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Windows into the Middle Kingdom: A Peek into the Importation and Sale of Software in China

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(A) Introduction

China's strength has always been in the production and export of hardware. Today, China is the world's largest hardware platform-accounting for almost 65 per cent to 75 per cent of the world's hardware base.[1] Software development and production in China, however, pales in comparison. According to year 2000 statistics, the software industry produced only one-fifth as much as the hardware industry.[2] At China's present stage of technological development, she requires a large amount of software technology to be imported into the country, and this presents a golden opportunity for foreign software companies. Just how lucrative is the Chinese software market? The market for software in China grew 19.5 percent in 2002 to reach $1.98 billion and will grow even faster over the next few years. The steady growth of the economy, rapid improvement in IT infrastructure and increasing demand from private enterprises will see the market grow at a CAGR (compound annual growth rate) of 25.8 percent up to 2007, when it will be worth $6.24 billion.[3] It is not at all surprising that many foreign companies have spared no attempts to penetrate the Chinese market. In fact, Microsoft Inc. was even willing to disclose its entire source code to the Chinese government in order to allay the government's security fears, and in the hope that the Chinese government will allow them to import and sell their software in China.

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1 Shakdher, The Long And Short Of Hardware Industry Travails, available on <http://www.financialexpress.com/fe/daily/20010222/efe22015.html>.

2 Experts Split on Prospects for China's Software Industry, available on <http://www.chinaproducts.com/eng2/content/contf1696.php>.

3 Legard, D., IDC: China software market to be worth $6B by 2007, available on <http://www.idg.net/ic_1263784_9675_1-5124.html>.

Nevertheless, it should be recognized that the legal regime governing the importation and sale of software in China differs from other jurisdictions such as the United States, the United Kingdom and Singapore. An ignorant importer of software technology will not only stand to lose out financially, but may also incur legal liability. Thus, a thorough understanding of the prevailing laws and regulations is a must before any company or individual wishes to foray into the Chinese market.

This article looks into the various intellectual property rights laws and laws relating to the importation and sale of software in China. It shall first examine the historical development of intellectual property and the growing recognition of the importance of intellectual property rights in modern China. This article also highlights the key intellectual property rights for computer software, namely copyrights and trademarks, which are protected in China, and the extent of such protection. This article will also describe the various procedures that a party needs to undertake to protect the intellectual property rights associated with the software product. Next, the article will examine the legal regime governing the registration of software products in China, and finally, we shall examine the laws governing the import of technology.

(B) Tthe Rise of Intellectual Property in China

Any discourse into the history of intellectual property laws in China must necessarily examine the influence of the history of Chinese culture, arguably the oldest civilization in the world. The modern recorded history of China is influenced by two value systems: Confucianism and Communism.

The Confucian ethic which is the bedrock of the Chinese work culture and family value system is based on five identified basic relationships. The five relationships – between ruler and subject, between father and son, between older brother and younger brother, between friends and between husband and wife encourage high ethical standards. However, outside of these five relationships, little or no ethical duty exists for either party.[4] Confucianism still has some influence on the value system in China as well as in the overseas Chinese enclaves of Singapore and Hong Kong.

Communism, which accompanied the establishment of the People's Republic of China in 1949, also defines the approach to

4 George P.Haley, New Asian Emperors: The Overseas Chinese, their Strategies and Competitive Advantages, Butterworth Heinemann, 1998.

intellectual property. This point is best illustrated by a early statement by Chairman Mao on the objective of copyright rules:

> "(our purpose is) to ensure that literature and art fit well into the whole revolutionary machine as a component part, that operates as a powerful weapon for uniting and educating the people and attacking and destroying the enemy, that they help the people fight the enemy with one heart and one mind."

Thus, it is not surprising that following the Cultural Revolution, intellectuals were imprisoned and intellectual works, representing the output of such intellectuals, were destroyed by the proletariate. It also represented the era when the Chinese government of the day repudiated all existing intellectual property agreements which had been entered into bilaterally with other countries. Therefore, in the context of its value systems, the Confucian-Communist value systems of China arguably places little emphasis on the individual rights on intellectual property in favour of the greater good.

On the other hand, one cannot ignore the fact that intellectual property is a concept conceived and promoted by the Western civilizations. For example, patent law confers the market monopoly to inventers. Developed in Europe as early as the 15th century, patent law was the catalyst for the industrial age. Copyright law protects the use of an expression of ideas and has its roots in the foundations of the copying industry.[5] As early as the 16th century, early English laws protected publishers with exclusive rights against copiers. Trademark law protects the indicia of goods and services and has its roots in the English common law of passing off and deceit in order to protect the goodwill involved in the selling goods or carrying on of business. Accordingly, in the late 19th century, a registration system of trademark was enacted to provide a more concrete way of protecting such indicia of good and services.

It must also be remembered that intellectual property laws were enacted by countries with a Judeo-Christian ethic system. With its clear emphasis on recognition of the right of individual and capitalism, it stands in contrast with China's Communist and Confucian principles of utilitarianism and socialism.

The other interesting point to note is that even so, certain intellectual property laws were conceived primarily to promote the interest of society.[6] The focus of intellectual property laws especially the law

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5 Although ironically, the birth of the modern printing press was of Chinese origin.

6 Lawrence Lessig, Code and Other Laws of Cyberspace, 133–135, Basic Books, 1999, pp. 133–135. He points out that Article 1, Section 8, Clause 8 of the Constitution of the United States states that 'to promote the progress of science and useful arts,

of copyright has been to encourage the creator to innovate in order to further the interest of society at large.

In the face of erosion of its intellectual heritage, the overwhelming ascendance of English as the lingua franca of the world and the fact that computer programming language is predominantly in the English alphabet, China has been, and it is likely that China will remain for many years, a net importer of intellectual property. Therefore, against this background, it is hardly surprising that before 1990, China's preoccupation has been with the import of technology rather than the protection of intellectual property.

However, coming under increasing international pressure, China has committed itself to developing its intellectual property laws. These include commitments to the World Trade Organisation to enact intellectual property laws which are in line with international standards. As part of China's accession to the World Trade Organisation (the "WTO"), China was required to strengthen its intellectual property laws to meet with the substantive obligations of the GATT Uruguay Round Agreement on Trade Related Intellectual Property Rights (TRIPS).

In the context of software products, three areas of intellectual property law are potentially applicable: copyright laws which protect the expressions of ideas protects the source code or the DNA which forms the software, patent laws which protect inventions is capable of affording protection to innovative programming techniques,[7] and trademark laws which protect the branding that accompanies the software. Some of the recent changes to such laws include the synchronization of regulations protecting computer software and copyright law and the inclusion of computer software as patentable inventions.

(C) The Intellectual Property Law System in China

Other than the three areas of law which form the specialist backbone of intellectual property laws, there are several other areas which form the rest of China's intellectual property regime, and they bear mentioning.

The Constitution, which was promulgated in 1982 and then amended in 1988, 1993 and 1999 respectively, represents the fundamental law of China – the legislative foundation of all other legislation.

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by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries' – which is communism, at the core of USA's constitutional protection of intellectual property.

7 Such patents are sometimes called 'software patents' because they protect software even though they are not patents on software as such.

It is not uncommon for other legislation in China (as is the common practice in other civil jurisdictions) to expressly state that intellectual property laws are formulated in accordance with the Constitution.[8] The Constitution enshrines the right of the individual to own property,[9] rewards scientific and technological research and innovation[10] and promotes the development of the arts and use of media.[11] Further, the Constitution encourages creative endeavours in the field of education, science, technology, literature, art and culture.[12]

The General Principles of the Civil Law which was promulgated in 1986 defines the relationships between parties over property matters. It sets out the civil rights of legal persons and the protection of such lawful civil rights and regulates relations between private parties. Section 3 of Chapter 5 of the General Principles of the Civil Law sets out intellectual property as one of the major components of civil rights. The rights of legal persons to create and exploit copyright, patents and trademarks are protected.[13]

The Criminal Law of the People's Republic of China which was promulgated in 1979 and revised in 1997, criminalizes certain activity within the territory of China. In relation to intellectual property, the worldwide trend, promoted by the intellectual property-intensive economies of the world, is to criminalize intellectual property infringement as a means of protection. Therefore, in Section 7, Chapter 3, Part II of the Criminal Law, infringement of intellectual property rights is punishable with imprisonment of up to seven years and unspecified fines.[14] However, in China's own unique way, the production or sale of imitation goods as genuine is also treated as a crime which undermines the order of a socialist market economy.[15]

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8 See for instance Article 1 of the Copyright Law which states that it 'is formulated in accordance with the Constitution'.

9 See Article 13 of the Constitution.

10 See Article 20 of the Constitution.

11 See Article 22 of the Constitution.

12 See Article 47 of the Constitution.

13 See Articles 94, 95 and 96 of the General Principles of Civil Law.

14 Article 213 to 219 of the Criminal Law criminalizes:

(a) the use of an identical trademark on the similar merchandise without the permission of its registered owner;

(b) knowingly selling merchandise with a fake trademark, forging or manufacturing without authority another person's registered trademarks;

(c) counterfeiting of patents, copyright infringement for the purpose of reaping illicit profit; and

(d) encroachment of commercial secrets which causes significant losses to persons having the rights to such commercial secrets.

15 Article 140 of the Criminal Law states that 'Any producer or seller who mixes up or adulterates products, passes fake imitations for genuine, sells seconds at best quality price, or passes unqualified products as qualified ones' may be sentenced to varying

The Law Against Unfair Competition was promulgated in 1993 and prohibits acts of passing off registered trademarks of another person[16] and the theft of business secrets.[17] Such acts, if considered criminal or prohibited by other legislation, will be dealt with under criminal or such other legislation. Otherwise, offenders will be subject to fines, compensation of the victim and confiscation of profits.[18]

Other than the judicial process for the hearing of intellectual property cases, China also has the unique administrative process for resolving intellectual property disputes. Administrative agencies have been set up for the purposes of providing effective and swift remedies when encountered in intellectual property disputes. The Administrative Authorities for Patent Affairs, the Administrative Authorities for Trademark Affairs and the National Copyright Administration Office and the various local level departments administer the Patent Law, the Trademark Law and the Copyright Law respectively. These administrative authorities typically have merged functions of law enforcement, management and administration. This powers include the powers to order infringers to desist from further acts of infringement, to order compensation[19] to collect fines, to seize infringing copies and equipment used to manufacture infringing copies. All decisions of the administrative authorities may be enforced by the People's Court. However, any party which disagrees with an administrative penalty imposed by the National Copyright Administration Office may, within three months of receipt of the written decision of the penalty, appeal to the People's Court.[20]

(D) The Copyright Law

The Copyright Law of the People's Republic of China was promulgated in 1991 and last revised in 2001. The expressed purposes of the enactment of the Copyright Law[21] are:

(a) to protect the copyrights, neighbouring rights and interests of authors of literary, artistic and scientific works;

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jail terms of up to 15 years and fined between RMB 25,000 to double of the value of the goods or suffer the confiscation of the goods.

16 See Article 5 of the Law Against Unfair Competition.

17 See Article 10 of the Law Against Unfair Competition.

18 See Articles 20 to 30 of the Law Against Unfair Competition.

19 See Article 47 of the Copyright Law. In the case of Trademark Law and Patent Law, Articles 53 and 57 respectively provide for the resolution of disputes over infringing use by mediation.

20 See Article 55 of the Copyright Law or 15 days, in the case of trademarks and patents (see Article 53 of the Trademark Law and Article 57 of the Patent Law respectively).

21 See Article 1 of the Copyright Law.

(b) to encourage the creation and propagation of works that are beneficial to the development of socialist spiritual and material civilization; and
(c) to promote the development of a flourishing socialist society of culture and science.

The Copyright Law is further supplemented with the People's Republic of China Copyright Law Implementing Regulations (the 'Copyright Regulations') which was promulgated in 2002.

Exclusive rights

The Copyright Law expressly specifies that computer software are a type of protected copyright subject matter or 'works',[22] and indicates that details of protection are to be set out in separate regulations such as the Regulations for the Protection of Computer Software ('Software Regulations').[23] This puts any lingering issue whether software is capable of protection under copyright law beyond doubt[24] and reflects the position under the World Intellectual Property Organization Copyright Treaty of 1996.[25]

In China, documentation accompanying software programs such as user manuals and charts describing functions, design, composition and method of use and contents are considered part of computer software.[26] In addition, it must be remembered that most software are accompanied by marketing material and packaging describing the use and maintenance of the software. Such written material is also protected as a literary work under the Copyright Law.[27]

The Copyright Law grants to the copyright holder exclusive rights to publish, reproduce and distribute and includes the rights of adaptation and translation.[28] Also included is the rights of attribution,[29]

22 See Article 3 of the Copyright Law.
23 See Article 58 of the Copyright Law.
24 In the Australian case of Apple Computer Inc v Computer Edge Pty Ltd [1984] FSR 481, an argument that computer programs in object code (machine-readable) form were not literary words in the copyright sense was rejected by a majority of the Federal Court of New South Wales.
25 It must be noted that although it is not a signatory to the WIPO Copyright Treaty, China, like many other countries including Singapore, has adopted certain provisions such Article 4 relating to computer programs and Article 7 relating to the right of commercial rental.
26 See Articles 2 and 3 of the Software Regulations.
27 See Article 3(1) of the Copyright Law.
28 See Article 10 of the Copyright Law.
29 See Article 10(2) of the Copyright Law. The right of attribution is the right to affix one's name to a work in order to indicate the author's identity. The right of attribution, revision and integrity are perpetual. See also Article 20 of the Copyright Law. However,

integrity[30] and revision,[31] which are akin to the French concept of moral rights. Specific attention is drawn to the right of rental,[32] which includes the right to permit others to temporarily use one's computer software for consideration provided that the computer software itself if not the essential object of the rental. This right has proven useful to the software industry applying the application service provider business model whereby software is accessed by users over a network such as the Internet to carry out certain functions instead of being downloaded into a specific computer. This right of rental may prove more crucial as more software is developed using the application service provider model.[33]

Ownership

Copyright vests in the author of the work unless otherwise provided in the Copyright Law such as where the work is created in the course of employment pursuant to an employment contract[34] or with the provision of material or technical resources[35] or the work is a commissioned work.[36] Arising from the aforesaid, as a matter of good practice, software companies should specify unequivocally in its contracts – whether with its employees or with external consultants engaged to work on any software – to ensure that the copyright of the resulting products will vest in the software company. Such approach should apply to localization work such as the adaptation of documentation in English to the Chinese language.

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this is disturbingly contrasted with Article 14 of the Software Regulations which seems to limit the life span of all copyrights including the right to attribution.

30 See Article 10(4) of the Copyright Law. The right of integrity is the right to protect one's work against misrepresentation and distortion.

31 See Article 10(3) of the Copyright Law. The right of revision is the right to revise or authorize others to revise one's work.

32 See Article 10(7).

33 See for instance a report on Microsoft's .NET, Oracle's and PeopleSoft's initiatives as reported in PC Magazine, 19 September 2000.

34 See Article 16 of the Copyright Law. Also, see Article 13 of the Software Regulations which provides that software developed by an employee shall be owned by an employer if (a) the software is developed in accordance with a development objective expressly assigned as part of the employee's duties, (b) the developed software is a foreseeable or natural result of the employee's carrying on activities in the line of duty; or (c) the software is one that is developed mainly using the funds, special equipment, undisclosed special information or other material and technical facilities of the employer.

35 In Article 11 the Copyright Regulations, 'material or technical resources' means that funds, equipment or materials provided exclusively by the legal person to the author for the author's completion of the work.

36 See Article 17 of the Copyright Law.

Duration of Protection

The Software Regulations provide that in the case of software owned by legal persons and other organizations, whether foreign or local, the period of protection is 50 years, ending on December 31 of the fiftieth year after the work was published.[37]

Works of Foreign Nationals

Pursuant to the Berne Convention,[38] the Copyright Law now applies national treatment – citizens of member countries to the Convention enjoy automatic protection in China upon the finishing of the works which are the subject matter of copyright, even though such works may have been published outside China.[39]

Exceptions to Copyright

There are a number of limited cases where a previously published work may be used without the consent of the copyright owner provided that the work is properly attributed to the copyright owner and the other rights enjoyed by the copyright owner shall not be prejudiced[40]:

(a) use for individual study, research or enjoyment;
(b) use for the purpose of reporting current event;
(c) printing or broadcasting of an article on an already published current political, religious or economic topic;
(d) translation or reproduction in small numbers for the purposes of teaching or scientific research;
(e) use by a government entity for the purpose of carrying out official duties to a reasonable extent;
(f) reproduction for the purpose of exhibiting or preserving a work in a library, archive, museum, art gallery or memorial hall;
(g) translation of a work created in the Han language (Mandarin) previously published by a Chinese citizen or entity into the language of a domestic minority ethic group in China; and
(h) transformation and subsequent publication of a work into Braille.

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37 See Article 14 of the Software Regulations.
38 The Berne Convention for the Protection of Literary and Artistic Works. It was held in 1886, completed in 1896, and last amended in 1979.
39 See Article 2 of the Copyright Law.
40 See Article 22 of the Copyright Law.

Dealing with Copyright

The Copyright Law provides in Part Three that copyright may be dealt with by way of licensing or assignment.[41]

A copyright licensing contract shall at a minimum contain the following terms[42]:

(a) the relevant rights being licensed;
(b) whether the license is exclusive or non-exclusive[43];
(c) the geographic scope and term of such licence;
(d) the amount of and procedure for remuneration;
(e) each party's liability for breach of contract; and
(f) other matters considered necessary by the parties.

An assignment of copyright shall at a minimum include the following terms[44]:

(a) the title of the work;
(b) the rights being assigned and the geographic scope of such rights;
(c) the price of the assignment;
(d) the amount of and procedure for remuneration;
(e) each party's liability for breach of contract; and
(f) other matters considered necessary by the parties.

The Copyright Law clearly states that any right not expressly licensed or assigned in the licensing or assignment contract may not be exercised by the licensee or assignee.[45] This calls into question other rights developed by the common law such as the right of repair.[46] However, Article 16 of the Software Regulations has a partial answer to this question – it provides that the owner of legitimate copies of software has the following rights:

(a) to load the software onto a computer or information processing device;

41 Article 21 of the Software Regulations provides that an exclusive license or assignment of software copyright may be registered with a registry designated by the Copyright Administrative Department.
42 See Article 24 of the Copyright Law.
43 In Article 25 of the Copyright Regulations and Article 19 of the Software Regulations, exclusive licenses must be in writing except in the case of works carried by newspapers or periodicals.
44 See Article 25 of the Copyright Law. In addition, Article 20 of the Software Regulations provides where a software copyright is to be assigned, the assignment must be in writing.
45 See Article 26 of the Copyright Law.
46 This limited right of repair was derived from the concept of non-derogation of grant and approved by the House of Lords in British Leyland v Armstrong [1986] RPC 279.

(b) to make backup copies to prepare for damaged copies provided that once the right to use the copy of software ceases, such backup copies shall be destroyed. The owner of the legitimate copies shall not supply such backups to any other persons for their use;

(c) to make necessary revisions to the software in order to customize it for actual use or to improve its function and performance.

The Copyright Law provides that if the rate of remuneration for any license or assignment of a work is unclear, then the remuneration shall be paid in accordance with the rate of remuneration established by the National Copyright Administration.[47]

The Software Regulations re-iterates where software is licensed or assigned by a Chinese citizen or entity to a foreigner, the relevant provisions of the Regulations of the People's Republic of China on Technology Import and Export Administration are applicable.[48]

In the event where there is a breach of contractual obligations or non-conformation with contractual terms, the remedy is civil in accordance with the Civil Law and Contract Law.[49] In addition, the parties to any contract dealing with copyright may agree to the inclusion of an arbitration clause.[50]

Liability and Enforcement Matters under the Copyright Law

Other than the usual acts of copyright infringement such as reproduction, publication and distribution without the consent of the copyright owner, the Software Regulations clarifies that the intentional circumvention of technological measures taken to protect the copyright in software and the intentional deletion or alteration of electronic right management information in the software are also considered acts of infringement.[51]

Remedies for infringing copyright include the cessation of such activity, payment of damages, issuing of an apology and eliminating the effects of such activity.[52] If the infringing activity also prejudices the public interest, then the copyright administration department may make the following orders:

(a) to cease the infringing acts;

47 See Article 27 of the Copyright Law.
48 See Part (H) below.
49 See Article 53 of the Copyright Law.
50 See Article 54 of the Copyright Law.
51 See Article 24(3) and (4) of the Software Regulations.
52 See Articles 46 and 47 of the Copyright Law.

(b) to confiscate unlawful income;
(c) to confiscate and destroy infringing copies; and
(d) to impose a fine.[53]

If the circumstances of infringement are serious, then the copyright administration department may also confiscate materials, tools and equipment used mainly in the manufacture of the infringing items.

According to Article 48 of the Copyright Law, the measure of damages payable to the copyright owner is based on the actual losses suffered. If such damages are difficult to quantify, then an order for damages may be made based on the illegal income earned by the infringer. However, if damages are still difficult to quantify, then the court may order statutory damages not exceeding RMB500,000. In addition, the measure of damages may include any reasonable expenses incurred in steps taken to halt the infringing activities.

If a copyright owner has evidence to show that infringing activity is happening or about to happen, and he can prove that failure to halt such activity would cause irreversible damage, then he can apply to court for an injunction as well as an order to preserve the property and evidence even before the lawsuit is brought to the courts.[54] This is in line with the common law development of Anton Piller and Mareva orders in England.

The burden of proving that the distribution of works, including computer software is lawful is on the distributor.[55] This position is different to that under the Singapore Copyright Act which requires to be shown, in order to establish infringement, that the distributor to have known or reasonable ought to have known, that the making of the article was carried out without the consent of the copyright owner.[56]

(E) Software Regulations

Of particular interest to software companies are the Regulations for the Protection of Computer Software which were adopted in 1991

53 Article 36 of the Copyright Regulations indicates that the imposed fine should not be more than three times the amount of the illegal turnover or if such amount of illegal turnover is difficult to determine, then the imposed fine should be no more than RMB100,000.
54 See Articles 49 and 50 of the Copyright Law. The details for such an order is specified in Article 93 to 96 and Article 99 of the Civil Procedure Law of the People's Republic of China.
55 Article 52 of the Copyright Law.
56 See section 105 of the Singapore Copyright Act.

and revised in 2002.[57] The Software Regulations complement the Copyright Law with a view to:[58]

(a) protecting the rights and interests of copyright owners of computer software;
(b) regulating the interests generated in the development, dissemination and use of computer software; and
(c) encouraging the development and circulation of computer software and the adoption of information technology in the Chinese economy.

Additional Rights

The Software Regulations reiterate the rights of software copyright owners as provided for in the Copyright Law.[59] In addition, they explain that the right of communication on information networks is the right to communicate software to the public by wire or by wireless means in such a way that members of the public may access the software at a time and from a place individually chosen by them.[60] The Software Regulations also explain that the right of translation is the right to translate the original software from one natural language and/or writing system into another natural language and/or writing system.[61]

Registration under the Measures for the Registration of Copyright in Computer Software

The Software Regulations provide software copyright owners with an avenue to register the software with a software registry vehicle designated by the Copyright Administration Department of the State Council[62] upon the payment of a fee.[63] The registration process is provided for in the Measures for the Registration of Copyright in Computer Software (the "Software Measures") which was promulgated by

57 Informal comments by Judge Jiang Zhipei of the Supreme People's Court of China indicate that regulations such as the Software Regulations are typically passed in order to gain experience before being passed as law. However, as the Software Regulations are specific legislation and the Copyright Law is general legislation, then in terms of software, the Software Regulations should have precedence.
58 See Article 1 of the Software Regulations.
59 See Article 10(12) of the Copyright Law.
60 See Article 8(7) of the Software Regulations.
61 See Article 8(8) of the Software Regulations.
62 The vehicle entrusted with the responsibilities of the software registry is the China Software Registration Center.
63 See Article 7 of the Software Regulations.

the National Copyright Administration on 20 February 2002. These new measures are meant to bring the Software Regulations in line with China's obligations under the WTO Agreement and the TRIPS Agreement. In particular, it removes the requirement that computer software had to be registered before legal or administrative proceedings on infringement could be brought. As such, the registration process is not compulsory but the State will give priority protection to software which has been registered with the National Copyright Administration. In addition, registration also has an evidential advantage, and would thus help to reduce litigation fees and ensure more certainty in commercial transactions between the parties

The following detailed provisions of the registration process are set out in the Software Measures:

(a) One application may be made for each independent published piece of software that can operate independently by the owner of the software copyright or its assignee;[64]
(b) Each application must be accompanied by a guarantee of rights, samples of the source code of the software and the documentation for the software;[65]
(c) All application forms shall be completed in Chinese. If the applicant completes the form in another language, it shall be accompanied by an explanation in Chinese;[66]
(d) Upon the approval for registration, the applicant may apply to deposit the source code for subsequent use of evidence. Such source code shall be sealed and may not be opened without the consent of the applicant or an order of the court.[67]

One of the legitimate concerns that businesses have is that the unauthorised leakage of their source codes to third parties may result in their software product being pirated, thereby resulting in severe losses for them. Indeed, applicants are required to submit 30 consecutive pages for each of the beginning and end of the source code. If the entire code consists of fewer than 60 pages, the entire source code list shall be submitted.[68] However, the Software Measures provide for the filing of an exceptional deposit if the source code contains the business secrets of the Applicant, or if the code contains other secrets that the applicant does not want to disclose. An application to file an exceptional deposit shall state the reason for filing the exceptional

64 See Articles 3 and 7 of the Software Measures.
65 See Article 8 of the Software Measures.
66 See Article 17 of the Software Measures.
67 See Article 13 of the Software Measures.
68 See Article 10 of the Software Measures.

deposit. Depending on the circumstances, the applicant then may file one of the following:

(a) 30 consecutive pages of each of the beginning and end of the source code, where the secret portions have been blocked out with thick diagonal lines, provided that the blocked out section does not exceed 50% of the source code submitted;
(b) the first 10 consecutive pages of the source code together with 50 consecutive pages from any part of the source code; or
(c) 30 consecutive pages from each of the beginning and end of the object code together with 30 consecutive pages from any part of the source program.[69]

(F) The Trademark Law System and Protection of Trademarks Associated with Software

It is not hard to imagine that in addition to issues of copyright in a software product, a firm that seeks to import and sell its software in China also needs to be aware of issues relating to the protection of its trademark. Often, many well-known trademarks are associated with popular software available in the market today. Microsoft, Windows, Linux, Norton and Adobe are just a few of these well-known and highly prized trademarks.

The protection of trademarks has been an important issue in the development of intellectual property laws in China. In 23 August 1982, the National People's Congress (the 'NPC') enacted the Trademark Law and it came into effect on 1 March 1983. This was the first piece of intellectual property legislation that was enacted by the NPC since China's adoption of the Economic Reform and Openness Policy at the end of the 1970s. This is also the primary legislation for the registration and protection of trademarks in China. Several other laws adopted by the NPC also relate to trademark protection, including the General Principles of the Civil Law and the Criminal Law of the People's Republic of China.[70] Since then, the State Council[71] and the State Administration of Industry and Commerce[72] have

69 See Article 12 of the Software Measures.
70 See Part C above.
71 These include the Implementing Regulations of the Trademark Law which was promulgated on 10 March 1983 and undergoing its fourth revision according to the revised Trademark Law of 2001, and the Regulations on Special Signs which was promulgated on 13 July 1996.
72 These include the Regulations on Registration and Administration of Collective Marks and Certification Marks which was promulgated on 30 December 1994 and revised on 3 December 1998, the Regulations on Trademark Printing which was published on 5 September 1996 and revised on 3 December 1998, and the Trademark Examination

promulgated various administrative regulations, opinions and guidelines to supplement the primary legislation. In addition, China has also acceded to several international treaties in her attempts to harmonize her trademark protection regime with the rest of the world. These include acceding to the Paris Convention for the Protection of Industrial Property in 1985, acceding to the Madrid Agreement Concerning the International Registration of Marks and Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks in 1989, acceding to the Nice Agreement Concerning the International Classification of Goods and Services for the Purposes of the Registration of Marks in 1994, acceding to the Trademark Law Treaty in 1994, and the most recent and arguably the most important, her accession to the Agreement on Trade-Related Aspects of Intellectual Property Rights, Including Trade in Counterfeit Goods (TRIPS Agreement) in 11 December 2001.

The Trademark Law received its first amendment on 22 February 1993 (the '1993 Trademark Law') and its second amendment on 27 October 2001 (the '2001 Trademark Law'). The most recent amendments were made to eliminate the discrepancies that have existed between the 1993 Trademark Law and the TRIPS Agreement and to incorporate the provisions of the Paris Convention with respect to the recognition and registration of well-known marks. In line with the second revision of the Trademark Law, the Implementing Regulations of the Trademark Law (the '2001 Trademark Implementing Regulations')[73] and the Trademark Examination Guidelines were also amended accordingly.

Registration of Trademarks

A registered trademark is defined as a trademark that has been approved for registration.[74] The 2001 Trademark Law now specifically provides that trademarks for goods, trademarks for services, collective marks and certification marks may be registered as trademarks.

Article 4 of the 2001 Trademark Law states that natural persons, legal persons or other organizations that need to obtain the exclusive right to use a trademark for the goods they produce, manufacture, process or distribute shall apply to register a trademark for goods. They may also register a trademark for services if they need to obtain the

Guidelines, which was promulgated on 2 November 1995 and now being revised according to the revised Trademark Law of 2001.

73 The Trademark Implementing Regulations were amended in August 2002 and came into effect on 15 September 2002.

74 See Article 3 of the 2001 Trademark Law.

exclusive right to use a trademark for the services they provide. This marks a departure from the 1993 Trademark Law, which only allowed local enterprises, institutions, individual producers or traders[75]and foreign natural persons[76] or foreign enterprises[77] to register a trademark for goods or services. Chinese natural persons, on the other hand, were not afforded a similar privilege. The 2001 Trademark Law now allows natural persons in China to register a trademark for goods or services. This amendment brings China's trademark law in line with the Paris Convention and the TRIPS Agreement.

One of the particularities of the 1993 Trademark Law was that it imposed a restriction on the type of words and devices that could be registered. The old law stipulated that signs to be used or registered as trademarks should be distinctive, visible and legitimate. The difficulty is that the law as it then stood only permitted the registration of trademarks derived from two dimensional words and devices.[78] This was clearly out of line with international practices and in particular, provisions of the TRIPS Agreement. In this regard, Article 15(1) of the TRIPS Agreement provides:

> "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 registration as trademarks. Where signs are not inherently capable of distinguishing

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75 Article 4 of the 1993 Trademark Law states: 'Any enterprise, institution, or individual producer or trader, intending to acquire the exclusive right to use a trademark for the goods produced, manufactured, processed, selected or marketed by it or him, shall file an application for the registration of the goods trademark with the Trademark Office. Any enterprise, institution, or individual producer or trader, intending to acquire the exclusive right to use a service mark for the services provided by it or him, shall file an application for the registration of the service mark with the Trademark Office.'

76 Article 9 of the 1993 Trademark Law states that 'Any foreigner or foreign enterprise intending to apply for the registration of a trademark in China shall file an application in accordance with any agreement concluded between the People's Republic of China and the country to which the applicant belongs, or according to the international treaty to which both countries are parties, or on the basis of the principle of reciprocity.' This basis is recognized under Article 6 of the Paris Convention.

77 Article 9 of the 1993 Trademark Law states: 'Any foreigner or foreign enterprise intending to apply for the registration of a trademark in China shall file an application in accordance with any agreement concluded between the People's Republic of China and the country to which the applicant belongs, or according to the international treaty to which both countries are parties, or on the basis of the principle of reciprocity.'

78 Article 7 of the 1993 Trademark Law emphatically states: 'Any word, device or their combination that is used as a trademark shall be so distinctive as to be distinguishable.'

> the relevant goods or services, Members may make registrability depend on distinctiveness acquired through use. Members may require, as a condition of registration, that signs be visually perceptible."

After China's accession to the WTO, the 2001 Trademark Law now expressly permits the registration of visually perceptible three-dimensional forms and colours or a combination of colours. Article 8 of the 2001 Trademark Law provides:

> "Any visible mark that can differentiate the commodity of a natural person, legal person or other organization from the commodity of other natural persons, legal persons or organizations, including a word, deign, letter, number, three-dimensional mark and colour combination, or any combination of the aforementioned marks, may be filed in an application for trademark registration."

Notwithstanding that three-dimensional marks are now capable of being registered, Article 12 of the 2001 Trademark Law prohibits the registration of three-dimensional marks that merely relate to shapes arising out of the nature of goods, shapes of goods required for obtaining technical effects or shapes that enable the goods to have substantial value.

In general, Article 11 of the 2001 Trademark Law provides that the following signs may not be registered as trademarks:

(a) marks that consist exclusively of the generic name, depiction or model number of the goods concerned;
(b) marks that consist exclusively of a direct designation of the quality, main raw materials, functions, intended purpose, weight, quantity or other characteristics of the goods; and
(c) marks that are lacking in distinctiveness.[79]

However, the above marks may be registered after they have acquired distinctiveness through use and are distinguishable.

In addition, Article 10 of the 2001 Trademark Act still provides that the following marks are incapable of registration under any circumstances:

(a) marks that are identical or similar to the state name, national flag, national emblem, military flag or decorations of the People's Republic of China;
(b) marks that are identical or similar to the names of places or civic buildings where organs of the government are located;

79 Article 11(1) to 11(3) of the 2001 Trademark Law.

(c) marks which are identical or similar to the state name, national flag, national emblem or military flag of a foreign country, unless approved by the government of the said country;
(d) marks which are identical or similar to the name, emblem or flag of an inter-governmental international organisation, unless the inter-governmental international organisation has consented to the trademark registration or unless doing so would not be likely to confuse the public;
(e) marks that are identical or similar to the name or mark of the 'Red Cross' or the 'Red Crescent';
(f) marks that are discriminatory against any nationality;
(g) marks that promote in an exaggerated manner and that are of a deceptive nature; or
(h) marks that are detrimental to socialist morals or customs, or have other adverse influences.

Article 13 of the 2001 Trademark Implementing Regulations sets out the procedure for an application for trademark registration. Whereas Chinese trademark owners are allowed to register their trademarks directly with the trademark office, it is mandatory for foreign trademark owners to appoint as their agent an organization recognized by the State as having the qualifications to act as a trademark agent to register their trademarks.[80] This seems to be inconsistent with Article 3 of the TRIPS Agreement, which enshrines the principle of equal treatment for all nationals of member states with regard to the protection of intellectual property. Nevertheless, it is submitted that Article 2(3) of the Paris Convention[81] expressly allows for a member state to do so.

Article 4 of the Paris Convention provides detailed rules with regard to the right of priority. Under Article 4(C) of the Paris Convention, the period of priority for trademarks is six months. Article 11 of the Paris Convention requires members to grant temporary protection to trademarks in respect of goods exhibited at official or officially recognized international exhibitions held in the territory of the members. The owner of the trademark under temporary protection may request

80 Article 18 of the 2001 Trademark Law states 'To apply for the registration of a trademark or the processing of other trademark matters in China, foreigners and foreign enterprises shall appoint as their agent an organization recognized by the State as having the qualifications to act as trademark agent.'

81 Article 2(3) of the Paris Convention states 'The provisions of the laws of each of the countries of the Union relating to judicial and administrative procedure and to jurisdiction, and to the designation of an address for service or the appointment of an agent, which may be required by the laws on industrial property are expressly reserved.'

the right of priority.[82] Before the second revision of the Trademark Law, there was no formal legal system for the right of priority. The 2001 Trademark Law now contains formal provisions for the right of priority, bringing China's trademark regime in line with international practices.

Thus, the 2001 Trademark Law provides that any app1icant for the registration of a trademark who files an application for registration of the same trademark for identical goods in China within six months from the date of filing the first application for the trademark registration overseas may enjoy the right of priority in accordance with any agreement concluded between the People's Republic of China and the country to which the applicant belongs, or according to the international treaty to which both countries are parties, or on the basis of the principle whereby each acknowledges the right of priority of the other. Any person claiming the right of priority according to the preceding paragraph shall make a statement in writing when it or he files the application for the trademark registration, and submit, within three months, a copy of the application documents it or he first filed for the registration of the trademark; where the applicant fails to make the claim in writing or submit the copy of the application documents within the time limit, the claim shall be deemed not to have been made for the right of priority.[83]

According to Article 25 of the 2001 Trademark Law, where a trademark is first used for goods in an international exhibition on sponsored or recognized by the Chinese Government, the applicant for the registration of the trademark may also enjoy the right of priority within six months from the date of exhibition of the goods. Anyone claiming the right of priority according to the preceding paragraph shall make a claim in writing when he files the application for the registration of the trademark, and submit, within three months, documents showing the title of the exhibition in which its or his goods was displayed, proof that the trademark was used for the goods exhibited, and the date of exhibition; where the claim is not made in writing, or the proof documents not submitted within the time limit, the claim shall be deemed not to have been made for the right of priority.

There is no specified time limit for the examination and registration of a trademark. However, Article 35 of the 2001 Trademark Law states that 'any application for trademark registration and trademark reviews shall be examined in a timely manner.' In the event of a successful registration, the registered trademark is valid for a period of 10

82 See Article 11(2) of the Paris Convention.
83 Article 24 of the 2001 Trademark Law.

years, calculated from the date on which the trademark is approved.[84] The owner of the registered trademark may apply to an extension of the validity period of the trademark within 6 months prior to the expiration of the period. The validity of the trademark can be extended for another 10 years.[85]

Infringement of Trademarks

Article 52 of the 2001 Trademark Act specifies certain acts which constitute the infringement of a registered trademark:

(a) using 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;
(b) sale of goods that infringe the exclusive right to use a registered trademark;
(c) counterfeiting, or making, 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;
(d) substituting, without the consent of the trademark registrant, his registered trademark and market again the goods bearing the replaced trademark; or
(e) causing, in other respects, prejudice to the exclusive right of another person to use a registered trademark.

Article 41 of the TRIPS Agreement requires members to ensure that specified enforcement procedures are available under the law to effectively combat infringement of intellectual property rights and to act as a deterrent to further infringement. The 2001 Trademark Law strengthens the legal protection of trademark rights by improving the civil, administrative and penal enforcement mechanisms. The 1993 Trademark Law did not expressly provide trademark administrative authorities to seize and destroy goods which infringed the trademark of others. However, the 2001 Trademark Law provides that the administrative authority for industry and commerce has the power to investigate and handle any act of infringement of the exclusive right to use a registered trademark,[86] and has the power to order the

84 Article 37 of the 2001 Trademark Law.
85 Article 38 of the 2001 Trademark Law. Note that this article also provides for a 6 month grace period after the expiration of the validity of the trademark. If no application has been filed at the expiration the grace period, the registered trademark shall be cancelled.
86 Article 54 of the 2001 Trademark Law.

infringer to immediately stop the infringing act, confiscate and destroy the infringing goods and tools specially used for the manufacture of the infringing goods and for counterfeiting the representations of the registered trademark, and impose a fine.[87] This brings the 2001 Trademark Law in line with Article 46 of the TRIPS Agreement.[88] Article 59 of the 2001 Trademark Law provides that if the infringement is so serious as to constitute a crime, he shall be prosecuted, according to law, for his criminal liabilities in addition to his compensation for the damages suffered by the trademark holder.[89] Much criticism was focused on the inadequate compensation provisions of the 1993 Trademark Law. The compensation payable under the 1993 Trademark Law, and as a matter of fact, under the 2001 Trademark Law, is still a sum equivalent to the benefits that the infringer has earned by the infringement during the infringement period or the losses the trademark owner has suffered in consequence of the infringement during the infringement period.[90] However, the 2001 Act now provides for damages to include appropriate expenses of the party whose trademark is infringed for stopping the infringement. Under Article 56(2) of the 2001 Trademark Law, where it is difficult to determine the profit that the infringer has earned because of the infringement in the period of the infringement or the injury that the infringee has suffered from the infringement in the period of the infringement, the People's Court shall impose an amount of damages of no more than RMB500,000 according to the circumstances of the infringement.

(G) Administration of Software Products

A distinct feature of the Chinese legal regime which differs from most jurisdictions is the requirement for a software product to be registered

87 Article 53 of the 2001 Trademark Law.

88 Article 46 of the TRIPS Agreement states 'In order to create an effective deterrent to infringement, the judicial authorities shall have the authority to order that goods that they have found to be infringing be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to avoid any harm caused to the right holder, or, unless this would be contrary to existing constitutional requirements, destroyed. The judicial authorities shall also have the authority to order that materials and implements the predominant use of which has been in the creation of the infringing goods be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to minimize the risks of further infringements. In considering such requests, the need for proportionality between the seriousness of the infringement and the remedies ordered as well as the interests of third parties shall be taken into account. In regard to counterfeit trademark goods, the simple removal of the trademark unlawfully affixed shall not be sufficient, other than in exceptional cases, to permit release of the goods into the channels of commerce.'

89 See Articles 213 to 215 of the Criminal Law. See also Part C above.

90 Article 56 of the 2001 Trademark Law.

before it can be sold within the country. The Measures for the Administration of Software Products (the 'Measures')[91] were adopted at the 4th Ministry Affairs Meeting of the Ministry of Information Industries (the 'MII') on 8 October 2000 and promulgated on 27 October 2000 by the MII in accordance with the State Council's Certain Policies for Encouraging the Development of the Software and Integrated Circuit Industries[92] (the 'Industry Policies').

The aims of the Measures are to strengthen the administration of software products and promote the development of the software industry in China.[93] Nevertheless, a closer examination of the provisions of the Measures would reveal that such procedures were set in place to enable the governing authorities to examine and control the contents of such software. The Measures provide a compulsory registration system for computer software products and set out various requirements and conditions which must be complied with for the manufacturing and sale of software in China. Also, domestically manufactured software products and imported software products which have undergone localized development and production within China which have been registered and filed in accordance with the provisions of the Measures may qualify for the relevant incentive policies stipulated in the Industry Policies.[94]

The Measures apply to the dealing in, and administration of, software products (including software domestically manufactured within China and imported software) within the territory of the People's Republic of China. The term 'software products' is defined as 'computer software, software embedded in information systems or equipment provided to users, and computer software provided together with computer information systems integration, application and other technical services'. The Measures further defines the terms 'domestically manufactured software' and 'imported software'. The former refers to software products developed and manufactured within China whereas the latter refers to software products developed outside of China which are manufactured and/or traded in various forms within China.[95] However, software developed by entities or individuals for their own use for their own exclusive use or software

91 Decree No. 5 of 2000.
92 In June 2000, the State Council promulgated 'Certain Policies on Encouraging the Development of Software and Integrated Circuit Industries', offering preferential policies in such areas as investment, taxation, technology, exports, personnel and procurement, in a bid to encourage enterprises to expand both the domestic and overseas markets.
93 Article 1, Measures for the Administration of Software Products.
94 Articles 7 and 10, Measures for the Administration of Software Products.
95 Article 3, Measures for the Administration of Software Products.

developed by others so commissioned do not fall under the provisions of these Measures.[96]

Under Article 4 of the Measures, no entity or individual may develop, manufacture, sell, import or export software products which infringes the intellectual property rights of others, which contain computer viruses, which may endanger the security of computer systems, which contains contents which are prohibited by state regulations and which do not conform to the standards and norm for software in China.[97]

Registration of Software Products

The Measures provide for a registration and filing system for software products. Software products which have not been registered of filed for the record, or software products which had their registrations revoked, may not be sold or traded within China.[98] The application procedure differs slightly depending on whether the software is domestically manufactured or imported.

The registration process for imported software products (including imported software products that has undergone localized development and production within China) differs slightly from the registration procedure for domestically manufactured software. Applications for the registration and filing of imported software products shall be made by the entity responsible for the import of the software product. The following materials are required for the registration of imported software products:

(a) an application form for software product registration;
(b) a copy of the applicant's legal person business licence and the identity documents of its legal representative;
(c) a sample of the software product (a copy of the software and the product manual is required);
(d) materials certifying that the copyright holder to the software product is authorized to deal in the product within China;
(e) test results issued by a software testing agency authorized by the MII, or other test materials recognized by the MII;[99] and
(f) materials certifying that the software product to be registered conforms with State policies and regulations concerning the

96 Article 2, Measures for the Administration of Software Products.
97 Article 4, Measures for the Administration of Software Products.
98 Article 7, Measures for the Administration of Software Products.
99 Most of the testing is done in the software testing centres although in the rare instance, this may be carried out in the premises if such facilities are not available in the software testing centres.

> importation of software, and other relevant materials which are required to be submitted.[100]

The registration and filing of imported software product is processed by the China Software Industry Association[101] and examined and approved by the MII. In the event of a successful registration, an imported software product registration number and software product registration certificate shall be issued.[102]

The registration and filing of software products is effective upon the issuance of the registration certificate for software products and its announcement by the MII.[103] Although the Measures do not provide for the maintenance of a register for such software products, details of software products which have been successfully registered with the MII can be found on the China Software website.[104] The software product registration is valid for five years and may be renewed upon the expiry of each application.[105]

If the registered software is discovered to have prohibited content under Article 4 of the Measures or if registration was fraudulently obtained, the software registration administration department shall revoke the software registration number and registration certificate of the software in question. Any preferential tax reductions awarded under the Industry Policies, if already extended, shall also be recovered. A warning and a public announcement of the breach will also be issued by the relevant department in charge of the information industry of the province, autonomous region or directly administered municipality.[106] The Measures further provide that where there is a violation of other state laws of regulations, punishment will be imposed by the relevant authority in accordance with the law.[107]

(H) Import of Technology

As postulated above, prior to China's accession to the WTO, the technology import regulatory framework of China was put in place

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100 Article 11, Measures for the Administration of Software Products.

101 The China Software Industry Association (CSIA) was founded on 6 September 1984. Further information relating to the CSIA, including its aims and primary tasks, can be found on their web page <http://www.csia.org.cn/Chinese_cn/about/about.htm>.

102 Article 10, Measures for the Administration of Software Products.

103 Article 12, Measures for the Administration of Software Products.

104 Information relating to the product name, developer, certificate number and the date the product registration is announced can be found on <http://www.chinasoftware.com.cn>. In the alternative, successful software product registration is also published on China Computer News.

105 Article 12, Measures for the Administration of Software Products.

106 Article 29, Measures for the Administration of Software Products.

107 Article 30, Measures for the Administration of Software Products.

primarily to protect Chinese domestic enterprises (most of which were state-owned and relatively inexperienced in technology transfer matters) from the unreasonable unscrupulous conduct of technology transferors. This was achieved by scrutinizing the terms of the contracts which effected such technology transfers. As a result, a number of onerous requirements were imposed on foreign technology transferors, including limited royalty period, strict warranty obligations, and elaborate regulatory approval procedures. A number of legislative instruments were put in place to regulate the import of technology; they include the Regulations on the Administration of Technology Import Contracts (the 'Technology Import Regulations'), the Implementing Rules for the Regulations on the Administration of Technology Import Contracts (the 'Technology Import Contracts Implementing Rules') and the Provisional Measures for the Administration of Technology and Equipment Import Matters (the 'Import Matters Provisional Measures'). This not only made the regulatory regime confusing and cumbersome, but it presents a legal minefield for those who wish to import technology into China.

With China's accession to the WTO, the government of China committed to the elimination of various regulatory measures which imposed onerous obligations and restrictions on foreign technology transferors. In 10 December of 2001, the State Council and the Ministry of Foreign Trade and Economic Cooperation ('MOFTEC') issued the Administration of Technology of Import and Export Regulations (the 'Technology Import Export Regulations') in an effort to conform China's technology import and export regulatory regime to the requirement of the WTO. The effect of the legislative changes is that technology import transactions are now subject to lesser degree of governmental control.

Under the pre-WTO regime, Technology Import Regulations required that transferred technology must be advanced and appropriate and shall conform to at least one of the following:

> (1) Capable of developing and producing new products;
> (2) Capable of improving quality and performance of products, reducing production cost and lowering consumption of energy or raw materials;
> (3) Favorable to the maximum utilization of local resources;
> (4) Capable of expanding product export and increasing earnings of foreign currencies;
> (5) Favorable to environmental protection;
> (6) Favorable to production safety;
> (7) Favorable to the improvement of management;

(8) Contributing to the advancement of scientific and technical levels.[108]

These mandatory requirements were not only vague, they also imposed onerous burdens on the parties to show that their products satisfied the requirements set out above.

The spirit of the post-WTO Scheme is to promote free cross-border technology transfer with relatively few criteria and restrictions imposed by the government. This is clearly reflected in Article 5 of the Technology Import Export Regulations, which provides that 'The State permits the free import and export of technology, unless otherwise provided by laws and administrative regulations'. Therefore, the new Technology Import Export Regulations dispensed with the detailed requirements that previously existed, while retaining a general statement that technology import shall comply with the industrial policies, scientific and technological policies, and social development policies of the State, and benefit China's scientific and technological progress and development of foreign economic and technological co-operation, and benefit the maintenance of China's economic and technological rights and interests.[109]

Before the new Technology Import Export Regulations were promulgated, all technology import contracts were subject to a cumbersome three-step procedure of preliminary approval, formal approval, and subsequent registration, which on the average took at least several months to complete. The Technology Import Contracts Implementing Rules also provide for substantial governmental interference in the substantive content of the contract. For example, the authorities shall not approve a contract if the price of the imported technology is unreasonable, or if stipulations on rights, responsibilities and obligations of the contracting parties are unclear, unequal or irrational.[110] These stipulations are not only vague, but they also run contrary to the principle of the freedom of contract. The approval authority was required to undertake substantive review of the contracts and often times did not hesitate to demand substantive changes in its review process. This in effect necessitated a second round of negotiations between the technology transferor and the approval authority after the transferor and transferee had formally signed the contract. This may result in much uncertainty and often delays and costs. Indeed, registration was a precondition to the effectiveness of all technology import

108 Article 2 of the Regulations on the Administration of Technology Import Contracts.
109 Article 4 of the Administration of Technology of Import and Export Regulations.
110 Article 18 of the Technology Import Contracts Implementing Rules.

contracts and as such, the importation process was a long drawn and costly affair.

The new Technology Import Export Regulations dispensed with these cumbersome registration procedures and introduced a simpler, more streamlined procedure. Technologies are classified into three general categories: prohibited, restricted, and technology that may be freely imported. On 30 December 2001, MOFTEC has published a catalogue which listed 25 prohibited technologies and 16 restricted import technologies.[111] Thus, it is incumbent on the software importer to check that the catalogue carefully in order to determine which category the software falls into.

Article 17 of the Foreign Trade Law lists 4 general classes of technology which are prohibited. They include, inter alia, technology which endanger the national security or the public good, technology that damage the environment and the prohibition of which is necessary to protect the life, health and security of the people and the natural environment. The specific technologies which are classified as 'prohibited' under the catalogue published by MOFTEC include, among others, 'waxed cork packing technology for pharmaceuticals', 'Acid leaching smelting technology for ionic rare-earth ore' and 'Thermal-sintering ore technology'. There is an absolute prohibition on the importation of such technology.

Article 16 of the Foreign Trade law lists 7 general classes of technology which are restricted. They include, inter alia, the restriction of import where it is necessary due to a shortage of domestic supplies or in order to effectively protect non-renewable domestic resources and where it is necessary to restrict imports in order to establish or accelerate the establishment of specific domestic industries. The catalogue published by MOFTEC lists the following technologies as 'restricted'. They include, among others, 'Genetic modified organisms technology', 'Gasoline hydrocracking techniques' and 'Anti-counterfeiting technology for RMB printing'. Article 10 of the Technology Import Export Regulations provides that a licensing system shall be adopted for technology which falls under this category, and no import without a licence shall be allowed. As such, to import such restricted technologies, an importer must apply to the foreign economic and trade administration department of the State Council (which is currently MOFTEC), which is required to process the application within the time limit of 30 days. In the event that the application is granted, MOFTEC will then issue a letter of intent to the importer, thereby

111 The obligation for MOFTEC to do so arises under Article 18 of the Foreign Trade Law.

enabling the importer to execute the technology import contract. A copy of the said contract must be submitted to MOFTEC together with an application for a technology import licence. MOFTEC will determine all applications within 10 days and upon approval of the contract, an import licence will then be issued, allowing the importer to bring the restricted technology into China. Article 16 of the Technology Import Export Regulations states that the contract will only be valid on the date on which the technology import licence is issued, and not the date on which the contract is executed.

For the importation of technology that may be freely imported, there is no need to obtain prior permission from the state. All that is required is for the importer to register its technology import contract with MOFTEC.[112] Upon successful registration, MOFTEC will then issue a technology import registration certificate to evidence the registration. In contrast to the pre-WTO Rules, the new Administration of Technology of Import and Export Regulations no longer expressly require that a Chinese version of the contract be submitted to the MOFTEC in the case of importation of unrestricted technology.[113] This procedure is relatively easy, and it takes only 3 working days for the registration process to be completed.[114]

In addition to the cumbersome registration procedures, the Technology Import Regulations also contained several provisions which govern the substantive content of the technology import contract. Article 8 of the Technology Import Regulations prescribed a maximum term of 10 years for all technology transfer contracts (except on certain extraordinary occasions where the technology was especially needed by China). Article 9 further mandated that except prior where regulatory approval is granted, after the contract term expired, the transferee would be free to exploit the technology without further royalty obligation. These provisions were onerous and placed the technology transferor in a disadvantaged position. Under the new Technology Import Export Regulations, technology transfer contracts are no longer subject to a maximum contract term of 10 years and the parties are free to prescribe their own term. Parties are also free to negotiate the continued use of the technology in accordance with the principles of fairness and reasonableness after the term of the contract has expired.[115] This seems to be fairer and more in line with the hallowed principle of the freedom of contract.

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112 Article 17, Administration of Technology of Import and Export Regulations.
113 Article 17(2) Implementing Rules for the Regulations on the Administration of Technology Import Contracts.
114 Article 18 Administration of Technology of Import and Export Regulations.
115 Article 28 Administration of Technology of Import and Export Regulations.

With regard to the substantive contents of the technology import contract, the Technology Import Export Regulations requires that the importer provide two mandatory warranties:

(1) The transferor is required to warrant that he is the lawful owner of the technology provided, or that it is the person who has the right to assign or license such technology;[116] and
(2) The transferor is required to warrant that the supplied technology is complete, free of error, valid and capable of achieving the technical goals agreed upon between the parties.[117]

These provisions are the vestiges of the pre-WTO regime, which was primarily aimed at protecting domestic companies and individuals from unscrupulous foreign parties.

Further, specific terms of the contract are also subject to governmental scrutiny in both the pre and post-WTO regime, especially with regard to certain restrictive clauses. The pre-WTO regime states out 9 classes of restrictive clauses which shall not be included in the technology import contract unless special approval is obtained from the governing authorities. These 9 clauses are:

> (1) Requiring the recipient to accept additional conditions which are not related to the technology to the imported, such as requiring the recipient to purchase unnecessary technology, technical services, raw materials, equipment and products;
> (2) Restricting the freedom of choice of the recipient to obtain raw materials, parts and components or equipment from other sources;
> (3) Restricting the development and improvement by the recipient of the imported technology;
> (4) Restricting the acquisition by the recipient of similar or competing technology from other sources;
> (5) Non-reciprocal terms of exchange by both parties of improvements to the imported technology;
> (6) Restricting the quantity, variety and sales price of products to be manufactured by the recipient with the imported technology;
> (7) Unreasonably restricting the sales channels and export markets of the recipient;

116 Article 24 Administration of Technology of Import and Export Regulations.
117 Article 25 Administration of Technology of Import and Export Regulations.

(8) Forbidding use by the recipient of the imported technology after expiration of the contract; and
(9) Requiring the recipient to pay for or to undertake obligations for patents which are unused or no longer effective.[118]

Under the new Technology Import Export Regulations, 7 classes of restrictive clauses are expressly prohibited, and they shall not be used in any technology import contract. The governing authorities do not have the prerogative to approve contracts which contain such restrictive clauses. With the obvious deletion of two classes of restrictive clauses, these clauses are largely similar to the previous legislation, and they are clauses which:

(1) requiring the transferee to accept tying conditions unrelated to technology import, including purchase of any unnecessary technology, raw materials, products, equipment or services;
(2) requiring the transferee to pay compensation for, or bear obligations with respect to, patents which have expired or have been invalidated;
(3) restricting the transferee's improvement of the imported technology or restricting the use of the improvement by the transferee;
(4) restricting the transferee's acquisition from other sources of technology similar to, or competitive with, the technology of the transferor;
(5) unreasonably restricting the transferee's channels or sources for purchase of raw materials, parts and components, products or equipment;
(6) unreasonably restricting the quantity, variety or sale price of the products produced by the transferee; and
(7) unreasonably restricting the export channels for products produced by transferee's using the technology imported.[119]

Nevertheless, since most technology import contracts are no longer subject to prior approval, it will likely be left to the court or arbitrator, and not the governmental authorities, to decide whether a particular technology contract clause falls into one of these categories in the event that a dispute arises between the contract parties.

Parties wishing to import software technology into China must be aware that failure to comply with the above procedures amounts to a criminal offence, and Article 46 of the Technology Import Export Regulations states that criminal liability shall be pursued according to

118 Article 9 Regulations on the Administration of Technology Import Contracts.
119 Article 29 Regulations on the Administration of Technology Import Contracts.

the provisions on the crime of smuggling, the crime of illegal operations, the crime of disclosure of State secrets and other crimes under the criminal law. If the acts are not sufficient for the State to impose criminal penalties, the party which failed to comply with the above procedures shall be fined, the illegal gains confiscated and have its foreign trade operation permit revoked.[120] It is evident that failure to comply with the above provisions and procedures constitute very serious crimes, and severe criminal sanctions may be imposed on the party in breach of these provisions.

(I) Conclusion

It is clear that China has enhanced its laws in relation to intellectual property to bring it in line with her international obligations. In addition, China has also revised its control on the import of technology in tandem with freer trade. However, it is clear that the legal issues facing software companies entering the Chinese market have their little nuances, just as they would face in any other market. In addition, as the Chinese legal regime on software-related laws is in an evolutionary stage, it remains to be seen whether more progress will be made or more fine-tuning will be required.

120 Article 46 Regulations on the Administration of Technology Import Contracts.