MEET THE NEW MEDIA, SAME AS THE OLD MEDIA: REAL LESSONS FROM CHINA'S DIGITAL COPYRIGHT INDUSTRIES

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INTRODUCTION

Has China discovered the next-generation monetization model for online content? Has China cracked the code for monetizing digital content in a "post-scarcity, post-copyright" world? China, which has been dealing with endemic copyright piracy for decades,[1] once seemed ideally positioned to leapfrog the West at a time when new digital technologies made copyright seem antediluvian. Western copyright owners' attempts to enforce their exclusive rights in the face of wave upon wave of new digital distribution technologies—from peer-to-peer file sharing to digital lockers to YouTube—seemed ham-handed and anachronistic. Music artists, record companies, filmmakers, and book publishers in China, however, had far more experience operating in a copyright vacuum. And they still wrote songs, released albums, made movies, and published books. Some of their most celebrated creators, and the companies that published their works, even got rich. What copyright-free business model innovations had the Chinese pioneered? What could we learn from them?

This Essay argues that China's digital content industries have not illuminated a new post-copyright, post-scarcity path. In fact, Chinese content producers and even online intermediaries increasingly embrace copyright-based monetization models.

Visions of China blazing trails in post-copyright entertainment business models have captured the imagination of Western digerati since Napster spawned a seismic shift in the content distribution landscape. Chris Anderson, former editor-in-chief of *Wired*[2] and author of *The Long Tail: Why the Future of Business Is Selling Less of More*,[3] envisioned post-

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1 *See* Eric Priest, *The Future of Music and Film Piracy in China*, 21 BERKELEY TECH. L.J. 795, 796 (2006).

2 *See* Wired *Editor-in-Chief Chris Anderson Steps Down to Run Robotics Startup*, WIRED (Nov. 2, 2012), http:/www.wired.com/2012/11/wired-editor-in-chief-chris-anderson-steps-down/.

3 CHRIS ANDERSON, THE LONG TAIL: WHY THE FUTURE OF BUSINESS IS SELLING LESS OF MORE (2006).

copyright content monetization models in his 2009 book *Free: The Future of a Radical Price*.[4] Anderson argued that in a post-scarcity world, in which content can be digitized and delivered at near-zero marginal cost, business models based on giving content away for free will become the norm: "It is a unique quality of the digital age that once something becomes software, it inevitably becomes free."[5]

To illustrate his point, Anderson devoted an entire chapter to two "frontiers of free": China and Brazil, where local creators have long coped without the aid of copyright.[6] China, Anderson proclaims, is a "country where piracy has won."[7] Because of this, Chinese creators have no need for copyright since they have become experts at making money from creations that are ubiquitous online for free.[8] "China will become a model for the world music industry," Anderson quotes a Chinese music executive as saying, and Anderson himself submits that, "[a]s goes China, so may go the rest of the world."[9] Envisioning a path forward for the global music industry, Anderson cited a number of coping strategies that Chinese music artists and record companies have employed to make money despite rampant piracy: seek corporate sponsorships; monetize live performances; record advertisements and radio spots; and, if you are a label, act as the artist's manager, too, so that you can partake in these alternative revenue streams.[10] If an artist's music is available for free, Anderson argued, it lowers the barriers for her to acquire a truly marketable asset: stardom, which can be monetized in ways far beyond just selling records.[11] The strategies Anderson cited are hardly unique to China, nor were they at the time Anderson wrote his book. Nevertheless, the thrust of Anderson's argument is clear: copyright in China is dead, piracy and free access have won, non-copyright business models will predominate, and the only remaining question is, when will the rest of the world follow suit?

Anderson is not the only commentator to consider China a digital frontier and trendsetter in a post-scarcity world. While Anderson focused on China's music industry, his *Wired* colleague, Kevin Kelly, examined China's film industry in 2010.[12] Kelly surveyed the film industries in China,

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4 CHRIS ANDERSON, FREE: THE FUTURE OF A RADICAL PRICE (2009).

5 *Id.* at 12.

6 *Id.* at 199.

7 *Id.*

8 *Id.* at 199-200.

9 *Id.* at 200-01.

10 *See* ANDERSON, *supra* note 4, at 199-201.

11 *See id.* at 200.

12 *See* Kevin Kelly, *How to Thrive Among Pirates*, TECHNIUM (Apr. 6, 2010), http://kk.org/thetechnium/how-to-thrive-a/. For a different take that illustrates how piracy harms expression in the Nigerian film industry, see Sean A. Pager, *Accentuating the Positive: Building Capacity for Creative Industries into the Development Agenda for Global Intellectual Property Law*, 28 AM. U. INT'L L. REV. 223, 260-67 (2012).

Nigeria, and India to ask, "How do post-copyright economics work? How do you keep producing more movies than Hollywood with no copyright protection for your efforts?"[13] Because of rampant online piracy in the United States, Kelly postulated, Hollywood is "speeding towards the copyright-free zones represented by China, India and Nigeria today. If so, do those movie industries operating smack in the middle of the cheap, ubiquitous copies flooding these countries have any lessons to teach Hollywood on how to survive?"[14] Kelly's main takeaways from China (and also Nigeria and India) were similar to Anderson's: charge for the in-person experience (theatrical exhibition) and find alternative distribution channels monetized through corporate sponsorship (i.e., ad-supported television and online distribution).[15] These again are hardly revelatory observations for anyone in the film industry. Kelly's point, however, is clear: hopes for copyright-based film revenue in China are lost, piracy has won, and the rest of the world better pay attention to how Chinese producers are coping because that is where we are all headed.

As a legal scholar already closely analyzing China's entertainment industries in 2006, I was also skeptical about the role copyright would play in China's future content businesses. Like Anderson and Kelly, I argued that Western content industries might do well to study how Chinese creators survive in a copyright-poor environment. In a presentation at Harvard's Berkman Center for Internet & Society titled *Asia at the Cutting Edge?*[16] I asked, "What can Asia teach the world about the next-generation music business model?"[17] The presentation argued that "[m]uch of the noteworthy innovation in Asia is actually happening in China, where music companies and artists are flexible and effective at adapting to piracy and changing market conditions."[18] The "next-generation" business models from China highlighted in the presentation resembled those later noted by Anderson: seek corporate sponsorships, monetize live performances, and so on.[19] Similarly, in a 2008 book chapter titled *Why Emerging Business Models and Not Copyright Law Are the Key to Monetising Content Online*, I predicted that

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13 Kelly, *supra* note 12.

14 *Id.*

15 Kelly says that another takeaway is to "[p]rice your copies near the cost of pirated copies" in order to compete with pirated copies. *Id.* By the time Kelly wrote his blog post in 2010, most Chinese netizens were downloading or streaming movies, and few were paying for copies. *See* Priest, *supra* note 1, at 797. So that observation has little relevance to China. Ironically, at the time Kelly was proclaiming China a post-copyright economy, a massive shift in China's online video ecosystem toward copyright compliance was already well underway. *See infra* Section I.A.

16 *See* Eric Priest, *Asia at the Cutting Edge?*, BERKMAN CTR. INTERNET & SOC'Y, https://cyber.law.harvard.edu/events/luncheon/2006/05/priest (last updated Apr. 4, 2008) (announcing May 30, 2006 presentation by Eric Priest).

17 *Id.*

18 *Id.*

19 *See id.*; ANDERSON, *supra* note 4, at 199-201.

going forward, copyright would have a decreasing role to play in digital content monetization.[20] Focusing on online content distribution business model developments in China, I concluded that "scarcity simply does not apply well to the Internet."[21] Instead, business models based on abundance rather than scarcity (i.e., free access rather than pay walls) were bound to win the day—in China and everywhere else.[22] The two most promising emerging models were ad-supported online content distribution and voluntary collective licensing.[23] Copyright-based online business models, I suggested, were likely doomed.[24]

As it turned out, developments went in largely the opposite direction of these predictions. Instead of blazing a trail in post-copyright, post-scarcity business models, copyright owners and Internet giants in China have largely embraced copyright, exclusivity, and scarcity as their next-generation content business models. This trend can be seen across multiple Chinese content industries.

I. CHINA'S CONTENT INDUSTRIES AND ONLINE INTERMEDIARIES ARE TRENDING TOWARD BUSINESS MODELS BASED ON COPYRIGHT AND EXCLUSIVITY

The online video, digital music, e-book publishing, and film industries illustrate the recent shift toward copyright, exclusivity, and scarcity-based models in China. Relevant changes in these industries are highlighted below.

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20 *See generally* Eric Priest, *Why Emerging Business Models and Not Copyright Law Are the Key to Monetising Content Online*, *in* COPYRIGHT LAW, DIGITAL CONTENT AND THE INTERNET IN THE ASIA-PACIFIC 119, 119 (Brian Fitzgerald et al. eds., 2008).

21 *Id.* at 133.

22 *See id.* at 140-41.

23 *Id.* at 141.

24 Other commentators have similarly argued that China is at the cutting edge of post-copyright monetization models. Lucy Montgomery, for example, suggested in 2010 that "[a]s new technologies and globalization increase levels of connectivity among consumers and creators, approaches that are proving successful in China['s high-piracy environment] may well turn out to be at the vanguard of models for monetizing creativity in a digital age." LUCY MONTGOMERY, CHINA'S CREATIVE INDUSTRIES: COPYRIGHT, SOCIAL NETWORK MARKETS AND THE BUSINESS OF CULTURE IN A DIGITAL AGE 106 (2010). In 2008, China music executive Ed Peto opined that developments in China at the time might "signal a seismic change in music consumption: major labels conceding that music must be free-to-user," and that "China is increasingly being seen as a brutal testing ground for radical new models that can survive in a 'more than 99%' (IFPI) digital piracy market." Ed Peto, *The Next Generation of Music Consumers*, MUSIC:)ALLY (May 1, 2008), http://musically.com/reports/ (requiring subscription—article resides in Issue 191 of the Music Ally Report). Quoting Peto, digital music futurist Gerd Leonhard remarked, "[T]his will be a huge shift if it happens—Asia may show the way [toward digital music monetization models of the future]." GERD LEONHARD, FRICTION IS FICTION—THE FUTURE OF CONTENT, MEDIA & BUSINESS 139 (Black & White 3.0 ed. 2010).

A. *Online Video*

The most dramatic shift toward a copyright-based model occurred in the online video context. To observers of China's online video space in early 2009, it did indeed appear that, as Anderson put it, piracy had won. Major Chinese streaming video portals—China's YouTube "clones," including then-market-leaders Youku.com and Tudou.com—were rife with pirated content from domestic and international producers alike.[25] If one wanted to watch every episode of *Friends* or *Sex in the City*—popular choices among young, urban Chinese viewers at the time—there were abundant free options. Of course, no copyright owners were paid. Repeated attempts to sue Chinese websites for copyright infringement had little effect.[26]

The piracy model was seriously flawed, however. While video sites were not saddled with copyright licensing fees, they had tremendous difficulty differentiating themselves from competitors, and there was little viewer loyalty or stickiness. The poor differentiation and lack of viewer loyalty drove down ad prices, as brands considered views derived from pirated content as being mostly low-value "junk" traffic.[27] More importantly, brands became increasingly concerned about being associated with pirated content. That concern reached its peak in late 2009, when copyright owners and competing online video service-provider Sohu sued The Coca-Cola Company and PepsiCo, arguing that the appearance of their ads with unlicensed content on Youku made them contributory copyright infringers.[28] Major brands pulled ads from pirate sites, which relied on advertising revenue. This forced the sites to respond.[29]

Starting in late 2009, a sea-change occurred in the Chinese online video industry. Youku, Tudou, Sohu, and other major video sites quite effectively purged their services of pirated content.[30] What's more, they replaced the pirate versions with versions licensed from copyright owners. The precise amount of these licensing deals are not public, but since 2009 they have amounted to many hundreds of millions of dollars in revenue for owners of film and television copyrights.[31] But the online licensing deals that predominate in China are different from others around the world: while most online content distribution deals are *nonexclusive* (record labels and movie studios, for example, will typically permit Apple, Amazon, and

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25 *See* Eric Priest, *Acupressure: The Emerging Role of Market Ordering in Global Copyright Enforcement*, 68 SMU L. REV. 169, 185-86 (2015) [hereinafter Priest, *Acupressure*].

26 *See id.* at 191.

27 *Id.* at 188 & n.112.

28 *Id.* at 189.

29 *See id.* at 188-89.

30 *See id.* at 171.

31 *See* Priest, *Acupressure*, *supra* note 25, at 171.

Google to distribute the same content), Chinese Internet companies seek *exclusive* licenses, and have been willing to pay a premium to get them.[32] In fact, the race to acquire exclusive licenses was so frenzied that it created an unprecedented content-licensing bubble. The cost of licensing popular Chinese shows reportedly increased by as much as one-hundred-and-eighty-fold in just the two years between 2009–2011.[33] Chinese video streaming sites, in fierce competition for viewers, saw exclusive content as a strategic differentiator. If Youku, for example, could acquire exclusive rights for the most popular television show or film, it would achieve the commensurate high levels of web traffic and could tell advertisers a more compelling story than its competitors could.[34] Sites with the most desirable content might also improve viewer loyalty.

The websites' sizable investment in exclusive licenses transformed them from copyright pirates to copyright stakeholders. As others have argued, as China develops more indigenous intellectual property stakeholders, an environment of greater respect for intellectual property rights is likely to emerge.[35] In order for the video sites' exclusive licenses to justify their sky-high values, they must be enforceable. Self-interest and the desire for reciprocal treatment prompted most of the major players in China's video streaming space to change their norms around copyright compliance, helping to ensure that competitors largely played by the rules.[36] The exclusive licensees were quick to enforce their rights against unscrupulous competitors.[37] Sites with exclusive licenses also further monetized those licenses by sublicensing competing sites.[38]

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32 *Id.* at 187.

33 *See id.*

34 *See id.*

35 *See, e.g.*, Peter K. Yu, *Intellectual Property, Economic Development, and the China Puzzle*, *in* INTELLECTUAL PROPERTY, TRADE AND DEVELOPMENT: STRATEGIES TO OPTIMIZE ECONOMIC DEVELOPMENT IN A TRIPS PLUS ERA 173, 194-97, 202 (Daniel J. Gervais ed., 2007); RICHARD P. SUTTMEIER & XIANGKUI YAO, CHINA'S IP TRANSITION: RETHINKING INTELLECTUAL PROPERTY RIGHTS IN A RISING CHINA 6 (Nat'l Bureau of Asian Research, NBR Special Report No. 29, 2011), http://nbr.org/publications/element.aspx?id=520.

36 *See* Priest, *Acupressure*, *supra* note 25, at 225-26.

37 *See id.* at 226. The stampede for exclusive rights to video content, followed by a rash of litigation between the Chinese video streaming sites once they acquired those exclusive rights, might be an example of what Suttmeier and Yao have termed the "hyper IPR environment" in China, characterized by an unusually high level of intellectual property (IP) litigation. *See* SUTTMEIER & YAO, *supra* note 35, at 20. Interestingly, the same pattern of exclusive licensing followed by intense litigation is presently occurring between players in China's online music space. *See* Josh Horwitz, *China's Major Music Streamers Are Suing the Hell Out of Each Other—and That's a Good Thing*, QUARTZ (July 22, 2015), http://qz.com/459551/a-whirlwind-of-lawsuits-among-chinas-internet-giants-might-tear-through-the-nations-piracy-habit-too/. Suttmeier and Yao warn that if the hyper IPR trend reflects "the intense competition characteristic of the Chinese economy, increasing strategic behavior, and a general absence of trust" among Chinese businesses, it could lead to an anti-commons problem in which IP rights become fragmented and right holders fail to cooperate with one another. SUTTMEIER & YAO, *supra* note 35, at

As holders and sublicensors of exclusive rights, the streaming video sites suddenly became content companies. This led them to invest in content production of their own, as they sought to keep the copyright-owner profits in-house and to reduce the crushing cost of sky-high licensing fees. For years, major online video sites have been investing in and nurturing the most promising talent from among the sites' contributors and investing in production technology and infrastructure. In August 2015, Youku announced that it will invest approximately $1.6 billion in original content production over the next three years.[39] Such investment represents a doubling down on the site's copyright-focused business strategy; it also represents a win for the independent creators whose works will now be funded. Other Internet giants such as Alibaba—which now owns Youku—and Tencent are also investing large sums in content production.[40]

Now, Chinese video websites hope their pivot to a copyright-based model will hasten the end of their reliance on the ad-supported, free-content model. Transitioning away from free is of existential importance to the Chinese Internet video industry because ad-supported video streaming has never been a profitable business in China.[41] Video websites hope that subscription and pay-per-view models based around premium and exclusive

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20; *cf.* Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 SCIENCE 698, 698, 701 (1998) (describing a potential "anticommons" situation in biomedical-research IP in the United States), http://science.sciencemag.org/content/280/5364/698. As this Essay notes in the Conclusion, excessive exclusive licensing in one industry can have dangerous anticompetitive effects. *See infra* note 65 and accompanying text. Interestingly, the fierce competitors in the online video space seem to view mutual respect for one another's rights as key to their own survival. *See infra* CONCLUSION. There has also been a high degree of cooperation between competitors, as the websites formed coalitions to pool licenses and sue infringing competitors. *See* Priest, *Acupressure*, *supra* note 25, at 226.

38 *See* Priest, *Acupressure*, *supra* note 25, at 187.

39 Josh Horwitz, *The "YouTube of China" Is Acting More and More Like YouTube*, QUARTZ (Aug. 7, 2015), http://qz.com/474656/the-youtube-of-china-is-acting-more-and-more-like-youtube/.

40 *See, e.g.*, Leo Barraclough, *Alibaba to Invest in Paramount's 'Mission: Impossible—Rogue Nation'*, VARIETY (June 24, 2015), http://variety.com/2015/film/global/alibaba-to-invest-in-paramounts-mission-impossible-rogue-nation-1201526937/; Patrick Frater, *China's Tencent Pictures to Invest in Legendary's 'Warcraft'*, VARIETY (Sept. 17, 2015), http://variety.com/2015/biz/asia/chinas-tencent-pictures-unveils-deals-with-legendary-and-wanda-1201595740/; Wei Gu, *Alibaba, Tencent Plan to Invest in Internet-TV Startup in Rare Collaboration*, WALL ST. J. (Aug. 12, 2015), http://www.wsj.com/articles/alibaba-tencent-plan-to-invest-in-internet-tv-startup-1439377788 (noting numerous investments in content companies that Alibaba and Tencent have made in recent years); Press Release, Youku Tudou Inc., Youku Tudou Announces Shareholder Approval of Merger Agreement (Mar. 14, 2016), http://www.prnewswire.com/news-releases/youku-tudou-announces-shareholder-approval-of-merger-agreement-300235364.html (announcing completion of Alibaba's bid to purchase Youku Tudou Inc.).

41 *See* Horwitz, *supra* note 39; Trefis Team, *How the Youku Tudou Acquisition Can Benefit Alibaba?*, FORBES (Mar. 10, 2016), http://www.forbes.com/sites/greatspeculations/2016/03/10/how-the-youku-tudou-acquisition-can-benefit-alibaba/#7517d44e7472 (noting that market-leading Chinese video sites Youku and Tudou are not yet profitable).

content will be their salvation. To date, pay-per-view accounts for a small fraction of the total revenue of sites such as Youku, but that revenue stream has grown every year. In 2014, Youku reported that since 2011 it had processed 24.5 million pay-per-view and subscription orders[42]—a small number in the grand scheme, but it does indicate that Chinese consumers are growing more accustomed to paying for content. iQiyi, the video arm of Chinese-Internet search-giant Baidu, offers further evidence: it recently reported a 765 percent increase in premium content subscriptions when it offered subscribers immediate access to all twelve episodes of a popular original series.[43] Nonsubscribers had to wait for the one free episode released weekly.

In short, instead of blazing trails in a "post-copyright" economy, an entire Internet industry in China looked to copyright for its salvation. And again, this occurred in a market in which piracy's victory was deemed a *fait accompli*.

B. *Digital Music*

China's online music industry has taken a page from the video websites' book, turning to copyright-heavy business models revolving around exclusive licensing. Online music is enormously popular; more than three-fourths of China's 564 million Internet users enjoy music online.[44] Chinese consumers also spend billions of dollars annually on mobile ring tones, but the mobile providers keep ninety-eight percent of the revenue for themselves.[45]

Until recently, the vast majority of online music consumption has been through pirate services, but that appears to be changing dramatically. The enormous potential opportunity for legitimate music monetization has attracted Chinese Internet giants such as Alibaba and Tencent, who are also players in the online video space. Just as they use exclusive content offerings to differentiate their video services, these companies have signed exclusive licensing deals for domestic and international music content, presumably in part because having the most attractive exclusive music offerings confers a competitive advantage. Tencent, for example, recently signed deals with Warner Music and Sony, granting Tencent the exclusive right to

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42 YOUKU TUDOU INC., 2014 ANNUAL REPORT (SEC FORM 20F) 77 (2015).

43 *Online Video Sites Bet Chinese Viewers Ready to Pay for Content*, GLOBAL TIMES (Aug. 16, 2015), http://www.globaltimes.cn/content/937332.shtml.

44 *See* Eric Priest, *Copyright Extremophiles: Do Creative Industries Thrive or Just Survive in China's High-Piracy Environment?*, 27 HARV. J.L. & TECH. 467, 495 (2014) [hereinafter Priest, *Copyright Extremophiles*].

45 *See id.* at 502.

distribute their content in China.[46] Alibaba has countered with its own acquisition of exclusive licenses for popular international music.[47]

The Web companies' long-term plans involve becoming more than mere online music portals, however: they intend to become music rights management companies, using their position as exclusive right holders to act as agents for labels by sublicensing competing digital platforms.[48] This exclusive "copyright agent" model has arisen partly because of state-imposed market access barriers that hinder foreign content companies' ability to operate directly in China.[49] Nevertheless, the development of music sublicensing in China further evidences a pronounced shift toward copyright-based revenue models in China's online music space.

C. *E-book Publishing*

China's digital book publishing industry also increasingly relies on copyright and scarcity-based business models. Many Chinese consumers get their books for free, but many are willing to pay for legitimate copies or digital access. Despite rampant book piracy, legitimate book sales are increasing, reaching $8.2 billion in 2013.[50] That number marked a ten-percent increase over the previous year, with much of the growth coming from e-book sales—a segment of the publishing market that increased by as much as thirty percent in 2013 alone.[51] Censorship of e-books is less stringent

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46 Paul Carsten, *Tencent, Sony Strike China Music Distribution Deal*, REUTERS (Dec. 16, 2014), http://www.reuters.com/article/us-tencent-sony-music-idUSKBN0JU0UN20141216; Juro Osawa, *Warner Music, Tencent in China Distribution Deal*, WALL ST. J. (Nov. 13, 2014), http://www.wsj.com/articles/warner-music-tencent-in-china-distribution-deal-1415869222.

47 *See* Lucy Montgomery & Eric Priest, *Copyright in China's Digital Cultural Industries*, *in* HANDBOOK OF CULTURAL AND CREATIVE INDUSTRIES IN CHINA 339, 353 (Michael Keane ed., 2016); Patrick Frater, *China's Alibaba Expands Further into Music*, VARIETY (July 21, 2015), http://variety.com/2015/biz/asia/alibaba-expands-into-music-1201544584/ (noting Alibaba's rights agreements with international labels BMG, Rock Records, and HIM Records).

48 *See* Montgomery & Priest, *supra* note 47, at 354; Ed Peto, *Glaciers Aligning: Progress in the Chinese Digital Music Industry*, CHINA MUSIC BUS. (Mar. 13, 2014), http://www.chinamusicbusiness.com/article/china-great-digital-music-leap-forward/; *China's Three Internet Music Providers Sign Mutual Licensing Agreement*, CHINATECHNEWS (Jan. 21, 2016), http://www.chinatechnews.com/2016/01/21/22982-chinas-three-internet-music-providers-sign-mutual-licensing-agreement (reporting sublicensing agreement between Chinese music websites and Tencent-owned QQ Music).

49 *See* Eric Priest, *Copyright and Free Expression in China's Film Industry*, 26 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1, 18-20 (2015) (describing U.S. efforts at the World Trade Organization to redress market access barriers for non-Chinese businesses seeking to engage in content importation and distribution in China).

50 *See Five Trends in Chinese Publishing that Will Change Your View of China*, INGENTA (Mar. 17, 2015), http://www.ingenta.com/blog-article/five-trends-in-chinese-publishing-that-will-change-your-view-of-china-2/ [hereinafter *Five Trends*].

51 *See id.*

than that of print books, making the format especially attractive to Chinese readers.[52] E-books in China are also cheap (about $1.30 each), enticing more users to buy them.[53] To be profitable, therefore, e-book publishers must depend on scale, leveraging China's massive market. Like online video sites, e-book publishers seek exclusive rights from top authors in order to gain a competitive advantage and maximize revenue.[54] E-book publishers employ freemium models, by which users can access a limited amount of free content but must pay to keep reading the most popular works.[55]

Unsurprisingly, the most popular e-books are the most lucrative, not only because they sell the most copies but also because publishers and authors leverage that popularity into exclusive licensing agreements for the publication of print editions, computer games, and film adaptations based on the e-book.[56] In other words, besides sales of copies (a classic copyright-based revenue model), publishers and authors of the most successful e-books derive a significant portion of revenue from licensing (a purely copyright-based business model). Moreover, the entities to which e-publishers license earn their revenue from old-fashioned, scarcity-based business models (hard copy book sales, pay-per-access video games, and theater-access-only film exhibition).

D. *Film and Theatrical Exhibition*

In China's movie industry, one sees much of the same: reliance on scarcity-based revenue models. China's film industry has achieved remarkable success over the past decade, in large part due to the classic, exclusionary film business practice of charging for admission to theatrical exhibitions.[57] Endemic film piracy remains a serious problem for both Chinese and foreign copyright owners, although, as noted above, the online piracy situation has improved markedly since 2009. The decline of online video piracy has resulted in increased copyright licensing revenues.

New technologies, such as TiVo-style set-top boxes preloaded with software for accessing licensed video subscription services also hold promise for expanding licensing revenue.[58] Although piracy challenges buffet the market at this early stage, set-top boxes represent a vast potential revenue

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52 *See* Montgomery & Priest, *supra* note 47, at 345.

53 *See Five Trends*, *supra* note 50.

54 *See* Montgomery & Priest, *supra* note 47, at 346.

55 *Id.* at 345-46.

56 *See Five Trends*, *supra* note 50 (describing several wealthy Chinese authors who leveraged their e-book publications into movie, TV show, and gaming agreements).

57 *See* Priest, *Copyright Extremophiles*, *supra* note 44, at 485.

58 *See* Gu, *supra* note 40.

stream enabled by copyright.[59] This new revenue is important for all film producers, but is especially important for independent creators. Major studios, including big Chinese and Hollywood studios, make plenty of money from theatrical exhibition, but most Chinese films have no shot at theatrical distribution. Access to revenue streams based on copyright licensing is crucial to ensure such films can be made[60]—or to ensure they are made for Chinese audiences, rather than to impress foreign audiences and critics.[61]

Finally, it is worth pausing to note that film exhibition is sometimes considered a "non-copyright" or "post-copyright" business model—the idea being that if you charge for admission to theatrical exhibitions of your film, you can subsidize the free distribution of copies of the film.[62] Calling theatrical exhibition a post-copyright model is really a misnomer, however. Without copyright law, it would be difficult for creators to derive much revenue from theatrical exhibition. Copyright law does important work establishing clarity in ownership rights for theatrical licensing and revenue distribution purposes, delineating the scope of those rights, and giving creators recourse against unauthorized—and unremunerated—performances of the film. Theatrical exhibition as a revenue model is decidedly dependent upon copyright law.

CONCLUSION

Several takeaways from developments in China's digital content landscape since 2010 are worth noting. First, experiments across digital content industries in China appear to trend in the same direction—toward copyright-oriented business models. Scarcity and exclusivity appear to have risen to the top as the best hope for monetizing content in China, even in the digital era. After testing a myriad of models in the cauldron of the world's largest market, this is where both copyright owners and Chinese Internet intermediaries seem to have landed.

Second, piracy in China has not won—at least not yet. While piracy remains an enormous challenge for copyright owners,[63] there have been notable gains in the past decade, and the copyright compliance norms of intermediaries and even consumers are starting to change.

Third, a slowly but steadily increasing number of Chinese consumers are willing to pay for digital content—a situation that was hard to imagine a

59 *See, e.g.*, *id*. (discussing plans by Alibaba and Tencent to invest in "smart TVs" that will deliver streaming, licensed content, "betting that smart TVs will be the next gadget of choice for the country's consumers").

60 *See* Priest, *Copyright Extremophiles*, *supra* note 44, at 516-17.

61 *See* GEREMIE R. BARMÉ, IN THE RED: ON CONTEMPORARY CHINESE CULTURE 190-92 (1999).

62 *See, e.g.*, Kelly, *supra* note 12.

63 *See* Priest, *Copyright Extremophiles*, *supra* note 44, at 470-71.

decade ago. This suggests that consumer habits, expectations, and preferences can change as conditions change. Early returns from China demonstrate that even if consumers are accustomed to perceiving something as "free," that perception can change. The true test may be in the digital music context. Consumers are famously stubborn—not only in China—in their perception that music is free. Hefty Chinese Internet players such as Tencent and Alibaba have invested in exclusive digital music licenses that they expect to monetize by charging for access. Can they change consumer perceptions and habits? The answer might depend on how well these sites can enforce their exclusive rights against the many infringers that remain in China.

Fourth, and perhaps most surprisingly, it is not just the traditional copyright owners who have embraced copyright-based business models. Online intermediaries (video streaming websites such as Youku and iQiyi, major Internet portals such as Tencent and Alibaba, and e-book sites such as Cloudary) have embraced digital copyright, not only to appease content owners but also to advance or even salvage their own businesses. The online intermediaries believe that in the future they will be steeped in the copyright ecosystem. They are investing heavily in content licenses and content production, and are pushing hard in the direction of premium, paid-access online-distribution models.

Fifth, Chinese Internet intermediaries' emphasis on exclusive licenses has been instrumental in making inroads against piracy. Exclusive licensing puts the incentives to enforce copyright squarely with the online intermediaries. And the intermediaries now involved are no less than "national champion" Internet giants with the resources and political clout to wage an effective war against piracy. But the widespread, long-term exclusive licensing of entire content catalogs is also quite unique to China. In the U.S., for example, exclusive content deals are less common, tend to be limited in duration (often used as part of a windowed retail release strategy), and typically focus on blockbuster content.[64]

Downward pricing pressures have not materialized in China's online video market because of fierce competition. With many competitors bidding, content pricing has experienced inflation rather than deflation. But that state of affairs cannot last forever, especially as the market consolidates. There is a danger that granting exclusive licenses will eventually

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[64] *Cf.* Ben W. Sheppard & John G. Plumpe, *The Rise of SVOD: How the Growth of Subscription Video-on-Demand Impacts Copyright Holders*, 8 LANDSLIDE 14, 17-18 (2015) (describing exclusive licensing practices in the U.S. subscription video-on-demand market); Charlotte Hassan, *Tidal Is Growing Faster than Apple and Spotify Combined*, DIGITAL MUSIC NEWS (May 16, 2016), http://www.digitalmusicnews.com/2016/05/16/tidal-become-major-competitor-spotify-apple-music/ (describing exclusive licensing practices in the U.S. music industry, noting the trend among digital music streaming services to seek exclusive licenses from superstars as a strategy to increase subscriptions, and noting that exclusive licensing is often part of a "windowed" release strategy).

cede too much market power to one entity, which as a monopsonist will then be positioned to drive down licensing fees.[65] On the flip side, fierce competition for exclusive licenses in the online video industry produced a pricing bubble that has destabilized the industry. Given these pitfalls, such widespread exclusive licensing might be too risky in markets other than China.

Overall, however, reducing piracy and moving toward copyright-based business models holds promise for Chinese creators and Chinese society. It will help direct funding to creators who badly need it. In the film space, for example, it enables investment in independent productions that would not be eligible for theatrical release in China.[66] This has the dual benefit of supporting diverse creative voices, as well as supporting the production of higher quality works for online dissemination, where censorship has generally been less stringent.[67] Healthy copyright-based revenue streams reduce the need for creators to rely too heavily on the kinds of alternative revenue streams that Anderson, Kelly, and I discussed in the pieces highlighted earlier in this Essay.[68] As Professor Sean Pager observes, "[T]here are serious questions both as to viability and desirability of many alternative [monetization] models. While copyright is a proven model subject to well-known tradeoffs, the drawbacks of many of the alternatives remain inadequately explored."[69] Commentators have written at length about the downsides and dangers of alternative monetization models, from advertising revenue and corporate sponsorships to theatrical revenue for film to ringtones and live concert revenue for musicians and record labels.[70] It is especially dangerous and potentially destabilizing when piracy forces a creative industry to rely on one or a very narrow set of revenue streams.[71]

If I had to predict what the future holds for digital content monetization models in China, I would bet on the continued development of copyright-based, exclusive-rights-based, premium content business models. Contrary to Chris Anderson's predictions, no imperative of Internet economics has pressured Chinese websites and content owners to abandon

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65 *See* Montgomery & Priest, *supra* note 47, at 351-52. China's two major mobile service providers, China Mobile and China Unicom, are in such a position in the lucrative mobile ringtone market. They hold monopsony power as the only licensees of music ringtones, and pay copyright owners a mere two percent or less of revenues. *See* Priest, *Copyright Extremophiles*, *supra* note 44, at 501-02.

66 *See supra* notes 60-61 and accompanying text.

67 Priest, *Copyright Extremophiles*, *supra* note 44, at 493-95.

68 *See supra* notes 6-19 and accompanying text.

69 Pager, *supra* note 12, at 268.

70 *See, e.g.*, *id.* at 269-74 (discussing downsides of alternative monetization models in the context of the Nigerian "Nollywood" film industry); Priest, *Copyright Extremophiles*, *supra* note 44, at 511-20, 529-32; Mark F. Schultz, *Live Performance, Copyright, and the Future of the Music Business*, 43 U. RICH. L. REV. 685, 696-701 (2009); Mark Schultz & Alec van Gelder, *Creative Development: Helping Poor Countries by Building Creative Industries*, 97 KY. L.J. 79, 127-30 (2008).

71 Priest, *Copyright Extremophiles*, *supra* note 44, at 514-20.

monetization models based on copyright or exclusion. The clear present trend in China's digital content space is toward more business models based on copyright and scarcity, not fewer. If trends in China provide any indication, the predominant content monetization model of the future looks a lot like the predominant model of the twentieth century.