Client Alert

August 1, 2013

Proposed Revision to China's Copyright Law Not a Hit with Film Producers

By Gabriel Bloch

The General Administration of Press and Publication released the *Notice Regarding Request for Comments on Second Draft Revisions to the Copyright Law of the People's Republic of China* (关于《中华人民共和国著作权法》（修改草案第二稿）公开征求意见的通知, the "**Second Draft**") for public comment on July 6, 2012. The Second Draft covered a variety of topics, but one in particular inspired heated debate: a proposal to give certain creators a "right of secondary remuneration" ("二次获酬权"). Since the release of the Second Draft last year, a putative third draft was circulated with further revisions, and this discussion will summarize where we are today with this proposed right, why production companies have been opposed to it, and what the outlook is going forward.

THE PROPOSAL

The Copyright Law of 1990 was amended twice, first in 2001 upon China's accession to the WTO and again in 2010. A third amendment was proposed by the State Council in 2012, and two drafts of that amendment were released to the public for comment. The Second Draft added a so-called "right of secondary remuneration", which has been controversial.

The right of secondary remuneration arises out of revisions to concepts found in Article 15 of the Copyright Law. Article 15 currently provides that:

> *[c]opyright in a cinematographic work or a work created by a process analogous to cinematography shall vest in the producer ["制片者"]. However, screenwriters, directors, cinematographers, lyricists, composers, etc., shall have the right of attribution, and the right to receive remuneration pursuant to the contract entered into with the producer. The authors of the screenplay, music and other works that form part of a cinematographic work or work created by a process analogous to cinematography that can be used separately shall have the right to exercise their copyrights independently.*

The default position under the current Copyright Law is thus that copyrights in cinematographic works are held by the producer, but that certain creators have statutory attribution rights, with the extent of remuneration essentially

a contractual matter between the producer and the individual creator. Article 17 of the Second Draft, which has the controversial language, has been drafted quite differently:

> *Where a producer uses a screenplay, musical or other work to film an audio-visual work, he should obtain approval from the copyright holder and pay remuneration. Copyright in the audio-visual work vests in the producer, but original creators, screenwriters, directors, cinematographers, lyricists, composers, etc. enjoy a right of attribution.* ***Original creators, screenwriters, directors, lyricists, and composers have the right to obtain reasonable remuneration in respect of others' ["他人"] use of the audio-visual work.***[1] *For screenplays, musical and other works in audio-visual works that can be used separately, the author can exercise the applicable copyrights separately, but may not impair the normal use of the audio-visual work. (Emphasis added).*

PROBLEMS WITH THE PROPOSAL

The language in bold above appears to create a statutory right of copyright holders to demand payment from users of the work in which the copyright subsists. Predictably, film producers in China objected to the open-ended statutory right to remuneration.[2] Several questions arise in connection with this proposed language:

- Who would be responsible for paying this remuneration? In the context of a film production, would distributors be required to pay? Exhibitors? Hotels and airlines that later distribute the work? Manufacturers of tie-in merchandise?
- How would "reasonable remuneration" be determined? For example, what would "reasonable remuneration" be for the composer of the score on a film budgeted at RMB 60,000,000 that goes on to gross RMB 300,000,000 at the box office? What about for other contributors of copyrightable material? Would these rights be one-off, or repeated over time?
- Considering the multiplicity of creative inputs into a film of even average budget, the right of secondary remuneration invites complexity and ambiguity into the allocation of revenues. Given that most professional feature films have multiple individuals involved in the screenplay, musical score, cinematography, and many other areas of production, the creation of a high-level statutory right to remuneration seems impractical. A full exposition of comparative international practices would be beyond the scope of this discussion, but it is worth noting that in the US, it is almost universally market practice for film companies to own the copyrights of related works via the "work for hire doctrine", and to the extent that the related works are not works for hire, the copyrights to such works are assigned to the producer by contract. As such, a statutory right to secondary remuneration would seemingly push China away from international practice.

[1] We assume that cinematographers were intentionally omitted by the drafters.

[2] *See, e.g.*, http://www.eeo.com.cn/2012/0903/232936.shtml.

Because of these issues, it would be next to impossible to effectuate the right of secondary remuneration as drafted in the Second Draft. In other contexts, secondary legislation has been passed which clarified unclear statutory language, and here too that seems necessary. We expect that if such clarifying legislation were passed, the relevant parties would rearrange their payment schemes accordingly. For example, if secondary legislation clarified that the statutory amount a person can demand is RMB 'X', we anticipate that filmmakers would simply adjust the upfront payment to the creator to be 'Y less X'. Viewed in this light, the core problem with the legislation from a producer's point of view (if not distributors and others as well) is the lack of clarity, rather than the grant of the statutory right *per se*.

A THIRD WAY?

There has been discussion of a third draft to the revised Copyright Law (the "**Third Draft"**). No official text is available, however we have obtained a copy of a purported Third Draft from online sources. Our review of a copy of the Third Draft available online suggests that the drafters of the revision may be seeking to dilute the impact of the right of secondary remuneration. The wording in Article 17 of the Third Draft we reviewed provided that "the remuneration for movies, television dramas and other audio-visual works shall be agreed upon by the producer and the author; where there is no such agreement or the agreement is unclear, the author shall have the right to obtain reasonable remuneration in respect of others' use of the audio-visual work."

Presumably, most professional productions will enter into clear contracts with all creative talent to ensure that all compensation questions are clearly resolved. The Third Draft revision should have no effect on such arrangements. How would the Third Draft revision apply when there is no agreement or the agreement is unclear? The PRC Contract Law has provisions to deal with ambiguous or missing terms of a contract. Article 61 of the Contract Law provides that where there is no agreement in a contract between the parties on remuneration or such agreement is unclear, the parties may agree upon supplementary terms through consultation, or if that fails, as determined from the context of the contract or through reference to "business practices". More specifically, Article 62 of the Contract Law provides that if remuneration is unclear, the market price in the place where the contract is performed at the time the contract was executed shall be applied.

In many cases, however, it may be difficult to establish what the "market price" is. Additionally, it is difficult to say how the language in the Third Draft would work in practice. As with the prior draft, it is unclear who is supposed to be paying the author in the absence of a clear agreement: if this was meant to be a right only against producers, the drafters could have so stated. Moreover, upon close consideration it is not clear that the Third Draft's hybrid contractual/statutory approach actually works. Consider the language: "where there is no such agreement *or the agreement is unclear*, the author shall have the right to obtain reasonable remuneration in respect of *others' use of the audio-visual work*" (emphasis added). It might be workable for the creator to go back to other parties to the contract and demand remuneration, but the language impliedly includes persons who were not party to the contract. Is this then a statutorily imposed right to demand remuneration based on a contract, but from persons who were never parties in the first place? Such a concept would run counter to basic contract law principles and be very difficult to effectuate in practice.

It is important to stress that at this point there is no public Third Draft, and the Third Draft language discussed herein may not be final, or ever used. If it ultimately is used in the revised Copyright Law, as noted there will be much to clarify in terms of its actual application. It may be that the drafters of the Copyright Law are backing off of the high water mark on the right of secondary remuneration, but there is also evidence that a hybrid version remains which awaits further clarification. There is minimal visibility on when the final revised Copyright Law will be released, but we will continue to watch the situation carefully and make sure our clients are kept up to date as the law develops.

If you have questions, please contact:

Gordon A. Milner
852 2585 0808
gmilner@mofo.com

Gabriel Bloch
86 10 5909 3367
gbloch@mofo.com

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