

# A STREAM OF HOPE: WHY MUSIC STREAMING LICENSES WILL TURN AROUND CHINA’S MUSIC INDUSTRY IN SPITE OF THE RAMPANT PIRACY OF MUSIC

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## I. INTRODUCTION

In January 2012, Song Ke, the former head of Warner Music China and arguably China's most popular music producer at that time, announced his retirement from the music industry to run a restaurant specializing in roast duck.<sup>1</sup> Upon exit, he explained why he wanted to leave the industry behind, stating, "When I make good roast duck, people pay and thank me. When I make good music, nobody pays me and some even ridicule me."<sup>2</sup> China's music industry was at a crossroads, and Song Ke believed that the entire industry needed a change, in light of the widespread illegal downloading of music.<sup>3</sup>

China has many deficiencies in the way that it combats the piracy of music, such as enforcement issues, difficulties adjudicating cases, and a general lack of experience with protecting copyrights,<sup>4</sup> all of which will be discussed in this article. These deficiencies weaken China's digital music industry to the point that its current state struggles in comparison to the strength of its overall digital economy.<sup>5</sup> China's legal history is rooted in philosophies of Confucianism, Legalism, Buddhism and Daoism.<sup>6</sup> These philosophies place great importance in the free dissemination of intellectual property,<sup>7</sup> prioritizing property rights of the state over property rights of its people.<sup>8</sup> Many of China's copyright problems stem from legal inexperience; copyright laws in China only developed late in the 20th Century.<sup>9</sup> These laws exist primarily to satisfy international treaty requirements as part of China's efforts to join the world economy.<sup>10</sup> China's copyright laws, which consist of concepts borrowed from Western culture, are a dra-

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1. Yang Yang, *A Record Tailspin in Music Industry*, CHINA DAILY (June 30, 2012, 9:41 AM), [http://usa.chinadaily.com.cn/weekly/2012-06/29/content\\_15534133.htm](http://usa.chinadaily.com.cn/weekly/2012-06/29/content_15534133.htm).

2. Mu Qian, *Music Isn't a Dead Duck*, CHINA DAILY (Feb. 24, 2012, 1:22 PM), [http://usa.chinadaily.com.cn/life/2012-02/24/content\\_14686264.htm](http://usa.chinadaily.com.cn/life/2012-02/24/content_14686264.htm).

3. See Yang, *supra* note 1.

4. See PETER GANEA & THOMAS PATTLOCH, *INTELLECTUAL PROPERTY LAW IN CHINA* 289-342 (Christopher Heath ed., 2005).

5. See INT'L FED'N OF THE PHONOGRAPHIC INDUS., *IFPI DIGITAL MUSIC REPORT 2014: LIGHTING UP NEW MARKETS* 36 (2014) [hereinafter *IFPI REPORT*], <http://www.ifpi.org/downloads/Digital-Music-Report-2014.pdf>; see also HANA BEN-SHABAT, MIKE MORIARTY & PARVANEH NILFOROUSHAN, A.T. KEARNEY, *ONLINE RETAIL IS FRONT AND CENTER IN THE QUEST FOR GROWTH 2* (2013) [hereinafter *A.T. KEARNEY REPORT*], <http://www.atkearney.com/documents/10192/3609951/Online+Retail+Is+Front+and+Center+in+the+Quest+for+Growth.pdf/f6693929-b2d6-459e-afaa-3a892adb33e> (referring to The 2013 Global Retail E-Commerce Index™ that shows a combination of developing and developed markets).

6. See GUAN H. TANG, *COPYRIGHT AND THE PUBLIC INTEREST IN CHINA* 47 (2011).

7. See *id.*

8. *Id.* at 48.

9. See *id.* at 67.

10. See *id.* at 66-67.

matic change from its historical treatment of intellectual property under the law.<sup>11</sup>

While piracy is not exclusive to China, other nations across the globe have actually benefited from the growth of free digital music streaming.<sup>12</sup> In some markets, streaming music licenses have effectively turned a profitless piracy environment to an economically sustainable streaming environment.<sup>13</sup> China is beginning to see the same growth in streaming music, and its market is developing rapidly.<sup>14</sup> Only a few months after retiring, Song Ke made a surprise comeback in the music industry, and founded the label Taihe Rye Music.<sup>15</sup> Song Ke's faith in the music industry was quickly restored. With China's technological infrastructure advancing rapidly, and a global shift in consumer behavior from downloading to streaming, China is well poised to capitalize on the lucrative future of streaming music services.<sup>16</sup>

Although piracy crippled China's online music market in recent years,<sup>17</sup> because of the strength of China's emerging online and mobile markets, and the ability of music streaming services to survive in a high piracy environment, China has the potential to become a world leader in the music industry.<sup>18</sup> Section II first illustrates the historical background of China's copyright laws to better understand how past policies impact current laws surrounding copyright protection. Section III will identify key factors that have made digital copyrights and intellectual property so difficult for China to defend, resulting in its current state of rampant piracy. Lastly, Sections IV and V will explain how digital streaming music licenses in particular can overcome those legal deficiencies and flourish with the technological developments in China's online market.

## II. CHINA'S LAW AND ACCESS PUBLIC INTEREST

Although China's rapidly-growing economy has led to the development of transparent and accessible copyright laws, these laws have

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11. *See id.* at 55.

12. *See* IFPI REPORT, *supra* note 5, at 9.

13. *See id.* at 34-35.

14. *See id.* at 36-37.

15. *See* Alexis Bonhomme, *China's Online Music Market Is Moving. . . Say It Loud!*, JING DAILY (Nov. 2, 2012), <http://jingdaily.com/chinas-online-music-market-is-movingsay-it-loud/>.

16. *See generally* IFPI REPORT, *supra* note 5; *China's Internet Speeds Increase by 20%*, TEST INTERNET SPEED.ORG (May 26, 2014, 10:21 PM), <http://testinternetspeed.org/blog/chinas-internet-speeds-increase-by-20/>.

17. IFPI REPORT, *supra* note 5, at 36.

18. TANG, *supra* note 6, at 13.

only existed for the past 50 years.<sup>19</sup> Copyright laws as they currently exist in China are heavily borrowed from Western civilizations,<sup>20</sup> and are a prerequisite for China to trade with the international community. China's historical views on intellectual property and the influence of "access public interest" create conflicts in how China approaches copyright protection compared to the Western world.<sup>21</sup>

A. *The History of Intellectual Property & the Role of "Public Interest"*

Historically, legal protection of intellectual property was non-existent in China.<sup>22</sup> Confucianism, which developed in 1046 BC during the Zhou Dynasty, was taught during arguably the greatest cultural and intellectual expansion in China's history.<sup>23</sup> Kongzi (Confucius) promoted doctrines that emphasized unity and harmony amongst the Chinese people, believing in the innate goodness of the individual.<sup>24</sup> Although Confucianism stresses "the benevolence," "the justice," and "the rites," it lacks the development of a harmonized legal system.<sup>25</sup> Confucianism closely aligns with the essential virtues of filial piety, obedience to authority, and trusting the wisdom of one's elders or superiors.<sup>26</sup> Under Confucianism, the creation of laws is viewed as promoting robbers and thieves.<sup>27</sup> Put more simply: laws are bad; people are good.

Thus, while the Zhou Dynasty flourished with creativity, Confucianism did not explicitly promote the protection of property as a function of law.<sup>28</sup> Property disputes were often settled through informal mediation conducted by respected elders in the community.<sup>29</sup> With regard to intellectual property, Kongzi promoted an ethical system of life based on real tradition and copying ideas of the old world, believing that imitation was the greatest form of flattery and that the development of society depended on the dissemination of ideas.<sup>30</sup>

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19. *Id.* at 67.

20. *Id.* at 48.

21. *Id.* at 48, 50.

22. *See id.* at 14-28.

23. *Id.* at 14.

24. *Id.* at 15.

25. *Id.*

26. *Id.*

27. *Id.*

28. *See id.* at 16.

29. Shin-yi Peng, *The WTO Legalistic Approach and East Asia: From the Legal Culture Perspective*, 1 *ASIAN-PAC. L. & POL'Y J.* 13, 13 (2000).

30. TANG, *supra* note 6, at 16.

Kongzi believed that a person's "function [was] to transmit rather than originate."<sup>31</sup> Quite contrary to the goals of general copyright law, Confucianism frowned upon profiting from the sale of books and intellectual property, as doing so prioritized the individual over the community.<sup>32</sup>

Legalism followed during the decline of the Zhou dynasty, and first introduced the concept of "public interest" as a rationale for granting the state sovereignty over matters concerning the public.<sup>33</sup> Legalism refers to governance by strict laws and heavy punishments during China's Warring States period at the end of the Zhou Dynasty and the subsequent Qin Dynasty in 221 BC.<sup>34</sup> Philosophically, Legalism stressed that the enforcement of laws is the only path to creating a society of order and value.<sup>35</sup> Legalism prioritized the rights of the state over the rights of its people, and thus did not establish individual property rights.<sup>36</sup> The state and its ruler were the law, and Legalist texts sought to protect the state's rights since the state knew what was best for the interests of its people.<sup>37</sup>

Confucianism regained influence during the Han Dynasty in 206 BC, a period when anyone who held an important post in government was required to know the Five Classics of Confucius.<sup>38</sup> Religious views of Taoism and Buddhism were introduced toward the end of the Han Dynasty.<sup>39</sup> Subsequent rulers of the various dynasty periods blended Taoism and Buddhism into Confucian doctrines to create what is known as Neo-Confucianism, which influenced the laws of each subsequent dynasty to varying degrees.<sup>40</sup> Confucian philosophies regarding the importance of sharing intellectual property remained intact until the beginning of the 20th Century.<sup>41</sup>

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31. *Id.*

32. *Id.*

33. *See id.* at 16-17.

34. *Id.* at 16-19.

35. *Id.* at 16.

36. *Id.* at 16-17.

37. *Id.* at 16.

38. *See id.*; *Wujing*, ENCYC. BRITANNICA, <http://www.britannica.com/topic/Wujing> (last visited Sept. 20, 2015).

39. YINGYING ZHANG & YU ZHOU, *THE SOURCE OF INNOVATION IN CHINA: HIGHLY INNOVATIVE SYSTEMS* 86 (2015).

40. *Id.*

41. *See* TANG, *supra* note 6, at 22.

### B. "New China" and the Birth of Copyright Law

The end of the dynasty periods and the creation of a "people's government" paved the way for the creation of laws that protected individual property.<sup>42</sup> After the Xinhai Revolution in 1911, the new government created a legal system designed to protect the rights of the people as opposed to the dynasties before, which created laws only to protect the rights of the state.<sup>43</sup> Civil war broke out in 1927, and the People's Republic of China (PRC) was born, marking the beginning of "New China."<sup>44</sup> One of the goals for "New China" was to open its borders to the rest of the world.<sup>45</sup> China's government underwent multiple phases of development, leading to a Reform and "Opening-up Policy" that opened the door for China to join the international community in trade, specifically with Western economies and politics.<sup>46</sup> Individual property laws, including intellectual property, developed in the 20th Century as a means for China to open its doors to trade with the rest of the world.<sup>47</sup>

With the goal of joining trade among the international community, China had to meet the requirements of the General Agreement on Tariffs and Trade (GATT), which required all member states to ensure the legal protection of copyright.<sup>48</sup> China created the National Copyright Office in 1985, tasking it with creating the first laws governing Chinese copyrights.<sup>49</sup> In 1990, China promulgated its first copyright law as part of its commitment to satisfy international requirements.<sup>50</sup> The Sino-US agreement of the Memorandum of Understanding on the Protection of Intellectual Property (1992) and the Intellectual Property Rights Enforcement Agreement (1995) were landmark bilateral treaties that demonstrated China's commitment to joining the world community in valuing intellectual property.<sup>51</sup> The 1994 Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) imposed further requirements for copyright protec-

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42. *See id.*

43. *Id.*

44. *Id.*

45. *See id.* at 24.

46. *Id.* at 22-24.

47. *Id.* at 26.

48. *See, e.g.,* TANG, *supra* note 6, at 25; The General Agreement on Tariffs and Trade, Jan. 1, 1948, 61 State. A-11, 55 U.N.T.S. 194 [hereinafter GATT].

49. KONG QINGJIANG, WTO, INTERNATIONALIZATION AND THE INTELLECTUAL PROPERTY RIGHTS REGIME IN CHINA 17 (2005).

50. *Id.*

51. *Id.* at 19.

tion, enforcement, remedies and dispute resolutions for all GATT signatories.<sup>52</sup>

GATT later led to the creation of the World Trade Organization (WTO) in 1995, whose members signed the World Intellectual Property Organization (WIPO) Copyright Treaty in 1996.<sup>53</sup> China's copyright law continued to undergo revisions to satisfy new WTO requirements under the WIPO Treaty.<sup>54</sup> In 2001, more amendments were made to include copyright protection over information networks,<sup>55</sup> which led to China's admission as a member state of the WTO.<sup>56</sup> China's copyright laws continued to evolve to keep up with the digital age. China issued the "Regulations for the Protection of the Right of Communication through Information Network" in 2006,<sup>57</sup> and most recently amended the law again in 2010.<sup>58</sup>

Through all of the progress China has made in the development of copyright law, China relied on "public interest" as a means to preserve the historical importance of the public's access to ideas. The underlying policy to "access public interest" means that the public has an interest in specific forms of access to protected works in order to further the development of society.<sup>59</sup> By utilizing the "Limitations and Exceptions" clause in the WIPO Treaty, China's copyright laws set forth a list of carve-outs that legalize public access of otherwise protected works, a rigid approach compared to countries like the U.S. that implement a fact-specific test for the fair use of copyrighted works.<sup>60</sup> In addition to educational use and research, other examples of when a work may be made available without permission, payment

52. See Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, 1869 U.N.T.S. 299 (1994) [hereinafter TRIPS Agreement]; GANEVA & PATTOLOCH, *supra* note 4, at 291.

53. See *The GATT Years: From Havana to Marrakesh*, WORLD TRADE ORGANIZATION, [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/fact4\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm) (last visited Sept. 20, 2015).

54. See generally WIPO Copyright Treaty, Dec. 20, 1996, 2186 U.N.T.S. 121 [hereinafter WIPO].

55. See Copyright Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, effective June 1, 1991), STANDING COMM. NAT'L PEOPLE'S CONG. GAZ. (China) [hereinafter PRC Copyright Law] (amended Oct. 27, 2001).

56. TANG, *supra* note 6, at 26.

57. See Regulations on Protection of the Right of Communications through Information Network (promulgated by the St. Council Gaz., May 10, 2006, effective July 1, 2006) ST. COUNCIL GAZ. (China) [hereinafter Regulation Through the Information Network].

58. See PRC Copyright Law, *supra* note 55.

59. See TANG, *supra* note 6, at 49-93.

60. Compare PRC Copyright Law, *supra* note 54, art. 22 (enumerating when a work may be used without permission from the copyright owner), with 17 U.S.C. § 107 (2012) (specifying that fair use of copyrighted work is allowed for criticism, comment, news reporting, teaching, scholarship, or research).

or remuneration include: publishing or rebroadcasting by the media of another media outlet on current political, economic and religious issues; use of a published work by a state organ in fulfillment of its official duties; or translating the works of a Chinese citizen into the various minority languages spoken in China.<sup>61</sup> Thus, China's copyright laws incorporate international trade requirements while using the "public interest" to preserve traditional philosophies about intellectual property.

### C. *The Current State of China's Copyright Law*

China's copyright laws not only define an author's protected rights, but also establish a sophisticated, "dual-enforcement" system with responsibilities divided between Chinese administrative agencies and its civil court system.<sup>62</sup> The separate bodies serve different purposes in the adjudication of copyright law. Administrative agencies are granted jurisdiction primarily for efficient resolution of copyright claims when damages are not sought.<sup>63</sup> The civil courts, on the other hand, afford relief for claims in which a copyright holder seeks damages from an infringing party.<sup>64</sup> Furthermore, civil courts may charge infringers as criminals, as long as the damages meet a statutory threshold for a party to be charged as such.<sup>65</sup>

The primary advantage of granting administrative agencies jurisdiction over copyright disputes is the efficient adjudication of copyright claims. Cases heard by administrative agencies typically involve claims of ownership or clear infringement cases, with a decision resulting within seven days from the start of the hearing.<sup>66</sup> Claims are judged only by the evidence available at the hearing, meaning an infringement claim must show evidence of an infringing act.<sup>67</sup> Preliminary injunctions sought to deter acts of infringement are therefore not available in administrative cases since evidence of infringement does not yet exist for the claim to be heard.<sup>68</sup> Judgments against a defendant result in discontinuing the infringement, confiscating or destroying copies, and fines.<sup>69</sup> Regarding copyright claims over information

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61. PRC Copyright Law, *supra* note 55, art. 22.

62. *Id.* at 48; *see also* GANEA & PATILOCH, *supra* note 4, at 289.

63. *See* GANEA & PATILOCH, *supra* note 4, at 289-90, 326.

64. *Id.* at 311.

65. *See id.* at 331.

66. *See id.* at 327.

67. *Id.*

68. *Id.* at 316-17.

69. *Id.* at 326.



networks, jurisdiction exists either in the defendant's location, or at the location of a network service provider that gives access to the infringing content.<sup>70</sup>

China's civil court system affords plaintiffs more relief than would otherwise be available from administrative agencies. First, claims brought to the civil courts may allow for a plaintiff to recover damages from a claim of infringement.<sup>71</sup> Second, the civil court system allows for a defendant to be charged as a criminal in cases of copyright infringement.<sup>72</sup> Damages must reach a specific financial threshold to meet the requirements for criminalization, although the threshold for criminalization is not defined in the copyright law itself.<sup>73</sup> Rather, the threshold may be referenced in either China's criminal code,<sup>74</sup> or set in China's patent law.<sup>75</sup> Because China is not a common-law state, courts may refer to prior cases for support, but do not have to decide copyright claims in accordance with prior decisions.<sup>76</sup> Also, because copyright cases are decided by various courts throughout China and not one central legal body, compared with how federal courts oversee copyright claims in the U.S., this opens the door for inconsistent decisions among the many litigating courts in China.<sup>77</sup>

The "Regulations for the Protection of the Right of Communication through Information Network" adds provisions that directly address copyright infringement via the internet.<sup>78</sup> The Regulations include explicit-use cases where protected works may be made available without permission, payment or remuneration.<sup>79</sup> More importantly, the Regulations spell out procedures of "notice to delete" requirements, how to introduce an infringement claim to a network service provider (NSP), and the subsequent steps that the NSP may perform to escape liability.<sup>80</sup>

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70. TANG, *supra* note 6, at 104.

71. GANEA & PATTLICH, *supra* note 4, at 312-13.

72. *Id.* at 331.

73. MARTIN K. DIMITROV, PIRACY AND THE STATE: THE POLITICS OF INTELLECTUAL PROPERTY RIGHTS IN CHINA 150 (2009).

74. Criminal Law of the People's Republic of China (promulgated by Standing Comm. Nat'l People's Cong. Gaz., July 1, 1979, effective Oct. 1, 1997) STANDING COMM. NAT'L PEOPLE'S CONG. GAZ., art. 217, (China) [hereinafter PRC Criminal Law] (amended Mar. 14, 1997); *see also* GANEA & PATTLICH, *supra* note 4, at 337.

75. *See* GANEA & PATTLICH, *supra* note 4, at 337.

76. *See* DIMITROV, *supra* note 73, at 96-97.

77. *Id.* at 96; *see* GANEA & PATTLICH, *supra* note 4, at 335-36.

78. *See generally* Regulations Through the Information Network, *supra* note 57.

79. *Id.* art. 6-7.

80. *Id.* art. 14-17.

The 2006 Regulations define a step-by-step process that NSPs must employ to avoid contributory liability in online copyright claims.<sup>81</sup> A rights owner who believes that his or her copyright is being infringed on information network storage space, searching or linking services, may serve notice to the network service provider.<sup>82</sup> The NSP must then remove or disconnect access to said content, and forward the notice to the suspected infringing network subscriber responsible for the content.<sup>83</sup> The defendant subscriber may then respond to the NSP, explaining the legitimacy of his or her use.<sup>84</sup> Once such response occurs, the NSP must restore the content, and may hold the claimant responsible for any damages relating to disruption of service if the defendant succeeds.<sup>85</sup> With the internet growing at a rapid rate in China, these Regulations attempt to add clarity to the country's developing copyright laws.

### III. DEFICIENCIES IN LEGAL PROTECTION OF COPYRIGHT IN CHINA

Despite having sophisticated copyright laws designed to meet WTO standards, including revisions to specifically address copyright protection over information networks, illegally downloaded music continues to cripple China's music industry.<sup>86</sup> China's music industry brought in \$82.6 million in total sales in 2013, 76% of which came from digital sales.<sup>87</sup> The number was just enough to place them 21st on a global ranking,<sup>88</sup> despite having both the world's largest population of internet users, as well as the most economic potential in the digital market.<sup>89</sup>

It is no secret that China struggles with internet piracy.<sup>90</sup> The U.S. estimates that in 2013, 99% of all music downloads were done so

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81. *Id.* art. 23.

82. *Id.* art. 14.

83. *Id.* art. 15.

84. *Id.* art 16.

85. *Id.* at. 17-18.

86. U.S. TRADE REP., EXEC. OFFICE OF THE PRESIDENT, 2013 Report to Congress On China's WTO Compliance (2013) [hereinafter U.S. TRADE REPORT].

87. IFPI REPORT, *supra* note 5, at 38; *see also* Yang, *supra* note 1 (explaining that in 2011 China's digital sales were 76 percent).

88. IFPI REPORT, *supra* note 5, at 36.

89. *The World Factbook*, CIA, <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2153rank.html> (last visited Sept. 20, 2015); *see also* A.T. KEARNEY REPORT, *supra* note 5, at 8-9.

90. Wang Aihua, *China's Copyright Protection Winning Battle Against Piracy*, XINHUA (Nov. 5, 2012, 9:37 PM), [http://news.xinhuanet.com/english/indepth/2012-11/05/c\\_131952723.htm](http://news.xinhuanet.com/english/indepth/2012-11/05/c_131952723.htm).

illegally.<sup>91</sup> This means that approximately \$62.8 million in sales for 2013 theoretically accounts for only 1% of all music downloads in China for that year.<sup>92</sup> To be sure, China has made significant developments in its copyright laws in the 25 years, but continues to struggle with their implementation.<sup>93</sup> In the past several years, China employed a nationwide effort to combat online piracy, and in 2013 prosecuted 60,000 individuals for piracy claims.<sup>94</sup> Yet, the U.S. still believes China has not done enough, criticizing China for its “poor enforcement record” of intellectual property rights.<sup>95</sup> Despite all of the effort aimed at combatting online piracy, exploiting copyright over the internet continues to be a great hurdle for China to overcome. There are several key areas of the law and enforcement that create problems for China.

### A. *Administrative Challenges*

From an administrative perspective, copyright claims must first overcome the hurdle of subject-matter jurisdiction. China’s copyright laws grant subject-matter jurisdiction to administrative agencies over copyright claims whenever “public rights and interests are impaired.”<sup>96</sup> With regard to digital copyright claims, administrative agencies generally hear claims when a rights holder either seeks to settle ownership claims or rule that a party infringed on the rights of the copyright holder.<sup>97</sup> However, administrative agencies are only awarded subject-matter jurisdiction by serving the “public interest” in adjudicating copyright claims.<sup>98</sup> Thus, contractual claims such as failure to pay consideration for conveyance of copyright ownership falls beyond the administrative agency’s jurisdiction.

Additionally, both courts and administrative personnel often cite to the “access public interest” in judges’ opinions, which may defeat a copyright claim even if a claim falls within the court or agency’s juris-

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91. U.S. TRADE REPORT, *supra* note 86, at 110.

92. These calculations were reached by multiplying 82.6 by .76, which are figures found in the IFPI REPORT. See generally IFPI REPORT, *supra* note 5.

93. QINGJIANG, *supra* note 49, at 35.

94. *China Seized 60,000 Piracy Suspects Last Year*, YAHOO! FINANCE (Jan. 21, 2014, 9:07 AM), <http://finance.yahoo.com/news/china-seized-60-000-piracy-131935052.html>.

95. Kate Tummarello, *U.S. Presses China on ‘Rampant’ Online Piracy*, THE HILL (Dec. 26, 2013, 3:22 PM), <http://thehill.com/policy/technology/194037-us-presses-china-on-rampant-online-piracy>.

96. PRC Copyright Law, *supra* note 55, art. 48.

97. See TANG, *supra* note 6, at 101-05.

98. See *id.* at 91.

diction.<sup>99</sup> The courts recognize that a balancing act must be performed when protecting international legal requirements for copyright protection as well as the nation's core values of sharing ideas for the betterment of society.<sup>100</sup> While protecting copyright is decidedly a matter of public interest, Chinese judges and agencies must take into account whether access public interest supersedes the interest of the individual right holder.

Interdepartmental communication also gets in the way of proper enforcement of copyright. Dual enforcement leads to confusion over how to properly transfer a case from an administrative agency to a civil court.<sup>101</sup> For example, a claim for ownership might initially be brought to an administrative body for speedy resolution. However, after winning an ownership claim, the plaintiff may attempt to recover damages from the infringing activity.<sup>102</sup> The case must then transfer from the administrative body to the civil court, with the possibility that the transfer gets delayed due to confusion about proper transfer procedures.<sup>103</sup>

Additionally, cases involving agencies and other government organs can get lost in the politics. China compartmentalizes its enforcement of copyright claims among the following agencies: General Administration of Press and Publication (GAPP); Ministry of Commerce (MOC); State Administration of Press, Publication, Radio, Film and Television (SARFT); National Anti-Piracy and Pornography Working Committee (NAPWC); and National Copyright Administration of the People's Republic of China (NCAC).<sup>104</sup> Departments will sometimes compete for the fines that are imposed on the infringing party.<sup>105</sup> Claims that should be transferred by the administrative agencies might never transfer the case to the police or civil courts. Generally, police involvement does not occur unless the agency transfers the case.<sup>106</sup> Police may have authority to initiate raids of copyright infringers, but generally refrain from doing so, since more significant crimes such as murder and robbery often take priority.<sup>107</sup>

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99. *See id.* at 90-93.

100. *See id.*

101. GANEA & PATTLACH, *supra* note 4, at 340.

102. *See id.* at 330-31.

103. *Id.* at 340.

104. DIMITROV, *supra* note 73, at 126.

105. *See* GANEA & PATTLACH, *supra* note 4, at 340.

106. *Id.* at 332.

107. DIMITROV, *supra* note 73, at 154.

### B. *The Burden on Network Service Providers*

Part of the problem also lies in the lack of clarity regarding the liability of NSPs. Unlike general copyright claims brought to administrative agencies, the notice to delete process affords the claimant an opportunity for interim injunction before the case gets adjudicated through their notice to delete process.<sup>108</sup> This, however, places a burden on the NSPs, as they must be the first to rule on the legitimacy of notice for a claim and decide whether the notice warrants the disruption of their business, or refuse to take action on the notice due to the frivolousness of a claim.<sup>109</sup>

Ultimately, the issue of NSP liability turns on whether a rights owner provided *sufficient* notice.<sup>110</sup> Identifying a sufficient delete notice poses problems in two seminal cases brought forward by the International Federation of the Phonographic Industry on behalf of several major record companies, *IFPI v. Baidu* and *IFPI v. Alibaba*, two seemingly identical cases with conflicting outcomes.<sup>111</sup> In both cases, the major record labels in China notified each defendant that they were providing “deep links” to pirated digital music content in the top search results of their popular search engines.<sup>112</sup> Both defendants refused to honor the delete notices and IFPI proceeded with the lawsuits.<sup>113</sup>

In *Baidu*, IFPI brought forth a claim of direct copyright infringement for providing deep links to the pirated content.<sup>114</sup> The Beijing No. 1 Intermediate People’s Court ruled in favor of Baidu, holding that Baidu itself was not hosting the pirated content, but rather leading users to the location of the sites who blatantly violated copyrights.<sup>115</sup> Baidu merely provided deep links to these online destinations. Because they did not provide the content themselves, Baidu did not directly violate any copyright laws.<sup>116</sup>

In *Alibaba*, IFPI not only claimed direct infringement but also included a claim for contributory infringement.<sup>117</sup> The Beijing No. 2

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108. See SEAGULL HAIYAN SONG, *NEW CHALLENGES OF CHINESE COPYRIGHT LAW IN THE DIGITAL AGE: A COMPARATIVE ANALYSIS OF ISP LIABILITY, FAIR USE AND SPORTS TELECASTS* 21 (2011).

109. See generally *id.* at 21-23.

110. See *id.* at 21.

111. See *id.* at 19-22; see also TANG, *supra* note 6, at 32-35.

112. SONG, *supra* note 108, at 19-20.

113. *Id.*

114. *Id.* at 19.

115. *Id.*

116. *Id.* at 19-20.

117. *Id.* at 20.

Intermediate People's Court found Alibaba, then operating Yahoo.cn, liable for contributory infringement.<sup>118</sup> The Court ruled that Alibaba received sufficient notice from the plaintiffs who explicitly listed the URLs of the infringing sites.<sup>119</sup> The websites should have raised enough "red flags" for Alibaba to know that the website distributed music illegally.<sup>120</sup> In light of the *Alibaba* decision, IFPI appealed against Baidu and sought to introduce a claim of contributory infringement.<sup>121</sup> The First People's Court again ruled for Baidu, holding that whereas notice that was given to Alibaba explicitly listed infringing websites, notice that was given to Baidu did not list such websites, even though the sites were available among the top results and raised similar "red flags."<sup>122</sup> In short, Baidu did not have reason to know of the infringing activity based on the delete notice itself. The conflicting results between the two cases creates ambiguity in defining the threshold for when an NSP must take action on a delete notice.

### C. Cross-Border Enforcement

Another difficulty with combatting online piracy is the importation of content and cross-border enforcement of copyright laws. Prior to 2001, China imposed a trade cap that limits foreign goods to consist of no more than 20% of available goods in the marketplace.<sup>123</sup> WTO has since ruled against the legality of a trade cap, and China instead imposes license requirements regulated by the Ministry of Culture for the selling of imported music.<sup>124</sup> In addition, China has a history of censoring international music from becoming available for Chinese markets in efforts to reduce competition against Chinese music.<sup>125</sup> The internet is unique such that importation of digital goods may occur in a household through a network of wires that are not subject to the same inspection upon importation. Thus, by limiting the amount

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118. *See id.* at 21.

119. *Id.* at 19-21.

120. *See id.* at 19.

121. *See id.* at 19-21.

122. *Id.* at 21-22.

123. Keith Bradsher, *W.T.O Rules Against China In Media Cases*, N.Y. TIMES, Aug. 13, 2009, at A1.

124. Eric Priest, *Copyright Extremophiles: Do Creative Industries Thrive or Just Survive in China's High-Piracy Environment?*, 27 HARV. J.L. & TECH. 467, 504-05 (2014); *see also* Bradsher, *supra* note 123.

125. *China's Culture Ministry Bans Songs From Artists Including Lady Gaga, Backstreet Boys*, NEWS.COM.AU (Aug. 25, 2011, 7:23 PM), <http://www.news.com.au/entertainment/music/chinas-culture-ministry-bans-songs-from-artists-including-lady-gaga-backstreet-boys/story-e6frfn09-1226122364851>.

of imported music that is available for legal purchase from Chinese music retailers, the demand for imported music is satisfied by illegally downloading music that would otherwise not be available for purchase legally.

Regulating access to pirate websites based beyond China's borders poses a challenge that can ultimately be resolved in only two ways: 1) censor access to the website altogether; or 2) encourage enforcement against the offender in the country where the piracy originates. Although China might not oppose censoring generally, doing so as a general first option contradicts the spirit of opening its doors for trade with the rest of the world.<sup>126</sup> Thus, the latter option is a more favorable alternative, but ultimately leaves Chinese rights holders at the mercy of foreign governments for relief against pirates who make content available in China.

#### D. *Deficiencies in the Courts*

In addition to challenges with online enforcement, the civil court possesses inherent flaws dealing with copyright claims. There are questions about whether the existing Chinese copyright laws have the "teeth" to combat online piracy.<sup>127</sup> Fines that are imposed on copyright infringers add to the slew of problems. First, copyright law sets a maximum fine of ¥100,000 (approximately US \$16,000) for infringement over the internet.<sup>128</sup> The average judgment, however, ranges from ¥10,000 to ¥30,000 (approximately US \$1,600-\$4,800), an insufficient deterrent considering that the profitability of online piracy may very well offset the cost of the fines.<sup>129</sup> The problem becomes exacerbated with online piracy, where there are little to no costs involved in the duplication and distribution of pirate content, while digital distribution simultaneously creates opportunities for a broader marketplace than in the physical world.<sup>130</sup>

Furthermore, China lacks qualified judges and administrative personnel to effectively decide the influx of copyright claims.<sup>131</sup> China has created a copyright tribunal by designating specific courts

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126. See Priest, *supra* note 124, at 505.

127. See GANEA & PATLOCH, *supra* note 4, at 289.

128. Regulations Through the Information Network, *supra* note 57, art. 18.

129. *China Intensifies Crackdown On Internet Piracy*, XINHUANET (Jan. 17, 2008, 3:48 PM), [http://news.xinhuanet.com/english/2008-01/17/content\\_7439618.htm](http://news.xinhuanet.com/english/2008-01/17/content_7439618.htm).

130. See James Ball, *The Pirate Bay Copyright Crackdown Is Unsustainable*, THE GUARDIAN (May 1, 2012, 7:30 AM), <http://www.theguardian.com/commentisfree/2012/may/01/pirate-bay-copyright-crackdown>.

131. DIMITROV, *supra* note 73, at 100.

within each district to handle all intellectual property claims to further their specialization with such claims.<sup>132</sup> However, with the rise of internet piracy, the quantity of claims continues to grow, increasing the workload for these courts.<sup>133</sup> The problem worsens when a decision depends on an administrative agency that has not had sufficient training and practice with copyright claims. Administrative agencies, in the spirit of the dual-enforcement system, structure themselves to decide cases in a short period of time, and it may not allow enough time for discovery or detailed analysis of the facts.<sup>134</sup> Thus, decisions made in haste by personnel who still have a developing understanding of Chinese copyright laws may lead to inconsistent or incorrect results, especially when the agency is not bound to prior decisions.<sup>135</sup>

The lack of national uniformity in copyright adjudication also leads to vastly different results among the courts. Unlike US law where copyright claims are strictly a matter for federal courts, China divides adjudicating responsibilities across multiple bodies of government.<sup>136</sup> Because the sister courts neither have a duty to abide by one another's decisions, nor do the courts have a higher governing body to unify the interpretation of copyright law among the lower courts and administrative bodies, it is difficult to predict the potential outcome of a copyright claim.<sup>137</sup> Despite the creation of the tribunal, because of China's size, there are simply too many courts and no rule of law to unify them.<sup>138</sup> Even more so, once a claim makes its way to a criminal trial, chances are that the judges hearing the case do not specialize in intellectual property law.<sup>139</sup> Lack of uniform interpretation can lead to forum shopping among courts.

Filing for IP claims in China's civil courts are expensive and not easily exercised by individual rights holders, and costs increase in proportion to the amount of damages sought.<sup>140</sup> Because damages may only be sought in civil courts, the expensive legal fees for trials may inhibit rights owners from pursuing the numerous infringing parties on the internet. The only way to eradicate piracy of any given song is to bring claims against every single infringing party in every district that

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132. *Id.* at 101.

133. *Id.* at 105.

134. See GANEA & PATTLACH, *supra* note 4, at 289.

135. See *id.* at 340.

136. See GANEA & PATTLACH, *supra* note 4, at 289; see also DIMITROV, *supra* note 73, at 116.

137. See DIMITROV, *supra* note 73, at 116.

138. See *id.* at 95.

139. See *id.* at 103.

140. See generally GANEA & PATTLACH, *supra* note 4, at 314.



piracy occurs, which can be tedious and futile considering the ease of reestablishing illegal activities under a different website with digital copies of infringing material spread across both local, international, and cloud-based servers.<sup>141</sup>

Lastly, an overarching theme of local protectionism appears to invade the courts in China.<sup>142</sup> In some districts where defendants have a major influence in the community, claims may be decided in their favor because of the reputation that the defendant has in that neighborhood.<sup>143</sup> A company's reputation may be enough to sway a decision even when similar fact patterns have been decided against the defendant.<sup>144</sup> Examples of such are more prevalent in communities with smaller budgets for law enforcement, especially when much of the community's revenue is sustained by piracy.<sup>145</sup>

Local protectionism has a broader reach in cases where foreign rights holders bring copyright claims into China's massive legal system. Often, foreign rights holders have difficulty navigating through the administration maze and, once they do, find that they hold an adverse position to the bias of the local courts that are weary of foreign views on copyright.<sup>146</sup> Campaign-style enforcement has often brought the most effective results, when then nation is pressured by the international community to unify the courts in an effort to combat piracy across the nation.<sup>147</sup> However, such efforts generally occur only once a year for varying lengths of time and lead to inconsistent results across varying regions.<sup>148</sup> Thus, protectionism, whether intentional or not, continues to be a problem with copyright enforcement in China.

#### IV. ADVANTAGES OF STREAMING LICENSES IN THE CURRENT CLIMATE

While China's music industry continues to combat the piracy of downloaded music, the industry needs to focus on exploiting alternative revenue streams that can survive in spite of the high rate of piracy. Specifically, capitalizing on the growth of digital music streaming licenses can turn China's music industry into a strong economy.

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141. See *The Pirate Bay Moves to the Cloud to Avoid Shutdown*, BBC (Oct. 17, 2012), <http://www.bbc.com/news/technology-19982440>.

142. GANEA & PATFLOCH, *supra* note 4, at 340.

143. See DIMITROV, *supra* note 73, at 157.

144. *Id.*

145. *Id.*

146. *Id.* at 171.

147. See *id.* at 226.

148. *Id.* at 157.

China possesses the world's largest and fastest growing e-commerce market.<sup>149</sup> Furthermore, China's strong mobile market provides a great opportunity for streaming music companies to exploit.<sup>150</sup> With current global trends shifting away from download business models, and toward streaming models, China may realistically become the largest consumer market for streaming music services.

### A. *Streaming vs. Downloading*

The two digital distribution models possess characteristics that are inherently different. Thus, the two utilize differing distribution rights, technologies, and business models altogether.<sup>151</sup> Digital downloads resemble more of a traditional distribution model: the consumer pays for her own reproduction of the product delivered from the retailer, which then resides permanently in the consumer's read-only memory (ROM).<sup>152</sup> Digital downloads require an internet connection for the initial distribution of the digital file.<sup>153</sup> Afterward, the file may be played as many times as the consumer chooses, using any digital music player, such as a computer, cell phone, or other portable device, as long as a copy of the file exists in the device's ROM. A download resembles the concept of a true purchase, where the consumer pays the retailer for the right to own a copy, then the retailer pays the owner of the master recording less the retailer's distribution fee.<sup>154</sup> iTunes and the Chinese company, Wa3, exemplify this model.<sup>155</sup>

Digital streaming differs from downloading in several ways. First, the distribution of a song in the streaming business model occurs practically every time a song gets played on a streaming music service.<sup>156</sup> The music player on the consumer's end, whether through an application or in-browser, stores a copy of the digital file in the device's random access memory (RAM).<sup>157</sup> Although the technical language of copyright law can qualify this as a reproduction, interpretation of the law delineates digital files stored in RAM because the file is not trans-

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149. A.T. KEARNEY REPORT, *supra* note 5, at 8.

150. See IFPI REPORT, *supra* note 5, at 36.

151. See DONALD S. PASSMAN, ALL YOU NEED TO KNOW ABOUT THE MUSIC BUSINESS 140 (2013).

152. See *id.* at 140-49.

153. See generally GARY SHELLY & JENNIFER CAMPBELL, DISCOVERING THE INTERNET (2012).

154. See PASSMAN, *supra* note 151, at 140, 145.

155. See *id.* at 139-40.

156. See *id.* at 144-46.

157. See *id.*

ferable or readily accessible as with a digital download. While in theory a song may be consumed just as much as a digital download, the business model resembles that of music renting.<sup>158</sup> Each play counts as one rental, and the transaction only occurs as long as the device has an internet connection to the server (unless the consumer stores the file in offline mode).<sup>159</sup> The retailer in this case does not get paid every time the consumer plays the song.<sup>160</sup> Rather, the retailer sells ad space (“ad-supported streaming model”) or subscriptions (“subscription model”), which then subsidizes the costs due to the owner of the master recording for all the times a song gets played.<sup>161</sup> Spotify and the Chinese company, Baidu Music, are examples of streaming music services.<sup>162</sup>

Although Baidu escaped liability on appeal, many view the case as a win for China’s music industry because in 2011, the court ordered Baidu to enter into a licensing agreement with the major record labels in China.<sup>163</sup> The ruling opened the door for music streaming services in China, which Baidu and several other competitors are now offering music streaming services.<sup>164</sup> There are several advantages to the streaming music license model that lends itself to successful business models even in a high piracy environment.

### B. *Added Value in Streaming Music Services*

First, music streaming services add value through expansive catalog and consumer interface tools that cannot be replicated by pirating downloads. Streaming music companies enter into deals with labels by acquiring a blanket license for the entire catalog of a label during the term of the license.<sup>165</sup> Thus, music companies can make content available to all consumers on the day of the album release without the consumer having to actively download and store the content.<sup>166</sup> Replicating such a service via illegal pirate downloads would not only require time and labor, but also storage space.

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158. *See id.* at 144-49.

159. *See id.* at 140.

160. *See id.* at 146-47.

161. *See id.*

162. *See id.* at 141.

163. *See* Robert Cookson, *Streaming is the Answer for Chinese Music Industry*, FIN. TIMES (May 28, 2014, 3:51 AM), <http://www.ft.com/intl/cms/s/0/60255bc6-e4c0-11e3-894f-00144feabdc0.html#axzz3CNnVaq7S>.

164. *See* IFPI REPORT, *supra* note 5, at 22.

165. *See* John Seabrook, *Revenue Streams: Is Spotify the Music Industry’s Friend or Foe?*, THE NEW YORKER, Nov. 24, 2014, at 73.

166. *See* Ben Sisario, *On the Charts the Heat is On*, N.Y. TIMES, Aug. 16, 2015, at MB4.

Presentation of content also favors streaming music services in a way pirate sites does not. Streaming music services are often accessed via a music player or some kind of interface, which plays and catalogs content in a more organized manner than pirate sites.<sup>167</sup> Furthermore, many streaming music services provide curated radio stations that can be based on a selected artist, genre or sonic profile.<sup>168</sup> Consumers often turn to these stations as a tool for music discovery, a service often not available on pirate sites. In addition, many streaming services incorporate some form of social networking aspect through its music player, whether it be through sending recommendations of songs and artists, or sharing entire playlists.<sup>169</sup>

The Swedish music industry is a testament to how streaming music companies can turn a piracy-ridden nation into a sustainable digital music economy.<sup>170</sup> Known for being the birthplace of The Pirate Bay, Sweden's music industry hit a record low of US \$144.8 million in sales in 2008, with digital revenue accounting for only 8 percent.<sup>171</sup> The court found The Pirate Bay guilty of copyright infringement in 2009, and a new law was passed to make it easier to sue copyright infringers.<sup>172</sup> Through the combined effect of The Pirate Bay litigation and the creation of a viable alternative for consumers with the advent of Spotify, the country shifted from an environment of illegal downloading to one of music streaming.<sup>173</sup> The growth of music streaming received a boost from a major internet and mobile company, Telia, which bundled its service with three months of free access to Spotify's streaming music player.<sup>174</sup> Consumer research conducted by GfK showed that of the sampled Spotify users in 2013, nine out of ten paying subscribers downloaded illegally "less often," while seven out of ten of the service's free users yielded the same results.<sup>175</sup> For some, illegal downloading became less alluring because of the availability of Spotify.<sup>176</sup> In 2013, revenue grew in the US to \$194.2 million, with

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167. Seabrook, *supra* note 165, at 70.

168. *Id.*

169. See PASSMAN, *supra* note 151, at 141.

170. See IFPI REPORT, *supra* note 5, at 34.

171. *See id.*

172. See Eric Pfanner, *Swedish Music Fans Start to Steer Clear of Pirates*, N.Y. TIMES (Jan. 24, 2010), [http://www.nytimes.com/2010/01/25/technology/internet/25iht-music.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2010/01/25/technology/internet/25iht-music.html?pagewanted=all&_r=0).

173. IFPI REPORT, *supra* note 5, at 34.

174. *Id.*

175. *Id.*

176. See Pfanner, *supra* note 172.

digital revenue accounting for 70 percent.<sup>177</sup> With Sweden demonstrating how the combined effort of law and e-commerce can turn a piracy-laden industry into one that effectively sustains itself on streaming music, China (with roughly 75 times the amount of internet users as Sweden<sup>178</sup>) can potentially make the same strides.

### C. Rapidly Growing e-Commerce Market

Second, China's ecommerce market is bolstered by the world's largest population tethered to rapidly improving technology.<sup>179</sup> With 517 million internet users as of 2013, and the world's second largest digital economy, a study published by AT Kearney predicts that China will emerge from \$64 billion in online retail to \$271 billion in the next five years.<sup>180</sup> Research conducted on China's e-commerce market shows that: 1) China's economy has become highly internationalized;<sup>181</sup> 2) the market has evolved to mature business models;<sup>182</sup> and 3) the market has moved from being largely independent to a market characterized by integration and merger.<sup>183</sup>

In terms of technological development, over 74% of China's internet population now experiences an average speed of 3.97 Mbps.<sup>184</sup> In addition, mobile internet speeds have increased to an average of 3.77 Mbps on the slowest carrier, an important technological advancement that enables streaming music services to support music services over cellular networks.<sup>185</sup> As the infrastructure improves, companies are expanding their services to the mobile marketplace to enable wireless access.<sup>186</sup> With over 600 million mobile phone users in China, the market potential for streaming music services on mobile phones is great.<sup>187</sup> Consider that in 2013, cellular carriers earned US \$2.2 billion in revenue for mobile music content on ring-back tones and music apps (though very little revenue gets paid back to the rights own-

177. IFPI REPORT, *supra* note 5, at 34.

178. *Internet Users By Country (2014)*, INTERNET LIVE STATS, <http://www.internetlivestats.com/internet-users-by-country/> (last visited Sept. 20, 2015).

179. See IFPI REPORT, *supra* note 5, at 8.

180. *Id.*

181. Shi Yutian & Yu Ping, *Reform of China's Economic System with WTO Accession and its Impact on Tertiary Education*, in *WTO ACCESSION AND SOCIO-ECONOMIC DEVELOPMENT IN CHINA* 19, 29 (Parikshit Basu & Yapa Bandara, eds., 2009).

182. A.T. KEARNEY REPORT, *supra* note 5, at 2.

183. Cong Lixian, *Chinese E-Commerce (2) and Legal Environment*, *CHINESE INTELLECTUAL PROPERTY AND TECHNOLOGY LAWS 270* (Rohan Kariyawasam, ed., 2011).

184. See *China's Internet Speeds Increase by 20%*, *supra* note 16.

185. *Id.*

186. IFPI REPORT, *supra* note 5, at 36.

187. *Id.* at 37.

ers).<sup>188</sup> Companies like Kuguo, TTPOD and Kuwo currently offer mobile streaming services over cellular networks.<sup>189</sup> Taking proper strides in technology may result in more consumers turning to such services, as China's technological infrastructure continues to develop throughout the nation.

#### *D. A Global Market Shift Toward Streaming Music Consumption*

Third, on an international scale, digital music streaming services continue to take more of the market share away from download retailers.<sup>190</sup> In 2013, ad-supported streaming grew 17.6% globally, while subscription models increased 51.3%, bringing in US \$1 billion for the first time.<sup>191</sup> An estimated 61% of global internet users use some form of streaming music service that same year.<sup>192</sup> In some European countries, streaming services have already surpassed the amount of revenue for download services.<sup>193</sup> Even the United States, the world's largest consumer of digital music, is noticing a rapid shift from downloaded purchases to digital streaming.<sup>194</sup> Apple, the top download retailer in the world, is breaking into the streaming world with the recent launches of iTunes Radio and Apple Music.<sup>195</sup> As a whole, consumers across the globe are shifting from a desire to download digital copies of mp3s to a desire to access any song at any time, from anywhere.<sup>196</sup> As more Chinese companies begin to offer streaming music consumption models, consumers will more than likely experience the same gradual transition from downloading music to streaming music.

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188. *Id.* at 36.

189. See Tracey Xiang, *China's Top 5 Music Apps Have A Combined Market Share of 80%*, TECHNODE (Sept. 9, 2014), <http://technode.com/2014/09/09/chinas-top-5-music-apps-combined-market-share-80/>.

190. See Ingrid Lunden, *In Europe, Spotify Royalties Overtake iTunes Earnings By 13%*, TECHCRUNCH (Nov. 4, 2014), <http://techcrunch.com/2014/11/04/in-europe-spotify-royalties-overtake-itunes-earnings-by-13/>.

191. See IFPI REPORT, *supra* note 5, at 7.

192. *Id.* at 11.

193. *Id.* at 34.

194. *Id.* at 9.

195. See generally *Apple Announces iTunes Radio*, APPLE (June 10, 2013), <https://www.apple.com/pr/library/2013/06/10Apple-Announces-iTunes-Radio.html>; *Introducing Apple Music — All The Ways You Love Music. All in One Place.*, APPLE (June 8, 2015), <http://www.apple.com/pr/library/2015/06/08Introducing-Apple-Music-All-The-Ways-You-Love-Music-All-in-One-Place-.html?sr=hotnews.rss>.

196. See IFPI REPORT, *supra* note 5, at 6.

### E. Congruence with “Access Public Interest”

Finally, current models for music streaming services, especially ad-supported models, do not compete, but rather align with China’s concept of “access public interest” by making digital music available to the public at virtually no cost. Consumers get to enjoy music content seemingly for free on the music platform, or for merely a small fee, if they are paying for an ad-free version of the platform. This model benefits both the copyright holders and public interest by granting access to the public while the interests of the rights holders are preserved through remuneration in the form of licensing revenue.

## V. CHALLENGES OF THE STREAMING MUSIC MODEL

There are several problems with proclaiming that streaming music licenses can altogether save China’s music industry. First, this approach discounts the importance of fighting illegal downloading and focuses on maximizing an alternative revenue stream, instead of defending a major source of revenue. Despite China’s uncontrollable problem with piracy, the music industry still relies on revenue from digital downloads.<sup>197</sup> However, until alternative revenue sources can relax the music industry’s dependence on the little download revenue that it currently generates, China’s music industry will continue to struggle in its ability to turn a profit. It is increasingly important that something be done, not only to stop the financial bleeding, but also to find alternative revenue streams that can offset the losses incurred by illegal downloading. China already earns more revenue in digital music sales than it does through physical retail,<sup>198</sup> and digital streaming licenses have proven to be a growing part of a global music industry.<sup>199</sup> By concentrating its efforts on maximizing the use of digital streaming licenses, China’s music industry may not only keep pace with the rest of the world but potentially surpass it due to its large e-commerce market and zeal for consuming mobile music products.

Second, streaming licenses generate much less revenue per stream for the rights holder when compared to downloading and physical purchases.<sup>200</sup> Streaming license models generally fall under ad-

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197. Priest, *supra* note 124, at 496.

198. *Id.*

199. IFPI REPORT, *supra* note 5, at 17.

200. See Ben Sisario, *As Music Streaming Grows, Artists’ Royalties Slow To A Trickle*, N.Y. TIMES, Jan 29, 2013, at A1.

supported models or subscription models.<sup>201</sup> In a typical purchase of a digital download, each purchase (say, for the price of \$1) is generally split by the retailer taking its share off the top (generally near 30%), while the rights owner of the master recording takes the remainder.<sup>202</sup> In music streaming business models, the money that the rights owner takes for each play is a function of how many plays the song has in a given period and how much ad or subscription revenue was brought in during that same period.<sup>203</sup> In comparison, the amount of revenue that a rights owner earns on one download may be equal to the revenue it earns over hundreds of plays on a streaming service, depending on the negotiated terms of the streaming license agreement.<sup>204</sup> Thus, streaming music services require far more activity from its consumers to generate the same amount of revenue as a download service.

The volume of consumer activity may play well to China's advantage. China not only has the largest population in the world,<sup>205</sup> but it consequently has the largest number of consumers in the e-commerce market, both in traditional online services and mobile services.<sup>206</sup> Furthermore, China's mobile consumers are very active in consuming mobile music products.<sup>207</sup> What streaming licenses do not generate in terms of profit margins may be made up for in the volume of music consumption on available services.

Third, if the goal is to make the most out of alternative revenue streams rather than rehabilitating one that is severely broken, one may argue that China's music industry would make the most progress by focusing on renegotiating license deals with mobile providers rather than investing in streaming license models. As illustrated, the revenue that cellular network providers generate from mobile music content is significant, at over US \$4 billion.<sup>208</sup> However, the share that rights holders receive in earnings from the mobile music content is roughly 2%.<sup>209</sup> This staggeringly low figure results from the heavy bargaining position of the cellular networks.<sup>210</sup> Three of China's larg-

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201. See PASSMAN, *supra* note 151, at 146; see also Paul Resnikoff, *YouTube and Pandora Control 65% Of All Streaming Music In the US*, DIGITAL MUSIC NEWS (Feb. 13, 2014), <http://www.digitalmusicnews.com/permalink/2014/02/13/youtubepandoracontrol>.

202. See PASSMAN, *supra* note 151, at 144.

203. *Id.* at 146.

204. See Sisario, *supra* note 166.

205. A.T. KEARNEY REPORT, *supra* note 5, at 8.

206. See *id.*; see also Priest, *supra* note 124, at 495.

207. See IFPI REPORT, *supra* note 5, at 36; Priest, *supra* note 124, at 501-02.

208. Priest, *supra* note 124, at 502.

209. See IFPI REPORT, *supra* note 5, at 36; Priest, *supra* note 124, at 502.

210. See Priest, *supra* note 124, at 519.



est cellular networks are state-owned.<sup>211</sup> Because of this, any policy that favors rights owners and urges the cellular networks to give up a greater share of earnings takes money directly out of China's pocket.<sup>212</sup> As such, it is not likely that the state will push for that general policy or enact any statutory royalty requirements for mobile music content. It would appear that the license agreement between cellular networks and rights holders is more of a formality than a product of sound negotiation; the 2% is merely being offered to satisfy the remuneration requirement under Chinese copyright laws.<sup>213</sup> Until rights owners have alternative revenue streams for which they can rely and survive independently from the cellular networks, rights owners will have little bargaining power in future negotiations with cellular network providers. Thus, China's music industry must find ways to capitalize on the potential market available for digital streaming licenses.

## VI. CONCLUSION

While piracy has long plagued digital music revenue in China, streaming services offer much to the consumer experience that cannot be replicated via a download platform. China has laid the legal foundation through its copyright laws, and, with better enforcement practices, can continue to develop over time as the system gains more traction. Despite these legal advancements, streaming licenses will grow in China's music industry, and they have the potential to save China's music market, due sheerly to its size, projected consumer behavior, and the viability of the streaming license model in a high-piracy environment.

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211. *See id.* (one of the three state-owned companies is China Mobile).

212. *See id.* at 502-03.

213. *Id.* at 502.