Adopting Subsequent Remuneration Right in Chinese Copyright Law

Xi Chen

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Adopting Subsequent Remuneration Right in Chinese Copyright Law

by Xi CHEN*

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   IIP.
I. Introduction

The Chinese government has intended to amend its current Copyright Law of the People’s Republic of China since 2012. 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”) for authors (“Drafts”). 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.” Upon the SRR, the author can enjoy the sustainable remuneration when their work is reused. Using Spiderman as an example, if 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 companies—Huayi Brothers Media Group (“HBMG”). HBMG alleged “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.”

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 producer enjoys authorship of audiovisual works. The author who contributed to the works only reserves 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 scriptwriters, 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 the Chinese movie industry experienced burgeoning growth and ever-increasing profit margins. The authors advocate that the legislation should grant SRR, while the producers argue that SRR will unfairly burden the producers with all of the risk for investing and producing an audiovisual work.

A main focus of discussion in this article is how to balance the various contending interests in audiovisual works. 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 authors with more legal rights by adding a special SRR. If the amendment comes into effect, it 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 that the movie industry in China confronts under the current China Copyright Law, and juxtaposes the

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7. References to Chinese Copyright Law and other Chinese law only refer to the People’s Republic of China Copyright law and other related laws. Also, China refers to the jurisdiction of mainland of China (excluding Hong Kong, Macao and Taiwan).


9. Id.

10. “Author,” as discussed in this article, does not include the “actor,” though they are also granted the subsequent remuneration right in the 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 author, this article does not discuss the subsequent remuneration for the actor.
solution adopted by U.S. and France with that of the draft proposal. Part I 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 freedom principle, the presumption of transfer should be a better solution than the 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 the Chinese movie industry and balance the conflicting interests between the producer and the author, the 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 part of the amendment. When compared with U.S. and France’s legislative practices on the subject matter, despite multiple alterations, the 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

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 Chinese movie industry generated RMB 27.68 billion (≈$4.5 billion) in revenue, an 18% increase from 2012, most of which came from box office revenue, reaching RMB 21.77 billion (≈$3.5 billion). When facing the ever-increasing economic interests, the authors argue that they deserve

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. Chinese Copyright Law, art. 11. There is no clear definition of the producer in Chinese Copyright Law or other related regulations. Currently, the Chinese government implements censorship mechanisms on the movie and TV industries. 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 article, copyright protection of movies is discussed as one example of audio-visual works. Under 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, multimedia work, and other works that satisfy the criteria of audiovisual work.

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 adopted the “hybrid regimes” to protect the economic interest of producers and the attribution right of authors. On one hand, to respect the intelligence of creators in audiovisual works, the law specifies 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 compensation pursuant to the agreement concluded with the producer. On the other hand, considering producers bear the investment risk by contributing funds, devices, organization, and other investments, they are granted the authorship of audiovisual works (hereinafter “ownership”), but not the right of attribution. Thus, in actuality, the producers enjoy all economic rights and the exploitation right of works.

Authors complain that, under 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 incident that drew a lot of attention 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 incident is of paramount importance for Chinese authors because it made authors realize that SRR has already become a legal right for other authors in developed countries. With the increase of media channels 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

14. JULIE E. COHEN, COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 131 (3d ed. 2010).
17. Id.
18. Id.
and effort in their work for refinement.\textsuperscript{19} From the authors’ perspective, granting SRR is a fairer approach than the practice condoned by the existing law because subsequent remuneration reflects the value of their work in accordance with the market demand. On top of that, it also provides a smoother income stream for authors.

On the contrary, producers contend that subsequent remuneration adds additional cost to them.\textsuperscript{20} The additional cost would limit the competitive advantage of producers and would suppress the development of the movie industry and the related entertainment industry.\textsuperscript{21} Due to this additional cost, it becomes more difficult to raise funds for audiovisual works, and it creates 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.\textsuperscript{22}

To balance the interest between the producer and the author, the 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, the legislation attempts to grants authors a legal right to enjoy sustainable benefits when their works are reused in subsequent exploitation.\textsuperscript{23} Since countries with more developed movie industries have already adopted similar measures, either in legislation or via private orderings, useful legislative practices can be learned from these predecessors.

\section{International Solution to the Problem}

\subsection{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.\textsuperscript{24} However, there exists “a second contractual layer of copyright attribution” as a supplement of WMFH.\textsuperscript{25} Screen credit, which is regulated in an agreement entered by the Alliance of Motion Picture and Television Producers (“AMPTP”) and

\begin{itemize}
  \item \textsuperscript{19} Id.
  \item \textsuperscript{20} SINA ENTM’T, supra note 6.
  \item \textsuperscript{21} Id.
  \item \textsuperscript{22} Wang, supra note 16.
  \item \textsuperscript{23} Brief Description of Second Draft, supra note 5.
  \item \textsuperscript{24} Adriane Porcin, Of Guild and Men: Copyright Workarounds in the Cinematographic Industry, 35 HASTINGS COMM & ENT L.J., 1, 12 (2012); see also F. Jay Dougherty, Not a Spike Lee Joint? Issues in the Authorship of Motion Pictures Under U.S. Copyright Law, 49 UCLA L. REV. 225, 228 (2002).
  \item \textsuperscript{25} Porcin, supra note 24.
\end{itemize}
Writers Guild of America ("WGA"), for example, supplies a revenue-sharing system "that compensates writers during periods of slack employment."26

a. “Work-Made-For-Hire” Doctrine

Under the WMFH stipulated in section 201(b) of the Copyright Act, the employer, or other person for whom the work was prepared, is considered the author for purposes of this title.27 The 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 of 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 guilds were formed, producers and studios 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”), 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 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

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31. Fisk, supra note 26, at 223.
32. Id. at 222.
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 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.

The American model is unique given the roles WGA and DGA play in collectively representing their members. Specifically, WGA determines screen credit, which is 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, and soundtrack] composed for the work, and the director are to be considered as authors in the absence of proof to the contrary.” 40 The French copyright laws implicitly protect both the economic and moral rights of the authors, mainly the screenwriter 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

34. Id.
35. About the DGA, DIRS. GUILD OF AM., supra note 29.
36. Id.
37. Id.
38. Id.
39. Fisk, supra note 26, at 245.
40. Porcin, supra note 25, at 6; see also Code de la propriété intellectuelle [C. PROP. INTEL.] [INTELLECTUAL PROP. CODE] art. L113-7 (Fr.).
transfer exclusive exploitation rights to the producer. The producer is thus 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 authors a nonexclusive right to remuneration in the form of a fixed rate levy on the sales of video tapes and other media. 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.”

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 the economic right and other exclusive exploitation right, original creators are only compensated through residual claims. The differing compensation regimes between the U.S. and France have important implications on who ultimately has more control over the copyrighted 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 the WGA and the DGA.

3. **China’s Proposed Solution: The SRR**

To balance the interests of producers and authors and prevent the monopolistic position of producers, the legislature of China intended to grant authors 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) [“First Draft”] and the related instructions for collecting comments and suggestions from the public.

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41. [INTELLECTUAL PROP CODE art. L132-24 (Fr.).]
42. *Id.* art. L132-25 (Fr.).
44. Fisk, *supra* note 26, 258–266.
45. Current Chinese Copyright Law was promulgated by the standing committee of National People Congress on September 7, 1990, effective Jun 1, 1991. *See* Natalie P Stoianoff, *The Influence of the WTO over China’s Intellectual Property Regime*, 34 SYDNEY L. REV. 65, 73–85 (2012). The Law was amended twice, once in 2001 and again in 2010, both of which were made under the WTO’s pressure. *Id.* The first amendment in 2001 revised and supplemented...
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 referred to as “Drafts”).

The highlights of the aforementioned drafts are summarized on the table below. Compared to current copyright law, the First and Second Draft grant the SRR to authors without requiring a separate agreement. Nevertheless, the Exam Draft stipulates, in the absence of an agreement or if there is ambiguity in a related clause, the authors have the right to share profits derived from their works. These amendments are becoming one of the most disputed parts of the Drafts. The following table compares 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. The table also highlights the main changes 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, per the contract between author and producer.</td>
<td>No SRR, unless SRR is agreed upon by both parties</td>
<td>Screenwriter, lyricist, composer, etc.</td>
<td>Producers own rights; authors reserve the attribution right.</td>
</tr>
<tr>
<td>First Draft</td>
<td>Authors have right to acquire reasonable remuneration, if the producer uses or licenses other parties to use the work.</td>
<td>Beneficiaries have SRR, unless explicit exclusion of SRR is agreed upon by both parties</td>
<td>Screenwriter, lyricist, composer</td>
<td>Producers own rights absent proof to the contrary.</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>Beneficiaries have SRR, without mention of exclusion clause</td>
<td>Author of existing work, screenwriter, director, lyricist, and composer</td>
<td>Producers own rights; authors only reserve the attribution right.</td>
</tr>
</tbody>
</table>

some provisions that were not consistent with TRIPS to satisfy the minimum standard for WTO members; due to the outcome of arbitration between China and U.S by the Dispute Settlement Body of the WTO, the second amendment in 2010 was prompted by pressure to adjust two provisions of Copyright Law. Id.

46. See supra text accompanying note 1.

47. Copyright Law Draft, art. 16 (China); Copyright Law Second Draft, art. 17 (China).

48. Copyright Law Examination Draft, art. 19 (China).
### C. Criticisms of China’s Proposed Solution

China’s existing situation is not unlike the U.S. system prior to the formation of the WGA and the 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. Thus, the issue of focus here is 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. 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 producers only have the economic right to works, such a legislation model for authorship will cause a “litigation flood” to some extent. To provide one example, following market demands, the producer needs to make alterations to works from time to time, but the reality would be that the producer lacks the right of integrity. The unclear authorship on copyright is a dilemma for the producers and can cause a great amount of litigation when different parties claim these unattributed rights. Another problem is that one of the main income sources for producers is the development and distribution of derivative works into related markets. However, due to the lack of complete copyright ownership, the producer or the licensee developing derivative works is

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49. Chinese Copyright Law, art. 10 (China). Article 10 stipulates: (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; and (4) the right of integrity, that is, the right to protect one’s work against distortion and mutilation. Id.

exposed to the risk of litigation, which will create a burden to every party involved, whether it be the producer, licensee, authors, or judicial resources.

By not having access to the complete copyright when financing the production, the producer is faced with a limitation on the promotion, distribution, exploitation, and other circumstances that create unforeseeable risks for recouping investment and generating revenue. Such distribution on the legal right of copyright will reduce financial incentive of producers and investors. Consequently, it is not beneficial for the development of the movie industry, and could possibly cause suppression.

2. The Definition and Scope of Subsequent Use Is Ambiguous

Furthermore, the SRR stipulated by the 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 upon (“the Exception”), the author has the right to acquire reasonable remuneration. In the Second Draft, legislators deleted the Exception stipulated in the First Draft. In both drafts, what constitutes “reasonable compensation” is unclear. The concept of SRR started to appear in the Brief Description of Second Draft issued by the China National Copyright Administration (“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.”\(^\text{51}\) Compared to “reasonable compensation” stipulated in the first two drafts, the Exam Draft did not mention “reasonable compensation” but specified that authors have the 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; but instead used ambiguous and vague words, such as “reasonable remuneration” and “profit sharing.”\(^\text{52}\)

In addition, the scope of subsequent utilization is undefined in all three drafts. In the First Draft, author(s) can have reasonable remuneration whenever the producer uses or licenses the work to other parties, but what constitutes “uses” is unmentioned.\(^\text{53}\) In the Second Draft, legislators deleted the phrase “[whenever] the producer uses”\(^\text{54}\) in order to limit the profit sharing scope to only when the producer licenses the work to other parties. Such amendments still do not fix the ambiguity problem. In the

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51. Brief Description of Second Draft, supra note 5.
52. Copyright Law Examination Draft, art. 19 (China).
53. Copyright Law Draft art. 16 (China).
54. Copyright Law Second Draft, art. 17 (China).
Exam Draft, the scope of subsequent use is completely taken out, and the Draft only stipulates that “the authors have right to share the profit.”

Without confining the definition and scope of subsequent use, all of 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 the equivalent of saying producers and authors share a joint copyright, and the authors shall enjoy economic rights that are otherwise entitled only to producers. SRR would then be deemed superfluous in practice, or to put it another way, such a clause puts authors and the producers on completely equal grounds. This is clearly not the intent 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 producers need to be explicitly excluded from the definition of subsequent use, and must not be included in the SRR provision.

3. The Scope of Beneficiary Is Unfair

In the First Draft and Second Draft, it is unfair that 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 under the law 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. The other example is animation work. The character designer, animator, modeler, and other artist make a greater contribution to the work. However, these creative contributors do not fall within the scope of beneficiaries of SRR. It is obvious this is not fair to these authors.

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

55. Copyright Law Examination Draft, art. 19 (China).
58. Id. at 405–433.
responsible for different portions of an audiovisual work casting.\textsuperscript{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 a group of screenwriters working on a single script, and even the actors may decide to be spontaneous and alter the script slightly during performance.\textsuperscript{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 standards 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, causing “a flood of litigation” just for determining who is entitled to what remuneration. Perhaps the legislators themselves are not clear on what the scope of beneficiary shall consist 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 the SRR to be unenforceable in reality. Countries with more mature legal systems with respect to copyright law have already established specific guidelines for calculating subsequent payments entitled to the authors. The approach adopted by the U.S., for example, takes several factors into consideration for the residual income calculation: For television, the residual is calculated based on the time (network prime time), and the number of broadcasted reruns; for theatrical motion pictures, in most cases, the residual consists of 1.2\% of distributor’s gross receipts for worldwide television reuse, 1.5\% of the first million dollars of the company’s reportable gross, and 1.8\% after for DVD/ videocassette.\textsuperscript{61}

Legislators must take steps to help establish guidelines for the SRR rates and create a system for collecting subsequent remuneration. One

\textsuperscript{59} Luo, supra note 56.
\textsuperscript{60} Id.
A common theme among mature audiovisual industries overseas 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 authors, and collect subsequent remunerations on behalf of authors. The Chinese legislators and film industry can potentially adopt this model.

III. A Model Subsequent Remuneration Right for China

To balance the competing interests of authors and 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 the SRR clause in the Copyright Law Amendment because such distributional approach is too far ahead of China’s movie industry development; others suggest granting SRR to authors by following previous approaches adopted by the U.S. and the EU. Part II of this article 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 with respect to authorship of audiovisual work in the Drafts while insisting on a market-oriented policy in the movie industry, the following proposed draft should be added to Article 19 of the latest draft for Copyright Law Amendment in Chinese legislative terminology:

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 the 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, 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 directors, screenwriters, authors of preexisting works, 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 Chinese legislators hesitated on how many exclusive rights of audiovisual works should be granted to the producer. In the First Draft, if it is not otherwise agreed upon in writing by both parties, the copyright of audiovisual work shall be enjoyed by the producer, but authors shall have the right of attribution. In the Second Draft, the legislators deleted this agreement exception, and the producer could enjoy the copyright directly by law. However, in the latest Draft, legislators made a substantial modification, which provides that if there is no agreement or 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 Part I explained above, contains a loophole.

1. The Authorship of Audiovisual Work: Contractual Freedom and Presumption of Transfer

To solve the lack of flexibility of current law and the existing loophole of the latest Draft, the presumption of transferring authorship, borrowed from the French legislative approach, provides a better resolution for the existing problems in current law.

64. Copyright Law Draft, art. 16 (China).
66. Copyright Law Examination Draft, art. 19 (China).
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 principles. 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, the existing law should be used as a “baseline,” which presumes that authors have transferred the other exclusive rights to the producer, except the right of attribution.

This approach is consistent with the authorship of work doctrine stipulated by Copyright Law, in which the copyright of work belongs to authors in the first place. It is also beneficial for the movie industry because producers have the complete legal right to exploit the market. Therefore, this article suggests 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 subsequent revenue of work instead of one-lump compensation. On the one hand, the SRR approach is more favorable to 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 producers 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, producers 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

68. Chinese Copyright Law, art. 11 (China).
69. Tao, supra note 62.
actual market demand.\footnote{Shi Bisheng, \textit{Economic Analysis for the Right of Second Remuneration}, CHINA INTELL. PROP. (Aug. 26, 2013), http://blog.sina.com.cn/s/blog_6e987b230101e3j0.html.} Actually, subsequent remuneration will not generate additional cost for the producer but will be paid by the licensee or end user as proportional of the 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. A 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 an economic incentive to encourage creativity of authors, it is an effective and fair approach to grant authors a legal right to participate in 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 (one of the major Chinese entertainment media), the right of second remuneration (a mistranslation of SRR) is a normal profit distribution approach in the current movie industry.\footnote{The Battle Between the Director and the Producer on the Right of Second Remuneration, TENCENT ENTM'T, http://ent.qq.com/zt2012/views/42.htm (last visited Jan. 2, 2015).} Some dominant creators agreed to be paid a small amount of compensation at first, but they are entitled to get compensation in certain proportions from the box office revenue. For example, Feng Xiaogang, one of the top directors in China, receives only a modest amount of first compensation for his movies; however, he has the right to share the revenue from the box office.\footnote{Id.} Nevertheless, no matter how many times authors acquire remuneration in the above circumstances, 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 already specified that authors are entitled to 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 a legislative perspective. Thus, the subsequent remuneration that 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 that it covers
will be much wider than both the one-time lump-sum the law (hereinafter referred to 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”). When a producer engages in a new movie or other audiovisual works, she evaluates the cost and profit based on the IIM, and bases her budget, which covers the 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 the budget estimated based on the IIM, but agree on a profit sharing plan.

The initial compensation, which is covered by the budget, and paid to authors, shall be regarded as initial, or first remuneration, on which Article 15 of current Copyright Law has already granted the authors. The “profit sharing,” which is a contingent portion of the compensation, is much more difficult to forecast and the 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 factors. Such contingent compensation, based on more volatile market factors, shall be deemed 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 compensation should depend on their contribution, artistic control, bargaining skill, and other market factors, rather than be mechanically determined by law.

Moreover, the restricted category of authors cannot keep pace with the technical developments in the movie industry. In the modern movie industry, high tech is widely used during filming and post-production. For instance, in Life of Pi, directed by Ang Lee, the tiger, a main antagonist of the movie, was a virtual character designed by graphics engineers during

73. Shi, supra note 70.
74. Id.
the post-production. In fact, in most blockbuster movies, such as Avatar, King Kong, Spiderman, etc., visual effect artists and coordinators, who are masters of cutting edge technology, designed many of the scenes. There is no doubt that these artists play an indispensable role in the movie, and their works also meet the elements of originality. Thus, the Copyright Law should grant such individuals, who contribute to the emerging field of high-tech within the movie industry, authorship. By stipulating a narrow category of authors, the law will necessarily lose flexibility and cannot meet the developing needs of the movie industry.

The authors listed in this article should adopt the existing remuneration approach, but the list needs to allow for opened categories—adding the other authors as the catch-all clause to put all type of authors in an equal position. Aside from the five categories of traditional authors, 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. 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 alteration does not meet the copyrightable standard, he cannot be regarded as an author of the work. The second prerequisite is to reach 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 her an SRR. This approach does not deprive the author of the SRR, but limits the number of authors who can enjoy SRR.

2. Remuneration Rate of SRR

Remuneration rate of SRR was not mentioned in the Drafts, but 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 the absence of contractual agreements. It is consistent with a “statute-law” system where the country must provide a minimum baseline in the statutes in order to restrict the judicial randomness. The remuneration rate is undoubtedly complex, and depends on the amount of contribution from the author, the subsequent contribution channel or media,

77. Here, “author” refers to authors of existing work, screenwriters, directors, lyricists, and composers.
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 the public.

E. Implementation and Administration of SRR by Collective Management System

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 authors, the collective organizations balance the bargaining power between producers and authors. The union of authors from each field of the movie industry, no doubt, has more bargaining power to break up the monopolistic position of producers and gain fairer SRR rates based on the market economy. 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 the WGA in the United States, the scope and the remuneration rate of authors who enjoy the SRR should be determined and negotiated by authors themselves and be referenced 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 employees of producers and freelance authors to set up their own unions and empower rights to these unions representing the authors to administer SRR. Currently, one copyright collective management organization exists in China in the movie industry, the China Film Copyright Association (“CFCA”). The CFCA, founded mainly by producers, represents the interest of producers to collect and administer the license fees from the third parties who use the films. There are several industrial associations, such as China Director Association and China Dramatist Film Association, which were voluntarily organized by elites from related fields. However, each of these associations lacks authority or power to negotiate with producers or the CFCA with respect to compensation representing the authors. The reasons are two-fold. First, there is no SRR that is similar to U.S. law on residual claims in China. Second, these related associations lack any collective management power because the law does not ordain them. Therefore, to make SRR


enforceable in practice, the legislators should grant related associations a
right to collect and administer subsequent remuneration for their members,
and encourage authors to establish private orders to protect their rights.

IV. Criticism of Subsequent Remuneration for the Author on
Audiovisual Work

The SRR is a novel concept in China. Currently, industrial guidelines
governing SRR are nonexistent. This Section 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, it
is unfair if a producer and an author enter into a contract where the author
is only entitled to de minimis sum of subsequent compensation (for
example, the equivalent of $1) and there are no industry standards that can
help to guide the courts in adjusting the subsequent remuneration to a
reasonable amount. Without such a standard, SRR still cannot be
enforced effectively in practice to protect the author’s right.

The unfairness resulting from 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 circumstances, 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, they do not need to worry
about such unfavorable contract terms because they have the freedom to
pick producers who can best satisfy their compensation demand. For most
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
producers who can provide more competitive compensations to authors
gain an edge in attracting talents in the labor market. Therefore, even if
contractual freedom does not achieve absolute fairness, it can still keep the
subsequent remuneration within a relatively fair range. Unfair contracts

80. Shi, supra note 70.
(“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.”).
will always exist, but they certainly will never be a ubiquitous phenomenon. Once 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 under contract law, if remuneration is far from fair, the court may adjust the remuneration into a reasonable scope at its discretion. The most common way courts exercise this power is by considering the value of similar works in a similar market. Since the value of 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. Although reference to SRR in current copyright law is non-existent, explicitly granting SRR to authors by law will certainly 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 because, even with collective bargaining, this may increase the transaction costs in negotiating and contracting around audiovisual works. However, the transaction costs will not be higher because, in this proposal, the number of authors entitled to SRR is limited. Aside from the five categories of traditional authors, the other authors potentially entitled to SRR must meet 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 contributions fairly. Thus, it is necessary to establish an objective evaluation system and industrial standard in the movie industry through collective management associations.

V. Conclusion

At present, the movie industry in China is experiencing exciting development. Facing the ever-increasing economic interests, authors are trying to break the producers’ monopolistic position granted by the current Copyright Law by demanding a higher remuneration, which reflects the value of their work in the market. A flexible proposal is recommended.

based on the contractual freedom principle to discontinue using the lump-sum compensation arrangement, which is 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. For collecting SRR to be enforceable, this article suggest relying on collective management entities for remuneration collection and administration. The clauses in this proposal intend to grant flexibility for parties to negotiate copyright and remuneration plans according to the market demand and their willingness. Adaptation to the proposal will provide legal certainty for authors, while balancing the economic interest between producers and authors.