

Old Bottle for New Wine: PRC Copyright Legislation in the Digital Context

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Since the invention of the art of printing, technology has been constantly affecting copyright law by bringing forth the need for adjusting the interests of different parties concerned. The introduction and widespread use of the Internet in the People's Republic of China (PRC) will inevitably expand the domain of traditional copyrights. However, the evolution of the copyright regime shall serve digital technology by prolonging the reach of Internet users. Therefore, a new approach has to be found in the effort to adapt the current copyright regime to the digital environment. This effort, moreover, should seek to maintain a balance between the rights of the owners of copyrighted works on the one hand and those of the digital service providers and users on the other.

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As observed by the distinguished copyright experts of the United States Information Infrastructure Task Force, "technology has a habit of

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outstripping even the most flexible statutes."¹ Keeping pace with technology is thus proving to be difficult, if not impossible, for intellectual property laws.²

The People's Republic of China (PRC) has been host to vivid examples of interaction between digital technology and the copyright regime over the past years. Faced with an exponential increase in the number of Internet users, those concerned with the development of copyright law can clearly see that the current PRC copyright regime has been challenged by the most fundamental shift of context in the history of copyright law. Therefore, a proposal was formulated to amend the current copyright regime that is centered on the 1990 Copyright Law (著作權法 *Zhuzuoquan fa*) and the accompanying Regulations for the Implementation of the Copyright Law (著作權法實施條例 *Zhuzuoquan fa shishi tiaoli*).

Moreover, the radical rise of Internet-related disputes heightened the urgency for a digital-friendly copyright regime. According to one survey, there were more than twenty on-line copyright-related disputes in Beijing alone that were brought to the local courts in 1999, including the high-profile case of *Wang Meng et al. v. the Shiji Hulian Communications Technology Corporation* (王蒙等對世紀互聯通訊技術有限公司案).³ Traditional copyright owners, such as writers, are reluctant to see their works reproduced and distributed over the Internet without their knowl-

¹Quoted in Jessica Litman, "Comments on Intellectual Property and the National Information Infrastructure," available at <<http://www.interop.org/Litman-comments.html>>.

²Take the copyright legislation of the United States as an example. The United States is generally regarded as the leading country in terms of both technology advance and copyright legislation. However, whenever technological advances cause ambiguity in the U.S. copyright law, courts find applying the old principles to resolve that ambiguity to be both difficult and awkward because technology develops too far ahead of the law.

³The plaintiff—Wang Meng, Zhang Kangkang, and four other writers—found that their novels and poems had been put on the Internet without their knowledge by the defendant, Shiji Hulian Communications Technology Corporation. Internet surfers could, through the website of the defendant, read and download the works. The plaintiff sued the defendant at the Haidian District People's Court for infringing upon their copyrights. The defendant argued that, first, no provision in the current PRC Copyright Law prohibits putting the works of others on the Internet; second, the company did not profit from the services because they were provided to visitors of its website at no charge. The Haidian Court, however, ruled that the defendant had infringed upon the copyrights of the plaintiff, going against "the spirit" of the Copyright Law. For the details of the case, see <<http://dailynews.sina.com.cn/china/writers/index.shtml>>.

edge and without the due payment of royalties; however, these owners and their lawyers find difficulty in convincing the judges that copying in the digital context constitutes copyright infringement. Because the issue of copyright law's protection of information in electronic form is new to the current PRC copyright regime, how to amend the 1990 Copyright Law has become a heatedly debated topic among PRC copyright legislators, administrators, and lawyers.

What Challenge Does Digital Technology Pose to Copyright Laws?

Paul Geller has pointed out that "all the copyright issues that have been explored to date should be re-examined in the Internet context."⁴ This perception is also true for the PRC. As a country anxious to embrace the digital era (a period which is characterized by the proliferation of computer technology in general and the Internet in particular), the PRC cannot escape the challenge that digital technology is posing to its copyright regime.

Many valuable studies have shed light on the multitude of new copyright issues to be dealt with in the digital environment.⁵ PRC lawyers, including the present author, argue that the following are among the most critical issues that digital technology poses to the copyright regime from the practical point of view.⁶ The first type of questions is directly brought

⁴Paul E. Geller, "Conflicts of Law in Cyberspace," *Law and Arts Journal* (Columbia University), Summer 1996, quoted in Zheng Chengsi, *Zhishi chanquan lun* (On intellectual property rights) (Beijing: Falüchubanshe, 1998), 451.

⁵Pamela Samuelson and Robert J. Glushko have insightfully pointed out that there are a series of six tools that operate on digital information that "seem likely to change significantly the contours of intellectual property law, especially copyright." These are: (1) copying; (2) transmission; (3) processing and manipulation; (4) obsolete media categories; (5) reliance on technology to see and use digital works; and (6) searching and linking capabilities. See Pamela Samuelson and Robert J. Glushko, "Electronic Communications and Legal Change: Intellectual Property Rights for Digital Library and Hypertext Publishing Systems," *Harvard Journal of Law and Technology* 6 (1993): 237-40.

⁶For the general PRC perspective on copyrights in the digital environment, see Li Dongtao, "The Revolution of Technology vs. the Revolution of Law: Some Questions concerning

about by digital technology. Note that the Internet enables copies of a work to be distributed to the public by transmission (傳播 *chuanbo*), which gives rise to questions of whether such transmissions fall within the exclusive distribution right (專屬發行權 *zhuanshu faxing quan*) of the copyright owner, and whether transmission of a work into the country where the copyright is affirmed infringes upon the copyright owner's exclusive importation rights. Secondly, given that the transmission of copyrighted work is rampant on the Internet, a further question arises: How to define the liabilities of the Internet service providers (ISPs). The third type of questions is related to the consumers of the digital data on the Internet as downloading becomes commonplace: Whether loading a protected work into a computer's random access memory is an actionable reproduction. In order to properly deal with these three interrelated issues, a fourth question has to be addressed, namely the principle underlining the copyright law in the digital environment that is crucial to maintain the balance of interests between different parties concerned.

Bearing the above in mind, this article will explore some of the fundamental questions that are being addressed by the recent PRC efforts toward designing an amendment to the 1990 Copyright Law as well as some of the issues that are at the center of the accompanying academic debate over the copyright legislation activity in the digital context.

New Dimensions for "Copying" in the Digital Context

Deliberate copying of copyrighted works is subject to applicable copyright law. Fair is to argue that the center of a copyright regime is its provisions on "copying" and "reproduction." In the light of the history of copyright law, the technology of copying is among the most important factors that affect the copyright law. Each technological innovation of copying pawns change in copyright law. For example, the emergence of the

the Internet" (in Chinese), available at <<http://www.peopledaily.com.cn/GB/channel17/35/20000704>>.

copying technology of video, which greatly reduced the cost of copying, caused heated debate over the copyright law.

Digital technology that makes copying practically penniless is a new example.⁷ Before the advent of digital technology, the term "copying" (複製 *fuzhi*) in copyright laws was understood as reproducing and fixing the copyrighted works onto a new, tangible medium such as paper, tape, or video tape.⁸ With the wide application of the computer and Internet technologies, the term "copying" has become complicated and requires clarification.

To simplify the situation, digital "copying" will be examined from three distinct contexts: (1) the inputting of copyrighted products into the computer ("digitalization"); (2) placement of the digitalized information onto the Internet server (or in other words the "transmission" of the information over the Internet); and (3) viewing, listening, and downloading (hereinafter referred to as "downloading").

In respect to digitalization, all information is dynamic and moves within the theoretically uniform system of the Internet in the form of electronic impulse. Some electronic information is intended to land onto the physical facility of the computer network; however, no user is in a position to identify the real physical existence of the information that is available to any authorized user. As to whether digitalization amounts to an actionable reproduction of that work, PRC lawyers are divided. Professor Zheng

⁷Copying is an ongoing, necessary, and inevitable component of using electronic information. As M. Ethan Katsh observed, "Saving a file, for example, involves making a copy of what is in memory. Using a file or loading it into memory involves making a copy of what has been stored on disk. Communicating electronically involves sending a copy and not the original." See M. Ethan Katsh, *Law in a Digital World* (New York: Oxford University Press, 1995), 216.

⁸For example, the U.S. Copyright Act defines copying as "fix(ing) in any tangible medium of expression, now known or later developed, from which they [original works of authorship] can be perceived, reproduced, or otherwise communicated either directly or with the aid of a machine or device." See U.S. Copyright Act 1976, Section 102 (a). Worth noting is that the United States has since enacted numerous acts including the Digital Millennium Copyright Act (DMCA) 1998. All the subsequent acts constitute amendments to the Copyright Act 1976. DMCA is basically designed to implement the WIPO Copyright Treaty but also contains additional provisions addressing related matters. For the source of the Copyright Act 1976 and the subsequent amendments, look up Title 17 of the United States Code, available at the official website of the U.S. Copyright Office: <<http://lcweb.loc.gov/copyright/title17/>>.

Chengsi (鄭成思), a renowned PRC intellectual property lawyer, holds that any new manner of reproducing an existing work that results from technological development is reproduction.⁹ He is in fact in favor of the approach of treating digitalization as a part of "reproduction" or "copying" (*fuzhi*). Others see digitalization as a new act that is parallel to "copying."¹⁰ This author, however, would argue that we should distinguish between situations where a work is read into a computer's random access memory¹¹ and where a work is placed into a computer's hard drive. From a technical perspective, the act of reading a work into a computer's random access memory is too transitory to be treated as a tangible medium.¹² From the legal perspective, linking "transitory copying" in the technical sense and "reproduction" in the legal sense contravenes the "fixation requirement" required by the prevailing copyright regimes around the world. These regimes demand that a work be "fixed in any tangible medium of expression" in order to be copyrighted.¹³ Theoretically, random access memory has nothing to do with "tangible medium of expression," and hence the digi-

⁹See Zheng Chengsi, *Zhishi chanquan fa* (Intellectual property law) (Beijing: Falü chubanshe), 1997, 401.

¹⁰Xue Hong, "Liability for Copyright Infringement on the Internet," *Dianzi zhishi chanquan* (Electronic Intellectual Property) 85, no. 10 (1998). See the website of the on-line magazine at <<http://www.computerworld.com.cn/magazine/eip/>>.

¹¹"Random access memory" (RAM) represents that part of a computer's memory in which data and computer programs can be recorded temporarily. When a computer is turned off, the information stored in RAM is lost.

¹²In *ProCD, Inc. v. Zeidenberg*, the Seventh Circuit District Court of the United States held that the defendant Zeidenberg did not violate the plaintiff's copyright by downloading the data from CD-ROM discs, of which the plaintiff ProCD, Inc. is the copyright owner, onto the random access memory of defendant's computer. For a description and analysis of the case, see C. Benjamin Salango, "Copyright Infringement in Cyberspace: Untangling the Web with Existing Law," available at <<http://www.wvjolt.wvu.edu/wvjolt/current/issue1/articles/salango/salango.html>>. Interesting in this regard is the drafting process of the WIPO Copyright Treaty. An earlier draft of the Treaty originally laid down a provision on "the scope of reproduction," which defined "reproduction" as including "transitory copying." The provision caused heated debate among the delegates to the Diplomatic Conference of WIPO members. As a result, the original provision with the controversial reference to "transitory copying" does not appear in the Agreed Statement concerning the WIPO Copyright Treaty. Therefore, the negotiators likely intended to leave to the individual member states of the WIPO the power to decide whether a transitory storage of a protected work in digital form in an electronic medium constitutes a reproduction within the meaning of Art. 9 of the Berne Convention. Also see Zheng, *Zhishi chanquan lun*, 562-63.

¹³"Fixation requirement" is related to the notion of copyrightability of works. The U.S. Copyright Act is an example. See U.S. Copyright Act, Section 102 (a).

talized work which exists transitorily in the random access memory is not entitled to copyright protection. In addition, the work is transitorily read into the memory of a user's computer often merely as a result of the random functioning of a technical program; the situation is thus not "copying" because the action is not intentional on the part of the user. "Transitory copying" in the form of reading a work into a computer's random access memory results from, in most cases, activities concerning the user's private study, research, or self-entertainment, and hence falls within the scope of "fair use."¹⁴ Moreover, even if "transitory copying" were treated as "reproduction," detecting when the work is reproduced in this manner would be practically impossible. From the present author's perspective, all these justify disconnecting "transitory copying" in the technical sense and "reproduction" in the legal sense.

As for viewing, listening, and downloading, the first two require transitory copying while downloading is basically a process of storage,¹⁵ although all the acts involve making a "copy" of what has been stored in the computer system. As explained above, holding that "downloading" fulfills the requirements of being "fixed" and "tangible" is also controversial.

"Right of On-Line Transmission": "Right of Reproduction" or "Right of Transmission"?

In theory, "right of reproduction" (複製權 *fuzhi quan*) and "right of transmission" (傳播權 *chuanbo quan*)¹⁶ are two of the three notions central to any copyright regime.¹⁷ The right of reproduction serves to ensure copyright owners' control of protected works while the right of transmission centers around the author's right to control the process of disseminating his

¹⁴Professor Züeng Chengsi made a similar observation. See Zheng, *Zhishi chanquan fa*, 563.

¹⁵In practice, many ISPs allow free reading but disallow further downloading through orchestrated technical measures.

¹⁶In the legal documents, the two terms "transmission" and "communication" (*chuanshu*) are used interchangeably.

¹⁷The third is the "right of derivation" (*yanyi quan*). See Zheng Chengsi, *Banquan fa* (Copyright law), revised edition (Beijing: Zhongguo renmin daxue chubanshe, 1997), 151.

works, for example, through performance or broadcasting. In a broader sense, the right of reproduction embodies the right of transmission.¹⁸ This is reflected in certain copyright legislation, in which the right of reproduction is established in such a manner that some of the items of the right of reproduction and those of the right of transmission overlap.

Art. 10 (5) of the PRC Copyright Law is such an example. This article provides that the economic aspect of copyrights shall include "the right of exploitation and the right to remuneration, that is, the right of exploiting one's work by: reproduction; live performance; broadcasting; exhibition; distribution; making cinematographic, television, or video production; adaptation; translation; annotation; compilation; and the right of authorizing others to exploit one's work by the above-mentioned means and of receiving remuneration therefore." The provision is supplemented by Art. 52 of the Copyright Law,¹⁹ which defines "reproduction" as "the act of producing one or more copies of a work by printing, photocopying, copying, lithographing, making a sound or video recording, duplicating a photographic work, or by other means."²⁰

The PRC Copyright Law does not specifically establish the right of transmission. Nevertheless, the term "reproduction," which is legally interpreted so as to include some of the items of the transmission right, allows slightly different explanations to cover the transmission of copyrighted works in the traditional context.

¹⁸For an analysis of the relationship between the right of reproduction and the other two key rights, see *ibid.*, 151-206.

¹⁹Art. 5 (1) of the Regulations for the Implementation repeats the definition of "reproduction" given by the Copyright Law.

²⁰"By other means" is in fact a translation of "*deng fangshi*" in the official Chinese version of Art. 52 of the Copyright Law. In the Chinese language, "*deng*" can be either an exhaustive or nonexhaustive expression. Therefore, the word "*deng*" needs to be interpreted according to context. In fact, the cited translation of "*deng fangshi*" as "by other means" shows the preference for expansive interpretation of the phrase. The judgment of the case of *Wang Meng et al. v. the Shiji Hulian Communications Technology Corporation* favored such interpretation. See Cui Li, "Six Writers Finally Defeat the Shiji Hulian Communications Technology Corporation; Delegates of the People's Congress Invited for Appearance at the Court," *Zhongguo qingnian bao* (China Youth News) (Beijing), December 15, 1999, available at <dailynews.sina.com.cn/china/1999-12-15/42049.html>. Note that the author cites the reference "by other means" merely to comply with the well-established translation.

However, the failure in providing for the right of transmission might be dreadful in the digital context. For example, e-mails, letters from newsgroups, software, photographs, music, motion pictures on FTP sites, and web pages on the World Wide Web are made available to users by transmission over the Internet. Since the PRC Copyright Law fails to give direct reference to transmission, there is an opinion among those in judicial circles that the provisions concerning reproduction secure to the copyright owner control over virtually any reproduction.²¹ In their view, the PRC Copyright Law is flexible enough to be applied to future innovations. Art. 10 (5) of the PRC Copyright Law vests copyright owners with control over reproduction of their works while Art. 52 leaves room for further interpretation by using the reference "by other means." The task is then to define "reproduction" to include any appearance (regardless how fleeting) of a protected work in any computer as well as any transfer of that work to, from, or through any other computer, thereby enhancing the exclusive rights in the copyright bundle so far as to give the copyright owner the exclusive right to control transmission of any work in digitalized form.

In the eyes of the others who view the provisions concerning reproduction completely differently, the mere fact that Art. 10 (5) of the PRC Copyright Law and Art. 5 (1) of the Regulations for the Implementation fail to encompass any transmission right of the copyright owner in the digital context is already a target for attack and the grounds for change.²² For them, the reference to "producing one or more copies of a work" in the provisions is unsatisfactory since it fails to take into consideration the distinction of on-line transmission. Again, the inclusion of "or by other means" (等方式 *deng fangshi*) in Art. 5 (1) of the Regulations for the Implementation is too vaguely worded to be properly and uniformly applied to similar cases. Nevertheless, given that there are insufficient qualified professionals in the PRC copyright administration department (and in the judici-

²¹For example, in a tele-conference of the chief justices of the provincial-level superior people's courts, the chief justice of the PRC Supreme People's Court instructed his subordinates to that effect. Quoted in Aster Shang et al., "A Discussion about the Questions of On-Line Copyright" (in Chinese), available at <<http://www.8bcity.com/changshi/>>.

²²Xu Chao, "Some Considerations concerning the Revisions of the Copyright Law," *Zhuzuo-quan* (Copyright) (Beijing), 1999, no. 1:23-27.

ary in particular), the defect is probably a fatal one for the purpose of prohibiting copyright infringement and protecting copyrighted products in the digital environment. Moreover, the distinction between on-line and traditional transmission²³ makes it difficult for the right of reproduction embodied in the Copyright Law to cover the transmission merely by way of expansive interpretation of such methods as broadcasting.

Despite the different perceptions toward transmission, there exists a prevailing viewpoint among PRC copyright lawyers that commercial transmission shall be distinguished from the noncommercial. The reason for separating these two types does not seem to be rooted in the idea that the infant Internet service industry as a whole needs room for development, but rather lies more in the moral justification that public goods may be enhanced by favoring noncommercial transmission vis-à-vis commercial transmission. Understandably, for that purpose, an appropriate copyright regime shall be made to regulate commercial and noncommercial transmission differently.

New Approaches to "Fair Use": How Shall the Current Copyright Law Be Amended?

Each copyright regime establishes a limitation to the right of reproduction, usually described as "fair use." The intention of the "fair use" doctrine allows different explanations.²⁴ Noncommercial copying or transmission is often presumed to be a due limitation on the right of the copyright owner to reproduce his copyrighted works. The current PRC Copyright Law is no exception.²⁵

²³On-line transmission is different from broadcasting in that the former is basically on-demand transmission and proceeds in accordance with the demanded time and place of the service users; the latter proceeds according to the time and place predetermined by the service providers.

²⁴See Zheng Chengsi, *Banquan gongyue, banquan baohu he banquan maoyi* (Copyright treaties, copyright protection, and copyright trade) (Beijing: Zhongguo renmin daxue chubanshe, 1992), 118-21.

²⁵See Qingjiang Kong, "Protection of Intellectual Property Rights in China: The Perspective of a Chinese Lawyer," *Heidelberg Journal of International Law* 58, no. 1 (1998): 197.

Attention should thus be paid to the provision of Art. 22 (6) of the Copyright Law,²⁶ which is probably the most controversial among the provisions therein. This article allows for the reproduction of copyrighted products for "teaching or scientific purposes," thus triggering a debate between those who argue against copying for decent reasons and those who favor the legality of such copying.

Copyright owners would obviously prefer laws that maximize their own control over the works they produce. Indeed, the enhancement of the copyright owner's rights is without question in the public interest, since without strong copyright protection, there would be no information infrastructure. If authors and publishers cannot reliably control their works, they will decline to make them available at all. These individuals would clearly oppose the application of the "purpose" standard—which already exists in the printing context—to the digital environment.

However, the model is too simplistic. First, some argue that the new approach must deal with liabilities from a different perspective. Copyright owners whose works are downloaded onto the Internet can expect to reap much more than in the previous printing context,²⁷ especially given that the ISP must invest heavily to maintain the on-line service. Therefore, the rights of the copyright owners over their works transmitted on-line should be restricted. Second, history has demonstrated that many industries have prospered when sheltered from exceptions to copyright.²⁸ Expansive ex-

²⁶Art. 22 (6) provides: "Under the following circumstances, a work may be exploited without permission from, and without payment of remuneration to, the copyright owner, provided that the name of the author and the title of the work shall be mentioned and the other rights enjoyed by the copyright owner by virtue of this Law shall not be prejudiced: translation, or reproduction in a small quantity of copies, of a published work for use by teachers or scientific researchers, in classroom teaching or scientific research, provided that the translation or reproduction shall not be published or distributed."

²⁷Estimates hold that the on-line transmission of a work brings, for its author, economic returns several or even tens of times greater than when the work is merely placed into the market in print form. See Tao Xinliang, "A Consideration of Interest-Balancing concerning Protection of Intellectual Property Rights in the Internet Era" (in Chinese), quoted in Aster Shang, "A Theoretic Study and Case Briefing of On-Line Copyright Protection" (in Chinese), available at <<http://www8.bcity.com/changshi>>.

²⁸Player piano rolls became ubiquitous after courts ruled that they did not infringe upon the copyright of the underlying musical composition; phonograph records superseded both piano rolls and sheet music with the aid of the compulsory license for mechanical reproductions. The videotape rental business swept through almost every country shielded from

exploitation of reproduction rights of copyright owners may inhibit the infant PRC information industry. If the right of reproduction in the current copyright regime is expansively interpreted, those seeking to create a multimedia website would have to secure the following authorizations: the right to digitalize the copyrighted works, the right to place the digitalized works on the Internet server, the right to revise the works, the right to transmit the digitalized information, as well as related rights such as the rights relating to the production and video recordings and the right to authorize the on-line service users to view, listen to, and download the information. A typical example is a computer game software manufacturer that had to spend ten months negotiating copyright-related issues with five hundred copyright owners.²⁹

Third, an appropriate copyright regime must assure the availability of the next generation of consumer electronics and computer products. Any copyright legislation in the digital environment shall provide a mechanism to assure the continued vitality of the "fair use" privilege enjoyed by teachers, students, library patrons, and all other information users. In other words, an individual user's ordinary reading, viewing, or listening to an authorized copy of a work does not infringe upon the copyright owner's rights.

Having dealt with the needs of the on-line service industry and its users, we can turn to the potential liabilities of ISPs and on-line service users. PRC copyright lawyers generally agree that the liabilities of the ISPs and users are basically within the purview of the doctrine of liability of civil law. However, from the present author's point of view, traditional civil law might be inadequate to fully address the issue of the ISPs' liabilities. Since on-line service users are often unidentifiable and an ISP and its users often interact,³⁰ the ISP often finds difficulty in holding individual users respon-

copyright liability by the "first sale" doctrine. Even an erroneous assumption of copyright immunity can stimulate a nascent industry. The commercial photocopy shop prospered in part because of the university course pack business made possible by a supposed "fair use" privilege.

²⁹Quoted in Sun Tiecheng, *Jisuanji he falü* (Computer and law) (Beijing: Falü chubanshe, 1998), 225.

³⁰The user can at any time input any contents into the existing data that the ISP has provided,

sible for the content of their sites, let alone screening and preexcluding these contents for materials that may infringe upon the copyright of a third party. In this context, unfair to the ISP and detrimental to the development of the Internet service industry would be to impose liabilities on the ISP based on the normal doctrine of liability for negligence. In view of the needs resulting from the further development of the on-line service industry, desirable might therefore be to introduce an additional approach to dealing with the new issue.³¹

Therefore, a well-settled copyright regime as a whole should carefully balance the goals of strong protection and incentives for innovation on the one hand, and the goals of interoperability, fair competition, and open systems on the other. In this regard, one must be mindful of the indisputable fact that copyrights are limited monopolies created by copyright laws which undergo an unending evolutionary process of interpretation, application, and revision and that improper interpretation, application, and revision of the copyright laws could stifle competition and thereby harm consumer welfare. Important is to maintain the correct balance between protection and competition.

Some Options for Revisions to the Copyright Law

Most agree that there is no need for new copyright legislation in the PRC; the existing rules only need alteration. However, legislators and administrators are divided as to how to adapt the PRC copyright regime to the digital environment. In an attempt to synthesize different opinions, the author suggests that the current copyright regime may be amended with the following options in mind.

One possibility is to introduce a new type of right for copyright

but the ISP can also delete the unsolicited addition. Some lawyers described the unique phenomenon of the on-line service with the newly-coined terms such as "uncertainty" and "instantability." See, for example, Aster et al., cited in note 21 above.

³¹ As a matter of fact, even the Digital Millennium Copyright Act of the United States, which is regarded as copyright owner-friendly, limits, in a general manner, copyright infringement liability of ISPs simply to transmitting information over the Internet.

owners: the right to communicate to the public—a term used in the World Intellectual Property Organization (WIPO) Copyright Treaty (1996)³² which establishes the exclusive right of the copyright owner to digitalize and transmit his works. For the proponents, this option would allow copyright legislation to follow "world trends." The PRC has missed every opportunity to keep pace with the developments in international legislation on intellectual property. Given the current knowledge economy, the PRC cannot afford to miss out on the new opportunity to participate in the formulation of a new wave of copyright rules.³³ Obviously, proponents would like to see copyright legislation develop at the same pace throughout the world and they agree that the WIPO Copyright Treaty has provided a model to follow.

A second option is to streamline the types of rights of reproduction. The current PRC copyright regime sees reproduction as being separate from broadcasting and distribution.³⁴ In the digital context, distinguishing one from another becomes increasingly difficult. Therefore, no longer appropriate is to distinguish between them. A possible approach is to substitute the differentiated types of copyright with the "right to reproduce and use" (再現並使用權 *zaixian bing shiyong quan*).³⁵

Another option is to disconnect reproduction from the form of the

³²Art. 8 of the WIPO Copyright Treaty provides: "... authors of literary and artistic works shall enjoy the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them." The Agreed Statement concerning Art. 8 further explains "[i]t is understood that the mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Treaty or the Berne Convention."

³³Jiang Zhipei, deputy director of the Tribunal for Intellectual Property Cases of the PRC Supreme People's Court, also holds this viewpoint. See Liu Haifen, "The Internet Era: Judicial Protection Meets Challenge," *Zhongguo lishi* (Chinese Lawyers) (Beijing) 105, no. 7 (1999): 62.

³⁴Art. 5 of the Regulations for the Implementation defines "broadcasting," "distribution," and "reproduction." In contrast to "reproduction," "broadcasting" means "the communication of works through wireless radio waves or cable television system" and "distribution" is defined as "the provision of a certain number of copies of a work to the public through selling, renting, or other means, insofar as the said number of copies satisfy the reasonable needs of the public."

³⁵See Liu, "The Internet Era," 63.

medium through which the copied work exists. A fourth option is to introduce and perfect the rules of tort in the current PRC Copyright Law. The purpose is to protect copyrighted works by providing that the act of "communicating a copyrighted work of others without the permission of the copyright owner constitutes infringement."³⁶ Apparently the proponents of this option seek to prevent people from transmitting works copyrighted by others over the Internet. In contrast with the "right to communicate to the public," the protection that this option would afford is weaker, since the tort law does not guarantee the right of the copyright owner to communicate his copyrighted work.

Another option is to weave a net for the protection of copyrights in the digital context. For the proponents, protection of copyrighted works through copyright law is not sufficient in the digital environment; contractual protection and protection through technical means are also necessary.³⁷ Note that some even propose to provide a new type of right to the copyright owner: the right to technical protection.³⁸ This approach would be consistent with the provisions of the WIPO Copyright Treaty.³⁹

Regarding legislation technique, the state of today's major copyright laws regarding reproduction rights is less than clear. First, the distribution right should be amended to reflect the idea that transmissions of copies of a work to the public fall within the exclusive distribution right of the copyright owner. Second, an amendment is required to clearly state that the transmission of a particular work infringes upon the copyright owner's exclusive importation rights. Third, the "first sale" doctrine⁴⁰ should be

³⁶Xue Hong revealed that the drafters of a previous version of the amendment to the current Copyright Law held this viewpoint. However, the approach was discarded later. See *ibid*.

³⁷Zheng Chengsi is a proponent of this approach. See *ibid*.

³⁸Shou Bu and Xue Hong share the viewpoint. See *ibid*.

³⁹Art. 11 of the WIPO Copyright Treaty provides: "Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law."

⁴⁰According to the "first sale" doctrine, the owner of a particular copy lawfully procured, or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of that copy. Cf. note 28 above.

repealed insofar as it might apply to transmissions. Finally, the recommended amendments should leave room for forestalling the emergence of other perceived threats to copyright owners' rights.

New Developments in the Amendment of the Copyright Law

In December 1998, the PRC's National People's Congress (NPC) examined a draft amendment to the Copyright Law. Thereafter, the draft amendment has been discussed nationwide, especially among national and local legislators, copyright administrators, and lawyers. However, due to its complexity and the involvement of numerous interest groups, the draft amendment will require additional time before being finally passed by the NPC.

The aims of the amendment are stated as follows:

1. To narrow or even eliminate the gap between the current copyright regime and international copyright treaties
2. To prepare for the establishment of collective administrative agencies for copyright protection⁴¹
3. To make available to copyright administrations appropriate mechanisms for the enforcement of copyrights
4. To provide effective protection to the copyright owners while promoting the use of databanks, multimedia, and the Internet⁴²

The major objective is to adapt the current PRC copyright regime to the digital environment, a challenging task for the drafters.

From the author's point of view, the PRC Copyright Law needs to be

⁴¹Collective administration for copyright protection is regarded as being beneficial to copyright owners and users of copyrighted works. With respect to on-line copyrighted works, collective administration would, inter alia, provide an organized force for copyright protection; for the ISPs, collective administration would simplify the procedures for licensing of the copyrighted works.

⁴²Shen Rengan, "Considerations concerning the Revisions of the Current Copyright Law," *Zhuzuoquan*, 1999, no. 2:19-26.

amended in the following respects:

1. The term "digitalization" should be incorporated into Art. 52 of the Copyright Law in order to supplement the interpretation of "reproduction."
2. The "right of transmission" should be added to the copyright bundle embodied in Art. 10 of the current Copyright Law; i.e. the right of transmission or communication to the public, either by wire or wireless means, including "the making available to the public of works in a way that the members of the public may access the work from a place and at a time individually chosen by them."⁴³
3. In order to facilitate using works in a manner that conforms to copyright protection, advisable is to expand the scope of compulsory license embodied in Art. 22 of the Copyright Law by way of collective administration of copyrights. The competent agency for collective administration of copyrights⁴⁴ should be authorized by the amendment to license the on-line use of the copyrighted works on behalf of the copyright owners.
4. The amendment should introduce special provisions to deal with the liabilities of ISPs, a move which would supplement the relevant provisions of the General Principles of Civil Law.
5. Provisions concerning "fair use" (such as for "teaching or scientific purposes") should be suitably maintained in the process of amending the current Copyright Law.⁴⁵

Conclusion

The ease of digital copying is likely to pose a profound threat to copy-

⁴³Here the author quotes the reference used by the WIPO Copyright Treaty. See Art. 8 of the WIPO Copyright Treaty.

⁴⁴The China Center for Copyright Protection is currently a nongovernmental organization of this kind.

⁴⁵In this respect, some scholars (Xue Hong, for example) favor this approach. See Liu, "The Internet Era," 63.

rights. This danger calls for the regulation of copying in the digital context. Fortunately, PRC copyright legislators, administrators, and lawyers concerned with the development of the copyright regime indisputably agree that in this fast-changing digital era, copyright law has to keep pace with technology.

The 1990 PRC Copyright Law is now being interpreted with a view to covering digital copying, with digital copying being identified as copying or "reproduction." Nevertheless, the same technological miracles that pose threats to copyright protection have also served up some unanticipated windfalls for the copyright owner. The reproduction right is evolving into something more encompassing than that envisioned by the current copyright regime that has always given copyright owners some form of exclusive reproduction rights.

The author argues for a modest revision toward a well-balanced copyright regime rather than allowing a power grab by copyright owners. Such new efforts should repair the unintended damage that the passage of time and the growth of technology have had on the Copyright Law. As far as protecting copyrights in the digital environment is concerned, the old bottle—the current PRC copyright regime, if properly amended—will surely be able to hold new wine.

