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EXAMINING COPYRIGHT REGIMES IN CHINA'S DIGITAL MUSIC INDUSTRY:

HISTORY, CHALLENGES AND NEW MODELS

A Thesis in

Media Studies

by

Tian Tiffany Zhang

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The thesis of Tian Tiffany Zhang was reviewed and approved* by the following:

Richard Taylor
Palmer Chair Professor in Telecommunications Studies
Thesis Advisor

Matt Jackson
Head of Department of Telecommunications
Associate Professor of Communications

Krishna Jayakar
Associate Professor of Communications

*Signatures are on file in the Graduate School

ABSTRACT

The traditional Chinese culture of Confucianism, Taoism, and Buddhism and the theories from Marxism and Communism played an essential role during both the forming and modifying era of the intellectual property law regimes in the People's Republic of China. This thesis analyzed the reasons why no counterparts to copyright law ever developed in ancient China and why it was always problematic to enforce copyright law in modern China. As one of the largest markets for cultural products, China's digital music industry emerged at the end of twentieth century as promising but fledgling. Troubles and problems took root during the short booming era when pirated copies of music products were available free through both streaming and downloading and were all over the internet. Thousands of illegal sites, a variety of peer-to-peer file sharing software, and even search engines with high reputations were offering infringing and illegitimate mp3 download services.

This thesis also discusses the practices of how the P. R. China developed the national Copyright Law which has been passed by the National People's Congress from 1990 through the twenty-first century and how the copyright regimes have been forced to undertake a dramatic evolution in the entertainment and technology sectors in China. Some of the illegal copies on search engines were erased or replaced by thirty second previews, and hundreds of pirated sites were shut down or blocked by the Ministry of Culture. The long-existing tension between the needs of consumers and producers, however, proved that developing new technological and business models of digital music distribution is an urgent mission for all the players in the industry. Several new technological and business models which emerged in the industry recently are examined and reviewed in this thesis.

Among these new models, Xiami which ranks first presently among the competitors in the industry runs a new model of unique peer-to-peer systems, virtual currency, multi-platform clients, and strategic partnerships with record labels and independent musicians, which according to its goals announced on its site are beneficial to the industry in terms of intellectual property rights and copyright protections; but

they could also challenge the dominance and power of the traditional regime of large record companies by satisfying the sharing and social needs of consumers in online music communities. This thesis demonstrates how Xiami and other similar new models work and how they challenge the traditional understanding with respect to copyright and intellectual property protection, and considers whether these patterns can close the gap between traditional music producers and distributors and consumers, and whether the new models disable or enable the dominant structure, in order to investigate the future and fate of China's digital music industry.

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CHAPTER I. INTRODUCTION

1.1 Background and Context of Copyright in China

During the last three decades of the twentieth century, the People's Republic of China realized the importance of a solid legal system to protect its mixed economic model and to maintain political stability. In addition to this internal consciousness, external pressure from western countries and international organizations played essential roles in the process. The legal position of China has moved closer to the western model and has started to accept the more individualized and commercialized notion of intellectual property rights¹. Because China has come under heavy pressure to open up and become part of the global economy, the Chinese government committed itself to the construction and modification of its system dealing with intellectual property issues by enacting and enforcing its first trademark law in 1983, the first patent law in 1984, the first copyright law in 1990, and further amendments of them in the next decades.

The adoption of modern copyright, however, raised a series of interesting questions concerning the origin, history and necessity of the intellectual property legal frameworks in the Chinese context. For instance, why was the Copyright Law enacted so late in the early 1990s in China? How did the Chinese government protect creative and cultural works before the passage of the Copyright Law in the four decades of its governance? If China could function well without a copyright law, why was it necessary to adopt one in China²? Why was it difficult to implement and enforce it in China? In light of the implications of these questions, this thesis traces the origin of piracy and copyright protection in China's

¹ See Lucy Montgomery & Brian Fitzgerald, *Copyright and the Creative Industries in China*, *International Journal of Cultural Studies*

² See Yiping Yang, *The 1990 Copyright Law of The People's Republic of China*, *UCLA Pacific Basin Law Journal* (1992); June Cohan Lazar, *Protecting Ideas and Ideals: Copyright Law in the People's Republic of China*, *Law and Policy in International Business* (1996).

history and studies the new models which challenged or augmented the Copyright Law in the digital music industry.

Historically, China, as one of the first countries throughout the world to develop printing techniques, encountered serious problems of unauthorized reproduction of books, government documents and other printed materials. The activities of cultural products protection and the concept of copyright in China can be traced back to the Song Dynasty (A.D. 960-1279) when publishers stated on the last page of a book that reproduction was prohibited.³ Violators who copied manuscripts without the consent of publishers were subject to fines, corporal punishment, and having their printing equipments destroyed. William P. Alford suggested, however, these regulations were not designed to protect private interests (intellectual property) per se, but rather to maintain the imperial legitimacy and power by censoring authors and content of the printed materials⁴. The subsequent emperors, especially the Ming Dynasty (A.D. 1368-1644), endeavored to secure the enforcement of the code established in Song Dynasty and to strengthen state control of publication but with relatively few changes to the formal structure of regulation until the Qing Dynasty⁵.

It was not until the early twentieth century that a true copyright law appeared in China. Prior to the 1990s, China had three official copyright codes: first, the copyright law of the Qing Dynasty (1910); second, the copyright law of the temporary Northern Warlords Government (1915); third, the Copyright Law of the Republic of China by the Nationalist Government (1928)⁶. Although the copyright law of the Qing Dynasty was never actually carried out since the 1911 Revolution overthrew the Qing Dynasty, it

³ See Yiping Yang supra note 2, at 262.

⁴ See William P. Alford, Don't Stop Thinking About... Yesterday: Why There Was No Indigenous Counterpart to Intellectual Property Law in Imperial China, 7 J. CHINESE L. 3 (1993).

⁵ See Ku Chieh-Kang, A Study of Literary Persecution During The Ming (L. Carrington Goodrich Trans., 1938), Harvard Journal of Asiatic Studies, Vol. 3, at 254.

⁶ See Yiping Yang supra note 2, at 262-263.

laid a foundation for the 1915 and 1928 copyright laws and built the frameworks essentially utilized by the legislators for the subsequent governments.

Despite the history of intellectual property conceptions in ancient China, it was still difficult to import, modify and fit western conceptions of modern copyright law into traditional Chinese law and culture. Similar to that of most countries in the world but with slight differences, the Copyright Law (passed in 1990 and amended in 2002) in China set out the general guidelines on the protection of copyright owners' rights, such as who owns copyright and what are the rights possessed by them. In the creative and cultural industries, to be more specific, in the digital music industry, intellectual property rights have received close attention and have been put under the spotlight in political, business, and academic fields.

1.2 Development of Chinese Digital Music Industry

Digital Music, as implied by the name, adopted digital signals in the processes of production, reproduction, distribution and storage of audio products. Digital music consumption includes the activities of purchasing audio or music videos online or from mobile phones. Globally, the rapid development of the digital music market is demonstrated through these facts and statistics:

- (1) 29% – the proportion of record companies' global revenues from digital channels;
- (2) US\$4.6 billion – trade value of the digital music market worldwide;
- (3) 13 million – tracks licensed by record companies to digital music services;
- (4) 400+ – licensed digital music services worldwide;
- (5) 1000%+ – the increase in the value of the digital music market 2004-10;

(6) 6% – growth of global digital music revenues in 2010.⁷

However, piracy in the industry was always a serious and growing global problem. Even though the growth rate of the booming digital music market reached 1000 percent from 2004 to 2010, global recorded music revenues declined dramatically by 31 percent over the same period. The thriving progress of the digital music services was unable to stop or slow down the decline in the overall recording market that resulted from the distribution of unlicensed or illegitimate cultural content. Some other statistics from the IFPI report illustrates the fact that the serious piracy problem was deadly harmful to the industry,

(1) 1.2 million – the number of jobs projected to be lost in the European creative industries due to piracy by 2015;

(2) €4240 billion – estimated cumulative lost retail revenues to the European creative industries from piracy 2008–2015.”⁸

As indicated by the figures below, global music sales have been experiencing a gradual but constant decline. In the People’s Republic of China, the high level and the large scale of copyright piracy led to a dramatic decline (disregarding methodological factors such as the increases in 2001 and 2006 were likely due to the inclusion of music videos and digital sales respectively for the first time⁹) and a “significant undervaluation” of musical and cultural works in the marketplace¹⁰. China has almost twice as many internet users as the United States, but digital music revenues per user

⁷ See IFPI Digital Music Report 2011: Music at the touch of a button (2011), at 5. (Retrieved from http://www.ifpi.org/content/section_resources/dmr2011.html).

⁸ See IFPI Digital Music Report 2011: Music at the touch of a button (2011), supra note 7.

⁹ See IFPI the Recording Industry in Numbers 2000-2007 (2007). (Retrieved from: http://www.ifpi.org/content/section_news/20070702.html).

¹⁰ See Liu, J., The Tough Reality of Copyright Piracy: A Case Study of the Music Industry in China, *Cardozo Arts & Entertainment Law Journal* (2010), 27, at 635.

were about 1 percent of that of the United States.¹¹ Even though as indicated in the third figure below, 97.6 percent of consumers acquired musical products from the internet, it didn't help stop the revenues shrinking. As pirated compact discs gradually occupied the CD market decades ago, consumers were habituated to getting musical works from numerous illegal sources for free. The digital environment and Internet provided more unlicensed sites and pirated content to users. The musicians, as well as music companies, were used to “tolerating the free sharing of their music” and “marketing their albums at a price low enough to compete with pirated copies”¹². They had to look at alternative revenue streams to making a living including live performance, sponsorship from advertisers, selling bundled products, producing soundtracks for movies and becoming multi-dimensional stars¹³.

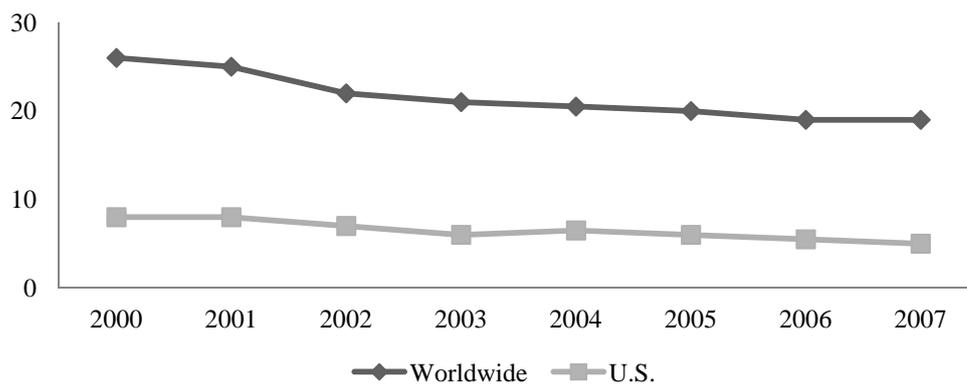


Figure 1-1: Recorded Music Trade Value Worldwide & in US (2000-2007), (US\$ Billions)¹⁴

¹¹ See IFPI Digital Music Report 2012: Expanding Choice. Going Global (2012), (Retrieved from: http://www.ifpi.org/content/section_resources/dmr2012.html). However, the statistic did not exclude the potential influences of differences in income and purchasing power.

¹² See Liu, J., The Tough Reality of Copyright Piracy: A Case Study of the Music Industry in China, *supra* note 10, at 636.

¹³ See Liu, J., The Tough Reality of Copyright Piracy: A Case Study of the Music Industry in China, *supra* note 10, at 636-643.

¹⁴ See IFPI the Recording Industry in Numbers 2000-2007 (2007), *supra* note 9.

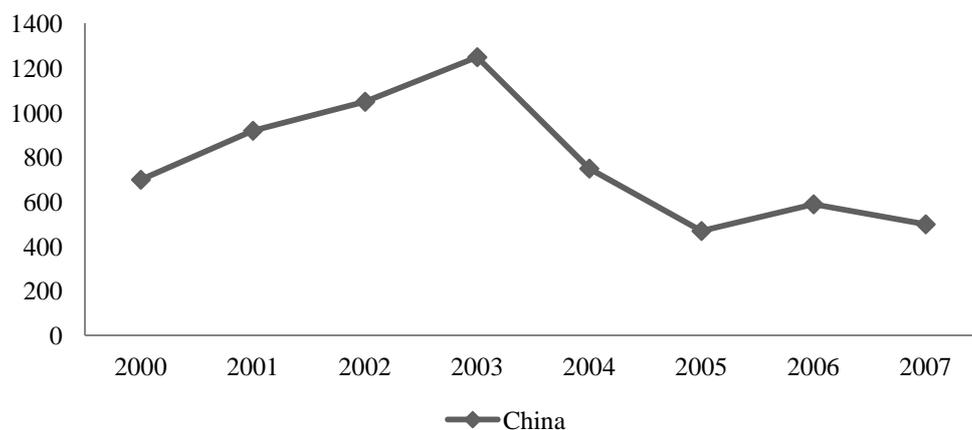


Figure 1-2: Recorded Music Trade Value in China (2000-2007), (China RMB Millions)¹⁵

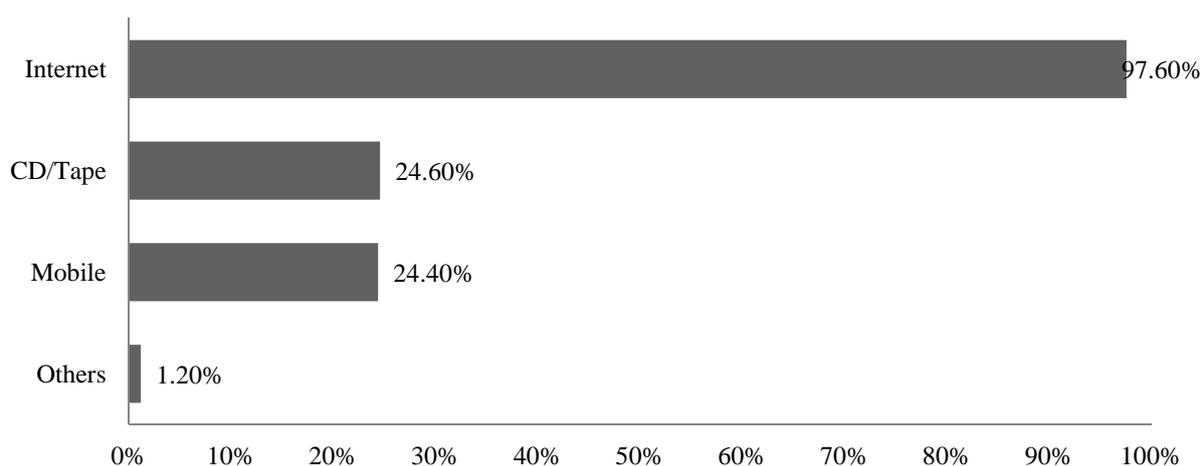


Figure 1-3: Channel of Consuming Music in China (2009)¹⁶

The tension between traditional music producers and digital music consumers in China was demonstrated in the last paragraph. Every player in the industry has started to change its business model in order to survive in this digital environment. In addition to the musicians, their companies and the

¹⁵ Id.

¹⁶ See IResearch, 2009-2010 China Digital Music Report (2010). It is worth noting that it was the percentage of people reporting that they use the particular platform to consume music; thus the categories were not exclusive.

copyright owners, the distributors of digital music, most licensed music websites, were providing free music streaming and downloading services to attract traffic and then to gain profits from advertisements. In order to explore the full potential for the music industry, the Chinese government has also increased its commitment to changing the estimated 99 percent digital piracy rate, and to making good use of the more than 70 percent penetration of digital music in the industry.

CHAPTER II. METHODOLOGY AND RESEARCH QUESTIONS

2.1 Methodology

The methodology of this policy-oriented analysis takes a political-economic approach; to be specific a historical analysis of Chinese traditions of piracy and intellectual property, and a case study of one new model emerging recently as a representative of the new challenging or supplemental models in the industry.

Focusing on how the industry understood the copyright regimes in China, cultural historians of communications have attempted to identify how policy shaped social power and structures and how dominance can be challenged and disabled by the agency of new models. By reviewing the origin and the twenty years of development of China's intellectual property law regimes, this thesis seeks to understand the present, and to investigate the future and fate of, China's copyright law and distribution system in the digital music industry. The Xiami model was chosen as a case study based upon its fast development and its important role in the sector according to the reliable sources (the annual report of digital music industry from iResearch, Ministry of Culture in the P. R. China, and Alexa).

According to Lindlof, "if we want to know how something is done and what it means, we have to know how it is talked about".¹⁷ This thesis seeks to understand how digital music users react to the new models by analyzing the existing online posts and articles on Xiami discussion groups with the name of Comments, Suggestions and Complaints about Xiami Group (<http://www.xiami.com/group/10147>). From reading the 31 thousand posts (1580 pages, 20 posts per page), not only was a general picture obtained about how users viewed the model, but generalized patterns were observed about what consumers were

¹⁷ See Lindlof, T.R., *Media Audiences as Interpretive Communities* (1988), *Communication Yearbook*, 11, 81–107.

really looking for. This methodology is best described as a textual analysis of viewers' discourse collected from the internet. In view of the fact that the theme of the discussion group was "suggestions and complaints", most posts were users' questions concerning using or technological problems with the website and the software. However, many positive posts were also posted by excited users on the discussion page. On the other hand, some posts frequently doubted as to whether the model was legitimate or not, and that question always raised heated debates when Xiami was first launched. The huge number of posts addressing copyright issues enhances the importance of the research and demonstrates that Chinese consumers are conscious of intellectual property protection in China. Further discussion will elaborate this in the results chapter and the conclusion and discussion chapter.

The literature review section conducts not only an analysis of Chinese culture from a historical perspective, but also a statistical analysis of China's digital music industry as well as the interpretation of official statistics and reports. In addition to official statistics provided by the Ministry of Culture of the People's Republic of China, a primary source was the data collected from research reports of iResearch, a leading organization focusing on China's internet industry and providing more than 100 annual reports concerning online media, e-commerce, online games, mobile internet and digital entertainment services, etc. The iResearch reports provided the data for the context, development, supply chain, business model, market analysis, and service providers' analysis of China's online music industry through online survey methods conducted both through iUserSurvey and more than ten online music sites of 3553 samples in total (for online music users analysis section).

In a word, this thesis utilizes a historical analysis of Chinese culture's reflection on intellectual property issues and a case study specifically demonstrating the new models in the industry, in order to reconcile the tensions or challenge the traditional understandings of the conceptions of intellectual property.

2.2 Research Questions

This thesis concerning the future of copyright regimes encompasses systematic research questions focusing on the outline of the industry, and a case study of Xiami, which offered new business and technological models, and investigates the reactions from the perspective of musical products consumers.

The main research questions were:

- (1) Is the Xiami model successful among online music communities?
 - a) What are the strengths/weaknesses of Xiami in terms of intellectual property issues?
 - b) What are the users' evaluations of the Xiami website?
- (2) What are the consequences of the new models of Xiami from the perspective of the consumers?
 - a) What are the positive and negative consequences of the virtual currency on Xiami?
 - b) What are the positive and negative consequences of multi-platform provided by Xiami?
 - c) What are the positive and negative consequences of strategic cooperation developing by Xiami and records labels?
 - d) What are the positive and negative consequences of strategic cooperation developing between Xiami and indie musicians?
 - e) What are the positive and negative consequences of the new peer to peer (P2P) technological system invented by Xiami?

It is also worth noting that reexamining the constantly changing industry in China might be an appropriate way to frame some answers to the question of "is this the right time for a fundamental shift of copyright regime in China", which would be an interesting discussion and research topic for future researchers.

CHAPTER III. LITERATURE REVIEW

3.1 Copyright Law in People's Republic of China

Even though the act of copyright protection emerged very early in the history, China didn't begin to build the legal framework for intellectual property protection until the early 1980s. Three national laws relevant for IP protection were the Patent Law, the Trademark Law and the Copyright Law passed by the National People's Congress during the last two decades of the twentieth century. The Chinese government subsequently enacted a series of regulations, policies and rules concerning copyright and intellectual property. Copyright regimes have been forced to make a dramatic evolution in the entertainment and technology sectors, and the high level of piracy started to draw much attention from political, business, and academic field both in and outside China.

The development of information technology has blurred the boundaries between content production, reproduction, distribution and consumption. In recent years, there were debates throughout the world concerning the extent to which copyright law should protect cultural works or guarantee the access of society to public goods in political, business, and academic fields. In China, the same debate demonstrated the long-existing tensions and contradictions in the cultural sector, especially in the music sector, and explored the new models in the market, gradually erasing the negative outcomes of the absence of concern about copyright protection in China.

3.1.1 Chinese Piracy in Historical Perspective

With thousands of years of continuous history, it was surprising to find out that no “indigenous” counterpart to intellectual property law or copyright law ever developed in ancient China¹⁸. The historical lack of an intellectual property culture in China could be attributed to several reasons involving the economic, political, philosophical, social and cultural context in China, which are elaborated below. Then the thesis examines the potential influences of these reasons on the modern copyright law system in the following two sections.

From the traditional understanding of the economy in ancient China, first of all, the Chinese economic system emphasized agriculture and ignored or even loathed commerce or in other words “profit-seeking activities” from a broad perspective¹⁹. One of Confucius principles could be translated into “noblemen seek righteousness, while petty persons only care about profit.” The word “profit” was “opposed to right” or morality to some extent in the long-existing economic philosophy.²⁰ From the Spring and Autumn Period (770-221 B.C.) of Chinese history, the Four Occupations demonstrate the essentially hierarchic social class structure in ancient China, which were gentry scholars, peasant farmers, artisans and craftsmen, and merchants and traders²¹. In addition, there were countless stories, fables, and idioms to make fun of individuals “obsessed by a lust for wealth”, and to admire those who were “not concerned with personal profit and wealth”.²² The initial image of merchants and the disdain for money appeared in the Spring and Autumn Period and has had strong influences on China through its history.

¹⁸ See Willian P. Alford, *To Steal a Book is an Elegant Offense: Intellectual Property Law in Chinese Civilization* (1995).

¹⁹ See Eric Priest, *The Future of Music and Film Piracy in China*, *Berkeley Technology Law Journal* (2006); See also Yiping Yang *supra* note 1, at 273.

²⁰ See Brian Barron, *Chinese Patent Legislation in Cultural and Historical Perspective*, 6 *INTELL. PROP. J.* (1991).

²¹ See Laurence Jacobs, Guopei Gao, & Paul Herbig, *Confucian roots in China: a Force for Today’s Business, Management Decision* (1995).

²² See Yiping Yang *supra* note 1, at 260.

Copyright protection lacked historical legitimacy in China since the royalties resulted in profits for individuals, which were discouraged and suppressed as private economic activities for over thousands of years. It was understandable why creative workers were unwilling to engage in the self-protection of their own rights because profit-seeking activities traditionally had been considered disgraceful.

Second, Chinese tradition was little concerned with individual rights and desires, but rather with social interests.²³ When it came to the individual, Confucianism and other traditional Chinese culture was involved fundamentally with the moral development of individuals and socially desired modes of behaviors in the state.²⁴ The hostility toward the employment of law to protect individual rights created the well-accepted idea that the collective or group benefits came first and individuals should even give up their personal interests if it would benefit the group.²⁵ Each person was encouraged to link his or her future and fate to the state's because as it was mentioned above that personal interest was subordinated to the welfare of the commonwealth at large²⁶. It has also been argued that China's Confucian traditions targeted "the transmission or passing down of creative works" for others or descendants to build on, rather than "learning or creation as in individualized activity".²⁷ Taking the first reason into consideration, traditional Chinese culture highlighted societal good instead of the pursuit of personal economic rewards.²⁸ Copyright royalties were blamed for expanding social inequality "by enriching authors at the expense of society".²⁹ In the cultural sector, therefore, some artists and creative workers considered

²³ See John R. Allison & Lianlian Lin, *The Evolution of Chinese Attitudes toward Property Rights in Invention and Discovery*, 20 U. PA. INT'L ECON. L. (1999); See also Ku Chieh-Kang *supra* note 5, at 1201.

²⁴ June Cohan Lazar, *Protecting Ideas and Ideals: Copyright Law in the People's Republic of China*, *Law and Policy in International Business* (1996), at 1201.

²⁵ *Id.*, at 1201-1202.

²⁶ See Yiping Yang *supra* note 1, at 274.

²⁷ See William P. Alford, *To Steal a Book is an Elegant Offense: Intellectual Property Law in Chinese Civilization* (1995).

²⁸ See Amy E. Simpson, *Copyright Law and Software Regulations in the People's Republic of China: Have the Chinese Pirates Affected World Trade?*, 20 N.C.J. INT'L L. & COM. REG. 575, 583 (1995).

²⁹ See June Cohan Lazar *supra* note 13, at 1202.

royalty payments after publication as unfair compensation. In China's music industry, many consumers could be heard claiming that those musicians who ask for royalties would be eliminated from the market because those stars were too rich to make requests for royalty payments, in contradiction to the wider interests of society.

Third, related to the last two reasons, individuals throughout China's history have been encouraged to keep the Buddhist Middle Way doctrine of moderation instead of competing against each other. Many examples showed that intellectuals preferred to "stand aloof from worldly success" rather than fight for fame, profit, or success.³⁰ Another concept of traditional China in Taoism which contributed to the Middle Way as a path of moderation between extremes was "yin and yang". According to the ancient culture of China, order was achieved through the balance between passivity and activity, negativity and positivity, destruction and construction, to be specific in the legal sense, the balance of "formal law with morality and benevolence".³¹ An extreme closeness to either pole (legal stricture or moral consideration) led to chaos and disorder which made the western-style legal system in China unlikely to be established. The yin-yang concept associated with the Middle Way notion urged legal judgments in China to preserve the social order, thus this was the reason why individuals were more eager to resolve disputes by mediation rather than the formal legal process.³²

Even though traditional Chinese culture had a great influence on the People's Republic of China, Marxist-Leninist theory, adopted by the government from 1949, also had a huge impact on how the copyright protection was evaluated in modern China. Traditional Marxism and socialist economies held the basic principle that every individual must work and should be rewarded for his or her efforts, but most importantly, individuals should profit equally no matter how great their abilities were and how bad their

³⁰ See Yiping Yang *supra* note 1, at 276.

³¹ See June Cohan Lazar, *supra* note 13, at 1202.

³² *Id.*, at 1202-1203.

situations were.³³ Offering private property or intellectual property rights to intellectuals or cultural workers would widen the gap between them and laborers and the author got paid according to the number of words in the work or some direct measures in order to narrow the gap. Although there were administrative means to control plagiarism till 1966, these regulations and implementations were very informal and with only limited power. During the Cultural Revolution, almost all intellectual property rights were revoked and the regulations were completely eliminated.³⁴ Without references to private property or the market economy in the history of the People's Republic of China, copyright, being essentially a private property right, was unacceptable and discouraged because it conflicted with the basic principles of Marxism.

Mao Zedong's "class struggle" theory which categorized Chinese people into distinct classes was another reason why China adopted the copyright law so late and why there were so many problems of its law enforcement in China. In Chinese history, intellectuals were classified as "semi-bourgeoisie", and artists and writers were regarded more bourgeois than other intellectuals.³⁵ They were required to "shift their stand" and according to Mao's talk on literature and art, they must:

"gradually move their feet over to the side of the workers, peasants and soldiers, to the side of the proletariat..." "to ensure that literature and art fit well into the whole revolutionary machine as a component part, that they operate as powerful weapons for uniting and educating the people and for attacking and destroying the enemy."³⁶

³³ See Yiping Yang supra note 1, at 269-270.

³⁴ See Amy E. Simpson supra note 27, at 1186-1187.

³⁵ See Yiping Yang supra note 1, at 271.

³⁶ See Mao Zedong, Talks at the Yanan Forum on Literature and Art, Selected Works of Mao Zedong (1967), at 78.

According to Mao's theory, there was "no such thing as art for art's sake, art that stands above classes or art that is detached from or independent of politics."³⁷ Chinese creative workers should not have "bourgeois" rewards of royalties according to the given Chinese cultural status.

In conclusion, Chinese society and more particularly, the philosophy of governing that society, could trace its intellectual roots back to the time of the emergence of Confucianism and Taoism. After that, Buddhism and then Socialism or Communism adopted by China for a certain amount of time have provided obstacles and difficulties for the Chinese to embrace western copyright and intellectual property law regimes. What is discussed above were the origins of cultural and psychological reasons deeply rooted in copyright owners and consumers' hearts. Throughout China's long history of seeking the balance between extremes, experts in the intellectual property field, copyright owners who have been harmed by infringing activities, and ordinary consumers with no idea about the concepts of copyright laws were all struggling to find ways to deal with all the external pressures and the rise of legal self-consciousness at the end of the 1970s.

3.1.2 Evolution of Copyright Law in P. R. China

Prior to 1978, the economic model in China was a political-command one. Under Deng Xiaoping's leadership, China started to transform itself into a market economy and to establish the open door policy. Some argued that the Chinese government realized the importance of a solid legal system and envisioned that "legal notions of economic rights would replace the political-command system."³⁸ While others argued that the first encounter of the People's Republic of China with copyright issues took place when the Chinese government was negotiating the China-US Trade Agreement, thus the essential

³⁷ Id.

³⁸ Jennifer S. Fan, *The Dilemma of China's Intellectual Property Piracy*, 4 *UCLA J. Int'l L. & Foreign Aff.* 207 (1999), at 207.

reasons for China adopting copyright law were external one. Since then, no matter what reasons were more fundamental, “a revolutionary transformation” has been made in China which made it from “a country without any protection to the one with a broad and systematic system”.³⁹ Under strong pressure from western nations, the United States in particular, the Chinese government enacted the Trademark Law in 1982 and the Patent Law in 1984 as a response. With the passage of the Chinese Constitution in 1982,⁴⁰ and the adoption of the General Principles of the Civil Law in 1986, the intellectual property rights of citizens and legal persons were recognized.⁴¹ Further, the Copyright Law of the People’s Republic of China was adopted by the National People’s Congress on September 7, 1990 and started to be implemented on June 1, 1991.⁴² Although China attempted to develop an intellectual property system to ease western concerns, the rights set out in these two documents were limited and did not satisfy either the western world or the Chinese people.

Because of the China-US intellectual property dispute, the piracy problems in China have been under the spotlight since the last two decades of the twentieth century. The United States Trade Representative (USTR) listed China as one of the “Priority Foreign Countries” three times (in 1991, 1995, and 1996) and placed it on the “Priority Watch List” even more often (in 2005, 2006, 2007, 2008, 2009, 2010, and 2011) in the annual Special 301 report. China has felt great pressure from the United States and felt forced to agree that it was necessary to improve intellectual property rights protection for U.S. computer software and sound recordings when China’s new Computer Software Copyright Regulations were enacted on June 13, 1991 (two weeks later than the Copyright Law took effect). In 1993, China amended its new

³⁹ See Yang, D. (2003). The development of intellectual property in China, *World Patent Information*, 25, 131–142.

⁴⁰ XIANFA [Constitution] (1982) (P.R.C.), translated and reprinted in ZHENG CHENG & MICHAEL PENDLETON, *CHINESE INTELLECTUAL PROPERTY AND TECHNOLOGY TRANSFER LAW* (1987)

⁴¹ See General Principles of the Civil Law of the P.R.C. (effective Jan. 1, 1987), translated and reprinted in ZHENG & PENDLETON, *INTELLECTUAL PROPERTY*, at 9.

⁴² See Beijing Newspaper Highlights, Xinghua General Overseas News Service, May 31, 1991. (Retrieved from Yiping Yang supra note 1, at 260.)

Copyright Law and relevant implementing regulations to make them consistent with two international conventions – the Berne Convention for the Protection of Literary and Artistic Works (October 1992) and the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms (June 1993). It is safe to claim that a systematic intellectual property law framework was in place at that time.⁴³

In addition to internal reform and external pressures from other states, the international organizations had an on-going influence on China's implementation of its system. In order to join the World Trade Organization (WTO) whose higher standard for intellectual property law became one "significant force in driving improvement" in 2001, China issued various amendments to improve implementation of the copyright laws.⁴⁴ While the World Intellectual Property Organization (WIPO) played a major role at the formation stage of China's intellectual property laws, a new element, the Trade-Related Aspects of Intellectual Property Rights (TRIPS) agreement introduced by the WTO, led to China's modification of all its existing intellectual property laws during the negotiation to bring them in line with the new requirements. These amendments summarized the extension of the subject matter of copyright, and clarified and elaborated copyright owners' economic and other rights, regulated copyright infringement in detail, etc.⁴⁵

Even as the USTR was castigating China, it also admitted that the Chinese government was becoming more active in dealing with online infringements both in administrative measures and operational means.⁴⁶ For instance, the Ministry of Culture announced an official notice to urge a list of 237 music websites to delete illegal music and 89 of these sites were closed in 2011 under pressure.

⁴³ See Yang, D. (2003). The development of intellectual property in China, *World Patent Information*, 25, 131–142.

⁴⁴ See Yang, D. (2003). The development of intellectual property in China, *World Patent Information*, 25, 131–142.

⁴⁵ See Xue, H., & Zheng, C., *Chinese Intellectual Property Law in the 21st Century* (2002), Hong Kong and Singapore: Sweet & Maxwell Asia.

⁴⁶ See IIPA Special 301 Report on Copyright Protection and Enforcement (2011) (retrieved from <http://www.iipa.com>).

Another endeavor was that the operators of some infringing websites were found guilty, sentenced to jail and received a fine.⁴⁷ However, the criticism of both the legal enforcement and the provisions per se from both the western world (primarily the United States) and Chinese public continued during the last several decades. In the next two sections of this chapter, the analyses of the Copyright Law and its regulations for enforcement will be described, and both the strengths and weaknesses of the law will be elaborated.

3.1.3 Analysis of The 1990 Copyright Law

The People's Republic of China Copyright Law enacted in 1990 protected the personal interests and rights of authors and started to encourage creative efforts.⁴⁸ The Chinese Copyright Law envisioned protecting authors' economic interests and moral rights which were suggested by the Berne Convention. The Berne Convention for the Protection of Literary and Artistic Works provided protection of authors' moral rights in article 6bis:

(1) Independently of the author's economic rights, and even after the transfer of the said rights, the author shall have the right to claim authorship of the work and to object to any distortion, mutilation or other modification of, or other derogatory action in relation to, the said work, which would be prejudicial to his honor or reputation.

(2) The rights granted to the author in accordance with the preceding paragraph shall, after his death, be maintained, at least until the expiry of the economic rights, and shall be exercisable by the persons or institutions authorized by the legislation of the country where protection is

⁴⁷ See Dong Pan, WENHUABUGUANBI300JIAWEIGUIWANGLUOYINYUEWANGZHANBAOHUZHISHICHANQUAN [Ministry of Culture Shut down 300 Illegal Websites to Protect Intellectual Property], SHENZHENXINWENWANG [Shenzhen News], Jan 13rd. 2011. (Available at <http://www.sznews.com>)

⁴⁸ See People's Republic of China Copyright Law [hereinafter P.R.C. Copyright Law], translated and reprinted in CHINA L. & PR c., Oct. 29, 1990, at 26.

claimed. However, those countries whose legislation, at the moment of their ratification of or accession to this Act, does not provide for the protection after the death of the author of all the rights set out in the preceding paragraph may provide that some of these rights may, after his death, cease to be maintained.

(3) The means of redress for safeguarding the rights granted by this Article shall be governed by the legislation of the country where protection is claimed.⁴⁹

Compared to American copyright law which has been amended four times in 186 years in the history, the protection of moral rights was extracted and modified from the Chinese legal tradition as in the first official copyright law in 1910 published by the Qing Dynasty in which the original, the name of the author, and the title of the work were not supposed to be altered or changed by the publisher.⁵⁰ There were two provisions included in 1990 Copyright Law: Article 16 (which mandated that authors or creators maintain signatory rights along with the economic rewards of the publication) and Article 20 (which ensured author's right of authorship, revision, and integrity to prevent the alteration of his or her work for an unlimited period).⁵¹ According to an examination of the Berne Convention which compared the Chinese Copyright Law with relevant provisions of the U.S. Visual Artists Rights Act of 1990, the Chinese Copyright Law offered an equivalent protection compared to the protection of the world's developed nations⁵².

⁴⁹ See Berne Convention for the Protection of Literary and Artistic Works (1971) (available at <http://www.law.cornell.edu/treaties/berne/overview.html>)

⁵⁰ See Yiping Yang, *supra* note 1, at 265.

⁵¹ See Copyright Law of the People's Republic of China (1990), *supra* note 44.

⁵² See Yiping Yang, *supra* note 1, at 265-266.

In addition to the protection of moral rights, the P. R. China Copyright Law provided only “moderate protection” for authors’ economic interests. In Article 10(5) of the Copyright Law, the economic rights that an author enjoys were described as follows:

the right to use his copyrighted work and to receive remuneration – or the rights to reproduce, show, broadcast, exhibit, publish, film, televise or videotape the works; or to adapt, translate, annotate and edit them; as well as the rights of permitting other people to use their works with aforementioned methods and receiving remuneration therefor.

Under Article 21, the economic rights lasted throughout the author’s lifetime plus 50 years after his death. However, the "fair use" provisions set out in Article 22 of the Copyright Law for which no license or remuneration is necessary, limited the exclusive economic rights of authors.⁵³ In contrast to the six exemplary fair use purposes identified by the U.S. (criticism, comment, new reporting, teaching, scholarship, or research), the Chinese Copyright Law identified twelve broad categories of fair use in which there were three that concerned the developed countries the most.⁵⁴ First of all, Article 22(7) approved the use of published works by state entities when carrying out their official duties.⁵⁵ Although the confusion arose in the western countries, the term “state entity” only applied to organizations such as the National People’s Congress and the Ministries, and did not include state-owned enterprises and collectively owned business.⁵⁶ In addition, Article 22(6) and Article 29 dealt with the translation of foreign language or minority language works into Chinese provided that the translation of the work may not unfairly impair the legitimate rights of copyright owners.⁵⁷ Finally, cultural works may be used in

⁵³ See Amy E. Simpson, *supra* note at 27, at 588-590.

⁵⁴ *Id.*, at 589; see also Yiping Yang, *supra* note 1, at 268; see also June Cohan Lazar, *supra* note 13, at 1149.

⁵⁵ See Amy E. Simpson, *supra* note at 17., at 589-590.

⁵⁶ See Yiping Yang, *supra* note 1; see also June Cohan Lazar, *supra* note 13.

⁵⁷ See P.R.C. Copyright Law, *supra* note 31.

professional performances, audio recordings, and radio or television programs without permission. Under Article 22 (4) and (5), the copyright owner must, at the date of publication, explicitly state whether the publication of his work is permitted or not. If the authors didn't reject the right of further use clearly, the default understanding was that the author acquiesces in such use.

3.1.4 Analysis of the 2001 Copyright Law Amendment

China's Copyright Law as amended in 2001 was structurally similar to that of most countries in the world. The provisions concerning the strong protection of moral rights and moderate protection of economic rights of copyright owners remained unchanged. The Copyright Law Amendment in 2001 was meant to correspond to the global economic, political, and technological reforms.⁵⁸ This amendment involved nine aspects: the equalization of rights of citizens and foreigners; detailed changes of definitions of the works; redefining the "copyright"; "collective administration of copyright"⁵⁹; the elaboration of the assignment of rights; strengthening legal enforcement; and copyright protection in new technological environments.

First, the equalization of the rights of citizens and foreigners expanded the scope of foreign works protected by the law:

Any work of a foreigner or stateless person which is eligible to enjoy copyright under an agreement concluded between the country to which the foreigner belongs or in which he has habitual residence and China, or under an international treaty to which both countries are party, shall be protected in accordance with this Law.

⁵⁸ See Guangliang Kang, XIUGAIJIUDANEIRONG ZHUZUOQUANFAXIUGAIMIANXIANGWTO[Chinese Copyright Law Amendment on nine topics], FAZHI RIBAO [Legal Daily], Sep, 19, 2001.

⁵⁹ See Copyright Law of the People's Republic of China (2001) the Standing Committee of the National People's Congress 2001 version (available at wikisource: [http://en.wikisource.org/wiki/Copyright_Law_of_the_People%27s_Republic_of_China_\(2001\)\)](http://en.wikisource.org/wiki/Copyright_Law_of_the_People%27s_Republic_of_China_(2001))))

Works of foreigners or stateless persons first published in the territory of the People's Republic of China shall enjoy copyright in accordance with this Law.

Any work of a foreigner who belongs to a country which has not concluded an agreement with China, or which is not a party to an international treaty with China or a stateless person first published in any country which is a party to an international treaty with China, or in such a member state or nonmember state, shall be protected in accordance with this Law.⁶⁰

Second, there were several obvious changes in the language defining the works protected by the law. The Copyright Law Amendment in 2001 added “acrobatic works” and “architecture” (categorized with fine art provision), applied “works created by virtue of an analogous method of film production” (followed the languages with Berne Convention) and gave up the expressions of “television and video-graphic works”, and added “model works” to the applied design provision.

⁶⁰ Id.

Language Using to Define Protected “Works” in China’s Copyright Law	
1990	2001
written works	written works
oral works	oral works
musical, dramatic, quyi and choreographic works	musical, dramatic, quyi, choreographic and acrobatic works
works of fine art and photographic works	works of fine art and architecture
	photographic works
cinematographic, television and video-graphic works	cinematographic works and works created by virtue of an analogous method of film production
drawings of engineering designs and product designs, and descriptions thereof	drawings of engineering designs, and product designs; maps, sketches and other graphic works and model works
maps, sketches and other graphic works	
computer software	computer software

Table 3-1: Language Used to Define Protected “Works” in 1990 and 2001 Copyright Law

To the contrary, the Copyright Law of the United States (2011) defined the works under protection as “original works of authorship fixed in any tangible medium of expression”⁶¹ and works of authorship included the categories as follows:

- (1) literary works;
- (2) musical works, including any accompanying words;
- (3) dramatic works, including any accompanying music;
- (4) pantomimes and choreographic works;
- (5) pictorial, graphic, and sculptural works;
- (6) motion pictures and other audiovisual works;

⁶¹ See Copyright Law of the United States and Related Laws Contained in Title 17 of the United States Code (Sep., 2011) (available at: <http://www.copyright.gov/title17/>), at 8.

(7) sound recordings; and

(8) architectural works.⁶²

The principles maintained in the U.S. copyright law, especially the clause that narrowed protected-works to those “fixed in any tangible medium”, improved the feasibility of law enforcement. In contrast, the definitions in the Chinese copyright law were also a mirror of traditional Chinese culture in which Chinese folk art including oral works (like mythologies, folk stories, and idioms) and folkloric shows (like the shadow puppetry) were flourishing and accounted for a large section of Chinese art. The differences in the expressions of works (included or excluded works not fixed in tangible media) in the copyright law were historically connected with the tradition and the culture of one state.

Third, the Copyright Law Amendment redefined the “copyright” by expanding the five rights to 17 rights and elaborating the ambiguous ones. They were the rights of reproduction, distribution, rental, exhibition, performance, showing, broadcast, communication of information on networks, making cinematographic work, adaptation, translation, compilation⁶³. They supplemented the copyrights of authors in the first version of the Chinese Copyright Law in 1990, especially the right of communication of information on networks as what Berne Convention suggested “communication to the public”⁶⁴ was an inevitable option. It was fitted in with the development of the internet technologies in which the instant and interactive communications online made it was much harder to protect the appropriate rights of copyright owners.

⁶² Id.

⁶³ See Copyright Law of the People's Republic of China, *supra* note 42. The right of communication of information on networks, in Copyright Law (2001), was understood as “the right to communicate to the public a work, by wire or wireless means in such a way that members of the public may access these works from a place and at a time individually chosen by them”.

⁶⁴ See Berne Convention for the Protection of Literary and Artistic Works (1971) (available at <http://www.law.cornell.edu/treaties/berne/overview.html>)

Fourth, the concept of the “collective administration of copyright” was legislated to administer copyright for copyright owners as a group rather than as separate individuals⁶⁵. The Copyright Law Amendment in 2001 allowed direct performers to transfer their responsibilities of acquiring the performance right from copyright owners to organizers including their agencies or recording companies⁶⁶. According to Kang, a researcher at the Intellectual Property Center of China Academy of Social Sciences, it might be an inevitable path for us to comprehensively solve the long-existed problems of copyright protection in China⁶⁷. However, there weren’t any efforts made to survey practices on this issue throughout the world, on how to build up a system of collective administration, how to arrange the concepts and the relationships among different parties, and most importantly how to operate and enforce the provisions of the law⁶⁸. The Chinese government never stopped to find the compromise between group-centered Marxism and individual-oriented intellectual property rights.

Fifth, the Copyright Law Amendment, after elaborating detailed categories of the term “copyrights”, permitted copyrights to be transferred and assigned between two parties on the basis of contracts between them, as mandated in the article 10,

A copyright owner may assign, in part or in whole, the rights under the preceding paragraphs (5) to (17), and receive remuneration pursuant to an agreement or this Law.⁶⁹

⁶⁵ See Copyright Law of the People’s Republic of China, supra note 42. In Article 8, “the copyright owners and copyright-related right holders may authorize an organization for collective administration of copyright to exercise the copyright or any copyright-related right. After authorization, the organization for collective administration of copyright may, in its own name, claim the right for the copyright owners and copyright-related right holders, and participate, as an interested party, in litigation or arbitration relating to the copyright or copyright-related right.”

⁶⁶ See Guangliang Kang, supra note 41.

⁶⁷ Id.

⁶⁸ Id.

⁶⁹ See Copyright Law of the People’s Republic of China, supra note 42.

The Chinese Copyright Law enacted in 1990 ignored the “assignment of rights” provisions, which created conflicting interpretations among experts in academic, administrative, and judicial fields. Most importantly, Xu from the National Copyright Bureau emphasized in a symposium that the transfer of copyrights was “reversible” and that they could designate any time to terminate the contracts and the original copyright owner could recall the rights when they received an agreement on duration of the protection.⁷⁰

Sixth, the Copyright Law in 2001 strengthened enforcement measures by employing the notions of statutory damages and imminent infringement.⁷¹ On one hand, the Amendment of 2001 drew on experiences of other countries and enacted the statutory damages (which was stipulated within the statute rather than calculated based on the degree of harm)⁷² in Article 48,

Where a copyright or a copyright-related right is infringed, the infringer shall compensate for the actual injury suffered by the right holder; where the actual injury is difficult to compute, the damages shall be paid on the basis of the unlawful income of the infringer. The amount of damages shall also include the appropriate fees paid by the right holder to stop the infringing act.

Where the right holder's actual injury or infringer's unlawful income cannot be determined, the People's Court shall judge the damages not exceeding RMB 500, 000 depending on the circumstances of the infringing act.⁷³

⁷⁰ See Guangliang Kang, *supra* note 41.

⁷¹ *Id.*

⁷² ZHONGHUARENMINGONGHEGUOZHUZUOQUANFASHIYI [Interpretation of the Copyright Law of the People's Republic of China] (available at: http://www.34law.com/lawfg/twsy/twsy_17.shtml)

⁷³ See Copyright Law of the People's Republic of China, *supra* note 42.

On the other hand, it also implemented a provision of imminent infringement (addressed by Obama Administration to allow the charge of people who have the intent to infringe), that is, the official “thought crime” provisions. In Article 49 from the Chinese Copyright Law Amendment, Article 49 said:

A copyright owner or owner of a copyright-related right who has evidence to establish that another person is committing or will commit an act of infringing his right, which could cause irreparable injury to his legitimate rights and interests if the act is not stopped immediately, may apply to the People's Court for ordering cessation of the related act and for taking the measures for property preservation before instituting legal proceedings.

Combined with the introduction of two notions “statutory damages” and “imminent infringement”, the Copyright Law Amendment asserted the property preservation and evidence preservation before initiating legal proceedings, and it also stipulated the provisions to provide enforcement measures in Article 50,

For the purpose of preventing an infringing act and under the circumstance where the evidence could be lost or is difficult to obtain afterwards, the copyright owner or the owner of a copyright-related right may apply to the People's Court for evidence preservation before initiating legal proceedings.

The People's Court must make the decision within forty-eight hours after it accepts an application; the measures of preservation shall be taken without delay if it is decided to do so.

The People's Court may order the applicant to provide a guaranty, if the latter fails to do so, the Court shall reject the application.

Where the applicant fails to institute legal proceedings within fifteen days after the People's Court adopted the measures of preservation, the latter shall terminate the measures of preservation.⁷⁴

Finally, the Chinese Copyright Law Amendment included the protection of copyright-related rights in new technological environments: (1) It defined the term of works by “Regulations for the Implementation of the Copyright Law” as the “original intellectual creations in the literary, artistic and scientific domain, insofar as they are capable of being reproduced in a certain tangible form”⁷⁵, which determined digital works would be protected by the Copyright Law in China no matter whether they have been fixed in a tangible form already or not. (2) It also included the digitalization of the traditional works as a mean of “reproduction” rather than “translation” because the digitalized works were technological activities completed by machines rather than accomplishments of human creativity. The definition was not contradictory to the original Regulations for the Implementation of the Copyright Law enacted in 1991 in which reproduction was defined as “the act of producing one or more copies of a work by printing, photocopying, copying, lithographing, making a sound recording or video recording, duplicating a recording, or duplicating a photographic work, or by other means.”⁷⁶ Even though the provision didn't involve anything related to digitalization, it was also a non-exhaustive list of reproduction activities.⁷⁷ (3) It also enacted “the right of communication of information on networks” as one category of copyright-related rights. (4) It also extended the scope of infringing activities by adding provisions in Article 47,

⁷⁴ See Regulations for the Implementation of the Copyright Law of the People's Republic of China (2002) (available at wikisource: [http://en.wikisource.org/wiki/Regulations_for_the_Implementation_of_the_Copyright_Law_of_the_People%27s_Republic_of_China_\(2002\)](http://en.wikisource.org/wiki/Regulations_for_the_Implementation_of_the_Copyright_Law_of_the_People%27s_Republic_of_China_(2002)))

⁷⁵ Id.

⁷⁶ See Regulations for the Implementation of the Copyright Law of the People's Republic of China (1991) (available at WIPO resource: <http://www.wipo.int/wipolex/en/details.jsp?id=847>)

⁷⁷ See Jinchuan Chen (Beijing Supreme People's Court), XINJISHUTIAOJIANXIADZHUZUOQUANSHENPANDEJICHU [The Basic Principles of Copyright Jurisdiction in New Technological Era], 2002. (available at CCTV website: <http://www.cctv.com/tvguide/tvcomment/tyzj/zjwz/7772.shtml>)

Anyone who commits any of the following acts of infringement shall bear civil liability for such remedies as ceasing the infringing act, eliminating the effects of the act, making an apology or paying damages, depending on the circumstances' and may, in addition, be subjected by a copyright administration department to such administrative penalties as ceasing the infringing act, confiscating unlawful income from the act, confiscating and destroying infringing reproductions and imposing a fine; where the circumstances are serious, the copyright administration department may also confiscate the materials, tools, and equipment mainly used for making the infringing reproductions; and if the act constitutes a crime, the infringer shall be prosecuted for his criminal liability:

..... (6) intentionally circumventing or destroying the technological measures taken by a right holder for protecting the copyright or copyright-related rights in his work, sound recording or video recording, without the permission of the copyright owner, or the owner of the copyright-related rights, unless otherwise provided in law or in administrative regulations;

(7) intentionally deleting or altering the electronic right management information of a work, sound recording or video recording, without the permission of the copyright owner or the owner of a copyright-related right, unless otherwise provided in law or in administrative regulations;.....⁷⁸

In conclusion, the 2001 Copyright Law Amendment of the People's Republic of China offered a significant advancement to the original enacted in 1990. The 2001 version of the Copyright Law has generally met the fundamental requisites of copyright protection. The debates on the extension and intensification of the enforcement measures of the copyright law, as well as about its legitimacy, value and practicability would continue to be debated in China, and throughout the world. However,

⁷⁸ See Copyright Law of the People's Republic of China, supra note 42.

what happened in the music industry, especially the digital music industry, became a litmus test of the efficacy of the original copyright law as well as its amendments.

3.2 Digital Music Industry in China

As a brand new technology of digitalization emerging in China, the traditional music industry has been severely challenged. Digital music, employed digital signals instead of traditional analog signals, has emerged and mostly replaced alternatives for over two decades with the introduction of CDs. Nowadays, digital music is widely understood as audio products distributed and consumed through internet technologies. Digital music accounts for 29 percent of global music industry revenues, demonstrating the rapid development of the digital music marketplace.⁷⁹

3.2.1 Origin and Development of the Music Industry in China

Because of its versatility in the mass-production, reproduction, and distribution of sound, China's digital music industry experienced a booming start from 1999 to 2001.⁸⁰ Baidu (China's largest search engine) offered free mp3 downloading services and the flourishing peer-to-peer (P2P) services led to rapid growth in digital music but also created a chaotic situation in the industry due to free downloads and pirated products.⁸¹ The market was struggling to find its way in the recession through 2003 to 2008. During this period, generally speaking, the level of music piracy in China was consistently very high (in the range of

⁷⁹ See IFPI Digital Music Report 2011: Music at the touch of a button (2011), *supra* note 7.

⁸⁰ See China Online Music Research Report (2007) (iResearch Consulting Group), retrieved from <http://www.iresearch.cn/> (October, 2011). [Chinese]

⁸¹ See Liu, J., The Tough Reality of Copyright Piracy: A Case Study of the Music Industry in China (2010). *Cardozo Arts & Entertainment Law Journal*, 27, 621-661.

85% to 90%⁸² or even 99%⁸³). Almost all major search engines in China, except for Google (which supported the Top100 Music Network – the earliest licensed music site), were involved in online music services, which never received authorization from the music labels. Other pirated channels such as VeryCD (Chinese eMule) using peer-to-peer file sharing technologies were apparently the people’s alternative sources of illegal music files. It was well accepted that China, as one of the largest potential markets for cultural products and digital applications, was facing a destructive problem of pirated content of cultural products, especially illegal downloads and streaming access provided by search engines and interactive online communities. Opening on April 28, 2003, Apple’s iTunes Music Store urged institutions in China to deal with the intellectual property issues, and domestic copyright agencies were developed to fight piracy. As discussed above, the ongoing China-US intellectual property dispute was another external pressure that catalyzed the birth of the Copyright Law in China. The market started to recover gradually from 2008 because piracy and free downloads were brought under tighter control and the new business models pursued by legitimate digital music sites began to achieve maturity and stability since 2010.⁸⁴ For instance, after it established a licensing agreement with the Big Four (Universal, Sony, Warner and EMI), Baidu guaranteed to shut down its infringing deep-linking music search service and to provide a new legitimate service (Baidu Ting) supported by advertising revenues to consumers with free streaming and downloads.⁸⁵

⁸² Id.

⁸³ See IFPI Digital Music Report 2012: Expanding Choice. Going Global (2012), (Retrieved from: http://www.ifpi.org/content/section_resources/dmr2012.html).

⁸⁴ See China Online Music Research Report (2007), (2009-2010) (iResearch Consulting Group), retrieved from <http://www.iresearch.cn/> (October, 2011). [Chinese]

⁸⁵ See IFPI Digital Music Report 2012: Expanding Choice. Going Global (2012), (Retrieved from: http://www.ifpi.org/content/section_resources/dmr2012.html).

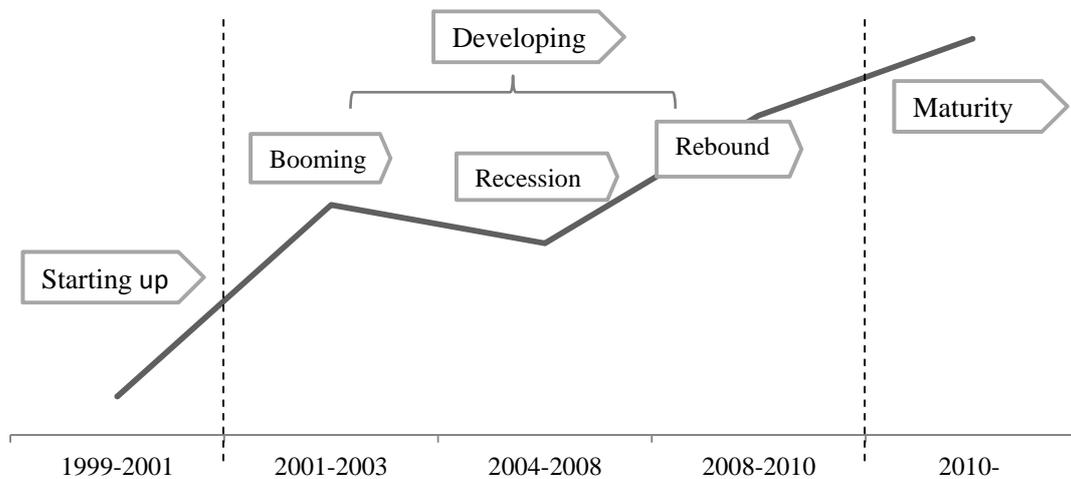


Figure 3-1: Development of China's Digital Music Industry⁸⁶

From 2008 till now, as mentioned in the previous paragraph, some facts about China's digital music market imply that the market for digital music which has had continuous growth and great attention has been regulated and new business models developed. Google investigated new business models promoting the services of legitimate music search and download supported by advertising revenues which allowed users to listen to and download music for free. The Chinese government enacted the supplementary provisions to the "Sino-Foreign Cooperative Audiovisual Products Retail Enterprises Management Rules" (Notice Concerning Strengthening and Improving Network Music Content Examination Work) on August, 2009. Due to the new action towards piracy, hundreds of websites offering illegal content have been shut down by Ministry of Culture and other websites were forced to delete pirated content, including multimedia or embedded hyperlinks.

Apart from the stringent enforcement actions against illegitimate music sites, many websites were exploring original ways to survive by distributing legal content but adapting to consumers' habits

⁸⁶ See China Online Music Research Report (2009-2010) (iResearch Consulting Group), retrieved from <http://www.iresearch.cn/> (October, 2011). [Chinese]

simultaneously. Some of the new approaches including the business models and the technological models were worth pointing out and will be elaborated on in the next section of this paper. In addition to the partnership with record labels employed by the Top100 music network (the first licensed music site financially supported by Google) and the advertising-supported business model pioneered by Baidu Ting (the largest Chinese internet company's music service), a new website, Xiami, started to stand out conspicuously from thousands of competitors.

3.2.2 Tensions in China's Digital Music Industry

Widespread piracy has caused consumers to "gravely undervalue musical works" in China.⁸⁷ A recent study showed that, while 88% of overall music consumption in China was based on online downloading or streaming, only 1.5 million out of 119 million online music users paid for music access, and only 10 out of over 700 music websites were properly authorized or licensed. It also indicated that 80% of Chinese consumers are only willing to pay less than two U.S. dollars (15 RMB) per month for music and 37% are unwilling to pay any amount for music at all.⁸⁸

As one of the most essential links, the distribution link in music industry was always an issue. From store to online streaming, to downloads and music sharing communities, music distributors experienced the most unpredictable transformation throughout the globe in the last few decades. In the mid-1990s, a new delivery system (compact discs) utilizing digital signals started to hold the market instead of audiotapes and long-playing microgroove records as analog signal storage media. The Big Five record companies (became the Big Four in 2004), EMI, Universal, Sony, Warner and Bertelsmann, extended

⁸⁷ See Liu, J., *The Tough Reality of Copyright Piracy: A Case Study of the Music Industry in China* (2010). *Cardozo Arts & Entertainment Law Journal*, 27, at 630.

⁸⁸ See *China Online Music Research Report (2007), (2009-2010)* (iResearch Consulting Group), retrieved from <http://www.iresearch.cn/> (October, 2011). [Chinese]

their market dominance to the Internet by the end of the 1990s, which forecast the potential success of internet delivery. In 1999, Napster (the first well-known peer-to-peer program) was introduced to the world and reached around 70 million users according to Napster's founders.⁸⁹ Its growth inspired many other peer-to-peer systems (Morpheus and Kazaa for instance) and they have become more widespread with hundreds of different options.⁹⁰ The Napster system of peer-to-peer acoustic file sharing unleashed a major force and posed a serious threat to the existing recording industry. Major record companies, associated with the Recording Industry Association of America (RIAA) launched a lawsuit against Napster which gave rise to extensive debates concerning whether it enabled copyright infringement and how it affected CD sales positively or negatively. From 2003, the record companies changed their strategy to target individuals and sued four hundred file sharers. In the end, the music industry succeeded in establishing a legitimate online distribution model, which also secured lower prices for consumers in view of the fact that the shift from the production and distribution of physical media (CDs, DVDs, audiotapes, etc.) to digital downloading and streaming services generated large cost savings.

When it came to China, distribution was also the most influential subject considering the potential opportunities for the country that was tarnished for decades by physical format piracy, gaining through the shift from the physical market to the digital environment. The story of an ordinary professor in Shanghai is an illustrative example:

In the 1980s, the tape recorder (Sharp AP9292) was the most important equipment in my family. The sound quality of the recorder was top-tier in China at that time. We recorded the classical music from Shanghai FM radio channel. The CD was very mysterious to our family for a long

⁸⁹ See Napster launches UK music service, May 20, 2004, BBC News. Retrieved from <http://news.bbc.co.uk/2/hi/technology/3728777.stm>

⁹⁰ See Chadwick, A., Internet Politics(2006). NY: Oxford. Chapter 12: The Political Economy of Internet Media, at 309.

time until we bought the first CD walkman in 1994. At the beginning of the 21st century, we started to use mp3 players. It's more convenient and portable with much less loss of quality.⁹¹

That is a case which could be generalized to the broader context in China. The similar process of media development in China's music distribution and the destructive influence of high levels of piracy moved both record companies and distributors seize the opportunity of digitalization. "CD is dead." is the declaration from the founder and CEO of one of the largest Chinese record companies – Taihe-Maitian Music – in October, 2011. According to the statistics in the report of International Federation of the Phonographic Industry (IFPI), the physical market was breaking down. In 2010, China's overall music sales were worth only US\$67 million, "making it a smaller market than Ireland" and more than 50 percent of consumers gave up CDs or barely buy a CD.⁹² According to the speech of the chairman and CEO of IFPI, John Kennedy, in China in 2006, China had the one of the largest mobile phone markets (now the number of users is 920 million in 2011) and "mobile music is already far advanced" in China.⁹³ The predominance of mobile music channels offered China the chance to modify and standardize the market for music. Mobile music had two big advantages – first a customer billing system that was already established; and second, unlike the internet, piracy in mobile music appeared to be better controlled with the help of the mobile telecommunication operators⁹⁴. In 2010, the revenue of mobile music (2 billion yuan, roughly US\$300 million) accounted for 87.8 percent of the revenue of digital music (2.3 billion yuan, roughly US\$350 million) and was the main force for the development of digital music. The revenue of online music in 2010 was 280 million yuan with a rise of 64 percent from 2009 while the rise of mobile

⁹¹ See Wu, Jingna, CD 25 SUZHOUYINIAN [CD At the age of 25], 2007 (available at <http://info.cb.com.cn/News/ShowNews.aspx?newsId=11973>)

⁹² See IFPI Digital Music Report 2012: Expanding Choice. Going Global (2012), (Retrieved from: http://www.ifpi.org/content/section_resources/dmr2012.html).

⁹³ See Kennedy, J., Unlocking the music market in China. Speech delivered at the China International Forum on the Audio Visual Industry, (2006). Shanghai. (Retrieved from <http://www.ifpr.org>)

⁹⁴ Id.

music was 9.8 percent.⁹⁵ Record companies have rapidly transformed themselves from a business dominated by two revenue streams – physical retail sales and radio – to different digital channels, from ringtones to subscription services, from mobile downloads to music videos.⁹⁶

In conclusion, the future of music distribution by physical, digital or mobile systems in China was still in suspense. The question remained what the new distribution platform for music industry would be, and how flexible a role it would play in the relationship between content creators and consumers.

3.2.3 Challenges of New Models

The technological changes were significantly affecting markets in the cultural sector with implications both for individuals (artists, creative workers, and consumers) and organizations (record companies, distributors, etc.). New technological and business models in the music industry were emerging from old models or were created with brand new ideas, facing the same challenges of convincing users to accept advertisements or to pay for the online music products.

Let's look at three representative models for details to examine how they understood the copyright regimes and disrupted the structure. First of all, Top100.cn financially supported by Google was the first successful advertisement-supported model in China which provided legitimate music downloads. It established alliances with thousands of record labels and allowed users to download music paying zero. This mode dealt with the tension by closing the gap between copyright owners and consumers, thus it provided free products but also sold consumers as products by offering advertising services. The second

⁹⁵ See China digital music industry annual report (2010), Ministry of Culture. (Retrieved from <http://wenku.baidu.com/>) [Chinese].

⁹⁶ See Kennedy, J., Unlocking the music market in China. Speech delivered at the China International Forum on the Audio Visual Industry, (2006). Shanghai. (Retrieved from <http://www.ifpr.org>)

model chosen was a personal website of an independent musician in mainland China which allowed fans not only set their own price for digital CDs as Radiohead did in 2007⁹⁷, but also ran the up-to-you price model for concert tickets. It posed an ideological and practical threat to the economic power of large record companies and challenged the traditional understanding about property rights. It reduced the cost of production and distribution, and provided means for cultivating the habit of paying for digital audio products. Unlike Radiohead, however, the singer barely maintained the balance of revenue and expenditure for every one of his digital CDs.⁹⁸ Radiohead laid the foundation of fans and built the consumer base using traditional models of distribution which determined and forecasted their success in liberated models. The third model which was the focus of this article was the Xiami model which allowed the coexistence of consumer generated content (peer-to-peer file sharing technology) and legitimate distribution of content (partnership relations and royalty payments).

No matter how successful or failed these models were, they demonstrated the rise of consumer-driven new business models. In response to consumers' embrace of digital media and the changing ways they access entertainment throughout the entire world, record companies have rethought and reinvented the way they do business, innovating with platforms and applying new technologies.

Xiami, which applied peer-to-peer technologies which relied upon users' uploads, was completely free of charge until the point of download. With more than 5 million registered users, the Xiami website ranked first in the Music category since August, 2011 according to Alexa Internet in China (however, the advantage was not constantly obvious according to the two charts shown below). Even though the CEO and founder of Xiami and the team are working on legalization of the site operation by paying copyright owners the royalty rates, the site was currently under threat and gave rise to intense disputes in business

⁹⁷ See Radiohead Asks Fans To Name Price For New Album (2007). Retrieved from http://www.billboard.com/bbcom/news/article_display.jsp?vnu_content_id=1003649114#/bbcom/news/article_display.jsp?vnu_content_id=1003649114

⁹⁸ See WODEYINYUEGENGZHENSHI [My music is true] (May 27, 2007). Available at <http://news.sohu.com/20070527/n250242066.shtml> [Chinese]

and policy fora. In this thesis, the analysis was mainly focused on the Xiami model itself rather than on discussing whether or not, and how, they achieved their goals.

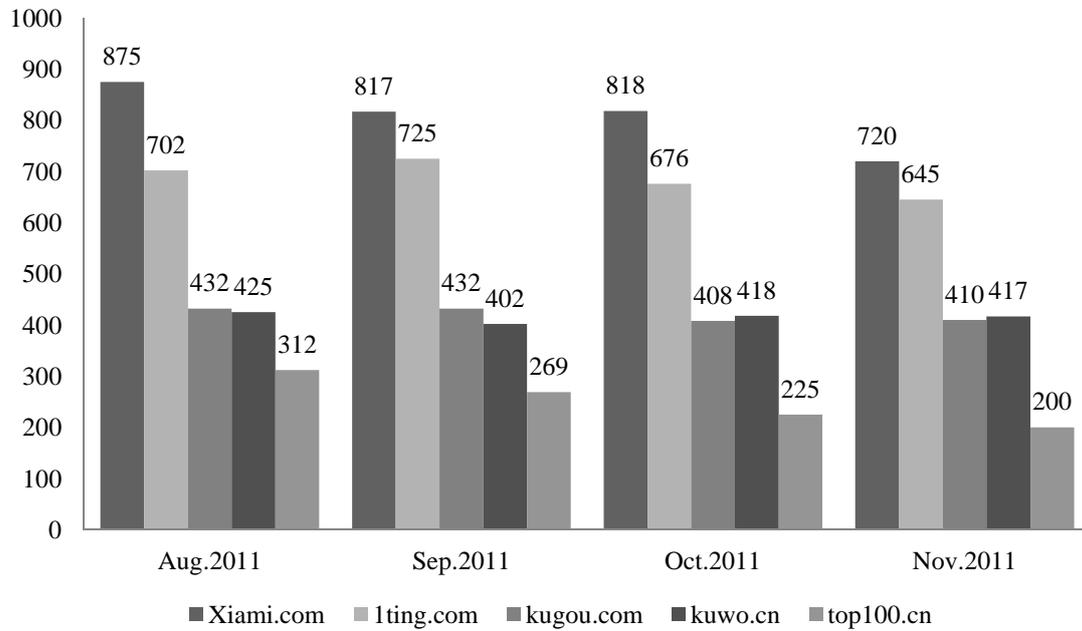


Figure 3-2: Daily Reach (Millions of Alexa Toolbar users) of Top Five Music Sites in China⁹⁹

⁹⁹ See iWebChoice industry report, retrieved from <http://www.iwebchoice.com/> (Feb. 19, 2012). Resources from Alexa.

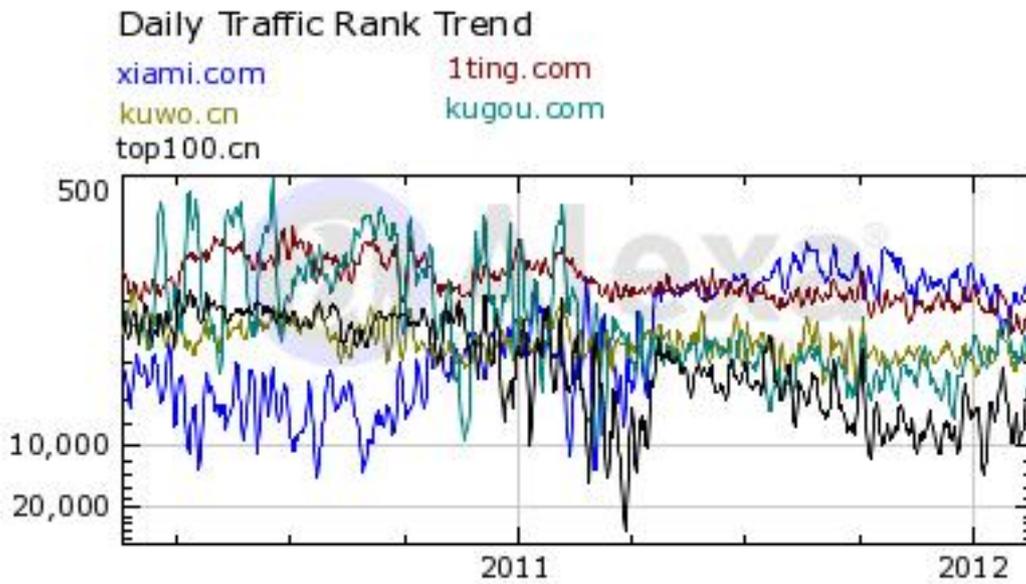


Figure 3-3: Daily Traffic Rank Trend (2010-2012)¹⁰⁰

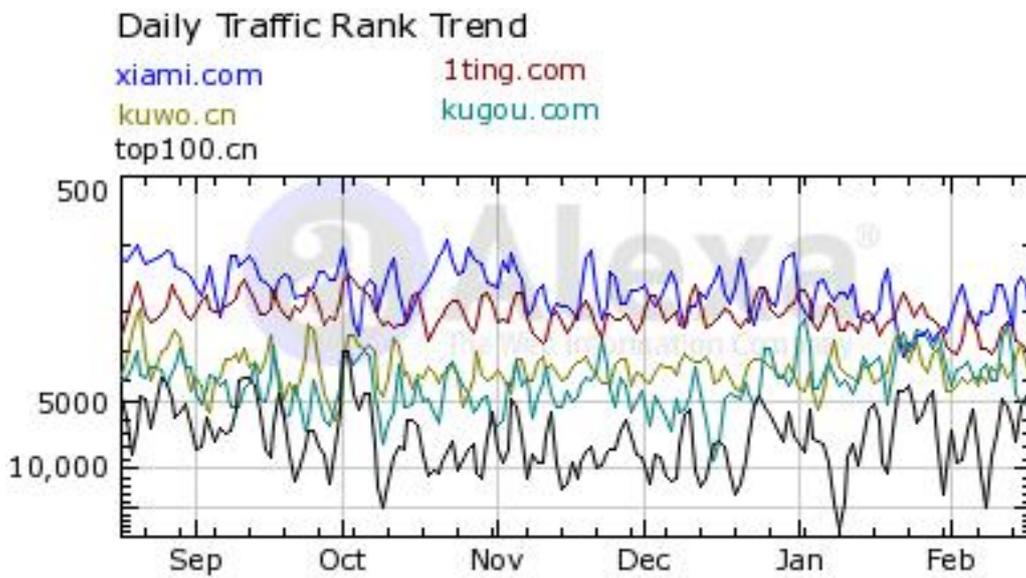


Figure 3-4: Daily Traffic Rank Trend in Recent Six Months¹⁰¹

¹⁰⁰ See Alexa site info, retrieved from <http://www.alexa.com/siteinfo/www.xiami.com> (Feb. 19, 2012). According to the elaboration of Alexa traffic statistics, “the traffic rank is based on three months of aggregated historical traffic data from millions of Alexa Toolbar users and data obtained from other, diverse traffic data sources, and is a combined measure of page views and users (reach).”

It's worth noting that the approach of measuring traffic, above, was combining users reach (estimated percentage of global internet users who visit the website) and page views (estimated percentage of global page views on the website). There was some controversy over how representative Alexa's user base is of typical Internet behavior even Alexa claimed that their global panel of toolbar users was a sample of all internet users¹⁰². However, it was still one of the most leading providers of internet data about traffic pattern and users' behavior and its openness not only made it controversial but also extraordinary from other "search-enabler" websites.¹⁰³



Figure 3-5: Homepage of Xiami.com (after login)

¹⁰¹ See Alexa site info, retrieved from <http://www.alexa.com/siteinfo/www.xiami.com> (Feb. 19, 2012).

¹⁰² See Alexa FAQ about traffic statistics, retrieved from <http://www.alexa.com/faqs/?cat=4> (Mar. 17, 2012)

¹⁰³ See Bulik, B. S., Media Morph: Alexa. (services of Alexa Internet), Advertising Age, 77 (17), 134, (2006). Retrieved from <http://search.proquest.com.ezaccess.libraries.psu.edu/docview/208381629?accountid=13158> (Mar. 17, 2012)

The main functions of the Xiami website included a music search engine (at the top of the website), internet radio (with the employment of Music Genome Project which matches and recommends music according to users' musical taste by analyzing their existing evaluations of music), discovering new music (with music listed by genres and styles), customer-made collections (allowing users to “produce” their own digital collections by themes or even their mood, e.g. we are lonely; my memory of music; unbearable heaviness of being etc.), and discussion groups (related to any music subjects). It also provides multi-platform clients ranging from PC software, mobile phone application to vehicular GPS application, which allow users to log in with their username anywhere, anytime.

Search Engine								Account
Home	Discover	Collections	Radio	Groups	Performances	Activities	Software	Shopping
Activities/Recommendations (Pictures)								Account
Recommendation of musicians			Internet Radio			My Favorite		Activities
Hot Albums								Today
People's Sharing								People

Table 3-2: Website Structure of Xiami.com

The Xiami business model allows users to upload CDs with high quality (192 kbps – 320 kbps) and will pay royalty and commissions to copyright owners and to users who first shared the music, after songs were downloaded. Consumers pay 80 virtual cents for every song they download. According to the founder of the website, the 80 cents of revenue is shared among three parties: 40 cents go to the copyright owners or content creators; 20 cents go to the users who uploaded the music and who made a portion of their resources and network bandwidth directly available to other participants. The concrete principles of how they distribute the 80 cents are negotiable in the operational process. However, when it came to streaming music online, the music files were compressed in relatively low quality (96 kbps) by the central server of the website and were stored in the central server of Xiami.

In the transaction model shown below, user A first noticed that there was one album missing from the website. He or she checked his or her record and started the software for PC, and then uploaded the complete album to the Xiami server and also filled detailed information about the album including artist, language, label, released date, genre etc. Xiami would review the album information and published it when all the information was accurate and the music met the quality requirements. User A got a base virtual payment when the album went through the review process. As user B and user C sent requests for downloading the music to Xiami, they had to pay virtual money to Xiami and could directly connect with user A's computer to download the album. Xiami would pay user A more with its virtual money which depends on the how much bandwidth user A contribute. The relations between Xiami and copyright owners could be built both before all the transactions happened (the alliance between Xiami and Big Four) or after (the cooperative partnership with independent musicians). They negotiated the share of revenues and Xiami would pay according to their agreement on price.

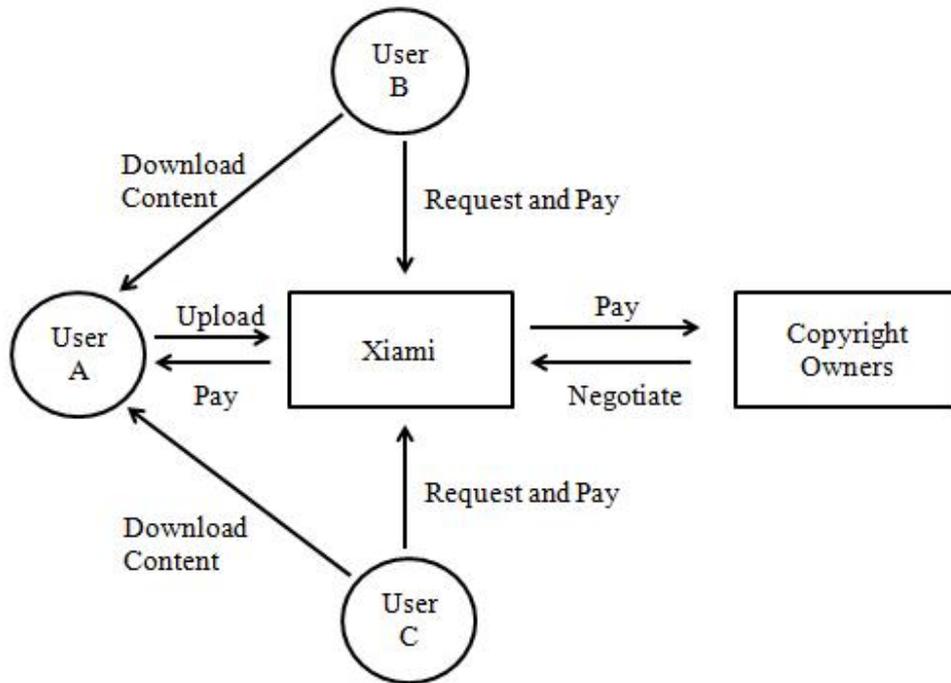


Figure 3-6: Transactional Model of Xiami Website

This thesis examines the implications of Xiami model and both the positive and negative consequences of this relatively new model by analyzing users' perceptions of this challenging model concerning intellectual property right regimes and addresses the research questions raised in the previous chapter. In general, is Xiami a successful model in Chinese digital music industry and what are the strengths and weaknesses of the model in terms of intellectual property law regimes in China? What is the role of the changing relationship between music and virtual consumption? How is peer-to-peer file sharing associated with legitimization of the music products? And, what's the next step for the distributors and service providers in digital music industry to develop taking the copyright regimes and consumers' needs into consideration simultaneously?

CHAPTER IV. RESULTS

4.1 Statistics

The Xiami website, established at the beginning of 2008, was planned and initiated by Hao Wang and several of his colleagues from Alibaba Group – China’s largest business-to-business e-commerce site – in 2006. After a half year of closed test, the open beta version of Xiami started to accept registration of public users in November, 2008. It has reached more than 5 million registered users.

As one of the five most popular music websites in mainland China, Xiami rose steadily in 2010 and 2011 and finally led among music online communities from the second half of 2011. With the heaviest traffic load, the most user accounts, the highest reach rate, Xiami ranked first among hundreds of online music websites in China. The highest page views per user and the lowest bounce rate which means the percentage of visits that consist of a single page view showed high stickiness and the loyalty of valid users of Xiami.¹⁰⁴ In terms of both quantity and quality, it can be concluded that Xiami was one of the most successful models, according to statistics from Alexa.

¹⁰⁴ See Alexa site info, retrieved from <http://www.alexa.com/siteinfo/www.xiami.com> (Feb. 19, 2012).

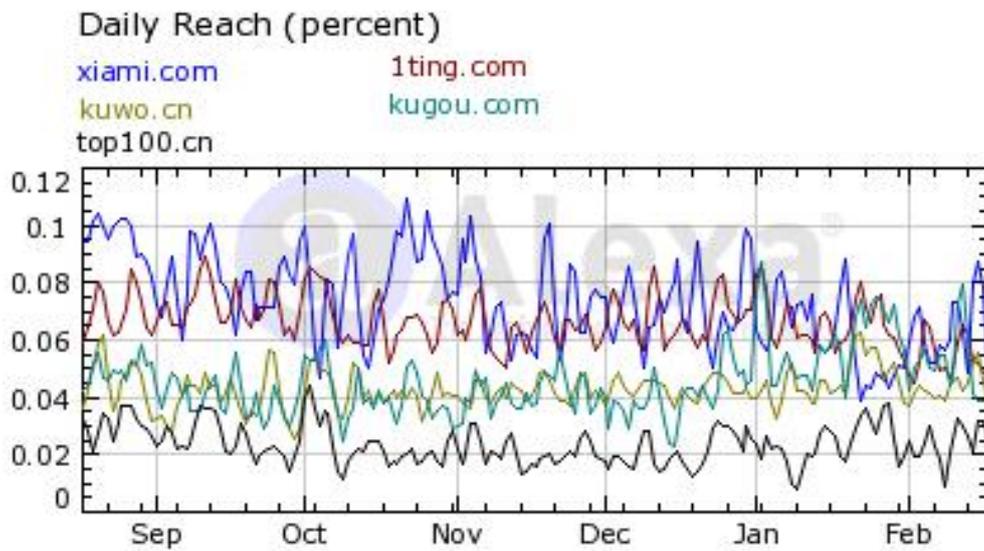


Figure 4-1: Daily Reach of Top Five Music Sites in China¹⁰⁵

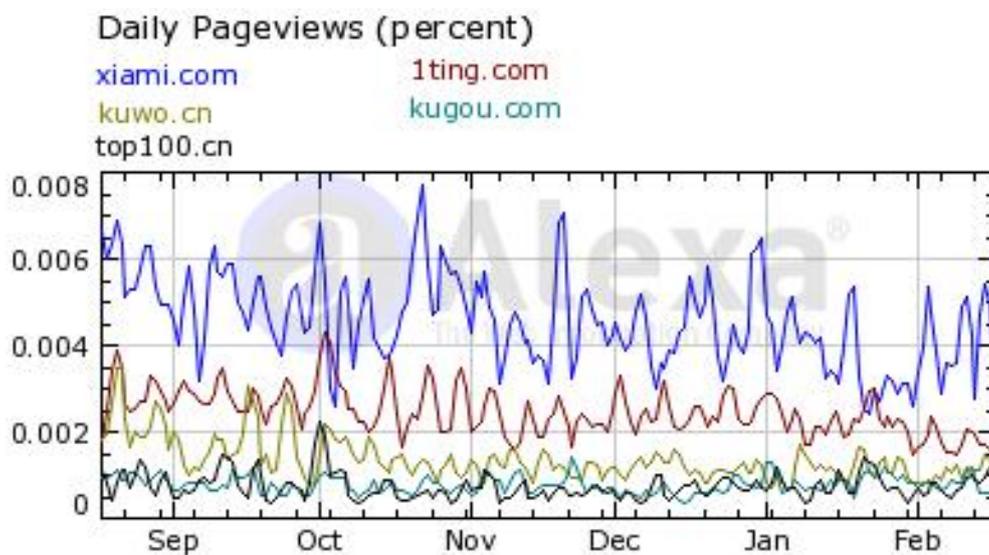


Figure 4-2: Daily Pageviews of Top Five Music Sites in China¹⁰⁶

¹⁰⁵ See Alexa site info, retrieved from <http://www.alexa.com/siteinfo/www.xiami.com> (Feb. 19, 2012). The time expansion of the data was six months from September 2011 to February 2012 (the same starting and ending time with following notes).

¹⁰⁶ Id.

The charts of daily reach and daily pageviews measured by Alexa from September 2011 through February 2012 demonstrated that Xiami was the most prevalent music website in China even through it was the youngest player in the sector (Xiami in 2008, while kugou in 2004, top100 in 2005, 1ting in 2003, kuwo in 2005). Although the website reached no more than 0.1 percent of global users, it ranked 279 in China where Baidu.com ranked first but got no more than 2 percent of global users in total.

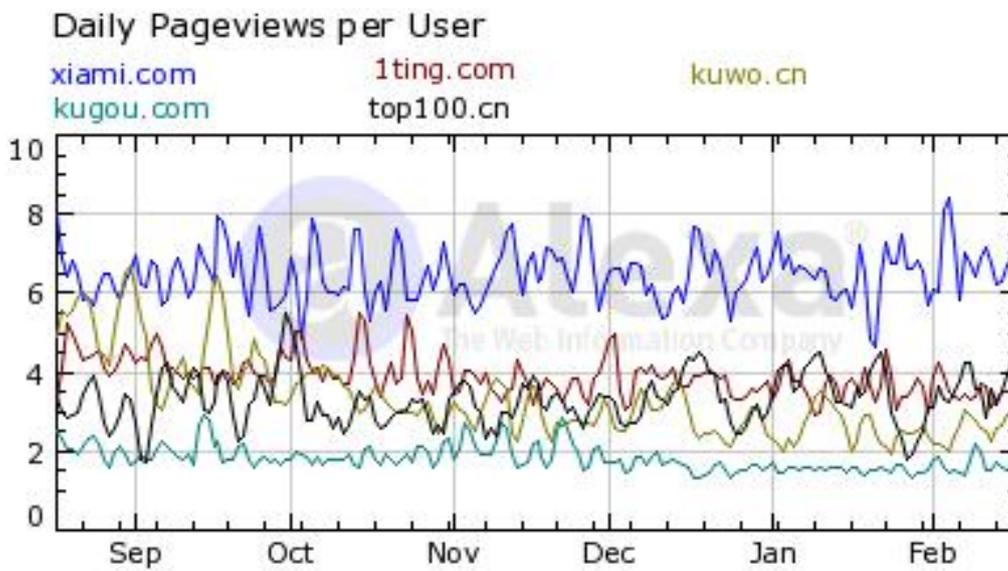


Figure 4-3: Daily Pageviews per User of Top Five Music Sites in China¹⁰⁷

¹⁰⁷ Id.

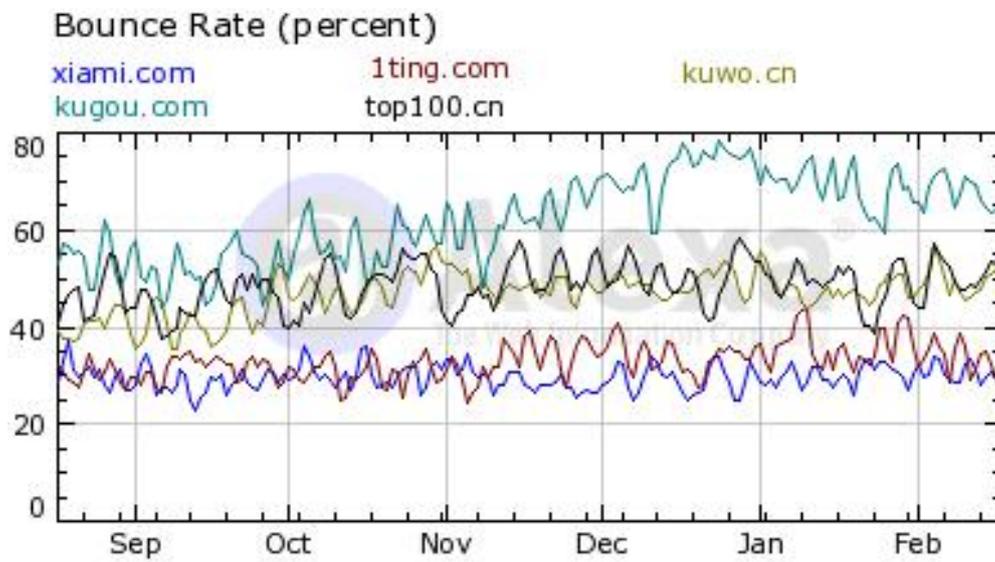


Figure 4-4: Bounce Rate of Top Five Music Sites in China¹⁰⁸

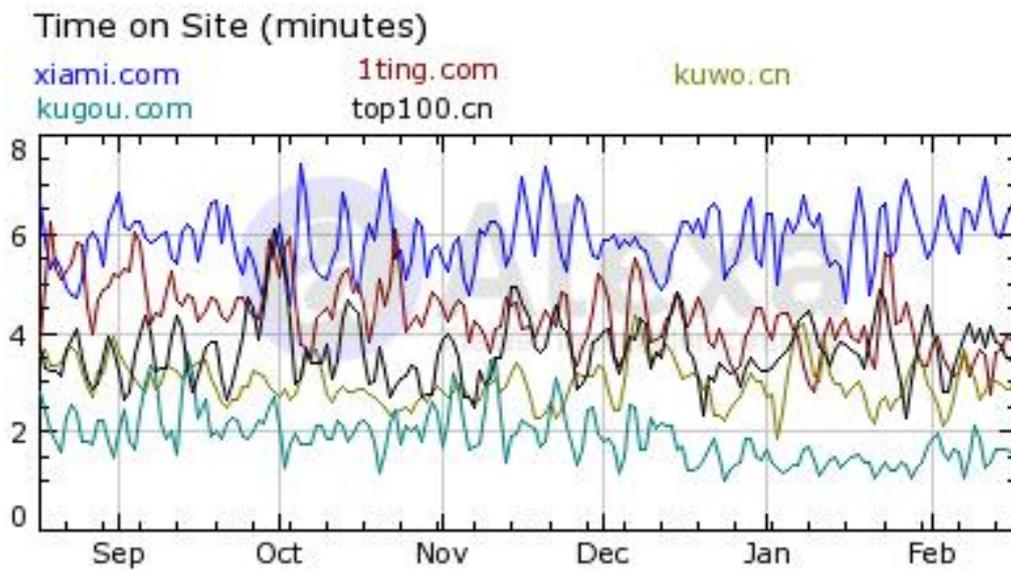


Figure 4-5: Time on Site of Top Five Music Sites in China¹⁰⁹

¹⁰⁸ Id.

¹⁰⁹ Id.

The high stickiness and loyalty of valid users of Xiami can be shown from the three charts above where Xiami had the highest pageviews per user (more than 6 pages per user average) and the lowest bounce rate (less than 25 percent of visits that consists of a single page view).¹¹⁰ In conclusion, Xiami was one of the most successful models concerning traffic and stickiness on the surface.

However, it cannot be conclusively argued that the Xiami model was the most efficient in terms of intellectual property without a comprehensive analysis of its functions and features, and users' behavior and perceptions towards them. Without analyzing users' opinions towards the model, it is pointless to claim the success or failure of the model. In the next chapter, the textual analysis of existing posts in the discussion group of Xiami centered on the major and unique features of the Xiami website.

4.2 Advantages of the New Model

There were four features in the Xiami model making it stand out from other similar websites and the section of results would elaborate each one of them, specifically combining with the analysis of consumers' feedback in the discussion group for suggestions mentioned in methodology section. They were the employment of virtual currency, multi-platform clients, strategic cooperation with record labels and independent musicians, and the P2P system and technologies.

First, the virtual money on Xiami (*Xia Bi*) was composed of either currency exchanged from RMB or prizes for users' activities (*Hong Bao*, means cash gift from daily activities like check-in everyday or completing specific tasks provided by other users concerning very broad issues from uploading the cover of one album to answering the questions of what music is suitable for bad mood, etc.). No normal payment culture was systematically introduced or broadly accepted for online consumption of music in

¹¹⁰ See Alexa site info, retrieved from <http://www.alexa.com/siteinfo/www.xiami.com> (Feb. 19, 2012).

China. It was only 1.5 million paid users (who paid for music online streaming or downloads) from a total of 120 million users of digital music in 2006.¹¹¹ According to users' posts in the discussion group, most people got used to spending virtual currency on music while some of them doubted whether someone would transfer the real currency into a virtual one since the easy way was to obtain prizes. However, some users did complain about the late transfer of their top-up to their accounts. At the same time, some posted prices of songs and albums were relatively high, while most felt it was reasonable considering the high quality of music, the convenience of using the website, and the easy ways to make virtual money. The potential impact of the virtual currency is considered together with the second characteristic and is elaborated in the next paragraph.

Second, the Xiami model provided multi-platform clients not only on PC, but also on mobile phones (Android and Iphone) and vehicular GPS. One of the co-founders and the Chief Operating Officer of the company, Xiaowei Wang revealed that paid downloads for PC were only one percent of all users' activities, compared to a much larger 15 to 20 percent for mobile phone applications and GPS applications.¹¹² Even though users mostly used the website and PC software, many got chances to try its mobile phone applications on iPhone or Android at least once through their posts on the group page.



Figure 4-6: Multi-Platform Clients

¹¹¹ See China Online Music Research Report (2007) (iResearch Consulting Group), retrieved from: <http://www.iresearch.cn/> (October, 2011). [Chinese]

¹¹² See XIAMIWANG: TINGSHANGQUHENMEI [Xiami: Sounds great], available at <http://www.chuangyejia.com/index.php?m=content&c=index&a=show&catid=63&id=2261>. [Chinese]

The goal of the multi-platform feature combined with employment of virtual currency is to develop users' habit of paying for the online products, and to change users' attitudes towards consuming online music. While Google (top100.cn) and Baidu (ting.baidu.com) provide absolutely free musical products to consumers, Xiami advocated the unique approach of attempting to change the atmosphere of "free lunch" on the internet and to cultivate the habit of actually paying for cultural products purchased through music sites.

Third, the Xiami model emphasized the strategic partnership with record labels and independent musicians as well. In the partner page of the Xiami website (link from the end of its homepage), there are 63 recording companies including the Big Four (Warner/Chappell Music, Universal Music, SONY/ATV Music and EMI Music) which acted as the international and traditional content providers and several national or local small record companies have established the partnership agreements with Xiami. Top 100 and Baidu Ting sponsored by Google and Baidu respectively built similar cooperative relationships with recording labels. A weakness of other music sites was the lack of connections with independent musicians who did not belong to any recording companies.

On the contrary, Xiami built an independent page for cooperation and connection with independent musicians. They were not only allowed but welcomed to send an email or make a call to request any promotional partnership, for recommendation and publicity on Xiami's homepage, and in the worst case for deletion of unlicensed music documents if they have no interest to publish their music on the Xiami website at all. In the discussion page, some users claimed they were independent musicians and asked for promotion of their albums. This model with close cooperation with not only large record companies but also independent musicians opened the channels between the content providers and service providers and attempted to benefit individual artists with creativity but without capital and power from the dominance of a few players in the market of music. It supplemented and extended the model of peer-to-peer file sharing which will be investigated in the next paragraph.

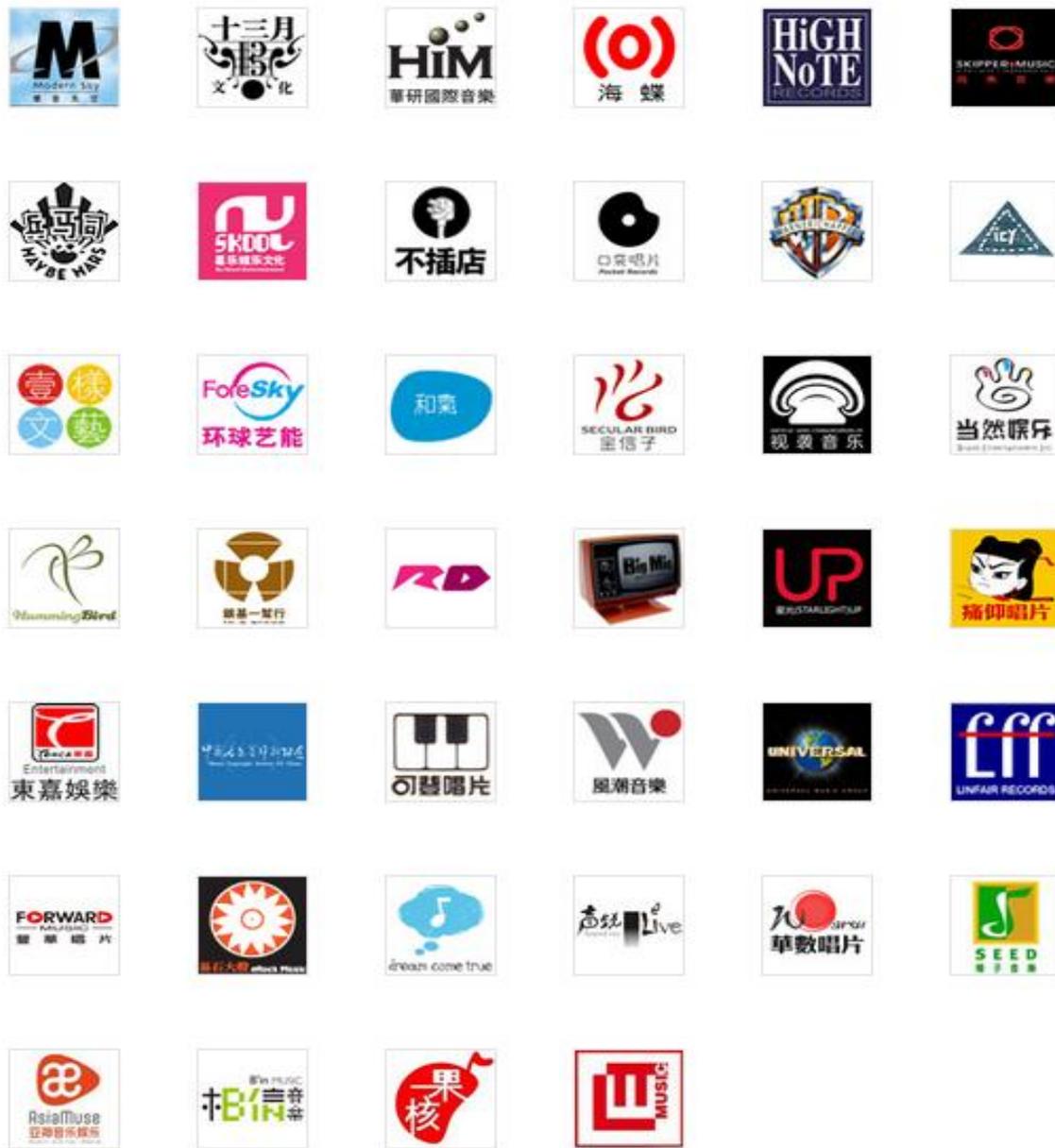


Figure 4-7: Partners of the Xiami Website (Incomplete)

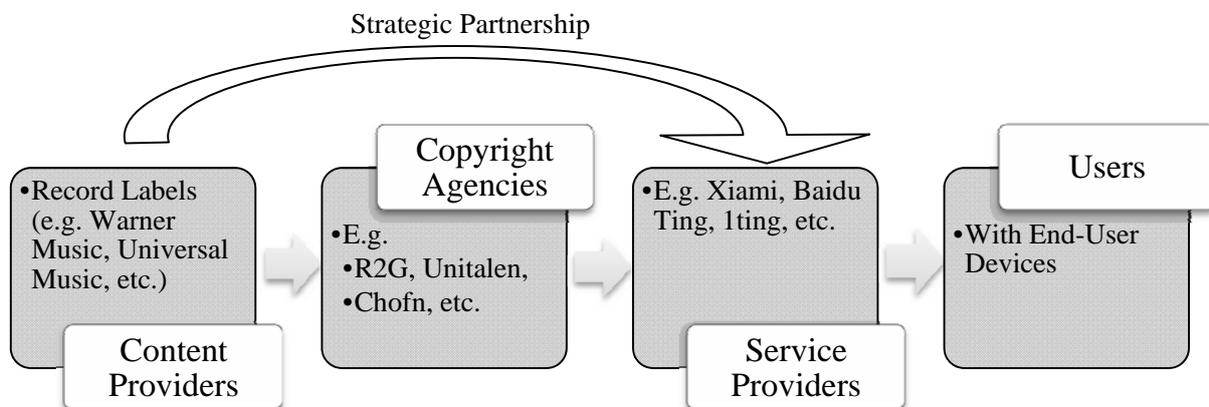


Figure 4-8: Online Music Supply Chain in China¹¹³

Fourth, the technology of peer-to-peer allows users who behaved as the direct content providers to “invest” in the legal copies they bought. As discussed earlier, among the 80 virtual cents revenue for every song, the first part would go to the copyright owners (record labels or indie musicians), while the second part would go to Xiami which provided the platform, and the last part would go to the users who uploaded the music and the users who provided bandwidth to other users. The revenue is shared among these three parties, and this will generate a “win-win-win” among them, according to the announcement of the company. It extends the one-time relationship between consumers and copyright owners into a continuous relationship in which users would protect copyrighted music for their own sake. Actually, it challenges the traditional understanding of the property right in one-time relationships and the concept of fair-use, and has thus provoked an extensive discussion about the existing copyright regimes in China. It was a bold trial with a mixed reception. One of the users posted his compliments about the creativity of the Xiami model in that “it provided the mediation in between the irreconcilable two parties, one puts foot

¹¹³ See China digital music industry annual report (2010), Ministry of Culture. (Retrieved from <http://wenku.baidu.com/>) [Chinese].

down on piracy while the other appreciates free of charge. It made us think that the sharing might not be a bad thing and it could also benefit both the copyright owners and customers.” It coincides with the announcement of the founder of Xiami, “the concepts of copyright protection went out-of-date in this internet era” and “we are devoted to making people see that sharing is actually a powerful push which will vitalize the industry rather than destroy it”.

4.3 Doubts about the New Model

During research on this topic, it was found that the lack of information transparency was a continuing problem in view of the fact that debates about Xiami’s legitimacy were all over the internet, especially on its own discussion group pages and some other major social network sites. In those discussion posts, consumers had various basic doubts concerning its technological and business model, and how Xiami realized their claims and goals.

According to one of the posts on the group discussion page – comments, suggestions and complaints about Xiami group – built by operators of the website, one user conveyed the idea that “what Xiami actually doing is pseudo-legal in between legitimate services providers and pirated products providers”. However, the founder of the website claimed that “Xiami was never thinking about using legal loopholes” and “the concepts of copyright protection went out-of-date in the internet era”.¹¹⁴ He stated below users’ posts challenging the model on moral and legal grounds that “sharing music is not necessarily a damaging effect of music industries, and we are devoted to making people see that sharing is actually a powerful push which will vitalize the industry.” Many similar doubts were raised by users of the website, which led to heated debates all over the group.

¹¹⁴ See Comments, Suggestions and Complaints to Xiami Discussion Group, and all quotes below in this chapter were retrieved anonymously from posts at <http://www.xiami.com/group/10147> (December, 2011).

First, in terms of the technological model Xiami employed, one user questioned “how Xiami deal with the high quality music uploaded by its users?” The two major methods to acquire the music on Xiami were online streaming and downloads, which according to the announcement on Xiami were from different channels and with different quality. The online streaming formats of music products were compressed music files at from 96 kbps to 128 kbps accessed from the server of Xiami, while the downloaded versions were high quality music at from 192 kbps to 320 kbps strictly controlled by website operators grabbed directly from other users’ computers. Therefore, the user mentioned above raised the question that “where are the high quality original files people uploaded when Xiami did the review process and compressed them from 192 kbps to 96 kbps? You didn’t keep them on server or you save them which acted also as one source of peer-to-peer transferring?” If the original tracks were saved on the server, the situation would be different and the royalties would be paid in another way rather than several cents per download.

Second, when it came to the profit and business model of Xiami, a large number of users suggested their reservations about the claim of postpaid royalty from Xiami’s revenue. The inquiry could be considered as four intertwined but different questions: whether they were paying the royalty fee; when were they paying the royalty; how were they paying the royalty; and who would get paid among all the copyright owners? Generally speaking, who got Xiami’s payment were mostly big Chinese record labels and they would pay royalty only when the copyright owners criticized and questioned them in the media. Consumers were doubtful about this model because of the low feasibility of their commitments to improve copyright law regimes, which will be elaborated later in this section.

Someone expressed his feeling that “Xiami must pay for royalty to the copyright owners actively rather than lying in the safe-harbor from copyright protection waiting for reminds from people who’ve been harmed. This is very inappropriate.” Some also had the query that “how did they pay for international labels?” Many also doubted the intention of Xiami by claiming that the price of music was

too low to really pay for royalties and greedy Xiami was making money from their users. On the other hand, others maintained that “you can see the partner page on Xiami and my friend who was working in record labels told me that they do have business alliance relationships with Xiami.”

Another issue that bothered users from the operational level was that the low feasibility of completing the postpaid royalty of millions of songs, which belonged to countless international copyright owners, in the database uploaded by millions of users. Users were feeling very doubtful maybe from the first day of using it, but a protest announcement from 14 independent musicians provoked the largest crisis.¹¹⁵

In terms of the content creators’ point of view, especially from the independent musicians’ perspective, the post-paid royalty model was inaccessible to monitor by individuals in the industry. In September 2010, one independent singer Zhi Li associated with other thirteen independent musicians published an announcement alleging that Xiami provided paid service for the download of his (their) albums but they never heard anything from Xiami, “not to mention get paid by royalty”. Instead of being challenging to the dominance, the Xiami model was actually harmful to the vitality of independent music industry from this perspective. The whole debate was

¹¹⁵ See LIZHIYINLINGDULIYINYUERENZHANKAIXIAMIWEIJIAO [Li Zhi led Indie Musicians Attacking Xiami], Indie China Website (September 28, 2010). Available at <http://www.indiechina.com/html/2010-09/1938.htm> [Chinese]

CHAPTER V. CONCLUSION AND DISCUSSION

5.1 Conclusion

In order to answer the research questions raised in Chapter 2 and to achieve the thesis goal of investigating the heated tension among traditional roles in the Chinese digital music industry, this study provided a thorough examination of the cultural, economic and political background and pointed out the difficulties of building the modern intellectual property law regime in China resulting from the long history of the unique culture possessed by ancient and modern China.

When People's Republic of China adopted copyright laws under international pressure, it was the tension between the new copyright law and the traditional Chinese culture, between easy-to-approach digital technologies and cultural creative works, between the needs of music producers and consumers that complicated the landscape of the cultural industry, specifically digital music distribution. New models attempted to reconcile the conflicts and build unique business models to adapt or cater to the market since the first decade of twenty first century. From the pure infringing deep-linking music search service to advertising-supported licensed music service, to Xiami discussed in this thesis, the prospect for Chinese intellectual property regimes was bright and the whole industry was overcoming barriers and difficulties which hopefully will benefit every single player in the sector.

The Xiami model, as discussed in previous chapters, was one of the most successful models in terms of not only its popularity in China, but also its implications and references in obedience to the copyright law. While early players in the industry offered free musical products to adapt to Chinese online consumption culture, Xiami initiated a distinct approach to cultivate users' habit of paying for cultural products through music sites and it effectively changed most users' consuming attitudes. It was a decent

start, but would not be the end. In addition, Xiami made a contribution to coordinate independent musicians and music consumers by opening channels for negotiation concerning both removal requests and promotional intentions. With the support of a flourishing independent music industry in China, Xiami's music collection is gigantic among other online music communities and websites. However, the weaknesses of the feasibility of the model and the lack of transparency of revenue distribution could be harmful to its goal of developing the copyright law in China. All its strengths and weaknesses were recognized by many users, and many heated discussions were posted online. They held a positive position towards the website and generally considered the website service legitimate and most products licensed, with reservations about a few products.

From consumers' perspectives, they were willing to spend virtual cash on music downloads, but most of them would just stay at the point of using virtual cash gifts from participating in activities on the website rather than paying real money to purchase the virtual one. In order to let people take online cultural products more seriously, the virtual currency couldn't be an end. However, it took a step forward in the industry by destroying the illusion of a "free lunch" on the internet. In addition, the multi-platform applications were not as successful as Xiami assumed. No one ever discussed Xiami GPS applications and almost all posts about the mobile application were criticisms. Some functions were missing from the application and the user interface was confusing, according to users' posts on its discussion group page. Thirdly, thousands of comments were concentrated on partnership relations, both with record labels and independent artists. Many of them believed in their cooperation and some of them spoke highly of the approach which may close the long-existing gap between the independent musicians and content distributors in the digital era. However, doubts were still reserved because several independent musicians pointed out the unfairness in Xiami's revenue distribution system. Finally, the confusing transaction process due to the combination of peer-to-peer and server technological systems was questioned by many users of the website and the software. Most articles posted on the discussion page were about people

complaining about the technology-related confusion and inconvenience which was considered the biggest barrier to progress.

In order to answer the question of “what’s next” in the cultural sector in China, the weaknesses of this specific case – the Xiami model – must be emphasized again. The technological model of Xiami applying both streaming from the host server and download through peer-to-peer file sharing was ambiguous because of the lack of explicit instructions about how the system was running. The business model of Xiami was questionable in terms of the “whether”, “when”, “how” and “who” four concerns and also concerning the low feasibility of the real actions even if their intentions were good.

The major reason why these doubts among content consumers and creators existed and were even exaggerated was the information asymmetry, or in other words the lack of information transparency. That would be the most vital and urgent task of improvement for any new legitimate distribution models which were eager to enter the industry. With accurate and direct information from the website or the model itself, the debates about the legitimacy among users and producers would be more meaningful and constructive to the future of the industry rather than to argue and question about how the model was running.

Xiami and other new models which already control a large amount of the market demonstrate the rising of the trend of customer-centered models (customer generated content, consumer setting price, etc.). The power of consumers forced record companies to change their distribution and retail sales model and the power could be immersed in the link of production in the future, of the digital music sector. The hundreds of peer-to-peer systems, the flourishing of free and open-source software, and the new development of Indymedia and blogging all shifted the way we look at the world and blurred the boundaries between every specific link in cultural industries. The traditional and dominant understanding about property rights and creative workers thus influenced the ecosystem. While internet users were unlikely to turn to independent models of news production and distribution, the digital music industry

depending on network externality was promising for new and small players with original ideas and creativities to enter the distribution market and challenge the dominant model.

There is an old saying in China, “absorbing the essence and rejecting the dross”. What is of the essence has been mixed with the dross in Chinese traditional culture. Along with the ongoing process of globalization, China and Chinese people should prefer not to be limited by the dross of the traditional culture and embrace the attitudes of respecting and appreciating the individualist characteristics with which the protection of copyright were no longer the honor or the luxury, but one of the essences of human rights.

5.2 Limitations and Future

Concentrating on the historical perspective of Chinese copyright and intellectual property regimes, and on the consumers’ perspective of the new model which challenged the tradition and dominance in the industry, the biggest limitation on the research process for this thesis was the lack of access to conduct personal interviews with insiders of the industry in the case study, to be specific, supportive technicians and administrative managers from Xiami. Although Xiami representatives actively answered most questions posted online and informed of users many details about the model of Xiami, there were still many doubts and no official explanations were introduced. It would be helpful and informative to hear what they think about the model.

Another similar but worth noting limitation of this thesis was the absence of the perspectives of musicians, producers and copyright owners. In the supply chain of digital music in China, the online content distributors played an important role in between the producers and the consumers of music. Even though this thesis noticed the case of Li Zhi’s public critical statement and the reality that numerous

record labels and independent musicians built partnership relations with Xiami, it was not clear how the decisions were made and how they evaluate the website at all.

Beyond expectations, the amount of posts on the Comments, Suggestions, and Complaints of Xiami discussion group page was enormous. The thesis should have employed the method of content analysis to sufficiently generalize the patterns of consumers' behaviors and their evaluations. This could be included in future research about China's digital music industry in which the new models were flourishing and prosperous.

Drawing conclusions in this topic and answering the question like "does Xiami model predict the future of the development of China's digital music industry" were particularly difficult. Overall, some of the characteristics in the new technological and business models in China's digital music industry challenged the economic and power status quo; some maintained it. It will be very interesting to see how these tensions are resolved in future.

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