

# EVOLUTIONS IN COPYRIGHT AND LICENSING MODELS: SNAPSHOTS FROM THE U.S. AND MANDARIN MUSIC MARKETS

Chien-Chih LU\*

## TABLE OF CONTENTS

I.	INTRODUCTION .....	4
A.	Economic Freedom: The Ability to Participate in a Market.....	5
B.	Incentive Theory: Motivation for Producing Valuable Artistic Works.....	7
C.	Applying Incentive Theory: The Music Industry in Statistics.....	10
1.	<i>Economic Incentives</i> .....	10
2.	<i>Technological Development</i> .....	12
3.	<i>New Future: Open and Diverse Internet World</i> .....	16
II.	THE HISTORY OF THE MANDARIN MUSIC INDUSTRY .....	17
A.	Confucian Ideology and Music Creativity.....	17
B.	The Establishment of the Modern Music Industry .....	18
C.	Civil War and Governmental Censorship .....	19
D.	International Treaties and Globalization .....	20
E.	Collective Management System.....	21
F.	Modern Implications: Innovative Technology and Legal Reform.....	23
III.	CRITICAL CHALLENGES ON COPYRIGHT AND MUSIC LICENSING .....	24

---

\* Chien-Chih Lu, Doctor of Juridical Science (J.S.D.) Candidate, University of California, Berkeley, School of Law; Doctor of Philosophy (Ph.D.) Student, National Chengchi University, School of Law; Visiting Researcher, University of Maryland School of Law; Researcher, USC Music Copyright Infringement Resource (MCIR). The author would like to thank UC Berkeley Professor Robert Mergers, Professor Robert Berring, Professor Peter Menell and Professor Thomas Gold, and National Cheng-Chi University Professor Shioh-Ming Wu and Professor Chung-Lun Shen, his friend Dr. Nicholas Hansen, anonymous reviewers, and Ms. Chih- Yu T. Wu, Executive Editor of MSCAS, for their assistance, comments, and suggestions throughout the process. Moreover, the author presents his sincere appreciations to University of Maryland School of Law faculty and staff's encouragements and supports during in his research visit in 2015.

A.	Monopoly and Competitive Market.....	24
	1. <i>Legal System and Tradition</i> .....	24
	2. <i>Legal Design of Monopoly Position</i> .....	25
	3. <i>Regulations of Monopoly Abuses</i> .....	26
	4. <i>Due Process on Price Setting: Seeking         Transparency and Accountability</i> .....	27
B.	Civil Law Tradition: Questions of Juridical Standing to File Lawsuit .....	29
C.	Expansion of Compulsory License .....	30
D.	Database and Coding System: Benefits and Challenges .....	31
E.	Appropriation Art as a Cornerstone of Modern Music: Licensing Challenges.....	32
	1. <i>Vague Standard</i> .....	34
	2. <i>High Transactional Costs</i> .....	35
	3. <i>Dangers of Settlements</i> .....	36
IV.	POSSIBLE ANSWERS .....	36
A.	Adopt Antitrust Law System .....	36
	1. <i>Specialized Supervision</i> .....	36
	2. <i>Antitrust Law Approach</i> .....	38
	3. <i>Consent Decree</i> .....	39
B.	Standing to File the Lawsuit.....	40
C.	Compulsory License: Section 115 of the Copyright Act ...	42
D.	Interoperability.....	43
E.	Appropriation Art .....	45
	1. <i>Compulsory Licensing</i> .....	45
	2. <i>Blanket Licensing</i> .....	46
	3. <i>Multi-Functional CMOs</i> .....	46
V.	CONCLUSION .....	49
A.	Reforms of CMO Models.....	49
B.	Licensing Systems in a Technological Era .....	50
C.	International and Cross-Strait Cooperation .....	51
	GLOSSARY .....	53
I.	Abbreviated Terms.....	53
II.	Names of Cases .....	54
III.	Mandarin Terms .....	54

## ABSTRACT

As technology keeps developing and information is disseminated extremely frequently, large-scale music creativity depends on specialized utilities for management and licensing. This research aims to examine the future of licensing models and copyright reform, based on policy, case, and empirical studies in the U.S. and Mandarin music markets, by further asking: What are the proper roles of licensing models to support and assist musical artists? In the light of the U.S.'s experiences, what is the future of licensing models for a more efficient and transparent music ecosystem? Lastly, this research targets to increase the music income by the exercises of copyright reform and innovative licensing models.

The first section of this research presents a general background. A roadmap toward an efficient music licensing with copyright reform is delivered by comprehending literature review, initial presentations of economic freedom and incentive theory, and statistic findings applied to resolve the research questions and achieve the outcome. The second section overviews the history of Mandarin music industry. 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, influence of international treaties and globalization, the legal reform and development provoked by innovative technology, and the international and historical conditions previously mentioned earlier on. In the third section, through the analysis of the issues associated with the nature of collective license, monopoly and competitive market, standing to file a lawsuit, database and code system, and appropriation art and compulsory license on musical works, this research aims to address the critical challenges in the existing music markets. Moreover, in the fourth section, the possible solutions to issues raised in this study are submitted. This research provides answers for facing the risks related to monopoly, standing, data interoperability, mashups, and music compulsory license. Finally, in the fifth section, the conclusion includes final comments and remarks in accordance with the improvement of the administration, enforcement, licensing pattern and copyright reform, and present international and cross-strait perspectives to the Mandarin music industry.

## I. INTRODUCTION

As a current “free culture”<sup>1</sup> trend in music transaction, the 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 (CMO), ASCAP (American Society of Composers, Authors and Publishers), BMI (Broadcast Music, Inc.), SESAC (Society of European Stage Authors and Composers) or RIAA (Recording Industry Association of America), by locating and working directly with artists or with independent record labels and publishing companies. By inserting themselves into an age-old industry through a new business model of direct licensing or 360° deal,<sup>2</sup> the artists are able to exclude the middlemen, Music Publishers, Record Companies or CMOs to grow their audiences more quickly and reap profits earlier. At this period, the music CMOs and new music platforms in China, Music Copyright Society of China (MCSC) and Alibaba’s Xiami Music<sup>3</sup>, Baidu Music<sup>4</sup> and QQ Music<sup>5</sup>, are devoted to constructing more efficient and profitable systems, when this new wave will be meaningful to their future by fostering more new usages and income.

---

1. “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*, Penguin Press HC, 2012. Lawrence Lessig, *Free Culture : How Big Media Uses Technology and The Law to Lock Down Culture and Control Creativity*, The Penguin Press, 2004, p. 28-29.

2. “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”. US Copyright Office, Copyright and the Music Marketplace, Report of The Register Of Copyrights, p.11-15 (2015).

3. Alibaba’s Xiami Music (阿里巴巴集團蝦米音樂) <http://www.xiami.com/>

4. Baidu Music (百度音樂) <http://music.baidu.com/pc/index.html>

5. QQ Music (QQ 音樂) <https://y.qq.com/>

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

According to the U.S. Copyright Office's report released in 2015, the main principles to strengthen the current music licensing are (1) Music creators should be fairly compensated for their contributions; (2) The licensing process should be more efficient; (3) Market participants should have access to authoritative data to identify and license sound recordings and musical works; (4) Usage and payment information should be transparent and accessible to right holders. These points have implantation to both of Mandarin and the U.S. music industry. With these approaches, by achieving a fairer, more efficient, and more rational licensing environment for all musical artists, the music income will thrive and gradually grow.<sup>6</sup>

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

The most critical issue between copyright and artistic freedom is actually the connection between creativity and money. "Art for art's sake" is a classic sentence urged by many artists for explaining their purposes of creations not about the wealth. It is no doubt that many creators devote themselves to arts for non-monetary reasons.<sup>7</sup> 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 may express their emotional feelings and social reflections without considering financial income. Not to mention, many art masterpieces such as Van Gogh's paintings have no relationship to monetary profits.<sup>8</sup> However, while some aspects insist many creations do not come from the purpose of

---

6. *supra* note Error! Bookmark not defined., at 1-2.

7. Matthew Barblan, Copyright as a Platform for Artistic and Creative Freedom (May 6, 2016). George Mason Law Review, V. 23, No. 4, pp. 796, 2016.

8. *Id.*

profit, monetary compensation still represents a meaningful part for artistic creation. When the financial budgets limit the creators to manage their time and expense 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 works?" Hence, It can be seen that copyright address this question to secure the economic freedom in the market.<sup>9</sup>

When copyright, under the U.S.'s intellectual property concept, is a property right formed by more unique nature and quality than tangible property rights, we have to realize these differences and structure copyright as a specific type of property right.<sup>10</sup> Naturally, copyright is a solid right and must be protected and secured. Additionally, property rights are core elements for economic freedom and free market. The property right, such as copyright, constructs the artistic environment for protecting creations' value by hard working creators. Therefore, by further thriving the property right nature of copyright, it brings us the most significant spot: property rights as copyright contribute to constitute diverse business models for creators' applications and support them to manage profits and continue crafting artistic works by productive labors with financial basis.<sup>11</sup> In terms of exclusive right<sup>12</sup>, copyright as a type of property right make creators have 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 labors. Artistic

---

9. *supra* note 7, at 796-797.

10. *supra* note 7, at 797.

11. *Id.*, at 797-798.

12. 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 made 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, Aspen Publishers, 2015, p.197, 313-314, 365-368, 382-387.

works are completed from authors' originality and creativity. These artistic contributions with economic value and moral basis come from expressions of artists' external ideas, emotions and identities.<sup>13</sup>

## **B. Incentive Theory: Motivation for Producing Valuable Artistic Works**

In light of the incentive theory, it is found that the current copyright law system does not actually encourage new music creativity such as remix music and appropriation art.<sup>14</sup> 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 creativity output of music industry.<sup>15</sup>

The copyright's incentive theory developed in the U.S. focuses on giving economic incentives and freedom for creators and intermediaries, two influential players in 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.<sup>16</sup> Authors can release their copyright to the public. However, in order to increase efficiency and reduce transaction costs, a significant number of creators will choose to license their copyrights to intermediar-

---

13. *supra* note 7, at 798.

14. 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* 301 (2013); Kembrew McLeod & Peter DiCola, *Creative License: The Law and Culture of Digital Sampling*, Duke University Press Books (2011). Jessica Litman, *Real Copyright Reform*, *Iowa Law Review*, Vol. 96, No. 1, (2010).

15. Peter S. Menell, *Adapting Copyright for the Mashup Generation*, 164 *UNIV. PENN. L. REV.* 441 (2016).

16. Peter C. DiCola, *Money from Music: Survey Evidence on Musicians' Revenue and Lessons About Copyright Incentives* (January 9, 2013). 55 *Arizona Law Review*, P.306 (2013).

ies for public or private distributions by business contracts. Meanwhile, within this ecosystem, after composers finished original works, the music intermediaries such as publishers, record labels and collecting societies help them to license the musical works to audiences and users.<sup>17</sup>

Interestingly, intermediaries in the music market provide marketing managements, such as commercial promotion, financial analyses and database establishments, which may stimulate luxury revenues and profitable opportunities beyond creators' personal implements. For this purpose, the artists may need to transmit copyright ownerships or managements or pay administrative fee to the intermediaries. For instance, in the music business, recording authors generally transfer their copyrights of sound recordings to the music labels.<sup>18</sup> Therefore, the intermediaries typically earn their commission and administrative fees by holding management rights and facilitating the 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.<sup>19</sup>

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 establish the circumstance sup-

---

17. Peter C. DiCola, Money from Music: Survey Evidence on Musicians' Revenue and Lessons About Copyright Incentives (January 9, 2013). 55 *Arizona Law Review*, P.306 (2013); Jessica Litman, Real Copyright Reform, 96 *IOWA L. REV.* 1, 10-12 (2010).

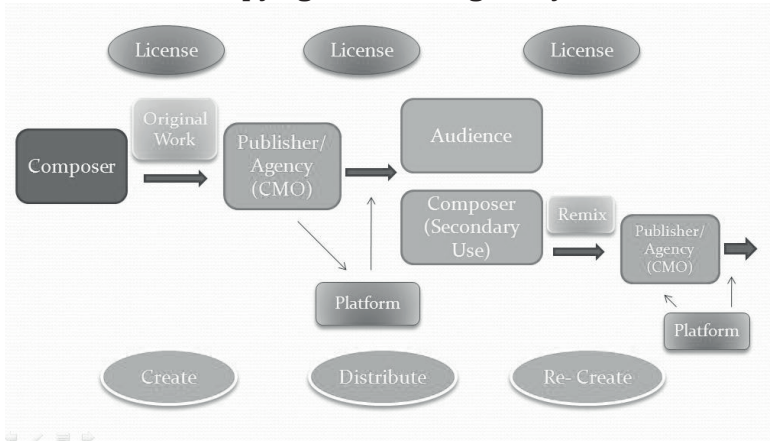
18. Peter C. DiCola, Money from Music: Survey Evidence on Musicians' Revenue and Lessons About Copyright Incentives (January 9, 2013). 55 *Arizona Law Review*, P.306 (2013); Kembrew McLeod & Peter Decola, Creative License: The Law and Culture of Digital Sampling, Duke University Press Books P.79-82(2011) Jessica Litman, Real Copyright Reform, 96 *IOWA L. REV.* 1, 18-19 (2010).

19. Peter C. DiCola, Money from Music: Survey Evidence on Musicians' Revenue and Lessons About Copyright Incentives (January 9, 2013). 55 *Arizona Law Review*, P.306 (2013); Kembrew McLeod & Peter Decola, Creative License: The Law and Culture of Digital Sampling, Duke University Press Books P.79-82(2011) Jessica Litman, Real Copyright Reform, 96 *IOWA L. REV.* 1, 18-19 (2010).



porting musical artists to obtain the simultaneous monetary compensation for every musical compositions or sound recordings under copyright protection.<sup>20</sup>

### Music Copyright: Licensing Ecosystem



Organized by the Author

In some “grey areas” of copyright regulations, it is tolerable for some audiences with special talents to recreate the original works into new creation. We call this secondary use as remix or appropriation. In *Campbell v. Acuff-Rose Music*, the U.S. Supreme Court states that within copyright regulation, “transformative use” is a potential ground where use of a copyrighted work may be eligible for “fair use”.<sup>21</sup> Just like Pablo Picasso said “Good artists copy, great artists steal,” it points to how the transformative use on traditional works plays an influential in the artistic history. This ecosystem is 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.

20. Peter C. DiCola, Money from Music: Survey Evidence on Musicians’ Revenue and Lessons About Copyright Incentives (January 9, 2013). 55 Arizona Law Review, P.306 (2013); The other observation connects incentive theory to the lottery approach. Diane Leenheer Zimmerman, Copyrights as Incentives: Did We Just Imagine That?, 12 THEORETICAL INQUIRIES L. P.41-42 (2011).

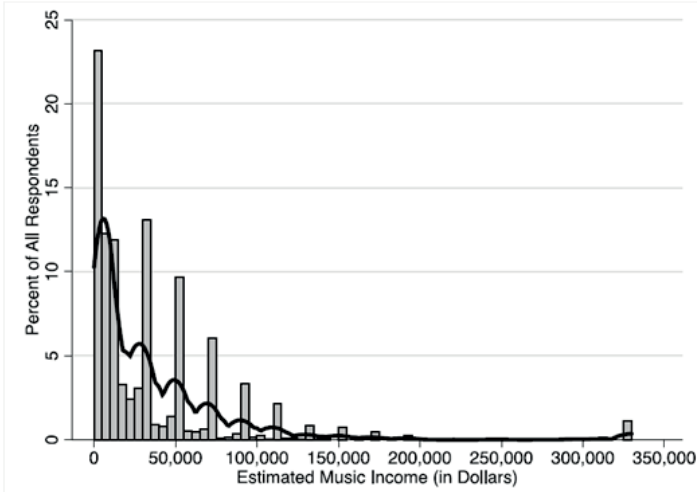
21. *Campbell v. Acuff-Rose Music* (92-1292), 510 U.S. 569 (1994).

### 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 license process and the inaccessibility of copyright information, while the artists and publishers are still expecting strict governmental regulations and enforcements to deter massive copyright infringements. The intense debate between use and rights-holders are continuing and are harmful for the music business. As technology keeps stimulating new musical arts and music licensing and copyright system seem outdated and can't catch up to current trends of digital music, copyright law needs reform for delivering a better system to secure economic freedom of musical artists and to enhance the whole music economy.

#### 1. Economic Incentives

#### Distribution of Estimated Annual Music-Related Income



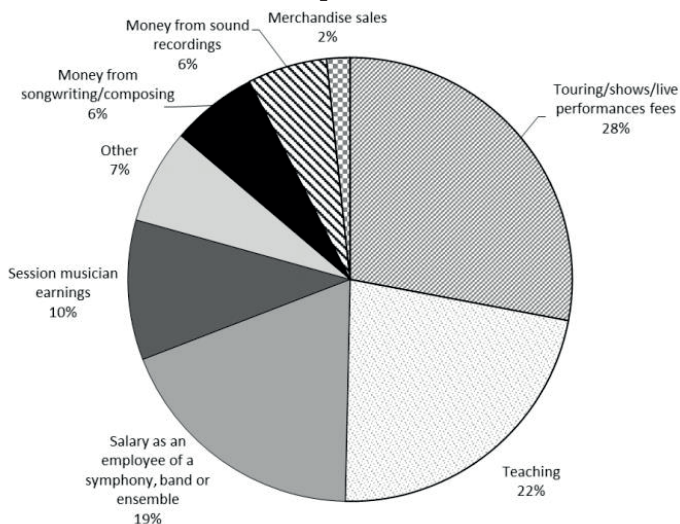
By Peter DiCola, *Money from Music: Survey Evidence on Musicians' Revenue and Lessons About Copyright Incentives*<sup>22</sup>

The basis of incentive theory research finds that in the music market, more than 50% of artists obtained less than 50,000 U.S. Dollar income per year and about 28% of artists earned lower than 100,000 U.S. Dollar income per year, while a specific part of artists can acquire

22. Peter C. DiCola, *Money from Music: Survey Evidence on Musicians' Revenue and Lessons About Copyright Incentives* (January 9, 2013). 55 *Arizona Law Review*, P.349 (2013).

more than 320,000 U.S. Dollar income per year. This result indicates that the current music income market is a “winners take all market” for a specific group of musical artists.<sup>23</sup> Further, according to statistical data, the particular group of artists accomplishing more than \$320,000 per year are categorized as senior composers. Surprisingly, on the basis of average share of music income from major revenue streams, money from song writing and composing represented merely 6% but touring/show/live performance fee constitute 28%, teaching accounts 22%, salary as an employee of a symphony, band or ensemble occupied 19%, and session musician earnings included 10%. In accordance with these statistics, music income in connection with copyright barely constitutes 12% while the music income unrelated to copyright account for significant 78%.<sup>24</sup>

### Average Share of Music Income from Major Revenue Streams, All Respondents



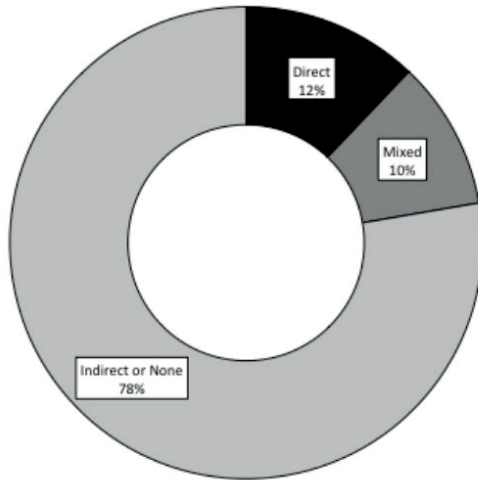
By Peter DiCola, *Money from Music: Survey Evidence on Musicians' Revenue and Lessons About Copyright Incentives*<sup>25</sup>

23. Peter C. DiCola, *Money from Music: Survey Evidence on Musicians' Revenue and Lessons About Copyright Incentives* (January 9, 2013). 55 *Arizona Law Review*, P.306,349 (2013).

24. Peter C. DiCola, *Money from Music: Survey Evidence on Musicians' Revenue and Lessons About Copyright Incentives* (January 9, 2013). 55 *Arizona Law Review*, P.352 (2013).

25. Peter C. DiCola, *Money from Music: Survey Evidence on Musicians' Revenue and Lessons About Copyright Incentives* (January 9, 2013). 55 *Arizona Law Review*, P.352 (2013).

## Average Share of Music Income from Major Revenue Streams, Categorized by Relation to Copyright Law, All Respondents



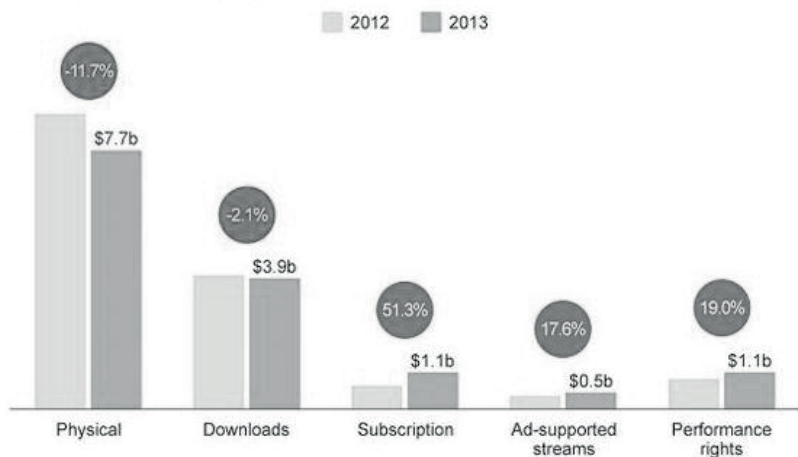
By Peter DiCola, *Money from Music: Survey Evidence on Musicians' Revenue and Lessons About Copyright Incentives*<sup>26</sup>

### 2. Technological Development

The 2014 International Federation of the Phonographic Industry (IFPI) Digital Music Report points out that the category of subscription streams had increased 51.3%, the category of ad-supported streams had grown 17.6%, and the category performance right had raised 19%, while the category of downloads had reduced 2.1% and the category of physical CDs had considerably shrunk 11.7%. This chart reveals that the higher profitability of music streaming was foreseeable in 2013. Specifically, the subscription streams showed the potential to bring concrete benefits to the music business.<sup>27</sup>

26. Peter C. DiCola, *Money from Music: Survey Evidence on Musicians' Revenue and Lessons About Copyright Incentives* (January 9, 2013). 55 *Arizona Law Review*, P.352 (2013).

27. IFPI's Digital Music Report 2014 <http://www.ifpi.org/downloads/Digital-Music-Report-2014.pdf>



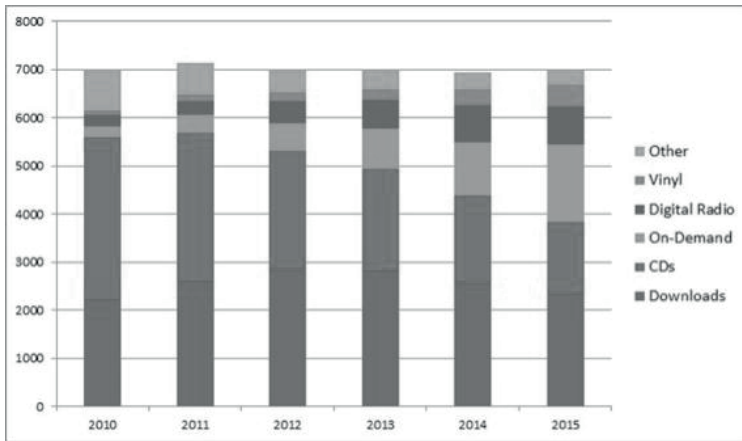
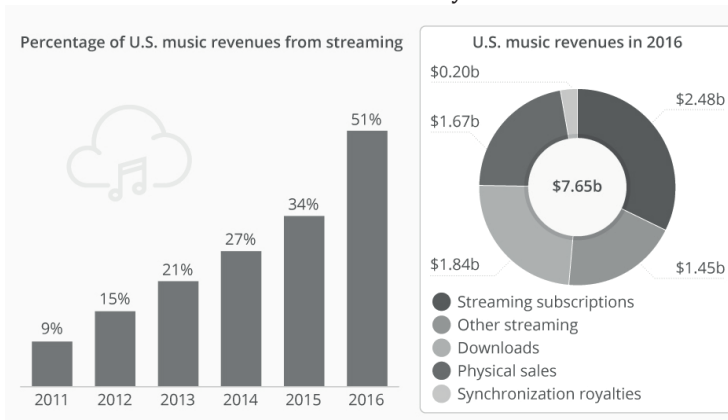
by 2014 IFPI Digital Music Report<sup>28</sup>

In light of the 2015 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, the music streaming subscriptions and other music streaming had reached \$2.48 billion and \$1.45 billion respectively. Further, the revenue of music streaming subscriptions had exceeded physical sales, downloads, and synchronization royalties. These two charts below reveals that as technology pushed the transform of music medium, the digital music succeeded the considerable part of the whole market share. Particularly, the business model of music streaming has become the biggest player in the U.S. music market.<sup>29</sup> In the meantime, the statistic research from MIDIA corporation in 2016 also shows the Chinese QQ Music's valuation per subscriber is five time that of Spotify.<sup>30</sup>

28. IFPI's Digital Music Report 2014 <http://www.ifpi.org/downloads/Digital-Music-Report-2014.pdf>

29. 2015 U.S. Consumer Music Profile <https://www.riaa.com/reports/2015-u-s-consumer-music-profile-musicwatch-inc/>

30. Mark Mulligan, Music and Streaming (MEDIa), IS QQ MUSIC WORTH \$10 BILLION? <https://www.midiaresearch.com/blog/is-qq-music-worth-10-billion/>

by 2015 RIAA U.S. Consumer Music Profile<sup>31</sup>by 2016 Mid-Year RIAA Shipment and Revenue Statistics<sup>32</sup>

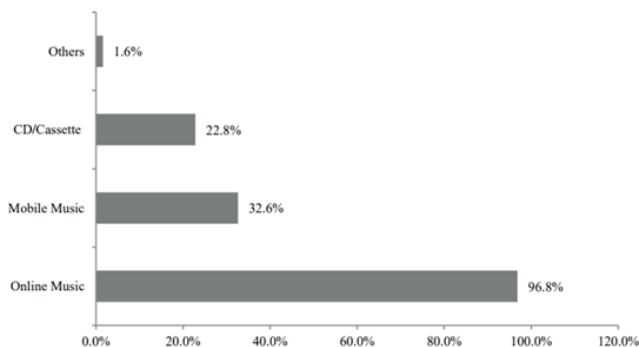
Although China's population is 1.411 billion, the largest of any country in the world, its music market relatively small and undeveloped. For example, the total Chinese transaction market is 41% the measurement of the total U.S. transaction market whereas the Chinese music market is merely 1.5% of the U.S.'s market. The Chinese music market is remarkably incommensurate with the entire market economy.<sup>33</sup>

31. 2015 U.S. Consumer Music Profile <https://www.riaa.com/reports/2015-u-s-consumer-music-profile-musicwatch-inc/>

32. 2016 Mid-Year RIAA Shipment and Revenue Statistics <https://www.riaa.com/reports/2016-mid-year-riaa-shipment-and-revenue-statistics/>

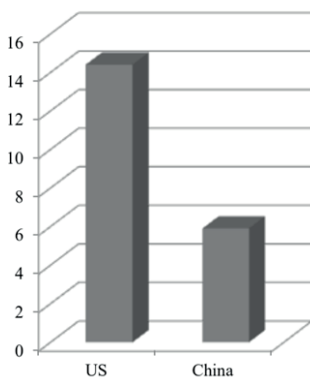
33. Jiarui Liu, Copyright for Blockheads: An Empirical Study of Market Incentive and Intrinsic Motivation," 38 Columbia Journal of Law & the Arts (2015), p.474.

### Major Channels for Music Access (China)

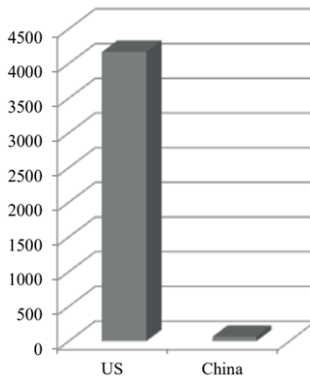


Ministry Of Culture, China Digital Music Market Annual Report in 2010<sup>34</sup>

### GDP 2010 (US\$ Trillions)



### Music Sales 2010 (US\$ Millions)



International Monetary Fund, World Economic Outlook Database<sup>35</sup>

IFPI, The Recording Industry In Numbers (2000-2010)<sup>36</sup>

34. Jiarui Liu, Copyright for Blockheads: An Empirical Study of Market Incentive and Intrinsic Motivation," 38 Columbia Journal of Law & the Arts (2015), p.27; Ministry Of Culture, China Digital Music Market Annual Report 11 (2010).

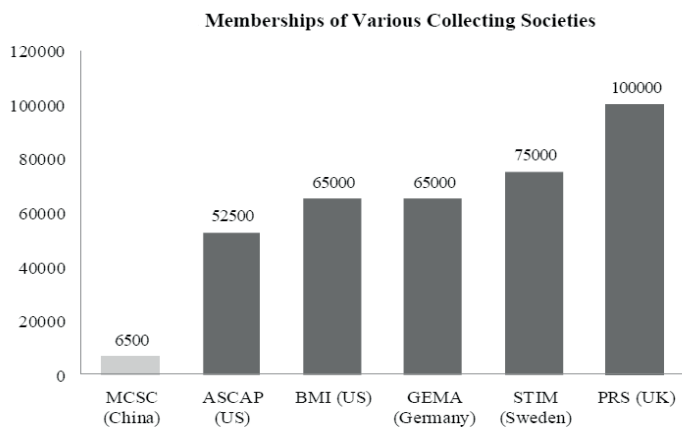
35. Jiarui Liu, Copyright for Blockheads: An Empirical Study of Market Incentive and Intrinsic Motivation," 38 Columbia Journal of Law & the Arts (2015), p.9-10; International Monetary Fund, World Economic Outlook Database <http://www.imf.org/external/pubs/ft/weo/2013/01/weodata/index.aspx>

36. Jiarui Liu, Copyright for Blockheads: An Empirical Study of Market Incentive and Intrinsic Motivation," 38 Columbia Journal of Law & the Arts (2015), p.9-10; IFPI, The Recording Industry In Numbers (2000-2010).

### 3. *New Future: Open and Diverse Internet World*

According to the statistical data, technology and selling models and platforms can represent essential parts for music transaction. For the music market in China, the copyright and licensing system should concretely devote themselves to increase the numbers of transaction and reduce transactional costs. Their aims should focus on stimulating the incentives of 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 and licensing system, economic incentives are what the Chinese music industry looking forward.

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



By Jiarui Liu, *Copyright Reform and Copyright Market A Cross-Pacific Perspective*<sup>37</sup>

37. Jiarui Liu, *Copyright Reform and Copyright Market A Cross-Pacific Perspective*, P.1476 (2017).



## II. THE HISTORY OF THE MANDARIN MUSIC INDUSTRY

### A. Confucian Ideology and Music Creativity

Chinese cultural traditions form a basic foundation for the copyright protection system. It is believed that the Zhuxiang Clan (朱襄氏) period 4800 years ago was the beginning of music business in China. At that time, the melodic sound performed by bone flutes and pan-pipes represented the most parts of traditional music.<sup>38</sup> From then on, the music culture became a fundamental element for the whole Chinese society. Music was advanced to an instrument for social education. This powerful educational instrument assisted the ancient authority to govern and regulate the communities.<sup>39</sup>

In ancient China a distinct line between civil law and criminal law does not exist. The substance of civil law was defined and supported by the virtues of Confucius, while the ideology of copyright was comprehended in the identical value of morality.<sup>40</sup> By organizing and converging approximately 300 folks and 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 part of Chinese community legacy, which 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.<sup>41</sup>

The Chinese Copyright Act had not been set up until the early 20th Century because the technology and music market was not well established. 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

---

38. Qin, C., Paid download music in the internet from next year 2013. Beijing Business Today, 2012, p.16.[http://newspaper.jfdaily.com/xwwb/html/2012-10/29/content\\_908763.htm](http://newspaper.jfdaily.com/xwwb/html/2012-10/29/content_908763.htm);

39. David Herlihy, Yu Zhang, Music industry and copyright protection in the United States and China, *Global Media and China*, Vol 1, Issue 4, 2016, p.393.

40. Lehman, J. A., Intellectual property rights and Chinese tradition section: Philosophical foundations. *Journal of Business Ethics*, 69, 2006, p. 1–9.

41. Shi, S. X., Chinese copyright law, peer production and the participatory media age: an old regime in a new world, 2008 (Brian Fitzgerald, Fuping Gao, Damien O’Brien, & Samsung Xiaoxiang Shi (eds), *Copyright law, digital content and the internet in the Asia-Pacific*, 2008, p. 257–304).

held in a overt site. However, the scale of music industry was still limited. Therefore, such a rough market economy lacked sufficient strength for provoking the conception of copyright regulation.<sup>42</sup>

## 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, the foreign countries began to advocate the notion of a copyright system to the Chinese as good community. At the outset, the Qing dynasty was forced to sign international agreements and treaties with foreign nations to ensuring their copyright. From that point, the foreign music economy inserted itself into the Chinese music market and affected Chinese norms on copyright protection.<sup>43</sup> Meanwhile, western recording technology and music business and culture brought a crucial impact to Chinese music industry.

The Beijing Opera of China was first 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 Dynasty in China of 1904. From then on, recorded music had begun representing this leading role in Chinese music economy until the 1970s. However, this sound record trend had been a half-decade later than Western countries.<sup>44</sup>

In Qing China, firstly, the copyright code secured the works through registration. In the early 20th Century, the establishment of “Copyright Code of Great Qing Dynasty” started to reveal the new advancement influenced by the wave of cultural and technological progression.<sup>45</sup> The articles including in total five chapters comprehended general principles, the duration of protection, registration, the limitation of right and supplementary, furnishes related principles in terms

42. Liang, S., A study on Washi and Goulan in Dongjing Northern Song dynasty (Master's thesis), Henan University, Kaifeng, China, 2009. David Herlihy, Yu Zhang, Music industry and copyright protection in the United States and China, *Global Media and China*, Vol 1, Issue 4, 2016, p.394.

43. Li, F., The development of China's music industry during the first half of the 20th century. *Journal of NEO*, 1,2011,p. 1-20.

44. Li, F., The development of China's music industry during the first half of the 20th century. *Journal of NEO*, 1,2011,p. 1-20.

45. China Intellectual Property , The dust-laden history revisited——the story of the Copyright Code of Great Qing Dynasty [https://ipr.chinadaily.com.cn/2011-03/17/content\\_12188711.htm](https://ipr.chinadaily.com.cn/2011-03/17/content_12188711.htm)

of the definition of copyright, the categories of works and rights.<sup>46</sup> 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, 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 executive order.<sup>47</sup>

"Songs of the era" (時代曲) is a genre of Mandarin folk/jazz fusion music that initiated in Shanghai city in the 1920s. The Mandarin Chinese popular songs showed up in the 1930s of Shanghai City. 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 music are comparable to the style of American jazz orchestra.<sup>48</sup> At that period, the music industry in China launched a technological and cultural integration with other creative business consisting of radio programs and motion picture production and distribution.<sup>49</sup>

### C. Civil War and Governmental Censorship

During World War II and the 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 were still alive, the music technology and market in China were growing slowly. Under the governance of PRC from 1949 to 1978, the production of music content was faced with more censorship by the government.<sup>50</sup>

46. China Intellectual Property, The dust-laden history revisited—the story of the Copyright Code of Great Qing Dynasty [http://ipr.chinadaily.com.cn/2011-03/16/content\\_12181207.htm](http://ipr.chinadaily.com.cn/2011-03/16/content_12181207.htm)

47. Ai, Y. M., Why did the attempt to modernise the legal system in late Qing China fail? A Sino-Japanese comparative study. *Bond Law Review*, 16, 2004, p.69–92.

48. Li, F., 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*, 2, 2013, p. 63–86.

49. Li, F., The development of China's music industry during the first half of the 20th century. *Journal of NEO*, 1, 2011, p. 1–20.

50. Ho, W.-C., 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*, 19, 2000, p.341–353.

Given the existence of martial law in Taiwan, the ROC government enforced more strict ideological controls on content review. At 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 the martial law in Taiwan, the PRC and ROC governments started to progressively propose an all-around policy on music cultural development.<sup>51</sup> Within the late 1980s and early 1990, a tide of popular music and rock and roll music was exposed in Mandarin music market. With a more open orientation on musical content production and business, the music creative industry faced prosperity.<sup>52</sup>

#### **D. International Treaties and Globalization**

In 1990, the State Council of the PRC launched the “Copyright Law of PRC”. This new enacted copyright law is a more modern and well-structured legal protection system for musical compositions and lyrics in mainland China.<sup>53</sup> Otherwise, after the ROC faced a series of lost battles in the Chinese Civil War against CPC in 1949 and retreated to Taiwan, the “Copyright Law of ROC” had 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 World Trade organization (WTO) and in 2017, agreed to sign the new amendment of Trade Related Intellectual Property Rights Agreement (TRIPS). Simultaneously, the ROC received membership of World Trade organization (WTO) in 2002.<sup>54</sup> These international conventions and agreements brought substantial development to legislation, judiciary, and governmental administration to both PRC (China) and ROC (Taiwan). Consequently, the outlook of international business and economic ex-

---

51. David Herlihy, Yu Zhang, Music industry and copyright protection in the United States and China, *Global Media and China*, Vol 1, Issue 4, 2016, p.395.

52. David Herlihy, Yu Zhang, Music industry and copyright protection in the United States and China, *Global Media and China*, Vol 1, Issue 4, 2016, p.395.

53. Liu, W., *Evolution of intellectual property protection in post-Mao China: Law and enforcement* (Unpublished doctoral dissertation), Erasmus University Rotterdam, Rotterdam, The Netherlands, 2014.

54. David Herlihy, Yu Zhang, Music industry and copyright protection in the United States and China, *Global Media and China*, Vol 1, Issue 4, 2016, p.395.

pansion was applied to the Mandarin music market, while the advancement of the legal system was stimulated and raised to facilitate local and global commercial transaction. 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 rights, incorporating the rights of reproduction, distribution, rental, exhibition, performance, screening, broadcasting, making cinematographic works, and communication through an information network.<sup>55</sup>

## E. Collective Management System

Collective management organizations (CMOs) in the Mandarin music market have been a speedy continuation, accomplished by a

---

55. 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:

(1) 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. David Herlihy, Yu Zhang, *Music industry and copyright protection in the United States and China*, Global Media and China, Vol 1, Issue 4, 2016, p.395.

significant contribution in the previous decade. But, several critical topics still wait further discussion. This chapter observes the existing exercises of the collective license in Mandarin music industry and finding possible solutions.<sup>56</sup> Collective management organizations (CMOs) act on behalf of their members, which may be authors or performers, and issue copyright licenses to users. CMOs negotiate rates and terms of use with users, collect and distribute royalties.<sup>57</sup> Within the scope of repertoire, this organization facilitates the license for a bundle of rights to users. In essence, CMO is an intermediate in licensing process. It communicates a group of right holders with a group of users, and carries through efficiency.<sup>58</sup> The origin of collective license should be tracked back to the ancient France in the 18th century. The first CMO is a French music collecting society named Société des auteurs, compositeurs et éditeurs de musique (SACEM).<sup>59</sup> At the late 19th century, the forming of composers' organizations had become established in Europe. The U.S.' first CMO was also founded at that moment.<sup>60</sup> However, surprisingly, the pattern of collective license was a very modern concept to China as the first Chinese CMO wasn't built until the late 20th century.<sup>61</sup> This background is comparatively uncommon among the most age-old countries.<sup>62</sup> In the Chinese music market, there is only Music Copyright Society of China (MCSC) for the licensing of musical works; while the China Audio-Video Copyright

56. Fuxiao Jiang, Daniel Gervais, *Collective Management Organizations in China: Practice, Problems and Possible Solutions*, *The Journal of World Intellectual Property* (2012) Vol. 15, no. 3, pp. 221.

57. Ficsor, Mihaly (2002). *Collective Management of Copyright and Related Right*. Geneva: World Intellectual Property Organization. p. 17; Gervais, Daniel (2010). *Collective Management of Copyright*. Netherlands: Kluwer Law International. p. 4.

58. Fuxiao Jiang, Daniel Gervais, *Collective Management Organizations in China: Practice, Problems and Possible Solutions*, *The Journal of World Intellectual Property* (2012) Vol. 15, no. 3, pp. 221.

59. Ficsor, Mihaly (2002). *Collective Management of Copyright and Related Right*. Geneva: World Intellectual Property Organization. p. 18-19.

60. In the U.S., the main music CMOs are American Society of Composers, Authors and Publishers (ASCAP) ([www.ascap.com](http://www.ascap.com)), Broadcast Music, Inc. (BMI) (<http://www.bmi.com>) and Society of European Stage Authors and Composers (SESAC) (<https://www.sesac.com>). Fuxiao Jiang, Daniel Gervais, *Collective Management Organizations in China: Practice, Problems and Possible Solutions*, *The Journal of World Intellectual Property* (2012) Vol. 15, no. 3, pp. 221.

61. In 1992, the initial collective management organization in China was established. This music CMO is called Music Copyright Society of China (MCSC).  
<http://www.mcsc.com.cn/Introduction.php?partid=28>

62. Fuxiao Jiang, Daniel Gervais, *Collective Management Organizations in China: Practice, Problems and Possible Solutions*, *The Journal of World Intellectual Property* (2012) Vol. 15, no. 3, pp. 221.

Association (CAVCA)<sup>63</sup> 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.<sup>64</sup>

## 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.<sup>65</sup> Based on the ideology of ethics, political controls, musical expression, and production in Taiwanese and Chinese markets existed for educational purposes. Nevertheless, the dramatic developments of technology and the global economy had spurred the Taiwanese and Chinese music market to put more considerations to music copyright protection.

In the current market, legal strategy on copyright protection and license had become 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 more fair compensation system and efficient licensing process. Building a creative environment with the equilibrium between “free information and open access to the social community” and “the protection

---

63. China Audio-Video Copyright Association (CAVCA)

<http://www.cavca.org/xhzc.php>

64. Fuxiao Jiang, Daniel Gervais, Collective Management Organizations in China: Practice, Problems and Possible Solutions, *The Journal of World Intellectual Property* (2012) Vol. 15, no. 3, pp. 223.

65. Li, F., & Morrow, G., Strategic leadership in China's music industry: A case study of the Shanghai

Audio Visual Press. In J. Caust (Ed.), *Arts leadership: International case studies* (p. 83–95). Melbourne, VIC, Australia: Tilde University Press, 2012. Montgomery, L., *China's creative industries: Copyright, social network market and the business of culture in a digital age*. Cheltenham, UK: Edward Elgar, 2010. Li, F., A study of the research activity of China's music industry since the reform and opening-up and some other related issues. *Huangzhong: Journal of Wuhan Conservatory of Music*, 3, 2010, 12–23. Zhang, L., & Wang, J., *Study on Chinese and foreign audio-visual publishing industry and related policies*. Beijing: China Book Press, 2009.

of artistic expression and intellectual property” is a necessary foundation for Taiwanese and Chinese music industries.<sup>66</sup>

### III. CRITICAL CHALLENGES ON COPYRIGHT AND MUSIC LICENSING

#### A. Monopoly and Competitive Market

##### 1. *Legal System and Tradition*

The two diverse philosophies on regulating CMOs in 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 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 performances of governmental controls and regulations.<sup>67</sup>

Compared to the European style channel, the U.S. creates a so called antitrust approach to form a fair and competitive market within the scope of Sherman Antitrust Act. CMOs in the U.S. market are governed by the regulations originated for the formation of corporate and antitrust law environment. The competition among CMOs of music performing rights is regarded as a very successful model within the U.S. antitrust law doctrine.<sup>68</sup>

The distinctions between these two models reveal the contrary ideologies and theories behind these two separate markets and copyright mechanisms. The European model (Civil Law Tradition) ordi- nates from the foundation of human rights (concentrated in the essence of moral right) whereas the U.S. model (Common Law

---

66. David Herlihy, Yu Zhang, Music industry and copyright protection in the United States and China, *Global Media and China*, Vol 1, Issue 4, 2016, p.397.

67. Dietz, A. (2002) ,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*, 49,897-916.

68. Gervais, D. (2011) 'The Landscape of Collective Management Schemes', *Columbia Journal of Law & the Arts*, 34(4), 423-49.



Tradition) is nurtured by the value of economic right (focused on the function of utility and practice).<sup>69</sup> 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 the history always reminds us to be humble 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*

In the basis of civil law tradition, the Chinese legal law system seems 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.

In the purpose for the affirmation of monopoly position, China designs several regulatory methods to exercise its market controls in music market. First, according to the RCCA article 5, the CMOs in China are all administered and supervised by the governmental copyright institution, 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 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.<sup>70</sup> This standard

---

69. Dietz, A. (2002), *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*, 49,897–916.

70. 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

is comparatively high and not easy to fulfill. Third, according to RCCA article 20, an “exclusive license” is formed between the CMO and the member during the time of establishing a contract with a CMO. The obligee shall not exercise by himself or permit others to exercise the rights that are stipulated in the contract to be exercised by the organization for collective administration of copyright.<sup>71</sup>

Moreover, let us assume it is controversial when the music CMOs in Chinese music market possesses exclusive right 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 risks violating the competition laws, Chinese music CMOs and the NCAC think this clause will ensure the functionality of these CMOs.<sup>72</sup>

### *3. Regulations of Monopoly Abuses*

In considering 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. The CMO shall not conclude with any user a

throughout the country;(4) The organization for collective administration of copyright has formulated a draft of its articles of association, a draft of royalty rates to be charged, and a draft of the measures for transferring royalties to the obligees (herein after referred to as royalty transfer measures).

71. RCCA Article 20.

72. 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 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).; Music in the Marketplace, Council of Better Business Bureaus. <http://www.bbb.org/council/for-businesses/toolkits/bbb-brochure-music-in-the-market-place>

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.<sup>73</sup> 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.<sup>74</sup> 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).<sup>75</sup> Particularly, in others views of the RCCA Chapter V (Supervision over CMO), they also show that the CMO shall lawfully set up financial and accounting systems, as well as asset management systems and accounting books according to “relevant provisions of the State” (Article 30).<sup>76</sup> The use and financial management of the assets of the CMO shall be under the supervision of “the copyright administration department and the department of civil affairs under the State Council” (Article 31)<sup>77</sup> and “the copyright administration department under the State Council” may supervise CMO and shall make records on the supervision activities (Article 37).<sup>78</sup>

#### 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 in an arbitrary basis. As a matter of fact, generally for an expanding market, at the beforehand period, it is relatively hard to urge that CMOs have faults to result in

---

73. RCCA Article 23

74. RCCA Article 25

75. RCCA Article 38

76. RCCA Article 30

77. RCCA Article 31

78. 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.

monopoly abuse on account of prejudice to licensees or decline to offer license. Nevertheless, the arbitrary decision on price and contractual terms could be connected to the problems about evidence (burden of proof) or accountability (transparency). The licensees commonly dispute for the high price setting, while the standard for fairness seems always changing and uncatchable.<sup>79</sup>

The governmental regulation administrates music market in three parts: access, pricing, and competition. The largest music economy in the world, the U.S. establishes 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, because China's music market is also extraordinarily huge, the current rate setting pattern causes considerable transactional costs and seems unreasonable.<sup>80</sup>

In China, the CMO's price setting may not contradict with the version announced by the NCAC. However, because the possibility of discord between the CMO and NCAC still occurs, we have to maintain the function of competition market and restrict and regulate abuse. This issue will be harmful to the Chinese market. For instance, in 2006 the price setting announced and confirmed by the NCAC was exactly the one advocated by the MCSC and CAVCA.<sup>81</sup> This complexity of price setting on karaoke licenses makes the coincidence unreasonable. In this issue, it seems the supervision of government failed. Alternatively speaking, the general price setting approved by the NCAC is only the reconfirmation of the proposal.<sup>82</sup> How to design a better system to avoid this potential risk of abuse, therefore, become a crucial mission for Chinese music market. A due process for deciding the price setting needs the accomplishment of transparency.

---

79. Fuxiao Jiang, Daniel Gervais, Collective Management Organizations in China: Practice, Problems and Possible Solutions, *The Journal of World Intellectual Property* (2012) Vol. 15, no. 3, pp. 230.

80. *supra* note Error! Bookmark not defined., at 3-5.

81. Karaoke Industry In China Stand Up And Go Against to the Rate Setting By CAVCA And NCAC.

<http://tech.163.com/06/1123/08/30JNSHO8000915BD.html>

82. The official information about the rate setting by CAVCA [www.cavca.org/news\\_show.php?un=xhwx&id=303&tn=%D0%AD%BB%E1%D0%C2%C5](http://www.cavca.org/news_show.php?un=xhwx&id=303&tn=%D0%AD%BB%E1%D0%C2%C5)

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

In China's CMO system, one of the primary issues is how to interpret the term "standing" on a legal basis. The primary question is whether the CMOs or right holders 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 middlemen, trust solidifies the cooperation between right-holders, CMO, and users.<sup>83</sup> In a sense, the CMO is an agency comprehending members' interests and managing the members' licensing affairs on behalf of its own name. According to 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."<sup>84</sup>

Even though, the legal notion of "fiduciary relation" in the Chinese legal institution has distinct meaning in common law tradition, Article 2 of the Trust Law of China demonstrates that it is "according to the will of the settler and in the name of the trustee."<sup>85</sup> This vague interpretation or legal designation about the word "trust" in this article leans on the Chinese legal tradition, which probably situates itself in a mixture of legal culture between Common Law and Civil legal institution.<sup>86</sup> From this viewpoint, the Chinese legal institution merges

---

83. Wang, J. (2010) 'Should China Adopt an Extended Licensing System to Facilitate Collective Copyright Administration: Preliminary Thoughts', *European Intellectual Property Review*, 32(6), 283-9.

84. RCCA Article 2

85. *supra* note 83, at 283-289.

86. 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) [http://www.china.org.cn/china/LegislationsForm2001-2010/2011-02/12/content\\_21907980.htm](http://www.china.org.cn/china/LegislationsForm2001-2010/2011-02/12/content_21907980.htm)

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 to conflict with the duo ownership (incorporating legal and equitable ownership) from civil law tradition.<sup>87</sup>

### C. Expansion of Compulsory License

Under the U.S. structure of consent decrees, ASCAP and BMI's consent decrees are censored by federal rate court in New York City. It is generally regarded as rate court. The consent decrees actually put government restrictions on ASCAP and BMI's implementations. 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. 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.<sup>88</sup>

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

“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 licensee 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. The Copyright Office's regulations set out in detail the procedures that must be followed when seeking a compulsory license.”<sup>89</sup>

The first issue faced by music publishers and composers is that the compulsory license does not permit them to control the use of their works or seek a higher price on negotiation. On the other hand, right holders also complain about the lack of an audit right and prac-

---

87. Fuxiao Jiang, Daniel Gervais, Collective Management Organizations in China: Practice, Problems and Possible Solutions, *The Journal of World Intellectual Property* (2012) Vol. 15, no. 3, pp. 221–237.

88. *supra* note Error! Bookmark not defined., at 5-8.

89. U.S. Copyright Office, Notice of Intention to Obtain a Compulsory License Section 115 [https://www.copyright.gov/licensing/sec\\_115.html](https://www.copyright.gov/licensing/sec_115.html)

tical inability to enforce reporting or payment obligations under section 115, resulting in inefficiency and vagueness in the licensing process. One critical issue recently revealed is whether section 115's compulsory licensing should be carried out on musical work's license and whether the compulsory license rate should be executed on sound recording licensing when the current blank in the section 115 is just left to musical work's licensing. Music publishers and writers argue for the lower price on the regulated sound recording market and urge they should benefit more from a free market system, which is why most musical work owners hope to get over the scope of section 115. From the US Copyright Office's perspective, the compulsory licensing should be merely applied to tackle market failure. Therefore, US Copyright Office disagrees in applying section 115 regulation to musical works. For the Chinese music market, whether the U.S.'s section 115 should be applied to musical works is also a critical issue.<sup>90</sup> Like the U.S., China is one of the biggest countries in the world. With China's huge territory brings inefficiency and impossibility on collecting vast revenues from each division. The same problem happens to China where compulsory license might be a useful treatment for this disparity.

#### **D. 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 also be provided to both sides.<sup>91</sup> The U.S. Copyright Office believed an authoritative public database would increase incentives of music licensing. Though this database is not necessarily established by the government, the database could be built by industry under the scope of government's regulatory level and expectation. By constructing this public database, private entities can devote their efforts, communicate, and integrate each other's knowledge.<sup>92</sup>

Recalling our previous discussion, the litigation-oriented nature of CMO revenue boosting can easily cause conflicts between users and creators. Thus, benefits would be achieved when the CMO represents

---

90. *supra* note Error! Bookmark not defined., at 162-174.

91. Ficsor, Mihaly (2002). Collective Management of Copyright and Related Right. Geneva: World Intellectual Property Organization. p. 45.

92. *supra* note Error! Bookmark not defined., at 183-189.

a more neutral role in managing copyright transactions. When litigation replaces transaction, the uncertainty of results translates into a specific transactional cost. Particularly, both sides have to bear expenses for hiring attorneys and spending time addressing litigation. This reality can substantially delay effectuation of music licenses in the Mandarin music market.

The CMOs in the Mandarin music market have argued that the establishment of a comprehensive database structure is impossible and impracticable when information is unclear and incomplete. 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, 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.

### **E. Appropriation Art as a Cornerstone of Modern Music: Licensing Challenges**

Based on the history of art, appropriation is essential 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 particularly in rap, funk, hip-hop, and jazz. The copyright law system should draw a line between stimulating the advancement of culture and allowing the audience to appreciate old creation. The legislation has to provide an environment for fostering and developing appropriation of art and protecting the creators' rights.<sup>93</sup>

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 harmonizing western and eastern culture, he creates a remix song called "Introduction" (序) on his album "Balance" (平衡) and 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 professional applause, the Golden

---

93. Peter S. Menell, *Adapting Copyright for the Mashup Generation*, 164 UNIV. PENN. L. REV. 452-458 (2016)



Melody award, and the chance to perform it on one of the most popular Chinese TV program, I Am A Singer (我是歌手) because it cleverly brings traditional sentences to modern content. Mash-up music greatly influences the music market in China and starts a new trend on Mandarin music creativity.

However, there are still no specific provisions in Copyright Law of PRC regarding mash-ups. The most relevant article is about “Quotation”. The article 22(2) of Chinese Copyright Act indicates that, “appropriate 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.”<sup>94</sup> However, compared to the “transformative use” doctrine adopted by the current U.S. court, when the context of “appropriate” or “for the purpose of introducing or commenting a certain work, or explaining a certain point” is difficult to define, it seems to address mash-up issues though the quotation approach though it is impractical. In the article and in present judicial opinions, there is no space for mash ups. For instance, it inserts copyrighted music materials to comment on something other than the former work.<sup>95</sup> The question is, “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 raised, it is not affirmative that it causes copyright infringement, as long as it can be considered as “essential”. (北京市第二中级人民法院民事判决书(2012)二中民终字第16700号).<sup>96</sup>

---

94. 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.”

95. Tianxiang He, The Future Model of Copyright Exception and Parody Protection in China A Modest Proposal for Reform, IPScholars Asia Conference (SMU), 2018.

96. ZY v. Global Times (BJEZMZZ No.16700., 2012); “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 (SMU), 2018.

### 1. *Vague Standard*

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. Based on this authorization, the licensee is able to combine an original piece into new creation. From U.S. experience, although the case *Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792,<sup>97</sup> brings success to copyright holders, the bright-line rule, “get a license or do not sample”, does not necessarily apply to remix music cases. In particular, mash-up artists don’t totally depend on sound recording to create 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.<sup>98</sup>

Moreover, even in the *Bridgeport Music, Inc. v. Dimension Films*, the U.S. Court of Appeals for the Sixth Circuit believed that the competitive market would maintain the reasonable price. However, this fairness would not be as evident if the remix artist needs to obtain many licenses in an individual song and can’t get partial licenses on individual songs. Consequently, the extremely high transactional costs for mash-up music are inappropriate.<sup>99</sup>

The current fair use mechanism, even “transformative use” doctrine from *Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994)<sup>100</sup>, exists on uncertainty. As the fair use defense is totally unpredictable and

97. *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.”

98. Peter S. Menell, *Adapting Copyright for the Mashup Generation*, 164 UNIV. PENN. L. REV. 464-465 (2016)

99. Peter S. Menell, *Adapting Copyright for the Mashup Generation*, 164 UNIV. PENN. L. REV. 464-465 (2016)

100. *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.”

risky in court, the expense for attorneys and litigation procedures can produce burdensome costs. Especially, in the Chinese market, the court has arguments on applying the “statutory limitation” and the “fair use doctrine”. Some think the establishment of statutory limitation should be combined with the fair use doctrine. The two sets of filters cause difficulties in defending 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 and avoid violating the copyright laws. However, this grey area contributes to extra expenses and risks for mash up creators. It causes a threat to the development of mash up music and a possible harm to the freedom of expression.<sup>101</sup>

## *2. High Transactional Costs*

The transaction cost in negotiation causes heavy burden for mash up creators. Broadly speaking, issues become complicated when mash up creators always need to search for the copyright holders and then obtain the license from diverse locations. Specifically, despite requests to right-holders for licenses, it is possible that these requests are rejected. This restrains the communication of copyright and increases unnecessary transactional costs.<sup>102</sup>

From the perspective of mash-ups, this complicated licensing process with high transaction cost is inconvenient, unfavorable, and may be seen by music producers as being unreasonable. Therefore, some artists rather take risks and neglect to gain a license while producing mash up music.

Nowadays, the rejection and high bargaining power on copyright holder’s side 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.<sup>103</sup>

---

101. Robert P. Merges, *Justifying Intellectual Property*, Harvard University Press, 2011, p.249, 254,266.

102. Robert P. Merges, *Justifying Intellectual Property*, Harvard University Press, 2011, p.249-251.

103. Emily Harper, *Music Mashups: Testing the Limits of Copyright Law as Remix Culture Takes Society by Storm*, *Hofstra Law Review*: Vol. 39, 2010, p.28-30.

### 3. *Dangers of Settlements*

A method for mash-up creators to avoid the risks of litigation is to depend on negotiation of settlement. According to out-of-court dispute settlements, legal mechanisms are structured to save time and expense, as opposed to overt litigation. Unfortunately, this pathway is appropriate for limited cases. Additionally, it sometimes has delayed the resolution of ambiguities in legislation. Therefore, spreading settlement actually stifles efficiency and evades legislative development.<sup>104</sup>

The existence of grey areas has led to the use of gap fillers and arbitrary explanations, when the lack of specific laws is related to cases.<sup>105</sup> This inappropriate explanation of ambiguity may result in “chilling effects” on freedom of expression. Furthermore, in contrast to chilling effects, the term of “warming phenomenon” causes more risk. For instance, people will participate in conducting and accepting the general value between peers without considering whether some behaviour is appropriate or legal.<sup>106</sup> As a result, in the absence of clarity, the warming phenomenon will be regarded as an ingredient of gap filler. Precisely, under this trend, the act of sharing and appropriation on mash-up music may become prevalent when the gray areas in legislation occurs. Most importantly, the proportion of flexibility should be clear and appropriate. Courts cannot rely on ambiguity to arbitrarily explain the laws when the gray area is dangerous<sup>107</sup>

## IV. 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

---

104. Emily Harper, *Music Mashups: Testing the Limits of Copyright Law as Remix Culture Takes Society by Storm*, *Hofstra Law Review*: Vol. 39, 2010, p.55-58.

105. Peter Menell, *Adapting Copyright for the Mashup Generation*, *University of Pennsylvania Law Review*, Forthcoming (UC Berkeley Public Law Research Paper No. 2576929.), 2015, P.66-68.

106. Emily Harper, *Music Mashups: Testing the Limits of Copyright Law as Remix Culture Takes Society by Storm*, *Hofstra Law Review*: Vol. 39, 2010, p.62-65.

107. Robert P. Merges, *Justifying Intellectual Property*, Harvard University Press, 2011, p.247-249.

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 regulation 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 direct and rebuttal phrase.<sup>108</sup>

However, the individual discovery are separately followed by both sides who can edit and adjust their proposal after discovery. Therefore, it is believed that these two separate trial proceedings result in more time and cost when arguments and evidence are more complicated and doubled. The overlapping parts are unnecessary and inefficient. Therefore, the U.S. copyright office also supports the modification of CRB procedure and advocates a special proceeding that should be harmonized with the traditional litigation. Also, 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.<sup>109</sup> "Early settlement" is also a crucial topic for the current CRB procedure. Many CRB participants think 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.<sup>110</sup>

For the Mandarin music market, to address 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 research areas.<sup>111</sup> This agency should include adjudicatory members with cultural, economic, and constitutional vision. Its mission should utilize experts and incorporate the capability of price-setting and other factors related to the specific market. In light of current research results, it is found that the function regulatory strategy or the general court system may be far from a specialized agency on solving the problems of monopoly abuses in civil law model. In particular, the decision by this agency should focus on fostering public interests and go beyond competition law and market

---

108. *supra* note Error! Bookmark not defined., at 10-11, 102.

109. *supra* note Error! Bookmark not defined., at 93-95.

110. *supra* note Error! Bookmark not defined., at 119-121.

111. Cui, G. (2005) 'The Antitrust Control on the CMOs', *Qinghua Law Science* (Chinese) 6, 110-138.

economy.<sup>112</sup> This specialized agency should supervise the whole exercises on the CMOs, from the formation deep into the management reports, financial arrangements, audit and rate plans. Reflection of the diverse perspectives in light of culture, economic and constitutional outlook is meaningful for this adjudicatory, specialized and independent agency.<sup>113</sup>

Moreover, in order to shorten the process and avoid unnecessary time consuming 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*

The other 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 a big scale country, specifically, the U.S.’s music market. As China is one of the largest nations in the world, similar market regulation in the U.S. might be 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. The RCCA article 7<sup>114</sup> indicates the establishing CMO’s business shall not be overlapped with that of another lawfully registered CMO. Additionally, article 20<sup>115</sup> 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

112. Gervais, D. (2010b) ‘Collective Management of Copyright: Theory and Practice in the Digital Age’, in Gervais, D. (ed.), *Collective Management of Copyright and Related Rights*, Kluwer Law International BV, The Netherlands, pp. 6–10.

113. Gervais, D. (2011) ‘The Landscape of Collective Management Schemes’, *Columbia Journal of Law & the Arts*, 34(4), 423–49.

114. 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.

115. RCCA article 20: 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.

practical, by amending the RCCA Article 7 and 20, to build up a competitive market and cutthroat atmosphere surrounded by several rival CMOs.

Even more, in accordance with Chinese Antitrust Law Article 12<sup>116</sup>, 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 the light of Chinese Copyright Article 8<sup>117</sup>, 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. But in recent years, a judicial wave is making exceptions to put CMOs into the Chinese Unfair Competition law regime. As a result, judicial interpretations by Supreme People’s Court could possibly be a solution to overcome this barrier. In addition, to propose a new amendment of Chinese Antitrust Law could be another answer. Consequently, to be sure, a new transform for the Chinese CMO system should be carried out.

### 3. *Consent Decree*

The U.S. government is affected by monopoly power. That is why the U.S. Congress avoids 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, decided at the same time beyond potential competitors. For example, music could be licensed by multiple competitors, such as ASCAP or BMI. The U.S. Supreme Court has recognized the social benefits of collecting management and devotes itself to prevent *ing per se* unlawful monopoly under a “rule of reason”.<sup>118</sup>

---

116. Article 12, Anti-Monopoly Law (promulgated by Order No. 68 of August 30, 2007, of the President of the People’s Republic of China) <http://www.wipo.int/wipolex/en/details.jsp?id=6543>

117. 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.

118. *supra* note Error! Bookmark not defined., at 150-153.

However, on the other side, the government had also authorized ASCAP and BMI to operate extensive regulation under the consent decree structure. This caused some opinions from the U.S. Department of Justice (DOJ) when the modern DOJ guideline had thought these consent decrees should be terminated, since 1979. In 2014, the DOJ implemented the new policy to rethink and terminate decrees. From the perspective of public interests, the DOJ will suggest the court should not agree on the decrees. Although there is an exception in limited circumstance, the facilitating of decrees is tolerated when a strong reliance between industry competitors is established under a long period. Therefore, the new version of U.S. DOJ's policy actually allows the consent decrees as facilitated by ASCAP and BMI.<sup>119</sup>

For the Chinese market, the concept of consent decrees has not been applied to the music licensing process. In the future, it might be a possibility for China to apply consent decrees to music copyright licensing agreements or settlements between CMO and right-holders. These types of agreements or settlements might possibly bring the Chinese market a more efficient and stable structure on music transaction within its enormous quantity of licensed music.

## **B. Standing to File the Lawsuit**

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

This study asserts that to tackle this issue by a functional approach would be more practical and realistic for the music industry. Thus, this research would like to associate the concept of trust relation with the Chinese CMOs. By inserting the paths below into the current collective licensing system in China and a better equilibrium to harmonize the conflicts between right holders, CMOs and users would likely be built up. First, a CMO can exclusively file litigation on behalf of its own name when the copyright is entrusted to that CMO, in the situation of either a contractual silence about the matter or a bilateral

---

119. *supra* note Error! Bookmark not defined., at 155-160.



contract established for shifting the standing of litigation to the CMO. Second, the right-holder has the standing once standing is explicitly on hold for right-holders in the established contract between the CMO and the right-holder. Third, both the CMO and right-holder have standing since this has been explicitly established in the contract between the CMO and the right-holder. Fourth, the right-holder recovers its standing once the membership in the CMO is revoked.<sup>120</sup>

In China, present litigation-oriented policies in CMOs ignore missions on building efficient licensing models between users and creators. As a general observation, these music CMOs tend to “protect” copyright by warning against possible infringement, rather than providing structures for the onward “licensing” of copyright.<sup>121</sup> However, its task on 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. This actually produces more transaction cost outside the internal system of the collective license and ends up producing a greater burden to musical society as a whole.<sup>122</sup>

120. *supra* note 56, at 231-232.

121. In Taiwan, there are three Music CMOs in the domestic music market. Music Copyright Society of Chinese Taipei (MÜST) [www.must.org.tw/](http://www.must.org.tw/); Music Copyright Intermediary Society of Taiwan (TMCS) [www.tmc.org.tw/](http://www.tmc.org.tw/), Music Copyright Association of Taiwan (MCAT) [www.mcat.org.tw/](http://www.mcat.org.tw/) (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); Music in the Marketplace, Council of Better Business Bureaus. <http://www.bbb.org/council/for-businesses/toolkits/bbb-brochure-music-in-the-market-place>

122. In the Taiwanese case “MÜST v. Inyuan Karaoke Technology Inc.” in 2008 (臺灣智慧財產法院民事判決 99 年度民他上更(一)第 1 號), MÜST represents its Japanese partnership, JASRAC, to suit Inyuan 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

### C. Compulsory License: Section 115 of the Copyright Act

Compared to sound recording's distribution, it is observed that music works are more diffusely licensed by a bunch of companies, labels, and independent composers. Generally, one sound recording is usually owned by one specific unity. However, musical works are executed by many unions. The joint ownership relationship complicates the licensing process and limits music publishers freedom to license their works. Consequently, the negotiation in music licensing market seems more restricted and limited when the complexity of ownership blocks the freedom of communication.<sup>123</sup>

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. How to use the 2 step analysis to interpret 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 silent on regulations.<sup>124</sup> How to address this issue in an appropriate matter, 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 tons of music owners. Therefore, it might be true that many supporters who go against the section 115 won't contradict that it will be extremely hard to license content on smaller-scale with lots of tiny music copyright holders. Some specific types of collective system will

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 *MÜST v Jingo Record* case in 2011 (臺灣臺北地方法院刑事判決 100 年度智易字第 19 號), MÜST files 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.

123. *supra* note Error! Bookmark not defined., at 162-165, 174.

124. 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 (called the "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."

still be necessary for assembling the negotiations with smaller-scale tiny 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 appropriate with trusts will be the most crucial challenge. To strike a balance between values of free market negotiation and collective management is likely to prove challenging. In addition, the task to accomplish fair compensation for artists and efficiency in licensing process is strict. Both methods should be considered and applied for forming the most complete strategy.<sup>125</sup>

It is questioned that Congress should involve itself in the establishment of music licensing structures. From the viewpoints of U.S. Copyright Office, it will be more appropriate to leave the details to the regulations where the legislation drafts a structure for the administration. Under this system, the legal mechanism will be more realistic and practical for the music industry, when the music licensing actually includes numerous of complicated sides.<sup>126</sup> It is impossible to cover the whole regulatory implementation by the Congress. Additionally, in addition to the legislative authorization, the general approaches will leave more flexibility and autonomy for music business. When the regulations can be amended over current advances and unpredictable risks, it leaves more space for administration to be more reasonable for music enterprise regulation.

#### **D. Interoperability**

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, MCSC builds a platform called the MORP license service center to operate the music registration and transaction.<sup>127</sup> However, MCSC should integrate its copyright information and learn from international institution for further development. Particularly, under the structure of World Intellectual Property Organization (WIPO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO), MCSC is the member of the International Confederation of

---

125. *supra* note Error! Bookmark not defined., at 150-155.

126. *Id.*

127. MORP Licensing Center [www.morp.mcsc.com.cn/www\\_new/index.html](http://www.morp.mcsc.com.cn/www_new/index.html)

Societies of Authors and Composers (CISAC).<sup>128</sup> CISAC can provide resources and technology for MCSC to coordinate copyright information<sup>129</sup> based the ISWC system to code their musical works and construct 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 efficient license. According to the pathway of open information by CISAC, it will help music CMOs approach more transparency on copyright licensing.<sup>130</sup>

High interoperability in music license will increase users' choice, flexibility, and convenience in competitive markets.<sup>131</sup> This advancement will build more access, diversity, and openness. It stimulates the efficiency of transaction between users, CMOs and authors. Common and overlapping affair should especially be harmonized. For instance, in the future, mash-up artists should be able to reply on one platform

---

128. International Confederation of Authors and Composers Societies (CISAC) official website [www.cisac.org/](http://www.cisac.org/)

129. Ang Kwee Tiang, *Collective Management in Asia*. In: Daniel Gervais, ed., *Collective Management of Copyright and Related Rights*, The Netherlands : Kluwer Law International, (2006), p.399-400.

130. 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 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." *Telecom Antitrust Handbook*, American Bar Association Section of Antitrust Law, Example: Telephone Network Interconnection, p. 381-382.

131. "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." Urs Gasser, John Palfrey, *DRM-Protected Music Interoperability And innovation*, Berkman Publication Series, 2007, p. 28, "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." 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* 28.2, 2005, p.33-34.

to process music licensing and distribute the licensing fee to different CMOs in each field. This “one-stop shop” should be encouraged in multi-CMOs countries. For the Chinese music market, depending on raising interconnection, the unnecessary time and transactional cost between copyright holders and users can be prevented. Under the framework of cooperation, the transparency on music CMOs can also be enhanced.<sup>132</sup>

## E. Appropriation Art

### 1. Compulsory Licensing

Under compulsory licensing mechanism (Section 115 of the Copyright Act), the U.S. Congress will grant a mash-up creator the right to use copyrighted material (sound recording) as long as they pay the copyright holders appropriate royalties. Additionally, one of the most appealing aspects of the compulsory licensing is that mash-up creators can enjoy access to all copyrighted music unless the copyright holder had opted out of the compulsory system through registration. However, according to the *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)<sup>133</sup>, with the legislative blank in the Article 115 of the U.S. Copyright Act, the free market will bring more fair competition to the music market. This research agrees that the 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 has been an exception and extreme example in modern antitrust doctrine.<sup>134</sup> We should not allow more involvement and over-interpretation to copyright law to violate the current balance and nature in the music market.<sup>135</sup>

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 li-

---

132. Robert P. Merges, *Justifying Intellectual Property*, Harvard University Press, 2011, p.222, 230.

133. *supra* note 124.

134. Robert P. Merges, *Compulsory Licensing vs. the Three “Golden Oldies” Property Rights, Contracts, and Markets*, *Cato Policy Analysis* (2004), p.5-9.

135. *supra* note Error! Bookmark not defined., at 162-167, 170-173.

censing, Congress should design a “termination right” system for composers. For instance, if the mash-up music infringes an original essential moral right and autonomy, the composer should be capable of terminating the compulsory licensing. Therefore, according to this kind of “flexibility”, the copyright law system can strike a balance between users and composers and avoid tension between licensees and licensors.<sup>136</sup>

## *2. Blanket Licensing*

In the music industry, the CMO system is regarded as an essential way to reduce transactional costs. Particularly, because blanket licensing system 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.

From the perspectives of mash-up art, based on different scale of businesses, the rate plans can be designed separately. The factors for different rates could also include “the length of the mash-up part” and “the popularity of the originals.” Contrary to the current copyright regime, a new blanket licensing system would be more appropriate and reasonable for mash-up creators. In particular, when the mash-up artists usually combine several parts of songs into their arrangements and compositions, a blanket licensing system can provide them substantial incentives with lower transactional 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*

The compulsory licensing and blanket licensing system could provide sufficient pathways to tackle the mash-up music issues. Moreover, they can also assist to construct a more creative environment for appropriation art. In the future, the Mandarin music market should

---

136. Peter S. Menell, *Adapting Copyright for the Mashup Generation*, 164 UNIV. PENN. L. REV. 441 (2016); Robert P. Merges, *Compulsory Licensing vs. the Three “Golden Oldies”*: Property Rights, Contracts, and Markets, Policy Analysis (2004), p.5-9.

build up suitable compulsory and blanket licensing systems to regulate mash-up creativity.<sup>137</sup>

For the Mandarin music market, this license-oriented regime would encourage mash-up creators to obtain authorization from copyright owners and would therefore serve to reduce the frequency of infringement. Generally speaking, to establish a compulsory, a blanket licensing system can provide mash-up creators an affordable means of music license. This structure also can fairly appreciate and 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 help the copyright holder earn more profits and keep litigations away, this license-oriented approach will take the mash-up music market to a new level. The current CMOs in Mandarin music market don't manage reproduction right licenses of musical works, which causes ambiguity and insufficiency. For musical artists, it is believed that much revenue diversity also assists with affirming much bargaining power against middlemen.<sup>138</sup> In the near future, CMOs in the Mandarin music market might include reproduction right licenses in their services for both musical works and sound recording. When the technology and management expertise are developing, music CMOs should take more responsibility in free licensing categories and connect to the wider Asian market. These new changes will help alleviate the existing licensing obstacles for mash-up artists.

---

137. Ficsor, Mihaly (2002). *Collective Management of Copyright and Related Right*. Geneva: World Intellectual Property Organization. p. 127-131.

138. USPTO and Renmin University Copyright Protection Program Highlights Importance of Copyright Reform for China <https://chinaipr.com/tag/eric-priest/>; Robert P. Merges, *Justifying Intellectual Property*, Harvard University Press, 2011, p.267.

## Copyright 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



## V. CONCLUSION

### A. Reforms of CMO Models

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 not to restrict artists' secondary creation methods. In terms of competition, despite the fact that the MCSC is the only authorized music CMO by the Chinese government and cannot provide complete license management to all urban and rural areas; for anti-trust law purposes, more accrediting licensing agencies under the MCSC and the government's permission should be envisaged and affirmed. As a result, the district royalties can be fully collected and administrated and the negatives of statutory monopoly can be tackled. As a result, the authors' revenue can be raised and stimulated.

On the 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. MCSC for music composition and CAVCA for audio-videos 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 this whole 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 stand on 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. Because the bargaining power between copyright holders and CMO is imbalanced, the licensee stays on 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 the member license by themselves 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.

Lastly, in accordance with the U.S. experiences on administrative regulations, firstly, the government in Mandarin music market should enhance the licensing parity and fair compensation in music licensing. Secondly, when it comes to government's role in the music market, the government should avoid excessive control within that market. On the other hand, reasonable monopoly such as consent decree should be allowed to solidify the stability in the licensing process. In the future amendment of copyright law, the CRB in Mandarin music market should also prevent pre-involvement before the negotiation between CMO and right holders for a more efficient licensing structure. Additionally, because these two separate trial proceeding's 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 and 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.

## **B. Licensing Systems in a Technological Era**

The copyright legal mechanism addresses the need to promote progress in the arts and sciences by granting innovators limited monopolies. The copyright will offer authors with economic incentives to make cultural contributions with benefit for communities. On the one hand, present state of online technology encourages the appropriation of arts and distribution without limitation on time and distance. This stimulates the cultural creativity in the society. On the other hand, this advance limits monopoly in copyright law system and takes away the dominance by copyright holders.

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 mash-up music issues include the types of music composition license such as reproduction, control over derivative works, distribution, and public performance. There are two possible pathways for this critic. Generally, one option is “fair use doctrine” and the other one is “compulsory license”. When it comes to a “fair use” doctrine, it is generally argued that the copyright litigation is unpredictable and can cause high transactional costs. It also causes the defendant should undertake a heavy burden of proof though transformative use can be used as a defense of fair use. By contrast, the compulsory license brings rational profit for original creation. If the rate plan and fees are fair and affordable by the remix creators, it brings incentives to stimulates music creativity.

### C. International and Cross-Strait Cooperation

Under the framework of World Trade Organization (WTO), the Trade-Related Aspects of Intellectual Property Rights (TRIPRs)<sup>139</sup> provides the Taiwanese and Chinese music market the pathway to reach international integration. The transnational conflicts can be negotiated and relieved by Dispute Settlement Body (DSB).<sup>140</sup> According to the International Confederation of Societies of Authors and Composers (CISAC) supported by WTO, China and Taiwan can harmonize their databases and stimulate efficiency. In addition, to increase interconnection and interoperability of different countries’ database can enhance the sharing of music and deepen understanding between individuals. Moreover, for the internal system of the Taiwanese and Chinese market, the Cross-Strait Intellectual Property Right Protection Cooperation Agreement (CIPRPCA; 兩岸智慧財產權保護合作協議)<sup>141</sup>

---

139. The Information of Trade-Related Aspects of Intellectual Property Rights [https://www.wto.org/english/tratop\\_e/trips\\_e/trips\\_e.htm](https://www.wto.org/english/tratop_e/trips_e/trips_e.htm)

140. WTO Dispute Settlement Body (DSB) [https://www.wto.org/english/tratop\\_e/dispu\\_e/dispu\\_body\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/dispu_body_e.htm)

141. Cross-Strait Signed Agreements, “Between 2008 and 2016, the Straits Exchange Foundation (SEF) and the Association for Relations Across the Taiwan Straits (ARATS)

was signed between Taiwan and China in 2010. Under this collaboration, these two markets serve to keep exploring the cooperation and seek erase the 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 (博鳌亞洲論壇) 2018<sup>142</sup>, 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 U.S. experiences, Taiwanese and Chinese CMOs should increase their data-related responsibility, flexibility, and autonomy in music licensing. Under the structure of cross-strait and international cooperation, it is expected that the right holders and composers in Mandarin market can build up their businesses 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.

---

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)."<https://www.eapasi.com/signed-agreements.html>

142. Financial Express, Boao Forum for Asia: Xi Jinping vows to protect IPR, further open China's economy amid trade row with US, April 10, 2018. <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/>

## GLOSSARY

### I. Abbreviated Terms

- Association of Recording Copyright Owners (ARCO)
- American Society of Composers, Authors and Publishers (ASCAP)
- 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)
- 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 Intermediary Society of Taiwan (TMCS)
- Music Copyright Society of Chinese Taipei (MÜST)
- National Copyright Administration of the People's Republic of China (NCAC)
- People's Republic of China (PRC)
- Regulations on the Copyrights Collective Administration (RCCA)
- Recording Industry Association of America (RIAA)
- Republic of China (ROC)
- Société des auteurs, compositeurs et éditeurs de musique (SACEM)
- Society of European Stage Authors and Composers (SESAC)
- 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 Trade Organization (WTO)

## II. Names of Cases

*Bridgeport Music, Inc. v. Dimension Films*, 410 F.3d 792 (6th Cir. 2005)

*Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)

*Campbell v. Acuff-Rose Music*, 510 U.S. 569 (1994)

*Hush-A-Phone v. United States*, 238 F.2d 266 (D.C. Cir. 1956)

*MÜST v. Inyuan Karaoke Technology Inc.* (臺灣智慧財產法院民事判決 99 年度民他上更(一)第 1 號)

*MÜST v Jingo Record* (臺灣臺北地方法院刑事判決 100 年度智易字第 19 號)

*United States v. American Society of Composers, Authors and Publishers (ASCAP) et al.*, No. 09-0539, 2010 WL 3749292 (2nd Cir. 2010)

*ZY v. Global Times* 北京市第二中级人民法院民事判决书 (2012)二中民终字第 16700 号 (BJEZMZZ No. 16700., 2012)

## III. Mandarin Terms

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