AUDIOVISUAL WORKS AND THEIR PROTECTION UNDER CHINESE COPYRIGHT LAW

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INTRODUCTION

With the new amendment of the Copyright Law of People's Republic of China ("Copyright Law") coming into effect on June 1, 2020, "cinematographic works and works created by a process analogous to cinematography" (hereafter referred to collectively as "cinematographic and quasi-cinematographic works") have given place to "audiovisual works." While the Regulations for the Implementation of the Copyright Law of the People's Republic of China ("Implementing Regulations") defines the former term as "works which are recorded on some medium, consisting of a series of images, with or without accompanying sound, and which can be projected with the aid of suitable devices or communicated by other means," the Law and the Regulations do not define the latter.

Some commentators go as far as to argue that audiovisual works as a category of works of authorship have the same coverage as "cinematographic and quasi-cinematographic works."[1] The life of law, however, has never been logic. Chinese courts are unlikely to follow scholarly opinions. On the contrary, courts are always breathing new life into an old legal concept. For them, "audiovisual works" is not an alien concept. The term was already found in many copyright judgments before the adoption of the recent amendment.[2] When struggling with copyright disputes over live streaming of sporting events and video gameplay, videos shot by balloon-borne cameras, water shows, and so on, Chinese courts had strained the

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1 *See* Wang Qian, *Audiovisual Works and Their Ownerships*, 33 PEKING UNIV. L.J. 664 (2021).

2 *See, e.g.*, Lianzhong Yida (Tianjin) Network Tech. Co. v. Beijing Huashi Juhe Culture Media Co., (2020) Jin Min Zhong No. 1210 (Tianjin High People's Ct.) (civil judgment); Shanghai Animation Film Studio v. Zizhou Media (Beijing) Co., (2018) Jing 0105 Min Chu No. 61575 (Beijing Chaoyang Dist. People's Ct.) (civil judgment); Dayu Info. Zixun Co. v. Hainan Dashun Cinema Culture Commc'n Co., (2016) Jing 73 Min Zhong No. 785 (Beijing Intell. Prop. Ct.) (civil judgment); Hangzhou Dechanglong Info. Tech. Co. v. Beijing Wangshang Culture Commc'n Co., (2009) Zhe Zhi Zhong No. 25 (Zhejiang High People's Ct.) (civil judgment).

legal concept of "quasi-cinematographic works" to a breaking point. The judicial legacy on the definition of these works is unlikely to dissipate. Rather, it will haunt future cases involving audiovisual works.

To examine the new legal concept of "audiovisual works," this Article gleans its normative elements from past cases. It proceeds in six parts. Part I discusses the possibility of developing a legal definition of audiovisual works and its impact. Part II argues that the contours of this category of works should be viewed against the backdrop of a non-exhaustive list of categories of works and the general definition of works of authorship under Article 3 of the Copyright Law. Parts III to VI investigate, respectively, the fixation requirement, the originality requirement, copyright ownership, and the infringement of audiovisual works.

I. AN EXPECTED DEFINITION?

While the new Chinese Copyright Law does not define "audiovisual works," a definition may eventually emerge. Such emergence should come as no surprise. Under the previous copyright law, there was no definition of any of the listed categories of works. It was the Implementing Regulations that did this job.[3] When proposing amendments to the Copyright Law,[4] the National Copyright Administration ("NCA") intended to change this convention. In the drafts, the NCA set forth definitions for every category of works, most of which were taken from the 2013 Implementing Regulations.[5] There, "audiovisual works" were defined as "works that consists of a series of images, with or without accompanying sound, which can be sensed through aid of devices, including motion pictures, television plays, and works created by a process analogous to cinematography."[6] Partly because Article 3 of the Copyright Law already provides a general definition of works of authorship, and partly because of the convention for regulations to prescribe more specific matters, the National People's Congress ("NPC") chose to remove all definitions of categories of works when passing the amendment. In the foreseeable future, the Implementing Regulations are likely to be revised, and the proposed definition of "audiovisual works" mentioned above may find a place there.

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[3] *See* Regulations for the Implementation of the Copyright Law of the People's Republic of China (promulgated by the State Council, Aug. 2, 2002, amended Jan. 30, 2013, effective Mar. 1, 2013), art. 4 (China) [hereinafter Implementing Regulations].

[4] Copyright Law of the People's Republic of China (Amendment Draft Submitted for Review, June 6, 2014), http://www.gov.cn/xinwen/2014-06/10/content_2697701.htm (in Chinese).

[5] *See id.* art. 5.

[6] *See id.* art. 5(12).

The NCA does have the authority to promulgate regulations, subject to the State Council's approval, and to implement various provisions of the Chinese Copyright Law, in particular the rules for copyright registration. The question is whether the definitions of the different categories of works provided in the regulations — in particular, the one for "audiovisual works" — will bind only the NCA for the purpose of copyright registration or both the NCA and courts.

This is a complicated legal matter under Chinese law. Since 1981, the early days of reform and opening-up in China, the Standing Committee of the NPC has delegated the power to interpret laws, authorizing the Supreme People's Court ("SPC") to interpret laws in their application. As a result, the judicial interpretations issued by the Court have equal force as the laws that are to be interpreted. [7] The Standing Committee has also authorized the State Council and its departments to interpret laws on matters regarding their implementation which are outside the courts' jurisdiction.[8] When articles in laws require further demarcation or supplementary provisions, the Standing Committee will step in to make a legislative interpretation or decision.[9] The Committee was silent on whether courts must apply regulations promulgated by the State Council in adjudicating disputes or not.

Typically, courts are willing to apply regulations. When enacting the Administrative Procedures Law in 1989, the NPC made clear that courts must apply regulations promulgated by the State Council and by the local peoples' congresses.[10] When interpreting contract law in 1999, the SPC made clear that courts shall apply regulations when invalidating con-

[7] *See* Provisions of the Supreme People' Court on Judicial Interpretation (最高人民法院关于司法解释工作的若干规定), Fafa [1997] No. 15 (promulgated by the Sup. People's Ct., June 23, 1997), art. 4, SUP. PEOPLE'S CT. GAZ., no. 3, 1997, at 96 (Sup. People's Ct. 2001) (China).

[8] *See* Resolution on Strengthening the Interpretation of Laws (全国人民代表大会常务委员会关于加强法律解释工作的决议) (promulgated by the Standing Comm. Nat'l People's Cong., June 10, 1981), §§ 2–3.

[9] *See id.* § 1.

[10] *See* Administrative Procedures Law (promulgated by the Nat'l People's Cong., June 28, 2017, effective July 1, 2017), art. 63; Administrative Procedures Law (promulgated by the Nat'l People's Cong., Nov. 1, 2014, effective May 1, 2015), art. 63; Administrative Procedures Law (promulgated by the Nat'l People's Cong., Apr. 4, 1989 effective Oct. 1, 1990), art. 52.

tracts.[11] Now it is generally settled that courts shall apply regulations promulgated or approved by the State Council.[12]

This approach was sensible. In the past thirty years, the central government has actively pushed for reform and opening-up in China, and policymakers and judges have been confronted with ever new disputes these reforms have caused while legislation has often lagged far behind. The SPC was never expected to make laws that keep abreast of the grand scheme of reform and opening-up; the wise general option was to rely on regulations as authorities when deciding cases. It should be recalled that when the Chinese Copyright Law was enacted in 1990, copyright was alien to everyday lives in China and to Chinese judges. The law was general, left out essential legal concepts, and was difficult to apply. For instance, while Article 3 of the 1991 Copyright Law provided a list of categories of works, there was no provision on the basic concept of "works of authorship," let alone any demarcation for the kinds of works. The NCA had the needed expertise and, out of necessity, promulgated the Regulations to elaborate the general rules under the Copyright Law and to fill gaps in that law.

Nevertheless, the adoption of the Implementing Regulations does not mean that these regulations will bind courts the same way as other regulations issued by the State Council. The Implementing Regulations are not intended to "regulate" at all. Copyright is essentially a private right. It arises automatically once a work is created,[13] without any need for administrative formalities. Copyright registration is not compulsory for copyright protection. It is only prima facie evidence for ownership.[14] The courts have the final say as to what a work of authorship is and to which

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11 *See* Interpretation of the Supreme People's Court on Several Issues Concerning Contract Law (I)
(最高人民法院关于适用《中华人民共和国合同法》若干问题的解释（一）), Fashi [1999] No. 19 (promulgated by the Judicial Comm. Sup. People's Ct., Dec. 19, 1999), art. 4.

12 *See* Provisions of the Supreme People' Court on Binding Authorities in Adjudication (最高人民法院关于裁判文书引用法律、法规等规范性法律文件的规定), Fashi [2009] No.14 (promulgated by the Judicial Comm. Sup. People's Ct., Oct.26, 2009), art. 2, SUP. PEOPLE'S CT. GAZ., no. 2, 2000, at 8.

13 *See* Implementing Regulations, *supra* note 3, art. 6.

14 *See* Interpretation of the Supreme People's Court on Several Issues Concerning the Applicable Law for Adjudicating Civil Copyright Cases
(最高人民法院关于审理著作权民事纠纷案件适用法律若干问题的解释), Fashi [2002] No. 31 (promulgated by the Judicial Comm. Sup. People's Ct., Oct. 12, 2002, effective Oct. 15, 2002), art. 7, SUP. PEOPLE'S CT. GAZ., no. 2, 2000, at 186, *as revised by* Fashi [2020] No. 19 (promulgated by the Judicial Comm. Sup. People's Ct., Dec. 29, 2020, effective Jan. 1, 2020); *see also* Kunlian (Xiamen) Camera Equip. Co. v. Bahang (Shenzhen) Indus. Co., (2010) Min Shen No. 281 (Sup. People's Ct.) (civil order).

category that work belongs. After nearly thirty years of adjudicating copyright disputes, courts have gained expertise. Even if the NCA sets forth a definition of audiovisual works and registers a work under this category, nothing prevents courts from finding otherwise. In *Beijing Zhongke Water Show Science & Technology Co. v. Management Office for the Hangzhou West Lake Scenery* ("*Water Show Case*"), the water show at issue was registered in the category of "cinematographic works and quasi-cinematographic works." On appeal, the Beijing Intellectual Property Court recharacterized the show as a work of fine art and therefore found it copyrightable.[15] On rehearing, the Beijing High People's Court affirmed.

In contrast, if the SPC promulgates a judicial interpretation for audiovisual works, the definition provided in that interpretation is equal to the law and shall bind both courts and the NCA. If the NCA does not follow, a court may overturn wrongful registrations or improper applications of administrative rules.[16] Nevertheless, it typically takes years for the SPC to distill practices into a judicial interpretation. It is unlikely that "audiovisual works" will be an exception.

II. CONSERVATIVE OR LIBERAL CONSTRUCTION?

The context for understanding "audiovisual works" under the new Chinese Copyright Law is Article 3 of the Copyright Law. The law provides generally that "works are intellectual creations with originality expressed in a tangible form in the literary, artistic, or scientific domain." This provision further provides a non-exhaustive list of categories of works, the last of which is "any intellectual creation that meets the requirements for a work of original authorship."

In this context, courts are generally expected to take a liberal approach to determining what constitute audiovisual works. Under the previous Copyright Law, courts already showed willingness to expand the defined categories of works. For example, in the *Water Show Case*, the Beijing Intellectual Property Court inflated the category of works of fine art even though it declined to find the water show a "quasi-cinemato-

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[15] (2017) Jing 73 Min Zhong No. 1404 (Beijing Intell. Prop. Ct.) (civil judgment) [hereinafter *Water Show Case*].

[16] Article 53 of Administrative Procedures Law (2017) provides:

> Where a citizen, a legal person, or any other organization deems that a regulatory document developed by a department of the State Council or by a local people's government or a department thereof, based on which the alleged administrative action was taken, is illegal, the citizen, legal person, or other organization may concurrently file a request for review of the regulatory document when filing a complaint against the administrative action. The term 'regulatory document' as mentioned in the preceding paragraph does not include administrative rules.

graphic work."[17] Article 4(8) of the 2013 Implementing Regulations defined works of fine art as "two- or three-dimensional works of the plastic arts created in lines, colors, or other media which impart aesthetic effect, such as paintings, works of calligraphy, and sculptures." Relying on this definition, the court held that with regard to works of fine art, there was no limitation to the medium and how long the work had to last.[18] Recognizing that traditional works of fine art — for example, paintings and sculptures — are plastic arts and are static and fixed, the court noted that the water show at issue was dynamic and aesthetical, comprising lines, colours, and other artistic elements.[19] The court maintained that "works of fine art" should not be confined to plastic arts but should instead be adapted to new forms of expression enabled by new technology.[20] With the general definition for works of authorship, courts are unlikely to be narrowminded with audiovisual works in the face of new forms of expression empowered by frontier technologies.

However, some judges remain conservative. When commenting on "audiovisual works" under the new Chinese Copyright Law, the deputy chief judge of the Beijing Intellectual Property Court — who decided the *Water Show Case* — insisted that water effects are not "images" for the purpose of audiovisual works and that the water show should not be characterized as such.[21] In his opinion, the dictionary meaning of an "image" should govern: a picture of somebody or something seen in the mirror, through a camera, a television, or a computer.[22] He defended that water effects were like plastic arts which are embodied in the medium of water. It is uncertain whether he is willing to expand the concept of audiovisual works beyond its traditional two-dimensional ambit to accommodate new technology and to deem holographic works and other multi-dimensional creations protectable.

III. FIXATION AS A REQUIREMENT?

It is open to debate whether audiovisual works must be fixed in order to enjoy copyright protection. This question has been raised regarding quasi-cinematographic works. This issue was intensely argued in one of the most high-profile copyright disputes over live sport streaming, *Sina*

17 *See Water Show Case*, *supra* note 15.
18 *See id.*
19 *See id.*
20 *See id.*
21 Chen Jinchuan, *Comments on the Enumerated Categories of Works Under Chinese Copyright Law*, CHINA COPYRIGHT, Dec. 2020, at 22; *see also* Li Chen, *Problems with the Chinese Translation of Copyright Law Terms in Chinese Copyright Law*, CHINA COPYRIGHT, Oct. 2019, at 78, 79.
22 *See* Chen, *supra* note 21.

(Beijing) Internet Information Service Co. v. Tianying Jiuzhou Network Technology Co. (*Sina Live Sport Streaming Case*). Sina was the sole licensee to provide the live streaming of football games of the Chinese Super League. The defendant, without permission from Sina, re-transmitted two live game events through its website. Sina argued that the continuous images contained in the broadcast signals should be copyrightable quasi-cinematographic works. On appeal, the Beijing Intellectual Property Court held that those images were not fixed and thus could not be protected as quasi-cinematographic works.[23] Under Article 4(11) of the 2013 Implementing Regulations, cinematographic and quasi-cinematographic works are "works which are recorded on some medium, consisting of a series of images, with or without accompanying sound, and which can be projected with the aid of suitable devices or communicated by other means." The court reasoned that "recorded on some medium" required quasi-cinematographic works to be fixed permanently on a certain medium. In its view, this reasoning was corroborated by the right of cinematography, which Article 10(13) of the 2010 Copyright Law defined as "the right to fix an adaptation of a work in a medium by cinematography or a process analogous to cinematography." Thus, the court held that in live sport streaming, those images were not permanently fixed in a medium and therefore could not be protected as "quasi-cinematographic works."

Nearly three months later, the court, using this same line of reasoning, held in the *Water Show Case* that water shows were not quasi-cinematographic works because the shows' continuous sights and sounds were not fixed in a process analogous to cinematography.[24] The court, however, arrived at a surprising conclusion: The water show should be protected as a work of fine art.

While the decision in the *Water Show Case* was final when the Beijing High People's Court rejected to rehear the case in 2019,[25] the *Sina Live Sport Streaming Case* was reversed.[26] When rehearing the latter case in 2020, the court held that the requirement for "recorded on some medium" in the Implementing Regulations distinguishes the objects of recording, such as figures, images, and movements, from expressions embodied in recorded matter. The former was never copyrightable, but the latter was. Only when figures, images, and movements were recorded on a medium and when the creator's personality was embodied in the expressions could the creator prove the content of the work and reproduce and transmit it. Thus, "recorded on some medium" required the creator to prove the exis-

[23] (2015) Jing Zhi Min Zhong No. 1818 (Beijing Intell. Prop. Ct.) (civil judgment).
[24] *See Water Show Case*, *supra* note 15.
[25] (2018) Jing Min Shen No. 4672 (Beijing High People's Ct.) (civil order).
[26] (2020) Jing Min Zai No. 128 (Beijing High People's Ct.) (civil judgment).

tence and reproducibility of the work. The court further noted that Article 4 of the Implementing Regulations state generally that works should be original and "reproducible," making no requirement for permanent fixation.

The court went even further. It held that a signal is a medium for the requirement for "recorded on some medium." The court reasoned that the images of live sport streaming were shot by several cameras placed at the spot. Before transmission, those images were selected, processed, edited, and uploaded. That the sport events were transmitted online was sufficient proof of digital processing, fixation, reproduction, and transmission. Even though the whole work would have been finally fixed only when the live sport broadcast finished, it was "reproducible" and "recorded on some medium" in order to qualify as a quasi-cinematographic work. In the court's view, copyright could subsist in a partially completed work just as it would in a completed work.[27]

This holding is distinct from the Federal Court of Australia's opinion in *Seven Network Limited v. Commissioner of Taxation*. There, Judge Bennett held that the signals did not amount to cinematograph films as the signals were received simultaneously by the Seven Network and not embodied or embedded in any recorded form including through the receiving cables: "There is no embodiment of an aggregate of visual images in the [International Television and Radio] Signal. There is no embodiment of any aggregate of visual images in a 'thing.'"[28]

In China, this holding is likely to prevail for audiovisual works in the future. Article 3 of the Copyright Law provides generally that "works are intellectual creations with originality expressed in a tangible form in the literary, artistic, or scientific domain." There is no requirement for fixation. The enumerated category of "oral works" further corroborated this interpretation. As "audiovisual works" is a broader concept than "quasi-cinematographic works," it is unlikely that the former will be required to be fixed "permanently" if the latter are not required.

By contrast, the holding in the *Water Show Case* is not tenable. There is no doubt that the cinematographic works are not fixed on a cinema screen but in film. Thus, the water show should not be precluded from being classified an "audiovisual work" simply because the sights are seen through the water effects. The copyright in the water show should be regarded as embodied in the computer program which produces the sights and sounds even if they are not fixed in the moving waters. Moreover, if a

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[27] *See also* Guidelines for Adjudicating Copyright Infringement (北京市高级人民法院侵害著作权案件审理指南) (promulgated by the Beijing High People's Ct. Sept. 4, 2019), § 2.2, https://www.bjcourt.gov.cn/article/newsDetail.htm?NId=150002897&channel=100014003&m=splc.

[28] Seven Network Ltd. v. Comm'r of Tax'n, [2014] FCA 1411 [120] (Austl.).

signal is a valid medium for the requirement for "recorded on some medium" as for images of live sport streaming, why are water drops floating in the air not construed as a medium for images of water effects? After all, they are produced through control commands from a computer program and are much more physically visible than broadcast signals.

IV. ORIGINALITY FOR AUDIOVISUAL WORKS

A. Distinction Between Audiovisual Works and Recordings

Under Chinese copyright law, copyright subsists in audiovisual works, but audiovisual recordings have only neighboring rights. "Copyright" is a full bundle of rights provided in Article 10 of the Copyright Law, including moral rights (the rights of attribution, divulgation, integrity and so on) and economic rights (the rights of reproduction, distribution, performance, display, broadcasting, communication through an information network and so on). By contrast, neighboring rights in audiovisual recordings as provided in Article 44 of the Copyright Law have no moral rights and enjoy a shorter list of economic rights, including only the right of reproduction, distribution, rental, and communication through an information network. It is hotly debated whether their difference in originality is in degree or in kind?

It appears that the SPC considers that the difference is in degree. In *Ye Jiaxiu v. Yongli International Hotel (Guangfeng District of Shangrao City)*, the Court opined briefly that the music video at issue was simply edited and not sufficiently original to be a "quasi-cinematographic work."[29] In the *Sina Live Sport Streaming Case*, the Beijing Intellectual Property Court elaborated the reasons for this position.[30] When singing the same song, different people had different performances, and the audience could easily discern the differences. Those differences, while not sufficient to bring about a new song, were protected, as the copyright law recognized that performers have moral rights in their performances. Likewise, in recording the same musical work, different producers made different sound effects which came from their individual ways of recording. The court thus concluded that performances and sound recordings had some originality in which neighboring rights subsisted. Finally, the court found that the images related through live sport streaming had some originality but were not sufficiently original to be "quasi-cinematographic works."

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[29] *See also* Beijing Zhongrong Hengsheng Wood Co. v. Zuoshang Mingshe Furniture Co., (2018) Zui Gao Min Shen No. 6061 (Sup. People's Ct.) (civil order); Songyuan Ningjiang Happy Wedding Plan. Ctr. v. Mr. Meng's Workshop, (2018) Zui Gao Fa Min Shen No. 3787 (Sup. People's Ct.) (civil order).

[30] (2015) Jing Zhi Min Zhong No. 1818 (Beijing Intell. Prop. Ct.) (civil judgment).

The Beijing High People's Court held otherwise, however. On rehearing the *Sina Live Sport Streaming Case*, the court reasoned that saying a work was created was the same as saying it was original. Because a work was either created or not, there was no possibility to gauge the originality of a work. The continuous images of quasi-cinematographic works were created and original, and those images of video recordings were not. By recognizing neighboring rights in the latter, the copyright law did not raise the originality requirement for the former. The individual ways of recording, while "personal," were for a technical purpose and did not touch upon original expressions. As such, those technical arrangements fell short of an intellectual creation. In the end, the court found that the related images of live sport streaming were original and should be protected as "quasi-cinematographic works."[31]

It should be noted that the lower court made a mistake in logic. The performers' personalities, while bringing about differences, does not necessarily produce original expressions. Those differences have nothing to do with creating a work, but with rendering an existing musical work of authorship. Different producers may choose different instruments, singers, backgrounds, and so on to record a song. Again, they make these choices not for the purpose of making a new song, but that of recording an existing one. As those acts are far from intellectual creations, the resultant "individuality" is irrelevant to originality.

The lower court appears to have endorsed "objective originality," confusing "originality" under copyright law with "novelty" or "inventive step" under patent law. Both "novelty" and "inventive step" is assessed against prior art, and "inventive step" is established when the claimed product or process is non-obvious. There is no need to inquire about the way the invention was created. By contrast, "originality" should not be established with reference to prior works. A work of authorship with non-obvious difference from prior works is not necessarily original. The non-obviousness might well reside in uncopyrightable functional elements or involve no human creation at all. Rather, when a work is "independently created," it may enjoy copyright even if an identical work already exists. Human intellectual creation should be the touchstone for finding originality, rather than an objective difference, which can be the product of commonplace intellectual labor, nature, or a machine. After all, Article 1 of the Copyright Law provides that the law is enacted to protect an "author's copyright" and to encourage "creation" and communication of works. Article 11 of the Copyright Law is crystal clear that the natural person who has created a work is its author.

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[31] *See* (2020) Jing Min Zai No. 128.

It seems that the SPC has endorsed the concept of "objective originality." In *Spin Master Co. v. Shantou Xianniu Toys Co.*, the Court held that the originality of applied art in an article should be assessed according to its visual difference from prior work pertaining to similar articles.[32] It would be wrong, however, to apply this holding of "originality" to all kinds of works. Rather, this holding is limited to works of applied art. It should be noted that there are two kinds of "originality" under U.S. Copyright Law: one for works of authorship and the other for designs. The latter is similar to "novelty." Under the law, a design is "original" if it is the result of the designer's creative endeavor that provides a distinguishable variation over prior work pertaining to similar articles which is more than merely trivial and has not been copied from another source.[33] The SPC might well consider taking a similar approach when determining the copyrightability of applied art in useful articles, with no intention to uproot the conventional concept of originality for other works of authorship.

B. Originality to Be Established Through a Creative Process

The originality of an audiovisual work is distinct from that of its pre-existing work. Audiovisual works are regarded as compound works in which separate copyrights may subsist. In *Xiao Hongchang v. Chengdu 1-Room Teaching Counsel Co.*,[34] the alleged infringer argued that the video content at issue was based on pre-existing works, including words, numbers, and pictures, and that the plaintiff failed to show that he was authorized to include those works into the video. The SPC rejected this claim. The Court maintained that the right holder claimed copyright protection for the whole video rather than any of the pre-existing works. In the video, the related images were animated. Their effects, sound and visual, were analogous to those of quasi-cinematographic works. In video production, scripts must be written, music arranged, and images selected and edited. Thus, the Court characterized the video as a quasi-cinematographic work and held that the copyrights in the pre-existing works did not prejudice its copyright.

The originality of an audiovisual work should be assessed through its creative process. There is no such thing as "objective originality" independent of a creative process. When assessing originality, Chinese courts normally investigate the creative process of a work. For example, in *Yong Yan v. Yongcheng Municipal Heritage Management Office*, the plaintiff's deceased father repaired an ancient stone tablet on commission from the local government. The tablet recorded a tale of an ancient Chinese em-

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32 (2018) Zui Gao Fa Min Shen No. 4397 (Sup. People's Ct.) (civil order).
33 17 U.S.C. § 1301(b)(1).
34 (2018) Zui Gao Fa Min Shen No. 726 (Sup. People's Ct.) (civil order).

peror killing a monstrous snake. Reflected on the smooth surface was an image that looked like a man drawing a sword. This extraordinary image attracted many tourists. The plaintiff claimed that he had copyright in the image. The court held that the image was not intentionally created but a phenomenon produced by nature and thus was not copyrightable.[35] This case shows that an image does not count as a copyrightable work simply because it resembles a human-created drawing.

This approach holds true even for computer-generated works. In *Xinzheng Sun v. Shuxiang Wang*,[36] the SPC held that "originality" requires independent intellectual creation where a personal stamp is fixed. In this case, the plaintiff asserted copyright in price line charts produced by a computer program. Looking into their allegedly creative process, the Court found no copyright subsisted in them: the data was in the public domain, the computer program ordinary, and the intellectual effort commonplace — with the data inputted into the computer to produce line charts with limited forms of expression.

As far as the originality of audiovisual works is concerned, it is already a standard judicial practice to investigate the creative process. For instance, the copyrightability of music videos is a delicate matter. If the production process of music videos involves only simple camera setups, follow and pull-back shots, and editing of takes, along with title designs, courts typically find that no quasi-cinematographic works have been cre-

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35 (2006) Yu Fa Min San Zhong No. 7 (Henan High People's Ct.) (civil judgment).

36 (2016) Zui Gao Min Shen No. 2136 (Sup. People's Ct.) (civil order). In *Beijing Feilin Law Firm v. Beijing Baidu Internet Technology Co.*, (2018) Jing 0491 Min Chu No. 239 (Beijing Internet Ct.) (civil judgment), the court reiterated that human intellectual creation is a necessary condition for finding a copyright work. It rejected copyright protection for the computer-generated market report at issue in the dispute for falling short of the necessary intellectual creation. In *Shezhen Tencent Computer System Co. v. Shanghai Yingxun Technology Co.*, (2019) Yue 0305 Min Chu No. 14010 (Shenzhen Nanshan Dist. Ct.) (civil judgment), the court found a financially focused news story generated by Dream Writer—the robotic reporter developed by the giant high-tech company Tencent—eligible for copyright protection and being infringed. Nevertheless, the court tracked the creative process and stressed that the Tencent staff created the story by selecting data and setting the operative parameters, the template, and the style for Dream Writer to generate the story. In *Jian Chen v. Fushun Wanpu Printing Co.*, (2010) Chuan Min Zhong No. 334 (Sichuan High People's Ct.) (civil judgment), the court did not find original the fillable machine-readable form generated by a computer program at issue in the dispute. Noting that the form was produced automatically when the computer program had received parameters from the users, the court found that such parameters setting involved no intellectual creation, but only mechanical arrangements required by the machine to read the form.

ated but only audiovisual recordings have been produced.[37] In contrast, if the process involves shooting scripts, directors, actors, lighting, montage, dubbing, and so on, they normally found the intellectual creation of quasi-cinematographic works.[38] Where these factors are absent—for example, in a live sport broadcast — courts may find a quasi-cinematographic work when its creation involves multiple setups and angles of cameras, selection of frames, and editing of shots and sequences.[39]

To establish an audiovisual work, however, it does not matter whether the creative process was analogous to cinematographic works or not. A court once commented that a work should not be denied as a cinematographic work simply because it was not shot by cameras, as movies were increasingly produced through computer technology rather than photography.[40] In practice, video games,[41] while not made in the same manner as films, and digital three-dimensional product presentations that were generated from photos by software,[42] were typically held to be quasi-cinematographic works. So long as images, accompanied by sound or not, were

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[37] *See, e.g.*, Ye Jiaxiu v. Xin Yinlong (Shixing Cnty.) Club, (2018) Yue Min Zhong No. 608 (Guangdong High People's Ct.) (civil judgment); Dongguan Time Tunnel Ent. Co. v. Ye Jiaxiu, (2014) Dong Zhong Fa Zhi Min Zhong No. 14 (Dongguan Interm. People's Ct.) (civil judgment).

[38] *See* No. 1 Ent. Club (Liyang City) v. Canxing Culture Commc'n (Shanghai) Co., (2020) Su Min Zhong No. 518 (Jiangsu High People's Ct.) (civil judgment); Ye Jiaxiu v. Xin Yinlong (Shixing Cnty.) Club, *supra* note 37; Dongguan Time Tunnel Ent. Co. v. Ye Jiaxiu, *supra* note 37; China Audio-Video Copyright Ass'n v. Zhang Yong, (2013) E Jing Men Zhi Chu No. 7 (Jing Men Interm. People's Ct.) (civil judgment); Guangzhou Xinyue Catering & Ent. Co. v. Xinli Phonogram (Hong Kong) Co., (2006) Yue Gao Fa Min San Zhong No. 213 (Guangdong High People's Ct.) (civil judgment); Jiangdong Huayang Nianhua Ent. (Ningbo City) Co. v. New Times Audiovisual Co., (2005) Zhe Min San Zhong No. 89 (Zhejiang High People's Ct.) (civil judgment); Beijing Sun-Swinging Culture & Art Commc'n Co. v. Geng Zihan, (2004) Gao Min Zhong No. 153 (Beijing High People's Ct.) (civil judgment).

[39] *See* (2020) Jing Min Zai No. 128.

[40] *See* Huaduo (Guangzhou) Network Tech. Co. v. NetEase (Guangzhou) Comput. Sys., (2018) Yue Min Zhong No. 552 (Guangdong High People's Ct.) (civil judgment).

[41] *See, e.g.*, Xianfeng (Suzhou) Network Tech. Co. v. Shenghe (Zhejiang) Network Tech. Co., (2019) Zhe Min Zhong No. 709 (Zhejiang High People's Ct.) (civil judgment); Snail (Suzhou) Digital Tech. Co. v. Tianxiang (Chengdu) Interactive Tech. Co., (2018) Su Min Zhong No. 1054 (Jiangsu High People's Ct.) (civil judgment); *see also* Guidelines for Adjudicating Copyright Infringement, *supra* note 27, § 2.14.

[42] Beijing Panorama Interactive Tech. Co. v. Beijing Silicon Valley Dynamic Network Tech. Co., (2006) Hai Min Chu No. 13216 (Beijing Haidian Dist. People's Ct.) (civil judgment).

originally arranged and related to represent the authors' conception, they were characterized as quasi-cinematographic works.[43]

C. "Original" Frames from Audiovisual Works and Recordings

While it is reasonable to regard frames selected from cinematographic or quasi-cinematographic works as original photographic works,[44] it is paradoxical to do the same for those selected from a non-original video recording. In *Gao Yang v. Shanghai Quan-Tudou Culture Communication Co.*, the Beijing Intellectual Property Court found as photographic works two frames from a non-original video recording.[45] The video was shot by a camera carried by a flying balloon. Once the balloon was launched, there was no human intervention, and the camera worked automatically. It was not disputed that the video should be characterized as a recording rather than a work of authorship. The court, however, found enough human intervention for the two shots to be original based on the intention to shoot the Earth from above through a balloon-borne camera, the choice of instruments and of weather conditions for launching the balloon, the setting of camera angles, and the configuration of the recording function. In particular, the court commented that the frames were digitally edited even though the editing is trivial. Indeed, the editing involves only the erasing of the strips of the camera accidentally snapped through the Photoshop software.

On rehearing, the Beijing High People's Court affirmed on different grounds.[46] In its opinion, the shooting process was automatic and involved no human intervention. All the acts taken before releasing the balloon were preparations for shooting. There was no creative process and no personal expression in the video shot. Every composite frame of the video underwent the same process and thus could not be an original work of authorship. The two disputed frames were merely found and were isolated from the video, and involved little selection, judgment and personality. However, the court found that the final pictures obtained from the digital editing were original photographic works. By removing the strips, the court commented, the resultant pictures showed a more beautiful scene of

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43 *See, e.g.*, Liangxin Website Culture Commc'n Co. v. NetEase (Guangzhou) Comput. Sys. Co., (2016) Jing 0102 Min Chu No. 25177 (Beijing W. Dist. People's Ct.) (civil judgment); Ma Xiaogui v. Guangzhou Qianjun Network Sci. & Tech. Co., (2011) Hui Zhong Fa Min San Zhong No. 70 (Guangzhou Interm. People's Ct.) (civil judgment).

44 *See, e.g.*, Xinli TV Culture Inv. Co. v. Guangzhou Xueteng Trade Co., (2018) Yue 73 Min Zhong No. 2169 (Guangzhou Intell. Prop. Ct.) (civil judgment); Xinli TV Culture Inv. Co. v. Yangzhou Kangkai Trade Co., (2017) Zhe 8601 Min Chu No. 2297 (Hangzhou Internet Ct.) (civil judgment).

45 (2017) Jing 73 Min Zhong No. 797 (Beijing Intell. Prop. Ct.) (civil judgment).

46 (2020) Jing Min Shen No. 3362 (Beijing High People's Ct.)(civil order).

the Earth than the primitive frames. The reasoning is quite controversial. The digital editing alone lacks the modicum of creativity to be original. The strips were just noise, just like grammatical errors in a paper. To hold the edited pictures original is equal to regarding the primitive frames as created. Under Article 3 of the 2013 Implementing Regulations, creation is an intellectual activity through which a literary, artistic, or scientific work is "directly produced." Once the balloon was released, no one directed the camera. The camera's angle, focus, and framing were out of human control. Because the fixing of the frames at issue involved no human intellectual creation, they should not be regarded as original. It is not tenable to insist that the above human interventions "directly" made the frames. The pictures of the frames seem to be equivalent to the photos in the "Monkey Selfie Case," where the crested macaque Naruto picked up a camera and snapped itself.[47] Without human intellectual creation, the U.S. Court of Appeals for the Ninth Circuit held the selfie to be uncopyrightable.

The camera set on the balloon is different from the camera in the Monkey Selfie case, however. In the latter, the camera was not arranged to be in the monkey's hands, and there was no showing of photographic techniques whatsoever. In contrast, in the former, the camera was on a flying balloon to take pictures of the Earth's surface through pull back shooting. To be sure, an aerial pull-back shot might not be original to be an audiovisual work due to a lack of creative arrangement of the related images. In a previous case, the Beijing Intellectual Property Court found that holding a camera to record the interactions with pets was just commonplace and the sequences so produced were not an original work.[48] On the other hand, the arrangement of pull-back shooting of a chosen area of the Earth's surface through a balloon-borne camera in a chosen weather and the digging up and capturing of the two frames appear to be a creative process. In particular, the two frames were created once the balloon-borne camera shot the Earth's surface, but they were intermingled with other ordinary frames. The two frames did not stand as separate works. When selected and captured, they were finally fixed. Their camera angle, focus, timing, framing, and lighting were a product of human selection. It can therefore be argued that the pictures were expressed by a process analogous to photography[49] and should thus be assimilated into photographic works.

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[47] *See* Naruto v. Slater, 888 F.3d 418, 426 (9th Cir. 2018).

[48] *See* Liang Zhi v. TV Station of Jilin Province, (2017) Jing 73 Min Zhong No. 445 (Beijing Intell. Prop. Ct.) (civil judgment).

[49] Under Article 2 of Berne Convention for the Protection of Literary and Artistic Works, "photographic works to which are assimilated works expressed by a process analogous to photography" is a listed category of work to enjoy copyright.

Even in this favorable light, it is doubtful that moral rights should accrue to the two frames. These two frames are very remote from fine-art photography. Instead, it is more appropriate to characterize them as "photos" and protect them through "neighboring rights." The anomaly is that the Chinese Copyright Law accords neighboring rights to audiovisual recordings but not to photos.

D. Audiovisual Works from Time-Lapse Photography?

You can take sequential photos captured over a period of hours and compress them into a video of only a few minutes. Is the video an audiovisual work? In *Liya Zhou v. Zhiwei Chen,*[50] the video was made through computer software out of 5,000 high resolution sequential photos. The Beijing Intellectual Property Court held that the still pictures from time-lapse photography were turned into aesthetic motion pictures and there was originality in selecting the raw material and in the expression of the subject matter. For this simplistic reason, the video was characterized as a quasi-cinematographic work.

It seems that the court anticipated no objection. After all, each picture is original. It is logical that the video made from pictures should be original and protected as a work of authorship. The only problem is that compressing sequential photos often does not require any creativity. It is common practice that if the production process of music videos involves only simple camera setups, follow and pull-back shots, and editing of takes — along with title designs — courts typically find that no quasi-cinematographic works have been created.[51] Time-lapse photography and compressing sequential photos involves no more complicated or creative jobs. Why then should the resulting video be treated otherwise?

V. OWNERSHIP OF AUDIOVISUAL WORKS

A. The "Producer" as the Copyright Owner of an Audiovisual Work

Audiovisual works are divided into two classes governed by different ownership rules. Under Article 17 of the Copyright Law, audiovisual works consist of "cinematographic works, television play works" and "other audiovisual works." For the former, the producer owns the copyright; the authors such as screenwriters, directors, photographers, composers, lyricists, and composers enjoy the right of attribution and are entitled to payment according to contractual arrangement.[52] This ownership ar-

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[50] (2020) Jing 73 Min Zhong No.1682 (Beijing Intell. Prop. Ct.) (civil judgment).
[51] *See supra* note 37.
[52] Copyright Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, amended Nov. 11, 2020, effective June 1, 2021), art. 17, ¶ 1 [hereinafter Copyright Law].

rangement was already there for cinematographic works before the Third Amendment to the Copyright Law. For the latter, however, their copyrights are owned according to the parties' agreement; in the case of no agreement, the producer owns the copyright, and the authors enjoy the rights of attribution and remuneration.[53]

These rules seem simple and easy to apply. The problem is: Who is the producer? There was — and still is — no definition for this key term under the Copyright Law, leading to divergent approaches. Some courts even took "producer" at face value, defining the "producer" as the person who made the film.[54] A cautious approach is to consult with cinema professionals. According to the China Federation of Literary and Art Circles and the China Film Association, "presenting producer," "production producer," and "filmmaker" are all used in practice and are interchangeable. To make matter worse, a film is often invested or produced by multiple persons, and there are several candidate "producers." As a corollary, courts are split as to who the copyright owner is. The Guangdong High People's Court takes an inclusive approach, regarding the following as "producers" for the purpose of copyright ownership: "presenting producer," "production producer," "filmmaker," "co-presenting producers," "co-production producers," and "co-filmmakers."[55] If there is conflict between the named producer(s) and the owner(s) indicated in the copyright notice, the latter is to be relied upon.[56] This approach causes trouble. In an exemplary case, *Shanghai Guangshi Culture Communication Co. v. Shanghai Quan-Tudou Culture Communication Co.*, twenty entities were listed as co-creators and five companies as co-presenters. The court held that the television play at issue was jointly owned by twenty-five entities.[57] To exercise the copyright, they were required to take concerted action.

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53 *Id.* art. 17, ¶ 2.

54 *See* Beijing Wangshang Culture Commc'n Co. v. Zhengzhou Lingdu Juzheng Inv. Mgmt. Co., (2011) Yu Fa Min San Zhong No. 57 (Henan High People's Ct.) (civil judgment); Beijing Huayi All. Culture Media Inv. Co. v. Wangle Internet (Beijing) Sci. & Tech. Co., (2009) Wu Zhi Chu No. 48 (Wuhan Interm. People's Ct.) (civil judgment); Beijing Ciwen Movie Prod. Co. v. Guangdong Guangxin Commc'n Serv. Co., (2009) Tian Fa Min Chu No. 147 (Guangzhou Tianhe Dist. People's Ct.) (civil judgment); Beijing Ciwen Movie Prod. Co. v. Wole Info. Sci. & Tech. Co., (2008) Chao Min Chu No. 16141 (Beijing Chaoyang Dist. People's Ct.) (civil judgment).

55 *See* Guidance for Adjudicating Copyright Disputes Involving Cinematographic and Musical Works
(广东省高级人民法院关于审理侵害影视和音乐作品著作权纠纷案件若干问题的办案指引) (promulgated by the Guangdong High People's Ct., Dec. 10, 2012), § 3, http://www.gdcourts.gov.cn/index.php?v=show&cid=131&id=52297.

56 *See id.*

57 (2010) Pu Min San (Zhi) Chu No. 38 (Shanghai Pudong Dist. People' s Ct.) (civil judgment).

On the other hand, the Beijing High People's Court distinguished the probative values of different strands of evidence for copyright ownership in a film, narrowing down the candidates for copyright owners. Absent contrary evidence, the copyright notice of a film should be relied upon to find its copyright owner; where the film bears no copyright notice, the producer(s) who present the film and credited as such at the opening or closing credits should be taken as the copyright owner; otherwise, the named filmmaker(s) will be the copyright owner.[58]

Which approach is the right one? For now, it is not possible to answer. It is disappointing that courts have consciously sidestepped the difficult problem concerning the substantive standard used to determine the producer of a film. To avoid disputes, it is advisable to provide explicitly and specifically in contracts for the copyright ownership of any audiovisual works and to affix a corresponding copyright notice thereupon.

B. Copyright Owners of Component Works of an Audiovisual Work

Under Article 17, Paragraph 3 of the Copyright Law, the authors of the screenplay, music, and so on (hereafter referred to collectively as "component works") may exercise independently their respective copyrights in the works which are capable of separate exploitation even though these works are incorporated into an audiovisual work.[59] Thus, the author of a cartoon character enjoys the copyright in its aesthetic image independently from the producer.[60] When the character is printed without authorization on kids' clothing,[61] embodied in toys,[62] used in video games,[63] or exploited in other ways, the author may on his or her own initiative launch a lawsuit to seek relief.

It is debated, however, how frames from audiovisual works should be protected. Some courts hold that they are just components of a cinematographic work and should not be protected as independent photographic works. In *Dongyang Leshi Flower Film Culture Co. v Beijing Douwang*

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[58] *See* Guidelines for Adjudicating Copyright Infringement, *supra* note 27, § 10.4.
[59] Copyright Law, *supra* note 52, art. 17, ¶ 3.
[60] *See* Guidelines for Adjudicating Copyright Infringement, *supra* note 27, § 10.2.
[61] *See, e.g.*, Shanghai Century Huachuang Cultural Images Mgmt. Co. v. Wuhan Baijia Supermarket Co., (2013) Min Shen No. 368 (Sup. People's Ct.) (civil order).
[62] *See, e.g.*, Guangdong Originality Power Culture Commc'n Co. v. Shanghai Qinba Indus. Co., (2020) Hu 73 Min Zhong No. 159 (Shanghai Intell. Prop. Ct.) (civil judgment); Guangdong Originality Power Culture Commc'n Co. v. Dongguan Weimao Shopping Mall, (2018) Yue 19 Min Zhong No. 80 (Dongguan Interm. People's Ct.) (civil judgment).
[63] *See, e.g.*, Anle (Beijing) Film Distrib. Co. v. Shanghai Zhuling Network Sci. & Tech. Co., (2018) Jing 0101 Min Chu No. 327 (Beijing E. Dist. People's Ct.) (civil judgment); Anle (Beijing) Film Distrib. Co. v. Litian Wuxian Network Tech. Co., (2017) Jing 73 Min Zhong No. 757 (Beijing Intell. Prop. Ct.) (civil judgment).

Science & Technology Co.,[64] the Beijing Chaoyang District People's Court held that the frames captured from a television play were its components. Because they were used in introducing and commenting on the play, the court found that the copyright in the play was subject to copyright limitation: (1) the frames were widely circulated before; (2) they were used for commenting, and the use might well promoted the play; and (3) they were non-substantial parts of the whole play and could not substitute for it in the marketplace to the extent that their use would prejudice the copyright owner's legitimate interests.

Some courts hold otherwise. In *Xinli Television Culture Investment Co. v. Guangzhou Xueteng Trade Co.*, the Guangzhou Intellectual Property Court took the view that frames from a television play were photographic. When they were used without authorization for advertising products online, their copyright was infringed.[65] It is clear from this case that once the frames from the films are characterized as "photographic works," each of them enjoys copyright of independent economic value. It is difficult, if not impossible, to find any unauthorized use to be fair use anymore.

The latter approach is legally questionable, as it subverts the protection term for audiovisual works. Under the Copyright Law, audiovisual works enjoy economic rights for fifty years after publication,[66] while photographic works enjoy protection for the life of the author plus fifty years.[67] When the term of protection for the former expires, no one may use the audiovisual work, as all of its frames still enjoy independent copyright. Furthermore, this approach encourages producers of audiovisual works to take strategies to prolong the term of copyright protection by registering millions of frames of an audiovisual work as independent photographic works, rather than a single "audiovisual work."

This approach also challenges the ownership rule for audiovisual works. Once frames are characterized as "photographic works," their copyright owners are typically held to be the "producer" of the audiovisual

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64 (2017) Jing 0105 Min Chu No. 10028 (Beijing Chaoyang Dist. People's Ct.) (civil judgment); *see also* Shanghai Mitao Film Co. v. Shanghai Suohan Trade Co., (2020) Hu 73 Min Zhong No. 2 (Shanghai Intell. Prop. Ct.) (civil judgment); Shanghai Animation Studio v. Beijing Hand-in-Hand Kids' Art Theatre Co., (2018) Jing 0105 Min Chu No. 61575 (Beijing Chaoyang Dist. People's Ct.) (civil judgment); Hu Jinqing v Shanghai Animation Film Studio, (2010) Huang Min San (Zhi) Chu No. 28 (Shanghai Huangpu Dist. People's Ct.) (civil judgment).

65 (2018) Yue 73 Min Zhong No. 2169 (Guangzhou Intell. Prop. Ct.) (civil judgment); *see also* Xinli TV Culture Inv. Co. v. Yangzhou Kangkai Trade Co., (2017) Zhe 8601 Min Chu No. 2297 (Hangzhou Internet Ct.) (civil judgment).

66 Copyright Law, *supra* note 52, art. 23, ¶ 3.

67 *Id.* art. 23, ¶ 1.

work,[68] rather than the photographer. This interpretation flies in the face of Article 17, Paragraph 3 of the Copyright Law. This provision only deals with "authors" of component works of an audiovisual work, who are at the same time the authors of the audiovisual work. As Article 17, Paragraph 1 already makes a legal distinction between the authors of an audiovisual work and its producer, it is untenable to argue the "producer" of an audiovisual work is the author of its frames and thus may exercise copyright in any one of them according to Article 17, Paragraph 3.

Some may argue that the author of the original frames is the photographer, and he or she is deemed to implicitly assign the copyright in them to the producer. But the very presence of Article 17, Paragraph 3 precludes implicit assignment of copyright in component works of an audiovisual work to the producer. Moreover, Article 29 of the Copyright Law provides that those rights which are not explicitly licensed or assigned in contract must not be exercised without permission from the copyright owner. In theory, the photographers of a film can assign copyright in each frame to the producer through explicit contractual terms, but such arrangements would amount to changing the basic practices in the film industry.

VI. INFRINGEMENT OF COPYRIGHT IN AN AUDIOVISUAL WORK

The copyright owner of an audiovisual work has a bundle of rights under Article 10 of the Copyright Law. To prove infringement, he must prove access and substantial similarity.[69]

To establish substantial similarity, there is no requirement that the infringing work must also be an audiovisual work. For instance, in *Youku Network Technology (Beijing) Co. v. Shenzhen Shuli Science & Technology Co.*,[70] the defendant used 382 frames from a television play in combination with descriptive words to introduce and comment on the play. The play's soundtrack was left out. The defendant argued that it only provided to the public still images with his own original descriptive words. The Beijing Intellectual Property Court found infringement, however. The court reasoned that cinematographic works consist of related images that are capable of imparting moving effects. Those frames used were key components of the copyrighted play. By viewing them, the audience could

[68] *See supra* note 65.

[69] *See* Guidelines for Adjudicating Copyright Infringement, *supra* note 27, § 10.8–.10.

[70] (2020) Jing 73 Min Zhong No. 187 (Beijing Intell. Prop. Ct.) (civil judgment); *see also* Shanghai Huimei Med. Sci. & Tech. Co. v Shenzhen Haomei Aquarian Sci. & Tech. Dev. Co., (2019) Hu 0107 Min Chu No. 641 (Shanghai Putuo Dist. People's Ct.) (civil judgment).

already learn its plot. The disputed use conflicted with a normal exploitation of the work and unreasonably prejudiced the legitimate interests of the right holder.

CONCLUSION

While the Copyright Law provides no definition of audiovisual works, it does not mean that Chinese courts will grasp in the dark. The judicial legacy on the treatment of cinematographic and quasi-cinematographic works is illuminating. In view of the general provision on works of authorship, Chinese courts are expected to take a liberal approach when determining the copyrightability of audiovisual works, just as they did under the old law. As the legal definition of works of authorship does not mention fixation, it is unlikely that they will impose a strict fixation requirement for this category of works. Instead, they will continue to find originality in an audiovisual work if that work involves a creative process. To find the "producer" of an audiovisual work, they will rely on existing evidentiary rules to determine its ownership. When a substantial part of the work is used without permission, they will find copyright infringement even if the use is not for making a video. Where its frames are commercially exploited without authorization, some courts are willing to protect them as "photographic works." But if they are used for commenting on or criticizing the audiovisual work, courts may regard them as its components and limit the copyright of the whole work according to the copyright limitation clauses under Article 24 of the Copyright Law.