CHINESE ENTERTAINMENT LAW YEAR IN REVIEW, 2015: IS IT CONVERGING WITH THE U.S. PRACTICE?

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INTRODUCTION

The year 2015 was monumental for the development of Chinese entertainment law. First, there was a substantial increase in the number of cases before the Chinese courts that are of interest to the entertainment industry.[1] Second, the courts' rulings and reasoning began to show characteristics that converge with U.S. entertainment law practice, and as such, these cases may have far-reaching implications for the future progress of China's entertainment industry.

The driving force behind the legal development is the contemporaneous and explosive growth of China's film industry. China's film box office exceeded US$6.8 billion in 2015—an almost fifty percent increase from the prior year.[2] Chinese local productions contributed to more than sixty-one percent of the total box office revenue.[3] It is esti-

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1. During 2015, Beijing courts, including its district courts, intermediate courts, and high court, received a total of 13,939 cases in the field of intellectual property law. *See* Press Release of Beijing People's Court held on Apr. 13, 2016, rev'g and summarizing its case portfolio in 2015 (Apr. 13, 2016), http://www.live.chinacourt.org/chat/chat/2016/04/id/44213.shtml [https://perma.cc/49W4-4TZP]. Among them, over ten thousand cases were related to copyright disputes, many of which involved films, television programs, video games, and so forth. *Id.*

2. *See China's 2015 Box Office Soars to 6.8 Billion USD,* XINHUA NEWS (Dec. 31, 2015), http://news.xinhuanet.com/english/2015-12/31/c_134968462.htm [https://perma.cc/T6EV-85MN]; Patrick Brzeski, *China Box Office Grows Astonishing 48.7 Percent in 2015, Hits $6.78 Billion*, HOLLYWOOD REPORTER (Dec. 31, 2015), http://www.hollywoodreporter.com/news/china-box-office-grows-astonishing-851629 [https://perma.cc/6SS4-GV3H]. Note that "box office receipts" are different from "theatrical receipts." The former refers to the total dollars spent by consumers on admission tickets to theatres, and the latter refers to the remaining dollars collected by distributing studios after the exhibitors (theater owners) take their share (usually fifty percent of the box office receipts). *See* DINA APPLETON & DANIEL YANKELEVITS, HOLLYWOOD DEALMAKING 185 (2d ed. 2010).

3. *See China's 2015 Box Office Soars to 6.8 Billion USD, supra* note 2.

mated that China will surpass the United States and become the number one box office by 2018.[4] However, the rapid growth of China's film industry, compounded by the issue of poorly-drafted contracts, naturally led to a significant increase in entertainment law-related cases.[5]

Between 2014 and 2015, a number of cutting-edge legal issues were presented before Chinese courts, including the substantial similarity test in copyright infringement analysis;[6] protection of movie titles[7] and story characters[8] through trademark and anti-unfair competition law; protection of private rights to privacy[9] and reputation;[10] and the treatment of freedom of speech and the public's right to information.[11] The number of legal cases has increased correspondingly to a point that one may observe some important, common trends in their legal decisions and opinions. In contrast, there has been no careful study that examines the development of Chinese entertainment law and explores the relationship between this development and the century-old case law developed in the United States.

This Article discusses the trends and implications of Chinese entertainment law cases between 2014 and 2015, with a focus on copyright, trademark, anti-unfair competition, and defamation laws. The cases discussed below are certainly not exhaustive, but they show a notable trend: the surprising convergence of the legal reasoning in Chinese opinions with that of long-established U.S. case law and practice, albeit with certain exceptions. Parts I–IV introduce selected Chinese enter-

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4. *Id.*

5. *See* Press Release of Beijing People's Court, *supra* note 1.

6. Qiong Yao Su Yu Zheng (琼瑶诉于正) [Chiung Yao v. Yu Zheng], Sanzhongminchuzi No. 07916 (Beijing 3rd Interm. People's Ct. 2014), *aff'd*, Gaominzhizhongzi No. 1039 (Beijing High Ct. 2015). Note that the page numbers referencing the Chinese cases in this Article are created by the author, based on her own Microsoft Word document format. Thus, depending on the font size and margin space of each document, the reference numbers to each case might vary from other sources.

7. Wu Han Hua Qi Su Beijing Guang Xian Chuan Mei (武汉华旗诉北京光线传媒，北京市高级人民法院) [Wuhan Huaqi Film Studio v. Beijing Enlight Media], Gaominchuzi No. 1236 (Beijing High Ct. 2014).

8. Beijing Yue Dong Zhuo Yue Ke Ji Su Beijing Kun Lun Yue Xiang Wang Luo (北京乐动卓越科技有限公司与北京昆仑乐享网络技术有限公司等计算机软件著作权权属纠纷) [Locojoy v. Kunlun], Jingzhiminchuzi No. 1 (Beijing Intell. Prop. Ct. 2014).

9. Yang Ji-Kang Su Zhong Mao Sheng Jia Guo Ji Pai Mai You Xian Gong Si (杨季康诉中贸圣佳拍卖有限公司) [Yang Jiang v. Sungari Auction Ltd.], Gaominzhongzi No. 1152 (Beijing High Ct. 2014).

10. Fang Shi Min Su Cui Yong Yuan (方是民诉崔永元名誉权) [Fang Shi-Min v. Cui Yong-Yuan], Yizhongminzhongzi No. 07485 (Beijing 1st Interm. People's Ct. 2015), *aff'g* (Beijing Haidian Dist. Ct.).

11. Shi She Hui (Beijing) Su Xin Jing Bao (世奢会（北京）国际商业管理有限公司诉新京报) [World Luxury Association v. Beijing News Press], Sanzhongminzhongzi No. 6013 (Beijing 3d Interm. People's Ct. 2015).

tainment law cases between 2014 and 2015, and related trends and implications. After a brief summary of each case, the legal issues are analyzed and compared to the corresponding case law in the United States. This analysis shows the convergence of Chinese entertainment law with the laws of the United States, with respect to the treatment of the substantial similarity test under copyright law, the likelihood-of-confusion standard in trademark and anti-unfair competition law, and finally the balancing test between protecting the right to reputation and safeguarding the public interest to information. The Article concludes with an optimistic yet somewhat speculative note that the continued cooperation between the Chinese film industry and Hollywood will create further convergence not only in industry practices but also in legal practices, and will thus have far-reaching implications for the development of Chinese jurisprudence in the long run.

I. RECENT COPYRIGHT DEVELOPMENT IN THE CHINESE ENTERTAINMENT INDUSTRY

In 2015 alone, Chinese courts were asked to decide on a number of emerging copyright issues central to China's future copyright law practice, including the idea/expression dichotomy;[12] the substantial similarity test in copyright infringement analysis;[13] the right to divulge[14] (one of the moral rights recognized in most civil law jurisdictions); the right to prepare derivative works;[15] fair use;[16] and Internet service provider liability.[17] The case *Chiung Yao v. Yu Zheng*[18] will be used to demonstrate copyright issues that have arisen in China and how the decision may impact the Chinese entertainment industry for years to come.

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12. Qiong Yao Su Yu Zheng (**琼瑶诉于正**) [Chiung Yao v. Yu Zheng], Sanzhongminchuzi No. 07916 (Beijing 3d Interm. People's Ct. 2014).

13. *Id.*

14. Yang Ji-Kang Su Zhong Mao Sheng Jia Guo Ji Pai Mai You Xian Gong Si (杨季康诉中贸圣佳拍卖有限公司**)** [Yang Jiang v. Sungari Auction Ltd.], Gaominzhongzi No. 1152 (Beijing High Ct. 2014). The court held that defendant Sungari's unauthorized auction of plaintiff Qian's family letters violated the plaintiff's privacy rights and also the right to divulge (a moral right) under the Copyright Law. *Id.*

15. Bai Xian Yong Su Shang Hai Dian Ying (Ji Tuan) **(**白先勇诉上海电影(集团)有限公司) [Bai Xian-Yong v. Shanghai Film Group], Huerzhong Minwuchu No. 83 (Shanghai No. 2 Interm. People's Ct. 2014).

16. Wang Xin Su Bei Jing Gu Xiang Xin Xi Ji Shu You Xian Gong Si (王莘诉北京谷翔信息技术有限公司**)** [Wang Xin v. Google], Gaominzhongzi No. 1221 (Beijing High Ct. 2013).

17. **Mo Tie Su Ping Guo** (磨铁诉苹果**)** [Motie v. Apple], Erzhongminchuzi No. 5177 (Beijing No. 2 Interm. People's Ct. 2012), *aff'd*, Gaominzhongzi No. 2620 (Beijing High Ct. Oct. 31, 2014).

18. Qiong Yao Su Yu Zheng (琼瑶诉于正) [Chiung Yao v. Yu Zheng], Sanzhongminchuzi No. 07916 (Beijing 3d Interm. People's Ct. 2014).

A. Non-Literal Copying of Literary Works: The Idea/Expression Dichotomy and Substantial Similarity Test

In *Chiung Yao v. Yu Zheng*,[19] Chinese judges addressed the substantial similarity test involving literature works, films, and television programs—one of the trickiest tasks in copyright infringement analysis.[20] In particular, the court applied copyright principles, namely the idea/expression dichotomy, the merger doctrine, and the *scènes à faire* doctrine, all of which were previously adopted by the United States in *Nichols v. Universal Pictures* (1931),[21] the United Kingdom in *The Da Vinci Code* case (2006),[22] and France in *La Bicyclette Blue* case (1993).[23]

Plaintiff Chiung was a well-known author of romantic novels. Defendant Yu was an emerging scriptwriter, producer, and director.[24] Chiung claimed that Yu's television series, Palace III: The Lost Daughter (宫锁连城 3), and its underlying script violated the copyright of Chiung's prior novel, *Plum Blossom Scar* (梅花烙), a book published in 1993.[25]

In copyright infringement cases involving works of literature, an infringement analysis cannot be achieved without a detailed reading and comparison of the story, plot, and character relationships between the two pieces of work.[26] As such, the plaintiff's novel was examined by the court, and is summarized as follows:

> [Plaintiff's] story was set in the background of the Qing dynasty and

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19. *Id*.

20. *Id.*

21. Nichols v. Universal Pictures Corp., 45 F.2d 119 (2d Cir. 1930).

22. Baigent v. Random House Group Ltd. (The Da Vinci Code Case) [2006] EWHC 719 (Ch). The authors of the book *Holy Blood, Holy Grail* sued Random House, the publisher of Dan Brown's bestselling book, *The Da Vinci Code*, for copyright infringement. *Id.* ¶ 1. The British judges rejected the plaintiff's claims after a lengthy comparison of the story plots between the two books, and found the defendant not liable for copyright infringement. *See id.* ¶¶ 11–103, 360. The same legal theories of the idea/expression dichotomy, scène à faire, the merger doctrine, and so forth, have been applied in *The Da Vinci Code Case*. *See id.* ¶¶ 137–327.

23. *See* Winston Maxwell, *A Comparative French and U.S. law Approach to Scènes à Faire and Other Non-Protectable Elements in Copyright Law*, 30 PROPRIÉTÉS INTELLECTUELLES 31, 31 (2009).

24. Qiong Yao Su Yu Zheng Zhu (琼瑶诉于正) [Chiung Yao v. Yu Zheng], Sanzhongminchuzi No. 07916 (Beijing 3d Interm. People's Ct. 2014).

25. *Id.*

26. *See id. Cf. The Da Vinci Code Case*, [2006] EWHC 719. For instance, in *Chiung Yao v. Yu Zhang*, Chinese judges spent the first thirty-four pages, out of its forty-two page opinion, summarizing the story developments between the two works. Qiong Yao Su Yu Zheng (琼瑶诉于正) [Chiung Yao v. Yu Zheng], Sanzhongminchuzi No. 07916 (Beijing 3d Interm. People's Ct. 2014). Likewise, in *The Da Vinci Code Case*, the British court spent thirteen pages repeating the storylines of plaintiff's book *Holy Blood and Holy Grail* and defendant's book *The Da Vinci Code*, out of its sixty-four page opinion. [2006] EWHC 719, ¶¶ 6–103.

> about a family of nobility. The imperial lord and his wife had three daughters and a fourth one was on the way. The wife hoped to have a son to inherit the lordship as this would calm her incessant fear of losing power and status in the family. Her fear was accentuated by her husband's attraction to a younger woman, a gift presented to him during his birthday party, and his immediate urge to accepting her into the family as a concubine. Out of her fear, the wife followed her sister's advice and switched her newborn baby girl with a boy they found outside the palace. Before abandoning the princess, the empress tattooed a plum blossom on her shoulder, hoping that the tattoo would help identify her in the future . . . . An indigent couple found the abandoned princess in a basket near a creek, and they adopted and raised her.
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> The baby boy was raised in the family as a prince. Many years later, as fate would have it, he met and saved the abandoned princess in a distressing circumstance. In a true fairytale fashion, he fell in love with the princess in spite of his engagement with another princess in what was an arranged marriage. Against the wish of his family, the prince took the abandoned princess as his concubine as a condition to entering into the arranged marriage. The truth about the identities of the prince and princess was revealed eventually, and the Emperor punished the imperial lord family for its lies and cover-ups. The story ends tragically with the princess' suicide and prince's abandonment of the family.[27]

A reading of defendant's script, *Palace III*, revealed a significant number of similar plot elements between the two works,[28] especially in the beginning of the story, including: the dynasty in which the story took place, the family structure (including the number of daughters), the relation of the family to the Emperor, the young concubine presented as a birthday gift, and even the discovery of the princess at a creek.[29] Defendant's work diverged from plaintiff's in several details: instead of a plum blossom tattoo, the baby girl had a natural birth mark; rather than being adopted by a couple, the girl was adopted by a woman operating a brothel; the prince and princess met for the first time under different circumstances; and defendant's story ended with a more complicated and dramatic plot including revenge and the birth of a child.[30]

To bring a prima facie copyright infringement case, a plaintiff needs to prove ownership of a valid copyright and that defendant copied original elements of plaintiff's copyrightable work.[31] With respect to the

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27. Qiong Yao Su Yu Zheng (琼瑶诉于正) [Chiung Yao v. Yu Zheng], Sanzhongminchuzi No. 07916, at 7 (Beijing 3d Interm. People's Ct. 2014).

28. *See id.* at 27. In the brief, the plaintiff cited twenty-one identical or similar plots between the two works. *Id.*

29. *Id.* at 5–7.

30. *Id.* at 27–30, 35–36.

31. *Id.* at 18–20.

second element, plaintiff must establish that there is actual copying by either direct[32] or indirect evidence,[33] and that defendant's copying amounts to improper appropriation, also known as the substantial similarity test.[34]

In this case, in addition to the fact that Chiung's novel was published long before defendant's work, the defendant himself also openly admitted that he copied Chiung's work when producing the television series, under his uneducated impression that "if the copying is less than [twenty percent], it would count as fair use."[35] Defendant's open admission bewildered the public.[36] It also helped to narrow down the legal arguments to one key issue: whether Yu copied copyrightable elements in Chiung's prior work, thus meeting the substantial similarity test.[37]

The Beijing 3rd Intermediate Court, the court of first-instance, acknowledged the idea/expression dichotomy that "copyright law does not protect themes, ideas, emotions or scientific principles, but only expressions of such ideas."[38] The court also recognized the challenge in distinguishing non-copyrightable ideas from copyrightable expressions of such ideas, describing it as "necessary but difficult to grasp."[39] Like Judge Hand's reasoning in *Nichols v. Universal Pictures Corp.*,[40] the Chinese court applied a similar analysis it called the "pyramid abstrac-

32. Direct evidence of actual copying is usually established by direct admission of defendant. *See* 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT §13.01 (Mathew Bender & Co. ed., 2016).

33. Indirect evidence of actually copying could be established by the access-plus-similarity test. *Id.*

34. The court acknowledged the challenge of distinguishing non-copyrightable ideas from copyrightable expressions of such ideas. *See* Qiong Yao Su Yu Zheng (琼瑶诉于正) [Chiung Yao v. Yu Zheng], Sanzhongminchuzi No. 07916, at 20–24, 27 (Beijing 3d Interm. People's Ct. 2014).

35. Scriptwriter Li Ya-Ling, who used to work with Yu Zheng, revealed to the media that Yu told her in 2009 that "copying was fine as long as it did not exceed [twenty percent of the prior work]." *Chiung Yao Criticized Yu Zheng for Copyright Infringement, Experts Commented on Non-literal Copying*, CHINANEWS.COM (Apr. 16, 2014, 4:34 PM), http://www.chinanews.com/cul/2014/04-16/6072294.shtml [https://perma.cc/V7H2-RL6P]. Yu explained to her, based on Li's recollection, that if a prior work has one hundred episodes, then copying a total of twenty episodes would bring no liability. *Id.*

36. *See On China: Chiung Yao Is Not Alone in Her Enforcement Journey*, BBC NEWS (Dec. 12, 2014), http://www.bbc.com/zhongwen/simp/comments_on_china/2014/12/141212_coc_qiongyao_copyright [https://perma.cc/EQZ6-NHRU].

37. The defendant also challenged the plaintiff's copyright ownership and copyrightability of the prior work, but both claims were rejected by the court. *See* Qiong Yao Su Yu Zheng (琼瑶诉于正) [Chiung Yao v. Yu Zheng], Sanzhongminchuzi No. 07916 (Beijing 3d Interm. People's Ct. 2014).

38. *Id.* at 21.

39. *Id.*

40. *Nichols*, 45 F.2d at 121.

tion test"—the separation of ideas from the expression of ideas—articulated by the Beijing 3rd Intermediate Court as follows:

> This Court finds that a "Pyramid abstraction analogy" can be used to analyze the idea-expression dichotomy. If a literary work is a Pyramid, the bottom of the Pyramid would be expressions with sufficient details, and the top of the Pyramid would be the most abstract, and therefore a generalized idea. When a copyright owner of a literary work sues others for copyright infringement, such a Pyramid-abstraction analysis should be applied to determine whether similar elements between the plaintiff's works and that of the defendant are copyrightable expressions or non-copyrightable ideas-the closer to the top, the more likely to be an idea; the closer to the bottom, the more likely to be an expression.[41]

In addition to the aforesaid "pyramid abstraction test," the Beijing 3rd Intermediate Court also applied a "source-identifying special experience test," ruling that "when the elements of the story plot are specific enough to bring a unique experience [to the audience], thus helping identify the source of a particular [author's] work," such plot elements are considered expressions of ideas.[42] After applying the "pyramid abstraction test" and "source identifying test," the court ruled that the copyrightable expressions in the plaintiff's work included detailed character settings, character relationships, storyline, plot development, and conflicts, all of which incorporated the plaintiff's original creativity and unique expressions.[43]

Having reviewed and compared twenty-one specific plot elements in plaintiff's novel with those in defendant's work, the Beijing court identified "almost identical story plot developments and character relationships" between the two works, except for "some minor variations."[44] The court held that such similarities "exceeded the boundary of fair reference," and thus found defendant liable for copyright infringement.[45]

The *Chiung Yao* case is a reflection of progress in China's copyright law. In a case almost a decade earlier, the Beijing High Court addressed non-literal copying of literature works in *Zhuang Yu v. Guo Jing-Ming*.[46] In this case, the Beijing High Court was asked to determine whether defendant Guo's novel *Never Flowers in Never Dreams* infringed on plaintiff's prior book *In and Out of the Circle*.[47] When ad-

41. Qiong Yao Su Yu Zheng (琼瑶诉于正) [Chiung Yao v. Yu Zheng], Sanzhongminchuzi No. 07916, at 21 (Beijing 3d Interm. People's Ct. 2014).

42. *Id.*

43. *Id.* at 20.

44. *Id.* at 37.

45. *Id.* at 38.

46. Zhuang Yu Su Guo Jing Ming (庄羽诉郭敬明) [Zhuang Yu v. Guo Jing-Ming], Gaominzhongzi No. 539 (Beijing High Ct. 2005).

47. *Id.* at 1–2.

dressing similarities between literature works, the court stated the following:

> Literature writing is an independent creative process, and it is closely related to the unique life experiences of its authors. Therefore, even if [two works] are set in the same historical background, address the same topic and [are] surrounded by [the] same historical facts, [it is possible that] certain plot elements or even sentences are similar between the two works, but it is not possible for the entire works created by two different authors to be identical.[48]

Having found twelve main plot elements and fifty-seven subplot elements in defendant's book that were similar or identical to those in plaintiff's novel, the court held that "the similarities between the two works far exceeded the extent that could be justified by 'coincidence,'" and thus found this earlier defendant liable for copyright infringement.[49]

Zhuang v. Guo was one of the first Chinese copyright cases where judges attempted to analyze non-literal copying of literary works.[50] Although the court found Guo liable for infringing Zhuang's prior novel, it did not explain what test to apply, except to note that the similarities in defendant's work could not be justified by mere "coincidence."[51] As such, the *Zhuang v. Guo* opinion resembled more of the "total concept and feel" test[52]—essentially, "I know it when I see it"[53]—making it vague and difficult to follow.

The Beijing High Court, the same court that decided *Zhuang v. Guo*, employed a different approach in *Chiung Yao*, explaining in great detail in the forty-two page opinion what principles to apply in copyright infringement analyses involving non-literal copying of literature works.[54]

B. A Comparison with the U.S. Approach: The Abstraction Test

Nimmer on Copyright discusses two primary instances of the substantial similarity test in copyright infringement analyses: fragmented literal similarity and comprehensive non-literal similarity.[55] Fragmented liter-

48. *Id.*; *see also* SEAGULL HAIYAN SONG, ENTERTAINMENT LAW 23–24 (2014).

49. Zhuang Yu, Guo JingMing (庄羽诉郭敬明) [Zhuang Yu v. Guo Jing-Ming], Gaominzhongzi No. 539 (Beijing High Ct. 2005).

50. *See* SONG, *supra* note 48, at 23–24.

51. *Id.*

52. *See* Roth Greeting Cards v. United Card Co., 429 F.2d 1106, 1110 (9th Cir. 1970). The court articulated a "total concept and feel" approach when addressing non-literal infringement of copyrighted work. In particular, the total concept and feel test looks to whether ordinary observers subjectively believe the alleged infringing work is substantially similar to the prior work.

53. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (stating "I know it when I see it.").

54. *See* Qiong Yao Su Yu Zheng (琼瑶诉于正) [Chiung Yao v. Yu Zheng], Sanzhongminchuzi No. 07916, at 27 (Beijing 3d Interm. People's Ct. 2014).

55. Nimmer, *supra* note 32, § 13.03.

al similarity refers to circumstances when a plaintiff virtually copies portions of a defendant's work word for word.[56] Under this scenario, the alleged infringer inevitably appropriates the original author's protected expressions.[57] Thus, the legal question becomes to what extent the original work is quantitatively and qualitatively copied.[58] Comprehensive non-literal similarity, on the other hand, examines beyond literal reproduction of works word for word.[59] Instead, it looks for similarities in the "essence or structure" of a work.[60] The second type of infringement is discernibly more difficult to ascertain.[61]

In *Nichols v. Universal Pictures*, the Second Circuit was asked to determine whether the defendant's motion picture, The Cohens and the Kellys, infringed the copyright of the plaintiff's play, *Abie's Irish Rose*.[62] Both were comedies surrounding an Irish family and a Jewish family, and more specifically, the dislike between the two fathers, the secret marriage between two children (an Irish son marrying a Jewish daughter), the shock of the fathers when they learned about the marriage, the birth of grandchildren, and the reconciliation of the two families in the end.[63]

After Judge Hand applied the abstraction test, filtering non-copyrightable elements from copyrightable expressions, he found that the similarities between the two works were merely *scènes à faire*.[64] Judge Hand stated that those similar elements were "subject[s] of enduring popularity"[65] and "no more susceptible of copyright than the outline of Romeo and Juliet,"[66] thus concluding that the defendant "took no more . . . than the law allowed."[67] The court emphasized the differences between the two works in its analysis.[68] For instance, in the plaintiff's play, the conflict of religions was the main theme, and the two fathers eventually reconciled because of their "grandparent pride and affection."[69] In contrast, in the defendant's motion picture, religion is not an issue, and the conflict focused on the Jewish family's unexpected

56. *Id.* § 13.03[A][2].
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* § 13.03[A][1].
61. *Id.*
62. *Nichols*, 45 F.2d at 119.
63. *Id.*
64. *Id.* at 122.
65. *Id.*
66. *Id.*
67. *Id.* at 121.
68. *Id.*
69. *Id.* at 122.

wealth.[70] In the end, the two fathers reconciled because of the Jewish man's honesty and the Irish man's generosity.[71] Therefore, the court found the defendant not liable for copyright infringement because the similarities in the disputed works were "uncopyrighted materials."[72]

The *Nichols* abstraction test has enjoyed widespread adoption in U.S. case law, although with variations and uncertainty.[73] It has always been a challenge to determine where to draw the line between non-copyrightable ideas and copyrightable expressions of such ideas.[74] In Judge Hand's own words, "Nobody has ever been able to fix that boundary, and nobody ever can."[75]

C. A Few Additional Words About Chiung Yao

The focus and highlight of the *Chiung Yao* opinion is copyright infringement analysis, but there are two other crucial and controversial issues discussed in the opinion that will have a long-lasting impact on the Chinese entertainment industry: joint liability of investors and injunctive relief.[76]

The co-defendants in this case included the scriptwriter and director Yu Zheng, the production company Dong Yang Entertainment Studio, and the investor Wanda Group, a former real estate group that transformed into an entertainment empire.[77] Based on the joint-investment agreement that Wanda signed with the production company, Wanda agreed to co-invest in a sixty-five episode television series in exchange for producer credit and a share of revenue.[78] Because of its role as producer and financial beneficiary of the television series, the Beijing court

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70. *Id.*

71. *Id.*

72. *Id.*

73. *See* Saregama India Ltd. v. Mosley, 687 F. Supp. 2d 1325 (S.D. Fla. 2009); Bridgeport Music v. Dimension Films, 230 F. Supp. 2d 830 (M.D. Tenn. 2002). For instance, the courts have not reached a consensus as to whether to adopt the substantial similarity test regarding sampling of sound recordings in copyright infringement cases.

74. *Nichols*, 45 F.2d at 121.

75. *Id.*

76. Qiong Yao Su Yu Zheng (琼瑶诉于正) [Chiung Yao v. Yu Zheng], Sanzhongminchuzi No. 07916, at 39–42 (Beijing 3d Interm. People's Ct. 2014).

77. Wanda acquired AMC, the second-largest U.S. theater chain, in 2012 and also announced its acquisition of Legendary Pictures in January 2016. Wanda's ambition in the entertainment industry also expanded to sports and on-stage performance. *See* Anita Busch, *Chinese Conglom Wanda Group Seals $3.5 Billion Deal for Legendary Entertainment*, DEADLINE (Jan. 11, 2016, 7:41 PM), http://deadline.com/2016/01/china-wanda-group-seals-multi-billion-deal-for-legendary-entertainment-1201680922/ [https://perma.cc/4GBU-99TG].

78. Qiong Yao Su Yu Zheng (琼瑶诉于正) [Chiung Yao v. Yu Zheng], Sanzhongminchuzi No. 07916, at 39 (Beijing 3d Interm. People's Ct. 2014).

found Wanda was also liable for copyright infringement.[79]

When addressing the joint liability theory in Chinese tort law,[80] the Beijing High Court held that joint liability is established when: (1) more than one party jointly engages in the tortious activity (i.e., infringement); (2) the co-defendants share fault in committing the tort; (3) the tortious activity is directed at the same target; and (4) the tort is the proximate and actual cause of the plaintiff's losses.[81] After review of the joint-investment agreement, the court rejected Wanda's argument that it was only a financial investor that had no control or supervision over the infringing content.[82] Rather, the court found that "even a financial investor should uphold the duty of care [to make sure that the project in which it invests is not infringing or otherwise illegal]."[83] The Beijing High Court found two particularly incriminating facts detrimental to Wanda.[84] First, Wanda was officially and publicly listed as co-producer on every episode of the entire sixty-five episode series.[85] Second, Wanda shared financial revenue as an investor, thus deriving direct financial benefits from the infringing activity.[86] As such, the court concluded that Wanda was not different from the other co-defendants in this case, and therefore should be found jointly liable.[87]

In the opinion, the court also issued a permanent injunction against the defendants, in addition to granting the plaintiff CN¥5 million (US$800,000) in damages.[88] The permanent injunction means that the entire television series is "frozen" unless defendant Yu acquires permission from the plaintiff to release the television series as an authorized derivative work.[89]

When addressing the issue of permanent injunction, the court noted

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79. *Id.*

80. Tort Law of the People's Republic of China, zhong hua ren min gong he guo qin quan ze ren fa (promulgated by the 12th session of the Standing Comm. of the Eleventh Nat'l People's Cong., Dec. 26, 2009, effective July 1, 2010), art. 9, http://www.wipo.int/edocs/lexdocs/laws/en/cn/cn136en.pdf [https://perma.cc/56KN-RS58] [hereinafter PRC Tort Law] ("One who abets or assists another person in committing a tort shall be liable jointly and severally with the tortfeasor.").

81. Qiong Yao Su Yu Zheng (琼瑶诉于正) [Chiung Yao v. Yu Zheng], Gaominzhizhongzi No. 1039, at 7 (Beijing High Ct. 2015).

82. Qiong Yao Su Yu Zheng (琼瑶诉于正) [Chiung Yao v. Yu Zheng], Sanzhongminchuzi No. 07916, at 38–39 (Beijing 3d Interm. People's Ct. 2014).

83. *Id.*

84. Qiong Yao Su Yu Zheng (琼瑶诉于正) [Chiung Yao v. Yu Zheng], Gaominzhizhongzi No. 1039, at 7 (Beijing High Ct. 2015).

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

that because the defendant's infringing television series had been distributed over major networks through its initial run and reruns for over eight months, the co-defendants should have "already recouped their investment."[90] Therefore, after balancing the potential hardships between the plaintiff and defendants, the court granted the permanent injunction, concluding that the defendants would not face unreasonable hardship compared to that faced by the plaintiff in the absence of such relief.[91]

The joint liability theory and permanent injunction issued in *Chiung Yao* came as a surprise to the Chinese entertainment industry.[92] It is not uncommon for financial investors in this industry to sign a joint-investor agreement that would allow the investor to receive producer credit and financial returns. Depending on the investment amount and leverage between the two parties, investors may have limited or even no control over the artistic process of the project, such as casting and story development. Typically, when the investors are purely financial investors with limited industry knowledge, they usually take a hands-off approach to the artistic process. By finding Wanda Group jointly liable in the infringement case, the Beijing High Court drew attention to a range of newly-arising issues surrounding investment in films, television, and other entertainment-related projects in China.[93]

Critics claim that the *Chiung Yao* decision will have a chilling impact on future investment in the Chinese entertainment industry.[94] They argue that the joint liability theory imposed on financial investors will drive away investment, thus slowing the development of China's entertainment industry.[95] They also believe that enjoining this sixty-five-episode television series is a colossal waste of resources and investment because, unless the defendants obtain permission from the copyright owner of the original work to prepare derivative works, the television series will be frozen indefinitely.[96]

While all of the concerns just mentioned deserve some consideration, the decision of the court in *Chiung Yao* should be applauded for several reasons. First, with regard to the concern that the joint liability theory

90. *Id.* at 40.

91. *Id.*

92. *See* Haining Song, *Beijing Court Issues Permanent Injunction And 5m Against A TV Drama in A Copyright Infringement Case*, CONVENTUS LAW (Apr. 5, 2015 http://www.conventuslaw.com/report/beijing-court-issues-permanent-injunction-and-5m [https://perma.cc/T44Y-J8P5].

93. *See* Weijun Zhang, *Regarding the Liability Analysis of Chiung Yao Case*, INTELLIGEAST (Dec. 22, 2015), http://zhihedongfang.com/article-15456 [https://perma.cc/Y9GB-5L6L] (questioning the liability of co-defendant Wanda as a financial investor).

94. *Id.*

95. *Id.*

96. *Id.*

has a discouraging effect on film investors and distributors, the risk could be mitigated by inclusion of a well-drafted warranty and indemnification clause in a joint-investor agreement. In doing so, the production company warrants that the project does not infringe on prior intellectual property rights of third parties, at least to the best of their knowledge. It also indemnifies investors' losses and legal costs should a copyright dispute occur.[97] Copyright clearance is a very common and necessary step in Hollywood practice, where chains of title for an underlying story are cleared before the movie or television program is produced or even green-lighted in the first place.[98]

Second, the legal consequences of joint liability and permanent injunctions are likely to prompt investors and distributors to closely examine the intellectual property aspect of the project, which in turn will encourage creators—script writers, directors, and production companies—to engage in truly original works, which is critical to the future of an entire industry. To that end, the *Chiung Yao* ruling has far-reaching consequences for China's broader "rags-to-riches overnight" culture, a result of the country's impressive yet often unbalanced economic growth. If the *Chiung Yao* opinion has any chilling effect, it would be a reminder to society at large about the consequences of one's actions in the realm of collective morality, beyond merely financial or other short-sighted interests.

II. RECENT TRADEMARK AND ANTI-UNFAIR COMPETITION LAW DEVELOPMENT IN THE CHINESE ENTERTAINMENT INDUSTRY

As with copyright law, trademark law plays an important role in the entertainment industry. Typical trademark disputes arising in the industry involve protection of movie titles,[99] trademark dilution,[100] and protection of character rights/merchandise rights.[101]

Compared to the Lanham Act (the United States Federal Trademark Law), which addresses a broad list of trademark issues from trademark

97. Understanding the legal risks behind film investment and taking effective measures (such as adding a warranty and indemnification clause) to mitigate such risks are necessary and would be beneficial to the development of the Chinese entertainment industry in the long run.

98. *See generally* MICHAEL C. DONALDSON & LISA A. CALLIF, CLEARANCE & COPYRIGHT: EVERYTHING YOU NEED TO KNOW FOR FILM AND TELEVISION (4th ed. 2014).

99. Tri-Star Pictures, Inc. v. Unger, 14 F. Supp. 2d. 339 (S.D.N.Y. 1998); Cinepix, Inc. v. Triple F. Productions, 150 U.S.P.Q. 134 (N.Y. Sup. Ct. 1966). In most cases involving protection of movie or book titles, U.S. courts have ruled that titles of movies, television programs, and single books are not entitled to trademark protection unless they have acquired "secondary meaning" through long-term use and marketing efforts.

100. *See, e.g.*, Caterpillar Inc. v. Walt Disney Co., 287 F. Supp. 2d 913, 921 (C.D. Ill. 2003); Eastman Kodak Co. v. Rakow Eastman Kodak Co., 739 F. Supp. 116, 117 (W.D.N.Y. 1989).

101. *See* Warner Bros., Inc. v. Gay Toys, Inc., 724 F.2d 327, 329 (2d Cir. 1983).

infringement and dilution to false origin and false endorsement, Chinese trademark law is substantially narrower in its scope.[102] In a number of recent cases involving protection of movie titles,[103] television program titles,[104] and story characters,[105] Chinese courts relied on anti-unfair competition law rather than trademark law to address the likelihood of confusion among the public as to the origin of content.[106] The cases discussed below will provide a glimpse of the differences between Chinese trademark law and the Lanham Act, and explain how Chinese courts address protection of movie titles through the existing legal regime.

A. Is "Kung Fu Panda" a Movie Title, a Trademark, or Both?

In *Shaanxi Maozhi v. DreamWorks* (the *Kung Fu Panda Case*),[107] plaintiff Maozhi, a local Chinese film studio, brought a trademark infringement case against DreamWorks.[108] It alleged that DreamWorks' movie title, Kung Fu Panda 2 (2011) (功夫熊猫), is identical to Maozhi's registered trademark "Kung Fu Panda" (功夫熊猫),[109] and thus constituted trademark infringement.[110]

The key issue before the court was whether DreamWorks used the movie title Kung Fu Panda 2 for trademark purposes in the context of

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102. *See generally* HUI HUANG, CHINESE TRADEMARK LAW 15 (2d ed. 2016).

103. Wu Han Hua Qi Su Beijing Guang Xian Chuan Mei (武汉华旗诉北京光线传媒) [Wuhan Huaqi Film Studio v. Beijing Enlight Media], Gaominchuzi No. 1236 (Beijing High Ct. 2013).

104. Dong Yang Rong Xuan Ying Shi Wen Hua Fa Zhan You Xian Gong Si Su Dong Yang Qing Yu Ying Shi Wen Hua You Xian Gong Si (东阳荣煊影视文化发展有限公司诉东阳青雨影视文化有限公司等) [Dongyang Rongxuan Film & Television Culture Ltd. v. Dongyang Qiangyu Ltd.], Gaominzhongzi No. 820 (Beijing High Ct. 2012). In this case, the court found that defendant's television series, Decisive Detective DI, was confusingly similar to plaintiff's prior television series, Genius Detective Di, in terms of program title, plot, and so forth, and had caused confusion among the public. *Id.* The court found defendant liable for violating China's Anti-Unfair Competition Law. *Id.*

105. *Id.*; *see also* Bao Xue Yu Le You Xian Gong Si Su Shang Hai You Yi Wang Luo Ke Ji (暴雪娱乐有限公司等诉上海游易网络科技) [Blizzard Entertainment v. Shanghai Youyi Internet Gaming Ltd.], Huyizhong Minwuzhichuzi No. 22 (Shanghai No. 1 Interm. People's Ct. 2014).

106. *Id.*

107. Shan Xi Mao Zhi Yu Le You Xian Gong Si Su Meng Gong Chang Dong Hua (陕西茂志娱乐有限公司诉梦工场动画影片公司) [Shaanxi Maozhi Entertainment Ltd. v. DreamWorks, Paramount et al.], Erzhongminchuzi No. 10236 (Beijing No. 2 Interm. People's Ct. 2011), *aff'd*, Gaominzhongzi No. 3027 (Beijing High Ct. 2013).

108. *Id.* at 1–3.

109. *Id.* In 2010, plaintiff Maozhi registered the mark "Kung Fu Panda Chinese characters" before the Chinese Trademark Office under no. 6,353,409 in Class 41 for entertainment, book publishing, and film production services. *Id.*

110. Shan Xi Mao Zhi Yu Le You Xian Gong Si Su Meng Gong Chang Dong Hua (陕西茂志娱乐诉梦工场动画) [Shaanxi Maozhi Entertainment Ltd. v. DreamWorks, Paramount et al.], Gaominzhongzi No. 3027, at 14 (Beijing High Ct. 2013).

trademark law.[111] If the defendant's intention behind the title was not for "trademark use," but a mere "nominative use/descriptive use," then the defendant would not be found liable for trademark infringement.[112]

To determine whether the defendant's use of the mark was for trademark purposes, the court considered whether the alleged infringing use was: (1) based on good faith; (2) to identify the source of the goods or services in question; and (3) to explain or describe the characteristics of the goods in question.[113]

Upon evaluation of the above factors, the court concluded that DreamWorks' use of the movie title Kung Fu Panda 2 did not constitute trademark infringement.[114] First, DreamWorks started marketing and promoting the first movie of its Kung Fu Panda franchise as early as 2005.[115] Although plaintiff Maozhi eventually acquired trademark rights for the mark "Kung Fu Panda" in China, DreamWork's Kung Fu Panda movie was announced to the public before the plaintiff filed its trademark in 2007 and registered it in 2010.[116] Therefore, DreamWorks adopted Kung Fu Panda 2 as the title for its sequel in good faith.[117] Second, the movie title in question described the premise of the movie, a panda that practices kung fu.[118] Therefore, the use of the movie title is a nominative use as opposed to a trademark use that identifies the source of goods or services.[119] Third, no evidence suggested a confusion among the public as to who was the producer of the movie franchise Kung Fu Panda.[120] As such, the Beijing High Court affirmed the Beijing Second Intermediate Court's ruling, rejected plaintiff Maozhi's claims, and found that DreamWorks' use of the movie title Kung Fu Panda 2 did not constitute trademark infringement.[121]

B. Protection of Movie Title: Lost on Journey[122]

One may compare the court's conclusion in the *Kung Fu Panda Case* to another opinion regarding movie title protection, *Wuhan Huaqi Film*

111. *Id.* at 15.
112. *Id.*
113. *Id.* at 14.
114. *Id.* at 14–16.
115. *Id.* at 14–15.
116. *Id.*
117. *Id.*
118. *Id.* at 15–16.
119. *Id.*
120. *Id.*
121. *Id.* at 14–16.
122. Wu Han Hua Qi Su Beijing Guang Xian Chuan Mei **(**武汉华旗诉北京光线传媒**)** [Wuhan Huaqi Film Studio v. Beijing Enlight Media], Gaominchuzi No. 1236 (Beijing High Ct. Sept. 15, 2014).

Studio v. Beijing Enlight Media (*Lost on Journey*), also issued by the Beijing High Court.[123] While in the *Kung Fu Panda Case*, the court relied on Chinese trademark law, in *Lost on Journey*, the court relied on Chinese anti-unfair competition law to reach a different conclusion in a similar dispute.[124]

In *Lost on Journey*, plaintiff Huaqi was a Chinese film studio and also the producer and copyright owner of the hit Chinese movie Lost on Journey (2010) (人在囧途).[125] Because of the movie's success, the plaintiff planned to produce a sequel, Lost on Journey 2.[126] Based on the writer agreement between plaintiff and the scriptwriter, TIAN, the plaintiff would enjoy the copyright to the script of the sequel while TIAN would retain the right of authorship.[127] Before the plaintiff could create a sequel, defendant Enlight Media hired several original cast members of the original movie, its scriptwriter, and other leading actors to independently launch its own film, Lost on Journey Again—in Thailand (2012) (人再囧途之泰囧).[128] The plaintiff brought suit against the defendant under Article 5(2) of the Chinese Anti-Unfair Competition Law, seeking protection of the movie title as a unique name for a well-known commodity.[129]

Article 5(2) of the Chinese Anti-Unfair Competition Law provides that a "business should not use for a commodity, without authorization, a unique name, package, or decoration of another's well-known commodity, or using a name, package or decoration similar to that of another's well-known commodity, thereby confusing consumers as to the origin of the commodity."[130] In deciding whether the defendant violated Article 5(2) of Chinese Anti-Unfair Competition Law, that is,

123. *Id.*

124. *Id.*

125. *Id.* at 2.

126. *Id.*

127. *Id.*

128. *Id.* at 1–2. The original title of the defendant's movie was Lost in Thailand, and then the defendant changed it to Lost on Journey Again—In Thailand. *Id.* Courts later considered this change to be evidence of the defendant's bad-faith effort to free-ride on the goodwill of the plaintiff's movie. *Id.*

129. *Id.* at 3. The plaintiff also cited other provisions in China's Anti-Unfair Competition Law in its brief, such as Article 2 (general principle of fair and honest business dealing), Article 9 on false advertisement, and Article 14 on commercial defamation. The court rejected the plaintiff's claims on false advertisement and commercial defamation, but upheld its claim on Articles 2 and 5 regarding protection of a unique name for a well-known commodity.

130. 《中华人民共和国反不正当竞争法》[People's Republic of China Anti-Unfair Competition Law] Zhong Hua Ren Min Gong He Guo Fan Bu Zheng Dang Jing Zheng Fa (promulgated by People's Republic of China Presidential Order No. 10, Sept. 2, 1993, effective Dec. 1, 1993), http://www.wipo.int/edocs/lexdocs/laws/en/cn/cn011en.pdf [https://perma.cc/WZV5-5WBX]. [hereinafter PRC Anti-Unfair Competition Law].

whether its unauthorized use of a movie title similar to that of plaintiff's caused confusion among the public, the court considered the following factors: (1) whether plaintiff's movie was a "well-known commodity"; (2) whether the title of plaintiff's movie was a "unique name"; and finally (3) whether defendant's unauthorized use of the movie title for its own product caused confusion among the public.[131]

The court concluded that plaintiff's movie was a well-known commodity, as it "has achieved wide acclaim and commercial success."[132] The court considered all the evidence submitted by the plaintiff, including the marketing expenses and promotional efforts, the box office revenues,[133] public and critical acclaim (such as various film awards),[134] and news reports.[135]

Additionally, the court affirmed that plaintiff's movie title, Lost on Journey, constituted a "unique name."[136] The Chinese character in the movie title, 囧 (Pinyin: jiǒng), is a unique expression, which originated from an ideographic emoticon used rather infrequently to describe feelings of annoyance, shock, embarrassment, and awkwardness.[137] After the success of the plaintiff's movie, the word 囧 became viral and has been used more extensively in later works to describe the feeling of embarrassment and awkwardness.[138]

Finally, the court ruled in favor of the plaintiff with respect to whether the defendant's unauthorized use of the movie title caused confusion among the public.[139] It considered the following factors: (1) the similarity between the plaintiff's and defendant's movie titles; (2) the reputation of the plaintiff's movie; (3) the similarity between the plaintiff's and defendant's movies; (4) the evidence of actual confusion; (5) distribution channels of the movies; (6) the relevant public's capability to distinguish the two works; and (7) the defendant's intent.[140] For in-

131. Wu Han Hua Qi Su Beijing Guang Xian Chuan Mei **(**武汉华旗诉北京光线传媒**)** [Wuhan Huaqi Film Studio v. Beijing Enlight Media], Gaominchuzi No. 1236, at 18–21 (Beijing High Ct. Sept. 15, 2014).

132. *Id.* at 7–8.

133. *Id.* at 7–8. By the time the litigation was filed, the plaintiff's movie grossed over CN¥30 million in box office revenue since its theatrical release, and was listed as a top ten box office movie that year.

134. *Id.* at 7–9. In 2011, the plaintiff's movie Lost on Journey was nominated for the "Outstanding Film Award" by the China Huabiao Film Awards and was awarded the "Production of Comedy Award" by the Eighteenth Beijing University Student Film Festival.

135. *Id.* at 7–8.

136. *Id.* at 18.

137. *Id.*

138. *Id.*

139. *Id.* at 19.

140. *Id.*

stance, the questionnaire submitted by the plaintiff showed that there was actual confusion among the public—even film critics and newspaper journalists thought that the defendant's movie was a sequel to the plaintiff's original movie.[141] Also, in a number of promotional events, the defendant repeatedly claimed that its film was an "advanced version" and "extension" of the plaintiff's movie.[142] In the end, the court supported the plaintiff's claims and found that defendant violated Article 5(2) of the Chinese Anti-Unfair Competition Law.[143]

C. The U.S. Approach: Tri-Star Pictures, Inc. v. Unger (The River Kwai Case)

The analysis by the Beijing High Court in *Lost on Journey* interestingly coincides with a U.S. decision in *The River Kwai Case* over a decade ago.[144] In *Tri-Star Pictures, Inc. v. Unger*, the Southern District of New York was asked to determine whether the defendant's movie, Return from the River Kwai (1989), constituted trademark infringement against the plaintiff's award-winning film Bridge on the River Kwai (1957).[145]

In order to prevail on a trademark infringement claim, a plaintiff must show that its trademark (for example, the disputed movie title) is subject to trademark protection under the Lanham Act and that the defendant's use of the mark is likely to cause confusion with the plaintiff's trademark.[146]

With regard to the first factor, the New York court affirmed that movie picture titles might be subject to trademark protection if "[the title] acquire[s] *secondary meaning* when [it] becomes so well known that consumers associate it with a particular author's work."[147] After reviewing the evidence submitted by the plaintiff, including advertising expenditures, consumer studies linking the mark (the movie title) to a source (the producer), unsolicited media coverage of the product (the movie), sales success, (defendant's) attempts to plagiarize the mark, and length and exclusivity of the mark's use, the court held that plaintiff's movie title acquired secondary meaning and was therefore subject to protection under the Lanham Act.[148]

As to the second factor, the likelihood of confusion, the court applied

141. *Id.* at 12–13, 19.
142. *Id.* at 3.
143. *Id.* at 21.
144. Tri-Star Pictures, Inc. v. Unger, 14 F. Supp. 2d 339 (S.D.N.Y. 1998).
145. *Id.*
146. *Id.* at 348.
147. *Id.* at 348 (emphasis added).
148. *Id*. at 349–54.

the analysis set forth by Judge Friendly in *Polaroid Corp. v. Polaroid Electronics Corp.*, and concluded that plaintiff had met most, if not all, of the *Polaroid* factors.[149] The court found a likelihood of confusion between the plaintiff's mark, Bridge on the River Kwai, and the defendant's mark, Return from the River Kwai.[150]

As a result, the court ruled that since the plaintiff's movie title achieved secondary meaning and thus was entitled to trademark protection, the defendant's use of a confusingly similar movie title constituted trademark infringement.[151]

D. We Are Similar, But Different

When one compares the Chinese case *Lost on Journey* with the United States' *The River Kwai Case*, common elements arise that were considered by both the Chinese and U.S. courts. For instance, both Chinese and U.S. judges considered, *inter alia*, the reputation of the plaintiff's movie, as evidenced by its box office revenue, marketing efforts, film awards, and public acclaim, although for different purposes.[152] In *Lost on Journey*, the purpose was to determine whether plaintiff's movie qualified as a "well-known commodity" defined under the Chinese Anti-Unfair Competition Law so as to deserve broader protection.[153] Yet in *The River Kwai Case*, the purpose was to decide whether the plaintiff's movie title acquired secondary meaning, based on whether it was ubiquitous enough to trigger protection under the Lanham Act.[154] Both the U.S. and Chinese courts considered evidence regarding the uniqueness of the plaintiff's mark, actual evidence of confusion, and bad faith behavior of the defendant to decide whether the defendant's unauthorized use of the mark caused a likelihood of confusion.[155]

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149. Polaroid Corp. v. Polaroid Elecs. Corp., 287 F.2d 492, 495 (2d Cir. 1961). The *Polaroid* factors included: (1) the strength of plaintiff's marks; (2) the similarity of plaintiff's and defendant's marks; (3) the competitive proximity of the products; (4) the likelihood that plaintiff will "bridge the gap" and offer a product like defendant's; (5) actual confusion between the products; (6) good faith on defendant's part; (7) the quality of defendant's product; and (8) the sophistication of buyers. *Id.* at 495.

150. *Tri-Star Pictures, Inc.*, 14 F. Supp. 2d at 359.

151. *Id.* at 354.

152. *Id.* at 348–53; Wu Han Hua Qi Su Beijing Guang Xian Chuan Mei **(**武汉华旗诉北京光线传媒**)** [Wuhan Huaqi Film Studio v. Beijing Enlight Media], Gaominchuzi No. 1236, at 7–8 (Beijing High Ct. Sept. 15, 2014).

153. Wu Han Hua Qi Su Beijing Guang Xian Chuan Mei **(**武汉华旗诉北京光线传媒**)** [Wuhan Huaqi Film Studio v. Beijing Enlight Media], Gaominchuzi No. 1236, at 7–8 (Beijing High Ct. Sept. 15, 2014).

154. *Tri-Star Pictures, Inc.*, 14 F. Supp. 2d at 348–53.

155. *Id.* at 348–54; Wu Han Hua Qi Su Beijing Guang Xian Chuan Mei **(**武汉华旗诉北京光线传媒**)** [Wuhan Huaqi Film Studio v. Beijing Enlight Media], Gaominchuzi No. 1236, at 7–8 (Beijing High Ct. Sept. 15, 2014).

Having identified similar factors addressed by the U.S. and Chinese courts, one might well wonder: why did the Chinese courts and their U.S. counterparts apply different laws—trademark law and the Anti-Unfair Competition Law—to address the same issue of movie title protection? There are two possible theories behind the different approaches. First, the question of whether titles for books, movies, and television programs can be registered and therefore protected as trademarks is still a hotly debated issue in China.[156] Second, assuming that titles for books, movies, and television programs can be protected as trademarks, in an instance where the right holder fails to register such titles as trademarks in China, it remains unclear whether the current Chinese trademark law, which provides limited protection for non-registered trademarks, provides a remedy to address the issue.[157]

With regard to the first theory—uncertainty in protecting movie titles through the trademark law—the general consensus is that the primary purpose of a trademark is to help consumers identify the source of goods or services.[158] So, can book titles, movie titles, and television program titles serve such a purpose? That depends. Critics who oppose granting protection to movie and television show titles under trademark law argue that a title alone cannot identify the source of a product or service.[159] For instance, in the *Kung Fu Panda Case*,[160] the Beijing High Court rejected Maozhi's claim that DreamWorks' movie title Kung Fu Panda 2 infringed on plaintiff 's prior trademark registration because the court found that DreamWorks' movie title was a nominative use that described the premise of its movie—a panda practicing Chinese kung fu—instead of serving a trademark purpose—identifying the source of the movie.[161] The court stated, "It is common practice for

156. *See* Chen Li, *Reflections on Trademark Dispute Surrounding the Reality TV Title "If You are the One"*, 1 INTELL. PROP. L. (2016) (describing the academic debate surrounding protection of movie and television program titles through Chinese trademark law).

157. *Id.*

158. *See* HUI HUANG, CHINESE TRADEMARK LAW 15 (2d ed. 2016); Shan Xi Mao Zhi Yu Le You Xian Gong Si Su Meng Gong Chang Dong Hua **(**陕西茂志娱乐有限公司诉梦工场动画**)** [Shaanxi Maozhi Entertainment Ltd. v. DreamWorks, Paramount et al.], Erzhongminchuzi No. 10236 (Beijing No. 2 Interm. People's Ct. 2011), *aff'd*, Gaominzhongzi No. 3027, at 10 (Beijing High Ct. 2013).

159. *See* Chen Li, *supra* note 156. Note that the hesitation to protect movie titles as trademarks exists not only in China. The Court of Justice of the European Union expressed similar concerns in Case T-435/05, *Danjaq, LLC v. Office for Harmonisation in the Internal Market*, 2009 E.C.R. ¶ 26.

160. Shan Xi Mao Zhi Yu Le You Xian Gong Si Su Meng Gong Chang Dong Hua **(**陕西茂志娱乐有限公司诉梦工场动画**)** [Shaanxi Maozhi Entertainment Ltd. V. DreamWorks, Paramount et al.], Erzhongminchuzi No. 10236 (Beijing No. 2 Interm. People's Ct. 2011), *aff'd*, Gaominzhongzi No. 3027, at 10 (Beijing High Ct. 2013).

161. *Id.* at 5.

film and television studios to create movies with different stories and different cast members but using the same title."[162] Citing the 1987 and 2011 versions of a well-known Chinese movie, A Chinese Ghost Story, the court found that DreamWorks' use of the movie title was not a trademark use in the context of trademark law.[163] Thus, DreamWorks did not infringe plaintiff Maozhi's prior trademark rights for "Kung Fu Panda."[164]

Indeed, most movie and book titles do not have secondary meanings and are not intended to trace back to a specific source; thus, they are not subject to trademark protection.[165] Yet, in the *Kung Fu Panda Case*, the Beijing court ruling does not necessarily provide long-term benefits to DreamWorks. By holding that DreamWorks' title was a nominative, but not a trademark, use,[166] the Beijing High Court indeed sided with DreamWorks. However, the underlying reasoning that it is "common practice" for studios to adopt the same title from previous films and television programs without authorization, regardless of whether the franchise movie title has acquired secondary meaning and becomes known to a specific source or not, has the unintended consequence of limiting DreamWorks' options to enforce against unauthorized uses of its movie titles by third parties.[167] This is certainly not beneficial to DreamWorks, especially in light of the box office success of the third sequel of Kung Fu Panda.[168] After three sequels, a good percentage of the audience recognizes that DreamWorks is the producer of Kung Fu Panda, yet the court's underlying reasoning may inadvertently allow a third party to use the same movie title to market its own products or services.

In summary, the court came to the right conclusion in the *Kung Fu Panda Case*: DreamWorks did not infringe plaintiff's trademark.[169] The

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162. *Id.* at 10.

163. *Id.*

164. *Id.*

165. *In re* Cooper, 254 F.2d 611, 615–16 (C.C.P.A. 1958); *In re* Scholastic, Inc., 223 U.S.P.Q. 431, 431 (T.T.A.B. 1984); Cinepix, Inc. v. Triple F. Productions, 150 U.S.P.Q. 134, 134 (N.Y. Sup. Ct. 1966); Teaching Co. Ltd. P'ship v. Unapix Entm't, Inc., 87 F. Supp. 2d 567, 577–79 (E.D. Va. 2000).

166. Shan Xi Mao Zhi Yu Le You Xian Gong Si Su Meng Gong Chang Dong Hua **(**陕西茂志娱乐有限公司诉梦工场动画**)** [Shaanxi Maozhi Entertainment Ltd. v. DreamWorks, Paramount et al.], Erzhongminchuzi No. 10236, at 10 (Beijing No. 2 Interm. People's People's Ct. 2011), *aff'd*, Gaominzhongzi No. 3027 (Beijing High Ct. 2013).

167. *Id*.

168. Dave McNary, *'Kung Fu Panda 3' Scores Biggest Animated Film Opening in China*, VARIETY (Jan. 31, 2016, 10:38 AM), http://variety.com/2016/film/box-office/kung-fu-panda-china-box-office-opening-1201693281 [https://perma.cc/2DA8-63CX].

169. Shan Xi Mao Zhi Yu Le You Xian Gong Si Su Meng Gong Chang Dong **(**陕西茂志娱乐有限公司诉梦工场动画**)** [Shaanxi Maozhi Entertainment Ltd. v. DreamWorks, Paramount et al.], Erzhongminchuzi No. 10236 (Beijing No. 2 Interm. People's Ct. 2011), *aff'd*, Gaomin-

court's reasoning, however, in particular its rejection of the possibility that movie titles could be subject to trademark protection, is not convincing due to the prospect of negative unintended consequences.[170]

With regard to the second theory—limited protection of Chinese trademark law to unregistered trademarks—if the rightholder fails to register a distinctive movie, television program, or book title as a trademark in China, it remains unclear whether the existing Chinese trademark law provides protection to such unregistered titles.

There are two clauses in the current Chinese trademark law that are related to protection of unregistered trademarks.[171] Article 13 addresses protection of unregistered well-known trademarks,[172] and Article 41 relates to prior trademark registrations through bad faith and other unfair means.[173] In other words, to claim trademark protection for unregistered trademarks (such as movie titles), a plaintiff either has to prove that its unregistered trademark is a well-known trademark in China, which has a very high threshold to meet,[174] or prove that the defendant has registered an identical or similar trademark through unfair means.[175]

This does not mean that the Chinese legal system does not protect unregistered trademarks. Rather, the protection of unregistered trademarks is achieved through a combination of laws and regulations, including the Chinese Trademark Law,[176] Anti-Unfair Competition Law,[177] and Civil Law Code.[178] For instance, the "unique name, pack-

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zhongzi No. 3027 (Beijing High Ct. 2013).

170. *Id.*

171. Trademark Law of the People's Republic of China 《中华人民共和国商标法》 zhong hua ren min gong he guo shang biao fa (promulgated by the Standing Comm. Nat'l People's Cong., Aug. 23, 1982, effective Mar. 1, 1983, revised Oct. 27, 2001) arts. 13, 41, http://www.wipo.int/wipolex/en/text.jsp?file_id=341321 [https://perma.cc/UB9P-UQ8T] [hereinafter PRC Trademark Law].

172. *Id.* art. 13.

173. PRC Trademark Law, *supra* note 171, art. 41, ¶ 1. For a general discussion of well-known trademark protection in China, see ZHOU YUN-CHUAN, RULES AND CASES, LITIGATIONS INVOLVING THE AUTHORIZATION AND DETERMINATION OF TRADEMARK RIGHTS 211–23 (2014).

174. *Id.*

175. *Id.*

176. *Id.*

177. Anti-Unfair Competition Law of the People's Republic of China 《中华人民共和国反不正当竞争法》 zhong hua ren min gong he guo fan bu zheng dang jing zheng fa (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 2, 1993 effective Dec. 1, 1993), art. 5(2), http://www.wipo.int/edocs/lexdocs/laws/en/cn/cn011en.pdf [https://perma.cc/2A4U-UDD4] [hereinafter Chinese Anti-Unfair Competition Law].

178. General Principles of the Civil Law of the People's Republic of China 《中华人民共和国民法通则》 zhong hua ren min gong he guo min fa tong ze (promulgated by Order No. 37 of the President of the People's Republic of China, Apr. 12, 1986), art 99–100, http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383941.htm [https://perma.cc/W577-SNAV] [hereinafter PRC Civil Law].

age and decoration" under Article 5(2) of Chinese Anti-Unfair Competition Law actually refers to "trademark and trade dress," and the term "well-known commodity" under Article 5(2) refers to "products or services that enjoy certain reputation,"[179] with a lower burden of proof than the requirements for the recognition of the "well-known trademark."[180]

Since the plaintiff's movie title in *Lost on Journey* was not a registered trademark in China, Chinese judges comfortably relied on the Chinese Anti-Unfair Competition Law, as opposed to Trademark Law, to provide protection to the movie title.[181] The court found that the plaintiff's movie constituted a "well-known commodity" based on the submitted evidence, and that the title itself constituted "a unique name" of a well-known commodity—all of which supported the plaintiff's claim for protection under Article 5(2) of the Chinese Anti-Unfair Competition Law.[182]

One of the unexpected consequences of *Lost on Journey* was the rush of film and television studios to register their movie titles and television program titles as trademarks, regardless of whether such films would become franchises.[183] From a cost-benefit standpoint, it certainly makes sense for the studios because the potential cost of litigation over a trademark registration could be enormous, especially considering the relatively low cost to file and register a trademark in China (around US$100).[184] This also explains the recent "gold rush" in China of trademark registrations (or trademark squatting, if the trademark is not filed by its rightholder), not only for movie titles, but also for best-selling book titles, popular television program titles, and even gaming

179. *Id.* Article 5(2) of Chinese Anti-Unfair Competition Law provides that, "[B]usiness should not use for a commodity, without authorization, a *unique name*, *package*, *or decoration* of another's *well-known commodity*, or using a name, package or decoration similar to that of another's well-known commodity, thereby confusing consumers as to the origin of the commodity." Chinese Anti-Unfair Competition Law, *supra* note 177 (emphasis added).

180. YUN-CHUAN, *supra* note 173, at 211–23.

181. Wu Han Hua Qi Su Beijing Guang Xian Chuan Mei **(**武汉华旗诉北京光线传媒**)** [Wuhan Huaqi Film Studio v. Beijing Enlight Media], Gaominchuzi No. 1236 (Beijing High Ct. 2013).

182. *Id*. at 19–21.

183. *See Copyright Disputes Over My Sunshine, Author of the Novel Criticized Le Vision Pictures for Unauthorized Trademark Registration*, CHINA NEWS (Dec. 2, 2014, 9:29 AM), http://www.chinanews.com/cul/2014/12-02/6834410.shtml [https://perma.cc/8YX4-4VWH] (concerning a trademark dispute related to the title of the bestseller *My Sunshine* between the author Gu Man and the studio Le Vision Pictures).

184. The official fees for filing one trademark application in one class in China are CN¥600, equivalent to US$100. *See* Trademark Filing Fee Schedule, Trademark Off. State Admin. for Indus. & Commerce, People's Republic of China (2015), http://sbj.saic.gov.cn/sbsq/sfbz [https://perma.cc/9NQE-C3UV].

titles.[185]

Yet the question remains: what is the best way to protect titles of books, movies, and television programs that have acquired secondary meaning? Does China need to revisit its Trademark Law? Or is the current combination of Trademark Law and Anti-Unfair Competition Law sufficient to address the issue?

There have been increasing concerns about overstretching the Chinese Anti-Unfair Competition Law, a seemingly catchall statute that Chinese courts constantly rely on, to address various intellectual property issues that are not sufficiently protected under the existing trademark, copyright, patent, or trade secret legal regime.[186] For example, Article 2 (fair business dealing) of the Chinese Anti-Unfair Competition Law has been cited to resolve various litigations ranging from commercial defamation,[187] copyright disputes regarding unauthorized retransmission of live sports telecasts over the Internet,[188] domain name disputes,[189] and blocking of online paid advertisements with Internet browsing tools,[190] to infringement of characters,[191] interfaces, and rules[192] in video games.

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185. Jin A Huan Su Jiang Su Guang Bo Dian Tai (金阿欢诉江苏广播电台) [Jing A-Huan v. Jiangsu TV Station], Shenzhongfa zhiminzhongzi No. 927 (Shenzhen Interm. Ct. 2015).

186. *See* Xue Jun, *The Civil Law Perspective of Anti-Unfair Competition Law over the Internet,* WEIXIN (Sept. 9, 2015), http://mp.weixin.qq.com/s?__biz=MzIwNzAwNDU0MA==&mid=213196768&idx=1&sn=e8929180cc49908827ee8e9a37877459&scene=5&srcid=0909hM1lAqFekJ6LoaBQGY6d#rd [https://perma.cc/48PH-UVLE] (discussing the over-reliance of rights-holders on PRC Anti-Unfair Competition Law, instead of PRC Tort Law or other IP-related legislation, in tort infringement related cases).

187. Bei Jing Qi Hu Ke Ji You Xian Gong Si Su Teng Xun Ke Ji (ShenZhen) You Xian Gong Si (北京奇虎科技有限公司诉腾讯科技（深圳）有限公司) [Qihu 360 v. Tencent], Minsanzhongzi No. 5 (Sup. People's Ct. 2013).

188. Yang Shi Guo Ji Su Wo Ai Liao (央视国际公司诉我爱聊)] [CCTV v. Beijing Appannie Ltd.], Yizhongminzhongzi No. 3199 (Beijing 1st Interm. People's Ct. 2014). For a general discussion as to why the current Chinese Copyright Law might not be sufficient to protect live telecasts of sports events, see Seagull Haiyan Song, *How Should China Respond to Online Piracy of Sports Telecasts? A Comparative Study of Chinese Copyright Legislation to the US and European Legislation*, 2010 DEN. U. SPORTS & ENT. L.J. 3 (2010) (discussing why current Chinese Copyright Law might not be sufficient to protect live telecasts of sports events).

189. Bei Jing Qu Na Xin Xi Ji Shu You Xian Gong Si Su Guang Zhou Qu Na Xin Xi Ji Shu You Xian Gong Si (北京趣拿信息技术有限公司诉广州市去哪信息技术有限公司) [Beijing Quna Information Ltd. v. Guangzhou Quna Internet Ltd.], Yuegaofa Minsanzhongzi No. 565 (Guangdong High Ct. 2014).

190. You Ku Su Lie Bao Liu Lan Qi (优酷诉猎豹浏览器，) [Youku v. CM Browser], (Beijing 1st Interm. People's Ct. 2014), *aff'g*, Haiminchuzi No. 13155 (Beijing Haidian Dist. Ct. 2013).

191. Beijing Yue Dong Ke Ji You Xian Gong Si Suu Beijing Kun Lun Yue Xiang Wang Luo Ji Shu You Xian Gong Si (北京乐动卓越科技有限公司诉北京昆仑乐享网络技术有限公司) [Locojoy v. Kunlun], Jingzhiminchuzi No. 1 (Beijing Intell. Prop. Ct. 2014).

192. Bao Xue Yu Le You Xian Gong Si Su Shang Hai You Yi Wang Luo Ke Ji Fa Zhan You Xian Gong Si (暴雪娱乐有限公司诉上海游易网络科技) [Blizzard Entertainment v.

The advantage of applying the Anti-Unfair Competition Law is that its general and broad provision might provide an alternative remedy to address cutting-edge intellectual property issues.[193] The downside, however, could be an abuse of the law, which was designed to promote market competition and protect the interests of public welfare, rather than to resolve disputes among private parties.[194]

III. PROTECTION OF PERSONAL REPUTATION: DEFAMATION

Protection of personal rights, such as privacy, reputation, and personal images, has always been an important subject in the entertainment industry.[195] Indeed, the unrelenting public interest in celebrities and public figures, especially through the lens of the paparazzi, makes movie stars especially vulnerable to personal rights violations.[196]

Unlike in the United States, where the doctrine of privacy originated from common law[197] and was later incorporated into state law statutes,[198] protection of personal rights in China, such as the rights to name, image, reputation, and privacy, are protected through Chinese tort law[199] and civil law.[200] Article 2 of the Chinese Tort Law provides the following:

> Civil rights and interests used in this Law shall include the right to life, the right to health**,** *the right to name, the right to reputation, the right to honor, the right to self-image, right of privacy*, marital autonomy, guardianship, ownership, usufruct, security interest, copyright, patent right, exclusive right to use a trademark, right to discovery, equities, right of succession, and other personal and property rights and interests.[201]

Shanghai Youyi Internet Gaming Ltd.], Huyizhong Minwuzhichuzi No. 22 (Shanghai No. 1 Interm. People's Ct. 2014).

193. *See* Xue Jun, *supra* note 186.

194. *See id.*

195. Danielle Duarte, *Respect My Privacy: Paparazzi v. Celebrity*, DOTTED LINE REPORTER (Feb. 14, 2014), http://dlreporter.com/2014/02/13/respect-my-privacy-paparazzi-vs-celebrity [https://perma.cc/VP3W-SBT9].

196. *Id.*

197. Samuel Warren & Louis Brandeis, *The Right to Privacy*, 4. HARV. L. REV. 193, 193 (1890) (referred to as one of the most classic treatises on privacy).

198. Protection of privacy has also been codified in state statutes, such as California Civil Code § 3344 on the right of publicity, Cal. Civ. Code § 3344, and New York Civil Rights Law, N.Y. Civ. Rights Law § 50.

199. PRC Tort Law (promulgated by Decress of the President of the People's Republic of China (No. 21), Dec. 26, 2009, effective July 1, 2010), ch. 1 art. 2 (emphasis added).

200. General Principles of PRC Civil Law (promulgated by Order No. 37 of the President of the People's Republic of China, Apr. 12, 1986), sec. 4. art 99–100, http://www.npc.gov.cn/englishnpc/Law/2007-12/12/content_1383941.htm [https://perma.cc/8YF2-GE7E] [hereinafter PRC Civil Law].

201. *Id.*

In China, establishing a prima facie defamation case requires: (1) that the defendant committed a tort; (2) damage to the plaintiff's reputation; (3) proven causation between the defendant's tortious behavior and the plaintiff's damaged reputation; and (4) that the defendant acted in bad faith.[202] The following two cases demonstrate how Chinese courts analyze the aforesaid elements in defamation cases, and in particular, how they address the issues of public figures, public interest, and news press privileges in their attempts to strike a balance between protecting the private right to reputation and safeguarding the public interest to information.

A. Public Figure and Public Interest Exception: Fang v. Cui (2015)[203]

In *Fang Zhou-Zi v. Cui Yong-Yuan*, plaintiff Fang was a well-known freelance science writer and an activist against what he perceived as academic plagiarism and pseudoscience in China.[204] Fang's personal blog, which often targets academics and public figures for their alleged academic plagiarism, makes him a controversial figure in China.[205] Defendant Cui was a former television show host.[206]

The dispute between Fang and Cui originated from a public debate surrounding the safety of genetically-modified food.[207] Cui strongly opposes the introduction and commercialization of genetically-modified food, arguing that such food will present an unprecedented health threat to the public and thus should be banned in China.[208] Fang, on the other hand, believes that genetically-modified food is generally safe and

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202. Shi She Hui Beijing Guo Ji Su Xin Jing Bao (世奢会（北京）国际诉新京报) [World Luxury Ass'n v. Beijing News Press], Sanzhongminzhongzi No. 06013, at 10 (Beijing 3d Interm. People's Ct. 2015).

203. Fang Shi Min Su Cui Yong Yuan (方是民诉崔永元) [Fang Shi-Min v. Cui Yong-Yuan], Yizhongminzhongzi No. 07485 (Beijing 1st Interm. People's t. 2015), *aff'g* (Beijing Haidian Dist. Ct.).

204. Fang Shi-Min, better known by his pen name Fang Zhou-Zi, earned several science degrees in both China and the United States. *See Science Corp. Fang Zhou Zi Injured in Attack Near Home*, CHINA DAILY (Aug. 29, 2010), http://www.chinadaily.com.cn/china//////2010-08/29/content_11221045.htm [https://perma.cc/N35V-7SVF].

205. *See id.* Despite Fang's good intentions to scrutinize and improve the quality of academic research in China through his campaign against academic fraud, Fang's accusations against other academics on his personal blogs were also criticized for lacking transparency, due process, and detail. He was the target of several defamation cases and also an assault case. *Id*.

206. Fang Shi Min Su Cui Yong Yuan (方是民诉崔永元) [Fang Shi-Min v. Cui Yong-Yuan], Yizhongminzhongzi No. 07485, at 1–5 (Beijing 1st Interm. People's Ct. 2015).

207. *Id.*

208. *See* Liu Yang & Zhang Yongsheng, *Cui Yong-Yuan and Fang Zhou-Zi Escalated Fight on Weibo to the Court, Evidence of "Scumbag" Caused Laughter*, PEOPLE (July 24, 2014, 6:54 AM), http://media.people.com.cn/n/2014/0724/c40606-25331708.html [https://perma.cc/7GD7-8EKY].

could help to solve the problem of poverty.[209] This academic debate, however, quickly escalated into personal attacks against each other.[210] Both Cui and Fang published blog articles criticizing the other's professional achievements, character, and trustworthiness, and accusations of bribery and mafia/gang involvement were made by both sides.[211] Soon after, Fang brought a lawsuit against Cui for defamation, and Cui counter-sued Fang for defamation, so the courts combined the two cases.[212] In their briefs, each accused the other of making public defamatory statements that damaged their reputation, and each invoked freedom of speech as an affirmative defense.[213]

Beijing Haidian District Court, a court of first instance, discussed the elements of defamation and distinguished the statements regarding an "academic debate" from those related to "personal attacks."[214] For example, the court ruled that statements related to the safety of genetically-modified food made by both parties, although utilizing unpleasant and offensive language, did not constitute defamatory remarks because the debate concerned a public topic.[215] Thus, both parties enjoyed the public interest privilege.[216] Other direct personal attack statements, such as Cui's accusation that Fang was the "Head of the Mafia Group" and "embezzled charity funds," and Fang's description of Cui as a "total liar" and allegation that Cui won an award as a result of "an under-the-table deal," were held to be defamatory, and the Beijing Haidian Court found both plaintiff and defendant liable for defamation.[217]

In *Fang v. Cui*, the court also addressed the elevated threshold for public figures to bring a defamation suit.[218] The court held that public figures should "show more tolerance to negative remarks from the public" even if such statements are not always accurate.[219] Unless the in-

209. *See id.*

210. Fang Shi Min Su Cui Yong Yuan (方是民诉崔永元**)** [Fang Shi-Min v. Cui Yong-Yuan], Yizhongminzhongzi No. 07485, at 3–6 (Beijing 1st Interm. People's Ct. 2015).

211. *Id.* For instance, on his personal blog, Cui called Fang the "head of the mafia and gangster organization," and Fang responded, describing Cui as a "crazy dog" and a "total liar." *Id.* at 2.

212. Liu & Zhang, *supra* note 208.

213. Fang Shi Min Su Cui Yong Yuan (方是民诉崔永元**)** [Fang Shi-Min v. Cui Yong-Yuan] Yizhongminzhongzi No. 07485, at 3–6 (Beijing 1st Interm. People's Ct. 2015).

214. *See* BEIJING HAIDIAN COURT, *Case Summary of Fang v. Cui*, http://mp.weixin.qq.com/s?__biz=MzAxMDI2MzQyNA==&mid=206870077&idx=1&sn=4aaf02e43d9606e4df253b47c5b32d1e&scene=5#rd [https://perma.cc/E5K7-VLTP] [hereinafter *Summary of Fang v. Cui*].

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. *Id.*

correct, harmful statements against public figures are totally groundless and the writer or publisher acted with obvious malice, such remarks do not constitute defamation.[220]

Fang v. Cui is a landmark defamation case for several reasons. First, this is the first defamation case in which a Chinese court imposed a higher burden of proof for public figures to bring a defamation suit.[221] Although the court did not adopt the same "actual malice" standard as did the United States Supreme Court in *New York Times v. Sullivan* (1964),[222] it did require public figures to "show more tolerance to negative and possibly inaccurate public comments," a price that public figures have to pay for putting themselves in the public eye.[223] Second, the public interest defense might apply when the alleged defamatory remarks concern a topic that affects the interests of the public.[224] In this case, the court treated the inaccurate and offensive statements surrounding the public debate of genetically-modified food differently than the insulting language used to attack the opponents' characters, holding that the "disagreements to a certain topic should be strictly limited to the discussion of that topic, and should not be directed as personal attacks against each other."[225] At the end of the opinion, the court also noted that, although the choice of words used in social media has become more casual and reckless, with less scrutiny, writers and bloggers should still be careful with their words so as not to trigger tort liability.[226]

B. News Press Privilege: World Luxury Assoc. v. Beijing News Press (2015)[227]

In *World Luxury Assoc. v. Beijing News Press*, Chinese courts were asked to address another important issue in defamation cases—privilege of the news press.[228] Defendant Beijing News Press (BNP) published an article on June 15, 2012, titled *World Luxury Association Accused of Being a Shell Company*, about World Luxury Association (WLA) and

220. *Id.*

221. *Id.*

222. New York Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

223. *See Summary of Fang v. Cui*, *supra* note 214.

224. *Id*.

225. *Id.*

226. *Id.*; *see* Fang Shi Min Su Cui Yong Yuan (方是民诉崔永元**)** [Fang Shi-Min v. Cui Yong-Yuan] Yizhongminzhongzi No. 07485 (Beijing 1st Interm. People's Ct. Dec. 25, 2015).

227. Shi She Hui Su Xin Jing Bao (世奢会（北京）**公司**诉**新京**报) [World Luxury Association v. Beijing News Press, Sanzhongminzhongzi], Sanzhongminzhongzi No. 06013 (Beijing 3d Interm. People's Ct. Nov. 9, 2015).

228. *Id.*

its Chinese subsidiary.[229] WLA perceived the article as provocative.[230] The article questioned the legitimacy of the company—whether WLA truly represented world luxury brands—based on a number of anecdotes disclosed by BNP sources.[231] The article discussed how WLA faked its accounting books the night before issuing a press release; that WLA claimed to own the luxury cars featured in an exhibition it hosted when in actuality the cars were rented; and that some of the so-called "VIPs" and clients that WLA invited to the exhibition were either paid actors or personal friends of its CEO.[232]

Plaintiff WLA sued BNP for defamation with respect to ten specific statements made in the disputed article.[233] In its defense, BNP used the news press privilege and claimed that the information was true.[234] At trial, BNP contended that the disputed article posed a legitimate question and did not constitute defamation because BNP conducted sufficient investigation and performed background checks of its sources for the article, including former employees of WLA.[235] However, because BNP refused to provide the identity of its sources or the tape recordings of its interviews with the sources, the Beijing Chaoyang Court ruled against BNP on the grounds that the allegations against WLA in the disputed article could not be verified with substantiating evidence.[236] Thus, the court found BNP liable for defamation.[237] BNP subsequently appealed.[238]

During the appeal, BNP submitted new evidence, including the original tape recordings of its four interviewees, and in particular, a four-hour interview with Tang, a former employee at WLA, to prove that the disputed article was written and published with sufficient factual support.[239] BNP also submitted the identification cards of its sources and written testimony in which the sources attested that the interviews were authentic and conducted on a voluntary basis.[240]

The Beijing 3rd Intermediate Court, the appellate court, overruled the district court's decision, finding BNP not liable for defamation because

229. *Id.* at 5.
230. *Id.*
231. *Id.*
232. *Id.* at 3.
233. *Id*.
234. *Id.* at 4–5. BNP also used the defense of a citizen's right to be informed. *Id.* at 11.
235. *Id.* at 4.
236. *Id.* at 2–4.
237. *Id.*
238. *Id.* at 5.
239. *Id.* at 6–7.
240. *Id*.

there was sufficient evidence to suggest that BNP's interview with its source, Tang, actually occurred, and that Tang made all the statements on a voluntary, informed, and consistent basis.[241] The court also found that BNP's report about WLA was triggered by and consistent with existing questions and concerns surrounding WLA's business behaviors,[242] and the disputed article was written with a legitimate purpose—to inform the public of newsworthy facts.[243]

In its opinion, the Beijing 3rd Intermediate Court also discussed the privilege of news press in defamation cases, holding that the "news media has the right to criticize and comment."[244] The court found that unless news media "purposefully distort the facts and make inaccurate statements, or fail to perform the duty of reasonable check and verification," the press would not be found liable for a tort (defamation).[245] Additionally, the court addressed the different threshold for public figures to bring defamation suits, holding:

> For those who voluntarily avail themselves [of] the public eye and use the media to gain public recognition and influence, the public then has the right to be informed about their origin, background and other information. News media's coverage on these social subjects therefore satisfy the public's needs and also fullfill the obligation of news media to provide useful information to keep these subjects in check.[246]

As such, the courts established a high bar for public figures to bring defamation suits in China.

C. A Comparison with the U.S. Approach: New York Times v. Sullivan

The Chinese court's reasoning in *World Luxury Assoc. v. Beijing News Press* is similar to that in *New York Times v. Sullivan*, a landmark defamation case that the United States Supreme Court decided half a century ago.[247] In 1964, the United States Supreme Court ruled in favor of defendant *The New York Times*, finding it not liable for defamation.[248] In this case, plaintiff Sullivan was an elected official in Montgomery, Alabama, and oversaw the local police department.[249] He alleged that *The New York Times* published, in a paid advertisement, inaccurate statements about local police conduct towards students who

241. *Id.* at 10–11.
242. *Id.* at 11.
243. *Id.* at 12.
244. *Id.*
245. *Id.* at 11.
246. *Id.*
247. *See* New York Times Co. v. Sullivan, 376 U.S. 254 (1964).
248. *Id.* at 292.
249. *Id.* at 256.

participated in the civil rights movement.[250]

Although the United States Supreme Court acknowledged that certain statements made by *The New York Times* were not accurate, it nonetheless showed tolerance to the newspaper because "[such an] erroneous statement is inevitable in free debate, and [discourse] must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'"[251] For public figures to bring a prima facie defamation suit, the court required an additional element of "actual malice," that is, a showing that the defendant had knowledge of or recklessly disregarded a statement's falsity.[252] After balancing the public's right to information and the private right to reputation, the court concurred with Judge Edgerton in *Sweeney v. Patterson*, stating, "The interest of the public here outweighs the interest of appellant or any other individual. The protection of the public requires not merely discussion, but information."[253] The decision upheld the freedoms of speech and of the press and found defendant *The New York Times* not liable for defamation.[254]

When one compares the classic *Sullivan* case with the recent Chinese defamation cases, *Fang v. Cui* and *World Luxury Assoc. v. Beijing News Press*, a number of enlightening similarities emerge. First, both the U.S. and Chinese courts set a higher standard for public figures to bring a defamation suit, although from different perspectives.[255] In *Sullivan*, the United States Supreme Court required the plaintiff, a public official, to prove that the defendant had "actual malice" when making inaccurate and harmful statements.[256] In *Fang v. Cui*, Chinese judges also required Fang and Cui, both of whom are celebrities, to "show more tolerance to negative remarks from the public," and determined that unless the incorrect harmful statements are "totally groundless and obvious malice is found," defamation cannot be established.[257]

Second, both the Chinese courts and their U.S. counterparts protected the freedom of the press, albeit in different formats. In the United States, freedom of speech is a constitutional right protected under the First Amendment,[258] while in China, the protection of freedom of speech and of the press is more similar to the European approach, strik-

250. *Id.* at 256–58.
251. *Id.* at 271 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).
252. *Id.* at 279–80.
253. *Id*. at 272 (quoting Sweeney v. Patterson, 128 F.2d 457, 458 (1942)).
254. *Id.* at 284–90.
255. *Id.* at 279–80; *see Summary of Fang v. Cui*, *supra* note 214.
256. *New York Times Co.*, 376 U.S. at 279–80.
257. *See Summary of Fang v. Cui*, *supra* note 214.
258. U.S. CONST. amend. I.

ing a balance between the individual right to privacy and the public right's to information.[259]

IV. RECENT DEVELOPMENTS IN UNITED STATES-CHINA FILM COOPERATION

Cooperation between Hollywood and the Chinese film industry occurs in two primary ways.[260] The first is Chinese financial investment in U.S. entertainment projects.[261] The second, more intimate way, involves both parties playing active roles in the movie co-production process.[262]

With regard to the first type of collaboration, China has increased its financial presence in single-project finance deals,[263] and in slate deals.[264] On a bigger scale, China's footprint can also be found in major studio equity deals, beginning from Fuson's equity investment in Studio 8 two years ago,[265] to Wanda's recent acquisition of Legendary Pictures,

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259. Convention for the Protection of Human Rights and Fundamental Freedoms, arts. 8, 10, Nov. 4, 1950, 213 U.N.T.S. 222.

260. *See* Tiffany Kwong, *China's Film Censorship Program and How Hollywood Can Enter China's Film Market*, 5 A.S.U. SPORTS & ENT. L.J., 164, 176 (2015).

261. *Id.* Project finance and slate finance are two movie-financing structures commonly found in the film industry. *See infra* text accompanying notes 263–264.

262. Kwong, *supra* note 260.

263. *See, e.g.*, Patrick Frater, *'Expendables 4' Secures China Pre-Sale (Exclusive)*, VARIETY (Oct. 9, 2015, 8:30 AM), http://variety.com/2015/film/asia/expendables-4-secures-china-pre-sale-1201614508 [https://perma.cc/2NQT-G5SJ]. Dr. Shi Jianxiang, chairman of Shanghai Kuailu Investment Group, which owns SSXH and Max Screen, and Steven Paul (Ghost Rider, Baby Geniuses, Tekken) will be credited as executive producers on both pictures. *Id.* Shanghai Kuailu Investment Group invests in this franchise, to be released in 2017. *Id.*

264. Project finance is a loan structure that relies primarily on the project's cash flow for repayment, with the project's assets, rights, and interests held as secondary security or collateral. Slate finance, on the other hand, requires both the studio and investors to contribute to the financing of the film. *See, e.g.*, Patrick Frater, *China's Bona Film Invests $235 Million in Fox Movie Slate*, VARIETY (Nov. 4, 2015, 7:30 PM), http://variety.com/2015/biz/asia/bona-film-fox-investment-1201633139 [https://perma.cc/3U7X-5AG6]; Patrick Frater, *China's Huayi Bros. Approves Deal With Robert Simonds' STX*, VARIETY (Apr. 1, 2015, 4:53 AM), http://variety.com/2015/biz/asia/chinas-huayi-bros-approves-deal-with-robert-simonds-stx-1201464047 [https://perma.cc/7GZ5-2CN8]; Kimberly Owczarski, *Becoming Legendary: Slate Financing and Hollywood Studio Partnership in Contemporary Filmmaking*, FOLLOW THE MONEY (Fall 2012) https://cinema.usc.edu/archivedassets/32_2/6_Owczarski.pdf [https://perma.cc/8LYM-6TSH]. Bona Film Group signed a deal to invest US$235 million in a slate of Hollywood tentpole movies from Twentieth Century Fox. Frater, *China's Bona Film Invests $235 Million in Fox Movie Slate*, *supra* note 264. The Martian was one of the six live-action tentpoles in which Bona Film Group invested. Patrick Frater, *Lions Gate Seals $1.5 Billion Deal With China's Hunan TV*, VARIETY (Mar. 17, 2015, 7:27 PM), http://variety.com/2015/biz/asia/lionsgate-seals-co-finance-co-production-pact-with-chinas-hunan-tv-1201454954 [https://perma.cc/2VP3-J5FV].

265. *See* Patrick Frater, *China's Fosun Revealed as Leading Owner of Jeff Robinov's Studio 8 (Exclusive)*, VARIETY (Apr. 20, 2015, 8:56 AM), *http://variety.com/2015/biz/asia/fosun-jeff-robinov-1201475704/* [https://perma.cc/GHH9-82K9].

announced in January 2016.[266]

The second type of cooperation, China-U.S. movie co-production, is particularly attractive to Hollywood studios as it effectively bypasses China's film quota system for foreign-made films.[267] Based on its import-movie quota system, China currently allows thirty-four foreign movie titles to be imported every year, an increase from the twenty-movie limit set in 2012.[268] An overwhelming majority of these movies are Hollywood blockbusters, while films from less competitive markets make up the rest.[269] The number, however, is a drop in the bucket compared to the total number of movies Hollywood releases each year.[270]

For example, 707 movie titles were released in the United States in 2014 alone.[271] This explains why the Motion Picture Association of America (MPAA), the trade association behind major Hollywood studios, has lobbied vigorously to open China's film market.[272] Of course, the quota system is not the only obstacle to studios outside China. A foreign title faces other barriers imposed by the Chinese Film Bureau, including restrictions in revenue sharing and limited theatrical release dates.[273] On the other hand, a U.S.-China film co-production is treated the same as a local Chinese production, without the burdens imposed on an imported title.[274] For this reason, it is extremely beneficial for studi-

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266. *See* Patrick Frater, *China's Wanda Acquires Legendary Entertainment for $3.5 Billion*, VARIETY (Jan. 11, 2016, 6:08 PM), http://variety.com/2016/biz/asia/wanda-deal-with-legendary-1201676878/ [https://perma.cc/B6LK-64NM].

267. *See* Kwong, *supra* note 260.

268. China adopted a quota system to restrict the number of foreign movies imported into China every year. *See China Film Import Quota Will Open Up in 2017, Says Top Local Producer*, HOLLYWOOD REPORTER (Apr. 16, 2014), http://www.hollywoodreporter.com/news/china-film-import-quota-increase-696708 [https://perma.cc/942D-Y33C]. The original quota of twenty foreign titles per year was increased to thirty-four titles in 2012. *Id.* The current quota system will expire in 2017. *Id.* Note that movies from Hong Kong, Taiwan, and Macau are exempted from this quota system based on the bilateral agreements signed between these markets and Mainland China. See Research Office, Information Services Division, *Challenges of the Film Industry in Hong Kong*, H.K. LEGIS. COUNCIL COMMISSION, http://www.legco.gov.hk/research-publications/english/essentials-1516ise13-challenges-of-the-film-industry-in-hong-kong.htm [https://perma.cc/9N4P-XRTQ].

269. *Id*.

270. Among the 707 movie titles, 136 titles were from major studios (MPAA members) and the remaining 571 titles came from independent studios. *See* MPAA, *Theatrical Market Statistics 2014*, at 21 (2015) http://www.mpaa.org/wp-content/uploads/2015/03/MPAA-Theatrical-Market-Statistics-2014.pdf [https://perma.cc/QW36-E9MU].

271. *Id*.

272. *See* Kwong, *supra* note 260.

273. *Id*.

274. *See* Robert Cain, *How (and Why) to Qualify Your Film as an Official Chinese Co-production*, CHINA FILM BIZ (Dec. 18, 2011), https://chinafilmbiz.com/2011/12/18/how-and-why-to-qualify-your-film-as-an-official-chinese-co-production/ [https://perma.cc/Q2KY-Q8M6]; State Admin. of Radio, Film, & Television, *The Stipulation of Administration on Chinese-*

os outside China to pursue co-production.[275]

Nonetheless, it is not entirely straightforward as to what kind of production qualifies as a U.S.-China co-production. Earlier attempts at qualification for co-production include Transformers 4 and Kung Fu Panda 2, but they were unsuccessful.[276] Miao Xiao-Tian, President of the China Co-Production Corporation, which is responsible for approving co-production status, pointed out that Chinese elements in a movie alone are not sufficient to qualify the film as a co-production.[277] Rather, major participation of talent from both the United States and China—from directors to actors to scriptwriters—is required for co-production status.[278]

As cooperation between China's entertainment industry and Hollywood continues to develop, U.S. production approaches will inevitably impact the practice of Chinese studios. For example, there is an increasing trend for Chinese studios and talent to engage in Hollywood-style negotiations and to model contracts after the templates used in the United States.[279] The de facto adherence to the Hollywood approach is consistent with the Chinese government's five-year plan that promotes China's culture industry, namely the goal to win the heart of the world with its soft power.[280] In general, Chinese studios and the government entities view the Hollywood practice as the most successful entertainment model in the world, and China is emulating its success.[281]

Foreign Film Co-production, (July 6, 2004) http://www.cfcc-film.com.cn/policeg/content/id/1.html [https://perma.cc/G4UR-MMWH] (full English text).

275. *Id.*

276. Note that the most recent franchise title Kung Fu Panda 3 eventually qualified as a U.S.-China co-production, after working closely with its Chinese partners including Oriental DreamWorks, Shanghai Media Group, and others. *See* Clifford Coonan, *'Kung Fu Panda 3' Gets Co-Production Status in China*, HOLLYWOOD REPORTER (Jan. 23, 2015), http://www.hollywoodreporter.com/news/kung-fu-panda-3-gets-766185 [https://perma.cc/N6SP-PTGR].

277. Miao Xian-Tian, President of China Co-Production Corporation, made such remarks during his lunch talk at the 2014 U.S.-China Film Summit, organized by the Asia Society Southern California, on November 5, 2014. *2014 US-China Film Summit: Miao Xiaotian*, ASIA SOCIETY, http://asiasociety.org/video/2014-us-china-film-summit-miao-xiaotian [https://perma.cc/725N-JZNB] (last visited on May 19, 2016).

278. *Id*.

279. In most U.S.-China-related entertainment deals on which the author directly or indirectly works, the drafts and negotiations are mostly conducted by U.S. entertainment lawyers. Even Chinese clients prefer hiring entertainment lawyers in the United States, believing that they have both the legal skills and the industry knowledge to best represent them.

280. *See China's Film Industry: Blockbuster in the Making*, KNOWLEDGE@WHARTON (Feb. 17, 2016), http://knowledge.wharton.upenn.edu/article/lights-china-action-how-china-is-getting-into-the-global-entertainment-business [https://perma.cc/8C68-63W3].

281. *See* SONG, *supra* note 48, at 249–55 (interviewing various stakeholders from the Chinese entertainment industry, including film investors, producers, and directors). Another explanation for China's lack of creativity in its content industry is the heavy censorship imposed by the

CONCLUSION

Convergence in different systems of law has certainly occurred previously. For instance, the convergence between common law and civil law systems already diminished some of the distinctive features they used to claim: law in codes versus law in cases.[282] Judge Calabresi observed in 1982 that the United States has entered an "age of statutes," and that statutes may be used as sources of law beyond their terms.[283] Others commented that the interpretation of statutes was the United States' new "primary source of law."[284] At the same time, traditional civil law jurisdictions are also paying more attention to the role of case law, in addition to written codes and statutes.[285] In 1997, an academic group conducted a survey that compared opinions written by judges in eleven civil and common law jurisdictions and found that the way judges in both legal systems treat legal precedent is becoming more and more similar.[286] To this end, it is encouraging to see Chinese judges begin to devote more effort to explain their reasoning in opinions, so as to provide better guidance for future judges and predictability for future parties.[287]

Chinese government and also the lack of clear guidance on such censorship rules. To address such concerns, the newly drafted People's Republic of China Film Industry Promotion Law 《中华人民共和国电影产业促进法》[zhong hua ren min gong he guo dian ying chan ye cu jin fa], which will become effective on March 1 2017, has made an effort to bring the film censorship guideline more transparent. For instance, Article 16 of China Film Industry Promotion Law includes a list of factors that are to be considered during the film censorship process should the theme of films are related to national security, diplomacy, ethnicities, religion or the military. See the full Chinese text of China Film Industry Promotion Law at http://www.npc.gov.cn/npc/xinwen/2016-11/07/content_2001625.htm.

282. *See generally* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1985) (arguing that law has become more statute-based, even in common law systems).

283. *Id.* at 87–88.

284. *See* Shael Herman, *The Fate and the Future of Codification in America*, 40 AM. J. LEGAL HIST. 407, 408 (1996); Mark D. Rosen, *What Has Happened to the Common Law? Recent American Codifications and Their Impact on Judicial Practice and the Law's Subsequent Development*, 1994 WIS. L. REV. 1119, 1119 (1994).

285. *See* Aleksander Peczenik, *The Binding Force of Precedent*, *in* INTERPRETING PRECEDENTS: A COMPARATIVE STUDY 461, 461 (D. Neil MacCormick & Robert S. Summers eds., 1997) (comparing the effect of precedent on judges in eleven jurisdictions); CALABRESI, *supra* note 282, at 1.

286. Peczenik, *supra* note 285, at 261. The group report reviewed opinions in the following eleven jurisdictions: Germany, Finland, France, Italy, Norway, Poland, Spain, Sweden, the United Kingdom, the United States, and the European Union. *See* INTERPRETING PRECEDENTS: A COMPARATIVE STUDY (D. Neil MacCormick & Robert S. Summers eds., 1997) (containing reports on precedent in the aforementioned jurisdictions).

287. The Chinese Supreme Court and Department of Justice have encouraged Chinese judges to follow a certain format in their written opinions. *See People's Court "First Five Reform Program" and "Two Five Reform Program"*, LEGAL DAILY (Apr. 30, 2009), http://www.legaldaily.com.cn/zbzk/2009-04/30/content_1091822.htm [https://perma.cc/Y3U3-VQVP].

Convergence in the area of entertainment law is a more recent phenomenon, but its increase is inevitable in the years to come. With around one hundred years of experience in the movie industry, the U.S. legal system has probably covered every aspect of law related to the industry: from copyright infringement cases involving plays,[288] magazine covers,[289] television commercials,[290] and a President's memo,[291] to distinguishing between parody[292] and satire;[293] from protecting movie titles,[294] story characters,[295] trademarked logos[296] and toys,[297] to striking a balance between protecting the private right to a good life,[298] personal image,[299] reputation,[300] and upholding the freedoms of speech and of the press.[301] The United States' legal experience in the entertainment industry has a lot to offer and will continue to impact Chinese entertainment law. Unsurprisingly, Chinese judges are gravitating towards their U.S. counterparts as they address cutting-edge legal issues in China's growing entertainment industry. Emerging questions include: the nature of a hiring contract between a studio and its actors—is it a regular employment contract or an agent contract?[302] Can a contract be unilaterally terminated?[303] Who should have control of the final cut, the director or the investor who controls the budget?[304] What is the industry definition of "film revenue"—does it mean the box office number or the Hollywood waterfall concept?[305] All of these issues are more than simple

288. *Nichols*, 45 F.2d at 119.

289. Steinberg v. Columbia Pictures Indus., Inc., 663 F. Supp. 706, 708–09 (S.D.N.Y. 1987).

290. Krofft Television Prods., Inc. v. McDonald's Corp., 562 F.2d 1157, 1160, 1162 (9th Cir. 1977).

291. Harper & Row Publishers v. Nat'l Enters., 471 U.S. 539, 2221, 2224 (1985).

292. Campbell v. Acuff-Rose Music, 510 U.S. 569, 579–81 (1994); Mattel Inc. v. Walking Mountain Prods., 335 F.3d 792, 800–01 (9th Cir. 2003).

293. Dr. Seuss Enters. v. Penguin Books, 109 F.3d 1394, 1400 (9th Cir. 1997).

294. Tri-Star Pictures Inc. v. Unger, 14 F. Supp. 2d 339, 345 (S.D.N.Y.1998).

295. Walt Disney Prod. v. Air Pirates, 581 F.2d 751 (9th Cir. 1978); Warner Brothers Pictures, Inc. v. Columbia Broad. Sys., Inc. 216 F.2d 945 (9th Cir. 1954).

296. *Caterpillar Inc.*, 287 F. Supp. 2d at 913.

297. *Warner Bros., Inc.*, 724 F.2d at 327.

298. Melvin v. Reid, 112 Cal. App. 285, 297 (Cal. Dist. Ct. App. 1931).

299. Comedy III Prod., Inc. v. Gary Saderup, Inc., 21 P.3d 797, 805 (Cal. 2001).

300. Gilliam v. American Broad. Co., 538 F.2d 14 (2d Cir. 1976).

301. *New York Times Co.*, 376 U.S. at 254; Paulsen v. Personality Posters, Inc. 299. N.Y.S.2d 501, 507 (N.Y. Sup. Ct. 1968) (citing Inc. v. Hill, 385 U.S. 374, 388 (1967)).

302. Dou Yao Su Bei Jing Xin Hua Mian Ying Ye You Xian Gong Si (窦骁诉北京新画面影业有限公司) [New Pictures v. DOU Yao], Gaominzhongzi No. 1164 (Beijing High Ct. 2013).

303. *Id.*

304. Zhang Jia Rui Su Jiang Su Zhen Hui Ying Ye You Xian Gong Si (章家瑞诉江苏真慧影业有限公司) [Zhang Jia-Rui v. Jiang Su Zhen Hui Studio], Suzhiminzhongzi No. 0185 (Jiangsu High Ct. 2014).

305. The Hollywood film industry uses the "waterfall concept" as a metaphor to describe the

legal questions because they reflect the often relentless skirmish between a studio and its talent, the influence of guilds and unions, and the unexpressed but generally understood rules behind Hollywood accounting.[306]

When I wrote the Chinese version of *Entertainment Law*,[307] I struggled with a lack of Chinese entertainment law cases—the industry was booming but disputes were still rare.[308] This has totally changed in just three short years. Today, for almost every legal issue related to the entertainment industry, there are questions being asked, litigation in motion, and conversations underway. The convergence of Chinese entertainment law with U.S. entertainment law will continue as China adopts more U.S. entertainment law principles into its own rules and understandings about what makes for a robust entertainment industry.

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priority of investment returns among the stakeholders of a film (including its investors, producers, actors, scriptwriters, etc.)—who gets paid first when the money comes in. Sometimes, the waterfall "dries up" and those who are at the very end of the list never receive money. *See generally* JEFF ULIN, THE BUSINESS OF MEDIA DISTRIBUTION (Focal Press, 2010) (describing the waterfall concept of Hollywood accounting); Wai Ying Tou Zi You Xian Gong Si Su Hua Yi Xiong Di Chuan Mei Gu Fen You Xian Gong Si (崴盈投资有限公司诉华谊兄弟传媒股份有限公司) [Zhou Xing-Chi v. Huayi Brothers], Sanzhongminzhichuzi No. 13217 (Beijing 3d Interm. People's Ct. 2014), *appeal pending* Beijing High Court. The focus of *Zhou Xing-Chi v. Huai Brothers* is the various interpretations of the term "film revenue," which was not well-defined in the original contract. *Id.* The plaintiff director/actor argued that the term should refer to the total box office number—the actual theater ticket sales of the movie—while the defendant producer argued that the term should refer to what the stakeholders actually received, after exhibitors took their share (usually forty-five percent) out of the total box office number. *Id.*

306. *See* Derek Thompson, *How Hollywood Accounting Can Make a $450 Million Movie 'Unprofitable'*, ATLANTIC (Sept. 14, 2011), http://www.theatlantic.com/business/archive/2011/09/how-hollywood-accounting-can-make-a-450-million-movie-unprofitable/245134/ [https://perma.cc/26VX-ZLE8]; *see also* Mike Masnick, *Hollywood Accounting: How a $19 Million Movie Makes $150 Million . . . And Still Isn't Profitable*, TECHDIRT (Oct. 19, 2012, 8:44 AM), https://www.techdirt.com/articles/20121018/01054720744/hollywood-accounting-how-19-million-movie-makes-150-million-still-isnt-profitable.shtml [https://perma.cc/2W3K-7TGU].

307. *See* SONG, *supra* note 48, at 23–24. This is the first treatise on this subject written and published in China. The book has since been adopted as the textbook for entertainment law curricula by a number of law schools and film schools in China. Additionally, certain ideas and proposals in this treatise were adopted by and reflected in recent entertainment law cases, such as *Chiung v. Yu*.

308. When I wrote the treatise *Entertainment Law*, I tried to pair a U.S. case with a corresponding Chinese case to comparatively address legal issues in the industry. Unfortunately, I was only able to match forty percent of the cases related to the legal issues discussed in my book, either because no such Chinese litigation had been yet filed or because the related industry practice did not exist (for instance, errors and omissions insurance was not yet available in China).