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COMPUTER SOFTWARE COPYRIGHT LAW IN THE PEOPLE'S
REPUBLIC OF CHINA

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INTRODUCTION

Consider the example of the Orange Corporation, a computer software company domiciled in the United States. It seeks to export its newest line of computer software to the People's Republic of China (PRC). The PRC is a signatory to the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention), a multilateral treaty providing protection to software creators.¹ The PRC's own regulations implementing copyright law also favor international law in any conflict between the PRC's copyright law and international treaties, so that if the PRC's laws conflict with the Berne Convention, the Orange Corporation should be protected by the Convention rather than Chinese law.² The Orange Corporation registers³ its products under the PRC's copyright law, believing that it will provide adequate copyright protection,⁴ and then

¹ Berne Convention for the Protection of Literary and Artistic Works, revised at Paris, July 24, 1971, 828 U.N.T.S. 221 [hereafter Berne Convention]. The PRC signed the Berne Convention on October 15, 1992. *Id.* The original Berne Convention was drafted in 1886. *Id.* at 223. The purpose of the Berne Convention is to protect the rights of authors of literary and artistic works. *Id.*

² Regulations on Implementation of International Copyright Treaties, China L. Foreign Bus. (CCH) ¶ 11-703, at arts. 1-22 (Sept. 25, 1992). If the Regulations stipulate provisions that differ from international copyright treaties, the provisions of the international copyright treaties are controlling. *Id.* at art. 19.

³ Applications for registration of software are made to the Software Assessment and Registration Center (SARC), the PRC's software registration control agency. Computer Software Protection Rules, China L. Foreign Bus. (CCH) ¶ 11-704, at art. 23 (May 24, 1991). The SARC examines software registration applications, publishes public announcements on software registration, and maintains public records of software registration. Measures for Computer Software Copyright Registration, China L. Foreign Bus. (CCH) ¶ 11-706, at art. 38 (April 6, 1992) [hereafter Copyright Registration]. The Ministry of Engineering and Electronics registers software copyrights for the PRC. *Id.* at art. 6. However, the SARC implements the registration measures. *Id.* The Orange Corporation will need to obtain separate copyright registration for each item. *Id.* at art. 7.

⁴ The PRC agreed in a Memorandum of Understanding with the United States to no longer require registration for software copyright protection. Memorandum of Understanding, Jan. 17, 1992, U.S.-P.R.C., available in Westlaw, 1992 WL 466269 [hereafter MOU]. Many foreign firms, however, still attempt to protect their software from pirates through the registration process. 7.3 Copyright, CHINA HAND, March 1, 1993. These firms register for two reasons. First, the registration certificate itself is an important piece of evidence. An infringement victim may easily secure a court

begins to export its software to the PRC.

Within a few months, however, the Orange Corporation's sales in the PRC begin to plummet. The decline is due to rampant copying by both software pirates⁵ and the PRC government itself.⁶ By copying information provided on the Orange Corporation's registration form, the pirates and the government can sell pirated software before the Orange Corporation can sell

proceeding with a registration certificate. *Id.* Second, registration of software is prima facie evidence that the software copyright is effective. Tan L. Khoo, *Registration Measures Complete Software Registration Scheme*, Pat. Trademark & Copyright L. Daily (BNA) (July 15, 1992). However, this registration process may make the software easier to pirate. Geoffrey Crothall, *China: On the Horns of Copyright Law Dilemma*, S. CHINA MORNING POST, June 25, 1991, at 11.

U.S. pressure on the PRC to amend its copyright laws has not necessarily solved all the problems of infringement and piracy. Mark E. Wojcik and Michael J. Osty, *Promises to Keep: American Views of Developments in Chinese Copyright Law*, 6 SOFTWARE L.J. 273, 288 (1993). For example, the Orange Corporation must go through the formality of giving authentication material on the software to the SARC. *See* Copyright Registration, *supra* note 3, at art. 9. The Orange Corporation can use authentication material to prove that the software was developed independently. *Id.* at art. 11. The authentication material must consist of 20 consecutive pages from the beginning, middle, and end of the source program. *Id.* at art. 12. This registration requirement for source material makes it much easier for pirates to copy software by obtaining key information from state officials. Crothall, *supra*, at 10.

The Berne Convention, however, explicitly rejects the requirement of any formalities, including source material requirements, for copyright protection. Berne Convention, *supra* note 1, at 233. The PRC's Copyright Registration dictates that an international treaty supersedes domestic law for software registration. *See supra* note 2 and accompanying text (discussing priority of international treaty over domestic law).

⁵ Software pirates manufacture counterfeit software without permission of the copyright holder. *Sega Enterprises LTD. v. Accolade, Inc.*, 977 F.2d 1510, 1530 (9th Cir. 1992).

⁶ The PRC government may copy software without a creator's authorization for non-commercial objectives. Computer Software Protection Rules, *supra* note 3, at art. 22. These objectives include classroom teaching, scientific research, and use by State officials. *Id.* *See infra* notes 61-76 and accompanying text (explaining legal infringement under PRC law). The Berne Convention only allows the use of copyrighted materials for teaching under a limited fair use exception. Berne Convention, *supra* note 1, at 239. *See infra* notes 77-87 and accompanying text (discussing conflicts between PRC law and Berne Convention).

its own software.⁷ Furthermore, soon after the Orange Corporation releases its version of the software, even more pirates are selling replicas of the software without the Orange Corporation's permission.⁸

The Orange Corporation then discovers that the pirates' legal liability is extremely limited under PRC copyright law.⁹ PRC copyright law does not allow seizure of pirated copies, so they will continue to be used and sold. Nor does PRC copyright law provide jail sentences for copyright pirates.¹⁰ When the Orange Corporation seeks to enforce its

⁷ See Crothall, *supra* note 4 and accompanying text (discussing dangers of registration). In Asia, stolen software is often on the market before the author has released the genuine product. Jane Blennerhassett, *China Software Over 80 Percent Pirated, Group Says*, REUTER BUS. REP., Oct. 20, 1993.

⁸ Individuals legally holding software copies in the PRC have the right to alter software to change its functional performance. Computer Software Protection Rules, *supra* note 3, at art. 21(3). The PRC law, however, forbids supplying others with the altered version without a separate agreement. *Id.* The Berne Convention states that the original authors have the exclusive right to authorize the reproduction of their works in any manner or form. Berne Convention, *supra*, note 1, at 239.

⁹ Computer Software Protection Rules, *supra* note 3, at art. 30. The law limits pirates' liability to ceasing infringement, making a public apology, paying compensating losses, forfeiting profits, and paying fines. *Id.* In a recent case involving Microsoft, the PRC court found Shenzhen University guilty of illegally manufacturing holograms for use in pirated copies of MS-Dos 5.0. *Microsoft Wants Further Action Against Fakers*, S. CHINA MORNING POST, Feb. 22, 1994, at B2. Microsoft estimated that its losses were between twenty and thirty million U.S. dollars. *Id.* The Shenzhen People's Court ordered Shenzhen University to pay a mere \$260.00 fine. Mark Evans, *Copyright Violators at Odds with GATT*, S. CHINA MORNING POST, Feb. 25, 1994, at B22.

¹⁰ Computer Software Protection Rules, *supra* note 3, at art. 30. See *infra* notes 91-100 and accompanying text (discussing punishment and deterrence for pirates). Foreign software producers can take several precautions to ensure they can locate and punish pirates. *Purging the Pirates: China Beefs Up Protection of Property Rights*, BUS. CHINA, May 17, 1993. First, producers should prepare a software inventory before opening an office in the PRC. Second, producers should appoint a software copyright manager to keep inventory current and watch the PRC market for infringements. Third, producers should keep up to date on registration and licensing deadlines. Fourth, producers should conduct market surveys to determine if pirates are violating copyrights. Finally, software producers should forge close ties to administrative agencies to ensure that pirates receive severe punishment. When a producer discovers an infringement, it should report the infringement immediately to the SARC. *Id.*

rights under international law, it finds that PRC law does not actually conform to the Berne Convention.¹¹ Although the PRC's regulations implementing copyright law favor international law in any conflict between its copyright law and international treaties, the PRC fails to meet the provisions of the Berne Convention through loopholes and lax enforcement. Specifically, loopholes in fair use provisions¹² allow anyone to lawfully copy more of the Orange Corporation's products under PRC law than allowed under the Berne Convention.¹³ Moreover, lax enforcement allows pirates to continue their activities with impunity,¹⁴ since the PRC only provides minimal potential punishments instead of the Berne Convention's mandated criminal sanctions.¹⁵

The Orange Corporation cannot look solely to international law for protection because the Berne Convention does not have a self-enforcing mechanism. The individual signatories of the Convention must use their own legal mechanisms to enforce the Berne Convention. Thus, the Orange Corporation is left without any real recourse and cannot fight the unauthorized copying of its software by the Chinese.

After discussing the conflicts between PRC copyright law and the Berne Convention, this Article proposes that the PRC close its loopholes to conform with the Berne Convention, and strictly enforce those provisions. Part I describes the background of software copyright protection in the PRC, including the reasons the PRC signed the Berne Convention.¹⁶ Part II analyzes the PRC's software copyright law, and its conflict with

¹¹ See *infra* notes 64-87 and accompanying text (discussing conflicts between PRC law and Berne Convention fair use provisions).

¹² See *infra* notes 64-87 and accompanying text (discussing inconsistencies in PRC fair use provisions). Fair use provisions allow users of copyrighted works to use the works in a reasonable manner without consent from the copyright owner. DAVID NIMMER & MELVILLE B. NIMMER, NIMMER ON COPYRIGHT § 1.03A, at ¶ 13-150 (1993).

¹³ See *infra* notes 64-87 and accompanying text (discussing conflicts between PRC law and Berne Convention fair use provisions).

¹⁴ See *infra* notes 91-105 and accompanying text (discussing lax enforcement).

¹⁵ See *supra* notes 9-11 and accompanying text (discussing punishment for copyright infringement).

¹⁶ See *infra* notes 30-59 and accompanying text (explaining background of software copyright protection in PRC).

international treaties.¹⁷ Part III proposes that the PRC amend its vague copyright infringement laws to comply with the Berne Convention, eliminate loopholes in the fair use provisions, and enforce its copyright laws strictly.¹⁸ Finally, Part III also recommends that the United States facilitate these changes through a cooperative bilateral agreement.¹⁹

I. BACKGROUND

Although both the United States and the PRC have codified their copyright law, the goals of each country's laws differ. United States copyright law is based on providing economic incentives for creators. The PRC law, on the other hand, reflects the socialist notion that the government should not have to pay for the use of an individual's creation.

A. *Copyright Law in the United States*

Congress enacted the Copyright Act of 1976 to strike a balance between two competing policy goals.²⁰ First, copyright law should provide incentives for authors to create works.²¹ Second, copyright law should permit public access to ideas.²² To further these goals, the Act provides protection for literary, musical, dramatic, and other artistic works.²³ Courts have ruled that computer software is included in the category of

¹⁷ See *infra* notes 60-128 and accompanying text (discussing conflicts between PRC copyright law and Berne Convention).

¹⁸ See *infra* notes 132-64 and accompanying text (discussing possible solutions to software copyright infringement). Part III proposes that the PRC take a stringent stance towards piracy by seizing infringing works. China is the only major trading country in the world that does not allow criminal proceedings against piracy. *China Must Stop Growth of Piracy or Risk U.S. Sanctions, IIPA Official Says*, 10 Int'l Trade Rep. (BNA), at 1771 (1993). In addition, Part III suggests that the PRC allocate more resources to enforcement.

¹⁹ See *infra* notes 165-98 and accompanying text (discussing bilateral agreement).

²⁰ LAURENCE J. BRAHM, *INTELLECTUAL PROPERTY LAW IN THE PEOPLE'S REPUBLIC OF CHINA* 61 (1988).

²¹ *Id.*

²² *Id.*

²³ 17 U.S.C. § 102 (1988 & Supp. IV 1992).

literary works.²⁴ Thus, copyright law prohibits unauthorized copying of computer software and allows creators to rightfully profit from their works.²⁵

As a matter of law, however, copyright infringement is subject to certain defenses and exceptions, so that not every unauthorized use of a protected work is unlawful.²⁶ One of these defenses is the fair use doctrine.²⁷ The fair use doctrine permits a defendant to use copyrighted material in a reasonable manner without the copyright owner's consent.²⁸ The United States has codified this doctrine,²⁹ while the PRC law has codified a rather different conception of fair use. One reason the PRC's fair use provisions differ from those of the United States is that the PRC has a different historical perspective on copyright protection and individual ownership of intellectual property.

B. *History of Chinese Copyright*

Copyright protection began in China during the 10th and 11th

²⁴ *Whelan Assoc., Inc. v. Jaslow Dental Lab., Inc.*, 797 F.2d 1222 (3rd Cir. 1986) (holding that computer software is within subject matter of copyright as literary work).

²⁵ Pierre N. Leval, *Toward A Fair Use Standard*, 103 HARV. L. REV. 1105, 1108 (1990). Copyright law allows an author to secure certain benefits by granting her property rights over her work. *Id.* Judith M. Nelson, Note, *Art Forgery and Copyright Law: Modifying the Requirement to Prevent the Forging of Artworks*, 8 CARDOZO ARTS AND ENT. L.J. 683, 685 (1990); BLACK'S LAW DICTIONARY 336-37 (6th ed. 1990). Although a copyright does not give an author absolute ownership over her work, the law was designed to stimulate creativity for public intellectual enrichment. *See generally* Leval *supra*, at 1107-09 (discussing constitutional history of copyright).

²⁶ *See generally* NIMMER & NIMMER, *supra* note 12, ¶ 13-149.

²⁷ *Id.* ¶ 13-150.

²⁸ *Id.*

²⁹ *See* 17 U.S.C. § 107 (1988 & Supp. IV 1992). Although the law does not define fair use, it lists factors courts would use to determine fair use. The first factor is the purpose and character of the defendant's work, including whether the use is commercial or for non-profit educational purposes; the second factor is the nature of the plaintiff's work; the third factor is the amount of the plaintiff's work used by the defendant; the fourth factor is the effect of the use on the potential value of the copyrighted work. *See generally* NIMMER & NIMMER, *supra* note 12, ¶ 1-44.15 (discussing four fair use factors).

centuries A.D.³⁰ Chinese emperors issued exclusive rights of printing to individual authors for the protection of their works.³¹ China had no statutory copyright law, however, until 1910.³²

In 1949, Chairman Mao Zedong established the communist PRC and immediately repealed all previous copyright laws, including those provisions which protected the rights of authors.³³ In 1966, Mao instituted a nationwide Great Proletarian Revolution (Cultural Revolution), which was aimed at suppressing the educated and elite classes.³⁴ Moreover, the PRC government controlled artistic and literary expression³⁵ and dismantled the previous legal system.³⁶ During the Cultural Revolution, the PRC government claimed to enrich the people's cultural life by exploiting the creative abilities of the educated classes.³⁷ Mao placed high value on physical labor, such as farming and construction, but considered mental labor, such as writing, to have little worth.³⁸ There was growing concern that artistic works such as literature, films, and plays contained bourgeois ideas that deviated from the strict party line.³⁹ Mao believed most teachers and professors were bourgeois intellectuals and targeted them.⁴⁰ Their failure to carry out the policies of the Communist Party since its inception demanded a reformulation of the arts that celebrated only images of

³⁰ BRAHM, *supra* note 20 at 61.

³¹ *Id.*

³² *Id.*

³³ RALPH H. FOLSOM, ET. AL., LAW AND POLITICS IN THE PEOPLE'S REPUBLIC OF CHINA IN A NUTSHELL 31 (1992); Richard L. Thurston, *Country Risk Management: China and Intellectual Property Protection*, 27 INT'L LAW. 51 (1993).

³⁴ See RICHARD WALKER, THE HUMAN COST OF COMMUNISM IN CHINA 22 (1971). The attack was an anti-intellectual campaign in which the Chinese government either killed or sent to labor camps hundreds of thousands of Chinese professors, attorneys, scientists, and other intellectuals. The government also shut down all middle schools and institutions of higher learning from 1966 to 1969. *Id.* at 23-24.

³⁵ BRAHM, *supra* note 20 at 61.

³⁶ ZHENG CHENGSI & MICHAEL PENDLETON, COPYRIGHT LAW IN CHINA 3 (1991).

³⁷ Chengsi, *The Future Chinese Copyright System and its Context*, 5 INT'L REV. OF INDUS. PROP. & COPYRIGHT L. 141, 152 (1984).

³⁸ BRAHM, *supra* note 20 at 61.

³⁹ ROBERT PAYNE, MAO TSE-TUNG 298 (1969).

⁴⁰ *Id.* at 300.

workers, peasants, and soldiers.⁴¹

When Mao died in 1976, the Cultural Revolution ended. Deng Xiaoping, the PRC's new leader, began to transform the PRC from a communist economy to a socialist mixed economy. The PRC's main goal was now to create a modern socialist country that would reach the market sophistication and financial status of the current developed countries by the 2050s. Copyright increased in importance to the PRC's rapidly expanding and less centralized economy.⁴² The PRC believed, however, that a strong, modern China must still retain its cultural identity and internal security.⁴³ Past PRC copyright law reflected the socialist notion that the government should not have to pay for the use of an individual's creation.⁴⁴ Socialists believed that enhancing the cultural life of the people justified the exploitation of an author's work.⁴⁵ However, the PRC also recognized that stringent copyright protection stimulates economic growth through foreign investment.⁴⁶ As the need for foreign investment in consumer and technology-based industries increased, the PRC further

⁴¹ *Id.* at 297.

⁴² Ren Jianxin, *Mediation, Conciliation, Arbitration and Litigation in the People's Republic of China, Address at the Fourth International Conference of Appellate Judges in Kuala Lumpur (April 23, 1987)*, in LEGAL ASPECTS OF FOREIGN INVESTMENTS IN THE PEOPLE'S REPUBLIC OF CHINA 11 (Ren Jianxin et. al., eds., 1987); BRAHM, *supra* note 20.

⁴³ Clark T. Randt, Jr., *Representative Offices in China: Legal Aspects of Registration and Control*, in FOREIGN TRADE, INVESTMENT AND THE LAW IN THE PRC 281 (Michael J. Moser ed., 1984). One commentator suggests that the PRC must also recognize the importance of modern technology transfer, managerial skills, and foreign currency. BRAHM, *supra*, at 20. The PRC needs this technology, but strong copyright protection in conformity with international conventions might restrict the PRC's ability to secure it. MICHAEL D. PENDLETON, INTELLECTUAL PROPERTY LAW IN THE PEOPLE'S REPUBLIC OF CHINA 49 (1985).

⁴⁴ BRAHM, *supra*, at 61. The state paid authors on a previously set fee basis which eliminated the incentive to create. *Id.*

⁴⁵ CHENGSI & PENDLETON, *supra* note 36, at 141. In most socialist countries with a copyright system, the major users of copyrighted works are state organizations. *Id.* at 153. All publishing companies are state-owned. Accordingly, the state has an interest in not protecting rights of authors. *Id.* at 141. Therefore, the importance of the work as a benefit to the state outweighs the author's right to limit the use of the work. *Id.* at 152.

⁴⁶ Wojcik & Osty, *supra* note 4, at 275-76; CHENGSI & PENDLETON, *supra* note 36, at 3.

developed its copyright law.⁴⁷ The PRC government realized that it needed to provide foreign software and technology copyright protection to expand its own technological development through foreign investment.⁴⁸ It also faced difficulties in the international community because of its failure to adequately protect intellectual property rights.⁴⁹

To provide this protection, the PRC drafted a comprehensive copyright law.⁵⁰ Bowing to pressure from the United States,⁵¹ the PRC

⁴⁷ Yiping Yang, *The 1990 Copyright Law of the People's Republic of China*, 2 UCLA PAC. BASIN L. REV. 260 (1993). To satisfy critics that the PRC was committed to protecting intellectual property, the PRC promulgated its first modern copyright law. *Id.* The PRC adopted this law in 1990. Copyright Law of the People's Republic of China, China L. Foreign Bus. (CCH) ¶ 11-700 (Sept. 7, 1990).

⁴⁸ PENDLETON, *supra* note 43, at 49. The PRC owes a duty to its people to procure this technology efficiently, quickly, and cheaply in order to continue to modernize. *Id.* On the other hand, the PRC must be careful not to scare off foreign companies by not protecting copyrighted works. *Id.*

⁴⁹ China's failure to adequately protect intellectual property rights of foreign investors has held up its accession to the World Trade Organization since December 1994. It was also turned down as host for the Olympic Games. James Finerock, *Cancel the Trade War; the United States and China Threaten Each Other with Sanctions, but There's a Good Chance Peace Will Break Out Instead*, SAN FRANCISCO EXAMINER, Feb. 10, 1995, at A22; *Kantor Scheduled to Visit Beijing to Launch Intellectual Property Deal*, Int'l Trade Daily (BNA), at D4 (Mar. 3, 1995).

⁵⁰ Copyright Law of the People's Republic of China, *supra* note 47. The government's emphasis on an open door policy with western nations and its push towards technological advancement led the Standing National Council of the PRC to promulgate the General Principles of Civil Law on January 1, 1985. General Principles of Civil Law, China L. Foreign Bus. (CCH) ¶ 7-1400 (Jan. 1, 1985). See generally Jianxin, *supra* note 42 (discussing open door approach in PRC). From 1979 to 1985, the drafting committee for copyright in the PRC only considered copyright protection regulations that would not protect foreign copyright owners. CHENGSI & PENDLETON, *supra* note 36, at 65. In 1985, the PRC decided that it would have to adhere to an international copyright convention after developing a copyright system. This convention gave a general outline for copyright protection in the PRC. *Id.* The PRC law did not protect foreign investors to the same extent as the Berne Convention. See *supra* note 1 and accompanying text (discussing national treatment). Although foreign works had little protection from the unauthorized use of their works, authors could sometimes receive copyright royalties on an ad hoc basis. PENDLETON, *supra* note 43, at 42. Effective software copyright protection, however, was still non-existent. *Copyright Conference Examines Fair Use, DAT, Berne, and Int'l Issues*, Pat. Trademark & Copyright L. Daily (BNA) (Apr. 20, 1990); Crothall, *supra* note 4, at

enacted a copyright law that on its face conforms with international conventions.⁵² Nevertheless, the law is deficient in software protection.⁵³ Commentators have suggested that the lack of computer software protection is part of a deliberate attempt by the PRC to steal foreign technology.⁵⁴ By providing deficient protection to computer software companies, the PRC government can lawfully copy foreign software programs to its benefit.⁵⁵ In fact, the two dozen factories in China churning out pirated goods are state-owned.⁵⁶

Deficient software protection for American companies finally prompted the United States to demand that the PRC sign the Berne

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⁵¹ See *infra* note 183 and accompanying text (discussing MOU). The United States put pressure on the PRC to promulgate a comprehensive copyright law in line with international conventions. *Id.* The United States pressure was a result of lobbying efforts by American literary and software creators. *Copyright Conference Examines Fair Use, DAT, Berne and Int'l Issues*, *supra* note 50.

Pursuant to a 1989 MOU with the United States, the PRC drafted a copyright law. The PRC, however, refused to make the law available to the public. *Id.* The United States made further demands in another MOU with the PRC in 1992. See *infra* note 187 and accompanying text (discussing MOU). This MOU was made under the threat by the United States of up to 1.5 billion dollars in retaliatory sanctions. *USTR Official Reports "Some Progress" on Intellectual Property Issues*, *Int'l Trade Daily* (BNA) (Dec. 26, 1991).

⁵² See *infra* note 187 and accompanying text (noting MOU demands conformity to Berne by PRC). In fashioning its new law, the PRC examined various international and foreign copyright laws. CHENGSI & PENDLETON, *supra* note 36, at 112-13, 171. To create its own copyright law, the PRC looked to the laws of the United States, France, the United Kingdom, West Germany, the former Union of Socialist Soviet Republics, the Berne Convention, and the Universal Copyright Convention. *Id.* For software protection, the drafters of the copyright law looked at the law in Brazil and South Korea. *Id.* at 195. The drafters also received significant guidance from the World Intellectual Property Organization (WIPO). PENDLETON, *supra* note 43, at 42. Some drafters, including Chengsi, considered the Berne Convention to be a model for the future copyright law. CHENGSI & PENDLETON, *supra* note 36, at 66.

⁵³ *Copyright Conference Examines Fair Use, DAT, Berne and Int'l Issues*, *supra* note 50.

⁵⁴ Arthur Fakes, *The Abduction of Licensed Software Technology by the People's Republic of China*, 3 SOFTWARE L.J. 223, 224 (1989).

⁵⁵ *Id.* at 223.

⁵⁶ Finerock, *supra* note 49.

Convention.⁵⁷ In 1992, the PRC signed the Berne Convention, a multinational treaty on copyright protection.⁵⁸ However, conflicts between the Berne Convention and the copyright law of the PRC still exist.⁵⁹

II. CONFLICTS BETWEEN PRC REGULATIONS AND THE BERNE CONVENTION

The copyright law of the PRC provides less copyright protection than the Berne Convention in two major respects.⁶⁰ First, although the PRC regulations appear to conform with the Berne Convention, they contain broader fair use provisions than the Berne Convention allows.⁶¹ These fair use provisions permit the PRC government and ordinary citizens to legally copy an author's work in many more situations than the Berne Convention.⁶² Second, the PRC's inadequate enforcement of its software laws conflicts with Berne Convention enforcement requirements.⁶³ The PRC government should identify these conflicts and resolve them.

A. Fair Use Exceptions

In 1992, the PRC government enacted the Computer Software Protection Rules in response to international pressure to provide copyright protection for computer software.⁶⁴ Three articles in the PRC's software copyright law permit copying under the fair use exception.⁶⁵ Article 22 allows users to copy software if necessary for teaching, research, or official

⁵⁷ *China Must Stop Growth of Piracy or Risk U.S. Sanctions, IIPA Official Says*, *supra* note 18, at 1771.

⁵⁸ *See supra* note 1 (discussing Berne Convention).

⁵⁹ *See infra* notes 60-128 and accompanying text (discussing conflicts between PRC copyright law and Berne Convention).

⁶⁰ *See infra* notes 64-90 and accompanying text (discussing fair use loopholes in PRC computer software copyright law).

⁶¹ *China Must Stop Growth of Piracy or Risk U.S. Sanctions, IIPA Official Says*, *supra* note 18, at 1771.

⁶² *Id.*

⁶³ *See infra* notes 90-128 and accompanying text (discussing lax enforcement of copyright protection in PRC).

⁶⁴ 7.3 Copyright, *supra* note 4.

⁶⁵ Computer Software Protection Rules, *supra* note 3, at arts. 21-22, 31.

government use.⁶⁶ This Article, in describing what constitutes lawful copying, uses the broad and ambiguous terms "necessary" and "state authorities' duties."⁶⁷ It does not mention the number of copies a user can make, however.⁶⁸ This omission, together with the ambiguous terms, allows the PRC government and ordinary citizens to interpret the law to their advantage.⁶⁹

The second fair use provision, Article 31, allows the PRC government and other users to develop software similar to copyrighted software in two major instances.⁷⁰ First, a user can create similar software to implement PRC government policies.⁷¹ For example, if the Orange Corporation creates an accounting software program that helps the PRC's banking system, the PRC can copy it without restriction.⁷² Second, a user can develop similar software to assist the PRC's technological development.⁷³ For example, if the Orange Corporation invents a program that is applicable to developing superconductors, a user could copy the software without restriction.⁷⁴

The third fair use provision of the PRC law, Article 21, allows users to modify copyrighted software that they acquired legally.⁷⁵ Furthermore, a user who modifies the software can resell the altered program without

⁶⁶ *Id.* at art. 22. The text of Article 22 reads: "If it is necessary to make a small number of copies of software to meet the needs of non-commercial objectives such as classroom teaching, scientific research or enabling State authorities to carry out their duties, the approval of the software copyright holder or its legal assignee shall not be required and no remuneration need be paid."

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ See *infra* notes 75-76 and accompanying text (discussing construction of copyright law to pirates' advantage).

⁷⁰ Computer Software Protection Rules, *supra* note 3, at art. 31.

⁷¹ *Id.* Similar software does not infringe when it is essential for implementing relevant State policies, laws, rules and regulations. *Id.*

⁷² *Id.*

⁷³ *Id.* Similar software does not infringe if it is essential for implementing state technological standards. *Id.*

⁷⁴ *Id.*

⁷⁵ Computer Software Protection Rules, *supra* note 3, at art. 21.

compensating the author.⁷⁶ For example, if the Orange Corporation creates a software program for designing dresses, a user could modify the program to design jeans as well. The user could then resell the program without compensating the Orange Corporation. The Berne Convention's own fair use provisions⁷⁷ include a fair use exception for teaching which is similar to the PRC's exception in Article 22.⁷⁸ The Berne Convention, however, allows users to reproduce works only if the reproduction does not unreasonably exploit the work or prejudice an author's interest.⁷⁹ Since the PRC's law does not restrict unreasonable exploitation, foreigners are reluctant to invest in, or export to, the PRC because of the uncontrollable infringement.⁸⁰

The Berne Convention does not permit copying software for government purposes or research.⁸¹ In contrast, Article 31 of the PRC law⁸² permits the PRC government to copy protected software without compensating the author.⁸³ Thus, the PRC law provides substantially less protection to authors than the Berne Convention.

The Berne Convention prohibits the user modifications that the PRC software protection rules permit under Article 21.⁸⁴ Under the Berne Convention, authors of protected works have an exclusive right to authorize reproduction of their works in any manner or form.⁸⁵ Thus, a user cannot legally copy a dress design program, alter the program to design jeans, and then resell it. Furthermore, Article 9 of the Berne Convention gives an

⁷⁶ *Id.*

⁷⁷ Berne Convention, *supra* note 1, at 239.

⁷⁸ *Id.*

⁷⁹ *Id.* The Berne Convention, however, allows each country to permit the reproduction of works in special cases. Under the Berne Convention, the reproduction should not conflict with the normal use of the work and should not unreasonably prejudice the author's interests. *Id.*

⁸⁰ See *infra* note 187 (discussing unprofitability of investment in PRC).

⁸¹ Berne Convention, *supra* note 1, at 239-41.

⁸² Computer Software Protection Rules, *supra* note 3, at art. 31.

⁸³ See *supra* notes 70-74 and accompanying text (discussing government use of copyrighted works).

⁸⁴ Berne Convention, *supra* note 1, at 239; Computer Software Protection Rules, *supra* note 3, at art. 21.

⁸⁵ Berne Convention, *supra* note 1, at 239.

author the right to object to any distortion, mutilation or other modification of a work.⁸⁶ This right expressly conflicts with the PRC's Article 21.⁸⁷

These fair use conflicts will deter foreign investment in the PRC.⁸⁸ U.S. companies are more likely to invest in countries that follow the Berne Convention.⁸⁹ Software producers want to be certain that no one will infringe their copyrights under the auspices of fair use.⁹⁰

B. Inadequate Enforcement

In addition to the conflicts between PRC copyright law and the Berne Convention discussed above, there are three major ways in which the two laws conflict with regard to enforcement.⁹¹ First, the PRC's enforcement is weaker than that provided in the Berne Convention because PRC law does not provide harsh penalties;⁹² second, the government benefits from the lax enforcement;⁹³ and third, the government has

⁸⁶ *Id.*

⁸⁷ See *supra* notes 75-76 and accompanying text (discussing right of users to alter software).

⁸⁸ *China Must Stop Growth of Piracy or Risk U.S. Sanctions, IIPA Official Says*, *supra* note 18, at 1771.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *U.S. Decision to Place China on Priority Watch List Criticized*, 10 Int'l Trade Rep. (BNA), at 2062 (Dec. 8, 1993). Critics state that China has not fulfilled enforcement clauses of the 1992 MOU. *China Must Stop Growth of Piracy or Risk U.S. Sanctions, IIPA Official Says*, *supra* note 18, at 1771. This lack of enforcement is contrary to the minimum standards of protection guaranteed by the Berne Convention. Berne Convention, *supra* note 1, at 227; Joseph Greenwald & Charles Levy, *Protection of Intellectual Property Rights: Berne Convention of September 9, 1986 for the Protection of Literary and Artistic Works*, in 1 BASIC DOCUMENTS OF INTERNATIONAL ECONOMIC LAW 711 (Stephen Zamora & Ronald A. Brand, eds., 1990). Members to the Berne Convention must recognize the right to translate, make reproductions and make adaptations. Berne Convention, *supra* note 1, at 235-45; Greenwald & Levy, *supra*, at 711. Furthermore, members to the Berne Convention must protect against the distortion or mutilation of an author's works even after they have been sold. Berne Convention, *supra* note 1, at 239; Greenwald & Levy, *supra*, at 711.

⁹² Computer Software Protection Rules, *supra* note 3, art. 30.

⁹³ Fakes, *supra* note 54, at 280.

inadequate resources to enforce its existing copyright laws.⁹⁴ PRC copyright law is ineffective without sufficient enforcement and deterrence.⁹⁵

The PRC's reliance on weak civil sanctions is the most important aspect of its enforcement problem.⁹⁶ The lack of powerful deterrents, such as seizures of infringing works,⁹⁷ allows pirates to copy protected software without fear of harsh punishment.⁹⁸ Without harsh sanctions to deter pirates from copying their programs, foreign software firms will continue to decrease their investment in the PRC.⁹⁹ Companies will not risk selling their software in a country where their works will be illegally copied and sold.¹⁰⁰ Moreover, the PRC's view of how best to achieve technological development contributes to its lack of enforcement.¹⁰¹ The PRC does not

⁹⁴ See *infra* notes 111-15 and accompanying text (discussing lack of resources for enforcement).

⁹⁵ Geoffrey Crothall, *Beijing Briefing; Copyright Laws Prove Ineffective*, S. CHINA MORNING POST, Sept. 6, 1993, at B2; Blennerhassett, *supra* note 7.

⁹⁶ Telephone Interview with Michael Keplinger, United States Patent and Trademark Office, Office of Legislation in International Affairs (Feb. 16, 1994).

⁹⁷ *Copyright Conventions - Do They Mean Business?*, BUS. INT'L; BUS. CHINA, Nov. 2, 1992. Seizures are the most effective tool for dealing with infringements in other countries. The National Copyright Administration (NCA) has the power to arrange them. However, the NCA itself has no resources to carry them out. *Id.*

⁹⁸ *China Must Stop Growth of Piracy or Risk U.S. Sanctions*, IIPA Official Says, *supra* note 18, at 1771. As more stringent laws are passed by Taiwan and Hong Kong, more pirates from these countries have flocked to China. *Id.* These pirates bring better technology to produce and package the counterfeits, and often have better international distribution networks. *Purging the Pirates: China Beefs Up Protection of Property Rights*, *supra* note 10.

⁹⁹ *China Must Stop Growth of Piracy or Risk U.S. Sanctions*, IIPA Official Says, *supra* note 18, at 1771.

¹⁰⁰ *U.S. Decision to Place China on Priority Watch List Criticized*, *supra* note 91, at 2062. Few foreign companies have been willing to bring cases against pirates to the courts of the PRC because of the meager punishments available. *Id.* Other industrialized countries allow criminal proceedings against software pirates. *China Must Stop Growth of Piracy or Risk U.S. Sanctions*, IIPA Official Says, *supra* note 18, at 1771. The PRC law has no real provision for criminal punishment. Computer Software Protection Rules, *supra* note 3, at art. 37. The PRC, however, permits only civil sanctions, and does not allow for the seizure of infringing works. *Id.* at art. 30.

¹⁰¹ BRAHM, *supra* note 20, at 84.

give software copyright protection high priority because its own computer industry is undeveloped.¹⁰² The PRC depends on foreign computer software to upgrade its own technology.¹⁰³ The PRC's view is that government and business must acquire and use foreign software cheaply and quickly without legal restrictions.¹⁰⁴ The PRC's drive to obtain technological parity with the rest of the world may contribute to its weak enforcement of its own law and the Berne Convention.¹⁰⁵

The PRC's weak copyright protection of foreign software hurts the growth of its software industry.¹⁰⁶ Meanwhile, U.S. computer software firms suffer huge monetary losses as a result of the lack of enforcement in the PRC.¹⁰⁷ American software and music companies lose an estimated \$1 billion annually to piracy in China.¹⁰⁸ Some firms, therefore, are

¹⁰² *Id.* at 84-85. The PRC has not yet identified enforcement as a priority. Therefore, trade friction between the United States and PRC will continue. *China Must Stop Growth of Piracy or Risk U.S. Sanctions*, IIPA Official Says, *supra* note 18, at 1771.

¹⁰³ Fakes, *supra* note 54, at 223.

¹⁰⁴ *China Must Stop Growth of Piracy or Risk U.S. Sanctions*, IIPA Official Says, *supra* note 18, at 1771; *See generally* Fakes, *supra* note 54 (discussing PRC use of domestic laws to attain software technology without paying remuneration or being restricted in use). An excellent example of the conflict between PRC law and the Berne Convention is the case of parallel imports. David Hunter, *China: Trade Surplus with the U.S.*, MFN Status Face Clinton, 10 Int'l Trade Rep. (BNA) No.4, at 148 (Jan. 27, 1993). Parallel imports are copies legitimately produced abroad but imported against contractual agreement. *Copyright Conventions - Do They Mean Business?*, *supra* note 97. The PRC recognizes the right of authors to prevent the importation of infringing works from countries that do not offer copyright protection. However, the PRC does not recognize the right to stop parallel imports. *Id.*

¹⁰⁵ Fakes, *supra* note 54, at 223-36, 288-89.

¹⁰⁶ 7.3 Copyright, *supra* note 4. Many foreign companies are watching the PRC's method of enforcement. These companies have several concerns, including how authorities will enforce copyright, how they will find counterfeiters, and the costs of bringing cases to court and penalties for infractions. If companies see progress, they will enter into the PRC market. *Id.*

¹⁰⁷ Wojcik & Osty, *supra* note 4, at 275; *China Must Stop Growth of Piracy or Risk U.S. Sanctions*, IIPA Official Says, *supra* note 18, at 1771.

¹⁰⁸ *China-U.S.: Too Much at Stake for Trade War*, INTER PRESS SERVICE, Feb. 27, 1995, available in Westlaw, 1995 WL 2259216.

reducing their investments and software exports to the PRC.¹⁰⁹ The PRC is thus beginning to realize that stronger enforcement will help, rather than hinder, its technological development.¹¹⁰

Finally, the PRC allocates inadequate resources to copyright enforcement agencies.¹¹¹ This lack of resources, which has resulted in a severe understaffing of copyright offices at both the local and national level,¹¹² is a major obstacle to successful enforcement of computer software copyright in the PRC.¹¹³ Turnover of competent personnel is high at the national level.¹¹⁴ Moreover, enforcement lacks a national focus because the PRC does not maintain national control of the network of local copyright offices throughout the country.¹¹⁵ The Copyright Administration of China and the SARC do not have enforcement capabilities. Therefore, victims of piracy have little administrative recourse, and may have to seek relief from courts within the PRC. The PRC's software copyright protection law stresses mediation and arbitration before litigation. Some foreign producers, nonetheless, prefer the Chinese courts. However, PRC courts lack judicial and legal expertise in software copyright protection because it is such a recent development in the PRC. The PRC only prosecuted its first software case in March of 1993.¹¹⁶ In April

¹⁰⁹ Wojcik & Osty, *supra* note 4, at 275.

¹¹⁰ *Id.*

¹¹¹ Telephone Interview with Gil Donahue, Director for Intellectual Property, United States Trade Representative (Feb. 16, 1994); BRAHM, *supra* note 20, at 83.

¹¹² 7.3 Copyright, *supra* note 4.

¹¹³ Telephone interview with Donahue, *supra* note 111.

¹¹⁴ *Id.*

¹¹⁵ *Id.* For successful enforcement the PRC needs to establish better coordination between central and provincial copyright authorities. *Id.*

¹¹⁶ BRAHM, *supra* note 20, at 83; *Purging the Pirates: China Beefs Up Protection of Property Rights*, *supra* note 10; Computer Software Protection Rules, *supra* note 3, at arts. 34-35; 7.3 Copyright, *supra* note 4; *China Must Stop Growth of Piracy or Risk U.S. Sanctions, IIPA Official Says*, *supra* note 18, at 1771.

Copyright law drafter and expert Zheng Chengsi admits that even by 1990 most Chinese courts had never encountered software cases. CHENGSI & PENDLETON, *supra* note 36, at 200. Some judges have never even encountered software at all. *Id.* They are also potentially biased in favor of the government. Jerome A. Cohen, *The Chinese Communist Party and "Judicial Independence": 1949-1959*, 82 HARV. L. REV. 967, 999 (1969). In the past, PRC courts were afraid to render decisions inconsistent

1994, Chinese officials reported they had set up five intellectual property courts which have handled approximately 2,000 cases of intellectual property litigation.¹¹⁷

The courts are also extremely inefficient. Most courts, due to a lack of resources, are understaffed. They usually will not hear a case unless large amounts of lost sales are at stake. Ironically, the courts are sometimes more efficient when foreign firms bring cases because the courts fear potential political repercussions. Software complaints are likely to receive sympathetic treatment because they are often a major concern of foreign political constituencies.¹¹⁸

The Chinese prefer to mediate or negotiate civil disputes.¹¹⁹ The constitution of the PRC established mediation committees in urban and rural areas to mediate civil disputes.¹²⁰ Chinese use litigation only as a final option.¹²¹ Instead of litigation, some software producers reduced piracy problems by forming a joint venture to distribute and license goods with those who were stealing their programs.¹²² Moreover, Chinese courts rarely give satisfactory compensatory damages.¹²³ Foreign investors have

with Communist Party policy. The courts would hand cases directly to a Communist Party committee without any analysis. Subsequently, party secretaries settled disputes without any judicial assistance. *Id.* The PRC has no separation of state power because the state mirrors the will of the proletariat. Hikota Koguchi, *Some Observations About "Judicial Independence" in Post-Mao China*, 7 B.C. THIRD WORLD L.J. 195 (1987). The judiciary is subordinate to the National People's Congress. XIANFA [Constitution] art. LVII (1982). But see *Id.* at art. CXXXI (stating PRC courts shall exercise authority independently according to law). Moreover, administrative bodies, organizations and individuals should not interfere with people's courts. *Id.*

¹¹⁷ *Intellectual Property: Chinese Official Outlines Improvements in Intellectual Property Protection*, Int'l Trade Daily (BNA), at D8 (Apr. 18, 1994).

¹¹⁸ *Purging the Pirates: China Beefs up Protection of Property Rights*, *supra* note 10.

¹¹⁹ Jianxin, *supra* note 42, at 91-95.

¹²⁰ XIANFA [Constitution], at art. CXI (1982).

¹²¹ American Embassy-Beijing, China - Investment Climate Statement July 1993, ¶ 18 Market Reports July 29, 1993 [hereafter Market Reports]. But see CHENGSI & PENDLETON, *supra* note 36, at 188-89 (discussing use of litigation within PRC).

¹²² *Purging the Pirates: China Beefs Up Protection of Protection of Property Rights*, *supra* note 10.

¹²³ *Id.* See *supra* note 9 and accompanying text (describing relief granted for copyright infringement).

found the Chinese approach of informal conciliation and then litigation unreliable.¹²⁴ The PRC should take affirmative steps to stop the growth and spread of piracy within its borders.¹²⁵ To accomplish this, the PRC must conform its fair use provisions to the Berne Convention. The PRC must then take significant steps toward meeting the minimum standards for enforcement that the Berne Convention requires, and thereby discourage piracy, when it enforces the provisions of its software copyright law and the provisions of the Berne Convention.¹²⁶ In turn, the PRC will attract more foreign investment because foreign creators will not fear infringement.¹²⁷ Furthermore, the PRC should allocate sufficient resources to copyright enforcement agencies.¹²⁸

¹²⁴ Market Reports, *supra* note 121, ¶ 18.

¹²⁵ *Id.*

¹²⁶ The PRC's lack of enforcement facilitates the high piracy rate in the PRC. *China Must Stop Growth of Piracy or Risk U.S. Sanctions, IIPA Official Says, supra* note 18, at 1771. Piracy is the biggest problem most foreign companies have in the PRC. U.S. software companies lose at least \$225 million dollars a year due to piracy in the PRC. *Id.* Assistant United States Trade Representative Joseph Massey labeled the PRC as the largest pirate of U.S. copyrights in the world. *USTR Official Reports "Some Progress" on Intellectual Property Issues, supra* note 51. The U.S. has demanded that the PRC take action over the growing problem of piracy. *U.S. Prepares to Press China on Trade*, REUTER ASIA-PACIFIC BUS. REP., Oct. 22, 1993. Over 80 percent of the computer software programs in the PRC are pirated versions. Blennerhassett, *supra* note 7.

The United States demanded that the PRC eliminate piracy in a MOU between the PRC and the United States in 1992. MOU, *supra* note 4. This MOU was the direct result of a U.S. Special 301 investigation. *See infra* notes 180-87 and accompanying text (discussing January, 1992 MOU and Special 301 provision). The PRC assented to the MOU under the threat by the United States of \$1.5 billion dollars in sanctions under the Special 301 provision. *China Must Stop Growth of Piracy or Risk U.S. Sanctions, IIPA Official Says, supra* note 18, at 1771. Progress is slow, and as recently as January of 1994 the United States declared action on piracy in the PRC to be unsatisfactory. *Special Report Trade Negotiators Turn Eastward*, Int'l Trade Rep. (BNA), at 107 (Jan. 19, 1994).

¹²⁷ *U.S. Gives China Until End of Year to Prove Adherence to Market Access Pact*, 10 Int'l Trade Rep. (BNA), at 1795 (Oct. 27, 1993).

¹²⁸ Wojcik & Osty, *supra* note 4, at 288-89; *Copyright Conventions - Do They Mean Business?*, *supra* note 97.

III. PROPOSED SOLUTION

The PRC needs to resolve the conflicts between its own law and the Berne Convention to continue its economic and technological growth.¹²⁹ To resolve these conflicts, the PRC must close its fair use loopholes and adequately enforce its copyright law.¹³⁰ This section sets forth several proposed changes in the PRC copyright law, and discusses the means the United States should use to persuade the PRC to adopt these changes.¹³¹

A. *Proposed Changes in PRC Copyright Law*

PRC copyright law allows the government and private actors to employ fair use loopholes to copy software without regard to an author's rights.¹³² To close these loopholes, the PRC government should revise Articles 22, 31 and 21 of its law to conform with the Berne Convention.

Currently, Article 22 of the PRC's copyright law allows users to copy software if necessary for teaching, research, or official government use.¹³³ The PRC government should revise Article 22 to state:

¹²⁹ Wojcik & Osty, *supra* note 4, at 274-76.

¹³⁰ Fakes, *supra* note 54, at 263. The PRC should enact revised computer software copyright laws to eliminate vague provisions that allow infringement. *Id.* The letter of the software copyright law of the PRC is in conformity with the Berne Convention. CHENGSI & PENDLETON, *supra* note 36, at 171; *WIPO Chief says China's Copyright Law is Excellent*, XINHUA NEWS AGENCY, Sept. 13, 1994. However, the PRC violates the spirit of the Berne Convention through the use of vague provisions. Fakes, *supra* note 54, at 263-64. The PRC takes advantage of necessary ambiguities in its law to facilitate the growth of its own computer software industry at the expense of foreign producers. *Id.* The enforcement of the PRC law, after the government has conformed it to the Berne Convention, is essential this proposal. *U.S. Gives China Until End of Year to Prove Adherence to Market Access Pact*, *supra* note 127, at 1795; *China Must Stop Growth of Piracy or Risk U.S. Sanctions*, *IIPA Official Says*, *supra* note 18, at 1771.

¹³¹ See *infra* notes 132-98 and accompanying text (describing PRC law changes and methods of persuasion).

¹³² See *supra* notes 64-76 and accompanying text (discussing PRC copyright law). But see CHENGSI & PENDLETON, *supra* note 36, at 171; *WIPO Chief says China's Copyright Law is Excellent*, *supra* note 130 (discussing influence and likeness of PRC's copyright laws and Berne Convention).

¹³³ Computer Software Protection Rules, *supra* note 3, at art. 22.

"A software user may make a small number of copies to meet the non-commercial needs of classroom teaching or scientific research without the copyright holder's approval. Moreover, government authorities may make a small number of copies of software to carry out their official duties without the copyright holder's approval. However, state authorities must pay the copyright holder fair market value for use of the software."

Article 31 of the PRC's copyright law¹³⁴ allows users to develop software similar to copyrighted software either for PRC purposes or when there are no other forms of expression available. Since Article 31 cannot be revised to conform to the Berne Convention, the PRC government should eliminate Article 31 entirely. Thus, if the PRC develops software similar to existing software, it should pay the copyright holder reasonable fees.

Article 21, section three¹³⁵ currently allows users to alter and then resell copyrighted software.¹³⁶ The PRC government should amend this provision to read: "an individual user may not alter software in any way without first obtaining the approval of the software copyright holder."

These revisions will eliminate the ambiguities in the current Article

¹³⁴ Computer Software Protection Rules, *supra* note 3:

"If software is developed which is similar to existing software, this shall not be seen to constitute an infringement of the existing software's copyright in the following circumstances:

- (1) when essential for implementing relevant State policies, laws, rules and regulations;
- (2) when essential for implementing State technological standards;
- (3) when the various forms of expression available for selection and use are limited."

¹³⁵ Computer Software Protection Rules, *supra* note 3 at art. 21, section 3:

"[An individual may, without the consent of the software copyright holder, enjoy] the right to alter software in order to use it in a computer's actual applied environment or to alter its functional performance. Unless, however, a separate agreement has been made, it shall be prohibited to supply a third party with an altered version of the software without obtaining the approval of the software copyright holder or its legal assignee."

¹³⁶ Computer Software Protection Rules, *supra* note 3, at art. 22.

22.¹³⁷ In addition, the Article 22 revision and the absence of Article 31 will eliminate fair use exceptions for all users.¹³⁸ The revised Article 21 will also reduce copying by the PRC government and ordinary citizens.¹³⁹ Also, these revisions will help, rather than hinder, the growth of the PRC's own computer software industry.¹⁴⁰ Foreign producers will feel secure about investing in the PRC, and will take advantage of the PRC's large consumer market.¹⁴¹ Finally, increased foreign technological investment will help spur the PRC's own technological growth.¹⁴²

Those who oppose revising the PRC fair use provisions raise two arguments. First, some commentators suggest that the PRC needs to put technology in the public domain to foster economic development.¹⁴³ They contend that the PRC's own technological growth will benefit from the public's free access to foreign technology not available from domestic producers.¹⁴⁴ The public can then use foreign software programs to create their own advanced programs.¹⁴⁵

However, this strategy is detrimental to the PRC.¹⁴⁶ The PRC will attain computer technological equality with the developed countries more rapidly under the revised provisions.¹⁴⁷ If the PRC's software copyright laws conform to international norms, the quality and variety of foreign software available in the PRC will also increase.¹⁴⁸ On the other hand, if rampant copying continues, foreign software producers will most

¹³⁷ See *supra* notes 67-69 and accompanying text (discussing ambiguities in Article 22).

¹³⁸ See *supra* notes 70-74 and accompanying text (discussing exceptions for government actors in Article 31).

¹³⁹ See *supra* notes 75-76 and accompanying text (discussing copying by non-state actors in Article 21).

¹⁴⁰ Wojcik & Osty, *supra* note 4, at 273-78.

¹⁴¹ Fakes, *supra* note 54, at 224.

¹⁴² *Id.*

¹⁴³ *Id.* at 224, 240.

¹⁴⁴ *Id.* at 241.

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 224.

¹⁴⁸ *Id.* at 290.

likely halt their exports to the PRC.¹⁴⁹ Thus, the PRC will be exposed to the software technology of the technologically advanced countries only if its laws conform to international norms.¹⁵⁰

Second, some commentators note that the PRC has a shortage of foreign currency in reserve.¹⁵¹ Without these reserves, according to this argument, the PRC cannot afford to pay licensing fees to software copyright holders.¹⁵² Therefore, from the standpoint of the PRC, it is more efficient to have a copyright law that does not require the PRC government to compensate creators for their software products.¹⁵³ The basic premise of this argument is false, however: the PRC does have sufficient foreign reserves to pay for imported technology.¹⁵⁴ Furthermore, if the PRC refuses to pay for technology, exporters to the PRC will limit computer software to obsolete programs or programs without market value elsewhere.¹⁵⁵ The PRC must change its software copyright law if it is to continue its growth in foreign investment and trade.¹⁵⁶

¹⁴⁹ *Id.* at 241.

¹⁵⁰ *Id.* at 290.

¹⁵¹ *Id.* at 281.

¹⁵² *Id.*

¹⁵³ *Id.* at 241.

¹⁵⁴ *Id.* The PRC has the sixth largest foreign exchange reserve in the world, totaling almost 45 billion U.S. dollars. *China: Trade Surplus with the U.S., MFN Status Face Clinton*, *supra* note 104, at 148.

¹⁵⁵ *Fakes*, *supra* note 54, at 281.

¹⁵⁶ Market Reports, *supra* note 121, ¶ 5. For the first half of 1993 the PRC annualized growth rate was 13.9%. *Id.* In the past few years the PRC has had unprecedented economic growth. *Indirect Trade with Mainland Topped US \$14 Billion in 1993*, CENTRAL NEWS AGENCY, Feb. 4, 1994. Foreign investment in the PRC increased over 300% in 1993 to 33 billion U.S. dollars. This made the PRC the world's top investment target. *Id.* U.S. firms desire to make direct equity investments in Chinese businesses to satiate the PRC's need for direct investment. Pete Engardio & Leah N. Spiro, "A Wild West" in the East, BUS. WEEK, Nov. 1993, at 6. However, since the Tiananmen Square incident in June of 1989, foreign investors have been wary of instability within the PRC. Thurston, *supra* note 33, at 51.

The PRC accomplished great economic growth through its open door economic and investment policy. Market Reports, *supra* note 121, ¶ 6. In early 1992, the PRC took several actions to encourage foreign investment. *Id.* The PRC opened new cities and sectors to foreign investment. *Id.* ¶ 7. The PRC also passed a tax law in 1991 that unified tax rates for all foreign-invested enterprises and expanded other tax

benefits. *Id.* New foreign investment in 1992 was three times higher than 1991. *Id.* ¶ 6. The law and the legal system in the PRC help to attract foreign investment and further PRC participation in the international economy. CHENGSI & PENDLETON, *supra* note 36, at 3; Jianxin, *supra* note 42, at 2-89. See generally SAMUEL P.S. HO & RALPH W. HUENEMANN, CHINA'S OPEN DOOR POLICY (1984) (reviewing economic aspects of opening PRC borders to trade).

The PRC has attempted to encourage open investment by strengthening its copyright laws. See, e.g., Computer Software Protection Rules, *supra* note 3, at art. 23. The PRC has encouraged foreign business to invest and export software to mainland China by signing the Berne Convention. Wojcik & Osty, *supra* note 4, at 276. Stronger protection of foreign software copyright promotes foreign investment and high-technology imports. *Id.* at 275-76. Although Microsoft has reentered the PRC market after the MOU, it is selling only a basic program in the PRC. 7.3 Copyright, *supra* note 4. Ninety-five percent of Chinese-made personal computers use a pirated version of this program. Others entering the PRC market include Borland, Digital Equipment, Software Systems Associates, and UNIX Systems laboratory. Most of these organizations have linked up with PRC based firms through licensing agreements and joint ventures. *Id.*

Critics argue that the PRC promotes economic development by using weak copyright laws to acquire foreign software free of restrictions. Fakes, *supra* note 54, at 223. Critics state that the PRC in the past has provided only limited legal protection for foreign software. *Id.* at 224. The purpose of weak protection is to enable the PRC to place the software technology in the public domain to foster economic development. *Id.* at 224. See generally Calvin E. Eib, *The Special 301 Investigation of China's Software Protection Laws: Cautious Optimism Leads for a Successful Exercise in Dispute Resolution*, 6 SOFTWARE L.J. 293, 301-02 (discussing PRC use of foreign software to advance domestic growth). This policy may backfire, however, as foreign software producers are becoming increasingly reluctant to export their products to the PRC because of such high rates of infringement. *China Must Stop Growth of Piracy or Risk U.S. Sanctions, IIPA Official Says*, *supra* note 18, at 1771. Foreign firms accuse the PRC of purposely creating a vague software copyright law to avoid the spirit of the Berne Convention. Jia Zhao, *Computer Software Protection: New Regulations Go into Effect*, 13 E. ASIAN EXECUTIVE REP. 9 (1991). Fakes, *supra* note 54, at 263. Software producers not aware of the malleable law are stepping up their investments. 7.3 Copyright, *supra* note 4; Market Reports, *supra* note 121. See also Tina Powers, *IBM Expects its China Business to Have Grown to the Same Size or Bigger Than its Hongkong Operations Within Five Years; Giant Looks to China for Business Future*, S. CHINA MORNING POST, Dec. 15, 1992, at 9 (citing increasing investment by some foreign firms).

Many PRC officials, however, take a different view on the protection of computer software in the PRC. *China Emphasizes Intellectual Property Rights Protection*, XINHUA NEWS AGENCY, Jan. 28, 1994; Geoffrey Crothall, *U.S. Concern Over Right Criticized*, S. CHINA MORNING POST, Dec. 3, 1993, at B2. The PRC

In addition, the PRC needs to control the manufacture and distribution of programs illegally copied by pirates. Besides revising its copyright laws to eliminate fair use loopholes, the PRC must increase penalties for pirates. Currently, Article 30 of the PRC's computer software copyright law imposes only civil liability upon copyright infringers.¹⁵⁷ The law limits punishments to monetary fines, ceasing infringement, public apology, payment of compensating losses, and forfeiture of profits. Currently, the PRC's copyright laws contain no provision for seizures of copied programs.¹⁵⁸ The Berne Convention, on the other hand, specifically requires governments to seize infringing works.¹⁵⁹ The PRC must use harsher punishments to dissuade potential pirates.¹⁶⁰ In particular, it should add the following language to Article 30: "The government software copyright administration shall also have the power to seize all infringing copies." This new regulation will discourage infringement by increasing the PRC's enforcement of copyright protection through harsher penalties for pirates.¹⁶¹

insists that it strictly enforces its copyright laws. Foreign Ministry spokesman Wu Jianmin claimed the PRC improved legislation and regulations on copyright to better enforce copyright protection. Critics, however, suggest that the PRC law still lacks real enforcement. *Id.* Recent efforts by the PRC to enforce software copyright demonstrate its intent to protect the software industry. Claire Leow, *China to Stage First Computer Show Next Year*, BUS. TIMES, Nov. 8, 1993. Moreover, the PRC government believes that it has made significant concessions in copyright negotiations. *USTR Official Reports "Some Progress" on Intellectual Property Issues*, *supra* note 51. The PRC's National Copyright Administration (NCA) stated that even though the PRC has given the United States more concessions than it has given other countries, the United States is still not satisfied. Chinese sources suggested that the United States demanded more from the PRC than it did from other copyright violators, such as Taiwan. *Id.* Arpad Bagsch, director general of WIPO, recently declared that the PRC's copyright law was complete and compatible with the Berne Convention. *WIPO Chief says China's Copyright Law is Excellent*, *supra* note 130.

¹⁵⁷ Computer Software Protection Rules, *supra* note 3, at art. 30.

¹⁵⁸ *Id.*

¹⁵⁹ Berne Convention, *supra* note 1, at 249-51.

¹⁶⁰ *U.S. Decision to Place China On Priority Watch List Criticized*, *supra* note 91. United States Trade Representative Mickey Kantor has accused China of not punishing copyright offenders. *Id.*

¹⁶¹ *Copyright Conventions - Do They Mean Business?*, *supra* note 97. Jail sentences and high fines are the most effective tools for dealing with infringements. *Id.*

To further these proposed amendments, the PRC needs to allocate more resources and power to copyright enforcement agencies to curb piracy.¹⁶² These agencies need the resources to investigate and prosecute potential infringements.¹⁶³ Without these resources, pirates will continue to operate without fear of punishment.¹⁶⁴

B. Proposed Methods to Persuade the PRC to Amend its Laws

The United States can help encourage these changes in the PRC's copyright law.¹⁶⁵ The United States should develop a bilateral agreement with the PRC that proposes changes in PRC law and enforcement procedures.¹⁶⁶ The bilateral agreement must stress that the PRC change its law and enforcement procedures to follow the spirit of the Berne Convention.¹⁶⁷ The time period for these changes should take into account the PRC's status as a developing country.¹⁶⁸ Moreover, the United States should limit trade threats to an embargo of computer software exports to the PRC.¹⁶⁹ Thus, if the PRC responds with trade sanctions of its own, they

¹⁶² The PRC has taken great steps in this direction by establishing an intellectual property court in Beijing. *U.S. Decision to Place China on Priority Watch List Criticized*, *supra* note 91.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *GATT Council Hears Complaints From Oilseed Producers Over Compensation*, Int'l Trade Daily (BNA) (May 13, 1993). The United States has used multilateral organizations, such as the General Agreement on Tariffs and Trade, to win concessions in intellectual property protection from Argentina, Brazil, Uruguay, India, and Canada. *Id.* The United States also used a trade embargo to pressure the Soviet Union to protect film copyrights. Lana C. Fleishman, *The Empire Strikes Back: The Influence of the United States Motion Picture Industry on Russian Copyright Law*, 26 CORNELL INT'L L.J. 189 (1993).

¹⁶⁶ *China Calls Designation Under Special 301 "Unacceptable," Warns Trade Endangered*, Pat., Trademark & Copyright L. Daily (BNA) (May 2, 1991).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ This approach was successful in the copyright negotiations between the movie industry of the United States and the former Soviet Union. Fleishman, *supra* note 165, at 189-91.

will most likely be limited to one area.¹⁷⁰

The bilateral agreement should make clear to the PRC that greater protection of foreign copyright will be good for technological development within the PRC.¹⁷¹ The agreement will encourage innovation in the PRC and promote technologically sophisticated imports.¹⁷² This will satisfy the PRC's goal of acquiring foreign technology efficiently.¹⁷³ Furthermore, the agreement will also simultaneously bolster foreign investment.¹⁷⁴

The bilateral agreement would protect the interests of U.S. companies better than Special 301 trade sanctions¹⁷⁵ and political sanctions.¹⁷⁶ The Special 301 provision authorizes the United States Trade Representative (USTR)¹⁷⁷ to investigate and negotiate foreign intellectual property protection,¹⁷⁸ and to impose trade sanctions.¹⁷⁹

The United States used the Special 301 provision to persuade the PRC to join the Berne Convention and strengthen its copyright law.¹⁸⁰

¹⁷⁰ *Id.* at 191.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ PENDLETON, *supra* note 43, at 49.

¹⁷⁴ Fakes, *supra* note 54, at 223-27.

¹⁷⁵ *Microsoft Wants Further Action Against Fakers*, *supra* note 9, at B1; Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107, 1164-76, 1179-81 (1988) (codified in 19 U.S.C. §§ 1301, 1303). The Special 301 provision is part of the United States Omnibus Trade and Competitiveness Act of 1988. 19 U.S.C. § 2416(b) (Supp. IV 1992). Special 301 is designed to use unilateral retaliation by the United States to force trading partners to provide adequate protection of intellectual property rights in foreign countries. *Id.* § 1303(a)(1)(B).

¹⁷⁶ See *infra* notes 190-94 and accompanying text (discussing political sanctions).

¹⁷⁷ The United States Trade Representative is responsible for all foreign trade relations conducting through the executive branch. See generally United States Trade Representative, 1994 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS (1994) [hereafter Foreign Trade Barriers].

¹⁷⁸ See generally Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. at 1164-76, 1179-81 (discussing duties of USTR); Eib, *supra* note 156, at 309-10 (discussing Special 301).

¹⁷⁹ Eib, *supra* note 156, at 309.

¹⁸⁰ *China Must Stop Growth of Piracy or Risk U.S. Sanctions*, IIPA Official Says, *supra* note 18, at 1771.

The United States also used the Special 301 provision to negotiate a bilateral agreement with the PRC in 1992.¹⁸¹ However, the Special 301 provision was not successful in achieving substantive change in PRC copyright protection, despite the 1992 agreement.¹⁸² The PRC has still not fulfilled the enforcement clauses of the bilateral agreement of 1992.¹⁸³ Many conflicts still remain between the Berne Convention and the PRC's copyright law.¹⁸⁴ As a result, many American software producers recently demanded that the United States reexamine the PRC's status under Special provision 301 and consider sanctions against the PRC.¹⁸⁵

Although the USTR can impose trade sanctions under Special 301,¹⁸⁶ threats of trade sanctions against the PRC do not always lead to changes in the PRC's copyright law.¹⁸⁷ For example, in 1992, when the United States threatened trade sanctions, the PRC threatened retaliatory trade

¹⁸¹ USTR Official Reports "Some Progress" on Intellectual Property Issues, *supra* note 51. The PRC faced potential sanctions of 1.5 billion dollars under the Special 301 provision. *Id.*

¹⁸² Wojcik & Osty, *supra* note 4, at 285-86.

¹⁸³ See *supra* note 4 and accompanying text (discussing January, 1992 MOU and Special 301 provision). The relevant copyright provisions state that the PRC will accede to the Berne Convention. MOU, *supra* note 4, at art. 3. Furthermore, the provisions state that the PRC will issue new regulations to comply with the Convention and the MOU in so far as the PRC's copyright law is inconsistent with them. Moreover, the provisions state that computer programs shall be protected by the governments. Finally, the MOU also states that both the United States and the PRC will provide effective procedures and remedies to prevent and deter infringement of intellectual property rights, whether internally or at their borders. *Id.* Under this MOU, the United States agreed to terminate the Special 301 investigation and the possibility of trade sanctions against the PRC. *Id.* at art. 7. The Deputy USTR stated that enforcement of intellectual property laws is "essentially absent." *U.S. Decision to Place China on Priority Watch List Criticized*, *supra* note 91.

¹⁸⁴ See *supra* notes 60-128 and accompanying text (discussing inconsistencies between PRC copyright law and Berne Convention).

¹⁸⁵ *Microsoft Wants Further Action Against Fakers*, *supra* note 9, at B1.

¹⁸⁶ Telephone interview with Donahue, *supra* note 111. The United States is considering whether to designate the PRC as a priority country, which would trigger a Special 301 investigation and possible sanctions. Evans, *supra* note 9, at B22.

¹⁸⁷ *U.S. Decision to Place China on Priority Watch List Criticized*, *supra* note 91. The USTR accused the PRC of not enforcing the MOU of 1992. *Id.*

sanctions against the United States.¹⁸⁸ The United States dropped its threats because it feared a disastrous trade war between the two countries.¹⁸⁹ Another, also undesirable, alternative to the Special 301 trade sanctions, is that the United States could threaten the PRC with harsh political sanctions.¹⁹⁰ The options under political sanctions are much broader than under the Special 301 provision.¹⁹¹ For example, the United States could show that it is serious about computer software protection by revoking the PRC's Most Favored Nation status.¹⁹² Again, the problem with political sanctions is that the PRC could respond by closing its markets to foreign investment and products.¹⁹³ The loss of the PRC's growing consumer market would be extremely detrimental to the United States.¹⁹⁴

A new bilateral agreement between the United States and the PRC is therefore the best approach to conform the PRC copyright law to the Berne Convention.¹⁹⁵ Unlike Special 301 or political sanctions, a bilateral

¹⁸⁸ *USTR Official Reports "Some Progress" on Intellectual Property Issues*, *supra* note 51. A spokesman for the PRC stated that the PRC would adopt corresponding measures if the United States imposed punitive tariffs. *Id.*

¹⁸⁹ *U.S., China Agreement on Intellectual Property Ends Retaliatory Duties Threat*, *Int'l Trade Daily* (BNA) (Jan. 21, 1992).

¹⁹⁰ Telephone interview with Donahue, *supra* note 111.

¹⁹¹ *See infra* note 192 and accompanying text (discussing Most Favored Nation status); *supra* notes 179-89 and accompanying text (discussing scope of Special 301 provision).

¹⁹² *Special Report Trade Negotiators Turn Eastward*, *supra* note 126, at 107. The Most Favored Nation (MFN) status of the PRC means that it will receive the most favorable treatment that the United States grants to any country with respect to imports and exports. JOHN H. JACKSON, *THE WORLD TRADING SYSTEM* 133 (1989). A deputy USTR referred to the revocation of the PRC's Most Favored Nation status as a "neutron bomb." *Deputy USTR Warns Against Revocation of MFN for China, Praises Bush Approach*, 10 *Int'l Trade Rep.* (BNA) No. 3, at 91 (Jan. 20, 1993).

¹⁹³ *USTR Official Reports "Some Progress" on Intellectual Property Issues*, *supra* note 51.

¹⁹⁴ *Special Trade Report Negotiators Turn Eastward*, *supra* note 126, at 107. As the United States increases economic contact with the PRC, the argument that revoking MFN status would do harm to both countries becomes more legitimate. *Id.* The United States is one of the three largest investors in the PRC. Market Reports, *supra* note 111, ¶ 45. The PRC is one of the United States' fastest growing export markets. Legislative Calendar, *Int'l Trade Rep.* (BNA), at 148 (Jan. 27, 1993).

¹⁹⁵ *Microsoft Wants Further Action Against Fakers*, *supra* note 9, at B1.

agreement is a cooperative effort.¹⁹⁶ For the PRC, it is imperative that the world perceive it as working with the United States, not under its influence.¹⁹⁷ Thus, a bilateral agreement will further the potential for future cooperation on trade issues between the United States and the PRC.¹⁹⁸

CONCLUSION

Despite an existing agreement with the United States, inconsistencies remain between the PRC's copyright law and the Berne Convention.¹⁹⁹ The PRC should revise its laws to eliminate the current fair use provisions.²⁰⁰ Moreover, the PRC should also take stronger steps to enforce its copyright laws.²⁰¹ The PRC must allocate more resources to the National Copyright Administration²⁰² and to its courts; it should also enact harsher penalties for pirates.²⁰³

The United States has two goals to consider. It must protect its software producers in the PRC market by persuading the PRC to uphold the Berne Convention's protections of copyrighted works.²⁰⁴ In addition, the

¹⁹⁶ MOU, *supra* note 4, at art. 1.

¹⁹⁷ *Intellectual Property Experts Discuss Pending Changes in Trademark, Patent Law*, Int'l Trade Daily (BNA) (Apr. 16, 1992). The PRC government regarded the MOU of 1992 as a loss of face. *Id.*

¹⁹⁸ *U.S., China Agreement on Intellectual Property Ends Retaliatory Duties Threat*, *supra* note 189. PRC officials contend that trade disputes are better solved through consultation on equal levels and mutual concession. *Id.*

¹⁹⁹ *See supra* notes 60-128 and accompanying text (discussing inconsistencies between PRC law and Berne Convention).

²⁰⁰ *See supra* notes 132-42 and accompanying text (discussing revision of PRC's fair use provisions).

²⁰¹ *See supra* notes 91-116 and accompanying text (regarding enforcement of copyright in PRC).

²⁰² *See supra* note 97 (discussing duties and actions of NCA).

²⁰³ *See supra* notes 84-89 and accompanying text (discussing importance of efficient allocation of resources to copyright offices).

²⁰⁴ *See supra* note 156 and accompanying text (discussing importance of copyright protection for U.S. software producers).

United States must maintain good trade relations with the PRC.²⁰⁵ Because of the PRC's past political and economic traditions, change will be slow.²⁰⁶ If the PRC wishes to join the global economy, however, it must play by the global rules.

UPDATE

In early February 1995, the United States announced it was going to impose 100% tariffs on more than \$1 billion worth of Chinese goods pursuant to the Special 301 provision in order to crack down on counterfeiting by Chinese plants.²⁰⁷ China retaliated with threatened duties on US-made cigarettes, alcoholic beverages, cosmetics, films and compact

²⁰⁵ USTR Official Reports "Some Progress" on Intellectual Property Issues, *supra* note 51.

²⁰⁶ BRAHM, *supra* note 20, at 61. The PRC has been slow to develop a modern copyright law compared with other forms of intellectual property law because of past national policies regarding artistic expression. *Id.* Notions of copyright were antithetical to the Marxist principles promulgated by Mao's Communist regime. Thurston, *supra* note 43, at 53. Although the PRC recognized some copyrights during the period of 1949 to 1976 under the reign of Mao Zedong, these rights were severely limited. *Id.*

The Chinese culture favors access to information. PENDLETON, *supra* note 33, at 5. Therefore, discrimination against a foreign copyright holder is acceptable for a beneficial work. *Id.* Another reason that people's courts may treat foreign parties unfairly is the fear of foreigners that is prevalent in Chinese culture. CHENGSI & PENDLETON, *supra* note 36, at 3. The Chinese people have feared foreign motives since the late 19th century when foreign powers forced open treaty ports for foreign trade and territory. *Id.*

Few citizens of the PRC have knowledge of copyright law. *China Calls for Strict Implementation of Copyright Law*, XINHUA NEWS AGENCY, Sept. 7, 1993. Those who infringe tend to violate copyrights unknowingly. The NCA has conceded that the copyright law is under-publicized and that little respect exists for people's intellectual achievements. *Id.* However, lack of knowledge is not always a viable excuse for copyright infringement. Crothall, *supra* note 95, at 2. A recent case in the PRC involved a literary work by an expert on intellectual property rights protection that was pirated by other authors for an Encyclopedia of Laws on International Protection. The court found for the plaintiff. *Id.*

²⁰⁷ Finefrock, *supra* note 49, at A22. American manufacturers were losing more than \$1 billion annually. *Id.*

discs.²⁰⁸ The U.S. gave China until midnight February 26 to reach an agreement before implementing what would have been the largest trade penalties in U.S. history.²⁰⁹

Breathing a sigh of relief, the two countries reached an agreement just before the deadline expired.²¹⁰ The agreement called for China to toughen its efforts against counterfeiters, particularly establishing a task force to raid counterfeiting plants and destroy pirated goods for a six-month period beginning in March 1995.²¹¹ China also agreed to toughen prosecution and penalties on infringers and stop exportation of pirated goods.²¹² Companies found engaging in software piracy would lose their business licenses for three years.²¹³ U.S. software manufacturers would also benefit from the abolition of quota and licensing requirements earlier imposed by China on software imports.²¹⁴ Finally, China would provide the U.S. with quarterly reports of its actions.²¹⁵

Three months after it signed the agreement with the U.S., China set up a new center under the control of the State Copyright Administration to

²⁰⁸ *Chrysler Van Output in China Is in Limbo*, SACRAMENTO BEE, Feb. 10, 1995, at D15. Beijing also threatened to break off talks with US auto, chemical and drug makers on new joint ventures. Chrysler's disagreements with China over a joint venture to build minivans in the mainland apparently concerned intellectual property rights over engineering and technology which China wanted to use outside the venture. *Id.*

²⁰⁹ *US Negotiators Arrive in Beijing for Crucial Copyright Talks*, AGENCE FRANCE-PRESSE, Feb. 14, 1995, available in Westlaw, 1995 WL 7759413; *China-U.S.: Too Much at Stake for Trade War*, INTER PRESS SERVICE, Feb. 27, 1995, available in Westlaw, 1995 WL 2259216.

²¹⁰ *China-U.S.: Too Much at Stake for Trade War*, *supra* note 209.

²¹¹ *Id.* The precipitating item which turned the talks towards a successful resolution was Beijing's agreement to shut down a factory in Shenzhen that was making counterfeit compact discs. Because the plant was operated by local government officials and had strong ties to the military, Beijing was reluctant earlier to crack down on the operation. *Id.*

²¹² *Id.*

²¹³ *Kantor Scheduled to Visit Beijing to Launch Intellectual Property Deal*, Int'l Trade Daily (BNA), at d4 (Mar. 3, 1995).

²¹⁴ *China Comes to Terms*, SEATTLE POST-INTELLIGENCER, Feb. 28, 1995, at A6.

²¹⁵ *Id.*

regulate protection of software copyrights.²¹⁶ Prior control under Beijing's Electronics Ministry was fraught with conflicts of interest because the ministry itself was a major software producer. The center represents the first single, unified body to control protection of software copyrights; previous protection precariously fell under the concurrent oversight authority of several governmental departments.²¹⁷

However, in late August, U.S. officials began to doubt China's commitment to carry out its obligations under the February accord. Although China had significantly cracked down on piracy of copyrighted materials at the retail level, there was no decline at the distribution or manufacturing level.²¹⁸ For example, a pirated copy of Microsoft's Windows 95 operating system was available several days before the software was to go on the market worldwide.²¹⁹ U.S. officials also cited China's ineffective customs system for failing to block export of pirated products.²²⁰ The more than thirty task forces established to conduct raids on counterfeit operations had taken virtually no action at all.²²¹ The accord's call for an end to quotas had been replaced by a system of informal quotas and other mechanisms hindering market access for U.S. companies such as arbitrary and capricious censorship practices and exorbitant taxation and tariff rates.²²²

The less than satisfactory compliance by China with its obligations under the February accord seems to parallel its performance under the 1992 Memorandum of Understanding after it was designated as a "priority"

²¹⁶ *China Sets Up New Centre for Software Copyright Control*, AGENCE FRANCE-PRESSE, May 31, 1995, available in Westlaw, 1995 WL 7810119.

²¹⁷ *Id.*

²¹⁸ *U.S. Raises Concerns with China on Compliance with Copyright Pact*, Int'l Trade Daily (BNA), at d4 (Sept. 1, 1995) [hereafter *U.S. Raises Concerns with China*]. More than 3,000 retailers had been raided. *Id.* That piracy has declined only at the retail level is quite revealing because the more than two dozen plants manufacturing and distributing counterfeit materials are state-owned whereas the retailers are not. Moreover, China's promises to purchase legitimate software for its government agencies is still just an empty assurance. *China's Intellectual Property Protection Practices Continue to Concern U.S.*, Int'l Trade Daily (BNA), at d11 (Oct. 19, 1995).

²¹⁹ *U.S. Raises Concerns with China*, *supra* note 218.

²²⁰ *Id.*

²²¹ *Id.*

²²² *U.S. Sets Deadlines for China Regarding Compliance*, Int'l Trade Daily (BNA), at d4 (Nov. 30, 1995).

country under the Special 301 trade provision.²²³ U.S. companies are growing increasingly uneasy with Beijing's pattern of hollow promises of toughening copyright protection. With annual losses due to software piracy totaling \$15 billion, American companies may deem withdrawal from China's market as a necessary business decision to cut piracy-related losses. Such action, however, would spell dramatic developmental losses for China on the technology frontier. Beijing urgently needs to re-examine its policy on intellectual property rights protection before it suffers irreparable loss of valuable opportunities for technological advancement.

²²³ See *China Warned to Honor Piracy Pledge or Face Trade Sanctions*, SACRAMENTO BEE, Feb. 4, 1996, at A17 (discussing US admonishment of trade sanctions against China for violation of trade agreement calling for copyright protection).

