China’s Copyright Protection for Audio-Visual Works:
A Comparison with Europe and the U.S.

Seagull Haiyan Song*

I. INTRODUCTION: ORIGIN OF THE DEBATE

China has been called the “final frontier” within the international film community. Indeed, despite an incredibly large market and a rapid rate of growth in domestic film production, there is still a surprisingly small number of Chinese film companies, and those in business lack sophistication compared to their Western counterparts. At a time when Chinese media is trying to remove the old label of “state propaganda machines” and catch up with sophisticated players in the global film market, it is understandable that the entire practice in the film industry remains quite primitive. One example of such is the current heated legal debate on copyright protection of films in China.

In the current Chinese Copyright Law reform, one of the most debated topics is copyright protection of audio-visual works. Individual creators/authors of audio-visual works (such as a film director or script writer) have criticized the current rule, which vests copyright ownership of a film with the producer of a film, as depriving them of a fair opportunity to share in the commercial success of their work. They argue that since individual authors are not the default copyright owner in a film, they often lack the bargaining power to negotiate a good compensation deal with the producer of a film.

*Seagull Haiyan Song, Visiting Associate Professor of Law at Loyola Law School of Los Angeles. I am very grateful to Robert Merges, XU Chao, Jay Dougherty, Paul Heald, Justin Hughes, Michael Waterstone, Karl Manheim, Xuan-Thao Nguyen and participants at the Loyola Law School of Los Angeles summer workshop, Drake Law School IP Conference and Cardozo Law School IPSC conference for their helpful comments and discussion. I also want to thank Jessica Di Palma and Luke Fiedler for their great research assistance.


3 See supra note 1.

4 For the purposes of this paper, “China” refers to the specific jurisdiction of “mainland China” only, and does not include Hong Kong, Macao, or Taiwan. Also, the reference to Chinese copyright law refers to “the PRC Copyright Law” only. The same is true for other Chinese laws discussed in this paper.


6 For the purpose of this paper, the author primarily discusses copyright protection of “films”, as one example of audio-visual works. The author acknowledges that compared with films, the definition of audio-visual works could be much broader, potentially including video-games, TV productions, and even multi-media works, which might all satisfy the criteria of audio-visual works.


8 It should be noted that compared with most not-so-well-known individual creators, Chinese celebrity directors, script writers and actors can often negotiate a better financial deal thanks to their reputation.
Moreover, the statutory language in the current Chinese Copyright Law is also criticized for being too vague and ambiguous to ensure a fair remuneration for individual authors in a film.\(^9\) As a result, the guilds representing directors and writers have lobbied to change the current “producer-ownership” rule to “individual creator-ownership” model, or as an alternative, leaving copyright ownership to be decided by the contracting parties.\(^10\) Not surprisingly, movie studios are objecting to such a proposed change.\(^11\)

The academic debate as to what constitutes the best model of intellectual property ownership, either by individual creator ownership or by corporate ownership, is nothing new.\(^12\) Scholars who advocate for individual creator ownership trace the philosophical origin of their arguments back to the desert reward theory,\(^13\) the Lockean labor theory,\(^14\) and Kant/Hegel’s personhood theory.\(^15\) William Cornish and Jane Ginsburg both call for a return to “the centrality of the author”—the human creator of the copyrighted work—in their writings.\(^16\)

In contrast, those who prefer corporate ownership of copyrighted works focus their arguments on the incentive-based economic theory. They contend that the ownership of copyrighted works should be placed with those who are best positioned to internalize costs and benefits in a way that will adequately incentivize the production of socially desirable goods.\(^17\) In terms of collective

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\(^10\) One interpretation of Article 15 of the P.R.C. Copyright Law (2010) is that in order for an individual author of a film to receive remuneration, there has to be a written contract between the author and the producer of a film. In the absence of such a written contract or specific provisions, the individual author might not have the right to receive remuneration. See also supra note 12.


\(^12\) Id.


\(^14\) Wendy Gordon, Toward a Jurisprudence of Benefits: The Norms of Copyright and the Problem of Private Censorship, 57 U. CHI. L. REV. 1009, 1038 (1990). Gordon noted that one strand of the authors’ rights tradition is restitutary, in the sense that “[i]t has to do with securing, for those who create works of value, reward for their ‘just deserts.’” Id.

\(^15\) For an excellent discussion of John Lockean theory, see MERGES, JUSTIFYING INTELLECTUAL PROPERTY supra note 12, at 195-236.

\(^16\) The personality/personhood theory is often advocated by Jane Ginsburg, with its origin tracing back to Kant and Hegel, who argued that an individual demonstrates ownership of property by imposing his will on it. See G. HEGEL, PHILOSOPHY OF RIGHT (T. Knox Trans. 1952) (1821). See also Jane C. Ginsburg, The Right to Claim Authorship in U.S. Copyright and Trademarks Law, 41 HOUS. L. REV. 263, 279-80 (2004); Jane C. Ginsburg, A Tale of Two Copyrights: Literary Property in Revolutionary France and America, 64 TUL. L. REV. 991, 995-96 (1990); Margaret J. Radin, Property and Personhood, 34 STAN. L. REV. 957 (1982).


\(^18\) Wendy Gordon, Excuse and Justification in the Law of Fair Use: Commodification and Market
works such as cinematographic works,\textsuperscript{18} which involve contributions from multiple individual creators, they argue that allocating the initial ownership to individual creators will create potential holdup problems, thus increasing transaction costs\textsuperscript{19} and hurting the public good in the long term.\textsuperscript{20}

In this paper, I compare the Continental European model, the US model with the Chinese model of copyright protection for films, and conclude that, copyright ownership of films should remain with the producer of a film. Part II begins with a comparative study of copyright protection for audio-visual works in France, Germany and the United States. In particular, the issues of film authorship (moral rights),\textsuperscript{21} film ownership (economic rights),\textsuperscript{22} choice of law and remuneration scheme in the film industry are discussed. Part III reviews the legislative history of Chinese copyright protection for audio-visual works and then addresses the existing challenges. In Parts IV and V, I propose that Chinese legislators should adopt a “hybrid” model in protecting films: incorporating the Continental European approach of protecting moral rights of individual authors, but vesting copyright ownership of a film in the producer of the film. Also, to ensure that individual authors’ economic interests are protected, a more balanced remuneration system should be implemented.

I admit that it is quite an ambitious undertaking to compare all three models (European, the US and China) within such a short contribution. Yet China’s inspiration to build a successful movie industry (“Chillywood”) is based on the Hollywood model, thus a comparison with the US copyright system is inevitable. On the other hand, Chinese Copyright Law originated from the Continental European model, and therefore, a comparison with its source is

\textsuperscript{18} For the purpose of this paper, the terms “films” and “cinematographic works” are often used interchangeably with the understanding that the latter term “cinematographic works” is broader in scope, including both films and television programs.


\textsuperscript{20} Weatherall, supra note 17, at 27, 29.

\textsuperscript{21} The concept of “authorship” in films varies slightly from country to country. In general, it refers to “director, script writer, photographer and composer” who engage in the creation of a film. In the United States and other countries that do not distinguish author’s rights from neighboring rights, it might also include “actors.” See Aalmuhammed v. Lee, 202 F.3d 1227 (9th Cir. 2000). See generally F. Jay Dougherty, Not a Spike Lee Joint? Issues in the Authorship of Motion Pictures Under U.S. Copyright Law, 49 UCLA L. REV. 225 (2001) (providing a very comprehensive study of authorship in audio-visual works under the U.S. Copyright law).

\textsuperscript{22} The ownership structure falls into two major camps: either individual creator ownership or corporate ownership. See infra Part II.B.
crucial so that any changes that China proposes will not deviate too much from its origin.

I am also aware that the making of a film often includes the use of pre-existing works, such as an underlying novel or pre-existing music. However, for the purpose of this paper, I will not discuss individual authors in the pre-existing works, but rather focus primarily on the individual creators who have participated in the production of a film. In other words, the "writers" or "composers" discussed in this paper do not include writers or composers of the underlying novel or music, but only the script writers and composers who engage in the production of a film.  

II. COMPARATIVE STUDY OF COPYRIGHT PROTECTION OF FILMS IN EUROPE (FRANCE AND GERMANY) AND THE U.S.

A. Authorship of Films and Moral Rights

Jane Ginsburg explored an important topic in her comparative study of the concept of authorship—who is an author under copyright law? The existing international treaties tell us little about the concept of authorship, except that both natural persons and legal persons qualify as authors in the copyright law. In the context of cinematographic works, the Berne Convention is silent regarding authorship and leaves the matter to be resolved by national legislation. The Convention does, however, address the "presumption of authorship" in a cinematographic work, which should be "the person or body corporate whose name appears on a cinematographic work."

When we look at national legislation in various countries, we see a wide divergence in the concept and scope of authorship in films. For instance, under

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23 Note that it is also possible that the writer of an underlying pre-existing work might participate in writing the scripts for the film, based on the agreement between the writer and the producer of a film. Under such circumstances, the writer is both the author of the underlying pre-existing work and also the author of the cinematographic work.

24 Ginsburg, supra note 15.


27 Article 15(2) of the Berne Convention provides that "[t]he person or body corporate whose name appears on a cinematographic work in the usual manner shall, in the absence of proof to the contrary, be presumed to be marker of the said work."
the U.S. Copyright Act, there is no explicit mention of “authorship” for films. In *Community v. Reid*, the Supreme Court of the United States stated that “[a]s a general rule, the author is the party who actually creates the work, that is the person who translates an idea into a fixed, tangible expression entitled to copyright protection.” However, based on the work-for-hire doctrine, the authorship in films, when supported by appropriate documentation, almost always vests in the producer of a film.

Within the European Union, the only consensus that its member states have agreed upon is to acknowledge “the principle director” as the author in a film. In France, its Copyright Act does not have an exhaustive list of film authorship, but contains presumptions as to typical authors in a film: “the author of the script; the author of the adaptation; the author of the dialogue; author of the musical compositions . . . specially composed for the work; [and the movie’s] director.” In Germany, because a film is treated as a collaborative work, it follows that “only those who actually participate in the creation of the film and whose individual creations may not be separately exploited” may be considered actual film authors. For example, Article 65 of the German Copyright Act suggests that “the principle film director, the author of the screenplay, the author of the dialogues and the composer of music specifically composed for use in the cinematographic work in question” might qualify as joint-authors of a film. In the current version of Chinese Copyright Law, in addition to the “script writer, director, cameramen and composer of original music specifically created for that work,” Article 15 also contains “and other authors,” a broad catch-all term, under which other creative talents may be considered authors of a film.

The reason for such diverse treatments of authorship in films is two-fold.

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28 The 1976 U.S. Copyright Act has no definition of authorship for cinematographic works or audio-visual works. Based on its work-for-hire doctrine, it is widely believed that the owner/author of a cinematographic work is the employer/producer of the work. See 17 U.S.C. § 201(b).


30 17 U.S.C. § 102(a). But note that occasionally the work for hire doctrine might not apply to audio-visual works if the formality requirement is not met. For instance, if the producer fails to execute a written agreement with individual authors specifying the film to be considered as a work make for hire, then it is disputable who is the author and owner of the film. See Aalmuhammed v. Lee, 202 F.3d 1227 (9th Cir. 2000).


35 2010 Chinese Copyright Law, Art. 15.
First and foremost, unlike the Anglo-American common law system, which is more focused on economic interests of authors, most civil law countries protect moral rights of individual authors, in addition to their economic rights. The concept of moral rights, which originated from the Continental European countries, concerns the relationship of authors to their works. Based on the personhood theory, when an author creates—either by writing, painting or composing—she is embodying parts of herself (e.g. ideas, feelings and recollections) in the work she creates, and therefore, it gives rise to an interest that deserves protection as any other personal interests, such as reputation and integrity. Although the scope of moral rights might vary among civil law countries, it generally includes the following three: the right to claim authorship (known in Europe as “the right of paternity” and “the right of attribution” in the U.S.), the right to divulge her work to the world, and the right to prevent the work from unauthorized alternations and changes (the right of integrity).

The common law countries, on the other hand, do not have direct protection for moral rights of authors because their copyright system has been traditionally more economic-oriented. This however is not to say that moral rights are completely unprotected in common law jurisdictions. Authors in common law jurisdictions can still claim the right of attribution and the right of integrity from the common law actions of defamation and passing off. In addition, the Visual Artists Rights Act 1990 (VARA) in the U.S. also provides certain moral rights protection, although very limited in scope, to those who

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36 Scholars typically attribute the origins of moral rights to Kant and Hegel. Kant categorized authors’ rights as personality rather than property. According to Kant, an author’s words are a continuing expression of his inner self. Therefore, an author’s right in his work is a fundamental personal right. See IMMANUEL KANT, THE PHILOSOPHY OF LAW 64 (W. Hastie trans. 1887) (1797). In contrast with Kant, Hegel regarded intellectual works as external things, rather than as extensions of personality, although Hegel also viewed mental ability as an inalienable part of the self. See G. HEGEL, PHILOSOPHY OF RIGHT Chs. 43, 68 (T. Knox Trans. 1952) (1821). The differences between Kant and Hegel’s thinking in terms of personality theory can be found in the “monist” and “dualist” approaches adopted by the German and French copyright systems. For a discussion of the monist and dualist approaches in Germany and France, see Neil Netanel, COPYRIGHT ALIENABLE RESTRICTIONS AND THE ENHANCEMENT OF AUTHOR AUTONOMY: A NORMATIVE EVALUATION, 24 Rutgers L.J. 347, 378-82 (1993).

37 The legal literature addressing moral rights is huge. See, e.g., ROBERTA KWALL, THE SOUL OF CREATIVITY: FORGING A MORAL RIGHTS LAW FOR THE UNITED STATES (Stanford Univ. Press 2009); ADOLF DIETZ, COPYRIGHT LAW IN THE EUROPEAN COMMUNITY Ch. 5 (1978); Jane C. Ginsburg, MORAL RIGHTS IN A COMMON LAW SYSTEM, 4 ENT. L. REV. 121 (1990); Martin A. Roeder, THE DOCTRINE OF MORAL RIGHT: A STUDY IN THE LAW OF ARTISTS, AUTHORS AND CREATORS, 53 Harv. L. Rev. 554, 557 (1940).

38 In certain jurisdictions, the moral right also includes the right to withdraw, where the author is entitled to withdraw or modify his work as long as he indemnifies the transferee in advance of exercising his right. See Article L121-4 of the French Intellectual Property Code.

39 See The Berne Convention, Art. 6; 2010 Chinese Copyright Law, Art. 10 (1)-(4); Gesetz über Urheberrecht und verwandte Schutzrechte [Urheberrechtsgesetz] [UrhG] [German Copyright Act], Sept. 9, 1965, BGBL.I at art. 11, available at http://www.gesetze-im-internet.de/englisch_urb/englisch_urb.html#p0146.

40 See Comment, An Author’s Artistic Reputation Under the Copyright Act of 1976, 92 Harv. L. Rev. 1490, 1496-1500 (1979) (discussing applicability of state defamation to the right of attribution). See also Edison v. Viva Int’l Ltd., 421 N.Y.S.2d 203 (1979) (sustaining libel action for publication of an article in substantially different format); Granz v. Harris, 198 F.2d 585, 589 (2d Cir. 1952).
can qualify as “authors of a work of visual art.”

The different treatment of moral rights between common law and civil law jurisdictions, as described above, explains the divergence in the concept of authorship in films among national legislations. Under civil law jurisdictions, it is essential to determine the authorship status of a film because it triggers the authors’ standing to assert their moral rights, which are often inalienable and independent from their economic rights, even after these economic exploitation rights have been assigned to the producer. In contrast, under the U.S. Copyright Act, based on the work-for-hire doctrine, individual creators in a film are all treated as “employees” hired by the producer of the film when they agree to sign the work-for-hire agreements, and the producer becomes the default “author” and “owner” of the film. Therefore, it becomes less relevant to define the scope of authorship in films in the United States.

The second reason for the lack of harmonization in defining the authorship in films is that such works involve too many individual contributors. A film production incorporates the creative contributions of, among others, a film director, producer, script writer(s), composers of the music created for the film, cameramen, lighting and sounding engineers, film editors, costume designers, and of course, actors. Nobody disputes that the entire cast has made valuable contributions to the production of a film. Yet how do we decide who should be credited as “authors” of a film in the copyright law context? Should we consider the “literary and artistic contributions” of individual creators? And what about the “technical skills” that are required in making of films?

The Berne Convention eventually decided to be silent in this regard, leaving the subject matter to be decided by its members’ own national legislation. But this is a controversial topic, and will remain so.

B. Ownership of Films and Exploitation Rights

With regard to the ownership of films, there are primarily three approaches around the world: (1) The film copyright system, under which the ownership of a film vests in the producer/maker of the film (such as in the U.S. and the U.K.); (2) The compulsory assignment system, under which the initial copyright ownership of a film vests in individual authors, but then is assigned to the producer of the film, as required by law; and (3) The presumption of assignment system, under which the initial copyright ownership of a film vests in individual joint-authors, but can be presumed to be assigned to the producer.

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42 In France, the moral rights protection is in its most classic format, in which they are perpetual and inalienable. *Code de la propriété intellectuelle* [Intellectual Property Code], Article L121-1.
44 For a discussion of various roles and contributions that individual talents make in a film, see Dougherty, *supra* note 21, at 282-317.
45 The Berne Convention, Art. 14bis (2)(b) & (3).

The first system of film copyright makes the exploitation of a film quite straightforward. Because the system grants the copyright ownership of a film to only one party—the producer/maker of the film—that producer is therefore free to exploit the film as he wishes, subject to his separate agreements with copyright owners of any pre-existing works used in making of the film (e.g. a pre-existing novel or a piece of music.) The United States is one of the most typical examples of such a system.\footnote{47}{Other countries that adopted the film copyright system include: Australia, Bulgaria, Ceylon, India, Ireland, Israel, Japan, Lebanon, Norway, New Zealand, Pakistan, Poland, Portugal, Syria, Thailand, Turkey, South Africa, and the U.K. \textit{See} BIRPI Study, DA 101 (1962). Note that the current Chinese Copyright Law (2010) also adopted the film copyright system, under which the producer of a film is the copyright owner of the film.\footnote{48}{17 U.S.C. § 101.}} As provided in Section 101 of the U.S. Copyright Act, whereas individual creators in a film (e.g. a film director, composer and script writer) are either employees of the producer, or have signed a written instrument agreeing to treat the film as a work made for hire, the producer becomes the copyright owner of the film.\footnote{49}{The BIRPI study identified the following countries as adopting the second system of compulsory assignment, which “grants exclusive rights to a single person whilst maintaining the theory of the film as a collective work:” Czech, Hungary, Iceland, the Netherlands, Romania, and Yugoslavia. DA 101-2 (1962).\footnote{50}{French Intellectual Property Code Section III, Article L132-24 (Audiovisual Production Contracts) \textit{Code de la propriété intellectuelle} [Intellectual Property Code]; \textit{see also} Nina Ñusta, et al., European Film Gateway, \textit{Final Guidelines on Copyright Clearance & IPR Management} at 33-34 (Oct. 2010), available at http://www.pro.europeana.eu/documents/862189/0/EFG_D5.3_Copyright_Clearance.pdf.}\textit{Id.}}

As to the second system of compulsory assignment, the final result is more or less the same as the first system of film copyright, whereas the producer of a film eventually becomes the copyright owner of the film, although its starting point acknowledges that a film is a “collective work” and the authorship/ownership of a film initially vests in individual joint-creators of the film.\footnote{51}{\textit{Id.}}

In terms of the presumption of assignment system, its primary difference from the second system is that the presumption of assignment can be rebutted by individual creators, which could create uncertainty for the producer in its exploitation of the film. France is one of the countries that have adopted the presumption of assignment system. Article L132-24 of the French \textit{Code de la Propriété Intellectuelle} provides that a rebuttable presumption of transfer of exploitation rights from an author to a producer of a film can be established via contract between those two parties.\footnote{52}{\textit{Id.}} However, contractual provisions prohibiting the transfer of exploitation rights may rebut this presumption.

\section*{C. Issue on Choice of Law}

Neither the Berne Convention nor other international treaties defines the
copyright ownership of films, except for broad language that declares it a matter for legislation in the member territory where protection is claimed.\(^{52}\) The flexible but vague language in the Convention creates challenges for films that seek international distribution and cross-border copyright protection.

Based on the choice-of-law rule—lex protectionis—suggested by the Convention, if a U.S. produced film claims copyright protection in China, then the Chinese copyright law applies; and vice versa.\(^{53}\) In practice it seems questionable whether the lex protectionis rule has been universally adopted.\(^{54}\) In the United States, the Second Circuit created its own choice-of-law rule in *Itar-Tass Russian News Agency v. Russian Kurier, Inc.* The case involved unauthorized distribution in New York of newspaper articles that were originally published in Russia.\(^{55}\) On the issue of copyright ownership, the Second Circuit adopted the rule of origin, holding that the Russian copyright law—the law of the country of origin of the copyright—should apply.\(^{56}\) On the issue of infringement, the court adopted the lex loci delicti rule (place of the wrong), holding that the U.S. law where infringement activities occurred should apply.\(^{57}\)

In China, although there is no direct case law applying the choice-of-law rule with respect to imported films, Chinese courts have adopted the rules of lex protectionis\(^ {58}\) and lex loci delicti\(^ {59}\) in other copyright cases involving foreign copyrighted works (e.g. books and music recordings) or foreign nationals (New Zealand author/plaintiff). It is worth noting that neither the *Itar-Tass* case (concerning Russian newspaper articles) nor the Chinese cases (concerning HK music videos, Chinese books, and the New Zealand author/plaintiff) were related to films. Therefore, it remains an open question whether the courts would have ruled differently should the disputed copyright works be films.\(^ {60}\)

\(^{52}\) Berne Convention, Art. 14bis 2(a).


\(^{54}\) See Anita B. Frohlich, *Copyright Infringement in the Internet Age—Primetime for Harmonized Conflict-of-Laws Rules?* 24 BERKELEY TECH. L.J. 851 (2009). The author did a comparative study of the choice of law in copyright cases (not restricted to cinematographic works) among the U.S., U.K., France, Germany and Belgium and eventually concluded that there was no harmonization in the choice of law among these countries.

\(^{55}\) *Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82 (2d Cir. 1998).

\(^{56}\) Id. at 90.

\(^{57}\) Id. at 91.

\(^{58}\) *Gorden Dryden (New Zealand) v. Li Hua Education*, (Beijing High Court 2000), (ruling that since the place where the plaintiff claimed copyright protection was in China, Chinese copyright law should apply in determining the authorship, content, scope and infringement of the alleged copyright in books).

\(^{59}\) *Warner Music Hong Kong Ltd v. Kun Ming Haoledi Entertainment Ltd.*, (Yun Nan Province High Court 2009), (holding that since the place of infringement—performance of the MTV videos—was in China, Chinese copyright law should apply in determining the initial ownership of copyright and infringement analysis).

\(^{60}\) As a matter of fact, the court in *Itar-Tass* specifically noted that Article 14bis 2(a) of the Berne Convention, which addresses the choice of law in terms of cinematographic works, was not relevant in the case. *See Itar-Tass Russian News Agency v. Russian Kurier, Inc.*, 153 F.3d 82, 91 n.12 (2d Cir. 1998).
This is also why I strongly caution the Chinese legislators against the temptation to hastily change the existing law in terms of copyright ownership in films. Any change of the ownership structure in films will not only affect the relationship between individual creators and the producer of a film, but also will have an impact (more likely uninvited and unanticipated) to all imported films or films that claim protection in China, as a result of the *lex protectionis* and the application of Chinese copyright law.

D. Remuneration System

As explained earlier, the primary concern among individual Chinese creators in a film is the lack of opportunity to share in the financial success of the film after their one-time lump sum payment. When we look at the remuneration system around the world, two interesting models stand out. The first model is “the Guild/Union model,” under which the unions representing individual creators play an active role in ensuring their members’ interests are protected. For instance, in the United States, the labor unions in Hollywood (“Guilds”), which represent directors, writers and actors, have made serious efforts to ensure that their members are compensated fairly.61 The second model is what I would call a “Statutory Guidance” model (e.g. France and Germany), under which the legislators have endeavored to provide guidelines as to how individual creators of films should be compensated.62

(1) The U.S. Union Model

In the United States, the relationship between individual creators and the producer of a film is primarily governed under employment contracts. Under the U.S. Copyright Act, a motion picture is deemed a “work made for hire” if a written instrument executed between individual creators and the producer of a film specifically says so, which then makes the production company the “author” and “copyright owner” of the film.63 As such, the producer is vested with all the rights to exploit the film, subject to any agreements with the copyright owners of any pre-existing works that were adopted in making of the film.

The American practice of treating individual creators of a film as “employees,” while vesting copyright ownership of a film in the producer, had

61 The guilds in Hollywood include: Director’s Guild of America (DGA), which represents directors; The Writer’s Guild of America (WGA), which has jurisdiction over writers; and the newly merged Screen Actor’s Guild- American Federation of Television and Radio Artists (SAG-AFTRA), which represents performing artists. See Alan Paul & Archie Kleingartner, *Flexible Production and the Transformation of Industrial Relations in the Motion Picture and Television Industry*, 47 INDUS. & LAB. REL. REV. 653, 666 (1994).


its roots in the studio system of the 1930s-40s. Back then, most writers, directors and actors were employed under exclusive employment agreements with movie studios and were assigned to particular projects as needed.\(^{64}\) Till the early 1950s, the studio system eventually gave way to the current independent talent agency system, but its practice of treating authors as "employees" has persisted.\(^{65}\) During the US Copyright Act revision process, the Writers Guild of America (WGA) attempted to have the work for hire doctrine replaced by a "shop right" concept, which would have only given the producer of a film the necessary rights in the underlying literary works to make and distribute the film. But this proposal was rejected,\(^{66}\) as the House Committee stated, "The presumption that initial ownership rights vest in the employer for hire is well established in American copyright law . . . \(^{67}\)

As a result, the task of securing authors' rights, including the right to continue to share in the proceeds of the film, fell on the Hollywood labor unions (the guilds). Through decades of negotiations, including hard-fought strikes, the guilds have eventually won certain rights and interests for their members. Two aspects of the guild agreements are very important for understanding how individual creators of films are compensated: (1) separation of rights; and (2) residuals (financial participation in supplemental markets).

(a) Separation of Rights

The debate over whether copyrights were "divisible rights" began in the 1930s in the United States when some writers proposed to "lease" their scripts to studios, instead of "selling" the entire copyright.\(^{68}\) The writers believed that by leasing the script, they could have retained the right to develop a script if the studio decided not to put it into production.\(^{69}\) This idea was rejected by studios who believed that copyright was not divisible. Studios were concerned that a license to use the copyright might void the copyright entirely.\(^{70}\)

In the 1951 Writers Guild of America Theatrical and Television Basic Agreement ("MBA"), the first set of separated rights provisions was negotiated, which allowed writers to negotiate for retention of book publishing. Studios also

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\(^{67}\) Id.

\(^{68}\) For a history of the separated rights provision and the legal arguments surrounding the debate, see Grace Reiner, *Separation of Rights for Screen and Television Writers*, L.A. LAWYER, April 2001, at 28.

\(^{69}\) Id.

\(^{70}\) Id. See also MELVILLE B. NIMMER & DAVID NIMMER, *Nimmer on Copyright* (Matthew Bender, rev. ed. 2012).
agreed to pay separate consideration to writers if they were to acquire the publication, stage and radio rights of the script.\textsuperscript{71} In the 1960s, the WGA also obtained rights in other media such as book, stage and radio.\textsuperscript{72} The separated rights provision still exists in the MBA today.\textsuperscript{73}

Based on the current version of the MBA negotiated between WGA and producers, in terms of theatrical motion pictures, the separated rights for writers of a film script include the right to publish the script (publication right), subject to a waiting period,\textsuperscript{74} and the right to produce a stage version of the material (dramatic rights). The writer is also entitled to do the first rewrite of a script, to receive payment for any sequel or series made based on the film, and finally to buy back unproduced material from the company, within five years at the price the writer was paid for the script or the writing service.\textsuperscript{75} In the case of television programs, the writers' separated rights are much broader, including dramatic rights, theatrical motion picture rights, publication rights, merchandising rights, radio, live television and certain television sequel rights.\textsuperscript{76} The broader scope of separated rights in television programs as compared to motion pictures, as explained by David Horowitz, might be related to the historical perception that a film director, more so than a film writer, serves as the artistic “core” of the work; whereas with television, often the opposite relationship is true.\textsuperscript{77}

(b) Residuals

Residuals refer to payments for re-use of materials created by authors that are calculated based on the later sales or exploitation of the work.\textsuperscript{78} It gives individual authors in a film an opportunity to continue to receive payment for re-use of the materials through other media over a long period of time. Residual payments were first negotiated by the WGA in 1950, and have now become an established feature in the entertainment industry.\textsuperscript{79}

The benefits of residuals to the film industry are two-fold. First, it benefits the producer of a film because it allows the buyer/producer of the creative work to pay the creators over a long period of time. This is very important in the film

\textsuperscript{71} Grace Reiner, *Separation of Rights for Screen and Television Writers*, L.A. LAWYER, April 2001, at 28. It should be noted that not all screen writers get separated rights. Only the creators of an original story and characters can claim separate rights.

\textsuperscript{72} Id. at 30-31.


\textsuperscript{74} See MBA, Art. 16A.3.a (publication rights) & Art. 16A.3.b (dramatic rights).

\textsuperscript{75} See MBA, Art. 16B.3.h (rewrite), Art. 16A.5 (sequel), Art. 16A.8 (right to reacquire).

\textsuperscript{76} See generally MBA, Art. 16B (Separation of Rights, Television).


\textsuperscript{79} Id.
industry because the buyer/producer could hardly predict whether a work will become popular and worthy of the investment. On the other hand, it also rewards individual creators financially if the work remains popular in the long run. Another benefit that Catherine Fisk discussed is that residuals help smooth out the irregularities in income that most individual creators face, and therefore, it keeps individual creators in the labor market pool, thus preserving human capital and creativity for the industry.  

(2) The Statutory Guidance Model

In contrast with the U.S. remuneration system where all benefits for individual creators are negotiated through employment contracts, in France and Germany, legislators have endeavored to provide a guideline as to how individual creators of a film—also the initial copyright owners of the film—should be compensated.

As with the concept of “separation of rights” in the U.S., the French Intellectual Property Code also recognizes that individual creators have “reserved rights” that are not automatically assigned to the producer of a film, but must be bargained for individually. Article L132-24 of the French IP Code provides that “[a]udiovisual production contracts shall not imply assignment to the producer of the graphic rights and theatrical rights in the work.”

Also similar to the U.S. concept of “residual payments,” the French IP Code lays out a statutory “proportionate remuneration scheme,” which compensates individual creators in a cinematographic work based on the financial success of the work. Article L132-25 paragraph 2 provides that: “where the public pays a price to receive communication of a given, individually identifiable audiovisual work, remuneration shall be proportional to such price, subject to any decreasing tariffs afforded by the distributor to the operator; the remuneration shall be paid to the authors by the producer.”

Under the German Copyright Act, similar provisions exist in the “German Law to Strengthen the Contractual Position of Authors and Performing Artists” enacted in 2002. The Amendment added two important provisions for

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80 See Fisk, The Role of Private Intellectual Property Rights in Markets for Labor and Ideas, supra note 65.
82 Note that there is a carve-out in the French Intellectual Property Code for foreign films. See Article L111-4 of the French Intellectual Property Code, which provides that foreign works “shall not enjoy the copyright protection afforded by [the] French legislation [to French works],” except for the moral rights (integrity and authorship). In other words, it can be interpreted that the French remuneration scheme for cinematographic works does not apply to foreign movies.
individual authors of a cinematographic work—“equitable remuneration” and “further participation by the author.” To determine whether remuneration that authors receive is “equitable,” the Amended Law states that: authors of a cinematographic work have the right to receive equitable remuneration based on the “customary and fair” industry practice. As to what constitutes “customary and fair” practice, the law has cited the following factors for consideration: the manner and extent of the exploitation granted, in particular the time, duration and other circumstances of the grant. Second, if the remuneration to authors is found to be inequitable—“disproportionate to the proceeds and benefits derived from the exploitation of the work”—then the producer of a film, at the request of authors, are obliged to modify the remuneration agreement and grant the author “further equitable participation appropriate to the circumstances,” no matter whether such a change in the amount of the proceeds or benefits is foreseeable or not.

III. COPYRIGHT PROTECTION OF FILMS IN CHINA

The Chinese Copyright Law has been revised twice, in 2001 and 2010, since the enactment of the first PRC Copyright Law in 1991. It is believed that foreign trade has been one of the driving forces pushing the Chinese copyright law reform during the past three decades. In the 1980s, several rounds of U.S.-China intellectual property negotiation led to the drafting of the first Chinese Copyright Law in 1990. In 2001, in order to join the WTO and comply with the TRIPS agreement, China revised its copyright law again. In 2010, the Chinese Copyright Law was revised for the second time in response to the WTO DSB Panel Report regarding the US-China intellectual property dispute. In this revision, Chinese legislators only made necessary changes, and the remainder of the copyright law remains intact as its 2001 version.

Because of historical reasons, the entire Chinese IP system was modeled

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86 Id. at Art. 32(a).
87 Id. at Art. 32.
88 Id. at Art. 32 (a).
92 Specifically, Article 4 was removed in the 2010 revision, which was accused of violating the TRIPS agreement. Article 4 of the 2001 P.R.C. Copyright Law provided that “[w]orks the publication or distribution of which is prohibited by law shall not be protected by this Law.” It was argued that if a work fails to pass the censorship review of the Chinese authorities, thus “prohibited by law,” then it cannot claim copyright protection, which is found to be violating the TRIPS agreement, as concluded by the WTO panel.
upon the continental European system (e.g. France and Germany), including protection of moral rights and economic rights of authors, and distinction between authors’ rights (droits d’auteur) and neighboring rights (droits voisins). It was not until more recently that Chinese legislators and academics started to consider IP related statutes and cases from the U.S. IP system. For good or for bad, one interesting characteristic of the Chinese IP system, including its Copyright Law, is that although it resembles the Continental European civil law system in most aspects, occasionally we find influences from the Anglo-American common system as well. Copyright protection of films, it turns out, is no exception.

A. 1990 PRC Copyright Law

It should be noted that when China was drafting its first copyright law in 1990, it was not a member of the Berne Convention or the TRIPS yet, and therefore, the legislation was primarily mirrored upon the Continental European model where the legislators previously studied.

As with its German counterpart, the 1990 Chinese Copyright Law also distinguished “creative video works, i.e. cinematographic works, television and video works” from “video recordings,” which was defined as “the original recordation of a series of related images, with or without accompanying sounds, other than cinematographic and television and videographic works.” Clearly, Chinese legislators intended to make a distinction between “creative video works” and “mere mechanical video recordings,” the latter of which is only subject to neighboring rights protection. The need to distinguish between creative video works and non-creative video recordings had been reinforced by the Chinese Copyright Office and various court opinions.

93 When China was establishing its IP system in the early 1980s, the first group of Chinese legislators and academics were sent to Germany, France, the U.K. and the U.S. to study their IP systems. It turned out that those who were responsible for drafting the earliest Chinese IP laws were heavily influenced by the German and French IP systems, especially in the area of copyright law and trademark law. For a good summary of the Chinese IP system and its relationship with international treaties, see Zheng Chengsi, The TRIPS Agreement and Intellectual Property Protection in China, 9 DUKE J. COMP. & INT’L L. 219 (1999).
94 Some of the recent Chinese IP legislation is more influenced by the U.S. IP system. For instance, the Regulation Protecting the Rights of Communication over the Internet (2006) was modeled upon the 1998 U.S. DMCA regulation. Moreover, in the current Chinese Copyright law reform, Chinese legislators also seem quite receptive to feedback provided by its U.S. counterparts, including the USPTO, U.S. Copyright Office and the U.S. industry players.
95 China joined the Berne Convention in October 1992 and became a member of WTO in December 2001.
97 1990 P.R.C. Copyright Implementing Regulations, Art. 6 (1) ¶ 3.
98 Article 5 (1) paragraph 7 of the 1991 P.R.C. Id.
99 See Chapter VI of the 1990 PRC Copyright Law; Chapter V of the 1991 PRC Copyright Implementing Regulations."
100 See Response from the Chinese Copyright Office Regarding the Nature of Karaoke Video Tapes, (Sept. 27, 1993), in which the Chinese Copyright Office recognized karaoke video tapes as creative video/cinematographic works.
101 See Guidance from Beijing High Court, (1996) (holding that “video works” refer to creative
but a consensus on how to draw such a distinction could not be reached.

In the 1990 version of Chinese Copyright law, authorship in a film included: “a film director, script writer, lyricist and composer for the music created for the film, and cameraman etc.” This was very similar to the Continental European approach, which includes an illustrative list of presumed authorships in films.

It came as a surprise, therefore, when Chinese legislators decided to follow the common law approach, in terms of ownership in a film, by designating the “producer of a film” as the statutory copyright owner of a film “in respect of other rights” not reserved by authors. It seems that Chinese legislators were trying to grant different rights—“moral rights” and “economic exploitation rights”—to different players in a film, with moral rights to individual authors and economic rights to the producer of a film.

In terms of remuneration between individual creators and the producer of a film, the 1990 Chinese Copyright law was silent. To make things even more confusing, with respect to the use of pre-existing works, the law required the producer of a “film” to get permission from and make payment to the copyright owner of the underlying pre-existing work for the use of such pre-existing works. Yet, with “television programs,” the law did not require the producer of television programs to get permission from the copyright owner of pre-existing published works. Rather the compulsory license scheme kicked in, and the producer of television programs only needed to compensate the owner of pre-existing published works for such use, without the need to seek permission. The different treatments to the use of pre-existing works between making of “films” (permission and payment required) and making of “television programs” (no permission required) was confusing and had drawn strong criticism since its implementation.

B. 2001 PRC Copyright Law

As with the 1990 Chinese Copyright Law, the 2001 Copyright Law distinguishes “creative video works” (subject to authors’ rights protection) from “non-creative/mechanical video recordings” (subject to neighboring rights protection). At the same time, there has been a rich body of case law

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102 1990 P.R.C. Copyright Law, Art. 15 (1).
103 Id. at Art. 15 (2).
104 Id. at Art. 40. The exception to this provision is when the copyright owner of the pre-existing published works explicitly prohibited such use, for instance by posting a notice with the submission of the article, then the producer of television programs should not make such uses.
105 Id.
106 2002 P.R.C. Copyright Implementing Regulations, Article 5(1) ¶ 3. For a detailed discussion regarding “video recordings” versus “video works”, see Seagull HY Song, "How Should China Respond to Online Piracy of Sports Telecasts? A Comparative Study of Chinese Copyright Legislation to the US and..."
developed on this issue, although the opinions often conflict with one another.\textsuperscript{107}

For example, in \textit{Guangzhou Jinguangyuan Karaoke v. Warner Music},\textsuperscript{108} the Guangdong High Court ruled in favor of the plaintiff (Warner) by holding that “music videos should be categorized as creative cinematographic works, thus subject to authors’ rights protection.”\textsuperscript{109} However in a similar case brought by \textit{Go East Entertainment Ltd.} in Shanghai, the Shanghai High Court found that the music video in that case was not a creative cinematographic work because it was a “mere mechanical recording of a live stage show,” and therefore was only subject to neighboring rights protection.\textsuperscript{110} The challenge in distinguishing creative film works from non-creative video recordings not only exists in music videos,\textsuperscript{111} but also in flash works,\textsuperscript{112} animated pictures,\textsuperscript{113} 3D animation,\textsuperscript{114} reality TV shows,\textsuperscript{115} and New Year’s Gala shows,\textsuperscript{116} among others.

On the topic of authorship in films, the 2001 version does not make any substantial changes from its 1990 version.\textsuperscript{117} However in terms of ownership in films, the statutory language moved more towards the film copyright system, providing that “the copyright in a cinematographic work…shall be enjoyed by the producer of a film…” although individual authors can reserve their rights of


\textsuperscript{108}Guangzhou Jinguangyuan Karaoke Club Ltd. v. Warner Music HK Ltd., (Guangdong High Court 2005); Shanghai Kylin Mansion Culture & Entmt’ Co. v. Go East Entmt’ Co., (Shanghai High Court 2005); Shanghai Haledi Music Entmt’n Ltd. v. Sony Music Entmt’n HK Ltd., (Shanghai High Court 2005).

\textsuperscript{109}Guangzhou Jinguangyuan Karaoke Club Ltd. v. Warner Music HK Ltd., (Guangdong High Court 2005). In this case, the plaintiff Warner Music sued the defendant (a KTV bar) for the unauthorized display of its music videos in the bar. One of the defendant’s defenses was that music videos are not creative cinematographic works, thus not entitled to authors’ rights protection. For a more detailed discussion of the case, see \textit{SEAGULL HAIYAN SONG, NEW CHALLENGES OF CHINESE COPYRIGHT LAW IN THE DIGITAL AGE}, (Wolters Kluwer 2011).

\textsuperscript{110}Id. See also Jinguangyuan, 2005 Yuegaofa minsan zhongzi No. 357, at 3-4.

\textsuperscript{111}Shanghai Kylin Mansion Culture & Entmt’ Co., (Shanghai High Court 2005).

\textsuperscript{112}Shanghai Haledi Music Entmt’n Ltd. v. Sony Music Entmt’n HK Ltd. (Shanghai High Court 2005).

\textsuperscript{113}Beijing Huaxia Golden Horse Culture Commc’n Ltd v. Wuhan Ledi Bear Entmt’ Ltd., (Hubei High Court 2009). The court ruled that “the series of images and pictures generated by flash works reflect the creativity of the authors and embody the intellectual contributions of a script writer, director, cameraman, editor and other staff. Therefore, it contained enough originality and belongs to creative cinematographic works.”

\textsuperscript{114}Fudan Kaiyuan Culture Ltd. v. Shanxi Culture Audio-Visual Pub’n House, (Guangzhou Intermediate Court 2010).

\textsuperscript{115}Shenzhen dianshi Digital Ltd v. Shenzhen TV Station, (Guangdong High Court 2006).

\textsuperscript{116}Hunan Happy Sun Interactive Entmt’n Ltd. v. Beijing Shilian Tianxia Tech. Ltd., (Beijing Changping District Court 2012). See also Hunan Mouse Creative Culture Ltd. v. Shanghai Internet Ltd., (Shanghai No.1 Intermediate Court 2011).

\textsuperscript{117}See Chen Peisi v. China Int’l TV Station, (Beijing No.1 Intermediate Court 1999); and also Chen Peisi v. Guangdong Zhongkai Culture Dev. Ltd., (Shanghai No. 2 Intermediate Court 2001). In both cases, the courts found the New Year’s Gala shows to be “creative television productions,” in which the works embodied “creations from director, master ceremony, stage designer, light engineers, costume designer, etc.” However, in CCTV v. Shanghai Potato Internet Ltd., (Shanghai Pudong District Court 2009), the court categorized the show as a “collective work” based on multiple contributions of individual creators. Yet in another case CCTV v. Beijing Zhitong (Beijing No. 1 Intermediate Court 2011), the Beijing court found the work to be a “mere mechanical recording of a live performance,” thus is only subject to neighboring right protection.

\textsuperscript{118}2001 P.R.C. Copyright Law, Art. 15(1).
Two major changes were made in the 2001 revision with respect to films. First, Article 15 provides a legal basis for authors in a film to be compensated by the producer of a film. This was supposed to be an improvement from the 1990 version, which did not even address the compensation issue between individual authors and the producer of a film. However, the ambiguous language in Article 15 of the 2001 Copyright Law fails to provide sufficient protection for individual authors in a film. Article 15 states that authors “shall have the right to receive remuneration pursuant to the contract concluded with the producer.” If interpreted literally, Article 15 sets out two prerequisites for authors in a film to receive remuneration: (1) first there has to be a contract signed between authors and the producer of a film; and (2) the contract has to include specific remuneration terms. In other words, in the absence of such a contract or if the contract fails to spell out remuneration terms between the parties, it is unclear whether the producer of a film is still obliged to compensate the individual authors. The ambiguous language has triggered disputes between individual authors and the producer of a film in terms of remuneration, thus fueling guilds to lobby for the legislative changes described in the beginning of the paper.

The second major change that occurred in the 2001 revision was to clear the confusion caused by the different treatments of pre-existing works when making of films versus making of television programs. The revised language requires that to “make” a “cinematographic work” (including both films and television programs), based on pre-existing works, the maker/producer needs to get permission from and make payments to the copyright owners of the pre-existing works. In contrast, to “broadcast” the pre-existing published works, no permission is required, but payment must be made to the copyright owners of the pre-existing works.

C. The Current PRC Copyright Law Reform

The current PRC Copyright Reform officially started in October 2012 and has carried high expectations from scholars, practitioners and legislators in the IP field both at home and abroad. Unlike the two earlier revisions in 2001 and 2010, where the Chinese government was believed to be responding to pressure from the United States and the international community to fulfill its treaty commitment, this revision was initiated by the Chinese Copyright Office, which noticed the inadequacy of the current law and has been advocating for a
comprehensive reform.

When it comes to copyright protection of films, two voices representing different interests groups are most noticeable in the legislative debate. On one side are individual creators of films, who have experienced difficulty receiving fair compensation from the producer of a film, either due to the ambiguous language in the Copyright law or restrained by the underdeveloped practice in the industry. These creators have been lobbying to replace the current “corporate/producer ownership” structure with the “individual author ownership” structure, hoping that the change of ownership could address their dilemma. In a different camp, producers of films are strongly resisting to such a proposal, arguing that the change of ownership structure will increase transaction costs and lead to potential holdup problems, making it more expensive and riskier to make a film.

Other issues were also brought up in the discussion of copyright protection of films. For instance, should China continue to use the term “cinematographic works” or adopt a new term “audio-visual works”? In terms of the distinction between “creative cinematographic works” and “non-creative/mechanical video recordings,” should the new draft maintain such a distinction like the German Copyright Act, or should it follow the U.S. approach and treat them the same? In terms of authorship in a film, should China reevaluate the current list of authors in a film? And of course, in terms of copyright ownership of a film and the compensation scheme between authors and the producer of a film—the most debated topic on this subject—how should Chinese legislators strike a balance between the two groups?

IV. PROPOSAL FOR CHINA: A HYBRID MODEL

In the following paragraphs, I will first summarize some of the proposed changes on the subject, and then lay out my own suggestions. Some of my key arguments include that: 1) the copyright ownership of a film should remain unchanged—vesting in the producer of a film; and 2) a more balanced and sophisticated remuneration scheme should be introduced between individual authors and the producer of a film.

A. Treat All “Video Recordings” Equal

One of the proposed changes in the Chinese Copyright Law is to abolish the different treatment between creative video works and non-creative video recordings. As explained earlier, China’s current approach has a strong German influence, distinguishing creative video works from non-creative video recordings, and protecting the former with authors’ rights and the latter with neighboring rights. However, this approach has attracted numerous disputes, and the line to distinguish the two is often blurry. Despite the legislative and judicial efforts to clarify the matter, judges are often presented with challenges
of drawing a line between the two.

One suggestion to resolve the problem is to follow the U.S. approach and abolish the different treatments between creative video works and non-creative video recordings. Supporters of this approach argue that by treating all audio-visual works the same—affording them with authors’ rights protection—the related copyright disputes will decrease and the resources of the court system will be better utilized. The new approach, as explained by its supporters, is not to say that China will lower its creativity threshold for copyrighted works and grant blanket protection for all audio-visual works regardless of their creativity. Rather, to qualify as a copyrightable work, an audio-visual work still needs to contain enough originality in its creation and meet other copyrightable criteria as required by the law.\(^\text{123}\)

B. Keep The Ownership Structure: Film Ownership Vests with Studio

One key argument I make in this paper is that the ownership structure of films should remain unchanged—vesting the ownership with the producer of a film. The debate as to what constitutes a better model for the ownership of intellectual property rights has continued for decades, if not longer. Scholars who advocate for individual author-ownership trace the philosophic origins back to Kant and Hegel’s personhood theory, emphasizing the relationship between the author and his work.\(^\text{124}\) In contrast, those who support corporate-ownership structure find their arguments in the incentive economic theory and believe that the ownership of intellectual property rights should be placed with those who are best positioned to internalize costs and benefits in a way that will give rise to adequate incentives to produce socially desirable goods.\(^\text{125}\)

The following are my arguments as to why I think that corporate ownership is the best structure in terms of copyright protection for films, and why I am not inclined to support either the individual creator ownership proposal or the contract autonomy proposal.

(1) Problem with the Individual Creator Ownership Proposal

One of the reasons justifying corporate ownership in intellectual property rights is the incentive economic theory, which examines the transaction cost

\(^{123}\) For instance, to qualify as a copyrightable work in China, the work needs to meet the “originality” and “dupllicable” threshold. Note that unlike the U.S. Copyright Act, the Chinese copyright law does not have the “fixation” requirement, thus oral works that are not fixed on a tangible medium, such as a public speech or live performance, are also protected works in China. See Article 2 of the P.R.C. Copyright Implementing Regulations.

\(^{124}\) See Hughes, The Philosophy of Intellectual Property, supra note 12.

\(^{125}\) See supra note 17.
associated with the transfer of resources from one economic unit to another, and asks a fundamental question: to whom should we allocate the initial ownership of copyrights, in order to maximize the public good?

The transaction cost theory was advanced in the twentieth century by a number of economists, including Ronald Coase, Oliver Williamson and others. To explain the theory in a simple way, it requires us to consider not only the cost of making things, but also the cost of transferring ownership from one economic agent to another. One application, for example, is in the area of specialization or “the division of labor.” When evaluating the benefits of specialization in any specific case, transaction cost theory advises to consider not only the gains from specialization, but also the costs associated with it. Michael Heller further argues that, in terms of ownership for property rights, granting many property rights to multiple owners might create what he calls an “anticommons,” producing more problems than it solves. Unlike the classic concept of the “tragedy of the commons,” the anticommons theory is more concerned with the under-usage of the resources as a result of the joint-ownership by multiple independent right holders. Under-usage occurs because of the high costs of dealing with multiple, independent right holders.

When applying the anticommons theory to explain the transaction cost related to intellectual property rights, Robert Merges observed four factors that courts cite when deciding IP ownership related cases, including the potential employee holdup problem and the difficulty in determining and compensating actual contributors in a collective work. Merges noticed that the pre-assignment of IP ownership to one single party (the employer) can avoid the potential employee holdup problem and reduce transaction costs, thus justifying the decision to vest the ownership of inventions to the employer.

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126 Oliver Williamson advanced the transaction costs economic theory (TCE), which studies the problem of hazards in the transfer of resources from one economic unit to another. See OLIVER E. WILLIAMSON, THE MECHANISMS OF GOVERNANCE 3 (1996).

127 Ronald Coase was the first economist to have an in-depth theory about the role of property rights in economic exchange, which won him a Nobel Prize in 1994. See Ronald H. Coase, The Problem of Social Cost, 3 J.L. & ECON. 1 (1960).

128 Oliver Williamson, as well as other scholars, pioneered the transaction cost theory. See Williamson, supra note 126, at 3.

129 Specialization was generally encouraged because it would help with overall economic growth based on the theories of Adam Smith and other economists. See George J. Stigler, The Division of Labor is Limited by the Extent of the Market, 59 J. POL. ECON. 185 (1951) (quoting Adam Smith).


131 The tragedy of commons theory argues that because human beings often act independently and rationally out of self-interest, vesting too many property rights with numerous rights holders will create an over-usage and exhaustion of the resources, thus hurting the group interest in the long run. See Garrett Hardin, The Tragedy of the Commons, SCIENCE, Dec. 13, 1968, at 1243-48.

132 See Heller, supra note 130130.

133 The four inefficiencies that courts cite in deciding the invention ownership related cases, as summarized by Robert Merges, include: (1) bargaining and transaction costs; (2) the difficulties of monitoring and compensating the members of R&D groups; (3) principal-agent problems; and (4) a change in the implicit risk allocation between employer and employee. See Robert P. Merges, The Law and Economics of Employee Inventions, 13 HARV. J. L. & TECH. 1, 12 (1999).

134 Id.
instead of their employees.\footnote{135}{Id. at 12-20. Other scholars, however, disagree on the economic rationale behind employer ownership. \textit{See} \textsc{Catherine Fisk}, \textsc{Working Knowledge: Employee Innovation and the Rise of Corporate Intellectual Property}, 1800-1930 (2009) (arguing that “politics” drove the employer-ownership rule, and that the economic rationale for employer ownership is wrong).} He also noted that where the invention involves the team of multiple employees from R&D centers, it would be difficult to determine the actual contributors of the invention, thus justifying the rationale of vesting the ownership of the invention in the employer as well.\footnote{136}{Id. at 20-26.}

The aforesaid rationales, although primarily based on the employer-employee relationship in patents, also work perfectly well with the scenario of films.\footnote{137}{\textit{See} Casey & Sawicki, \textit{supra} note 17.} First of all, a film embodies many contributions from multiple individual creators, including a film director, script writers, composers, cameraman, editors, costume designer, actors and lighting engineers, to just name a few. To determine whose contributions count and whose do not is definitely not an easy task, if not impossible.\footnote{138}{\textit{See} Dougherty, \textit{supra} note 21.} The divergence in the definitions of authorship in a film is already quite self-evident. Second, to grant the ownership of a film to individual creators is likely to create the potential holdup problem—with multiple individual creators claiming a share of the ownership of a film—thus increasing transaction costs and creating a delay in the dissemination of the film. It is important to realize that in terms of the filmmaking industry, writing a script and directing a film are certainly important, but it is equally important to “make” a film and “distribute” a film so that the audience could eventually watch and appreciate the film. In addition, any additional transaction costs that producers of films have to bear will be eventually shifted to us, the consumers. Therefore, when deciding to whom to allocate the ownership of films, it is not only the incentives of individual creators that we need to take into consideration, but also the incentives of film producers, who invest big dollars and take the responsibility and initiative in the filmmaking and distributing endeavor, as well as the interests of the general public, who embrace films as an indispensable part of our culture. In short, allocating the ownership in a film to individual creators is likely to cause potential holdup problems, create uncertainty in film-making process, increase transaction costs, reduce incentives for film producers to invest the necessary time and money, and eventually hurt the welfare of the public.

The adoption of the incentive utilitarian theory by the U.S. copyright law probably explains why the Hollywood model—vesting ownership of films in the producer of a film based on the work for hire doctrine—is by far the most successful filmmaking model in the world. Across the European civil law system, which emphasizes the personhood theory and recognizes moral rights as an essential part of authors rights, we also see that the ownership of films is eventually assigned to the producer of a film, either by presumption of
assignment or by compulsory assignment. As such, if China is serious about developing its film industry, it should consider maintaining the current ownership structure—vesting the ownership of films in the producer of a film.

(2) Problem with the Contract Autonomy Proposal

I would also be cautious about the proposal of leaving film ownership to be decided by the contracting parties—usually individual authors and producer of a film. As illustrated by the “new property rights” (NPR) theory pioneered by Oliver Hart, Sanford J. Grossman and John Moore, contracts are never perfect, either because drafting is not perfect or because they are difficult to enforce. Therefore, to overcome the incompleteness of contracts, the recommended solution becomes a pre-assignment of a property right to one or the other of transacting parties before contractual exchange takes place.

The contract autonomy proposal is especially problematic in China because China’s film industry remains primitive, the pool of entertainment attorneys being small and the overall IP enforcement remains challenging. Lots of individual creators do not hire attorneys when they walk into negotiations. Even when they do, the sophistication level of Chinese entertainment law attorneys is often not comparable with their counterparts in the U.S. After all, the U.S. movie industry has been around for almost a hundred years, thus having cultivated enough seasoned attorneys in this field. As such, the proposal of contract autonomy will not help Chinese individual

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141 See supra note 19, Merges quoting Oliver Hart & John Moore, Foundations of Incomplete Contracts, 66 REV. ECON. STUD. 115 (1999), (noting that because parties to a contract can never specify and exhaust all the possible outcomes and scenarios in advance, contracts can never be complete and perfect).
142 Id.
143 Id.
144 During my earlier life, as former partner at a leading Chinese law firm and former Senior IP Counsel for a big U.S. studio, one of my job responsibilities was to identify experienced entertainment attorneys in the region. Very often, the search efforts turned futile, and the options for sophisticated entertainment attorneys in China are very limited. See China’s Looming Entertainment Problem: Not Enough Lawyers, THE HOLLYWOOD REPORTER, (June 21, 2013), http://www.hollywoodreporter.com/thr-esq/chinas-looming-entertainment-problem-not-572629 (discussing the lack of experienced entertainment lawyers in China).
145 The reasons for individual creators not hiring entertainment attorneys in business negotiations are multifold: First, the legal development in China is still young and most Chinese individuals are not used to the idea of hiring attorneys yet. Second, the cost of hiring attorneys could be high and most individual creators either cannot afford or are not willing to bear such costs. Third, China traditionally did not have a culture of litigation. Part of the traditional culture seems to relate the role of lawyers with trouble, punishment (criminal code) and humiliation, and therefore, attorneys (mostly litigators) are not always welcomed in ordinary people’s lives although this perception has changed in recent decades as a result of the open door policy. We start to witness more and more litigation brought by individuals as their awareness of protecting their own rights and interests have increased.
creators much. Instead, what is more likely to happen is that big studios with deep pockets and represented by sophisticated attorneys will use the contract autonomy principle to take full advantage of individual creators, who lack the bargaining power and representation of good attorneys.

Having said that, I agree the contract autonomy proposal should still be encouraged in the long run in view of its long-term benefits to China’s legal and political system. Chinese legal system has long been criticized for its “rule of man” and “rule by law,” instead of “rule of law.” Liberals and scholars have advocated for less government intervention and more recognition and respect for individual freedom and rights. The contract autonomy proposal, therefore, can be considered as a significant shift from the traditional approach of central-planned economy to a more free-market economy, from the old model of big government regulation towards a growing respect to the autonomy of individual contracting parties.

However, in the context of China’s entertainment industry today, I am concerned that it is a little bit premature to advance the contract autonomy proposal because individual creators are often not as sophisticated as their negotiating counterparts (big studios). The contract autonomy proposal, although good in theory, might not bring the results that advocates ask for. In terms of the unions (guilds) who represent individual creators, their role seems to be quite limited too, which we will discuss shortly. As such, the contract autonomy proposal lacks a solid foundation to make a real impact in today’s China’s film industry, although it might become more effective in the future when the industry becomes more mature and the legal and enforcement system improves.

Last but not least, I want to emphasize that the legislative process is a very serious undertaking, especially when it relates to the allocation of ownership to a property. The idea of flipping the current “corporate ownership” structure to an alternative model would be disruptive and costly. If China had adopted a different model thirty years ago and vested copyright ownership of a

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146 Confucius has a strong and lasting influence on the “rule of man” philosophy in China’s culture and history. He believes that the success in ruling a country lies in the wisdom and moral ethics of its rulers. He questions the role of law (orders) and argues that in a well-maintained society, the role of law should be minimum. See Tsze-Lu, Confucian Analects, Book XIII, Chapt. VI., quoting a conversation between Confucius and his student Tsze Lu, “[t]he Master said, ‘When a prince’s personal conduct is correct, his government is effective without the issuing of orders. If his personal conduct is not correct, he may issue orders, but they will not be followed.”

147 For an interesting discussion regarding Chinese political and legislative reform from the “rule of man” and “rule by law” to the proposal of “rule of law,” see WU Nansheng, One Word Change for the Past 20 Years, SOUTHERN METROPOLIS DAILY, April 1, 2008, available at: http://epaper.oeeee.com/A/html/2008-04/01/content_428626.htm. Professor WU Nansheng is a well-known Chinese scholar and professor in constitutional law.

148 Id.

149 I should admit that I was favoring the contract autonomy proposal in the beginning of the legislative debate. Yet after I began to see the reality in China’s entertainment industry—how unsophisticated the individual creators are and how limited a role their unions play—I eventually concluded that the contract autonomy proposal is too premature and idealistic for today’s China.
film in individual authors, it would have been a different story. But to ignore the reality and propose an overthrow of an existing legal framework, without solid justifiable reasons, will have serious unintended consequences, such as causing confusion in the industry, changing expectations and the balance of powers among various players, and inviting unnecessary litigation. Therefore, to address the concerns of individual creators, we need to find an alternative solution other than overthrowing the current ownership structure in films.

C. New Compensation Scheme: The Hybrid Model

Although I assert that copyright ownership in a film should vest in the producer of a film, I recognize that the concerns of individual creators, who suffer from weak bargaining power and inadequate remuneration, are real and valid. The solution to address such concerns, however, does not lie in the ownership change as proposed by the guilds, but can be found instead by introducing a more sophisticated remuneration system to China’s film industry.

The remuneration system that I propose includes the following: (1) recognition of copyright as separated rights; (2) issuance of legislative guidelines on minimum remuneration standards to which individual creators are entitled; and (3) development of strong guilds to represent their members’ interests.

(1) Recognition of Separation of Rights

First of all, it is essential to recognize that copyrights are divisible, thus laying out the legal foundation for creators (e.g. writers) to retain other rights that are not separately assigned to or acquired by the producer of a film. This could be achieved by explicit provisions in the Copyright Law (as with the French Intellectual Property Code\textsuperscript{150} and the German Copyright Act\textsuperscript{151}) or by specific employment agreements (the U.S.).

(2) Issuance of Legislative Guideline

Moreover, the issuance of legislative guidelines as to how individual authors should be compensated could also help protect individual authors’ interests. In France, the Intellectual Property Code requires that compensation to authors in a film needs to be “proportionate” to their individual contributions.\textsuperscript{152} In Germany, its Copyright Act includes similar requirements—“equitable remuneration” for authors\textsuperscript{153}—and the failure to

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\textsuperscript{151} Gesetz über Urheberrecht und verwandte Schutzrechte [Urheberrechtsgesetz] [UrhG] [German Copyright Act], Sept. 9, 1965, BGBl. I at art. 89, available at http://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html#p0146
\end{flushright}
provide such compensation will lead to the voidance of the contract.\textsuperscript{154}

There might be a few follow-up questions in response to my aforesaid proposal. The first question might be how effective the government’s intervention could be. After all, isn’t it better to leave the pricing scheme to the “invisible hand” of the market? How does the government determine a work’s value and what compensation is fair for authors? My response to such questions, is that, the government does not know, and will not know. But we are not asking the government to draft a detailed price sheet for the remuneration standard between authors and producer of a film. Instead, all we ask of the legislators is to spell out, either through its Copyright law or through case law, that: (1) copyright is divisible, therefore establishing the legal basis for authors to request separate payment for separate rights; (2) individual authors are entitled to \textit{proportionate} proceeds or \textit{equitable} remuneration from the exploitation of the work (similar to the French or German Code); and (3) establish an effective remedy mechanism for authors if their remuneration is not equitable/proportionate to their contributions.\textsuperscript{155}

Other skeptics might challenge the term “proportionate” and “equitable remuneration” as too vague and ambiguous. Would it not be better if the law could clearly spell out the minimum percentage to which individual creators are entitled, for instance, borrowing the percentage from the MBA agreement negotiated between the Hollywood unions and its producers? My answer would be: it can, but \textit{not} through the law. The Law, in my opinion, should only lay out the basic principle in setting remuneration standards for individual authors. The specific remuneration rate, such as the minimum percentage of running royalties or a bonus threshold, can be suggested by the artists’ unions or issued by the corresponding agency, as the “Best Practice Guideline,” subject to review by industrial players on an annual basis. After all, it does not hurt to borrow the decade-long hard-earned wisdom and fruits of the U.S. guilds. Or it could also be developed through the case law. For example, the Japanese case law has helped a lot in clarifying Article 35 of Japanese Patent Law in respect of fair remuneration in employee-related inventions.\textsuperscript{156} But my point is that the Copyright Law itself should avoid going into too much details with the minimum remuneration rate, and should only touch upon the basic principle that individual creators are entitled to “equitable” or “proportionate” remuneration.

To summarize, in light of the individual authors’ overall weak bargaining

\textsuperscript{154} \textit{Id.}

\textsuperscript{155} For instance, the German Copyright Act allows individual authors to request for modification of contract if the remuneration they have agreed upon earlier turns out to be not equitable to the financial success of the film. The remedy could be at the courts’ discretion when they review the case.

power and lack of familiarity and sophistication in contract negotiations, the issuance of legislative guideline would help strengthen the leverage of individual authors in their negotiation with the producer of the film, therefore striking a better balance between protecting authors’ economic interests in receiving a fair compensation, and at the same time, respecting the producer’s interests and ability to exploit the film.

(3) Development of Guilds.

In addition, unions (guilds) representing individual authors should be further developed to better protect interests of their members. The unions in China face unique challenges compared with their counterparts in the west world. First of all, Chinese social organizations usually need to affiliate themselves with Chinese government institutions in order to obtain legitimate status.\(^\text{157}\) Based on the current registration requirements, non-government organizations (NGOs) are required to find an official sponsor and obtain a license from the Ministry of Civil Affairs to operate legally in China.\(^\text{158}\) The official sponsor is usually a Chinese government agency. This threshold has been criticized by lots of NGOs as being too high.\(^\text{159}\) For those NGOs that cannot meet the threshold, they either choose to operate without registration as “grassroots NGOs” or register as “for-profit corporations.”\(^\text{160}\)

The counterparts of Hollywood unions in China—Chinese Writers Association (CWA), Chinese Musicians Association (CMA) and Chinese Directors Association (CDA)—are all legitimate NGOs that have obtained blessings from the Chinese government. The legitimate status of these associations certainly helps their operation in China, and the official affiliation sometimes provides them with a unique opportunity to get their voices heard by the state legislators. The current copyright legislative lobby from unions representing individual creators is one of such examples demonstrating their influence and power.

The downside of such official affiliation, however, is that these unions


\(^{158}\) In China, non-government organizations are separated into three major categories: social organizations (shehui tuanti, 社会团体) which are the equivalent of membership associations and include many trade and professional associations; civil non-enterprise institutions (minban fei qiye danwei, 民办非企业) which are the equivalent of nonprofit service providers; and foundations (jijinhui, 基金会). See The Chinese Social Organization Registration Rule Arts. 2, 6 & 10 (1998), available at http://cszh.mca.gov.cn/article/zcfg/200804/20080400013543.shtml.

\(^{159}\) It should be also noted that the Ministry of Civil Affairs recently announced its plan to relax the registration requirements, yet it is unclear how it will be implemented. See NGO Law Monitor: China (July 1, 2014), available at http://www.icnl.org/research/monitor/china.html.

might not be able to fully represent interests of their members as a result of conflict of interests. In the United States, the Hollywood labor unions have been able to secure the minimum compensation packages for their members through decade-long negotiations and sometimes hard-fought strikes.\textsuperscript{161} In China, strikes, sit-ins and street demonstrations are generally discouraged or even prohibited by the government because of the political sensitivity that such events might trigger.\textsuperscript{162} Therefore, it is questionable whether the unions representing individual creators in China will effectively exercise their collective bargaining power, including organizing strikes if necessary, when negotiating with producers of films. When the unions are confronted with conflict of interests, between fighting the best remuneration package for their members with all means necessary and maintaining the social order as expected by the government, it is unclear how they will respond. It is hoped that with the deepening of the political reform that is underway, NGOs in China will enjoy more independence and flexibility in pursuing their course and representing their members. But before that is accomplished, it is important to have the legislative guidelines in the interim to ensure that the interests of individual creators are addressed.

V. CONCLUSION

The current Chinese Copyright Law Reform has trigged a live debate as to who should own copyright in films. Individual creators in films, represented by their guilds, argue that copyright ownership in a film should be vested with them, while producers of films strongly object to such a proposal.

I argue that we should keep the current “producer ownership” structure because it will be too disruptive to overthrow a 30-year old legal framework that already vests copyright ownership of films in the producer of a film.\textsuperscript{163} If China had adopted a different model thirty years ago and vested copyright ownership of films in individual authors, it would be a different story. But to ignore the reality and propose an overthrow of an existing legal framework will have serious unintended consequences, such as creating uncertainty as to ownership of rights and inviting unnecessary litigation.

Second, through a comparative study of copyright protection for films in France, Germany and the United States, plus analysis of various economic theories, we could clearly see the benefits of vesting film copyright ownership with its producer, which would avoid potential holdup problems, reduce transaction cost and provide incentives for producers to make big-item


\textsuperscript{162} Scholars have generally attributed the Chinese government’s discomfort to mass demonstrations and strikes as a result of the colorful revolutions that spread in Eastern Europe and Russia in 1980s.

\textsuperscript{163} The first version of the PRC Copyright Law enacted in 1990 already vested ownership of a cinematographic work in studios (the producer). See infra Part III.A.
investment in the film industry.

Lastly, what Chinese individual creators are most concerned with is inadequate remuneration they receive from studios, which I believe is best addressed by means other than adjusting the copyright ownership of films. As explained in Park IV, we need to bring a more sophisticated remuneration system to China, which should include both the legislative guidance approach (e.g., France and Germany) and the union self-help approach (e.g., the U.S.), so that economic interests of individual authors to receive a fair remuneration will be protected.