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AUTHORSHIP IN CHINA (AND BEYOND):

AUTHORSHIP AND RELATED ISSUES UNDER THE CHINESE COPYRIGHT LAW OF 1990

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ABSTRACT

Copyright vests initially in the author of a work. Anyone else can only acquire copyright through transfer. On this point, there is no difference between the copyright law in common law and the authors law in civil law. But as to the issue of who is the author of a work, the copyright law and the authors law have gone separate ways. While the authors law has invariably followed the creator-as-author rule regardless of the conditions under which a work is prepared, the copyright law has adhered to the rule as a principle and formulated the deemed-to-be-author rule as an exception in the case of works made for hire. The Chinese Copyright Act of 1990 received the deemed-to-be-author rule. But due to misunderstanding of the logic and rationale of the rule, many disputes have arisen since over the ownership of copyright in works made for hire and commissioned works, and different courts have rendered different judgments. The intended revision of the Law (Proposed Draft) has not made any improvement. If the issues are not well addressed, more disputes will continue to arise in the future.

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I. INTRODUCTION

The Chinese Copyright Act of 1990 was drafted during the 1980s when Chinese scholars had not made ample or sufficient academic studies and research on intellectual property law in general and copyright law in particular.[1] Therefore, the defects or flaws found in the Act cannot be attributed merely to the circumstances of the time. Although the Copyright Act has played

1. *See* Yiping Yang, *The 1990 Copyright Law of the People's Republic of China*, 11 UCLA PAC. BASIN L.J. 260, 263 (1993) (describing the recent development of Chinese copyright law).

an important role in protecting copyright and promoting cultural and scientific progress in the People's Republic of China (P.R.C.), the concrete provisions of the Act can no longer meet the needs of the social and material conditions in China today. Moreover, the Act itself has serious theoretical and logical defects that have led to different judicial interpretations in different People's Courts.

After three decades of reform starting from 1978, political and economic life in China has experienced great changes.[2] Market reform is being implemented, and China became a member of the World Trade Organization (WTO) in 2001. Accordingly, despite two previous minor changes made in 2001 and 2010 respectively, it is necessary to revise and perfect the 1990 Copyright Act to adapt it to the requirements of a market economy and the international obligations that China has assumed.

There are many provisions in the Chinese Copyright Act of 1990 that need to be rewritten, but some of the revisions intended by the Proposed Draft of the Third Revision of the Law (as submitted in 2014 but not yet approved)[3] are not satisfactory. This piece attempts only to give a few simple and basic ideas about authorship and some related issues regarding the Act of 1990 and the Proposed Draft, with a view toward providing a background for a better understanding of the existing law and its would-be changes.

II. AUTHORSHIP IN CHINA BEFORE THE LAW OF 1990

A. Pre-P.R.C. Authorship

Although the Chinese Copyright Act was enacted in 1990, only two and a half decades ago, copyright legislation in China began in the early 1900s.[4]

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2. *See generally* Gregory C. Chow, *Economic Reform and Growth in China*, 5 ANNALS ECON. & FIN. 127 (2004) (surveying China's economic reform beginning in 1978 and subsequent economic growth).

3. *Compare* Zhong Hua Ren Min Gong He Guo Zhu Zuo Quan Fa (中华人民共和国著作权法) [Copyright Law of the People's Republic of China] (revision draft submission version submitted by the National Copyright Administration), art. 5 [hereinafter Copyright Law of the People's Republic of China, Revision Draft, Submission Version], *with* Zhong Hua Ren Min Gong He Guo Zhu Zuo Quan Fa (中华人民共和国著作权法) [Copyright Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, amendment promulgated Feb. 26, 2010, effective Apr. 1, 2010) [hereinafter Copyright Law of the People's Republic of China 1990]. Translations of the 1990 Law are drawn from https://en.wikisource.org/wiki/Copyright_Law_of_the_People%27s_Republic_of_China_(1990) [https://perma.cc/P4Y8-WRFR]. Translations of the revision draft, submission version are drawn from https://chinacopyrightandmedia.wordpress.com/2014/06/06/copyright-law-of-the-peoples-republic-of-china-revision-draft-submission-version/_(1990) [https://perma.cc/R2SD-GJJZ].

4. Some scholars claim their research revealed that, as early as in the Song Dynasty (960-1279 D.C.), the Chinese imperial court began to issue decrees banning the

The Chinese were first exposed to the term "copyright" in 1903 when the government of the Qing Dynasty and the government of the United States signed "The Sino-American Treaty as to Commercial Relations."[5] Article 11 of the Treaty had a provision on the protection of copyright.[6] Since the Qing government assumed an international duty under the treaty to protect copyright, they began to pay attention to copyright affairs. In 1908, the Qing government sent delegates to attend the Berlin diplomatic conference on the revision of the Berne Convention of 1886.[7] Two years later, in 1910, modeling their effort on the Japanese and German copyright laws, the Qing government promulgated the first copyright law in Chinese history, the Daqing Copyright Law.[8] But unfortunately, before the law was formally implemented, the Qing Dynasty was overthrown by the 1911 Revolution led by Doctor Sun Yat-sen.[9]

Unsuccessful as it was, the Daqing Copyright Law was significant because the promulgation of the law played an active role in the introduction of the concept of copyright into this ancient country and served as a blueprint for later copyright legislation in China.

In 1915, the Beiyang government adopted the Beiyang Government Copyright Law, which almost verbally copied the

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unauthorized duplication of certain works. *See generally* ZHENG CHENGSI (郑成思), ZHI SHI CHAN QUAN LUN (知识产权论), 8–15 (3d ed. 2007); WILLIAM P. ALFORD, TO STEAL A BOOK IS AN ELEGANT OFFENSE: INTELLECTUAL PROPERTY LAW IN CHINESE CIVILIZATION 13 (1995). But it seems to this Author that these early decrees, even if they existed, had not much to do with the modern copyright protection. For the Chinese did not develop the concept of copyright until they encountered the Western copyright culture in the early 1900s. *Cf.* Yang, *supra* note 1, at 262 (claiming the concept of copyright law dated back to 960). For additional historical commentary by a U.S. scholar, published in an earlier IPIL Symposium Issue of the Houston Law Review, see generally William O. Hennessey, *Protection of Intellectual Property in China (30 Years and More): A Personal Reflection*, 46 HOUS. L. REV. 1257 (2009).

5. Treaty Between the United States and China for the Extension of the Commercial Relations Between Them, China–U.S., art. XI, Oct. 8, 1903, 33 Stat. 2208.

6. *Id.*

7. *See* Lei Yanlin (雷雁林), W*ai Jiao Bao Yu Bo Er Ni Gong Yue Zai Zhong Guo Di Chuan Bo* (《外交报》与《伯尔尼公约》在中国的传播), 41 J. NORTHWEST UNIV. 150 (2011) (China). The Chinese academia then were also interested in international copyright protection. The 1908 Berlin diplomatic conference was reported and the Berne Convention was translated into Chinese. *Id.*

8. *The Dust-Laden History Revisited—The Story of the Copyright Code of the Great Qing Dynasty*, CHINA INTELL. PROP., http://www.chinadaily.com.cn/m/cip/2011-03/16/content_12181207.htm [https://perma.cc/9E77-A8DU] (discussing the Japanese influence on the development of Chinese copyright laws); ALFORD, *supra* note 4, at 45 (demonstrating continued influence of German copyright law on development of Chinese law). "Zhuzuoquan (works right)" is commonly translated into "copyright" in English, but in Chinese the term is much closer to authors' rights in civil law rather than copyright in common law. *Id.* at 156 n.118.

9. Yang, *supra* note 1, at 263.

Daqing Copyright Law.[10] In 1927, the nationalist government (the Republic of China)[11] was founded in Nanjing in southern China. In its second year, the new government promulgated the Copyright Law of the Republic of China, which remains effective today in Taiwan.[12]

As to authorship, none of the three early Chinese copyright laws defined the term "author."[13] But it appears that all followed the "creator-as-author" rule, by which the creator of a work was treated as its author and, by virtue of that status, achieved ownership of the copyright from its beginning.[14] However, these laws also contained exceptions under which an "investor" (or, as Westerners might think of it, a corporation or other "legal person" rather than an individual person) would acquire the copyright in the work, or be "deemed to be" its creator, if he paid the actual author for its preparation.[15] These works might include (again using words more familiar to the Western reader) works made for

10. *Id.* In the late years of the Qing Dynasty, General Yuan Shikai was entrusted with the power to train, in Tianjin (a port at Bohai), a modern army for the Dynasty, the Beiyang (North Sea) New Army. Mary Backus Rankin, *State and Society in Early Republican Politics, 1912–1918*, 1997 CHINA Q. 260, 263. In 1912, Doctor Sun Yat-sen stepped down as the president of the new Republic in Nanjing for the exchange of General Yuan's support to the Republic. *Id.*; Walter Fung, *Dr. Sun Yatsen*, CHINA EYE MAGAZINE, AUTUMN 2011 http://www.sacu.org/yatsen.html [https://perma.cc/SMW5-543M]. General Yuan forced the Emperor to abdicate and thus became the president of the Republic. Rankin, *supra*, at 263–65. After he died in 1916, his followers occupied the presidency one after another until 1928, when they were defeated by the forces led by Doctor Sun Yat-sen's follower, Jiang Gai-shek, from the south. *Id.* at 263; Julia C. Strauss, *The Evolution of Republican Government*, 1997 CHINA Q. 329, 336. The period between 1912 and 1928 is referred to in Chinese history as the Period of the Reign of Beiyang War Lords. *Id.* at 268.

11. JIANFU CHEN, CHINESE LAW: CONTEXT AND TRANSFORMATION 32 (2016). After the victory of the Northern Expedition, Jiang Gai-shek set up his nationalist government in Nanjing from 1927 until 1949, when it retreated to Taiwan (except that it moved to Chongqing, an inner city in China, during the Anti-Japanese War of 1937–1945). CARSUN CHANG, THE THIRD FORCE IN CHINA 90, 109 (1952).

12. ANDY Y. SUN, FROM PIRATE KING TO JUNGLE KING: TRANSFORMATION OF TAIWAN'S INTELLECTUAL PROPERTY PROTECTION 3, 26 (1997).

13. Nor, it should be noted, does the current American Copyright Law define "author" or "authorship." *See* Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., 499 U.S. 340, 355 (1991) (decided one year after adoption of the present Chinese Copyright Law).

14. *See* Peter Ganea, *Copyright*, *in* INTELLECTUAL PROPERTY LAW IN CHINA 205, 207 (Christopher Heath ed., 2005); Copyright Law of the People's Republic of China 1990, art 11; *cf.* Wu Handong, *Intellectual Property Law as China Moves Toward an Innovation-Oriented Society*, *in* CHINA'S JOURNEY TOWARD THE RULE OF LAW 439 (CaiDingjian & Wang Chenguang eds., 2010).

15. Da Qing Zhu Zuo Quan Lu (大清著作权律) [Da Qing Copyright Law] (1910), art. 26; Bei Yang Zheng Fu Zhu Zuo Quan Fa (北洋政府 著作權法) [Beiyang Copyright Law] (1915), art. 20; Copyright Law of the People's Republic of China 1990, art 17.

hire[16] and commissioned works[17] as well. But the early laws were not clear as to whether, when the deemed-to-be-author rule applied, the investor's acquisition of the copyright was initial (as the author) or successive (as an assignee by operation of law), and the laws contained no provision as to an author's "moral rights," such as a right to claim authorship or to prevent distortion, as discussed in detail hereinafter.[18]

B. The Early P.R.C. Years

Shortly after the end of the Anti-Japanese War in 1945, a civil war started between the army of the Nationalist Government and the army led by the Communist Party. In 1949, the Communists won the three-year civil war and founded the P.R.C.[19] The Six Codes enacted by the Nationalist Government over the years were all repealed by the Communist Government.[20]

Since then, except for the Marriage Law of 1950, no more statutory law was enacted in the P.R.C. for twenty-nine years.[21] The country was ruled according to administrative regulations and, more generally, government policies. During the ten-year Cultural Revolution (from 1966 to 1976), China completely degraded into a lawless country.[22]

Starting from 1955, the P.R.C. emulated the then-Soviet Union by mimicking its planned economy.[23] A new national

16. To think of such works in U.S. copyright terms, we should consider them as being the works of an investor (or "employer") by virtue of his payment to the actual author ("employee"). *See* 17 U.S.C. § 101 (2012) (first prong of definition of "work made for hire").

17. In U.S. terms, these would be certain works "specially ordered or commissioned" by the investor. *See* 17 U.S.C. § 101 (second prong of work made for hire definition). For an interesting general history touching on these subjects, see generally Catherine L. Fisk, *Working Knowledge: Trade Secrets, Restrictive Covenants in Employment, and the Rise of Corporate Intellectual Property, 1800–1920*, 52 HASTINGS L.J. 441 (2000).

18. Authors' moral rights are such rights as are provided for in the Berne Convention: "Independently of the author's economic 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 . . . work, which would be prejudicial to his honor or reputation." Berne Convention for the Protection of Literary and Artistic Works, art. XI, Sept. 9, 1886, 1980 U.N.T.S 31 (revised at Paris July 24, 1971) [hereinafter Berne Convention]. For discussion of moral rights, see *infra* notes 90–92 and accompanying text.

19. William R. Doerner, *Man of the Year: The Comeback Comrade*, TIME, Jan. 6, 1986, at 43–44.

20. R. Randle Edwards, *Preface*, 1 J. CHINESE L. i (1987).

21. The Penal Law of the People's Republic of China was adopted in 1979. Zhong Hua Ren Min Gong He Guo Xing Fa (中华人民共和国刑法) [Criminal Law of the People's Republic of China], (promulgated by the Standing Comm. Nat'l People's Cong., July 1, 1979, amendment promulgated Aug. 29, 2015, effective Nov. 1, 2015), http://www.lawinfochina.com/displau.aspx?id=3&lib=law# [https://perma.cc/D6UD-H2LT].

22. Lucian W. Pye, *Reassessing the Cultural Revolution*, 1986 CHINA Q. 597.

23. Zhengyi Wang, Understanding Transition in China: Domestic Tensions,

economic plan was fabricated every five years. Almost every business entity was owned by the State and "the market" (as known in Western countries) did not exist at all. Under such an economic system, there was no need to enact any civil or commercial law, let alone a more technically oriented law on copyright, although the National Copyright Office and the Ministry of Culture sporadically issued some administrative regulations governing royalties and protection for books, journals, and video and audio products.[24]

According to Communist ideology, collectivism was praised and individualism criticized. During the Cultural Revolution, this ideology reached its peak. Although no copyright law was enacted to deprive the right of authorship of an individual of a work, in practice individuals experienced concern about the would-be charge that they were individualistic. In order to avoid such criticism, they chose not to publish their works under their own names, but under the name of a collective (a legal entity) regardless of whether the work was really a work made for hire.[25] This historical practice conintues today. In recent years, disputes have arisen over the ownership of copyright in the works published during the Revolution Era.[26]

Before the implementation of the reform and opening-up policy in 1978, the Chinese Government for a long time overlooked legal education. Nationwide, there were only a few law schools at some comprehensive universities.[27] During the Cultural Revolution, Chinese legal education was disrupted amidst the general lawlessness.[28] As a consequence, by the early 1980s when the Copyright Law was drafted, Chinese scholars had not made

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Institutional Adjustment and International Forces 4 (Dec. 10, 2008) (unpublished manuscript) (https://www.princeton.edu/~pcglobal/conferences/beijing08/papers/Wang.pdf [https://perma.cc/4EMY-4KKW]).

24. In 1950, the Ministry of Culture passed The Resolution Regarding the Improvement and Development of Publication Work. Hongsong Song, *The Development of Copyright Law and the Transition of Press Control in China*, 16 OR. REV. INT'L L. 249, 275 (2014) (indicating that there were remuneration rules in place in the 1950s). In 1980, the State Copyright Office issued The Interim Provisions Regarding Royalty for Books. *Id.* at 253–54. In 1982, the Ministry of Broadcast Television issued The Interim Provisions on the Regulation of Audio and Video Products. *Id.* at 258–59. In 1985, the Ministry issued The Regulations (for Trial Implementation) on the Protection of Copyright in Books and Journals. *Id.* at 267. These normative documents provided some protection for copyright before the Chinese Copyright Act was adopted in 1990.

25. *Id.* at 277.

26. *Id.* at 253, 278 (discussing the authors remuneration system).

27. *China Law Schools*, HG.ORG LEGAL RESOURCES, https://www.hg.org/law-schools-china.asp (last visited Nov. 22, 2016) (indicating that few law schools in China were founded before 1978).

28. Chow, *supra* note 2, at 137.

ample or sufficient academic studies and research on intellectual property law in general and copyright law in particular.[29]

In 1976, Mao Zedong died, the Gang of Four were arrested, and the Cultural Revolution approached its end.[30] Deng Xiaoping was set free. Using his political wisdom and also by playing tricks, he quickly controlled the Party and regained command of State power.[31]

In 1978, the Third Session of the Eleventh Party Plenary Congress convened in Beijing and passed a resolution calling for reform and an opening-up.[32] Thereafter, as the working focus of the Party shifted from political revolution to economic development, China's legal reconstruction was accelerated.

In 1979, Deng Xiaoping visited the United States as vice premier. His visit was so successful that he was named Man of the Year by Time magazine.[33]

In order to attract foreign investment and to introduce advanced foreign technology into China, under the leadership of Deng the country in 1982 adopted its Fourth Constitution, which promised to protect foreigners' property.[34] China also enacted the Trademark Law in the same year, the Patent Law in 1984, and the Copyright Law in 1990.[35]

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29. Song, *supra* note 24, at 269 (indicating that Chinese copyright law was formulated mostly from law from the courts and agencies). Few people had ever heard of intellectual property and there were even fewer experts in the area of copyright law. It was said that the late Professor Zheng Chengsi, one of the main reporters selected for his erudite knowledge in the area, gained merely one year of relevant experience during a visit to a university in the United Kingdom. *Zheng Chengsi*, INSTITUTE OF LAW: CHINA LAW NET, http://www.iolaw.org.cn/showscholar.asp?id=81&type=%E4%B8%AA%E4%BA%BA%E7%AE%80%E5%8E%86 [https://perma.cc/52SH-4GNZ].

30. *The Comeback Comrade*, TIME, Jan. 6, 1986, at 45.

31. For example, Deng Xiaoping implicitly criticized Mao's successor and undermined public confidence in the then-current leadership in his speech during the Eleventh National Congress of the Chinese Communist Party by calling for the need to "restore and carry forward the practice of seeking truth from facts, the fine tradition and style which Chairman Mao fostered in our party." RICHARD BAUM, BURYING MAO: CHINESE POLITICS IN THE AGE OF DENG XIAOPING 50 (1994).

32. *See* Wang, *supra* note 22.

33. *Man of the Year: China's Deng Xiaoping Leads 1 Billion People on a Far-Reaching, Bold but Risky Second Revolution*, TIME, Jan. 6, 1986, at 24.

34. XIANFA art. 18 (1982) (China).

35. Zhong Hua Ren Min Gong He Guo Shang Biao Fa (中华人民共和国商标法) [Trademark Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 23, 1982, amendment promulgated Aug. 30, 2013, effective May 1, 2014), http://www.lawinfochina.com/display.aspx?id=14839&lib=law [https://perma.cc/RGW6-ED87]; Zhong Hua Ren Min Gong He Guo Zhuan Li Fa (中华人民共和国专利法) [Patent Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 12, 1984, amendment promulgated Dec. 27, 2008, effective Oct. 1, 2009), http://www.lawinfochina.com/display.aspx?id=7289&lib=law [https://perma.cc/6H9G-EUL9]; Zhong Hua Ren Min Gong He Guo Zhu Zuo Quan Fa (中华人民共和国著作权法)

Within a short period of ten years, China enacted three main intellectual property statutes. Compared to any other third world country, this was quite an achievement.

However, it cannot be ignored that the 1990 Copyright Law was legislated without the undergirding of a corresponding economic infrastructure and without background of profound theoretical study of copyright law. It is no wonder the Law was "born" defective.

III. AUTHORSHIP IN THE UNITED STATES AND BEYOND

A. United States

1. Preliminary Observations. The United States is one of the countries where copyright law was first legislated. The term "Author" entered the domain of law in 1710,[36] with the passage of the first copyright statute, the English Statute of Anne.[37] Receiving English common law tradition, the American Constitution used the term "Author" in Article 1, Section 8, Clause 8, which empowers Congress "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[38] This clause associates authors with writings, indicating that the author was understood by the Framers as the creator. That the author was the creator was a notion then universally accepted. The American Supreme Court once quoted the notion favorably: an author is "he to whom anything owes its origin; originator; maker; one who completes a work of science or literature."[39] Such understanding of the "author" has no difference with the term used in the "authors law" familiar first in Continental Europe and then more broadly in Berne Convention countries.[40]

[Copyright Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, amendment promulgated Feb. 26, 2010, effective Apr. 1, 2010).

36. A case can be made for dating the Statute of Anne to 1709 instead. Exactly which date to celebrate presents a matter of at least modest difficulty, owing to parliamentary dating conventions (and perhaps also calendrical revisions effected in Great Britain, and thus the American colonies, in 1752 in order to conform differing calendars in England and Europe). *See* 1 WILLIAM F. PATRY, PATRY ON COPYRIGHT § 1:9 n.18 (2016); Craig Joyce, *Prologue*: *The Statute of Anne: Yesterday and Today*, 47 HOUS. L. REV. 782 n.10 (2010); David Nimmer, *Queen Anne in the Emperor's Shadow*, 47 HOUS. L. REV. 919, 946 n.174 (2010). For present purposes, the simplest solution seems the best. According to the Statute of Anne itself, its provisions became effective "from and after the Tenth Day of April One thousand Seven hundred and ten" whenever that may have occurred! Statute of Anne, 1710, 8 Ann., c. 19.

37. 8 Ann., c. 19.

38. U.S. CONST. art. 1, § 8, cl. 8.

39. Burrow-Giles Lithographic Co. v. Sarony, 111 U.S. 53, 58–59 (1884).

40. Robert A. Jacobs, *Work-For-Hire and the Moral Right Dilemma in the European Community: A U. S. Perspective*, 16 B.C. INT'L & COMP. L. REV. 29, 35 (1993)

As early as 1790, the first American Congress passed the first American Copyright Act.[41] But like European copyright laws (such as the Statute of Anne) and authors laws (such as the French Author's Rights Laws of 1791 and 1793), before 1909 no American copyright act had ever dealt in detail with the concept of copyright ownership by virtue of authorship. The creator-as-author rule was followed as elsewhere. The creator of a work was taken for granted to be the author of the work he had created. This widely accepted rule reflected the agrarian life and the social reality of the early stage of industrialization and the fact that most works were prepared by individuals by and for themselves. Even in the case of a work made for hire, the creator-as-author rule was to be applied:

> [N]o court recognized that an employer was entitled to copyright the works of its employees simply by virtue of the employment . . . . It took an express agreement to assign the copyright to the employer . . . to persuade a court to conclude that an employer owned the copyright.[42]

However, to be fair and equitable to the employer, "[b]y the end of the century . . . courts increasingly began to describe the employment relationship as a contract by which the employer acquired the rights to *all* of the employee's work, including the copyrights."[43]

2. Origin of "Deemed-to-be-Author" Rule. The dramatic changes that took place in the latter part of the 19th century in America altered the landscape of law. After the Civil War, the industrial revolution, which started in New England and on the East Coast, developed rapidly and spread to the West and the South.[44] The diligent and intelligent Americans spent just a few decades industrializing their country. By 1894, the American economy had surpassed that of Great Britain and became the largest economy in the world.[45]

As the industrial revolution progressed, America became more and more urbanized. Medium and large cities emerged all over the country like mushrooms after a spring rain.[46] Under such

41. Act of May 31, 1790, ch. 15, 1 Stat. 124.

42. Catherine L. Fisk, *Authors at Work: The Origins of the Work-for-Hire Doctrine*, 15 YALE J.L. & HUMAN. 1, 32 (2003).

43. *Id.*

44. *See* WILLIAM A. LINK & ARTHUR S. LINK, AMERICAN EPOCH: A HISTORY OF THE UNITED STATES SINCE 1900, at 4 (McGraw-Hill, Inc., 7th ed. 1993).

45. *See* Ding Zeming, MEI GUO NEI ZHAN YU DU JIN SHI DAI, 1861-19 SHI JI MO (美国内战与镀金时代, 1861-19 世纪末) 77–89 (1990); Edgar Kiser & Kriss A. Drass, *Changes in the Core of the World-System and the Production of Utopian Literature in Great Britain and the United States, 1883–1975*, 52 AM. SOC. REV. 286, 290 (1987).

46. *See supra* note 44, at 24–31.

social and economic circumstances, cultural industries such as commercial printing, the press and advertising flourished more than ever before. As to the advertising of the time, one commentator wrote: "As the sale of consumer goods grew in economic importance, advertising that relied on arresting and colorful chromolithographic images was quickly evolving from primarily a show business phenomenon into a widely used device by manufacturers and retailers trying to build public demand for their products."[47] An artist who designed posters in the 1890s was paid as high as $5,000 each year for his efforts.[48] Judging by the size of such payment, we can tell how booming the advertising business was then.

What was unprecedented is that most works prepared in the booming cultural industries were what we call today "works made for hire." Work made for hire is not a category of works (such as literary works or musical works).[49] Except for the fact that they are prepared under an employment relationship, works made for hire are no different from any other category of works. There was no reason not to afford protection to them under the copyright law. But before protection is afforded, a question must be answered: Who is the author of such a work? If the traditional creator-as-author rule continued to be applied, the employee would be the author because he was the creator. And he would get both the copyright as author and a salary as employee; the employer would acquire no copyright because he was not the creator and thus not the author. Yet he was still obligated to pay the creator-employee the salary. Of course, the employer, i.e., the corporation or other legal entity, would not accept such a ridiculous result even though it was derived by following an entrenched legal rule. Instead, the employer claimed it would own the creations of its employee and should be treated as the "author" of the employee's creation.[50] This idea came to the forefront by the end of the century.

So the courts' position towards works made for hire changed. History gave the American Supreme Court an opportunity to

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47. Diane Leenheer Zimmerman, *The Story of* Bleistein v. Donaldson Lithographing Company*: Originality as a Vehicle for Copyright Inclusivity (Copyright)*, *in* INTELLECTUAL PROPERTY STORIES 90 (Jane C. Ginsburg & Rochelle Cooper Dreyfuss eds., 2006).

48. *Id*.

49. For a full listing of types of works that may qualify as "original works of authorship," see 17 U.S.C. § 102(a) (2012). For limitations on which individual works are candidates for such categorization, see *id.* Finally, for an understanding of what happens in authorship terms when a literary work is incorporated into a compilation or a derivative work based on the underlying work, see 17 U.S.C. § 103(a), (b).

50. *See* INTELLECTUAL PROPERTY STORIES, *supra* note 47, at 92.

strike a heavy blow on this rule. In 1903, in *Bleistein v. Donaldson Lithographing Co.*, Justice Holmes delivered the opinion of the Court, in which he acknowledged that "[t]here was evidence warranting the inference that the designs belonged to the plaintiffs, they having been produced by persons employed and paid by the plaintiffs in their establishment to make those very things."[51]

3. Codifications of "Deemed-to-be-Author" Rule. Six years later, the doctrine of work for hire was codified into the American Copyright Act of 1909. Section 26 of the Act provided that, in the case of a work made for hire, "the word 'author' [which the Act did not otherwise define] shall include an employer in the case of works made for hire."[52]

The American Copyright Act of 1976 restates the deemed-to-be-author rule and, besides including works created by an employee in the hire of an employer, extends its application to nine categories of specially ordered or commissioned works if the commissioning party and the commissioned party have signed a written agreement that considers the work as a work made for hire.[53]

Before 1976, when the Copyright Act of 1909 was replaced, the United States had accumulated plentiful judicial experience and academic research in the area of copyright, laying a solid foundation for the revision of the earlier Act. Of course, there were

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51. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 248 (1903).

52. Act of Mar. 4, 1909, ch. 320, 35 Stat. 1075 (codified at 17 U.S.C. § 26 (1976)).

53. The term is defined in 17 U.S.C. § 101 (2012):

> A "work made for hire" is—(1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire. For the purpose of the foregoing sentence, a "supplementary work" is a work prepared for publication as a secondary adjunct to a work by another author for the purpose of introducing, concluding, illustrating, explaining, revising, commenting upon, or assisting in the use of the other work, such as forewords, afterwords, pictorial illustrations, maps, charts, tables, editorial notes, musical arrangements, answer material for tests, bibliographies, appendixes, and indexes, and an "instructional text" is a literary, pictorial, or graphic work prepared for publication and with the purpose of use in systematic instructional activities.

Section 201(b) provides that initial ownership a work made for hire shall belong to the employer:

> Works Made for Hire.—In the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.

controversies and conflicts between different interest groups. The controversy over commissioned works may be the most noteworthy.

A commissioned work, by its name, is a specially ordered work, not a work made for hire created by an employee.[54] But publishers, as well as motion picture studios, thought differently. To them, it was meaningless to differentiate the two types of works.[55] Before the Act of 1909, federal courts had frequently treated the commissioning party as the owner of the copyright in a commissioned work.[56] After the 1909 Act, perhaps because the Act did not define "employee" and "employment," the decisions of the courts evaded an important issue: Who was the author of a commissioned work?

The courts did not deny the authorship-in-fact of the commissioned party (the employee), but simply presumed that he as the author had transferred his copyright implicitly to the commissioning party, making that party the author-in-law.[57] This meant the commissioning party was a transferee whose acquisition of the copyright was not initial, but successive. From a point of view of a civil lawyer, this would be quite different from the employer's initial, not successive, acquisition of the copyright in a work made for hire (provided for explicitly by Section 26 of the 1909 Act as quoted above). In the latter case, due to the application of the deemed-to-be-author rule, the employer would acquire the initial ownership of the copyright in the work as the "author," not as an assignee. The situation of a commissioning party was not so clear.

This difference caused resentment from independent contractors. They bargained hard for their authorship rights during the revision of the 1909 Act from 1955 to 1976.[58] Today, the American Copyright Law explicitly distinguishes between two different types of works made for hire, in both of which ownership of the copyright vests in the hiring party from the moment of creation by the hired party: (1) those "prepared by an employee within the scope of his or her employment" and (2) those "specially ordered or commissioned" for use as a contribution to specified

54. *Id.*

55. Marci A. Hamilton, Comment, *Commissioned Works as Works Made for Hire Under the 1976 Copyright Act: Misinterpretation and Injustice*, 135 U. PA. L. REV. 1281, 1291–92 (1987).

56. *See*, *e.g.*, Dielman v. White, 102 F. 892 (C.C.D. Mass. 1900); Solomons v. United States, 137 U.S. 342, 346 (1890).

57. *Solomons*, 137 U.S. at 346.

58. Barbara Ringer, *First Thoughts on the Copyright Act of 1976*, 22 N.Y.L. SCH. L. REV. 477, 479 (1977).

types of works (such as collective works and motion pictures) "the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire."[59]

4. Construing the 1976 Act. But even the 1976 Act was not without its own problem: how to differentiate works made for hire and commissioned works.[60] Due to a lack of definitions of the terms of "employer" and "employee" under the Act, disputes arose over those types of works.[61] Finally, in 1989, the Supreme Court for the first time addressed the issue in *Community for Creative Nonviolence* (*CCNV*) *v. Reid*[62] in an attempt to resolve the conflicts "by providing a working definition of the terms 'employee' and 'within the scope of employment' in the work for hire doctrine of the 1976 Copyright Act."[63]

A careful reading of the opinion of the Court does not lead this Author to an optimistic conclusion that the century-long dispute over work made for hire has been fully put to rest.[64] It appears that the reason why disputes arise over the ownership of copyright in a commissioned work is not because a bright line has not been drawn between works made for hire and commissioned works, but because no such bright line is drawn between an employer and a commissioning party or an employee and a commissioned party (i.e. an independent contractor). To be clear, the distinction between the employee and independent contractor is the first distinction upon which a work made for hire is differentiated from a commissioned work. If the first distinction is not clear to perceive, the second distinction is superfluous no matter how clear it is.

In drawing the first line between the employee and the independent contractor, the Supreme Court took into consideration various non-determinative factors, such as tools

59. 17 U.S.C. § 101 (2012) (defining a work made for hire).

60. If the creator-as-author rule is applied invariably, there would be no such problem. *See supra* note 14 and accompanying text.

61. *See, e.g.*, Aldon Accessories Ltd. v. Spiegel, Inc., 738 F.2d 548, 551 (2d Cir. 1984), *cert. denied*, 469 U.S. 982 (1984). *See also* Easter Seal Soc'y for Crippled Children & Adults of La. Inc., v. Playboy Enters., 815 F.2d 323, 335 (5th Cir.1987); Evans Newton Inc. v. Chi. Sys. Software, 793 F.2d 889, 894 (7th Cir. 1986), *cert. denied*, 479 U.S. 949 (1986); Dumas v. Gommerman, 865 F.2d 1093, 1096 (9th Cir. 1989).

62. Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 740–41 (1989).

63. Alexandra Duran, Community for Creative Non-Violence v. Reid: *The Supreme Court Reduces Predictability by Attributing an Agency Standard to the Works for Hire Doctrine of the 1976 Copyright Act*, 56 BROOK. L. REV. 1081, 1082 (1990).

64. *Contra* Katherine B. Marik, Community for Creative Non-Violence v. Reid*: New Certainty for the Copyright Work for Hire Doctrine*, 18 PEPP. L. REV. 589, 621 (1991) ("[*CCNV*] has put to rest the dispute over work made for hire which has divided the circuits for over a century.").

used, place of work, payroll and tax matters, etc.[65] The *Dumas* Court rejected the Ninth Circuit's formal salaried employee test (the brightest line),[66] but some believe that the factors finally adopted for consideration by the Supreme Court in *CCNV*, when taken together, tend to describe a formal salaried employee. The decision is good enough for well-trained judges to adjudicate such disputes in hindsight, but a lack of predictability and certainty is perceived by some commentators.[67]

Besides, the decision left open to commissioning parties a "way" to joint works. If such a party finds it hard to change a commissioned work outside of the nine categories into a work made for hire, he may, as a second choice, attempt to label the commissioned work as a joint work.[68] Half is always better than nothing. But he needs to prove that the commissioned party has accepted his suggestions or proposals, important ones, during the preparation of the work.[69] This is not hard to do for a commissioning party. If more commissioning parties pursue this strategy, they still have a chance to circumvent the hard-struck "compromise" separating works made for hire into employee-made works and commissioned works by independent contractors. For the definition of a joint work under Section 101 is not any clearer than the definition of a work made for hire.[70]

To provide perspective: The adoption of the doctrine of work made for hire by the United States not only reflected the changed social circumstances of the early 20th century, but also embodied a pragmatic philosophy towards authorship. There is no wonder it has been received widely by common law countries where Anglo-Saxons have a faith in empiricism and pragmatism.

B. Europe and the Berne Convention

Influenced much by early Romanticism, many European writers long believed that an author is a genius and a work is the expression of an author's personality.[71] Because of this ideology, under the author laws of the European countries an author not

65. *Reid*, 490 U.S. at 751–52.

66. *Dumas*, 865 F.2d at 1102.

67. Duran, *supra* note 63, at 1099–1100.

68. *Dumas*, 865 F.2d at 1105.

69. *Id.*

70. *See* 17 U.S.C. § 101 (2012) (defining a "joint work" as "a work prepared by two or more authors with the intention that their contributions be merged into inseparable or interdependent parts of a unitary whole.").

71. *See* Peter Jaszi, *Toward a Theory of Copyright: The Metamorphoses of "Authorship"*, 1991 DUKE L.J. 455, 459–60 n.11.

only enjoys economic rights but also moral rights.[72] The authors' rights are believed to arise from the fact that he created the work. There is no need for the author to perform any formality. In such a culture, the creator-as-author rule has been invariably followed. According to the rule, the creator is the author and the author must be the creator.[73] The two different terms refer to the same natural person. The deemed-to-be-author rule is flatly rejected, even in the case of works made for hire, for its pragmatic style.[74] An employer can only acquire economic rights through consensual or statutory transfer.[75] As to moral rights, they may not be transferred by inter vivos transaction.[76]

The Berne Convention was concluded in 1886, twenty-three years before the doctrine of work for hire was codified in the American Copyright Act of 1909. As late as 1883, judges in the United Kingdom, one of the original signatory countries of the Berne Convention, rejected the idea that an employer could be treated as the author of a work made for hire.[77] Accordingly, it is sound to conclude that the early Acts of Berne Convention only accepted the creator-as-author rule and did not embrace the deemed-to-be-author rule.

However, as time passed by and the movie industry became more and more important to people's cultural life and national economies, the Convention's attitude towards the deemed-to-be-author rule began to change. In 1967, the Stockholm Act made some revisions to the Convention. "Two additions were made . . . , one as to the makers of films, and the other as to folklore."[78] Article 15 of the Convention now allows presumptions of authorship in the case of a cinematographic work.[79] According to the Article, the author is the person whose name appears as such on the work.[80] Although it goes no further, it "leaves member countries free to make their own rules on the subject."[81] This

72. *Id.* at 496–97.

73. *See supra* note 14 and accompanying text.

74. A few European countries, such as the Netherlands, have received the deemed-to-be author rule. *See* Jacobs, *supra* note 40, at 66–67.

75. *Id.*

76. The authors laws of some European countries allow the inheritance of certain moral rights on the ground that rights must have their subjects. *See supra* note 52 and accompanying text.

77. Nottage v. Jackson [1883] 11 QBD 627, at 632–36 (cited in Jaszi, *supra* note 71, at 486 n.117).

78. GUIDE TO THE BERNE CONVENTION FOR THE PROTECTION OF LITERARY AND ARTISTIC WORKS (PARIS ACT, 1971) 93 (1978).

79. *Id.*

80. *Id.*

81. *Id.*

means common law countries can continue to apply the deemed-to-be-author rule with respect to works made for hire. The charge that the doctrine of work made for hire violates the Berne Convention[82] is not supported either by the letter or the spirit of the Convention.

IV. THE CHINESE COPYRIGHT LAW OF 1990

A. Enactment, Moral Rights, and Works Made for Hire

The drafting of the Chinese Copyright Law began in the middle 1980s, just a few years after general reform in society.[83] The process presented certain conflicts between the traditions of authors' rights law and copyright law.

China had received the civil law authors' rights tradition from Japan in the early 20th century.[84] So naturally, Chinese legal academia generally preferred civil law theories and doctrines and cherished the creator-as-author rule. This rule takes as its theoretical and factual bases, respectively, John Locke's natural law doctrine that property arises from labor and that creative activity is the mental labor of people, the reasoning process of their minds, and a physiological phenomenon unique to human beings.[85]

Under the prevalent theory of authors' rights, creation of a work is considered a mental activity to design and complete a literary or artistic form and constitutes the entire process from the conception of an idea to the completion of its expression. Creation does not include organizational efforts on behalf of another person for his or her creation of a work or the provision of consultancy and materials or the supply of assistance. Accordingly, only a natural person with mental ability or capacity can be an author of a work, i.e., hold the status of a creator.[86] Based on the theory, the Chinese Copyright Law of 1990, like most other copyright laws of civil law countries, recognizes only a natural person as the author of a work.[87] Paragraph 3 of Article 11 of the 1990 Law declares that "a

82. ZHENG CHENGSI (郑成思), *supra* note 4, at 110; Jacobs, *supra* note 40, at 44 (suggesting that the Berne Convention and the work-for-hire doctrine are in disagreement).

83. Chong Zheng Ren, Copyright Law of China: Can it Effectively Protect U.S. Works?, 16 LOY. OF L.A. ENT. L.J. 67, 71 (1995).

84. See *supra* note 8 and accompanying text.

85. Alfred C. Yen, *Restoring the Natural Law: Copyright as Labor and Possession*, 51 OHIO ST. L.J. 517, 523 (1990).

86. Jacqueline Seignette, *Authorship, Copyright Ownership and Works Made on Commission and Under Employment*, *in* A CENTURY OF DUTCH COPYRIGHT LAW 115, 118 (Bernt Hugenholtz, Antoon Quaedvlieg & Dirk Visser eds., 2012).

87. Article 7 of the German Copyright Act states: "The author is the person who creates the work." Gesetz Uber Urheberrecht und Verwandte Schutz-rechte [The German Copyright Act of 1965], Sept. 9, 1965 Urheberrechtsgesetz [URHG] at 28, art. 7, § 64. As

citizen who has created a work is the author of the work."[88] Although the deemed-to-be-author rule has been incorporated into the Act, the definition cited contains no exception at all. Even today, many Chinese commentators still reject the doctrine of work for hire in theory.

With respect to authors' rights, the Chinese Copyright Law of 1990 follows the French dualist approach.[89] Under Article 10 of the Law, the author enjoys four moral rights[90] and thirteen economic rights in his work of authorship.[91] The economic rights, under

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amended in 1996, the Article redefines the term "author": "The person who creates the work shall be deemed the author." *See* CODE DE LA PROPRIÉTÉ INTELLECTUELLE [INTELLECTUAL PROPERTY CODE] art. L111-1, L113-2, L113-7-8 (Fr.).

88. Zhong Hua Ren Min Gong He Guo Zhu Zuo Quan Fa (中华人民共和国著作权法) [Copyright Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, amendment promulgated Feb. 26, 2010, effective Apr. 1, 2010).

89. There are two approaches to author's rights in civil law countries. *See, e.g.*, Özge Akin Mengenli, *Does It Make a Difference to Follow Monism or Dualism?*, ANKARA B. REV., July 2010, at 85, 85–86 (discussing French dualism and German monism approaches to copyright). Based on different theories, the two approaches treat authors' rights differently. Under the dualist approach, the economic right under the authors' right may be transferred although moral rights may not. *Id.* at 91–92. For the monist approach, moral rights and economic rights are treated monolithically. *Id.* at 87–88. Thus, authors' rights may not be transferred at all. But to yield to reality, the exercise of the economic rights may be assigned. *Id.* at 88–89.

90. The four moral rights are the right of authorship, right of integrity, right of publication and right of modification. Julia Cheng, *China's Copyright System: Rising to the Spirit of Trips Requires an Internal Focus and WTO Membership*, 21 FORDHAM INT'L L.J. 1941, 1947 n.35 (1997); Derek Dessler, Comment, *China's Intellectual Property Protection: Prospects for Achieving International Standards*, 19 FORDHAM INT'L L.J. 181, 198 n.138, 201 n.171 (1995). They are specified as follows:

> (1) the right of publication, that is, the right to decide whether to make a work available to the public;
>
> (2) the right of authorship, that is, the right to claim authorship and to have the author's name indicated on his works;
>
> (3) the right of alternation, that is, the right to alter or authorize others to alter one's work; [and]
>
> (4) the right of integrity, that is, the right to protect one's work against distortion and mutilation.

Zhong Hua Ren Min Gong He Guo Zhu Zuo Quan Fa (中华人民共和国著作权法) [Copyright Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, amendment promulgated Feb. 26, 2010, effective Apr. 1, 2010), art 10. China acceded to the Berne Convention in 1992. Susan Tiefenbrun, *A Hermeneutic Methodology and How Pirates Read and Misread the Berne Convention*, 17 WIS. INT'L L.J. 1, 4 (1999); Stephanie L. Sgambati, Comment, *China's Accession to the Berne Convention: Bandaging the Wounds of Intellectual Piracy in China*, 3 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 138, 140–41 (1992). According to the principle of independent protection adopted by Article 5 of the Convention, American authors may also enjoy these moral rights in China and may bring an action when any of these rights are infringed. Berne Convention, *supra* note 18, art. 5.

91. Yang, *supra* note 1, at 267. Article 10 also specifies economic rights:

> (5) the right of exploitation and the right to remuneration, that is, the right of exploiting one's work by means of reproduction, performance, broadcasting,

Article 21 of the Law, endure for a term of the author's life plus fifty years after his death, but the protection afforded for the moral rights is subject to no time limit.[92] In the case of a work made for hire, the copyright in the work lasts for fifty years after its first publication.[93] The duration of copyright under the Chinese Copyright Law of 1990, despite compliance with the minimum requirement of the Berne Convention,[94] is much shorter than the life-plus-seventy-year term under the United States Copyright Act of 1976 (as amended).[95]

Also applying the French dualist approach, the Chinese Copyright Law of 1990 allows the assignment or transfer of the economic rights.[96] If an economic right has been transferred, it is gone forever. Unlike the U.S. Copyright Act, the Chinese Copyright Law of 1990 does not allow the owner of the right to terminate the transfer or the grant.[97] This was the Chinese legal academia's preferred approach to drafting the 1990 Law.

However, "legal persons" (mostly state-owned enterprises, institutes and universities) opposed that approach.[98] Instead, the

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exhibition, distribution, making cinematographic, television or video production, adaptation, translation, annotation, compilation and the like, and the right of authorizing others to exploit one's work by the above-mentioned means, and of receiving remuneration therefor.

Zhong Hua Ren Min Gong He Guo Zhu Zuo Quan Fa (中华人民共和国著作权法) [Copyright Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, amendment promulgated Feb. 26, 2010, effective Apr. 1, 2010). Due to a misunderstanding of TRIPs, Article 10, the "literary work" used in the Article was mistranslated into Chinese as "written work." *Compare* Copyright Law of the People's Republic of China 1990, art. 3, *with* Zhong Hua Ren Min Gong He Guo Zhu Zuo Quan Fa (中华人民共和国著作权法) [Copyright Law of the People's Republic of China] (revision draft submission version submitted by the National Copyright Administration), art. 5. The early Chinese scholars simply did not understand how a "cold" computer software program could be a "literary" work. Because two different criteria (form and content) were used by the Chinese Copyright Law of 1990 to categorize works, the categories of work are illogical and overlap.

92. Copyright Law of the People's Republic of China 1990, art 21.

93. *Id.*

94. Berne Convention, *supra* note 18, art. 7.

95. 17 U.S.C. § 302 (2012).

96. Mengenli, *supra* note 89, at 91–93.

97. 17 U.S.C. §§ 203, 304(c)–(d). Note also that inheritance or succession under the Chinese Law is considered as a way of transfer of copyright. *See supra* note 76 and accompanying text. The Law contains a provision, with Chinese characteristics, on the succession of the copyright in a work made for hire. Copyright Law of the People's Republic of China 1990, art. 19. Under Article 19 of the Act, where there is no successor to the copyright in the work made for hire, the work would not enter into the public domain as expected, but the State instead enjoys the copyright in the work. *Id.* Such provision is tinted with strong statism that reminds people of Leviathan under the pen of John Hobbes. *See, e.g.*, Frank van Dun, *Philosophical Statism and the Illusions of Citizenship: Reflections on the Neutral State*, 56 PHILOSOPHICA 91 (1995), http://logica.ugent.be/philosophica/fulltexts/56-5.pdf [https://perma.cc/C3YG-4KQA].

98. Neither the Copyright Act of 1990 nor the 2014 Proposed Draft of the Third

"legal persons" favored the doctrine of "work-for-hire" (known as the "deemed-to-be-author" rule in China) and strongly urged its inclusion in the Law's draft.[99]

Finally, a compromise was reached. The deemed-to-be-author rule was transplanted from U.S. law into Chinese law,[100] but works made for hire were divided into two categories and, as such, treated differently.

Like the authors laws in most civil law countries, the Chinese Copyright Law does not adopt the term "work made for hire" and instead refers to such a work as a "service work."[101] But they are the same. So, compared with the corresponding provisions in the authors laws in civil law countries and the copyright laws in common law countries, the provisions in the Chinese Copyright Act are unique with respect to works made for hire (and also commissioned works, as said below). Unlike its counterparts in most authors laws, the Chinese Act does not strictly follow the creator-as-author rule in the case of works made for hire. Nor does it totally adopt the deemed-to-be-author rule prevalent in copyright laws. By making a special arrangement regarding works made for hire, the drafters of the Law attempted to find a more equitable way, a characteristically Chinese way, to treat works prepared by employees during their employment.

Thus, the Law classifies works made for hire into two categories. The creator-as-author rule applies to both categories of works made for hire, as specified in Paragraph 2 of Article 16, but the categories differ:

Revision thereof define "legal persons" other than inferentially through juxtaposing them with "natural persons." *See* Copyright Law of the People's Republic of China, Revision Draft, Submission Version, art 2. For an explanation of the general meaning of the term "legal persons," see Zhao Zhongfu, *Enterprise Legal Persons: Their Important Status in Chinese Civil Law*, 52 LAW AND CONTEMPORARY PROBLEMS 1, 4–5 (1989)

99. Fisk, *supra* note 42, at 2, 63.

100. Article 11 of the 1990 Copyright Law of the People's Republic of China provides:

> *Except where otherwise provided in this Law*, the copyright in a work shall belong to its author.
>
> The author of a work is the citizen who has created the work.
>
> Where a work is created according to the will and under the sponsorship and the responsibility of a legal person or entity without legal personality, *such legal person or entity without legal personality shall be deemed to be the author of the work*.
>
> The citizen, legal person or entity without legal personality whose name is indicated on a work shall, in the absence of proof to the contrary, be deemed to be the author of the work.

Copyright Law of the People's Republic of China 1990, art 11 (emphasis added).

101. To people at that time, "hire" and "employment" meant exploitation, which runs contrary to the socialist nature of the country. To this author, a "service work" is just a "work made for hire" under the American law. They are "different" not because of legal reasons, but due to political causes.

> A work created by a citizen when fulfilling the tasks assigned to him by a legal entity or another organization shall be deemed to be a service work. Unless otherwise provided in Paragraph 2 of this Article, the copyright of such a work shall be enjoyed by the author, but the legal entity or organization shall have a priority right to exploit the work within the scope of its professional activities. During the two years after the completion of the work, the author shall not, without the consent of the legal entity or organization, authorize a third party to exploit the work in the same way as the legal entity or organization does.
>
> In the following cases the author of a service work shall enjoy the right of authorship, while the legal entity or organization shall enjoy other rights included in the copyright and may reward the author: (1) drawings of engineering designs and product designs, maps, computer software and other service works, which are created mainly with the materials and technical resources of the legal entity or organization and under its responsibility; [and] (2) works in which the copyright is, in accordance with the laws or administrative regulations or as agreed upon in the contract, enjoyed by the legal entity or organization.[102]

In the first group of works made for hire, the author/creator acquires the initial ownership of copyright in the work he has created with no legal obligation to transfer the copyright to his business unit or the employer (i.e., the author retains both economic and moral rights). However, the copyright he enjoys is subject to some restrictions.[103] For example, the author's unit has priority in the use of the work in the ordinary course of its business. For two years from the creation of the work, the author may not allow any third party to use the work in the same way as his unit does.[104]

As for the second group of works made for hire, the author/creator acquires the initial ownership of copyright in the work he has created, but he transfers all "other rights," except the right of authorship, to his unit by operation of law.[105]

Some drafters delighted in talking about this unique arrangement. One drafter recalled: "The experts at WIPO were very satisfied with the provisions regarding works made for hire under our Law. Taiwan even made reference to the provisions

102. Copyright Law of the People's Republic of China 1990, art 16.

103. *Id.*

104. *Id.*

105. *Id.*

when it revised its copyright law in 1991."[106] Another commentator wrote: "I am not sure whether the provision of [A]rticle 16 concerning works made for hire is the best arrangement, but it should be admitted that it is a good arrangement and is practicable basically."[107]

Satisfied as the drafters were with their unique arrangement for works made for hire, Chinese judicial practice for the past twenty-five years has revealed a quite different picture. Ever since the Act was legislated in 1990, disputes between employees and employers over the ownership of copyright in works made for hire have kept arising.[108] To make things worse, different Chinese People's Courts[109] have interpreted the strange arrangement differently and rendered totally different judgments.[110] To make

106. ZHENG CHENGSI (郑成思), Ban Quan Fa (版权法) 289–90 (rev. ed. 1997).

107. Shen Rengan (沈仁干), *You Guan Zhong Guo Zhu Zuo Guan Fa Zhi Ding Di Hui Gu* (有关中国著作权法制定的回顾), *in* Zhong Guo Zhi Shi Chan Quan Er Shi Nian (中国知识产权二十年) 46 (Liu Chun Tian (刘春田) ed., 1998).

108. To cite a few recent cases: Zhi Gui Mantang Tushu (Beijing) Youxian Gongsi v. Dazhong Wenyi Chuban She (纸贵满堂图书（北京）有限公司诉大众文艺出版社) [ZhiGui Man Tang Books (Beijing) Co. v. Mass Arts Press] LEXIS China Online (Third Ct. of Second Instance Beijing Intermediate People's Ct. Sept. 2, 2014); Cai Xin Chanmei Youxian Gongsi v. Fujian Zhong Jin Zaixian Wangluo Gufen Youxian Gongsi (财新传媒有限公司诉福建中金在线网络股份有限公司) [Caixin Media Co. v. Fujian Zhongjing Online Network Corp.] LEXIS China Online (Ct. of Second Instance Fuzhou Intermediate People's Ct. Aug. 29, 2014); Guangzhou Shi Jiaohu Shi Xinxi Wangluo Youxian Gongsi v. Shenzhen Shi Da Yingjia Wangluo Youxian Gongsi (广州市交互式信息网络有限公司、深圳市大赢家网络有限公司) [Guangzhou Interactive Info. Network Co. v. Shenzhen Big Winner Network Co.] LEXIS China Online (Ct. of Second Instance Guangdong Shenzhen Intermediate People's Ct. June 4, 2013); Zhongguo Qingnian Bao She v. Beijing Che Xun Hulianwang Xinxi Fuwu Youxian Gongsi (中国青年报社北京车讯互联网信息服务有限公司) [The Chinese Youth Press v. Beijing Auto Info. Serv. Co.] LEXIS China Online (Ct. of First Instance Chaoyang District People's Ct. Nov. 18. 2014); Jingji Cankao Baoshe v. Hangzhou He Xin Ruanjian Jishu Youxian Gongsi Qinhai Quopin Xinxi (经济参考报社诉杭州核新软件技术有限公司) [Econ. Info. Daily v. Hangzhou Hexin Software Techs. Ltd.] LEXIS China Online (Ct. of First Instance Ct. of Zhejiang Province People's Ct. of Hangzhou Binjiang District Oct. 8, 2014); Jingji Cankao Baoshe v. Beijing Ali Baba Xinxi Jishu Youxian Gongsi (经济参考报社诉北京阿里巴巴信息技术有限公司) [Econ. Info. Daily v. Beijing Ali Baba Info. Tech., Co.] LEXIS China Online (Ct. of First Instance Beijing Chaoyang District People's Ct. Aug. 8, 2014); Shenzhen Shi A Xinxi Wang Youxian Gongsi v. Shanghai B Wangluo Tongxun Jishu Youxian Gongsi, Beijing C Wangji Chuanbo Jishu Youxian Gongsi (深圳市A信息网有限公司诉上海B网络通讯技术有限公司、北京C网际传播技术有限公司) [Shenzhen A Info. Network Co. v. Shanghai B Network Telecomm. Tech. Co. and Beijing C Internet Commc'n Techs. Co.] LEXIS China Online (Ct. of First Instance Shanghai Minghang District People's Ct. July 26, 2012).

109. *See* Gregory S. Kolton, Comment, *Copyright Law and the People's Courts in the People's Republic of China: A Review and Critique of China's Intellectual Property Courts*, 17 U. PENN. J. INT'L ECON. L. 415, 424–29 (1996) (providing a detailed English-language description of the People's Courts).

110. As to these different judgments, *see generally*; Cao Xinming (曹新明), *Woguo Zhuzuoquan Guishu Moshi de Lifa Wanshan* (我国著作权归属模式的立法完善) [*The Legislative Perfection of the Chinese Approach of Copyright Ownershp*], FAXUE (法学) [JURISPRUDENCE], no. 6, 2011, at 81–89; Cong Lixian (丛立先), *Zhi Wu Zuo Pin Yu Fa Ren Zuo Pin Bian Xi* (职务作品与法人作品辨析) [*An Analysis of Service Works and Juridical*

matters worse yet, the Chinese judicial system is not like the American system. No high court has a final say to bring differing judgments together.[111] And at present, the Chinese Supreme Court has not delivered an opinion on this issue yet.

B. Flaws and Subsequent Developments

Paragraph 3 of Article 11 of the 1990 Chinese Copyright Law states that "[w]here a work is created according to the will and under the sponsorship and the responsibility of a legal person or organization, *such legal person or the organization shall be deemed to be the author of the work*."[112] This provision unambiguously indicates the reception of the doctrine of works made for hire, codified in the United States under Section 201(b) of the Copyright Act of 1976.[113]

However, Paragraph 1 of Article 11 stipulates: "*Except where otherwise provided in this Law*, the copyright in a work belongs to its author."[114] The exceptional proviso contained in this language on initial ownership of copyright adds feet to a snake while drawing it, exposing a deep misunderstanding of the doctrine of works made for hire. The logic and the rationale of the doctrine are not appreciated, despite reception of the doctrine.

There is no doubt that "the copyright in a work belongs to its author" in Paragraph 1 means that the initial ownership of copyright in a work vests in the author of the work.[115] For the language does not contemplate a case where the author's copyright has been *transferred from someone else*. But under this provision, the initial ownership of copyright in a work, in certain circumstances ("where otherwise provided"), does not belong to its author.[116] In other words, a copyright owner other than the author may obtain the *initial ownership* of copyright in a work, pursuant to this exceptional provision.

Persons' Works], ZHONG GUO BAN QUAN (中国版权) [CHINA COPYRIGHT], no. 1, 2009, at 61–63; Wang Qian (王迁), Lun "Fa Ren Zuo Pin" Gui Ding Di Chong Gou (论 "法人作品" 规定的重构) [*On the Reconstruction of the Provisions of Juridical Persons' Works*], 22 FA XUE LUN TAN (法学论坛) [LEGAL F.] 30 (2007). At an IP conference held at Renmin University in the spring of 2014, Justice Yu Xiaobai of the Chinese Supreme Court complained to this Author that the situation is "chaotic."

111. Kolton, *supra* note 109, at 426.

112. Zhong Hua Ren Min Gong He Guo Zhu Zuo Quan Fa (中华人民共和国著作权法) [Copyright Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, amendment promulgated Feb. 26, 2010, effective Apr. 1, 2010), art. 11 (emphasis added).

113. 17 U.S.C. § 201(b) (2012).

114. Copyright Law of the People's Republic of China 1990, art. 11 (emphasis added).

115. *Id.*

116. *Id.*

So, together Paragraphs 1 and 3 thoroughly misunderstand the American work for hire doctrine that the Chinese Copyright Act of 1990 incorporates, but with mistakes.

This misunderstanding is just one example of strange provisions in the Chinese Copyright Act of 1990, relevant to authorship, which include the provision for two types of works made for hire mentioned above,[117] as well as provisions on commissioned works (as they differ from works made for hire) and initial ownership of copyright in motion pictures.

First, with respect to works made for hire, Article 16 of the Law stipulates that "the author of a work made for hire shall enjoy the right of authorship, while the legal entity or the other organization shall enjoy other rights under the copyright and may reward the author."[118] As previewed above, Article 16 divides such works in (1) designs, etc., created mainly with resources, and under the responsibility, of a legal entity and (2) works where copyright is enjoyed by the legal entity because of regulation or contract, but treats the two such categories differently.[119]

Second, as to commissioned works, Article 17 states that "[t]he ownership of copyright in a commissioned work shall be agreed upon in a contract between the commissioning and the commissioned parties. In the absence of such a contract or of an explicit agreement in the contract, the copyright in such a work shall belong to the commissioned party."[120] Article 17 is confusing, as explained below.

Third, with respect to motion pictures, the 1990 Law contains a separate Article 15, which provides:

> [T]he copyright in a cinematographic work or a work created in a way similar to cinematography shall be enjoyed by the producer, and the playwright, director, cameraman, lyrist, composer and any other author of the work shall enjoy the right of authorship, and shall be entitled to obtain remuneration as agreed upon in the contract between him and the producer.[121]

Another muddle to be explained.

In the following paragraphs, these three strange provisions on authorship of copyright are analyzed in detail from a comparative perspective.

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117. *See supra* note 102 and accompanying text.
118. Copyright Law of the People's Republic of China 1990, art. 16.
119. *Id.*
120. *Id.* art. 17.
121. *Id.* art. 15.

First is the problem of two types of works for hire. Generally speaking, China may be considered a civil law country.[122] With respect to the issue of who is the author of a work, the creator-as-author rule has always been followed. Paragraph 2 of Article 11 of the 1990 Law, providing that "[t]he author of a work is the citizen who has created the work," embodies the rule.[123] But China is also a socialist country in which state ownership plays a leading role in the national economy.[124] When the Act was drafted, the Judicial Committee of the National People's Congress demanded that the deemed-to-be-author rule be adopted in the Law.[125] Notwithstanding the strong opposition to the demand from the academic circle, the deemed-to-be-author rule or the doctrine of work made for hire was eventually written into Paragraph 3 of Article 11 of the Law.[126]

However, the doctrine of work made for hire was misperceived and so implemented wrongly. With respect to this typical common law rule in the field of copyright, an American copyright expert, Mr. David Nimmer, explains that in the case of works made for hire, the "author" is statutorily deemed to be not the work's creator, but instead "the employer or other person for whom the work was prepared."[127] Mr. Nimmer is very clear: the reason why the employer is granted the initial ownership of copyright in a work made for hire is not because it is an employer, but because it is the author of the work in the eyes of law.[128] It is thus evident that Paragraph 3 of Article 11 is not an exception to the principle that copyright in a work vests initially in its author.[129] Quite the contrary, the "author" has secured the first ownership of copyright in its work although he is not the creator.

Strangely enough, having borrowed this common law doctrine, the Chinese Copyright Law of 1990 has rejected its logic and still recognizes the creator's authorship status. As a result,

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122. Alice E.-S. Tay, *The Struggle For Law in China*, 21 U.B.C. L. Rev. 561, 564–65 (1987).

123. Copyright Law of the People's Republic of China 1990, Article 11.

124. Scott Cendrowski, *China's Global 500 Companies are Bigger Than Ever—And Mostly State-Owned*, Fortune (July 22, 2015), http://fortune.com/2015/07/22/china-global-500-government-owned/ [https://perma.cc/8TQZ-E7Q3].

125. Shen Rengan (沈仁干), *supra* note 107, at 46.

126. *See supra* note 112 and accompanying text.

127. 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 5.03[D] (2015).

128. *Id. See also* 17 U.S.C. § 201(b) (2012); H.R. Rep. No. 94-1476, at 121 (1976), *reprinted* in 2012 U.S.C.C.A.N. 1137 (noting, in the historical and revision notes, that employers are the owners of works for hire).

129. *Compare* 17 U.S.C. § 201(b), *and* H.R. Rep. No. 94-1476, at 121 (1976) *reprinted in* 2012 U.S.C.C.A.N. 1137, *with* Copyright Law of the People's Republic of China 1990, art. 11 ¶ 2.

the Chinese copyright community generally has concluded that the author's rights in a work made for hire *do not belong* to its author. "The initial ownership of copyright in a work made for hire vests initially in the employer or the unit of the author," wrote a well-known Chinese copyright expert.[130] So the Chinese legal community has confused the actual author with the statutory author.

Article 16 of the Law is where the problem is manifest. Paragraph 1, concerning engineering drawings and the like, is unexceptionable. Although there are conditions on his ownership, the creator (employee), not the investor (employer), is the initial owner.

However, under the second category of works in Article 16, Paragraph 2, the situation is different. As earlier mentioned, the author/creator theoretically does acquire initial ownership in the work he has created, but by operation of law his rights, all except the right of authorship, immediately transfer to his unit.[131] Thus, as thought typically by Chinese scholars, an entity other than the author of a work acquires most of the exclusive rights of copyright. To this Writer, Paragraph 2 is a provision regarding works made for hire to which the doctrine of works made for hire should apply fully, so that all rights, economic and moral, belong to the creator/author. Instead, the competing creator-as-author rule, illogically, is mixed in as well. Since the doctrine of work made for hire is completely misapplied in Article 16, Paragraph 2, what is the point of incorporating the doctrine into the Law at all here?

So the doctrine of work made for hire does not apply fully to works made for hire under Article 16, Paragraph 2. However, as indicated above, the doctrine does apply to a legal person's work under Article 11, Paragraph 3, under which, where a work is created according to the responsibility of a legal person or an organization, such legal person is deemed to be the author of the work.[132] This contradicts Article 16, paragraph 2, where initial ownership of the work (although it is subject to automatic transfer to the legal person/employer) vests initially in the creator/employee. However, the mechanism in this provision is

130. ZHENG CHENGSI (郑成思), *supra* note 106, at 288. *Compare Copyright Protection in China: A Guide for European SMEs*, at 3 (Aug. 2010), http://www.china-iprhelpdesk.eu/sites/all/docs/publications/EN_Copyright_guide_Aug_2010.pdf [https://perma.cc/7ZVT-UDGL] (stating that Chinese copyright law vests authorship with the commissioned creator), *with* U.S. COPYRIGHT OFFICE, 9.0912, CIRCULAR 9: WORKS MADE FOR HIRE (2012) (noting that U.S. copyright law vests authorship with the commissioner of the work).

131. See supra notes 102 & 105 and accompanying text.

132. *See supra* note 112 and accompanying text.

illogical. Under the doctrine of work made for hire as understood in the United States, the country of its origin, there is no need for transfer. The legal person/employer is the initial owner of the right, such as they are (all economic rights, no moral rights), to use an American word, *ab initio*.

So due to the misunderstanding just related, the Chinese Copyright Law of 1990, in Article 11, Paragraph 3 and Article 16, Paragraph 2, applies the creator-as-author rule and the deemed-to-be-author rule to the same category of works made for hire at the same time. But the deemed-to-be-author rule is not a rule free-standing, but only an exception to the creator-as-author rule. Accordingly, they cannot apply together side-by-side. Otherwise, conflicts will arise between the principle and its exception. Recent chaotic Chinese judicial practice has proved this. In solving disputes over the initial ownership of a work made for hire where an employer or legal person is involved, some courts have treated the work as a legal person's work by applying Article 11, Paragraph 3 and rendered a judgment in favor of the employer. Other courts, to the contrary, by applying Article 16, Paragraph 2 have made a judgment favorable to the employee.[133]

Now for the next "strange provision."

Article 17 of the Chinese Copyright Law on commissioned works also is considered by some Chinese scholars to be a case in which initial ownership does not vest in the author of the work. For the Article allows the commissioning and commissioned parties to agree upon the initial ownership of copyright in a commissioned work. One commentator maintains:

> This is one of the exceptions described in [A]rticle 11, [P]aragraph 1, of the Chinese Copyright Law of 1990 that 'except as provided otherwise in this Law, copyright in a work shall belong to the author of the work'; that is to say it is an exceptional case where copyright in a work may not belong to its author.[134]

It appears to this Writer that this provision has resulted from a misunderstanding by Chinese scholars of the nature and features of commissioned works and the relevant provisions in copyright laws of common law countries. Those commentators tend to think that "under the copyright laws of most civil law countries, the commissioned party acquires the initial ownership of copyright, and under that of common law countries, the

133. *See supra* note 110 (citing conflicting judgments).

134. ZHI SHI CHAN QUAN FA YUAN LI JI YAO AN PING XI (知识产权法原理及要案评析) 42 (Wang Changshuo (王昌硕) ed., 1996).

commissioning party secures the initial ownership of copyright."[135] Quite to the contrary, the creator-as-author rule is followed with respect to commissioned works in the copyright laws of both civil and common law countries.

Take for example the American Copyright Act of 1976, which is frequently cited by Chinese scholars to support their point of view. The provisions regarding commissioned works in the 1976 American Copyright Act are actually a legislative compromise between independent contractors, on the one side, and publishers and motion picture studios, on the other.[136] Without understanding the legislative background and by overlooking the *"if* clause" contained in the definition of works made for hire, it is hard to understand the 1976 Act, Section 101.

To be sure, under the 1976 Act, a commissioned work or a work for special order may be placed in the category of works made for hire, but this is only true "*if* the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire."[137] Only when the parties have signed such an instrument can a commissioned work be "changed to" a work made for hire.[138] The commissioned works that may be transformed into works made for hire are confined to nine categories enumerated in the definition: "a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas."[139]

With respect to these nine categories of commissioned works, if the parties have signed such an instrument in which they consider their commissioned work to be a work made for hire, their agreement will lead to the application of the provisions in the Act regarding works made for hire. In the 1976 Act, the Appendix to Section 201(b) provides that, "[i]n the case of a work made for hire, the employer or other person for whom the work was prepared is considered the author for the purposes of this title."[140] Thus, according to the deemed-to-be-author rule embodied in this

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135. CHENG KAIYUAN (程开源), ZHI SHI CHAN QUAN FA (知识产权法) 81 (1993). *Compare Copyright Protection in China: A Guide for European SMEs*, *supra* note 130, at 3, *with* U.S. COPYRIGHT OFFICE, *supra* note 130.

136. Jessica D. Litman, *Copyright, Compromise, and Legislative History*, 72 CORNELL L. REV. 857, 890–91 (1987).

137. Copyright Act of 1976, Pub. L. No. 94-553, § 101, 90 Stat. 2541, 2544 (defining a "work made for hire") (emphasis added); *see infra* text accompanying notes 206 & 207.

138. Copyright Act of 1976 § 101

139. *Id.*

140. Copyright Act of 1976 § 201(b).

provision, the commissioning party acquires the initial ownership of copyright.

However, note that the commissioning party acquires the initial ownership not in the capacity of a commissioning party *per se*, but in the capacity of the statutory author of a converted work made for hire.[141] Not all commissioning parties are statutory authors.[142] So Section 201(b) is not an exception to, but conforms with, the principle that copyright in a work vests initially in the author of the work.[143] As to a commissioned work not included in the nine categories, such as sculptural work, it remains a commissioned work and the creator-as-author rule applies.[144]

Even if copyright laws allowed the commissioned party and commissioning party to agree upon the ownership of copyright in a commissioned work, the commissioning party could be understood to obtain the copyright through transfer. The final result would be little different.[145]

Under the authors law, there is much difference between a commissioning party's initial ownership and successive ownership of copyright. For there are moral rights alongside the author's rights. If the deemed-to-be-author rule did not apply and the commissioning party was not deemed to be the author of the work, he could acquire the copyright only through assignment and, in this way, he could not obtain the moral rights.

Again, the fundamental civil law theory is also against the initial acquisition of property through legal acts such as contract. Notwithstanding the civil law taboo, however, the Chinese Copyright Law of 1990 permits the commissioning party to acquire the initial copyright through agreement. In theory, at least, such provision may cause an embarrassing situation in which the party (the commissioning party) who acquires initially the author's rights through agreement, including the right of authorship, is not the author of a commissioned work and the author (the commissioned party) does not enjoy any right under the author's rights, including the right of authorship.[146]

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141. Copyright Act of 1976 § 101.

142. *See, e.g.*, Cmty. for Creative Non-Violence v. Reid, 490 U.S. 730, 748 (1989) (noting that only commissioned works within certain enumerated categories qualify as works for hire).

143. *But see id.* at 737 (noting that § 201(b) is an exception to the general rule that the author is the owner).

144. *Id.* at 748.

145. If not for the renewal right historically contained in the American law of the duration of copyright, the initial or successive ownership of copyright in a work would be the same. But that is another, longer story. *See generally* CRAIG JOYCE ET AL., COPYRIGHT LAW § 4.01 (10th ed. 2016).

146. Besides, Chinese courts have often confused a legal person's work with a

Lastly among the "strange provisions," the Chinese Copyright Law of 1990, Article 15, is even more unique. It treats cinematographic works separately, but neither as a work made for hire nor as a commissioned work. According to the Article, the authors enjoy the right of authorship and the producer or studio enjoys authors' rights/copyright.[147] From this provision, we can conclude that the creator-as-author rule is applied to the cinematographic work under the Law. Since the producer is not the author of the work, his copyright is acquired by operation of law or through statutory transfer. Due to the inalienability of moral rights, he could not acquire any moral right and the authors would retain all the moral rights. But the Article states that the authors enjoy only the right of authorship. Where are the other moral rights?

The unique provision under Article 15 is an emblem of the whole problem of the reception of common law doctrines into the Chinese Copyright Law of 1990.[148] The desire to solve practical problems in a modern society became twisted up with stubborn adherence to the civil law tradition. The resulting "solutions," on examination, make no logical sense.

C. Summary

At the beginning of the 20th century, the American Supreme Court formulated the common law doctrine of work made for hire as an exception to the traditional creator-as-author rule in order to protect more and more works created by corporate employees and capable of significant commercial exploitation. The doctrine was recognized in the U.S. Copyright Act of 1909 and was restated and more fully defined in the Copyright Act of 1976.

When it was enacted, the Chinese Copyright Law of 1990 meant to receive the doctrine. However, due to misunderstandings

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commissioned work. *See supra* note 108 and accompanying text. The Rikaze Intermediate People's Court and the Higher People's Court in Tibet, in a well-known dispute over the ownership of the copyright in the head statute the 10th Panchen Lama, interpreted the commissioned work as a legal person's work by applying Article 11, Paragraph 3 of the Chinese Copyright Law of 1990. Zhonghua Renmin Gongheguo Zuigao Renmin Fayuan Gongbao (中华人民共和国最高人民法院公报) [Gazette of the Supreme People's Court of the People's Republic of China], 1999 SUP. PEOPLE'S CT. GAZETTE 204.

147. Zhong Hua Ren Min Gong He Guo Zhu Zuo Quan Fa (中华人民共和国著作权法) [Copyright Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, amendment promulgated Feb. 26, 2010, effective Apr. 1, 2010), art. 15.

148. *Cf.* Jacobs, *supra* note 40, at 32 (comparing the civil law based dualistic system of the (then) European Community with the common law monistic system of the United States, and highlighting that the dualistic system of the European Community "affects U.S. work-for-hire owners most severely").

of the work made for hire doctrine, the Law provided different rules with respect to the ownership of works made for hire. Such provisions, unique to China, violated the logic inherent in the doctrine and made the Law nonsensical in all respects.

Thus, the whole theory upon which the "deemed-to-be-author" provisions of the 1990 Law in China are based fell into a dilemma from which it needed rescue.

V. THE THIRD REVISION OF THE CHINESE COPYRIGHT LAW OF 1990

A. Background of the Revision

Great changes have taken place in China since the enactment of the Chinese Copyright Law of 1990.

First, in 1993 the Chinese Government decided to build up a market economy.[149] Ever since then, Chinese society has engaged in continuous transition. The pattern of social interests has gradually changed. One of the remarkable changes is that private rights are recognized.[150]

Second, science and technology in general, and digital technology and the internet in particular, have developed rapidly since 1990. Widely used digital technologies and the internet have caused a revolution in both the preparation and the dissemination of works, which is challenging and threatening the traditional way of protecting copyrighted works.[151] Thus, not long after its adoption, the Chinese Copyright Law of 1990 became dysfunctional and could not cope with the sudden great changes.

Third, although not widely noticed, China was actually one of the twenty-three original signatory countries to the 1947 General Agreement on Tariffs and Trade (the GATT).[152] In 1950, the Nationalist Government in Taiwan was forced by other contracting parties, including the United States, to retreat from the organization.[153] Between 1950 and 1986, the P.R.C. showed

149. Zhengyi Wang, *supra* note 23, at 3, 5.

150. *See, e.g.*, Lindsay Beck & Guo Shipeng, *China Property Law Bolsters Private Rights*, REUTERS, (Mar. 8, 2007, 12:33AM), http://www.reuters.com/article/us-china-parliament-propertylaw-idUSSP36543620070308 [https://perma.cc/2SVL-3YWN].

151. The first copyright case arising from the exploitation of preexisting works on the internet occurred in China in 1999. Cong Lixian, *Chinese E-commerce (2) and Legal Environment*, *in* CHINESE INTELLECTUAL PROPERTY AND TECHNOLOGY LAWS 268, 275 (Rohan Kariyawasam ed., 2011).

152. *See* General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S 194.

153. Hui-Wan Cho, *Legal Eligibility of Taiwan's Accession to GATT/WTO*, MD. SERIES CONTEMP. ASIAN STUD., no. 3, 2000, at 4.

little interest in succeeding the Republic of China in an international trade organization the Communist Government viewed as a rich men's club.[154] However, due to its opening-up policy beginning in 1978, the P.R.C.'s attitude towards the GATT began to change.[155] In 1986, it formally applied to the organization for the restoration of membership, thus starting on a long march aimed to regain China's original seat in the GATT.[156] But its ten-year-long efforts finally failed in 1995 when the World Trade Organization (the WTO) was established.[157] China no longer had any claim to restoration of its original seat in the GATT but had instead to apply for a new membership in the WTO. After another six years of hard negotiation, China acceded to the WTO in 2001.[158] Since then, China's trade has developed quickly and its economy has been more and more involved in the world economy.[159] To deal with globalization and to assume its corresponding international duties, the Chinese Copyright Law of 1990 needed to be brought into conformity with international requirements.

Fourth, the Communist Government now wants to revive traditional Chinese culture after decades of trying to destroy it, peaking during the ten-year-long Great Proletarian Cultural Revolution from 1966 to 1976,[160] which suggests to some that communism in today's China is just a slogan rather than a reality.

Under such circumstances, the Chinese Copyright Law of 1990 desperately needed to be revised to respond to all of the developments that had come into play since its adoption.

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154. John A. Callcott, *China Ready to Join GATT*, UPI (July 13, 1986), http://www.upi.com/Archives/1986/07/13/China-ready-to-join-GATT/6359521611200/ [https://perma.cc/8J98-UMBB].

155. Jeremy T. Paltiel, *Hinges and Latches on the Open Door: The Normative Parameters of China's WTO Accession*, *in* CHINA'S REFORMS AND INTERNATIONAL POLITICAL ECONOMY 131, 136 (David Zweig & Chen Zhimin eds., 2007).

156. *Id.*

157. *The GATT Years: From Havana to Marrakesh*, WORLD TRADE ORGANIZATION, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm [https://perma.cc/Q5B6-VY9E].

158. *China and the WTO*, WORLD TRADE ORGANIZATION, http://www.wto.org /english/thewto_e/countries_e/china_e.htm [https://perma.cc/FY8C-SG4N].

159. In 2001, when acceding to the WTO, China was the sixth largest trading country in the world, and by 2012, China became the largest trading country in the world. Ramesh Adhikari & Yongzheng Yang, *What Will WTO Membership Mean for China and Its Trading Partners?*, FIN. & DEV. (Sept. 2002), http://www.imf.org/external/pubs/ft/fandd/2002 /09/adhikari.htm [https://perma.cc/98J8-C6E9]; *China Eclipses U.S. as Biggest Trading Nation*, BLOOMBERG NEWS (Feb. 10, 2013, 10:01 AM), http://www.bloomberg.com /news/articles/2013-02-09/china-passes-u-s-to-become-the-world-s-biggest-trading-nation [https://perma.cc/6XKG-XCQQ].

160. Jeremy Page, *Why China is Turning Back to Confucius*, WALL ST. J. (Sept. 20, 2015, 9:00 AM), http://www.wsj.com/articles/why-china-is-turning-back-to-confucius-1442 754000.

B. The Copyright Law of the P. R.C. (Proposed Draft) of 2014

The Chinese National People's Congress is the largest legislature in the whole world.[161] It boasts almost 3,000 people's deputies.[162] But due to its large size, it can only convene once a year.[163] The day-to-day work of the National People's Congress is actually run by its Standing Committee, which in size is comparable to the American Congress.[164] The smaller State Council is usually responsible for the drafting work of a legislative act.[165] The Council entrusts the work to a relevant ministry, a department or a committee, according to the act to be written. When it has produced a draft that it thinks satisfactory, the Council submits it to the National People's Congress or its Standing Committee, where it is to be deliberated and stamped.[166]

The Chinese Copyright Act of 1990 authorizes the Chinese National Copyright Office to administrate copyright affairs all over China.[167] It was thus natural for the Office to take charge of revising the 1990 Copyright Act, which it did twice before 2014 to meet specific needs.[168]

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161. *Representatives in Parliament: Full House*, THE ECONOMIST (Apr. 20, 2011, 2:14 PM), http://www.economist.com/blogs/dailychart/2011/04/representatives_parliament [https://perma.cc/QN5D-7XZA].

162. *Id.*

163. Tom Saich, *The National People's Congress: Functions and Membership*, HARV. KENNEDY SCH.: ASH CTR. FOR DEMOCRATIC GOVERNANCE & INNOVATION 1, 4 (2015), http://ash.harvard.edu/files/ash/files/the_national_peoples_congress.pdf [https://perma.cc/C87B-T23S].

164. *Standing Committee*, THE NATIONAL PEOPLE'S CONGRESS OF THE PEOPLE'S REPUBLIC OF CHINA, http://www.npc.gov.cn/englishnpc/Organization/node_2847.htm [https://perma.cc/7HER-9J5C].

165. *Special Committees*, THE NATIONAL PEOPLE'S CONGRESS OF THE PEOPLE'S REPUBLIC OF CHINA, http://www.npc.gov.cn/englishnpc/Organization/node_2849.htm [https://perma.cc/NBU9-QZBP].

166. *Functions and Powers of the Standing Committee*, THE NATIONAL PEOPLE'S CONGRESS OF THE PEOPLE'S REPUBLIC OF CHINA, http://www.npc.gov.cn/englishnpc/Organization/2007-11/15/content_1373018.htm [https://perma.cc/RKY4-KFYW].

167. Zhong Hua Ren Min Gong He Guo Zhu Zuo Quan Fa (中华人民共和国著作权法) [Copyright Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, amendment promulgated Feb. 26, 2010, effective Apr. 1, 2010), art. 8.

168. The first revision was made in 2001 in order to bring the Law into compliance with TRIPs. *China Amends Copyright Law*, CHINA.ORG.CN (Nov. 16, 2001), http://www.china.org.cn/english/2001/Nov/22246.htm [https://perma.cc/H8A9-RNPB]. The second revision occurred in 2010 to implement a ruling of the DSB of the WTO in favor of the United States on Article 4 of the Chinese Copyright Law of 1990. Zhong Hua Ren Min Gong He Guo Zhu Zuo Quan Fa (中华人民共和国著作权法) [Copyright Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, amendment promulgated Feb. 26, 2010, effective Apr. 1, 2010). The Article denied copyright protection to works the publication and dissemination of which were prohibited by law. *Id.* These two revisions made only minor changes and, in a certain sense, did so unwillingly. *See* Hong Xue, *A User-Unfriendly Draft: 3rd Revision of the Chinese Copyright Law*,

The National Copyright Office generalized its basic working approach to the Third Revision as follows:

sticking to one concept,

following three principles, and

pursuing three effects.[169]

Sticking to one concept, according to the Office, means to pool various useful ideas or opinions from all walks of life and to solve problems.[170]

The so-called *three principles* include: the principle of independence; a balance of various social interests; and abiding by the accepted international norms.[171]

The *three effects* (or purposes) pursued are: high efficiency; high quality; and high level of legislation.[172]

The Proposed Draft of the Third Revision (originally referred to in Chinese as the Submission Draft) would greatly revise or even replace portions of the existing 1990 Copyright Law. Altogether, the Draft would add twenty-nine articles and two chapters, and if adopted, would total ninety articles and eight chapters, too many to discuss here.[173]

Accordingly, the remainder of this essay is confined to relevant *authorship-related* aspects of the Proposed Draft of 2014, specifically, Article 15 (the deemed-to-be-author rule) and Articles 19, 20 and 21 (the creator-as-author rule).[174]

INFOJUSTICE.ORG (Apr. 25, 2012), http://infojustice.org/wp-content/uploads/2012/04/hongxue042012.pdf [https://perma.cc/JU2V-XVLJ]. But the Third Revision is different. China itself has initiated the revision without any direct pressure from the outside world. Paul Kossof, *First Draft Revision of Chinese Copyright Law under Xi Administration Demonstrates Commitment to Significant Copyright Reform*, ASIA LAW PORTAL (July 1, 2014), http://www.asialawportal.com/2014/07/01/first-draft-revision-of-chinese-copyright-law-under-xi-administration-demonstrates-commitment-to-significant-copyright-reform/ [https://perma.cc/V9W2-EBGH].

169. Rogier Creemers, *A Brief Explanation Concerning the "Copyright Law of the People's Republic of China" (Revised Draft)*, CHINA COPYRIGHT AND MEDIA https://chinacopyrightandmedia.wordpress.com/2012/04/06/a-brief-explanation-concerning-the-copyright-law-of-the-peoples-republic-of-china-revision-draft/ [https://perma.cc/2YN9-U2UN].

170. *Id.*

171. *Id.*

172. Wang Ziqiang (王自强), *Cong Ju Zhu Quan Fa Di San Ci Xiu Gai Tan Ke Xue Li Fa* (从著作权法第三次修改谈科学立法) [*A Discussion on Scientific Legislation from the Perspective of the Third Revision of the Copyright Law*], Zhong Guo Ban Quan (中国版权) [CHINA COPYRIGHT] (2013); Wang Ziqiang, *A Study on the Third Revision on the Chinese Copyright Law and the Related Hot Issues*, BEIJING POWER-NATION IP INST., http://www.powernation.cn/nshow.asp?ncid=36&nid=hzRbhW==&c=3 [https://perma.cc/CD7J-DVAZ].

173. Ziqiang, *A Study on the Third Revision*, *supra* note 172.

174. Other authorship/ownership provisions of the Proposed Draft, such as Articles 16 (derivative works), 17 (joint works) and 18 (compilations) are not pertinent to the present discussion. *See* Zhong Hua Ren Min Gong He Guo Zhu Zuo Quan Fa (中华人民共和国著作

As said above, the provisions on authorship of the Chinese Copyright Law of 1990 are illogical and are in conformity with neither common law doctrines nor civil law principles. The chaotic judicial practice for the past twenty-five years has proven the Law's failure in governing authorship in works made for hire and commissioned works.[175] The Third Revision process provides an opportunity to adapt copyright law to today's reality in China, to balance the various interests, and to straighten out prior law both in logic and theory. In a word, this revision offers a good chance, if it is grasped. The Chinese copyright law, enacted late as compared with other such laws, might become one of the best copyright laws in the world.[176]

However, the published Proposed Draft is disappointing in quite important respects. As to authorship issues, there is not any improvement made with respect to the relevant provisions under the Law of 1990, and the revisions only make bad things worse.

Article 15 of the Proposed Draft provides:

> Copyright vests in the author of a work, *except where this Law provides otherwise*.
>
> The natural person preparing a work is the author.
>
> For a work organized or invested in by a legal person or an organization, created to represent the intention of the legal person or the other organization, published under the name of the legal person, the other organization or *its representative*, and of which the legal person or the organization bears responsibility, the legal person or the organization shall be considered as the author.
>
> *Where there is no evidence to the contrary, any natural person, legal person or other organization whose name is attributed to the work shall be construed as the author.*[177]

Compare with the corresponding article under the Law of 1990, Article 11.[178] The revised Article would not delete the exception ("[e]xcept where otherwise provided in this Law") in

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权法) [Copyright Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, amendment promulgated Feb. 26, 2010, effective Apr. 1, 2010).

175. *See supra* note 110 (citing conflicting judgments).

176. *Compare* Kolton, *supra* note 109, 415–17 (discussing the development of Chinese copyright law in the 20th century) *with* Timeline, United States Copyright Office (Oct. 5, 2016, 9:54 PM), http://www.copyright.gov/about/timeline.html [https://perma.cc/B3H8-3G2J] (illustrating that the United States had copyright laws as far back as the 18th century).

177. Zhong Hua Ren Min Gong He Guo Zhu Zuo Quan Fa (中华人民共和国著作权法) [Copyright Law of the People's Republic of China] (revision draft submission version submitted by the National Copyright Administration), art. 5 (emphasis added).

178. *See supra* notes 112–14 and accompanying text.

Article 11. But confusingly, the revised Article also would add no such exception to its second paragraph. Both authors law and copyright law universally follow the principle that either author's rights or copyright vests initially in the "author" of a work. The reason why the copyright law applies the deemed-to-be-author rule to a work made for hire is to give the employer authorship status from the beginning so that he can acquire ownership of the copyright as author, not as assignee. So the creator/employee has nothing to do with the copyright in the work not because he has not created the work, but because he is not the author of the work in law or his actual authorship has no legal significance. Shortly said, the copyright law does not violate the above principle.

However, due to misunderstanding the deemed-to-be-author rule applied in the copyright law, the Chinese academia only see that, under copyright law, the employer acquires the initial ownership of copyright in a work made for hire,[179] totally overlooking the essence of the rule that the employer acquires the initial ownership of copyright not in the capacity of employer but in the capacity of author. Therefore, Article 11 of the Law of 1990, applying the deemed-to-be-author rule, treats a legal person as the author of a work that is "created according to the will and under the sponsorship and the responsibility of a legal person . . ." but still asserts that "[t]he author of a work is the citizen who has created the work."[180] There is no wonder why, in practice, a creator/employee would compete with his employer, the legal person, for copyright in the work made for hire. There would be a chance for Article 15 of the Proposed Draft to correct the misunderstanding, but regrettably the illogical provision is left intact.

Also, "its representative" in Paragraph 3 of Article 15 of the Proposed Draft contradicts Paragraph 4. According to Paragraph 3, if a work is published under the name of a representative of a legal person, the legal person shall be considered as the author of the work.[181] However, Paragraph 4 adopts the presumed-to-be-author rule.[182] Under this rule, any person, natural or legal, whose name is

179. Zhi Shu Can Quan Fa Xue (知识产权法学) 38 (Hadong Wu ed., Peking University Press 3d ed., 2011).

180. Zhong Hua Ren Min Gong He Guo Zhu Zuo Quan Fa (中华人民共和国著作权法) [Copyright Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, amendment promulgated Feb. 26, 2010, effective Apr. 1, 2010), art. 11.

181. Copyright Law of the People's Republic of China, Revision Draft, Submission Version, art 15.

182. *Id.* In a strict sense, it is not a rule at all, but a popular provision contained in authors laws as a compromise between the creator-as-author rule and the deemed-to-be-author rule. *See* Jane C. Ginsburg, *The Concept of Authorship in Comparative Copyright Law*, 52 DEPAUL L. REV. 1063, 1071 (2003) (discussing the deemed-to-be-author rule).

attributed to a work shall be presumed to be the author of the work.[183] This raises a question: Is a representative of a legal person not himself an individual or a natural person and, as such, entitled to be presumed the author?

Article 19 of the Proposed Draft on audiovisual works, too, is controversial. This article provides:

> Producers of motion pictures, using novels, music, dramatic or other works to produce audiovisual works, shall obtain authorization from the copyright owners.
>
> Except as agreed otherwise, the copyright owners of the abovementioned preexisting works shall enjoy an exclusive right over the use of the audiovisual work under Article 16, Paragraph 2.
>
> The authors of cinematographic works, TV films and other such audiovisual works shall include directors, screenwriters as well as the composers of music specially prepared for the audiovisual work.
>
> The *economic rights* under the copyright in cinematographic works, TV films and other such audiovisual works and the share of interest may be agreed upon by the producer and the authors. Where there is no agreement or the agreement is unclear, the property rights under the copyright shall be enjoyed by the producer, but the authors shall have *the right of authorship and a right to share in profit*.[184]

Proposed Draft Article 19 concerning motion pictures is clearer than Article 15 of the Law of 1990. It specifically provides that the producer's rights are limited to "economic [or property] rights," where Article 15 of the Law of 1990 simply states "authors' rights."[185] A statutory transfer is more clearly indicated here. Since the producer's rights are acquired through transfer and moral rights are inalienable, the producer could not enjoy any moral rights. All the moral rights should be retained by the authors of the work. But same as Article 15, Proposed Draft Article 19 states that the authors enjoy only the right of authorship.[186]

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183. Copyright Law of the People's Republic of China, Revision Draft, Submission Version, art. 15.

184. Copyright Law of the People's Republic of China, Revision Draft, Submission Version, art. 19 (emphasis added).

185. *Compare id.*, *with* Zhong Hua Ren Min Gong He Guo Zhu Zuo Quan Fa (中华人民共和国著作权法) [Copyright Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, amendment promulgated Feb. 26, 2010, effective Apr. 1, 2010), art. 15.

186. *Compare* Copyright Law of the People's Republic of China, Revision Draft, Submission Version, art. 19, *with* Copyright Law of the People's Republic of China 1990, art. 15.

The revision still keeps silent about the whereabouts of the other moral rights.[187]

If the whereabouts of the other moral rights are more of theoretical significance, the "right to share in [the] profit" gained from the distribution of a motion picture[188] will have a great practical impact on the movie industry in China. However, to understand what is a right to share in this profit, we must first understand the general practice of the movie industry.

In the industry, a studio invests in the production of a motion picture. Its investment may be successful, which is the studio's first chance at compensation. But even if its investment is a failure and loses money, the studio still has to pay the participants, namely, the employees or independent contractors who are the actual authors.[189] These authors are not joint-investors with the studio and do not take the risk of the investment. They would demand to be paid regardless of whether the investment of the studio is profitable or not. In a word, whether the investment of the studio is profitable or loses money has nothing to do with the participants. Any loss belongs to the studio.

However, the Proposed Draft intends to change the practice by granting the authors an economic right, the right to share profit in a cinematographic work. What is a "share in profit"? It is a share of the movie producers' profits gained from the *distribution* of their motion pictures, sometimes referred to as a "right of second compensation."[190] But the "right to share in profit" is not one of the property rights under copyright law.[191] It is a new addition by the drafters. Under the existing Chinese Copyright Law, authors do not enjoy such a right. The draft language, giving the right to authors in some circumstances, is meeting with strong opposition from the movie industry.[192]

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187. *See supra* note 90.

188. The proposed language is not consistent. It first says "share of interest" and then it says "share of profit." They mean the same. *See supra* note 184 and accompanying text.

189. For example, before the 1950s participants in the production of a motion picture were mainly employees of a studio. Richard Colby, *Copyright Revision Revisited: Commissioned Works as Works Made for Hire Under the United States Copyright Act*, 5 WHITTIER L. REV. 491, 499 (1983). Later, as music became more and more important for motion pictures, studios began to hire well-known nonemployee composers and conductors to participate in the production of motion pictures. *Id.*

190. BERTRAND MOULLIER & RICHARD HOLMES, WORLD INTELLECTUAL PROPERTY ORGANIZATION, RIGHTS, CAMERA, ACTION! IP RIGHTS AND THE FILM-MAKING PROCESS (May 2007), http://www.wipo.int/edocs/pubdocs/en/copyright/869/wipo_pub_869.pdf [https://perma.cc/C3RN-J2HQ].

191. *See* Copyright Law of the People's Republic of China 1990, art. 10.

192. *See "Copyright Law" Published Manuscript Implementation of the Second Fee?*, SINA (July 4, 2014, 10:37 AM) http://ent.sina.com.cn/v/m/2014-07-04/10374169663.shtml [https://perma.cc/G4BV-EYW2].

A hundred years ago, Justice Holmes refused to judge on the values of posters as fine art works.[193] The reason he gave is convincing even today, that "[i]t would be a dangerous undertaking for persons trained only to the law to constitute themselves final judges of the worth of pictorial illustrations, outside of the narrowest and most obvious limits."[194] By the same token, one may doubt the wisdom of lawyers of the government meddling with a general practice in the movie industry.

Now Article 20 of the Proposed Draft, Article 17 of the Chinese Copyright Law of 1990 allows the commissioning party to acquire the initial ownership of copyright in a commissioned work through contract.[195] This provision has resulted from a misunderstanding of Section 101 of the American Copyright Act of 1976. The Proposed Draft has made no improvement and even applies this "contract approach" to works made for hire. Article 20 of the Proposed Draft provides: "A work prepared by an employee in completing his or her work duties during working hours is a work made for hire, the ownership of *the copyright may be agreed upon by the parties*."[196]

The Chinese Copyright Law of 1990 treats the so-called legal person's work differently from the work made for hire. The transplanted deemed-to-be-author rule applies to the legal person's work, but not to the work made for hire, although in theory and in fact it is a type of work made for hire.[197] Therefore, an employer could not acquire the initial ownership of copyright in a work made for hire as the statutory author. If he acquires the copyright through contract, he can only acquire the economic rights as assignee. His acquisition is successive, not initial. Proposed Draft Article 20 is designed to give the employer a chance to acquire initially the ownership of copyright in a work made for hire, but this is illogical and not in conformity with civil

193. Bleistein v. Donaldson Lithographing Co., 188 U.S. 239, 249 (1903).

194. *Id.* at 252.

195. Zhong Hua Ren Min Gong He Guo Zhu Zuo Quan Fa (中华人民共和国著作权法) [Copyright Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, amendment promulgated Feb. 26, 2010, effective Apr. 1, 2010), art. 17.

196. Copyright Law of the People's Republic of China, Revision Draft, Submission Version, art 20 (emphasis added). The remainder of Article 20 provides that, "where the parties have no agreement or their agreement is unclear, the copyright in a work made for hire shall be enjoyed by the employee," with the exception of such works as engineering design drawings, as to which the work unit is entitled to use the work free of charge and has a right of exclusive use of the work for a term of two years. *Id.* Where a work made for hire is owned by the work unit, the work unit shall grant the employee a corresponding reward on the basis of the quantity and quality of the work prepared, and the employee may publish the work in compilations. *Id.*

197. *See supra* notes 100–05 and accompanying text.

law principles. Different Chinese People's Courts will interpret it differently.

Finally, Article 21 of the Proposed Draft (on commissioned works) provides that the ownership of copyright of works prepared "on entrustment" may be agreed upon by the parties.[198] Where the parties have no agreement or their agreement is unclear, the copyright in a commissioned work shall be enjoyed by the commissioned party, but the entrusting party may use the work free of charge within its scope of operation.[199]

VI. A COMMENT ON PROVISIONS CONCERNING AUTHORSHIP IN THE PROPOSED DRAFT

As the Chinese saying goes: a fall in pit, a gain in wit. The disputes over the copyright in works made for hire and commissioned works in the past twenty-five years have shown that the provisions on authorship in these categories of work under the Chinese Copyright Law of 1990 are not successful. This revision offered a good opportunity for their perfection. Unfortunately, under the above-mentioned Articles, we would not see any improvement. These revised Articles may make things worse.

To illustrate, the motion picture industry has a history of over a hundred years.[200] During these years, the industry developed its own practices. For example, a studio pays salaries to the employee participants in the production of a motion picture and pays the non-employee participants according to contract signed by them.

Under the American Copyright of 1976, a motion picture is either a work made for hire or a commissioned work, which can be changed into a work made for hire.[201] Because of this explicit provision, there has seldom been any dispute over the ownership of the copyright in a motion picture. There may be many reasons, including the advanced development of the American movie industry. But the proper and adequate legal protection for works for hire is an important reason that paves the way for the smooth evolution of the industry in the United States.

Under Article 15 of the Chinese Copyright Law of 1990, a producer of a motion picture enjoys authors' rights, except the

198. Copyright Law of the People's Republic of China, Revision Draft, Submission Version, art 21.

199. *Id.*

200. Gerben Bakker, *The Economic History of the International Film Industry*, EH.NET, http://eh.net/encyclopedia/the-economic-history-of-the-international-film-industry/ [https://perma.cc/7PX7-FDD4] (tracing the history of the motion picture industry back to the explosion of Nickelodeon theaters in 1905).

201. *See supra* notes 53 & 137–39 and accompanying text.

right of authorship.[202] If asked what is wrong about such provision, we can only say it is illogical and violates the civil law theory on authorship. But in practice, it has not generated any real problem.

However, Article 19 of the Proposed Draft, varying settled practice, has added to the individual authors of a motion picture an economic right to share in the studios' profits from distributions of motion pictures. Thus, the authors may claim a share in this profit, if any, made by a producer, even after they are paid with salaries or paid according to contracts signed, for their services in making the motion picture. But if the distribution of the motion picture proves to be a failure, the producer has to assume all the loss incurred. The authors suffer no loss.

Due to China's membership in the WTO, China's studios have to confront competition from their counterparts in America and Europe.[203] It is already hard for them to operate. If the Proposed Draft is adopted, the newly added right may ruin the whole Chinese movie industry.

Besides this unfair addition, the selection of the participants as authors is arbitrary. A screenwriter and a composer are listed as authors of a motion picture, but actors and actresses are not.[204] We know that a motion picture is still a motion picture even without music (although actually in the early years, motion pictures were without sound). But a live-action motion picture is not a motion picture without actors and actresses.

As to the initial acquisition of copyright through contract provided under Article 17 of the Chinese Copyright Law of 1990, the Proposed Draft does not correct the mistake. Although Proposed Draft Article 21 is purported to be based on the cognate provisions under the American Copyright Act of 1976, that is a misunderstanding already pointed out above.[205]

It is true that there is a provision on commissioned works in the definition of works made for hire in Section 101 of the American Copyright Act of 1976,[206] but the commissioning party

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202. *See supra* note 147 and accompanying text. Chinese scholars have different views about the whereabouts of the other moral rights, except the right of authorship. *See supra* note 90.

203. SEAN O' CONNOR & NICHOLAS ARMSTRONG, U.S.–CHINA ECONOMIC AND SECURITY REVIEW COMMISSION, DIRECTED BY HOLLYWOOD, EDITED BY CHINA: HOW CHINA'S CENSORSHIP AND INFLUENCE AFFECT FILMS WORLDWIDE (2015), http://origin.www.uscc.gov/sites/default/files/Research/Directed%20by%20Hollywood%20Edited%20by%20China.pdf [https://perma.cc/Q7WN-9SMY].

204. *See supra* note 184 and accompanying text (quoting Article 19 of the Proposed Draft that authors of audiovisual works "include directors, screenwriters as well as the composers of music specially prepared for the audiovisual work").

205. *See supra* notes 195–99.

206. Copyright Act of 1976, Pub. L. No. 94-553, § 101, 90 Stat. 2541, 2544 (1976)

does not acquire the initial ownership of copyright directly through the signed contract. The contract is intended to change a commissioned work into a work made for hire if it falls into one of the nine categories of commissioned works and the parties agree in a signed writing to the change.[207] For a commissioned work outside of the nine categories, it is still a commissioned work and the creator-as-author rule is applied, even if such a contract is signed.[208] In such case, the commissioning party may only acquire the copyright in the work through assignment (or perhaps a joint work argument).[209]

As to employers and employees under Section 101, unless they have agreed otherwise, the deemed-to-be-author rule applies to the work created by the employee.[210] If they have agreed otherwise, then the creator-as-author rule applies and he acquires the initial ownership of copyright.[211]

The Proposed Draft in China, same as the Law of 1990, does not apply the deemed-to-be-author rule, either to commissioned works or to works made for hire. The commissioning party of a commissioned work or the employer of an employee who creates a work made for hire is allowed to acquire the initial ownership of copyright through contract. Such a strange provision would lead to the occurrence of an embarrassing situation in which the party acquiring the copyright (authors' rights), including the right of authorship, is not the author at all, and the author of the work is completely excluded from having any right, including the right of authorship. Such an illogical result would never arise under the United States Copyright Act of 1976.

VII. CONCLUSION

Before the enactment of the United States Copyright of 1909, the copyright law and the authors law had followed the creator-as-author rule since the Statute of Anne for about 200 years. The rule is based on John Locke's labor theory of property

(defining a "work for hire" as "a work specially ordered or commissioned for use as a contribution . . . if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made for hire").

207. *Id.*

208. Cmty. for Creative Non-Violence v. Reed, 490 U.S. 730, 741–43 (1989).

209. The difference between the initial acquisition of the ownership of copyright as author and the successive acquisition as assignee is not immaterial because the United States now recognizes limited moral rights in works of visual art and allows for terminations of transfers regardless of any terms of grants. 17 U.S.C. §§ 106(a), 203, 304(c)–(d) (2012).

210. 17 U.S.C. app. § 201(b).

211. *Id.*

and the fact that creation is an activity and a reasoning process of a human being and a psychological phenomenon unique to a human being. According to the rule, the creator is the author and only the author can be the creator. The term "author" and the term "creator" were synonyms and referred to the same individual, a natural person.

As science and technology disseminated and economies developed in the 20th century in Western industrialized societies, works made for hire emerged, many of them created as by employees of the new corporations. The copyright law quickly responded by formulating the deemed-to-be-author rule to resolve the issue of protecting these special kinds of works in modern society.

While most civil law countries rejected this new common law doctrine, the Chinese Copyright Law of 1990 received the doctrine because it was thought to be favorable to state-owned enterprises. But due to misunderstandings and the resulting compromises in China's reception of the deemed-to-be-author rule, Chinese law only resembles U.S. work-make-for-hire law upon first looking. On close examination and as explained above, they are *not* the same. The many contradictions and illogicalities within China's law, both the Chinese Copyright Act of 1990 and the Proposed Draft of the Third Revision of the 1990 Law as submitted in 2014, have sowed confusion and wasted the scarce and valuable judicial resources in China.

To be sure, the Proposed Draft makes other, quite good revisions with respect to the Law of 1990. Its reception of common law injunctive relief would make the proof of infringement easier, for example, and the greatly increased statutory damages will be welcomed by foreign copyright owners. But the Proposed Draft revisions on authorship and related issues are still not satisfactory. Once the Draft is adopted by the National People's Congress, it is certain that the disputes that arose in the past will continue to arise in the future.