Empirical Assessment of Copyright Enforcement:
A Comparative Study of the Music Industry in the P.R.C. and the R.O.C.

By
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A dissertation submitted in partial satisfaction of the
requirement for the degree of
Doctor of Juridical Science
in the
Graduate Division
Of the
University of California, Berkeley

Committee in charge:
Professor Robert P. Merges, Chair
Professor Peter S. Menell
Professor Brian D. Wright

Spring 2016
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Abstract

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Since 2000, the revenue of the music industry plummeted worldwide. Meanwhile, the advancement of technology created many changes that impacted the copyright law system, which raised doubts about the effectiveness and necessity of copyright law system. Many literatures related to this topic focused on the discussion about the North America and the Europe regions. In the past two decades, researchers started to explore the intellectual property right protection in the P.R.C.; however, few works emphasized the comparative perspective between the copyright protection in the P.R.C. and the R.O.C.

This dissertation argues that copyright law is still important to encourage and reward creativity. Under the utilitarian rationale, copyright law should be able to maintain incentive for authors and creators. By comparing the similarities and differences of legislation, law enforcement, judiciary, and unspoken rules in the music industry between the P.R.C. and the R.O.C., this dissertation aimed to find out what is the effect of copyright law enforcement on the music industry in the P.R.C. and the R.O.C. respectively?

Before 1990, the P.R.C. lacked the codification of copyright law. After the P.R.C. Copyright Law was promulgated, the multiple copyright enforcement regimes diluted the P.R.C.’s protection efforts. The laws, enforcement campaigns, and judicial decisions did not create significant impact on average citizens or the music industry. Even today, the P.R.C. Copyright Law is still ignored by many citizens in mainland China. On the contrary, the R.O.C. Copyright Act was promulgated relatively earlier, amended frequently, and was enforced consistently. In addition, the record companies’ business practices were introduced along with the entran of western music to Taiwan in the 1980s, and the unspoken rule to protect creator’s incentive and revenue stream was well established. It was believed that this great environment of the Taiwanese music industry attracted talents all over the Greater China region to Taiwan, and further made Taiwan the center of creativity for Mandarin Chinese music.

Through copyright law legislation and amendment, enforcement, judicial decision, and unspoken rules, the notion to respect copyright were embedded in most people’s minds in
Taiwan. Therefore, the record companies in Taiwan were willing to respect the hard work of composers, lyricists, and producers. This revenue stream maintained a virtuous circle that attracted new talents to join the industry, which it would be impossible to achieve without the existence of effective copyright law.

The evidence exhibited in this dissertation including the comparison between the music industry in mainland China and Taiwan, indicates that copyright enforcement is highly relevant to the robust music industry in Taiwan. On the contrary, a relatively late promulgation of copyright law and lack of effective copyright law enforcement were considered to be an important reason for the underdeveloped domestic music industry in mainland China.
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1 INTRODUCTION

Copyright has fulfilled various functions throughout history, including press control, censorship, to secure monopolies, trade regulation, and eventually becomes the primary rules to protect author’s right. As mankind progressed towards the digital era, it has become easy and relevantly efficient to produce, store, duplicate, and distribute copyrighted works, and this has completely altered the entertainment industry and the copyright law.

As technology advanced, consumers and businesses were benefited from the creativity, efficiency, and innovation that computer and the Internet enabled. On the other hand, some industries faced overwhelming challenges, and some were forced to adapt new business models to survive. Thus, many people started to question the function and necessity of copyright law in the Internet era. Proponents of copyright believed that copyright plays an important role in enriching “national cultural heritage,” and have positive effect on social, economic and cultural development. Contrarily, opponents of copyright assert that the current copyright system hinders innovation because of excessive protection.

The majority of scholars recognized the utilitarian rationale of copyright protection. Under the utilitarian rationale, the copyright regime should provide an environment for the authors and creators to create freely, and also maintain incentive for them to make a living as “creative professionals”. In order to enrich and preserve valuable literature and artistic works, it is necessary to understand the effects of the copyright law regime.

Copyright law is the principal method to protect literature and artistic works, yet copyright will not function properly without effective enforcement. Enforcing copyright law and granting reward to the authors and creators helps to ensure that copyrighted works will maintain their economic value. I argue in this dissertation that with an effective copyright enforcement regime, the creators and authors will be able to reap the reward of their labor, consequently music industry will be benefited from the creative professionals’ incentive to join and stay in the industry.

1 LYMAN RAY PATTERSON, COPYRIGHT IN HISTORICAL PERSPECTIVE 222-224 (1968).
2 See Bilski v. Kappos, 561 U.S. 593, 608 (2010) (“The Information Age empowers people with new capacities to perform statistical analyses and mathematical calculations with a speed and sophistication that enable the design of protocols for more efficient performance of a vast number of business tasks.”).
4 See CHRIS ANDERSON, FREE: HOW TODAY'S SMARTEST BUSINESSES PROFIT BY GIVING SOMETHING FOR NOTHING 225 (2009); Michael A Carrier, Copyright and Innovation: The Untold Story, 2012 Wis. L REV. 891, 950 (2012).
7 See WORLD INTELL. PROP. ORG., supra note 3, at 207.
This dissertation uses comparative research methods as a foundation to draw out the similarities and differences between People’s Republic of China (hereinafter the P.R.C.) and Republic of China (hereinafter the R.O.C.) copyright protection regime. The qualitative data are interwoven throughout the most of the sections, to serve as evidence of “linear property right” theory: if works that could be protected by copyright are freely appropriable to the public, incentive for creation will be lacking; contrarily, if private rights are granted to the creators and authors, the ideas will emerge at a more rapid pace. In short, the research question of this dissertation is: what is the effect of copyright law enforcement on the music industry in the P.R.C. and the R.O.C. respectively? What difference does copyright protection, which manifests in legislation, law enforcement, judiciary, and unspoken rules in the industry, affect to the music industry in mainland China and Taiwan?

Since the P.R.C. has been the economic powerhouse since 1990s, abundant literature focused on the intellectual property protection in the P.R.C. However, not much literature emphasized on the development on the other side of Taiwan strait – the R.O.C. The comparative study between the P.R.C. and the R.O.C. could provide arguably the closest cultural and ethnic background that is available. Besides, while most of the literature relied on second-hand resources, this dissertation provided first-hand empirical data collected in mainland China and Taiwan, from the actual participants of the legal profession and music industry in mainland China and Taiwan. Particularly, as the primary content provider of mainland China music industry, the Taiwanese interviewees could present the perspectives of supplier in the mainland China market, and reveal the untold stories.

Part 1 provides a general overview of this dissertation. Part 2 introduces the background information of this dissertation, including background on Chinese culture and copyright, music industry in mainland China and Taiwan, and the dynamics of the Greater China music industry. Part 3 provides the detailed methodology of this dissertation, and introduces the research question of this dissertation; in addition, rationales, approaches, and the limitations of comparative research and empirical research are also explained.

From Part 4 to Part 7, the sections are organized in chronological order. The chronological order is designed to show how copyright laws were enacted, enforced, applied, and its effect on the music industry. Part 4 outlines the progression of copyright laws in mainland China and Taiwan, which points out both laws were profoundly influenced by international copyright treaties or prevalent international standards. Part 5 illustrates the differences between enforcement regimes in mainland China and Taiwan, both of which have some unique characteristics that affect the enforcement result. Part 6 depicts the judiciaries of mainland China and Taiwan, with the emphasis on several landmark cases that impact the two copyright regimes. Part 7 depicts how copyright law enforcement regimes affect music industries in P.R.C. and R.O.C., which includes first hand qualitative data from the music industry in mainland China and Taiwan. Part 8 concludes how the copyright regime of P.R.C. failed to improve the music industry in
Introduction

mainland China. On the other hand, the copyright regime of R.O.C. facilitated the music industry in Taiwan, and grew to become the creative center of Mandarin Chinese music.
2 BACKGROUND

2.1 The Music Industry as Research Target

Music is considered the most accessible, personal, and prevalent part of the entertainment industry. Music industry is the center of the entertainment industry, having a vital role in all the other entertainment industry sectors, for instance television, radio, and films. In addition, in the Internet era, the music industry also generates tremendous added value to online business. Thus, I chose the music industry as the focus for my study to understand the effect of copyright enforcement.

2.2 Chinese Culture and Copyright

One of the common theories that is put forward to explain the lack of intellectual property protection in Chinese civilization, is that Chinese culture value disregards intellectual property. Many scholars believed that Confucianism, the most influential value of Chinese culture, embodies disregard for the notion of copyright. Born and raised in Chinese culture, the theory was unheard-of to me, and raised my curiosity. Many commentators cited the Book VII Chapter I of the Analects as a foundation to the theory:

The Master said, “A transmitter and not a maker, believing in and loving the ancients, I venture to compare myself with our old Pang.”

The above James Legge’s translation on the Analects was one of the earliest versions, and most other translations adopted his interpretation. The first sentence, 「述而不作」, translated by Legge as “a transmitter and not a maker” was an oversimplification of the sentence. The interpretations of authentic Confucian scholars in China were more widely accepted in the Greater Chinese region. First, renowned Song

8 HAROLD L. VOGEL, ENTERTAINMENT INDUSTRY ECONOMICS: A GUIDE FOR FINANCIAL ANALYSIS 228 (8th ed. 2010).
9 See id. at 238.
11 See, e.g., WILLIAM P. ALFORD, TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION 25 (1995) (discussing that the Confucianism promotes the wisdom of the past. In addition, the historical Chinese literature and art tend to follow past format, to pay respect of the past); MARTIN K. DIMITROV, PIRACY AND THE STATE: THE POLITICS OF INTELLECTUAL PROPERTY RIGHTS IN CHINA 20-21 (2009) (citing Alford, and contending that bureaucratic organization of P.R.C. was a greater obstacle to intellectual property law enforcement); Peter K. Yu, Piracy, Predjudice, and Perspectives: An Attempt to Use Shakespeare to Reconfigure the U.S.-China Intellectual Property Debate, 19 B.U. INT’L L.J. 1, 16-19 (2001) (suggesting that the Chinese are deeply influenced by Confucianism, knowledge of the past were encouraged to borrow or to transmit to younger generations. Therefore, the imperial Chinese people did not consider copying or imitation a moral offense).
13 Based on my research to almost all the English and Chinese version of the Analects available in East Asian Library of UC Berkeley.
14 The Analects was written during 475 BC–221 BC, in “Classical Chinese” or “literary Chinese.” The language in Analects was difficult to comprehend to most average Mandarin native speakers, and let along it was translated into another language.
dynasty Confucian scholar Zhu Xi (朱熹) (1130-1200) illustrated that the sentence was only intended to show that Confucius was a humble person, and it did not imply that Confucius disregarded creativity.\textsuperscript{15} Second, Southern dynasty Confucian scholar Huang Kan (皇侃) (488-545) explicated that the word 「作」 (“create”) particularly indicated the creation of “li yue” (禮樂).\textsuperscript{16} The creation of “li yue” means the enactment and creation of human relationship, manner, good faith, loyalty, righteousness, and music for ceremonies and special events. For Confucianism, it was particularly important to be in a particular position or social class to “create” li yue.\textsuperscript{17} Therefore, the intention of Confucius was to encourage people to do a fine job on their duty, and not overreach oneself.

Besides, if Confucianism did in fact disregard creativity as many scholars posited, it would certainly have the opposite effect in modern mainland China. Since the Cultural Revolution from 1966 to 1976 particularly aimed to eliminate Confucianism, and there was even a national campaign in 1974 to “Criticize Lin, Criticize Confucius.”\textsuperscript{18} It was not until 1980s, mainland China scholars gradually revived the research on Confucianism, but Confucianism was not as popular or influential as communism and Marxism.\textsuperscript{19} However, the copyright enforcement has not been effective in mainland China.\textsuperscript{20} But, by contrast the R.O.C. government continually promoted promoting Confucianism, and copyright enforcement has gradually improved over time.\textsuperscript{21} This cross-strait comparison suggests that the theory of Confucianism disregarded intellectual property protection is misplaced, and indicated that Confucianism was not a viable reason of copyright enforcement failure.

\subsection*{2.3 Music Industry in mainland China}

The music industry in mainland China was profoundly affected by recent Chinese history, especially after the 1960s. In May 1966, Mao Zedong launched the “Cultural Revolution” in China. The Revolution aimed to enforce communism, eliminate dissenters, and abolish traditions, which led to a disastrous era in mainland China. In December 1978, the “Chinese Economic Reform” (改革開放) started, and the “socialist market economy” was adopted in mainland China. As a result of the Chinese Economic


\textsuperscript{17} See THE CHINESE CLASSIC 213 (James Legge trans., Oxford 2d ed. 1893) (Book VIII, Chapter XIV: Confucius said “He who is not in any particular office, has nothing to do with plans for the administration of its duties” (泰伯第八－子曰：不在其位，不謀其政。)).


\textsuperscript{19} See Fu Yong-ju & Han Zhong-wen (傅永聚、韓鐘文), 20 Shiji Zhongguo Ruxue Yanjiu de Huigu yu Fansi (20 世紀中國儒學研究的回顧與反思) [Reflection on the Research of Chinese Confucianism in 20th Century], CONFUCIUS STUD., no. 1, 2003, at 4, 7 (China).

\textsuperscript{20} See infra Part 5.1.

\textsuperscript{21} See infra Part 5.2.
Reform era, foreign cultural, art, and life style gradually were introduced, and people in mainland China were exposed to more modern music from all over the world.22

2.3.1 Brief History in Chinese Music Industry

In general, the music industry in China could be roughly divided into three stages: (1) initiation of music industry era (1979-1989); (2) the formation stage of the music industry (1990-2000); (3) the integration era of Chinese music industry (2001-present).23

The first modern record company Pacific Audio & Video co. was established in 1979, but the concepts of “music industry” and “music business” were far from established.24 During the “Cultural Revolution” in the 1960s to 1970s, the music in China was mostly made for propaganda, and the characteristics of the music were usually “sharp, raw, up-tempo, and loud”.25

Meanwhile in Hong Kong and Taiwan, copyright law was in force and the music industry was robust, and Hong Kong and Taiwanese pop music started to enter mainland China. There were some sayings in the 1980s mainland China: “We listen to Deng Sr. (Deng Xiaoping) in the morning, but Deng Jr. (Deng Lijun, also known as Teresa Teng) in the evening,” and “We do not love Deng Sr., but we love Deng Jr.”26 These sayings vividly reflect that how popular and significant a Taiwanese singer could be in mainland China.27 P.R.C. government was shocked about how influential music from Hong Kong and Taiwan could be. In 1983, Deng Xiaoping commented on the 12th Central Committee of the Communist Party of China (hereinafter the CPC), criticized the music from Hong Kong and Taiwan as being “spiritual pollution.”28 However, within a short

23 See Chen Xi (陳曦), WoGuo Liuxing Yinyue Chanye FaZhan XianZhuang ji Qi Celüe Fenxi (我國流行音樂產業發展現狀及其策略分析) [The Current Status and Strategy of Chinese Music Industry], LITERARY THEORY, no. 6, 2011, at 104 (China); Zhao Pei (趙沛), The Development and the Concept of Chinese Music Industry (中國音樂產業的概念界定及其發展現狀), 15 HUAZHONG NORMAL U. J. OF POSTGRADUATES 144, 145 (2008).
25 See ZHANG YULIANG (張裕亮), ZHONGGUODALU LIUXING WEN HUA YU DANGGUO YISHI (中國大陸流行文化與黨國意識) [POP CULTURE AND PARTY-STATE IDEOLOGY IN MAINLAND CHINA] 17 (2010).
27 See id . Teresa Teng was not only popular in the Greater China region. She won three consecutive years for a major Japanese music award, and performed in the most important annual TV music program “NHK Kōhaku Uta Gassen” three times in Japan. It was estimated by IFPI that her record sales were at least 48 million copies, without counting the sales in China.
time period, many singers from Hong Kong and Taiwan were invited to perform in the CCTV New Year’s Gala.\(^\text{29}\)

Meanwhile, in order to compete with the music industry in Hong Kong and Taiwan, mainland China introduced music television programs to promote domestic music development.\(^\text{30}\) In 1984, the first television singing competition show “CCTV National Youth Singers Competition” was held, and the “Chinese Golden Bell Award for Music” was initiated in 2001.\(^\text{31}\) These events showed that the Chinese government tried to develop music industry with governmental initiated competitions and awards, to encourage talents joining the music industry. After the P.R.C.’s accession to the World Trade Organization (hereinafter the WTO) in 2001, the Chinese music industry entered into the integration era. At this stage, the Chinese music industry officially integrated into the global market, and was impacted by digitized music and online music business models.\(^\text{32}\)

2.3.2 The Highly Anticipated but Struggling Market

Since mainland China has been one of the largest consumer market in the world,\(^\text{33}\) the consumption of consumer products should be leading the world in most sectors. As we can see from Table 1 and Table 2, the publication of music works in mainland China did not increase at the same rate as the economic growth.\(^\text{34}\) On the contrary, we could infer that the delay progress of the music industry in mainland China was certainly not hindered by lack of economic development.\(^\text{35}\)

\(^{29}\) ZHANG, supra note 25, at 17-18.

\(^{30}\) Id. at 18.


\(^{32}\) Zhao, supra note 23, at 145.


\(^{34}\) See Figure 1: Phonogram Publication in mainland China.

\(^{35}\) See Liu Jiarui, Copyright for Blockheads: An Empirical Study of Market Incentive and Intrinsic Motivation, 38 COLUM. J.L. & ARTS 467, 475 (2015) (suggested that decline in music sales was not resulted from weakened purchasing power, and censorship was also not a factor because book publication industry had experienced annual growth since 2000).
<table>
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<tr>
<th>Year</th>
<th>Cassette Publications</th>
<th>CD Publications</th>
<th>DVD &amp; Other Publications</th>
<th>Total Phonogram Publications</th>
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<tr>
<td>2014</td>
<td>239,206,400</td>
<td>223,851,000</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2013</td>
<td>216,750,300</td>
<td>179,242,300</td>
<td></td>
<td></td>
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<tr>
<td>2012</td>
<td>197,898,100</td>
<td>172,653,000</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2011</td>
<td>246,427,500</td>
<td>187,570,600</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2010</td>
<td>238,549,600</td>
<td>174,035,200</td>
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<tr>
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<td>236,754,800</td>
<td>165,841,700</td>
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<tr>
<td>2008</td>
<td>253,992,500</td>
<td>196,450,600</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2007</td>
<td>205,686,000</td>
<td>146,528,100</td>
<td></td>
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<tr>
<td>2006</td>
<td>248,727,700</td>
<td>184,301,300</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2005</td>
<td>222,927,000</td>
<td>151,568,700</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2004</td>
<td>206,283,800</td>
<td>156,064,700</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2003</td>
<td>220,040,600</td>
<td>176,463,000</td>
<td></td>
<td></td>
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<tr>
<td>2002</td>
<td>225,788,000</td>
<td>196,624,000</td>
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<tr>
<td>2001</td>
<td>137,070,700</td>
<td>120,570,700</td>
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<td></td>
</tr>
<tr>
<td>2000</td>
<td>121,615,000</td>
<td>111,284,400</td>
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<tr>
<td>1999</td>
<td>113,308,100</td>
<td>104,239,100</td>
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<tr>
<td>1998</td>
<td>119,831,300</td>
<td>112,341,400</td>
<td></td>
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</tr>
</tbody>
</table>

Unit: publication counts

Table 1: Phonogram Published Figure in mainland China

---

Background

Unit: total publication counts

**Figure 1: Phonogram Publication in mainland China**

37 *Id.* There were no categorized 2014 data.
<table>
<thead>
<tr>
<th>Year</th>
<th>China</th>
</tr>
</thead>
<tbody>
<tr>
<td>2017</td>
<td>16,290.05</td>
</tr>
<tr>
<td>2016</td>
<td>15,183.53</td>
</tr>
<tr>
<td>2015</td>
<td>14,189.52</td>
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<tr>
<td>2014</td>
<td>13,224.00</td>
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<tr>
<td>2013</td>
<td>12,188.40</td>
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<td>2012</td>
<td>11,191.93</td>
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<tr>
<td>2011</td>
<td>10,249.94</td>
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<td>2010</td>
<td>9,215.40</td>
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<td>2009</td>
<td>8,271.15</td>
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<td>2008</td>
<td>7,553.91</td>
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<td>2007</td>
<td>6,791.94</td>
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<tr>
<td>2006</td>
<td>5,825.18</td>
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<tr>
<td>2005</td>
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<td>2004</td>
<td>4,414.65</td>
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<tr>
<td>2003</td>
<td>3,925.87</td>
</tr>
<tr>
<td>2002</td>
<td>3,519.48</td>
</tr>
<tr>
<td>2001</td>
<td>3,198.23</td>
</tr>
<tr>
<td>2000</td>
<td>2,907.45</td>
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<tr>
<td>1999</td>
<td>2,641.67</td>
</tr>
<tr>
<td>1998</td>
<td>2,437.49</td>
</tr>
</tbody>
</table>

Unit: current international dollar (October, 2015)\(^{38}\)

**Table 2: The P.R.C. Gross Domestic Product Based on Purchasing-Power-Parity (PPP) Per Capita GDP\(^{39}\)**

---

\(^{38}\) *What is an “international dollar”?*, THE WORLD BANK, https://datahelpdesk.worldbank.org/knowledgebase/articles/114944-what-is-an-international-dollar (last visited Mar. 11, 2016) (“An international dollar would buy in the cited country a comparable amount of goods and services a U.S. dollar would buy in the United States. This term is often used in conjunction with Purchasing Power Parity (PPP) data.”)

Besides, the international trade of music product in mainland China had been very one sided, it had been facing trade deficit for many years. The import sources were concentrated from Taiwan, U.S., and Hong Kong.

<table>
<thead>
<tr>
<th></th>
<th>Exports</th>
<th>Imports</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>CD</td>
<td>Value</td>
</tr>
<tr>
<td>2014</td>
<td>937</td>
<td>900</td>
</tr>
<tr>
<td>2013</td>
<td>800</td>
<td>4,000</td>
</tr>
<tr>
<td>2012</td>
<td>25,766</td>
<td>155,900</td>
</tr>
<tr>
<td>2011</td>
<td>1,345</td>
<td>2,500</td>
</tr>
<tr>
<td>2010</td>
<td>3,645</td>
<td>42,600</td>
</tr>
<tr>
<td>2009</td>
<td>39,250</td>
<td>73,572</td>
</tr>
<tr>
<td>2008</td>
<td>98,804</td>
<td>231,682</td>
</tr>
</tbody>
</table>

Unit: discs, USD

Table 3: International Trade Figure of Audio Products of mainland China

See Table 4: Mainland China Figures of Phonogram Products Split by Origin or Destination.
See Figure 3: Phonogram Products Import of mainland China Split by Origin.
Many Chinese scholars believed that the struggling music industry in China was resulted from two reasons: the market failure of the music market, and serious outdated
law and management system in the music industry. It is particularly true under this cross-strait comparison.

2.4 Music Industry in Taiwan

The music industry of Taiwan has been leading the Greater Chinese region for decades. In the music industry of Greater Chinese region, many successful singers from Hong Kong, Singapore, and Malaysia started or polished their career in Taiwan. With this success in the music industry, the R.O.C. was anticipated to be a model of intellectual property rights enforcement in Asia, yet the road to success was bumpy over the years.

In the 1960s, mainland China was ravaged by “Cultural Revolution.” To counter P.R.C.’s “revolution,” the R.O.C. government initiated the “Chinese Cultural Renaissance” in Taiwan, directed to protect Chinese culture. The “Chinese Cultural Renaissance” unexpectedly created an environment to nourish the music industry, and it turned out to have significant impact on the current music industry in the Greater Chinese region.

2.4.1 Center of Creation, Exporter of Music

Taiwan has been recognized as the center of creativity for Greater Chinese region music industry. Approximately 80 percent of mandarin Chinese music was created in Taiwan, and the market share of Taiwanese music products out of total music products in mainland China was over 70 percent for many years. While the music works are created

45 See, e.g., Wang Xiaoxia (王小夏), Zhongguo Wanglu Yinyue Chanye Fazhan Gailan (中國網路音樂產業發展概覽) [Brief Introduction on the Development of Chinese Online Music Industry], CHINA PUB. J., no. 9, 2015, at 16-17 (China) (discussing that the Chinese music industry cannot develop without industry policy and protection of law, and the unreasonable royalties is particularly hostile to creators’ incentive); Tong Xue-na (佟雪娜), Dilemma and Strategies of China’s Music Industry Foreign Trade (中國音樂產業對外貿易的困境與突破), 25 J. OF TONGJI U. 68, 71 (2014) (China) (suggesting a well-developed legal system for the music industry is the foundation for improving the export marketing); Kong Xiaofei (孔曉飛), Liulun Zhongguo Yinyue Chanye Dangqian de Fazhan (略論中國音樂產業當前的發展) [On the Development of Current Chinese Music Industry], 16 CROSS CENTURY 256, 256 (2008) (China) (discussing that piracy and the free of charge of music products in China cause investors unable to earn from investment, consequently created a vicious cycle in the industry).

46 See infra Part 7.2.


48 ALFORD, supra note 11, at 111.


50 See Recent Development of Recording Industry in Taiwan (台灣唱片業發展現況), RECORDING INDUSTRY FOUND. IN TAIWAN, http://www.ifpi.org.tw/record/activity/Taiwan_music_market2015.pdf (last visited Apr. 6, 2016); E-mail from author, to Secretary of Recording Industry Found. in Taiwan (Apr. 3, 2014) (author confirmed with RIT that the statistic was collected individually by Chinese and Taiwanese record companies, and some of the record companies in China estimated music created in Taiwan should be over 80 percent).
in Taiwan, many products were exported to other markets, and some artists and bands were able to tour around the globe to hold sold-out concerts.\footnote{See Frank Shyong, \textit{In L.A., Taiwanese band Mayday rocks its all-Chinese audience}, LA TIMES (Mar. 30, 2014), available at http://www.latimes.com/local/la-me-chinese-beatles-20140331-story.html.}

<table>
<thead>
<tr>
<th></th>
<th>Imports</th>
<th>Exports</th>
</tr>
</thead>
<tbody>
<tr>
<td>2013</td>
<td>422,620,000</td>
<td>1,542,700,000</td>
</tr>
<tr>
<td>2012</td>
<td>420,790,000</td>
<td>2,228,410,000</td>
</tr>
<tr>
<td>2011</td>
<td>495,090,000</td>
<td>2,334,990,000</td>
</tr>
<tr>
<td>2010</td>
<td>565,760,000</td>
<td>2,403,120,000</td>
</tr>
<tr>
<td>2009</td>
<td>504,280,000</td>
<td>2,407,830,000</td>
</tr>
</tbody>
</table>

Unit: NTD


Nevertheless, the music industry in Taiwan did not emerge out of nowhere. After the Chinese Civil War in 1949, the R.O.C. government relocated to Taiwan to establish a provisional base, aimed to “reclaim the mainland”. In the 1960s to 1970s, while the P.R.C. determined to eliminate traditional Chinese culture in “Cultural Revolution,” the late President Chiang Kai-shek, in response, launched the “Chinese Cultural Renaissance” in Taiwan at the same time.\footnote{See generally Chinese Cultural Renaissance, CHINESE ENCYCLOPEDIA ONLINE, http://ap6.pccu.edu.tw/encyclopedia/data.asp?id=230&forepage=1 (last visited Mar. 15, 2016) (stating the “Chinese Cultural Renaissance” or the “Chinese Cultural Renaissance Movement,” was a propaganda proposed to in Taiwan to recover and protect the Chinese culture opposing the “Cultural Revolution” in mainland China).} There were many goals that stimulated the development of music industry, including the establishment of the “Culture and Art Promotion Committee”,\footnote{LIN GUO SHIAN (林果顯), \textit{“ZHONGHUA WENHUA FUXING YUNDONG TUIXING WEIYUANHUI” ZHI YANJIU (1966-1975) - TONGZHI ZHENGDANGXING DE JIANLI YU ZHUANBIAN (「中華文化復興運動推行委員會」之研究(1966-1975) – 統治正當性的建立與轉變) [RESEARCH ON CHINESE CULTURAL RENAISSANCE MOVEMENT COMMITTEE (1966-1975) – ESTABLISHING AND TRANSFORMING OF LEGITIMACY OF RULING] 107 (2005).}} “to encourage the creation of new literary and art works that are relevant to contemporary society and informed by the ideals of the cultural renaissance;” “to launch government planning and construction of new theaters, opera houses, auditoriums, and art galleries, as well as stadiums throughout the country, and to improve existing facilities;” and “to revise tax statutes and regulations in order to encourage wealthy individuals, private industries, and businesses to make donations to government-endorsed cultural and educational establishments . . . .”\footnote{NANCY GUY, PEKING OPERA AND POLITICS IN TAIWAN 67-68 (2005).}

The original goal for the “Chinese Cultural Renaissance” was to promote and preserve Chinese culture in Taiwan, in order to claim the diplomatic legitimacy in the global context, and preserve the balance of government power for the war against the CPC in mainland China. The campaign also resulted in Taiwan to be seen as the faithful
protector of Chinese culture,\textsuperscript{56} which allowed Taiwan preserve many valuable cultural and artistic legacies.

After the cross-strait relation thawed, the R.O.C. government ended the era of martial law in 1987, and emancipated restrictions on freedom of expression, freedom of press, personal freedoms, freedom of association, and freedom of forming new political parties.\textsuperscript{57} In addition to the democratic political reforms, the encouragement and legislative protection of the creative industries are the primary factors that resulted in the leading status of Taiwan’s music industry.\textsuperscript{58}

2.4.2 Brief History of Taiwanese Music Industry

The music industry in Taiwan can be roughly divided in four stages: (1) developing and import era (1911-1961); (2) formation of the domestic music industry era (1962-1985); (3) the golden era (1986-1998); (3) piracy rampage and the rise of digital era (1999-2006); (4) digital music era (2007-).\textsuperscript{59}

Before 1961, there was no music industry in Taiwan, and most of the music was imported from Japan. Since 1961, recording and music publishing companies were family owned, and gradually transformed into modern music industry. From 1986 to 1998, the music industry in Taiwan grew more mature. Record companies started to establish departments specialized in production, publication, and manufacture. Since 1991, international record companies such as Sony Music, Universal Music, Warner Music, and Avex joined the industry, and many domestic record companies were merged or acquired by the international companies. In addition, Taiwanese record companies were eager to participate in the mainland China market. The entrance of these major international record companies had a profound impact to the music industry with two decisive factors.\textsuperscript{60} First, the international record companies facilitated the import and export of music in Taiwan. Second, the international record companies brought in the unspoken rules and business practices, and deeply influenced the domestic record companies.

\begin{itemize}
\item \textsuperscript{58} See infra Part 5.
\item \textsuperscript{59} See CENG JUNZHOU (曾俊洲). SHENGYIN LUZHI JI YINYUE CHUBANYE JIBEN ZILIAO (聲音錄製及音樂出版業基本資料) [INTRODUCTION TO RECORDING AND MUSIC PUBLISHING INDUSTRY] 3-5, TAIWAN INDUS. ECON. SERV. (Mar. 3, 2011).
\item \textsuperscript{60} See infra Part 7.1.
\end{itemize}
According to research by the Recording Industry Foundation in Taiwan (hereinafter RIT), the physical record market in Taiwan has been shrinking since 1997, mainly because of piracy.\textsuperscript{61} The sales of music CDs in Taiwan declined dramatically as well.\textsuperscript{62}

<table>
<thead>
<tr>
<th>Year</th>
<th>Asia Rank</th>
<th>World Rank</th>
</tr>
</thead>
<tbody>
<tr>
<td>2014</td>
<td>5</td>
<td>27</td>
</tr>
<tr>
<td>2013</td>
<td>5</td>
<td>27</td>
</tr>
<tr>
<td>2012</td>
<td>6</td>
<td>28</td>
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<td>2011</td>
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<td>28</td>
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<td>2009</td>
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<td>2008</td>
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<td>30</td>
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<td>2007</td>
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<td>2005</td>
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<td>23</td>
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<td>2001</td>
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<td>2000</td>
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<td>18</td>
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<td>1999</td>
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<td>16</td>
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<td>1998</td>
<td>2</td>
<td>16</td>
</tr>
<tr>
<td>1997</td>
<td>2</td>
<td>13</td>
</tr>
</tbody>
</table>

Table 6: Record Market Rank of Taiwan\textsuperscript{63}


\textsuperscript{62} See Table 7: Estimated Retail Value of Singles and Albums Sales in Taiwan.

Background

<table>
<thead>
<tr>
<th></th>
<th>Domestic</th>
<th>International</th>
<th>Other 64</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>2014</td>
<td>407,365.05</td>
<td>331,440.22</td>
<td>104,177.21</td>
<td>842,982.47</td>
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<tr>
<td>2013</td>
<td>435,122.61</td>
<td>379,452.90</td>
<td>126,546.46</td>
<td>941,121.96</td>
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<td>494,701.83</td>
<td>155,603.66</td>
<td>1,102,450.52</td>
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<tr>
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<td>633,566.26</td>
<td>168,339.91</td>
<td>1,372,433.31</td>
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<tr>
<td>2010</td>
<td>607,853.26</td>
<td>703,813.21</td>
<td>191,963.07</td>
<td>1,503,629.52</td>
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<tr>
<td>2009</td>
<td>634,028.20</td>
<td>659,449.11</td>
<td>183,639.80</td>
<td>1,477,117.11</td>
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<tr>
<td>2008</td>
<td>660,776.07</td>
<td>668,798.59</td>
<td>184,268.29</td>
<td>1,513,842.95</td>
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<td>989,307.14</td>
<td>789,686.84</td>
<td>193,055.29</td>
<td>1,477,117.11</td>
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<td>2006</td>
<td>1,089,345.57</td>
<td>836,341.03</td>
<td>200,869.66</td>
<td>2,126,556.25</td>
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<tr>
<td>2005</td>
<td>1,679,318.66</td>
<td>1,284,911.98</td>
<td>244,477.93</td>
<td>3,208,708.57</td>
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<td>2004</td>
<td>2,146,170.00</td>
<td>1,713,820.83</td>
<td>501,977.01</td>
<td>4,361,967.84</td>
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<tr>
<td>2003</td>
<td>2,143,137.67</td>
<td>1,845,393.46</td>
<td>498,595.66</td>
<td>4,487,126.79</td>
</tr>
<tr>
<td>2002</td>
<td>2,340,444.01</td>
<td>2,160,935.19</td>
<td>476,290.95</td>
<td>5,977,665.17</td>
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<td>2001</td>
<td>2,783,376.56</td>
<td>2,354,830.63</td>
<td>637,558.68</td>
<td>5,775,755.86</td>
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<td>2,079,848.56</td>
<td>942,708.34</td>
<td>8,013,409.24</td>
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<td>6,107,834.66</td>
<td>2,536,104.74</td>
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<td>6,606,347.09</td>
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<td>6,901,687.00</td>
<td>3,680,022.00</td>
<td>N/A</td>
<td>10,581,709.00</td>
</tr>
</tbody>
</table>

Unit: thousands NTD

Table 7: Estimated Retail Value of Singles and Albums Sales in Taiwan

<table>
<thead>
<tr>
<th></th>
<th>Sales</th>
<th>Annual Growth Rate</th>
</tr>
</thead>
<tbody>
<tr>
<td>2014</td>
<td>794</td>
<td>23%</td>
</tr>
<tr>
<td>2013</td>
<td>647</td>
<td>36%</td>
</tr>
<tr>
<td>2012</td>
<td>476</td>
<td>38%</td>
</tr>
<tr>
<td>2011</td>
<td>345</td>
<td>39%</td>
</tr>
<tr>
<td>2010</td>
<td>249</td>
<td>-4%</td>
</tr>
<tr>
<td>2009</td>
<td>258</td>
<td>-7%</td>
</tr>
<tr>
<td>2008</td>
<td>277</td>
<td>11%</td>
</tr>
<tr>
<td>2007</td>
<td>248</td>
<td>61%</td>
</tr>
<tr>
<td>2006</td>
<td>154</td>
<td></td>
</tr>
</tbody>
</table>

Unit: millions NTD

Table 8: Digital Music Sales in Taiwan

However, the “music and performing art industry” were not seriously impacted in the digital era. Instead, the industry showed trends of growth, such as increase of newly

---

64 1997-2004 includes multi-artist sales and classical music sales, after 2005 multi-artist sales is classified into domestic and international sales.
67 The “music and performing art industry” includes dance and theatre groups, orchestra and concert band, circuses, studios, agencies, collective management organizations, costumes artists, and lighting artists, but excluding pop music. The statistics of 2009-2014 were available for “music and performing art industry;” however, the categories were different from the data provided here. See MINISTRY OF CULTURE, TAIWAN CULTURAL & CREATIVE INDUSTRIES ANNUAL REPORT, available at http://stat.moc.gov.tw/Research.aspx?type=5 (last visited Mar. 18, 2016).
established business, revenue, and economic value added.\(^{68}\) Comparing to the sales of singles and albums in the same time frame, although we can clearly see that the sales of physical records were dropping, music performing professions such as orchestra and concert band were not seriously affected by the digital era.


<table>
<thead>
<tr>
<th>Year</th>
<th>Businesses</th>
<th>Revenue</th>
<th>Economic Value Added</th>
<th>Revenue by Export</th>
</tr>
</thead>
<tbody>
<tr>
<td>2009</td>
<td>1,618</td>
<td>9,532,728,000</td>
<td>172,787,000</td>
<td></td>
</tr>
<tr>
<td>2008</td>
<td>1,487</td>
<td>9,355,637,000</td>
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<td></td>
</tr>
<tr>
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</tr>
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<td>2006</td>
<td>1,169</td>
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</tr>
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<td>2005</td>
<td>1,019</td>
<td>6,616,260,000</td>
<td>181,650,000</td>
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</tr>
<tr>
<td>2004</td>
<td>872</td>
<td>5,608,674,000</td>
<td>135,130,000</td>
<td></td>
</tr>
<tr>
<td>2003</td>
<td>738</td>
<td>3,988,699,000</td>
<td>174,870,000</td>
<td></td>
</tr>
<tr>
<td>2002</td>
<td>614</td>
<td>4,556,772,000</td>
<td>3,144,173,000</td>
<td></td>
</tr>
</tbody>
</table>

**Table 9: Music and Performing Art Industry Statistics in Taiwan\(^{69}\)**

During 1999-2006, the music industry in Taiwan was facing the transitional era of music format, and digitized music became the prevailing format.\(^{70}\) Several important litigations and enforcement actions took place, and impacted on music industry, the government, the legal profession, and the general public.\(^{71}\) The general public in Taiwan started to recognize the value and importance of copyright.

In the current digital music era, the pop music industry in Taiwan is showing signs of stagnating.\(^{72}\) However, this is an international phenomenon primarily caused by aggregated effect of piracy and mass digitization of the music industry.\(^{73}\)

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\(^{68}\) See Table 9: Music and Performing Art Industry Statistics in Taiwan.


\(^{70}\) See CENG, supra note 59, at 4.

\(^{71}\) See infra Part 5.2.2.2.

\(^{72}\) See Table 10: Pop Music and Cultural Content Industry Statistics in Taiwan.

Background

<table>
<thead>
<tr>
<th>Year</th>
<th>Businesses</th>
<th>Revenue</th>
<th>Export</th>
<th>% of Export</th>
</tr>
</thead>
<tbody>
<tr>
<td>2014</td>
<td>4,133</td>
<td>30,095,117,000</td>
<td>1,555,739,000</td>
<td>5.17%</td>
</tr>
<tr>
<td>2013</td>
<td>4,243</td>
<td>30,407,804,000</td>
<td>1,797,006,000</td>
<td>5.91%</td>
</tr>
<tr>
<td>2012</td>
<td>4,385</td>
<td>30,867,556,000</td>
<td>1,394,145,000</td>
<td>4.52%</td>
</tr>
<tr>
<td>2011</td>
<td>4,504</td>
<td>31,072,181,000</td>
<td>1,202,004,000</td>
<td>3.87%</td>
</tr>
<tr>
<td>2010</td>
<td>4,411</td>
<td>29,108,694,000</td>
<td>1,094,073,000</td>
<td>3.76%</td>
</tr>
<tr>
<td>2009</td>
<td>4,381</td>
<td>28,014,858,000</td>
<td>1,225,009,000</td>
<td>4.37%</td>
</tr>
</tbody>
</table>

Units: business entities, NTD, NTD, the export amount out of total revenue

Table 10: Pop Music and Cultural Content Industry Statistics in Taiwan

Although the data showed signs of stagnating or decline on physical record sales, the phenomenon was not directly attributable to failure of copyright enforcement in Taiwan. There was no doubt that the digitizing changed the music industry, and the revenue distribution became disproportionate.

In the U.S., earlier decisions such as A&M Records, Inc. v. Napster, Inc. established that digital music service providers could face litigation and liability for contributory and vicarious copyright infringement. Similar decisions from the R.O.C. courts, such as ezPeer case and KURO case also encouraged the development of the authentic digital music market in Taiwan. After years of battle in the courts, Taiwanese record companies and collective management organizations (hereinafter CMOs) realized that litigation would not stop the digitization of music. Therefore, the record companies and CMOs started to collaborate with many online music service providers. Online music services such as KKBox, ezPeer+, and Omusic emerged, and provided legitimate music service to fight against online piracy. In addition, enforcement action such as the MP3 incident in National Cheng Kung University created significant deterrence effect to copyright enforcement.

In recent years, the revenue stream of record companies shifted from physical record sales to performance and advertising deals. Take HIM International Music Inc. as

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75 See infra Part 5.2.3.
76 See WITT, supra note 73, at 260-261 (discussing that artists and labels sought new channels for revenue, and started to license to streaming media. However, streaming did not return enough revenue, and artists with millions of plays could only earn hundreds of dollars); ROBERT LEVINE, FREE RIDE: HOW DIGITAL PARASITES ARE DESTROYING THE CULTURE BUSINESS, AND HOW THE CULTURE BUSINESS CAN FIGHT BACK 49, 68 (2011) (discussing the Silicon Valley thought the traditional music business was inefficient, and the online market forced the music labels to “cut prices in order to turn pirates into consumers”).
77 A&M Records v. Napster, Inc., 239 F.3d 1004 (9th Cir. 2001).
78 See infra Part 6.2.1.1.
79 See infra Part 6.2.1.2.
80 See CENG, supra note 59, at 4.
an example. The major revenue streams of HIM were physical record sales, licensing royalties, and agency deals, which were approximately 3.31%, 32.6%, and 64.09% respectively in 2015.\footnote{CHEN YUTING (陳玉婷), SHENGYIN LUZHI JI YINYUE CHUBANYE JIBEN ZILIAO (聲音錄製及音樂出版業基本資料) [INTRODUCTION TO RECORDING AND MUSIC PUBLISHING INDUSTRY] 4, TAIWAN INDUS. ECON. SERV. (Jan. 29, 2016).} Besides, HIM signed many illustrator and cartoonist since 2014, and participated many concerts and music festivals in mainland China.\footnote{See id. at 5-6.} This reflected the fact that in current Taiwanese music industry, the record companies recognize the market for selling records is shrinking. This means that seeking for new revenue streams to balance the decrease of record sales is crucial for their survival.

\subsection*{2.5 The Dynamics of the Greater China Music Industry}

As previously mentioned, music industries in mainland China and Taiwan are very interconnected. Since the 1980s, Teresa Teng dominated the pop music market in the Greater China region, and Taiwanese music professionals continued to lead and energize the entertainment industry in the Greater China region. According to Forbes’ 2015 China Celebrity List, there were 19 Taiwanese celebrities in the top 100 rank, including 10 singers and 9 movie and TV stars (most of them started their career as singers).\footnote{See supra note 22, at 137.} Jay Chou, an extremely popular Taiwanese R&B and Hip-Hop singer, topped the 2012 celebrity list (and ranked second in 2015, 2013, and 2011, and third in 2014).\footnote{Id. at 137.} The Celebrity List illustrates that the Taiwanese entertainment industry has been very influential and popular in mainland China, and Taiwanese celebrities love to expand their career in mainland China because the market is great for Taiwanese music industry professionals.\footnote{See infra Part 7.2.}

However, surviving in the mainland China market has been difficult, and it is particularly true for the music industry. As one of the strongest economic power in the world, the music industry in China had not yet benefited from the economic growth. Scholars believed that the most relevant and decisive reasons would be the unhealthy music market environment, and lack of a fine-tuned legal system to protect the industry.\footnote{See infra Part 7.2.} In China, the socialist market economy has functioned for less than 40 years. While the market was developing, suddenly it was impacted by the Information Age. The digitized music and piracy significantly reduced the income stream of the talents, therefore hindered the development of the music industry.\footnote{Id. at 137.} Because the music market is not well
Background

developed, a fine-tuned legal system should be the critical support and solution for the market. 89

89 Id. at 137. See infra Part 7.2.
3  METHODOLOGY

3.1  Research Question

The research question for this dissertation is, what is the effect of copyright law enforcement on the music industry in the P.R.C. and the R.O.C. respectively? By understanding the interaction and correlation between copyright law and the music industry, we will be a step closer to be able to examine copyright’s function and effectiveness. Ultimately, my research may further provide some evidence to approach the inquiry: whether copyright is achieving its utilitarian goal or not.

This research question is based on Professor Harold Demsetz’s “linear property right” theory: if works subject to copyright protection are freely appropriable to the public, incentive for creation will be lacking; on the other hand, if private rights are granted to the creators and authors, the ideas will emerge at a more rapid pace. In addition, the institutions for collective management will emerge in an environment that enforces strong intellectual property rights, in order to evolve in response to changes in the asset values.

Applying the “linear property right” theory to music industry, if the enforcement of copyright law is effective in a country, it will increase creativity output of music industry.

3.2  Comparative Research

Comparative research method is considered useful to connect rules to effects, which may establish causation by comparing differences and similarities to eliminate unrelated factors. In addition, it provides a different perspective for legal reform, and can be served as possible prediction about legislation, law amendments, and enforcement. In order to achieve a thorough comparative research, it is important to analyze the interrelationships between substantive law and procedure, because the variations may further identify the differences which affect the outcome.

To further analyze the research question under the “linear property right” theory, comparative research method will be applied to examine the comparison between the P.R.C. and the R.O.C. As previously mentioned, the music industry in Taiwan was robust and influential, but it was not the same in mainland China. The focus of this dissertation

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92 See Gerhard Danneman, Comparative Law: Study of Similarities or Differences?, in THE OXFORD HANDBOOK OF COMPARATIVE LAW 384, 396-99 (Mathias Reimann & Reinhard Zimmermann ed., 2006); John C. Reitz, How to Do Comparative Law, 46 AM. J. COMP. L. 617, 624 (1998) (“The process of comparison is particularly suited to lead to conclusions about (a) distinctive characteristics of each individual legal system and/or (b) commonalities concerning how law deals with the particular subject under study”).
93 See Danneman, supra note 92, at 398-99.
94 Reitz, supra note 92, at 621-22.
is to explore that copyright protection is not occasional to the success of Taiwanese music industry. Instead, the copyright enforcement in the P.R.C. and the R.O.C. was highly correlate to the development of the music industry, and some case studies even believed that copyright protection was the cause that made music industry in mainland China and Taiwan completely different. Of course, the causation in this instance does not mean generalization.

The P.R.C. and the R.O.C. share the Chinese culture origin. Both have the same official language and similar official script, and the citizens are composed of identical ethnic groups. The legal system in the P.R.C. and the R.O.C. both adopt civil law system. However, the two governments showed very different approach and result on copyright enforcement.

Although Taiwan represents a small market compared to mainland China, the combination of economic growth, vigorous technology innovation, robust entertainment industry, and crucial geographical location shaped Taiwan a pivotal role among the Greater China region. Therefore, mainland China and Taiwan provide an interesting comparative study subjects concerning music industry and copyright enforcement.

Some scholars are concerned that comparative research method could not reflect the reality due to language barrier, and may have reliability issues relying on secondary materials. Since I am a native speaker of Mandarin Chinese, there would not be any language barrier in this research. As for reliability issue of secondary materials, I managed to collect first hand data from sources in mainland China, Taiwan, the music industry, and the legal professions. The data were used to apply the triangulation method to improve the validity and reliability.

3.3 Empirical Research

This dissertation generally includes first-hand and second-hand empirical data. I collected statistical data from international organizations, governments, and music industry organizations. The data were further recompiled and designed to illustrate information such as music industry background, and the enforcement result. I analyzed quantitative and qualitative data to build up this comparative research.
3.3.1 Quantitative Data Descriptive Analysis

There are two types of quantitative data in this dissertation: copyright law enforcement related statistics and music industry statistics. Copyright law enforcement related statistics could help us to understand how the law is used to enforce copyright law in mainland China and Taiwan; on the other hand, music industry statistics could indicate the development of music industry in mainland China and Taiwan.

The sources of the data are National Bureau of Statistics of China, State Intellectual Property Office of the P.R.C., National Copyright Administration of the P.R.C., R.O.C. Ministry of Culture, R.O.C. Intellectual Property Office, and Recording Industry Foundation in Taiwan. Although the statistical data provided by P.R.C. were not always considered reliable, the data still provides meaningful information for analysis purposes. The quantitative data are useful for designing interview questions. For example, questions were designed to find out whether the statistics were accurate enough to reflect the reality in the industry: “How does piracy affect your willingness and frequency of creating new works?” “Why was there more civil litigation on copyright infringement than criminal prosecution in mainland China?”

Besides, the law enforcement statistics and music industry development statistics could be read together with the copyright amendment historical timeline. This could indicate how changes in law affect law enforcement, and further impact the music industry.

3.3.2 Qualitative Data Analysis

To better elaborate the history, status quo, and effect of copyright law enforcement in mainland China and Taiwan, qualitative research is the most ideal method to present perspectives from different segments of the music industry. For the purpose of studying the effect of copyright enforcement on the music industry, I directed the focus to the entities and people who have personal experiences with change in the music industry, instead of the general professionals in the music and legal career. Besides using the interviews as qualitative data, these interviews were also used as “triangulation” to cross-validate the quantitative data I obtained from the above mentioned sources.

This dissertation includes insights from eighteen interviews, twelve with representatives of the music industry and six with representatives of the legal

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104 See infra Part 5.3.
105 See infra text accompanying notes 125-129.
profession. The interviewees included record company manager, producer, lyricist, singer, collective management organization manager, tour promoter, judges, prosecutor, police officer, and lawyer.

The goals of conducting quantitative research is to establish causation, prediction and generalization of findings; however, qualitative research targets “illumination, understanding, and extrapolation to similar situations.” Since the research question for this dissertation is to find out the effect of copyright law enforcement on the music industry, the qualitative data could be used to illuminate or explain how and why did the interviewees enter and stay in the industry. If an interviewee considered copyright law guaranteed or protected their livelihood, which cause her or him to join and stay in the music industry, there may be causation for the particular case study. In addition, if an interviewee claimed that copyright law is necessary for the development of music industry, we could only infer that the individual’s understanding and extrapolation of the relationship between copyright law enforcement and the music industry. With triangulation of interviewees in different professions, and the comparison between the P.R.C. and the R.O.C., it would eliminate the irrelevant factors and strengthen the correlation.

3.3.2.1 Sampling

In qualitative research, it is most difficult to conclude the sampling strategies, size of sampling, and the generalizability. Because this dissertation was designed to focus on the effect of copyright enforcement on the music industry in mainland China and Taiwan, it does not indicate this research will provide generalizability that applicable to every copyright enforcement scenario. However, these case studies can still provide meaningful research on how different could music industry develop with or without an effective copyright protection regime. Although large sample-sized studies are valuable, a small amount of cases studies could still provide meaningful knowledge and perspectives.

The sampling method of this qualitative research began with opportunistic sampling, and continued to snowball sampling (also known as chain referral sampling). Common problems of snowball sampling are: (1) finding respondents and initiating referral chains; (2) the final interviewees are likely to know each other and may constitute a social network, therefore affect the result of the research; and (3) issue of controlling the types of chains and data quality.

107 See infra Appendix A: List of Interviewees.
110 See Jessica Silbey, THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY 290 (2015) (suggesting that it is not easy to decide how many interviews are needed. The book was based on set of fifty interviews).
Finding the respondents and initiating referral chains were the most significant problems for me. As a law school student with no previous background in the music industry, my best connections to professionals who work in the music industry were via my friends and family. Therefore, I initiated most of my music industry interviews from personal friends and friends of family members. Initiating and continuing the referral chain was also very challenging, and sometimes frustrated, because many potential interviewees rejected or ignored my requests for the interview. However, being an “outsider” to the music industry, eliminated the possibility of researcher’s bias conducting the interviews, and may reduce personal presumption that interfere with conducting fieldwork.\footnote{See Jack Katz, \textit{A Theory of Qualitative Methodology: The Social System of Analytic Fieldwork}, 1 Afr. J. of Soc. Sci. Methodology 131, 140 (2015); Robert M. Emerson, \textit{Contemporary Field Research: Perspectives and Formulations} 301 (2d ed., 2001); Maxine Baca Zinn, \textit{Insider Field Research in Minority Communities}, in \textit{Contemporary Field Research: Perspectives and Formulations} 165 (Robert M. Emerson 2d. ed., 2001).}

As for the second problem, most of my interviewees certainly know each other, and even mentioned or quoted each other during my interviews. Some of the interviewees in my research were undoubtedly members of a social network. Nevertheless, the subject of this dissertation is to research on a particular “social group” – the music industry, it would be unlikely if the interviewees do not know each other (otherwise it would be the person is new to the industry). Although I was only able to collect a small number of interviews, the interviewees were carefully selected, almost every one of them were veterans in the industry, had crucial roles in the industry, or had rich personal experience and experts in their music or legal career.

Control of the referral chain refers to ensuring that the sample reflects the “general characteristics of the population in question.”\footnote{Biernacki & Waldorf, \textit{supra} note 111, at 155.} As previously mentioned, interviewees of this qualitative research are members of a relatively small community; therefore, this research was not designed to reflect the generalizability of every copyright enforcement regime, every professional in the music industry, or every legal professional.

### 3.3.2.2 Data Credibility

In order to conduct qualitative research, I took Qualitative Field and Observational Methods seminar during fall semester of 2014, and completed the training program of Collaborative Institutional Training Initiative (CITI). The qualitative research protocol was approved by UC Berkeley’s Institutional Review Board (hereinafter the IRB) on January 14, 2015.

The research was categorized as a research exempt under of Federal Policy for the Protection of Human Subjects category 2 and 4, including interview procedures that guaranteed subjects cannot be identified under any circumstances, and publicly available data, documents, and records.\footnote{See Comm. for Prot. of Hum. Subjects, UC Berkeley, Exempt Research 3-4 (2015), available at http://cphs.berkeley.edu/exempt.pdf.} All of the interviewees were informed that the dissertation will create pseudonyms for their identity, and there are minimum identifiers.
that can be connected to the interviewees, either directly or through a coding system.\footnote{See Appendix A: List of Interviewees; Appendix B: Sample of Interview Guide.} The audio recordings of the interviews were created for the sole purpose of completing the transcripts. Since the information collected was innocuous to the interviewees, it could still qualify under category 2 of the research exempt.

To increase the trustworthiness of the qualitative research, many strategies were undertaken. Each interviews were conducted by in-depth, semi-open structured style, to understand their experiences and opinion about music industry and copyright law.\footnote{See infra Appendix B: Sample of Interview Guide.} The interviewees were approached by either email or telephone by me, and were provided opportunities to refuse to participate during the initial approach and at the beginning of each interview.\footnote{See Andrew K. Shenton, Strategies for Ensuring Trustworthiness in Qualitative Research Projects, 22 EDUC. FOR INFO. 63, 66-67 (2004) (discussing the tactics to help ensure honesty in informants).} In addition, interviewees were guaranteed that their identity will be protected by pseudonyms, which may increase the willingness to contribute their opinions and share their experiences, without the fear of negative impact on their career, social life, or economic status.\footnote{See HOWARD S. BECKER, Fieldwork Evidence, in SOCIOLOGICAL WORK: METHOD AND SUBSTANCE FIELDWORK EVIDENCE 39, 49 (1970).}

Reliability and validity of data are challenged fiercely in empirical research. The most common definition for reliability regards to whether the result is replicable, and validity stands for whether the measurements are accurate and actually measuring the intended subject.\footnote{See Golafshani, supra note 101, at 599.} However, some qualitative researchers strongly consider utilizing the quantitative definition to conceptualize qualitative research was inadequate.\footnote{Id. at 599-600.} Despite this consideration, there are methods to improve and establish reliability and validity, such as prolonged engagement, negative case analysis, and triangulation.\footnote{See NORMAN K. DENZIN, THE RESEARCH ACT: A THEORETICAL INTRODUCTION TO SOCIOLOGICAL METHODS 297 (2009) (illustrating combining different methods could generate grounded and verified theories); YVONNA S. LINCOLN & EGON G. GUBA, Establishing Trustworthiness, in NATURALISTIC INQUIRY 289, 301 (1985).}

First, prolonged engagement requires researcher invest sufficient time to expose to the culture of the research site.\footnote{Lincoln & Guba, supra note 121, at 301.} Born and raised in Taiwan, I grow up in the Chinese culture, and have personal experience through the transformation of copyright law and the music industry in Taiwan. During the winter break and early spring of 2015, I spend a week in mainland China and two months back in Taiwan to collect qualitative and quantitative data.

Second, negative case analysis is a method to search for the data that oppose to the theory being tested.\footnote{See MATTHEW B. MILES & A. MICHAEL HUBERMAN, QUALITATIVE DATA ANALYSIS: AN EXPANDED SOURCEBOOK 271 (2d ed., 1994); Lincoln & Guba, supra note 121, at 312.} After finishing the interviews and writing most chapters, I revisited all of the transcript to see if there were negative cases that I neglected. For example, Senior Producer Peter mentioned that piracy did not affect his willingness to produce new music, because music is a passion to the musicians. This opinion would be a
negative case that copyright enforcement may not have any effect on music industry. However, Peter further explained that this may only affect producer more significantly, but not the singers.124 Certainly there were negative cases just like the example above illustrated, almost all of the opinions directed the reason to non-copyright related factor, such as the changes of business model, and transformation of the industry.

Third, triangulation is a technique that use a combination of different methodologies to study the same subject.125 In other words, triangulation is conducted by a process of using different methods to test against each other, which result in maximize the validity of a qualitative data.126 This dissertation particularly relied on triangulation, which combined qualitative and quantitative data to increase the trustworthiness and validity of the quantitative data in different scenarios.127 For the comparative research between P.R.C. and R.O.C., the interviews included both interviewees from mainland China and Taiwan, and many of them have cross-strait expertise and experience on the subject. This “site triangulation” could reduce the possible bias resulted from geographical limitation.128 In addition, since the music industry is composed of different members and professions, these various members and professionals represent complicated aspects and diverse interests in music industry. By interviewing members and professions represent different or even opposing perspectives, it could serve as a “cross-examination” to the interviews. This is the most common and effective mode of triangulation, which utilize multiple and different “sources” to increase validity of the data.129

3.4 Limitations

3.4.1 Limitation on the Research Coverage

Research and writing on copyright is very challenging, because the rules may seem rigid, scope of protection is broad and lengthy, and the interests of different interest groups usually intertwine. As Professor Lyman Ray Patterson put:

Copyright is a concept used to deal with exceedingly complex issues, issues with require careful distinctions based upon a perceptive awareness of the problems, and understanding of purpose, and an appreciation of function.130

This phenomenon is particularly obvious in the music industry, and it was amplified since the arrival of information age. Because the scope of copyright law related to protection of music works could be essentially boundless, it is impossible for this dissertation to analyze on all of the related issues. Hence, the focus of this dissertation is how copyright law affected to the music industry, particularly on the effect that copyright

124 Interview with Peter, Singer/Composer/Producer (Feb. 3, 2015).
125 See DENZIN, supra note 121, at 297.
126 See DENZIN, supra note 121, at 310.
128 See Shenton, supra note 117, at 66.
129 DENZIN, supra note 121, at 310-11. See also LINCOLN & GUBA, supra note 121, at 301.
130 PATTERSON, supra note 1, at 228-29.
granted exclusive rights to the authors and creators, which they can financially benefit from their labor.

One of the widely disputed issues in music industry is the fair allocation of profit within different groups in music industry, and the tech companies that provide the online music services. One of the issues is the fair allocation of profit within different groups in music industry, and the tech companies that provide the online music services. However, this dissertation did not focus on the breakdown of revenue stream among music composer, music publishers, recording artists, record labels, and remix artists. Rather, the emphasis of this dissertation is on how copyright law, enforcement, judiciary, and unspoken rules in the music industry affects the music industry.

3.4.2 Limitation on the Empirical Methods

The process of collecting, recompiling, and validating the quantitative data were one of the constraints of this dissertation. Besides the extra effort involved to validate the data, I encountered various difficulties in obtaining the data both from mainland China and Taiwan. The difficulties included (1) lack of data: the data were non-existent or the data are not accessible; (2) fragmentation of the data: some of the data have problem of missing years or categories, and some of the data were composed of different measurements, scopes, and units. The dissertation had difficulty to create time series analysis due to the fragmentation of the data.

The challenges were more pervasive for the qualitative research. The research schedule was very compact for a typical qualitative research, and I could only spend less than three months per year to conduct my research outside the U.S. due to my scholarship limitation. In addition, as an outsider of the music industry, it was difficult to obtain interview participants. Many requests were sent out, and very few responded (even if the person was connected by music industry fellows). It was especially difficult to find music industry professionals in mainland China because of lack of connection. Although I only managed to find two participants of music industry in mainland China, many of my Taiwanese interviewees had established their career partially in mainland China.

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132 See supra Part 3.3.1.

133 For example, the music industry revenue of mainland China, and the categorized police enforcement data in Taiwan. I sent numerous emails of requesting data unavailable to the public or seeking clarification of the data since 2013, but receive only less than four responses.

134 For example, Table 9: Music and Performing Art Industry Statistics in Taiwan and Table 10: Pop Music and Cultural Content Industry Statistics in Taiwan are both quantitative data for the “general music industry” in Taiwan; however, the two set of data included different sectors in the industry. Possible reason for this absurd phenomenon was due to the reorganization of the Executive Yuan.

135 Professor Tsai Ming-Cheng of NTU also experienced difficulty conducting empirical research on copyright infringement in Taiwan, he received only 24 out of 195 survey responds for his research. Tsai Ming-Cheng (蔡明誠), Shuwei Shidai Zhuzuoquan Qinquan Dui Chanye Chongji zhi Yanjiu (數位時代著作權侵權對產業衝擊之研究) [Research on Impact of Copyright Infringement to Industry in Digital Age], 99 INTELL. PROP. RIGHT J. (智慧財產權月刊) 18, 39, 60-61 (2007) (Taiwan) (discussing the industry was indifferent about responding to copyright research).
Therefore, the interviews may reflect opinions from the perspective of Taiwanese, and present limited views from the group of mainland China music industry professionals.

Due to the focus of this dissertation and the time constraint, not every interview was quoted in this dissertation. It is neither because the interviewee’s opinions contradict the theory proposed in this dissertation, nor it is less important. The interviews quoted in this dissertation were the ones that had direct meaning or relevance to the research question, and could serve as direct evidence to the theory proposed in this dissertation.
4 PROGRESSION OF THE LAW

4.1 The Development of Copyright in Chinese History (pre 1949)

The concept of “zhu zuo” (著作), namely “work,” could be traced back to ancient China. “Zhu zuo” could be classified into “work,” “adaptation,” and “copy,” and there was even a government official position particularly in charge of “zhu zuo” since the early Qin dynasty (221–206 BC).136 These historical facts indicated that creativity was not indifferent in the Chinese history.

The modern concept of copyright emerged in the Song Dynasty (960-1279 CE). The Song Dynasty was an era that highly respected Confucianism, literature, art, and scholarly works. At that time, woodblock printing was invented and was prevalent. It was popular for private or commercial publishers to mark their “edition notice” inside a framed rectangle.137 Some plates were printer’s preface or even operated as advertisement; others included words such as “duplication prohibited,” or usually have the sentence “Copyright is claimed. Any infringement will be pursued, even if it is a thousand miles away.”138 Although as there was no formally promulgated copyright law at the time, the copyright notice was intended to deter copyright infringement.139

136 LI MING-SHAN (李明山), ZHONGGUO GUDAI BANQUAN SHI (中國古代版權史) [History of Copyright in Ancient China] 2 (2012).
138 LI, supra note 136, at 134.
139 Id. at 136-38.
As for copyright codification, the first copyright law in Chinese history was the “Daqing Zhuzuoquan Lü” (大清著作權律) [Great Qing Copyright Law] in 1910. The “Great Qing Copyright Law” combined principles from common law and civil law, which protected “copyright owners’ interest, with an exception when the private interest is against public interest.” The “Great Qing Copyright Law” only lasted for one year, because Qing Dynasty was overthrown by R.O.C. in 1911.

In the first few years of R.O.C., the “Great Qing Copyright Law” was still in force in China. Before the implementation of the first official Copyright Act in 1928, China was still in turmoil because of endless civil wars. There was a copyright law implemented by Beiyang government in 1915, but was replaced by Nationalist government in 1927. In

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141 Li, supra note 136, at 240.
general, there were traces of copyright disputes at the time, but mostly were small scale.\textsuperscript{144}

In 1949, the Nationalist government lost the Chinese Civil War, and retreated to Taipei, Taiwan as of today. Since then, the P.R.C. government rules the mainland China territory, and R.O.C. government rules the territories of Taiwan, Penghu, Kinmen, and Matsu. According to the R.O.C. Constitution, the R.O.C. is a sovereign and independent country.\textsuperscript{145} The current status of R.O.C. could be explained under the R.O.C. Constitution framework: the government adheres to the principles of maintaining the status quo of “no unification, no independence, and no use of force” in the Taiwan Strait.\textsuperscript{146} Therefore, 1949 was the beginning of the two different copyright regimes.

4.2 Copyright Law with “Chinese Characteristics” – the P.R.C. Copyright Law

Before the promulgation of the Copyright Law in 1990, there were no modern copyright law implemented. Since the “Chinese Economic Reform” (改革開放) in December 1978, P.R.C. started to focusing on building China’s economic. More specifically, the “Chinese Economic Reform” aimed “to open enterprises’ autonomy and democratic management, to use “planned economy” (計劃經濟) to stabilize the market as supplementary, to reasonably use foreign investments and technology.”\textsuperscript{147} Although capitalism was regarded as “corruptive” and “evil,”\textsuperscript{148} P.R.C. embraced capitalism to guide the economic reform.

Along with economic development and the “Open Door Policy” to international market in mainland China, protecting intellectual property rights in mainland china has been the top priority for many developed countries. In March 3, 1980, P.R.C. joined the World Intellectual Property Organization (hereinafter WIPO) and acceded to the WIPO Convention. However, the intellectual property rights in China was still underdeveloped for a long time. The 1986 amendment of the General Principles of the Civil Law, was considered the origin of copyright protection.\textsuperscript{149} In the Section Three of Chapter Five in General Principles of the Civil Law, four general provisions to protect copyright, patent,

\textsuperscript{144} \textit{Id.} at 168-69.
\textsuperscript{145} \textit{CONSTITUTION OF THE REPUBLIC OF CHINA (中華民國憲法) art. 1 (1947) (Taiwan).}
\textsuperscript{149} \textit{See WU HAN-DONG (吳漢東), ZHONGGUO ZHISHI CHANQUAN ZHIDU PINGJIA YU LIFA JIANYI (中國知識產權制度評價與立法建議) [REVIEW AND SUGGESTION ON CHINESE INTELLECTUAL PROPERTY LAW] 36 (2008).}
trademark, and “discoveries.” Later on, the 1990 Copyright Law was promulgated, which provided substantive rules of copyright protection.

4.2.1 The 1990 Copyright Law

The 1990 Copyright Law included six chapters (general provisions, copyright, copyright licensing contracts, publication, performance, sound recording, video recording and broadcasting, legal liability, and supplementary provisions) and fifty-six articles. The law provided rules including scope of copyright protection, exclusive rights, exclusions of protection, term of protection, limitation of rights, right to publication, right to performance, right to sound and video recording, right to broadcasting by radio or television station, and liability. Later on in 1992, P.R.C. acceded to the Berne Convention for the Protection of Literary and Artistic Works (hereinafter the Berne Convention) and Universal Copyright Convention (hereinafter the UCC). To comply with the two conventions, the State Council promulgated the Provisions on the Implementation of the International Copyright Treaties (hereinafter the 1992 Treaties Implementation Provisions) in 1992. The 1992 Treaties Implementation Provisions was particularly designed for foreign work protection, and granted protection exceeded standard national treatment.

4.2.2 The 2001 Amendment

Since P.R.C. joined the WTO on December 2001, the economic environment has been changing rapidly. Thus, copyright, patent, and trademark protection became a pressing issue for foreign enterprises invested in China. In order to join WTO and comply with the WTO Trade-Related Aspects of Intellectual Property Rights (hereinafter the TRIPS), P.R.C. made a major amendment of Copyright Law in 2001. The 2001 amendment had some significant changes, including (1) expanded the protected

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150 General Principles of the Civil Law of the P.R.C. (中華人民共和國民法通則) arts. 94-97 (Pkulaw.cn 1986) (“Article 94. Citizens and legal persons shall enjoy rights of authorship (copyrights) and shall be entitled to sign their names as authors, issue and publish their works and obtain remuneration in accordance with the law.

Article 95. The patent rights lawfully obtained by citizens and legal persons shall be protected by law.

Article 96. The rights to exclusive use of trademarks obtained by legal persons, individual businesses and individual partnerships shall be protected by law.

Article 97. Citizens who make discoveries shall be entitled to the rights of discovery. A discoverer shall have the right to apply for and receive certificates of discovery, bonuses or other awards. Citizens who make inventions or other achievements in scientific and technological researches shall have the right to apply for and receive certificates of honor, bonuses or other awards") (China).


155 Wu, supra note 149, at 37 (explaining that certain protection was later on amended in the 2001 Copyright Law, so foreign work enjoyed “preferable” national treatment for almost ten years).

subject matter, and rearranging the classification in the 1990 Copyright Law;\textsuperscript{157} (2) enhanced copyright owner’s rights; (3) reduced the scope of fair use defense;\textsuperscript{158} (4) the right of information network dissemination was amended to keep up with the Information Age;\textsuperscript{159} (5) rules for administrative enforcement and law enforcement were also amended, for instance procedures for securing evidence and confiscation.\textsuperscript{160}

Besides, many associated laws and administrative regulations were also promulgated or amended to cooperate the 2001 Copyright Law. For instance, Regulations for the Implementation of the Copyright Law of the P.R.C.,\textsuperscript{161} Rules for the Implementation of Copyright Administrative Punishment,\textsuperscript{162} Regulation on the Collective Administration of Copyright,\textsuperscript{163} Measures for the Administrative Protection of Internet Copyright,\textsuperscript{164} and Interpretation of the Supreme People’s Court Concerning the Application of Laws in the Trial of Civil Disputes over Copyright.\textsuperscript{165} The promulgations and amendments facilitated the function of copyright system, which helped P.R.C. to conform the international treaty obligations.

4.2.3 The 2010 Amendment

In 2010, P.R.C. amended Copyright Law for the second time; however, not much was modified during this amendment. One of the important amendments was the deletion of 2001 Copyright Law article 4 subparagraph 1, which provided that “[w]orks that are prohibited from publication or distribution by laws, shall not be protected by [Copyright] Law.”

The 2001 Copyright Law article 4 subparagraph 2 was also amended. The 2001 version provided that “[c]opyright owners, in exercising their copyright, shall not violate the Constitution, laws, or harm the public interests.” It replaced article 4, which provides “[c]opyright owners, in exercising their copyright, shall not violate the Constitution or laws or infringe upon the public interests. The publication and dissemination of works shall be subject to the administration and supervision of the State.” (emphasis added) This amendment was a respond to the complaint submitted to WTO by the U.S. in 2007,

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{157} The amendment emphasized on protecting computer software and movie works. \textit{See} Copyright Law of P.R.C. (中華人民共和國著作權法) art. 10 (2001) (China).
\item \textsuperscript{158} \textit{See} Copyright Law of P.R.C. (中華人民共和國著作權法) art. 22 (2001) (China).
\item \textsuperscript{159} Copyright Law of P.R.C. (中華人民共和國著作權法) art. 10 subpara. 12 (2001) (China).
\item \textsuperscript{160} \textit{See infra} Part 5.1.1.
\item \textsuperscript{161} Regulations for the Implementation of the Copyright Law of the P.R.C. (著作權行政處罰實施條例) (2002) (China).
\item \textsuperscript{162} Rules for the Implementation of Copyright Administrative Punishment (著作權行政處罰實施辦法) (2003) (China).
\item \textsuperscript{163} Regulation on the Collective Administration of Copyright (著作權集體管理條例) (2004) (China).
\item \textsuperscript{164} Measures for the Administrative Protection of Internet Copyright (互聯網著作權行政保護辦法) (2005) (China).
\item \textsuperscript{165} Interpretation of the Supreme People's Court Concerning the Application of Laws in the Trial of Civil Disputes over Copyright (最高人民法院關於審理著作權民事糾紛案件適用法律若干問題的解釋) (2002).
\end{enumerate}
\end{footnotesize}
which stated that the article 4 of the 2001 Copyright Law violated article 9.1 and 41.1 in TRIPS.166

4.2.4 The “Chinese Characteristics” of P.R.C. Copyright Law

“Chinese characteristics” was a term that frequently appeared in all kinds of law and official statements. According to “The Socialist System of Laws with Chinese Characteristics” white paper issued by P.R.C. Information Office of the State Council:

China is a socialist country under the people’s democratic dictatorship, led by the working class and based on the alliance of workers and peasants . . . . China practices a basic economic system with public ownership as the mainstay and the joint development of diverse forms of ownership, which determines that China’s legal institutions are bound to be socialist ones and . . . with Chinese characteristics. All legal norms covered in and all legal institutions established by the socialist legal system contribute to consolidating and developing socialism . . . . (emphases added)167

The white paper provided two general ideologies about P.R.C. legislation policy. First, even though the “Chinese Economic Reform” gradually embraced some idea of free market economics, P.R.C. was reluctant to admit the reform had elements of capitalism. Instead, P.R.C. coined the modified socialism with the title “socialist system of laws with Chinese characteristics.” Second, the utmost ideology for Communist Party of China (hereinafter the CCP) is socialism, therefore it is crucial for CCP to reiterate the idea of “socialist system of laws with Chinese characteristics.” It is embedded in many laws and regulations, and the policies are supreme over the laws.168

Copyright Law article 1 is a good example for “socialist system of laws with Chinese characteristics.” Article 1 provided that “[t]his Law is enacted, in accordance with the Constitution for the purposes of protecting the copyright of authors . . ., and of promoting the development and flourishing of socialist culture and sciences.” (emphasis added) This is very different from other countries in the world. For example, the U.S. Copyright Act does not mention any political ideology in the act,169 neither does the Copyright Act of R.O.C. provide article like the P.R.C. Copyright Law.170

168 See STANLEY B. LUBMAN, BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO 130 (1999).
169 See 17 U.S.C. § 101 (2010); U.S. CONST. art. I, §8, cl. 8. “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[.]”
170 See Copyright Act (著作權法) art. 1 (1985) (Taiwan) (“This Act is specifically enacted for the purposes of protecting the rights and interests of authors with respect to their works, balancing different interests for the common good of society, and promoting the development of national culture. Matters not provided for herein shall be governed by the provisions of other acts.”)
Although the goal of “promoting the development and flourishing of socialist culture” had nothing or not much to do with copyright protection, it is a very convenient technique to justify governmental censorship with such text. Some scholar even suggests that the Copyright Law of P.R.C. was composed of at least four very different theories: (1) western copyright law that protect private economic rights; (2) western copyright law that protect moral rights; (3) socialist copyright law that encourages innovation for the benefit of the whole society; (4) the historical tendency of dictatorship with strong censorship power controlling future creations. However, evidence showed that censorship did not impact book publication industry and music industry in a significant way.

4.3 Internationally Influenced Copyright Act – the R.O.C. Copyright Act

The first modern R.O.C. “Copyright Act” was promulgated in 1928. Since then, the “Copyright Act” was amended seventeen times, including three full text revision, and many crucial amendments over the years. In 1949, the R.O.C. government relocated from mainland China to Taiwan after losing the Civil War against CPC. During 1964 - 1985, the economic development of Taiwan had significant progress, an up-to-date Copyright Act was also need to keep up with up; therefore, the 1985 Copyright Act was amended.

4.3.1 Conforming to International Standard Era: 1985 – 2002

The 1985 Copyright Act expanded the law in a very thorough way. The definitions of legal terms were amended, the protected rights were noticeable expanded, and foreign works protection were also amended. The 1990 amendment was a minor revision to some of the articles, including the addition of definition for “public presentation” and expanded the penal provision to infringement other than copying. In 1992, the Copyright Act had a large scale revision. The amendment revised the rules to conform with Berne Convention, including added the grace period for foreign works first published outside of Taiwan, added right to translation, broadened the protected works, added provision for work made for hire, and added moral rights protection . . . etc.

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172 See Liu, supra note 35, at 475 (suggested that censorship was not a factor to the underdeveloped music industry, because book publication industry had experienced annual growth since 2000).
173 Wu Suhua (吴素華), Zhuzuoquanfa Xiuzheng Yaodian Jianjie (著作權法修正要點簡介) [Introduction to Copyright Act Amendment], 22 Fr L. REV. (萬國法律) 16 (1985) (Taiwan).
174 Copyright Act (著作權法) arts. 3 (1985) (Taiwan).
175 Copyright Act (著作權法) arts. 4 (1985) (Taiwan).
176 Copyright Act (著作權法) arts. 17 (1985) (Taiwan).
177Copyright Act (著作權法) arts. 28, 39 (1990) (Taiwan).
178 Copyright Act (著作權法) (June 10, 1992) (Taiwan).
Because the U.S. was major trade partner of Taiwan, the intellectual property laws were profoundly influenced by the U.S.\(^{179}\) In July 16, 1993, the R.O.C. and American Institute in Taiwan (hereinafter AIT)\(^{180}\) signed the Agreement for the Protection of Copyright Between the Coordination Council for North American Affairs and the American Institute in Taiwan.\(^{181}\) The Agreement urged the R.O.C. to amend a rule to sanction importing unlicensed works, and the amendment was passed swiftly in April 24, 1993.\(^{182}\)

Preparing to join the WTO, the 1998 amendment expanded to 117 articles in order to conform with the minimum standards of the TRIPS.\(^{183}\) The definition of “public broadcast” and “public performance” was amended in accordance with the Berne Convention, and abolished the compulsory licensing for right to translations.\(^{184}\)

4.3.2 Adapting the Copyright Act to Technological Challenges: 2003 - present

The 2003 amendment focused on amending the 1998 and 2001 Act, in order to conform to WIPO Copyright Treaty (WCT) and WIPO Performances and Phonograms Treaty (WPPT). Rules including “temporary reproduction” fair use defense, public broadcasting, distribution right, the right for author of a publicly performed sound recording to claim payment, and electronic right management information was amended.\(^{185}\) These rights were particularly important to music industry, because the rights can protect the income stream of music industry while the revenue shifted from music album sales to performance.\(^{186}\)

The criminal liability of copyright infringement has been the most controversial topic almost in each amendment, and it was especially sensitive after the “MP3 incident of National Cheng Kung University” took place in 2001.\(^{187}\) An early version of 2001 proposed bill planned to remove all the copyright infringement from Antragsdelikt offense, which could make prosecutors initiate a criminal charge without right holder’s


\(^{180}\) Facing the diplomatic pressure from P.R.C., the U.S. was unable to have official diplomatic relation with R.O.C., therefore the “American Institute in Taiwan” was established as a substitute of an embassy.


\(^{182}\) Copyright Act (著作權法) arts. 87, 87-1 (1993) (Taiwan).


\(^{184}\) Copyright Act (著作權法) (1998) (Taiwan).

\(^{185}\) Copyright Act (著作權法) (2003) (Taiwan).

\(^{186}\) Jerry G. Fong (馮震宇), Xin Zhuzuoquanfa Zhongyang Xiuzheng yu Zhengyi Wenti Jianjie (新著作權法重要修正內容與爭議問題簡介) [INTRODUCTION TO THE REVISIONS AND CONTROVERSIES IN THE COPYRIGHT AMENDMENT], 101 TAIWAN L. REV. (2003) 51, 55-56.

\(^{187}\) See infra text accompanying notes 378-387.
consent. After the general public witnessed college students getting searched and sued, a public outcry in Taiwan changed the bill. Consequently, to strike a balance between the pressure from the U.S. and the domestic outcry, the “criminal offense of infringement by reproducing onto an optical disk” was amended as an exception from Antragsdelikt offense category. Clearly, the proposal of removing all the copyright infringement from Antragsdelikt offense did not pass, and the Antragsdelikt copyright infringement offense remained as a special feature of the R.O.C. Copyright Act.

After the 2003 amendment, the Copyright Act generally conformed to international standards, the legislation started to amend rules related to technology advancement. The 2004 amendment provided the definition and relevant rules of anti-circumvention of technological protection measures, removed the infringement criteria “intent to profit,” and increased the jail time for optical disk piracy. In 2007, infringement by providing computer program or technology to public transmit or reproduce was amended. According to the commentary of amendment, the subparagraph was amended to handle the infringement that “intentionally facilitate” by providing software or other technology that infringes copyrighted work, such as peer-to-peer file sharing software.

The 2009 amendment focused on provisions regulating internet service providers, which referenced the U.S. Digital Millennium Copyright Act (hereinafter DMCA). Article 90-4 provides the safe harbor protection, which is similar to notice and take down rules of the DMCA. In 2010, rules regulating CMOs in the Copyright Act were revised, public broadcasts of copyrighted works provided by commercial premises were regulated by right to publicly broadcast. In addition, Copyright Collective Management Organization Act was amended with the revision of Copyright Act, provided CMOs to gain more control to the copyrighted work, therefore reduced the possibility of right holders directly settling with infringers.

188 For detailed illustration on Antragsdelikt offenses, see infra text accompanying notes 342-348.
189 Fong, supra note 186, at 58.
190 Copyright Act (著作權法) art. 91, para. 3 (2003) (Taiwan).
191 Copyright Act (著作權法) art. 100 (2014) (Taiwan). However, R.O.C. Copyright Act is not the only copyright law that adopt Antragsdelikt offense as the general principle. For example, Copyright Law of Japan art. 123 (2010) & Gesetz über Urheberrecht und verwandte Schutzrechte art. 109 (2013).
192 Copyright Act (著作權法) art. 1, para. 1, subpara. 18, art. 5 (2004) (Taiwan).
194 Copyright Act (著作權法) art. 91, para. 3 (2004) (Taiwan).
195 Copyright Act (著作權法) art. 87, para. 1, subpara. 7 (2007) (Taiwan).
198 Copyright Act (著作權法) art. 90-4 (2009) (Taiwan).
199 Copyright Act (著作權法) art. 37 (2010) (Taiwan).
The frequency of Copyright Act amendments demonstrates that R.O.C. government had prioritized amending copyright law over the years. For the future amendments, the R.O.C. Intellectual Property Office (hereinafter TIPO) created a list of candidate issues to guide future amendments.\textsuperscript{202} The candidate issues include clarifying and adjusting the exclusive rights, neighboring rights issues, limitation to rights, rules for licensing and transferring, updating the works made for hire rules, moral rights, orphan works, parallel import, database protection, and joint work provisions.\textsuperscript{203}

4.4 Convergence or Divergence?

In general, copyright codifications in P.R.C. and R.O.C. are moving towards the same direction, which is to comply with international standards.

\begin{figure}[h]
\centering
\includegraphics[width=\textwidth]{Figure5.png}
\caption{The P.R.C. and the R.O.C. Treaty and Rules Conformity Timeline}
\end{figure}

However, the most significant differences between the two laws is with respect to the type of liabilities and the enforcement mechanisms. In the P.R.C., copyright infringement is subject to civil, administrative, and criminal liability. For administrative and criminal liability, governmental agencies can initiate enforcement action without the complaint of right holders. On the other hand, copyright infringement in Taiwan is subject to civil and criminal liability, and both processes can only initiated by a complaint from a right holder. Because of the differences of liability, the enforcement regimes were also entirely different.

\textsuperscript{203} Id.
5 ENFORCEMENT OF THE LAW

In order to establish analysis for this comparative study, there must be a consistent basis to evaluate intellectual property law enforcement. The annual Special 301 Reports issued by the Office of the United States Trade Representative (hereinafter the USTR) provides a consistent basis of comparison, for the purpose of comparatively evaluating copyright law enforcement between the P.R.C. and the R.O.C. Although this review was criticized internationally, the Special 301 Report should be considered to have an equal evaluation standard towards the P.R.C. and the R.O.C. Because the purpose of the Special 301 Report is to identify foreign countries that deny intellectual property rights protection or market access for U.S. persons relying on intellectual property protection, it would be against the national interest of the U.S. to have a favorable report for any individual country.

Since the first review back in 1989, the placement of Taiwan has shown significant progress: from the Priority Watch List in 1989, to the removal from the list since 2009. On the other hand, China has remained on the Priority Watch List since 1989 to present date.

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204 See, e.g., PETER DRAHOS & JOHN BRAITHWAITE, INFORMATION FEUDALISM 89 (2002) (describing special 301 report as “a public law devoted to the service of private corporate interests”); Gwen Hinze, Shaping IP Laws by Not-So-Gentle Persuasion: The Special 301 Report, ELECTRONIC FRONTIER FOUND. (Apr. 21, 2010), https://www.eff.org/deeplinks/2010/04/shaping-ip-laws-not-so-gentle-persuasion-special (discussing that USTR relied heavily on the assessment provided by the entertainment and pharmaceutical industries to develop the rank for special 301 report, which did not account for a wider range of stakeholders); LEGISLATIVE YUAN GAZETTE (立法院公報), Vol. 82, No. 59, at 359 (1993) (Taiwan) (suggesting that the Copyright Act amendment to conform with “Special 301 Report” was “inapplicable” and “unreasonable”); JERRY G. FONG, TRENDS AND ISSUES OF INTELLECTUAL PROPERTY RIGHT DEVELOPMENT (智慧財產權發展趨勢與重要問題研究) 311-313 (2003) (suggesting that a harsh Copyright Act might lead to distortion of justice); LI YU-FENG (李雨峰), QIANGKOUXIA DE FALÜ: ZHONGGUO BANQUANSHI YANJIU (槍口下的法律：中國版權史研究) [LAW MADE AT GUNPOINT: HISTORY OF CHINESE COPYRIGHT LAW] 180 (2006) (criticizing the Special 301 Report was “rude and unfair”).


206 See Table 12: Annual Special 301 Placement of the R.O.C.

207 See Table 11: Annual Special 301 Placement of the P.R.C.
<table>
<thead>
<tr>
<th>Year</th>
<th>Status</th>
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</thead>
<tbody>
<tr>
<td>2016</td>
<td>Priority Watch List + monitored under Section 306 of the Trade Act</td>
</tr>
<tr>
<td>2015</td>
<td>Priority Watch List</td>
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<tr>
<td>2014</td>
<td>Priority Watch List + monitored under Section 306 of the Trade Act</td>
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<tr>
<td>2013</td>
<td>Priority Watch List</td>
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<tr>
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<td>Priority Watch List + monitored under Section 306 of the Trade Act</td>
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<tr>
<td>2011</td>
<td>Priority Watch List</td>
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<tr>
<td>2010</td>
<td>Priority Watch List</td>
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<td>2009</td>
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<td>2008</td>
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<td>2007</td>
<td>Priority Watch List</td>
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<tr>
<td>2006</td>
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<td>2005</td>
<td>Priority Watch List</td>
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<tr>
<td>2004</td>
<td>Monitored under Section 306 of the Trade Act + Out-of-Cycle Review</td>
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<tr>
<td>2003</td>
<td>Monitored under Section 306 of the Trade Act</td>
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<td>2002</td>
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<td>1989</td>
<td>Priority Watch List</td>
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Table 11: Annual Special 301 Placement of the P.R.C.\textsuperscript{208}

Enforcement of the Law

Table 12: Annual Special 301 Placement of the R.O.C. 209

<table>
<thead>
<tr>
<th>Year</th>
<th>Status</th>
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<tbody>
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<td>2015</td>
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<td>2014</td>
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<td>2008</td>
<td>Watch List (then off the list due to Out-of-Cycle Review)</td>
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<td>2007</td>
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<td>2006</td>
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<td>2005</td>
<td>Watch List</td>
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<td>2004</td>
<td>Priority Watch List + Out-of-Cycle Review</td>
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<td>2003</td>
<td>Priority Watch List</td>
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<td>2002</td>
<td>Priority Watch List</td>
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<td>1996</td>
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<td>1993</td>
<td>Priority Watch List</td>
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<td>Priority Foreign Country</td>
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<td>1991</td>
<td>Watch List</td>
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<td>1990</td>
<td>Watch List</td>
</tr>
<tr>
<td>1989</td>
<td>Priority Watch List</td>
</tr>
</tbody>
</table>

Besides the relatively late adoption of copyright law legislation in the P.R.C. in 1990, 210 the enforcement of the law certainly was decisive to protect copyright. Because without a functional law enforcement, copyright law would never be applied.

This Chapter compares the process of copyright law enforcement in mainland China and in Taiwan, and concludes with an overview of the cross-strait copyright enforcement relationship.

5.1 An Enforcement with “Chinese Characteristic” – P.R.C. Copyright Law Enforcement

The enforcement of copyright law in mainland China has been a serious concern for copyright holders for a long time. Before the promulgation of the Copyright Law in 1990, there were no modern copyright law implemented, let alone enforcement of copyright law. 211 Over the years, the P.R.C. government had gradually established a modern enforcement mechanism to protect copyright, and it is unique in its own way. In

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210 See supra Part 4.2.
211 See supra Part 4.2.
Enforcement of the Law

in general, the enforcement of copyright law can be categorized in three different channels: the administrative enforcement regime, criminal prosecution regime, and civil litigations.

5.1.1 The Unique Administrative Copyright Enforcement Regime

As a socialist single-party country, the P.R.C. is ruled by the CPC,212 and the separation of powers does not apply in the P.R.C. However, the administrative branch in mainland China is similar to the executive branch in the separation of powers, but with many differences.213 These significant differences affects how copyright law was enforced in mainland China.

In 1985, National Copyright Administration of the P.R.C. (hereinafter the NCAC) was established.214 At the time, the priorities for NCAC were to assist in drafting the bill of the Copyright Law, and to administer and register transfer of copyright by transactions between Taiwan, Hong Kong, Macau, and mainland China.215 After the Copyright Law was promulgated in 1990, it provided that the “copyright administration department under the State Council” is responsible for the nationwide administration of copyright,216 namely the NCAC.217 The Regulation on the Implementation of the Copyright Law of the P.R.C. further provided that a copyright administration department may sanction administrative penalties, including confiscation of unlawful income from the act or imposition of a fine.218 To elaborate, the Regulation on the Implementation of the Copyright Law of the P.R.C. grants administrative agencies the judicial power to make decisions and sanction copyright infringements, which have overlapping subject matter jurisdiction over infringements. The power is additional to civil litigation or criminal prosecution, which is very different from the U.S.219 and the R.O.C.220

The “administrative enforcement” is considered to be one of the “Chinese Characteristics” in the P.R.C. copyright law enforcement system.221 The 1990 Copyright Law provided that a copyright administration department may sanction administrative penalties on infringements, which granted administrative agency “quasi-judicial” power. The “quasi-judicial” power enables a copyright administration department to investigate infringements, make administrative decisions, accept appeals to the administrative

215 Li, supra note 156, at 235.
216 Copyright Law of P.R.C. (中華人民共和國著作權法) art. 8 (1990) (China).
217 CHINA LEGAL PUBL’G HOUSE (中國法制出版社), P.R.C. COPYRIGHT LAW INTERPRETATION AND STATUTORY SUPPLEMENT (中華人民共和國著作權法: 註解與配套) 13 (3d ed. 2014).
221 See Wu, supra note 149, at 45; Li, supra note 156, at 232.
decisions, and sanction administrative penalties including confiscation of unlawful income from the act or imposition of a fine.\textsuperscript{222} The administrative system is unique to the world because the administrative agencies directly enforce the law, which has subject matter jurisdiction parallel to the judiciary system, which overlaps with civil litigation or criminal prosecution. The strong administrative enforcement power was believed to be a result of the historical background in 1980s: while the P.R.C. was establishing the intellectual property law, advanced enforcement rules and specialized judiciary system for intellectual property were not yet implemented; therefore, the administration was a “natural” and “necessary” choice for the P.R.C.\textsuperscript{223}

In accordance with the article 5(2) of the Berne Convention, registration is not required to acquire copyright protection in mainland China.\textsuperscript{224} However, registration of a music work provides many benefits for a right holder asserting his or her right in P.R.C. First, the copyright registration could be adopted as evidence while dispute arise.\textsuperscript{225} For music works in the digital era, registration would be particular crucial, since many authors could upload their works online; without any registration, it would be difficult to prove the author or owner of the music works.\textsuperscript{226} Second, copyright registration could reduce the transaction costs of investigating the title of the copyrighted works, and further utilize or license the works.\textsuperscript{227} Besides, copyright contracts were also available for registration in Music On-line Register Platform (hereinafter the MORP)\textsuperscript{228} of the Music Copyright Society of China (hereinafter the MCSC).\textsuperscript{229}

\begin{footnotesize}
\begin{enumerate}
\item Li Shunde (李順德), \textit{Dui Jiaqiang Zhuzuoquan Xingzhengzhifa de Sikao (對加強著作權行政執法的思考)} [\textit{On Copyright Administrative Enforcement}], \textit{Intell. Prop.}, no.11, 2015, at 20-21.
\item \textit{Id.} at 21-22.
\item Copyright Law of P.R.C. (中華人民共和國著作權法) art. 2 (1990) (China).
\item Interpretation of the Supreme People’s Court Concerning the Application of Laws in the Trial of Civil Disputes over Copyright (最高人民法院關於審理著作權民事糾紛案件適用法律若干問題的解釋) art.7 (2002) (China).
\item JIANG KAI (蔣凱), \textit{Music Copyright Management and Litigation in China} (中國音樂著作權管理與訴訟) 1 (2008).
\item See infra text accompanying notes 266-268.
\end{enumerate}
\end{footnotesize}
Table 13: The P.R.C. Voluntary Copyright Registration Figures

<table>
<thead>
<tr>
<th>Year</th>
<th>Music Registrations</th>
<th>Total Registrations</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>2014</td>
<td>6,094</td>
<td>997,350</td>
<td>0.61%</td>
</tr>
<tr>
<td>2013</td>
<td>62,119</td>
<td>834,569</td>
<td>7.44%</td>
</tr>
<tr>
<td>2012</td>
<td>3,901</td>
<td>560,583</td>
<td>0.70%</td>
</tr>
<tr>
<td>2011</td>
<td>2,339</td>
<td>461,363</td>
<td>0.51%</td>
</tr>
<tr>
<td>2010</td>
<td>1,425</td>
<td>359,871</td>
<td>0.40%</td>
</tr>
<tr>
<td>2009</td>
<td>1,360</td>
<td>336,086</td>
<td>0.40%</td>
</tr>
<tr>
<td>2008</td>
<td>2,084</td>
<td>1,040,454</td>
<td>0.20%</td>
</tr>
<tr>
<td>2007</td>
<td>2,193</td>
<td>133,789</td>
<td>1.64%</td>
</tr>
<tr>
<td>2006</td>
<td>1,589</td>
<td>149,900</td>
<td>1.06%</td>
</tr>
<tr>
<td>2005</td>
<td>855</td>
<td>58,523</td>
<td>1.46%</td>
</tr>
<tr>
<td>2004</td>
<td>260</td>
<td>22,209</td>
<td>1.17%</td>
</tr>
<tr>
<td>2003</td>
<td>181</td>
<td>12,137</td>
<td>1.49%</td>
</tr>
<tr>
<td>2002</td>
<td>188</td>
<td>11,067</td>
<td>1.70%</td>
</tr>
<tr>
<td>2001</td>
<td>182</td>
<td>6,801</td>
<td>2.68%</td>
</tr>
<tr>
<td>2000</td>
<td>198</td>
<td>3,174</td>
<td>6.24%</td>
</tr>
</tbody>
</table>

Nevertheless, the administrative enforcement regime has been vigorously debated and even criticized over the years. According to the 1990 Copyright Law and the 1994 Implementation Rules of Administrative Punishment to Copyright Infringement, there were essentially no limitation on administrative power. Both rules provided that the copyright administration department shall have jurisdiction over infringements including: infringement which create significant impact in P.R.C., transnational infringements, and infringement matters that are deemed to be the duty of NCAC. In the 2001 Copyright Law and 2003 Rules for the Implementation of Copyright Administrative Punishment, the articles were amended by the incorporation of a new criterion, which was “when the infringement impairs the public interest.” Proponents believed that expanding the administrative power was an effective choice, since administrative enforcement requires relatively low cost for the right holders to initiate an enforcement action. In other words, the usual judicial system is time consuming and financially burdensome; contrarily, utilizing administrative enforcement means that right holders can avoid the
lengthy litigation process with a lower cost to protect their rights.\(^{233}\) In addition, the strong administrative enforcement regime provides copyright holders an additional channel to protect their rights. If an infringement was investigated and decided by administrative agency, the People’s Court shall still hear the case, and review the case trial de novo.\(^{234}\) In an administrative investigation, an administrative agency is required to produce an investigation report or administrative decision.\(^{235}\) The report and decision are considered to be self-authenticating, therefore could serve as evidence in the litigation process.\(^{236}\) In a case decided by Sichuan Province Chengdu City Intermediate People’s Court, the investigation report and the administrative decision were provided as evidence, and were accepted by the court to evaluate damages.\(^{237}\) Although many administrative enforcement figures were not available to the public, we can certainly observe from Table 14 that the number of entities inspected were growing. And this expansion of administrative enforcement is confirmed by past amendments and future bills.\(^{238}\) The most recent bill removed the “public interest” criterion, for the precise purpose to reinforce the administrative enforcement regime.\(^{239}\)

\(^{233}\) See Li, supra note 222, at 22-23.

\(^{234}\) Interpretation of the Supreme People’s Court Concerning the Application of Laws in the Trial of Civil Disputes over Copyright (最高人民法院關於審理著作權民事糾紛案件適用法律若干問題的解釋), art. 3 (2002) (China).


\(^{236}\) JIANG, supra note 226, at 173.


<table>
<thead>
<tr>
<th>Year</th>
<th>Administrative Infringement Cases</th>
<th>Entities Inspected</th>
<th>Entities Committed</th>
<th>Percentage of Commitment</th>
<th>Total Fines</th>
</tr>
</thead>
<tbody>
<tr>
<td>2014</td>
<td>4,728</td>
<td>1,063,061</td>
<td>8,686</td>
<td>0.82%</td>
<td>13,499,937</td>
</tr>
<tr>
<td>2013</td>
<td>7,019</td>
<td>1,032,721</td>
<td>10,208</td>
<td>0.99%</td>
<td>14,182,264</td>
</tr>
<tr>
<td>2012</td>
<td>12,015</td>
<td></td>
<td></td>
<td></td>
<td>24,473,000</td>
</tr>
<tr>
<td>2011</td>
<td>63,700</td>
<td>7,419,000</td>
<td>57,000</td>
<td>0.77%</td>
<td>191,000,000</td>
</tr>
<tr>
<td>2010</td>
<td>10,590</td>
<td>963,842</td>
<td>61,995</td>
<td>6.43%</td>
<td>22,143,117</td>
</tr>
<tr>
<td>2009</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2008</td>
<td>9,032</td>
<td>782,670</td>
<td>36,601</td>
<td>4.68%</td>
<td>14,188,386</td>
</tr>
<tr>
<td>2007</td>
<td>9,816</td>
<td>548,646</td>
<td>13,170</td>
<td>2.40%</td>
<td>19,096,456</td>
</tr>
<tr>
<td>2006</td>
<td>8,524</td>
<td>371,144</td>
<td>10,293</td>
<td>2.77%</td>
<td>7,617,869</td>
</tr>
<tr>
<td>2005</td>
<td>7,840</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2004</td>
<td>798</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2003</td>
<td>21,032</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2002</td>
<td>5,250</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2001</td>
<td>3,650</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>2000</td>
<td>1,726</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Unit: cases, entities, RMB

**Table 14: The P.R.C. Copyright Administrative Enforcement Result Figure**

One of the successful administrative enforcement actions was the “Gougou” Shutdown in 2011. Gougou.com was founded in 2004, it was one of the largest search engine for pirated music, movie, video, software, and e-books. In 2007, the founder sold Gougou to Xunlei, and it was shut down several times because of the administrative enforcement. In 2011, the Ministry of Culture ordered Gougou to shut down and reform, it was online for a while but shut down several times afterwards. Many believed that the shutdown was due to Xunlei’s goal to initial public offering in the U.S. Gougou was

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243 GOGOU, http://www.gougou.com (last visited Apr. 2, 2016) (The site was shut down, and left a notice on the page: “Gougou.com has been closed down. Thank you all for your support, and we are sorry for any inconvenience”).
later on sold to an undisclosed third party.\textsuperscript{244} The administrative enforcement eventually shut down the infringing website. The “Gougou” Shutdown revealed the ineffectiveness of the administrative enforcement actions, because it took the administrative agencies more than four years to completely cease the infringement.

Critics raised several concerns about this strong administrative enforcement regime. First, although the 2001 amendment added a criterion “public interest” to limit the scope, it was still ambiguous and left room for interpretation. “Public interest” could be interpreted broadly to include communications, public order, public administration, antitrust, public safety, and morality of the society;\textsuperscript{245} consequently, the copyright administration department still remained to be a channel that is easily abused.\textsuperscript{246} Since courts are allowed to make a civil decision after an administrative decision, scholars worry that the system will lead to a waste of administrative resources.\textsuperscript{247} Further, it may create the double jeopardy to an infringer, which seriously impact the accused’s procedural and human rights. In addition, since intellectual property is considered to be in the scope of private law, expanding administrative enforcement power could result in negative effect on intellectual property protection, further impact the legal system.\textsuperscript{248} This is particularly problematic in the P.R.C., because the administrative branch often seen to act beyond the scope of its power.\textsuperscript{249}

In terms of administrative enforcement on copyright, CMO In-house Counsel Charles and Supreme People’s Court Judge Jack both mentioned that administrative copyright enforcement was weaker comparing to trademark, because there were fewer agencies, resources, and administrative staffs nationwide to carry out enforcement.\textsuperscript{250} Charles further criticized administrative copyright enforcement was not practical, and it is not very viable for handling copyright infringement.

5.1.2 The Ambiguous Criminal Copyright Enforcement Regime


\textsuperscript{245} Yang Yong (楊勇), Zhuzuoquan Xingzhengzhifa Ruhe Panding Qinquxinxingwei Sunhai le Gonggongliyi ([Copyright Administrative Enforcement: How to Decide Infringement that Impairs Public Interest], CHINA IP, July 2011, available at http://www.chinaipmagazine.com/journal-show.asp?id=1021&pn=0).


\textsuperscript{247} Id. at 162.

\textsuperscript{248} WU, supra note 149, at 45.

\textsuperscript{250} Interview with Jack, Judge, P.R.C. Supreme People’s Court (Feb. 8, 2016); Interview with Charles, CMO In-house Counsel (Dec. 8, 2014).
The codification of criminal liability of copyright infringement originated in the 1997 amendment of Criminal Law. The section “Crimes of Intellectual Property Right Infringement” was added into chapter “Crimes of Undermining the Order of Socialist Market Economy”. A total of eight articles were amended, covering trademark, patent, copyright, and trade secret infringement offenses. Article 217 provided the offense of copyright infringement:

Whoever, for the purpose of reaping profits, has committed one of the following acts of copyright infringement and gains a fairly large amount of illicit income, or when there are other serious circumstances, is to be sentenced to not more than three years of fixed-term imprisonment, criminal detention, and may in addition or exclusively be sentenced to a fine; when the amount of the illicit income is huge or when there are other particularly serious circumstances, he is to be sentenced to not less than three years and not more than seven years of fixed-term imprisonment and a fine:

(1) copy and distribute written, musical, movie, televised, and video works; computer software; and other works without the permission of their copyrighters;

(2) publish books whose copyrights are exclusively owned by others;

(3) duplicate and distribute audiovisual works without the permission of their producers;

(4) produce and sell artistic works bearing fake signatures of others.

Because administrative enforcement regime was established before the codification of criminal liability of copyright infringement, administrative enforcement regime is still acting as the primary enforcement mechanism of battling piracy. There were many reasons that lead to this undermined criminal protection of copyright: first, overall copyright protection was designed in a hierarchical regime. The majority believed that the intellectual property rights protection must be carried out by different liability systems, and a hierarchical protection regime was adequate for that purpose. Scholars described this hierarchical system as “applying civil law as fundamental, supplement with administrative law, and guarantee with criminal law.” However, the shortcoming for the current hierarchical system yield most of the cases closed at the administrative stage. Scholars and practitioners argued that this common trend of “using

251 See Liu Xianquan & Zhang Lun (劉憲權、張晗), Lun Zhishichanquan Xingfa Baohu de Biyaoxing han Shiduxing (論知識產權刑法保護的必要性和適度性) [On the Necessity and Properness of Criminal Protection to Intellectual Property Rights], CRIM. RESEARCH (犯罪研究), no. 4, 2006, at 2-4 (China).
252 See Chen Zhonglin & Chen Keqian (陳忠林、陳可倩), Guanyu Zhishichanquan Xingfa Baohu de Jige Wenti (關於知識產權刑法保護的幾個問題) [Issues on Criminalization of Intellectual Property Rights], CRIM. SCI. (中國刑事法雜誌), no. 3, 2007, at 16 (China).
253 See LI, supra note 156, at 234-39.
254 Chen & Chen, supra note 253, at 16.
administrative punishment to replace criminal sanction” could diminish the criminal enforcement regime, therefore minimum the deterrence effect of the criminal law.256 Second, the jurisdictional rules for administrative and criminal law was extremely ambiguous on copyright infringement, causing overlapping jurisdiction between the administrative agency and prosecutors.257 Third, the elements of article 217 of Criminal Law was extremely vague, particularly “for the purpose of reaping profits,” “a fairly large amount of illicit income,” “illicit income is huge” and “other particularly serious circumstances.” Commentators argued that “the purpose of reaping profits” element is vague, creating uncertainty to either apply “subjective standard” or “objective standard.”258 In addition, the “illicit income” element was also tricky for prosecution. Although there were standards to evaluate the “illicit income” of committing copyright infringement,259 the evidence collecting process was particularly difficult. This difficulty was stressed by CMO in-house counsel Charles, as he explained me why there were more civil litigations than criminal prosecutions in mainland China:

Our CMO currently do not rely on criminal prosecution, because the threshold for intellectual property right criminal prosecution is relatively high. Even though the threshold was lowered, technically speaking it is still difficult (to establish a crime). It is not as clear as civil litigation, because criminal procedure applies an inquisitorial system, the discretion lies on the government agencies. If they think there is a case, there will be a case. If the prosecutors actively initiated a case, we will cooperate to provide evidence. We had previous experiences in Xiamen, Shanghai, and Guangxi. The local public security will request for evidence if they encounter copyright infringement cases, evidence such as whether use of music was licensed. Another difficulty is the burden of proof. Because there must be an amount sufficient enough to constitute a criminal charge. We are unable to accumulate evidence collection, and there was no enforcement agency to collect relevant evidence.”260

5.1.3 How Special 301 Report Impacted P.R.C. Copyright Enforcement

Although the P.R.C. enjoys claiming its uniqueness of its government, it is undoubted that the copyright law and enforcement was profoundly impacted by

256 Interview with Charles, CMO In-house Counsel (Dec. 8, 2014). See Luo Ying (羅穎), Zhishichanquan Xingfa Baohu de Shiti Jiexian [Limitation of Criminal Protection for Intellectual Property Rights], LEGALITY VISION (法制博覽), no. 6, 2016, at 10 (China).


259 Wang Minmin & Lan Bo (王敏敏、蘭波), Qinfan Zhishichanquanzui de Shue Rending [Damages in the Infringement of Intellectual Property Rights], CHINESE PROCURATORS (中國檢察官), no. 18, 2012, at 21 (China).

260 Interview with Charles, CMO In-house Counsel (Dec. 8, 2014).
international standard. Since the Chinese Economic Reform in the late 1970s, the P.R.C. strived to improve economics, and gradually built up the trade partnership with many countries. Because the U.S. was an important trade partner to the P.R.C., the U.S. played a crucial part in propagandize the copyright enforcement in the P.R.C. The U.S.-China relations became more substantial because the popular copyrighted works were from the U.S., and the U.S. was also one of the first countries that concerned about copyright protection in P.R.C.\textsuperscript{261} On the other hand, it was crucial for the U.S. to promote intellectual property protection in P.R.C., because it would benefit the domestic industries that were founded on intellectual property rights. Therefore, the Special 301 Report served as a method to negotiate P.R.C. to improve its intellectual property protection.

For the purpose of examining copyright enforcement in the P.R.C., the timeline can be roughly broken into two eras. The first era was from 1989 to 2001, which was the period when the P.R.C. conformed its domestic law to the international standard. The second era was from 2002, which was the year the P.R.C. joined WTO, to the present. In this era, the CPC gradually understood the importance of intellectual property to Chinese domestic industries and global competitiveness, and started to construct and reinforce the copyright system.

5.1.3.1 Conforming to International Standard Era

The first Special 301 Report was published in 1989, when the P.R.C. lacked a copyright law. As part of the trade negotiations between the U.S. and the P.R.C., the P.R.C. government promised to pass the then Copyright Law bill.\textsuperscript{262} Although the Copyright Law was promulgated in 1990, piracy was still widespread in mainland China, resulting in “significant losses to U.S. industries.”\textsuperscript{263} This was primarily due to the fact that the law did not protect foreign authors’ works first published outside of mainland China.\textsuperscript{264} In January 17, 1992, Memorandum of Understanding Between the Government of the People’s Republic of China and the Government of the United States of America on the Protection of Intellectual Property was signed, reiterating the promise to accede and implement the Berne Convention and the UCC, and protect foreign works including sound recordings.\textsuperscript{265}

In 1992, the P.R.C. acceded to the Berne Convention and the UCC, with the commitment to protect foreign works. Due to the need for an organization to manage music copyright, many international right holders called for the establishment of CMOs.\textsuperscript{266} In December 17, 1992, the NCAC and the Chinese Musicians’ Association founded the Music Copyright Society of China (the MCSC), the sole CMO that manages

\begin{itemize}
\item \textsuperscript{261} Li, supra note 156, at 266.
\item \textsuperscript{262} Li, supra note 204, at 174.
\item \textsuperscript{264} Id. at 7.
\item \textsuperscript{266} Li, supra note 156, at 237.
\end{itemize}
music authors rights, protecting the rights of composers, lyricists, and other right holders. The main function of MCSC includes to administer the registration of rights and collect information for musical works, to represent the right holder members for licensing matter, to represent the right holder members in litigations, and to provide advices on Copyright Law amendment. In 1995, the NCAC approved the International Federation of Phonogram Industries (hereinafter the IFPI) to establish a representative office in mainland China. On the other hand, the CMO for sound recording and video recording rights - China Audio-Video Copyright Association (hereinafter the CAVCA) was established in 2005, which was thirteen years after the establishment of MCSC.

Although P.R.C. promulgated laws and established the first CMO for music copyright, the enforcement was still ineffective to control the piracy problem in 1994. In February 26, 1995, China-United States Agreement Regarding Intellectual Property Rights Memorandum of Understanding reiterated China’s commitment “to provide[] adequate and effective protection and enforcement of intellectual property rights . . . .” It aimed to strengthen enforcement efforts by establishing intellectual property rights enforcement structure, and pursuing education and training on intellectual property law. In particular, the P.R.C. State Council established a task committee for intellectual property enforcement, to organize and coordinate the enforcement nationwide. The administrative and law enforcement agencies, including NCAC, State Administration for Industry and Commerce, the Patent Office, the Police, and the General Administration of Customs, planned to coordinate the enforcement action by participating in enforcement task forces. Pirated audio-visual product, along with motion pictures and computer software, were specifically mentioned to be the focus of enforcement task force. And as aforementioned, the administrative agency – NCAC was responsible for directing enforcement task force on investigation and sanction of copyright infringement. However, the piracy still remained serious, particularly pirated CD and videos; consequently, the P.R.C. was placed on the USTR’s Watch List and designated as a Priority Foreign Country in the 1995 and 1996 Special 301 Reports. Critics questioned whether the P.R.C. internal structure and capacity were incapable of controlling the piracy at that time.

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268 Id.
272 See supra Section 5.1.1.
Enforcement progress was reported in the 1997 Special 301 Report, including 39 piracy factories shut down, 250 people arrested, and 15 years of prison terms were sentenced to copyright infringers. Nevertheless, the piracy in mainland China was still serious and ongoing, the P.R.C. was designated for out of cycle “Section 306 monitoring” from 1997 to 2004. This allowed USTR to react more swiftly without initiating a new special 301 investigation.

Despite this progress, many concerns remained unanswered in 2000, and pirated goods were still prevalent in mainland China. The structure of intellectual property administration and enforcement was criticized as being opaque, and the provincial level enforcement was inconsistent. In 2001, pirated optical media products were found to be produced by licensed plants, which worsened the piracy problem.

In December 2001, the P.R.C. became a member of the WTO. An amendment was made on October 27, 2001 to conform the Copyright Law to TRIPS standard. For enforcement aspect, the provision related to CMO was amended in 2001 Copyright Law. While the 1990 Copyright Law did not include provision for CMOs, the 2001 Copyright Law provided a general provision allowing “copyright owner and copyright-related right holders may authorize an organization for collective administration of copyright to exercise the copyright or any copyright-related right,” including representation of the right holders to litigate. The provision also facilitated the promulgation of Regulation on the Collective Administration of Copyright in 2004. Most importantly, the 2001 Copyright Law also added criminal liability to copyright infringements, and created a hierarchy of liability. In other words, on a base level, an infringer will be liable for civil liability of their infringement; if the infringement impairs “public interest,” the administrative liability will be applied; furthermore, if the infringer committed a crime, the infringer will be liable under criminal law.

5.1.3.2 Enforcement for Protecting Domestic Industries and Improving Global Competitiveness Era

2002 was a turning point for the copyright enforcement of P.R.C. Since the P.R.C. acceded to the TRIPS Agreement in 2001, protecting intellectual property rights had become a substantial reason to shape a stable economic development and improve global competitiveness. In 2002, the then Vice Premier Wen Jiabao stated in an intellectual property forum that “the technology advancement, the flourishing knowledge economy,
Enforcement of the Law

and the thriving global economic were all reinforced by intellectual property.”\(^{283}\) In 2004, Wen urged that “the global competition in the future will be the competition on intellectual property rights, and it will be reflected on technology and products; in order to realize a prosperity China, the goal to make excellent domestic enterprises to become international brands is encouraged.”\(^{284}\)

While the Chinese government was managing to control the domestic production of pirated products, imports of pirated products became a new problem.\(^{285}\) Besides, the administrative enforcement system was not functioning as expected. According to 2002 Special 301 Report, the administrative enforcement and the judiciary both failed to deter infringements.\(^{286}\) The report pointed out the reasons of the failure were, that the administrative fines imposed were minimal, and very few cases were transferred to criminal prosecution.\(^{287}\)

In 2004, the P.R.C. topped the exportation of pirated goods of the world,\(^{288}\) which indicated that the legislations and enforcement actions were not able to control the piracy problem. To react to the problem, National Taskforce of Intellectual Property Right was established, to improve the coordination between the governmental agencies, and to improve the cooperation of administrative enforcement and judiciary.\(^{289}\) The taskforce was comprised of the chief officials of Ministry of Public Security, Publicity Department of the Communist Party of China, Ministry of Industry and Information Technology, Ministry of Commerce, State Administration for Industry and Commerce, General Administration of Quality Supervision, Inspection and Quarantine, NCAC, General Administration of Customs, China Food and Drug Administration, State Intellectual Property Office (hereinafter the SIPO), Legislative Affairs Office, Supreme People’s Court, and Supreme People’s Procuratorate.

In December of 2004, due to the ineffective criminal law system, the Supreme People’s Court and Supreme People’s Procuratorate jointly issued the Interpretation of the Supreme People’s Court and the Supreme People’s Procuratorate Concerning Some Issues on the Specific Application of Law for Handling Criminal Cases of Infringement upon Intellectual Property Rights. The Interpretation clarified the monetary threshold for


\(^{286}\) Id.

\(^{287}\) Id.


crime of copyright infringement, which provided the “relatively large amount of illegal proceeds” to be the illegal proceeds that exceeded thirty thousand RMB. However, the threshold is still widely criticized being ineffective even today. For example, there were no criminal liability to smuggling pirated optical discs and manufacturing pirated optical discs, and the infringers were only liable for administrative liability. According to data provided by NCAC in Table 15, the confiscated optical media products and total confiscations of copyright infringement by administrative enforcement have both been dropping since 2005. The peak number in 2005 was a result of NCAC initiated multiple campaigns of combating against pirated optical media products and the Internet piracy.

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290 Criminal Law of the P.R.C. (中華人民共和國刑法) art. 217 (1997) (China) (“Whoever, for the purpose of reaping profits, has committed one of the following acts of copyright infringement and gains a fairly large amount of illicit income, or when there are other serious circumstances, is to be sentenced to not more than three years of fixed-term imprisonment, criminal detention, and may in addition or exclusively be sentenced to a fine; when the amount of the illicit income is huge or when there are other particularly serious circumstances, he is to be sentenced to not less than three years and not more than seven years of fixed-term imprisonment and a fine”).


292 See supra Part 5.1.2.


Table 15: Confiscation Figure by Administrative Copyright Enforcement in the P.R.C.²⁹⁵

<table>
<thead>
<tr>
<th>Year</th>
<th>Confiscated Optical Media Products</th>
<th>Total Confiscations</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>2014</td>
<td>9,224,736</td>
<td>16,665,890</td>
<td>55.35%</td>
</tr>
<tr>
<td>2013</td>
<td>9,921,835</td>
<td>17,666,712</td>
<td>56.16%</td>
</tr>
<tr>
<td>2012</td>
<td>2011</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2010</td>
<td>23,754,110</td>
<td>35,097,739</td>
<td>67.68%</td>
</tr>
<tr>
<td>2009</td>
<td>30,536,277</td>
<td>45,648,426</td>
<td>66.89%</td>
</tr>
<tr>
<td>2008</td>
<td>52,498,769</td>
<td>75,696,954</td>
<td>69.35%</td>
</tr>
<tr>
<td>2007</td>
<td>48,143,389</td>
<td>73,687,892</td>
<td>65.33%</td>
</tr>
<tr>
<td>2006</td>
<td>65,870,348</td>
<td>106,961,146</td>
<td>61.58%</td>
</tr>
<tr>
<td>2005</td>
<td>39,374,359</td>
<td>85,057,775</td>
<td>46.29%</td>
</tr>
<tr>
<td>2004</td>
<td>26,451,917</td>
<td>67,975,284</td>
<td>38.91%</td>
</tr>
<tr>
<td>2003</td>
<td>27,071,282</td>
<td>67,904,261</td>
<td>39.87%</td>
</tr>
<tr>
<td>2002</td>
<td>37,657,164</td>
<td>62,161,173</td>
<td>60.58%</td>
</tr>
<tr>
<td>2001</td>
<td>7,682,960</td>
<td>32,602,319</td>
<td>23.57%</td>
</tr>
<tr>
<td>2000</td>
<td>26,451,917</td>
<td>67,975,284</td>
<td>38.91%</td>
</tr>
</tbody>
</table>

Unit: disks, total confiscated units, percentage of confiscated optical media products out of total confiscations

In 2006, in the Group Study Meeting of the Party’s Political Bureau Central Committee, General Secretary of the Central Committee of the CPC Hu Jintao stated that China needs to accelerate the protection of intellectual property, to invest in intellectual property intensive industries, and to develop international brands.²⁹⁶ This public statement indicated that the P.R.C. government officials clearly acknowledged the importance of intellectual property rights, especially to have strong domestic industries that are founded on intellectual property rights. In May 2006, Regulation on the Protection of the Right to Communicate Works to the Public over Information Networks was promulgated, “for the purpose of protecting the right to communicate works to the public over information networks of the copyright owners, and performers and producers of audio-visual products.”²⁹⁷

2007 was the “Year of the Intellectual Property Right Culture” of the P.R.C. In the 17th National Congress of the CPC, Hu Jintao urged to improve intellectual property

Enforcement of the Law

... protection, and transfer the intellectual property strategy from promulgation of laws into enforcement of laws. The Second Interpretation of the Supreme People’s Court and the Supreme People’s Procuratorate of the Issues concerning the Specific Application of Law in Handling Criminal Cases of Infringement of Intellectual Property Rights was jointly issued by the Supreme People’s Court and Supreme People’s Procuratorate, in order to improve the criminal prosecution of copyright infringement. In addition, the Anti-piracy Report Center was initiated in September 2007, which provided rewards for people who report copyright infringements. Ministry of Culture also issued notification that requested provincial and local enforcement agencies to target for the source of infringement, to stop the piracy of audio and video products.

In 2010, the Ministry of Public Security had much better coordination with administrative enforcement agencies. The Ministry of Public Security accepted 754 transferred cases from administrative agencies, which was an 52.9% increase from 2009.

From October 2010 to June 2011, the “Special Operation against IPR Infringement and Counterfeit” campaign was held, then Premier Wen Jiabao had a press conference especially for the campaign. Besides reiterating the progress of intellectual property protection in China, Wen mentioned that the focuses of the campaign were on News publishing, culture and entertainment industry, technology and agriculture industry. Criminal prosecution was once again being emphasized, and also stressed on improving the intellectual property legislation, enforcement, and judiciary system.
To combat serious online piracy in mainland China, annual “Online Piracy Campaign” was launched since 2005, and continued by “Jian Wang campaign” from 2010. The enforcement campaign did successfully shutdown several major piracy websites, including the notorious “Shooter” movie piracy website in 2014, “Tianlaicun” music piracy website in 2011, “Tianxian Shipin” video piracy website in 2010, and “Tomatolei” Windows XP piracy website in 2008.

<table>
<thead>
<tr>
<th>Year</th>
<th>Infringements</th>
<th>Confiscated Servers</th>
<th>Website Shutdowns</th>
<th>Notice and Takedowns</th>
<th>Fine</th>
<th>Transfer to Criminal Prosecution</th>
</tr>
</thead>
<tbody>
<tr>
<td>2005-2013</td>
<td>4,241</td>
<td>1,178</td>
<td>1,926</td>
<td>7,830,000</td>
<td>322</td>
<td></td>
</tr>
<tr>
<td>2014</td>
<td>512</td>
<td>362</td>
<td>1,280,000</td>
<td>24</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2013</td>
<td>282</td>
<td>93</td>
<td>1,079,853</td>
<td>10</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2012</td>
<td>1,148</td>
<td>36</td>
<td>870,750</td>
<td>31</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2011</td>
<td>204</td>
<td>20</td>
<td>705,000</td>
<td>6</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2009</td>
<td>453</td>
<td>184</td>
<td>362</td>
<td>129</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2008</td>
<td>1,001</td>
<td>123</td>
<td>832</td>
<td>36</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2007</td>
<td>436</td>
<td>71</td>
<td>870,750</td>
<td>31</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2006</td>
<td>172</td>
<td>39</td>
<td>789,000</td>
<td>18</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2005</td>
<td>172</td>
<td>39</td>
<td>789,000</td>
<td>18</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Unit: cases, server units, website counts, cases, RMB, cases

Table 16: The P.R.C. Copyright Enforcement Result of “Online Piracy Campaign” and “Jian Wang Campaign”

In July 9, 2015, the NCAC for the first time issued a notice and take down announcement to forbid the use of unlicensed music works. The announcement further stated that online music service providers must takedown the unlicensed work before July

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31, 2015, or NCAC will commence enforcement action against the infringements.\textsuperscript{312} It had been reported that major online music service providers, including Tencent, Ali Music, Baidu, and, Duomi took down all the unlicensed music works because of the announcement.\textsuperscript{313}

From 2005 to 2015, P.R.C. was placed on the USTR’s Priority Watch List in the Special 301 Report, and was monitored for out-of-cycle review under Section 306 in 2006, 2012, and 2014. The major concerns about the copyright enforcement in mainland China listed by USTR generally remained the same within this 10-year period. The infringement level remained high, resulted from ineffectiveness of criminal enforcement.\textsuperscript{314} Ineffectiveness of customs enforcement\textsuperscript{315} and poor coordination between central and local government and agencies were also claimed to be key to ineffective enforcement.\textsuperscript{316}

5.1.4 Conclusion

From 1985 to 2015, we can see that the P.R.C. made effort to improve copyright protection. However, many U.S. and Taiwanese copyright owners were still harmed by serious infringement in mainland China.\textsuperscript{317} According to USTR, the reasons for the ineffective enforcement have not changed for many years. First, the opaqueness in rulemaking and decision making discourages the U.S. right holders to participate the market in the P.R.C.\textsuperscript{318} Second, lack of criminal prosecution resulted in lack of

\textsuperscript{312} Id.


deterrence to copyright infringers. Third, ineffectiveness of customs enforcement increased the quantity of infringing products in the mainland China market. Fourth, poor coordination between central and local government agencies increased the costs for right holders to protect their intellectual property.

Scholars also pointed out that “inadequate enabling environment” was one of the import reasons USTR left out. The “inadequate enabling environment” such as enforcement difficulties in a large territory, corruption, local protectionism, the indistinguishability between public and private entities . . . etc. In addition, many scholars suggested that cultural value on copyright was also an important factor that affect copyright law enforcement in mainland China. While Taiwan also practice, preserve and promote Chinese culture, it would not make sense that Chinese culture caused to two different enforcement results.

5.2 From Pirate Island to Asian Enforcement Model – R.O.C. Copyright Law Enforcement

The R.O.C. government’s separation of powers is similar to the U.S. system, but with some modifications; the government has five branches, including Executive Yuan, Legislative Yuan, Judicial Yuan, Examination Yuan, and Control Yuan. The Examination Yuan manages the examination, employment, and human resource matter of civil service personnel systems, and Control Yuan exercises the powers of consent, impeachment, censure and auditing. Besides the above mentioned differences, the Executive Yuan, Legislative Yuan, and Judicial Yuan have very similar functions to the U.S. Cabinet, Congress, and the judiciary system. Therefore, law enforcement is carried out by the prosecutor and police under the executive branch.

5.2.1 The Law Enforcement System in Taiwan

323 Id.
324 See sources cited supra note 11.
325 See supra Part 2.2.
The battlefront of copyright law enforcement is carried out by the R.O.C. Police. As provided in the Code of Criminal Procedure, the Police shall investigate by the order of a public prosecutor, or suspicious that an offense has been committed.\(^{327}\) Specifically, the Intellectual Property Right Protection Task Force of Second Special Police Corps specialized in enforcing intellectual property laws, including trademark and copyright infringements.\(^{328}\)

Over the years, the R.O.C. Police have worked closely with right holders and CMOs. In a typical case, copyright holders and CMOs offer evidence of infringement to the police, which initiate the investigation. Generally, the right holders or CMOs search and find infringements or infringing goods online, in night markets, or in stores.\(^{329}\) To meet the burden of proof, the right holders and CMOs usually purchase the infringing goods as evidence of infringements,\(^{330}\) which is also a common method of investigation and establishing venue in the U.S. (“an undercover buy”).\(^{331}\) However, there were strategies used by infringers that create difficulty for evidence collection. There were two typical music copyright enforcement scenarios in Taiwan, which were “police patrol” and “karaoke machines cases.”

In “police patrol” scenario, the Police receives accusation of vendor selling pirated goods in night markets. Although the facts of this type of cases are relatively certain, the copyright infringers create new strategies to avoid investigation. The night market vendors that sells pirated CDs, DVDs, and Blue-rays usually set up their stand with a bucket nearby, which include a sign that says “put money in the bucket.” As a result, there are no obvious evidence to support the vendors are “selling” the infringing goods. The only way for the police to collect evidence is to wait for the vendors to collect the money after staying put for hours. Even if the police stops and ask the suspects about the act, the suspects can easily deny with an excuse that they are just passing by.

Another type of infringement is “karaoke machines cases,” which concerns infringement of right to reproduce and right to public performance. In this type of scenario, the right holders are usually the CMOs, and defendants are the “owners of the karaoke machines” or “small appliance store owners.” The discovery of infringing goods is usually initiated by CMOs, by sending agents to karaoke clubs, restaurants that offer karaoke machines, and small appliance stores that sell karaoke machines. At karaoke clubs or restaurants, the CMOs agents will look for the on-demand menu for songs of their members or possessed by the CMOs, and actually order those songs and record them as evidence.

\(^{327}\) Code of Criminal Procedure (刑事訴訟法) art. 231 (2003) (Taiwan); Police Act (警察法) art. 9 (2002) (Taiwan).
\(^{330}\) Interview with Patricia, Prosecutor, County D. Prosecutor’s Off. (Nov. 24, 2014); Interview with Larry, Police Officer, Second Special Police Corps (Jan. 2, 2015).
\(^{331}\) See 1-4 SHERRI L. SCHORNSTEIN, CRIMINAL ENFORCEMENT OF IP RIGHTS § 4.04 (2013).
These two scenarios showed that even where a comprehensive copyright law has been enacted and is being actively enforced, there may still be difficulties for law enforcement in combatting commercial motivated piracy.

According to infringement data collected by National Police Agency, Ministry of the Interior, there are statistical fluctuations for infringements count and infringers count. However, in the period from 1996 to 2014, the maximum of infringements and infringers was in 2001, which was 4,511 infringements and 5,091 infringers; the general trend after 2001 shows a decline in both the total number of infringements and infringers. Assuming that the enforcement level remains constant, we could infer that enforcement is effective in reducing infringements and infringers. On the other hand, the estimated damage showed fluctuations too, with a significant increase from 2006 to 2008, and a general trend showing steady increase of estimated damage. Overall, the decrease of infringements and infringers with increasing estimated damage indicates that the average damage for each case is increasing. This may be explained that due to the consistent enforcement, the risk and cost of infringing copyright increase, therefore the infringers may be commercially motivated “professional criminals”.

<table>
<thead>
<tr>
<th>Year</th>
<th>Infringements</th>
<th>Infringers</th>
<th>Pirated CDs</th>
<th>Estimated Damage</th>
</tr>
</thead>
<tbody>
<tr>
<td>2015</td>
<td>2,210</td>
<td>2,621</td>
<td>183,958</td>
<td></td>
</tr>
<tr>
<td>2014</td>
<td>2,150</td>
<td>2,610</td>
<td>461,950</td>
<td>68,830,190,102</td>
</tr>
<tr>
<td>2013</td>
<td>2,255</td>
<td>2,640</td>
<td>99,608</td>
<td>24,682,455,395</td>
</tr>
<tr>
<td>2012</td>
<td>2,224</td>
<td>2,626</td>
<td>131,648</td>
<td>28,921,475,266</td>
</tr>
<tr>
<td>2011</td>
<td>2,250</td>
<td>2,637</td>
<td>615,528</td>
<td>12,771,015,152</td>
</tr>
<tr>
<td>2010</td>
<td>2,271</td>
<td>2,611</td>
<td>1,348,523</td>
<td>8,226,950,344</td>
</tr>
<tr>
<td>2009</td>
<td>2,923</td>
<td>3,196</td>
<td>785,806</td>
<td>8,897,430,438</td>
</tr>
<tr>
<td>2008</td>
<td>3,250</td>
<td>3,411</td>
<td>1,396,305</td>
<td>14,754,216,387</td>
</tr>
<tr>
<td>2007</td>
<td>3,384</td>
<td>3,840</td>
<td>636,080</td>
<td>33,942,237,935</td>
</tr>
<tr>
<td>2006</td>
<td>3,071</td>
<td>3,290</td>
<td>1,177,523</td>
<td>26,378,811,037</td>
</tr>
<tr>
<td>2005</td>
<td>2,404</td>
<td>2,618</td>
<td>1,578,734</td>
<td>5,168,978,141</td>
</tr>
<tr>
<td>2004</td>
<td>2,358</td>
<td>2,133</td>
<td>2,492,147</td>
<td>4,502,267,936</td>
</tr>
<tr>
<td>2003</td>
<td>2,617</td>
<td>3,254</td>
<td>3,272,359</td>
<td>8,079,355,459</td>
</tr>
<tr>
<td>2002</td>
<td>4,032</td>
<td>4,824</td>
<td>8,044,815</td>
<td>8,044,815,936</td>
</tr>
<tr>
<td>2001</td>
<td>4,511</td>
<td>5,091</td>
<td>4,105,942</td>
<td>4,195,474,221</td>
</tr>
<tr>
<td>2000</td>
<td>3,280</td>
<td>3,682</td>
<td>5,689,385</td>
<td>5,689,385,706</td>
</tr>
<tr>
<td>1999</td>
<td>1,948</td>
<td>2,296</td>
<td>460,573</td>
<td>460,573,566</td>
</tr>
<tr>
<td>1998</td>
<td>1,314</td>
<td>1,483</td>
<td>434,344</td>
<td>434,344,987</td>
</tr>
<tr>
<td>1997</td>
<td>1,193</td>
<td>1,360</td>
<td>268,622</td>
<td>268,622,094</td>
</tr>
<tr>
<td>1996</td>
<td>1,087</td>
<td>1,301</td>
<td>103,895</td>
<td>103,895,869</td>
</tr>
</tbody>
</table>

Unit: cases, people, discs, NTD

Table 17: The R.O.C. Copyright Law Enforcement Result Figure

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332 See Table 17: The R.O.C. Copyright Law Enforcement Result Figure.
333 See Table 17: The R.O.C. Copyright Law Enforcement Result Figure.
334 See Don C. Gibbons & Donald L. Garrity, Definition and Analysis Certain Criminal Types, 53 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 27, 28 (1962) (provided a typology that illustrate “professional criminals” see themselves as skilled career offenders).
335 Statistics recompiled by author, originally from: National Police Agency Statistical Annual Report: Commercial Crimes (警政統計年報：查獲經濟案件), NATIONAL POLICE AGENCY, MINISTRY OF
If we look at the enforcement result and sales statistics split by origin of the work altogether, we could infer the piracy in Taiwan actually had more impact on the domestic creative industry than international. The total music sales share of domestic work and international works were within only 10 percent difference annually, shifting from higher domestic sales into higher international sales since 2008. On the other hand, the copyright enforcement result showed very different trend, the majority of infringements were domestic works.

<table>
<thead>
<tr>
<th>Year</th>
<th>Domestic</th>
<th>International</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>2014</td>
<td>1,502</td>
<td>69.86%</td>
<td>648</td>
</tr>
<tr>
<td>2013</td>
<td>1,528</td>
<td>67.76%</td>
<td>727</td>
</tr>
<tr>
<td>2012</td>
<td>1,654</td>
<td>74.37%</td>
<td>570</td>
</tr>
<tr>
<td>2011</td>
<td>1,615</td>
<td>71.78%</td>
<td>635</td>
</tr>
<tr>
<td>2010</td>
<td>1,460</td>
<td>64.29%</td>
<td>811</td>
</tr>
<tr>
<td>2009</td>
<td>1,799</td>
<td>61.55%</td>
<td>1,124</td>
</tr>
<tr>
<td>2008</td>
<td>1,880</td>
<td>57.85%</td>
<td>1,370</td>
</tr>
<tr>
<td>2007</td>
<td>2,262</td>
<td>66.84%</td>
<td>1,122</td>
</tr>
<tr>
<td>2006</td>
<td>1,818</td>
<td>59.20%</td>
<td>1,253</td>
</tr>
<tr>
<td>2005</td>
<td>1,836</td>
<td>76.37%</td>
<td>568</td>
</tr>
<tr>
<td>2004</td>
<td>1,959</td>
<td>83.08%</td>
<td>399</td>
</tr>
<tr>
<td>2003</td>
<td>2,289</td>
<td>87.47%</td>
<td>328</td>
</tr>
<tr>
<td>2002</td>
<td>3,563</td>
<td>88.37%</td>
<td>469</td>
</tr>
</tbody>
</table>

Unit: infringement cases, percentage out of all cases, infringement cases, percentage out of all cases, total cases

Table 18: The R.O.C. Copyright Enforcement Result Split by Origin of the Work

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336 See Table 19: Music Sales Split by Origin of the Work in Taiwan.
337 See Table 18: The R.O.C. Copyright Enforcement Result Split by Origin of the Work.
Table 19: Music Sales Split by Origin of the Work in Taiwan

<table>
<thead>
<tr>
<th>Year</th>
<th>Domestic</th>
<th>International</th>
<th>Other</th>
</tr>
</thead>
<tbody>
<tr>
<td>2014</td>
<td>1,080,640</td>
<td>949,490</td>
<td>211,540</td>
</tr>
<tr>
<td>2013</td>
<td>1,313,690</td>
<td>1,363,870</td>
<td>1,008,070</td>
</tr>
<tr>
<td>2012</td>
<td>1,613,770</td>
<td>1,826,930</td>
<td>1,164,660</td>
</tr>
<tr>
<td>2011</td>
<td>2,023,230</td>
<td>2,451,930</td>
<td>1,250,990</td>
</tr>
<tr>
<td>2010</td>
<td>2,119,580</td>
<td>2,647,790</td>
<td>1,204,690</td>
</tr>
<tr>
<td>2009</td>
<td>2,180,860</td>
<td>2,396,390</td>
<td>1,040,350</td>
</tr>
<tr>
<td>2008</td>
<td>2,201,620</td>
<td>2,370,100</td>
<td>875,960</td>
</tr>
<tr>
<td>2007</td>
<td>3,091,350</td>
<td>2,763,910</td>
<td>875,960</td>
</tr>
<tr>
<td>2006</td>
<td>3,368,150</td>
<td>2,946,910</td>
<td>895,210</td>
</tr>
<tr>
<td>2005</td>
<td>5,510,150</td>
<td>4,524,990</td>
<td>1,038,390</td>
</tr>
<tr>
<td>2004</td>
<td>7,328,160</td>
<td>5,471,340</td>
<td>2,153,810</td>
</tr>
<tr>
<td>2003</td>
<td>7,370,250</td>
<td>6,066,890</td>
<td>2,151,710</td>
</tr>
<tr>
<td>2002</td>
<td>8,241,250</td>
<td>7,115,420</td>
<td>2,033,560</td>
</tr>
</tbody>
</table>

Unit: discs, percentage of market share

Figure 6: Percentage Comparison of Infringement Cases and Sales Split by Origin of the Work in Taiwan

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339 Before 2005, group artists are included in the category “other.” After 2005, “other” includes only classical music.


341 Figure created by author, statistics recompiled from: Table 18: The R.O.C. Copyright Enforcement Result Split by Origin of the Work and Table 19: Music Sales Split by Origin of the Work in Taiwan.
The enforcement result could be due to several possible factors: the infringers have easier access to domestic work, or the higher demand for domestic works. Another relevant factor would be, the R.O.C. Copyright Act provides that infringement is an *Antragsdelikt* offense, meaning that offenses are actionable only upon complaint.\(^{342}\) However, the data included all the enforcement result, rather than prosecution count or conviction count.\(^{343}\) Based on the sales data, the Recording Industry Foundation in Taiwan (hereinafter RIT) also believed that music piracy has much deeper impact to domestic music industry than international music industry.\(^{344}\)

The *Antragsdelikt* offenses system for copyright infringement has been heatedly debated in Taiwan since 2000s. Because the R.O.C. adopts a civil law system, many offenses are categorized as *Antragsdelikt* offenses, including most of the copyright infringement offenses.\(^{345}\) For the music industry, many CMOs, authors, and copyright owners support the removal of copyright infringement offenses from *Antragsdelikt* category.\(^{346}\) In addition, Larry, a police officer of the Intellectual Property Right Protection Task Force expressed that, the categorization of *Antragsdelikt* offenses certainly increases the level of enforcement difficulty.\(^{347}\) Since *Antragsdelikt* offenses require a complaint by the copyright owner to initiate an investigation, the police cannot initiate investigation by themselves. On the other hand, scholars and practitioners worry that, for the purpose of convenience to law enforcement or to increase deterrence, removing copyright infringement offenses from *Antragsdelikt* category will violate the proportionality principle.\(^{348}\)

However, the piracy of optical media discs was the only exception of the *Antragsdelikt* offenses. In 2001, the U.S. trade officials visited Taiwan to “discuss with Taiwan authorities about how Taiwan can strengthen its IPR protection,” particularly to deal with the serious piracy of optical media products.\(^{349}\) In responding to the pressure of the USTR, Optical Disk Act was promulgated on November 14, 2001, which provided an

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\(^{342}\) Copyright Act (著作權法) art. 100 (2006) (Taiwan).


\(^{345}\) See Copyright Act (著作權法) art. 100 (2006) (Taiwan).


\(^{347}\) Interview with Larry, Police Officer, Second Special Police Corps (Jan 2, 2015).


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occupational licensing system to the optical disk manufacturers,\textsuperscript{350} and violation is punishable by fines, equipment seizures, and jail terms.\textsuperscript{351} In addition, the Joint Optical Disk Enforcement Taskforce was established to specialize on investigate optical disk factories.\textsuperscript{352} In 2003, the R.O.C. Copyright Act was amended to create a criminal offense of infringing by reproducing onto an optical disk,\textsuperscript{353} and the offense was specially listed as an exception to Antragsdelikt offenses.\textsuperscript{354} In other words, the Police could initiate an investigation with or without the complaint of a right holder. As of 2015, the Joint Optical Disk Enforcement Taskforce provided an effective enforcement result that was commended by USTR.\textsuperscript{355}

<table>
<thead>
<tr>
<th>Year</th>
<th>Manufacturers Inspected</th>
<th>Manufacturers Audited / Superintended</th>
<th>Serious Infringements</th>
<th>Administrative Decisions Made</th>
<th>Transferred to Criminal Prosecution</th>
</tr>
</thead>
<tbody>
<tr>
<td>2015</td>
<td>444</td>
<td>60</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>2014</td>
<td>660</td>
<td>62</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>2013</td>
<td>700</td>
<td>66</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>2012</td>
<td>699</td>
<td>133</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>2011</td>
<td>665</td>
<td>195</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>2010</td>
<td>765</td>
<td>274</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>2009</td>
<td>820</td>
<td>263</td>
<td>2</td>
<td>2</td>
<td>0</td>
</tr>
<tr>
<td>2008</td>
<td>916</td>
<td>255</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>2007</td>
<td>1,008</td>
<td>117</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>2006</td>
<td>1,076</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>2005</td>
<td>1,193</td>
<td>0</td>
<td>0</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>2004</td>
<td>1,067</td>
<td>7</td>
<td>4</td>
<td>5</td>
<td>0</td>
</tr>
<tr>
<td>2003</td>
<td>1,088</td>
<td>10</td>
<td>8</td>
<td>7</td>
<td>0</td>
</tr>
</tbody>
</table>

Unit: manufactures count, manufactures count, cases, decisions, cases

Table 20: The R.O.C. Joint Optical Disk Enforcement Taskforce Enforcement Result\textsuperscript{356}

In the Report of Police Agency Enforcement on Intellectual Property Cases, the National Police Agency claimed to receive a positive feedback on intellectual property

\textsuperscript{350} Optical Disk Act (光碟管理條例) art.4 (2001) (Taiwan).
\textsuperscript{351} Optical Disk Act (光碟管理條例) art.15-23 (2001) (Taiwan).
\textsuperscript{353} Copyright Act (著作權法) art. 91, para. 3 (2003) (Taiwan).
\textsuperscript{354} Copyright Act (著作權法) art. 100 (2003) (Taiwan).
\textsuperscript{355} See infra text accompanying note 392-395.
enforcement from the Special 301 Report, which led to the removal of R.O.C. on the watch list since 2009.\textsuperscript{357}

5.2.2 How Special 301 Report Impacted the R.O.C. Law Enforcement

Based on the ranking and data contended in the Special 301 Report, it was clear that copyright enforcement in Taiwan are gradually improving. Back in 1992, the Special 301 Report specifically point out that “Taiwan is a center for copyright piracy and, trademark counterfeiting of U.S. products.”\textsuperscript{358} If we look at the transformation of legislations, law enforcement, and judicial system of copyright in Taiwan, it is difficult to deny the improvement of copyright protection. However, this improvement was not a change overnight, but should be attributable to a consistent legislative amendment, performance of law enforcement, and judiciary.

From 1989 to present day, the R.O.C. law enforcement can be roughly break into three eras. The first era was 1989 to 1998, with emphasis on conforming the enforcement to the international standard. The second era was 1999 to 2009, which was focusing on reacting to the rapid technology advancement, and establishing the specialized enforcement mechanism. The third era was from 2010 to present day, which stressed maintaining consistent law enforcement. By reviewing the annual Special 301 Reports, we can certainly see the encouraging progress of Taiwan’s intellectual property protection over the years.

5.2.2.1 Conforming to International Standard Era

The 1989 Report placed Taiwan in the Priority Watch List, and pointed out that Taiwan needed “specific and effective actions” and “concrete evidence of decreased sales of pirated and counterfeit items.”\textsuperscript{359} In addition, due to the dated 1985 Copyright Act,\textsuperscript{360} the 1989 Report requested an “implementation of measures to fulfill obligations under the . . . bilateral copyright agreement . . . .”\textsuperscript{361} In the 1990 Special 301 Report, the R.O.C. had “significant progress in the protection of intellectual property rights,” by initiated a bilateral agreement to improve copyright protection, consequently was moved to the Watch List.\textsuperscript{362} In 1992, the Report censured the R.O.C. as the “center for copyright piracy . . . of U.S. products.”\textsuperscript{363} The 1992 Report further commented that the major problem was lack of “effective enforcement of intellectual property rights”, and “failure


\textsuperscript{360} Agreement for the Protection of Copyright Between the Coordination Council for North American Affairs and the American Institute in Taiwan (entered into force July 16, 1993).


to apply penalties that deter further infringement.” However, in June 10, 1992, the Copyright Act had its first major amendment since 1985.

1994 was considered as another year of significant progress by the Special 301 Report, due to the promulgation of Cable TV Act, amendment of Copyright Act, amendment Trademark Act, amendment Patent Act, and the enactment of a Bilateral Copyright Agreement to prohibit parallel importation. In 1996 Special 301 Report, the R.O.C. was removed from the watch list for the first time since 1989, stated that “Taiwan has continued to make significant strides in improving the protection of intellectual property.” However, the Report also mentioned that need for improvement on cross-strait piracy, enforcement, education, and export monitoring system. In addition, the R.O.C. government made noticeable effort protecting copyright during 1997 and 1998, including improvement of foreign copyright owners’ accusation with Prosecutors Office, improvement of enforcing Taiwanese infringer who conduct copyright infringement in mainland China of works protected in Taiwan, enforcement of Commodity Labeling Law which requires identification number on CD production, and implementation of laws to fill commitments from WTO accession process.

5.2.2.2 Enforcement Transformation Era: Establishing the Specialized Enforcement Mechanism

The 2000s were the transformation era for law enforcement in Taiwan, many foundational enforcement mechanisms were established or reorganized in this period of time. In the 2000s, CD remained as the most prevalent storage medium for music, and peer-to-peer networking started to gain its popularity internationally. Because of the high-technology intensified industry and environment in Taiwan, the cutting-edge law and technology issues often occurred in Taiwan quickly. Therefore, it was challenging to update the enforcement as rapidly as technology advanced.

In the 1999 Special 301 Report, the law enforcement in Taiwan was criticized to be “time-consuming and cumbersome,” and the litigation procedure was claimed to be lengthy and provided little deterrence to infringement. On the bright side, the R.O.C.

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365 See supra Part 4.3.1.
368 Id.
370 Id. at 22-23.
371 Id. at 25.
372 Id. at 26.
Ministry of Economic Affairs reorganized and established the TIPO in 1999, which in charges of the administration of patent, trademark, copyright, integrated circuit and layout design, and trade secret rights, formulates intellectual property policy and bills, and enforces inter-agency coordination. By 2000, Taiwan was among the world’s largest producers of optical media disc, the Special 301 Report especially pointed out the enforcement of intellectual property rights was “out of step with Taiwan’s increasing role as an originator of the intellectual property.”

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374 The former body of TIPO includes National Registration Bureau, Bureau of Weights and Measures, and Bureau of Standards, Metrology & Inspection (M.O.E.A. R.O.C.), and were later reorganized into the present TIPO and M.O.E.A. in 1999.


Table 21: Copyright Registration Figure in the R.O.C.\textsuperscript{377}

One of the most well-known and impactful law enforcement actions in the R.O.C. copyright enforcement history took place in 2001, which was the “MP3 incident of National Cheng Kung University.” On April 11, 2001, Tainan Prosecutors Office searched the dormitories of 14 National Cheng Kung University students. The students were accused of illegally reproducing music and established a website illegally sharing the MP3 files.\textsuperscript{378} After the International Federation of the Phonographic Industry Members’ Foundation in Taiwan (hereinafter IFPI Taiwan)\textsuperscript{379} received notice of copyright infringement from the police, the IFPI Taiwan insisted on bringing a suit against the student who established website to illegally sharing approximately 4,000 MP3

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|c|}
\hline
Year & Applied & Granted & Grant \% \\
\hline
2015 & 28,218 & 28,130 & 99.69\% \\
2014 & 33,227 & 33,066 & 99.52\% \\
2013 & 35,475 & 35,273 & 99.43\% \\
2012 & 39,530 & 39,295 & 99.41\% \\
2011 & 41,177 & 40,855 & 99.22\% \\
2010 & 43,970 & 43,801 & 99.62\% \\
2009 & 41,655 & & \\
2008 & 43,344 & & \\
2007 & 52,092 & & \\
2006 & 53,405 & & \\
2005 & 42,946 & & \\
2004 & 42,115 & & \\
2003 & 30,846 & & \\
2002 & 19,143 & & \\
\hline
\end{tabular}
\caption{Copyright Registration Figure in the R.O.C.}
\end{table}


\textsuperscript{378} Wu Ming-Liang & Wu Zhen-Fu (吳明良、吳振福), Prosecutors and Polices Searched the Student Dormitory of National Cheng Kung University 14 Computers Used for Music Piracy Were Attached (檢警搜索成大宿舍 查扣十四台盜版音樂電腦) 8, UNITED DAILY NEWS, Apr. 12, 2001 (Taiwan); Wu Ming-Liang & Wu Zhen-Fu (吳明良、吳振福), Computers Attached National Cheng Kung University Students Frightened (下載版權音樂 成大學僧電腦被扣 心惶惶) 20, UNITED DAILY NEWS, Apr. 12, 2001 (Taiwan).

\textsuperscript{379} International Federation of the Phonographic Industry Members’ Foundation in Taiwan (IFPI Taiwan) renamed the foundation to Recording Industry Foundation in Taiwan (RIT) in Nov. 1, 2008.
files;\textsuperscript{380} IFPI Taiwan alleged the student intentionally reproduced and disseminated unauthorized MP3 files, therefore violated of Copyright Act article 87 (2).\textsuperscript{381}

With several negotiations between the Ministry of Education, the IFPI Taiwan, and the students, the parties had finally reached an agreement. IFPI Taiwan agreed to withdraw the case,\textsuperscript{382} and the students published apologetic statements on newspapers.\textsuperscript{383}

Although there was no judicial decision resulted from the incident, the effect was astonishingly profound. The incident had raised the awareness of intellectual property rights in the society of Taiwan, especially to the young generation.\textsuperscript{384} In addition to the campaigns for promoting intellectual property right, the Ministry of Education requested every school in Taiwan to have internal policies about intellectual property rights, and create “special work force for propaganda and execution of protecting intellectual property right” in every university and college.\textsuperscript{385} Furthermore, the “Internet Law Consulting Committee” was established on May 29, 2001, which provided guidance and coordination of legal awareness of the Internet usage in campuses, creating a responsible Internet usage environment in campuses.\textsuperscript{386} “Campus Internet Usage Direction” was also enacted on December 26, 2001 by Ministry of Education to promote anti-piracy. According to the Direction, “Internet misuse” is forbidden, and schools should limit the bandwidth for students, any violation of the Direction or disturbance of the functioning network shall be subjected to deprivation of the right to use the Internet.\textsuperscript{387}

On the other hand, not all the transformation went smoothly and peacefully. To counter the tougher enforcement activities on copyright infringement, some of the

\textsuperscript{380} Wu Ming-Liang (吳明良), Illegally Downloaded Music Recording Industry Claimed to Sue (下載版權音樂唱片業說要告) 7, UNITED DAILY EVENING NEWS, Apr. 13, 2001 (Taiwan).

\textsuperscript{381} Wu Ming-Liang (吳明良), IFPI Sued the National Cheng Kung University Student Who Established the Illegal Website (IFPI 控告成大架設網站學生) 9, UNITED DAILY NEWS, May. 24, 2001 (Taiwan).


\textsuperscript{384} See Shieh Ming-Yan (謝銘洋), Related Legal Issues of the MP3 Incident in National Cheng Kung University (成大 MP3 事件相關著作權法問題探討), in ISSUES OF INTELLECTUAL PROPERTY IN TECHNOLOGY DEVELOPMENT 2, 22 (2005).

\textsuperscript{385} Chen Rong-Yu (陳榮裕), MP3 Downloading Incident The Ministry of Education Put Forward Three Proposals (MP3 下載風波 教部三方案處理), CHINA TIMES, Apr. 16, 2001, at 5 (Taiwan).

\textsuperscript{386} Lin Shuei Siou (林水秀), Ministry of Education established the Internet Law Committee (教育部成立網路法律諮詢委員會), TAIWAN LIH PAO, May 31, 2001, available at http://www.lihpao.com/?action=viewnews-itemid-57144 (Taiwan).

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infringers worked with or worked for criminal organization. These criminal
organizations sent mobs to vandalize offices of the CMOs, hurt staffs of CMOs, and
threatened to kill the staffs of CMOs.

In 2002, the R.O.C. became a member of the WTO, and the intellectual property
law was obligated to fully comply with the TRIPS Agreement. Besides full compliance of
the law, the Joint Optical Disk Enforcement Taskforce was established under Ministry of
Economic Affairs, specialized on enforcing copyright law with the cooperation of the
Intellectual Property Right Protection Task Force of Second Special Police Corps. Due
to the active reorganization, cooperation, and functioning of the agencies, the rampant
optical media products piracy has been decreasing since 2004, and the R.O.C. was
"commended" by USTR for "increasing the frequency and effectiveness of raids against
night markets and inspections of optical media factories, which have significantly
reduced the number of pirated optical media products for retail sale." This enforcement
effectiveness was also reflected on the percentage of music piracy in Taiwan, the physical
peaked in 2001 and dropped steadily since then. At the end of 2004, Taiwan was
removed from Priority Watch List to Watch List as part of the out-of-cycle review.

388 See Singers Gathered and Spoke Up to “End Piracy, Stand Up for Copyright” and Crusade Against Pirated Music (眾家歌手誓師「終結盜版 捍衛正版」討伐所有非法複製的聲音), IFPI TAIWAN, http://www.ifpi.org.tw/record/about/0901%E8%AA%93%E5%B8%AB%E5%A4%A7%E6%9C%83%E6%9B%81%E8%81%9E%7A%E8%BF%20.htm (last visited Feb. 21, 2016); Chen Jun-Bin & Huang Ming-Shang (陳俊斌、黃明賞), Tainan City Investigated Pirated CDs Including Pirated Harry Potter Movie (台南市查獲盜版光碟 赫見哈利波特), LIBERTY TIMES (Nov. 11, 2001), available at http://old.ltn.com.tw/2001/new/nov/11/today-c1.htm (Taiwan).
389 Interview with one of the CMO manager (on file with author).
391 See Table 20: The R.O.C. Joint Optical Disk Enforcement Taskforce Enforcement Result.
393 See Table 22: Music Piracy Rate in Taiwan.
In 2005, Internet piracy brought new challenges to Taiwanese law enforcement. However, the U.S. copyright industry claimed to the USTR that the enforcement of copyright law in Taiwan significantly reduced the estimated trade loss, from $847.9 million USD in 2002 to $315.5 million USD in 2004.\textsuperscript{396} In addition, the 2006 Special 301 Report especially pointed out the first conviction of copyright infringement by peer-to-peer file sharing was held in 2005, which was effective both on law enforcement and judiciary.\textsuperscript{397} The 2007 Special 301 Report recognized the R.O.C. law enforcement effort, but still urged legislation particularly on provide liability for internet service providers, peer-to-peer infringements, stronger criminal penalties, and stronger enforcement against student infringer.\textsuperscript{398}

In 2007, an amendment specifically intended to regulate illegal peer-to-peer file sharing platforms came into force.\textsuperscript{399} This promulgation swiftly affected copyright enforcement, and facilitated some immediate enforcement result. Kupeer, a peer-to-peer software, that allowed users to share unlicensed copyrighted materials, was the first

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|}
\hline
Year & Physical & Digital \\
\hline
2015 & 8\% & 86\% \\
2014 & 9\% & 85\% \\
2013 & 10\% & 83\% \\
2012 & 11\% & 85\% \\
2011 & 12\% & 88\% \\
2010 & 15\% & 89\% \\
2009 & 20\% & \\
2008 & 22\% & \\
2007 & 22\% & \\
2006 & 28\% & \\
2005 & 26\% & \\
2004 & 36\% & \\
2003 & 42\% & \\
2002 & 47\% & \\
2001 & 48\% & \\
2000 & 40\% & \\
1999 & 35\% & \\
1998 & 25\% & \\
1997 & 17\% & \\
\hline
\end{tabular}
\caption{Music Piracy Rate in Taiwan\textsuperscript{395}}
\end{table}

Unit: percentage of piracy

\textsuperscript{395} See Recent Development of Recording Industry in Taiwan (台灣唱片業發展現況), RECORDING INDUSTRY FOUND. IN TAIWAN, http://www.ifpi.org.tw/record/activity/Taiwan_music_market2015.pdf (last visited Apr. 6, 2016).
\textsuperscript{397} See infra Part 6.2.1.
\textsuperscript{399} See supra Part 4.3.2.
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defendant prosecuted under the amendment.400 To comply with the amendment, many universities revised the internal internet usage policies for using the Taiwan Academic Networks (TANet), by forbidding use of several peer-to-peer software and blocking the protocol ports of the peer-to-peer software.401 On July 1, 2008, the Intellectual Property Branch of Taiwan High Prosecutors Office was established together with the R.O.C. Intellectual Property Court, which specifically undertakes criminal prosecution of violation to Trademark Act, Copyright Act, and Fair Trade Act.402 With the establishment of the Intellectual Property Branch of Taiwan High Prosecutors Office, the law enforcement and criminal prosecution were able to focus their efforts on intellectual property protection, without being distracted by other criminal cases.

These enforcement efforts were commended by the 2008 Special 310 Report, and further considered the R.O.C. to be removed from the Watch List.403 In January 2009, the USTR announced the removal of the R.O.C. from Watch List following an out-of-cycle review.404

5.2.2.3 Maintaining Consistent Law Enforcement

Since 2010, the R.O.C. law enforcement maintained the level of enforcement, and had close cooperation with TIPO, District Prosecutors Offices, and copyright right holders.405 Due to reorganization of the Executive Yuan, the Intellectual Property Right Protection Task Force of Second Special Police Corps was reorganized into Criminal Investigation Division. The purpose of reorganization for the Intellectual Property Right Protection Task Force was to respond to the change of infringement channel, which was from physical crime scene to online infringements.406

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406 Id. at 23-24.
Table 23: The R.O.C. Enforcement Result of Intellectual Property Right Protection

Task Force

<table>
<thead>
<tr>
<th>Year</th>
<th>Copyright Infringement</th>
<th>Trademark Infringement</th>
<th>Infringement Suspects</th>
</tr>
</thead>
<tbody>
<tr>
<td>2013</td>
<td>706</td>
<td>2,048</td>
<td>3,166</td>
</tr>
<tr>
<td>2012</td>
<td>692</td>
<td>1,875</td>
<td>2,867</td>
</tr>
<tr>
<td>2011</td>
<td>699</td>
<td>1,544</td>
<td>2,549</td>
</tr>
<tr>
<td>2010</td>
<td>717</td>
<td>1,231</td>
<td>2,192</td>
</tr>
<tr>
<td>2009</td>
<td>970</td>
<td>1,040</td>
<td>1,933</td>
</tr>
<tr>
<td>2008</td>
<td>1,254</td>
<td>873</td>
<td>1,946</td>
</tr>
<tr>
<td>2007</td>
<td>1,087</td>
<td>1,193</td>
<td>2,380</td>
</tr>
<tr>
<td>2006</td>
<td>1,042</td>
<td>893</td>
<td>2,057</td>
</tr>
<tr>
<td>2005</td>
<td>195</td>
<td>933</td>
<td>1,593</td>
</tr>
<tr>
<td>2004</td>
<td>659</td>
<td>560</td>
<td>1,052</td>
</tr>
<tr>
<td>2003</td>
<td>1,748</td>
<td>269</td>
<td>1,025</td>
</tr>
</tbody>
</table>

Unit: investigated cases, investigated cases, number of infringement suspects

Since 2010, TIPO, District Prosecutors Offices, and the Police noticed that many infringement difficulties were resulted from accessory or accomplice committed in the
“cross-strait,” so the cooperation of the law enforcement of China and Taiwan became more and more critical to copyright protection.\textsuperscript{409}

### 5.2.3 Conclusion

Since 1989, the R.O.C. copyright law enforcement has been improving in scope and effectiveness, and seeking the balance between conforming to international standard and protecting domestic copyright industry. From 1989 to 1998, the R.O.C. made significant effort to conform to international standards, and the reform of law enforcement was considered to be a relatively peaceful transformation.\textsuperscript{410} After 1999, serious optical media disc and internet piracy emerged. To continue the reform of copyright protection, Copyright Act was amended several times, and most importantly, the establishment of intellectual property law enforcement agencies and government organizations, including the TIPO, the Optical Disk Integrated Enforcement Task Force, the Intellectual Property Right Protection Task Force of Second Special Police Corps, the Intellectual Property Branch of Taiwan High Prosecutors Office, and the R.O.C. Intellectual Property Court.

Besides the legislations, amendments, and reorganization to improve intellectual property law in general, the law enforcement made impactful enforcement actions after 1999, including the MP3 incident in National Cheng Kung University that stunned the Taiwanese society.

The enforcement of the R.O.C. copyright law has become more and more challenging for several reasons: first, the infringers were difficult or costly to track down in most cases, which made the law enforcement difficult to investigate and collect evidence; second, the advancement of new technology might assist the circumvention or evasion of copyright law;\textsuperscript{411} third, many infringers were end users, who were the worst litigation target for the music industry;\textsuperscript{412} fourth, cross-border infringement has become the most common scenario in Taiwan, especially most infringing goods were produced in mainland China, it significantly increased law enforcement difficulty.

### 5.3 Enforcing the Laws in “Cross-strait” Relation

Since mid-1980s, “Taiwanese Businessmen,” commonly known as “Tai-Shang,” started to invest or relocate the labor-intensive industry from Taiwan to mainland China. In 1987, as the cross-strait relation began to thaw, the R.O.C. government started to permit citizens to visit their family in the mainland China, the cross-strait relation had


\textsuperscript{411} See MERGES, MENELL & LEMLEY, supra note 5, at 690; Loraine Gelsthorpe, Copyright Infringement: A Criminological Perspective, in COPYRIGHT AND PIRACY: AN INTERDISCIPLINARY CRITIQUE 399 (Lionel Bently et al. eds., 2010).

been improving since then.\textsuperscript{413} However, many issues and problems occurred because of this new cross-strait relation. In order to have a private intermediate entity to exercise governmental power under the special cross-strait relation, the Straits Exchange Foundation (hereinafter the SEF) was established with governmental and private funds to serve the function in March 1991.\textsuperscript{414} In December 1991, mainland China established a corresponding intermediate entity, which is the Association for Relations Across the Taiwan Straits (hereinafter the ARATS).\textsuperscript{415}

This complicated cross-strait relationship was a hindrance of law enforcement. For the R.O.C. law enforcement, new challenges emerged because of the effective copyright law enforcement. I asked police officer Larry about how did the copyright enforcement changed in Taiwan, he illustrated:

> The enforcement existed because there is still a market for piracy, but the scenario changed. There used to be many underground factories, manufacturing pirated products. But nowadays, the factories and the products are both from mainland China, Taiwan is only an Internet platform. Seven out of ten suspects we apprehend claimed that, manufactures were based in mainland China. The Criminal Investigation Division did plan to work on border control, but we are still scheming with all the agencies involved . . . .\textsuperscript{416}

Both governments were aware of the cross-strait enforcement difficulty. In 2009, the third “Chiang-Chen Talks” was held in Nanjing, the Cross-Strait Joint Crime-Fighting and Judicial Mutual Assistance Agreement was signed among two other Agreement.\textsuperscript{417} In 2010, the fifth “Chiang-Chen Talks” completed the signature of Cross-Strait Economic Cooperation Framework Agreement and the Cross-Strait Agreement on Intellectual Property Rights Protection and Cooperation.\textsuperscript{418}

The Cross-Strait Joint Crime-Fighting and Judicial Mutual Assistance Agreement provided a broad range of cooperation rules in both civil and criminal law, including prosecution, exchange of documents, investigations and evidence collection, mutual recognition and enforcement of judgments and arbitration awards, and extradition.\textsuperscript{419} However, the focus of the Agreement is not on intellectual property protection, but serious economic crimes such as embezzlement, breach of faith, fraud, money-

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\textsuperscript{413} The cross-strait relation was not always peaceful after the establishment of SEF and ARATS. In the two Presidential terms of Chen Shui-bian, there were very little substantial cross-strait relation progress from 2000 to 2008.


\textsuperscript{416} Interview with Larry, Police Officer, Second Special Police Corps (Jan. 2, 2015).


\textsuperscript{418} Id.

\textsuperscript{419} Cross-Strait Joint Crime-Fighting and Judicial Mutual Assistance Agreement (海峽兩岸共同打擊犯罪及司法互助協議) art. 1, China-Taiwan, Apr. 26, 2009.
laundering, and forgery or alteration of currency and negotiable securities.\(^{420}\) The overall statistics is interesting, because Taiwan had more requests to mainland China than mainland China to Taiwan in most categories.

<table>
<thead>
<tr>
<th>Suspect Extractions</th>
<th>Taiwan (requests, invites, and voluntarily offers)</th>
<th>Response from China</th>
<th>China (requests, invites, and voluntarily offers)</th>
<th>Response from Taiwan</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1419 cases (1026 people)</td>
<td>473 cases (446 people)</td>
<td>21 cases (19 people)</td>
<td>15 cases (11 people)</td>
</tr>
<tr>
<td>Intelligence Exchanges</td>
<td>3,920</td>
<td>1,333</td>
<td>2,585</td>
<td>1,322</td>
</tr>
<tr>
<td>Serving Processes</td>
<td>49,186</td>
<td>39,464</td>
<td>12,265</td>
<td>11,389</td>
</tr>
<tr>
<td>Investigations and Evidence Collection</td>
<td>1,078</td>
<td>666</td>
<td>338</td>
<td>569</td>
</tr>
<tr>
<td>Convict Extractions</td>
<td>440</td>
<td>19</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Table 24: Enforcement Statistics of Cross-Strait Joint Crime-Fighting and Judicial Mutual Assistance Agreement (June 25, 2009 to Dec. 31, 2015)\(^{421}\)

On the other hand, Cross-Strait Agreement on Intellectual Property Rights Protection and Cooperation was signed particularly to cooperate intellectual property rights.\(^{422}\) The agreement provided to cooperate on the music and video products licensing in designated CMOs.\(^{423}\) In addition, the parties agreed on establishing a law enforcement assistance mechanism for intellectual property protection, on combating online piracy and physical pirated products, and exchange necessary intelligence.\(^{424}\) Since June 29, 2010 until March 31, 2016, out of 685 cases requested from TIPO to SIPO, 500 cases were completed, 36 in progress, and 149 turned to legal assistance.\(^{425}\)

However, in scenarios that right holders entrust CMOs to manage their works, there had been serious problem between the P.R.C. CMOs and R.O.C. CMOs. According

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\(^{420}\) Cross-Strait Joint Crime-Fighting and Judicial Mutual Assistance Agreement (海峽兩岸共同打擊犯罪及司法互助協議) art. 4, China-Taiwan, Apr. 26, 2009.


\(^{422}\) Cross-Strait Agreement on Intellectual Property Rights Protection and Cooperation (海峽兩岸智慧財產權保護合作協議) art. 1, China-Taiwan, June 29, 2010.

\(^{423}\) Cross-Strait Agreement on Intellectual Property Rights Protection and Cooperation (海峽兩岸智慧財產權保護合作協議) art. 6, China-Taiwan, June 29, 2010.

\(^{424}\) Cross-Strait Agreement on Intellectual Property Rights Protection and Cooperation (海峽兩岸智慧財產權保護合作協議) art. 7, China-Taiwan, June 29, 2010.

to Scott,426 Roger,427 and Claire,428 right holders in Taiwan faced difficulty receiving royalties from the P.R.C. CMOs. For example, when a Taiwanese song was publicly performed in China, the MCSC was supposed to collect royalty from the performer. However, it is very common that a Chinese performer ignore the request from MCSC.429

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426 Interview with Scott, Singer and Musician NPO President (Jan. 28, 2015).
427 Interview with Roger, Record Company Vice President (Feb. 4, 2015).
428 Interview with Claire, CMO CEO (Feb. 10, 2015).
429 Interview with Charles, CMO In-house Counsel (Dec. 8, 2014).
6 JUDICIARY

In Chapter 4 and 5, we can clearly see that both the P.R.C. and the R.O.C. made great effort to conform international standards by legislation and enforcement effort. Although both governments seek to follow the new standards, there were notable differences in the two copyright laws, which shaped very different enforcement regimes. That being the case, the judiciary systems of the P.R.C. and the R.O.C. also developed differently.

Since intellectual property litigation is considered to be highly technical, for the purpose of promoting judicial specialization, many governments established specialized intellectual property courts since the 2000s.430 For the P.R.C., the first batch of specialized Intellectual Property Court was established in November and December of 2014, including Beijing Intellectual Property Court, Shanghai Intellectual Property Court, and Guangzhou Intellectual Property Court.431 On the other side of Taiwan Strait, the R.O.C. was six years ahead, which established the R.O.C. Intellectual Property Court on July 1, 2008.432

Nevertheless, before the specialized intellectual property courts were established, many landmark decisions were made by the district courts and appellate courts. This chapter introduces the development of the P.R.C. and the R.O.C. courts undertaking copyright related cases, and several landmark cases to the music industry in mainland China and Taiwan.

6.1 Copyright Litigation in P.R.C. Judiciary

Since 2002, copyright cases have been leading among all the other intellectual property rights litigations; for example, in 2011, the district court in China accepted 59,882 cases, including 35,185 copyright cases, and about 60% of the cases are related to right to Internet dissemination.433

<table>
<thead>
<tr>
<th></th>
<th>Patent</th>
<th>Trademark</th>
<th>Copyright</th>
<th>Technology Contracts</th>
<th>Competition</th>
<th>Others</th>
</tr>
</thead>
<tbody>
<tr>
<td>2014</td>
<td>9,648</td>
<td>21,362</td>
<td>59,493</td>
<td>1,071</td>
<td>1,422</td>
<td>2,526</td>
</tr>
<tr>
<td>2013</td>
<td>9,195</td>
<td>23,272</td>
<td>51,351</td>
<td>949</td>
<td>1,302</td>
<td>2,514</td>
</tr>
<tr>
<td>2012</td>
<td>9,680</td>
<td>19,815</td>
<td>53,848</td>
<td>746</td>
<td>1,123</td>
<td>2,207</td>
</tr>
<tr>
<td>2011</td>
<td>7,819</td>
<td>12,991</td>
<td>35,185</td>
<td>557</td>
<td>1,137</td>
<td>2,193</td>
</tr>
<tr>
<td>2010</td>
<td>5,785</td>
<td>8,460</td>
<td>24,719</td>
<td>670</td>
<td>1,131</td>
<td>1,966</td>
</tr>
<tr>
<td>2009</td>
<td>4,422</td>
<td>6,906</td>
<td>15,302</td>
<td>747</td>
<td>1,282</td>
<td>1,967</td>
</tr>
<tr>
<td>2008</td>
<td>4,074</td>
<td>6,233</td>
<td>10,951</td>
<td>623</td>
<td>1,185</td>
<td>1,340</td>
</tr>
</tbody>
</table>

Table 25: The P.R.C. Civil Trial Court Intellectual Property Right Filings Split by Type of Case\(^{434}\)

It is obvious that copyright cases have been the majority of intellectual property right civil litigation in mainland China for a long time, and this steady growth of


\(^{435}\) Figure created by author, statistics recompiled from: Table 25: The P.R.C. Civil Trial Court Intellectual Property Right Filings Split by Type of Case.
According to Supreme People’s Court Judge Jack, there were several possible reasons for this phenomenon.

First, it could be the fact that China is the world’s most populous country, so people have high demand for music. Based on our traditional value, we should be able to listen to music if we want. If I bought a CD, I should be able to share with my friends. This is a very common opinion. Second, comparing to economics of the U.S. and Taiwan, there is still a gap for market economic development. For example, patent and trademark are rights for industry; on the other hand, music is a need for culture, and average citizen needs those (culture product), but not patent and trademark rights, only merchants need those rights. Third, it is also possible that cases such as copyright infringement by KTV owners and internet piracy infringements, could result in high filings. Because each song that was infringed may be count as one case. What’s more important is, for example in Taiwan or the U.S., the mechanism for dealing with typical infringements is mature, or the cases are more predictable, so once an infringement dispute occurred, it will not be filed to a court. [Instead, t]he right holder may directly communicate with the infringer. Since everyone know what will happen, they will settle, or even [negotiate a] license [of] the songs. Patent and trademark cases may be more controversial, but copyright cases such as KTV infringements or Internet piracy are obviously illegal. (emphasis added)

The reasons illustrated by Jack were interconnected. Because of the “tradition value” and high demand of music in China, it was very likely that the supply will increase to respond the demand. Since the legitimate market for online music was very limited before July 2015, certainly music piracy would be rampant, and there were only a few notable enforcement actions and decisions to protect copyright.

6.1.1 Landmark Judicial Decisions

It was rare for the P.R.C. courts to public disclose the decisions, but since copyright law cases are usually less sensitive, some cases were available to the public. Since the 1990s, there were sporadic news report of infringement cases. In July 11, 1998, the Beijing First Intermediate People’s Court publicly held a hearing deciding a case.

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436 See Matthew Sag, *IP Litigation in United States District Courts: 1994 to 2014*, 101 IOWA L. REV. (Forthcoming 2016), available at http://ssrn.com/abstract=2570803 (discussing that in the U.S. district courts, trademark and patent cases has much limited fluctuation comparing to copyright law. The fluctuation was due to a surge of “John Doe” copyright filings in 2003 to 2007, namely litigation against infringement by file sharing. Excluding the “John Doe” cases, copyright litigation has been slightly declining for the past 20 years).
437 See infra Part 6.2.
438 Interview with Jack, Judge, P.R.C. Supreme People’s Court (Feb. 8, 2016).
439 See supra text accompanying notes 311-313.
440 See supra text accompanying notes 290-295.
regarding copyright infringement of a movie licensing center. The case represented significant historical meaning, not only because it was the first public hearing held with live broadcast, but the event also demonstrated that copyright was protected by judiciary, to show the transparency of the judiciary system, and meanwhile educated the Chinese citizen about copyright law. The P.R.C. Supreme People’s Court Third Civil Division has been publishing “list of top 10 intellectual property cases.” The cases are very helpful for understanding how judiciary apply the law, and its effect to the music industry. The following section provides some of the most impactful cases since 2002.

6.1.1.1 NetEase Ringtone Case (2002)

NetEase ringtone case was one of the earliest cases concerning the liability of mobile phone network and online service providers. The ringtone service provided by NetEase was found infringing a song, which was not licensed by the copyright owner. The Beijing Second Intermediate People’s Court held that Beijing Mobile was not guilty of copyright infringement. Because the mobile phone network provider only provided network service to its network user, it cannot recognize, record, or edit the data, neither did it have the capacity to delete or filter the infringing files. Therefore, the mobile network service provider had no intention or negligence about the infringement, there were no tort committed. However, online service provider NetEase uploaded the song in its public available catalog for mobile phone users to download as ringtone, which were not license from MCSC.

The NetEase case created a leading case that clarify copyright infringement liability of mobile phone network provider and online service providers. Although the P.R.C. did not have any safe harbor rules at that time, we can see the traces of the DMCA rules in the reasoning, analyzing the intent or knowledge of the online service providers.

445 Similar opinions were also held in Taiwan. See infra Part 6.2.1.
6.1.1.2 BaiDu MP3 Infringement Case (2006)\textsuperscript{446}

In 2005, record company BuSheng found BaiDu, the largest search engine company in mainland China, offered unlicensed download for 46 songs owned by BuSheng. BaiDu claimed that its search engine automatically collected the data from the Internet, after processed the data, the search engine provided search service for the users, and BaiDu did not perform non-mechanical selection or control for the data.

The district court held that, if the Internet search service provider’s service exceeded “providing search result and relevant digest of data,” the service would be regarded as no longer providing the search result of the songs, but directly profiting from the MP3 files. During the appeal in Beijing First Intermediate People’s Court, BuSheng and BaiDu reached a settlement.

This was not the only case that BaiDu got sued, but most cases end up in settlements.\textsuperscript{447} Although the cases settled in the end, Judge Jack, CMO In-house Counsel Charles, and Attorney Adam all considered these cases were the most import cases that affect music industry in mainland China.\textsuperscript{448} These case impacted the promulgation of Provisions of the Supreme People’s Court on Several Issues concerning the Application of Law in Hearing Civil Dispute Cases Involving Infringement of the Right of Dissemination on Information Networks in 2012.\textsuperscript{449}

6.1.1.3 MTV Infringement Case (2012)\textsuperscript{450}

Defendant ZhiZun YuLe was a karaoke Pub in Zhuhai city, which utilized unlicensed the songs and music videos to run its business. Defendant ZhiZun YuLe asserted that the music videos were individual cinematographic work created by them,

\textsuperscript{446} ShangHai BuSheng YinYue WenHua ChuanBo LLC v. Beijing BaiDu LLC, YI ZHONG MIN ZHONG ZI Di 2491 HAO (一中民终字第2491号) (2006).


\textsuperscript{448} Interview with Jack, Judge, P.R.C. Supreme People’s Court (Feb. 8, 2016); Interview with Charles, CMO In-house Counsel (Dec. 8, 2014); Interview with Adam, Attorney (Dec. 10, 2014).

\textsuperscript{449} Provisions of the Supreme People's Court on Several Issues concerning the Application of Law in Hearing Civil Dispute Cases Involving Infringement of the Right of Dissemination on Information Networks (最高人民法院關於審理侵害資訊網路傳播權民事糾紛案件適用法律若干問題的規定) (2012) (the provisions amended safe harbor rules for online service providers, including notice and takedown procedure).

\textsuperscript{450} Zhongguo Yin Yue Zhuzuoquan Xie Hui Su Zhu Hui Shi Zhizun You Xiangzong Shi Zhu Hui Zhizun KTV Shiyong MTV Zuopin Qian Fan Ci Qu Biao Yuan An (中國音樂著作權協會訴珠海市至尊娛樂有限公司珠海至尊 KTV 使用 MTV 作品侵犯詞曲表演權案) [Music Copyright Society of China v. Zhuhui Shi Zhizun Yule LLC Infringement on right of performance of lyrics and melodies], YUE GAO FA MIN SAN ZHONG ZI DI 470 HAO (粵高法民三終字第470號) (Guangdong Higher People’s Ct. 2011) (China).
therefore MCSC did not own the copyright of the work. MCSC argued that music videos were “music that was accompanied by video,” which should not be regard as an individual cinematographic work. Guangdong High People’s Court accepted MCSC’s argument, recognized “music video” as “recorded music and video works,” therefore the copyright belongs to the author of the song. The Guangdong High People’s Court analyzed the “music videos” lack the originality requirement for copyright protection, therefore the use of music in the videos infringed MCSC’s copyright.

6.1.2 Conclusion

The gradual improvement of P.R.C. judicial decision is encouraging for the copyright protection. However, we can clearly observe that the improvement of judiciary was at a slower pace comparing to other countries. Although the total number of cases were increasing, and the quality of the decisions were also improving, the influence of judicial decisions to average citizens were very limited.

6.2 Copyright Litigation in R.O.C. Judiciary

Before 2008, intellectual property rights litigations were handled by district courts and high courts. In fact, the transformation towards specialized courts came a long way back since 1999. The notion of judiciary specialization was first proposed in the 1999 Judicial Yuan judicial reform meeting. Judicial Yuan began with issuing specialized judge certification, and intellectual property was one of the specializations. To handle the increase of intellectual property case filings, specialized criminal departments (廳) was established in levels of courts on July 1, 1998, and specialized civil departments was established in levels of courts on August 19, 2002.

In 2007, Intellectual Property Court Organization Act and Intellectual Property Case Adjudication Act were promulgated, and the Intellectual Property Court was officially established on July 1, 2008. Besides responding to the increase of caseload, the specialization of intellectual property court could also facilitate the delay caused by stay of proceedings, and judges could accumulate more experiences by focusing on intellectual property cases.

Under Intellectual Property Case Adjudication Act, the Intellectual Property Court has the jurisdiction to civil actions specified in Intellectual Property Court Organization Act, including “[f]irst instance and second instance civil actions for the protection of intellectual property rights and interests arising under the Patent Act,

451 See HSIUNG SUNG-MEI (熊誦梅), WHEN PUBLIC LAW COMES ACROSS PRIVATE LAW: TAIWAN INTELLECTUAL PROPERTY LITIGATION SYSTEM THEN AND NOW (當公法遇上私法：臺灣智慧財產訴訟制度之今昔) 79 (2011).
452 Id. at 80.
456 Intellectual Property Case Adjudication Act (智慧財產案件審理法) art. 7 (2007) (Taiwan).
Trademark Act, Copyright Act, Optical Disk Act, Trade Secret Act, Regulations Governing the Protection of Integrated Circuits Configuration, Species of Plants and Seedling Act, or Fair Trade Act.” (emphasis added) However, the current practice is both Intellectual Property and District Court could have overlapping subject matter jurisdiction over one case, and the plaintiff may request transfer of venue.

<table>
<thead>
<tr>
<th></th>
<th>IP Court Civil Case Closed</th>
<th>District Court Civil Case Closed</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Copyright</td>
<td>Patent</td>
</tr>
<tr>
<td>2014</td>
<td>90</td>
<td>111</td>
</tr>
<tr>
<td>2013</td>
<td>52</td>
<td>153</td>
</tr>
<tr>
<td>2012</td>
<td>53</td>
<td>133</td>
</tr>
<tr>
<td>2011</td>
<td>62</td>
<td>168</td>
</tr>
<tr>
<td>2010</td>
<td>78</td>
<td>211</td>
</tr>
<tr>
<td>2009</td>
<td>41</td>
<td>131</td>
</tr>
<tr>
<td>2008</td>
<td>13</td>
<td>11</td>
</tr>
<tr>
<td>2007</td>
<td></td>
<td></td>
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<tr>
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<td></td>
<td></td>
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<tr>
<td>2003</td>
<td></td>
<td></td>
</tr>
<tr>
<td>2002</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Table 26: Intellectual Property Civil Cases Closed Figures of the R.O.C. Intellectual Property Court and District Court

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458 Intellectual Property Case Adjudication Rules (智慧財產案件審理細則) art. 2 (2008) (the legislative commentary particularly pointed out that the jurisdiction of intellectual property for civil and administrative litigations are non-exclusive, which means district court may also have jurisdiction on intellectual property cases).
On the other hand, the trial court of criminal of copyright infringement cases is the district court, and the appellate court is the Intellectual Property Court. The statistics showed that copyright criminal cases and defendants gradually decreased since 2007.

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Figure 9: The R.O.C. Intellectual Property Civil Cases Closed Trend

On the other hand, the trial court of criminal of copyright infringement cases is the district court, and the appellate court is the Intellectual Property Court. The statistics showed that copyright criminal cases and defendants gradually decreased since 2007.

---

461 See infra Table 27: Intellectual Property Criminal Cases Closed and Defendants Figures of the R.O.C. District Court.
<table>
<thead>
<tr>
<th>Year</th>
<th>Copyright Case Closed</th>
<th>Copyright Defendants</th>
<th>Trademark Case Closed</th>
<th>Trademark Defendants</th>
</tr>
</thead>
<tbody>
<tr>
<td>2014</td>
<td>500</td>
<td>688</td>
<td>918</td>
<td>973</td>
</tr>
<tr>
<td>2013</td>
<td>550</td>
<td>737</td>
<td>972</td>
<td>1,052</td>
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<tr>
<td>2012</td>
<td>495</td>
<td>621</td>
<td>1,057</td>
<td>1,129</td>
</tr>
<tr>
<td>2011</td>
<td>617</td>
<td>854</td>
<td>1,030</td>
<td>1,122</td>
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<tr>
<td>2010</td>
<td>692</td>
<td>880</td>
<td>894</td>
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<td>2009</td>
<td>898</td>
<td>1,095</td>
<td>899</td>
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<td>2008</td>
<td>1,124</td>
<td>1,411</td>
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<tr>
<td>2007</td>
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<td>2006</td>
<td>1,078</td>
<td>1,289</td>
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<td>1,270</td>
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<td>2005</td>
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<td>1,051</td>
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<td>1,522</td>
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<td>2004</td>
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<td>1,440</td>
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<td>2003</td>
<td>1,480</td>
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<td>1,164</td>
<td>1,331</td>
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<td>2002</td>
<td>1,640</td>
<td>2,041</td>
<td>553</td>
<td>696</td>
</tr>
</tbody>
</table>

Table 27: Intellectual Property Criminal Cases Closed and Defendants Figures of the R.O.C. District Court

Figure 10: Trend of Intellectual Property Criminal Cases Closed and Defendants of District Court in the R.O.C. 

6.2.1 Landmark Judicial Decisions

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463 See id.
There were many crucial decisions for copyright protection in Taiwan, and these decisions impacted Taiwanese’s awareness about copyright law profoundly.

6.2.1.1 ezPeer Case (2005-2011)

Global Cyber Tech operated “ezPeer” website and “ezPeer” peer to peer software, which provided a platform for members to search and exchange files. In order to use “ezPeer” software, members had to pay $ 100 NTD (approximately $ 3.5 USD) per month for membership. Most of the files shared by the members on the platform were pirated movies and music files. In 2005, the Disney Enterprises Inc., Warner Bros. Entertainment, Twentieth Century Fox Film Corporation, Universal Studios Production, Columbia Pictures Industries, Inc., New Line Productions Inc., Paramount Pictures Corp., and IFPI Taiwan filed a criminal law suit against Global Cyber Tech, Global Cyber Tech’s CEO Wu Yi Da, and several users of illegally reproducing, distributing copyrighted files.464

In the decision delivered by Taiwan Shihlin District Court, the CEO of Global Cyber Tech, Wu Yi Da, was held not guiltily on the ground of “the defendant did not personally commit the act of copyright infringement, the actual infringing act of reproducing or distributing was conducted by the ezPeer software users.” The court examined the fact, held the CEO not liable as an accomplice. Furthermore, the court commented “the act [of providing ezPeer software] was beyond the scope of existing definition of copyright infringement, causing a loophole in the Copyright Act.” The court admitted that issue in question could not be amended by the judicial interpretation, abiding by the nulla poena sine lege principle; therefore, the defendant was not liable for the infringement.465

The case did not close in the district court. The prosecutors appealed to Taiwan High Court,466 Supreme Court,467 and remanded to the newly established Intellectual Property Court.468 The appeals were all dismissed on the ground that the ezPeer company itself did not reproduce or distribute the copyrighted files, and the Intellectual Property Court held that “doctrine of media neutrality” principle was applicable to ezPeer.469

The case made a dramatic turn in 2010, when Supreme Court reversed the decision. The Supreme Court indicated that the Intellectual Property Court did not

465 Id.
467 Prosecutors of Taiwan Gaodeng Fayuan Zhihuicaichanfenshu v. Global Cyber Tech, ZUIGAO FAYUAN CRIMINAL DECISION 98 NIANDU TAI SHANG ZI DI 1132 HAO (最高法院刑事判決 98 年度台上字第 1132 號) (Sup. Ct. Mar. 05 2009) (Taiwan).
469 See id.
provide specific reasoning concerning the purpose of the ezPeer software, and there were
evidences that indicated Defendant have knowledge and profit from the infringing files.
In addition, the Supreme Court stated the Intellectual Property Court’s opinion lack of
reasoning and investigation by giving the opinion that “encouraging members to use
ezPeer software does not prove the intent of infringing copyright” and “the purpose of
ezPeer software is not limit to infringing copyright, it is capable of legal purpose.”

After the decision made by Supreme Court, Intellectual Property Court followed
the opinion, and stated that the monthly membership fee proved the link of intent to profit
from copyright infringement. Furthermore, the advertisements on ezPeer website
promoted the peer to peer software to mass distribution and reproduction of pirated
music, pictures, and movies, induced people to join the membership, and encouraged to
use ezPeer to share pirated files. The illegal acts of distribution and reproduction were not
against defendant’s will, therefore the defendant Wu Yi Da was liable as an accomplice
by creating and establishing the file index of ezPeer software.

6.2.1.2 Kuro Case (2005-2009)

The Kuro case was very similar to ezPeer case. Kuro was a peer to peer software
connect to a centralized server in Kuro company, which provided index of paid
members and files. The case started in Taipei District Court, appealed all the way to
Taiwan High Court, Supreme Court, and remanded to Intellectual Property Court.

The Intellectual Property Court held that because defendant provided software
that connected to the server, which existed causation to the Kuro users’ infringements.
Kuro committed copyright infringement by assisting public transmission of pirated files,
therefore the managers of Kuro were liable as accomplices.

470 Prosecutors of Taiwan Gaodeng Fayuan Zhihuicaichanfenshu v. Wu Yi Da, ZUIGAO FAYUAN CRIMINAL
DECISION 99 NIANDU TAI SHANG ZI DI 4697 HAO (最高法院刑事判決 99 年度台上字第 4697 號) (Sup.
471 Prosecutors of Shihlin Difang Fayuan v. Global Cyber Tech, ZHIHUICAICHAN FAYUAN CRIMINAL
DECISION 99 NIANDU XING ZHI SHANG GENG (2) ZI DI 24 HAO (智慧財產法院刑事判決 99 年度刑智上
472 Prosecutors of Taipei Difang Fayuan v. Kuro Co., TAIWAN TAIPEI DIFANG FAYUAN CRIMINAL
DECISION 92 NIANDU SU ZI DI 2146 HAO (臺灣臺北地方法院刑事判決 92 年度訴字第 2146 號) (Taiwan
473 Prosecutors of Taipei Difang Fayuan v. Kuro Co., TAIWAN GAODENG FAYUAN CRIMINAL DECISION 94
NIANDU ZHU SHANG SU ZI DI 5 HAO (臺灣高等法院刑事判決 94 年度駁上訴字第 5 號) (Taiwan High
474 ZUIGAO FAYUAN CRIMINAL DECISION 98 NIANDU TAI SHANG ZI DI 6177 HAO (最高法院刑事判決 98
475 Prosecutors of Taipei Difang Fayuan v. Kuro Co., ZHIHUICAICHAN FAYUAN CRIMINAL DECISION 99
NIANDU XING ZHI SHANG GENG (1) ZI DI 48 HAO (智慧財產法院刑事判決 99 年度刑智上更(一)字第 48
476 Id.
6.3 Conclusion

Since 1992, both P.R.C. and R.O.C. started to conform to international treaties, and even referenced copyright law of many countries. Although the laws were not identical, both provided music work copyright protection, and amended the law reacting to the advance of technology. Therefore, it would be unfair to say that the lack of copyright protection in mainland China was caused by dated codification.

However, the most significant differences between the P.R.C. and the R.O.C. copyright protection were the enforcement regime and judiciary. Since the P.R.C. government designed the copyright protection in a hierarchical regime, and expanded administrative enforcement regime to handle most of the cases, criminal prosecution was very limited, consequently cause the diminish the deterrence effect of the criminal law.477

On the other hand, although the R.O.C. legislation kept the Antragsdelikt offenses system on copyright offenses, it did not diminish the deterrence effect of the law. As we can see in the comparison between Table 26 and Table 27, criminal enforcement was still the dominated resolution used in Taiwan. The very well known “MP3 incident of National Cheng Kung University,” ezPeer Case, and Kuro Case were all criminal law cases. Scholars worried that the tendency of relying on criminal prosecution could be exceedingly harsh to natural person, therefore failing to strike a balance between protecting a private right and legitimizing the state power.478

477 See supra Part 5.1.2.
Many influential and respected scholars started to rethink copyright’s capacity since late 1990s, they proposed that copyright should be limited, weakened, or greatly amended, because it hinders human creativity and innovation.\textsuperscript{479} Almost every day we could find out new technology, business model, or creative work being invented or created, but what about intellectual property law?

Akin to technology and creative work were based on prior arts, knowledge, or ideas in the public domain, copyright law was founded on normative foundations such as Lockean appropriation, Kantian individualism, and Rawlsian’s distributive effects of property.\textsuperscript{480} Abandoning the foundations just to avoid possible burden, would be “can’t see the forest for the trees.” In other words, protecting the “value” of the creative works and the right to “ownership” of the authors, are critical to the utilitarian goal. Without copyright law, there would not be ownership for the authors, let alone to maintain the value of the creative works.

This chapter provides detailed interviews to illustrate how music industry professionals’ opinion about copyright, the effect of copyright enforcement on the music industry, and how music industry professionals survived in the transformation of the industry, the rapid changing market, the cross-strait market, and copyright law.

7.1 Music Industry Professional as a Career

A common question for empirical research on copyright law is about incentive of creators.\textsuperscript{481} Since the predominant philosophical foundation is utilitarian,\textsuperscript{482} the incentive of creators is necessarily important to analyze the effectiveness of copyright law. As previously mentioned, “linear property right” theory provided that the lack of copyright protection will result in a frail music industry; contrarily, if copyright law is functioning

\textsuperscript{479} See, e.g., LAWRENCE LESSIG, THE FUTURE OF IDEAS 250-251, 254 (2001) (arguing that over expanding and extending copyright may harm innovation, and new technology had been obstructed by copyright law before showing harm to industry); SIVA VAIDHYANATHAN, COPYRIGHTS AND COPYWRONGS: THE RISE OF INTELLECTUAL PROPERTY AND HOW IT THREATENS CREATIVITY 184 (2001) (discussing that a loosely regulated copyright law will provide more input for the works, and permit reasonable space for fair use).

\textsuperscript{480} See Merges, supra note 6, at 13-14.


\textsuperscript{482} See Copyright Act (著作權法) art. 1 (1985) (Taiwan) (“This Act is specifically enacted for the purposes of protecting the rights and interests of authors with respect to their works, balancing different interests for the common good of society, and promoting the development of national culture. .’’); Copyright Law of P.R.C. (中華人民共和國著作權法) art. 1 (1990) (China) (“This Law is enacted, in accordance with the Constitution, for the purposes of protecting the copyright of authors in their literary, artistic and scientific works and rights related to copyright, of encouraging the creation and dissemination of works which would contribute to the construction of socialist spiritual and material civilization, and of promoting the development and flourishing of socialist culture and sciences.”); Merges, Menell & Lemley, supra note 5, at 436.
effectively, it will protect the exclusive rights of the authors or copyright owners and provide people the incentive to join music industry.483

7.1.1 Incentive, Music Industry Entrants, and the Buy Out Deals

According to my interviewees, almost all of the music industry professionals had consensus on copyright is necessary to music industry, and copyright certainly helps them to make a living choosing music industry profession. However, every one of them have very different style of expressing the necessity.

On the reason of choosing music industry, besides the love for music, many believed it was a profitable industry, some even consider it to be lucrative. William, one of the most popular celebrity lyricists in the Greater China region, was very straight about my questions. When I asked him about the reason switching from a publishing career to a music industry career, he answered:

[I] wanted to make a fortune. Because I am a good writer, [writing] is my talent. So I was thinking about what kind of job requires this talent and could make a fortune at the same time? Writing poems? Prose? There were so many prose writers. Novel? It is so lengthy! What if I get rejected, wouldn’t it wasted a lot of effort? Making advertisements? But I have no connections. Writing lyrics? So I looked into how much can a lyricist make, and found out it was much more [profitable] than other [jobs]. At that time, I had no idea about how much I can make, so I asked my boss to set a price for me. Then I found out that my boss also didn’t know about the average price, just randomly offered me a decent price. It was $ 7,000 [NTD] per song.484 I was a rookie! 25 years ago! Probably my lyrics was appealing to them. It turned out I became popular, plus at that time the market was big, if they though I did a good job, they would raise the payment. Within a year, it became $ 15,000 [NTD per song]. I wrote about 200 songs per year, and all of those were just the payment of writing the lyrics, excluding the royalties, there were more for royalties. Royalties include Karaoke royalty, sales royalty, reproduce royalty, and cover version royalty. At that time, a popular song, if it was a lead single, it could be [licensed] to more than 10 karaoke pubs. Lyricists could get more than $ 100,000 [NTD]. . . . I remember [I wrote a song] for [a popular singer from Hong Kong],485 I earned at least $ 4,000,000 NTD (approximately $ 151,080 USD in 1995). Anyways writing lyrics was very lucrative. . . . I wanted to make a fortune, so I joined [music industry]. (emphases added)486

483 See supra Part 3.1.
485 To protect William’s identity, author replaced the name of the singer to avoid the risk of indirectly identifying the interviewee.
Some other interviewees did not directly say that their motivation to join the music industry was because of it is profitable, and most of them expressed that it was because of the love to music.487 Peter, a highly respected singer, composer, and producer in the Greater China region, had been a veteran of the music industry since 1980. He mentioned that: “[w]hen I started to work in the music industry, I did consider that if copyright can protect the creators, this would be a wonderful job.”488

Besides the initial incentive or motivation to join the industry, the revenue stream is also crucial to the music industry. Almost all of my interviewees indicated that the copyright protection regime was the pivotal to protection to revenue stream, therefore provided a positive prospect for people who want to join the industry. Peter provided some important historical background on how “copyright” was “established” in the music industry. I asked him about whether he had experience on other musicians want to adapt or purchase his work? He replied:

Yes, of course. During the 1980s and 1990s, the music industry in Taiwan was most robust. While technology and the Internet was not very developed, it was an era of analog, and physical [sales] were great. At that time, it was a great environment for producer or production. Because everyone needed some products, and I produced massive amount of music for other people. Or it could be multiple uses of a single song, it was very common. (emphases added)489

I followed up and asked about whether record companies provided any assistance on managing the adaption or purchase. Peter answered:

At the beginning, there were no rules for publisher or publication. Record companies usually bought out, and paid in lump sum; therefore, creators and singers cannot own any copyright. In my generation, when I first entered the industry, because we listened to western music, [we] understood the foreign [music industry] environment. So at that time, I wanted to fight for the rights of creators in Taiwan, by initiated some associations, and communicated with record companies. Because at that time the environment of music industry was great, composers were the big shots [of music industry], record companies were willing to share the rights. It was at that era, we started to establish some concept of copyright. And it was then the commencement of copyright era, approximately 1984, 1985. (emphases added)490

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487 Interview with Christine, Former CMO CEO/Musician NPO Vice President (Jan. 28, 2015); Interview with Craig, Recording Industry NPO CEO (Jan. 30, 2015); Interview with Gary, Amateur Guitarist/Guitar Tutor (Oct. 9, 2014); Interview with Peter, Singer/Composer/Producer (Feb. 3, 2015); Interview with Roger, Record Company Vice President (Feb. 4, 2015); Interview with Sarah, Record Company Personal Secretary to CEO (Dec. 9, 2014); Interview with Scott, Singer/Musician NPO President (Jan. 28, 2015); Interview with Taylor, Tour Promoter CEO (Feb. 4, 2015).
488 Interview with Peter, Singer/Composer/Producer (Feb. 3, 2015).
489 Interview with Peter, Singer/Composer/Producer (Feb. 3, 2015).
490 Interview with Peter, Singer/Composer/Producer (Feb. 3, 2015).
Scott was a very famous singer at the earlier stage of his career, and now he works in a musician non-profit organization as president. I asked about why did he choose to become a singer, and how was the music industry during his singer career, he replied:

It was for fun. What would a 19-year-old know? [I] thought I sang well, so I gave it a try. [I] didn’t do well in school, [I] was not good looking, so I just wanted to become somebody. [I] couldn’t imagine that I got selected [by a singing-competition], and then I had a record deal! . . . From the perspective of copyright law, it did not exist at the time. All of my songs were, [sold for] $3,000 NTD, I only got $1,500 NTD, the other half went to the lyricist. It was called “buy out.” My record deal was $20,000 NTD, 10 songs, each for $2,000 NTD. I said goodbye [to the rights to the album] after I finished recording. There was no royalty at that time, they gave you a fixed price $20,000 NTD per album, when the price for a record, a cassette was sold for $120 NTD. . . . [One of my albums] sold 110,000 copies, I received about $80,000 NTD. It was pretty good, comparing to other people. But after the copyright law was amended, there was a great difference. Since then, it was about 10 to 20 percent royalty. Until 1990s, 2000s, . . . they earned a fortune. Then Copyright Act was amended, the sales figures were great, over million copies sold. If [singers] earned $10 or 20 NTD per record sold, it would be shocking. (emphases added)

William also criticized on this “buy out” practice in the music industry, he argued that the lack of royalty system caused the quality of music plummeted:

. . . There used to be some creative promotion and planning [in the music industry], [they] cannot do it [anymore] because there is no money. [Karaoke video] productions were getting worse, because of the minimum budget. The Taiwanese Hokkien music has been controlled by an oligopoly market, only buy out deals are available. So who would be willing to create [under this environment]? This business model uses a percentage of the revenue from karaoke, to make records, ignores album sales, and profit from future the karaoke royalty. If [a lyricist] want to make a fortune, he will make buy out agreements to all of his songs. Because everyone rips-off each other, so they will be willing to make buy out agreements. No one will put emotion in this kind of creation. Especially many creators take things too seriously, they may sell the song to you for their livelihood today. When the song become popular, they will be very depressed. (emphases added)

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491 To protect Scott’s identity, author replaced the name of the album to avoid the risk of indirectly identifying the interviewee.
492 The 1985 R.O.C. Copyright Act had already covered music works and sound recordings protection, we could infer that the law was not prevalent enough to make royal-based contract as default for talents.
493 Interview with Scott, Singer/Musician NPO President (Jan. 28, 2015).
The theory of copyright regime maintained the incentive for music professionals is also confirmed by record company. Record company Vice President Roger had thirty-three years of experience in the music industry, and he highly valued the royalty and copyright protection regime. I asked Roger about how does your record company discover the talents, he replied:

There were many channels, which varied with different environment. At the early stage of our label, there were many people who involved in this industry. It was very rough, but we did not [ignore the creators’ rights]. Unlike other record companies, most of them buy out [copyright deals]. But when we started our company, we encouraged [royalty system], and insisted on not to buy out copyright deals. This was [the reason] that mandarin Chinese music in Taiwan, at the beginning 1980s, attracted people who were interested in this industry. Because the [copyright] system was initiated, you were able to appeal people. Otherwise if it was chaotic, [people] would feel that they didn’t miss anything. Our company and a few others led this [movement of establishing the rule of preserving talents’ copyright,] many other companies had to follow. Otherwise they will be challenged that they were exploiting their talents. Gradually, copyright was on track. During this process of getting on track, many singer-songwriters naturally emerged in this environment. Of course there were competitions, in universities. . . . During this progress, we found many talents, and signed some of them . . . . (emphases added)\(^495\)

Just like any other industry, music industry has many unspoken rules and business practices. These unspoken rules, business practices, and copyright law were particularly decisive to the development of the industry. For record company, composer, lyricist, and, singers, the shift from “buy out” system to the royalty system became the unspoken rule and business practice, and it was a turning point for the music industry in Taiwan.

From the perspective of mainland China, CMO In-house Counsel Charles illustrated the livelihood of composers and lyricists:

It has been so many years, basically it is impossible to feed oneself by creating [music]. Because the current enforcement and protection of law are far from our expectation, the goal will never be reached. It is impossible for creators to make a living by composing or writing, because the income is so minimum, and consequently they need to make a living via other methods. For example, doing part-time jobs, working for television networks. (emphases added)\(^496\)

The interviews pointed out two main issues regarding to the livelihood of music industry professionals in the past. First, the bargaining between the entrants and record company need to be fair to the entrants. Before the international record companies joined the music industry in Taiwan, many domestic record companies negotiated with composers and lyricists to buy out their works. Consequently, many talents were not able

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\(^495\) Interview with Roger, Record Company Vice President (Feb. 4, 2015).

\(^496\) Interview with Charles, CMO In-house Counsel (Dec. 8, 2014).
to benefit from the exclusive rights protected by copyright law. Since 1980s, gradually some domestic record companies started to learn from international labels to share royalty with the entrants or the creators. This unspoken rule helped many talents to become who they are today, because it protected the integrity and goal of the copyright, which is to encourage creativity. Second, the revenue stream of the professionals in the industry should be maintained. Unlike singers can earn their living through performance, royalty is the steadiest income stream for composers, lyricists, and producers. It was because the record companies in Taiwan established these unspoken rules that rewarded the creators, the music industry attracted many talents joining and staying in the industry.

7.2 “Marching towards Mainland”

The Taiwanese music has been influential and extremely popular in the mainland China for over 30 years. With the economic growth of P.R.C., music all over the world want to make their share in mainland China. It was no exception for Taiwanese music industry. There was this popular pun called “marching towards mainland” (錢進大陸) in Taiwan. The literal meaning of the phrase is “moving money towards mainland China,” but the pronunciation means “marching towards mainland China”. This pun vividly described Taiwanese businessmen’s high hope in finding the “gold mine” by investing in mainland China, but critics and anti-China groups worrying businessmen leaving only debts in Taiwan. In this cross-strait comparison, I asked CMO CEO Claire about why did Taiwanese music industry was the leader in the Greater China region since the 1980s. She pointed out several factors:

Many good music was produced in Taiwan. Taiwan was opened to the international market earlier, and freedom of speech is stronger. The P.R.C. Copyright law and the R.O.C. Copyright Act are very different on protecting sound recording. P.R.C. protects sound recording as neighboring rights, but R.O.C. protects sound recordings as authors rights. More or less, this could encourage music industry to possess the contents. (emphases added)

William’s steady success exhibited the value of Taiwanese music talents in mainland China, as he witnessed the changes since the beginning of his career until today:

The peak [of music industry] was in the past, but we are not at the bottom yet, because the market expanded. Currently [we] have the mainland China market, and also the Asia market. As long as [your] music is classic, no matter you are singer, composer, or lyricist, there is a big market. The Internet provided these talents more opportunities. People like us (lyricist and producer) would never get the change to appear on TV.

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497 See supra Part 2.3.1.
499 Interview with Claire, CMO CEO (Feb. 10, 2015).
500 Meaning the popularity of music does not fade when time passes.
programs. Right now, I can be a judge on the reality television singing competition programs in mainland China. [The wage] per episode is higher than the wage of a month in Taiwan! This is the price for lyricist and producer, not for an actual celebrity, we could get tens of thousands RMB per episode. Plus, we still get reimbursements for fight tickets, hotel, and assistants, and 2,000 RMB meal fee. This is something that never happened before. I also get to host radio program in mainland China, and I just need to record in Taiwan and send it to mainland China. . . . (emphases added)\(^{501}\)

In fact, music industry professionals have mixed feelings about expanding their market in mainland China. Christine explained her observations:

This all begins before the “Chinese Economic Reform,” because Taiwanese music developed to be the best among all Mandarin Chinese music, and not a single country in Asia can match it. Not Singapore, Malaysia, or Hong Kong. Before “Chinese Economic Reform,” the best music [mainland China] can get was Teresa Teng . . . . In terms of pop music, which need to be fancy, [they] need to rely on Taiwan. There was many good music in Taiwan, so the music was dumping into mainland China. This is the first [reason]. Second, [Taiwanese] artists had better advertisements. Since “Chinese Economic Reform,” national income increased dramatically, media became better, music industry became better. So most of [Taiwanese] artist went there, receiving much higher revenue contrasting to [the revenue in] Taiwan. The price they offer for a concert, say a single concert [in mainland China], can out sell 6 months’ revenue in Taiwan. So there is the difference. To be honest, it is all about the market. You can’t really avoid it, because you can sing wherever you are. . . . So market decides everything. (emphases added)\(^{502}\)

Veteran Singer Producer Peter, he mentioned that gradually he had more collaboration opportunities in mainland China, to create or produce albums, give lectures, and participate forums. He explained:

There are still a lot of people listen to Taiwanese music. In the past, they could only listen to the CDs, but now they want to connect to us face to face, including singers, creators. They want to fill up the gap in the past [of music industry]. For Taiwanese singers, particularly the popular singers from the 1980s, are extremely popular in the mainland China. Because to the people in mainland China, they (the 80s singers) are the people they have never met before, they are curious about us. As for me, I would be the type of person who are desirable among music industry professionals, or the people who are more involved in the industry . . . . (emphases added)\(^{503}\)

\(^{501}\) Interview with William, Lyricist/Producer/Writer/Celebrity (Jan. 25, 2015).
\(^{502}\) Interview with Christine, Former CMO CEO/Musician NPO Vice President (Jan. 28, 2015).
\(^{503}\) Interview with Peter, Singer/Composer/Producer (Feb. 3, 2015).
Scott provided a different perspective as a singer. I asked that what is the difference between the music industry in mainland China and Taiwan? He explained:

Their [music industry] have several different [business] model. I occasionally participated in some concerts, but only when Taiwanese promoters invite me. If Chinese promoters wish to hold an event, they will not invite me. Because I am not famous in mainland China, when I was popular in Taiwan, the cross-strait relationship had not thawed yet. The folk song [singers] in my era have the same experience, that the market in mainland China knows about the song, but they do not know about the original singer, because all of the songs have cover versions. Besides, I do not own the copyright of the song, so no matter how popular that song became in mainland China, it is none of my business. However, concerts are only one of the business models of music revenue stream. Only the most popular ones possess the market for concert. To composers and lyricists, they have lesser rights. It is unlike here, we have MUST (Music Copyright Society of Chinese Taipei), and a complete system. MCSC has limited power, regardless of it is due to self-restraining, or it is the environment. For composers and lyricists, they have little chance of profiting [from their works]. This would be another reason that mainland China composers and lyricists are not as good as Taiwanese composers and lyricists. This is also the reason that Taiwanese produced so many, and high quality stuff. The virtuous circle has not emerged [in mainland China] yet, so there were no good composers and lyricists. From the performance perspective, a lesser known person would not have [market for] a concert. Because in Taiwan, or other countries, there is model like iTunes, and model like Spotify, subscription service by month. These business models are very common in Taiwan, because people are willing to pay [for music]. Although the payment is low, and it would be lower when it is allocated to composers and lyricists. At least it is a model, and it doesn’t exist in mainland China yet. It is beginning right now, there is evidence of appearance, but it will be easily eliminated by other online service providers. Many new online service providers gathered a large amount of funding from capital market, then provide free [music]. They provide licensed music, but it is free. So the paid streaming services will not grow. It is necessary to have a consensus, or a cartel, because when every platform charges, nobody will destroy the market, then the [non-free] market will be able to develop. If a single service provider is not coordinating, everyone’s [effort] is in vain. People would just listen on the free service provider, why [would they] pay? This is something that the government must do, the mainland China government, to regulate the service providers must run the pay-to-listen model, then it would be possible. It is not impossible, because the movie industry is working on it, music [industry] could be the next wave. To me it is hopeful, of course it is an optimistic opinion. If the model is established, the music market would be different. Because the [mainland China] market scale is several times bigger than Taiwan, if the KKBox (a Taiwanese online music
streaming service) had 700 thousand users, it would be 7 hundred million users in mainland China! If everyone pays $20 RMB, it would be unbelievable. Certainly this is a utopia, very idealistic, but it is not impossible. If we look at the current market, the existing models are live concert and streaming service. If these models will be established, the composers and lyricists will actually be protected. There must be a powerful public performance mechanism to support. And these are the goals P.R.C. need to be working on. (emphases added)\textsuperscript{504}

The interview with Roger had identical view when he responded to my questions about whether piracy affected the willingness and frequency of producing new works:

We talked about the unspoken rules of this industry. In the past, no matter it was composer, lyricist, artist, and this industry, there were clear rules to be applied. For example, there were tangible media, cassette, vinyl, and CD. Those were all “[physical] goods.” But right now we are in the Internet era, we are still searching [for the rules] . . . I was in [mainland China] two days ago, discussing a licensing deal. Because from the beginning, until today, paid service were essentially non-existent, or just very few. Most of the online music services are free, music is free. Then we licensed some [services], there are about 5 companies in mainland China, possessing most, about 90% of the contents. I just knew a few days ago that Universal may sign a license deal with Alibaba. [In addition,] Alibaba bought Xiami (an online music service), Rock Records signed a license deal with Xiami. It seems Alibaba possess many contents. Recently these companies are issuing some stuff, because they paid a lot of money to record companies. Alibaba prepared for a battle of online [content], but right now it was settled. They are planning to have a subscription mechanism. If this comes true, the spring is coming [for music industry]. As I said, let’s ignore [the question of a reasonable] price for now, what if we charge 10 cents RMB per song? People in mainland China are rich nowadays. Even if it is a dollar per song, I would highly encourage it. In my opinion, pay-to-listen and pricing are [a method] to let consumers understand the rules. After 5 or 10 year, we could gradually adjust the pricing, and that would be a promising environment. But what’s the point about pricing? To establish the concept of user-pays. If this concept is established, this industry is saved . . . The current problem we are facing is institutional, strictly speaking, about half of the unspoken rules are not controlled by the record company anymore. [The unspoken rules] were established on copyright and artists, 20-30 years ago, we have no influence on about half of the things. Although [we] licensed them [the rights], we are the right owners, we still have to see how [the online service providers] do with it. They would even influence some of the

\textsuperscript{504} Interview with Scott, Singer and Musician NPO President (Jan. 28, 2015).
record companies to change the business, in a way that is beneficial to them. (emphases added)\textsuperscript{505}

From the perspective of CMOs, both Claire and Christine pointed out that there were difficulty collecting royalties in mainland China, even with a sister organization in mainland China.\textsuperscript{506} Christine explained:

*Because the [CMOs] in P.R.C. are closely connected to the government, many things are not as flexible as the CMOs in Taiwan.* Of course they couldn’t promise [Taiwanese CMOs] too much, they have been watched by so many countries. Each and every countries’ music was used by mainland China, but none of them feel that they are getting a satisfactory revenue. Basically the *CMOs in mainland China have been acting very defensively in the international market.* The reason is, they are doing their best, and I would certainly believe so, because the territory of mainland China is extremely big . . . . *The only channel for Taiwanese composers and lyricists to collect licensing fee is MCSC, and particularly live concerts.* The live concert is the easiest category to handle, it is [usually] a couple dozens of songs, just get the performance list, and there is a distribution mechanism. A portion for MCSC, and a portion for composers and lyricists. Every society charges administrative fees, and the rest are supposed to go to authors. *But here we have a cross-border scenario, the money that are distribute to Taiwan will remain very little. There is a lot of deductions, so when the revenue arrives our Taiwanese CMO, it would be less than $1/3.$ Many Taiwanese authors’ work were utilized in the mainland, but the revenue was seriously deducted. This is the reality of cross-border use, but what’s a pity is, *Taiwanese music is the most utilized one all over the world in mainland China.* . . . What we could do is just politely ask them to make an effort to collect the licensing fee. In the end, we just focused on the concerts. Every time our member plans to hold a concert in mainland China, we attach a list of songs in the email to them, and ask them to collect according to the list we provided. . . . The fact is, mainland China is such a big place, for example MCSC has branch in Shanghai too, but the Beijing office and Shanghai office are not very coordinated. So we still contact the main office in Beijing, the request will be delivered to Shanghai, but it will not be carried out sometimes . . . . When the CMOs in mainland China collects royalty, they don’t really go by the book. *Instead, they can set the price on their own.* So we cannot know how much we could get from a concert, we cannot evaluate. They will tell you the sum in the end, and that is how much we get. (emphases added)\textsuperscript{507}

\textsuperscript{505} Interview with Roger, Record Company Vice President (Feb. 4, 2015).

\textsuperscript{506} Interview with Claire, CMO CEO (Feb. 10, 2015).

\textsuperscript{507} Interview with Christine, Former CMO CEO/Musician NPO Vice President (Jan. 28, 2015).
From the perspective of mainland China, CMO In-house Counsel Charles’ comment perfectly matches the comments of Claire and Christine.508

Besides the music from mainland China, the most utilized music was from Taiwan and Hong Kong. . . . Because those are all Mandarin Chinese music, which are very popular in mainland China, particularly music from Taiwan leads the popularity. . . . Copyright enforcement on music still needs improvement. Overall it is a rough path, especially in mainland China, in the digital era. Right holders, particularly author’s rights are ignored, or appropriated.

To sum up, since mainland China gradually opened up its music market, the music industry in Taiwan had been a role model for the mainland China music industry. From the beginning, Taiwanese “singers” has been more popular. However, since the recent effort to establish their own music and entertainment industry, the “producers, composers, and lyricists” suddenly became desirable for them.

As we can observe from the interviews, copyright not only enforced in a format of law, but also impact in a form of the unspoken rule or business practice in Taiwan. On the contrary, there were no such system or transformation in mainland China. The legislation progress of the P.R.C. and the R.O.C. seems to align at a very similar time line with the amendments,509 but the cross-strait music industry developed very differently. Based on the empirical evidences, I argue that the key differences that highly correlates the music industry in Taiwan robust was the effective copyright enforcement in Taiwan, and the unspoken rule and business practices that founded on copyright in the music industry in Taiwan.

7.3 Conclusion

The interviews illuminated several key issues at the formation era and the golden era of music industry in Taiwan. In 1980s to 1990s, although domestic record companies were expanding, music industry relied on unspoken rules or business practices to establish business relationship with new entrants. Because most new entrants of music industry did not have the bargain power nor experience to make a better deal with the record companies, they may need to sacrifice their exclusive rights in order to gain their place in the music industry.510

Many interviewees mentioned the unspoken rules and business practices of “refusing buy out deal” were essential to the livelihood of the talents. In fact, talents who refused the buy out deal at the early stage of their career turned out to benefit from royalty significantly,511 and some record companies believed that buy out deal was not an ethical business practice to the entrants of music industry.512 Therefore, protecting the

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508 The interviews also confirmed the background provided in Part 2.5.
509 See supra Part 4.4.
510 Interview with Scott, Singer/Musician NPO President (Jan. 28, 2015) (contending that even some of the famous producers and singers did not have the bargain power to negotiate out of those “buy out” deals); Interview with William, Lyricist/Producer/Writer/Celebrity (Jan. 25, 2015).
511 Such as Peter and William.
512 Interview with Roger, Record Company Vice President (Feb. 4, 2015).
revenue stream of the talents was the key, and copyright law certainly played a crucial role on it.

As we can see from the interviews, copyright law profoundly affected the music industry in an in-depth, way: copyright law and the business practice of western record companies impacted the formation of domestic record companies’ unspoken rules and business practices, consequently inspired them to preserve the exclusive to the talents. CMO CEO Claire particularly pointed out that “our current advantage comparing to mainland China, is the concept of [respecting] copyright.”

Because of this practice, talents from all over the Great China region were attracted to Taiwan, and established the music industry of Taiwan as the center of creativity for Greater Chinese region. Comparing to mainland China, the golden era of music industry in Taiwan is highly correlate with the copyright law legislation, enforcement, judiciary decisions, and the unspoken rules in the music industry.

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513 Interview with Claire, CMO CEO (Feb. 10, 2015).
Music industry has changed significantly since the Information Age. Due to the storage media had significant improvement, and transmission of data have become more and more efficient, copyright law took on the role to protect creative works that are impacted by new technologies and services. However, no matter how technology progressed, the core value of copyright should not be abandoned, which is to protect the rights and interests of the authors and creators. Particularly for the purpose of “rewarding effort and promoting autonomy,” which could be used to further develop their talent and make a living to work as a music industry professional.

Some empirical studies suggested that piracy did not affect the increase of music available to consumers each year, and may facilitate the critic to creative work via the Internet. However, these research results were conducted under the circumstance that U.S. federal copyright law was still in force and the creators and author still possess exclusive rights to the work they created. It would be an overstatement to claim copyright is useless or hinders creativity. Instead, most scholars and practitioners believed that copyright law is important and valuable for the society and economic growth. Certainly, copyright law should be more adaptable and flexible, in order to reinforce the creative industry by means of rewarding creativity and innovation.

This empirical assessment was established on the comparative research of the P.R.C. and the R.O.C., providing arguably the closest comparative research targets that were available. The comparison indicated that, even under similar codification foundation, factors including law enforcement, judiciary, and the unspoken rule of the industry could impact music industry profoundly. These differences established a healthier environment to develop music industry in Taiwan, therefore created the creative central of Mandarin Chinese music.

Since the Chinese Economic Reform, the world has elevated its attention on the P.R.C. Although the legislation conformed the international standard, the “Chinese characteristics” certainly differentiated the enforcement mechanism and judiciary from any other country. The P.R.C. copyright regime heavily relied on administrative enforcement as its primary copyright enforcement mechanism, which created overlapping jurisdiction and elevated risk of harming procedure rights to the citizens. Nevertheless, the P.R.C. copyright enforcement regime were still observed to be ineffective against

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514 See supra text accompanying note 482.
515 Merges, supra note 6, at 195, 237-238.
517 See Paul Goldstein, Copyright’s Highway: From Gutenberg to the Celestial Jukebox 214 (2003) (suggesting copyright should provide up to date protection for authors for their incentives); Levine, supra note 76, at 252-253 (suggesting copyright is still crucial for the existence of a healthy market for entertainment industry); Maria A. Pallante, The Next Great Copyright Act, 36 Colum. J.L. & Arts 315, 320 (2013) (urging a more frequent review of copyright law in the age of Internet is necessary).
Conclusion

piracy.\textsuperscript{518} The overall P.R.C. copyright protection regime was designed in a hierarchical system, from the minor offenses that apply to civil liability to the serious offenses punishable by criminal law. However, the ambiguous language in the criminal law and administrative law created room for interpretation, which facilitated the administrative enforcement to become the primary enforcement method.\textsuperscript{519} Scholars and practitioners believed that the administrative punishment lacks the deterrence that criminal law could provide, and the due process of administrative enforcement is extremely limited.\textsuperscript{520} On the other hand, the expanding the administrative enforcement could increase the control of the local government on the matter. This could be the resulted from CPC’s core ideology to dilute the effect of separation of powers, to maintain more control on intellectual property protection. Many scholars in mainland China believed that the struggling music industry in China was resulted from market failure and lack of effective enforcement.\textsuperscript{521}

Even though the caseload of judicial decisions were growing at an incredible speed, the impact of judicial decision to the average citizens were very limited. One of the heatedly debated topics for the next P.R.C. Copyright Law was the reform of administrative enforcement. The next Copyright Law amendment would be decisive to the copyright protection in mainland China, particularly depend on what changes of the current hydra-headed copyright regime will become.

Most scholars, practitioners, and average citizen in Taiwan would agree that the R.O.C. copyright regime was far from perfect. Nevertheless, the improvement of the progress of copyright legislation, enforcement, and judiciary was effective to nourish and benefited the music industry, and the improvement was also recognized by the U.S.\textsuperscript{522} Similar to the P.R.C., the R.O.C. also been through the conform to international standard era, with even greater pressure from the U.S.\textsuperscript{523} However, the R.O.C. government made an effort to carry out copyright law, by law enforcement and criminal prosecution, right holders also stood up and asserted their rights via either filing criminal complaints or bring civil litigation against the infringers. In addition, the quality of judicial decisions improved year by year, which also educated average citizens profoundly. Based on the “Taiwanese experience,” we can clearly see that the effect of copyright law should function through legislation, law enforcement, and judiciary altogether. These different channels served as complement and amplify the effect of copyright enforcement, particular in developing the awareness of respecting intellectual property rights.

The critical differences for the two enforcement regimes was the P.R.C.’s administrative enforcement regime, and the R.O.C.’s \textit{Antragsdelikt} copyright infringement offense system. For both the P.R.C. and R.O.C., the reason to have these unique rules is to balance copyright’s ultimate goals: protect the rights and interests of the author and creator, balance the public interest, and promote the development of national

\textsuperscript{518} See supra Part 5.1.1.
\textsuperscript{519} See supra Part 5.1.2.
\textsuperscript{520} See supra Part 5.1.1.
\textsuperscript{521} See supra text accompanying note 45.
\textsuperscript{522} See supra Parts 5.2.3 & 6.2.
\textsuperscript{523} See supra Part 4.3.1.
culture. The goal of striking a balance on satisfying the domestic copyright industry and conforming to international copyright protection standard is much more difficult than it sounds. First, balancing the interests domestically of different industries, member within the industries, and different interest groups were never easy tasks. Second, the delicate cross-strait relation may increase the complexity of the issue. Because the Chinese Economic Reform brought in new music work from the world and Taiwan, P.R.C. may plan to develop their own music industry as a long term goal.

Regarding to future amendments, it is very likely that P.R.C. and R.O.C. aiming into direct opposite direction. Because the P.R.C. Copyright Law was being criticized for lack of criminal liability, the considerable amount of copyright law revision members suggested to expand the criminal liability by adding liability to non-commercial infringements. Contrarily, the “scholar version” of the R.O.C. copyright amendment bill seek to abolish criminal liability to non-commercial infringements, hoping to limit the negative chilling effect created by criminal copyright liability. From the experience of Taiwan, expanding criminal liability to copyright infringement does not necessarily guarantees a better enforcement result. In addition, consumers nowadays actively impact the copyright protection regime, simply rely on the traditional deterrence model would not stop them from using the unauthorized channels; therefore, amending copyright should be aligning with the merit of creators and consumers.

Besides the hydra-headed copyright regime diluted the P.R.C.’s protection efforts, the laws, enforcement campaigns, and judicial decisions did not create significant impact to average citizens. On the contrary, the R.O.C. copyright regime was feasible because the amendments, law enforcement activities, and judicial decisions always created a startling effect to the society. For example, when there were new proposed bills publish to the public requesting for feedbacks and comments, people from all the professions want to have their say in the draft. Moreover, law enforcement activities such as “MP3 incident of National Cheng Kung University” caused the entire Taiwan concerned and discussed about the issue. I remembered at that time, everyone in school were talking

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524 See supra text accompanying note 482. See also Fong, supra note 186, at 51-52.
525 See supra text accompanying notes 28-32.
527 See Liu Kung-Chung (劉孔中), Comparative Study of Principles for de lege ferenda Copyright Law (著作權法宏觀修法之比較研究), 11 INTELL. PROP. REV. (智慧財產評論) 1, 32-33 (2013).
528 See Liu Kung-Chung (劉孔中), Mowangchuzhong - Dui Liangan Zhuzuoquan Xiufa zhi Qixu (莫忘初衷－對兩岸著作權修法之期許) [On the Cross-strait Copyright Law Amendments], in INTERNET COPYRIGHT PROTECTION, PRACTICES AND RULE OF LAW (網路著作權保護、應用及法制) 3, 15-16, 23-24 (Jerry G. Fong et. al. eds. (馮震宇等), 2012).
529 Menell, supra note 131, at 264.
530 See Lin Xin-nan (林信男), Buman Zhuzuoquanfa Xiuzhengcaoan Yinyuequan Pi Zhengfu Daya Banguan Yezhe Shoulu (不滿著作權法修正草案 音樂圈批政府打壓版權業者收入) [Upset about Proposed Copyright Bill Music Industry Criticized the Government Repressing the Revenue Stream of Copyright Industry], ETtoday (July 9, 2014), available at http://www.ettoday.net/news/20140709/376810.htm#ixzz45UDHgFAi.
531 See supra text accompanying notes 378-387.
about the incident, and teachers started to warn us to “respect copyright.” Judicial
decision had the exact impact, if not more significant. Landmark cases such as ezPeer and
Kuro were well-known by almost every Internet user.532

Through different channels, copyright law, enforcement, judicial decision, and
unspoken rules embedded in most people’s minds, the record companies in Taiwan were
willing to respect the hard work of composers, lyricists, and producers. The record
companies created and followed the unspoken rule to keep the revenue stream to the
creators and authors. This revenue stream maintained a virtuous circle that attracted new
talents to join the industry, and it would be impossible to achieve without the existence of
effective copyright law. Particularly, the royalty that provides authors and creators are
much more critical to the survival and transformation of the music industry business
model. Because in the current music industry, it is difficult for the creators to be
rewarded without the performing revenue stream.

It is also believed that the quality of music from Taiwan was highly relevant to
the effective copyright enforcement and the general respect for copyright, and it was also
relevant to the robust development of music industry in Taiwan. On the other hand, the
lack of a virtuous circle and revenue stream system to reward the creators hindered the
development of music industry in mainland China. As the evidence exhibited in this
dissertation, the comparison between the music industry in mainland China and Taiwan
explained the copyright enforcement is highly relevant to the robust music industry in
Taiwan, and this relevance supports the hypothesis of linear property right theory.

As Chief Justice Earl Warren once wrote: “[i]t is the spirit and not the form of law
that keeps justice alive.”533 Only laws that are accepted and believed by people, will truly
take effect to the society.

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532 See supra Part 6.2.1.
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IFPI TAIWAN, *Singers Gathered and Spoke Up to “End Piracy, Stand Up for Copyright” and Crusade Against Pirated Music* (眾家歌手誓師「終結盜版 捍衛正版」討伐所有非法複製的聲音), http://www.ifpi.org.tw/record/about/0901%E8%AA%93%E5%B8%AB%E5%A4%A7%E6%9C%83%E6%96%B0%E8%81%9E%E7%A8%BF%20.htm (last visited Feb. 21, 2016).


RECORDING INDUSTRY FOUND. IN TAIWAN, Recent Development of Recording Industry in Taiwan (台灣唱片業發展現況), http://www.ifpi.org.tw/record/activity/Taiwan_music_market2015.pdf (last visited Apr. 6, 2016).


International Materials


Cross-Strait Agreement on Intellectual Property Rights Protection and Cooperation (海峽兩岸智慧財產權保護合作協議) art. 1, 6, 7, China-Taiwan, June 29, 2010.


**APPENDIX A: LIST OF INTERVIEWEES**

<table>
<thead>
<tr>
<th></th>
<th>Professions</th>
<th>Pseudonym</th>
<th>Active Region</th>
<th>Date</th>
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<tbody>
<tr>
<td><strong>Music Industry</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1.</td>
<td>Singer/Composer/Producer</td>
<td>Peter</td>
<td>TW/CN</td>
<td>Feb. 3, 2015</td>
</tr>
<tr>
<td>3.</td>
<td>Singer/Musician NPO President</td>
<td>Scott</td>
<td>TW/CN</td>
<td>Jan. 28, 2015</td>
</tr>
<tr>
<td>5.</td>
<td>Record Company Vice President</td>
<td>Roger</td>
<td>TW/CN</td>
<td>Feb. 4, 2015</td>
</tr>
<tr>
<td>7.</td>
<td>Record Company Personal Secretary to CEO</td>
<td>Sarah</td>
<td>CN</td>
<td>Dec. 9, 2014</td>
</tr>
<tr>
<td>8.</td>
<td>Tour Promoter CEO</td>
<td>Taylor</td>
<td>TW</td>
<td>Feb. 4, 2015</td>
</tr>
<tr>
<td>10.</td>
<td>CMO CEO</td>
<td>Claire</td>
<td>TW</td>
<td>Feb. 10, 2015</td>
</tr>
<tr>
<td>11.</td>
<td>CMO In-house Counsel</td>
<td>Charles</td>
<td>CN</td>
<td>Dec. 8, 2014</td>
</tr>
<tr>
<td>12.</td>
<td>Former CMO CEO/Musician NPO Vice President</td>
<td>Christine</td>
<td>TW</td>
<td>Jan. 28, 2015</td>
</tr>
<tr>
<td><strong>Legal Profession</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>13.</td>
<td>IP Court Judge</td>
<td>Jennifer</td>
<td>TW</td>
<td>Jan. 28, 2015</td>
</tr>
<tr>
<td>14.</td>
<td>Supreme People’s Court Judge</td>
<td>Jack</td>
<td>CN</td>
<td>Feb 8, 2016</td>
</tr>
<tr>
<td>15.</td>
<td>Prosecutor</td>
<td>Patricia</td>
<td>TW</td>
<td>Nov. 24, 2014</td>
</tr>
<tr>
<td>17.</td>
<td>Attorney</td>
<td>Alex</td>
<td>TW</td>
<td>Oct. 3, 2014</td>
</tr>
</tbody>
</table>
APPENDIX B: SAMPLE OF INTERVIEW GUIDE

I am Gi-Kuen Jacob Li, a UC Berkeley School of Law J.S.D. student, my research focus on the interaction of law and the music industry, so I would like to understand your opinion or knowledge on copyright law enforcement in the music industry.

The information obtained from this interview will be presented in pseudonyms. If there are audio recording, the recording will be used solely for the purpose of preparing the transcripts or fieldnotes, and the recording will be deleted immediately after transcripts or fieldnotes are completed.

Part I: Interviewee Background

A. Please briefly describe your occupation?
   1. When did you start the occupation?
   2. (What did you do before the occupation?)
   3. How would you describe your role in music industry? (musicians, music related jobs)

B. What is your motivation of choosing the occupation?
   1. Probe: Does your occupation satisfy your expectation? How so?
   2. How do you think about your experience of your occupation?

Part II: Personal Experience

A. What is the incentive of creating new works? (for singers, composers, and producers)

B. How do you feel about music piracy?
   1. How does it affect your willingness and frequency of creating new works? (for singers, composers, and producers)
   2. Have you ever experience your copyrighted works being infringed by others? (for singers, composers, and producers)
      a) How did the infringement affect your career?
      b) How did the infringement resolve? Or what happened?
   3. During the process of creation/performing/production, how does copyright law affect your creation/performance/production? (for singers, composers, and producers)
      a) Do you think about law when you are creating/performing? (for singers, composers, and producers)

C. What was the most important case related to music industry in your career so far? (judges and lawyers)
   1. How much do your clients/parties know about copyright?
Appendix B: Sample of Interview Guide

2. How did the parties react after winning, losing, or settlement?

D. Have you ever encounter copyright cases that includes parties from both Taiwan and mainland China? (judges and lawyers)
   1. What was the result?
   2. Was there problem with enforcement of the decision?

Part III: Music Industry and Copyright Law

A. How do you think about the environment of music industry in Taiwan/mainland China? (for singers, composers, and producers)
   1. What is the strength and weakness of Taiwanese/Chinese musicians/producers/composers, and music industry?
      a) Why?
   2. How do musicians’ the overall earning change?
      a) Are you experiencing the same change?

B. What do you think about the copyright collective management organization in Taiwan/China?
   1. What do you think about the royalty rate on radio/online streaming/KTV? (for singers, composers, and producers)
   2. If the royalty becomes lower (down to zero), what would you do? (for singers, composers, and producers)
   3. If the royalty becomes higher, what would you do? (for singers, composers, and producers)
      a) Would you have less concerts or live performances?

C. How do you think about the interaction between copyright law and the music industry in Taiwan/China? (professors, judges, lawyers)
   1. What are the advantages of copyright law in Taiwan/China?
   2. What are the flaws of copyright law in Taiwan/China?

D. Would you like to expand your career in mainland China/Taiwan? Why or why not?

Part IV: Demographics

A. What is your education level?
   1. What is your field of study?

B. Where would you think you will be positioning in 10 years?

C. Would you mind if I conduct follow-up in the future?
### APPENDIX C: LIST OF ABBREVIATIONS

<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Full Form</th>
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<tbody>
<tr>
<td>ARATS</td>
<td>Association for Relations Across the Taiwan Straits</td>
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<tr>
<td>CAVCA</td>
<td>China Audio-Video Copyright Association</td>
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<td>CMO</td>
<td>Collective management organization</td>
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<td>CPC</td>
<td>Communist Party of China</td>
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<td>IFPI</td>
<td>International Federation of Phonogram Industries</td>
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<tr>
<td>MCSC</td>
<td>Music Copyright Society of China</td>
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<td>NCAC</td>
<td>National Copyright Administration of the P.R.C.</td>
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<tr>
<td>RMB</td>
<td>Chinese yuan, also known as Renminbi</td>
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<tr>
<td>P.R.C.</td>
<td>People’s Republic of China</td>
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<tr>
<td>R.O.C.</td>
<td>Republic of China, Taiwan</td>
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<tr>
<td>SEF</td>
<td>Straits Exchange Foundation</td>
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<tr>
<td>SIPO</td>
<td>State Intellectual Property Office (China)</td>
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<tr>
<td>TIPO</td>
<td>Intellectual Property Office, Ministry of Economic Affairs, R.O.C. (Taiwan)</td>
</tr>
<tr>
<td>TRIPS</td>
<td>Trade-Related Aspects of Intellectual Property Rights</td>
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<tr>
<td>NTD</td>
<td>New Taiwan dollar</td>
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<tr>
<td>WCT</td>
<td>WIPO Copyright Treaty</td>
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<tr>
<td>WPPT</td>
<td>WIPO Performances and Phonograms Treaty</td>
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<tr>
<td>WTO</td>
<td>World Trade Organization</td>
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