REFORMING THE PROTECTION OF INTELLECTUAL PROPERTY: THE CASE OF CHINA AND TAIWAN IN LIGHT OF WTO ACCESSION

Andy Y. SUN
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I. INTRODUCTION

Toward the second half of 2001, sensing imminent accession to the World Trade Organization (hereinafter WTO), both the People’s Republic of China (hereinafter PRC) and the Republic of China (hereinafter ROC) went into high gear and passed a large amount of economic legislation to demonstrate that they were in conformity with the rules of the WTO. ¹ The critical moment finally arrived at the WTO’s Fourth Ministerial Conference in Doha, Qatar, when it voted to approve the accession applications of the PRC and ROC on November 10 and 11, 2001, respectively.² For China, this ended a long and winding road of negotiation and concession that had begun in 1986; for the ROC, similar processes took exactly twelve years.³ Official calculation suggests that a total of 1,413 “legal documents” have been consolidated or clarified in the PRC, with 624 laws and regulations having been repealed, 6 having been revised and 21 new laws having been

¹ Because of its unique political situation, the ROC formally filed its application in the name of “Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu” to the former General Agreement on Tariffs and Trade (GATT) under Article XXIII of the 1947 GATT, also to be known as “Chinese Taipei.” This provision was subsequently transformed into Article XII of the Marrakesh Agreement Establishing the World Trade Organization: “1. Any State or separate customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement and the Multilateral Trade Agreements may accede to this Agreement, on terms to be agreed between it and the WTO. Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto.”

² Both votes were cast in the form of consensus, and three documents were voted on in each case: Report of the Working Party for the Accession, the Protocol of Accession, which includes the terms of membership, and the schedule of commitments on market access for goods and services. As a result, China became the 143rd member of the WTO on December 11, 2001, 30 days after it formally notified the WTO Director-General that it had completed its domestic ratification. On the other hand, Chinese Taipei (ROC) becomes the 144th member on January 1, 2001, after it has done the same. See WTO, Report of the Working Party on the Accession of China, WT/MIN(01)/3, November 10, 2001; Report of the Working Party on the Accession of Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu, WT/MIN(01)/4, November 11, 2001.

³ The PRC formally filed its application to the GATT on July 11, 1986 and the ROC filed its application on January 1, 1990. Ironically, China was one of the 23 original members when GATT came into being in 1948 but withdrew from the organization in March 1950 as a result of the civil war that eventually split China into two opposing regimes, a state that continues to this day.
Reforming the Protection of Intellectual Property

enacted by the end of 2001. The review/revision process is still on-going. In the ROC, a total of 55 legislative amendments have been made in an effort to be in line with WTO rules.

These legislative developments, together with many other government policy actions and pronouncements, suggest that both the PRC and ROC are indeed committed to the rules and spirit of the WTO. Not surprisingly, there is genuine, across-the-board optimism from foreign governments and businesses alike that the market doors of both places have finally cracked open.

Despite the air of change, there is concern whether the societies of the PRC and ROC can first withstand a period of economic hardship and perhaps even social unrest due to initial market disorder and severe foreign competition after their WTO accession before reaping any benefit. The issue of how those new trade

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6 For example, China will for the first time allow private companies to import crude and refined oil products. See “China Allows Private Companies to Import Oil,” Asia Port Daily News, January 21, 2002, p. 3; “Overseas Insurers Bracing Up for Local Market,” Asia Port Daily News, January 21, 2002, p. 3.


rules and policies will actually be enforced also remains questionable, given that so-called "local protectionism" is still prevalent in the PRC, and in the ROC to a lesser extent.

WTO rules are designed to cover and regulate a broad range of trade-related issues, to provide certain substantive standards on those issues and to ensure that each WTO member’s domestic laws and policies related to them are fair, non-discriminatory, and transparent. In fact, the WTO in its entirety is a legalistic framework designed to facilitate a global trade environment that is governed by the rule of law consistent with certain international norms.

One prominent area being used as a benchmark in measuring each WTO member’s compliance is the protection of intellectual property. The Agreement on Trade-Related Aspects of Intellectual Property Rights (hereinafter TRIPS Agreement), as Annex 1C of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, the fundamental instrument upon which the WTO is established, is designated specifically for this purpose. Furthermore, the United States and the European Union had placed this issue at the top of their international trade negotiation list even before the TRIPS Agreement came into being.

As a result, both the PRC and ROC have been constantly placed on the EU and US sanction list throughout the 1990s for the lack or


9 See Groombridge and Barfield, id., pp. 63-75.

10 For WTO’s objectives, see Preamble, Agreement Establishing the World Trade Organization, as a part of the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations (Marrakesh, April 15, 1994) (Final Act). Geneva, Switzerland: World Trade Organization, 1994. Non-discriminatory and fair treatment is reflected by the principles of national treatment and most-favored-nation treatment on market access.

11 There has been a simultaneous parallel between the “bilateral track” and “multilateral track” under the auspices of the Uruguay Round Multilateral Trade Negotiations. See Andy Y. SUN, “From Pirate King to Jungle King: Transformation of Taiwan’s Intellectual Property Protection,” Fordham Intellectual Property, Media and Entertainment Law Journal, Vol. 9, No.1 (1998), pp. 67, 73-76.
insufficiency of protection afforded intellectual property.\textsuperscript{12} Not unexpectedly, this resulted in further delays on their respective paths to WTO accession.\textsuperscript{13}

For Chinese society, meeting the WTO requirements for intellectual property protection can be particularly challenging. Culturally, arguably the Chinese imperial past has not developed a sustained, indigenous counterpart to intellectual property law.\textsuperscript{14} This means an outright transplantation of a foreign model or a mixture of several models can be problematic. In addition, before there is any meaningful, nationwide respect for intellectual property, Chinese society must address at least the following questions or sentiment that seems to be quite prevalent:

- Why does Chinese society need to protect intellectual property in the first place? Is it primarily for the benefit of foreign interests or self-interests?
- Even if intellectual property protection is beneficial to society, is it really so over the long run? In addition, should the Chinese economy focus on development in the present (preferably with the lowest possible costs) and then engage in intellectual property protection only when the economy and standard of education have reached a certain level?

\textsuperscript{12} Id.

\textsuperscript{13} For example, while the PRC and the United States signed a Memorandum of Understanding on the Protection of Intellectual Property on January 17, 1992 to set a comprehensive and specific course of action that both parties will take either by meeting a specific deadline or “within a reasonable time” (Articles 2-4), it was not until the signing of two more agreements (in 1995 and 1996 respectively) and nine more years of political heckling that the United States finally dropped this issue in the PRC’s WTO accession negotiations. On the other hand, as of the end of 2001, the PRC remained on the U.S. “Special 301” list for lack of adequate and effective intellectual property protection, and was placed in one of the worst categories possible (“Section 3056 monitoring” under the Trade Act of 1974). On the other hand, while having been taken off the “Special 301” list briefly, ROC was re-designated as a “Priority Watch” (the second worst category) under the list in 2001.

• From the perspective of consumers, why must people pay a high premium for something that may otherwise be freely or cheaply obtainable (either with similar or much lower quality)?

Using intellectual property protection as a test platform and recent cases, this article attempts to examine how the PRC and ROC tackle these questions, their struggle for reaching a balance while under enormous pressure (political and legal) from within and without, and finally, the progress toward a rule of law society in light of their respective WTO accession.

II. A STRUGGLE FOR BALANCE

In their efforts to develop modern economies based on high technology, terms such as “knowledge-based economy,” “technology management” and “internationalization” have become fashionable buzzwords in the PRC and ROC. While these concepts are now fully acceptable to Chinese society, there has been considerable discussion and debate on exactly what they mean and what should be done initially.\(^{15}\) Eventually a consensus has emerged. Regardless of what else should be done, one reform is essential and inevitable, i.e., bringing the existing legal system in line with international norms, as least as far as economic and trade regulations are concerned.\(^{16}\) Clearly the quest for WTO accession

\(^{15}\) The initial discussion of a knowledge-based economy was not without controversy in the PRC, especially when placed in the context of maximizing one’s self-interest with one’s knowledge against the backdrop of socialist ideology. For detailed analyses and the difficult challenges facing PRC reform, see Carl J. Dahlman and Jean-Eric Aubert, *China and the Knowledge Economy*, Washington, D.C.: The World Bank Group, 2001.

\(^{16}\) For the PRC, while the “open door” policy has been in place since 1978, the definitive turning point in embracing internationalism occurred in 1984, when DENG Xiaooping, then the PRC’s paramount leader, proclaimed that “development behind closed doors cannot be successful; China’s development cannot be parted from the world.” See DENG Xiaooping, “Wo men de hong wei mu biao he gen ben zheng ce (Our Profound Objectives and Fundamental Policies),” Talk on October 6, 1984, collected in *Selected Scripts of Deng Xiaooping*, Vol. 3, Beijing, China: People’s Publication Co., 1993, pp. 77, 78 (text in Chinese). See also, GONG Wen, “Rang li shi ming ji she shi wu nian – Zhong guo ru shi
played a pivotal role in the formation of this consensus. As will be illustrated further *infra*, this need has even gone beyond mere WTO compliance, as many intellectual property cases are now clearly border-crossing and may be resolved through multi-faceted channels, involving both domestic and foreign forums.

A. Legislative Reform

Both the PRC and ROC follow the civil (or continental) law tradition in that legislation takes precedence over judicial decisions. The role of the judiciary is to strictly interpret laws and regulations, while consciously avoiding construing new rules as a substitute to the codified law. The common law principle of *stare decisis* is not formally recognized, as least in theory, although judicial precedents are gaining more prominence in practice in recent times. In addition, given the backlog of the legislature, once a bill is enacted into law, past experience suggests that it will be at least a decade or so before the law is revisited and there is an opportunity to review and examine the effect of the legislation.

All these traditions are now under serious challenge in light of the rapid development of technology as well as market demand for an effective and flexible legal regime capable of resolving issues derived from that technology. As a result, PRC Patent Law has gone through two major revisions since its inception in 1985,

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*tan pan bei wang lu (Let History Rivet Those Fifteen Years – Memorandum on China’s WTO Accession Negotiations),” People’s Daily, November 11, 2001, p. 1 (text in Chinese, quoting Madam WU Yi, former Minister for Foreign Trade and Economic Cooperation and currently member of the State Council, “After WTO accession, [China] will more than ever develop an opened economy across the board... Policy-oriented openness will be transformed into predictable openness under the legal framework.”).

17 In practice, however, the PRC Supreme People’s Court now regularly publishes selected judgments online and in its official gazette. Those cases will then be considered as “models” that other similar cases should look to for guidance, although short of being cited as primary authority. In the ROC, the Supreme Court will select and compile certain decisions each year and grant them the status of “judicial precedents,” which can be cited as primary authority. For detailed analyses of rule of law and legality reform in China, see Yuanyuan SHEN, “Conception and Receptions of Legality – Understanding the Complexity of Law Reform in Modern China,” in Karen G. Turner, James V. Feinerman, and R. Kent Guy, co-ed., *The Limits of the Rule of Law in China*, Seattle, WA: University of Washington Press, 2000, pp. 20-44.
while Trademark Law and Copyright Law have each gone through two major revisions. Similar developments can be found in the ROC, where each of its intellectual property laws has been under constant review and revision.

By and large both the PRC and ROC can take pride in their recent efforts in intellectual property-related legislative reform. Judging from the fact that the PRC did not have any meaningful protection afforded to intellectual property prior to 1982, and that the ROC government openly advocated imitation without authorization as a necessary means to achieving economic development the same year, both have indeed come a long way to produce a comprehensive legal regime on this subject and to ensure that it is in conformity with the TRIPS Agreement. While there are still shortcomings, certain areas have arguably exceeded the TRIPS requirement. For example, within a year of first enactment of its Copyright Law, the PRC promulgated International Copyright Treaties Implementing Rules, which provided more protection or better than national treatment to foreign copyrighted

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19 For the PRC, its first modern intellectual property law came into place on August 23, 1982 when the Fifth National People's Congress Standing Committee enacted Trademark Law (effective on March 1, 1983). For the ROC, see Board of Foreign Trade (BOFT), Ministry of Economic Affairs (MOEA), *Intellectual Property Rights Protection: A Republic of China Prospective*, 1983. This document asserted "[t]he R.O.C. government has viewed imitation as a necessary process in the evolution of human civilization and believed that commercial counterfeiting is an inevitable phenomena in most developing countries...." This attitude quickly changed toward support for an effective legal protection of IP in the following years, once the government realized that it has committed a major blunder. See BOFT, MOEA, R.O.C., *Efforts and Accomplishments in the Protection of Intellectual Properties*, 1985.

In the ROC, in addition to civil liability, patent infringement may also constitute a criminal offense.22

Ironically, it is precisely the belief that certain existing laws may have exceeded what the TRIPS Agreement is asking for that has prompted internal movements within the PRC and ROC to water down those laws. For example, there has been heated debate in the ROC on whether its statute should continue to "decriminalize" patent infringers, especially in utility or invention patent infringement disputes. While other considerations and factors have played important roles in the discussion, such as whether imposing criminal sanctions in fact creates a disincentive for innovation and will have a long-lasting chilling effect on local high-tech industry, it clearly has been the argument against excessive protection beyond the TRIPS Agreement standard that has given proponents of de-criminalization the upper hand.23 Unlike in the early 1990s when U.S. pressure could have a decisive influence on major ROC economic policies, in its latest move, the Legislative Yuan has simply disregarded strong U.S. opposition and passed a patent amendment that completely removes criminal penalties against utility patent infringers, willful or otherwise.24 Yet as a trade-off, the bill

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21 Although on the surface domestic, unilateral rule-making, it is evidently the result of foreign pressure and has been often referred to as "super national treatment" by many Chinese scholars, a term that carries the reminiscent sentiment of "unequal treatment" and humiliation China suffered in the international community for over a century, from the end of the Opium War in 1842 to the end of World War II in 1945.

22 Articles 123-131, Patent Law. Thanks to a strong local high-tech industry lobby, ironically an infringer of a utility model or design patent may incur criminal penalty as opposed to an infringer of invention (or utility) patent, where criminal penalty has been repealed. Note that Article 61 of the TRIPS Agreement requires that all WTO members provide criminal procedures and penalties at least in cases of willful trademark counterfeiting or copyright piracy on a commercial scale. Therefore, criminal penalties on patent infringement are not mandatory.

23 Another point raised by proponents of the bill is that the threat of criminal penalties had been constantly used by patent right holders to intimidate their competitors and as leverage in demanding excessive amounts of royalty payments, causing great instability in the market place.

24 Patent Law Amendment, promulgated October 24, 2001, which repealed Sections 123 and 124. Note, however, that criminal penalties for design and utility model (or petite) patents remain in the code.
did adopt the U.S. model by imposing treble damages in case of willful infringement.\textsuperscript{25}

In the PRC, the latest round of legislative reform of intellectual property law, albeit for the sake of WTO/TRIPS Agreement compliance, was also designed to meet its domestic demands. As will be illustrated infra, recent cases in the area of electronic commerce have seriously challenged the insufficiency of existing laws and left courts to struggle and stretch the meaning of the law to its limits.

B. Judicial Challenge

(a) Beijing Online Case

On December 14, 1999, the Beijing First Intermediate People’s Court (BFIPC) reviewed the case of Wang Meng, et al. v. Beijing Cenpok Intercom Technology Co., Ltd. (世互通技术有限公司), a/k/a Beijing Online (北京在线) in an “appeal trial,” in many respects a landmark decision.\textsuperscript{26} Despite some speculation that the court might need more time to ponder the issues, the three-judge panel issued its decision right after the trial.\textsuperscript{27} The court affirmed the lower court’s ruling that the defendant’s unauthorized posting of plaintiffs’ works on the Internet constituted copyright infringement and that the damages rendered by the lower court were appropriate. This case is now final.\textsuperscript{28}

This is the third known copyright infringement lawsuit in the PRC concerning the liability of an Internet service provider. Yet it

\textsuperscript{25} Article 89, Section 3, Patent Law.

\textsuperscript{26} Under the PRC litigation system, an appeals court always has jurisdiction to review the facts of each case de novo, provided, that a party in a given dispute has indeed raised a question concerning the court of first appearance’s fact finding. \textit{See} Articles 151, Civil Procedure Law of the PRC.

\textsuperscript{27} This panel was headed by LUO Dongchuan (罗东川), Deputy Chief Judge of that court’s Intellectual Property Division and a renowned intellectual property scholar in China.

\textsuperscript{28} The Chinese legal system in principle permits only one appeal in both civil and criminal cases. \textit{See} Article 158, Civil Procedure Law and Article 197, Criminal Procedure Law of the PRC.
has gained national prominence from the outset. The plaintiffs are all celebrity writers, the defendant is the leading Internet firm, and the outcome will no doubt have a profound impact on the future of e-commerce in the PRC. On June 15, six renowned writers jointly filed a civil complaint before the Haidian District People’s Court in Beijing, charging Beijing Online, one of the largest Internet access and content providers in the PRC, owned and managed by Beijing Cenpok Intercom Co., Ltd., for unauthorized and illegal copying and distribution of their works over the Internet. They specifically demanded compensation for their economic losses and mental suffering. On September 18, the district court ruled in favor of the plaintiffs, awarded Renminbi ¥26,580 (US$3,200) in compensatory damages but rejected any award for mental distress. The defendant appealed.

Here the BFIPC had to first resolve a fundamental question: Are works posted on the Internet copyrightable at all? The existing law apparently does not address this issue directly. The defendant indeed raised this very argument as its primary defense. The closest statutory provision the court could identify was Article 10 of the Copyright Law. It provides that the term “copyright” shall include the right of publication, authorship, alteration, integrity, exploitation, and remuneration. Specifically, subsection (5) states that the right of exploitation is “the right of exploiting one’s work by reproduction, live performance, broadcasting, exhibition, dis-

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29 For example, the lead plaintiff, Mr. WANG Meng, was one of most well-known writers/novelists in the PRC. The case gained more attention by the official Chinese Central Television’s national live broadcast of the entire trial on September 18, 1999. The names of the other five plaintiffs are: ZHANG Jie, BI Shumin, ZHANG Kangkang, ZHANG Zhi and LIU Zhenyu.

30 By the end of 1999, however, Starboom Enterprises Ltd., a subsidiary of the Hong Kong real estate giant Pearl Oriental Holdings Ltd., had purchased 65% of Beijing Online and announced that under the new name Starboom (China) Co., Ltd., the company intended to transform Beijing Online from a life information network into the largest comprehensive Chinese language entertainment website in the People’s Republic of China. See “Pearl Oriental Holdings Buys China ISP Beijing Online,” Zhong Guo Xin Xi Bao (China Information News), December 15, 1999.

31 Although stressing that they were not really for the money but only seeking the court’s ascertainment of their legitimate rights, the plaintiffs have each asked for Renminbi ¥5,000 for mental suffering or distress.
tribution, making cinematographic, television or video production, adaptation, translation, annotation, compilation and the like." In the Chinese language, "and the like" in connotation can be either exclusive (i.e., after an exhaustive list) or inclusive. For instance, to describe that there are four factors that need to be considered in a given issue, it can be said that there are factors A, B, C, D and the like to be considered. However, it can also be said that there are elements A, B, … and the like to be considered. The BFIPC eventually sided with the lower court, ruling that "and the like" should be non-exclusive and, therefore, cyberspace publications are copyrightable subject matter under the current law. It follows that the posting (hence distribution and reproduction) of an electronic version of literary works falls within the scope of rights enjoyed by the copyright holder.

The court rejected the defendant’s contention that the Internet "posting" should be treated as fair use or permissible statutory license because there was no profit taking involved (the defendant claimed that there were even losses). Furthermore, the defendant argued that as an access provider, it had no control over the actual content of its site (the evidence showed that the defendant acquired the ownership of Beijing Online through a merger with another company and did not know of the potential infringement until it received the court’s summons when the case had been filed against

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32 Emphasis added. The original Chinese language for the emphasized words is deng (等). This is based on the official translation. See Document and Archive Center, National Copyright Administration of China, Copyright Law of the People's Republic of China, 1993, pp. 54-55.

33 An analogy to this is the usage of "consists of" as opposed to "comprises" with the former being exclusive and the latter being inclusive.

34 Article 22 of the Copyright Law provides, among other things, "[i]n the following cases, a work may be exploited without permission from, and without payment of [sic] remuneration to, the copyright owner, provided that the name of the author and title of the work shall be mentioned and the other rights enjoyed by the copyright owner by virtue of this Law shall not be prejudiced: (1) use of a published work for the purposes of the user's own private study, research or self-entertainment; ...." For two detailed and excellent discussions on on-line copyright infringement and liability, see JIANG Zhipei, Copyright Liability for Internet Service Providers, reprinted and available at http://www.chinaiplaw.com/1grt/ggr1.htm (text in Chinese); and LI Dongtao, "Challenges from the Internet Cyberspace," Electronics Intellectual Property, September 1999, pp. 17-19, 39 (text in Chinese).
it) and even if it were to be held responsible for the content, it had provided a disclaimer and quickly removed the contents in question once it learned of the potential infringement.\textsuperscript{35} In other words, it lacked any intent to infringe and should at most be held liable for failing to provide reasonable remuneration to the authors, nothing more. The court, however, sided with the lower court and discarded all of these arguments.

The BFIPC held that the unauthorized reproduction and distribution of copyrighted works over the Internet was likely to cause more damage to the plaintiffs’ copyright given the nature and scope of transmission over the Internet. Although the existing law does not offer a clear guideline on the calculation of damages, and the exact amount of losses is difficult to determine, the lower court’s ruling apparently is not unreasonable with all the facts considered. Consequently, the court affirmed the Haidian court’s decision to award compensatory damages and left the total amount intact. The court also agreed with the lower court by not rendering any award for plaintiffs’ alleged mental suffering.

Noticeably, the plaintiffs chose to maintain a low profile and remained cautious throughout. One of them stated that the purpose of their suit was not to be an impediment to the development of e-commerce or flow of information; rather they just wanted to be properly recognized, be informed and be consulted before anyone put their works on the Internet.\textsuperscript{36} Beside the celebrity status of the parties and the case itself, their reaction as such apparently was due, in part, to the contentious debate the dispute help to ignite.

This case has indeed generated very mixed feelings within the legal, political and business communities in the PRC. While most would acknowledge that the case exposes the deficiency of the current law, some nevertheless believe the court has exceeded its jurisdiction by unreasonably expanding the scope of the Copyright

\textsuperscript{35} The defendant's evidence suggested that most of the contents on the web site in question were provided through the exchange of e-mails (through uploads and downloads) by subscribers to that site.

\textsuperscript{36} See ZHANG Afang, etc., "Six Writers Victorious, First Trial on the First Internet Infringement Case Concluded," \textit{Beijing Qing nian Bao (Beijing Youth Daily)}, September 19, 1999 (text in Chinese) (interviews with ZHANG Kangkang and LIU Zhengyu).
Law without proper or legitimate authorization from the National People’s Congress, its Standing Committee or the Supreme People’s Court.37 Some commentators even feel that the whole hoopla is the result of bad influence from American practices and caution against the adoption of the U.S. model.38 Others, however, feel the court has functioned properly and brought law and order to what heretofore has been a “lawless society” within cyberspace.39 Yet a majority of scholars seem to take a middle-of-the-road approach, arguing that while authors ought to be reasonably compensated, they should not, on the other hand, be permitted to reap the full profit from the Internet, given the unique environment, functions and structure of communications on the Internet (i.e., the actual profit is too difficult to calculate and the costs to disseminate works have been greatly reduced). They also argue that such a policy will be in full conformity with the national policy of encouraging massive and maximum flows of information.40 For Internet

38 For instance, Mr. PAN Bo, member of the Haidian District Chinese People’s Political Consultation Council, suggested that China should take the “wait and see” attitude and pay particular attention to ensure that enough leeway is provided for the development of indigenous information industries within China. See GAO Wei, “Is There Free Lunch on the Internet? A Commentary,” Sinanews, December 14, 1999, reprinted and available at http://dailynews.sina.com.cn/comment/1999-12-14/41971.html (text in Chinese).
39 For instance, Mr. ZOU Bian, Deputy Director of Copyright Division, Ministry of Information Industry, drew a rhetorical analogy: “There has to be cars running on the superhighway. But if all the cars thereon are stolen, isn’t it so, then, that the superhighway itself becomes a fertile ground for criminal activities?” Given the rampant copyright piracy activity in China, this remark has touched off very strong reactions from different sectors within China. See supra note 34. Note that Mr. Zou is also the founder and president of the Chinese Software Alliance, an ardent advocacy group for strong antipiracy policy and enforcement in China. Separately, Mr. XU Chao, Deputy Director of Copyrights Division, National Copyright Administration of China (the equivalent of deputy general counsel), suggested that the principle of fault (as in intentional or negligent tort) under the General Principles of Civil Code should also be the applicable standard in copyright infringement cases, including acts taking place in cyberspace. See GAO Wei, id.
40 For instance, Mr. WANG Xiangdong of the Chinese Academy of Social Science argued that in order to find the balance between the interests of the copyright holder and the Internet service provider, special consideration should be given to the preliminary
service providers, they understandably fear that this will significantly discourage the growth of e-commerce.\footnote{For instance, CHEN Binze, Director of the News Center, Sinanet.com complained that this case was overkill. He did acknowledge, however, that the court was correct in its ruling. See ZHANG Dongcao, “More on the Six Writers’ Case, Beijing Online Appealed to Have More Say,” Zhong Guo Qing Nian Bao (China Youth Daily), October 18, 1999.}

Those diverse opinions aside, at least two things are certain. First, there will be more challenges to the Copyright Law of 1990 and other intellectual property laws in the days ahead concerning the use of the Internet. Second, it is inevitable that the current law will be revised and the National People’s Congress will be the final forum for similar debate to take place. Regardless of what the outcome may be and how many people in the PRC are still living without electricity, a good part of the country has clearly crossed the threshold and entered the squabbling stage in how to deal with the new digital age.\footnote{The PRC did expand the scope of copyright to cover online publications in the latest amendment of its Copyright Law, enacted October 27, 2001. See Article 10, Section 2 (right of communications to the public) and Article 47 (liability for unauthorized online publication). Furthermore, prior to the enactment of this amendment, and as a supplement to the Copyright Law, the Supreme People’s Court of the PRC promulgated an Interpretation on Certain Issues Concerning the Application of Law in Relation to Computer Network Copyright Disputes, effective on December 21, 2000, Fa Shi [2000] No. 48. Article 1 of this Interpretation specifically grants jurisdiction to the lower courts over online copyright disputes. In addition to extending copyright protection to online publication, Article 2 expressly states that courts will afford protection to original literature, artistic and scientific works duplicable in any tangible form, however, courts might not afford protection within the scope of the Copyright Law. This set of rules also provides some guidelines to address the issue of online service providers. While this interpretation clearly serves a very important purpose in bridging the gap between an existing law and new societal development, this is nevertheless an example where the court has usurped the legislative power and this rule may be entirely invalid under Articles 8 (items exclusively reserved for the enactment of law) and 87 (usurping of upper level law) of the Li Fa Fa (Legislative Procedure Law) of 2000.}
(b) Microsoft (China) v. Beijing Yadu

On December 17, 1999, the BFIPC issued its judgment in another landmark case, *Microsoft Corporation (China), Ltd. v. Beijing Yadu Science and Technology Group* (北京亞都科技集団). This was the first time a major foreign software manufacturer went directly after an end user for copyright infringement in the PRC and the judgment came only three days after the *Beijing Online* case. Unlike *Beijing Online*, however, the BFIPC was the court of first instance. Having concluded the trial, the court summarily dismissed plaintiff’s complaint for lack of sufficient evidence. Specifically, the court held that the plaintiff misidentified Beijing Yadu Science and Technology Group (hereinafter Yadu Group) as the defendant in its allegations. Microsoft (China) indicated that it would fight on by filing a new complaint against the proper defendant in the near future.43

In its complaint, Microsoft claimed that on November 17, 1998, its agent, the China United Intellectual Property Investigation Center (CUIPIC), joined local authorities in a raid on the Yadu Building, the office compound of defendant Yadu Science and Technology Group, and discovered more than a dozen pirated titles of its software being used on Yadu’s computers.44 The law enforcement authorities then impounded all the pirated software along with the computers and produced an official investigation report. This report contained certified statements of two engineers of Yadu during an interview by the investigators while the raid was being carried out. They admitted on the scene (and apparently without their attorneys being present) that there were at least 50

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43 As of the end of 2001, however, Microsoft (China) has not yet filed or refiled a new complaint.
44 The authorities involved in the raid were the Haidian District Bureau of the Administrative Department of Industry and Commerce (AIC), the agency that has primary authority in trademark enforcement, and the Beijing Haidian No. 3 Notary Sector, which provided the certified/notarized statement from the two engineers. Noticeably missing here in the raid was the National Copyright Administration. It was not directly involved apparently due to lack of resources (only 20 or so full-time personnel working in the national headquarters). CUIPIC is a private (and perhaps the largest in China) investigative agency specializing in anti-counterfeiting activities.
personal computers installed in the company, each of which contained more than 10 different types of pirated Microsoft software (such as the Windows operating system and Office suite). This report turned out to be the most critical piece of evidence in the lawsuit. Microsoft sued for Renminbi ¥1.5 million (US$181,000) in lost profit, investigation and evidence collection costs, litigation and attorney’s fees, immediate cease and desist of all infringing acts, eliminating the effects of the infringing act, and a public apology in accordance with Article 46 of the Copyright Law and Article 134 of the General Principles of Civil Law.

In its answer, the defendant claimed that it did not own the pirated software in the first place, nor was it the proper party to be named in the lawsuit. It claimed that CUPIPC and the government authorities in fact never visited its office. The raid was conducted, according to the defendant, against another company going by the same name (Beijing Yadu Science and Technology, Ltd., hereinafter Yadu Ltd.) and located in the same office building. The defendant alleged that Yadu Ltd. was completely independent from Yadu Group, although both companies retained the same individual, HE Lumin (賀魯民), as their legal representative and Mr. He was chairman of the board at both companies.45

Because the question of improper party was raised, the court first had to resolve that issue. Here BFIPC accepted defendant’s arguments and found that there was no direct evidence that the two confessed engineers were actually employed by Yadu Group (there was no question about their employment with Yadu Ltd., however). Consequently, it dismissed the case on the ground of improper party identity. Moreover, the court ordered Microsoft to pay Renminbi ¥500 (US$60) for litigation costs. Microsoft (China) Co., Ltd. thereafter issued a statement stressing that it would file a-

45 In addition to claiming two independent corporate entities, Mr. He insisted that the alleged infringing activities, even if they were true, were at best individual acts committed by employees, not sanctioned by the company. Note that the current PRC law does not have the doctrine of respondeat superior.
another complaint, this time against Yadu Ltd., the subsidiary of Yadu Group, in due course and in due time.\textsuperscript{46}

\textit{Issues}. This judgment did come as a bit of a surprise to many observers, and was somewhat ironic. Microsoft deliberately went after the parent company of Yadu Ltd. to pursue the “deep pocket” but wound up getting its case thrown out of court. By ruling on this procedural ground, the court apparently avoided, at least for the time being, the need to address the substantive and fundamental question of the case, \textit{i.e.}, whether an end user of pirated software is directly or indirectly liable for infringement under the current copyright regime, and more specifically, whether or not Article 32 of the Regulations on Computer Software Protection provides an end user sufficient exemption from any and all liability as long as that user has no knowledge of, or no reasonable basis for having knowledge of, the infringing nature of the software.\textsuperscript{47} If the answer is yes, the next issue is whether or not this provision nevertheless contradicts the Copyright Law (Article 45),\textsuperscript{48} its related regulations or the norm of applicable international conventions and

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\textsuperscript{46} See Microsoft Corporation, \textit{Statement in Response to Judgment Dismissing Microsoft v. Yadu}, December 17, 1999 (text in Chinese). In reality, there is a concern that there may not be many assets left under Yadu Ltd. if and when Microsoft wins the case against that company many months later.

\textsuperscript{47} Article 32 of the 1991 Regulations on Computer Software Protection: “Where the holder of a piece of software has no knowledge of, or has no reasonable basis for having knowledge of, the piece of software being an infringing object, the liability for infringement shall be borne by the supplier of the infringing piece of software. However, where the rights and interests of the copyright owner of the software owner of the software will not be sufficiently protected without that piece of software held by the holder being destroyed, the holder has the obligation to destroy the piece of software it holds, and the holder may demand compensation from the supplier of the infringing piece of software for the losses the holder suffers in this connection.

“The term [‘]supplier of an infringing piece of software[‘] mentioned in the preceding section covers one who supplies \textit{an} infringing piece of software to others fully knowing that it is an infringing piece of software.” [Emphasis added.]

\textsuperscript{48} Article 45 of the 1990 Copyright Law: “Anyone who commits any of the following acts of infringement shall bear civil liability for such remedies as ceasing the infringing act, eliminating the effects of the act, making a public apology or paying compensation for damages, depending on the circumstances: … (6) exploiting a work created by another without paying remuneration as prescribed by regulations; … (8) committing other acts of infringement of copyright and of other rights related to copyright.”
should therefore be held invalid.\textsuperscript{49} Otherwise, what should be the scope of the exemption? On the other hand, if the answer is no, may the act of an end user nevertheless be free from liability because the infringing act constitutes “fair use” under Article 22 of the Copyright Law?\textsuperscript{50} If neither Article 32 nor fair use is applicable, then what ought to be the standard in resolving the end user issue?

\textit{Analysis.} During the legislative process of the 1990 Copyright Law, there was an internal debate regarding the necessity of establishing a set of additional rules specifically dealing with the registration, protection and licensing aspects of computer software.\textsuperscript{51} Eventually those in favor carried the day and Article 53 was created to give the State Council (the equivalent of the Cabinet) the authority to do so. The State Council then promulgated the Regulations on Computer Software Protection on June 4, 1991 (hereinafter RCSP). But the controversy did not end there.

To begin with, there are inconsistencies between the RCSP provisions and the Copyright Law itself, raising the question of whether those contradictory provisions in the RCSP ought to be invalid. For instance, Article 15 of the RCSP provides a 25-year term of protection, subject to a possible one-time renewal for another 25 years. This obviously is in direct contradiction with Article 21 of the Copyright Law, which grants a term of copyright pro-

\textsuperscript{49} The International Copyright Treaties Implementing Rules provides special guarantees for the protection of foreign copyrighted works. These rules have in effect created certain preferential treatment for foreign works. With regard to how bilateral and multilateral agreements address the end user issue, please see infra for detailed illustration.

\textsuperscript{50} Article 22 of the 1990 Copyright Law: “In the following cases, a work may be exploited without permission from, and without payment of remuneration to, the copyright owner, provided that the name of the author and the title of the work shall be mentioned and the other rights enjoyed by the copyright owner by virtue of this Law shall not be prejudiced: (1) use of a published work for the purposes of the user's own private study, research or self-entertainment; ... (6) translation, or reproduction in a small quantity of copies, of a published work for use by teachers or scientific researchers, in classroom teaching or scientific research, provided that the translation or reproduction shall not be published or distributed; ....”

\textsuperscript{51} Note that Article 3, Subsection (8) of the Copyright Law has already incorporated computer software as one of the protectable subject matters under that law.
tection (which covers computer software) for the life of the author plus fifty year. Another example may be found concerning the proper government agency authorized to manage national copyright-related affairs. Under Article 8 of the Copyright Law, the National Copyright Administration (NCA) ought to be the pro-per agency, but for computer software registration and management, it was not until 1996 that operations were finally transferred to the NCA from the Ministry of Electronic Industry. Although there has not been any formal governmental action to invalidate the inconsistent portion of the RCSP yet, in all likelihood the new draft Copyright Law Amendment will take into consideration that friction by consolidating the existing rules into a single, unified statute in the future. This would also ensure that the rules conform to the PRC's international obligations.

52 In addition, Article 15 of the RCSP is in violation of Article 7 (1) of the Berne Convention for the Protection of Literary and Artistic Works (1971) (hereinafter Berne Convention, of which China is a member) and Article 12 of the TRIPS Agreement.

53 The Ministry of Electronic Industry (MEI) was reorganized and merged with several other ministries into a single Ministry of Information Industry in 1998, under the State Council's Agency Reform Plan, approved by the Ninth National People's Congress (NPC) on March 10, 1998. See Executive Office of the National People's Congress, Zhong Hua Ren Min Gong He Guo Di Jiu Jie Quan Guo Ren Min Dai Biao Da Fui Di Yi Ci Hui Yi Wen Jian Hui Bian (Compilation of Documents for the Ninth National People's Congress First Conference), 1998, pp. 82-98 (text in Chinese); Article 8, Organization Law of the State Council. It was formerly known as the Ministry of Machinery and Electronic Industry (MMEI) and charged with the responsibility of drafting the RCSP. It, therefore, did not come as a surprise when the Computer Software Registration Center (CSRC) was first established to enforce the RCSP, it was placed directly under the MMEI/MME. When the State Council finally decided to transfer CSRC's authority and lucrative operations to the NCA, tensions were quite high on several occasions between the two agencies. But the transition was eventually completed without major incidents.

54 On November 18, 1998 and at its 10th Executive Meeting, the State Council approved a new draft of Copyright Law Amendments and transmitted it to the NPC. The NPC committees then began an extensive consultative process across the country. Many local meetings generated heated debate concerning software and other high-tech issues. By April 1999, except databases, the final and revised bill did not add any new provisions concerning computer software, thinking that it could wait until the dust had settled. Initially the plan was to have the bill formally voted on and enacted by the Standing Committee of the NPC at the end of the year. However, in light of this and the Beijing Online case, among other things, the NPC apparently became dissatisfied with the current version, put the brake on the process and quietly sent it back to the drawing board, with special demand that rules be formulated to deal with emerging technology issues. Note also that the NCA at first proposed the inclusion of those provisions and a major revision
The reason for the creation of Article 32 in the RCSP is because "software sales agents in [the PRC] have little knowledge of laws and the accepted rule in the international software market, and they are easily deceived. The attention is given to education than punishment." Moreover, "in light of the complexity of international software market, it occurs quite frequently that people sell and distribute pirated software. We believe [the Copyright Law] should target those who duplicate and sell the illicit copies of software, not the bona fide acquirers who themselves are being deceived. The law, therefore, provides that where the holder of a piece of software has no knowledge of, or has no reasonable basis for having the knowledge of, the piece of software being an infringing object, the liability for infringement shall be borne by the supplier of the infringing piece of software." It is precisely against this legislative background that at least one scholar suggests that all software end users in the PRC who have no knowledge of the infringing nature and are involved in no commercial activity with that software should be exempted from infringement liability. To further back up this argument, he points to the 1999 State Council's reissue of a Circular which prohibits any and all units (but not families and/or individuals) from using unauthorized software. He believes the national policy is

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55 See YING Ming, "The Legal Protection System for Computer Software," in State Science and Technology Commission (now Ministry of Science and Technology) of the People's Republic of China, China's Intellectual Property System, Blue Book on Science and Technology, No. 7, 1992, p. 187. Note that Professor Ying was the reporter and one of the drafters of the RCSP.

56 See Ministry of Machinery and Electronic Industry, "Illustrations Concerning the Draft Regulations on Computer Software Protection," May 1991 (original text in Chinese). This is the equivalent of an official legislative history of the statute. Note that thus far neither the NCA nor any other agency (including courts) have issued any further interpretation of Article 32.


58 See Executive Office of the State Council, "Circular on the Re-issuance of the National Copyright Administration's Circular Concerning the Prohibition of Using Illegally Duplicated Computer Software," February 24, 1999. The NCA Circular was first issued in
clear on this point and regardless of what the future policy ought to be, as far as the present case is concerned, there is no need for the PRC to go out of its way to be the leader of the pack, setting an ultrahigh protection standard above that of the rest of the world for intellectual property rights.\(^{59}\) This has touched off intense discussion within the PRC on what ought to be the fundamental policies on computer software. As expected, there are also scholars who caution against an across-the-board exemption for end users and advocate a more balanced approach by taking into consideration Article 21 of the RCSP, which only exempts certain acts of “personal usage” under the fair use principle.\(^{60}\) However, the differences seem to lie only in the degree or extensiveness of end user liability; there seems to be a consensus in the PRC that personal end users should be less liable than commercial distributors or users, although it is not clear how the line may be drawn.

The argument for such a broad-based exemption for software end users is troubling. Even with the most extensive scope and favorable terms given to the language of Article 32, such a presumption can hardly be deduced, assuming the article is considered valid. First and foremost, under Article 32, the end user will still need to carry the burden of showing that he/she has no knowledge of the unauthorized nature of the software. Given the fact that there is a significant price difference between the genuine and pirated product, and that a “key number” (or password) is required before each individual software title can be successfully installed in a computer, a case of the end user’s lack of knowledge as such

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59 See SHOU Bu, supra note 56.

60 See, for example, ZOU Bian, “Legal Liability for Computer Software Users,” Zhong Guo Zhan Li Yu Shang Biao (China Patents and Trademarks), No. 2 (1999), pp. 68-71 (text in Chinese and English). Zou also argued for a reduced compensatory damage award in the event of end user liability: “[S]ince the user only uses the software himself and his infringement and damages to the right holder are also limited, the amount of compensation should be determined on the basis of the normal and reasonable license fee of the software. Obviously, it is inappropriate to over-extend the liability of a software user for compensation and even to punish by imposing too much compensation.”
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can hardly be made. For the simple reason of saving money under most circumstances, a not-so-gullible end user probably cannot justify his/her act as merely having been "deceived." Even the author/drafter of the RCSIP indicated that Article 32 aside, an end user may still wind up with civil liability under Article 7 of the General Principles of Civil Law.

Another problem for Article 32 is that it first exempts those who possess any unauthorized or infringing product and then shifts liability to the product suppliers. This approach is quite extraordinary in and of itself, considering that the international norm of copyright protection regime always regulates a certain "use" of a copyrighted work, such as alteration, reproduction, distribution, performance, display and importation, but not possession. Even if possession itself constitutes no infringement, exploiting a work created by another without payment is under Article 45 (6) of the Copyright Law.

It should be noted that while initially this case appears to present a clear-cut scenario of infringement, it does seem to get clouded each day by the ongoing debate inside the PRC, especially on the issues of liability and how much the damages should be. This is primarily because Microsoft is the party who brought the case; Microsoft has been widely perceived as being "hegemonic" and coming to court with unclean hands, i.e., by setting a pricing scheme for certain "must have" software products so high

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61 For example, a genuine Microsoft Windows 98 (simplified Chinese version) may be sold for as much as Renminbi ¥1,998 (US$241), more than twice the price at which it is being sold in the U.S. market and the equivalent of a month and a half of salary for an average worker in China. On the other hand, a CD that contains pirated Windows 98 and Office 97 suite can be sold for no more than Renminbi ¥20 (US$2.5). So stiff is the price of the genuine product that two companies brought suit against Microsoft in December 1999 for monopoly and price discrimination against consumers. See Central News Agency, "Two Enterprises in Fuzhou Sue Microsoft," World Journal, December 25, 1999, p. A6 (text in Chinese).

62 See YING Ming, Copyright Protection for Computer Software, 1991, pp. 176-77 (text in Chinese). Article 7 provides: "Civil activities shall have respect for social ethics and shall not harm the public interests, undermine state economic plans or disrupt social-economic order."

63 See Articles 5, 8, and 9, Berne Convention.

64 See supra note 47.
and so far beyond the reach of ordinary people that Microsoft in effect induces the growth of piracy activity and should be barred from claiming itself to be the victim of piracy. As a result, the prevalent sentiment in the PRC is that even if Microsoft should win on liability grounds, some form of equity should apply so that it is not awarded the full amount it has asked for.65

In a widely publicized interview in mid-1998, Microsoft's chairman and chief executive officer Bill Gates was quoted as saying, "[a]lthough about three million computers get sold every year in the PRC, people don't pay for the software. Someday they will, though. And as long as they're going to steal it, we want them to steal ours. They'll get sort of addicted, and then we'll somehow figure out how to collect sometime in the next decade."66 Not surprisingly, this statement was extremely ill received in the PRC and almost instantly created a strong backlash against Microsoft. Adding insult to injury, the high price tag accompanying the formal release of Windows 98 and Office 2000 around the same time did not help the company's image (nor its sales) at all in the PRC. Only government agencies and corporations (mostly large ones) are under mandatory rules to use genuine products. Both Microsoft and the Chinese general public found themselves moving farther away from each other by the day.

In late October of 1999, Juliet Shihong WU (呂士宏), one of the most prominent businesswomen in the PRC who had formally resigned from her position as general manager at Microsoft (China) Co., Ltd. only two months earlier, published her autobiography in which she detailed Microsoft's managing style, premium pricing scheme, and "get tough," "go bullying them" anti-piracy practices in the PRC, further confirming Microsoft's intent to carry out

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65 There is in fact a good legal authority that the court may use to react to this sentiment. Article 131 of the General Principles of the Civil Law provides: "If a person infringed upon is also at fault for causing the harm or damages, the civil liability of the infringer may be reduced." The statute does not, however, offer any specific guidelines on what might be reduced, leaving the court plenty of room in which to maneuver indeed.
Gate's words. These developments, on top of a growing and pervasive anxiety that any consumer who pays a few dollars for a pirated CD off the street may now wind up in court and be liable for thousands, if not millions, of dollars in damages, certainly do not sit well with the general public. Many people now firmly believe that Microsoft's PRC market strategy is no different from what the British did to China in the mid-19th century—i.e., first to get people addicted to opium and then to reap windfall profit with full armory in hand—a modern showcase of "gun boat market-economy." For Microsoft, however, this is no doubt payback time.

Under such a climate, exactly how is the court likely to rule on the substantive issues of the case? A recent Supreme People's Court ruling in another software end user case, Pacific Unidata v. Avon Products (Guangzhou), Ltd., may offer some clues.  

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67 See Juliet S. Wu, Ni Feng Fei Yang (Up Against the Wind), Beijing, China: Guangming Publishing Co., 1999, pp. 60-116 (text in Chinese). This book became an instant best seller in China. Adding to her prominence was the fact that Wu only graduated from middle school and managed to pass an adult English placement test through self-study and qualify as being the equivalent of possessing college-level English capability. In the book, she claimed that she was completely in the dark regarding Microsoft's raid against Yadu until it happened and that it was apparently the work of Microsoft's legal team in Hong Kong, not her staff. This incident, as it turns out, became one of the reasons for her resignation.

68 This is by far the largest amount (Renminbi ¥250 Million, approximately US$30 Million) involved in an intellectual property dispute in China (and perhaps one of the most bizarre ones as well). In April 1995, Avon (Guangzhou) Ltd. bought a sales-tracking software program directly from a U.S. based company, Unidata, Inc., for US$15,000. Unidata subsequently dispatched its technicians to China to help install the software system and train Avon's local personnel. In June 1996, Hong Kong-based Pacific Unidata, Ltd. (PU) first filed a complaint to the NCA, claiming Avon illegally bought the software because PU owned the sole licensing right for China, Hong Kong and Taiwan. PU specifically requested that the NCA levy administrative penalties against Avon. Having concluded that PU was the legal licensor and Avon had used unauthorized software, Avon was fined Renminbi ¥490,000 (US$59,000) in May 1997. Thinking this would have ended the dispute, Avon paid the fine, completely uninstalled the software and returned it to Unidata. Only three months later, however, PU and its affiliate in China, Jingyan Co., Ltd. jointly brought suit against Avon (Guangzhou) before the Guangdong Province High People's Court, asking for Renminbi ¥250 Million in damages. They claimed that this case was an instance of a major U.S. corporation pirating a Chinese company's intellectual property right. In June 1998, the court issued its judgment in favor of the plaintiffs and awarded Renminbi ¥100 Million (US$12.5 Million) in damages. See Guangdong Province High People's Court Judgement, (1997) Yue Zhi Chu Zi No. 1. Avon appealed to the Supreme People's Court and an "appeal trial" was conducted from
Although the court does not specifically indicate in its judgment (which remands the case to the lower court) what position it will take on the issue of software end user liability, the way the ruling was handled, i.e., having the ruling issued by the court’s highest authority, the Judgment Committee, can be interpreted as a rather strong signal against the imposition of such liability, at least for that particular case. The Supreme People’s Court clearly thinks the defendant in that case falls squarely within the realm of protection that Article 32 was designed for. Given the significantly different fact patterns between Pacific Unidata and Yadu, it remains, of course, highly unpredictable what the court may do; this may turn on the fate of the provision, or even the RCSP as a whole.

Whatever the final outcome of this case, the end user liability issue remains unresolved, especially with regard to other forms of copyright. Unlike software, there is no counterpart to Article 32 in dealing with other types of expression under the current Copyright Law. More effort is certainly needed to clarify this issue.69

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February 2 to February 4, 1999. Avon claimed that it was a completely innocent party to the case and that the problem lay with Unidata and its relationship with its subsidiary PU. It bought the software directly from Unidata in the United States and what it bought was the legitimate English version, which is different from the Chinese version that PU registered in China. Avon further claimed that as an end user, it did not resell nor make any profit out of the software. If there is any party that may be liable, it should be Unidata, not Avon (Guangzhou). See “Avon Unit Braces for Copyright Ruling,” South China Morning Post, March 3, 1999, pp. 4; Ian Johnson, “Chinese Court to Hear Appeal in Avon Case,” Asian Wall Street Journal, February 2, 1999, pp. 3. In December 1999, it was reported that the Supreme People’s Court had remanded the case back to the Guangdong High Court for improper fact-finding. What is unusual is that, as opposed to the normal panel ruling, it was the Supreme People’s Court’s highest authority, the Judgment Committee, that issued the judgment (somewhat similar to an en banc decision). For a detailed illustration, see China NTD Intellectual Property Office Newsletter, December 1999, available at http://www.chinandt.com/chinese-main.html (text in Chinese).

69 The State Council issued a new set of Regulations on Computer Software Protection on December 20, 2001, effective as of January 1, 2002. Article 33 of this new Regulation expressly provides that the 1991 RCSP, including the controversial Article 32, is to be completely repealed by then. In accordance with Article 24 of the new RCSP, except as otherwise provided (such as for fair use), any unauthorized copy, or distribution to the public, rental, communication to the public through the use of information network (i.e., the Internet) shall be subject to a fine of Renminbi ¥100 per piece (or infringement) or no more than five times the value of the infringed product; for unauthorized circumvention, deletion or alteration of software electronic management information, or transfer or
While Microsoft lost the first round in its latest campaign against software piracy in the PRC, this certainly will not be the end of it. Aside from Microsoft, many indigenous firms in the PRC are yearning for better protection of their intellectual property rights and they may well be the strength of PRC's future economy. There are also consumers who are demanding affordable prices, good quality and a well-balanced approach between the protection of foreign and domestic interests. After all, the PRC is not yet a completely opened market-economy and the role of government is simply too significant to be ignored. Therefore, more punches will be thrown from all sides and courts throughout the PRC will probably be getting more and more cases challenging the wisdom of the existing law and the creativity of judges in light of innovation and consumer demand. The PRC is indeed facing a new kind of tug-of-war among different interest groups that it has not seen before. Yet this on-going trend will hopefully continue the healthy debate on how best to legislate and enforce the law, better educate the general public, test the strength of the market-oriented economy and, in the end, significantly eradicate the piracy problem that has plagued the PRC for so long.\footnote{See also Julia CHEN, Note, “China’s Copyright System: Rising to the Spirit of TRIPS Requires An Internal Focus and WTO Membership,” \textit{Fordham International Law Journal}, Vol. 21 (1998), pp. 1941-2012.}

(c) The MP3 Incident

While \textit{Microsoft v. Yadu} generated a tremendous amount of controversy in the PRC, it was hardly noticed across the Taiwan Strait. The ROC nevertheless got its share of end-user liability controversy soon after.

\textit{Facts.} Located in the southern city of Tainan on the island of Taiwan, National Cheng-kung University (NCKU) is renowned for its engineering schools. Backed by their fluency with computer
programming, students of this university maintain active usage of
the Internet, including, among other things, the downloading and
swapping of so-called MP3 electronic music files.\textsuperscript{71} Initially, a
local police station received an anonymous complaint that some
NCKU students were involved in the downloading of illegal music
and perhaps pornographic files. The police then coordinated with
the local prosecutorial office and went to a NCKU male dormitory
to conduct an investigation on April 11, 2001. They discovered
that at least 14 personal computers did contain thousands of elec-
tronic files of suspicious origin and immediately took action to
impound those computers. Because the Copyright Law only al-
lows a private cause of action, an interested party must step in
before the investigation can move forward.\textsuperscript{72} As a result, the In-
ternational Federation of the Phonographic Industry (IFPI) Taiwan
quickly got involved, announcing that it intended to pursue this
case to the very end, including, among other things, criminal pro-
secution of the 14 students who owned the impounded com-
puters.\textsuperscript{73} The local Motion Picture Association and Business Soft-
ware Alliance later joined rank with IFPI.

This incident immediately ignited a major firestorm on the
island and literally turned college campuses (which happen to be
the largest source of online usage) into panicking grounds. Thou-
sands of e-mails and opinion letters clogged computer servers for

\textsuperscript{71} MP3 is the abbreviation of the ISO-MPEG Audio Layer–3 standard. Established in
1988 and under the auspices of the International Standards Organization (ISO), the
Moving Picture Experts Group (MPEG) is designed specifically for the development of
telecomitalialab.com. Derived from a 1987 joint research project code named DAB (di-
gital audio broadcasting) Eureka Project EU147 between the Institut of Integrierte
Schaltungen (an affiliate of the giant research organization Fraunhofer) and Professor
Dieter Seitzer of Erlangen University of Germany, it successfully developed a new com-
pression/decompression algorithm ("codec") to ensure high quality yet low volume of
storage space for electronic audio and video files. With the rapid spread of Internet use,
MP3 has quickly become the most popular format for electronic audio/video exchange
and storage. For more introduction and illustration, see John Alderman, \textit{Sonic Boom –
Napster, MP3 and the New Pioneers of Music}, Cambridge, Massachusetts: Perseus

\textsuperscript{72} Article 84, Copyright Law.

\textsuperscript{73} Mei-wen CHEN, "NCKU – Not An Inexcusable Crime; IFPI – Never Settle," \textit{China
days. Students spread rumors that "undercover" prosecutors were running amuck, seizing their computers around different campuses. There was even a plan for a national protest on the eve of May 4th, the date of the famed 1919 student protest in Beijing that led China to the quest for modernization and political reform, but it was dropped at the eleventh hour. On May 24, IFPI filed a formal criminal complaint, further heightening the controversy. Several senior government officials, including the Ministers of Education and Justice, and university presidents then involved themselves personally in an effort to reach a settlement. On August 17, a settlement was indeed reached. With a formal apology from the 14 students and their parents, plus a number of concrete steps NCKU and the Ministry of Education agreed to undertake in the management of online intellectual property issues, the IFPI, MPA and BSA all agreed to withdraw their complaints, but insisted that this was only an exception, and that there would be no settlement of any kind in any future infringement cases.  

*Issues and analysis.* Although the ROC arguably has a more elaborate legal framework for copyright protection than the PRC, particularly in the area of fair use (after all, Article 65 of its 1994 Copyright Amendment is modeled after Section 107 of the U.S. Copyright Act of 1976), this incident nevertheless exposed similar shortcomings of its law just as occurred in the PRC in dealing with end-user fair use.  

On the other hand, legal issues aside, this incident and *Microsoft v. Yaddu* also highlight how disastrous it can be, as far as public relations are concerned, for a foreign company or a trade association perceived to be a Goliath in going after a small group of domestic end-users (consumers), especially with a take-no-prisoner attitude, regardless of how wrong the consumers really were. If not handled with extreme caution, disputes involving end-users can easily get politicized. This results in the real legal issues being blurred, with everyone ending up a loser. 

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75 In addition, Articles 44 to 63 lay out specific circumstances under which fair use may be established.
Strictly from the legal point of view, the current scope of permissible fair use under the Copyright Law can be very broad and murky indeed. While a court is required to examine the purpose and character of the use, the nature of the work, the amount and substantiability of the work used, and the effect of the use on the potential market before passing judgment on the issue, as long as such use is justified for "individual or family" consumption, not-for-profit and "within reasonable scope," the use of a library and "machine not for public usage" to duplicate a published work or material is always considered fair use. This seems to suggest that the not-for-profit use of a personal computer in duplicating files is always within the fair use safe harbor, and that is exactly what many students and some senior government officials tried to argue. On the other hand, unlike the U.S. law under which a party must meet a certain subjective and objective criteria before being criminally prosecuted for copyright infringement, any and all copyright infringement in the ROC is punishable at least by a term of imprisonment between six months and no more than three years, plus a fine of no more than NY$200,000 (roughly US$5,800).

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76 Articles 51 and 65, Paragraph 2, Copyright Law.
77 Tien-tsai LIU and Yu-ping TIEN, "DPP Legislators: Search Illegal without notifying the [University] President," China Times, April 17, 2001, p. 2 (quoting several DPP members of the Legislative Yuan. Note that DPP is the Democratic Progressive Party, the political affiliation of incumbent ROC President CHEN Shui-bian).
78 Article 91, Paragraph 1, Copyright Law: "Any person who infringes without authorization on the economic rights of another person by means of reproducing the work shall be imprisoned not less than six months and not more than three years, and in addition thereto, may be fined up to two hundred thousand New Taiwan Dollars." Cf. 18 U.S.C. §2319 (1994): "(a) Whoever violates section 506(a) (relating to criminal offenses) of title 17 shall be punished as provided in subsections (b) and (c) of this section and such penalties shall be in addition to any other provisions of title 17 or any other law. (b) Any person who commits an offense under section 506(a)(1) of title 17 – (1) shall be imprisoned not more than 5 years, or fined in the amount set forth in this title, or both, if the offense consists of the reproduction or distribution, including by electronic means, during any 180-day period, of at least 10 copies or phonorecords, of 1 or more copyrighted works, which have a total retail value of more than $2,500; (2) shall be imprisoned not more than 10 years, or fined in the amount set forth in this title, or both, if the offense is a second or subsequent offense under paragraph (1); and (3) shall be imprisoned not more than 1 year, or fined in the amount set forth in this title, or both, in any other case. (c) Any person who commits an offense under section 506(a)(2) of title 17, United States Code – (1) shall be imprisoned not more than 3 years, or fined in the
Thus, there was clearly a "fear" factor and the criminal consequences of copyright infringement in the ROC can be quite grave indeed.

Courts have so far offered very few clues on what they view as fair use besides what the statute has already provided. In a recent judgment, the Taiwan High Court held that although the act of duplication itself was not for profit and the quantity produced was not massive, it could nevertheless exceed the scope of fair use if the ultimate goal of such duplication was to aid profiteering and the duplication was substantial if it covered the entire subject matter (here a few photographs for the printing of a user manual).\textsuperscript{79} Realizing that the market urgently needs some guidelines on the scope of fair use, the Intellectual Property Office of the Ministry of Economic Affairs has proposed that a new section or paragraph be added to the Copyright Law which encourages parties to engage in negotiation and consent on the issue.\textsuperscript{80} But for now, it appears both the PRC and ROC courts will have to wait for another day to clarify the end-user and fair use issues.

(d) Domain Name Disputes

Another issue of first instance confronting PRC and ROC courts is domain name dispute. On June 20, 2000, the Beijing Second Intermediate Court handed down its judgment concerning the domain name dispute over ikea.com.cn. In InterIKEA Systems (China), Ltd. v. China International Network Corporation, Ltd. (CiNet), the court handed a total victory to InterIKEA and ordered

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\textsuperscript{79} Judgement of the Taiwan High Court, (87) Shang Yi Zi Di No. 5828. Note that this judgment has not yet received the status of being a "judicial precedent."

\textsuperscript{80} Article 65, Paragraph 3, Copyright Law Amendment (Third Draft), February 2002.
that defendant CiNet's registration of ikea.com.cn be terminated immediately because it had violated the plaintiff's well-known mark. The judgment of this case carries a strong signal that not even a company that has the full backing of the government is exempted from infringement liability.

This is the first domain name dispute in the PRC which happens to involve a foreign firm and the question of a well-known mark. In October 1997, CiNet launched a major campaign whereby a wide variety of registered domain names were put up for sale, especially terms with a prefix of "i" or "e," such as ibook, ido, imusic, etc. By then CiNet had registered more than 2,000 domain names, making it the single largest client of China Internet Network Information Center (CNNIC), the domain name registrar in the PRC. On November 19, 1997, CiNet registered ikea.com.cn to CNNIC.

On the other hand, the Dutch corporation InterIKEA Systems, B.V. began to open its IKEA home furnishing retail stores in Shanghai and Beijing. When it tried to register ikea.com.cn as its domain name in the PRC, obviously it was rejected and the lawsuit followed. The defendant claimed that it never knew who IKEA was or what it represented. It further argued that the ikea.com.cn registration was really meant to be "i-kea," as in ibook and imusic, where "i" stands for "Internet" and "kea" for a large predominantly green New Zealand parrot that can mimick the human voice. This was meant for the online voice mail services CiNet was about to engage in.

The court did not buy any of defendant's arguments. This ruling established at least three precedents: (1) for the first time, a court in the PRC has declared that a domain name dispute is a trademark issue; (2) for the first time, a court in its own right has decided what constitutes a well-known mark, as opposed to leaving

82 Established in 1995 and with the backing of the then Ministry of Post and Telecommunications (now Ministry of Information Industry), the Information Office of the State Council and China Institute of Science and Technology Net Center, CiNet is among one of the earliest Internet service providers in China.
the task to the authority of the State Administrative Department of Industry and Commerce; and (3) for the first time, the court has combined the application of Article 5, Section 2 of the Anti-Unfair Competition Law, Article 6\textsuperscript{bis} of the Paris Convention for the Protection of Industrial Property (on well-known marks), and the \textit{WIPO Final Report on Domain Name Process}, among other things, in reaching its conclusion.\textsuperscript{83} Although the defendant has indicated that it will appeal, the outcome of this case could open the floodgates for many other similar cases.

Separately, the BFIPC on April 19, 2000 conducted a trial on another domain name dispute, \textit{E.I. duPont deNemours \\& Co. (China), Ltd. v. China International Network Corporation, Ltd. (CiNet) (北京国网信息有限责任公司)}, over the registration of \textit{dupont.com.cn}.

Plaintiff E. I. duPont DeNemours (China), Ltd. claimed that it had had a duly registered trademark in China since 1976. In early 1999, the company filed an application to the CNNIC in an attempt to register \textit{dupont.com.cn} as the domain name for its Chinese website, only to find out that the defendant, an Internet service provider and domain name service company, had already registered the same name. Claiming outright cybersquatting, \textit{duPont} sued for damages, an immediate and permanent halt of defendant's use of the domain name in dispute, litigation costs and a public apology.

Defendant denied engaging in cybersquatting. It claimed that a trademark registration does not automatically bestow priority over a domain name registration with the same name. Arguing that domain names should not be treated as equivalent to trademarks, it pointed out that there is no law in China that prohibits defendant's first registration of \textit{dupont.com.cn}. Note that the defendant did not provide any evidence concerning its genuine or legitimate usage of that domain address during the trial.

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Although there is no legislation to tackle the issue of cybersquatting directly, the closest statute may be found in Article 5 of the Anti-Unfair Competition Law, which provides, among other things, that no business may pirate another's registered trademark or use the specific trade names, or packages or decorations employing the famous/well-known marks, of another business. Thus, the key question here is whether domain names ought to be treated the same as trademarks.

As in *Beijing Online*, LUO Dongchuan was the presiding judge in this case. The court issued its judgment on November 21, 2000, for the plaintiff. Following the same analysis and citing the Paris Convention as well as the WIPO domain name report, the court pointed out that Dupont has since 1976 maintained a registered trademark in the PRC and has long gained well-known mark status worldwide, including in the PRC. The court specifically pointed to the fact that there is hardly any relationship between the domain name *dupont.com.cn* and the defendant’s business. Furthermore, CiNet never used the domain name once it was registered. Therefore, the BFIPC concluded that there was a strong likelihood that the general public would be confused by the source or identity of the name. Consequently, CiNet was ordered to remove the domain name immediately and withdraw the domain name registration in question within ten days of issuance of the judgment. On the other hand, the court refused to grant the plaintiff’s request for a public apology on the ground that the domain name was never actually used.

While the court is now confronted with these issues, lively discussion has also taken place within PRC intellectual property circles concerning whether there is an urgent need to amend the existing Trademark Law and/or the Anti-Unfair Competition Law (both of which were last amended and enacted in 1993), and if so, whether the PRC should adopt the approach of either the United States (with an outright prohibition and legal liability) or the WIPO recommendations (including formal recognition of the Uniform

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Domain-Name Dispute-Resolution Policy, URDP, promulgated by the Internet Corporation for Assigned Names and Numbers (ICANN).  

In light of these developments, a whole host of foreign firms have started filing cybersquatting lawsuits, including such famous names as Coca-Cola, Cosco and Kentucky Fried Chicken. Most of them have managed to get favorable judgments, but there are exceptions. A case in point is *Procter & Gamble Co. v. Beijing Tide Electronic Group* over the domain name dispute of tide.com.cn. The BFIPC once again relied on its line of reasoning in previous domain name disputes to hold in favor of the plaintiff, recognizing that Tide detergent has gained well-known mark status in the PRC. On appeal, the Beijing High People’s Court reversed, holding that the defendant has been using the name “Tide” since 1992 to conduct its legitimate business and that it has been a registered trademark for them as well.

In the meantime, thanks to the growing popularity of URDP, some Chinese domain name registrants have been dragged into tribunals outside of the PRC. One of the most controversial cases is *America Online Inc. v. Shenzhen JZT Computer Software Co. Ltd.* (中国深圳金智塔软件科技有限公司), which involved the domain names gameicq.com and gameicq.net. The defendant was the software provider of some very popular computer games in

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85 The CNNIC proposed a series of draft rules to invite discussion on how best to resolve domain name disputes. Being the court system that receives the most voluminous caseload in this area, the Beijing High People’s Court then issued a set of guidelines on how it will handle domain name disputes. *See* Office of Beijing High People’s Court, Several Guiding Opinions Concerning Civil Intellectual Property Disputes Resulting from Domain Name Registration and Use, promulgated on August 15, 2000, available at http://www.cnnic.net.cn/policy/14.shtml (text in Chinese). Eventually the Supreme People’s Court of the PRC stepped in and followed the model of online copyright disputes by promulgating an Interpretation on Certain Issues Concerning the Application of Law in Relation to Computer Network Civil Disputes over Domain Names, effective on July 24, 2001, *Fa Shi* [2001] No. 24. For details of URDP, see http://www.icann.org/udrp.


87 America Online Inc. v. Shenzhen JZT Computer Software Co. Ltd., WIPO Arbitration and Mediation Center, Administrative Panel Decision, Case No. D2000-0809 (December 6, 2000).
the PRC and had registered those two domain names there. America Online was one of the largest Internet service and content providers in the world and the software program ICQ (nick name for "I seek you") was a very popular online communication protocol, allowing its members to instantly detect each other online and engage in e-mail communication (also known as instant messaging) or file transfers. AOL in recent years has aggressively gone worldwide to deter those who attempt to use ICQ as part of their domain names, and the WIPO Arbitration and Mediation Center is clearly a convenient forum.\textsuperscript{88} Here the WIPO panel concluded that (1) the domain names registered by the respondent (Shenzhen JZT) were identical or confusingly similar to the trademark to which the complainant had rights; (2) that the respondent had no right or legitimate interest in respect of the domain names; and (3) the respondent's domain names had been registered and were being used in bad faith. In the end, in addition to monetary damages, Shenzhen JZT was forced to relinquish the use of the two names and transfer title to AOL.

C. Enforcement Mechanism and Attitude

While the legislature and judiciary are both trying to grapple with rapid change in the economic environment and demand from the market place for more protection, one other aspect that has plagued the effectiveness of intellectual property protection in the PRC and ROC has been their enforcement mechanisms and attitudes.

While governments on both sides have shown evidence of progress in their enforcement efforts, including raids, seizure and the destruction of thousands of counterfeited goods and materials worth millions of dollars every year, piracy remains a serious

\textsuperscript{88} It is the very first ICANN approved dispute-resolution service provider (as of December 1, 1999). Thousands of domain name cases have been resolved since then, including, among other things, disputes concerning the names of Madonna.com and JuliaRoberts.com. Other approved dispute-resolution service providers are: CPR Institute for Dispute Resolution, the National Arbitration Forum and the Asian Domain Name Resolution Centre.
problem, causing significant damage not only to foreign business interests, but most importantly, Chinese domestic interests, including loss of jobs, loss of incentive to create, loss of business revenues and above all, loss of life.\textsuperscript{89}

In the PRC, the enforcement mechanism is still diverse and complex. The mere coordination of all relevant agencies to form a comprehensive enforcement strategy can be an undue hardship in and of itself.\textsuperscript{90} The cutback in the public work force that began in 1998 certainly did not help the situation.\textsuperscript{91} So-called "local protectionism" remains a persistent problem dampening the effectiveness of enforcement.\textsuperscript{92} There are positive developments, however. Se-


\textsuperscript{91} This is based on the State Council Agencies Reform Plan passed by the NPG on March 10, 1998. See Office of the Standing Committee, NPG, \textit{Compilation of Documents for the First Meeting of the Ninth National People's Congress, Beijing, China: People's Publishing Co.}, 1998, pp. 82-100 (text in Chinese). As a result, for example, the National Copyright Administration was left with only three full time employees to coordinate the entire national enforcement functions from its perspective.

\textsuperscript{92} This is a general term loosely used in the PRC to describe the uneven enforcement from locality to locality and from agency to agency. It also refers to hostility local people sometimes have toward "outsiders," be they national government officials, foreign entities or individuals who are perceived to be messing with their internal affairs. This reflects problems rooted in the general Chinese populace with regard to knowledge, concept and attitude towards intellectual property. See Seth Faison, "Razors, Soap,
ior government officials and judges have clearly come to terms with the importance of intellectual property protection and demonstrated their commitment to the effort. They have also recognized that these efforts are really for the benefit of their own economic development, as opposed to purely promoting foreign interests. This is indeed a win-win strategy.

Contrary to the general perception of the PRC being the single largest market and consisting of more than 1.2 billion consumers (which is true in a very general sense), it is anything but a monolithic market place. Subtle local differences in customs along with hundreds of dialects, geographic barriers, degrees of economic development and complex local rules form numerous fault lines underneath what seems to be a level trading ground. As a result, while the effectiveness of intellectual property improves in the "first tier" markets, such as Beijing, Shanghai and other major metropolises, those who commit piracy may still maintain a good living simply by moving "outward" to the next tier markets, as those markets gradually mature. In other words, the PRC is really a time capsule with people living under very diverse conditions. Without a comprehensive enforcement strategy (including an effective national education program as opposed to sporadic political campaigns) and well-trained, well-funded mechanisms, the piracy problems that Shanghai experienced a few years ago are likely to recur soon in another metropolis, burgeoning to become

Cornflakes: Pirating Spreads in China,” New York Times, February 17, 1995, p. D2 (quoting Joseph T. Simone, a Hong Kong attorney: “In most countries, if you have ten pirates, you can go after one, expect seven to stop, and then figure out how to get the remaining two…. But in China, when you go after one, the other nine see exactly what you're doing. Not only do they keep pirating, but you invite ten more to join in.”).

93 The central government of the PRC issued a major policy guideline in 1999 to push for intellectual property and technology management as a basis for the PRC’s high-tech development. Under this policy, the government will become actively involved in getting more university or research institution-based inventions patented and licensed, including subsidies for patent prosecution costs. See State Council, Decision on the Enhancement of Technology Innovation, Development of High Technology and Realization of Commercialization, August 20, 1999, [1999] Zhong Fa No. 14.
the next Shanghai. Yet by then great social costs will have been borne by the PRC and perhaps the rest of the world.

In the ROC, although literally all related enforcement agencies (with the exception of local police and the customs service) have now been consolidated and placed under the wings of the Intellectual Property Office, this agency nevertheless encounters great difficulty in eradicating piracy, at least at the consumer level. The MP3 incident only highlights the depth of the problem and irony: the very crowd that participates in the anti-piracy rock concert happens to be the same group of students who in large part do not want to pay to get their music. They would feel guilty shoplifting even without being caught, but do not see anything wrong in “soft-lifting” a few computer programs or music files at home.

At the business-to-business level, however, the ROC is clearly making significant progress, and this has helped advance its domestic economy, especially the semiconductor and perhaps biotechnology related sectors.

As in many other countries, the issues of online service provider liability, end-user infringement and domain name disputes (cybersquatting) highlighted in this article are all novelties to the Chinese legal community. To complicate matters even more, to-

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94 Many private institutions, foundations, firms and government agencies from the United States and the European Union have engaged in education programs in the PRC. In addition, international organizations such as UNESCO, WIPO and WTO have sponsored different education programs in the PRC. They sometimes join ranks to maximize the effect and reduce costs. One such example is an international conference held in May 2000 in Beijing, co-sponsored by the Peking University, State Intellectual Property Office, National Bureau of Asian Research (based in Seattle, Washington), EU-China Intellectual Property Rights Program, and the Asia Pacific Legal Institute (based in Washington, DC).
95 See USTR, 2001 National Trade Estimate Report, supra note 20 (on Taiwan). For a detailed illustration of the ROC's enforcement mechanism, see Sun, “From Pirate King to Jungle King,” supra note 11, pp. 141-163.
96 See Jason Dean and Terho Uimonen, “Long Adept at Copying, Taiwan Takes to Patents: As the Country Becomes High-Tech Innovator, Its Copyrights Multiply,” Wall Street Journal, January 11, 2002, p. A8 (citing statistics that the ROC ranked fourth globally in the number of U.S. patent grants received, surpassed only by the U.S. itself, Japan and Germany – and up from 11th place a decade ago, and that the island's cutting-edge semiconductor manufacturers top the list of ROC patent holders).
day's intellectual property disputes often cross borderlines which render a "purely domestic" resolution of the issue obsolete. This only adds to the urgency for WTO/TRIPS compliance so that a set of international substantive and procedural standards with teeth for enforcement can be truly established.

Because the TRIPS Agreement came into being prior to the full bloom of Internet usage, it did not have the opportunity to fully address these subjects. Yet these are some of the most pressing issues at present that TRIPS compliance simply cannot do without. Relying heavily on high-tech and foreign investment as keys to economic development, neither the PRC nor the ROC can avoid its share of responsibility by simply reaping fruit without cultivation. Any argument for more leeway or time to comply because there is no such tradition or concept may be trivial and irrelevant now that every state is confronted with fierce global competition and similar issues that are novel and without solutions. Intellectual property indeed is the core of any meaningful high-tech development, and this is an economic issue regardless of cultural differences.

III. CONCLUSION

Accession to the WTO is not the end of a path, but the beginning of a new era and new test for the PRC and ROC. Although both parties have been members of an identical international organization in two other instances, this is really the first time both have joined what promises to be the most important multilateral trade organization in the world, and they will have to work together in the years to come.97

By joining the WTO, both parties have demonstrated their utmost commitment to the principles of transparency, fairness and

97 The two organizations are the Asian Development Bank and Asia-Pacific Economic Cooperation forum, both regionally oriented. The former is a financial institution and the latter is a dialogue-based economic forum. None of them will carry the same weight as the WTO in setting global trade policies and resolving disputes. Note that the WTO itself is an organization that carries a tremendous amount of political luggage even though ostensibly it tries to "de-politicize" its process and shrug off that image.
non-discrimination in making available their respective markets for competition so that consumers can benefit. With very few exceptions, there is no room for back paddling. Thus, the future can be very challenging indeed.

As far as protection of intellectual property is concerned, both have come a long way in the past two decades, from virtually having nothing to offer in setting examples for other developing economies to follow. Legislatively, what has been enacted thus far should by and large meet, and in some instances exceed, the substantive standards provided in the TRIPS Agreement. Not surprisingly, their respective economies, especially the high-tech sectors, have also taken off during this period. Drawing from the analogy of starting from an empty bottle, the water in the bottle is now more than half full and yet some problems remain, especially in the enforcement and education areas.

While it is impossible to forecast what will happen in the post-WTO accession era, there are at least two critical developments.

*Forum shopping and competition.* The cases cited in this article highlight the difficulties with which courts grapple in resolving a novel issue while still being leashed by existing rules and systems. In *Beijing Online*, instead of simply applying Article 2(1) of the Berne Convention (of which the PRC is a member and the application of which would automatically supersede the PRC’s domestic law), the court took a more creative approach and literally stretched the meaning of the existing statute to its limits to encompass online publication within the scope of copyright protection. The impact of this approach can be enormous. Should

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98 Article 2(1) provides, “The expression ‘literary and artistic works’ shall include every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression ....” Therefore, online publication can easily fit into this category as long as it meets other criteria for being copyrightable. Note that in the domain name cases, the Beijing court did go ahead with the application of Articles 6th (concerning well-known marks) and 10th (concerning unfair competition) as well as the Anti-Unfair Competition Law as primary authority in resolving the disputes. The court did not stretch any provision of the Trademark Law to cover domain names as a protectable subject matter.
all statutes that use the same word "deng" ("and so forth") be affected and interpreted the same way? If so, this could lead to great uncertainty in the law. If not, then where should the line be drawn and how? In Microsoft v. Yadu, the same court took a drastic turn from Beijing Online, nevertheless a creative approach, by completely avoiding the real substantive issues (so it could buy more time and hopefully settle the dispute?). At any rate, this flip-flop does tend to give the impression that the court may have already pre-determined the outcome (albeit with good intention) even before the trial began and the court’s judgment was to simply find a creative way to justify that end.  

In any event, the court was really trying to do what the legislature did not and has done a commendable job. Yet one must caution against expediency as this inconsistency could make the court look unpredictable, and ultimately impact negatively on the PRC’s image as well as investor evaluation.

With the WTO Dispute Settlement Mechanism coming into play and other forums (such as the WIPO Arbitration and Mediation Center) eager to attract cases, there is a strong likelihood that courts in the PRC and ROC are entering a new arena, i.e., a field of international forum competition, where the edge favors those who can offer creative thinking combined with prudent reasoning. The global market also demands that courts be both competitive and cooperative. Parties and their government proxies are likely to engage in more forum shopping and settle with whichever court can offer the speediest trial and best possible

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99 This, of course, is strictly the author’s own speculation. In several meetings with Judge Luo Dongchuan in Beijing, he never revealed his thought process to this author. Yet it is clear that Judge Luo sincerely and strongly believes that online publication should be copyrightable and domain names should be treated more or less like trademarks, even though none of the existing statutes then clearly stipulated to that effect.

100 Being competitive means being attractive to intellectual property right holders, thereby generating more foreign investment and technology transfer to the forum locality. Being cooperative means judicial cooperation or being willing to provide assistance in foreign trials (such as service of process, information sharing,) and cross-border enforcement of foreign judgments. This could drastically change the role of a Chinese court from traditionally being perceived as passive and conservative to an active and "user-friendly" forum.
The prevalence of licensing could further accelerate this trend. As a result, it will probably be more difficult, if not impossible, for any WTO member to argue in the future that certain intellectual property issues are so unique in their own right (Chinese or other ethnicity) that they deserve special treatment and perhaps to be exempted from WTO jurisdiction altogether.\footnote{Another recent development that can have a strong impact on international jurisdiction and judicial recognition is the Hague Conference on Private International Law proceedings. See Hague Conference on Private International Law (HCPIIL), Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (October 30, 1999), available at http://www.hcch.net/e/conventions/draft36e.html. This proposal received a mixed review from the intellectual property community worldwide and strong opposition from the U.S., see Permanent Bureau, HCPIIL, Report of the Experts Meeting on the Intellectual Property Aspects of the Future Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters, Preliminary Document No. 13 of April 1, 2001.}

\footnote{An example is the protection of traditional knowledge and/or folklore. Yet it is still a shared concern and hardly an issue so particular to any single ethnicity in the world. See International Bureau of WIPO, The Protection of Traditional Knowledge, Including Expression of Folklore, WIPO/IPTK/MCT/02/INF.4 (November 2001). In the PRC, the 2001 Copyright Law Amendment added a new “right of adaptation” (huibian quan, 汇编权) as Article 10(16), meaning the right to use a portion of the [original copyrighted] work to adapt, annotate and compile into a new work through selection or editing. This addition is the result of a high profile copyright infringement case, in which a state-sponsored publishing company compiled without authorization different versions of a very famous novel into a single volume, in the name of literary study and annotation. Although the Copyright Law then did not provide anything on this type of publication, the Shanghai High People’s Court nevertheless ruled in favor of the original author and the right holder, Mr. Qian Zhongshu, one of the most famous and respected literary scholars in the PRC. Note that Article 10(16) apparently is the codification of this ruling and the new law still does not adopt the term “derivative works” as an umbrella term. See QIAN Zhongshu, et. al. v. Xu Zhiqian, et. al., contained as Case 2 in CHEN Xu, Reporter, Cases and Commentaries of Shanghai Intellectual Property Court, Beijing, China: Court Publishing Co., 1997, pp. 21-35 (text in Chinese). In the ROC, its Copyright Law long has a special section dedicated to the protection of “plate right,” that is, the manufacturer or publisher of a plate of a certain layout enjoys a one-time, ten-year protection of that specific print layout. This is a cultural policy designed to encourage publication of works to which rights do not attach or whose copyright terms have expired. See Articles 79 and 80, Copyright Law. Note that these provisions were almost repealed in the last several rounds of copyright revision but somehow always managed to survive at the last minute. Also worth noting is that while no registration is needed for copyright protection, registration is still a prerequisite before anyone may enjoy plate right protection. Whether these rights will be recognized elsewhere remains questionable.}
International harmonization. The degree of success of future technology exchange and development hinges upon to what extent the domestic intellectual property laws of each WTO member can be harmonized, substantively and procedurally. In addition, costs will be another key as rising prosecution, maintenance and litigation fees (particularly for utility patents) have already hindered the proliferation of technology. Recent development also shows that the integration of corporate social responsibility and intellectual property rights will be at the front burner of future global discussions. Indeed, there is now the emergence of “intellectual property responsibility,” if not outright “obligations,” that ought to go hand in hand with their corresponding rights, as developed and less developed economies must jointly tackle many environmental, labor and health issues around the world.\textsuperscript{103}

It is within this general environment that government and business leaders of the PRC and ROC now clearly realize the urgency to commit and move forward to full-fledged protection of intellectual property. After all, eradication of piracy activities and counterfeiting goods are only the first phase. The next phase is to use it as a power tool to generate wealth and well-being for Chinese society, and the final, long-term goal ought to be sharing their experiences with other nations or economies in building a successful knowledge-based economy around the globe.\textsuperscript{104} These tasks

\textsuperscript{103} The Fourth WTO Ministerial Conference identified the following intellectual property issues to be given the foremost priority: (1) the establishment of a multilateral system of notification and registration of geographical indications for wines and spirits by the Fifth Session of the Ministerial Conference; (2) to examine the relationship between the TRIPS Agreement and the Convention on Biological Diversity (CBD), particularly Article 16 of that Convention concerning access to and transfer of technology; and (3) the protection of traditional knowledge and folklore. See WTO Ministerial Conference 4\textsuperscript{th} Session, Ministerial Declaration, adopted November 14, 2001, WT/MIN(01)/DEC/1 (November 20, 2001), pp. 17-19. For the text of CBD of 1992, see http://www.biodiv.org/convention/articles.asp.

clearly won’t be easy. Moreover, there is much to be done to educate the general public. In sum, the three fundamental questions listed at the beginning of this article may perhaps be addressed in the following way:

- Chinese society really needs to protect intellectual property because it is ultimately for its own benefit, in that its indigenous industry will have incentives to grow, to expand and to compete. As a result, intellectual property is not and should never be a “wedge” issue to create social-economic fault lines, but a win-win strategy to generate welfare and to improve quality of life for all.

- Instead of looking at the relation between intellectual property protection and economic development in the context of the chicken and the egg, they are more like the analogy of a sword and a shield. It is of course much preferable for each state or economy to have them both instead of just having one.

- Ordinary consumers must be educated to realize that the premium they pay for the purchase of genuine product today is the assurance of better goods and better services tomorrow. This “inconvenience,” if not abided by, will only result in the disruption of the market, and eventually make everyone in it suffer, much like the disobedience of traffic laws (for one’s own convenience) quickly paralyzes the flow of traffic as a whole. In fact, that is exactly the situation in which the Chinese market (both the PRC and ROC, with the PRC in a worse state of affairs) finds itself at present. Consumers simply cannot distinguish between what is real and what is fake anymore.

"Intellectual Property Rights and Economic Development in China," presented at the Sino-U.S. Conference on Intellectual Property Rights and Economic Development, September 16, 1998, Chongqing, P.R.C. Professor Maskus finds that while industrializing countries will have to pay higher fees for technology licenses and production rights, stronger intellectual property protection in the PRC should soon produce a significant growth bonus of as much as 0.5 percent of its annual GDP per year through enhanced inflows of trade, foreign direct investment and licensing.
It is now the job of everyone in that society to improve his or her own livelihood and quality of life. Accession to the WTO hopefully will accelerate the government’s efforts toward making a rule of law society for the Chinese people, but this may also be the best opportunity for Chinese society as whole to demonstrate that it is making a critical contribution to the well-being of the entire world.

POSTSCRIPT

The content of this article has gone through several major revisions since its first draft in 2000. Both the PRC and ROC have since gone through two major makeovers of their entire intellectual property law and more are expected. Both have since successfully entered the WTO, and this development, although long expected, is likely to have a profound impact on their trade, technology and economic development in the future. Due to publishing delays, the author has been able to include some of these latest developments in this analysis and appreciates any thoughts and comments.
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