ADOPTING SUBSEQUENT REMUNERATION RIGHT IN CHINESE COPYRIGHT LAW

Xi Chen
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One heavily and contentiously argued clause in Chinese Copyright Law amendments drafts focuses on the practicality of granting authors of audiovisual works the legal right to collect subsequent remunerations (SRR), when their works are reused in subsequent exploitations.

With the rapid increase of media channels for the Chinese movie industry, and other entertainment industries relying on a heavy usage of audiovisual work, authors demand that they should be entitled to the profit earned from derivative markets and other media channel beyond the first intended market. In order to balance the conflicting interest between the author and the producer, and to encourage creativity, Chinese legislators added a clause that granted subsequent remuneration rights, in all three revisions of the amendment drafts. This Article analyzes the solution proposed in the draft, and compares that with the U.S. and the French practice; the article analyzes the rationality behind this clause and the potential side effects this clause may entail should the amendment drafts be implemented in practice. This article reveals reasons behind why the drafted subsequent remuneration right still exhibits a high degree of ambiguity and lacks enforceability in practice. Lastly, this article concludes with its own proposal.

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I. INTRODUCTION

Chinese government has intended to amend its current Copyright Law since 2012.¹ One of the major proposals for the amendments is the rearrangement of the authorship of audiovisual work and the addition of “the subsequent remuneration right” (“SRR”) ² for authors (“Drafts”).³ The Drafts are welcomed among authors who contribute to audiovisual works. Li Shaohong, the president of China Director Association, said in her Weibo (Chinese Twitter) that “the China Film Association has submitted its proposal to the General Administration of Press and Publication to allege that 1) directors shall be the author of the audiovisual works; 2) Authors shall enjoy the subsequent remuneration right”.⁴ Upon the SRR, the author can enjoy the sustainable remuneration when their work is reused.⁵ Using Spiderman as an example, if the Spiderman is developed into a video game or displayed on media channels other than the theatre, the authors will be paid subsequent remuneration proportional to the license fee or other revenue. The Drafts encountered fierce opposition from producers, represented by one of the leading film production company - Huayi Brothers Media Group (HBMG). HBMG alleged that “when such Drafts are legally in effect, it will be a devastating blow to the whole movie industry, because ‘the subsequent remuneration right’ disrupts the already well-established profit model in the industry”⁶.


² The literal translation is “the right of second remuneration”. For correct understanding, I translate such right into “the subsequent remuneration right”.

³ Supra note 1.


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Indeed, it is not easy to balance the conflicting interest in the movie industry, because the audiovisual work involves different parties with a related interest. Under the current Chinese Copyright Law, the authorship of audiovisual works is enjoyed by the producer. The author who contributed to the works only reserved the right of attribution and one lump-sum of compensation pursuant to the agreement with the producer. When films acquire huge successes, especially small budget films, directors and script writers, who are of paramount importance in the successes of the films receive little remuneration for their unbalanced contribution, while producers reap huge profits. This problem became increasingly more acute as Chinese movie industry experience burgeoning growth and ever increasing profit margin. The authors advocate that the legislation should grant SRR, while the producers argue that SRR will unfairly burden the producers with all the risk for investing and producing an audio visual work.

How to balance the various contending interests in audiovisual works is a main focus of discussion in this article. In order to balance the beneficial interests in such an enormously ever-increasing revenue stake, the Chinese legislature proposed this amendment in an attempt to empower more legal right to the authors by adding a special “SRR” to authors. If coming into effect, the amendment would give authors the right to acquire sustainable remuneration when their works are reused in the subsequent exploitation of the audiovisual works.

Part I of this article analyzes the problem with which the movie industry in China confronts under the current China Copyright Law and juxtaposes the solution adopted by U.S. and France with that of the draft proposal. Part I, next, presents the main content of each of the three versions of Chinese Copyright Law Drafts and discusses briefly the criticisms and ambiguity inherent within the draft clause. Part II of the paper provides a flexible proposal to balance the various contending interests in an audiovisual work. Based on the contractual

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7 The reference to Chinese copyright law and other Chinese law only refer to the P.R.C Copyright law and other related laws. Also, China refers to the jurisdiction of mainland of China (exclude Hong Kong, Macao and Taiwan).
9 Id.
10 The author discussed in this article does not include the actor, though they are also granted the subsequent remuneration right in Drafts. The right of the actor in Chinese Copyright Law falls under the neighboring right, which is not a complete copyright. Since the right of the actor is different from the right of the authors mentioned in the article, this article does not discuss the subsequent remuneration for the actor.
freedom principle, the presumption of transfer should be a better solution than current one. Part II also discusses the scope and the definition of SRR, and methodologies for enforcing SRR in practice. Part III discusses potential flaws of this proposal, and alternative remedies to the problem.

II. AUTHORSHIP AND REMUNERATION IN AUDIOVISUAL WORKS

To promote the development of Chinese movie industry and balance the conflicting interests between the producer and the author\(^{11}\), Chinese government proposed to grant a SRR to the author in all three draft versions of the amendment of Copyright Law. This proposal is the most disputed parts of the amendment. When compared with U.S. and France’s legislative practice of the subject matter, despite multiple alterations, SRR mentioned in the drafts still exhibits a high degree of ambiguity and lacks enforceability in practice.

A. The Problem of Remuneration in Movie Industry\(^{12}\)

China’s movie industry has exploded in recent years; nevertheless, the producers’ monopolistic position granted by Copyright Law has caused dissatisfaction among authors. According to the recent research, in 2013, the revenue Chinese movie industry generated reached RMB 27.68 billion (≈$4.5 billion), an 18% increase from 2012, most of which came from box office revenue, reaching at RMB 21.77 billion (≈$3.5 billion).\(^{13}\) When facing the ever-increasing economic interests, the authors argue that they deserve more remuneration, and legislators need to break the producers’ monopolistic position granted by the existing Copyright Law. The most critical problem is how to distribute profit created by audiovisual works fairly.

Under Article 15 of the current Chinese Copyright Law, China has

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\(^{11}\) According to Article 11 of Chinese Copyright Law, if there is no other evidence, the author refers to the individuals, corporations or other entities whose signatures are on the work; there is no clear definition of the producer in Chinese Copyright Law or other related regulations. Currently, Chinese government implements censorship mechanism on movie industry and TV industry. In practice, the producer refers to the movie companies, studios or other eligible movie production entities whose signatures are on the Distribution License issued by the authorities.

\(^{12}\) For the purpose of this paper, the author primarily discusses copyright protection of movies, as one example of audio-visual works. In Chinese Copyright Law, the definition of audiovisual work is much broader, and refers to cinematographic works, works created by a process analogous to shooting cinematographic works, and works consisting of a series of related images on suitable devices, together with or without accompanying sounds. The audiovisual works include films, video-games, TV production, multi-media work and other works that satisfy the criteria of audiovisual work.

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adopted the “hybrid regimes” to protect the economic interest of producer and the attribution right of author. On one hand, to respect the intelligence of creators in audiovisual works, the law specifies that the author of audiovisual works to be “the scriptwriter, director, cameraman, lyricist, composer, and other authors”; and the authors enjoy the rights of attribution and are entitled to the compensation pursuant to the agreement concluded with the producer. On the other hand, considering the funds, device, organization and other investment contributed by producers, the authorship of audiovisual works, except the right of attribution, is granted to producers for bearing the investment risk (hereafter refers as “ownership”). Thus, the producers enjoy all economic rights and the exploitation right of works in actuality.

Authors complain that, upon the current provision, the compensation approach is dampening their creativity, because the existing approach does not associate the value of their work with the fair market price. One incidence that drew a lot of attentions from the author community happened when two Chinese directors Zhang Yang and He Ping, whose work was reused by the Spanish Film Copyright Association, revealed their license fee receipt publicly on Weibo (Chinese Twitter). This incidence drew a lot of attentions from Chinese authors, because it made them realize the importance of the SRR, which has already become a legal right for other authors in the developed countries. With the increase of media channel for the movie industry, other than theater, such as TV, Internet, the international copyright transactions, and its associated derivative market, the authors argue that they should be entitled to the profit earned from the other channel aside from the box office. Li Saohong, the president of China Director Association, said subsequent remuneration grants the author a right to collect the residual value of their work and provides a more stable source of income, she argued that “if the directors in China receive the same SRR as their developed countries counterparts, the directors will invest more time and effort in their work for refinement”.

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14 Julie E. Cohen, COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 131 (3rd ed. 2010).
17 Id.
18 Id.
19 Id.
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condoned by the existing law, because subsequent remuneration reflects the value of their work in accordance with the marker demand; on top of that, it also provides a smoother income stream for the authors.

On the contrary, the producers contended that subsequent remuneration adds additional cost to the producers. The additional cost would limit the competitive advantage of producers and would suppress the development of movie industry and related entertainment industry. Due to this additional cost, it becomes more difficult to raise fund for audiovisual works; and it exists an unforeseeable risk to recoup the cost if payments for subsequent remuneration exceeds the initial compensation, which is the only source of income Chinese authors currently enjoy. In this case, the producer makes little profit and may not recoup the cost.

To balance the interest between the producer and the author, Chinese legislation administration cautiously proposed to introduce SRR in the Copyright Law Amendment. Aside from the initial remuneration pursuant to the agreement agreed by the author and the producer, legislation attempt to grants authors a legal right to enjoy sustainable benefits when their works are reused in subsequent exploitation. Since countries with more developed movie industries have already adopted similar measure, either in legislation or via private orderings, useful legislative practices can be learned from these predecessors.

B. International Solution to the Problem

1. The U.S Solution

In the U.S. film industry, most copyrightable contributions to a movie fall under the work made for hire category (“WMFH”), in which the producer or financier usually is regarded as “the author and the initial owner of the copyright” in the audiovisual work. However there exists “a second contractual layer of copyright attribution” as a supplement of WMFH. Screen credit, which is regulated in an

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20 Supra note 6.
21 Id.
22 Supra note 16.
23 Supra note 5.
25 Adriane Porcin, Of Guild and Men: Copyright Workarounds in the Cinematographic
agreement entered by the Alliance of Motion Picture and Television Producers (“AMPTP”) and Writers Guild of America (“WGA”), for example, supply a revenue-sharing system “that compensates writers during periods of slack employment”. 26

a. “Work-Made-For-Hire” Doctrine

Under the WMFH stipulated in §201(b), the employer, or other person whom the work was prepared, is considered the author for purposes of this title.27 WMFH is thus the strongest stipulation in existence that protects the rights of producers; the U.S. legal system, however, does offer a work around that separates the moral rights28 from the economic rights.

b. WGA, DGA, and the “Collective Bargain” System

In order to protect the screen writers and directors who do not own the copyright to their works and thus have little control over what becomes it, a labor union of directors – Directors Guild of America (DGA) 29 and a labor union of TV and film writers – Writers Guild of America (WGA) 30 were founded with the specific purpose of protecting the directors’ and writers’ rights. Before the guild was formed, producers and studio would “buy the rights to a large numbers of books, plays, songs, and vaudeville sketches with familiar or catchy titles and then pay writers a flat rate of about $200 per week to spin a story around the title or the idea.”31

Currently, a Minimum Basic Agreement (MBA) is negotiated between the WGA and the AMPTP states that “credits for screen authorship shall be given only pursuant to the terms of and in the manner prescribed in the Theatrical Schedule A, a thirty-page addendum to the basic agreement, [which specifies] the criteria for awarding screen

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31 Fist, Supra note 26, at 223.
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credit for writers.”32 The WGA developed a system of authorship attribution by credit, which means “[writers] position in the motion picture or television industry is determined largely by [their] credit [and their] professional status depends on the quality and number of the screenplays, teleplays, or stories which bear his/ her name” 33, and through the credit, screen writers are entitled to a series of residual incomes, based on the revenues generated by the audiovisual work.34 DGA performs a similar function for the directors, and “negotiates industry-wide agreements governing the minimum compensation (salary), benefits, working conditions and duties of DGA members”.35 Negotiating these collective bargaining agreements provides the DGA with the opportunity to address changes in the industry and to negotiate further gains for DGA members.36 Contracts negotiated by the DGA also “provide the right to residuals, for the distribution or exhibition of feature films and most television beyond their initial release”. 37 “These residuals include television reruns, basic cable exhibition, home video and digital exploitation”,38 and are very similar to the aforementioned residual system negotiated between WGA and AMPTP.

What is unique about the American model are the roles WGA and DGA play in collectively representing their members, and for WGA specifically, determining screen credit, which are closely linked to future remuneration for the writers; in fact, the system is “one of the very few forms of intellectual property in the modern economy that is designed by workers for workers and without the involvement of the corporations that control most intellectual property policy”.39

2. The French Solution: Presumption of Transfer and Mandatory Collective Management

In the French System, the attribution of authorship follows a “presumption of authorship”, which “specifies that the physical person who directed the work is regarded as its author, and that the author of the script, [adaptation, dialogue, soundtrack] composed for the work, and the director are to be considered as authors in the absence of proof

32 Id., at 222.
34 Id.
35 DGA, Supra note 29.
36 Id.
37 Id.
38 Id.
39 Fisk, supra note 26, at 245.
to the contrary.”40 The French copyright laws implicitly protect both the economic and moral rights of the authors, mainly the screen writer, and the director, without relying on the private sector. Nevertheless, the law does allow agreements to be formed between the authors and the producer to transfer exclusive exploitation rights to the producer.41 The producer thus is able to exert full control over exploitations of audiovisual works.

To protect the authors’ economic rights from subsequent usage of the audiovisual works, the French system grants the authors a nonexclusive right to remuneration in the form of a fixed-rate levy on the sales of video tapes and other media.42 To collect and administer “all private copying levies related to audiovisual works, and the directors, screenwriters, and writers”, the law adopted “a mandatory system of collective management”, which is the “Société des auteurs et compositeurs dramatiques” (SACD), acting as “an intermediary between Copie-France”. 43

Under the French system, SACD acts as the ultimate overseeing entity that collects subsequent remunerations in forms of levy, and distributes the gains evenly among the authors, interpreters, and the producers. Since the original creators are deemed the author and the owner (for the purpose of exclusive rights less the right for exploitation) of the audiovisual work, and the remuneration collection process is conducted through a third party, the potential conflict between the producers and the authors is much less acute. Whereas, in the U.S., producers control economic right and other exclusive exploitation right, original creators are only compensated through residual claims.44 The

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40 Porcin, supra note 25, at 6. See also: L. 113-7 C.P.I.: “Ont la qualité d’auteur d’une oeuvre audiovisuelle la ou les personnes physiques qui réalisent la création intellectuelle de cette oeuvre. Sont présumés, sauf preuve contraire, coauteurs d’une oeuvre audiovisuelle réalisée en collaboration: 1° L’auteur du scénario; 2° L’auteur de l’adaptation; 3° L’auteur du texte parlé; 4° L’auteur des compositions musicales avec ou sans paroles spécialement réalisées pour l’œuvre; 5° Le réalisateur. Lorsque l’oeuvre audiovisuelle est tirée d’une oeuvre ou d’un scénario préexistants encore protégées, les auteurs de l’oeuvre originaire sont assimilés aux auteurs de l’oeuvre nouvelle”.


43 Porcin, supra note 25, at 10.

44 Fisk, supra note 26, 258-266.
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differing compensation regimes between U.S. and France have important implication on who ultimately have more control over the copyright work. While the French government clearly places the creative individuals at the heart of the compensation, the U.S. system is much more producer-centric, and tends to give the producers more power, but still protects the authors’ rights by delegating such duties to WGA and DGA.

3. China’s Proposed Solution: the SRR

To balance the interest between producers and authors and prevent the monopolistic position of producers, legislature of China intended to grant author a subsequent remuneration right (SRR) in the latest amendment drafts of Copyright Law. On March 31, 2012, China National Copyright Administration (“CNCA”) released Copyright Law of People Republic of China (Amendment Draft) \(^{45}\) (“First Draft”) and the related instructions for collecting comments and suggestions from the public. After taking the public opinions into consideration, CNCA released a subsequent Copyright Law of People Republic of China (Second Amendment Draft) (“Second Draft”) and Copyright Law of People Republic of China (the Draft for Examination) (“Exam Draft”) in July and November of 2012 respectively (collectively refers as “Drafts”). \(^{46}\)

The highlights of the aforementioned drafts are summarized as below table. Compare to current copyright law, the First and Second Draft grant the SRR to authors without requiring a separate agreement. \(^{47}\) Nevertheless, the Exam Draft stipulates, if in absence of agreement or there is ambiguity on related clause, the authors have the right to share profits derived from their works. \(^{48}\) These amendments are becoming the one of most disputed part of the Drafts. In this table, I compare

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\(^{45}\) Current Copyright Law is promulgated by the standing committee of National People Congress on Sep 7, 1990, effective Jun 1, 1991, and experienced amendment two times, in 2001 and 2010 respectively, both of which are made under WTO’s pressure. The first amendment in 2001 revise and supplement some provisions that are not consistent with TRIPS to satisfy the minimum standard for being number of WTO; due to the outcome of arbitration between China and U.S by DSB of WTO, the second amendment in 2010 was under pressure to adjust two provision of Copyright Law.

\(^{46}\) Supra note 1.


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Each key element of the SRR clauses in the Drafts with the current Copyright Law. The key elements include the main content of SRR, the scope of author, the beneficiary of SRR and the authorship of the work. I also highlight the main change in each version of the Drafts.

<table>
<thead>
<tr>
<th>Content Highlights</th>
<th>Author</th>
<th>SRR</th>
<th>SRR Beneficiary</th>
<th>Copyright</th>
</tr>
</thead>
<tbody>
<tr>
<td>Current Copyright Law</td>
<td>Authors have right to acquire remuneration, according to the contract agreed by the author and producer.</td>
<td>Scriptwriter, Director, Cameraman, Lyricist, Composer, and other authors</td>
<td>No SRR, unless SRR is agreed upon by both parties</td>
<td>No SRR</td>
</tr>
<tr>
<td>First Draft</td>
<td>Authors have right to acquire reasonable remuneration, provided that the producer uses or licenses the other parties to use the work.</td>
<td>Screenwriter, Director, Cameraman, Lyricist, Composer, etc.</td>
<td>Beneficiaries have SRR, unless explicit exclusion of SRR is agreed upon by both parties</td>
<td>Screenwriter, Lyricist, Composer</td>
</tr>
<tr>
<td>Second Draft</td>
<td>Authors have right to acquire reasonable remuneration, provided that the producer licenses other parties to use the work.</td>
<td>The author of existing work, Screenwriter, Director, Cameraman, Lyricist, Composer and other authors</td>
<td>Beneficiaries have SRR, without mentioning of exclusion clause</td>
<td>Author of existing work, Screenwriter, Director, Lyricist, and Composer</td>
</tr>
<tr>
<td>Exam Draft</td>
<td>Authors enjoy the attribution right and the right to share the profit of the work</td>
<td>Director, Screenwriter and All Musicians whose works are produced solely for the purpose of the audiovisual works, etc.</td>
<td>Beneficiaries have SRR, unless explicit exclusion of SRR is agreed upon by both parties</td>
<td>All authors</td>
</tr>
</tbody>
</table>
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C. Criticisms of China’s Proposed Solution

China’s existing situation is not unlike the U.S. system prior to the formation of WGA and DGA; by examining the history of the U.S. system, it is not difficult to deduce the rationale behind the draft amendments proposed by the Chinese government. The issue of focus here is thus not to question the validity of including a “subsequent remuneration clause”, rather, it is to carefully engineer specific legislation details of a subsequent remuneration to make it practical. However, SRR mentioned in the Drafts still exhibits a high degree of ambiguity and lacks enforceability in practice.

1. The Authorship has loophole and is not flexible

Under the existing proposal, there is a gap in rights that is not covered by the economic right and the attribution right. Specifically, the Exam Draft does not mention the right of publication, the right of alternation and the integrity right of work.49 By not attributing these omitted rights to either the producer or the natural author, the Exam Draft is incomplete, and thus leaves behind a loophole.

Simultaneously, if the producers only have the economic right of works, such legislation model for authorship will cause a “litigation flood” in some extent.50 To provide one example, following market demands, the producer needs to make alternation to works from time to time, but the reality would be the producers are lack of the right of integrity. The unclear authorship on copyright is a dilemma to the producers and can cause a great amount of litigations when different parties contend for these unattributed rights. Another situation is that, the one of main income sources for producer is to develop and distribute derivative works into related market. However, due to the lack of complete copyright, the producer or the licensee developing derivative works is exposed to the risk of litigations, which will create a burden to every parties, whether the producer, licensee, even authors or judicial resource.

49 Zhuzuoquanfa(著作权法)[Chinese Copyright Law], Art.10, (promulgated by the standing Comm. Nat’l People’s Cong., Feb 26, 2010, effective Apr 1, 2010) (P.R.C), English version is available at: http://www.wipo.int/wipolex/en/text.jsp?file_id=186569. (Article 10 stipulate: (1) the right of publication, that is, the right to decide whether to make a work available to the public; (3) the right of alternation, that is, the right to alter or authorize others to alter one’s work; (4) the right of integrity, that is, the right to protect one’s work against distortion and mutilation ).

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When financing the production, by not having access to the complete copyright, the producer is faced with a limitation on the promotion, distribution, exploitation, and other circumstances which exist unforeseeable risk for recouping investment and generating revenue. And such distribution on legal right of copyright will reduce financial incentive of producers and investors. Consequently, it is not beneficial for development of movie industry, even possible cause suppression.

2. The Definition and Scope of Subsequent Use is Ambiguous

Furthermore, the SRR stipulated by Drafts is ambiguous and vague. In the First Draft, it does not mention SRR explicitly. Instead, the provision only states that, unless it is otherwise agreed by agreement (“the Exception”), author has right to acquire reasonable remuneration. In the Second Draft, legislators deleted the Exception stipulated in the First Draft. In both drafts, what constitute “reasonable compensation” is unclear. The concept of SRR started to appear in the Brief Description of Second Draft issued by CNCA (“Description”), in which it “…specified that the author of the existing work, screenwriter, director, composer and lyricist of audiovisual works have the SRR based on the subsequent utilization”.\(^51\) Compared to “reasonable compensation” stipulated in the first two drafts, Exam Draft did not mention “reasonable compensation” but specified that the authors have right to share profit. Although intending to adopt the SRR to balance the rights in the audiovisual industry, in the most recent Exam Draft, the legislators did not finalize the concept of SRR explicitly; and instead used ambiguous and vague words, such as “reasonable remuneration” and “profit sharing”.\(^52\)

In addition, the scope of subsequent utilization is undefined in all three drafts. In the First Draft, the author(s) can have reasonable remuneration, whenever the producer uses or licenses the work to other parties; what constitutes “uses” is unmentioned.\(^53\) In the Second Draft, legislator deleted one the phrase “[whenever] the producer uses”,\(^54\) to limit the profit sharing scope to a single condition, in which the producer licenses the work to other parties; such amendments still do not fix the ambiguity problem. In Exam Draft, the scope of subsequent

\(^51\) Supra note 5.
\(^52\) Supra note 48.
\(^53\) Zhuzuoquanfa(xiugaicaoan)(著著作权法修改草案)(Copyright Law Draft), Art.16 (drafted by Copyright Administration of China, Mar 2012) (P.R.C), http://www.ncc.gov.cn/chinacopyright/contents/483/17745.html;
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use is completely taken out, and the Draft only stipulates that “the authors have right to share the profit”.55

Without confining the definition and scope of subsequent use, all the Drafts lack enforceability. The word “use” literally can include all exclusive rights enjoyed by the producers (assuming there is no initial agreement preventing the producer from obtaining exclusive exploitation rights and authorship). However, if authors are granted the rights to share all profit from every type of exclusive “use”, then it is equivalent of saying the producers and the authors share a joint copyright, and the authors shall enjoy economic rights that are otherwise entitled only to the producers. SRR would then be deemed superfluous in practice, or to put it in another way, such a clause puts authors and the producers on completely equal grounds; this clearly is not the intention of the legislators, but without confining the scope of “subsequent use”, such an impractical interpretation is not completely absurd. Therefore, in order to balance the rights of producers and authors, certain scope of exclusive rights enjoyed solely by the producers need to be explicitly excluded from the definition of subsequent use, and must not be included in the SRR provision.56

3. The Scope of Beneficiary is Unfair

In the First Draft and Second Draft, it is unfair that the legislators only grant SRR to a restricted category of authors, including directors, screenwriters and musicians. All other authors are deprived of their SRR rights, and have no negotiation power legally to allege subsequent compensation from the producer. Contribution of authors is different in different types of work. For example, in most documentaries relating to nature, cinematographers will play a vital role and have much artistic control over other authors.57 The other example is the animation work. The character designer, animator, modeler and other artist make a greater contribution to work58. However, these creative contributors do not list in the scope of beneficiaries of SRR. It is obvious this is not fair to these authors.

55 Supra note 48.
58 Id, at 405, 433.
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On the other hand, according to the Drafts, there are no legal definitions for “director” and “screenwriter” or the other types of authors. In a large film casting, it is not uncommon to see more than ten directors responsible for different portions of an audiovisual work casting.\(^{59}\) While the audience is only familiar with the chief director, vice directors and executive directors also play pivotal roles in a casting. Similarly, in an audiovisual work, there is also a group of screenwriter working on a single script, even the actors may decide to be spontaneous and alter the script slightly during performance.\(^{60}\) Does that necessarily imply every individual who is responsible for even the slightest alteration of the script is entitled to SRR? An audiovisual work is a complex joint effort, every employee and every commissioner contributes to the work, but not all of them shall be regarded as authors for the purpose of determining subsequent remuneration.

Without either creating legal definitions or industry standard for terminologies such as “director”, “screenwriter”, or establishing a separate institution (similar to the WGA) for determining who are entitled to screen credits, and subsequent remuneration, the legislature may be creating legal loopholes, and incur “a flood of litigation” just for determining who are entitled to what remuneration. Perhaps the legislators themselves are not clear on what the scope of beneficiary shall consists of, evident by the repeated changes on the SRR beneficiary from First Draft to the Exam Draft. The ambiguity of the scope of remuneration entitlement remains one of the biggest problems present in all of the Drafts.

4. The Collection Mechanism and Remuneration Standard of Subsequent Remuneration is NOT Mentioned

The other most important practical issue is the absence of a specific distribution approach and a distribution rate of SRR. The lack of remuneration standard may cause SRR to be unenforceable in reality. Countries with more mature legal systems in copyright have already established specific guidelines for calculating subsequent payments entitled to the authors. Take the approach adopted by U.S. as an example, in U.S., the residual income calculation takes several factors into consideration. For television, the residual is calculated based on the time (network prime time), and the number of broadcasts reruns (for television); for theatrical motion pictures, in most cases, the

\(^{59}\) Luo, supra note 56.

\(^{60}\) Id.
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residual consists of 1.2% of distributor’s gross receipts for worldwide television reuse, and 1.5% of the first million dollars of the Company’s reportable gross, and 1.8% after for DVD/videocassette.  

The legislators must take steps to help establishing a guideline for the SRR rates, and create a system for collecting subsequent remuneration. One common theme that repeatedly appears in mature audiovisual industries oversea, and can potentially be adapted by the Chinese legislator and the film industry is the establishment of a separate entity whose function is to act on behalf of the authors of audiovisual works. Such an entity should represent solely the rights of the audiovisual authors, negotiate SRR rates for the authors, and collective subsequent remunerations on behalf of the authors.

III. A Model Subsequent Remuneration Right for China

To balance the competing interests of authors and the producers and solve foregoing issues of SRR proposed in the Drafts, it is necessary to offer a clearer provision relating to SRR. Some producers and scholars advise to delete SRR in Copyright law amendment, because such distributional approach is way ahead of development of movie industry in China; others suggests granting SRR to authors by following previous approaches adopted by U.S. and EU. Part II proposes to grant authors SRR in order to cushion the conflict between the producer and the author.

A. Draft of a “Subsequent Remuneration” Provision of China

In order to fill the loophole and clarify the ambiguity of the Article on authorship of audiovisual work in the Drafts while insisting on a market-orient policy in movie industry, I draft the following provision to put in the Article 19 of the latest draft for Copyright Law Amendment in Chinese legislative terminologies.

61 Supra note 33.
The Copyright and Compensation of the Audiovisual Work

The authorship of audiovisual works, other than the right of attribution, shall be pursuant to the agreement concluded by the producer and the author. If in absence of such an agreement, or if the validity of such an agreement is unclear, the ownership of work shall be deemed to have transferred to the producer from the authors, but the author shall have the right to reserve the right of attribution, and shall have the right to receive compensation pursuant to the agreement concluded with the producer.

Besides the above compensation, the authors shall be entitled to reasonable subsequent remunerations, if the audiovisual work is reused beyond the initial intended market agreed by the author and producer. The remuneration rate shall be subject to the contract concluded with the producer, and if in absence of such a contract, or the validity of such a contract is ambiguous, with reference to the industry standards for similar work.

Authors of movies, TV shows and other audiovisual works include the directors, screenwriters, authors of preexisting work, composers and lyricists for audiovisual work, and other authors, if agreed by the both parties, whose works contribute to the audiovisual works.

B. Authorship and Fair Compensation System

From the First Draft to the Exam Draft, it is noticeable that legislators have hesitated on how many exclusive rights of audiovisual works should grant to the producer. In the First Draft, if it is not otherwise agreed in writing by both parties, the copyright of audiovisual work shall be enjoyed by the producer, but the authors shall have the right of attribution. In Second Draft, there is only a minor change that legislators deleted the exception agreed in writing by both parties and the producer could enjoy the copyright directly by the law. However, legislators made a substantial modification in the latest Draft, which stipulated that, if there is no agreement or in doubt, only the economic right of the audiovisual work shall be enjoyed by the producer, and the authors reserve the attribution right and have the right to share profit. Such modification, however, as the Part I explained above, contains a

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64 Supra note 53;
65 Supra note 54.
66 Supra note 48.
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To solve the lack of flexibility of current law and existing loophole of the latest Draft, the presumption of transferring authorship, borrowed from French legislative approach, provides a better resolution for the existing problems in current law.

First of all, the principle puts an emphasis on the parties' acceptability and autonomy, as well as setting the freedom of contract as the foremost applicable principle. The movie industry is highly market-oriented. In reality, the authorship and profit distribution, in most cases, is determined by complex market factors, such as investment proposal, bargaining skill and power, artistic control, etc. or based on box office success. These contingent factors shall be determined by the market. Thus, each party in the movie industry should have the freedom to conclude an agreement to decide the authorship and profit share method at their discretion, rather than relying on the law to stipulate authorship mechanically.

Moreover, only if such an agreement is absent, or if related provisions of the agreement agreed by both parties are unclear, should the existing law be used as a “baseline”, which presumes the authors, except the right of attribution, have transferred the other exclusive rights to the producer.

This approach is consistent with authorship of work doctrine stipulated by Copyright Law, in which the copyright of work belong to authors in the first place. It is also beneficial for the movie industry, because the producers have complete legal right to exploit the market. Therefore, I suggest that “the presumption of transfer” approach should be applied to the copyright law on audiovisual works in China.

2. Granting an Explicit SRR to Authors

Granting authors an explicit SRR will alleviate the conflict between producers and authors. SRR associates authors’ compensation with the

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67 Kernochan, supra note 57, at 387.
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subsequent revenue of work, instead one lump compensation. On the one hand, The SRR approach is more favorable by authors, because it reflects the value of their work more fairly based on market demand, if the market has more demand for the authors’ work, then their works shall be deemed more valuable, and they should be entitled to more compensation and vice versa.

On the other hand, the SRR will not add any additional cost on the producer as the producer argued. First, subsequent remuneration is not an uncertain risk for the producer or investor. Although the amount of subsequent remuneration is unpredictable, it is feasible to assess the amount of first compensation, which shall be covered by the producer’s budget. Based on the budget allowance, and taking SRR into consideration, the producer can adjust authors’ initial compensations within an acceptable range; on the contrary, it gives the producer more bargaining power and freedom to adjust her cost basis. Second, the cost of SRR is not borne by the producer but ultimately passed on to the consumer through actual market demand. Actually, subsequent remuneration will not generate the additional cost for the producer, but will be paid by the licensee or end user as proportional of license fee.

Since the amount of subsequent remuneration associates the remuneration with the market demand, it aligns the interest of both the producer and the authors together. SRR compensation scheme results in a win-win scenario for both the author and the producer. Thus, to balance the right between the producer and authors and to provide economic incentive to encourage creativity of authors, it is an effective and fair approach to grant the authors a legal right to participate the subsequent profit distribution beyond the initial compensation.

C. Condition on Claiming SRR

1. What is SRR?

In China, many people misunderstood SRR to be an equivalent of acquiring remuneration for a second time. As Tencent Entertainment reported (which is one of major Chinese entertainment media), the right of second remuneration (which is a mistranslation of SRR) is a

69 Supra note 62.
normal profit distribution approach in current movie industry. Some dominant creators agreed to be paid a small amount of compensation at first, but they are entitled to get compensation at certain proportion from revenue of the box office. For example, Feng Xiaogang, one of top directors in China, receives only a modest amount of first compensation for his movies; however, he had the right to share the revenue from box office. Nevertheless, no matter how many times the authors acquire remuneration in above circumstance, such remuneration, in fact, comes from the same revenue source. Such an arrangement differs from SRR.

The scope of SRR will be much wider than what the current law covers. The current provision has already specified that the authors are entitled to have compensation subject to the contract agreed by both parties. If the sources of the first and the second remunerations are identical, it is not necessary to stipulate the details from the legislative perspective. Thus, the subsequent remuneration that the legislators intend to grant to authors in this amendment process is not equivalent to a second time or multiple time remuneration, the amendment should necessarily allow subsequent remunerations to come from different revenue sources, therefore the scope which it covers will be much wider than both the one-time lump sum the law (hereafter refers as “initial compensation”) currently stipulates, and the second remuneration covered by individual author-producer agreements.

2. The Scope of SRR: Initially Intended Market (IIM) Test

The boundary between the initial compensation and subsequent remuneration should be determined by whether the scope of exploration is within the initial intended market (IIM test). When the producer engages in a new movie or other audiovisual works, they evaluate the cost and profit based on the initial intended market (IIM), and based their budget, which covers authors’ initial compensation, on the market feedback conducted in only the IIM. Generally speaking, to reach breakeven and to mitigate risk, a good producer will not, nor can they afford to offer compensation more than budget estimated based on the IIM, but agreeing on a profit sharing plan. The initial compensation, which is covered by the budge, and paid to authors,

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72 Id.
73 Shi, Supra note 70.
74 Id.
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shall be regard as initial or first remuneration, on which the authors have already been granted by Article 15 of current Copyright Law. The “profit sharing”, which is a contingent portion of the compensation is much more difficult to forecast, that portion depends on complex and comprehensive factors in the market, such as feedback from audience, ease of adoption in other derivative market environments, funding and business cycles, distribution cost, advertising cost and other contingent factor. Such contingent compensation based on more volatile market factors shall be deemed as the subsequent remuneration. The aforementioned way of separating initial compensation from subsequent remuneration is the IIM test. The IIM test provides an effective and objective line to distinguish the initial compensation from subsequent remuneration.

D. Scope of Beneficiaries and Remuneration Rate of SRR

1. Scope of Beneficiaries

The categories of authors proposed in the Drafts are not flexible and fair. Every individual who made contributions to the work should be respected and their authorship and compensations should depend on their contribution, artistic control, bargaining skill and other market factor rather than be determined by law mechanically.

Moreover, the restricted category of authors cannot keep pace with the technical development in movie industry. In modern movie industry, high-tech is widely used during filming and post-production. For instance, in the life of Pi, directed by Ang Lee, the tiger, a main antagonist of the movie, was a virtual character designed by graphics engineers during the post-production. In fact, in most of block-buster movie, such as Avatar, King Kong, Spiderman, etc., many of the scenes were designed by visual effect artists and coordinators who are masters of cutting edge technology. There is no doubt that these artists play an indispensable role in the movie, and their works also meet the elements of originality. Thus, such individuals who contribute to the emerging field of hi-tech movie industry should be granted authorship by the copyright law. By stipulating a narrow category of authors, the law will necessarily lose flexibility and cannot meet the need of development of movie industry.

75 The interview of The Life of Pi, YOUTUBE, https://www.youtube.com/watch?v=wCCcRSmeHwc (last visited Apr 30, 2015).
I suggest the authors listed in this article can adopt the existing enumeration approach, but the list needs to allow opened categories—adding the other authors as the catch-all clause, to make all type of authors on the equal position. Aside from the five categories of traditional authors77 who normally make the main contribution criteria in an audiovisual work, the other authors who are potentially entitled to SRR should meet the following prerequisites: 1) the first prerequisite for SRR is to determine whether the work is copyrightable. To use an example, in some cases, the actor may argue that he, as an author, should be entitled to SRR, because he changed some lines in the performance. However, if such alternation does not meet the copyrightable standard, he cannot be regarded as an author of the work; 2) the next prerequisite is to have a consensus with the producer. If an author does not have any artistic control or other bargaining leverage to ask for subsequent remuneration, it is likely that such an author does not play a vital role in a production. In this circumstance, depending on the author’s contribution, the producer may not even need to consider granting him an SRR. Under this approach, it does not deprive of SRR for the other author, but limited the number of the author who can enjoy SRR.

2. Remuneration Rate of SRR

Remuneration rate of SRR was not mentioned in the Drafts, and it is necessary to establish an applicable standard to determine the remuneration rate. As a civil law country, China needs to specify a basic standard for remuneration rate in absence of contractual agreements. It is consistent with “statute-law” system that, in order to restrict the judicial randomness, the country must provide a minimum baseline in the statutes. It cannot be denied that remuneration rate is complex, and depends on the amount of contribution from the author, the subsequent contribution channel or media, target audience market, and other elements. Normally, if there is an agreement to decide the rate, then it is easy to implement SRR by every party. But if there is no agreement or if such provision is ambiguous, deciding an applicable compensation rate is a difficult issue. Nevertheless, the industry standard can always be used as a reference to be the baseline; stipulating a baseline offers some legal certainty to public.

77 Here, refer to the author of existing work, Screenwriter, Director, Lyricist, and Composer.
The collective management system is an effective and common approach to collect and administer SRR in the world. First, due to the weak bargaining power of individual author, the collective organizations balance the bargaining power between producers and authors. The union of authors from each field of movie industry, no doubt, has more bargaining power to break up the monopoly position of producers and gain fairer SRR rate based on the market economic.\textsuperscript{78} Furthermore, because the value of authors’ contribution is intangible, it is necessary to establish widely recognized evaluation criteria to assess the value of authors’ work. Thus, like the “screen credit” established by WGA in U.S. the scope and the remuneration rate of authors who enjoy the SRR should be determined and negotiate by authors themselves and be reference with industrial standards. Ultimately, this collective management system is a convenient and effective way to collect and administer subsequent remuneration.

To develop the collective management association in China, legislation should encourage the employee of the producer and the free-lance authors to set up their own union and empower right to such union representing the author administer SRR. Currently, there exists one copyright collective management organization in China in movie industry, which is China Film Copyright Association (“CFCA”), it represents the benefit of producers to collect and administer the license fee from the third parties who use the films, because CFCA is found by the producers mainly.\textsuperscript{79} Although there are several industrial associations, such as China Director Association, China Dramatist Film Association, which organized by elites from related field voluntarily, each of them has no authority or power to negotiate with producers or CFCA on compensation representing the authors. The reasons are two-fold. First, there is no SRR that is similar to residual claims in U.S. law in China, and second, these related associations lack any collective management power, because they are not ordained by the law. Therefore, to make SRR enforceable in practice, the legislator should empower related associations a right to collective and administer subsequent remuneration for their members, and encourage authors to establish private order to protect their rights.

\textsuperscript{78} Fisk, supra note 26, at 215-237.

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IV. CRITICISM OF SUBSEQUENT REMUNERATION FOR THE AUTHOR ON AUDIOVISUAL WORK

The SRR is a novel concept in China. Currently, industrial guidelines governing SRR is currently non-existent. In this section, I will address the problem of a lack of industrial standard, along with other criticisms.

A. The Effectiveness of the SRR

The potential criticism is that, under the rule of contractual freedom, if a producer and an author enter into a contract where the author is only entitled to de minimis sum of subsequent compensation (the equivalent of $1, for example), there exists unfairness and no industry standards that can help guiding the courts to adjust the subsequent remuneration to a reasonable amount. In lack of such a standard, SRR still cannot be enforced effectively in practice to protect the author’s right.

The unfairness resulting from the contractual freedom is overstated. Admittedly, due to the natural monopolistic position and strong bargaining power of the producers, they may offer authors unfavorable contract terms. However, in most of the aforementioned circumstance, such authors have no artistic control, or talent, and thus no bargaining leverage. On the contrary, if the authors are A-list directors, screenwriters or musicians possessing strong artistic control over their work, then they do not need to worry about such unfavorable contract terms, because they have freedom to pick producers who can best satisfy their compensation demand. For most of those authors who are not primary authors in a production, but can offer tangible values to a production, they are offered fair market rated compensation, governed by the market law of supply and demand. In the long run, the producer who can provide more competitive compensations to authors

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80 Shi, Supra note 70.
81 See EDWIN MANSFIELD & GARY YOHE, MICROECONOMICS 347-48 (11th ed. 2004) (“We have seen that a perfectly competitive economy maximizes the total net gain of consumers and producers. We then showed ... how deadweight losses--reductions in economic efficiency--result if the government [obstructs the forces of supply and demand by imposing] a price ceiling[,] ... a price floor[,] ... a tariff, a quota, or an excise tax.”); ROBERT S. PINDYCK & DANIEL L. RUBINFELD, MICROECONOMICS 590-91 (5th ed. 2001) (“The market mechanism is the tendency for supply and demand to equilibrate (i.e., for price to move to the market-clearing level), so that there is neither excess demand nor excess supply.”).
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gains an edge in attracting talents in the labor market. Therefore, even if contractual freedom does not achieve absolutely fair, it can still keep the subsequent remuneration within a relatively fair range. Unfair contracts will always exist, but they certainly will never be a ubiquitous phenomenon. Once the authors are granted SRR officially and legally, they can further consolidate and strengthen their bargaining power by relying on a collective bargaining entity, to protect their right.

Moreover, according to the doctrine of unconscionability of Contract Law, 82 if the remuneration is far from fair, the court may adjust the remuneration into a reasonable scope at its discretion. The most common way the court exercises this power in the past is by considering the value of similar works in a similar market. Since value of the works in the movie industry is intangible, it becomes more difficult to rely on this metric. Thus, the industrial standard is an objective and reasonable standard for reference. Though, reference to SRR in current copyright law is non-existent, explicitly granting SRR to authors by law definitely will accelerate the formation of an industrial standard and will eventually push this standard to maturity.

B. High Transaction Cost for Open-end Authors?

Another criticism is that granting every author an SRR is impractical. Even with collective bargaining, this may increase the transaction costs in negotiating and contracting around audiovisual works. 83

The transaction will not be high because the number of authors who are entitled to SRR is limited in my proposal. Aside from the five categories of traditional authors, the other authors who are potentially entitled to SRR should meet the two prerequisites: the work is copyrightable and the author has a consensus with the producer. The producer can set a list of guidelines to screen authors who have indeed made critical contributions to the work, and are thus entitled to SRRs. However, with the producer’s natural monopolistic position, she may not evaluate the contributions fairly. Thus, it is necessary to establish an objective evaluation system and industrial standard in movie industry through collective management associations.

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V. CONCLUSION

At present, movie industry in China is experiencing exciting development. Facing the ever-increasing economic interests, the authors try to break the producers’ monopolistic position granted by the current Copyright Law, and demand a higher remuneration, which should reflect the value of their work in the market. I suggest a flexible proposal based on the contractual freedom principle to discontinue using the lump sum compensation arrangement, which was mandated in the current Copyright Law. This proposal shows the necessity to grant SRRs to the author, and the amount of any subsequent remuneration should depend on the revenue received from the derived markets when authors’ works are reused beyond the first intended market. In order for collecting SRR to be enforceable, I suggest relying on collective management entities for remuneration collection and administration. The articles in my proposal intend to grant flexibility for parties to negotiate copyright and remuneration plans according to the market demand and their willing. Adaptation to the proposal will provide legal certainty for authors, while balancing the economic interest between producers and authors.

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