Summer 1995

Copyright Law and Software Regulations in the People's Republic of China: Have the Chinese Pirates Affected World Trade

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Cover Page Footnote
International Law; Commercial Law; Law
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I. Introduction

Over the past twenty years, the People's Republic of China (China) has witnessed an explosion of economic development and legal reform. In the process, the issue of international intellectual property rights protection has risen to the political forefront and stirred the landscape of world trade. On February 26, 1995, after eleven days of intensive talks and eight months of negotiations, Chinese and U.S. officials ceased the impending threat of a trade war by signing an agreement which outlines the steps that the Chinese government must take immediately to curb the widespread copyright infringement and piracy of U.S. products. This hallmark agreement between the United States and China will effectively boost bilateral trade and will usher both nations into a new trading era.

U.S. trade officials, optimistic about the agreement and satisfied with the results, are apprehensive that the pact may be rendered ineffective by China's failure to enforce and carry out its provisions—a failure it has shown in the past. Charlene Barshefsky, the Deputy U.S. Trade Representative that headed the U.S. negotiating team, recognized the magnitude of the recent events and remarked that the pact is "the single most comprehensive and detailed intellectual property rights enforcement agreement that the U.S. has ever concluded." Nevertheless, in the same statement she noted that this agreement is only the first step towards building a successful and profitable trade relationship with China.

The road leading to this agreement was not easy. In the beginning, China's weak legal system had an almost nonexistent intellectual property rights system and no framework of laws to protect against violations. Subsequently, as China began to open its doors to international trade, it soon found itself on the brink of its first trade war with the United States because of its inability to protect U.S. goods from the growing number of Chinese intellectual property pirates. On January 17, 1992, the United States and China entered into an agreement, known as a Memorandum of Understanding (MOU). This pact was the first of its kind in recent history to deal with the imposition and enforcement of intellectual property rights within China. Pursuant to this agreement, China made efforts to improve its legal framework for

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1 "China" refers to the People's Republic of China as distinguished from Taiwan or the Republic of China.
2 U.S.-China Reach Accord on 'Pirated' Goods, FACTS ON FILE WORLD NEWS DIG., Mar. 2, 1995, available in LEXIS, News Library, Currents File. The items covered by the agreement include computer software, audiovisual goods, and sound recordings. Id.
3 Id.
4 Id.
5 Id.
6 See infra part V.B.
7 See infra part V.B.
intellectual property rights, including copyright infringement and computer software protection. The Chinese government adopted many of the laws and regulations of the major world players, including such precepts of western law as intellectual property protection.8

In his address to the deputies of the Eighth National People's Congress, Ren Jianxin, President of the Supreme People's Court, reported that recent years have been marked by progress in the legislative and judicial protection of intellectual property rights.9 He added that in addition to joining many international conventions, China has formed a new and modern legal system that protects intellectual property rights and enforces newly adopted international standards.10 Moreover, China has established special tribunals within the Chinese judicial system, such as the new Intellectual Property Court.11 One commentator has suggested that "China has accomplished in a decade what took many countries several decades to achieve: the establishment of a modern intellectual property protection system."12 However, in reality, China has struggled with this new rule of law, and according to U.S. trade officials, many of the initial changes have proven to be inadequate.13

Despite these newly created laws, only a fraction of the violations within China ever made it to Chinese courts; furthermore, the cases that were heard had low success rates, and successful litigants usually did not receive adequate or just rewards.14 This lackluster enforcement by the Chinese government helped to create a widespread epidemic of piracy of U.S. products. Almost twenty months ago, after many failed attempts by U.S. corporations to pursue enforcement and retribution, the U.S. government stepped in to try to contain the conflict between the corporations and the Chinese.

Mickey Kantor, the U.S. Trade Representative (USTR), initiated a

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10 Id.
11 Id. In Ren Jianxin's estimation, the Intellectual Property Court heard 1,662 intellectual property rights-related cases in 1994 alone. Id. The court, actually designated the Intellectual Property Rights Chamber, was formed as a division of the Beijing Intermediate People's Court specifically to handle intellectual property rights cases. See infra part II.C.3.
13 See infra part V.B. According to commentators, China has "never been a dedicated free-trader." Right to Punish China, ECONOMIST, February 11, 1995, at 15. At the end of 1994, after eight years of discussions, China had made so few meaningful reforms that it failed to win a place in GATT or GATT's successor, the World Trade Organization (WTO). Id.
14 See infra part IV.
Special 301 investigation against China on June 30, 1994. In December 1994, in an effort to avoid a multi-million dollar trade war, U.S. trade officials briefly extended the six month deadline prescribed under the Special 301 provision, and on February 20, 1995, Charlene Barshefsky traveled to China to meet with Wu Yi, Minister of Foreign Trade and Economic Cooperation. Because China may constitute the world’s largest remaining potential market for the twenty-first century, this meeting, which led to an agreement on February 26, was one of the most important events in international intellectual property rights in recent history.

The events of the last year have proven that the Chinese are no longer content to exist in an isolationist environment. As a nation, China has begun to take significant steps to ensure both its sovereignty and its integration into the world economy, including membership in the World Trade Organization (WTO). In response, the United States will continue to monitor the Chinese to make sure they are able to comply with the rules of international trade. The recently signed agreement proves that the ability to impose trade sanctions gives the United States the power it needs to maintain this oversight position. China can no longer debate whether respect for law and equal justice

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15 Special 301 is a mechanism provided in the Trade Act of 1974 that allows U.S. trade officials to warn and sanction nations that continue to violate international intellectual property rights. See infra part V.B. Special 301 poses the significant threat of unilateral trade retaliation against countries with inadequate intellectual property protection, and often the mere threat of a Special 301 investigation will persuade a nation to accede to U.S. demands. Brent Sadler, Intellectual Property Protection Through International Trade, 14 Hous. J. Int'l L. 393, 413-15 (1992).


17 Summary, supra note 16. These talks began on the “official” level in Beijing on February 13, 1995, after nine days of previous negotiations which had ended unsuccessfully on January 28, 1995. Id.

18 See supra note 2 and accompanying text. Wu Yi acknowledged that many Chinese officials have privately hoped that the U.S. would be able to ensure enforcement of China's copyright laws. Making War on China's Pirates, Economist, Feb. 11, 1995, at 33. However, these officials also are concerned about China's ability to maintain its national sovereignty. Id. at 33-34.

19 Janiece Marshall, Current Developments in the People's Republic of China: Has China Changed?, 1 Transnat'l Law. 505, 506-07 (1988). China's policy of isolationism, in the past, has been reinforced by a deep-seated commitment to traditionalism which ultimately prevented any foreign country from having a meaningful impact on the Chinese economy. Id. In 1978, the Third Plenary Session of the 11th Party's Central Committee of the People's Republic of China adopted a policy of reform and opened China's doors to the outside world—the "Open Door" Policy. Id. at n.1.

20 One of China's primary motivations in coming to terms with the United States over intellectual property rights has been to get U.S. support for their entry into the WTO, which came into being as the successor of GATT on January 1, 1995. This desire on the part of the Chinese government has proven to be a major bargaining tool for the U.S. government. See supra part V.C.
will hinder its incredible economic growth, but instead must use its efforts to enforce the laws and strengthen the new legal framework designed for the protection of international intellectual property rights.

This Comment will discuss the development of the Copyright Law and Software Regulations in China and how these laws have affected international trade. Part II will begin by exploring the 1991 Copyright Law, which emerged amidst political reforms and economic changes as China began to break from a culture which has historically avoided recognition of property rights and mistrusted intellectuals. Part III will analyze the Software Regulations, a supplement to the 1991 Copyright Law, which have grown from the multitude of issues that continue to surround this dynamic and technical industry. Part IV will begin to tie these two important pieces of legislation together through a discussion of recent cases and decisions that have arisen from the enforcement of these new laws within China. Part V will discuss how these new laws and the Chinese government's inability to enforce them has affected the trade relationship between the United States and China and the international trade environment as a whole. Part VI will conclude with a discussion on how past and recent events will shape the scope of international trade and intellectual property rights protection for the United States, China, and other major countries around the world for many years to come.

II. Copyright Law

A. Introduction

It was not until recently that a Western lawyer had to concern himself with Chinese intellectual property laws when doing business in China. Copyright protection, in particular, was basically nonexistent, because the laws were loosely constructed and rarely enforced. During recent legal reforms, copyright law was the last area addressed by the government, despite historical evidence which credits the Chinese with being the first people to produce printed material by using movable

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22 All references to Chinese legal documents in this comment, including the 1991 Copyright Law and the Software Regulations, are taken from English-language secondary sources. Note that the official Chinese-language documents are the authoritative versions of these legal documents.
23 See Brian Barron, CHINESE PATENT LEGISLATION IN CULTURAL AND HISTORICAL PERSPECTIVE, 6 INTELL. PROP. J. 313, 330 (1991). According to this commentator, [t]he concept of individuals holding exclusive rights in an article of intellectual property, as well as the 'money-seeking' tendencies and excessive individualism such rights might foster, are troublesome for a society with a traditionally low tolerance for rapacious profit-seeking and a long political tradition favouring state control over individual enterprise.

Id.
type on manufactured writing paper. Until the emergence of China's "Open Door Policy" in the early 1980s, the Chinese cultural and political systems served as barriers to an effective intellectual property protection system. Although copyright law dates as far back as 1068, with the rise of printing during the Tang Dynasty, formal laws often have been little more than superficial because enforcement of such regulations was not a priority for the Chinese government. However, the impetus toward reform has begun. Over the last fifteen years, the relationship between the Chinese government and Chinese intellectuals has improved and may prove to be an important catalyst for change in the international trade arena.

In an effort to recognize the rules and needs of the world's most prominent trading countries, China has gone to great lengths to incorporate accepted international copyright norms into its new copyright laws. In addition to drafting innovative and modern legal language, China joined major international treaties and organizations that require member countries to adopt certain laws and regulations. For example, as of October 1992, China had joined both the Universal Copyright Convention and the Berne Convention for the Protection of Literary and Artistic Works administered by the World Intellectual

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25 Xiao-Lin, supra note 12, at 1118.
26 Durney, supra note 24, at 312 (citing Guo Shoukang, China, in 1 International Copyright Law and Practice § 1[1] (Paul Edward Geller ed., 1992)).
27 One of the primary reasons that it took so long to formulate a Chinese copyright law was the long history of mistrust between the state and Chinese intellectuals. Mark Sidel, Copyright, Trademark, and Patent Law in the People's Republic of China, 21 Tex. Int'l L.J. 259, 288 (1986). Following the end of the Cultural Revolution in 1976, the relationship between the two groups improved, and China was able to promulgate strong intellectual property laws. Id. at 288-89.
28 Universal Copyright Convention, July 24, 1971, 25 U.S.T. 1341, 943 U.N.T.S. 178 [hereinafter UCC]. The UCC is administered by the United Nations and provides minimum standards for adequate and effective copyright protection. Id. at art. I. Under the UCC, authors enjoy the rights to the reproduction (by any means), public performance, and broadcasting of their works. Id. at art. IV. The term of protection for works under the UCC is the life of the author plus twenty-five years. Id. The treaty protects the rights of authors in literary, scientific, and artistic works, including writings, paintings, engravings, sculpture, and musical, dramatic, and cinematographic works. Id. at art. I. Finally, an author enjoys these rights in his own territory and that of any contracting state that is a member of the UCC. Id. at art. II.
29 The Berne Copyright Convention refers to the Convention for the Protection of Literary and Artistic Works, signed at Berne, Switzerland, on September 8, 1886. The Convention provides two principal conditions:
1) That Berne Union authors enjoy, for works protectible under the Convention, in Union countries "other than the country of origin," the rights which their respective laws grant to their nationals (reciprocal national treatment), as well as the rights "specially granted" by the Convention; and 2) That the enjoyment and exercise of such rights "shall not be subject to any formality." Thomas T. Moga, Recent Intellectual Property Developments in Japan, Taiwan, and China, 70 U.
B. History

1. 1910-1949: The Road to Mao and Communist China

Historically, China has been credited with dominating world progress in scientific and technological areas. However, a rigid culture and the prevalence of Confucian ideology, which places a strong emphasis on development for the good of society rather than personal reward, hindered China from reaping the economic benefits of intellectual discoveries or breakthroughs. Very early on, China was placed on a vastly different course than its western counterparts, one immersed in a sense of superiority that stunted economic growth. This same ideology forced the Chinese to focus on the value of public recognition and not on a standard of legal protection for intellectual property. For many decades, any significant economic development...
in China was hindered by a deeply-rooted resistance to modernization because of its perceived association with "foreignism," a cultural ideology based on traditionalism and isolationism, and an avoidance of the concept of individual property rights. Ultimately, this Confucian ideology, set against the backdrop of foreign exploitation and a preeminent state interest, led to the welcoming of the Marxist economic system later introduced by the Chinese Communist Party.

Historically, the legal system in China was centered around the Emperor and was based on a blend of dynastic codes with Confucian ethical principles. The Confucian ethical system was not based on conflict resolution, but instead focused on a system of conciliation and compromise in which a neutral observer (judge) would make a unilateral decision based on the relevant evidence presented by the feuding parties. Each dynasty promulgated their own codes of law. In 1910, the first of three copyright statutes was enacted by the government of the Qing Dynasty during the reign of the last feudal emperor, Xuantong (1909-1912). The Copyright Law of the Great Qing was comprehensive, with fifty-five articles in five chapters protecting works of literature and art, pamphlets, calligraphy, photographs, sculptures, and models. The law stated that any party convicted of counterfeiting a work created by another or willfully selling counterfeited works would be fined and required to compensate the artist for damages, and the government would confiscate the plates and other instruments used to counterfeit the works. However, this extensive law was never implemented completely because the Qing Government subsequently was overthrown by the Northern Warlords Government (1912-1927) who revised the statute in 1915. In 1928, the last formal copyright statute was promulgated by the Nationalist (Guomindang) Government (1912-1949). This law remained in effect until 1949, when the Chinese Communist Party rose to power and destroyed all existing

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37 Marshall, supra note 19, at 507.
38 Harrington, supra note 8, at 342. See also Barron, supra note 23, at 326-27; Beaumont, supra note 36, at 44.
40 ERIC LEE, COMMERCIAL DISPUTES SETTLEMENT IN CHINA ch. 1 (1985).
41 Durney, supra note 24, at 314.
42 Song Muwen, Letter from China, 27 ZHUZUOQUAN [COPYRIGHT] 43 (1991). The works not protected are laws, orders, official documents, speeches delivered at various religious ceremonies, news on politics and current events published in newspapers, and public speeches. Id.
43 Id. at 44. Also, anyone who distorted or mutilated a work created by another, or distributed a work without mentioning the name of the author or the title of the work would be fined. Id. The law also provided for ownership of the copyright, inheritance of the copyright, works of joint authorship, commissioned works, oral works, and translations. Id.
44 Durney, supra note 24, at 314.
2. 1949-1979: The Road to the Cultural Revolution

In 1949, Mao Tse-tung took control of China and expelled two forces crucial to intellectual property development from the state: (1) all foreign influence, and (2) any formal copyright law. The Communist Party promised the people a better life by freeing China from its economic backwardness and lack of modernization. The new government made many changes in the laws and economic structure; as a result, the law and the judicial system became secondary to state interest and government policy. By the 1950s, copyright provisions in China existed primarily as administrative orders or internal regulations that merely governed the system of remuneration between authors and publishers. In 1950, the new government implemented Article 17 of the Resolution on the Improvement and Development of Publishing Work, which was adopted at the First National Publishing Conference in Beijing in October 1950. This Article stipulated that the rights of publication and copyright were to be respected such that the acts of unauthorized reprinting, plagiarism, and mutilation were prohibited. Sometime later, the Resolution on the Correction of Unauthorized Reprinting of Books was issued by the National Publishing Administration Organization, and it prohibited unauthorized reprinting of books and pictures by any institution.

However, these publishing regulations were ad hoc, informal, limited, and in no way as expansive as their copyright predecessors. During the Communist reign, the concept of law in China was weak, and there were neither administrative mechanisms in place to enforce

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46 Sidel, supra note 27, at 261 (citing SHEN REN’GAN & ZHONG YINGKE, BAN-QUANFA QIUANTAN [A DISCUSSION OF COPYRIGHT LAW] 100-04 (1982) (this author’s translation of title) (Chinese copy on file with the Texas International Law Journal)).
48 Marshall, supra note 19, at 508.
49 See Roy J. Girasa, Legal Aspects of Doing Business in China, 20 WESTCHESTER BAR J. 305 (1993), available in WESTLAW, Jlr Database. After the Communist Party abolished all laws enacted by the previous government, judges were forced to decide any new cases in accordance with governmental policy. Id. at *2. From 1958 to 1966, no laws were passed, but 420 decrees were enacted. LADANY, supra note 39, at ch. 3.
50 Yiping, supra note 45, at 263.
51 Sidel, supra note 27, at 261.
52 Muwen, supra note 42, at 44.
53 Id. This organization was created by the Chinese government to ensure that the legitimate rights of authors were to be respected and the copyrights were to be protected from illegal use. Id. The government hoped that this protection and the guarantee of fixed salaries would provide a more creative climate for its authors. Id. Unfortunately, this system of remuneration and reward was dismantled during the Cultural Revolution. Id. See supra part II.B.2.
the copyright regulations nor remedies to apply to violations.\textsuperscript{55} In reality, according to international standards, China did not possess a true copyright law until 1990.\textsuperscript{56} Therefore, since Communist China lacked both a developed legal system and a formal copyright law for forty-one years, incidents of intellectual property piracy were abundant.

Although intellectual property rights laws were not strictly enforced by the Chinese during these years, they did not ignore the subject completely. Over the next decade, out of concern for authors and their protection, the government developed a system of publishing contracts to regulate the relationship between authors and publishers.\textsuperscript{57} New contract-based regulations on book and periodical publishing and printing granted citizens remuneration for their creativity.\textsuperscript{58} For example, a per-word and per-copy royalty system was formulated for authors and publishers.\textsuperscript{59} Yet in 1957, Chinese culture and Confucian ideology regained prominence, and Chinese officials reduced the per-word and per-copy royalty payments to authors and translators in order to bridge the income gap between mental and manual labor.\textsuperscript{60} Ultimately, this contract system failed to protect copyrights because it could not control unauthorized reproduction by third parties effectively.\textsuperscript{61} These regulations and remuneration standards were dismantled completely during the ten-year long Cultural Revolution.

During the Cultural Revolution of 1966-1976, the state blocked the production of any new creative work in China, once again evidencing a policy towards intellectuals of mistrust and antagonism. The works previously protected under the contract system for copyrights were taken over by the government, and the rights to publish and receive royalties were abolished.\textsuperscript{62} These actions led to widespread infringement and left intellectual property protection in disarray.

\section*{3. 1977-1986: On the Road to Copyright Protection}

Following the Cultural Revolution, China was faced with a faltering economy and an ineffective and unproductive bureaucratic system plagued by unfulfilled demand and an overall dissatisfaction with the
state of affairs. After Mao's death in 1976, the new Communist leaders, Deng Xiaoping and his allies, began a course for change that rested on the belief that China would never reach economic equality with the western world without increased application of modern technology to all sectors of the economy. The Constitution of China, promulgated in 1982, stipulated in Article 47, Chapter 2 that the state would support and encourage all citizens to create works that were conducive to the development of culture and science and that were beneficial to the interests of the country. China began to develop new intellectual property laws that reflected the efforts of a nation trying to restructure its economic system.

To facilitate foreign investment, China was forced to recognize the value of a legal and economic system based on individual wealth; as a result, the government began to create a more stable legal system for the protection of intellectual property rights. Also, as the People's Congress became invigorated, legislation was passed which gave credibility to the "new rule of law" in China. The Ministry of Justice was reestablished in 1979, and new laws began to reflect China's entry into the global marketplace. China "essentially abandoned Marxist economics in favor of a dual system . . . , a one-party autocratic political system, coupled with a government-assisted free market economy." During these transitional years, the government began to formulate the first drafts of the long-awaited Copyright Law of 1991.

Prior to the promulgation of the Copyright Law, the Chinese government issued one of its most important administrative regulations, the 1984 Regulation, which soon was adopted by the National Copyright Administration of China (NCAC) and the Ministry of Culture. The Regulation embodied the principle of "to each according to his labor," as stated in Article I, and it was designed to foster intellectual creation by protecting the legitimate rights of authors and translators. The right of publication, the right of translation, the ownership of copyrights, and even the protection of the economic rights of for-

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63 See Marshall, supra note 19, at 508 n.14.
64 Id. at 509.
65 Muwen, supra note 42, at 44. The Chinese government offered artists and writers appropriate jobs and fixed salaries, which became their basic guarantee of livelihood and renumeration and encouraged the creative climate. Id.; see also XIANFA [Constitution] ch. 2, at art. 47 (1982) (P.R.C.).
66 Marshall, supra note 19, at 527-28 n.150.
67 See Girasa, supra note 49, at *2.
68 Id. (citing DU XICHUAN & ZHANG LINGYUAN, CHINA'S LEGAL SYSTEM: A GENERAL SURVEY 22 (1990)). By reestablishing the Ministry of Justice, a judicial office within the Chinese system of government, the state reignited the People's Congress and the interest in legislation and law-making. Id. The entire movement signalled that the Chinese government was now ready to interact with global and local forces on a modern and more widespread scale. Id.
69 Id. at *1.
70 Muwen, supra note 42, at 45.
71 Id.
eigners were included within this administrative order. However, with the rapid changes taking place within China, this regulation was soon ineffective to meet ever growing demands. In 1979, with prodding and support from the Chinese government, a Copyright Study Group was developed within the Publishers Association of China to analyze the primary international copyright conventions and copyright laws of other major countries.

In July 1985, the NCAC was given the power to facilitate the progress of modern copyright legislation. The group became responsible for a draft of the new law, administration of the copyright procedures, collection and dissemination of copyright knowledge, and the handling of international concerns on behalf of the Chinese government. In 1986, the first draft of the new law was submitted for review to the Bureau of Legislative Affairs of the State Council, and after several revisions, the Director General of the NCAC successfully pushed the draft law through the Standing Meeting of the State Council on December 14, 1989. Shortly thereafter, the draft was submitted officially to the 11th Session of the Standing Committee of the Seventh National People’s Congress where it was reviewed and adopted.

Two major legal bases for this copyright legislation were the General Principles of the Constitution and the General Principles of the Civil Code. First, Articles 19 through 24 of the General Principles of the Constitution outlined that the state has a right to develop and protect scientific, cultural, and educational developments. Along these lines, the state should encourage and assist citizens in research and creations that ultimately would benefit the state. Second, in 1986, the Fourth Session of the Standing Committee of the Sixth National People’s Congress passed the General Principles of the Civil Code, which provided special legal rights to the authors of literary, artistic, and scientific works. Specifically, Articles 94 and 118 stated that citizens and legal entities are granted copyright protection, including the

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72 Id.
73 Id. This group was responsible for analyzing the international copyright laws and treaties in order to draft a more comprehensive copyright law in China. Id.
74 The National Copyright Administration of China (NCAC) was established by the State Council, the highest administration in China, to promote the progress of the copyright law. Id.
75 Id.
76 Id.
77 Id. During this process, the NCAC established long-term cooperative relations with the WIPO and other international organizations concerned with copyright protection as well as the copyright institutions of a number of countries. Id. A friendly relationship developed during the process of copyright legislation. Id.
79 Id.
80 Muwen, supra note 42, at 46; see also General Principles of the Civil Law, Law No. 346 (1986) (P.R.C.), available in LEXIS, Asiapc Library, Chinal File.
right of authorship, the right of publication, and the right to receive remuneration thereof.\textsuperscript{81} Any infringement of such rights required the cessation of the infringing act, the elimination of the effects of the infringing act, and compensation to the artist for damages incurred.\textsuperscript{82}

As the creation of the official Copyright Law of China drew closer, it became clear that the underlying impetus for the legislation was a modern blend of the promotion of socialist culture and scientific advancement through the protection of legitimate rights of individual creators.\textsuperscript{83} In addition, the promulgation of an effective copyright law would facilitate the exchange of technology between China and other major western countries, a result China seemed very eager to achieve within its new socialist modernization movement. In its final form, the new Copyright Law of China appears to have satisfied many of these goals.

C. The Copyright Law of China
   1. In General

   The Copyright Law of China (Copyright Law or Law) was formally introduced after twenty drafts and eleven years.\textsuperscript{84} According to one Chinese scholar, the new law is "likely [to be] the most up-to-date and perhaps the most fair copyright legislation in the world."\textsuperscript{85} From its inception, the Copyright Law has been a mix of politics and ideology. The law has attempted to provide private rights for a socialist purpose within the context of a socialist government framework and a fledgling market economy.\textsuperscript{86} In its current form, the new law should be equal or even superior to the copyright laws of other developed nations, because many of the precepts, standards, and needs of the world's major players have been integrated in its creation.\textsuperscript{87}

   At the present time, the official Copyright Law of China contains six chapters with fifty-six articles. The Law took effect together with the NCAC's Implementing Regulations on June 1, 1991.\textsuperscript{88} The Implementing Regulations themselves contain seven chapters and fifty-six articles.\textsuperscript{89} Within the six chapters of the Copyright Law, nine categories

\textsuperscript{81} General Principles of the Civil Law, supra note 80, at arts. 94, 118.

\textsuperscript{82} Id.

\textsuperscript{83} Muwen, supra note 42, at 46.

\textsuperscript{84} Durney, supra note 24, at 315; see Chinese Copyright Law, arts. 1-56 (1991) (P.R.C.), reprinted in Copyright and Neighboring Rights Laws and Treaties, supplement to 27 COPYRIGHT, 2-01 p.1 (No. 2, Feb. 1991) [hereinafter Copyright Law].


\textsuperscript{86} Durney, supra note 24, at 315.

\textsuperscript{87} See supra part II.A. The major rules and regulations of the world's most prominent countries were incorporated into the Chinese Copyright Law both independently and through Chinese membership in a number of the international trade organizations. See supra part II.A.

\textsuperscript{88} Durney, supra note 24, at 315.

\textsuperscript{89} Id.; see Implementation Regulations to the Copyright Law, art. 1 (1991) (P.R.C.) re-
of works are protected.\textsuperscript{90} In general, under Article 21, an author of a work, whether an individual, legal entity, or an entity without legal personality, will enjoy copyright protection, which under the new law is inheritable, for the author’s lifetime plus fifty years.\textsuperscript{91} Each author of a joint work may claim copyrights independently for the sections that author individually created, but the exercise of an individual copyright claim cannot infringe upon the joint work’s overall copyright.\textsuperscript{92}

Currently, there are four provisions within the Copyright Law that are exempt from any form of enforcement procedures. First, Article 16 protects “works-made-for hire” or works created in the course of employment and ensures that authors of certain occupational works may retain signatory rights as well as the economic rewards of publication.\textsuperscript{93} This Article extends to any author, whether a citizen, legal entity, or entity without legal personality at the work’s creation, and any name that is mentioned in connection with a work will be deemed to be an author of the work with full copyright protection.\textsuperscript{94} As for ownership of a work produced in the course of employment, the Copyright Law stipulates that when a work is made primarily from the material and resources of the employing entity, it belongs to that entity and the work unit will have priority for use; however, the right of authorship remains with the person who has created the work.\textsuperscript{95} The author has the right to exploit his work within the scope of his professional activities, but for two years after completion of the work the author may not authorize a third party to use the work in the same way as the entity without the entity’s consent.\textsuperscript{96} By handling the situation with a dual analysis, the government stimulates both the author’s creativity and his professional innovation.

Second, the Law protects the moral rights of authors and creators. The current Chinese Copyright Law seems to offer a level of “moral protection” at least equal to that provided by the comparable intellectual property laws of the world’s major economic powers, including the United States, because it covers almost all that is stipulated in the

\textsuperscript{90} The nine categories protected under the new Law are as follows: (1) written literary works; (2) orally delivered works; (3) musical, dramatic, \textit{quyi} (or Chinese folklore/traditional art forms), and choreographic works; (4) works of fine art and photographic works; (5) cinematographic, television, and videographic works; (6) drawings of engineering designs and product designs; (7) maps, sketches, and other graphic works; (8) computer software (which is formulated separately by the State Council, see infra part III); and (9) other works as provided for in laws and administrative regulations. Muwen, supra note 42, at 47 (citing Copyright Law, supra note 84, at art. 3).

\textsuperscript{91} Id. (citing Copyright Law, supra note 84, at art. 21).

\textsuperscript{92} Id. at 48.

\textsuperscript{93} Yiping, supra note 45, at 265; see Copyright Law, supra note 84, at art. 16.

\textsuperscript{94} Muwen, supra note 42, at 48; see Copyright Law, supra note 84, at art. 11.

\textsuperscript{95} Muwen, supra note 42, at 48 (citing Copyright Law, supra note 84, at art. 16).

\textsuperscript{96} Id.
In essence, laws that protect an author’s “moral rights” are concerned with the integrity of the author, and deal specifically with the protection against actions by parties which would directly or indirectly injure the author’s reputation or challenge his honor.98

Third, the Law protects economic rights. Article 10 outlines the five basic personal and property rights which are protected: (1) the right of publication, (2) the right of authorship, (3) the right of alteration, (4) the right of integrity, and (5) the right of exploitation and remuneration.99 Article 10(5) specifically governs the economic rights of authors, stating that an author has the “right to exploit his work by reproduction, live performance, broadcasting, exhibition, distribution, making cinematographic, television, or video production, adaptation, translation, annotation, compilation and the like, and the right to authorize others to exploit his works with aforementioned methods and receive remuneration therefrom.”100 As discussed previously, Article 21 allows the economic rights granted under Article 10(5) to exist during the author’s lifetime, plus fifty years after death.101

Finally, the Law contains “fair” or “free” use provisions, which are exceptions or limitations to the listed rights. Article 22 sets forth the twelve fair uses of copyrighted works for which a user does not need to obtain permission or pay any of the normally required remunerations.102 These provisions apply equally to authors, publishers, performers, producers of sound and video recordings, and radio and television stations.103

The “fair use” provisions are an attempt by the state to aid in the cultural and educational development of the population and to encourage the rapid social and economic development of China.104 Nevertheless, the provisions have been interpreted quite broadly, causing concern among developed countries around the world, particularly the United States. For instance, Article 22(7) approves the use of published works by state organs when carrying out their official duties.105 As a result of the way the Chinese society is organized, there are a
multitude of state-owned entities that are associated with "state organs." Thus, the dominance of the state in China's economic organizations may erode effective copyright protection if the fair use provisions are construed too broadly.

In addition, Article 22(6) deals with the translation of foreign language works into Chinese when used for classroom teaching or scientific research. While Article 29 provides that a translation may not "unreasonably impair" the legitimate rights of copyright owners, this may not be sufficient to protect foreign copyrighted works in all situations. The subject of foreign copyrighted works translated into Chinese has long been a subject of interest, and in the early 1980s concern for this issue grew as the Chinese demand for foreign materials increased. For example, in the 1980s, foreign professors were coming to China to teach certain social science courses associated with the development of a market economy, and China suffered a shortage of textbooks which led to the widespread unauthorized translation and publication of foreign university textbooks. In 1990, experts estimated that the piracy of American textbooks resulted in losses of $1 million annually.

Finally, material may be reprinted by newspapers or magazines, or used in professional performances, audio recordings, radio or television programs, without permission as long as the proper usage fees are paid. Under Article 48, if a copyright owner does not want his work to be performed or used to make a sound recording or a radio or television program, he must make it known at the date of publication or declare his intent in the Copyright Gazette published by the NCAC; otherwise, a third party may exploit the work without permission.

2. International Standards and Effects

Article 2 of the Copyright Law provides that any works of Chinese citizens, legal entities, and entities without legal personalities are automatically subject to copyright protection under the Law whether or not the works are published. However, at the time the Copyright Law

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106 Yiping, supra note 45, at 279. Some critics, however, do not agree that the state organ exemption will expand the scope of the fair use provision beyond reasonable means, and instead assert that the provision merely reflects the traditional state supremacy concept that has always dominated the Chinese political system. Id. at 280.
107 Copyright Law, supra note 84, at art. 22(6).
108 Id. at art. 29.
109 Yiping, supra note 45, at 281.
110 Id.
112 Copyright Law, supra note 84, at arts. 32, 35, 37, 40.
113 Id. at art. 48.
114 Id.
115 Id. at art. 2.
went into effect, it only protected works by foreign entities if they were published in China first. Under Article 25, Section 3 of the Implementation Regulations to the Copyright Law, a book published outside China will receive automatic copyright protection if it is also published in China within thirty days of the initial foreign publication.116 As a result, the United States disapproved of the original version of the Copyright Law, because the protection provided to foreign works was not as strong as that found in the Berne Convention.117 In response, the United States threatened trade sanctions and put China on the Special 301 "priority watch list."118

At the last minute China folded under U.S. pressure and signed a Memorandum of Understanding (MOU) on January 17, 1992.119 The MOU became a bilateral agreement on copyright when President Bush proclaimed under 17 U.S.C. § 104(b)(5) that the MOU would give reciprocal copyright protection to U.S. authors in China.120 President Bush made the announcement only after the Chinese government assured him that the works of U.S. entities would receive the same automatic protection that Chinese entities receive under the Copyright Law, even when the works are first published in the United States. Pursuant to the MOU, China joined the Berne Convention on October 15, 1992, and the Universal Copyright Convention fifteen days later.121 China answered the question of automatic protection within its country by joining the Berne Convention and the Universal Copyright Convention.

Today, in China, a foreign work will automatically gain copyright protection whether or not it is initially published in China. Also, under the new regulations, a work will be protected regardless of the country in which the work is first published if that country and China either have an express agreement or are both parties to an international copyright convention.122 In addition, in an effort to close the gaps between the requirements of the Berne Convention and the Chinese Copyright Law, the State Council of China issued the Interna-

116 Implementation Regulations, supra note 89, at art. 25(3).
117 Durney, supra note 24, at 315-16. At that point in time, China was not a member of the Berne Convention. Id.
118 Special 301 is a device used by the U.S. Trade Representatives (USTR) to identify foreign countries that do not have acceptable intellectual property rights protection. A country that is placed on the "priority watch list" is one that has initially been warned, but has failed to comply with the U.S. demands thereafter. By placing a country on the "priority watch list" the United States hopes to encourage the nation to change its habits before any major trade sanctions must be imposed. See infra part V.B. The Bush administration, which created the "watch list," was able to circumvent the mandatory retaliation provisions of Special 301 to give trade negotiations more flexibility. Sadler, supra note 15, at 416-17.
119 Durney, supra note 24, at 316.
120 Id.
121 Yiping, supra note 45, at 264-65.
122 Id. This is in conformity with Article 3(4) of the Berne Convention.
tional Treaties Implementation Rules (International Rules), which provide in part:

1. Foreign works that are covered by the Berne Convention or a bilateral treaty are protected, whether published or unpublished.
2. Foreign works of applied art are protected for twenty-five years from the date on which they are made.
3. Foreign computer programs are protected as literary works for a term of fifty years from the end of the year of the first publication. No registration of foreign computer programs is required before instituting a lawsuit.
4. Translating a foreign work originally created in Chinese to the language of a minority national requires prior permission of the copyright owner. This translation under the 1991 Copyright Law is a fair use.
5. Rights given by the 1991 Copyright Law to radio and television stations to broadcast sound recordings, and rights given to periodicals to reprint works from other periodicals, exclude foreign works.
6. The P.R.C. [People's Republic of China] must give foreign copyright owners the exclusive right to "import" their copyrighted works.123

Inconsistencies between the Berne Convention and the Copyright Law are resolved under Article 142 of China General Principles of Civil Law.124 Finally, under Article 17 of the International Rules, there can be no retroactive liability for infringement before the Copyright Law or the Implementing Regulations were enacted.125

3. Enforcement and Remedies

Unlike other copyright laws, the Copyright Law of China spells out the acts that are infringing. Specifically, there are five actions that are considered to be copyright infringements: (1) publishing a work without the consent of the copyright owner; (2) publishing a work of joint authorship as a work created solely by oneself, without the consent of the other co-authors; (3) having one’s name mentioned in connection with a work created by another; (4) distorting or mutilating a work created by another; and (5) exploiting a work without the consent of the copyright owner as prescribed by regulations.126 Under the law, violators are subject to civil liability which requires cessation of the infringing act, elimination of the effects of the act, and a public apol-

124 Durney, supra note 24, at 318 (citing Zheng, supra note 123, at 35).
125 Id. at 318-19 (citing Yang Xiaoguang, Protection of Intellectual Property in the People's Republic of China, 7 WIPR 78, 80-81 (1993)).
126 Muwen, supra note 42, at 50 (citing Copyright Law, supra note 84, at art.45).
ogy and/or compensation for damages. However, if the violations are deemed to be more egregious in nature, then the remedies include administrative penalties such as confiscation of any unlawful income from the infringing act and imposition of a fine.

As China continues to grow in both size and economic sophistication, the system of copyright protection will require more than one method in which to remedy violations. Article 48 of the Copyright Law outlines that individuals and entities can pursue copyright infringers in three ways: mediation, administrative proceedings, and civil litigation. Of these three methods, mediation has traditionally been the most common proceeding in copyright cases, but as China continues to move towards a market economy there may be a surge in arbitration and litigation. In 1979, the current civil law system was reestablished as a mix of socialist ideology, ancient practices, traditional values, and modern legal principles after years of latency; as a result, the Chinese Civil Procedure Law did not become effective until April 9, 1991. Given the short period of time that the Copyright Law and the civil law court system have been active, any civil litigation by foreign companies is likely to be decided by inexperienced judges unsure of the law and the direction in which it is developing. Because the Chinese courts have little experience deciding these cases, they undoubtedly will have a difficult time determining the amount of damages to be awarded even if infringement is found.

There are many problems associated with bringing a case to trial in China's judicial system. The first is collecting the evidence. The party whose rights are being violated often must resort to raiding the infringing parties' premises and seizing the illegal material in order to have concrete proof of piracy to present as evidence. Next, a for-

127 Id.
128 Id. Such aggravating violations are as follows: (1) plagiarizing a work created by another; (2) reproducing and distributing a work for commercial purposes without the consent of the copyright owner; (3) publishing a book where the exclusive right of publication belongs to another; (4) infringing on the legitimate rights, as prescribed by the Law, of publishers, performers, producers of sound recordings or video recordings, and broadcasters; and (5) producing or selling a work of fine art upon which the signature of the artist is counterfeited. Id. (citing Copyright Law, supra note 84, at art. 46).
129 Copyright Law, supra note 84, at art. 48. See also Durney, supra note 24, at 323; Muwen, supra note 42, at 50.
130 Durney, supra note 24, at 323.
132 Id.
133 Id.
135 Susan Orenstein, More Than Mickey Mouse Enforcement, RECORDER, July 7, 1994, at 1, available in Lexis, News Library, News File. For example, Walt Disney hired a Chinese investigative firm to gather evidence against pirates it was planning to sue in a Chinese court. Id. But the firm did not complete the job, so Disney had to use its own employees to raid stores on the streets of Beijing to confiscate incriminating evidence. Id.
eign firm must use local Chinese Deacons and local lawyers, because foreign lawyers are not allowed to practice before the Chinese courts.136 This can be quite frustrating since local Chinese lawyers are often under-trained in intellectual property rights laws because these laws are new and technical in nature.137

Su Chi, Chief of the Copyright Court, has said that the Chinese court will treat both foreign and Chinese parties on the basis of fair judgment, and that all judgments will be made without subjectivity and according to strict interpretation of China's civil prosecution and copyright laws.138 At this point, in theory, litigants have equal chances to have their case heard without the threat of illegal interference.139 Yet, despite these procedures, both foreign and domestic litigants frequently have been dissatisfied with the legal system and the level of fines assessed in intellectual property cases.140

With the massive changes in intellectual property rights protection, China has set up a specialized intellectual property tribunal, the Intellectual Property Rights Chamber, affiliated with the Beijing Intermediate People's Court. Since 1993, the Chamber has adjudicated more than seventy cases, the majority of which have been software cases, and settled another forty.141 Moreover, in early July 1994, the National People's Congress established copyright courts in Beijing, Shanghai, Guangdong, Hainan, and Fujian.142 In September 1994, China also instituted its first "national intellectual property rights watchdog," a nongovernmental center in Beijing, known as the United Intellectual Property Protection Center, whose function is to protect anyone "whose trademark, brand name, insignia, patent, copyright, know-how or other intellectual property is nationally or internationally

Also, in June 1994, the Business Software Alliance and the Beijing International Property Rights Chamber had to jointly raid five companies in order to seize illegally pirated goods for evidence in a copyright infringement suit brought by three major U.S. software companies. Software Firms Sue Chinese Over 'Pirates,' LEgal intelligence, July 28, 1994, at 11, available in LEXIS, News Library, Curnws File.

136 Orenstein, supra note 135, at 1.

137 Id. Furthermore U.S. lawyers say some of the biggest problems with pursuing a lawsuit in China's court system is the history of the legal system: (1) there is a lack of legal training among judges, (2) state officials still interfere in lawsuits, and (3) judges are paid low salaries which makes them susceptible to bribes. Uli Schmetzer, China Taking the Wind out of Copyright Pirates' Sales, CHi. TPiB., Aug. 10, 1994, at 1.


139 Id.


recognized." The center's primary function is to monitor the enforcement of intellectual property rights nationally and regionally. It also aids in the legal adjudication of infringement cases for both domestic and foreign clients by conducting investigations, gathering evidence, and filing lawsuits in more than twenty-six provinces, municipalities, and autonomous regions within China.

The private sector of China is getting involved in the fight against intellectual property rights infringement as well. For example, in July 1993, a group of Hong Kong professionals joined in a Beijing-supported joint venture consulting group, entitled Intellectual Property Protection Services, to provide businessmen with guidance on how to protect their intellectual property rights. The group has assisted such well-known clients as Walt Disney and Burroughs Wellcome.

When a foreign party decides to pursue administrative arbitration, the NCAC is responsible for investigating and deciding the degree of copyright infringement, but it is often uncertain exactly how these administrative proceedings will operate. Generally, in an administrative proceeding, remedies for infringement violations include a public apology, compensation, and in some cases confiscation of the unlawful income, injunctions, public warnings, jail time, and fines. A party dissatisfied with the administrative penalty assessed in arbitration has three months to appeal the decision. In early July 1994, the National People's Congress increased the maximum prison term for copyright violations from five to seven years plus fines, and new laws state that trademark violators may be subject to the death penalty in certain situations.

III. Computer Software

A. Introduction

As technology has advanced, the concern of U.S. software compa-
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nies has called attention to the inefficiencies of China’s current laws governing the protection of software copyrights. The need to consider the protection of computer software is relatively new. It has come about only with the development of low-cost personal and microcomputers, and with the creation of application programs not linked to a given piece of hardware but programmed as commodities themselves.\textsuperscript{153} After these developments, it did not take long for a need for legal protection to arise. Software piracy in China reached epidemic proportions in the 1980s. In 1988 alone, it is estimated that U.S. businesses lost upwards of $300 million as a result of computer software piracy in China.\textsuperscript{154} Since that time, unauthorized software duplication has cost American companies $400 million annually in lost sales.\textsuperscript{155} In 1994, the U.S. software industry lost $351 million, and the rate of software piracy in China exceeded ninety-eight percent.\textsuperscript{156} As a result of the reported levels of software piracy, the USTR placed China on the Special 301 “priority watch list” for the third time in April 1991.\textsuperscript{157}

Indecisiveness among Chinese officials as to whether computer software protection should be handled through patent or copyright laws delayed any progress on creation of the law. Copyright laws were eventually deemed to be the more appropriate mechanism, because essentially a computer program is a form of writing, “a fixation of words, phrases, numbers or other indicia in various media” which can be followed by a human being.\textsuperscript{158} Recognizing this idea, the Chinese government attempted to remedy extensive pirating by providing


\textsuperscript{157} Yiping, supra note 45, at 260. “Special 301” is a part of the U.S. Omnibus Trade and Competitiveness Act that is intended to protect the intellectual property rights of U.S. manufacturers in foreign countries with whom the United States has trade agreements. Omnibus Trade and Competitiveness Act of 1988, § 301, 19 U.S.C. §§ 2242 (a)(1), 2411.

Under the “Special 301” provision, . . . failure to provide adequate and effective protection for [American] intellectual property rights constitutes an unreasonable trade practice. The [A]ct requires the [United States Trade Representative (USTR)] to identify countries engaging in such practices or denying fair and equitable market access to [American] companies that rely on intellectual property protection. Countries so identified are designated ‘priority countries.’

\textit{Id.} at n.3.

China was placed on the “priority watch list” in both 1989 and 1990 by the USTR for inadequate intellectual property protection and for its lack of a copyright law. \textit{See infra} part III.B.

\textsuperscript{158} HAMILTON, supra note 153, at 262. Copyright law provides a better balance of proprietary and user interests. \textit{Id.} It is uniform, complete and not as sweeping a protection system as the current patent law. \textit{Id.}
software protection under existing copyright provisions.\textsuperscript{159} Eventually, the Chinese government created a separate set of regulations to govern the copyright protection of computer software as a supplement to the Copyright Law of 1991. Article 53 of the Copyright Law now clearly states that "[r]egulations for the protection of computer software shall be formulated separately by the State Council."\textsuperscript{160}

B. The Regulations For the Protection of Computer Software

1. In General

On June 4, 1991, the State Council introduced the Regulations for the Protection of Computer Software (Software Regulations), and they were put into effect on October 1, 1991.\textsuperscript{161} Less than one year later, on April 6, 1992, the Measures for the Registration of Copyright in Computer Software (Registration Measures) were signed by the head of the Ministry of Machine-Building and Electronics Industry, the organization responsible for the interpretation and revision of the Registration Measures.\textsuperscript{162} Shortly thereafter, the Software Assessment and Registration Center (Software Center) was established by the Chinese government in order to manage the registration of computer software and to publish a software newsletter.\textsuperscript{163} The Software Center was formed to provide new registrants with certificates and announce new applications upon registration, so that the Chinese population would be notified and educated about new copyright holders and their rights.\textsuperscript{164}

2. Definitions

The protection of software owes its origin to Article 3 of the Copyright Law that expressly protects "works of literature, art, ... engineering and technology ... which are expressed in the following forms, ... [including] Computer Software."\textsuperscript{165} Yet, the specific laws governing the protection of software were left under the term, "computer software" and the 1991 Computer Software Regulations.\textsuperscript{166} Under Article 3(1) of the Software Regulations, computer programs are defined as a series of coded instructions, or a series of sentences which can be converted into coded instructions, which can be executed on com-

\textsuperscript{160} Copyright Law, supra note 84, at art. 53.
\textsuperscript{161} Durney, supra note 24, at 320.
\textsuperscript{162} Id.
\textsuperscript{163} Id.
\textsuperscript{164} Id.
\textsuperscript{165} Copyright Law, supra note 84, at art. 3.
\textsuperscript{166} Liu, supra note 159, at 470. The Chinese government abandoned the idea of handling the protection of computer software under the Copyright Law after discovering that the protection would be less effective and more impractical. Id.
puters or other information-processing equipment. This definition also encompasses "documentation," which consists of the flow charts and materials compiled and written in natural language or formal language that are used to document the content, design and function of computer software or to record a computer program. Like Article 3 of the Copyright Law, Article 3 of the Software Regulations states that in order to receive protection, software must be developed independently and must be fixed in a tangible medium or a hard copy. The purpose of Chinese protection for software development, like the Copyright Law, is to advance the creativity and originality of its citizens.

In addition, the Software Regulations recognize citizens, foreigners, and both non-legal and legal entities, which are each afforded equal protection of their software. However, just like the Copyright Law, the Software Regulations differentiate between Chinese entities and foreigners on certain measures. For example, Article 6 of the Software Regulations states that Chinese citizens who develop software shall enjoy copyright protection "regardless of whether or where the said software has been made public." Yet, unlike the Chinese citizens, foreigners must "make their software public" or publish their software before being eligible for copyright protection in China.

In the Registration Procedures, the rules specify that to "make public" is to distribute software through retail sales markets or to display software publicly with the express intent to circulate more copies. Software developed by a foreigner and first made public outside China will be afforded protection "in accordance with agreements concluded between his country and China or with international conventions acceded to by his country and China." In other words, just like the Copyright Law, the Software Regulations indicate that foreigners who initially release computer software within China will be protected automatically by the laws, and those who release their works outside of China will be governed by the bilateral or multilateral international treaties to which both China and the foreigner's country are parties.

The treatment of the joint development of software by the

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167 The Regulations on Computer Software Protection, at art. 3(1) (1991) (P.R.C.) [hereinafter Software Regulations].
168 Id. at art. 3(2).
169 Id. at art. 5.
170 Id.
171 These entities carry out development work, provide working facilities for software development, and assume responsibility for the software. Id. at arts. 3(3)-(4), 6.
172 Id.
173 Id. at art. 6.
174 Id. at art. 9(1).
175 Liu, supra note 159, at 477 (citing Measures for Computer Software Copyright Registration, 2 China Laws for Foreign Bus. (CCH Austl. Ltd.) ¶ 11-706(5) (1992)).
176 Software Regulations, supra note 167, at art. 6.
177 Id.
Software Regulations is similar to that found in the Copyright Law. Software developed by two or more entities in cooperation is jointly owned by the parties. The developers may separately enjoy the copyright to the portion they developed if the software may be partitioned and used, but if the software is not divisible the parties may only use the copyright cooperatively. Protection of software developed during the course of employment is addressed in two ways. If the software is developed specifically for the company as a part of a corporate strategy, the software copyright belongs to the corporate entity. However, if the software is neither developed by a citizen in direct relation to job activities or developed using the employer’s resources and facilities, then the copyright belongs to the citizen.

3. Rights and Regulations

Article 4 broadly outlines that software copyright privileges extend to an owner of a piece of software and to his assignee of the “various rights under the software copyright prescribed by these regulations.” Generally, under Article 9 these privileges or “rights” which are afforded to a legitimate copyright owner under Article 4 fall into two categories, personal rights and property rights. The first two provisions are the personal rights of publication and authorship. The duration of these rights is unlimited because they refer to the protection of the personal reputation and honor of the developer himself. Article 9, Sections (3) through (5), which define “property rights,” limit the duration of such rights because they protect the actual creation.

A copyright holder may license the copyright through a renewable contract for a period of ten years or less. The copyright owner and any assignees are able to charge royalty fees for such exploitations.

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178 Compare id. at art. 11 with Copyright Law, supra note 84, at art. 13.
179 Software Regulations, supra note 167, at art. 11.
180 Id. If unanimity cannot be reached by the developing parties, none of the parties may prevent the other party or parties from exercising the rights other than the right of assignment. Id. In that event, the proceeds may be reasonably distributed among the legitimate copyright holders or partners. Id.
181 Id. at art. 14.
182 Id. However, under Article 13, software developed in fulfillment of a work assignment by a higher entity or government department under a contract or letter work assignment will be the property of the entity which accepts the assignment. Id. at art. 13.
183 Id. at art. 4.
184 Article 9(1)-(2) reads as follows: (1) the right to decide whether to publish the software; and (2) the right to identify himself or herself and affix his or her name. Id. at art. 9(1)-(2).
185 Liu, supra note 159, at 478.
186 Article 9 Sections (3)-(5) read as follows: (3) the right to use the software by duplicating, demonstrating, publishing, altering, translating, or annotating the software on condition that such does not harm the public interest; (4) the right to authorize use of software by others and receive remuneration therefor; (5) the right to assign use of the software. Software Regulations, supra note 167, at art. 9(3)-(5).
187 Id. at art. 18.
188 Id.
These signed licensing agreements do not change the ownership of the copyright, and under the laws of China the rights to exclusivity must be clearly stipulated within the contract.\textsuperscript{189} Finally, under Article 28, when a Chinese copyright owner licenses the rights of protected software to a foreigner outside of China, the original copyright owner must report the agreement to two parties, the Software Registration Center and the State Council.\textsuperscript{190}

Under the Software Regulations there are limitations on the copyright protection afforded to software. While the law expressly prohibits illegal sales or duplication of software, a party may duplicate the work if it is in small amounts and, under the "fair use" provisions, such duplication does not require the permission of the software copyright holder.\textsuperscript{191} Any party that legally holds computer software programs may load the software, make backup copies for "archival purposes," and alter the programs in order to improve their capabilities or adapt them to other computer applications.\textsuperscript{192} Like the Copyright Law, the Software Regulations list several "fair" or "free" uses that exempt a party from liability for infringing activity.\textsuperscript{193} For example, under Article 22, software may be copied if it is needed to implement rules or technical standards of the state or where there are only a limited number of ways the material may be presented.\textsuperscript{194} Finally, if the software is of "great significance" to national or public interests, to the State Council, or to the People's Government, it may be used for a given exploitation fee.\textsuperscript{195} Nevertheless, in all cases, all copies made in the course of the exempted infringing activity must be stored properly and returned to the copyright owner directly after use.\textsuperscript{196}

These issues raise concern among many outside observers, because the "fair" uses listed are broad and actually leave the door open for infringing activity by non-state-owned, but state-affiliated, organizations. For example, one of China's largest counterfeiters, the Tianjin New Star Electronics Co., which sold more than 300 pirated video games in 1993, is operated by the government even though it is not formally a state-owned organization.\textsuperscript{197} The company's president is the director of a department in the Ministry of Electronics and Machinery, and the ministry receives twenty percent of New Star's prof-

\begin{footnotesize}
\begin{enumerate}
\item[189] Id.
\item[190] Id. at art. 28.
\item[191] Id. at art. 22. This provision includes noncommercial activities such as classroom teaching, scientific research, and official state duties. Id.
\item[192] Id. at art. 21.
\item[193] See id. at art. 22. Cf. Copyright Law, supra note 84, at art. 22.
\item[194] Software Regulations, supra note 167, at art. 22.
\item[195] Id. at arts. 13, 22.
\item[196] Id. at art. 22. Also, instead of returning the copies, a party may destroy them after use so they are not used for other purposes or supplied to others. Id.
\end{enumerate}
\end{footnotesize}
Thus, the Chinese government is able to find its way around the Software Regulations, and the active presence of the government in the practice of piracy makes it unlikely that these regulations will be enforced properly. Merchants selling pirated goods admit that the state, up to this time, has played both sides of the coin by selling both legitimate and pirated goods on the same street corner.

Finally, other concerns center around the ambiguity of the language found within the regulations themselves. For instance, the law indicates that copyright protection is extended to "legitimate" holders of software. Yet the term "legitimate" can be interpreted in an ad hoc way by the Chinese courts, depending on the facts of the specific situation. Also, in their current form, the Software Regulations mandate that a copyright owner's use of the software "not harm public interest." Experts fear that this phrase can be too easily manipulated and that the definition of "harm" is too subjective to provide a uniform standard.

4. Term of Copyright Protection

In the case of computer software, registration is a prerequisite only for the pursuit of an administrative settlement or the institution of a legal proceeding. In other words, a software developer does not have to register the computer program to be protected, but if the program is ever violated and the author wishes to recover via the legal system, the program must have been registered. Furthermore, automatic protection only lasts twenty-five years, ending on the 31st day of December of the twenty-fifth year after the software is first published, and under Article 15 of the Software Regulations an application must be obtained by the Software Registration Center after twenty-five years to extend protection an additional twenty-five years. This requirement does not comply with the fifty-year term of protection

198 Id.
199 Id.
201 Moga, supra note 29, at 322.
202 Id.
203 Id.
204 Id. The troublesome issue about this phrase is that there is no uniform standard to define what constitutes harm, and logic may play only a limited role. Id. For example, two individuals in 1990 were executed in the Fujian Province because they had distributed cards with pictures of nude women. Id.
205 Zhao, supra note 154. By registering software, the owner is able to prove that the software is valid and that he has the authority to pursue legal recourse for any copyright violations. Id. If the software is registered and subsequently assigned, the new owner must re-register within three months to be afforded any protection. Id.
206 Software Regulations, supra note 167, at art. 15.
207 Id.
spelled out in the Berne Convention. Nonetheless, the United States is unaffected by the discrepancy because the Berne Convention prevails over any inconsistencies in domestic laws, and the twenty-five year limit does not apply to computer programs authored by foreign Berne member countries. After expiration of the copyright, the "property rights" previously mentioned terminate automatically and the "personal rights" continue forever.

5. Infringement

Software protection is similar to traditional copyright protection in that the governing laws are designed to protect the reasonable rights and interests of the authors and to provide incentives for continued creativity and publication. As a result, many of the provisions set forth in the Software Regulations are similar to those in the Copyright Law of 1991. According to the Software Regulations, any infringing party must make a public apology and compensate the owner for any damages incurred; also, the State administrative authorities may impose administrative sanctions, fine the parties, and confiscate the income derived from the infringing activity. Article 32 clearly spells out eight actions by individuals or entities which are considered to be infringing. Furthermore, to be considered infringing, a piece of software must be more than just similar to an existing piece of software protected by a copyright. Also, where one party has no reasonable basis for knowing that the software in its possession is infringing, the liability is borne by the supplier who has distributed the infringing software knowing the program was in violation of the copyright laws. In this case, the legitimate copyright holder may demand compensation from the supplier for the losses suffered, and if the holder's rights are egregiously affected he may rightfully demand that the other party

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208 See supra note 29.
209 Durney, supra note 24, at 921 (citing Michael D. Pendleton, Chinese-Intellectual Property: Some Global Implications for Legal Culture and National Sovereignty, 4 EIPR 119, 120 (1993)). Article 7 of the International Rules provides: "Foreign computer programs shall be protected as literary works, being subject to no registration and enjoying a term of protection of fifty years commencing from the end of the year of first publication." Id.
210 Software Regulations, supra note 167, at art. 20.
211 Liu, supra note 159, at 472.
212 Software Regulations, supra note 167, at art. 30.
213 These eight provisions are as follows: (1) publishing software without consent; (2) publishing someone else's software as your own; (3) publishing software developed in cooperation with others as your own without consent of the developers; (4) indicating your own name on software developed by others or obliterating the name on software developed by others; (5) altering, translating, or annotating software without consent; (6) copying software in whole or part without consent; (7) distributing or disclosing software to the public without consent; and (8) conducting business concerning licensing or transfer of the software to a third party without consent, and knowingly supplying an infringing piece of software to others. Id. at art. 32.
214 Id. at art. 31.
215 Id. at art. 32.
destroy its version of the infringing software.\textsuperscript{216}

A software infringement dispute may be resolved either through mediation or through binding arbitration in either the intellectual property arm of the People's Court or the software copyright arbitration organ of the state.\textsuperscript{217} Parties unsatisfied after arbitration proceedings may bring their case to court if one of three circumstances exists: (1) one party fails to execute the award; (2) the People's Court finds the arbitral award illegal; or (3) the parties do not have an arbitration clause in the contract and there is no written agreement.\textsuperscript{218} Finally, a party may be subject to civil liability under the General Principles of the Civil Law if that party fails to carry out its contract or fails to perform the duties of a contract governing intellectual property rights transfer in conformity with the stipulated conditions.\textsuperscript{219}

While China continues to make inroads on curbing software infringement, the current system still has holes and problems for the Chinese government to iron out. For example, the organization responsible for border controls, the Administrative Authority for Software Copyright, has no appreciable power to enforce the software laws.\textsuperscript{220} Likewise, the Chinese government has yet to issue jurisdictional power to groups like the National Copyright Administration (NCAC), greatly limiting such organizations' enforcement ability.\textsuperscript{221}

As the market in China and the needs of the Chinese people continue to expand, demand for commercial software will grow as well. As long as the Chinese are behind other western countries in the ability to meet this demand with quality products, the United States will continue to be a major presence in China's software market. In fact, U.S. companies are supplying most of the commercial software sold in China, and they have spent millions on the technology required to provide these goods.\textsuperscript{222} The reality of this very valuable investment is precisely why the United States is leading the fight to establish stronger copyright enforcement in China.

\begin{itemize}
\item \textsuperscript{216} Id. at art. 31.
\item \textsuperscript{217} Liu, supra note 159, at 484.
\item \textsuperscript{218} Software Regulations, supra note 167, at art. 35.
\item \textsuperscript{219} Id.
\item \textsuperscript{220} Lincoln, supra note 197.
\item \textsuperscript{221} Id. The NCAC has only superficial enforcement responsibilities, because the Chinese government is still contemplating giving jurisdiction over software matters to the Ministry of Electronics, ironically the same group that controls one of China's largest counterfeiters. Id.
\item \textsuperscript{222} For example, Nintendo of America spends on average two years and one-million dollars in investment capital to produce just one video game. Id. The imagination and ingenuity is what makes these technological creations so unique and valuable; only within the past few years, Nintendo of America has lost $1.2 billion to the over 20 million units illegally counterfeited by Chinese pirates. Id.
\end{itemize}
IV. Recent Lawsuits and Other Legal Developments

A. The Walt Disney Case

In recent history, U.S. companies have begun to seek redress for their intellectual property grievances in the Chinese court system. Thus far, the vast majority of such efforts have been unsuccessful. Yet American business giants such as Walt Disney, Microsoft, and Lotus have stepped up efforts to find a legal remedy for copyright violations in the People’s Republic of China.223

On August 3, 1994, the Beijing Intermediate Court ruled in favor of Walt Disney Co., against a prominent Beijing children’s book publisher, in the first copyright infringement case brought by an American company in China.224 The ruling is expected to have major economic ramifications, as Hollywood studios are encouraged to resume supplying films, television, and video products to China.225 In addition, many observers agree that this ruling may be only the tip of the economic iceberg, because many other U.S. companies interested in entering the lucrative Chinese markets see this ruling as a promising sign that China is dedicated to protecting intellectual property rights.226 The Disney suit, only one of twenty civil cases filed in two years to receive a judgment, also may have touched off what could be the key to curbing piracy in China—getting the Chinese people to realize that they are victims of piracy as well.

The precedent-setting Walt Disney case is the first publication copyright lawsuit filed by a U.S. company in the special intellectual property court in Beijing, and the case is being hailed as the “first tangible sign that the Chinese authorities are getting serious about cracking down on rampant piracy.”227 The Beijing People’s Intermediate Court found that the Beijing Publishing Press/Beijing Children’s Publishing Press and its distributor, New China Book Store Distribution Center, illegally published and distributed a range of children’s books based on Disney animated films.228 According to the state-run paper, the Guangming Daily, the defendants argued that they had acted legally under a license obtained from a company in Hong Kong.229 The Beijing Court found that the 300,000 books published and distributed by the companies were identical to a series produced earlier by another

224 Chinese Court Backs Disney Copyright, DAILY VARIETY, Aug. 5, 1994, at 5.
225 Id.
226 Bronwen Maddox, Chinese Pirates Fail to Take Mickey out of Disney, FIN. TIMES, Aug. 5, 1994, at 14.
227 Chinese Court Backs Disney Copyright, supra note 224, at 5.
228 Id. The books contained such well-known Disney characters as Mickey Mouse, Cinderella, Peter Pan, and Snow White. Id.
229 Maddox, supra note 226, at 14.
Chinese company under a Disney license that had expired in 1990.\textsuperscript{230} The ruling by the newly formed intellectual property division of the Beijing People's Intermediate Court determined the liability portion of the trial, but the penalty phase has yet to follow.\textsuperscript{231} Walt Disney has not disclosed the damages it is seeking, but Chuck Champlin, Communications Director for Disney Consumer Products, indicated that Disney has asked the court to be compensated for lost revenues.\textsuperscript{232} More specifically, Claire Robinson, Vice-President and Counsel who heads Disney's anti-piracy efforts out of Burbank, California, explained that Disney would be seeking penalties equal to profits made by the pirates which would be less than $300,000.\textsuperscript{233} Sources for Business Asia reported that damages being sought totalled approximately $77,000.\textsuperscript{234} Under current Chinese Copyright Law, a party who proves infringement of its copyright is entitled to recovery of the income earned from the infringing activity when aggravating circumstances, like those present in the Disney case, exist.\textsuperscript{235}

Prior to the ruling, Disney was selling a limited range of merchandise in approximately seventy Chinese department stores via a Hong Kong-based licensee, Vigor International.\textsuperscript{236} Now, however, Disney has severely limited the distribution of its character goods because of the extent of piracy of Disney images within the country.\textsuperscript{237} Disney has been earning more than $100 million a year in China on legitimately marketed goods, but illegitimate sales are estimated to cost the company tens of millions of dollars annually.\textsuperscript{238} In the 1980s, Disney was forced to cancel a successful half-hour Disney television show, because the exposure only served to popularize the characters and to further enrich the pirates.\textsuperscript{239}

Experts say that the size of the penalty imposed in the Disney case

\textsuperscript{230}Walters, supra note 140, at D1.
\textsuperscript{231}Id.
\textsuperscript{232}Maddox, supra note 226, at 14.
\textsuperscript{233}Walters, supra note 140, at D1.
\textsuperscript{235}Muwen, supra note 42, at 50. Such aggravating circumstances include the "reproduction and distribution of a work for commercial purposes without the consent of the copyright owner" and the "publication of a book where the exclusive right of publication belongs to another." Id. Both of these aggravating circumstances existed in the Disney case.
\textsuperscript{236}Chinese Court Backs Disney Copyright, supra note 224. Disney had also hoped to resume supplying Disney products to Chinese television before the end of the year, but only plans to follow through if Beijing makes a concerted effort to crackdown on piracy. Id.
\textsuperscript{237}Maddox, supra note 226, at 14.
\textsuperscript{239}Drawbaugh, supra note 238. A similar cancellation occurred in 1992 for the same reasons. Disney Wins Copyright Suit Against Chinese Companies, Orlando Sentinel, Aug. 5, 1994, at B1.
will be a major test of China’s commitment to its crackdown on intellectual property rights infringement because past penalties imposed by Chinese courts against intellectual property rights violators have been inadequate.\textsuperscript{240} For example, in an earlier trademark infringement case won by Disney, the infringing Chinese publisher was fined only $91, while Disney spent more than $15,000 in legal costs alone.\textsuperscript{241} When Disney tried to appeal, government officials discouraged them, saying that it would embarrass the trademark agency and would take too long.\textsuperscript{242}

According to Claire Robinson, the Disney copyright case was brought as a “test case” to see how serious China is about putting “more teeth” in its intellectual property laws.\textsuperscript{243} “We are going through this to set a precedent,” remarked Robinson, “[i]f we lose, it will be grounds for further complaining. If we win, it will be precedent for further success.”\textsuperscript{244} Disney, historically a staunch defender of its intellectual property rights, is concerned with the actions by the Chinese government because of the potential damage to company finances and to the company’s reputation for quality.\textsuperscript{245}

Skeptics have reaffirmed their predictions that the impact of the Disney case will not be of landmark proportions as once hoped, because as of April, 1995, no penalty had been assessed yet.\textsuperscript{246} The original ruling was handed down over eight months ago, in early August. Chuck Champlin, Communications Director for Disney Consumer Products, explained in frustration that Disney has been “waiting for the penalty phase of [the] case, but it’s been put off and put off.”\textsuperscript{247} In his estimation, the delay in assessing money damages against the infringing parties is a “microcosm of this whole issue. They [the Chinese government] seem to be willing to acknowledge that piracy is a problem, but are reluctant to do anything about it.”\textsuperscript{248} A penalty is not expected to be handed down until after the United States and China work out the terms of the recently signed agreement concerning enforcement of intellectual property violations.\textsuperscript{249}

In the meantime, Disney is taking steps of its own to crack down on piracy and the illegal counterfeit of Disney products. For example, in mid-December Walt Disney opened a regional office of its Television and Telecommunications Unit in Hong Kong to monitor the Asia

\begin{itemize}
  \item \textsuperscript{240} Walters, \textit{supra} note 140, at D1.
  \item \textsuperscript{241} Orenstein, \textit{supra} note 238, at 2.
  \item \textsuperscript{242} Id.
  \item \textsuperscript{243} Id.
  \item \textsuperscript{244} Id.
  \item \textsuperscript{245} \textit{Disney Wins Copyright Suit Against Chinese Companies}, \textit{Orlando Sentinel}, Aug.5, 1994, at B1.
  \item \textsuperscript{246} Drawbaugh, \textit{supra} note 238.
  \item \textsuperscript{247} Id.
  \item \textsuperscript{248} Id.
  \item \textsuperscript{249} See infra part V.B.
\end{itemize}
Sources from Disney explained that the new office will manage all of its television interests, including television sales, marketing, and production, in the Asia Pacific area. By opening this office, Disney hopes to take advantage of investment opportunities, to capitalize on the growth opportunities in television business, and to crack down on counterfeiting. Nevertheless, until the Chinese government takes substantial steps toward the enforcement of copyright laws and protection, it is uncertain what effect efforts by U.S. companies like Walt Disney actually will have on the crackdown against intellectual property piracy.

B. Other Copyright Infringement Cases

In October 1994, a group of industry giants filed a joint lawsuit in the Beijing Intermediate People’s Court against a Chinese video distributor, Xianke Jiguang Market, alleging copyright infringement of major films including such blockbusters as “The Godfather,” “Rocky,” and “Out of Africa.” These companies have alleged that Xianke is selling laser-disk copies of these films without authorization as required under the 1991 Copyright Law, and they have demanded the amount of lost sales, legal costs, and a guarantee that this behavior will cease immediately. This suit reinforces the understanding that copyright protection has quickly risen to the top of many international businesses’ agendas.

As the demand in China for audiovisual entertainment related products has grown recently, the market has been flooded with pirated products. Yet, China has been slow to open the audiovisual market to legitimate foreign products because the pirated products have been easy to buy at very low prices. In fact, illegal copying and distribution of copies of popular American videos is so widespread that Chinese street hustlers were able to sell pirated-copies of Walt Disney’s million dollar movie “The Lion King” months before it was released on video in the United States. Pirated materials are overwhelming the market for such products as compact discs (CDs), computer software, and videos. In response, even the Chinese people themselves have begun

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251 Id. The area of the Asia Pacific includes such countries as Japan, China, Taiwan, India, Australia, and New Zealand. Id.
252 Id. In one example of its campaign against counterfeiting, the company has run advertisements in a local Malaysian newspaper that featured an “angry Mickey Mouse, with the warning that the sale of unauthorized merchandise using Walt Disney characters is illegal.” Id.
253 Id. The companies that filed suit include Universal Pictures, Twentieth Century Fox, United Pictures International, Paramount, Walt Disney Co., Columbia, Time Warner, and Tri-Star. Id.
254 Id.
to realize the damage copyright infringement can cause and have begun to litigate such cases, if only to a limited extent.

For instance, on November 4, 1994, eleven Chinese writers filed an infringement suit in the Beijing Intermediate People's Court alleging that Julin University Publishing House, a state-owned press in northeast China, and its editor, Yuan Ye, illegally published nearly a hundred of their writings in a ten-book "Children's Series" without their permission or consent.\textsuperscript{256} The plaintiffs are seeking an injunction against the publisher, an apology, and unspecified financial compensation.\textsuperscript{257} The timing of the suit is not surprising as Walt Disney is currently waiting to hear the determination of the penalty in its case.\textsuperscript{258}

\section*{C. Recent Software Lawsuits and Decisions}

Walt Disney is not alone in its fight against China for enforcement of intellectual property rights. U.S. businesses are beginning to act both on their own and through industry groups. Despite the legal obstacles of the Chinese court system, U.S. companies recently have begun to aid in the fight against piracy by filing lawsuits in China against copyright infringers.\textsuperscript{259} The Beijing Weihong Software Research Institute brought the first software copyright infringement suit against Yuanwang Technology for displaying its software at a national computer exhibition without permission from the copyright holder.\textsuperscript{260} The court settled the case in February 1993 and awarded Beijing Weihong approximately $7,900 in damages.\textsuperscript{261} In December 1993, the same court, the People's Court in Beijing's Haidian District, awarded the East Computer Institute the largest award thus far, $36,206, for software infringement by Zhuai Electronic Technology Development Company.\textsuperscript{262}

The Business Software Alliance (BSA), a Washington-based lobbying group formed in 1988, is one of the major players in the effort by U.S. software vendors to fight the war against copyright infringe-

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id. The official China Daily said the multi-plaintiff case "reflects the government's determination to curb copyright violations" and suggested the timing was no accident. Id.
\item Software companies, including such giants as Microsoft, have begun to file suits against infringing Beijing firms. \textit{Three U.S. Software Makers, Including Microsoft, Sue Chinese Firms}, \textit{Agence Fr. Presse}, Jul. 27, 1994, available in LEXIS, News Library, Currents File. In order to step up efforts, Microsoft engineers have helped Chinese authorities with their investigations. Id.
\item Enforcement, supra note 150.
\item Id. The exact amount awarded was Rmb46,000. Id.
\item Id. The Zhuai firm was convicted of marketing and copying software called Cross Debugging Windows under another name. Id.
\end{enumerate}
\end{footnotesize}
ment.263 According to the BSA, in 1992 alone, software piracy generated sales of up to $12 billion worldwide and $5 billion in Asia.264 While the BSA has the power to investigate and raid Chinese businesses to uncover evidence of piracy on behalf of U.S. companies, the organization has limited legal powers and, like a private citizen, must take these cases to court and fund the cost itself.265 Nonetheless, the goal of the BSA is to eradicate copyright infringement, which is an increasingly expensive impediment to U.S. profits. In July 1994, the BSA filed suit against five Beijing retailers on behalf of Microsoft, Lotus Development, and Autodesk in the Intellectual Property Rights Chamber under the Beijing Intermediate People's Court.266

The BSA and the individual companies claim that the Chinese software companies were selling and displaying computers loaded with pirated programs in the capital's Zhongguancun computer district—Beijing's "Silicon Valley."267 The China Daily reported that the ten alleged incidents of copyright infringement may have cost the three plaintiff companies millions in lost profits.268 The companies are demanding between $10,000 and $30,000 for each copyright breach, even though actual damages may be far higher.269 In June 1994, after four months of plaintiffs trying to convince Chinese authorities that copyright piracy was swallowing the software market, BSA officials raided five large Chinese computer software retailers and seized more than 300 pirated floppy disks and six hard disks to be used as evidence.270 The BSA has reported that this is just the first of many lawsuits to follow.271 As a result of this precedent setting case, China's General Administration of Customs and the State Council have begun to draft regulations designed specifically to enforce the illegal importing and exporting of pirated products and "to protect integrated cir-

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264 Id. These figures represent 1992 sales but are based on the 1990 dollar. Id.
265 Id.
266 Three U.S. Software Makers, Including Microsoft, Sue Chinese Firms, supra note 259. Two Microsoft engineers are working with the authorities to confiscate evidence and property for the case. Id. A spokeswoman for Microsoft said very little about the case and remarked only that Microsoft "encourages customers to use authorized software and welcomes the Chinese government's moves to enable companies to sue over copyright violations." Id. Microsoft estimates it has lost billions in copyright violations. Id.
267 Borros et al., supra note 223, at 40.
269 Id.
270 Id. These companies included Gaoli Computer Co., Sanhua Electronics, Huili Computer Co., Huigin Computer Shop, and the Beijing branch of Giant Group, one of China's largest computer software retailers. Id.
cuits and the transfer of scientific and technological research findings."^{272}

On June 30, 1994, the first of many raids on retailers of the pirated goods that cost U.S. businesses more than $800 million last year was initiated by the Clinton administration.^{273} In order to avoid stiff trade sanctions, Deputy U.S. Trade Representative Charlene Barshefsky, after two days of meetings with Chinese officials including Foreign Trade Minister Wu Yi, ordered China to shut down twenty-six of its CD factories having a production capacity of up to seventy-five million CDs per year.^{274} Of these seventy-five million illegally produced CDs, seventy million units are slated for export to other markets in Southeast Asia.^{275} China initially responded by shutting down four factories and six production lines, while re-registering and investigating the remaining factories under question.^{276}

In addition, the Chinese State Council, or cabinet, agreed to meet regularly to develop ways to curb the widespread copyright infringement, and inspectors have been put out on the lookout for pirated patents and trademarks, particularly in the audio, video, and computer software markets.^{277} Nevertheless, the Chinese government said that it did not have the power to shut down all twenty-six factories and that the U.S. companies currently affected should take legal action themselves against the infringers.^{278} Zhang Yuezhao, Deputy Director of the Trade Ministry's Foreign Trade Department, indicated that the Chinese Government could not take such unilateral action against the factories because no administrative agency could legally issue such orders since China is a country under the rule of law.^{279} The reality is that China has failed in many of its promises to crack down on piracy. By early 1995, the number of illegal factories in Guangdong producing illegal CDs, cassettes, videos and software had grown to at least twenty-nine, none of which had been shut down by the Chinese government.^{280} China has not made any significant progress in developing its enforcement procedures to the point at which it can deal with these

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^{272} China's Piracy Woes Tarnish Image, supra note 152.
^{273} Borros et al., supra note 223, at 40. Despite the intentions of private U.S. companies who hope to help curb the piracy problems through the court system, Chinese authorities have been slow to respond to allegations of piracy with sweeps of the infringing stores. Id. Some fear that the delays on the part of the judicial system give pirates a chance to destroy crucial evidence. Id.
^{274} China CD Plants to Close or Face U.S. Sanctions, ASIAN WALL ST. J., July 22, 1994, available in WESTLAW, Allnews Database.
^{276} Id.
^{277} China CD Plants To Close or Face U.S. Sanctions, supra note 274.
^{278} Id.
^{279} Id.
Accordingly, U.S. companies continue to suffer; meanwhile, the Chinese legal system has not served as a source of relief at all until very recently.

For example, in 1993 Microsoft won a case against the Reflective Materials Institute which was illegally manufacturing holograms protected under the copyright law. Nevertheless, the guilty party was fined only $260 for actual losses incurred by Microsoft estimated at between $30 million and $180 million. That award later was raised to $4,900, but as of July 1994, Microsoft was still entangled in an appeal to recover a more accurate award of $22 million. Officials at Microsoft estimate that, even today, for every one legal software program sold in China there will be a hundred fakes. It has been estimated that in 1994 U.S. software publishers, including Microsoft, lost $351 million in sales due to copyright piracy in China alone.

Nevertheless, U.S. companies continue to pursue entrance into China's legitimate market system because of its enormous potential. For example, since 1992 and the signing of the MOU, Microsoft has entered into a licensing agreement with the China Great Wall Computer Group and other Chinese software groups in the hopes of combating pirated MS-DOS products with legally protected versions. Other U.S. software companies such as Borland, Digital Equipment, and Software Systems Associates have followed suit and funneled money and software into China through joint ventures and foreign-owned subsidiaries.

V. Effect on Trade Between the United States and China

A. In General

In a discussion on the fate of international intellectual property rights, David Beier, Vice-President and General Counsel of Genetech, Inc., estimated that since World War II, the percentage of intellectual property exported from the United States increased from eight to twenty-five percent. In his opinion, the balance of payments and

281 See supra part I.
283 Id.
284 Orenstein, supra note 238, at 2.
286 Drawbaugh, supra note 238. The BSA estimates that U.S. software companies lost $322 million in this sector in 1993 due to piracy, which is an increase from $225 million in 1992. Three U.S. Software Makers, Including Microsoft, Sue Chinese Firms, supra note 259.
288 Id. IBM set up a wholly owned subsidiary in China in 1992, and Unix Systems Laboratory formed a joint venture with Deshi Development Group of Hong Kong and six Chinese Partners in November 1992. Id.
289 HAMILTON, supra note 153, at 265.
trade deficit considerations have clearly pushed intellectual property to the forefront of world trade issues.\textsuperscript{290} It is no secret that intellectual property has become a major component of international trade, and as Beier points out, its direct bearing on U.S. competitiveness and commerce has thrust it sharply into the world spotlight.\textsuperscript{291} It is estimated that were it not for industries with a large concentration in intellectual property the “U.S. trade deficit in 1988 would have been fifty-four percent worse than the 109 billion dollars reported” by the government.\textsuperscript{292}

In addition, the United States currently has a world trade surplus in intellectual property, and in 1988, U.S. companies received $8 billion in royalties while paying out only $1.25 billion.\textsuperscript{293} During this same time period, U.S. companies lost approximately $43 billion due to piracy and counterfeiting.\textsuperscript{294} When President Clinton extended China’s low-tariff trading status on May 26, 1994, these crucial trading issues were thrown into the hot seat as $40 billion in two-way trade was now at stake.\textsuperscript{295} China is one of the ten largest developing markets targeted for U.S. investment and export growth, but future trade hinges on resolution of conflicts over market access and protection of intellectual property rights.\textsuperscript{296} Although China has massive market potential as a developing nation, it is still often vulnerable to the demands and needs of other countries. Today, China continues to run a trade surplus with the United States.\textsuperscript{297} In fact, as China entered negotiations with the United States over a threatened bilateral trade war, it did so knowing that it could lose the U.S. market which imported almost $40 billion worth of goods in 1994.\textsuperscript{298}

Since 1978, China has tried to “open the door” to foreign invest-

\begin{thebibliography}{99}
\bibitem{290} Id. at 265.
\bibitem{291} Kinney \& Lange, Overview of Intellectual Property for Business Lawyers 125 (1992). \textit{See also Hamilton, supra note 153, at 265.}
\bibitem{292} Hamilton, \textit{supra note 153}, at 265.
\bibitem{293} Id. at 257.
\bibitem{294} Id.
\bibitem{295} One of the key features of being assigned Most Favored Nation (MFN) status is low tariffs, and when President Clinton re-extended this status to China it once again helped boost Chinese exports to the United States by cutting down taxes. \textit{See J.T. Nguyen, Foreign Investors Ignore Eastern Europe}, UPI, Aug. 31, 1994, \textit{available in LEXIS, News Library, Curnaws File}. With the renewal of China’s MFN status in 1994, President Clinton essentially reiterated the distinction between human rights and trade that his administration originally made in June, 1993. \textit{Id.}
\bibitem{297} Xiao-Lin, \textit{supra note 12}, at 1.
\bibitem{298} The imbalance of trade dollars with China rose 30\% from 1993 to 1994. Santini, \textit{supra note 156}. The trade imbalance between the United States and China totalled $29.5 billion in 1994, which is second only to the $50 billion imbalance the United States had with Japan. \textit{Id.}
\bibitem{299} \textit{U.S.-China Reach Accord on 'Pirated Goods,' supra note 2.}
\end{thebibliography}
ment and consumerism by rebuilding ineffective parts of its economic and political systems. Chinese citizens have opened their pockets and begun to exhibit their expansive consumer potential in markets for both domestic and foreign goods. Industries are expanding at a rapid pace, and American companies are looking at a total market of over 1.2 billion people. The market potential in China is incredible, and since 1949, over 400 million Chinese people have been born without the deeply-rooted Communist ideological and cultural ties of the past generations. On any given day in Shanghai, there are three million shoppers in a one-to two-mile commercial area, and yet, on this same given day, there is copyright infringement, software piracy, and intellectual property theft. In reality, despite vocal disapproval by the U.S. government and private corporations, the state continues to sell illegally pirated goods to local merchants to peddle on the main streets of China's growing cities. These circumstances mandate that China finally begin to enforce the new and stronger intellectual property laws it worked so hard to create.

Introduction of the Copyright Law and the Software Regulations were two noticeable steps taken by China in its effort to invite the rest of the world to invest in China. As of yet, however, China has not enforced these laws. There has been sparse local border control, and the government has yet to streamline its system for enforcement. A 1979 U.S.-China Trade Agreement originally obligated these powerhouse countries to provide each other with equal intellectual property right protection; yet, as of 1994, the goal had not been met. Dollars are not the only thing at stake. Intellectual property rights piracy costs industrialized countries more than money because the increased labor and manufacturing costs stemming from infringement can make products in developed nations less competitive in the world market. Intellectual property pirates essentially reap all the profits and benefits from other countries' hard work and research skills. Thus, the loss to intellectual property right owners occurs on many levels. The copyright holder can lose revenues, the product's reputation for quality, and goodwill. Also, industrialized societies as a whole suffer from the decrease in the incentive of the population to develop new prod-

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300 Marshall, supra note 19, at 543.
301 Id.
302 Id. at 545-46.
303 Girasa, supra note 49, at 305.
304 Kurtenbach, supra note 200, at D1.
305 See supra parts I and II.
309 Id.
ucts.\textsuperscript{310} The Counterfeiting Intelligence Bureau, an international intellectual property intelligence bureau, estimated that pirated products constitute eight percent of total world trade.\textsuperscript{311} 

In 1986, the U.S. Federal Trade Commission directed the U.S. International Trade Commission (USITC) to investigate the impact of international piracy on world trade. The USITC reported that over 193 U.S. companies lost $23.8 billion, or 2.7\% of total worldwide sales of intellectual property-related goods to piracy.\textsuperscript{312} Of those, companies selling scientific and photographic goods reported the greatest losses, at twenty-one percent of the total, while computers and software were second at seventeen percent.\textsuperscript{313} According to the USITC study, eighty-four companies cited evidence of losses due to copyright infringement in a total of fifty-two states.\textsuperscript{314} The concerns often cited by American companies were the lack of protection for American works, an inaccessible system of formalities, and an ineffective system of enforcement and remedy.\textsuperscript{315} 

As piracy reduces the demand for the legitimate item, production levels in the developed nations are affected. For example, the Business Software Alliance reported that more than 17,400 additional jobs would be created in the software industry in the European Union if piracy were not destroying the demand for authorized software.\textsuperscript{316} The United States loses an estimated 210,000 jobs annually because pirates erode a portion of international demand for legitimate products.\textsuperscript{317} 

Ultimately, these intellectual property piracy issues were what determined China's reentry into the global trading market when the General Agreement on Tariffs and Trade (GATT) evolved into the World Trade Organization (WTO) in January 1995. Entry into the WTO has been one of China's leadership's most important goals in recent history, but the U.S. government was able to block any attempt by China to enter the WTO until it agreed to accept basic norms of

\textsuperscript{310} Id. at 943-44.  
\textsuperscript{314} \textsuperscript{USITC Study, supra note 312, at 3-2.  
\textsuperscript{315} Id. at 3-3 to 3-5.  
\textsuperscript{316} \textit{European Industry Coalition Urges More EC Controls on Counterfeit Goods, 9 Int'l Trade Rep. (BNA) No. 26, at 1103 (June 24, 1992).  
\textsuperscript{317} Trish Donnally, \textit{Counterfeiters Cost Companies Jobs, Revenue; Consumer Has Little Recourse}, \textit{STAR TRIB.}, June 3, 1992, at 1E. For example, in 1991 and 1992, Levi Strauss & Co. confiscated almost two million pairs of counterfeit jeans in China earmarked for Eastern Europe. Id.
international commerce, most specifically strict enforcement of intellectual property rights regulations.\textsuperscript{318} In the long run, despite the inherent differences in the legal and political systems of the United States and China, the strong economic bond between the two nations requires that the issue of intellectual property protection and the resulting trade disputes be resolved in a way that facilitates mutually beneficial trade relations.

\textbf{B. The U.S.-China Confrontation and Special 301}

In the last decade, China has witnessed an explosion of change. While it has tried to keep up with the rest of the world by enacting new laws and regulations, it has not been successful at enforcement of these new regulations.\textsuperscript{319} As a result, China has been closely monitored by the United States.

The United States has placed a great deal of emphasis on the protection of international intellectual property rights in the context of international trade. The development and utilization of various trade tools have played a crucially important role in maintaining the United States' leverage in bilateral negotiations with China. One such effective tool, the Special 301 provision, was used recently by U.S. trade representatives to persuade China to negotiate a fair settlement on the adequate protection of intellectual property rights, and to avert what could have been a devastating trade war.\textsuperscript{320}

The Special 301 provision was enacted by the U.S. Trade Commission as part of the Omnibus Trade and Competitiveness Act of 1988.\textsuperscript{321} Special 301 is a subset of Super 301\textsuperscript{322} and is designed specifically to address the inadequacies associated with foreign intellectual property rights in developing countries and to increase U.S. bargaining power in international trade negotiations.\textsuperscript{323} Under Special 301, the USTR each year must identify the foreign countries which deny "adequate and effective protection of intellectual property rights,"\textsuperscript{324} or deny "fair and equitable market access to United States persons who rely upon intellectual property protection."\textsuperscript{325} Finally, the USTR must designate "priority foreign countries" which are countries:

1. whose acts, practices, or policies are most onerous and egregious


\textsuperscript{319} \textit{See supra} part II.C.

\textsuperscript{320} \textit{See Sadler, supra} note 15, at 422. The threat of trade sanctions by the U.S. often has been used successfully to secure bilateral agreements for intellectual property rights protection. \textit{Id}.


\textsuperscript{322} \textit{Id}.


\textsuperscript{324} \textit{Id.} § 2242(a)(1)(A) (1988).

\textsuperscript{325} \textit{Id.} § 2242 (a)(1)(B) (1988).
[against intellectual property owners];\textsuperscript{326}

ii) and have the greatest adverse economic impact on the United States;\textsuperscript{327}

iii) and which are not entering into good faith negotiations or making significant progress in bilateral or multilateral negotiations to provide adequate and effective protection of intellectual property rights.\textsuperscript{328}

Thirty days after the designation of the "priority" countries, the USTR must begin to investigate the acts, practices, and policies of those countries,\textsuperscript{329} unless such investigations would be detrimental to U.S. economic interests.\textsuperscript{330} The USTR has six months to investigate and negotiate bilateral solutions.\textsuperscript{331} At the end of the investigation period, if no substantially positive change has occurred and the nation in question is violating any trade agreements or is unjustifiably burdening U.S. commerce, the USTR may retaliate by imposing trade sanctions, import duties, or other economic restrictions, under the direction of the President.\textsuperscript{332}

In 1990, China was placed on the "priority watch list" for the first time because of its ineffective enforcement of intellectual property right laws, its lack of a formal copyright law, and its deficient patent law.\textsuperscript{333} The "watch list" was established by the USTR to provide a modified approach to compliance with Special 301 in the hopes that the nation in question would correct the problems before they escalated to a level of severity that would mandate designation as a "priority foreign country."\textsuperscript{334} Under the support of the Clinton administration, the USTR has added "immediate action plans" and "out-of-cycle reviews" to supplement the current Special 301 procedure.\textsuperscript{335} These two additions provide deadlines and guidelines for the USTR when monitoring a country's on-going progress on intellectual property issues as well as periodic reviews to prevent the inconvenience associated with having only annual proceedings.\textsuperscript{336}

On April 26, 1991, the USTR identified China as a "priority foreign country" because:

\textsuperscript{326} Id. § 2242 (b)(1)(A) (1988).
\textsuperscript{327} Id. § 2242 (b)(1)(B) (1988).
\textsuperscript{328} Id. § 2242 (b)(1)(C) (1988).
\textsuperscript{329} Id. §§ 2242 (a)(2), 2412 (b)(2) (1988).
\textsuperscript{330} Id. § 2411(a)(2)(B)(iv) (1988).
\textsuperscript{331} Id. § 2414(a)(3)(A)-(B) (1988). Upon conclusion of the six months, trade officials can grant a 90 day extension at their discretion. Id.
\textsuperscript{332} Id. § 2411(a)(1), (c) (1988). The USTR may impose these restrictions or sanctions against all the products from the offending country, not only the products involved in the investigation. Id. § 2411(c)(3).
\textsuperscript{333} U.S. China Agreement on Intellectual Property Ends Retaliatory Duties Threat, 43 Pat. Trademark & Copyright J. (BNA) No. 1074, at 95 (Jan. 23, 1992).
\textsuperscript{335} See U.S.T.R. Fact Sheet on Special 301 Released April 30, 1993, 10 Int'l Trade Rep. (BNA) No. 18, at 761 (May 5, 1993).
\textsuperscript{336} See id. at 762.
China is our only major trading partner to offer neither product patent protection for pharmaceuticals and other chemicals, nor copyright protection for U.S. works. In addition, trademarks are granted to the first registrant in China, regardless of the original owner. Trade secrets are not adequately protected in China. As a result, piracy of all forms of intellectual property is widespread in China, accounting for significant losses to U.S. industries.

This event marked the first time any country had officially been put on the list as a "priority foreign country." The Chinese government struggled with the U.S. government to come to an agreement or find a working solution. The United States is China's biggest trading partner, and to avoid the trade sanctions the USTR was threatening, China bowed to the pressure. On January 17, 1992, the night before the United States was to begin institution of import tariffs on Chinese products, China signed a Memorandum of Understanding (MOU) with the United States regarding key intellectual property matters. The MOU became a formal bilateral copyright agreement when the U.S. President proclaimed under 17 U.S.C. § 104(b)(5) that there would be reciprocal copyright protection between the two countries.

Ultimately, China formally promised that it would improve its current copyright system and protect copyrighted works, including software, for fifty years and join the major international intellectual property rights conventions. At that point, U.S. trade officials revealed the three-step investigation as required under the provisions of Special 301: (1) "China must immediately and effectively take steps to shut down wholesalers, manufacturers, and retailers of pirated software and CDs"; (2) China must enforce the rules against intellectual property piracy; and (3) China must take steps to ensure laws are visible. Yet, China failed in its promise to enforce its laws and regulations and the level of piracy skyrocketed. As a result, on June 30, 1994, USTR Mickey Kantor placed China on the Special 301 “priority watch list,” giving the nation six months to enforce laws protecting intellectual property rights, most specifically the copyright protection legisla-

538 See Anderson et al., supra note 334, at 95.
539 Durney, supra note 24, at 316.
541 Waters, supra note 308, at 959. China also agreed to provide patents for chemicals and pharmaceuticals. Id. As of July 1992, China joined the Berne Convention and the Universal Copyright Convention. Id.
At that time, the U.S. government warned that if China did not significantly alter its practices by December 31, 1994, unless given a legal 90-day extension, it would face trade sanctions for copyrighted goods valued at $800 million. China responded by raiding Chinese firms and seizing pirated goods including 200,000 CDs and 750,000 video and audio tapes, resulting in the arrest of 7,000 people and the closing of fifty-six illegal factories. According to the U.S. government, these actions were not enough. U.S. negotiators broke off talks with China on December 14, 1994, after the Chinese government failed to close down twenty-nine factories that were linked to the production of over $75 million in pirated CDs, cassettes, videos and software.

On January 1, 1995, U.S. trade officials determined that after eighteen months of negotiations and efforts, China had failed to enforce the protection of intellectual property rights within the country. USTR Mickey Kantor announced that if after further negotiations the two countries could not resolve these pressing issues by February 4, 1995, the United States would impose prohibitive tariffs on Chinese exports totalling almost $2.8 billion. Given the history between the two countries and what was at stake, experts reported that it was likely that some measure of agreement would be reached before any serious tariffs and/or penalties would be imposed. Robert Kapp, President of the U.S.-China Business Council in Washington, reported that the “experience we have had with the Chinese in the past is that you have to get far down the road (with threats of retaliation) before you reach a settlement.” Negotiators from China and the United States met unsuccessfully on January 21, 1995, and again on January 24, 1995, to discuss resolution of three major issues: the closure of manufacturing facilities of illegally pirated goods, software protection, and the question of whether or not the government will provide Chinese consumers with the necessary market access to legitimate goods. However, talks were suspended on January 30, 1995,

\[\text{Walters, supra note 140, at D1.}\]
\[\text{Under § 301 sanctions, China could face sanctions equal to the approximate dollar amount lost by U.S. companies from piracy. Id. In this case, $800 million represents the estimated losses that U.S. companies suffered in 1993. Id.}\]
\[\text{Disney Wins Copyright Suit Against Chinese Companies; The Precedent-Setting Case was the First Publication Lawsuit filed by a U.S. company in China, ORLANDO SENTINEL, Aug. 5, 1994, at B1.}\]
\[\text{Nickerson, supra note 280.}\]
\[\text{Time to Get Tough on China Over Piracy, NEWS TRIB., Jan. 5, 1995, at A10. One billion dollars was from copyright violations and $1.8 billion was due to trademark infringements. Id.}\]
\[\text{Id.}\]
\[\text{Id.}\]
\[\text{U.S. to List Items for China Trade Sanctions, SAN DIEGO UNION-TRIB., Dec. 29, 1994, at C1.}\]
\[\text{Nickerson, supra note 280.}\]
because of China’s seven-day lunar New Year holiday.

On February 4, 1995, Kantor announced another harsh deadline for the Chinese. He stated that 100% duties would be imposed on $1.8 billion worth of Chinese imports, the steepest tariff punishment ever threatened by the U.S. government, at midnight on February 26, 1995, if no concrete agreement and action could be reached before that time.\textsuperscript{353} In response, Chinese Trade Minister Wu Yi set up another round of negotiations in Beijing on February 13, 1995. In addition, China made retaliatory threats to counter-sanction with 100% punitive duties on various U.S. products such as alcohol, tobacco products, cosmetics, automobiles, and others.\textsuperscript{354} Furthermore, China threatened to suspend talks on the increase of U.S. investments in China, to suspend ties with several U.S. trade associations, and to suspend negotiations on many joint venture projects with the United States.\textsuperscript{355}

Meanwhile, trade representatives from the United States continued to offer their support and to express their frustration with this prolonged fight for protection; but China had already become a “pirate’s market.”\textsuperscript{356} In fact, many have considered China to be the “world’s worst pirate.”\textsuperscript{357} The President of the International Intellectual Property Alliance, Eric Smith, has said that: “in terms of the rate of the piracy, it is the worst in the world right now, and in this country it is growing and uncontrolled.”\textsuperscript{358} Smith rejected China’s defense that U.S. companies have failed to file civil suits to enforce copyright protection in China, citing examples of many companies that have tried and failed, on more than one occasion, to seek redress through China’s legal system, including such powerful and resourceful organizations as Disney and Microsoft.\textsuperscript{359}

The world waited eagerly to see whether the United States ultimately would engage in a major Pacific trade war, knowing that sanctions could no longer be avoided if China continued to ignore the

\textsuperscript{353} Drawbaugh, \textit{supra} note 238. The top five areas of Chinese exports to the United States targeted by the USTR for the 100% duties are as follows: (1) miscellaneous plastic articles ($465 million); (2) answering machines and cellular phones ($108 million); (3) sporting goods ($78 million); (4) wooden articles ($70 million); and (5) bicycles with wheels, 20 inches or smaller ($65 million). Kurtenbach, \textit{supra} note 200, at DI. In sum, 35 categories of imports from China were chosen, including confectionery, citric acid, rubber gloves, gold and platinum jewelry, copper articles, greeting cards, and others. \textit{Id.} These goods were chosen under a complex system designed to avoid hurting U.S. consumers or businesses. \textit{Making War on China’s Pirates,} \textit{supra} note 18, at 33.

\textsuperscript{354} \textit{Id.} The Chinese have made counter-threats because of the more than $32.4 billion at stake (China’s current export level with the United States). \textit{See U.S. to List Items for China Trade Sanctions,} \textit{supra} note 351, at C1.

\textsuperscript{355} \textit{Id.}

\textsuperscript{356} \textit{Id.} China bought software worth $1 million in 1994, averaging only $1 per desktop computer, the lowest rate in the world today. \textit{See id.}


\textsuperscript{358} \textit{Id.}

\textsuperscript{359} \textit{See id.}
increasingly devastating intellectual property rights crisis situation. What China had accomplished since its citation as a Special 301 "priority country" was not sufficient to satisfy the concerns of the U.S. government or U.S. companies currently doing or wanting to do business in China. Unfortunately, many trade officials acknowledged that no matter what happened, the situation would not be easy to remedy because of the massive structural changes that would have to take place within China. John Kamm, an American business consultant in China, summarized the situation: "When you ask China's leaders to observe basic trade norms, you are asking them to institute commercial laws, independent courts, anti-corruption measures, and equal treatment for foreigners."

The world got its answer by February 26, 1995. A last-minute deal by the Chinese government averted what promised to have been one of the greatest trade wars in American history. According to President Clinton, in addition to signing the agreement and making concessions to all U.S. demands, China backed away from its threats of retaliation, including the threats to cease the current negotiations with the three big U.S. automakers planning to open new production facilities in the Chinese market within the next year. Under this new agreement, China formally agreed to mount a crackdown on intellectual property pirates through efforts such as shutting down seven of the twenty-nine factories making counterfeit movies and CDs, destroying more than two million tapes and CDs, confiscating 30,000 fake computer discs in the city's Zhongguacun District (the Chinese "Silicon Valley"), and raiding an eighth illegal CD factory as the agreement was being signed. USTR Mickey Kantor was pleased with the outcome and remarked that the agreement will "have an enormous impact in expanding U.S. export-oriented jobs." In addition, Kantor remarked that this new agreement should help China in its bid for entrance to the WTO.

The pact was hammered out in detail over the weeks following its signing, and its final form completed on March 12, 1995, consisted of three crucial areas. First, under the settlement, the Chinese govern-

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361 Id.
363 Id.
364 Id.
365 Id.
366 Santini, supra note 156. If China had already been a member of GATT or the WTO, the U.S. would not have been able to make these unilateral trade sanctions. Right to Punish China, supra note 13, at 16. In that case, American sanctions would not have been legal until GATT or the WTO had administered a complaint against China and determined just compensation. Id. However, U.S. sanctions might have been unnecessary in that scenario because China would have been bound by the rigorous regulations and requirements of GATT or the WTO. Id.
ment has agreed to take the following immediate action and allocate resources in order to combat piracy: (1) implement a Special Enforcement Period in which government resources will be used specifically to cleanup large-scale producers and distributors of infringing products; (2) shut down all illegal counterfeit CD factories within three months and destroy any machinery used to produce such goods; and (3) provide stricter border control to prevent the exportation of illegal products.

Secondly, the pact deals with long-term enforcement of intellectual property rights including the following actions:

1) ensure that the Chinese government will use adequate resources to prevent and punish the unauthorized use of legitimate software and other intellectual property goods,
2) establish a strong intellectual property enforcement structure that includes:
   a) Intellectual Property Rights (IPR) conference working groups at all levels of government to carry out enforcement efforts,
   b) IPR enforcement task forces under each working group that have the actual power and authority to carry out enforcement efforts,
   c) cross-jurisdictional enforcement efforts carried out cooperatively,
   d) a Customs enforcement system modeled on the U.S. customs service,
   e) a title verification system to prevent the illegal production, distribution, importation, exportation and retail sale of U.S. audiovisual works that includes participation by U.S. right holders within the Chinese borders,
   f) focused enforcement efforts against the infringement of audiovisual works, computer programs, and publications,
   g) equal treatment of U.S. right holders in the Chinese judicial system, including international treatment for civil filing fees, expeditious handling of IPR cases by foreigners, and prevention of the destruction of evidence of infringement while a case is pending,
   h) establishment of a statistical system that monitors and reports to the U.S. the level of Chinese enforcement efforts on a regular basis together with a schedule of regular meetings between the two countries to monitor the adequacy of such efforts,
   i) enhanced training mechanisms offered to judges, lawyers, stu-

866 Under the agreement's action plan, this special enforcement period began on March 1, 1995, as all intellectual property enforcement agencies in China were asked to increase the pursuit and prosecution of violations for at least the next six months. Business Beams on IPR Breakthrough, S. CHINA MORNING POST, Mar. 17, 1995, at 7, available in LEXIS, News Library, Curnws File.

Such action will include regular raids on retail outlets suspected of selling pirated goods, and imposition of steep penalties against plants that produce such illegal goods. See U.S.-China Reach Accord on 'Pirated' Goods, supra note 2.

867 Summary by U.S. Trade Representative, supra note 343, at 442.

868 Id. China and the United States will exchange this information on a quarterly basis beginning on June 1, 1995. Business Beams on IPR Breakthrough, supra note 366, at 7.
Finally, the Chinese government has agreed to provide greater access to U.S. right holders, including a commitment to: (1) place no quotas on the importation of U.S. audiovisual products; (2) eliminate the ten works per year limit on audiovisual products and instead guarantee U.S. record companies complete access to market their entire catalog of works subject only to censorship laws; and (3) allow U.S. intellectual property-related companies (including software companies) to enter into joint venture arrangements for the production, reproduction, distribution, and sale of their products in Shanghai, Guangzhou, and eventually eleven other cities by the year 2000.370

Software companies hurt by Chinese pirating practices were excited over the results. Robert Holleyman, head of the Business Software Alliance, reported that the pact signaled an “explicit demonstrable commitment to the protection of intellectual property, including software.”371 But others are not as impressed. Frank Wang, General Counsel for Computer Associates, a major New York software firm, is skeptical about how effective the pact will ultimately be. He challenges those who think the pact will take care of the problem and characterizes them as “naive,” stating that the Chinese have not converted, but are only “in the church” to hear the United States preach.372 Regardless of predictions, it has become clear that the Chinese government can no longer afford not to have the United States as an economic ally. From 1984 to 1994, yearly exports from the United States to China rose from $3 billion to $8.8 billion, and Chinese exports to the United States rose from $3.1 billion to almost $38 billion.373

The United States is clearly pleased with the concessions it achieved on every major point in the dispute. In fact, President Clinton released a statement on February 26, 1995, in which he said that the pact will mean “thousands of jobs for Americans in key industries, including computer software, pharmaceuticals, agricultural and chemical products, books and periodicals, and audiovisual products.”374 Fur-

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369 Business Beams on IPR Breakthrough, supra note 366, at 7.
370 Id.; see also Landers, supra note 362, at D1.
371 Santini, supra note 156.
372 Landers, supra note 362, at D2.
373 Summary by U.S. Trade Representative, supra note 343. The Chinese have become very dependent upon the U.S. market as 30% of China’s exports went to the United States last year; only Japan has a bigger bilateral trade surplus with America. Trade Peace; Deja Vu Again, THE ECONOMIST, Mar. 4, 1995, at 73.
374 U.S.-China Reach Accord on 'Pirated' Goods, supra note 2. According to trade officials, the pact will positively affect the ability of U.S. intellectual property-related companies to work and protect their legally-guaranteed rights in China and Asia, which will ultimately lead to the creation of more U.S. jobs in some of the most up-and-coming industries of the U.S. economy. Summary by U.S. Trade Representative, supra note 343.
thermore, the pact promises to reduce the level of pirating of movies, software, music, and CDs which will encourage U.S. companies to move into the growing and dynamic Chinese market. However, trade officials know this is only the first step. As China comes closer to curbing piracy and to entering the WTO, it will have to act quickly to enforce its promises, an action that may very well strengthen the global trading system.\(^{375}\)

C. International Trade Bargaining Tools—WTO

If the last year has proven anything, it is that the United States has a powerful arsenal of bargaining tools that it can and will bring to the international trade table. In addition to Special 301, trade officials have acknowledged that China acquiesced in large part due to the agreement by the United States to rescind its block against the entrance of China into the WTO, the global trade-monitoring body that came into being January 1, 1995.\(^{376}\) Until recently, the United States had vehemently blocked China's entrance into GATT, the predecessor to the WTO, arguing that China should be treated as a developed country and should be forced to enforce its intellectual property rights provisions before entering the world group.\(^{377}\)

The feeling of the United States was that China possessed an export potential and level of world trade comparable to most major world players, and thus that they should not be given preferential treatment or the extension of transition time given to developing nations.\(^{378}\) According to Long Yongtu, Assistant Minister of Foreign Economy and Trade, excessive expectations of market openings due to the reduction of trade barriers are “not realistic,” and those involved in the negotiations with China should take a realistic stance on China and its progress.\(^{379}\) Yet Miao Fuchun, GATT spokesperson, suggested that the continued rejection of China’s bid for entry into that organization eventually could mean bad news for the entire international system of trade, investment, and development as a whole.\(^{380}\) If China was not bound by the WTO, all international trade agreements and conventions made over the last eight years essentially would be nullified.\(^{381}\)

From the beginning, GATT was born from the idea that eventually worldwide trade would be tariff free and international competition would be equitable among all nations.\(^{382}\) GATT was also a mechanism

\(^{375}\) Trade Peace; De Ja Vu Again, supra note 373.

\(^{376}\) See Id.


\(^{379}\) China’s Piracy Woes Tarnish Image, supra note 152.


\(^{381}\) Id.

\(^{382}\) Richerand, supra note 312, at 4.
to which western nations eager to bolster international trade turned for effective intellectual property protection and for enforcement on an international scale. These countries turned to GATT because most felt that the World Intellectual Property Organization (WIPO) could not offer a dispute resolution mechanism that could be used for intellectual property disputes involving trade. The United States in particular looked to GATT, because it wanted "to see its domestic rules on authorship reflected in foreign legislation," so that U.S. authors would receive protection and remuneration in Europe as well as the United States. At the time, GATT was the only institution that was able to provide a mechanism for imposing sanctions for failure to satisfy the agreed upon international regulations. However, the presence of GATT, now the newly-formed WTO, has served in this case to be more a bargaining tool wielded by the United States than a means by which to help curb rampant piracy in China.

The United States, in particular, wrapped itself in the power of GATT to try to combat intellectual property rights violations around the world, because of the large losses it had suffered at the hands of pirates. For example, as of 1986 the U.S. publishing industry was losing $1.3 billion annually, and the worldwide computer software industry was losing nearly $500 million annually. Also, in 1994, U.S. software makers estimated that at least ninety-four percent of all computer programs sold in China were pirated. Many governments, in-

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383 Waters, supra note 308, at 948-49. Westerners looked to GATT to provide the trade incentives not available in the world treaties governing international relations at the time that would give these nations more bargaining power on the trade table. Id. at 949-50.

384 Gutterman, supra note 313, at 108-09.


386 Id. While intellectual property rights issues were not initially included in the core of the GATT provisions, the United States, Japan, and the European Union (EU) helped to bring the Trade-Related Aspects of Intellectual Property Rights (TRIPS) to the negotiating table of the Uruguay Round by the late 1980s. Robert W. Kastenmeier & David Beier, International Trade and Intellectual Property: Promise, Risks, and Reality, 22 VAND. J. TRANSNAT’L L. 285, 290-92 (1989). According to the experts, the objective of these and future discussions was to "prevent distortions in international trade, to promote effective protection for intellectual property rights and to ensure that trade policy measures designed to deal with pirate activities do not interfere with legitimate trade." Morner, supra note 385, at 7. By the end of 1989, the TRIPS proposals presented by negotiators included eight substantive regulations and six rules for enforcement which outlined a minimum level of guaranteed protection for intellectual property rights. Id. at 9. The countries laid out a proposed minimum set of standards that GATT should set in place for the protection against copyright infringement. The minimum protection under the proposed regulations include the following rights: (a) to guarantee the author’s exclusive right to reproduce protected works in any manner or form; (b) to translate, adapt, arrange or edit the protected work in any way; (c) to distribute copies of such works, including their sale, hire and importation; and (d) to communicate the work to the public by any means. Richerand, supra note 312, at 6.

388 James Cox, Message to Bootleggers in China: Just Don’t Do It, USA TODAY, Feb. 23, 1995, at 1B. In 1994, it is estimated that U.S. companies lost $866 million in the following industries: Software ($351 million); Recordings ($345 million); Music & Books ($120 million); and Video ($50 million). Id.
cluding China’s, still maintained great control over the content of their laws and the level of enforcement that would be afforded to them. These practices too often left the rights of foreigners vulnerable to violation, if not completely unprotected.\textsuperscript{389}

On July 28, 1994, GATT convened its 18th session to discuss readmitting China, one of its founding countries.\textsuperscript{390} This reentry into GATT has proven to be an important weapon in the fight by the United States to encourage reform in China’s copyright system. China initially left the trade organization when the Communists rose to power and since 1986, have been trying to reenter GATT and its successor the WTO.\textsuperscript{391} As recently as December 1994, the United States had successfully blocked any attempt by China to enter the WTO.\textsuperscript{392} Now, with the new pact signed and China seemingly eager to enforce its laws, the situation has changed. On the weekend of March 11, 1995, when the details of the agreement were formally laid out in Beijing, USTR Mickey Kantor noted that the United States was now “realistically” considering China’s bid for entry into the WTO.\textsuperscript{393} Kantor acknowledged that while China is a “dynamic, fast-growing economic power,” it should be treated as a “hybrid” member and excluded from some rules in specific circumstances so that it would be able to build its economy up to the WTO standards.\textsuperscript{394} While today the outlook is positive and Kantor and other U.S. trade officials hope this is the dawn of a new era, onlookers remain skeptical, citing the past history of a Chinese government that makes promises and signs agreements only to back out once it has received what it needs.\textsuperscript{395} But officials hope that once China is inside the WTO, fellow members and the organization as a whole will force China to “play by the same rules.”\textsuperscript{396}

On March 11, 1995, Mickey Kantor and Wu Yi, China’s Foreign Trade Minister, hammered out an eight-point agreement that entailed U.S. sponsorship of China into the WTO in exchange for a lifting of quotas and licensing requirements on agrarian goods, and the formalization of a three-part landmark agreement to curb piracy within China.\textsuperscript{397} As the United States prepares to recommend China for en-

\textsuperscript{389} Waters, \textit{supra} note 308, at 948-49.
\textsuperscript{390} China’s Piracy Woes Tarnish Image, \textit{supra} note 152, at *1-42.
\textsuperscript{391} Id.
\textsuperscript{392} U.S.-China Reach Accord on ‘Pirated’ Goods, \textit{supra} note 2.
\textsuperscript{393} A Lasting Trade Peace with China?, \textit{supra} note 377.
\textsuperscript{394} Id. According to the Chinese government, if China was to enter with some of the benefits of a developing nation it could gradually lower tariffs, reform its economy, and boost the wealth of its country to meet the level of a developed country at a heightened pace. \textit{Id.}
\textsuperscript{395} Id.
\textsuperscript{396} Uli Schmetzer, \textit{Optimism on China Trade Accords}, \textit{Cm. Tmb.}, Mar. 14, 1995, at 3. For example, as a member of the WTO, China could no longer use political and criminal detainees as slave labor, and Beijing would be forced to conform to international labor rules, as well. \textit{Id.}
\textsuperscript{397} Id. The two sides also agreed to set standards for fruit and wheat imports that China must accept, and they also agreed to the joint launching of commercial satellites. \textit{Id.}
try into the global trading organization, Chinese officials have reassigned one million people from the courts to the police to help enforce rules prohibiting the piracy that threatened to become one of the worst problems in a sea of international trade issues.\textsuperscript{398}

VI. Concluding Remarks

The international trade situation has been and will continue to be an explosive source of conflict and power among nations. China, now a major world player, will be forced to keep up with the consequences of such issues. It appears that, like the country that enacted them, the Chinese Copyright Law and Software Regulations will continue to develop with major speed and impact. However, now, the focus no longer is on creation of these new laws but rather on the enforcement of them.\textsuperscript{399} The outlook is hopeful but uncertain, as the local political environment in China continues to hinder reform, and a renewed interest in black-market copying and pirating activities thrives among a controlling segment of the population.\textsuperscript{400} Yet, unlike in the past, the United States will no longer accept a "wait and see" approach.\textsuperscript{401}

The time has come for China to prove its commitment to overall reform, and the nation has been put to the test repeatedly. Having faced its biggest challenge with the threat of a crippling $1.8 billion in tariffs, China appears ready to conform to the rigid world intellectual property rights standards. Too much is at stake for the Chinese not to change. They face the opportunity for billions of dollars in investments, joint ventures, and new product imports from the United States and countries around the world. As a result, the Chinese government has made its first real efforts towards destroying the black-market economy that has corrupted and stolen from the legitimate markets on the streets of Beijing and beyond. This commitment includes its promise of more stringent enforcement of its copyright law and the solid agreement signed on February 26, 1995, and delivered March 11, 1995.\textsuperscript{402} U.S. companies can no longer afford the millions of dollars they lose each year to copyright infringement, and China can no longer afford to risk losing the major economic countries as allies.\textsuperscript{403} China wants desperately to solidify its presence in the international marketplace through entrance into the WTO, and the United States literally holds

\textsuperscript{398} Id.

\textsuperscript{399} The U.S. and China have been engaged in trade talks for over a year because China has not been able to provide reliable copyright protection. Ideas Follow Trade, supra note 21. According to commentators, the greatest source of tension is not the laws themselves but the open disregard for their enforcement. Id.

\textsuperscript{400} See Gutterman, supra note 313, at 124.

\textsuperscript{401} Durney, supra note 24, at 319.

\textsuperscript{402} See supra part V.B.

\textsuperscript{403} In 1993, multinational corporations poured $26 billion in direct investment into China as a developing nation. Foreign Investors Ignore Eastern Europe, UPI, Aug. 31, 1994, available in LEXIS, News Library, Curnws File.
the key. Progress by the Chinese has been slow, because both legally and economically, the Chinese government has gotten itself in a catch-22 situation. The Chinese government wants to curb piracy and copyright infringement, but it does not want the enforcement of rights to be a tool that will strangle the economic development of their country.

China knows that it has become a courted nation, and in an effort to maximize on its potential, it has begun to play a game of cat and mouse with many nations. Both the United States and China acknowledge that piracy has gotten out of control, and companies are losing billions of dollars each year. The United States is serious about curbing piracy in China, and China is serious about preventing the United States from making any unilateral trade sanctions. The hallmark agreement signed recently by the two nations should prove to be the catalyst by which both achieve these important goals.\textsuperscript{404}

It is only fair to say that China has come a long way. It has developed some of the most sophisticated copyright and software regulations in the world. Yet, while it has made many efforts to curb piracy in its country, it has only scratched the surface. The recently signed pact proves that for the first time China has formally acknowledged this weakness. As the third-largest economy in the world, the Chinese can stop their rampant piracy epidemic; they should stop it, and now they find themselves as a nation being forced to stop it. China has cracked open its door to U.S. companies wider than ever before but many still have their doubts. Until there is full market access and strict enforcement, piracy threatens to abound.

In summary, it is evident that the Copyright Law of 1991 and the Software Regulations were created by a government with an eye to the future. These newly-enacted laws are some of the most comprehensively drafted laws of their kind in the world.\textsuperscript{405} Without a doubt, they will more than meet WTO standards if they are rigorously enforced. But only today has the Chinese government begun to enforce them. A clear example of lax enforcement is the case brought in China by Walt Disney.\textsuperscript{406} In August of 1994, Walt Disney won what should have been a landmark case. The guilty verdict should have changed the face of intellectual property rights protection in China, but it has not. As of April 1995, no penalty has been assessed, and there is no indication as to when this will happen.\textsuperscript{407} Unfortunately, what this case of potentially epic proportions might become is another statistic of the Chinese legal system, another copyright case that makes it to court but leaves the violated party empty handed.\textsuperscript{408}

\textsuperscript{404} See supra part V.B.
\textsuperscript{405} See supra parts IIA and II.C.2. See also supra part III.B.
\textsuperscript{406} See supra part IVA.
\textsuperscript{407} See supra part IVA.
\textsuperscript{408} Lawyers in the Chinese court system are undertrained and the courts are ill-equipped to perform the investigative work necessary to adjudicate properly the cases that come before
Unfortunately, all the U.S. government can do is watch. Can Microsoft and Disney afford to exit the Chinese market as it continues to grow economically, as consumer spending power continues to escalate, and as the door to opportunity continues to open that much further? This is a question that only those companies can answer with any certainty. In the meantime, the U.S. government has found itself asking the very same questions. Can the U.S. afford to leave the Chinese market if the Chinese fail to uphold their end of the newly signed agreement? Or will such an exit leave both nations at a bigger disadvantage than ever before? In any case, the reality remains that in the next two to five years the United States will witness some of the most significant international trade events the world has faced in the last decade, as this powerhouse nation called China adjusts, modifies, and revamps its economic and legal systems. The United States and the People's Republic of China, which may well be inextricably bound in mutual economic dependency, will continue to shape the landscape of world trade.

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See Orenstein, supra note 135, at 2. While courts have stepped up their level of enforcement, the fact remains that U.S. companies very rarely are compensated properly for the damage done by pirates. Enforcement, supra note 150. Ultimately, U.S. companies find themselves alone in their efforts to ensure enforcement of China's new copyright laws, as affected businesses in other countries, including Japan, seem to be staying out of the piracy confrontation. See Schmetzer, supra note 137, at 1.