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Comparative Research on Reproduction Concept in US and China Copyright Laws

ZHENG Derong^{[a],*}; WANG Zhiyuan^[a]; WANG Hui^[a]

^[a]School of Management, University of Science and Technology of China, Hefei, China.

*Corresponding author.

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Abstract

Relied on the development of reproducing technology, copyright law occurs and develops, and the right to reproduction is considered to be a key right for the owner of copyright right. However, with the rapid development of related technologies, changes have also taken place in the concept of reproduction. On a systematical analysis of the differences in reproduction right between US and China copyright law, a history and a forecasting view have been briefly outlined. The emphasis of the paper is placed on how to respond, and how to get a dynamic adjustment in the concept of reproduction while facing the impact of network communication by contrasting US with China copyright laws. And I also discuss the possible convergent characters of reproduction concept with each other. On the basis of analyzing and comparing, I hope to give a comparable understanding of reproduction concept in copyright laws of US and China, and suggest the needed reforms in the new run of revision of China Copyright Law.

Key words: Reproduction; Concept; Copyright law; US and China

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INTRODUCTION

Copyright law purposes to protect the works, but the law did not occur while the first works being produced until

the movable type printing technology emerged. Then the reproducing was widely applied, and copyright law was gradually established and developed (Guo, 2001). It is no exaggeration to say, relied on the development of reproducing technology, copyright law occurs and develops, and the reproduction right is a key right for the owner of copyright right. However, with the rapid development of technology, fantastic changes have also taken place in the concept of reproduction.

As a great nation with tremendous intellectual property rights, United States' economic level and whole legal advancement are good examples of other countries. In the aspects of legislation and enforcement of intellectual property, especially in copyright protection and implementation, United States has accumulated lots of valuable experience as well, and these experiences have important references for China. As a fast developing country, China is increasingly integrated into the world mainstream, and it keenly needs the experiences from US too. Because of the administering differences between United States and China, the copyright system has also some significant distinctions. Though China has a central level of legislation and an effective law enforcement system nowadays, there are still some specific problems to be solved concerning copyright law. This paper tries to take the reproduction concept as the clue to analyze the copyright evolution process, and the changing trends of copyright law in United States and China. Hoping to play a role of "from one small clue, one can see what is coming", I try to compare the Sino-American copyright systems, meanwhile to provide some suggestions for the perfection of China copyright law presently or in the near future.

1. A GLANCE AT CHINA COPYRIGHT LAW SYSTEM

Chinese modern copyright system was born in the opening of the twentieth Century. In 1910, the Qing Dynasty

Government promulgated the “Copyright Law of the Qing Dynasty”, which is the first copyright law to protect copyright right in the whole history of China. Although the law was formulated by the feudal government, it was painfully accomplished after several revisions of modeling on the most authoritative international copyright convention, “Berne Convention for the Protection of Literary and Artistic Works”, and referred to many nations, including US copyright law. “Copyright Law of the Qing Dynasty” initially established the modern Chinese copyright system, which had a significant effect to its successor, The Republic of China copyright legislation.

After the founding of The People’s Republic of China, Chinese copyright legislation obtained fast development after many setbacks (However, based on Chinese specific historical reasons, Taiwan, Hong Kong and Macao’s copyright law exist in overall China side by side). In 1950, The First National Publishing Conference had made a resolution on copyright issues. The resolution announced to respect the rights of the authors and proposed remuneration, etc. In 1958 and then 1959, China successively promulgated the important fields in authors’ remuneration and so on. However, the arrangement was interrupted by The Cultural Revolution. It didn’t restore until after The Cultural Revolution, especially in 1986, “General Principles of the Civil Law of the People’s Republic of China” regarded the intellectual property as the civil rights to be protected for the first time. In 1990, The Fifteenth Meeting of the Seventh National People’s Congress examined and passed “The Copyright Law of the People’s Republic of China”, and the law have put into effect since 1991. In 1992, China successfully joined the “Berne Convention for the Protection of Literary and Artistic Works”. In 2001, The Twenty-Fourth Meeting of The Ninth Standing Committee of The National People’s Congress approved the amendment to “The Copyright Law of the People’s Republic of China”. In 2002, China’s Central Government announced and implemented “Implementing Regulations of the Copyright Law of the People’s Republic of China”. Since then, Chinese modern copyright law was formally established and gradually perfected. In order to adapt to the new situation, in 2010, The Thirteenth Meeting of the Eleventh Standing Committee of the National People’s Congress made the second revision of the “The Copyright Law of the People’s Republic of China”.

Furthermore, with the development of computer technology, for solving the severe piracy problems and dealing with the sustaining accusations from the arrangement of World Trade Organization (“The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)”), China has promulgated a series of laws and regulations to adjust the social and economic relations, such as “Provisions on the Implementation of the International Copyright Treaties”, “Regulations on the Protection of Computer

Software”, “Regulations on Publication Administration”, “Regulations on Administration of Audio and Video Products”, etc.. After the development of more than 20 years, Chinese copyright law system has gradually been maturing. It can be said, the process of Chinese copyright system construction is a process to combine the international accepted right and obligations of the copyright ruling with the actual situation of China, and it is also a process of paralleling to copyright protection by the international advanced standards.

2. THE EVOLUTION OF REPRODUCTION CONCEPT IN US COPYRIGHT LAW

Since the copyright law system established, it has experienced three major technological innovations. First is the invention of the printing, which provides a basic condition for reproduction, led to the emergence of modern copyright law. Second is the evolving of the electronic technology, which made a series of important changes inside of the copyright law system. Third is the development of the digital technology and network, which have brought unprecedented impact to the copyright system, and continues.

The first copyright law in the United States began in 1790. According to the above division of the technology span, it experienced printing copyright, electronic copyright and digital rights. As a core right in the copyright law, the traditional reproduction right is the proprietary rights excluding the others to copy the works for commercial purposes, and the protection object must be a fixed tangible work. However, in the digital environment, information transmission channels are digitized. In addition, the multi-networks fusion of communication, broadcasting television and computer networks makes the copyright protection more and more complex. Generally, because of the substantial similarity in mechanical printing and simulation technique, the evolution of reproduction concept can be divided into traditional technology and digital technology eras.

2.1 The Reproduction Concept of US Copyright Law in Traditional Technology Condition

Before the invention of printing technology, reproducing mainly relied on manual transcription, it was difficult to achieve the commercial purposes, and it wasn’t necessary to design the copyright law to control the illegal reproduction. However, due to the development of printing technologies, especially the emergence of mechanized (industrialized) print machine, the difficulties and costs of reproduction were greatly reduced, thus it made the works as commercial goods. At the same time, that spawned the concept of reproduction in copyright law.

US copyright law use summarized style to define the definition of works, copyright, reproduction. Firstly, the provision of “works” is in p.102. Secondly, the provision of “copyright” is in p.106. Thirdly, the provision about

“reproduction” is in p.101 as “Copies” are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. The term “copies” includes the material object, other than a phonorecord, in which the work is first fixed. (Copyright law of the United States of America and related laws contained in title 17 of the United States code). In the traditional sense, the US copyright laws not only stressed the reproduction is fixed on a tangible carrier, but also defined the device, instruments or methods as “the device, instruments or methods are now known or later developed”. All of these reflect the “neutrality of technology” in US Copyright law.

2.2 The Reproduction Concept in US Copyright Law in Digital Technology Condition

In the environment of network information transmission technology, the reproduction in copyright law is encountered new challenges. On the one hand, it is so difficult to control reproduction effectively for the owner of copyright that it leaves loopholes and hidden dangers for the emergence of reproduction infringement. On the other hand, many kinds of reproductions, such as automatic reproduction, temporary reproduction are generated automatically under the computer and network situation. If considering all of these sorts of reproductions into traditional copyright approval arena, we should get permissions one by one from every copyright owner. The doings would seriously affect the speed and quality of transmission, and the strange approval arrangement would become the obstacle of network information flow. Copyright law should seek answers for the impact and problems.

In December 1998, United States issued “Digital Millennium Copyright Act (DMCA)”, and this is the representative legislation for copyright industry in digital age. The Act makes the scalable interpretation of “The World Intellectual Property Organization Copyright Treaty”, for the protected works in the electronic media stored in digital form. First, the Act turns the temporary reproduction in the computer memory into a part of the reproduction right. Meanwhile, according to the characteristics of the network transmission, it increases the various restrictions and rules the rational use system and network service providers’ responsibility. Though the law doesn’t define the scope of reproduction right clearly, the law has actually confirmed the reproduction right is an extensive rights including the temporary reproduction. As its reference, in May 1999, the European Commission unveiled a revised “Amended Proposal for a Directive of the European Parliament and of the Council on the Harmonization of Certain Aspects of Copyright and Related Rights in the Information Society”, it sketched the scope of reproduction right very broadly, including in any

manner or form, the whole or part, directly or indirectly, temporary or permanent reproduction (Hong, 2001). The reproduction concept in US has been amplified gradually.

3. TRANSPLANTATION OF REPRODUCTION CONCEPT IN CHINA COPYRIGHT LAW

3.1 The Transplantation Process of Reproduction Concept in China Copyright Law

From the founding of the People’s Republic of China (1949) to 1990, China copyright law system experienced a process of transplantation which could be divided into three stages.

The first stage (1950 to 1957). This stage did not formulate the specific law for copyright protection. In practice, China protected the rights of the authors mainly through policy documents issued by Ministry of Culture and Press and Publication Administration Department, so there was no concept of reproduction in the sense of so-called copyright law.

The second stage (1958 to the end of The Cultural Revolution, 1976). In 1958 and 1959, the Central Government introduced the files according to authors’ royalties. However, it was virtually wasted in The Cultural Revolution until its end, and there was also no concept of reproduction.

The third stage (1979 to 1990). It is a stage not only of the current copyright law drafting and application, but also of transplanting the concept with reference to international conventions and copyright laws in developed countries. After China’s Reform and Opening-up Policy in 1978, copyright protection became one of the issues of the Sino-US Trade Negotiations. The copyright legislation began on the law design agenda, “General Principles of the Civil Law of the People’s Republic of China”(in 1986) made the copyright right is an important civil right included in the scope of protection of intellectual property rights. Article 94 of “General Principles of the Civil Law of the People’s Republic of China” clearly stipulates as, “Citizens and legal persons shall enjoy rights of authorship (copyrights) and shall be entitled to sign their names as authors, issue and publish their works and obtain remuneration in accordance with the law.” In September 1990, The Fifteenth Standing Committee of The Seventh National People’s Congress passed “Copyright Law of the People’s Republic of China”, which formally established the concept of reproduction in modern sense of copyright law, and led the legal protection of copyright in Chinese Mainland into a new phase.

After the first copyright law’s going into effect, in 1992, China has become the member of “Berne Convention for the Protection of Literary and Artistic Works” and “Universal Copyright Convention”. In 1993, it became the member of “The Convention for the Protection of Producers of Phonograms Against

Unauthorized Duplication of Their Phonograms”, and especially on December 11, 2001 joined the World Trade Organization’s “The Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)”. In 2007, it joined “World Intellectual Property Organization Copyright Treaty” and “World Intellectual Property Organization Performance and Phonograms Treaty”. The main provisions of Chinese Mainland copyright law are consistent with the international copyright conventions, and the legislation level is somewhat comparable with US and the other major western countries.

3.2 The Status Quo of Reproduction Concept in Copyright Law of People’s Republic of China

In 1990, Article 52 of the supplementary provisions of “Copyright Law of the People’s Republic of China” (1990) formulated two special provisions. The first provision as, the term “reproduction” as used in this Law shall mean the act of producing one or more copies of a work by printing, photocopying, copying, lithographing, duplicating a recording, or duplicating a photographic work, or by other means. The second provision as, The term “reproduction” as used in this Law shall not cover the construction or the manufacture of industrial products on the basis of drawings of engineering designs and product designs, and descriptions thereof. In 2001, the definition of reproduction in the amendment of “Copyright Law of the People’s Republic of China” (as last amended on 27 October 2001) is basically equal to its former Article 52, except for deleting the *copying*. Because the copying is very complex, lots of copying is reproductions, and others as copying are creation, it is necessary to treat them differently, rather than considering all of them are reproductions (Hong, 2001). In 2010, the second revision of “Copyright Law of the People’s Republic of China” (as last amended on February 26, 2010) made the same statement. Therefore, at present stage, the definition of reproduction in China copyright law refers to “the right to produce one or more copies of a work by printing, photocopying, lithographing, making a sound recording or video recording, duplicating a recording, or duplicating a photographic work or by any other means”, and reproduction right is the right mentioned above.

4. THE RESPONSES OF REPRODUCTION CONCEPT IN US AND CHINA WHILE FACED WITH NETWORK INFORMATION TRANSMISSION TECHNOLOGIES’ IMPACT

4.1 The Impact of Network Information Transmission Technologies to Reproduction Concept

Since 1990s, the rise of digital technology threw down the challenges to the copyright law system which was

previously based on simulation technology. Under the simulation environment, the copies are easy to be distorted, and the quality is always worse than the original ones, hence, the exclusive rights endowed by the law and the specific technical conditions lead the works to be materialized as single or small amounts of goods to sell. At the same time, controlling the reproduction doesn’t interfere with works to routine using, thereby, it is easy to realize the objectives set by the copyright system for balancing private rights and public interest. However, the network information transmission technologies’ revolution fundamentally changed the way that people access to information. All of works existing in digital signals, the digital signals could be easily copied, distributed without any complicated material carriers. Digital network technology triggers the copyright protection problems as well as it provides convenience for people to obtain information with extremely high fidelity. Because this kind of technology is so convenient for people to copy that almost everyone will be the potential duplication of works, whether it’s legal or not (National research council committee on intellectual property rights and emerging information infrastructure, 2000). In cyber space, network information transmission technology is the most profound impact since the copyright law established, and all of the areas of traditional copyright law are being challenged.

By the background of network information transmission technologies, the holders or other persons could easily upload any works into the network to create digital works. Because of the technological arrangement, the works are reproduced and linked by internet system automatically, and then the readers could copy the works by downloading into their computer or other storages. The right restrictions of digital works, temporary reproduction and (private) reproduction are the three basic problems (National research council committee on intellectual property rights and emerging information infrastructure, 2000), so it is unable to avoid the unauthorized reproduction paths in the network environment. Under the network information transmission technology conditions, various forms of temporary or occasional, incidental reproduction are inevitable and widespread, but the traditional concept of reproduction does not include various forms of temporary or accidental, incidental reproduction.

4.2 Responses in US Copyright Law

There is no doubt that under the network information transmission technology environment, the concept of reproduction is difficult to define accurately and the form of reproduction tends to be more diversified. In 1995, “Intellectual Property and National Information Infrastructure” The Report of the Working Group on Intellectual Property Rights pointed out that, “for instance, activities such as loading a work into a computer, scanning a printed work into a digital file, uploading or downloading a work between a user’s computer and a

BBS or other server, and transmitting a work from one computer to another may be infringements (in those cases, of the reproduction right).” So even without the physical carrier to create a stable reproduction, while the users browsing or listening to the works, the works will be inevitably reproduced into the users’ computer memory from network, this temporary reproduction is also a reproduction behavior.

However, the use of the works by temporary reproduction is duplicating works as the premise. And the strict controlling of the reproduction may mean the manipulating of the works, there is undoubtedly a serious side effect to public interest. Because of this, National Research Council Committee on Intellectual Property Rights and Emerging Information Infrastructure in the report “The Digital Dilemma: Intellectual Property in the Information Age” launched in 2000, put forward the idea giving up the reproduction concepts to rebuild a new copyright protection mode (National Research Council Committee on Intellectual Property Rights and Emerging Information Infrastructure, 2000). But the Committee has not put forward a specific reconstruction scheme, and some scholars respectively proposed the new copyright protection modes based on “commercial exploitation rights” and “From Having Copies to Experiencing Works”.

Columbia University Professor Ginsburg pointed out, “an access right” will replace the “reproduction right” as the fundamental rights in copyright law. Works while using model of transformation from hard copy to direct experiencing, so controlling the obtaining rights of others to works from the copyright owners has a pivotal position. In American academia, copyright whether it should contain “an access right” has increasingly become a hot topic, because it is related to human rights, such as the freedom of expression. On the other hand, University of Michigan Professor Litman has put forward the mode of “exclusive right of commercial exploitation of a work” instead of “reproduction rights”, that is, copyright law should grant the proprietary right of their works for the purpose of commercial exploitation and utilization. Accordingly, copyright law should change to the existing legislation mode focusing on reproduction behavior as well, and establish a new copyright system on the basis of a clear distinction between commercial and non-commercial use of the work.

4.3 Responses in China Copyright Law

In the existing copyright law, “Copyright Law of the People’s Republic of China” (as last amended on February 26, 2010), combined the cited and summarized style to define the reproduction right. Reproduction right refers to “the right of reproduction, that is, the right to produce one or more copies of a work by printing, photocopying, lithographing, making a sound recording or video recording duplicating a recording, or duplicating a photographic work, or by other means”. But the list

of these types of reproduction behavior still belongs to permanent reproduction, obviously, the copyright law doesn’t include the temporary reproduction after two amended versions. The definition of the reproduction right in “Regulations on the Protection of Computer Software” as, “the right of reproduction, that is, the right to produce one or more copies of the software”, is too simple. The temporary reproduction whether belongs to the reproduction behavior is indeterminate. Meanwhile, China’s “Regulation on Protection of the Right to Network Dissemination of Information” avoided the demarcation of permanent & temporary reproduction. Therefore, some scholars have explained there is no concept of temporary reproduction in Chinese Mainland.

Aiming at dealing with this dilemma, some scholars in China pointed out, in the era of information network, transmission is more important than reproduction, and there is greater significance of controlling transmission rather than reproduction. Therefore, in the field of network information transmission, copyright law needs to be repositioned. China should adjust the law’s central idea of preventing illegal reproducing to illegal spreading publicly. In theory, reproduction merely will not be harmful to the copyright right. One of the necessary actions causes the copyright infringement is to issue or spread the reproductions. Theoretically, neither temporary reproducing nor private or digital reproducing infringe the copyright owners’ right of transmission in common. Article 10 of “Copyright Law of the People’s Republic of China” (as last amended on February 26, 2010) shows the right of reproduction and distribution are coordinate, and the reproduction right is prior to distribution, which reflects the traditional copyright protection practice and theory on reproduction rights as the core of legislation. Furthermore, the subsequent “Regulation on Protection of the Right to Network Dissemination of Information” showed legislators have realized that transmission should be one of the copyright core components under the condition of network information transmission technology. However, I cannot help asking, could the right of transmission in Chinese Mainland tolerate the temporary reproduction right? And so far, under the condition of the cloud computing network technology, how to deal with the new reproduction type?

5. REPRODUCTION CONCEPT AS THE KEY FACTOR FOR US AND CHINA COPYRIGHT PROTECTING AND VALUE MINING

Needless to say, network information transmission technologies have brought an unprecedented impact on copyright law, but they haven’t been able to change the “right of reproduction state-centric theory”. Some people

still believe “in the network environment, the right of reproduction is still the basis of copyright owners to exploit their rights” (Hong, 2001). Though some scholars have pointed out, with the right that historically has been the “core” right of the copyright owner – the right to reproduce, and authorize others to reproduce, but the impact of this (technological) change in the statutory language was felt almost immediately (Julie et al., 2003). No matter how the reproduction right mode is, whether as the traditional copyright law as China’s, or as the “exclusive right of commercial exploitation of a work”, or as “an access right” put forward newly, all of their aims are letting copyright protected when the users access to and use the copies, in order to realize the value and interests of the copyright, which is the invariant theoretical view about reproduction right as the core position in academia.

Some scholars have pointed out, in the traditional copyright law theory system, the reproduction right as its foundation is a prerequisite of its economic condition, technical background and legislation. In the era of simulation technology, reproducing behavior generally has a clear intention and is easily identified, which usually constitute the foreboding of infringement. Therefore, controlling reproduction has become an effective method for copyright protection (Peng, 2005). However, the scope of the effectiveness of the reproduction right is not constant. For balancing the interests between copyright owners and the public, as technology continuously changes, the history of reproduction right development is also known as the expansion history of reproduction right enjoyed by the copyright owners. Under the environment of network information transmission technology, the range of reproduction right validity is always difficult to reach an agreement in people’s mind. That is largely because, in this environment, the agreeing foundation seems to disappear, the interests balancing relationship which is the pursuit by the copyright law cannot be easily achieved by the adjustment of the range of reproduction right. So it is necessary to re-examine the traditional reproduction right mode in China.

In fact, in my opinion, the principle of interest balance is the essence of the copyright law. On the one hand, it requires the greatest extent possible to provide incentives for creators, and on the other hand, it makes the knowledge benefit to the public as much as possible. In other words, only combining the exclusive right for the copyright owners with taking into account the interests of the public can the copyright law promote the sustainable development of creation, therefore, the development trend of the copyright law under the network information transmission technology environment must still include “fair use” principle, for balancing the interests between authors (copyright owner) and users, so as to realize interests equilibrium among copyright protection, information communication and inspiring creation, etc..

6. SEEKING THE CONVERGENCE OF REPRODUCTION CONCEPT IN US & CHINA COPYRIGHT LAW UNDER NEW SITUATION

Legal convergence refers to the laws of different countries, along with the development of the society needs, and based on the growing international exchanges, gradually absorb and permeate each other for tending to be close or even consistent. With narrowing of the legislative base and environmental differences in copyright law, it is increasingly obvious that the tendency of the worldwide law develops accordance. This is not an accidental phenomenon, but the manifestation of looking at ourselves, the needs of times, and every nation’s common interest demands. The US copyright law was developed earlier and somewhat more advanced than others as the piracy phenomena are rare in US, so China also has taken example by US experiences in copyright legislation. In the recent development stage, the US and China copyright systems have more and more similarity (though there is a clear difference in temporary reproduction between US and China).

Interestingly, Professor Ginsburg’s so-called “an access right” (Jane, 2003) has a similar place with the “Information Network Transmission Right” in China copyright law. Actually, when facing with the common network information environment, the concept of reproduction in US and China copyright law must exhibit a certain degree of convergence. I deem that if we followed the definition of reproduction right, Article 10 in the existing China copyright law, it is not difficult to enlarge the definition of reproduction right as “the right of reproduction, that is, the right to produce one or more copies of a work by printing, photocopying, lithographing, making a sound recording or video recording duplicating a recording, or duplicating a photographic work, or by other means, whether direct, indirect, permanent or temporary”, though China insists on the concept of traditional reproduction. While reviewing US provision in §101, obviously, there is a significant overlap between them, but where is the convergence?

CONCLUSION AND RECOMMENDATION

Through comprehensive comparative analysis, the concept of reproduction in the history of the evolution of US and China copyright laws show, in the era of network information transmission technology, how to demarcate the equilibrium relationship between creators (copyright owners) and users is still a fundamental question to be solved. Even if we don’t give up the concept of reproduction in traditional copyright law, we should examine carefully from the perspective of promoting the

spread of network information, in order to regulate the circulation and transaction of copyright rights and related products under the new environment.

Just as Professor Michael J. Madison considered that although creativity should not be excluded from copyright, copyright should be conceived primarily as a system for producing, distributing, conserving, sharing, and ensuring access to knowledge. (Michael, 2010) There is no doubt that seeking the new connotation of the reproduction under the era of network information transmission is a fundamental work, based on this, I suggest that in the new round or incoming amendment of "Copyright Law of the People's Republic of China", related legislators and experts should seriously reflect on the concept of reproduction, and make the proper responses to the new situation and the future development trend.

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