

# Red Flag Way: Exploring Copyright Protection, TRIPS and Open Source Software Licensing in the People's Republic of China

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## Abstract

The focus of this paper is to explore the interaction between open source software licenses and China's developing stance on intellectual property laws and standards over the last three and a half decades. It is contended that open source software licensing alters the intended use of copyright protection in a manner which conforms to the cultural understandings of the People's Republic of China. It is also argued that a copyright policy that is preferential towards open source software licensing would advance the PRC's conformity to TRIPS' minimum protection requirements.

## Keywords

Law; information technology; Free and Open Source Software, People's Republic of China, GPL, GNU General Public License, TRIPS

## Introduction

### Background

In modern times, international intellectual property (IP) law has been forced to develop and evolve on two fronts; on one hand, the law must ensure compliance from signatory states to ensure the proper function of the IP concept.<sup>1</sup> And on the other, IP laws and policies, where applicable, must

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1 World Trade Organization, 'Intellectual property: protection and enforcement', available at [http://www.wto.org/english/thewto\\_e/whatis\\_e/tif\\_e/agrm7\\_e.htm](http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm) accessed 21<sup>st</sup> August 2012

keep pace with the rate at which new technologies and inventions are being developed.<sup>2</sup>

The accession of the People's Republic of China (PRC) into the World Trade Organization (WTO) in December 2001 has proven to be an interesting subject in the context of these two "fronts". On joining the WTO, the PRC became obligated to comply with the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). This in turn compels China to improve standards for the protection of IP. China began recognising the importance of international trade, and intellectual property rights (IPR), towards the late 1970's through the adoption of the "Open Door Policy",<sup>3</sup> a reform programme aimed at bringing the PRC out of economic isolation from the rest of the trading world.<sup>4</sup> As a result of this, it is interesting to note that China's legal system for IP protection and its information technology sector are developing at the same time.

Despite being a signatory to TRIPS, which confers obligations to establish a minimum level of protection to IPR, China is no stranger to controversy with regards to the enforcement of IPR, and consistently appears on the United States Trade Representative's "Special 301 Report", under the "Priority Watch List".<sup>5</sup> Infringement of software copyright has been of particular concern in China, so much so that the violation rate has been remarked as "so high as to make statistics virtually meaningless".<sup>6</sup> In 2011, the PRC was ranked the second highest spenders on computer hardware in the world, but only the eighth highest spender on computer software.<sup>7</sup> The implication of course is that Chinese software users are running easily acquirable, illegitimate software on legitimate hardware, compiling an "illegal software market" of nearly \$9 billion.<sup>8</sup>

The PRC's disparities in implementation of international IP standards are a widely discussed topic. Such ideas submitted include the incompatibility of the concept of IP in China, owing to a history rooted in Confucianism that lacks recognition of ownership over ideas or expressions;<sup>9</sup> the decentralised government that allows infringers to act outside of the reach of control;<sup>10</sup> the fact that the Chinese legal system follows the civil law tradition, which tends to allow judicial decisions to stray away from international set standards;<sup>11</sup> and strict political control prevented a system of IPR being developed in the same manner as it did in other parts of the world.<sup>12</sup>

However, in more recent years, it appears that the Chinese government is taking steps to embrace the "open source" licensing model in some of its own software.<sup>13</sup> Conventional IPR generally incentivise innovation and creativity by conferring to the inventor an exclusive right over their creation, and restrict usage by any other parties. Open source software licenses, on the other hand, enable users to take previously created software, modify it, and then distribute the modification

2 Thurow, Lester, 'Needed: a new system of intellectual property rights' (1997) 75(5) Harv Bus Rev. 94-103

3 Symposium by Shanghai Foreign Investment Commission, Opportunities for Foreign Investment and the Process in Shanghai (Sept. 9, 1988)

4 Cheng, Julia, 'China's Copyright System: Rising to the Spirit of TRIPS Requires an Internal Focus and WTO Membership' (1999) Fordham Law Journal, 1941, at 1942

5 United States Trade Representative, 2012 Special 301 Report

6 Mitchell, S J, 'The Software Wars: Organizations, Politics and Policy in Intellectual Property Protection in China' in Cohen, et al *Chinese Intellectual Property Law and Practice*, (Kluwer Law International, 1999) at 334

7 David Leonhardt "Software Piracy in China" New York Times Jan 19, 2011, available at <http://economix.blogs.nytimes.com/2011/01/19/software-piracy-in-china/> accessed 23rd May 2012

8 Business Software Alliance, "Shadow Market – 2011 BSA Global Software Piracy Study" 9th ed. May 2012, page 4, available at [http://portal.bsa.org/globalpiracy2011/downloads/study\\_pdf/2011\\_BSA\\_Piracy\\_Study-Standard.pdf](http://portal.bsa.org/globalpiracy2011/downloads/study_pdf/2011_BSA_Piracy_Study-Standard.pdf)

9 Hesse, C, 'The Rise of Intellectual Property, 700 B.C.--A.D. 2000: an Idea in the Balance' (2002) Spring 2002, Doedalus 26, at 27

10 Shao, 'The global debates on intellectual property: what if China is not a born pirate?' (2010) IPQ 341

11 Zhang, 'Intellectual Property Law Enforcement in China: Trade Issues, Policies, Practices' (1997) 8 Fordham Intellectual Property Media & Entertainment Law Journal 63, at 81

12 Alford, *To Steal a Book is an Elegant Offense: Intellectual Property Law in Chinese Civilization* (California: Stanford University Press, 1995) 17

13 Searls, Doc, *Raising the Red Flag*, LinuxJournal.com, Jan 30, 2002 available at <http://www.linuxjournal.com/article/5784> accessed 24 Jun. 2012

under the same open source license.<sup>14</sup> Here, the justification for open source innovators has been said to come in the form of a social consequence, through reputational capital that in the long term could provide greater returns in exchange for their work.<sup>15</sup> The objective of open source licensing is not to take advantage of a monopoly over a work, but to invite others to improve and modify it, and then share it with other users.

## Research Focus

The focus of this paper is to explore the interaction between open source software licenses and China's developing stance on IP laws and standards over the last three and a half decades.

In order to evaluate the impact of open source software licensing on Chinese copyright policy, this work will survey the legal landscape of Chinese copyright law since its promulgation by the state in the late 1970's. The work will then focus on the experience with open source software licensing, the versatility of the system, and finally its compatibility with China's young IP system and policy.

This work intends to establish that a preference towards open source software licences is the most logical method to circumventing the many issues that confront the enforcement of software copyright in the PRC.

## Outline

Chapter II of this work will deal with the evolution of China's IP system since its inception, focusing on the problems the state has had to endure since its accession to the WTO in 2001. Chapter III will briefly outline the philosophy of open source software licensing, and explore the validity and enforceability of these licenses across different states. Chapter IV will explore the compatibility of open source licensing on China's current copyright system, focusing on the doctrinal concerns and the compatibility of the model in China's socio-economic attitudes to IP. Chapter V will conclude.

## Copyright Law in the People's Republic of China

### Background

IPR have been recognised and protected in the People's Republic of China since the Open Door Policy was implemented in the late 1970's. The PRC subsequently became a member of the World Intellectual Property Organization (WIPO) in 1980. In terms of doctrinal recognition of IPR, China enacted law on trademarks in 1983,<sup>16</sup> patents in 1985<sup>17</sup> and copyright in 1991.<sup>18</sup> This somewhat unhurried implementation of the three main subjects on IP was commented by SIPO's (State Intellectual Property Office of China) Commissioner Tian Lipu, as a movement towards "comprehensively carrying out its obligations under international treaties and agreements."<sup>19</sup>

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14 Ghosh, Rishab, 'Open source software: economics, innovation, law and policy' (2010) W.I.P.O.J 82

15 McGowan, 'Legal Implications of Open-Source Software' (2001) U. Ill. L. Rev. 241, at 286

16 Trademark Law of the People's Republic of China 1983

17 Patent Law of the People's Republic of China 1984

18 Copyright Law of the People's Republic of China [Hereinafter Copyright Law of the PRC] 1990

19 Lipu, Tian, 'China's IP Journey', WIPO News & Events, available at [http://www.wipo.int/wipo\\_magazine/en/2010/06/article\\_0010.html](http://www.wipo.int/wipo_magazine/en/2010/06/article_0010.html) accessed 24<sup>th</sup> June 2012

The competence of China's "comprehensive" system is the centre of much debate. However, Lipu is correct in remarking that China's IP system "has been established and at an unprecedented pace",<sup>20</sup> having over the past three decades taken steps towards recognising and implementing into domestic law, a system that has taken other countries centuries to inaugurate. Upon the PRC's entry into the WTO in 2001, China have been required to offer IP a minimum standard of protection, as required by their signatory status to the TRIPS Agreement.

Despite this optimistic perspective on China's IP implementation, the United States International Trade Commission (USITC) estimates that, as of 2009, infringements of all kinds led to a \$48.2 billion loss to the U.S. economy.<sup>21</sup> This would suggest that not enough is being done to tackle IP infringements. This chapter will survey the landscape of copyright law in China focusing on the administrative and judicial implementation of the law in China, its compatibility with the TRIPS Agreement, the challenges the country faces in applying the law of copyright, and how infringement has become a norm in the socioeconomic sphere.

### Copyright Law in the PRC

As a relative newcomer to copyright protection, the PRC enacted its first Copyright Law in 1991. Furthermore, in 1992, China enacted the Implementing Rules for the Copyright Law of the PRC ("Implementing Rules") to harmonize its laws with the Berne Convention.<sup>22</sup> The Regulations on the Implementations of the International Copyright Treaties ("ICT Provisions") and the Protection of Computer Software ("Software Regulations") followed, bringing its copyright legislation into compliance with TRIPS by extending the area of protection to include computer programs and compilations of data.<sup>23</sup>

Article 3 of the Copyright Law lists the types of works under protection, which include written,<sup>24</sup> oral, musical, dramatic and choreographic, art and photographic, cinematographic, engineering designs, maps and sketches and computer software.<sup>25</sup> This in essence matches the list of protected subject matter contained in Article 2 of the Berne Convention.<sup>26</sup> The Law does not apply to "laws [...] orders of State organs; other documents of a legislative, administrative or judicial nature [...] news on current affairs [...] calendars, numerical tables and forms [...] and formulas".<sup>27</sup>

The International Copyright Treaties Implementing Rules also helped to clarify the scope of the PRC's Copyright Law<sup>28</sup> by including protection to published works of authors outside the territory of China if the work is published in China within thirty days.<sup>29</sup>

Under the Copyright Law, rights holders have the right to publication,<sup>30</sup> attribution<sup>31</sup>, revision<sup>32</sup>,

20 Lipu, Tian, 'China's IP Journey', WIPO News & Events, available at [http://www.wipo.int/wipo\\_magazine/en/2010/06/article\\_0010.html](http://www.wipo.int/wipo_magazine/en/2010/06/article_0010.html) accessed 24<sup>th</sup> June 2012

21 United States International Trade Commission, *China: Effects of Intellectual Property Infringement and Indigenous Innovation Policies on the U.S. Economy*, publication 42226, May 2011, section 3 page 9

22 Feaver, Reiko R., 'China's Copyright Law and the TRIPs Agreement' (1996) 5 J. Transnational Law. & Policy 431, at 434-38

23 Agreement on Trade-Related Aspects of Intellectual Property Rights 1994 [hereinafter TRIPS] Article 10(2)

24 Copyright Law of the People's Republic of China (adopted by Standing Comm., 7<sup>th</sup> Nat'l People's Cong., 15<sup>th</sup> Sess., Sept. 7, 1990, promulgated by Pres. Order No. 31, Sept. 7, 1990) (hereinafter Copyright Law of the PRC) Article 3 (1)

25 Copyright Law of the PRC Article 3

26 Berne Convention for the Protection of Literary and Artistic Works 1871 [hereinafter Berne Convention] Article 2

27 Copyright Law of the PRC Article 5

28 Feaver, Reiko R., 'China's Copyright Law and the TRIPs Agreement' (1996) 5 J. Transnational Law. & Policy 431, at 440

29 International Copyright Treaties Implementing Rules 1992 Article 5

30 Copyright Law of the PRC Article 10(1)

31 Copyright Law of the PRC Article 10(2)

32 Copyright Law of the PRC Article 10(3)

receive remuneration and use their own works.<sup>33</sup> The protection period for the copyright expires fifty years after the author's death.<sup>34</sup>

Works that were created within the scope of its author's employment are considered to be professional works that the employer has a priority right to use.<sup>35</sup> The Copyright Law also contains fair use provisions that allow the use of a published work without remuneration or prior authorisation. Examples of fair use are listed in the text as translation,<sup>36</sup> personal enjoyment<sup>37</sup> and official state purposes.<sup>38</sup>

## Administrative Framework

### Objectives

Article 1 of the PRC's Copyright Law sets the objective as;

*"[...] encouraging the creation and dissemination of works which would contribute to the building of an advanced socialist culture and ideology and to socialist material development, and... promoting the development and flourishing of socialist culture and sciences."*<sup>39</sup>

Apart from the ideological manner in which it is expressed, the language of Article 1 of the Copyright Law is almost parallel to that used in the TRIPS Agreement. This means that, theoretically, the intentions of the PRC's policy makers are aligned with that of the other signatories to TRIPS.

### Enforcement

The TRIPS Agreement sets a minimum standard of enforcement measures to effectively combat infringement of IPR under Article 41. The general obligations include: providing quick remedies in order to deter further infringement;<sup>40</sup> "fair and equitable" procedures that are efficient and diligently carried out;<sup>41</sup> a preference for decisions on a case to be in writing and based on parties evidence;<sup>42</sup> and the opportunity for a review of the decision.<sup>43</sup> Article 41 notes that there is no obligation to separate enforcement of IP Law and enforcement of the Law in general, by way of judicial system, resources, or otherwise.<sup>44</sup>

In compliance with these obligations, Chapter V of the Copyright Law provides an exhaustive list of actions that result in infringement of IPR<sup>45</sup> and provides such remedies as "ceasing the infringing act, eliminating the effects of the act, making an apology or paying compensation for damages, depending on the circumstances."<sup>46</sup> Furthermore, the Copyright Law categorises

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33 Copyright Law of the PRC Article 10(5)

34 Copyright Law of the PRC Article 21

35 Copyright Law of the PRC Article 16

36 Copyright Law of the PRC Article 22(6)

37 Copyright Law of the PRC Article 22(1)

38 Copyright Law of the PRC Article 22(7)

39 Copyright Law of the PRC Article 1

40 TRIPS Article 41 (1)

41 TRIPS Article 41 (2)

42 TRIPS Article 41 (3)

43 TRIPS Article 41 (4)

44 TRIPS Article 41 (5)

45 Copyright Law of the PRC Articles 46-55

46 Copyright Law of the PRC Article 46

offences into two lists: Article 46 lists civil offences,<sup>47</sup> while Article 47 lists criminal offences.<sup>48</sup> The Copyright Law provides an exhaustive list of remedies for each list of violating acts.<sup>49</sup>

A situation where the production and distribution of infringing copies causes “injury to the social and public interest [...]” the Implementing Rules holds that any fines imposed do not exceed three times the amount of illegal business turnover, and do not exceed a total of ¥100,000.<sup>50</sup>

TRIPS outlines that the fines to be issued shall be “sufficient to provide a deterrent”.<sup>51</sup> It is difficult to surmise whether ¥500,000 in damages or ¥100,000 in fines is sufficient to deter would-be IP infringers, but bearing in mind that the counterfeiting industry is vast, accounting for 8% of the Chinese GDP,<sup>52</sup> one can reasonably assume that some counterfeiting groups or organisations would not be deterred by such a fine. As of 2012, a redraft of the Copyright Law will raise the maximum fine for copyright infringement to a maximum of ¥1m.<sup>53</sup>

### *Damages and the Judiciary*

Article 45 of TRIPS requires that the relevant judicial authorities shall have the authority to order the infringer to pay damages to the rights holder to compensate for the loss suffered due to the infringement, including illegal profits and attorney fees.<sup>54</sup> Article 46 empowers the judicial authorities to dispose of the infringing goods “outside the channels of commerce in such a manner as to avoid any harm caused to the rights holder.”<sup>55</sup>

Article 48 of the Copyright Law also stipulates that where unlawful income is problematic to calculate, damages to the defendant cannot exceed ¥500,000, once again “depending of the circumstances”.<sup>56</sup> This non-specific language used in the Copyright Law ultimately implies the manner in which the defendant is charged, and the remedy issued is a matter of the judge’s discretion. This is emphasised in Articles 46 and 47 where liability of infringement is “depending on the circumstances”.<sup>57</sup> This is inadequate in light of the TRIPS requirement for the damages ordered to be compensatory to the loss suffered.

Also, it is suggested that whilst a simple “compensation for loss” calculation is easy to implement, it fails to reflect any potential growth in the market that may have occurred in the absence of the infringement.<sup>58</sup>

Despite this, it has been reported that the number of IP cases that undergo judicial treatment undergoes a near 50% annual increase, settling 931 civil IPR violation cases between the years 2002 and 2006.<sup>59</sup>

47 Copyright Law of the PRC Article 46 (1) – (11)

48 Copyright Law of the PRC Article 47 (1) – (8)

49 Copyright Law of the PRC Articles 55-46

50 Implementing Regulations Article 36

51 TRIPS Article 61

52 Pei, Minxin, ‘Intellectual Property Rights: A Survey of the Major Issues’, (Sept 2005) Asia Business Council, page 2

53 Unknown, ‘Pirating Fine Doubles in Copyright Law Draft, China Daily Europe’ 29<sup>th</sup> May 2012, available at [http://europe.chinadaily.com.cn/china/2012-05/29/content\\_15417762.htm](http://europe.chinadaily.com.cn/china/2012-05/29/content_15417762.htm) accessed on 2<sup>nd</sup> August 2012

54 TRIPS Article 45

55 TRIPS Article 46

56 Copyright Law of the PRC Articles 48

57 Copyright Law of the PRC Articles 46 and 47

58 Kristina Sepetys and Alan Cox, ‘NERA Economic Consultime, Topics in Law and Economics in China - IPR protection in China: Trends in Litigation and Economic Damages’-at page 5

59 China State Intellectual Property Office, [http://www.sipo.gov.cn/sipo\\_English/news/iprspecial/200701/t20070129\\_131237.htm](http://www.sipo.gov.cn/sipo_English/news/iprspecial/200701/t20070129_131237.htm), accessed 20 July 2013.

### ***Damages in the Administrative Process***

In practice, the lack of an empirical formula for calculating damages had led to inconsistent determinations of compensation<sup>60</sup> to the point where the damages awarded are not proportionate to the damage suffered. For example, in a case brought by Microsoft against a Chinese company that reproduced over 650,000 copies of a Microsoft software product, Microsoft were awarded \$250 in damages despite the alleged loss of \$20 million.<sup>61</sup> It has been contended that since the early 1990's, however, a trend towards awarding harsher damages has been emerging.<sup>62</sup> Alford submits that it is almost impossible to accurately calculate damages at all, as he points out that "[...] those engaged in pirating IP have not been considerate enough to compile statistics for academic researchers,"<sup>63</sup> while this is true, other sources gathered by the International IP Alliance (IIPA) suggest that administrative actions are not effective.<sup>64</sup> With this in mind, the awarding of damages in the PRC for copyright infringement should be regarded as an on-going and unresolved issue.

It is submitted that the shortcomings of Articles 46 and 47 of the PRC's Copyright Law could easily be rectified by changing the loose language of the legislation so that damages are awarded on a compensatory basis rather than leaving the matter to the judge's discretion. However, it is likely that the "trend" towards harsher damages will continue to occur under the present circumstances. In summary, steps have been taken to secure damages for claimants in copyright infringement pursuits; however, it is this lack of specific remedial instruction in the Copyright Laws that prevents the PRC's enforcement measures from producing its deterrent effect.<sup>65</sup>

### **Judicial Framework**

The judicial system of China has four levels of courts. The highest court is the "Supreme People's Court". Immediately below that are thirty "Higher Level People's Courts", spread across the PRC's provinces and autonomous regions such as Shanghai and Beijing. Below that are 389 "Intermediate Level People's Courts" that sit at the municipality level throughout the rest of the PRC. And at the lowest level are around three thousand "Basic Level People's Courts", which reside at the county level.<sup>66</sup> The number of judges selected by the People's Congress is around 200,000.<sup>67</sup>

Copyright cases are heard in China's "Civil Trial Division", whereas other areas of IP law are dealt with in the "Economic Trial Division", along with issues concerning unfair competition law. The "Criminal Trial Division" may hold defendants liable under criminal law for IP law infringements.<sup>68</sup>

60 Li, Yiqiang, 'Evaluation of the Sino-American Intellectual Property Agreements: A Judicial Approach to Solving the Local Protectionism Problem' (1996) 10 *Columbia. J. Asian L.* 391, at 408

61 Silk, Michael, 'Cracking Down on Economic Crime Will China's Latest Anti-Corruption Campaign Have Any Impact?' *China Bus. Rev.*, May 1, 1994, at 25

62 Schlesinger, Michael, 'Intellectual Property Law in China: Part II – Evolving Judicial Role in Enforcement' *E. Asian Exec. Report*, Mar. 15, 1997, at 9

63 Alford, William, *To Steal a Book is an Elegant Offense: Intellectual Property Law in Chinese Civilization* (California: Stanford University Press, 1995) at 6

64 International Intellectual Property Alliance (IIPA), '2004 Special 301 Report: People's Republic of China', at 40

65 Li, Ying, 'Procedural Provisions for Intellectual Property in GATT and the Legislation in China' (1994) 4, *China Patents & Trademarks* 17, at 17

66 Clarke, Donald, 'Power and Politics in the Chinese Court System: The Enforcement of Civil Judgements' (1996) 10 *Columbia. J. Asian L.* 1, at 7

67 Cohen, Jerome, 'China's Legal Reform at the Crossroads' March 2006, Council on Foreign Relations, *Far Eastern Economic Review*, available at <http://www.cfr.org/china/chinas-legal-reform-crossroads/p10063> accessed 2<sup>nd</sup> August 2012

68 Zhang, Naigen, 'Intellectual Property Law Enforcement in China: Trade Issues, Policies and Practices' (1998) 8 *Fordham Intell. Prop. Media & Ent. L. J.* 63, at 66



In an effort to better manage the enforcement of IP laws, the “Intellectual Property Rights Trial Division” (IPTD) was established in 1993 in the Higher Level People’s Courts. An IPTD was established in cities where Higher Level People’s Courts were located, as these were the more developed areas and as such, “three to one” trials took place. This is where civil, criminal and economic cases, with IP related disputes occurred.<sup>69</sup> In 1996, the Intellectual Property Rights Office was established.<sup>70</sup>

### Judicial Enforcement and Civil Law Tradition

The unsuitability of the PRC’s legal system for the Western concept of copyright is often cited as a primary cause for its poor enforcement.<sup>71</sup> Most countries with a developed IP system operate on a tradition of common law, where case law serves as precedent. China does not follow this model, and instead favours civil law, where judges determine the outcome of each case as they see fit.<sup>72</sup> One severe setback of this system is that a judge’s function is to ratify the facts of a case, and then apply the law to the facts; as a result, judges are not obliged to make precedent of their legal reasoning.<sup>73</sup> This is adequate for the purposes of TRIPS, which requires that “[d]ecisions 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 [...]”.<sup>74</sup> However, the fact that there is no requirement to keep a written decision on record as judicial precedent prevents the consistent application of the law.

Liu contends that the published cases in the “Gazette of the Supreme People’s Court” are the closest thing to judicial precedent available to judges in lower-tier courts.<sup>75</sup> In fact, since 2007, the Chinese Supreme Court has published the ten most influential IP cases each year to provide a form of guidance for judges.<sup>76</sup> Whilst this is a promising step towards a standard of judicial precedent, it could be argued that only selecting the “top ten” cases out of all those heard throughout the year to be set as judicial guidance is extremely narrow, especially as since joining the WTO in 2001, the number of IP claims from foreign companies heard in Chinese courts of all levels has soared from 41 in 2001<sup>77</sup> to 1,369 in 2010.<sup>78</sup>

This approach to IP has been criticised as too focused on individual facts, leading to unpredictable outcomes.<sup>79</sup> The preference towards inconsistent judicial application is more likely to act as a deterrent for pursuing copyright claims, especially from foreign copyright holders. This is contrary to the purpose of international copyright protection standards.

69 Zhang, Naigen, ‘Intellectual Property Law in China: Basic Policy and New Developments’ (1997) 4 (1) Annual Survey of International and Company Law, at page 15

70 Hanes, Kathryn, ‘Signs of the Times-IP Registrations on the Rise’ IP Asia, Dec. 1996, at 29.

71 Patel, Nilay, ‘Open Source and China: Inverting Copyright?’ (2006) 23 (4) Wiscon. Int. L. J., 781 at 790

72 Kolton, Gregory, ‘Copyright Law and the People’s Courts in the People’s Republic of China: A Review and Critique of China’s Intellectual Property Courts’ (1996) 17 U. Pa. J. Int’l Econ L. 415, at 435

73 Zhang, Naigen, ‘Intellectual Property Law Enforcement in China: Trade Issues, Policies and Practices’ (1998) 8 Fordham Intell. Prop. Media & Ent. L. J. 63, at 81

74 TRIPS Article 41 (3)

75 Liu, Nanping, “‘Legal Precedents’ With Chinese Characteristics: Published Cases in the Gazette of the Supreme People’s Court” (1991) 5, Journal of Chinese Law 107

76 ‘The Supreme People’s Court published top ten cases in IPR judicial protection’, April 2011, Intellectual Property Protection in China, at [http://www.chinaipr.gov.cn/newsarticle/news/headlines/201104/1219150\\_1.html](http://www.chinaipr.gov.cn/newsarticle/news/headlines/201104/1219150_1.html) accessed 13th Feb 2013

77 Wild, Joff ‘Chinese Supreme Court judge signals higher damages are on the way in IP cases’, 27<sup>th</sup> February 2008, Intellectual Asset Management, at <http://www.iam-magazine.com/blog/detail.aspx?g=fc843e59-0bc1-43c1-9857-b250c35d9688> accessed 13<sup>th</sup> February 2013

78 ‘The Supreme People’s Court published top ten cases in IPR judicial protection’, April 2011, Intellectual Property Protection in China, at [http://www.chinaipr.gov.cn/newsarticle/news/headlines/201104/1219150\\_1.html](http://www.chinaipr.gov.cn/newsarticle/news/headlines/201104/1219150_1.html) accessed 13th Feb 2013

79 Zhang, Naigen, ‘Intellectual Property Law Enforcement in China: Trade Issues, Policies and Practices’ (1998) 8 Fordham Intell. Prop. Media & Ent. L. J. 63, at 81



One example of judicial enforcement is found in the case of *Walt Disney Co v Beijing Youngsters and Children's Publishing House*.<sup>80</sup> In summary, the defendants distributed books containing pictures of well-known Disney characters without permission from the claimant. The claimant subsequently sought an injunction and damages amounting to \$70,000 under Article 46 of the Copyright Law. The judge awarded Disney the sum of \$27,000 in damages, and ordered Children's Publishing House to issue an apology and stop the production of the offending product. The damages were far lower than what the claimant pursued. Even so, the sum of damages in this case is a vast improvement over a previous Disney trademark infringement pursuit, which amounted to \$91 in total.<sup>81</sup> This example brings into question the stability of IP enforcement under a civil law position.

In the context of software copyright infringement, Business Software Alliance (BSA) in 1994 claimed against five Beijing-based companies for pirating and selling software. For each of the ten infringements, BSA were seeking damages of between \$10,000 and \$30,000. Again, the judge ordered less than what the claimants were pursuing, awarding \$53,000 in damages, just over \$5,000 for each infringement.<sup>82</sup> The court also ordered the defendants to make a public apology.

These cases outline that a pursuit of IP claims from foreign companies will indeed obtain remedies, contrary to the situation some decades before. However, these remedies will only be sufficient in the eyes of the presiding judge. It is contended that the lack of instruction to the judiciary, along with the insufficiency of damages awarded, significantly undermine the deterrent effect that the legal system is expected to employ.<sup>83</sup>

As stated previously, Article 36 of the Implementing Regulations state that fines for copyright infringement cannot exceed "three times the amount of illegal business turnover",<sup>84</sup> to a maximum of ¥100,000. As the cases above fail to mention fines at all, it is clear that judicial application of this rule is sparse, if it is ever implemented.

There are no set guidelines for judges to calculate damages in a copyright case. However, in the field of patent law, the prevailing principle is that of fairness;<sup>85</sup> damages are calculated based on the monetary injury inflicted on the right holder and the profits that the infringer gains.<sup>86</sup> In the context of copyright protection, the guidance is not clear and the requirement of "fairness" opens the door to subjective and independent rulings, hampering the consistent application of copyright protection in the PRC. As a result of the inadequate deterrent effect of judicial rulings, "[m]any foreign companies have been reluctant to litigate their rights in the Chinese legal setting, with only about 3% of all civil litigation in China today involving a foreign entity."<sup>87</sup>

In summary, while the PRC has established a substantial judicial system to cater for the new Copyright Law, in practice its effects are largely insufficient. Specifically, judicial enforcement of copyright law in the PRC fails to create a deterrent effect through fines, as required by Article 61

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80 Walt Disney Wins in Copyright Case, China L. & Prac., Sept. 13, 1995, at 17

81 Walters, Donna, 'Chinese Court for First Time Upholds U.S. Firm's Copyright' LA Times August 5<sup>th</sup> 1994, available at [http://articles.latimes.com/1994-08-05/business/fi-23941\\_1\\_intellectual-property-theft](http://articles.latimes.com/1994-08-05/business/fi-23941_1_intellectual-property-theft) accessed 3<sup>rd</sup> August 2012

82 Zhang, Naigen, 'Intellectual Property Law Enforcement in China: Trade Issues, Policies and Practices' (1998) 8 Fordham Intell. Prop. Media & Ent. L. J. 63, 81

83 Zhang, Naigen, 'Intellectual Property Law Enforcement in China: Trade Issues, Policies and Practices' (1998) 8 Fordham Intell. Prop. Media & Ent. L. J. 63, 81

84 Implementing Rules Article 36

85 Intellectual Property Law Services, PRC I.P. Law and Regulations Service

86 Cheng, Wenting, 'Inside Views: Third Revision of Patent Law in China (Part II)', IP Watch.org, available at <http://www.ip-watch.org/2009/10/01/third-revision-of-patent-law-in-china-part-ii/> accessed on 3<sup>rd</sup> August 2012

87 Suttmier, Yao, 'China's IP Transition: Rethinking Intellectual Property Rights in a Rising China' (July 2011) NBR Special Report #29, at 24

of TRIPS.<sup>88</sup> Also, the lack of judicial precedent in the court systems allows decisions and the awarding of damages to be unpredictable, which prevents damages being awarded on a compensatory basis, for the purposes of Article 45 of TRIPS.<sup>89</sup> Finally, the absence of a requirement to give legal reasoning when making a decision contravenes Article 41 of TRIPS.<sup>90</sup> Ultimately, the effect of these discrepancies is that copyright protection in the PRC contravenes the TRIPS Agreement to which the PRC is a signatory party. This, in turn, deters foreign pursuit of copyright claims and strains the business relations of the PRC and other states.<sup>91</sup>

## Other Enforcement Issues

### *Decentralisation*

The 1996 IPR Agreement<sup>92</sup> between China and the United States purported to combat IP infringement in China through robust administrative enforcement over an intense process to shut down piracy operations.<sup>93</sup> The understanding was that the Chinese government would expand enforcement powers in activities such as the coordination of investigations, the assigning of “task forces”, and prosecution.<sup>94</sup> Once an appeal to investigate a potential infringement has been made to the local enforcement authority, usually the Basic Level people’s Court, an “action plan” will be drafted and then executed by local enforcement officials.<sup>95</sup> Despite this, “inconsistencies in enforcement” allowed the frequent occurrence of IP infringement to continue.<sup>96</sup>

Lazar submits that the Chinese government itself lacks the sufficient power to control the situation,<sup>97</sup> while others remark that “political unwillingness” lies at the heart of the problem.<sup>98</sup> Li contends that the main concern is the disparity between local and administrative bodies which hinders effective implementation of IP enforcement.<sup>99</sup>

Each jurisdiction in China is governed by the “Local People’s Congress” (LPC). Officials of the LPC are elected directly by the citizens and the decisions of the Congress are not dictated by central government.<sup>100</sup> Also, Article 101 of the Chinese Constitution grants the LPC the power to elect and dismiss personnel at its own level.<sup>101</sup> This prevents central governmental authorities from

<sup>88</sup> TRIPS Article 61

<sup>89</sup> TRIPS Article 45 (1)

<sup>90</sup> TRIPS Article 41 (3)

<sup>91</sup> Lewis, Lloyd, ‘US-China Relations on the Protection of Intellectual Property’ (1997) available at <http://gurukul.ucc.american.edu/ted/hpages/ipr/lloyd.htm> accessed on 3<sup>rd</sup> August 2012

<sup>92</sup> Agreement Regarding Intellectual Property Rights, Feb. 26, 1995, U.S.-P.R.C., 34 I.L.M. 881 (1995)

<sup>93</sup> Seth Faison, ‘U.S and China sign Accord to end piracy of software, music recordings and film’ New York Times, Feb 27, 1995, available at <http://www.nytimes.com/1995/02/27/business/us-and-china-sign-accord-to-end-piracy-of-software-music-recordings-and-film.html?pagewanted=all&src=pm> accessed 31 July 2012

<sup>94</sup> People's Republic Of China Implementation Of The 1995 Intellectual Property Rights Agreement – available at [http://tcc.export.gov/Trade\\_Agreements/All\\_Trade\\_Agreements/exp\\_005361.asp](http://tcc.export.gov/Trade_Agreements/All_Trade_Agreements/exp_005361.asp) accessed 31 July 2012

<sup>95</sup> ‘China-United States: Agreement Regarding Intellectual Property Rights’ Feb. 26, 1995, Annex, 34 Int. Legal. Mat. 881

<sup>96</sup> Maggie Farley & James Gerstenzang, ‘China Piracy of US Products Surges Despite Accord’ L.A. Times, Oct. 10, 1995, at A1 – at [http://articles.latimes.com/1995-10-10/news/mn-55287\\_1\\_china-trade](http://articles.latimes.com/1995-10-10/news/mn-55287_1_china-trade) accessed 20 July 2012

<sup>97</sup> Lazar, ‘Protecting Ideas and Ideals: Copyright Law in the People's Republic of China’ (1996) 27 Law & Pol. Int’l Bus. 1185, at 1198

<sup>98</sup> David E. Sanger, ‘In Trade Rift, U.S. Outlines Penalties, and So Does China’ N.Y. Times, May 16, 1996, available at <http://www.nytimes.com/1996/05/16/business/in-trade-rift-us-outlines-penalties-and-so-does-china.html?pagewanted=all&src=pm> accessed 3<sup>rd</sup> August 2012

<sup>99</sup> Berkman, Jeffrey ‘Intellectual Property Rights in the P.R.C.: Impediments to Protection and the Need for the Rule of Law’ (1996) 15 U.C.L.A. Pac. Basin L.J., 1, at 19

<sup>100</sup> Ying Li, ‘Procedural Provisions for Intellectual Property in GATT and the Legislation in China’ (1994) 4 China Pat. & Trademarks 17, at 399

<sup>101</sup> Constitution of the PRC Article 101

having any influence over the management of the LPC.<sup>102</sup>

This decentralisation of government allows local leaders of the LPC to prioritise local interests over state policies when making political judgements. More importantly, local governments are required to yield only a portion of their revenues to the central PRC government, leaving the remainder of income to be used on local expenses.<sup>103</sup> Commentators in the late 20th century observed that it was often the case where a local leader must step in and intervene in judgements that jeopardise local businesses and revenue streams, as the local officials themselves would be responsible for any negative consequences that arise.<sup>104</sup> In addition, as Clarke points out, Chinese judges themselves do not have tenure; they are accountable to the People's Congress, making them vulnerable to external pressures and localism.<sup>105</sup> In 1995, U.S. attorney David Buxbaum commented;

*"There are entire villages in China devoted to making bootleg products [...] How can the policemen who live in the village close down the industry that the whole place depends on for its livelihood? They're very protective of local interests."*<sup>106</sup>

The problem is further aggravated as the local government is required to bear the cost of implementing enforcement measures. The local leader is forced to decide between protecting the local industry, or spending money to block the flow of revenue.<sup>107</sup>

In recent years, however, the Commission for Discipline Inspection, the body responsible for seeking and resolving matters of corruption and abuse of power, set up a website to allow citizens to report instances of corruption by local officials.<sup>108</sup> Nevertheless, the Commission may not be able to completely prevent local protectionism by local officials, as it is likely that those in a community that benefits from a bootlegging industry will be reluctant to report any abuses of power.

It is clear that the local protectionism enabled by decentralised government, which forces local leaders and legal figures to prioritise local interests over copyright protection, is potentially one of the main difficulties of IP enforcement.

### **Cultural Disincentives**

The judicial and administrative forces that implement copyright law in the PRC have not yielded the results that were intended.<sup>109</sup> There are many arguments that consider the notion that the Chinese norm is to recognize the right to personal and real property, not intellectual works or

102 Ying Li, 'Procedural Provisions for Intellectual Property in GATT and the Legislation in China' (1994) 4 China Pat. & Trademarks 17, at 399

103 Donald C. Clarke, 'What's Law Got to Do With It? Legal Institutions and Economic Reform in China' (1995) 10 U.C.L.A. Pac. Basin L.J. 1, at 13-15

104 Cheng, Julia, 'China's Copyright System: Rising to the Spirit of TRIPS Requires an Internal Focus and WTO Membership' (1999) Fordham Law Journal, 1941, at 1986

105 Clarke, Donald, 'Power and Politics in the Chinese Court System: The Enforcement of Civil Judgements' (1996) 10 Columbia. J. Asian L. 1, at 8

106 Maggie Farley & James Gerstenzang, 'China Piracy of US Products Surges Despite Accord' L.A. Times, Oct. 10, 1995, available at [http://articles.latimes.com/1995-10-10/news/mn-55287\\_1\\_china-trade](http://articles.latimes.com/1995-10-10/news/mn-55287_1_china-trade) accessed 20 July 2012

107 Cheng, Julia, 'China's Copyright System: Rising to the Spirit of TRIPS Requires an Internal Focus and WTO Membership' (1999) Fordham Law Journal, 1941, at 1987

108 Central Commission for Discipline Inspection of the Communist Party of China  
<<http://www.12388.gov.cn/xf/index.html>>

109 Zhang, Naigen, 'Intellectual Property Law Enforcement in China: Trade Issues, Policies and Practices' (1998) 8 Fordham Intell. Prop. Media & Ent. L. J. 63, 82

artistic creations,<sup>110</sup> and, as a result, the laws that are enforced do not have any effect on infringement.

Article 22 of the Constitution of China<sup>111</sup> states that;

*“[t]he state promotes the development of literature and art, the press, broadcasting and television undertakings[...] and other cultural undertakings, that serve the people and socialism, and sponsors mass cultural activities...”<sup>112</sup>*

The language of the Article is very similar to the basic ethos of copyright. It suggests that the PRC wants to protect copyrights for the development and benefit of “the people and socialism.” Despite this pledge, it has been argued that the concept of copyright is fundamentally incompatible with the socio-political culture of the PRC and its current economic development.<sup>113</sup> Also, the private property ethos of copyright contravenes the culture of acting in the “societal good”, and, as such, would require major overhaul of Chinese social institutions for effective application.<sup>114</sup>

### ***Socialism***

The PRC operates a system that exercises strict controls over publications, due to its intentions that labours and creations must “serve the people and socialism”.<sup>115</sup> As a result, whilst international law obliges the PRC to create a system that incentivises creativity, the government is heavily concerned with external influences from Western countries. This facilitates a discouragement to effectively enforce copyright law, as to do so would undermine the ethos that a creation must “serve the people and socialism.”<sup>116</sup>

The language of the Copyright Law also emphasises the subordination of an individual’s personal interest to the goal of society.<sup>117</sup> Article 4 states that “[...] Copyright owners, in exercising their copyright, shall not violate the Constitution or laws or prejudice the public interests...”<sup>118</sup> As it is written, it could be argued that Article 4 is legitimising infringement, as long as it is in the name of development of the art or work and is beneficial to the “people and socialism” for the purpose of Article 22 of the Constitution.

### ***Confucianism***

China was founded in Confucian philosophy, an ideology that dominated China from 100BC to A.D 1911. Confucianism places an emphasis on the good of society at large instead of individual pursuits. This ideology promoted social order and frowned upon the litigious nature of law.<sup>119</sup> As such, no moral negative was associated with copying a previous creation. As Alford explains, “[...] the need to interact with the past sharply curtailed the extent to which it was proper for anyone

110 Alford, William, ‘Forum: Taiwan and the GATT: Panel Three: Intellectual Property Trade and Taiwan: A GATT-Fly’s View, 1992’ (1992) Columbia. Bus. L. Rev. 97, at 104

111 Constitution of the PRC Article 22

112 Constitution of the PRC Article 22

113 Yiqiang Li, ‘Evaluation of the Sino-American Intellectual Property Agreements: A Judicial Approach to Solving the Local Protectionism Problem’ (1996) 10 Colum. J. Asian L. 391, at 393-394

114 Feng, Peter, *Intellectual Property In China* (Sweet and Maxwell, 1997) at 4

115 Constitution of the PRC Article 22

116 Zhang, Naigen, ‘Intellectual Property Law Enforcement in China: Trade Issues, Policies and Practices’ (1998) 8 Fordham Intell. Prop. Media & Ent. L. J. 63, 78

117 Cheng, Julia, ‘China’s Copyright System: Rising to the Spirit of TRIPS Requires an Internal Focus and WTO Membership’ (1999) Fordham Law Journal, 1941, at 1981

118 Copyright Law of the PRC Article 4

119 Bodde, D and Morris, C, *Law in Imperial China* (University of Pennsylvania Press, 1973) at 50

other than persons acting in a fiducial capacity to restrict access to its expressions.”<sup>120</sup> In short, the ideology considers copying to be of great importance when interacting with the past, which in turn facilitates further creativity and understanding.<sup>121</sup>

The Confucian principles that the PRC operates by have produced certain distrust for Western entrepreneurship. In turn, it makes it difficult for Chinese citizens to trust that the copyright model can be used as a vehicle for innovation, and does not simply serve the interests of private companies.<sup>122</sup>

Also, noteworthy is the impact of the Maoist regime of 1949 to 1976 on the modern Chinese legal system, which promoted access to creative works by the masses,<sup>123</sup> and the role traditional Marxism considered the withdrawal of private property as essential to economic growth.<sup>124</sup>

### *Economic Disincentives*

As a developing country that spent most of its time in economic isolation, China has had difficulty in meeting the expense of “TRIPS standard” enforcement measures.<sup>125</sup> In response to this, software illegally obtained by Chinese software users was referred to as “patriotic software” as it allowed modernisation without research and development costs.<sup>126</sup> Also, software piracy enables a short term method of providing a livelihood for Chinese citizens who rely on the production of pirated goods as an occupation.<sup>127</sup>

Yeh argues that despite the “Open Door Policy” and its intentions for China to interact with the international economy, China is not at the stage of development to efficiently enforce IP rights.<sup>128</sup> He further argues that vigorous IP protection doesn’t offer any further economic benefit to PRC as it increases the costs of living and compromises the livelihood of China’s citizens.<sup>129</sup>

120 Alford, William, *To Steal a Book is an Elegant Offense: Intellectual Property Law in Chinese Civilization* (California: Stanford University Press, 1995) at 25

121 Alford, William, *To Steal a Book is an Elegant Offense: Intellectual Property Law in Chinese Civilization* (California: Stanford University Press, 1995) at 28-9

122 Suttmier, Yao, ‘China’s IP Transition: Rethinking Intellectual Property Rights in a Rising China’ (July 2011) NBR Special Report #29, at 17

123 Richard Goldstein, ‘Copyright Relations between the United States and the People’s Republic of China: An Interim Report’ (1984) 10 Brook. J. Int’l L. 403, 410-11

124 Syz, Jing-Kai, ‘Note, Expanding the Patent Law of the People’s Republic of China: A Proposal for Patent Protection of Computer Programs’ (1991) 5 J. Chinese L. 349, at 353

125 Robert M. Sherwood, ‘The TRIPs Agreement: Implications for Developing Countries’ (1997) 37 Idea: J.L. & Tech. 491, at 537

126 Tara Kalagher Guinta & Lily H. Shang, ‘Ownership of Information in a Global Economy’ (1993) 27 Geo. Wash.J. Int’l L. & Econ. 327, at 330-31

127 Maggie Farley & James Gerstenzang, ‘China Piracy of US Products Surges Despite Accord’ L.A. Times, Oct. 10, 1995, available at [http://articles.latimes.com/1995-10-10/news/mn-55287\\_1\\_china-trade](http://articles.latimes.com/1995-10-10/news/mn-55287_1_china-trade) accessed 20 July 2012

128 Yeh, Michael, ‘Up Against a Great Wall: The Fight Against Intellectual Property Piracy in China’ 5 Minn. J. Global Trade 503, at 516-17

129 Yeh, Michael, ‘Up Against a Great Wall: The Fight Against Intellectual Property Piracy in China’ 5 Minn. J. Global Trade 503, at 516

## Conclusions

Copyright law in the PRC has undergone remarkable development since its inception in 1992, having implemented substantial administrative and judicial frameworks within just two decades. However, problems persist in the Copyright Law and its related legislation. Namely, the ambiguity of the rights of agencies reporting current affairs and the limitation of protection with regards to rental rights in Article 22 of the Copyright Law, the insufficient rights conferred to performers in Article 39, the non-deterrent nature of the fines and damages in Articles 46 and 47 of the Copyright Law and Article 36 of the Implementing Regulations.

Inadequacies are also found in the judicial enforcement of copyright law. While a sophisticated court system is in place, the civil law tradition prevents the application of judicial precedent and without a system to calculate damages court decisions are disproportionate and unpredictable.

More enforcement issues lie in the decentralisation of government and the impact of local protectionism which prevents copyright protection from reaching communities which rely on counterfeiting for a livelihood. Chinese culture itself prioritises the needs of the state at large over the needs of the individual. The Confucian culture that resides in the PRC also fuels social mistrust of the concept of IP as Confucianism values real and tangible property, not "creations of the mind". Also, it has been argued that the PRC has little economic capability to partake in copyright protection, and little to gain from participation.

It is clear that revisions need to be made to the copyright law of the PRC if policymakers intend to establish a state of protection parallel to requirements made in the TRIPS Agreement. As of 2012, a new revision of the Copyright Law is currently underway,<sup>130</sup> but it remains to be seen if the reforms made are sufficient to match the requirements of TRIPS. However, it could be argued that the cultural disincentives in the PRC are too strong to be applicable to the principle of copyright.

## Open source software licensing in the PRC

### Background

A number of provisions in the TRIPS Agreement allow for slow implementation in certain circumstances. From the outset, Article 7 sets the objective of the TRIPS Agreement to "contribute to the promotion of technological innovation and to the transfer and dissemination of technology [...] in a manner conducive to social and economic welfare [...]"<sup>131</sup> As such, the agreement recognises the needs of " [...] least-developed country Members, their economic, financial and administrative constraints, and their need for flexibility to create a viable technological base [...]"<sup>132</sup> As China qualifies as a developing country according to the International Monetary Fund,<sup>133</sup> The World Bank Group<sup>134</sup> and the United Nations World Economic Survey,<sup>135</sup> the PRC is entitled to a ten year grace period before implementing TRIPS under Article 66.<sup>136</sup>

130 Abrams, Stan, 'China Copyright Infringement: It Could be Worse' China Hearsay.com, available at <http://www.chinahearsay.com/china-copyright-infringement-it-could-be-worse/> accessed 5<sup>th</sup> August 2012

131 TRIPS Article 7

132 TRIPS Article 66 (1)

133 IMF Advanced Economies List World Economic Outlook Report, April 2012, p. 179, available at <http://www.imf.org/external/pubs/ft/weo/2012/01/pdf/text.pdf> accessed 13<sup>th</sup> August 2012

134 World Bank Group, 'Data: Country and Lending Groups' at <http://data.worldbank.org/about/country-classifications/country-and-lending-groups> accessed 13<sup>th</sup> August 2012

135 UN Report, 'World Economic Situation and Prospects 2012' page 135, available at

[http://www.un.org/en/development/desa/policy/wesp/wesp\\_current/2012country\\_class.pdf](http://www.un.org/en/development/desa/policy/wesp/wesp_current/2012country_class.pdf) accessed 13<sup>th</sup> August 2012

136 TRIPS Article 66

Additionally, the PRC is entitled to a further delay of four years courtesy of Article 65,<sup>137</sup> which offers the deferral to a nation “[...] which is in the process of transformation from a centrally-planned into a market, free-enterprise economy [...]” and is undertaking reform of its IP system and facing special problems in the preparation and implementation of IP laws and regulations.<sup>138</sup> While it remains unclear as to when China’s transition to capitalism has or will end,<sup>139</sup> it is certain that the PRC has encountered obstacles in implementing and enforcing its newly adopted IP policies (as explored in chapter II). This means that the PRC has until December 2015 to implement the minimum standards of protection set out in TRIPS and to overcome the obstacles preventing the performance of this protection.

As briefly outlined in the first chapter, the PRC has already taken steps to embrace open source software through the creation and adoption of Red Flag Linux in 1999.<sup>140</sup> Furthermore, a culture of free software is emerging in China,<sup>141</sup> and the concept is taking hold in the business sector.<sup>142</sup> With a new revision of the Copyright Law on its way,<sup>143</sup> along with the changing landscape of computer software in China and the rest of the world, the interaction between open source software licensing and Chinese copyright norms could be a central feature to the PRC’s IP framework.

This section will demonstrate that by embracing and promoting open source software licensing on a legal and administrative level in the PRC, many of the software-related problems in implementing IP laws can be circumvented, as well as many other economic benefits provided. And that, in doing so, the PRC can meet the minimum standards of protection for copyright as required by TRIPS without interfering with the politics and culture of the state.

## Legal Framework

### Objectives

Article 1 of the Copyright Law states that the idealistic purpose of protecting copyright in the PRC is in pursuit of;

*“ [...] encouraging the creation and dissemination of works which would contribute to the construction of socialist spiritual and material civilization, and of promoting the development and prosperity of the socialist culture and science [...] ”*<sup>144</sup>

Here the principle is to encourage the creation and sharing of works for the greater development of society. The GNU General Public License bears a similar ideology in its preamble;

*“Developers that use the GNU GPL protect your rights with two steps: (1) assert copyright on the software, and (2) offer you this License giving you legal permission*

137 TRIPS Article 65 (2)

138 TRIPS Article 65 (3)

139 Buster, G, ‘The Transition to Capitalism’ International Viewpoint Online Magazine, December 2003, at <http://www.internationalviewpoint.org/spip.php?article117> accessed 13<sup>th</sup> August 2012

140 Lettice, John, ‘Red Flag Linux beats out Windows in Beijing’ 4<sup>th</sup> January 2002, The Register, available at [http://www.theregister.co.uk/2002/01/04/red\\_flag\\_linux\\_beats\\_out/](http://www.theregister.co.uk/2002/01/04/red_flag_linux_beats_out/) accessed 12<sup>th</sup> August 2012

141 Jiangsu, Amy, ‘Open Source in China?’ discussion with Stephen Walli, available at <http://www.amyjiangsu.com/?p=45> accessed 12<sup>th</sup> August 2012

142 Legard, David, ‘Reports: Open-source software alliance formed in China’ Infoworld.com, 11<sup>th</sup> August 2004, at <http://www.infoworld.com/t/platforms/reports-open-source-software-alliance-formed-in-china-421> accessed 12<sup>th</sup> August 2012

143 Abrams, Stan, ‘China Copyright Infringement: It Could be Worse’ China Hearsay.com, available at <http://www.chinahearsay.com/china-copyright-infringement-it-could-be-worse/> accessed 5<sup>th</sup> August 2012

144 Copyright Law of the PRC Article 1



*to copy, distribute and/or modify it.*"<sup>145</sup>

Both documents in their objectives state the importance of protecting copyrighted works and encourage the user to create and distribute new works. This is, in turn, aligned with the objectives of the TRIPS Agreement which also emphasises the "promotion of technical innovation" and the further "dissemination of technology."<sup>146</sup>

### **Enforcement**

The PRC's administrative and judicial enforcement of the Copyright Law was observed in chapter II, and it was concluded that the enforcement measures in place were inadequate for the purposes of TRIPS for a number of reasons. This section purports to explore the potential impact of open source software licensing on the problems encountered with copyright implementation. The GPL will be used as a template, as the license has already been embraced as legally enforceable in its use by Red Flag Linux.<sup>147</sup>

Article 41 of TRIPS stipulates that the enforcement measures of IP rights are to be fair and efficient, and ultimately have a deterrent effect.<sup>148</sup> Article 45 goes on to give judicial authorities the authority to order the payment of damages to compensate for a loss as a result of infringement.<sup>149</sup> The PRC's Copyright Law states its enforcement measures in Articles 46 and 47, ultimately conferring the power of remedy to the judge's discretion.<sup>150</sup> The Implementing Rules, in turn, require that a fine cannot exceed three times the amount of illegal business profit and cannot exceed ¥100,000,<sup>151</sup> whereas the Copyright Law requires that where the copyright holder's injury or the infringer's unlawful income cannot be determined, a maximum of ¥500,000 can be awarded.<sup>152</sup>

The criticisms of the system in place in the PRC were mainly concerned with the inconsistent orders and rulings of the judges presiding over copyright claims, and the fact that fines and damages were not sufficient to deter copyright infringers. It is submitted that in the instance of open source software licences, such as the GPL, some of these problems may be mitigated.

It was argued that the ordering of damages is a futile venture because it is nearly impossible to accurately calculate the amount of damages that must be paid to the claimant,<sup>153</sup> and the maximum fine available is never recognised in practice.<sup>154</sup> In the case of the GPL, the source code that is distributed is free. Therefore, in a claim for infringement, the amount to be compensated is zero, so the ordering of damages can never be inadequate. If there is no monetary damage to compensate for, then Article 45 of TRIPS is satisfied.

In addition, the maximum fine of three times the amount of illegal turnover would be appropriate

145 GNU General Public License version 3, 29<sup>th</sup> June 2007, Preamble, available at <http://www.gnu.org/copyleft/gpl.html> accessed 14th August 2012

146 TRIPS Article 7

147 Unknown, 'The Qt SDK is now included in the largest Linux distribution in China' RedFlag-Linux.com, 23<sup>rd</sup> June 2009, available at [http://www.redflag-linux.com/en/news\\_end.php?class1=2&class2=1&productid=&id=76](http://www.redflag-linux.com/en/news_end.php?class1=2&class2=1&productid=&id=76) accessed 14<sup>th</sup> August 2012

148 TRIPS Article 41

149 TRIPS Article 45

150 Copyright Law of the PRC Article 46 and 47

151 Implementing Rules of the PRC Article 36

152 Copyright Law of the PRC Article 48

153 Alford, William, *To Steal a Book is an Elegant Offense: Intellectual Property Law in Chinese Civilization* (California: Stanford University Press, 1995) 6

154 Silk, Michael, 'Cracking Down on Economic Crime Will China's Latest Anti-Corruption Campaign Have Any Impact?' *China Bus. Rev.*, May 1, 1994, at 25

if asserting the enforceability of the GPL, as was the outcome of the Software Freedom Conservancy case.<sup>155</sup> It is also submitted that an outcome like this would not be unlikely as to profit from withholding source code is paramount to preventing the dissemination of science and technological knowledge, and the participation of research into technology, both freedoms provided by the Constitution of the PRC.<sup>156</sup> It would also prevent the “creation and dissemination of works” for the purposes of Article 1 of the Copyright Law.<sup>157</sup>

Finally, it is often concluded that, as a result of inconsistent rulings by the judiciary, the enforcement of copyright provisions is not having the deterrent effect required by TRIPS<sup>158</sup> either because the fines or damages ordered are too low, or the infringing business is profitable enough to simply pay the fine and continue infringement. It is submitted that, in the case of GPL, the deterrent effect would be far greater. This is because, unlike proprietary software, the lightest remedy available for a GPL violation, an injunction, would make the source code of the software available to the public and, in turn, destroy the value of the product itself. Beyond that point a would-be infringer would only stand to lose money as the software would have no market value. This would give copyright enforcement a harsher deterrent effect in the context of GPL violations.

In summary, a license like the GPL would be workably enforceable in China’s copyright legislative framework as it stands. Because the GPL causes the source code to be distributed for free, the allocation of damages would no longer be an issue. The withholding of the source code prevents some of the fundamental freedoms provided in the Constitution of the PRC from being carried out, which, in turn, would put an end to judicial apathy. And, finally, the minimal remedy issued by the judiciary would be to make the source code available to the public, which would destroy the value of GPL-infringing practices, giving enforcement a heavier deterrent effect.

### ***Civil Law Tradition***

It was argued that an IP framework that works in Western countries is incompatible with Chinese law as a whole because it operates in a civil law tradition, as opposed to common law. And while the publishing of the ten most influential IP cases by the Supreme Court every year does offer some guidance to judges, that guidance is very limited considering the dramatic influx of cases and cannot be substantial enough to be considered judicial precedent.

This lack of precedent leads many to determine that judicial decision making in the PRC is highly inconsistent,<sup>159</sup> and, as a result, it only deters foreign copyright owners in pursuing copyright claims instead of deterring the infringers. This assumption is made in the context of proprietary software where the success of an infringement claim is measured by the amount of damages won. As previously stated, certain distrust for Western ideals and companies, among other cultural motives, can be cited to explain the failure for foreign claims to reap sufficient monetary awards.<sup>160</sup>

In the context of the GPL and other open source licenses, success cannot be measured by monetary damages as the source code itself is free. Consequently, success or failure can only be determined if the judge finds infringement to have taken place or not; this way, the unpredictable nature of judicial application has been relaxed.

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155 Software Freedom Conservancy v. Best Buy 812 F.Supp.2d 483 at 491 (2011)

156 Constitution of the PRC, Article 20 and Article 47

157 Copyright Law of the PRC Article 1

158 TRIPS Article 41

159 Zhang, Naigen ‘Intellectual Property Law Enforcement in China: Trade Issues, Policies, Practices’ (1997) 8 Fordham Intellectual Property Media & Entertainment Law Journal 63, at 81

160 Suttmier, Yao, ‘China’s IP Transition: Rethinking Intellectual Property Rights in a Rising China’ (July 2011) NBR Special Report #29, at 17

The civil law system may offer an advantage, however, in situations regarding fair use of the GPL. As judges are bound by the Constitution to enable citizens to pursue their “creative endeavours [...] in education, science [and] technology [...]”,<sup>161</sup> it is likely that situations surrounding fair use will lean in favour of ensuring the dissemination of knowledge to Chinese citizens.

In fact, Chinese legislation has already made such use of software legally permissible. Article 17 of the Regulation for Computer Software Protection (RCSP) 2002 states that;

*“[a] piece of software may be used by its installing, displaying, transmitting or storing for the purposes of studying or researching the design ideas or principles embodied therein, without permission from, and without payment of remuneration, to the software copyright owner.”<sup>162</sup>*

Article 17 promotes the dissemination of knowledge and works and renders the reproduction of software for the purposes of research and education permissible. This policy is perfectly aligned with the ethos of open source software licensing as this encouragement to reverse engineer software and its code is the main driving force behind the GPL.<sup>163</sup>

On the other hand, a more complicated issue concerning fair use may not benefit from a predisposition towards the dissemination of knowledge and technology. Such as, for example, the United States case of *Sony Computer Entertainment v. Connectix Corporation*,<sup>164</sup> where an open source code was used to make a product compatible with other existing works, was ruled as fair use.<sup>165</sup> This is because the inconsistent nature of judicial rule could blur the lines on more technical matters, such as fair use.

The same could be said for the problem of downstream liability. On one hand it would appear that Chinese judges would make decisions of liability depending on “the circumstances” as required by the Copyright Law,<sup>166</sup> which may allow defences such as an honest mistake and fairness to prevail. However, the civil law system may blur the lines on downstream liability and confuse the matter further.

The backdrop provided by the Chinese Constitution<sup>167</sup> and Copyright Law<sup>168</sup> aligns the interests of the Chinese policymakers to promote the distribution of technology and knowledge with the objective of the GPL.<sup>169</sup> This “background duty” provides judges with additional guidance to enforce open source licenses such as the GPL. Also, the fact that the GPL stipulates that source code is to be made available for free makes the remedial nature of copyright implementation more sufficient. However, in practice, the lack of precedent still raises concerns about consistent application. What might be regarded as an infringement of the GPL for one judge might be considered fair use for another. Nevertheless the absence of written precedent does not contravene TRIPS,<sup>170</sup> and is therefore adequate.

161 Constitution of the PRC, Article 47

162 Regulation for Computer Software Protection (RCSP) 2002 Article 17

163 GNU General Public License version 3, 29<sup>th</sup> June 2007, Preamble, available at <http://www.gnu.org/copyleft/gpl.html> accessed 14th August 2012

164 *Sony Computer Entm't, Inc. v. Connectix Corp.*, 203 F.3d 596 (9th Cir. 2000)

165 *Sony Computer Entm't, Inc. v. Connectix Corp.*, 203 F.3d 596, 603-10 (9th Cir. 2000)

166 Copyright Law of the PRC Article 46 and 47

167 Constitution of the PRC, Article 20

168 Copyright Law of the PRC Article 1

169 GNU General Public License version 3, 29<sup>th</sup> June 2007, Preamble, available at <http://www.gnu.org/copyleft/gpl.html> accessed 14th August 2012

170 TRIPS Article 41

## Other Enforcement Concerns

### *GPL Licence vs Contract Law*

Large profile cases such as *Jacobsen v. Katzer*<sup>171</sup> in the United States deal with the question of enforcing open source software, such as the GPL, through contract law; however, no such substantial precedent has been set in the PRC.

Typically, in the PRC, a breach of contract is remedied through the awarding of damages to the injured party.<sup>172</sup> It has been commented that, in order for foreign contracts to be enforced in the PRC, three general rules must be followed. First, any enforcement through litigation must go through the Chinese court system. Second, the governing law of the enforcement must be the Chinese Law. Finally, the governing language must be Chinese.<sup>173</sup> Whilst foreign contracts are still enforceable in the PRC, some preliminary obstacles must be overcome.

The GPL licence itself is written in English. The authors of the licence, the Free Software Foundation (FSF), do not approve of any unofficial translations in a legal capacity, but encourage any unofficial translations of the license for the purposes of education. According to the GNU website, all translations require a notice that state that it does not legally state the distribution terms for software that uses the GPL as “only the original English text of the GNU GPL does that.”<sup>174</sup>

In summary, only the English copy of the GPL can legally state the distribution terms, and, therefore, would have difficulty being enforced under contract law in the PRC owing to the general rule that foreign contracts must be in Chinese in order to be enforced.

### *Decentralisation*

It was previously explored how the decentralisation of the Chinese government contributes to the poor implementation of copyright protection. It was found out that the officials of the Local People's Congress are directly elected by citizens<sup>175</sup> and are not controlled by the federal government,<sup>176</sup> and the local judges are not awarded tenure.<sup>177</sup> As a result, local officials and judges are vulnerable to local pressures and it is often the case where these officials intervene on copyright infringement cases for the sake of local interests and businesses which thrive on copyright infringement.<sup>178</sup>

With GPL infringement cases, the incentive for local leaders to intervene in favour of local business is removed. In the case of proprietary software, local leaders and judges obstruct copyright protection to continue infringement for the sake of the livelihood of the local people in

171 *Jacobsen v. Katzer*, 535 F.3d 1373 (Fed. Cir. 2008)

172 Contract Law of the People's Republic of China (adopted by the National People's Congress on March 15, 1999, and promulgated by the Presidential Order No. 15)) Chapter seven, Articles 107, 108, 109 and 113.

173 Dickinson, Steve, 'Enforcing Contracts in China. Way, Way Better Than You Think', China Law Blog, July 13<sup>th</sup> 2009, available at [http://www.chinalawblog.com/2009/07/enforcing\\_contracts\\_in\\_china\\_w.html](http://www.chinalawblog.com/2009/07/enforcing_contracts_in_china_w.html), accessed July 20<sup>th</sup> 2013

174 GNU website, Unofficial Translations page, accessible at <http://www.gnu.org/licenses/translations.html>, accessed 20<sup>th</sup> July 2013

175 Ying Li, 'Procedural Provisions for Intellectual Property in GATT and the Legislation in China' (1994) 4 China Pat. & Trademarks 17, at 399

176 Constitution of the PRC Article 101

177 Clarke, Donald, 'Power and Politics in the Chinese Court System: The Enforcement of Civil Judgements' (1996) 10 Columbia J. Asian L. 1, at 8

178 Cheng, Julia, 'China's Copyright System: Rising to the Spirit of TRIPS Requires an Internal Focus and WTO Membership' (1999) Fordham Law Journal, 1941, at 1986

an effort to “serve the people and socialism” for the purposes of Article 22 of the Constitution of the PRC. However, a local official desiring to obstruct the protection of the GPL would be met with a dilemma. The leader must either continue the hindrance of copyright protection, which would restrict the local population’s access to the source code, and, in turn, prevent the dissemination of knowledge for the purposes of the Copyright law and the Constitution, or alternatively, they can enable copyright protection to allow access to the source code for the public, but at the same time destroying the value of the software and perhaps harming local business.

It is submitted that a Confucian culture that does not intend to serve the interests of private companies<sup>179</sup> would allow the latter scenario to prevail as the local leader will be more attentive in protecting the local interest of shared knowledge and the various economic benefits conferred by it. Once again, it is contended that the GPL and other open source licenses are more compatible with the framework of copyright protection in the PRC than the protection of proprietary software despite the underperformances of the system owing to the decentralisation of government.

### ***TRIPS - Article 7***

Under Article 7 of the TRIPS Agreement, each state is to implement their IPR protection “[...] in a manner conducive to social and economic welfare, and to a balance of rights and obligations.”<sup>180</sup> In the case of the PRC, it is submitted that PRC policymakers should, when drafting the new Copyright Law,<sup>181</sup> take into account the suitability of open source to their “social and economic welfare.” The policymakers can take advantage of this opportunity to render their laws to heavily promote open source software.

### ***Cultural Applicability***

Since implementing the “open door policy” the PRC has made policy concessions to embrace IP, which is arguably a Western capitalist venture.<sup>182</sup> As has been explored, these concessions have led to friction between the Western concept of private ownership of “inventions of the mind” and the Chinese culture of serving the “people and socialism.”

One of the main conflicts lies between the concept of copyright, and the function of Marxism that had a great impact on the modern Chinese legal framework. As Cheng comments, “The acquisition of private property was largely forbidden in China because traditional Marxism considered the renunciation of private property essential to economic growth.”<sup>183</sup>

In other words, production of goods should be undertaken in a spirit of cooperation and co-ownership, with the resulting creation being a “social product”.<sup>184</sup> The philosophy behind the GPL and the open source movement conform to this ideal as the source code licensed by the GPL allows users to modify and collaborate on software projects, consequently creating “social software.” As the creator of the GPL, Richard Stallman states: “Cooperation is more important

179 Suttmier, Yao, ‘China’s IP Transition: Rethinking Intellectual Property Rights in a Rising China’ (July 2011) NBR Special Report #29, at 17

180 TRIPS Article 7

181 Abrams, Stan, ‘China Copyright Infringement: It Could be Worse’ China Hearsay.com, available at <http://www.chinahearsay.com/china-copyright-infringement-it-could-be-worse/> accessed 5<sup>th</sup> August 2012

182 Hesse, Carla, ‘The rise of intellectual property, 700 B.C. – A.D. 2000: an idea in the balance’ (2002) Daedalus (Spring 2002), 6-45

183 Cheng, Julia, ‘China’s Copyright System: Rising to the Spirit of TRIPS Requires an Internal Focus and WTO Membership’ (1999) Fordham Law Journal, 1941, at 1981

184 Encyclopaedia Britannica, “socialism”, available at <http://www.britannica.com/EBchecked/topic/551569/socialism> accessed 14<sup>th</sup> August 2012

than copyright.”<sup>185</sup>

It is submitted that policymakers in the PRC could therefore draft the new Copyright Law in a way that bears a heavy preference to open source licenses. In this respect, the law can still satisfy the minimum requirements set out by TRIPS but at the same time the protection can conform to Marxist ideology through the GPL.

### ***Economic Implications***

Incorporating open source into the new Copyright Law would also bring advantages for the Chinese worker. The alternative incentive of engaging with the software development community could in turn offer skills and training not normally available to Chinese citizens. Widespread participation in open source projects could lead to a new wave of innovation in the PRC. As Patel states, “[...] a generation of Chinese software engineers leaving their mark on the software that literally runs the Internet would be a major step up on the world stage.”<sup>186</sup> This in turn could lead to foreign multinationals outsourcing work to Chinese development companies, and improve trade relationships between the PRC and other states.

Also, under Article 7 of the Regulations on Computer Software Protection, the copyright owner has to pay a registration fee to obtain a “preliminary proof” of registration.<sup>187</sup> With the GPL, there is no such fee or registration as the license itself is embedded in the source code. This lowers barriers for users to create open source software in the PRC.

Furthermore, legislation that places an emphasis on the benefits of open source software in the PRC could allow more people to learn about software programming. The development of free, quality software products could mitigate the reliance on pirated products in China, and could allow developers to create new software that caters for the needs of local communities.

### **Conclusion**

It has been explained that while the IP framework of the PRC has developed at a significant pace since the 1980's, the culture of the PRC and a heavy reliance on piracy as means of support for poor communities are among the largest contributors towards the inadequate implementation of copyright protection of proprietary software. As a result, without a fundamental renovation of social values, it is likely that the PRC will never successfully implement copyright protection in a way that will address the high amount of copyright infringement that takes place.

A general consensus is that while open source licenses do not command the same legal rights as the conventional copyright does, it does attach the licensee to conditions that would signify copyright infringement if violated. In the case of the PRC, open source licensing usurps copyright protection in a very unique way, and confirms the flexibility of the IP system.<sup>188</sup> This flexibility could allow Chinese policymakers to go a long way in circumventing the copyright enforcement issue in the PRC, whilst maintaining adequate copyright protection for the purposes of the TRIPS Agreement.

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185 Stallman, Richard, ‘Why Software Should Not Have Owners’ in *Free Software Free Society: Selected Essays of Richard M. Stallman*, 2nd Edition, Free Software Foundation (October 2002), p 37-43

186 Patel, Nilay, ‘Open Source and China: Inverting Copyright?’ (2006) 23 (4) *Wiscon. Int. L. J.*, 781 at 804

187 Regulations on Computer Software Protection, Article 7

188 McGowan, ‘Legal Implications of Open-Source Software’ (2001) *U. Ill. L. Rev.* 241, at 303

If policy reasons for copyright law were based on cultural understandings rather than economics, then the IP situation in the PRC would appear substantially more pacified. Open source licensing expressively alters the intended use of copyright protection and aligns its application with the cultural understandings of the PRC. A copyright policy that is preferential towards open source would advance the Chinese conformity to TRIPS' minimum protection requirements, without compromising any unique Chinese ideals. This, in turn, could allow economic benefits to develop and prosper, such as improved business relations and a new method of sharing knowledge and works.

As the Chinese government is already implementing rules to have Red Flag Linux installed on internet café computers in certain cities,<sup>189</sup> it is clear that the PRC has a vested interest in open source software. Laws that allow the use of open source software to be widespread in the PRC could, in time, run piracy out of business with new, better, free software. They could use this opportunity to address some issues faced by licenses such as the GPL by, for example, redefining fair use and ensuring conformity among the judicial application of the principle, and providing guidelines for judges when presiding over a case concerning downstream liability.

It is recommended that policymakers of the PRC consider the vast benefits of open source software and its licensing, and take advantage of the timing of the new Copyright Law. As Patel states, "An IPR regime based around copyright as the basis for open source instead of economic incentive could very well take China's WTO compliance from 'uneven' to 'revolutionary'."<sup>190</sup>

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189 Johnson, Bobbie, 'China: We'll keep Red Flag flying here' The Guardian, 4<sup>th</sup> December 2008, available at <http://www.guardian.co.uk/technology/blog/2008/dec/04/linux-microsoft> accessed 9<sup>th</sup> August 2012

190 Patel, Nilay, 'Open Source and China: Inverting Copyright?' (2006) 23 (4) Wiscon. Int. L. J., 781 at 805



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