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# MISTRANSLATION OF LEGAL TERMINOLOGY RECONSIDERED

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**Abstract:** This study aims to explore different causes for the mistranslation of legal terminology in international agreements that are enforced through domestic legislation, and attempt to provide some solutions. It is said that legal training will help legal translators to render terminology correctly. This should be held true because many legal terms from different legal systems are 'false friends', in that even a well-trained lawyer may need to undertake extensive legal and linguistic research to render them in another language or legal system. This study, by use of a comparison of several translated legal terms from People's Republic of China (PRC) and Taiwan, shows that besides the cause of 'legal knowledge', the disparities between international law and national law and different legal traditions can also lead to an improper transfer of legal terminology. Examples of these terms are "Copyright piracy" (*Daoban* **盗版** vs. *qinhai zhuzuoquan* **侵害著作**权), "Good Faith" (*Chengshi shouxin* 诚实守信 vs. *shanyi* **善意**), and "Inventive Step" (*Famingxing de buzhou* 发明性的步骤 vs. *jinbuxing* 进步性). In order to enhance translators' legal knowledge, it is proposed that they be presented with some substantive laws together with simple illustrations of their

structures. Translators should crosscheck their translations against a wide range of sources at work.

**Key words:** mistranslation, legal terminology, international agreements, Chinese

**Streszczenie:** Niniejsze badanie ma na celu (1) zbadanie różnych przyczyn błędnego tłumaczenia terminologii prawnej w umowach międzynarodowych, które są egzekwowane na mocy przepisów krajowych i (2) próbę dostarczenia pewnych rozwiązań. Powszechnie uważa się, że szkolenie prawne pomaga tłumaczom prawniczym poprawnie tłumaczyć terminologię. Należy to potwierdzić, ponieważ wiele terminów prawnych z różnych systemów prawnych to fałszywi przyjaciele, ponieważ nawet dobrze wyszkolony prawnik może być zmuszony do przeprowadzenia szeroko zakrojonych badań prawnych i językowych, aby uczynić je w innym języku lub systemie prawnym. Badanie to, w oparciu o porównanie kilku przetłumaczonych pojęć prawnych z system prawnego Chińskiej Republiki Ludowej (ChRL) i Tajwanu, pokazuje, że oprócz wiedzy prawnej, różnice między prawem międzynarodowym a prawem krajowym i różnymi tradycjami prawnymi mogą również prowadzić do niewłaściwego przeniesienia terminologii prawnej na inny język.

**Słowa kluczowe:** błędne tłumaczenie, terminologia prawnicza, umowy międzynarodowe, chiński

## 1. Introduction

This paper sets out to identify some causes for the mistranslation of legal terminology and make some suggestions to enhance translators' knowledge of law. It is said that legal translators must possess some basic legal knowledge as an important aspect of their professional competency, although they do not need to undergo full legal training. Cao (2002:337) remarks: "…some basic knowledge of the relevant law and legal concepts and understanding of legal usage will go a long way". Moreover,

> 'A legal translator, therefore, needs to have a basic understanding of the nature and function of law in society as

> such a legal knowledge is essential not to interpret or apply the law, but to understand the message and re-present it in another language appropriately' (Cao, 1998:250).

These comments sound reasonable because the differences between legal systems that result in a lack of conceptual and terminological correspondence constitute one of the main problems faced by legal translation. Some legal knowledge must be possessed in order to determine the equivalence of terms. While legal knowledge is a key factor in the successful translation of legal terminology, there has been limited research that analyses other reasons for error. This study compares a number of Chinese legal terms as translated by PRC and Taiwan in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) (1994), administered by the World Trade Organisation (WTO) for its members. It demonstrates that the gap between international law and national law, 'intentional' errors based on different legal traditions, and translators' language competency also lead to an improper transfer of legal terminology. Since "the language of the law consists primarily of concepts which are bound to a particular national legal system and culture", and "the legal terminology of different legal systems is inherently incongruent", it is proposed that legal translators should be conceptually acquainted with some basic legal terminology, especially through the approach of functional equivalence and its measurement (Šarčević 1989, 1997). This approach is fundamental in this study of terminological incongruence in law to differentiating three types of "functional equivalents", that is, "near equivalents", "partial equivalents" and "non-equivalents", and in detecting errors. Practically, the presentation of some substantive laws to legal translators along with simple, macro and bilingual illustrations of their structures appended with relevant statutes will provide an effective training method for dealing with these shortcomings. In addition, a list of legal references including bilingual dictionaries can be compiled. Translators during actual work should cross check their translations through various means against the corpus of their national laws and the laws of other Chinese regions.

## 2. Data and Methodology

The data is taken from TRIPS signed in Marrakesh, Morocco in 1994 and its two official Chinese translations: PRC's version Yu Maoyi Youguan de Zhishichanquan Xieyi《与贸易有关的知识产权协议》(Publication date: 29 March 2007) and Taiwan's version Yu Maoyi Youguan zhi Zhihuicaichanquan Xieyi《与贸易有关之智慧财产权协议》(Completion date: October 1995). TRIPS aims at promoting effective protection of intellectual property rights (IPR) among members of the World Trade Organization (WTO), while ensuring that such protection does not impede international trade. This international agreement was drafted in English and translated into different languages. China's and Taiwan's admission to the World Trade Organisation as members in 2001 and 2002 brought them to be signatories to TRIPS. Five legal terms, each including their original in TRIPS and their respective translation from PRC's and Taiwan's versions, are selected for analysis from the agreement's Part II Standards Concerning the Availability, Scope and Use of Intellectual Property Rights.

As an international agreement on IPR, TRIPS was selected for the following reasons. Due to globalization and closer trade ties among different nations, IPR, which concerns the legal protection of a variety of intangible matter, is becoming more important (Ricketson and Richardson, 2005:5). Because an international agreement takes effect through the enactment of domestic laws, and the terms discussed in this international agreement also appear in local legislation, this discussion should have significance for legal translation in general. Moreover, international agreements such as TRIPS tend to reconcile and integrate national differences in trade relations, so their legal terminology can be more up-to-date and reflective of changing realities in the economic and legal arenas.

While PRC legal codes use simplified characters and Taiwan's codes use traditional characters, for the sake of consistency in the body text, Taiwan's codes have been changed to simplified characters in the following examples. No change is made to Taiwan's codes in the endnotes.

Five important terms in law/intellectual property rights are selected for detailed analysis, to illustrate this issue of mistranslation. They are "good faith" which is a key concept in all areas of law,

"copyright piracy" and "expression" which are key concepts in copyright, "inventive step", a key concept in patent and "offering for sale", a key concept in contract law.

## 3. Analysis of Various Causes for Mistranslated Legal Terms

### 3.1 Gap between International Law and National Law

Since this study is based on the translation of an international agreement, it is important to point out that the translation of legal terms is related to the openness of a legal system to foreign terms and their borrowing into domestic law. It also brings up the issue of the globalisation of legal systems. The following examples show that PRC and Taiwan have different degrees of receptiveness to legal terms and that a conservative attitude can result in a mistranslation of terms, which, to be exact, a 'partial equivalent' in translation.

Copyright piracy: Daoban (盗版) vs. Qinhai Zhuzuoquan (侵害著作权)

In Article 61 of TRIPS, the term "copyright piracy" is translated as daoban (**盗版**) (pirated copy) in PRC's version and qinhai zhuzuoquan (**侵害著作**权) (infringement of authorship right) in Taiwan's version.

> (1)
> Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. (Article 61, TRIPS English Version)
> **成**员方应规定刑事程序和惩罚，至少适用于具有商业规模的故意的商标仿冒和盗版案件。 (Article 61, TRIPS PRC's Version)
> **会**员至少应对具有商业规模而故意仿冒商标或侵害著作权之案件，订定刑事程序及罚则。 (Article 61, TRIPS Taiwan's Version)

These two translations of "copyright piracy" must be explained with reference to two Chinese translations of "copyright". These are zhuzuoquan (著作權) (authorship), which emphasises the natural person who owns the creation, and banquan (版權) (copyright), which emphasises the work itself, and can be extended to include both "publishing" and "copying" as advances in technology allow (Jiang, 2005:4-5). In its Copyright Law 2010, PRC uses zhuzuoquan (著作權), but deliberately makes both translations equivalent to each other in Article 57, which are therefore considered interchangeable in international law (Jiang, 2005:6). While choosing to use banquan (版權) to translate "copyright" in TRIPS (e.g. Article 9(2)), PRC also translates "copyright piracy" as daoban (盜版) (pirated copy). Supporters of banquan (版權) as translation of "copyright" believe that it is more internationalised because in international law, the concept of "copyright" (right to a copy rather than right to an author) is used and it is a term familiar to the general public who use daoban (盜版) to mean "illegal copying" (Qu, 2009). "Piracy" is understood as "reproducing published works or phonograms by any appropriate means for public distribution and also rebroadcasting another's broadcast without proper authorization" (World Intellectual Property Organization, 2007:186), and daoban (盜版) as the act of reproducing and distributing works with the aim of making profit without the authorisation of the copyright holder (Lü, 2006:56). The two definitions are similar in that the means of infringement is reproduction and the copyright owner's consent has not been sought, but different in that there is the requirement of profit-making in PRC. The two definitions also accords with the general meaning of daoban (盜版) from an authoritative Chinese dictionary: "reprint publications without getting the permission of the copyright holder" (Dictionary Department, Institute of Linguistics, Chinese Academy of Social Sciences, 2002:398), which suggests that the public also has this understanding. Therefore, because both terms have the meaning of "reproduction without copyright owner's permission", "piracy" and daoban (盜版) are close equivalents.

Taiwan's translation qinhai zhuzuoquan (侵害著作权) is derived from another Chinese translation of "copyright", zhuzuoquan (著作权), which, in its Copyright Act 2010, is defined as the moral right and economic right created for the accomplishment of work or production (Chen, 2011a:C-002). The reason why Taiwan uses

zhuzuoquan (著作权) is largely because it is used in this Act. Supporters believe that this Chinese term has a longer history of legislative use in China, originating as a Japanese borrowing during the Qing legal revision, and that it is more compatible with the concept of "author's right" adopted in civil law countries (Qu, 2009). Thus any infringement of such personal or property rights will be referred to as qinhai zhuzuoquan (侵害著作权) in Copyright Act 2010. However, the problem of translating "piracy" as qinhai (侵害) is that the latter can be used in a wider scope than the former because it involves other types of copyright infringement such as infringements of the rights to publicly release the work, to indicate the author's name, to publicly perform, and to rent according to Article 87 of the Act . In other words, qinhai (侵害) refers to various means of harm or damage, while "piracy" is mostly realised through reproduction. The ordinary definition of qinhai (侵害) also implies such a meaning: "harm or damage by force or by illegal means" (Dictionary Department, Institute of Linguistics, Chinese Academy of Social Sciences, 2002:1557). As previously noted, because the Chinese term daoban (盗版) is mainly realised through reprinting and reproduction of the original documents, it is also in line with "piracy" in terms of means of infringement.

The above example illustrates that there is a difference between the terms used in international and national laws, and the existing translations of legal terms can influence a nation to adopt and absorb new legal terms for use in domestic laws and translations of international conventions. Furthermore, when the domestic law has already taken in a source term from international law, its translation will take root. While "copyright piracy" is not in use in the IP codes of PRC and Taiwan, it is used in Hong Kong, that is, in the Prevention of Copyright Piracy Ordinance (Cap 544), which is translated literally as Fangzhi Daoyong Banquan Tiaoli (防止盗用版权条例). It can be argued that the official status of English in Hong Kong assists in a new term being more easily absorbed than in PRC and Taiwan, where Chinese is the only official language.

## 3.2. "Intentional" Mistakes Due to Different Legal Traditions

It is found that in cases of obviously mistranslated legal terms, the legal translator may do this to purposely create greater convenience for legal interpretation. Such 'manipulation' may be made possible by the differing legal traditions that offer differing explanations of a term. The eventual choice of a particular term, which is often a "partial equivalent", may also be influenced by the linguistic and cultural reason that it is more familiar to the general public.

Good Faith: Chengshi Shouxin (诚实守信) vs. Shanyi (**善意**)

In Article 24(5) that states "Where a trademark has been applied for or registered in good faith...", "good faith"is translated as chengshi shouxin (诚实守信) (honesty and keeping one's words) in PRC's version and shanyi (**善意**) (good intention) in Taiwan's version.

> (2)
> Where a trademark has been applied for or registered in good faith, or where rights to a trademark have been acquired through use in good faith either: (Article 24(5), TRIPS English Version)
> **若一商**标已被诚实守信地使用或注册…**通**过诚实守信的使用而获得一商标的权利… (Article 24(5), TRIPS PRC's Version)
> **商**标之申请或注册系属善意，或商标权系因善意使用而取得… (Article 24(5), TRIPS Taiwan's Version)

"Good faith", as a frequently-used legal notion, plays a vital role in some legal principles concerning the determination of mental elements. Rooted in common law, the term has various meanings in different legal families and legal areas which definitely confuse some translators. The general meaning of "good faith" in the common law system is "A state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards of fair dealing in a given trade or business, or (4) absence of intent to defraud or to seek unconscionable advantage" (Garner, 2009:762). The most common understanding of

the term is that used in the commercial law notions of "good-faith purchaser" or "bona fide purchaser", meaning one should act with honesty and reasonableness, without the intention to seek unconscionable advantage. In Continental law, on the other hand, its similar concepts enjoy greater scope than does "good faith" in common law. For example, the equivalent Treu und Glauben in § 242 of the German Civil Code is enshrined as a general civil law principle used to evaluate the legitimacy of most kinds of contractual relationships. In comparison, "good faith" is usually used in a more specific context which renders its meanings relatively definite (Mäntysaari, 2010:131-137).

This contrast can also be found in the interpretation of "good faith" in trademark registration. In the Trade Marks Act 1994 in the UK, for example, there is no clear scope of the meaning of bona fide (good faith). Its boundaries are equated with the reverse side of "bad faith", meaning that it is a mental state that lacks the objectives of preventing the entitled competitor using the applied trademark and of acquiring a similar trademark for gaining unfair advantages (Bainbridge, 2009:666). Actually, the requirement of "good faith" in some international laws such as the Paris Convention Article 6ter(1)(c) is higher, as its opposite "bad faith" can be found in that "the trademark has been registered in the knowledge that it incorporated the emblem, sign or hallmark concerned" (Bodenhausen, 1968:102). Accordingly, just the knowledge of earlier marks may successfully overturn the presumption of "good faith". In Article 24(5) of TRIPS, with respect to the exceptions of strong protection for geographical indications (GI), in particular those concerning wines and spirits, a compromise between the US and Europe exists along just those lines. The US tends to use a lower standard to interpret "good faith": from the standpoint of parties who applied, registered or used the "Containing-GI" trademarks, "good faith" might mean the absence of intention to violate a legal rule at the time of adoption. On the other hand, Europe uses a higher standard: from the standpoint of potential complaining regions, "good faith" might suggest that the party should be without knowledge of the fact that the GI was already adopted by foreign producers, or have no reason to know this fact (UNCTAD-ICTSD, 2005: 304-305).

Nevertheless, based on the purpose of Article 24(5), that is to exempt the existing trademarks and maintain the status quo, "good faith" can be understood as having no intention to infringe domestic

rights in GIs during application (Stoll, 2009:425). Therefore, the Anglo-Saxon common law interpretation is more pertinent. In light of this, the two Chinese translations can be further explained in that Taiwan's shanyi (**善意**) is related to the lower standard of "good faith" from common law and PRC's chengshi shouxin (诚实守信) to the higher standard from civil law. In Taiwan's civil law, shanyi (**善意**), as the opposite of eyi (**恶意**) (bad faith), is also referred to as buzhiqing (**不知情**) (without knowledge), meaning "without knowledge of the condition or the formation of others' legal relationship" (Liu, 2001:151). However, shanyi (**善意**) has the specific meaning in Article 36(3) of Taiwan Trademark Act 2011, that a registered trademark proprietor shall not prohibit a bona fide third party from using an identical or similar trademark prior to the filing date. This is similar to the meaning of "good faith" in Article 24(5) of TRIPS Agreement, both of which aim to maintain the rights of prior using parties, even if their usage is in conflict with registered trademarks or protected GIs (Zeng, 2003:77-78). The bona fide third party means having no intention to acquire unfair advantage from another's registered trademark, which can be compared to the US's requirement of being without the intention to violate a legal rule only. In conclusion, within Taiwan's legal system, shanyi (**善意**) is an ideal translation of "good faith" because of their high degree of equivalence in conceptual meaning and referential dimension.

In comparison, chengshi shouxin (诚实守信) in PRC's version also appears to work as an equivalent to "good faith" because it carries its core meaning of "honesty" (chengshi诚实), coupled with "keeping one's promise" (shouxin**守信**). The Chinese term is essentially modified from its noun form chengshi xinyong (诚实信用) (honesty and trustworthiness), a high principle in PRC civil law that can be understood as similar to the higher standard of "good faith" operating within the Continental tradition. Known as chengshi xinyong yuanze (诚实信用原则) and chengxin yuanze (诚信原则) (Principle of Good Faith / Good Faith Doctrine), this principle is embedded in the General Principle of Civil Law, Contract Law and some other important legislation, and enshrined by some jurists as "The Emperor Clause" in Contract Law (Zheng, 2000:Abstract 1). Therefore, chengshi shouxin (诚实守信), when used to translate "good faith", apparently expands the scope of obligations of civil subjects in IPR. It is defined thus: "[when] parties of civil activities exercise their rights and fulfil their obligations, they shall maintain the

balance of interests between the parties, and the balance between the interests of parties and that of the society in order to obey the moral standard of good faith" (Chinese Academy of Social Sciences, Institute of Law, Law Dictionary Compilation Committee, 2003:142).

Rather than using the term shanyi (**善意**) which also appears in Article 16(1) of PRC's Trademark Law 2001 (added as a result of the implementation of Articles 22-24 of the TRIPS Agreement), China might use the principle of chengshi shouxin (诚实守信) as a flexible doctrine to interpret natural justice according to different circumstances. It should be admitted that there is a tradition of endowing judges with considerable discretion in PRC judiciary practices (Zheng, 2000:131). Another important reason is that shanyi (**善意**) is still a young term in PRC, used in relatively new laws such as Contract Law and Real Right Law. More importantly, chengshi xinyong (诚实信用) has long been in use and it is a more understandable term for the general public. Its use may be due to the authorities' promotion of shehui zhuyi fazhi linian (**社会主**义法治理念) (Socialist Concept of the Rule of Law), which aims to render a comprehensive understanding of PRC law for ordinary citizens (Wei, 2008:116-122).

## 3.3. Inadequate Legal Knowledge

Inadequate legal knowledge is commonly cited as a cause of the mistranslation of legal terms. This section will discuss three mistranslated terms from IPR and contract law, which are quite obvious errors that have occurred mainly due to a lack of legal knowledge and concepts. They can all be considered 'non-equivalents'. Following that in section 4, as a practical solution to the problem of improving the legal knowledge of legal translators, some charts on the basic structure of some substantive laws will be introduced in order to explain these terms to translators.

Expression: Gongshi (**公式**) vs. Biaoda (**表达**)

In Article 9(2), "expression" is translated as gongshi (**公式**) (formula) in PRC and biaoda (**表达**) (expression) in Taiwan.

(3)

> Copyright protection shall extend to expressions and not to ideas, procedures, methods of operation or mathematical concepts as such. (Article 9(2), TRIPS English Version)
> 对版权的保护可延伸到公式，但不得延伸到思想、程序、操作方法或数学上的概念等。 (Article 9(2), TRIPS PRC's Version)
> **著作**权之保护范围仅及于表达，不及于观念、程序、操作方法或数理概念等。 (Article 9(2), TRIPS Taiwan's Version)

While copyright law protects only expression of ideas, not the ideas themselves, "expression" is "the method by which a work is made perceptible, including performance, recitation, fixation, material shaping or any other appropriate method" (World Intellectual Property Organization, 2007:109). The two regions' respective Chinese translations have different meanings. PRC's translation gongshi (**公式**) means "formula; set form of words for stating or declaring something definitively or authoritatively for indicating procedure to be followed by things of the same kind" (Dictionary Department, Institute of Linguistics, Chinese Academy of Social Sciences, 2002:670). An example of this term would be a mathematical 'formula', and the translation is therefore inappropriate. On the other hand, Taiwan's translation biaoda (**表达**) (expression) is a legal concept vis-a-vis guannian (观念) (idea). Following the distinction between "idea" and "expression" made above, guannian (观念), which refers to the thinking, program, process, system, method of operation, concept, principle and discovery expressed by the work, is not subject to the copyright protection in Taiwan, while biaoda (**表达**) is protected (Chen, 2011b:242). Given that the term "expression" already has a literal translation that reflects its meaning, it is very obvious that the PRC translation has made a mistake. PRC also has this translation of "form of expression" as biaoda xingshi (**表达形式**) in an IPR dictionary (Lu, 2005:10). A noteworthy point is that Article 9(2) TRIPS is modified and used as Article 10bis of the Copyright Act 2010, indicating that the translation of an international agreement has great impact on the national enactment of relevant laws.

Expression: Gongshi (**公式**) vs. Biaoda (**表达**)

In Article 9(2), "expression" is translated as gongshi (**公式**) (formula) in PRC and biaoda (**表达**) (expression) in Taiwan.

(4)

> Subject to the provisions of paragraphs 2 and 3, patents shall be available for any inventions, whether products or processes, in all fields of technology, provided that they are new, involve an inventive step and are capable of industrial application. (Article 27(1), TRIPS English Version)
> **根据下述第**2、3**款的**规定，所有技术领域内的任何发明，无论是产品还是工艺，均可取得专利，只要它们是新的、包含一个发明性的步骤，工业上能够适用。(Article 27(1), TRIPS PRC's Version)
> **在符合本条第二**项及第三项规定之前提下，所有技术领域之发明应可取得专利，无论为物品或方法，惟需具备新颖性、进步性及可为产业上利用(**注**5)。(Article 27(1), TRIPS Taiwan's Version)

"Inventive step" is one of the three requirements of patent application. According to Section 3 of the UK Patents Act 1977, the invention must not be obvious to an "unimaginative person skilled in the art", compared to prior techniques. All matters relating to the state of the art are to be considered except those included in previous patent applications published after the priority date of the invention (Groves, 2011:170). According to a footnote of Article 27(1) of TRIPS, "inventive step" is made synonymous with the terms "non-obvious". The term is translated literally as famingxing de buzhou (发明性的步骤) in PRC, and liberally as jinbuxing (进步性) in Taiwan. The former, with the component buzhou (**步**骤) which means "step; measure" (Dictionary Department, Institute of Linguistics, Chinese Academy of Social Sciences, 2002:173) and refers to something already known or even established, may contradict the legal meaning of inventiveness that indicates techniques not known to a skilled person. The Taiwan's translation jinbuxing (进步性) is more indicative of the literal meaning of "inventive step", but not "non-obviousness". In Taiwan Patent Act 2011, three factors, similar to that of the original meaning of "inventiveness" in the UK law, are used for evaluation: 1. the technique and knowledge in the public domain before the application; 2. The scope of the object is confined to the area which this invention belongs to; 3. the standard shall be the capacity of the person with ordinary knowledge in the specific technical area (Chen, 2011b:152; Heath, 2003:31-32). Compared with the above translations, chuangzaoxing (创造性) (creativity) used in Article 22 of PRC's Patent Law 2008 more clearly indicates the

advancement as well as non-obviousness of the invention. This reflects that when an international law is implemented through domestic laws, the translation can improve.

Offering for Sale: Chumai (出卖) vs. Yaoyue zhi Fanmai (要约之贩卖)

In Article 28(1), "offering for sale" is translated as chumai (出卖) (offer for sale) in PRC's version and yaoyue fanmai (要约贩卖) (offer for sale) in Taiwan's version.

> (5)
> where the subject matter of a patent is a product, to prevent third parties not having the owner's consent from the acts of: making, using, **offering for sale**, selling, or importing for these purposes that product; (Article 28.1, TRIPS English Version)
> **若一**项专利的标的事项是一种产品，则专利所有者有权阻止未得到专利所有者同意的第三方制造、使用、**出卖**、销售、或为这些目的而进口被授予专利的产品；(Article 28(1), TRIPS PRC's Version)
> **物品**专利权人得禁止第三人未经其同意而制造、使用、为**要约之贩卖**、贩卖或为上述目的而进口**(注6)其**专利物品。(Article 28(1), TRIPS Taiwan's Version)

Both "offer" and "sale" in "offering for sale" can be defined in law. "Offer" is "a display of willingness to enter into a contract on specified terms made in a way that will lead a reasonable person to understand that an acceptance, having been sought, will result in a binding contract" (Garner, 2009:1189). "Sale" is "a transfer of property or of a right from one man to another, in consideration of a sum of money, as opposed to barters, exchanges and gifts" (Burke, 1977:1602). Considering the translation of yaoyue zhi fanmai (要约之贩卖), yaoyue (要约) is the legal term for "offer" in the relevant contract laws of three Chinese regions, namely, PRC's Contract Law 1999, Hong Kong's Sale of Goods Ordinance (Cap. 26), and Taiwan's Civil Code Part II, and fanmai (贩卖) means "(of businessmen) buy and resell products for a profit" (Dictionary Department, Institute of Linguistics, Chinese Academy of Social Sciences, 2002:543). Given that there is already a fixed Chinese legal equivalent for "offer" across the three Chinese communities, PRC's translation chumai (出卖), despite being a plain language word that is easier to understand, can

create ambiguity. It means not only "offer for sale", but also "betrayal" and an "illegal transaction" (Bilancia, 1981:162; Dictionary Department, Institute of Linguistics, Chinese Academy of Social Sciences, 2002:285). The use of plain language is good for communicative purposes, however another translation chushou (出售) is suggested, which literally means "sell" without any negative connotations (Dictionary Department, Institute of Linguistics, Chinese Academy of Social Sciences, 2002:286). Because TRIPS is a legal document where both terms "offer" and "sale" have particular legal meanings, it is suggested that both terms must be rendered and not combined into one term during translating. Therefore, yaoyue zhi fanmai (要约之贩卖) is an acceptable translation.

The above raises general translation issues related to the language proficiency of translators such as the translation of "expression" as biaoda (表达), the interpretation of "step" in a broad rather than narrow sense, and the use of chumai (出卖) which carries the unwanted connotation of "betrayal". However, the mistranslation of the above terms mainly results from inadequate legal knowledge and this will be dealt with in the following section.

## 4. Specific Suggestions for Enhancing Legal Knowledge of Translators

### 4.1. Conceptual evaluation of functional equivalents

The primary task in enhancing the legal knowledge of translators, is to equip them with the ability to explore the functional equivalents in the target language, which Šarčević (1997: 236) defines as "a concept or institution of the target legal system having the same function as a particular concept of the source legal system." This strategy is concerned with the three important criteria in compiling a good legal dictionary, namely (1) function/structure (which concerns whether the concepts solve the same problem); (2) scope of application (which concerns to what specific situation the concepts apply); and (3) legal effects of the source language and target language terms (which concerns how the legal effects of the same

concept vary in different situations) (Šarčević 1989: 283–287, 1997: 237–249). This approach of functional equivalence and its measurement has been cited and used by Sandrini (1996) and EI-Farahaty (2008) in their similar studies of the equivalence of legal terms in Western languages.

To analyse the data under study, the terms "copyright", zhuzuoquan (著作權) (authorship), and banquan (版權) can be considered generally as "functional equivalents" as they do the same job: to protect the "right to copy", which is the definition of "copyright" in Black's Law Dictionary (Garner, 2004: 361). However, to differentiate them more closely, zhuzuoquan (著作權), which protects the copyright owner rather than the work itself, can be considered a "near equivalent" as such a difference deviates from the second criteria of "scope of application" to which the concepts apply. Furthermore, "piracy"and qinhai zhuzuoquan (侵害著作權) can be considered as "partial equivalents", as the latter covers a wider scope than the former, because it involves other types of copyright infringement. The difference deviates clearly from the second criteria of scope of application and the third criteria of legal effects. Last but not the least, "expression", the way a work is presented, and gongshi (公式) (formula) are "non-equivalents", since they differ in all three criteria, namely, function, scope and legal effects.

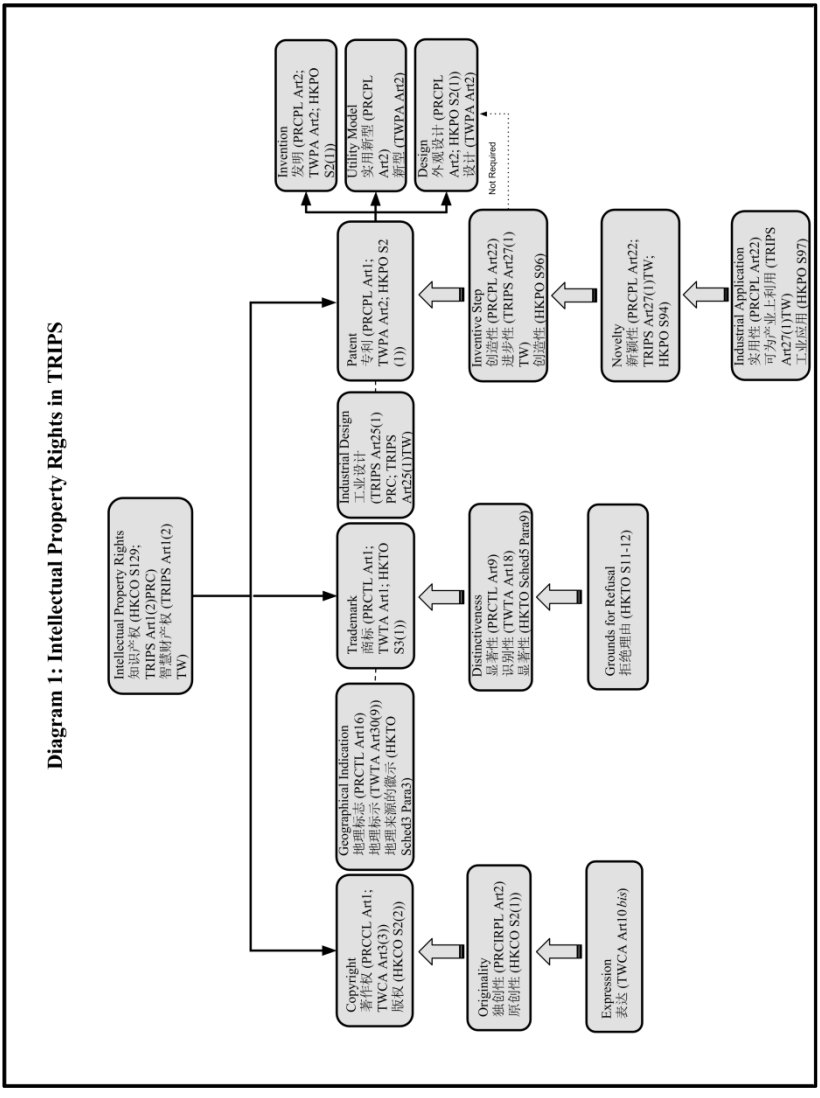
## 4.1. Illustrations of Substantive Law Hierarchy

Given their susceptibility to making mistakes in legal translation, a preliminary training in relevant legal topics would seem essential for translators before they enter into actual work. To give translators "a basic understanding of the nature and function of law in society" as suggested by Cao (1998:250), simple illustrations as a kind of short-term training method can be introduced to quickly achieve this training objective. Such diagrams or charts, which mainly present a macro structure of the relevant legal area with bilingual lists of key terms and their sources, can be used in in-house training for translators and in university lectures for translation students. Following are two diagrams with bilingual annotations of key terms, created mainly for the explanation of the above three mistranslated terms to translators (Diagrams 1 & 2). It is suggested that statutory provisions are most

helpful resources to translators because the legislative language is the preferable source of translation. While most current law textbooks already encompass the use of diagrams to illustrate intricate principles, this design allows the study of law and translation to take place in an integrated and economical manner, which reduces the burden of memorising terms during legal training.

Following are two diagrams on IP laws and contract laws respectively. The design of Diagram 1 includes the basic IPR terms taken from TRIPS agreement together with their counterparts taken from the law of PRC, Taiwan and Hong Kong or their TRIPS translations. Translators can refer to the given provisions and find the Chinese terms used in a legislative context. It should be noted that not all important English terms will necessarily find close equivalents in the laws of all three regions, because the concepts may be classified differently in the different legal systems. It is recommended that the annotated statutes be updated from time to time. A list of bilingual legal references can also be attached for reference. With the training assistance provided by the diagrams, mistranslations such as those for the legal concepts "expression" and "inventive step" in IP law and "offer" in contract law are unlikely to occur.

Diagram1: Intellectual Property Rights in TRIPS.



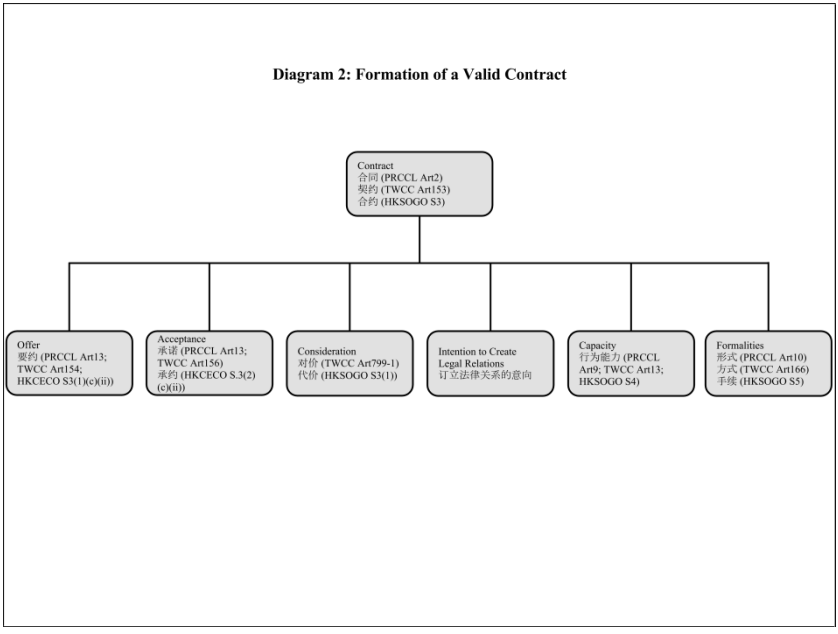

Abbreviation

PRCCL: Copyright Law of PRC (amended on 26 February 2010)
PRCTL: Trademark Law of PRC (amended on 27 October 2001)
PRCPL: Patent Law of PRC (amended on 27 December 2008)
PRCIRPL: Implementing Regulation of PRC (promulgated on 2 August 2002)

TWCA: Taiwan Copyright Act (amended on 10 February 2010)
TWTA: Taiwan Trademark Act (amended on 29 June 2011)
TWPA: Taiwan Patent Act (amended on 21 December 2011)
HKCO: Hong Kong Copyright Ordinance (Cap. 528)
HKTO: Hong Kong Trademark Ordinance (Cap. 559)
HKPO: Hong Kong Patent Ordinance (Cap. 514)
HKRDO: Hong Kong Registered Design Ordinance (Cap. 522)

Diagram 2 features six most frequently-cited elements for the formation of a valid contract in various legal systems, with English terms from UK common laws and Chinese translations from the three regions' laws. The first four elements are considered as positive elements for contract formation by most common law jurists. Among them, 'intention to create legal relations' is derived from case laws and since it is not a term and does not pose difficulties to translators, a translation, dingli falü guanxi de yixiang (订立法律关系的意向) is included as a reference (Chen et al., 1999:187). The remaining two elements, 'capacity' and 'formalities', are sometimes regarded as vitiating factors or as essential elements in a narrow sense. For example, the formality requirement only applies in certain exceptional cases and sometimes it determines the validity of contract and sometimes only affects the enforceability of contract (Beatson, 2010:78). In addition, some common law notions are not used in the legislations in civil law jurisdictions, such as 'consideration' that cannot be found in PRC laws. Therefore, no such statutory source from PRC is provided.

Diagram 2: Formation of a Valid Contract..

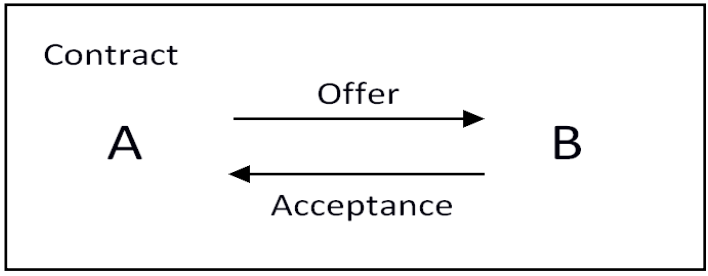



Abbreviation

PRCCL: Copyright Law of PRC (amended on 26 February 2010)
PRCCL: Contract Law of PRC (promulgated on 15 March 1999)
TWCC: Taiwan Civil Code (amended on 13 June 2012)
HKSOGO: Hong Kong Sale of Goods Ordinance (Cap. 26)
HKCECO: Hong Kong Control of Exemption Clause Ordinance (Cap. 71)

While diagrams can be presented in a carefully designed, formal manner as above, they can also be presented in an informal manner, handwritten on a whiteboard or visualiser in the classroom. In the past few years of teaching experience in legal translation, legal Chinese and even a general translation course to students who had not taken any law courses, the author has used diagrams in class to express concepts such as "contract", "offer" and "acceptance". Although such diagrams are not used in legal training, they are useful as an aid to quick understanding.

Diagram 3: Handwritten Illustration on 'Offer' and 'Acceptance.'




## 4.2. Legal Research Skills

As well as making use of training tools as above, legal translators ought to research the related codes in the same legal areas to cross-check translated IPR terms. For example, as the PRC version of TRIPS was published on 29 March 2007 by State Intellectual Property Office of PRC website, they should have double-checked related codes, such as the revised PRC Trademark Law promulgated six years earlier, in which shanyi (善意) was added in its new Article 16 due to the implementation of TRIP. Such codes and WTO laws are primary sources legal translators need to take into account. Another level of legal research is secondary sources, which in this case includes important publications concerning the TRIPS Agreement. It should be noted before the PRC version of TRIPS was published, some prestigious jurists had already published several books on the interpretation and framework of the TRIPS Agreement in which the relevance of the TRIPS Provision to the Mainland Provision was explained in detail (Zhang, 2001; Zheng, 1995, 2001). It would be particularly helpful for the Mainland translator to refer to them.

In all of the three Chinese regions, there exist official and non-commercial databases and websites established to enable the community to access essential statues free of charge. In the Mainland, some authoritative legislation databases are embedded in the official website of the Central People's Government (www.gov.cn/flfg and http://search.chinalaw.gov.cn/search2.html). An experienced translator can find all updated PRC laws on this website. For instance, the bilingual IP laws can be found on the website of State Intellectual

Property Office of PRC (http://english.sipo.gov.cn/laws). The English translations of domestic laws are also available from the paid commercial database Beida Fabao (北大法宝).

For Taiwan legislation, it would be helpful for translators to visit the Laws and Regulations database which carries current legislation in Taiwan and their translations (http://law.moj.gov.tw). Older versions can be excavated on the government department websites, for example, IP-related laws in the website of Intellectual Property Office, Ministry of Economic Affairs. It is noteworthy that Taiwan also has a prestigious commercial legal database, Yuedan Faxue Zhishiku (月旦法学知识库), in which law dictionaries and Cross-Straits statutes can be found.

Last but not the least, in Hong Kong, BLIS (Bilingual Laws Information System http://www.legislation.gov.hk/index.htm) is a legal database set up by Department of Justice, which provides access to all primary and secondary legislation in Hong Kong, and a free online dictionary. Besides, HKLII (Hong Kong Legal Information Institute http://www.hklii.hk/eng/) is a free legal database giving full access to legislation as well as court cases. Westlaw and LexisNexis are paid commercial databases that provide legal information related to common law jurisdictions.

In order to promote translating accuracy, it is important to instruct translators in the skills of legal research. Translators so equipped will be able to self-navigate and absorb primary and secondary resources in law. Once this habit becomes ingrained, it will continue to promote work efficiency even after they become experienced translators.

## 5. Conclusion

In summary, translators can err in rendering legal terminology for different reasons. The ‘new’ causes under study, including the discrepancy between international and national law and manipulations between different legal systems and traditions, are in fact also related to one’s knowledge of different legal systems, particularly in a changing world where globalisation brings different legal jurisdictions in closer contact. Although such causes mainly result in ‘partial equivalents’, when further research is conducted into legal terms and

their multiple translations, some would be found more appropriate than others for conveying the intended meaning of the original terms. Therefore, to properly equip legal translators for their job, some legal training is essential in today's world. The training suggested in this study is to first give translators an idea of the structures of particular legal areas with monolingual and bilingual resources such as statutes. More importantly, such training should motivate legal translators to research and crosscheck statutes and other references when they translate legal terms, particularly as those materials should not be so difficult to locate on the Internet. This is the attitude a legal translator must possess to meet the challenges of globalisation and the closer economic and trade relations between countries and the legal development it engenders.

## Notes

[i] Taiwan Copyright Act 2010 Article 87:
有下列情形之一者，除本法另有規定外，視為侵害著作權或製版權：
一、以侵害著作人名譽之方法利用其著作者。
二、明知為侵害製版權之物而散布或意圖散布而公開陳列或持有者。
三、輸入未經著作財產權人或製版權人授權重製之重製物或製版物者。
四、未經著作財產權人同意而輸入著作原件或其重製物者。
五、以侵害電腦程式著作財產權之重製物作為營業之使用者。
六、明知為侵害著作財產權之物而以移轉所有權或出租以外之方式散布者，或明知為侵害著作財產權之物，意圖散布而公開陳列或持有者。
七、未經著作財產權人同意或授權，意圖供公眾透過網路公開傳輸或重製他人著作，侵害著作財產權，對公眾提供可公開傳輸或重製著作之電腦程式或其他技術，而受有利益者。
前項第七款之行為人，採取廣告或其他積極措施，教唆、誘使、煽惑、說服公眾利用電腦程式或其他技術侵害著作財產權者，為具備該款之意圖。
The official English translation of Taiwan Copyright Act 2010 Article 87:
Any of the following circumstances, except as otherwise provided under this Act, shall be deemed an infringement of copyright or plate rights:
1. To exploit a work by means of infringing on the reputation of the author.
2. Distribution of articles that are known to infringe on plate rights, or public display or possession of such articles with the intent to distribute.
3. Import of any copies reproduced without the authorization of the economic

rights holder or the plate rights holder.
4. Import of the original or any copies of a work without the authorization of the economic rights holder.
5. Exploitation for business purposes of a copy of a computer program that infringes on economic rights in such computer program.
6. Distribution, by any means other than transfer of ownership or rental, articles that are known to infringe on economic rights; or public display or possession, with the intent to distribute, of articles that are known to infringe on economic rights.
7. To provide to the public computer programs or other technology that can be used to publicly transmit or reproduce works, with the intent to allow the public to infringe economic rights by means of public transmission or reproduction by means of the Internet of the works of another, without the consent of or a license from the economic rights holder, and to receive benefit therefrom. A person who undertakes the actions set out in subparagraph 7 above shall be deemed to have "intent" pursuant to that subparagraph when the advertising or other active measures employed by the person instigates, solicits, incites, or persuades the public to use the computer program or other technology provided by that person for the purpose of infringing upon the economic rights of others.
http://www.tipo.gov.tw/en/MultiMedia_FileDownload.ashx?guid=b17741ff-f893-4b27-ad38-e3eef477802f

[ii] § 242 BGB: *Leistung nach Treu und Glauben: Der Schuldner ist verpflichtet, die Leistung so zu bewirken, wie Treu und Glauben mit Rücksicht auf die Verkehrssitte es erfordern*. Its official English translation: “Performance in good faith: The obligor must perform in a manner consistent with good faith taking into account accepted practice" (Accessed September 30, 2013. http://www.gesetze-im-internet.de/englisch_bgb/englisch_bgb.html#p0716)

[iii] "German Civil Code" is the English translation of *Bürgerliches Gesetzbuch*, which is usually abbreviated as BGB. BGB was compiled in the last three decades of the nineteenth century and then took effect on 1 January 1900. As a far-reaching civil code in Europe, BGB is still the pillar of the contemporary German legal system.

[iv] Paris Convention for the Protection of Industrial Property Article 6*ter*(1)(c): (c) No country of the Union shall be required to apply the provisions of subparagraph (b), above, to the prejudice of the owners of rights acquired in good faith before the entry into force, in that country, of this Convention. The countries of the Union shall not be required to apply the said provisions when the use or registration referred to in subparagraph (a), above, is not of such a

nature as to suggest to the public that a connection exists between the organization concerned and the armorial bearings, flags, emblems, abbreviations, and names, or if such use or registration is probably not of such a nature as to mislead the public as to the existence of a connection between the user and the organization.

[v] It should be noted that this controversy exists in both Art. 24.4 and Art. 24.5 of TRIPS, since these two provisions are closely connected and both adopt the notion of "good faith".

[vi] Taiwan Trademark Act 2011 Article 36(3):
下列情形，不受他人商標權之效力所拘束：……三、在他人商標註冊申請日前，善意使用相同或近似之商標於同一或類似之商品或服務者。但以原使用之商品或服務為限；商標權人並得要求其附加適當之區別標示。

The English Version of Taiwan Trademark Act 2011 Art. 36(3):
A registered trademark shall not entitle the proprietor to prohibit a third party from: ... (3) using *bona fide*, prior to the filing date of the registered trademark, an identical or similar trademark on goods or services identical with or similar to those for which the registered trademark is protected, provided that the use is only on the original goods or services; the proprietor of the registered trademark is entitled to request the party who use the trademark to add an appropriate and distinguishing indication. (Accessed September 30, 2013. http://www.tipo.gov.tw/en/MultiMedia_FileDownload.ashx?guid=53e1cc66-9446-443e-8c6a-0ca3d1b802f7 on 7 August 2012)

[vii] PRC Trademark Law 2001 Article 16(1):
商标中的地理标志—商标中有商品的地理标志，而该商品并非来源于该标志所标示的地区，误导公众的，不予注册并禁止使用；但是，已经善意取得注册的继续有效。

The official English Translation of PRC Trademark Law 2001 Article 16(1): Where a trademark contains a geographic indication of the goods in respect of which the trademark is used, the goods is not from the region indicated therein and it misleads the public, it shall be rejected for registration and prohibited from use; however, any trademark that has been registered in good faith shall remain valid. (Accessed September 30, 2013. http://english.sipo.gov.cn/laws/relatedlaws/200804/t20080416_380361.html

[viii] Taiwan Copyright Act 2010 Article 10*bis*: “依本法取得之著作权，其保护仅及于该著作之表达，而不及于其所表达之思想、程序、制程、系统、操作方法、概念、原理、发现。” The official English Translation of Taiwan Copyright Act 201o Article 10*bis*: “Protection for copyright that has been obtained in accordance with this Act shall only extend to the expression of the work in question, and shall not extend to the work's underlying ideas,

procedures, production processes, systems, methods of operation, concepts, principles, or discoveries." (Accessed September 30, 2013. http://www.tipo.gov.tw/en/MultiMedia_FileDownload.ashx?guid=b17741ff-f893-4b27-ad38-e3eef477802f)

[ix] Section 3 of UK Patent Act 1977:

Inventive step

An invention shall be taken to involve an inventive step if it is not obvious to a person skilled in the art, having regard to any matter which forms part of the state of the art by virtue only of section 2(2) above (and disregarding section 2(3) above).

[x] PRC Patent Law 2008 Article 22:

第二十二条　授予专利权的发明和实用新型，应当具备新颖性、创造性和实用性。

新颖性，是指该发明或者实用新型不属于现有技术；也没有任何单位或者个人就同样的发明或者实用新型在申请日以前向国务院专利行政部门提出过申请，并记载在申请日以后公布的专利申请文件或者公告的专利文件中。

创造性，是指与现有技术相比，该发明具有突出的实质性特点和显著的进步，该实用新型具有实质性特点和进步。

实用性，是指该发明或者实用新型能够制造或者使用，并且能够产生积极效果。

本法所称现有技术，是指申请日以前在国内外为公众所知的技术。

The official English translation of PRC Patent Law 2008 Article 22:

Article 22 Inventions and utility models for which patent rights are to be granted shall be ones which are novel, creative and of practical use. Novelty means that the invention or utility model concerned is not an existing technology; no patent application is filed by any unit or individual for any identical invention or utility model with the patent administration department under the State Council before the date of application for patent right, and no identical invention or utility model is recorded in the patent application documents or the patent documentations which are published or announced after the date of application. Creativity means that, compared with the existing technologies, the invention possesses prominent substantive features and indicates remarkable advancements, and the utility model possesses substantive features and indicates advancements.

Practical use means that the said invention or utility model can be used for production or be utilized, and may produce positive results. For the purposes of this Law, existing technologies mean the technologies known to the public both domestically and abroad before the date of application.

http://english.sipo.gov.cn/laws/relatedlaws/200804/t20080416_380361.html

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