Consumer Protection and IP Abuse Prevention under the WTO Framework

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Dr George Yijun Tian
Senior Lecturer, Faculty of Law
University of Technology, Sydney
Email: George.Tian@uts.edu.au
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Aim

• 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.
Structure

• 1. Background: IP in the Digital Age

• 2. examine whether provisions to limit IP enforcement measures on consumer protection grounds are permissible under the IP abuse provision of the TRIPS Agreement.

• 3. 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.

• 4. Some recent cases on IP abuse prevention in high technology market, such as Song PSN case, Google and Amazon clouding computing cases.

• 5. provide some practical advices for individual countries, particularly IP net importing countries, to use consumer law to prevent IP abuse.
1. IP Protection vs IP Abuse: Innovation, Competition & Consumer Protection

• Source: swiss-copyright.ch
• As we all known, in the current IP expansion environment, a sound balance of benefits of different stakeholders in IP law has become increasingly important to protect innovation, fair competition and consumer rights.
• The problem is how to achieve such a balance.
1. Background: History of IP Education

• Until two to three decades ago, IP law, such as copyright law, was ‘the province of a small bar and an even smaller cadre of law professors’.
  • ---- Prof. Hugh Hansen

• The law had not attracted much attention due to the complexity of the law, the limited amount of IP work and the limited scale of international IP trade.
1. Background: Digital Era

- However, the *situation* has *changed dramatically* in recent years.

- Along with the *wide application of technology, particularly digital technology*, the influence of IP law has extended to almost *all disciplines and every corner of the world*. 
1. IP Law in Digital Era: Change of Complexity

- Consequently, the complexity of IP law has increased dramatically in recent years.
1. Complexity of IP Law

- IP law is now related to many issues, such as widespread piracy across various media, the imbalance of international IP trade, privacy, free speech, constitutional problems, democracy, and even human rights issues.

- The balancing problem in IP law has now become a complicated global issue with many social, economic and political elements involved.

- It cannot be expected to be resolved by simply adapting domestic IP law. The increased complexity requires us to seek possible resolutions by viewing balancing issues broadly, rather than simply through the lens of IP law.
1. Another Approach: IP Law & Non-IP Law

• So, instead of focusing on examining how to use IP law to balance the benefits of different stakeholders in IP trade

• This presentation will focus on
  – how to use existing legal instruments, particularly non-IP law instruments, to restrict the activities of IPR holders in abusing IPR to jeopardize public interests and consumer rights.
  • such as consumer laws.
Part 2

• Part 2. examine whether provisions to limit IP enforcement measures on consumer protection grounds are permissible under the IP abuse provision of the TRIPS Agreement.
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.
2. Objective and Principle Provisions of TRIPS: IP Abuse Prevention Regulation beyond Antitrust Law

- **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 agriculture and textiles.
2. Objective and Principle Provisions of TRIPS: IP Abuse Prevention Regulation beyond Antitrust Law

- 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.
2. Requirement under TRIPS: Preventing IP Abuse

• Article 8 of the *TRIPS Agreement 1994* 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*.”

• Put simply, Art 8 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.

• Art 8 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*’.
2. Objective and Principle Provisions of TRIPS: IP Abuse Prevention Regulation beyond Antitrust Law

- 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.

- Paris Convention for the Protection of Industrial Property 1883, Article 5, for the first time use the term ‘abuse’, but mainly focusing on ‘abuse’ of ‘patent’ rather than ‘abuse’ of IPR in general.
2. Objective and Principle Provisions of TRIPS: IP Abuse Prevention Regulation beyond Antitrust Law

• The *TRIPS Agreement* also includes specific provisions on anticompetitive matters.
  – i.e. Article 31 specified the **conditions for compulsory licensing of patents** as parts of measures to **remedy** anticompetitive practices.
  – i.e. 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’.
2. 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’.
2. Leeway for Member Countries – Consumer Law Remedies against IP Abuse

- 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. (Frederick M. Abbott, 2004)

- 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 members’ states themselves to make specific law and policies to ‘define the concept of abuses through appropriate domestic measures’ and to regulate the activities of IPR holders when commercializing their IP

- (UNCTAD-ICTSD, *Resource Book*, above n 51, 548.)
  - United Nations Conference on Trade and Development
  - International Centre for Trade and Sustainable Development
2. Leeway for Member Countries – Consumer Law Remedies against IP Abuse

- 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 (UNCTAD-ICTSD) 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’.

- In the 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’.
2. Leeway for Member Countries – Consumer Law Remedies against IP Abuse

• 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.
2. Leeway for Member Countries – Consumer Law Remedies against IP Abuse

- I will next examine how different countries adopt domestic laws to prevent IP abuse and enhance innovation and technology transfer, and

- particularly focus on non-competition law approach – consumer law approach in China, Australia and Brazil.
Competition Law and Consumer Law

- **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.
Competition Law and Consumer Law

• 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 (e.g. 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.
Competition Law and Consumer Law

- 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).
Part 3

- Part 3. 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.

- 3.1. China
- 3.2. Australia
- 3.3. Brazil
3.1. Non-Competition Law Approach on IP Abuse Prevention in China

• Over the past one decade, China has established a preliminary legal framework on preventing IP abuse.

• (i) AML – one of core components of the Chinese IP Abuse Rules
  – Structure of AML
  – Enforcement Agency
  – IP Provision – Art 55

• (ii) Non-Competition Law Approach on IP Abuse Prevention
  – Contract Law
  – Foreign Trade Law
  – Anti-unfair competition Law
  – Patent law
China’s Anti-Monopoly Law

It performs a key role in the establishment, maintenance and operation of the country’s competition mechanism and the legal environment for competition.
3.1. Background of AML

• After 13 years of discussion and three revisions, China’s *Anti-Monopoly Law (AML)* was promulgated on 30 August 2007 and has come into effect on 1 August last year.

• It is the *first anti-monopoly law* in China. It is also the first law that includes a special provision on ‘IP abuse’.

• **However**, the *wording* of some provisions of the AML, including the sections dealing with IP protection, is quite *vague*.

• Juridical interpretations and more specific implementing regulations on the AML have *not appeared yet*.

• This has arguably led to a lot of *uncertainty* for the operations of foreign enterprises, particularly IP related enterprises in China.
3.1. Brief Overview of AML

- The AML includes 8 chapters and 57 articles

- Chapter I - General Provisions
- Chapter II - Monopoly Agreements
- Chapter III - Abuse of Dominant Market Position
- Chapter IV - Concentration
- Chapter V - Prohibition of Abuse of Administrative Powers to Restrict Competition
- Chapter VI - Investigation of Suspicious Monopoly Behaviours
- Chapter VII - Legal Liability
- Chapter VIII - Supplementary Provisions

- This presentation will mainly focus on the provisions on Legislative Purposes, Enforcement Agencies, General Prohibitions, General Exemptions, and IP.
3.1. Enforcement Agencies

State Council

Anti-Monopoly Commission (AMC)

Anti-Monopoly Enforcement Agency (AMEA)

Ministry of Commerce

National Development and Reform Commission (NDRC)

State Administration for Industry and Commerce (SAIC)
3.1. IP Provision: Art 55

- Regarding IP, unlike the EC Treaty, which does not have an IP provision, the AML contains a specific provision (Article 55) on IP.

- Article 55 provides:
  - ‘This Law is not applicable to the undertakings which use intellectual property rights according to the laws and administrative regulations relevant to intellectual property, but is applicable to the undertakings which abuse intellectual property and eliminate or restrict market competition’.

- It has two-fold meaning:
  - On the one hand, it recognized legitimate use of IPR. It implies that the IP law and the AML are considered to be ‘equivalent in status’.
  - On the other hand, the AML explicitly prohibits the abuses of IPRs.

- But the language of Article 55 is overly general. Neither has it provided a clear definition of the ‘IP abuse’, nor has it detailed potential penalty for IP abuses.
### 3.1. IP Abuse Prevention Rules in China

<table>
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<th>(1)</th>
<th>Contract Law 1999</th>
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3.2. Australia

The Australian Consumer Law
3.2. 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.

Source: dieswaytoofast.blogspot.com
3.2. 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.
3.2. Australia

• 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’.

• i.e, the Microsoft Software License Terms for Windows Vista is 5701 words.

• The EULA for Microsoft Windows XP Pro SP2 is 5623, which contains a 1013 word limitation of liability written entirely in French.

• The longest English sentence in agreement is 178 words and was written entirely in capital letters. (Cornons, 2007)
NetworkActiv Web Server END USER Legal Agreement

The Legal Agreement between the "END USER" and the "AUTHOR" and the "DISTRIBUTOR" is as follows:

I. DEFINITIONS OF TERMS:

Definition of "END USER" is as follows: Any and all parties which use this software; This includes but is not limited to the following: Any and all parties which own, run, or use the system with which this software is run on or is installed on.

Definition of "AUTHOR" is as follows: Any and all parties which produce and/or contribute to the production of this software; This includes but is not limited to NetworkActiv.

Definition of "DISTRIBUTOR" is as follows: Any and all parties which are in any way involved with the distribution of this software in part or in whole to the "END USER"; This includes but is not limited to any and all websites (including any and all parties that run or contribute to such websites in any way) through which this software can be obtained from in part or in whole, and NetworkActiv.

II. END USER RIGHTS AND DUTIES:

You must read and scroll to the bottom to continue.

I do NOT Understand and / or do not Agree to the above Legal Statement

I Understand and Agree to the entire above Legal Statement

Source: www.networkactiv.com
3.2. Australia

- 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.

  - References: Dale Clapperton & Stephen Corones, ‘Unfair Terms in “Clickwrip” and other electronic contract’….., Part II.
3.2. Australia

- IP Abuse on Unfair Terms of Contracts: *Consumer Law in Australia 2010*
3.2. Australia

- **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”.

3.2. Australia

- (1) unfairness issue/unconscionability issue on the “formation of contracts”; and

- 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.
3.2. Australia

- 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 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.
- In the other words, the terms of EULA are presented on a ‘take it or leave it’ basis. (Cornorns, 2007).
3.2. Australia

- 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.
- (Cornorns, 2007, 35).
3.2. Australia

- IP Abuse on Unfair Terms of Contracts: Consumer Law in Australia 2010
3.2. Australia

• New consumer laws
• The new Australian Competition and Consumer Act 2010 took into effect this 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 “Uniconsiconable conduct within the main of the unwritten law;

• S51AB has been repealed and replaced by Sch 2 s21 under the same title ‘Unconscionable conduct’
• The former provisions and new provisions are identical.
3.2. Australia

- **New consumer laws**
- (1) unfairness issue/unconscionability issue on the “formation of contracts”; and
- (2) unfairness issue on the “terms of contracts”.

- A **main difference** is the former TPA only focused on the **unconscionable conduct of corporation**.
- The new CCA focused on the **unconscionable conduct of a person**.
- Thus, it seems that the new CCA has a broader coverage and includes both conducts of “corporation”, incorporation (other forms of entities) and individuals.
3.2. Australia

- **New consumer laws - Issue 2:**

- 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.

- Further, CCA introduces some detailed provision on the definition of consumer contract, the meaning of unfair and examples of unfair terms.
3.3. Brazil
3.3. Brazil

• Overview of Consumer Protection Code (CPC) in Brazil

• Brazil has a tradition of **strong consumer protection** and such a traditional has been supported by its **Federal Constitution**. The Brazilian **Consumer Protection Code (CPC)** was enacted on September 11th, 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**.
3.3. Brazil

• Overview of Consumer Protection Code (CPC) in Brazil

• It is in Article 5 of the 1988 Federal Constitution, where we find the first reference to consumer rights.

• And when treating the economical and financial order, Article 170 explicitly lists ‘consumer protection’ as a basic principle.

• As one commentator noted, ‘the Constitution does not leave any doubts as to the responsibility of the State to promote consumer rights’. (Luciano Rodrigues Maia Pinto, )
3.3. Brazil

• 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. CPC 1990, Chapter VI: CONTRACTUAL PROTECTION: ABUSIVE CLAUSES Article 51
3.3. Brazil

- Like the ACL 2010, the CPC 1990 the CPC provides a non-exhaustive list of abuse clauses, including the 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 (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);
3.3. Brazil

- 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 it 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).
3.3. Brazil

• **Applications:**
  • As such, it seems that any provision in a software licensing agreement, which
    – allows a licensor 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
3.3. Brazil

- **Remedies**

- **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.
  - Section V, Title I, Chapter 3 Consumer’s Basic Rights

- 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.
3.3. Brazil

• **Remarks:**

• 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** on consumers against the abusive clause/unfair terms in the consumer contracts.
3.3. Brazil

- **Remarks:**

- **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 abuse 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 constitution support.

- It creates a possibility for Brazil courts to apply and interpret Article 51 broadly and better protect consumers against unfair terms/abusive clauses in a contract.
• Part 4. Some recent cases on IP abuse prevention in high technology market, such as Song PSN case, Google and Amazon clouding computing cases.

• examine another important aspect of consumer protection on the online environment – consumer privacy and data security.
• examine some recent cases (Song 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.
4. Background

• In order to become an eligible licensee (eligible software/computer game user), in addition to purchase software, a customer normally has to provide detailed personal information to 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 availability 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. Background

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• **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. PSN

• Sony's global PlayStation network (PSN) was hacked and user account information was compromised between 17 and 19 April 2011.

• Sony immediately took PSN offline on 20 April.

• This led to the exposure of **unencrypted personal information** of **77 million users**, including names, addresses and possibly credit card data. This is ‘one of the largest-ever Internet security break-ins.'
4. PSN

- This attack makes regulators in different countries rethink the effectiveness of the existing legal system in protecting consumers against potential online risks.

- As we known, most software licensing agreements contain provisions that permit IP holders/licensors to collect consumer personal information.

- However, **neither** have these agreements imposed **strong obligations** to licensors to protect the safety of consumer personal data, **nor** contain detailed provisions on how to compensate consumers if their personal data has been stolen or misused.
4. PSN

• However, in terms to Sony’s obligations of protecting consumers, these documents impost 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....”
4. PSN

• It is clear that a sound balance of rights of both parties does not seem to be stricken.

• According to Reuters, by June 2011, in the U.S. 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.’
4. PSN

• 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.

• Terms of User Agreement. http://legaldoc.dl.playstation.net/ps3-eula/psn/e/e_tosua_en.html (last visited on 10 Jan 2012)
4. PSN

- It seems that these clauses are abuse 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, 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 strike 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. PSN

- It seems that these clauses are abuse 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)’.

- 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.
  - not strike 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.
• **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.

• The aim of this paper is 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.

• All after, in comparison with global IT giants which arm with in house lawyers, consumers are normally lack of sophisticated legal knowledge and not quite familiar with potential legal remedies they may have. In next session, I will provide some recommendations for future law reform at both international and domestic level.
Part 5

- Part 5. provide **some practical advices** for individual countries, particularly IP net importing countries, to use consumer law to prevent IP abuse.
5.1. Recommendations at the Domestic Level

- 5.1.1. Recommendation I: Strong Consumer Laws for IP Abuse Prevention

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

- 5.1.3. Recommendation III: One Way IP Education vs. Consumer Education
5.2. Recommendations at the International Level

• 5.2.1. Recommendation I: TRIPS Amendment & Minimum Requirement of Consumer Protection

• 5.2.2. Recommendation II: ‘Reverse Nation Treatment’ Principle for Consumer Protection

• 5.2.3. Recommendation III: UN Compliance Regime & Involvement of NGOs
TRIPS Requirement

• ‘IP Abuse’ is NOT a new terminology – Originally from Art 8 of TRIPS
• Patent Misuse,

• Although it was the original idea of developing countries’ to include provisions for prohibiting IPR abuse and promoting technology transfer as part of the objectives and principles of TRIPS,

• 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, developed countries, particularly the US and the EU, have developed sophisticated laws and policies on coordinating the relationship between IP and antitrust laws and enhancing technology transfer over the past two decades.
EC and US Law: IP Abuse Rules in IP Exporting Countries

- For example, in Europe, the Europe Commission (EC) issued
  - Technology Transfer Block Exemption Regulation – Commission Regulation 240/1996 (‘TTBER 1996’)

- In the US, the U.S. Department of Justice (DOJ) and the Federal Trade Commission (FTC) issued
  - a "watch list" for prohibiting anticompetitive restraints in patent licensing agreements in the 1970s.
  - 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.
  - Antitrust Enforcement & IPRs: Promoting Innovation and Competition (hereinafter ‘the Report 2007’) in order to facilitate the understanding and application of the 1995 Guidelines
Law Transplant

• They may arguably serve as important sources of law for IP abuse rule making in developing countries.

• However, it is noteworthy that the laws in developed countries/IP exporting countries are not necessarily suited developing countries/IP importing countries. (Advices for US International Trade Commission)

• As the UK IPR Commission Report 2002 observed: ‘… the interests of developing countries are best served by tailoring their intellectual property regimes to their particular economic and social circumstances.’


• Same principle may also apply to importing IP abuse laws from other countries
Conclusion

VOLTAIRE
French Enlightenment Writer and Philosopher
(1694-1778)
Chapter Eight: Conclusion

“The true conquerors are those who know how to make laws. Their power is stable; the others are torrents which pass.”

--- Voltaire in 1756

VOLTAIRE
Author and Philosopher
(1694-1778)
• Thank You!!