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## DRAGONFLY IS WATCHING YOU: ARTVEILLANCE AND THE LEGAL ISSUES IMPLICATED

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# DRAGONFLY IS WATCHING YOU: ARTVEILLANCE AND THE LEGAL ISSUES IMPLICATED

By Sydney Yang\*

## Abstract

*Art law as a practice area can seem innately contradictory. Indeed, at first glance “art” and “law” are concepts that should be on the opposite ends of the spectrum. While art is all about unleashing your imagination and thinking out of the box, law may seem more rigid and orderly as it focuses more on the structured legal system and the enforcement of law by social and governmental institutions. As the art market became more complex and sophisticated in the 20th century, art law has developed into a discrete and increasingly recognized legal field despite the fact that it is not always readily responsive to the needs and demand of artists and the art market.*

*This article explores the intersection of art and law and uses a work of art entitled *Dragonfly Eyes* as an example to discuss the potential legal issues a work of contemporary art may raise. Hopefully, this article might provide clues to the future of the interaction between art and law and also shed some light on the development of copyright and privacy laws in China.*

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## INTRODUCTION

Art law as a practice area may seem innately contradictory. Indeed, at first glance “art” and “law” are concepts that should be on the opposite ends of the spectrum. While art is all about unleashing your imagination and thinking out of the box, law follows a more rigid and orderly process as it focuses on the structured legal system and enforcement by social and governmental institutions. However, art and law have been entwined for centuries. Their first encounter probably happened during the Renaissance with the first art commission contract that was signed amid the decline of church power and the emergence of the market economy.<sup>1</sup>

Before the legal institutions recognized art as a particular type of chattel and treated it with some particularity, most of the problems involving a piece of art were resolved by recourse to some generalized body of law.<sup>2</sup> Historically, “the rules regulating the sale of an etching by Picasso were largely the same as those covering a sack of potatoes by a farmer.”<sup>3</sup> “A museum might dispose of a painting from its collection with as little question as a hospital selling a used bed.”<sup>4</sup> In the United States, the legal regulation of art began to catch up with the art market after World War II, when the art center shifted from Europe to the U.S. Concomitant. With the economic, political, and cultural shifts after the war, new trends in art arose in the U.S. and gradually art became an important commodity.

As the art market became more complex and sophisticated, the law evolved to meet the additional needs of the market and became more specialized. However, the fact that art law has developed into a discrete and increasingly recognized legal field does not necessarily mean that the law is readily responsive to the needs and demands of artists or the art market. Still, art law is merely an umbrella term which encompasses a variety of areas of law. As art consultant Lauren P. Della Monica explains, “[a]rt law is an amalgam of contracts law, trusts and estates law, litigation, and statutory law at different levels.”<sup>5</sup>

Regardless, art does not fit well within legal frameworks. Since the very first day art came into the court system, legal professionals have been struggling to verbalize their definitions and assumptions of art, art labor, authorship, authenticity, and so forth. The dramatic expansions of the art market in the 1960s and 1980s made urgent the need to understand how law functioned in the art world, especially among post-war art movements of conceptualist, readymade, and interstitial

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<sup>1</sup> GEORGIO VASARI, LIVES OF THE ARTISTS, viii (Julia Conaway Bondanella & Peter Bondanella trans., Oxford Univ. Press, ed., 1991) (1998).

<sup>2</sup> James J. Fishman, *The Emergence of Art Law*, 26 CLEV. ST. L. REV. 481, 481 (1977).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* (citing Franklin Feldman & Stephen E. Weil, *Art Works: Law, Policy, Practice*, 5 (1974).

<sup>5</sup> Lauren P. Della Monica, *What is Art Law?*, LPDM FINE ART (July 27, 2007), <http://www.lpdmfineart.com/2007/07/what-is-art-law/>.

critique.<sup>6</sup> This expansion posed formidable challenges to legal professionals whenever such works of art interacted with the legal system.

This article explores the intersection of art and law and uses the work *Dragonfly Eyes* as an example to discuss the potential legal issues contemporary artworks may raise. This article might further provide clues to the future of the interaction between art and law and shed some light on the development of copyright and privacy laws in China.

## **I. MODERN AND CONTEMPORARY ART & ITS BOUNDARY-PUSHING PRACTICE**

### **A. What is a Work of Art?**

The definition of art is rather controversial and complex.<sup>7</sup> Traditionally, art is put on a metaphorical pedestal and thus the definition would emphasize the aesthetic dimensions of art. It intentionally draws a clear distinction between fine art and everyday objects. In contrast, more contemporary definitions deny that art has an essential connection to aesthetic properties and instead address the institutional features of art. These movements emphasize the ways in which art is mainly both defined by and is dependent upon institutional authorities. According to George Dickie, one of the most prominent and influential art philosophers of our time, art consists of an interlocking set of five definitions: (1) An artist is a person who participates with understanding in the making of a work of art; (2) A work of art is an artifact of a kind created to be presented to an artworld public; (3) A public is a set of persons the members of which are prepared in some degree to understand an object which is presented to them; (4) The artworld is the totality of all artworld systems; and (5) An artworld system is a framework for the presentation of a work of art by an artist to an artworld public.<sup>8</sup>

Still, others remain skeptical of the necessity and possibility of a definition of art. They argue that the phenomena of art is, by its nature, too diverse to admit to the unification that a satisfactory definition strives for, or that a definition of art, were there to be such a thing, would exert a stifling influence on artistic creativity.<sup>9</sup>

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<sup>6</sup> Sonia K. Katyal & Joan Kee, *How Art and Law Can Work Together Beyond the Marketplace*, HYPERALLERGIC (Jan. 12, 2017), <https://hyperallergic.com/350921/how-art-and-law-can-work-together-beyond-the-marketplace/>.

<sup>7</sup> See E.H. GOMBRICH, *THE STORY OF ART* 15 (16th ed. 1995) (“[t]here really is no such thing as Art. There are only artists.”).

<sup>8</sup> Thomas Adajian, *The Definition of Art*, first published Oct. 23, 2007; substantive revision Aug. 14, 2018 (citing GEORGE DICKIE, *THE ART CIRCLE: A THEORY OF ART*, NEW YORK: HAVEN (1984)).

<sup>9</sup> *Id.*

Perhaps surprisingly, law has taken upon itself the contentious task of answering the question, “What is art?” Law strives to provide a definition that is precise enough to help resolve legal disputes but also not too formulative to stifle the creativity of artists. However, judges are often making *ad hoc* judgments of art for the purpose of resolving disputes without taking into account the benefit of art history, art criticism, or art policy.<sup>10</sup> Therefore, they sometimes make value judgments of art that fail to appreciate its novelty and create an unfortunate lingering effect in the art market. As Justice Holmes wrote in *Bleistein v. Donaldson Lithographing Co.*, 199 U.S. 239 (1903), where the Court was asked to decide whether copyright protection shall extend to a circus poster, “[i]t may be more than doubted, for instance, whether the etching of Goya or the painting of Manet would have been sure[ly] protect[ed] when seen for the first time. At the other end, copyright would be denied to pictures which appealed to a public less educated than the judge.”<sup>11</sup> The Court held that copyright protection is not reserved exclusively for works of fine art, and the courts should not pass judgment on what constitutes art for the purpose of the protection.<sup>12</sup>

The *Bleistein* Court made it clear that when evaluating issues of copyrightability, judges should not evaluate the aesthetic quality of the works under consideration.<sup>13</sup> However, how a particular work or activity is characterized under tax law could have a substantial impact and is not easily avoidable. For example, in 1928, the U.S. Customs Court was tasked with deciding if a polished metal sculpture by Constantin Brancusi was a work of art, or an ordinary piece of bronze.<sup>14</sup> The sculpture “Bird in Space” was imported into the United States for an exhibition, but customs officials initially categorized it as regular metal and described it as “a production in bronze about 4 ½ feet high supported by a cylindrical base about 6 inches in diameter and 6 inches high.”<sup>15</sup> This classification of the sculpture resulted in a 40% duty tax. Judge Waite, after carefully evaluating the testimony of art experts, reasoned that even though the work is not strictly representational, the object:

is shown to be for purely ornamental purposes, its use being the same as that of any piece of sculpture of the old masters. It is beautiful and symmetrical in outline, and while some difficulty might be encountered in associating it with a bird, it is nevertheless pleasing to look at and highly ornamental...

*Brancusi v. United States*, 1928 Cust. Ct. LEXIS 3, 8 (Cust. Ct. 1928). Based upon this reasoning, the court eventually reached the conclusion that the object at issue was a work of art. The significance of *Brancusi* for the development of art law was

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<sup>10</sup> Christine Haight Farley, *Judging Art*, 79 TUL. L. REV. 805, 839 (2005).

<sup>11</sup> *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 251-252 (1903).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Brancusi v. United States*, 1928 Cust. Ct. LEXIS 3 (Cust. Ct. 1928).

<sup>15</sup> *Id.* at 3.

the judicial recognition that the standards relating to works of art must include special criteria which reflect the unique nature of the subject matter.<sup>16</sup>

Nonetheless, courts continue to struggle with distinctions between art and non-art as artists in their practice have strived to break down boundaries around art and destabilize the perception of art, authorship, and originality. For instance, in *Kelley v. Chi. Park Dist.*, 635 F.3d 290 (7th Cir. 2011), the 7th Circuit Court refused to consider Kelley's VARA claims against the Chicago Park District for reconfiguration of "Chicago Wildflower Work" for reasons relating to copyright's requirements of expressive authorship and fixation.<sup>17</sup> Because Kelley's work "Chicago Wildflower Work" was an installation of two oval flower beds with 60 species of wildflowers native to the region planted in the flower bed, the court reasoned that the work lacked the kind of authorship and fixation that copyright requires because plants "originate in nature, and nature forces determine their form, growth, and appearance, not the intellect of the gardener."<sup>18</sup> This holding can be detrimental for any artists, be it painters, sculptors, and others who use organic material in their works.<sup>19</sup>

A more extreme case in which the judicial branch attempts to craft legal boundaries for works of art and define authenticity is *Steinkamp v. Hoffman*, WL 1941149 (N.Y. Sup. Ct. May 22, 2012), where the New York Superior Court was asked to distinguish/determine the art object in a conceptual art piece by Sol LeWitt. The work at issue was "Wall Drawing no. 448," which, instead of being a piece of drawing by the artist, provided detailed instructions and a certificate of authenticity.<sup>20</sup> Someone besides the artist himself, would then perform the final step of creation with these instructions. Skeinkamp, a collector and dealer, brought a lawsuit against the Rhona Hoffman Gallery on the grounds that she lost the certificate of authenticity for this piece of art and therefore suffered financially. Eventually, the parties reached an undisclosed settlement a few weeks after the suit was filed. Due to the settlement, we do not yet know how a court would value such a certificate of art vis-à-vis the finished product of a conceptual art.

## **B. Xu Bing: Dragonfly Eyes**

*Dragonfly Eyes*, or Qing Ting Zhi Yan, is a recent case in which art and law again clash or converge to ask the interesting question of the definition of art and raise awareness of surveillance and privacy in the public sector. It is a "film" without actors or photographers. More specifically, it has no conscious actors. It at first seems like a parody of a genre film – superficially, it is a love story. The film

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<sup>16</sup> Fishman, *supra* note 2, at 485.

<sup>17</sup> *Kelley v. Chicago Park Dist.*, 635 F.3d 290, 300-302 (7th Cir. 2011).

<sup>18</sup> *Id.* at 304.

<sup>19</sup> Dr. Derek Fincham, *How Law Defines Art*, 14 JOHN MARSHALL REV. INTELLECTUAL PROP. L. 314, 319 (2015).

<sup>20</sup> *Id.* at 322.

tells the story of a girl named Qing Ting (or Dragonfly in English), who is trained to be a Buddhist nun but decides to leave the temple. She eventually fell in love with a man, Ke Fan. Their relationship takes a few detours, resulting with Ke Fan in jail and Qing Ting's reinvention of herself with the start of a career as an online celebrity, including a new face and a new name.<sup>21</sup> It is made by the renowned visual artist Xu Bing using surveillance camera material, compiled from 10,000 hours of footage pulled from the internet cloud, with the entire dialogue scripted and post-synched.<sup>22</sup> This is a work of art that is only possible in the present-day panopticon of China, where the omnipresent security cameras are installed everywhere and are on 24/7. They unreasonably intrude upon citizens' privacy and blur the boundaries between private and public life. As the artist notes in the director's statement, he was not able to make such a film from surveillance footage until 2015, when surveillance cameras in China "began to be linked to the cloud database [where] countless surveillance recordings [had] been streamed online."<sup>23</sup> As a commentary on privacy and violence, the film is quietly disturbing as it shows footage of real-life accidents, from an apparent drowning to a frightening scene of road rage and a spectacular but clearly deadly plane crash.<sup>24</sup> It constantly disrupts our understanding of reality as well as our understanding of film as a genre.

Does such a collage of security camera footage constitute a film for purposes of copyright law? How should one define the rights associated with or related to this film? Who owns these rights? How does this film implicate the rights of its unconscious actors and actresses? This comment aims at highlighting some of the interesting legal issues this experimental work has raised.

## II. CURRENT LAWS IN PLACE

### A. Intellectual Property Law in China

China did not have a system for protecting intellectual property rights until the 1980s when it adopted the Trademark Law of the People's Republic of China

<sup>21</sup> Joseph Owen, *Qing Ting zhi yan (Dragonfly Eyes)*, THE UP COMING (Aug. 11, 2017), <https://www.theupcoming.co.uk/2017/08/11/locarno-film-festival-2017-qing-ting-zhi-yan-dragonfly-eyes-review/>.

<sup>22</sup> Enid Tsui, *Chinese Artist Xu Bing's Beijing Retrospective Reveals His Attitudes to China and Western Art, But Don't Call Him a Pessimist*, POST MAGAZINE (Aug. 11, 2018), <https://www.scribd.com/article/386007793/Chinese-Artist-Xu-Bing-s-Beijing-Retrospective-Reveals-His-Attitudes-To-China-And-Western-Art-But-Don-t-Call-Him-A-Pessimist>. This article originally appeared on South China Morning Post (SCMP).

<sup>23</sup> *Movie Night: 'Dragonfly Eyes' by Xu Bing*, ASIA SOCIETY, <https://asiasociety.org/switzerland/events/movie-night-dragonfly-eyes-xu-bing> (last visited Apr. 16, 2022).

<sup>24</sup> Boyd van Hoeij, *'Dragonfly Eyes' ('Qing Ting zhi yan')*: Film Review | Locarno 2017, THE HOLLYWOOD REPORTER (Aug. 15, 2017), <https://www.hollywoodreporter.com/news/dragonfly-eyes-qing-ting-zhi-yan-1029652>.



(“PRC”) in 1983, which was followed two years later by the Patent Law, then in 1991 by the Copyright Law and in 1993 by the Law Against Unfair Competition.<sup>25</sup> Theories vary about when the indigenous notions of intellectual property rights emerged. While western commentators widely believe that the ideas of intellectual property were introduced into China through gunboat diplomacy, trade pressures, legal assistance, or other forceful means,<sup>26</sup> Chinese scholars tend to refute such culture-based claims and are willing to go further in time to locate the system's origin in early Chinese history.<sup>27</sup>

Regardless of the origin of the idea of intellectual property rights, in modern China – an economy based on the Soviet model – the notion of rewarding individual inventors and creators for their innovative and creative endeavors was directly in conflict with the communist ideal of public ownership.<sup>28</sup> Therefore, the PRC intellectual protection system attempted to create a “demarcation between the bourgeois desire for personal fame and gain and the lawful rights and interests of [authors].”<sup>29</sup> Moreover, the desire of the country to bridge the technology gap and catch up with advanced economies resulted in rampant intellectual property violations under the acquiescence of the government.<sup>30</sup> As a result, after the establishment of the system of intellectual property protection, enforcement was still lacking in the early 1990s. The real changes did not come until 2001, when China joined the World Trade Organization (WTO) and actively undertook domestic intellectual property reforms to meet international standards.<sup>31</sup>

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<sup>25</sup> Peter K. Yu, *A Half-Century of Scholarship on the Chinese Intellectual Property System*, 67 AM. U. L. REV. 1045, 1046 (2018).

<sup>26</sup> Yu, *supra* note 25, at 1053.

<sup>27</sup> See Yu, *supra* note 25, at 1055. Some scholars located primitive forms of intellectual property rights to the Han dynasty when Emperor Wu granted individual merchants to “smelt iron, distill salt, and mint coin” more than two millennia ago.

<sup>28</sup> Fen Lin, *Digital Intellectual Property Protection in China: Trends And Damages in Litigation Involving the Big Five Websites (2003–2013)*, 25 ASIA PAC. L. REV. 149, 151 (H.K.).

<sup>29</sup> June Cohan Lazar, *Protecting Ideas and Ideals: Copyright Law in the People's Republic of China*, 27 LAW & POL'Y INT'L BUS. 1185, 1192 (1996) (quoting GUANGMING RIBAO [GUANGMING DAILY] (Sept. 9, 1990) translated in “Guangming Ribao” *Comments on Copyright Law*, SWB/FE, Oct. 2, 1990, at B2/1, cited in Jing-Kai Syz, Note, *Expanding the Patent Law of the People's Republic of China: A Proposal for Patent Protection of Computer Programs*, 5 J. CHINESE L. 349, 354 n.22 (1991)).

<sup>30</sup> Lin, *supra* note 28, at 152.

<sup>31</sup> See Yu, *supra* note 25, at 1068. There is another major strand of scholarship that focuses more on the American intellectual property policy toward China during the 1990s and covers actions and threats taken by the U.S. against China to induce China to strengthen its protection of intellectual property rights.

The Copyright Law of the PRC was enacted in 1991 and has since been amended three times.<sup>32</sup> It aims at protecting the rights and interests of authors to encourage creative efforts and promote science and culture.<sup>33</sup> It seems to reflect the European system of authorship and grants authors broad protections for both moral and economic interests.<sup>34</sup> Article 10 details the basic rights given to authors, which is generally similar to the U.S. Copyright Act and grants the copyright owner the exclusive right to: publication, attribution, alteration, reproduction, distribution, adaption, public performance, public display, etc.<sup>35</sup> However, one difference between the U.S. and the Chinese copyright laws is that the latter also recognizes the right to integrity, which is the right to “protect one's work against distortion and mutilation.”<sup>36</sup>

Moreover, the Chinese Law also differs from the U.S. equivalent in two major areas: its system for employee-created works and fair use provisions.<sup>37</sup> Under U.S. law, the employer is considered the author of any work created by an employee within her scope of employment, unless the parties have expressly agreed otherwise in a signed written instrument.<sup>38</sup> The same is true for commissioned works. Under the Chinese law, works made for hire and commissioned works are addressed separately in Article 18 and 19. Under Article 18, the creator of a job-related work retains all rights in the work, but the employer enjoys a priority right to use the work within the scope of its professional activities for two years.<sup>39</sup> Under Article 19, the creator of the commissioned work retains all rights absent an explicit agreement assigning the rights to the commissioner.<sup>40</sup> The only condition under which an employer/organization may gain some authorship rights is when the work

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<sup>32</sup> The Copyright Law has been amended in October 2001, February 2010, and recently in November 2020. See NATIONAL L. REV. *China's National People's Congress Releases Translation of the Amended Copyright Law* (Sep. 18, 2021), <https://www.natlawreview.com/article/china-s-national-people-s-congress-releases-translation-amended-copyright-law>.

<sup>33</sup> Lazar, *supra* note 29, at 1191.

<sup>34</sup> Lazar, *supra* note 29, at 1192-93.

<sup>35</sup> Patent Law of the People's Republic of China, (promulgated by the Standing Comm. Nat'l People's Cong., Nov. 11, 2020, effective June 1, 2021) 2021 P.R.C. Laws (China), <http://www.npc.gov.cn/englishnpc/c23934/202109/ae0f0804894b4f71949016957ecc45a3.shtml> (last visited on Feb 3, 2022).

<sup>36</sup> Copyright Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l Cong., Sept. 7, 1990, effective Oct. 27, 2001), art. 10(4), 2001 P.R.C. Laws (China).

<sup>37</sup> Lazar, *supra* note 29, at 1194.

<sup>38</sup> 17 U.S.C. § 201(b).

<sup>39</sup> Copyright Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l Cong., Sept. 7, 1990, effective Oct. 27, 2001), art. 18, 2001 P.R.C. Laws (China).

<sup>40</sup> *Id.* at art. 19.

is created “according to the intention and under the supervision and responsibility of a legal entity or other organization.”<sup>41</sup>

Article 24 of the Copyright Law of the PRC sets forth twelve “fair uses,” of which two subsections are of special concern: the “use by a State organ” provision and the translation provision. Under subsection (7), no license or remuneration is required if the published work is used by a State organ “for the purpose of fulfilling its official duties.”<sup>42</sup> At first glance, the language of this provision might appear exceptionally broad. However, the term “State organ,” as used in the Copyright Law of the PRC, only applies to such organizations as the National People’s Congress and the Ministries, and not the myriad of collectively owned businesses.<sup>43</sup> Under subsection (11), any third party may translate a “published work of a Chinese citizen, legal entity or any other organization from the Han language into any minority nationality language for publication and distribution within the country.”<sup>44</sup> This seemingly broad provision also addresses the issues particular to developing countries.<sup>45</sup> There are UNESCO statistics showing that in the 1960s, 28% of the world population lived in Asia, but only 2.5% of the world’s books were available there.<sup>46</sup> The demand for foreign publications in China and the lack of foreign currency to buy them render this provision necessary.<sup>47</sup>

## B. Privacy Law in China

### *i. The Concept of Privacy*

Although privacy is probably a concept that “though less developed, is not alien to Chinese society and culture,”<sup>48</sup> the modern concept and protection of privacy emerged in China almost a century later than some western countries. The Warren-Brandeis article is regarded as a landmark in the evolution of the right of privacy, which emphasizes the individual’s right to the protection of the inviolate self.<sup>49</sup> Whereas in China, privacy, or 隱私 (Yin-si), is the combination of two

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<sup>41</sup> *Id.* at art. 11.

<sup>42</sup> *Id.* at art. 24.

<sup>43</sup> Lazar, *supra* note 29, at 1191 (citing Yiping Yang, *The 1990 Copyright Law of the People's Republic of China*, 11 UCLA PAC. BASIN L. J. 260, 266-67 (1993)).

<sup>44</sup> Lazar, *supra* note 29, at 1191.

<sup>45</sup> Lazar, *supra* note 29, at 1195.

<sup>46</sup> Lazar, *supra* note 29, at 1195 n.80.

<sup>47</sup> Lazar, *supra* note 29, at 1195.

<sup>48</sup> Cao Jingchun, *Protecting the Right to Privacy in China*, 36 VIC. UNIV. WELLINGT. LAW REV. 645, 664 (2005).

<sup>49</sup> Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. LAW REV. 193, 220 (1890).

characters: 隱 (Yin): v. hide; conceal and 私 (Si): adj. personal; secret.<sup>50</sup> Combined together, the word *Yinsi* puts more emphasis on the subjective will of the individual to “keep something personal and not wish to disclose to the public.”<sup>51</sup> Moreover, the word 私 also has a rather negative connotation, which is associated with illegality and indecency; it stands in stark contrast to the English word “privacy,” which does not necessarily involve private matters that offend public decency.<sup>52</sup>

In China, the discussion of the protection of privacy did not happen until the late 1980s.<sup>53</sup> An initial view was rather narrow and equated privacy to a “shameful secret,” referring in particular to unusual relations between men and women.<sup>54</sup> In 1990, inspired by the works of Warren, Brandeis, and Prosser, young scholars, such as Xinbao Zhang, began to interpret the right of privacy as one aspect of the rights of the person.<sup>55</sup> Zhang wrote:

[T]he right to privacy is a legal right, by which citizen’s residences, inner world, financial situations, social relations, sexual life, and past and current matters of purely personal nature they do not wish to divulge to the outside world are protected from any intrusion of others.

Guobin Zhu, *The Right to Privacy: An Emerging Right in Chinese Law*, 18 *Statut. Law Rev.* 208-9, 209 (1997) (quoting Zhang, Xinbao, *On the Right to Privacy, Study on Legal Science (Faxue Yanjiu)* 3 (1990)). Zhang’s view focused on the negative right to privacy against unauthorized publicity of personal matters, while some other scholars considered the right to privacy to also include the right against unreasonable interference.<sup>56</sup> Combining the existing analysis of both western and Chinese scholars, civil law Professor Wang Liming concluded that the right of privacy comprises of three aspects: personal private matters, personal information and personal areas, in contrast to the more traditional view of privacy, which limited the scope of the right to the unusual sexual relations.<sup>57</sup>

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<sup>50</sup> 隱 (Yin), ZDIC.NET, <https://www.zdic.net/hans/%E9%9A%90> (last visited Apr. 15, 2022). 私 (Si), ZDIC.NET, <https://www.zdic.net/hans/%E7%A7%81> (last visited Apr. 15, 2022).

<sup>51</sup> 隱私 (Yin Si), ZDIC.NET, <https://www.zdic.net/hans/%E9%9A%90%E7%A7%81> (last visited Apr. 15, 2022).

<sup>52</sup> Guobin Zhu, *The Right to Privacy: An Emerging Right in Chinese Law*, 18 *STATUT. LAW REV.* 208-9 (1997).

<sup>53</sup> Zhu, *supra* note 52, at 209.

<sup>54</sup> Zhu, *supra* note 52, at 209.

<sup>55</sup> Zhu, *supra* note 52, at 209.

<sup>56</sup> Zhu, *supra* note 52, at 210 (quoting Tong et al., *Zhongguo Minfa [Chinese Civil Law]* (Beijing: Legal Press, 1990)).

<sup>57</sup> Zhu, *supra* note 52, at 210.

*ii. The Scope of the Legislative Protection of Privacy in China*

Privacy protection in China is in a period of change and there has been significant progress in the field in recent years. No adequate definition of privacy and personal information was available before the enactment of the Civil Code of the People's Republic of China (hereafter the Civil Code) and the Personal Information Protection Law ("PIPL") in 2021, which is the first comprehensive, national-level personal information protection law in the P.R.C.<sup>58</sup> Meanwhile, new supporting rules (such as guidelines and standards) are expected in 2022 and beyond as China's cybersecurity and personal information protection framework continues to evolve.<sup>59</sup> This section provides a general overview of the scope of the legislative protection of privacy in China.

The right to privacy is not explicitly protected by the Chinese constitutional law.<sup>60</sup> Generally speaking, compared to the U.S. Constitution, the Chinese Constitution protects only against private parties in China, such as social organizations or citizens, and does not extend to unwarranted government actions.<sup>61</sup> Thus, when the governmental interests and citizen's interests collide, the former will always prevail in China.<sup>62</sup>

Articles 37–40 of the Constitution provide limited and indirect protection for privacy in China.<sup>63</sup> Articles 37 and 39 protect privacy of body and privacy of territory against private actions.<sup>64</sup> Under Article 37, freedom of Chinese citizens is inviolable; unlawful detention or deprivation or restriction of the citizens' freedom by any means is prohibited, and unlawful body search is also prohibited.<sup>65</sup> Similarly, Article 39 prohibits unlawful search of, or intrusion into, a citizen's residence.<sup>66</sup> Articles 38 and 40 concern more with the protection of personal rights. While Article 40 protects the privacy of written communication, Article 38 protects personal dignity, which states that "Chinese citizens' personal dignity is inviolable and that insult, libel, false accusation, or false incrimination directed against

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<sup>58</sup> DLA PIPER, *Data Protection Laws of the World: China*, <https://www.dlapiperdataprotection.com/index.html?t=law&c=CN> (last visited Feb. 10, 2022).

<sup>59</sup> Dora Luo & Yanchen Wang, *China - Data Protection Overview*, ONETRUST DATA GUIDANCE, <https://www.dataguidance.com/notes/china-data-protection-overview> (last visited Feb. 10, 2022).

<sup>60</sup> Articles 37-40 of the Constitution do provide protection for privacy in China indirectly. XIANFA art. 37-40 (2018) (China).

<sup>61</sup> Hao Wang, *The Conceptual Basis of Privacy Standards in China and its Implications for China's Privacy Law*, 7 FRONT. LAW CHINA 134, 146 (2012), <https://doi.org/10.3868/s050-001-012-0007-4>.

<sup>62</sup> *Id.* at 147.

<sup>63</sup> XIANFA, art. 37-40 (1982) (China).

<sup>64</sup> XIANFA, art. 37 & 39 (1982) (China).

<sup>65</sup> XIANFA, art. 37 (1982) (China).

<sup>66</sup> XIANFA, art. 39 (1982) (China).

Chinese citizens by any means will be prohibited.”<sup>67</sup> Personal dignity, in the context of Chinese jurisdiction, can be understood to include the right to name, the right to portrait, and the right to privacy.<sup>68</sup>

While the Constitution provides individual citizens limited protection to privacy, the General Provisions of the Civil Law of the People’s Republic of China (GPCL) also provides individuals against privacy intrusions.<sup>69</sup> Under the 1986 GPCL, three types of torts concerned the right to privacy of individuals: (1) Article 99 provides that Chinese citizens “shall enjoy the right of personal name, and the interference with, usurpation of, and false representation of personal names shall be prohibited;” (2) Article 100 provides that Chinese citizens enjoy rights to “[their] likeness, and no one may use a person’s likeness for profit without his or her consent;” and (3) Article 101 provides that “[c]itizens and legal persons enjoy a right to their reputations; a citizen’s dignity is protected by law; it is forbidden for anyone to damage the reputation of a citizen or a legal person by the use of slander, libel, or similar means.”<sup>70</sup> Looking at the plain language of the relevant GPCL provisions, the right to name in Article 99 and the right to portrait in Article 100 do not recognize privacy and are only applicable to the unauthorized commercial use of another person’s name and likeness. In the case where a person’s name or likeness is used without her permission for non-commercial purposes, the only legal resort this person has under the GPCL is probably the right to reputation under Article 101.

The increasing number of privacy-related cases demonstrated the inadequacy of the existing legislative provisions and necessitated the court’s immediate attention. However, the Supreme People’s Court in two seminal judicial interpretations equated the right to privacy with the right to reputation. In a judicial interpretation issued in 1988, the Court held that:

[T]he cases in which, a person discloses personal secrets in written or oral way, or fabricates facts to publicly vilify the personal dignity, or damages the reputation by such means as insults and defamation of the others, and these acts have caused a certain negative impact

<sup>67</sup> XIANFA, art. 38 & 40 (1982) (China).

<sup>68</sup> Wang, *supra* note 61, at 147.

<sup>69</sup> Under the most recent version of the GPCL, the right to name, portrait, and reputation are combined under Article 110. Under the GPCL: (1) Article 110 provides that “a natural person shall enjoy . . . the rights to his/her body, health, name, portrait, reputation, honor, privacy, and marriage by choice.” (2) Article 111 provides that “[t]he personal information of a natural person shall be protected by law . . . No one may illegally collect, use, process, transmit, trade, provide or publicize the personal information of others.” *See* General Provisions of the Civil Law of China (promulgated by the Fifth Session of the Twelfth Nat’l People’s Cong., Mar. 15, 2017), art. 110-11, 2017 P. R. C. Laws (China). The GPCL was repealed on January 1st, 2021, when the new PRC Civil Code took effect.

<sup>70</sup> General Principles of Civil Law of China (promulgated by the Sixth Nat’l People’s Cong., Apr. 12, 1986, effective Jan. 1, 1987), art. 99-101, 1986 P. R. C. Laws (China).

on the persons concerned, shall be treated as an invasion of the right of reputation.

Whitmore Gray & Henry R. Zheng, *Opinion of the Supreme People's Court on Questions Concerning the Implementation of the General Principles of Civil Law of the People's Republic of China*, 52 *Law & Contemp. Probs.* 59-87 (1989). Five years later, in 1993, the Court issued another interpretation, *Reply to Several Questions on Adjudicating the Cases of the Rights of Reputation*, which specified that all cases concerning the invasion of privacy were to be determined in accordance with the provisions regarding the right of reputation.<sup>71</sup>

Since these two general judicial interpretations have been adopted, subsequent privacy cases have been judged on the basis of the right to reputation.<sup>72</sup> However, there are clear differences between the rights of privacy and the right of reputation; and thus render the protection of privacy offered under the GPCL inadequate. While the right of reputation is a right which concerns the interest brought by external social appraisal, the right of privacy is more concerned with the internal inviolate personality.<sup>73</sup> Besides the different nature of the rights, the characters of the torts are also different. Where the right of reputation concerns the use of one's name or likeness in ways that may cause damage to the person's good name, the right to privacy protects a person's information or private life against any forms of unlawful interference which may or may not involve public dissemination, regardless of the truthfulness of the information.<sup>74</sup> Moreover, an important reason why the tort of defamation would not provide sufficient protection for privacy is that the invasion of one's privacy does not always cause harm to one's reputation. If the unauthorized intrusion upon one's privacy does not constitute defamation or does not cause any damage to the victim's reputation, the person whose privacy has been invaded would have no sufficient grounds to sue the other party pursuant to the tort of defamation.

The most significant privacy-related case under the GPCL was *Wang Fei v. Zhang Leyi, Daqi.com, and Tianya.cn* from 2008, where the Defendant Zhang Leyi set up a memorial website for a university friend that had allegedly killed herself after discovering her husband, Wang Fei, was involved in an extra-marital affair.<sup>75</sup> On that website and two other web portals, Zhang posted many personal details of Wang Fei, including his address, family details, photographs, and other

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<sup>71</sup> Zhu, *supra* note 52, at 212.

<sup>72</sup> Wang, *supra* note 61, at 148.

<sup>73</sup> Zhu, *supra* note 52, at 213.

<sup>74</sup> Zhu, *supra* note 52, at 213.

<sup>75</sup> Tiffany Li et. al., *Saving Face: Unfolding the Screen of Chinese Privacy Law*, J. OF L., INFO., AND SCI. (forthcoming) (manuscript at 21) (Aug. 2017), <https://ssrn.com/abstract=2826087>.

information.<sup>76</sup> The detailed personal information provided online resulted in Wang Fei being tracked down, harassed, and eventually forced to resign from his job.<sup>77</sup> It was the first case giving prominence to the phenomenon of the “human flesh search engine,”<sup>78</sup> which is a form of online vigilante justice in which Internet users hunt down targets and attempt to get them fired from their jobs, shamed in front of their family and neighbors, and run out of town.<sup>79</sup>

The *Wang Fei* case is still of relevance today not only because of the issue of human-flesh searching, but also the definition of privacy the court found in this case, which is relatively close to a western idea of privacy.<sup>80</sup> According to the court, privacy means “private life, information, space, and peace of private life related to a person’s interests and personality that he does not intend to share with others.”<sup>81</sup> The court identified five factors in determining whether a privacy right has been infringed: “(a) the manner by which the private information was acquired; (b) the manner in which the information was disclosed; (c) the scope of disclosure; (d) the purpose of disclosure; and (e) the consequences of disclosure.”<sup>82</sup> Based on this, the court concluded that Wang’s right to privacy had been infringed by the unauthorized disclosure or publication of his private life, areas, or domestic tranquility.<sup>83</sup>

In 2009, a new version of the Tort Liability Law (TLL) in China was promulgated which included two significant privacy-related provisions: Article 2, which offers a general protection of individual rights to privacy, and Article 36, which protects one’s civil rights in the online context.<sup>84</sup> The TLL itself does not provide a definition of “privacy.” Unfortunately, judicial interpretation of the provision is difficult to locate because, to date, no (or few) new privacy-related cases have been filed under the new law.<sup>85</sup> The ones that have been reported mostly involved copyright infringements over the Internet, instead of privacy-related violations.<sup>86</sup> Two reported cases involving Article 2 of the TLL’s right to privacy

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<sup>76</sup> Scott Livingston & Graham Greenleaf, *The Emergence of Tort Liability for Online Privacy Violations in China*, 135 PRIVACY L. & BUS. INT’L REP, UNSW LAW RESEARCH PAPER NO. 2015-54, at 3 (June 1, 2015), <https://ssrn.com/abstract=2636129>.

<sup>77</sup> Livingston & Greenleaf, *supra* note 76, at 3.

<sup>78</sup> Livingston & Greenleaf, *supra* note 76, at 3.

<sup>79</sup> Tom Downey, *China’s Cyberposse*, N. Y. TIMES (Mar. 3, 2010), <https://www.nytimes.com/2010/03/07/magazine/07Human-t.html?ref=magazine> (last accessed Feb. 6, 2021).

<sup>80</sup> Li et. al., *supra* note 75, at 21.

<sup>81</sup> Livingston & Greenleaf, *supra* note 76, at 2, n.10 (citing Rebecca Ong, *Recognition of the Right To Privacy on the Internet in China*, 1(3) INT’L DATA PRIV. L., 172 (2011)).

<sup>82</sup> Livingston & Greenleaf, *supra* note 76, at 3.

<sup>83</sup> Li et. al., *supra* note 75, at 21.

<sup>84</sup> WIPO, *Tort Law of the People’s Republic of China* (2009), <https://www.wipo.int/edocs/lexdocs/laws/en/cn/cn136en.pdf>. The TLL was repealed on January 1st, 2022, when the new PRC Civil Code took effect.

<sup>85</sup> Li et. al., *supra* note 75, at 24.

<sup>86</sup> Livingston & Greenleaf, *supra* note 76, at 6.



have provided slightly different definitions of the term “privacy.” While Shanghai 2nd Intermediate People’s Court defined privacy as a “citizen’s right to control their own personal secrets and life free from any other person’s intervention,”<sup>87</sup> the Shanghai 1st Intermediate People’s Court defined it as “a natural person’s right to control and keep their personal information and personal activities which are not related to public interests from being illegally known, utilized, and disclosed by any other person.”<sup>88</sup> The former emphasizes the unreasonable intervention of others and is thus similar to the torts of invasion of privacy. The latter focuses more on the unconsented-to publicity given to private matters. Thus, there remains no formal definition of the “right to privacy.” The different results and definitions of privacy provided in the aforementioned cases inevitably lead to the conclusion that it is impossible to predict how the TLL privacy protection would play out in courts.<sup>89</sup>

The enactment of the Civil Code and the PIPL marks the introduction of a comprehensive system for the protection of personal information in China. On January 1st, 2021, the Civil Code came into force. It covers a wide spectrum of rights and issues ranging from property rights, contracts, matrimonial and family law, to tort liability and personal and personal dignity rights.<sup>90</sup> Probably most importantly for this article, the Civil Code has also introduced new provisions and definitions on the right to privacy and the protection of personal information.<sup>91</sup> It is the first time that a law of the PRC defines what privacy is and clarifies that “privacy is the undisturbed private life of a natural person and his private space, private activities, and private information that he does not want to be known to others.”<sup>92</sup> In essence, it combines the tort of intrusion upon seclusion tort and the

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<sup>87</sup> Livingston & Greenleaf, *supra* note 76, at 5, n. 21 (citing *Zhang Desheng, Zhong Guifang, and Zhang Zhong v. Yang Hongyan, Lu Ying and Yang Jun*, (Shanghai 2nd Interm. People’s Ct. 2014)). In this case, the intermediate court upheld a decision finding a right to privacy violation where an upstairs neighbour had installed a camera monitoring the entrance to the downstairs neighbor’s apartment.

<sup>88</sup> Livingston & Greenleaf, *supra* note 76, at 5, n.22 (citing *Yang v. a Property Management Company*, (Shanghai 1st Interm. People’s Ct. 2013)). In this case, the court dismissed a complaint alleging a “right to privacy” violation where a building’s management had installed a camera monitoring a common area that included views of the plaintiff’s doorway.

<sup>89</sup> China’s Supreme People’s Court (SPC) promulgated the SPC Regulation on June 23, 2014, to clarify the uncertainty regarding the application of Article 36 to privacy matters. However, it is not the focus of this comment. Please see Livingston & Greenleaf, *supra* note 76.

<sup>90</sup> Sammy Fang et. al., *New Chinese Civil Code Introduces Greater Protection of Privacy Rights and Personal Information*, DLA PIPER (June 9, 2020), <https://www.dlapiper.com/en/uk/insights/publications/2020/06/new-chinese-civil-code-introduces-greater-protection-of-privacy-rights-and-personal-information/>.

<sup>91</sup> *Id.*

<sup>92</sup> The Civil Code of the People’s Republic of China (promulgated by the Standing Comm. Nat’l People’s Cong., May 28, 2020, effective Jan. 1, 2021), art. 1032, 2001 P.R.C. Laws (China),

public disclosure of private facts. Moreover, the Civil Code’s definition of personal information resembles the broad definition of “personal data” in the GDPR and constitutes “any information relating to an identified or identifiable natural person.”<sup>93</sup>

Whereas the Civil Code provides a fundamental legal principles of personal information protection, the PIPL, which took effect on November 1st, 2021, provides a detailed definition of personal information and sensitive personal information and sharpens the focus on information transfers.<sup>94</sup> Rather than bringing substantial changes to the existing China data privacy framework, the PIPL helpfully consolidates and clarifies obligations on the processing of personal information at a national level.<sup>95</sup> It sets comprehensive rules for companies on how to process personal information of individuals and regulates the lifecycle process of handling personal information, including personal information collection, storage, use, processing, transmission, provision, disclosure, and deletion, etc.<sup>96</sup>

### III. LEGAL ISSUES IMPLICATED

#### A. Does the Work Fall Under the Definition of Motion Picture?

At first glance, *Dragonfly Eyes* might constitute a motion picture under the U.S. Copyright Act. Pursuant to 17 U.S.C. § 101, motion pictures are “audiovisual works consisting of a series of related images which, when shown in succession, impart an impression of motion, together with accompanying sounds, if any.” Audiovisual work is defined as a work that consists of “a series of related images which are intrinsically intended to be shown by the use of machines, or devices such as projectors, viewers, electronic equipment, together with accompanying sounds, if any. . .” Like discussed earlier, *Dragonfly Eyes* is a work that consists of a collection of surveillance footages. Such footages are intended to be shown on devices such as viewers or electronic equipment. These footages catch bits and

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<http://www.npc.gov.cn/englishnpc/c23934/202012/f627aa3a4651475db936899d69419d1e/files/47c16489e186437eab3244495cb47d66.pdf>.

<sup>93</sup> *Id.* at art. 1034; Personal Information Protection Law (PIPL) (promulgated by the Standing Comm. Nat’l. People’s Cong., Aug. 20, 2021, effective Nov. 1, 2021), art. 4, § 1, 2021 P.R.C. Laws (China).

<sup>94</sup> Yiming Hu, *China’s Personal Information Protection Law and Its Global Impact*, THE DIPLOMAT (Aug. 31, 2021), <https://thediplomat.com/2021/08/chinas-personal-information-protection-law-and-its-global-impact/>.

<sup>95</sup> DLA PIPER, *Navigating China Episode 20: PIPL has finally arrived, bringing helpful clarification (rather than substantial change) to China’s data privacy framework* (Aug. 23, 2021), <https://blogs.dlapiper.com/privacymatters/chinas-pipl-has-finally-arrived-and-brings-helpful-clarification-rather-than-substantial-change-to-chinas-data-privacy-framework/>.

<sup>96</sup> Wan Li & Leo Mao, *PRC Personal Information Protection Law Challenges: Why Companies Should Evaluate Their Business Practice Now*, JDSUPRA (Oct. 18, 2021), <https://www.jdsupra.com/legalnews/prc-personal-information-protection-law-4947686/>.

pieces of events unfolding before it, sometimes capturing images of people, sometimes not. They are eventually edited into a loose narrative devised by the poet Zhai Youngming and the screenwriter Zhang Hanyi.<sup>97</sup>

However, the fact that *Dragonfly Eyes* is compiled of tens of thousands of publicly accessible surveillance footage raises the question of whether these footages are “related” in the same sense as the images in a motion picture. Similar to motion pictures, assembling surveillance footages in this case also requires the director to go through the process of selecting and assembling individual footages into a complete work to realize the director’s vision. Whether or not the images are “related” for purposes of the Copyright Act may hinge on the cohesiveness of the end product. Even if the experimental film at issue is made of a collage of unrelated, randomly found video footage, the producers were able to sort through the hours and hours of raw materials and produce a cohesive and focused story. Therefore, *Dragonfly Eyes* might constitute a motion picture for purposes of the U.S. Copyright Law.

In contrast, film experts may hold a different view. Like Lois Burwell, Vice President of the Academy of Motion Picture Arts and Sciences once said, a movie must “meet the minimum length of 40 minutes and theatrical-release requirements.”<sup>98</sup> A “film” that has only been screened in art museums can hardly meet the requirements.

Even if *Dragonfly Eyes* does not fall under the definition of motion picture, it is a “compilation” at the very least. Under 17 U.S.C. § 101, a compilation is a work formed by “the collection and assembling of preexisting materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship.” *Dragonfly Eyes* is indeed a collection and assembling of pre-existing footage of surveillance cameras that are selected, coordinated, and arranged by Xu Bing in such a way that the resulting work as a whole constitutes a film – that is, an original work of authorship. A compilation must meet the “originality” requirement of copyright. That is, in order for the compilation to be eligible for copyright protection, the compiler must select and arrange pre-existing material in a minimally creative way. Clearly, to better convey the story, Xu Bing stitches together surveillance footage collected from the internet and adds voice acting to fill the narrative with sounds. Therefore, the resulting work as a whole constitutes an original work of authorship as it is both original in terms of the creative method and the actual story conveyed.

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<sup>97</sup> Ava Kofman, *Your Face Tomorrow*, ART IN AMERICA (Jan. 1, 2019),

<https://www.artnews.com/art-in-america/features/your-face-tomorrow-63595/>.

<sup>98</sup> Nicole Sperling, *What’s the Definition of a Movie, Anyway?*, VANITYFAIR (May 3, 2019), <https://www.vanityfair.com/hollywood/2019/05/whats-the-definition-of-a-movie-anyway>.

Generally, the copyright in a compilation work extends only to the incremental contribution provided by the author of such work.<sup>99</sup> However, because surveillance footage does not possess more than a modicum of creativity and thus is not copyrightable in and of itself under the copyright law, Xu Bing's right in the film would not in any way "affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material."<sup>100</sup>

Under the Copyright Law of the PRC, *Dragonfly Eyes* might not constitute a cinematographic work or "work created by virtue of an analogous method of film production."<sup>101</sup> The definition of cinematographic work, as stipulated in *Implementing Regulations of the Copyright Law of the People's Republic of China*, is similar to the one in the U.S. Copyright Act. Under Article 4(9), cinematographic works are works which are "consisting of a series of related images which, when shown in succession, impart an impression of motion with the aid of suitable devices, together with accompanying sounds or not"<sup>102</sup> However, despite the similarity between the definitions, *Dragonfly Eyes* can hardly fall under cinematographic works for purposes of the Copyright Law of the PRC. The Higher People's Court of Guangdong Province in a 2018 guideline provided a list of factors courts would look at when determining whether or not a work qualifies as a cinematographic work under Article 3(7) or a video recording under Article 40.<sup>103</sup> Based on the published guideline, copyright protection for cinematographic works requires a higher degree of originality, and generally would require such work to reflect the distinctive creative endeavors of the filmmakers and directors in terms

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<sup>99</sup> 17 U.S.C. § 103(b). "The copyright in a compilation or derivative work extends only to the material contributed by the author of such work, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material. The copyright in such work is independent of, and does not affect or enlarge the scope, duration, ownership, or subsistence of, any copyright protection in the preexisting material."

<sup>100</sup> *Id.*

<sup>101</sup> Copyright Law of People's Republic of China (promulgated by the Standing Comm. Nat'l Cong., Sept. 7, 1990, effective Oct. 27, 2001), art. 15, 2001 P.R.C. Laws (China).

<sup>102</sup> Implementing Regulations of the Copyright Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l Cong., Aug. 2, 2002, effective Sep. 15, 2002), art. 4(11), 2002 P.R.C. Laws (China), [http://english.www.gov.cn/archive/laws\\_regulations/2014/08/23/content\\_281474983043861.htm](http://english.www.gov.cn/archive/laws_regulations/2014/08/23/content_281474983043861.htm).

<sup>103</sup> King & Wood Mallesons, *Is Your Short Video Protected Under the Copyright Law?* (July 25, 2018), <https://www.kwm.com/cn/zh/insights/latest-thinking/are-your-short-video-protected-by-copyright-law-2.html> (citing Guangdongsheng Gaoji Renmin Fayuan Guanyu Shenli Qin Hai Yingshi He Yinyue Zuopin Zhuzuo Jiufen Anjian Ruogan Wenti De Banan Zhiyin (广东省高级人民法院关于审理侵害影视和音乐作品著作权纠纷案件若干问题的办案指引) [The Higher People's Court of Guangdong Province Guidelines on Several Issues Concerning the Disputes over Copyright Infringement of Film and Music Works, Higher People's Court of Guangdong Province]).

of their craftsmanship.<sup>104</sup> Films are usually based on a screenplay and require collaborations between actors/actresses, scriptwriters, cameramen, costume designers, composers, makeup artists, and other authors thereof.<sup>105</sup> *Dragonfly Eyes*, as a “film” without actors and cinematographer, can hardly meet this standard and thus cannot constitute a cinematographic work for purposes of the Copyright Law of the PRC.

Similarly, the work would not constitute a work “created by virtue of an analogous method of film production.” The method of production – the selecting, arranging, and editing of hours of footage of surveillance cameras – is far from analogous to the method of film production for purpose of the Copyright Law of the PRC, which usually requires more than editing and needs multisectoral coordination and cooperation between producer, scriptwriter, director, cameraman, lyricist, composer, and other authors.<sup>106</sup>

If it is not a cinematographic work or work created by virtue of an analogous method of film production, *Dragonfly Eyes* may still constitute a compilation work under the Chinese law. Under Article 14, “a work created by compilation of several works, parts of works, data that do not constitute a work or other material and having originality in the selection or arrangement of its contents is a work of compilation.”<sup>107</sup> As previously discussed, the selection and arrangement of the surveillance footage is creative enough to make *Dragonfly Eyes* a work of compilation for the purpose of the Copyright Law of the PRC.

### **B. Who Owns the Copyright to this Work that is Created Entirely with Surveillance Footage that is Readily Online?**

Under the U.S. Copyright Law, the statutory language makes it clear that copyright in a compilation extends to the material contributed by the author of such compilation, as distinguished from the preexisting material employed in the work, and does not imply any exclusive right in the preexisting material.<sup>108</sup> Generally, copyright law would require the compiler to obtain permission from the owners of the pre-existing materials.<sup>109</sup> In this case, because surveillance footages are set up for the practical purpose of protecting the public by deterring criminal activity and

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<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> He Wei & Song Xudong, *Is Your Short Video Protected Under the Copyright Law?* (Part 2), FRONTIER WATCH, KING & WOOD MALLESONS (July 25, 2018), <https://www.kwm.com/cn/zh/insights/latest-thinking/are-your-short-video-protected-by-copyright-law-2.html>.

<sup>107</sup> Copyright Law of People’s Republic of China (promulgated by the Standing Comm. Nat’l Cong., Sept. 7, 1990, effective Oct. 27, 2001), art. 14, 2001 P.R.C. Laws (China).

<sup>108</sup> 17 U.S.C. § 103.

<sup>109</sup> *Id.*

by providing material evidence when a crime has been caught on film,<sup>110</sup> they lack the required originality to warrant copyright. Thus, these surveillance footages are not copyright-protected and therefore Xu Bing needs not obtain permission to use them.

Similarly, under the Copyright Law of the PRC, Xu Bing as the compiler enjoys the copyright in this work of compilation. Because surveillance footages are not “*original intellectual creations* in the literary, artistic and scientific domain,” surveillance footage is not protected under the Copyright Law of the PRC due to its lack of originality.<sup>111</sup> As a result, Xu Bing’s exercise of his copyright in the film likely would not prejudice the copyright in the preexisting works.

### **C. If Surveillance Footage is Not a Work of Art Within the Protection of Copyright Law, Can the Artist Take the Liberty to Appropriate These Publicly Accessible Footages to Make His Film/Artwork?**

As discussed earlier, the “film” was created from cutting and compiling more than 10,000 hours of video surveillance footage and is possibly the first such film to combine the technologies of over 245 million global surveillance cameras and cloud computing.<sup>112</sup> As the director of this “film,” Xu Bing “filmed” this work by relying on video search as a means to source clips for a pre-written script. For example, at one point during the production, Xu was looking for footage of a car driving along a mountain road on a rainy night. In an interview with Tony Ryans, Xu described the process in detail: “First we checked weather forecasts to find out where it was due to rain. Then we locked on to a surveillance camera in that area. The next day, we checked to see if we’d managed to ‘harvest’ the images we needed.”<sup>113</sup> He believes that his working methods are in tune with the ways our society and technology are developing.<sup>114</sup> To justify his method, Xu compared his film production to that of the global transportation network company Uber, stating that just like Uber, which does not own a single car but provides transportation

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<sup>110</sup> IFSEC GLOBAL, *Role of CCTV Cameras: Public, Privacy and Protection*, (Jan. 1, 2021), <https://www.ifsecglobal.com/video-surveillance/role-cctv-cameras-public-privacy-protection/#:~:text=Surveillance%20cameras%20are%20meant%20to,has%20been%20caught%20on%20film>.

<sup>111</sup> Implementing Regulations of the Copyright Law of the People’s Republic of China (promulgated by the Standing Comm. Nat’l Cong., Aug. 2, 2002, effective Sep. 15, 2002), art. 2, 2002 P.R.C. Laws (China), [http://english.www.gov.cn/archive/laws\\_regulations/2014/08/23/content\\_281474983043861.htm](http://english.www.gov.cn/archive/laws_regulations/2014/08/23/content_281474983043861.htm) (emphasis added).

<sup>112</sup> David Frazier, *Man, Machine or Dragonfly?*, ART ASIA PACIFIC (Mar./Apr. 2018), <http://li367-91.members.linode.com/Magazine/107/ManMachineOrDragonfly>.

<sup>113</sup> Tony Ryans, *Xu Bing Answers Seven Questions about Dragonfly Eyes*, XUBING.COM (July 2017), <http://www.xubing.com/en/database/interview/325>.

<sup>114</sup> *Id.*

services using private vehicles owned by individual drivers, he appropriates surveillance cameras in the public space.<sup>115</sup>

The majority of the surveillance footages are taken from popular live-streaming platforms, such as Shuidi (Waterdrop) and Yingshi (EZVIZ).<sup>116</sup> Such platforms mainly broadcast footage from the Wi-Fi-operated surveillance cameras developed by their parent companies. Based on the policy statement of EZVIZ, it is likely that the live-streaming platforms own this video footage and can control its use.<sup>117</sup> Section 5.2 of the service agreement stipulates that EZVIZ owes all content (including but not limited to corporate image, logos, web pages, text, pictures, audio, video, graphics, etc.) except for those owned by others in accordance with the law.<sup>118</sup> Without written permission, developers are not allowed to use or create related derivative works in any form.<sup>119</sup>

Secondly, some other videos featured in the film are news reports taken from news media websites which are likely not covered by the Copyright Act. Whereas in the U.S. Copyright Act, copyright protection does extend to news clips,<sup>120</sup> Xu Bing has a strong fair use argument for using copyrighted news clips to make comments on the issue of public surveillance and promote the development of contemporary art.<sup>121</sup> Under the Copyright Law of the PRC, news on current affairs is outside the scope of copyright protection.<sup>122</sup> “News on current affairs,” as defined in the *Implementing Regulations of the Copyright Law of the People's Republic of China*, refers to “the mere report of facts or happenings conveyed by newspapers, periodicals and radio and television programs.”<sup>123</sup> Even though the content of the news clips are not copyrightable, the video clips themselves may be original enough to fall under the definition of “video recordings.”<sup>124</sup> In that event, Xu Bing would need to obtain permission from the news media for the use of the clips in the movie because the producers of these videos enjoy the right to authorize others to “reproduce, distribute, rent and communicate to the public on an

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<sup>115</sup> *Id.*

<sup>116</sup> Helena Poole, *Get to know Xu Bing ahead of one of 2018's biggest exhibitions*, TIME OUT BEIJING (May 16, 2019), <https://freewechat.com/a/MjM5MjA0OTc4Mg==/2651969814/1>.

<sup>117</sup> Ezviz Service Agreement § 5.2, <https://service.yz7.com/policy?id=148> (last accessed on Apr. 16, 2022).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> 17 U.S.C. § 102(a)(6).

<sup>121</sup> *See* 17 U.S.C. § 107.

<sup>122</sup> Copyright Law of People's Republic of China (promulgated by the Standing Comm. Nat'l Cong., Sept. 7, 1990, effective Oct. 27, 2001), art. 5(2), 2001 P.R.C. Laws (China) (amended 2020).

<sup>123</sup> Livingston & Greenleaf, *supra* note 76, at 3.

<sup>124</sup> Livingston & Greenleaf, *supra* note 76, at 4.

information network such video recordings and the right to obtain remuneration therefor.”<sup>125</sup>

#### **D. Can Persons in These Surveillance Footages Bring Suits Against the Artist for Interference of Their Right to Privacy?**

The film highlights the pervasiveness of surveillance technology in China and presents to viewers the deeply haunting strangeness and uneasiness of our new technological reality. Furthermore, it raises the question of whether the individuals featured in the film may sue for interfering with their right to privacy. One might have had a private right of action against the artist for using their likeness in the film under the now-repealed GPCL and the TLL. Also, as discussed, the PIPL, together with the Civil Code, is a robust data protection framework designed to safeguard the individual’s personal data against abuse.<sup>126</sup> One might have a private right of action against the artist for appropriating surveillance footage of them without first obtaining their express consent under the PIPL.

If the courts are still following the right to reputation approach developed by the Supreme People’s Court in the late 20<sup>th</sup> century, then the people featured in the film without their permission have no claim against the artist due to the difficulty of proving damage to their reputations. Under the 2017 GPCL, Article 110 provides that “a natural person shall enjoy . . . the rights to his/her . . . name, portrait, reputation, honor, privacy, and marriage by choice.”<sup>127</sup> Applying the *Wang Fei* five-factor test, it is unlikely that the courts would find any privacy right has been infringed.<sup>128</sup> First, the surveillance footages were publicly available online and were not acquired by Xu Bing by illegal means. Second, the information was used as artwork in the form of a film. Third, the scope of the disclosure may be relatively broad as *Dragonfly Eyes* has been shown in various international film festivals and screening events in art galleries. Fourth, the purpose of disclosure is to comment on the pervasiveness of public surveillance in society and to promote the development of art. Finally, it is unlikely that the disclosure has caused any serious consequences because the relatively low quality of the footage makes most individuals featured in the film unrecognizable. Moreover, Xu Bing and his team have already reached out to most of the people and obtained their permission for

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<sup>125</sup> Copyright Law of People’s Republic of China (promulgated by the Standing Comm. Nat’l Cong., Sept. 7, 1990, effective Oct. 27, 2001), art. 42, 2001 P.R.C. Laws (China) (current version at art. 44).

<sup>126</sup> DLA PIPER, *supra* note 95.

<sup>127</sup> General Principles of Civil Law of China (promulgated by the Sixth Nat’l People’s Cong., Apr. 12, 1986, effective Jan. 1, 1987), art. 110, 1986 P.R.C. Laws (China).

<sup>128</sup> Li et. al., *supra* note 75, at 21.



using their likeness in the film to avoid any potential legal disputes that could arise.<sup>129</sup>

Under the TLL, it is difficult for individuals featured in the film to establish a case because it is unclear whether the private surveillance camera set up for the purpose of maintaining public safety constitutes an infringement of privacy for purposes of the TLL.<sup>130</sup> Article 12 of the SPC Regulation states that disclosure of an individual's "personal information" or disclosure of certain sensitive information, such as health, medical history, or criminal records, will be actionable under the TLL if it causes harm to a natural person.<sup>131</sup> Personal information, pursuant to Article 12 of the SPC, includes but is not limited to "genetic information, medical history materials, health inspection materials, criminal records, household addresses, private activities, and other personal information or personal privacy of natural persons."<sup>132</sup> Even though one may make the argument that some videos expose private activities of these individuals in the privacy of their home and therefore meet the "personal information" requirement, it is still unclear whether such disclosure has caused any real harm to these individuals.

It is unlikely that the artist can be found liable for using the likeness of others or invasion of privacy under the Civil Code. Under the Civil Code, Articles 1018 and 1019 provide that "[a] natural person enjoys the right to likeness, and is entitled to make, use, publicize, or authorize others to use his image in accordance with the law," and "[u]nless otherwise provided by law, no one may make, use, or publicize the image of the right holder without the latter's consent."<sup>133</sup> Therefore, Article 1020(1) permits a person to use the image of the right holder without their consent if it is done in a reasonable way and for art appreciation.<sup>134</sup> The artist and his team can then argue that the images of the persons are used in a piece of art that comments on the pervasiveness of public surveillance in society and promotes the development of art. Thus, they may argue, such images can be used without the right holders' consent.

It is unlikely that the artist can be found liable for the invasion of privacy of the rights holders. Under Article 1032 of the Civil Code:

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<sup>129</sup> *Fruits of Surveillance: Xu Bing Interview About "Dragonfly Eyes"*, MUSEE (Oct. 17, 2017), <https://museemagazine.com/features/2017/10/17/dragonfly-eyes-an-interview-with-xu-bing>.

<sup>130</sup> Li et. al., *supra* note 75.

<sup>131</sup> Livingston & Greenleaf, *supra* note 76, at 2.

<sup>132</sup> Livingston & Greenleaf, *supra* note 76, at 6.

<sup>133</sup> General Principles of Civil Law of China (promulgated by the Sixth Nat'l People's Cong., Apr. 12, 1986, effective Jan. 1, 1987), art. 1018-1019, 1986 P.R.C. Laws (China).

<sup>134</sup> General Principles of Civil Law of China (promulgated by the Sixth Nat'l People's Cong., Apr. 12, 1986, effective Jan. 1, 1987), art. 1020(1), 1986 P.R.C. Laws (China).

[a] natural person enjoys the right to privacy. No organization or individual may infringe upon the other's right to privacy by prying into, intruding upon, disclosing, or publicizing other's private matters. Privacy is the undisturbed private life of a natural person and his private space, private activities, and private information that he does not want to be known to others.

General Principles of Civil Law of China (promulgated by the Sixth Nat'l People's Cong., Apr. 12, 1986, effective Jan. 1, 1987), art. 1032, 1986 P.R.C. LAW (China). Even though the surveillance footage intrudes on the private life of people featured in the film without consent, Xu Bing may have a defense under Article 1036(3), which says that an actor shall not bear civil liability if the actor "reasonably performs the other acts to protect . . . the lawful rights and interests of the person."<sup>135</sup> Xu Bing and his team have already reached out to most of the people and obtained their permission for using their likeness in the film to avoid any potential legal disputes that could arise. This would be considered a reasonable act under the code.<sup>136</sup> Therefore, it is unlikely that any individual featured in the *Dragonfly Eyes* would be able to bring a suit against Xu Bing on grounds of privacy under the Civil Code.

However, it is very likely that the artist can be found liable under the PIPL. Under Article 2 of the PIPL, "[t]he personal information of any natural person shall be protected by law, and no organization or individual may infringe upon the personal information rights and interests of any natural person."<sup>137</sup> Under Article 13, which provides a list of circumstances under which personal information processors may handle personal information of natural persons within the borders of the People's Republic of China legally, Xu Bing may only process the surveillance footage of the right holders with their consent.<sup>138</sup> None of the other exceptions seem to apply. Moreover, the PIPL imposes stricter rules for use of surveillance footages. Under Article 26, "[p]ersonal images and personally identifiable information collected may only be used for the purpose of maintaining public security and shall not be used for other purposes unless the individual's consent is obtained."<sup>139</sup> Unlike the Civil Code, no exception or defense is available

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<sup>135</sup> General Principles of Civil Law of China (promulgated by the Sixth Nat'l People's Cong., Apr. 12, 1986, effective Jan. 1, 1987), art. 1036(3), 1986 P.R.C. Laws (China).

<sup>136</sup> *Supra* note 131.

<sup>137</sup> The Personal Information Protection Law (promulgated by the Thirteenth Nat'l People's Cong., Aug. 20, 2021, effective Nov. 1, 2021), art. 2, 2021 P.R.C. Laws (China).

<sup>138</sup> The Personal Information Protection Law (promulgated by the Thirteenth Nat'l People's Cong., Aug. 20, 2021, effective Nov. 1, 2021), art. 13, 2021 P.R.C. Laws (China).

<sup>139</sup> The Personal Information Protection Law (promulgated by the Sixth Nat'l People's Cong., Apr. 12, 2021, effective Nov. 1, 2021), art. 26, 2021 P.R.C. Laws (China).

under the PIPL to relieve the artists of this liability. Therefore, it is likely that Xu Bing may be found liable under the new PIPL.

## CONCLUSION

In this paper, we have used the film/artwork *Dragonfly Eyes* by Xu Bing, a prominent contemporary artist from China, to discuss the current state of Chinese copyright and privacy laws, in light of cultural and historical factors that may have influenced and may continue to influence the future direction of such laws.

As mentioned, the pre-existing Chinese copyright and privacy laws may be less than ideal, and the enforcement thereof might be lacking. The newly enacted Civil Code and the PIPL provide more robust protection of privacy and personal information. Moreover, even when legal protection is lacking, artists are constantly bringing awareness to the issues of public surveillance and attempting to destabilize the status quo with their creative endeavors.<sup>140</sup> Such increased awareness of copyright and privacy protections, as well as heated scholarly research, shall have the potential of moving the Chinese copyright and privacy laws forward.

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<sup>140</sup> See Vincent Ni & Yitsing Wang, *How to 'disappear' on Happiness Avenue in Beijing*, BBC (Nov 24, 2020), <https://www.bbc.com/news/technology-55053978>.