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# Policies of Software Protection: The Practice in China

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**Abstract.** Policies of software protection greatly embody the development of a nation's information industry and its respect for international regulations. However, the requirements of legislation and execution measures of these policies are varied with nations in view of its different practical national conditions. This paper studies the software protection policies in China and some experiences which may also applicable in other Asian countries. In the aspect of legislation, China adopts the principals of "pragmatism" and "gradualism", which not only consider the national conditions but also actively come in line with international standards. As for the execution of these polices, China applies the "dual track system", which refer to the joint law enforcements by judicial authority and administrative organs, while the simultaneous conduction of special administrative checking activities participated by multi-departmental bodies in individual district of the country functions as the effective and necessary supplement to the legal software protection in China.

**Keywords:** Software protection, pragmatism, administrative law enforcement

## INTRODUCTION

In recent years, the developed countries with advanced software industries in America and Europe accelerate their steps in the building of information highway. Meanwhile, the information industries in Asian countries also develop at amazing speed, like that of India in South Asian area, and China in East Asia. Large scale multinational corporations increase their direct investment in Asian-Pacific area, which also bring the inflow of technology, information and software to these countries. In Asian-Pacific area, software industries are promoted in the process of outsourcing business of multinational corporations in these developing countries. But what kind of legislation can protect the foreign and national software, what is the proper degree of protection, which way of execution can make full play of the existing laws and regulations, these issues have become great challenge faced by the government authorities of these countries and regions. Under such background, this paper mainly introduces the software protection policies in China, including the legislation framework, policies on law enforcement, and the experience marked with Chinese characteristics accumulated among the process.

## BACKGROUND AND LEGISLATIVE HISTORY<sup>1</sup>

Though illegally produced software began appearing in China as early as 1982, an official government body dedicated to creating a protective legislative framework was not organized until August 1985 when the State Council set up the Workgroup of Software Legal Protection Rules, which was headed by the then called Ministry of Machine-building and

Electronics Industry and consisted of representatives from 16 agencies under the State Council and five geographic regions, to work on the issue.

From then on with the successive efforts, China gradually set up comparatively complete legislation framework for software protection, and great progresses have been made in software management and protection. In 1991, after the promulgation of a series of relevant laws and regulations, China issued Copyright Law, in which software is listed the in the domain of copyright protection, and Protection of Computer Software Regulations, which specifies the implementation procedures of software protection in Copyright Law; In 1992, China entered " Berne Pact " and several other copyright treaties, and promulgated the Implementation of International Copyright Treaties Provisions, which stipulates clearly that foreign computer programs will be given protection as literary works, the registration requirement is waived, and the protection period is extended to 50 years counting from the end of the year of publication; In June 2000, the State Council issued the Encouraging the Development of the Software and Integrated Circuit Industries Several Policies, in which the National Copyright Administration of China (NCAC) was required to improve the software registration system, encourage the registration of software copyright and give priority protection to registered software. The policies mainly focus on the strengthening and promotion of computer software registration (article 32), regulate that computer software products cannot be used without permission (article 33), and require the concerning authorities to jointly launch the special checking activities of attacking pirate software regularly (article 34); In October of 2001, China revised Copyright Law, in which the basic principles of the international copyright protection are set up. In December of 2001, the State Council announced the revised Protection of Computer Software Regulations to meet Chinese government’s commitments to WTO accession, which bring Chinese software protection in line with the international standards. The primary goal for 2001 revision of the Regulations including the PRC Copyright Law (the Copyright Law), the Protection of Computer Software Regulations (the Software Regulations), was to eliminate the discrepancies between provisions in the 1991 Regulations and the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS), and to seek conformity with WTO requirements. Another important reason for the revision was to respond to requirements and demands of both the international and domestic software industries. These laws, regulations and rules forming the basic legislation framework of software copyright protection, together with the related laws and regulations of intellectual property rights, are known as the basic foundations of legal protection of software in China.

**THE PRACTICE OF SOFTWARE PROTECTION**

Piracy is an obstacle faced by the software industries all over the world, which is very hard to eliminate. In recent years, China makes a lot of efforts in both legal law enforcement and administrative law enforcement, which makes the above-mentioned laws, rules and regulations on paper become alive and function in the real life. The Supreme People's Court has established No. 3 civil justice trial office, which mainly deals with the cases of intellectual property right disputes, such as copyright (including that of computer software). Thereafter the Intermediate and Higher People's Court of different provinces follow suits to establish special civil justice trial offices of intellectual property right. In August of 1993, the first two intellectual property right trial offices were set up respectively in the Higher People’s Court and Intermediate People’s Court of Beijing. Also special checking activities of pirate software were regularly launched by the relevant ministries, commissions and authorities in China, which is proven to be applicable and effective. According to data in global pirate software research, which is issued by Business Software Alliance(BSA)in June 2003, percentages of pirate software in China present a downward trend gradually, while compared with other country or area this downward trend is still slow in speed and little in scale, see table 1.The downward trend of pirate software in China has stated that Chinese government made lots of efforts in protecting the copyright, especially after in 2001 the Protection of Computer Software Regulations was revised, there is being an effective mechanism both in the legislation and law enforcements.

	1994	1995	1996	1997	1998	1999	2000	2001	2002
China	97%	96%	96%	96%	95%	91%	94%	92%	92%
Asia	68%	64%	55%	52%	49%	47%	51%	54%	55%
World	49%	46%	43%	40%	38%	36%	37%	40%	39%

**Table 1.The percentage of pirate software--- number of China, Asia and the world 1994-2002**

## A ROCKY ROAD OF LEGISLATION

The legal protection system of software intellectual property is a mechanism, which balances the benefits and interests of developers, retailers and end-users in the process of software programming, selling and using. That brings the problem of how to balance the right of exclusiveness and sharing. The attitude towards this problem often decided by a nation's conditions can reflect its goal in the development of software protection. People in Asian-Pacific countries gradually learn to respect the intellectual property right of software, while they continue to call for rational protection of software, but not over protection. In the legislation of software protection, China takes respecting intellectual property rights of software and rational protection as the foundation of software protection legislation. While in practice, principles of pragmatism<sup>ii</sup> and gradualism are adopted. Pragmatism means policies applied not only are beneficial to home country's software industry but also provide the basic protection of the rights of foreign producers. Pragmatism presents a strong trend of protection for home software industry. And gradualism means to raise national standards of software protection by actively participating international activities of software protection, on the basis of protecting the development of national software industry. In recent years, the software protection in China has reached such level: it not only conforms to the international rules of software protection and provides duly protection for the national and foreign software intellectual property right holders, but also creates good investment environment and atmosphere of legal justice. It realizes the protection of intellectual property right holders of developed countries, and also leaves enough developing space for China, such a large developing country in the field of intellectual property.

Here is an example, on Jun.1<sup>st</sup>, 2002, China began to enforce the revised Protection of Computer Software Regulations, which abolished the stipulation about "reasonable use"<sup>iii</sup>, and that is to say, it will be illegal and fined for any organization and individual to use the software with proper reasons without permission. In the definition of infringement, the new regulation surpasses the standards of revised version of Protection of Intellectual Property Rights Regulations of Hong Kong 2001<sup>iv</sup> and even that of certain developed countries<sup>v</sup>. As for the protection of copyright owners, it stipulates that the permission of developer is needed when copying and renting the software. The 1991 Regulations did not give clear numerical guidance for damages or fines. The new Regulations have clarified this issue. For guidance on compensation to copyright owners, the new Regulations point to Article 48 of the revised PRC Copyright Law, which stipulates that compensation should be equal to the actual losses of the copyright owner (or the illegal gains where the actual damages cannot be determined), or an amount to be determined by the court that does not exceed RMB500, 000 where the damages cannot be determined or assumed, plus the copyright owner's reasonable costs for stopping the infringement. In addition, in Article 24 infringements, a fine (to be paid to the government, not to the copyright owner) can also be imposed. This can range from RMB100 per piece or an amount up to five times the software value for less serious offences, to an amount of no more than RMB50, 000 for more serious cases. This means that it will be illegal for end users of commercial software to set up the software in computers without the permission of intellectual property right owners. From these changes of regulations, the determination of Chinese government in software protection is clearly shown, and it can be easily forecast that the developing trend of software protection is to apply the standards up to the international level of software protection. While in the new regulations, the rigid requirements do not differentiate the use of software in commercial manner or not arouse a wide debate in the academic circle of Chinese software protection<sup>vi</sup>. On Oct.15<sup>th</sup> 2002, the Supreme People's Court issued the Interpretation of Certain Issues Relating to Application of Laws in the Trial of Civil Disputes Involving Copyrights<sup>vii</sup>. Article 21 of this Interpretation stipulates that the civil liability of copyright infringement will only confine to range of commercial use. This adjustment is made with the consideration of justice and the national conditions of China. Since judicial Interpretation is the explanations for judges in applying the laws in the process of trials, which is only valid inside legal system. So the judge will not charge the non-commercial user civil liability for the suing of unauthorized computer software. The regulations are the supplements and modifications to the original legislation also present the embodiments of the principal of pragmatism and gradualism.

## "DUAL TRACK SYSTEM" --LAW ENFORCEMENTS JOINTLY CONDUCTED BY JUDICIAL AUTHORITY AND ADMINISTRATIVE ORGANS

In the practice of attacking actions of piracy and infringement where public interests is also endangered, the "dual track system" jointly implemented by judicial authority and administrative organs of Chinese government is proven to be quite successful. In the aspect of law enforcement, China applies the principle of effectiveness in software protection. The principal of effectiveness means that the concrete law enforcement measures in software protection should be proper and effective, on the basis of full consideration of the framework of Chinese legal system and actual conditions of national administrative system. And the law enforcement implemented by administration body acts as a necessary supplement to judicial enforcement, which conforms to legal principle and also meet the requirements of national conditions of developing country. The protective strategy China introduces is proven to be practical and effective in software protection, which takes

administrative law enforcement as the main measure, and general supervision and special checking activities as supplementations. To set an example, Chinese Government issued a notice prohibiting all units (including all government agencies and business entities) from using unauthorized software and called on government agencies to take the lead in using legal software<sup>viii</sup>. Meanwhile, the government makes great efforts in participating special administrative activities of attacking piracy with the help of other departments. In the U.S., the court judgment can promote the policy making of patent office, while in China, it is nearly impossible for the court to act contrary to Intellectual Property Right Bureau and Copyright Bureau. Since policies made by administrative organs are relatively stable, thus administrative organs and the court often negotiate and coordinate in dealing with the cases. Therefore it is often the case in China for several departments to enforce the law jointly, these departments include NCAC, administrative departments of the information industry, public security department and administrative department for industry and commerce, etc.. Since these involving departments, each of which supervises different market subjects, and with the participation of public security department, the law enforcement is strengthened to a great extent in China. The above mentioned are the experience marked with Chinese characteristic in software protection, and more detailed elaborations will be in the follow discussions.

### **SPECIALIZED CHECKING ACTIVITIES JOINTLY PARTICIPATED BY MULTI-GOVERNMENTAL BODIES.**

The joint efforts of multi-governmental bodies reflect the importance of administrative law enforcement in software protection. It is true with most developing countries that the construction of legal framework is far from perfect and strong sense of legal justice has not yet established. Under such social background, administrative law enforcement implemented by multi-departmental bodies is an essential and effective measure.

This can be illustrated by the following cases. In June of 2003, an implementing scheme of attacking pirate software about the enforcement of "Outline of Actions in Revitalizing Software Industry" is issued by National Copyright Administration of China (NCAC), the Ministry of Information Industry, the Ministry of Public Security and National Administration for Industry and Commerce. In August of 2003, NCAC sends out "Notice on Launching Special Administrative Actions of Attacking Pirate software ", in which the decision of carrying the special administrative actions of attacking pirate software from September to October in 2003 is made. On 10:00 of September 8<sup>th</sup> 2003, the very first day of the movement, each region of the country respectively carried on the administrative check of the pirate software simultaneously.

#### **Measurements of Shanghai**

In the morning of September 8<sup>th</sup> 2003, Shanghai Copyright Bureau and Public Security Bureau carried on a joint check on the conditions of software pre-installing in the process of hardware production and selling among the main hardware manufacturers in Shanghai, and sales situation of in computer stores as well. This activity discovered and seized more than 1500 slices of pirate CD sold on spot in three counters, and about 3000 other pirate products. Shanghai Copyright Bureau investigated and fined some of the firms involved in software infringement.<sup>ix</sup>

#### **Practice in Beijing**

In the morning of September 8<sup>th</sup> 2003, a movement named "Maple Leaf Action" was done aiming to attack the pirate software by Beijing Copyright Bureau with the participation of State Scientific and Technological Commission, Beijing Branch, Public Security Bureau and Industry and Commerce Administration. Without any preliminary notice, the electronic market of All Best Store in Fangzhuang Area of Beijing is checked, more than 70000 pieces of pirate software were discovered and seized on the spot, and meanwhile more than 10000 pieces of pirate DVD and VCD were seized. In the following three months of the movement, 15000 law enforcing persons were assigned and 22 large-scale electronic markets were cleared up, and more than 600,000 pieces of pirate software were seized<sup>x</sup>.

#### **Actions of Guangdong province**

In the morning of September 8<sup>th</sup> 2003, three law enforcing groups organized by Copyright Bureau of Guangdong Province and Copyright Bureau of Guangzhou city went to check software selling counter by counter in three comparatively large scale computer markets. In this action participated by over 100 law enforcing people, 23 software selling stores were checked and more than 33500 pieces of pirate software of different kinds were confiscated. Pirate software selling units and individuals were duly given the administrative penalty in accordance with the stipulations of relevant laws and regulations<sup>xi</sup>.

### **CONCLUSIONS AND PROSPECTS**

Generally speaking, China adopts the principal of "pragmatism" and "gradualism" in the legislation of computer software protection, which not only considers the national conditions of China but also actively comes in line with international standards. The achievements made in China in recent years are quite hard to realize in any other country in the world. As for the execution of these polices, China applies the "dual track system", which refer to the joint law enforcements by judicial authority and administrative organs, while simultaneously conduction of special administrative checking activities participated by multi-departmental bodies in individual district of the country regularly functions as the effective and necessary supplement to the legal software protection in China.

In the future, the protection of computer software under the TRIPS agreement appears to be both an advance and a loss for the computer software industry. The final outcome will depend on the way in which each of the individual countries to craft their own domestic legislation (Aaron, D.C., 2002). The case of Cisco suing Huawei, the largest case of Sino-U.S intellectual property right disputes in 2002, gives the hint that the trend in software technology protection is to protect the software as the patent<sup>xii</sup>. This case arouses our attention to Chinese software protection policies, and forwards new issues for legal protection of software industry. In all, protecting computer software as relevant invention patent will be the developing trend of software protection for China and other developing countries in the future.

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<sup>i</sup> The legal system of China includes many aspects: law promulgated by China people's congress and the Standing Committee of National People's Congress, regulation that the State Council issue, all department rule that ministries and commissions announce of country (including notice, suggestion etc.), still include the regulation of local characteristic.

<sup>ii</sup> Posner (2003) views ideals as useless and philosophical theorizing as empty. Lacking any meaningful approach for scrutinizing social goals, pragmatism thus devolves into an efficiency exercise. The task of the pragmatist becomes merely finding the appropriate means to achieve our given ends.

<sup>iii</sup> So-called "reasonable use", means the situation where users who use other works, need not be authorized by copyright owners and will not be required to pay remuneration to them.

<sup>iv</sup> The Hong Kong Special Administrative Region began to implement the new law of the intellectual property right on April 1, 2001. Some articles set higher level, which arose the strong opposition opinion of public. Hong Kong Legislative Council determined to lay some articles among them aside in advance.

<sup>v</sup> According to regulation of Japan, knowing obviously to encroach right software but among conduct of business / use at business, is deemed to encroach right.

<sup>vi</sup> On December 23, 2001, Sina web (<http://tech.sina.com.cn/it/e/2001-12-23/97029.shtml>) published an appeal about protecting the intellectual property right of the software rationally; a dozen reviewers noticed a kind of excessive protecting

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inclination in copyright of software. Heated debates on copyright protection of software took place among China's top copyright experts, representatives of software associations, representatives from the judiciary, executives in the information technology industry and informed laypeople. After China's joining WTO, there is the first time enormous dispute on relevant intellectual property right regulation, which reflected the strong requests of academia that software protection policy should be accorded with China's actual conditions. Notwithstanding the controversies, the end result was a drastic promotion of software copyright protection in China, and many changes were made in accordance with international commitments and China's actual conditions.

<sup>vii</sup> No 31 of the Supreme People's Court Interpretation, and effective as of October 15 2002.

<sup>viii</sup> General Office of the State Council(GOSC) sent the documents and noticed to every government of province, autonomous region, municipality and all ministries, and put emphasis on strengthening the work of intellectual property protection further. GOSC required that the government department should take the lead to use the legal software.

<sup>ix</sup> Network news from the National Copyright Administration of China on January 10 2004,  
<http://www.ncac.gov.cn/servlet/servlet.info.InfoTopicServlet?action=topiclist&id=18>.

<sup>x</sup> Network news from the Copyright Administration of Beijing on January 25 <http://www.bjcab.gov.cn/box/2004-02-05-2.htm>.

<sup>xi</sup> Network news from the National Copyright Administration of China on January 10 2004,  
<http://www.ncac.gov.cn/servlet/servlet.info.InfoTopicServlet?action=topiclist&id=18>.

<sup>xii</sup> After State Street Bank & Trust Co. case (1998), AT&T Corp(1999).case, United States Patent and Trademark Office gave patent protection to commercial method and computer software, European patent office checked guide legalize the application for patent of software in announce after revising 2001 October too.