1. Introduction

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This book is the first of its kind to introduce Chinese intellectual property (IP) and technology laws in a single volume in English. Its unique perspective for a book covering intellectual property law is that it also includes chapters on competition and trade law, and provides as full a spectrum as possible of Chinese legislation which impacts on the regulation of telecommunications, information technology and electronic commerce.

The first eight chapters focus on intellectual property. The remaining chapters look at the regulation of technology, competition and trade. The aim of the book is to introduce readers to the rich mix of Chinese IP and technology laws currently undergoing rapid reform and to discuss appropriate case law where relevant.

China is quickly moving from ‘made in China’ to ‘created in China’ and with this change comes an incredible rate of change of amendments to IP and other laws that impact on the delivery of content over the Internet. Added to this process of change is China’s unique system of law that has origins in Confucian thought, but with overtones of Japanese and German influence in China’s more recent history. There exists a complex mix of administrative, civil and criminal law. The country’s unique ‘one country, two systems’ approach, which provides a differentiated autonomy in China’s special administrative regions of Hong Kong, Macau and Tibet, also gives its law making processes a special ‘Chinese Flavour’. This is particularly the case in the telecommunications sector.

The current Telecommunications Regulations 2000 (‘Regulations’), for example, are not laws, but administrative regulations. The impact of this distinction lies in the hierarchy of legislative instruments used in Chinese legal practice. So for example, the National People’s Congress (NPC) is the highest authority and has responsibility for any amendments to the Chinese Constitution. Both the NPC and its Standing Committee are responsible for the enactment and amendment of laws. The State Council is the government of the People’s Republic of China under the authority of the NPC.

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the Constitution, the State Council is the highest organ of state power, and
of state administration. The State Council consists of the Premiers, Vice-
Premiers, State Councillors, Ministers in charge of ministries, Ministers in
charge of commissions, the Auditor-General and the Secretary-General.
Under Article 86, the State Council has a term of office of five years.

The State Council formulates administrative regulations according
to the Constitution and laws. The State Council will often enact admin-
istrative regulations, including ordinances, measures, provisions, rules
and decisions, with a formal law (through the NPC) generally following
afterwards. Local law/regulations are enacted by local people’s con-
gresses: departmental regulations are enacted by the separate ministries
(e.g., MIIT, MOFCOM etc.) and which fall under the jurisdiction of the
State Council. Therefore, the general hierarchy of laws in China is the
Constitution; NPC Laws; State Council Administrative regulations; local
laws/regulations and departmental regulations. If there is any conflict
between local laws/regulations and departmental regulations, the State
Council will decide which law/regulation/measure etc., will apply.3

The Chinese judiciary, or system of courts, is also hierarchical. In
several sections of this book, particularly the IP sections, there are
references to both courts and procuratorates. Articles 123–135 of the
Constitution govern the judicial system of the PRC, and consist of the
people’s courts, the Supreme People’s Court, the people’s procuratorates,
the Supreme People’s Procuratorate, military procuratorates and other
special people’s procuratorates. At the top is the Supreme People’s Court
(SPC), the Higher People’s Courts, the Intermediate People’s Courts, and
then the Basic People’s Courts at the lowest level. Article 129 Constitution
refers to the people’s procuratorates as ‘state organs for legal supervi-
sion’. The Supreme People’s Procuratorate reports to the NPC and its
Standing Committee and is the highest prosecutorial agency in China,

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2 An English version of the Chinese Constitution (adopted by the fifth
National People’s Congress on 4 December 1982 and revised 1988, 1993, 1999, and
html, accessed November 2010.

3 For a more detailed treatment of Chinese civil, administrative and criminal
law (in English), including the court system, please see: Bin Liang, The Changing
Chow, The Legal System of the People’s Republic of China in a Nutshell, St Paul,
Minn.: West, 2003; Donald C. Clarke, China’s Legal System: New Developments,
New Challenges, Cambridge: Cambridge University Press, 2008. Also, for a
complete discussion of these issues (in Chinese) see: http://www.sypf.com/fzxw/
pfcz01/074.htm, accessed November 2010.
exercising and supervising prosecutorial authority at all state and local levels. Procuratorates investigate cases brought by public security agencies to decide if a suspect should be arrested or not, and whether a case should be prosecuted. Procuratorates are not courts, but they support the work of the courts (similar perhaps to the UK’s Crown Prosecution Service). They institute and support public prosecutions in criminal cases.4

It is also highly significant that the NPC has the power to withdraw departmental or local administrative laws, regulations, measures etc., that contravene laws already issued by the NPC. This power of the NPC illustrates well the internal dynamics of China’s legislative structure – it is one primarily of subordination, unification and supervision, and quite unlike the internal dynamics of Western structures, which tend more to represent a relationship of restraint and legislative balance between the legislature, judiciary and executive.5 Further, no Chinese administrative or local law, measure, regulation, rule or ordinance is allowed to contravene the state Constitution and state law. Though with some exceptions, some laws and regulations of the autonomous regions may differ from the Constitution and state law,6 although in the drafting of such laws, regional legislative institutions must abide by the Constitution, the Law of Self-government in Minority Autonomous Regions (1984, amended 2001) and the Legislation Law of the People’s Republic of China (2000), and report to the NPC’s Standing Committee for prior approval.7 The great variety of legislative instruments is seen in several of the chapters that follow, but particularly in patents, copyright, and telecommunications.

The IP chapters of the book start with a discussion of patents by Professor Guo He (Renmin University) in Chapter 2. Professor He writes on the new Patent Law (2008) (‘New Patent Law’), which amongst its major amendments introduces new provisions on employee remuneration for patent inventions. Recently, the Chinese Supreme People’s Court (‘SPC’) has issued regulations on the implementation of the Patent Law 2008, which include the Interpretation on the Application of Law

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4 For an overview see, LawInfoChina, a brief introduction (in English) at: http://www.lawinfochina.com/Legal/index.asp, accessed November 2010.
7 China’s current legislation and structure (English) at: http://www.china.org.cn/english/kuaixun/76212.htm, accessed November 2010.
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concerning Several Issues in Handling Patent Infringement Disputes (‘Interpretation Rules’, effective January 2010) and also revision of the Rules for Implementation of the Patent Law of PRC (‘Implementation Rules’, effective 1 February 2010). The Interpretation Rules cover guidelines for the calculation of damages (particularly damages in relation to gains from infringement of the rights of the patent holder) and also rules on indirect infringement that are not covered in the New Patent Law. For indirect infringement, the use of a patented product as a component in the manufacture of another product, as well as the sale of manufactured products, is considered as indirect infringement. However, the rules introduce an exception for industrial designs, in that the manufacture of another product using an industrial design product as a component will not be considered as an infringement if the use is limited to the technical function of the product only. As regards the Implementation Rules, new provisions are included on service patents. The previous patent law did make provision for employees of Chinese state owned enterprises, but no detailed rules were given for companies other than state owned enterprises. The new Implementing Rules extend the provision given to employees of State Owned Enterprises to all types of company. Also, the New Patent Law introduces a disclosure obligation for the application of patents based on genetic resources. The Implementation Rules clarify further some terms included in the New Patent Law as regards genetic material. For example, at Article 26 Implementation Rules both ‘genetic resources’ and ‘invention relying on genetic resource’ are defined, but no definitions are given for ‘direct source’ and ‘original source’ as yet. Finally, the New Patent Law also provides guidance on the granting of compulsory licenses in China. Under the New Patent Law, the patent authority can grant compulsory licenses where a patent holder fails to exploit or fully exploit his patent without any justified reason within three years of the patent grant date or four years of the patent application date, or where the patent right holder has been exploiting the patent rights in a monopolistic manner. The Implementation Rules clarify that failing to exploit a patent could happen in the event that the patent rights holder’s (or its licensee’s) methods or scale of exploiting the patent cannot fulfill the need for the patented product in China.

In China, design right falls within the patent law (unlike the UK, for example, where both registered and unregistered design rights are separate from patent rights). Article 11 of the New Patent Law provides that ‘after the grant of the patent right for a design, no entity or individual may, without the authorization of the patentee, exploit the patent, that is, make, offering for sell, sell or import the product incorporating its or his patented design, for production or business purposes’. This provision seems to leave
out the stocking and exporting of products, which might leave open the potential for dealing in counterfeit designs.

Finally, the New Patent Law provides the patent authority with the right to grant Chinese companies the license to manufacture patented medicine and/or export the medicines to countries or regions with whom China has already concluded relevant international treaties. This new provision on compulsory licensing is likely to give the Chinese government extra bargaining power when negotiating the scope of monopoly patent rights with patent holders.

Associate Professor Li Zuming (China University of Political Science and Law) discusses the current Chinese Trademarks Act 2001 (as revised) in Chapter 3. China’s trademark law was adopted on 23 August, 1982, and has been revised twice, in 1993 and 2001. The latest amendment on 27 October 2001 includes 64 articles stipulating the basic protection of a trademark, the definition of a registered trademark, the definition of rights, holders, and the content of rights as well as penalty provisions. Work on the third revision began in 2004. The State Administration for Industry and Commerce of the PRC (SAIC) issued a proposal for the third revision of the trademark law on 20 June 2009 (updated 2010), which at the time of writing, is still under review by the National People’s Congress (NPC). It is anticipated that the third revision of the Trademark Act will take effect within the next two years. Under the current trademark law, a trademark registration may be filed for any visible mark including a word, sign, letter, number, 3D (three-dimensional) mark, color combination, or any combination of the elements mentioned above, that distinguish the commodities of the natural person, legal person or other organization from those of others. A sound, smell or an animation cannot compose a registered trademark. However, the third revision of the Trademark Law is likely to extend the concept of a ‘brand’, which means that non-traditional trademarks such as sound, smell and color labels might also be accepted. The new draft also looks to improve the prospects for foreign brands, which are not currently ‘famous’ brands, for example, to protect such brands from registrations in bad faith.

As regards well-known marks, in April 2009, the SPC issued the Interpretation on Certain Issues Concerning the Application of Law in the Trial of Civil Dispute Cases Involving Protection of Well-Known Trademarks (Fa Shi [2009] No. 3 (‘Interpretation’)). This follows earlier guidance from the SPC on well-known marks, such as the overlap of trademarks with domain names in Interpretation of the Supreme People’s Court on Several Issues Concerning the Application of Law to the Trial of Civil Dispute Cases Involving Computer Network Domain Names (promulgated 24 July 2001) and Interpretation of the Supreme People’s
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Court on Certain Issues Concerning the Application of Law in the Trial of Civil Cases Involving Trademark Disputes (16 October 2002). The 2001 revision of the Trademark Law allows for a well-known mark to be protected through both administrative procedures and judicial procedures. Administrative procedures govern organs of the state whereas judicial procedures are processed through China’s court system. The function of the 2009 Interpretation is to set out more clearly the conditions for the protection of well-known marks in China. Article 1 Interpretation defines a well-known trademark as a mark that is ‘well-known to the relevant public in China’. The Article does not refer to ‘market reputation’, but includes market reputation as one of the factors to be considered in Article 5(1)(5) of the Interpretation as to what constitutes a well-known mark. The knowledge of the public will therefore be important in determining whether a mark is well-known in China and the level of this knowledge will relate not only to the distinctiveness of the mark, but also to ‘classes and ways of use of goods designated by the trademark, such as sales regions and sales methods’.8

As regards the conflict between well-known marks and registration of domain names identical to the mark, in earlier guidance (listed above), the SPC made clear that if such a conflict arises, the courts could have power to determine whether a mark was well-known or not. However, Article 3 of the 2009 Interpretation now strengthens the hand of rights owners of well-known marks in that if the mark has already garnered a certain amount of ‘fame’, the courts may be more willing to accept that a defendant’s registration and use of a similar or identical domain name will be sufficient to mislead the relevant public, leading to a potential ruling of trademark infringement and unfair competition (without the formal need for the plaintiff to prove that the mark is ‘well-known’).9 The third revision of the trademark law might include a restriction on the power to object, which will hopefully speed up the registration process, but how the objection process might be limited is still unclear at the time of writing.

Further improvements are also likely both with the level of compen-

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8 See comments by Kong Xianjun (Vice Chief Judge of IP Division, SPC) and Xia Junli (Presiding Judge, IP Division, SPC) in ‘Understanding and Application of the Interpretation on Certain Issues Concerning the Application of Law in the Trial of Civil Disputes Involving Protection of Well Known Trademarks’, China Intellectual Property, HurryMedia, May–June 2009, 5–6 (30), 89.

sation for infringement (increases are likely) as well as a requirement for the trademark authority to complete the examination of an application within 12 months from the filing date (although whether the latter is likely to make it into the final law is also uncertain given the current number of trademark applications to the Trademark Office (TMO) of the Chinese State Administration for Industry and Commerce (SAIC), and the backlog in pending cases). Also included might be greater powers for the local administrations for industry and commerce (Administration of Industry and Commerce (AIC)) which might lead to greater administrative efficiency, but with a corresponding loss of potential legal certainty.

As with patents and trademarks, copyright in China has also been the focus of intense discussion. In the last two years, China has had to deal with two World Trade Organization (WTO) cases: (1) China – measures affecting the protection and enforcement of intellectual property rights, 26 January 2009 (‘China – IP’, Panel report adopted 20 March 2009); and (2) China – measures affecting trading rights and distribution services of certain publications and audiovisual entertainment products (‘China – Audiovisual’, Appellate Body report, 21 December 2009). Both cases required China to make amendments to its laws, and both concern the issue of copyright to some extent. In summary, China – IP concerned an application by the US to the WTO’s Dispute Settlement Body (DSB) that China’s IP law and practice, specifically: (1) the denial of copyright protection of censored works in China; (2) the disposal by donation and auction of seized counterfeit goods; and (3) the unavailability of criminal sanctions for piracy and counterfeiting of copyright and trademark rights below certain thresholds, all fell foul of China’s accession commitments under the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS). As regards (1), the US claim was founded on the allegation that Article 4 China’s Copyright Law 2001 was inconsistent with Article 9.1 TRIPS that incorporates Articles 5(1) and 5(2) Berne Convention (1971). As to (2), the US claimed that China’s system for disposal of

12 Paragraphs 2.4 Panel Report (China-IP): ‘The United States claims that China is acting inconsistently with its obligations under the TRIPS Agreement by denying the protection of its Copyright Law to creative works of authorship (and, to the extent Article 4 of the Copyright Law applies to them, sound recordings
seized counterfeit goods violated Articles 46 and 59 of the TRIPS, which require that counterfeit goods do not re-enter trade channels. At the time of the case, China had an agreement with the Red Cross to ensure no commercial use of donated goods and for the removal of trademarks prior to auction, for example. For the final claim (3), the US challenged China’s absence of criminal penalties for trademark infringement below particular quantitative and qualitative thresholds. In other words, the US was challenging China’s threshold levels set for criminal penalties for IP infringement as well as the factors used to establish these thresholds, arguing that Article 61 TRIPS imposed a positive obligation on China to implement domestic criminal law penalties for ‘willful trademark counterfeiting or copyright piracy on a commercial scale’. The US was largely successful in the first and second claims, which required China to amend its copyright law (which it did in 2010), and to abandon its current system of auctions for disposal of seized counterfeit goods. However, on the third claim, the panel argued that the US had not submitted sufficient evidence that was accurate enough to prove piracy levels on a commercial level in

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13 Paragraph 7.197 Panel Report: ‘The United States claims that the competent Chinese authorities lack the scope of authority to order the destruction or disposal of infringing goods required by Article 59 of the TRIPS Agreement. The measures at issue create a “compulsory scheme” so that the Chinese customs authorities cannot exercise their discretion to destroy the goods and must give priority to disposal options that allow infringing goods to enter the channels of commerce or otherwise cause harm to the right holder’. China’s response is in paragraph 7.198: ‘China responds that its Customs authorities possess the authority to order both disposal and destruction of infringing goods in accordance with Article 59 of the TRIPS Agreement. Donation to social welfare bodies and sale to the right holder constitute disposal outside the channels of commerce in such a way as to avoid harm to the right holder. Article 59 must be read in conjunction with Article 1.1 of the TRIPS Agreement. Chinese law sets forth criteria that reflect an official preference for the use of disposition methods besides destruction but Customs has the discretion to determine whether the criteria are met and therefore which disposition method is appropriate. China Customs chose to destroy 58 per cent of the total value of infringing goods between 2005 and 2007 which proves that the putative hierarchy of disposition options does not hinder Customs’ ability to order destruction of infringing goods . . .’ (emphasis added).


15 Paragraph 2.2 Panel Report: ‘The United States claims that China has not provided for criminal procedures and penalties to be applied in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale that fail to meet certain thresholds . . . [Chinese measures identified omitted].’
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China and sufficient to challenge the threshold levels China had set for criminal penalties for IP infringement. 16

In China – Audiovisual, the US bought a claim to the DSB arguing that some Chinese measures (specifically Articles 5 and 7 of the Chinese Audiovisual Products Regulation 2001) limited the right to import audiovisual entertainment products and some publications to Chinese state-designated and wholly or partially state-owned companies (in effect, imposing a discriminatory right to trade on foreign imports of these products).17 Following a panel report largely upholding the US claims, the Chinese appealed to the Appellate Body of the DSB. In a report of the Appellate Body (AB) issued in December 2009,18 the AB recommended that the DSB request that China bring into conformity the measures found to be inconsistent with its Accession Protocol, its Accession working party report, the GATS, and the GATT 1994. The Appellate Body upheld several of the panel’s findings, and in particular, upheld the panel’s findings that Chinese measures preventing foreign-invested companies from engaging in ‘the wholesale of imported reading materials, the exclusive sale of books, periodicals and newspapers, and the master wholesale and wholesale of electronic publications’ were inconsistent with China’s national treatment commitments under Article XVII of the General Agreement on Trade in Services (GATS).19 The Appellate Body also found that ‘China’s measures limiting the distribution of audiovisual materials to joint ventures with Chinese majority ownership’ were inconsistent with China’s commitments under the GATS.20

16 Paragraph 7.628 Panel Report: ‘The Panel has reviewed the press articles and notes that none of them are corroborated, nor do they refer to events or statements that would not require corroboration. Whilst the publications are reputable, most of these particular articles are brief and are quoted either for general statements or random pieces of information. Most are anecdotal in tone, some repeating casual remarks about prices of fake goods, anonymous statements or speculation.’ Also in paragraph 7.629: ‘... For the reasons set out above, the Panel does not ascribe any weight to the evidence in the press articles and finds that, even if it did, the information that these press articles contain is inadequate to demonstrate what is typical or usual in China for the purposes of the relevant treaty obligation.’


19 Paragraph 8 AB Report (WT/DS363/AB/R) citing the earlier panel’s wording.

20 Paragraph 414 AB Report.
An important issue was whether China could invoke the ‘public morals’ defense under Article XX(a) GATT to restrict imports (the first time that the defense had been run in a GATT case: the US attempted a similar defense in US – Gambling\(^\text{21}\) under Article XIV GATS\(^\text{22}\)). The AB in China – Audiovisual found that the panel had erred in failing to recognize that the Chinese state plan requirement in Article 42 of the Publications Regulation was ‘apt to make a material contribution to the protection of public morals’,\(^\text{23}\) but that China had nevertheless failed to prove that its measures for the import of foreign audiovisual products were ‘necessary’\(^\text{24}\) for the protection of public morals in China as required by Article XX(a) GATT.\(^\text{25}\)

A further important issue determined in China-Audiovisual was the

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\(^{21}\) Appellate Body Report, United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services, WT/DS285/R (20 April 2005) (hereafter US – Gambling (AB)).

\(^{22}\) Article XIV(a), The General Agreement on Trade in Services’ ‘public morals’ exception states: ‘Provided that such measures do not “constitute a means of arbitrary or unjustifiable discrimination between countries . . . or a disguised restriction on trade in services” GATS allows the “adoption or enforcement by any Member of measures: (a) necessary to protect public morals or to maintain public order.”’ General Agreement on Trade in Services, 15 April 1994, WTO Agreement, Annex 1B 33 ILM 1168 (1994) (hereafter GATS).

\(^{23}\) Paragraph 415(b)(iii) AB Report: ‘... finds that the Panel erred, in paragraph 7.836 of the Panel Report, in finding that the State plan requirement in Article 42 of the Publications Regulation is apt to make a material contribution to the protection of public morals and that, in the absence of a reasonably available alternative, it can be characterized as “necessary” to protect public morals in China.’

\(^{24}\) The ‘necessity test’ involves a process of ‘weighing and balancing’ the objectives of the challenged measure, with its trade restrictive aspects on commerce. At paragraph 240 AB Report, the Appellate Body refers to the AB’s report in the US – Gambling case cited above to explain the meaning of necessity: ‘In US – Gambling, for example, the Appellate Body addressed, in the context of Article XIV(a) of the GATS, the proper means of assessing “necessity” through a process of “weighing and balancing” a number of factors. The Appellate Body explained that the process begins with an assessment of the relative importance of the interests or values furthered by the challenged measure. A panel should then turn to the other factors that are to be weighed and balanced, which will in most cases include: (i) the contribution of the measure to the realization of the ends pursued by it; and (ii) the restrictive effect of the measure on international commerce. Additional factors may be relevant in specific cases. Once a panel has identified the factors to be weighed and balanced, a comparison of the challenged measure and possible alternatives should be undertaken, and the results considered in the light of the importance of the objective pursued.’

\(^{25}\) Paragraph 415(e) AB Report.
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classification of ‘sound recording distribution services’. China argued that electronic sound recording distribution services were not covered by China’s schedule of commitments. However, both the panel and AB found that sound recording distribution services in sector 2.D of China’s GATS Schedule extended to the distribution of sound recordings in non-physical form through electronic means and upheld the panel’s conclusion (in paragraph 8.2.3(b)(i) of the Panel Report) that the provisions of China’s measures prohibiting foreign-invested entities from engaging in the distribution of sound recordings in electronic form were inconsistent with Article XVII of the GATS. This is an important finding and further strengthens the precedent established in the earlier WTO case of US – Gambling that online products are equivalent to their physical counterparts, and that the WTO is able to extend the commitments made by a member to include intangible products delivered over the internet.

Both cases have significant implications for China and demonstrate a common thread running from the issue of piracy of copyrighted works in China – IP to market access commitments for foreign content material in China – Audiovisual. It could be argued that the strict censorship laws on foreign content in China have contributed to the rise in potential piracy of foreign content. There is a danger, however, that the international trading community, particularly the developing nations, could perceive the judgment by the AB in China – Audiovisual as indicative of a threat to national sovereignty, and also that the US’s challenge to China’s interpretation of the necessity test under the Article XX(a) ‘public morals’ GATT defence, could be further perceived as an expression of cultural dominance by the US in exporting audiovisual products overseas.26

Professor Li Yufeng (Southwest University of Political Science and Law) discusses China’s copyright laws in Chapter 4. Although copyright can be traced back in China to the Han Dynasty (206 BC–220 AD), it became codified only in the latter Qing period and after the Opium Wars (1840–42 onwards) with the establishment of the Great Qing Copyright Law of 1910.27 The current copyright system embodies a three level legislative hierarchy. The first level comprises the laws adopted by the NPC and its Standing Committee, such as the General Principle of Civil Code

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1986 (GPCC) and the Copyright Law 2001 (CL). The second level consists of regulations, administrative measures and orders endorsed by the State Council: Regulations for the Implementation of the Copyright Law 2002 (CLIR); Regulations for the Protection of Computer Software 2001 (CSPR); Regulations for the Protection of the Right of Communication through Information Network 2006 (RCPR), and Regulations for the Collective Management of Copyrights 2005 (RCMC), and Interim Measures for Video and Television Broadcasting and Sound Recording Products 2010.

In February 2010, China adopted the second revision of its copyright law, the Copyright Law of the People’s Republic of China (revised 2010) and coming into effect in April 2010. The major changes include dropping Article 4(1) Copyright Law 2001, and introducing a new Article 26 on the pledging of copyright. The prior Article 4(1) was a controversial provision that created some uncertainty as to whether foreign films and other audiovisual material that had not obtained approval under China’s censorship regulations enjoyed copyright under the CL 2001. As a result of a challenge by the US and a decision by the WTO’s Appellate Body in December 2009 (discussed above in China – IP), Article 4(1) was dropped from the CL (revised 2010).

The CL (revised 2010), however, has still failed to list the right of rental for performers, which runs foul of the WIPO Performances and Phonograms Treaty 1996 (WPPT). The WPPT was binding on China from 9 June 2007.

Also, Chapter 4 makes clear that the term ‘broadcasting’ in China actually refers to two different types of dissemination: broadcasting in a wireless form, and cable casting in a wire form. The mainstream view held by NCAC officials and SPC judges is that ‘broadcasting’ in China refers to broadcasting in a wireless form and retransmission of the wireless-

\[\text{28 The Decision of the Standing Committee of the National People’s Congress on Revision of the Copyright Law of the People’s Republic of China, adopted at the 13th meeting of the Standing Committee of the 11th National People’s Congress of the People’s Republic of China on 26 February 2010 and coming into force on 1 April 2010.}\
\[\text{29 Article 26 CL (revised 2010): ‘In case of pledge of copyright, the pledger and the pledgee shall go through registration of the pledge with the copyright administration under the State Council.’}\
\[\text{30 China – measures affecting trading rights and distribution services for certain publications and audiovisual entertainment products, WTO Appellate Body Decision WT/DS363/AB/R, December 2009.}\
\[\text{31 See WPPT, Articles 9 and 15.} \]
broadcasted programs using wired means.\textsuperscript{32} In other words, it does not cover direct cable casting.

This narrow definition, which reflects the intention of the legislators, is not consistent with requirements of the WCT and WPPT. This will naturally cause conflict between Chinese law harmonization and international conventions. In addition, the definition may to some extent be outdated given that cable and webcasting services are developing so rapidly and will soon overtake wireless broadcasting and (potentially) dominate the Chinese market. As a consequence, the wireless-based definition of ‘broadcasting’ in the current CL may subject all the cable broadcasters and webcasters to a lacuna in protection.

Chapter 5 on unfair competition by Professor Hu Kaizhong (Zhongnan University of Economics and Law) discusses China’s Anti-Unfair Competition Law 1993 (AUCL). Article 2 of the AUCL defines unfair competition as ‘... activities made by business operators who damage the others’ legal rights and interests, disturb the order of social economy and violate the provisions of this Law’. This provision is the legal standard for judging any act of unfair competition in China. The chapter provides a wide range of examples of unfair competition, an area of law that China is seeking to revise (along with the trademark law). Also mentioned is the relationship between the AUCL and China’s Anti Monopoly Law (discussed further below).

One important aspect of the AUCL are the provisions on counterfeit trade. There has been much discussion of China and the trade in counterfeit goods. Article 5 AUCL focuses on counterfeit trade as a form of unfair competition. Counterfeiting of goods is provided in Article 5 and includes confusion of commodity and the false marking of goods. Business operators who breach Article 5 and cause damage to infringed business operators will bear the liability for compensating for damage. The amount of this compensation will be equivalent to the profit made by the infringer during the period of infringement (if it proves difficult to measure the amount of damage done). Also, the infringer will be required to compensate for the reasonable costs to the infringed party to investigate the unfair competition acts of the infringer. The infringed party can sue the infringer in the People’s Court when its legal interests and rights are damaged due to unfair competition. Meanwhile, if the business operator imitates the

\textsuperscript{32} CL (revised 2010), Article 11 defines the ‘right of broadcasting’ as: ‘... the right to publicly broadcast or disseminate works by wireless means, to disseminate broadcast works to the public by wired dissemination or rebroadcast, and to disseminate broadcast works to the public by audio amplifier or other similar instruments for transmission of signs, sounds or images’.
other’s registered trademark, uses the other enterprise’s name or personal name without permission, forges or fakes the mark of certificate, the mark of famous or high quality products, fakes the original place of production, makes a fake or creates misunderstanding over the description or quality of products, the infringer will be punished in accordance with the provisions of the Trademark Law of the PRC and the Product Quality Law of the PRC.33

There is pressure on China to improve its provisions on counterfeit trade. The recent WTO China – IP case mentioned above highlights (particularly US) concerns over the limited availability of criminal sanctions for piracy and the absence of criminal penalties for infringements below particular quantitative and qualitative thresholds (claims that the WTO did not uphold). Furthermore, the Anti Counterfeit Trade Agreement (ACTA) being pursued plurilaterally by the US, including Japan and the EU amongst others, has now reached an advanced stage with, at the time of writing, a draft of the treaty available in the public domain. The ACTA treaty is likely to include stringent provisions on digital rights management and anti-circumvention.34

It is clear that the AUCL is now in need of revision. Chapter 5 highlights several ways in which the current law can be amended. Discussion of the AUCL continues in Chapter 6 by Professor Liu Xiaohai (Tongji University), with Professor Liu expanding the discussion of unfair competition to include the overlap between trade secrets and other IP rights, such as copyright and the law of trademark, and then going on to discuss the licensing of know-how and confidentiality in Chinese employment contracts. Under Chinese law, the relationship between trade secrets and patents is (before the patent application becomes public) anything related to the patent application. Patents and trade secrets coexist in the technical solutions set out in the patent. The termination of the patent would not prevent the trade secret from continuing to exist in the patented technical solution. As regards the relationship between trade secrets and copyright, under Chinese law, copyright work can be protected as a trade secret as long as it has not been partially or fully disclosed. For example, if the confidential part of the source code of computer software has not been disclosed, it may still be protected as a trade secret.35 Chapter 6 includes

33 See Chapter 3 on Trademarks.
34 See, for example, Chapter 2 (Section 4) ACTA available at: https://www.ige.ch/en/legal-info/legal-areas/counterfeiting-piracy/acta.html, accessed September 2010.
35 See Article 12 of the Measures for the Registration of Computer Software Copyright (2002).
extensive discussion of licensing of know-how and technology transfer and technology development contracts under Chinese law. Also covered are the conditions that can be imposed on employees to guarantee trade secrets and restraint of trade provisions.

Chapter 7 by Professor Michael Pendleton (Chinese University of Hong Kong) discusses the IP framework in China’s Special Administrative Region (SAR) of Hong Kong. Much of China’s entire legal system was created in the early 1980s, the Trademark Law in 1982 for example. However, Hong Kong has as long a history and immersion in intellectual property as many countries of Western Europe or the United States, mainly due to the UK’s influence over the period of colonization. For at least a century, Hong Kong’s laws have been heavily biased in favor of the rights holder in order to attract foreign capital. Hong Kong was the first member of the WTO to seek TRIPS compliance for its intellectual property laws and is a member of the WTO independently of China, and in its own right as the only non-sovereign member state of the WTO. As we see in Chapter 7, Hong Kong has a strong regime to enforce and protect intellectual property, and quite distinct from mainland China. For example, civil remedies include the ex parte Anton Piller order, Mareva and interlocutory injunctions. For over half a century, the criminal enforcement regime has been a pioneer, instigating criminal enforcement of copyright from the 1960s. In a recent case, Chan Nai Ming v Hong Kong SAR, a man was jailed for uploading a genuine VCD to a peer-to-peer (P2P) server. He was held to have distributed an infringing copy, i.e. the copy of the genuine VCD he made on his PC to facilitate uploading.

In Chan Nai Ming, the defendant was charged with, inter alia, attempting to distribute infringing copies of three copyright films contrary to the original section 118(1)(f) (now section 118(1)(g)) Copyright Ordinance. The distribution was by means of the peer-to-peer system BitTorrent, and the defendant was the ‘seeder’ who created the seed files for others to download. The defendant was sentenced to three months’ imprisonment on each charge, the sentences to run concurrently. The case went all the way to the Court of Final Appeal and the decision and sentence were upheld.

In Hong Kong as regards anti-circumvention of technological measures for copyright protection, copyright owners commonly employ technological measures to prevent or restrict unauthorized access to, or copying of,
Copyright works in electronic form that are issued or made available to
the public. Chapter 7 makes clear that the HK Copyright Ordinance has
already provided civil liability for the circumvention of such measures.
To further combat such circumvention, the civil liability provisions have
been expanded, and new criminal sanctions introduced following the 2007
amendments. Chapter 7 discusses the full range of IP rights available,
including a broad discussion of design rights and confidential information.

Chapter 8 on copyright protection in the electronic environment by
Professor Liu Chuntian (Renmin University) is a discussion about China’s
evolving IP framework for dealing with network technology issues. The
chapter introduces some of the problems facing regulators in dealing with
designing legal frameworks to cope with new technology. The challenge
for China is to move from a system where currently the state has interests
in being (both) a market player and a regulator to where, in the next three
decades, private enterprise will take the lead in innovation and design, and
the state will need to take a more supportive role. The chapter makes clear
that China is still in a state of transition: there are examples of innovation
and development that are on par with the best international practice, but
there are also many parts of China that remain undeveloped. A mature
understanding of IP throughout the country is lacking. The chapter argues
that China needs to find a way to harmonize private monopoly IP rights
with its civil law system. Also guidance from the SPC will be necessary
in assisting the lower courts to rule effectively on technology disputes.
The chapter makes reference to several lower court decisions on copy-
right infringement involving P2P networks and the internet. In this way,
Chapter 9 functions as a ‘bridging chapter’, bringing together the more
traditional aspects of regulation of IP in terms of black-letter law with a
broader discussion of the underlying policy issues that regulators need to
bear in mind when designing new legal frameworks for IP in dealing with
the internet. In taking as a central theme the use of the network to dis-
seminate intangible products, the chapter also acts as a bridge to the next
two chapters that discuss the regulation of information technology and
electronic commerce.

Chapter 9 by Professors Zhang Ping and Meng Zhaoping (Peking
University Law School) discusses the regulation of information

38 See the consultation document issued by the Commerce & Industry Branch,
‘Review of Certain Provisions of Copyright Ordinance’, (December 2004), para-
graph 6.1.
39 Copyright Ordinance, s 273, as enacted.
40 Copyright Ordinance, s 273A to s 273C, inserted by virtue of the Copyright
(Amendment) Ordinance 2007, s 69. See also the exceptions in s 273D to s 273F.
technology, computer software and e-commerce (Chapter 10 extends the discussion of e-commerce – discussed further below). In Chapter 9, the authors look at the aspects of Chinese civil law that underpin the regulation of technology. They cover the aspects of the Patent Law (2008) that look at the patenting of business processes and technical inventions and regulations looking at computer security and database protection. Under Chinese law, databases can also be protected. A database comprises of data and a system for managing the data. Also, the system management software may be eligible for patent protection. For example, the invention ‘System and method for executing search in a relational database’ was granted a patent in China on 14 January 2009.41

The development of e-commerce has generated a large number of business method-related inventions. As early as 1996, CitiBank filed business method applications with the Chinese State Intellectual Property Office (SIPO) and was granted patents.42 The essential issue lies in the patentability of computer software. It should be noted that pure business methods are not patentable under the Patent Law 2008 (New Patent Law). There is extensive discussion of the protection of computer software under copyright laws in Chapter 9, but owing to the special features of computer software, whether other aspects of software that have not been defined by the law, such as character databases, menu and user interfaces, are protected by copyright law is, at the time of writing, still under discussion in China.

Chapter 10 by Professor Cong Lixian (Beijing Foreign Studies University, and Research Fellow of Zhongnan University of Economics and Law) extends the discussion of e-commerce introduced in Chapter 9. There is a more extensive discussion of domain name registration and the relationship between domain names and trademarks under Chinese law. Also discussed is the issue of privacy. China does not at present have any specific laws on the protection of privacy. The chapter discusses one of the many ‘human flesh cases’ that has resulted in some guidelines from the SPC on privacy in China.

As mentioned above, counterfeit trade has been a central issue for the Quad countries (US, Japan, Canada and the European Union) in their relationship with China. Chapter 10 discusses some aspects of counterfeit trade involving the two local search and auction portals E-Bay and Alibaba. The chapter goes on to discuss differences in the regulation of e-commerce at a provincial level, taking three main areas as examples:

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41 Patent Application No. 200610064263.4; Issuance No. 100452047C.
42 For instance, patent application No. 92113147.X was granted on 18 December 2002.
Guangdong (one of China’s most successful Special Economic Zones), Shanghai (often seen as the commercial capital of China) and Beijing (the political capital).

The next two chapters, Chapter 11 by Professor Huang Young and Dr Zhang Zhe (both of the University of International Business and Economics) and Chapter 12 by Professor Xu Shiying (East China University of Political Science and Law) focus on the application of anti-monopoly law in China. An effective competition framework is important in markets characterized by network externalities where operators with market power can leverage their dominance from downstream markets into several upstream markets. China introduced a new Anti-Monopoly Law (AML) in 2008.

The AML targets three main monopoly behaviors: monopoly agreements; the abuse of market dominance; and the concentration of undertakings. Several draft rules providing further guidance as to the AML’s implementation were published in January 2011 (following a period of public consultation from the publication of draft rules in May 2010), such as the Rules of Administrative Authority for Industry and Commerce on Prohibition of Abuse of Dominant Market Position (‘Dominance Rules’) and coming into effect on 1 February 2011.43

Article 17 AML defines market dominance as a ‘market position where an undertaking is capable of controlling price, quantity or other trading terms within a relevant market, or deterring or affecting other undertakings’ ability to enter into a relevant market’. The Dominance Rules are important in that they define more clearly (than the AML) the types of behavior by a dominant undertaking that may be classed as unlawful abuse (for example, the imposition of unreasonable restrictions on payment terms, delivery terms or the manner of service provision). Also, guidance is given on possible defenses to abuse of dominance allegations by undertakings. Article 8 Dominance Rules defines the factors that the Administration for Industry and Commerce (AIC) will consider when looking at valid justifications for abusive dominant behavior. The consultation period for the draft rules ended in June 2010. The Dominance Rules came into effect on 1 February 2011. Regulations on procedural provisions with regard to abuse of dominance, monopoly agreements, and

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abuse of administrative powers are already published by SAIC in June 2009.

In Chapter 11, Professor Huang Young and Dr. Zhang Zhe write about the AML, describing in detail its background history and implementation. Professor Huang was one of the early drafters of the AML. The chapter looks at the regulatory framework for the enforcement of the AML in China at both state and provincial level and reviews the areas of the AML that are still in need of clarification. Interestingly, in conformity with the theory of ‘one country, two systems’ proposed by Mr. Deng Xiaoping, the Chinese leader in the 1980s, Hong Kong and Macau are able to maintain their separate legal systems so long as they are not in contradiction with the Basic Law of the Hong Kong Special Administrative Region and the Basic Law of the Macau Special Administrative Region. In this sense, the Chinese AML is not applicable in Hong Kong or Macau. In fact, on 6 May 2008, the local government of Hong Kong launched a second public consultation on its own competition law. However, the attempt encountered a major setback when on 27 February, in the House Committee of the Legislative Council, the administration confirmed that the competition law would be postponed due to ‘technical issues’. On the other hand, as provided by Article 2 of the Chinese AML, the exclusion of Hong Kong, Macau and Taiwan does not prevent the enforcement authorities from investigating any anti-competitive activities with an impact on the Chinese domestic market. Chapter 11 also looks at the overlap of the AML with other Chinese laws impacting on anti-competitive practices, such as Articles VII (commodities entering markets) and XV (bid rigging) of the AUCL.

Chapter 12 by Professor Xu Shiying (East China University of Political Science & Law) discusses the relationship between IPRs and the AML in greater detail. Article 55 AML is concerned with the potential abuse of a dominant position by an undertaking in exercising monopoly IPR rights. The Chinese government has no problem with a monopoly exercising its IPR, but is concerned (as with other developed competition regimes, such as in the US and EU) with the abuse of monopoly IPRs. For this reason, Article 55 reads: ‘This law is not applicable to conducts by undertakings to implement their intellectual property rights in accordance with relevant IP laws and administrative regulations; however, this law is applicable to the conduct by undertakings to eliminate or restrict market competition by abusing intellectual property rights’.

At the time of writing, the Enforcement Bureau for Anti Monopoly and Anti Improper Competition of SAIC is expected to publish guidelines on the abuse of IPRs under the AML. For example, unlike in the EU with the EC regulation on technology transfer agreements (EC 772/2004), and
other exemptions (for example on vertical agreements: Reg 2790/99 and R&D agreements: 2659/2000), at the time of writing, no similar guidance in China exists. As such, new guidelines on the interface of competition law and IP are much anticipated, as multinationals based in China are understandably fearful that Article 55 AML could be used against them when protecting their IPRs (for example, refusing to license a patent or copyright, as might be the case in the computer software sector).

Already, following litigation in the EU, the US, Japan and Korea, Microsoft is facing a legal challenge in China on the potential abuse of a dominant position arising from its use of IPRs. The allegation against Microsoft is that it is using its dominant market position to manipulate software prices in China, and has breached Articles 6, 17 and 19 of the AML, which prohibit abuse of market dominance. However, under Chapter 2, Article 15 of the AML, a competent anti-monopoly authority can approve exemptions from Articles 13 and 14 if certain monopoly agreements among operators are beneficial (for example, in improving technology or research and developing new products; upgrading product quality and improving operational efficiency and enhancing competitiveness of small and medium sized entities etc.). Microsoft may attempt to invoke the Article 15 exemptions by arguing that its business operations in China are beneficial to improving technology or research and developing new products (Article 15(i)). However, any exemption is subject to the approval of a competent anti-monopoly authority and it is still unclear which specific agency (MOFCOM, NDRC or SAIC) is the relevant ‘competent anti-monopoly authority’ for the purposes of Article 15(i).

Also, the leading Intelligent Messaging operator in China, Tencent, with its refusal to interconnect its QQ platform (similar to Microsoft’s MSN network) with other competitors gave rise to a legal challenge in the courts which Tencent eventually won. The Tencent case is discussed in Chapters 8 and 12.

Chapter 13 moves to the arena of international trade and specifically the use of IPRs in China’s negotiations with other WTO member states and its implementation of the TRIPS Agreement. Professor Kong Qingjiang (Zhejiang Gongshang University) discusses the Doha Round and China’s unique position in the round as both a trading giant, but also a developing country, and therefore having the potential to mediate between different interest groups, both developed and developing countries. What is clear is that with China surpassing Japan in terms of purchasing power parity as the second largest economy in the world (soon to be followed by India in the next year or so), China and India are destined to play even more significant roles in the WTO in the years ahead. In terms of IP, both
nations, together with Brazil, Cuba, the Dominican Republic, Ecuador, Pakistan, Thailand, Venezuela, Zambia and Zimbabwe, submitted a communication to the Council on TRIPS, stressing the need to modify the TRIPS Agreement and arguing that it contained no provisions to prevent biopiracy (illegal access and use) or ensure prior informed consent and the fair and equitable sharing of benefits. The communication proposed several conditions for the acquisition of patent rights related to biological materials of traditional knowledge, including requirements for patent applicants to disclose the source of origin of the biological resource and associated traditional knowledge and evidence of prior informed consent and benefit-sharing.\(^4\)

Also, against the backdrop that the Quad countries of the USA, Japan, Canada and the EU have been pushing for TRIPS-plus provisions in several bilateral and free trade agreements, China too is now adopting a similar position on the use of regional trade agreements to secure specific IPR provisions with its own bilateral and regional trading partners.\(^5\)

China has also had to deal with two WTO DSB cases (\textit{China – IP} and \textit{China – Audiovisual}) mentioned above, the former case leading to an amendment to China’s copyright laws. Also, to further implement WTO commitments post-Doha, China has implemented the Doha Declaration on Public Health in its patent laws with the third amendment to the Patent Law (Patent Law 2008 discussed above), providing for a more definitive statutory basis to compel compulsory licenses, and also new rules that restrict the general scope of compulsory licensing while making it more feasible and likely for compulsory licenses to be granted in the area of pharmaceuticals\(^6\) and semiconductor technology.\(^7\) As such, in the event of a public health crisis, such as SARS or bird flu, the Chinese government is likely to grant a compulsory license to manufacture and export the required patented drugs.

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\(^4\) IP/C/W/356.

\(^5\) At the time of writing, China and Peru are preparing for the negotiation of a free trade agreement. From the Joint Feasibility Report released by the Ministry of Foreign Trade and Tourism of Peru and the Ministry of Commerce of the People’s Republic of China, both parties agreed that ‘[a]ccording to the characteristics of bilateral trade between China and Peru, the intellectual property protection can be fulfilled under the frame of TRIPS’. They seemed not to go beyond the minimum requirements of the TRIPS Agreement. Available at http://www.mincetur.gob.pe/newweb/Portals/0/Peru-China%20JFS%20Final.pdf, accessed July 2010.


\(^7\) Article 52 of the Patent Law (2008).
Also discussed in Chapter 13 is the relationship between the New Patent Law 2008 and the AML. The New Patent Law stipulates that compulsory licensing may be granted to remove or reduce the negative effects of competition due to monopoly acts caused by the patentee exploiting the patent.\(^{48}\) In other words, the issuance of a compulsory license is now a remedy for patent misuse in China.

Unlike many of the previous chapters in this book that focus purely on the content of the law with regard to IP and technology, Chapter 14 (the QBPC chapter) written by the Quality Brands Protection Committee (QBPC) chair, and Senior IP Counsel to GE China, Mr. Jack Chang, takes as its central focus the view of multinationals present in China and the challenges faced when protecting their IP under the evolving Chinese legislative framework. The chapter looks at the early formation of the Quality Brands Protection Committee, a coalition of foreign multinationals that came together with the aim of working with the Chinese government to improve IP protection in China. The chapter offers a unique perspective on QBPC’s achievements and case law work over the several years since its early formation in 1998. Also, the chapter sets out some practical recommendations going forward as China continues to amend its legislative framework for IP protection and enforcement. The chapter provides a practical insight into the protection of IP and detailed legal provisions that illustrate the difficulties faced by brand owners in protecting their well-known labels from the threat of counterfeit trade.

Chapter 15 on telecommunications and the internet, written by the editor, Professor Rohan Kariyawasam (Cardiff University), brings together a discussion of telecommunications infrastructure with regulation of content in a converged environment. Discussion focuses on China’s Telecommunications Regulations 2000 and their relevance to trade on the internet and new regulations from the Ministry of Industry and Information Technology, and State Administration of Radio, Film and Television on new electronic services, such as mobile TV and IPTV. At the time of writing, the Chinese legislature, the Financial and Economic Committee of the National People’s Congress (NPC), has submitted the latest draft of the new planned telecommunications law (rumored to be called the ‘Communications Law’ when finally implemented to reflect the converged telecoms, broadcasting and internet networks in China) to the State Council. The new draft telecoms law was initially proposed as far back as 1980 to replace the current Telecommunications Regulations, but was delayed mainly due to difficulties on reaching an agreement between

industry players. Although the State Council is currently revising the draft law, this is not the first time that the draft law has been reviewed in this way. In 2005, a draft of the telecoms law was also received by the State Council, but the draft never reached the highest organ of the Chinese legislature, the NPC, for final approval. The discussion of the current new draft law in Chapter 15 therefore can only be seen as cursory, although the Chinese government is said to be committed to the idea of finalizing the law as quickly as possible to give legislative effect to the convergence of telecommunications, the internet, and cable networks and to give greater certainty to investors. The current draft law is now on the NPC’s Standing Committee legislative planning timetable and in the State Council’s legislative work plan.

The focus of network infrastructure regulation in Chapter 15 is on aspects of the digital network that looks to deliver new content services, such as IPTV (TV over internet networks) and mobile TV, where there is an overlap between infrastructure regulation and content regulation (viz. broadcasting). The chapter discusses the current Telecommunications Regulations 2000 with a focus on licensing, and particularly the Ministry of Industry and Information Technology’s (MIIT’s) recent Measures on the Administration of Licensing for Telecommunication Services Business (effective 10 April 2009), 49 and interconnection, and clarifying the status of the Telecommunications Regulations within the complex hierarchy of laws, regulations, measures, rules and notices within China. Also reviewed is the regulation of internet infrastructure, and converged audiovisual services delivered over internet networks, and new measures introduced on network security in 2009. The chapter also looks briefly at Next Generation Networks.

A significant issue for China is the involvement and investment of foreign operators in the telecoms sector. Chapter 15 looks at the complex regulatory environment for foreign telecommunication enterprises in China under the Provisions for the Administration of Foreign-Investment Telecommunications Enterprises (Revised), State Council Decree No. 534 (promulgated and effective 10 September 2008) (‘FITE Rules’), and the interplay of the Anti-Monopoly Law with the Telecommunications Regulations, including the 2010 Dominance Rules published by the State Administration for Industry and Commerce (SAIC), discussed above, before concluding with a brief discussion of the new draft Telecommunications Law.

49 This replaced the older Measures on the Administration of Licensing for Telecommunication Services Business (1 January 2002).
Finally, it should be noted that this book aims to provide an *introduction* to the major IP and technology laws impacting on the delivery of electronic content over the Internet. The main purpose is to introduce the relevant laws to a foreign readership in a single work in English. Furthermore, as indicated by this introduction, Chinese law is very complex, with a mix of civil, administrative and criminal provisions. A detailed treatment of the relationship between these different systems is beyond the scope of this book, but individual authors do touch on this mix throughout.\(^{50}\)