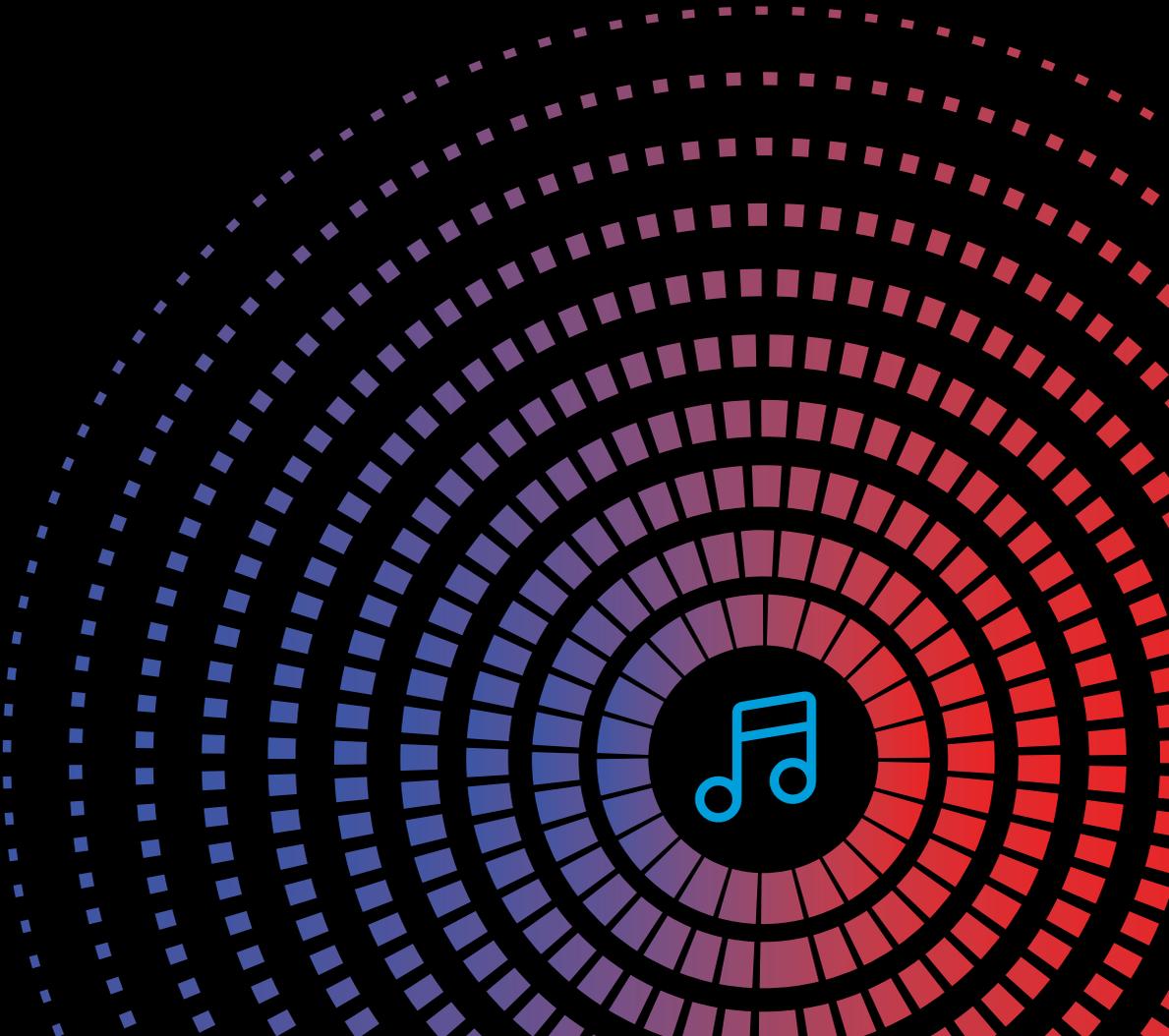




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# The International Disposition Of Music Catalogs

Edited by Ken Abdo & Jake Abdo



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# Catalogue Sales in Asia



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## >> Introduction

When Music Business Worldwide published its list of catalogues and music rights acquisition deals in 2021 (including deals of individual catalogues sold by artists, songwriters and acquisitions of music rights portfolios owned by labels and publishers),<sup>1</sup> Asia was conspicuously absent, save for one deal in connection with an Indian-based label Think Music. This despite the fact that Japan remains the second largest music market in the world, alongside China and South Korea which come in at number 6 and 7 respectively.<sup>2</sup> In this article, I look to explore the reasons why this may be so. (Huge disclaimer: I have spent my career arguing against the concept of an "Asian music market." As you see, I am making that very same assumption below. However, in the context of this specific issue, I believe that there is some commonality among the Asian markets.)

## Ability to Travel

With few exceptions, repertoire from Asia has not shown a sustained ability to sell into other markets in quite the same way as Anglo-American repertoire. Over the decades, major record labels in particular have done a very good job at selling Anglo-American priority artists to pretty much every corner of the globe. Though Japanese acts enjoyed fleeting success across a number of Asian markets in the 1990s and early 2000s, it has not historically been sustainable in Anglo-American markets.

In the last decade, K-pop has received increasing attention globally. BTS was the first Asian act to take home the Artist of the Year at the American Music Awards 2021. At the same time, several other Asian artists, such as Rich Brian, Jackson Wang and Jay Park, have gained popularity in the U.S. in recent years. The rise of K-pop has been driven by very effective global digital marketing strategies through social media, coupled with a strong focus on visually-intensive performances.<sup>3</sup> The K-pop model, particularly in terms of branding, seems to have influenced other Asian artists, including Filipino boy band SB19, which has quickly gained attention in the US by becoming the first Filipino and Southeast Asian act to be nominated in Billboard Music Awards for the Top Social Artist category in 2021. Perhaps K-pop will prove to be a genre which achieves sustainable international success?

## Governance and Infrastructure

Few would question the strength of the legal infrastructure supporting the rights flowing in the Anglo-American markets. The rights construct is heavily lawyered, some would even say over-lawyered. Purchasers conduct diligence on prospective assets and are assured of effective legal protection over any assets acquired.

In most markets in the Asia region, the contractual construct would not quite be what a purchaser of rights in the West might expect to encounter. Outside of the orbit of major record labels, contracts would be comparatively short-form and

“Historically, the publishers and the record companies were in a position to acquire the rights from their writers/artists.’

certainly not as comprehensive. Standards vary greatly from market to market as does industry custom and practice.

### Collection Societies

The “pipes” through which revenue flows to support the valuation of music catalogues are perhaps not quite as efficient in the Asia region as in Anglo-American markets. As these revenues are now increasingly digital, it would be hoped that this would facilitate the improved flow as such revenues are infinitely more “traceable” than are the analogue versions. However, both on the PRO and the platform side, there would seem to be some way to go in terms of efficiency and transparency.

China’s only officially recognised music copyright administration organisation is Music Copyright Society of China (MCSC), which was established in 1992. As of the end of 2020, MCSC has just over 10,000 members and recorded an annual collection of about 409 million yuan (approximately US\$64 million).<sup>4</sup> The numbers would seem disproportionately low considering the growing music market in China, specifically the digital music market. By comparison, the American Society of Composers, Authors and Publishers (ASCAP), with a membership of over 850,000, recorded revenues of over US\$1 billion available for distribution to its members in 2021.<sup>5</sup>

The Korea Music Copyright Association (KOMCA), despite being one of the earliest PROs in Asia, has made the headlines for the wrong reasons, being criticised due to apparent issues with its royalty payment system and lack of transparency. There were concerns about unfair exploitation by KOMCA’s blanket licensing scheme, where licensees generally granted unlimited use of the rights for a lump sum payment calculated irrespective of the actual usage of the musical works.<sup>6</sup> Artists also raised questions as to how KOMCA calculates and distributes royalties to its members without a systematic plan.<sup>7</sup> This prompted the formation of a new PRO, the Korean Society of Composers, Authors and Publishers (KOSCAP) in 2014 to increase competition and, hopefully, efficiency in the market.

### Ownership

Whether on the publishing or the recording side, the rights owners have tended not to be the artists. Historically, the publishers and the record companies were in a position to acquire the rights from their writers/artists. On the recording side, licence deals tended to be very rare (sometimes a prominent artist would be in a position to form a label and to licence those rights to a major), the majority of deals are being structured through a direct signing. As for publishing, in some markets (e.g., India) there were no recognisable publishing rights until relatively recently and even when there was, buy outs were not uncommon. For a long time, the royalty-based arrangements were seen as exceptions rather than the norm, as artists would usually assign all their rights to music labels in exchange for a lump sum payment.

In the Indian film industry (which still accounts for the vast majority of the Indian music industry), composers and lyricists are typically “commissioned” by film producers to create music for productions, they are commonly required to assign all of their rights to the producer, who subsequently assign the same to music labels.<sup>8</sup> The statutory concept of royalties was only introduced in India’s 2012 revision of its Copyright Act, which attempts to offer authors stronger bargaining power with the newly added proviso expressly providing an unwaivable right to receive royalties – that the author of literary and musical work included in a cinematograph film or in the sound recording but not forming any part of any cinematograph film “*shall not assign or waive the right to receive royalties to be shared on an equal basis with the assignee of copyright for any utilization of such work except to the legal heirs of the authors or to a collecting society for collection and distribution and any assignment to the contrary shall be void*”.<sup>9</sup> In practice, however, authors may still face difficulties when trying to claim their share of royalties.<sup>10</sup>

### Legal Framework

Most countries in the region have joined the Berne Convention and are parties to international treaties protecting intellectual property rights. That said, the standards

“Overall, copyright laws in most countries across the region are still in early stages of development, gradually extending and building up protection for different stakeholders in the music industry.”

and approach adopted in the protection of such rights still varies greatly from country to country.

Some have yet to implement the standards stipulated in international treaties into their local laws. According to the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS agreement), all World Trade Organisation member states are bound to observe the minimum standards for the regulation of different forms of intellectual property set out therein. However, in reality, less developed countries face more difficulties in achieving full compliance of the standards and thus the WTO grants those countries extra time to conform. Since the agreement became effective in 1995, the transitional period for less developed countries has been extended three times, and now runs until 1 July 2034.<sup>11</sup> Cambodia, for example, has yet to confer automatic protection to foreign rights holders under its copyright law.<sup>12</sup> In fact, even for local Cambodian music, families of musicians who passed away during the genocide in late 1970s are still struggling to seek copyright protection for the works composed by their late family members.<sup>13</sup>

Overall, copyright laws in most countries across the region are still in early stages of development, gradually extending and building up protection for different stakeholders in the music industry. The new amendments to the China copyright law that came to effect in June 2021 now offers more rounded protections to original works other than cinematographic works, such as music videos and short clips. It does so by introducing the new concept of “audio-visual” works and clarifying that rights holders of the underlying music used in these audio-visual works are also entitled to receive remuneration and benefit from the subsequent dissemination of these audio-visual works.<sup>14</sup>

In Singapore, one of the fastest growing economies in the world, even its copyright laws has continued to mature. Before the enactment of the new Copyright Act in 2021 (“CA”), when sound recordings were being played in public places by businesses in Singapore, local sound recording companies were still not able to enforce their

copyrights and collect licensing fees. Apart from rights to publish unpublished recordings, these companies only had a right to control how sound recordings were made available to the public via the Internet only, hence these companies had no rights to collect licensing fees, when third parties utilised their published recordings in public, in a manner other than by sharing it on the Internet.<sup>15</sup> This issue has only just been rectified in the recent enactment of the CA at the end of last year, as s. 121 CA has finally expanded the notion of copyrights for sound recordings, to include broad rights to “communicate the recording in public”, as well as the specific right to equitable remuneration, where a sound recording “has been published for commercial purposes and a person causes the sounds embodied in the recording to be heard in public”<sup>16</sup>, granting more comprehensive legal protection to sound recording companies.

### Piracy

Allied to the above, for the majority of the markets in the region, copyright piracy has been rampant, certainly in the physical world. Great efforts however, have been made in this regard in recent years. Notably, in 2015, the Chinese government launched an anti-piracy campaign and ordered online streaming services to stop streaming unlicensed music to their users, leading to the removal of 2.2 million unauthorised recordings.<sup>17</sup> Yet, public awareness of the importance of copyright protections within the region still lags behind Western communities. The level of actual compliance and enforcement remains questionable. Commencing a copyright infringement lawsuit can be time-consuming and costly. Even if the outcome is favourable to the plaintiff, the defendant may only be ordered to pay a relatively small compensation, thus offering a limited deterrent effect.

### Market Forces

In the 1960s, the major record labels established themselves as a force in signing domestic repertoire in the region and in some of the markets. However, it was not until the later period of the 20th Century that Asia became anything of a priority. At that point, the easiest way into these markets was by way of acquisition such that by the

“China did not recognise personal ownership of property until the late 1970s, therefore there was little value ascribed to intellectual property, let alone there being a market for the same.”

1990s and early 2000s, a number of the independent labels which had been prominent had become outposts of or subsumed by major labels. In addition to the financial muscle of the majors, a series of financial crises hit the region at the end of the 20th Century which led to several of the leading independents to close, re-trench or, sell.

## Regulations

Some markets in the region have controls as to foreign ownership of companies, outright or across industry sectors (media being generally quite sensitive). For instance, investments in the media and entertainment sector in India and Malaysia are subject to their respective foreign investment restriction policies. Foreign-funded entities are banned from providing online publishing services including music in China. Foreign entities may cooperate with a Chinese online publishing service, but this is also subject to the approval of the State Administration of Press, Publication, Radio, Film and Television.<sup>18</sup>

In relation to the ownership of copyright in Indonesia, the government has the power to invalidate copyright if they are considered to be “*violations of religious norms, norms of morality, public order, State defense and security, or laws and regulations*”.<sup>19</sup> It is not uncommon for songs that are considered “politically sensitive” to be banned in China. Concerns as to legal and regulatory challenges are possibly something of an inhibiting factor when considering an acquisition, even of repertoire.

China did not recognise personal ownership of property until the late 1970s, therefore there was little value ascribed to intellectual property, let alone there being a market for the same.

## Language

The diversity of languages throughout Asia differentiates itself from the West where English is the common primary language. Naturally, catalogues of a certain language

are often only popular among those speaking the language. Chinese-language songs may circulate through mainland China, Hong Kong, Taiwan, Malaysia and Singapore, but music in other Asian languages may not reach as wide an audience. While Asian musicians have been able to produce a number of viral global/regional hits, the difference in language still poses an obstacle in terms of gathering a long-term global fan base. Without such, there may be less incentive in acquiring these catalogues if the audience size cannot guarantee a lucrative stream of revenue.

## Custom and Practice

The markets operate very differently from North America and the UK. Culturally, a conversation about a potential acquisition might not be as easy to broach in Asia as it would be in an Anglo-American market.

While the factors above might mitigate against rights sales in the region, on a positive note, I would highlight the following:

- **Industry Acquisitions.** Both major publishers and record companies have been and are continuing to be active purchasers of repertoire, as it comes available. Perhaps more significantly, some platforms are making acquisitions directly or via proxies, so much so that there has been some regulatory concerns, particularly in China, about platforms straying too far off their tracks. On 24 July 2021, the PRC government imposed a fine on Tencent and ordered it to give up its exclusive music licensing deals given its dominance in the market controlling more than 80% of China’s exclusive music streaming rights. Such dominance could result in an unfair advantage over rival streaming platforms.<sup>20</sup> That said, Tencent continues to have a strong presence in the music streaming market in China.
- **Non-traditional Purchasers.** While not high profile, there is some interest and indeed some small scale activity by financial purchasers - some familiar from the Anglo-American space and some domestic. Of the domestic purchasers, one to note may

“Prices for Anglo-American repertoire have gotten so high it seems only a matter of time until attention turns East..”

be Fubon Digital Music Asset Management Co Ltd, which, as the name suggests is connected with Fubon Bank, the largest domestic bank in Taiwan. The focus is very clearly on Chinese repertoire which can be exploited across the Greater China market (i.e., PRC, Hong Kong, Taiwan, Singapore and Malaysia). Fubon plans to open writer schools across the region, working in collaboration with writers from the Anglo-American world in the hope of training new writers, to ensure a steady supply of songs.

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- **Trading platforms.** Interesting to note is the emergence of a Korean platform, Musicow, where users can buy or sell a fractional ownership in song copyright and collect royalties as dividends. It is reported that this trading platform is planning an initial public offering.<sup>22</sup> Another similar Europe-based music royalty investment platform ANote has expanded its services to Japanese music trades.<sup>23</sup> While these platforms are not mainstream, it looks like there is growing recognition in the region that music can be the subject of retail investments.

With Japan as the second largest music market in the world, there is certainly the revenue streams and scale to interest potential international purchasers. It also has the infrastructure and legal structure which support a very healthy business. Unlike the rest of the region, the rights ownership landscape is highly fractured and power is certainly not in the hands of the majors nor indeed any one party or industry. TV stations, talent management companies, advertising agencies all have a share of rights owned; along with powerful independent publishers and labels, many of whom have very strong but ageing management with no apparent successors. Perhaps more than any other country in the region, however, it is a unique market, with its own customs and practices and where money is not always the dominating consideration.

## Conclusion

Whilst non-industry rights acquisitions in the region to date have been negligible, this is likely to change. Prices for Anglo-American repertoire have gotten so high it seems only a matter of time until attention turns East.

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- [16] *Section 121(b) of the Copyright Act 2021 of Singapore*, section 121(b) provides that “for the purpose of this Act, unless the contrary intention appears, copyright in a sound recording is – ... (b) if the recording has been published for commercial purposes and a person (X) causes the sounds embodied in the recording to be heard in public, the right to be paid equitable remuneration of an amount – (i) agreed between the copyright owner and X; or (ii) in default of agreement, decided by a Copyright Tribunal.”
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Music catalog sales, purchases, and collateralization are ubiquitous and varied. IP assets may be sold and purchased in whole, in part, in pieces, and for value based on many considerations. Weighing diverse factors, the transactions may be relatively simple or extremely complicated. In confirming the chain of title, which bears on the ultimate value to buying and selling parties, the due diligence processes may reveal unanticipated and costly complications. Some obstacles may be surmounted and some may kill the deal. The purchase agreement must contemplate pre-closing and post-closing contingencies, including litigation. A thorough review of international aspects of disposition requires further sophistication. This edition explores the sale, purchase, and collateralization of music catalogs for musical compositions, recordings, and related IP issues from the point of view of the various parties to the transaction. The authors provide practical edification and issue-raising guidance to these complex commercial transactions.

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