

CONVERGENCE, COERCION AND COUNTERFEITING: INTELLECTUAL PROPERTY RIGHTS ENFORCEMENT IN THE PEOPLE'S REPUBLIC OF CHINA

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... despite the presence of excellent laws on the books, the enforcement and protection of [intellectual property rights] in China fall well below that provided for in its domestic laws and mandated by those international agreements to which China is a party.¹

I INTRODUCTION

The development of law in the People's Republic of China has converged with the legal traditions of Europe, and more recently the United States of America, in a concerted effort to comply with international expectations.² This is most evident in the case of intellectual property laws developed in China since the advent of the Open Door policy at the end of 1978.

With the push towards membership of the World Trade Organisation (WTO) came the need to further develop these intellectual property laws in order to comply with the requirements of the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPS Agreement). This has been an issue of importance for many Asian nations.

The TRIPS Agreement is an attempt to bring convergence in the way intellectual property rights are protected around the world by requiring compliance with common international rules. It brings together and complements the various existing

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¹ Mikhaelle Schiappacasse, 'Intellectual Property Rights in China: Technology Transfers and Economic Development' (2004) 2 *Buffalo Intellectual Property Law Journal* 164, 179.

² Lin Ying and Natalie P Stoianoff, 'Foreign Investment in China: The Cross Cultural Dilemma' (2004) 1 *Macquarie Journal of Business Law* 5.

international agreements on intellectual property and extends the harmonisation by providing enforcement and dispute settlement mechanisms. However, it is the intellectual property enforcement regime that has created the most controversy for China. Despite the substantive law, intellectual property infringement, commonly through the production of counterfeit goods, remains rampant in China. For example, in 2004, the value of Chinese counterfeits entering the United States market alone was US\$ 134 million,³ and in both 2005 and 2006 infringement levels have reportedly not improved.⁴ This illustrates a divergence between the rule of law and its effective implementation within society.

Under the TRIPS Agreement, China is required to implement effective enforcement procedures for the protection of intellectual property rights and to provide civil and criminal remedies that have a deterrent effect.⁵ It is the failure to adequately enforce intellectual property rights in China that is of current concern to Australia as the negotiation of the Australia-China Free Trade Agreement (FTA) proceeds. This has been made quite plain in much of the Australian media commentary on the Australia-China FTA.⁶ Such concerns are certainly justified given the enormous volume and value of counterfeited or pirated goods produced in China and the associated loss to foreign trade mark and copyright owners in particular.

China joined the WTO in November 2001. The potential growth of China upon accession to the WTO was of concern to developed nations. Accordingly, unlike developing nations able to take advantage of the transitional arrangements under the TRIPS Agreement, China was required to comply fully with the TRIPS Agreement upon accession.⁷ But the economic circumstances of China are quite unique. While having characteristics of a developing nation, China has experienced high rates of foreign investment and with that investment access to foreign technologies, trade marks and products mostly protected by intellectual property rights. Economic growth has led to an ever increasing 'middle class' with purchasing capacity for private homes, cars, education and holidays, not to mention luxury brand products.⁸

³ United States Trade Representative, *Report to Congress on China's WTO Compliance* (2004) 66 <http://www.ustr.gov/assets/Document_Library/Reports_Publications/2004/asset_upload_file281_6986.pdf> 9 September 2005.

⁴ United States Trade Representative, *2005 Report to Congress on China's WTO Compliance*, 11 December 2005, 64; and United States Trade Representative, *2006 Report to Congress on China's WTO Compliance*, 11 December 2006, 76.

⁵ *Agreement on Trade Related Aspects of Intellectual Property Rights*, opened for signature 15 April 1994, [1995] ATS 38, arts 41 and 61.

⁶ Shane Wright and Felicity Williams, 'Australia to hit China on Tariffs, Quarantine and IP: Vaile', *Australian Associated Press Financial News Wire*, 8 June 2005. See also for example, Tracey Sutherland with Susannah Moran, 'Raw Materials top Vaile's China FTA Wish List', *Australian Financial Review*, 9 June 2005. <http://global.factiva.com.eproxy.uow.edu.au:2048/en/arch/print_results.asp> 17 August 2005.

⁷ Ching Cheong and Ching Hung Yee, *Handbook on China's WTO Accession and its Impacts* (2003) v.

⁸ Xin Zhigang, *Dissecting China's 'Middle Class'*, *China Daily*, 27 October 2004, <http://www.chinadaily.com.cn/english/doc/2004-10/27/content_386060.htm> 22 November 2006.

This 'middle class' in Chinese society has been determined to account for 19% of the population in 2003, 24.5% in 2005, with an expectation that 40% of the Chinese population will achieve 'middle class' status by 2020.⁹ Accordingly, one would expect that intellectual property rights protection and compliance should increase as the ability to pay the price of the 'real' product, as opposed to the counterfeit product, increases. But this has not been the experience thus far as counterfeits are travelling beyond China's borders and into foreign markets. This is an interesting situation when China has been accused of maintaining import and distribution restrictions over legitimate foreign products and thereby providing incentives for the expansion of the counterfeit product market within its borders.¹⁰ Perhaps all that is needed is to further educate Chinese society about the significance of intellectual property rights, or persevere until enough Chinese citizens produce their own intellectual property to bring a change in attitude toward the protection of such intellectual property. In each case time is a significant factor, but Australia and China are negotiating a Free Trade Agreement now and the Australian manufacturing sector has expressed concerns over the current intellectual property regime in China and the impact of that regime on Australian exports to and investment in China.¹¹

It is the intellectual property enforcement regime that has been at the centre of criticism by intellectual property exporting nations. China has been requested to provide detailed information about its intellectual property rights enforcement efforts over the period 2001 to 2005. This request was made in October 2005 by the United States under Article 63.3 of the TRIPS Agreement.¹² Similar requests have been made by Switzerland and Japan.¹³ China's short response came in early 2006 challenging the nature of the requests and requiring further clarification from each of the three nations.¹⁴ However, China did note its fulfilment of WTO obligations under Article 63 of the TRIPS Agreement, the efforts of its 'competent domestic IPR authorities' to make 'relevant information publicly available', and the use of 'bilateral exchange and cooperation activities with WTO members' to provide

⁹ Ibid. Statistics reported from The Chinese Academy of Social Sciences (CASS) and from the National Bureau of Statistics of China.

¹⁰ United States Trade Representative, *2006 Report to Congress on China's WTO Compliance*, 11 December 2006, 78.

¹¹ See the various submissions by manufacturers on the Australia-China FTA website of the Australian Government Department of Foreign Affairs and Trade at <<http://www.dfat.gov.au/geo/china/fta/submissions/index.html>>. See also the presentation by Heather Riddout, Chief Executive, Australian Industry Group, at the Australia-China FTA Conference in Shenzhen, China, 28-29 June 2006: <http://www.dfat.gov.au/geo/china/fta/060628_shenzhen_ridout.html> 18 August 2006.

¹² United States Trade Representative, *2005 Report to Congress on China's WTO Compliance*, 11 December 2005, 66. The actual document containing the request is cited as IP/C/W/461, 14 November 2005.

¹³ Ibid. The Swiss request is cited as IP/C/W/462, 11 November, 2005, while the Japanese requested is cited as IP/C/W/463, 14 November, 2005.

¹⁴ IP/C/W/465, 23 January 2006; IP/C/W/466, 23 January 2006; and IP/C/W/467, 23 January 2006.

further information on their IPR legislation and enforcement.¹⁵ In addition, China could have reported on specific cases adjudicated in the higher courts, noted the efforts already made to strengthen the legal framework and improve the specialist tribunals in the judicial system, and provided a statistical analysis of the various 'front-line' enforcement actions undertaken by agencies such as customs. The issue will be how effective these efforts have been and what more needs to be done to quell the enticing flame of piracy and bring about a change in behaviour.

This article provides an overview of the Intellectual Property Rights (IPR) regime in China and considers the enforcement obligations under the TRIPS Agreement and the attitudes of three major intellectual property exporting countries to China's track record in IPR enforcement. The evidentiary basis of these attitudes comes from WTO documentation and from US Trade Representative reports on TRIPS compliance and IPR enforcement activities.¹⁶ The article then turns to the unique circumstances in which Australia finds itself due to the negotiations of the Australia-China FTA and the drafting of the Intellectual Property Chapter. In response, an overview of China's enforcement activities illustrates the apparent grand scale efforts of the authorities to deal with the IPR infringement crisis. However, progress is slow but in the scheme of things understandable when comparing the respective legal histories in IPR protection.

II THE INTELLECTUAL PROPERTY RIGHTS (IPR) REGIME IN CHINA

A Key Legislation

It is well recognised that the introduction of intellectual property laws in China during the early days of the Open Door Policy was aimed to 'meet the requirements of economic development and scientific advancement'.¹⁷ More specifically, if China was to attract foreign investment and technologies it had to demonstrate that it was capable of providing the necessary legal protection for such investment. This also resulted in China acceding to the numerous international conventions related to the protection of intellectual property rights¹⁸ culminating in membership of the TRIPS Agreement on 11 December 2001.¹⁹

¹⁵ Ibid.

¹⁶ For a discussion on the role played by the US Trade Representative in applying unilateral pressure upon nations perceived not to be complying with their TRIPS obligations see Joshua J Simmons, 'Cooperation and Coercion: The Protection of Intellectual Property in Developing Countries' (1999) 11 *Bond LR* 59.

¹⁷ MOFCOM Report, *I. Status Regarding Legislation in Terms of IPR in China*, Tuesday, April 05, 2005 Posted: 11:08 BJT (0308) GMT) <<http://english.mofcom.gov.cn/column/print.shtml?/topic/sentence/200504/2005040003>> 2 June 2005.

¹⁸ Including the Paris Convention, Berne Convention, Madrid Agreement and its Protocol, Universal Copyright Convention, Phonograms Convention, Patent Cooperation Treaty, UPOV Convention, Washington Integrated Circuits Treaty.

¹⁹ MOFCOM Report, *II. China's Accession to International Conventions for the Protection of IPR and its Participation in International Negotiation about IPR*, Tuesday, 5 April 2005 Posted: 11:21 BJT (0321) GMT), <<http://english.mofcom.gov.cn/column/print.shtml?/topic/sentence/200504/2005040003>> 2 June 2005.

There are three main pieces of legislation covering intellectual property rights in China. These are the Patent Law of the People's Republic of China (PRC), the Trademark Law of the PRC and the Copyright Law of the PRC. The three forms of intellectual property protected under these laws are expressly provided for under Articles 94-97 of the General Principles of the Civil Code. Each has its own regulations and implementing provisions,²⁰ and each is administered by a different government authority, namely, the *State Intellectual Property Office* (SIPO) for patents, utility models and designs, the Trade Mark Office within the *State Administration of Industry and Commerce* (SAIC), and the *National Copyright Administration for China* (NCAC). In addition, the Law Against Unfair Competition of the PRC provides protection in relation to trade names and unfair competition (known as passing off in common law jurisdictions), control of anti-competitive practices in contractual licences and the protection of undisclosed information. These laws were amended where necessary to ensure compliance with the requirements of the TRIPS Agreement before accession to the WTO.²¹ However, it is not the letter of the law that has caused concern to foreign investors. The implementation of the laws, more particularly the enforcement of IPR, has received the most criticism as is discussed below.

B The Court System

The Court system should be considered at this point. At the top of the court structure is the Supreme People's Court. Next comes the High People's Court, found in each province, autonomous region and municipality under authority of the central government. The Intermediate People's Court follows in each major city and then at the bottom of the structure comes the Basic or Primary People's Court found in each county, district and major city. While the court system is one of the three elements of governmental power in China, the concept of separation of powers is expressed somewhat differently to that understood in countries like Australia.²² Wang Kui Hua suggests that the separation of powers in China resides in 'a functional difference between the legislative, judicial and administrative arms of Government'.²³ For example, judicial independence means that the political influence of the Chinese Communist Party is only present in the form of general policy directions rather than in actual decision-making.²⁴ Meanwhile, in line with civil law influences, most notably the German Civil Code, the issue of judgments or opinions by the Supreme People's Court does not constitute an interpretation of the law.²⁵ Having said that, 'Judge-made law' in China is effectively confined to those judicial opinions issued by the Supreme People's Court as official interpretations.

²⁰ Including regulations pertaining to software, plant variety rights and circuit layouts.

²¹ In addition, there are three significant regulations that have also been established, namely, the Regulations for Protection of New Varieties of Plant (1997), the Regulations on the Protection of Layout-Designs of Integrated Circuits (2001) and the Regulations for Protection of Computer Software (2001).

²² K H Wang, *Chinese Commercial Law* (2000) 15-16.

²³ Ibid 16.

²⁴ Ibid 16.

²⁵ Ibid 16.

This is, perhaps the closest China's judicial system comes to the common law concept of *stare decisis* (the doctrine of precedent), an important consideration when one realises that IPR cases are handled primarily in the lower courts. The first instance hearings take place either in the Intermediate People's Court or the High People's Court. Intellectual Property Tribunals or Trial Divisions were established in the courts from 1993 and renamed third civil tribunals in 2000 for infringement and contract disputes. Meanwhile, Administrative Tribunals became the forum for validity and ownership disputes.

C Administrative Measures

The judicial system is not the only way that one can achieve IPR enforcement, administrative measures are also available. For example, the local administrations of the NCAC have had the power to initiate actions against infringers since 2002.²⁶ In the case of trade marks, the SAIC, or more likely its local authority (AIC), has the power to investigate and deal with trade mark infringements.²⁷ In addition to ordering an infringer to immediately stop the infringing act, the AIC can impose a fine, confiscate and destroy the infringing articles, the tools used for the manufacture of those articles, and tools used for counterfeiting the representation for the registered trade mark.²⁸ In relation to international trade, the *China General Administration of Customs* has provided an enforcement mechanism through its *Border Protection Division for IP Protection* established in 1995.²⁹ Further, criminal infringement and piracy is handled by the various public security authorities through the *Ministry of Public Security*.

With such a comprehensive IPR regime in operation, why then, is China failing to meet its WTO obligations to ensure effective IPR protection? To explore this, one needs to consider the obligations found under the TRIPS Agreement.

III COMPLYING WITH THE TRIPS AGREEMENT

The establishment of the World Trade Organization (WTO) by the 'WTO Agreement'³⁰ in 1995 symbolises a desire to converge trade principles in order to reduce distortions and impediments to international trade. Part of this process was the recognition that intellectual property rights play a significant role in the

²⁶ 2003 saw a number of special actions taken with 150,000 executive staff dispatched to investigate markets, enterprises and schools: 12.9m products seized resulting in fines and business closures.

²⁷ *Trademark Law of the People's Republic of China*, art 54.

²⁸ *Trademark Law of the People's Republic of China*, art 53.

²⁹ MOFCOM Report, *V. Status Regarding China's Enforcement of IPR*, Tuesday, 12 April 2005 Posted: 14:38 BJT (0638) GMT) <<http://english.mofcom.gov.cn/aarticle/topic/sentence/200504/20050400050082.html>> 6 September 2006.

³⁰ *The Marrakesh Agreement Establishing the World Trade Organization*, concluded 15 April 1994.

promotion of international trade. Accordingly, members of the WTO are bound to another agreement found in Annex 1C of the WTO Agreement, namely, the TRIPS Agreement. Having its beginnings as part of the Uruguay Round of the General Agreement on Trade and Tariffs (GATT),³¹ it was not until December of 1993 that the TRIPS Agreement was concluded providing international rules for the availability, scope, use and enforcement of intellectual property rights and for dispute prevention and settlement.

The TRIPS Agreement recognises and reinforces the operation of the pre-existing intellectual property conventions³² and '[desires] to establish a mutually supportive relationship ... [with the World Intellectual Property Organisation and] ... other relevant international organisations'.³³ It should be noted that Members, when implementing the TRIPS Agreement, 'may, but shall not be obliged to, implement in their law more extensive protection than is required by [the TRIPS] Agreement, provided that such protection does not contravene the provisions of [that] Agreement'.³⁴ While Members are given the freedom to 'determine the appropriate method of implementing the provisions of ... [the TRIPS Agreement] ... within their own legal system and practice'³⁵ they are reminded of the objectives of the Agreement at Article 7:

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 a balance of rights and obligations.

This statement of objectives goes to the core of the tension between the monopoly rights established through intellectual property regimes and the desire to engender free trade among nations. The art is in getting the balance right. But perhaps the most telling element of the success of a member's intellectual property regime even after complying with the principles and standards harmonised under the TRIPS Agreement is the effectiveness of the enforcement regime.

The enforcement provisions of the TRIPS Agreement are found in Part 3, comprising 5 Sections covering Articles 41-61. The general obligation is found in Article 41 reproduced below:

³¹ Commencing in 1986.

³² See Part I of the *Agreement on Trade Related Aspects of Intellectual Property Rights*.

³³ See the preamble or recitals to the *Agreement on Trade Related Aspects of Intellectual Property Rights*.

³⁴ *Agreement on Trade Related Aspects of Intellectual Property Rights*, art 1. This would seem to be aimed at those jurisdictions that have not taken such a liberal view of the breadth of subject matter capable of protection. In this regard, consider the European Patent Convention that prohibits the patenting of plant and animal varieties and developing nations that have refused to afford patent protection to pharmaceuticals.

³⁵ *Agreement on Trade Related Aspects of Intellectual Property Rights*, art 1.

- 1 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, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements. These procedures shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse.
- 2 Procedures concerning the enforcement of intellectual property rights shall be fair and equitable. They shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.
- 3 Decisions on the merits of a case shall preferably be in writing and reasoned. They shall be made available at least to the parties to the proceeding without undue delay. Decisions on the merits of a case shall be based only on evidence in respect of which parties were offered the opportunity to be heard.
- 4 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 acquittals in criminal cases.
- 5 It is understood that this Part does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of Members to enforce their law in general. Nothing in this Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general.

It is arguable that China's IPR system has failed against the majority of the principles found in Article 41 of the TRIPS Agreement. China has been required to address the issue of enforcement by a number of countries. More specifically, the United States of America, Switzerland and Japan have each invoked the operation of Article 63.3 of the TRIPS Agreement requesting information from China regarding the publication of 'Laws and regulations, and final judicial decisions and administrative rulings of general application'.³⁶

It is an understatement to say that the United States of America is unhappy with China's progress on the enforcement of intellectual property rights. This is emphasised by the action of the United States submitting the request under Article 63.3 of the TRIPS Agreement in late 2005, seeking to obtain information on China's enforcement efforts. The request was targeted at judicial decisions or administrative rulings on intellectual property rights related matters. The justification for this action was succinctly expressed by the US Trade

³⁶ *Agreement on Trade Related Aspects of Intellectual Property Rights*, art 63.1.

Representative (USTR), Rob Portman, in a press release made on 25 October 2005 in Geneva:

Based on all available information, piracy and counterfeiting remain rampant in China despite years of engagement on this issue. If China believes that it is doing enough to protect intellectual property, then it should view this process as a chance to prove its case ... Our goal is to get detailed information that will help pinpoint exactly where the enforcement system is breaking down so we can decide appropriate next steps.³⁷

Lack of transparency has been cited as an acute problem in relation to obtaining sufficient information about enforcement activities in China.³⁸ This is all the more poignant when infringement levels are quoted at 90% in the USTR's Special 301 Report³⁹ published in April 2005.⁴⁰ The report comprises data and details of experiences collected through submissions of interested stakeholders or industry groups. For example:

Several OCR submissions express concern regarding the Chinese Government's unwillingness to provide sufficiently detailed enforcement information. For example, one industry group observed that '[a]lthough Chinese authorities have undertaken some administrative enforcement actions against pirates, the Government's refusal to share information about ... the ultimate outcomes of these actions makes it very difficult for rights holders to assess the deterrent impact of China's enforcement efforts'.⁴¹

The April 2006 Special 301 Report was not much more encouraging indicating that levels of copyright piracy in China were between 85 and 93 percent, with estimated US business software losses in 2005 representing US\$1.27 billion, only US\$210 million less from 2004.⁴² As for the motion picture industry, piracy is said to have 'reached almost 100 percent of the retail market in China'.⁴³ But the sale of

³⁷ USTR Press Release 2005-65, 26 October 2005.

³⁸ USTR, Special 301 Report, Out of Cycle Review of China, 29 April 2005.

³⁹ This is an annual report prepared pursuant to section 182 and under the Special 301 provisions of the Trade Act 1974 as amended. The USTR has the obligation to 'identify those countries that deny adequate and effective protection for IPR or deny fair and equitable market access for persons that rely on intellectual property protection' (See Background on Special 301, 2006 Special 301 Report). China is currently under the Priority Watch List and therefore the focus of bilateral attention in order to deal with the identified IPR problems. The significance of the Special 301 mechanism is that it provides the US with the power to coerce the implementation of stronger intellectual property protection by the offending state through the threat of trade restrictions and may go as far as invoking the WTO dispute settlement processes even where the country is recognised as TRIPS-compliant: for a detailed discussion see Simons, above n 16.

⁴⁰ USTR, Special 301 Report, Out of Cycle Review of China, 29 April 2005, 2.

⁴¹ Ibid 3.

⁴² USTR, 2006 Special 301 Report 17 <http://www.ustr.gov/Document_Library/Reports_Publications/2006/2006_Special_301_Review/Section_index.html> 1 May 2006.

⁴³ Susan Krause, 'Legislators Detail Concerns About Counterfeit Goods from China: Theft of Intellectual Property has Significant Impact on Revenue, Jobs', Washington File, US Department of State, Office of International Information Programs, 12 June 2006.

counterfeit products in China is not the only concern, the export of counterfeits from China is a significant problem around the globe. In the 2006 Special 301 Report, it was noted that 69 percent of infringing products seized at the US border were of Chinese origin accounting for US\$63.9 million in 2005.⁴⁴ Clearly Chinese customs enforcement mechanisms are failing to secure effective border enforcement.

Transparency in the process of rule-making has also been quoted as a failure of the Chinese IPR system.⁴⁵ For example, draft rules have not been made available for public comment but have been provided to selected organisations only for comment.⁴⁶ The result can only be inconsistency. But most evidently, China's criminal IPR enforcement system has failed to achieve the deterrent effect required for compliance with Article 61 of the TRIPS Agreement.⁴⁷ This has been the case despite high level government commitment to addressing counterfeiting and piracy problems in China.⁴⁸ Administrative enforcement has accounted for 99% of copyright and trade mark cases with less than one percent of these cases being transferred to the Public Security Bureau for criminal prosecution.⁴⁹ It has been claimed that administrative fines are too low and merely constitute a cost of doing business for the infringers.⁵⁰ Patent cases, on the other hand, rely more heavily on civil enforcement procedures which have been accused of being 'inefficient and unpredictable'.⁵¹ The failings of the civil court system have been summed up as follows:

Litigants have found that most judges lack necessary technical training, court rules regarding evidence, expert witnesses, and protection of confidential information are vague or ineffective, and the costs of investigation and bringing cases are prohibitively high.⁵²

On the issue of transparency article 63 paragraph 1 of the TRIPS Agreement requires that

Laws and regulations, and final judicial decisions and administrative rulings of general application, made effective by a Member pertaining to the subject matter of this Agreement (the availability, scope, acquisition, enforcement and prevention of the abuse of intellectual property rights) shall be published, or where such publication is not practicable made publicly available, in a national language, in such a manner as to enable governments and right holders to become acquainted with them ...

⁴⁴ USTR, above n 42.

⁴⁵ USTR, Special 301 Report, Out of Cycle Review of China, 29 April 2005, 3.

⁴⁶ USTR, 2006 Special 301 Report, 24.

⁴⁷ USTR, Special 301 Report, Out of Cycle Review of China, 29 April 29, 2005, 3.

⁴⁸ Ibid 4. See also below.

⁴⁹ USTR, 2006 Special 301 Report 18.

⁵⁰ Ibid.

⁵¹ Ibid 21.

⁵² Ibid.

Uncertainty due to lack of transparency poses the greatest difficulty for foreign owners of intellectual property to understand the enforcement regime in China. Judgments are short and historically only a few cases were made public and of those only a few in a foreign language such as English. For example, the Beijing High People's Court announced and briefly described the 10 top IPR cases in 2003-2004, the majority of which were Chinese nationals versus Chinese nationals.⁵³ This can hardly be representative when in the Beijing courts alone there were nearly 1,400 IPR cases dealt with during the first eleven months of 2004. Now judgments for intellectual property cases can be obtained on the internet through a dedicated site in the Chinese language.⁵⁴ The question is, should these judgments be made available in other languages to satisfy the TRIPS requirement of transparency?

Short judgments are what one would expect of a legal system based on civil law traditions such as in France. However, the Chinese legal system has been influenced by German based civil law traditions and Soviet socialist law traditions (which in turn have their basis in civil law).⁵⁵ German court opinions can be comparable to English-based common law decisions not only discussing the relevant legislation but also prior cases and often academic dissertations. Why China has not followed this tradition could be attributable to the fact that its private law judiciary is at the early stages of its development and training and will require a longer period to establish a comparable judicial tradition. As for decisions being made available in the English language or other languages other than in Chinese to satisfy transparency requirements, the TRIPS Agreement, at article 63.1, only requires publication in the national language. Surely it is up to those engaging in the Chinese legal system to ensure they have adequate representation able to explain results in the language of the foreign owner of IPR. However, it is arguable that China has set a precedent of multilingual expectation. The foreign investment and technology transfer contracts entered into under Chinese laws may be drafted in more than one language, namely, one in the Chinese language and others in the language of the foreign investors, with all versions being considered equally effective.⁵⁶ But a language barrier alone could not be responsible for a belief of lack of transparency in relation to judicial decisions. Rather, transparency under article 63.1 of the TRIPS Agreement is concerned with informing governments and rights holders of the 'final judicial decisions and administrative rulings of general application', namely, the general principles that can be gleaned from those judgments. Does 'in a manner as to enable governments and rights holders to be acquainted with' such general principles require language accessibility? It is arguable that since the WTO

⁵³ State Intellectual property Office, *Beijing reports top 10 IPR cases*, <http://www.sipo.gov.cn/sipo_English/gfxx/iprspecial/t20041220_37538.htm> 25 January 2005.

⁵⁴ Xinhua News Agency, *Court Decisions Go online in Beijing*, 6 November 2003, <<http://www.china.org.cn/english/government/79383.htm>> 17 June 2006.

⁵⁵ Lin and Stoianoff, above n 2.

⁵⁶ See, for example, Article 125 of the *Contract Law of the Peoples' Republic of China 1999*. Note that where the versions are not identical, a purposive construction is to be used according to Article 125.

operates in English, French and Spanish,⁵⁷ members, in turn, ought to be providing the relevant information required under article 63.1 in one of these three languages. However, the requests made under Article 63.3 make no specific mention of language.

In its initial response to the Article 63.3 requests by the United States, Switzerland and Japan, China made the statement that ‘it is not in a position to provide any such ‘judicial decisions and administrative rulings of general application’ as ‘China does not follow the common law system’.⁵⁸ This is an extraordinary claim when one recognises that the TRIPS Agreement applies to WTO member nations of both civil law and common law systems, as noted by Switzerland, a civil law country, in its response. Accordingly, Switzerland clarifies as follows:

Article 63 of the TRIPS Agreement being applicable to all WTO Members, we interpret Article 63.1 and 3 as referring to final judicial decisions in the sense of decisions which have become legally binding because they have either not been appealed or were rendered by the court of final instance.⁵⁹

China’s initial response provided further resistance including arguing that the request for information regarding IPR enforcement cases identified by China for the period 2001 to 2004 in China’s own documentation to the TRIPS Council was not sufficiently specific as required under Article 63.3 of the TRIPS Agreement.⁶⁰ Each of the United States, Switzerland and Japan noted in their response to China’s request for clarification that no further specificity was required as China had already identified the cases to the TRIPS Council in successive reviews and particularly in China’s white paper distributed to the Council immediately prior to the Article 63.3 Requests.⁶¹

Resistance turned into cooperation when China invited the United States to participate in constructive discussions to improve IPR enforcement transparency in March 2006.⁶² The result has been the provision of ‘previously unavailable IPR criminal prosecution data’ and a commitment to provide IPR enforcement statistics to the public in both Chinese and English.⁶³ While this is a step forward it is clearly not a complete response to the Article 63.3 requests, however, *China’s Action Plan*

⁵⁷ See *The Marrakesh Agreement Establishing the World Trade Organization*, concluded 15 April, 1994

⁵⁸ Communication from China, *Response to a request for information pursuant to Article 63.3 of the TRIPS Agreement*, WTO Council for Trade-Related Aspects of Intellectual Property Rights, IP/C/W/465, 23 January 2006.

⁵⁹ Communication from Switzerland, Addendum, *Follow-up request for information pursuant to Article 63.3 of the TRIPS Agreement*, WTO Council for Trade-Related Aspects of Intellectual Property Rights, IP/C/W/462/Add.1, 1 February 2006.

⁶⁰ Communication from China, *Response to a Request for Information Pursuant to Article 63.3 of the TRIPS Agreement*, WTO Council for Trade-Related Aspects of Intellectual Property Rights, IP/C/W/465, 23 January 2006.

⁶¹ IP/C/W/461/Add.1, 24 January 2006(US); IP/C/W/462/Add.1, 1 February 2006 (Switzerland); and IP/C/W/463/Add.1 24 January 2006 (Japan).

⁶² USTR, 2006 Special 301 Report, 24.

⁶³ Ibid.

of *IPR Protection 2006* does suggest further work will be undertaken to satisfy those requests.⁶⁴

IV IPR ISSUES FOR AN AUSTRALIA-CHINA FREE TRADE AGREEMENT

What does this mean for Australia, currently involved in negotiations with China for a Free Trade Agreement? Following the completion of a joint feasibility study, Australia and China agreed on 18 April 2005 to launch negotiations on a bilateral free trade agreement. Australia had already gone down that pathway with the United States of America and certain sectors of Australian industry are still reeling from the effect on the intellectual property regime, particularly the strengthening of copyright through, for example, increasing the period of protection from 50 to 70 years (over an above the life of the author), digital rights management and technological protection measures, and the broadening of criminal liability.⁶⁵ It is not unusual for a bilateral agreement with the US to result in 'TRIPS – plus' obligations being adopted in the agreement's intellectual property chapter.⁶⁶ However, this means that if Australia has introduced an enhanced regime of intellectual property protection there might therefore be an expectation that other countries with which Australia concludes a free trade agreement would follow suit. It is not surprising then that the Australian Government has not put a timeframe on negotiations with China. Instead, the Australian Government is committed to 'spend as much time as is required to negotiate a high-quality agreement that contains commercially meaningful outcomes for Australian businesses and is consistent with the rules of the World Trade Organisation'.⁶⁷ To this end, community consultation has played a significant role in the negotiation process on the part of the Australian Government. However, prior to the decision to commence negotiations with China, Australian business spoke out about the issue of IPR protection in China calling for 'China and Australia to set up an IP monitoring and dispute panel'.⁶⁸ A similar suggestion has been made by the chief executive of the Australian Industry Group, Heather Ridout, at the Australia-China FTA Conference in Shenzhen, 28-29 June 2006. The suggestion, put forward on the Australian Industry Group's behalf, is for:

The establishment of an ongoing bilateral consultative and referral mechanism to address the particular IP concerns of Australian business people regarding IP rights infringement in or from China. In this regard, the Australian Industry Group has for some time advocated that as an early investment in the FTA process, Australia and

⁶⁴ See below.

⁶⁵ See Chapter 17, *Australia/United States Free Trade Agreement*, and Schedules 2, 3, 7, 8 and 9 of the *US Free Trade Agreement Implementation Act 2004* with the resultant amendments to Australia's intellectual property legislation effective from 1 January 2005.

⁶⁶ See, for example, the discussion in Peter Drahos, 'Bits and Bips: Bilateralism in Intellectual Property' (2001) 4 *Journal of World Intellectual Property* 791.

⁶⁷ Department of Foreign Affairs and Trade, *Australia-China FTA Negotiations: Launch of negotiations*, <http://www.dfat.gov.au/geo/china/fta/facts/launch_negotiations.html> 6 April 2006.

⁶⁸ Department of Foreign Affairs and Trade, *Australian Business calls for IP monitoring in China*, Legal Media Group – 20 March 2005, <<http://www.legalmediagroup.com/news/print.asp?SID=15185&CH>> 24 March 2005.

China agree to set up now a dedicated IP panel that could focus on implementation issues hindering Australian companies.⁶⁹

However, these suggestions do not provide a mechanism for such a body, rather, the Australia/United States Free Trade Agreement may provide a model along the basis of its Standard Technical Working Group on Animal and Plant Health Measures as suggested by Mauger and Stoianoff.⁷⁰ Further, in recent negotiations between Australia and China regarding the free trade agreement, Australia has repeatedly made a case for the inclusion of provisions regarding a 'consultative mechanism on intellectual property' but little progress has been noted.⁷¹

Other submissions by the Australian manufacturing sector have brought to light specific problems concerning the Chinese IPR regime. These include 'insufficient penalties for deterrence; undue delays in cases involving foreign companies and complex technologies, inconsistent application of intellectual property across provinces; and inconsistencies between Australian and Chinese patent law regimes'.⁷² These have been described in greater detail providing a picture not dissimilar to that painted by United States reports as mentioned above. However, Australian complaints go a step further citing lack of transparency and consistency in the registration processes.⁷³ Clearly, this is a failure to provide effective IPR protection from the outset and suggests a lack of training and adequate systems.

The negotiations for an Australia-China Free Trade Agreement provide an opportunity to improve China's IPR system. This could be achieved through the drafting of a dedicated chapter on Intellectual Property addressing the failings of the current IPR regime in China through a bench-marking process effectively requiring that China's systems of IPR protection and enforcement meet specified standards. Specific shortcomings in the laws and their implementation, institutional deficiencies and lack of consistency could be dealt with in a carefully drafted Intellectual Property Chapter. Clearly, the degree to which such an ambitious objective can be achieved depends on the weighing up of competing interests and at

⁶⁹ Heather Ridout, Australia – China FTA Conference, Shenzhen, 28-29 June 2006 <http://www.dfat.gov.au/geo/china/fta/060628_shenzhen_ridout.html> 23 April 2007.

⁷⁰ Leah Mauger and Natalie P Stoianoff, 'Protecting Australia's Trade Mark Interests through the Australia-China Free Trade Agreement' [2006] *LAWASIA Journal* 125, 160.

⁷¹ Department of Foreign Affairs and Trade, *Australia-China FTA Negotiations – Subscriber update: Eighth round of negotiations*, 12 April 2007, <http://www.dfat.gov.au/geo/china/fta/070412_subscriber_update.html> 23 April 2007. In the ninth round of negotiations, 18-22 June 2007, Australia tabled draft text for the establishment of such a bilateral mechanism, as well as other intellectual property issues but no further developments have been noted: see Department of Foreign Affairs and Trade, *Australia-China FTA Negotiations – Subscriber update: Ninth round of negotiations*, 29 June 2007, <http://www.dfat.gov.au/geo/china/fta/070629_subscriber_update.html> 25 September 2007.

⁷² Department of Foreign Affairs and Trade, *Australia-China FTA Negotiations – Interests and concerns of the Australian manufacturing sector*, <http://www.dfat.gov.au/geo/china/fta/facts/manufacturing_2.html> 6 April 2006.

⁷³ Department of Foreign Affairs and Trade, *Australia-China FTA Negotiations – Behind the border issues and concerns*, <http://www.dfat.gov.au/geo/china/fta/facts/border_html> 6 April 2006.

present there are 'strong differences' in the approaches of each country to the drafting of the Intellectual Property Chapter.⁷⁴

On the whole Australia is an intellectual property importer rather than exporter. Australian exports are predominantly based on resources and agriculture that need markets.⁷⁵ China provides a significant market for Australian resources and agriculture albeit a protected market.⁷⁶ Removing the trade barriers for such exports will be of greater significance to the Australian negotiators than improving China's IPR protection regime. However, that does not mean that both cannot be achieved, particularly since,

China is now Australia's 4th largest export market for manufactures, reflecting China's increasing demand for imported inputs into its expanding manufacturing sector and Australia's capacity to supply the Chinese market competitively.⁷⁷

Together with Australia's intellectual property obligations under the Australia-US Free Trade Agreement, the interests of Australia's manufacturing sector should provide sufficient influence for the negotiators to aim high when negotiating the Intellectual Property Chapter for the Australia-China Free Trade Agreement. To-date, China's offer of trade liberalisation with respect to goods has not met Australia's expectations⁷⁸ and this degree of protectionism may well be responsible for the ongoing high levels of infringement experienced by foreign IPR holders attempting to access the Chinese market.⁷⁹ However, for the negotiations to be meaningful, China's IPR enforcement activities would need to be determined and analysed for deficiencies that the Intellectual Property Chapter could address. The following outlines China's enforcement activities and attempts to explain the deficiencies.

V CHINA'S ENFORCEMENT ACTIVITIES

It is through the administrative pathways that the most action has taken place in relation to intellectual property rights enforcement in China. This is probably due to

⁷⁴ Department of Foreign Affairs and Trade, *Australia-China FTA Negotiations – Subscriber update: Eighth round of negotiations*, 12 April 2007, <http://www.dfat.gov.au/geo/china/fta/070412_subscriber_update.html> 23 April 2007.

⁷⁵ Department of Foreign Affairs and Trade, *The Australia-China FTA Negotiations in Brief*, <http://www.dfat.gov.au/geo/china/fta/general_guide_march_2006.html> 11 September 2006.

⁷⁶ Ibid. As pointed out in *The Australia-China FTA Negotiations in Brief*, 'Australia's rural exports to China have trebled over the past decade to a value of more than \$3 billion in 2005, making China our 3rd largest rural export market', while 'China is Australia's 2nd largest export market for minerals and fuels and this market has grown by over 700% in the past decade (valued at \$8.3 billion in 2005)'.

⁷⁷ Ibid.

⁷⁸ Department of Foreign Affairs and Trade, *Australia-China FTA Negotiations – Subscriber update: Eighth round of negotiations*, 12 April 2007, <http://www.dfat.gov.au/geo/china/fta/070412_subscriber_update.html> 23 April 2007.

⁷⁹ United States Trade Representative, *2006 Report to Congress on China's WTO Compliance*, 11 December 2006, 78.

the fact that administrative enforcement actions cost the intellectual property owner less than civil judicial actions and return faster results.⁸⁰ However, whether the result is a fine or compensation the questions of adequacy and deterrent effect come up time and time again. These are important considerations when analysing the volume of enforcement activity in China. For example, in 2004, the Public Security Bureau, which carries out criminal enforcement, recorded the resolution of 30,000 infringement and piracy cases comprising the seizure of 130 million infringing and pirated publications, the closure of 21 assembly lines for illegal disc production and the banning of more than 2,960 illegal printerries.⁸¹ The numbers of cases resolved in 2005 increased to 36,000 with a further 17 assembly lines for illegal discs having been 'confiscated' together with millions of copies of pirated discs.⁸² The audio-video market has also seen significant enforcement action in 2005 through cultural administration authorities in China resulting in over 136 million copies of pirated audio-video products confiscated and over 66.21 million copies having been destroyed.⁸³

The above statistics illustrate copyright enforcement. Customs investigations, on the other hand, have been predominantly concerned with trade mark infringements, accounting for 1,106 cases in 2005, compared to patent infringements accounting for 37 cases and copyright infringements accounting for 67 cases.⁸⁴ Of the total cases, only 51 were related to imports while 1159 cases were export related.⁸⁵ This proportion would explain the alarming numbers of counterfeit products originating from China and entering other countries.⁸⁶

China has certainly projected a strong commitment to IPR protection and the international convergence of this field of law, and this is evident at the highest levels. In 2004 the State Council of China established The Lead Group of IPR Protection comprising twelve central authorities that have some form of engagement with intellectual property protection.⁸⁷ Operating at national level

⁸⁰ Consider the advice given to Australian intellectual property holders by IP Australia in its 2006 Fact Sheet, *Enforcement of IP in China*.

⁸¹ The State Intellectual Property Office of the People's Republic of China, 'Report on China's Intellectual Property Protection in 2005' 49-50.

⁸² The State Intellectual Property Office of the People's Republic of China, 'Report on the Intellectual Property Rights Protection in China in 2004' 56.

⁸³ The State Intellectual Property Office of the People's Republic of China, 'Report on China's Intellectual Property Protection in 2005' 45.

⁸⁴ Ibid 43. The Report points out that these cases represent a 19% increase in IP infringement import cases and 18.5% increase in IP infringement export cases over 2004 and are valued at a total of RMB 99.78 million.

⁸⁵ Ibid.

⁸⁶ As noted above in relation to the US.

⁸⁷ The State Intellectual Property Office of the People's Republic of China, 'Report on the Intellectual Property Rights Protection in China in 2004' 28. These authorities include the Supreme People's Court, the Supreme People's Procuratorate, the Ministry of Commerce, the Ministry of Public Security, the State Administration for Industry & Commerce, the National Copyright Administration, the State Intellectual Property Office and the General Administration for Customs of China.

down to the local level, this body has the responsibility to direct and coordinate IPR protection issues.⁸⁸ The achievements illustrated by the above authorities demonstrate a concerted effort of enforcement actions from the national to the local level. Publicity activities have also been utilised to improve public awareness of IPR protection in China.⁸⁹ And while the usefulness of such activities has been called into question, they remain an integral part of current government initiatives in China.

China's Action Plan of IPR Protection 2006 (the Action Plan) is the current initiative to improve intellectual property protection in China.⁹⁰ The Action Plan was formulated by the National IPR Protection Working Group Office working together with the other relevant government departments.⁹¹ The Action Plan covers four major spheres, namely, copyright, patents, trade marks, and import/export.⁹² Legislation will either be revised and improved or newly formulated as will relevant judicial interpretations.⁹³ Intellectual property law enforcement efforts have been specified including seven dedicated campaigns.⁹⁴ A service centre is to be established for the reporting of intellectual property violations and a significant number of measures will be undertaken to improve public awareness of intellectual property rights protection.⁹⁵ Personnel engaged in intellectual property rights protection will have 21 training programs available to them as well as 19 international exchange and cooperation activities.⁹⁶ The promotion of enterprise self-discipline and the provision of services to rights holders are also dealt with in the Action Plan as is the plan to conduct countermeasure oriented research.⁹⁷

With such a concerted effort to ensure IPR protection is achieved in compliance with the TRIPS Agreement, why then, is China perceived as failing to meet its WTO obligations? The example of the difficulty of enforcing judgments generally in China may provide some insight. While 90 percent of civil and criminal judgments by Beijing courts have been enforced during the period 2003 to 2006, the national levels of enforcement paint another picture.⁹⁸ Enforcement rates for civil judgments nationally have been noted at 40 percent for High People's Courts, 50

⁸⁸ Ibid.

⁸⁹ MOFCOM Report, *IV. Situation about Publicity Activities for Improving the Public Awareness of IPR Protection in China*, Friday, 8 April 2005, Posted: 10:53 BJT (0253 GMT), <<http://english.mofcom.gov.cn/column/print.shtml?/topic/sentence/200504/2005040003>> 2 June 2005.

⁹⁰ State Administration for Industry and Commerce, Trademark Office, *China's plan on IR Protection Action 2006 (I)*, <<http://sbj.saic.gov.cn/english/show.asp?id=460&bm=sbyw>> 18 August 2006.

⁹¹ Ibid.

⁹² Ibid.

⁹³ Ibid.

⁹⁴ Ibid.

⁹⁵ Ibid.

⁹⁶ Ibid.

⁹⁷ Ibid.

⁹⁸ Robert Slate, 'Judicial Copyright Enforcement in China: Shaping World Opinion on TRIPS Compliance' Spring 2006 31 NCJInt'l L and Com Reg 665, 686.

percent for Intermediate People's Courts and 60 percent for the Basic or Primary People's Courts.⁹⁹ When one considers that IPR cases constitute a small proportion of these judgments, the failure to enforce judgments generally can be recognised as endemic.¹⁰⁰ Certainly one can expect that the more economically underdeveloped the region is the lower the rate of enforcement of civil judgments.¹⁰¹ But corruption and protectionism at the local level generally are significant factors that need to be taken into account when intellectual property rights are sought to be enforced in locations outside the cities where more sophisticated regimes are in place.¹⁰² Despite the prosecution of corrupt judges for the acceptance of bribes,

[t]oday, courts remain ineffectual because local judges are literally in the pocket of local governments, which pay their wages and routinely influence decisions. Most people have little chance of a fair hearing against anyone with government connections.¹⁰³

This, coupled with the fact that IPR cases, civil, administrative and criminal together, represent approximately 0.3 percent of all cases dealt with annually in China, brings the importance of IPR enforcement into perspective.¹⁰⁴ The Chief Justice of the IPR Tribunal of the Supreme People's Court, Jiang Zhipei, points out that 'China is still a developing country' despite its many developed cities.¹⁰⁵ Accordingly,

[t]here are more urgent issues to be addressed than IP protection' when one considers that 'there are still many places where people don't have enough to eat and there is a big imbalance in terms of economic development and people's lives in China as a whole.'¹⁰⁶

Despite such sentiment, Chief Justice Jiang maintains a personal website, *Judicial Protection of IPR in China*, in both Chinese and English, providing the latest IPR laws and regulations, judgments, trial news, case analyses, and personal responses to questions posted on the website by the public.¹⁰⁷ This is perhaps a gallant attempt at contributing toward the transparency required under the TRIPS Agreement, albeit unofficial,¹⁰⁸ but it also adds to general public awareness building.

⁹⁹

Ibid.

¹⁰⁰

Ibid 693.

¹⁰¹

Ibid 686.

¹⁰²

Ibid.

¹⁰³

Ibid 686-687, quoting David Murphy of the Far Eastern Economic Review.

¹⁰⁴

Ibid 693.

¹⁰⁵

Ibid 692.

¹⁰⁶

Ibid.

¹⁰⁷

See the English version of the website <<http://www.chinaiprlaw.com/english/>>. Note that it is not as up-to-date as the Chinese version.

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However, Slate's analysis of the website proposes that it is aimed at Americans and is intended 'to convey that the Chinese judiciary is becoming more transparent and predictable with regards to IPR matters ... and that the government is giving senior IPR judges more independence', Slate, above n 99, 697.

The concept of intellectual property is not a natural one in Chinese society. Confucian ideals expressed 'that true scholars wrote for edification and moral renewal rather than profit'.¹⁰⁹ Chinese painters have been described as tolerant toward forgers of their works noting that '[s]uch copying ... bore witness to the quality of the work copied and to its creator's degree of understanding and civility'.¹¹⁰ Intellectual creation is believed to have its origins in the past and therefore 'no later author may claim exclusive rights over it'.¹¹¹ This ideal is expressed a little differently in socialist societies, namely, 'that intellectual creation or invention was a product based upon a repository of knowledge that belonged to all members of society and thus a product of the larger society'.¹¹² This then implies that Chinese society, which was built on Confucian ideology and adopted socialist ideologies in more recent times, has been asked to expunge thousands of years of a collective doctrine in favour of the private property rights doctrine protecting individual creation embodied in the TRIPS Agreement. Twenty years does not seem so long in the scheme of things.

However, a more cynical view of the failings of Chinese IPR enforcement is that there is no incentive for China to enforce IPR laws while the country is in development. It has been suggested 'that China will steal as much as it can until it can produce its own technology'.¹¹³ But Chinese businesses are producing their own technology and other forms of intellectual property and are defending their rights through the court system.¹¹⁴ However, the technology is predominantly low level and protected by utility models or industrial designs rather than standard patents.¹¹⁵ It is suggested that when a critical mass of higher technology producers is achieved in China the benefits of IPR protection will be recognised and bring about a cultural change in attitude toward enforcement. At present, nearly half of China's labour force is in agriculture.¹¹⁶ Meanwhile, 'tens of millions of manufacturing jobs' in China were lost since the mid-1990s.¹¹⁷ How does this reconcile with China's immense economic growth 'accounting for a quarter of the world's total economic growth over the last two years' and becoming 'the world's 3rd largest trading nation after the United States and Germany'?¹¹⁸ One must recognise that of the 1.3 billion people living in China a sizable proportion are still living in poverty and earning

¹⁰⁹ William P Alford, *To Steal a Book is an Elegant Offense: Intellectual Property Law in Chinese Civilisation* (1995) 29.

¹¹⁰ Ibid.

¹¹¹ Deming Lui, 'Now the Wolf has Indeed Come! Perspective on the Patent Protection of Biotechnology Inventions in China' Winter 2005 53 *Am J Comp L* 207, 213.

¹¹² Ibid.

¹¹³ Slate, above n 98, 701.

¹¹⁴ USTR, 2006 Special 301 Report, 22.

¹¹⁵ The State Intellectual Property Office of the People's Republic of China, 'Report on the Intellectual Property Rights Protection in China in 2004' 36.

¹¹⁶ Pranab Bardhan, 'China, India Superpower? Not so fast!' *YaleGlobal Online*, 25 October 2005 <<http://yaleglobal.yale.edu/display.article?id=6407>> 25 August 2006.

¹¹⁷ Ibid.

¹¹⁸ Department of Foreign Affairs and Trade, *The Australia-China FTA Negotiations in Brief*, <http://www.dfat.gov.au/geo/china/fta/general_guide_march_2006.html> 11 September 2006.

‘less than US\$2 a day’.¹¹⁹ The United States did not provide protection for foreign copyrighted materials until after its ‘developing’ period and was for the most part of the 19th century a significant infringer of European copyright works.¹²⁰ The United States now finds itself in Europe’s position more than 100 years ago. The question is whether China is in the position the United States was during that ‘developing’ period and whether such a comparison is valid in today’s globalised world. This is particularly relevant when one considers the latest complaint by the USTR, namely that China’s import restrictions and restrictions placed on the wholesale and retail distribution of legitimate foreign products is considered to exacerbate the infringement of those very products in China by enabling the domination of counterfeit products in the Chinese market.¹²¹ Accordingly, China’s protectionist position together with its failure to provide deterrent criminal remedies stands contrary to the principle of national treatment¹²² and the aim of freer trade among nations.

VI CONCLUSION: CONVERGENT LAW DIVERGENT BEHAVIOUR?

This article has illustrated the immense effort that the Chinese Government has made to develop a complete IPR system in the space of 20 years. But complying with an ever converging international IPR system required under the TRIPS Agreement has proven to be inadequate. This has been demonstrated by the numerous accounts of foreign IPR holders having to deal with a rampant counterfeiting culture in China and the attempts by nation states to deal with these issues directly with China. The question arises, why does this cultural acceptance of counterfeiting and piracy continue to exist despite the laws, the publicity campaigns, and despite the operations of the security forces and customs departments? Can Confucian ideology and/or socialist ideology be to blame? Perhaps, but China is operating in the 21st century, benefiting from globalisation and contributing to it in a significant way. The system is described as corrupt and protectionist and the penalties for IPR infringement in China are considered inadequate and have been accused of failing to meet Article 61 requirements. The economic influences and the lack of political will to make real change at an institutional and structural level would seem to be more feasible explanations for China’s perceived failure to comply with TRIPS obligations. However, China opened its doors to the world less than 30 years ago and has embarked on a massive transformation into a market economy that recognises private property rights on the one hand but at the same time is governed under socialist principles. Ultimately, it is a case of the world’s most populous country striving for rapid economic

¹¹⁹ Bardhan, above n 116.

¹²⁰ Alford, above n 109, 5.

¹²¹ United States Trade Representative, ‘2006 Report to Congress on China’s WTO Compliance’, 11 December 2006, 70.

¹²² See Agreement on Trade-Related Aspects of Intellectual Property Rights, art 3; The General Agreement on Tariffs and Trade (GATT 1947), art 3; and General Agreement on Trade in Services, art 17.

development and thereby choosing to tip the balance in favour of society rather than the individual.