

COPYRIGHT FOR BLOCKHEADS: AN EMPIRICAL STUDY OF MARKET INCENTIVE AND INTRINSIC MOTIVATION

*Jiarui Liu**

Copyright law is widely perceived as the means to promote social welfare by providing necessary incentive for intellectual creation. However, there has been little clarity in copyright literature on how artists actually respond to copyright incentives: What factors motivate artists to create works? How do artists perceive the usefulness of copyright protection? Would artists continue their artistic careers in a world without copyright law? This article contains a systematic study regarding copyright incentives, based on industrial statistics and extensive interviews from the music industry in China, a virtual copyright-free environment featuring one of the highest piracy rates in the world and having forced dramatic transformation of music businesses.

The empirical research indicates three seemingly paradoxical phenomena: While 17.9% of all the musicians in the sample referred to economic benefits as at least part of their motivations for music creation, 97.4% specifically recognized money as being important and helpful for music creation; While 56.4% alleged that copyright piracy did not affect their creative motivations, 72% agreed that copyright piracy does affect music creation; While 53.8% explicitly admitted that they had little awareness or knowledge of copyright, 92.3% indicated that the current level of copyright protection is insufficient and 71.8% suggested that copyright law should provide strong incentives for music creation.

The empirical evidence itself provides compelling explanations for such paradoxes: Even though musicians primarily create music for music's sake, copyright law could still supply powerful incentive for music production in a way that not only caters to market demand, but also allows for broader artistic freedom. Copyright piracy that does not necessarily affect musicians' intrinsic motivations could nevertheless affect music creation in terms of the time spent on music creation, the volume of investment in music creation, and ultimately the quality of music creation. Most importantly,

* Assistant Professor of Law, University of New Hampshire School of Law; J.S.D. Candidate and Olin Fellow in Law and Economics, Stanford Law School. I am very grateful to Paul Goldstein, Mark A. Lemley, Lawrence M. Friedman, Deborah Hensler, A. Mitch Polinsky, Peter K. Yu, Glynn S. Lunney, Christopher Jon Sprigman, Ben Depoorter, Kristelia A. García, Guy A. Rub, and the participants in the Intellectual Property Scholars Conference, the Works-in-Process Intellectual Property Conference, and the Law and Economic Seminar at Stanford Law School for their insightful comments and suggestions. Of course, all errors remain my own. © 2014 Jiarui Liu.

copyright incentives do not function as a reward that musicians consciously bargain for and chase after but as a mechanism that preserves market conditions for gifted musicians to prosper, including a decent standard of living, sufficient income to cover production costs, and maximum artistic autonomy during the creative process.

- I. INTRODUCTION
- II. THE MUSIC INDUSTRY IN SHADOW
 - A. *Overview*
 - 1. Music Market
 - 2. Music Piracy
 - 3. Digital Music
 - B. *Revenue Streams*
 - 1. Music Royalties
 - 2. Performance
 - 3. Synchronization
 - 4. State Patronage
 - 5. Sponsorship and Advertisement
 - 6. Bundling
 - 7. Merchandizing
 - 8. Non-Musical Sources
 - C. *Changing Business Models*
- III. MUSICIANS ON COPYRIGHT
 - A. *Motivation for Creation*
 - 1. Self-expression
 - 2. Communication
 - 3. Peer Respect
 - 4. Popularity
 - 5. Economic Benefits
 - B. *Attitudes towards Piracy*
 - 1. Benefits of Piracy
 - 2. Costs of Piracy
 - C. *Copyright Awareness*
- IV. A THEORY OF COPYRIGHT AND INCENTIVE
 - A. *The Incentive Rationale*
 - B. *Economic Benefits versus Emotional Benefits*
 - C. *Incentive through Copyright*
 - D. *The Endowment Effect and Moral Rights*
 - E. *Cost Disease and Copyright Piracy*
 - F. *Copyright and Foreseeability*
- V. CONCLUSION

I. INTRODUCTION

Anglo-American copyright law is widely believed to follow the utilitarian tradition by providing necessary incentives for intellectual creation as a means to promote the end of social welfare.¹ However, there has been little consensus in copyright scholarship regarding how artists actually perceive and respond to copyright incentives. Commentators sometimes regard copyright law as a hypothetical bargain between artists and the general public: Copyright protection provides financial rewards necessary to induce creative works that otherwise would not have been created.² This approach appears to be based on the notion of a rational artist who strives to maximize the economic interests of her own: “No man but a blockhead ever wrote, except for money.”³ The hypothetical bargain has often been proffered to limit, rather than justify, the scope of copyright protection. For instance, in the context of the debate over copyright term extension, some critics contend that longer copyright protection is undesirable to the extent that the additional terms in the future, after being discounted to the present value, amount to negligible economic benefits for artists.⁴ Interestingly, the hypothetical bargain has recently been under attack from commentators who are skeptical of the traditional copyright institution. They advocate the notion of a romantic artist, believing most artists are not motivated by economic interests but “create art for art’s sake.”⁵ It follows that a world without copyright law could actually benefit

¹ See, e.g., *Sony corp. of America v. Universal City Studios*, 464 U.S. 417 (1984) (“The monopoly privileges that Congress may authorize are neither unlimited nor primarily designed to provide a special private benefit. Rather, the limited grant is a means by which an important public purpose may be achieved. It is intended to motivate the creative activity of authors...by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired.”); *Mazer v. Stein*, 347 U.S. 201 (1954) (“The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in ‘Science and useful Arts.’”); *United States v. Paramount Pictures*, 334 U.S. 131, 158 (1948) (“The copyright law, like the patent statutes, makes reward to the owner a secondary consideration”).

² See, generally, Arnold Plant, *Economic Aspects of Copyright in Books*, in *SELECTED ECONOMIC ESSAYS AND ADDRESSES* 57(1974); Robert M. Hurt & Robert M. Schuchman, *The Economic Rationale of Copyright*, 56 AM. ECON. REV. 421 (1966); Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970).

³ See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994) (quoting 3 JAMES BOSWELL, *LIFE OF JOHNSON* 19 (GEORGE HILL ED. 1934)).

⁴ See, e.g., *Eldred v. Ashcroft*, 537 US 186, 256 (2003) (BREYER J. dissenting).

⁵ See, e.g., Eric E. Johnson, *Intellectual Property and the Incentive Fallacy*, 39 FLA. ST. U. L. REV. 623 (2012); Diane Leenheer Zimmerman, *Copyrights as Incentives: Did We Just Imagine That?*, 12 THEORETICAL INQUIRIES L. 29 (2011); Rebecca Tushnet,

the public as a whole: Consumers would have greater access to low-price intellectual products and artists would continue to create for intrinsic motivations such as self-expression, communication, and reputation. The notion of a romantic artist, once forcefully rejected in the U.S. as the maximalist approach to importing moral rights and perpetual protection,⁶ is enlisted, ironically, to carry the minimalist agenda nowadays.

That being said, the merits of this proposed copyright-free world *vis-à-vis* the current copyright regime have yet to be seriously examined from an empirical perspective. While a small number of existing studies have analyzed the impact of file sharing on music sales in the United States, Canada and Europe,⁷ the findings are generally limited due to their narrow focus on developed countries with low levels of copyright piracy overall. The recent trend of escalating copyright enforcement in developed countries suggests that any proposition for a copyright-free world there will remain highly theoretical for the foreseeable future.⁸ However, China and similar emerging markets, where copyright piracy is rampant and effective copyright enforcement is nonexistent, may provide fertile ground for empirical research that documents the dramatic evolution of the music industry virtually in a copyright-free world. As a matter of fact, a few observers have begun to champion China as a model for the future of the music industry worldwide.⁹

Economies of Desire: Fair Use and Marketplace Assumptions, 51 WM. & MARY L. REV. 513 (2009).

⁶ See PAUL GOLDSTEIN, *COPYRIGHT'S HIGHWAY – FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 160 (2003); *Dastar Corp. v. Twentieth Century Fox Film Corp.* 539 U.S. 23, 37 (2003).

⁷ See, e.g., Felix Oberholze-Gee & Koleman Strumpf, *The Effect of Filing Sharing on Record Sales: An Empirical Analysis*, 115(1) J. POL. ECON. 1 (2007); Stan J. Liebowitz, *Filing Sharing: Creative Destruction or Just Plain Destruction*, 49 J.L. & ECON. 1 (2006); Rafael Rob & Joel Waldfogel, *Piracy on the High C's: Music Downloading, Sales Displacement, and social Welfare in a Sample of College Students*, 49 J.L. & ECON. 29 (2006).

⁸ For legislation that enhances copyright enforcement in the US and the EU, see e.g. the No Electronic Theft Act of 1997, HR 2265, P.L. 105-147, 111 Stat. 2678.; Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the Enforcement of Intellectual Property Rights (OJ L 157, 30.4.2004).

⁹ See Kevin Maney, *If Pirating Grows, It May Not Be The End of Music World*, USA TODAY, May 03, 2005, available at http://www.usatoday.com:80/tech/columnist/kevinmaney/2005-05-03-music-piracy-china_x.htm (quoting the chairman of IFPI, Jay Berman: “The business model for the record industry worldwide is moving toward resembling what we see in China today.”); Thomas Crampton, *In China Record Companies Find New Ways to Do Business : Pop Stars Learn to Live with Pirates*, INTERNATIONAL HAROLD TRIBUNE (February 24, 2003) available at http://www.iht.com/articles/2003/02/24/t1_55.php (indicating the reality in China “is beginning to draw attention in Europe and the United States, where music

This article studies how the Chinese music industry has adapted and evolved in the shadow of rampant copyright piracy, based on industrial statistics and extensive interviews with musicians, music labels, and collective management organizations.¹⁰ The research focuses on real-world artists instead of hypothetical rational or romantic artists and answers three key questions regarding copyright and incentive: What factors motivate artists to create works? How do artists perceive the usefulness of copyright protection? Would artists continue their artistic careers in a world without copyright law?

The findings herein illustrate that a high level of piracy could have profound effects on the profitability, business models, and creative processes of various musicians. Because the competition from low-price pirated works both online and offline undercuts stable income from copyright royalties, the entire music industry has become increasingly dependent on alternative revenue streams such as advertising, merchandizing, and performance.¹¹ Alternative revenue streams force many music companies to abandon traditional album contracts and operate in a way more like talent agencies that control all aspects of an artist's career.¹² Music companies are inclined to sign talent at a very young age with a long-term agency deal in order to exploit the full value of artists in the advertising market. In addition, the need to attract sponsorship opportunities puts more emphasis on non-musical qualities, such as a fresh appearance and healthy public image, which to some extent marginalizes pure musicians who have less value in alternative markets.

Most remarkably, as copyright piracy obstructs the communication of consumer preferences to musicians, an increasing number of musical works are created to accommodate the tastes of entrepreneurs (e.g., sponsors and advertisers) rather than those of average consumers, and this has caused a fundamental shift in the creative process of the music industry.¹³ Although entrepreneurs should arguably be willing to use whatever is popular among music fans to generate interests in their own products, the expectations of entrepreneurs and consumers do not always meet squarely in a dynamic market setting. For this reason, the interests of alternative artists and new artists are more likely to be compromised.

The empirical research also indicates three seemingly paradoxical

companies face falling revenue from compact disk sales as Internet piracy increases”).

¹⁰ The qualitative research in this paper principally consists of 53 in-depth interviews, conducted in 2010, with musicians, music executives and collecting societies in the Chinese music industry. For interview protocols, sampling techniques and other methodological introductions, *see* the Methodology Notes available upon request.

¹¹ *See infra* note 103 and accompanying text.

¹² *See infra* note 179 and accompanying text.

¹³ *See infra* note 190 and accompanying text.

phenomena: While 17.9% of all the musicians in the sample referred to economic benefits as at least part of their motivations for music creation, 97.4% specifically recognized money as being important and helpful for music creation.¹⁴ While 56.4% of all the musicians alleged that copyright piracy did not affect their creative motivations, 72% agreed that copyright piracy does affect music creation.¹⁵ While 53.8% of all the musicians explicitly admitted that they had little awareness or knowledge of copyright, 92.3% indicated that the current level of copyright protection is insufficient and 71.8% suggested that copyright law should provide strong incentives for music creation.¹⁶

The empirical evidence itself provides compelling explanations for such paradoxes: Even though musicians primarily create music for music's sake, copyright law could still supply powerful incentive for music production in a way that not only caters to market demand but also allows for broader artistic freedom.¹⁷ Copyright piracy that does not necessarily affect musicians' intrinsic motivations could nevertheless affect music creation in terms of the time spent on music creation, the volume of investment in music creation and ultimately the quality of music creation.¹⁸ Most importantly, copyright incentives do not function as a reward that musicians consciously bargain for and chase after but as a mechanism that preserves market conditions for gifted musicians to prosper, including a decent standard of living, sufficient income to cover production costs, and maximum artistic autonomy during the creative process.¹⁹

Section II starts with an overview of the music industry in China. It indicates how rampant copyright piracy profoundly affects revenue streams and transforms business models. Section III presents detailed empirical findings, based upon in-depth interviews with Chinese musicians, music executives, and collecting societies. These discussions are focused on three aspects including motivation for creation, attitude towards piracy, and copyright awareness. Section IV analyzes the interaction between the various economic and non-economic motivations that drive musicians. The analysis explains why copyright incentives could not only facilitate direct communication between musicians and audiences but also promote the diversity of new musical works even though most musicians create principally for intrinsic motivations. Section V concludes the article with a

¹⁴ See *infra* note 191 and accompanying text.

¹⁵ See *infra* note 279 and accompanying text.

¹⁶ See *infra* note 286 and accompanying text.

¹⁷ See *infra* note 349 and accompanying text.

¹⁸ See *infra* note 265 and accompanying text.

¹⁹ See *Id*; *Vernon v Bethell* (1762) 28 ER 838 (L. Henry) (“Necessitous men are not, truly speaking, free men, but, to answer a present exigency, will submit to any terms that the crafty may impose upon them.”).

summary of the main issues.

II. THE MUSIC INDUSTRY IN SHADOW

A. Overview

1. Music Market

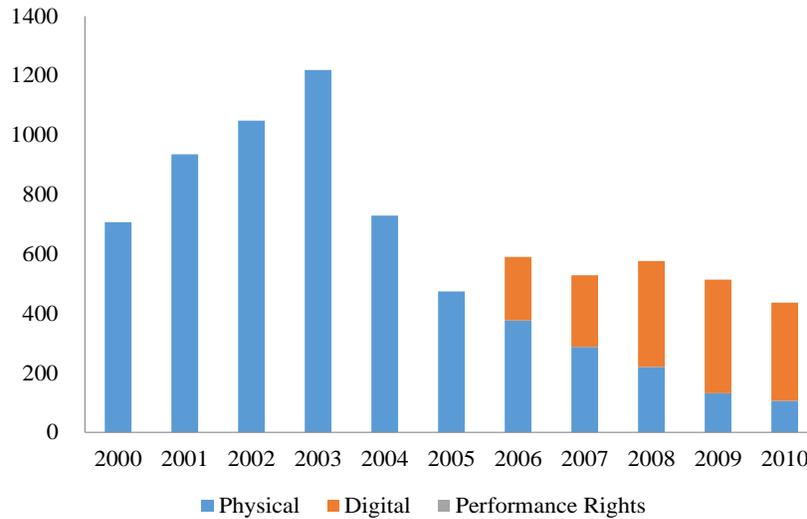
China, consistent with worldwide trends, has witnessed a significant slump in music sales, which have declined 38.3% since 2000 (**Exhibit 1**).²⁰ Although digital sales rapidly exceeded physical sales years ago, they are still not sufficient to offset the overall decline. However, these IFPI statistics have certain limitations. First, trade association sources are sometimes questioned for having an inclination to present statistics in a self-serving manner.²¹ Second, while the annual sales appear to rise and fall in a wider range, the fluctuation is mostly artificial, and reflects adjustments in methodologies. For instance, the temporary increase in 2001 is likely due to the inclusion of music videos in DVD and VCD formats, and the slight increase in 2006 results from the addition of digital sales for the first time.²² Disregarding such methodological factors, the actual decline in China could presumably be even larger. Third, the industrial statistics are only relevant to the impact of copyright piracy on the consumer demand for legitimate products. They are generally silent on supply side effect, e.g. the quantity of new music, which arguably contains more pertinent information from social welfare perspectives.

²⁰ See IFPI, *THE RECORDING INDUSTRY IN NUMBERS* (2000-2010).

²¹ See, e.g., Kai-Lung Hui & Ivan Png, *Piracy and the Legitimate Demand for Recorded Music*, 2 *CONTRIBUTIONS TO ECONOMIC ANALYSIS & POLICY* 11, 16 (2003) (indicating that the sales losses due to piracy should only account for about 50% of the industry estimates, even assuming a one-to-one displacement rate).

²² See IFPI, *THE RECORDING INDUSTRY IN NUMBERS* (2000-2010).

Exhibit 1
Recorded Music Trade Value Trend
(China: RMB Millions)

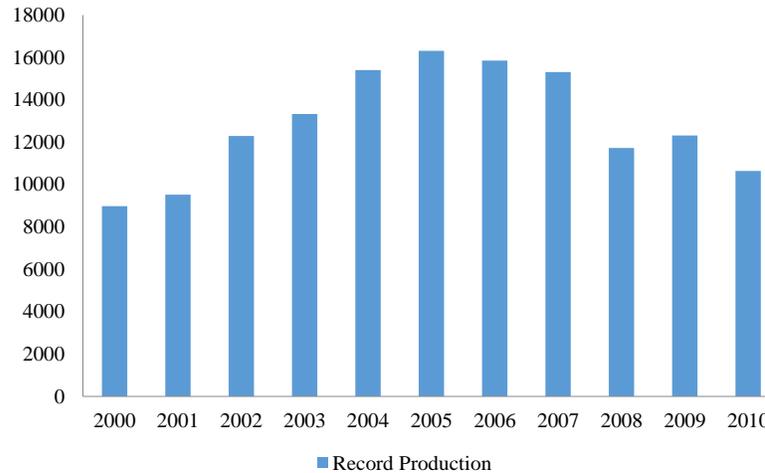


Therefore, this article is focused primarily on the supply trend as measured by the quantity of annual title releases, which presents a clearer and more meaningful picture than the demand trend.²³ **Exhibit 2** indicates how music production continued to increase from 2000 until peaking in 2005 and then turning into a downward trend through 2010. The level of new supply in 2010 (10639 titles) is approximately equivalent to the level ten years ago in 2001 (9529 titles), and 35% off the level in 2005 (16313 titles).²⁴

²³ See GAPP, *National Press and Publication Industries Basic Information* (2000-2010), available at <http://www.gapp.gov.cn/govpublic/> (It's unclear whether the data contains digital titles.).

²⁴ It needs to be cautioned that the official statistics from the Chinese government are also controversial sometimes. See, e.g., Richard Posner, *The Chinese Economy*, available at <http://www.becker-posner-blog.com/2013/05/the-chinese-economyposner.html> ("I'm mistrustful of Chinese statistics. Should we trust economic reporting by officials of a dictatorship? I think not."); Paul Krugman, *Hitting China's Wall*, available at <http://www.nytimes.com/2013/07/19/opinion/krugman-hitting-chinas-wall.html?partner=rssnyt&emc=rss> ("All economic data are best viewed as a peculiarly boring genre of science fiction, but Chinese data are even more fictional than most.").

Exhibit 2
Record Production Trend
(China: Titles)



Regardless of the overall trend in music production, it is safe to say that the Chinese music industry is seriously underdeveloped. For instance, the overall Chinese economy is 41% the size of the overall United States economy (**Exhibit 3**).²⁵ By contrast, the music industry in China is just 1.5% of the music industry in the U.S. (**Exhibit 4**).²⁶ China, the second largest economy in the world, is actually ranked 27th with regard to the music market, right behind Ireland, a nation with a total population 5% the size of the Chinese population. In this sense, the music industry in China is extremely disproportionate to the overall economy.²⁷

²⁵ See International Monetary Fund, *World Economic Outlook Database*, available at <http://www.imf.org/external/pubs/ft/weo/2013/01/weodata/index.aspx>.

²⁶ See IFPI, *THE RECORDING INDUSTRY IN NUMBERS (2000-2010)*.

²⁷ See *Id.*

Exhibit 3
GDP 2010
(US\$ Billions)

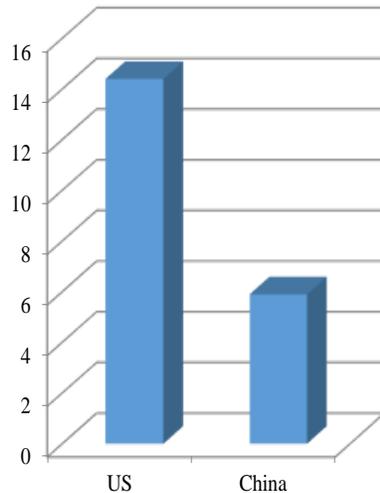
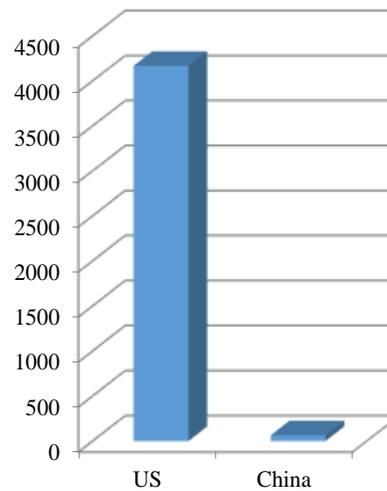


Exhibit 4
Music Sales 2010
(US\$ Millions)



The music industry in China also appears to be underdeveloped compared to the book industry in China, given that music sales are only equivalent to 1.4% of book sales (**Exhibit 5**).²⁸ In the U.S., music sales still amount to 54.5% of book sales (**Exhibit 6**).²⁹ The significant imbalance between the music and book industries does not result from any shortage of consumer enthusiasm for music as discussed below.³⁰

²⁸ See GAPP, *National Press and Publication Industries Basic Information* (2009), available at <http://www.gapp.gov.cn/govpublic/>.

²⁹ See US Census Bureau, *The 2012 Statistics Abstract*, available at http://www.census.gov/compendia/statab/cats/information_communications/publishing_industries.html.

³⁰ See *infra* note 67 and accompany text.

Exhibit 5
US 2009
 (US\$ Millions)

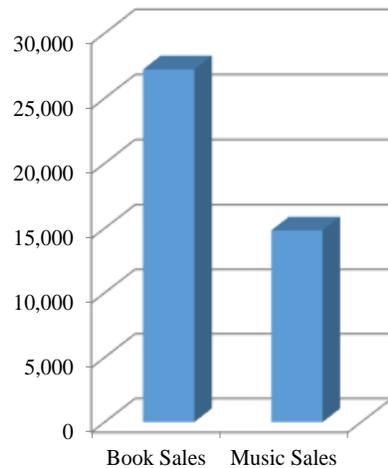
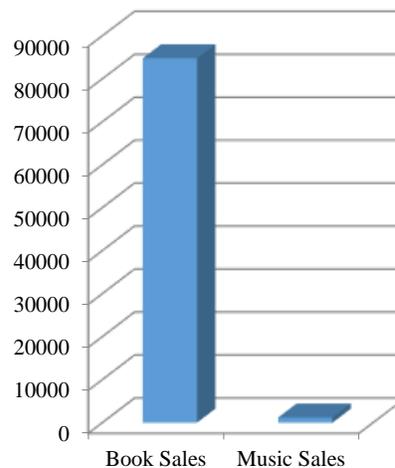


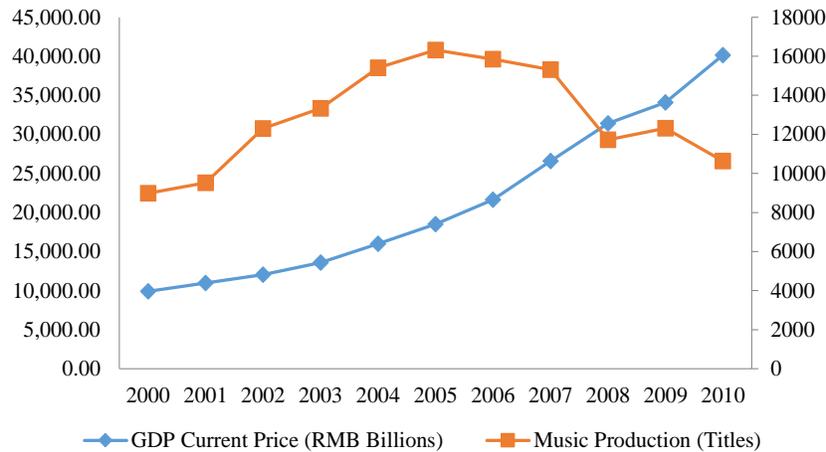
Exhibit 6
China 2009
 (RMB Millions)



The next questions are naturally what factors are hindering the growth of the music industry in China, and in particular, what caused the downturn of the music industry around 2005. First, it may be inferred from **Exhibit 7** that the overall economic environment has little to do with the stumbling music industry in China. Because the overall Chinese economy has been enjoying 10% growth almost every year since 2000, there is no reason to speculate that the decline in music sales is a consequence of the weakened buying power of Chinese consumers.³¹

³¹ See International Monetary Fund, *World Economic Outlook Database*, available at <http://www.imf.org/external/pubs/ft/weo/2013/01/weodata/index.aspx>.

Exhibit 7
GDP Growth & Record Production Trend
(China)



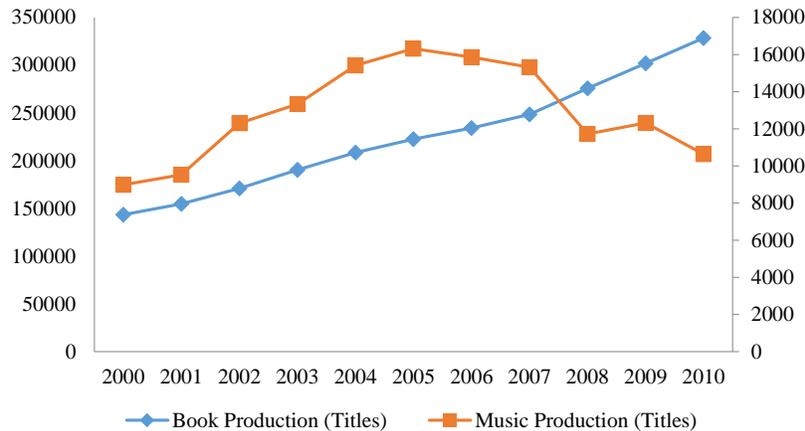
It may also be ruled out that the censorship system in China is principally responsible for the underdevelopment in the music industry.³² **Exhibit 8** indicates that, unlike the music industry, which has experienced a substantial decline since 2005, the book industry has continuously increased by 129% from 2000 to 2010. Given there is no obvious reason that the Chinese government would differentiate between books and music in terms of censorship levels,³³ we should turn to other reasons for the huge gap between their growth rates. A more convincing explanation appears to be that the piracy level of books is far lower than the piracy level of other forms of copyrighted works, including music.³⁴

³² China introduces a unique censorship system for all kinds of publication, including books, newspapers, journals, movies and music. Reproduction, distribution and importation of new products as well as establishment of new companies in those industries are subject to extensive scrutiny by governmental authorities. The United States filed a WTO complaint against the censorship system in China. *See* WTO, DISPUTE DS363: China — Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, available at http://www.wto.int/english/tratop_e/dispu_e/cases_e/ds363_e.htm.

³³ Legally speaking, the censorship criteria are identical for books and music. Compare Article 26 of the Administrative Regulation for Publication and Article 3 of the Administrative Regulation for Audio and Video Products, available at <http://www.gapp.gov.cn/cms/html/21/396/List-1.html>.

³⁴ *See infra* note 40 and accompanying text.

Exhibit 8 Book Production Trend & Record Production Trend (China)



2. Music Piracy

The piracy problem in China has been in the spotlight since the early 1990s as a result of the still ongoing Sino-U.S. intellectual property disputes.³⁵ The United States Trade Representative (USTR) had listed China as one of the “Priority Foreign Countries” three times in the annual Special 301 report (respectively in 1991, 1995 and 1996), followed by imminent threats of unilateral trade sanctions.³⁶ Each time, however, the two countries managed at the last minute to avoid a trade war by reaching an agreement in which China undertook to take further legislative and enforcement initiatives to improve intellectual property protection, and the U.S. agreed to withhold sanctions for the time being. Although the threat of unilateral retaliation has rarely been used since China joined the World

³⁵ For a chronicle of the Sino-US intellectual property dispute, *see* PAUL GOLDSTEIN & JOSEPH STRAUS, *INTELLECTUAL PROPERTY IN ASIA* 32 (2009).

³⁶ *See* Trade Act of 1974, § 301, Pub. L. No. 93-618, 88 Stat. 1978 (1974) (codified as amended at 19 U.S.C. § 2411-20 (1994 & Supp. IV 1998)). Under Special 301 provisions, USTR will identify those countries that deny adequate and effective protection for intellectual property or deny fair and equitable market access for intellectual property producers. Countries whose intellectual property policies or practices are considered most egregious and having the most significant impact on the relevant US industries will be designated as “Priority Foreign Countries”, followed by further investigation and possible trade sanctions. In addition, USTR has created a “Priority Watch List” and a “Watch List” under Special 301 provisions. Placement of countries on such lists indicates that they are the focus of increased bilateral attention with respect to intellectual property protection.

Trade Organization (“WTO”) in 2001,³⁷ China has still topped the “Priority Watch List” in the USTR Special 301 report most years, inciting the U.S. to file a WTO complaint against China’s non-compliance with the TRIPS Agreement.³⁸

The ubiquity of the piracy problem in China is apparent from the annual country-by-country review for the USTR Special 301 report.³⁹ As indicated by **Exhibit 9** below, the level of music piracy in China has consistently ranged between 85% and 90%. Other major copyright industries in China, including motion picture, business software, and video games, have also been plagued by rampant piracy and subjected to similar piracy rates of 80% to 99%.⁴⁰ To call this situation a copyright-free world is hardly an overstatement given that four in five of all copyrighted works in the marketplace are potentially pirated.

Exhibit 9

Levels of Piracy and Estimated Trade Losses Due to Piracy (China: US\$ Millions)

	Industry	Motion Pictures	Music	Business Software	Entertainment Software	Books	Totals
2007	Loss	NA	451.2	2472.0	NA	52.0	2975.2
	Level	NA	90%	80%	95%	NA	
2006	Loss	NA	206.0	1949.0	NA	52.0	2207.0
	Level	NA	85%	82%	NA	NA	
2005	Loss	244.0	204.0	1554.0	589.9	52.0	2643.9
	Level	93%	85%	86%	92%	NA	
2004	Loss	280.0	202.9	1488.0	510.0	50.0	2530.9
	Level	95%	85%	90%	90%	NA	
2003	Loss	178.0	286.0	1787.0	568.2	40.0	2859.2
	Level	95%	90%	92%	96%	NA	
2002	Loss	168.0	48.0	1637.3	NA	40.0	1893.3
	Level	91%	90%	92%	96%	NA	
2001	Loss	160.0	47.0	714.6	455.0	130.0	1506.6

³⁷ For more detail on China’s accession to WTO, *see generally* Raj Bhala, *Enter the Dragon: An Essay on China’s WTO Accession Saga*, 15 AM. U. INT’L L. REV. 1469 (2000); Karen Halverson, *China’s WTO Accession: Economic, Legal, and Political Implications*, 27 B.C. INT’L & COMP. L. REV. 319 (2004).

³⁸ The WTO panel report, which partly upheld the US claims, was issued on January 26, 2009, available at http://www.wto.int/english/tratop_e/dispu_e/cases_e/ds362_e.htm.

³⁹ *See* IIPA, *2008 Special 301 Submission, People’s Republic of China (PRC)*, available at <http://www.iipa.com/rbc/2008/2008SPEC301PRC.pdf>. The piracy level has not been presented after 2007.

⁴⁰ Notably, the piracy problem in the Chinese book market does not appear to be as serious as other sectors of the copyright industries. For instance, trade losses in the book market due to piracy was merely 11.5% of those in the music market and 2% of those in the business software market in 2007.

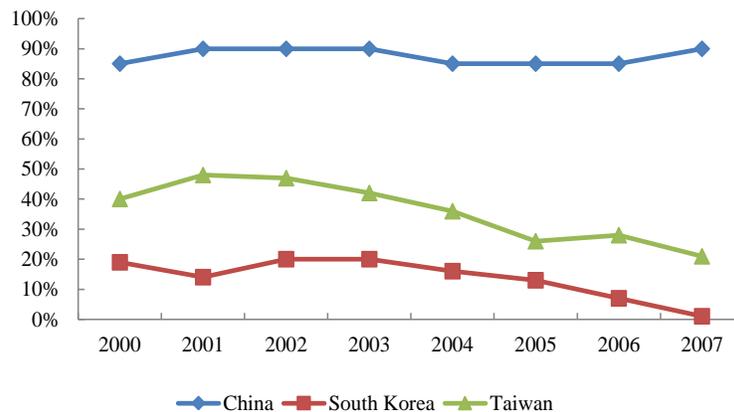
	Level	88%	90%	93%	92%	NA	
2000	Loss	120.0	70.0	765.2	NA	130.0	1085.2
	Level	90%	85%	93%	99%	NA	

A horizontal comparison may shed more light on the magnitude of the piracy problem in China: The overall level of music piracy in the world is slightly above 30%.⁴¹ In such advanced markets as the U.S., Japan, and Western Europe, the levels of music piracy are estimated to be lower than 10%.⁴² Even among emerging markets, China probably suffers one of the highest levels of music piracy: the average level of music piracy was 88% in China, 14% in South Korea and 36% in Taiwan (**Exhibit 10**).⁴³

Exhibit 10

Music Piracy Rates

(China, Taiwan & South Korea)



The recent surge of online piracy adds to the continuing struggle of copyright enforcement in China.⁴⁴ Unlike the U.S., where P2P file sharing is apparently the principal source of illegal music files,⁴⁵ China is confronted with a wider variety of infringements; and search engines play a more significant role in breeding online piracy than do P2P services. The

⁴¹ See IFPI, THE RECORDING INDUSTRY PIRACY REPORT 3 (2005), available at <http://www.ifpi.com/content/library/piracy2005.pdf>.

⁴² *Id.*

⁴³ See IIPA, 2008 Special 301 Submission, South Korea & Taiwan, available at http://www.iipa.com/rbc/2008/2008SPEC301SOUTH_KOREA.pdf (please note that 2007 figures are absent and 2008 figures are used as proxy) and <http://www.iipa.com/rbc/2008/2008SPEC301TAIWAN.pdf>.

⁴⁴ Previous data quoted from IIPA and IFPI are focused on physical piracy (e.g. pirated CDs) rather than online piracy (e.g. file sharing).

⁴⁵ See, e.g., *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); *MGM Studios, Inc. v. Grokster, Ltd.* 545 U.S. 913 (2005).

majority (83.6%) of online music users obtain music through music search engines (**Exhibit 11**).⁴⁶ Among all Chinese search engines, Baidu MP3 is unquestionably the market leader and occupies 48.4% of the total market in terms of annual music revenue (**Exhibit 12**).⁴⁷

Exhibit 11

Major Channels to Access Music by Online Music Users (China)

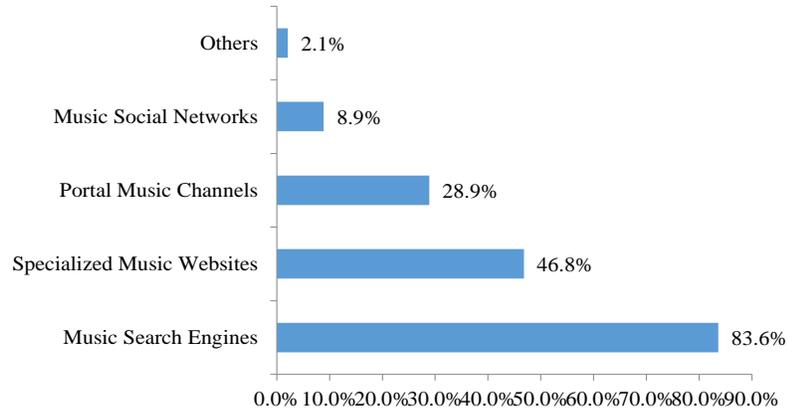
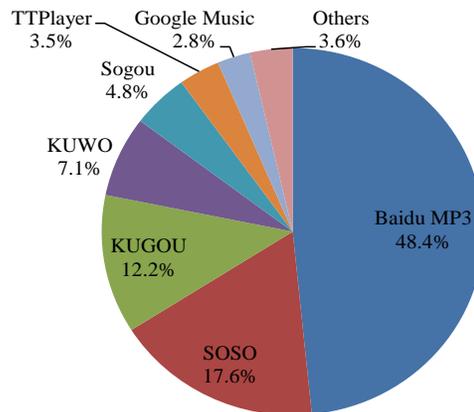


Exhibit 12

Music Search Engine Market Shares by Revenue (China)



Baidu offers an online music service called “Baidu MP3”⁴⁸, based

⁴⁶ See MINISTRY OF CULTURE, CHINA DIGITAL MUSIC MARKET ANNUAL REPORT 13 (2010).

⁴⁷ See *Id.*

⁴⁸ See <http://mp3.baidu.com>. Baidu has recently restructured the services after settling copyright actions with several music labels.

on a business model of deep-linking illegal music files situated on third party websites. Once a user enters a search keyword (e.g. artist name, song title, or album title), Baidu MP3 generates a list of search results that designates available music files organized by such criteria as song title, artist name, album title, lyrics, file format, file size and download speed. By clicking on any of the search results, the user may directly download or stream the music file via a pop-up window embedding the hyperlink to the actual IP address. Alternatively, a user may choose from pre-determined search terms, which normally consist of artist names or song titles. Those pre-determined search terms are categorized into various charts and hot lists, based on their popularity, genre, release year, language, and places of origin (e.g., Hong Kong, Taiwan, and western countries).⁴⁹ By browsing such charts and hot lists, a user could reach similar search results without having to formulate search keywords by herself.

Such a business model enables Baidu MP3 to offer a massive repertoire of music tracks that may drastically dwarf any legitimate music services offered online or offline. On any given day, the kinds of different music tracks (e.g. varieties rather than copies of music files) available on Baidu MP3 reach more than 8,900,⁵⁰ and the number of music search requests amounts to 11.6 million.⁵¹ According to a recent survey,⁵² users of Baidu MP3 downloaded a total of 80 billion copies of music tracks in 2006 and 2007⁵³ (i.e. 8.9 million copies per track), which was 192 times larger than the overall legitimate music market in China during the same period.⁵⁴ Baidu is by no means unique in its involvement in piracy, however. Almost all major search engines in China are engaged in similar online music services without proper copyright license, save Google, which merely possesses a 2.8% market share.⁵⁵

Unparalleled involvement of major market players results in an unparalleled level of online piracy. To put this into perspective, among 457 million Chinese Internet users, 79.2% downloaded music files online and

⁴⁹ See <http://list.mp3.baidu.com/list/topmp3.html?id=1>.

⁵⁰ The number is manually calculated based on the All-Repertoire list in Baidu MP3, available at <http://list.mp3.baidu.com/song/A.htm?id=1?top8>.

⁵¹ See iRESEARCH, CHINA ONLINE MUSIC RESEARCH REPORT 43 (2007), available at http://www.iresearch.com.cn/html/consulting/digital_music/Charge_classid_29_id_1052.html.

⁵² See SINOTRUST, ONLINE MUSIC DOWNLOAD BEHAVIOR RESEARCH REPORT 15 (2008) (unpublished, on file with the author).

⁵³ In other words, each user of Baidu MP3 averagely downloaded 840 copies in 2006 and 2007.

⁵⁴ For the overall size of the legitimate music market in China, see IFPI, RECORDING INDUSTRY IN NUMBERS (2007 & 2008).

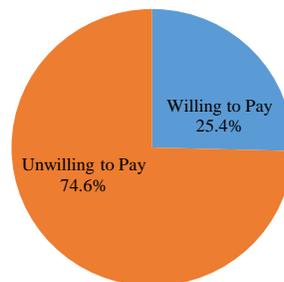
⁵⁵ See *supra* note 46 and accompanying text.

66.2% downloaded them from various search engines while it is estimated that 99% of online music files in China are pirated.⁵⁶ By contrast, even when the usage of P2P file sharing peaked in the U.S. in 2003, only 30% of American Internet users downloaded illegal music files (i.e. less than half of the percentage of Chinese Internet users who did so);⁵⁷ and only 850 million files were downloaded per month (i.e., one fourth of the downloads from Baidu alone).⁵⁸ The level of online piracy in China appears even more shocking considering that the legitimate market in the U.S. is almost a hundred times larger than that in China.⁵⁹

Widespread piracy has probably caused consumers to undervalue musical works. A recent study shows that, although 96.8% of Chinese music users enjoy online downloading or streaming,⁶⁰ 74.6% of online music users are unwilling to pay for music (**Exhibit 13**);⁶¹ More interestingly, only 5.9% of online music users actually pay for music access,⁶² while only 10 out of over 7,000 music websites are properly licensed (**Exhibit 14**).⁶³

Exhibit 13

Online Music User Willingness to Pay (China)



⁵⁶ See IFPI, RECORDING INDUSTRY IN NUMBERS (2007 & 2008).

⁵⁷ See Pew Internet & American Life Project, *Music and Video Downloading Moves Beyond P2P*, available at http://www.pewinternet.org/PPF/r/153/report_display.asp.

⁵⁸ See NPD, *RIAA Lawsuits Appear to Reduce Music File Sharing*, available at http://www.npd.com/press/releases/press_030825.htm.

⁵⁹ See *supra* note 26 and accompanying text.

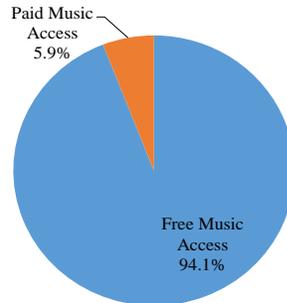
⁶⁰ See MINISTRY OF CULTURE, CHINA DIGITAL MUSIC MARKET ANNUAL REPORT 11 (2010).

⁶¹ See MINISTRY OF CULTURE, CHINA DIGITAL MUSIC MARKET ANNUAL REPORT 21 (2009).

⁶² See, IRESEARCH, CHINA DIGITAL MUSIC ANALYSIS REPORT 22 (2009-2010).

⁶³ See IRESEARCH, CHINA ONLINE MUSIC RESEARCH REPORT 25 (2007). By contrast, in the mobile market, the majority (63.5%) of Chinese music users pay for music consumption. See IRESEARCH, CHINA MOBILE MUSIC USER RESEARCH REPORT 16 (2010).

Exhibit 14
Online Music User Paying Experience
(China)



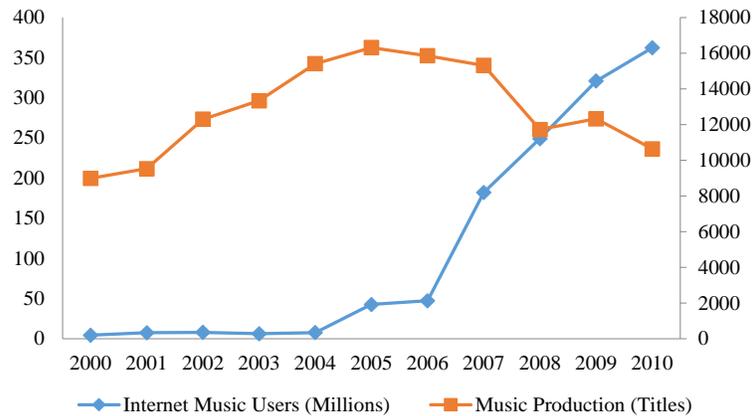
It is therefore unsurprising that the music industry in China closely correlates with the usage of online music, which is currently dominated by rampant copyright piracy.⁶⁴ **Exhibit 15** indicates that the number of online music users surged in 2005, and music production promptly started declining the following year.⁶⁵ The increasing popularity of online music usage diverts consumer demand for legitimate music and undermines the incentives to invest in new music production. None of the major digital music services, including iTunes, Amazon, and Spotify, have entered into the Chinese market. The Chinese counterparts, i.e. A8, Aigo, and Top100, have all shut down their music services, even after having initially imitated international models.⁶⁶

⁶⁴ See *supra* note 56 and accompanying text.

⁶⁵ A linear regression shows statistical significance at the 0.10 level ($p=0.062$).

⁶⁶ See MINISTRY OF CULTURE, CHINA DIGITAL MUSIC MARKET ANNUAL REPORT 19 (2011).

Exhibit 15
Online Music Usage & Music Production Trend
(China)



3. Digital Music

Copyright piracy in particular has a significant impact on the development of the Chinese digital music market, which supposedly assumes an increasingly important role for the livelihood of modern musicians.

According to the annual report released by the China Internet Network Information Center (“CNNIC”), the total number of Chinese Internet users has grown from 22.5 million in 2000 to 457 million in 2010.⁶⁷ They account for 23.2% of all Internet users in the world and 34.3% of the total population in China. Additionally, 98.3% of Chinese Internet users are connected through broadband, which has paved the way for online content services including music, video and games. As a result, the number of Internet music users has increased from 4.3 million in 2000 to 362 million in 2010, and represents 79.2% of all Chinese Internet users (**Exhibit 16**). Internet music is the second most popular Internet application in China in 2010 (**Exhibit 17**) and has been the most popular for the three previous years (**Exhibit 18**).

⁶⁷ See CNNIC, CHINA INTERNET DEVELOPMENT STATISTICS REPORT (2000-2010) <http://www.cnnic.net.cn/hlwfzyj>.

Exhibit 16
Internet Music Users as a Proportion of Total Internet Users
(China: Millions)

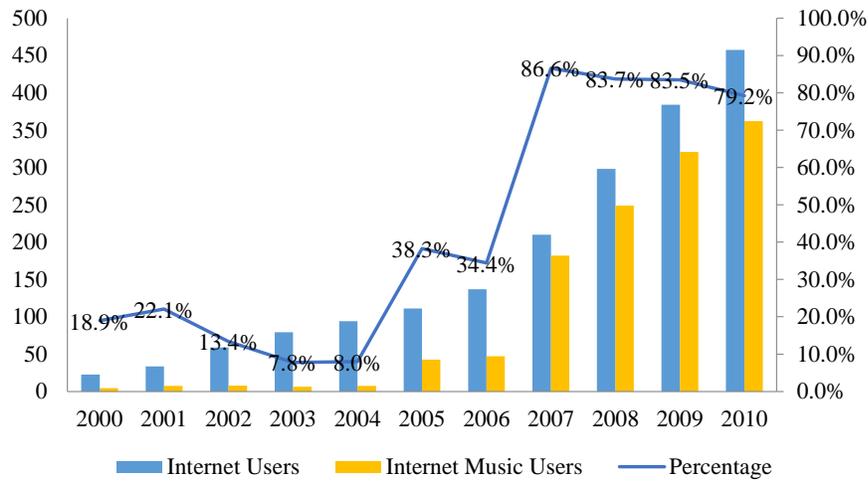


Exhibit 17
Internet Application Rankings
(China)

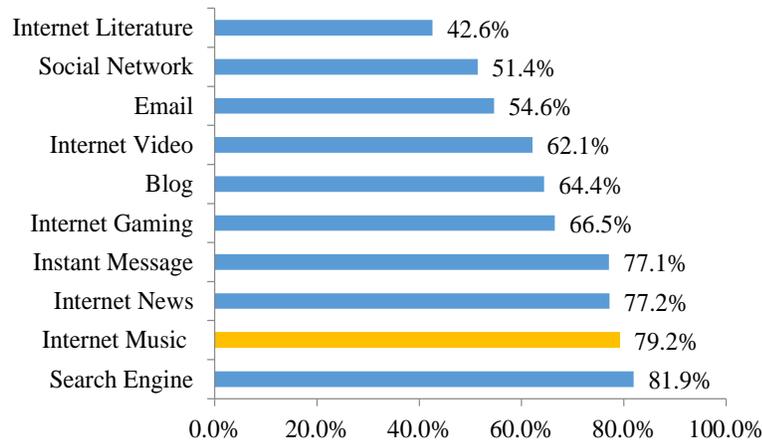
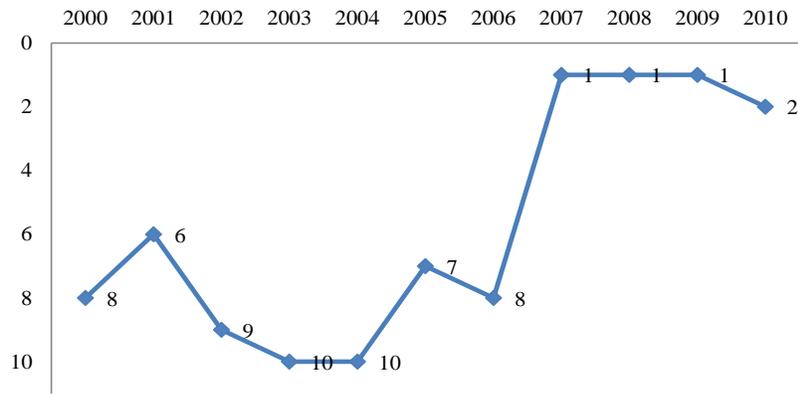
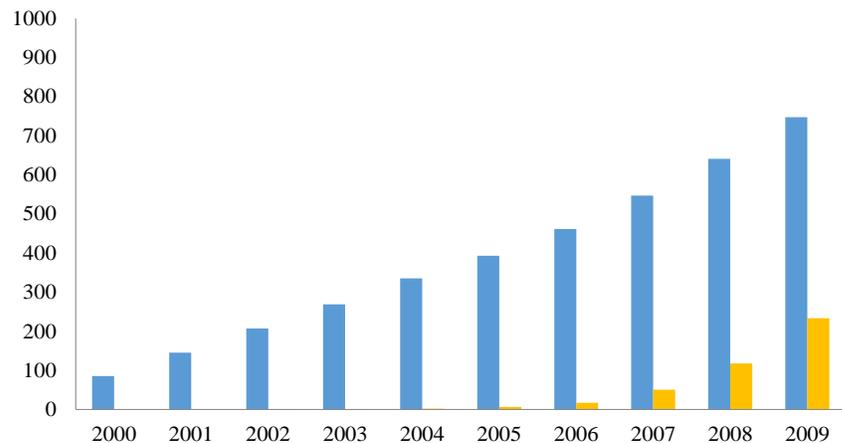


Exhibit 18
Internet Music Ranked among all Internet Applications
(China)



Meanwhile, the total number of mobile phone users in China has increased ten-fold from 85 million in 2000 to 859 million in 2010, accounting for 64% of the Chinese population.⁶⁸ Among these users, 303 million (35.3%) use mobile phones to access the Internet (**Exhibit 19**) and downloading and streaming music has become the fourth most popular Internet application among mobile phone users (**Exhibit 20**).⁶⁹

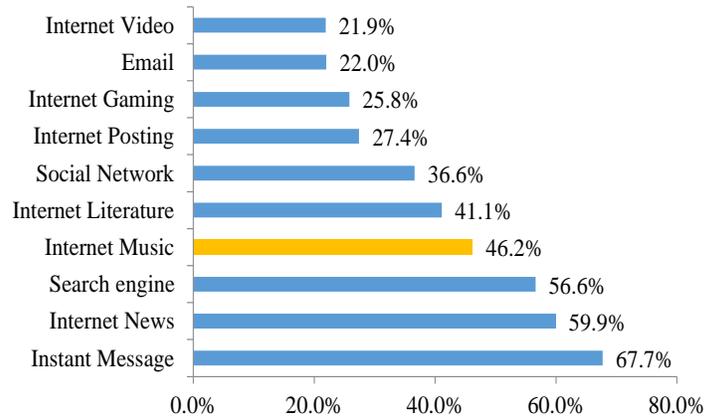
Exhibit 19
Mobile Internet Users as a Proportion of Mobile Phone Users
(China)



⁶⁸ See the chart available at http://tupian.baik.com/a1_45_33_01300001174781131642332074461_gif.html for the relevant mobile usage statistics.

⁶⁹ See CNNIC, CHINA INTERNET DEVELOPMENT STATISTICS REPORT (2000-2010) <http://www.cnnic.net.cn/hlwfzyj>.

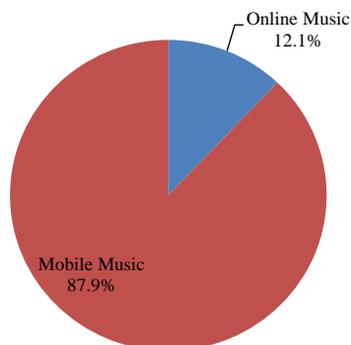
Exhibit 20
Mobile Application Rankings
(China)



Despite the enormous and ever-growing consumer base, the Chinese digital music market has experienced a remarkable imbalance in its development. Digital music usually takes two different forms depending on its distribution channels: (i) online music, which is distributed to end users through normal Internet access, e.g. computers connected via broadband; and (ii) mobile music, which is distributed to end users through wireless networks. While the digital market reaches RMB 2.3 billion (US\$ 376 million) in 2010, the online market accounts for RMB 2.8 billion (US\$ 45.7 million) and the mobile market accounts for RMB 20.2 billion (US\$ 329.9 million). The mobile market, albeit not substantial by itself, is around seven times larger than the online market (**Exhibit 21**).⁷⁰

⁷⁰ See MINISTRY OF CULTURE, CHINA DIGITAL MUSIC MARKET ANNUAL REPORT 1 (2010) (indicating the digital music market size is measured with the revenue of various service providers).

Exhibit 21
Digital Music Market – Service Providers
(China: RMB Billion)



Notably, the above statistics may not accurately measure the revenue stream of the music industry from digital music. The reason stems from the structure of the Chinese digital music market, which involves three key players: (i) content providers, i.e. musicians, music companies, and other copyright owners in the music industry; (ii) service providers, who aggregate music products, package music programs, and offer their products to consumers and retailers; and (iii) network providers, i.e. Internet access providers for online music and wireless network operators for mobile music. Chinese network providers are particularly involved in the mobile market, by controlling the platforms for music distribution and the means to collect payments from consumers.

On the one hand, the market size calculated above may *overestimate* the revenue of the music industry because they include all of the revenue of service providers, who only share a portion of their revenue with copyright owners.

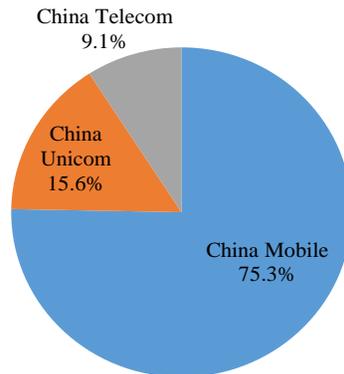
On the other hand, the above statistics may arguably *underestimate* the market size if all the money that music users pay for access to mobile music is taken into account. A Chinese user must typically make two kinds of payments if she desires to access digital music (e.g. ringback tones) via her mobile phone: First, she must pay a membership fee to activate the music function in her phone. The membership fee entirely goes to wireless network operators, who do not share a penny with copyright owners. The total revenue from membership fees reaches RMB 27.9 billion (US\$ 4.56 billion) in 2010.⁷¹ Second, the user must additionally pay a usage fee for actual music consumption (subscription or *a-la-carte*), which are shared

⁷¹ See MINISTRY OF CULTURE, CHINA DIGITAL MUSIC MARKET ANNUAL REPORT 23 (2010).

among wireless network operators, service providers and content providers. Where wireless network operators procure music products from service providers, wireless network operators generally retain 15% of the usage fee and service providers share the remaining 85% with content providers (typically by 40%/45%). Where wireless network operators directly contract with content providers bypassing service providers, they may share the usage fee by 50%/50%.⁷² Three stated-owned companies dominate the wireless network operator market; no other operator has received the necessary license from the Chinese government to enter into the market (**Exhibit 22**).⁷³ The three companies use their market power to squeeze the profit margins of service providers by asking the latter to accommodate large discounts and frequent awards to attract new members.⁷⁴ To the extent that the membership fee is taken into account, the mobile market is almost 100 times larger than the online market and the revenue of copyright owners appears to account only for 4% of the total Chinese digital music market, as **Exhibit 23** indicates.

Exhibit 22

Wireless Network Operator Market Shares by Mobile Music Users (China)

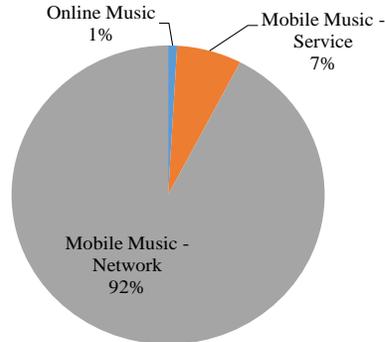


⁷² See *Id.*, at 26.

⁷³ See IIMEDIA, CHINA WIRELESS MUSIC MARKET ANNUAL RESEARCH REPORT 41 (2012).

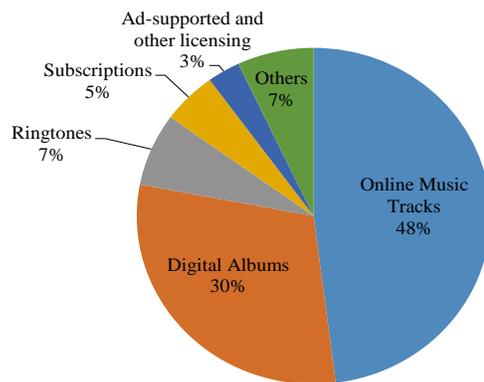
⁷⁴ See IRESEARCH, CHINA DIGITAL MUSIC ANALYSIS REPORT 60 (2009-2010).

Exhibit 23
Digital Music Market – Network Providers Included
(China: RMB Billions)



The Chinese digital music market dramatically contrasts with the digital market in the U.S. because of their different structures. **Exhibit 24** indicates that the online market, including online tracks and digital albums, accounts for almost 80% of the total digital music revenue in the U.S. Ringtones, the typical application in the mobile market, only accounts for 7% of the total digital music revenue in the U.S.⁷⁵

Exhibit 24
Digital Music Market
(US)

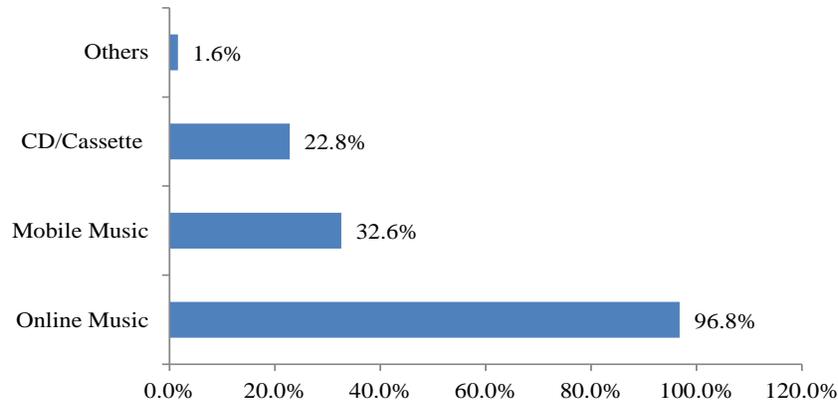


The limited size of the online market does not result from a shortage in consumer demand for music. As a matter of fact, the Internet is the most popular channel to access music among the Chinese public. Although the online market is negligible compared to the mobile market, 96.8% of Chinese music users obtain music through online channels, three times

⁷⁵ See IFPI, RECORDING INDUSTRY IN NUMBERS 37 (2011).

those who obtain music through mobile channels (**Exhibit 25**).⁷⁶ In other words, Chinese music users appear to pay the least for the most useful services.

Exhibit 25
Major Channels for Music Access
(China)



The Chinese Ministry of Culture points to the following reasons in explaining why the online market has yet to transfer the extraordinarily large consumer bases into effective market demand: First, consumers lack the willingness to pay for online music; Second, unauthorized resources diminish consumer incentives to pay for music. They are essentially two sides of the same coin. Because users are able to access abundant pirated music for free, they see no reason to purchase legitimate music and thus never establish habits to pay for music. The Chinese government appears to concede that uncontrolled copyright piracy has hindered the development of the online market.⁷⁷

By contrast, the rapid development in the mobile market benefits mostly from ringback-tone sales, which account for 79.2% of mobile music transactions (**Exhibit 26**).⁷⁸ Unlike mastertones and full-length tracks, ringback tones are technically not stored in mobile phone terminals, but firmly controlled by a centralized platform. As a result, average consumers are unable to access ringback tones from any sources other than wireless network operators. Despite their low quality and short length of approximately 30 seconds, ringback tones have developed into the most lucrative revenue source in the digital market due to effective technical

⁷⁶ See MINISTRY OF CULTURE, CHINA DIGITAL MUSIC MARKET ANNUAL REPORT 11 (2010).

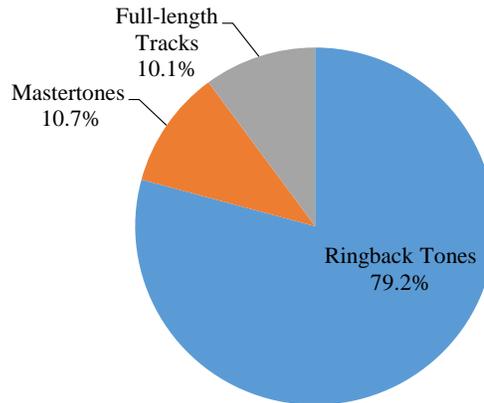
⁷⁷ See MINISTRY OF CULTURE, CHINA DIGITAL MUSIC MARKET ANNUAL REPORT 9 (2010).

⁷⁸ See *Id.*

measures against piracy.

Exhibit 26

Central Music Platform Product downloading Shares – China Mobile (China)



Besides, copyright piracy apparently affects the configuration of the digital market: Only 15.1% of Chinese consumers in the online market favor domestic music rather than the musical works from outside of mainland China (**Exhibit 27**);⁷⁹ By contrast, domestic music accounts for a much larger percentage (29%) in the mobile market (**Exhibit 28**).⁸⁰ The reason appears to be that the profitability of the mobile market is significantly higher due to limited copyright piracy in the environment.⁸¹ Therefore, domestic companies attach far more importance to developing music products suitable for ringback tones.

⁷⁹ See IRESEARCH, CHINA ONLINE MUSIC RESEARCH REPORT 60, 61(2007), available at http://www.iresearch.com.cn/html/consulting/digital_music/Charge_classid_29_id_1052.html.

⁸⁰ See IIMEDIA, CHINA WIRELESS MUSIC MARKET ANNUAL RESEARCH REPORT 39 (2012).

⁸¹ See *supra* note 73 and the accompanying text.

Exhibit 27
Origins of Pop Music that Online Music Users Favor
(China)

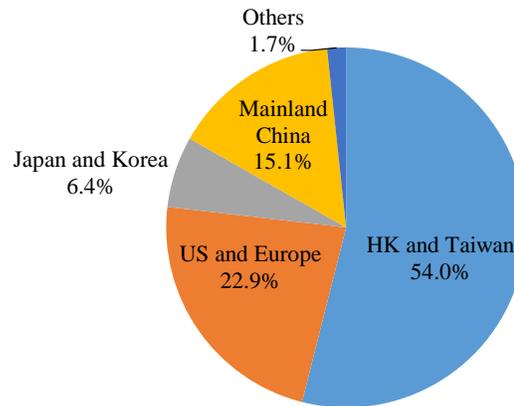
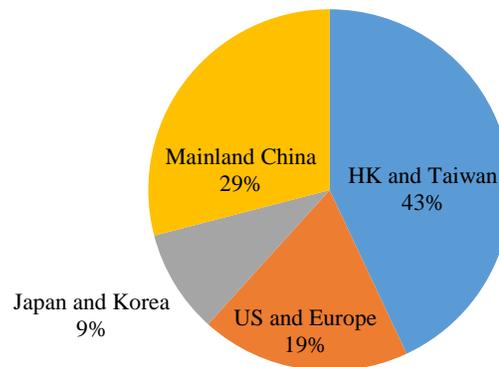


Exhibit 28
Origins of Pop Music that Mobile Music Users Favor
(China)



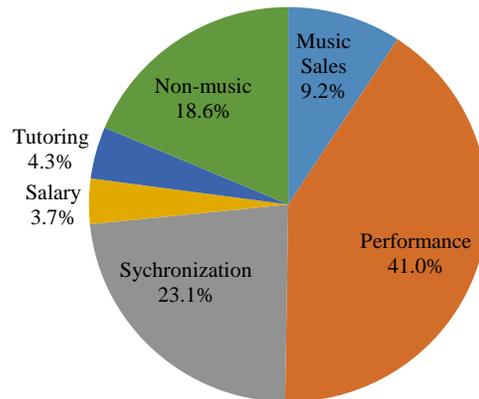
B. Revenue Streams

As indicated above, a high level of copyright piracy leads to significant undervaluation of musical works in the Chinese market.⁸² Consumers are now predominantly exposed to free music from illegal sources in the digital environment. Relying solely on record sales ceases to be a viable business model when consumers are accustomed to paying very little (if anything) for musical works. Musicians have to look at other ways to make a living.

⁸² See *supra* note 63 and accompanying text.

Exhibit 29 below illustrates the relative magnitude of various revenue streams as a percentage of the total income for the musicians who were willing to provide detailed breakdowns of their financial sources.⁸³ Remarkably, music sales are not even among the top three, which are performance, synchronization and non-music sources.

Exhibit 29
Sources of Income for the Musicians
(China)



The Artist Revenue Streams project launched by the Future of Music Coalition (“FMC”) contains comparable financial statistics for U.S. musicians in 2011 (**Exhibit 30**).⁸⁴ Several similarities exist between the diagrams of the two countries: First, musician revenue streams are highly diversified. Second, performance generates the largest revenues for musicians. Third, merchandizing has yet to develop into a meaningful source of income. Nevertheless, there are several notable differences: First, the U.S. chart is focused exclusively on music-related revenues and does not include any non-music sources. Second, copyright interests appear to account for 20% of all the income for U.S. musicians (categorized as Recording, Composing, and Session in **Exhibit 30**) but only 9% for Chinese musicians.⁸⁵ Third, synchronization is a much larger source of revenue in

⁸³ 79% of the musician participants agreed to supply the detailed information of their financial sources.

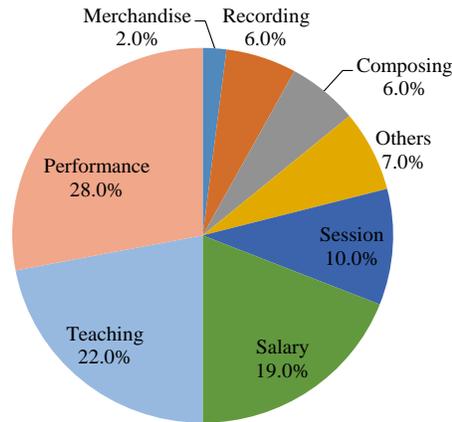
⁸⁴ See The Future of Music Coalition, *Artist Revenue Streams*, available at <http://money.futureofmusic.org>. The major findings are also presented in Peter DiCola, *Money from Music: Survey Evidence on Musicians’ Revenue and Lessons about Copyright Incentives*, 55 ARIZ. L. REV. 301 (2013).

⁸⁵ The importance of copyright royalties in the US appear to exhibit a declining trend since 2003 when the royalties were allegedly the second largest revenue stream for

China (23.1%) than in the U.S. (<6%, which is unidentified but apparently blended into the Composing category). Finally, the market share for music teaching appears relatively limited in China (4.3% as opposed to 22% in the U.S.), which may be troubling for China because this market size usually correlates with the pool of young people who are interested in music and may potentially become future generations of musicians.

Exhibit 30

Sources of Income for the Musicians (US)



This section provides detailed discussions for several revenue streams, including music sales, performance, synchronization, state patronage, non-music, bundling, merchandising, and sponsorship. These revenue streams include those that are important to musicians and those that are more relevant to companies than musicians individually.

1. Music Royalties

Consistent with the overall trend in the music industry mentioned above,⁸⁶ the importance of music sales has dramatically decreased as a source of income for individual musicians and music companies. Among all the musicians observed, only 15% indicated they received 30% or more of

musicians after performance. See Mary Madden, *Artists, Musicians and the Internet*, THE PEW INTERNET & AMERICAN LIFE PROJECT, at 46, available at http://www.pewinternet.org/~media/Files/Reports/2004/PIP_Artists.Musicians_Report.pdf. See, also, Joan Jeffri, Eric Oberstein and Trevor Reed, *Taking Note: A Study of Composers & New Music Activity in the U.S.*, at 28, available at <http://artsandcultureresearch.org/images/rcacimages/taking%20note.pdf> (“Professional composers earned approximately 19% of their income from composing”).

⁸⁶ See *supra* note 23 and accompanying text.

their incomes from copyright royalties,⁸⁷ while 56% received almost no copyright royalties for their albums. The musicians on average received as little as 9% of their incomes from the sales. Several musicians explained that, as a common practice in the business, their albums were routinely bought out for modest lump-sum payments that barely covered production costs.⁸⁸ Sometimes, a contract defined the lump-sum payment as advance, and the musician would be entitled to ongoing royalties should the music sales hit a milestone number (say 6000 copies) required to first reimburse the advance. Most musicians have nevertheless learned to ignore the rhetoric difference, understanding how difficult it would be to either reach the sales milestone or audit the legitimate sales in the wake of widespread piracy.⁸⁹

The royalties from collecting societies are hardly a meaningful source of income for the majority of Chinese musicians. A high-level official in a collecting society described the situation: “Of the 6,000 members of our society, one third regularly received nothing from our annual distribution of copyright royalties. Among the remaining 4,000 members, only 600-700 could receive substantial royalty payment.” In other words, only about 10% of all society members have benefited from the collecting society in a meaningful way.⁹⁰ Online piracy appears to impose a significant impact on collecting societies. One society had previously collected RMB 33 million (USD 5.3 million) from online licensing in 2005. The number rapidly decreased to RMB 2.2 million (USD 0.35 million) in 2010 after Baidu had launched its MP3 services. “All the online companies that used to pay for music licensing have been driven out of the market,” the collecting society official explained. “It makes no business sense for these companies to pay copyright royalties when consumers can obtain all songs for free on the Internet. Once the business model completely ceases to function, nowhere could our society collect any money anymore.”⁹¹

Mainstream music labels do not appear to fare any better than individual musicians. According to a music executive, in the 1990s, the whole industry had reached RMB 3-4 billion (USD 500-600 million) in annual music sales and his company alone generated RMB 300 million (USD 50 million) even though the dominant format at the time was low-priced audio cassettes. At the time of the interview, the whole industry only generated a total of RMB 500 million (USD 80 million), including CDs and

⁸⁷ See the interview with the musician WXF (allegedly one of the five lyrists in Beijing who may earn a decent living mostly on writing lyrics).

⁸⁸ See the interviews with the musicians LH, AD, and WJ.

⁸⁹ See the interviews with the musicians WK, WZL and DQ.

⁹⁰ See the interview with the official QJM.

⁹¹ See *Id.*

DVDs.⁹² Another music executive similarly confirmed that music sales now add up merely to RMB 20 million (USD 3.2 million) for his whole company while in the 1990s its Shanghai branch *alone* had accounted for RMB 80 million (USD 12.8 million).⁹³ This significant decline in music sales has triggered a chain effect on retail outlets. There used to be at least 5,000 music stores in Shanghai. At present, only about 200 music stores are still in business, representing a 96% decrease without any legitimate online music services similar to iTunes or Amazon being developed in China. Smaller indie labels do not appear to have substantial music sales to begin with. No indie labels in the sample earned music sales that exceeded 10% of their total income.

The aforesaid statistics regarding music sales are not surprising. A mainstream album could easily sell 0.3-1 million copies in the 1990s, while today “a thousand units is doing great and ten thousand units calls for a celebration.”⁹⁴ The success of the music industry in the 1990s was attributable to three key reasons: “First, musicians had the luxury of concentrating on music creation. Second, the Internet was at a young age and the forms of cultural consumption were relatively homogenous, music and movies. Third, copyright piracy was still under control.”⁹⁵

The small number of Chinese musicians and music companies that can actually make money via music sales almost all concentrate on two narrow markets: ringback tones sales and overseas sales. For instance, two leading labels that earned 60% of their income from music sales both depended heavily on ringback tones, one having no online sales or physical sales, and the other earning merely 3% from online sales.⁹⁶ The top three among the musicians who received a substantial amount from copyright royalties uniformly attributed the majority of their paychecks to overseas sales. They either signed directly with a foreign publisher⁹⁷ or distributed their albums through foreign wholesalers.⁹⁸ For example, one musician mentioned: “Our CDs are mostly distributed overseas and may be downloaded from iTunes. We don’t offer them for sale domestically except at our concerts. MP3 piracy is so rampant in China that everyone who is capable of downloading will download. Therefore, the majority of our income comes from overseas channels.”⁹⁹

⁹² See the interview with the executive ZYB. Notably, the figures are smaller than those reported by the Chinese government as discussed above.

⁹³ See the interview with the executive ZJC.

⁹⁴ See the interview with the executive ZYB.

⁹⁵ See the interview with the executive ZYB.

⁹⁶ See the interviews with the executive ZYP and SK.

⁹⁷ See the interviews with the musicians WXF and HXT.

⁹⁸ See the interviews with the musician LD, and with the executives CS and WM.

⁹⁹ See the interview with the musician LD.

That being said, most musicians are apparently still interested in publishing their own albums regardless of the market potential. The interviewees offered two reasons. First:

No musicians are satisfied with a few ringtones or MP3 downloads. Albums are the proof of their music careers, representing tradition, honor and prestige. Similarly, a real writer wants to publish her book. It is relatively easy for anyone to write a blog these days. But not every writer has a book displayed in the bookstore.¹⁰⁰

Second, albums are still considered one of the most cost-effective marketing mechanisms for many musicians. They analogized albums to their business cards or resumes, which may open doors to other opportunities, e.g. performances, synchronization, and sponsorship.¹⁰¹ In other words, albums are denied their independent value as final products and instead morph into promotional tools to boost the popularity of the musicians and enhance their values in alternative markets.¹⁰²

2. Performance

Live performance is one of the most primitive revenue streams for musicians, dating way back before the advent of sound recording. It now has the potential to regain its historical glory as the music industry quickly transforms in the digital age. Musicians increasingly depend on performance for their livelihoods as income from music sales continues to dwindle. Among all the musicians observed, almost 90% received some earnings from performance, and 63% received 30% or more of their total income from performance. The musicians received on average 40% of their income from performance, which constitutes the largest one among all revenue streams. Many musicians predicted that the future of the music lies in performance;¹⁰³ “Performance is not replicable or susceptible to MP3 problems. Just as with a soccer game, people simply want to watch a game that has not started yet.”¹⁰⁴ “It’s not that different from a painting. Why can a painting be really expensive? It’s the original instance. For musicians, live performance is the original instance, unlike music albums that may be reproduced for an unlimited number of times.”¹⁰⁵

Several music insiders indicated that the performance market reinforces and widens the gap between established artists and new artists.¹⁰⁶ The

¹⁰⁰ See the interviews with the executive ZYB and the musicians WJ and WJ1.

¹⁰¹ See the interviews with the executive WM and the musicians LH and WK.

¹⁰² See the interviews with the executive FHN and the musicians ZWJ and LH1.

¹⁰³ See the interviews with the musicians YYC, LH1 and ZD and the executives LJ and WM.

¹⁰⁴ See the interview with the musician AD.

¹⁰⁵ See the interview with the musician WZL.

¹⁰⁶ See the interviews with the musicians LD, ZJH and JSL, and the executives CS,

market tilts in favor of a small number of successful musicians because most consumers idolize a small group of well-known superstars. Other musicians struggle to survive in the market no matter how gifted they are. An executive explained:

Concert promoters prefer to invite a famous musician for a million dollars rather than a lesser known but equally brilliant one for fifty thousand dollars... It might sound ridiculous but the music market depends on those who don't usually listen to music to make money. The current group of genuine music fans is not large enough to support the market. You would have to attract the audience who don't understand music to attend concerts in order to make the big bucks. The snobbish people who attend concerts in the same way they attend social events are only attracted to big-name musicians.¹⁰⁷

Furthermore, physical venues suitable for music concerts are quite limited in China, especially for up-and-coming and alternative artists who do not have a fan base large enough for stadium shows.¹⁰⁸ One musician stated:

There are about one hundred live houses for original music performances around the country. Many are a couple of hundred square meters only and not really suitable for live performance. Should the boss invite us for shows, she would make little money from ticket sales after paying for the flight, hotel, and remuneration because the place only has the capacity for a few hundred people.¹⁰⁹

Many original musicians would prefer not to perform in a bar or pub.¹¹⁰ Some places require performances of cover songs, which is unacceptable for the musicians who regard music as their religion. Other places cannot provide audiences interested in serious music performances or simply lack appropriate audio equipment. A musician described his experience as a young artist:

The first problem was surviving and feeding myself when I had just arrived in Beijing. I was very proud thinking of myself as a real artist and didn't want to do anything unrelated to music. It was a big challenge because I would be able to do what I love only after I feed myself. As a result, I had to perform in a bar, which I didn't enjoy at all. I was requested to play all the songs that I hated to get the wages. Over the years, it had become increasingly uncomfortable psychologically in the bar environment. For example, a rich guy once asked a song to be played ten times consecutively simply because he had the money. I felt like I was playing in a monkey show.¹¹¹

Another musician had a similar experience:

ZYB and LXR.

¹⁰⁷ See the interview with the executive LXR.

¹⁰⁸ See the interview with the executive CS (stating "the hardware's not there, some of the clubs you go to, the sound system is horrible or non-existent.").

¹⁰⁹ See the interview with the musician DQ.

¹¹⁰ See the interviews with the musicians WK and LH1.

¹¹¹ See the interview with the musician LGR.

I started my music career just for fun. But the practical problem soon loomed large: I had to make money for a living. This was such a paradox. I lived near the Olympic village at the time and performed in the Hong Kong Gourmet Cuisine Restaurant. Rather than taking a taxi cab, I bicycled for one and a half hours one way during winter in order to retain the wages. Besides, while performing on the stage, I had to listen to the noises of those who were eating crab shells. I had no choice but to tolerate it. I told myself that I could earn a living and purchase better equipment after making the money.¹¹²

3. Synchronization

The Chinese music industry has also witnessed many leading musicians shift the focus of their careers from making records to producing soundtracks for movies, television shows, video games, and advertisements.¹¹³ Because synchronization works usually piggyback on more investment-intensive creations, of which there are relatively few, these opportunities are limited to established artists, although not necessarily superstars.¹¹⁴ Some musicians may receive similar (though less lucrative) opportunities to produce music for other musicians and amateur clients as producers, arrangers, or engineers.¹¹⁵ Among all the musicians observed, 40% received some earnings from synchronization and all but one received 30% or larger portion of their total income from synchronization. The musicians received on average about 23% of their revenues from synchronization, comprising the second largest of all revenue streams after performance.

Some synchronization work is very profitable. Professional jingle writers can easily earn a fortune by composing 30-60 second pieces of music for commercials at a price tag of RMB 1000 (US\$ 160) per second. Interestingly, many musicians do not enjoy doing lucrative synchronization work and only create as much of such work as is essential for earning a living.¹¹⁶ They often spend more than 50% of their time on their own music while earning around 90% of their total income from making music for others.¹¹⁷ These musicians explained that their direct customers in the synchronization market are usually entrepreneurs, such as movie makers, video game developers, and advertisers. Unlike passive consumers, entrepreneurial customers oftentimes insist on extensive involvement in the creative process to ensure that the musical created will be consistent with

¹¹² See the interview with the musician CT.

¹¹³ For top Chinese musicians that devote most of their time into synchronization, see Li Guangping, *Balancing the Pressure of Living and the Pride of Life*, PEOPLE MUSIC, May 2007, available at <http://qkzz.net/magazine/0447-6573/2007/05/1146682.htm>.

¹¹⁴ See the interview with the musician LH.

¹¹⁵ See the interviews with the musicians LY, HJJ and JSL.

¹¹⁶ See the interviews with the musicians HXT, CT and JSL.

¹¹⁷ See the interviews with the musicians LD, HJJ and NB.

the marketability of the products supported by the music commissioned.¹¹⁸ As one musician phrased it, “Sometimes, they asked me to create music in the same way one orders food in restaurants. I had to supply whatever they wanted even though I didn’t like that kind of music.”¹¹⁹

Another musician admitted:

I don’t like writing music for commercials. It has to cater to advertisers and various commercial needs, which leaves very little room for any music creativity. But it is a good way to make a living. I struggled for a while and am now gradually retreating from the jingle market. I don’t like it but did it for several years. It was painful. You had to write several jingles a month for several different clients, who repeatedly needed modifications for non-musical reasons. It became increasingly unpleasant over the years. It was a job but an unpleasant one. We all know a pleasant job requires minimum outside interference. Excessive interference would make you feel really annoyed.¹²⁰

In addition, jingle writers and, to a lesser extent, movie/television composers do not appear to enjoy a favorable reputation among fellow musicians, due to their willingness to compromise artistic freedom. A musician who sometimes writes jingles herself actually claimed: “Professional jingle writers may become really wealthy. Of course, we should not call them musicians... These people make a living via music, a profession we usually call ‘music-smiths’ because making music is a job for them rather than a career.”¹²¹

4. State Patronage

State patronage takes two different forms: direct patronage and indirect patronage. First, the state directly supports the payroll expenditure of state-owned organizations. Chinese state-owned organizations touch upon almost all music genres ranging from Peking operas,¹²² western operas,¹²³ musicals,¹²⁴ Chinese classical music,¹²⁵ western classical music,¹²⁶ to pop music.¹²⁷

Second, the state regularly allots funds for specific projects including

¹¹⁸ For instance, a pop artist Pu Shu wrote a song “Colorful Day” for TOYOTA VIOS commercials and another song “Rush Out of Your Window” for Microsoft Windows commercials. See Feng, *infra* note 159.

¹¹⁹ See the interview with the musician YF. See also the interview with the musicians NB and LGR.

¹²⁰ See the interview with the musician AD.

¹²¹ See the interview with the musician LD.

¹²² See the interviews with the concert promoter HYF, the musicians ZJH and LY.

¹²³ See the interview with the musician ZJH.

¹²⁴ See the interview with the musician LFQ.

¹²⁵ See the interview with the musician YYC.

¹²⁶ See the interview with the musician BY.

¹²⁷ See the interview with the musician KR.

shows,¹²⁸ celebrations,¹²⁹ and festivals.¹³⁰ The state-funded projects do not have to be operated by state-owned organizations. As a matter of fact, a number of private concert promoters target the government as their primary client.¹³¹ They typically provide live performances to the general public with a ticket price below cost, sometimes even for free. However, as one concert promoter indicated, they actually make lucrative revenues by offering “one big ticket” to the government.¹³²

The consensus among the interview participants appears to be that the government normally covers the majority (around 70%) of the operating budgets for state-owned organizations through both direct and indirect patronage.¹³³

The government wields great influence on the creative processes of the stated-owned organizations and state-funded projects. A significant portion of the programs from state-owned organizations started with official government instructions and/or realized political objectives, e.g. to celebrate the anniversaries of the Communist Party or the Liberation Army.¹³⁴ Similarly, the government manifests its political preferences when it procures music programs from private companies. Several executives confirmed that the government favors Chinese classical music, western classical music, and world music, because contemporary music genres including jazz and rock are deemed relatively ideological.¹³⁵ One executive indicated:

It has become an unwritten custom that television stations have a reservation about rock music though there are no explicit prohibitions against it. The majority of rock music is probably not suitable for mass media, which aims to promote social harmony. Rock often emphasizes rebelliousness and, as a result, goes against the ideology of social harmony.¹³⁶

Another executive suggested: “The government should first provide financial support for musicians and second get out of the way, allowing creative freedom. However, it has been a concept unthinkable in China.”¹³⁷

It appears peculiar that a number of young musicians, while maintaining their positions in state-owned organizations, have spent the majority of their time creating drastically different music and earned the

¹²⁸ See the interview with the musician LY.

¹²⁹ See the interview with the musician ZWJ.

¹³⁰ See the interview with the musician LD.

¹³¹ See the interviews with the executives HYF and LJ.

¹³² See the interview with the executive LJ.

¹³³ See the interviews with the executive HYF and the musicians TY, ZJH, LY, YYC and KR.

¹³⁴ See the interviews with the executive HYF,.

¹³⁵ See the interviews with ZD, LJ and BY.

¹³⁶ See the interview with the executive BY.

¹³⁷ See the interview with the executive LXR.

majority of their income from the second, non-state-supported jobs. For example, one musician plays Peking opera as his job by day and is a rocker at night,¹³⁸ while another musician teaches drumming at a music conservatory but meanwhile is a well-known guitarist in the rock community.¹³⁹ There are several possible reasons for this phenomenon. First, musicians value the platforms provided by state-owned organizations to develop their careers. The government controls all the mainstream media (e.g., television, radio and newspapers) and is increasingly active in the music market procuring a large number of music programs. Musicians from state-owned organizations naturally enjoy favorable treatment and come first in the pecking order.¹⁴⁰ Second, a position in a state-owned organization provides better job security for risk-averse musicians, including stable income, social insurance, and pension programs.¹⁴¹

5. Sponsorship and Advertisement

In the same way as famous NBA players receive sponsorships from sneaker and beverage manufacturers, pop artists may obtain opportunities to endorse commodities of other companies. In exchange for corporate sponsorship, they use their star power and/or become advertising media to influence potential purchasers of the advertised products. Sponsorship may take several forms: First, the artists may be required to participate in television commercials, product release parties, and other promotional events.¹⁴² Second, the advertisers may demand product placement in music videos, live performances, and other occasions. For example, a musician may be required to wear a particular brand of clothing during concerts and have a sports car parked in front of the main entrance for when she performs.¹⁴³ Third, musicians sometimes receive remuneration simply for mentioning a product brand during media interviews.¹⁴⁴ Fourth, musicians may receive equipment sponsorship rather than monetary sponsorship, including free musical instruments and audio equipment.¹⁴⁵ Finally, many

¹³⁸ See the interview with the musician LY.

¹³⁹ See *Id.*

¹⁴⁰ See the interviews with the musicians ZWJ, YYC, AD, LFQ and LY.

¹⁴¹ See the interviews with the concert promoter HYF and the musician ZJH and KR.

¹⁴² For a few examples of corporate sponsorship in China, see a pop band Yu Quan endorsed Intel microprocessors, <http://www.zhanxian.cn/MingxingZhuanlan/mingxingdaiyan/2007/06/20/06201157437405.shtml>; a pop singer Li Yuchun endorsed Crest toothpaste <http://gb.cri.cn/9964/2006/04/06/114@986782.htm>; another pop singer Wang Lihong endorsed Wahaha bottled water, <http://www.wahaha.com.cn/playland/star/leehom.shtml>.

¹⁴³ See the interview with the executive WM.

¹⁴⁴ See *Id.*

¹⁴⁵ See the interviews with the musicians ZWJ, YYC and LH1.

property developers, often joining force with local governments, have recently emerged as an important source of corporate sponsorship. They are investing in a number of music festivals in big cities in order to draw attention and traffic to their development projects.¹⁴⁶

Advertisers usually prefer to contact music labels to strike a package deal for all of their musicians rather than directly dealing with individual musicians.¹⁴⁷ As a result, music companies pocket the majority of the revenues. In the rare cases that sponsors do approach individual musicians directly, they naturally prioritize a small number of superstars because the success of advertisements basically hinges on the popularity of those artists and the fan loyalty they inspire.¹⁴⁸ These are the reasons why no musician participants mentioned sponsorship as a substantial source of income.

Moreover, commercial sponsorship, a typical modern form of private patronage, often comes with a catch, similar to state patronage discussed above. It has proven difficult even for famous artists to strike satisfying deals with business partners that align with their goals, their beliefs, and, more importantly, their messages behind the music. More often than not, sponsorship may end up putting artists on the short leash of corporate powers.¹⁴⁹ For instance, many wealthy fans of Peking opera are happy to provide financial support for a new opera on the condition that the fans themselves play the leading characters in the spectacle.¹⁵⁰ Additionally, in order to preserve and enhance the advertising value of sponsored musicians, corporate sponsors are accustomed to placing various restrictions on artists' behavior (through contracts or music companies that similarly live on sponsorship), out of fear that any mischief could derogate their public appeal. Yet these examples are far from the worst-case scenario. Music companies sometimes demand musicians to entertain potential sponsors in order to obtain external investment.¹⁵¹ One executive shared a horror story:

There are actually bosses that force musicians to accompany clients at dinners and parties. I once received a call from a friend almost at midnight. She was so upset and said: "They asked me to dress in revealing clothes and brought me to those occasions. I was so unhappy and felt like a prostitute..." She was really serious about her music career. It was painful.¹⁵²

¹⁴⁶ See the interview with the musician LD.

¹⁴⁷ See the interviews with JSL, FHN and WM.

¹⁴⁸ See the interview with the musician GF (stating only 100 out of 100,000 musicians in Beijing may actually receive sponsorship opportunities).

¹⁴⁹ See, e.g., BBC News, *Music Firm Tune into New Deals*, available at <http://news.bbc.co.uk/2/hi/business/7480183.stm> (discussing controversies around direct sponsorship).

¹⁵⁰ See the interview with the musician LY.

¹⁵¹ See the interview with the musician KR.

¹⁵² See the interview with the executive FHN.

6. Bundling

As copyright piracy drives the price of musical works towards the marginal cost, which is near zero in the digital age, music companies have attempted to appropriate the value of their music indirectly by bundling music with the sales of other products. Music companies usually share the revenues from beverage and snacks sold within the premises of their performances.¹⁵³ Several music executives also introduced the practice of bundling CDs with cosmetics¹⁵⁴ or books.¹⁵⁵ The bundled products may be complementary goods in connection with music consumption, such as MP3 players, cell phones, or broadband services.¹⁵⁶ These music companies appear to expect that free music would enhance the value of the bundled products (say MP3 players), which would then increase the willingness of MP3 player manufacturers to pay royalties for copyright licenses or to invest directly in music production businesses.

Uncontrolled piracy could, however, give rise to the problem of free riding even in the context of complementary goods.¹⁵⁷ In order to optimally price complementary goods, a supplier of two goods must be able to lock in customers so that they would prefer to buy the two goods from the same supplier. Only in this way would a decrease in the price of one good lead to an increase in the demand of the other good offered by the same supplier. If an MP3 player manufacturer invests in music creation and the resulting music is simultaneously accessible with all brands of MP3 players, it would create a powerful incentive for competitors to free ride others' investment. This indicates that free music does not necessarily mean copyright-free music because the latter could actually result in underproduction of free music.

7. Merchandizing

Some music companies also develop the market for physical merchandise such as T-shirts, posters, and dolls.¹⁵⁸ They become more involved in selling artist merchandise by acquiring specialist firms or forming partnership with existing suppliers.¹⁵⁹ The music industry has

¹⁵³ See the interviews with the executives JSL and WM.

¹⁵⁴ See the interview with the musician ZWJ.

¹⁵⁵ See the interview with the executive FHN.

¹⁵⁶ See, e.g., Zhou Zhen, *How Far Legitimate Websites Need to Go before Making any Profits*, CHINA CULTURE POST, June 05, 2006, available at <http://www.ccdy.cn/pubnews/451267/20060605/492322.htm> (Music labels licensed Lenovo to pre-load a large number of music tracks in cell phones.).

¹⁵⁷ See *infra* note 319 and accompanying text for detailed discussions of free riding and public goods.

¹⁵⁸ See the interview with the executive CS.

¹⁵⁹ For instance, the pop duo Yu Quan has markets comic books and toys featuring

sometimes alleged that merchandizing creates a market for so-called “unpiratable products,”¹⁶⁰ which is in fact another example, in addition to performance, of copyright owners reluctantly turning back to physical constraints to recoup their investment in a digital era.

The marketing of merchandise relies principally on the fame of related artists, as illustrated by the intuition that a poster signed by the featured artist is usually much more valuable than one without the signature. As a result, this market is inherently prejudiced against up-and-coming artists who have yet to develop a reputation among music audiences. More interestingly, those who expect the prosperity of a merchandise market in China appear to assume unrealistically that a haven of copyright piracy would somehow be free of counterfeiting. It is therefore not difficult to comprehend why no musician participants regard merchandizing as a meaningful source of income.

8. Non-Music Sources

In response to the questions about sources of income, one of the most impressive answers was “a woman who loves me,” alluding to the fact that the musician’s girlfriend had supported him financially at the beginning of his music career.¹⁶¹ His experience was hardly an embarrassing exception given that a large number of musicians depend heavily on family support and non-music income for their livelihoods. Among all the musicians observed, 40% received some income from non-music sources and 22.2% received 30% or more of their total income from non-music sources.¹⁶² These musicians received an average of 19% of their total income from non-music sources. The non-music income involves a wide range of second jobs: Some musicians assist their spouses in online shops that offer clothes, home theaters, and crystal balls;¹⁶³ some work in offices as translators, secretaries, or journalist;¹⁶⁴ some operate bars or companies;¹⁶⁵ some invest in the stock market;¹⁶⁶ and others become so-called “multi-dimensional”

their images. See Feng Xing, *Songke Model – Exploring New Ideas in the Recording Industry*, NEWS WKLY., Feb. 16, 2004, available at <http://www.chinanews.com.cn/n/2004-02-17/26/402869.html>.

¹⁶⁰ See IFPI, DIGITAL MUSIC REPORT (2009).

¹⁶¹ See the interview with the musician ZD.

¹⁶² A comparable study in the US indicates that 15% of musicians have non-arts related occupations, a percentage significantly smaller. See, Jeffri, Oberstein & Reed, *supra* note 85, at 39.

¹⁶³ See the interviews with the musicians WK, WJ1 and XB.

¹⁶⁴ See the interviews with the musicians WZL and SF.

¹⁶⁵ See the interviews with the musicians ZD, ZHS and DQ

¹⁶⁶ See the interviews with the musicians CT.

artists, taking acting roles in movies and television shows.¹⁶⁷

When invited to provide their words of wisdom to aspiring musicians, a number of participants suggested that all musicians should get a second job to earn a living.¹⁶⁸ As one musician pointed out:

If you truly love music, don't depend upon music for money...My family is doing business and uses my popularity to create more business opportunities... I have won medals in national singing competitions a couple of times. When I went back to my hometown, local government officials greeted me in person because I brought honor to my hometown. By this means, we are able to obtain support from the local government for our business.¹⁶⁹

Although these second jobs are often far more lucrative than music-related work, most musicians have shown a clear preference to spend more time on their music-related works including albums, performances, and synchronization. Examples abound in the sample where musicians spent more than half of their time on music-related work but earned 80% of their total income from non-music jobs.¹⁷⁰

One musician stated:

Music-related income for our band was just performances.¹⁷¹ We would receive RMB 15,000 (US\$ 2,409) per show and the music company would pocket about 40%. For the remaining RMB 9,000 (US\$ 1,446), the five members of our band would each get RMB 1,600 (US\$ 257)... If I act as artistic director for movies, my daily wages may reach RMB 6,000 (US\$ 964). The rate would likely get even higher provided that I concentrate on the job. Nevertheless, I have started to turn down a lot of movies now. What would our band do if I needed to film a movie out of town? Therefore, my current plan is to gradually retreat from artistic director work. When I get a phone call inviting me to film a commercial, I usually say no these days.¹⁷²

C. Changing Business Models

In response to the inherent uncertainty of public taste in entertainment products, music companies traditionally invest in a large portfolio of varied musical works in the hope of cross-subsidizing less popular music with high sales of hit music.¹⁷³ In contrast, copyright piracy naturally tends to focus on bestsellers and in doing so undermines the revenues that copyright owners could otherwise collect from hit sales. In the wake of widespread

¹⁶⁷ See the interviews with the musician LH and the executive FHN.

¹⁶⁸ See the interviews with the musicians LL, WJ and SF.

¹⁶⁹ See the interview with the musician KR.

¹⁷⁰ See the interviews with the musicians WZL and SF.

¹⁷¹ See the interview with the musician SF.

¹⁷² See the interview with the musician YZ.

¹⁷³ See Paul Goldstein, *Copyright*, 55 LAW AND CONTEMP. PROBS. 79, 83 (1992); Barry W. Tyerman, *The Economic Rationale for Copyright Protection for Published Books: A Reply To Professor Breyer*, 18 UCLA L. REV. 1100, 1131 (1971).

piracy, Chinese music companies have been increasingly reluctant to risk financing new forms of music and new artists as the traditional model mandates. A number of musicians and executives highlighted this key issue during our interviews.¹⁷⁴ For instance, one executive stated:

I feel the whole industry has become increasingly cautious about discovering and developing new artists. Music labels have little incentive to promote new artists, which reflects an unhealthy trend in the industry. As a matter of fact, music companies operate a bit like venture capitalists. If I invest in ten new artists, two successful artists should recoup all my investment. Only in this way can music companies develop new artists. Nowadays, not to mention any new artists, superstars like SBL and LYC could hardly support ten other artists financially. So music companies are more cautious.¹⁷⁵

Two business models have emerged that aim to minimize the investment risks resulting from copyright piracy. First, some music companies have stopped signing any new artists and instead work with artists on a so-called “cooperative” or “self-funded” basis. This generally means, instead of the music company investing in the artist, the artist pays the music company for various services, e.g. production, promotion, and distribution.¹⁷⁶ In this model, the artist rather than the music company shoulders all investment risks. Leading music labels have started to follow this model because their prestigious brands and extensive distribution channels are attractive especially to up-and-coming musicians. Two additional factors render this model viable: First, the recent development of digital technologies has significantly lowered the costs involved in producing, marketing, and distributing music;¹⁷⁷ thus, more indie musicians can afford such services. Second, a substantial number of Chinese musicians are employed by state-owned organizations and therefore are not allowed to formally sign contracts with music labels. But these musicians enjoy a stable source of income and often desire to release their own albums to increase their reputations among peer musicians and music fans. In this case, the music companies function as vanity publishers that do not directly target consumers.

The second model has largely reflected music companies’ attempts to further diversify their investment portfolios in response to the increased risks in the music market.¹⁷⁸ The role of record companies in the music

¹⁷⁴ See the interviews with the musicians LD, LH1 and LH, and the executives SK, FHN and ZYP.

¹⁷⁵ See the interview with the musician SK.

¹⁷⁶ See the interviews with the musicians YYC, ZWJ and KR, and the executives ZYB, ZJC and LXR.

¹⁷⁷ See *infra* note 230 and accompanying text.

¹⁷⁸ Traditionally, an artist would sign three kinds of contracts, i.e. album contract, agent contract and copyright contract with three different entities. A record company would

value chain was traditionally limited to production, promotion, and distribution of recorded music. Given the crucial importance of alternative revenue streams in this era of widespread piracy, Chinese record companies are reshaping their business models to be more and more like talent management agencies that handle and share revenues for all aspects of a musician's entertainment-related businesses including record sales, touring, merchandising, brand sponsorship, music publishing, fan clubs, official websites, and television and film appearances.¹⁷⁹ These all-encompassing deals are often called the "360 degree" model,¹⁸⁰ by which musicians essentially sign over the entirety of their careers during the contractual term.¹⁸¹ An established musician described the new trend:

It has been apparent that music companies try to sign 360 degree deals with new artists. It's impossible to recoup all investment from albums, unlike years ago. They have to recoup investment from performances, from advertisements and from acting in movies and television shows. Music itself has been reduced to a promotional tool for artists rather than their principal product. Many albums are released simply to create more public exposure and performance opportunities.¹⁸²

"360 degree" deals have given rise to several phenomena that were unseen in traditional business models. First, record companies prefer to sign new artists at a relatively young age and for an extended period of time. Alternative revenue streams (e.g., touring, advertising and merchandizing) in most cases entail long-term investment in cultivating artists' reputations and influences in the peripheral markets. A long-term contract would help recoup the heavy initial investment in young artists who meanwhile have less bargaining power than established artists in deal negotiations.¹⁸³

Second, although one may presume that digital technologies have empowered artists with more autonomy in music creation, record companies have become even closer to wielding "360 degree" control over an artist's creative process and even personal life in order to maintain her

be responsible for production, promotion and distribution of her albums. A talent agent would be responsible for managing performances, sponsorship and advertisement. A music publisher would be responsible for handling copyright issues. Nowadays a 360 degree deal would typically include all three contracts.

¹⁷⁹ See Ed Pato, *Music in China: The Inside Story*, THE REGISTER, November 01, 2007, available at http://www.theregister.co.uk/2007/11/01/music_in_china_feature/.

¹⁸⁰ See Pete Paphides, *The Guy to Save the Music Industry?*, THE TIMES, January 18, 2008, available at http://www.timesonline.co.uk/tol/comment/columnists/guest_contributors/article3207048.ece.

¹⁸¹ See Huang Jingjing, *Reshuffling Recording Companies*, available at <http://stars.zaobao.com/pages6/stars081113.shtml>.

¹⁸² See the interview with the musician LH.

¹⁸³ See the interview with the musician LD.

commercial value in advertising and merchandizing markets. Not only does the music need to convey the same message as the products promoted, but also the public image of the artist needs to be consistent with mainstream perception. For example, a rock star temper in the original sense could hardly attract a robust stream of sponsorship revenue in the relatively conservative culture of China. It is not an overstatement to suggest that “360 degree” deals have a tendency to turn every aspect of artists’ lives into a music company’s commodity. A musician accurately summarized the role that his music label played: “They are not involved in production; they are interfering in music production.”¹⁸⁴ Another musician explained why she decided to remain independent after witnessing the experience of her friends with music labels:

An underground band signed with a famous label in Shanghai. However, the company did not release a single album for them but merely asked them to lose weight and grow longer hair. After two years, the band was sold to another music label, which liked their new appearances rather than their music. The new label hired a production team to write songs for the band and prohibited them from singing their own works.¹⁸⁵

Third, when music companies search for new artists, they increasingly emphasize non-musical characteristics such as attractive appearance and positive public image, again in order to accommodate the need for alternative sources of revenue.¹⁸⁶ A musician observed this tendency:

It used to be that to be an artist, you had your own songs and you had to at least be fluent in music, had to at least know what chords are and how to play songs. All the people who used to do that and who would be the artists are now actually supporting these front people and creating their bands and creating their songs... We had a guy come into our studio and they paid us to train him to sing for two months. Then we had to record him, work the songs, and hire arrangers. His job was to wear nice clothes and take photographs and all that stuff... He’s a card-carrying model who’s been on the covers of magazines.¹⁸⁷

If an artist has no potential to tour and spin off into ancillary forms of revenue such as movie and advertising opportunities, music companies might eventually pass up an otherwise unparalleled music talent. In other words, it is no longer enough to be a pure musician.¹⁸⁸ A musician explained the rationale behind the dramatic change in talent search criteria:

Nobody pays attention to those musicians who have enormous gifts rather than a pretty face. Music companies today believe an artist with market potential should be capable of performing, acting, *and* appearing in

¹⁸⁴ See the interview with the musician WJ1.

¹⁸⁵ See the interviews with the musicians LD, LY and XQ.

¹⁸⁶ See, e.g., the interview with the executive FHN.

¹⁸⁷ See the interview with the musician LH1.

¹⁸⁸ See the interview with the musician LH.

commercials. If a musician is not very good-looking and already in her thirties, her market value is limited to her musical works. However, the return from music sales is negligible due to widespread piracy. It's understandable that music companies prefer to invest in someone who would bring in more profits... They pay more attention to entertainers than to musicians. The simplest way is to select the most beautiful no matter whether she can actually perform or not. As long as one of her songs eventually gains some popularity, I would have opportunities to exploit her market value in acting, commercials and endorsement.¹⁸⁹

Another musician illustrated how those artists with little music talent could nevertheless succeed in the music industry today through such techniques as lip-syncing:

Many of the live shows in China, especially the televised ones, they're not even organized to be a real performance, real singing – I mean, they're lip-syncing. We went to some big TV productions to play and they didn't have a place for us to play or even the power for an instrument, let alone the capacity to record the song, which was very hard for me to get used to... If anybody who can't even sing can sound good, then it's really hard for people, for really hardcore musicians, to excel. So this has been a big problem for us... If it goes this way it becomes completely a look contest.¹⁹⁰

III. MUSICIANS ON COPYRIGHT

This section presents empirical findings from the perspectives of individual musicians in three aspects: (i) motivation for creation; (ii) attitude towards piracy; and (iii) copyright law awareness. The findings have highlighted the attitudes, opinions, and beliefs of musicians and other music insiders with regard to the music industry, creative process and legal environment.¹⁹¹

A. *Motivation for Creation*

When asked about their motivations, incentives or drives for music creation, the musicians offered a wide range of factors as illustrated in **Exhibit 31**. Notably, 97.4% of all the musicians referred to certain

¹⁸⁹ See the interview with the musician LL.

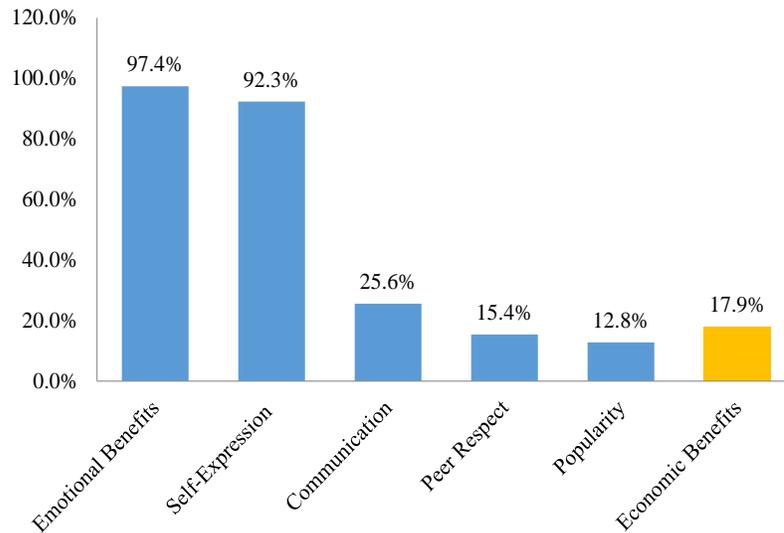
¹⁹⁰ See the interview with the musician LH1.

¹⁹¹ Focused as it is on ideas, values, and attitudes regarding copyright law, the article falls squarely into the domain of legal culture studies. See Lawrence M. Friedman, *Legal Culture and Social Development*, 4 L. & SOCIETY REV., 29 (1969) (This article pioneers the studies of legal culture, an influential concept that owes its origin to the same article); Lawrence M. Friedman, *Is there a Modern Legal Culture?*, 7 RATIO JURIS. 117, 120 (1994) (“Legal culture, like general culture, is a body of ideas, values, and attitudes. We can talk about the legal culture of a community; this does not mean, of course, that everybody shares the same ideas-what we refer to are patterns, tendencies, trends.”); LAWRENCE M. FRIEDMAN, *THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE* 193 (1975) (Characterizing legal culture as a concept “refers to public knowledge of and attitudes and behavior patterns toward the legal system.”).

emotional benefits as their motivations while only 17.9% mentioned economic benefits as their motivations. It appears paradoxical, however, that 97.4% of all the musicians viewed money as important and helpful for music creation. The following sections will analyze these emotional and economic benefits in more detail. The emotional benefits are further categorized into four groups based on the degree of their dependence upon the audience: self-expression, communication, peer respect, and popularity.

Exhibit 31

Motivations for Creation



1. Self-expression

The vast majority of the musicians (92.3%) indicated that they were willing to express themselves through music whether or not there is an audience. These musicians described their self-expression motivation through a wide range of narratives:

a. *Desire to Create* – The musicians have an inherent desire to create music regardless of any external incentives. one musician described her almost automatic urge for music creation:

I feel that I am a little bit like a robot. I always tell people that, once you put me in front of a piano or a computer, I will start composing music. This is natural and automatic without the need for any motivation... My producer says that I am born to be a composer. If I am not allowed to compose, the creative impulse would mount pressure, would try to find an outlet, and would overflow. It has nothing to do with money at all.¹⁹²

Another musician analogized his music to his diary:

¹⁹² See the interview with the musician LD.

The best part about being a musician is that you can express your sentiments, your happiness, your sorrow, what you experienced, and what you saw all through music. It is like writing a diary. I mark the year, the month, the date, the time, and the place of creation for each and every song that I write. When I bring out the music score and sing the song again, it brings back all the memories.¹⁹³

b. Love for Music – The musicians compose music because they enjoy doing so. One artist indicated:

Love for music isn't something over which I have any control. It is genetic, like eating pepper. You could fall into love with pepper the first time you eat it and you don't know why. Music was exactly like that to me. I simply enjoy listening to music. I can completely concentrate on music, always excited, and undistracted no matter for how long.¹⁹⁴

Another musician claimed:

What is really important is the fact that you are still making music. It doesn't matter how many people appreciate you or how many people recognize you... For example, I have been creating music for ten years, twenty years. Not many people have listened to my works and I am not famous either. Why am I still doing this? The reason is that I myself appreciate the works that I made ten years ago and I believe they are successful. It keeps me going. It's enough... It has nothing to do with how many people say I am great.¹⁹⁵

c. Identity – Music has become an indispensable part of their lives and identities. An artist claimed:

I feel music has become part of my life. It may sound a bit cheesy, but it is the truth. If I stop playing music, I would no longer be who I am. It has been with me for so long and has given me the greatest satisfaction ... It was not my own choice when I was young, but it has gradually grown into my life and into my DNA.¹⁹⁶

Another musician stated:

Music takes no effort for me. It is my way of living, simply like breathing. I don't have to force it and I don't have to try hard for it. Each day I need to breathe, I need to do this... A lot of people are curious, and I am curious too, that I don't need relaxation, vacation or going somewhere fun. My work is my relaxation. It is not something I have to finish first so that I can have time for relaxation or vacation.¹⁹⁷

d. Religion – Music has become a faith or a religion that musicians follow loyally. One musician explained:

The reason I am still making music after all these years is that we need a place to rest our souls. This country, driven not by religion or faith, but by the material desires to buy houses, buy cars, and get rich, has turned into a

¹⁹³ See the interview with the musician WJ1.

¹⁹⁴ See the interview with the musician YWM.

¹⁹⁵ See the interview with the musician ZD.

¹⁹⁶ See the interview with the musician YYC.

¹⁹⁷ See the interview with the musician HXT.

horrifying place... We need a place to rest our souls and allow us to understand who we are. Therefore, music has become our savior. This is the reason we are still making music no matter whether we can make money.¹⁹⁸

Another musician who received one percent of his total income from music said:

Others are curious about what we are doing here. Our bass is a Japanese guy who has been in China for several years. He was very surprised initially to discover that rock in China means totally different things from rock in Japan. For them, rock is simply a branch of pop music. But in China, it is entirely spiritual and ideological, like a religion. A lot of musicians would not be able to persist but for such a religion.¹⁹⁹

e. Stewardship:²⁰⁰ Closely related to the religious reasonings, musicians commonly regard music talent as a blessing and feel obligated not to waste it. One musician mentioned: "I feel that it's really a blessing if you happen to have the ability to create music and have opportunities to have others listen to your music. It's because numerous musicians feel the same way that they continue to pursue their music careers regardless of any cost and benefit."²⁰¹ Another musician indicated:

I don't handle leisure well. I would not be able to celebrate the New Year if I hadn't done anything I was proud of or anything contributing to the society during the whole year. I feel that having a musical gift is a joy, not really something everyone can have. I should not waste the gift at all. I shouldn't waste my whole life, not even a single year.²⁰²

2. Communication

Musicians also use their music as a medium to identify like-minded friends and communicate with friends. To this extent, musicians do need an audience, although the size of their audience does not matter much. One musician admitted:

I never think about market or audience while making my own music. My works are simply like myself: a guy sitting on a couch facing a lot of people. If someone happens to like me, we could perhaps become good friends. If she doesn't like me, I would not bother her either. I would not market myself as a commodity you must like.²⁰³

Another musician explained:

I have a theory that, if only ten out of a hundred people agree with the

¹⁹⁸ See the interview with the musician SF.

¹⁹⁹ See the interview with the musician WK.

²⁰⁰ For a thorough discussion of the stewardship concept rooted in Western religions in the context of intrinsic dimension for artistic creativity, see ROBERTA ROSENTHAL KWALL, *THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES* 19 (2010).

²⁰¹ See the interview with the musician JSL.

²⁰² See the interview with the musician LYQ.

²⁰³ See the interview with the musician LGR.

ideas conveyed in my works, I would be content with the ten people because I merely try to find the like-minded. Music is a bit like eating. It is impossible that everyone likes the same thing. It is enough that there are some who like your music no matter how few they are.²⁰⁴

3. Peer Respect

Musicians oftentimes regard recognition and respect from their fellow musicians (i.e. professional reputation) as a powerful motivation for future creation. Peer respect can take the form of professional awards or invitations from other musicians for creative collaboration. From this perspective, musicians again need an audience, but a particular type of professional audience.

One musician described how a couple of prestigious awards kick-started his career:

One of my biggest pleasant surprises was that my song was nominated as one of the Top 10 Golden Songs for the Beijing Olympics in 2006. It was such an honor for a new artist to share the spotlight with those established composers and lyricists. It was also a great encouragement and a proof of my talent. I could hardly carry on without any encouragement to fuel my passion and self-esteem. The confidence booster of the recognition by music experts allowed me to unleash my desire to create music. Another pleasant surprise was in the same year when I took part in a music competition singing my own music. It received not only the support of music fans but also praise from the head of Universal Records. Both events add up to tremendous motivation, resulting in a dramatically improved and increased output in my music creation.²⁰⁵

Another artist told a similar story about how peer recognition rejuvenated his career:

I thought about giving up my music career at the point that my band broke up. I then set a milestone for myself: If I were able to perform with one of my favorite musicians or to perform on a big stage by the time I was twenty-five, it would prove that I have achieved something. Eventually, I did reach that milestone at the age of twenty-five. I had an opportunity to perform on the same stage with GS, my idol since my college years. That showed my efforts were not worthless after all. If you continue to work hard, you can do better and better.²⁰⁶

A well-known musician also described how the importance of professional reputation increased as his career advanced:

My motivation varied between different stages. Initially, it was interest. Then, I needed to make money and buy equipment. Now I just want to prove myself to others. In a nutshell, it is about a mouth and a face. First of all, you have to be able to feed yourself and to survive. Once the mouth is no longer a

²⁰⁴ See the interview with the musician YWM.

²⁰⁵ See the interview with the musician WJ1.

²⁰⁶ See the interview with the musician YWM.

problem, it is all about the face – how to win others’ respect no matter what profession you are in.²⁰⁷

4. Popularity

Several musicians admitted that one of the major reasons for their music creation was to promote the popularity of their music or of themselves. From this perspective, the musicians generally welcome as large a music audience as possible. Interestingly, this objective was often narrated in a way that actually appeared altruistic and non-pecuniary.

For instance, one musician who specializes in a traditional Chinese musical instrument spelled out one of the common themes among many musicians:

My aspiration is to promote what I have learned and allow more people to understand it and appreciate it. Although this instrument is well-known in China, there are not many people who can really appreciate it. I would not do it as a job merely to make money or earn a living. I regard it as my career, a lifelong career.²⁰⁸

Another musician explained why his personal quest for popularity was non-pecuniary:

For my generation, it would be very satisfying for a musician if she were able to perform on a bigger stage, say an arena or a stadium, or release her own albums. It has absolutely nothing to do with commercial concerns. Instead it’s about more people recognizing what you want to express in your music and in your lyrics.²⁰⁹

5. Economic Benefits

Exhibit 31 illustrates that only 17.9% of all the musicians in the sample admitted that economic benefits created some motivation for their music creation. Furthermore, 74.4% explicitly denied that they created music for money and 49% alleged outright that they rarely thought about audience or market while making music.²¹⁰ The musicians provided three reasons for

²⁰⁷ See the interview with the musician CT.

²⁰⁸ See the interview with the musician YYC.

²⁰⁹ See the interview with the musician YWM.

²¹⁰ The statistics however may not result in the inference that musicians generally don’t need economic incentives for creation. It merely implies that economic incentives may not be necessary for the musicians who remain in the music industry. Because rampant piracy has drastically decreased the return for music sales, the musicians who still persist in the music industry are probably those who care little about economic incentives. It may be entirely possible that those who really care about economic incentives are deterred from entering into the music profession and would otherwise participate given copyright protection. See the interviews with the musician LH1 (stating “you have to be crazy these days to go into the music industry for money.”); the executive CS (“That’s why I like what I’m doing, is I know that none of our musicians get into this because they have the goal of being rich... Our kind of musicians, the ones that we normally sign, they have

the apparent absence of economic benefits as motivation.

First, some musicians indicated that they simply were not capable of taking audience or market into account while making music. As one musician pointed out:

It is impossible to think about audience while you create music. The creative process is very selfish and individualistic. It is not the business of our musicians to think about audience. It is up to music companies that are promoting the music to figure out how to attract more audience, how to turn music into a product, and how to better sell the product. Making music is a personal thing, unlike the process of making commodities, say chocolate or bottled water, for which you should surely take into account the market at an early stage. Music as a cultural product is essentially personal expression. One will become successful if one's expression happens to be accepted by the majority. One will become alternative if one's expression happen to be accepted only by the minority.²¹¹

Another musician echoed the preceding viewpoint:

I never speculate about audience or market while making music. It probably wouldn't be right either. I'd rather wait for people to choose me than speculate about what people really like. If they really want to listen, they will come and listen. A lot of people thought that my music was a bit weird when I first started composing music. But I never think about changing my music for anyone. Nor can I.²¹²

Second, other musicians believed that a quest for pecuniary rewards might become a distraction and ultimately affect music quality. One musician stated: "My works almost have nothing to do with money. If a musician creates with a particular motive, namely for money or for fame, her creations would not have any vitality."²¹³ Another musician told a story about how money became counterproductive at one point of his career:

When we started making music in the 1990s, we never thought much about money. As a matter of fact, a lot of people told us that we wouldn't make a penny with the stuff we wrote. We said, "let it be." This was what we loved. If it could touch us, it could also touch other people. We ended up making a lot of money. But after we discovered that our music could actually make money, we went astray for a while. We started to think whether we could write something that had both musical value and great marketability.

to be quite aware that it's very difficult for them to make any kind of living from music. So they have to be passionate about music. They have to love music."); the musician LD ("If you choose to be a rocker, you should be prepared for no money and no house, fighting a long-term battle with the reality. Basically, I don't usually suggest making a quick decision to enter into the music business, because the majority would end up giving up one or two years later. If you are interested to become a musician, you should first think about your economic conditions, including family support. If you dream of making money by making music, simply stop dreaming.").

²¹¹ See the interview with the musician YWM.

²¹² See the interview with the musician LD.

²¹³ See the interview with the musician DQ.

Then, our music careers were stuck: For a long time, we had written a lot of works that remained in process, but produced very few finished works. We realized several years later that it was not worth it after all. When it comes down to it, a musician should write what she really loves and shouldn't think too much about other things. The relationship between music and business is that it won't come if you think about it, and it might come if you don't think about it.²¹⁴

Third, a recurring theme that emerged from the musicians' observations was economic motivations conflict with the essence of music creation, a belief reflective of such intrinsic motivations as love for music, genuine expression, and artistic integrity. They sometimes described their music as being "purer" without economic motivations.²¹⁵ One musician stated: "Money has little to do with my creation. A musician, as a pure artist and a clean artist, should separate money and art. It would have little to do with art if you wrote a song for money."²¹⁶ Another artist deemed catering to audience or market as a sign of vanity and falsity:

Music creation needs to be purer. Musicians should resist such distracting thoughts as becoming popular and making money. When you have those thoughts, your music is not pure. We live in a society where we have to face so many lies and tell so many lies every day, from the very moment we open our eyes and get out of bed. While people are not genuine to one another you should at least be genuine to music because you love music. If you could not even be genuine to yourself, it would be really frustrating. I understand that a lot of young kids dream of becoming superstars, like I did years ago. But when music and life are gradually unified, you would realize that music is what you love and being a superstar is not.²¹⁷

This sentiment was frequently expressed using a rhetorical pattern that pitted value against price.²¹⁸ For example, a music executive suggested to aspiring musicians: "If you want to be a rich man, be a property developer. If you want to be a valuable poor man, be a musician."²¹⁹ Another musician echoed such a suggestion:

I'd like to remind music executives that they shouldn't deal with music just for money. You won't get it right if you are in it for money. You can make music a very tasteful and valuable thing. But never turn it into commodity. I wish more people would put emphasis on artistic value rather than market value.²²⁰

It is thus unsurprising that musicians often measure the seriousness of

²¹⁴ See the interview with the musician SF.

²¹⁵ Purity v. profit has similarly been a constant battle for US musicians. See Jeffri, Oberstein & Reed, *supra* note 85, at 50.

²¹⁶ See the interview with the musician WJ.

²¹⁷ See the interviews with the musician LGR.

²¹⁸ See the interviews with the participants XB, ZYB, BY, SF and LD.

²¹⁹ See the interview with the executive ZYB.

²²⁰ See the interview with the musician LD.

another musician by how much she strives for fame or money. As mentioned above, commercial jingle writers are widely deemed as “music-smiths” rather than musicians.²²¹ Instead, musicians took pride in their indifference to economic benefits: “I never think about market or audience. Himalaya doesn’t exist to please humans although that doesn’t stop humans from worshipping her.”²²²

The above statements might appear peculiar viewed together with the fact 97.4% of all the musicians recognized money as important and helpful for music creation. These musicians, however, did not consider the two positions to be contradictory or irreconcilable. They appeared to believe that money could promote music creation even though musicians do not work for money.

First, money may provide musicians with the means for a living. These musicians put great emphasis on the joy of “making a living by doing what you love,” “turning your passion into a profession,” and “combining your dream with the reality.”²²³ The reality is, however, that a third of all the musicians in the sample named earning a livelihood as the largest challenge for Chinese musicians.²²⁴ In particular, of the seven musician participants who reported having stepped out of music careers at certain points in their lives, four explicitly admitted that they had had to do so mostly for financial reasons. In other words, musicians rarely start their music careers because of money, but many cease their music careers because of money. One musician highlighted the importance of making a living for young musicians:

The biggest problem for underground musicians is livelihood. A lot of these musicians were not brought up in Beijing. They love rock and gather in the Tree Village [a small village in the outskirts of Beijing], every day facing these problems – meals, rent, and practice space. These are enormous pressures for young musicians without other sources of income. Some lived upon family support. Many others sang in the subway.²²⁵

Another artist explained the reason he had left music for a while:

I felt enormous living pressure at the time. It became a conflict with the band, a time conflict and a mental conflict. For instance, when the band

²²¹ See *supra* note 113 and accompanying text. Musicians also differentiate between a career to fulfill their dreams and a job to make a living. See the interviews with LN, YYC and LD.

²²² See the interview with the musician HXT.

²²³ See the interviews with the musicians ZHS, CT, WJ, YZ, YWM, KR, LH, YYC, LH1, PLY, LN, WK, GF, WXF, AD, ZD and MZ.

²²⁴ A recent study reports that a third of professional composers in the US regard money from composition as an extremely important creative challenge, and almost half cite a lack of time to compose and not enough performance as extremely important creative challenges. See Jeffri, Oberstein & Reed, *supra* note 85, at 22.

²²⁵ See the interview with the musician WK.

wanted me to write music and practice music, I was however concerned mostly with the economic pressure. As a consequence, I could concentrate on neither money nor music. I had to get away for some adjustment.²²⁶

Second, money may enable musicians to obtain better musical instruments, recording equipment, and cover other production costs for music creation. Notably, digital technology developments have significantly decreased various production costs. For example, many musicians are now able to set up a home studio with a computer, a sound convertor, and digital audio software for multi-track recording, editing, and mixing with professional quality. Therefore, it is not surprising that a number of musicians in the sample have built home studios.²²⁷ The production cost for a music album is now around RMB 25,000 (US\$ 4000) if produced in a home studio compared to RMB 100,000 (US\$ 16,000) if produced in a standard studio, neither being a truly prohibitive price.²²⁸ With regard to marketing and promotion, indie musicians mostly depend on online channels, e.g. MySpace, YouTube, and their Chinese counterparts, such as Douban. Similarly, music sales have become increasingly independent of traditional brick-and-mortar outlets and often take two forms: First, online music aggregators (e.g. CDBaby, TuneCore, and TheOrchard) can widely distribute any album through all the major online retailers (e.g. iTunes, Amazon, and Spotify) for a payment of up to US\$ 50.²²⁹ Second, many musicians bypass all intermediaries and distribute their own albums at their concerts.²³⁰ Notably, the above figures represent the lowest end of the cost spectrum for music investment. Musicians may choose to upgrade their music production and promotion with increased investment. A professional-level album could easily cost RMB 500,000 (US\$ 80,000) for production, and another RMB 500,000-1,000,000 (US\$ 80,000-160,000) for targeted promotion in mainstream media, e.g. television, radio, and Internet portals.²³¹

Third, money may facilitate collaboration among various musicians, including composers, vocalists, instrumentalists, producers, and engineers. One artist explained the significance of collaboration in music production:

Of course, the costs of producing music have become lower. So does the music quality. Digital technologies can simulate all sounds. But digital music is often made by a single individual rather than by a team. Where is the communication between individuals? The concepts of a real drummer and a

²²⁶ See the interview with the musician WJ.

²²⁷ See the interviews with the musicians LD, HJJ, CT, JSL, LH1, PLY, SF, WXL, WKX, ZD and HXT.

²²⁸ See the interviews with the executives ZHS and ZYB.

²²⁹ See the interviews with the musicians LD, the executives CS and WM.

²³⁰ See the interviews with the musicians LD, WXL and WZL.

²³¹ See the interviews with the executives CK, FHN and ZYP.

real musician have disappeared, which inevitably results in low quality music. It has conversely added a certain sense of arrogance: If I can single-handedly complete everything that a band does, why do I need a band and why do I need to listen to others' opinions? But that's wrong. Human societies are based on communication and the openness to different opinions.²³²

Another musician emphasized the relationship between collaboration and money:

[Money]'s so important to production. Just equates time and labor. Making a really good recording is a lot of work. I'm a trained engineer, the kind of design engineer. So I think all the time about how to do the thing efficiently, and still you need to spend a lot of time with a good recording like you would with session players and stuff. So when people don't have the money to produce, it just means they don't have the time and the people to do what they really need to do to make a beautiful recording. So it hurts the quality of music a lot, you bet. It's a big deal. It's a big deal.²³³

Fourth, money can safeguard artistic freedom for musicians as people are more likely to compromise if they are under economic pressure. A musician told a vivid story:

Only after musicians have secured their livelihoods can better music be produced. For example, I wanted to write an artistic composition while the music label wanted me to write a pop song that would be mundane but would sell better. I didn't have a choice. I was hungry and had to use the music to obtain a piece of bread. I would therefore write whatever the one who provided the bread asked me to write. If I insisted on my own preference, rejecting the request, I would be unable to get the bread and continue to starve. I hence had no choice but to write the music that I found disgusting in exchange for the bread.²³⁴

Fifth, money enables musicians to concentrate more fully on music creation. One musician stated:

If the earnings from my music accounted for 60% of my total income, I would devote 90% of my total time to music. However, since music only accounts for 20%, that means that I have to spend a lot of energy on making a living. I have to worry about my livelihood, what happens when I get old, what happens when I have kids and what happens when I get married. Besides, in this society and this country, you don't have any human dignity if you don't have a decent level of living. It's horrible.²³⁵

It would indeed be difficult for musicians to justify a career that requires all effort but earns minimal income in a society where wealth is the standard measurement of personal success and social status. A music executive described the psychological impact that the devaluation of music among consumers has on musicians:

If students are willing to pay five or six bucks for Coca-Cola, why are

²³² See the interview with the musician ZD.

²³³ See the interview with the musician LH1.

²³⁴ See the interview with the musician WJ1.

²³⁵ See the interviews with the musicians SF, LH and YWM.

they so reluctant to spend five or six bucks on cultural products as if the cultural industry only produces worthless stuff? If what we are doing is worthless, how can I prove myself by making music? First, I have to make a living, too, and music creation is not without cost. But let us put these aside. If a song has less value than a cup of tea or a cup of coffee, what are we doing here? So music turns into fast food. A song used to take a week, a month, or even a year to produce. Now it takes one day to produce dozens of songs, all being rubbish.²³⁶

Sixth, for musicians who really care about market and audience, money can guide their music creation by providing important signals about what music is valuable for consumers. A musician who had previously worked for a state-owned organization indicated that he understood better what “Serve the People” (a slogan of the Communist Party) meant since he became an indie musician: “I now genuinely attend everybody and serve everybody from the bottom of my heart.”²³⁷ Another musician who spent decades in a central-planning economy also applauded the marketization in the cultural industries and in the whole country:

Musicians are here to serve consumers. Consumer services depend upon money. Consumers have no other rights than their own money. They control their money and won’t allow you to make any money if they refuse to buy your products. At this moment, money is fairness, money is justice. By contrast, during the course of the Cultural Revolution, everybody had to submit their ID to buy a half pound meat and a half pound peanuts to celebrate spring festivals. Why don’t we do that any longer? It is because of marketization. Producers supply whatever consumers want and make money by doing so.²³⁸

B. Attitudes towards Piracy

The musicians in the sample have formed rather nuanced attitudes toward copyright piracy. **Exhibit 32** indicates, although only 5% stated that copyright piracy is overall beneficial to musicians, 33% held relatively neutral attitudes that appeared to assign equal weight to the benefits and costs of copyright piracy. They often described their views of copyright piracy as “a double-edged sword”²³⁹ or “a love/hate relationship.”²⁴⁰ Even among those who indicated copyright piracy is overall detrimental to musicians, 58.3% agreed that copyright piracy indeed has certain benefits.

²³⁶ See the interview with the executive ZYB.

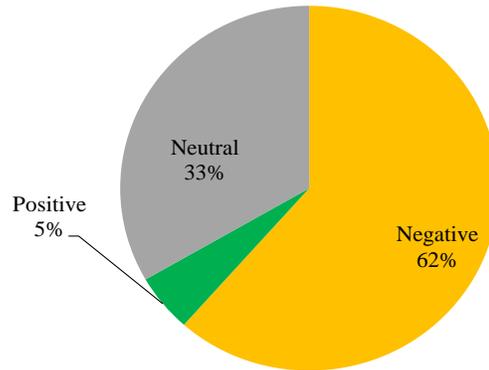
²³⁷ See the interview with the musician DQ.

²³⁸ See the interview with the musician LYQ.

²³⁹ See the interviews with the musicians LH1, PLY and YZ.

²⁴⁰ See the interviews with the musicians LGR and BY.

Exhibit 32
Attitudes towards Piracy
(China)

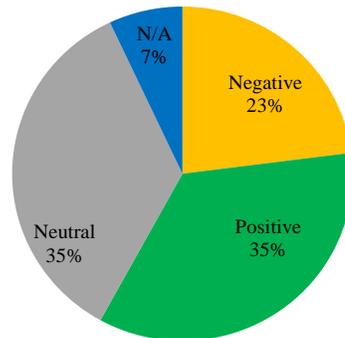


Before delving into the costs and benefits of piracy as perceived by Chinese musicians, it may be useful to contrast the attitudes towards piracy among U.S. musicians as **Exhibit 33** indicates below. On average, U.S. musicians are more tolerant of copyright piracy: 35% agree that file-sharing services are not bad for artists because they help promote and distribute their works, as opposed to 5% of Chinese musicians who think the same way.²⁴¹ Different attitudes may result from different personal experiences and everyday realities. The majority of Chinese musicians have personally faced copyright piracy, whereas average US musicians have never had the experience.²⁴²

²⁴¹ See Madden, *supra* note 85, at 34; Jeffri, Oberstein & Reed, *supra* note 85, at 71 (indicating that 41% of the US musicians like the exposure from downloading, 32% think they should get paid, and 21% don't mind).

²⁴² See *supra* note 311 and accompanying text.

Exhibit 33
Attitudes towards Piracy
(US)



1. Benefits of Piracy

First, 41% of all the musicians agreed that copyright piracy may promote dissemination of existing copyrighted products among the public by lowering the costs of accessing such products. Even musicians themselves benefit greatly from access to a wider variety of others' music, which brings new ideas and opens new horizons for their music creation. For instance, a music executive admitted frankly: "Copyright piracy may actually serve the purposes of education and dissemination. Arguably, this whole generation of Chinese people has in a large part built their music preferences around copyright piracy. I feel thankful to copyright piracy."²⁴³ Several musicians also suggested that copyright piracy could significantly lower music production costs because licensed music software could be priced in the range of hundreds to thousands of dollars. One musician confirmed: "Without copyright piracy, you would have to spend a lot of money on software, which is often unrealistic for Chinese musicians other than a small group of superstars."²⁴⁴

Second, copyright piracy may help consumers and musicians bypass the censorship system. As mentioned above, China subjects the reproduction, distribution, and importation of cultural products to extensive scrutiny by governmental authorities.²⁴⁵ In particular, the government only issues licenses for the importation of sound recordings to a limited number of state-owned enterprises. All imported titles must be pre-approved by the government. The censorship system naturally limits the supply of

²⁴³ See the interview with the executive LJ.

²⁴⁴ See the interview with the musician LGR.

²⁴⁵ See *supra* note 32 and accompanying text.

international music albums and creates market opportunities for piracy. One music executive pointed out:

Copyright piracy is unavoidable under the current circumstance that audiovisual products are subject to ideological censorship within China. The demand is still there while the supply has been firmly controlled. Consumers have turned to pirated products because they are either unable to access legitimate products or are forced to pay exorbitant prices for them. This is therefore a social problem rather than a simple matter of black or white.²⁴⁶

Third, the musicians apparently hold different views about whether copyright piracy could have any meaningful effect on the popularity of musicians and their works. 41% of all the musicians agreed that copyright piracy could promote their popularity, which in turn could generate better opportunities in ancillary markets, e.g. performance, advertisement, and sponsorship. The increased incomes from alternative markets, therefore, can substantially offset the impact of copyright piracy on music sales. One musician indicated: “You have to adjust your mentality. You’d realize that copyright piracy is actually helpful if you don’t depend on selling albums for money. For example, once you increase your popularity, you may make money from performances. The more people listen to your music, the more popular you would become.”²⁴⁷ A concert promoter echoed this attitude:

You might think that copyright piracy is harmful to musicians if you are accustomed to the lucrative profits that the record industry brings. However, looking at the big picture, it has only been a hundred years since the record industry started to bring musicians profits. Musicians had relied upon performances and patronage for their livelihoods throughout the majority of the human history. Many people may currently think that copyright piracy affects their interests. But why don’t you treat copyright piracy as a promotional tool and join the great tradition of generations of musicians returning to performances and patronage? Modern patronage is government support or commercial sponsorship.²⁴⁸

By contrast, 35.9% of all the musicians believed that copyright piracy had a limited effect, if any, as a promotional tool, which could hardly offset the overall impact of copyright piracy on the music industry. These musicians offered three reasons. First, any positive effect that musicians obtain from copyright piracy is usually not so substantial as to substitute for targeted promotion through mainstream channels. One musician stated:

What happened before was that, whatever money you got from physical sales and other lucrative things, you could buy promotion not only for that artist but for a bunch of other artists that were up-and-coming in a record label. That’s all disappeared. So piracy is a kind of very low-cost promotion. But I don’t think it’s replaced the really well-funded promotion that was going on before, where you could buy real advertisements for a bunch of artists...

²⁴⁶ See the interview with the musician LXR.

²⁴⁷ See the interview with the musician YZ.

²⁴⁸ See the interview with the executive LJ.

‘Cause the piracy stuff is all just whatever you get from the guys downloading the files, whatever impression they get. But you’re not buying media time on high quality media like television. It’s catch as catch can. You can direct people to your website a little bit but the quality of the promotion is much lower.²⁴⁹

Second, copyright piracy only enhances the popularity of a small group of musicians who are also singers or performers. A music executive explained this argument: “What copyright piracy really impacts is the livelihood of composers, arrangers, and engineers who are working behind the curtain although the impact on performers could be offset in alternative markets.”²⁵⁰ It is not only because average consumers usually pay little attention to musicians other than the frontwomen/frontmen but also because pure musicians who have limited ability to perform and are less attractive in appearance do not have substantial value in performance, advertisement, and sponsorship markets.²⁵¹

Third, although most musicians welcome copyright piracy as a signal of popularity, the causal relationship is probably reversed: It is not piracy causing popularity but popularity causing piracy. A music executive pointed out: “I have not seen our artists become popular because of copyright piracy. Relevant copyright piracy emerges only after we have spent a lot of money on promotion and an artist has started to achieve certain popularity in the marketplace. Why would they pirate a new artist out of nowhere?”²⁵²

2. Costs of Piracy

59% of the musicians in the sample made moral claims against copyright piracy while talking about the toll it takes on creativity. They asserted that copyright piracy is “unfair”²⁵³ to musicians, “disrespectful”²⁵⁴ to laborers, and equivalent to “stealing”²⁵⁵ that destroys the values of honesty and credibility in the society. Despite differences in rhetoric, their underlying themes appear to be highly consistent with Locke’s labor theory:²⁵⁶ First, Musicians, like all workers, are entitled to receiving fair return from the fruits of their labors. Second, the fair return should be proportionate to the labor that they devoted and the value that they contributed to society. Third,

²⁴⁹ See the interview with the musician LH1.

²⁵⁰ See the interview with the executive SK.

²⁵¹ See the interviews with the musicians AD, HXT, LH.

²⁵² See the interview with the executive FHJ.

²⁵³ See the interviews with the musicians JSL, ZJH and LL.

²⁵⁴ See the interviews with the musicians ZHS, LYQ, YF, LH1, SF, WPC, LD and LFQ.

²⁵⁵ See the interviews with the musicians DQ, LYQ, and LN, and the executives NB, ZYB and SK.

²⁵⁶ See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT*, SECOND TREATISE, §§ 25-51, at 302-51 (Peter Laslett ed., 2d ed., Cambridge Univ. Press 1967) (1690).

copyright piracy unduly appropriates their intellectual labors without fair compensation. Those musicians who complained about copyright piracy clearly followed this philosophy by emphasizing how much effort they put into creating music. For example, one musician stated:

Copyright piracy is totally harmful to social norms and shows no respect for authors... Making music involves a lot of hard work. Musicians spend countless hours on education, training, and practice, no matter whether they are trained in professional conservatories or not. However, their earnings are much lower than other professions, such as writers. Musicians are in a business that requires a substantial effort but receives a grossly disproportionate return that's been eroded by copyright piracy.²⁵⁷

Another musician explained the reason why his band was hesitant to release their third album:

Online piracy is a horrible thing. Consumers previously had to pay for an album, taking a walk, visiting a shop, and spending some money. This showed some return and respect to musicians. Nowadays, people can get any music with a few clicks on a computer in a dark house. Therefore, we are a bit concerned about making new albums. We devote money, energy, and emotion to our works. But how many people will pay for your albums?²⁵⁸

With regard to economic costs, the musicians in the sample unanimously agreed that copyright piracy affected music sales. One musician described the magnitude of its effect:

Copyright piracy has a great impact. If we were to release an album this month, three pirated versions would quickly emerge next month... During our tours, some music fans asked us to sign a disc that really amazed me. It was an MP3 compact disc that stored all the discographies of 30 to 50 bands. They bought the whole disc for 5 bucks. After signing that kind of disc, I really felt a bit uncomfortable... But that was still the disc era. Nowadays, in the network era, you release an album this week and it would become available everywhere online next week through Taobao, eMule, and famous portals. Even on my official blog, a fan commented: "you can download their songs directly from the IP address if you like the band." She posted the IP address on the blog, which eventually led to a digital locker with enormous saving space.²⁵⁹

As a matter of fact, a number of musicians observed that online piracy apparently had almost driven traditional media piracy out of the Chinese market.²⁶⁰

The majority of the musicians (66.7%) believed that the losses in music sales translated into decreases in their incomes. One musician gave examples about what happened to people around him:

²⁵⁷ See the interview with the musician LD.

²⁵⁸ See the interview with the musician DQ.

²⁵⁹ See the interview with the musician NB.

²⁶⁰ See the interviews with the musicians LH, BY, WXL, JSL, WZL, WJ1, YZ, XQ, ZWJ, LY, LL and XB.

The guy that we worked for, again, without being specific or anything, he made millions and millions [from music albums]. Once piracy began, all the revenues just vanished though his talent didn't just go away. So it slashed his income by a huge amount. I know others who are the same way. There are many famous people in China I know that were already successful recording artists, their revenues plummeted. They're not less talented and they're not less liked.²⁶¹

The rest of the musicians (33.3%) did not regard copyright piracy as a threat to their earnings after they changed their career focuses or simply changed their mentalities. As mentioned above, many musicians attached an increasing importance to performance and other alternative markets for their earnings. Copyright piracy does not appear to have any negative effects and may arguably have certain positive effects on those markets.²⁶² One musician expressed her skepticism about the actual impact:

Copyright piracy is of course harmful, but is the harm really large? I feel nowadays nobody depend on albums for money, including pop stars. Do you think they really make a living through music sales? They instead earn a living through performance opportunities that result from their albums. China has turned into a performance market today.²⁶³

The composers who are not also performers tried to minimize the impact of copyright piracy by demanding lump-sum payments rather than ongoing royalties. Sales numbers no longer concern them when they have collected lump-sum payments.²⁶⁴ These musicians, however, did not appear to factor in the possibility that the buy-out price might be higher if copyright piracy were better controlled.

38.5% of the musicians in the sample pointed out that copyright piracy may affect investment in music creation because it impedes the ability of musicians and music companies to recoup their investment. For example, a music executive indicated that the investment in music production was 10% of the level it was five years ago before Baidu music services emerged. His company used to budget an average of RMB 20,000-30,000 (US\$ 3,200-4,800) for purchasing a song, but today can only afford RMB 3000 (US\$ 480) per song.²⁶⁵ A self-funded musician shared his own experience:

We devoted a lot of money and energy to producing our music, which, however, became immediately available online for free downloading. We could not recoup our investment from anywhere. It started a vicious circle. We were merely able to produce two albums and had no resources to continue with the third one. When we were unable to maintain this business, we had to find other jobs to make a living. Maybe, we'll resume music creation one day

²⁶¹ See the interview with the musician LH1.

²⁶² See *supra* note 323 and accompanying text.

²⁶³ See the interview with the musician YYC.

²⁶⁴ See the interviews with the musicians YYC, WK, WZL, TY, WJ1 and YF.

²⁶⁵ See the interview with the executive ZYP. The price decrease was confirmed by others. See, *also*, the interview with the musician WJ1.

when financial conditions get better. This is as far as we can go.²⁶⁶

38.5% of the musicians in the sample further believed that copyright piracy may also affect the quality of music production. They offered three major reasons. First, the diminished investment in music production naturally affects its quality:

When copyright piracy wasn't a big concern yet and my albums could sell fifty thousand, I didn't hesitate to invite the best musicians, those who not only possessed the finest techniques but also shared the same perspectives to collaborate. Besides, the studio was accessible to musicians 24/7. So musicians could start recording whenever they were ready. Record companies could afford such investment in those days when albums were lucrative. No record companies continue this way today. They all think: "Why do we need to invest in music production if there are neither album sales nor payment from online downloading?" They simply simulate music by computer, get artists some media attention, and make quick bucks through performances.²⁶⁷

Second, music companies devote their attention to producing music that caters specifically to ringback-tone markets as ringback tones comprise the only remaining source of income from music sales. As mentioned above, ringback tones are one of the most menial applications of MP3 technology, featuring low quality and short length.²⁶⁸ The music market driven by ringback tones is more likely to compromise quality and variety. One music executive summarized the golden standards for successful products in ringback-tone markets: "It would likely be a hit if the melody is catchy and I could sing along while you play the song. The lyrics should sound simple and explicit."²⁶⁹

Third, a number of music companies have shifted their attention to developing models, actors, and other existing celebrities who have substantial values in performance, sponsorship, and advertisement markets. Music production following this approach apparently does not revolve around quality concerns because these celebrities generally lack musical talent and formal training.²⁷⁰ One musician explained:

All the stuff we complain about, models and actors, they're doing that because the only thing they can monetize is very big fame. So those guys who already have fame or are beautiful physically don't need music sales. It makes sense for them... That's all pretty unhealthy because music has gotten thrown under the bus. I mean nobody really cares about that anymore. So that's not a good thing. That would be like an art community where nobody cares anything about the art.²⁷¹

The musicians in the sample expressed extremely divergent views

²⁶⁶ See the interview with the musician NB.

²⁶⁷ See the interview with the musician ZD.

²⁶⁸ See *supra* note 173 and accompanying text.

²⁶⁹ See the interview with the musician WJ1.

²⁷⁰ See *supra* note 265 and accompanying text.

²⁷¹ See the interview with the musician LH1.

about the impact of copyright piracy on their motivations for music creation. 56.4% thought that there was no impact and 43.6% thought otherwise. Most musicians who had brushed off the impact appeared to follow the belief: “Real musicians should not be affected by copyright piracy.”²⁷² They took great pride in their intrinsic motivations and prefer making music for music’s sake instead of making music for money. One musician explained why he did not mind copyright piracy:

Musicians produce music and may happen to produce money. If you are really interested in making money you should do something else. Using music to collect money is a wrong choice... Musicians have to realize that musicians are supposed to produce music like writers are supposed to produce writings. Music itself should be satisfying enough although it may or may not result in money as a byproduct, which is a totally different issue.²⁷³

As mentioned above, young artists and alternative artists who strived to expand their fan bases sometimes thought that copyright piracy could promote their popularity and in any event amount to a welcome sign of increasing popularity.²⁷⁴ Several musicians believed that copyright piracy did *not* substantially impact their incomes after having totally disregarded music sales and transferred the focuses of their careers to alternative markets such as performances.²⁷⁵ Nevertheless, there is evidence that such a mentality may result from coming to terms with the reality rather than personal preferences. While there is rampant online piracy affecting a vast number of musicians and their works, no single musician has sufficient incentive to enforce her rights. The reason is that her individual efforts in copyright enforcement would not generate more sales, but rather divert consumers from her works to others’. In other words, the pirated music of other musicians simultaneously devalues her works, reflecting the classic problem of collective action. Musicians have learned to stop worrying about copyright piracy. If musicians are now focused on alternative revenues, copyright piracy supposedly has a limited impact on the half of the glass that remains full: “We were previously worried about copyright piracy because we could still make money from music sales. Nowadays, nobody would buy your music even if there were absolutely no piracy of your works. Conversely, some piracy of your music might actually bring opportunities in the performance market.”²⁷⁶

The 43.6% musicians who agreed that copyright piracy may affect motivation for creation mostly stressed its financial impact on livelihood,

²⁷² See, e.g., the interviews with the musicians XB, HXT, ZD, ZJH and XQ.

²⁷³ See the interview with the musician HXT.

²⁷⁴ See, e.g., the interviews with the musicians, XQ, WZL and GF.

²⁷⁵ See *supra* note 253 and accompanying text.

²⁷⁶ See the interview with the musician WJ1.

which could make a music career less sustainable.²⁷⁷ For example, one musician explained why the impact of copyright piracy might not be clearly felt in the short run:

Generations of talented and hardworking musicians have devoted themselves to music because of their passion for music but are unable to receive much return. This financial situation become increasingly problematic as a musician grows from a youngster to one who needs to support a family. Some musicians persist with their dreams and others end up changing their careers... Yes, copyright piracy may indeed affect motivation for creation. It rarely takes effect during the first year because anyone can spend a year for music regardless of costs and benefits. However, it is not a long-run plan. Her passion would gradually diminish after three years passed by, or a number of three years in the cases of up-and-coming Chinese musicians. Many eventually have to change their careers doing something else for their livelihood.²⁷⁸

Remarkably, even among the musicians who claimed that copyright piracy did not significantly affect their motivations, 50% admitted that it could nevertheless affect their energy and time spent on music creation or the quality of music creation.²⁷⁹ Musicians can hardly concentrate on their own expression if a decent living requires working excessive hours in alternative markets, e.g. performances, synchronization or taking non-musical second jobs.²⁸⁰

C. Copyright Awareness

The majority of the musicians interviewed (53.8%) explicitly admitted that they had little knowledge about copyright law. Many further indicated that the general public also lacks necessary copyright awareness and has been accustomed to rampant piracy.²⁸¹ A musician who worked for a radio station told a fascinating story:

The radio station used to have a program called "Please Record," which showed little copyright awareness. The host would say, "Today we have a new album and will broadcast the whole album per listeners' request. Please get your cassette ready in a recorder. Now we play the six songs on Side A.

²⁷⁷ See, e.g., the interviews with the musicians AD, YWM, SF, ZHS, LH, JSL, KR, MZ and LD. Against, it's very likely that those musicians whose motivations are significantly affected by copyright piracy might have retreated from the music industry. Therefore, they would be underrepresented in the sample. In other words, the empirical evidence based upon interviews with existing musicians would have a tendency to select those who care relatively little about copyright piracy impact.

²⁷⁸ See the interview with the musician JSL.

²⁷⁹ This implies that 72% of the musicians in the sample agreed that copyright piracy could at least affect one aspect of music production, whether being motivation, quality or energy.

²⁸⁰ See, e.g., the interviews with the musicians NB, YYC and XQ.

²⁸¹ See, e.g., the interview with the executive CS.

Please record.” Therefore you could record a number of entire albums.²⁸²

The most intriguing part about the story was that the musician did not appear to recognize the obvious exemption that end users recording a broadcast off the air could actually constitute fair use.²⁸³

Copyright awareness even became a problem for judges sometimes. An executive mentioned:

There were actually judges who questioned us: ‘For the exactly same plastic disc, how come the pirated version was sold for five dollars and you could instead charge fifty dollars? Are you involved in profiteering?’ However, those judges didn’t know that pirate enterprises indeed paid merely for the plastic disc but we paid much more than the plastic disc.²⁸⁴

Although most musicians had minimal copyright awareness, 71.8% agreed that copyright law should provide incentive for music creation.²⁸⁵ Their explanations were again focused primarily on the importance of respecting intellectual labors following Locke’s labor theory.²⁸⁶ For example, a musician said: “In terms of copyright law, it is a time-proof truth that every society and every country should respect every individual and his labor, not only by applause but also by offering him a return in proportion to his contribution to the social welfare.”²⁸⁷ Another musician instead justified copyright law by using market rhetoric: “The starting point of all laws should be protecting productivity and creativity. Likewise, copyright law should provide incentive for the development of various creations, rewarding those who have created better works and more works and punishing those who have plagiarized and infringed others.”²⁸⁸

Meanwhile, 92.3% of all the musicians in the sample indicated that the current level of copyright protection in China is insufficient, and 64.1% suggested that the Chinese government should increase its copyright efforts.²⁸⁹ Though most musicians were not familiar with the nuances in copyright law, they formed their perceptions of copyright protection

²⁸² See the interview with the musician LH.

²⁸³ The copyright awareness among Chinese artists may contrast the findings related to US musicians. See Madden, *supra* note 85, at 23 (indicating “some 54% of all artists in our sample say they are somewhat or very familiar with current copyright laws and regulations”).

²⁸⁴ See the interview with the executive CK.

²⁸⁵ US musicians appear to have similar perceptions about copyright law. See Madden, *supra* note 85, at 46 (67% of the musicians say copyright owners should have complete control over the material they copyright, and the same proportion do not believe current copyright laws unfairly limit public access to art.)

²⁸⁶ See *supra* note 256 and accompanying text.

²⁸⁷ See the interview with the musician LFQ.

²⁸⁸ See the interview with the musician LYQ.

²⁸⁹ By contrast, US musicians appear far more content with copyright laws as 61% believe that current copyright laws do a good job of protecting artists’ rights. See Madden, *supra* note 85, at 46.

through everyday experience. They noticed that copyright piracy was everywhere online and offline,²⁹⁰ that multiple pirated versions emerged within a week after they released their new albums,²⁹¹ that their music was performed by karaoke bars, at amusement parks, and by other artists without any authorization,²⁹² that even the biggest television networks and the biggest search engines in China contained extensive infringing content,²⁹³ and that their fellow musicians are constantly complaining about copyright piracy.²⁹⁴

These musicians appeared to be concerned mostly with copyright enforcement rather than the law itself.²⁹⁵ They referred to copyright law frequently using such phrases as “decorative”,²⁹⁶ “non-existent”,²⁹⁷ and “a piece of meaningless paper”,²⁹⁸ because it had not been seriously enforced yet. In other words, these musicians have instinctively understood the important difference between law in action and law in books. The comment below was a typical example:

Copyright law is irrelevant to me. It can't help me. The government simply put it out as a token policy, but has apparent difficulty in enforcing it to control widespread piracy. We are unsure how much effect the law has in practice. To indie musicians, it's irrelevant and we solve our problems mostly through private measures regardless of government policy.²⁹⁹

Some musicians expressed their understanding that the Chinese government might not have necessary resources yet to enforce copyright throughout such a large and populous country.³⁰⁰ But others disagreed, maintaining that although it would be difficult to eliminate copyright piracy completely, it should be straightforward to reduce it from its current level. One executive emphasized that the Chinese government should have little problem fighting widespread piracy:

They know. They know. When you are providing large-scale services to download pirated music you can track that down pretty easily... If your largest search engine in the country is linking, hot-linking to lots of sources of downloads to free music there might be something wrong with that. They could enforce things like that. If I as a user send an email to my friend with the MP3, that is much harder to enforce. But the large-scale, easy, free

²⁹⁰ See the interviews with the musicians YYC, XQ, LN, YWM, ZJH, ZHS and SF.

²⁹¹ See the interviews with the musicians DQ, NB and LL.

²⁹² See the interviews with the musicians WZL, WXL and YF.

²⁹³ See the interviews with the musicians YYC, LH and JSL.

²⁹⁴ See the interview with the musician LL.

²⁹⁵ See the interviews with the musicians WXL, WZL, JSL WK, YWM and WJ, the executives CS, ZJC and WM.

²⁹⁶ See the interviews with the musicians SF and WXL.

²⁹⁷ See the interviews with the musicians DQ, WXL and ZJH. YF.

²⁹⁸ See the interviews with the musicians WZL and WK.

²⁹⁹ See the interview with the musician NB.

³⁰⁰ See the interviews with the musicians BY, ZWJ and YZ.

downloading, they can do something about that.³⁰¹

Another musician echoed:

The government is totally capable of preventing copyright piracy. You couldn't find any pirated copies of a movie by Zhang Yimao [the director of the Olympic opening] while it was playing in theaters... All pirating stores had been closed down during the Beijing Olympics and the Shanghai World Exposition, too. The government could stop copyright piracy if they wanted to.³⁰²

Some believed that the tentative attitude towards copyright enforcement was mainly attributable to the fact that the Chinese government had other priorities at the moment. An executive indicated:

To enforce those kind of laws would involve quite a large effort, one way or another, and I think their efforts are elsewhere right now, which makes sense. I think it's more important right now to – which they've been doing for the past thirty years – to sort of eradicate poverty and not have people starving, for example, than to be helping several artists in the big city have a better living... I think they decide which battle to fight and I don't think they are picking this one right now.³⁰³

Other musicians implied a deeper reason why the Chinese government likely lacked the political will necessary to control widespread piracy, which was often deemed beneficial for local economy. An established musician pointed out:

After all these years in the music business, I have witnessed companies that began by producing piracy turned into legitimate music labels. I have also heard that these companies did not shut down their piracy businesses. They actually produced A/B versions after obtaining the masters. Version A was licensed and Version B was pirated. Version B was distributed in the marketplace and didn't affect their profits at all... Copyright piracy involves a lot of intertwined interests. Local governments are often unwilling to shut down pirate factories because they provide local tax revenues and employment opportunities.³⁰⁴

Among all the musicians who provided a definite answer to the question on the level of copyright piracy they thought would be *ideal* under the current social, economic, and cultural conditions, the mean value was 21.6% and the median value was 20%. 36.4% preferred zero copyright piracy, 93.9% recommended a 50% level if not lower and the most generous suggested a 70% level. These statistics explain why almost all of the musicians thought, and rightfully so, that the current copyright protection efforts were insufficient (**Exhibit 34**). Even the most generous among them preferred a level of copyright piracy vastly below the actual

³⁰¹ See the interview with the executive CS.

³⁰² See the interview with the musician LD.

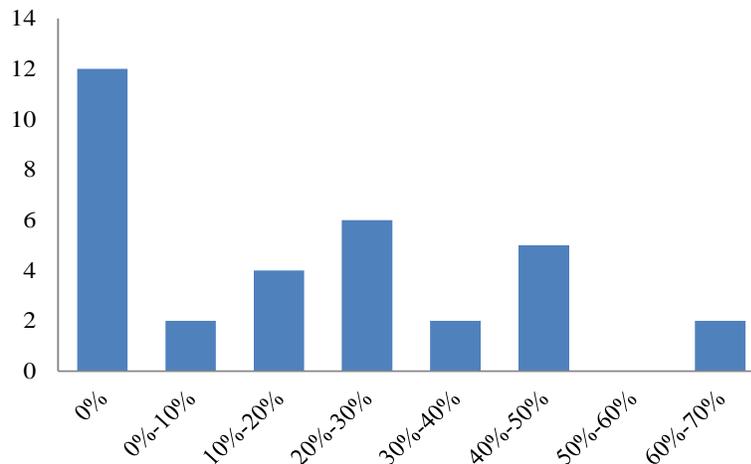
³⁰³ See the interviews with the executive CS, and the musician WZL.

³⁰⁴ See the interviews with the musicians LH, ZJH and WJ1.

level within China, which has consistently exceeded 90% in recent years.³⁰⁵ Those who suggested tolerating a certain percentage of copyright piracy generally emphasized its three benefits as discussed above, i.e. widening music access especially for low-income families,³⁰⁶ assisting average Chinese consumers in bypassing the censorship system,³⁰⁷ and boosting the popularity of various musicians and their work.³⁰⁸

Exhibit 34

Distribution of Piracy Rates Suggested by Musicians



Only 17.9% of the musicians in the sample mentioned they had taken enforcement action in response to copyright infringement (**Exhibit 35**). One plausible explanation is that musicians neither sought out nor came across any infringement of their own works.³⁰⁹ However, this explanation is not really applicable to 82.1% of the sample who have personally encountered infringing activities. The percentage strikingly contrasts a comparable study that finds, in the U.S., 28% of musicians have similar experiences.³¹⁰ Another reason is that certain Chinese musicians do not really care about copyright piracy, especially those who believe that copyright piracy may promote their popularity.³¹¹ However, the biggest reason appears to be that musicians are concerned about the costs of enforcement, including the energy, time, and money spent on investigating infringers, collecting evidence, and hiring attorneys.³¹² One musician made a typical statement: “I

³⁰⁵ See *supra* note 40 and the accompanying text.

³⁰⁶ See the interviews with the musicians WCP, WZL and ZWJ.

³⁰⁷ See the interviews with the musicians YYC and LH.

³⁰⁸ See the interviews with the musicians PLY, HJJ and WK.

³⁰⁹ See, e.g., the interviews with the musicians XQ, YYC and WJ.

³¹⁰ See Madden, *supra* note 85, at 46.

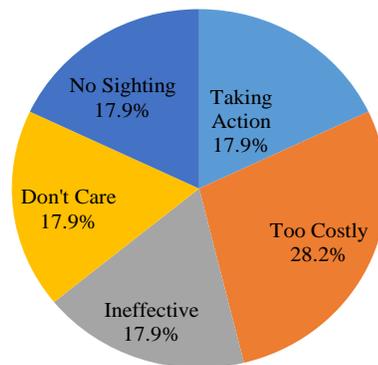
³¹¹ See, e.g., the interviews with the musicians GF, ZD and YZ.

³¹² See, e.g., the interviews with the musicians KR, SF and TY.

don't have the energy to fight copyright piracy because it has been everywhere in China. I don't even know where to begin."³¹³ A related reason is that musicians often felt that they were powerless in the face of widespread piracy and their actions would not change anything anyway.³¹⁴ One musician indicated: "I can't do anything about copyright piracy. The fight against copyright piracy didn't start today. Why is the fight still going on after so many years? Copyright piracy exists for a reason. It has become an industry."³¹⁵ It seems a bit ironic that Chinese copyright law apparently does more to deter authors whose copyrights are infringed than those who infringe others' copyrights.³¹⁶

Exhibit 35

Responses to Infringement



IV. A THEORY OF COPYRIGHT AND INCENTIVE

This section discusses how the empirical findings may contribute to the current discourses on the incentive rationale, which is widely believed to be the economic foundation justifying the utilitarian approach in Anglo-American copyright law.³¹⁷ It presents a theoretical framework that explains under what conditions an artist would remain a full-time musician, become a part-time musician, or change her career, taking into account the interactions between emotional benefits and economic benefits from music creation. The analysis clarifies that copyright law can supply powerful

³¹³ See the interview with the musician LL.

³¹⁴ See the interviews with the musicians NB, LN, WK, YWM, JSL and XB.

³¹⁵ See the interview with the musician WJ1.

³¹⁶ Among the nine music labels interviewed, six mainstream labels had all been involved in enforcement action while three indie labels had not. The indie labels, which usually had limited financial resources, were similarly deterred by substantial enforcement costs. See the interviews with the executives WM, JSL and CS.

³¹⁷ See *supra* note 1 and accompanying text.

incentives for music production in a way that not only caters to market demand but also allows for wider artistic freedom even though musicians mostly work for intrinsic motivation.

A. *The Incentive Rationale*

The incentive rationale begins with an understanding of the economic features of copyright subject matters.³¹⁸ Information products including works of authorship are believed to have certain characteristics of a public good, i.e., “non-excludability” (or “inappropriability”) and “non-rivalry” (or “indivisibility”).³¹⁹ “Non-excludability” means that, once information is created and distributed, it is physically difficult to exclude others from enjoying it. The consumption of information is “non-rivalrous” where it may be enjoyed simultaneously by an infinite number of people without incidentally affecting the enjoyment by others. In economic terms, the marginal cost of extending the consumption to another person is negligible or near zero. Under such circumstances, it is extremely difficult for authors to recoup the fixed costs of creating their works in a market without property rights because competitors, who are free to copy the same works without incurring the fixed costs, will soon drive the prices towards the marginal costs of reproduction and distribution.³²⁰ Therefore, the market tends to undersupply those valuable works absent sufficient incentive for intellectual creation. Copyright law is intended to solve the incentive problem by granting authors exclusive control for a limited period of time over reproduction and distribution of their works, which in turn generates market opportunities of pricing their works above marginal costs.

The incentive rationale has given birth to three different approaches in copyright scholarship, which may be loosely called the “bargain approach”, the “autonomy approach” and the “market approach.”

The “bargain approach”³²¹ refers to the line of arguments that regard

³¹⁸ For a detailed survey of economic theories in connection with copyright law, see PAUL GOLDSTEIN, *GOLDSTEIN ON COPYRIGHT* (3rd Ed., 2005); Gillian K. Hadfield, *The Economics of Copyright: An Historical Perspective*, 38 *COPYRIGHT L. SYMP.* (ASCAP) 1 (1992).

³¹⁹ See, e.g., PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, *ECONOMICS* 37 (17th ed. 2001); ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 135 (1988); William M. Landes & Richard A. Posner, *An Economic Analysis of Copyright Law*, 28 *J. LEGAL STUD.* 325, 326 (1989).

³²⁰ From an *ex post* perspective, once a work is created, the author would be unable to internalize the fixed costs and therefore suffer a competitive disadvantage over free riders who do not bear the fixed costs. From an *ex ante* perspective, even if the author tries to negotiate a price with all potential users before the work is created, the gaming theory suggests that many users likely undervalue the work attempting to free ride other consumers’ contribution.

³²¹ See *supra* note 2 and accompanying text.

copyright law essentially as a hypothetical bargain between authors and the general public. From the perspective of the general public, copyright protection should only be offered to the extent absolutely necessary to induce creation of works that otherwise would not have been created. In other words, copyright protection is not desirable as long as authors would continue to create works of no less quantity, variety, and quality, either based on alternative revenue streams or for non-commercial reasons.

According to the “autonomy approach,”³²² although authors create for a variety of reasons, many of which may actually be non-commercial in nature, copyright law provides the necessary financial independence for a robust creative and expressive sector that can stand up to political interference and commercial manipulation. Copyright law supplies a powerful incentive for creativity not in the sense that authors would not create but for money, but in the sense that money protects authors’ autonomy in literary and artistic expression.

The “market approach”³²³ emphasizes that copyright law preserves the market as the principal mechanism to allocate resources to intellectual production and to connect authors with their consumers in the most direct way possible. Consumer demand will signal the appropriate levels of pricing and production for various intellectual products while generating proper compensation for authors in proportion to the values of their works to the society.³²⁴ The market mechanism has the potential to work better in the digital environment where new technological tools have become available to measure consumer preferences more precisely.

Recent copyright literature has started to question the validity of the incentive rationale, arguing that artists are mostly self-driven and create

³²² See Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 341 (1996).

³²³ See GOLDSTEIN, *supra* note 6, at 200 (2003) (“there is no better way for the public to indicate what they want than through the price they are willing to pay in the marketplace”); Harold Demsetz, *Information and Efficiency: Another Viewpoint*, J. L. & ECON. 12 (1969) (arguing that production and consumption of information cannot be judged independent). In fact, the “market approach” may date back as early as to Adam Smith. See ADAM SMITH, LECTURES ON JURISPRUDENCE 82-83 (R. L. MEEK et al. eds. 1987) (1762) (“[Copyright] is perhaps as well adapted to the real value of the work as any other, for if the book be valuable one the demand for it in that time will probably be a considerable addition to his fortune. But if it is of no value the advantage he can reap from it will be very small”).

³²⁴ The “market approach” discussed here is more of *ex ante* justification in that it suggests how to allocate resources for creation of intellectual products. This is different from *ex post* justification that teaches how to allocate existing intellectual products to their highest socially valued uses. See Netanel, *supra* note 322, at 309. For the differences between *ex ante* and *ex post* justifications, see generally Mark A. Lemley, *Ex Ante versus Ex Post Justifications for Intellectual Property*, 71 U. CHI. L. REV. 129, 148-49 (2004).

music for music's sake rather than for economic rewards.³²⁵ Therefore, any economic incentive would allegedly become redundant, if not counterproductive, for music creation in cases where musicians are only responsive to intrinsic motivations. As a matter of fact, aren't there a lot of people who pay instead of getting paid to create and distribute their works including karaoke performers, Flickr photographers, and vanity authors? This logic calls for a reexamination of the incentive rationale under copyright law: If the economic benefits provided under copyright law are actually *not* what induce artists to create, it should be possible to remove or lower copyright protection without any negative effect, a tempting proposition considering the transaction costs involved in copyright regimes.³²⁶ This argument, however, appears to reflect an oversimplified perception as regards the incentive rationale.

B. Economic Benefits versus Emotional Benefits

This article confirms that musicians often receive both emotional benefits and economic benefits from music production. To sum up the empirical findings presented above, the majority of the musicians in the sample referred to one or more of the following emotional benefits as their motivations:

1. Self-expression: Musicians have an inherent desire to express themselves through music creations whether or not there is an audience.³²⁷ This emotional benefit attaches great importance to such values as genuine expression, artistic integrity, and love for music.
2. Communication: Musicians also use their music as a means to identify like-minded friends and communicate with friends.³²⁸ To this extent, musicians do need an audience although the size of the audience does not really matter much.
3. Peer respect: Musicians sometimes regard the recognition and respect from their fellow musicians (i.e. professional reputation) as a powerful motivation for future creation.³²⁹ Peer respect could take the form of professional awards or invitations from other musicians for collaboration. From this perspective, musicians again need an audience, but a particular kind of professional audience.

³²⁵ In economic terms, the supply of creative works has low price elasticity to the extent that artists are not really sensitive to price changes. For recent literature that questions the incentive rationale, *see, e.g., supra* note 5 and accompanying text.

³²⁶ *See* Stan J. Leibowitz, *Is Efficient Copyright a Reasonable Goal?*, 79 GEO. WASH. L. REV. 1692 (2011) (discussing whether copyright protection creates economic rent, which is relevant to the incentives for music production).

³²⁷ *See supra* note 193 and accompanying text.

³²⁸ *See supra* note 203 and accompanying text.

³²⁹ *See supra* note 205 and accompanying text.

4. Popularity: Musicians often strive to develop the popularity of their music or of themselves as one of the major reasons for their music creation.³³⁰ These musicians generally welcome as large a music audience as possible. This objective may be manifested in a way that is actually altruistic and non-pecuniary, e.g. promoting the dissemination of indigenous music.

The above four emotional benefits are listed in the order of increasing dependence upon the feedback from others.³³¹ Music for self-expression may totally ignore any feedback and concentrate on the artistic integrity of the artist. Music for communication emphasizes the shared identity of the artist and her friends irrespective of any feedback from the outside world. By contrast, music for peer respect and popularity requires feedback from a large audience. As the feedback group grows larger, it becomes more difficult to identify common values among group members and, therefore, the artist faces increasing pressure to compromise her individuality. Interestingly, the empirical evidence also confirms that the more musicians need to depend upon the feedback from others to obtain an emotional benefit, the less important that same benefit becomes to musicians.³³² Besides, as the emotional benefits increasingly correspond to larger feedback groups, there are better opportunities to monetize such emotional benefits. For instance, peer respect may bring more performance gigs through referral and popularity may result in better music/ticket sales.

Nevertheless, such emotional benefits are normally inalienable to the extent that a musician is physically unable to transfer her integrity or her reputation to a third party in exchange for monetary payment.³³³ The

³³⁰ See *supra* note 209 and accompanying text.

³³¹ Notably, the economic benefits and emotional benefits roughly correspond to the well-known Maslow's hierarchy of needs, which include physiological needs, safety, love and belonging, esteem, and self-actualization. The economic benefits cover physiological needs and safety, communication enhances love and belonging, peer respect and popularity satisfies esteem, and self-expression equals self-actualization. The five needs are basically described in a hierarchy of decreasing magnitude. The earlier needs constitute more fundamental motivations that individuals must satisfy first before striving to satisfy the later needs in the hierarchy. The empirical evidence herein nevertheless indicates that musicians often regard the later needs (e.g. self-expression) as their fundamental motivations. See Abraham Maslow, *A Theory of Human Motivation*, 50 PSYCH. REV. 370 (1943).

³³² See *supra* note 191 and accompanying text.

³³³ When we speak of a musician having sold out, it usually means that she has significantly compromised her artistic integrity for monetary gains. It doesn't mean there is a third party who actually receives her musical integrity. See, e.g., Dorian Lynskey, *The Great Rock 'N' Roll Sellout*, THE GUARDIAN (Thursday 30 June 2011), available at <http://www.guardian.co.uk/music/2011/jun/30/rocknroll-sellout>; Lizzie Azran, *In Defense of "Sell Out" Musicians*, NYU LOCAL (March 20th, 2012), available at <http://nyulocal.com/entertainment/2012/03/20/in-defense-of-sell-out-musicians>; Matt

emotional benefits of self-expression and communication, which are inherent in creative processes rather than creative works, would likely diminish if one merely replicates what others have created. Similarly, reputation is usually not something one could purchase in the market. Even in the narrow cases of ghost writing, the credited author would only buy the opportunity to establish a reputation before the work is actually published. Transactions would no longer be attractive for either party if a work has been published and the ensuing reputation has been vested in the original author.

Almost all musicians in the sample recognized that economic benefits should be useful and important for music creation, a position that they did not find irreconcilable with their intrinsic motivations. They appeared to believe that money can promote music creation even though musicians do not work for money, which likely has a lot to do with the following costs involved in music creation:

1. Living Costs: Musicians need a sufficient source of income for their livelihoods while pursuing their music dreams. Musicians should ideally be able to follow the maxim to “make a living by doing what you love.”³³⁴
2. Production Costs: Musicians need access to various musical instruments and recording equipment for music creation. They often need to collaborate widely with other musicians including session players, sound engineers, and producers. While such costs are not as exorbitant as they were decades ago thanks to the rapid growth of digital technologies, they can still amount to a substantial investment for indie musicians.³³⁵
3. Opportunity Costs. Musicians sometimes need to sacrifice other job opportunities to pursue their music careers. To this extent, the opportunity costs are the net benefits from the best alternative.³³⁶

Rosoff, *Can Bands Sell Out Anymore?* CNET (April 14, 2010) available at http://news.cnet.com/8301-13526_3-20002543-27.html.

³³⁴ See, e.g., the interviews with the musicians ZHS, CT, WJ, YZ, YWM, KR, LH, YYC, LH1, PLY, LN, WK, GF, WXF, AD, ZD and MZ.

³³⁵ See *supra* note 311 and accompany text. Notably, marketing costs and distribution costs are NOT included herein because not all musicians are motivated to distribute their works as widely as possible.

³³⁶ See *supra* note 163 and accompanying text for discussions of various second jobs for musicians. The major factors of production are often categorized into three groups: capital, material and labor. The net benefits refer to the total benefits (including both emotional benefits and economic benefits) minus the costs for capital and material, because we are addressing the issue where and how to invest labor. For general introductions of opportunity costs regarding the cultural industries, See RUTH TOWSE, *A TEXTBOOK OF CULTURAL ECONOMICS* 300 (2010).

C. Incentive through Copyright

The above discussions on the costs and benefits of music production lay the foundation for establishing the conditions under which a person would become a full-time musician by choosing a music job over a non-music job.

The first condition requires that the total of emotional benefits and economic benefits from being a musician exceed the total of opportunity costs and production costs involved. This condition explains why some musicians turned down lucrative non-music jobs in favor of music jobs. Taking the example discussed above,³³⁷ being an artistic director for films could bring three times the economic benefits of being a musician. Being a musician may however generate far more emotional benefits than being an artistic director. The artist chose her music career over her film career after weighing both emotional benefits and economic benefits.

The second condition requires that the economic benefits from being a musician exceed the sum of living costs and production costs. This condition explains why a musician may choose to change her job even though a music job would bring her more net benefits than any other job. For instance, the total of emotional benefits and economic benefits from being a musician may significantly outweigh those from being a lawyer. Meanwhile, the economic benefits are only a small portion of the total benefits from being a musician, and the emotional benefits are a small portion of the total benefits from being a lawyer (not so far-fetched an assumption for corporate lawyers). Musicians, however, can only pay off their living and production costs through the economic benefits they receive, and the ability to afford such costs is clearly essential for anyone to remain a full-time musician. An artist who is unable to earn enough money from a music job for living and production costs would therefore be forced to get a non-music job.

When the first condition is satisfied (i.e. a musician gains more net benefits from a music job), but the second is *not* satisfied (i.e. a music job does not provide sufficient economic benefits to cover both living and production costs), a musician would probably take a non-music job on a part-time basis rather than totally change her career path. She would spend just enough energy and time on the non-music job to pay the bills, saving as much as possible for the music job, which, after all, is the most rewarding when both emotional and economic benefits are taken into account.³³⁸ This

³³⁷ See the interview with the musician YZ.

³³⁸ What second job a musician may choose depends on how long it requires to bridge the gap between the economic benefits from her music job and living costs plus production costs (which inversely correlates with how much she get paid for the second job) and the difference between the net benefits of her music job and her second job. A musician would

explains why many musicians who are multiple job-holders earn the majority of their earnings from non-music jobs, but spend the majority of their energy on music jobs.³³⁹

The above could also explain the interesting phenomenon that those musicians who receive pay raises on non-music jobs end up spending more time on their less lucrative music jobs, seemingly contradictory to the theory of supply and demand. An increase in wages for a non-music job may have three different effects on different musicians: For those who receive relatively small emotional benefit from music creation, the wages difference might be enough to overcome the losses in emotional benefits and induce them to totally change their careers. However, for those who receive relatively large emotional benefits from music creation, the wages difference would not be enough to outweigh the loss in emotional benefits or induce them to change careers. Among the latter group of musicians, if they are able to earn enough revenues from music jobs for their living and production costs, the pay raise would not have any effect whatsoever; If they still need non-music jobs for financial reasons, they would be able to bridge the gap between the economic benefits from music jobs and living costs plus production costs faster. This effect naturally offers the third group of musicians (i.e., multiple job-holders) more energy and time to spend on beloved music careers.³⁴⁰

The two conditions may apply equally to explain why musicians prefer one music job to another. For example, an artist may choose between writing a folk ballad for her indie band and making jingles for television commercials. Though a commercial jingle pays a lot better, the empirical evidence indicates that the price difference may not necessarily induce a

choose the second job for which the scarification of net benefits is the smallest as resulting from the first factor multiplied by the second factor. This means that the best alternative, which may or may not have a substantial percentage of economic benefits, is not necessarily the second job that a musician would choose.

³³⁹ See the interview with the musicians YZ, WZL and SF.

³⁴⁰ Other empirical research has demonstrated a similar tendency that musicians prefer to spend more energy and time on music jobs no matter whether they actually receive more remuneration for music jobs or non-music jobs. In economic terms, the supply of musician labor may be deemed as a function of incomes both from music jobs and from non-music jobs. It increases with both revenue streams, indicating an own elasticity of supply for music jobs and a positive cross-elasticity of supply for non-music jobs. This article may add to existing empirical research by illuminating the more nuanced responses to economic incentives by different musicians and clarifying that the work-preference model on the positive cross-elasticity of supply for a non-music job only applies to a small subset of all musicians, e.g., multiple job-holders. See David Throsby, *A Work-Preference Model of Artist Behaviour*, CULTURAL ECONOMICS AND CULTURAL POLICIES 69 (Alan T. Peacock & Ilde Rizzo eds. 1994).

musician to create commercial jingles.³⁴¹ The major reason is that commercial jingles, while generating more economic benefits for the musician, would likely undermine her emotional benefits in several ways: It may compromise her artistic integrity, divert from the messages she wants to convey through music, lower her reputation among peer musicians, and constitute a sell-out signal that typically distances her original fans. The artist may reasonably decide not to follow the larger paychecks if the ensuing impact to emotional benefits outweighs the gains of economic benefits.

The phenomenon that a music job bringing more economic benefits has less emotional benefits implies an inverse relationship. The magnitude of the inverse relationship relies on how much a musician's taste may differ from mainstream consumer preferences in the marketplace. The starker the difference is, the less a musician would gain financially for creating her own music, which, however, brings maximum emotional benefits. To illustrate this notion, we may call those who have mainstream tastes "mainstream musicians" and those who have niche tastes "niche musicians." Mainstream music presumably brings more economic benefits than niche music. Therefore, mainstream musicians would obtain maximum economic benefits by making mainstream music without sacrificing any emotional benefits. They would see no inverse relationship. By contrast, niche musicians who create niche music would obtain maximum emotional benefits but sacrifice substantial economic benefits, usually. Niche musicians would be motivated to create mainstream music if the gains in economic benefits outweigh the losses in emotional benefits and/or if making mainstream music on a part-time basis has become financially necessary to afford living and production costs.³⁴²

To rephrase the two conditions in the context of different music genres, a musician would freely concentrate on her own music on a full-time basis in the cases where the total of emotional benefits and economic benefits exceed the total of opportunity costs and production costs, and the economic benefits from her music creation are enough to pay for both living

³⁴¹ Many musicians hardly enjoy doing lucrative synchronization works and would prefer to create as little as possible if not essential for livelihood. *See, e.g.*, the interviews with the musicians AD, HXT, LD, JSL and CT.

³⁴² This theory mainly addresses two alternative jobs that have different configurations of economic benefits and moral benefits, which is different from the crowding-out effect in behavioral science literature showing a financial reward for a job may discourage an individual who is intrinsically motivated to engage in the same job. *See, e.g.*, BRUNO S. FREY, *ARTS & ECONOMICS: ANALYSIS & CULTURAL POLICY* 149 (2003); TERESA M AMABILE, *CREATIVITY IN CONTEXT: UPDATE TO THE SOCIAL PSYCHOLOGY OF CREATIVITY* 115 (1996); EDWARD L. DELI AND RICHARD FLASTE, *WHY WE DO WHAT WE DO: THE DYNAMICS OF PERSONAL AUTONOMY* 29 (1995).

costs and production costs. Where the first condition is satisfied but the second is not, the musician may take on multiple tasks, creating music for others (e.g. commercial jingles) as a part-time job but solely to the extent needed to defray relevant costs. Unsurprisingly, many musicians in the sample spent more than 50% of their time on their own music while earning 90% of their total income from making music for others.³⁴³

The theoretical contour is useful to compare how technological development and copyright protection affect the motivations for music creation. The development of digital technologies that lowers production costs has unambiguous positive effects on the two conditions for music production. Musical works which total benefits would otherwise not be worth their production costs now appear worthwhile thanks to decreased production costs. More musicians are financially able to pursue their music careers as the savings from production costs render it easier for musicians to make a living.³⁴⁴ Technological developments can potentially motivate all musical works, including those that generate purely emotional benefits, because they may decrease the production costs equally for all musical works regardless of any market value. By contrast, while copyright protection is understood to assist musicians in recouping the economic benefits from their works,³⁴⁵ it may indirectly grant musicians more artistic freedom to concentrate on their musical works that bring substantial emotional benefits but have little market demand, as discussed below.

Copyright protection would have rather nuanced effects on full-time musicians, depending on how it increases economic benefits. We may assume in the first scenario that better copyright protection would merely bring more economic benefits to mainstream music (say a 30% increase for mainstream and a 0% increase for niche), which is plausible because copyright piracy naturally targets pop stars and bestsellers.³⁴⁶ The musicians whose tastes are relatively proximate to mainstream consumer preferences would likely be motivated to create mainstream music where the gains in economic benefits outweigh the losses in emotional benefits (“First

³⁴³ See the interviews with the musicians LD, HJJ and NB.

³⁴⁴ The positive effect of technological development may become dominant so as to totally offset the impact of digital piracy that would otherwise be evident if holding technology constant.

³⁴⁵ This paper addresses the contention that the economic incentives generated by copyright protection are redundant for creativity. Notably, copyright protection could impose transaction costs and licensing costs that may or may not exceed the economic benefits. Therefore, it may not necessarily result in net economic gains.

³⁴⁶ See, e.g., Francisco Alcalá & Miguel González-Maestrea, *Copying, Superstars, and Artistic Creation*, 22 INFORMATION ECONOMICS AND POLICY 365, 365 (2010) (indicating piracy reduces superstars’ earnings and the incentives to invest in their promotion.)

Group”).³⁴⁷ The musicians whose tastes are relatively distant from mainstream consumer preferences would not be motivated to create mainstream music where the losses in emotional benefits offset the gains in economic benefits. Among the latter group of musicians, if they are able to earn enough money from their own music to cover both living and production costs, better copyright protection would not have any effect whatsoever (“Second Group”); If they still need to make ends meet by writing mainstream music occasionally, better copyright protection would actually allow them to spend more energy and time on their own music because the second jobs would more efficiently bridge the gap between the economic benefits from their own music and living costs plus production costs (“Third Group”).

Alternatively, we may assume in the second scenario that better copyright protection would bring more economic benefits proportionately to all musicians, including both mainstream superstars and new/niche artists (say a 30% increase for all musicians), which is equally plausible because copyright piracy that undermines the economic return from hit music would also diminish the financial ability to cross-subsidize niche musicians and niche music genres.³⁴⁸ The First Group, whose members are motivated to create mainstream music, would be smaller in the second scenario since they would receive more economic benefits by creating their own music anyway. Some musicians who would otherwise belong to the Third Group in the above scenario would join the Second Group because they would have better financial abilities to create their own music on a full-time basis. Accordingly, the Second Group would become much larger while the Third Group would get smaller. Those who remain in the Third Group would enjoy broader freedom to create their own music because the increased wages for all music jobs would bridge the gap between the economic benefits from their own music and living costs plus production costs even

³⁴⁷ It may be ambiguous whether increased copyright protection would induce those musicians who have originally worked full-time on mainstream music to spend longer hours. It depends on how much those musicians appreciate leisure time relative to their music jobs. The marginal utility of leisure time increases as the number of working hours increase: An artist would need relaxation more after longer hours and money usually may make leisure more joyful. Meanwhile, the marginal utility of higher income decreases as income increases: What is the money good for if you don’t have time to spend it? More economic benefits therefore bring longer working hours to the point that the marginal utility of higher income equals the marginal utility of leisure time. After the point, money would only become counterproductive. See TOWSE, *supra* note 336, at 300.

³⁴⁸ See *supra* note 173 and accompanying text. One recent paper argues digital piracy benefits superstars but not new/niche artists. See Robert G. Hammond, *Profit Leak? Pre-Release File Sharing and the Music Industry*, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2059356.

faster than the first scenario.³⁴⁹

In a nutshell, copyright protection would promote music variety by encouraging those who prefer mainstream music to create more mainstream music and allowing more artistic freedom for those who prefer niche music to concentrate on niche music. Promoting the diversity in cultural expression is a desirable policy objective of enormous importance beyond any potential effects on economic growth. Furthermore, even from the utilitarian perspective, maximum artistic freedom especially for niche musicians is likely to increase social welfare, taking into account the sum of producer welfare and consumer welfare: First, if the consumer demand for mainstream music can be smoothly channeled to niche musicians via the price signal, niche musicians would appropriately weigh the emotional benefits for themselves against the economic benefits for consumers. Any creative decisions made through the market mechanism would probably improve social welfare, which adds yet another reason to develop a copyright market that internalizes both economic and emotional benefits. Second, copyright protection that offers niche musicians broader freedom to concentrate on niche music may not necessarily decrease consumer welfare. It depends on whether the mainstream music created by niche musicians would generate additional consumer surplus or simply result in rent dissipation. If niche musicians may create mainstream music of substantially different nature, they would generate new demand and, therefore, new surplus. Directing their creative attention to niche music would probably affect the surplus for consumers who prefer more mainstream music. If niche musicians otherwise create repetitive mainstream music only, they would merely divert the existing demand from mainstream musicians without producing new utility. Allowing these musicians to concentrate instead on niche music would likely generate additional consumer surplus no matter its size.

From this perspective, the market approach that posits copyright secures market signals for music creation and the autonomy approach that suggests copyright protects musician autonomy appear to have more explanatory power than the bargaining approach that argues copyright represents a hypothetical bargain between authors and legislators but gives

³⁴⁹ The above discussions have revolved around full-time musicians. Better copyright protection would have similar effects on part-time musicians and potential musicians who are doing non-music jobs at the moment: It should be intuitive to see that the total number of musicians would likely increase if economic benefits were to increase proportionately for all musicians. If economic benefits increase only for mainstream music, the portion of part-time musicians and potential musicians whose tastes are relatively proximate to mainstream consumer preferences would be motivated to substitute non-music jobs and/or their own music for more mainstream music.

little indication which and how many musical works should be produced.³⁵⁰ The bargain approach cannot be reconciled with the empirical evidence for a number of reasons. First, since many musicians enter into the music business with little awareness of copyright law, there could not be any bargain between the government and these uninformed musicians. Second, those who create music purely for intrinsic motivations presumably ignore any bargain for economic benefits, although copyrights subsist in the music anyway. Third, the bargain approach has no inherent limitation. Assuming increasing copyright protection may still incentivize more works, should we continue increasing the level until there are no marginal works produced? The answer is probably no, taking into account a basic cost and benefit analysis: Better copyright enforcement would only improve social welfare if its benefits, e.g. more works incentivized, exceed its costs, e.g. transaction costs and opportunity costs. Nonetheless, the bargain approach itself does not tell you how to determine the costs and benefits. The market approach instead offers such a measurement: The market should determine the values of copyrighted works and the values of resources needed for producing creative works and alternative opportunities precluded. The autonomy approach, meanwhile, suggests that society place utmost importance on the diversity of expressive works from a democratic perspective and the government is generally worse than the market in promoting diversity.³⁵¹

D. The Endowment Effect and Moral Rights

Recent empirical studies indicate that authors are inclined to overestimate the market value of their copyrighted works relative to the valuation by average consumers, a phenomenon called “the endowment effect” in behavioral sciences.³⁵² These researchers are also concerned that the over-valuation arises from irrational cognitive biases and obstructs market transactions for copyrighted works. The interaction between emotional benefits and economic benefits in creative works may provide an additional perspective to understanding the endowment effect.

For example, a music publisher is interested in buying out the

³⁵⁰ See *supra* note 321 and accompanying text.

³⁵¹ The bargain approach, which has originated from patent law, is equally influential under copyright law. See *Eldred v. Ashcroft*, 537 US 186, 226 (2003) (STEVENS J. dissenting) (arguing copyright represents a *quid pro quo* between the state and the author).

³⁵² For a series of empirical experiments that study the endowment effect under copyright law, see, generally, Christopher Buccafusco & Christopher Jon Sprigman, *Valuing Intellectual Property: An Experiment*, 96 CORNELL L. REV. 1 (2010); Christopher Buccafusco & Christopher Jon Sprigman, *The Creativity Effect*, 78 U. CHI. L. REV. 31 (2011); Christopher Jon Sprigman, Christopher Buccafusco & Zachary Burns, *What’s a Name Worth?: Experimental Tests of the Value of Attribution in Intellectual Property*, 93 B. U. L. REV. 1389 (2013).

copyrights in a musical composition for commercial exploitations including advertising, movies, and television shows. The composer and the publisher may agree upon the magnitude of the economic benefits from those exploitations, yet still be unable to identify a mutually beneficial price for the assignment. The reason is that the emotional benefits are basically inalienable from the composer as discussed above.³⁵³ The composer is physically unable to transfer her integrity or reputation to the publisher in exchange for monetary payment. However, it does not follow that the commercial exploitations would not impact the emotional benefits the composer holds. It is possible that a commercial success eventually boosts her reputation. Possible but improbable. The significant uncertainty in entertainment markets dictates that merely a small number of movies and shows accomplish modest success. More importantly, it has been shown that the emotional benefits and the economic benefits usually exhibit an inverse relationship especially for niche musicians. Commercial exploitations, e.g. for television jingles, could compromise her artistic integrity, alter the messages she wishes to communicate, create a music-smith reputation among peers, and send a sell-out signal that distances her original fans.³⁵⁴ While deliberating on the buyout price, the composer would take into account the fact she would no longer wield any control over whether and how future commercial exploitations may affect her emotional benefits. Her asking price would therefore include a dollar value offsetting the potential impact to her emotional benefits. However, the publisher who does not internalize any emotional benefits would understandably be reluctant to pay anything above the economic benefits she could indeed receive.

In other words, if the parties share the same valuation regarding the economic benefits, a pricing discrepancy could still emerge due to the inalienability of the emotional benefits. An agreement would be difficult to conclude in the cases where commercial exploitations could potentially impose a substantial impact to the emotional benefits, and rightfully so. Forced transactions that ignore the emotional benefits would hardly create social gains. The parties would agree upon the price where the publisher has a larger valuation of the economic benefits and the valuation margin is large enough to offset the potential impact to the emotional benefits. The endowment effect along those lines does not represent any inefficiency, but a well-functioning market that has the inherent tendency to internalize both economic and emotional factors in copyright transactions.

Therefore, the best way to facilitate copyright transactions does not appear to be overriding the choices of the parties. Instead, the parties would

³⁵³ See supra note 333 and accompanying text.

³⁵⁴ See supra note 340 and accompanying text.

be able to bridge the pricing gap more easily if they could find a way to lower the impact that commercial transactions impose upon the emotional benefits. The parties could ideally try to anticipate all potential uses during negotiations and ascertain which uses are agreeable emotionally, which uses create sufficient economic benefits outweighing the effect on the emotional benefits, and which uses unreasonably impact the emotional benefits. If the contract excludes all harmful uses, the composer would be more willing to decrease her asking price. However, it would be very difficult (if not impossible) in practice to predict all potential uses and ensuing impacts to the emotional benefits, particularly in the cases of wholesale copyright transfers rather than individual licenses for specified purposes. Such contractual terms could be prohibitively expensive to negotiate, draft, and enforce for most musicians besides a small group of superstars.

In this regard, moral rights that strengthen the tie between authors and their works could play a surprising role in minimizing information costs and facilitating copyright transactions.³⁵⁵ The right of attribution would ensure that increased emotional benefits, e.g. reputational gains from movies/televisions, are to be channeled to the composer. More importantly, the right of integrity would defend the composer against certain commercial exploitations that are derogatory and prejudicial to her emotional benefits even after the assignment of all copyrights. Although the composer could theoretically retain similar rights through negotiation, moral rights principles developed through legislative history and common law would effectively serve as default rules that supplement contractual terms and save transaction costs that would otherwise be spent on the clause-by-clause bargaining.³⁵⁶ Such legal principles would also provide objective standards regarding what actions have undue effects on the emotional benefits and therefore minimize the hold-out problem.

³⁵⁵ The Copyright Act only provides a scale-down version of moral rights for works of visual arts. *Compare* 17 U.S.C. § 106A and Berne Convention for the Protection of Literary and Artistic Works, Art. 6*bis*, Sept. 9, 1886, 1161 U.N.T.S. 30, as amended on Sept. 28, 1979, S. TREATY DOC. NO. 99-27. When the United States first joined the Berne Convention, it was believed that Congress was not obligated to accord any additional protection because unfair competition law and other common-law principles had sufficiently protected moral rights interests. *See Final Report of the Ad Hoc Working Group on U.S. Adherence to the Berne Convention*, 10 COLUM.-VLA. J.L. & ARTS 513, 547 (1986). The Supreme Court has downplayed the relevance of unfair competition law (especially § 43(a) of the Lanham Act) and cast doubts on the argument that moral rights are currently sufficient in the US. *See Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 US 23 (2003).

³⁵⁶ In other words, moral rights herein would function in the same way as the Uniform Commercial Code (UCC) that supplements, and may be superseded by, explicit contractual terms.

E. Cost Disease and Copyright Piracy

“The cost disease” is one of the most well-known theories in cultural industry studies.³⁵⁷ It arises from the observation that the productivity in performing arts develops at a rate significantly slower than those in other industries. While the non-art sector in the economy, e.g. the automobile and computer industries, has witnessed that the amount of manpower needed to produce the same output drastically decreases, the same number of musicians is required to perform a Beethoven string quartet now as was required in the 19th century.

Therefore, cultural industries face continual pressure to match the wages increases that result from increasing productivity in the economy as a whole. Falling short of doing so, they would see talented artists moving to other industries, which would naturally affect the quantity, variety, and quality of creative production. Even assume they raise artist wages consistently with the non-art sector, their production costs would rise disproportionately because their productivity still lags behind, making them increasingly more labor-intensive than other industries. The rising costs would result in higher prices that would reduce the market demand for artistic works, barring outside support, e.g. government subsidy and private patronage.

In recent years, commentators have often downplayed the practical concern of the cost disease in cultural industries.³⁵⁸ The rapid development of various information technologies, including sound recording, film, telephone, radio, television, and digitization, has unquestionably broadened the dissemination of information products. In particular, the advent of digital technology enables an unlimited number of consumers to access the same performances at different times and different places they individually choose.³⁵⁹ The productivity of the performing arts, viewed not from the perspective of how many performances are produced but how many times the performances are consumed, has increased at a rate consistent with the economy.

As mentioned above, Chinese musicians have become increasingly reliant on alternative revenue streams including live performance for a living because widespread copyright piracy has quickly evaporated the earnings from copyright royalties. It appears a bit paradoxical that

³⁵⁷ WILLIAM J. BAUMOL AND WILLIAM G. BOWEN, *PERFORMING ARTS: THE ECONOMIC DILEMMA* 666 (1966).

³⁵⁸ See, e.g., Tyler Cowen, *Why I Do Not Believe in the Cost-Disease: Comment on Baumol*, 20 *J. Cul. Econ.* 207, 214 (1996).

³⁵⁹ See Ronald H. Brown & Bruce A. Lehman, *Information Infrastructure Task Force, Intellectual Property and the National Information Infrastructure* 114, 124 (1995) (describing the development of digital technology in connection with copyright).

musicians end up having to depend on one of the most primitive forms of physical constraints i.e. walls and entrances for their livelihoods in the digital era which supposedly liberates them from physical barriers to connect their works directly with consumers.³⁶⁰ It has been shown that the productivity in the performance market is relatively insensitive to communication technology: The revenues result from the number of performances produced within the pay walls rather than the copies of performances distributed online. Therefore, the concern of cost disease may re-emerge with the increasing importance of performances.

Another factor that may mitigate the cost disease is that musicians are motivated principally by emotional benefits rather than economic benefits. The non-art sector with higher economic benefits but limited emotional benefits might not actually be attractive to musicians. Therefore, the music industry would not always be forced to lure musicians from other industries by increasing their wages at a comparable pace. As a matter of fact, existing empirical research has shown that the wages for average musicians have experienced a growth rate slower than those for the non-music occupations consistently over the course of several decades.³⁶¹ Such findings are apparently contradictory to the prediction derived from the theory of cost decrease.

Notably, although the music industry revolves around creativity and musicians, it unavoidably requires the services from the humdrum side including managers, accountants, and lawyers. The limited ability to recoup investment resulting from uncontrolled copyright piracy makes it harder to afford such services, for which the music industry has to compete directly with other industries in the common market. The cost disease may affect musicians to the extent that they are not able to receive the better services from the humdrum side. A music executive in the sample has described this phenomenon in a very intuitive yet precise manner:

The biggest problems resulting from copyright piracy are that the whole industry is unable to sufficiently invest in new talent, more exciting concerts, higher quality albums, and the development of Internet products. The whole industry lacks the financial recourses to rejuvenate itself. There are few companies that are sustainable in the industry not to mention making profits. It in turn means that the music industry lacks the financial ability to effectively lobby the policy makers, build a better public image, and influence social norms. The biggest problem is that numerous youngsters have had to leave the industry, unable to make a decent living. It is not only about musicians but also about creative staff who have transferred to the advertising, movie, and television industries for better incomes and better development. The music industry retains few talents although new artists, new composers and new

³⁶⁰ See *supra* note 103 and accompanying text.

³⁶¹ See Towse, *supra* note 336, at 300.

performers enter into the market every year.³⁶²

F. Copyright and Foreseeability

Several commentators have contended that copyright protection should not extend to the uses of creative works that artists could not reasonably foresee at the time of creation, e.g. certain new uses resulting from recent technological developments.³⁶³ If artists create works in anticipation of the economic benefits provided by copyright law, the unforeseeable uses at the time of creation by definition should not form any portion of the incentive, and removing those windfalls from copyright protection should not affect any creations. The same logic has caused others to question how much copyright protection could possibly incentivize creativity when many people continue to create despite ignorance of copyright law.³⁶⁴

However, such arguments appear to represent a misunderstanding of the manner that copyright incentives actually operate in the production of creative works. As indicated by the empirical evidence, the majority of the musicians explicitly admitted that they had little knowledge about copyright law. They meanwhile stated that the current level of copyright protection in China was insufficient and copyright law should provide incentives for music creation. Such findings may appear to be contradictory at first blush: How can musicians have any concrete thoughts about whether copyright protection is sufficient or not, if they never come across copyright law? The concept of legal culture brings a powerful explanation for the findings.³⁶⁵ Musicians have formed their copyright culture, i.e. ideas, values, and attitudes toward copyright law not through following the law in books, but through observing the law in action.

As discussed above, they evaluated the effectiveness and relevance of copyright protection by their personal experiences and everyday realities that unavoidably involved frequent encounters with copyright piracy.³⁶⁶ When musicians described copyright law using the phrases as “decorative,”³⁶⁷ “non-existent,”³⁶⁸ and “a piece of meaningless paper,”³⁶⁹

³⁶² See the interview with the executive SK.

³⁶³ See, generally, Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, (2009); Christina Bohannon, *Copyright Harm, Foreseeability, and Fair Use*, 85 WASH. U. L. REV. 969 (2007).

³⁶⁴ See, e.g., ROBERT PITKETHLY, UK INTELLECTUAL PROPERTY AWARENESS SURVEY 2006, UK INTELLECTUAL PROPERTY OFFICE 11 (2006), <http://www.ipo.gov.uk/ipsurvey.pdf> (indicating “awareness of the [IP] system is a pre-requisite for it to work.”).

³⁶⁵ See *supra* note 191 and accompanying text.

³⁶⁶ See the interview with the musician LL.

³⁶⁷ See the interviews with the musician SF and WXL.

³⁶⁸ See the interviews with the musicians DQ, WXL and ZJH.

³⁶⁹ See the interviews with the musicians WZL and WK.

they were not really commenting on the potential usefulness of copyright law. Instead, they intuitively and rightfully paid attention to the law as currently enforced (or unenforced to be more precise), which was what had made numerous musicians choose not to take enforcement action even against blatant infringement.³⁷⁰

Similarly, musicians typically do not make their decisions on whether to continue creating music based upon the availability and scope of copyright protection. It appears that the majority of the musicians do not make a conscious effort to pursue the economic benefits provided by copyright. Their music creations are mostly motivated by the emotional benefits including self-expression, communication, peer respect and popularity. Again, what really influences their career decisions is their own experience and shared experience with their fellow musicians. For example, in explaining why she did not try to attract outside investment from labels to improve production quality, a musician recounted the story of how a music company transformed an underground group into a boy band that dressed in exquisite clothes and sang pop songs written for them, as mentioned above.³⁷¹ Yet another musician explained why he merely saved his own works in the demo format instead of producing full-length albums by telling a story about one of the best modern guitarists to his knowledge: The guitarist earned his livelihood by teaching drumming classes at a music conservatory, and sometimes only ate food provided by his students in order to save money for expensive instruments.³⁷² As devoted as the guitarist was, his albums were still collecting dust somewhere on the top shelves of local stores.

These stories illustrate that, while most musicians do not always create for the expected benefits from their new works, the return from existing works determines how long musicians can continue to create music while making a decent living, how much musicians can invest in future music production, and what degree of artistic freedom musicians can enjoy to pursue their music dreams. These issues represent exactly what affect their decision-making processes.

Copyright protection provides powerful incentives for music creation to the extent that it secures market conditions for musicians to prosper, including a decent standard of living, sufficient production costs, and

³⁷⁰ Copyright awareness appears to increase at later stages of the value chain. The empirical research confirms that music executives who are responsible for marketing, distributing and licensing copyrighted works generally have far better knowledge about copyright law than average musicians.

³⁷¹ See the interview with the musician LD.

³⁷² See the interview with the musician LY. Notably, the forward-looking argument suggesting the revenues from existing works may encourage the creation of future works has briefly been mentioned in *Eldred v. Ashcroft*, 537 US 186, FN 15 (2003).

maximum creative freedom.³⁷³

V. CONCLUSION

The now famous Samuel Johnson quote, “no man but a blockhead ever wrote, except for money,”³⁷⁴ has become the punching bag in recent copyright scholarship.³⁷⁵ It would be harder not to notice that, when digital technology has dramatically lowered the production costs for various creative expressions, user generated content begins to flourish on the Internet, including fan fictions, blog posts, and YouTube videos, most of which are supposedly non-commercial. Furthermore, in the wake of widespread copyright piracy, the musicians who persist in the music profession are precisely those who care little about economic benefits. As the article has quoted above, “you have to be crazy these days to go into the music industry for money.”³⁷⁶

Given that the majority of musicians appear to create music simply for music’s sake, copyright law may not realize its full potential in the digital age if it is understood narrowly as a *quid pro quo* using economic benefits to induce creative production. This article has shown that copyright incentives, although not something musicians deliberately bargain for or chase after, should be playing an important role in cultivating market conditions for the widest variety of musicians to prosper, including a decent standard of living, sufficient investment to allay production costs, and maximum artistic autonomy during the creative process. Copyright piracy that does not necessarily affect musicians’ intrinsic motivations could affect music creation nevertheless in terms of the time spent on music creation, the volume of investment in music creation and ultimately the quality of music creation.

In other words, copyright law could supply powerful incentive for intellectual creation in a way that not only caters to market demand but also allows for maximum artistic freedom especially for artists who create primarily for non-economic interests. To this extent, copyright law is and should be, after all, a law for the blockheads, which harnesses the powers of market economy to achieve the ultimate purpose of promoting cultural diversity and knowledge development in our society.

³⁷³ The new uses that result from recent technological development therefore may still supply financial incentives for future music creations especially while musicians are making music mostly for intrinsic motivations.

³⁷⁴ See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994) (quoting 3 JAMES BOSWELL, *LIFE OF JOHNSON* 19 (GEORGE HILL ED. 1934)).

³⁷⁵ See Tushnet *supra* note 3 at 513; Silbey, *supra* note 272, at 2101; Johnson, *supra* note 3 at 626.

³⁷⁶ See *supra* note 210 and accompanying text (citing the interview with the musician LH1).