

The trial of the TRIPS Agreement in the Chinese IP law

LE TEST DE L'ACCORD TRIPS DANS LA LOI CHINOISE DE PROPRIETE INTELLECTUELLE

Guo Wei¹

Abstract: Recently, intellectual property right has played an important role in the world. How can this right be protected properly and people get interests from it as much as possible? This has become a hot topic currently.

As one of the agreement of WTO, the TRIPS is a good answer for that question. Its protection to intellectual property right reaches an unprecedented height. However executing it in China exist problems. This dissertation shows, why those problems come, by explaining the TRIPS Agreement and the Chinese IP law and analyses their provisions to find differences and similarities between them. After that, from those differences, defects of the Chinese IP law are concluded. Some advices are suggested for amending relative laws, which is very necessary for protecting IP right in China. The dissertation point out defects of the Chinese IP law and then give some advices of amendment to perfect it. The aim is to propose a solution that link up the Chinese IP law and the TRIPS Agreement.

Key words: the TRIPS Agreement, Chinese IP Law, intellectual property right, difference, defect, amendment

Resumé : Récemment les droits relatifs à la propriété intellectuelle ont joué un grand rôle à travers le monde. Comment est-il possible de protéger efficacement ce droit et être sur que ce soit dans le meilleur intérêt possible. Ceci est actuellement devenu un sujet passionnant. En tant qu'un des accords de l'OMC (Organisation Mondiale du Commerce) l'ADPIC est un élément de réponse à cette question.. La protection de ce dernier en terme de droit de propriété intellectuelle à atteint un niveau sans précédent. Cependant l'application de ce droit en Chine soulève certains problèmes. Cet essai illustre les causes de l'apparition de ces problèmes en expliquant l'accord ADPIC et la loi chinoise de propriété intellectuelle, et analyse aussi les similarités et différences entre les deux. Partant de ces différences, les imperfections de la loi chinoise sont énoncées. Des suggestions sont par la suite soumises pour ajouter des amendements aux lois concernées ce qui est nécessaire pour protéger le droit à la propriété intellectuelle en Chine . Cet essai met à jour les défauts de la loi de propriété intellectuelle chinoise et propose des pistes d'amélioration. L'objectif de ce travail est de parvenir à une solution qui combinerait la loi de propriété intellectuelle chinoise et l'accord ADPIC.

ADPIC =aspects des droits de propriété intellectuelle qui touchent au commerce

Mots clés: ADPIC, loi de propriété intellectuelle chinoise, droit de propriété intellectuelle, différence, défauts, amendement

1. INTRODUCTION

1.1 Background

Recently, China has developed rapidly in the reorganised global economy. Pascal Lamy, who is the director general of the World Trade Organisation, said

that China will play an important role in the World Trade Organisation (WTO) as one of its leaders. He also figured that in the 21st century, China would become "an elephant" in the international trade, similar in status to the USA or Europe in the WTO. However, China took more than fifteen years to get into the WTO. From 1986 China applied to renew member status of the contracting party in the GATT and many endeavors

¹ University of Geosciences (Beijing), China.

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were made by the state, but hard and fast conditions blocked the way. From 1995 to 1999, China had put in for membership of the WTO and there were many communications. Constant refusal did not deter the endeavour to join the WTO; ultimately, China was granted membership of this international organisation in 2001. During course of tough negotiations with other members, there were compromises and many changes in law. However the big improvement in the economy cannot be ignored after joining the WTO.

China joined the WTO with extensive and ambitious commitments. After only a few years, China is overtaking Japan as the world's third largest merchandise trader. The Chinese economy has become not only bigger and stronger but it is also more integrated with the rest of the world.²

The WTO has brought many opportunities for China as well as many challenges. A very important challenge is that some Chinese law concerned with international trade, has to integrate with the relative agreements in the WTO. Those changes in Chinese law concern tax breaks, the commercial law amendment and the Chinese IP (Intellectual Property) law constitution.³ Chinese IP law had been constituted while China was applying for membership of the WTO, so that IP law system in China has been affected by the international IP agreement of the WTO.

The **Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS)** is an international treaty administered by the World Trade Organization (WTO) which sets down minimum standards for most forms of intellectual property regulation within all member countries of the World Trade Organization. It was negotiated at the end of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) treaty in 1994. In the TRIPS was the first stage in the global recognition of an investment morality that sees knowledge as a private goods, rather than public goods. The intellectual property standards contained in the TRIPS Agreement, obligatory on all members of the WTO, would help them to enforce that morality around the world.⁴

1.2 Introduction of this dissertation

Since China joined the WTO, the TRIPS Agreement has become an important treaty which should be complied with by intellectual property regime of China. However, currently there are many differences between these two legal regimes in both lawmaking and performance of law. Those differences make cases difficult to be judged

and disputes difficult to be settled.

This dissertation will discuss the differences between the Chinese IP law and the TRIPS Agreement, in order to perfect the Chinese IP law. The aim is to propose a solution that links up the Chinese IP law and the TRIPS Agreement, in order to make the Chinese IP law better adapted to the international situation, and to decrease conflicts between the Chinese IP law and the TRIPS Agreement.

Firstly the TRIPS Agreement and the Chinese IP law will be analysed thoroughly, in order to discuss their differences in their provisions in detail. So in chapter one, the TRIPS Agreement will be analysed from many aspects. In this chapter, the background of treaty will be introduced, including the time and place of this treaty, the memberships of this treaty, and the international environment of this treaty. The treaty's requirements will be set out, such as the high standard of protection of intellectual property and the perfect IP law system. Those requirements are important conditions when countries really want to execute the TRIPS Agreement. Specially, there is a veiled condition which is not mentioned in the agreement directly, but showed by enforcement of the TRIPS Agreement. It is the requirement of strong economy. This dissertation is going to explain that the strong economy ensures that the TRIPS Agreement can be executed in the country. Recently, the TRIPS Agreement has revealed some problems, two of which will be discussed. Those problems will be showed as a big issue between developed countries and developing countries, because according to their interests, these countries have different standards and expectations in intellectual property regime.⁵ Moreover, in the last part of chapter one, it will be showed that the execution of the TRIPS Agreement has improved in China after China joined the WTO from two important points.

Chapter two will provide a detailed analysis of Chinese IP law. Firstly, Chinese phylogeny of intellectual property law will be given in a general form. In the same part, the question will be answered as to why the Chinese IP right was later than other countries to accept the notion of private property. This issue is bound up with chinese traditional culture. The main part of chapter two will analyse three Chinese regulations of intellectual property right in detail; these are the Patent Law of China, Trademark Law of China and Copyright Law of China, and compare the TRIPS Agreement with these three regulations of intellectual property right. Differences will be showed from specific provisions in practice of law. This dissertation will analyse factors of those provisions, such as the object or subject of rules, find differences between specific Chinese IP rules and the international treaty, and analyse the effect of those differences for protecting each different Chinese IP right.

² For details, see: *Background Note: China—trade*, available from <http://www.state.gov/r/pa/ei/bgn/18902.htm>

³ 'China has embraced world since WTO entry'[NEWS], *China Daily*, 13 Dec, 2005.

⁴ Correa M.C. *Intellectual Property Rights, the WTO and Developing Countries: the TRIPS Agreement and Policy Options*, Chapter one, 1999

⁵ For details Drahos P. *Developing Countries and International Intellectual Property Standard-setting*,

Defects of Chinese IP law will be concluded in chapter three. In this chapter, those defects of Chinese IP law will be divided in two parts; one is defects of lawmaking and one is defects of law practice. In the lawmaking part, Patent Law of China, Trademark Law of China and Copyright law of China all have defects respectively. Due to the Chinese legal system's imperfections, the next amendment is necessary.

In Chapter four, the TRIPS Agreement will be analysed, discussing three common problems in the law theory; these are the principle of exhaustion, the principle of liability without fault and the principle of imminent infringement. As in many other countries those problems affect the legal system. To overcome those problems, the traditional principles of civil law in the Chinese legal system are unsuitable. This question needs to be researched.

These key points will be discussed in the following chapters.

2. ANALYSIS OF THE TRIPS AGREEMENT

2.1 Introduction of the TRIPS Agreement

Agreement on Trade Related Aspects of Intellectual Property Rights abbreviates the TRIPS Agreement is the most important fruit from the Uruguay Round of Multilateral Trade Negotiations. During the course of an interview in 1994 with a senior US trade negotiator, who remarked to people that 'probably less than 50 people were responsible for TRIPS'. The TRIPS Agreement is the most important agreement on intellectual property of the 20th century. On 15 April 1994, this agreement was signed by more than a hundred ministers signed on behalf of their nations in the splendid Salle Royale of the Palais des Congres in Marrakesh.⁶

There are in total 28 agreements that make up the Final Act of the Uruguay Round of Multilateral Trade Negotiations, the TRIPS is one of them. In 1986, the negotiations had begun in Punta Del Este. Another of those agreements established the WTO, and it is the WTO that administers the TRIPS Agreement. This treaty specially deals with: copyright and related rights, such as rights of performers, producers of sound recordings and broadcasting organisations; geographical indications, including appellations of origin; industrial designs; integrated circuit layout-designs; patents, including the protection of new varieties of plants; trademarks; trade dress; and undisclosed or confidential information, including trade secrets and test data. Remedies, procedures, and dispute

resolution procedures are also specified for enforcement by the TRIPS Agreement. It effectively globalizes the set of intellectual property principles it contains, because nowadays most states of the world are members of, or are seeking membership of the WTO. The TRIPS has an essential harmonizing impact on intellectual property regulation because it sets, in some cases, quite detailed standards of intellectual property law and it also obliges states to provide effective enforcement procedures against the infringement of intellectual property right. The TRIPS Agreement brings a new way to protect intellectual property which is different with other international conventions. It empowers the dispute settlement body of the WTO to be the strong instrument for protecting intellectual property. But the traditional way to protect the intellectual property, which other international conventions usually use, is a self-discipline. A strong mechanism was missing in the procedure of enforcement although the International Court of Justice does enforce sanctions. International trade is concerned with intellectual property in the TRIPS Agreement, if the protection of the intellectual property in one membership is not up to standard, all members would retaliate in trade: this is also another important difference between the TRIPS Agreement and other international conventions.⁷

The TRIPS Agreement provides that the WTO member countries must comply with the substantive obligations of the main conventions of WIPO — the Paris Convention⁸ on industrial property, and the Berne Convention⁹ on copyright (in their most recent versions).¹⁰ With the exception of the provisions of the Berne Convention on moral rights, all the substantive provisions of these conventions are incorporated by reference. They therefore become obligations for WTO member countries under the TRIPS Agreement — they have to apply these main provisions, and apply them to the individuals and companies of all other WTO members. The TRIPS Agreement also introduces additional obligations in areas which were not addressed in these conventions, or were thought not to be sufficiently addressed in them. Sometimes this treaty can be described as a "Berne and Paris-plus" Agreement.¹¹

The keystone of the TRIPS Agreement is the adoption of the principles that are central to the WTO in the regime of intellectual property: national treatment; most-favoured nation treatment (MFN); and

9. Drahos P. & Braithwaite J. *Information Feudalism: who owns the knowledge economy?* Chapter one, 2002

⁷ Drahos P. & Braithwaite J. *Information Feudalism: who owns the knowledge economy?* Chapter one, 2002

⁸ Paris Convention, the text in http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html

⁹ Berne Convention, the text in http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html

¹⁰ *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Article 1(3)

¹¹ Detail information is available from http://en.wikipedia.org/wiki/Agreement_on_Trade-Related_Aspects_of_Intellectual_Property_Rights

reciprocity.¹² Though they do not dissolve specific agreements within conventions under the auspices of WIPO, in the main these principles will be effective across the various elements of the TRIPS Agreement (Verma 1996)¹³. National treatment requires signatories to accord the same rights and protection to both nationals and non-nationals in their jurisdiction. Though there are some exceptions these are only allowable 'where such exceptions are necessary to secure compliance with national laws and regulations which are not inconsistent with the TRIPS Agreement itself (Blakeney 1996)¹⁴. The TRIPS Agreement explicitly extends national treatment to cover performers, producers of 'phonograms' and broadcasting organisations, where such treatment was ambiguous under the WIPO supervised conventions. As with the WTO overall, the application of most-favoured nation (MFN) status to all members requires that 'any advantage, favour, privilege or immunity granted by a member to the nationals of any other country be accorded immediately and unconditionally to the nationals of all other members' (GATT 1994)¹⁵. While there are again several exceptions linked to the previous conventions which some members of the WTO have acceded to, in the main these do not compromise this requirement. Reciprocity as a principle has a long history within international agreements and its formal inclusion in the TRIPS Agreement does little in itself to change the intellectual property regime. Taken altogether, MFN treatment is the key tool for expanding trade agreements and is therefore in one sense the most important innovative aspect of the TRIPS Agreement.¹⁶

2.2 Requirements of the TRIPS Agreement.

The TRIPS Agreement provides the benchmark for many countries' IP law. The WTO requires its members to review their IP law and make their inland law accord with the TRIPS in a given period of time. The new members have to finish this requirement before joining the organisation. The preamble of the TRIPS is said to reduce distortions and impediments to international trade, and take into account the need to promote effective and adequate protection of intellectual property rights, and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade. (Macmillan F. P28)¹⁷ So according to this preamble, the

conclusion can be made that the TRIPS Agreement is powerful and effective; its operation is great, its minimum standard is higher than other agreements on intellectual property. It imposes many requirements on members of the WTO.

2.2.1 High standard of protection in intellectual property

The TRIPS requires member states to provide strong protection for intellectual property rights, it is not solely about reform in developing nations. Several developed economies have changed their intellectual property laws in order to comply with the TRIPS. For example, the United States while retaining its unique system of awarding patents to applicants who demonstrate they were the first to invent a technology, now ensures that the term of patent protection is 20 years from the date of filing.¹⁸ Other members of WTO award patents to the first to file successful applications. Every member, for example, has to have a copyright law that protects computer programs as a literary work, as well as a patent law that does not exclude micro-organisms and microbiological processes from patentability.

Under the TRIPS Agreement, copyright terms must extend to 50 years after the death of the author, although films and photographs are only required to have fixed 50 and 25 year terms, respectively.¹⁹ Copyright must be granted automatically, and not based upon any "formality", such as registrations or systems of renewal. Computer programs must be regarded as "literary works" under copyright law and receive the same terms of protection.²⁰ National exceptions to copyright, such as "fair use" in the United States, must be tightly constrained. Patents must be granted in all "fields of technology," although exceptions for certain public interests are allowed²¹. Exceptions to patent law must be limited almost as strictly as those to copyright law. In each state, intellectual property laws may not offer any benefits to local citizens which are not available to citizens of other TRIPS signatories by the principles of national treatment, though there are some certain limited exceptions.²²

In order to comply with the TRIPS Agreement, many national IP laws have made corresponding changes. Ireland has failed to adopt the directive of European Union on rental rights, including rental rights for films, which comply with TRIPS.²³ The United

¹² *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Article 3, 4.

¹³ Verma, S.K. TRIPS-Development and Transfer of Technology, *International Journal of Industrial Property and Copyright Law* 27, 3: 331-364, 1996

¹⁴ Blakeney, M. 'The Impact of the TRIPS Agreement in the Asia Pacific Region', *European Intellectual Property Review* 10: 544-554, 1996, Available on Westlaw

¹⁵ *General Agreement on Tariffs and Trade*, 1994, available from http://www.wto.org/english/docs_e/gattdocs_e.htm

¹⁶ May C. *A Global Political Economy of Intellectual Property Rights*, Chapter Three (2000)

¹⁷ Macmillan F. *WTO and the Environment*, Chapter Four

(2001)

¹⁸ Maskus K. E. *Intellectual Property Rights in the Global Economy*, Chapter 6, 2000

¹⁹ *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Article 12

²⁰ *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Article 10(1)

²¹ *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Article 27(2). (3)

²² *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Article 3, 5(2)

²³ Rental and Lending Directive, 92/100/EEC

States lodged a dispute at the WTO in May 1997, which is still pending in some aspects. So to a significant degree the agreement updates protection even among those nations with strong prior regimes. In many developing countries the TRIPS requirements place significant demands for reform of the intellectual property rights regimes. Primo Braga (1996) compiled some useful information: as of 1994, 25 developing nations (of 98 GATT contracting parties in this category) excluded pharmaceutical products from patent protection, furthermore, they failed to protect chemical products in 13 of those countries. There were 56 countries which provided terms of protection for patents that were shorter than the 20 years required by TRIPS in the full sample. Few developing countries were members of UPOV²⁴ and only six provided sui generis protection for plant varieties, although patent protection for plant strains was available in principle in a number of nations. There were only 36 developing countries which provided copyright protection for software as of 1994. Sherwood (1995) claimed that 8 of the 12 Latin American nations it studied would require changes in their compulsory licensing laws, as indeed would nearly any country that has adopted compulsory licenses before the TRIPS was enforced. These figures point to the need for significant legal and institutional change in a broad sweep of the developing world.²⁵

2.2.2 The strong economy

There is a veiled condition which although the TRIPS Agreement has not mentioned it directly, it cannot be ignored for enforcing the TRIPS Agreement, especially in many developing countries or least developed countries. How important of this veiled requirement is showed very clearly. If a country does not have a strong economy to support the legal system, it will not have enough power to execute the TRIPS. The perfect system of protecting IP right by the TRIPS Agreement will only be a castle in the air for such countries.²⁶

From articles of the TRIPS Agreement, the requirement of strong economy also can be deduced. The obligations under the TRIPS apply equally to all member states, however developing countries were allowed extra time to implement the applicable changes to their national laws, in two tiers of transition according to their level of development. The transition period for developing countries expired in 2005 (e.g. India, China). The transition period for least developed countries was extended to 2016, and could be extended beyond that (e.g. Rwanda, Gambia).²⁷ Why do those developing and least developed countries have this

special treatment? The first reason is that there must be a strong economy to attain the standard of the TRIPS Agreement. It will take years for developing countries to actualize strong commitments to effective administration and enforcement of intellectual property rights. The administrative mechanisms in many poor countries remain skeletal. The costs of establishing a system adequate to handling even counterfeiting cases, let alone complex conflicts over patent infringement can be daunting. Institutional infrastructure have significant fixed costs in the form of examination and registration offices and equipment, drafting administrative procedures, and training examiners, judges, attorneys and police and customs authorities. There are further recurrent costs for training, hiring new personnel, and upgrading intellectual property rights systems-costs that will rise as intellectual property rights come into greater use.

UNCTAD (1996)²⁸ provides some rough estimates of the administrative costs of complying with TRIPS in various developing countries. In Chile, additional fixed costs of this upgrade were estimated at \$718,000 and annual recurrent costs at \$837,000. An Egyptian expert thought fixed costs in Egypt would be perhaps \$800,000 with additional annual training costs of around \$1 million. Bangladesh anticipated one-time costs of administrating the TRIPS compliance (drafting legislation) of \$250,000 and over \$1.1 million in annual costs for judicial work, equipment, and enforcement efforts. These estimates do not include training costs. In view of those huge costs a strong economy is essential for implementing the TRIPS.²⁹

2.3 Likely implication of the TRIPS Agreement

The constitution of the TRIPS Agreement has generated a big discussion between developed countries and developing countries. Developed Countries, especially the US, Japan, European Community and Switzerland, want effective protection on the minimum standard for intellectual property rights. The purpose is to avoid competition with the infant enterprise in developing countries and to maintain the status of long-established monopoly in developed countries. They advised using the Dispute Settlement Body for enforced protection and removing barriers which they think hinder the development of trade. Especially, the standards in the TRIPS will profoundly affect the ownership of the 21st century's two great technologies - digital technology and biotechnology. Copyright, patents and protection for layout-designs are all used to protect digital technology, whereas patents and trade secrets are the

²⁴ 'UPOV-- The International Union for the Protection of New Varieties of Plants', find more details in <http://www.upov.int/>

²⁵ Maskus K.E. *Intellectual Property Rights in the Global Economy*, Chapter 6, 2000

²⁶ Maskus K.E. *Intellectual Property Rights in the Global Economy*, Chapter 6, 2000

²⁷ *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Article 65(4), 66(1)

²⁸ UNCTAD-- United Nations Conference on Trade and Development

²⁹ Finger and Schuler, *for a broader view of the costs of implementing the Uruguay Round in the least-developed countries*, 1999.

principal means by which biotechnological and trade secrets are the principal means by which biotechnological knowledge is being enclosed. Those new technologies will bring more benefits for the countries which have already advanced technology, such as the US. Everyone knows that the US owns the great resource of new technologies. Its high technology multinationals greeted the signing of TRIPS with considerable satisfaction, because of the great benefit at hand.³⁰

On the other hand, developing countries are concerned that protecting intellectual property rights would form obstacles to legal trade. Even though some developing countries can sometimes also benefit from the TRIPS Agreement, great cost is incurred every time and every where in most developing countries.³¹ In India, after the signing of TRIPS, hundreds of thousands of farmers gathered to protest about the intrusion of patents on the seeds of their agricultural future. The Indian generics industry warned of dramatic price increases in essential medicines that would follow from the obligation in the TRIPS to grant 20-year patents on pharmaceutical products. Nevertheless, generally, the cost is much bigger than the earning to developing countries at least in the following 50 years. Strong intellectual property rights advantages the monopoly from transnational corporations; the price of food and medicine increases, thus disadvantaging the public weal.³² In addition, nowadays many objects of intellectual property rights have not been properly protected; many countries have not got an agreement on the theory and practice. In this situation, it is unfair to require developing countries to adopt high standards of protection, because strong protection costs a lot in developing countries. Developed countries were insisting on an overly-narrow reading of TRIPS by developing countries in 2001. A WTO statement clarifies the scope of TRIPS, stating for example that TRIPS can and should be interpreted in light of the goal "to promote access to medicines for all."³³ This is a result in the Doha Declaration.

Another one of the chief implications of the TRIPS Agreement is an expansion of corporate control of important knowledge resources. This is at the cost of the public or social availability of such knowledge; knowledge as property is now considered to be scarce and exclusive under the terms of the agreement.³⁴ Thus,

³⁰ He F. *The Protection of Intellectual Property Rights Bring Effects to Developing Countries* [J], 2003

³¹ Zheng S.C. *Differences Between Current Chinese IP law and the TRIPS Agreement* [J], 2005

³² Drahos P. & Braithwaite J. *Information Feudalism: who owns the knowledge economy?* Chapter 4, 2002

³³ More details are available from: http://en.wikipedia.org/wiki/Agreement_on_Trade-Related_Aspects_of_Intellectual_Property_Rights

³⁴ M. Reber *The influence of intellectual property rights on international business*, 2003, available to be downloaded from

<http://www.diplom.de/db/diplomarbeiten7957.pdf#search=%>

the balance between the regime of private rights and that of publicly available knowledge is where the impact of the TRIPS Agreement is most significant. Though this underlies many of the specific legal changes outlined above, the key part of the agreement in this regard is the Article 8 which sets out the provisions for the protection of the public interest in the area of intellectual property as part of the principles of the agreement. 'Members may, in formulating or amending their national laws and regulations, adopt measures necessary to protect public health and nutrition, and to promote the public interest in sectors of vital importance to their socio-economic and technological development, provided that such measures are consistent with the provisions of this Agreement.'³⁵ This shows clearly that what public rights or needs that are recognised can only be accorded legal significance if they are consistent with the TRIPS Agreement's overall provisions. But actually the bulk of the text of the agreement extends and expands the rights of private owners of intellectual property rights. Therefore, this invocation of the need to recognise the importance of a public regime is of less real importance or significance than might be immediately presumed. The net effect of the TRIPS Agreement is actually to critically reduce the area of public knowledge, especially in areas where new technologies and processes are important or even vital to socio-economic development.

There is another problem of implication which is about technical transfer. Many people think that the TRIPS Agreement has not played a role in promoting development of technology for developing countries. There are big differences in economies, living standard and technology development between developed countries and developing countries; those differences show the TRIPS Agreement favours developed countries in some aspects. Many governments of developing countries have detected that this Agreement has not really been used to promote the transfer of development of technology to their countries. Analysing several main provisions, the conclusion can be made that the effect of TRIPS is to bring benefits to those who hold more patents, copyrights, undisclosed information and so on. These things are mostly held by rich countries. The benefits inevitably work against the interests of developing countries. This is why developing countries did not want to conclude this treaty. The enforcement of the TRIPS Agreement undoubtedly has brought great benefit to developed

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³⁵ *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Article 8

countries, but not that much benefit to developing countries in the short term. So after signing this treaty, how to adapt the TRIPS to avoid expense and gain advantage is the essential question for developing countries.³⁶

2.4 Enforcement of the TRIPS Agreement in China

The effective enforcement of intellectual property rights is a challenge faced by all of our governments. The increase in both the quality and quantity of counterfeits and pirated copies combined with increasing involvement of organized criminal syndicates presents a threat to rights holders and society.³⁷ Given the importance of this issue, how they can enforce the TRIPS Agreement in their regions is the significant question for all of WTO's members.

In 2001 China joined the WTO; the government has to accept all of agreements which are included by the WTO. The TRIPS Agreement is one of the main treaties, so abiding by this treaty has become an obligation for China. The Chinese government must face the challenge of how to better enforce the TRIPS Agreement. The real situation now is that China has made much progress but there are still problems. Adapting the national laws to the TRIPS Agreement has engendered a lot of work on the system of IP laws.

2.4.1 Perfecting the current system of intellectual property

Since the TRIPS Agreement China has received notice to bring the national legal system more in line with international practice. The Patent Law and the Trademark Law were amended; the Copyright Law and other regulations which connect with intellectual property are being made or amended. So, recently Chinese regulations have become quite similar to the TRIPS Agreement with regard to protection in the intellectual property regime. However, some significant legislation still differs from the TRIPS Agreement; there are gaps where extra work needs to be done. For example, in the TRIPS, 'rental right' has been used as one of the general rights for the copyright owner of softer ware and films. But there is not this kind of right in Chinese Copyright Law.

2.4.2 Establishing judicial review

International protection of intellectual property in the

WTO regulates in two ways, one is by administrative decision, and the other is by judicial review. In China, administrative decision has been emphasized more than judicial review, because the administration is more powerful. It is a Chinese characteristic to use administrative protection more than the judicial review in Copyright Law, Trademark Law and Patent Law.³⁸ So there was no judicial review before the TRIPS Agreement extended to China. The Article 41 (4) of TRIPS Agreement provides that 'Parties to a proceeding shall have an opportunity for review of final administrative decisions by a judicial authority and, subject to jurisdictional provisions in a Member's law concerning the importance of a case, 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.'³⁹ This is sufficient to show that judicial review is a very important tool in the protective process, and members of WTO have to use it to ensure consistency with TRIPS. So, on the one hand, China has kept the quondam principle that uses administrative decisions to solve cases; on the other hand, the system of judicial review has been introduced to be used with administrative decisions to protect intellectual property, as the TRIPS Agreement prescribes. The system of judicial review is shown in some new changes in Chinese legislation. Article 43 in new Patent Law shows that

'The Patent Office shall set up a Patent Reexamination Board. Where any party is not satisfied with the decision of the Patent Office rejecting the application, or the decision of the Patent Office revoking or upholding the patent right, such party may, within three months from the date of receipt of the notification, request the Patent Reexamination Board to make a reexamination. The Patent Reexamination Board shall, after reexamination, make a decision and notify the applicant, the patentee or the person who made the request for revocation of the patent right. Where the applicant for a patent for invention, the patentee of an invention or the person who made the request for revocation of the patent right for invention is not satisfied with the decision of the Patent Reexamination Board, he or it may, within three months from the date of receipt of the notification, institute legal proceedings in the people's court.'⁴⁰

From this Article, it can be seen that judicial review has already functioned. And in the new Copyright Law, the Article 50 provides

'Any party who is not satisfied with an administrative penalty may institute proceedings in a

³⁶ Author's essay, "The TRIPS Agreement does little to promote the development of technology transfer to Developing Countries. On the contrary its provisions actively discourage such a trade." Discuss.

³⁷ U.S. Government Email on Proposed EU Directive on Measures and Procedures to Ensure Enforcement of Intellectual Property Rights, 2003, http://www.ipjustice.org/CODE/usgovt_EUIPRE.html

³⁸ Zhou Z. *Complete Body of Chinese Intellectual Property laws*, Chapter 8, 1992

³⁹ *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Article 41(4)

⁴⁰ Patent Law of the People's Republic of China, <http://law.97i.net/html/1984/75810.htm>

people's court within three months from receipt of the written decision of the administrative penalty. If the party neither institutes proceedings nor executes the decision within the time limit, the copyright administration department may apply to a people's court for execution.⁴¹

Moreover, the Article 43 in the new Trademark Law also has incorporated this kind of regulation.⁴² Those Articles show definitely that judicial review has been established in China nowadays.

3. ANALYSIS OF THE CHINESE IP LAW

3.1 Introduction to the Chinese IP law

Intellectual property is an exclusive right which shows personal intellectual property. This is a private right, a property right. In the 21st century, the system of intellectual property has played an important role in the world. More and more cases have showed that if somebody controls intellectual property, he could have an advantage in marketing. The concept of intellectual property has a history of 300 years in those developed western countries, such as America, Germany and Switzerland.⁴³ A system to implement this has already developed. However, scientific theory of intellectual property only appeared from 1979 in China.⁴⁴ There is a big gap between the 20-year-historical development and the 300-year; compared with those western countries, the system of safeguarding intellectual property in China is like a new baby. There are reasons why the Chinese system of intellectual property is later than others.

The first reason is that as everyone knows, China had been ruled autocratically by emperors for several thousand years. The ruling class cut the throat of free thinkers in order to consolidate political power. So long as people's thinking was controlled by one person, it was impossible to express personal innovative ideas. Moreover, there was no right for intellectual property. Secondly Taoism⁴⁵ and Confucianism⁴⁶ were

considered as the basic rules for Chinese people during these thousands of years. These philosophies taught people that they only have obligation for their country; they do not have a right to personal request. Furthermore, because of this culture, people today still think that asking for a right is shameful. Another point is that Chinese traditional culture emphasizes the non inheritability of intellectual property, so the personal intellectual property does not exist. Thus the delays in developing the intellectual property system have historical reasons.⁴⁷

Since the 1980s, because of the reform and open policy, regulations about intellectual property have been devised gradually in China. China acceded to the Paris Convention for the Protection of Industrial Property on 14 November 1984 and became an official member on 19 March 1985. It also acceded to the Madrid Agreement for the International Registration of Trademarks in June 1989. In January 1992, the People's Republic of China entered into a Memorandum of Understanding with the United States government to provide copyright protection for all American 'works' and for other foreign works. Several bilateral negotiations have been conducted between the two governments. At some points, trade sanctions were threatened by the two governments over intellectual property right issues. At the conclusion of negotiations in 1995, the Sino-US Agreement on Intellectual Property Rights was signed. In June 1996, the two governments entered into another agreement protecting American intellectual property in China.⁴⁸

China also constituted many regulations, rules, measures and policies for protecting intellectual property right.⁴⁹ The legal framework for protecting intellectual property in the People's Republic of China is built on three national laws passed by the National People's Congress: the Patent Law, the Trademark Law and the Copyright Law. A great number of regulations, rules, measures and policies have been made by the NPC (National People's Congress) Standing Committee, the State Council and various ministries, bureaus and commissions. The circulars, opinions and notices of the Supreme People's Court also form part of the legal framework.⁵⁰

In order to fit in with those international treaties, the system of Chinese IP law has been amended very often.

⁴¹ Copyright Law of the People's Republic of China, <http://law.97i.net/html/1990/75664.htm>

⁴² Trademark Law of the People's Republic of China, can be download from <http://ott.sibs.ac.cn/doc/019-e.doc>

⁴³ More details is available from article: *A history of Copyright*, <http://www.intellectual-property.gov.uk/resources/copyright/history.htm>

⁴⁴ More details is available from news: *protection of Intellectual property in China*, 2005 http://news.xinhuanet.com/newmedia/2005-04/20/content_2852338.htm

⁴⁵ Taoism-- A Chinese folk religion. More information is available from <http://en.wikipedia.org/wiki/Taoist>

⁴⁶ Confucianism --A Chinese ethical and philosophical system originally developed from the teachings of the early Chinese sage Confucius. More information is available from <http://en.wikipedia.org/wiki/Confucianism>

⁴⁷ Kong X.J. *Regulation of WTO and Chinese IP Law*, Chapter 2, 2006

⁴⁸ Intellectual property in the People's Republic of China, From Wikipedia, the free encyclopedia, 23-06-2006

http://en.wikipedia.org/wiki/Intellectual_property_in_the_People%27s_Republic_of_China#International_conventions

⁴⁹ All rules and regulations of China can be find from <http://ott.sibs.ac.cn/zhengcegz-1.htm>

⁵⁰ Yang H. *Conflicts and Elusion Between the Regulation of WTO and the Chinese IP Regulations*, Chapter 2, 2002

Especially, after China joined the WTO in 2001,⁵¹ more precise standards have been specified by the Chinese legal system. In order to integrate with the TRIPS Agreement, there are a series of regulations or rules which have been amended again, such as Patent Law of the People's Republic of China, Copyright Law of the People's Republic of China and Trademark Law of the People's Republic of China. The government also has made several new regulations for the untouched part in intellectual property regime, such as Protective Rule on Layout-Designs of Integrated Circuits and Protective Rule on Software for Computers. Administrations which can be used to manage the intellectual property rightly and judge cases have been established in local governments. During these two years, the State Intellectual Property Right Administration of China has taken on more than 600 censors, in order to solve the problem of insufficient officers.⁵²

3.2 Practical effects in different IP rights

The TRIPS Agreement had already become the major influence when China constituted its IP legislation. In practice, the power of this treaty is stronger than the national regulations⁵³ and this treaty is also the only determinant for the cases that Chinese IP law does not cover. Generally, once the People's Republic of China has acceded to an international treaty, the People's Courts can quote the provisions of the treaty directly in deciding an intellectual property infringement case, without reference to a Chinese domestic law by which the treaty provision is incorporated.⁵⁴ The practical circumstances of Chinese IP law will be analysed to show the same points or the different points between Chinese IP law and the TRIPS Agreement.

3.2.1 Patent law of the people's republic of China compared with the TRIP Agreement

Patent Law of the People's Republic of China was adopted at the 4th Session of the Standing Committee of the Sixth National People's Congress on March 12, 1984. And then it was amended by the Decision Regarding the Revision of the Patent Law of the People's Republic of China, and adopted at the 27th Session of the Standing Committee of the Seventh National People's Congress on September 4, 1992. The second to amendment to this regulation was at the 17th Session of the Standing Committee of the Ninth National People's Congress on

August 25, 2000. After these two amendments, Patent Law of China has been brought in line with the TRIPS Agreement.⁵⁵

3.2.1.1 Comparison the subject of Patent Law

In Chinese Patent Law, the subject can be a natural person or a corporation, the Article 6 provides that

'For a service invention-creation, made by a person in execution of the tasks of the entity to which he belongs or made by him mainly by using the material means of the entity, the right to apply for a patent belongs to the entity. For any non service invention-creation, the right to apply for a patent belongs to the inventor or creator. After the application is approved, if it was filed by an entity under ownership by the whole people, the patent right shall be held by the entity; if it was filed by an entity under collective ownership or by an individual, the patent right shall be owned by the entity or individual. For a service invention-creation made by any staff member or worker of a foreign enterprise, or of a Chinese-foreign joint venture enterprise, located in China, the right to apply for a patent belongs to the enterprise. For any non service invention-creation, the right to apply for a patent belongs to the inventor or creator. After the application is approved, the patent right shall be owned by the enterprise or the individual that applied for it. The owner of the patent right and the holder of the patent right are referred to as "patentee".⁵⁶

This rule is similar most countries, and it also complies with the Paris Convention⁵⁷. The TRIPS Agreement does not have a specific provision for the subject of patent law.

3.2.1.2 Comparison of the right of patentee

The Article 28 of TRIPS Agreement regulated the exclusive right 'where the subject matter of a patent is a product, to prevent third parties not having the owner's consent for the acts of making, using, offering for sale, selling, or import for these purposes that product.'⁵⁸ However, the Chinese Patent Law does not regulate about 'offering for sale'. This kind of action is not actually selling but it has a direct relationship with selling. So the action of offering for sale also needs to be included in the right of patentee as the TRIPS did. The Chinese legal system has already decided to put 'offer for sale' in the provision next amendment.

⁵¹ Suo X. *Strategy and Reply with the Regulation of WTO and Current Legal System of China*, Chapter 1, 2001

⁵² Kong X.J. *Regulation of WTO and Chinese IP Law*, Chapter three (2006)

⁵³ This is provided in the Article 1 of TRIPS Agreement

⁵⁴ This is provided in the Article 142 of General Principles of the Civil Law of the People's Republic of China,

the detail is available on <http://www.nmglawyer.com/Article/465.html>

⁵⁵ Patent Law of the People's Republic of China(2000), available from <http://law.97i.net/html/1984/75810.htm>

⁵⁶ Patent Law of the People's Republic of China(2000), Article 6, available from <http://law.97i.net/html/1984/75810.htm>

⁵⁷ Paris Convention for the Protection of Industrial Property, available from http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html

⁵⁸ *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Article 28

3.2.1.3 Comparison of the object of Patent Law

The object is a complicated problem in Patent Law, made up of a lot of parts. Article 27 of TRIPS Agreement regulate that 'patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application.'⁵⁹ This is a great extension, which is virtually comprehensive. There are some differences in the names between the TRIPS Agreement and Patent Law of China. For example, in the TRIPS Agreement, there is an item called 'industrial design'⁶⁰, it is an independent object in one specific paragraph, although, Chinese Patent Law calls this kind of object 'design'⁶¹. Nevertheless, these two objects are different in name only, the others are same. In Chinese law, patent, design and model utility (some countries call these 'small patent')⁶² are all included in the patent law; this is a feature of Patent Law of China. However, in the TRIPS Agreement, model utility is not identified; the other two objects are explained respectively.

Compared with the TRIPS Agreement, the range of object in Chinese patent law is narrower. It is not concerned with new plant varieties and computer software. Hence there is specific inconsistency and conflict, which will be elaborated in the following chapter.

3.2.2 Trademark Law of the People's Republic of China compared with the TRIP Agreement

Trademark Law of the People's Republic of China was adopted at the 24th Session of the Standing Committee of the Fifth National People's Congress on 23 August 1982, revised for the first time according to the Decision on the Amendment of the Trademark Law of the People's Republic of China adopted at the 30th Session of the Standing Committee of the Seventh National People's Congress, on 22 February 1993, and revised for the second time according to the Decision on the Amendment of the Trademark Law of the People's Republic of China adopted at the 24th Session of the Standing Committee of the Ninth National People's Congress on 27 October 2001. After being amended twice, Trademark Law of China is same as regulation of TRIPS Agreement; some points are not included in the protective level of TRIPS Agreement and the regulation of TRIPS Agreement is not totally followed.⁶³

3.2.2.1 Comparison of the right of the owner

The right is conferred by TRIPS Agreement to regulate

⁵⁹ *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Article 27

⁶⁰ *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Section 4

⁶¹ Patent Law of the People's Republic of China, Article 2

⁶² Yu Y.L. *WTO and Immaterial Assets*, P27, 2002

⁶³ Trademark Law of the People's Republic of China(2001), <http://ott.sibs.ac.cn/zhengcegz-1.htm>

that the owner of a registered trademark shall have the exclusive right to prevent all third parties, unless they have the owner's consent, using in the course of identical trade similar signs for goods or services in respect of which the trademark is registered, where such use would result in a likelihood of confusion. In the Chinese Trademark Law, rights of the owner of a registered trademark are indicated. Any of the following acts shall be an infringement of the exclusive right to use a registered trademark:

(1) To use a trademark that is identical with or similar to a registered trademark in respect of the identical or similar goods without the authorization from the trademark registrant;

(2) To sell goods that he knows bear a counterfeited registered trademark;

(3) To counterfeit, or to make, without authorization, representations of a registered trademark of another person, or to sell such representations of a registered trademark as were counterfeited, or made without authorization;

(4) To replace, without the consent of the trademark registrant, its or his registered trademark and market again the goods bearing the replaced trademark; or

(5) To cause, in other respects, prejudice to the exclusive right of another person to use a registered trademark.⁶⁴

As can be seen, Chinese Trademark Law has more systematic regulation for the trademark owner's right. Its proper intention is clear. Moreover, those detailed provisions underlie the basis of TRIPS Agreement.

The more important thing is that Trademark Law of China restricts exclusive use of the right of the trademark owner. Firstly, it regulates that this exclusive right is only valid in the specifically registered area. Secondly, this right only can be used for one kind of goods that is those where this trademark applies. If a registered trademark is to be used on another kind of goods, it needs to be applied for again. Finally, the owner of a registered trademark has to maintain the standard and quality of goods. If the owner cannot accomplish this point, the exclusive using right could be questioned, stopped or canceled.

3.2.2.2 Comparison of the subject of Trademark Law

The Article 5 in the TRIPS Agreement shows that

'Any sign, or any combination of signs, capable of distinguishing the goods or services of one undertaking from those of other undertakings, shall be capable of constituting a trademark. Such signs, in particular, words including personal names, letters, numerals, figurative elements and combinations of colours as well as any combination of such signs, shall be eligible for

⁶⁴ Trademark Law of the People's Republic of China(2001), Article 56

registration as trademarks. Where signs are not inherently capable of distinguishing the relevant goods or services, members may make registrability dependent on distinctiveness acquired through use. Members may require, as a condition of registration, that signs be visually perceptible.’⁶⁵

In this provision, a sign must be visually perceptible for obtaining registration. Although ‘audio signs’ and ‘odorous signs’ are excluded, a combination of signs is included.

In Chinese Trademark Law, combination of signs also is covered. It is stated in the Article 8 ‘In respect of any visual sign capable of distinguishing the goods or service of one natural person, legal entity or any other organization from that of others, including any word, design, letters of an alphabet, numerals, three-dimensional symbol, combinations of colours, and their combination, an application may be filed for registration.’⁶⁶ Nevertheless, China has some special regulations to some specific signs with Chinese characteristics which cannot be allowed to register; Article 10 provides this following special condition:

(1) Those identical with or similar to the State name, national flag, national emblem, military flag, or decorations, of the People's Republic of China, with names of the places where the Central and State organs are located, or with the names and designs of landmark buildings;

(2) Those identical with or similar to the State names, national flags, national emblems or military flags of foreign countries, except where the foreign state government agrees otherwise on the use;

(3) Those identical with or similar to the names, flags or emblems or names, of international intergovernmental organizations, except that the organizations agree otherwise on the use or that it is not easy for the use to mislead the public;

(4) Those identical with or similar to official signs and hallmarks, showing official control or warranty by them, except where the use thereof is otherwise authorized;

(5) Those identical with or similar to the symbols, or names, of the Red Cross or the Red Crescent;

(6) Those having the nature of discrimination against any nationality;

(7) Those having the nature of exaggeration and fraud in advertising goods; and

(8) Those detrimental to socialist morals or customs, or having other unhealthy influences.⁶⁷

⁶⁵ *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Article 5

⁶⁶ Trademark Law of the People's Republic of China, Article 8

⁶⁷ Trademark Law of the People's Republic of China, Article 10

3.2.2.3 General comparison between Trademark Law of China and the TRIPS Agreement

Comparison of application, examination for and approval of trademark registration

The trademark Law of China and the TRIPS Agreement are basically similar. They all use a cardinal principle, which is first filed to treat publication for the trademark. For the period of validity of a registered trademark, the TRIPS Agreement requires it to be longer than 7 years.⁶⁸ Chinese Trademark Law regulates the period of validity to be 10 years exactly⁶⁹, which reaches the standard that the international treaty requires. Trademark Law of China gives a well-known mark very special protection by a large margin as the TRIPS Agreement required. Article 14⁷⁰ regulates this point. Questions of renewal, assignment and licensing of registered trademarks, are the most difficult part in the protection of a trademark. Chinese Trademark Law is defective in this respect. In the following chapter, it will be analysed in detail.

3.2.3 Copyright Law of the People's Republic of China compared with the TRIP Agreement

Copyright Law of the People's Republic of China was adopted at the Fifteenth Session of the Standing Committee of the Seventh National People's Congress on 7 September 1990, and revised in accordance with the Decision on the Amendment of the Copyright Law of the People's Republic of China adopted at the 24th Session of the Standing Committee of the Ninth National People's Congress on 27 October 2001. Copyright Law of China has many provisions which comply with the TRIPS Agreement, but there are still some provisions which conflict with this international treaty. It is important to compare those two regulations.⁷¹

3.2.3.1 Comparison of the definition of copyright owner

There is a different definition of copyright owner in Chinese Copyright Law and the TRIPS Agreement. The Article 9 (1) in the TRIPS Agreement regulates that members of WTO shall comply with Articles 1 through to 21 of the Berne Convention (1971)⁷² and the Appendix thereto. In the Berne Convention⁷³, authors who are nationals of one of the countries of the Union

⁶⁸ *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Article 18

⁶⁹ Trademark Law of the People's Republic of China, Article 38

⁷⁰ Trademark Law of the People's Republic of China, Article 14

⁷¹ Copyright Law of the People's Republic of China(2001), <http://law.97i.net/html/1990/75664.htm>

⁷² *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Article 9(1)

⁷³ Berne Convention for the Protection of Literary and Artistic Works, the text is available from http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html

can be copyright owners for their work, whether published or not. The definition in Chinese Copyright Law is in Article 11 which provides that 'Except where otherwise provided in this Law, the copyright in a work shall belong to its author. The author of a work is the citizen who has created the work. Where a work is created according to the intention and under the supervision and responsibility of a legal entity or other organization, such legal entity or organization shall be deemed to be the author of the work. The citizen, legal entity or other organization whose name is mentioned in connection with a work shall, in the absence of proof to the contrary, be deemed to be the author of the work.'⁷⁴ It should be noted that copyright is a private right or a government property. Intellectual property right has been regulated as a kind of private right in the TRIPS Agreement. However a legal entity or organization also has been allowed to be a copyright owner as a national author in Copyright Law of China. In other words, an administrative unit also can own copyright. In this case, copyright is government property, not a private right. This is a barrier for lining up with international standards in the WTO.

3.2.3.2 Comparison of Term of Protection for rights

The TRIPS Agreement regulates term of protection in Article 12.

'Whenever the term of protection of a work, other than a photographic work or a work of applied art, is calculated on a basis other than the life of a natural person, such term shall be no less than 50 years from the end of the calendar year of authorized publication, or, failing such authorized publication within 50 years from the making of the work, 50 years from the end of the calendar year of making.'⁷⁵

In Copyright Law of China, the term of protection for rights is stipulated in Article 20 and the Article 21 separately. It can be divided into 3 points.⁷⁶ The first point is that the rights of authorship, alteration and integrity of an author shall be unlimited in time. Secondly the term of protection for the right of publication in respect of a work of a citizen shall be the lifetime of the author and fifty years after his death, and expires on 31 December of the fiftieth year after the death of the author. In the case of a work of joint authorship, such term shall expire on 31 December of the fiftieth year after the death of the last surviving author. If the case in respect of a work where the copyright belongs to a legal entity or other organization or in respect of a work created in the course of employment where the legal entity or other organization enjoys the copyright (except the right of authorship),

shall be fifty years, and expires on 31 December of the fiftieth year after the first Publication of such work, provided that any such work that has not been published within fifty years after the completion of its creation shall no longer be protected under this Law. Lastly in respect of a cinematographic work, a work created by virtue of an analogous method of film production or a photographic work shall be protected for fifty years, expiring on 31 December of the fiftieth year after the first publication of such work, provided that any such work that has not been published within fifty years after the completion of its creation shall no longer be protected under this Law.⁷⁷

When comparing those two regulations, there is a difference for photographic works and works of applied art. The TRIPS Agreement does not include these two works, but they are same as other works in Chinese Copyright Law, which means that their rights also have the term of protection for fifty years.

3.2.3.3 General comparison between Copyright Law of China and the TRIPS Agreement

In general, Copyright Law of China complies with the TRIPS Agreement after being amended. Due to different situations in every membership country, TRIPS only regulates a part of intellectual property about Substantive law. How to make and maintain the process will be regulated by other legal systems such as the national law. According to the situation of China nowadays, Chinese Copyright Law regulates in detail the subject of copyright, the specific rights for copyright owner, and the way to protect copyright on basis of the TRIPS Agreement, and makes their provisions more powerful.

4. DEFECTS OF CHINESE IP LAW

4.1 Analysis of the defect in Chinese IP law

Although Chinese IP law has been amended several times in order to comply with the TRIPS Agreement for integrating with the international situation, there are still some points which are different from the TRIPS Agreement. Those differences could be called defects because they have made the law practice complicated and confused. In this chapter, those defects will be analysed thoroughly.

Those defects are revealed in several ways, such as lawmaking and practice of law in Chinese IP law. Some of them are ready to be amended, although some of them are difficult to change because their existence proves that they are still necessary in practice for China currently, even if they do not follow international treaties absolutely. There are special circumstances in China. How those conflicts between special regulation

⁷⁴ Copyright Law of the People's Republic of China(2001), Article 11

⁷⁵ *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Article 12

⁷⁶ Copyright Law of the People's Republic of China(2001), Article 20, 21

⁷⁷ Yu Y.L. *WTO and Immaterial Assets*, P49, 2002

of China and international treaties can be tackled is a difficult question

4.2 Defects of Chinese IP law in lawmaking

Lawmaking in China is dependent on the situation of the time. Instituting laws affects society, the standard of living, national culture, the voice of the nation and so on. International treaties also have an effect. Because conditions vary, lawmaking becomes very complicated. Laws always need to be updated, in order to comply with changing conditions.

4.2.1 Defects in Chinese Patent Law

There are many differences between Chinese Patent Law and the TRIPS Agreement under the topic of patents' object. In the last chapter, a part of patents' object was noted. This is about same or similar concepts and different names.⁷⁸ We consider now real different meaning of patent's object between Chinese Patent Law and the TRIPS Agreement.

Some subjects are regulated that are not patentable by patent law. Article 5 in the Patent Law of China regulates that no patent right shall be granted for any invention-creation that is contrary to the laws of the State or social morality or that is detrimental to public interest.⁷⁹ For example, equipments used to offend against national law, such as equipment for gambling and drug-taking as well as equipment for forging the national currency, legal documents or a certificate. If this invention-creation is not against national law, but nevertheless people abuse it, it should not be included in the Article 5; exceptions are anesthetics, sedatives and analeptics. Moreover, Article 25 in Chinese Patent Law regulates 5 items for which no patent right is to be granted, (1) scientific discoveries; (2) rules and methods for mental activities; (3) methods for the diagnosis or for the treatment of diseases; (4) animal and plant varieties; (5) substances obtained by means of nuclear transformation. For processes used in producing products referred to in items (4) of the preceding paragraph, patent right may be granted in accordance with the Provisions of this Law.⁸⁰

In the TRIPS Agreement, Article 27 regulates 3 ways which allow members of WTO not to give the patent right: these are (1) the prevention within their territory of commercial exploitation which is necessary to protect public order or morality, including protecting human, animal or plant life or health or to avoid serious damage to the environment, provided that such exclusion is not made merely because the exploitation is prohibited by their law; (2) diagnostic, therapeutic and surgical methods for the treatment of humans or animals;

(3) plants and animals other than micro-organisms, and essentially biological processes for the production of plants or animals other than non-biological and microbiological processes. However, members shall provide for the protection of plant varieties either by patents or by an effective sui generis system or by any combination thereof.⁸¹

There are some points that show differences between those two regulations.

In Chinese Patent Law, apart from the regulation of TRIPS concerning those three items above, there are three more items which are not patentable. The first one is scientific discoveries, second one is rules and methods for mental activities, and last one is substances obtained by means of nuclear transformation.⁸² Chinese legal workers think that these three items belong to the field of scientific research. Because patent law is concerned with technological fields and awards the patent right in these fields it should exclude creative achievement from the field of scientific research.

However, Chinese Patent Law does narrow down the patentable extension. It has not attained the level for protecting patent right as the TRIPS Agreement required. In my opinion, this kind of provision should not be permitted by the WTO. It creates problems for enforcing the TRIPS Agreement in China.

Patent Law of China explicitly regulates that plant variety is not included for protection by law. Because of the different regulation of unpatentable items in different countries, the TRIPS Agreement provides two choices for patent protection for plant variety; one is the patent law, and the other one is the specific law. The treaty points out that those member countries may not award the patent to the plant variety, but they should have the specific law to protect the right of plant variety.

Plant variety is excluded from the protection of patent in Chinese Patent Law; this is an obstacle for development in the field of agriculture. China is a big agricultural country, if plant variety were protected by Chinese Patent Law; more and more new kinds of grain, vegetable and fruit would be created by agricultural researchers. They are enthusiastic to get patents for their intellectual property. Thus the level of agricultural development would be improved. Chinese agricultural researchers have had excellent results during these 30 years in international fields especially in the crossbred rice cultivation. But until now many kinds of crossbred rice cannot get a patent in China, they only can get the right to the way of production.⁸³ This is not good for retaining top class researchers; they might want to go to other countries which could protect their intellectual

⁷⁸ See P33

⁷⁹ Patent Law of the People's Republic of China, Artic 5

⁸⁰ Patent Law of the People's Republic of China, Artic 25

⁸¹ *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Article 27

⁸² Patent Law of the People's Republic of China, Artic 25

⁸³ Lv W. *Situation and Problems of Chinese IP Works*[J], 2003

property.

Nowadays, UPOV Convention for the Protection of New Varieties of Plants is a specific treaty for protecting plant variety. This convention was signed on 2nd of December 1961 in Paris. Until now this convention has 39 members, but China has not signed it yet.⁸⁴ There is an administrative regulation in China, which has protected the plant variety. It is called Statutes for Protection of New Varieties of Plants.⁸⁵ This was published by Chinese State Department in 20th of March 1997. This statute followed an international convention basically, but some parts lack legal force and are not explicit enough as to how to protect rights and how to tackle the dissension. This is a big defect in enforcing this statute. So in my opinion, China needs to formulate a perfect law to protect the plant variety specifically, in order to comply with the TRIPS Agreement.

Computer software has not been regulated explicitly in Patent Law of China. In practice, Chinese Patent Office has already awarded patents to some computer software inventions which have brought big technical improvement with hardware. Awarding of patents for software has increased, because there is an administrative rule about protecting computer software in China.⁸⁶ But this trend has not been implemented definitely in the regulation of law. For instance, a patent which was a optimization of the scheme of one kind of computer input method, was treated as a new input method system by Chinese Patent Office. This has been disputed by several companies. Actually in the TRIPS Agreement, computer software is not noticed so it can be patented or not. It is not regulated in the patentable group and also does not belong to objects which are not allowed to be awarded a patent. In the US or other countries of the world, there are two views on computer software, one is patentable, and the other one is unpatentable. China should choose one view, and make clear the system especially for computer software. Otherwise more confusion will occur.

There should add some provisions which comply with Paris Convention for the Protection of Industrial Property.⁸⁷ The Article 2 of TRIPS Agreement provides that in respect of Parts 2, 3 and 4 of this Agreement, members shall comply with Articles 1 through 12, and Article 19, of the Paris Convention (1967). It also regulates that nothing in Parts 1 to 4 of this Agreement shall override existing obligations that Members may have to each other under the Paris Convention, the

⁸⁴ UPOV-- The International Union for the Protection of New Varieties of Plants, find more details in <http://www.upov.int/>

⁸⁵ Statutes for Protection of New Varieties of Plants, available to be download from <http://ott.sibs.ac.cn/doc/013.doc>

⁸⁶ Regulations for the Protection of Computer Software, the detail in <http://law.97i.net/html/1991/37342.htm>

⁸⁷ Paris Convention, the text in http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html

Berne Convention⁸⁸, the Rome Convention⁸⁹ and the Treaty on Intellectual Property in Respect of Integrated Circuits.⁹⁰ In other words, all the members of WTO have to abide by these treaties, and undertake those obligations. If the national law offends against these treaties, it is effectively breaking the TRIPS Agreement.⁹¹

About those objects which cannot be awarded a patent, the Article 4 in Paris Convention regulates that the grant of a patent shall not be refused and a patent shall not be invalidated on the ground that the sale of the patented product or of a product obtained by means of a patented process is subject to restrictions or limitations resulting from the domestic law. Compared with the Article 5 in Chinese Copyright Law, the conflict is obvious.

Article 5 regulates that 'no patent right shall be granted for any invention-creation that is contrary to the laws of the State or social morality or that is detrimental to public interest.'⁹²

We cannot say that Copyright Law of China break the TRIPS Agreement, it should be seen that the provision in Copyright Law of China is too general, some detailed rules have to be added to highlight different lawbreaking cases.

4.2.2 Defects in Chinese Trademark Law

With regard to licensing and assignment of registered trademarks, Chinese Trademark Law has several defects.

Article 21 in the TRIPS Agreement regulates licensing and assignment of registered trademarks that 'members may determine conditions on the licensing and assignment of trademarks, it being understood that the compulsory licensing of trademarks shall not be permitted and that the owner of a registered trademark shall have the right to assign the trademark with or without the transfer of the business to which the trademark belongs.'⁹³ This provision protects the normal use of registered trademarks in trade, mentions the clear interest of the legal trademark owner, and makes the exclusive right of registered trademark stronger. The second trademark amendment also

⁸⁸ Berne Convention for the Protection of Literary and Artistic Works, the detail in http://www.wipo.int/treaties/en/ip/berne/trtdocs_wo001.html

⁸⁹ Rome Convention, the detail in <http://www.rome-convention.org/>

⁹⁰ Treaty on Intellectual Property in respect of Integrated Circuits, the text in <http://www.jus.uio.no/lm/ip.integrated.circuits.treaty.washington.1989/>

⁹¹ *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Article 1(3)

⁹² *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Article 5

⁹³ *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Article 21

regulates the licensing and assignment of registered trademarks in Article 39 and 40:

‘Where a registered trademark is assigned, the assignor and assignee shall conclude a contract for the assignment, and jointly file an application with the trademark office. The assignee shall guarantee the quality of the goods in respect of which the registered trademark is used. The assignment of a registered trademark shall be published after it has been approved, and the assignee enjoys the exclusive right to use the trademark from the date of publication. Any trademark registrant may, by signing a trademark license contract, authorize other persons to use his registered trademark. The licensor shall supervise the quality of the goods in respect of which the licensee uses his registered trademark, and the licensee shall guarantee the quality of the goods in respect of which the registered trademark is used. Where any party is authorized to use a registered trademark of another person, the name of the licensee and the origin of the goods must be indicated on the goods that bear the registered trademark. The trademark license contract shall be submitted to the Trademark Office for record.’⁹⁴

Comparison of these two regulations reveals two points.

There are registered trademarks which are regulated in the Trademark Law of China. However the TRIPS Agreement does not only refer to registered trademarks, but also protects trademarks which are excluded from registered trademarks.

In many commonwealth countries, the trademark license contract has to be registered. That means the trademark license contract should be legal after licensors are approved to be ‘registered users’ by taking charge of an administrative office. In China, the trademark license contract only needs to record for executive office after use; Chinese Trademark law does not require approval.

According to these differences, a defect can be seen from Chinese Trademark law. This is that its range is narrower than the international treaty and it is not systematic enough in some execution aspects. Recently, some detailed procedures and regulations which have been showed from other international treaties, have not been added in Chinese Trademark Law, For example, the regulation about ‘separately from any transfer of the undertaking’ and ‘inheriting the registered trademark’ have been published by Council Regulation (EC) No. 40/94 of 20 December 1993 on the Community Trade Mark.⁹⁵ This new legal system has to be learned by Trademark of China.

⁹⁴ Trademark Law of the People’s Republic of China, Artic 39, 40

⁹⁵ Council Regulation (EC) No 722/97 of 22 April 1997, the text in <http://www.clapv.org/new/show.php?id=943&catename=>

4.2.3 Defects in Chinese Copyright Law

Chinese Copyright Law in the right limiting part states that some work may be exploited without permission from, and without payment of remuneration to, the copyright owner, provided that the name of the author and the title of the work shall be mentioned and the other rights enjoyed by the copyright owner by virtue of this Law shall not be prejudiced. Those works include the following items:

(1) Use of a published work for the purposes of the user’s own private study, research or self-entertainment;

(2) Appropriate quotation from a published work in one’s own work for the purposes of introduction to, or comments on, a work, or demonstration of a point;

(3) Reuse or citation, for any unavoidable reason, of a published work in newspapers, periodicals, at radio stations, television stations or any other media for the purpose of reporting current events;

(4) Reprinting by newspapers or periodicals, or rebroadcasting by radio stations, television stations, or any other media, of Articles on current issues relating to politics, economics or religion published by other newspapers, periodicals, or broadcast by other radio stations, television stations or any other media except where the author has declared that the reprinting and rebroadcasting is not permitted;

(5) Publication in newspapers or periodicals, or broadcasting by radio stations, television stations or any other media, of a speech delivered at a public gathering, except where the author has declared that the publication or broadcasting is not permitted;

(6) Translation, or reproduction in a small quantity of copies, of a published work for use by teachers or scientific researchers, in classroom teaching or scientific research, provided that the translation or reproduction shall not be published or distributed;

(7) Use of a published work, within proper scope, by a State organ for the purpose of fulfilling its official duties;

(8) Reproduction of a work in its collections by a library, archive, memorial hall, museum, art gallery or any similar institution, for the purposes of the display, or preservation of a copy, of the work;

(9) Free-of-charge live performance of a published work and said performance which neither collects any fees from the members of the public nor pays remuneration to the performers;

(10) Copying, drawing, photographing or video recording of an artistic work located or on display in an outdoor public place;

(11) Translation of a published work of a Chinese citizen, legal entity or any other organization from the Han language into any minority nationality language for publication and distribution within the country; and

(12) Transliteration of a published work into Braille

and publication of the work so transliterated.

The above limitations on rights shall be applicable also to the rights of publishers, performers, producers of sound recordings and video recordings, radio stations and television stations.⁹⁶

Those items are more than most of other countries; the copyright of owner is limited by them.

The TRIPS Agreement shows:

'Members shall confine limitations or exceptions to exclusive rights to certain special cases which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the right holder.'

Compared with those two regulations, there are more limitations on rights in copyright of China and limitation and the right of limitation is larger. Furthermore, there is not the principal regulation, as in 'do not unreasonably prejudice the legitimate interests of the right holder' in the TRIPS Agreement. Since China joined the WTO, Copyright Law has had to narrow down the limitation on rights, in order to ensure that legal copyright is never infringed.⁹⁷

Apart from the points which have been analysed, there are many problems of expression in Chinese IP law. Some of them are different only in the expression and the outcome is not influenced in practice of law. Ambiguous expression sometimes means the underlying meaning of all provision is changed and this can influence the outcome of the application of the law. Those big or small defects block the application of the TRIPS Agreement in Chinese IP cases.

4.3 Defects of Chinese IP law in practice

4.3.1 The problem of applying the provisions of an international treaty directly to settle disputes of China

The Chinese diplomatic spokesperson said during negotiation with WTO that even if China did not amend IP law; it could comply with the requirement of WTO because intellectual property right is included in General Principles of the Civil Law of the People's Republic of China, and in this Civil Law, Article 142 regulates that if any international treaty concluded or acceded to by the People's Republic of China contains provisions differing from those in the civil laws of the People's Republic of China, the provisions of the international treaty shall apply, unless the provisions are ones on which the People's Republic of China has announced reservations.⁹⁸ In Civil Procedure the Law

of the People's Republic of China also has same regulation in Article 238.⁹⁹ However, there is a controversial question as to whether the TRIPS Agreement could be quoted directly. China has a problem which affects the direct application of TRIPS Agreement in the cases of Hong Kong, Macao and Taiwan. Areas with independent tax rates can all apply to join in this organization separately. Hong Kong, Macao and Taiwan have joined the WTO separately. In other words, Hong Kong, Macao and Taiwan have an equal relationship with China in the WTO. Nevertheless, these three areas are also a part of China. This presents an anomalous situation, when the TRIPS Agreement is trialed in China directly. If there are disparities in some points between Chinese IP law and the TRIPS Agreement, which show that Chinese IP law, could not reach the minimum standard of TRIPS Agreement, the national IP law only can be used for citizens of mainland China. Citizens in other places such as Hong Kong, Macao and Taiwan should quote the TRIPS Agreement directly to settle those disparities as the prescriptive regulation in General Principles of the Civil Law of the People's Republic of China. According to the main principle of most-favoured-nation clause in the TRIPS Agreement, if China has given any advantages to any members of WTO in the intellectual property protection, she has to give exactly same advantages to Hong Kong, Macao and Taiwan as well. Otherwise they have the right to lodge a complaint against China with the WTO.

Furthermore, as everyone knows that Hong Kong, Macao and Taiwan are a part of China,¹⁰⁰ citizens there should have the same rights as citizens of mainland China in Chinese IP law. The situation now is that because the most-favoured-nation is used in those special areas, citizens there have advantages and rights which exceed the general ones of Chinese IP law. For example, Article 43 in Chinese Copyright Law regulates that a radio station or television station that broadcasts a published sound recording, does not need permission, but shall pay remuneration to the copyright owner, unless the interested parties have agreed otherwise.¹⁰¹ The specific procedures for treating the matter shall be established by the State Council. This free provision has been used on radio stations or television stations of Taiwan. After Taiwan joined the WTO, the national law was not suitable for Taiwan, so the TRIPS Agreement was used, and those rights of radio station or television station in Taiwan have been protected. Thus citizens in same country have different levels of right; that is an anomaly and this situation should be amended. Otherwise, more improper cases

<http://www.nmglawyer.com/Article/465.html>

⁹⁹ Civil Procedure Law of the People's Republic of China, <http://www.haolawyer.com/law/view.asp?id=74148>

¹⁰⁰ More information for supporting this idea can be fought in <http://chineseculture.about.com/library/china/whitepaper/blstaiwan2.htm?terms=taiwan>

¹⁰¹ Copyright Law of the People's Republic of China, Article 43

⁹⁶ Copyright Law of the People's Republic of China, Article 22

⁹⁷ Yu Y.L. *WTO and Immaterial Assets*, Chapter two (2002)

⁹⁸ General Principles of the Civil Law of the People's Republic of China, 11

and more disputes will appear in the practice of IP law. There seems only one way to solve this strange situation; that is to amend Chinese IP law to avoid those disparities with the TRIPS Agreement. Article 142 in General Principles of the Civil Law of the People's Republic of China in practice is not good enough to solve such problems as this one

In addition, there is a loophole in all the Chinese provisions which concern foreign affairs. Chinese rules of law only regulate that if there are differences between national laws and international treaties, international treaties should be applied directly. But it does not regulate for when a part regulation has not been applied in domestic law although how to deal with this has been noted in international convention. For example, the TRIPS Agreement requires protecting layout-designs of integrated circuits and geographic signs, although these parts are omitted in Chinese IP law. According to that case, if this loophole is not amended, 'to apply the international treaty directly' will be difficult.

4.3.2 The problem for practical use of judicial review

The judicial review is a very important part in the WTO, which is a most effective instrument for dispute settlement. Building a perfect system of judicial review in member countries is strongly required by the WTO. Those regulations of the judicial review which should be incorporated by members of the WTO are showed in many agreements and treaties. Article 41 of TRIPS Agreement also regulates about judicial review in 5 points:

Member 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. b) 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. c) 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. d) 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. e) 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.¹⁰²

According to this provision, the TRIPS Agreement explicitly points out those administrative decisions cannot be final; only the judicial review can be final. If judgment is based on administrative decisions, which have not been accepted there is a right to take action to judicial authority.

However, many Chinese cases in intellectual property right show that the administration decisions have been used more often than the judicial review for quite a long time in China.¹⁰³ In the intellectual property domain, regulations of administration are used very often in China, which are more than rules of IP law, such as Regulations for the Protection of Computer Software, Regulations for the Protection of Plant Variety, and Regulations for the Protection of layout-design of integrated circuits etc. There are 16 regulations of administration made by State Department of China, and more local statutes and regulations made by local government of provinces, which are used to solve concrete disputes and infringements.¹⁰⁴ Furthermore Chinese IP laws included many provisions about using the administration decisions to be a final judgment before regulations of IP law are amended. For example the Patent Law of China regulated that the final judgment made by patent reexamination board which is about model utility and industrial design were invalid in 1984.¹⁰⁵ Using administration decisions has advantages as they are more economical, more efficient and faster. They are more economic because the administration decisions do not have many fussy processes, the owner of IP rights could get the most effective protection with the less input. They are more efficient because China has used administration decisions for long time, these processes have been perfected. They are faster because administration decisions are not delayed because of long lawsuits. When the owner of IP right notices someone infringe his right and presents proofs to the relative administration, then the relative administration can restrain this infringement very quickly to protect

¹⁰² *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Article 41

¹⁰³ Yang H. *Conflicts and Elusion Between the Regulation of WTO and the Chinese IP Regulations*, Chapter 4, 2001

¹⁰⁴ All rules and regulations can be found in <http://ott.sibs.ac.cn/zhengcegzh-1.htm>

¹⁰⁵ Yu Y.L. *WTO and Immaterial Assets*, Chapter 2, 2002

lawful rights and interests of right owner.¹⁰⁶

The above advantages of the administration decisions, in the realm of competing copy and punishing counterfeit goods, the administration decisions outweigh the judicial review. Furthermore, Chinese society does not expect rule by law traditionally; one reason is that China is under economical restriction; another reason is that Chinese administrative power has been used to settle disputes in intellectual property domain in Chinese history.¹⁰⁷ Those relative administrations used successfully to reinforce intellectual property. However, the judicial review has played more important role recently, as is showed by the TRIPS Agreement. The judicial review avoids abusing the administrative power and also it is more thorough than the administration decisions for settling disputes; this means results are more reliable. In order to comply with international treaties, Chinese IP law needs to give more power to the judicial review, even though administration decisions is more convenient to use. To improve the judicial review in Chinese IP law is most important.

To strengthen the judicial review system is an important task; Chinese lawyers started to do this after China joined the WTO, but there is still a long way to go.

4.4 Conclusion of Defects of Chinese IP law

The content of TRIPS Agreement can be divided to three parts: first one is the basic principles, which should be followed by all the member countries; second one is the minimum standard, which should be attained by all the member countries; third one is the average requirements, which can be used in different situations by different countries.¹⁰⁸ From chapter 3 and chapter 4, it can be seen that disparities between the TRIPS Agreement and Chinese IP law are in the basic principles and the minimum standard.

1. Chinese IP law uses the administrative decision to be the final decision in many situations without the necessity of a judicial review. This is not in accord with the TRIPS Agreement. This agreement regulates the judicial review in many provisions. It is a most powerful instrument to deal with cases of infringement. This disadvantage of the less powerful Chinese judicial review can be showed from whole legal system of China.

2. Chinese IP law is not powerful enough to prevent the tort of intellectual property right sometimes,

especially for counterfeit and piratical acts. When infringing parties suffer from the tort, the remedy does not fulfil the TRIPS Agreement requirements.

3. Many provisions in Chinese IP law unreasonably damage the legal interest of rightful; owners by excessively restricting their right. This problem occurs often in three Chinese IP laws such as Copyright Law of China, Patent Law of China and Trademark Law of China, even though they have already been amended several times to widen IP holders' right.

4. Chinese IP law system is inadequate to protect different intellectual property rights. It has a high standard of protection for patent, trademark and copyright, but the layout-design of integrated circuits has no protection by rules of law. In the TRIPS Agreement, the layout-design of integrated circuits is an independent part which is regulated very clearly like other intellectual property rights. China only has an administrative regulation about protecting the layout-design of integrated circuits, which was published by State Department of China on the first of October 2001. This regulation is not powerful and complete because of the limitation of the administrative decision. There are conflicts between this regulation and the TRIPS Agreement.

5. Chinese IP law is short of restrictive provisions to prevent the misuse of intellectual property right, which has cost a lot of damage.

5. COMMON PROBLEMS OF THE TRIPS AND AMENDMENT OF CHINESE IP LAW

There are three principles that have been questioned by the legal systems of WTO members. These are the principle of exhaustion, the principle of liability without fault and the principle of imminent infringement. They have revealed common problems involving the TRIPS Agreement and many countries' national law. Those problems also exist and affect the Chinese legal system. To overcome those problems, the traditional principles of civil law in the Chinese legal system are unsuitable. Chinese IP law should be amended to fit in with a new epoch of intellectual property.

5.1 The Question of Exhaustion

Exhaustion is covered in Article 6 of the TRIPS Agreement.¹⁰⁹ There are many different regulations in different countries concerning this. For example, the Copyright Law of Germany regulates that if a copyright owner has only used the publishing right once in market,

¹⁰⁶ Guo B.M. *Analysis the Judicial Review of China on the Effect of WTO* (Translate by author), 2005, <http://www.daima.com.cn/LW/4/daima2857/>

¹⁰⁷ Same to footnote 106

¹⁰⁸ Zheng S.C. *Differences Between Current Chinese IP law and the TRIPS Agreement*[J] 2005

¹⁰⁹ *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Article 6

then the owner loses his right to publish and sell.¹¹⁰ This publishing right is exhausted from its first publishing. However, in France and Belgium, when the copy of works is put into market by copyright owners, then they have the right to control the copy of works until the last user.¹¹¹ That means the copyright will not be exhausted as the case of Germany in those countries. Though in the patent regime, the principle of exhaustion is accepted in most countries. As Chinese patent law regulates how a patented product is put into market, then others do not need permission to use this patent or sell these patented goods.¹¹² In the domain of trademark, the situation is similar. The principle is that trademark owners put the registered trademarks on the original goods, and then subsequently, the same trademark can be added to similar goods without permission from the trademark owner.

This principle of exhaustion is clear in national law respectively, even the regulations are different in some countries as those examples showed. But the problem is in international trade. Some countries regulate that if the work is published in one country, the owner's right will not be exhausted in other countries; some countries think that if the work is published in one country then the rights owner cannot use the publishing rights elsewhere.¹¹³ Moreover, there are some countries like France; they do not admit this principle. So the Article 6 of TRIPS Agreement regulates that for the purposes of dispute settlement under this Agreement, subject to the provisions of Articles 3 and 4 nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights.¹¹⁴ Although this provision avoids conflicts between different national laws, there are still problems in the principle of exhaustion, especially in patent cases and copyright cases. In my opinion, the TRIPS Agreement should be made the uniform principle here. However, before the uniform principle is made, developing countries such as China should take the opportunity to give their citizen greater rights; China does not need to limit the rights as some developed countries did.

5.2 The problem of liability without fault

The TRIPS Agreement has no provision to regulate directly the principle of culpability. However, this agreement regulates in which situation the 'blamable side' should take the liability for tort, and in which situation there are no blamable parties who need to take the liability for tort. One example is the Article 37 of

TRIPS Agreement, which is a provision about protecting Layout-Designs of Integrated Circuits¹¹⁵; another example is the Article 44 of TRIPS Agreement, which is the regulation about the importation and order of goods.¹¹⁶ Logically, if the TRIPS Agreement claims cognizance of the principle of tort as the liability for fault, it is unnecessary to point out in special provision as Article 37, 44 that without fault means without tortious liability. Having pointed out those provisions, it can be concluded that in other places, the principle of liability without fault is implied. For example, the emphatic protection of trademark in the Article 16 of TRIPS Agreement and the exclusive area of patent right in the Article 28 of TRIPS Agreement does not mean that the infringing party with fault is a necessary condition of tort.¹¹⁷

In China, the liability of infringement is always debated, so the conclusion from last paragraph is difficult to reach. Because of the traditional thinking of civil law, the subjective fault of infringing party is considered as a necessary condition for cognizance of tort. Explaining the Article 106 of General Principles of the Civil Law of the People's Republic of China can demonstrate that the principle of liability for fault is used in the intellectual property domain in China.¹¹⁸ However, after the TRIPS Agreement was constituted, the position calls for review. It should be showed definitely that supporters of liability without fault never say that this principle can be used in all situations of intellectual property. For some roles as co-defendants and indirect infringers in tort, those supporters also believe that these parties only have the liability for fault. Furthermore, supporters of liability for fault think that this principle should be used throughout the intellectual property regime. During these several years' discussion, the principle of liability without fault is accepted by more and more people. It is more practical and logical. In my opinion, Chinese lawmaking should amend the principle of civil law to make more situations of liability without fault is accepted, and this principle should be used in more provisions in Chinese IP law. This is a development which can encourage Chinese IP law to do better in line with international standards.

Those two points indicate the common problems in the TRIPS Agreement, especially when this agreement is applied in China. Lawyer should make great efforts in those areas in order to develop the legislation.

¹¹⁰ More information is available from <http://www.edri.org/edriagram/number2.17/copyright>

¹¹¹ Guo X. *Differences Between French Copyright and Chinese Copyright*[J], 2006, <http://www.mzfwz.cn/fzjy/57/134/200607252300.html>

¹¹² Patent Law of the People's Republic of China, Chapter 5

¹¹³ Same to footnote 114

¹¹⁴ *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Article 6

¹¹⁵ *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Article 37

¹¹⁶ *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Article 44

¹¹⁷ *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Article 16 and 28

¹¹⁸ General Principles of the Civil Law of the People's Republic of China, <http://www.nmglawyer.com/Article/465.html>

5.3 The problem of imminent infringement

In traditional thinking in civil law, the cognizance of tort needs a condition that this tort has to engender real injury. In other words, no injury, no liability.¹¹⁹ However, this thinking is not suitable in intellectual property domain. This was a necessary condition in tort of intellectual property. In Chinese IP law all would be renewed. For example, patent owners have the producing right, but this right cannot be protected if using 'real injury' to be a necessary condition.¹²⁰ Because if some manufacturers produce the patented product without permission, but they have not put these illegal products in sale, the real injury has not been made yet. However the patent owner's producing right has already been infringed. Liability with real injury makes the producing right exist in name only. A court was presented with a case which conflicted with the theory of Chinese civil law in 1999. A manufacturer collected many winebottles with a specific legal trademark; the owner of this legal trademark knew that the next step of this manufacturer would be to put cheap wine in those bottles to hoodwink customers. But because those bottles had not been sold yet following the principle of civil law, the court could not do the cognizance of tort at that time because of the principle of civil law.¹²¹

Article 50 of TRIPS Agreement regulates that memberships should prohibit this imminent infringement.¹²² Those products of infringement should be banned before they go to channels for commodity circulation. This restraint for imminent infringement is expressly provided for in intellectual property provisions of many countries, but most countries which used the system of civil law, do not have regulations to ban imminent infringement. Actually banning the imminent infringement in intellectual property regime is very significant. Intellectual property cannot be protected by real taking with owners as normal property. Moreover, what is difficult to create, is easy to copy. So cognizance of tort should include acts without injury to prevent infringement before happening in 'real damage' to intellectual property right owners.

Nowadays, Chinese lawyers should notice that with the changes of the times, the civil law theory has developed gradually. Using 'real injury' to judge infringement cannot provide suitable protection to intellectual property right. The imminent infringement is imported to Chinese IP law, which is an inevitable trend in legal development. Furthermore another strong

reason for adding the imminent infringement in Chinese IP law is that it should comply with the regulation of TRIPS Agreement. Lawmaking of China has been positive. The principles of civil law as above should be amended; otherwise conflicts between Chinese law and the TRIPS Agreement will not be avoided.

6. CONCLUSION

China joined the WTO; this is a milestone in the development of Chinese international trade. It will bring long term benefit in future, which is much greater than the benefit now.

The precondition of realizing all these benefits is that China should exactly comply with the regulation of WTO and fulfil its obligation of membership to the organisation. In other words greater interests come in better combination. So to find a better way to combine the TRIPS Agreement with the Chinese IP law is a significant work for lawyers.

It can be seen from foregoing paragraphs that the TRIPS Agreement has a high standard in protection of intellectual property right. To sum up, the TRIPS Agreement is scientific and advanced. It has promoted economic development. However, its high standard has also exerted a big pressure upon some developing countries. Because constituting perfect intellectual property system such as the TRIPS Agreement required a strong economy to support and also needs perfect intellectual property regulations to operate on the different intellectual property rights. Many developing countries cannot reach these requirements; their national intellectual property laws are not up to the standard of TRIPS Agreement. China is one of those countries. Discussions are still going on about the TRIPS Agreement, on the transfer of new technology, the minimum standard of TRIPS and protective extension of important knowledge resources, between developing countries and developed countries.

Regulations of Chinese IP law have already been amended several times after signing the TRIPS Agreement.¹²³ The Patent Law of China, the Trademark Law of China and the Copyright Law of China all had two amendments which have made significant clarifications. However, due to the state of the country's economy, there are still anomalies between the rules of IP law in the real situation of China and the international regulations. There are loopholes and disparities

which mean that intellectual property rights cannot be protected properly in China. So in my opinion, the next amendment for Chinese IP law system is necessary and urgent, in order to avoid economic losses and get greater benefits from intellectual property rights. The

¹¹⁹ Zhang X.B. *Tort Law of China*, P92, China Social Sciences Publishing House, 1998

¹²⁰ Guo X. *Differences Between French Copyright and Chinese Copyright*[J], 2006, <http://www.mzfzw.cn/fzjy/57/134/200607252300.html>

¹²¹ Kong X.J. *Regulation of WTO and Chinese IP Law*, Chapter 3, 2006

¹²² *Agreement on Trade-Related Aspects of Intellectual Property Rights*, Article 50

¹²³ Amended twice for Patent Law of the People's Republic of China, <http://law.97i.net/html/1984/75810.htm>

provisions will become more precise, the system will be more perfect and the scope of the law will be more extensive. Moreover, there are some objects which are protected by the TRIPS Agreement but not concerned in Chinese IP law system; those neglected aspects need to be covered in the next amendment. Some suggested amendments have been given by this dissertation.

In Chapter four, some common problems are highlighted from three principles. They are the principle of exhaustion, the principle of liability without fault and the principle of imminent infringement, which are regulated in provisions of TRIPS Agreement, but those provisions are not clearly stated in my opinion. As I mentioned they appear in many countries' national IP laws with different regulations, thus engendering conflicts between countries because different understanding of the principles can lead to differences

in lawmaking and practice of law.

To sum up, this dissertation analyses the TRIPS Agreement and the Chinese IP law respectively, and then compares the differences between those two regulations. Researching these differences leads to the conclusion that Chinese IP law is inadequate to protect intellectual property rights as the TRIPS Agreement required, and many conflicts cannot be resolved.

This dissertation suggested some amendments, such as more powerful judicial review, abolishing those provisions which might narrow down the IP right holders' right and covering more subjects and objects in intellectual property region. This would improve Chinese IP law and make it easier to linkup to international treaties, especially with the TRIPS Agreement.

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THE AUTHOR

Guo Wei, An assistant , Master degree, University of Geosciences (Beijing), Beijing, 100000, P.R. China.
E-mail: guow@cugb.edu.cn