

# [Intellectual property right protection issues concerning fdi](https://assignbuster.com/intellectual-property-right-protection-issues-concerning-fdi/)

JVC partners in developing countries often cite technology transfer as an important expected outcome of their collaborative activities, but for developed nation partners, the risks that such technology will be misused or ‘ leaked’ to other domestic companies are significant.

Discuss the issues faced by foreign partners when entering markets where intellectual property rights have traditionally been poorly protected. What provisions can partners make to protect their interests? (60%)

## Introduction

In this assignment, I would like to focus on intellectual property right protection issues while foreign investors entering market where intellectual property rights have traditionally been poorly protected, as well as the possible provisions can investors make to protect their interests. On the face of it, intellectual property right protection would seem to be a simple concept, as a prominent contribution on international policy agenda, the importance of IPRs hardly needs to be questioned further. However, although the Trade-Related Aspects of Intellectual Property Rights (TRIPs) had been made agreement, there are still many developing countries and economics such as China and India are less concerning about enhancing their Intellectual Property Rights because they thought there might be some ‘ invisible benefits’ inside the poor protection of IPRs. Hence a better comprehension of potential benefits from a higher Intellectual Property Rights regime should be deeply discussed. For instance, stronger IPRs will attract more inflows of foreign direct investment. In another aspect, as globalisation has became one of the most ruling ‘ buzz words’ in the world, International Joint Ventures play an important role in modern world, in other words, the protection of IPRs, which is the main issues faced by foreign investors, become more and more significant. Structurally, firstly I would like to discuss the differences between a weak and strong IPR to start this paper, and then I would like to discuss the main issues such as copyright and trademarks which foreigner investors will be faced. At last, a final conclusion will be given.

## A weak and strong IPR

To make a better understanding of the IPR issues for foreign investors, in this part, I would like to discuss the relationship between Intellectual Property Rights protection and foreign direct investment (FDI). General speaking, it is a little bit complex between IPR protection and FDI. On the one hand, according to Javorcik (2002), strong IPR protection will shift the willing of multinational companies from FDI towards licensing. On the other hand, if that country’s Intellectual Property Rights are to some extend weak, it will increase the probability of imitation, which could lead that country a less attractive location for foreign investors (ibid). In other words, the first issue faced by foreign partners when entering markets where IPRs have been poorly protected is that the phenomenon of imitation.

## Fake iPhone in developing country

For example, it is no doubt about how popular when the iPhone was born since the June 2007. Its unique operating system and exoteric port made it became gizmo lover’s dream. However, as time goes by, there are many imitation of iPhone had been created in many developing countries such as China. It should have surprised no one if people would want to buy a fake iPhone, just like people want to buy a fake Louisiana Pneumonia handbag. At the moment, in the China’s biggest online C2C shop – TAOBAO, there are many kinds of ‘ iClone’ with enough good of the Apple logo and similar pattern to the real iPhone. The package as well as instruction book are completely same as real iPhone, which means it is really hard to find out what are the differences between the real and fake one. The only obvious difference is merely the price. The picture below is from a friend who bought a fake iPhone several months ago, it can be found that from the picture there are no differences between two)

## The impact of imitation

From the IPR protection perspective, the ‘ imitation company’ should need a lesson of IPRs laws. However, it is obviously that such imitation company did it deliberately by taking advantage of poorly intellectual property rights of that country. The impact of imitation is that Apple is to some extend losing their sales; there are unquestionably damages to the Apple, which is the most respected and cleanest technology company in the world. In addition, more significant impact is that such phenomenon will affect other foreign investors’ confidence as well as enthusiasm, which put developing countries such as China at a serious disadvantage. Hence the improvement of IPR protection is important and significant. From another aspect, according to Mansfield (1994 & 1995), as surveys of IJV have shown, the significance and importance of intellectual property rights protection have different levels of damages to different industries. Besides, the purpose of investment project also decides the levels of damages that IJV might be taken. Companies such as Research and Development facilities would be the highest whereas companies focusing on exclusively on distribution and sales would be the lowest. From this point, it can be found that Apple Company obviously belongs to the first matter, which is based on the high technology and research.

## Provision that Apple make to protect their interests

In this part, I would like to brief explain how high-tech corporations such as Apple protect their interests when they against poorly protected IPRs in developing countries. Generally speaking, the way of defending can be divided into two parts: first of all, which is the most difficult one, however, simultaneously the most effective one, is that make their products to have a very rare quality, a good quality means equivalent price. For instance, till today the technology of Apple’s iPhone has been updated six times. After each upgrade the new iPhone is more slim and delicate than previous product. One the one hand, after several times’ upgrade, new iPhone became harder to imitate than before, both from material textures and inner construct. Hence it will cost more to those who produce fake iPhone. According to the TaoBao online shop in China at the moment, it can be found that ‘ fake iPhone’ is considerable decrease than before, which indicates that rare quality can extremely increase the difficulty of imitating high-tech productions such as iPhone, hence the consequence is disappearance of imitation, which is a way to protect intellective property rights.

On the other hand, the system between China and developed countries is significant different. For example, in the UK, people usually do not direct buy a phone; instead, they prefer sign contracts within 12 or 24 months, and pay bills monthly so that they can get that phone free. Although this system is advance, however, such system is quite unfamiliar to those people in China. Hence copy of that system in China could lead an extremely decrease of sales’ volume. In other words, the culture and consumption habit should be considered as well for those JVCs when they entering developing countries’ market. In my opinion, as sustained, rapid and sound economic development of developing countries such as China, the people’s purchasing power has constantly risen, which means the price issues are not the first reason when people purchasing. Instead, the quality, brand name awareness, advertisement, as well as marketing strategy plays a more important and significant role in such circumstance. Hence, after understanding these elements, JVCs should concentrate more on improving the qualities of their products as well as marketing strategies, so that their products would attract clients, and establish some kind of ‘ trust’ between clients and them, this also benefits for the future profits because in China people is more trend oriented rather than analyse products themselves.

## Copyright in developing country

In this paragraph, I would like to discuss another important issue of intellectual property rights – copyright. Take Chinese market as an example as well, the main copyright issues can be divided into two aspects: book and computer programs. In this part, I would like mainly focus on the windows program as an example, windows operation system is a type of operating system for computers, produced by the Microsoft Corporation, which allows users to run several programs at the same time in separate areas of the computer screen. Windows systems include Windows NT, Windows 2000, Windows 98and Windows XP (Longman dictionary, 2009). According to the WTO website (2009), the TRIPS agreement ensures that computer programs will be protected as literary works under the Berne Convention and outlines how databases should be protected. This rule is very significant because computer programs are really hard to project in developing countries, both for the native computer programs and multinational companies’ programs such as Microsoft’s windows.

Through the reform and opening up in the last two decades, China had established a fiscal management system which was compatible with the principles of a market economy. In other words, Chinese market has a huge potential value, hence since decades before, Microsoft made a lot of collaborative activities with Chinese company such as Huawei ltd. They developed many specific programs as well as improvement on windows operation system targeting on Chinese clients. However, according to a statistic, ‘ China’s piracy rates, at 82 per cent according to the Business Software Alliance, are not the world’s worst. But the country’s sheer size means piracy generates vastly bigger losses there – $6. 7bn for all software companies last year – than in any other market, according to the industry group’ (strategy page, 2008). Form this statistic, it can be found that the situation of privacy lead a huge damage to companies such as Microsoft. In additional, there are many relative programs such as sound recording program attached in windows operation system also have been damaged simultaneously.

According to the WTO website for the protection of computer program (WTO, 2009), ‘ It also expands international copyright rules to cover rental rights. Authors of computer programs and producers of sound recordings must have the right to prohibit the commercial rental of their works to the public. A similar exclusive right applies to films where commercial rental has led to widespread copying, affecting copyright-owners’ potential earnings from their films’. In addition, the agreement says performers must also have the right to prevent unauthorized recording, reproduction and broadcast of live performances (bootlegging) for no less than 50 years. Producers of sound recordings must have the right to prevent the unauthorized reproduction of recordings for a period of 50 years (ibid). All the rules indicate that piracy behaviors are extremely prohibited since China enter the WTO; however, the defense of Microsoft is not that easy in China.

## Defense of Microsoft: another way to protect interests in developing country

The initial action of Microsoft is that they launched an anti-piracy program in 2008; this program will identify all users who use windows without license in worldwide, so that they can force them to but legal copy of windows program. However, things became complex when Microsoft roll-out hit China, this anti-piracy program will made the background of desktop into totally black on computer if the user using windows without license. Hence, this program made Chinese users became really anger. During that period, Chinese users’ anger can be found in every software forums as well as media such as newspaper and television. In addition, the government of China criticised Microsoft as well, according to Liu (2008), Commissioner of the National Copyright Administration: ‘ Violating consumers’ rights in order to protect your own rights is inappropriate,” He adds that in future he wants the company to discuss anti-piracy measures with the government before they are launched. (Strategy page, 2008) From above, it can be concluded that Chinese government have a strong tendency to protect their own people’s right, which means multinationals such as Microsoft cannot simply follow the IPRs in China, even if it is right. In other words, the most difficult things that multinationals need to consider in China in that they should carefully analyse the culture ideology of people and government’s willing, otherwise, they will lose a very big ‘ cake’ in their business. Hence just like other collaborative companies doing business in China, there is no reason that Microsoft should ignore such kind of message from the government.

## Conclusion

From the case of Microsoft, in my opinion, Microsoft should seek more communication to government of China, and discuss more reasonable schemes to its intellectual property rights. In addition, Microsoft should seek another way to adjust their anti-piracy to fit the culture ideology of people in China. For example, they can limit some of the functions in windows operation system instead of making the desktop totally black, and constantly improve the quality of windows so that they can grasp the main market share of desk operation system in China. The good news is that Microsoft engineers are working on ways to improve the user experience,” says Garth Fort, Microsoft’s marketing head for Greater China (ibid).

As globalisation has become a main trend in the future, the mode of JVC will play a more significant role in this arena. Since developing counties are becoming a large and important market in the world, issues such as ‘ technology leak’ cannot be absolutely avoided due to the imperfection of IPRs in developing countries. Therefore, from the above cases I have been discussed, high-tech companies should not seek to solve these IPR problems immediately, instead, they should focus more on how to improve their products’ qualities so that they can grasp the consumer’s heart. At the same time, they should constantly negotiate with the IPR problems with government, and prepare for the ‘ long-term battle’, and I thing as time goes by, the mechanism of IPR protections will be more and more perfect, and the lost interests of IPRs during the difficult time will ultimately ‘ refund’ by the huge market share they have obtained.

## Question 2

## Select a developing nations where JVCs are prevalent and discuss the ‘ pitfalls’ of collaborating within that country with respect to IP rights, and where applicable comment on any recent improvements to the legal framework protecting partner’s interests.

Introduction

In this question, I would like to focus on the issues of ‘ pitfalls’ of collaborating companies respect to IP rights on China, as well as some applicable comment on any recent improvements to the legal framework protecting partner’s interests. Thomas (2009) had been said in his article ‘ Protecting your Intellectual Property Rights (IPR) in China’: ‘ IP Protection is an important issue today for any firm contemplating selling products in China’. In other words, if joint venture companies do not prepare well, they are likely facing a lot of ‘ pitfalls’ while they are doing business in China. Therefore, a well understanding of China’s intellectual property rights as well as native culture has become significant important. For instance, except those traditional goods, things like knowledge and ideas are an important part of trading. Besides, there are many low-tech products such as brandnamed clothing actually contains designs and invention inside them, which means they has their own values and become no longer cheap. However, in China people do not have a strong intellectual property rights consciousness; hence the ‘ pitfalls’ that JVCs sometimes encountered actually can be avoided by necessary measures such as prevention. Hence in this question, by providing some statistics, I will illustrate examples to explain some of common ‘ pitfalls’ in China. At last, a final conclusion will be given.

## Philosophy behind the intellectual property rights in Western countries

Although the concept of intellectual property rights dates back to the fourth century B. C., the moment toward creating an international standard for protecting innovation is a relatively new development. (Karen, 1995) The most significant step in this trend is the recent delegation of intellectual property issues to the decision-making and regulatory bodies of the World Trade Organisation (ibid). China as a developing country in the Asia, the potential market attracts a large number of investments, however, at the same time, there are many ‘ pitfalls’ come along with such actions for JVCs. Therefore, it is worth to discuss such difficulties as well as recent improvements to the legal framework to protect partner’s interests. Before this, I would like to briefly talk about the basic philosophy behind the intellectual property rights. Thomas Edison once said, ‘ Genius is one percent inspiration and ninety-nine percent perspiration’. This saying indicated the basic philosophy behind IPRs. Intellectual property rights are founded on the assumption that inventions are the product of nothing more than individual labor and investment. (Tansey, 1999) IPRs create private property rights in developers of new knowledge to compaensate them for the labor and resources expended during the creative process. (Kate, 1994) By rewarding research and development, IPRs systems are intended to foster the creation and dissemination of new knowledge, thereby benefiting society in general as well as the individual inventors. (Sarma, 1999) Most developed nations such as UK adhere to this philosophy and have established extensive protective systems for IPRs. (ibid) From above, it can be easily concluded that the philosophy of intellectual property rights in most Western countries is fixed, that is, the consciousness of IPRs protection had been deeply accepted by the people. In other words, People respect other people’s working and will not steal other’s achievement, otherwise they will be condemned.

## Philosophy behind the intellectual property rights in China

However, although dominant among developed nations, this individualistic philosophy is not globally accepted. Many developing countries such as China regard knowledge as communal rather than private property. (ibid) These societies value and encourage intergenerational innovation, perceiving inventions not as purely unique personal achievements but as extensions of existing ideas and discoveries. (Rosemary, 1998) In other words, the philosophy of intellectual property rights in developing countries such as China is totally different from the Western countries, that is the reason why I firstly discus the philosophy behind the IPRs. In china, industrialized counterparts are advanced than their technology. As a public policy, China recognises copying as a way of improving its technology, and such situation determines that China cannot strictly follow IPR regimes. For example, when a ‘ child’ grows up, it is really hard to let that child create new things; instead, the best way for that child is imitate what he saw, so that he can fast grow up. Developing countries such as China is just like this child, Western counties such as UK had been experienced twice industrial revolutions and has many advanced sciences and technologies as well as education systems, which mean they have affluent resources to let China appreciate and imitate. During this period, to some extent, it is very hard for developing countries to strictly follow the intellectual property rights. Therefore, there are many inescapable ‘ pitfalls’ would be happened for JVCs.

## ‘ Pitfalls’ of IPRs in China

From the above discussion, the main point that I want to indicate is that 100% following IPRs in China is not a wise choice. Instead, find a more balanced way to establish a new method is just a right decision. The success of Blizzard entertainment is just a good example. As I discuss above, intellectual property such as copyright in China is hard to protect, when Blizzard entertainment firstly enter the Chinese market, they are impressed by the potential profits of China, because China has a large population, which means even if they occupy 5% of the whole market, they will get an unbelievable markup. However, at the beginning they spent a large number of time and money focus on the intellectual property right in China. For instance, some of their program was modified by players without any authorization, and the modified programs were rapidly spread through the internet. Blizzard entertainment become very anger and complains such behavior to the relative departments of China. However, they found that even the player was penalised, other players will constantly do what the previous one did. Finally the Blizzard entertainment realised that the essential reason for such behaviors is the different philosophy behind the culture. Therefore, they started to looking for a new path to face Chinese market. They changed their strategies to fit Chinese customers’ habits. For instance, they freely open their program’s code, and let Chinese players freely modify their program until most of them are satisfied. The consequence is that this program is become very popular in China, and made most of Chinese remembered the ‘ Blizzard’.

## China is improving Intellectual Property Rights Protection

Although China is still in a period of growth, however, as time goes by, China will finally become an ‘ adult’, which means its intellectual property rights will constantly consummate. The U. S. Embassy in Beijing reports that “ Since joining the World Trade Organization, China has strengthened its legal framework and amended its IPR laws and regulations to comply with the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) (Global Spec, 2009). Besides, China has constantly enhanced the IPR enforcement system to the legal framework protecting partner’s interests. For example, Addressing infringement of IP in China follows a two-track system. The first and most prevalent is the administrative track, whereby an IP rights holder files a complaint at the local administrative office. (Global Spec, 2009) The second is the judicial track, whereby complaints are filed through the court system. (China has established specialized IP panels in its civil court system throughout the country.) (ibid) Determining which IP agency has jurisdiction over an act of infringement can be confusing. (ibid) Jurisdiction of IP protection is diffused throughout a number of government agencies and offices, with each typically responsible for the protection afforded by one statute or one specific area of IP-related law. (ibid) There may be geographical limits or conflicts posed by one administrative agency taking a case involving piracy or counterfeiting that also occurs in another region. (ibid) In recognition of these difficulties, some regional IP officials have discussed plans for creating cross-jurisdictional enforcement procedures. China’s courts also have rules regarding jurisdiction over infringing or counterfeit activities, and the scope of potential orders. (ibid) From above, it can be found that the Chinese government’s motivation is positive.

## Conclusion

Throughout the whole discussion, my conclusion is twofold: first of all, there is no doubt that developing country such as China still has many imperfect mechanisms for the intellectual property rights, hence JVCs should be very careful of the ‘ pitfalls’ of collaborating within China with respect to intellectual property right such as copyright and trademark issues. Secondly, China is still a ‘ child’ who is in a period of growth; hence, JVCs should also understand the specific culture and philosophy aspects behind the Chinese. In other words, traditional western countries’ ideology is not that fit in China, JVCs should find a more innovative way before China become a ‘ real adult’, just like Blizzard entertainment did.