

2002

China Law

Michael E. Burke IV

Yunan Ren

Maria C. H. Lin

Jiwen Chen

Recommended Citation

Michael E. Burke et al., *China Law*, 36 INT'L L. 815 (2002)
<https://scholar.smu.edu/til/vol36/iss3/5>

This Symposium is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in International Lawyer by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

China Law

MICHAEL E. BURKE IV, YUNAN REN, MARIA C.H. LIN, JIWEN CHEN, MEI YIN LIM,
AND RENÉ KRAUS*

"Historic" is an adjective that is overused to the point that its impact is blunted. However, to call 2001 "historic" in the context of legal development in the People's Republic of China ("China" or "PRC") might be appropriate. In 2001, it was reported that over 140 laws and regulations were adopted or amended, while over 500 laws and regulations were deleted. Much of this legal reform activity was connected to China's World Trade Organization (WTO) accession. On December 11, 2001, China concluded its sixteen-year journey and joined the WTO. While WTO accession is an important milestone, China still faces the challenge of satisfying its WTO commitments, such as market access liberalization. China's WTO accession should be viewed as the beginning of a process of legal development, not the conclusion of that process.

The pace of legislation and regulatory development quickened in 2001 in an effort to better conform China's legal system to international and WTO standards. Indeed, the volume of laws and regulations enacted or amended in 2001 was larger than in past years. This legislative momentum has caused some to ask whether such development represents runaway legislating or the further development of the rule of law in China. Despite the relatively quick pace of legislation in 2001, one should expect a more gradual progress in the development of the rule of law. Institutional reform and internal dislocation brought

*Michael E. Burke, J.D., Georgetown University Law Center, 1998; B.S.F.S., Georgetown University School of Foreign Service, 1993. Mr. Burke is a Vice-Chair of the China Law Committee and is an associate in the Washington, D.C. office of Perkins Coie LLP. Mr. Burke edited this article, and drafted the Securities and Foreign Invested Enterprises sections of this article. Yunan Ren, LL.M., Harvard Law School, 1999; LL.B., Beijing University Department of Law, 1997. Mr. Ren is an associate with the Hong Kong office of Perkins Coie, LLP and drafted the Internet and Electronic Commerce section of this article. Maria C.H. Lin, B.Sc., College of Mt. St. Vincent, 1966; M.Sc., University of Kansas, 1970; J.D., Fordham Law School, 1978. Ms. Lin is a Partner in the New York office of Morgan & Finnegan LLP and drafted the Trademarks section of this article. Jiwen Chen, LL.M., George Washington University Law School, 2000; LL.B., Fudan University Law School, 1997; B.Sc., Tianjin University School of Chemical Engineering, 1995. Mr. Chen is an associate with the Washington D.C. office of Reed Smith LLP and drafted the Patents and Copyrights sections of this article. Mei Yin Lim, LL.B., National University of Singapore. Ms. Lim is Of Counsel with the Hong Kong office of Perkins Coie LLP and drafted the Telecommunications section of this article. René Kraus, B.A., University of California, Berkeley, 1981. Ms. Kraus works in the Market Intelligence Group at Thomson Legal & Regulatory and drafted the Legal Services section of this article.

about by WTO accession will pose significant challenges to China's government. In the end, the best advice for foreign enterprises in China might be to expect the unexpected.¹

This article will highlight selected changes in China's legal structure that took place in 2001. Significant changes in the Internet and electronic commerce sector included revised classifications and definitions of Internet and electronic commerce-related activities, national regulations involving various service sectors and local rules enacted in areas not yet covered by national legislation. Changes to the *Copyright Law* and the *Trademark Law* have brought these statutes closer to compliance with WTO standards. The *Copyright Law's* amendments have expanded the scope of copyright protections, as well as expanded and strengthened enforcement avenues for copyright holders. The *Trademark Law's* changes provide for stronger enforcement measures and a simplified application procedure. Similarly, changes to China's *Patent Law* were passed in order to make such regulation more consistent with WTO standards. Amendments to telecommunications regulations specified which services would be deemed "telecommunications." Modifications to China's *Tax Collection and Administration Law* reduced the late-payment penalty and offered several other breaks for taxpayers. For the first time, China passed a regulation addressing the qualification of judges. Regulation of China's securities markets continued, with the notable introduction of foreign venture capital regulations. Similarly, changes to China's *Wholly-Owned Foreign Enterprise Law* and *Equity Joint Venture Law* altered the legal landscape for foreign-invested enterprises. As will be discussed herein, 2001 was an exciting and important year in China's legal development.

I. Securities

At the end of 2001, there were indications that China intended to accelerate the development of its capital markets. In connection therewith, and with China's WTO accession, the Chinese government is evaluating plans to accelerate the opening of capital markets to foreign service providers. Despite this, CSRC Chairman Zhou Xiaochuan's March 8th announcement that the CSRC envisioned a more cautious, five to ten year timeframe for market restructuring.² Importantly, in 2001, the opening of a second, NASDAQ-style technology board in Shenzhen was also indefinitely delayed. There were other significant events in the development of China's securities markets in 2001.

A. VENTURE CAPITAL

On August 28, 2001, MOFTEC issued the *Provisional Regulations on the Establishment of Foreign-Invested Venture Capital Investment Enterprises* (VC Regulations), effective September 1, 2001.³ The VC Regulations are China's first attempt to attract and regulate foreign venture capital investment in the PRC.

1. See James M. Zimmerman, Speech at ABA China Law Committee Program held at Washington, D.C. offices of Coudert Brothers, "China Law Reform, Politics and Trade in a Post-WTO World," Washington, D.C., November 14, 2001.

2. See generally Penny Richards, Consul General, Shanghai, *The Reform Process in China*, Presentation to Linking Latitudes Conference (Apr. 15, 2001), available at <http://www.asialink.unimelb.edu.au/aef/shanghai/papers/prich.html> (last visited July 6, 2002).

3. See generally *Regulations for the Establishment of Foreign-Invested Venture Investment Enterprises*, THE AMERICAN CHAMBER OF COMMERCE IN CHINA, Aug. 28, 2001, at <http://www.amcham-china.org.cn/publications/brief/document/LegalBrief12-01.htm> (last visited July 6, 2002).

The VC Regulations were drafted to “encourag[e] foreign companies, enterprises, and other economic institutions or individuals to invest in China’s high-tech industry and to establish and perfect China’s venture capital investment regime.”⁴ The vehicle for such investment is a Foreign Invested Venture Capital Investment Enterprises (FIVCIEs) (*wàis-hāng tóuzī chuàngyè tóuzī qiyè*). The VC Regulations are the first time the Chinese central government has addressed foreign venture capital investment in China.⁵

A FIVCIE may be structured as a wholly foreign-owned enterprise, equity joint venture, foreign-invested limited liability company or a cooperative joint venture with or without legal person status. In addition to the VC Regulations, the FIVCIE will be governed by other relevant legislation such as: *PRC Company Law*, *PRC Law on Sino-Foreign Joint Ventures*, *PRC Law on Sino-Foreign Cooperative Joint Ventures* or *PRC Law on Wholly Foreign-Owned Enterprises*.⁶ If the FIVCIE is structured as a cooperative joint venture, profits may be shared according to contract and liabilities may be borne by all joint venture partners equally or primarily by a lead joint venture partner, similar to a United States general partnership or limited partnership. Sharing of profits and losses in other FIVCIE forms are governed by the entity’s organic documents and relevant legislation.⁷

Interpretation of the VC Regulations is left to MOFTEC, the Ministry of Science and Technology (MOST), and SAIC. For purposes of the VC Regulations, investors from the Hong Kong SAR, Macao SAR, and Taiwan are considered “foreign.” FIVCIEs are to have a twelve-year life span, and may not have organic documents or enter into contracts with a longer span. The FIVCIE’s span may be extended upon MOFTEC approval. Early termination or dissolution of the FIVCIE may only be made upon MOFTEC approval.⁸

The VC Regulations describe different classes of foreign partners. The primary foreign partner must meet a set of minimum criteria, including venture investment as its primary business, management of one hundred million U.S. dollars in three years prior to application, and investment of fifty million U.S. dollars in the three years prior to application. If there is more than one foreign investor, at least one of the others must invest twenty million U.S. dollars and have net assets of one hundred million U.S. dollars in the year prior to application. Each foreign investor, primary and otherwise, must invest at least ten million U.S. dollars, have legitimate sources of funding, and be able to withstand risk. The primary foreign investor may not withdraw shares from the FIVCIE during their tenure with such FIVCIE but may designate a new foreign primary investor upon MOFTEC approval.

Foreign capital must be at least 25 percent of the FIVCIE’s total capital, and a FIVCIE must take at least a 25 percent stake in a “target” company.⁹ Foreign investors may invest in installments, provided that (1) the first installment is at least 15 percent of the total to be invested by that investor; (2) the initial investment is made within three months of the

4. Provisional Regulation on the Establishment of Foreign-Invested Venture Capital Investment Enterprises, MOFTEC 2001, Foreign Trade and Investment Document No. 62, art. 1 (Sept. 1, 2002).

5. *Id.*

6. See SINO-FOREIGN EQUITY JOINT VENTURE LAW, at <http://www.qis.net/chinalaw/prclaw11.htm> (last visited July 6, 2002).

7. *Id.*

8. See generally Owen D. Nee & Jingzhou Tao, *Editorial*, COUDERT BROTHERS’ NEWSLETTER, Oct. 2001, at http://www.coudert.com/practice/china_newsletter_issue28.pdf (last visited July 6, 2002).

9. Provisional Regulation on the Establishment of Foreign-Invested Venture Capital Investment Enterprises, MOFTEC 2001, Foreign Trade and Investment Document No. 62, arts. 7, 23 (Sept. 1, 2002).

issuance of the FIVCIE's business license; and (3) the last installment is made within three years of the issuance of the FIVCIE's business license. Chinese investors may invest RMB, and foreign investors should invest convertible currency.

Each Chinese investor (if any) in the FIVCIE must possess legitimate sources of funding, an ability to withstand risks, and invest at least five million U.S. dollars into the venture. A primary Chinese investor (if any) in the FIVCIE must have at least RMB 100 million (U.S.\$12.1 million) in total assets or managed the same amount of capital in the three years prior to formation of the venture and have venture capital investment as its primary business.¹⁰

Investors seeking to establish an FIVCIE must submit an application, with supporting materials such as accounting reports and the FIVCIE's organic documents audited by a law or accounting firm, to MOFTEC. MOFTEC will act on an application within forty-five days of receipt of the completed application packet, with the consent of MOST. Successful applicants will receive a foreign-invested enterprise approval certificate. Within one month of receipt of the certificate, the FIVCIE must apply to SAIC for registration.

A FIVCIE may only engage in four activities: (1) management consulting for invested enterprises, (2) venture capital investment consulting, (3) investment in areas opened or encouraged by the PRC government for foreign investment, and (4) other areas as stipulated by MOFTEC.

FIVCIEs may not (1) invest in sectors prohibited by the PRC government, (2) provide loans or guarantees, (3) invest in funds not owned by the FIVCIE, (4) invest in loan provisions, (5) invest in fixed assets beyond those needed for the operation of the FIVCIE, (6) invest in publicly-traded securities (except those items held by the FIVCIE at the time of initial offering), or (7) engage in other activities as prohibited by law or regulation.¹¹

The VC Regulations allow for termination of investment or withdrawal of profits in limited circumstances. FIVCIEs may not terminate an investment or transfer any securities in an invested company until it has completed its agreed-upon investment. If the FIVCIE seeks to terminate the invested company or transfer securities in the invested company, it must complete relevant procedures created by SAIC and obtain the assent of MOST. FIVCIEs may only withdraw profits by (1) a transfer of securities to another entity, (2) a buyback by the invested enterprise pursuant to a buyback agreement, (3) a post-IPO sale on the public market, or (4) other methods allowed under PRC law and regulation.

FIVCIEs are also required to also establish internal controls, including a board of directors or a management committee. Such a board or committee is charged with management of the FIVCIE and, according to the VC Regulations, must decide all matters of importance to the entity. The board or committee may appoint a smaller group responsible for day-to-day management of the entity. FIVCIEs must submit semi-annual investment and operations reports to MOFTEC as part of an annual unified inspection. Lastly, FIVCIE employees must have relevant experience and, among other things, must not have a criminal record.¹²

B. JUDICIAL INTERPRETATION OF SECURITIES REGULATIONS

In late September 2001, China's Supreme People's Court (the "Court") instructed lower courts to temporarily stop accepting shareholder-initiated securities fraud actions. The

10. *Id.* art. 6.

11. *Id.* art. 13.

12. *Id.* arts. 18, 27.

Court stated that it needed to make "necessary legal and judicial preparations," reflecting the difficulties that local courts in China face as they attempt to adjudicate in areas without precedent and expertise and as shareholders look increasingly to the higher court for remedies.¹³ The ruling also exposes the concern in the courts and at the CSRC that the growing number of securities related fraud cases lodged by disgruntled shareholders, if handled incorrectly, could damage China's financial sector. The Court intends to deliberate internally and consult with legal experts over three to six months to develop consistent guidelines for hearing such cases. At last report, the Court issued a notice that provided that the CSRC must determine that there has been a violation of the securities law before suits can be brought, with the statute of limitations running from the time CSRC's determination.

C. DISCLOSURE AND TRANSPARENCY IN CHINA'S SECURITIES SYSTEM

On January 10, 2001, the CSRC issued the *Notice on Internet Disclosure of the Prospectus Prepared by a Company for an Initial Public Offering*.¹⁴ The *Notice* requires that the issuer and underwriters disclose the full prospectus (identical to the one approved by the CSRC) for the issuer's initial public offering on the Web site designated by the stock exchange. Such disclosure is to be made on the same date as the prospectus summary appears in its press release. Any discrepancy between the electronic version and that approved by the CSRC will result in public criticism by the CSRC. In addition, pursuant to this *Notice*, if investors suffer losses as a result of any default by the lead underwriter, the latter will be held responsible for the losses and required to take relevant remedy measures.

The CSRC issued, on March 17, 2001, *Guidance Opinion on Certain Issues Regarding Lead Underwriting of Share Issuance by Securities Companies*, describing the rights and obligations of an underwriter in the offering process.¹⁵ Among other tasks, the lead underwriter is to conduct due diligence, help the issuer establish a standardized management structure and ensure all directors of the issuer fully understand the liabilities imposed on them. Before formal application to the CSRC, the lead underwriter should internally review and examine the issuance proposal and issue a recommendation letter to the CSRC.

The CSRC issued the *Administrative Measures for the Issuance of New Shares by Listed Companies* on March 29, 2001 stipulating that a company who has just issued new shares must have average net asset returns greater than 6 percent over the previous three fiscal years before issuing new shares.¹⁶ Further, a securities company qualified to act as lead underwriter, and be approved by the CSRC must sponsor such an issuance of new shares. The company must wait at least one year between each new share issuance, and the total number of new shares may not exceed 30 percent of the company's total equity.

Under new regulations issued in May 2001, domestically listed companies must issue quarterly reports starting with the first quarter of 2002. The reports do not have to be

13. See generally Xiaochuan Zhou, Chairman, China Securities Regulatory Commission, *Securities Market Regulations in the Internet Age*, Speech at 2001 IOSCO Annual Conference, at <http://www.csrc.gov.cn/CSRCsite/eng/enews/efi20011121.htm> (last visited July 6, 2002).

14. CSRC, *Notice on Internet Disclosure of the Prospectus Prepared by a Company for an Initial Public Offering* (Jan. 10, 2001), available at <http://www.coudert.com/practice/chinanews22.htm> (last visited Sept. 22, 2002).

15. CSRC, *Guidance Opinion on Certain Issues Regarding Lead Underwriting of Share Issuance by Securities Companies* (Mar. 17, 2001), available at <http://www.coudert.com/practice/chinanews23.htm> (last visited Sept. 22, 2002).

16. CSRC, *Administrative Measures for the Issuance of New Shares by Listed Companies* (Mar. 29, 2001), available at <http://www.omm.com.cn/digest/010406/> (last visited Sept. 22, 2002).

audited but must contain basic financial information, such as core revenue, expenses, and net profit. The reports must also divulge any recent material developments. The new regulations are to take effect in phases, based on a company's financial history.

D. OPENING OF CHINA'S SECURITIES MARKETS

China's B share market (domestically listed foreign shares) opened to individual domestic investors in February 28, 2001. This move is a necessary precursor to the unification of the A and B share markets and other reforms. Any funds to be used by domestic investors to purchase B shares must be transferred from deposits in foreign exchange accounts or other acceptable format. For example, prospective domestic investors may transfer their foreign currency deposits (of at least U.S.\$1,000) into a B Share Guarantee Fund Account to establish individual B Share Fund Accounts and B Share Trading Accounts with a securities institution. After these required accounts have been established, the domestic investors may then trade B shares and place any proceeds accrued from the trading into their respective B Share Fund Accounts. Previously, B shares, denominated in U.S. dollars on the Shanghai Exchange and in Hong Kong dollars in Shenzhen, were open only to foreign investors. Domestic investors, however, used loopholes and false documents to trade B shares and accounted for as much as 70 percent to 90 percent of all B share activity before this change.

On May 17, 2001, MOFTEC issued the *Ministry of Foreign Trade and Economic Cooperation General Office, Circular of Issues Regarding Joint Stock Foreign Investment Companies*.¹⁷ When applying to issue A or B shares, existing joint stock foreign investment companies must obtain approval from MOFTEC and meet the following conditions including complying with policies regarding foreign investment industries. Additionally, when applying to list unlisted foreign shares, B share companies must meet conditions including that the percentage of unlisted foreign shares shall not be less than 25 percent of the total shares.

On October 23, 2001, CSRC announced that the mandatory sale of state-owned shares would be suspended, revoking the *Provisional Management Rules on the Reduction of State Owned Shares to Accumulate Social Security Pension Funds*, issued on June 13, 2001.¹⁸ These *Measures* provided that when a PRC company completed an initial public offering or a new issue, its shareholders owning State-owned shares must sell out a percentage of their shares equal to 10 percent of the proceeds of the IPO or the new issue. The proceeds from the sale of State-owned shares were to have been used as the national social security fund.

On November 5, 2001, MOFTEC and the CSRC jointly released *Opinions on Issues Related to Listed Companies Involving Foreign Investments*.¹⁹ The notice provided further details on legal requirements and processes for the domestic listing of foreign invested enterprises following MOFTEC Order No. 39 in May 2001.

17. See *Issues Concerning Foreign Invested Joint-stock Companies*, COMMERCIAL INFORMATION CIRCULAR NO. 129/01, at http://www.chamber.org.hk/info/what_on/Trade_Dept_Circular/trade_dept_circular129.asp (last visited July 6, 2002).

18. CSRC, *Provisional Management Rules on the Reduction of State Owned Shares to Accumulate Social Security Pension Funds* (Oct. 23, 2001), available at <http://www.omm.com> (last visited Sept. 22, 2002).

19. *Issues Related to Listed Companies Involving Foreign Investments*, Ops. of MOFTEC & CSRC (Nov. 5, 2001).

E. CHINA'S BOND MARKETS

On April 26, 2001 the CSRC issued the *Implementation Measures on Issue of Convertible Bonds by Listed Companies*.²⁰ These *Measures* provide detailed requirements and procedures for the issuance of convertible bonds by listed companies, including basic requirements of the issuer, application and approval procedures, issuance and underwriting, redemption, "sell-back" and conversion of issued bonds, disclosure of information, and legal liabilities for violation. Notably, the CSRC is adopting procedures for the examination and approval of applications for the issue of convertible bonds similar to those for stock offerings.

F. LOCAL SECURITIES REGULATION

On May 1, 2001 the *Broker Regulations For The Shanghai Municipality* issued by the Standing Committee of the Eleventh Shanghai Municipal People's Congress became effective.²¹ The *Regulations* were promulgated to standardize brokerage activities in the Shanghai Municipality. "Brokerage activities," refers to the provision of agency, commission and intermediary services, and the like, on a basis of entrustment, to facilitate trades between others. According to the *Regulations*, the term "broker" should be understood to include both individuals and institutions (such as companies, partnerships, and individual sole investment enterprises). The Shanghai Administration for Industry and Commerce is then stipulated as the authority responsible for broker registration, the administration of brokerage activities, and guidance of the Shanghai Brokers' Association.²²

II. Foreign Invested Enterprises

China's government amended two foreign-invested enterprises laws in order to better conform to WTO principles, specifically national treatment and most favored nation trading status. These amendments are another step in the revision of China's legal framework for foreign investment and de-emphasize MOFTEC's desire to strictly oversee foreign investment. Among the more significant changes, Wholly Foreign-Owned Enterprises (WFOEs) are subject to the *Catalogue for Foreign Investment*; further, foreign invested enterprises no longer have to report their operations plans to central authorities. Also, the provisions of China's *Contract Law* are made clearly applicable to WFOEs.

On March 15, 2001, the National People's Congress issued the *Decision on Amendments to the Law on Sino-Foreign Equity Joint Ventures* China's WTO commitments guided these amendments, which effect eight major changes in the EJV Law. These amendments include looser requirements for the filing of production plans and preferred treatment of domestic suppliers in the purchase of raw materials, fuels and other production materials. Further, the insurance industry in China has also been expanded, allowing consumers access to foreign invested insurance companies. In addition, workers will be allowed to establish labor unions, and joint venture parties may bring an action in People's Courts, in the absence of a written arbitration agreement or arbitration articles in the relevant joint venture contract.

20. CSRC, *Implementation Measures on Issue of Convertible Bonds by Listed Companies* (Apr. 26, 2001), available at <http://www.coudert.com/practice/chinanews> (last visited Sept. 22, 2002).

21. See REGULATIONS OF SHANGHAI MUNICIPALITY ON BROKERS, available at <http://www.sh.gov.cn/gb/shanghai/English/Bulletin/node1646/userobject26ai170.html> (last visited July 6, 2002).

22. *Id.*

On April 23, 2001, the State Council issued the *Decision on Amendments to the Implementation Rules of the Law on Wholly Foreign-Owned Enterprises*. Pursuant to the *Decision*, WFOEs are no longer required to adopt advanced technology or be export-oriented, and quotas for domestic and overseas market sales and preferential treatment of domestic suppliers have been abolished. Limitations on the use of intellectual property rights only for purposes of export or manufacture of new products urgently needed in China have also been withdrawn. However, the PRC authorities still mainly encourage WFOEs to adopt advanced technology or be export. WFOE will also enjoy looser administrative control as they are no longer obligated to file their production and operation plans or maintain a foreign exchange balance, and price controls on products sold on the domestic market have been abolished.

The year 2001 will likely rank as a significant year in China's legal development. The run-up to WTO accession saw a flurry of statutory and regulatory development in the Internet, intellectual property, telecommunications, legal services, taxation, securities, and foreign invested enterprises sectors. Many of these changes related to China's market access commitments and conforming China's foreign investment regime to the WTO national treatment and most-favored-nation disciplines. In the future, foreign investors will enjoy new benefits and opportunities (as well as risks) as China continues to open its markets and implement its WTO commitments. Foreign investors should keep a keen eye on the development of China's legal system. China's legal system will continue to adapt to implement its WTO commitments, but such adaptation might not be seamless. Practitioners should, however, not fall into the trap of assuming that, with WTO accession, legal reform in China will wane. Quite the opposite should be expected, and we should expect the unexpected.

III. Internet and Electronic Commerce

The *Telecommunications Regulations of the People's Republic of China* (Telecom Regulations), promulgated in September of 2000 by the State Council, marked the beginning of an ordered regulatory system for China's fledgling Internet industry and conferred regulatory authority upon the Ministry of Information Industry (MII).

Pursuant to the Telecom Regulations, the State Council also issued the *Measures for Administration of Internet Information Service* (IIS Measures),²³ which broadly defined Internet information services (IIS) as, "the provision of information services to online users via the Internet." The IIS Measures cover a very wide range of Internet activities.

The IIS Measures draw a distinction between commercial IIS (i.e., services provided for compensation) and non-commercial IIS. Entities that provide commercial IIS are subject to rigorous licensing and compliance requirements, while non-commercial IIS providers need only complete specified filing procedures. In addition, the IIS Measures stipulate that IIS providers in certain sensitive industries, such as publishing, education, health and pharmaceuticals must meet the approval requirements of the responsible administrative authority for the relevant industry.

A. REVISED TELECOM CATALOGUE

Most Internet-related services are regulated as telecom services, which are subject to significant foreign investment restrictions and approval procedures. In June 2001, the Min-

23. Issued by the State Council on September 25, 2000, and effective on the same date [hereinafter IIS Measures].

istry of Foreign Trade and Economic Cooperation (MOFTEC) revised the *Telecommunications Services Categorization List* (Telecom Catalogue),²⁴ providing more detailed guidance on the classification of Internet-related services that qualify as telecom services. The expansive PRC definition of telecom services includes such Internet-related activities as Internet backbone, X.25, DDN, ATM and frame relay data transmission services (i.e., basic telecom services) as well as a new category of value-added telecom services, including Internet Connection Services, Internet data centers, Internet information services (IIS), Internet virtual special networks, Internet-conference television and graphic services and Internet call centers.

B. NEW NATIONAL REGULATION

The evolution of China's legal system and the corresponding surge in new legislation led many China watchers to speculate on the possible emergence of a comprehensive, national electronic commerce law. However, in mid-2001, the MII made it clear that government policy currently favors the gradual development of regulations in specific industries to keep pace with the development of e-commerce. In line with this policy, 2001 witnessed the promulgation of legislation by the various ministries responsible for regulating business activities in specific IIS sectors.

1. *Internet Cafes*

During the past few years, hundreds of Internet cafes have appeared throughout China. In response, the MII, the Ministry of Public Security, the Ministry of Culture and the State Administration for Industry and Commerce jointly issued the *Measures for the Administration of Places of Business that Provide Internet Access Services* on April 3, 2001.²⁵ The measures apply to Internet cafes as well as other business places that provide Internet access services to the public. The measures outline the approval procedures and operating requirements for such businesses, as well as the penalties for violating the measures. Local authorities under the Ministry of Culture may impose penalties in cases involving computer games with pornographic, gambling, violent or superstitious content.

2. *Medical and Health Web Sites*

Services involving public health have always been highly regulated. Pursuant to the IIS Measures, the Ministry of Public Health issued the *Measures for the Administration of Online Medical Treatment and Health Information Services* (Online Health Measures) in January 2001.²⁶ Under these measures, approval is required from local public health bureaus for Web sites to publish medical and health information online.

The Online Health Measures make it clear that only licensed medical institutions may provide medical treatment over the Internet. Other online providers may offer consulting services, but are not allowed to provide online diagnosis or medical treatment.

24. *Notice on Adjustment of Telecommunications Services Categorization List*, Ministry of Information Industry (June 11, 2001).

25. *Measures for the Administration of Places of Business that Provide Internet Access Services*, jointly issued by Ministry of Information Industry, Ministry of Public Security, Ministry of Culture and State Administration for Industry and Commerce (Apr. 3, 2001).

26. *Measures for the Administration of Online Medical Treatment and Health Information Services*, Ministry of Public Health (Jan. 8, 2001) [hereinafter *Online Medical Treatment*].

As part of the approval procedures, operators of health and medical Web sites must submit materials concerning the measures taken to ensure the information to be provided online is safe for the general public. Approved Web sites receive an approval number to be placed on the home page of the Web site, together with the license or filing number.

3. *Pharmaceutical Web Sites*

Pursuant to the IIS Measures, the State Drug Administration issued the *Interim Provisions for the Administration of Online Pharmaceutical Information Services* in January 2001.²⁷ The provisions govern all domestic Web sites that provide pharmaceutical information services via the Internet. By definition, "pharmaceutical information," as used in these provisions, includes information concerning medical equipment and instruments, health materials and pharmaceutical packaging materials. Under the provisions, the State Drug Administration or its local branches must approve Web sites providing pharmaceutical information services.

Online pharmaceutical transactions, however, remain subject to the *Measures on Supervision and Administration of Pharmaceutical E-Commerce on a Trial Basis*, issued by the State Drug Administration on June 26, 2000.²⁸ In other words, absent approval pursuant to these measures, Web sites are proscribed from engaging in pharmaceutical transactions.

4. *Online Banking*

On July 9, 2001, the People's Bank of China (the "PBOC"), the chief regulatory authority in China's banking sector issued the *Provisional Measures for the Administration of Online Banking Services* (the "Online Banking Measures").²⁹ The Online Banking Measures apply to all banks established within China, including domestic banks and Sino-foreign joint venture banks, wholly foreign-owned banks and branches of foreign banks that provide financial services via the Internet. The PBOC will issue separate regulations to govern so-called "virtual banks" that exclusively provide banking services online. Currently, virtual banks are not permitted to provide financial services in China.

The Online Banking Measures set out a list of criteria that banks must meet in order to obtain approval to provide online banking services. For example, a branch of a foreign bank in China that applies to conduct online banking must show that the regulatory authorities in its home country have established an adequate legal framework and regulatory system for online banking services.

The Online Banking Measures also require that foreign-registered banks (including institutions in Taiwan, Hong Kong or Macao) that do not have a presence in Mainland China, but wish to provide online banking services to Mainland Chinese residents via the Internet, may apply for approval from the PBOC. Domestic banks wishing to provide online services to residents outside China are subject to an analogous application requirement.

5. *Securities*

The China Securities Regulatory Commission (CSRC) issued several notices concerning Internet-related securities activities. The *Notice in Relation to Introduction Via Internet of*

27. *Interim Provisions for the Administration of Online Pharmaceutical Information Services*, State Drug Administration (effective Feb. 1, 2001).

28. *Measures on Supervision and Administration of Pharmaceutical E-Commerce on a Trial Basis*, State Drug Administration (June 26, 2000).

29. *Provisional Measures for the Administration of Online Banking Services*, People's Bank of China (July 9, 2001).

*Companies Issuing New Shares*³⁰ requires a company wishing to issue new stock to introduce itself to investors through live online broadcasts over the Internet. The live online broadcasts must include text and graphics. The company must warrant in writing to the CSRC that the information to be disseminated contains no misleading statements or material omissions.

Another significant notice is the *Notice on Matters in Relation to Online Disclosure of Prospectuses of Companies that Conduct Initial Public Offerings*,³¹ which requires the issuer and the leading underwriters of an IPO to post the prospectus on Web sites designated by the stock exchange for the proposed listing.

6. Software Export

Keen to compete in the international software market, China has been proactive in establishing a detailed regulatory system governing the software industry. On October 25, 2001, several central ministries, including MOFTEC and the MII, jointly issued the *Measures on Software Export Administration and Statistics* (Software Export Measures),³² which includes provisions streamlining contract filing procedures and facilitating electronic exports of software products.

The Software Export Measures define the term "software export" broadly to include the export of tangible software products, the transfer or license of software technology, and the provision of information and data services, such as data processing, software applications, and the development of programming systems.

The Software Export Measures apply to the export of software delivered electronically and to the export of software stored on tangible media. Generally, exporters must present customs documentation in order to complete banking formalities related to receipt of the foreign currency sale price. An enterprise exporting software electronically is not subject to this requirement.

Because of current foreign exchange, customs and other regulatory requirements, most cross-border trade cannot take place online. The Software Export Measures represent an effort to facilitate cross-border e-commerce, albeit within the narrow field of software exports. It remains to be seen how efficiently the regime contemplated by the measures operates in practice.

7. Domain Names

In late 2000, the China Internet Network Information Center (CNNIC) was officially recognized by the MII as China's principal registrar for Chinese language domain names. Clarification of the CNNIC's registration policies and procedures continued into 2001. Foreign companies were permitted to register Chinese language domain names with PRC registrars without having a registered address in the PRC.

To address the increasing number of disputes involving domain names, several regulations on domain name dispute resolution for civil suits and arbitrations were promulgated during

30. *Notice in Relation to Introduction Via Internet of Companies Issuing New Shares*, China Securities Regulatory Commission (Mar. 1, 2001).

31. *Notice on Matters in Relation to Online Disclosure of Prospectuses of Companies that Conduct Initial Public Offerings*, China Securities Regulatory Commission (Mar. 1, 2001).

32. *Measures on Software Export Administration and Statistics*, jointly issued by Ministry of Foreign Trade and Economic Relations, Ministry of Information Industry, State Statistics Bureau, Ministry of Science and Technology, and State Administration of Foreign Exchange (Oct. 25, 2001).

the year. On January 1, 2001, the Domain Name Dispute Resolution Center of the China International Economic and Trade Arbitration Commission (CIETAC Domain Name Center) issued the *Procedural Rules for the Resolution of Domain Name Disputes (for Trial Implementation)*.³³ The CIETAC Domain Name Center is authorized by the CNNIC to resolve disputes involving domain names on China's Internet. CIETAC is the PRC arbitration body authorized to resolve disputes involving "foreign elements."

For Chinese language domain name disputes, the CNNIC issued in late 2000 the *Measures for the Resolution of Disputes Involving Chinese Language Domain Names on the Internet (for Trial Implementation)*.³⁴ For civil suits involving the registration and use of domain names, the Supreme People's Court issued the *Interpretation on Several Issues Concerning the Law Applicable to the Trial of Civil Disputes Involving Computer Network Domain Names* on July 17, 2001.³⁵ The *Interpretation* addressed issues such as the acceptance of cases, jurisdiction, and causes of action in domain name disputes. The *Interpretation* also discusses the circumstances under which a defendant's actions are deemed to infringe a third party's rights or to constitute unfair competition.

The MII also exerted its administrative power to fight cybersquatting and "pirate" registrations. In response to a question raised by the CNNIC, the MII issued the *Official Reply Concerning the Handling of Bad Faith Acts of Using Domain Name Resources* (Official Reply).³⁶ CNNIC has encountered the problem of companies pre-registering domain names, but not submitting the necessary hard copy documents and paying the registration fees to CNNIC as required by the *Interim Measures for the Administration of the Registration of Chinese Internet Domain Names*.³⁷ The Official Reply provided that CNNIC will discontinue an application if the applicant fails to submit the paper application documents within the required thirty-day period.

C. SIGNIFICANT LOCAL REGULATIONS

Although many local regulations in China simply mirror national legislation, in some cases local authorities issue regulations to deal with activities not covered by national law. Some significant examples are set out below.

1. Tianjin: E-Commerce Rules

Despite the absence of comprehensive national e-commerce legislation, Tianjin Municipality promulgated the *Interim Measures for the Administration of the Implementation of Electronic Commerce in Tianjin*.³⁸ These measures specify the types of business activities an

33. *Procedural Rules for the Resolution of Domain Name Disputes*, CIETAC Domain Name Center (Jan. 1, 2001).

34. *Measures for the Resolution of Disputes Involving Chinese Language Domain Names on the Internet*, CNNIC (Dec. 1, 2000).

35. *Interpretation on Several Issues Concerning the Law Applicable to the Trial of Civil Disputes Involving Computer Network Domain Names*, Supreme People's Court (July 24, 2001).

36. *Official Reply Concerning the Handling of Bad Faith Acts of Using Domain Name Resources*, Ministry of Information Industry (Aug. 23, 2001).

37. *Interim Measures for the Administration of the Registration of Chinese Internet Domain Names*, CNNIC (Nov. 1, 2000).

38. See report of *Implementation of Interim Measures for the Administration of Electronic Commerce*, by Chen Baohui on *Tianjin Daily*, Feb. 1, 2001.

economic entity must register with the Tianjin Municipal Administration for Industry and Commerce. Such activities include posting business-type advertisements via the Internet and, more generally, activities that aim to generate profits from the Internet. The measures also stipulate the standards that must be followed to disseminate commercial information via email.

2. *Beijing: Online Advertising Rules*

Online advertising activities are subject to the *Advertising Law of the People's Republic of China* (Advertising Law).³⁹ The State Administration for Industry and Commerce and its local branches are responsible for regulating the advertising sector. Pursuant to this regulatory framework, the Beijing Municipal Administration for Industry and Commerce (Beijing AIC) issued the *Interim Measures of Beijing Municipality for the Administration of Online Advertising*, effective May 1, 2001 (Beijing Online Advertising Measures).⁴⁰

The Beijing Online Advertising Measures introduce specific rules concerning online advertising. For example, these measures define online advertising to include banner ads, hypertext link ads and e-mail ads posted on Internet Web sites or Web pages.

Under the Beijing Online Advertising Measures, the content of online advertisements must be reviewed by the Beijing AIC through its Online Advertising Management Center prior to posting on Web sites. This mirrors provisions concerning the review process for traditional ads as set out in the Advertising Law. However, for online advertisements, the Beijing AIC goes a step further by transmitting the reviewed online ad directly to the Web site.

3. *Hainan: Digital Certificate Rules*

The provincial government of Hainan, China's largest economic development zone, issued the *Interim Measures for the Administration of the Certification of Digital Certificates* (Hainan Digital Certificate Measures).⁴¹ The Hainan Digital Certificate Measures are among the first Chinese regulations to define terms such as *electronic document*, *digital signature*, *digital certificate* and *digital certificate certification authority*. Although the definitions apply only in Hainan, they may have reference value elsewhere in China.

The Hainan Digital Certificate Measures require an institution to obtain a qualification certificate from the Hainan Information Industry Bureau (the "HIIB") in order to engage in certification activities. The Hainan Digital Certificate Measures also provide that, once certified, an institution may produce, issue, and administer digital certificates, confirm the authenticity of the digital certificates it issues, provide electronic document certification services and digital certificate index search services, and engage in other activities as approved by the HIIB.

The Hainan Digital Certificate Measures appear to be the first legislation of its kind in China. Certification authorities in other parts of China are affiliated with the local regulators for the information industry and appear to operate in accordance with internal ad-

39. See *id.* at 9.

40. *Interim Measures of Beijing Municipality for the Administration of Online Advertising*, Beijing Municipal Administration for Industry and Commerce (May 1, 2001).

41. *Interim Measures for the Administration of the Certification of Digital Certificates*, Hainan Provincial People's Government (Aug. 9, 2001).

ministrative rules rather than publicly issued legislation. The Hainan Digital Certificate Measures represent a departure from this practice, and may serve as a model for regulations in other localities in China.

IV. Trademarks

In preparation for WTO accession China promulgated, on October 27, 2001, the amended *Copyright Law* and the amended *Trademark Law*.⁴² The *Trademark Law of 2001* marks a second time that it is amended in an effort to comply with the Trade-Related Intellectual Property Rights Agreement (TRIPs). The *Trademark Law of 2001* has clarified a number of contentious issues.

A. MAIN FEATURES OF THE NEW LAW

The *Trademark Law of 2001* provides:

1. An expansion of the scope of protection to collective marks, certification marks, three-dimensional marks and famous marks;⁴³
2. A new basis for claim of priority if the mark was used with a product at an exhibition sponsored or approved by the Chinese government;⁴⁴
3. Judicial review of the decisions by the administrative agencies;⁴⁵
4. New grounds for cancellation of registration;⁴⁶
5. Availability of preliminary injunction or temporary restriction order for trademark infringement;⁴⁷
6. Availability of statutory damages for infringement.⁴⁸

B. SCOPE OF PROTECTION

For the first time, collective, certification, three-dimensional, and colors as marks are registrable in China. The types of marks that are registrable are defined by Articles 3 and 8 and limited by Articles 10 and 11.

Article 10 provides for marks that are identical or confusingly similar to the name of a state or country, a national flag, emblem, medal; the name of famous places or buildings, government organizations, international organizations, Red Cross, Red Crescent, terms inferring racial prejudice; promotional or aggrandizing terms, terms that harm the morals of the society or have other harmful effects. Article 11 provides for generic names of a product, terms that are descriptive of the quality, the major ingredients, the use, the weight or amount or other characteristics of a product and non-distinctive terms cannot be registered. These Articles define terms or symbols that are not registrable under the laws of many nations.

42. See generally <http://www.IP.net.cn/news> (last visited Nov. 2, 2001).

43. Trademark Law of 2001, art. 3.

44. Trademark Law of 2001, art. 25.

45. Trademark Law of 2001, art. 33.

46. Trademark Law of 2001, arts. 44, 50 and 53.

47. Trademark Law of 2001, art. 55.

48. Trademark Law of 2001, art. 56.

C. FAMOUS MARKS

A major issue with the *Trademark Law of 1983 and 1993* was the lack of provisions for the protection of famous marks. This appeared to have been remedied when China became a member of the Paris Convention in 1985 and explicitly provided under Article 142 of its *General Principles of the Civil Code*.⁴⁹

If any international treaty concluded or acceded to by the People's Republic of China (PRC) contains provisions differing from those in the civil laws of the PRC, the provisions of the international treaty shall apply unless the provisions are the ones for which the PRC has announced reservations.

China had not made any reservations under the Paris Convention and it would appear that famous marks would be protected. However, until recently when China had to show its intention to abide by the Paris Convention for entry into the WTO, it had not enforced rights under famous marks. It was only in 2000 and 2001 that the courts decided to use the famous mark provision to enforce the rights under the marks: IKEA,⁵⁰ DUPONT,⁵¹ and ROLEX.⁵² But these marks were registered in China. Therefore, it was unclear whether the courts would enforce the rights under a famous mark that is not registered in China.

Article 13 of the *Trademark Law of 2001* explicitly provides for the protection of famous marks. It states that a mark that is identical or confusingly similar to a famous mark is not registrable and the use of such a mark is prohibited. Further, Article 14 sets forth five factors for determining whether a mark is famous. These are:

1. Knowledge by the public of the mark at issue;
2. Time in which the mark has been in continuous use;
3. Time and geographical area in which the mark has been continuously promoted;
4. The history of the protection of the mark as a famous mark; and
5. Other factors showing that the mark is famous.

Based on these provisions, it may be easier to protect a famous mark that has not been registered in China.

D. CANCELLATION PROCEEDINGS

Under Article 44 of the *Trademark Law of 2001* there are four grounds for the cancellation of a mark:⁵³

1. Alteration of a registered mark;
2. Alteration of the name and address of the registrant;
3. Unrecorded transfer of a registered mark; and
4. Non-use for a continuous period of three years.

It is, therefore, important to record the change in name and address of the registrant and the assignment of a registered mark with the State Administration of Industry and Com-

49. *General Principles of the Civil Code*, art. 142 (Jan. 1, 1987).

50. China Intellectual Property Newsletter, at <http://www.chinalaw.cc> (last visited Dec. 28, 2000).

51. *Id.*

52. Private communication, Beijing Second Intermediate Court Decision No. 5, Sept. 20, 2001.

53. Trademark Law of PRC, art. 44 (2001).

merce (SAIC). If such changes were not recorded, these would provide further bases for the cancellation of a mark in addition to non-use. If a registered mark has been changed, it may be necessary to file a new application for the changed mark. Presently, the SAIC is very strict about amendment of a mark. It does not allow even the change of an English language mark from the upper case to the lower case.

E. JUDICIAL REVIEW

The *Trademark Law of 2001* now provides for judicial review of the decisions of the Trademark Bureau and the Trademark Administrative Bureaus under the SAIC.⁵⁴ This is new and welcomed. Hopefully, this will put the decisions by the SAIC during prosecution under scrutiny. It may also open up the decision process of the Trademark Administrative Bureaus.

F. PROVISIONAL REMEDIES

Article 55 of the *Trademark Law of 2001* explicitly empowers the Trademark Administrative Bureaus to grant provisional remedies in an infringement case. The enforcement of trademark rights by the Trademark Administrative Bureaus would now be more effective.

G. STATUTORY DAMAGES

Article 56 of the *Trademark Law of 2001* provides for statutory damage of up to RMB 500,000 (U.S.\$60,240) if it is difficult to prove the damages for infringement. The lack of discovery under the Chinese legal system has often made it difficult to prove the actual amount of damages suffered. Previously, trademark owners would resort to the use of private investigations. However, these investigations are often very expensive and not justified by the amount of damages uncovered. This may provide a welcome relief.

H. OTHER FEATURES

Under Chapters III and IV of the *Trademark Law of 2001* the registration process appears to have been simplified. However, the implementing regulations under the new law have not yet been promulgated. In the interim, if the SAIC applies the regulations that are still in place then the provisions of the new law would not have any actual effect. It is hoped that the new implementing regulations will be in place in the near future.

V. Copyrights

In 2001, the Chinese National People's Congress Standing Committee finally passed the long-awaited *Amendment to PRC Copyright Law* and the State Council issued the new *Computer Software Protection Regulations*.⁵⁵ These changes in copyright laws and regulations hon-

54. Trademark Law of PRC, arts. 32, 33 (2001).

55. *Computer Software Protection Regulations*, Copyright Law of the People's Republic of China, adopted by Chinese National People's Congress Standing Committee on October 27, 2001, 15 China L. & Prac. No. 10, 53 (Dec. 2001/Jan. 2002) [hereinafter Copyright Law]; Computer Software Protection Regulations issued by State Council on December 20, 2001, at http://www.law-lib/law_view.asp?id=16805 (last visited July 3, 2002).

ored China's WTO commitment, and literally bring copyright protection and enforcement in China to a higher level.

A. MAJOR CHANGES TO COPYRIGHT LAW

The *Amendment to PRC Copyright Law* expands copyright protection to acrobatic works, architectural works and three-dimensional model works.⁵⁶ In addition, compilation works, such as databases, are protected as long as the selection or arrangement of the elements shows originality.⁵⁷ The new rights conferred to copyright holders include (1) the right of rental of cinematographic work and work created by a process analogous to cinematography and computer software (except computer software is not the essential object of the rental); and, (2) the right to disseminate by information network any types of copyrighted works, that is, the right to make the copyrighted works available to the public by wire or wireless means thereby enabling the public to access the work at the time and place of his/her choice.⁵⁸ These new rights confirmed some aspects of online copyright protection as indicated in the Supreme People's Court's judicial interpretation issued at the end of 2000.⁵⁹

The neighboring rights include rights of publishers, performers, producers of sound and video recordings and radio and television stations. The amendment either expands or limits these rights. For publishers' rights, the amendment improves the protection of the publishers' interests. For example, under the old law, the exclusive publishing right under a publishing contract is limited to ten years. Now, no such restriction is imposed. Additionally, a publisher has the exclusive right to the layout design of the books and periodicals for ten years following the first publication of such layout design.⁶⁰ For performers' rights, the amendment provides performers with the following new rights in their performance: (1) to authorize others to publicly transmit their live performance and to receive compensation; (2) to authorize others to make, reproduce and distribute sound or video recordings of their performance and to receive compensation; and (3) to authorize others to disseminate their performance to the public through the information network and to receive compensation. The protection period for these rights is fifty years. The performance organizer and licensee of the above rights shall obtain permission from copyright holders of the works being performed and pay compensation to the copyright holders.⁶¹ For rights of sound and video recording producers, the amendment restricts their rights by requiring these producers to obtain permission from copyright owners and to make payments to copyright owners before making sound or video recording using copyrighted works. The exception is that of producing sound recording, which use music work that has previously been legally produced, as sound recording does not require permission from copyright owner; however, remuneration shall be paid to the copyright owner unless the copyright owner declared that that use is not permitted.⁶² For rights of radio and television stations, the amendment permits

56. See Copyright Law, *supra* note 55, art. 2.

57. See *id.* art. 14.

58. *Id.* art. 10.

59. See Interpretation of the Supreme People's Court on Certain Issues Concerning the Application of Law in the Hearing of Cases Involving Computer Network Copyright Disputes [Business Regulation] China L. Foreign Bus. (CCH) P11-720 (Dec. 21, 2001).

60. See IIS Measures, *supra* note 23, arts. 30, 35.

61. *Id.* arts. 36-38.

62. *Id.* art. 39.

radio and television stations to broadcast published work without permission from copyright owner; but they shall pay remuneration. This is different from the old copyright law in that under the old copyright law, if the copyright owner declares that the broadcasting of his work is not permitted, the radio or television station shall not broadcast the work. This rule is also applicable to published sound recordings unless related parties have agreed otherwise, which replaces the old rule that non-business broadcasting of published sound recording is free and permission is not needed. A television station that wishes to broadcast cinematography work or work created by a process analogous to cinematography work or video recording shall obtain permission from the producer and pay remuneration. When broadcasting another's video recording, the permission of the copyright owner shall also be obtained and remuneration paid. A radio or television station shall have the right to prohibit the following acts when undertaken without permission: (1) rebroadcast of its radio or television broadcasts, and (2) recording onto a sound or video medium of its radio or television broadcasts and the reproduction of such sound or video medium.⁶³

B. LIMITATION TO COPYRIGHTS

Pursuant to the *Amendment to PRC Copyright Law*, under certain circumstances, copyright law guarantees using copyrighted work without permission and payment ("exemption"). The amendment has made changes on limitations to copyrights. For example, in a current event report, exemption is available for an *unavoidable* showing or quoting published work. The amendment adds the requirement of "unavoidable."⁶⁴ The mass media may publish or broadcast an article on a current political, economic or religious topic already published by other mass media, except where the author has declared that printing or broadcast of such article is not permitted. The author's declaration exception is a limitation to the exemption, which is not in the old copyright law.⁶⁵ Under the old copyright law, the government authority could use copyrighted work for free; the amendment, however, requires that such use be limited to a reasonable extent.⁶⁶ The amendment further limits the exemption for free performance of a published work to the scenario where neither charge is collected from the public nor remuneration is paid to the performers for the performance.⁶⁷ A new exemption is added for using copyrighted works to compile and publish textbooks under the Chinese nine-year compulsory education and state educational plan.⁶⁸

C. NEW MEASURES FOR ADMINISTRATIVE PROTECTION AND JUDICIAL ENFORCEMENT OF COPYRIGHTS

The *Amendment to PRC Copyright Law* provides the copyright administrative authority with new tools to fight copyright infringement and passing-off acts. Besides the authority to confiscate illegal income and impose fines, under the amendment the copyright administrative authority may (a) order the infringer to cease the infringing act; (b) confiscate and

63. *Id.* arts. 42-45.

64. *Id.* art. 22(3) (emphasis added).

65. *Id.* art. 22(4).

66. *Id.* art. 22(7).

67. *Id.* art. 22(9).

68. *Id.* art. 23.

destroy infringing copies; and (c) confiscate the materials, tools, equipment, etc. mainly used to manufacture infringing copies, if the circumstances are serious. These penalties apply to the following violations, which were added by the amendment, unless otherwise provided in laws or administrative regulations: (1) deliberately circumventing or cracking the technical measures taken by a copyright owner or owner of neighboring rights to protect his copyright or neighboring rights in a work, sound recording, video recording, etc. without the permission of such copyright owner or owner of neighboring rights; and (2) deliberately removing or modifying the electronic rights control information contained in a work, sound recording, video recording, etc. without the permission of such copyright owner or owner of neighboring rights.⁶⁹

The *Amendment to PRC Copyright Law* provides new judicial remedies to protect copyrights, such as pre-trial injunction and specified methods to calculate infringement damages. These measures are very similar to those discussed in the patent law section of this article.

D. COMPUTER SOFTWARE PROTECTION REGULATIONS

Before the *Amendment to PRC Copyright Law*, foreign computer software copyright owners literally enjoyed "super-national treatment" by enjoying voluntary registration, a longer protection period, and additional rights that are not available to domestic computer software copyright owners.⁷⁰ The *Amendment to PRC Copyright Law*, however, eliminates these differences and treats the computer software the same as protected copyrighted literary works under the revised *Copyright Law* by conferring new types of rights, redefining limitations to copyrights, canceling mandatory registration requirements, and providing administrative and judicial protection and a damages calculation standard.

1. *New Computer Software Copyrights*

According to the amendment,⁷¹ "discovery," "principle," "calculation method," and "concept" other than "mathematics concepts," which are excluded from computer software protection, are not excluded.⁷² The amendment provides the right of rental and right of information network dissemination to software copyright owners. And "the rights of distribution" is defined to include rights to provide software to the public for free. The rights to use software in exhibitions and in annotated forms, however, are not expressly listed.⁷³ The amended *Computer Software Protection Regulations* clarify the scope of "work made for hire" to include computer software created mainly by using capital, special equipment, undisclosed proprietary information, and other material and technical resources of a legal person or other organization and the responsibility for which is borne by such legal person or other organization.⁷⁴

69. *Id.* art. 47.

70. See Regulations for the Implementation of International Copyright Treaties [Business Regulation] China L. Foreign Bus. (CCH) P11-703 (Sept. 25, 1992); see also Computer Software Protection Regulations (old) [Business Regulation] China L. Foreign Bus. (CCH) P11-704 (June 4, 1991); see also Rengan Sheng, *Entry into WTO and Copyright Protection in China*, CHINA INTELLECTUAL PROPERTY YEAR BOOK 3 (Year 2000 ed., China Intell. Prop. Pub.) (2001).

71. See *Computer Software Protection Regulations*, *supra* note 55.

72. *Id.* art. 6.

73. *Id.* art. 8.

74. *Id.* art. 13.

2. *Limitations to Computer Software Copyrights*

Pursuant to the *Computer Software Protection Regulations* an owner of a legal copy of computer software has the right to install the software into computers "and other equipment that is capable of information processing," which expands software users' rights.⁷⁵ The old regulations permit software owners to make a back-up copy "for file." The amendment, however, only permits software owners to make a back-up copy "to prevent the software copy from being destroyed."⁷⁶ One significant limitation to copyright owners is that for the purposes of studying and researching the ideas and principles imbedded in the software, it is permitted to use software by installing, displaying, transmitting, or saving software or in other means without permission from copyright owner and payment. Terms like "study," "research," and "other means" to use software are not clear and as a result may become excuses for software infringement. This exemption replaces the old exemption, which permitted reproduction of a small number of software for non-business purposes such as classroom teaching, scientific research and performance of public duty by government.⁷⁷ In addition, if newly developed software is similar to an existing one because of limited options available for expression, the software developer is not engaging in copyright infringement.⁷⁸ If the software developer does not know and has no reasonable reason to know that the copy is infringing upon another copy, such software developer is not liable for compensation due to the infringement. But the developer shall cease to use and destroy the infringing copy. If such cease and destroy will cause significant loss to the software developer, he may continue to use the infringing copy by paying a reasonable royalty to the copyright owner.⁷⁹

3. *Software License, Transfer and Registration*

The *Computer Software Protection Regulations* provide that a software copyright holder "may" register the software with the software registration institute recognized by the copyright administrative authority. The registration document is a preliminary proof of registered subjects.⁸⁰ The old regulations require software registration and the registration is the condition precedent to applying for administrative protection and initiating a civil action.⁸¹ Under the amendment, copyrights in software begin from the date that the development of the software is completed. If the developer is an individual, the protection period for the copyright will be the entire life of the individual and fifty years following his death. If the developer is a legal entity or other organization, the protection period will be fifty years following the publication of the software.⁸²

Under the *Computer Software Protection Regulations* software may be transferred by the legal successor of the copyright owner. Copyright licenses and transfer contracts are not required to be registered with the copyright administrative authority. To protect the copyright owner, the right that is not expressly licensed or transferred in the contract, is still vested with the copyright owner. In addition, a license that is not expressly categorized as

75. *Id.* art. 16.

76. *Id.*

77. *Id.* art. 17.

78. *Id.* art. 29.

79. *Id.* art. 30.

80. *Id.* art. 7.

81. See *Computer Software Protection Regulations* (old), *supra* note 70, art. 24.

82. See *supra* note 38, art. 14.

an exclusive license in a license contract will be construed as a non-exclusive license. To transfer or license software copyright from a Chinese individual or legal entity to foreign countries, the general rule regarding technology import-export applies, which takes the place of the old rule for approval.⁸³

4. *Administrative and Judicial Enforcement of Computer Software Copyrights*

Under the *Computer Software Protection Regulations* the measures that copyright administrative authorities may take to penalize software infringement activities are generally the same as those stipulated in the revised *Copyright Law*. The fines such authorities may impose are specified in the amended regulations. The new judicial remedies to protect computer software copyrights are the same as those stipulated in the new *Copyright Law*, such as pre-trial injunction, preservation of property and evidence, and calculation of damages.⁸⁴

VI. Patents

In 2001, the major changes in patent law and practice in China included the implementation of the amended *Patent Law*, new legislation to protect integrated circuit layout designs, improvement in administrative and judicial protection of patent rights, and simplified administrative procedures of technology import and export.

A. THE IMPLEMENTATION OF AMENDED PATENT LAW

The *Patent Law*, which was amended on August 25, 2000, took effect on July 1, 2001, together with the *Implementation Rules for Patent Law*.⁸⁵ The amendments provided to patent right holders new substantive rights, simplified patent application procedures, and improved administrative and judicial enforcement procedures.

To comply with TRIPs,⁸⁶ the amendment confers a patent right holder the right of "offer for sale," which means no one may offer for sale a product that is covered by a valid patent without the authorization of the patent right holder. Thus, the patent right holder may stop infringement before the actual sale of infringing products.⁸⁷

The patent right holder and the interested party may apply for a court order to cease the infringement acts before actually filing infringement claims if any delay to stop the acts is likely to cause irreparable harm to legitimate patent rights.⁸⁸ The Supreme People's Court issued a detailed judicial interpretation to implement the preliminary injunction.⁸⁹ The

83. *Id.* arts. 18–22.

84. *Id.* arts. 24–25.

85. Patent Law of the People's Republic of China [Business Regulation] China L. Foreign Bus. (CCH) P11–600 (July 1, 2001) [hereinafter Patent Law]; Implementation Regulations of the Patent Law of the People's Republic of China [Business Regulation] China L. Foreign Bus. (CCH) P11–603 (July 1, 2001) [hereinafter Implementation Rules for Patent Law].

86. Agreement on Trade-Related Aspects of Intellectual Property Rights, 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).

87. See Patent Law, *supra* note 85, art. 11.

88. See *id.* art. 61.

89. Several provisions on Issues Concerning the Application of Law to Pre-litigation Injunctions to Cease Patent Infringement Activities issued by Chinese Supreme Court on June 5, 2001 (Fa Shi (2001) No. 20), 15 China L. & Prac. No. 7, 83.

applicant must provide security at the time of application for the injunction order. The courts are required to make a decision within forty-eight hours. If the infringement claim is not filed within fifteen days after the injunction, the injunction order will expire.⁹⁰

Under the new *Patent Law*, if a party uses or sells patent-infringing products without knowing that they are infringing products, the seller or user has the burden to prove that the product comes from a legitimate source. Otherwise, it will be liable for the infringement.⁹¹

The amendments to the *Patent Law* (1) provide that if the infringement damage is hard to be determined, the court may impose statutory damages, which can be a multiple of patent royalties, which is explained in detail at the later part of this article;⁹² (2) remove the revocation procedures in patent application and streamlines the invalidation procedure as the only available way to challenge the validity of patent rights;⁹³ and (3) provide judicial remedy to challenge the decisions of State Intellectual Property Office (SIPO) on the patentability of utility model patent, which is final before the amendment.⁹⁴

In addition, the amendment clarified the issues relating to burden of proof in process patent infringement, statute of limitation, patent agent liability, administrative enforcement of local authority, and international applications. SIPO also revised its examination manual and issued regulations to deal with the transition period between the old law and new law, especially for utility model patent.⁹⁵

B. THE PROTECTION OF INTEGRATED CIRCUIT LAYOUT DESIGN

In 2001, the Chinese State Council promulgated the Regulations for the Protection of Integrated Circuit Design (IC Design Regulations) and SIPO issued relevant implementation rules to protect integrated circuit (IC) layout designs.⁹⁶

To qualify for protection under IC Circuit Regulations, the IC designs must possess originality. The exclusive rights conferred under IC Regulations include the right to duplication and the right to commercialization.⁹⁷ The IC designs must be registered with SIPO to be granted the exclusive rights. Especially, applicants must file a registration application for IC designs within two years after the date that they first commercially exploit them anywhere in the world.⁹⁸

Any IC designers that are Chinese natural persons, legal entities, or other organizations have exclusive rights to their IC designs. Foreign natural persons or legal entities that commercially exploited the design first in China or in a country having a

90. See *id.* art. 12.

91. See *Patent Law*, *supra* note 85, art. 63.

92. See *id.* art. 60.

93. See *id.* arts. 45–46.

94. See *Patent Law*, *supra* note 85, art. 41.

95. *The Transition Rules for Implementation of Amended Patent Law and Its Implementation Rules*, PRC STATE INTELLECTUAL PROPERTY OFFICE GAZETTE No. 78 (June 25, 2001), available at http://www.sipo.gov.cn_English/gysipo_e/gjhz_e/default.htm (last visited July 7, 2002).

96. *Regulations for the Protection of the Layout Design of Integrated Circuits*, China L. Foreign Bus. (CCH) P1-730 (Apr. 2, 2001) [hereinafter *IC Design Regulations*]; *Implementation Rules of Regulations for the Protection of the Layout Design of Integrated Circuits issued by SIPO September 18, 2001*, 15 China L. & Prac. No. 9, at 51.

97. See *IC Design Regulations*, *supra* note 96, art. 7.

98. See *id.* art. 17.

relevant bilateral or international treaty with China also have exclusive rights to their designs.⁹⁹

The IC Design Regulations provide certain exemptions and limitations to the exclusive rights, including research, first sale, innocent infringement and compulsory license. Research exemption refers to reproducing a protected IC design for individual purpose or for the sole purposes of evaluation, analysis, research and teaching and creating a new design based on the foregoing research. The exclusive rights are exhausted after the first sale of products containing IC designs. A person is not liable for infringement if he or she commercially exploits an IC or an article with such IC without knowing, or having any reasonable ground to know, that it incorporates an illegally reproduced IC design. After receiving a notice of infringement, the dealer or user must, however, pay reasonable royalties to the exclusive rights holder for the goods remaining in stock or previously ordered. SIPO may grant a compulsory license to exploit an IC design to a third party applicant if (a) there is a national emergency; (b) it is in the public interest to do so; or (c) the exclusive rights holder of the IC design is engaging in unfair competition. The compulsory license decisions are subject to administrative and judicial reviews. In addition, the duplication or commercialization of an IC design that is independently created but identical to an IC design created by others is not infringement.¹⁰⁰

The IC Design Regulations provide remedies for infringement of exclusive rights, such as preliminary and permanent injunction and compensation for damages incurred in infringement.¹⁰¹

C. ADMINISTRATIVE PROTECTION OF PATENT RIGHTS

Administrative protection has been and will continue to be a special feature of Chinese intellectual property enforcement. SIPO is taking a more active role in monitoring the local patent administrative authorities in handling patent disputes in order to have nation-wide unified enforcement of patent rights. According to a relevant report, SIPO has required the local patent administrative authorities to report major patent cases within their jurisdictions.¹⁰² SIPO also issued the new Patent Administrative Enforcement Rules, which replace the prior similar rules.¹⁰³ In these new rules, SIPO and local patent administrative

99. *See id.* art. 3.

100. *See id.* arts. 24–29.

101. *See id.* art. 32.

102. *See* news report, in Chinese, dated December 12, 2001, Xinhua News Agency, at <http://tech.sina.com.cn/it/e/2001-12-27/97545.shtml> (last visited July 7, 2002). The major patent infringement cases include the following seven types: (1) the infringed party is from foreign countries, Hong Kong, Macao and Taiwan and the infringement damage is over RMB 100,000, or the infringer is from foreign countries, Hong Kong, Macao or Taiwan; (2) patent infringement with damage over RMB 100,000 that involve technology in the fields of information, biology, pharmaceutical and environment protection; (3) patent disputes that involve over three provinces or involve multiple parties with serious results; (4) cases with infringement damages over RMB 200,000; (5) passing-off patent cases with illegal income of over RMB 100,000; (6) patent passing-off cases with penalty over RMB 30,000; (7) other difficult cases, or cases having material effects that need direction, monitor and organization from SIPO during the handling of these cases. In addition, SIPO emphasized that special major patent cases that related to the state economic security and personal safety shall be reported to SIPO immediately or within one week of filing. *Id.*

103. SIPO DIRECTOR GENERAL ORDER NO. 19, *Patent Administrative Enforcement Rules*, Dec. 17, 2001 [hereinafter *Patent Administrative Enforcement Rules*], at http://www.law-lib.com/law/law_view.asp?id=16917 (last visited July 7, 2002).

authorities further strengthen their authority and power in handling patent infringement disputes, mediating patent disputes, and investigating and punishing patent passing-off activities. Especially, the new rules provide SIPO and local patent administrative authorities much more power in investigation and collection of evidences than the old rules.

1. *Handling Patent Infringement Disputes*

The *Patent Administrative Enforcement Rules* require that the patent administrative authority must assign three or more persons to handle every patent infringement dispute. It is important that the *Patent Administrative Enforcement Rules* expressly stipulate that “equivalent characteristics” shall be considered in determining whether there is infringement. The “equivalent characteristics” refers to characteristics that perform substantially the same function in substantially the same way as the claimed technical features to produce substantially the same result, and the person with ordinary skills in the art may find out such equivalent characteristics without inventive labor.¹⁰⁴ This is very similar to the “doctrine of equivalents” in U.S. law.¹⁰⁵ If the patent administrative authority determines that the patent infringement occurred, it may (a) order the infringer to stop the infringement activities, (b) destroy the equipment or module for manufacturing the infringing products, and (c) take measures to prevent the products in stock from being sold, used or entry into market in any way. The administrative decision on infringement will not stay during the appeal period of such decision at the People’s Court.¹⁰⁶

2. *Passing-off Actions*

The *Patent Administrative Enforcement Rules* require the patent administrative authorities to act promptly on patent passing-off cases and assign two or more staff to handle the case. If the patent administrative authority determined that the passing-off occurred, the infringer shall be ordered to (1) remove the patent marks from the infringing products, or destroy such products if patent mark is difficult to be removed; (2) stop advertising the misleading patent information; (3) change relevant contract, and (4) submit the fabricated patent certificates or documents. In addition, all patent passing-off penalty decisions shall be published.¹⁰⁷

D. JUDICIAL REMEDIES FOR PATENT INFRINGEMENT

Chinese Supreme People’s Court issued numerous notices and judicial interpretations, such as Issues Concerning the Application of Law to Pre-litigation Injunctions to Cease Patent Infringement Activities¹⁰⁸ and Questions Concerning the Application of Law to Handle Patent Disputes Cases Several Provisions (Patent Trial Interpretation) to implement the changes in Patent Law.¹⁰⁹ The Patent Trial Interpretation covers both civil disputes and administrative cases that challenge the administrative decisions of SIPO and/or local patent administrative authorities. In addition, Supreme People’s Court issued Several Provisions

104. See *Patent Administrative Enforcement Rules*, *supra* note 103, arts. 4–15.

105. See *Graver Tank & Mfg. Co. v. Linda Air Products Co.*, 339 U.S. 605 (1950).

106. See *Patent Law*, *supra* note 85, art. 33.

107. See *id.* art. 36.

108. See *Online Medical Treatment*, *supra* note 26.

109. See generally *Several Provisions on Issues Concerning the Application of Law in Hearing Cases Involving Patent Disputes*, Supreme People’s Court, June 22, 2001, effective July 1, 2001, at http://www.law-lib.com/law/law_view.asp?id=15366 (last visited July 7, 2002).

Regarding Civil Litigation Evidences (Civil Evidence Rules), which is unprecedented in Chinese legal history and will have an effect on patent infringement civil cases regarding the collection, admission, exchange, and proving power of evidences.¹¹⁰ Finally, Beijing's Highest People's Court issued Opinions on Several Problems in Determining Patent Infringement (trial), which stipulate the principles of claim construction, doctrine of equivalents, prosecution history estoppel, etc., which might be important for future application throughout the country.¹¹¹

The *Patent Trial Interpretation* stipulates detail standards to determine the proper jurisdiction and further specifies the conditions and procedures to stay the infringement trial when defendant initiate invalidation proceedings at SIPO. For utility model and industrial design patents, to stay the infringement trial, the request for stay must be made within the responding period. The court, however, may not stay the infringement trial, if any one of the conditions is met: (1) search report provided by the plaintiff does not disclose technical document that may indicate that the utility model does not satisfy the requirements of novelty and creativeness; (2) the evidence(s) provided by the defendant is enough to prove that the technology used (in the patent) is publicly known; (3) the defendant's evidence(s) and reasons upon which request for invalidation is initiated are obviously inadequate; or (4) other situations the court deems that trial shall not be stayed.¹¹² One important improvement regarding the conflict of different types of intellectual property rights is that the *Patent Trial Interpretation* recognizes the principle to protect prior rights, meaning that if patent rights are obtained by infringing the prior obtained trademark rights, copyrights, enterprise name rights, image rights, rights of using special packaging for well-known products or trade dress rights, etc., the patent right will not be protected.¹¹³ The *Patent Trial Interpretation* further specifies the methods to calculate infringement damages as follows: (1) the loss of patent right holder may be calculated by multiplying the amount of decreased sale because of the infringement with reasonable profit of single patented product. If the amount of decreased sale is hard to be determined, the total amount of infringing products on the market may be used instead; (2) the profit gained by infringer may be calculated by multiplying the total amount of infringing products with reasonable profit of single infringing product; (3) if the loss incurred by the patent right holder or profit gained by the patent infringer is difficult to be determined, and there is patent license royalty can be used as reference, the court may decide the damages as one to three time of reasonable royalties. If there is no royalty for reference or the royalty is obviously unreasonable, the court may determine the damages between RMB 5000 to RMB 300,000 and shall not exceed RMB 500,000 in any case, and (4) the court may calculate into damages the reasonable expenses paid by the patent right holder to investigate and stop the infringement.¹¹⁴ Finally, the *Patent Trial Interpretation* stipulates that the court shall take a complete review of the cases; even

110. See *Provisions on Civil Litigation Evidences*, Chinese Supreme People's Court, December 21, 2001, effective April 1, 2002 (Fa Shi [2001] No. 33), at http://www.law = lib/law/law_view.asp?id = 16829 (last visited July 7, 2002).

111. See *Opinions on Certain Issues Concerning Determination of Patent Infringement* (trial), Beijing Highest People's Court, September 29, 2001 (Jing Gao Fa Fa [2001] No. 229), at <http://www.chinaiplaw.com/fgtr/fgtr80.htm> (last visited July 7, 2002).

112. See Patent Law, *supra* note 85, art. 9.

113. See *id.* arts. 15–16; see also CHENGSI ZHENG, *The Contribution of Chinese Intellectual Property Laws to Torts Theories*, CHINA INTELLECTUAL PROPERTY YEAR BOOK 21, China Intell. Prop. Pub. 2001 (2000).

114. See *id.* arts. 20–22.

the patent administrative authority has made a decision on infringement or non-infringement.¹¹⁵

E. LICENSING AND TECHNOLOGY TRANSFER

The Chinese legal regime regarding international technology transfer has gradually evolved from a beforehand approval system to an afterward registration one. In 2001, the State Council promulgated *PRC Technology Import-Export Administrative Regulations* (Technology Import-Export Regulations) and MOFTEC issued new *Administrative Rules for Technology Import-Export Contract Registration* (Technology Import-Export Rules), which replaced the old ones.¹¹⁶ The administrative requirements are different depending on the types of technology involved—technology that are prohibited, restricted or freely transferable. A list of technology that is prohibited from being importing and exporting will be periodically published by Chinese government. Restricted technology is only permitted to be imported and exported after a license is obtained. The contract of freely transferable technology is required to be registered after it is signed. The registration, however, will not affect the effectiveness of the contract.¹¹⁷ The Technology Import-Export Rules provide an online portal for contract registration—China International E-Commerce Net at <http://info.ec.com.cn>.¹¹⁸ In addition, major import projects shall be registered with the MOFTEC.¹¹⁹ Other technology import and export contracts shall be registered with the local MOFTEC offices. Although the registration is after the conclusion of the technology transfer contract, the Technology Import-Export Regulations do have restrictions on the substance of technology transfer contract. The major restrictions remain the same as the old technology transfer regulations and rules regarding guarantee of the technology, limitations on using and improvement of imported technology and other transferee/licensee's activities.¹²⁰ Finally, the Supreme People's Court issued a memorandum to the lower level court regarding trial of technology contract disputes.¹²¹ Such 102-clause memo provides the detailed rules on scope and types of technology contracts, the definition of work made for hire, the restriction on the terms of technology transfer contract, the breach of contract and liabilities. Clauses in a technology contract which prohibit the technology receiver from

115. See *id.* art. 25.

116. STATE COUNCIL, TECHNOLOGY IMPORT-EXPORT ADMINISTRATIVE REGULATIONS, Dec. 10, 2001, at http://www.law-lib/law/law_view.asp?id=16753 [hereinafter TECHNOLOGY IMPORT-EXPORT REGULATIONS]; ADMINISTRATIVE RULES OF TECHNOLOGY IMPORT-EXPORT CONTRACT REGISTRATION ISSUED BY MOFTEC, Dec. 30, 2001, at http://www.law-lib/law/law_view.asp?id=16841 (last visited July 7, 2002) [hereinafter TECHNOLOGY IMPORT-EXPORT CONTRACT RULES]; the old regulations and implementation rules are the REGULATIONS ON ADMINISTRATION OF TECHNOLOGY IMPORT CONTRACT OF THE PEOPLE'S REPUBLIC OF CHINA, [Business Regulation] China L. Foreign Bus. (CCH) P5-570 (May 24, 1985); and DETAILED RULES FOR THE IMPLEMENTATION OF THE ADMINISTRATIVE REGULATIONS OF THE PEOPLE'S REPUBLIC OF CHINA ON TECHNOLOGY IMPORT CONTRACTS, [Business Regulation] China L. Foreign Bus. (CCH) P5-573 (Jan. 20, 1988).

117. See TECHNOLOGY IMPORT-EXPORT REGULATIONS, *supra* note 116, art. 17.

118. See *id.* art. 4.

119. *Id.* Major projects means those projects funded by a state fiscal fund, foreign government loan and international finance organization's loan, and those approved by the State Council.

120. See Patent Law, *supra* note 85, arts. 24–29.

121. See *Memorandum on Certain Issues Concerning Hearing Cases of Technology Contract Disputes by National Court Intellectual Property Trial Working Meeting*, June 19, 2001, in Chinese, at <http://www.chinaiprlaw.com/flfg/flfg84.htm> (last visited July 7, 2002).

challenging the validity of the intellectual property rights of technology covered by the contract are deemed invalid under this memorandum.¹²²

VII. Telecommunications

Significant legislation applying to the telecommunications sector was enacted in 2001. Although the *Telecommunications Regulations of the People's Republic of China* was promulgated by the State Council the previous year (September 25, 2000), this first comprehensive legislation on the governance of the telecommunications industry left open many important matters, such as the regulation of foreign investment in the telecommunications sector. The catalog of basic and value-added telecommunications services issued as an attachment to the Telecommunications Regulations also raised concerns as the brief descriptions of services could be interpreted very broadly. In fact, the catalog raised fears (subsequently confirmed) that many services not considered to telecommunications related in other countries would be regulated—thus preventing a foreign company from providing such services in the PRC. It was therefore anticipated that 2001 would see the issuance of much legislation concerning the telecommunications sector. However, the number of new laws and regulations and revisions was considerably more than many foresaw.

As with many other areas of the law, the PRC's accession to the WTO was the impetus for the revision or promulgation of many regulations. For many foreign companies, WTO accession would permit direct foreign investment in PRC telecommunications joint ventures. As noted above in the Internet and electronic commerce section of this article, due to the fact that various types of Internet related activities were classified as telecommunications services in the PRC (e.g., data storage services, application service providers and many others), foreign companies, which were not traditionally considered telecommunications service providers, were previously unable to establish their own operations in the PRC. Thus, the impact on the telecommunications sector upon the PRC's accession on December 11, 2001, is broader than it may appear at first glance.

Another driving force for legislative change was the recognition that technological developments raised new situations and issues not contemplated under existing legislation. This led to additional legislation on technical standards for equipment and services. Regulation of service standards was also a reflection of the growing recognition of the consumer's importance.

Finally, the end of 2001 also saw the announcement of the restructuring of several domestic telecommunications operators with the breakup of the principal fixed line operator, China Telecommunications Group Corporation, into two separate companies along geographical lines and the merger of the "northern" company with two other existing operators, Jitong Communications Corporation and China Netcom Corporation. While important details of the restructuring have not been released, it is certain that the government-sponsored reform will have a strong impact on the further development of the telecommunications industry in the PRC.

A. GENERAL REGULATORY REGIME AND INVESTMENT RELATED LEGISLATION

The Catalog of Basic and Value-Added Telecommunications Services was revised by the MII with the issuance of the Circular Concerning Adjustments to the Catalog of Telecommu-

122. *Id.* art. 11.

nications Business on June 11, 2001.¹²³ The revisions were a significant expansion from the earlier list. In particular, the revised Catalog provided a fuller list of various types of Internet-related services and classified as them as either basic or value added telecommunications services.

In connection with the PRC's commitments on market access pursuant to its membership of the WTO, the MII issued *Order No. 17 of the Ministry of Information Industries Abolishing the 1993 Interim Measures for Administration of the Examination and Approval for Engagement in Telecommunications Business and the 1995 Interim Provisions for Administration of the Market for Telecommunications Business* on November 26, 2001, effective December 11, 2001.¹²⁴ The repealed legislation banned foreign participation in telecommunications operations and provision of services.

The State Council promulgated the *Provisions for the Administration of Foreign Invested Telecommunications Enterprises* on December 11, 2001, to take effect from January 1, 2002.¹²⁵ The *Provisions* set out the qualification conditions for foreign and Chinese investors and the procedure for applying for approval to establish foreign invested telecommunications enterprises.

The above *Provisions* on foreign invested telecommunications enterprises must be read in conjunction with the specific market access commitments agreed to by the PRC set out in its accession documents to WTO, which detail the time frame for liberalization. Foreign investment in companies providing value-added telecommunications services, mobile and data services and paging services was permitted upon accession in the cities of Beijing, Shanghai and Guangzhou. The maximum percentage of foreign investment initially is either 25 percent or 30 percent, and rises over a period of several years to 49 percent or 50 percent for these types of services.¹²⁶ The geographical restrictions will also be eliminated gradually. For domestic and international basic telecommunications services, foreign investment will be permitted within three years of accession and geographical restrictions will be phased out completely within six years of accession.¹²⁷

The *Measures for the Administration of Telecommunications Services Operating Licenses* was issued by MII on December 26, 2001, effective January 1, 2002.¹²⁸ The *Measures* set out the procedures for obtaining operating licenses for the various types of telecommunications services.¹²⁹

The MII issued the *Provisions for Administrative Penalty Procedures in Telecommunications* on May 10, 2001, which took effect on the same date.¹³⁰ The *Provisions* supersede the *Interim*

123. See Regulations of the PRC on Telecommunications, at <http://www.cn-cl14.net/policy/read.asp?articleid=78> (last visited July 7, 2002).

124. See MINISTRY OF POST AND TELECOMMUNICATIONS, *PRC Interim Provisions on the Approval and Regulations of Businesses Engaging in Opened Telecommunications Services*, Sept. 11, 1993, at http://www.chinaonline.com/issues/internet_policy/regulations/c9091710.asp (last visited July 7, 2002).

125. See STATE COUNCIL, *Provisions on the Administration of Foreign-Invested Telecommunications Enterprises*, December 5, 2001, effective January 1, 2001 [hereinafter FITE Provisions], at <http://web.syr.edu/~ztan/translation.pdf> (last visited July 6, 2002).

126. See generally FITE Provisions, *supra* note 125, at Summary.

127. *Id.*

128. See STATE COUNCIL, *Measures for Managing Internet Content Provision*, September 20, 2000, effective October 3, 2000, at <http://www.dfn.org/voices/china/netreg-0010txt.htm> (last visited July 6, 2002).

129. *Id.*

130. See STATE COUNCIL, *Rules for the Implementation of the Postal Law of the People's Republic of China*, Decree 65, Nov. 12, 1990, at <http://www.mii.gov.cn/mii/zcfg/xzfg/law2007.htm> (last visited July 6, 2002).

Provisions for Administrative Penalty Provisions in Telecommunications issued in 1995. The *Provisions* deal with the imposition of administrative penalties for violations of telecommunications administrative procedures.¹³¹

The MII issued the *10th Five-Year Plan Outline for Information Industries* on September 7, 2001.¹³² MII also promulgated the *Special Plan of the 10th Five-Year Plan for Telecommunications Products* on October 15, 2001.¹³³

The *Notice on Relevant Issues Concerning the Operation of Telecommunications Services by Domestic Equity Joint Ventures Established by Telecommunications Service Operators* was issued by MII on July 26, 2001.¹³⁴ The *Notice* sets out the qualification requirements for the shareholders and also addresses the provision of services and use of operating licenses.

MII issued the *Measures for the Administration of Telecommunications Administrative Enforcement Documents*. The exact promulgation date in June 2001 is unclear. The *Measures* address the application for, issuance of, use and administration of administrative enforcement documents or certificates.

MII promulgated the *Provisions for Administration of Quality Supervision for Telecommunications Projects* on December 19, 2001, effective January 1, 2002.¹³⁵ The *Provisions* concern supervision of quality in relation to the design, construction and other aspects of telecommunications projects.

MII issued the *Notice on Further Standardizing the Market for Satellite Telecommunications Services* on June 6, 2001.¹³⁶ The *Notice* seeks to regulate the provision of satellite services by domestic providers as well as the rental or leasing of transmission equipment by foreign operators.

On March 27, 2001, MII and the State Development and Planning Commission issued the *Notice Concerning the Clearing Up of Optic Fiber Construction Projects Which Violate Regulations and Rectification of Construction Procedures for Long-distance Optic Fiber Networks*. Pursuant to the *Notice*, all optic fiber construction projects that had not been approved in accordance with relevant procedures and regulations should be immediately suspended. The *Notice* also reiterated that operation of optic fiber networks constituted basic telecommunications services and prior to the PRC's entry into WTO, no foreign investment was permitted in the construction or operation of telecommunications networks within the country.

B. INTERCONNECTION AND FREQUENCY AND NUMBER ALLOCATION

The *Provisions for the Administration of Interconnection Between Public Telecommunications Networks* were promulgated on May 10, 2001, and supersede the *Interim Provisions for the*

131. *Id.*

132. See generally Premier on *10th Five-Year Plan for National Economic and Social Development*, at <http://www.china.org.cn/english/8449.htm> (last visited July 6, 2002).

133. *Id.*

134. See generally LINKLATERS & ALLIANCE BULLETIN, *The new PRC Telecommunications Regulations: a first step towards a more level playing field*, Nov. 2000, at <http://www.linklaters.com/english/publications/pdf/716.pdf> (last visited July 6, 2002).

135. See CHINA LAW BRIEFS, *Foreign Investment in Telecommunications*, 2001, Issue 23, at <http://www.chinalawchange.com/a-teleco.html> (last visited July 6, 2002).

136. See generally PERKINS COIE BULLETIN, *China Legal Highlights*, June 2001, at <http://www.perkinscoie.com/resource/intldocs/june2001.htm> (last visited July 6, 2002).

Administration of Interconnection of Telecommunications Networks issued on September 7, 1999.¹³⁷

MII issued the *Notice on Relevant Issues Concerning the Interconnection of Private Telephone Networks of Enterprises with Public Telecommunications Networks* on November 30, 2001.

MII issued the *Measures on Handling of Disputes Arising From Interconnection of Telecommunications Networks* on November 19, 2001, effective January 1, 2002. The *Measures* discuss mediation and encourage quick resolution of disputes in order to avoid disruptions.

The *Provisions of the People's Republic of China for the Division of Radio Frequency* were issued by MII on November 12, 2001.

The *Notice on Developing the Clearing Up and Adjustment Work for Telecommunications Network Short Number Resources Throughout China* was issued by MII on November 14, 2001. The *Notice* sets out information on the responsible authorities and also principles on the handling of the work to be done for clearing up and adjusting short number allocations.

C. QUALITY OF SERVICE AND CONSUMER ISSUES

The *Interim Measures for the Supervision and Administration of the Quality of Telecommunications Services* was issued by MII on January 11, 2001.¹³⁸ These *Measures* note that service providers have the obligation to provide services in accordance with applicable standards. Subscribers who have complaints or questions regarding services may submit them to subscriber centers and the telecommunications authorities will investigate the complaints.

The *Interim Measures for Dealing with Appeals by Telecommunications Subscribers* were promulgated by MII on January 11, 2001.¹³⁹ The *Interim Measures* set out the procedures for submitting complaints and require the relevant telecommunications authorities to respond within specified time periods.

The Ministry of Finance and MII issued the *Notice on Canceling Government-Oriented Fund Items Such As Initial Installation Fees for Local Telephone Calls and Post and Telecommunications Surcharges* on July 1, 2001.

D. EQUIPMENT AND NETWORK ACCESS MATTERS

The *Notice on Banning the Illegal Development, Production and Use of Radio Interference Equipment* was issued by MII on June 14, 2001.

The *Catalog of Classification of Telephone Series* was issued by MII on June 25, 2001. The *Classification* has an impact on the requirements for network access licenses for various products.

MII promulgated the *Measures for Administration of Network Access of Telecommunications Equipment* on May 29, 2001.¹⁴⁰ The *Measures* supersede the *Measures for Approval and Administration of Telecommunications Equipment Network Access* issued by the Ministry of Infor-

137. See generally LINKLATERS & ALLIANCE BULLETIN, *Links to China: The New Administration of Network Access for Telecommunications Equipment Measures*, June 2001, at <http://www.linklaters.com/english/publications/pdf/851.pdf> (last visited July 6, 2002).

138. See generally PERKINS COIE BULLETIN, *China Legal Highlights*, Feb. 2001, at <http://www.perkinscoie.com/resource/intldocs/febhigh.pdf> (last visited July 6, 2002).

139. *Id.*

140. See generally CHINA LAW BRIEFS, *Network Access for Telecommunications Equipment*, 2001, Issue 10, at <http://www.chinalgalchange.com/Archiv01/C0110028.html> (last visited July 6, 2002).

mation Industry on December 31, 1998. Following the promulgation of the above *Measures*, MII issued a slew of related legislation dealing with network access of telecommunications equipment including:

- *Provisions for Administration of Sampling in Tests of Telecommunications Equipment Network Access* issued on June 25, 2001;
- *Provisions for Administration of the Change in Models for Network Access of Telecommunications Terminal Equipment* issued on June 25, 2001;
- *Provisions for Administration of Network Access Tests of Telecommunications Equipment* on June 25, 2001;
- *Names of the First Batch of Telecommunications Equipment Subject to the Network Access License System* on June 25, 2001;
- *Measures for the Examination and Approval of Guarantees for Production Quality of Telecommunications Equipment Network Access* on July 2, 2001;
- *The Provisions for Administration of Authorization of Testing Institutions for Network Access of Telecommunications Equipment* on July 7, 2001; and
- *Provisions for Administration of Expert Evaluations of Network Access of Telecommunications Equipment* on August 29, 2001.

E. STANDARDS

The *Standards for Trials for Mobile Telephone* were issued by MII on June 25, 2001.¹⁴¹ According to the *Standards*, mobile telephone manufactures must apply to have their telephones to undergo trials conducted by authorized entities. The trials are conducted to check that the mobile telephones will operate normally when connected to networks.

The following standards were also issued by MII during 2001:

- Notice on the Issuance of Four Industrial Standards for Telecommunications, issued in April 2001 (exact date unclear). The standards referred to in the Notice include those relating to TDMA technology, UPS products for telecommunication use and testing of telecommunication products;
- Eight Telecommunications Industrial Standards, issued in April 2001 (exact date unclear). Matters addressed in the standards include standardization of technology for routers, testing of routers and technology relation to interconnection with networks;
- Twenty-two Telecommunications Industrial Standards, issued on July 2, 2001. The standardization of central exchange technology was among the standards issued.
- Thirteen Telecommunications Industrial Standards, issued on October 9, 2001. The matters addressed include network access requirements for 3.5GHz fixed wireless access.
- Thirteen Telecommunications Industrial Standards, issued on November 18, 2001. These include standards on network management interface testing measures, wireless access and broadband.

F. SELECTED LOCAL LEGISLATION

1. Beijing

The Beijing Communications Administration promulgated the *Measures for Administration of the Trial Opening of Broadband User Station Networks in the Beijing Area* on July 10,

141. *Id.*

2001. Entities wishing to engage in construction or operation of broadband user station networks are required to obtain a license. Accompanying the above *Measures*, the Beijing Communications Administration also issued the *Measures for Administration of the Carrying Out of an Experiment in Broadband User Station Networks in the Beijing Area*. The latter *Measures* provide a definition of broadband user station networks.

The *Interim Measures for Administration of Mobile Network Value Added Services in Beijing* was also promulgated by the Beijing Communications Administration on December 12, 2001.

2. Chongqing

The *Specific Implementing Measures of Chongqing Municipality for the Structural Adjustment of Telecommunications Charges* were issued by Chongqing Municipal People's Government in early 2001 (exact date unclear). The *Measures* are stated to come into effect on February 21, 2001, although the implementation of the adjusted charges for certain services have different implementation deadlines.

Subsequently, the Chongqing Municipal Telecommunications Administration and the Chongqing Municipal Pricing Bureau issued the *Supplementary Notice Concerning the Adjustment of Public Telephone Charges in Chongqing Municipality* on April 16, 2001. The *Supplementary Notice* stated that the adjustments were to be implemented by June 1, 2001.

3. Guangdong

The Guangdong Provincial Communications Administration issued the *Circular of Guangdong Provincial Communications Administration on the Operation of Broadband Station Networks* on July 5, 2001.

4. Liaoning

The *Circular of the Liaoning Provincial Communications Administration on Halting Construction and Operation of User Station Networks* was issued by the Liaoning Provincial Communication Administration on June 20, 2001.

The *Regulations of Liaoning Province for Administration of Telecommunications* was promulgated by the Standing Committee of the Liaoning Provincial People's Congress on November 30, 2001, effective February 1, 2002.¹⁴² The *Regulations* supersede the *Regulations of Liaoning Province for Administration of Posts and Telecommunications* adopted on September 22, 1989 (and amended in 1995).¹⁴³

5. Shanghai

The Shanghai Municipal Telecommunications Administration issued the *Measures of Shanghai Municipality for Administration of Broadband User Station Networks (for Trial Implementation)* on July 2, 2001. The *Measures* reiterate that broadband service providers must obtain operating licenses and require existing providers to submit a report on subscriber information within a specified time period.

142. See Stefanie Tetz & Ralph Koppitz, *Draft Telecom Laws*, CLIFFORD CHANCE PUNDER NEWSLETTER, July/Aug. 2000, at <http://www.ahk-china.org/newsletter/puender-newsletter2.pdf> (last visited July 6, 2002).

143. *Id.*

6. Zhejiang

The Zhejiang Provincial Pricing Bureau issued the *Notice of the Zhejiang Provincial Pricing Bureau on Standardizing the Clear Marking of Prices in the Telecommunications Sector* on May 30, 2001, effective June 25, 2001.

VIII. Legal Services

China is undergoing rapid social and economic reforms, and reform of its legal system is central to this process. As is known, law firms can be state funded, a cooperative or an equity partnership. Today there is a majority of state funded firms, and a more or less equal number of coops and partnerships. Most law firms are small, with an average of between ten and thirty lawyers. Areas of practice are diversifying to meet China's increased prominence in the world; lawyers now practice in an expanding range of specialties, including international finance and high technology.

The backbone to the reform of the legal system is change to the legal educational system. Currently, a 'zhuanke' degree can be obtained in just two years, during which time only one and a half years are spent in studying law. The rest of the time is devoted to general studies in philosophy, politics and the economy.

In addition to a perceived lack of expertise, China has a shortage of practitioners as well. The deputy director-general of the law ministry's education department, Huo Xiandan, said, "China will need a large number of high-level personnel with a comprehensive background in the law and expertise in other areas. Presently, there should be at least 30,000 such legal professionals capable of providing international legal services."¹⁴⁴ The legal educational system is flourishing, as more and more people recognize the great opportunities to contribute to a promising future.

To date, there has been a restriction on foreign or Hong Kong law firms on establishing more than one office in China. This rule is often circumvented by the arrangement of 'consulting offices,' which are not actually licensed for legal practice. However, it is expected this year that the government will relax the one-office rule. The judicial system is also under scrutiny to comply with new standardization. WTO provisions mandate that the judicial system be consistent with international standards.

As part of this process, on June 30, 2001, the Standing Committee of the Ninth National People's Congress, Twenty-second Session, issued the *Decision on Amendments to the Law of Judges of the People's Republic of China*, effective as of January 1, 2002. These amendments enhance the legal qualifications and training of judges. In order to qualify for a judgeship, one must: (1) obtain a bachelor of laws degree from an institution of higher education or obtain a non-law bachelor's degree yet have an expertise in law, and have at least two years of work experience in the legal field; or (2) obtain a master of laws or doctor of laws degree or a non-law master's or doctorate but have expertise in law, and have at least one year of work experience in the legal field. The work experience requirements for Supreme People's Court judges and Higher People's Court judges are three years for bachelor degree holders and two years for masters or doctorate holders.¹⁴⁵

144. See CHINA BUSINESS INFORMATION NETWORK, Jan. 4, 2002.

145. See *China to Hold National Exam for Entry to Legal Profession*, July 16, 2001, at http://english.peopledaily.com.cn/200007/03/eng20000703_44547.html (last visited July 6, 2002).

In addition, the present qualification exams for judges and prosecutors as well as the bar exam are now combined into one uniform judiciary exam. This exam will be held for the first time in January 2002 pursuant to the implementation rules to be made by the Department of Justice, the Supreme People's Court, and the Supreme People's Procuratorate.¹⁴⁶

146. See *China to Revise Laws on Judges, Prosecutors*, July 3, 2000, at http://english.peopledaily.com.cn/200007/03/eng20000703_44547.html (last visited July 6, 2002).