

# REALITY BITES: HOW THE BITING REALITY OF PIRACY IN CHINA IS WORKING TO STRENGTHEN ITS COPYRIGHT LAWS<sup>1</sup>

*This iBrief discusses how persistent international concern and emerging domestic concern over Chinese intellectual property theft have helped give sharper teeth to the Chinese copyright regime in the past two years and how these new laws may leave bite marks in the future.*

## Introduction

The reality of the voracious Chinese appetite for pirated software, music, and books has been gnawing at the world for years. In 1996, the International Intellectual Property Alliance reported that the US suffered a trade loss of 2.3 billion dollars.<sup>2</sup> While this number decreased to 1.5 billion dollars in 2001,<sup>3</sup> piracy rates are still astronomically high with the piracy levels of major goods over 90%.<sup>4</sup>

Recently, however, reality has begun to bite down hard on the Chinese movie and music and industries. Two recent bite victims were the major motion picture “The Touch,” whose ticket sales plummeted when black market copies of the movie became ubiquitously available four days after its opening,<sup>5</sup> and the latest album from Yi Ren Zhi Zao, whose CD now commands a staggeringly paltry 1.4% market share after black market copies became available before legitimate copies even hit the music stores.<sup>6</sup>

As is evident from the above statistics, the enforcement of copyright law<sup>7</sup> in China has been, in a word, toothless. However, with its entrance into the World Trade Organization and with the problems of copyright violation becoming a reality to Chinese companies, the notion of

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<sup>2</sup> *2002 Special 301 People’s Republic of China*, Int’l Intellectual Property Alliance [hereinafter IIPA], at <http://www.iipa.com/rbc/2002/2002SPEC301PRC.pdf> (last visited Nov. 2, 2002).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Joseph Kahn, *The Pinch of Piracy Wakes China Up on Copyright Issue*, N. Y. Times, November 1, 2002, at 1C.

<sup>6</sup> *Id.*

<sup>7</sup> Copyright has different legal meanings internationally, but the term generally refers to “a property right in an original work of authorship (such as a literary, musical, artistic, photographic, or film work) fixed in any tangible medium of expression, giving the holder the exclusive right to reproduce, adapt, distribute, perform, and display the work.” Black’s Law Dictionary 337 (7th ed. 1999).

Chinese Copyright Law may be on the verge of losing its oxymoronic status. This iBrief examines the pressures China faces internationally and domestically due to its weak copyright laws. It also provides an analysis of the content and potential impact of the new People's Republic of China (PRC) Copyright Law<sup>8</sup> that went into force September 13, 2002.

### **International Concern**

The 1.3 billion<sup>9</sup> people in China represent the largest consumer market in the world. Visions of access to this market have inspired great interest in entering the Chinese market from international corporations.<sup>10</sup> These business interests, combined with the opening of China in the 1970s after decades of seclusion from the world economy,<sup>11</sup> have led to China's recent entrance as a member of the World Trade Organization<sup>12</sup> as well as to today's unprecedented level of cooperation and interaction between the Chinese government, Chinese businesses and the international political and business community.<sup>13</sup> This increased level of engagement has focused international attention on China's Intellectual Property Rights (IPR) regime generally and has spawned increasing pressure for China to conform its laws and regulations to global standards.<sup>14</sup> International pressure has been especially forceful in the area of copyright.<sup>15</sup>

The fundamental motivations at the root of the international push for China to adopt more protective and potent copyright law is the product of historically strong international support for IPR protection<sup>16</sup> and the flagrant Chinese piracy of such property that has over the years produced vast losses in potential revenue to many firms throughout the world.<sup>17</sup> The theory behind copyright protection is that it promotes development of creative works in the areas of science and

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<sup>8</sup> *China Revises Copyright Law for WTO Entry*, Xinhua News Agency, November 7, 2001.

<sup>9</sup> See *China Population* at <http://www.cpirc.org.cn/eindex.htm> (last visited Nov. 3, 2002).

<sup>10</sup> See generally *Annual Report: U.S. Trade in 1994*, Office of U.S. Trade Rep. at <http://www.ustr.gov/html/1994trade.html> (last visited Nov. 3, 2002).

<sup>11</sup> See Jessica Jiong Zhou, *Trademark Law & Enforcement in China: A Transnational Perspective*, 20 *Wis. Int'l L.J.* 415, at 421 (2002).

<sup>12</sup> *China Signs WTO Accession Protocol*, Xinhua General News Service Nov. 11, 2001.

<sup>13</sup> See *China's Development Contributes to World Economy, President Says*, at [http://news.xinhuanet.com/english/2002-10/27/content\\_612571.html](http://news.xinhuanet.com/english/2002-10/27/content_612571.html) (last visited Nov. 3, 2002).

<sup>14</sup> See Naigen Zhan, *Intellectual Property Law Enforcement in China: Trade Issues, Policies and Practices*, 8 *Fordham Intell. Prop. Media & Ent. L. J.* 63, 63 (1997).

<sup>15</sup> *Id.* at 64-66.

<sup>16</sup> See generally *Convention Establishing the World Intellectual Property Organization*, July 14, 1967, at <http://www.wipo.int/clea/docs/en/wo/wo029en.htm>. See also *Madrid Agreement Concerning the International Registration of Marks*, April 14, 1891, at <http://www.wipo.int/clea/docs/en/wo/wo015en.htm>.

<sup>17</sup> See Serri E. Miller, *The Posse is Coming to Town... Maybe: The Role of United States Non-Governmental Organizations in Software Anti-Piracy Initiatives as China Seeks WTO Accession*, 7 *ILSA J. Int'l Comp. L.* 111, at 113 (2000).

the arts and allows artists to benefit from their creations.<sup>18</sup> Copyright protection based on this theory has been enshrined in the nation-state constitutions since the late 1700s.<sup>19</sup> With the emergence of greater levels of trade between nation-states in the late 1800s, the importance of copyright in the international context became apparent and a number of international agreements on intellectual property rights were negotiated.<sup>20</sup> Since that time, the international copyright agreements have continued to broaden their scope and strengthen in potency. The negotiation of the Trade-Related aspects of Intellectual Property Rights (TRIPS) agreement as part of the Uruguay round of the WTO negotiations demonstrates a new high water mark in worldwide availability of copyright protection.<sup>21</sup> The astounding amount, both in percentage and in quantity, of copyright theft in China has made China one of the world's top offenders<sup>22</sup> and has played a large part in heightening international concern about the Chinese IPR regime.

### **Domestic Concern**

The nature of the international concern and pressure for improvement of Chinese copyright law constitutes a well covered area of academic inquiry.<sup>23</sup> Also well covered, though to a comparatively lesser extent, in the academy are reasons behind Chinese resistance to the idea of copyright and strong enforcement of copyright law.<sup>24</sup> To this point, domestic concern and

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<sup>18</sup> See generally Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, at <http://www.patent.gov.uk/about/consultations/eccopyright/annexb.htm> (last visited Nov. 25, 2002).

<sup>19</sup> See U.S. CONST. art. I., § 8, cl. 8. See also Statute of Anne, 8 Anne, ch. 19 (1709).

<sup>20</sup> See, e.g., Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, revised at Stockholm, July 14, 1967, 21 U.S.T. 1583, 828 U.N.T.S. 305; Berne Convention for the Protection of Literary and Artistic Works, opened for signature Sept. 9, 1886, revised at Paris, July 24, 1979, 828 U.N.T.S. 221, S. Treaty Doc. No. 99-27, 99th Cong., (1986); General Agreement on Tariffs and Trade: Agreement on Trade-Related Aspects of Intellectual Property Rights, Dec. 15, 1993, 33 I.L.M. 81 art. 9 (1994); WIPO Copyright Treaty, adopted Dec. 20, 1996, WIPO Doc. CRNR/DC/94.

<sup>21</sup> General Agreement on Tariffs and Trade: Agreement on Trade-Related Aspects of Intellectual Property Rights, Dec. 15, 1993, 33 I.L.M. 81 art. 9 (1994).

<sup>22</sup> IIPA, *supra* note 2, at 32.

<sup>23</sup> See, e.g., Zheng Chengsi, *The TRIPS Agreement and Intellectual Property Protection in China*, 9 Duke J. Comp. & Int'l L. 219 (1998); Richard J. Ansson, Jr., *International Intellectual Property Rights, the United States, and the People's Republic of China*, 13 Temp. Int'l & Comp. L.J. 1 (1999), Miller, *supra* note 17.

<sup>24</sup> See, e.g., Glenn Butters, *Pirates, Dragons, and U.S. Intellectual Property Rights in China: Problems and Prospects of Chinese Enforcement*, 38 Ariz. L. R. 1081, 1110 (1996); Brent Yonehara, *Enter the Dragon: China's WTO Accession, Film Piracy and Prospects for Enforcement of Copyright Law*, 22 J. Art and Ent. L. 63, 78-79 (2002).

pressure for an improvement of the copyright regime has received scant attention. This oversight, however, misses an opportunity for informative analysis.

To understand the importance of the recent signs indicating an increasing domestic concern over copyright, it is fitting to provide a brief discussion of the historical, cultural, political, and economic context of copyright in China. Historically, copyright law has been present in at least some form since the Tang Dynasty (618-906 A.D.).<sup>25</sup> Since then, copyright law has existed somewhat irregularly and its potency has always remained a question.<sup>26</sup> Although copyright law has existed *de jure*, the cultural norms of the Chinese society played a large role in mitigating its *de facto* significance.<sup>27</sup> The deep-seeded yin-yang cultural concepts of *Li* and *Fa*<sup>28</sup> leave the Chinese people predisposed against the concept of copyright.<sup>29</sup> Mainly, this predisposition comes from the *Li* notions that the individual should be submerged in the collective, that the individual-society relationship should be non-competitive, and the disfavored *Fa* notion that the state has control over the individual.<sup>30</sup>

The political context of copyright law is important because many of the cultural norms that presented barriers to effective copyright law have become part of the country's political doctrine following Mao's 1949 Marxist revolution.<sup>31</sup> Of specific importance to this political enshrinement of anti-copyright beliefs was that the collective should own all capital and property, including intellectual property of ideas.<sup>32</sup> As China remains a socialist country today its fundamental political doctrine remains difficult, though not impossible, to square with the idea of copyright.<sup>33</sup> The economic realities of the situation have also played a role in China's resistance to copyright.<sup>34</sup> One need not go much further than to note the significant benefits China can enjoy from free riding on the copyrighted creative work of foreigners to understand the strong incentive to leave copyright laws unwritten or unenforced.

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<sup>25</sup> Zhou, *supra* note 11, at 417-418.

<sup>26</sup> Yonehara, *supra* note 24, at 78-79.

<sup>27</sup> *Id.* at 77-78.

<sup>28</sup> The concept of *Li* is important to an individual's emotional understanding of the relationship themselves as an individual to larger socially constructed groups. Properly followed, *Li* should lead one away from activity that promotes dissension and toward social harmony. Butterton, *supra* note 24, at 1081, 1110. The concept of *Fa* is important is an individuals logical and physically understanding of the relationship between themselves as an individual and larger society. More rigid then *Li*, *Fa* must be followed so as to maintain the social structure. *Id.*

<sup>29</sup> Yiping Yang, *The 1990 Copyright Law of the People's Republic of China*, 11 UCLA Pac. Basin L.J. 260, 276, (1993).

<sup>30</sup> *Id.* at 276

<sup>31</sup> See Zhou, *supra* note 11.

<sup>32</sup> See *id.*

<sup>33</sup> See generally Zhou, *supra* note 11.

Having briefly described the forces arrayed against copyright in China, the more interesting task of inquiry into domestic concern about producing stronger copyright law is appropriate. The realization that the strengthening of copyright was a legal and moral priority is one that the central government has only recently begun to fully appreciate<sup>35</sup> and that the Chinese people are only becoming aware of. After the failure of the “cultural revolution”<sup>36</sup> it was the Chinese government’s “open door” policy in the 1970s that took the first steps along the path toward stronger copyright law.<sup>37</sup> Since this initial move, the government has taken a truly astounding number of measures to become a part of the international IPR community: in 1980 China became a signatory to the Convention Establishing the World Intellectual Property Organization (WIPO),<sup>38</sup> in 1985 they joined the Paris Convention for Protection of Industry Property,<sup>39</sup> in 1989 China joined the Madrid Convention for the International Registration of Marks,<sup>40</sup> in 1992 they joined the Berne Convention for the Protection of Literary and Artistic Works,<sup>41</sup> the Geneva Phonograms Convention,<sup>42</sup> and the Universal Copyright Convention,<sup>43</sup> in 1994 they joined the Patent Cooperation Treaty,<sup>44</sup> and in 1999 they agreed to the TRIPs agreement as part of their accession to the WTO.<sup>45</sup> In addition to its prolific international endeavors at the multilateral level the government has also negotiated some important bilateral agreements, including the 1979 bilateral trade agreement with the United States in which each country committed to reciprocity with regard to copyright, patent, and trademark protection.<sup>46</sup>

The Chinese government has also been active on the home front with regard to IPRs: in 1982 it passed the Trademark Law<sup>47</sup>, in 1984 it passed the Patent Law,<sup>48</sup> in 1990 it passed the

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<sup>34</sup> Yonehara, *supra* note 8, at 81-82.

<sup>35</sup> See Geoffrey T. Willard, *An Examination of China’s Emerging Intellectual Property Regime: Historical Underpinnings, The Current System and Prospects for the Future*, 6 *Ind. Int’l & Comp. L. Rev.* 411 (1996).

<sup>36</sup> See Zhou, *supra* note 11, at 420-22.

<sup>37</sup> *Id.*

<sup>38</sup> Naigen Zhan, *Intellectual Property Law Enforcement in China: Trade Issues, Policies and Practices*, 8 *Fordham Intell. Prop. Media & Ent. L. J.* 63, 63 (1997).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> Butterson, *supra* note 24, at 1094-95.

<sup>43</sup> *Id.*

<sup>44</sup> Zhou, *supra* note 11.

<sup>45</sup> Miller, *supra* note 17, at 112.

<sup>46</sup> See Agreement on Trade Relations, July 7, 1979, U.S.-China, art 6, 31 U.S.T. 4651, T.I.A.S. No. 9630.

<sup>47</sup> Zhonghua Renmin Gongheguo Shangbiaofa, [Trademark Law of the People’s Republic of China] Fagui Huiban, translated in 2 *China L. Foreign Bus.* 11, 11-600 (1993).

Copyright Law,<sup>49</sup> in 1991 it passed the Software Protection Act,<sup>50</sup> and in 1993 it passed the Unfair Competition Law.<sup>51</sup> While attempting to strengthen its IPR laws, the government amended both its copyright<sup>52</sup> and trademark<sup>53</sup> laws in 2001, and this year implemented regulatory regimes for copyrights and trademarks<sup>54</sup> in addition to supporting judicial interpretations of the laws by the People's Supreme Judicial Court.<sup>55</sup>

The copious amount top-down copyright protection efforts by the Chinese government have so far produced more bark than bite. However, there are a number of factors that leads the author to believe that, as one recent native author put it, "China has reached a stage in its development where it increasingly recognizes the value of a strong intellectual property regime."<sup>56</sup> Support for the notion that there is a growing base of "bottom-up" concern for copyright protection in China laws is legitimized by actor-based economic and interests analysis<sup>57</sup> and evidence from current legal and social events in China.<sup>58</sup>

For many years, there has been a significant incentive for China to free ride on the intellectual property creations of other countries because domestic production of intellectual property was relatively low.<sup>59</sup> However, as China's economy has become increasingly open, the inflow of foreign investment has worked to increase domestic production of intellectual property, most significantly in the Internet<sup>60</sup> and software industries.<sup>61</sup> During this time, the Chinese movie

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<sup>48</sup> Zhonghua Renmin Gongheguo Shangbiaofa, [Patent Law of the People's Republic of China] Fagui Huiban, translated in 2 China L. Foreign Bus.11, 11-600 (1993).

<sup>49</sup> Zhonghua Renmin Gongheguo Shangbiaofa, [Copyright Law of the People's Republic of China] Fagui Huiban, translated in 2 China L. Foreign Bus.11, 11-600 (1993).

<sup>50</sup> Jisuanji Ruanjian Baohu Tiaoli [Computer Software Rules] Fagui Huiban, translated in 2 China L. Foreign Bus. 11, 11-704, (1993).

<sup>51</sup> Zhonghua Renmin Gongheguo Shangbiaofa, [Unfair Competition Law of the People's Republic of China] Fagui Huiban, translated in 2 China L. Foreign Bus.11, 11-600 (1993).

<sup>52</sup> IIPA, *supra* note 2.

<sup>53</sup> Zhou, *supra* note 11.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Zhou, *supra* note 11.

<sup>57</sup> This analysis is performed below.

<sup>58</sup> See generally Xin Zhiming, *Protecting Internet Copyrights*, China Daily, February 18, 2002, at <http://www.chinadaily.com.cn> (last visited Nov. 2, 2002); *Court Comes Down Heavy on Piracy*, China Daily, October 11, 2002, at [www.china.org.cn](http://www.china.org.cn) (last visited Nov. 2, 2002.) [hereinafter *Court Comes Down Heavy*]; *Sina.com Apologizes for Copyright Violation*, China Daily, July 22, 2002, at <http://www.china.org.cn> (last visited Nov. 2, 2002) [hereinafter *Sina.Com Apologizes*].

<sup>59</sup> See generally, Zhou, *supra* note 11, at 420-21.

<sup>60</sup> See Baker & McKenzie, *An Overview of China's Internet Market and Its Regulation*, Copy on file with Duke Law & Technology Review (2000).

<sup>61</sup> See IIPA, *supra* note 2, at 31-33.

and recording industries have also seen growth.<sup>62</sup> Correspondingly, the cost-benefit analysis for domestic non-governmental actors with regard to the protection of intellectual property is changing. As domestic firms see increasing losses due to China's weak copyright regime, they should begin to pressure the government to strengthen and increase enforcement of copyright protection measures. There are indications that, while its pace has not been satisfactory to some parties,<sup>63</sup> this has begun to happen.<sup>64</sup> What critics of current domestic Chinese concern should not discount, however, is the critical importance of the fact that the interests, with regard to copyright protections, of domestic Chinese firms are beginning to align with those of foreign firms in an unprecedented way.

Anecdotal evidence of this new domestic concern for copyright protection does not end with the narratives that were mentioned at the beginning of this iBrief. Several high profile events over the past year have also made clear that copyright protection is a rising concern for non-governmental Chinese actors. The first was the legal war that raged between two of China's largest web-portals. The battle between Sina.com and Sohu.com started over who had the rights to claim that they were the official news partner of the Chinese Soccer team during the 2002 World Cup. The issue was resolved at the end of July when Sina.com was forced to pay a fine and publish an apology on its website for seven days for copyright violation.<sup>65</sup>

Three other major IPR suits have also made it into the headlines this year. In the first, Mr. Zhou, head of Yi Ren Zhi Zao, won 300,000 Yuan in a dispute regarding the manufacturing of illegal compact discs (CDs) by Chinese factories.<sup>66</sup> In a second, a suit was brought by the Shaolin Temple monks for use of their name by a major canned food manufacturer.<sup>67</sup> In the third, in the first ruling to use the 2001 Chinese Copyright Law, Shanghai People's Publishing House sued Shanghai Haishang Books Distribution Company and won when the No. 2 Intermediate People's Court fined the distribution company 50,000 Yuan for the sale of a single pirated book.<sup>68</sup> The case had significant precedential value in that it was the first to use the Law's new evidentiary rule that places the burden of proof on the defendant.<sup>69</sup> In addition, it was first to

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<sup>62</sup> See Lu Yi, *China's Media Rush*, at <http://www.bjreview.com.cn/2001/200149/CoverStory-200149.htm> (last visited Dec. 13, 2002).

<sup>63</sup> See IIPA, *supra* note 2, at 31.

<sup>64</sup> Zhiming, *supra* note 57.

<sup>65</sup> *Sina.com Apologizes*, *supra* note 57.

<sup>66</sup> Kahn, *supra* note 2.

<sup>67</sup> *Id.*

<sup>68</sup> *Court Comes Down Heavy*, *supra* note 57.

<sup>69</sup> *Id.*

use the Law's new damages rule that does not limit awards to the number of sales of pirated goods.<sup>70</sup>

These examples are also indicative of a statistical increase in legal and administrative copyright inquiries in China. Between 1997 and 2000, the number of cases handled by the National Copyright Administration (NCA) increased by 80% from 1,361 to 2,547.<sup>71</sup> During that time, the number of copyright suits accepted by the courts jumped by 175% from 350 to 963.

The final indicator of domestic concern for copyright protection is the effort by domestic Chinese firms to join forces with the government to form the first National Anti-Piracy Committee. Chinese companies have also begun talking of joining forces with American interests to improve copyright protection across the county. Given the above analysis, it is clear that, while copyright has not enjoyed a historically strong position in Chinese culture and law, it is certainly emerging as an important player in the socio-economic scene.

### **The Present and Future of Copyright Law in China**

The past year has been a busy one for copyright law in China. Last October, the Standing Committee of the National People's Congress adopted the "Decision to Amend Copyright Law of the People's Republic of China."<sup>72</sup> The amendment to the Copyright Law of 1990 had a significant positive impact upon the efficacy of the law.<sup>73</sup> Important substantive changes include the following: film rental rights, Internet distribution rights, rights in public performances, full and partial assignment of copyright, recognition of copyrights in databases, removal of the ten year limitation on copyright, and removal of the fair use exception for government employees.<sup>74</sup> Important changes to the enforcement regime include: preliminary injunction became an available form of relief, damages available when infringer's profits could not be determined were set at 500,000 yuan, the definition of infringement was greatly expanded, and the enforcement powers of administrative units were greatly clarified.<sup>75</sup>

However, in order for these amendments to have their full effect, the government needed to formulate and implement the regulations as newly amended and the Supreme Judicial Court needed to issue an interpretation for the handling of copyright cases. In August and October of

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<sup>70</sup> *Id.*

<sup>71</sup> Christine Xu, *Piracy is No Elegant Offense*, China Online News, April 4, 2002, at [www.chinaonline.com](http://www.chinaonline.com) (last visited Nov. 2, 2002).

<sup>72</sup> IIPA, *supra* note 9.

<sup>73</sup> *Id.*

<sup>74</sup> Joseph Simone, *Chinese Copyright Law Amended to Comply with WTO Requirements*, World Intellectual Property Report, Vol. 16 No. 3 (March 15, 2002).

<sup>75</sup> *Id.*



2002, respectively, both of these actions were accomplished.<sup>76</sup> These moves represent important steps toward implementing the commitments on IPR that China has made internationally, but perhaps more importantly it is beginning to give real bite to its domestic enforcement.

With these foundations, it is clear that the IPR regime in China, and the copyright law in particular, has continued to improve over the decade since its was first passed into law. But what does the future hold? The recent ruling against the Shanghai Haishang Books Distribution makes it clear that the immediate prospects are good. Further down the road, the proactive stance of the national government and the courts with regard to copyright protection, combined with stronger laws, better regulations, and more rights-friendly judicial interpretations on the books, mean that Chinese copyright law will certainly get stronger before it gets weaker. Finally, as the Chinese market continues to open and its domestic capacity for producing intellectual property becomes more significant, the free ride will be over and domestic firms will begin to play an even more significant role in demanding and helping to create a more potent copyright protection regime.

## **Conclusion**

The international community has long felt the reality of the biting losses created by theft of intellectual property in China. Today, Chinese firms with intellectual property interests are also feeling the bite of such losses. These domestic interests are converging with international pressures to promote a greater respect for copyright in the country and a greater demand from firms for protection of their rights through the legal system. As a result, while firms are feeling the pain today, Chinese IP pirates may soon feel the law nipping at their heels.

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<sup>76</sup> *Xinhua Carries "Full Text" of China's Copyright Regulations*, BBC Monitoring, Sept. 16, 2002, available at 2002 WL 100096542.