously, this copyright cycling will furnish creators' commercial incentives to encourage and reward artistic and intellectual diligence, and achievements for the cultural community. However, the existing evolution of digital music technology motivates "artistic appropriation", as well as dissemination beyond restrictions on geographical boundaries and points in time. This excites the society music of creativity

[441] *Id*
[442] *Id*, at 211.
[443] *Id*
[444] *Id*, at 212.
[445] *Id*

and business. However, this impetus simultaneously interrupts fixed exclusivity, monopolies and rewards within music licensing ecosystem and reinforces rightsholder supremacy by the owners of music copyright.

It must be seen how practically every other sector in the mass media is undergoing a series of cost efficiencies due to technological innovation. Given that music distribution is a function of this innovation, the underlying factors related to the essential function show a lower cost basis. This is to say, in terms of music licensing, the transaction cost has been necessarily reduced due to technology. The compulsory licensing matters comprise the types of music copyright license such as reproduction, control over derivative works, distribution, and public performance. Overall, there are two possible pathways to tackle this crisis. One approach is a "fair use doctrine" and the other one is a "compulsory license". When it comes to a "fair use" doctrine, it is commonly argued that the copyright litigation is unpredictable and can cause high transactional costs. Meanwhile, it also leads to the defendant should shoulder a heavy burden of proof. That said, in the court, transformative use can be used as a defense of fair use. On the other hand, the compulsory license generates pragmatic, transparent financial compensation for all rightsholders involved in a musical work. If the rate plan and fees are fair, reasonable and affordable by the users, the compulsory licensing system provides incentives to promote and motivate new music creativity and economic freedom.

C. New Perspectives of Modernization of Music Act

In reality, the problem in the music market the MMA aims to resolve is extremely thorny and difficult. The complication of music licensing in the technological era actually calls our attention to reconsideration the perspectives advocated by Professor David Nimmer in his insightful publication in 2000, "On the Absurd Complexity of the Digital Audio Transmission Right", 7 UCLA Ent. L. Rev. 189. The same as the legal entitlements about compulsory license system within the section 114 and previous 115, the forthcoming 115 will be extra insanely intricate. Additionally, the new MMA paradoxically directs to expand the compulsory license without the careful considerations for the crucial aspects of a competitive market, commonwealth and social justice. Specifically, the new MMA should be built on the ground of the competent conversation and sufficient negotiations, among music users, creators and copyright owners. The licensing models in the new MMA should be legally-binding contracts, which administer the authorship and inform obligations of

both sides. The intense evolutions en route to governmental and lawmaking intervention, are formerly discovered through Professor Jessica Litman's groundbreaking work, "Copyright, Compromise, and Legislative History", 72 Cornell L. Rev. 857 (1987) and Professor Robert Merges's inspiring work, *Compulsory Licensing vs. the Three "Golden Oldies" Property Rights, Contracts, and Markets*, Cato Policy Analysis (2004). The new regulations within the MMA appear to involve bureaucratic compromise among music users, creators and copyright owners on the strength of the occurrence, in these circumstances, "the legislative assembly focuses on engaging the present interests' groups to mediate their offers and requests, and it stages all bargained arrangements the market participants concurred". To sum up, these reconciliations and coexistences retain the political operations and movements circulated.

However, looking on the bright aspect, the MMA practically addresses music licensing controversies among users, creators and copyright holders with regard to the implantation of a compulsory licensing framework in section 115, toward the comprehensive levels of online music streaming services. Also, this new MMA prospectively decreases the financial expense and transactional costs originally included within digital music streaming for securing the copyright authorization and stimulating the accessibility of on-line music services. Furthermore, this coming copyright amendment seeks an answer to orphan work matters by empowering a legislative permission to turn orphan works into more new creations in music market. As a matter of fact, the establishment of the up-to-date elaborate database for the music community is probably the primary contribution on the basis of the rising MMA's arrangements.

D. International and Cross-Strait Cooperation

Under the framework of the World Trade Organization (WTO), the Trade-Related Aspects of Intellectual Property Rights (TRIPRs)[446] provides the Taiwanese and Chinese music markets a pathway to reach international integration. The transnational conflicts can be negotiated and relieved by Dispute Settlement Body (DSB).[447] According to the

[446] World Trade Organization, The Information of Trade-Related Aspects of Intellectual Property Rights, *available at* https://www.wto.org/english/tratop_e/trips_e/trips_e.htm (last visited Apr. 20, 2019).
[447] World Trade Organization, WTO Dispute Settlement Body (DSB), *available at* https://www.wto.org/english/tratop_e/dispu_e/dispu_body_e.htm (last visited Apr. 20, 2019).

International Confederation of Societies of Authors and Composers (CISAC) supported by the WTO, China and Taiwan can harmonize their databases and stimulate efficiency. In addition, increasing interconnection and interoperability of different countries' databases can enhance the sharing of music and deepen understanding between individuals. Moreover, for the internal system of the Taiwanese and Chinese markets, the Cross-Strait Intellectual Property Right Protection Cooperation Agreement (CIPRPCA; 兩岸智慧財產權保護合作協議)[448] was signed between Taiwan and China in 2010. Under this collaboration, these two markets serve to keep exploring the cooperation and seek to diminish obstacles and boundaries in Cross-Strait interactions. It is believed that the further detail on this agreement will tackle the problem of collecting and distributing revenue when the negotiation platform is established. Furthermore in the Boao Forum for Asia (博鰲亞洲論壇) 2018,[449] the Chinese government vows that the new reform of its state intellectual property office, NCAC, will step up to enforce the legal intellectual property of foreign firms. It is believed that the block and prevention of intellectual property infringements in China can be facilitated more efficiently. On the basis of the U.S. experiences, most importantly, Taiwanese and Chinese CMOs should increase their data-related responsibility and flexibility and autonomy in music licensing. Under the structure of cross-strait and international cooperation, it is expected that the rightsholders and composers in the Mandarin market can build up their business and share their experiences with more concrete cooperation and few conflicts. Therefore, as a logical consequence, the music CMOs can monetize their members' creation within a more international and harmonized regime.

E. Copyright Reconstruction and Mandarin Music Economy

1. Copyright Reforms

[448] Cross-Strait Signed Agreements, "Between 2008 and 2016, the Straits Exchange Foundation (SEF) and the Association for Relations Across the Taiwan Straits (ARATS) held 11 rounds of high-level talks. The talks resulted in the two sides signing 23 agreements and issuing two consensuses as well as three common opinions. In addition the two sides signed numerous Memorandum of Understanding (MoU)." *See* The East Asia Peace & Security Initiative, Cross-Strait Agreements, *available at* https://www.eapasi.com/signed-agreements.html (last visited Apr. 20, 2019).

[449] *Boao Forum for Asia: Xi Jinping vows to protect IPR, further open China's economy amid trade row with US.*, Financial Express (Apr. 10, 2018), *available at* https://www.financialexpress.com/economy/xi-jinping-speech-at-boao-forum-for-asia-chinese-president-promises-to-cut-auto-import-tariff-amid-us-china-trade-war/1127632/ (last visited Apr. 20, 2019).

The announcement of the 2012 Copyright Reform Draft in China leads to adverse reaction. The primary ground indicates, on the contrary to the resistance of copyright spread, the Chinese community was remonstrating toward the restrictions on copyright protections. In particular, it believes compulsory licensing is likely to dishonor the exclusivity of copyright and mortify the rights of compensation on copyrighted material. In addition, surprisingly, the community of interests such as technological enterprises, music publishers, record labels and consumers had not mobilized the objection of copyright reform.

Alternatively, the composers, lyricists and creators in the Chinese music industry advocated the counteraction against the proposal of compulsory licensing on the copyright amendment. These Chinese musical artists immensely voiced their propositions in printed publications, such as interview reports, press articles, and commentaries, online media, and participated in discussions and dialogues in the company with public sectors' officials on mass media. Furthermore, these advocates attracted supporters to lodge appeals to the Chinese authorities. In the course of collecting overt opinions, with regard to the copyright reform motion, over 1500 outstanding appeals were delivered to NCAC and NCAC's website. Approximately a million responses against the reform proposal were also received.[450]

Astonishingly, on contrary to serious piracy phenomenon, the vast objections from the Chinese society toward the copyright amendment proposal expressed appreciations for local musical artists, and reflected creators' courage. In addition, while the press and public information was governed by the central administration, surprisingly, at these disputes toward copyright reform proposal, the mass media released widespread discussions about the community's concerns by fairly righteous observations. Moreover, it seems unusual to catch news articles and reports describing a public sector by the terms of "arguable, lot of criticism, and urgent requests by the community" with this opposition of initial copyright reform.

At present, several leading countries in North America and Asia are devoting themselves to copyright reforms by enhancing the functionality of music licensing. In particular, the U.S., Canada, China and Taiwan are all suffering dramatic quakes associated with the sharp acceleration by information technology evolution. Thus, diverse modernization approaches

[450] Jiarui Liu, *Copyright Reform and Copyright Market: A Cross-Pacific Perspective*, Berkeley Technology Law Journal, Vol. 31, Issue 3, p.1464 (2017).

against the market failure due to digital technology are introducing in separate aspects of legislative or commercial dispensations.

Some of these conceptualizations involve:

> (a) Opt-in system, on the basis of conventional copyright exclusivity, prior to the operation or adoption of the originators' copyrighted subjects, the users should obtain a license from the copyright holders;
> (b) Opt-out system, only if the creators carry out a specific move to extricate themselves from this pattern, the creators initially grant the licenses to the paid users. For instance, the ECL framework, safe harbor (limited liability under "notice-and-take-down" procedure) and copyright formalities[451] are included in this system;
> (c) Mandatory system, on the basis of governmental intervention, creators lose their rights to reject a licensing grant on their copyrighted works. However, creators acquire copyright compensation within the authorities' price-setting process. For example, the compulsory licensing model for the mechanical right of sound recording and public copyright levies are within this category;
> (d) Free (All-extinct) system, copyright immunity or exemption such as fair use and public domain tolerate the public to adopt the copyrighted subjects in the absence of creators' permission and any compensation.

In the last few years, compulsory licensing and ECL models are significantly discussed around countries in North America, Asia and Europe. These two models are regarded as promising answers to the problematic of digital music and internet technology. The latest evolutions offer the Mandarin music industry a favorable moment to assess new copyright reforms and licensing models to stimulate and collaborate with the new digital music scene. Specially, the rising operations such as "ECL" and "compulsory license" are constantly acclaimed as vigorous responses to accelerate mass digitalization and decreasing transactional costs by distributing impartial remuneration.

In the spirit of fair rewards, these two emerging regimes are considered to uphold the middle class and close the divide between content suppliers and musical creators in the

[451] *See* Christopher Jon Sprigman, *Reform(aliz)ing Copyright*, Stanford Law Review, Vol. 57, Issue 2, p.485-490 (November 2004).

digital era. Having said that, statistics data indicates the individuals are keeping on bargaining contracts with copyright holders toward the backwash of compulsory license.[452] Notwithstanding, 17 U.S.C. § 115 (Compulsory Licenses on Mechanical Rights), the Harry Fox Agency (HFA), a primary supplier of mechanical rights on sound recording and collecting intermediary and allocator of mechanical royalties on behalf of the U.S.'s music publishers, is a renowned case in point. In numerous respects, in addition to the compulsory license system in the U.S., 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. Therefore, in comparison to contract negotiation in the free market, the accumulation of the expenditure of rent seeking and unremoved transactional costs possibly make the model of compulsory licensing vexatious, troublesome and costly.[453]

Significantly, the rate formula processed and approved by the administration and legislative cannot generate impartial compensations for musical creators to access specific gravity on the price within the market completion. In support of individual creators, the latter Information and communication advance has lowered economic barriers to enter the music market, and fostered a diverse and open environment for building multiple and mixed commercial channels.

Specifically, the Nordic countries, such as Denmark, Finland, Iceland, Norway, and Sweden, initially framed the ECL system. Compared to the compulsory license structure launched by the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement)[454] and the Berne Convention for the Protection of Literary and Artistic Work[455], the ECL mechanism is a substitute for empowering a recognition linking

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[452] Mark A. Lemley, *Contracting around Liability Rules*, California Law Review, Vol. 100, Issue 2, p.463-466 (April 2012).; Robert P Merges, Compulsory Licensing vs. the Three "Golden Oldies" Property Rights, Contracts, and Markets, Cato Policy Analysis, No.508, p.10-11 (Jan. 25, 2004).

[453] Jiarui Liu, *Copyright Reform and Copyright Market: A Cross-Pacific Perspective*, Berkeley Technology Law Journal, Vol. 31, Issue 3, p.1461 (2017).

[454] Jane C. Ginsburg, *Extended Collective Licenses in International Treaty Perspective: Issues and Statutory Implementation*, Columbia Public Law Research Paper, No. 14-564, p.9 (Nov. 2017), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3068997 (last visited Apr. 13, 2019).

[455] 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)

a collective management organization and its licensees to be obligatory on nonaffiliated creators.

Hypothetically, if the representivity of a collective management organization is thoroughly widespread, comprehensive and competent, the ECL mechanism could just hold the least influence concerning the competition economy. Controversially, actually, the advocate on the affirmation of the ECL is usually the initially developing and immature collecting society which still has not gathered adequate registers and so far been situated in a market share monopolized through the considerable quantity on overseas or nonaffiliated subjects. Presently, by means of upgrading competition markets and lowering transaction costs, the ECL channel has represented concrete answers to back extensive utilization of authorized musical creation.

Within the U.S.'s competition economy, the music copyright collectives including BMI, ASCAP and SESAC (PRO), HFA and SoundExchange, convey essential free expression to the re-users.[456] According to the blanket license, the bundling mechanism efficiently transits the right of secondary exercises to musical creators by streamlining transactional costs.[457] In light of 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 the legal actions of the non-affiliated copyright holders. Consequently, the essential worry with regard to the ECL model, the goal of China's, by persuading the congress and administration, turns into a negative skill, potentially achieving abuse of monopoly power. However, the merits to enhance the considerable quantity of memberships for improving the administration and fostering the competence of functioning could remain in vain.

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[456] Unlike the 3 PROs in America," SoundExchange is the only organization in America that collects performance royalties for "non-interactive" digital sound recordings (not compositions). "Non-interactive" means you can't choose your song. So, Pandora radio is non-interactive, whereas Apple Music and Spotify are "interactive." Beats 1 (within Apple Music) is digital radio (non-interactive). Spotify's Pandora-like radio service is also non-interactive, but more on that in a sec.
"Like the PROs, SoundExchange issues blanket licenses to digital radio (non-interactive) platforms (like iHeartRadio and Sirius/XM) which gives these outlets the ability to play any song they represent. Like the PROs, the outlets pay an annual fee for the blanket license." *See* Ari Herstand, *How To Get All Your Music Royalties: ASCAP, BMI, PRS, SOUNDEXCHANGE, PROS AND THE REST*, available at https://aristake.com/post/what-is-soundexchange-ascap-bmi-pros-hfa-mechanicals-and-how-to-get-all-your-royalties (last visited Apr. 30, 2019).

[457] Jane C. Ginsburg, *Extended Collective Licenses in International Treaty Perspective: Issues and Statutory Implementation*, Columbia Public Law Research Paper, No. 14-564, p.7-9 (Nov. 2017), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3068997 (last visited Apr. 13, 2019).

2. Governmental Supervision and Free Market

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 fee and terms, unescorted by adequate and legal negotiation process; (3) Inappropriate prejudice regarding two separate applications of identical licensing objects.[458]

Conscientiously, when the copyright management market is forming, it is probably troublesome to question if collecting societies were achieving significant market power and whether this results in abuse through denial to issue 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 governmental authority, NCAC.[459] For instance, the copyright licensing tariff of Chinese karaoke businesses, affirmed by NCAC, was routinely matching the proposal raised by the music copyright collecting society, Music Copyright Society of China (MCSC), and the audiovisual copyright collecting society, China Audio-Video Copyright Association (CACVA).[460]

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 competition market function. In fact, in China, the criterion of a licensing tariff declared and proved 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.[461]

"Due process" and "openness" will be essential factors to enhance licensing efficiency in China's music market. As specifying the licensing tariff of musical works and sound

[458] Xianjin Tian, Fuxiao Jiang, Katherine C. Spelman, Daniel Gervais, Mark H. Wittow and Trevor M. Gates, *Copyright Law of China, in* IP Protection in China, American Bar Association (Donna Suchy ed.) p.212 (June 7, 2017)
[459] *Id*, at 213.
[460] *Id*.
[461] *Id*.

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. Especially in this technological era, 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 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.[462]

Moreover, compared to global level, the music licensing rate in China appears to be depressed. Specifically, in China, the price policy about broadcast rights licenses leans toward supporting the extensive exploitation facilitated by the TV and radio stations, and provides lower licensing rate than global level. In addition, the implement 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.[463]

At this point, the focus shifts to why the Chinese government should generate sufficient supervision toward a copyright collective management system. The competent supervision will bring transparency and openness to China's music and audiovisual collecting societies. Consequently, reaching future modernization with these substances, China can be confident of an efficient licensing mechanism to encourage a thriving music market, affording transparent domestic and international access to producers and consumers.

[462] *Id*, at 213-214.
[463] *Id*, at 214.

VIII. GLOSSARY

A. Abbreviated Terms

Amusic Rights Management (ARM)
Association of Recording Copyright Owners (ARCO)
American Society of Composers, Authors and Publishers (ASCAP)
Better Business Bureau (BBB)
Broadcast Music, Inc. (BMI)
China Audio-Video Copyright Association (CAVCA)
Collective Management Organization (CMO)
Copyright Royalty Board (CRB)
Cross-Strait Intellectual Property Right Protection Cooperation Agreement (CIPRPCA)
Department of Justice (DOJ)
Dispute Settlement Body (DSB)
Extended Collective License (ECL)
Gesellschaft für Musikalische Aufführungs- und Mechanische Vervielfältigungsrechte [German musical copyright monitoring body] (GEMA)
National Music Publishers' Association (NMPA)
Harry Fox Agency (HFA)
International Confederation of Societies of Authors and Composers (CISAC)
International Standard Musical Work Code (ISWC)
International Federation of the Phonographic Industry (IFPI)
Music Copyright Association Taiwan (MCAT)
Music Copyright Society of China (MCSC)
Music On-line Register Platform (MORP)
Music Copyright Association of Taiwan (MCAT)
Music Copyright Intermediary Society of Taiwan (TMCS)
Music Copyright Society of Chinese Taipei (MÜST)
National Copyright Administration of the People's Republic of China (NCAC)
National Music Publishers' Association (NMPA)
Recording Industry Association of America (RIAA)
Regulations on the Copyrights Collective Administration (RCCA)
People's Republic of China (PRC)

Republic of China (ROC)
Performing Right Society (PRS)
Société des auteurs, compositeurs et éditeurs de musique (SACEM)
Society of European Stage Authors and Composers (SESAC)
Svenska Tonsättares Internationella Musikbyrå (Swedish Performing Rights Society) (STIM)
Taiwan Intellectual Property Office (TIPO)
Trade-Related Aspects of Intellectual Property Rights (TRIPRs)
Universal Copyright Convention (UCC)
United Nations Educational, Scientific and Cultural Organization (UNESCO)
World Intellectual Property Organization (WIPO)
World Trade Organization (WTO)

B. Mandarin Terms

Tecent 騰訊
Alibaba's Xiami Music 阿里巴巴集團蝦米音樂
Baidu Music 百度音樂
Boao Forum for Asia 博鰲亞洲論壇
Book of Odes and Hymns 詩經
Chinese Civil War 國共內戰
Cross-Strait Intellectual Property Right Protection Cooperation Agreement 兩岸智慧財產權保護合作協議
Goulan Wasi 勾欄瓦肆
Love Amongst War 薛平貴與王寶釧
Riding A White Horse 身騎白馬
Victor Talking Machine Company 勝利留聲機公司
Xinhai Revolution 辛亥革命
Yangming Chunxiao 陽明春曉
Zhuxiang Clan 朱襄氏

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