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Henry Liu

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LEGISLATIVE UPDATE—
LEGAL ASPECTS OF SOFTWARE
PROTECTION IN CHINA:
THE COMPUTER SOFTWARE
PROTECTION REGULATIONS

Henry Hong Liu†

This article examines the background and major contents of the Chinese Regulations on Computer Software Protection, as well as software administration in China.[1]

I. BACKGROUND

In the early 1980's, issues regarding whether and how computer software should be protected were vigorously debated in China. These discussions arose from the Chinese government's indecision regarding whether to provide this protection through the patent or copyright laws, or whether to enact separate regulations.

Patent protection was deemed inadequate, as computer software was not specifically protected under the Patent Law of 1984,[2] nor the amended Patent Law of 1991. Indeed, the text of the Patent Law implies that computer software is denied protection under the Patent Law as "rules and methods of mental activities."[3]

As patent protection appeared to exclude software, the Chinese

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† Mr. Liu received his legal and business education at a number of institutions including Bejing University, Harvard and Stanford Law Schools. In addition to his business and legal practice which focuses on China and Pacific Rim countries, Mr. Liu writes extensively in the fields of international business law, technology transfers, and legal and business issues between China and the United States.

1. The Regulations on Computer Software Protection of 1991 promulgated by the State Council (hereinafter Regulations) were promulgated on June 4, 1991 and took effect on October 1, 1991. These Regulations contain 40 articles. *See* Appendix for English text of articles.

The Ministry of Machine-building and Electronics Industry (hereinafter, Ministry of M & E or Ministry) is responsible for the registration and administration of software copyright nationwide. The Ministry formulated and published the specific procedures for software registration; the Software Registration Center was established to fulfill this obligation.

2. Patent Law of the People's Republic of China (1984). For an English translation, *see* Hong Liu & Jun Wei, *Technology Transfer to China: The Patent System*, 5 SANTA CLARA COMPUTER & HIGH TECH. L.J. 363, 386-98 (1989) (hereinafter PRC Patent Law).

3. PRC Patent Law, *supra* note 2, at 390.

government attempted to include protection for computer software through the Copyright Law. This effort was abandoned primarily due to the belief that the protection would be less effective and more impractical than originally thought.[4] Ultimately, the Chinese government's decision to enact separate regulations to protect software lead to the enactment of the Computer Software Protection Regulations in 1991. Until this time, computer software was protected in China only through contractual non-disclosure provisions.[5]

China is not alone in providing special treatment for computer software in its intellectual property law. The Model Provisions on the Protection of Computer Software proposed by WIPO in 1978 advocate the formulation of new, independent laws and regulations midway between patent and copyright law to protect computer software.[6] Some countries have enacted completely separate legislation, while others have created special sections in their copyright law.

For example, Korea[7] and Brazil[8] formulated separate regulations on software, outside of the mode of protection provided by their copyright laws.

In France, the French Author's Right Law of 1985,[9] places computer software in a class by itself located after "Neighboring Rights" and far away from literary and artistic works in general. Protection for this special class is limited to a term of 25 years and may not be extended. Although France has long been known for its protection of authors' rights, the law provides that the initial owner of rights in a work under this special class need not be the author, but may be the author's employer.

The Spanish Intellectual Property Law of 1987[10] follows the

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4. The Chinese were persuaded by arguments similar to those set forth in the U.S. decision in Whelan Associates, Inc. v. Jaslow Dental Laboratory, Inc., 797 F.2d 1222 (3d Cir. 1986), *cert. denied* 107 S. Ct. 877 (1987), which suggested that, unlike patents, copyright law does not protect the novelty and content of a work, but rather the manner in which the work is expressed.

5. Liu & Wei, *supra* note 3.

6. The Model Provisions suggest a three-point definition of computer software: computer program, program description and supporting material. The exclusive rights include the right to keep secret, the right to copy and the right to use.

7. South Korea Computer Program Law, Law No. 3920 (1986).

8. Brazil Law No. 7646 (1987). *See Brazil*, INTERNATIONAL COPYRIGHT LAW PRACTICE, § 2[d][iii] (Nimmer & Geller eds., 1992) (hereinafter INTERNATIONAL COPYRIGHT LAW).

9. France Law No. 85-660, 1985 J.O. 7495.

10. Ley de Propiedad Intelectual (1987). *See Spain*, 2 INTERNATIONAL COPYRIGHT LAW, *supra* note 7. Computer Software Protection is found in Title VII of Part 1 of the Act from articles 96-100.

French practice by isolating software from works in general. Protection for software is included within a separate section. In this section, the previously abolished registration systems are restored. It also provides that the principle of "fair dealing," applicable to works in general, is applicable to software. However, the provision regarding reproduction for personal use is not applicable to software.

The 1988 Copyright Act of the United Kingdom,[11] though listing computer programs side by side with works in general, provides different definitions applicable only to programs. Also, in the provisions which deal with moral rights, authors of works such as computer programs are not provided the same rights enjoyed by authors of literary and artistic works in general.

Under the Copyright Law of Japan (as revised after 1985),[12] article 47, section 2 is a special, separately inserted provision applicable to computer programs. Like many countries, Japan also provides optional registration for computer programs.

When the United States listed computer programs among the objects of copyright in 1980, section 117[13] was specifically added to provide limitations on rights applicable only to computer programs.

The European Community Directive of May 14, 1991[14] on computer software protection, provides that as of January 1993 all computer software within the boundaries of the European Community will enjoy the same copyright protection as that enjoyed by literary works, the term of protection being 50 years.

Thus, enactment of the Computer Software Protection Regulations (Regulations) places China in a position which is very similar to that of other countries with respect to recognition of the need for legislation to protect software. Importantly, the Regulations are supplementary to the Copyright Law, as article 53 of the Copyright Law stipulates that "[r]egulations for the protection of computer software shall be formulated separately by the State Council."[15]

II. SOFTWARE PROTECTION AS A SUPPLEMENT TO COPYRIGHT LAW

Software is expressly included under Chinese Copyright Law, which protects "works of literature, art, natural science, social sci-

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11. Copyright, Designs and Patents Act, 1988, § 3(1) (Eng.).
12. Copyright Law of Japan, *reprinted in* 2 Japan Bus. L. (CCH Int'l) ¶ 60-120 (1993).
13. 17 U.S.C. § 117.
14. Council Directive 91/250/EEC, 1991 O.J. (L122).
15. Copyright Law of 1990, art. 53.

ence, engineering and technology, etc., which are expressed in the following forms: . . . Computer Software."[16]

Because of the many similarities between traditional copyrights and software protection, there are several important reasons for incorporating software within the protection provided by copyright.

A. *Similarities Between Copyright Protection and Software Protection.*

First, software is similar to a written work. A piece of computer software is a coded sequence of logical procedures which may be expressed by numerals, words and/or symbols. In a manner analogous to traditional written works, the mode of software expression (i.e., the coded representation) may be fixed on such physical carriers as paper, magnetic disks and magnetic tapes.

The mode of expression of a program fixed on a carrier may be easily copied. As with literary works, this copying of the program's mode of expression is precisely the principal means of infringing the interests of the owner of the rights to the program. Therefore, it is reasonable to list computer software as a class of works within the protection of Copyright Law.

Second, the principles of copyright law give protection to the reasonable rights and interests of the authors, so that they are encouraged to publish their works, thereby allowing society to benefit from them. To this end, the work already created should be protected for a certain period of time against reproduction, plagiarism, alteration, dissemination, and distribution of reproductions of such works without the copyright owner's authorization.

On the other hand, the scope of the protection should be confined to the expression of a work, not the ideas and concepts contained within the work. Thus, copyright law should not restrain anyone from giving play to the intelligence and wisdom which results in newer, more complete expressions of the idea, concept or theme of the work of another person. Because progress and innovation are encouraged through the cumulative efforts of many, society is benefitted by these new expressions.

The Regulations follow these principles. As with copyright, originality is important. The Regulations provide that "software being protected under these regulations must be developed independently by the developers and borne by physical objects."[17] The sub-

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16. *Id.* art. 3.
17. Regulations, *supra* note 1, art. 5.

ject matter of software is also limited to certain types of protectable expression. In a manner somewhat similar to the provisions of U.S. laws regarding software protection, under the Regulations, protection "cannot be extended to cover the ideas, concepts, discoveries, theories, algorithms, processing and operating methods used in software development."[18]

Article 10 provides that under ordinary circumstances, the copyright of a piece of software is owned by the software developer.[19] Article 9 of the Regulations enumerates the rights enjoyed by software copyright owners, including: (1) the right of making public; (2) the right of the developer's authorship; (3) the right of exploiting the software (e.g., by copying, display, distribution, revision, translation, and annotation); (4) the right to authorize use of the software by others and receive renumeration therefor; and (5) the right of assigning these rights.[20]

B. *Differences Between Copyright Protection and Software Protection.*

Although there are many similarities, there are also several important differences between copyright protection and software protection. First, computer software has a series of features which are not shared with literary works. The most fundamental of these characteristics is that a piece of computer software, unlike a literary work, is also expressed as an electric impulse sequence capable of driving computer hardware to accomplish a certain task. Software is a practical tool at the user's disposal which may be put directly to functional use. We may say that its capability for direct, functional uses is precisely the reason for its being. Literary works, on the other hand, can only present ideas, viewpoints, methods, or knowledge to those who then may use these ideas, viewpoints, methods or knowledge presented. But, unlike software, these literary works cannot themselves be put to direct, functional use.

Also, software development is often an industrial production activity which is conducted by an organized, cooperative group of people operating in accord with certain technical standards. Therefore, software is a type of industrial product. Although the reproduction process of literary works may be an industrial production activity engaged in by a collective (e.g., the printing and publishing

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18. *Id.* art. 7.
19. *Id.* art. 10.
20. *Id.* art. 9.

of books), the creative process of literary works involves personal activity and certainly is not an "industrial production activity."

Prior to the software development and production, these unique features had not been encountered in issues surrounding protection of traditional works grounded in copyright. In adopting copyright law to protect computer software, various aspects, such as the provisions for the objects of protection, the contents and subjects of rights, etc., must necessarily involve resolution of these incompatibilities. Essential adjustments must be made in certain traditional clauses within the copyright law in order to meet the needs of software copyright protection.

The Regulations take into consideration the differences between software and works traditionally protected by copyright. For example, in the protection of objects, the Regulations stipulate that computer programs include source programs and object programs. Under the Regulations, the source text and object text of the same program are deemed to be one and the same copyrighted piece. The recognition of software as a type of industrial product is reflected in the rights pertaining to the assignability of software.

In light of the needs of users who have lawfully obtained the software for functional use, article 31 of the Regulations imposes a number of limitations on the rights of the software copyright owner, which include allowing a lawful user to input a program into the internal storage of a computer, make necessary revisions, or make back-up copies, according to the user's needs.[21] It may be seen from a comparison between article 22 of the Copyright Law and articles 21 and 31 of the Regulations that the limitations on economic rights differ in respect to software copyright and copyright of works in general.

With regard to the subjects of the rights, article 3 of the Regulations stipulates that software copyright owners may be either citizens, legal persons or "non-legal person" entities. There are corresponding conditions attached to these designations. For example, articles 11-14 of the Regulations explicitly distinguish between the ownership of copyright in software developed through cooperation, on commission, in fulfillment of a task assigned by a higher entity, and software developed in the line of duty.

As software is a type of industrial wealth, the question of attribution of rights is even more sensitive as compared with traditional works. In order to lend assistance to the determination of the attri-

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21. *Id.* art. 31.

bution of rights, chapter 3 of the Regulations provides for a copyright registration system established in respect to software. The organ for registration and administration (i.e., the Center for Software Registration) has been given the mandate to develop and publish procedures for software registration and administration.

III. EXAMINATION OF THE COMPUTER SOFTWARE PROTECTION REGULATIONS OF 1991

Under the Regulations, protection for software refers to "the enjoyment by a copyright owner of a piece of software or his assignee of the various rights under software copyright prescribed by these regulations."[22]

A. *Definitions.*

In the Regulations, "computer software" refers to "computer programs" and their relevant "documentation."[23] A computer program refers to "a coded instruction sequence which may be executed by devices with information processing capabilities such as computers, or a symbolic instruction sequence or symbolic statement sequence which may be automatically converted into a coded instruction sequence for the purpose of obtaining certain expected results."[24] As indicated previously, computer programs include "source programs" and "object programs;" the source text and object text of the same program are deemed to be one and the same copyrighted piece.[25]

"Documentation" refers to "literal descriptions and charts compiled and written in natural language or formal languages and used to describe the content, structure, design, functional performance, historical development, test results and usage, such as program design instructions, flowcharts, and users' manuals."[26]

Under the Regulations, "software being protected under these Regulations must be developed independently by the developers and borne by physical objects."[27] This principle is basically the same as that for works protected under the Copyright Law.[28] The Regulations also require that protected software possess "originality."[29] In

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22. Regulations, *supra* note 1, art. 4.
23. *Id.* art. 2.
24. *Id.* art. 3(1).
25. *Id.* art. 3(1).
26. *Id.* art. 3(2).
27. Regulations, *supra* note 1, art. 5.
28. Copyright Law of 1990, art. 3.
29. Regulations, *supra* note 1, art. 5.

addition, the software must be borne by "physical objects." Although a "physical object" could be interpreted as a hard copy,[30] it is unclear whether "hard copy" also refers to magnetic disks.

Under the Regulations, persons eligible to receive protection for their software include entities, citizens, and foreigners.[31] The term "software copyright owners" refers to "entities and citizens enjoying the copyright of software in accordance with the provisions of these Regulations."[32] "Entities" refers to "legal persons or non-legal person entities" (hereinafter referred to as entities) actually organizing and carrying out development work, providing working facilities for accomplishing software development, and assuming responsibility for the software. The term "citizens" refers to those "accomplishing software development by relying on their own facilities and assuming responsibility for the pieces of software." "Software developers" encompasses entities and citizens.[33]

With respect to software developed by a Chinese citizen or an entity, "regardless of whether or where the said software has been made public, he or it shall enjoy the copyright."[34] In contrast, the Computer Protection Regulations provide that foreigners may enjoy copyright protection in China in two situations. The first is where a piece of software "developed by a foreigner is first made public in China." In this case, the foreigner may enjoy the copyright in accordance with the Regulations.[35] Secondly, copyrighted software owned by a foreigner "made public outside China" may be protected under the Regulations "in accordance with agreements concluded between his country and China or with international conventions acceded to by his country and China."[36]

This is generally in accord with the principles of national territorial treatment and reciprocity in copyright laws of other countries. However, it should be noted that unlike Chinese entities or citizens, foreigners must "make their software public" before being eligible for copyright protection in China. The exact translation of "make public" in the Chinese text of the Regulations is "publish."[37]

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30. *Id.* art. 3(5). "Copying refers to acts of transferring software onto physical objects."

31. *Id.* arts. 3(3), 3(4), 6.

32. *Id.* art. 3(4).

33. *Id.* art. 3(3).

34. Regulations, *supra* note 1, art. 6. The territorial requirement is not limited to China proper.

35. *Id.* art. 6.

36. *Id.* art. 6.

37. "The right of making public" refers to making the software available to the public. *Id.* art. 9(1).

However, it is unclear what exactly constitutes "make public" or "publish." In later promulgated Computer Software Registration Procedures, "make public" is defined as "the act of making software available to the public, including the issue of the software to the public through sales or by other means of providing copies or through public demonstration of the software undertaken with a view to further distributing copies."[38]

With respect to software developed by two or more entities or citizens in cooperation, the copyright of the software is jointly owned by the developers who cooperated to produce the software.[39] In the case where a written agreement is made in advance, the software copyright is owned by the cooperating developers according to that agreement. In cases where there is no written agreement, but the software developed in cooperation may be partitioned and used, the developers may separately enjoy the copyright to the respective portions they developed. However, the exercise of this copyright may not be extended to the copyright of the jointly developed software as a whole.

If the software developed in cooperation cannot be partitioned and used, the copyright is to be exercised by the cooperating developers, upon reaching unanimity through consultation. If unanimity cannot be reached through consultation, none of the parties may prevent the other party or parties from exercising the rights other than the right of assignment. The proceeds are reasonably distributed to all cooperating developers.[40]

The copyright of software developed on commission is governed by written agreement between the commissioning and commissioned parties. Where there is either no written agreement, nor an explicit stipulation made in the agreement, copyright ownership is attributed to the commissioned party.[41]

There are two situations under which the ownership of software developed by a citizen while working for an entity becomes an issue.[42] In the first situation, the software is developed in accordance with a development objective explicitly assigned in the line of an employee's duty, or is a foreseen or natural result of his carrying out activities in the line of duty. In this case, the software copyright is attributed to the entity. In the second situation, where a

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38. Measures for Computer Software Copyright Registration, 2 China Laws for Foreign Bus. (CCH Austl. Ltd.) ¶ 11-706(3) (1992) (hereinafter Registration Procedures).

39. Regulations, *supra* note 1, art. 11.

40. *Id.* art. 11.

41. *Id.* art. 12.

42. *Id.* art. 14.

piece of software developed by a citizen is not a result of performing his or her duty, and is not directly related to the content of the work engaged in by the developer in the entity, nor has the developer utilized the material and technical facilities of the entity, the software copyright is attributed to the developer. In reality, the criteria for making these distinctions regarding the line of duty remain to be determined.

Under article 13, the rights to copyrighted software developed in fulfillment of a task assigned by a higher entity or government department, the rights are normally stipulated within a letter of work assignment or contract. Where no explicit stipulation is made in the letter of work assignment or contract, the copyright of the piece of software is attributed to the entity which accepts assignment.[43]

B. *Characteristics of Software Copyrights.*

A computer software copyright owner enjoys both personal rights and property rights. The personal rights are inherent rights which are not limited by the duration of the protection. The two major types of personal rights, the "right of making public" and the "right of authorship," refer to the protection of the honor and reputation of the computer software developer.

The right of making public refers to the right to decide whether to make the software available to the public.[44] This means that the software developer enjoys the right to decide whether, where, when and in what form, to publish or make public of his or her software.

The right of authorship refers to the right of the developer to make his identity known and to have his name indicated on the software.[45] The duration of the protection for the right of "authorship" is "unlimited."[46]

The other bundle of rights, the "property rights," refer to the exclusive rights of the software copyright owner to exploit his software and to obtain renumeration. Unlike the personal rights, these property rights are limited.

The "right of exploitation" refers to the right of the software copyright owner to exploit his or her software in such a manner as copying, displaying, distribution, revision, translation, and annota-

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43. *Id.* art. 13.
44. Regulations, *supra* note 1, art. 9(1).
45. *Id.* art. 9(2).
46. *Id.* art. 15.

tion, on the premise that the public interest is not damaged.[47]

The "right to authorize use" and the "right to renumeration" refer to the right to authorize others to use or exploit the software and to receive renumeration therefor.[48]

The "right of assignment" refers to the right to assign to others the right of exploitation and the right of authorization for use.[49] In addition, software copyrights are inheritable, as the Regulations provide that within the duration of protection for the copyright of a piece of software, the successor to the software copyright is entitled to the rights of exploitation, authorization for use, and renumeration, according to the law of succession.[50] However, there is no provision regarding the inheritance of the right of assignment.

Article 9 provides the basis for the right of assignment of software copyright. Within the duration of protection for the copyrighted software, the copyright owner (or the assignee) has the right to authorize others to exercise the right of exploitation.[51] As part of this authorization agreement, the copyright owner or his assignee may charge royalty fees.[52] The period of validity of a licensing contract must not exceed ten years. However, a contract may be renewed on expiration.

To ensure the validity of these agreements, licensing agreements pertaining to these software rights should be executed in a written contract in accordance with the relevant laws and regulations of the People's Republic of China. The licensee should exercise the right of exploitation by adhering to the manner, conditions, scope and duration stipulated in the contract.[53] Where the licensed rights pertaining to the software are not explicitly stipulated in the contract as exclusive, they are deemed to be non-exclusive.[54] Importantly, these licenses do not change the ownership of the copyrighted software.

In the case where the software copyright owner is an entity, if the entity's ownership changes within the duration of the copyright of the software, the various rights pertaining to that piece of software are owned by the lawful succeeding owner to the entity. In this situation, the duration of protection for the rights pertaining to

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47. *Id.* art. 9(3).
48. *Id.* art. 9(4).
49. Regulations, *supra* note 1, art. 9(5).
50. *Id.* art. 16.
51. *Id.* art. 18.
52. *Id.* art. 18.
53. *Id.* art. 18.
54. Regulations, *supra* note 1, art. 18.

the software do not change.[55]

When a Chinese software copyright owner licenses or transfers the rights of a piece of software developed in China to a foreigner, the copyright owner must report the transaction to the relevant governmental department under the State Council for approval, and to the Software Registration Center for software registration and administration.[56]

C. *Duration of Protection.*

The duration of protection for the copyright on a piece of software is twenty-five years, ending on the 31st day of December of the twenty-fifth year after the software is first made public. Before the expiration of the duration of protection, the software copyright owner may apply to the organ for software registration and administration (i.e., the Software Registration Center) for an extension of twenty-five years. The maximum duration of protection is fifty years.[57]

Under article 20, after expiration of copyright protection, the rights, other than the right pertaining to the developer's authorship, are terminated.[58] The duration of protection for the right of the developer's authorship of the software is unlimited.[59]

As indicated above, where there is a change in copyright ownership, or there is an assignment, the duration of protection for the rights pertaining to the software do not change.[60]

Other than the rights of the developer's authorship, the various rights pertaining to a piece of software enter the public domain before the expiration of the duration of protection when either (1) the entity owning the copyright of the software has been dissolved and there is no lawful successor, or (2) the citizen owning the software copyright dies and there is no lawful successor.[61]

D. *Limitations on Protection.*

Within the Regulations, there are several limitations on the protection provided to owners of copyrighted software. First, a piece of software may be copied "in small quantities to serve such

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55. *Id.* art. 17.
56. *Id.* art. 28.
57. Regulations, *supra* note 1, art. 15.
58. *Id.* art. 20.
59. *Id.* art. 15.
60. *Id.* art. 17, 19.
61. *Id.* art. 20.

non-commercial purposes as education, scientific research, or government business without the consent of or renumeration to, the copyright owner of the software or his or her lawful assignee."[62] Since many business enterprises in China are state-owned companies, a phrase such as "government business" is very vague and includes a majority of the businesses within China.

Second, uses in which it is necessary to implement "the relevant policies, laws, regulations and rules of the state," to implement "the technical standards of the state," or where there is "a limited number of available options in the forms of presentation," do not infringe the software copyright holder's property rights. These extremely broad provisions may result in liberal interpretations of "free use," which could present potential problems for software developers. If a large number of companies which would otherwise be infringers fit within this exception, the software developers risk losing a large proportion of their investment.

In addition, with respect to software which is developed by "entities under ownership of the whole people" within their respective sectors or under their jurisdiction, if such a software is of great significance to national interests and public interests, the "relevant departments" under the State Council and "the People's Government of the various provinces, autonomous regions and municipalities" have the right to decide whether to allow such a software to be exploited by "designated entities." The exploiting entities then pay exploitation fees to the developing entities in accordance with the relevant laws of the State.[63]

E. *Infringement.*

If any acts defined within the term "infringement" occur, according to the circumstances, the infringer must stop infringing, eliminate the adverse effects, make a public apology, and compensate the copyright owner for any damages incurred due to the infringement. In addition, the State administrative authorities for software copyright protection may impose administrative sanctions on the infringer, including confiscation of the unlawful income and imposition of a fine.[64] Article 32 defines the following acts as "infringing:"[65]

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62. Regulations, *supra* note 1, art. 22.
63. *Id.* art. 13.
64. Regulations, *supra* note 1, art. 30.
65. *Id.* art. 32.

(1) making a piece of software public without the consent of the copyright owner;

(2) making public as one's own work a piece of software developed by others;

(3) making public as a work completed on one's own, a piece of software developed in cooperation with others without the consent of the collaborators;

(4) having one's own name indicated on a piece of software developed by others or obliterating the name indicated on a piece of software developed by others;

(5) altering, translating or annotating a piece of software without the consent of the copyright owner or the lawful assignee;

(6) copying in whole or in part, a piece of software without the consent of the copyright owner or the lawful assignee;

(7) distributing or disclosing to the public a copy of a piece of software without the consent of the copyright owner or the lawful assignee;

(8) conducting business concerning licensing or transfer of a piece of software to any third party without the consent of the copyright owner or the lawful assignee;[66]

(9) supplying an infringing piece of software to others, while fully knowing that the software infringes another's copyright.

There are many acts which do not constitute infringement. For example, entities or citizens who lawfully hold copies of software enjoy the following rights, without the requirement of consent of the software copyright owner:

(1) installation and storage of software on a computer according to the user's need and for the purpose of using it;

(2) making backup copies for filing;[67] and

(3) making necessary revisions to the software in order to implement it in an actual environment of computer application, or to improve its function and performance.[68]

As stated above, software may be copied in small quantities to serve such non-commercial purposes as education, scientific research, or government business without the consent of, or remuner-

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66. *Id.* art. 30.

67. Backup copies must not be supplied in any way for use by others. Once the holders lose the right to hold the software lawfully, all backup copies must be destroyed.

68. Except as otherwise agreed, the holder must not supply the revised version to any third party without the consent of the software copyright owner or the lawful assignee. Regulations, *supra* note 1, art. 21.

ation to, the copyright owner of the software or his lawful assignee. However, in exploiting the software in such a manner, the title and developer of the piece of software are to be made known, and the various other rights enjoyed by the copyright owner or his lawful assignee in accordance with the Regulations must not be infringed. In addition, the copies should be properly stored, returned or destroyed after use, and must not be used for other purposes, nor supplied to others.[69]

Similarity between a piece of software developed by one person and an existing piece of software may not constitute copyright infringement of the existing software. For example, where a particular piece of software is necessary to implement the relevant policies, laws, regulations and rules of the State or it is necessary to implement the technical standards of the State, or where there is a limited number of available options in the forms of presentation, there is no infringement.[70]

Where the holder of a piece of software has no knowledge of, or has no reasonable basis for having knowledge of, the piece of software as infringing, liability for infringement is borne entirely by the supplier of the infringing piece of software. The term "supplier of an infringing piece of software" covers those who supply an infringing piece of software to others in the full knowledge that it infringes.[71] Where the rights and interests of the copyright owner of the software would not be sufficiently protected without the destruction of the software held by the holder, the holder is obligated to destroy the software. However, the holder may demand compensation from the supplier of the infringing piece of software for the losses suffered by the holder.

Due to recognition that disputes involving contract issues (e.g., failure to perform contracts) and infringement may arise during the term of copyright protection, the Regulations include provisions regarding disputes which arise from transactions involving software.[72]

As discussed previously, administrative sanctions may be imposed in infringement cases.[73] However, if the software is registered and the software rights are assigned, the assignee must report the transaction to the organ for software registration and administration for the record within three months of the official signing of the

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69. *Id.* art. 22.
70. *Id.* art. 31.
71. *Id.* art. 32.
72. *See* Regulations, *supra* note 1, art. 33-35.
73. *Id.* art. 30.

assignment contract in order to protect their rights. For example, unless the transaction is reported within the required time period, the assignee will not be able to counter the infringing activities of a third party.[74]

Where a party is not satisfied with the administrative sanction imposed by the administrative authority of the State for software copyright affairs, it may institute proceedings in the People's Court within three months from the date of receipt of the relevant notification. Where the party neither executes the fulfills the requirements of a sanction decision, nor institutes proceedings in the People's Court within the time limit, the appropriate administrative authority may apply to the People's Court for compulsory execution.[75]

An infringement dispute over software copyright may be settled through mediation. Where mediation fails or where one of the parties changes its mind after an agreement has been concluded through mediation, proceedings may be instituted in the People's Court. Proceedings may also be instituted directly in the People's Court if the parties do not wish to settle the dispute through mediation.[76]

Contract disputes over software copyrights may also be settled through mediation. Or, the parties may apply for arbitration by the software copyright arbitration organ of the State. These arbitration proceedings are conducted in accordance with the arbitration clause in the contract or a written arbitration agreement subsequently concluded.

Parties to the arbitration may bring their case to a court under three circumstances. First, if one party fails to execute the arbitral award, the other party may apply to the People's Court for execution. Second, if the People's Court finds the arbitral award illegal, it has the right to prevent execution of the award. In this circumstance, the party may institute proceedings in the People's Court regarding the contractual dispute. Third, when the parties do not have an arbitration clause in the contract, nor is there a subsequently concluded a written agreement, either party may directly initiate proceedings in the People's Court.[77]

In cases where an interested party fails to perform their contractual obligations, or fails to perform the obligations in a contract in conformity with the conditions stipulated, it may result in civil

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74. *Id.* art. 27.
75. *Id.* art. 36.
76. *Id.* art. 34.
77. Regulations, *supra* note 1, art. 35.

liability in accord with the relevant provisions of the General Principles of the Civil Law.[78] Thus, in addition to the situations discussed above, civil litigation is sometimes an option.

F. *Summary of Copyright Protection for Software.*

Thus, while computer software protection in China has primarily been enacted through the Regulations, computer software may also be protected under other legal theories, with contracts playing a particularly important role.

IV. CONTRACT AND PATENT LAW APPLIED TO SOFTWARE

An important consideration in protection of software is that although contract law can provide protection by itself, the Patent Law and Copyright Law often cannot effectively protect software without some contribution from contract law.

A. *Contract Law.*

The Technical Contract Law of the People's Republic of China[79] recognizes that any technology capable of bringing some sort of benefit to the other party may be taken as the object of a contract.[80] For example, such contracts include those for individual and joint software development, sales of software and software data, and software testing and security. Moreover, the protection provided to computer software by contract law is very flexible. Through specific clauses within the contract, a software developer may fix his desired method and degree of protection in legalized form.

B. *Patent Law.*

The form of expression of computer software is as a work consisting of a group of sentences or instructions protectable under copyright law. However, software is also the crystallization of mathematics, information, control, and engineering (i.e., software engineering), the contents of which should also be patentable.

Due to the difficulties presented by problematic rules regarding mathematical algorithms and mental activity, the intellectual property circles in various countries initially excluded software from the

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78. *Id.* art. 33.
79. Law of the People's Republic of China on Technology Contracts, 1 China Laws for Foreign Bus. (CCH Austl. Ltd.) ¶ 5-577 (1987).
80. *Id.* ¶ 5-577(3)-(4).

scope of patent law protection. However, in recognition during the 1980s of the needs for industry development, many countries re-interpreted the relevant legal provisions and revised their examination standards. These changes were based on guiding cases and led to provisions for software patent protection.

Most countries have displayed great flexibility in the matter. Since China began implementation of its patent law in 1985, its practice in this respect is consistent with the international trend. In accordance with the provision in article 25(2) of the Chinese Patent Law,[81] no patent right is granted for rules and methods of mental activities.[82] Also, computer software *per se* is not regarded as an object of protection by patent law.[83]

However, where an invention containing computer software has technical effects considered a complete technical solution, it may be granted patent rights, regardless of whether it is a computer program which involves the handling of a technological process by automation, or operation of a computer system in a new mode. This is true even if the inventive point lies in the computer program. Examples include (1) the encoding of Chinese characters as an input method of the processing of Chinese characters by a computer system, (2) a method of processing information in Chinese characters, and (3) installation of new software on a publicly known computer, to improve its performance. This has made it possible for such processes and products to receive the high degree of protection provided by patent law.[84]

V. Administration and Registration of Computer Software in China

The "organ for software registration and administration" mentioned in the Regulations is the Ministry. The grant of power regarding computer software administration and registration is contained within article 6 of the Computer Software Registration Procedures, which states: "With the authorization of the State Council, the Ministry of M & E is in charge of the registration and administration of the copyright of software nationwide." The Ministry entrusted the Software Registration Center of China with the routine work of registering computer software copyrights.[85]

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81. PRC Patent Law, *supra* note 2, at 390.
82. *Id.*
83. *See* Liu & Wei, *supra* note 2.
84. *Id.*
85. Procedures, *supra* note 38, ¶ 11-706(6).

The Ministry of M & E is also charged with designating, according to need, appropriate agencies to assist the Software Registration Center in handling software registrations. The functions and responsibilities of these agencies is determined separately by the Ministry of M & E according to specific, publicly announced conditions.[86] As discussed below, this presumably includes the Software Registration Reexamination Board.

The Software Registration Center has various functions, including: (1) implementation of the provisions in the Regulations concerning registration and these procedures; (2) submitting proposals for improving or perfecting the registration process; (3) accepting and examining applications for software registration; (4) publication and distribution of the software registration announcements; (5) setting up, classifying and storing the software registration files; (6) providing the public with facilities for reading the registrations; (7) attending to public inquiries; and (8) completion of other tasks related to the registration work which are entrusted to the Center by the Ministry of M & E.[87]

Article 25 of the Regulations stipulates that "the specific administrative procedures and schedule of charges for software registration shall be published by the organ for software registration and administration."[88] The Ministry formulated and published Procedures for the Registration of Copyright in Computer Software on April 6, 1992. The Ministry of M & E and the Software Registration Center of China, as organs of the State Council are responsible for implementation of the Regulations and the Procedures for the Registration of Copyright in Software.[89]

The Regulations require that a registration application be filed with "the organ for software registration and administration" namely, the Software Registration Center. The Software Registration Center began accepting applications for registration on May 1, 1992. After the application for registration is approved, a registration certificate is granted and an announcement is made to the public by the organ for software registration and administration.[90] The Center is also required to seal the checklists for the source programs deposited for safekeeping.[91]

It may be seen from these provisions that applying for registra-

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86. *Id.* art. 39.
87. *Id.* art. 38.
88. Regulations, *supra* note 1, art. 25.
89. *Id.* art. 39; Procedures, *supra* note 38, ¶ 11-706(49).
90. Regulations, *supra* note 1, art. 23.
91. *Id.* art. 14. Removal of this seal requires the applicant's consent or a court decision.

tion is a voluntary act on the part of software owner and not a prerequisite for obtaining a copyright. However, the software must be made public before or at the same time as it is registered. A piece of software not intended to be made public cannot be registered.

The owner of the software enjoys the copyright, whether or not the software is registered. The applicant may be the software copyright owner, successor to the original owner, or an assignee.[92] Where the assignment of the rights is to be put on record, an assignment contract authenticated according to law and the original certificate of registration should be submitted. Where the rights are assigned to a foreigner, the document of approval issued by the relevant responsible department of the State Council must be submitted.[93]

When registering a software for which one of the copyright owners is a foreigner, the application is to be handled in accordance with "the relevant provisions of international conventions acceded to by the country to which he belongs and by China or in bilateral agreements concluded between the country he belongs to and China." If the relevant provisions do not require a registration process, the formalities may be dispensed with. However, if an application for registration is filed voluntarily, these Procedures apply.[94]

In January 1992, China and the United States signed a memorandum of understanding on the mutual protection of each other's intellectual property including software copyright. In July 1992, China approved a proposal to accede to the Berne Convention for the Protection of Literary and Artistic Works and the Universal Copyright Convention in cooperation with other countries to provide copyright protection in member countries.

If certain provisions in the agreements are signed, or if international copyright conventions commonly acceded to by the Chinese and foreign governments differ from the provisions in the Regulations on Computer Software Copyright Protection of China, the compliance will be based on the provisions in the international agreements signed or conventions acceded. The only exception to this is where the Chinese government has stated its reservations.

In order to be eligible for registration, the software must have been "made public" after the promulgation of the Computer Software Regulations.[95] Software which has not entered the public

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92. Procedures, *supra* note 38, ¶ 11-706(4).

93. *Id.* ¶ 11-706(18).

94. *Id.* ¶ 11-706(5).

95. *Id.* ¶ 11-706(2).

domain may be registered, as long as it registration is completed within one year after the Procedures take effect.[96]

Under the Regulations, to apply for registration, the software copyright owner should submit a completed software copyright registration form, and a "written appraisal."[97] Furthermore, an application for software copyright registration is limited to one piece of software which has been made public independently and is capable of independent operation.[98] The application will not be accepted if it does not comply with the application procedures and/or if there are missing application materials.[99]

When registering co-developed software, the co-owners may, through consultation, decide on one of the copyright owners as their representative.[100] If the various copyright owners fail to reach unanimity through consultation, each copyright owner has the right to apply for registration on the premise that the interests of the other copyright owners will not be damaged, and the names of the other copyright owners are to be listed in the registration documents.[101]

The Procedures include detailed requirements regarding the application.[102] The principal certifying documents that should be submitted for copyright registration include: (1) a legal personal certificate of identity; (2) a written agreement on the attribution of the copyright if applicable; (3) consent or authorization of the copyright owner or owners, in the case of revised or integrated software developed based on the software of others; and (4) a certifying document of the succession to or assignment of the rights, in the case where a successor or assignee of rights applies for registration.[103] A letter of consent or a power of attorney should be submitted as well. Where the rights are assigned to a foreigner, the document of approval issued by the relevant responsible department of the State Council should be submitted.[104]

The written appraisal should demonstrate that the software was independently developed, contain a program appraisal, and a

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96. *Id.*
97. Regulations, *supra* note 1, art. 25.
98. Procedures, *supra* note 38, ¶ 11-706(7).
99. *Id.* ¶¶ 11-706(25)-(27).
100. *Id.* ¶ 11-706(8).
101. *Id.*
102. *Id.* ¶ 11-706(9).
103. Procedures, *supra* note 38, ¶ 11-706(10).
104. *Id.* ¶ 11-706(18).

program description for identification of the software.[105] The program description appraisal "should be the appraisal of at least one software description."[106]

A registration certificate granted by the "organ for software registration and administration" is the initial certification of the copyright validity for a piece of software, and may be the verification and proof of the facts stated in the application document for registration.[107] A registered software copyright may be cancelled when there is a final judicial judgment, or if the principal information provided in the application for registration is confirmed to be untrue.[108]

Under the Regulations, registration of the copyrighted software with the Software Registration Center is the basis for submission of a request for administrative intervention or instituting legal proceedings to resolve disputes. The Procedures further state that where software rights are transferred, the following parties should report the transfer to the Software Registration Center for recordation in order to permit the countering of infringing activities conducted by third parties:[109]

(1) the successor to the rights referred to in Articles 16 and 17 of the Regulations;

(2) the assignee of the rights referred to in Article 27 of the Regulations; and

(3) the licensor or the transferring party of the right referred to in Article 28 of the Regulations.[110]

Any party may file an opposition with the Software Registration Center against software for which the principal information provided at registration was untrue and/or the software is not in conformity with the provisions of the Regulations and Procedures. The opponent should submit, in duplicate, a request for opposition and a relevant certifying document.[111] Where an opposition is held to be tenable after examination, the Ministry of M & E will cancel the registration, notify the opponent and the software registrant in writing, and make an announcement regarding the cancellation. If the opposition is found to be untenable, it is rejected.[112]

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105. *Id.* ¶ 11-706(11).
106. *Id.* ¶ 11-706(13).
107. Regulations, *supra* note 1, art. 24.
108. *Id.* art. 26.
109. Procedures, *supra* note 38, ¶ 11-706(16).
110. *Id.*
111. *Id.* ¶ 11-706(28).
112. *Id.* ¶ 11-706(31).

In conformity with article 26,[113] the Ministry of M & E can cancel the registration on the basis of the "relevant documents" and request that the software registrant return the original registration certificate.[114] However, it is unclear what comprises the "relevant documents."

Where a party is opposed to the rejection of a registration application, or if the registration for a piece of software is cancelled because an opposition is found to be tenable, the aggrieved party may petition the Software Registration Reexamination Board. The Board was set up by the Ministry of M & E for the purpose of reexamining registration applications.[115] Thus, it is composed of personnel conversant with the law, or software technology. The petitioner should submit, in duplicate, a request for reexamination and all relevant certifying documents.[116] This request should be submitted within 60 days after receipt of the relevant notification regarding the rejection or cancellation of a registration application.

VI. SUMMARY

Although the level of development of China's software industry was taken into consideration in the formulation of the Computer Software Protection Regulations, China's software industry is still evolving. For a variety of reasons, there is little sophisticated commercial software currently produced in China, even though China has fairly good software scientists, technicians and programmers.

However, the sale of computers in China is rapidly growing with sales of computers greater than 100,000 computers/year. This will undoubtedly stimulate a parallel call for the rapid development of commercial software. The Regulations "must be capable of encouraging a larger number of pieces of software as commodities to be developed faster which will meet the needs of users, and normal channels of their circulation to be formed as soon as possible."[117] While the Chinese government desires to provide protection for computer software against copyright infringement, it does not want the protection to be a strict tool which will hurt the economic development of the country.

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113. Regulations, *supra* note 1, art. 26. The registration of the copyright of a piece of software may be cancelled based on a final judicial judgment or if the principal information provided in the registration application is confirmed to be untrue.

114. Procedures, *supra* note 38, ¶ 11-706(32).

115. *Id.* ¶ 11-706(33).

116. *Id.* ¶ 11-706(34).

117. Ying Ming, *China's Regulations on Computer Software Protection*, CHINA PATENTS & TRADEMARKS, No. 4, 1991, at 86.

Another indication of the legislative intent is represented by the prohibition against copying and plagarizing of the results of other people's software development, and provisions which safeguard the reasonable rights and interests of software developers. In addition to the breadth of protection provided to software, the depth of the protection should also be controlled appropriately. For example, it is inadvisable to impose excessive restrictions on the legitimate development and circulation of software, in order to prevent the situation where those working in the software industry continuously live in fear of being held liable for violating the Regulations on protection at every turn.[118]

In conclusion, China may not currently protect computer software as effectively as many industrial countries. Nonetheless, despite their shortcomings, the Regulations have helped to advance China's intellectual property law. It is likely that these Regulations will continue to play an significant role in the continued development of this important body of law.

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118. *Id.*

APPENDIX

REGULATIONS ON COMPUTER SOFTWARE PROTECTION OF THE PEOPLE'S REPUBLIC OF CHINA

(Promulgated by the State Council, effective as of October 1, 1991)

Chapter I

General Provisions

ARTICLE 1   These Regulations are formulated in accordance with the provision of the Copyright Law of the People's Republic of China with a view to protecting the rights and interests of copyright owners of computer software, regulating the interests generated in the development, dissemination and use of computer software, encouraging the development and circulation of computer software and promoting the application of computers.

ARTICLE 2   Computer software (hereinafter referred to as software for short) as mentioned in these Regulations refers to computer programs and their relevant documentation.

ARTICLE 3   The meaning of the following terms in these Regulations are as follows:

(1) A computer program refers to a coded instruction sequence which may be executed by devices with information processing capabilities such as computers, or a symbolic instruction sequence or symbolic statement sequence which may be automatically converted into a coded instruction sequence for the purpose of obtaining certain expected results.

Computer programs include source programs and object programs. The source text and object text of the same program shall be deemed to be one and the same copyright piece.

(2) Documentation refers to literal descriptions and charts compiled and written in natural language or formal languages and used to describe the content, structure, design, functional performance, historical development, text results and usage, such as program design instructions, flowcharts, and users' manuals.

(3) Software developers refer to legal persons or non-legal person entities (hereinafter referred to as entities) actually organizing and carrying out development work, providing working facilities for accomplishing software development, and assuming responsibility for the software, and citizens accomplishing software development

by relying on their own facilities and assuming responsibility for the pieces of software.

(4) Software copyright owners refer to entities and citizens enjoying the copyright of software in accordance with the provision of these Regulations.

(5) Copying refers to acts of transferring software onto physical objects.

ARTICLE 4   Protection for software as mentioned in these Regulations refers to the enjoyment by a copyright owner a piece of software or his assignee of the various rights under software copyright prescribed by these Regulations.

ARTICLE 5   Software being protected under these Regulations must be developed independently by the developers and borne by physical objects.

ARTICLE 6   In respect of a piece of software developed by a Chinese citizen or entity, regardless of whether or where the said software has been made public, he or it shall enjoy the copyright in accordance with these Regulations.

Where a piece of software developed by a foreigner is first made public in China, he shall enjoy the copyright in accordance with these Regulations.

The copyright of the software of a foreigner made public outside China shall be protected by these Regulations in accordance with agreements concluded between his country and China or with international conventions acceded to by his country and China.

ARTICLE 7   The protection of software under these Regulations cannot be extended to cover the ideas, concepts, discoveries, theories, algorithms, processing and operating methods used in software development.

ARTICLE 8   The organ for software registration and administration authorized by the State Council shall be in charge of software registration throughout the country.

Chapter II

Copyright of Computer Software

ARTICLE 9   A software copyright owner shall enjoy the following rights:

(1) The right of making public, i.e., the right to decide whether to make the software available to the public;

(2) The right of the developer's authorship, i.e., the right to

make known his identity as developer and the right to have his name indicated on his piece of software;

(3) The right of exploitation, i.e., the right to exploit his software in such manners as copying, display, distribution, revision, translation, and annotation on the premise that the public interest is not damaged;

(4) The right of authorization for use and the right of being remunerated, i.e., the right to authorize others to use his piece of software in some or all of the manners stipulated in (3) of this article and to receive remuneration therefor;

(5) The right of assignment, i.e., the right to assign to others the right of exploitation and the right authorization for use as stipulated in (3) and (4) of this article.

ARTICLE 10   The copyright of a piece of software shall be owned by the software developer. Where there are special provisions in these Regulations, the provisions shall apply.

ARTICLE 11   In respect of a piece of software developed by two or more entities or citizens in cooperation, the copyright of the software shall be jointly owned by the developers who have cooperated in its development.

The software copyright owned by the cooperating developers shall be exercised according to a written agreement concluded in advance. Where there is no written agreement while the software developed in cooperation may be partitioned and used, the developers may separately enjoy the copyright to the respective portions developed by them, but the exercise of such copyright may not be extended to the copyright of the jointly developed software as a whole. Where the piece of software developed in cooperation cannot be partitioned and used, the copyright shall be exercised by the cooperating developers after reaching unanimity through consultation. Where unanimity cannot be reached through consultation, nor is there any justified reason, none of the parties shall prevent the other party or parties from exercising the rights other than the right of assignment, but the proceeds shall be distributed reasonably to all cooperating parties.

ARTICLE 12   The attribution of the copyright of a piece of software developed on commission shall be stipulated by the conclusion of a written agreement between the commissioning party and the commissioned party. Where there is no written agreement, nor is an explicit stipulation made in the agreement, the copyright shall be attributed to the commissioned party.

ARTICLE 13   The attribution of the copyright of a piece of

software developed in fulfilling a task assigned by a higher entity or government department shall be stipulated by a letter of work assignment or contract. Where no explicit stipulation is made in the letter of work assignment or contract, the copyright of the piece of software shall be attributed to the entity accepting the assignment.

The relevant departments under the State Council and the People's Government of the various provinces, autonomous regions and municipalities have the right to decide, in respect of software which is developed by entities under ownership of the whole people within their respective sectors or under their jurisdiction and which is of great significance to national interests and public interests, to allow such pieces of software to be exploited by designated entities, and the exploiting entities shall pay exploitation fees to the developing entities in accordance with the relevant enactments of the State.

ARTICLE 14   In respect of a piece of software developed by a citizen while working in an entity, where such a piece of software is a result of performing his assigned duty, i.e., where it is developed in accordance with a development objective explicitly assigned in the line of duty, or a foreseen result or natural result of his carrying out activities in the line of duty, the copyright of the software shall be attributed to the entity.

Where a piece of software developed by a citizen is not a result of performing his duty, and is not directly related to the content of the work engaged in by the developer in the entity, nor have the material and technical facilities of the entity been utilized, the copyright of the software shall be attributed to the entity.

ARTICLE 15   The duration of protection for the copyright of a piece of software shall be twenty-five years, ending on the 31st day of December of the twenty-fifth year after the software is first made public. Before the expiration of the duration of protection, the software copyright owner may apply to the organ for software registration and administration for an extension of twenty-five years, but the total duration of protection shall not exceed fifty years at the longest.

The duration of protection for the right of the developer's authorship of the software shall be unlimited.

ARTICLE 16   Within the duration for protection for the copyright of a piece of software, the successor to the software copyright shall be entitled to the rights stipulated in Items (3) and (4) of Article 9 of these Regulations in accordance with the relevant provisions of the Law of Succession of the People's Republic of China.

The occurrence of succession shall not change the duration of protection for the rights pertaining to the software.

ARTICLE 17   After the occurrence of a change of the entity owning the copyright of a piece of software within the duration of protection for the copyright of that piece of software, the various rights pertaining to that piece of software shall be owned by the lawful succeeding entity.

Where there is a change of the entity owning the copyright of a piece of software, the duration of protection for the rights pertaining to that piece of software shall not change.

ARTICLE 18   Within the duration of protection for the copyright of a piece of software, the copyright owner of the piece of software or his assignee has the right to authorize others to exercise the right of exploitation stipulated in Item (3) of Article 9 of these Regulation. In authorizing others to exercise the right of exploitation, the copyright owner or his assignee may charge fees according to an agreement.

The licensing of software rights should be conducted in the manner of concluding an executing a written contract in accordance with the relevant laws and regulation of the People's Republic of China. The license should exercise the right of exploitation by adhering to the manner, conditions, scope and duration stipulated in the contract.

The period of validity of a licensing contract shall not exceed ten years each time. A contract may be renewed on expiration.

Where the licensed rights pertaining to the software are not explicitly stipulated in the contract as exclusive, they should be deemed as non-exclusive.

The occurrence of the above-mentioned licensing activities shall not change the attribution of the copyright of the software.

ARTICLE 19   Within the duration of protection for a piece of software, the owner of the right of exploitation and the right of authorization for use stipulated in Items (3) and (4) of Article 9 of these Regulations may assign to others the right of exploitation and the right of authorization for use.

The assignment of rights pertaining to a piece of software should be conducted in the manner of concluding and executing a written contract according to the relevant laws and regulations of the People's Republic of China.

The occurrence of assignment activities shall not change the duration of protection for the copyright of the piece of software.

ARTICLE 20   After the duration of protection for the copy-

right of a piece of software expires, the rights, other than the right of the developer's authorship, pertaining to the software shall be terminated.

In one of the following events, the various rights, other than the rights of the developer's authorship, pertaining to a piece of software shall enter the public domain before the expiration of the duration of protection:

(1) the entity owning the copyright of the software having been dissolved and there having been no lawful successor;

(2) the citizen owning the copyright of the software being dead and there having been no lawful successor.

ARTICLE 21   Entities or citizens lawfully holding copies of a piece of software shall enjoy the following rights without the consent of the copyright owner of the software:

(1) to install and store the piece of software on a computer according to its/his need and for the purpose of using it.

(2) to make backup copies for filing. However, such backup copies shall not be supplied in any way to others for their use. Once the holders lose the right to hold the software lawfully, all the said backup copies must be destroyed.

(3) to make necessary revision in the piece of software in order to implement it in an actual environment of computer application, or to improve its function and performance. However, except otherwise agreed, the holder shall not supply the revised version to any third party without the consent of the copyright owner of the software or his lawful assignee.

ARTICLE 22   A piece of software may be copied in small quantities to serve such non-commercial purposes as education, scientific research, or government business without the consent of, or remuneration to, the copyright owner of the software or his lawful assignee. However, in exploiting the software in such a manner, the title and developer of the piece of software should be made known, and the various other rights enjoyed by the copyright owner or his lawful assignee in accordance with these Regulations must not be infringed. The copies should be properly stored, redeemed or destroyed after use and must not be used for other purposes or supplied to others.

Chapter III

The Registration and Administration of Computer Software

ARTICLE 23   In respect of a piece of software being made

public after the issuance of these Regulations, an application for its registration may be filed with the organ for software registration and administration. After the application for registration is approved, a registration certificate shall be granted and an announcement shall be made to the public by the organ for software registration and administration.

ARTICLE 24   The registration of the copyright of a piece of software with the organ for software registration and administration is the premise to submitting a request for the administrative intervention in, or to instituting legal proceedings for, a software dispute. A registration certificate granted by the organ for software registration and administration is the initial certification of the validity of the copyright of a piece of software or of the verification and proof of the facts stated in the application document for registration.

ARTICLE 25   In applying for registration, the copyright owner of the piece of software should submit:

(1) a software copyright registration form to be filed in as prescribed;

(2) a written appraisal of the piece of software conforming to the prescribed rules;

The copyright owner of the software should also pay a registration fee as prescribed.

The specific administrative procedures and schedule of charges for software registration shall be published by the organ for software registration and administration.

ARTICLE 26   The registration of the copyright of a piece of software may be cancelled in one of the following events:

(1) in accordance with a final judicial judgement;

(2) the principal information provided in the application for registration having been confirmed to be untrue.

ARTICLE 27   In respect of a piece of software already registered, where the software rights are assigned, the assignee should report the transaction to the organ for software registration and administration for the record within three months of the official signing of the assignment contract, other wise the assignee will not be able to counter the infringing activities of a third party.

ARTICLE 28   Where a Chinese software copyright owner licenses or transfers to a foreigner the rights of a piece of software developed in China, the copyright owner shall report the transaction to the relevant department under the State Council for ap-

proval, and to the organ for software registration and administration for the record.

ARTICLE 29   Personnel engaging in software registration and those who have worked in this capacity shall not make use of or divulge to others, within the duration of protection for the copyright of the software, the filed material and related information that applicants submit on registration except for the purpose of performing the duties of registration and administration.

Chapter IV

Legal Liabilities

ARTICLE 30   Where any of the following acts of infringement occurs, the infringer should, according to circumstances, bear such civil liabilities as stopping the infringement, eliminating the adverse effects, making a public apology and compensating for the damages, and the administrative authorities of the State for software copyright may inflict administrative sanctions on the infringer such as confiscating the unlawful income and imposing a fine:

(1) to make a piece of software public without the consent of the copyright owner of the software;

(2) to make public as one's own work a piece of software developed by others;

(3) to make public as a work completed on one's own, a piece of software developed in cooperation with others without the consent of the cooperators;

(4) to have one's own name indicated on a piece of software developed by others or to obliterate the name indicated on a piece of software developed by others;

(5) to alter, translate or annotate a piece of software without the consent of the copyright owner of the software or its lawful assignee;

(6) to copy, or copy in part, a piece of software without the consent of the copyright owner of the software or its lawful assignee;

(7) to distribute or disclose to the public a copy of a piece of software without the consent of the copyright owner of the software or its lawful assignee;

(8) to conduct business concerning the licensing or transfer of a piece of software to any third party without the consent of the copyright owner of the software or its lawful assignee.

ARTICLE 31   Similarity between a piece of software developed

by oneself and an existing piece of software caused by one of the following events shall not constitute infringement on the copyright of the existing piece of software:

(1) where it is necessary to implement the relevant policies, laws, regulations and rules of the State;

(2) where it is necessary to implement the technical standards of the State;

(3) where there is a limited number of available options in the forms of presentation.

ARTICLE 32   Where the holder of a piece of software has no knowledge of, or has no reasonable basis for having knowledge of, the piece of software being an infringing object, the liability for infringement shall be borne by the supplier of the infringing piece of software. However, where the rights and interests of the copyright owner of the software will not be sufficiently protected without that piece of software held by the holder being destroyed, the holder has the obligation to destroy the piece of software it holds, and the holder may demand compensation from the supplier of the infringing piece of software for the losses the holder suffers in this connection.

The term "supplier of an infringing piece of software" mentioned in the preceding section covers one who supplies an infringing piece of software to others fully knowing that it is an infringing piece of software.

ARTICLE 33   Where an interested party fails to perform the obligations in a contract or fails to perform the obligations in a contract in conformity with the conditions stipulated, it should be civil liabilities according to the relevant provisions of the General Principles of the Civil Law.

ARTICLE 34   An infringement dispute over software copyright may be settled through mediation. Where mediation fails or where one of the parties changes its mind after an agreement has been concluded through mediation, proceedings may be instituted in the People's Court. Proceedings may also be instituted directly in the People's Court where the parties do not wish to settle the dispute through mediation.

ARTICLE 35   A contract dispute over software copyright may be settled through mediation, or the parties may apply to the software copyright arbitration organ of the State for arbitration in accordance with the arbitration clause in the contract or a written arbitration agreement subsequently concluded.

The parties should execute the arbitral award. Where one

party fails to execute the arbitral award, the other party may apply to the People's Court for execution.

Where the People's Court which is applied to finds the arbitral award illegal, it has the right not to execute the award. Where the award is not executed by the People's Court, a party may institute proceedings in the People's Court in respect of the contractual dispute.

Where the parties have not inserted an arbitration clause in the contract, nor have they concluded subsequently a written agreement, either of the parties may directly institute proceedings in the People's Court.

ARTICLE 36   Where a party is not satisfied with the administrative sanction imposed by the administrative authority of the State for software copyright affairs, it may institute proceedings in the People's Court within three months from the date of receipt of the relevant notification. Where the said party neither executes the decision on sanction nor institutes proceedings in the People's Court within the time limit, the administrative authority of the State for software copyright may apply to the People's Court for compulsory execution.

ARTICLE 37   Where a staff member of the organ for software registration and administration contravenes the provision of Article 29 of these Regulations, administrative sanctions shall be imposed on him by the organ for software registration and administration or a superior department in charge; where the circumstances are so serious as to constitute an offence, he shall be prosecuted for his criminal liability by the judicial organs according to law.

Chapter V

Supplementary Provisions

ARTICLE 38   Acts of infringement which occur before these Regulations come into effect shall be dealt with in accordance with the relevant enactments in effect when the said acts of infringement occur.

ARTICLE 39   The administrative authority in charge of software copyright affairs as well as software registration and administration under the State Council shall be responsible for interpreting these Regulations.

ARTICLE 40   These Regulations shall come into effect as of October 1, 1991.