

# MORE IS LESS: A CRITICAL REVIEW OF WORKS MADE FOR HIRE RULES IN CHINA

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### *Abstract*

*The creation of works in modern society is becoming more and more impersonal, and the majority of works are created as works made for hire. Reasonable property rules are required to minimize transaction cost and to facilitate smooth dissemination of such works. However, neither the current nor the envisaged amended version of Chinese Copyright Law provides works made for hire rules, which are fair and predictable enough. Rules with continental European origin and those with Anglo-American characteristics collide with each other, causing confusion in court practice and in research. Awareness of the imperfectness is important for both scholars and practitioners interested in the protection of intellectual properties in China. To bring the status quo into a fairer and more predictable set of rules, colliding rules should be harmonized. In pursuing this goal, the freedom of contract, as strengthened by the envisaged revision of copyright law, is not sufficient. It is also recommendable to make employment a pre-condition of Legal Entities' Works.*

### I. INTRODUCTION

Few would seriously doubt that, in comparison with pre-modern times when works were often occasional sparks of individual intellectuals, more and more works are not ignited by the creator him- or herself, but created for someone else, whether within an employment or non-employment framework (hereinafter “**Works Made For Hire**”). It is hardly possible to obtain reliable statistics of the proportion of Works Made For Hire among all works created in China<sup>1</sup> because Chinese Copyright Law<sup>2</sup> requires neither publication nor registration as a pre-condition for the protection of a work. Copyright is established upon completion of a piece of work.<sup>3</sup> Yet the trend that the majority of works in China are becoming more

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<sup>1</sup> As a rough indication to the importance of Works Made For Hire in modern times, see MANFRED REHBINDER, URHEBERRECHT, 4 (2010) (indicating that only about 22% of people working in copyright-based industries in Germany are self-employed).

<sup>2</sup> Zhonghua Renmin Gongheguo Zhuzuoquan Fa (著作权法) [Copyright Law of the People's Republic of China] (“**Chinese Copyright Law**”), (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, effective June 1, 1991) (all three versions referred to as Chinese Copyright Law 1990, 2001 and 2010 respectively) (Chinalawinfo). English translation thereof can be found in the online database of laws and regulations of the National People's Congress [hereinafter “**NPC**”], the highest legislative body in China, [http://www.npc.gov.cn/englishnpc/Law/Integrated\\_index.html](http://www.npc.gov.cn/englishnpc/Law/Integrated_index.html) (last visited Oct. 11, 2013).

<sup>3</sup> Zhonghua Renmin Gongheguo Zhuzuoquanfa Shishi Tiaoli (中华人民共和国著作权法实施条例) [Regulations for the Implementation of the Copyright Law of the People's Republic of China] (“**Implementation Regulations**”), (promulgated by St. Council, Aug. 2, 2002, effective Sept. 15, 2002) art. 6 (Chinalawinfo). English version can be found in e.g., 71 CHINA PAT. & TRADEMARKS 95 (2002) (translation of Chinese laws and regulations in this article made by the author with reference to pre-existing translations).

and more commercial and impersonal is too obvious to deny. This social background might explain the legislative ambition to regulate issues related to such works. Rules from both continental European and Anglo-American jurisdictions were transplanted into the Chinese Copyright Law.

Good intention, however, does not always lead to satisfactory outcome. As the Chinese saying goes: “More haste, less speed (*yu su ze bu da*).” Rules with heterogeneous origins raise confusion that is found neither within the continental European nor the Anglo-American tradition. Realizing that knowledge of possible problems regarding proprietorship of works made for hire is indispensable for the understanding of copyright regime in China, bearing in mind the importance of clear property rules for the development of copyright-based industries, this article serves not only as an information source of facts and issues, but more as a discussion forum for possible solutions. It starts with an overview of Works Made For Hire rules in China (*infra* Part II), followed by an analysis of the troubles brought on by these rules (*infra* Part III) and a flashback to the legal transplantation history during which the mismatch emerged (*infra* Part IV), and ends up by questioning how these problems might be solved (*infra* Part V).

## II. DEFINITIONS AND RULES

As a general rule, the natural person<sup>4</sup> having created a work is its author (hereinafter “**Natural Person Author**”) (Art. 11 (2)<sup>5</sup>) and holds its copyright<sup>6</sup> (Art. 11 (1)). The Natural Person Author enjoys

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<sup>4</sup> Chinese Copyright Law uses “citizen” instead of “natural person”, which is correctly criticized by e.g., Li Mingde, Guan Yuying & Tang Guangliang (李明德, 管育鹰, 唐广良), *Zhuzuoquan Fa Zhuanjia Jianyi Gao Shuoming* (著作权法专家建议稿说明) [Proposals for the Amendments of the Copyright Law of China], 80 (2012) (stating that the concept “citizen” is a concept normally used in public law which refers to someone with a certain nationality); see XIANFA art. 33, § 1 (1982) (China). Since Chinese Copyright Law acknowledges stateless persons to be eligible copyright holders, the term “citizen” is improper. See also Yong Wan, *Moral Rights of Authors in China*, 58 J. COPYRIGHT SOC’Y U.S.A. 455, 457 (2011-2012).

<sup>5</sup> Articles and sections without reference to the name of the codification are those of the Chinese Copyright Law 2010.

<sup>6</sup> There are two Chinese terms referring equally to copyright: one is “author’s right” (*zhuzuoquan*) and the other is copyright (*banquan*). The former is said to stem from the *droit d’auteur* tradition, while the latter to be traced back to the Anglo-American tradition. According to available documents at the beginning of twentieth century, “copyright” was widely used in private correspondence and newspaper articles, see *Zhongguo Banquan Shi Yanjiu Wenxian* (中国版权史研究文献) [Documents For Research of Chinese Copyright History] 18-23 (Zhou Lin et al. (周林等) eds., 1999) [hereinafter Zhou et al.]. But see *Daqing Zhuzuoquan lü* (大清著作权律) [Copyright Act of Great Qing] (1910) (the first copyright codification in China promulgated by the last Emperor of Qing Dynasty in 1910, using the term “author’s right”). For history of Chinese copyright law, see Feng Xiaoqing, Yang Lihua & Huang Xianfeng Frank, *Awakening of Sleeping Dragon: The Evolution of Copyright Conception in China*, 51 J. Copyright Soc’y U.S.A. 615, 632-635 (2003-2004) [hereinafter Feng et al.]. The Chinese Copyright

four moral rights<sup>7</sup> (Art. 10 (1) - (4)), twelve economic rights (Art. 10 (5) - (16)) and “other rights which should be held by the copyright holder” (Art. 10 (17)). China follows the French dualistic approach,<sup>8</sup> according to which economic rights are transferrable<sup>9</sup> and heritable<sup>10</sup>, while moral rights do not enjoy the same freedom.<sup>11</sup> To the extent reserved by fair use and statutory license rules of Chinese Copyright Law,<sup>12</sup> it is basically left to the discretion of Natural Person Authors as to whether and how someone who has not physically created the works can make use of them.

This is, however, only the general rule. Exceptions soon arise, when the contribution of the other party is so essential to the creation of the work. The most common way for the other party to be involved in the creation is employment, namely that the Natural Person Authors create for their employers. Another way is when the works are created as products of commissions or orders. As works made for hire rules in Sec. 101 of the U.S. Copyright Act of 1976 demonstrates, to handle the two circumstances separately might better embody the disparate balance of interest behind each constellation.<sup>13</sup> In light of the idea to divide Works Made For Hire

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Law uses in most of its provisions “author’s right”, but provides in art. 57 that “[t]he term author’s right for the purpose of this law is copyright.” Therefore “author’s right” and “copyright” are used interchangeably in China.

<sup>7</sup> For detailed information regarding author’s moral rights in China, see Wan, *supra* note 4; Zhiwei Liang, *Between Freedom of Commerce and Protection of Moral Rights: The Chinese Experience and a Comparative Analysis*, 57 J. Copyright Soc’y U.S.A. 107 (2009-2010). For a functional analysis of author’s moral rights in China, see Kalscheur, *About ‘Face’: Using Moral Rights to Increase Copyright Enforcement in China*, 39 Hastings Cons. L. Q. 513 (Winter 2011). Regarding moral rights of performers in China, see Yong Wan, *Legal Protection of Performers’ Rights in the Chinese Copyright Law*, 56 J. COPYRIGHT SOC’Y U.S.A. 669 (2008-2009).

<sup>8</sup> See e.g., Qu Sanqiang et al. (曲三强等), *Xiandai Zhuzuoquan Fa (现代著作权法) [Modern Copyright Law]* 123 (2011); Wan, *supra* note 4, at 463-64.

<sup>9</sup> Art. 10 (2) (3).

<sup>10</sup> Art. 19 (1).

<sup>11</sup> See Wan, *supra* note 4, at 465 (stating that authors’ moral rights cannot be transferred *inter vivos*, but the negative aspects of moral rights capacity may be passed to the heirs in China).

<sup>12</sup> “Fair use” and “statutory license” are not terminologies drawn directly from legislation, but commonly used to describe two different types of “limitations of rights” as provided primarily in the fourth sub-section of Chapter Two of Chinese Copyright Law 2010. “Fair use” refers to limitations on rights according to which others may use the works without prior consent from the copyright holders for free, while “statutory license” refers to those according to which others may use the works without prior consent from copyright holders but have to pay remuneration. See, e.g., Seagull H. Song, *Reevaluating Fair Use in China – A Comparative Copyright Analysis of Chinese Fair Use Legislation, U.S. Fair Use Doctrine and the European Fair Dealing Model*, 51 IDEA 453,453-489 (2011) (general information regarding fair use in China). See, e.g., Qian Wang, *Is Downloading of Pirated Content for Private Purposes a Copyright Infringement in China?*, 57 J. Copyright Soc’y U. S. A 655 (2009-2010) (specific topics in this field); Hong Xue, *One Step Forward, Two Steps Back – Reverse Engineering The Second Draft for the Third Revision of the Chinese Copyright Law*, 28 AM. U. INT’L L. REV. 295 (2012-2013).

<sup>13</sup> See *Community For Creative Non-Violence v. Reid*, 490 U.S. 730 (1989) (distinctions between the two categories of works made for hire under U.S. law).

with the underlying relationship between – roughly speaking – the capital and the labor, the complex rules regarding Works Made For Hire in the Chinese Copyright Law and its by-laws can be divided into two groups: One stipulates rules for works created in the course of employment<sup>14</sup> (hereinafter “**Employment Works Made For Hire**”) (*infra* part II.A). The other regulates works, which do not owe their creation to an employment relationship (hereinafter “**Non-Employment Works Made For Hire**”) (*infra* part II.B). Each group contains more than one sub-division. Before we look into the confusion, overlapping and contradiction both between the groups and within each group in part III, we shall first do some stage-setting by outlining each sub-division in this part II.

### A. *Employment Works Made For Hire*

Employment Works Made For Hire consist of three sub-divisions: Normal Employment Works (*infra* part II.A.1), Special Employment Works (*infra* part II.A.2) and Legal Entities’ Works by Employees (*infra* part II.A.3). They are presented below in an order which mirrors the ascending control of employers over works in ascending order.

#### 1. Normal Employment Works (Art. 16 (1))

Art. 16 (1) provides that works which are made in order to fulfill tasks assigned by legal persons or organizations of other types<sup>15</sup> (hereinafter “**Legal Entities**”) to Natural Person Authors in the scope of their work are employment works (hereinafter “**Employment**”).

<sup>14</sup> The term “employment” in this article includes not only typical employment relationship pursuant to Labor Contract Law of People’s Republic of China promulgated in 2007, but also quasi-employment relationships such as the relationship between public agencies and its staff. See *Guojia Banquanju Banquan Guanlisi Guanyu Kuaile Dabenying Gei Mou Renmin Fayuan De Dafu* (国家版权局版权管理司关于《快乐大本营》一案给xx市xx区人民法院的答复) [Answer to A People’s Court Regarding the Case of Happy Camp], No. 73 Quansi (1999) (promulgated by Copyright Administration Office of the National Copyright Administration of People’s Republic of China, Nov. 11, 1999, effective Nov. 11, 1999) (Chinalawinfo). The National Copyright Administration of People’s Republic of China [hereinafter referred to as “NCAC”] is the government agency under the direct supervision of State Council, responsible for administrative copyright enforcement and playing a crucial role in copyright legislation.

<sup>15</sup> The phrase “organizations of other types” is an often used term in Chinese civil law and civil procedure law. Art. 48 of Chinese Civil Procedure Law 2013 acknowledges three sorts of subjects with capacity to take legal actions: natural persons, legal persons and organizations of other types. See *Zuigao Renmin Fayuan Guanyu Shiyong Minshi Susong Fa Ruogan Wenti De Yijian* (最高人民法院关于适用中华人民共和国民事诉讼法若干问题的意见) [Opinions Regarding Issues of Implementing Chinese Civil Procedure Law of the People’s Supreme Court] (promulgated by Sup. People’s Ct. Jul.14, 1992, effective Jul.14, 1992) art.40 (Chinalawinfo) (stipulating that “organizations of other types” mean organizations which are legitimately established, maintain certain organizational structure and property, but are not qualified as legal persons). See Wan, *supra* note 4, at 458-59 (further information of other organizations, especially different categories thereof).

**Works**”). Employment Works include two sub-divisions: Certain Employment Works which are handled separately in Art. 16 (2) (hereinafter “**Special Employment Works**”) and Employment Works which do not fall into the scope of Art. 16 (2) (hereinafter “**Normal Employment Works**”).

The copyright of Normal Employment Works belongs to Natural Person Authors but the employers have priority to use the work in the scope of their business. Natural Person Authors shall not authorize any third party to use the work in the same manner as the employers do within a two-year-period<sup>16</sup> without consent of the employers<sup>17</sup>.

The constraint of employees’ capacities to exploit the Normal Employment Works might seem good enough to reflect employer’s contribution to the work. However, note that the License Constraint is confined to (1) use of the work in the same manner as it is used by the employers and (2) a period of only two years. Where Natural Person Authors license third parties to use the work in a different manner from the employers or after the two-year-period expires, employers are not entitled to prohibit such licenses by utilizing Art. 16 (1).

## 2. Special Employment Works (Art. 16(2))

Art. 16 (1) clarifies that once the employers have made substantial contribution to the creation of works, Natural Person Authors’ control over the works must be restricted respectively. The greater the contribution of the employers weighs against that of the employees, the more control over the work shall be attributed to the employers rather than to the employees. Art. 16 (2) follows this ratio and sets forth the rule of the Special Employment Works:

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<sup>16</sup> The two-year-period is regulated differently in Chinese Copyright Law and Implementation Regulations 2002. Chinese Copyright Law sets the starting point of the two-year-term as “completion of the work”, while Implementation Regulations 2002 calculates the period from handing over of the work by the Natural Person Author to the employer. See LiFa Fa (立法法) [Chinese Legislation Law] (promulgated by the Standing Comm. Nat’l People’s Cong., Mar. 15, 2000, effective Jul.1, 2000) (2015) art. 88(1) (Chinalawinfo) (stipulating that in case the law which is enacted by NPC or its Standing Committee and the implementing regulation which is enacted by State Council provide different rules on the same issue, the former shall prevail). Therefore – theoretically – the completion of works instead of handing over of works to the employers shall be deemed as the starting point for calculating the two-year-term. However, to take account the fact that the date of handing over of the work might be easier to investigate than the date of creation of the work, the possibility cannot be excluded that some courts will apply Implementation Regulations 2002 instead of Chinese Copyright Law on this issue.

<sup>17</sup> The Chinese Copyright Law uses “unit” (in Chinese: *danwei*) instead of “employer” here, which is synonymous with Legal Entity in the first sentence of art. 16 (1) and therefore refers to employer. The interpretation that “Legal Entity” in the first sentence and “unit” in the second sentence of art. 16 (1) are synonyms is confirmed by the English version of Chinese Copyright Law, which translates both as “legal entity or other organization”.

“Natural Person Authors of Employment Works which fall into one of the following circumstances are only entitled to the right to claim authorship, other copyrights shall be owned by employers, and employers may reward the Natural Person Authors:

(1) Employment Works such as engineering designs, product designs, maps, computer software ect. which are created primarily by means of materials and techniques of the employers and whose responsibilities are taken by the employers; or

(2) Employment Works whose copyrights shall belong to the employer either based on respective contractual arrangement or respective rules set forth by laws<sup>18</sup> or administrative regulations<sup>19</sup>.”

Note that employers of Special Employment Works enjoy all economic rights, but not every moral right (how employers may enjoy moral rights at all is an unanswered question) – the right to claim authorship remains with the Natural Person Author instead of passing to the employers.

### 3. Legal Entities’ Works by Employees (Art. 11(3))

Narrowing of the Natural Person Authors’ domination and expansion of the employers’ influence over Employment Works does not end up with reserving the right to claim authorship for employees. The legislature considered situations in which the Natural Person Author shall not be entitled to claim even authorship and set forth in Art. 11 (3) a rule strongly in favor of employers: “For works whose creation is organized by Legal Entities, which represent the willpower of Legal Entities and whose responsibilities are taken by Legal Entities, the Legal Entities are deemed to be authors.” (Hereinafter “**Legal Entities’ Works**”)

In the context of Art. 16, the term “Legal Entities” can only be understood as employers since the article regulates only Employment Works. However, the same term in Art. 11 (3) is silent as to (1) whether it covers employers and (2) whether it is limited to employers.

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<sup>18</sup> Laws are enacted by the NPC and its Standing Committee, *see* Chinese Legislation Law art. 1. English version is available in the online database of NPC, *supra* note 16.

<sup>19</sup> *See* Chinese Legislation Law art. 56 (stipulating that administrative regulations are promulgated by the State Council).

Regarding the first question, although labeling of Art. 16 as “provision of employment works” leaves the impression that Employment Works Made For Hire are governed exclusively by Art. 16, legislators<sup>20</sup>, courts<sup>21</sup> and scholars<sup>22</sup> hold it for self-evident that the term “Legal Entities” in Art. 11 (3) covers employers. Thus Art. 11 (3) is also applicable to Employment Works Made For Hire. The primary legislative intent of Art. 11 (3) may even lie exactly in the presumed necessity to give the right to claim authorship to employers rather than to employees. The fact that Art. 16 is called provision of employment works is misleading. Employment Works form only part of Employment Works Made For Hire.

The second question regarding the understanding of the term “Legal Entities” under Art. 11 (3) is related to Non-Employment Works Made For Hire and will be answered in part III C.

### B. Non-Employment Works Made For Hire

The institutional framework for the production of non-personal works does not always have to be employment. The party conceiving the initiative, providing the financial resources and organizing the creation does not always have to enter into a stable relationship with the party who physically “translates an idea into a fixed<sup>23</sup>, tangible expression entitled to copyright protection.”<sup>24</sup> The relationship between the financially investing party and the intellectually investing party may be merely ad hoc. When the costs of creating a work within a firm exceed that outside the firm, *homo economicus* will simply outsource such works to external parties for the sake of cost-saving.<sup>25</sup> Copyright law is obliged to make clear the ownership

<sup>20</sup> Hu Kangsheng et al. (胡康生等), *Zhonghua Renmin Gongheguo Zhuzuoquan Fa Shiyi* (中华人民共和国著作权法释义) [Interpretation of Chinese Copyright Law], 70 (2002) (The three preconditions of Legal Entities’ Works, i.e. the institutional base, reflected willpower and risk-bearing, are analyzed individually. The first precondition of Legal Entities’ Works has been interpreted as “the creation of works has been organized by the Legal Entities rather than the employees of the Legal Entities”. Such interpretation entails that “Legal Entities” in Art. 11 (3) can be employers). To note is that Mr. Kangsheng Hu, editor of the book, is deputy director the Legislative Affairs Commission of NPC Standing Committee.

<sup>21</sup> Works which are classified by courts as “Legal Entities’ Works” are normally created by employees of Legal Entities. See, e.g., Wang Jinrong Yu Jiangsu Sanling Muju Muliao Youxian Gongsì Qinfan Zhuzuoquan Jiufen Shangsù An (汪金荣与江苏三菱磨料磨具有限公司侵犯著作权纠纷上诉案) [Wang Jinrong v. Sanling Muju Muliao Ltd. Co] (Jiangsu High People’s Ct. Dec. 15, 2010) (Chinalawinfo); Tian Xiuhua Yu. Anhui Linshui Jiuye Youxian Gongsì Zhuzuoquan Qinfan Jiufen Shangsù An (田秀华与安徽临水酒业有限公司著作权侵权纠纷上诉案) [Tian Xiuhua v. Anhui Linshui Wine Business Ltd. Co] (Anhui High People’s Ct. Dec. 15, 2008) (Chinalawinfo)

<sup>22</sup> E.g., Wang Qian (王迁), *Courses on Intellectual Property Law* (知识产权法教程) 161-163 (2007, 2011)

<sup>23</sup> Chinese Copyright Law does not require fixation of the expression as a condition to protection.

<sup>24</sup> *Reid*, 490 U.S. 730.

<sup>25</sup> Ronald Coase, *The Nature of the Firm*, 4 *Economica* 386, 386-405 (1937).



of works created under such circumstances. Various ways are demonstrated by other jurisdictions - either, as Sec. 101 of the U.S Copyright Act 1976 stipulates, only expressly listed sorts of non-employment works, which are specially commissioned or ordered, can be owned initially by the financially investing party based on written agreement; or, as the German Act On Copyright and Related Rights<sup>26</sup> (thereafter “**German Copyright Act**”) insists on the “creator-principle”,<sup>27</sup> only Natural Person Authors can be the initial copyright holders. The ordering or commissioning party can at most exploit the works through a license.

### 1. Legal Entities’ Works by Independent Contractor (Art. 11(3))

At first glance, it seems that only Art. 17 deals with works created for the purpose of a commission (hereinafter “**Commissioned Works**”). However, when searching for answers to the second question regarding understanding of the term “Legal Entities” under Art. 11 (3), the truth turns out to be more complicated than at the first glance.

While legislators, courts and scholars take it for granted that the term “Legal Entities” in Art. 11 (3) *covers* employers, there is hardly anyone who is interested in the question whether that term is *limited* to employers. Without taking the question seriously, courts have directly qualified works which are not created in the course of employment as Legal Entities’ Works.<sup>28</sup> In other words, works created by independent contractors can be owned initially and completely by the commissioning or ordering party – even without consent from the Natural Person Authors.

### 2. Commissioned Works (Art. 17)

Ownership of Commissioned Works is defined in Art. 17, which states that copyright of Commissioned Works shall be held by the agent rather than the principal, unless otherwise agreed upon. Where the agents hold the copyrights, the principals are entitled to use the

<sup>26</sup> Übersetzung durch Ute Reusch [UrhG] [The German Act On Copyright and Related Rights], Sept. 9, 1965, BGBl. I at 1273, last amended by Gesetz [G], Oct. 1, 2013, BGBl. I at 3714, art. 8, translated by Ute Reusch, *available at* [http://www.gesetze-im-internet.de/englisch\\_urhg/index.html](http://www.gesetze-im-internet.de/englisch_urhg/index.html) (last visited Oct. 16, 2013).

<sup>27</sup> *Id.* art. 7.

<sup>28</sup> *E.g.*, Zhou Yan Yu Longyan Yanco Gongye Youxian Gongsu Queren Bu Qinfan Zhuzuoquan Jiufen Shangsu An (周焰与龙岩烟草工业有限责任公司确认不侵犯著作权纠纷上诉案) [Zhou Yan v. Longyan Tobacco Industry Ltd. Co.] (Fujian High People’s Ct. Mar. 31, 2008) (Chinalawinfo); Yang Songyun Su Xiujian Lingta Bangongshi Zhuzuoquan Jiufen An (杨松云诉修建灵塔办公室著作权纠纷案) [Yang Songyun v. Office For Constructing Lama’s Temple] (Tibet Autonomous Region High People’s Ct. June. 8, 1998) (Chinalawinfo), *aff’d*, Sup. People’s Ct. (2008).

Commissioned Works within the agreed scope of usage. Where no such scope has been mutually defined, principals are entitled to use the Commissioned Works within the scope drawn from the respective purpose of the commission for free.<sup>29</sup>

### III. CONFUSION AND CONTRADICTIONS

As noted in the introductory part of this article, confusion and contradictions are seen both between the two groups (Employment Works Made For Hire and Non-Employment Works Made For Hire) and within each group. Some problems have already been quickly touched upon in part II. The following part III intends to analyze the issues in more detail.

#### A. *Normal Employment Works v. Special Employment Works*

The allocation of controlling capacity between employers and employees differs significantly between Normal Employment Works and Special Employment Works. In order to provide a fair separation, Art. 16 (2) sets forth three general preconditions and lists four types of works which are particularly eligible to be qualified as Special Employment Works. These factors, however, do not form a dividing line as bright as litigating parties with it to be.

Uncertainty is found firstly for works other than the chosen types. Despite the clear text of Art. 16 (2), which states the four types only constitute a non-exhaustive enumeration, court practice shows that some courts refuse to recognize certain works as being Special Employment Works because they are not one of the four explicitly listed.<sup>30</sup> Other courts do not base their rejection expressly on the ground that the work at issue is not mentioned in Art. 16 (2), but simply state that the work at issue does not meet requirements set forth by Art. 16 (2) and is therefore not a Special Employment Work.<sup>31</sup> Still some decisions simply keep silent on this issue even where a party asks the court to decide between Normal Employment

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<sup>29</sup> *Zuigao Renmin Fayuan Guanyu Shenli Zhuzuoquan Minshi Jiufen Anjian Shiyong Falu Ruogan Wenti De Jieshi* (最高人民法院于审理著作权民事纠纷案件适用法律若干问题的解释) [Interpretation of Sup. People's Ct. Concerning the Application of Laws in the Trial of Civil Disputes Over Copyright] (promulgated by Sup. People's Ct. Oct.12, 2002, effective Oct. 15, 2002) art. 12 (Chinalawinfo).

<sup>30</sup> *E.g.*, Liu Tiejun Yu Zhang Wenbin Qinfan Zhuzuoquan Jiufen Shangsu An (刘铁军与张文斌侵犯著作权纠纷上诉案) [Liu Tiejun v. Zhang Wenbin] (Hubei High People's Ct. Dec. 3, 2010) (Chinalawinfo).

<sup>31</sup> *E.g.*, Tian Tao Yu Zhongyang Renmin Guangbo Diantai Zhuzuoquan Quanshu Qinquan Jiufen Shangsu An (田涛与中央人民广播电台侵权纠纷上诉案) [Tian Tao v. Central People's Broadcasting Station] (Beijing First Interim. People's Ct. May. 30, 2011) (Chinalawinfo).

Work and Special Employment Work.<sup>32</sup> While candid rejections of works which do not fall within the list can be easily refuted by pointing to the “*etc.*” under Art. 16 (2), implied rejection or even silence on this issue outline an exceptionally cautious image of judges. Such rejection and silence may be partially explained by the general judicial condition in China. It is also worth thinking about the extent to which the relatively vague preconditions have aggravated the problem.

Questions can also be raised with regards to the three preconditions. As some judges have pointed out, listing of the four types of works only counts as a non-binding and non-exhaustive enumeration. A court emphasized correctly that being one of the listed types does not automatically lead to classification as a Special Employment Work; on the other hand, works of other types shall also be classified as Special Employment Works, as long as the three general preconditions are satisfied.<sup>33</sup> Thus the three preconditions rather than the four types play the decisive role in distinguishing Special Employment Works from Normal Employment Works. However, when examined more closely, the general preconditions are not always persuasive in carving out certain works as Special Employment Works out of other works based on employment. The general preconditions are (1) employment, (2) supply of key materials and technique<sup>34</sup> and (3) risk-bearing. The first precondition is unable to distinguish Special Employment Works from Normal Employment Works while the other two do not provide enough guidance in individual cases. Courts have vast space for discretion which leads to decisions through which a coherent theory can hardly be found.<sup>35</sup>

<sup>32</sup> Teng Yanxia Yu Yang Ningqing Qinfan Zhuzuoquan Jiufen Shangsu An (滕彦霞与杨凝清侵犯著作权纠纷上诉案) [Teng Yanxia v. Yang Ningqing] (Shandong High People's Ct. Nov. 11, 2009) (Chinalawinfo).

<sup>33</sup> Liu Mou Yu Yang Mou Ran Deng Zhuzuoquan Quanshu Jiufen Shangsu An (刘某与杨某然等著作权权属纠纷上诉案) [Liu v. Yang] (Shanghai First Interim. People's Ct. Sept. 5, 2012) (Chinalawinfo).

<sup>34</sup> See Implementation Regulations art.11(2) (“capital, equipments or material specifically provided by the Legal Entity for the creation of the work”).

<sup>35</sup> E.g., Li Qi Deng Yu Zhonghua Gongshang Lianhe Chubanshe Qinfan Zhuzuoquan Jiufen An (黎齐等与中华工商联合出版社侵犯著作权纠纷案) [Li v. Beijing Shidai Huanke Kemao Ltd. Co.] (Beijing Second Interim. People's Ct. Oct. 20, 2008), [http://www.110.com/panli/panli\\_120820.html](http://www.110.com/panli/panli_120820.html) (last visited 15 April, 2015) (classifying book covers as Normal Employment Works); Wang Zhongping Yu Ding Weidong Deng Zhuzuoquan Qinfan Jiufen Shangsu An (王中平与丁卫东等著作权侵权纠纷上诉案) [Wang Zhongping v. Ding Weidong] (Henan High People's Ct. Dec. 18, 2007) (Chinalawinfo) (classifying investigation report regarding underground water as Normal Employment Works); *Liu v. Yang*, (2012), by Shanghai First Interim People's Ct, *supra* note 33 (deeming Educational books as Special Employment Works).

To reduce the social costs involved in the separation of Normal Employment Works and Special Employment Works, freedom of contract, which is not explicitly acknowledged by the current version of Chinese Copyright Law, shall be accommodated and encouraged. Besides, the distinguishing criteria must be further developed. Foreign experience may provide useful indication regarding this issue so that decisions will be less arbitrary:

“Among the other factors ... are the skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party...[yet] no one of these factors is determinative.”<sup>36</sup>

*B. Special Employment Works v. Legal Entities’ Works*

The distinction between Special Employment Works and Legal Entities’ Works is confusing. As to Special Employment Works, Art. 16 (2) specifies (1) material and technical support, (2) existence of employment, and (3) risk-bearing as the thresholds.<sup>37</sup> As to Legal Entities’ Works, Art. 11 (3) lists (1) organizational importance for the creation, (2) willpower underlying the works, and (3) risk-bearing as criteria.

When comparing each criterion with its corresponding criterion in the other set, the line between Special Employment Works and Legal Entities’ Works becomes obscure. Where the creation of a work is organized by the employer (as required by Art. 11 (3), first criterion), the employer normally provides vital material and technical support to the creation of the work (as required by Art. 16 (2), first criterion). Where the Natural Person Author creates the work in the course employment (as required by Art. 16 (2), second criterion), it is not unlikely that the final work embodies the will, plan and interest of the employer rather than the employee’s (as required by Art. 11 (3), second criterion). And the third criterion from both sets are identical in that the employer instead of the employee bears the risk and

<sup>36</sup> See *Reid*, 490 U.S. 730.

<sup>37</sup> Order of the following three perspectives are rearranged to make the comparison to art. 11, § 3 easier.

responsibilities for the work. The gap made artificially by the legislative language disappears when one examines each of the criteria. There are cases whose facts are substantially identically in that the works at issue are labeled differently: in some as “Special Employment Works” and in some as “Legal Entities’ Works”.<sup>38</sup> This arbitrariness is the target of harsh criticism from the mainstream copyright scholars.<sup>39</sup>

### C. *Legal Entities’ Works v. Commissioned Works*

Works Made For Hire but not based on employment may be held initially either by their Natural Person Authors or the financially investigating party, depending on whether the works at issue are qualified as Legal Entity’s Works or Commissioned Works by the court. Lack of clear delineation makes ownership of such works highly unpredictable.

In a case where a garment trading company asked a photographer to prepare advertisement photos, copyright of the photos was ruled to be held by the photographer because the photos were categorized as Commissioned Works.<sup>40</sup> In another case, the Office Responsible For Building Lama Temple In Shigatse District Of Tibet asked a sculptor to complete a head sculpture of Panchen. Copyright of the sculpture was ruled to be held by the Lama temple office.<sup>41</sup> In the latter case, the courts of both the first and the second instance held the sculpture to be a “Legal Entity’s Work”.<sup>42</sup>

<sup>38</sup> E.g., ShenYang Shi Qiumi Xiehui Su Liaoning Yufuan Yishu Gongcheng Youxian Gongsì Deng Qinfan Zhuzuoquan Jiufen An (沈阳市球迷协会诉辽宁缘福雕塑艺术工程有限公司等侵犯著作权纠纷案) [Football Fan Club of Shenyang v. Liaoning Yuanfu Art Sculpture Engineering Co. Ltd.] (Shenyang Interim People’s Ct. Nov. 11, 2005) (Chinalawinfo) (holding that a sculpture is a Special Employment Work). But see Songyun Yang, Tibet Autonomous Region High People’s Ct. June. 8, 1998 (holding that a sculpture is a Legal Entity’s Work).

<sup>39</sup> E.g. Wang Qian (王迁), *Lun Faren Zuopin Guize De Chonggou* (论法人作品的重构) [On the Reconstruction of Works Made For Hire Rules], 6 FAXUE LUNTAN (法学论坛) [LEGAL FORUM] 30, 35-36 (2007) (pointing out that the facts of the two cases were similar but courts reached different findings).

<sup>40</sup> Wang Ming Su Liumianti Fuzhuang Maoyi (Shanghai) Youxian Gongsì Qinfan Zhuzuoquan Jiufen An (王敏诉六面体服装贸易(上海)有限公司侵犯著作权纠纷案) [Wang Ming v. Liumianti Garment Trading Shanghai Co. Ltd.] (Shanghai First Interim. People’s Ct. June 18, 2007) (Chinalawinfo).

<sup>41</sup> Songyun Yang, Tibet Autonomous Region High People’s Ct. June. 8, 1998.

<sup>42</sup> The second instance court ascertained (without reasoning) shortly that the relationship between Lama Temple Office and Yang is one of employment, ignoring the facts that (1) the contractual foundation of the relationship between the parties is the Research & Manufacture Contract, which is non-recurring rather than of long-term nature; and (2) such a contract shall be sorted more into the category of commission or order, rather than in the category of employment.

Court decisions similar to the first case can be found easily.<sup>43</sup> That the copyright of some Non-Employment Works Made For Hire belongs to the Natural Person Author is unproblematic since it stands in accordance with the general principle that copyright shall be held by the person who has actually created it. Problematic is the fact that the second case is not the only one of its kind. Other cases<sup>44</sup> also show that copyrights of a Non-Employment Work Made For Hire may be held initially by the non-employer commissioning party. Despite the ostensibly clear rule that copyrights of Commissioned Works shall be held by Natural Person Authors, the final decision of ownership is up to the courts' discretion. The second case regarding the sculpture makes it clear how unpredictable the copyright is for a work that is actually created in the course of a commission. Such unpredictability is related to the answer to the second question raised under part II A 3, namely whether the term "Legal Entities" under Art. 11 (3) is *limited to* employers. The above-mentioned cases show that courts obviously do not limit "Legal Entities" under Art. 11 (3) to employers, but extend the scope to cover non-employer principals.

#### IV. HISTORY AND TODAY

It is uncommon for one jurisdiction to have so many disparate kinds of Works Made For Hire rules as is the case now in China. Admittedly, in a society in which a large – if not the largest – portion of works are created in institutional frameworks rather than individually, Works Made For Hire rules unavoidably form the pivotal part of copyright law regarding allocation of rights and obligations. However, importance alone does not perfectly explain the complexity of rules as shown above. In order to see how the

<sup>43</sup> E.g., Beijing Fangda Kongjian Yingshi Wenhua Youxian Gongsi Su Yu Jiangying Zhuzuoquan Guishu Jiufen An (北京放大空间影视文化有限公司诉于江盈著作权归属纠纷案) [Beijing Fangda Kongjian Yingshi Wenhua Ltd. Co. v. Yu Jiangying] (Beijing Second Inter. People's Ct. Dec. 20, 2006) (Chinalawinfo).

<sup>44</sup> E.g., Zhao Yunping Yu Quanguo Yishu Kexue Guihua Xiaozu Deng Qinfan Shuming Quan Jiufen Zaishen An (赵云平与全国艺术科学规划小组等侵犯署名权纠纷再审案) [Zhao Yunping v. National Committee for the Plan of Art and Science] (Sup. People's Ct. Oct. 28, 2009). See also Zhang Gong Yu Lanzhou Shi Chengguan Qu Renmin Zhengfu, Zhonggong Lanzhou Shi Chengguan Qu Wei Dang Shi Ziliao Zhengji Yanjiu Weiyuanhui Bangongshi, Mali Qin Hai Zhuzuoquan Jiufen Shangsu An (张弓与兰州市城关区人民政府、中共兰州市城关区委党史资料征集研究委员会办公室、马莉侵害著作权纠纷上诉案) [Chengguan District of Lanzhou City et al. v. Zhang Gong] (Gansu High People's Ct. Sept. 18, 2012) (Chinalawinfo); Liu Jiazhu Deng Yu Yunnan Ziran Yu Wenhua Yichan Baohu Cujin Hui Deng Zhuzuoquan Qinquan Jiufen Shangsu An (刘家柱等与云南自然与文化遗产保护促进会等著作权侵权纠纷上诉案) [Liu Jiazhu et al. v. Commission for the Promotion of Natural and Cultural Heritage in Yunnan] (Yunnan High People's Ct. Mar. 17, 2012) (Chinalawinfo). A detailed critical review of the latter two cases, see Jiang Ge (蒋赳), *Guyong guanxi yu faren zuopin goucheng yaojian* (雇佣关系与法人作品构成要件) [Employment as a Condition of Legal Entities Works], 5 FALÜ KEXUE (法律科学) [SCIENCE OF LAW] (2014) 102, 102.

complicated and confusing regime has been formed, it is worth taking a brief look at the evolving history of the regime in China.

### A. A Historical Overview

This article does not intend to investigate the cultural and institutional reasons behind the absence of organic development of copyright in traditional Chinese society<sup>45</sup>. For the purpose of this article, it is only necessary to point out that despite being the birthplace of printing technology, copyright protection is an adopted rather than a natural child of the Chinese society. The modern concept of copyright was introduced into China largely by pressure from industrialized countries since the end of the nineteenth century.<sup>46</sup> Influence from divergent legal traditions already left various footprints in the preparation of a Chinese copyright law. Countries from both the common law tradition and jurisdictions of continental European tradition tried to shape the emerging copyright law in China. While the U.S successfully entered into a bilateral treaty with China which contained copyright provisions,<sup>47</sup> Japan, *e.g.*, also left its mark on the formation process of the copyright concept in China.<sup>48</sup>

Qing Copyright Act<sup>49</sup>, the first copyright law in China, was promulgated exactly two hundred years after the Statute of Anne, and only one year before the fall of the last dynasty. It was a product of legal comparative study.<sup>50</sup> Qing Copyright Act bore significant

<sup>45</sup> See *e.g.*, William Alford, Don't Stop Thinking About ... Yesterday: Why There Was No Indigenous Counterpart to Intellectual Property Right Law in Imperial China, 7 J. Chinese L. 3, 3-34 (1993); Wei Shi, Cultural Perplexity in Intellectual Property: Is Stealing a Book an Elegant Offense? 32 B. U. INT'L L.J. 1, 3 (2001); Charles R. Stone, What Plagiarism was not: Some Preliminary Observations on Classical Chinese Attitudes Toward What the West Calls Intellectual Property, 92 MARQ. L. REV. 199 (2008-2009); Wei Shi, Incurable or Remediable? Clues to Undoing the Gordian Knot Tied by Intellectual Property Rights Enforcement in China, 30 U. PA. J. INT'L L. 541 (2008-2009); Wei Shi, Paradox Confucian Determinism: Tracking the Root Causes of Intellectual Property Rights Problem in China, 7 J. MARSHALL REV. INTELL. PROP. L. [1] 454 (2007-2008).

<sup>46</sup> A governmental announcement dated December 24, 1896 prohibited unauthorized copies of books of a missionary. The announcement explained the background of its issuance, saying that the Consul General of U.S.A submitted written request to an officer of the Qing Dynasty to prohibit the copying of the missionary's books. See Zhou et al., *supra* note 6, at 17.

<sup>47</sup> Zhongmei Tongshang Xingchuan Xuding Tiaoyue (中美通商行船续订条约) [Sino-American Trade and Navigation Treaty], Oct. 8, 1903, art. 11. See Li Yufeng (李雨峰), Qiangkou Xia De Falu – Zhongguo Banquan Shi Yanjiu (枪口下的法律：中国版权史研究) [Law Under Gunpoint – Study of Chinese Copyright History] 90-95 (2006).

<sup>48</sup> *E.g.*, Cai Yuanpei (蔡元培), Ri Ben Meng Wo Banquan (日本盟我版权) [Japanese Ask For Copyright Union With Us] in Zhou et al., *supra* note 6, at 38-39; Zhang Baixi (张百熙), A letter to Uchida Kosai dated in 1902 (给内田康哉的信) [Uchida Kosai was the then ambassador of Japan to China] in Zhou et al., *supra* note 6, at 41-42.

<sup>49</sup> Full title: Copyright Act of Great Qing.

<sup>50</sup> *Id.*, especially at 112. See also Owner of Commercial Press: Banquan Kao (版权考) in Zhou et al., *supra* note 6, at 50-77.

traces of Anglo-American utilitarian tradition, *e.g.*, it did not acknowledge moral rights of authors. At the same time the concept of “Legal Entities’ Works” was introduced to accommodate “the widespread practice that works often being published in the name of public branches or other legal entities”. Thus, “though governmental branches, educational institutions, companies, offices, monarchs or clubhouses are not natural persons and theoretically shall not own copyright”, such legal entities can still be the initial copyright holders as long as the works are published in their names.<sup>51</sup> Neither Employment Works nor Commissioned Works were dealt with by Qing Copyright Act.

Qing Dynasty was followed by the Republic of China, which saw three copyright codifications, namely those promulgated in 1915, 1928 and 1944. Works Made For Hire rules saw little development during this period. China suffered from continuous wars and was very unstable.<sup>52</sup> Copyright protection had low priority in times as the main concern for the vast majority of the people was survival. It is not that surprising to see little literature regarding copyright law, not to mention specific discussion about rules of Works Made For Hire. What is clear is the fact that the regime only contained provisions related to Legal Entities’ Works, but neither provisions regarding Employment Works nor provision regarding Commissioned Works.

The People’s Republic of China was founded in 1949 and it soon invalidated all laws and regulations promulgated during KMT’s reign.<sup>53</sup> There was no formal copyright codification till Chinese Copyright Law 1990 was enacted. Preliminary Regulation for Protection of Published Works<sup>54</sup> only mentioned the general rule that copyright shall belong to its creator and did not deal with Works Made For Hire.

Rules regarding Employment Works and Commissioned Works entered into the regime of copyright law with the promulgation of Chinese Copyright Law 1990, the first formal copyright law since founding of the People’s Republic of China. Unlike the former copyright laws before 1949, Chinese Copyright Law since 1990

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<sup>51</sup> *Minzhengbu Wei Niding Zhuzuoquan Lu Caoan Liyou Shi Zhi Zizhengyuan Gao* (民政部为拟定著作权律草案理由事致资政院稿) [Letter From Minister of Interior to Congress Regarding Draft of Legislative Rationales of Copyright Act] (1910) in Zhou *et al.*, *supra* note 6, at 87.

<sup>52</sup> See Hu *et al.*, *supra* note 20, at 4 (holding that frequent regime changes and constant wars are held responsible for stagnated development of copyright law).

<sup>53</sup> See LAW IN THE PEOPLE’S REPUBLIC OF CHINA: COMMENTARY, READING AND MATERIAL 8 (Ralph H. Folsom & John H. Minan eds., 1989), cited from Feng *et al.*, *supra* note 6, at 635.

<sup>54</sup> *Baozhang Chubanshu Zhuzuoquan Zanxing Guiding* (保障出版物著作权暂行规定) [Preliminary Rules for the Protection of Published Works] (1957) in Zhou *et al.*, *supra* note 6, at 300. See also Zhou *et al.*, *supra* note 6, at 301 (stating that the guiding document of the Preliminary Rules explains that its drafting was based on relevant laws in former Soviet Union and other socialist countries).



appeared to be more “continental European”. Moral rights of authors were introduced, and Employment Works (Art. 16) as well as Commissioned Works (Art. 17) become part of copyright law. However, legislators of the Copyright Act 1990 also noted that it was common for works to be published in the name of Legal Entities rather than of the Natural Person Authors.<sup>55</sup> Instead of responding this practice in the framework of Employment Works, Legal Entities’ Works from the “old” Chinese copyright laws were made use of. Parallel-existence of Legal Entities’ Works and Employment Works was thus formed. Despite the minor changes made in the first (2001) and second (2010) copyright reforms, the basic structure of the co-existence of Legal Entities’ Works, Employment Works and Commissioned Works has been kept till today.

### B. A Mixed Blessing

The historical review illustrates the formation process of the current Works Made For Hire rules in China. Based on comparative legal study, the Chinese Copyright Law mirrors elements from both common law and continental European jurisdictions. The concept of Employment Works echoes the *droit d’auteur* romanticism in continental European jurisdictions, raising authors from normal employees and giving works special treatment in comparison to other products. The concept of Legal Entities’ Works, however, very much resembles the idea of works made for hire in the U.S., which treats authors in the same way as normal employees and works in the same manner as ordinary products.

In addition to this hybrid legal transplantation, the discrepancy between the self-identification of the Chinese legal system and the methodology employed by the legislation and jurisdiction also exacerbates the inconsistency. On the one hand, Chinese legislators believe that China belongs to the continental European system, the Chinese copyright rules protect moral rights of authors, and – consciously or unconsciously – followed the romantic approach of copyright law. On the other hand, copyright legislation and jurisdiction in China are dominated by utilitarian philosophy.<sup>56</sup> Chinese legislators always looked into local conditions and tried to reflect established practices in copyright-related industries through the copyright law. Even at the beginning of the 20<sup>th</sup> century, legislators of the Qing Copyright Act noticed that “statistic report of ministries or other government agencies, and reports of railway

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<sup>55</sup> See Hu et al., *supra* note 20, at 70.

<sup>56</sup> See also Wan, *supra* note 4, at 457.

companies<sup>57</sup> were normally not published in the name of their Natural Person Authors, but the employers. Such practice has been kept through the 20<sup>th</sup> century. This pragmatic consideration has also been translated into Art. 11 (3) regarding Legal Entities' Works in the current regime.

It is thus multilayer consideration that caused the problems described under part III. Though always targeted by various criticisms, Works Made For Hire rules have stuck to the structure set forth in Chinese Copyright Law 1990. With the Chinese Copyright Law currently in its third revision, one cannot help but wonder: what will happen to these rules which may influence ownership of the majority of works created in China. . .

## V. STAY OR CHANGE?

Despite the confusion and contradictions summarized above, both the second<sup>58</sup> and third edition<sup>59</sup> of the Draft Amendment of Chinese Copyright Law presented by NCAC have made only slight changes but kept the overall structure of all the five sub-divisions of Works Made For Hire. A welcome change lies in that the freedom of contract has been explicitly adopted for Employment Works. But this change does not solve all the problems. As a matter of fact, among the problems listed in part III of this article, only the first problem has been touched. The drafts change the non-exhaustive enumeration into an exhaustive one, and expand the current list of four sorts of works with the addition of a fifth: works made by journalists of newspapers or news agencies in fulfillment of their reporting tasks. Though such change may have reflected the interest of the newspapers or news agencies, it is doubtful whether the interest of other employers is not equally worthy of protection. The type of the work serves only as an important indication to evaluate the connection between employment and the work. It is such a connection, rather than the type of the work per se, which should be decisive in determining the ownership of a work. Should such a revision shall enter into force, it is worth following-up on the issue of whether the exhaustive enumeration can loyally mirror the industrial practice.

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<sup>57</sup> *Minzhengbu Wei Niding Zhuzuoquan Lu Caoan Liyou Shi Zhi Zizhengyuan Gao* (民政部为拟定著作权律草案理由事致资政院稿) [Letter From Minister of Interior to Congress Regarding Draft of Legislative Rationales of Copyright Act)] (1910) in Zhou et al., *supra* note 6, at 87.

<sup>58</sup> See Hong Xue, *supra* note 12, at 295 (introducing and analyzing the second edition presented by NCAC on July 6, 2013). Since rules regarding Works Made For Others have not been substantially revised, they are not an issue in Xue's article.

<sup>59</sup> The third edition was brought by NCAC in October, 2013.

The overlapping of Special Employment Works and Legal Entities' Works by employees remains. Scholars have already made various suggestions to remove the overlap. While some suggest giving up Legal Entities' Works,<sup>60</sup> others suggest removing Special Employment Works.<sup>61</sup> As analyzed under part IV, the root of the overlap lies in the contemplated combination of rules from continental European jurisdictions and rules with Anglo-American origin. To remove one of them would keep the coherency of the rules. When it comes to the question of which one shall be removed, one approach might be to remove the one which causes the most confusion and contradictions.

Two out of the three incompatibilities listed in part III are related to Legal Entities' Works. Taking into consideration that modern Chinese Copyright Laws, namely those since 1990, have been dyed primarily with the continental European tradition, a workable modification might be to integrate Legal Entities' Works into Employment Works Made for Hire. In deleting Art. 11 (3), overlapping or confusion caused by Legal Entities' Works will be erased. Furthermore a set of refined rules regarding Employment Works will sufficiently accommodate considerations behind the current complicated rules regarding Legal Entities' Works. Works which satisfy pre-conditions of either Legal Entities' Works or Special Employment Works will be unified as Special Employment Works. As such, their Natural Person Authors are entitled to claim authorship. Meanwhile, the employers are also entitled to make known their ownership of all other moral rights and economic rights, so that potential licensees of such works may easily discover with whom they should bargain in order to exploit the works. The unveiling of the employers does not only reflect the employers' interest, but is also required in the interest of the public to reduce transaction cost. Once it is clear that employers of Special Employment Works are allowed or to some extent even encouraged to put their names on the works, the main concern behind Legal Entities' Works will already be taken into account. The law may further stipulate that Natural Person Authors may waive their right to claim authorship either through explicit agreement with employers or where the established practice in the relevant branch requires so.

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<sup>60</sup> E.g., Wang Qing (王清), *Feichu Faren Zuopin Guiding De Lingwai Sange Liyou* (废除法人作品规定的另外三个理由) [*Three Other Reasons to Abandon Rules Regarding Legal Entities' Works*], 8 ZHENGFA LUNTAN (政法论坛) [TRIBUNE OF POLITICAL SCIENCE AND LAW] 60-65 (2011); Xu Huimeng (徐辉猛), *Zhuzuoquan Jiben Yuanli* (著作权基本原理) [Basic Principles of Copyright] 256 (2011); Wang Qian, *supra* note 22, at 163.

<sup>61</sup> In an unpublished experts' draft proposal to amend Chinese Copyright Law, it is proposed to cancel art. 16.

Deletion of Art. 11 (3) will on one hand avert the problems caused by overlapping of Legal Entities' Works and Special Employment Works without ignoring the practical concern that employers often need to make known their domination of the work. On the other hand, the deletion also brings the advantage that the copyright of Commissioned Works will be governed exclusively by Art. 17. The arbitrary labeling as either Legal Entities' Works (such that the copyright belongs to the principal) or Commissioned Works (so the agent will own the copyright) will no longer be the an issue. Absent explicit agreement ensuring that principal will gain the copyright of Commissioned Works, the agent will not have to worry that the works will be regarded to be Legal Entities Works nor will he need to worry about losing his copyright. The incentives for Natural Person Authors of Commissioned Works can therefore be best preserved.

To sum up, this article suggests simplifying the current complicated system of Works Made For Hire rules in China. The merits of dense regulation can only be appreciated when the rules are self-consistent. The number of regulations does not necessarily bear positive correlation with legal certainty. Under the worst circumstance, co-existence can even be the root of trouble. In the face of a complicated structure, the art of law and that of architecture do have one thing in common - both have to integrate many divergent elements from different sources to make one single feasible piece of instrument. In pursuing this goal, the reputable architect Mies van der Rohe made the following phrase by Robert Browning famous: Less is more. This insight also applies for the Works Made for Hire rules in China.