

Copyright and software protection: is it working in China?

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With the 2008 Beijing Olympic Games quickly approaching, intellectual property rights ("IPRs") protection in China is becoming an ever more important issue.¹ From 1985 to 1994, China's trade with the rest of the world increased to more than USD 50 billion and the Chinese economy is currently expanding at a rate of 12 percent annually.²

There has been an increasing focus, by the US and other developed countries, on IPR protection in relation to computer software and audio-visual products in China. The Chinese government's copyright and software protection law reforms have not stemmed all pirated computer software, Video CDs and DVDs, which still enter the Chinese market to the detriment of the US and other developed countries' software and entertainment industries. The debate about IPRs protection in China was highlighted in relation to China's WTO Accession in December 2001.

The successful implementation and further development of China's intellectual property laws will enhance foreign investment and technology transfer, and help China realise its objective of playing a more significant role in the world economy.

In this article, the author will review the history of IPRs protection in China. This is followed by an assessment of the reform of Chinese intellectual property laws with a particular focus on the protection of copyright in computer software and audio visual material and a review of the social, economic and political factors impacting on intellectual property laws in China.

1 The history of the reform of intellectual property laws in China

1.1 Early attempts at intellectual property laws in China

Prior to the 20th Century, China did not have a comprehensive IPRs protection regime. There were ad hoc laws, which restricted the reproduction of literary works so as to control the dissemination of ideas and maintain the stability of the Chinese imperial regime.³

In the first half of the 20th Century, China attempted to introduce intellectual property regimes.⁴ With the establishment of the People's Republic of China by the Chinese Communist Party, the government embarked upon a socialist command economy, in which notions of intellectual property or private property became meaningless.⁵

1.2 Open-door policy and agreement with the US (1979)

With the death of Mao and Deng Xiaoping entering into power in China, China adopted an "open door" policy, re-opening its markets and allowing its people to own limited private property.⁶

In 1979, China entered into the Agreement on Trade Relations between the United States of America and the People's Republic of China ("the 1979 Agreement"). The 1979 Agreement required both parties to provide each other's nationals with a corresponding level of IPRs.⁷

In accordance with the 1979 Agreement, China became a member of the World Intellectual Property Organisation ("WIPO") in 1980 and acceded to the Paris Convention for the Protection of Industrial Property in 1984 ("the Paris Convention"). China

also enacted a *Trademark Law* in 1982 ("Trademark Law") and a *Patent Law* in 1984 ("Patent Law"). China provided authors and inventors with limited IPRs protection.⁸

China also enacted a new copyright law ("Copyright Law") and enacted new implementing regulations in 1990. A separate set of computer software regulations were enacted by China in 1991.⁹ Clearly, these were significant efforts, given China's size and history.

1.3 Sino-American Memorandum of Understanding (1992)

The US Government commenced a Section 301 investigation on 26 April 1991 in relation to the US view of lax IPRs protection in China.¹⁰ The United States threatened to impose retaliatory tariffs of \$1.5 billion on Chinese products. China responded with counter-sanctions on American commodities. Hours prior to the imposition of trade sanctions, the two countries reached agreement and signed the *Memorandum of Understanding between China and the United States on the Protection of Intellectual Property* ("the 1992 MOU"), to prevent a trade war between the two countries.¹¹

Pursuant to the 1992 MOU, China amended the Patent Law, promulgated new patent regulations and acceded to the Patent Co-operation Treaty.¹² China also acceded to the Berne Convention for the Protection of Literary and Artistic Works ("the Berne Convention"), the Universal Copyright Convention, and ratified the Geneva Convention for the Protection of Producers of Phonograms Against Unauthorised Duplication of their Phonograms in 1992.¹³

In 1992, the Chinese Government amended the Copyright Law and issued the Rules for Implementing International Copyright Treaties ("the

ICT Provisions"). The ICT Provisions removed some inconsistencies between the Copyright Law and the Berne Convention identified by the US.¹⁴

On 1 July 1993, China updated its Trademark Law by the inclusion of criminal penalties and also extended trademark protection to service marks. Further, the sale of counterfeiting goods was included as a trademark infringement. In addition, China adopted the Unfair Competition Law that afforded protection to trade secrets and well-known marks.¹⁵

1.4 Sino-American Intellectual Property Protection Agreement (1995)

By 1994, American businesses were again complaining about the lack of IPRs protection in China, and claimed to be suffering significant losses.¹⁶ On 30 June 1994, the USTR again designated China a "priority foreign country" and initiated a Section 301 investigation. The US threatened to impose 100% tariffs on over USD 1 billion worth of Chinese exports. In response, China threatened retaliatory trade sanctions of 100% tariffs on American products and said that it would cease negotiations in relation to the creation of a major Sino-US joint venture.¹⁷

Once again, the two countries reached an eleventh hour compromise before the 26 February 1995 deadline, entering into the Agreement regarding Intellectual Property Rights ("1995 Agreement").

The 1995 Agreement provided for a number of enforcement measures and activities to be engaged by both parties, in order to enhance IPRs protection in China, such as the training of customs officials. Moreover, the 1995 Agreement provided for the improvement of market access for US products and the promotion of transparency of the Chinese legal system.¹⁸ The 1995

Agreement also included detailed requirements that focused on improving the enforcement structure and the legal environment regarding IPRs protection in China.¹⁹

1.5 Sino American Accord (1996)

On 30 April 1996, the US again designated China as a "Priority Foreign Country", alleging that China still did not properly protect IPRs. It also announced its intention to impose approximately USD 2 billion worth of trade sanctions on Chinese products. China again responded with a proposed retaliatory sanction of a similar amount on American products.²⁰

On 18 June 1996, the US and China reached a new accord ("the 1996 Accord"). The 1996 Accord reaffirmed China's commitment to protect IPRs and included measures that China would undertake to protect US IPRs. Substantially, the 1996 Accord did not impose any additional requirements upon China than those of the 1995 Agreement.²¹

1.6 WTO accession process

In order to accede to the WTO, China had to negotiate bilateral concessions with each WTO member that asks for one ("the Accession Working Party"). These bilateral agreements embodied China's promises to individual WTO members about opening its market. The second step involved the negotiation of the protocol of accession with all WTO members collectively, and securing a two-thirds majority vote in favour of China's accession.²² China acceded to the WTO on 11 December 2001.²³

The process of negotiating bilateral concessions for China went on for nearly fourteen years. During this time, China had intense and heated negotiations with the Accession Working Party in relation to its bilateral trade concessions and in particular with the US.²⁴

Negotiations for accession were temporarily abandoned in 1999 with the bombing of the Chinese embassy in Belgrade by the US. Eventually, China did enter into a bilateral agreement with the US on 15 November 1999 and with the EU on 19 May 2000.²⁵

In order to ensure China's accession to the WTO, China ratified further international intellectual property treaties and conventions and amended its laws.²⁶

In particular, China amended the Criminal Law in 1997 to provide for seven specific types of criminal acts regarding IPRs infringement.²⁷ The TRIPs Council was informed recently that China is currently in the process of revising its IPRs laws so as to ensure that they are in full compliance with the TRIPs Agreement.²⁸

In the years prior to China's WTO accession, the US was increasingly agitated by the state of IPRs protection in China. The threat of unilateral trade sanctions have forced extensive changes to Chinese IPRs law and enforcement. The law reform process in China was motivated by external coercion, rather than domestic interest.²⁹ This is evident from the fact that the US had to regularly utilise threats of trade sanctions under its Section 301 procedure between 1991 and 1996 to encourage China to reform its IPRs protection laws.

Some commentators have suggested that due to the current high level of trade between China and the US, the trade potential of China, and Chinese co-operation in growing international issues, this cannot continue to be the preferred method to encourage IPRs protection law reform in China.³⁰ The US and other developed countries therefore will need to engage other methods in encouraging IPRs law reform in China.

With China's accession to the WTO, it is increasingly in China's interest to reform and enforce its IPRs laws. This would ensure that China would be able to reap the economic benefits from WTO accession. This may provide an alternative form of encouragement to China to reform and enforce its IPRs laws. The use by China and the US of the WTO Dispute Settlement Mechanism in relation to disputes with respect to IPRs protection would also ensure that there are fewer incidents of US unilateralism.

2 Assessment of intellectual property laws in China

Given the restricted nature of this paper, it is proposed that an examination of the consistency of China's Copyright Law and Software Protection Regulations with the TRIPs Agreement may provide a useful platform to assess IPRs laws in China.

2.1 The TRIPs Agreement

On 15 April 1994, negotiations for the Uruguay Round of the General Agreement on Tariffs and Trade ("GATT") were concluded. The negotiations culminated in the signing of the Agreement Establishing the World Trade Organisation ("WTO Agreement").³¹ Under the WTO Agreement, the *Agreement on Trade-Related Aspects of Intellectual Property Rights* ("the TRIPs Agreement") is binding upon all members.

(a) Rationales of the TRIPs Agreement

Some of the rationales for the inclusion of the TRIPs Agreement into the WTO Agreement are:

- (1) to reduce distortions and impediments to international trade caused by the inadequate protection of IPRs;
- (2) to ensure the universal application of intellectual property protection in all member countries, which was not available under the previous international IPRs regime;
- (3) to provide trade incentives to encourage developing countries to accept the burden of legislating for the protection of IPRs; and
- (4) to prohibit the application of unilateral trade sanctions by developed countries without utilising the transparent and multilateral WTO dispute settlement process.³²

(b) General Principles under the TRIPs Agreement

Under the TRIPs Agreement, member countries are given the freedom of determining the appropriate method of implementing its provisions. Member countries may implement more extensive protection of IPRs than is required under the agreement.³³ Member countries are also required to accord the same treatment to nationals of other member countries as its own nationals. They must also provide any advantages granted by the member country to the nationals of another country to the nationals of all other members.³⁴

The TRIPs Agreement states that its objective is the promotion of technological innovation and technology transfer to the mutual advantage of producers and users of technological knowledge in a manner conducive to social and economic welfare.³⁵

Members may enact limitations or exceptions to IPRs protected under the TRIPs Agreement. However, these limitations or exceptions must not conflict with the normal exploitation of the work and must not unreasonably prejudice the legitimate interests of the right holder.³⁶

(c) Copyright Protection

The basic obligations and rights contained in the Berne Convention are incorporated into the TRIPs Agreement.³⁷ In summary, the main provisions of the TRIPs Agreement, as supplemented by the provisions of the Berne Convention, provide as follows:

- (1) Only "literary and artistic works" such as books, pamphlets, lectures, choreographic works, dramatico-musical works, cinematographic works, photographic works etc. fixed in material form are protected by copyright.³⁸
- (2) Copyright protection only extends to expressions and not to ideas, procedures, methods of operation or mathematical concepts.³⁹
- (3) In general, the required minimum length of copyright protection is the author's life plus fifty years.⁴⁰
- (4) During the term of protection, authors enjoy the exclusive right of authorising any reproduction, performance, communication, translation, or broadcast of the works they have created.⁴¹
- (5) Copyright protection may be subject to certain limitations or exceptions, such as for quotation and utilisation of works in other publications or works.⁴²
- (6) "Computer programs whether in source or object code" shall be protected as "literary works" under the Berne Convention.⁴³
- (7) Authors are provided with the right to authorise or prohibit

commercial rental to the public of the originals or copies of their copyright works.⁴⁴

- (8) Infringing copies of a copyright work must be liable to seizure by a member country.⁴⁵

(d) Criminal provisions and enforcement

Significant requirements of the TRIPs Agreement in relation to criminal and civil enforcement of IPRs are as follows:

- (1) Members must provide effective action against infringement of IPRs protected in the TRIPs Agreement, including expeditious remedies to prevent infringements, and remedies which constitute a deterrent against further infringements.⁴⁶
- (2) Members are required to provide judicial authorities with power to issue injunctions,⁴⁷ award damages and legal costs to the successful rights holders,⁴⁸ and to dispose of goods tainted by infringement of IPRs outside the ordinary channels of commercial activity.⁴⁹
- (3) Members must provide judicial authorities with the power to grant interim or provisional injunctions, including in *ex parte* proceedings where any delay is likely to cause irreparable harm to the rights holder.⁵⁰
- (4) Member countries are required to provide for criminal procedures and penalties to be applied, at least in cases of wilful trademark counterfeiting, or copyright piracy on a commercial scale. Remedies shall include imprisonment, monetary fines, and the seizure, forfeiture, and destruction of infringing goods and of any materials and implements the predominant use of which has been in the commission of the offence.⁵¹

2.2 Compliance of Chinese IP Laws with TRIPs

According to the Chinese General Principles of Civil Law, as soon as China adheres to an international treaty, that treaty shall automatically constitute a part of the Chinese domestic law.⁵² This means that in the

event of any inconsistency between the Chinese municipal law and a treaty ratified by China, then the international treaty or convention would prevail.⁵³

(a) *Copyright Law*

The Copyright Law provides that its purpose is to encourage the creation and dissemination of works, which would contribute to the construction of the social, spiritual, and material civilisation and of promoting and flourishing socialist culture and sciences.⁵⁴

The non-economic focus of the Copyright Law is reflected in its name in Chinese (ie “*zhuzuoquan*”). “*Zhuzuoquan*” may be translated into English as “authorship right” or “right to

publish”. However, the typical Chinese term for copyright is “*banquan*”. This strong moral rights focus of Chinese Copyright Law reflected the European system of authorship rather than the economic focus of Anglo-American copyright law.⁵⁵ Under Article 56 of the

Copyright Law, the terms “*zhuzuoquan*” and “*banquan*” are treated as synonymous.

Works of Chinese citizens, legal entities or other bodies, whether published or not, shall enjoy copyright protection under the law. Works of foreigners first published in China shall also enjoy copyright in accordance with the law. Foreign works published outside China are protected in accordance with the right of priority afforded under the Berne Convention.⁵⁶ Some commentators have suggested that unpublished works may not be protected in China under the law.⁵⁷ However, this inconsistency has been rectified by the ICT Provisions.⁵⁸

Copyright extends to works of literature, art, natural science, social science, or engineering technology which are expressed in written works, oral works, musical and dramatic works, cinematographic works, or computer software, etc.⁵⁹ Works the publication or distribution of which are prohibited by law will not be protected. In addition, copyright owners must not, in exercising their copyright, violate the Constitution or

other laws, or prejudice the public interest.⁶⁰

Authors have the right to publication, attribution of authorship, revision or alteration, reproduction, distribution, rental, exhibition, performance, presentation, broadcast, communication through information networks, adaptation, translation and compilation of their own works.⁶¹

Copyright in a work belongs to the author, who is the citizen who created the work.⁶² The term of protection for the right of authorship, alteration and integrity of an author will be unlimited in time. The term of protection for the right of publication, and the remainder of the rights specified in relation to a work of an author, will be the lifetime of the author and fifty years after his or her death.⁶³

If the work is created according to the intention, and under the supervision and responsibility, of a legal entity or other body, then that entity or body will be deemed to be the author of the work.⁶⁴ Further, an author, legal entity or other body whose name is mentioned in connection with the work, will be presumed to be the author of the work. The Copyright Law treats works that individuals have created within the scope of their employment as professional works that the employer has a priority right to use.⁶⁵

The Copyright Law contains “fair use” provisions allowing reasonable use of a published work, for which no authorisation or remuneration is necessary (eg private study, research and entertainment, or quotation in newspapers etc).⁶⁶

The Copyright Law provides the copyright owner with neighbouring rights including the right of performers, producers of sound and video recordings, radio and television broadcasters and publishers of books and periodicals to authorise the use of his or her copyright works, and to receive remuneration for the use of the works.⁶⁷

The Copyright Law defines infringing acts. There are two types of infringement under the Copyright Law, ordinary and serious infringement.⁶⁸

Ordinary infringement is typified by publishing a work without the consent

or licence, neglecting to pay remuneration, or pretending to have written someone else’s work. Ordinary infringement is punishable by public apologies, payment of damages, cessation of the infringement and elimination of the act’s effects.⁶⁹

Serious or public interest infringement includes reproducing or communicating the work to the public without the consent of the copyright owner.⁷⁰ Serious infringements are those where the amount of the illegal gains is relatively large,⁷¹ and the infringer has infringed another’s copyright more than twice within the period of two years.⁷² In addition to the remedies outline above, serious infringements are punishable by confiscating unlawful profits, imposing fines on the infringing party or imprisonment.⁷³

A party may institute proceedings directly in a People’s Court in the absence of a written arbitration agreement between the parties. The parties may also request administrative remedies. Anyone who infringes the rights of a copyright owner shall pay compensation for damages according to the actual loss of the right owner, or according to the unlawful income of the infringer. Where these amounts cannot be ascertained, the People’s Court will order compensation of not more than RMB500,000 yuan.⁷⁴ This article was recently inserted into the Copyright Law to ensure consistency in the methods that judges employ to determine compensation.⁷⁵

In addition, the copyright owner may apply to the People’s Court for an injunction to restrain an infringer, or a potential infringer from infringing the owner’s rights. The owner may also apply to the Court for an order to preserve any evidence.⁷⁶ The Court may confiscate the unlawful income, infringing copies and property used for illegal activities where copyright or a related right is infringed.

Customs may detain imported or exported goods suspected of infringing intellectual property rights either on its own initiative or upon application of a IPRs holder. If it is found that such goods are infringing goods, then Customs may confiscate and destroy the goods and levy a fine on the infringer.⁷⁷

Some provisions of the Copyright Law may not be consistent with the TRIPs Agreement. For example:

- (1) Articles 22(4) and (5) allow newspapers, periodicals, radio stations or television stations to use published works as a source for reports on current political, economic and social topics. Whether the provisions of the Copyright Law are in compliance with the TRIPs Agreement may be dependent upon an interpretation of whether the exception is within the bounds of normal exploitation, which does not unreasonably prejudice the legitimate interests of the author under Article 13 of the TRIPs Agreement.⁷⁸
 - (2) It is also unclear as to whether the fair use provisions are consistent with the TRIPs Agreement and in particular the personal entertainment exception.⁷⁹ This would depend upon whether the exception is in accordance with Article 13 of the TRIPs Agreement.⁸⁰
 - (3) Article 14 of the TRIPs Agreement requires members to provide that performers shall have the possibility of preventing the fixation of their unfixed performance, and the reproduction of such fixation undertaken without their authorisation. Producers of phonograms shall enjoy the right to authorise or prohibit the direct or indirect reproduction of their phonograms. The Copyright Law and its Implementing Rules do not specially address these neighbouring rights. However, they do provide the other similar rights to performers, producers of sound recordings and broadcasting organisations required under TRIPs.⁸¹
- (b) *Regulations on Computer Software Protection ("the Regulations")*

The Regulations became effective on 1 January 2002. Previously, the Software Regulations of 1991 applied to the protection of copyright in computer software. These regulations were repealed on 1 January 2002. The Software Regulations were repealed and replaced so as to allow China to

comply with the TRIPs Agreement in accordance with its WTO accession.

Previously, various complaints were made against the 1991 Regulations and its compliance with international IPRs protection principles. An example was that the 1991 Regulations required the relevant software to be registered with the relevant Chinese administrative body, before the software would be protected in China. Some commentators suggested that this requirement was in contravention of the TRIPs Agreement.⁸²

The purpose of the Regulations is to protect the rights and interests of copyright owners of computer software and to regulate the dissemination, development and use of computer software. A further objective is to promote the development of the software industry and to integrate the use of information technology into the national economy.⁸³

The term "computer software" has been defined to include both source and object codes in accordance with the TRIPs Agreement and documents relating to program design, instructions, flowcharts and user manuals.⁸⁴

The software protected under the Regulations must be developed independently and fixed in some material form.⁸⁵ The protection does not extend to ideas, processing, operating methods, mathematical concepts or the like used in software development.⁸⁶

Software developers have the right to publication, attribution of "developer-ship", revision or alteration, reproduction, distribution, rental, communication through information networks, and translation.⁸⁷

The copyright in a piece of software will exist from the date on which its development has been completed. The term of protection for the computer software is the lifetime of the author plus fifty years for an individual, and fifty years from the first publication of the software for a legal entity or other body. If the software is not published after fifty years from the date of its development, then the protection will lapse.⁸⁸

Owners of lawful copies of a piece of software have the right to install and

store the software on their computers, make back up copies against damage, and to make alterations to the software in order to implement it in an actual environment of computer application, or to improve its functions and performance.⁸⁹

However, the Regulations provide that a piece of software may be used by installing, displaying, transmitting or storing for the purposes of studying or researching the design ideas or principles embodied therein, without permission from and without payment of remuneration to the software copyright owner.⁹⁰

The Regulations, like the Copyright Law, also provide for ordinary and serious infringements and provide similar penalties for ordinary and serious infringements of the copyright subsisting in computer software. Ordinary infringement is typified by publishing a work without the consent or licence, neglecting to pay remuneration or pretending to have written someone else's work.⁹¹

Serious or public interest infringement includes reproducing or distributing the work to the public without the consent of the copyright owner and knowingly circumventing or sabotaging technological measures used by the copyright holder for protecting the copyright of the software.⁹² The Regulations impose a fine of RMB50,000 on a person who is found to have engaged in the circumvention or sabotage of these technological measures.⁹³

The Copyright Law and the Regulations promulgated by the Chinese Government are quite sophisticated. It appears that they substantially comply with China's WTO commitments. However, implementation and enforcement mechanisms have not yet been developed to the same extent as those existing in developed countries with different legal systems and cultures.

3 Political, social and economic impacts on IP protection in China

In order to understand some of China's difficulties in enforcing IPRs laws and regulations in the same way as developed Western countries, it is necessary to examine the relevant

social, political and economic barriers to the reform process in China.

3.1 Chinese cultural preferences

Chinese culture has been heavily influenced by Confucianism for the past 2000 years. Confucianism provided the foundation principles by which human behaviour and relationships were measured. The Chinese did not develop a concept of individual rights and concentrated on familial values and collective rights. Historically, they regarded creativity as a collective benefit to their community and to posterity. The Chinese had strong disdain for commerce and were not accepting of those who created works for mere profit.⁹⁴

To the Chinese people, the past was the embodiment of cultural and social values, and materials and information about the past had to be put in the public domain for people to borrow or to transmit to younger generations. The Chinese were educated as compilers from a young age. They constructed their works by extensive replication from other sources. The existence of IPRs would allow a significant few to monopolise these needed materials and would prevent the majority from understanding their life, culture and society.⁹⁵

3.2 "Necessary evil" for accession to the WTO

One commentator expressed the view that the overall theme of the implementation and enforcement of Chinese intellectual property laws appears to be that "of China grudgingly and reactively taking whatever minimal action is required to safeguard its trade interest, with no conviction that it has an inherent interest in a better functioning IP system."⁹⁶ Under this view, the implementation of the TRIPs Agreement appears to be perceived as a necessary evil to gain WTO accession.⁹⁷

Even if such a view had an element of truth at one time, it is becoming increasingly evident that the socialist market economy system recognises the value of intellectual property, and that China's entrepreneurs are now themselves supportive of reforms, such as in IPRs protection.

3.3 Socialist economic system

Under the socialist economic system, all property belonged to the State and the people, rather than to private owners. Authors created works for the welfare of the State rather than for the purpose of generating economic benefits for themselves.⁹⁸

This view of the collective ownership of property was reinforced by the numerous mass campaigns and class struggles that took place during the Mao era and in particular during the Great Proletariat Cultural Revolution. Intellectuals were criticised and condemned during these campaigns.⁹⁹

Further, as a result of these campaigns, many Chinese developed contempt for authorship and remuneration from creative efforts, despite the efforts of Chinese leaders subsequently to promote reforms for IPRs protection.¹⁰⁰

China's gradual transition from a socialist economic system to a market economy, rewarded and hastened by accession to the WTO, has created momentous reforms. There is now strong recognition of property rights at the economic level, and this is starting to be acknowledged at the political level as well.

3.4 Self-strengthening mentality

During the nineteenth and twentieth centuries, China was forced by Western powers to open up its ports to Western trade, and to sign various treaties giving significant economic and territorial concessions to the Western powers. Desperate to prevent further inequitable treatment, the Chinese adopted a self strengthening worldview. Under this view, attaining independence and liberating the nation became the country's top priority.¹⁰¹

Reformers suggested a critical re-evaluation of China's cultural heritage in light of modern Western standards. They also called for China to part with those elements that made it weak and to assimilate Western science, democracy and culture. As a result, many Chinese believed it was acceptable to freely reproduce or tolerated the unauthorised reproduction of foreign works, so as to allow China to catch up with Western developed countries.¹⁰²

3.5 Chinese nationalism

Prior to the Opium Wars, the Chinese regarded foreigners as "outer barbarians" and believed the country had no need for foreign objects, products or ideas. Subsequent to China's defeat in the Opium Wars, China attempted to modernise, but these were limited to the acquisition of weapons and other useful technologies. No attempts were made to assimilate Western institutions, philosophy, arts and culture in China, due to nationalist sentiments amongst the Chinese population.¹⁰³

During the Mao era, xenophobia and nationalism were primarily used to mobilise domestic resources to catch up with advanced Western powers and prevent China's further victimisation.¹⁰⁴ Because of these feelings of Chinese nationalism, some of the Chinese people might have felt that it was in China's national interests to engage in copying of foreign works. This was seen by some as a strategy which would allow China's technology to catch up with that of the developed countries, such as the US.

During the Deng era, Deng saw economic wealth as the foundation of China's power. Deng vigorously pushed for the modernisation and the

renewal of diplomatic and commercial ties with the Western developed countries. With the death of Deng, many commentators suggested that nationalist sentiments would return. The Chinese reaction to the threats of unilateral trade sanctions made by the US, and the bombing of the Chinese embassy by the US in Belgrade, are examples of such nationalist sentiments.¹⁰⁵

3.6 Information control policy

Since the establishment of the People's Republic of China in 1949, the Communist Government has exercised very strict control over the dissemination of information and the distribution of media products, to exclude politically sensitive materials that it was thought would destabilise the country and the communist regime.¹⁰⁶

Due to this stringent information control policy, many media products were not available, even if there was

great demand in the Chinese market. Unable to purchase these products in the open markets, some consumers settled for black market products or pirated goods.¹⁰⁷ This argument might have less force now that China has acceded to the WTO, and has further opened up its media markets.¹⁰⁸

3.7 Laws with Chinese characteristics

The Chinese people have regarded laws as an inefficient, arbitrary and cumbersome instrument for governance. The Chinese preferred governance by way of moral force rather than by way of regulations, to cover the whole range of political, social and familial relationships that encompasses a harmonious Confucian society.

People who were guided by this concept always understood their normative roles, responsibilities and obligations to others. In this Confucian society, people avoided confrontation in order to preserve harmony. Therefore, litigation and promotion of individual rights became unnecessary in a Confucian society.¹⁰⁹

During the Mao era, formal laws were denounced as inherently bureaucratic, formalistic, and unable to deal with changing social relationships. To replace this defective legacy, Mao

instituted socialist laws that operated within the boundaries of policy directives, under the guidance of policy principles and supplemented by various policy tools (such as a Party or government circular or notice).¹¹⁰

Laws were considered as a concrete formulation of the Party's policy and as a summary of practical administrative and judicial experience. They did not necessarily constitute a detailed, comprehensive and self-contained rule based system, with coherent principles and well defined concepts, justifiable on ideological and jurisprudential grounds. Even currently, generally speaking, Chinese laws are broadly drafted, leaving the detailed rules to be provided by relevant administrations under State Council.¹¹¹

However, it appears that there is an increasing respect for the law and an awareness that a legal framework is necessary for the normal functioning of society in the Chinese population.

So the above theories are increasingly becoming less relevant to modern Chinese society.¹¹²

3.8 Pirated goods are cheaper

Pirated goods are much cheaper than their original counterparts.¹¹³ In a large, low income developing country, it is easier to sell cheaper products. The desire for "brands" is exacerbated when, as in China's case, economic development is coupled with a huge increase in access to information through the internet, and traditional media. This provides infringers with a ready-made market within which to operate in China.

3.9 Local protectionism

A key misunderstanding in Sino-US IPRs protection relations lies in the different institutional arrangements in China which affect the ability of the Chinese government¹¹⁴ to implement effective IPRs protection in China. China's inability to tackle piracy arose in large part from the Chinese Government's 1979 decision to decentralise power from the federal government, to the local and provincial governments, as a means of facilitating the country's transition from a planned to a market economy.¹¹⁵

Under the new fiscal system established in the early 1980's, local governments were required to surrender only a portion of their revenues to the central Chinese Government. The remaining portion of local revenue allowed local governments to function as independent fiscal entities responsible for managing local expenditures.¹¹⁶

In order to protect their own interests or interests of the region, local officials can be hesitant to take action against infringers that provide income and employment opportunities in the region. Local protectionism can also be reflected through active obstruction by the local authorities of IPRs law enforcement, and intervention of local authorities in judicial and administrative proceedings in relation to intellectual property protection.¹¹⁷

As seen from the above, there appear to be quite significant economic, political and social barriers to the full scale establishment of Western modelled IPRs protection laws in China. External coercion by the US

and other developed countries may not have the effect of encouraging reform in China. China will continue to be motivated by its own self-interest in adopting and reforming its intellectual property laws. In joining the WTO, China has shown that it wants to remodel its economy, which will itself create a strong focus for political and social changes as well. China has made significant progress in the reform and enforcement of its intellectual property laws, and will continue to do as domestic pressure for IPRs protection builds.

Some strategies which may be adopted by foreign copyright owners to encourage intellectual property reform and enforcement in China, may include the following:

- education of Chinese judges, officials and the general populace;
- supporting local IPRs owners to enforce their IPRs in China; and
- entering into joint ventures with local entities for the production or supply of IPRs related goods and services to encourage active enforcement of foreign IPRs in China by the local entities.¹¹⁸

4 Enforcement and Implementation of IP Laws in China

In order to determine whether China's laws provide for "effective" action against infringement of IPRs,¹¹⁹ and therefore are in compliance with the TRIPs Agreement, it is relevant to examine the history and the scale of the piracy problem in China and the recent efforts by the Chinese Government to combat the problem.

4.1 History and scale of the piracy problem in China

In 2001, the International Intellectual Property Alliance (IIPA), a US based industry body suggested that:

"Despite efforts made by the Chinese government to crack down on massive domestic piracy of all types of copyrighted products earlier in 2000, including raids netting hundreds of thousands of pirate optical media produces, piracy rates in China continue to hover at the 90% level."¹²⁰

During the 1990's, IPRs infringement was widespread in China. With an assumed piracy rate of 93%, the total losses in relation to the infringement of US IPRs were estimated at USD 1 billion in 1995 and USD 2 billion in 1998.¹²¹ The USTR's Office alleges that copyright theft alone accounted for over USD 850 million in losses to the US in 1994.¹²² The EC estimated that piracy, directly or indirectly, employs between 3-5 million people and brings in between US\$40-80 billion.¹²³

4.2 Enforcement efforts by the Chinese Government

Notwithstanding the difficulties in enforcing intellectual property laws and regulations in China, the Chinese government has made serious efforts in cracking down on IPRs infringement and has made significant progress in this respect.

Even before China's WTO accession, Chinese authorities were seizing large numbers of infringing goods.¹²⁴

Chinese Courts were also increasingly involved in civil and criminal intellectual property cases.¹²⁵ Administrative authorities were also

increasingly involved in IPRs enforcement, being the preferred means of IPRs protection, as opposed to litigation, in the enforcement of IPRs.¹²⁶ In 2000, the National Trade Estimate Report stated that:

*"Today, China has improved its legal framework – and it has virtually shut down the illegal production and export of pirated music and video CDs and CD ROMS. Indeed today, it is an importer of such products from third countries. Nevertheless, significant problems still exist with the enforcement of intellectual property laws at the grassroots level. These problems include local protectionism and corruption, reluctance or inability on the part of enforcement officials to impose deterrent level penalties and a low number of criminal prosecutions."*¹²⁷

Subsequent to China's accession to the WTO, Chinese authorities have increasingly been focusing their attention on the "effective"

implementation of IPRs protection laws. In 2002, the number of recorded cases relating to IPRs protection increased 22% as compared with figures in 2001. The number of infringement cases dealt with by Chinese customs authorities also increased 57% as compared with figures in 2001.¹²⁸ The Chinese Government has also cracked down more forcefully on the operation of smuggled and pirated audio-video products and have seized record numbers of pirated products including audio video products, books, software and electronic publications.¹²⁹

It is clear that the Chinese Government is increasingly focusing on the implementation and enforcement of IPRs protection laws in China despite the difficulties faced by the Chinese authorities in a demographic, historical and cultural sense.

4.3 Recent cases

There has also been an increase in China in the number of new technologies being dealt with in cases relating to copyright protection in 2002. With the introduction of new technologies and life style products, such as information available on the Internet, software products, the application of theatrical makeup, and the downloading of ring-tones and pictures on mobile phones, there is an increasing need for Chinese intellectual property laws to expand protection to these new technologies and life style products.¹³⁰

A recent case which is interesting from the perspective of the protection of software products in China was the Discreet's case. Discreet is a Canadian company which develops systems and software for visual effects, 3D animation, editing and production. This software is crucial to the creation of digital moving pictures in feature films, video, broadcast graphics, interactive games and the web. Discreet developed a piece of software called "Flame", which could be used in the production of movies, advertisements and other various kinds of video products. The software was used in the production of movies such as "Gladiator", "Star Wars Episode 1" and "The Matrix".

Discreet discovered that the Shanghai Culture Broadcast Company ("the Company") had installed the "Flame" software without authorization and was using and exploiting the software. Discreet brought an action against the Company in the Shanghai First Intermediate People's Court. The Company denied liability to pay RMB 1,000,000 as claimed by Discreet.

In the trial, the defendant submitted that since the software had not been registered within the China Ministry of Information Industry, Discreet was not entitled to bring an action for breach of copyright against the Company. However, the Court held that since Canada and China have both ratified the *Universal Copyright Convention*, and the convention provided for the protection of literary and artistic works, including computer software, Chinese law did extend to protect the "Flame" software developed by Discreet.¹³¹

The Court found that the Company had infringed Discreet's copyright in the "Flame" software and ordered that

the Company ceased the infringing act, apologise publicly to Discreet, and pay compensation in the amount of RMB500,000 in relation to the economic loss suffered by Discreet and the legal costs incurred by Discreet in the litigation.¹³²

The case demonstrated that software developed by foreign companies which is not registered in China may be protected by the Copyright Law and Software Regulations in China. The software may also be protected by copyright in accordance with the *Universal Copyright Convention* ratified by China if the foreign copyright holder's country had ratified the *Convention*.¹³³

4.4 New rules relating to copyright cases

In order to assist with the successful implementation of the Copyright Law of the PRC, on 12 October 2002 the Supreme People's Court promulgated the *Interpretation of the Supreme People's Court Concerning Several Issues on Application of Law in Hearing Correctly the Civil Copyright Case* ("the Judicial Interpretation"). The Judicial Interpretation became effective on 15 October 2002.

The Judicial Interpretation provides that civil proceedings initiated for the infringement of copyright would be within the jurisdiction of the Local People's Courts in the place where the infringing acts are done, the infringing products are stored or confiscated or where the defendants are located.¹³⁴

Where a copyright agency set up by law, commences legal action in its own name in order to protect the copyright owned by one of its copyright owner members, the People's Court will accept the case where the agency obtains written authorization from the relevant copyright owners.¹³⁵

The actual losses of copyright owners may be calculated as the multiplication of the decreased distribution volume of the reproduced products due to the infringement or the sale volume of the infringing reproduced products by the unit profits of the reproduced products of the copyright owners. In case the decreased distribution volume is hard to determine, it may be determined according to the market sale volume of infringing reproduced products.¹³⁶

The limitation period for commencing actions of copyright infringement is two years, starting from the date when the copyright owners have known or should have known about the infringing acts. If a plaintiff commences legal action subsequent to the expiry of the limitation period and the defendant continues to engage in the infringing act, then it is possible for the plaintiff to seek an injunction from the Court restraining the defendant from engaging in the infringing act and to recover compensation from the defendant in relation to the infringing act. However, the amount of compensation will be limited to any damage suffered by the plaintiff in the two years preceding the litigation.¹³⁷

5 Concluding comment

In spite of the difficulties involved with IPRs protection laws in China, the Chinese Government has made tremendous progress with reform and enforcement.

Even though the reform process may have been driven initially by external coercion, the reform process is currently fuelled by China's own

economic development coupled with its recent accession to the WTO. The reform process is necessary as a means by which China can comply with its obligations under the TRIPs Agreement and reap the economic and trade benefits of WTO accession.

The self interested nature of the reform process has led to significant progress in the reform of China's intellectual property laws and also in relation to their implementation and enforcement. This is evidenced by the increasing number of infringement cases being dealt with by Chinese Courts, and the record numbers of pirated and counterfeit goods and products being seized by Chinese authorities.

China's intellectual property laws will again be subject to scrutiny by the international community in 2008 prior to the commencement of the Beijing Olympic Games. This is due to the large numbers of Olympic products and audio visual material being disseminated prior to and during the

Olympics. Owners of IPRs will be seeking to protect their works from illegal reproduction and distribution by infringers.

If the efforts by the Chinese Government to reform and enforce its intellectual property laws are successful by that date, it would inspire confidence in the international community in its ability to protect IPRs. Such confidence would encourage further foreign investment and foreign dissemination of technology in China, and assist China in its development as a leading world economy.

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¹ Gamvros A, "Case Study: Let the Games Begin: Challenges ahead for Beijing in 2008 in Protecting Intellectual Property and Sponsors Rights" (2002) 117 *Copyright World*, page 10 – 13.

² Harrington LP, "Recent Amendments to Chinese Patent Law: The Emperor's New Clothes?" (1994) *Boston College International and Comparative Law Review*, Vol 17(2) page 337-374 at 350.

³ Yu PK, "Piracy, Prejudice, and Perspectives: An attempt to use Shakespeare to Reconfigure the US-China Intellectual Property Debate (2001) *Boston University Law Journal*, Vol 19(1), page 1-87 at pages 4-5.

⁴ Ibid at pages 6-8.

⁵ Ibid.

⁶ Ibid at 8-10.

⁷ Ibid.

⁸ Ibid.

⁹ Yu PK, "Piracy, Prejudice, and Perspectives: An attempt to use Shakespeare to Reconfigure the US-China Intellectual Property Debate (2001) *Boston University Law Journal*, Vol 19(1), page 1-87 at page 9.

¹⁰ Section 301 of the Trade Act 1974, provided the United States Trade Representative ("USTR") with a procedure by which the USTR may identify and investigate those countries which provided inadequate IPRs protection to US goods and enter into consultations with the relevant country. If these consultations fail to resolve the issue within 6 months, then the USTR may impose trade sanctions upon the relevant country: P K Yu, "From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century", *American University Law Review*, Vol 50, page 131 – 243 at page 139-141. See also Cheng J, "China's Copyright System: Rising to the Spirit of TRIPs Requires an Internal Focus and WTO Membership", *Fordham International Law Journal*, Vol 21, page 1941 at 1966.

¹¹ Ibid at page 10-11. See also P K Yu, "From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century", *American University Law Review*, Vol 50, page 131 – 243 at page 141-142.

¹² Ibid. See also P K Yu, "From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century", *American University Law Review*, Vol 50, page 131 – 243 at page 142 and Cheng J, "China's Copyright System: Rising to the Spirit of TRIPs Requires an Internal Focus and WTO Membership", *Fordham International Law Journal*, Vol 21, page 1941 at 1968.

¹³ Ibid. See also P K Yu, "From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century", *American University Law Review*, Vol 50, page 131 – 243 at page 142 and Cheng J, "China's Copyright System: Rising to the Spirit of TRIPs Requires an Internal Focus and WTO Membership", *Fordham International Law Journal*, Vol 21, page 1941 at 1968.

¹⁴ The amended Copyright Law protected computer software as literary works for 50 years, removed formalities on copyright protection and extended protection to all works originating in a Berne Convention member country: Zheng C, "The Chinese Copyright System and Three Relevant Copyright Conventions", (1993) *Copyright World*, Vol 26, page 33 at 34-35.

- ¹⁵ P K Yu, "From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century", *American University Law Review*, Vol 50, page 131 – 243 at pages 139-143.
- ¹⁶ Losses were estimated at USD 850 million in copyright infringements alone: *Ibid* at pages 144.
- ¹⁷ China also announced that it would suspend negotiations with American auto-makers over the creation of joint ventures in China for manufacturing mini-vans and passenger cars: *Ibid* at Pages 144. See also Cheng J, "China's Copyright System: Rising to the Spirit of TRIPs Requires an Internal Focus and WTO Membership", *Fordham International Law Journal*, Vol 21, page 1941 at 1969-1970.
- ¹⁸ *Ibid* at 145-146. See also Cheng J, "China's Copyright System: Rising to the Spirit of TRIPs Requires an Internal Focus and WTO Membership", *Fordham International Law Journal*, Vol 21, page 1941 at 1970-1971.
- ¹⁹ *Ibid* at 144. See also Cheng J, "China's Copyright System: Rising to the Spirit of TRIPs Requires an Internal Focus and WTO Membership", *Fordham International Law Journal*, Vol 21, page 1941 at 1971-1975.
- ²⁰ *Ibid* at 148-152. See also Cheng J, "China's Copyright System: Rising to the Spirit of TRIPs Requires an Internal Focus and WTO Membership", *Fordham International Law Journal*, Vol 21, page 1941 at 1976-1979.
- ²¹ *Ibid* at 148-152. Yu PK, "Piracy, Prejudice, and Perspectives: An attempt to use Shakespeare to Reconfigure the US-China Intellectual Property Debate (2001) *Boston University Law Journal*, Vol 19(1), page 1-87 at page 14.
- ²² Bhala R, "Enter the Dragon: An Essay on China's WTO Accession Saga" (2000) *American University International Law Review* Vol 15, page 1469 at 1472.
- ²³ "Trading into the Future: the Introduction to the WTO: WTO Members and Observers", http://www.wto.int/english/thewto_e/whatis_e/tif_e?org6_e.htm
- ²⁴ See Bhala R, "Enter the Dragon: An Essay on China's WTO Accession Saga" (2000) *American University International Law Review* Vol 15, page 1469
- ²⁵ *Ibid*.
- ²⁶ China has issued Regulations on the Certification and Protection of Famous Trademarks, thus bringing its laws in conformity with the TRIPs Agreement and the new WIPO treaties. In March 1997, China issued Regulations on the Protection of New Plant Varieties and China also amended its criminal law to include a sanction on intellectual property crimes. In 1999 China became a member state of the International Union for the Protection of New Varieties of Plants: P K Yu, "From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century", *American University Law Review*, Vol 50, page 131 – 243 at pages 148-152
- ²⁷ Council for Trade-Related Aspects of Intellectual Property Rights, Review of Legislation: *Responses from China to questions posed by Australia, the European Communities and their member States*, *Japan and the United States* at paragraph 25.
- ²⁸ Council for Trade-Related Aspects of Intellectual Property Rights, *Notification of Laws and Regulations under Article 63.2 of the Agreement: China*, 18 July 2002. See also Council for Trade-Related Aspects of Intellectual Property Rights, *Transitional Review Mechanism of China: Communication from China*, 16 September 2002.
- ²⁹ Taubman AS, "TRIPs Goes East: China's Interests and International Trade in Intellectual Property" (draft article) at paragraph 2.
- ³⁰ Cheng J, "China's Copyright System: Rising to the Spirit of TRIPs Requires an Internal Focus and WTO Membership", *Fordham International Law Journal*, Vol 21, page 1941 at 1978.
- ³¹ Katzenburger P and Kur A, "TRIPs and Intellectual Property", *International Intellectual Property Law: Course Materials, Semester 2 2002* page 3.
- ³² Article 64 of the TRIPs Agreement. See also Katzenburger P and Kur A, "TRIPs and Intellectual Property", *International Intellectual Property Law: Course Materials, Semester 2 2002* page 3-18.
- ³³ Article 1 of the TRIPs Agreement.
- ³⁴ Article 3 and 4 of the TRIPs Agreement.
- ³⁵ Article 7 of the TRIPs Agreement.
- ³⁶ Article 13 of the TRIPs Agreement.
- ³⁷ Article 9 of the TRIPs Agreement.
- ³⁸ Article 2 of the Berne Convention.
- ³⁹ Article 9.2 of the TRIPs Agreement.
- ⁴⁰ Article 7(1) of the Berne Convention.
- ⁴¹ Articles 9-14 of the Berne Convention.
- ⁴² Article 9(2) of the Berne Convention.
- ⁴³ Article 10 of the Berne Convention.
- ⁴⁴ Article 11 of the TRIPs Agreement.
- ⁴⁵ Article 16 of the Berne Convention.
- ⁴⁶ Article 41.1 of the TRIPs Agreement.
- ⁴⁷ Article 44(1) of the TRIPs Agreement.
- ⁴⁸ Article 45 of the TRIPs Agreement.
- ⁴⁹ Article 46 of the TRIPs Agreement.
- ⁵⁰ Article 50(3) of the TRIPs Agreement.
- ⁵¹ Article 61 of the TRIPs Agreement.
- ⁵² Zheng C, "The Implementation of the Chinese Copyright Law". (1994) *Copyright World*, Vol 41, page 38 at 38.
- ⁵³ This is different from the position in Australia where international treaties do not become part of Australian municipal law until implemented by legislation.
- ⁵⁴ Article 1 of the Copyright Law 1991 (PRC).
- ⁵⁵ Lazar JC, "Protecting Ideas and Ideals: Copyright Law in the People's Republic of China", *Law and Policy in International Business*, Vol 27, page 1185 at 1191-1192.
- ⁵⁶ Article 2 of the Copyright Law 1991 (PRC).
- ⁵⁷ Zheng C, "The Chinese Copyright System and Three Relevant Copyright Conventions", *Copyright World*, vol 26, page 33 at 33.
- ⁵⁸ *Ibid* at 35.
- ⁵⁹ Article 3 of the Copyright Law 1991 (PRC).
- ⁶⁰ Article 4 of the Copyright Law 1991 (PRC).
- ⁶¹ Article 10 of the Copyright Law 1991 (PRC).
- ⁶² Article 11 of the Copyright Law 1991 (PRC).
- ⁶³ Articles 20 and 21 of the Copyright Law 1991 (PRC).
- ⁶⁴ Article 11 of the Copyright Law 1991 (PRC).
- ⁶⁵ Article 16 of the Copyright Law 1991 (PRC).
- ⁶⁶ Article 22 of the Copyright Law 1991 (PRC).
- ⁶⁷ Articles 36-45 of the Copyright Law 1991 (PRC). Zheng C "Understanding the Protection of Neighbouring Rights in China: the First Court Decision Regarding Performers Rights" (1997) *Copyright World* Volume 69 page 45.
- ⁶⁸ Lazar JC, "Protecting Ideas and Ideals: Copyright Law in the People's Republic of China", *Law and Policy in International Business*, Vol 27, page 1185 at 1195.
- ⁶⁹ Article 46 of the Copyright Law 1991 (PRC). See also Lazar JC, "Protecting Ideas and Ideals: Copyright Law in the People's Republic of China", *Law and Policy in International Business*, Vol 27, page 1185 at 1195-6.
- ⁷⁰ Article 47 of the Copyright Law 1991 (PRC). Lazar JC, "Protecting Ideas and Ideals: Copyright Law in the People's Republic of China", *Law and Policy in International Business*, Vol 27, page 1185 at 1195-6.
- ⁷¹ Article 217 of the Criminal Law (PRC) provides that in order for persons to be prosecuted for infringement of copyright, the following amounts of large illegal gains must have been received by the infringing party:
- RMB 200,000 for an individual; and
 - RMB 1 Million for a legal entity
- ⁷² Article 217 of the Criminal Law (PRC). See also Council for Trade-Related Aspects of Intellectual Property Rights, *Review of Legislation: Responses from China to questions posed by Australia, the European Communities and their member States, Japan and the United States* at paragraph 25.
- ⁷³ Council for Trade-Related Aspects of Intellectual Property Rights, *Review of Legislation: Responses from China to questions posed by Australia, the European Communities and their member States, Japan and the United States* at paragraph 25. See also Lazar JC, "Protecting Ideas and Ideals: Copyright Law in the People's Republic of China", *Law and Policy in International Business*, Vol 27, page 1185 at 1195-6.
- ⁷⁴ Article 48 of the Copyright Law 1991 (PRC).
- ⁷⁵ Cheng J, "China's Copyright System: Rising to the Spirit of TRIPs Requires an Internal Focus and WTO Membership", *Fordham International Law Journal*, Vol 21, page 1941 at 1963.
- ⁷⁶ Articles 49 and 50 of the Copyright Law 1991 (PRC).
- ⁷⁷ Council for Trade-Related Aspects of Intellectual Property Rights, *Checklist of Issues on Enforcement: Responses from China*, 19 July 2002 at paragraphs 15-19.
- ⁷⁸ Cheng J, "China's Copyright System: Rising to the Spirit of TRIPs Requires an Internal Focus and WTO Membership", *Fordham International Law Journal*, Vol 21, page 1941 at 1956-7.
- ⁷⁹ Article 22 of the Copyright Law 1991 (PRC).

⁸⁰ Ibid at 1952-55.
⁸¹ Ibid at 1958-60.
⁸² DU Juan and KH Pun, "Practical Aspects of Software Copyright in China", (2000) *EIPR*, page 520.
⁸³ Article 1, Regulations on Computer Software Protection.
⁸⁴ Articles 2 and 3, Regulations on Computer Software Protection.
⁸⁵ Article 4, Regulations on Computer Software Protection.
⁸⁶ Article 6, Regulations on Computer Software Protection.
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⁸⁸ Article 14, Regulations on Computer Software Protection.
⁸⁹ Article 16, Regulations on Computer Software Protection.
⁹⁰ Article 17, Regulations on Computer Software Protection.
⁹¹ Article 23, Regulations on Computer Software Protection.
⁹² Article 24, Regulations on Computer Software Protection.
⁹³ Ibid.
⁹⁴ Yu PK, "Piracy, Prejudice, and Perspectives: An attempt to use Shakespeare to Reconfigure the US-China Intellectual Property Debate (2001) *Boston University Law Journal*, Vol 19(1), page 1-87 at pages 19-20. See also Wang L, "The Chinese Traditions Inimical to the Patent Law", (1993) *Northwestern Journal of International Law and Business*, Volume 14, page 15 at page 36.
⁹⁵ Ibid.
⁹⁶ Taubman AS, "TRIPs Goes East: China's Interests and International Trade in Intellectual Property" (draft article) at paragraph 2.
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⁹⁸ Yu PK, "Piracy, Prejudice, and Perspectives: An attempt to use Shakespeare to Reconfigure the US-China Intellectual Property Debate (2001) *Boston University Law Journal*, Vol 19(1), page 1-87 at pages 21-22.
⁹⁹ Ibid.
¹⁰⁰ Ibid.
¹⁰¹ Ibid at 23-4.
¹⁰² Ibid.
¹⁰³ Ibid at 26-8.
¹⁰⁴ Ibid.
¹⁰⁵ Ibid.
¹⁰⁶ Ibid at 29-30.
¹⁰⁷ Ibid at 31.
¹⁰⁸ Bhala R, "Enter the Dragon: An Essay on China's WTO Accession Saga" (2000) *American University International Law Review* Vol 15, page 1469.
¹⁰⁹ Yu PK, "Piracy, Prejudice, and Perspectives: An attempt to use Shakespeare to Reconfigure the US-China Intellectual Property Debate (2001) *Boston University Law Journal*, Vol 19(1), page 1-87 at pages 35-7.
¹¹⁰ Yu PK, "Piracy, Prejudice, and Perspectives: An attempt to use Shakespeare to Reconfigure the US-China Intellectual Property Debate (2001) *Boston University Law Journal*, Vol 19(1), page 1-87 at pages 35-7.
¹¹¹ Ibid.
¹¹² Zeng Xianwu and Qiao Rongde, 14 March 2003.

¹¹³ "High Prices encourage Software Piracy", *Australian Financial Review*, 4 September 2002.
¹¹⁴ Palmer SJ "An Identity Crisis: Regime Legitimacy and the Politics of Intellectual Property Rights in China", *Indiana Journal of Global Legal Studies*, Volume 8, page 449.
¹¹⁵ Cheng J, "China's Copyright System: Rising to the Spirit of TRIPs Requires an Internal Focus and WTO Membership", *Fordham International Law Journal*, Vol 21, page 1941 at 1985.
¹¹⁶ Ibid at 1986.
¹¹⁷ Tse JSL, "Protecting Patent Rights in the People's Republic of China", (1998) *Canterbury Law Review*, Volume 7, page 123 at 137.
¹¹⁸ Cheng J, "China's Copyright System: Rising to the Spirit of TRIPs Requires an Internal Focus and WTO Membership", *Fordham International Law Journal*, Vol 21, page 1941 at 2008-13.
¹¹⁹ Article 41 of the TRIPs Agreement.
¹²⁰ International Intellectual Property Alliance: 2001 Special 301 Report: People's Republic of China, www.iipa.com. See also Taubman AS, "TRIPs Goes East: China's Interests and International Trade in Intellectual Property", (Draft Article) page 1.
¹²¹ Yu PK, "From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century" *American University Law Review*, Vol 50 page 131 at page 172.
¹²² Hill D and Evans J, "Chinese Patent Law: Recent Changes Align China More Closely with Modern International Practice", *George Washington Journal of International Law and Economics*, Volume 27 page 359 at page 363.
¹²³ It is unclear as to whether this was an annual figure: Council for Trade-Related Aspects of Intellectual Property Rights, *Transitional Review Mechanisms of China: Communication from the European Communities and their member States*, 29 August 2002 at paragraph 9.
¹²⁴ The enforcement of intellectual property has become part of China's national anti-crime campaign; the Chinese police and court systems have become actively involved in combating IPRS piracy. According to incomplete Chinese statistics, during the mass action in 1996 against underground compact disk factories, more than 590,000 man hours were spent and 6.5 million pieces of audio and video products, 60,000 discs of computer publication, and 12.35 million magazines were confiscated. Thirty six underground CD production lines were exposed with an annual production ability of 200 million CDs. In addition over 80 major illegal publishing places were shut down, 108 provincial cases were brought and criminal gangs were cracked down on. Nationwide, 20 illegal publication markets were shut down and a number of publishing houses were severely punished: Wu S, "The Conditions of the Juridical and Administrative Protection of Copyright in China", (1998) *Duke Journal of Comparative and International Law*, Vol 9, page 241.
¹²⁵ Chinese figures suggests that from 1991 to 1996, Chinese courts accepted 19,404 cases of intellectual property civil disputes (of

which 17,588 cases were decided). These cases included 4,138 patent dispute cases, 3,036 copyright dispute cases, 1,227 trademark dispute cases, 8,162 technology contract dispute cases and 2,841 other cases including infringement of trade secrets cases. In criminal matters, from 1991 to 1996, Chinese courts accepted 1,934 criminal cases of trademark infringement of which 1,927 cases were concluded and 1,675 people were sentenced to imprisonment or other punishment: Cheng YS, "Juridical Protection of Intellectual Property in China" (1998) *Duke Journal of Comparative and International Law*, Vol 9, page 267.
 Recently, Chinese authorities suggested that in respect of the enforcement of Trademark Law, there were 41,163 trademark law cases in 2001. Administrative authorities confiscated 250,000,000 illegal trademark signs and 14,404 implements used for infringing production. 2227.74 tons of infringing products were destroyed and the total value of fines amounted to RMB 210,000,000. Infringers were ordered to pay damages of 3,343,400 in total. 86 of these cases were transferred to criminal procedures involving 88 people. In respect of copyright law infringement, copyright administrative authorities received 4,416 cases in 2001 with 4,306 cases being concluded with 66 cases being transferred

to the criminal jurisdiction: TRIPs Council, *Transnational Review Mechanism of China: Communication from China*, 16 September 2002 at paragraphs 23-25.

¹²⁶ Administrative authorities have also been prevalent in the enforcement of IP rights in China. Statistics reveal that more than 14,736 IP cases were enforced by the relevant Chinese administrative authorities in 1998 with the total compensation being awarded to brand owners at about \$600,000 which is about \$41 per case: Nguyen LL, "World Trade Compliance: the Future for Intellectual Property Rights in China, *Intellectual Property Law Bulletin*, Vol 14(9), page 105 at 106.

¹²⁷ P K Yu, "From Pirates to Partners: Protecting Intellectual Property in China in the Twenty-First Century", *American University Law Review*, Vol 50, page 131 - 243 at page 153.

¹²⁸ Since 1998, the various customs in China have investigated and dealt with 1480 cases of infringement of IPRs in export and import. On 1 May 2002, the customs authorities of China seized 2,510,000 smuggled CDs of 70 types in 2,150 boxes, which reached the maximum amount of seized CDs in a single smuggle case in 2002. At present, the holders of IPRs have registered with the General Customs Administration to seek protection for 3,728 items of intellectual property, including 2,392 items relating to trademark rights. In the records of trademark rights, 1387 items (58%) are for domestic trademarks: www.chinaiprlaw.com.

¹²⁹ In 2002, the local governments in the whole nation seized more than 61,570,000 pieces of pirated products, including 36,920,000 pieces of pirated audio-video products, 12,230,000 pirated books, 5,820,000 pieces of pirated electronic publications and

4,120,000 pieces of pirated software. This is a record amount of seized pirated products in China in a single year: Li W, Li S and Yu Z, "Chinese Says No to Piracy", www.chinacourt.org.

¹³⁰ Qu Z, "Protection of Copyright: Another Year of Hard Battle", www.chinacourt.org, (2 January 2003).

¹³¹ Ye Y, : "Both apology and compensation—copyright of the software from foreign countries is under protection by China's abidance to the international conventions", www.chinacourt.org (December 16th, 2002).

¹³² Ye Y, : "Both apology and compensation—copyright of the software from foreign

countries is under protection by China's abidance to the international conventions", www.chinacourt.org (December 16th, 2002).

¹³³ Ye Y, : "Both apology and compensation—copyright of the software from foreign countries is under protection by China's abidance to the international conventions", www.chinacourt.org (December 16th, 2002).

¹³⁴ Article 4, *Interpretation of the Supreme People's Court Concerning Several Issues on Application of Law in Hearing Correctly the Civil Copyright Case* (12 October 2002).

¹³⁵ Article 6, *Interpretation of the Supreme People's Court Concerning Several Issues on Application of Law in Hearing Correctly the Civil Copyright Case* (12 October 2002).

¹³⁶ Article 24, *Interpretation of the Supreme People's Court Concerning Several Issues on Application of Law in Hearing Correctly the Civil Copyright Case* (12 October 2002).

¹³⁷ Article 28, *Interpretation of the Supreme People's Court Concerning Several Issues on Application of Law in Hearing Correctly the Civil Copyright Case* (12 October 2002).



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