

Music industry and copyright protection in the United States and China

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Abstract

From the standard economic rationale, music copyright supports the rights of authors and creators to exclude competitors and the public from accessing and copying their works to the extent necessary to provide incentive to recover the investment they made in creating those works. The necessary extent in music copyright is from the interplay of three historical drivers of copyright policy—technology (which makes things possible), the market (which gives rise to consumer demand and companies delivering goods and services to satisfy those consumers), and the law (which determines the rules of the road). Due to differences in cultural traditions and historical developments, these processes have been different for the United States and China. This “In Focus” report briefly explores intellectual property and music copyright in these two countries from an historical perspective, comments on their current state, and reflects on future directions.

Keywords

China, copyright law, music, United States

The United States and China are each confronting the challenge of updating their copyright laws in a way that is consonant with their intellectual traditions. The theoretical underpinnings for copyright policy in the Anglo-American tradition are quite distinct from tenets of Confucianism within the Eastern tradition (from which the spirit of Chinese law is derived); as a result, the development

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of copyright law in each country has followed very different paths. This “In Focus” report introduces and gives a brief historical perspective of copyright law in the United States and China—especially with respect to the media and entertainment industries, and the music industry in particular—to serve as a basis for their comparison. In addition, we reflect on how new markets and technologies have impacted the efficacy of each country’s copyright policies, with a goal of understanding how China and the United States might approach the future of copyright law.

History and US intellectual property policy

US copyright law is derived from the Statute of Anne, created as an act of the Parliament of Great Britain passed in 1710. This Anglo-American copyright tradition is based, in large part, on utilitarian justifications, personhood, and the theories of John Locke (1764). The utilitarian theory emphasizes the social benefit of the production of creative works and justifies monopolistic incentives to innovate, while Lockean theories postulate that rights are justified in notions of personhood and in relation to labor and merit.

The stated goal of copyright in the Statute of Anne was “for the Encouragement of Learned Men to Compose and Write useful Books,” while the “Progress Clause,” Article I, Section 8, Clause 8 of the United States Constitution, empowers Congress “to Promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.” The fundamental utilitarian copyright mechanism, set forth in both the Statute of Anne and the “Progress Clause,” is the statutorily created (i.e. enacted by legislators), time-limited monopoly to incentivize creativity for the public good, after which, the monopoly expires and the creative work passes into the public domain. This time-limited monopoly has been adopted in the copyright laws of virtually every country in the world. Striking the appropriate balance between the monopoly grant to copyright owners and serving the public interest has proven to be an ongoing challenge for policymakers.

In the more than two centuries following the enactment of the first copyright law under the new United States Constitution in 1790, the concurrent interplay among technological advancements, market forces, and the law resulted in a gradual, organic, albeit complex, development of copyright policy in the United States.

Underpinnings of copyright law in the United States through 1900

While the development of copyright policy in the United States focused primarily on an economic rationale, this was not the only Western intellectual tradition supporting the justification of copyright in the 19th century. The more personhood-based theory of “droit d’auteur” (rights of the author) or “droit moral” (moral rights), including the author’s right of attribution and the right to prevent the mutilation of a work, had gained much momentum in continental Europe. This led to the adoption of the “Berne Convention for the Protection of Literary and Artistic Works,” in 1886, which is the world’s oldest international copyright treaty focusing on the rights of authors (Rudd, 1971). Today, virtually every industrialized country in the world is a signatory to the Berne Convention, including the United States (1989) and China (1992).

In 1890, the US Congress passed The Sherman Act, the first antitrust law in the United States, in order to promote fair competition for the benefit of consumers. The Sherman Act outlawed “every contract, combination, or conspiracy in restraint of trade,” and any “monopolization, attempted monopolization, or conspiracy or combination to monopolize” (Sherman Anti-Trust Act,

1890). The application of antitrust principles would prove to have a significant impact on the structure of the music industries and the implementation of copyright law in the United States in the 20th century.

The music industry and developments in 20th century US copyright law

A succession of disruptive technological developments in the 20th century (i.e. player pianos, phonograph records, CDs, the Internet, digital downloads, and streaming) created new commercial exploitations of music, which in turn prompted a cycle of lawsuits and thereafter, legislative responses from the US Congress. The first of these technological developments, the player piano, used musical works without permission, which prompted Congress to include a so-called “mechanical license” provision in the Copyright Act (1909) to allow for the “mechanical” reproduction and distribution of musical works.

In deciding how to strike the appropriate balance between the monopoly interests of the publishers and the social benefit of new mechanical technologies, Congress created an exception to the exclusive rights of the author—once the copyright holder had licensed the first mechanical reproduction of a musical work, the “statutory license” would allow anyone thereafter to make a mechanical reproduction of a musical composition without the consent of the copyright owner, provided that person adhered to the provisions of the license, including the payment of a mechanical royalty rate determined by Congress (Copyright Act, 1909).¹ In 1927, the National Music Publisher’s Association founded the Harry Fox Agency to administer the statutory mechanical license.

The public performance right for music, first established by Congress in the late 19th century, was further codified in the 1909 Act (Copyright Act, 1909).² In 1914, a group of composers and publishers realized that it was impractical to attempt to license, police, and enforce the huge number of public performances of every musical work throughout the United States, so they formed the performance rights organization (“PRO”) called the American Society of Composers, Authors and Publishers (ASCAP) to enforce their so-called “small performance rights” (also known as “non-dramatic rights”). Soon thereafter, ASCAP implemented a “blanket license,” pooling the musical copyrights held by their composer, authors, and publisher affiliates and collectively licensing those rights to music users (e.g. restaurants, clubs, radio stations and later television stations) for a single fee, without resorting to individualized licensing determinations or negotiations.

The benefits of the marketplace dynamic were aptly described by Frederic Boucher (1987):

This “milieu” in which ASCAP (and thereafter, in 1939, Broadcast Music Inc. (BMI)) emerged dictated creation of an unusual licensing technique, which would accomplish several objectives: (i) permit users rapid access to a large body of copyrighted material; (ii) avoid the cost and delay of individual negotiations over specific copyrighted works; and (iii) ensure the copyright owners reasonable payment for exploitation of their works. What emerged is a form of license called the blanket license, at once a brilliant solution to a thorny problem and, as experience has shown, a potent tool of monopoly.

While the blanket licenses did bring great efficiency to the marketplace, this consolidation of market power raised antitrust concerns. In 1941, ASCAP and BMI’s licensing practices became subject to antitrust consent decrees (i.e. agreements to resolve a dispute without admission of liability or guilt) overseen by the Antitrust Division of the Department of Justice and enforced by federal district courts in New York City (US Department of Justice, 2014).

The interplay of technology, markets, and the law during the 20th century coalesced into the creation of a somewhat consistent, if not complicated, treatment of musical works. However, the same cannot be said for phonorecords, which were not even recognized as federally protected copyrightable matter until 1972. Congress finally extended federal copyright protection to sound recordings, but due to effective lobbying of Congress by The National Association of Broadcasters (“NAB”), that law expressly excluded a performance right for sound recordings (Sound Recordings Act, 1971).

Congress passed the Copyright Act (1976), which remains the fundamental framework of copyright law in the United States to this day. The duration of copyright for pre-existing works was extended to 75 years, for new works it was expanded to the life of the author plus 50 years, or 75 years in the case of works made for hire. In addition, the scope of protection was expanded to all works “fixed in a tangible medium of expression.” Congress also added many new compulsory licenses (i.e. a governmentally mandated license to use a copyrighted work without the consent of the owner), and codified fair use (copying of copyrighted material done for a limited and “transformative” purpose, such as to comment upon, criticize, or parody a copyrighted work).

In response to advances in digital technology (e.g. digital audio recording technology, the development of the MP3 format, and the public launch of the Internet), the Copyright Act (1976) was updated several times, including the Audio Home Recording Act (1992) (to implement a royalty payment system and a serial copy management system for digital audio recording), The Performance in Sound Recordings Act (1995) (which recognized, for the first time, a performance right for sound recordings, limited to “digital audio transmissions”), and the Digital Millennium Copyright Act (1998) (which provided safe harbors for online service providers, a statutory license for non-interactive webcasting of sound recordings, and anti-circumvention measures, which prohibits people from “breaking” or hacking into any technological “lock” that controls access to a copyrighted work).

In 1999, the peer-to-peer sharing service Napster introduced the world to digital music distribution, but was quickly shut down because its operations constituted copyright infringement (*A&M Records v. Napster*, 2000). Some observers argue that the Napster decision has stifled progress and innovation in the United States and represents an imbalance of the public and private interests at the heart of copyright policy, which needs to be rectified (Carrier, 2012).

History and Chinese music intellectual property policy

Confucianism and music

Although theories about stages of economic development predict that governments in China will continue to improve intellectual property (IP) laws, some citizens there have continued to ignore them (Hsieh, Hsieh, & Lehman, 2003). The impact of Chinese tradition should be considered in understanding IP protection of music (Husted, 2000; Wan & Lu, 1997). China’s music economy can be traced back 4800 years ago in the *Zhuxiang* Clan period, and bone flutes as well as panpipes were used as main musical instruments in ancient music (Jin, 2006; Qin, 2012). Music since then has occupied a central role in Chinese life with a function to regulate society. Across thousands years of history, music was a social education tool used by Chinese ancient rulers.

Music had been part of the Kingdom’s culture and property and was not regulated by law. In ancient China, there was no division of civil law and criminal law in its legal system. The function of civil law, including IP law, was filled primarily by Confucian ethics (Lehman, 2006). Confucius

had participated in collecting and editing the classic book *Poetry* (诗经, the *Book of Songs*) which includes around 300 folk songs and sacrificial songs. Confucius emphasized that he transmitted rather than created these songs. He believed that intellectual knowledge of these songs was the common heritage of all Chinese people and could not be owned by private individuals (Shi, 2008). Confucius' idea suggests that copyright ideology should be based on moral concerns rather than legal regulation.

Music IP policy in China: a process promoted by technology and the market

There was no copyright statute before 1910 in ancient China. At that time, modern recording technology for music was not yet popular in the mainland, and music business in China only existed in the form of individual performers. From the Song Dynasty (AD 960) to the late 19th Century, live music was presented in the context of other performing arts such as dance and drama and took place at public places of entertainment known as *goulan wasi* (勾栏瓦肆), which became the leading sector of the music industry at that time (Liang, 2009). Such simple forms of music business did not have specific copyright protection.

The protection of book copyright did exist in the form of a writ (i.e. a written command from a legal authority). In order to protect the quality of works and the interests of their stakeholders, bookstores applied to local governments to issue a writ to protect the rights of publication. A writ declared that bookstores were dedicated to publishing books and no pirated printing was permitted. That said, these protection within these writs focused on the publisher rather than the author; the major goal of protection being not to protect IP, but to maintain the imperial legitimacy and power by censoring authors and the content of printed materials. This again points to the "moral" concern of copyright ideology (Liu, 2014).

In the early 20th century, the late *Qing* dynasty was facing severe challenges in the form of invasion from Western powers, as well as rising dissatisfaction and protest occurring within the nation. The commencement of "school songs" in 1900 (the singing of songs that played a critical role in mobilizing Chinese nationalism in school music education), influenced by "the Hundred Days Reform" (a consequence of the Opium Wars), is often considered the starting point of the history of contemporary Chinese music (Li, 2011). Foreigners first proposed the concept of copyright protection to the Qing dynasty via treaty (as there was no copyright law in China, foreign governments insisted upon formal agreements between countries to protect its IP interests); this, in turn, brought a change in copyright ideology to China. At the same time, Western music business activities began to influence the Chinese music industry, and recording technology was brought into China (Li, 2011). In 1904, the Chinese Peking opera were recorded and released for the first time by the Victor Talking Machine Company (Li, 2011). Since then, recorded music remained a dominant sector in the Chinese music industry until the 21st century, though its start was nearly 50 years later than China's Western counterparts (Liang, 2009).

Numerous newspapers, books, and magazines commenced circulation in China, and accordingly, copyright protection became an urgent requirement. At that time, a work could be protected only after it was officially registered (Wang, 2011). The "Copyright Code of Great Qing Dynasty" issued in 1910 clearly shows the modification of laws, having adapted to the trends of social development (Ai, 2004). The Copyright Code consists of five chapters, namely, general rules, the duration of right, submission, the limitation of right, and supplementary.

The copyright protection at that time mainly focused on protecting the interests of publishers and authors (Wang, 2011). It shows Chinese traditional copyright ideology. The exclusive right of

a writer does not commence at the moment the work is created, but instead must be obtained through registration and approval by the state in terms of publishing. After the overthrow of the Qing Dynasty (i.e. after the Revolution of 1911 that established the Republic of China), some parts of the Copyright Code of Great Qing Dynasty were temporarily applied by virtue of Presidential decree in March of 1912.

Western music, Western music education, and Western musical instruments were transmitted into China after the Opium Wars in 1898 (Li, 2011). Both Western music and Chinese folk music were performed in major cities. A number of music organizations and schools were established, including the Shanghai Municipal Council Symphony Orchestra, the National Conservatory of Shanghai, the Shanghai National Conservatory of Music, and so on (Li, 2011). These organizations held a series of concerts to promote music to the public, and soon these non-profit organizations set the stage for a new Chinese music industry. Albeit an immature marketplace for music, revenue was generated from public donations, membership fees, music instrument sales, and other sources (Li, 2011).

China's modern popular music can be traced back to the 1930s in Shanghai (Ge, 2009). The first Chinese popular song "Mao Mao Yu (Drizzle)" was composed in 1927 and popularized in 1929 (Li, 2013). The Chinese music industry began to integrate with other creative industries, including radio and film (Li, 2011). Although live music and the record business both existed at that time, the development of a sophisticated music industry developed slowly due to wars and an unstable social economy.

From 1949 to 1978, music and other cultural forms were viewed as a means of propaganda for the prevailing state political ideology (Ho, 2000). Content control was the major focus of state policy. After the open-door policy started in 1978, the state's culture policy gradually adapted to a "pluralistic" society's "tastes and values" (Ju, 1991). The cultural market, including the music industry, saw a boom.

It was during the late 1980s when mainland China first encountered a real development of popular music (Qiao, 2009). Pop songs in the style of northwest *Shanxi* folk songs (*xibeifeng*, 西北风) were trendy during the late 1980s and early 1990s, with the arrival of rock and roll.

On 25 July 1985, the State Council established the National Copyright Administration, administered by the National Publishing Administration. There was no systematic copyright protection until 1990, when the "Copyright Law of the PRC" was enacted. This law laid the formal groundwork for the legal recognition of authors' rights with respect to their creations, and musical compositions were added to the list of statutorily protected works (Liu, 2014).

In 1992, China agreed to the Berne Convention, and the Universal Copyright Convention (Chen & Maxwell, 2010). In 2001, China gained admission to the World Trade Organization (WTO), and in 2007, China accepted the amendment of the Trade Related Intellectual Property Rights Agreement (TRIPS), which spurred the development of new legislation and the marked expansion of governmental administration and the judiciary in China. A market economy was formally adopted by the government for domestic and foreign commerce, and the legal system was improved in order to facilitate the promotion of economic growth.

The first amendments to the 1990 "Copyright Law of the PRC" was added in 2001, which created 13 categories of economic rights, including the rights of reproduction, distribution, rental, exhibition, performance, screening, broadcasting, making cinematographic works, and communication through an information network (Liu, 2014). Inclusion of the right of "communication through an information network" was designed to enhance copyright protection in the era of digital

technologies. This amendment was designed to solve the mounting number of Internet-related copyright cases.

Technology, including computing and telecommunication, plays a significant role in music industry convergence. In the late 1990s, the convergence of digital and the music industry led to the creation of the digital music industry in China (Li, 2010; Li & Morrow, 2012; Montgomery, 2010; Zhang & Wang, 2009). In the early 2000s, mobile phones proliferated the marketplace, a series of mobile music companies appeared, and the music polyphonic ring-tone business rapidly expanded (Montgomery, 2010; Wang, 2012).

Gradually, the music industry has become an important element of the Chinese economy, and with the advancement of information technology, digital music has become the major part of its music industry. By 2006, the digital music sector constituted 36% of total sales (US\$26.8 million) in mainland China. More and more record companies began to enter into and transform China's digital music industry (Li, 2011). And with the expansion of the digital music industry came new challenges to copyright protection, especially during the 2000s when free downloads of music became commonplace in the online music market (Li, 2013). Music download websites neither protected the copyright of music owners' content nor shared the financial benefit with the owners; as a result, pirated music seriously impaired the growth of revenue in the digital music industry (Li, 2013; Montgomery, 2010). Because people can access musical products illegally by various approaches, the music industry has been in a depression since 2008 (Liu, 2014). In 2008, the annual distribution revenue of music albums decreased by 25% compared to 2007, and in 2009, it decreased by 40% compared to 2008 (Liu, 2014). This depression within the music industry required new laws and policy regulation.

In 2006, Regulations for the Protection of Information Network Transmission Right was enacted. In December 2006, the Ministry of Culture published *Suggestions on the Development and Management of Internet Music*, which insisted that Internet music companies should investigate the music uploaded to their websites by users. In August 2009, the Ministry of Culture published the *Notice of Strengthening and Improving Internet Music Content Censorship* (Ministry of Culture, 2009, No. 31), which defined and made clear the procedure for censoring imported music products. It also required music companies to register domestic music products with the Ministry of Culture (Street, Zhang, Simunjak, & Wang, 2015). Following this new regulation, the Ministry of Culture shut down hundreds of websites offering illegal content, and other websites were forced to delete pirated content, including multimedia and hyperlinks (Zhang, 2012).

In 2010, the Copyright Law of the PRC was revised. Collective management organizations, which represent groups of copyright owners, were established as not-for-profit organizations regulated by the NCAC (The National Copyright Administration of China). In addition, the revised law intended to remove "plagiarism and unauthorized modification" and ensure that radio and television stations pay for their use of copyrighted music (Hua, 2009; Street et al., 2015). A controversial statutory licensing measure was also introduced, one that allowed broadcasters to use music without contacting the original rights holder; such cases the onus of responsibility falls upon the rights owner, who are required to prove their ownership claims (Street et al., 2015). A second amendment to the Copyright Law of the PRC was added in 2012, which allows for music to be re-used after 3 months of publication without the consent of the rights holder, as long as the authorities were notified of the re-use, and fair compensation is paid (Street et al., 2015).

In 2012, the major music downloading and streaming platforms in China, including Baidu, QQ Music, Duomi, Kugou, and Kuwo, which represented nearly 95% of the market share,

reached an agreement to begin charging for music downloaded from the Internet (Qin, 2012). This development supports core principles of music copyright protection: music creators should be fairly compensated for their contributions, market participants should have access to license music, and usage and payment information should be transparent and accessible to rights owners (U.S. Copyright Office, 2015). The National Copyright Administration of China published a “Notice on Ordering Internet Music Service Providers to Stop Communicating Unauthorized Music Products” on 8 July 2015, stating that service providers must remove all unauthorized music from their websites by 31 July 2015; otherwise, they would be severely punished by law. It should be no surprise that, after this directive from the Chinese government, nearly 2 million songs were deleted from the web, making their illegal access much more difficult to come by (Street et al., 2015).

Copyright collection societies in China are “Quasi-Non-Governmental Organizations” (i.e. a hybrid form of organization with elements of non-government organizations and public sector organizations that provide governmental services); such organizations are limited in their ability to exercise and control related to copyright protection. China’s collective copyright management organization, the Music Copyright Society of China (MCSC), was established in 1992 and its practice lacks efficiency; for example, the MCSC has proven to be very limited in its ability to manage copyright royalty distribution (Liu, 2014).

The rapid development of China’s digital music industry requires fundamental legal reform and innovation through cultural and economic promotion government policies. Historically, due to the influence of Confucian ideology, music in China has taken a social education function. However, with the rapid advance of technology and music industry marketplace, attention to music copyright protection has become more and more important. In recent years, participants in the music industry marketplace have begun to cooperate with respect to copyright protection. The Chinese government’s licensing and supervision policies and implementation should become more fair and efficient. Keeping the balance between content that is free and openly available to the public as a whole (i.e. content in the public domain) and IP that is protected by copyright is crucial to future success for Chinese music industry.

Conclusion

While the development of the music industries in the United States and China has taken different paths, both countries face the very significant tasks of updating their copyright laws for the 21st century in order to achieve their respective social, economic, and cultural goals. The significance of this undertaking is reflected in supporting documentation for the Berne Convention for the Protection of Literary and Artistic Works:

Experience has shown that the enrichment of the national cultural heritage depends directly on the level of protection afforded to literary and artistic works ... In the final analysis, encouragement of intellectual creation is one of the basic prerequisites of all social, economic and cultural development. (Paris Act, 1971)

In February 2015, following an exhaustive analysis of industry practices, considerable dialogue with music creators and the businesses that represent and invest in their interests, as well as music services and distributors and other interested parties, the U.S. Copyright Office (2015) published a report: “Copyright in the Music Marketplace,” an in-depth analysis of the law and industry practices, as well as a series of balanced recommendations, to improve the music marketplace. These

observations have application to the music marketplaces in both the United States and China and reveal broad consensus among study participants on four key principles:

- Music creators should be fairly compensated for their contributions;
- The licensing process should be more efficient;
- Market participants should have access to authoritative data to identify and license sound recordings and musical works;
- Usage and payment information should be transparent and accessible to rights owners.

The US Copyright Office report also concluded that government licensing processes should aspire to treat similar uses of music alike and that government supervision should enable voluntary transactions while still supporting collective solutions. Finally, it recognized the need to create an authoritative public database and suggested that the government could have a role in establishing incentives for such a database through statutory licensing schemes. An authoritative database will certainly be essential if we are to achieve a healthy 21st century music marketplace.

The 27th US–China Joint Commission on Commerce and Trade (JCCT) meetings in November 2016 resulted in a declaration that both countries will commit to close cooperation over IP rights protection including information exchange and training programs (Office of the United States Trade Representative, 2016).

In a departure from previous policy, China will open online music distribution for foreign-invested enterprises. This openness to foreign investment for music industry enterprises operating in China should stimulate growth in China’s music industry marketplace, as well as the media and entertainment industry as a whole. Without doubt, a continuously improving system of IP and copyright law is an essential element of this anticipated growth.

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Notes

1.

... whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of two cents on each such part manufactured ...

2. “To perform the copyrighted work publicly for profit if it be a musical composition and for the purpose of public performance for profit ...”

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