



## Topics in Chinese Law

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### China's New Film Industry Promotion Law (Draft)

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China is now on track to overtake the United States as the world's largest film market in the next few years. The global box office has grown slowly with worldwide receipts reaching US\$38 billion in 2015, up from US\$36.4 billion in 2014. Much of the growth was powered by China, where box office receipts jumped 49% in 2015 to reach US\$6.78 billion after growing 34% from the previous year. Heading into 2016, theatrical box office revenues in China grew by 50% in the first three months of this year. Some projections hold that China may top US\$10 billion in box office revenues for 2016, nearly totaling the 2015 box office in North America of US\$11 billion.<sup>1</sup> While growth in the Chinese box office is being fueled in large part by growing demand for Chinese language films, English language films are also benefitting from that growth. By way of illustration, *Transformers: Age of Extinction* was the first film to make more than US\$1 billion at the global box office in 2014. The statistics show that the film has only made US\$241 million in the United States but earned over US\$300 million in China.<sup>2</sup> It is not unheard of for a movie's Chinese haul to exceed its U.S. take: recent examples include *Pacific Rim*, *Escape Plan* and *Need for Speed*. *Pacific Rim* only pulled in US\$101 million at the U.S. box office in 2013 but earned another US\$111 million in China.<sup>3</sup>

Many international film companies, such as Warner Bros., Universal Studios, Walt Disney, Paramount Pictures and DreamWorks Animation, have already entered the China market, and more will surely follow. With a view to facilitating development of the film industry and regulating this booming sector, China's National People's Congress (the "NPC") issued a draft of the Film Industry Promotion Law (the "Draft") on November 6, 2015, for public comment. The period for public comment closed on December 5, 2015. It is difficult to predict how long it will take for the NPC's legislation process to be completed as the Draft is still subject to two readings before the full NPC or its Standing Committee, and we anticipate that significant debate within government circles has yet to take place on various aspects of the Draft before the law is formally promulgated.<sup>4</sup> Some commentators are optimistically predicting that the Draft might be promulgated before the end of 2016.<sup>5</sup>

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Comprising 58 clauses spread over six chapters, the Draft sets forth detailed provisions on the development, production, distribution and screening of films as well as supportive and preferential policies in the film industry. It is known as the “first” law in the Chinese film industry. This Article examines the key features of the Draft and highlights its potential impact on making films in China, especially for foreign companies intending to explore and navigate the film businesses in China.

## I. Film Production

### (1) Lower Market Barriers for Film Production

The Draft reduces the market access barriers for film production in China. It abolishes the one-time “Film Production License (Single Film)” (“SFL”) granted on a film-by-film basis. Currently, a Chinese studio has to apply first for the SFL, and, after producing at least two films permitted for public release, it is then qualified to apply for the “Film Production License” (“FPL”), which allows it to produce films on a continuous basis. Under the Draft, a Chinese studio can directly apply for the FPL without meeting those pre-conditions.

Further, the Draft no longer requires Chinese studios to have a sponsoring unit and an administrative agency that have been recognized by the State Administration of Press, Publication, Radio, Film and Television (“SARFT”). Chinese enterprises and other organizations with “appropriate personnel, funds and other conditions” are allowed to engage in the film production activities with government approval.

The Draft also delegates the authority of granting the FPL from SARFT to its provincial counterparts (the “**Local Film Authority**”). The approval time for the FPL is shortened to 20 days.

The changes discussed above regarding FPL approval could make such licenses no longer a scarce resource and could result in more film studios appearing in China. But this result might not affect the number of qualified Sino-foreign co-productions because Chinese studios holding either a SFL or FPL can take part in the co-production and be the local partner of the foreign producer.

### (2) Impact on Foreign Producers

The Draft does not reflect a substantive change on the current regulatory regime affecting foreign producers. Under the Draft, foreigner entities are still prevented from independently producing films in China. Chinese entities may cooperate with overseas entities to produce films upon approval of SARFT, provided that such Chinese entities have experience producing films permitted for public screening. But Chinese entities are explicitly prohibited from cooperating with foreign entities that have engaged in activities damaging China’s honor and interests, endangering China’s social stability or harming China’s national sentiments.

### (3) Impact on Sino-Foreign Co-Productions

Clause 17 of the Draft provides that a Sino-foreign co-produced film whose copyright is owned by a Chinese entity enjoys the same treatment as a domestic film. Domestic treatment for Sino-foreign co-productions is not something totally new. Current SARFT rules treat qualified co-productions as domestically produced films<sup>6</sup> but do not require the Chinese entity to hold the film’s copyright. However, Clause 17 of the Draft does not specify whether sole ownership of the copyright by the Chinese entity is required or whether joint copyright ownership with the foreign entity is permitted. It is a widespread practice for the foreign and Chinese parties to share copyright.<sup>7</sup> If the Draft is interpreted to permit joint ownership, then the Draft simply repeats the existing rules with some clarification and increases the authority of the rules by raising them to the level of statute. However, if the Draft is interpreted to require sole copyright ownership by the Chinese entity, then the Draft will set forth a stricter requirement than the existing regime and will hinder the development of Sino-foreign co-productions, which are, by far, the most popular mode for investment by foreign producers in China. We think the legislative intent of the Draft permits joint ownership of copyright. The predecessor to Clause 17 of the Draft, contained in an earlier version of the *Film Industry Promotion Law* issued in 2011, was once followed by a sentence regarding the circumstance where the Chinese party does not enjoy any copyright interest.<sup>8</sup> It seems the legislative focus is whether the Chinese party “has” or “doesn’t have” a copyright interest instead of “joint ownership” versus “sole ownership.”

#### (4) Impact on Foreign Film Quota System

The Draft does not touch the quota system limiting the number of foreign film imports. It might intentionally neglect this topic because the scope of law under the Draft does not cover film import and export. However, even if the quota system may be amended or abolished by other legislation, it is still restricted by Clause 32 of the Draft, which reiterates the current regulation<sup>9</sup> and provides that domestic films must comprise at least two-thirds (2/3) of the total screening time of each movie theater. This would set a *de facto* quota for foreign films as they will be limited to at most one third (1/3) of all screen time.

## II. Film Censorship and Release

### (1) Relaxation of Censorship System

Content censorship is a major issue for the film industry and has been blamed for limiting growth of the film industry. Western studios always find it difficult and time-consuming to develop a script that appeals both to Chinese censors and to the country's cinema-goers. Both imported films and co-productions are subject to censorship whims of the Chinese government. Although the Draft still requires a finished film to clear censorship, it has relaxed the current censorship system for screenplays. A film with a "general theme" is no longer subject to screenplay review. It is merely required to file the synopsis with SARFT or the Local Film Authority. Thus, the shooting of a film with a general theme need not wait for censorship approval, which can otherwise delay the shooting period and result in inefficiencies. However, a film with a "special theme" is still subject to screenplay review. The Draft does not elaborate what "special themes" are or what makes a theme "special," but such themes would be expected to include politically and religiously sensitive ones.

The Draft requires the relevant government authority, for the first time, to clarify censorship rules by formulating "concrete film examination standards" and making those standards open to the public. In the past, film censorship standards were criticized for being opaque and non-public. Although the Chinese government previously released a list of subject matter prohibited from film distribution, it is still often difficult to predict what will be

censored. The Draft's new requirements should help clarify the standards for censorship. Clearer censorship principles will be easier for international filmmakers to comply with and should help filmmakers assess the relevant risks. In addition, under the Draft's proposals, the censorship process would be subject to a more objective "expert opinion." Filmmakers would also be permitted to object to initial expert opinions and call for further expert review. In the recent NPC session in March 2016, in answer to the reporter's questions on the Draft, the NPC spokesman emphasized the government's determination to improve the censorship system and stated, "*We are all concerned about the film censorship. One important basic consensus is that the film censorship must be open and transparent.*"<sup>10</sup>

The Draft's proposed changes with respect to censorship are a response to mounting pressure on the Chinese government to reform the censorship system. Nevertheless, whether the government can really loosen censorship standards and its control on film content in practice remains to be seen, considering that films have long been an important propaganda tool to promote socialist values.

### (2) Simplified Approval for Public Release Licenses

Under current rules, no film can be publicly screened or exhibited in China without a Public Release License. This includes foreign films imported into China for release. The Draft maintains this rule and also further clarifies that films that have not received a Public Release License may also not be broadcast over the information network, including Internet, telecom networks and broadcast television. This clarification could indicate a trend of stronger enforcement to ban distribution of unlicensed content via Internet. The Draft also increases punishment for violations. The exhibition of films without a Public Release License can be fined as high as 20 times the amount of illegal gains, while the highest fine under current rules is 10 times the amount of illegal gains.

While the Draft restricts exhibition of unlicensed content, it also accelerates the license approval process by delegating authority for granting the Public Release License from the SARFT to either SARFT or the Local Film Authority and reduces the approval timeline to

30 days. These policies should simplify the license approval and allow films to get to market more quickly, even for foreign producers.

### (3) Punishment of Box Office Fraud

The Draft strengthens box office management and intends to eliminate box office fraud. It requires a computerized ticketing system to be installed in all theaters in accordance with national standards, and box office sales must not be concealed or wrongly portrayed. If a theater calculates box office receipts fraudulantly, a fine of RMB50,000 to RMB500,000 will be imposed and the theater's license will be revoked. These provisions will reduce unfair competition among film producers and increase transparency of the industry.

Recently, SARFT has undertaken stricter supervision of box office fraud. In March 2016, SARFT began investigations on the alleged box office fraud of *Ip Man 3*. Not only the cinemas but also the film producers and distributors of *Ip Man 3* were accused of illicit conduct. SARFT expressed that they will nullify box office returns and punish the cinemas, distributors and film producers involved in the fraud.<sup>11</sup>

## III. Film Industry Promotion Policies

### (1) Incentives to Boost the Film Industry

Under the Draft, the government will implement a series of incentives in financing, taxation, investment and land utilization to encourage enterprises and individuals to enter and grow the film industry. Although these incentives are just conceptual guidelines in nature, they have set a foundation for relevant governmental departments to issue more detailed rules and regulations. With these guidelines issued, it should be only a matter of time before a supporting mechanism to implement the guidelines will be created.

Below are examples of the conceptual guidelines for incentives:

- Implement preferential tax policies to support film development.
- Encourage Chinese entities to invest in overseas co-productions by facilitating their foreign exchange

needs and simplifying their foreign exchange administrative procedures.

- Encourage financial institutions to provide financing services for engaging in film activities and improving film facilities, and to conduct pledge businesses for film-related intellectual property.
- Require financial institutions to set reasonable tenor and interest rates for loans extended for film production.
- Encourage insurance companies to develop suitable insurance products.
- Encourage financing guarantee institutions to provide financial guarantee services in the film industry and mitigate the risks through re-guarantees and co-guarantees.<sup>12</sup>
- Satisfy land needs for building new movie theaters and encourage renovation of existing movie theaters.
- Offer special film funding provided by the State.

### (2) Protection of Film IP Rights

The Draft is expected to “ensure the freedom of creating films.” The legislature has realized the importance of robust intellectual property (“IP”) rights to the film industry. The Draft emphasizes that IP rights relating to films are protected by the law and are not to be infringed by anyone. The IP law enforcement agencies at the county level or higher are required to adopt measures to protect IP rights related to films and to punish activities infringing those rights. These requirements should provide some comfort to foreign producers who fear infringement of their IP rights in China.

Please note that “film” as defined under the Draft is work that is screened to the public. If a film is not screened to the public, then it might not be eligible for the IP protections set forth in the Draft. However, such a film might enjoy the IP protections afforded by other regulations. For instance, the film definition under the PRC Copyright Law does not contain any public screening requirement. Hence, such film works may still be protected by PRC Copyright Law.

In conclusion, the Draft makes meaningful progress with respect to the current film regulation regime. However, we have not yet seen fundamental changes to the

existing regulatory framework, particularly relating to the regulations governing foreign investors. There is no indication in the Draft that either the import quotas stopping foreign films from entering into China or the restrictions on foreign investment in film production and distribution will be relaxed any time soon. This is understandable because the recent Foreign Investment Catalogue still places film production under the “restricted” band and film distribution under the “prohibited” band. In any event, in light of the bureaucracy and complexity of China’s film regulation regime, the Draft makes a significant endeavor to lower barriers for film production, clarify censorship standards and promote growth of the film industry. It sends a strong signal that China will continue to encourage its film business. We believe the Draft will have a positive effect on the China film industry and progress China’s film industry to the next level.

## Endnotes:

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1. See “Global Box Office Hits Record \$36.4 Billion Fueled by China”, *available here*, and “China Box Office Grows by 50% in First Quarter”, *available here*,
2. See “Transformers 4 Is The First Film To Make \$1 Billion In 2014”, *available here*.
3. See “Pacific Rim Grossed More Worldwide Than Any Other Live-Action Original Film This Year”, *available here*.
4. This long-awaited law had started since 2003 but dragged on for decades. The recent quick move of the legislation is driven by the robust development of the film industry and growth of China’s box office revenues over the last few years, but there is still strong disagreement among legislators on certain issues in the Draft.
5. See “电影产业促进法明年望落地” (Translation: Film Industry Promotion Law is expected to be passed next year), *available here*.
6. According to Article 1 of the *Administrative Provisions of the Employment of Overseas Major Crew Personnel to Participate in the Taking of Domestically-produced Films* (“聘用境外主创人员参与摄制国产影片管理规定”), issued by SARFT in 2001, “domestically produced film” includes the co-produced films (excluding assisted production and commissioned production).
7. Some film co-production bilateral treaties between China and other countries, such as the China-France Co-production Treaty in 2010 and the China-UK Co-production Treaty in 2014, explicitly permit the intellectual property rights of the co-produced films to be jointly owned by both Chinese and foreign entities.
8. Article 18 of the *Film Industry Promotion Law (Draft)* issued in 2011 provided that “where domestic enterprise does not enjoy the copyright of the film, all of the negative, working print or copy of the film shall be shipped out of the Chinese territory.” This sentence has been deleted in the current Draft.
9. See Article 44 of the *Film Administration Regulation* (电影管理条例) issued by the State Council in 2001.
10. “Fu Ying: Actor Jurisprudence gambling banned for life if the draft law is not a movie column”, *available here*.
11. “China Box Office: ‘Ip Man 3’ Opens to \$75M Amid Fraud Allegations, ‘The Mermaid’ First to Cross \$500M”, *available here*.
12. Although the Draft only states “financial guarantee institutions” and does not explicitly refer to the completion guarantors, the policy trend has already attracted the completion guarantors to enter the China market. The world leading completion guarantor company Film Finances Inc. (“FFI”) plans to facilitate modern film financing in China and has recently set up its office in the Shanghai Free Trade Zone. FFI believes the completion guarantees they offer -- which do not currently exist in China -- will minimize the risks to film financiers and assure a film’s timely delivery.

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