

NOTE TO USERS

This reproduction is the best copy available.

UMI[®]

**INTERNATIONAL COPYRIGHT AND DEVELOPING COUNTRIES:
THE IMPACT OF THE TRIPS AGREEMENT**

By

Xiaorong Wang

A thesis submitted to McGill University in partial fulfilment of the requirements of the
degree of Master of Laws

October 2004

Institute of Comparative Law
McGill University
Montreal, Quebec
Canada

© Xiaorong Wang, 2004



Library and
Archives Canada

Bibliothèque et
Archives Canada

Published Heritage
Branch

Direction du
Patrimoine de l'édition

395 Wellington Street
Ottawa ON K1A 0N4
Canada

395, rue Wellington
Ottawa ON K1A 0N4
Canada

Your file Votre référence

ISBN: 0-494-12688-4

Our file Notre référence

ISBN: 0-494-12688-4

NOTICE:

The author has granted a non-exclusive license allowing Library and Archives Canada to reproduce, publish, archive, preserve, conserve, communicate to the public by telecommunication or on the Internet, loan, distribute and sell theses worldwide, for commercial or non-commercial purposes, in microform, paper, electronic and/or any other formats.

The author retains copyright ownership and moral rights in this thesis. Neither the thesis nor substantial extracts from it may be printed or otherwise reproduced without the author's permission.

AVIS:

L'auteur a accordé une licence non exclusive permettant à la Bibliothèque et Archives Canada de reproduire, publier, archiver, sauvegarder, conserver, transmettre au public par télécommunication ou par l'Internet, prêter, distribuer et vendre des thèses partout dans le monde, à des fins commerciales ou autres, sur support microforme, papier, électronique et/ou autres formats.

L'auteur conserve la propriété du droit d'auteur et des droits moraux qui protègent cette thèse. Ni la thèse ni des extraits substantiels de celle-ci ne doivent être imprimés ou autrement reproduits sans son autorisation.

In compliance with the Canadian Privacy Act some supporting forms may have been removed from this thesis.

Conformément à la loi canadienne sur la protection de la vie privée, quelques formulaires secondaires ont été enlevés de cette thèse.

While these forms may be included in the document page count, their removal does not represent any loss of content from the thesis.

Bien que ces formulaires aient inclus dans la pagination, il n'y aura aucun contenu manquant.


Canada

Acknowledgement

First of all, I would like to express my deepest gratitude to Professor Wendy Ann Adams, my thesis supervisor, who has dedicated so much time and gave me valuable comments on my drafts.

I would also like to thank all the professors in the faculty, all the staffs in the law library, and all my friends here. They all gave me more or less help during my two years' study at McGill.

A special thank should be given to my dear friend, Melissa Knock, who with great patience, proofread this whole paper for me.

I am also grateful to my dear parents and sister, who made my dream of studying abroad come true and who have given me material and spiritual support. Finally, I wish to take the chance to say thank you to my beloved husband, from whom I gained so much strength and with whom I have come through all those difficult moments.

Abstract

The promulgation of the TRIPs Agreement marks a new direction for international copyright: copyright protection has been put under the auspices of the world trading system. During the arduous negotiations, developing countries played a minor role due to the unilateral trade threats exerted by the United States. As a result, the final text of the TRIPs mainly mirrors the domestic copyright legislations of those developed countries.

The question of what impact the TRIPs will have on developing Member States has triggered hot debates. While acknowledging that a short-term negative impact is likely, the long-term effects of a strengthened copyright regime in those countries are hard to predict at this time. The author uses China as a case study to illustrate the difficulties that developing nations might have in implementing and enforcing such heightened copyright standards. Moreover, possible solutions to minimize any adverse effects of the TRIPs Agreement are discussed.

Résumé

La promulgation du traité ADPIC (Aspects des Droits de Propriété Intellectuelle qui touchent au Commerce) marque une nouvelle orientation pour le droit d'auteur international, celui-ci ayant été érigé dans le cadre du système de l'OMC. Durant des négociations plutôt ardues, les pays en voie de développement ont joué un rôle mineur en raison de l'influence agressive des Etats-Unis. En conséquence, le texte final du traité reflète principalement les règles établies par les pays développés.

L'impact du traité sur les pays en voie de développement est une question vivement débattue. Même si l'on peut admettre un effet négatif à court terme, les conséquences à long terme dans ces pays sont plus difficiles à définir. L'auteur a choisi la Chine comme sujet d'étude, afin d'envisager les difficultés auxquelles les pays en voie de développement risqueront de se heurter dans la mise en œuvre et l'application de standards du droit d'auteur particulièrement élevés. En outre, des solutions visant à minimiser tout effet négatif du traité seront également abordées.

Table of Contents

INTRODUCTION.....	1
 CHAPTER 1: INTERNATIONAL COPYRIGHT PRIOR TO THE TRIPS	
AGREEMENT.....	7
1.1. Introduction.....	7
1.2. Definition of International Copyright.....	9
1.3. International Copyright Relations before the TRIPs Agreement.....	12
1.3.1. <i>The Berne Convention</i>	13
1.3.2. <i>The Universal Copyright Convention (UCC)</i>	18
1.3.3. <i>The Rome Convention</i>	20
1.3.4. <i>Other Related Multilateral Agreement</i>	22
1.3.5. <i>Other Bilateral Agreements and Regional Conventions</i>	23
1.4. Developing Countries' Issue in the Historical Context.....	24
 CHAPTER 2: DEVELOPING COUNTRIES AND COPYRIGHT PROTECTION.....	26
2.1. Definition of "Developing Country"	26
2.2. Copyright Protection and Economic Growth.....	28
2.2.1. <i>Justifications of Copyright</i>	29
2.2.2. <i>North-South Divergent Perspectives on Copyright Protection</i>	34
2.2.3. <i>Economic Development and the Level of Copyright Protection</i>	36

CHAPTER 3: THE CONCLUSION OF THE TRIPS AGREEMENT	39
3.1. Introduction	39
3.2. The Origins and the Negotiating Process of the TRIPS Agreement	40
3.2.1. <i>Efforts from the Developed Side</i>	42
3.2.2. <i>Negotiations</i>	43
3.3. The Final Text	45
3.3.1. <i>Objectives</i>	47
3.3.2. <i>Basic Principles</i>	50
3.3.3. <i>Substantive Standards</i>	51
3.3.4. <i>Enforcement</i>	54
3.3.5. <i>Dispute Settlement</i>	55
3.3.6. <i>Transitional Arrangements</i>	56
3.4. Implementing and Enforcing the New Agreement	57
3.4.1. <i>Administration of the Agreement</i>	57
3.4.2. <i>Implementing the Agreement</i>	58
 CHAPTER 4: DEVELOPING COUNTRIES AND THE TRIPS AGREEMENT	 60
4.1. The Development Objectives of Developing Countries	62
4.2. The Impact of the TRIPS on Developing Countries	66
4.2.1. <i>Foreign Direct Investment (FDI)</i>	67
4.2.2. <i>The Transfer of Technology</i>	71
4.2.3. <i>Local Innovation</i>	73

4.2.4. <i>Domestic Costs for the Implementation of the TRIPs</i>	77
4.2.5. <i>A Simple Conclusion</i>	79
 CHAPTER 5: COPYRIGHT IN CHINA AND CHINA IN THE TRIPs	
AGREEMENT	82
5.1. China in the Global Economy.....	82
5.2. Does China Have Its Own Copyright Law? (The Origins of China's Copyright Law).....	85
5.2.1. <i>Ancient Chinese "Copyright" Protection</i>	85
5.2.2. <i>The End of Imperial China: Introducing Western Copyright to China</i>	87
5.2.3. <i>The People's Republic of China: Contemporary Development</i>	88
5.2.4. <i>Summary</i>	90
5.3. The Current Chinese Copyright Protection System	91
5.3.1. <i>The Revision of Modern Chinese Copyright Law</i>	91
5.3.2. <i>Other Sources of Chinese Copyright Regulations</i>	93
5.4. Chinese Copyright Law and the TRIPs Agreement.....	95
5.4.1. <i>Attitudes towards the Implementation of the TRIPs in China</i>	96
5.4.2. <i>Implications for China When Enforcing International Copyright Standards</i> ..	99
5.5. Solutions for Developing Countries: Lessons Learned from China.....	103
CONCLUSION	108
BIBLIOGRAPHY	111

INTRODUCTION

Although a modern legal notion, copyright today is no stranger to most countries. A consensus has been reached throughout the world that copyright plays a positive role in providing incentives for creations and innovations within a society, if the scope of protection corresponds to a country's level of economic and technological development. With the advent of the information era, copyright law actually plays a central role in regulating information and media flows, which are the new engines of economic growth.¹ Copyright's importance has already been recognized by countries at different levels of economic development.

Copyright is defined as a limited monopoly granted by a government and is distinguished from other property rights due to the intangible nature of its subject matters. The limitations placed on it function to preserve a delicate balance in the copyright world: the balance between rights holders, who need to be encouraged to create, and users, who require accesses to the works that are created for them. The scope of a country's copyright protection determines how these different interests are balanced within that country. The established copyright regime in each country attempts to strike the balance that the country deems appropriate for its national economic, political, and social context.²

¹ Julie E. Cohen, Lydia Loren, Ruth Gana Okediji & Maureen A. O'Rourke, *Copyright in a Global Information Economy* (New York: Aspen Law & Business, 2002) at 3.

² Mitchel B. Wallerstein, Mary Ellen Moge, & Roberta A. Schoen, eds., *Global Dimensions of Intellectual Property Rights in Science and Technology* (Washington, DC: National Academy Press, 1993) at 4.

Historically, copyright has been territorial in nature. A copyright granted in one state is not necessarily protected in another. While “[i]t is in the nature of copyright that it would be, at best, greatly reduced in value, and at worst, useless, unless it was internationally recognized”,³ copyright protection paved its way from domestic jurisdictions to the international arena in the late nineteenth century, with the adoption of bilateral copyright agreements. The conclusion of the Berne Convention for the Protection of Literary and Artistic Work (the Berne Convention) in 1883, a milestone in copyright’s history, opened the door to a much wider multilateral forum for copyright’s international development. Since then, international copyright has evolved while attempting to balance between a widest possible participation and the most desirable protection standards by the negotiation power’s perspectives.

The promulgation of the Agreement on Trade-Related Aspects of Intellectual Property Rights (the TRIPs Agreement) during the Uruguay Round of GATT negotiations constitutes another milestone in the history of international copyright development. The TRIPs Agreement is to date the most significant international treaty on copyright, as well as on other intellectual property rights. The raising of intellectual property issues in the international trade context has resulted in the inclusion of intellectual property protection under the auspices of the World Trade Organization (the WTO). As a multilateral trading system, the WTO offers countries at different economic levels different benefits at certain prices, like a free market. For developing and least-developed countries, participation in the WTO provides them with opportunities in agricultural and textile markets where they

³ Stephen M. Stewart & Hamish Sandison, *International Copyright and Neighbouring Rights* (London, Toronto: Butterworths, 1989) at 98.

have comparative advantages mainly due to their low-cost, skilled labour force. Meanwhile, they must commit themselves to enforcing the minimum standards of intellectual property protection, according to the TRIPs Agreement, as the condition for taking advantages of their WTO membership. Although divergences on the scope of copyright protection have always existed between technologically advanced nations and developing nations seeking to industrialize and grow up through cheap access to necessary technologies, the TRIPs Agreement, a success for information-dependant industries in developed countries, has gained its widest participation as part of the WTO package.⁴ While facing great difficulties to implement the TRIPs, developing countries have to accept the raised standards, as they rely heavily on the world trading system for their further development.

International copyright norms provided in the TRIPs Agreement derive from the substantive content of domestic copyright regime, with different countries having various influences in shaping international law according to their bargaining and economic power.⁵ International copyright systems in turn exert great influence on domestic copyright development, as the implementation of international agreements has reflected an increasing trend towards copyright harmonization among countries.⁶ In an era of globalization, situating a country's copyright law within the larger system of international copyright law is necessary to better understand and apply both the national and

⁴ M.B. Rao & Manjula Guru, *Understanding TRIPs: Managing Knowledge in Developing Countries* (New Delhi: Response Books, 2003) at 23.

⁵ Wendy A. Adams, "Intellectual Property Infringement in Global Networks: The Implications of Protection Ahead of the Curve", (2002) 10:1 Int'l J. L. & I. T. 71 at 75.

⁶ *Ibid.*

international copyright regimes.⁷ Therefore, it is very important for developing and least-developed nations within the WTO system to grasp any possible effects the implementation of the TRIPs Agreement will have on their domestic legal and economic systems.

Accordingly, the author seeks to answer two questions in this thesis. The first is: When enforcing the minimum standards of copyright protection provided by the TRIPs Agreement within developing countries' domestic legal regimes, what are the possible impacts on their economic and social developments? In answering this question, this thesis begins, in Chapter 1, by providing the historical background of international copyright development prior to the conclusion of the TRIPs Agreement. Through a description of the simple developmental route taken by international copyright, how copyright paved its way to the international arena and how developing countries came to this international copyright forum are illustrated. Since the TRIPs Agreement has incorporated all the former international agreements on intellectual property of significance, a general description of those pre-TRIPs agreements is presented.

In order to better understand the possible effects of the TRIPs, chapter 2 gives the definition of developing countries and examines the economic justifications of copyright at the national level. While accepting that copyright has positive effects on economic development, no proof has been found to show that the higher the level of copyright protection, the more industrialized the country will be.

⁷ Cohen, Loren, Okediji, & O'Rourke, *surpa* note 1 at 3.

Chapter 3, through analyzing the negotiation process, the main contents, and the administration of the TRIPs Agreement, serves as the basis for the further analysis of the impacts of the TRIPs on developing states. Due to the length of this thesis, this part only supplies a very general and concise contour of the TRIPs Agreement, with the focus being placed on issues and Articles that are most relevant to developing countries. In a comparison with the pre-TRIPs copyright agreements, a new direction in international copyright evolvement, that is, the inclusion of enforcement procedures and multilateral dispute settlement marked by the promulgation of the TRIPs, is highlighted. It is these enforcement and dispute settlement procedures that make the TRIPs Agreement significantly diverse from its predecessors and able to have a tremendous impact on each Member's national copyright system.

Chapter 4 directly answers the first question of this thesis: What impact does the TRIPs Agreement have on developing country Members? Through analyzing issues such as foreign direct investment, technology transfer, and local innovations, the author draws conclusions based on a comparative study of both negative-impacts theory and positive-impacts theory. The short-term impacts of the TRIPs are likely to be negative in general in developing and least-developed countries.

Chapter 5 answers the second question: Are there any solutions for developing countries to reduce the possible negative influences during the implementation of the TRIPs? To answer this, the author chooses China, one of the largest and most controversial developing countries in the world, as a concrete example. The Chinese case shows the particular difficulties of enforcing western copyright in developing countries, and

illustrates the special costs that China has to pay in order to fulfill its TRIPs obligations. At the end of this thesis, the author highlights some implications, such as competition regulations and tax policy, for developing countries to keep their own balance of interests in the larger international arena.

CHAPTER 1

INTERNATIONAL COPYRIGHT PRIOR TO THE TRIPS AGREEMENT

1.1. Introduction

Although copyright has largely been territorial in scope, it “is not a purely domestic issue. It has been international almost ever since it existed.”⁸ Compared with other law fields, copyright has a strong international character in not only its protection system but also possible manners in which it is infringed. International piracy dates back nearly as far as the system of privileges, the predecessor of copyright laws.⁹ But copyright protection at the international level does not extend back that far. Originally, an author’s rights could only be protected under the domestic legislation of the country to which he belonged. As international piracy increased, affected countries began to protect foreign works using their domestic copyright laws, without any requirement of reciprocity.¹⁰ When this method proved to be ineffective, they began to negotiate with each other in order to gain protections abroad. Those early bilateral copyright agreements formulated between

⁸ Jorg Reinbothe, “The Role of Europe in World-Wide Copyright Protection” in Frank Gotzen ed., *The Future of Intellectual Property in the Global Market of the Information Society: Who is Going to Shape the IPR System in the New Millennium?* (Bruxelles: Bruylant, 2003) 5 at 5.

⁹ Sam Ricketson, *The Berne Convention for the Protection of Literary and Artistic Works: 1886—1986* (London, England: Centre for Commercial Law Studies, Queen Mary College, 1987) at 18. For the explanation of the System of Privileges, see *ibid* at 3: “The origins of this form (copyright) of protection in each country are strikingly similar: the grant of exclusive printing rights or privileges which were made to printers and publishers by national authorities soon after the introduction of printing in Europe in the late fifteenth and early sixteenth centuries”.

¹⁰ *Ibid.* at 20. French law led the way to unilaterally protect all works published abroad. The philosophical basis for this act is that copyright is a kind of natural right and it “should not be restricted by artificial restraints such as nationality or geographical boundaries”.

European countries eventually led to a uniform, universal copyright protection system to prevent international piracy.

The early copyright protection accorded to foreign authors was based on the view that copyright has the character of a natural right and it is of universal character to be protected.¹¹ With the tremendous growth of international trade, it became apparent that protection could be much more effectively established if common rules were applied. The resulting international norms, like the existing domestic standards, were largely shaped by the periodic tensions at the international level that arose from the interests of authors expecting to capitalize on their work, and the needs of those who wanted to gain access to that work at little or no cost, on the one hand.¹² On the other hand, the fact that the amount of unprotectible and uncopyrightable works, *i.e.* those fell into the public domain, was critical conditions for future creation was another factor to influence the scope of protection in this system.¹³ Although the further incentive to have broader protection for IPRs arose from the conflicts generated in international trade, none of those international conventions on copyright prior to the TRIPS Agreement officially integrated copyright protection into the international trade region.

This chapter attempts to trace the development of international copyright relations. It commences by providing a simple definition of international copyright, and then introduces forerunners to the TRIPS Agreement, ordered according to their importance.

¹¹ *Ibid.*

¹² Paul Goldstein, *International Copyright: Principles, Law, and Practice* (New York: Oxford University Press, 2001) at 13[Goldstein, *International Copyright*].

¹³ Jessica Litman, "The Public Domain" in (1990) 39 Emory L. J.965 at 967.

Since developing countries did not initially play a leading role, this chapter does not focus on them; it does, however, outline their historical position in the international forum.

1.2. Definition of International Copyright

The word “copyright”, whose essence is to protect the “expression of an idea in a tangible fixed form”, means a bundle of exclusive rights that are accorded to authors upon their literary and artistic works.¹⁴ With those rights, the owner is able to authorize or prohibit the exploitation of his copyright work by others. Copyright is the oldest member of the intellectual property family, which is “defined as governmental protection of private innovations and creativity”.¹⁵ In addition to copyright, intellectual property also encompasses patents, trademarks, and trade secrets. Since different intellectual property rights (IPRs) have different subject matter, each has its own protection standards, procedures, durations of protection, and remedies for infringement.

The fact that some people refer to international copyright as international copyright law is misleading. What actually exists are national copyright systems, international copyright conventions, such as the Berne Convention, and other types of treaties and agreements, which contain arrangements between member countries for the recognition of the rights of each other’s authors.¹⁶ A notable example of the latter is the North American Free

¹⁴ Duncan Matthews, *Globalising Intellectual Property Rights: the TRIPs Agreement* (London and New York: Routledge, 2002) at 50.

¹⁵ Evelyn Su, “The Winners and the losers: the Agreement on Trade-Related Aspects of Intellectual Property Rights and its Effects on Developing Countries” in (2000) 23 Hous. J. of Int’l L. 169 at 172.

¹⁶ Dianne Andrea Daley, *International Copyright and Developing Countries: The Impact of Recent Developments from A Jamaican Perspective* (LL.M. Thesis, McGill Faculty of Law, 1995) [unpublished] at 16.

Trade Agreement 1992 (NAFTA), which in its Chapter 17 has articles dealing with the national treatment and high levels of protection for copyright.

It follows, then, that domestic laws are important sources of international copyright protection. The earliest domestic copyright law, the 1709 British Statute of Anne, emerged just after the printing press was invented, which made it possible for literary works to be duplicated by mechanical processes instead of being copied by hand.¹⁷ Although the Statute of Anne for the first time gave authors the sole right to print their books, the copyright law at that time was not targeted at protecting the authors; rather, it was aimed at protecting the economic interests of established printers and booksellers, *i.e.* stationers. Authors' rights were recognized more by public ethics than by the law. Today, most countries have their own domestic copyright laws, which aim at protecting authors and other rights holders, rather than stationers.¹⁸

Despite many broad similarities, great differences existed among the provisions of the various modern national copyright laws, especially regarding issues like the scope of the subject matter, the duration of the protection, the formalities required for protection, and so on.¹⁹ At one time, those differences were tied to a great deal of uncertainty for authors whose works were crossing national borders. More importantly, domestic copyright laws traditionally defined the scope and contents of copyright protection within the country's own territory and protection could be garnered only by nationals of that country. Since

¹⁷ The origins of the printing press can be traced back to roughly 15th century. So can the earliest beginnings of copyright. Sunny Handa, *Copyright Law in Canada* (Canada: Butterworths, 2002) at 28.

¹⁸ In some cases, rights holders of copyright may not be the original author of the work. For example, when a work emanates from one or more corporate bodies, the corporate bodies are recognized as the rights holder in this case.

¹⁹ Ricketson, *supra* note 9 at 8.

today it is impossible for the works to stay only within the country's territory, a lack of international copyright norms would give rise to significant copyright protection gaps not only for works crossing national borders, but even for those remaining in an author's homeland. Especially in this age of digital information, traditional territorial copyright protection without common international standards is no longer sufficient. The recent widespread dissemination of music on the Internet is a good example.²⁰ But, as national copyright laws are far more similar than they are different,²¹ the potential exists for countries to reach a consensus in order to achieve a universal copyright protection system.

When the disparity between national laws and the non-recognition of foreign authors' rights created a major impediment to copyright relations between states, protection to foreign works by domestic law, based on the premise of material reciprocity or formal reciprocity, emerged as the new international copyright protection norm.²² Then there came the early bilateral agreements, which "paved the way for copyright protection of an international character".²³ However, while they established a system of international protection for literary and artistic works, those bilateral agreements also resulted in different levels of protection for different authors, mostly depending on the nationality involved.²⁴ This led to an extremely complex legal situation so that the need for the

²⁰ Selena Kim, "The Reinforcement of International Copyright For the Digital Age" (2002) 16:1 I. P. J. 95.

²¹ Goldstein, *International Copyright*, *supra* note 12 at preface page xii.

²² Under material reciprocity, country A accords protection to works from country B on condition that country B provides "substantially equivalent protection" to works from country A; under formal reciprocity, country A protects works from country B if the latter protects works from country A "in the same way" as it protects its own authors. Substantially equivalence in the level of protection is not necessary under formal reciprocity. See Ricketson, *supra* note 9 at 23-24.

²³ Daley, *supra* note 16 at 19.

²⁴ J.A.L. Sterling, *World Copyright Law: Protection of Authors' Work, Performances, Phonograms, Films, Video, Broadcasts and Published Editions in National, International and Regional Law* (London: Sweet & Maxwell, 2003) at 5. Those early bilateral agreements were based on reciprocity and national treatment. In both situations, there was great uncertainty for authors to predict whether or not and how much their works

uniformity of international copyright protection became apparent. Stemming from those bilateral agreements, the 1886 Berne Convention finally opened the door for real multilateral international copyright protection. It did not significantly depart from the principles already adopted by those bilateral agreements or the national copyright laws on which they rested. Its success, compared to the bilateral agreements it replaced, is due in large part to its increased number of memberships, which makes sense for the universal copyright protection norm.

International copyright conventions take effect in a territory mostly by being implemented through domestic laws, as is the case with the Berne Convention in Canada and China, or sometimes by being directly enforced within a country, like in Italy. The method of implementation depends on the nature of the treaty and the constitutional traditions of the protecting country. Therefore, in this thesis, international copyright refers to bilateral and multilateral copyright agreements among countries, the systems based on those agreements, and the relations established by them, as well as those parts of the domestic laws that implement the international copyright agreements.

1.3. International Copyright Relations before the TRIPS Agreement

International copyright relations before the TRIPS Agreement focused on the development of the Berne Convention, and, at the same time, were affected by the

could be protected in another country. For example, whether an author from country A was able to enjoy his or her copyright protection in country B would depend on if there was similar protection accorded by country B to authors from country A. Therefore, whether a foreign literature or artistic work could be protected under country B's copyright law depended on from which country the author was from and whether that country accorded copyright protection to nationals from country B.

Universal Copyright Convention (UCC), other conventions concerning neighbouring rights,²⁵ and some important bilateral agreements and regional conventions. The issue of developing countries, which initially surfaced in the middle of the 20th century, began to affect the development of both the Berne Convention and the UCC, and is growing increasingly important with regard to international copyright relations today. The following part examines the contour of the most relevant international conventions in terms of both copyright and neighboring rights, provides a brief history of their formation, outlines their main characteristics, and offers some general comments regarding their influence.

1.3.1. The Berne Convention

The Berne Convention for the Protection of Literary and Artistic Work is recognized as the first truly multilateral convention and the most successful copyright treaty.²⁶ Originally signed on 9 September 1886, in Berne, Switzerland, immediately after the first Industrial Revolution in Europe, it entered into force on 5 December 1887.²⁷ Since then it has undergone six official revisions,²⁸ each of which has elevated the minimum standards of protection by adding subject matter and exclusive rights in order to cope with the challenges presented by the accelerating development of technologies. The 1971 version, the most recent, has provided the highest level of international legal protection for

²⁵ The Universal Copyright Convention and the Rome Convention on Neighbouring Rights are recognized as important supplements to the international copyright protection system established by the Berne Convention. See Ricketson, *supra* note 9 at 836.

²⁶ Handa, *supra* note 17 at 287.

²⁷ Goldstein, *International Copyright*, *supra* note 12 at 20.

²⁸ The six official revisions are: the 1896 Paris Revision, the 1908 Berlin Revision, the 1928 Rome Revision, the 1948 Brussels Revision, the 1967 Stockholm Revision, and the 1971 Paris Revision.

copyright, prior to the TRIPS.²⁹ Even today, the Berne Convention may be considered to be the most important international copyright treaty, as more recent treaties in this area, namely the TRIPS Agreement and the WIPO Copyright Treaty, have all incorporated the 1971 version of the Berne Convention.³⁰

Initially the Berne Convention had only ten signatories, two of which by today's standards could be termed developing countries—Tunisia and Haiti.³¹ In order to become a truly “universal” copyright convention, one of the main goals of the Berne Convention was to attract as many countries as possible. But this took some time. Due to its Euro-centric character, especially its prohibition of formalities as a condition to the acquisition, exercise, or enjoyment of copyright following the 1908 Berlin Act, the United States, one of the most powerful countries in the western world, did not become a member of the Berne Convention until 1989, more than 100 years after the Convention's birth.³² And China, the biggest developing country in the world, only signed the Berne Convention in 1992. Now, the Berne Convention, with its more than 140 members worldwide,³³ can be

²⁹ Jayashree Watal, *Intellectual Property Rights in the WTO and Developing Countries* (The Hague, London, and Boston: Kluwer Law, 2001) at 207.

³⁰ Jörg Reibothé & Silke von Lewinski, *The WIPO Treaties 1996: the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty: Commentary and Legal Analysis* (London: Butterworths, 2002) at 1.

³¹ Rickeston, *supra* note 9 at 592.

³² “Euro-centric” means that the Berne Convention originated from European countries; therefore, it adopted the European droit d’auteur legal tradition to protect moral rights and does not require formality for protection. The reasons that the United States did not join the Berne Convention before 1989 are: “first, it (the United States) did not wish to be obligated to provide foreign works with a uniformly high substantive standard of protection on a national treatment basis”. Second, “the Berne Convention provided that the enjoyment of copyright ‘shall not be subject to any formality,’ and the United States did not want to abandon the formalities that it had chosen to impose on authors who wished to gain federal copyright protection”. “Third, the Berne Convention required protection for some works that were not currently protected under U.S. copyright law”. Cohen, Loren, Okediji & O’Rourke, *supra* note 1 at 51.

³³ Lionel Bently & Brad Sherman, *Intellectual Property Law* (New York: Oxford University Press, 2001) at 34.

considered to be the largest group in terms of international copyright, prior to the TRIPS Agreement.

National Treatment constitutes the basic principle of the Convention. Essentially, the principle offers copyright holders from other countries the same protection as that accorded to nationals of the host country under domestic legislation. Different from material reciprocity, national treatment does not require the substantive protection accorded to foreigners be comparable.³⁴ But with common minimum standards, substantive protection could be maintained to a specific level no matter which Member is the host country.

According to the National Treatment article, the beneficiaries of the Berne Convention are “authors who are nationals of one of the countries of the Union, for their works, whether published or not” or “authors who are not nationals of one of the countries of the Union, for their works first published in one of those countries, or simultaneously in a country outside the Union and in a country of the Union”,³⁵ and protection is accorded to their “literary and artistic works”.³⁶ This national treatment is furthermore supplemented by the common minimum standards of protection, which oblige Union Members to ensure their national rules meet this minimum requirement. But it does not prevent countries from providing higher levels of protection.

³⁴ Goldstein, *International Copyright*, *supra* note 12 at 16.

³⁵ See Art. 3, *The Berne Convention for the Protection of Literary and Artistic Works of September 9, 1986*, (Paris Act), 24 July 1971, (Geneva: WIPO Publication No.287 (E), 1978).

³⁶ Art.1, *ibid.*

Generally, the Berne Convention requires that Member States recognize the following rights in favor of authors and other owners of copyrights: moral rights, the exclusive right of making and of authorizing the translation of their works, the exclusive right of authorizing the reproduction of their works, the exclusive right of authorizing the public performance, the broadcasting and the public recitation of their works, the exclusive right of authorizing adaptations, arrangements and other alterations of their works, and the exclusive right of authorizing the cinematographic adaptation and reproduction of their works.³⁷ Since the Berne Convention was largely Euro-centric in character at its birth and for many years after the Berne Union's formation, it reflects the *droit d'auteur* approach to copyright,³⁸ in that it protects not only an author's economic rights but also his moral rights.³⁹ However, it does not protect neighboring rights.⁴⁰

During its first 80 years, the Berne Convention did not possess a permanent governing body, if one excludes from consideration the revision conferences that met at irregular intervals. In fact, the nature of these conferences was legislative in that their principal

³⁷ Arts. 7, 8, 9, 10, 11, 12, 13, and 14, *ibid.*

³⁸ Ricketson, *supra* note 9 at liii.

³⁹ France is the first country to protect moral rights legally. In the beginning, the idea of moral rights came from the reorganization of an author's right to remain some control over the use of his work, even after he had transferred all his economic rights in that work to another party. See *ibid.* at 457. Currently, moral rights usually include: "the right of paternity (which the author can exercise by claiming authorship, by remaining anonymous, or by using a pseudonym); of integrity (which allows the author to prevent the work from being distorted, mutilated or modified to the prejudice of his or her honour or reputation); and the right to prevent the use of a work 'in association with products, services, causes or institutions in ways which are prejudicial to the author's honour or reputation'". See Caldwell Taylor, Susan Crean & Greg Young-Ing, "Handbook on Creators' Rights" (2003) online: Creators' Rights Alliance, <<http://www.cra-adc.ca/handbookrights.doc>>, last visited on 5 October 2004.

⁴⁰ Handa, *supra* note 17 at 295. Neighbouring rights appeared at the beginning of the twentieth century when the need of protecting photographs, cinematograph film, and sound recordings was recognized by people. The name "neighbouring rights" came from the fact that those rights exist nearly always in derivative works that based on a pre-existing work. See Stewart, *supra* note 3 at 190.

function was to amend or to add to the provisions of the Convention.⁴¹ At the Stockholm Revision, the Assembly and the Executive Committee were established in order to provide the Union with a supreme governing body that would meet regularly between revision conferences.⁴² But this was still more legislative than it was executive.

The Berne Convention is currently administered by the World Intellectual Property Organization (WIPO), the mandate of which is “to administer intellectual property matters recognized by the Member States” of the United Nations.⁴³ The Convention has not been revised since the 1979 Paris Act. With the polarization of the interests of different countries at the international copyright forum, it is quite clear that the Berne Convention is in jeopardy, as further changes to the copyright rules will inevitably result in Members from one interest group making demands for concessions of the other.⁴⁴ “[T]he increase of economic importance of copyright after 1971” has not only led to “an aggravation of the North-South conflict, but also to the raising of new, strong interests in copyright and, hence, of new conflicts of interests, as for example between different groups of industrialized countries.”⁴⁵ However, with the promulgation of the TRIPs Agreement, which has incorporated the main provisions of the Berne, international copyright standards have been successfully raised to reflect the North side’s need.

⁴¹ Ricketson, *supra* note 9 at 696.

⁴² *Ibid.* at 704-705.

⁴³ The WIPO, currently one of the specialized agencies of the United Nations system of organizations, was established in 1967 and headquartered in Geneva. See online: The WIPO <http://www.wipo.int/about-wipo/en/gib.htm#P6_18>, last visited on September 20, 2004.

⁴⁴ Handa, *supra* note 17 at 395.

⁴⁵ Reibothe & Lewinski, *supra* note 30 at 1.

1.3.2. *The Universal Copyright Convention (UCC)*

The UCC originated on the other side of the Atlantic, in the United States, and as such it reflects the United States' copyright law philosophy, the Anglo-American utilitarian view.⁴⁶ The Convention was originally proposed by the United States as an alternative to the Berne Convention.⁴⁷ But when the UCC was first signed in 1952, in Geneva, it was as a separate convention,⁴⁸ since it would have been difficult to justify replacing the already-successful Berne Convention. The UCC's primary objective was to secure the multilateral copyright relations between the Berne Union Members and as many countries as possible outside of the Union.⁴⁹ It was obviously trying to establish a broader-based convention that would bring together countries with widely varied levels of protection.

As mentioned before, the United States refused to sign the Berne Convention for almost 100 years, leading to the isolation in the field of international copyright of this country, one of the world's largest producers of copyrightable works in the 20th century.⁵⁰ With the importance of copyrightable products ever increasing, the United States began to look for ways to change its negative image. To this end, the country became the main promoter of the new international copyright convention almost immediately after the coming into force of the Berne Convention. Yet, the United States was only successful after World War II.

⁴⁶ For a more detailed explanation of this, please refer to Chapter 2, Section 2.2.1. Justification of Copyright.

⁴⁷ Handa, *supra* note 17 at 402.

⁴⁸ Ricketson, *supra* note 9 at 859.

⁴⁹ Goldstein, *International Copyright*, *supra* note 12 at 28.

⁵⁰ Handa, *supra* note 17 at 402.

As with the Berne Convention, the UCC is based on the national treatment principle, but the level of standardized protection to Member States provided is generally less than with the Berne Convention. In addition, the UCC does not protect an author's moral rights, which the Berne Convention clearly protects. The Preamble of the UCC states that "the Convention is additional to, and without impairing, international systems already in existence".⁵¹ This is vital, as it clearly announces not only the relation between the UCC and the Berne Convention, but also that between the UCC and the numerous bilateral and regional agreements among individual countries.⁵² This "coexistence" nature of the UCC has allowed it to succeed remarkably in terms of membership. In fact, during the UCC's development, "no Berne member has left the Berne Union in order to rely on the protection of the UCC alone, and the number of states adhering to both conventions has increased steadily with a growing overlap of membership".⁵³

With the advent of the TRIPS Agreement, the importance of the UCC is diminishing, since the emphasis in international copyright "has moved away from the attempt to bring countries together on a 'lowest common denominator' basis, and towards a global increase in the standard of copyright protection".⁵⁴ Also, it seems that there is no longer any reason for its original promoter, the United States, to keep this lower protection norm, since it is now a Member of the Berne Convention. In fact, the United States has become the main proponent raising the standard of protection.

⁵¹ Wilhelm Nordemann, Kai Vinck & Paul W. Hertin, *International Copyright and Neighboring Rights Law: Commentary with Special Emphasis on the European Community*, trans. by Gerald Meyer (New York: VCH Publishers, 1990) at 215. This clause in the preamble, called the Safeguard Clause, figured prominently in the demands made by developing countries at the 1967 Stockholm Conference. See also Goldstein, *International Copyright*, *supra* note 12 at 29.

⁵² Nordemann, Vinck & Hertin, *supra* note 51 at 215.

⁵³ Rickestson, *supra* note 9 at 864.

⁵⁴ Sterling, *supra* note 24 at 634.

1.3.3. *The Rome Convention*

At the end of the nineteenth century, new technological developments brought about the emergence of sound recording and film,⁵⁵ which created problems for performers who started seeking protections on their recorded performances. Then in the 1920s, with the introduction of public broadcasting, it became apparent that “three new interests, separate from those of traditional authors, had appeared, namely those of performers, sound recording producers, and broadcasters”.⁵⁶ National legislations started to recognize these interests in the first part of the twentieth century through the formation of national laws protecting creative contributions to phonograms and broadcasts.⁵⁷ Those protections evolved differently in the two legal traditions, where they have been called “neighbouring rights” in the Continental system and “related rights” in the Anglo-American system.⁵⁸ In Canada, these rights are protected by copyright without being separated from the rights of traditional authors, since Canada applies the Anglo-American concept of copyright.⁵⁹

Soon after they had surfaced, neighbouring rights made their way to the international forum. At the 1928 Rome Revision Conference of the Berne Convention, Member

⁵⁵ *Ibid.* at 647.

⁵⁶ *Ibid.* at 648.

⁵⁷ Goldstein, *International Copyright*, *supra* note 12 at 36.

⁵⁸ Actually, “related rights” is not the original term used to define these rights in the Anglo-American system. These rights were recognized as another form of the copyright originated from works like phonogram under the Anglo-American system. It is then the result of the compromise between the two systems. See Daniel Gervais, *The TRIPS Agreement: Drafting History and Analysis* (London: Sweet & Maxwell, 2003) at 99. “Related Rights” is now used internationally more often than the word “neighbouring rights”. In WIPO’s website, “related rights” are construed as: “These related rights grew up around copyrighted works, and provide similar, although often more limited and of shorter duration, rights to: performing artists in their performances; producers of sound recordings in their recordings; broadcasting organizations in their radio and television programs.” Online: WIPO <<http://www.wipo.int/>> last visited on 6 October 2004.

⁵⁹ David Vaver, *Copyright Law* (Toronto: Irwin Law, 2000) at 53[Vaver, *Copyright*].

Countries expressed their desire to find an appropriate method to achieve international protection for those newly-emerged interests, but without any substantial result. It is at the 1948 Brussels Revision Conference that their desire was put down in a series of Resolutions.⁶⁰ Neighboring rights were however excluded from the Berne Convention.⁶¹ Then, the International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations (the Rome Convention), adopted in 1961, became the first and basic international convention on neighboring rights. It was initially signed by more than forty countries in Rome.

Like both the Berne and the UCC, the Rome Convention is based on the principle of national treatment, but due to the size of its membership, its application is not as wide as that of the Berne.⁶² In order for countries to ratify it, the Rome Convention expressly subordinates neighbouring rights to copyright that the protection of neighbouring rights “shall in no way affect the protection of copyright”.⁶³ The relationship between copyright and neighboring rights, as set out in its first article has also been addressed by many of its successors, such as the Geneva Phonograms Convention, the WIPO Performances and

⁶⁰ Sterling, *supra* note 24 at 648.

⁶¹ Nordemann, Vinck & Hertin, *supra* note 51 at 9.

⁶² Daley, *supra* note 16 at 36.

⁶³ “Protection granted under this Convention shall leave intact and shall in no way affect the protection of copyright in literary and artistic works. Consequently, no provision of this Convention may be interpreted as prejudicing such protection”. Art. 1, International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of October 26, 1961 (Rome Convention), (Geneva: WIPO, 1985). International copyright protection has remained its focus on the protection of authors. Neighbouring rights, *i.e.* the rights of performers, phonogram producers, and the broadcasting entities included in the Rome Convention, “hold a second place within the international system”. See Alberto Bercoivitz “Copyright and Related Rights” in Carlos M Correa & Abdulqawi A Yusuf eds., *Intellectual Property and International Trade: The TRIPs Agreement* (London: Kluwer Law International, 1998) 145.

Phonograms Treaty, the Brussels Satellite Convention, and even the neighboring rights provisions of the TRIPS Agreement.⁶⁴

Currently, the Rome Convention is administered jointly by WIPO and two other international organizations, the International Labour Organization and UNESCO.⁶⁵ As it is only open to states that are parties to either the UCC or the Berne Convention, the membership of it has been slow in growing.⁶⁶ It has not been revised since the original text was concluded in 1961.

1.3.4. Other Related Multilateral Agreements

In addition to the Berne Convention, the UCC, and the Rome Convention, there are some other conventions that form part of the international copyright system before the conclusion of the TRIPS Agreement.

The Geneva Phonograms Convention, which entered into force in 1973, the Convention Relating to the Distribution of Programme-Carrying Signals Transmitted by Satellite, adopted in 1974, the 1979 Madrid Convention for the Avoidance of Double Taxation of Copyright Royalties, and the 1960 Hague Act of the Hague Agreement Concerning the International Deposit of Industrial Designs are all more or less connected to the Berne Convention. Each covers some specific aspects of copyright protection, rather than being an overall copyright convention. In other words, they supplement the Berne Convention.

⁶⁴ Goldstein, *International Copyright*, *supra* note 12 at 37.

⁶⁵ Reibothe & Lewinski, *supra* note 30 at 2.

⁶⁶ Ricketson, *supra* note 9 at 880.

1.3.5. *Other Bilateral Agreements and Regional Conventions*

Bilateral copyright agreements emerged prior to multilateral conventions and after the Berne Convention's formation, multilateral conventions began replacing bilateral agreements, although the latter did not disappear altogether.⁶⁷ Bilateral agreements usually plant the seed for a multilateral convention to spring forth when it becomes time to boost the number of members, and they become a substitute when the formation of an agreement is difficult. The Memorandum of Understanding Between the People's Republic of China and the United States on the Protection of Intellectual Property (1992), a bilateral copyright agreement between the two countries, is a good example to show that when countries with different positions under the existing multilateral conventions have difficulties in reaching a consensus, bilateral agreements can play a critical role in establishing basic relations between them. In addition, bilateral agreements can usually impose more detailed obligations to suit the countries involved than could be provided in a multilateral agreement.

Regional conventions must also be considered when one speaks of international copyright protection systems. Following the 1889 Montevideo Treaty, a series of Inter-American Copyright Agreements were reached to establish inter-American copyright relations, which led to the formation of the UCC. The NAFTA, whose copyright provisions bear a striking similarity to those of the TRIPs, is also playing a significant role in the current

⁶⁷ Examples are the agreements concluded by the former Soviet Union with Hungary, Bulgaria, Germany, former Czechoslovakia, Cuba and Poland, or by the United States of America with the Republic of Korea, Singapore, Indonesia and the People's Republic of China. See Delia Lipszyc, *Copyright and Neighbouring Rights* (Paris, France: Unesco, 1999) at 600.

international copyright system at the North American arena.⁶⁸ The European Community constitutes another major force in shaping world intellectual property law.⁶⁹ Beginning with the Green Paper on Copyright, the European Commission “has undertaken an ambitious program to harmonize the copyright laws of member states”.⁷⁰

1.4. Developing Countries’ Issue in the Historical Context

At the end of the 1960s, developing countries’ objections to more stringent standards for copyright protection became a problem that “threatened to break up the entire international copyright system” achieved by the Berne Convention.⁷¹ For the first time, the question of whether special assistance could be provided to developing countries in relation to copyright was officially posed at the Stockholm 1967 Revision Conference of the Berne Convention. Actually, the issue was initially raised in the context of the UCC rather than that of the Berne Convention,⁷² and it later became a problem in the Berne context partly due to pressure from the UCC. But the Stockholm Conference was the first time that developing countries successfully represented their interests, achieving the broad privileges laid down in the new Appendix to the Berne Convention.⁷³ However, the 1967 version of the Berne Convention failed to obtain the required number of ratifications,

⁶⁸ Michael S. Shapiro, “The International Copyright System” in Lee B. Becker & Tudor Vlad eds., *Copyright and Consequences: Central European and U.S. Perspectives* (Cresskill, New Jersey: Hampton Press, 2003) 16 at 27.

⁶⁹ Paul Goldstein, *International Intellectual Property Law: Cases and Materials* (New York: Foundation Press, 2001) at 114 [Goldstein, *Intellectual Property*].

⁷⁰ Shapiro, *supra* note 68 at 26.

⁷¹ Ricketson, *supra* note 9 at 591.

⁷² *Ibid.* at 596.

⁷³ Reibothé & Lewinski, *supra* note 30 at 1. The changes that were made in the Stockholm Protocol generally include five distinct reservations: duration of protection, translation, reproduction, broadcasting, and general educational uses. All these issues were of great concern of developing countries as for their further development. For detailed explanation, please refer to Ricketson, *supra* note 9 at 610-616.

as most of the industrialized countries were reluctant to give “such generous” concessions to developing countries.

The pioneers of this movement to push developing countries to the front line of international copyright relations were India and some African countries, independent as a result of the decolonization process that followed World War II. The 1963 Brazzaville Meeting, whose purpose was to assist new African states to formulate appropriate principles for the drafting of their own copyright laws,⁷⁴ played an important role. In fact, this Meeting influenced the 1964 Study Group of the Berne Convention to change its emphasis from solely raising the level of protection offered by the Convention to demonstrating that they were indeed endeavoring to keep and attract developing countries into the Berne Union.⁷⁵ Although the new Appendix, included in the Berne Convention in its 1967 Stockholm version, failed to achieve its final ratification, the modified version of it was finally made an Appendix to the Paris Act, which is agreed in 1971.⁷⁶ Similar provisions were also found in the UCC of its 1971 Paris Revision.

⁷⁴ Ricketson, *supra* note 9 at 598.

⁷⁵ *Ibid.* at 598-600.

⁷⁶ *Ibid.* at 590. The Appendix to the 1971 reversion of the Berne Convention is entitled “Special Provisions Regarding Developing Countries”, and it empowers developing countries “to grant non-exclusive, non-transferable licenses to its nationals for the reproduction or translation of foreign-owned copyright works for educational or research purposes”. See *the Berne Convention*, *supra* note 35.

CHAPTER 2

DEVELOPING COUNTRIES AND COPYRIGHT PROTECTION

2.1. Definition of “Developing Country”

The term “developing country” is used in contrast to the term “developed country”.

Developed countries are defined as those where manufacturing and technology account for a large percentage of the economy, whereas developing countries are those countries whose economies lag behind those of the advanced industrialized nations,⁷⁷ and where there is usually little technological development and a low standard living. Developing countries are also called “the South”, as most of them are located in the Southern Hemisphere, while in the contrast, developed countries are known as “the North”. The term “the third world”,⁷⁸ which gained widespread popularity during the Cold War, means the “non-aligned” third world outside of NATO and the USSR.⁷⁹ The majority of the countries in the world belong to this developing country catalog. There are also a group of countries that are called “least-developed countries” (LDCs), which are designated by the United Nations according to the status of their national income, human assets, and economic vulnerability.⁸⁰ LDCs are having generally even a lower level of economic development than that of those called developing countries. The term “developing countries” used in this thesis, according to the Berne Convention, should be

⁷⁷ Su, *supra* note 15 at 170.

⁷⁸ In this article, “developing countries”, “the South” and “the Third World” are used in the same meaning.

⁷⁹ “Third World”, online: Wikipedia: the free encyclopedia, <http://www.fact-index.com/t/th/third_world.html>, last visited on 29 September 2004.

⁸⁰ See online: United Nations Conference on Trade and Development <www.unctad.org>, last visited on 4 October 2004.

“in conformity with the established practice of the General Assembly of the United Nations”, and it is also used in a broad sense to include also the LDCs.⁸¹

“Economic growth and development in the world have always been geographically uneven”,⁸² and thus, there have always been divergences amongst the positions of countries at different levels of economic development. Under the common goal of improving global economic growth, the industrialized countries want to maintain their leading role in the world, while the poor countries hope to catch up with them. Consequently, some visible and even invisible conflicts exist between these different interest groups in the international political and economic arena. The field of IPRs is no exception, especially when one considers the information era,⁸³ which makes information more critical than ever for a country’s economy. On the other side of this scenario, the world is much more inter-dependant than ever before. The Mexican Peso Crisis of 1994-1995 demonstrated such interdependence and the risks associated with it.⁸⁴ It also showed countries that, no matter which interest group they belong to, they should take common

⁸¹ Salah Basalamah, “Compulsory Licensing for Translation: an Instrument of Development?” (2000) 40 IDEA 503 (LexisNexis). Also see Appendix, Art. I, the Berne Convention, *supra* note 35. Note that there is no official definition for “developing country” in the WTO Agreements. Members generally announce by themselves whether they are developing or developed countries. See online: WTO <www.wto.org>.

⁸² Su, *supra* note 15 at 195.

⁸³ For the definition of “information era”, please refer to 2.1. *Copyright Protection and Economic Growth* of this chapter. It is also called “knowledge era”, “information age”, and so on.

⁸⁴ Frederick M. Abbott, “The WTO TRIPs Agreement and Global Economic Development” (1996) 72 Chicago-Kent L. Rev. 385 at 394 [Abbott, “TRIPs”]. The Mexico Peso Crisis of 1994-1995 is widely recognized as a “contagion crisis”, as the influence of the crisis was spread to many other countries, such as Argentina, the Philippines, Chile, Colombia, and *etc.* This has showed that global investment patterns, not national economic policies, are increasingly the cause of instability in the financial structure. See Renate Rieder, “The Tequila Effect—the Mexican Peso Crisis” online: Vienna University of Economics and Business Administration, <<http://www.wu-wien.ac.at/inst/vw7/TequilaEffect.pdf>>, last visited on 6 October 2004. See also “Bubbles: the Era of Global Finance” online: University of Puget Sound, <<http://www.ups.edu/ipe/asiacrisis/bubbles.htm>>, last visited on 6 October 2004.

global economic interests into consideration when reshaping international economic relationships.

With the definition of developing country, this chapter is followed by an analysis of the relationship between copyright protection and economic growth from a macro-economic perspective, which serves as the basis for the further analysis of the impact of the TRIPs on developing countries' economic interests. The justification of copyright at the national level, the North-South divergences on copyright protection at the international level, as well as the influences of economic and technological development on copyright legislations are discussed.

2.2. Copyright Protection and Economic Growth

During the last decades of the 20th century, the global economy underwent a fundamental transformation: innovations, technological developments and knowledge-based industries emerged as the new engines of global economic growth, replacing the traditional factors of industrial production and the control of natural resources.⁸⁵ In the future, the economic strength of nations would depend in large measure on their ability to access information and, from it, create new knowledge and innovations.⁸⁶ The new age is hence called a *knowledge economy*, which means that knowledge has become the driving force in the current global economy.⁸⁷ While knowledge possesses a great potential to benefit the

⁸⁵ Ann Holifield, Tudor Vlad & Lee B. Becker, "The Effect of International Copyright Laws on National Economic Development" in Becker & Vlad eds., *supra* note 68 at 163.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.* at 165.

global economy in the new age, the embodiment of this potential will depend on who owns it, and how it is used and disseminated.⁸⁸

2.2.1. *Justifications of Copyright*

Historically, there have generally been two basic approaches to copyright protection: an author-centered view and a work-centered view.⁸⁹ These are more commonly referred to as continental *droit d'auteur* and Anglo-American copyright schemes of protection. The *droit d'auteur* system, born in the wake of the French Revolution, is largely based on notions of natural rights, and the inherent right of an author to the fruits of his intellectual and creative endeavors, whereas the copyright system, stemming from the English Copyright Act, accords protection to an author for more practical reasons: “the grant of rights is intended as an incentive to creativity and hence to the production of a wide variety of works, to the betterment of society”.⁹⁰

The *droit d'auteur* scheme is often associated with the natural right theory,⁹¹ which originated from Locke’s famous property theory. The core of the Lockean theory is that every person should have the exclusive proprietary right to the fruits of his labor, as “[t]he Labour of his Body and the Work of his Hands... are properly his”.⁹² Locke based his

⁸⁸ Simon Walker, *The TRIPS Agreement, Sustainable Development and the Public Interest: Discussion Paper* (Gland, Switzerland; Cambridge, UK: IUCN – The World Conservation Union, 2001) at 3.

⁸⁹ Handa, *supra* note 17 at 62.

⁹⁰ Graeme B. Dinwoodie, William O. Hennessey & Shira Perlmutter, *International Intellectual Property Law and Policy* (Newark, NJ: LexisNexis, 2001) at 513.

⁹¹ Alain Strowel, “Droit d’auteur and Copyright: Between History and Nature” in Sherman Brad & Alain Strowel eds., *Of Authors and Origins: Essays on Copyright Law* (New York: Oxford University Press, 1994) 235.

⁹² As quoted in Simon Stockes, *Art & Copyright* (Oxford: Hart Pub., 2003) at 15. See John Locke, *Second Treatise of Civil Government* (1690). Please also see Locke’s famous proviso—“[l]abour being the unquestionable Property of the Labourer, no Man but he can have a right to what that is joined to, at least where there is enough and as good left in common for others”.

property theory on physical rather than abstract objects, but his view has been extended to intellectual property by scholars after him.⁹³ The direct beneficiary of protection under this natural principle is authors, which is why the *droit d'auteur* system is considered to be author-centered.

The utilitarian view is related to the idea of legal monopoly,⁹⁴ which is granted by the government with the purpose of encouraging creative activities and investment. Monopoly rights are necessary, as intellectual property lacks the exclusivity and inherent scarcity, which tangible properties possess to be able to prevent others from unauthorized occupation and usage.⁹⁵ With this strongest economic argument for intellectual property, much production due to creative contributions would not be created by authors or be financed by capitalists without copyright protection, since with the absence of copyright, works can be distributed at a much lower price by any imitators.⁹⁶ This economic justification for copyright is also called the Anglo-American utilitarian. Copyright protection aims to encourage as many works to be created for society as possible; hence, works rather than authors become the real target of protection. As Anthony Trollope said: "Take away from English authors their copyrights, and you would very soon take away from England her authors".⁹⁷ While the natural law argument is given more weight in

⁹³ Peter Drahos, *A Philosophy of Intellectual Property* (Brookfield, USA: Dartmouth, 1996) at 47. There are also a group of scholars who reject the use of Locke's property theory to justify intellectual property. For example, Professor Litman contends that "the every act of authorship in any medium is more akin to translation and recombination than it is to creating Aphrodite from the foam of the sea". See Litman, *supra* note 13 at 966. See also Ronald V. Bettig, *Copyrighting Culture: the Political Economy of Intellectual Property* (Boulder, Colo.: Westview Press, 1996) at 19-22.

⁹⁴ Strowel, *supra* note 91 at 235.

⁹⁵ This is well summarized in Adams, *supra* note 5 at 77.

⁹⁶ David Vaver, *Intellectual Property Law: Copyright, Patent, Trade-marks* (Concord, Ontario: Irwin Law, 1997) at 8 [Vaver, *Intellectual Property*].

⁹⁷ This is quoted in Kevin Garnett, Jonathan Rayner James & Gillian Davies, *Copinger and Skone James on Copyright* (London: Sweet & Maxwell, 1999) at 29.

continental law countries, whereas the utilitarian view is adopted in Anglo-American copyright laws, neither is likely to preclude the other from existing in any particular jurisdiction or at any particular time.⁹⁸

Two other arguments for the justification of copyright are the cultural and the social arguments.⁹⁹ The cultural argument, also called “just reward for labour”, contends that authors deserve to be remunerated for their contribution to the whole society.¹⁰⁰ A similar meaning is contained in the reap/sow theory, which suggests that “as one sows, so should one reap”.¹⁰¹ The social argument, also called public policy arguments and social requirements, holds that it is in the public interest to encourage authors to publish their works so as to allow the widest possible dissemination of knowledge and culture.¹⁰² The four aspects of the copyright justifications, namely, the natural right principle, the utilitarian, the just reward for labour, and the public policy, are “cumulative and interdependent” and are applied in all countries, although different countries may vary the emphasis given to each of them.¹⁰³

Based on those fundamental principles, no matter whether one is discussing the *droit d’auteur* or Anglo-American utility-based copyright tradition, they all agree that the scope of copyright protection should be defined by the government and that certain limitations need to be added to copyright protection. This is evidenced by the fact that an idea is not

⁹⁸ Stocks, *supra* note 92 at 22.

⁹⁹ Stewart, *supra* note 3 at 3.

¹⁰⁰ Garnett, James & Davies, *supra* note 97 at 29.

¹⁰¹ Vaver, *Intellectual Property*, *supra* note 96 at 6. For the reap/sow theory, also see the US case *International News Service v. Associated Press*.

¹⁰² Garnett, James & Davies, *supra* note 97 at 29. Also see Stocks, *supra* note 92 at 12, and Stewart, *supra* note 3 at 4.

¹⁰³ Garnett, James & Davies, *supra* note 97 at 29.

protected once it leaves its producer's brain unless it has been put in a concrete form.¹⁰⁴ Furthermore, throughout the history of copyright, it has been proved by the fact that protection is never accorded without time and territory limitations.¹⁰⁵ So the primary question that remains to be answered is not whether copyright should exist but rather the appropriate scope of its protection, although there does exist different voice that challenging the necessity of copyright legal protection.¹⁰⁶

The argument for strong IPRs protection is based on the assumption that there is a correlation between copyright protection and economic growth.¹⁰⁷ But how strong the protection should be in order for an optimal economic result? Each copyright system has to strike a balance between two major interests: the rights accorded to authors on the one side, and the need for others to use it, or the advancement of the society at large, on the other.¹⁰⁸ In *Sayre v. Moore* this is described by Lord Mansfield as “the one, that men of ability, who have employed their time for the service of the community, may not be deprived of their just merits, and the reward of their ingenuity and labour; the other, that the world may not be deprived of improvements, nor the progress of the arts be retarded”.¹⁰⁹ And the two sides are both recognized by the Declaration of Human Rights,

¹⁰⁴ Vaver, *Intellectual Property*, *supra* note 96 at 6.

¹⁰⁵ *Ibid.*

¹⁰⁶ There are a group of scholars who actually have challenged the necessity of copyright protection. Arnold Plant is the first one who conducted the first formal analysis of copyright based on economic theory. Their arguments mainly rely on the idea that the incentive of creation can be obtained in the economic area and the cost of legal protection may be too high to be covered from the profit of being protected. See Richard Watt, *Copyright and Economic Theory: Friends or Foes?* (Cheltenham, UK: Edward Elgar, 2000) at 113. See also F. Scott Kieff, “The Case against Copyright: A Comparative Institutional Analysis of Intellectual Property Regimes” (Working Draft, 2004), [unpublished].

¹⁰⁷ Robert L. Ostergard, *The Development Dilemma: The Political Economy of Intellectual Property Rights in the International System* (New York: LFB Scholarly, 2003) at 33.

¹⁰⁸ Stewart, *supra* note 3 at 5.

¹⁰⁹ This is quoted in Vaver, *Intellectual Property*, *supra* note 96 at 10.

as they are both basic human rights that need to be protected.¹¹⁰ The dilemma of copyright protection is that “it attracts more resources to it than would exist without its presence and everyone wants their activity protected under copyright because it is by far the best game in town”.¹¹¹ Between those conflicts of interests, there is a public domain whose existence “permits the rest of the system to work by leaving the raw material of authorship available for authors to use” and it is of “central importance in promoting the enterprise of authorship”.¹¹² Therefore, copyright law should also provide such a public domain and promote its function while according monopoly to authors. In order to promote economic efficiency, the principal legal doctrines of copyright law should maximize the benefits from creating additional works minus both the losses from limiting access and the costs of administering copyright protection, taking into consideration of the balance of interests and the role of public domain.¹¹³

Thus, the existing copyright regimes have been treated as the product of competing interests and values, evolving with constant tension between the two interests.¹¹⁴ So too have international copyright relations, where the tensions exist between countries with different levels of economic development. On the protection pole, it is suggested that “what is worth copying is *prima facie* worth protecting”, while on the users’ pole, it is believed that copyright law should not be made “instruments of oppression and

¹¹⁰ “Both sides of the copyright coin are well set out in article 27 of the Declaration of Human Rights... (1) Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. (2) Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.” see Stewart, *supra* note 3 at 5.

¹¹¹ David Vaver, “Rejuvenating Copyright” (1996) 75 The Can. Bar Rev. 69 at 73 [Vaver, “Rejuvenating”].

¹¹² Litman, *supra* note 13 at 968.

¹¹³ William M. Landes and Richard A. Posner, “An Economic Analysis of Copyright Law” (1989) 18 J. Legal Stud. 325 at 326.

¹¹⁴ Vaver, *Intellectual Property*, *supra* note at 10.

extortion”.¹¹⁵ However, with the prosperity of information-dependant industries, it seems that the reality of copyright law is that it is moving toward the protection pole, as expressed by Professor David Vaver:

“The reality of copyright is that it is indeed a Very Good Thing... One can start, stop and finish exploiting the product as one wishes, charge whatever prices the market will bear for the rights or products produced under it, refuse licenses whenever one wants, and band together with others to exploit rights collectively, with relative immunity from competition or antitrust action so long as one behaves with a modicum of diplomacy.”¹¹⁶

The current protection scope of copyright represents the striking of a balance between different interests.¹¹⁷ The parties involved in this balance include the rights holders, those wishing to use the copyrightable works, and society as a whole.¹¹⁸ At the international level, these parties are represented by developed countries where most copyrightable products are produced, as the rights holders, developing countries, as those requiring information and technology from developed countries, and the global economy, as the common interest of all human beings. Therefore, the objectives of the international copyright law should be to strike a balance between the interests of both developed and developing countries, while taking into account the global economic growth at large.

2.2.2. North-South Divergent Perspectives on Copyright Protection

There have always been divergences between technologically advanced countries and those in the process of development regarding the scope of copyright protection.¹¹⁹

Although empirical studies indicate a positive correlation between IPRs and economic

¹¹⁵ *Ibid.* at 11.

¹¹⁶ Vaver, “Rejuvenating”, *supra* note 111 at 70-71.

¹¹⁷ Richard A. Posner, *Economic Analysis of Law* (New York: Aspen Publishers, 2003) at 41.

¹¹⁸ Handa, *supra* note 17 at 59.

¹¹⁹ Abdulqawi A. Yusuf, “TRIPs: Background, Principles and General Provisions” in Correa & Yusuf eds., *supra* note 63, 3 at 4.

growth, this effect may vary significantly among countries, especially between developed and developing countries.¹²⁰ The latter actually has made limitations to the protection granted to foreigners as part of their catching-up strategies.¹²¹

In the early 1980's, most countries in the developed world, especially the United States, started to transform their economic base gradually from manufacturing to information-dependant industry.¹²² Currently, information-dependent industries constitute a large part of their comparative advantages in the global market. Thus they have strong incentives to raise the level of copyright protection by standing on the right holders' side. Such incentive is well described by Representative Coble of the Congress of the United States in his comment of the Sonny Bono Copyright Term Extension Act, that the Act is an

essential legislation that will ensure that the United States will continue to receive the enormous export revenues that it does today from the sale of its copyright works abroad...[it] will give the United States economy 20 more years of foreign sales revenue from movies, books, records and software products sold abroad. We are by far the world's largest producer of copyrighted works and the copyright industries give us one of our most significant trade surpluses.¹²³

The developing countries' share in world R&D expenditures is negligible, despite the recent great increase in the Asian NICs.¹²⁴ They are hence, "overwhelmingly dependent upon innovations made in the North".¹²⁵ The reluctance of their strengthening the protection of IPRs stems from the fact that when a country's technological capacity is

¹²⁰ Ostergard, *supra* note 107 at 59.

¹²¹ Yusuf, *supra* note 119 at 4.

¹²² Ruth L. Gana, "Prospects for Developing Countries Under the TRIPs Agreement" (1996) 29 Vand. J. Transnat'l L. 735 at 741.

¹²³ Irene Segal Ayers, "The Future of Global Copyright Protection: Has Copyright Law Gone Too Far?" (2000) 62 U. of Pitt. L. Rev. 49 at 54.

¹²⁴ Carlos M Correa, *Intellectual Property Rights, the WTO and Developing countries: the TRIPs Agreement and Policy Options* (Malaysia: Zed Book, 2000) at 5 [Correa, *the WTO*].

¹²⁵ *Ibid.* at 5.

weak, the incentives provided by IPRs “may be outweighed by the disadvantages of not being able to acquire and adapt foreign technology without reference to its creator, or to improve new products and processes from alternative or cheaper sources”.¹²⁶

Because of those divergences, both sides have exerted great efforts to pull the advance of international copyright relations towards the directions in favour of their respective interests. The South tried to put special considerations and extend those already existing into multilateral copyright agreements and they succeeded with the inclusion of a new Appendix in the Berne Convention as well as in the UCC. The North, however, has “promoted the elaboration of new international agreements that clearly tip the balance in favour of technology creators and providers in the global market”.¹²⁷ To a large extent, the promulgation of the TRIPs Agreement, with strengthened IPRs in a global dimension, satisfies the North, which represents mainly the rights holders’ interests.

2.2.3. Economic Development and the Level of Copyright Protection

Traditionally, the legal systems of a country, which have been categorized as part of the superstructure by Marx, have a very strong correlation with the level of its economy, the base.¹²⁸ On one side, as we have seen above, legal environment may have positive or negative influence on economic development of a country. When the legal system suits a country’s economic development, it probably benefits the economic growth; if it does not, (it may be too advanced or too lagged) then it would probably impede the country’s

¹²⁶ Yusuf, *supra* note 119 at 5.

¹²⁷ *Ibid.* at 6.

¹²⁸ Janet Campbell, *An Analysis of Law in the Marxist Tradition* (Lewiston: Edwin Mellen Press, 2003) at 126-130.

economic development. On the other side, the economic development or technological development has their influence on the development of the legal basis of a country.¹²⁹

How copyright protection would benefit economic growth is discussed before. But a significant impact of economic growth or, of technological development, is also found. For instance, the creation of copyright is actually a direct result of the emergence of the printing press, and then copyright evolves as the means by which the “protected works” reach the public evolves.¹³⁰ In the end of 19th century, domestic copyright legislations as well as international copyright relations develop rapidly due to the fruit of the Second Industrial Revolution in Europe.¹³¹ History shows that the structure of protective rights is determined by the level of technological development and the state of development of the relevant national economy at the time.¹³² Another ground of this argument is the history of copyright protection in the United States. Although the United States is currently the main proponent of a stronger intellectual property protection in the global range, IPRs are not always well protected through its domestic laws. Take copyright as an example, the United States laws did not protect foreign copyright until 1952. During the late 19th and early 20th centuries, the United States, as a developing country of that time, denied copyright protection to foreigners in order to entrench its infant industries. And the denial of foreign copyright was deemed an important factor to facilitate the transfer of

¹²⁹ *Ibid.* at 103-106.

¹³⁰ Stewart, *supra* note 3 at 185.

¹³¹ The Second Industrial Revolution lasted from 1871 to 1914, with the result of significant developments within the chemical, electrical, petroleum, and steel industries. It is also called “the second phase of the industrial revolution”. See online: Wikipedia: The Free Encyclopedia <http://en.wikipedia.org/wiki/Second_Industrial_Revolution>, last visited on October 2, 2004.

¹³² Ana Maria Pacon, “What Will TRIPs Do for Developing Countries?” in Friedrich-Karl Beier & Gerhard Schricker, eds., *from GATT to TRIPs—The Agreement on Trade-Related Aspects of Intellectual Property Rights* (Munich: Max Planck Institute for Foreign and International Patent, Copyright and Competition Law; New York, NY: VCH, 1996) 329 at 356.

technology from Europe to the United States.¹³³ In the history of Japan's booming, there was something similar to what we found in the history of the United States. Japan also made very good use of the knowledge from western countries through taking advantages of a weak intellectual property protection.

Given such a strong correlation between copyright protection and the level of the economic development, when constructing the system of copyright protection, the state of economic and technological development should be considered seriously for the best result of copyright's objectives. Since different countries have different level of economic development, their copyright protection should be corresponding to their respective stages of development in order to have a beneficial copyright protection system. However, to some extent, the minimum standards adopted by the TRIPs Agreement have taken some national sovereignty of framing a country's own copyright laws. Although the Agreement does not mandate a real uniform copyright law, it does exert a harmonizing influence.¹³⁴ This harmonized international copyright system may benefit the liberalization of international trade through reducing the trade barriers created by the diversity of national copyright laws, and hence benefits WTO members, including developing nations, through offering them with participation opportunities in international trade. However, it may not directly promote national economics if the heightened national copyright protection does not go with a country's domestic development.

¹³³ Julia J. Osei-Tutu, *TRIPS and Domestic Control: Implications for Developing Countries* (LL.M. thesis, McGill University, 2002) [unpublished] at 99. Please also note that the same meaning was expressed by the US Congress in their report that "When the United States was still a relatively young and developing country, for example, it refused to respect international intellectual property rights on the grounds that it was freely entitled to foreign works to further its social and economic development". US Congress, Office of Technology Assessment, *Intellectual Property Rights in an Age of Electronic Information*, OTA-CIT-302, Washington, DC, US Government Printing Office, April 1986, at 228.

¹³⁴ Adams, *supra* note 5 at 72.

CHAPTER 3

THE CONCLUSION OF THE TRIPS AGREEMENT

3.1. Introduction

The TRIPs Agreement is undoubtedly one of the most significant milestones in the development of international copyright in the twentieth century. As an integral part of the larger General Agreement on Tariffs and Trade (GATT), it marks a new direction in international copyright, as it successfully incorporates the protection of intellectual property rights into the national and international trading system.¹³⁵ It surpasses all prior international agreements in the field of intellectual property protection, not only in the breadth of IPRs covered,¹³⁶ but also in the scope of protection given.¹³⁷ More importantly, it finally includes the most difficult and painful aspects of intellectual property rights: enforcement, which is lacking in all the previous agreements.¹³⁸ Through the imposition of trade sanctions against countries that violate their obligations under the TRIPs, it provides a new international enforcement mechanism as well as a new dispute resolution that replaces power relations with rule of law.

¹³⁵ Ayers, *supra* note 123 at 68.

¹³⁶ The TRIPs Agreement covers totally 8 forms of intellectual property: copyright and related rights; trademarks; geographical indications; industrial design; patents; layout-designs of integrated circuits; confidential information or trade secrets and contractual licenses. See Part II, section 1 to 8, *the Agreement on Trade-Related Aspects of Intellectual Property Rights* [the TRIPs Agreement], Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments Results of the Uruguay Round, vol. 31, 33 I.L.M. 81 (1994).

¹³⁷ Andrés Moncayo Von Hase, "The Application and Interpretation of the Agreement on Trade-Related Aspects of Intellectual Property Rights" in Correa & Yusuf eds., *supra* note 63 at 93.

¹³⁸ Daniel Gervais, *The TRIPS Agreement: Drafting History and Analysis* (London: Sweet & Maxwell, 2003) at 3.

This chapter commences with a description of the origins and negotiating process of the TRIPs Agreement so as to provide a historical view of the different roles that both developed and developing countries played in the creation of the new Agreement. That is followed by a general introduction of the main content of the Agreement, with an emphasis on the copyright issues that are most relevant to developing countries. In the final part of this chapter, a summary of the implementation and enforcement of the Agreement after its coming into force will be presented.

3.2. The Origins and the Negotiating Process of the TRIPs Agreement

While developing countries were seeking broader privileges provided by the Berne Convention in the WIPO forum at the end of 1960s, an opposite voice was found in the developed world. In the late 1970s, the Anti-counterfeiting Coalition of multinational corporations was formed to mobilize corporate actors on a global scale to encourage their governments to take action to halt the growth of trade in counterfeit goods.¹³⁹ That is where the origins of the TRIPs Agreement can be traced back to.¹⁴⁰ The efforts of the Coalition encouraging the governments to achieve a consensus on a draft “Agreement on Measures to Discourage the Importation of Counterfeit Goods” failed to get the desired result during the Tokyo Round of the GATT,¹⁴¹ mainly due to strong opposition from developing countries. Led by India and Brazil, the majority of those developing country GATT members insisted that further changes to international intellectual property should

¹³⁹ The Anti-counterfeiting Coalition is ‘an alliance of 100 multinational corporations with the common aim of encouraging national governments to strengthen protection against counterfeit trademarked goods’, see Matthews, *supra* note 14 at 9.

¹⁴⁰ *Ibid.*, at 8.

¹⁴¹ *Ibid.* at 9. Note that the Tokyo Round of the GATT negotiation was undergone between the year of 1973 and 1979.

be made, but in the WIPO forum rather than under the GATT. From the developing countries' perspective, "WIPO had the practical advantage of offering a forum where, owing to the system of voting, they could use their numerical advantage to better protect their interests".¹⁴² Contrary to developed nations' efforts to raise the standard of copyright protection, developing countries tried to obtain more privileges that allow them to have broader access to information and technology that they need.

The establishment of WIPO in 1967 constitutes another significant event in the copyright world, since it is the largest organization to govern intellectual property conventions. As a United Nations agency, the main functions of WIPO are to administer the Paris and Berne Conventions and to seek the harmonization of national intellectual property laws.¹⁴³ WIPO's objective is "the promotion of the protection of intellectual property throughout the world through cooperation among States", and "the administration of various multilateral treaties dealing with the legal and administrative aspects of intellectual property".¹⁴⁴ The complaint from developed countries was that the formation of WIPO did not solve the problems existing in those conventions, namely that they lacked detailed rules on the enforcement of IPRs before national judicial administrative authorities, as well as an effective mechanism to settle disputes between states. WIPO's dispute settlement mechanism relies on the voluntary cooperation of the parties concerned and does not have measures to sanction violators.¹⁴⁵

¹⁴² *Ibid.* at 10.

¹⁴³ The Paris Convention is the Paris Convention for the Protection of Industrial Property of 1883, first signed on March 20, 1883 in Paris. It is the first multinational agreement on intellectual property. As revised up to September 28, 1979, it is one of the most important international conventions to regulate patents, as well as other intellectual property rights such as industrial designs and trademarks.

¹⁴⁴ *Su, supra* note 15 at 182.

¹⁴⁵ *Ibid.* at 183-84.

3.2.1. Efforts from the Developed Side

Beginning in the 1970s, developed countries attempted to revise and strengthen WIPO's intellectual property conventions in order to introduce efficient intellectual property law enforcement mechanisms, as the lack of intellectual property protection had significantly affected their interests in international trade arena. Meanwhile, developing countries tried to revise the Paris Convention in order for it would allow them to retain the use of compulsory licenses. The positions of developed and developing countries began to polarize under the WIPO conventions and the revision conferences that took place in Geneva (1980), Nairobi (1981) and Geneva (1982) were fruitless, as further consensus became difficult.¹⁴⁶

When efforts to strengthen the WIPO conventions failed, the businesses behind the developed countries' governments transferred their efforts to strengthening their domestic legislation, which resulted in important amendments to Section 301 of the Trade and Tariff Act 1974 of the United States. The new Section 301 introduced a trade-based approach to intellectual property protection, which is, using threat of trade sanctions to enforce IPRs in foreign countries. The United States found linking intellectual property standards to trade to be a successful strategy, because the application of Section 301 pressured some developing countries to improve their domestic intellectual property protection.¹⁴⁷ This led to another wave of efforts on the part of US industry in an attempt

¹⁴⁶ Matthews, *supra* note 14 at 12.

¹⁴⁷ By 1985, the amended Section 301 was being used for the first time against the Republic of Korea and it succeeded in changing Korea's intellectual property laws. And it was also used against Brazil in 1987. See *ibid*, at 16.

to bring the protection of IPRs into the GATT forum, and gain long-term benefits and a wider coverage of protection. Special 301, a revised form of the Section 301 that appeared in the Omnibus Trade and Tariff Act of 1988, became a useful “supplement” to the later US negotiating strategy for the TRIPs.¹⁴⁸

3.2.2. Negotiations

The alliance formed by US, European, and Japanese business succeeded in putting the international protection of IRPs onto the agenda of the coming round of GATT negotiations.¹⁴⁹ Then came the most difficult part — overcoming the strong opposition of developing countries. They still contended that WIPO rather than the GATT would be the appropriate forum in which to discuss IPRs, as WIPO offered developing nations more opportunities to address their need. Great divergences between the two groups made it impossible to reach a consensus at the negotiating table. With its past success in mind, the United States again used Special 301 as leverage to commence a new round of bilateral trade negotiations. Due to the developing countries’ great need to have US-market access, the strategy to link trade and the protection of IPRs worked well so that opposition to the new TRIPs Agreement waned. The alliance of the developing side was destroyed little by little, paving the way for substantive negotiations. In other words, the “North-South” negotiations ended and the “North-North” negotiations began.

¹⁴⁸ Special 301, based on Section 301 of the Trade Act 1984, has enhanced the role of the Office of the United States Trade Representative in initiating investigations in intellectual property infringements by other countries, raised the profile of intellectual property protection. See *ibid*, at 15-32.

¹⁴⁹ The Union of Industrial and Employers’ Confederations of Europe (UNICE) AND Keidanren was forged by the US, European, and Japanese businesses during the Uruguay Round of negotiations. See UNCTAD-ICTSD Project on IPRs and Sustainable Development, “The Global Intellectual Property Rights System”, online: International Centre for Trade and Sustainable Development, <http://www.ictsd.org/pubs/ictsd_series/iprs/PP/PP_3CH_02.pdf>, last visited on 7 October 2004.

The threat of bilateral trade sanctions being brought by the United States under Special 301 has been recognized as the most important stimulus for progress in those negotiations.¹⁵⁰ For developing countries, the compromise within the GATT negotiations can even be regarded to have offered some “respite” from the threat of US trade sanctions,¹⁵¹ as under unilateralism, the United States would have been the one to determine the rules on intellectual property to be adhered to by other countries, whether those rules had been breached, and whether a penalty had to be imposed.¹⁵² Although the developing countries still participated in the negotiations that followed, the content of the final text of the Agreement actually became “much more an issue of discussion of detail between the triumvirate of the United States, Europe and Japan”.¹⁵³ The disputes among their proposals became the new issues to be discussed.

The disagreements focused on issues such as the role of dispute settlement procedures for intellectual property disputes, the transitional arrangements for developing countries to implement the TRIPs Agreement, the protection of pharmaceutical products by patents; the status of moral rights related to copyright, the neighbouring rights of performers and broadcasters, and so on.¹⁵⁴ Among them, transitional arrangements and patentability exceptions were mostly related to developing countries’ interests, but those issues were proposed by the European negotiators rather than the developing countries themselves.

¹⁵⁰ Matthews, *supra* note 14 at 31.

¹⁵¹ *Ibid.* at 33.

¹⁵² Ted L. McDorman, “Unilateralism (Section 301) to Multilateralism (GATT): Settlement of International Intellectual Property Disputes After the Uruguay Round” in George R. Stewart, Myra J. Tawfik and Maureen Irish, eds., *International Trade and Intellectual Property: The Search for a Balanced System* (Boulder: Westview Press, 1994) 119 at 119-20.

¹⁵³ Matthews, *supra* note 14 at 33.

¹⁵⁴ *Ibid.* at 37.

“The trilateral alliance between the United States, the European Community and Japan, supported by their industry experts” had played a crucial role in the conclusion of the TRIPs Agreement.¹⁵⁵ Due to the threat of trade sanctions from the US side, and also the absence of the necessary legal expertise, developing countries did not have the opportunity to negotiate effectively on the content of the TRIPs Agreement.¹⁵⁶ In terms of developed countries, “business succeeded in getting most of what it wanted in the TRIPs Agreement, with industry demands clearly reflected in the final agreement”.¹⁵⁷ However, developing countries were able to be engaged in the “linkage-bargain diplomacy”, in return for accepting the TRIPs Agreement. As a result, the GATT package contained other benefits for developing countries, since agricultural and textile quotas served as significant payoffs.¹⁵⁸

3.3. The Final Text

After more than eight years of arduous negotiations, minimum standards for the protection and enforcement of IPRs were finally inserted on the international trade agenda in the form of the TRIPs Agreement, which was adopted at Marrakesh on 15 April 1994 as an Annex to the WTO Agreement. Simply speaking, the most important multilateral conventions on IPRs are re-codified as the TRIPs in order to be brought into the WTO

¹⁵⁵ *Ibid.* at 44.

¹⁵⁶ *Ibid.*

¹⁵⁷ *Ibid.* at 45.

¹⁵⁸ *Ibid.* at 42. “Ryan defines international diplomacy as a two-tier process where states bargain with their domestic industries even as they bargain with each other. At the domestic level, industry pressure had been hugely successful in promoting the issue of international intellectual property protection from being virtually non-existent to a high-priority trade issue¹⁵⁸. At international level, the key to achieving agreement is to link issues, even if previously unrelated, for the purposes of bargaining (termed “linkage-bargaining”)”, see K. Nijar, “America’s Use of Section 301 in Influencing International Intellectual Property Rights” at 18, online: [the University of Kent](https://www.kent.ac.uk/law/undergraduate/modules/ip/handouts/ip_dissertations/Diss-Nijar.doc), <https://www.kent.ac.uk/law/undergraduate/modules/ip/handouts/ip_dissertations/Diss-Nijar.doc>, last visited on 7 October 2004.

forum. “In many respects, it was the successor to earlier WIPO-administered conventions”,¹⁵⁹ namely, the Paris and Berne Conventions, which led to its becoming known as the “Berne-plus” and “Paris-plus” approaches, and also the main provisions of the Rome Convention and the Treaty on Intellectual Property in Respect of Integrated Circuits (IPIC treaty).¹⁶⁰ Compared with its predecessors, the TRIPs covers the whole spectrum of IPRs and has succeeded in linking IPRs protection to the dispute settlement procedure of the WTO, which has led to significant changes to the whole contour of the international IPRs protection system.

Developing countries played a minor role in terms of setting the regulations during the negotiation, thus, the interpretation of those rules is of great significance for their interests. The content of the TRIPs can be divided into three main sections: substantive standards, enforcement procedures, and dispute settlement. In Parts I and II, minimum standards, national treatment, and most-favored nation treatment (MFN treatment) are recognized as the three core commitments of the Agreement.¹⁶¹ The section on minimum substantive copyright standards is mainly based on the principles and provisions set forth in the Berne Convention, with “a substantial number of additional obligations on matters where the

¹⁵⁹ Matthews, *supra* 14 note at 11.

¹⁶⁰ Art. 2.2, *The TRIPs Agreement*, *supra* note 136. The TRIPs Agreement does not incorporate the Rome Convention and the IPIC treaty directly like it incorporates the Paris and Berne Convention.

¹⁶¹ Su, *supra* note 15 at 187. Minimum standards principle means that each Member State has to accord the treatment provided by the Agreement to the nationals of other Members, but they are not required to provide the treatments higher than that of the Agreement. National treatment requires Members to accord to the nationals of other Members treatment no less favourable than that is accorded to its own nationals. Both minimum standards and national treatment are introduced from international trade field to international copyright system by the Berne Convention of 1886. The MFN treatment provides that any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members. The MFN treatment, although not new to international trade agreements, are newly introduced to international copyright forum by the TRIPs Agreement. See Art.1, Art.2, and Art.3, *The TRIPs Agreement*, *supra* note 136.

other conventions are either silent or are seen inadequate”.¹⁶² Domestic enforcement procedures and dispute settlement constitute the internal and external enforcement mechanisms of the TRIPs. Internal enforcement ensures that judicial procedures against intellectual property violations should be available for private parties under the national laws of Member countries, as provided in Part III of the Agreement.¹⁶³ External enforcement, at the international level, permits the use of trade sanctions according to the final decisions of the WTO dispute settlement body.¹⁶⁴

3.3.1. Objectives

The objectives of the Agreement offer an important framework for the interpretation and application of its provisions. According to the Vienna Convention on the Law of Treaties, the objectives, together with the history of the negotiations, play a significant role when there are ambiguities within the provisions of the Agreement.¹⁶⁵

The general objectives underlying the negotiations and the conclusion of the TRIPs Agreement are stated in its Preamble.¹⁶⁶ It addresses the desire to reduce distortions and

¹⁶² Su, *supra* note 15 at 188. The changes made in the TRIPs Agreement for copyright protection are less as compared with those made in the field of patent. For the details of those changes, please see the following of this part.

¹⁶³ Part III: Civil and Administrative Procedures and Remedies. See table of contents, *the TRIPs Agreement*, *supra* note 136.

¹⁶⁴ Su, *supra* note 15 at 189.

¹⁶⁵ Art.30, Art. 31, *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (entry into force on 27 January 1980).

¹⁶⁶ “Members,

Desiring to reduce distortions and impediments to international trade, and taking 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;

Recognizing, to this end, the need for new rules and disciplines concerning:

(a) the applicability of the basic principles of GATT 1994 and of relevant international intellectual property agreement or conventions;

impediments to international trade, and the need to promote effective and adequate protection of IPRs while ensuring that measures and procedures to enforce IPRs do not themselves become barriers to legitimate trade. It further recognizes the need for new rules and disciplines concerning IPRs, respecting not only the basic principles of the GATT 1994 but also relevant international agreements and conventions. The new rules should comprise adequate standards and principles for IPRs, subjecting those norms to effective enforcement measures, whilst taking into account differences in national legal systems.

The underlying developmental and technological public policy objectives of national systems for the protection of intellectual property is recognized explicitly in the Preamble as playing an important role in national IPRs systems. The Preamble, in addressing the importance of resolving disputes through multilateral rather than bilateral procedures,

-
- (b) the provision of adequate standards and principles concerning the availability, scope and suse of trade-related intellectual property rights;
 - (c) the provision of effective and appropriate means for the enforcement of trade-related intellectual property rights, taking into account differences in national legal systems;
 - (d) the provision of effective and expeditious procedures for the multilateral prevention and settlement of disputes between governments; and
 - (e) transitional arrangements aiming at the fullest participation in the results of the netotiations;

Recognizing the need for a multilateral framework of principles, rules and disciplines dealing with interntioanl trade in counterfeit goods;

Recognizing that intellectual property rights are private rights;

Recognizing the underlying public policy objectives of national systems for the protection of intellectual property, including developmental and technological objectives;

Recognizing also the special needs of the least-developed country Members in respect of maximum flexibility in the domestic implementation of laws and regulations in order to enable them to create a sound and viable technological base;

Emphasizing the importance of reducing tensions by reaching strengthened commitments to resovle disputes on trade-related intellectual property issues through multilateral procedures;

Desiring to establish a mutually supportive relationship between the WTO and the World Intellectual Property Organization (referred to in this Agreement as 'WIPO') as well as other relevant international organizations;

Hereby agree as follows:"

emphasizes the concerns of developing countries regarding the pressures exerted by the United States through its domestic trade laws.¹⁶⁷

Besides the Preamble, Article 7 repeats the most vital aspect of the objectives:

The protection and enforcement of intellectual property rights should contribute to the promotion of technological innovation and to the transfer and dissemination of technology, to the mutual advantage of producers and users of technological knowledge and in a manner conducive to social and economic welfare, and to a balance of rights and obligations.

The essence of this objective article is the balance of the rights and obligations of intellectual property, which is a perennial issue when one talks about the objectives of intellectual property protection, no matter whether that protection is domestic or international.¹⁶⁸ The objective of intellectual property protection is defined as “the setting of an equilibrium between two objectives”, namely, rewarding the creators and inventors and promoting the public interest.¹⁶⁹ Since most intellectual property products are created in industrial countries, when the issue of the relationship between right holders and users gets to the international level, the developed side represents the right holders and the developing side, the users.

The need to balance the interests of the two sides, following the provisions of the developing countries’ proposal, became one of the objectives of the new Agreement from the very beginning of the negotiations.¹⁷⁰ Although developing countries did not play a

¹⁶⁷ Yusuf, *supra* note 119 at 11.

¹⁶⁸ *Ibid.* at 6.

¹⁶⁹ Gervais, *supra* note 138 at 117.

¹⁷⁰ See the Brussels Draft: “Recognising also the special needs of the least developed countries in respect of maximum flexibility in the domestic implementation of laws and regulations in order to enable them to create a sound and viable technological base”.

leading role during the negotiations, their concerns became part of the negotiating list for the simple reason that the success of the Agreement was dependent on the number of Members. Article 7, together with the Preamble, is likely to be used frequently in the settlement of disputes by developing countries, since it can be interpreted favorably in their interest.¹⁷¹ Articles 7 and 8 have actually been recognized by the Doha Ministerial Declaration to have a special importance in interpreting the TRIPs Agreement.¹⁷²

3.3.2. *Basic Principles*

The basic principles of GATT, *i.e.*, national treatment and MFN treatment are finely transplanted into the TRIPs. National treatment is not new to international IPRs. As acknowledged in the first chapter, it became the basic principle for international copyright protection as early as the first multinational convention—the Berne Convention. It has maintained its “basic” position in international intellectual property conventions since then and is re-emphasized as the most important “basic principle” in the TRIPs and it is extended to the protection of performers, producers of phonograms, and broadcasting organizations, with the exception of Article 6 of the Berne Convention and Article 16(1)(b) of the Rome Convention.¹⁷³ It is recognized as the “cornerstone” of not only the TRIPs Agreement and all other international intellectual property conventions, but of the whole WTO trading system as well.¹⁷⁴

¹⁷¹ Gervais, *supra* note 138 at 120.

¹⁷² “In undertaking this work, the TRIPs Council shall be guided by the objectives and principles set out in Articles 7 and 8 of the TRIPs Agreement and shall take fully into account the development dimension.” Doha Ministerial Declaration, Section B, Part One.

¹⁷³ Art.3 (1), *the TRIPs Agreement*, *supra* note 136.

¹⁷⁴ Gervais, *supra* note 138 at 101.

MFN treatment, a new element in the international intellectual property framework, is stipulated in the Agreement, requiring that nationals of other states be treated without prejudice.¹⁷⁵ This requirement is intended to ensure the uniformity of international intellectual property protection where national treatment does not apply.¹⁷⁶ National treatment plus MFN treatment forms a tighter safety net and in conjunction with the substantive standards, a real universal intellectual property law is possible to make.

Additionally, Article 8 is named “Principles” in order to emphasize the need for protecting public health and nutrition, for promoting the public interest in sectors of vital importance, and for measures to prevent the abuse of IPRs.¹⁷⁷ This Article was adopted from the developing countries’ proposal. The first part aims to preserve a measure of flexibility in the enactment and implementation of their domestic IPRs legislation,¹⁷⁸ while the second enunciates a general principle on the possible need for preventing the abuse of IPRs.

3.3.3. Substantive Standards

¹⁷⁵ There are a few exemptions to the MFN treatment, that is, the benefits under the pre-TRIPs bilateral agreements shall not subject to MFN treatment. See Art. 4, *the TRIPs Agreement*, *supra* note 136.

¹⁷⁶ “[E]ither because it falls under an exception or because it does not apply to nationals of the country concerned” Gervais, *supra* note 138 at 104.

¹⁷⁷ Art.8: Principles

1 Members may, in formulating or amending their 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.

2 Appropriate measures, provided that they are consistent with the provisions of this Agreement, may be needed to prevent the abuse of intellectual property rights by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.” *The TRIPs Agreement*, *supra* note 136.

¹⁷⁸ Yusuf, *supra* note 119 at 12-13.

According to the TRIPs Agreement, each Member State is allowed to construct its own intellectual property system according to its respective social, legal, and economic situations as long as the level of protection meets the minimum substantive standards. The Agreement does not prohibit countries from providing higher levels of protection. While raising the level of copyright protection in general, the TRIPs Agreement leaves ample “wiggle room” in which developing nations are able to “implement national policies favoring the public interest in free competition”.¹⁷⁹

Article 9 provides that copyright and related rights protection standards should refer to the 1971 version of the Berne Convention, except for the moral rights addressed under Article 6bis.¹⁸⁰ Moral rights were always one of the main dissensions between Anglo-American and continental countries during international copyright negotiations. This time, the Americans succeeded in excluding them from the new international copyright system. With the exception of moral rights, the parties agreed that the substantive standards existing before the TRIPs had already reached a reasonable level and that they should not be the focus of the new negotiations. Article 2, entitled “Intellectual Property Conventions”, sets out the basic relationship between the TRIPs Agreement and the pre-existing IPR conventions so as to express the intentions of the parties to maintain the obligations under those conventions.¹⁸¹

¹⁷⁹ J. H. Reichman, “from Free Riders to Fair Followers: Global Competition under the TRIPs Agreement” in (1996-1997) 29:11 Int’l L. Pol. 11 at 28.

¹⁸⁰ Art. 9, *the TRIPs Agreement*, *supra* note 136.

¹⁸¹ Yusuf, *supra* note 119 at 19.

The TRIPs Agreement takes a so-called “Berne-plus” approach, meaning that the Agreement introduces additional protection standards based on those of the Berne.¹⁸² The remainder of the articles in this part of the Agreement deals with this “plus” part. For the first time in a multilateral convention, the protection of computer programs by copyright principles has been confirmed, in Article 10.¹⁸³ Article 11 recognizes the necessity of protecting rental rights, but only for certain categories of works.¹⁸⁴ The inclusion of rental rights, although a limited exclusive right, signals a great progress of the western countries in strengthening copyright protection, as they are net exporters of copyrighted goods. By prohibiting unauthorized commercial rental, the monopoly position of right holders is further confirmed, while access of to copyrighted products through a cheaper method is hindered. Articles 12 and 13 list the terms of copyright protection, and limitations and exceptions so as to avoid misunderstandings.

Article 14 is relevant to related rights. In contrast to the copyright provisions, it does not directly incorporate the provisions of the Rome Convention, but rather reproduces the substantive rights recognized by the Rome Convention in a simplified form.¹⁸⁵ Some small changes have been made according to the new round of negotiations. For example, exclusive rental rights in terms of phonograms are granted under Article 14(4).

In general, except for enhancements to the market position of software, database, and phonogram industries, in which US firms have a dominant business interest, substantive

¹⁸² Paul Katzenberger, “TRIPs and Copyright Law” in Beier & Schricker eds., *supra* note 132, 59 at 65.

¹⁸³ Gervais, *supra* note 138 at 133.

¹⁸⁴ “...at least computer programs and cinematographic works” see Art.11, *the TRIPs Agreement*, *supra* note 136.

¹⁸⁵ Bercovitz, *supra* note 63 at 155-56.

standards of copyright and related rights protection have not changed dramatically from those concluded in former WIPO-administered conventions.¹⁸⁶

3.3.4. Enforcement

Whether enforcement procedures should be included in the TRIPs had been one of the main dissensions between the North and the South camps. Western countries had complained for a long time that the main shortfall of the former WIPO conventions was that they were toothless, meaning they lacked an effective enforcement mechanism. The ability to achieve the international enforcement of IPRs then became one of the key incentives driving developed countries to push for a new convention.¹⁸⁷ On the other side, developing countries suggested that enforcement should consider the administrative and resource capabilities of each country and that common enforcement procedures in the TRIPs Agreement might not be appropriate. Yet, the final text of the TRIPs adopted the developed countries' proposal, with the enforcement procedures of IPRs comprising in Part III of the Agreement.¹⁸⁸ This was a difficult compromise during the Uruguay Round negotiations and was one of the major achievements on the developed countries' side.

By providing for civil, criminal, and administrative enforcement, as well as remedies of different forms, the provisions of the TRIPs on enforcement, as the internal enforcement mechanism of the Agreement, aim to set forth detailed enforcement obligations for Member States to ensure the embodiment of the protection of IPRs at the national

¹⁸⁶ Correa, *the WTO*, *supra* note 124 at 12.

¹⁸⁷ Matthews, *supra* note 14 at 65.

¹⁸⁸ *Ibid.* at 66.

level.¹⁸⁹ By adding preventive injunctions, the enforcement procedures have been further strengthened, especially in certain South Asian countries, as there is a loophole in their intellectual property legislation, whereby the law can halt but not prevent infringement.¹⁹⁰ Developing countries' special concerns, that they lack sufficient resources, are addressed in the wording of Article 41(5), which states that "this Part does not create any obligation to put in place a judicial system for the enforcement of IPRs distinct from that for the enforcement of law in general, nor does it affect the capacity of Members to enforce their law in general".¹⁹¹

3.3.5. *Dispute Settlement*

Another major success of the TRIPs Agreement comes from the inclusion of Article 64, which incorporates the WTO dispute settlement procedures. This incorporation confirms the full application of the WTO Dispute Settlement mechanism in the TRIPs context, through the inclusion of provisions from both the GATT 1994 and the "Understanding on Rules and Procedures Governing the Settlement of Dispute" (DSU). Regarding the application of unilateral measures, which is of the greatest relevance for developing countries, Article 64 remains silent. However, the prohibition of unilateral threats can be found in the Preamble of the TRIPs Agreement, as well as in Article 23 of the DSU, which has been incorporated into the TRIPs.¹⁹² Therefore, the TRIPs Agreement prohibits unilateral measures, such as the application of the Special 301 by the United States, from

¹⁸⁹ *Ibid.* "Internal enforcement mechanism primarily concerns private actions by requiring member countries to ensure that enforcement procedures, as specified in the Agreement, are made available under national laws." See also Su, *supra* note 15 at 189.

¹⁹⁰ Some Southeast Asian countries' intellectual property rights legal system did not provide for preventive injunctions so that infringements of intellectual property rights could not be halted efficiently. See Gervais, *supra* note 138 at 287.

¹⁹¹ Art.41(5), *the TRIPs Agreement*, *supra* note 136.

¹⁹² Article 23 is titled "Strengthening of the Multilateral System", see *ibid.*

being used to solve any disputes between Members. Despite the explicit prohibitions, unilateral trade sanctions are employed by some developed countries in order to enforce a robust system of IPRs in certain developing countries, and sometimes the requested regime is even stronger than that is provided in the TRIPs Agreement.¹⁹³

3.3.6. Transitional Arrangements

Certain transitional periods are provided in the sixth part to allow the Agreement to take effect in those countries on a date after its coming into force. This timeline, outlined for the benefit of developing countries, aims to attract the broadest possible membership.¹⁹⁴ Developed countries have a general one-year transition period, while developing countries have an additional four years. In the latter case, however, an exception applies with regard to Articles 3 and 4 (those related to National treatment and MFN treatment), which are applicable after the general one-year transition period rather than the four-year period. Least-developed countries have as long as ten years to make the transition.¹⁹⁵ Besides, another five additional years are allowed for developing countries to delay protection in “areas of technology not so protectable in its territory”.¹⁹⁶ Thereafter, the Agreement will take effect in all WTO Member States. The inclusion of different transition periods is a concession by industrialized countries, although not a generous one.¹⁹⁷ But it is essential for many developing countries, since they need time to introduce

¹⁹³ The United States, for instance, keep using the special 301 as a method to enforce IP protection higher than that of the TRIPs Agreement in some developing countries, e.g. in Argentina.

¹⁹⁴ The Preamble, *the TRIPs Agreement*, *supra* note 136.

¹⁹⁵ Arts.65 & 66, *ibid.*

¹⁹⁶ Gervais, *supra* note 138 at 349.

¹⁹⁷ Correa, *the WTO*, *supra* note 124 at 9.

new legislation, to develop the infrastructure administering IPRs, and to prepare themselves to adapt to the new regulatory framework.¹⁹⁸

3.4. Implementing and Enforcing the New Agreement

The TRIPs Agreement itself came into force together with other GATT Agreements on 1 January 1995. According to the transition-period provisions, the Agreement entered into force with respect to developed Members on 1 January 1996 and developing Members on 1 January 2000. It will come into effect for least-developed Members on 1 January 2006.

3.4.1. Administration of the Agreement

The TRIPs Council was established in order to act formally as the main organ carrying out the scrutiny and surveillance of national measures implementing the TRIPs Agreement. According to Article 63, WTO Members should notify the Council of the relative national laws and regulations in order to make them available for both the Council and other Members to review and to questions whether or not they are in fact complying with their TRIPs obligations. Under the TRIPs this is called “transparency”, which is at the heart of the administrative procedure of the Agreement. It also constitutes a good supplement to the dispute settlement procedure, since as a “relatively non-confrontational” mode,¹⁹⁹ it exerts pressure on Members to change their legislation and administrative procedures according to the provisions of TRIPs Agreement. In fact, due to bureaucratic problems, the aim of real transparency is not easy to achieve.²⁰⁰

¹⁹⁸ *Ibid.* at 10.

¹⁹⁹ J.H. Reichman, “Compliance with the TRIPs Agreement: Introduction to a Scholarly Debate” (1996) 29 Vand. J. Transnat’l L. 366 at 368.

²⁰⁰ Matthews, *supra* note 14 at 81.

Global corporate actors, just as they played a significant role in the formulation of the TRIPs Agreement, are now playing a leading role in monitoring the implementation of the Agreement.²⁰¹ As the main source of information on the infringement of IPRs in particular countries, they have a strong influence on government decision makers as they can lobby them with expertise. Industry interests play a vital role in this field, primarily because IPRs are inherently private rights and business interests benefit the most from strong intellectual property protection.

3.4.2. Implementing the Agreement

Since the adoption of the TRIPs, WTO panels have shown an inclination to apply the TRIPs in a rigid manner.²⁰² As a result, developing countries are facing and will continue to face more difficulties when implementing the TRIPs Agreement both from a domestic resources and international pressure perspective. Article 67 demonstrates the commitment of developed countries to provide technical and financial cooperation in favor of developing and least developed Members in order to facilitate the implementation of the TRIPs Agreement. In 1998, a joint initiative was launched by the WTO and WIPO Secretariats with the aim of maximizing the assistance that could be granted to developing countries, which agreed to bring themselves into conformity by the year 2000. However, as those “assistance” provisions have proven to be too general to practice and as “toothless” as those Pre-TRIPs conventions, they cannot be deemed a real, charitable concession on the part of industrialized countries.

²⁰¹ *Ibid.* at 79.

²⁰² Osei-Tutu, *supra* note 133 at 137.

While implementing the TRIPs Agreement, a question about the relationship between the WTO and WIPO and their respective roles regarding international intellectual property protection arose. Following the conclusion of the TRIPs Agreement, the WTO became the new forum for international intellectual property protection. In the TRIPs, the importance of cooperating with WIPO is mentioned, in both the Preamble and in some of the Articles regarding issues such as technical co-operation.²⁰³ But when the TRIPs was concluded, there was a tendency for the WTO to replace WIPO in the primary role of governing the protection of international intellectual property. This situation changed when between 1994 and 1996 WIPO successfully conducted negotiations for a series of new treaties in the field of intellectual property protection.²⁰⁴ Then, in 1995, one year after the entry into force of the TRIPs Agreement, another agreement, the Agreement between the World Intellectual Property Organization and the World Trade Organization, was concluded to recognize the importance of cooperation between the two organizations. In the future, WIPO may take the leading role for major norm-setting efforts, since historically it has had different objectives from those of the TRIPs Agreement and the basis for copyright protection continues to be the Berne Convention. Accordingly, those changed norms in the WIPO forum will influence any future development of the TRIPs Agreement.²⁰⁵

²⁰³ "Desiring to establish a mutually supportive relationship between the WTO and the World Intellectual Property Organization as well as other relevant international organizations;" See Preamble, and Articles 68 and 63(2), *the TRIPs Agreement*, *supra* note 136.

²⁰⁴ Namely, they are: the Trademark Law Treaty, the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty.

²⁰⁵ Gervais, *supra* note 138 at 82.

CHAPTER 4

DEVELOPING COUNTRIES AND THE TRIPS AGREEMENT

The TRIPs Agreement constitutes the most wide-ranging and far-reaching international treaty on the subject of intellectual property to date. In fact, it covers the most subject matters of protection and can also boast to having the most memberships. Currently, it has taken effect in most WTO Member countries, except for those on the list of “least-developed countries”.²⁰⁶ Furthermore, it provides the highest level of intellectual property protection, which means that most developing country Members are bound to amend their legislation or to extend it to new areas, such as software, plant varieties, and integrated circuits, in order to fulfill their obligations under the new Agreement.²⁰⁷ These amendments will definitely bring new changes to the domestic economic and political development of developing countries. Especially as they had remained on the periphery during the negotiations for the Agreement, the final TRIPs Agreement is, from their perspective, more like coercion than cooperation, and they assume that the new Agreement will narrow their access to technology and hence impede their economic growth.²⁰⁸

The TRIPs Agreement has been defined as a big success in terms of protecting interests of business in developed countries, especially those that invest heavily in research and

²⁰⁶ See Arts. 65 & 66, *The TRIPs Agreement*, *supra* note 136. Also see chapter 3 of this thesis about the “transitional period”.

²⁰⁷ Carlos M. Correa, “Intellectual Property Rights: a Perspective from Developing Countries” in Gotzen ed. *Supra* note 8, 175 at 178 [Correa, “Intellectual Property”].

²⁰⁸ Joshua J Simons, “Cooperation and Coercion: the Protection of Intellectual Property in Developing Countries” (1999) 11 *Bond LR*. 59.

development (R&D), and export their technology and goods to other countries.²⁰⁹ The final text expresses most of their demands as represented by their governmental delegates.²¹⁰ These businesses are apparently the winners in the TRIPs Agreement.²¹¹ And the developed countries to which they belong will indirectly benefit from this triumph. Will the TRIPs also benefit developing countries as much as it has developed countries? Is the Agreement reciprocity or “zero-sum competition (your win is my loss)”? The two sides, with totally different answers to these questions, both realize that as most developing countries did not have the necessary legal infrastructure and legal traditions to protect IPRs sufficiently before the conclusion of the Agreement, their domestic system will require significant changes as a result of the Agreement. Those changes are expected to have a great impact on their economic interests.

This chapter begins with the introduction of the developmental objectives that developing nations are seeking to achieve. In the discussion of the impact of TRIPs on developing countries—the core of this chapter, detailed arguments for theoretic and realistic impacts are provided. As the impacts of the TRIPs Agreement as a whole and copyright part in particular have a lot in common, and it is difficult in terms of both the theory and empirical studies to separate these two types of impact, the whole intellectual property system is examined so that its impact on developing countries can be studied, with a general comment on the differences that exist among the various types of IPRs.

²⁰⁹ Su, *supra* note 15 at 214.

²¹⁰ The business interest in developed countries had played a significant role during the negotiation. For details, please see chapter 3.

²¹¹ Su, *supra* note 15 at 214.

4.1. The Development Objectives of Developing Countries

To answer the question of what impact the TRIPs Agreement will have on developing countries, one has to first assess the domestic situation of developing countries and determine what objectives they are seeking to achieve from integrating themselves into the multilateral trading system. While developing countries are all engaged in industrialization process, the reasons for this commonality differ. Most of them were colonized by another nation and gained their independence shortly after World War II, as is the case for most countries in South Africa. Some had undergone a long history of imperialism or feudalism, which impeded them from benefiting from the industrial revolutions in Europe. China is a perfect example of this. Nowadays, these countries usually have a poor but enormous population and their economies traditionally depend on the exportation of agricultural goods and natural resources.²¹² Since gaining their independence, most developing countries have experienced major progress in their economic development. Due to cheaper labor, environmental concerns, and so on, developing countries are replacing developed countries as centers of manufacturing and their negative position in traditional international trade is improving. However, the gap between their general economic power and that of developed countries is still considerable.

For developing countries, there are two objectives in terms of their economic development. The first objective is to improve the living conditions for their people. In this regard, some least-developed countries have progressed no further than the first stage of struggling with hunger and diseases. The second objective is to catch up economically

²¹² *Ibid.* at 197.

with developed countries by promoting industrialization and by using trade policy.²¹³ Improving living conditions comprises part of the industrialization process, whilst the ultimate goal is to catch up with developed countries in order to have a strong voice in the international political and economic arena. These two objectives intersect and accelerate with each other.

It seems that achieving the first objective is much easier than achieving the second. Since World War II, most developing countries have experienced some level of economic growth and improvement in their living conditions.²¹⁴ Certain amongst them have even emerged as Newly Industrialized Countries (NICs),²¹⁵ those countries whose economy has grown so much that their position in the global market has changed dramatically. Yet, for developing countries as a whole, despite some growth and improvement, the divide between them and developed countries has not diminished, and is actually growing larger.²¹⁶ This phenomenon has prompted some curious neoclassical economists to investigate the reasons for it.

According to the Solow model, formulated by Robert Solow and being used to illustrate the modern economic structure, there are three production factors — labour, capital, and technical progress.²¹⁷ Labor and capital have long been recognized as factors accounting for economic growth, but Solow discovered that technical progress can also enhance

²¹³ *Ibid.* at 195.

²¹⁴ *Ibid.* at 196.

²¹⁵ These include South Korean, Taiwan, Hong Kong, and Singapore.

²¹⁶ Thomas D. Lairson & David Skidmore, *International Political Economy: The struggle for Power and Wealth* (Belmont, CA: Thomson/Wadsworth, 2003) at 181.

²¹⁷ Rober Solow, "A contribution to the Theory of Economic Growth" Q. J. Economy, (1956) Vol. 70 at 65-66, cited in Su, *supra* note 15 at 198.

growth significantly.²¹⁸ This theory can be used to explain the possible reasons why the gap between the first world and the third world is widening, despite the growth of the domestic economies of developing countries, since their main growth stems from improvements in labour and increases in capital rather than technical progress. Based on Solow's theory, it is not difficult to understand from the developing countries' view that technical progress is the key regarding their developmental objectives.

Not all developing countries have the same level of economic development. The NICs that emerged in Asia at the end of last century actually successfully created and accumulated a wealth of technology.²¹⁹ But this does not change the position of developing countries as a whole in the technology market. Most new technology is still produced in developed countries, while developing countries use it. To eliminate this gap, developing countries can either establish their own technological production lines, that is, they can become producers of technology, or they can increase other export revenues in order to offset payments made for technological imports. Unfortunately, both of these solutions do not seem especially practical: the economic situation in most developing countries does not allow for much investment in the highly risky and time-consuming area of technology R & D whilst those export revenues currently based on agriculture and labour-intensive industry are insufficient to afford expensive technological imports. This tremendous obstacle stands in the way of their catching up with industrialized countries. As a result, without the ability to create and without the money to buy, developing countries choose to "steal" — a word used by developed countries to describe developing

²¹⁸ Su, *supra* note 15 at 198.

²¹⁹ *Ibid.*

countries' intellectual property piracy. This international piracy then transfers the domestic puzzlement of technology access from within developing countries to the international forum.

There are countries that have benefited from piracy. In this regard, the “[c]heap imitation of foreign products” has been said to have contributed substantially to Japan’s boom and later this tacit was learned by NICs like South Korean, Taiwan, and Singapore.²²⁰ Even the most powerful technology production base of today — the United States — was an imitator of the European countries’ intellectual property during the early 20th century.²²¹ Other developing countries have attempted to imitate their success and obtain technology at a cheaper price. But when the TRIPs Agreement is fully implemented in all the developing and least-developed Member countries, cheap access to foreign technology in these countries through traditional methods will be strictly restricted since the TRIPs provides a high level of IPRs protection through effective enforcement procedures. Foreign Direct Investment (FDI), which is usually the focus of developing countries’ trade policies, is believed to be a solution to the issue of technological progress.²²² To some extent, it is a good way to fill the balance-of-payments gap, and it can also bring R & D investment to developing countries. Whether or not it works out for developing countries remains to be seen. From the developing countries’ perspective, the best

²²⁰ Pacon, *supra* note 132 at 329.

²²¹ The United States were reluctant to join the Berne Convention, which represented the highest copyright protection at that time in early 20th Century. For details, please refer to the first chapter of this thesis.

²²² Su, *supra* note 15 at 199.

solution is to encourage the free flow of technology from industrialized countries to developing countries to the largest extent possible.²²³

4.2. The Impact of the TRIPs on Developing Countries

Although the TRIPs Agreement is said to have mirrored developed countries' domestic intellectual property laws, especially those of the United States, and developing countries finally agreed to sign it due to great pressure rather than being willing to accept the new Agreement, some scholars from developed countries have argued that, by strengthening IPRs protection, the Agreement benefits developing countries as much as it does developed countries. Some even maintain that stronger IPRs protection is in the best interest of developing countries,²²⁴ as it is in the best interest of all nations. They identify three major types of benefits developing countries will obtain as the result of implementation of the Agreement: more FDI, greater technology transfer, and increased local innovations. It is generally agreed that there are some benefits for developing countries to implement the TRIPs Agreement, no matter whether within the TRIPs context or within the bigger WTO forum. Otherwise they would not finally have signed it. However, the main argument between developed and developing countries lies in whether the TRIPs Agreement will serve to benefit the industries of developed countries more than those of developing countries.²²⁵

In the following part, copyright is put into the larger IPRs context in order to examine the impact of the TRIPs on developing countries. But the hottest debate arises from issues

²²³ *Ibid.*

²²⁴ Abbott, "TRIPs", *supra* note 84 at 390.

²²⁵ Su, *supra* note 15 at 203.

related to patents, as the minimum standards set forth for patent protection in the Agreement are much more advanced than those in developing countries' former domestic laws. Public health and environmental concerns, which are regulated mainly by patent laws, seem more relevant to developing countries' first developmental objective. However, despite the fact that relatively advanced copyright laws already existed in most developing countries, enforcement remains a big challenge on developing countries' part, mainly due to a lack of essential resources as well as the reluctance of those countries to implement a strong copyright regime. As an essential instrument of national cultural and information policy,²²⁶ copyright is still significant under the TRIPs Agreement, especially as computer programs are protected by copyright principles under the new Agreement.

4.2.1. Foreign Direct Investment (FDI)

Arguments about what positive impact the TRIPs Agreement could have on the domestic economic development of developing countries focus mainly on the increase of FDI. According to these arguments, strong protection of IPRs would not only encourage FDI in technology-concentrated sections but would also promote the transfer of technology from developed countries to developing countries.²²⁷ Proponents of this view believe that when intellectual property protection is not sufficient in a country, firms with valuable technology assets will hesitate to invest in the country for fear of losing their technology.

²²⁶ Graeme B. Dinwoodie, "A New Copyright Order: Why National Courts Should Create Global Norms" (2000) 149 U. Pa. L. Rev. 469 at 472.

²²⁷ Su, *supra* note 15 at 204.

This argument is grounded in the statement that strong intellectual property protection is an incentive for investors just as it is an incentive in society for creators.²²⁸

Edwin Mansfield, who conducted the first major empirical study on the importance of intellectual property protection for the stimulation of FDI in developing countries,²²⁹ found that there is “a strong positive correlation between higher levels of intellectual property protection and foreign direct investment”.²³⁰ He also pointed out that there are different types of FDI and that the impact of strong intellectual property protection on different types of FDI can vary. For example, when a country strengthened its intellectual property protection, chemical, pharmaceutical, machinery, and electrical equipment industries received a bigger amount of FDI and foreign joint venture, while the transportation equipment, metals, and food industries did not benefit from the stronger IPRs protection.²³¹ He reminded people that when explaining the relationship between FDI and intellectual property protection, one should not treat different kinds of FDI all the same.

In order to explain the relationship between FDI outflows in the United States and the level of protection for IPRs in target countries, Jeong-Yeon Lee and Mansfield compiled an index of intellectual property protection for sixteen countries, and discovered that “countries with stronger intellectual property protection attracted significantly higher

²²⁸ The statement that intellectual property protection serves as an incentive for investors to create can be found in the utilitarian justification of copyright. Please refer to section 2.2.1. Justifications of Copyright.

²²⁹ Robert M. Sherwood, “Intellectual Property Systems and Investment Stimulation: The Rating of Systems in Eighteen Developing Countries”, (1997) 37 J.L. & Tech. 261 at 351-52 [Sherwood, “Intellectual Property”].

²³⁰ Edwin Mansfield, “Intellectual Property Protection, Direct Investment, and Technology Transfer” in International Finance Corporation Discussion Paper No. 27, 1995.

²³¹ Su, *supra* note 15 at 209.

levels of foreign direct investment”.²³² This conclusion was criticized for its subjectivity, as it was drawn from surveys that included the US firms’ personal perceptions.²³³ Despite its subjectivity, Mansfield and Lee’s index at least proved that intellectual property protection is a factor to consider when US firms make their FDI decisions.

Based on studies conducted by Sherwood, Mansfield, and Lee, Evelyn Su concluded that “a positive correlation between strengthening of IPRs protection and the increase of foreign direct investment generally exists”,²³⁴ and that the robust intellectual property protection provided through the enforcement of the TRIPs Agreement would encourage inflows of FDI to developing countries. Such FDI in turn would support the domestic technological and economic development of developing countries.

In contrast, more recently, Carlos M. Correa opposes the arguments about the positive correlation between FDI and intellectual property protection.²³⁵ He insists that the availability of such protection is not a critical determinant of FDI decisions. This is proved by the fact that FDI inflows are highly concentrated in some developing countries not having an advanced IPRs regime; and FDI inflows to a country do not change dramatically once the country brings its domestic legislation into conformity with the TRIPs Agreement.²³⁶ On the extreme side of this argument, Correa even believes that

²³² Cited in *ibid.* at 210.

²³³ Cited in *ibid.*

²³⁴ *Ibid.* at 212.

²³⁵ Correa, *the WTO*, *supra* note 124 at 29.

²³⁶ *Ibid.* “Inflows of FDI in Asia and the Pacific have been strongly concentrated so far in a few countries: China, Singapore, Malaysia, Thailand, Hong Kong and Indonesia, which accounted for about 90% of such inflows to the region in 1992. These countries have become major recipients of FDI before changes in IPRs, even under legislation with a considerable degree of inconsistency with the standards of protection now deemed the minimum acceptable under the TRIPs Agreement. NO Significant changes in those flows can

once all Member States have changed their laws according to the standards provided by the TRIPs Agreement, a real universal uniform intellectual property law system will be achieved. When there is no divergence, intellectual property protection will no longer be a factor to consider in making FDI decisions. He concludes that “compliance with the TRIPs Agreement will not ensure by itself greater attractiveness of a particular country vis-à-vis other countries competing for the same investment”.²³⁷

There is no doubt that investors are more reluctant to invest in countries with weak intellectual property protection when this investment entails “a significant transfer of proprietary knowledge, such as R & D and technology-intensive manufacturing processes”,²³⁸ because stronger intellectual property protection helps to reduce the high financial risk associated with the R & D of new technology that are protected by trade secrets, as well as patents and copyright.²³⁹ That is why these investors are the main proponents of the TRIPs Agreement. In addition, there are other factors, such as the availability of a low-cost and skilled workforce, the size of the domestic market, the openness of trade, the level of development, local transportation infrastructure, political stability, and currency, which are also essential when choosing the target country of investments. In fact, the “economic environment” of a country has been recognized as having an “overriding” effect on FDI decisions, while the availability and standards of

be expected as a direct result of the reinforcement of IPRs in those countries.” Another example is in Su, *supra* note 15 at 207. Su pointed out that “Countries with the highest levels of foreign direct investment, such as Argentina, Brazil, China, and Thailand, have the lowest levels of intellectual property protection. On the other hand, countries with high levels of intellectual property protection, such as Nigeria, have not attracted higher levels of foreign direct investment than other similarly situated countries.”

²³⁷ Correa, *the WTO*, *supra* note 124 at 30.

²³⁸ Su, *supra* note 15 at 208.

²³⁹ *Ibid.* at 211.

IPRs protection are not included in the list of the most relevant determinants for FDI.²⁴⁰ Take India as an example: It appears that “access to a low-cost and skilled workforce has played a more significant role than has the relative absence of a comprehensive intellectual property regime” when multinational firms are deciding whether to invest in that country.²⁴¹ If one assumes that all factors except for the intellectual property regime are the same for different countries, it may be possible to conclude that countries having a higher level of intellectual property protection will attract more FDI. In reality, it is impossible for all the other factors to be the same among different countries; thus, it is extremely difficult to disaggregate the likely impact of the TRIPs Agreement.

While acknowledging that the standard of IPRs protection has an effect on FDI decisions, it should be noted that it is only one of many factors that will affect investors’ choice. Besides, the degree to which FDI will be affected by the level of intellectual property protection is likely to vary not only between industry sectors, but also between countries having different stages of economic development, and even between product types.²⁴² Therefore, it seems that the implementation of the TRIPs Agreement may not necessarily change a country’s position in the FDI market.

4.2.2. The Transfer of Technology

One of the main concerns of developing countries with regard to the impact that the TRIPs Agreement might have on their domestic economy has been “the extent to which

²⁴⁰ See Correa, *the WTO*, *supra* note 124 at 28. In his book, Correa quoted the conclusion of the econometric studies on the determinants of FDI conducted by United Nations. “Economic environment” includes skills and natural resource availability, market size and characteristics, etc.

²⁴¹ Matthews, *supra* note 14 at 113.

²⁴² *Ibid.* at 109.

the new rules will affect the transfer of technology”, since technology transfer has been, and will continue to be, the key for developing countries to advance their industrialization process.²⁴³ Imitation and reverse engineering, which used to be practical ways for developing countries to benefit from technology at a cheaper price, will be strictly limited once the Agreement has been implemented. The strengthened intellectual property regime will necessarily increase the conditions of technology access and usage; it may also increase the royalty payments required by rights holders,²⁴⁴ as the bargaining position of the rights holder is likely enhanced by a stronger IPRs protection environment. This being the case, in the short run developing countries will definitely experience a period of pain following the transition period, since according to the changed intellectual property laws promulgated by the TRIPs Agreement, access to technologies, which may be vital for maintaining the basic living conditions of poor populations and supporting both industrial and agricultural development, will be restricted without paying a high price. From this perspective, developing countries’ ability to catch up will be more difficult than in the pre-TRIPs era, and their economic dependence on the developed world will be exacerbated.²⁴⁵

However, some theorists believe that stronger intellectual property protection will not limit developing countries’ technology access; instead, such access will be enhanced. In this view, when firms from developed countries make the decision to invest in a country, the fear of losing their technology, and hence their comparative advantage in the global marketplace, will not only affect the amount of FDI flowing into a country, but will also

²⁴³ Correa, *the WTO*, *supra* note 124 at 18.

²⁴⁴ *Ibid.* at 19.

²⁴⁵ Matthews, *supra* note 14 at 113.

impede the transfer of technology from developed countries to developing countries. This is true because in the situation where intellectual property protection is weak, firms will choose to protect their technology and transfer the manufacture part to developing countries rather than the technology itself. In the long run, this situation does not allow developing countries to obtain assistance from developed countries when establishing their own technological system and ultimately it inhibits them from becoming technologically independent from the developed world.

As with FDI, the exact impact of the TRIPs Agreement on the transfer of technology from developed countries to developing countries is not clear at this time. Insufficient protection may actually pose a barrier to obtaining the required technology for developing countries, but this impact differs according to the nature of the technology concerned.²⁴⁶ The holder of easily imitable technology is more concerned about the technology-receiving countries' intellectual property protection than those technologies not so easy to imitate.²⁴⁷ Studies show that IPRs as a factor affecting the transfer-of-technology decisions are generally of medium importance.²⁴⁸ Competitive abilities, comparative advantages, and labour costs are all likely to affect transfer-of-technology decisions.

4.2.3. Local Innovation

The TRIPs Agreement is also said to benefit developing countries by providing indigenous scientists and other inventors with incentives to develop their own technology. In this argument, proponents insist that the key to filling the technology gap between

²⁴⁶ Correa, the WTO, *supra* note 124 at 31.

²⁴⁷ *Ibid.*

²⁴⁸ *Ibid.* at 30.

developing countries and developed countries is not technology transfer, nor FDI, but the capabilities of developing countries to foster their own technology development. The obstacles in front of developing countries' industrialization are financial shortages, difficulties accessing technology, and also the outflows of their local technicians. Each year, countries having substantial level of immigration, such as the United States, Canada, and Australia, attract large numbers of well-educated, skilled immigrants, and most of these new immigrants are from developing countries.²⁴⁹ Insufficient protection of IPRs is recognized as one reason, since IPRs protection serves as an incentive for creation within a society. By raising the level of intellectual property protection, countries should be able to solve this outflow problem, and hence promote local innovation.

On the other hand, for those inventors who choose to remain in the country, stronger IPRs protection will also promote their innovative activities, which will benefit the whole society. This argument then reverts back to the question of the nature and functions of intellectual property protection. All these points are very well summarized by Frederick as follows:

(1) OECD (Organization for Economic Co-operation and Development) countries have high levels of IPRs protection; (2) OECD industries are very innovative; (3) if developing countries adopt high levels of IPRs, their industries will be very innovative; (4) if developing countries do not adopt high levels of IPRs, their scientists and other innovators will leave because they will not be adequately rewarded for their innovation; and (5) if developing countries do not adopt high levels of IPRs, then industrialized country IPRs-holders will not transfer technology to them.²⁵⁰

²⁴⁹ India is the largest source of American immigrations. China is the second to the United States and the biggest to Canada.

²⁵⁰ Abbott, "The TRIPs", *supra* note 84 at 392.

Opponents point out that since the population of local inventors who are able to benefit from a robust intellectual property protection in most developing countries is very tiny, any resulting benefits are far outweighed by the raised royal payments to developed countries.²⁵¹ Reichman and Lange furthermore reiterate that this innovative benefit might have been achieved by less socially costly means than the TRIPs Agreement.²⁵²

It seems that the outflows of technicians from developing countries cannot be blamed for the existence of the economic gap between developed countries and developing countries, although it has aggravated the problem. There are many reasons for those scientists and innovators to leaving their countries, the protection of IPRs being one of them. Other possible reasons include a country's general living conditions, the political situation, the legal environment (in addition to the IP field), the amount of funding for R & D, the research conditions, and so on. To some extent, stronger local IPRs protection could reduce technicians' outflows, but there is no doubt that intellectual property protection itself cannot change the whole picture. Actually, if the gap between developed countries and developing countries is actually increasing rather than decreasing, the situation may worsen. Thus, the real solution to the outflows should be a country's economic development. If an enhanced intellectual property regime benefits a country's economic growth, then it will eventually prevent technicians from leaving their homeland; if not, the result will be quite the opposite.

²⁵¹ Mathews, *supra* note 14 at 110.

²⁵² *Ibid.* at 113.

Moreover, in addition to incentives to create, local technology development also needs a sound technology base; that is, it requires a basis for further technological progress. Completely independent technological research consumes both time and money. Given that the gap between developed countries and developing countries is already massive, independent innovation development would not be a good way for developing countries to catch up. By enhancing IPRs protection, the TRIPs Agreement may raise the cost of the new technology and restrict its availability. Further progress in the technology thus may be delayed, as others might be prevented from developing new innovations or improvements that build on the original innovation in a cumulative way.²⁵³ Besides, completely independent research is virtually impossible, as innovative activity “has shifted away from models based on absolute novelty and first improvement towards a model in which innovation is no longer driven by technological breakthroughs but by the routine exploitation of existing technologies”.²⁵⁴ Consequently, the local innovation of developing countries will also depend on their access to technologies, including educational materials and ready-made technologies.

However, the impact of strengthened intellectual property laws on local technology development in developing countries will depend mainly on the technological capabilities of the country concerned.²⁵⁵ Countries with the existence of a reasonable R & D infrastructure, such as the Asian-tiger countries, India, and Brazil, will benefit more than

²⁵³ Wallerstein, Mogee & Schoen eds., *supra* note 2 at 3.

²⁵⁴ Dominique Foray, “Production and Distribution of Knowledge in the New Systems of Innovation: the Role of Intellectual Property Rights”, (1996) *STI Review* No. 16.

²⁵⁵ Correa, *the WTO*, *supra* note 124 at 38.

those without their own R & D basis.²⁵⁶ The Asian tigers actually abandoned their opposition to the TRIPs Agreement during the Uruguay Round negotiations.²⁵⁷ Most developing countries, other than the Asian tigers, India, and Brazil, are unlikely to transform themselves into thriving technology producers based solely on a stronger IPRs regime.²⁵⁸

4.2.4. Domestic Costs for the Implementation of the TRIPs

It is generally agreed that the TRIPs Agreement appears to have a negative short-run impact on developing countries; that is, it has domestic costs for the implementation of the Agreement.²⁵⁹ As mentioned before, in order to fulfill their obligations in terms of the TRIPs Agreement, most developing countries need to make considerable amendments to their domestic legislation, legislation which includes not only intellectual property laws but also those laws from corresponding fields, such as criminal laws, civil laws, and constitutional laws. Compared with the enforcement of new regulations, the adoption of amended legislation according to the requirements of the TRIPs has generally been less difficult.²⁶⁰ Many countries have already amended their laws in response to the threats of bilateral trade sanctions from the United States before the adoption of the TRIPs Agreement.²⁶¹ But enforcing a law is quite different from making one. The enactment of a law is of concern only to legislators, while the enforcement of a law is of concern to society as a whole. The effective enforcement of a new intellectual property regime may

²⁵⁶ The term "Asian tigers" is used to mean those NICs in Asia, whose economy has greatly progressed during the end of last century. They are Korea, Taiwan, Hong Kong and Singapore.

²⁵⁷ Matthews, *supra* note 14 at 111.

²⁵⁸ Correa, *the WTO*, *supra* note 124 at 38.

²⁵⁹ See for example, Gana, *supra* note 122 at 759.

²⁶⁰ Matthews, *supra* note 14 at 117.

²⁶¹ *Ibid.*

take years to achieve, and it challenges the administrative and judicial capacity of developing countries.²⁶² To enforce a robust IPRs regime in a developing country requires numerous, well-educated legal experts in a wide range of professions, from the courts, to the custom offices, to the police stations. Given the long history of developing countries' legal traditions, which lack strong IPRs protection, these changes are not easy to make and the costs of implementation are substantial not only in terms of time but also in terms of money.

Resistance during the implementation process should also be expected from the indigenous cultures of developing countries, as social obligations are emphasized more than personal rights. To a great extent, the adoption of the western concept of intellectual property that is reflected in the TRIPS Agreement does not only mean adding new regulations to developing countries' domestic laws in order to protect IPRs, but also tremendous in-depth changes to their legal philosophies. This is the case for certain developing countries, such as China.²⁶³

There is another domestic expense paid by local customers — an increase in the price of protected products due to the strengthened IP regime. Higher IPRs standards reinforce the monopoly of the rights holder, and with this buttressed monopoly, rights holders logically want to charge as high a price as the market can bear in order to maximize their profit.²⁶⁴

²⁶² *Ibid.*

²⁶³ For a detailed argument with the Chinese case, please refer to Chapter 5.

²⁶⁴ Correa, *the WTO*, *supra* note 124 at 36.

At least in the short run, this will have a negative impact not only in developing countries but also possibly even in some developed countries' domestic markets.²⁶⁵

4.2.5. A Simple Conclusion

Determining the impact of the TRIPs Agreement on developing countries is very complex. Aside from those issues mentioned in the former part of this chapter, other factors also play a part. For example, the level of a country's economic development will have a significant impact. If a country is so poor that it does not even have the ability to "pirate", stronger or weaker intellectual property protection will make little difference for its domestic industries, at least in the short and medium terms. But a tendency for the market prices of protected goods to increase will have adverse effects on local customers; countries that used to be Members of the Berne Convention before the conclusion of the TRIPs Agreement and those that were not Members encounter different problems in amending their laws according to the obligations under the new Agreement. Besides, there are differences between the short-run and long-run impacts that should not be disregarded. It is much easier to discover the short-run impact of the TRIPs on developing countries; the long-run impacts are more unclear. Even Sherwood, an advocate of strong intellectual property protection, has acknowledged that there is "little empirical indication of what robust protection for intellectual property will produce in the economies of developing countries."²⁶⁶

²⁶⁵ Whether or not a developed country's local market price will be affected by the implementation of the TRIPs Agreement depends on how much the TRIPs Agreement changes its domestic IPRs standard.

²⁶⁶ Osei-Tutu, *supra* note 133 at 28.

While the exact impact that the TRIPs Agreement will have on developing countries is difficult to predict, “trends and orders of magnitude may be suggested”.²⁶⁷ For example, no clear links between IPRs protection and FDI have been found, even though IPRs have been proven to be one of the factors affecting FDI decisions. The same is true of technology transfer. In the short run, it seems that there may be more of a negative impact than a positive one. In the long run, to some extent countries may benefit from higher IPRs standards, but those advantages need to be balanced with the disadvantages. It seems that obligations under the TRIPs Agreement may be too demanding for most developing countries, considering their current economic conditions. However, this does not mean that developing countries should not protect IPRs within their territories; rather, with domestic industrialization, some developing countries need to reinforce their intellectual property system in order to adapt themselves to the new information era.

The impact of international copyright’s new development, *i.e.* the promulgation of the TRIPs Agreement, on developing countries is examined by putting copyright into the larger IPRs concept. In this field, patent has actually obtained much more attention than copyright, as patent is related to more fundamental issues such as health and biotechnology so that the enforcement patent encounters more resistances from developing countries. However, as copyright law is an essential part of national cultural and information policy and it affects “an ever larger and diverse set of societal interests”,²⁶⁸ the impact of the heightened copyright standards in the TRIPs Agreement,

²⁶⁷ Robert M. Sherwood, “the TRIPs Agreement: Implications for Developing Countries” in IDEA: The Journal of Law and Technology (1997) 37 IDEA: J.L. & Tech. 491 at 493 <LexisNexis> [Sherwood, “The TRIPs”].

²⁶⁸ Dinwoodie, *supra* note 226 at 472-73.

separated from the impact of the whole Agreement, should also be addressed and it requires further study.

CHAPTER 5

COPYRIGHT IN CHINA AND CHINA IN THE TRIPS AGREEMENT

5.1. China in the Global Economy

The establishment of the WTO has been one of the most significant events in the development of the global economy. The addition of China on 11 November 2001 during the Doha Ministerial Conference represents the integration of one-fifth of the world's populace into the largest trading system in the world, and it will definitely have a substantial influence on global economic growth. From China's perspective, becoming a WTO Member has opened its domestic market while simultaneously increasing access to foreign markets for its ever-increasing productions, reducing the risk of trade privileges being waived by foreign governments and enabling its trade disputes with other countries to be settled through multilateral procedures.²⁶⁹ From the perspective of many developed countries, China's integration into the WTO system also means tremendous opportunities, due to the openness of its huge internal market to foreign goods and services and the commitment that the nation has made to bring its domestic law into conformity with international regulations.²⁷⁰ Moreover, the integration of China, with its large territory and the largest population in the world, into the WTO also represents advantages in terms of international economic relations, as the WTO will be playing a greater role in global

²⁶⁹ Frederick M. Abbott, "Reflection Paper on China in the World Trading System: Defining the Principles of Engagement" in Fredrick M. Abbott ed., *China in the World Trading System: Defining the Principles of Engagement* (Boston: Kluwer Law International, 1998) 1 at 3 [Abbott, "Reflection Paper"].

²⁷⁰ *Ibid.* at 2.

economic development. As Professor Sam Noumoff says, “[t]he more rapidly China develops, the healthier the world will be”.²⁷¹

China, which is perhaps the most contentious developing country to join the WTO membership, has a very special position in the global economy. One obstacle that has impeded the conclusion of China’s Accession Protocol is whether or not China should be treated as a “developing country” in order to take advantage of the WTO’s special treatment for developing Members.²⁷² After more than twenty years’ application of its “open policy”, China has become one of the world’s largest economies.²⁷³ Yet, due to its staggering population, its GDP per capita has stagnated at a much lower level than those of the leading developed countries in the world and the majority of its populace is currently living in comparatively poorer conditions. In addition, much of China’s economic development has been in the traditional agricultural and manufacturing sectors, rather than in the information sector, due in part to the availability of cheap labour.²⁷⁴

China has received a great deal of attention in international copyright forum because in addition to being the largest developing country in the world, it has the greatest number of

²⁷¹ *Ibid.* at 3. For Professor Sam Noumoff’s words, see James Martin, “Ventures in China”, McGill University, <<http://www.mcgill.ca/reporter/33/11/noumoff/>>

²⁷² *Ibid.* at 26.

²⁷³ “Open Policy” was adopted in 1978, right after the Cultural Revolution ended. It targets at opening Chinese domestic market to foreign products, services and direct investment and also at opening Chinese economy to reform, *i.e.* transfer the former centrally planned economic system into a market economy, which is based on free competitions among a large number of individual enterprises in accordance with commercial considerations. See Tang Xiaobing, “China’s Economic System and its New Role in the World Economy” in Abbott ed., *supra* note 269 at 53. For a description of China’s economic position in the world trading system, please also see Brent T. Yonehara, “Enter the Dragon: China’s WTO Accession, Film Piracy and Prospects for Enforcement of Copyright Laws” (2003) 63 *Depaul-LCA J. Art. And Ent. L.* 63 at 63-64.

²⁷⁴ Pamela Samuelson, “Intellectual Property and Economic Development: Opportunities for China in the Information Age” online: School of Information Management & Systems, University of California, Berkeley <www.sims.berkeley.edu/~pam/papers/chinaip.html>.

pirated products. In fact, *Time* magazine recently dubbed China “home to the world’s largest gang of CD [compact disc] pirates”.²⁷⁵ Notwithstanding newly promulgated copyright laws, piracy is running rampant within China. In addition, such pirated products do not affect only China, as such products move throughout the world through international trade. Enforcement has generally been recognized as the main problem with the Chinese copyright regime. Foreign entities exerting pressure on the Chinese government are struggling with the reluctance of China, whose economy has benefited from limitation and piracy, to enforce its copyright law. Besides, the fact that China, as a WTO Member, is required to bring its domestic copyright system into conformity with the TRIPs Agreement has contributed in large part to the direction of Chinese copyright development, not only in the promulgation but also in the enforcement of law.

China did not participate in the Uruguay Round negotiations, which resulted in a series of agreements that included the TRIPs. Nevertheless, with its accession into the WTO, China is and will be playing an increasingly significant role in international copyright as well as in international economic relations. It is with this in mind that the author has chosen to use China in order to illustrate the difficulties that developing countries were and are facing when implementing western notions of copyright and to examine the impact of the TRIPs Agreement on a typical developing country. This case study begins by presenting the history of ancient Chinese indigenous “copyright protection”, which construes the particular difficulties that China was and is facing in developing its copyright regime. This is followed by an introduction to the current Chinese copyright

²⁷⁵ William P. Alford, *To Steal a Book Is an Elegant Offense: Intellectual Property Law in Chinese Civilization* (Stanford, Calif: Stanford University Press, 1995) at 91.

legal system, as well as the latest developments in the field. Based on this brief background, an analysis of the possible impact of the TRIPs Agreement on China's legal reform and economic development is provided.

5.2. Does China Have Its Own Copyright Law? (The Origins of China's Copyright Law)

In western countries, modern copyright law is recognized as a by-product of the invention of the printing press.²⁷⁶ Paper originated in A.D. 105 in China, as did the block printing in the 6th century, much earlier than when the printing press emerged in Europe.²⁷⁷ Unlike the invention of printing, however, copyright law did not originate in China.²⁷⁸

5.2.1. Ancient Chinese "Copyright" Protection

It is difficult to pinpoint exactly when Chinese copyright protection began. Some Chinese legal scholars contend that Chinese copyright law originated during the Tang Dynasty, when printing was invented.²⁷⁹ True, there were substantial, sustained efforts to regulate publication and republication with the advent of printing, in the form of an edict to prohibit the unauthorized reproduction by persons of calendars, almanacs, etc.²⁸⁰ During

²⁷⁶ Please see Chapter 1: International Copyright Prior to the TRIPs Agreement.

²⁷⁷ Gana, *supra* note 122 at 766.

²⁷⁸ Note that the term "copyright law" and the word copyright in this chapter are used in conformity with the western copyright notions. For the conception of copyright in western notions, please see Chapter 1: International Copyright Prior to the TRIPs Agreement and Chapter 2: Developing Countries and Copyright Protection.

²⁷⁹ Such as Zheng, Chengsi, the leading authority on intellectual property law in China, contends that copyright emerged in China centuries before Europe, as with the invention of printing, see Chengsi Zheng and Michael Pendleton, *Copyright Law in China* (North Ryde, NSW: CCH Australia; Chicago: Commerce Clearing House, 1991) at 11. Also see Guo: "Copyright protection in China can be traced back to before 1068 AD." Guo Shoukang, "People's Republic of China" in Stephen. M. Stewart ed., *International Copyright and Neighbouring Rights* (London: Butterworths, 1989) Volume 2, at 1.

²⁸⁰ Alford, *supra* note 275 at 13.

the ensuing Song Dynasty (A.D. 960-1279), a prepublication review procedure was created to halt the private reproduction of materials that were either subject to exclusive state control or heterodox, and this prepublication review was inherited by successors of the Song Dynasty.²⁸¹ This prepublication review, albeit a kind of prohibition of unauthorized reproduction, cannot be equated to copyright, as its purpose was not to protect personal rights, nor to encourage creativity, but rather to maintain the state's authority.²⁸² Governmental control of printing aimed primarily to prevent the dilution of sacred texts, to protect the purity of knowledge, and to control the dissemination of ideas.²⁸³

Essentially this prohibition was a response to the purpose of printing in China. Since commerce in traditional Chinese culture had far less importance than other aspects of society, such as morality, sovereignty, and religion, publishing became the sole means of supplying a lay readership with knowledge, not a way to gain economic benefits. Accordingly, the prohibition of unauthorized publishing was used to control how and what kind of knowledge was disseminated to society, rather than to protect the economic interests of authors, printers, booksellers, and so on.²⁸⁴

However, throughout China's feudal history, efforts had been made on the part of printers, booksellers, and other guilds and merchants to protect their economic interests. The protection they sought was akin to modern copyright, as indicated by a notice contained

²⁸¹ *Ibid.* at 13. After the Song dynasty, there were Yuan, Ming, and Qing dynasties.

²⁸² Gana, *supra* note 122 at 766.

²⁸³ *Ibid.* Also see Alford, *supra* note 275 at 17.

²⁸⁴ Gana, *supra* note 122 at 766.

in a twelfth-century work of history: “This book has been printed by the family of Secretary Cheng of Meishan[,] who have registered it with the government. No one is permitted to reprint it.”²⁸⁵ These efforts were weak, as was commerce in the Chinese culture, and thus copyright-related businesses failed to achieve any kind of formal legal protection from their government during imperial China’s long history.

5.2.2. *The End of Imperial China: Introducing Western Copyright to China*

In the late-Imperial period, the situation changed. China was opened to western countries as a large market for international trade. As industrialization progressed, piracy became easier, and western countries’ economic interests increased. As a result, foreign businesses began seeking protection for their intellectual property in China. A series of turn-of-the-century commercial treaties, in which China was forced to negotiate, opened the door for the first time to western copyright notions.²⁸⁶ Consequently, imperial China promulgated its first copyright law in 1910, the contents of which were indirectly copied from the German copyright law, through the changed version by the Japanese. Although final provisions were set forth, with some residue from the ancient *prepublication review procedure*, they were “more in name than fact”.²⁸⁷

The initial implantation of western copyright laws failed. For China’s part, the authorities regarded law reform as an *expedient* to appease both internal and external turmoil, but not

²⁸⁵ Alford, *supra* note 275 at 14-17.

²⁸⁶ Those turn-of-century treaties include the Mackay Treaty of 1902, China’s 1903 Treaty with the United States, Japan’s contemporaneous treaty, and etc. See *ibid.* at 37.

²⁸⁷ *Ibid.* at 41-51. This 1910 copyright of Qing dynasty, including the ensuing the 1915 Northern Warlord copyright law and the 1928 Guomindang copyright law, provided strict restrictions on publications in order to control the flow of ideas.

as a way to benefit China.²⁸⁸ For the western countries' part, introducing their laws to China was a way to satisfy their own interests as much as possible, rather than to help China. While forcing China to promulgate the laws, they made no real efforts to introduce the essence of intellectual property to the Chinese imperial government and people.²⁸⁹ Ironically, China committed itself in the turn-of-the-century treaties to the protection of intellectual property without even understanding the differences between a trademark and a patent.²⁹⁰ Moreover, these new laws failed to achieve their objectives, primarily because they were based on a legal consciousness that did not exist in China at that time.²⁹¹

The 1910 copyright law of the Qing Dynasty was not actually implemented but was re-enacted with slight amendments by the 1915 copyright law of the Northern Warlord and the 1928 one of the Guomindang government.²⁹² During those years, China started to learn the real meaning of copyright. However, due to World Wars I and II, as well as the Chinese Civil War, early Chinese copyright legislation faced enforcement difficulties until 1949, when the People's Republic of China (PRC) was established and those laws were repealed on mainland China.

5.2.3. The People's Republic of China: Contemporary Development

²⁸⁸ *Ibid.* at 47.

²⁸⁹ *Ibid.* at 49.

²⁹⁰ *Ibid.* at 45. "As the U.S. consul general in Shanghai wrote to his ambassador in 1904, 'The Chinese seem to have confused a trademark with a patent.'"

²⁹¹ *Ibid.* at 53.

²⁹² Guo, *supra* note 279 at 3.

The first decree dealing with copyright in new China, “A Resolution on the Development and Improvement of Publishing”, was adopted in 1950.²⁹³ This Resolution vaguely recognized the rights of an author upon his work, but without any substantial description of these “rights”. It dealt mainly with the standard of remuneration, which was generally based on the quality of the work and the number of Chinese characters contained in it.²⁹⁴ It seems that due to their hazy knowledge of copyright, the Chinese authorities treated copyright as though it were synonymous to “payments for authors”. Another Resolution, formulated in 1953, forbade the unauthorized reprinting of books and introduced standards of remuneration for “related rights”. These early developments of Chinese copyright regulations were influenced considerably by the Soviet model. Progress was interrupted in 1966 due to the so-called “Cultural Revolution”.²⁹⁵

In the latter part of the 1970s, when the Cultural Revolution ended, China began to adopt an “open policy” for its economic development and embarked on rebuilding its legal framework. In 1979, the United States and China concluded the Agreement on Trade Relations, the first trade agreement between the two countries to be concluded following the establishment of the PRC. The Agreement initially signaled the importance of intellectual property protection and its enforcement as a country’s international obligation under international trade relations.²⁹⁶ In response to the obligations contained in the series

²⁹³ Noting that some scholars used the word “decree” to refer this Resolution, see *ibid.* But Prof. Alford deems this Resolution as an official policy, which does not have the force of law. See Alford, *supra* note 275 at 60.

²⁹⁴ Alford, *supra* note 275 at 60.

²⁹⁵ During the Cultural Revolution (1966-1976), the legal frameworks of China, which was hardly established after the establishment of the PRC, were suspended thoroughly. Not only the government stopped to promulgate new laws, but also those already promulgated was suspended.

²⁹⁶ Art. 6: “Both contracting parties, in their relations, recognise the importance of the effective protection of patents, trademarks and copyrights. Both contracting parties agree that each party shall take appropriate

of international treaties that China had signed during that time, as well as the failure in the early years of the “open” policy to attract more foreign technology, China launched the drafting of its copyright law. In consequence, the first copyright law was finally adopted in 1990 and came into effect on 1 June 1991. It was enacted “in accordance with the policy of reform and opening to the outside world as well as having Chinese characteristics and also taking into account the experience of foreign and international copyright legislations and practices”.²⁹⁷

5.2.4. Summary

The comparatively short history of real copyright protection in China has already demonstrated the difficulties associated with adopting the modern copyright notion in a country like China, where deep influences have been carried over from its Imperial experience. Copyright, as a private right which does not have its origins in China’s own history, contradicts the fundamental social and political structures of China. While it is evident that China needs to change its copyright system in order to adapt to the new economic environment, the changes remain “a long march with many steps yet to be traversed”,²⁹⁸ what with its scanty past development. Foreign interests have been the driving force behind moves to strengthen copyright protection in China, while the Chinese culture has resisted.²⁹⁹ Even in its latest copyright law, that of 1990, the idea of

measures, under their respective laws and regulations and with due regard to international practice, to guarantee to legal or natural persons of the other party protection of copyright equivalent to the copyright protection correspondingly accorded by the other party.” *The China and United States Agreement on Trade Relations*, adopted in 1979.

²⁹⁷ Guo, *supra* note 279 at 4.

²⁹⁸ Alford, *supra* note 275 at 92.

²⁹⁹ Ostergard, *supra* note 107 at 120.

the necessity to control the flow of ideas remains,³⁰⁰ echoing the prepublication review of the Imperial years.

5.3. The Current Chinese Copyright Protection System

5.3.1. *The Revision of Modern Chinese Copyright Law*

Traditionally, modern copyright law within a country evolves in response to domestic pressures (*e.g.*, information industries, artists' groups), international trade (*e.g.*, compliance with the Berne Convention, the TRIPs Agreement, and other bilateral and regional agreements), and technological development (*e.g.*, the emergence of the internet).³⁰¹ The first revision of the current Chinese copyright law, since its promulgation in 1990, has followed this evolving rule. The revised copyright law, which came into force on 27 October 2001, aims to adapt to the new market economy, to prepare China to enter the WTO, to better face the challenge of the new technological development, and to enhance the enforcement procedure.³⁰²

Although weak, domestic efforts to obtain protection from the interests involved surfaced again after the Cultural Revolution, especially due to the growth of indigenous information industries. These efforts have exerted more influence on local practice than on amendments to the law. But with the recent tremendous growth of China's domestic

³⁰⁰ Art. 4: [official translation] "Works the publication or distribution of which is prohibited by law shall not be protected by this law. Copyright owners, in exercising their copyright, shall not violate the Constitution or laws or prejudice the public interest." Copyright Law of People's Republic of China, adopted on 7 September 1990, translated in and available online: State of Intellectual Property Office of the People's Republic of China <www.sipo.gov.cn/sipo_English>.

³⁰¹ Handa, *supra* note 17 at 60.

³⁰² These four objectives of the Chinese Copyright Law revision were addressed in the academic conference held by the Chinese Intellectual Property Law Research Committee on 28 October 2001. See Tang Guangliang, "Xiu Gai Jiu Da Nei Rong: Zhu Zuo Quan Fa Xiu Gai Mian Xiang WTO", online: Lao Xing Zhe <www.law-walker.net>.

economy, the need for copyright holders to have their rights protected has become stronger than ever in affecting the development of China's copyright law. In order to provide sufficient protection for domestic authors, the 2001 Copyright Law tries to fix the problem of "double standards" resulting from the implementation of the 1992 US-PRC Memorandum, by emphasizing the raising of standards of protection for domestic authors.³⁰³

International treaties signed by China since the late 1970s, together with threats of bilateral trade sanctions from certain countries like the United States, have become the main incentives behind movements toward law reforms. For instance, the China-US economic relationship proved to be the catalyst for shaping China's current copyright policy.³⁰⁴ The promulgation of the 1990 Copyright Law was a response to the pressure exerted by the United States through Special 301. In order to enforce the 1992 US-PRC Memorandum, death penalties and life sentences, and other criminal penalties were imposed in intellectual property infringement cases.³⁰⁵ The 1990 Copyright Law was neither in compliance with the Berne Convention nor the UCC, both of which China joined in 1992. Thus, one of the major reasons for the 2001 historic revision of the Copyright Law was compliance with the TRIPs Agreement due to China's impending

³⁰³ "Double standards" refer to the different standards of copyright protection accorded to domestic and foreign works. This is a direct result of the 1992 International Copyright Treaties Implementing Rules (the Treaties Implementing Rules), in which the Chinese government has committed to protect copyright according to the international copyright treaties that China acceded, but this is only applied to foreign works. Since the Chinese Copyright Law at that time provided a generally lower protection level, the application of the Treaties Implementing Rules resulted in a lower protection to domestic works than to foreign works in China.

³⁰⁴ Ostergard, *supra* note 107 at 130.

³⁰⁵ Alford, *supra* note 275 at 91.

entry into the WTO.³⁰⁶ Independent rental rights for cinematographic works, other audiovisual works, and computer programs, for example, have been included under the Copyright Law, and are expressed similarly to their counterpart in the TRIPs Agreement.³⁰⁷

Another major reason behind the revision was to extend copyright protection to new fields like computer networks.³⁰⁸ China's "open policy", while bringing new technologies to the nation, challenged its copyright protection in the new information era. As discussed previously, a country's copyright legislation has a strong correlation with its technological development. When new technologies such as computers and the Internet were introduced in China, the unrevised Chinese Copyright Law, which lacked corresponding provisions to protect works like Internet-published articles, triggered hot debates. In order to address this problem, the modified law in its Article 10(12) now includes the right of communication on information networks, and more detailed rules are expected to be provided separately by the State Council of the PRC.³⁰⁹

5.3.2. Other Sources of Chinese Copyright Regulations

³⁰⁶ Chiang Ling Li "New Chinese Copyright Law" in (2001-2002) 116 Copyright World, at 24.

³⁰⁷ Xue, Hong & Zheng. Chengsi, *Chinese Intellectual Property Law in the 21st Century* (Hong Kong: Sweet & Maxwell Asia, 2002) at 13.

³⁰⁸ *Ibid.* at 5. To improve the Chinese copyright system and satisfy the requirements of the TRIPs Agreement, and to extend copyright protection to the computer network environment are recognized by Professor Xue Hong and Zheng Chengsi as two important reasons for the modification of the Chinese Copyright Law.

³⁰⁹ Art. 10(12): [official translation] "the right of communication on information networks, that is, the right to communicate to the public a work, by wire or wireless means in such a way that members of the public may access these works from a place and at a time individually chosen by them;" Copyright Law of People's Republic of China, adopted on 7 September 1990, revised on 27 October 2001, [hereinafter 2001 Copyright Law] translated in and available on line: State of Intellectual Property Office of the People's Republic of China, <www.sipo.gov.cn/sipo_English>.

The foundation of copyright protection, in addition to China's current Copyright Law, is contained in the Constitutional Law and the General Principle of the Civil Law of the PRC.³¹⁰ Those provisions, together with the penalty provisions contained in China's Criminal Law, constitute another part of the Chinese copyright statute. Moreover, there are administrative and judicial regulations, which are subordinate to copyright statutes, promulgated by the State Council and the Supreme Court as practical implementation rules.³¹¹

Last but not least, international treaties signed by China have very special positions under China's copyright regime. Since 1992, when China first signed the Berne Convention, it has become a Member of the most important agreements on copyright, namely, the UCC in 1992, the Convention for the Protection of Producers of Phonograms against

³¹⁰ Art.47: [official translation] "Citizens of the People's Republic of China have the freedom to engage in scientific research, literary and artistic creation and other cultural pursuits. The State encourages and assists creative endeavors conducive to the interests of the people made by citizens engaged in education, science, technology, literature, art and other cultural work." the Constitution Law of the PRC, adopted on 4 December 1982, translated in and available online: People's Daily online, <<http://english.people.com.cn/constitution/constitution.html>>. Art.94: "Citizens and legal persons shall enjoy rights of authorship and shall be entitled to sign their names as authors, issue and publish their works, and obtain remuneration in accordance with the law." Art.118: "If the rights of authorship ... of citizens or legal persons are infringed by such means as plagiarism, alteration or imitation, they shall have the right to demand that the infringement be stopped, its ill effects be eliminated and the damages suffered be compensated for." the General Principles of Civil Law of PRC, promulgated on 12 April 1986, translated in and available at online: China Law, <www.qis.net/chinalaw/prclaw27.htm>.

³¹¹ The most important administrative regulations on copyright protection include: 1.Implementing Regulations of the Copyright Law (1991); 2.International Copyright Treaties Implementing Rules (1992); 3.Regulations on Computer Software Protection (2002); 4.Regulations of the Customs Protection of Intellectual Property (1995); 5.Regulations on Publications Management(2002); 6.Regulations on Motion Pictures (2002); 7.Regulations on Sound Recording and Video Recordings (2002); 8.Regulations on Payments for Publications of Literary Works (1999); 9.Book Publishing Contract (Standard Contract) (1999); 10.Expanation on the Issues of Application of "Performances" Stipulated in Article 5 of Implementing Regulations of the Copyright Law (1999); 11.Regulations of Copyright on Making of Digital Products (2000); 12. Implementing Rules on Copyright Administrative Punishments (2000); 13.Circular on Prohibition of Use of Illegally Reproduced Computer Software (1999); 14.Circular on Registration and Authentication of Copyright Authorization Contracts of Publishing and Reproducing Foreign Electronic Publications and Computer Software (1996). See Xue & Zheng, *supra* note 307 at 3-4. The most important judicial regulations include: 1. The Judicial Explanation of Internet Copyright (2000); 2.Explanation of Applying Copyright Law on Copyright Civil Cases (2002).

Unauthorized Duplication of their Phonograms in 1993, and the TRIPs in 2001. Although international treaties take effect within China mainly by being implemented through its domestic law, the provisions of international treaties prevail in the event that differences exist between them and those of the domestic law, subject only to special reservations.³¹²

5.4. Chinese Copyright Law and the TRIPs Agreement

So as to successfully become a WTO Member, the Chinese government prepared itself by revising its domestic laws and creating new administrative entities, according to the requirements of the WTO treaties. Thus, China's current Copyright Law, as revised in 2001, together with other copyright statutes and regulations generally satisfy the international standards provided by the TRIPs Agreement.³¹³ The main criticism of the Chinese copyright regime arises from its enforcement, a common problem faced by the majority of developing countries.

Copyright enforcement has met with resistance from every echelon of Chinese society.³¹⁴ Before the implementation of China's "open policy", resistance mainly stemmed from cultural and political barriers.³¹⁵ But with industrialization, resistance is largely the result of economic concerns, as access to foreign technology has proven to be a factor encouraging economic growth. Deficiencies of the resources necessary to enforce

³¹² Article 142: [official translation] "...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..." the General Principles of the Civil Law of PRC, *supra* note 310.

³¹³ Warren Newberry, "Copyright Reform in China: A 'TRIPs' Much Shorter and Less Strange Than Imagined?" (2003) 35 Conn. L. Rev. 1425 at 1447. (HeinOnline).

³¹⁴ *Ibid.* 1460.

³¹⁵ *Ibid.*

copyright exist as well, since China is still a developing country. Generally, the current situation of copyright protection in China is that, from the producers' perspective, "the potential for extravagant profits from piracy far outweighs the risk of punishment", while from the consumers' viewpoint, they are simply unable to afford copyrighted goods at western prices, which is why piracy is so difficult to deter, even with China's commitment to implement the TRIPs Agreement.³¹⁶

5.4.1. Attitudes towards the Implementation of the TRIPs in China

Following China's entry into the WTO, three different attitudes towards strengthening copyright protection according to the TRIPs' requirements emerged: the proponents, the opponents, and the formalists.³¹⁷ Proponents come mainly from the Chinese local information industries that have already established their comparatively mature infrastructures. Those domestic copyrighted-goods producers, who have suffered from copyright infringements, insist on the idea of strengthening China's copyright protection in order to encourage the development of China's information sector. Their supporting principle is that markets for information products and services can only thrive when IPRs are properly protected.³¹⁸ Others who suggest using copyright law as a device for fostering a more general openness of Chinese domestic market can also be found amongst the government leadership.³¹⁹ Some of them believe that there is a close link between intellectual property protection and FDI, which is critical for China's further development, while others deem strong intellectual property to be a catalyst for western countries'

³¹⁶ *Ibid.*

³¹⁷ Alford, *supra* note 275 at 78.

³¹⁸ Samuelson, *supra* note 274.

³¹⁹ Alford, *supra* note 275 at 78.

industrialization, which would also be the case for China. They generally maintain that China has no option but to maintain a strong copyright regime if it aspires to be internationally competitive.³²⁰ No matter how painful it might be in the short term, strong intellectual property protection is a necessary precursor to the promotion of indigenous innovation and growth in the information industries.³²¹ Support of robust copyright protection has furthermore spread among some Chinese customers who have suffered as a result of counterfeit goods. Economic growth has improved the living conditions of Chinese people, and their consumption demands have gradually shifted the focus from quantity to quality. The lack of copyright protection will inevitably result in a lack of control over the market order. Hence, the burden of recognizing the quality of goods will be placed on the customers, who actually may not have the capacity to make such a determination. From this perspective, some local customers have begun to realize the importance of copyright protection in order to pay the “right” price for the “right” products.³²²

Opponents have their own reasons for resisting the trend to reinforce copyright protection within China. They believe that China thrived at the end of the last century as a result of economic openness and political reforms. Although there have been numerous FDI boosts and foreign technology transfers since the 1980s, there is little proof that the promulgation of the Copyright Law or other intellectual property law, such as the Patent Law in 1984 and Trademark Law in 1982, has contributed to that growth. Besides, they

³²⁰ *Ibid.*

³²¹ *Ibid.* See also Newberry, *supra* note 313 at 1450.

³²² Noting that although China promulgated its Product Quality Law on 22 February 1993, the quality of product in China has not been controlled properly, especially for copyrighted-products, patented-products, and trademark protected products, due to the rampant intellectual property infringements in China.

believe that a robust copyright regime is in the best interests of western countries, which aspire to strengthen their comparative advantages in China's huge market, as those businesses are actually the driving force behind reforms to China's copyright laws. Opponents have realized that copyright protection may be necessary to achieve the long-term goal of moving beyond a manufacturing-based economy. However, this long-term need can hardly overcome the pressures exerted by local industries and customers to have access of low-cost information and knowledge.³²³ In fact, when implementing the TRIPS Agreement within China's legal system, small businesses relying on cheap access to foreign technologies must face a new level of competition if they are to survive. At the beginning, those businesses will lose, due to the fact that copyright holders may demand a much higher price. Some of them may later recover from the loss, while others may never be able to return to the market. Another group of opponents, some central government officials, are still influenced by the ancient Chinese culture of controlling the flow of ideas.³²⁴ This has directly resulted in provisions being added to the Copyright Law so that only "legitimate" works are protected and the promulgation of Regulations on Publication Management to further control the publishing market.³²⁵

The third attitude towards the implementation of the TRIPS Agreement in China has been to treat the promulgation of the Copyright Law as a respite from the pressures exerted by foreign governments. Those people contend that "China should commit herself to

³²³ Newberry, *supra* note 313 at 1450.

³²⁴ Alford, *supra* note 275 at 78. Noting that Professor Alford pointed out that: "Energetic though they have been, the Chinese government's attempts to promote more vigorous adherence to its intellectual property laws have been overtaken by a simultaneous and far more strenuous effort to reassert a strong degree of direct state control over the flow of ideas... it represents an unwitting reaffirmation by the state of the priorities of its imperial and nationalist predecessors with respect to the dissemination of ideas." *Ibid.* at 90.

³²⁵ Regulations on Publication Management of the PRC, became effective on 1 February 2002.

copyright more in name than substance, with the objective of buying time gradually to adapt to the inevitability of adherence to international standards”.³²⁶ The Copyright Law and its enforcement are deemed to be a tool to appease foreign investors. Therefore, the level of copyright enforcement depends primarily on the reaction of foreign businesses to China’s intellectual property protection status. This view explains why China’s copyright enforcement levels change from time to time according to pressure exerted by foreign governments. Among other countries, the United States is and will continue to be on the frontlines so as to influence the direction of copyright enforcement in China, as the United States is China’s largest trading partner and an important source of FDI. Even with China’s membership in the WTO, the multilateral dispute settlement procedure does not replace the United States’ position as the driving force behind China’s political and legal reforms. Bilateral trade sanctions still have influence in the international copyright forum.

5.4.2. Implications for China When Enforcing International Copyright Standards

As a developing country, China has experienced the same difficulties during the enforcement of the TRIPS Agreement as other developing countries that became WTO Members: China lacks the tradition of copyright protection, the capacity of local customers to pay the “right” price, and the availability of administrative and judicial resources. In addition, China has special difficulties, due to its diverse cultural background, long imperial experience, and background of socialism that lacks rationales for private property rights in general. Therefore, enforcing copyright will be a complex process requiring the evolution of appropriate social institutions and policies to support

³²⁶ Alford, *supra* note 275 at 78.

private property rights in intellectual property.³²⁷ However, as a leading force in the global economy today, China's legal system has been subject to tremendous changes, as has its economic development; and China's copyright has been greatly improved in terms of both legislation and enforcement.

Those improvements to China's copyright protection are in fact deemed to be a condition for China to enjoy the possible benefits of being integrated into the WTO, rather than the need to develop local information industries. But indigenous Chinese information businesses, the prosperity of which will propel China's further economic growth, do become the largest direct domestic beneficiaries of a robust copyright regime. Nevertheless, their enjoyment of this benefit has to be balanced with other factors that affecting China's information economy, as Professor Samuelson has pointed out:

Strong information economies also depend on a highly educated and skilled workforce, the availability of capital, rules that permit firms to efficiently organize their production, distribution, and marketing of information products, broad availability of communications and information technologies, and strategic information systems that support commerce and financial markets more generally.³²⁸

Accordingly, in order to encourage the growth of China's information economy, the Chinese government must make efforts in other respects in addition to strengthening copyright protection and maintaining a delicate balance within the copyright system. Furthermore, while accepting that a weak copyright regime can be harmful to economic growth, one has to realize that copyright that is too stringent can also stifle economic

³²⁷ Peter Feng, *Intellectual Property in China* (Hong Kong: Sweet & Maxwell Asia, 2003) at 5. See also Samuelson, *supra* note 7.

³²⁸ Samuelson, *supra* note 274.

development.³²⁹ Since the common standards of copyright protection have been put in place for every WTO Member through the TRIPs Agreement, the Chinese government should try to reduce any possible negative effects of enforcing such standards through other available methods.

In 1993, before China became an official WTO Member, it promulgated its first Competition Law in order to establish a comprehensive fair competitive legal environment. This Competition Law is likely to be used when implementing the TRIPs Agreement in order to avoid possible IPRs abuse, as Article 40 of the TRIPs Agreement expressly provides that Member Countries are permitted to police against IPRs abuses within their national competition law regime.³³⁰ A rich history to “place significant limitations on market allocations based on IPRs” in order to avoid IPRs-related concentrations can be found in Europe.³³¹ More recently, the importance of competition law in addressing the abuse of IPRs problem has been widely recognized, as intellectual property is essentially a monopoly, which is in conflict with the concept of fair competition.³³² And it is worthy to mention that there is no international common standard of antitrust law as such for copyright so that countries have more flexibilities in shaping their competition legal regime.

³²⁹ *Ibid.*

³³⁰ Art.40, *the TRIPs Agreement*, *supra* note 136.

³³¹ Abbott, “TRIPs”, *supra* note 84 at 397.

³³² See for example, David Aitma & Alison Jones, “Competition Law and Copyright: Has the Copyright Owners Last the Ability to Control His Copyright?” in (2004) 26 Eur. I.P. Rev. 137.

Copyright-related tax policy is also viable, if it complies with national treatment under the TRIPs Agreement.³³³ Through annual tax requirements based on revenues received from sales of copyrighted products or from copyright licenses, copyright-related tax policy will act as a leverage to help maintain the delicate balance between copyright protection and the general economic welfare of the country.³³⁴ Especially where developed countries are predominant in China's information market, beneficial effects will result from applying copyright-related tax policies, due to the disproportionateness of the market occupation.

Moreover, China can seek financial and technological aid from non-government organizations (NGOs), which have made significant contributions in the fields of international trade and environmental policies and are expected to play an even more critical role in the field of intellectual property favoring developing countries.

In the meantime, efforts have been made from within the Chinese copyright regime to try to keep the balance of interests so as to protect public interests while enforcing the raised standards of copyright protection. The balance of interests is not only the key of the Chinese copyright system but is also an important issue in the TRIPs context, particularly for developing countries. While adopting the TRIPs' provisions into domestic copyright legislation, China should pay special attention to this balance for its own benefits. Two major methods to limit copyright protection in order to balance the interests in western copyright laws are the protection of expression and the fair-use exceptions. Although there are no provisions in the Chinese copyright statutes stipulating that copyright

³³³ Abbott, "TRIPs", *supra* note 84 at 401.

³³⁴ *Ibid.* at 401-02. Regarding the issue of the balance of interests in the copyright world, please refer to Chapter 2, Section 2.2.1. "Justifications of Copyright" of this thesis for detailed discussion.

protection extends only to expression, not to ideas, the judicial practice of the courts has shown the trend to limit copyright protection to expression.³³⁵ Besides, a comprehensive fair-use regime, which offers great flexibility for judges in applying copyright law, is contained in the revised 2001 Copyright Law.³³⁶

However, the actual complement of China's copyright regime should also depend greatly on China's own information industries growing up, which, in turn, should be dependant upon the general economic growth of China. With industrialization proceeding in China, the difficulties associated with enforcing copyright may gradually be overcome by other interests. A recent successful anti-infringement example well illustrates the complexity of the role played by indigenous businesses. The latest Chinese movie, "Shi Mian Mai Fu", is effectively immune to infringement, as the producer has triumphantly used its lobbying power to gain the government's judicial and administrative aid for halting piracy.

5.5. Solutions for Developing Countries: Lessons Learned from China

While compliance with the TRIPs Agreement may have a negative impact on domestic economic development, there are ways in which developing countries can reduce the

³³⁵ Samuelson, *supra* note 274.

³³⁶ Art. 22: [official translation] "In the following cases, a 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: (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 station, television stations or any other media for the purpose of reporting current events; ..." Art.23: "In compiling and publishing textbooks for implementing the nine-year compulsory education and the national educational program, parts of published works, short written works, music works or single copies of works of painting or photographic works may be compiled into textbooks without the authorization from the authors, except where the authors have declared in advance the use thereof is not permitted, with remuneration paid according to the regulations, the name of the author and the title of the work indicated and without prejudice to other rights enjoyed by the copyright owners according to this Law..." 2001 Copyright Law, *supra* note 309.

adverse effects and even take advantage of the TRIPs to some extent. But finding solutions will require a good understanding of the potential influences of heightened copyright standards on domestic economic, social, political, and legal development. A precise assessment of the difficulties in implementing the Agreement will also help. As is clear from studying in China, there are some common difficulties that developing countries may face when enforcing the enhanced copyright regime. Generally, these difficulties fall into one of four categories: (1) The probability of short-term adverse effects. In China's case, the two big promises of the Agreement, namely the trade-off of short-term losses with immediate access to the textile and agricultural markets in developed countries and the long-term gains from implementing intellectual property, seem to be problematic, as China has not had the opportunity to take advantage of "linkage-bargain diplomacy".³³⁷ (2) A lack of the resources necessary to implement and enforce copyright. (3) Resistance from the local population, including not only resistance based on economic factors but also on cultural factors. (4) The possible lag of local information development due to limited access to raw materials.

In facing the short-term adverse effects, a copyright law that can best balance each country's particular interests is of great significance. As the TRIPs is not self-executing within national jurisdictions, the approach to implementing the Agreement can vary from one country to another, mainly depending on each Member's own national innovation strategy.³³⁸ The domestic copyright system should follow the TRIPs' objectives in order to address public interests, take advantage of the ample "wriggle room" left by the TRIPs'

³³⁷ This is because China joined the WTO in 2001 after the TRIPs negotiations finished.

³³⁸ Reichman, *supra* note 179 at 15-16.

provisions, and build a comprehensive “fair-use article” in conformity with the fair-use exception available under the TRIPs Agreement. For benefit of developing countries, the scope of protection, while needing to meet the TRIPs’ minimum requirements, should be kept at a lower level than that provided in western countries.³³⁹ In the meantime, since there is no proof that a robust copyright system leads to an increase in FDI inflows and technology transfers, developing countries should not rely too much on copyright strengthening in terms of encouraging FDI and technology transfers. Instead, other strategies, such as favorable foreign investment policies and a stable legal environment, should be used. Efforts can also be made from other legal fields. As discussed earlier, competition law in this context plays a critical role. By providing fair competition rules, a comprehensive competition system effectively prevents rights holders from abusing their copyright, and hence reduces the negative effect of a strong copyright regime, which tends to favor rights holders. Taxation is another significant leverage to balance the unevenness of copyright-related profits. As long as disproportionateness exists in the copyright product market, high tax rates charged on copyright-related goods will result in benefits gained by developing countries’ local governments.

While enhancing the comparative advantages of developed countries, the TRIPs’ standards are also beneficial to local authors. This is of particular importance to countries with mass cultural productions, but benefits will only be available with the establishment of an institutional framework to ensure the required investment.³⁴⁰ In the international arena, developing nations should strive for technological assistance from developed

³³⁹ *Ibid.* at 46.

³⁴⁰ *Ibid.* at 43.

nations, as developed countries are obliged under the TRIPs Agreement to provide such assistance.³⁴¹ They should also seek financial and technological aid from other international organizations, as domestic efforts alone are unlikely to compensate for insufficient resources. Moreover, involvement in any future discussions within the international copyright forum offers opportunities for them to address their interests and to resist the drive toward stronger international IPRs.³⁴² In return, this requires a group of experts whose participation in international copyright law making will be efficient.

Strong resistance from indigenous population may be encountered during enforcement, particularly in countries where copyright does not have local origins and in countries where small and medium-sized firms have relied on imitation as their main strategy to compete in the global market. With respect to cultural resistance, propaganda related to the copyright concept spread using public media such as television and newspaper, as well as the strengthening of copyright in national legal education systems help nationals at large to accept copyright protection. To appease economic opposition, countries may choose either to sacrifice those injured businesses' current economic interests to potential future economic growth or to offer those businesses pay-offs through other industrial policies, such as tax waiver.

³⁴¹ Art. 67: "In order to facilitate the implementation of this Agreement, developed country Members shall provide, on request and on mutually agreed terms and conditions, technical and financial cooperation in favour of developing and least-developed country Members. Such cooperation shall include assistance in the preparation of laws and regulations on the protection and enforcement of intellectual property rights as well as on the prevention of their abuse, and shall include support regarding the establishment or reinforcement of domestic offices and agencies relevant to these matters, including the training of personnel." *The TRIPs Agreement*, *supra* note 136.

³⁴² Reichman, *supra* note 179 at 75.

Strengthened copyright protection will inevitably result in limited access to information and hence a barrier for “free-riders” in the information market. Although protection is strengthened by the TRIPs, the exploitation of works in the foreign market that have fallen into the public domain is not prohibited.³⁴³ These public goods constitute great sources of “raw materials” critical for local information industry. Developing nations are able to justify themselves as legal “free-riders” in this case, as exploitations of those works without paying royalty are allowed in the original countries.

³⁴³ *Ibid.* at 46.

CONCLUSION

In the information era, the ability to acquire and exploit information has become the key of economic growth. Through heightened copyright standards, the TRIPs Agreement, as the most significant international treaty on copyright to date, is going to reshape the global information market. It has not only successfully raised the norms of international copyright protection, but has also for the first time put these norms on each Member Country's enforcement agenda. This is no doubt a triumph for highly information-dependant industries, and developed nations' comparative advantages in their information sectors have been strengthened. Whether developing countries can benefit from a robust copyright regime as well has triggered hot debates.

Copyright has been proven to generally play a positive role in encouraging creative activities within a society. Yet, the scope of protection in each country must strike a balance of interests that is suitable in the context of that country's economic, social, and political development, according to the correlation between the country's level of copyright protection and economic status. While the TRIPs Agreement does not propose to create a universal copyright law, it does harmonize copyright norms by imposing common minimum standards of protection to be implemented by the domestic legislations of Member States. Due to the disproportion of economic growth and technological development, those common standards, which mirror the system of western countries, have and will definitely continue to have various effects on local economic and technological growth. As the main consumers of copyright-protected products,

developing Members have a generally less influence in the TRIPs context. They do not participate in the TRIPs in order to accept developed-country intellectual property norms. However, they are required to implement the norms with the pay-offs obtained from other aspects of international trade.³⁴⁴

In the short-run, raised prices and limited accesses, consequences of strengthened copyright protection, will have negative impacts on the industrialization process. At the same time, developing nations' local governments will also have to invest heavily in order to acquire the administrative and judicial capacities to enforce increased copyright protection. However, positive impacts may result from the implementation of the TRIPs Agreement, such as possible increases in FDI inflows, transfer of technologies from developed nations, and stimulus for local innovations, although no proof has been found yet to demonstrate the correlation between the scope of copyright protection and the increase of all these advantages.

Both developed and developing Members must realize the difficulties that developing countries have been facing during the enforcement of the Agreement within their domestic legal system. The fulfillment of their obligations under the TRIPs Agreement will be a long process. From developing countries perspectives, the first thing is to amend their copyright system to favor national public interests. In order to minimize any adverse effects during the implementation of the TRIPs, other legal tools, such as competition, taxation legislations, are also helpful. On the international forum, although developing group missed the opportunity to fully address their interests during the Uruguay Round

³⁴⁴ Daley, *supra* note 16 at 157.

negotiations, they should take an active participation in future international lawmaking and revisions with the purpose to avoid further trends of raising the level of copyright protection.

Even though the TRIPs Agreement may have some beneficial impacts on developing countries, it is important to understand that any potential beneficial impacts need to be balanced with costs, and that there is a distinction between the short-run and long-run impacts. The short-term impacts have tended to be negative without too many debates while the long-term ones are still hard to predict. Moreover, the actual impacts of the TRIPs Agreement also depend on each country's economic and technological levels, since within the developing-nations group, there are divergences among countries' growth.

In facing of the difficulties to implement and enforce the TRIPs Agreement, developing countries do have solutions both domestically and internationally to reduce the negative impacts. On developed nations' part, it is also in their best interests to help developing Members to establish a sound infrastructure for their economic development, as the globalization of world economy, and the growth of the borderless Internet have brought countries closer than ever.

Bibliography

International Materials:

Agreement on Trade-Related Aspects of Intellectual Property Rights, April 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, Legal Instruments Results of the Uruguay Round, vol.31, 33 I.L.M. 81 (1994).

The Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, Paris Act, July 24, 1971 (Generva: WIPO Publication No.287 (E), 1978).

General Agreement on Tariff and Trade, 30 October 1947, 58 U.N.T.S. 187, Can. T.S.1947 No.27 (entered into force 1 January 1948).

International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations of October 26, 1961 (Rome Convention) (Geneva: WIPO, 1985).

The Universal Copyright Convention – Paris July 24, 1971 25 U.S.T 1341; T.I.A.S. 7868, reproduced in *International Copyright Conventions: Circular 38* (Washington D.C.: Copyright Office, Library of Congress, 1977).

Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679 (entry into force on 27 January 1980).

Legislations:

The Constitution Law of the People's Republic of China (PRC), adopted on 4 December 1982, translated in and available online: People's Daily online, <<http://english.people.com.cn/constitution/constitution.html>>.

Copyright Law of the PRC, adopted on 7 September 1990, translated in and available online: State of Intellectual Property Office of the People's Republic of China <www.sipo.gov.cn/sipo_English>.

The General Principles of Civil Law of PRC, promulgated on 12 April 1986, translated in and available at online: China Law, <www.qis.net/chinalaw/prclaw27.htm>.

Regulations on Publication Management of the PRC, effective on 1 February 2002.

Secondary Material: Monographs

Alford, William P. *To Steal a Book Is an Elegant Offense: Intellectual Property Law in Chinese Civilization* (Stanford, Calif: Stanford University Press, 1995).

Bently, Lionel and Sherman, Brad. *Intellectual Property Law* (New York: Oxford University Press, 2001).

Bettig, Ronald V. *Copyrighting Culture: the Political Economy of Intellectual Property* (Boulder, Colo.: Westview Press, 1996).

Campbell, Janet. *An Analysis of Law in the Marxist Tradition* (Lewiston: Edwin Mellen Press, 2003).

Cohen, Julie E., Loren, Lydia Pallas., Okediji, Ruth Gana. and O'Rourke, Maureen A. *Copyright in a Global Information Economy* (New York: Aspen Law & Business, 2002).

Correa, Carlos M. *Intellectual Property Rights, the WTO and Developing Countries: The TRIPS Agreement and Policy Options* (Malaysia: Zed Books, 2000).

Daley, Dianne Andrea. *International Copyright and Developing Countries: the Impact of Recent Developments from A Jamaican Perspective* (LL.M. Thesis, McGill Faculty of Law, 1995) [unpublished].

Dinwoodie, Graeme B., Hennessey, William O. & Perlmutter, Shira. *International Intellectual Property Law and Policy* (Newark, NJ: LexisNexis, 2001).

Drahos, Peter. *A Philosophy of Intellectual Property* (Brookfield, USA: Dartmouth, 1996).

Feng, Peter. *Intellectual Property in China* (Hong Kong: Sweet & Maxwell Asia, 2003).

Garnett, Kevin., James, Jonathan Rayner. & Davies, Gillian. *Copinger and Skone James on Copyright* (London: Sweet & Maxwell, 1999).

Gervais, Daniel. *The TRIPs Agreement: Drafting History and Analysis* (London: Sweet & Maxwell, 2003).

Goldstein, Paul. *Copyright's Highway: from Gutenberg to the Celestial Jukebox* (Stanford, Calif: Stanford Law and Politics, 2003).

———. *International Copyright: Principles, Law, and Practice* (New York: Oxford University Press, 2001).

———. *International Intellectual Property Law: Cases and Materials* (New York: Foundation Press, 2001).

Handa, Sunny. *Copyright Law in Canada* (Canada: Butterworths, 2002).

Kong, Qingjiang. *China and the World Trade Organization: A Legal Perspective* (Singapore: World Scientific Publishing Co., 2002).

Lairson, Thomas D. & Skidmore, David. *International Political Economy: The struggle for Power and Wealth* (Belmont, CA: Thomson/Wadsworth, 2003).

Lipszyc, Delia. *Copyright and Neighbouring Rights* (Paris, France: Unesco Publishing, 1999).

Matthews, Duncan. *Globalising Intellectual Property Rights: The TRIPs Agreement* (London and New York: Routledge, 2002).

Nordemann, Wilhelm., Vinck, Kai. & Hertin, Paul W. *International Copyright and Neighboring Rights Law: Commentary with Special Emphasis on the European Community*, trans. by Gerald Meyer (New York: VCH, 1990).

Osei-Tutu, Julia J. *TRIPS and Domestic Control: Implications for Developing Countries* (Master Thesis, McGill Faculty of Law, 2002) [unpublished].

Ostergard, Robert L. *The Development Dilemma: The Political Economy of Intellectual Property Rights in the International System* (New York: LFB Scholarly Pub., 2003).

Posner, Richard A. *Economic Analysis of Law* (New York: Aspen, 2003).

Rao, M.B. and Guru, Manjula. *Understanding TRIPs: Managing Knowledge in Developing Countries* (New Delhi: Response Books, 2003).

Reinbothe, Jorg. & Lewinski, Silke Von. *The WIPO Treaties 1996: the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty: Commentary and Legal Analysis* (London: Butterworths, 2002).

Ricketson, Sam. *The Berne Convention for the Protection of Literary and Artistic Works: 1886-1986* (London, England: Centre for Commercial Law Studies, Queen Mary College, 1987).

Sterling, J.A.L. *World Copyright Law: Protection of Authors' Works, Performances, Phonograms, Films, Video, Broadcasts and Published Editions in National, International and Regional Law* (London: Sweet & Maxwell, 2003).

Stewart, Stephen M. *International Copyright and Neighbouring Rights* (London, Toronto: Butterworths, 1989).

Stockes, Simon. *Art & Copyright* (Oxford: Hart Pub., 2003).

Vaver, David. *Copyright Law* (Toronto: Irwin Law, 2000).

———. *Intellectual Property Law: Copyright, Patent, Trade-marks* (Concord, Ontario: Irwin Law, 1997).

Walker, Simon. *The TRIPS Agreement, Sustainable Development and the Public Interest: Discussion Paper* (Gland, Switzerland; Cambridge, UK: IUCN—The World Conservation Union, 2001).

Wallerstein, Mitchel B., Moge, Mary Ellen, & Schoen, Roberta A., eds., *Global Dimensions of Intellectual Property Rights in Science and Technology* (Washington, DC: National Academy Press, 1993).

Watal, Jayashree. *Intellectual Property Rights in the WTO and Developing Countries* (The Hague, London, and Boston: Kluwer Law, 2001).

Watt, Richard. *Copyright and Economic Theory: Friends or Foes?* (Cheltenham, UK: Edward Elgar, 2000).

Xue, Hong & Zheng, Chengsi. *Chinese Intellectual Property Law in the 21st Century* (Hong Kong: Sweet & Maxwell Asia, 2002).

Zheng, Chengsi & Pendleton, Michael. *Copyright Law in China* (Australia: CCH International, 1991).

Secondary Material: Articles

Abbott, Frederick M. "Reflection Paper on China in the World Trading System: Defining the Principle of Engagement" in Frederick M. Abbott ed., *China in the World Trading System: Defining the Principles of engagement* (Boston: Kluwer Law International, 1998).

———. "The WTO TRIPs Agreement and Global Economic Development" (1996) 72 Chicago-Kent L. Rev. 385.

Adams, Wendy A. "Intellectual Property Infringement in Global Networks: The Implications of Protection Ahead of the Curve" in (2002) 10:1 Int'l J. L. & I. T. 71.

Aitma, David & Jones, Alison. "Competition Law and Copyright: Has the Copyright Owners Last the Ability to Control His Copyright?" in (2004) 26 Eur. I.P. Rev. 137.

Ayers, Irene Segal. "The Future of Global Copyright Protection: Has Copyright Law Gone Too Far?" (2000) 62 U. of Pitt. L. Rev. 49.

Basalamah, Salah. "Compulsory Licensing for Translation: an Instrument of Development?" in (2000) 40 IDEA 503 (LexisNexis).

Bercovitz, Alberto. "Copyright and Related Rights" in Correa, Carlos M. and Yusuf, Abdulqawi A. eds., *Intellectual Property and International Trade: The TRIPs Agreement* (London: Kluwer Law International Ltd., 1998) 145.

Correa, Carlos M. "Intellectual Property Rights: a Perspective from Developing Countries" in Frank Gotzen ed., *The Future of Intellectual Property in the Global Market of the Information Society: Who is Going to Shape the IPR System in the New Millennium?* (Bruxelles: Bruylant, 2003) 175.

Dinwoodie, Graeme B. "A New Copyright Order: Why National Courts Should Create Global Norms" (2000) 149 U. Pa. L. Rev. 469.

Foray, Dominique. "Production and Distribution of Knowledge in the New Systems of Innovation: the Role of Intellectual Property Rights", (1996) *STI Review* No. 16.

Gana, Ruth L. "Prospects For Developing Countries Under the TRIPs Agreement" (1996) 29 Vand. J. Transnat'l L. 735.

Gao, Lulin. "China's Intellectual Property Protection System in Progress" in Frederick M. Abbott ed., *China in the World Trading System* (United States of America: Kluwer Law International, 1998).

Giust, John E. "Noncompliance with TRIPs by Developed and Developing Countries: Is TRIPs Working?" in (1997) 8:1 Ind. Int'l & Comp. L. Rev. 69.

Hase, Andrés Moncayo Von. "The Application and Interpretation of the Agreement on Trade-Related Aspects of Intellectual Property Rights" in Carlos M Correa & Abdulqawi A Yusuf eds., *Intellectual Property and International Trade: the TRIPs Agreement* (London: Kluwer Law International Ltd., 1998), 93.

Hollifield, C. Ann, Vlad, Tudor & Becker, Lee B. "The Effects of International Copyright Laws on National Economic Development" in Becker, Lee B. and Vlad, Tudor eds., *Copyright and Consequences: Central European and U.S. Perspectives* (The United States of America: Hampton Press, Inc. 2003).

Hufbauer, Gary. "China as an Economic Actor on the World Stage: An Overview" in Frederick M. Abbott ed., *China in the World Trading System* (United States of America: Kluwer Law International, 1998).

Katzenberger, Paul. "TRIPs and Copyright Law" in Friedrich-Karl Beier and Gerhard Schricker, ed., *From GATT to TRIPs—The Agreement on Trade-Related Aspects of Intellectual Property Rights* (Munich: Max Planck Institute for Foreign and International Patent, Copyright and Competition Law; New York, NY: VCH, 1996)

Kieff, F. Scott. "The Case against Copyright: A Comparative Institutional Analysis of Intellectual Property Regimes" (Working Draft, 2004), [unpublished].

Kim, Selena. "The Reinforcement of International Copyright for the Digital Age" in (2002) 16:1 I. P. J. 95.

Landes, William M. and Posner, Richard A. "An Economic Analysis of Copyright Law" in (1989) 18 J. Legal Stud. 325.

Li, Chiang Ling. "New Chinese Copyright Law" in (2001) 116 Copyright World, 24.

Litman, Jessica. "The Public Domain" in (1990) 39 Emory L. J. 965.

Mansfield, Edwin. "Intellectual Property Protection, Direct Investment, and Technology Transfer" in International Finance Corporation Discussion Paper No. 27, 1995.

McDorman, Ted L. "Unilateralism (Section 301) to Multilateralism (GATT): Settlement of International Intellectual Property Disputes After the Uruguay Round" in George R. Stewart, Myra J. Tawfik and Maureen Irish, eds., *International Trade and Intellectual Property: The Search for a Balanced System* (Boulder: Westview Press, 1994) 119.

Newberry, Warren. "Copyright Reform in China: A 'TRIPs' Much Shorter and Less Strange Than Imagined?" (2003) 35 Conn. L. Rev. 1425.

Nijar, K. "America's Use of Section 301 in Influencing International Intellectual Property Rights", online: the University of Kent, <https://www.kent.ac.uk/law/undergraduate/modules/ip/handouts/ip_dissertations/Diss-Nijar.doc>.

Pacon, Ana Maria. "What Will TRIPs Do For Developing Countries?" in Friedrich-Karl Beier & Gerhard Schricker, ed., *From GATT to TRIPs—The Agreement on Trade-Related Aspects of Intellectual Property Rights* (Munich: Max Planck Institute for Foreign and International Patent, Copyright and Competition Law; New York, NY: VCH, 1996).

Reichman, Jerome H. "Compliance with the TRIPs Agreement: Introduction to a Scholarly Debate" (1996) 29 Vand. J. Transnat'l L. 366.

———. "From Free Riders to Fair Followers: Global Competition under the TRIPs Agreement" in (1997) 29:11 N.Y.U.J. Int'l L. & Pol. 11.

———. "The TRIPs Agreement Comes of Age: Conflict or Cooperation in the Post-Transitional Phase?" in Cottier, Thomas and Mavroidis, Petros C. ed., *Intellectual Property: Trade, Competition, and Sustainable Development* (Ann Arbor: University of Michigan Press, 2003), 115.

Reinbothe, Jorg. "The Role of Europe in World-Wide Copyright Protection" in Frank Gotzen ed., *The Future of Intellectual Property in the Global Market of the Information Society: Who is Going to Shape the IPR System in the New Millennium?* (Bruxelles: Bruylant, 2003) 5.

Rieder, Renate. "The Tequila Effect—the Mexican Peso Crisis" online: Vienna University of Economics and Business Administration, <<http://www.wu-wien.ac.at/inst/vw7/TequilaEffect.pdf>>.

Samuelson, Pamela. "Intellectual Property and Economic Development: Opportunities for China in the Information Age" online: School of Information Management & Systems, University of California, Berkeley <www.sims.berkeley.edu/~pam/papers/chinaip.html>.

Shapiro, Michael S. "The International Copyright System" in Becker, Lee B. & Vlad, Tudor eds., *Copyright and Consequences: Central European and U.S. Perspectives* (Cresskill, New Jersey: Hampton Press, 2003).

Sherwood, Robert M. "Intellectual Property Systems and Investment Stimulation: The Rating of Systems in Eighteen Developing Countries", (1997) 37 J.L. & Tech. 261.

———. "The TRIPs Agreement: Implications for Developing Countries" (1997) 37 IDEA: The J.L. & Tech, 491.

Simons, Joshua J. "Cooperation and Coercion: the Protection of Intellectual Property in Developing Countries" in (1999) 11 BOND LR 59.

Strowel, Alain. "Droit d'auteur and Copyright: Between History and Nature" in Sherman, Brad. & Strowel, Alain. eds., *Of Authors and Origins: Essays on Copyright Law* (New York: Oxford University Press, 1994) 235.

Su, Evelyn. "The Winners and The Losers: The Agreement on Trade-Related Aspects of Intellectual Property Rights and Its Effects on Developing Countries" in (2000) 23 Hous. J. Int'l L. 169.

Tang, Guangliang, "Xiu Gai Jiu Da Nei Rong: Zhu Zuo Quan Fa Xiu Gai Mian Xiang WTO", online: Lao Xing Zhe <www.law-walker.net>.

Tang, Xiaobing. "China's Economic System and its New Role in the World Economy" in Frederick M. Abbott ed., *China in the World Trading System: Defining the Principles of Engagement* (Boston: Kluwer Law International, 1998) 53.

Taylor, Caldwell, Crean, Susan, & Young-Ing, Greg. "Handbook on Creators' Rights" online: Creators' Rights Association <<http://www.cra-adc.ca/handbookrights.doc>>.

UNCTAD-ICTSD Project on IPRs and Sustainable Development, "The Global Intellectual Property Rights System", online: International Centre for Trade and Sustainable Development, <http://www.ictsd.org/pubs/ictsd_series/iprs/PP/PP_3CH_02.pdf>.

Vaver, David. "Rejuvenating Copyright" (1996) 75 Can. Bar Rev. 69.

Yonehara, Brent T. "Enter the Dragon: China's WTO Accession, Film Piracy and Prospects for Enforcement of Copyright Laws" (2003) 63 Depaul-LCA J. Art. And Ent. L. 63.

Yusuf, Abdulqawi A. "TRIPs: Background, Principles and General Provisions" in Correa, Carlos M. and Yusuf, Abdulqawi A. eds., *Intellectual Property and International Trade: The TRIPs Agreement* (London: Kluwer Law International Ltd., 1998), 3.

Secondary Materials: Websites:

The United Nations: <www.un.org>.

United Nations Conference on Trade and Development <www.unctad.org>.

University of McGill, <<http://www.mcgill.ca/reporter/33/11/noumoff/>>.

University of Puget Sound, <<http://www.ups.edu/ipe/asiacrisis/bubbles.htm>>.

Wikipedia: the Free Encyclopedia, <http://www.fact-index.com/t/th/third_world.html>.

The World Intellectual Property Organization: <www.wipo.int>.

The World Trade Organization: <www.wto.org>.