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Title	On the Perfection of 'Work Made for Hire' Under Chinese Copyright Law
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Citation	知的財産法政策学研究, 4, 77-85
Issue Date	2004-10
Doc URL	https://hdl.handle.net/2115/43417
Type	departmental bulletin paper
File Information	4_77-85.pdf

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On the Perfection of 'Work Made for Hire' Under Chinese Copyright Law[1]

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The general rule is the copyright of a work shall belong to its author; but there is an exception to that principle. Chinese Copyright Law defines a category of works called "works created in the course of employment." The significance of "works created in the course of employment" is inimitable, and differs from "work made for hire" under U.S Copyright Law. It is said Chinese rule for "works created in the course of employment" is appreciated by the WIPO, for it protects the interest of author thoroughly. This paper maintains that the rule of "works created in the course of employment" has some flaws. In addition, legal entity or organization shall be deemed to be the author of the work and the rule of commissioned works. Three provisions together make some confusion in practice. This paper will discuss how to resolve this confusion.

I. The Ownership of A Work Created in The Course of Employment

1. Statutory Definition

Article 16 CCL was read:

A work created by a citizen in the fulfillment of tasks assigned to him by a legal entity or other organization shall be deemed to be a work created in the course of employment. The copyright in such work shall be enjoyed by the author, subjected to the provisions of the second paragraph of this Article, provided that the legal entity or other organizations

[1] Author note: there are no such concept 'works made for hire' in Chinese Copyright Law, Chinese concept is Works created in the course of employment. The author use U.S copyright concept for easy communication, and the difference between two concepts can be seen in this paper.

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shall have a priority right to exploit the work within the scope of its professional activities. During the two years after the completion of the work, the author shall not, without the consent of the legal entity or other organization, authorize a third party to exploit the work in the same way as the legal entity or other organization does.

In any of the following cases the author of a work created in the course of employment shall enjoy the right of authorship, while the legal entity or other organizations shall enjoy the other rights included in the copyright and may reward the author:

(1) Drawings of engineering designs and product designs and maps, computer software and other works created in the course of employment mainly with the material and technical resources of the legal entity or other organizations and under its responsibility;

(2) Works created in the course of employment where the copyright is, in accordance with laws, administrative regulations or contracts, enjoyed by the legal entity or other organizations.

Art 11 and 12 of The Implementing Regulations of CCL read as:

Article 11, Tasks assigned mentioned in paragraph 2 of Article 16(1) of the Law shall mean that, obligation of the citizen in institution within one's scope of employment.

Material and technical conditions mentioned in paragraph 2 of Article 16(1) of the Law shall mean fund, equipments or materials provided expressly for the creation of a work.

Art.12 Within 2 years after the creation of the work, the author may, with the permission of the institution, permit a third party to use the work in the manner as the institution may have done. Remunerations thus obtained shall be divided between them according to agreed proportion.

The aforementioned 2- year period after the creation of the work shall be calculated from the date on which the work concerned is submitted to the institution.

2. Ownership of copyright

a. Ownership (one). According to the first sentence of Art.16 (1) CCL, The copyright in such work shall be enjoyed by the author, but the legal entity or other organizations shall have a priority right to exploit the work within the scope of its professional activities. During the two years after the completion of the work, the author shall not, without the consent of the legal entity or other organization, authorize a third party to exploit the work in the same way as the legal entity or other organization does. This

means that the copyright of author is not intact and the rights are limited. First of all, the entity has a priority right to exploit the work, and the author authorizes other use of the work depending on the consent of the entity; the author shall pay the entity part of Remunerations according to agreed proportion.

b. Ownership (two). According to Art. 16(2) CCL, the author shall enjoy the right of authorship, while the legal entity or other organization shall enjoy the other rights included in the copyright. There are two situations. First is the industry-oriented works, such as drawing of engineering design and product design, computer software, maps and other works created in the course of employment mainly with the material and technical resources of the legal entity; for those works, the author only enjoys the right of authorship. The second is, in accordance with laws, administrative regulations or contracts, the author enjoys the right of authorship, and the rest copyrights are enjoyed by the legal entity or other organizations. For example, the IR of CCL before revised had provided: In the case of compilation of works, being in the form of encyclopedias, dictionaries, text books or photo books of large size, as the case may be, copyright in the work as a whole shall belong to legal entities or non-legal entities who have arranged manpower or provided financial aid and material means for their creation and bear the responsibility in relation to the said work.[2] Interestingly, the revised IR of CCL abrogated this clause。

As to the contract between the employer and employee, which stipulates the author only has right of authorship; the entity enjoys all the rest rights, like other countries. If the contract stipulated, "Concerning the ownership of copyright, all rights under Art.10 CCL belong to the entity." The author would have nothing, and the Contract Law of China does not forbid such stipulation, this is to say, this Article can be circumvented through the contract, and the interest of the author depends on his bargaining power.

3. Doctrine about ownership of works made for hire.

There are four doctrines concerning the ownership of works made for hire.

[2] The author is very hesitant to cite this example, to the best knowledge of the author, those works should be works that the entity deems to be the author (more like works made for hire), other than works created in the course of employment. But many textbooks think so, the author doubts that they mix up those two concepts.

a. Belonging to the author.
Although all rights belong to the author, in the contract, the author should accept some limitations to his rights. For example, a journalist creates a report in its office time and in the scope of employment, this report can be published in the name of newspaper, even in pseudonym, and can be modified when it is necessary. French Copyright Law provides: The existence or conclusion of a contract for hire or of service by the author of a work of the mind shall in no way derogate from the enjoyment of the right afforded by first paragraph above (Art.L.111-1). Normally, the civil law countries apply this doctrine.
b. Belonging to the employer.
The common law system normally applies this doctrine. Section 201 of the U.S Copyright Law provides: In the case of a work made for hire, the employer or other persons for whom the work is prepared is considered the author for the purposes of this title, and, unless the parties have expressly agreed otherwise in a written instrument signed by them, owns all of the rights comprised in the copyright.
c. Belonging to the employer and the author jointly.
For instance, the Brazil copyright law.[3]
d. Belonging to the author in principle.
The Soviet Union and some Eastern European countries have ever provided that, ownership of works created by the employed authors, belongs to the author in principle, and his employer can exploit the works free of charge in its professional action and in limited period.
Now it can be seen, the doctrine concerning ownership of works created in course of employment in China is a hybrid of the civil law and the common law. On the understanding that U.S doctrine is an exception of author-own-copyright, Chinese doctrine is an exception of exceptions.

4. Characteristics of Chinese doctrine
a. Attaching importance to protection of the author.
This characteristic is draw mainly in contrast to the common law. Unless the contract stipulates excluding the authorship of the author, according to the law, the author enjoys the right of authorship, and then the economic right, and the moral interest is emphasized in Chinese doctrine.[4]

[3] Wang Erxian edited: *International Intellectual Property Law*, Hubei Remin Press, 2001, p120.
[4] As the author observation, Chinese authors value moral right more than economic right; this maybe can be explanted in "face" from view of legal culture. The authorship has also an indirect relationship with author's income. The work

This practice wins appreciation of commentators. A frequently cited case supports them. In 60s of 20th century, two employed composers created an opera, which turned out to be a big success, the composer was listed in the name of "collective creator", there was no any nature person's name mentioned, which is the normal way in that time. Two composers won the lawsuit, according to the CCL, regained the right of authorship. For the opera still is on stage, two composers obtained royalty of more than ten thousand dollars.
b. Different works enjoy different treatment, to balance the interest between the entity and the author.
Scrutinizing the Art.16 (1) and (2), the discriminative treatment is obvious. In works that are industry-oriented and have more investment, the entity enjoys all economic interest. For the works enjoying lower investment, the author enjoys more rights even to all of rights except that the author pays part of royalty, if the work is authorized to other to exploit within two years after the completion of the work. These clauses consider the interest of the entity and the author, and will encourage the creation of works.
c. Agreement about the ownership is permitted.
The law does not limit the content of the contract, so the ownership of works can be decided according to their agreement, but the commenter demerit this, for in present China, most of sources are on the hand of the entity, the author is in disadvantaged position in the bargain.[5] If the law does not forbid line, the author will get nothing out of the agreement, because the author has no power to bargain when he has no right on hand.

II. The shortage of Chinese doctrine.

At first sight, Chinese doctrine guarantees the interest balance between the author and the entity; the law deliberatively allocates rights between the author and the entity. Carefully analyzing, taking the practice into account, it will be seen that the unnecessary confusion arises from applying of the doctrine, and protection of the author's interest is more on paper than in practice.

with his name will help the promotion in academic rank, and then the income increases.
[5] Pang Liming: *On Perfection of Copyright System of Service Works in China*, No.5 2002, Journal of National Procurator College, P45.

1. Confusion between works created in course of employment and works created by deemed author.

The CCL provides that the entity is deemed to be author, although the Law itself hasn't this concept, but in theory there is. Japanese Copyright Law has similar provisions; maybe China and Japan are the only countries that provide the two categories work in their law at same time.

Art.11 (2) CCL reads:

Where a work is created according to the intention and under the supervision and responsibility of a legal entity or other organization, such legal entity or organization shall be deemed to be the author of the work.

In their literal expression, Art 11 differentiates with Art.16. One scholar summarizes the differentiation of two categories works: First, works created by deemed author represents the will of the entity, whereas the works created in the course of employment does not represent the will of the entity in whole and the author can show his creative skill. Second, the entity takes responsibility arising from the works created by him, and the creator has no liability for the work; for the works created in the course of employment, the author takes or does take the responsibility depending on the agreement and law. [6]

Subjectivity differentiation is hard to use in practice. One case showed the puzzle of one Judge on the two categories. In his judgment, on one hand, the judgment thinks the work was one created by deemed author; on the other hand, the Judgment hold that one of creators enjoy the right of authorship.[7] According to the law, the two situations can't co-exist in one work; if the entity enjoys the authorship, the creator of the work can't to be author any way. Otherwise there will be two authors on the work, are they co-authors? The answer is no.

This reporter has never understood the differences between that case and normal cases of employed authors, since even where an entity supervises creation of a work and accepts responsibility for it the fact that the actual creation is made by a natural person, the employed author, is still there.[8]

[6] Tan Weicai: *Distinguishing Between Works Created in the Course of Employment and Work Made for Hire.* Vol.3, 1998, Judgment Practice, p13.

[7] Luo Yan: *Intermediate People's Court decision on Luo Yan Culture Protection Office vs. Luo Yan Culture Exploration Team.*

[8] Adolf Dietz: *Draft report on the Amendment of Chinese copyright Law—Elaborated at the request of National Copyright Administration of China.* Intellectual Property Studies, No.10, Chinese Fanzheng publishing house.

In true life, the works created by the deemed author do exist, for example, the "white paper " of the government. The problem is how to avoid the confusion.

Japanese experience should be paid attention here. In Japanese Copyright Law Art.15 provides " under requirement of the legal person or user, a work (excluding the software) that created by the employee in his scope of employment, shall be published in the name of the legal person; unless they're no other stipulation in the contact or the regulation, the legal person shall be deemed the author." It can be seen that Japanese law limits the scope of works created by the deemed author to avoid the conflict.

2. It is hard to separate ownership (one) from ownership (two).

The aim of different treatments to ownership (one) and ownership (two) of CCL is visible, which intents to protect the reward of the entity investment. Works listed in ownership (two) need a big amount of investment, but the listed works is for enumeration, the list is open-end, as the "etc" has implied.

"As for as employed authors are, the present regulation in Art.16 CCA seems to realize already a number of compromises. first of all there is a differentiation between groups of works, whereby more industry-oriented works (such as drawing of engineering design and product design, computer software, maps and other works created in the course of employment mainly with the material and technical resources of the legal entity) are differentiated from other, supposedly less technical works where the legal position of the employer is quite weaker than in the first case. However, the differentiation criterion of "material and technical resources" appears to be too general, especially in light of the definition given it by Art.15 IR. Almost necessarily works of employed authors are normally made with the material and technical resources of an entity so that the differentiation could appear meaningless in practice."[9]

3. No limitation for the contract, that Art.16 intention for protection of author would go by the board possibly. This has explained in part I.

[9] Adolf Dietz: *Draft Report on the Amendment of Chinese Copyright Law—Elaborated at the Request of National Copyright Administration of China.* Intellectual Property Studies, No.10, Chinese Fanzheng Publishing house. P243.

4. Elaborate provision twists a hole.

The elaborate provision of CCL on works in the course of employment is so substantive that it is second to none, which should be perfectly safe. But the practice says no. A company concludes a contract with B, an advertising company, commissioning B creates a flysheet for A. B assigns W, one of its employee to fulfill the task. W finished the work and claims the authorship, the A say no way, for A has the all copyright under the contract between A and B; but in the contract between B and W, there is no stipulation about the ownership of work created by W, then, according to the Art.16 (1), W at least enjoy the right of authorship. And then, has B the right transfer the right B hasn't? The provision creates a dilemma for itself.[10]

As one scholar pointed out, CCL tries to elaborate the ownership of work in the course of employment due to the inertia of planed economy; with the establishment of market economy in China, this design is unwanted any more.[11]

III. Suggestions for perfection of works in the course of employment.

The law is an adjuster of social interest; the end of Copyright law is "encouraging the creation and disseminating of works." Human beings are the only source of creation, so the copyright law should protect authors. With the development of technology, some works can't be created in basement like before, the creation need the teamwork and money, which is the business of the legal person. In this sense, the natural person and the legal person are all active subjects in creation, mobilizing the both will promote the progress of culture. Copyright law should be both an instrument of change and a result of changes.

With the establishment of a full-fledged socialist market economy, the capacity of civil subject is increasing; they incline to distribute interest with contract action. There is more inflexible clause in law; there is less space for civil subject to agree. Concerning the ownership of works in the course of employment, the government should encourage the conclusion of contract to distribute the interest between the entity and the

[10] Guo Minrui, Tan Shaoguan, Fang Shaokun: *Principal of Civil Law*, China Renmin University Press, 1998, p518-519.

[11] Liu Chuntian edited: *Intellectual Property Law*. China Renmin University Press, 2000, P75.

employee. Works in the course of employment differ in thousands ways, the law that covers everything is hard to draft, the clause in principle would be better than elaborate one.

Works in the course of employment even be more complex than works made for hire. The pragmatism in U.S Copyright Act can be a reference. First, it ranges the commissioned work on the line of work made for hire. Although there is difference between them, they are work created in the interest of another party; jointed providing in one provision is good. Second, in dealing with the commissioned work, the Act lists ten categories, which is created under order and normally is used as a contribution, and no economic significance for commissioned party to independent use.

The CCL should meet the new situation to adopt flexible attitude. Notwithstanding, The CCL just be amended, further amendment is out of sight, some suggestions for further amendment maybe helpful for the thinking about this problem.

In theory, works created in the course of employment shall the upper-concept of works created by deemed author, and contain all works created in contract relationship. Works created in the course of employment embody three categories work: work created by the deemed author, the legal person has authorship and responsibility for it; work belonging to author, the author enjoys all of rights; work that the author has authorship and all remaining rights belong to the legal person. Ownership of works depends on the contract, no contract or no stipulation, belong to creator.

The suggestions are as follows: 1. it is recommend to drop Art. 11(3), in other word, abrogate the work created by the deemed author. 2. Providing one comprehensive article on works created in the course of employment. In this article, adding a work on which the legal person has its name mentioned, and the creator has no any right to this work; and providing the work the author has all of right and just right of authorship. 3. Removing Art.17 in this clause, to treat the commissioned work as one of works in the course of employment.

［編集者付記］本稿は、2月23日・24日に開催された国際シンポジウム「知的財産法政策学の基本理念の確立に向けて」の第一セッション「知的財産法制と経済発展」（23日実施）において行われた報告の原稿に加筆修正を施したものの翻訳（原文は中国語）である。当日ご報告の労をとっていただいた上に翻訳掲載の許可をくださった彭涛先生に謝意を表したい。