

Not Enough?

An examination of China's compliance with the intentions of the TRIPS accord

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Introduction

According to the People's Republic of China's Ministry of Foreign Trade and Economic Co-operation *"On September 17, the Intellectual Property Council of World Trade Organization reviewed the implementation of TRIPS (Trade Related Agreement on Intellectual Property Rights) in China after entry of WTO and also commitment made by China in the protocol, and positive appraisal was made."*

Despite such apparently encouraging statements, the question remains whether such positive achievements are indeed enough to enforce the true intentions of the TRIPS, or if such implementations by China of the standards set by the accord is just a formality in order to adhere to the requirements of membership in the World Trade Organization.

Presently, as China is into its junior year as a member of the World Trade Organization, its protection, or more specifically, enforcement of intellectual property rights is critical.

Although the WTO may be a vehicle for the PRC to gain access to the rest of the world, it is also an instrument in which the rest of the world can better access the Chinese market. As a result, with China being a part of the WTO and having to obligate its rules and agreements, in this case the Trade Related Agreement on Intellectual Property Rights (TRIPS), foreign investors expect to have international standards of protection when investing in the fifth largest trading nation in the world. With an export market worth US\$ 357.1 billion and growing¹, it is no wonder why investors demand that their intellectual property rights need to be protected. According to China's Ministry of Commerce of the People's Republic of China, statistics show that 41,081 foreign investment enterprises

were newly approved for establishment nationwide in January through December, 2003, an increase of 20.22% over the same period in 2002² and by the end of February 2004 there were 471,302 in total of such enterprises; the contractual foreign investment reached US \$76.947 billion, up by 27.38%³; and by the end of 2003, the accumulated total of actually used foreign capital was at US\$501.47 billion⁴. With such promising investment figures, China will be more than willing to meet the minimum standards set by the TRIPS, or perhaps at the slightest appear to be doing so.

The US Chamber of Commerce has recently made a trip to China to assess its developments since joining the WTO⁵. Although it is acknowledged that China is still in a transitional period, there are high hopes that there are positive results in the development of the protection of intellectual property rights in the country. One cannot ignore the fact that the TRIPS Agreement has transformed pre-existing Chinese intellectual property law, there are many who believe such changes are not suffice. One may argue that for every change that China has incurred in its intellectual property law in order to achieve accession, there is another which still needs to be made in order for the country to be in full compliance with the terms of the TRIPS Agreement.

In considering whether China is complying with the true intentions of TRIPS, I will firstly consider briefly the history of intellectual property rights in China and what led to China's accession to the WTO, and examine the reasons leading to China's accession to the WTO. Secondly, I will consider what China has done to comply with TRIPS, mainly focusing on the pressures that China faces in implicating measures in order to comply with TRIPS.

Finally, I will move on to consider the intention of the TRIPS and whether what China has done does comply with Agreement. What I intend to show is that by just meeting TRIPS requirements on paper is not so black and white; and by simply adhering to its requirements may not reflect what the international community nor what the TRIPS intends.

Intellectual Property Rights in China

Changes in China's IP law –

Since the late 1970s China has actively participated in various international Intellectual Property Rights protection conventions and activities as well as advancing cooperation with other countries in protecting these rights. Its aim is clear – to reach an international standard of intellectual property rights protection to attract more investors to invest in the PRC.

Over the past two decades, China has managed to reform its intellectual property rights protection through laws such as the *Anti-Unfair Competition Law*, *Patent Law of the People's Republic of China*, *Trademark Law of the People's Republic of China*, *Copyright Law of the People's Republic of China*, *Regulations on Protection of Computer Software*, *Implementing Regulations of Patent Law of the People's republic of China*, *Implementing Regulations of Copyright Law of the People's Republic of China*, *Implementing Regulations of Trademark Law of the People's Republic of China*; in addition to the

creation of *Regulations of Layout-Design of Integrated Circuit*.⁶ During the 1980s and 1990s China saw a “birth and incremental development of intellectual property related legislation”⁷.

The developments brought amendments to the *trademark, patent and copyright laws*. These developments occurred in the seventeenth and twenty-fourth meetings of the Standing Committee of the Ninth Session of the National People’s Congress (NPC) where they respectively adopted the decision of amending the *Patent Law* of PRC for the second time, and amending the *Copyright Law* and *Trademark Law*. The amendments for the *Patent, Copyright and Trademark Law* took effect on the 1st July, 2001, October and December 2001 respectively.

Examples of amendments made to these laws are as follows: amendments were made to the copyright regime which included regulations for the implementation of the *Copyright Law*, as well as the provisions on the *Implementation of the International Copyright Treaty* in order to ensure consistency with TRIPS⁸. Amendments were made to the *Trademark laws* particularly in aspects of registration, content symbols, well-known trademarks, priority rights, rights confirmation system, judicial review, crackdown on infringements, and infringement damages, all in order to meet the TRIPS requirements. Amendments were also made to the *Implementing Rules of Patent Law* in order to fulfill the compliance requirements of the TRIPS provision Article 27.2 in which certain terms are described under which a WTO member may deny a patent application.

Moreover, powers have been granted to Public Security Bureaus to receive complaints and investigate allegations of counterfeiting activities. Various other intellectual property laws, as noted above, were formulated to deal with other areas of intellectual property rights such as the *Regulations on Administrative Protection of Pharmaceuticals* of 1992, the *Anti-Unfair Competition Law of the PRC* of 1993, and the 1997 *Criminal Law of the PRC* which included special penalties for infringement on intellectual property rights.⁹

These developments marked an important change to intellectual property legislation preparing China's accession to the WTO, bringing China's intellectual property laws in line with the TRIPS requirements. Moreover, these improvements were considered to be a "significant landmark in the development history of (China's) intellectual property-related legal system"¹⁰. However, TRIPS rules and Dispute Settlement Body rulings would not be a part of Chinese law unless it was incorporated into PRC law. In addition, China is left with a degree of flexibility when incorporating these rules as the WTO does require a perfect system from member states; all that is required is a degree of fairness and transparency.

Amongst other commitments, in order for China to comply with TRIPS, the relevant laws, regulations and other measures needed to be modified so that nationals of other members are given "treatment no less favorable" than treatment given to China's own nationals¹¹. Additionally, Article 4 of the TRIPS ensures that any favorable treatment to one member is reciprocated to all members.

Prior to joining the WTO, China's People's Courts enacted new judicial interpretations, established a judicial system in order to address intellectual property rights protection, and began to hear and adjudicate a series of intellectual property-related cases, thus establishing a use in practice of the newly amended intellectual property-laws. The PRC saw this as legitimizing their newly formed intellectual property rights protection legal structure¹².

The cause for these recent improvements –

In the months and even years leading up to December 11th 2001, China had already begun to re-fashion its existing legal framework in order to match WTO standards and comply with the Protocol of Accession. One may argue that the People's Republic of China views intellectual property law reform through a much broader socio-political framework in which intellectual property law advancement is used to modernize the nation, and secure its protection and prosperity in the world market economy; as the following statement by the Mission of the People's Republic of China supports:

“The Government of People's Republic of China believes that intellectual property rights protection system is of great importance in promoting science and technology development as well as cultural and economic prosperities. Effective intellectual property protection secures smooth operation of the socialist market economy and facilitates international exchanges and cooperation in the fields of economy, science, technology and culture. Intellectual property rights protection is an important element of the policy of reform and opening-up of China. It is also an important element in the process of China's construction of a socialist legal system.”¹³

This mission statement is true in many ways to China's efforts in improving its intellectual property rights protection system. However, despite its intentions, it does not hide the true forces that are shaping the intellectual property rights system in China. Law is a process that shapes a country's values and codes of conduct. On the same note, a country's values and codes of conduct affect, as well, the law. Mission statements, although may inspire, do not have as much influence as these impacts. In considering whether it is possible for China to embrace the international standards of intellectual property rights protection of the TRIPS agreement, the history and pressures affecting this protection must be considered.

History of intellectual property rights infringements-

The need for improvements was called for due to the recent influx of infringing products available both within and outside of China. Resulting damages due to violations have cost some U.S. companies losses up to 15% to 20% of their total sales in China¹⁴. Many foreign companies were considering pulling out of China. Procter & Gamble estimated that over US\$150 million is lost in the local market due to counterfeit products¹⁵. Others such as Japanese company Kao, German company Henkel, and Yamaha reported millions of dollars lost to infringing products¹⁶.

However, counterfeiting is not an uncommon problem with developing countries, all countries including the U.S. have gone through this stage of development¹⁷. Douglas Clark

notes that ‘the difference in China’s case is that a country with one fifth of the world’s population will soon join the world’s trading regime at the very time international trade is freer than ever before. This has unleashed a flood of products – both genuine and counterfeit into the world market’¹⁸.

It seems that China being the target of world scrutiny due to its counterfeit problem was just bad timing, however without counterfeit and infringing products and services, the Chinese will be at a disadvantage with the more developed countries. This is due to the fact that without these products, there would be limited access to science, and information such as software, books, medicine etc.

History of Counterfeit products

During the mid-1980s, there were virtually no counterfeit products available for sale in China¹⁹. There were minor occurrences of counterfeit products in the beginning of 1990 which involved only small quantities of products such as cigarettes. Counterfeit production began to take a rise during the 1990s which saw the distribution and sale of these products within and outside of China. There are several reasons that attributed to this problem, which included: the liberalization of the Chinese economy allowing domestic companies to produce goods of their choice without distribution restrictions; the establishment of manufacturing facilities capable of producing counterfeits in China by Hong Kong and Taiwan companies; the realization of intellectual property rights in China²⁰. The new found appreciation of the capitalistic benefits of intellectual property

rights was partly, if not completely, responsible for the increase in intellectual property rights infringements. Before this enlightenment, rules were not acknowledged, therefore they were not broken. However, now they are acknowledged and can be broken, as a result: intellectual property rights infringements.

Despite on-going reforms in intellectual property laws and enforcement during the 1990s, counterfeit production saw a revolution with the introduction of new technology that facilitates the production of high-quality counterfeit goods. Combined with a market loose with licensed goods that can easily be copied, counterfeit production was a lucrative market. Counterfeit products and genuine ones were difficult to distinguish and became a serious concern for intellectual property holders²¹.

Advancements in technology not only aid the manufacturing process, but also lend to the export of pirate goods. In one example, water soluble paints are incorporated to hide a well-known logo on pirate golf clubs in order to evade customs officials. Once the clubs clear customs, the paint can be rinsed off to reveal the popular trademark²².

In addition to the technological advances aiding the counterfeit production market, domestic Chinese consumers' spending power increased much due to the freeing of China's internal market and semi-privatization of companies, loosening of export controls and a growing manufacturing market brought over from Hong Kong and Taiwan²³; this ate into the profits of the intellectual property rights holders. It was estimated that as much as 90% of the product for all copyright industries sold in the market in China is illegal²⁴.

Most, if not all, of the major intellectual property rights holders affected by counterfeiters were foreign. Nonetheless many of these companies would be the targets of foreign direct investment and the new reforms to intellectual property rights protection in China and its membership to the WTO was expected to give them the security to invest in the Chinese market.

Political Pressure

Ongoing concern as to protection of intellectual property rights in China has been expressed by foreign States as well as the business community. Without a system of intellectual property rights protection that meets world standards, foreign sources of investment will be limited. China's accession to the WTO has forced itself to shed its image as a rogue state that has no respect of intellectual property rights, and to reform its regulations and initiate measures to prevent infringements of intellectual property rights. Article 64 of TRIPS sets out the dispute resolution procedures which other Member States may bring complaints concerning China's enforcement of intellectual property rights. However, nonetheless other governments remain concerned with the current state of intellectual property rights protection in China.

Although China's protection of intellectual property rights has improved during the past few years, the U.S. Department of State²⁵ maintains that the business community and other countries including the United States remain concerned with the significant amount of

business loss resulting from intellectual property rights violations. Estimated losses due to piracy, excluding entertainment software, were estimated to be up to US\$2.8 billion in 2002²⁶. Software piracy in China, alone, resulted in losses of roughly US \$1.7 billion dollars in 2001. The U.S. Trade Representative considers that enforcement of intellectual property rights in China is inadequate, despite the recent progress in revising regulations and initiating measures to protect intellectual property rights. The agency does note however, that China has taken action to protect intellectual property rights by amending its patent, trademark and copyright laws as well as by issuing judicial interpretation on issues concerning intellectual property rights²⁷.

What the U.S. remains concerned about though, is encouraging more instances of criminal prosecution to deter infringement of intellectual property rights in China, as well and modification of current legislation in order to bring China's intellectual property laws in line with international intellectual property rights agreements²⁸.

The International Intellectual Property Alliance (IIPA) claims that China is an area of concern when they reported that the United States has lost over US\$ 9.2 billion through intellectual property rights infringement. Under U.S. trade law, it requires that the U.S. Trade Representative specify if China 'either refuses to protect intellectual property rights or deny fair and equitable market access for U.S. entities which rely on IPR', if so, the U.S. Trade Representative must consider applying sanctions on the PRC.²⁹

The United States' concern with China's enforcement of intellectual property infringements likely reflects its central role in the creation of the TRIPS accord. Michael Perelman exposes this through the words of Edmund J. Pratt, Chairman Emeritus of Pfizer:

In, 1983, Pfizer joined with other corporations such as Merck, Johnson & Johnson, Bristol-Meyers, IBM, Hewlett Packard, General Motors, General Electric, Rockwell International, Du Pont, Monsanto, and Warner Communications to form the Intellectual Property Committee to advocate intellectual property protection. The committee helped convince U.S. official that we should take a tough stance on intellectual property issues, and that led to trade-related intellectual property rights being included on the GATT agenda when negotiations began in Punta del Este, Uruguay, in 1986³⁰

Perelman continues:

Then, in 1986, six months before the Punta del Este meeting launching the Uruguay Round of the General Agreement on Tariffs and Trade, the chief executive officers of 12 major corporations belonging to the committee met again. The result was profound: "The IPC [Intellectual Property Committee], in conjunction with its counterparts in Europe and Japan, crafted a proposal based on existing industrialized country laws and presented its proposals to the GATT Secretariat. By 1994, the IPC had achieved its goal in the Trade Related Aspects of Intellectual Property (TRIPS) accord of the Uruguay trade round.... In Effect, twelve corporations made public law for the world."³¹

In this illustration, it shows the power and influence the business community can have. It is so influential that not only can it convince the United States Government to enforce

intellectual property protection, but it can convince the world to enforce American standards of intellectual property protection. It is not surprising why China will want to bow to the demands of the international community's pressure to protect intellectual property rights.

It is not only the United States who is concerned with intellectual property rights protection, Europe has expressed concern that many of its companies are affected by China's lack of intellectual property protection and is also aware of that Chinese companies "badly needed foreign investment will not be forthcoming" without adequate legislation³². Companies from countries all over are considering pulling out of investments in China due to the lack of intellectual property rights enforcement³³.

This sort of attitude is a form of political blackmail, with the richer developed nations saying: "If you want our money, you have to accept our rules". What they didn't say is that if China accepted and enforced their rules, China's economy will basically be reliant on the success of these foreign companies.

The recent improvements brought on by TRIPS are not derived only from pressure from foreign governments, but also from the fact that more domestic innovators are applying for intellectual property protection³⁴. The reason for this is due to the increase in monopoly rights offered by the standards imposed by the new rules. Despite this interest expressed by domestic innovators, it does not seem that domestic innovators have nearly as much interest in the protection offered by TRIPS influenced law, as the foreign corporations.

Therefore, it is clear that the imposition of these new standards and increased protection of intellectual property rights was not enacted for the interests of the local innovators but the foreign ones who are going to pour money into the country. The Former Secretary of State for Trade in the UK, Rt. Hon Stephen Byers reflected this by stating that ‘the greater security and comfort for foreign investors afforded by China’s membership (to the WTO) should lead to increased levels of foreign direct investment in China.’³⁵

One may also argue that China joined the WTO for its own benefit. Donald Clarke, Professor of Law at the University of Washington argues that ‘the Chinese government has embarked on this strategy for its own sake, not to fulfill treaty commitments to foreigners, and Chinese leaders have sought WTO membership not simply because they believe that it will open more markets to Chinese products, but because they see membership as giving them extra leverage to force through difficult changes in the domestic economic system’³⁶. This observation is true to the point that ultimately, China’s entry to the WTO will and has opened new doors to trade and foreign direct investment which is good for the country. However one must recognize the fact that the rules China must adhere to is tailored for the protection of the very countries that are going to invest in the region. To succumb to such rules, China must undergo massive legal and economic reform. Thus, if its interests don’t remain on the domestic front, it may be in danger of losing its markets to the monopolistic control of foreign companies.

Conclusion

From looking at the recent history of rampant counterfeiting and intellectual property infringements, it is difficult to believe that an abrupt transition by enforcing the recent amendments will work in China. Although intellectual property rights must be protected, one cannot deny that over a decade of acceptance of counterfeit and other infringing products is a habit that can be broken easily. In Yiwu, one can purchase 10 boxes of six pirate Gillette razor blades for the wholesale price of 65 cents, whereas the Beijing market price is \$9.60³⁷. If the public was immediately denied of these products, the people of China will be greatly affected economically.

The call for improvements of the protection of intellectual property rights was mainly brought on by foreign companies through the mouths of their governments. The pressure of losing foreign investment if China didn't improve its intellectual property rights protection resulted in China's change of attitude towards protecting these rights. Therefore, despite mission statements and the like, the reason for China's adoption of TRIPS policies is not so simple.

The need to enforce intellectual property rights is nonetheless inevitable. Although the reason to enforce these rights is not as righteous as claimed (by both foreign and the Chinese government), China faces enormous pressure to do so. However, it must do so in a 'slowburn' process allowing the population to come to terms with paying much more for legitimate products, a process of acceptance which has an enormous effect from a socio-economic standpoint.

TRIPS

TRIPS explained

According to the WTO, “the TRIPS Agreement is an attempt to narrow the gaps in the way Intellectual Property Rights are protected around the world, and to bring them under common international rules. It attempts to strike a balance between the long term social objective of providing incentives for future inventions and creation, and the short term objective of allowing people to use existing inventions and creations...”³⁸ In addition to this, the WTO’s Dispute Settlement system is available to settle disputes concerning intellectual property.

In brief, the TRIPS identifies the scope and procedures of the enforcement of intellectual property rights in various areas. The areas covered run from copyrights, trademarks, patents, to geographical indications, industrial designs, integrated, trade secrets, as well as control of anticompetitive practices in contracts. Examples of China's intellectual property rights commitments are described in the table below.

The TRIPS Agreement resulted from multilateral negotiations on “trade-related intellectual property rights” during the General Agreement on Tariffs and Trade(GATT) Uruguay Round. It is the most comprehensive international instrument on intellectual

property rights in existence.³⁹ When the WTO Agreement came into force on January 1, 1995, it concurrently established the WTO and additionally all agreements negotiated during the Uruguay Round and all previous GATT Rounds. Thus, a newly negotiated TRIPS Agreement was incorporated into the *Agreement Establishing the World Trade Organization*.⁴⁰ The TRIPS Agreement is based upon and supplements the Berne, Paris, Rome and Washington Conventions.⁴¹ It is not a fully independent convention, but part of a larger series of conventions meant to provide protection for Intellectual Property Rights.

What the TRIPS sets to do is set *minimum* standards to which member nations must adhere to in the areas of copyright and related rights, including computer programs and databases; trademarks; geographical indications; industrial designs; patents; integrated circuits; and undisclosed information.⁴² Article 1 of the TRIPS Agreement states: “Members shall give effect to the provisions of this Agreement. Members may, but shall not be obliged to, implement in their law more extensive protection than is required by this Agreement, provided that such protection does not contravene the provisions of this Agreement. Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice.”⁴³

In other words, member nations are not only protected against demands from fellow members for higher levels of protection, but are also given the right to expand their own nation’s intellectual property law if they deem it necessary.

One may argue that the innovation of the TRIPS Agreement is evident in Part III, V, VI, and VII which include detailed provisions on enforcement measures, measures for Dispute

Settlement Understanding (DSU), and transitional arrangements for developing countries which were not included in prior conventions. The enforcement measures “stipulate specific obligations related to administrative and judicial procedures including, *inter alia*, provisions on evidence, injunctions, damages, measures at the border against counterfeiting, and penalties in case of infringement.”⁴⁴ The DSU provisions ensure that institutionalized, multilateral procedures will occur should controversy over agreement compliance arise between nations. This inhibits unilateral measures being taken by members involved in a dispute. As will soon be addressed in detail, with China’s accession to the WTO, such provisions of the TRIPS Agreement have had much influence over, and resulted in the inevitable change of China’s outstanding intellectual property laws.

What TRIPS required of China

In order to amend its laws to ensure consistency with the TRIPS Agreement, from the year 2000 onwards, China made changes to intellectual property laws including the *Patent Law of the People’s Republic of China*, *Trademark Law of the People’s Republic of China*, *Copyright Law of the People’s Republic of China*, *Regulations on Protection of Computer Software*, *Implementing Regulations of Patent Law of the People’s republic of China*, *Implementing Regulations of Copyright Law of the People’s Republic of China*, *Implementing Regulations of Trademark Law of the People’s Republic of China*; in addition to the creation of *Regulations of Layout-Design of Integrated Circuit*.⁴⁵

It not my intention to examine whether the changes made to China's legislation has complied with the requirements of the TRIPS but rather to consider whether the application of these changes adheres to the spirit of the TRIPS agreement. With the exception of a few, China's Intellectual Property Laws essentially complies with the TRIPS. Part II Section 3: Geographical Indications, Articles 22 and 23 which have yet to be complied with, the Chinese Intellectual Property Laws are compliant or essentially compliant⁴⁶. In Article 22, the TRIPS requires that there be protection of geographical indications, but in China there is no legislation doing so. Moreover, Article 23 requires Additional protection for geographical indications for wines, again, in China there is no legislation allowing for such protection.

Another area that needs attention is China's addition of the Regulation on Integrated Circuit Layout Design Protection that took effect October 1st, 2001. This regulation in essence adheres to the requirements of Articles 35-38 of the TRIPS accord, however, the Semi-Conductor Industry Association raised concerns in its report to the U.S. Trade Representative that 'discrete semiconductors' may not be covered by the Regulation and therefore inconsistent with TRIPS due to the interpretation given by a senior official of the Ministry of Information Industry⁴⁷. The Chinese semiconductor market is worth US\$15 billion and represents 13 percent of total world demand making it the third largest market behind the U.S. and Japan⁴⁸, thus it is no wonder that China's legislation would not cover all segments of the semiconductor market

As for Article 63 of the TRIPS, it calls for transparency where laws are required to be publicly available. China has made efforts by making information on trade-related measures available to WTO members upon request before those measures are implemented or enforced⁴⁹. Moreover, a journal for publication of all trade-related measures will be available for comment before measures are implemented. In addition, China is considering providing an English version available on the world-wide-web of this information to the international community in order to promote transparency.

Not enough?

Despite having made major changes made to its intellectual property legislation, and having complied essentially to the TRIPS requirements, many have expressed concerns over the extent to which China's intellectual property laws comply with the accord. China's *Patent Law*, for example, does not allow the right for a patent to be granted to inventions that violate the laws of China, are contrary to social morality, or may prejudice public interest. Because such stipulations cover such a broad area, some argue that they may help China to justify the exclusion of an invention that would otherwise be patented under the TRIPS Agreement.⁵⁰

Moreover, China's *Patent Law* in regard to compulsory licensing does not comply with TRIPS articles 31(b), which asserts that a nation's law must clearly state what a user must do to gain authorization from the right holder; and 31(f) which states, "any such use shall be authorized predominately for the supply of the domestic market of the Member

authorizing such use.”⁵¹ Unfortunately, there is nowhere in China’s *Patent Law* where a clear specification is made to distinguish what a user must do to obtain authorization from the right holder. It may also be argued that the stipulations in Article 31(f) are currently omitted from the *Patent Law*. Finally, in the case of *Patent Law*, China has yet to amend the law to comply with TRIPS Article 31(h), which states, “the right holder shall be paid adequate re-numeration in the circumstances of each case, taking into account the economic value of the authorization.”

The case with China’s *Copyright Law* also provides evidence for TRIPS incompatibility. For example, TRIPS Article 14.2 which requires the extension to “producers of phonograms...the right to authorize or prohibit the direct or indirect reproduction of their phonograms;” has not yet been met by China’s copyright practices; and with the internet catching on rapidly in the PRC, copyright infringement will only get worse¹.

China’s regulations on computer software could also be deemed in direct opposition to TRIPS standards because Article 17 of China’s new legislation states that any software may be used for training in the country. However, when one compares such practice to TRIPS Article 13 it is evident that it does not correlate, as the use of such training software could imply reproduction without adequate permission.⁵²

¹ Illegal music download sites all over the world costs record companies billions of dollars in lost revenue. This trend has managed to catch on in China. Consequently, Warner music recently sought compensation from Rongshuxia, a Shanghai based internet content provider. It is alleged that Rongshuxia was providing free downloads of music, of which the intellectual property is owned by Warner, from its website www.rongshu.com (*Warner Wages War Against Website*, China Daily, (13 February, 2004)). Music download companies such as rongshu.com as well as listen4ever.com and many others are an ever-growing trend. China’s 2001 Internet Regulations has recently been reviewed and is in its draft state. If it is incorporated into Chinese law, it will hopefully aid in the country’s struggle to control a currently phenomenal outlet for pirate activity.

Such close scrutiny by critics is daunting as it is evidence that no matter what changes are made to its laws, China cannot escape demands for reforms, amendments, or even the creation of new legislation, until virtually all intellectual property rights infringements cease to exist in the nation. Criticisms such as these are too excessive to be put on a country only in its 16th month as a member of the WTO. Especially considering all the efforts it has made to prove its sincerity to meet TRIPS standards.

Enforcement

China's "Pattern of Parallel channels and Coordinated Operation"⁵³ is its two sided enforcement system which consists of an administrative side- where a complaint is prepared, and another side that incorporates the courts system. It is the right of the intellectual property holders to decide which channel they wish to use when making a complaint. Some argue China has exceeded TRIPS standards by establishing a chamber of specialized intellectual property courts throughout the country.⁵⁴ Such advances made by China prove its attempt to create an enforcement system which complies with Part III of the TRIPS Agreement: Enforcement of Intellectual Property Rights. TRIPS Article 41.1 states that, "members shall ensure that enforcement procedures as specified in this part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this agreement..."⁵⁵ The establishment of an inter-agency liaison mechanism, and enforcement coordination mechanism in May 2001

by the joined forces of the State Administration of Industry and Commerce, the Ministry of Public Security and the State Intellectual Property Office additionally helped to create a system which supports enforcement against TRIPS violations.⁵⁶ There have also been co-operative measures such as the creation of networks on trademark enforcement established in the Shandong, Jiangsu, Zhejiang provinces and Shanghai municipality.⁵⁷

Despite these efforts, amongst others, roughly half of China's commitments to the TRIPS specifically concerns enforcement issues⁵⁸. Although there has been praise as to China's changes in legislation concerning the protection of intellectual property rights, there remains much concern relating to the enforcement of intellectual property rights in China. In a report to the U.S. Trade Representative it was found that despite having revised its laws to provide criminal penalties for intellectual property rights violations, there lacks enforcement and weak penalties allowing for widespread intellectual property rights violations to continue; there is a lack of deterrent punishments imposed on intellectual property rights violators, and 'there is little sign of this changing'⁵⁹. The same body suggested that "intellectual property rights enforcement is hampered by lack of co-ordination among Chinese government ministries and agencies, local protectionism and corruption, high thresholds from criminal prosecution, lack of training and weak punishments"⁶⁰.

Examples of such include members raising concerns about filing civil judicial actions concerning intellectual property rights violations in China, and that compensation for

damages and fall far from matching the damages incurred from the infringements⁶¹. As a result, China has made efforts to implement TRIPS provisions Articles 42 and 43 which concerns civil judicial procedures and evidence, as well as Articles 45 and 46 which relate to damages and compensation.

There is additionally conflict found between Article 41.4 of TRIPS and China's *Administrative Procedural Law*. TRIPS Article 41.4 states that: "Parties to a proceeding shall have an opportunity for review by a judicial authority of final administrative decisions and, subject to jurisdictional provisions in a Member's law concerning the importance of a case, of at least the legal aspects of initial judicial decisions on the merits of a case. However, there shall be no obligation to provide an opportunity for review of acquittal in criminal cases."⁶² China's Administrative Law states that no one can challenge any administrative rules or acts of a binding nature.⁶³ Such policies may be viewed in terms of strengthening the regime and are essentially in conflict with TRIPS.

Concerns were expressed in addition to the inadequate penalties imposed by administrative bodies, as to the required monetary threshold for initiating criminal actions against intellectual property rights infringers were too high and rarely met by the amount of the crime⁶⁴. The IIPA identified this by noting concern with China's enforcement of its TRIPS obligations suggesting that China fails to fully comply with TRIPS obligations⁶⁵. The reason they say this is partly due to China's closed market preventing outside intellectual property holders from benefiting from the rights offered under the TRIPS accord. They propose that this is due to the persistent dominance of pirated copyright materials available

on the market and market access restrictions preventing Chinese authorities from effectively managing this problem. They suggest that by lowering the threshold required to bring criminal actions against intellectual property infringers, Chinese authorities will be more willing to prosecute.

China has responded to such concerns by recommending that the fiscal requirements be lowered in order to allow for easier criminal prosecution on intellectual property offenders. Such a response deemed by China is a critical component in its enforcement of intellectual property rights simply because a monetary threshold is what separates who will suffer criminal punishment and who will not; and thus clearly not a very sound deterrent for potential intellectual property rights violators. However, China has not yet required that the threshold be lowered, and without doing this, it would ultimately defeat the purpose intended by TRIPS. Such a move by the Chinese government would be encouraged by the IIPA as they called for 'lowering the threshold in order to bring criminal actions in China against copyright piracy and commencing coordinated efforts to enforce against all forms of piracy, combined with steps to open the Chinese market, that China can hope to meet its WTO commitments.'⁶⁶

Where civil matters are concerned, levels of compensation for damages do not have as great an impact as a deterrent as criminal actions do. Also, many foreign companies have not yet moved into the Chinese market and may be unaware of infringing products in the region; this only adds to the confidence of intellectual property rights infringers. In the landmark case of *Lego Co. v Tianjin Coko Toy Co.*, the Beijing High People's Court ruled

in favour of the Danish company. This case is important because ‘the court ordered *Coko Toy* to turn over the molds it used to produce the ersatz Legos. That's a strong message in a country where pirates can be sued one day, only to open up shop three blocks away a day later’⁶⁷. It must be kept in mind, however, that there is a healthy establishment of domestic Chinese toy manufacturers in China, that earned an estimated US\$8.243 billion in 2002⁶⁸ despite its majority of exports are foreign owned brands; thus the toy industry may be able to afford less domestic protectionism as opposed to other sectors of industry. Additionally, for products that are physically easy to produce, such as T-shirts or DVDs, ‘enforcement is always more difficult, in China and everywhere else’⁶⁹.

Nonetheless, the reason for these actions, or rather lack of action by the Chinese government is likely because they are aware of the negative impacts that would result in other less established sectors of industry if the standards required by TRIPS was imposed too strictly too early. Even the U.S. Chamber of Commerce recognizes that it is too early to ‘issue sweeping judgments about China’s overall compliance with its WTO obligations’⁷⁰ though one must keep in mind that ‘it does nobody any favors to pretend that specific and binding obligations do not exist. But it is necessary to bear in mind that not all violations will be deliberate, and that not all delay is obstruction’⁷¹. Thus, although the government rushed to implement legislation, they are in no rush to implement the enforcement of the laws as it would have ill social and economic effects on the country; rather a slow steady increase in enforcement is in need instead of no enforcement or immediate enforcement.

The effect of TRIPS in China

For those countries that are worried about China's lack of enforcement of intellectual property rights, since China's ascension to the WTO, legislation protecting intellectual property rights has greatly improved and has essentially met world standards. Moreover, the WTO's dispute settlement mechanisms in place, foreign governments can now file complaints with the WTO in order to address problems they have with China's lack of enforcement of intellectual property rights.

However, the application and enforcement of these measures are of a different matter and of much concern to foreign companies and governments alike. It is the way China enforces and plans to enforce the standards required by the TRIPS agreement that strikes to the heart of the matter. Despite all the amendments, new legislation, and powers of judicial interpretation enacted by the Chinese government, does China really plan to enforce the requirements set by the TRIPS in order to achieve the true intentions of the accord, which is ultimately to protect the financial interests of foreign corporations? Much to the relief of foreign and potential foreign investors, cases such as *Lego Co. against Coko Toys Co.*, shows Beijing's sincerity on changing its enforcement practices to greater protect intellectual property rights despite hypercritical scrutiny. Moreover, it is only a matter of time before there is greater market access to China. This would allow for more legitimate products into China and in turn would aid in combating piracy within the region⁷².

Despite the continuing problem with enforcing intellectual property rights protection, the Chinese government has shown its concern regarding the piracy problem. Chinese

authorities managed to raid 18 counterfeit VCD/DVD manufacturing factories as well as over 5000 retail outlets between 1st January 2003 and 31st July 2003.⁷³ In their first year after its ascension to the WTO, Beijing courts, Beijing High People's Court heard 888 intellectual property rights cases, 100 up from the year before⁷⁴. In addition, cases in 2001 were up 32% to that in 2000. From 2002-2003, there was a 24.57% increase in cases. Between January and November of 2003, China's courts dealt with 5,750 intellectual property lawsuits. Vice-President of the Beijing High People's Court, Wang Zhenqing claimed that the promising performance of the courts was owed to the 'relatively complete legislation' on intellectual property rights, its preparations before the Nation's ascension to the WTO, and its 'adaptability to international trends on intellectual property rights protection'⁷⁵.

What can be derived from this praise by Chinese officials is, again, that China does have adequate intellectual property laws but, despite its efforts, there is not adequate enforcement⁷⁶. According to Zhenqing, the State Intellectual Property Office has made plans to 'facilitate the establishment of intellectual property right agencies, and train a number of agents and lawyers familiar with international rules, laws and practices concerning intellectual property rights'⁷⁷. Although this may be promising, it remains to be seen how these agents will apply and enforce the protection of intellectual property rights.

As discussed earlier, the current state of enforcement standards in China is not by accident as China must keep its own interests in mind when choosing whether or not to enforce

intellectual property rights. An important point to keep in mind when judging China's intellectual property rights enforcement is that, without access to science, technology and information it is difficult for any developing country even to keep up with developed ones.

What China must do is to strike a balance between the demands of political pressure to enforce intellectual property rights and meeting the needs of its own society and economy. If precedents are to be set, the local industry and markets should be well established beforehand in order to prevent foreign monopolies from taking over sectors of China's economy.

Understandably, it is in a country's interest that intellectual property rights are protected if they have a comparative advantage in innovation⁷⁸. The interests of China appears to not lie in innovation but rather in imitation and adaptation of other innovations therefore a lower standard of intellectual property rights protection are in its interests. This theory however, is not limited to just China and other developing countries. The very countries concerned about China's lack of intellectual property rights enforcement such as Japan and Canada, are imitation and adaptation based countries⁷⁹. However, with the greater access to information from a lower level of protection may allow China to grow into an innovation-based country while at the same time grow into appreciating the advantages of intellectual property rights protection; after all, Article 7 of the Agreement states that "the protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a

manner conducive to social and economic welfare, and to the balance of rights and obligations". At a recent National Patent Conference in Beijing, Vice Premier promoted local development of intellectual property by encouraging domestic companies to create technological innovations as they will be protected under China's intellectual property laws.

It appears that China certainly does have an interest in taking advantage of such protections as well as limiting its functions. A more relaxed approach to enforcement of intellectual property rights would allow domestic access to technological information. China's accumulative export sum of high-tech products is up to US\$14,859,880,000 in Jan-Feb 2004, a figure up 53.5% from the year before⁸⁰. Export of mechanic and electronic products is up to US\$28,596,720,000 an increase of 57.9%⁸¹. Components for integrate circuits and micro-assembles is up to US\$4,623,660,000 an increase of 69.9%⁸² from the year before. An explanation for such increases may be a result of not only increased foreign investments but also an increase of domestic high-tech manufacturers.

Conclusion

The recent changes to China's intellectual property rights protection laws are, at the moment, not entirely true to the real intentions of the TRIPS accord. However, this is not without reason.

China has come a long way in the past few decades in this area of law, and has made changes significant enough to comply with the TRIPS requirements and show to the world its intent to protect intellectual property rights. Its entry to the WTO does not only result in the benefit of access to some 138 overseas markets, but also secures the confidence of many foreign investors.

The intention of the TRIPS accord, despite its requirements on paper, is to drive the ideals of those states with the greatest interest in intellectual property rights onto other states to ensure that their intellectual property rights enforced globally. This is not an overstatement. It is evident that despite what the TRIPS requires of a member state, as meeting the requirements is not enough. A state must eliminate intellectual property rights infringements and send a deterrent message to all potential infringers in the region.

China will therefore face scrutiny and political pressure despite the enormous advancements it has made in its protection of intellectual property rights. Instead of adhering to the endless demands of foreign governments, China should keep its domestic industries in mind before setting more 'landmark' cases, imposing lower thresholds, changing its legislation, and making any other changes so that Chinese law, in a looser sense of the word, 'complies' with TRIPS and WTO requirements.

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