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# PROMISES TO KEEP: AMERICAN VIEWS OF DEVELOPMENTS IN CHINESE COPYRIGHT LAW

by MARK E. WOJCIK\* and MICHAEL J. OSTY\*\*

## I. INTRODUCTION

Imagine investing \$30-\$100 million to develop a computer software package only to have someone else copy your design for as little as \$100,000.<sup>1</sup> Then imagine that the software product, which retails for \$100, sells on the black market for \$2.<sup>2</sup> This scenario occurs in developing countries because of software piracy, which costs the United States' software industry as much as \$12 billion annually.<sup>3</sup>

The domestic software industry has urged the United States to increase the pressure on offending countries to strengthen protections for computer software. One developing country where piracy seriously af-

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1. See John S. McClenehan, *They'll Steal You Blind; 'Pirates,' Counterfeiters Prey on U.S. Firms*, INDUSTRY WEEK, May 27, 1985, at 78.

2. Michael Stroud, *China's High Tech Star Begins to Rise; Will Political Blunders Halt Its Ascent?*, INVESTOR'S BUSINESS DAILY, Dec. 17, 1991, at 31. In Taiwan, dozens of small stores openly advertise pirated software products. See Ronald E. Yates, *Far East Offers Friendly Ports for Product Pirates*, CHI. TRIB., Nov. 12, 1989, at 1. Pirated copies of programs such as Lotus 1-2-3, D-Base IV, and Symphony that retail for \$350 to \$450 in the United States can be purchased at the pirate software stores for as little as \$40. *Id.* The average price for \$50 software is approximately \$7.75. *Id.*

3. Mark Cursi, *The Never Ending Battle to Skin the Copycats; Software Counsel Say Illegal Pirating Costs the Industry Some \$2.4 Billion a Year*, THE RECORDER, Dec. 4, 1991, at 1. The term "piracy" refers to illegal copying of copyrighted computer software programs. *Id.* Pirates can be companies that legitimately purchase software programs and copy them for their employees as well as individuals copying solely for profit. *Id.* Counterfeiting is one step further than pirating, as counterfeiters illegally copy the programs, package them in look-alike packaging, and include copied instruction manuals along with the illegal software. *Id.* The United States is estimated to lose \$400 million dollars from software piracy sales in China alone. *Id.*

fects the United States industry is the People's Republic of China (PRC).<sup>4</sup> Historically, China's enforcement of intellectual property rights appeared to permit an excessive amount of piracy.<sup>5</sup> For example, until recently China's laws protected only those works<sup>6</sup> first published within the borders of the PRC.<sup>7</sup> These laws showed its weak commitment to protecting the rights of foreign copyright owners who export software products to China.<sup>8</sup>

A predominant view is that China's copyright laws and enforcement remain weak due to China's desire to advance technologically.<sup>9</sup> To achieve this goal, China crafted its copyright laws to allow software to move easily into the public domain free of intellectual property law protections.<sup>10</sup> By avoiding these protections Chinese programmers have greater access to Western software. They do not have to pay full market prices, and they can use Western software as a basis to develop their

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4. John Boatman, *Intellectual Property Problems Detailed in USTR Report*, EAST ASIAN EXEC. RPTS., May 15, 1989, at 20-21. The United States Trade Representative (USTR) released a trade barrier report listing 34 countries. The Asian countries reported on that list were China, Taiwan, South Korea, Thailand, Philippines, Indonesia, and Malaysia. *Id.* The report characterized software piracy in China as a "common growing practice." *Id.* Although we focus on China in this article, we recognize that software piracy is a problem in many countries, including the United States and the Republic of China (Taiwan).

5. See Arthur Fakes, *The Abduction of Licensed Software Technology in the People's Republic of China*, 3 SOFTWARE L.J. 223 (1989). Another reason for the excessive piracy in China is the population's lack of knowledge of copyright and inability to understand the importance of copyright.

6. The term "works" in the Chinese Copyright Law includes the following creative works of literature, art, and natural science, social science, and engineering technology: written works, oral works, music, dramatic and choreographic works and quyi (quyi is a broad term for a variety of popular performing art forms, including ballad singing, story telling, comic dialogues and the like), fine arts and photographic works, cinematographic, television and video works, engineering designs, product design drawing and explanations, maps, illustrations and other graphic works, computer software, other works stipulated by Law and administrative regulations. David Kay, *Copyright Law at Last?*, IP ASIA, Sept. 13, 1990, at 22.

7. *Text of Computer Software Regulations*, B.B.C.; Summary of World Broadcasts, July 1, 1991.

8. See David Holley, *China's Software Copyright Law Seen as Inadequate*, L.A. TIMES, June 16, 1991, at 4.

9. See Fakes, *supra* note 5, at 230. The strategy employed by China is to attain software technology equality by placing as much software in the public domain as quickly and cheaply as possible. *Id.* To accomplish this the Chinese maintain a "policy of providing limited legal and contractual protections for licensed foreign software over a limited period of time, and the other is policy of assimilating such software." *Id.* at 223-24.

10. *Id.* at 241. China has focused on obtaining as much licensed foreign software as possible and placing it in the public domain. *Id.* By keeping the laws weak, China can acquire foreign software without paying licensing fees. *Id.*

own software.<sup>11</sup> By providing increased access to Western software technology through weak copyright protection, the Chinese government believes that its own technology can become as advanced as the West.<sup>12</sup>

China's past approach, however, has had a negative impact on software developers. United States' software creators suffer great financial losses as a result of China's weak protection of intellectual property. To curb further financial loss, United States' industries are reducing their investments in China and curtailing direct export of their state-of-the-market software.<sup>13</sup> The United States pressured China to amend its copyright laws to afford foreign software greater protection. The United States also denied copyright protection under U.S. law to China's citizens.<sup>14</sup> This pressure culminated in the Memorandum of Understanding (MOU) between the United States and China signed on January 17, 1992. In this MOU the Chinese government agreed to provide foreign software protection following the Berne Convention.<sup>15</sup> China's accession to the Berne Convention became effective in October of 1992.<sup>16</sup>

China evidently recognized that stronger copyright laws would eventually advance China's technological development.<sup>17</sup> Specifically, stronger protection of foreign software copyrights will encourage Chi-

11. See Michael Stroud, *China's High Tech Star Begins to Rise; Will Political Blunders Halt Its Ascent?*, INVESTOR'S BUS. DAILY, Dec. 17, 1991.

12. See Fakes, *supra* note 5, at 230.

13. Uli Schmetzer, *The China Gap Widens on Trade Beijing Could Lose 'Favored' Nation Status*, Chi. Trib., Apr. 26, 1991, at 1. Many United States businessmen are reluctant to send high-tech products to China because, as one software company representative explained, "next thing we see, they're [referring to high-tech products] marketed under a Chinese name by some ministry." *Id.* Due to the risk of losing valuable invested dollars, the trend is to take only small risks. *Id.* Microsoft had refused to sell software to China because of the fear that its products would be copied. Gren Manuel, *Microsoft in Deal with PC Consortium*, S. China Morning Post, Nov. 13, 1992. Only recently, with the resolution of the China copyright issue, has Microsoft decided to enter the Chinese market directly. *Id.* However, Microsoft is only licensing its most basic product, MS-DOS, which is more than ten years old. *Id.*

14. See *infra* note 57 and accompanying text.

15. Memorandum of Understanding, art. 3, *reprinted in* 9 Int'l Trade Rep. (BNA) 139 (Jan. 17, 1992) [hereinafter Memorandum].

16. See *Copyright Conventions-Do They Mean Business?*, BUS. INT'L, Nov. 2, 1992. China acceded to the Berne Convention for the Protection of Literary and Artistic Works, and the Universal Copyright Convention on October 30, 1992. *Id.* Prior to accession to the two conventions, China issued the Regulations for the Implementation of International Copyright Treaties on September 25, 1992. *Id.* These Regulations give the National Copyright Administration the power to interpret the provisions of the Berne Convention. *Id.*

17. This is evidenced by China's recent establishment of the intellectual property protection system, namely the Berne Convention and the UCC. See *infra* note 39; see also Fakes, *supra* note 5, at 289, for an interesting application of the philosophy of Sun Tzu to the steps China should take to become a technically advanced country.

nese innovation<sup>18</sup> while simultaneously promoting foreign investment and high-technology imports.<sup>19</sup> This is an important development because of the PRC's economic potential. The PRC continues to develop as a critical participant in the global economy. However, China's accession to the Berne Convention, in itself, falls short of correcting the entire copyright problem. There remain certain underlying policies that may prevent the PRC from ever developing an effective copyright law, such as the view that an individual works for the good of the State, rather than the individual. The PRC desires to retain its current political policies while attempting to increase its copyright protection. This raises questions as to the implementation of international conventions and the protection of foreign intellectual property in the PRC, as well as whether further changes are necessary to develop an effective Chinese copyright law.

This article examines the effect of China's intellectual property protection law on foreign intellectual property. First, the article reviews policy reasons underlying copyright law and compares how developed and developing countries carry out these policies. Second, the article examines the background of copyright relations between the United States and the PRC prior to the 1992 MOU. Third, the article compares the protection of foreign software copyrights under the Berne Convention and the protection under China's previous copyright law. The article concludes with recommendations for further changes necessary to develop an effective Chinese copyright law. We wish to encourage the development of the PRC as a responsible member of the global trading community.

## II. POLICY REASONS OF COPYRIGHT

The fundamental policy of copyright law is to distribute intellectual works into the public domain.<sup>20</sup> Under the Western view of copyright, a social contract typically accomplishes this purpose. In return for the author disclosing a work, the government grants the author exclusive

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18. See John S. McClenehan, *The Rights Stuff*, *INDUSTRY WEEK*, Dec. 4, 1989, at 87. The former United States Trade Representative, Ambassador Carla Hills, warned that failure to protect intellectual property copyrights harms "the national economic interests of all trading nations and undermines a vital asset — the creativity and inventiveness of a country's own citizens." *Id.*

19. See *U.S., China Agreement on Intellectual Property Ends Retaliatory Duties Threat*, *Pat. Trademark & Copyright L. Daily (BNA)* (Jan. 21, 1992). In a standing session of China's legislature that ended July 1, 1992, Song Muwen, director of the State Copyright Bureau, told the legislators that China could strengthen its foreign trade relations and raise the quality of entering foreign products by acceding to Berne. *China's Legislature Approves Membership in Two Copyright Conventions*, *Int'l Trade Protection Daily (BNA)* (July 8, 1992).

20. ROBERT A. GORMAN, *COPYRIGHT FOR THE NINETIES* 14-15 (3d ed. 1989).

rights in the work for a limited period.<sup>21</sup> When that period ends, the work falls into the public domain where all are free to use it.<sup>22</sup>

A developed country, such as the United States, believes that the copyright laws should offer strong protection.<sup>23</sup> Stronger protection makes it less likely that another party will copy the work and undercut the developer's selling price.<sup>24</sup> The author has greater incentive to invest time and money to develop a product if rights to the work are protected.<sup>25</sup>

A developing country, such as China, carries out the policy of copyright differently.<sup>26</sup> China lacks the technological capability or the financial resources to invest in substantial research and development.<sup>27</sup> Thus, its access to advanced technology is crucial. The PRC and other developing countries need the basic tools to develop their own technology.<sup>28</sup> With access to this technology a developing country can advance its industry and promote its economy.<sup>29</sup>

The PRC, for example, acquires advanced Western technology by quickly placing foreign works into the public domain.<sup>30</sup> Historically, Chinese laws did not provide any copyright protection.<sup>31</sup> When the

21. *Id.* at 30. The author has the exclusive right to the original expressions of ideas, but not the ideas themselves. *Id.* at 32-33. The author can control further publication following public disclosure. *Id.* at 34-36. The author can also create derivative works (works that are a product of the original), as well as reproduce, copy and distribute the original work. In the United States, current copyright laws protect software, but the computer program must be an original expression in a tangible medium. *Id.* at 160-62.

22. *Id.*

23. *See id.* at 20.

24. *See id.* at 16.

25. *See* John Eckhouse, *Laws Don't Worry Product Counterfeiters*, S.F. CHRON., Feb. 12, 1991. Money made from the work can finance the research and development of drugs, films and computer technology. *Id.*

26. *See* Fakes, *supra* note 5, at 289.

27. *Id.* "[M]ost of the products turned out by Chinese enterprises, in particular, consumer goods, are still unable generally to reach the level of high quality products in developed countries; on the other hand, Chinese enterprises have the technical capacity to imitate nearly all foreign high quality products." Tang Yongchun, *The Causes of Counterfeit Goods Emerging in the Chinese Market and the Countermeasures for Their Suppression*, 2 CHINA PAT. & TRADEMARKS. QTLY. 29, 52 (1992).

28. *See* Stroud, *supra* note 11, at 1. To spur development, China has set up thirty high-tech industrial parks in Beijing. *Id.* They also lowered the tax rate for new electronics ventures from thirty-three percent to fifteen percent. *Id.*

29. *See id.* China's growing technology industry helped to make China's economy grow over nine percent annually through 1980. *Id.*

30. *See* Fakes, *supra* note 5, at 289.

31. When the Communist Party came to power in 1949, China's copyright law was repudiated. Mark Sidel, *Copyright, Trademark, & Patent Law in the People's Republic of China*, 21 TEXAS INT'L L.J. 259, 261 (1986). Since then, no official copyright law was established until 1990 *infra* note 74.

PRC finally enacted a copyright statute, it did not protect foreign works first published outside China.<sup>32</sup> Moreover, Chinese laws gave state organizations the right of unlimited copyright use.<sup>33</sup> This copyright freedom permitted China to acquire licensed foreign software free of intellectual property law protections.<sup>34</sup> Once the technology entered the public domain, it helped to further China's technology and economy.<sup>35</sup>

However, China has begun to realize that by denying foreign owners protection of their copyrights, it jeopardized its own technological future.<sup>36</sup> United States manufacturers have reduced direct technological exports to China because of the financial loss due to intellectual property piracy.<sup>37</sup> Consequently, China is not receiving all of the necessary technology to develop its own industrial base.<sup>38</sup> To encourage technology transfer, China has developed an internationally acceptable copyright law.<sup>39</sup>

### III. UNITED STATES AND CHINESE COPYRIGHT RELATIONS

China has a history of promising to provide greater protection for foreign intellectual property. China also has a history of sporadic compliance with these promises.<sup>40</sup> These promises took the form of agree-

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32. See Jia Zhao, *China Promulgates New Copyright Law*, E. ASIAN EXECUTIVE REP., Oct. 15, 1990, at 5.

33. *PRC Copyright Law: A Step Forward But Not Far Enough*, BUSINESS CHINA, Oct. 8, 1990, at 4. The possibility of government abuse is great, since the law gives state organizations the right to unlimited copyright use. *Id.*

34. See Fakes, *supra* note 5, at 289. These protections cover the use, distribution and reproduction of software. *Id.* at 223.

35. *Id.* at 224. The technology, which is then distributed state-wide, is used to improve manufacturing, agriculture and other key industries. *Id.*

36. China's willingness to improve economic and trade relations is evidence of the country's recognition that their policy of technology acquisition needs to change. *Id.* at 289.

37. See Cyndia Zwalen, *L.A. Attorney Keys Effort to Quash Computer Piracy*, L.A. BUS. J., Jan. 25, 1988, at 5 (explaining that investors will be unlikely to put money into a developing country's budding high-technology industry if new products have no copyright protection). The decision to export to or invest in a country is usually based on more than one factor, however. *Id.*

38. *Id.*; see also Uli Schmetzer, *The China Gap Widens on Trade; Beijing Could Lose "Favored" Status*, CHI. TRIB., Apr. 26, 1991, at 1. Many members of Congress want to link most favored nation (MFN) trading status to improved human rights as well as improved copyright protection. *Id.*

39. China's accession to both the Berne Convention and the Universal Copyright Convention promises to place its copyright law on an internationally acceptable level. Prior to joining the two international conventions, China's protection of foreign software was inadequate. See Liu Gang, *Copyright Protection of Computer Software in the People's Republic of China*, SOFTWARE PROTECTION, Aug. 1991.

40. See Fakes, *supra* note 5, at 291.

ments with the United States and pledges to join international organizations.<sup>41</sup>

The United States and China first developed a copyright relationship in the 1970's.<sup>42</sup> Copyright protection consisted of mainly individual contracts or licensing agreements.<sup>43</sup> When China began its "Open Door"<sup>44</sup> policy in 1978, only contract agreements could protect most potential foreign investors.<sup>45</sup> Even then, those protected found it difficult to enforce contracts or bring an action for breach.<sup>46</sup> Thus, China could pirate foreign made goods even from companies that took measures to protect themselves.

To prevent this piracy, the United States took steps to ensure a sufficient level of protection of intellectual property in China.<sup>47</sup> One of the

41. See *infra* notes 75-77 for a discussion of the conventions.

42. See Richard Goldstein, *Copyright Relations Between the United States and the People's Republic of China: An Interim Report*, 10 BROOK. J. INT'L L. 420-21 (1984). This relationship developed when China looked to the United States as a trading partner. *Id.*

43. Not until 1985, however, with the passage of the Foreign Economic Contract Law of the People's Republic of China (FECL), was there an established set of laws which applied to the making of commercial contracts between Chinese businesses and foreign businesses as well as Chinese businesses and individuals. *Id.* Under the FECL it is possible for developers to negotiate a contract clause for the protection of computer know how for an infinite period. *Id.* In addition, American developers can include provisions of nondisclosure or confidentiality within the terms of the contract. *Id.*

44. See *Fakes*, *supra* note 5, at 230. The "open door" policy is another name for the Chinese policy of allowing foreign technology and capital into the country. *Id.* This policy is a development from China's previous desire to remain isolated from outside influences. *Id.* The reason for the change came from the realization that China could benefit by modernizing its agriculture, industry, national defense, science and technology. *Id.* at 229. This promotion of Chinese economics is known as the "four modernizations." *Id.* at 229-30. They remain the focus of China's economic advancements today. *Id.*

45. See William P. Fuller V, *The Protection of Computer Software in the People's Republic of China*, 9 B.C. THIRD WORLD L.J. 57, 63 (1989).

46. Clauses put into the contracts to protect intellectual property have often proven to be ineffective. Daniel Sutherland, *U.S. Businesses Urge Trade Sanctions To Stop Piracy of Software in China*, WASH. POST, Apr. 11, 1989, at E7. Technology import contracts must meet government approval and cannot exceed ten years. See Fuller, *supra* note 45, at 64. In addition, the ways for settling disputes must be written into the contract. FECL's favorite means of resolution is through arbitration, and they actively encourage parties to arbitrate any grievance. *Id.* at 66. An additional limitation is the unavailability of injunctive relief under FECL. See *Fakes*, *supra* note 5, at 300. The developer can attempt to build an injunctive remedy into the contract, but there is not guarantee that the Chinese courts will enforce it. Without injunctive relief under the new law, it is possible that there will still be a gap through which piracy can continue. *Id.*

47. See Richard Goldstein, *Copyright Relations Between the United States and China: an Interim Report*, 10 BROOKLYN J. INT'L L. 403 (1984). In the 1979 Trade Agreement between the United States China was meant to establish stronger legal and economic ties. However, within this agreement, the United States inserted a reciprocity clause which called for the protection of American copyrights in China equal to protection afforded Chinese copyrights in America. *Id.*



first steps came in 1979, when the United States and China created an Agreement on Trade Relations.<sup>48</sup> Pursuant to this treaty, China agreed to enact "appropriate laws and regulations" to ensure United States companies and individuals in China, the same protection as that afforded Chinese in the United States.<sup>49</sup> In exchange, the United States gave China its Most-Favored-Nation (MFN) trading status.<sup>50</sup>

To provide greater copyright protection to foreign works, and to integrate itself into the international community, China joined the World Intellectual Property Organization (WIPO) in 1980.<sup>51</sup> One of WIPO's services is to help a country develop its intellectual property law.<sup>52</sup> WIPO aided the PRC in developing a domestic copyright law that would meet international requirements.<sup>53</sup>

Unfortunately, the 1979 agreement and accession to WIPO were simply a good will gesture.<sup>54</sup> Despite its action, the PRC failed to draft a copyright law or enact legislation necessary to enforce its promises.<sup>55</sup> Instead, it continued to provide only the same minimal protection to foreign software owners, that available by contract or licensing agreements. This enabled the PRC to continue pirating foreign software.<sup>56</sup> In response, the United States continued to deny copyright protection to citizens of China, but this retaliation was largely symbolic.<sup>57</sup> In addi-

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48. *Agreement on Trade Relations, China-United States*, 31 U.S.T. 4651, T.I.A.S. No. 9630 (July 7, 1979). In the agreement both countries are required to "take appropriate measures, under [their] laws and regulations and with due regard to international practice" to protect the copyrights of citizens of each country. *Id.* at 4658.

49. See Zhao, *supra* note 32, at 2.

50. See Natasha Roit, Comment, *Soviet and Chinese Copyright: Ideology Gives Way to Economic Necessity*, 6 LOY. ENT. L.J. 53, 66 (1986). MFN status, also known as reciprocal, non-discriminatory tariff treatment, provides that imports from other countries which enjoy MFN be subject to the same rates of duty. *Id.* These rates are generally substantially lower than the duty rates for products imported from non-MFN countries under the Harmonized Tariff Schedules of the United States.

51. WIPO Notification No. 110 of March 3, 1980, 16 Copyright 113 (1980). WIPO, an agency of the United Nations Educational, Scientific, and Cultural Organization (UNESCO), promotes the global protection of intellectual property. See Convention Establishing the World Intellectual Property Organization, 21 U.S.T. 1770, T.I.A.S. No. 6932, 828 U.N.T.S. 3 (July 14, 1967).

52. See Elisa Cirillo, Comment, *The Legal Protection of Computer Software in the People's Republic of China*, 7 CARDOZO ARTS & ENT. 398 (1989). WIPO provides training courses in the development of the intellectual property law. *Id.*

53. *Id.*

54. See Jamie Horsely, *Protecting Intellectual Property*, CHINA BUS. REV., Nov.-Dec. 1986, at 17.

55. See Fuller, *supra* note 45, at 62.

56. American software owners unprotected by Chinese law were easy targets for expropriation and duplication of their works. See Goldstein, *supra* note 47, at 430.

57. This was done pursuant to section 104(b) of the Copyright Act, 17 U.S.C. § 104(b) (1988), which provides that published works are subject to protection if:

tion, software manufacturers grew more apprehensive about exporting their goods to China.

In 1985, China began an effort to create a copyright law and fulfill its promises to the international trading community. In that year, China established the State Copyright Bureau (SCB),<sup>58</sup> and began discussing accession to the Universal Copyright Convention (UCC) or the Berne Convention.<sup>59</sup> The SCB is the governmental organization responsible for the administration of copyright.<sup>60</sup> With help from the SCB, China began determining the type of copyright law it needed.<sup>61</sup>

As a result of these efforts, China began to draft copyright regulations in late 1985.<sup>62</sup> These regulations were a supplement to the still unfinished copyright law and were to protect computer software.<sup>63</sup> Two years later, in 1987, China had only a draft copyright law, which did not include computer software as a protected work.<sup>64</sup> The proposed regula-

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(1) on the date of first publication, one or more of the authors is a national or domiciliary of the United States, or is a national, domiciliary, or sovereign authority of a foreign nation that is a party to a copyright treaty to which the United States is also a party, or is a stateless person, wherever that person may be domiciled; or

(2) the work is first published in the United States or in a foreign nation that on the date of first publication, is a party to the Universal Copyright Convention; or

(3) the work is first published by the United Nations or any of its specialized agencies, or by the Organization of American States; or . . .

(4) the work comes within the scope of a Presidential proclamation. Whenever the President finds that a particular foreign nation extends, to works by authors who are nationals or domiciliaries of the United States or to works that are first published in the United States, copyright protection on substantially the same basis as that on which the foreign nation extends protection to works of its own nationals and domiciliaries and works first published in that nation, the President may by proclamation extend protection under this title to works of which one or more of the authors is, on the date of first publication, a national, domiciliary, or sovereign authority of that nation, or which first published in that nation. The President may revise, suspend, or revoke any such proclamation or impose any conditions or limitations on protection under a proclamation.

17 U.S.C. § 104(b) (1988).

58. See Shen Rengan, *An Overview of Copyright Protection in China*, CHINA PAT. & TRADEMARKS, No. 4, at 50 (1988). In 1988, Shen Rengan, Director of the Copyright Department of the State Bureau of the People's Republic of China, opined that the "general situation of copyright protection in China may be summed up as: copyright protection exists but is imperfect, and a Copyright Law is being drafted with a view to gradually strengthening the copyright system." *Id.*

59. See Horsley, *supra* note 54, at 22.

60. See Rengan, *supra* note 58. The SCB set the rules and regulations, supervised implementation of the copyright law, and provided guidance. *Id.*

61. See Horsley, *supra* note 54, at 22.

62. Chinese leaders began to draft a national copyright law and to construct a Chinese copyright system. See Sidel, *supra* note 31.

63. *Id.*

64. See Cirillo, *supra* note 52, at 5. The 1987 draft did not contain software protection provisions in order to promote exploitation of software, which accelerates China's technological development. *Id.*

tions for computer software, intended to stem from the copyright law, remained incomplete as well.<sup>65</sup> As a result, software remained unprotected and the piracy of foreign software continued.<sup>66</sup>

Despite continued efforts, China's legislature had not yet enacted a copyright law as late as 1989.<sup>67</sup> The proposed regulations for the protection of software also remained unfinished.<sup>68</sup> Meanwhile, in 1989, American companies with software available in China suffered an estimated loss of \$418 million, exclusively to piracy in China.<sup>69</sup>

As a result of China's failure to enact its proposed laws, in 1989 the United States put China on a "priority watch list under Section 301."<sup>70</sup> This list named countries that failed to provide adequate intellectual property protection for American goods and services.<sup>71</sup> The United States intended the list to serve as a warning for China to establish adequate copyright protection for foreign software, or face trade sanctions.<sup>72</sup> China reacted by agreeing to protect computer software in its future copyright law.<sup>73</sup> As a result of increased pressure and

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65. *Id.*

66. See McClenehan, *supra* note 1.

67. See Fuller, *supra* note 45, at 63.

68. *Id.*

69. *Copyright Holders Name Top 12 Pirate Nations*, REUTER LIBR. REP., Apr. 19, 1989, at 1. The International Intellectual Property Alliance cited China as one of the 12 countries and estimated the loss to American industry. *Id.* The alliance wanted the USTR to impose special trade treatment on the countries if they did not take steps to end the piracy. *Id.*

70. Office of the United States Trade Representative, "Special 301" on Intellectual Property (May 25, 1989), reprinted in 6 Int'l Trade Rep. (BNA) No. 22, 714, 718 (May 31, 1989). *China, India, and Thailand: USTR Names 3 For Potential Trade Sanctions*, COMM. DAILY, Apr. 29, 1991, at 2. Those placed on the priority watch list for negotiations are considered to have the "most onerous and egregious" of practices or fail to act in good faith. *Id.* After a country is listed, it has six to nine months to satisfy United States concerns before trade sanctions may be implemented. *Id.*

71. *Id.*

72. As China was placed on the priority watch list, it simultaneously signed a memorandum with the United States, agreeing to enact a copyright law to protect computer software. See Comment, Brian Berliner, *Making Intellectual Property Pirates Walk the Plank: Using "Special 301" to Protect the United States' Rights*, 12 LOY. L.A. INT'L & COMP. L.J. 725, 739 (1990).

73. John Boatman, *Intellectual Property Problems Detailed in USTR Report*, E. ASIAN EXECUTIVE REP., May 15, 1989, at 20. Super 301 and its successor, Special 301, were included in the 1988 Omnibus Trade and Competitiveness Act to promote protection of United States intellectual property overseas. Judith M. Bello & Alan F. Holmer, U.S. Trade Law and Policy Series No 21: *GATT Dispute Settlement Agreement: Internationalization or Elimination of Section 301?*, 26 Int'l Law 795, 798-99 (1992). Under Special 301, the USTR must identify those countries which tolerate the piracy of intellectual property. *Id.* The USTR must then begin negotiations with those countries to curb the piracy. *Id.* If no agreement is reached within nine months, trade retaliations could follow. See John Boatman, *supra* note 4.

threatened trade sanctions, in 1990, China passed its first comprehensive copyright law, adopted June 1, 1991.<sup>74</sup> Once adopted, the copyright law made China eligible to accede to the Paris Convention,<sup>75</sup> the Universal Copyright Convention,<sup>76</sup> and the Berne Convention.<sup>77</sup>

The Berne Convention, the most widely observed copyright treaty, requires that member countries offer: (1) uniform or national protection, (2) economic rights, (3) retroactive protection, (4) protection of

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74. Copyright Law of the People's Republic of China, China L. Foreign Bus. (CCH) § 11-700 (Sept. 7, 1990); Lu Song, *Computer Software Protection—New Development in the People's Republic of China*, 22 SOFTWARE PROTECTION, June 1991, Vol. 10, at 1 [hereinafter Software Protection]. The United States Trade Representative was aware of the deficient levels of protection under the copyright law and regulations. 56 Fed. Reg. 24,878 (1991). In response to the lack of protection the copyright law afforded to U.S. works, the USTR initiated an investigation under section 302(b)(2)(a) of the Trade Act of 1974. 19 U.S.C. § 2112 (1993). The USTR began investigation of certain acts, policies and practices of the People's Republic of China that denied adequate and effective protection of intellectual property rights. *Id.* These acts and policies included the lack of copyright protection for U.S. works first published outside of China, deficient levels of protection under the new copyright law coming into effect on June 1, 1991, and the absence of effective enforcement of intellectual property rights in China. *Id.*

75. *Paris Convention for the Protection of Industrial Property*, March 20, 1883, as revised at Stockholm on June 14, 1967, 21 U.S.T. 1583, 2140 T.I.A.S. Nos. 6923, 7727 (1967). Under the Paris Convention, a trademark owner may have trademark rights backdated in a foreign country to the date of initial filing in its home country. *Id.* The United States is a member to this convention. As of January 1, 1993, the following countries were also members: Algeria, Argentina, Belgium, Brazil, Canada, China, the Czech Republic, Egypt, France, Germany, Greece, Hungary, Ireland, Israel, Japan, Mexico, the Netherlands, the Philippines, Poland, Portugal, Russia, Slovakia, South Korea, Spain, Sweden, the United Kingdom, and Yugoslavia. The People's Republic of China acceded to the Paris Convention in 1984, which became effective on March 19, 1985. Software Protection, *supra* note 74, at 1.

76. *Universal Copyright Convention*, Sept. 6, 1952, revised at Paris July 24, 1971, 25 U.S.T. 1341, T.I.A.S. No. 7868, reprinted in 5 COPYRIGHT BULLETIN 4 (1971). As of January 1, 1993 members of the UCC include: Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, Colombia, Costa Rica, the Czech Republic, Denmark, the Dominican Republic, Egypt, Finland, France, Germany, Hungary, India, Ireland, Israel, Italy, Japan, Mexico, New Zealand, Norway, Pakistan, Panama, Poland, Portugal, Russia, Slovakia, South Korea, Spain, Sweden, the United Kingdom, Venezuela, and Yugoslavia. China's accession to the UCC became effective October 30, 1992.

77. *The Berne Convention for the Protection of Literary and Artistic Works*, Sept. 9, 1886, revised at Paris, July 24, 1971 reprinted in 7 COPYRIGHT BULLETIN 135 (1971). Membership in the Berne Convention is open to all countries of the world provided that certain minimum requirements are met. *Id.* The United States joined the Berne Convention in March, 1989. As of January 1, 1993, the members of the Berne Convention include: Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, Colombia, Denmark, Egypt, Finland, France, Germany, Greece, Hong Kong, Hungary, India, Israel, Italy, Japan, Luxembourg, Malaysia, Mexico, the Netherlands, Pakistan, Peru, Poland, Portugal, South Africa, Spain, Sweden, Switzerland, Thailand, Turkey, the United Kingdom, Uruguay, Venezuela, and Yugoslavia. China's accession to the Berne Convention became effective October 15, 1992 *supra* note 16.

computer programs as literary works, (5) minimum terms of protection, and (6) protection without formal registration.<sup>78</sup> With this level of protection foreign exports and investments to China are more likely.<sup>79</sup> Recognizing a need to protect foreign intellectual property on an internationally acceptable level, China has acceded to the Berne Convention.

While the copyright law of June 1, 1991, represented a positive step in Chinese intellectual property law, it contained problem areas for foreign intellectual property owners.<sup>80</sup> The law mentioned computer software, but covered it under separate rules.<sup>81</sup> These separate rules, called the Regulations for the Protection of Computer Software (Regulations), went into effect October 1, 1991.<sup>82</sup>

The regulations include the definition of "software"<sup>83</sup> and protect foreign works first published inside China.<sup>84</sup> Protection is offered to software first published outside of China only pursuant to a bilateral or multilateral agreement to which China is a party.<sup>85</sup> Software published after the promulgation of the regulations must be registered, while software published before the promulgation is not eligible for protection.<sup>86</sup> Software may be reproduced in small quantities without the con-

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78. See Fenwick & West, 1992 Update: International Legal Protection for Software, *SOFTWARE PROTECTION* Jan. 1992.

79. See Lynn Curry, *US Prepares to Repel Chinese Software Pirates*, *FIN. TIMES*, Apr. 23, 1991. China must achieve adequate protection for foreign intellectual property if the country wants continued access to investment and high technology. *Id.*

80. See *supra* note 84, at 9. The law protects foreign works first published in China. Few works fit into this category. *Id.* The law agrees to protect foreign works produced outside the country, pursuant to an international treaty to which China has acceded. *Id.*

81. *Id.*

82. *Computer Software Protection Rules*, China L. Foreign Bus. (CCH) § 11-704; Liu Gang, *Copyright Protection of Computer Software in the People's Republic of China*, *SOFTWARE PROTECTION*, Aug. 1991, at 4.

83. Song, *supra* note 74, at 2. According to the regulations, a "computer program" is a "coded sequence of instructions which can be executed by a computer or other devices capable of processing information in order to obtain certain results, or is a symbolic instruction sequence or a symbolic statement sequence which can be automatically converted into a code instruction sequence." *Id.* A computer program includes source code and object code. *Id.* "Documentation" means "the literal documents and diagrams edited and written with natural language or formal language for the purpose of describing the content, composition, design, functional specification, situation of development, result of tests and usage methods of the program, for example, programming specifications, flowcharts, user's manuals, etc." *Id.* at 2.

84. See Jia Zhao, *Computer Software Protection: New Regulations Go Into Effect*, *INT'L EXECUTIVE REP.*, Oct. 15, 1991 at 9.

85. *Id.*

86. *Id.* Under the regulations, only software published after the promulgation date of the regulation can be registered. *Id.* This leaves all software published previous to the implementation date without any means of protection and vulnerable to infringement. *Id.*

sent of or payment to the owner for noncommercial purposes, such as official business conducted by government entities.<sup>87</sup>

While the regulations were an advance toward greater protection of software, they failed to protect foreign developers adequately.<sup>88</sup> Very few foreign works are first published inside of China.<sup>89</sup> Furthermore, when China promulgated the regulations, China was not yet a party to any international treaty, such as the Berne Convention, which would protect software developers. Moreover, because the majority of foreign software was published before the promulgation of the regulations, most software remained unprotected.<sup>90</sup> In addition, the regulations made foreign software susceptible to contrived definitions of "noncommercial purposes" and "official business by government entities" which would authorize uncompensated dissemination of software.<sup>91</sup> These inadequacies prompted the United States to encourage China to provide greater protection to foreign software in 1992. The PRC, likewise, had an interest in developing its stature as an important participant in the global economy.

#### IV. ANALYSIS

China's history of weak protection of intellectual property and reluctance to strengthen the protection led the United States into threatening massive retaliatory trade sanctions blocking China's exports to America.<sup>92</sup> China narrowly avoided these sanctions by signing the "Memorandum of Understanding on the Protection of Intellectual Property" on January 17, 1992.<sup>93</sup> China agreed to join the Berne Convention, to extend protection to existing as well as new works, and to treat computer programs as literary works protected for fifty years.<sup>94</sup> It is a matter of significant debate, however, as to whether the PRC's ac-

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87. *Id.* There are similar provisions under the United States copyright law.

88. *See id.* at 9.

89. *Id.*

90. *See* James McGregor, *China's New Software Rules Are Called Inadequate by U.S. Official*, WALL ST. J., June 17, 1991.

91. *See* Zhao, *supra* note 84, at 11.

92. 56 Fed. Reg. 64,280 (1991).

93. The Memorandum was signed by the then United States Trade Representative, Carla Hills, and Chinese Vice-Minister of Foreign Economic Relations, Wu Yi.

94. Article 3 of the Memorandum states:

The Chinese Government will accede to the Berne Convention for the Protection of Literary and Artists Works (Berne Convention) (Paris 1971). The Chinese Government will submit a bill authorizing accession to the Berne Convention to its legislative body by April 1, 1992. Upon enactment of the authorizing bill, the Chinese Government's instrument of accession to the Berne Convention will be submitted to the World Intellectual Property Organization with accession to be effective by October 15, 1992.

tions were a response to threats of trade sanctions threatened by the United States or whether the PRC undertook these developments because of its own desire to become a responsible member of the global trading community.

China's accession to the Berne Convention on October 30, 1992, gives foreign intellectual property formal protection on an internationally acceptable level. Having acceded to the Berne Convention, China's laws must now conform to the following Berne Convention requirements: first, national treatment; second, the granting of economic rights to authors with regard to the exploitation of their work; third, that protection extend retroactively to the works of Berne member countries; fourth, that computer software be regarded as a literary work; fifth, that software be given a minimum term of protection; and sixth, that copyright protection be granted without requiring that any formalities be observed.<sup>95</sup>

First, Berne requires the national treatment of foreign works.<sup>96</sup> This means that China will have to grant the same protection that Chinese developers receive, to works (whether published or not) created by nationals of a Berne member country, and to works first published in any other member country.<sup>97</sup> Thus, under Berne, software created by an American author or first published in the United States receives protection to the extent that China's current copyright statute protects software of its nationals.<sup>98</sup>

Second, Berne requires the granting of economic rights to authors with regard to the exploitation of their work.<sup>99</sup> These economic rights include such protections as the exclusive rights of translation from one computer language or code to another, reproduction, performance, or adaptation of the work.<sup>100</sup> The current law in China states that property rights include the exclusive rights of software translation from one computer language or code to another computer language or code,

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95. See Rengan, *supra* note 58, at 8.

96. *Berne Convention for the Protection of Literary & Artistic Works*, art. 5(1) [hereinafter *Berne Convention*].

97. *Id.*

98. In contrast, the provisions of articles 2 & 13 of the Chinese Copyright Law stated that software would not receive copyright protection unless it was published in China within thirty days after it was first published outside of China. Further, articles 2 and 13 provided that software may qualify for copyright protection, if it is developed in China or if created pursuant to an agreement between China and the software's country of origin, or if mandated by an international convention to which both countries belong.

99. *Berne Convention*, *supra* note 96, arts. 8, 9 and 12.

100. *Id.* Along with economic rights, Berne also requires its members to protect certain "moral rights" as well. *Id.* These include the right to be known as the author of the work ("right of paternity") and the right to prevent others from distorting the work ("right of integrity"). *Id.*

software reproduction, software demonstrations, software distributions, and software alteration.<sup>101</sup>

Third, Berne requires that protection of foreign works extend retroactively to the works of Berne member countries.<sup>102</sup> This means that all works originating in a Berne member country that are not in the public domain in their country of origin will be protected in all other countries of the Berne Union.<sup>103</sup> China's previous law effectively denied protection for software first published before the promulgation of the regulations on June 4, 1991.<sup>104</sup> This left all previously published software vulnerable to infringement. Software developers were on notice, however, that their works were not eligible for protection. Pursuant to the Berne Convention, China should protect all works not in the public domain of their country of origin. Any software "owned and used" before the date the Berne Convention went into effect may continue to be used, provided that no reproductions are made which harm the copyright owner's rights and interests.<sup>105</sup>

Fourth and fifth, Berne requires that member countries regard computer software as a literary or artistic work and give it a minimum term of protection.<sup>106</sup> As a literary work, the computer program receives greater protection for a term of fifty years.<sup>107</sup> Under China's previous law, computer programs were not classified as literary works and the protection period started at only twenty-five years, but with the ability to apply for a second twenty-five year term of legal protection.<sup>108</sup> Following the Berne Convention, China has amended its regulations to classify computer programs as literary works and provide protection for the minimum period.<sup>109</sup> Given the rapid rate of development of computer programs, however, the useful life of any particular program will seldom require legal protection of this extraordinary period of decades.

Sixth, Berne requires that member countries grant copyright pro-

101. Gang, *supra* note 39, at 6.

102. *Berne Convention*, *supra* note 96 art. 18(1) and 18(4).

103. *Id.* Unless otherwise agreed to by special convention, a work whose country of origin is the United States will receive Berne protection from other member countries if that work had not fallen into the public domain under U.S. domestic copyright law as of March 1, 1989. *Id.*

104. See Song, *supra* note 74, at 2.

105. Regulations for the Implementation of International Copyright Treaties, Sept. 25, 1992.

106. *Berne Convention*, *supra* note 96, art. 2 & 7.

107. *Berne Convention*, *supra* note 96, art. 7(1).

108. The Regulations explicitly defined software as an "industrial work" rather than a "literary work." Joseph Simone, *Draft Software Implementing Rules*, IP ASIA, Apr. 25, 1991, at 23. If classified as an "industrial work" the scope of protection of software would be limited solely to the prevention of literal copying. *Id.*

109. See Memorandum, *supra* note 15, art. 3, § 6.



tection without requiring any formalities, such as formal registration.<sup>110</sup> Under China's previous law, unregistered software would not receive copyright protection.<sup>111</sup> To satisfy the Berne requirement, China has agreed to protect software without the imposition of any mandatory formalities.<sup>112</sup>

To comply with the Berne Convention, China will have to provide many protections to foreign software that the previous copyright law effectively denied. China must fully protect foreign works under its copyright law and software regulations. However, the mere creation of this formal system of protection for foreign intellectual property is not the final solution to the piracy problem. Promises must be kept. Effective enforcement of copyright protection is essential to the PRC's development in the global trading community.

China's amendments to its copyright law are encouraging. By themselves, however, the amendments may be insufficient to restore the immediate confidence of all U.S. software exporters.<sup>113</sup> While revising the copyright laws and software regulations are positive developments, these revisions are not the complete answer to the piracy problem. In addition to amending its laws, China must change many of its views on enforcement of copyright protection. China must educate its population about copyright laws and China must convince its business sector that the government will diligently enforce the copyright law. The confidence of U.S. software exporters can only be certain where there is a consistent pattern of enforcement of copyright protection.

Another change that China must effect in amending its laws and acceding to the Berne Convention rests in educating the business sector about copyright and instilling confidence in government enforcement. China has only recently developed its comprehensive copyright law. While some Chinese businesses are aware of the law, their own lack of faith in the Chinese government's commitment to enforcing that law leaves them without an appreciation for its importance. Many Chinese businessmen believe that the Chinese government will change the law at its convenience. Therefore, businessmen may continue to infringe copyrights regardless of the law. With a reputation for changing its own law to accommodate its needs, the Chinese government will have a difficult time convincing its own citizens as well as foreign developers that the copyright law is permanent or effective.

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110. *Berne Convention*, *supra* note 96, art. 5(2).

111. *Gang*, *supra* note 82, at 4.

112. *See Memorandum*, *supra* note 15, art. 3, § 6.

113. While Microsoft has decided to enter the China market directly, it is doing so with only its most basic product. *See Microsoft in Deal with PC Consortium*, *supra* note 13.

China has recognized that it must popularize knowledge on copyright and train copyright personnel in order to create an effective copyright system. It cannot rely on a government decree to change the common perception that intellectual property protection in China remains weak. China must propagate knowledge on copyright on a national level. Intellectual property associations must continue to educate and train copyright personnel on a large scale, who in turn, will teach people the value of copyright protection.

In addition, as China moves toward a market economy, changes must occur in people's business philosophy and ideas of consumption. In the past, nearly all products were sold exclusively by the State. There was no sense of competition and therefore no environment of fair competition. The result is that many Chinese enterprises see nothing wrong in counterfeiting the products of others. In order for the copyright law to become effective, Chinese enterprises must develop a proper sense of business ethics to create an environment of fair competition.

Consumers, faced with an ever expanding market of goods and a limited ability to pay, willingly buy counterfeit goods. People unable to afford the famous brand names or high technology deliberately seek out imitations. Illegal copies of computer programs are more affordable than their legitimate counterparts, and therefore more desirable. This desire to consume with a limited ability to pay has contributed in the development of the counterfeiting industry. China must work toward changing these ideas of consumption, make people conscious of the copyright law, and induce people to abide it.

China's legislature and judiciary need education in matters of intellectual property rights, specifically copyrights.<sup>114</sup> Western countries have hundreds of years of experience in implementing and fine tuning their copyright law.<sup>115</sup> Without this experience from which to draw,

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114. In 1949, when the Communist party established the People's Republic of China, the new Chinese government repealed all laws and treaties of its predecessor, the Republic of China. Roit, *supra* note 53, at 64. Among the laws that were nullified were several domestic copyright laws. *Id.* Since that time, any legislative or judicial member who did not have experience with the prior law, did not have a chance to work with copyright law. *Id.*

115. Beginning as early as the 1700's, with the Statute of Anne, Western European countries have had ample experience with copyright. See ROBERT GORMAN, COPYRIGHT FOR THE NINETIES 1-15 (1989). The United States Constitution contains a patent and copyright clause. *Id.* The first United States Federal Copyright Act was enacted in 1790, and revisions were made in 1802, 1831, 1856, 1865, and 1870. *Id.* By 1891 there was an International Copyright Act which made copyright available to foreigners. *Id.* In 1909, a new Copyright Act was passed which lasted for over 60 years. *Id.* The last new Copyright Act was in 1976. *Id.* All the while improvements were being made to develop copyright protection.

China will have difficulty implementing, developing, and enforcing this new policy and law.<sup>116</sup>

Diligent and continued enforcement of the copyright law throughout the PRC is essential before the law will have an effect on piracy. China's lack of copyright history, education, and commitment indicate that, despite a written law, enforcement may not occur. For example, as far back as the 1979 Agreement, China committed itself to protecting intellectual property, but failed to act for over ten years.<sup>117</sup> China also joined WIPO in 1980 to develop a copyright law and join an international convention, but did neither until recently, due in part to U.S. pressure.<sup>118</sup>

These problems raise the suspicions of both United States officials and scholars alike. Knowing China's history, the then United States Trade Representative, Carla Hills, stated that "[U]ntil the new copyright law is enforced, there is effectively no copyright protection in China."<sup>119</sup> She pledged that the United States would maintain a close watch to ensure that the Chinese government would fully implement the agreements of the Memorandum of Understanding. In addition, the Director of Asian Studies at the Washington-Based Center for Strategic

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116. One example of this difficulty is *Jiang v. Qiao*. In *Jiang*, the defendant had written a novel that she thought would make a good movie. *Id.* Defendant approached plaintiff, a member of a film studio, with the idea. *Id.* Together they decided that defendant would draft the screenplay while plaintiff would revise and edit it. *Id.* The agreement was put in writing. Defendant sent the plaintiff the first draft of the screenplay. *Id.* More than one and a half years passed and since defendant heard no word from plaintiff, she assumed that he had not proceeded with the idea. *Id.* Defendant approached another film studio and her suggestion was accepted immediately. *Id.* When plaintiff heard of the arrangement, he claimed that he had modified the original novel in his screenplay, some of his material should be used in the film and he should be made co-author of the screenplay. *Id.*

While the entire film contained only five minutes of plaintiff's work, the High Court of the Province conducted a mediation and reported that the parties mutually agreed that they were "joint adapters," with defendant as the main adaptor. *Id.* Copyright in the film was to be enjoyed by both of the parties. *Id.* at 217. While this case is universally acknowledged as the first copyright case officially dealt with in China, it was done without the benefit of a copyright law. *Id.* The Chinese Copyright Law had not even been promulgated at the time of the decision. *Id.* Therefore it was done without any specific copyright legislation. *Id.* Instead, the Court took the case from a pragmatic approach and tried to resolve the issues. *Id.* The problem is that there was no basis for jurisdiction nor were there any definitions of joint authorship which the court could interpret. See Comment, Zheng Chengsi, *China's First Court Decision on Copyright: Jiang v. Qiao and the Film 'Hospital Ward No. 16'*, 6 EIPR 217 (1990). Hopefully, the new Copyright Law will prevent such *ad hoc* decisions and develop a uniform and more predictable system. *Id.*

117. See Simone, *supra* note 108, at 20.

118. *Id.*

119. Allan Kelley, *U.S.-China Trade Accord Praised*, AGENCE FRANCE PRESSE, Jan. 17, 1992.

and International Studies cautioned that too much should not be expected too soon, since the "Chinese system is moving from the 19th century to the 21st century."<sup>120</sup> Both of these comments recognize, however, that the PRC is entirely capable of adopting and implementing an effective copyright regime. As the PRC undertakes to fulfill its promises to protect foreign software, it increases its own stature as a reliable trading partner and participant in the global economy.

The process of implementing an effective copyright regime will not be easy. China's own businessmen have attested to their government's historical unwillingness to enforce the copyright law. There is a continuing perception that many government officials in charge of enforcing the copyright law have a vested interest in the continuation of the uncompensated appropriation of computer software. It is believed that officials earn money through the indirect controlling of businesses that make illegal copies. In a country where most every activity is overseen by some level of government, it is believed that officials have used this opportunity for personal gain. The gain is not only monetary. Officials may put their names at the top of a work, whether copied or original, that came from a business that they controlled. The officials thus hope to gain recognition and advancement by their actions. By curbing illegal copying, the official's advancement is also stalled.

The unwillingness to enforce copyright laws stems from the government's need for Chinese businesses to continue making money by cheaply copying software.<sup>121</sup> The current policy seems to be that the government will enforce the copyright law and curb infringement if notified by the company whose product is being infringed.<sup>122</sup> This policy leaves companies in the position of having to investigate and discover any instances of piracy on their own, before the government will act. Even then, no guarantee exists that the government will act to halt re-

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120. *Id.*

121. Through the illegal copying of software, the government is able to earn a large amount of money with very little investment. See McClenehan, *supra* note 1, at 87.

122. The government is more likely to attack infringement in a highly visible city, like Beijing, than in one of the more distant provinces. One reason for more enforcement in a larger city is not only that there are more companies possibly pirating, but also that the enforcement is highly visible and will give the appearance that China is actively pursuing pirates. However, the companies that the government chooses to make an example out of are either overly blatant pirates or small scale operations. By making highly visible, but small enforcements, the government is able to claim a strong stance on piracy while maintaining the more lucrative piracy operations. Another reason that enforcement occurs more in larger cities is that it takes more time for government investigators to travel to a distant city. By the time investigators arrive, the infringing company has usually stopped the violative activities and hidden any evidence of wrongdoing. The typical response by the allegedly infringing company is that they are not making illegal copies. The government, in turn, warns the company that it will come to the company and "take a look." The company then has time to hide any evidence of illegal copying.

ported acts of piracy. In many instances the Chinese government may close down the offending business, but the business can simply reopen under another name. This process of changing companies can go on infinitely. The PRC can begin to implement effective enforcement of copyright protection by improving its investigations of reported violations. Effective enforcement will also demonstrate the country's commitment to become a responsible member of the global trading community.

## VI. CONCLUSION

The People's Republic of China took a significant step toward integration in the global-trading community when it acceded to the Berne Convention. China must continue developments in this direction if it wants to gain the confidence of foreign investors and intellectual property exporters. However, the passage of new laws and accessions to international agreements is only the beginning.

The answer to the piracy problem lies within China's population as well. China must educate both businessmen and laymen about copyright and raise the general awareness of the copyright law. It must urge the people to abide by the law and to respect the intellectual labor of others. In addition, China must foster a new sense of ethics and fair competition in the business community. Consumers too must do their part to help curb the development of the counterfeiting industry.

At the administrative level and in the courts, China must aggressively enforce the copyright law. It must actively pursue offenders and impose meaningful punishments that deter future infringement. Only then, when citizens and businessmen witness diligent and consistent enforcement, will the copyright law begin to affect piracy.

As the PRC begins implementing an effective copyright regime it will increase its own stature as a reliable trading partner and participant in the global economy. Effective enforcement will demonstrate the country's commitment to becoming a responsible member of the global trading community. In this way, China will encourage new foreign investment and instill confidence in intellectual property exporters. Ultimately, these groups will come to rely on the Chinese copyright law.<sup>123</sup>

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123. Until such a time, intellectual property exporters should continue to analyze their risk and take measures to minimize losses to piracy. See Richard L. Thurston, *Country Risk Management: China and Intellectual Property Protection*, 27 Int'l Law. 51 (1993).