视听作品著作权研究

以参与利益分配的主体为视角

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内容提要

该书以视听作品中参与利益分配的主体为视角，运用历史研究、比较研究和法哲学研究方法，阐述每一个利益主体在视听作品中享有的权利，重点结合著作权法修改草案，从制度层面对我国视听作品著作权利益合理分配展开构想。

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内容摘要

与其他类型作品相比，“视听作品”涉及的著作权问题尤为复杂。其主要原因在于参与视听作品制作的主体数量众多且分工各有不同。视听作品制作需要从事创作劳动的创作者、负责出资的投资者、从事技术劳动的技术工作人员以及从事辅助劳动的工作人员等各类主体共同努力才能制作完成。一部视听作品涉及的著作权利益关系错综复杂，作品是体现人格，还是属于纯粹的财产，关乎视听作品作者的确定；在投资者和创作者之间，立法是鼓励投资，还是鼓励创作，决定着视听作品著作权的归属；已有作品和视听作品之间是演绎关系、复制关系、结合关系，抑或合作关系，直接影响两者著作权人的权利；视听作品著作权和公有领域边界的划分直接决定使用者自由使用的范围；视听作品的表演者是创作者，抑或邻接权主体，其与视听作品制作者之间的权利分配都是需要厘清的法律问题。鉴于此，本书选择从参与视听作品利益分配的主体角度，同时，结合我国《著作权法》第三次修改对视听作品著作权问题进行系统体系研究。本书除引言之外，尚有六章。

第一章探讨视听作品从电影到电影作品的历史演变过程，分析电影被纳入著作权法保护的原因。视听作品是由电影作品发展而来的一个概念，而电影作品概念的出现是基于电影进入著作权法。为了克服电影作品概念的局限性，本着兼具技术中立、文字简练、晓白和包容性的原则，视听作品概念逐渐被引入著作权法。从作品特定的表达方面考虑，视听作品应被定义为“由一系列彼此相关联的（有伴音或者无伴音的）影像组成，借助适当技术装置可供视觉和听觉（如有伴音）感知的作品”。电影被引入著作权法经历了漫

长的等待，促使电影进入著作权法的首要原因不是作品独创性问题，而是资金的投入与回报问题。当然，电影能被引入著作权法而非其他部门法律的真正原因则与视听作品本身具有独创性有关。视听作品与电影作品是包含关系，视听作品除了包括电影作品之外，还包括电视作品、录像作品甚至录像制品。

第二章研究视听作品作者的确定。一般而言，无论作者权法国家还是版权法国家均规定作品的原始版权属于作者，因此，作者身份的确定是确定视听作品著作权归属的关键因素。考察国外立法，作者既可以基于创作产生，也可以基于出资产生。其中，作者权法国家普遍受到法国浪漫主义美学与德国古典哲学影响，认为“作品体现人格”，普遍遵守“创作人原则”，作者多指实际从事作品创作的人。但是，参与视听作品的创作人员数量众多，确定视听作品的创作者并非易事。作者权法国家确定视听作品作者的模式主要有三种：有限列举式、开放列举式和消极式，这三种确定作者的模式各有利弊。相比较而言，版权法国家确定视听作品作者较为容易，出于经济利益原则考虑，作者范围主要限于出资的人。但是，基于我国立法传统、视听作品作者的特殊性以及对创作劳动的尊重，我国可以借鉴作者权法国家开放列举模式确定视听作品的作者。首先，我国著作权立法体系与作者权法国家更为接近，采用作者权法国家的立法模式不存在理论上和逻辑上的障碍。我国著作权立法始终坚持“作者就是创作作品的人”的“创作人原则”，即便我们有法人被视为作者的例外情形，但是视听作品的作者从来都是实际的创作者，而不是那些没有参与创作劳动的法人。其次，视听作品与其他作品有明显区别，参与创作人员众多且从事的创作劳动形式多样，对于一些“创作”特质明显且普遍争议较小的人员可以通过列举方式直接确定为作者，免除其证明作者身份之累。最后，直接确定视听作品作者的做法体现出对创作人员创作劳动的充分尊重和对作者利益的维护，符合我国著作权法倡导的鼓励作品创作的宗旨。其中，明确列举的视听作品作者应包括导演、编剧、专门为视听作品创作的音乐作品作者和摄影师。因为，无论在作者权法国家还是在版权法国家，导演属于基本无争议的一类作者。导演以其艺术表现力将剧本中以语言表述的各个场面变成影像，将影像变成视听作品，在视听作品创作

中，导演起着较为重要的作用。将导演列为我国视听作品的作者的理由不言自明，且符合国际立法惯例。关于编剧，我国著作权法并没有类似于德国和日本两国著作权法所赋予的视听作品作者可以拥有的权利，且我国的合作作品包括可以分割使用的作品，在这种情况下，将编剧列为视听作品作者实属必要，且不存在制度上的障碍。对于专门为视听作品创作的音乐作品作者，由于我国采用比较宽泛的合作作品概念，故将其列为视听作品作者具备法律依据。至于摄影师，在立法中采用列举式时应兼顾代表性、选择性，以求立法严谨、周延，摄影师在视听作品创作中从事的创作劳动具有技术性特点，故宜将摄影师作为技术性创作代表列为视听作品作者。

第三章从法理和促进产业发展层面探讨视听作品著作权的归属。从世界范围看，版权法国家的著作权法从实用主义出发，重点放在对作品的保护上，把作品视为纯粹的财产，激励投资，将著作权归属于制片者。而作者权法国家普遍将作者放在首位，一般将著作权归属于作者。根据洛克劳动财产权理论，创作者付出了智力劳动，理应由创作者享有著作权。以黑格尔为代表的人格理论将财产与人格联系在一起，认为人只有在与外部的某件东西发生财产关系时才能成为真正的自我。作者创作作品，要成为真正的自我，须对作品进行控制，这种控制权就是财产权，因此，只有作者可以取得这种著作财产权。而激励理论则认为应该将著作权赋予最能发挥客体效用的主体，考虑效率因素和利益最大化因素，将视听作品著作权赋予制片者更为合适。其实，激励创作与激励投资并不是非此即彼的关系，而是一荣俱荣、一损俱损的关系。既然如此，在确定著作权归属时，就无须在激励投资和激励创作之间游移不定，进行二选一的艰难抉择，也不会因为激励投资所具有的浓烈的功利主义色彩而对其予以排斥。因此，为了促进视听产业发展，激励投资，尊重创作，可以考虑将确定视听作品著作权的归属于制片者的同时，保障作者分享收益。为此，首先，应该确定视听作品的作者为创作者，确立创作者的利益分享机制；其次，赋予制片者视听作品著作权。最后，借鉴日本和法国确定视听作品著作权的模式，理顺视听作品作者与制片者之间的逻辑关系，将视听作品著作权通过推定转让的方式归于制片者。

第四章重新审视已有作品与视听作品的关系。在视听作品创作过程中，

需要大量使用已有作品。考察各国立法以及学界观点，有的将已有作品与视听作品之间的关系看作演绎关系，有的将两者之间的关系视为合作关系。其实，两者之间并非单一的合作关系或者演绎关系，因为一方面为了制作视听作品而对已有作品的使用方式（如复制、演绎）并不一样；另一方面每个国家对于合作作品的界定也不完全一致。视听作品使用已有作品的复杂性已经决定了两者之间复杂的关系。即使对于合作作品的界定完全一致，已有作品与视听作品的关系也未必完全一致，因此，已有作品与视听作品之间既有演绎关系，也有复制关系。鉴于已有作品与视听作品之间不同的法律关系，应该将已有作品区分原著作品与素材作品并分别赋予其作者不同的权利。

第五章探寻视听作品著作权的边界，确定使用者自由使用的起点。首先，对于视听作品著作权的时间边界，从繁荣公有领域考虑，50年的保护期无疑比70年的保护期更为合适。鉴于视听作品的作者数量众多，且难以确定，选择将几类视听作品主创人员的作者寿命作为计算保护期的依据比适用合作作品著作权保护期的一般规则更为简洁、实用。其次，通过对电视节目模式保护的研究，分析视听作品的思想与表达边界，不难看出，尽管理论上设计得足够具体或者详细的电视节目模式可以被认定为“表达”而受到著作权保护，但是，在实践中划清思想与表达的界限并非易事。最后，以戏仿为例探究视听作品著作权的空间边界。从保护公众的表达自由和保护戏仿作品的长远利益考虑，戏仿不应当被禁止。但是戏仿作品对于原作品的使用必须限定在必要的范围内，既能让人联想起原作品，又能明显让人知道新作品的存在，不会导致人们将两者混淆，不会损害原作品的利益。这个必要的范围实质上是判断戏仿是否构成合理使用的核心要件。但是，划定必要的范围并非易事，法律上自然没有固定的标准可以参照，需要法官自由裁量。

第六章结合《视听表演北京条约》，研究我国视听作品中表演者的权利属性以及著作权归属。在有著作权与邻接权之分的国家，演员的表演通常以邻接权加以保护，鲜有以著作权加以保护。如果演员在表演中付出了独创性劳动，一般情况下，演员只能在著作权和邻接权中选择其一予以保护，不能同时享受两种不同的权利保护。尽管有些演员，特别是主要演员在视听作品创作中影响较大，但是很少有国家以立法列举的形式明确肯定演员的创作者

身份，至多通过概括性立法模式推断出演员有成为作者的可能性。我国对于视听作品中的表演者应给予邻接权保护。一方面由于我国存在著作权与邻接权之分；另一方面虽然不否认有些表演者在视听作品演绎中付出了独创性劳动。但是，首先，能够付出独创性劳动的表演者毕竟只是极少数。其次，即使给予这些付出独创性的表演者以视听作品作者身份，这部分表演者也不会因此而享有更多的利益保障。最后，表演者的本职工作是表演，而非创作，如果基于其少许创作劳动而给予其作者身份是本末倒置。就视听表演者享有的经济专有权利而言，《视听表演北京条约》对我国著作权法修改影响不大。由于我国著作权法修改草案删除了“录像制品”的规定，将录像制品归入视听作品之中，使得一些原来作为录像制品表演者可以享有的“复制、发行以及信息网络传播权”的权利因此失去，这样的结果对于此类表演者缺乏公平性。因此，可以考虑将表演者的权利归属于制片者的情形仅限于原本属于电影作品以及以类似摄制电影的方法创作的作品中的表演者，其他如“录像制品”类的视听作品中的表演者则不受此限，仍然可以保留完整的表演者权。

关键词：视听作品；著作权；作者；制片者；已有作品；使用者；表演者

Abstract

Compared with other types of works, the copyright issues involved in "audiovisual works" are particularly complex. The main reason is that a number of subjects Who play different roles are involved in the production of audiovisual works. Production of audiovisual works is the multiple efforts of the creator creation, technical staff engaged in technical work and support staff and investors responsible for putting up funds. Copyright interests involved in an audiovisual works are complex and mixed. What is creative labor? These will determine who is the author of audiovisual works. Investors or creators Who should enjoy and exercise the copyright will determine the ownership of audiovisual works copyright;The relationship between existing works and audiovisual works-deductive or cooperation-directly affects the rights of both;the divide of boundaries between audiovisual copyright and public domain directly determines the scope of free use;[These are legal problems needed to be sorted out that the performer is the creator of an audiovisual work or the neighboring rights body regarding the assignment of rights between he and the producer of audiovisual works.] Therefore, the paper is a systematic research is carrd about the audiovisual works combining with China's "Copyright Law", and chooses the angle from the main interests involved in audiovisual distribution works. In addition to the introduction, there is still another six chapters in this book.

The first chapter discusses the evolution of audiovisual works from movie to

film works, and analyses reasons that the film was included in protection of the copyright law.The ancept of Audiovisual works evolved from the film works, Whieh is based on the movie works into copyright law. As to the principles of technology neutral , concise text, and inclusive, taking the expression of specific aspects of the work into consideration, audiovisual works should be defined as "Works that composed of a series of videos associated with each other (with or without accompanying sound)" , and can be seen and heared (if anysound) by appropriate technical means .It's a long way that film was introduced in Copyright Act, which was the result of capital investment and return issues not the originality. Of course, the real reason that film can be introduced into the Copyright Act rather than other sectors is relevant to the originality of audiovisual works. Films is included in Audiovisual works which also includes television works, video works, and even video products.

The second chapter studies the determination of authors of audiovisual works. In general, whether national or national copyright laws provide that works' original copyright belongs to the author.Therefore, the determination of the authorship of audiovisual works is the key factor to determine the ownership of copyright. By studying abroad legislation, the author can be based on the creation and also be based on fund. Among them, the authors rights law countries are generally impacted by the French Romantic aesthetics and the German classical philosophy, which maintains that "works reflects personality" , obey to the " principle of the creator" , the authors actually engaged in the work of creation multi-fingered man. However, there are numerous creative people in audiovisual works, It's not easy to determine the creator of audiovisual works. [There are three main modes in State law to determine the authorship of audiovisual works, which have advantages and disadvantages: limited enumerated type, open type and negative type list.] Comparatively, the copyright law of the state for audiovisual works more easily, considering the principles for economic benefits, funded mainly limited range of people. However, given our legal tradition, the author of the particularity of

audiovisual works and to respect the creative work into consideration, our country shall learn the right method of determining the national open enumeration mode of audiovisual works. Firstly, China's legislative system of copyright is similar to authors' rights law countries', and there will not be barriers in theory and logic to apply the legislative model of national rights law. Our copyright legislation always adheres to "who create works, who is the author" and "the principle of the creator." Even if we have a legal person is regarded as the author, but the authors of audiovisual works have always been the actual creators, rather than legal person who don't provide the creative labor. Secondly, there are significant differences between other works and audiovisual works, which includs many creative people that engaged in various forms of creation, Some creators that have significant "creative trait" and with less controversial can be directly determined by the way the author cited exemption from proof of tired identity. Furthermore, the approach to determine directly the authors of audiovisual works reflects the full respect for creation and the protection of authors' interests, which consists with the purpose of copyright law to encourage advocacy work creation. Also, the author of audiovisual works clearly listed should include director, screenwriter, the authors of musical works and photographers specifically created for audiovisual works. It is because that the director is of a class of non-controversial regardless of authorship or copyright law countries. The director plays a more important role in creation of audiovisual works, transforming the language of the script for each scene into an image with its artistic expression, and changing the image into audiovisual works. It is self-evident to list the director of an audiovisual work as author, which is also conforming to the international legislative practices. About screenwriter, China's "Copyright Law" is different from Germany and Japan whose screenwriter can own the rights of the author of audiovisual works conferred by the law, and our cooperation works include works can be separated, in this case, It is necessary to regard the screenwriter of audiovisual works as the author, and there are no institutional barriers. For the author of music works specifically creating for

audiovisual works, because of the use of relatively broad concept of cooperative work, who will be listed as the author of audiovisual works based on legal basis. As a photographer, in order to legislate rigorous, comprehensive, when using enumeration in the legislation the representation, selectivity should be taken into account, and therefore he should be classified as the author of audiovisual works.

The third chapter explores the ownership of the copyright of audiovisual works from the Jurisprudence and promotion of industrial development. From a global perspective, copyright law countries focus on the protection of the works, from a pragmatic way, the work is regarded as a purely property, encouraging investment, the copyright belongs to the producer. And in the author's rights countries, author is in the first place, generally copyright attributed to the author. According to Locke labor theory of property rights, intellectual creators who paid labor should be enjoyed the copyright. Hegel's theory of personality aryues the property is linked with the personality so that people only in the event of property relations with the outside of a thing can become a true himself. If one author want to become himself, he should control the works such control is the property.Therefore, only the author can enjoy this economic rights. The incentive theory holds the copyright should be given to the object can play main utility, so considering efficiency factors and maximize the benefits, copyright would be given producers. In fact, incentive creation and investment incentives are not either-or relationship, but prosperity, a loss for both sides of the relationship. Aware of this, when determine the ownership of copyright, It shoud not wander between encouraging investment and the creation of incentives and exclude strong investment incentives utilitarian colors. Therefore, in order to promote the development of the audiovisual industry, encourage investment, and respect for creation, the copyright of audiovisual works may be attributed to the producer and the sharing revenue should be protected. To do this, you should first identify the author as creator of audiovisual works and establish creators' benefit-sharing mechanisms; secondly, giving the producer of audiovisual works copyright. Again, learning

from Japan and France' mode of determing the ownership of the copyright of audiovisual works, rationalizing the logical relationship between authors and filmmakers. The copyright of audiovisual works should be transferred to the producer through constructive way.

Chapter Ⅳ re-examines the relationship between works and audiovisual works. In the creative process of audiovisual works' a lot of existing works are needed. Examine national legislation as well as the academic point of view, some see the relationship between the existing works and audiovisual works as deductive relationship, some see the relationship between two partners as partnerships. In fact, it is not a single deductive relation or partnership, on the one hand, in order to produce audiovisual works the use of existing works (such as copying, interpretation) is different, on the other hand, each country in defining the joint work is not complete consistent. The complexity of using existing works has already decided the complex relationship between the two parties. Even for the definition of cooperation works is exactly the same, the relationship between existing works and audiovisual works may not be exactly the same, so there are both deductive relationship and replication relationship. Given the different legal relationship between the existing works and audiovisual works, there should be distinction between original works and material works, given different rights.

The fifth chapter analyzes the boundaries of copyright of audiovisual works, explores the starting point of free use for users. First, for the time borders of audiovisual works' copyright. Considering the prosperity of the public domain, 50 years' protection is undoubtedly more appropriate than 70 years' protection. Given the large number of parties of audiovisual works and difficult to determine, selecting the life of several types staff of audiovisual works as the basis for calculating copyright protection period as a general rule is more applicable and concise. Second, through researching the protection of television programs mode, analyses the boundary between idea and expression of audiovisual works. Even though TV program mode designed sufficiently specific or exhaustive can be

identified as the "expression" in theory and subject to copyright protection, it is diffallt to draw a boundary between ideas and expression in practice. Again, explores the space boundary of audiovisual works copyright by parody example. Considering the long-term interests to protect freedom of expression of the public, works of parody should not be banned. But the use of parody must be limited to the extent necessary. To the necessary extent, it can be reminiscent of the original work, however, it is obviously to let people know there is a new works. People will not confuse them. It will not harm the interests of the original works. It is the core elements to determine parody constituting fair use. However, it is difficult to delineate the necessary range. There is no fixed standard reference in the law. It needs judges' discretion.

Chapter Ⅵ combining with "Beijing Treaty on Audiovisual Performances" to study the property and ownership of performers' rights of audiovisual works. In the countries whose law providing copyright and neighboring rights, the actor's performances usually protected by neighboring rights, with little to copyright protection. Under normal circumstances, if the actor paid original labor in the show, the actors can only choose one in the middle of copyright and neighboring rights to be protected and can not enjoy the protection of two different rights. Although some actors especially the main actors in the audiovisual work influence the creation, few countries expressly enumerated the identity of the creator of the actors in the form of legislation and infer the possibility of actors through broad legislative model. The performers of audiovisual works should be given to the protection of neighboring rights. On the one hand, it dues to the existence of copyright and neighboring rights. On the other hand, while not denying that some performers paid original labor in the interpretation of audiovisual works, first of all, this kind of perfomers is just a handful. Even giving these performers the authorship of audiovisual works, these performers also will not be entitled to more protection of the interests. Moreover, performers' job is to perform rather than create. Giving its authorship for a little creative work would make it upside down.

For the purposes of audiovisual performers' exclusive economic rights, "Beijing Treaty on Audiovisual Performances" has little effect on China's Copyright Law modify. Since the draft amendment deleting the "video product" requirement to be classified among audiovisual works which led to some video products enjoying the rights "to copy, distribute and disseminate" will lose these rights. This results in a lack of fairness. Therefore, we can consider the rights of performers who belong to the producers only limited to performers of films and a method analogous to cinematography creative works, other performances of audiovisual works such as "video product" not affected by this limit still retain the full rights of performers.

Key words: audiovisual work; copyright; author; producer; existing works; users; performer

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