

## Copyright for Blockheads: An Empirical Study of Market Incentive and Intrinsic Motivation

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### ABSTRACT

Copyright law is widely perceived as the means to promote social welfare by providing a 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 virtually copyright-free environment featuring one of the highest piracy rates in the world, which has caused a dramatic transformation of the music business.

The empirical research indicates three seemingly paradoxical phenomena: (1) 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; (2) while 56.4% alleged that copyright piracy did not affect their creative motivations, 72% agreed that copyright piracy does affect music creation and (3) 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 seem to primarily create music for music's sake, copyright law could still supply powerful incentives 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, 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.

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\* Fellow, Center for Internet and Society, Stanford Law School. I am very grateful to Paul Goldstein, Mark A. Lemley, Lawrence M. Friedman, Deborah Hensler, A. Mitch Polinsky, Susan Richey, John Orcutt, Marcus Hum, Peter K. Yu, Zhou Lin, Glynn S. Lunney, Christopher Jon Sprigman, Ben Depoorter, Kristelia A. Garcia, Guy A. Rub, Amy A. Abeloff 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. Of course, all errors remain my own. © 2015 Jiarui Liu.

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## 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 social welfare.<sup>1</sup> 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.<sup>2</sup> This approach appears to be based on the notion that artists are rational individuals who strive to maximize their own economic interests—“No man but a blockhead ever wrote, except for money.”<sup>3</sup> 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 additional terms in the future, after being discounted from the present value, amount to negligible economic benefits for artists.<sup>4</sup> Interestingly, the hypothetical bargain has recently been criticized by 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.”<sup>5</sup> It follows that a world without copyright law could actually benefit the public as a whole. Consumers would have greater access to low-price intellectual products and artists would continue to create for intrinsic motivations

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1 See, e.g., *Sony Corp. of Am. v. Universal City Studios*, 464 U.S. 417, 429 (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, 219 (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); Stephen Breyer, *The Uneasy Case for Copyright: A Study of Copyright in Books, Photocopies, and Computer Programs*, 84 HARV. L. REV. 281 (1970); Robert M. Hurt & Robert M. Schuchman, *The Economic Rationale of Copyright*, 56 AM. ECON. REV. 421 (1966).

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

such as self-expression, communication and reputation. The notion of a romantic artist—once forcefully rejected in the United States as the maximalist approach to importing moral rights and perpetual protection<sup>6</sup>—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,<sup>7</sup> the findings are generally limited due to their narrow focus on developed countries with comparatively 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.<sup>8</sup> 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 a music industry in a virtually copyright-free environment. As a matter of fact, a few observers have begun to champion China as a model for the future of the music industry worldwide.<sup>9</sup>

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.<sup>10</sup> The research focuses on real-world artists—instead of hypothetical rational or romantic artists—and answers three key questions regarding copyright and incentives: What factors motivate artists to create works? How do artists perceive the usefulness of copyright protection? Would artists continue their

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

7 See, e.g., Felix Oberholzer-Gee & Koleman Strumpf, *The Effect of Filing Sharing on Record Sales: An Empirical Analysis*, 115 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 United States and the European Union, see, e.g., the No Electronic Theft Act of 1997, H.R. 2265, Pub. L. No. 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, 2004 O.J. (L 157) 45.

9 See Kevin Maney, *If Pirating Grows, It May Not Be The End of Music World*, USA TODAY (May 3, 2005), <http://perma.cc/4VJZ-M29L> (“The business model for the record industry worldwide is moving toward resembling what we see in China today.” (quoting Jay Berman, Chairman, IFPI)); Thomas Crampton, *Pop Stars Learn to Live with Pirates: In China, Record Companies Find New Ways to Do Business*, INT'L HERALD TRIB., Feb. 22, 2003, at 1 (stating that the reality in China “is beginning to draw attention in Europe and the United States, where music companies face falling revenue from compact disk sales as Internet piracy increases”).

10 The qualitative research in this Article principally consists of fifty-three in-depth interviews, conducted in 2010, with musicians, music executives and collecting societies in the Chinese music industry. For protocols, sampling techniques and methodological introductions, the Methodology Notes are available upon request.

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 a stable income from copyright royalties, the entire music industry has become increasingly dependent on alternative revenue streams, such as touring, advertising and merchandizing.<sup>11</sup> Alternative revenue streams force many music companies to abandon traditional album contracts and to operate in a way more like talent agencies that control all aspects of an artist's career.<sup>12</sup> 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—for example, 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 (such as sponsors and advertisers) rather than those of average consumers, and this has caused a fundamental shift in the creative process of the music industry.<sup>13</sup> Although entrepreneurs should arguably be willing to use whatever is popular among music fans to generate interest in their 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 phenomena. First, 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.<sup>14</sup> Second, while 56.4% of the musicians alleged that copyright piracy did not affect their creative motivations, 72% agreed that copyright piracy does affect music creation.<sup>15</sup> Third, 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.<sup>16</sup>

The empirical evidence itself provides compelling explanations for such paradoxes. Even though musicians seem to primarily create music for music's sake, copyright law could still supply powerful incentives for music production in a way that not only caters to market demand but also allows for broader artistic

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11 See *infra* note 113 and accompanying text.

12 See *infra* note 184 and accompanying text.

13 See *infra* note 192 and accompanying text.

14 See *infra* note 193 and accompanying text.

15 See *infra* note 287 and accompanying text.

16 See *infra* note 294 and accompanying text.

freedom.<sup>17</sup> 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.<sup>18</sup> 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.<sup>19</sup>

Section I starts with an overview of the music industry in China. It shows how rampant copyright piracy profoundly affects revenue streams and transforms business models. Section II presents detailed empirical findings, based on in-depth interviews with Chinese musicians, music executives and collecting societies. These discussions were focused on three main themes: (1) motivation for creation; (2) attitude towards piracy and (3) copyright awareness. Section III 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 IV concludes the Article with a summary of the main issues.

## I. THE MUSIC INDUSTRY IN SHADOW

### A. OVERVIEW

#### 1. Music Market

China, consistent with worldwide trends, has witnessed a significant slump in music sales, which declined 38.3% between 2000 and 2010.<sup>20</sup> Although digital sales exceeded physical sales years ago, digital sales are still not sufficient to offset the overall decline. However, these International Federation of the Phonographic Industry (IFPI) statistics have certain limitations. First, trade association sources are sometimes questioned for having an inclination to present statistics in a self-serving manner.<sup>21</sup> Second, while the annual sales appear to rise and fall in a wider range, the fluctuation is mostly artificial and reflects adjustments in methodologies.

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<sup>17</sup> See *infra* note 359 and accompanying text.

<sup>18</sup> See *infra* note 273 and accompanying text.

<sup>19</sup> See *id.*; *Vernon v. Bethell*, 2 Eden R. 110 (1762) (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.”).

<sup>20</sup> See *infra* Figure 1; see also INT’L FED’N OF THE PHONOGRAPHIC INDUS. [IFPI], RECORDING INDUSTRY IN NUMBERS 2010 (2010) [hereinafter IFPI REPORT 2010]; IFPI, RECORDING INDUSTRY IN NUMBERS 2000 (2000) [hereinafter IFPI REPORT 2000].

<sup>21</sup> See, e.g., Kai-Lung Hui & Ivan Png, *Piracy and the Legitimate Demand for Recorded Music*, 2 CONTRIBUTIONS ECON. ANAL. & POL’Y 11, 16 (2003) (indicating that the sales losses due to piracy should only account for 50% of the industry estimates, even assuming a one-to-one displacement rate).

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 likely results from the addition of digital sales for the first time.<sup>22</sup> 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 consumer demand for legitimate products. They are generally silent on supply-side effects—for example, the quantity of new music—which arguably contain more pertinent information from social welfare perspectives.

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.<sup>23</sup> Figure 2 indicates how music production continued to increase from 2000 until peaking in 2005 and then turning into a downward trend through 2010.<sup>24</sup> The level of new supply in 2010 (10,639 titles) was approximately equivalent to the level fourteen years ago in 2001 (9529 titles) and 35% less than the level in 2005 (16,313 titles).<sup>25</sup>

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 U.S. economy.<sup>26</sup> By contrast, the music industry in China is just 1.5% of the size of the music industry in the United States.<sup>27</sup> China, the second largest economy in the world, is actually ranked twenty-seventh with regard to the music market, right behind Ireland, a nation with a total population 5% the size of the Chinese population.<sup>28</sup> In this sense, the music industry in China is extremely disproportionate to the overall economy.

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.<sup>29</sup> In the United States, music sales still amount to 54.5% of book sales.<sup>30</sup>

22 See IFPI, *THE RECORDING INDUSTRY IN NUMBERS 2006* (2006); IFPI, *RECORDING INDUSTRY IN NUMBERS 2001* (2001).

23 See Zhèngfǔ Xīnxī Gōngkāi Tōngjì Xīnxī (政府信息公开统计信息) [*Government Information Disclosure: Statistical Information*], Zhōnghuá Rénmín Gònghéguó Xīnwén Chūbǎn Zōngshǔ (中华人民共和国新闻出版总署) [GEN. ADMIN. PRESS & PUBL'N], <http://perma.cc/ED76-TZQG> (last visited Apr. 15, 2015) (China) [hereinafter *GAPP Publication Industries Statistical Reports*] (note that it is not clear whether the data contains digital titles). It needs to be cautioned that the official statistics from the Chinese government are also sometimes considered controversial. See, e.g., Paul Krugman, *Hitting China's Wall*, N.Y. TIMES, July 19, 2013, at A25 (“All economic data are best viewed as a peculiarly boring genre of science fiction, but Chinese data are even more fictional than most.”); Richard Posner, *The Chinese Economy*, BECKER-POSNER BLOG (May 5, 2013), <http://perma.cc/4CLD-FWAG> (“I’m mistrustful of Chinese statistics. Should we trust economic reporting by officials of a dictatorship? I think not.”).

24 See *infra* Figure 2.

25 *GAPP Publication Industries Statistical Reports*, *supra* note 23.

26 See *infra* Figure 3; see also *World Economic Outlook Database*, INT’L MONETARY FUND (Apr. 2013), <http://perma.cc/C68N-SABY> [hereinafter *IMF World Economic Outlook Database*].

27 See *infra* Figure 4; IFPI REPORT 2010, *supra* note 20.

28 See IFPI REPORT 2010, *supra* note 20.

29 See *infra* Figure 5; see also 2009 Nián Xīnwén Chūbǎn Chǎnyè Fēnxī Bào gào Quánwén (2009年新闻出版产业分析报告(全文)) [*2009 National Press and Publication Industries Report*], GEN. ADMIN. PRESS & PUBL'N (July 29, 2010), <http://perma.cc/9NC9-YTAV> (China).



The significant imbalance between the music and book industries does not result from any shortage of consumer enthusiasm for music, as discussed below.<sup>31</sup>

The next questions are, naturally, which 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 Figure 7 that the overall economic environment has little to do with the stumbling music industry in China.<sup>32</sup> 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.<sup>33</sup>

It may also be ruled out that the censorship system in China is principally responsible for the underdevelopment in the music industry.<sup>34</sup> Figure 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.<sup>35</sup> Because there is no obvious reason that the Chinese government would differentiate between books and music in terms of censorship levels,<sup>36</sup> 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.<sup>37</sup>

## 2. Music Piracy

The magnitude of the piracy problem in China is apparent from the annual

30 See *infra* Figure 6; see also U.S. CENSUS BUREAU, TABLE 1134, PUBLISHING INDUSTRIES—ESTIMATED REVENUE BY SOURCE AND MEDIA TYPE: 2005 TO 2009 (2012), available at <http://perma.cc/S4SK-V45R>; U.S. CENSUS BUREAU, TABLE 1140, RECORDING MEDIA—MANUFACTURERS' SHIPMENTS AND VALUE: 2000 TO 2010 (2012), available at <http://perma.cc/D4EL-VNTG>.

31 See *infra* note 66 and accompanying text.

32 See *infra* Figure 7.

33 See *IMF World Economic Outlook Database*, *supra* note 26.

34 China introduces a unique censorship system for all kinds of publications, 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 World Trade Organization (WTO) complaint against the censorship system in China. See Request for Consultations by the United States, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS363/1 (Apr. 16, 2007), available at <https://perma.cc/VJ6D-UHZQ>. See generally *Dispute DS363: China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WORLD TRADE ORG. (Oct. 12, 2012), <https://perma.cc/6LGP-KS83?type=source>.

35 See *infra* Figure 8.

36 Legally speaking, the censorship criteria are identical for books and music. Compare *Chūbān Guānlǐ Tiáolì* (出版管理条例) [Regulations on the Administration of Publications] (promulgated by the St. Council, Mar. 19, 2011, effective July 18, 2013) art. 26 (Lawinfochina) (China), with *Yīnxiàng Zhìpǐn Guānlǐ Tiáolì* (音像制品管理条例) [Regulations on the Administration of Audio and Video Products] (promulgated by the St. Council, Mar. 19, 2011, effective Dec. 7, 2013) art. 3 (Lawinfochina) (China).

37 See *infra* note 40 and accompanying text.

country-by-country review for the Office of the U.S. Trade Representative (USTR) Special 301 report.<sup>38</sup> It indicated that the level of music piracy in China has consistently ranged between 85% and 90%.<sup>39</sup> Other major copyright industries in China, including motion pictures, business software and video games, have also been plagued by rampant piracy, with similar piracy rates ranging from 80% to 99%.<sup>40</sup> To call this situation a copyright-free world is hardly an overstatement, given that at least four in five of all copyrighted works in the marketplace are potentially pirated.

A horizontal comparison sheds more light: The overall level of music piracy in the world was slightly above 30%.<sup>41</sup> In advanced markets such as the United States, Japan and Western Europe, the levels of music piracy were estimated to be lower than 10%.<sup>42</sup> Even among emerging markets, China likely 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.<sup>43</sup>

The recent surge of online piracy adds to the continuing struggle of copyright enforcement in China.<sup>44</sup> Unlike the United States, where peer-to-peer (P2P) file sharing seems to be the principal source of illegal music files,<sup>45</sup> 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 majority (83.6%) of online music users obtain music through music search engines.<sup>46</sup> 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.<sup>47</sup>

Baidu offers an online music service called Baidu MP3,<sup>48</sup> based 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

38 See INT'L INTELLECTUAL PROP. ALLIANCE, 2008 SPECIAL 301 REPORT: PEOPLE'S REPUBLIC OF CHINA (PRC) (2008), available at <http://perma.cc/75MY-GSEP>.

39 *Id.* at 68.

40 *Id.*

41 See IFPI, THE RECORDING INDUSTRY 2005 COMMERCIAL PIRACY REPORT 3 (2005), available at <http://perma.cc/9QMR-VFE4>.

42 *Id.*

43 See INT'L INTELLECTUAL PROP. ALLIANCE, 2008 SPECIAL 301 REPORT: SOUTH KOREA (2008), available at <http://perma.cc/H2KQ-YBYD> (2007 figures are absent and 2008 figures are used as proxy); INT'L INTELLECTUAL PROP. ALLIANCE, 2008 SPECIAL 301 REPORT: TAIWAN (2008), available at <http://perma.cc/5RZ5-9GXB>.

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

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

46 See *infra* Figure 9; see also Wénhuà Bù (文化部) [MINISTRY OF CULTURE], 2010 Zhōngguó Wǎngluò Yīnyuè Shìchǎng Niándù Bàoào (2010中国网络音乐市场年度报告) 13 (2011) (China) [hereinafter 2010 MINISTRY OF CULTURE ONLINE MUSIC REPORT].

47 2010 MINISTRY OF CULTURE ONLINE MUSIC REPORT, *supra* note 46.

48 See *infra* Figure 10; see also BAIDU MP3, <http://perma.cc/94AQ-N9QC> (last visited Apr. 12, 2015) (China).

organized by criteria such 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 predetermined search terms, which normally consist of artist names or song titles. Those predetermined search terms are categorized into various charts and hot lists, based on their popularity, genre, release year, language and place of origin (e.g., Hong Kong, Taiwan and Western countries).<sup>49</sup> By browsing such charts and hot lists, a user can reach similar search results without having to formulate search keywords by herself. Baidu is by no means unique in its involvement in piracy, however. Almost all major search engines in China engage in similar services without proper copyright licenses—save Google, which possesses a mere 2.8% market share.<sup>50</sup>

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 66.2% downloaded them from various search engines, while it is estimated that 99% of online music files in China are pirated.<sup>51</sup> By contrast, even when the usage of P2P file sharing peaked in the United States in 2003, only 30% of American Internet users downloaded illegal music files—less than half of the percentage of Chinese Internet users who did so<sup>52</sup>—and only 850 million files were downloaded per month, with one-fourth of the downloads from Baidu alone.<sup>53</sup> The level of online piracy in China appears even more shocking considering that the legitimate market in the United States is almost a hundred times larger than that in China.<sup>54</sup>

Widespread piracy has apparently caused consumers to undervalue musical works. A recent study shows that, although 96.8% of Chinese music users enjoy online downloading or streaming,<sup>55</sup> 74.6% of online music users are unwilling to pay for music.<sup>56</sup> More interestingly, only 5.9% of online music users actually pay for music access,<sup>57</sup> while only 10 out of over 7000 music websites are properly licensed.<sup>58</sup>

49 See Yīnyuè Kù Bǎng Dān (音乐库榜单) [*Music Library List*], BAIDU MP3, <http://perma.cc/8SDV-A2TZ> (last visited Apr. 12, 2015) (China).

50 See *supra* note 47 and accompanying text.

51 See IFPI, RECORDING INDUSTRY IN NUMBERS 2008 (2008); IFPI, RECORDING INDUSTRY IN NUMBERS 2007 (2007).

52 See MARY MADDEN & LEE RAINIE, PEW INTERNET & AM. LIFE PROJ., MUSIC AND VIDEO DOWNLOADING MOVES BEYOND P2P (2005), available at <http://perma.cc/6AYG-REK7>.

53 RIAA *Lawsuits Appear to Reduce Music File Sharing*, NPD GRP., INC. (Aug. 21, 2013), <http://perma.cc/6AYG-REK7>.

54 See *supra* note 26 and accompanying text.

55 See 2010 MINISTRY OF CULTURE ONLINE MUSIC REPORT, *supra* note 46, at 11.

56 See MINISTRY OF CULTURE, 2009 Nián Zhōngguó wǎng Luò Yīnyuè Shìchǎng Niándù Bàoào (2009年中国网络音乐市场年度报告) 21 (2009) (China).

57 See IRESEARCH, 2009–2010 Nián Zhōngguó Shùzì Yīnyuè Hángyè Fāzhǎn Bàoào (2009–2010年中国数字音乐行业发展报告) [2009–2010 CHINA DIGITAL MUSIC INDUSTRY REPORT] 22 (2010) (China) [hereinafter 2009–10 IRESEARCH DIGITAL MUSIC REPORT].

58 See IRESEARCH, 2007 Nián Zhōngguó Zàixiàn Yīnyuè Yánjiūbàoào

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.<sup>59</sup> Figure 11 indicates that the number of online music users surged in 2005, and music production promptly started declining the following year.<sup>60</sup> 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—such as iTunes, Amazon or Spotify—have entered into the Chinese market. Their Chinese counterparts—A8, Aigo and Top100—have all shut down their music services, even after having initially imitated international models.<sup>61</sup>

### 3. Digital Music

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

According to 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.<sup>62</sup> They account for 23.2% of all Internet users in the world and 34.3% of the total population in China.<sup>63</sup> Additionally, 98.3% of Chinese Internet users are connected through broadband, which has paved the way for online content services including music, videos 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.<sup>64</sup> Internet music was the second most popular type of Internet application in China in 2010, after having been the most popular for the three previous years.<sup>65</sup>

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.<sup>66</sup> Among these users, 303 million (35.3%) use mobile phones

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(2007年中国在线音乐研究报告) [2007 CHINA ONLINE MUSIC RESEARCH REPORT] 25 (2007) (China) [hereinafter 2007 iRESEARCH DIGITAL MUSIC REPORT]. By contrast, in the mobile market, the majority (63.5%) of Chinese music users pay for music consumption. See iRESEARCH, 2010 Nián Zhōngguó Shǒujī Yīnyuè Yònghù Xíngwéi Yánjiūbàogào (2010年中国手机音乐用户行为研究报告) [CHINA MOBILE MUSIC USER RESEARCH REPORT] 16 (2010) (China).

<sup>59</sup> See *supra* note 50 and accompanying text.

<sup>60</sup> See *infra* Figure 11. A linear regression shows statistical significance at the 0.10 level ( $p=0.062$ ).

<sup>61</sup> See 2010 MINISTRY OF CULTURE ONLINE MUSIC REPORT, *supra* note 46, at 19.

<sup>62</sup> See CHINA INTERNET NETWORK INFO. CTR. [CNNIC], 27TH STATISTICAL REPORT ON INTERNET DEVELOPMENT IN CHINA (Jan. 2011) (China) [hereinafter 2010 CNNIC INTERNET REPORT]; CNNIC, 7TH STATISTICAL REPORT ON INTERNET DEVELOPMENT IN CHINA (Jan. 2001) (China) [hereinafter 2000 CNNIC INTERNET REPORT].

<sup>63</sup> See 2010 CNNIC INTERNET REPORT, *supra* note 61.

<sup>64</sup> See *infra* Figure 12.

<sup>65</sup> See *infra* Figure 13.

<sup>66</sup> For the relevant mobile usage statistics, see Shǒu jī (Shùmǎ Chǎnpǐn) (手机[数码产品]) [Phone (Digital Products)], BAIKE (Sept. 19, 2011), <http://perma.cc/NV38-TJKW>.

to access the Internet, and downloading and streaming music has become the fourth most popular Internet application among mobile phone users.<sup>67</sup>

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: (1) online music, which is distributed to end users through normal Internet access (e.g., computers connected via broadband) and (2) mobile music, which is distributed to end users through wireless networks. While the digital market reached RMB 2.3 billion (US \$376 million) in 2010, the online market accounts for RMB 0.28 billion (US \$45.7 million) and the mobile market accounts for RMB 2.02 billion (US \$329.9 million).<sup>68</sup> The mobile market, albeit not substantial by itself, is around seven times larger than the online market.<sup>69</sup>

Notably, the above statistics may not accurately measure the revenue stream of the music industry from digital music. This stems from the structure of the Chinese digital music market, which involves three key players: (1) content providers, i.e., musicians, music companies and other copyright owners in the music industry; (2) service providers, who aggregate music products, package music programs and offer their products to consumers and retailers and (3) 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 it includes 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 *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 (such as ringback tones) via her mobile phone. First, she must pay a membership fee to activate the music function on her phone. The membership fee goes entirely to wireless network operators, who do not share a penny with copyright owners. The total revenue from membership fees reached RMB 27.9 billion (US \$4.56 billion) in 2010.<sup>70</sup> Second, the user must pay a usage fee for actual music consumption (subscription or à-la-carte), which is shared 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 a 40/45 split).<sup>71</sup> Where

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67 See *infra* Figures 14–15; see also 2010 CNNIC INTERNET REPORT, *supra* note 60; 2000 CNNIC INTERNET REPORT, *supra* note 60.

68 See *infra* Figure 16.

69 See *infra id.*; see also 2010 MINISTRY OF CULTURE ONLINE MUSIC REPORT, *supra* note 46, at 1 (indicating the digital music market size is measured with the revenue of service providers).

70 See 2010 MINISTRY OF CULTURE ONLINE MUSIC REPORT, *supra* note 46, at 23.

71 See *id.* at 26.

wireless network operators directly contract with content providers, bypassing service providers, they may share the usage fee by a 50/50 split.<sup>72</sup> Three state-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.<sup>73</sup> The three companies use their market power to squeeze the profit margins of service providers by asking service providers to accommodate large discounts and frequent awards to attract new members.<sup>74</sup> 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 revenues of copyright owners account for only 4% of the total Chinese digital music market.<sup>75</sup>

The Chinese digital music market dramatically contrasts with the digital market in the United States. Figure 18 indicates that the online market, including online tracks and digital albums, accounts for almost 80% of the total digital music revenue in the United States.<sup>76</sup> Ringtones, the typical application in the mobile market, only accounts for 7% of the total digital music revenue in the United States.<sup>77</sup>

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 the number of those who obtain music through mobile channels.<sup>78</sup> In other words, Chinese music users appear to pay the least for the services they use the most.

The Chinese Ministry of Culture points to the following reasons to explain why the online market has yet to transfer the extraordinarily large consumer bases into effective market demand: first, consumers are not willing to pay for online music and second, unauthorized resources diminish consumer incentives to pay for music.<sup>79</sup> These reasons 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 the habit of paying for music. The Chinese government appears to concede that uncontrolled copyright piracy has hindered the development of the online market.<sup>80</sup>

By contrast, the rapid development in the mobile market benefits mostly from

72 *See id.*

73 *See* IIMEDIA, *Nián Zhōngguó Wúxiàn Yīnyuè Shìchǎng Niándù Bàoào* (2012年中国无线音乐市场年度报告) [2012 ANNUAL REPORT ON CHINA'S WIRELESS MUSIC MARKET] 41 (2013) [hereinafter 2012 IIMEDIA WIRELESS MUSIC REPORT] (the three state-owned companies are China Mobile, China Telecom and China Unicom).

74 *See* 2009–10 IRESEARCH DIGITAL MUSIC REPORT, *supra* note 57, at 60.

75 *See infra* Figure 17.

76 *See infra* Figure 18.

77 *See infra* Figure 19; *see also* IFPI, *RECORDING INDUSTRY IN NUMBERS 37* (2011).

78 *See infra* Figure 19; *see* 2010 MINISTRY OF CULTURE ONLINE MUSIC REPORT, *supra* note 46, at 11.

79 *See id.*

80 *See id.* at 9.

ringback-tone sales, which account for 79.2% of mobile music transactions.<sup>81</sup> 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 thirty seconds, ringback tones have developed into the most lucrative revenue source in the digital market due to effective technological measures against piracy.

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 musical works from outside of mainland China;<sup>82</sup> by contrast, domestic music accounts for a much larger percentage (29%) in the mobile market.<sup>83</sup> The reason appears to be that the profitability of the mobile market is significantly higher due to limited copyright piracy in the environment.<sup>84</sup> Therefore, domestic companies attach far more importance to developing music products suitable for ringback tones.

## B. REVENUE STREAMS

As discussed above, a high level of copyright piracy leads to significant undervaluation of musical works in the Chinese market. 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. Figure 23 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 finances.<sup>85</sup> Remarkably, music sales are not even among the top three; rather, the top three income streams are performance, synchronization and non-music sources.

The Artist Revenue Streams project, launched by the Future of Music Coalition (FMC), contains comparable financial statistics for U.S. musicians in 2011.<sup>86</sup> 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.

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<sup>81</sup> See *id.*; *infra* Figure 20.

<sup>82</sup> See *infra* Figure 21; see also 2007 IRESEARCH DIGITAL MUSIC REPORT, *supra* note 58, at 60–61.

<sup>83</sup> See *infra* Figure 22; see also 2012 IIMEDIA WIRELESS MUSIC REPORT, *supra* note 73, at 39.

<sup>84</sup> See *supra* note 77 and accompanying text.

<sup>85</sup> 79% of the musician participants agreed to supply the detailed information of their financial sources. See *infra* Figure 23.

<sup>86</sup> See *Artist Revenue Streams*, FUTURE OF MUSIC COALITION, <http://perma.cc/HVR7-665A> (last visited Apr. 17, 2015); see also Peter DiCola, *Money from Music: Survey Evidence on Musicians' Revenue and Lessons About Copyright Incentives*, 55 ARIZ. L. REV. 301 (2013).

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 income for U.S. musicians (categorized as Recording, Composing and Session in Figure 24) but only 9% for Chinese musicians.<sup>87</sup> Third, synchronization is a much larger source of revenue in China (23.1%) than in the United States (less than 6%, which is unidentified but apparently blended into the Composing category).<sup>88</sup> Finally, the market share for music teaching appears relatively limited in China (4.3% as opposed to 22% in the United States), 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 become part of the next generation of musicians.<sup>89</sup>

This section of the Article provides detailed discussions about 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 to individual musicians.

### 1. Music Royalties

Consistent with the overall trend in the music industry mentioned above, the importance of music sales has dramatically decreased as a source of income for individual musicians and music companies.<sup>90</sup> Among all the musicians interviewed, only 15% indicated that they received 30% or more of their incomes from copyright royalties, while 56% received almost no copyright royalties for their albums.<sup>91</sup> On average, the musicians received as little as 9% of their incomes from music 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.<sup>92</sup> Sometimes, a contract defined the lump-sum payment as an 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 learned to ignore the rhetorical difference, though, as they understand how difficult it would be to either reach the sales milestone or to audit the legitimate sales in the wake of widespread

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87 See *infra* Figure 24. The importance of copyright royalties in the U.S. exhibits a declining trend since 2003, when the royalties were allegedly the second largest revenue stream for musicians after performance. See MARY MADDEN, PEW INTERNET & AM. LIFE PROJECT, ARTISTS, MUSICIANS AND THE INTERNET 46 (2004); see also JOAN JEFFRI, ERIC OBERSTEIN & TREVOR REED, TAKING NOTE: A STUDY OF COMPOSERS & NEW MUSIC ACTIVITY IN THE U.S. 28 (2008) (“Professional composers earned approximately 19% of their income from composing . . .”).

88 See *infra* Figure 24.

89 See *id.*

90 See *supra* text accompanying notes 23–24.

91 Interview with W.X.F., Musician (Nov. 19, 2010). W.X.F. is allegedly one of the five lyricists in Beijing who may earn a decent living mostly from writing lyrics.

92 Interview with A.D., Musician (Dec. 9, 2010); Interview with L.H. 1, Musician (Nov. 5, 2010); Interview with W.J. 1, Musician (Nov. 21, 2010).



piracy.<sup>93</sup>

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.”<sup>94</sup> In other words, only about 10% of all society members have benefited from the collecting society in a meaningful way.<sup>95</sup> Online piracy appears to impose a significant impact on collecting societies. One society had previously collected RMB 33 million (US \$5.3 million) from online licensing in 2005.<sup>96</sup> The number rapidly decreased to RMB 2.2 million (US \$0.35 million) in 2010 after Baidu launched its MP3 services. The collecting society official explained:

All the online companies that used to pay for music licensing have been driven out of the market. 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.<sup>97</sup>

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 to 4 billion (US \$500 to 600 million) in annual music sales, and his company alone generated RMB 300 million (US \$50 million), even though the dominant format at the time was low-priced audio cassettes.<sup>98</sup> At the time of the interview, the whole industry only generated a total of RMB 500 million (US 80 million), including CDs and DVDs.<sup>99</sup> Another music executive similarly confirmed that music sales now add up to a mere RMB 20 million (US \$3.2 million) for his whole company, while in the 1990s its Shanghai branch *alone* had accounted for RMB 80 million (US \$12.8 million).<sup>100</sup> This significant decline in music sales has triggered a chain effect on retail outlets. There used to be at least 5000 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.<sup>101</sup> Smaller independent labels do not appear to have substantial music sales to begin with. No independent labels in the sample earned music sales that exceeded 10% of their total income.

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93 Interview with D.Q., Musician (Nov. 25, 2010); Interview with W.K., Musician (Nov. 18, 2010); Interview with W.Z.L., Musician (Nov. 24, 2010).

94 Interview with Q.J.M., Official (Nov. 2, 2010).

95 *Id.*

96 *Id.*

97 *Id.*

98 Interview with Z.Y.B., Executive (Nov. 12, 2010).

99 *Id.* Notably, the figures are smaller than those reported by the Chinese government, as discussed above. See *supra* Part I.A.

100 Interview with Z.J.C., Executive (Nov. 19, 2010).

101 *Id.*

The aforesaid statistics regarding music sales are not surprising. A mainstream album could easily sell 0.3 to 1 million copies in the 1990s, while today “a thousand units is doing great and ten thousand units calls for a celebration.”<sup>102</sup> There were three key reasons for the success of the music industry in the 1990s: “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.”<sup>103</sup>

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% of its income from online sales.<sup>104</sup> The top three among the musicians who received a substantial income from copyright royalties uniformly attributed the majority of their paychecks to overseas sales. These musicians either signed directly with a foreign publisher<sup>105</sup> or distributed their albums through foreign wholesalers.<sup>106</sup> 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.”<sup>107</sup>

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.<sup>108</sup>

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, such as performances, synchronization and sponsorship.<sup>109</sup> In other words, albums are denied their

102 Interview with Z.Y.B., Executive, *supra* note 98.

103 *Id.*

104 Interview with S.K., Executive (Nov. 26, 2010); Interview with Z.Y.P., Executive (Nov. 22, 2010).

105 Interview with H.X.T., Musician (Oct. 14, 2010); Interview with W.X.F., Musician, *supra* note 87.

106 See Interview with C.S., Executive (Nov. 26, 2010); Interview with L.D., Musician (Oct. 31, 2010); Interview with W.M., Executive (Nov. 24, 2010).

107 See Interview with L.D., Musician, *supra* note 106.

108 See Interview with W.J. 1, Musician, *supra* note 92; Interview with W.J. 2, Musician (Nov. 19, 2010); Interview with Z.Y.B., Executive, *supra* note 98.

109 See Interview with L.H. 1, Musician, *supra* note 92; Interview with W.K., Musician, *supra* note 93; Interview with W.M., Executive, *supra* note 106.

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.<sup>110</sup>

## 2. Performance

Live performance is one of the most primitive revenue streams for musicians, dating way back to the time 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.<sup>111</sup> On average, the musicians received 41% of their income from performance, which constitutes the largest source of income among all revenue streams.<sup>112</sup> Many musicians predicted that the future of music lies in performance:<sup>113</sup> “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.”<sup>114</sup> “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.”<sup>115</sup>

Several music insiders indicated that the performance market reinforces and widens the gap between established artists and new artists.<sup>116</sup> The 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 have to attract the audience who doesn’t understand music to attend concerts in order to make the big bucks. The snobbish people who attend concerts in

110 See Interview with F.H.N., Executive (Nov. 30, 2010); Interview with L.H. 2, Musician (Nov. 25, 2010); Interview with Z.W.J., Musician (Nov. 4, 2010).

111 See *infra* Figure 23.

112 See *id.*

113 See Interview with L.H. 2, Musician, *supra* note 110; Interview with L.J., Executive (Dec. 7, 2010); Interview with W.M., Executive, *supra* note 106; Interview with Y.Y.C., Musician (Nov. 25, 2010); Interview with Z.D., Musician (Oct. 25, 2010).

114 See Interview with A.D., Musician, *supra* note 92.

115 See Interview with W.Z.L., Musician, *supra* note 93.

116 See Interview with C.S., Executive, *supra* note 106; Interview with L.D., Musician, *supra* note 106; Interview with J.S.L., Musician (Nov. 17, 2010); Interview with L.X.R., Executive (Dec. 9, 2010); Interview with Z.J.H., Musician (Oct. 30, 2010); Interview with Z.Y.B., Executive, *supra* note 98.

the same way they attend social events are only attracted to big-name musicians.<sup>117</sup>

Furthermore, physical venues suitable for music concerts are quite limited, especially for up-and-coming and alternative artists who do not have a fan base large enough for stadium shows.<sup>118</sup> 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 profits from ticket sales after paying for the flight, hotel, and remuneration because the place only has the capacity for a few hundred people.<sup>119</sup>

### 3. Synchronization

The Chinese music industry has also witnessed many leading musicians shift the focus of their careers from making records to synchronization works, such as producing soundtracks for movies, television shows, video games and advertisements.<sup>120</sup> 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.<sup>121</sup> Some musicians may receive similar (though less lucrative) opportunities to produce music for other musicians and for amateur clients as producers, arrangers or engineers.<sup>122</sup> Among all the musicians observed, 40% received some earnings from synchronization and all but one received a 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.

Some synchronization work is very profitable. Professional jingle writers can easily earn a fortune by composing 30-to-60 second musical compositions 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.<sup>123</sup> 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.<sup>124</sup> These musicians explained that their

117 See Interview with L.X.R., Executive, *supra* note 116.

118 See Interview with C.S., Executive, *supra* note 106 (stating “the hardware’s not there, some of the clubs you go to, the sound system is horrible or non-existent”).

119 See Interview with D.Q., Musician, *supra* note 93.

120 See Li Guangping (李广平), *Zài Shēngcún de Yāli yú Shēngmíng de Zūnyán Zhōng Xúnzhǎo Pínghéng* (在“生存的压力与生命的尊严”中寻找平衡) [*Balancing the Pressure of Living and the Pride of Life*], *Rénmín Yīnyuè* (人民音乐) [PEOPLE’S MUSIC], (May 2007), <http://perma.cc/359W-JSDA> (discussing the top Chinese musicians that devote most of their time to synchronization).

121 See Interview with L.H. 1, Musician, *supra* note 92.

122 See Interview with H.J.J., Musician (Nov. 14, 2010); Interview with J.S.L., Musician, *supra* note 116; Interview with L.Y., Musician (Nov. 13, 2010).

123 See Interview with C.T., Musician (Nov. 26, 2010); Interview with H.X.T., Musician, *supra* note 105; Interview with J.S.L., Musician, *supra* note 116.

124 See Interview with H.J.J., Musician, *supra* note 122; Interview with L.D., Musician, *supra*

direct customers in the synchronization market are usually entrepreneurs, such as moviemakers, video game developers and advertisers. Unlike passive consumers, entrepreneurial customers oftentimes insist on extensive involvement in the creative process to ensure that the music created will be consistent with the marketability of the products supported by the music.<sup>125</sup> One artist 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 musical 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.<sup>126</sup>

In addition, jingle writers and, to a lesser extent, movie and 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, 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."<sup>127</sup>

#### 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,<sup>128</sup> to Western operas,<sup>129</sup> to musicals,<sup>130</sup> to Chinese classical music,<sup>131</sup> to Western classical music<sup>132</sup> and to pop music.<sup>133</sup>

Second, the state regularly allots funds for specific projects including shows,<sup>134</sup>

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note 106; Interview with N.B., Musician (Nov. 23, 2010).

125 For instance, pop artist Pu Shu wrote the song "Colorful Day" for Toyota Vios commercials and another song "Rush Out of Your Window" for Microsoft Windows commercials. See Feng Xing (丰兴), *Zhōngguó Xīnwén Zhōukān Sòngkē Móshì Shìtàn Chàngpiàn yè Xīn Sīlù* (中国《新闻周刊》: 宋柯模式试探唱片业新思路) [*"Songke" Model: Exploring New Ideas in the Recording Industry*], *Zhōngguó Xīnwén Shè* (中国新闻社) [CHINESE NEWS SERV.] (Feb. 16, 2004, 2:46 PM), <http://perma.cc/4QUL-59A5> (China).

126 See Interview with A.D., Musician, *supra* note 92.

127 See Interview with L.D., Musician, *supra* note 106.

128 See Interview with H.Y.F., Executive (Oct. 29, 2010); Interview with L.Y., Musician, *supra* note 122; Interview with Z.J.H., Musician, *supra* note 116.

129 See Interview with Z.J.H., Musician, *supra* note 116.

130 See Interview with L.F.Q., Musician (Nov. 4, 2010).

131 See Interview with Y.Y.C., Musician, *supra* note 113.

132 See Interview with B.Y., Musician & Executive (Dec. 13, 2010).

133 See Interview with K.R., Musician (Nov. 25, 2010).

134 See Interview with L.Y., Musician, *supra* note 122.

celebrations<sup>135</sup> and festivals.<sup>136</sup> 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.<sup>137</sup> 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.<sup>138</sup>

The consensus among the interviewees appears to be that the government covers the majority (around 70%) of the operating budgets for state-owned organizations through both direct and indirect patronage.<sup>139</sup>

The government wields great influence on the creative processes of the state-owned organizations and state-funded projects. A significant portion of the programs from state-owned organizations follows official government instructions and/or serves political objectives, such as celebrating the anniversaries of the Communist Party or the Liberation Army.<sup>140</sup> Similarly, the government manifests its political preferences when it procures music programs from private parties. Several executives confirmed that the government favors Chinese classical music, Western classical music and world music, because contemporary music genres such as jazz and rock are deemed relatively ideological.<sup>141</sup> One executive said:

It has become an unwritten custom that television stations have reservations 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.<sup>142</sup>

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.”<sup>143</sup>

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 majority of their income from their second, non state-supported jobs. For example, a rock drummer plays Peking

135 See Interview with Z.W.J., Musician, *supra* note 110.

136 See Interview with L.D., Musician, *supra* note 106.

137 See Interview with H.Y.F., Executive, *supra* note 128; Interview with L.J., Executive, *supra* note 113.

138 See Interview with L.J., Executive, *supra* note 113.

139 See Interview with H.Y.F., Executive, *supra* note 128; see also Interview with K.R., Musician, *supra* note 133; Interview with L.Y., Musician, *supra* note 122; Interview with T.Y., Musician (Nov. 23, 2010); Interview with Y.Y.C., Musician, *supra* note 113; Interview with Z.J.H., Musician, *supra* note 116.

140 See Interview with H.Y.F., Executive, *supra* note 128.

141 See Interview with B.Y., Musician & Executive, *supra* note 132; Interview with L.J., Executive, *supra* note 113; Interview with Z.D., Musician, *supra* note 113.

142 See Interview with B.Y., Musician & Executive, *supra* note 132.

143 See Interview with L.X.R., Executive, *supra* note 116.

opera as his day job,<sup>144</sup> and a well-known guitarist in the rock community teaches drumming at a music conservatory.<sup>145</sup> 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 (television, radio and newspapers) and is increasingly active in the music market, procuring a large number of music programs. Musicians from state-owned organizations enjoy favorable treatment and come first in the pecking order.<sup>146</sup> Second, a position in a state-owned organization provides better job security for risk-averse musicians, including stable income, social insurance and pension programs.<sup>147</sup>

### 5. Sponsorship and Advertisement

In the same way that famous NBA players receive sponsorships from sneaker and beverage manufacturers, pop artists may have opportunities to endorse various consumer products. In exchange for corporate sponsorship, artists use their star power to influence potential purchasers of the advertised products. Sponsorship may take several forms. First, artists may be required to participate in television commercials, product release parties and other promotional events.<sup>148</sup> Second, 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 certain sports car parked in front of the main entrance when she performs.<sup>149</sup> Third, musicians sometimes receive remuneration simply for mentioning a product brand during media interviews.<sup>150</sup> Fourth, musicians may receive equipment sponsorship rather than monetary sponsorship, including free musical instruments and audio equipment.<sup>151</sup> Finally, many property developers, often joining force with local governments, have

144 See Interview with L.Y., Musician, *supra* note 122.

145 See *id.*

146 See Interview with A.D., Musician, *supra* note 92; Interview with L.F.Q., Musician, *supra* note 130; Interview with L.Y., Musician, *supra* note 122; Interview with Y.Y.C., Musician, *supra* note 113; Interview with Z.W.J., Musician, *supra* note 110.

147 See Interview with H.Y.F., Executive, *supra* note 128; see also Interview with K.R., Musician, *supra* note 133; Interview with Z.J.H., Musician, *supra* note 116.

148 For a few examples of corporate sponsorship in China, see Yīngtèèr Pīnqǐng yǔ Quán Wéi Dàiyánrén Fānxīn Yānyì Kù Rui Dàodì (英特尔聘请羽泉为代言人 翻新演绎《酷睿到底》), BEIJING TIMES (June 22, 2007), <http://perma.cc/395E-TPE5> (China) (reporting that pop band Yu Quan endorsed Intel microprocessors), and Zhao Yi (赵毅), Weixiào Chuán Zhongguó Lǐyǔchūn Dàiyán Jia Jiéshì Xiào Yán Ke'ài Zūtú (微笑传中国 李宇春代言佳洁士笑颜可爱(组图)), CRI ONLINE (Apr. 6, 2006), <http://perma.cc/CW2L-C5JU> (China) (reporting that pop singer Li Yuchun endorsed Crest toothpaste), and Wánglìhóng Qīng Qīng Dàiyán Wá Hāhā Fù Yǎng Ruò Jiǎnxìng Shuǐ (王力宏倾情代言娃哈哈富氧弱碱性水), WAHAHA (July 26, 2014), <http://perma.cc/73D7-MQ6V> (China) (reporting that pop singer Wang Lihong endorsed Wahaha bottled water).

149 See Interview with W.M., Executive, *supra* note 106.

150 See *id.*

151 See Interview with L.H. 2, Musician, *supra* note 110; Interview with Y.Y.C., Musician, *supra* note 113; Interview with Z.W.J., Musician, *supra* note 110.

recently emerged as an important source of corporate sponsorship. They have invested in a number of music festivals in big cities in order to draw attention and traffic to their development projects.<sup>152</sup>

Advertisers usually prefer to contact music labels to strike a package deal for all their musicians rather than directly dealing with individual musicians.<sup>153</sup> As a result, music companies pocket the majority of the revenue. 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.<sup>154</sup> These are the reasons why none of the musicians surveyed here 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, the messages behind their music. More often than not, sponsorship may end up putting artists on the short leash of corporate powers.<sup>155</sup> For instance, many wealthy fans of Peking opera are happy to supply financial support for new operas, but only on the condition that the fans themselves play the leading characters in the spectacle.<sup>156</sup> Additionally, in order to preserve and enhance the advertising value of sponsored musicians, corporate sponsors are accustomed to placing various restrictions on artists' behaviors, 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 that musicians entertain potential sponsors in order to obtain their sponsorship.<sup>157</sup> 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.<sup>158</sup>

## 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

152 See Interview with L.D., Musician, *supra* note 106.

153 See Interview with F.H.N., Executive, *supra* note 110; Interview with J.S.L., Musician, *supra* note 116; Interview with W.M., Executive, *supra* note 106.

154 See Interview with G.F., Musician (Nov. 18, 2010) (stating that only 100 out of 100,000 musicians in Beijing may actually receive sponsorship opportunities).

155 See *Music Firm Tune into New Deals*, BBC NEWS (June 30, 2008), <http://perma.cc/G5P5-QM8T> (discussing controversies around direct sponsorship).

156 See Interview with L.Y., Musician, *supra* note 122.

157 See Interview with K.R., Musician, *supra* note 133.

158 See Interview with F.H.N., Executive, *supra* note 110.



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 at their concerts.<sup>159</sup> Several music executives also introduced the practice of bundling CDs with cosmetics<sup>160</sup> or books.<sup>161</sup> The bundled products may also be complementary goods related to music consumption, such as MP3 players, cell phones or broadband services.<sup>162</sup> 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.<sup>163</sup> 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 on others' investment. This indicates that free music does not necessarily mean copyright-free music because the latter could 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.<sup>164</sup> They become more involved in selling artists' merchandise by acquiring specialist firms or forming partnerships with existing suppliers.<sup>165</sup> The music industry has sometimes alleged that merchandizing creates a market for so-called "unpiratable products."<sup>166</sup> This 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 suggested by the intuition that a poster signed by the featured artist is usually

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159 See Interview with J.S.L., Musician, *supra* note 116; Interview with W.M., Executive, *supra* note 106.

160 See Interview with Z.W.J., Musician, *supra* note 110.

161 See Interview with F.H.N., Executive, *supra* note 110.

162 See Zhou Zhen (周珍), 正版音乐网站离赢利还有多远 [How Far Legitimate Websites Need to Go Before Making Any Profits], CHINA CULTURE POST, (June 5, 2006), <http://perma.cc/4EPC-JM8P> (China) (stating that music labels licensed Lenovo to pre-load a large number of music tracks onto cell phones).

163 See *infra* note 330 and accompanying text for a detailed discussion of free-riding and public goods.

164 See Interview with C.S., Executive, *supra* note 106.

165 For instance, the pop duo Yu Quan market comic books and toys featuring their images. See Feng, *supra* note 125.

166 See IFPI, DIGITAL MUSIC REPORT, at 12 (2009).

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 success of a merchandise market in China appear to assume unrealistically that this haven of copyright piracy would somehow be free of counterfeiting of the physical merchandise. It is therefore not difficult to comprehend why musician participants did not 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 memorable 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.<sup>167</sup> 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.<sup>168</sup> 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;<sup>169</sup> some work in offices as translators, secretaries or journalists;<sup>170</sup> some operate bars or companies;<sup>171</sup> some invest in the stock market<sup>172</sup> and others become so-called “multi-dimensional” artists, taking acting roles in movies and television shows.<sup>173</sup>

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.<sup>174</sup> 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

167 See Interview with Z.D., Musician, *supra* note 113.

168 See *infra* Figure 23. By contrast, a related study in the United States indicates that 15% of musicians have non-arts related occupations. See JEFFRI, OBERSTEIN & REED, *supra* note 87, at 39.

169 See Interview with W.J. 2, Musician, *supra* note 108; Interview with W.K., Musician, *supra* note 93; Interview with X.B., Musician (Nov. 21, 2010).

170 See Interview with S.F., Musician (Nov. 27, 2010); Interview with W.Z.L., Musician, *supra* note 93.

171 See Interview with D.Q., Musician, *supra* note 93; Interview with Z.D., Musician, *supra* note 113; Interview with Z.H.S., Musician (Nov. 13, 2010).

172 See Interview with C.T., Musician, *supra* note 123.

173 See Interview with F.H.N., Executive, *supra* note 110; Interview with L.H. 1, Musician, *supra* note 92.

174 See Interview with L.L., Musician (Nov. 19, 2010); Interview with S.F., Musician, *supra* note 170; Interview with W.J. 1, Musician, *supra* note 88.

government for our business.<sup>175</sup>

Although these second jobs are often far more lucrative than music-related work, most musicians have shown a clear preference to spending more time on their music-related work, 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.<sup>176</sup> One musician stated:

Music-related income for our band was just performances. 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 assuming I concentrate on the job. However, I have started to turn down a lot of movies now. What would our band do if I had to film a movie out of town? Therefore, my current plan is to gradually retreat from artistic director work.<sup>177</sup>

### 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.<sup>178</sup> 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 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.<sup>179</sup> 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 artists financially. Therefore, music

<sup>175</sup> See Interview with K.R., Musician, *supra* note 133.

<sup>176</sup> See Interview with S.F., Musician, *supra* note 170; Interview with W.Z.L., Musician, *supra* note 89.

<sup>177</sup> See Interview with Y.Z., Musician (Nov. 23, 2010).

<sup>178</sup> See Paul Goldstein, *Copyright*, 55 *LAW & CONTEMP. PROBS.* 79, 83 (1992). See generally Barry W. Tyerman, *The Economic Rationale for Copyright Protection for Published Books: A Reply to Professor Breyer*, 18 *UCLA L. REV.* 1100, 1131 (1971) (discussing analogous cross-subsidization in book publishing).

<sup>179</sup> See Interview with F.H.N., Executive, *supra* note 110; Interview with L.D., Musician, *supra* note 106; Interview with L.H. 1, Musician, *supra* note 92; Interview L.H. 2, Musician, *supra* note 110; Interview with S.K., Executive, *supra* note 104; Interview with Z.Y.P., Executive, *supra* note 104.

companies are more cautious.<sup>180</sup>

Two business models have emerged that aim to further minimize the investment risks resulting from copyright piracy: (1) self-funded artists and (2) 360 deals.

### 1. Self-Funded Artists

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 that instead of the music company investing in the artist, the artist pays the music company for various services, such as production, promotion and distribution.<sup>181</sup> 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 especially attractive 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;<sup>182</sup> 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 these cases, the music labels function as vanity publishers that do not directly target consumers.

### 2. 360 Deals

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.<sup>183</sup> The role of record companies in the music 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,

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180 See Interview with S.K., Executive, *supra* note 104.

181 See Interview with K.R., Musician, *supra* note 133; Interview with L.X.R., Executive, *supra* note 116; Interview with Y.Y.C., Musician, *supra* note 113; Interview with Z.J.C., Executive, *supra* note 100; Interview with Z.W.J., Musician, *supra* note 110; Interview with Z.Y.B., Executive, *supra* note 98.

182 See *infra* note 236 and accompanying text.

183 Traditionally, an artist would sign three kinds of contracts—an album contract, an agent contract and a copyright contract—with three different entities. A record company would 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 deal would typically incorporate all three of these contracts.

merchandising, brand sponsorship, music publishing, fan clubs, official websites and television and film appearances.<sup>184</sup> These all-encompassing deals are often called the “360 degree” model, by which musicians essentially sign over the entirety of their careers during the contractual term.<sup>185</sup> 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 generate more public exposure and performance opportunities.<sup>186</sup>

“360 degree” deals have given rise to several phenomena that were not seen 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—such as touring, advertising and merchandizing—in most cases entail long-term investment in cultivating artists’ reputations and influencing 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.<sup>187</sup>

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 her personal life in order to maintain her commercial value in advertising and merchandizing markets. Not only must the music convey the same message as that which the products promote, but the public image of the artist must also be consistent with mainstream perception. For example, a rock star temper 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. One musician recapped her friends’ experience 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.<sup>188</sup>

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<sup>184</sup> See Ed Pato, *Music in China: The Inside Story*, REGISTER (U.K.) (Nov. 1, 2007), <http://perma.cc/STL5-X7VD>.

<sup>185</sup> See Pete Paphides, *The Guy to Save the Music Industry?*, TIMES (London) (Jan. 18, 2008), <http://perma.cc/526A-2MJW>.

<sup>186</sup> See Interview with L.H. 1, Musician, *supra* note 92.

<sup>187</sup> See Interview with L.D., Musician, *supra* note 106.

<sup>188</sup> See Interview with L.D., Musician, *supra* note 106; Interview with L.Y., Musician, *supra* note 122; Interview with W.K.X., Musician (Nov. 23, 2010).

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 revenue streams.<sup>189</sup> 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.<sup>190</sup>

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.<sup>191</sup> One musician explained the rationale behind the dramatic change in talent search criteria:

Nobody pays attention to 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 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 gains some popularity, I would have opportunities to exploit her market value in acting, commercials and endorsements.<sup>192</sup>

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 looks contest.<sup>193</sup>

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189 See, e.g., Interview with F.H.N., Executive, *supra* note 110.

190 See Interview with L.H. 2, Musician, *supra* note 110.

191 See Interview with L.H. 1, Musician, *supra* note 92.

192 See Interview with L.L., *supra* note 174.

193 See Interview with L.H. 2, Musician, *supra* note 110.

## II. MUSICIANS ON COPYRIGHT

This section of the Article presents empirical findings from the perspectives of individual musicians related to three subjects: (1) motivation for creation; (2) attitude towards piracy and (3) 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.<sup>194</sup>

### A. MOTIVATIONS

When asked about their motivations, incentives or drives for music creation, the musicians offered a wide range of factors, as illustrated in Figure 25.<sup>195</sup> Notably, 97.4% of all the musicians referred to certain emotional benefits as their motivations, while only 17.9% mentioned economic benefits as their motivations.<sup>196</sup> 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: (1) self-expression; (2) communication; (3) peer respect and (4) popularity.

#### 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*

These 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

194 Focused as it is on ideas, values and attitudes regarding copyright protection, this Article falls squarely into the domain of legal cultural studies. See LAWRENCE M. FRIEDMAN, *THE LEGAL SYSTEM: A SOCIAL SCIENCE PERSPECTIVE* 193 (1975) (Legal culture is “public knowledge of and attitudes and behavior patterns toward the legal system”); Lawrence M. Friedman, *Legal Culture and Social Development*, 4 L. & SOC’Y REV. 29 (1969); 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.”).

195 See *infra* Figure 25.

196 See *infra id.*

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.<sup>197</sup>

Another musician analogized his music to his diary:

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.<sup>198</sup>

*b. Love for Music*

Some of 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 in 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.<sup>199</sup>

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. 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.<sup>200</sup>

*c. Identity*

Music has become an indispensable part of their lives and identities. One 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.<sup>201</sup>

Another musician stated:

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197 See Interview with L.D., Musician, *supra* note 106.  
198 See Interview with W.J. 2, Musician, *supra* note 108.  
199 See Interview with Y.W.M., Musician (Nov. 26, 2010).  
200 See Interview with Z.D., Musician, *supra* note 113.  
201 See Interview with Y.Y.C., Musician, *supra* note 113.



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.<sup>202</sup>

*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 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.<sup>203</sup>

Another artist who received one percent of his 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.<sup>204</sup>

*e. Stewardship*<sup>205</sup>

Closely related to the religious reasoning, 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.<sup>206</sup>

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

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202 See Interview with H.X.T., Musician, *supra* note 105.

203 See Interview with S.F., Musician, *supra* note 170.

204 See Interview with W.K., Musician, *supra* note 93.

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

206 See Interview with J.S.L., Musician, *supra* note 116.

single year.<sup>207</sup>

## 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.<sup>208</sup>

Another musician explained:

I have a theory that, if only ten out of a hundred people agree with the 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.<sup>209</sup>

## 3. Peer Respect

Musicians often 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 Ten Golden Songs for the Beijing Olympics in 2006. It was such an honor for a new artist to share the spotlight with established musicians. . . . Another pleasant surprise was in the same year, when I took part in a singing competition and performed 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.<sup>210</sup>

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

I thought about giving up my music career at the point 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 had

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207 See Interview with L.Y.Q., Musician (Nov. 16, 2010).

208 See Interview with L.G.R., Musician (Oct. 23, 2010).

209 See Interview with Y.W.M., Musician, *supra* note 199.

210 See Interview with W.J. 2, Musician, *supra* note 108.

achieved something. I did reach that milestone at the age of twenty-five, eventually: I shared the stage with GS, my idol since college. That showed my efforts were not worthless after all. If you continue to work hard, you can do better and better.<sup>211</sup>

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 problem, it is all about the face—how to win others' respect no matter what profession you are in.<sup>212</sup>

#### 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 an 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 listeners 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.<sup>213</sup>

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.<sup>214</sup>

#### 5. Economic Benefits

Figure 25 illustrates that only 17.9% of all the musicians in the sample admitted that economic benefits created some motivation for their music creation.<sup>215</sup> 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

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211 See Interview with Y.W.M., Musician, *supra* note 199.

212 See Interview with C.T., Musician, *supra* note 123.

213 See Interview with Y.Y.C., Musician, *supra* note 113.

214 See Interview with Y.W.M., Musician, *supra* note 199.

215 See *infra* Figure 25.

music.<sup>216</sup> The musicians provided three reasons for 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 commodity and how to market the commodity. 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.<sup>217</sup>

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.<sup>218</sup>

Second, other musicians believed that a quest for pecuniary rewards might become a distraction and ultimately negatively 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.”<sup>219</sup> Another musician told a story about how money became

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216 See *infra id.* The statistics, however, do not necessarily lead to the inference that musicians generally do not need economic incentives for creation. They merely imply 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 sufficient copyright enforcement. See Interview with C.S., Executive, *supra* note 106 (“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 to be quite aware that it’s very difficult for them to make any kind of a living from music. So they have to be passionate about music. They have to love music.”); Interview with L.D., Musician, *supra* note 106 (“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 in becoming a musician, you should think about your economic conditions first, e.g., family support. If you dream of making money by making music, simply stop dreaming.”); Interview with L.H. 2, Musician, *supra* note 110 (“You have to be crazy these days to go into the music industry for money.”).

217 See Interview with Y.W.M., Musician, *supra* note 199.

218 See Interview with L.D., Musician, *supra* note 106.

219 See Interview with D.Q., Musician, *supra* note 93.

counter-productive at one point of his career:

We never thought about money when we started making music in the 1990s. 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. Then, our music careers were stuck: For a long time, we had written a lot of demos 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 may come if you don't think about it.<sup>220</sup>

Third, a recurring theme that emerged from the musicians' observations was that 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.<sup>221</sup> 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."<sup>222</sup> 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. If 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.<sup>223</sup>

This sentiment was frequently expressed using a rhetorical pattern that pitted value against price.<sup>224</sup> For example, a music executive had a message for 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."<sup>225</sup> Another musician echoed this suggestion:

220 See Interview with S.F., Musician, *supra* note 170.

221 Purity versus profit has similarly been a constant battle for U.S. musicians. See JEFFRI, OBERSTEIN & REED, *supra* note 87, at 46.

222 See Interview with W.J. 1, Musician, *supra* note 92.

223 See Interview with L.G.R., Musician, *supra* note 208.

224 See Interview with B.Y., Musician & Executive, *supra* note 132; Interview with L.D., Musician, *supra* note 106; Interview with S.F., Musician, *supra* note 170; Interview with X.B., Musician, *supra* note 169; Interview with Z.Y.B., Executive, *supra* note 98.

225 See Interview with Z.Y.B., Executive, *supra* note 98.

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 an emphasis on artistic value rather than market value.<sup>226</sup>

It is thus unsurprising that musicians often measure the seriousness of another musician by how much she strives for fame or money. As mentioned above, commercial jingle writers are widely deemed "music-smiths" rather than musicians.<sup>227</sup> Instead, musicians take pride in their indifference to economic benefits. For example, one musician stated, "I never think about market or audience. Himalaya doesn't exist to please humans although that doesn't stop humans from worshiping her."<sup>228</sup>

The above statements might appear peculiar viewed together with the fact that 97.4% of all the musicians in the sample 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 reality."<sup>229</sup> The reality is, however, that a third of all the musicians in the sample named earning a livelihood as the largest challenge facing Chinese musicians.<sup>230</sup> 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 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:

226 See Interview with L.D., Musician, *supra* note 106.

227 See Li Guangping, *supra* note 120 and accompanying text. Musicians also differentiate between a career to fulfill their dreams and a job to make a living. See Interview with L.D., Musician, *supra* note 106; Interview with L.N., Musician (Nov. 26, 2010); Interview with Y.Y.C., Musician, *supra* note 113.

228 See Interview with H.X.T., Musician, *supra* note 105.

229 See Interview with A.D., Musician, *supra* note 92; Interview with C.T., Musician, *supra* note 123; Interview with G.F., Musician, *supra* note 154; Interview with K.R., Musician, *supra* note 133; Interview with L.H. 1, Musician, *supra* note 92; Interview with L.H. 2, Musician, *supra* note 110; Interview with L.N., Musician, *supra* note 227; Interview with W.P.C., Musician (Nov. 18, 2010); Interview with P.L.Y., Musician (Nov. 25, 2010); Interview with W.J. 1, Musician, *supra* note 92; Interview with W.K., Musician, *supra* note 93; Interview with W.X.F., Musician, *supra* note 93; Interview with Y.W.M., Musician, *supra* note 199; Interview with Y.Y.C., Musician, *supra* note 113; Interview with Y.Z., Musician, *supra* note 177; Interview with Z.D., Musician, *supra* note 113; Interview with Z.H.S., Musician, *supra* note 171.

230 A recent study reports that a third of professional composers in the United States regard earning money from composing 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 87, at 22.

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 source of income. Some lived on family support. Many others sang in the subway.<sup>231</sup>

Another artist similarly explained why he had chosen to temporarily leave music:

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 wanted me to write music and practice music, I was 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.<sup>232</sup>

Second, money may enable musicians to pay for better musical instruments, recording equipment and other production costs involved with music creation. Notably, developments in digital technology 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 professional-quality multi-track recording, editing and mixing. Therefore, it is not surprising that a number of musicians in the sample have built home studios.<sup>233</sup> The production cost for a music album is now around RMB 25,000 (US \$4,000) if produced in a home studio, and RMB 100,000 (US \$16,000) if produced in a standard studio, neither of which is a truly prohibitive price.<sup>234</sup> With regard to marketing and promotion, indie musicians mostly depend on online channels like 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 (such as CDBaby, TuneCore and TheOrchard) can widely distribute any album through all the major online retailers (such as iTunes, Amazon and Spotify) for a payment of up to US \$50.<sup>235</sup> Second, many musicians bypass all intermediaries and distribute their own albums at their concerts.<sup>236</sup> Notably, the above figures represent the lowest end of the cost spectrum. Musicians may upgrade their music production and promotion

231 See Interview with W.K., Musician, *supra* note 93.

232 See Interview with W.J. 1, Musician, *supra* note 92.

233 See Interview with C.T., Musician, *supra* note 123; Interview with H.J.J., Musician, *supra* note 122; Interview with H.X.T., Musician, *supra* note 105; Interview with J.S.L., Musician, *supra* note 116; Interview with L.D., Musician, *supra* note 106; Interview with L.H. 2, Musician, *supra* note 110; Interview with P.L.Y., Musician, *supra* note 229; Interview with S.F., Musician, *supra* note 170; Interview with W.K.X., Musician (Nov. 23, 2010); Interview with W.X.L., Musician (Nov. 20, 2010); Interview with Z.D., Musician, *supra* note 113.

234 See Interview with Z.H.S., Musician, *supra* note 171; Interview with Z.Y.B., Executive, *supra* note 98.

235 See Interview with C.S., Executive, *supra* note 106; Interview with L.D., Musician, *supra* note 106; Interview with W.M., Executive, *supra* note 106.

236 See Interview with L.D., Musician, *supra* note 106; Interview with W.X.L., Musician, *supra* note 233; Interview with W.Z.L., Musician, *supra* note 93.

with increased investment. A professional-level album could easily cost RMB 500,000 (US \$80,000) for production and another RMB 500,000 to 1,000,000 (US \$80,000 to 160,000) for targeted promotion in mainstream media, such as television, radio and Internet portals.<sup>237</sup>

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

Of course, the costs of producing music have now become lower. So has the music quality. A digital device may 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 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.<sup>238</sup>

Another artist emphasized the relationship between collaboration and money:

[Money] is 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.<sup>239</sup>

Fourth, because musicians are more likely to compromise if they are under economic pressure, money can safeguard artistic freedom. One musician told a vivid story illustrating this:

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 pop that was mundane but would sell better. I didn't have a choice. I was hungry and had to use the music to get a piece of bread. So I would 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 had no choice but to write the music that I found despicable in exchange for the bread.<sup>240</sup>

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

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237 See Interview with S.K., Executive, *supra* note 104; Interview with F.H.N., Executive, *supra* note 110; Interview with Z.Y.P., Executive, *supra* note 104.

238 See Interview with Z.D., Musician, *supra* note 113.

239 See Interview with L.H. 2, Musician, *supra* note 110.

240 See Interview with W.J. 2, Musician, *supra* note 108.



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% [of my income], 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.<sup>241</sup>

It would indeed be difficult for musicians to justify a career that requires enormous 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 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 rubbish.<sup>242</sup>

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 worked for a state-owned organization indicated that he understood what the government slogan "Serve the People really meant only after he became indie.<sup>243</sup> 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 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 of meat and a half pound of 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.<sup>244</sup>

## B. ATTITUDES TOWARDS PIRACY

The musicians in the sample have formed rather nuanced attitudes toward copyright piracy. Figure 26 indicates that, although only 5% stated that copyright

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241 See Interview with L.H. 1, Musician, *supra* note 92; Interview with S.F., Musician, *supra* note 170; Interview with Y.W.M., Musician, *supra* note 199.

242 See Interview with Z.Y.B., Executive, *supra* note 98.

243 See Interview with D.Q., Musician, *supra* note 93.

244 See Interview with L.Y.Q., Musician, *supra* note 207.

piracy is beneficial overall to musicians, 33% held relatively neutral attitudes that appeared to assign equal weight to the benefits and costs of copyright piracy.<sup>245</sup> The musicians often described their views of copyright piracy as “a double-edged sword”<sup>246</sup> or “a love/hate relationship.”<sup>247</sup> Even among those who said that copyright piracy is detrimental overall to musicians, 58.3% agreed that copyright piracy indeed has certain benefits.

Before delving into how Chinese musicians perceive the costs and benefits of piracy, it may be useful to contrast their attitudes towards piracy with those of U.S. musicians, as Figure 27 demonstrates.<sup>248</sup> On average, U.S. musicians are more tolerant of piracy: 35% agree that file-sharing services are not bad for musicians because they help promote and distribute their works, as opposed to only 5% of Chinese musicians who think the same.<sup>249</sup> These different attitudes are probably a result of different personal experiences and everyday realities. Many Chinese musicians have personally faced piracy of their own music whereas U.S. musicians rarely have the same experience.<sup>250</sup>

### 1. Benefits of Piracy

First, 41% of all the musicians in the sample 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 from access to a wider variety of others’ music, which brings new ideas and opens new horizons for their music creation. For example, one music executive admitted: “Copyright piracy may serve the purposes of education and dissemination. Arguably, this whole generation of Chinese people has for a large part built their music preferences around copyright piracy. I feel thankful to copyright piracy.”<sup>251</sup> 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 stated: “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.”<sup>252</sup>

Second, copyright piracy may help consumers and musicians bypass the censorship system. As mentioned above, China subjects the reproduction,

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245 See *infra* Figure 26.

246 See Interview with L.H. 2, Musician, *supra* note 110; Interview with P.L.Y., Musician, *supra* note 229; Interview with Y.Z., Musician, *supra* note 177.

247 See Interview with B.Y., Musician & Executive, *supra* note 132; Interview with L.G.R., Musician, *supra* note 208.

248 See *infra* Figure 27.

249 See JEFFRI, OBERSTEIN & REED, *supra* note 87, at 71 (indicating that 41% of the U.S. musicians surveyed like exposure gained from downloading, 32% think they should get paid and 21% do not mind); MADDEN, *supra* note 87, at 34.

250 See *infra* note 322 and accompanying text.

251 See Interview with L.J., Executive, *supra* note 113.

252 See Interview with L.G.R., Musician, *supra* note 208.

distribution and importation of cultural products to extensive scrutiny.<sup>253</sup> In particular, the government only issues licenses for the importation of sound recordings to a small number of state-owned enterprises. All imported titles must be pre-approved by the government.<sup>254</sup> The censorship system limits the supply of international music albums and naturally 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. Therefore, this is a social problem rather than a simple matter of black or white.<sup>255</sup>

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 such as performance, advertisement and sponsorship. The increased incomes from alternative markets, therefore, can substantially offset the impact of copyright piracy on music sales.<sup>256</sup> One concert promoter applauded this attitude:

You may 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 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 by returning to performances and patronage?<sup>257</sup>

By contrast, 35.9% of all the musicians believed that copyright piracy had limited effects, if any, as a promotional tool, and that such benefits 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. 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. . . . 'Cause the piracy stuff is all just

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253 See *supra* note 34 and accompanying text.

254 *Id.*

255 See Interview with L.X.R., Executive, *supra* note 116.

256 See Interview with Y.Z., Musician, *supra* note 177.

257 See Interview with L.J., Executive, *supra* note 113.

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.<sup>258</sup>

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."<sup>259</sup> 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.<sup>260</sup> Third, although most musicians welcome copyright piracy as a signal of popularity, the causal relationship may be 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?"<sup>261</sup>

## 2. Costs of Piracy

Fifty-nine percent 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" to musicians,<sup>262</sup> "disrespectful" to laborers<sup>263</sup> and equivalent to "stealing" that destroys the values of honesty and credibility in society.<sup>264</sup> Despite rhetorical differences, their underlying themes appear to be highly consistent with Locke's labor theory.<sup>265</sup> First, musicians, like all workers, are entitled to receive fair return from the fruits of their labors. Second, the fair

258 See Interview with L.H. 2, Musician, *supra* note 110.

259 See Interview with S.K., Executive, *supra* note 104.

260 See Interview with A.D., Musician, *supra* note 92; Interview with H.X.T., Musician, *supra* note 105; Interview with L.H. 1, Musician, *supra* note 92.

261 See Interview with F.H.N., Executive, *supra* note 110.

262 See Interview with J.S.L., Musician, *supra* note 116; Interview with L.L., Musician, *supra* note 174; Interview with Z.J.H., Musician, *supra* note 116.

263 See Interview with L.D., Musician, *supra* note 106; Interview with L.F.Q., Musician, *supra* note 130; Interview with L.H. 2, Musician, *supra* note 110; Interview with L.Y.Q., Musician, *supra* note 207; Interview with S.F., Musician, *supra* note 170; Interview with W.P.C., Musician (Nov. 18, 2010); Interview with Y.F., Musician (Nov. 23, 2010); Interview with Z.H.S., Musician, *supra* note 171.

264 See Interview with D.Q., Musician, *supra* note 93; Interview with L.N., Musician, *supra* note 227; Interview with L.Y.Q., Musician, *supra* note 207; Interview with N.B., Musician, *supra* note 124; Interview with S.K., Executive, *supra* note 104; Interview with Z.Y.B., Executive, *supra* note 98.

265 See JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 302–51 (Peter Laslett ed., Cambridge Univ. Press 2d ed. 1967) (1690).

return should be proportionate to the labor that they devoted and the value that they contributed to society. Third, 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 to 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.<sup>266</sup>

Another musician explained the reason why his band was hesitant to release its 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?<sup>267</sup>

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 effects:

Copyright piracy has a great impact. If we 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. I really felt a bit uncomfortable after signing that kind of disc. . . . 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.<sup>268</sup>

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.<sup>269</sup>

266 See Interview with L.D., Musician, *supra* note 106.

267 See Interview with D.Q., Musician, *supra* note 93.

268 See Interview with N.B., Musician, *supra* note 124.

269 See Interview with B.Y., Musician & Executive, *supra* note 132; Interview with J.S.L., Musician, *supra* note 116; Interview with L.H. 1, Musician, *supra* note 92; Interview with L.L., Musician, *supra* note 174; Interview with L.Y., Musician, *supra* note 122; Interview with W.J. 2, Musician, *supra* note 108; Interview with W.X.L., Musician, *supra* note 233; Interview with W.Z.L., Musician, *supra* note 93; Interview with X.B., Musician, *supra* note 169; Interview with W.K.X., Musician, *supra* note 188; Interview with Y.Z., Musician, *supra* note 177; Interview with Z.W.J., Musician, *supra* note 110.

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:

The guy that we worked for, without being specific or anything, he made millions and millions [from his 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.<sup>270</sup>

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.<sup>271</sup> One musician expressed her skepticism about the actual impact:

Copyright piracy is of course harmful, but is the harm really significant? 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.<sup>272</sup>

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.<sup>273</sup> These musicians, however, did not appear to factor in the possibility that the buy-out price might be higher if copyright piracy was better controlled.

Thirty-eight point five percent of the musicians in the sample pointed out that copyright piracy might 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 to 30,000 (US \$3,200 to 4,800) for purchasing a song, but today can only afford RMB 3000 (US \$480) per song.<sup>274</sup> A self-funded musician shared his own experience:

We devoted a lot of money and energy to producing our music, which, however,

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270 See Interview with L.H. 2, Musician, *supra* note 110.

271 See *supra* note 255 and accompanying text.

272 See Interview with Y.Y.C., Musician, *supra* note 113.

273 See Interview with T.Y., Musician, *supra* note 139; Interview with W.J. 2, Musician, *supra* note 108; Interview with W.K., Musician, *supra* note 93; Interview with W.Z.L., Musician, *supra* note 93; Interview with Y.F., Musician, *supra* note 263; Interview with Y.Y.C., Musician, *supra* note 113.

274 See Interview with Z.Y.P., Executive, *supra* note 104. The price decrease was confirmed by others. See also Interview with W.J. 2, Musician, *supra* note 108.

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 when financial conditions get better. This is as far as we can go.<sup>275</sup>

Thirty-eight point five percent of the musicians in the sample further believed that copyright piracy might also affect the quality of music production. They offered three major reasons. First, the diminished investment in music production naturally affects quality:

When copyright piracy was not a big concern yet and my albums could sell fifty thousand, I didn't hesitate to invite the best musicians to collaborate, those who not only possessed the finest techniques but also shared the same perspectives. Besides, the studio was usually open 24/7. Musicians could start recording whenever they were ready. Record labels could afford such investment in those days when albums were lucrative. No record labels 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.<sup>276</sup>

Second, music companies devote their attention to producing music that caters specifically to ringback-tone markets, as ringback tones comprise the only real 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.<sup>277</sup> 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."<sup>278</sup> Third, a number of music companies have shifted their attention to developing models, actors and other existing celebrities who have substantial values in sponsorship, advertisement and performance markets. Music production following this approach apparently does not revolve around quality concerns because these celebrities generally lack musical talent and formal training.<sup>279</sup> 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

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275 See Interview with N.B., Musician, *supra* note 124.

276 See Interview with Z.D., Musician, *supra* note 113.

277 See *supra* note 176 and accompanying text.

278 See Interview with W.J. 2, Musician, *supra* note 108.

279 See *supra* note 274 and accompanying text.

community where nobody cares anything about art.<sup>280</sup>

The musicians in the sample expressed extremely divergent views about the impact of copyright piracy on their motivations for music creation. Fifty-six point four percent thought that there was no impact and 43.6% thought otherwise. Most musicians who had brushed off the impact appeared to follow the belief that “[r]eal musicians should not be affected by copyright piracy.”<sup>281</sup> 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 get 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.<sup>282</sup>

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.<sup>283</sup> Several musicians believed that copyright piracy did *not* substantially impact their incomes after having totally disregarded music sales and shifted the focuses of their careers to alternative markets such as performances.<sup>284</sup> Nevertheless, there is evidence that such a mentality may result from coming to terms with reality rather than personal preferences. While uncontrolled piracy affects a vast number of musicians and their works, no single musician has sufficient incentive to enforce her rights—an individual’s efforts to enforce copyright would not generate more sales, but rather would only serve to divert consumers away from that individual’s works and to find other musicians’ works instead. In other words, the pirated music of other musicians simultaneously devalues her works, reflecting the classic problem of collective action. Musicians learned to stop worrying about copyright piracy and focused on alternative revenues. One musician stated, “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.”<sup>285</sup>

The 43.6% musicians who agreed that copyright piracy might affect motivation

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280 See Interview with L.H. 2, Musician, *supra* note 110.

281 See, e.g., Interview with H.X.T., Musician, *supra* note 105; Interview with X.B., Musician, *supra* note 169; Interview with W.K.X., Musician, *supra* note 188; Interview with Z.D., Musician, *supra* note 113; Interview with Z.J.H., Musician, *supra* note 116.

282 See Interview with H.X.T., Musician, *supra* note 105.

283 See, e.g., Interview with G.F., Musician, *supra* note 154; Interview with W.Z.L., Musician, *supra* note 93; Interview with W.K.X., Musician, *supra* note 188.

284 See *supra* note 253 and accompanying text.

285 See Interview with W.J. 2, Musician, *supra* note 108.



for creation mostly stressed its financial impact on livelihood, which could make a music career less sustainable.<sup>286</sup> 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 devote themselves to music out 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 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. But 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 a living.<sup>287</sup>

Interestingly, 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 their music creation.<sup>288</sup> Musicians can hardly concentrate on their own expression if a decent living requires working excessive hours in alternative markets like performances, synchronization or taking non-musical second jobs.<sup>289</sup>

### C. COPYRIGHT LAW 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.<sup>290</sup> 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’ requests. Please get your cassette ready in a recorder. Now we play the six songs on Side A. Please record.” Therefore, you

286 See, e.g., Interview with A.D., Musician, *supra* note 92; Interview with J.S.L., Musician, *supra* note 116; Interview with K.R., Musician, *supra* note 133; Interview with L.D., Musician, *supra* note 106; Interview with L.H. 1, Musician, *supra* note 92; Interview with M.Z., Musician, *supra* note 229; Interview with S.F., Musician, *supra* note 170; Interview with Y.W.M., Musician, *supra* note 199; Interview with Z.H.S., Musician, *supra* note 171. However, it is 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.

287 See Interview with J.S.L., Musician, *supra* note 116.

288 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.

289 See, e.g., Interview with N.B., Musician, *supra* note 124; Interview with W.K.X, Musician, *supra* note 188; Interview with Y.Y.C., Musician, *supra* note 113.

290 See, e.g., Interview with C.S., Executive, *supra* note 106.

could record entire albums.<sup>291</sup>

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.<sup>292</sup>

Copyright awareness has even become a problem for judges on occasion. An executive mentioned:

There were actually judges who questioned us: “For the exact same plastic disc, how come the pirated version was sold for five bucks and you could instead charge fifty bucks? Are you involved in profiteering?” However, those judges didn’t know that pirate enterprises indeed paid merely for the plastic disc, but we paid for much more than the plastic disc.<sup>293</sup>

Although most musicians had minimal copyright awareness, 71.8% agreed that copyright law should provide incentive for music creation.<sup>294</sup> Their explanations were again focused primarily on the importance of respecting intellectual labors following Locke’s labor theory.<sup>295</sup> 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.”<sup>296</sup> 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.”<sup>297</sup>

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 copyright enforcement efforts.<sup>298</sup> Though most musicians were not familiar with the nuances of copyright law, they formed their perceptions of copyright protection through everyday experience. They noticed that copyright piracy was everywhere online and offline;<sup>299</sup> that multiple

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291 See Interview with L.H. 1, Musician, *supra* note 92.

292 The copyright awareness among Chinese artists contrasts with the findings related to U.S. musicians. See MADDEN, *supra* note 87, at 23 (indicating “some 54% of all artists in our sample say they are somewhat or very familiar with current copyright laws and regulations”).

293 See Interview with S.K., Executive, *supra* note 104.

294 U.S. musicians appear to have similar perceptions about copyright law. See MADDEN, *supra* note 87, at 46 (noting that 67% of the musicians surveyed said 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).

295 See *supra* note 252 and accompanying text.

296 See Interview with L.F.Q., Musician, *supra* note 130.

297 See Interview with L.Y.Q., Musician, *supra* note 207.

298 By contrast, U.S. musicians appear far more content with their country’s copyright laws; in one survey, 61% believe that current copyright laws do a good job of protecting artists’ rights. See MADDEN, *supra* note 83, at 46.

299 See Interview with L.N., Musician, *supra* note 227; Interview with S.F., Musician, *supra* note

pirated versions emerged within a week after they released new albums;<sup>300</sup> that their music was performed by karaoke bars, at amusement parks and by other artists without authorization;<sup>301</sup> that even the biggest television networks and the biggest search engines in China had extensive infringing content<sup>302</sup> and that their fellow musicians are constantly complaining about copyright piracy.<sup>303</sup>

These musicians appeared to be concerned mostly with copyright enforcement rather than the law itself.<sup>304</sup> They referred to copyright law frequently using such phrases as “decorative,”<sup>305</sup> “non-existent”<sup>306</sup> and “a piece of meaningless paper,”<sup>307</sup> because it had not been seriously enforced yet. In other words, these musicians have instinctively understood the 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, 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.<sup>308</sup>

Some musicians expressed their understanding that the Chinese government might not yet have the resources necessary to enforce copyright law throughout such a large and populous country.<sup>309</sup> 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:

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170; Interview with W.K.X., Musician, *supra* note 188; Interview with Y.W.M., Musician, *supra* note 199; Interview with Y.Y.C., Musician, *supra* note 113; Interview with Z.H.S., Musician, *supra* note 171; Interview with Z.J.H., Musician, *supra* note 116.

300 See Interview with D.Q., Musician, *supra* note 93; Interview with L.L., Musician, *supra* note 174; Interview with N.B., Musician, *supra* note 124.

301 See Interview with W.X.L., Musician, *supra* note 233; Interview with W.Z.L., Musician, *supra* note 93.

302 See Interview with J.S.L., Musician, *supra* note 116; Interview with the L.H. 1, Musician, *supra* note 92; Interview with Y.F., Musician, *supra* note 263; Interview with Y.Y.C., Musician, *supra* note 113.

303 See Interview with L.L., Musician, *supra* note 174.

304 See Interview with C.S., Executive, *supra* note 106; Interview with J.S.L., Musician, *supra* note 116; Interview with W.J. 1, Musician, *supra* note 92; Interview with W.K., Musician, *supra* note 93; Interview with W.M., Executive, *supra* note 106; Interview with W.X.L., Musician, *supra* note 233; Interview with W.Z.L., Musician, *supra* note 93; Interview with Y.W.M., Musician, *supra* note 199; Interview with Z.J.C., Executive, *supra* note 100.

305 See Interview with S.F., Musician, *supra* note 170; Interview with W.X.L., Musician, *supra* note 233.

306 See Interview with D.Q., Musician, *supra* note 93; Interview with W.X.L., Musician, *supra* note 233; Interview with Y.F., Musician, *supra* note 263; Interview with Z.J.H., Musician, *supra* note 116.

307 See Interview with W.K., Musician, *supra* note 93; Interview with W.Z.L., Musician, *supra* note 93.

308 See Interview with N.B., Musician, *supra* note 124.

309 See Interview with B.Y., Musician & Executive, *supra* note 132; Interview with Y.Z., Musician, *supra* note 177; Interview with Z.W.J., Musician, *supra* note 110.

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 e-mail to my friend with the MP3, that is much harder to enforce. But the large-scale, easy, free downloading, they can do something about that.<sup>310</sup>

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 can stop piracy if they wanted to.<sup>311</sup>

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.<sup>312</sup>

Others implied a deeper reason why the Chinese government lacked the political will necessary to control widespread piracy, which was often deemed beneficial for the 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 tax revenues and employment opportunities.<sup>313</sup>

Among all the musicians who provided definite answers to the question about 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%. Thirty-six point four percent preferred zero copyright piracy, 93.9% recommended a 50% level if not lower and the most generous suggested a 70%

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310 See Interview with C.S., Executive, *supra* note 106.

311 See Interview with L.D., Musician, *supra* note 106.

312 See Interview with C.S., Executive, *supra* note 1061; Interview with W.Z.L., Musician, *supra* note 93.

313 See Interview with L.H. 1, Musician, *supra* note 92; Interview with W.J. 2, Musician, *supra* note 108; Interview with Z.J.H., Musician, *supra* note 116.

level. These statistics explain why almost all of the musicians thought—and rightfully so—that the current copyright protection efforts were insufficient.<sup>314</sup> Even the most generous among them preferred a level of copyright piracy vastly below the actual level in China, which has consistently hovered around 90% in recent years.<sup>315</sup> Those who suggested tolerating a certain percentage of copyright piracy generally emphasized its three benefits as discussed above, like widening music access (especially for low-income families),<sup>316</sup> assisting average Chinese consumers in bypassing the censorship system<sup>317</sup> and boosting the popularity of musicians and their works.<sup>318</sup>

Only 17.9% of the musicians in the sample mentioned that they had taken enforcement action in response to copyright infringement.<sup>319</sup> One plausible explanation is that musicians neither sought out nor came across any infringement of their own works.<sup>320</sup> However, this explanation is not applicable to the 82.1% of the sample that have personally encountered infringing activities. The percentage strikingly contrasts with a comparable study that found 28% of musicians in the United States have had similar experiences.<sup>321</sup> Another reason is that some Chinese musicians do not care about copyright piracy, especially those who believe that copyright piracy may promote their popularity.<sup>322</sup> 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.<sup>323</sup> One musician made a typical statement: “I don’t have the energy to fight copyright piracy because it’s everywhere in China. I don’t even know where to begin.”<sup>324</sup> A related reason is that musicians often felt that they were powerless in the face of rampant piracy and their actions would not change anything.<sup>325</sup> 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

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314 See *infra* Figure 28.

315 See *supra* note 39 and the accompanying text.

316 See Interview with W.C.P., Musician, *supra* note 263; Interview with W.Z.L., Musician, *supra* note 93; Interview with Z.W.J., Musician, *supra* note 110.

317 See Interview with L.H. 1, Musician, *supra* note 92; Interview with Y.Y.C., Musician, *supra* note 113.

318 See Interview with H.J.J., Musician, *supra* note 122; Interview with P.L.Y., Musician, *supra* note 229; Interview with W.K., Musician, *supra* note 93.

319 See *infra* Figure 29.

320 See, e.g., Interview with W.J. 1, Musician, *supra* note 92; Interview with W.K.X., Musician, *supra* note 188; Interview with Y.Y.C., Musician, *supra* note 113.

321 See MADDEN, *supra* note 87, at 36.

322 See, e.g., Interview with G.F., Musician, *supra* note 154; Interview with Y.Z., Musician, *supra* note 177; Interview with Z.D., Musician, *supra* note 113.

323 See, e.g., Interview with K.R., Musician, *supra* note 133; Interview with S.F., Musician, *supra* note 170; Interview with T.Y., Musician, *supra* note 139.

324 See Interview with L.L., Musician, *supra* note 174.

325 See, e.g., Interview with J.S.L., Musician, *supra* note 116; Interview with L.N., Musician, *supra* note 227; Interview with N.B., Musician, *supra* note 124; Interview with W.K., Musician, *supra* note 93; Interview with X.B., Musician, *supra* note 169; Interview with Y.W.M., Musician, *supra* note 199.

going on after so many years? Copyright piracy exists for a reason. It has become an industry.”<sup>326</sup> It appears a bit ironic that Chinese copyright law does more to deter authors whose copyrights are infringed than those who infringe others’ copyrights.<sup>327</sup>

### III. 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.<sup>328</sup> 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 incentives for music production in a way that not only caters to market demand but also allows for wider artistic freedom even though musicians seem to work mostly for intrinsic motivation.

#### A. THE INCENTIVE RATIONALE

The incentive rationale begins with an understanding of the economic features of the subject matters of copyright.<sup>329</sup> 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”).<sup>330</sup> “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 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

326 See Interview with W.J. 2, Musician, *supra* note 108.

327 Among the nine music labels interviewed, six mainstream labels had 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 Interview with C.S., Executive, *supra* note 106; Interview with J.S.L., Musician, *supra* note 116; Interview with W.M., Executive, *supra* note 106.

328 See *supra* note 2 and accompanying text.

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

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

and distribution.<sup>331</sup> 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 the reproduction and distribution of their works, which in turn generates market opportunities for 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” refers to the line of arguments that regard copyright law essentially as a hypothetical bargain between authors and the general public.<sup>332</sup> 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 noncommercial reasons.

According to the “autonomy approach,” 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 stands up to political interference and commercial manipulation.<sup>333</sup> Copyright law supplies a powerful incentive for creativity, not in the sense that authors would create exclusively for money, but in the sense that money protects authors’ autonomy in literary and artistic expression.

The “market approach” emphasizes that copyright law preserves the market as the principal mechanism to allocate resources to intellectual production and to connect authors with consumers in the most direct way possible.<sup>334</sup> 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 society.<sup>335</sup> The market mechanism has

331 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, game theory suggests that many users may underbid the work attempting to free ride other consumers’ contribution.

332 See *supra* note 2 and accompanying text.

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

334 See GOLDSTEIN, *supra* note 6, at 200 (“[T]here 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 independently). 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.”).

335 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

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 music for music's sake rather than for economic rewards.<sup>336</sup> 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.<sup>337</sup> 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 summarize 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.<sup>338</sup> 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.<sup>339</sup> To this extent, musicians do need an audience, although the size of the audience does not matter.
3. Peer respect: Musicians sometimes regard the recognition and respect from their fellow musicians (that is, professional reputation) as a powerful motivation for future creation.<sup>340</sup> Peer respect could take the form of professional awards or invitations from other musicians for collaboration.

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teaches how to allocate existing intellectual products to their highest socially valued uses. See Netanel, *supra* note 333, at 308–10. 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).

<sup>336</sup> In economic terms, the supply of creative works has low price elasticity to the extent that artists are not sensitive to price changes. For recent literature that questions the incentive rationale, see sources cited *supra* note 5.

<sup>337</sup> See Stan J. Liebowitz, *Is Efficient Copyright a Reasonable Goal?*, 79 GEO. WASH. L. REV. 1692, 1699–1700 (2011) (discussing whether copyright protection creates economic rent, which is relevant to the incentives for music production).

<sup>338</sup> See *supra* note 198 and accompanying text.

<sup>339</sup> See *supra* note 206 and accompanying text.

<sup>340</sup> See *supra* note 208 accompanying text.



From this perspective, musicians again need an audience, but a particular kind of professional audience.

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.<sup>341</sup> 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, such as promoting the dissemination of indigenous music.

The above four emotional benefits are listed in the order of increasing dependence upon the feedback from others.<sup>342</sup> 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.<sup>343</sup> 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, and referral and popularity may result in better music and 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.<sup>344</sup> The 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.

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341 See *supra* note 212 and accompanying text.

342 The economic benefits and emotional benefits roughly correspond to the well-known Maslow's hierarchy of needs, which includes 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. Nevertheless, the empirical evidence herein 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).

343 See *supra* note 186 and accompanying text.

344 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., Lizzie Azran, *In Defense of "Sell Out" Musicians*, NYU LOCAL (March 20, 2012), <http://perma.cc/C45P-S5S5>; Dorian Lynskey, *The Great Rock 'N' Roll Sellout*, GUARDIAN (June 30, 2011), <http://perma.cc/7U27-CG9Y>; Matt Rosoff, *Can Bands Sell Out Anymore?*, CNET (April 14, 2010), <http://perma.cc/GL4Y-AB8U>.

Transactions would no longer be attractive 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 believed that money can promote music creation even though musicians do not work for money, which apparently has a lot to do with the following costs involved in music creation:

1. Living Costs: Musicians need sufficient sources of income for their livelihood while pursuing their music dreams. Musicians should ideally be able to follow the maxim to “make a living by doing what you love.”<sup>345</sup>
2. Production Costs: Musicians need access to various musical instruments and recording equipment for music creation. They often need to collaborate extensively 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 independent musicians.<sup>346</sup>
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.<sup>347</sup>

### 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 the emotional benefits and economic benefits from being a musician exceed the total of the opportunity costs and production costs involved. This condition explains why some musicians turned down lucrative non-music jobs in favor of music jobs. Taking an example discussed above, being an artistic director for films brings three times the economic

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<sup>345</sup> See, e.g., Interview with A.D., Musician, *supra* note 92; Interview with C.T., Musician, *supra* note 123; Interview with G.F., Musician, *supra* note 154; Interview with K.R., Musician, *supra* note 133; Interview with L.H. 1, Musician, *supra* note 92; Interview with L.H. 2, Musician, *supra* note 110; Interview with L.N., Musician, *supra* note 227; Interview with M.Z., Musician, *supra* note 229; Interview with P.L.Y., Musician, *supra* note 229; Interview with W.J. 1, Musician, *supra* note 92; Interview with W.K., Musician, *supra* note 93; Interview with W.X.F., Musician, *supra* note 91; Interview with Y.W.M., Musician, *supra* note 199; Interview with Y.Y.C., Musician, *supra* note 113; Interview with Y.Z., Musician, *supra* note 177; Interview with Z.D., Musician, *supra* note 113; Interview with Z.H.S., Musician, *supra* note 171.

<sup>346</sup> See *supra* note 322 and accompanying text. Notably, marketing costs and distribution costs are not included here because not all musicians are motivated to distribute their works as widely as possible.

<sup>347</sup> See *supra* note 168 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 of where and how to invest labor. For a general introduction to the opportunity costs relevant to the cultural industries, see RUTH TOWSE, *A TEXTBOOK OF CULTURAL ECONOMICS* 300 (2010).

benefits of being a musician.<sup>348</sup> However, for that individual, being a musician generates far more emotional benefits than being an artistic director. The artist therefore 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 (arguably not so far-fetched an assumption for corporate lawyers). However, musicians can only pay off their living and production costs through the economic benefits they receive, and the financial 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 time and energy 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.<sup>349</sup> This explains why many musicians are multiple-job-holders who earn the majority of their earnings from non-music jobs, but spend the majority of their energy on music jobs.<sup>350</sup>

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, even though that is 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 benefits from music creation, the wage 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

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348 See Interview with Y.Z., Musician, *supra* note 177.

349 What second job a musician may choose depends on how much money is required to bridge the gap between the economic benefits from her music job and her living costs plus production costs (which inversely correlates with how much she gets paid for the second job) and the difference between the net benefits of her music job and her second job. A musician would choose the second job for which the disparity 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.

350 See Interview with S.F., Musician, *supra* note 170; Interview with W.Z.L., Musician, *supra* note 93; Interview with Y.Z., Musician, *supra* note 177.

music creation, the wage difference would not be enough to outweigh the losses in emotional benefits or induce them to change careers. Among the latter group of musicians, if they are able to earn enough revenue 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 more quickly bridge the gap between the economic benefits from music jobs and living costs plus production costs. This effect naturally offers the third group of musicians (i.e., multiple-job-holders) more energy and time to spend on beloved music careers.<sup>351</sup>

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 musician to create commercial jingles.<sup>352</sup> The reason is that commercial jingles, while generating more economic benefits for the musician, may affect her emotional benefits in several ways: it may compromise her artistic integrity, divert from the messages she wants to convey through music, decrease her reputation among peer musicians and constitute a sell-out signal that 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

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351 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 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 like multiple job-holders. See David Throsby, *A Work-Preference Model of Artist Behaviour*, in *CULTURAL ECONOMICS AND CULTURAL POLICIES* 69, 69 (Alan T. Peacock & Ilde Rizzo eds., 1994).

352 Many musicians hardly enjoy doing lucrative synchronization works and would prefer to create as little as possible, if it were not essential for livelihood. See, e.g., Interview with A.D., Musician, *supra* note 92; Interview with C.T., Musician, *supra* note 123; Interview with H.X.T., Musician, *supra* note 106; Interview with J.S.L., Musician, *supra* note 116; Interview with L.D., Musician, *supra* note 106.

musicians who create niche music would obtain maximum emotional benefits but sacrifice substantial economic benefits. 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.<sup>353</sup>

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 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 (such as 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.<sup>354</sup>

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 whose 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.<sup>355</sup> Technological developments can potentially motivate all musical works, including those that generate purely emotional benefits, because they may decrease production costs equally for all musical works regardless of any market value. By contrast, although copyright protection is understood to assist musicians in recouping economic benefits from their works,<sup>356</sup> 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

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353 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 that a financial reward for a job may discourage an individual who is already intrinsically motivated to engage in that same job. See, e.g., TERESA M AMABILE, *CREATIVITY IN CONTEXT: UPDATE TO THE SOCIAL PSYCHOLOGY OF CREATIVITY* 115 (1996); EDWARD L. DELI & RICHARD FLASTE, *WHY WE DO WHAT WE DO: THE DYNAMICS OF PERSONAL AUTONOMY* 29 (1995); BRUNO S. FREY, *ARTS & ECONOMICS: ANALYSIS & CULTURAL POLICY* 149 (2003).

354 See Interview with H.J.J., Musician, *supra* note 122; Interview with L.D., Musician, *supra* note 106; Interview with N.B., Musician, *supra* note 124.

355 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.

356 This Article 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.

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.<sup>357</sup> 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 (we will call these musicians the “First Group”). 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 this 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 (these musicians are the “Second Group”). But, 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 (these musicians are the “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 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.<sup>358</sup> 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 faster than the first scenario.<sup>359</sup>

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357 See, e.g., Francisco Alcalá & Miguel González-Maestrea, *Copying, Superstars, and Artistic Creation*, 22 INFO. ECON. & POL’Y 365, 366 (2010) (indicating that piracy reduces superstars’ earnings and the incentives to invest in promotion).

358 See *supra* note 178 and accompanying text. A 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*, 81 S. ECON. J. 357 (2014).

359 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.

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 create mainstream music of a different nature, they would generate new demand and, therefore, new surplus. Directing their 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 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 that copyright secures market signals for music creation, and the autonomy approach that suggests that copyright protects musician autonomy appear to have more explanatory power than the bargaining approach that argues that copyright represents a hypothetical bargain between authors and legislators but gives little indication which and how many musical works should be produced.<sup>360</sup> 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 copyright subsists 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-benefit analysis—better copyright enforcement would only improve social welfare if its benefits (more works incentivized) exceed its costs (transaction costs and opportunity costs).

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360 See *supra* note 332 and accompanying text.

Nonetheless, the bargain approach itself does not tell you how to determine 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 the utmost importance on the diversity of expressive works from a democratic perspective and the government is generally worse than the market in promoting diversity.<sup>361</sup>

#### 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.<sup>362</sup> 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 a fresh perspective to understand the endowment effect.

For example, consider the following scenario: a music publisher is interested in buying out the copyrights in a musical composition for commercial exploitation, including advertising, movies and television shows. The composer and the publisher may not identify a mutually beneficial price for the assignment even though they agree upon the magnitude of the economic benefits from those exploitations. The reason is that the emotional benefits are inalienable from the composer, as discussed above<sup>363</sup>—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, though improbable, that a commercial success eventually boosts her reputation. The inherent uncertainty in entertainment markets dictates that merely a small number of movies and shows accomplish modest success. More importantly, it has been shown that emotional benefits and economic benefits usually exhibit an inverse relationship, especially for niche musicians. Commercial exploitations, such as jingles, could compromise her artistic integrity, alter the messages she wishes to convey, create a music-smith reputation among her peers and send a sell-out signal that distances her original

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361 The bargain approach, which originated in patent law, is also influential in copyright law. See, e.g., *Eldred v. Ashcroft*, 537 U.S. 186, 224–25 (2003) (Stevens, J., dissenting) (arguing copyright represents a quid pro quo between the state and the author).

362 For a series of empirical experiments that study the endowment effect under copyright law, see generally Christopher Buccafusco & Christopher Jon Sprigman, *The Creativity Effect*, 78 U. CHI. L. REV. 31 (2011); Christopher Buccafusco & Christopher Jon Sprigman, *Valuing Intellectual Property: An Experiment*, 96 CORNELL L. REV. 1 (2010); 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).

363 See *supra* note 344 and accompanying text.



fans.<sup>364</sup> While deliberating on the buyout price, the composer would take into account the fact that 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 reasonably would 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. It would be difficult to reach an agreement in the cases where commercial exploitations could potentially impose a substantial impact to the artist's emotional benefits, and rightfully so. Forced transactions that ignore emotional benefits would not generate 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 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 excessively undermine 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.<sup>365</sup> The right of attribution would ensure that increased

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<sup>364</sup> See *supra* note 352 and accompanying text.

<sup>365</sup> The Copyright Act only provides a scaled-down version of moral rights, and only for works of visual arts. Compare 17 U.S.C. § 106A (2012), with Berne Convention for the Protection of Literary and Artistic Works, art. 6*bis*, Sept. 9, 1886, as amended Sept. 28, 1979, 102 Stat. 2853, 1161 U.N.T.S. 30. 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, 15 U.S.C. § 1125(a) (2012)) and cast doubts on the argument that moral rights are

emotional benefits, such as reputational gains from movies and 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, theoretically, could 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.<sup>366</sup> Such legal principles would also provide objective standards regarding what actions have undue effects on emotional benefits and therefore minimize the holdout problem.

### E. 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, such as certain new uses resulting from recent technological developments.<sup>367</sup> If artists create works in anticipation of the economic benefits provided by copyright law, the uses unforeseeable 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 creation. 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.<sup>368</sup>

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. Meanwhile, they stated that the current level of copyright protection in China was insufficient and copyright law should provide stronger incentives for music creation. Such findings appear to be contradictory at first blush: how do musicians manage to evaluate whether copyright protection is sufficient or not, if they hardly comprehend anything in copyright law? The concept of legal culture brings a powerful explanation for the findings.<sup>369</sup> Musicians have formed their copyright culture—i.e., ideas, values and attitudes toward copyright law—not through following the

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currently sufficient in the United States. See *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23, 33 (2003).

<sup>366</sup> In other words, moral rights herein would function in the same way as the Uniform Commercial Code (UCC), which supplements—and may be superseded by—explicit contractual terms.

<sup>367</sup> See generally Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1605 (2009); Christina Bohannon, *Copyright Harm, Foreseeability, and Fair Use*, 85 WASH. U. L. REV. 969, 974 (2007).

<sup>368</sup> See, e.g., ROBERT PITKETHLY, UK INTELLECTUAL PROPERTY OFFICE, UK INTELLECTUAL PROPERTY AWARENESS SURVEY 2006, at 11 (2006), available at <http://perma.cc/Z2Q7-63BD> (stating that “awareness of the [IP] system is a pre-requisite for it to work”).

<sup>369</sup> See *supra* note 194 and accompanying text.

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.<sup>370</sup> When musicians described copyright law using the phrases as “decorative,”<sup>371</sup> “non-existent”<sup>372</sup> and “a piece of meaningless paper,”<sup>373</sup> 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.<sup>374</sup>

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.<sup>375</sup> Another musician explained why he saved all his works as demos instead of producing full-length albums by telling a story about one of the best modern guitarists: the guitarist earned his living by teaching drumming classes at a music conservatory, and sometimes lived upon food provided by his students in order to save money for instruments.<sup>376</sup> As devoted as the guitarist was, his albums still collected 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

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370 See Interview with L.L., Musician, *supra* note 174.

371 See Interview with S.F., Musician, *supra* note 170; Interview with W.X.L., Musician, *supra* note 233.

372 See Interview with D.Q., Musician, *supra* note 93; Interview with W.X.L., Musician, *supra* note 233; Interview with Z.J.H., Musician, *supra* note 116.

373 See Interview with W.K., Musician, *supra* note 93; Interview with W.Z.L., Musician, *supra* note 93.

374 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.

375 See Interview with L.D., Musician, *supra* note 106.

376 See Interview with L.Y., Musician, *supra* note 122. Notably, the forward-looking argument suggesting the revenues from existing works may encourage the creation of future works was briefly mentioned in *Eldred v. Ashcroft*, 537 U.S. 186, 207 n.15 (2003).

are exactly what affect their decision-making where creativity is supposed to be an ongoing process rather than a one-time impulse.

#### IV. CONCLUSION

The now-famous Samuel Johnson quotation, “No man but a blockhead ever wrote, except for money,”<sup>377</sup> has become a punching bag in recent copyright scholarship.<sup>378</sup> It would be more difficult 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 fiction, blog posts and YouTube videos, most of which are supposedly noncommercial. Furthermore, in the wake of prevalent copyright piracy, the musicians who persist in the music profession are precisely those who care little about economic benefits. As this Article quoted above, “You have to be crazy these days to go into the music industry for money.”<sup>379</sup>

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 demonstrated that copyright incentives—although not something most 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 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.

In other words, copyright law could supply powerful incentives 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.

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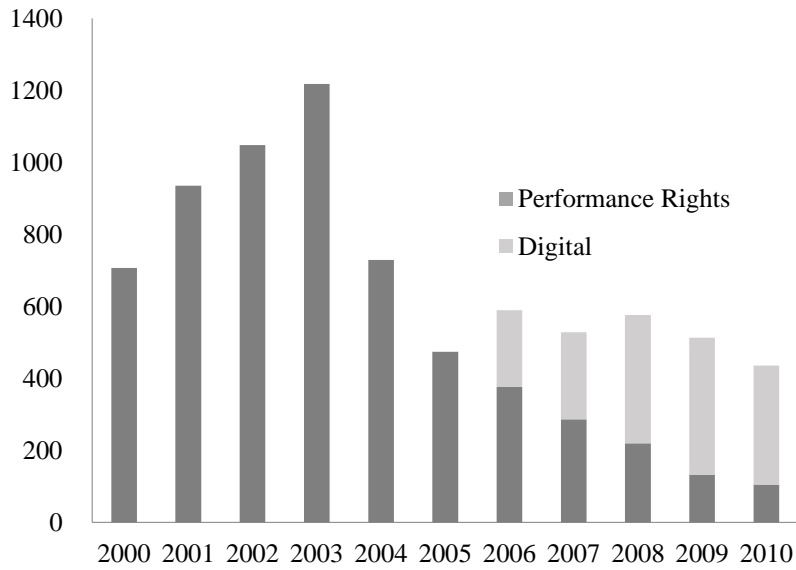
377 See, e.g., *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 584 (1994) (quoting 3 JAMES BOSWELL, *LIFE OF JOHNSON* 19 (George Hill ed. 1934)).

378 See Tushnet, *supra* note 5, at 517; Johnson, *supra* note 5, at 628.

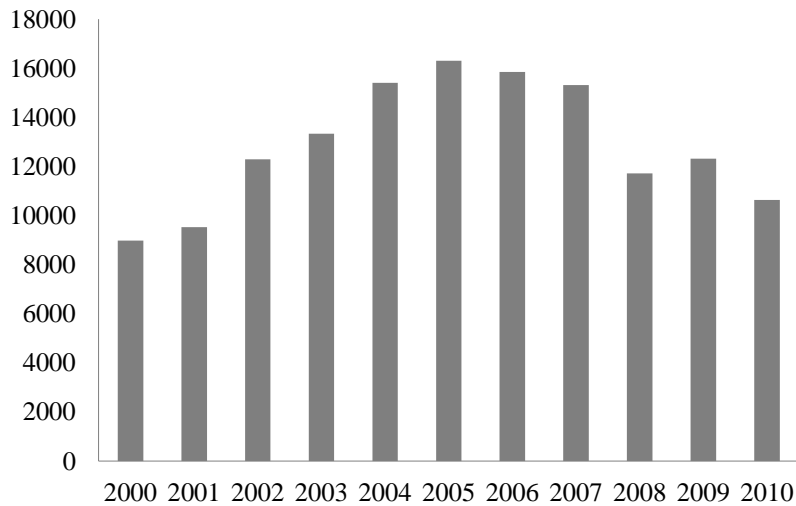
379 See *supra* note 216 (quoting Interview with L.H. 2, Musician, *supra* note 110).

APPENDIX

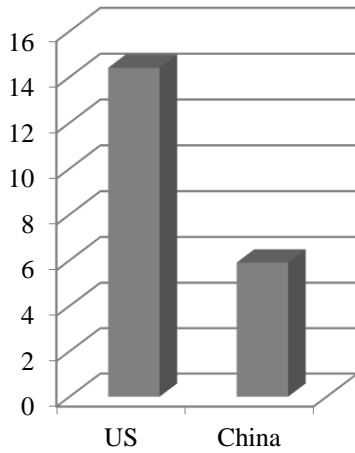
**Figure 1**  
**Recorded Music Trade Value Trend**  
**(China: RMB Millions)**



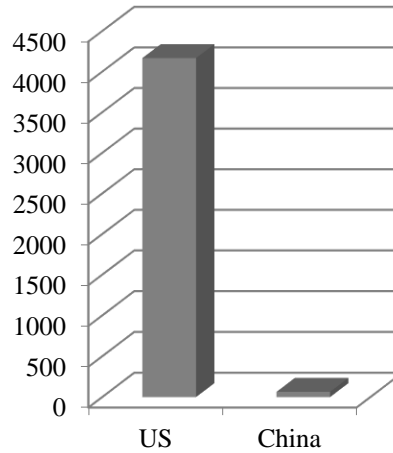
**Figure 2**  
**Record Production Trend**  
**(China: Titles)**



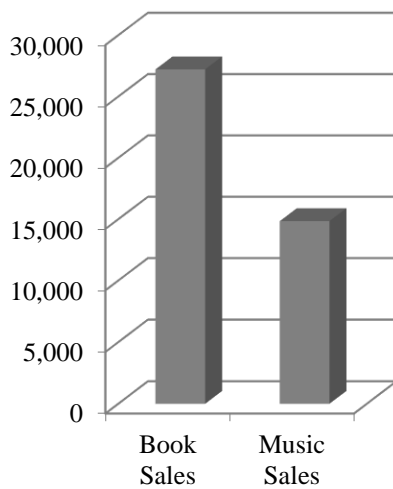
**Figure 3**  
**GDP 2010**  
**(US\$ Trillions)**



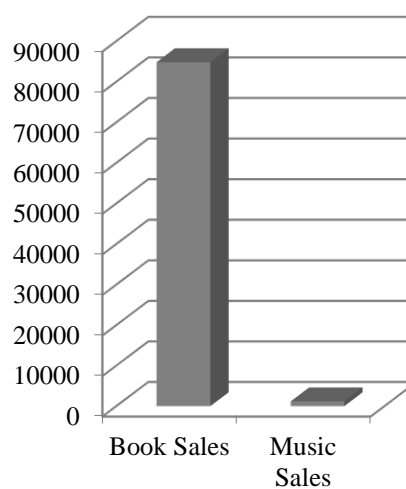
**Figure 4**  
**Music Sales 2010**  
**(US\$ Millions)**



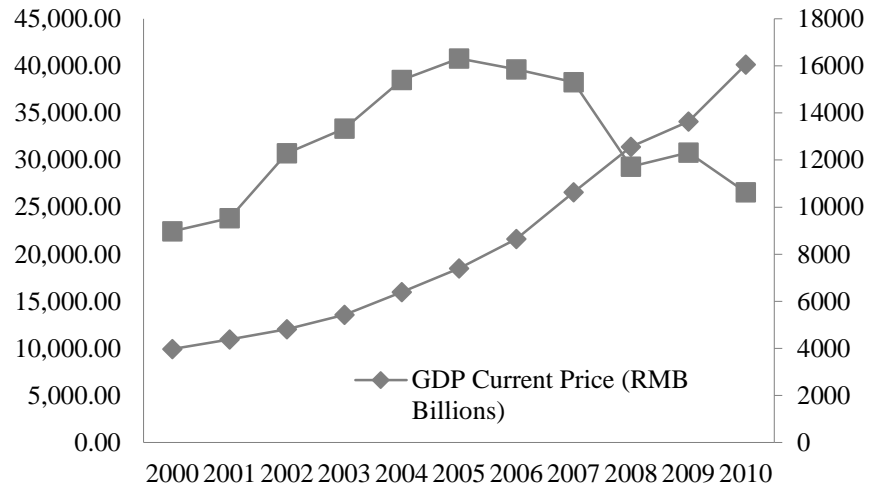
**Figure 5**  
**US 2009**  
**(US\$ Millions)**



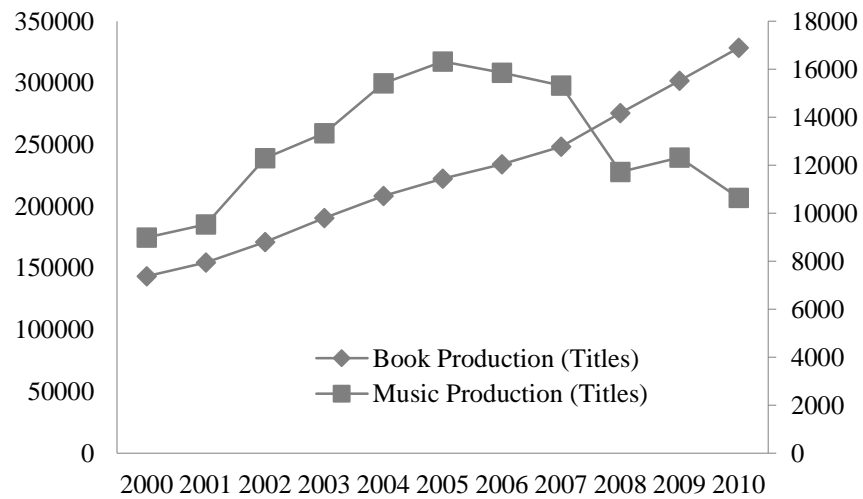
**Figure 6**  
**China 2009**  
**(RMB Millions)**



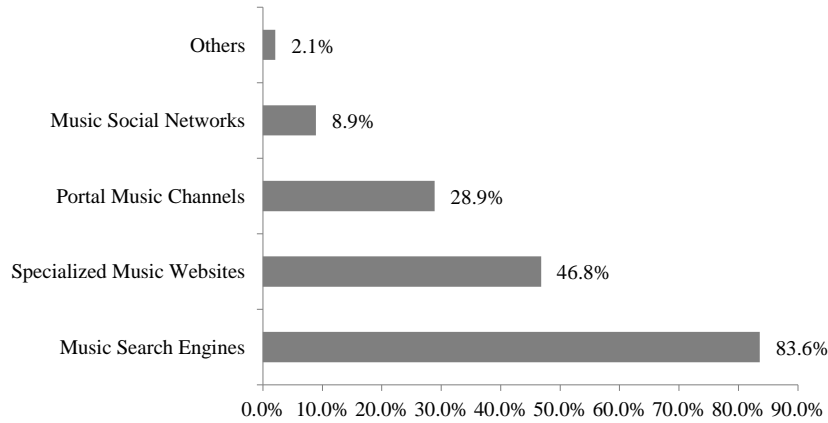
**Figure 7**  
**GDP Growth & Record Production Trend**  
**(China)**



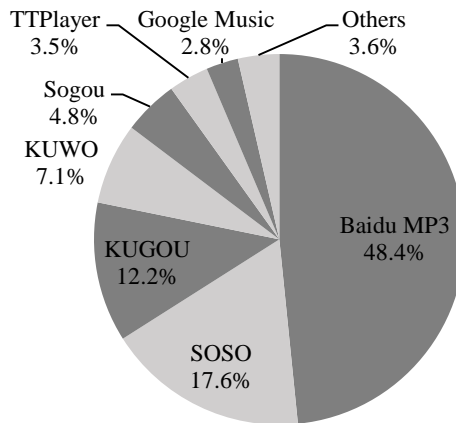
**Figure 8**  
**Book Production Trend & Record Production Trend**  
**(China)**



**Figure 9**  
**Major Channels to Access Music by Online Music Users**  
**(China)**

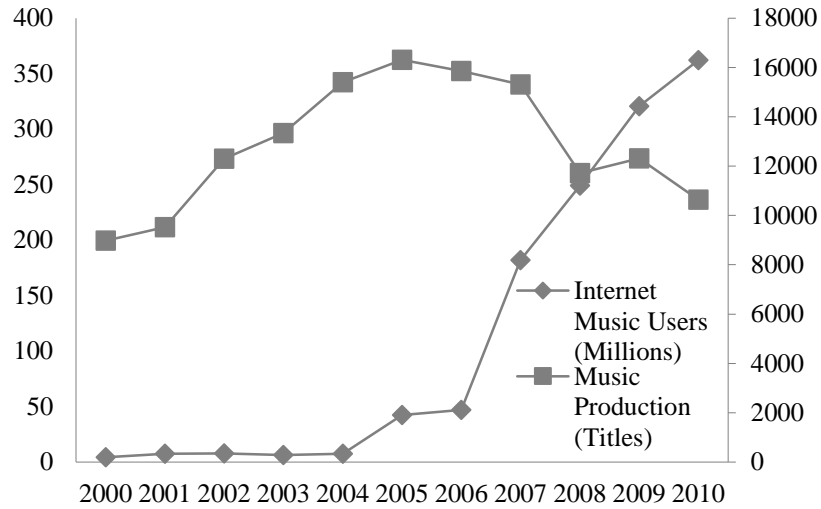


**Figure 10**  
**Music Search Engine Market Shares by Revenue**  
**(China)**

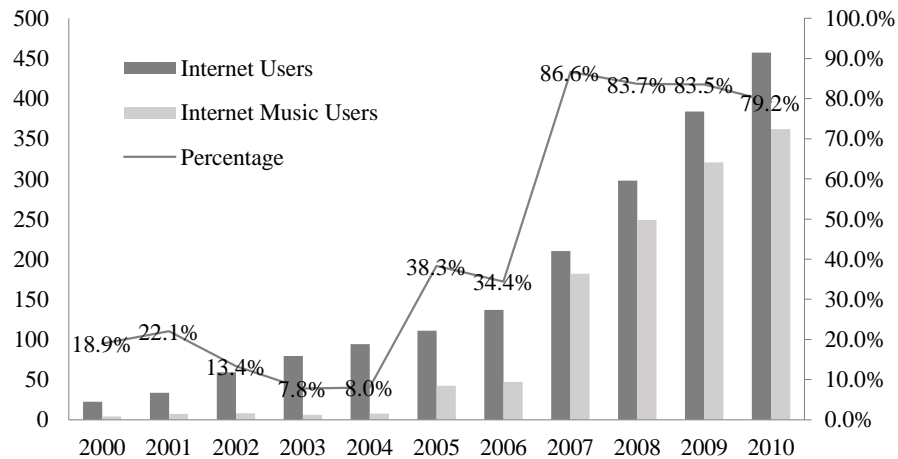




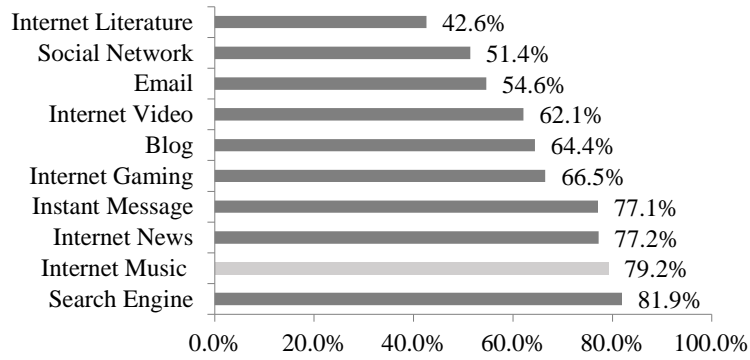
**Figure 11**  
**Online Music Usage & Music Production Trend**  
**(China)**



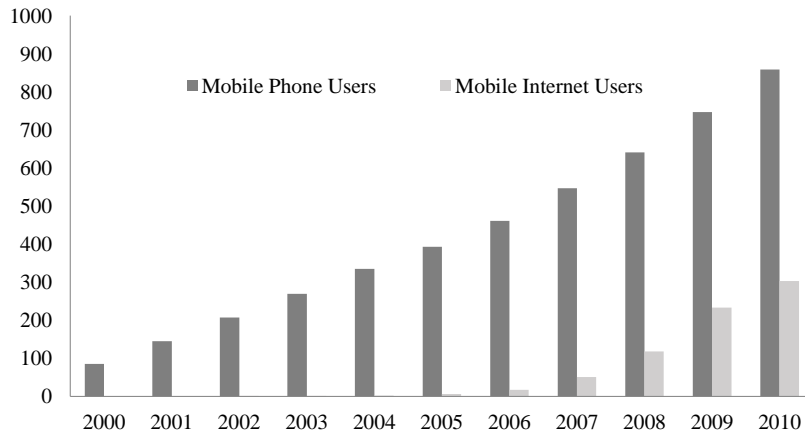
**Figure 12**  
**Internet Music Users as a Proportion of Total Internet Users**  
**(China: Millions)**



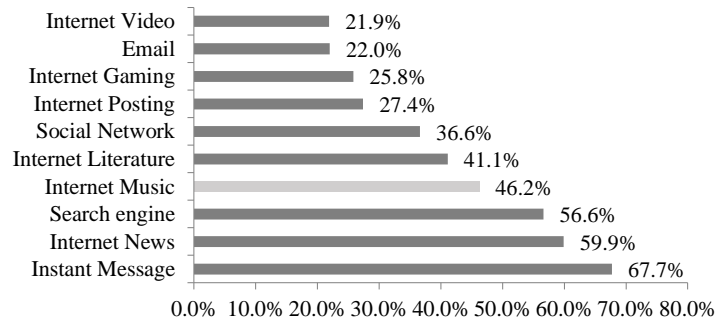
**Figure 13**  
**Internet Application Rankings**  
**(China)**



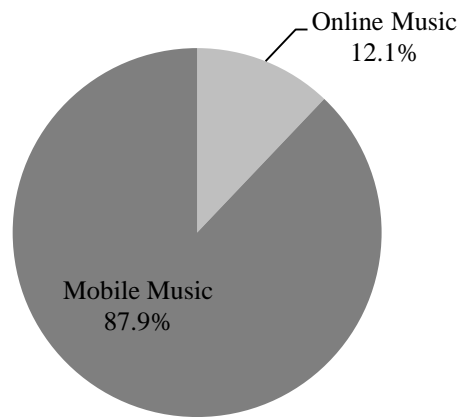
**Figure 14**  
**Mobile Internet Users as a Proportion of Mobile Phone Users**  
**(China)**



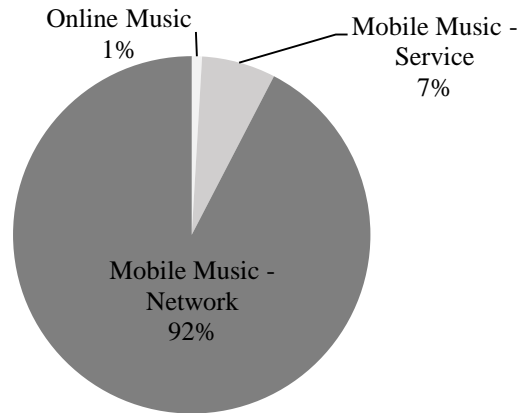
**Figure 15**  
**Mobile Application Rankings**  
**(China)**



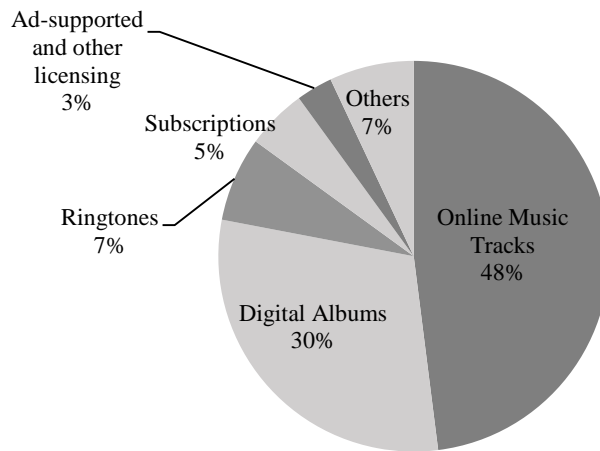
**Figure 16**  
**Digital Music Market – Service Providers**  
**(China: RMB Billion)**



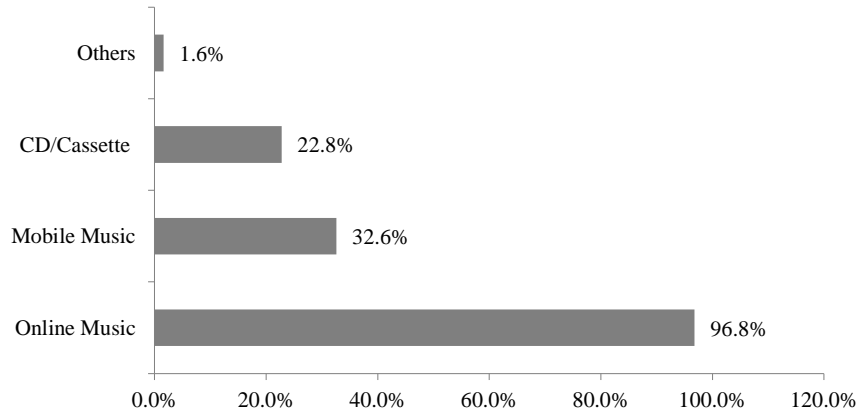
**Figure 17**  
**Digital Music Market – Network Providers Included**  
**(China: RMB Billions)**



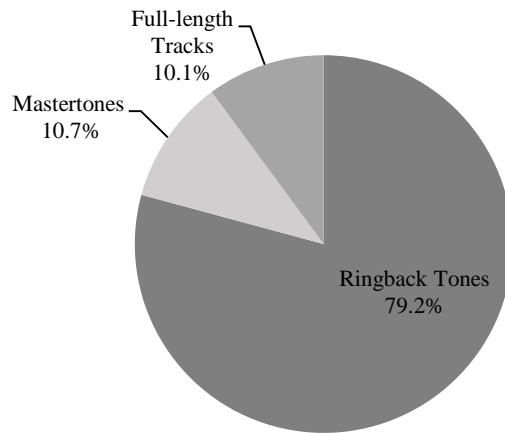
**Figure 18**  
**Digital Music Market**  
**(US)**



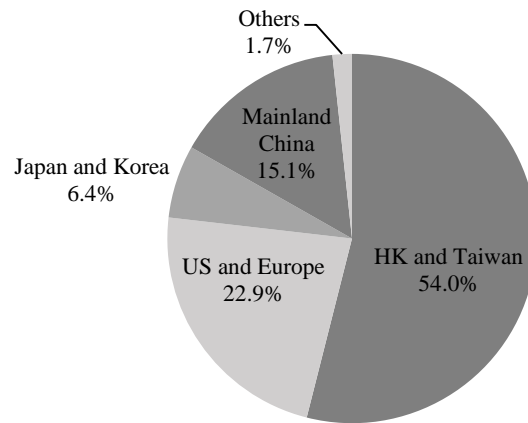
**Figure 19**  
**Major Channels for Music Access**  
**(China)**



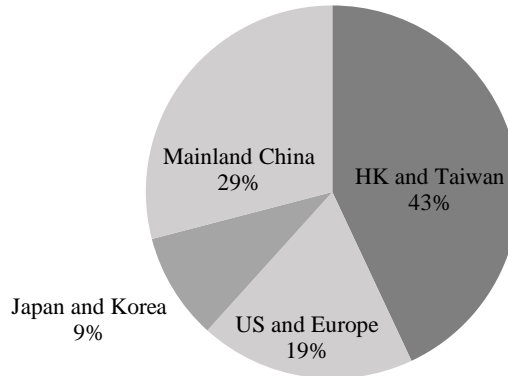
**Figure 20**  
**Central Music Platform Product downloading Shares – China Mobile**  
**(China)**



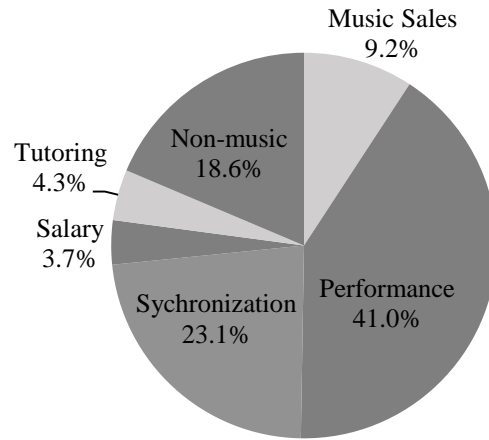
**Figure 21**  
**Origins of Pop Music that Online Music Users Favor**  
**(China)**



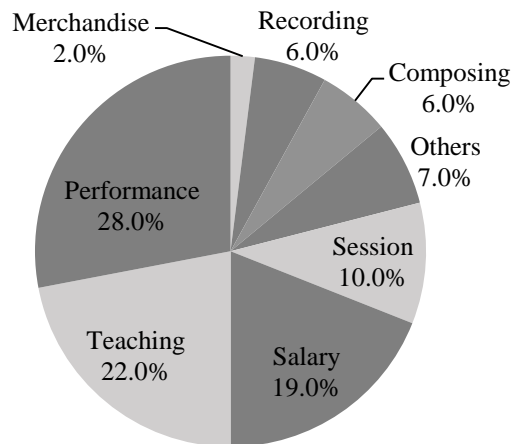
**Figure 22**  
**Origins of Pop Music that Mobile Music Users Favor**  
**(China)**



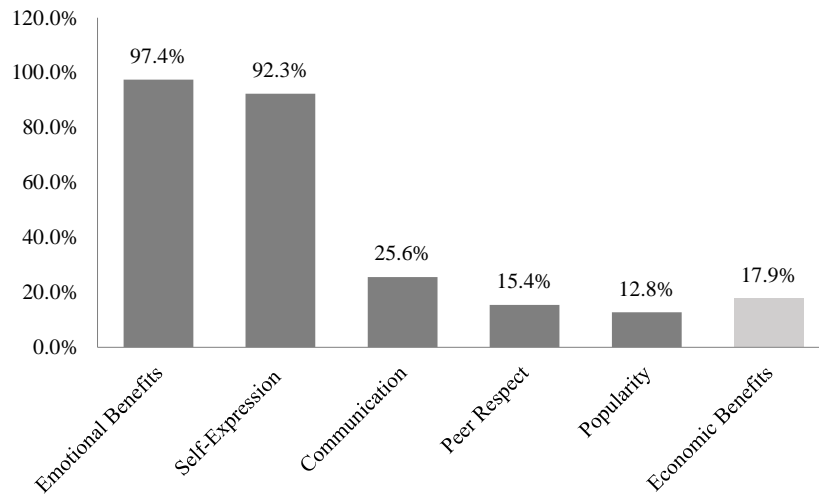
**Figure 23**  
**Sources of Income for the Musicians**  
**(China)**



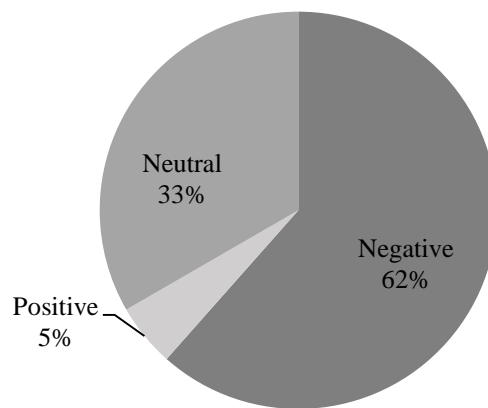
**Figure 24**  
**Sources of Income for the Musicians**  
**(US)**



**Figure 25**  
**Motivations for Creation**

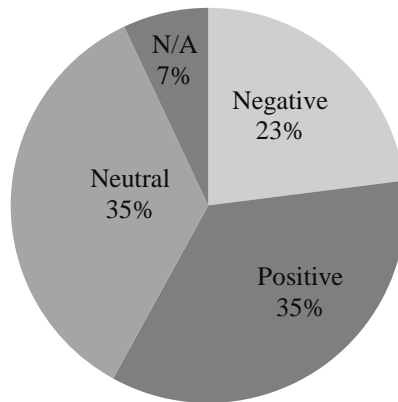


**Figure 26**  
**Attitudes towards Piracy**  
**(China)**

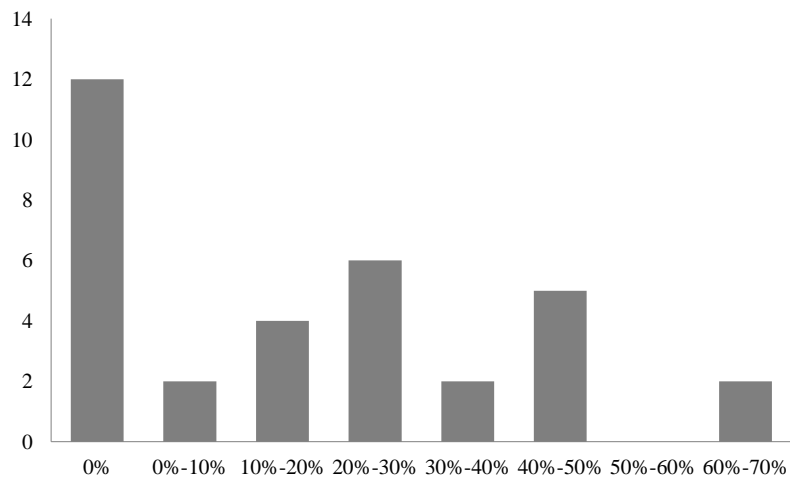




**Figure 27**  
**Attitudes towards Piracy**  
**(US)**



**Figure 28**  
**Distribution of Piracy Rates Suggested by Musicians**



**Figure 29**  
**Responses to Infringement**

