Consumer Protection and IP Abuse Prevention under the WTO Framework

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In this paper, I will examine the likely effects of the WTO framework and the TRIPS Agreement on consumer protection in the IP and technological market. I will first examine whether provisions to limit IP enforcement measures on consumer protection grounds are permissible under the IP abuse provision of the TRIPS Agreement. I will then use China, Australia and Brazil as examples to examine how non-competition law approach, particularly consumer laws, can be used to prevent various forms of IP abuse, particularly unfair terms in End Users Licensing Agreements. Some recent cases on IP abuse prevention in high technology market will be discussed by referring to consumer protection laws in Australia and Brazil, such as Sony PSN case, Google and Amazon cloud computing cases. Finally, I will provide some practical advice for individual countries, particularly IP net importing countries, to use consumer law to prevent IP abuse. It is imperative that each country, particularly developing countries, should adopt more flexible approaches at both international and domestic levels to address the IP abuse issues and to protect legitimate rights of their citizens in using new technology products and services. This is not only important for protecting consumers but also important for encouraging competition and supporting innovation.

Introduction

The inclusion of Intellectual Property (IP) law within the World Trade Organisation (WTO) framework is a profound change from the trade law framework that the WTO replaced in 1995, and its impact on developing and developed countries alike has been enormous. As many commentators noted, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) is one of the most controversial international IP agreements that has entered into force.¹

Its negotiations were “highly contentious”, and the “perspectives of developed and less developed countries on the role of IP and enforcement remain far apart”. Particularly in recent years, developing countries are frustrated by the ongoing demands by developed countries for protections and “additional TRIPS-plus demands” imposed by new bilateral and regional trade and investment agreements. They believe that the TRIPS and these TRIPS-plus agreements have “ignore[d] their local needs, national interests, technological capabilities, institutional capacities, and public health conditions”, and believe that it is necessary for the WTO and WIPO to take into account the development concerns and to develop a more effective regulatory framework for achieving the objectives of the TRIPS Agreement in preventing the abuse of IP and enhancing technology transfer.

Nevertheless, most existing studies on WTO and TRIPS Agreement focus on the balancing issues in IP law and international IP trade and the role of competition law in preventing IP abuse. The TRIPS Agreement, in Article 8(2), explicitly allows WTO members to include provisions to prevent the abuse of intellectual property rights in their local law. Pursuant to this provision, a number of jurisdictions do regulate the abuse of intellectual property rights through competition law, such as where a rights holder refuses to negotiate a licence with a third party with the intention and effect of stifling the emergence of a new market. However, few studies have been done on the impacts of the inclusion of IP law within the WTO framework on consumer protection, and how developing countries may use consumer law to prevent IP abuse. Fewer studies have been done on the impacts of developing countries’ access to the WTO on their domestic consumers in IP market.

In this paper, I will examine the likely effects of the WTO framework and the TRIPS Agreement, on consumer protection in the IP and technological market, and whether provisions to limit IP enforcement measures on consumer protection grounds are also permissible under TRIPS.

In Part I, I will discuss the limits of the current WTO framework on consumer protection, particularly the protection for the consumers in developing nations. I will examine the democratic negotiation process of the WTO regimes (including the weak bargaining power of developing countries and the absence of voice of NGOs in the formal negotiation process) and its direct impacts on public rights. Some specific examples will be given to demonstrate the potential risks that the WTO disputes resolution mechanism is used to diminish consumer rights or public rights in general. I will also explore the rationale behind these examples and call on future reform. I will use China as an example to explore the difficulties of developing countries to apply the WTO rules and TRIPS Agreement, and potential impacts (including both negative and positive impacts) on consumer protections in these countries.

In Part II, I will discuss the likely effects of the TRIPS Agreement on the protection of consumers and IPR users. I will provide a brief history review of the negotiation

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2 Peter K Yu, above n 1 at 1.
4 Peter K Yu, above n 1.
5 Peter Yu further stated “these concerns and frustrations eventually led to the establishment of a set of development agendas at the WTO, the World Intellectual Property Organisation (WIPO), and other international fora.”
process of TRIPS Agreement, and comment on whether the TRIPS negotiation process is a democratic one and how the trade-off between developing and developed countries has been temporarily achieved. I will then examine both possibilities and difficulties for individual countries to use the IP abuse prevention provision in the TRIPS Agreement to balance IP protection and consumer welfare, particularly focusing on Articles 7 and 8 of the TRIPS Agreement (on the Objectives and Principle of the TRIPS Agreement), and examine whether they provide a leeway for individual countries to use consumer laws to prevent IP abuse, particularly preventing IP abuses through unfair terms of IP licensing agreements. Various forms of IP abuse, which may harm consumers and IP users, will be examined. Particular attention will be given to unfair terms of IP licensing agreements.

In Part III, I will focus on the consumer protection laws at the domestic level. I will examine the major forms of IP abuse (including IPR abuse in the online environment) in China, and discuss how the Chinese consumer law addresses IP abuse issues. I will then use Australia and Brazil as examples to explore how to use sophisticated consumer laws to strengthen the protection of consumers and IP users under current digital environment. The recent revision of consumer law sections in Australian Competition and Consumer Act 2010 (CCA, former Trade Practices Act 1974) and Consumer Protection Law in Brazil, particularly unfair contract term provisions, will be examined.

In Part IV, I will examine some recent IP abuse cases in high technology market, such as the Sony PlayStation Network (PSN), Google and Amazon cases. In particular, it will examine how existing Australian and Brazilian consumer protection laws may deal with unfair terms in End User Licensing Agreements, and advise consumers on potential legal remedies against IP abusive conduct of IP licensors or technology service providers.

In Part V, I will provide some practical advice for individual countries, especially IP net importing countries (such as China), to use consumer law to prevent the abuse of IP. I will also discuss the possibility that developing countries, international organisations and NGOs (such as Consumer International) work together in enhancing democracy in TRIPS revision negotiations in the future. Further, I will argue that, like the TRIPS Agreement, the WTO/UN should set up the minimum requirements of consumer protection for member countries.

Part I: WTO Framework and Consumer Protection

1.1 Trade Oriented vs People Oriented

Most discussion of the WTO is focused on trade issues rather than people in the trade. This is no surprise, because it reflects the WTO’s own philosophy. The preamble of the Agreement Establishing the WTO explicitly indicated that the WTO contributes to its recognised objectives through the “multilateral trading system.” Consequently, as some commentators noted, the constitution of the WTO is based on the “principles of

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8 Bill Butcher & Mary Ip, “Are Chinese Consumers Winners or Losers under WTO Membership?” (2007) 4 Macquarie Journal of Business Law 71; “Being desirous of contributing to these objectives by entering into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade... Determined to preserve the basic principles and to futher the objectives underling this multilateral trading system”.

trade rather than rules for people”.

This WTO philosophy has also been articulated in the statement made by the WTO Working Group on the Interaction Between Trade and Competition Policy in 1999:

[in the case of Article III of the General Agreement on Tariffs and Trade (GATT) the subject matter which must benefit from national treatment is not the persons of other Members but the products of other Members... While this is apparent on the face of Article III, it has also been emphasised in various panel decisions... In the case of trade in services, the potential beneficiaries of national treatment under the General Agreement on Trade in Services (GATS) are both the services of other Members and the service suppliers of other Members.]

It is clear that the primary focus of the WTO institutional framework is on the trade itself (products and services) rather than the person (consumers).

The trade-oriented approach/organisation philosophy itself is not something to be condemned. But the implementation of such a philosophy may have negative effects on many social issues, including the protection of consumer rights. This has been evidenced by numerous WTO/GATT dispute settlement decisions:

- In 1990 WTO panels have ruled against the Thai government for its import ban on the United States’ cigarettes;
- In 2000 WTO panels overrode the European Union’s ban on beef laced with artificial hormones;
- In 2001 Bolivia, Sri Lanka and Croatia governments abandoned a proposal to ban biotech foods after the United States and Argentina threatened to take WTO action;
- In 2005 WTO panels have ruled that Japanese quarantine restrictions on apples to protect against introduction of fire blight breached Japan’s WTO obligations; and
- More recently, in 2009 and 2010 WTO panels have ruled that China violated international trade rules by restricting the exportation of nine raw materials, such as coke, zinc, and bauxite.

As some commentators observed, it is clear that these decisions have undermined consumer health and safety concerns in favour of commercial interests. They “can...
all be explained as trade barriers masquerading as environmental and health concerns, but they still reflect the primacy of trade and the diminution of national sovereignty that comes with WTO membership, even where questions of consumer health and safety arise."

1.2 **Rationale Behind: Imbalance of Bargaining Power**

Despite recent improvement in its transparency and accountability, the WTO has been criticised for its secrecy. The consensus system under the WTO Marrakesh Agreements may be manipulated by a few of the most developed countries. Some commentators criticised that WTO negotiations are “held behind closed doors, contrary to the usual practice of other international organisations such as the United Nations”.

The reasons for the possibility of the manipulation of democratic negotiation are various. One of the major reasons is the imbalance of bargaining powers between member countries. On the one hand, the WTO is dominated by four largest trading blocs, namely the United States, the European Union, Japan and Canada.

These developed countries share similar commercial goals and interests, and often work collaboratively to push through an agenda at the expense of developing countries (more specific examples, such as the TRIPS Agreement negotiation will be discussed in later sections.). Although the developing countries make up more than three-quarters of WTO membership, developed countries have the capacity to locate large delegations permanently at the WTO Headquarters in Geneva, and to receive ample support from their home country, including sending trade specialist teams to Geneva to assist with complex matters confronted at the WTO.

On the other hand, while there is increasing unity and power among developing countries to influence WTO directions, most recently at the 2005 Hong Kong Ministerial Conference, lack of financial resources and experienced negotiators necessarily limit their impact in WTO negotiations. (More specific examples will be given later). Although the WTO has a mechanism to provide technical assistance to developing and least-developed countries (“LDCs”), the purpose of the WTO technical assistance is

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18 Butcher & Ip, above n 8. Some protection is afforded, but not guaranteed, by Article XX(b) of the GATT, discussed below in the context of the Thai cigarette dispute.

19 Article IX.1 of the Marrakesh Agreement states that, “The WTO shall continue the practice of decision-making by consensus followed under GATT 1947. Except as otherwise provided, where a decision cannot be arrived at by consensus, the matter at issue shall be decided by voting.” For example of WTO consensus manipulation, including “consensus manufacturing”, see Aileen Kwa, “Power Politics in the WTO” (2003) *Focus on the Global South* http://www.global.ucsb.edu/classes/global_130_f06/reading/Aileen.Kwa..Power.Politics.in.the.WTO.4-6.pdf.


21 Butcher & Ip, above n 8.


24 The Sixth Hong Kong Ministerial Conference was held in Hong Kong, China, from 13-18 December, 2005. Ministerial conferences are held every two years and are the WTO’s chief decision-making body. The growing strength of member countries outside the “Big Four” is suggested by the progress made at the Hong Kong Ministerial on preserving their interests, particularly on agricultural reform.
mainly focussed on assisting member countries to understand and implement WTO rules rather than meaningful assistance for strengthening their negotiation capacity.

Another problem is the exclusion of non-government organisations (NGOs) from meaningful participation in WTO policy discussions and law making processes. Under the “close-door policy” of WTO, NGOs were not able to participate in the WTO’s debate. They can only observe WTO’s activities. Although they can present at WTO Ministerial Conferences and take part in various symposia organised by the WTO Secretariat, they cannot be directly involved in the work of the WTO.25

As many commentators have observed, “the significant role played by NGOs in international forums should not be neglected”.26 For example, the expansion of the United Nations Guidelines on Consumer Protection (1999) into the area of sustainable consumption was largely credited to the impetus and contribution of the international consumer groups in the United Nations forum.27

1.3 Different Position of Consumers in Developed and Developing Countries: China as an Example

A direct consequence of trade-oriented organisational philosophy and imbalance of negotiation power is the increased risk of jeopardising the interests of consumers in developing countries. As discussed above, while membership of the WTO enables consumers in developing countries to enjoy greater variety of products with more affordable prices, it also limits the ability of these countries’ government to protect their consumers. The WTO agreement has been deemed as a trade-off between right of free trade and limitation of national sovereignty. Most developed countries have already established strong consumer protection mechanisms, the limitations on national sovereignty under the WTO regime is less damaging for them. By contrast, as most developing countries and LDCs do not have well-developed consumer protection laws and administration, these limitations could have deleterious consequences. Although the consumer protection regimes in many developing countries have improved dramatically over the recent two decades, they are still relatively “less developed” in general.28

Using China as example, on the one hand, China’s consumer protection laws and regulations have been improved remarkably in various aspects in the past two decades. On the other hand, like many other developing countries, its regulatory and administrative schemes on consumer protection are still subject to further improvement. In terms of regulatory schemes, the market situation in China has undergone tremendous change after its access to the WTO in 2001. However, the Chinese Law for the Protection of Consumers Right and Interests 1993 (CLPC 1993) has not been revised since it was passed in 1993. A review and revision of the current CLPC becomes increasingly necessary in order to ensure that the consumer law can be implemented broadly and

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25 Butcher & Ip, above n 8.
26 Ibid.
28 Many developing countries did not pass consumer laws until recent decades. In addition to consumer laws, many developing countries, including China, do not have a specialized agency for consumer law enforcement. It is a very loose structure of consumer protection.
administered effectively to achieve its original legislative purposes. This has been evidenced by numerous post-WTO cases which involved foreign technology companies, including the Sony TV and Toshiba notebook cases.

In each of these cases, technology products produced by foreign companies endangered the safety and interests of Chinese consumers, who have not received efficient and effective protection and compensation, because the Chinese laws on consumer protection and production liability (laws made by the congress) do not contain a “product recall” regime, which most developed countries have, and the scale of monetary compensation in Chinese Product Liability Law is too low.

However, it is noteworthy that China does have “product recall” regimes at ministerial level. Since 2004, China has made impressive progresses in enacting new rules on product recalls, including: Administration Rules on Motor Vehicle Defects and Safety Recalls, Administration Rules on Children Toy Recalls, Administration Rule on Food Recalls, and Administration Rules on Medicine Recalls. They have arguably had great impacts in promoting the protection of consumer interests. Nevertheless, these rules are mainly at the ministerial level, and the administrative monetary penalty is 30,000 RMB only (less than 5,000 USD). Again, it seems to be too low to deter rule breakers.

At the administrative and institutional level, it seems that China needs a stronger and more independent body dedicated to enforcing consumer laws to safeguard consumers’ interests, and to address the potential conflict between consumer law enforcement and WTO-imposed obligations. As we know, most developed countries have specialized agencies to address consumer protection issues, such as Federal Trade Commission (FTC) in the United States and the Australian Competition and Consumer Commission (ACCC). China has no real equivalent of the FTC or the ACCC. In China, the nearest to a comparable body overseeing consumer interests is the China Consumers’ Association (CCA).

The CCA, established in 1984, has completed a remarkable job in promoting consumer protection and consumer education in China in the past decades. Nevertheless, as some commentators pointed out, the CCA may consider further improvement in at least three areas. Firstly, the CCA may consider expanding its authority on competition-related issues. At present, the CCA’s activities are confined to research, disseminating information, mediating consumer disputes, and advising government on consumer issues. It has no authority to initiate competition investigation or competition litigation. China enacted the Anti-Monopoly Law in 2008, and three government agencies (Ministry of Commerce, National Development and Reform Committee, and the State Administration for Industry and Commerce) are currently enforcing AML. The CCA is not one of them and takes no part in safeguarding consumers against market malpractice. In other words, unlike the FTC or ACCC, China has separate agencies to deal with the consumer protection and competition protection issues. As such, it would be desirable for the CCA to work more actively with competition enforcement agencies, and set up a formal connection between competition protection and consumer protection at both legislative and institutional levels (since consumer protection is also one of legislative purposes of the AMLs).
Secondly, the CCA, as a quasi-governmental organisation,\textsuperscript{33} has limited financial resources and insufficient government subsidy. Some CCA local branches rely heavily on monetary contributions from business enterprises.\textsuperscript{34} It would be desirable if the CCA may seek various ways to finance its operation, particularly through direct funds or subsidy from the central government. China is the country with the biggest consumer population, and its consumer protection agency naturally deserves more subsidies. In doing so, the CCA may function more actively and independently in its objectives.

Thirdly, as Butcher and Ip observed, the CCA may need more qualified and experienced personnel who are competent to deal with complicated post-WTO consumer protection issues, and to protect domestic consumers more strategically. Although, in recent years, new agencies have been created within the Ministry of Commerce to monitor WTO affairs and the WTO Training Centre has been established in the Beijing University, the CCA has not yet established a similar division to particularly deal with post-WTO consumer protection affairs. In terms of the training of professionals, the EU-China Trade Project (governmental projects) has provided a sound platform for professionals in governmental agencies (such as IP agencies and competition law enforcement agencies) in both sides to regularly learn from each other.\textsuperscript{35} It would be desirable if both side’s governments agree to include consumer protection agencies, such as the CCA, in this project.

1.4 Summary and Remarks: Nexus of Market Economy and Consumer Protection

In summary, many developing countries progressed well in consumer protection law making. However, a revolutionary improvement of consumer protection in developing countries cannot be achieved overnight. The WTO framework aims to use WTO agreements to reduce government interference and allow market forces to operate. However, an unfettered market economy is not focused on protecting the consumer but on protecting free trade. Although the “negative impact of a market economy on consumer protection may not pose a significant problem to people in developed countries”, it may pose a significant problem to consumers in developing countries, such as China. As some commentators criticized, Chinese consumers’ interests have “been jeopardized by the lack of a quality control agency to execute the relevant laws” and such a circumstance “would be exacerbated with the influx of foreign goods upon WTO entry”.\textsuperscript{36} Similar problems may also be found in other developing countries, particularly in the least developing countries (LDCs).

Part II: TRIPS Agreement: IP Abuse Prevention and Consumer Protection

As introduced above, it is clear that the WTO is not a sound forum for protecting the rights of consumers in individual member countries, but a forum for protecting


\textsuperscript{34} Butcher & Ip, above n 8.


\textsuperscript{36} See Butcher & Ip, above n 8.
suppliers of products and services and promoting free trade of products and services.

The TRIPS Agreement, as an important agreement in the WTO framework, has arguably inherited the WTO’s pro-supplier features. Nevertheless, if we examine the provisions of the TRIPS Agreement in detail, we may find that it seems to provide a leeway for developing countries to adjust their domestic laws to protect the interests of consumers.

2.1 TRIPS Agreement and Democratic Negotiation

The bargaining process of the TRIPS has been regarded as a typical example of the way in which major stakeholders in developed nations have applied their economic powers and sophisticated negotiation skills to circumvent democratic bargaining processes in pursuit of maximization of their individual economic interests. Professor Drahos, in 2002, summarized three fundamental conditions of democratic bargaining: (1) the representation condition: the interests of all parties should be fully represented; (2) the full information condition: all negotiation parties should have full information about the consequences of possible outcomes; and (3) the non-domination condition: negotiation parties should not coerce each other. The negotiation process of the TRIPS appears to meet none of them, at least, none completely.

According to Drahos, in order to reduce possible resistance from developing nations, the US and the US big-business community adopted a “forum-shifting” strategy in the 1980s. They shifted the negotiation forum of IP standard-setting from the WIPO, UNCTAD and UNESCO where the developing nations might defeat their proposals to the GATT forum where the US was the “single most influential player”. Moreover, the first three circles of consensus in the TRIPS negotiation, which produced draft texts of a possible agreement, were conducted within the Quad States (US, EC, Japan and Canada) without the involvement of any developing nation. Under such an arrangement, obviously, the interests of developing nations could not be well represented (lack of the representation condition). This also allowed the Quad States to obtain more information than any other negotiating parties. Consequently, when the TRIPS was concluded, many countries did not have a clear understanding as to the TRIPS’ possible economic consequences (lack of the full information condition). When, in an interview conducted in Seoul in 1994, Professor Drahos asked a senior official why...
Korea had agreed to TRIPS, the reply was “because we were ignorant”. Later, although the proposal of the Quad States incurred stronger resistance from developing nations, particularly from India and Brazil, the threats of the US Special 301 sanctions finally broke the loose alliances of developing nations. US bilateralism and potential trade sanctions put developing nations in a very passive situation – either negotiate multilaterally under the framework of the TRIPS or face the US alone (lack of the non-dominination condition).

“Forum-shifting”, “hierarchical consensus”, “trade sanction threats” and all other bargaining strategies worked collectively to enable the Quad States to win the “first round IP war”: The passage of the TRIPS has formally linked IP protection to the trade regime, and enables trade laws to serve as a weapon by use of which developed nations can control “a resource even more important than oil – knowledge.” As Drahos criticized, “the reality of IP standard-setting has been that of an insider’s game dominated by a few producers of IP supported by states with the most to gain.” It is clear that the TRIPS negotiations are a typical example of the imbalance of negotiation powers between developing and developed countries in the WTO negotiations (introduced above).

Although the Quad States were to win the “first round IP war”, the efforts of developing countries in the TRIPS negotiations are not completely meaningless. One important outcome of their efforts is to successfully incorporate the IP abuse prevention provision into the Objectives and Principles of the TRIPS Agreement.

2.2 Objective and Principle Provisions of TRIPS: IP Abuse Prevention Regulation beyond Antitrust Law

The TRIPS has been the most significant development in the international IP arena in the twentieth century and an “ineluctable consequence of increased global economic interdependence”. It is often deemed a compromise between developing and developed nations in international trade negotiation. Developing nations promise to provide strong IP protection to foreign IP products. In return, developed nations promise to provide concessions to developing nations in labour-intensive industries, such as agri-
culture and textiles.  

In response to development concerns, Articles 7 and 8 of the TRIPS lay down the important principles and objectives of the Agreement. Article 7 requires that the protection and enforcement of IPRs should “contribute to the promotion of technological innovation and to the transfer and dissemination of technology”; the enhancement of “social and economic welfare”, as well as a sound balance of rights and obligations of producers and users of technological knowledge. Moreover, Article 8 of the TRIPS explicitly provides:

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

It is clear that this article allows member states to adopt any measures they think appropriate to prohibit IPR abuse and any other conduct that may unreasonably restrain trade or international technology transfer. As a United Nations study has pointed out, this article to a large extent reflects the view of many developing countries, such as India, during the Uruguay Round negotiations, that a “main objective of TRIPS should be to provide mechanisms to restrain competitive abuses brought about by reliance on IPR protection”.

This may be the first time that the term “abuse of Intellectual Property Rights” appears in an international agreement. It is also the first time that the international community put “IP abuse”, “innovation promotion”, “restrictive trade practice (anti-competition)” and “technology transfer” issues altogether in one international document.

The TRIPS Agreement also includes specific provisions on anti-competitive matters. For instance, Article 31 specified the conditions for compulsory licensing of patents as parts of measures to remedy anticompetitive practices. Moreover, TRIPS includes a special section on the “control of anti-competitive practices in contractual licences”, which focuses on anticompetitive licensing practices and conditions that restrain trade. Article 40 of TRIPS imposes an obligation on member states to act on “licensing practices or conditions pertaining to IPRs, which restrain competition” if they “have adverse effects on trade and may impede the transfer and dissemination of technology”.

51 See TRIPS Agreement, Art 7.
52 See TRIPS Agreement, Art 8.2.
55 TRIPS Agreement, Sec 8, Art 40.
56 TRIPS Agreement, Sec 8, Art 40.1. See also TRIPS Resource Book, at 554.
2.3 Leeway for Member Countries – Consumer Law Remedies against IP Abuse

It is clear that these provisions have a narrower scope of application than Article 8. They contain rules which, with have regard to only some of the conduct of IPR-holders that is listed in Article 8, and may establish obligations on member states that are not mandated by Article 8. As some commentators have observed, the TRIPS Agreement has not placed significant limitations on the authority of WTO member states to “take steps to control anticompetitive practices”.\(^{57}\) For example, the TRIPS Agreement does not limit the remedial measures that each member state may impose. In addition to “compulsory licensing”, member states may apply other remedies against antitrust infringement, such as injunction, damages and fines.\(^{58}\) Since the TRIPS Agreement only sets up general principles for dealing with IP abuse, restrictive trade activities and technology transfer issues, it mainly relies on member states themselves to make specific law and policies to “define the concept of abuses through appropriate domestic measures”\(^{59}\) and to regulate the activities of IPR holders when commercialising their IP products/services.

It is clear that the scope of IP abuse under Article 8 of the TRIPS Agreement is very broad. As the United Nations TRIPS and Development Resources Book has recognised, member states may consider conduct of IPR holders to be abusive “regardless of whether the enterprise in question dominates the market or not, and regardless of whether there is an anticompetitive use or simply a use of an IPR which defeats its purpose, e.g., the purpose of innovation or of dissemination of technology”.\(^{60}\) In other words, it is not limited to prohibitions under the antitrust law (i.e. abuse of dominant market position), but may cover any “illegitimate use of IP” which is “contrary to the basis and/or the objectives of IPR protection”.\(^{61}\)

As such, although the existing TRIPS Agreement mainly uses competition law approach as a main legal instrument to prevent and provide remedies for IP abuse activities, it is clear that the TRIPS provides sufficient space for member countries to adopt any other appropriate domestic measures to define the concept of IP abuses, to prevent IP abuse and restrictive trade practice and to enhance technology transfer. In addition to the competition law approach specified in Articles 31 and 40 of the TRIPS, member states can use any other legislation to prevent IP abuse, including consumer protection law and contract law.

Next I will examine how different countries adopt domestic laws to prevent IP abuse and enhance innovation and technology transfer, and particularly focus on the non-competition law approach – consumer law in China, Australia and Brazil.

\(^{57}\) UNCTAD-ICTSD, Resource Book, above n 15, 128.
\(^{59}\) UNCTAD-ICTSD, Resource Book, above n 15, 548.
\(^{60}\) Ibid.
\(^{61}\) Ibid.
Part III: IP Abuse Prevention and Consumer Law at the Domestic Level

3.1 Existing Mainstream Approach for IP Abuse Prevention – Competition Law Approach and Its Limits

Competition law is often deemed as one of most popular and effective legal instruments to prevent IP abuse. Although it is the idea of developing countries to include provisions for prohibiting IPR abuse and promoting technology transfer as part of the objectives and principles of TRIPS, regulators in most developing countries have not developed sophisticated laws and policies to enforce antitrust law in IP areas. In fact, some countries, such as China, have only set up their antitrust laws recently. By contrast, in developed countries, particularly in the US and the EU, sophisticated laws and policies on coordinating the relationship between IP and antitrust laws and enhancing technology transfer have developed over the past two decades.

For example, in Europe, the European Commission (EC) issued its first united Technology Transfer Block Exemption Regulation – Commission Regulation 240/1996 (“TTBER 1996”) – in 1996 which provides a general guideline on how to apply anti-competition provisions of the Treaty of Rome to certain categories of technology transfer agreements. The EC conducted a regulatory review on the application effects of the TTBER 1996 and enacted its New Technology Transfer Block Exemption Regulation (“TTBER 2004”) – Commission Regulation 123/2004 – in April 2004, in order to simplify the TTBER 1996 and to improve the certainty of application of IP licensing agreements. In the US, the US Department of Justice (DOJ) issued a “watch list” for prohibiting anti-competitive restrictions in patent licensing agreements in the 1970s. Moreover, in April 1995, the DOJ and the Federal Trade Commission (FTC) enacted a joint document Antitrust Guidelines for the Licensing of Intellectual Property (the Guidelines 1995), which provides some general approaches (such as Rule of Reason Approach) and principles for determining IP-related monopolistic activities. In 2007, the DOJ and FTC issued

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63 There are various types of IP abuse, such as using IP lawsuits as a tool against competitors, using IP licensing agreements against new entrants to the market, and using contract law to expand the scope or term of IPR protection. However, most existing legislation and legal guidelines mainly focuses on restraints of IP licensing arrangements, and technology transfer issues.

64 UNCTAD-ICTSD, Resource Book, above n 42, 543 (introducing negotiation history of article 8).


68 US Department of Justice (DOJ) & the Federal Trade Commission (FTC), Antitrust Guidelines for the
a more detailed document – Antitrust Enforcement & IPRs: Promoting Innovation and Competition (hereinafter “the Report 2007”) in order to facilitate the understanding and application of the 1995 Guidelines and to improve the degree of certainty involved in IP licensing arrangements.

The legislative experiences of the US and EC are arguably very valuable for developing countries that do not have sophisticated legal experiences in enforcing antitrust laws in IPR areas. However, given that most developing countries only have a short history of competition law enforcement (eg three-year experiences in China), competition law may not be the most effective way for them to prevent IP abuse in a short timeframe. This is particularly true for new market economy countries. As introduced above, the legislative foundation of the competition law is market economy, and the purpose of the competition law is to create and maintain fair competition in the market. Thus, it would not be an easy job for most former social plan-orientated economies (such as China) to develop an effective competition law enforcement mechanism within a short time period. By contrast, it may be more feasible for developing countries to explore how to apply other non-competition law approach, which they are familiar with, to prevent IP abuse (such as consumer law approach).

I will next examine how the existing laws (non-competition law, particularly consumer law) prevent IP abuse in China and its limits by referring to similar laws in the US and the EU. I will then examine how other countries, such as Australia and Brazil, address similar issues in their consumer laws, and what lessons other developing countries may learn from them.

### 3.2 Forms of IP Abuse and Non-Competition Law Approach for IP Abuse Prevention in China

China is the second-largest economy in the world and has nearly one-quarter of the world’s population. China, as a new rising economy, does not need to worry about the issue – “locked by old technology”. Thus, any international enterprises, particularly technology-driving companies, cannot afford to simply ignore a nation with such a big market. It is important for foreign IPR holders and technology-driven companies to have a sound understanding of the Chinese laws on technology transfer and IP abuse in order that they can avoid potential legal risk and commercialize their IPRs in an appropriate way.

After China entered the WTO in 2001 it sped up its efforts to become a part of the international IPR community, and enacted a number of laws and other regulations on technology transfer, anti-competition and IP abuse prevention. In particular, the last few years have seen China enact its first antitrust law – Anti-Monopoly Law 2008 (AML). In line with the requirements of Article 8 of the TRIPS Agreement, the AML includes a special article on IP protection and IP abuse prevention (Article 55). It is the first time that China has explicitly included the term – “the abuse of intellectual property rights” – in its domestic law. Nevertheless, even before AML, China already has relevant laws to address IP abuse issues. Both the AML and non-AML laws are currently valid, and serve as important components of the current Chinese IP Abuse regime.

Before the AML came into effect, a small range of domestic laws in China contained certain provisions on technology transfer and various forms of “IP abuse”. Generally speaking, prior to the AML, provisions focused on IP abuse could be found in four groups of laws and regulations. These were contract law, foreign trade law, anti-unfair competition law, and intellectual property law. They are not consumer law codes, but they all have provisions which are designated to protect consumer benefits. As such, they follow into a broad definition of consumer law.

3.2.1 **Contract Laws 1999 and Interpretation 2005 vs Nine No-Nos**

The legal group of laws involve the laws on contract. The *Contract Law 1999* contained some specific provisions on IP abuse caused by technology/technology transfer contracts. It explicitly provided that any technology contract, which “illegally monopolizes technology, impairs technological progress/advancement or infringes on the technology of a third party, would be invalid”. It further provided that the scope of the patent exploration or the use of the technical secret by the transferor and the transferee, which is set forth in technology transfer contracts, should not “restrict technological competition and technological development”. The *Contract Law 1999* arguably reflected the concerns on IP abuse caused by technology contracts, but it was too general and has not provided specific provision or standards for determining whether a technological contract has “illegally monopolized technology or impaired technological progress”.

Six years later, in the *Interpretation of the Supreme People’s Court Concerning Some Issues on Application of Law for the Trial of Cases on Disputes over Technology Contracts*, which came into force in January 2005 (hereinafter the “Interpretation 2005”), the Supreme People’s Court listed six specific circumstances/situations which would be deemed as “illegally monopolising technology and impairing technological progress” in Article 329 of the *Contract Law 1999*, including:

1. Restricting one party from making new research and development on the basis of the contractual subject technology.
2. Restricting one party from obtaining similar technology from competitors of the technology provider in the contract.
3. Restricting the technology accepter from reasonably exploring/commercialising the contractual subject technology (including unreasonable restrictions on the quantity, varieties, price, sales channel or export market of the contractual subject technology).
4. Restricting the technology accepter to accept attached conditions dispensable for exploiting the technology (including purchasing dispensable technologies, raw materials, products, equipment, services or accepting dispensable persons).

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71 *Contract Law 1999*, section 343.
72 Chinese title of the document: Interpretation of the Supreme People’s Court Concerning the Application of Laws in the Trial of Civil Disputes over Technology Contract.
73 See the *Interpretation of the Supreme People’s Court concerning Some Issues on Application of Law for the Trial of Cases on Disputes over Technology Contracts 2005* (“Interpretation 2005”), section 10.
5. Unreasonably restricting the channels or origins for the technology accepter to purchase raw materials, parts and components, products or equipment, and so forth.

6. Prohibiting the technology accepter from making objections to the effectiveness of the IP of the contractual subject technology, or attaching conditions to the objections made.

It is clear that the approach of the list adopted in the Interpretation 2005 is quite similar with the approach that the US adopted in its Patent Licensing regulation in the 1970s. In order to better facilitate the application of the antitrust law in IP areas, in the 1970s the US Antitrust Division of the Department of Justice announced a “watch list” of nine specified licensing practices that would be viewed as anticompetitive restraints of trade in licensing agreements, including patent pools. They are often referred to as the “Nine No-Nos”.

1. Royalties not reasonably related to sales of patented products.

2. Restraints on licensees’ commerce outside the scope of the patent (tie-outs).

3. Requiring the licensee to purchase unpatented material from the licensor (tie-ins).

4. Mandatory package licensing.

5. Requiring the licensee to assign to the patentee patents that may be issued to the licensee after the licensing arrangement is executed (exclusive grant backs).

6. Licensee veto power over grants of further licences.

7. Restraints on sales of unpatented products made with a patented process.

8. Post-sale restraints on resale.

9. Setting minimum prices on resale of the patent products.

The DOJ intended to apply specific regulations to prevent patent holders from “extending their patent monopolies to unpatented supplies”, such as the control over further improvements of their innovations, price determination, and the control over market allocations. This “specific listing” approach was easy to understand and enforce. But many commentators criticized that the list was overly “specific” and unnecessary, and some provisions on the list have never been used. They argued that most patent licensing arrangements have pro-competitive effects and claimed that “unconstrained patent licensing increases the value of patents and encourages licensing and innovation”.

Since the Interpretation 2005 adopted a listing approach which is similar with that of the US Nine No-Nos regulation, it would arguably import both advantages and disadvantages of this approach. Like the US regulation, the provisions in the Interpretation

74 See Lind, Kleymanova, et al, above n 27, 23.
76 Ibid, 286. Gilbert and Shapiro further state: “In actuality, of the sixteen cases filed by the division’s Intellectual Property Section between the late 1960s and the late 1970s, only half specifically addressed any of the nine practices. Moreover, almost all of these cases were litigated under a rule of reason rather than per se illegality”.
77 Ibid.
are relatively specific and easy to apply, but they mainly focus on the rights and obligations of the parties within technology contracts, particularly the protection of the technology accepters (assignees/licensees). They have not paid much attention to the impacts of the technology owners’ behaviour on other competitors (non-licensees), and how these competitors’ rights in the market can be protected. Neither the Nine No-Nos regulation nor the Interpretation has provided any exemptions or immunity for reasonable licensing arrangements, which have been included in the prohibition lists but may have pro-competitive effects. Moreover, none of them provided a detailed guideline on how to determine whether an act of an IPR holder has “restricted technological competition and technological development”, or provided a general approach for their agencies to evaluate or determine the IP abuse conducts. Thus, they have failed to strike a sound balance between preventing monopolistic activities and improving the legal certainty for the use of IP licenses.

3.2.2 Foreign trade law vs EU regulation 2004

The second group is the law and regulation related to foreign trade. Trading with foreign countries has provided an important opportunity for China to engage with the broader international community, and to better understand international legal practices. Thus, it is not surprising that many important legislative attempts often initiate from foreign trade law areas. This includes legislative attempts addressing technology transfers and IP licensing issues. In particular, after China’s access to the WTO in 2001, remarkable progress was made in improving its legal regime, including its laws on foreign trade, technology transfers, and competition.

The Regulations on Technology Import and Export Administration of the People’s Republic of China 2002 (hereinafter the Regulations 2002) may be the first regulation in China which deals with illegitimate restraints in technology contracts. Article 29 of the Regulation 2002 explicitly lists seven types of restrictive clauses that a technology import contract shall not contain. Most of these clauses have been adopted by the later Interpretation on Technology Import and Export Administration of the People’s Republic of China 2002, and are hereby published. These Regulations shall be implemented starting from January 1, 2002 (“Regulation 2002”), at http://www.lehmanlaw.com/resource-centre/laws-and-regulations/contract/regulations-on-technology-import-and-export-administration-of-the-people’s-republic-of-china-2002.html at 12 January 2009.

Article 29 of the Regulation 2002 provides:

A technology import contract shall not contain any of the following restrictive clauses:

1. requiring the receiving party to accept any additional condition unnecessary for the technology import, including buying any unnecessary technology, raw material, product, equipment or service;
2. requiring the receiving party to pay exploitation fee for a technology when the term of validity of the patent right in which has expired or the patent right of which has been invalidated, or to undertake other relevant obligations;
3. restricting the receiving party from improving the technology supplied by the supplying party, or restricting the receiving party from using the improved technology;
4. restricting the receiving party from obtaining technology similar to that supplied by the supplying party from other sources or from obtaining a competing technology;
5. unduly restricting the receiving party from purchasing raw material, parts and components, products or equipment from other channels or sources;
6. unduly restricting the quantity, variety, or sales price of the products the receiving party produces; or

78 These legislative efforts have also been recognized by the US government. The USTR, in its 2004 Report to Congress on China’s WTO Compliance, stated: “China has undertaken substantial efforts in this regard, as it has revised or adopted a wide range of laws, regulations and other measures. While some problems remain, China did a relatively good job of overhauling its legal regime.” See USTR, 2004 USTR Report to Congress on China’s WTO Compliance, 4, http://www.ustr.gov/assets/Document.Library/Reports.Publications/2004/asset_upload_file281.6986.pdf at 10 January 2009, at 5.

prevention 2005 (introduced above) to interpret the specific circumstances/situations of “illegally monopolising technology and impairing technological progress” under Article 329 of the Contract Law 1999.\(^8^1\)

Moreover, in compliance with the TRIPS Agreement, the amended Foreign Trade Law 2004 includes a special chapter on “Foreign-trade-related IP protection.”\(^8^2\) Article 30 of the law explicitly prohibited any of three acts committed by IPR holders: (1) hindering the licensee from questioning the validity of the IPR involved in the license agreement; (2) conducting forced package licensing; or (3) providing exclusive sale back conditions in the license agreement, etc. and, at the same time, endangering the fair competition order of foreign trade.\(^8^3\)

Generally speaking, these provisions\(^8^4\) are similar with the counterparts of the EC’s new Technology Transfer Block Exemption Regulation of April 2004 (“TTBER 2004”).\(^8^5\) The TTBER 2004 set up its strict restrictions prohibiting: (1) exclusive grant-back obligations of a licensee’s own severable improvements; (2) no-challenge clauses in respect of the validity of the IPRs and (3) restrictions on the licensee’s ability to exploit its own technology or on its ability to develop new technology (where the license is granted to a non-competitor).\(^8^6\)

Moreover, the EC has noted that, in most cases, technology licensing agreements “have positive effects that outweigh their restrictive effects on competition”.\(^8^7\) Thus, the TTBER 2004 sets up new “block exemption” provisions in order to strike a sound balance between the IPR protection and the protection of competition and to create “an area of certainty for most licensing agreements”.\(^8^8\) The EC also enacted a very detailed TTBER Guideline 2004 to facilitate the implementation the TTBER 2004, which includes both general approaches and specific examples for helping agencies to determine IP abuse and monopolistic activities.\(^8^9\)

By contrast, neither the Regulation 2002 nor the Foreign Trade Law 2004 has provided any useful exemptions for activities on their licensing practice prohibition lists. It does

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\(^{[7]}\) unduly restricting the receiving party from utilising the channel for exporting products manufactured using the imported technology.

\(^{[8^1]}\) See Interpretation 2005, section 10.

\(^{[8^2]}\) See Foreign Trade Law 2004, Chapter V Foreign-trade-related Intellectual Property Protection.


\(^{[8^4]}\) Provisions in the Foreign Trade Law 2004, the Regulations 2002 and the Interpretation 2005


\(^{[8^6]}\) See TTBER 2004, Article 5, Section 1(a) (b) (c) and Section 2. See also Jones, “Licensing in China”, above n 9 at 14 (providing a summary of core prohibition provisions in the TTBER 2004).

\(^{[8^7]}\) The EC official website explicitly states: “Such agreements will usually improve economic efficiency and be pro-competitive as they can reduce duplication of research and development, strengthen the incentive for the initial research and development, spur incremental innovation, facilitate diffusion and generate product market competition.” See EUROPA, Technology transfer agreements at http://europa.eu/scadplus/leg/en/lvb/126108.htm at 12 January 2009.


\(^{[8^9]}\) See TTBER Guideline 2004 at 2-42. The TTBER Guideline 2004 provides very detailed instructions on applications of the TTBER 2004 and Art 81 of the EC Treaty in general.
not seem that the pro-competitive effects of certain restraint arrangements in technology licensing agreements has been recognized and reflected in these legislations. Moreover, none of them provided any EC-style detailed guidelines for facilitating the understanding and application of these prohibitions either.

3.2.3 Anti-unfair competition vs antitrust law

The third group is anti-unfair competition law. The Anti-unfair Competition Law of the People’s Republic of China 1993 includes some general provisions on “tying” arrangement. It explicitly prohibits sellers from selling products to consumers by forcing them to purchase additional products that they are unwilling to purchase, or by imposing unreasonable conditions.\(^90\) It is noteworthy that, as some have commentators pointed out, the Anti-Unfair Competition Law in China does “not deal with matters pertaining to anti-trust issues” (such as the abuse of dominant position),\(^91\) but mainly focuses on maintaining a sound market order and protecting the rights of managers and consumers.\(^92\) More details on China’s recent development in antitrust laws – i.e. Anti-Monopoly Law 2008 – will be discussed later.

3.2.4 Patent misuse

The last group is IP law. Like patent laws in other countries, the Chinese Patent Law 2000 contains some general provisions on “compulsory licensing” as one of the possible remedies for IP abuse.\(^93\) The Patent Law 2000 allows any applicant, which is qualified to exploit the invention or utility model, to make requests for “authorization from the patentee of an invention or utility model to exploit its or his patent on reasonable terms”.\(^94\) If an applicant has not been successful in obtaining the relevant authorization within a reasonable period of time, upon the application of the applicant, the patent administrative department of the State Council may grant the applicant a compulsory license to exploit the patent for invention or utility model.\(^95\)

It is also noteworthy that the Patent Law 2000 was recently amended, and the Patent Law 2009 further clarifies and revised the requirements on compulsory licensing. Article 50 of the Patent Law 2009 entitles the State Intellectual Property Office (SIPO) to grant a compulsory license in three circumstances:

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\(^90\) It is noteworthy that, as some foreign practitioners have observed, “the Anti-Unfair Competition Law in China does not deal with matters pertaining to anti-trust issues, but as the market develops in China, it is likely to gain importance”. See LEHMAN, What is the situation between IPRs and unfair competition in China? at http://www.lehmanlaw.com/resource-centre/faqs/intellectual-property/general-ip/what-is-the-situation-between-irps-and-unfair-competition-in-china.html at 12 December 2008.
\(^91\) Ibid.
\(^92\) See Anti-unfair Competition Law of the People’s Republic of China 1993, Article 1. (Providing “This law is drawn up in order to safeguard the healthy development of the socialist market economy, encourage and protect fair market competition, prohibit unfair competition, safeguard the legal rights and interests of managers and consumers.”)
\(^93\) See Patent Law of the People’s Republic of China (2000 Revision) (Adopted at the 44th Session of the Standing Committee of the Sixth National People’s Congress on March 12, 1984, Articles 48 and 49.)

Article 48: Where any entity which is qualified to exploit the invention or utility model has made requests for authorization from the patentee of an invention or utility model to exploit its or his patent on reasonable terms and such efforts have not been successful within a reasonable period of time, the patent administrative department of the State Council may, upon the application of that entity, grant a compulsory license to exploit the patent for invention or utility model.

Article 49: Where a national emergency or any extraordinary state of affairs occurs, or where the public interest so requires, the patent administrative department of the State Council may grant a compulsory license to exploit the patent for invention or utility model.

1. The patentee’s exploitation of the patented technology is found to be insufficient within a prescribed timeframe;

2. The patentee’s exploitation of the patented technology is found to be eliminating or restricting competition; or

3. The application is for the making and exportation of a patented medicine to certain countries and regions for the benefit of public health in accordance with international treaties.\(^96\)

However, like other regulations introduced above, the new patent law has not provided specific guidelines on the application of “compulsory licensing” provisions, such as how to determine “elimination or restriction of competition”.

### 3.2.5 Summary: Achievements and Limitations

In summary, the provisions in the existing Chinese laws (prior-AML laws) have covered some major forms of IP abuse activities, such as monopoly pricing, restrictions on the number of products, market division, cross-licensing and patent cooperation agreements, exclusive provisions (i.e. provisions to prevent licensees from questioning the validity of the IP in licensing agreements, and provisions to prohibit compulsory licensing), tying sales and so forth.\(^97\)

However, they do have their limitations. Firstly, the legislation is either too general or too narrow. Some only provide general requirements on prohibited IP licensing arrangements, such as Foreign Trade Law and Patent Law, but fail to provide detailed guidelines to explain how to apply these requirements in practice. Some only focus on very narrow subject matter or single forms of IP abuse. For example, the Contract Law 1999 and the Regulation 2002 mainly focus on the protection of technology accepters in technology contracts or technology importing contracts. The Anti-Unfair Competition Law only focuses on tying sale. Unlike the counterparts in the US and EU laws, they have distinguished licensing transactions that occur between competing and non-competing undertakings.\(^98\)

Secondly, they have failed to explain the general approach that the competent agencies employ in their evaluations of licensing agreements under the applicable antitrust law, and the way that they determine IP abuses.

Thirdly, none of them provides the immunity for the licensing arrangements that are on the prohibition lists but have pro-competitive overweight anti-competitive effects. Consequently, they have arguably not struck a sound balance between IP licensees and licensors, and have not created sufficient legal certainty for the application of IP licensing arrangements.

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\(^{97}\) Zhang, Gao and Guo, above n 29.

Lastly, as introduced above, these provisions spread across various types of laws. This loose structure renders it difficult for foreign investors and technology companies to get a clear picture of China’s requirements on technology transfer and IP abuse. This has arguably increased the uncertainties of law applications and the operations of foreign undertakings in China.

3.3 IP Abuse on Unfair Terms of Contracts: Consumer Law in Australia

I will next focus on some more specific issues on IP abuse, particularly on the potential risks and consumer law remedies for unfair terms of contracts. Among various IP abuse activities mentioned above, one of most typical and popular ones may be the IP-related unfair contracts, particularly software-related contracts/licensing agreements.

Under the current digital economy environment, consumers use software every day. In order to install and use the software they have to “agree” and “sign” online licensing agreements. But many consumers/software users may not fully understand these e-contracts they have signed, and the potential legal risks these agreements may bring to them, and possible legal remedies they may have when disputes occurred. I will use the Australian consumer law as an example to demonstrate how member countries may use consumer law to prevent IP abuse on unfair contracts, particularly IP abuse in standard-term of e-contract for IP products.

3.3.1 Different Types of the E-contract

As we know, generally speaking there are three main forms of software licensing methods: (1) Shrink-wrap; (2) Clickwrap; and (3) Browsewrap.

The “Shrinkwrap” method started from the early 1980’s. At that time, software vendors were constrained to deliver their software products in physical form. They normally put their products in a cardboard box package, including a computer disk, manuals and a printed licence agreement. The licence agreement usually provided that opening the sealed (shrink-wrapped) package containing the computer disks signified the user’s assent to the terms of the licence.

The “Click-wrap” method became increasingly popular with the wide use of PCs and the Internet. Through this method, the terms of the “clickwrap” licence are presented to the user electronically. In order to agree to the terms of the licence and “sign” the licensing agreement, the user usually needs to click on a button or ticking a box labelled “I agree”.

The “Browse-wrap” method is another common phenomenon today, and emerges with the wide application of the Internet. With this method, the operator of a website purports to make all use of that website subject to a “terms and conditions” agreement. The user is “said to assent by merely using the website” 99 Usually, the terms of that agreement are never actually presented to the website user. Instead there will be a small hyperlink to a separate “Terms and Conditions” page, in the small print at the bottom of the website. For example, when visiting your favourite news websites and scrolling to the bottom of the page, we will commonly find a link labelled “terms and

conditions" along with other seldom-read links to things such as the website’s privacy policy.  

For the purposes of this paper, we mainly focus on the click-wrap “electronic contracts” since it is the most common method for software licensing arrangements at the present.

### 3.3.2 IP abuse: Unfair Contract

#### 3.3.2.1 Overview

Generally speaking, most software licensing agreements do not have a consumer-friendly interface. As some commentators criticized:

“Electronic contracts are typically quite lengthy, often running to several thousand words, and written with little regard for the principles of plain English drafting or concern for comprehension by a lay audience”.

As examples, the Microsoft Software License Terms for Windows Vista is 5,701 words. The EULA for Microsoft Windows XP Pro SP2 is 5,623, which contains a 1,013 word limitation of liability written entirely in French. The longest English sentence in agreement is 178 words and was written entirely in capital letters.

EULAs are often displayed in a small window and consumers can only view a small portion of the agreement at any one time. Reading the entire EULA may require viewing more than 100 separate “pages” of text, and many EULAs cannot be printed, or save for later viewing by the end-user.

As a direct consequence, the vast majority of software users do not read EULAs but simply agree it. This is evidenced by a test completed by software vendor PC Pitstop. PC Pitstop inserted a special clause in the EULA in order to encourage users to read EULA:

**SPECIAL CONSIDERATION**

A special consideration which may include financial compensation will be awarded to a limited number of authorize licensee [sic] to read this section of the license agreement and contact PC Pitstop at consideration@pcpitstop.com.

However, after four months and more than 3,000 downloads, only one person wrote in.

Given that many consumers (software users) do not read and are not aware of the licensing terms, licensors normally have no incentive to compete on the terms offered. By contrast, they may misuse their advantageous negotiation position, and include some terms which may be unfair to consumers, such as the provisions of limiting the consumer rights.

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101 “Clickwrap contracts are ubiquitous in markets for software and digitally distributed copyright content (such as music and movies), and are increasingly used to set terms for access to services such as everyday websites.”

102 Corones, above n 99, Part II.


104 Corones, above n 99 at 9 of 35.

105 Ibid.

106 Ibid.


108 Corones, above n 99 at 11 of 35.
### Two legal issues

Generally speaking, the legal issues on click-wrap electronic contracts mainly include two aspects: (1) unfairness issue/unconscionability issue on the “formation of contracts”; and (2) unfairness issue on the “terms of contracts”.

Regarding the first aspect, a key question is whether a “money now, terms later” approach is permissible. The most common form of click-wrap software licence is the “End User License Agreement” (EULA). The EULA is a contractual agreement between a software licensor and software licensee (end-users of software product). The licensee (end-user) agrees to pay required licensing fee and observe all terms of the EULA. In return, the licensor (software vendor) authorize the licensee (end-user) to use the software.

The terms of the EULA is typically presented to licensee/end-user as part of the software installation process. In order to install the software successfully, end-user must signify their assent to the terms of the agreement first. However, in order to view the terms of the EULA, the end-user needs to the buy the software from retail outlets in the first place. Although the EULA often states that consumers may return the software to the place of purchase for a full refund if they do not agree to the terms of the EULA, retail outlets may often refuse to refund the software if the packaging has been opened.

As such, as some commentator noted, if the consumers already purchased software, they may “have little choice but to accept whatever terms are presented to them”, and consumers (end-users) have no opportunity for the negotiation of terms. This seems to be unfair to consumers.

Regarding the second aspect, the issue of unfair terms in relation to software EULAs is one of long-standing. Professor Corones in 2007 listed a number of common ways to introduce unfair provisions into software licensing agreements:

- Through provisions that allow the licensor to unilaterally vary the terms of the contract, such as the provisions specifically allowing for unilateral variation by the licensor.
- Through software patches, updates, or new versions to allow the licensor to amend the EULA.
- Through Notice Clauses, such as provisions that allow the licensor to give notice of contract amendments to the licensee in ways that are not likely to come to the actual notice of the licensor (eg giving notices by simply publishing amended version of the contract online).
- Through Digital Rights Management (DRM) technologies, which allow a licensor to change the rules governing how a consumer may use digital content, without

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109 In the other words, the terms of EULA are presented on a “take it or leave it” basis.
110 Corones, above n 99 at 5 of 35.
111 Ibid.
112 It looks like licensees have been given a chance to choose whether they agree to the terms of the new EULA or to continue to use the existing version of the software. However, in reality, most software patches or updates are designed to address crucial security problems of original programs. Thus, this often leaves the licensees with little or no choice but to agree to the terms of the new EULA.
113 The Apple iTunes Music Store “Terms of Sale” agreement states: iTunes reserves the right to change the terms and conditions of sale at the iTunes Store at any time. Revised Terms of Sale will be made available on our website. Customers are encouraged to review the Terms of Sale on a periodic basis for modifications.
changing the contract, and even where the contract makes no provision for the licensor to change the “usage rules”.114

3.3.3 Current law in Australia on This Issue

At the national level, Australian courts have traditionally not recognised the substantive unfairness of a term of a contract as basis for intervention.115 The former TPA at the Commonwealth level only provides some limited relief in relation to unfair terms in e-contracts, and it is mainly through the provision on unconscionability under ss 51AA or 51AB.

Section 51AA of the TPA provides that:

(1) A corporation must not, in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law, from time to time, of the States and Territories.

(2) This section does not apply to conduct that is prohibited by section 51AB or 51AC.

Section 51AB of the TPA provides in part:

(1) A corporation shall not, in trade or commerce, in connection with the supply or possible supply of goods or services to a person, engage in conduct that is, in all the circumstances, unconscionable.

(2) Without in any way limiting the matters to which the Court may have regard for the purpose of determining whether a corporation has contravened subsection (1) in connection with the supply or possible supply of goods or services to a person (in this subsection referred to as the consumer), the Court may have regard to:

(a) the relative strengths of the bargaining positions of the corporation and the consumer;

(b) whether, as a result of conduct engaged in by the corporation, the consumer was required to comply with conditions that were not reasonably necessary for the protection of the legitimate interests of the corporation;

(c) whether the consumer was able to understand any documents relating to the supply or possible supply of the goods or services;

(d) whether any undue influence or pressure was exerted on, or any unfair tactics were used against, the consumer or a person acting on behalf of the consumer by the corporation or a person acting on behalf of the corporation in relation to the supply or possible supply of the goods or services; and

(e) the amount for which, and the circumstances under which, the consumer could have acquired identical or equivalent goods or services from a person other than the corporation.

Although the provisions in the former TPA (ss51 AA and AB) seem to cover both substantive and procedural unfairness, in practice, Courts mainly focus on procedural unfairness of the formation of a contract.116 For example, in Hurley v McDonald’s Australia Ltd (2000) the Full Federal Court held:

114 Using online purchased DRM-protected music as example, the DRM restricts buyer’s ability to use and copy the music. When a buyer purchases the music, the vendor of the music permits the buyer to copy (“burn”) a “playlist” of music to an audio CD only 10 times. Through the DRM system of the vendor, once the buyer has copied the music the permitted 10 times, the DRM prevents him/her from making further copies. However, technically, the vendor can unilaterally change the number of copies the buyer is permitted to make from 10 to 7. This change affects not only music that the buyer purchases after the change, but the music the buyer purchased before the change (when the buyer was permitted 10 copies).


116 See High Court cases: ACCC v CG Berbatis Holdings Pty Ltd (2000) 96 FCR 491.
There is no allegation of any circumstance that renders reliance upon the terms of the contracts unconscionable. For example, it might be that, having regard to particular circumstances it would be unconscionable for one party to insist upon the strict enforcement of the terms of a contract. One such circumstance might be that an obligation under a contract arises as a result of a mistake by one party. The mistake is an additional circumstance that might render strict reliance upon the terms of the contract unconscionable. Mere reliance on the terms of a contract cannot, without something more, constitute unconscionable conduct. … Before sections 51AA, 51AB or 51AC will be applicable, there must be some circumstance other than the mere terms of the contract itself that would render reliance on the terms of the contract “unfair” or “unreasonable” or “immoral” or “wrong”. (Emphasis added).117

It is clear that, despite the substantive unconscionability or unfairness of a contractual term, it seems that 51AA and AB will not apply if there is no “procedural unconscionability”.

At the state level, given the limited relief on unfair terms of contract, New South Wales and Victoria followed international developments in UK and EU and enacted/amended their laws to regulate the use of unfair terms in consumer contracts. NSW Contracts Review Act 1980 and Victorian Fair Trading Act 1999 cover both substantive and procedural unfairness. Particularly, the Victorian Act provides detailed provisions on the definition of “unfair term” (s32W)118 and a list of factors (s32X) to determine the unfair term.119

But in practice, as Zumbo pointed out, while NSW courts are able to consider substantive unconscionability under the NSW Contracts Review Act 1980, they “rarely do so without also considering the impact of procedural unconscionability”.120 It seems that

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118 Section 32W of the FTA defines “unfair term” as:
A term in a consumer contract is to be regarded as unfair if, contrary to the requirements of good faith and in all the circumstances, it causes a significant imbalance in the parties’ rights and obligations arising under the contract to the detriment of the consumer.
119 Section 32X of the FTA provides:
Without limiting section 32W, in determining whether a term of a consumer contract is unfair, a court or the Tribunal may take into account, among other matters, whether the term was individually negotiated, whether the term is a prescribed unfair term and whether the term has the object or effect of:
(a) permitting the supplier but not the consumer to avoid or limit performance of the contract;
(b) permitting the supplier but not the consumer to terminate the contract;
(c) penalising the consumer but not the supplier for a breach or termination of the contract;
(d) permitting the supplier but not the consumer to vary the terms of the contract;
(e) permitting the supplier but not the consumer to renew or not renew the contract;
(f) permitting the supplier to determine the price without the right of the consumer to terminate the contract;
(g) permitting the supplier unilaterally to vary the characteristics of the goods or services to be supplied under the contract;
(h) permitting the supplier unilaterally to determine whether the contract had been breached or to interpret its meaning;
(i) limiting the supplier’s vicarious liability for its agents;
(j) permitting the supplier to assign the contract to the consumer’s detriment without the consumer’s consent;
(k) limiting the consumer’s right to sue the supplier;
(l) limiting the evidence the consumer can lead in proceedings on the contract;
(m) imposing the evidential burden on the consumer in proceedings on the contract.
120 Zumbo, F. “Dealing with Unfair Terms in Consumer Contracts: Is Australia Falling Behind?” (2005) 13 TPLJ 70 at 82. Zumbo observes that this residual reliance upon procedural unconscionability severely limits the ability of the Act to deal directly with unfair terms in consumer contracts.
only Victorian courts directly intervened against substantive unfair conduct.\textsuperscript{121}

\subsection*{3.3.3.1 New Consumer Laws}

The new \textit{Australian Competition and Consumer Act 2010} took effect last year. s51AA “Unconscionable conduct within the meaning of the unwritten law of the States and Territories” has been repealed and replaced by Sch 2 s20 under the title “Unconscionable conduct within the meaning of the unwritten law”; and s51AB has been repealed and replaced by Sch 2 s21 under the same title “Unconscionable conduct”\textsuperscript{122}. The former provisions and new provisions are identical. A main difference is the former TPA only focused on the unconscionable conduct of corporations.\textsuperscript{123} The new CCA focuses on the unconscionable conduct of a person. Thus, it seems that the new CCA has a broader coverage and includes both conducts of “corporations”, other forms of incorporated entities, and individuals.

The CCA 2010 explicitly includes a statutory remedy for unfair terms of contract (mainly following the Victorian model and drawing on lessons from EC Directive on Unfair Terms in Consumer Contracts 1993/UK Unfair Contract Term Act 1977/ The UK Unfair Terms in Consumer Contracts Regulations 1999).\textsuperscript{124} According to Section 23 of the CCA 2010, in order to receive the remedies, the contract must be (1) a consumer contract, (2) a standard form contract, and (3) contain a term that is unfair.\textsuperscript{125} Further,
CCA introduces some detailed provision on the definition of consumer contract, the meaning of unfair and examples of unfair terms.

It seems that major forms of unfair provisions in software licensing agreements, which were summarized by Professor Corones in 2007 (as above), all fall into the unfair terms provisions under the new CCA 2010. For example, Section 25 (d) explicitly prohibited a term “that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract”. Thus, if a software licensing agreement contains a provision that allows a licensor to use software patches, updates, or new versions to amend the EULA, it seems that such a provision should be held unfair under the new CCA.

Section 25 (a) explicitly prohibit unfair terms of a consumer contract, such as “a term that permits, or has the effect of permitting, one party (but not another party) to avoid or limit performance of the contract”. Thus, if a software licensing agreement contains a provision that allows a licensor use Digital Rights Management (DRM) technologies to change the rules governing how a consumer may use digital content, it seems that such a provision should be held unfair under the new CCA.

Moreover, if a software licensing agreement contains a provision that allows the licensor to unilaterally vary the terms of the contract, such a provision may also be held unfair under the new CCA. Section 25 explicitly prohibits a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract; to renew or not renew the contract; to vary the upfront price payable.

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126 (3) A consumer contract is a contract for:
(a) a supply of goods or services; or
(b) a sale or grant of an interest in land;
to an individual whose acquisition of the goods, services or interest is wholly or predominantly for personal, domestic or household use or consumption.

127 Meaning of unfair
(1) A term of a consumer contract is unfair if:
(a) it would cause a significant imbalance in the parties’ rights and obligations arising under the contract; and
(b) it is not reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term; and
(c) it would cause detriment (whether financial or otherwise) to a party if it were to be applied or relied on.

(2) In determining whether a term of a consumer contract is unfair under subsection (1), a court may take into account such matters as it thinks relevant, but must take into account the following:
(a) the extent to which the term is transparent;
(b) the contract as a whole.

(3) A term is transparent if the term is:
(a) expressed in reasonably plain language; and
(b) legible; and
(c) presented clearly; and
(d) readily available to any party affected by the term.

(4) For the purposes of subsection (1)(b), a term of a consumer contract is presumed not to be reasonably necessary in order to protect the legitimate interests of the party who would be advantaged by the term, unless that party proves otherwise.

128 s25 CCA 2010.
129 s35(d) CCA 2010.
130 s25(e) CCA 2010.
under the contract without the right of another party to terminate the contract;\textsuperscript{131} to vary the characteristics of the goods or services to be supplied,\textsuperscript{132} and to unilaterally determine whether the contract has been breached or to interpret its meaning.\textsuperscript{133}

For a consumer contract which contains an unfair term, a basic remedy for consumers is that such a term is void.\textsuperscript{134} The CCA 2011 (Part 5-2, Sch 2 \textit{The Australian Consumer Law}) further provides broad remedies for the breach of the law, such as pecuniary penalties,\textsuperscript{135} injunctions,\textsuperscript{136} damages,\textsuperscript{137} compensation orders etc for injured persons and orders for non-party consumers,\textsuperscript{138} and other remedies.\textsuperscript{139}

In summary, the inclusion of the unfair term section into the ACL improves Australian laws on consumer protection. It has codified many important common principles on unfair term issues, mainly common law principles established by Victorian courts. Nevertheless, it may be still too early to say whether and how all these remedies apply to unfair term of consumer contract since the CCA has just taken effect. It would be desirable if Australia can have more detailed regulations on unfair terms in consumer contracts in the future – ie the UK style regulation – the UK \textit{Unfair Terms in Consumer Contracts Regulations 1999}.

### 3.4 Consumer Laws in Brazil

#### 3.4.1 Overview of Consumer Protection Code (CPC) in Brazil

Brazil has a tradition of strong consumer protection supported by its Federal Constitution. The Brazilian \textit{Consumer Protection Code} (CPC) was enacted on 11 September 1990. Unlike consumer laws in many other countries, which were motivated by social movements on consumer protection, the CPC was created by a legal order – a constitutional commandment.

It is in Article 5 of the \textit{1988 Federal Constitution}, where we find the first reference to consumer rights.\textsuperscript{140} And when treating the economical and financial order, Article 170 explicitly lists “consumer protection” as a basic principle.\textsuperscript{141} As one commentator noted, “the Constitution does not leave any doubts as to the responsibility of the State to promote consumer rights”.\textsuperscript{142}

\begin{itemize}
  \item \textsuperscript{131} s25(f) CCA 2010.
  \item \textsuperscript{132} s25(g) CCA 2010.
  \item \textsuperscript{133} s25(h) CCA 2010.
  \item \textsuperscript{134} s23(3) CCA 2010.
  \item \textsuperscript{135} Div 1, Part 5-2 Remedies, Sch 2, CCA 2010.
  \item \textsuperscript{136} Div 2, Part 5-2 Remedies, Sch 2, CCA 2010.
  \item \textsuperscript{137} Div 3, Part 5-2 Remedies, Sch 2, CCA 2010.
  \item \textsuperscript{138} Div 4, Part 5-2 Remedies, Sch 2, CCA 2010.
  \item \textsuperscript{139} Div 5, Part 5-2 Remedies, Sch 2, CCA 2010; other remedies include: s246 Non-punitive orders, s247 Adverse publicity orders, s248 Order disqualifying a person from managing corporations, s249 Privilege against exposure to penalty or forfeiture – disqualification from managing corporations, and s250 Declarations relating to consumer contracts.
  \item \textsuperscript{140} Luciano Rodrigues Maia Pinto, “Consumer Protection in Brazil – A General View”, Prof. Ernie Englander, School of Business and Public Management, Institute of Brazilian Business and Public Management Issue, at page 3.
  \item \textsuperscript{141} 1988 \textit{Federal Constitution}, Chapter I, on the General Principles of the Economic activity of Title VII, that is on the Economical and Financial Order, the Great Letter, in Article 170.
  \item \textsuperscript{142} Ibid at 3.
\end{itemize}
3.4.2 **Abusive Clause Provision in CPC**

Article 25 of CPC explicitly states: “It shall be banned the establishment of any contractual clause that makes it impossible, or exempts or diminishes the obligation of indemnity provided for in this and in the foregoing sections”. It is clear that any contractual clause, which allows the licensor to unilaterally vary the terms of the contract, may be prohibited under the CPC. Furthermore, the CPC has a special session on the use of abusive or deceptive clauses in adhesion contracts.\(^\text{143}\) Like the ACL 2010, the CPC 1990 the CPC provides a non-exhaustive list of abusive clauses, including the clauses that:\(^\text{144}\)

- prevent, exempt or reduce suppliers’ liability for defects of any nature in products and services or imply a renunciation or a waiver of rights (I).
- take from the consumer the option for reimbursement of an amount already paid, in the cases provided for in this Code (II);
- transfer responsibility to third parties (III);
- establish obligations understood as unfair, abusive, or that lead the consumer to an unreasonable disadvantage or those that are not consistent with good faith or equity (IV);
- N/A (V)
- establish the reversion of the burden of proof against consumers (VI);
- determine a compulsory use of arbitration (VII);
- impose a representative to conclude or carry out another legal negotiation by consumer (VIII);
- leave to the supplier alone the option to conclude or not the contract, though obliging the consumer (IX);
- make possible for the supplier to directly or indirectly change the price unilaterally (X);
- authorize the supplier to unilaterally cancel the contract without giving the same right to the Consumer (XI);
- require from the consumer the reimbursement for expenses related to the collection of his debts, without giving the same right to the consumer against the supplier (XII);
- infringe or make it possible to violate environmental rules (XIII);
- are in disagreement with the consumer protection system (XIV);
- make it possible a waiver of the indemnity right related to necessary improvements (XVI).

\(^\text{143}\) Chapter VI: Contractual Protection: Abusive Clauses, Article 51

\(^\text{144}\) Like the ACL 2010, Article 51 of the CPC 1990 (Chapter VI: Contractual Protection – Abusive Clauses).
It seems that main forms of unfair terms in software licensing agreements, which were summarized by Professor Corones in 2007 (as above), all fall into the abusive clause prohibition provisions the CPC 1990. For example, Article 51, clause IV of the CPC explicitly prohibits abusive clauses that “establish obligations understood as unfair, abusive, or that lead the consumer to an unreasonable disadvantage or those that are not consistent with good faith or equity”. Article 51, Clause XIII, further prohibits abusive clauses that “authorize the supplier to unilaterally modify the contents or the quality of the contract after it having been entered into” (XIII).

As such, it seems that any provision in a software licensing agreement, which allows a licensor to use DRM technologies to change the rules governing how a consumer may use digital content, or allows the licensor to unilaterally vary the terms of the contract, will be held to be an abusive clause under the CPC. Any provision that allows a licensor to use software patches, updates, or new versions to amend the EULA, may be held as an abusive clause under the CPC also.

3.4.3 Remedies and Remarks

The “Consumer’s Basic Rights” Chapter of CPC provides some basic remedies for consumers against unfair terms of contract. It explicitly provides that consumers have a right to modify “the contractual clauses that establish unreasonable instalments”.

In other words, the consumers have a right to modify the unfair terms/abusive clause of contract.

Article 51 provides that abusive “contractual clauses concerning products and services supply shall be deemed lawfully void”. In other words, any abusive contractual clauses under CPC should be deemed lawfully void.

In comparison with Australian Consumer Law, which only provides legal remedies to consumer contract and standard contract, the application of the remedies under the Brazil CPC seems to be wider. It covers both standard form contract and non-standard form contract. The Brazil CPC arguably provided a stronger protection for consumers against abusive clause/unfair terms in consumer contracts.

However, it seems that the abusive clause prohibition provisions in the CPC are a bit too general than unfair term provisions under the ACL. Although Art 51 of the CPC also provides a list of abusive clauses (like section 25 of the ACL – examples of unfair terms), the CPC has provided some specific principles for the courts to determine whether a term/clause is “unfair” or “abusive”, which ACL has provided. Thus, it seems that the ACL is more ready to follow and apply by the court.

Nevertheless, Brazil has a good tradition on consumer protection – consumer protection culture, and strong constitutional support. It creates a possibility for Brazilian courts to apply and interpret Article 51 broadly and better protect consumers against unfair terms/abusive clauses in a contract.

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145 Section V, Title I, Chapter 3 Consumer’s Basic Rights
146 Article 51, CPC.
Part IV: IP Abuse and Potential Remedy from Consumer Law – Sony as a Case Study

4.1 Introduction

In this part, I will examine another important aspect of consumer protection on the online environment – consumer privacy and data security. I will examine some recent cases (Sony PSN case and Google cloud case) on IP abuses/misuses against consumers, and examine how Chinese, Australian and Brazilian consumer laws may cope with these issues.

In order to become an eligible licensee (eligible software/computer game user), in addition to purchasing software, a customer normally has to provide detailed personal information to the IP licensor, such as name, address, date of birth and other information. IP holders (licensors) normally promise they will protect the safety of customers’ personal data and will not make them available for any third party without permission from consumers. This seems to be a general practice for many years. However, the recent hacker-attack to the Sony’s global PlayStation network and the Amazon’s Cloud crash push us to rethink the legitimacy of such a general practice and legal questions raised, such as the balance of rights in a licensing agreement.

4.2 Imbalance of Rights in the Agreement

Sony’s global PlayStation network (PSN) was hacked and user account information was compromised between 17 and 19 April 2011.\(^{147}\) Sony immediately took PSN offline on 20 April.\(^{148}\) This led to the exposure of unencrypted personal information of 77 million users, including names, addresses and possibly credit card data.\(^{149}\) This is “one of the largest-ever Internet security break-ins”.\(^{150}\)

This attack makes regulators in different countries rethink the effectiveness of the existing legal system in protecting consumers against potential online risks. As we know, most software licensing agreements contain provisions that permit IP holders/licensors to collect consumer personal information.\(^{151}\) However, these agreements have not imposed strong obligations on licensors to protect the safety of consumer per-

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\(^{150}\) Liana B. Baker & Jim Finkle, “Sony PlayStation suffers massive data breach” in Reuters, Apr 26, 2011 at http://www.reuters.com/article/2011/04/26/us-sony-stoldendata-idUSTRE73P6M220110426 (last visited on 30 November 2011); see also Fran Foo & Chris Griffith “Sony PlayStation hack hits over 700,000 Australians” in The Australian, April 27, 2011 at http://www.theaustralian.com.au/australian-it/sony-playstation-hack-hits-700000-australians/story-e6frgakx-1226045764154 (“According to a local Sony spokeswoman, there are over 1.1 million PlayStation 3 devices in Australia – approximately 715,000 people are connected to the PlayStation Network, which gamers use to spar online and purchase services like movie downloads.”)

\(^{151}\) “Except as stated otherwise, collection and use of consumer data are subject to the PSN Privacy Policy, which can be found at eu.playstation.com/terms”. http://au.playstation.com/legal/detail/item235615/PlayStation-Network-Cards-Terms-Conditions/.
sonal data, nor contain detailed provisions on how to compensate consumers if their personal data has been stolen or misused.

We next use the Sony PSN as an example. According to the PSN Privacy Policy, Sony not only can collect users’ personal information, such as “name, email address, postal address, date of birth, gender and language, password and any parental control options”, but also can collect information on users’ IP address and console MAC address, system ID and hardware information, information about how users use PSN153 and users’ gamer profile.154 For PSN wallet users, Sony will also collect their payment details, “such as credit card numbers, cardholder name, expiry date and security code”, and store this information for future purchases.155 This is why after the hacker-attack many users felt panic and Sony also warned users that their credit card information may have been compromised.

However, in terms of Sony’s obligations of protecting consumers, these documents impose loose obligation on Sony to protect the safety of consumer information. For example, the PSN Privacy Policy explicitly states:

We cannot monitor the whole of Sony Online Network and make no commitment to do so. However, we reserve the right in our sole discretion to monitor and record your online activity and communication throughout Sony Online Network and to remove any content from Sony Online Network at our sole discretion, without further notice to you. . . .”

In the other words, it seems that Sony does not commit to monitor its Online Network and protect personal data safety of its customers. And the main reasons for them to monitor the network is not for protecting customers but for stopping any inappropriate activities of customers/users of Sony. It is clear that a sound balance of rights for both parties does not seem to be stricken. According to Reuters, by June 2011, in the US alone, Sony was facing a whopping 55 lawsuits, “each one related to the massive PlayStation Network data breach that initiated a service blackout that lasted for nearly a month.”156

The Terms of User Agreement further states:

Whenever you participate in online communities via, or in connection with, Sony Online Network (including forums, games and social networks), you must act reasonably and with common sense; respect the rights and privacy of other members of the communities; and follow any particular rules applying to those communities. You must not do, attempt or threaten to do, any of the actions set out below. Breach of these Conditions may result in suspension or termination of your account and/or access to Sony Online Network. . . . You must not stalk, bully or otherwise abuse or harass other users or our staff or invade their privacy.157

It seems that these clauses are abusive clauses under the Brazilian Consumer Law. As introduced above, the CPC explicitly prohibits clauses that “establish obligations understood as unfair, abusive, or that lead the consumer to an unreasonable disadvantage or those that are not consistent with good faith or equity (IV)”. It is clear that,

152 Eg model and serial number, parental control settings, photograph and music settings, remote play settings.
153 Eg content users download, services users access and for how long.
154 See “What information do we collect?” session, at http://legaldoc.dl.playstation.net/ps3-eula/psn/h/h_privacy_en.html
155 Ibid.
under the current agreement, Sony is able to collect required personal information from its end users, but Sony does not seem to provide adequate protection for the safety of personal information it collects from its customers and remedies for personal information loss. It is clear that these provisions have not struck a sound balance of benefits between Sony PSN and its users, and are not “consistent with good faith or equity”. They arguably place end users in an “unreasonable disadvantage” situation.

4.3 Limiting the Right to Sue

It is noteworthy that Sony recently updated its terms of service agreement and included a “Binding Individual Arbitration and Class Action Waiver Provision”.

NOTE: THIS AGREEMENT CONTAINS A BINDING INDIVIDUAL ARBITRATION AND CLASS ACTION WAIVER PROVISION IN SECTION 15 THAT AFFECTS YOUR RIGHTS UNDER THIS AGREEMENT AND WITH RESPECT TO ANY “DISPUTE” (AS DEFINED BELOW) BETWEEN YOU AND SNEI, SONY COMPUTER ENTERTAINMENT INC., SONY COMPUTER ENTERTAINMENT AMERICA LLC, THEIR AFFILIATES, PARENTS OR SUBSIDIARIES (ALL ENTITIES COLLECTIVELY REFERRED TO BELOW AS “SONY ENTITIES”). YOU HAVE A RIGHT TO OPT OUT OF THE BINDING ARBITRATION AND CLASS ACTION WAIVER PROVISIONS AS FURTHER DESCRIBED IN SECTION 15.158

On the one hand, in order to use the PlayStation Network, a consumer must agree to settle any dispute with Sony outside of court. In section 15 of the document:

Other than those matters listed in the Exclusions from Arbitration clause (small claims), you and the Sony Entity that you have a Dispute with agree to seek resolution of the Dispute only through arbitration of that Dispute in accordance with the terms of this Section 15, and not litigate any Dispute in court. Arbitration means that the Dispute will be resolved by a neutral arbitrator instead of in a court by a judge or jury.

The arbitration clause may arguably breach the Brazilian Consumer Protection Law 1990, which explicitly prohibits clauses that “determine a compulsory use of arbitration” (VII). The Sony’s Arbitration and Class Action Waiver provisions arguably place consumers in an “unreasonable disadvantage” situation.

Section 15 also contains a class action waiver clause, which states that:

Class Action Waiver. ANY DISPUTE RESOLUTION PROCEEDINGS, WHETHER IN ARBITRATION OR COURT, WILL BE CONDUCTED ONLY ON AN INDIVIDUAL BASIS AND NOT IN A CLASS OR REPRESENTATIVE ACTION OR AS A NAMED OR UNNAMED MEMBER IN A CLASS, CONSOLIDATED, REPRESENTATIVE OR PRIVATE ATTORNEY GENERAL LEGAL ACTION, UNLESS BOTH YOU AND THE SONY ENTITY WITH WHICH YOU HAVE A DISPUTE SPECIFICALLY AGREE TO DO SO IN WRITING FOLLOWING INITIATION OF THE ARBITRATION. THIS PROVISION DOES NOT PRECLUDE YOUR PARTICIPATION AS A MEMBER IN A CLASS ACTION FILED ON OR BEFORE AUGUST 20, 2011.

In other words, consumers cannot participate in a group action, unless that group action was set in motion before August 20, 2011. Those agreeing to the new terms of service are also agreeing to settle their disputes with Sony on one-on-one basis.159 This

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158 For a comparison of the new version and former version of the user agreement, please see http://www.sonyentertainmentnetwork.com/SEN-legal-docs/TERMS_OF_SERVICE_AGREEMENT-EN.pdf

would arguably increase the cost of litigation and dispute resolution for individual consumers.

New TOS also includes a clause that may cause undue deferral of the litigation process, and provides:

INFORMALLY THROUGH NEGOTIATION. You agree to negotiate resolution of the Dispute in good faith for no less than 60 days after you provide notice of the Dispute. If the Sony Entity you have a Dispute with does not resolve your Dispute within 60 days from receipt of notice of the Dispute, you or the Sony Entity you have a Dispute with may pursue your claim in arbitration pursuant to the terms in this Section 15.

This clause arguably limits the rights of consumers to seek possible legal remedies in a timely fashion. It seems that this provision may have violated the new Australian Consumer Law 2010. s25 (k) of Australian Consumer Law 2010 explicitly provides that “a term that limits, or has the effect of limiting, one party’s right to sue another party” is an unfair term of contract. It is clear that the section 15 may have effects of limiting consumer group actions and causing undue delay of legal proceeding (through the “informally through negotiation” provision). As such it may breach s25(K).

The arbitration clause may also breach the Brazilian Consumer Protection Law 1990.

As introduced above, the CPC provides a non-exhaustive list of abusive clauses.160 It explicitly prohibits clauses that “establish obligations understood as unfair, abusive, or that lead the consumer to an unreasonable disadvantage or those that are not consistent with good faith or equity”. The Sony’s Arbitration and Class Action Waiver provisions arguably place consumers in an “unreasonable disadvantage” situation.

Moreover, as some commentators have pointed out, such arbitration clauses featuring class action waivers “could be and were invalidated by the US courts on the grounds that they were “unconscionable”. (Chalk vs T-Mobile; Omsted vs Dell; Laster vs ATT Mobility; Discover Bank vs Superior Court).161

Nevertheless, it is noteworthy that the TOS has been written in a very “technical” way to avoid the possible challenges under the ACL 2010. It did give consumers a way to opt-out of the agreement. The TOS agreement also contains a provision on “RIGHT TO OPT OUT OF BINDING ARBITRATION AND CLASS ACTION WAIVER WITHIN 30 DAYS” and stated that:

IF YOU DO NOT WISH TO BE BOUND BY THE BINDING ARBITRATION AND CLASS ACTION WAIVER IN THIS SECTION 15, YOU MUST NOTIFY SNEI IN WRITING WITHIN 30 DAYS OF THE DATE THAT YOU ACCEPT THIS AGREEMENT. YOUR WRITTEN NOTIFICATION MUST BE MAILED TO 6080 CENTER DRIVE, 10TH FLOOR, LOS ANGELES, CA 90045, ATTN: LEGAL DEPARTMENT/ARBITRATION AND MUST INCLUDE: (1) YOUR NAME, (2) YOUR ADDRESS, (3) YOUR PSN ACCOUNT NUMBER, IF YOU HAVE ONE, AND (4) A CLEAR STATEMENT THAT YOU DO NOT WISH TO RESOLVE DISPUTES WITH ANY SONY ENTITY THROUGH ARBITRATION.

It seems that this provision does provide consumers with a possibility to “opt-out” the Binding Arbitration and Class Action Waive provision. However, as we know, few consumers may really have patience and skills to read such a sophistic legal document (as discussed above), and spend time in writing and mailing a formal statement letter to Sony to opt-out of such a provision. In the other words, it may be another “unenforceable” provision for consumers. As one commentator noted, “[i]t’s a rather sneaky move on the part of Sony’s legal department, though it isn’t quite as nasty as it

160 Like the ACL 2010, Article 51 of the CPC 1990 (Chapter VI: Contractual Protection – Abusive Clauses) also provides a non-exhaustive list of abuse clauses: see section 3.4.2 above.

161 http://www.reddit.com/r/technology/comments/nk5r7/sony_sued_over_psn_cant_sue_us_clause/.
sounds”, and it may take too long for a judge to conclude this illegal, unenforceable or unconscionable.

4.4 Non-Sue Provision

Most recently, it is reported that Sony was sued over a term in its PlayStation Network’s End User Licensing Agreement (EULA) amended in September 2011, which forced PSN users to agree not to sue the company. This is a class action suit for all of those who purchased a PS3 and signed up for the PSN before the September amendment to the EULA. The suit alleges that Sony hid the new clauses down in the long document. Sony failed to make an easily accessible version of the agreement available online as it had for former terms of service changes, and the EULA can only be read on the device itself.

Again, such a term and the way that Sony disclosed the term to end users consists of a breach of the provision on limiting right to sue (s25 (k)) and the provision on substantive unconscionability (s21, Sch2) in Australian Consumer Law 2010.

4.5 Amazon and Google – Internal Breach

There are various reasons for consumer data losses. The consumer personal information losses in Sony cases were mainly caused by external reasons – hacker attacks. However, recent data losses with cloud services provided by Amazon and Google were mainly caused by internal reasons.

Amazon controls about 60% of the cloud computing market, which is expected to balloon to $148.8B in revenue by 2014, worldwide. In April 2011, a major flaw in Amazon cloud computing was exposed. Amazon cloud computing service has been so successful but it could not expand its Elastic Block Storage (EBS) architecture fast enough to meet demand. Consequently, this resulted in a “catastrophic cascading failure, and permanent loss of 0.7% of customer data”.

A cloud computing crash of the type Amazon recently experienced sent ripples through the industry. As one commentator noted, “when a busy cloud computing platform crashes, the impact is felt widely” and “the problems are rippling through to customers, causing downtime for many services that use Amazon’s cloud to run their web services”.

Amazon is not alone. Other major cloud computing service providers, such as

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163 Josh Wretlind, Ibid., stating: “The PS3 EULA is a 21 page document, that is not available online, and The ‘No Suing’ provision, is placed toward the end of the document, where users are likely not to see it, and thus catch the end users in a trap”.


Google and Microsoft, have not experienced similar problems. For example, in December 2010, the Microsoft Business Productivity Online Suite (BPOS) was breached in North America, Europe, and Asia. In September 2011, a software upgrade that went wrong caused parts of the Google Docs cloud-hosted office productivity suite were not available online for an hour.

One important issue here is whether the consumers, who have been affected by the cloud computing crash, are able to obtain adequate remedies to recover their losses. Again, this raised the unfair term issues.

It is clear that “if there is an outage or a security breach, a user of cloud services could be in breach of its contract with its own customers or of applicable laws, even if this is caused by the provider of services”. Not surprising, lawyers of these major computing service providers will try to minimize their legal risks through Term of Service or User agreements.

This is reinforced by a reading of some standard disclaimers on cloud computing sites. As of September 2010, Google Apps Premier Edition’s online disclaimer, for example, noted:

**Google and its licensors make no warranty** of any kind, whether express, implied, statutory or otherwise, including without limitation warranties of merchantability, fitness for a particular use and/or non-infringement. **Google assumes no responsibility for the use of the services.** Google and its licensors make no representations about any content or information made accessible by or through the service. Google makes no representation that Google (or any third party) will issue updates or an enhancement to the service, **Google does not warrant that the functions contained in the service will be uninterrupted or error-free.**

As some commentators point out, many consumers “consider that providers of IT services often tend to offer their services “as is”, without assuming any risk – and with an exclusion for all liability where permitted by law”. However, through various licensing agreement or Term of Service, IT service providers often unilaterally exclude their responsibilities for not being able to provide consumers with the services as they have described.

**Google Apps Premier Edition’s** online disclaimer may arguably have breached the Brazilian consumer protection law. As introduced above, Article 51 of CPC 1990 (Chapter VI: Contractual Protection – Abusive Clauses) explicitly prohibits abusive clauses that “prevent, exempt or reduce suppliers’ liability for defects of any nature in products and services or imply a renouncement or a waiver of rights”.

### 4.6 Summary and Remarks

A clear line is always hard to draw and a sound balance of consumers and IP holders is always hard to strike. Sony, Google and many other high technology companies
surely can find some persuasive arguments to justify their current practices – such as for enhancing innovation or for improving user security.

For example, when a Sony staff responded to inquiry on the recent changes of TOS, he said:

This language in our TOS is common and similar to that of many other service related Terms of Service Agreements. It is designed to benefit both the consumer and the company by ensuring that there is adequate time and procedures to resolve disputes.172

As some commentators pointed out, each country has its own set of laws regarding data protection and privacy. Some are dramatically more stringent than others. For example, in 2010, in the UK, HSBC (in one of a series of security breaches relating to its customer data) was fined £3 million “for failing to have adequate safeguards in place for its customer’s confidential details.”173

The aim of this paper is not to advise on how a right balance can be achieved between licensees and licensors, but to identify potential legal instruments that consumers may seek remedies from. In comparison with global IT giants armed with in house lawyers, consumers normally lack sophisticated legal knowledge and are not quite familiar with potential legal remedies they may have. In the next section, I will provide some recommendations for future law reform at both international and domestic level.

Part V: Conclusion and Recommendations

As some commentators pointed out, “any global technology solution will be impacted by the laws of a large number of nation states.”174 However, as introduced above, IP related consumer laws in each country are various. As such, it is necessary to explore some practical strategies to harmonize laws in various countries and improve the enforceability of consumer protection laws at both domestic and international level.

5.1 Recommendations at the Domestic Level

5.1.1 Recommendation I: Strong Consumer Laws for IP Abuse Prevention

Individual countries may consider using more detailed consumer laws to protect consumers from IP abusive conduct, including unfair terms or abusive clauses in End User Licensing Agreements. They may draw on lessons from both Australia and Brazil. For example, as introduced above, the Brazilian CPC 1990 provides a non-exhaustive list of abusive clauses that may harm the interests of consumers. Australian consumer law contains similar provisions on unfair terms of contract and provide some general standards to assess “unfairness”. They may serve as model laws for others countries to reform their laws against IP abuse.

Future consumer laws should explicitly prohibit the conduct of IP holders in unilaterally revising the term of service or rule of usage. The proposed A2K amendments to the United Nations Guidelines for Consumer Protection (amended Guidelines) provide some sound guidelines on how individual countries may address the said issues.

172 Mike Fahey, above n 159.
173 Nick Hart & Mark Vincent, above n 169.
174 Nick Hart & Mark Vincent, above n 169.
For example, future regulation may explicitly “restrict suppliers of digital products and services from employing technologies that have a significant effect of preventing consumers from using those products or services in ways or for purposes that would otherwise be reasonable and safe”.\(^{175}\)

Article 23A of the amended Guidelines further provide:

Suppliers of consumer electronic devices, or of proprietary software for such devices, may not issue a software or firmware update that would disable the consumer’s access to functionality that the device or software possessed at the time of purchase, unless:

(a) the update is essential to protect the safety of the consumer or the consumer’s data;
(b) the consumer is fully and clearly informed of the effects of the update; and
(c) the consumer is given the opportunity to accept or reject the update, unconditionally upon the acceptance of any other update that improves or corrects functionality of the device or software.

There provisions arguably provide a clear example on how individual countries may prohibit IP holders’ unilateral conduct which may harm consumers. It would be desirable if individual countries can incorporate these prohibition provisions into their domestic consumer laws. In doing so, adoption in national law can extend consumer protection provisions relating to IP.

5.1.2 Recommendation II: ACCC-Style Strong and Specialized Enforcement Agency on Consumer Protection

Each country needs to set up a specialized consumer right enforcement agency, and strengthen the coordination between consumer right enforcement and competition law enforcement. In this regard, the Australian ACCC model may serve as a sound model. As discussed above, many developing countries, including China, do not have a strong and effective consumer protection enforcement agency.

As such, China and many other developing countries may consider drawing on lessons from the experiences of Australia, and give its Consumer Protection Association “greater power”, including the power to initiate litigation against conduct that harms consumers, the power of investigation, the power to make administrative resolutions and the power to issue infringement notices.\(^{176}\)

Unlike Australia, the Consumer Protection Association and Anti-Monopoly Enforcement Agency are two different agencies. Thus, it is important to strengthen the coordination of these two enforcement mechanisms. As introduced above, competition law alone may not be sufficient to prevent all forms of IP abuse and to protect consumers under the current online environment.

5.1.3 Recommendation III: One Way IP Education vs Consumer Education

As noted in the United Nations Guidelines for Consumer Protection, consumer education is an important component of the consumer protection regime. However, existing IP education mainly focuses on how to enforce IP law and prevent IP infringement and how to teach IP users/consumers to follow IP laws, rather than how to protect

\(^{175}\) A2K amendments to the United Nations Guidelines for Consumer Protection, Article 21A.

consumers from IP abuse or how to teach IP holders to explore IPRs in properly.\textsuperscript{177} Same holds true in the US. For example, a US scholar commented:

\begin{quote}
\ldots the IP exposures US citizens receive is dichotomous. One exposure is \textbf{consumer IP education}. Here, limited information is disseminated to those who purchase the IP of others. Consumer IP education focuses upon purchasers, or future purchasers, of software, technology, and media. Consumer IP education is directed at explaining how the \textsuperscript{146} products are protected by IPRs, how to abide by said rights, and proper purchasing rather than downloading or sharing.[FN14]

The second exposure is \textbf{producer IP education}. Producer IP education informs the public of the rights and benefits IP laws bestow upon their conceptions and works of authorship. Producer IP education encourages innovation and enhances a public familiarity with the basic steps in obtaining IP protection.[FN15] Despite the recognized need of an all-encompassing public exposure to IP laws,[FN16] IP education in the \textsuperscript{147} US has a disproportionately greater emphasis on consumer IP education, as opposed to producer IP education.[FN17]\textsuperscript{178}
\end{quote}

Indeed, the current IP education model is mainly focused on teaching consumers to follow IP laws rather than teaching IP holders to exploit their IPRs properly. In addition, current legal studies on IP abuse prevention are mainly focusing on the competition law approach. The major parties who can benefit from these types of studies are companies rather than individual consumers. As such, it is necessary to identify some new ways to help consumers to readily learn to understand and use the current legal infrastructure against IP abusive activities.

For example, the ACCC website provides a list of authorized agencies for Ombudsman and dispute resolution. Many consumers, who have not taken action against IP abuse, have simply been scared by the high cost of litigation and arbitration proceedings. They do not know there are so many low cost or free dispute resolution mechanisms available for them. Particularly in many developing countries, civil Ombudsman and dispute resolution mechanisms are not well developed. Most consumers rely on national consumer protection associations, and they are not very familiar with many other specialized and cheap/free dispute resolution mechanisms. For example, in Australia, the Telecommunications Industry Ombudsman (TIO) is “a fast, free and fair dispute resolution service for small business and residential customers who have a complaint about their telephone or internet service”.\textsuperscript{179} However, not every consumer, who suffers with “legal traps” in sophisticated Terms of Service and EULA (eg no suing provision), knows about this free legal service.

As such, future IP education should strike a better balance between consumer IP education and producer IP education. It should focus on both IP infringement prevention and IP abuse prevention. Future consumer IP education should not only focus on teaching consumers to respect IPRs, but also arm consumers with effective legal instruments against IP abuse. Consumers and IP users should be well informed about their rights under IP laws, consumer laws, and other consumer-related legislation. They should also be able to locate suitable dispute resolution mechanisms to defend their legitimate rights.

\textsuperscript{177} For example, most WIPO IP education projects in China and other developing countries are focusing on the “protection of IPR” rather than “the prevention of IP abuse.”


\textsuperscript{179} http://www.tio.com.au/about-us
5.2 Recommendations at the International Level

5.2.1 Recommendation I: TRIPS Amendment and Minimum Requirement of Consumer Protection

IP Abuse provision in TRIPS should be amended. Firstly, the WTO needs to provide a clearer and more operational definition of IP abuse to protect the interests of IP users and consumers. Alternatively, it may explicitly authorise member states to adopt any measure to define “IP abuse” under their domestic laws against harming consumers.

Secondly, the WTO or the UN may consider setting up minimum requirements for consumer protections for member countries – either through TRIPS (IP related consumer rights) or through an independent International Treaty. As we know, the TRIPS Agreement has set up minimum requirement of member countries to amend their domestic IP laws to protect the benefit of IP holders. A similar strategy may also be applied to protect the benefits to IP users and consumers in general.

The United Nations Guidelines for Consumer Protection has provided a fine guideline for individual countries, particularly developing countries to amend their consumer laws. However, it is an only a guideline and not a binding law. It would be desirable if more detailed model laws (eg model law on unfair term of contract) or international consumer protection treaties with binding effects can be made in order to harmonize consumer protection laws at the international level.

5.2.2 Recommendation II: “Reverse Nation Treatment” Principle for Consumer Protection

As discussed above, under the current knowledge economy environment, “any global technology solution will be impacted by the laws of a large number of nation states.” Any global technology failure may also affect consumers in a number of countries. Moreover, consumer protection levels in different countries are various. Consumers, particularly consumers in developing countries, often face “imbalances in economic terms, educational levels, and bargaining power”. However, the reform of consumer law and improvement of consumer protection level cannot be achieved overnight.

Thus, I would suggest that it may be necessary to set up a “reverse nation treatment” principle at both domestic and international levels to strengthen the consumer protection in different countries. Under this proposed principle, when a multinational/foreign company has conducted any conduct that may harm consumers, a court in the hosting country may apply either hosting country law or the consumer laws in the country where foreign company was incorporated to provide remedies for consumers. For example, although there is no Australia-style unfair term of contract law in China, if an Australia IP company uses unfair terms in EULA to harm the interests of consumers, the Chinese court can then apply the Australian unfair term of contract laws to prevent the conduct of the Australian IP companies.

In doing so, a foreign company will not be able to use the flaw of the consumer law in the hosting country to harm consumers in that country. This will not create an extra burden for foreign IP companies. It simply requests these companies not to

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180 Nick Hart & Mark Vincent, above n 169.
harm consumers in a way which has been prohibited by consumer laws in their home countries.

However, one of the problems of applying this principle is that it may conflict with the national treatment principle under the WTO framework. It creates a possibility that foreign companies who were incorporated in a country without strict consumer laws may be treated differently with the foreign companies who were incorporated in a country with strict consumer laws.

In order to comply with the WTO rule, before a court decides to apply the consumer laws in foreign countries, regulators must announce that their consumer laws will be amended accordingly and make sure all companies in the hosting countries will be treated equally under the new laws.

In doing so, it will push hosting countries (who do not have strong consumer laws) to speed up the consumer law reform process. It will also force regulators and courts in the hosting countries to be more cautious when they decide to apply a stricter consumer protection law in foreign country.

5.2.3 Recommendation III: UN Compliance Regime and Involvement of NGOs

In addition to law making and law reform, the United Nations should set up a special agency or work closely with NGOs to set up an effective mechanism to assess the effectiveness of the laws on consumer protection and IP abuse prevention in individual countries.

Like the USTR, which issues Special 301 IP watch list every year, the UN or authorized NGOs should issue similar watch list or reports to assess the consumer protection status in each country, including their compliance with the UN Consumer Protection Guidelines, the effectiveness of their domestic laws in preventing IP abuse and consumer protection and the enforcement of their consumer laws. Upon request, the UN special agency or NGOs may provide detailed recommendations for law reforms in individual countries, particularly developing countries.

As introduced above, given that many developing countries lack well qualified legal experts in consumer and IP protection areas, it is necessary to encourage the involvement of NGOs in the WTO negotiation process. For example, the WTO may consider setting up a “member country invitation mechanism” which allows member countries to invite NGOs to directly participate in the WTO negotiation process.
Conclusion

In conclusion, under the current knowledge economy environment, an increasing number of countries have noticed that governments “need to ensure that consumer law not only protects consumers, but also encourages competition and supports innovation”\(^{182}\). In response to the challenges brought by “global technology solution” and in order to better prohibit various forms of IP abusive conduct worldwide, it may be necessary to get the TRIPS agreement, particularly its IP abuse provision, amended. As introduced above, the TRIPS Agreement provides a leeway for countries to make any laws to prevent the abuse of IP and to enhance technology transfer and innovation. In addition to a traditional competition law approach, consumer laws may serve as an important supplement for preventing IP abuse and enhance innovation in a long run.

In addition to the TRIPS Agreement, the United Nations Guidelines for Consumer Protection, particularly the A2K proposed amendments to the Guideline (as introduced above), may serve as an example of a possible instrument that could facilitate the resolution of the IP abuse problems and defend consumer rights under the current digital environment. In addition to soft laws, individual countries should learn from each other and consider using “binding” laws or treaties to strengthen the protection of consumers under the current digital environment, such as unfair term provisions in Australian consumer law and abusive clause provision in the Brazilian consumer law. In order to speed up the process of law reform, some more creative legislative strategies may be adopted, such as “reverse national treatment” principle.

It is imperative that each country, particularly developing countries, should adopt more flexible approaches at both international and domestic levels to address IP abuse issues and to protect legitimate rights of their citizens in using new technology products and services. This is not only important for protecting consumers but also important for encouraging competition and supporting innovation.

\(^{182}\) Christian Twigg-Flesner, “Innovation and EU Consumer Law” Journal of Consumer Policy, Vol 28, Issue 4, December 2005, at http://www.springerlink.com/content/y343nu668102271r/ at 409-432 (stated: “Recent consumer policy initiatives, primarily at the domestic, but also at the European, level have emphasised the need to ensure that consumer law not only protects consumers, but also encourages competition and supports innovation). See also Australian Government, Attorney-General’s Department, “The Australian Consumer Law – An introduction” at 15 at http://www.consumerlaw.gov.au/content/the_acl/downloads/ACL_an_introduction_November_2010.pdf (stating: “The ACL simplifies the law and makes it clearer to understand for both consumers and businesses. More informed consumers make better choices, driving competition and innovation in markets and the development of a seamless national economy”.)