# THE POSSE IS COMING TO TOWN . . . MAYBE: THE ROLE OF UNITED STATES NON-GOVERNMENTAL ORGANIZATIONS IN SOFTWARE ANTI-PIRACY INITIATIVES AS CHINA SEEKS WTO ACCESSION

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## I. INTRODUCTION

In 1999, worldwide financial losses to business software piracy were estimated at $12 billion.[1] Although worldwide piracy rates dropped between 1994 and 1999, possibly due to increased availability of legal software and increased government cooperation in enforcing penalties,[2] business software

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1. BUSINESS SOFTWARE ALLIANCE, 1999 GLOBAL SOFTWARE PIRACY REPORT - A STUDY CONDUCTED BY THE INTERNATIONAL PLANNING AND RESEARCH CORPORATION FOR THE BUSINESS SOFTWARE ALLIANCE AND SOFTWARE & INFORMATION INDUSTRY ASSOCIATION 8 (2000) (presenting a table of financial losses to piracy by country, region, and world from 1994 through 1999). All financial information in this Comment is presented in United States dollars.

2. *Id.* at 4.

piracy remains a pressing issue in Asia.[3] While North America and Western Europe, at 30% each, accounted for the largest percentages of money lost to business software piracy in 1999, Asia and Pacific Rim countries followed close behind at 23%.[4]

As China seeks accession to the World Trade Organization (hereinafter "WTO"), its software anti-piracy enforcement efforts will be scrutinized and may be found lacking. If China accedes to the WTO, it will be required to comply with the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) standards for intellectual property protection. United States non-governmental organizations (hereinafter "NGOs"), such as the Business Software Alliance (BSA) and the International Intellectual Property Alliance (IIPA), are willing to help China reduce its rate of software piracy. These organizations have experience working in the United States and other countries to educate software users, encourage software piracy reporting, assist law enforcement agencies, gather market information, and recommend software anti-piracy strategies to businesses and governments. However, China's political, legal, and social structures present special challenges to these NGOs.

This Note will first discuss transnational software trade in China with an emphasis on United States concerns over the piracy of its software products. Second, it will examine China's current software anti-piracy initiatives. Third, it will outline TRIPS requirements and discuss how China's current software anti-piracy initiatives fall short of TRIPS's standards. Fourth, this Comment will introduce two NGOs, the IIPA and the BSA, explain their software anti-piracy capabilities, and examine their current activities in China. Finally, it will identify problems NGOs may encounter as they seek to help China comply with TRIPS and make recommendations for future NGO software anti-piracy activities in China.

## II. TRANSNATIONAL SOFTWARE TRADE IN CHINA

Software is a booming business in countries across the globe, and China is no exception. A November 1998 study reports that China's software industry is growing by 28% per year and projects a total economic impact of $6.2 billion by 2001.[5] As the software industry grows, so grow its associated problems. In

3. *Id.*

4. *Id.*

5. PRICEWATERHOUSECOOPERS, CONTRIBUTION OF THE SOFTWARE INDUSTRY TO THE CHINESE ECONOMY - A STUDY CONDUCTED BY PRICEWATERHOUSECOOPERS, COMMISSIONED BY THE BUSINESS SOFTWARE ALLIANCE 1 (1998) [hereinafter CONTRIBUTION OF THE SOFTWARE INDUSTRY TO THE CHINESE ECONOMY].

a recent worldwide study, China, with a 91% rate of software piracy,[6] was second only to Vietnam (at 98%) in its utilization of pirated business software.[7] Business software piracy[8] takes several forms: downloading software from the Internet, making multiple copies of a program when a license has been bought for only one user, creating or copying compact disc read-only memory (hereinafter "CD-ROMs"), or loading software without license onto new computers before sale.[9] Because pirates can instantly redistribute their spoils worldwide via the Internet, and because purchasers of pilfered software have an attractive choice of media, software piracy is not merely a local problem but a national and transnational concern.

For China, national protection of intellectual property[10] is both an internal and an external issue: first, China must protect its own software developers' work from piracy by others (a problem beyond the scope of this Comment), and second, China must protect the intellectual property of its transnational trading partners. With a WTO membership on the horizon, China is focused on the second tier of the problem: reassuring the international community of its concern for other nations' intellectual property, including software copyrights.

Historically, China's failure to provide adequate copyright protection[11] to other nations' software products discouraged transnational software trade, especially with the United States. The United States Trade Representative's Office (USTR) has for years kept China on its watch list,[12] although in the wake

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6. "Rate of software piracy" refers to the percentage of software applications in use that were not purchased at retail, but pirated (copied) from a private source and redistributed through various means without license from the original author. BUSINESS SOFTWARE ALLIANCE, CONTRIBUTIONS OF THE PACKAGED SOFTWARE INDUSTRY TO THE GLOBAL ECONOMY 13-14 (1999) [hereinafter CONTRIBUTIONS OF THE PACKAGED SOFTWARE INDUSTRY].

7. *Id.* at 13.

8. "Software Piracy is the use or reproduction of a software product without the express consent of its author." *Id.*

9. *Id.*

10. "Intellectual property, very broadly, means the legal rights which result from intellectual activity in the industrial, scientific, literary, and artistic fields." INTELLECTUAL PROPERTY READING MATERIAL, at 3, WIPO Pub. No. 476(e), *available at* http://www.wipo. org/about-ip/en/ (last visited July 30, 2000). Software protection is a facet of intellectual property protection. *Id.*

11. The question, "what is software?" has spawned interesting debates: is it mathematical expression, a written work, or an electronic pattern? Is it mere command, or expression? Is it tangible or intangible, and what sort of legal tool can best deter its unauthorized use? Should it be patented, copyrighted, or trademarked? For an introductory discussion in the context of copyright law, *see* Rafael A. Declet, Jr., *Protecting American Intellectual Property in China: The Persistent Problem of Software Piracy*, 10 N.Y. INT'L L. REV. 57, 70-71 (1997). *See also* Karl F. Jorda, *Software Protection: Copyrights, Patents, Trade Secrets and/or sui generis*, 4 ILSA J. INT'L & COMP. L. 337, 337 (1998) (advocating *sui generis* protection for software).

12. "Countries listed on the [USTR's] *Priority Watch List*, *Watch List*, and *Special Mention* list are subject to increased bilateral scrutiny but are not subject to immediate trade sanctions . . . *Priority*

of recent trade agreements the USTR demoted China from a high-scrutiny status[13] to one of continued monitoring.[14] The United States voted in May 2000 to grant permanent normal trade relations (hereinafter "PNTR") status to China.[15] This optimistic development, however, pales in comparison to China's piracy-related trade losses, which were measured in 1998 at $808.4 million for commercial software applications alone.[16]

Over the last twenty years, China has tried to become the friendliest child on the transnational software trading playground. Recent trade agreements ostensibly reflect deep concern for protecting other nations' intellectual property. During trade negotiations with the United States between 1980 and 1995, China designed new copyright laws as a concession to the United States' concern over intellectual property protection.[17] The Sino-German Accord signed this summer emphasized intellectual property protection and "technology cooperation."[18] A May 2000 trade agreement with the European Union

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*Foreign Countries* under Special 301 become subject, after 30 days, to a Section 301 action . . . [emphasis sic]." Press Release, International Intellectual Property Alliance, USTR Again Names China as a Priority Foreign Country Under Special 301 (Apr. 30, 1996) (on file with author) [hereinafter USTR Again Names China as a Priority Foreign Country].

13. "Section 301 of the Trade Act of 1974 is the principal United States statute for addressing foreign unfair practices affecting United States' exports of goods or services. Section 301 may be used to enforce United States rights under international trade agreements . . . ." Press Release, Office of the U.S. Trade Representative, Monitoring and Enforcing Trade Laws and Agreements (2000) (on file with author). The WTO has held that Section 301 activities are in compliance with WTO member guidelines. Press Release, Office of the U.S. Trade Representative, WTO Adopts Panel Findings Upholding Section 301 (Jan. 27, 2000) (on file with author).

14. The USTR ended its Special 301 investigation of China in February 1995 when the United States and China entered into a bilateral trade agreement. The investigation had been initiated in May 1994. USTR Again Names China as a Priority Foreign Country, *supra* note 12. As of May 1, 2000, and at the time of this writing, the USTR is monitoring China at the "Section 306" level, which "monitors how countries are complying with their agreements with the U.S. — to ensure that the countries are implementing the reforms to which they have committed themselves." Press Release, International Intellectual Property Alliance, IIPA Lauds USTR's Continuing Pressure On Countries To Improve Copyright Protection and Enforcement Through the Special 301 and TRIPS Processes (May 1, 2000) (on file with author) [hereinafter IIPA Lauds USTR's Continuing Pressure].

15. *See, e.g., US House Passes Bill on China's PNTR Status*, CHINA DAILY (May 25, 2000), *available at* http://www.chinadaily.com.cn/highlights/wto/reaction/pntr.525.html.

16. INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE, INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2000 SPECIAL 301 REPORT PEOPLE'S REPUBLIC OF CHINA 27 (2000) [hereinafter INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2000 SPECIAL 301 REPORT] (presenting a table of financial losses to software piracy from 1994 through 1999).

17. *See, e.g.*, Kenyon S. Jenckes, Note, *Protection of Foreign Copyrights in China: The Intellectual Property Courts and Alternative Avenues of Protection*, 5 S. CAL. INTERDISCIPLINARY L.J. 551, 557 (1997) (discussing highlights of the 1995 Intellectual Property Agreement between the United States and China).

18. Agence France Presse, *Chinese Prime Minister Wins German Assurances on Taiwan, Opens Rule of Law Dialogue*, INSIDE CHINA TODAY, July 2, 2000.

emphasized access and ownership in mobile telecommunication markets.[19] China has also made international treaty commitments to intellectual property protection. In 1980, China joined the World Intellectual Property Organization (hereinafter "WIPO"),[20] an agency of the United Nations system.[21] In 1985, China became a member of the Paris Convention for the Protection of Industrial Property,[22] which provides for reciprocal intellectual property protection among the states of its Union.[23] In 1992, China became a party to the Berne Convention, which establishes copyright protection guidelines for its member countries.[24]

China has, at least on paper, backed its international commitments with national action. It has launched internal software anti-piracy initiatives designed to reduce the rate of software piracy in China. These initiatives will form the backbone of China's TRIPS compliance strategy should China accede to the WTO.

## III. CHINA'S SOFTWARE ANTI-PIRACY INITIATIVES

China's internal anti-piracy initiatives include creating laws against software piracy, establishing courts to deal with intellectual property rights violations, and establishing government offices to coordinate law enforcement.

First, as a result of United States trade pressure and China's desire for WTO membership, China has made significant changes in the "substantive aspect of copyright enforcement in China," i.e. its copyright laws.[25] Copyright laws are held by "international consensus" to be an appropriate, albeit not ideal, means of software protection.[26] The United States has been a driving force in

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19. BBC News Online, *EU-China Agree Trade Deal, available at* http://news6.thdo.bbc.co.uk/hi/english/business/newsid%5F755000/755139.stm (last modified May 19, 2000).

20. World Intellectual Property Organization, *Contracting Parties of Treaties Administered by the WIPO - Convention Establishing the World Intellectual Property Organization, at* http://www.wipo.int/eng/ratific/doc/e-berne.doc (last visited July 30, 2000).

21. World Intellectual Property Organization, *What is WIPO, available at* http://www. wipo.org /eng/newindex/about.htm (last visited July 31, 2000).

22. World Intellectual Property Organization, *Contracting Parties of Treaties Administered by the WIPO - Paris Convention for the Protection of Industrial Property, at* http://www.wipo.int/eng/ratific/doc/d-paris.doc (last visited July 30, 2000).

23. World Intellectual Property Organization, *Paris Convention for the Protection of Industrial Property, available at* http://www.wipo.org/eng/iplex/wo_par0_.htm (last visited July 26, 2000).

24. Gregory S. Feder, Note, *Enforcement of Intellectual Property Rights in China: You Can Lead a Horse to Water, But You Can't Make It Drink*, 37 VIR. J. INT'L L. 223, 226-27 (1996) (*citing generally* the Berne Convention for the Protection of Literary and Artistic Works).

25. Julia Cheng, Note, *China's Copyright System: Rising To The Spirit of TRIPS Requires An Internal Focus and WTO Membership*, 21 FORDHAM INT'L L.J. 1941, 2006 (1998).

26. *See* Jorda, *supra* note 11, at 337 (noting an "international consensus" in favor of copyright protection for software, but advocating *sui generis* protection).

China's copyright law development, successfully urging through trade pressure that China enact "modern" intellectual property legislation.[27] Second, China has created an intellectual property court system.[28] The intellectual property courts, which have been in place since 1993, were specifically created to deal with copyright, patent, and trademark litigation.[29] Finally, China has created government offices and agencies to enforce software anti-piracy measures. The IIPA reports that in 1999, two government offices emerged as leaders in China's fight to enforce its copyright laws.[30] China's State Intellectual Property Office (hereinafter "SIPO") was established in 1998 to monitor and centralize intellectual property protection enforcement.[31] China has also created the Office of National Antipiracy and Pornography (hereinafter "NAPP"), which the IIPA reports has "assumed control over coordinating all copyright enforcement throughout China."[32]

## IV. THE CHALLENGE OF TRIPS

China's desire for WTO membership[33] is viewed as the solution to its ongoing software piracy problem. The prevailing attitude is that China would not dare endanger its quest for WTO-member status, or its status if achieved.[34] If it accedes to the WTO, China will be obligated to comply[35] with the

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27. Assafa Endeshaw, Commentary, *A Critical Assessment of the U.S.-China Conflict on Intellectual Property*, 6 ALB. L.J. SCI. & TECH. 295, 312-13 (1996).

28. *See, e.g.*, Declet, *supra* note 11, at 70.

29. *See* Gregory S. Kolton, Comment, *Copyright Law and the People's Courts in the People's Republic of China: A Review and Critique of China's Intellectual Property Courts*, 17 U. PA. J. INT'L ECON. L. 415, 436-37 (1996).

30. INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2000 SPECIAL 301 REPORT, *supra* note 16, at 30.

31. OFFICE OF THE U.S. TRADE REPRESENTATIVE, 2000 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS 50 (2000) [hereinafter 2000 NATIONAL TRADE ESTIMATE REPORT].

32. INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2000 SPECIAL 301 REPORT, *supra* note 16, at 30.

33. *See* General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125, 1150-51 [hereinafter WTO Agreement]. Although a signatory to the WTO Agreement, China is not yet a member of the WTO. Article XI ¶ 1 of the WTO Agreement only incorporates the European Communities nations and nations that were signatories to the 1947 GATT. *Id.* China, not in either of these classes, must comply with a Schedule of Specific Commitments. If it complies, it will be designated an original WTO member. *Id.*

34. "The financial promise of WTO membership and the tremendous volume of Chinese exports to the United States have become too important to the future of the Chinese economy for Beijing to risk the consequences of non-compliance." Jenckes, *supra* note 17, at 571. Declet agrees, saying WTO membership is the "long-term solution" to China's software piracy problem. *See* Declet, *supra* note 11, at 76.

35. Some WTO member obligations, including TRIPS obligations, were scheduled for implementation over a period of time beginning April 14, 1994 (the date of the Uruguay Round's Final Act). Countries acceding to the WTO after April 14, 1994 must also meet these obligations. Further, the standards

intellectual property protection standards set out in the WTO's Agreement on Trade-Related Aspects of Intellectual Property Rights.[36]

On its face, TRIPS does not overburden China. TRIPS allows members to implement existing laws in pursuit of TRIPS-defined objectives, and it does not require members to create special legal channels for intellectual property enforcement.[37] The substance of the Berne Convention, of which China is already a member, serves as the basis for TRIPS guidelines,[38] and the Berne Convention requirements are incorporated into the current WTO standards for intellectual property protection.[39]

However, TRIPS is more than a legislative drafting checklist. TRIPS also provides for compliance monitoring, identifies information that WTO members are required to disclose upon request, sets forth guidelines for enforcing TRIPS, and creates a body charged with overseeing member compliance.[40] These provisions are the ones that might cause trouble for a WTO-member China, because they do more than set legal standards. They require actual deterrence of intellectual property infringement and disclosure of results to the WTO.

First, TRIPS specifies that members "provide for" criminal penalties, fines, and imprisonment that will deter "willful . . . copyright piracy on a commercial scale."[41] TRIPS specifically states that "remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent [to piracy and counterfeiting]."[42] Although TRIPS does not set forth any standard or formula for measuring whether a nation is providing sufficient deterrents, this language certainly implies that TRIPS is outcome-based. Common sense

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applicable to existing WTO members will be applied equally to the new country when it accedes, i.e., a latecomer to the WTO must, at the time of its accession, compare favorably to countries that have been working on their implementations for years. *See* WTO Agreement, *supra* note 33, at 1151.

36. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) is Annex 1c to the Agreement Establishing the World Trade Organization, which is embodied in the Uruguay Round GATT concluded in Marrakesh on April 15, 1994.

37. "[T]his Part does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of Members to enforce their law in general." Agreement on Trade-Related Aspects of Intellectual Property Rights, General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, Apr. 15, 1994, 33 I.L.M. 1125, 1214 [hereinafter TRIPS Agreement].

38. Cheng, *supra* note 25, at 1946.

39. World Intellectual Property Organization, *International Protection of Copyright and Neighboring Rights, at* http://www.wipo.int/eng/general/copyrght/bern.htm (last visited July 31, 2000). The WIPO's online information about the Berne Convention notes that all members of the WTO are also bound to the terms of the Convention, with some exceptions for parties that are not signatories to the Convention.

40. *See generally* TRIPS Agreement, *supra* note 37, at 1213-20 (setting out general member obligations to enforce TRIPS).

41. *Id.* at 1220.

42. *Id.*

indicates that the "sufficiency" of a penalty could vary from nation to nation, so the most simple way to determine whether piracy is reduced is an empirical one: find a way to measure a nation's rate of software piracy and monitor the nation for a decline in that rate. Therefore, it is reasonable to infer that WTO members are expected to comply with TRIPS by finding ways to reduce their measurable rates of software piracy.

Second, TRIPS created The Council for Trade-Related Aspects of Intellectual Property Rights (hereinafter "Council for TRIPS"), which reports to the General Council of the WTO.[43] The Council for TRIPS monitors TRIPS member compliance and works in cooperation with WIPO to carry out duties assigned to it by TRIPS members.[44] TRIPS charges the Council for TRIPS with reporting and evaluating TRIPS-related complaints.[45]

Finally, TRIPS requires WTO members to publicize TRIPS-related laws, judicial decisions, government administrative rulings, and agreements among domestic government agencies to their fellow members.[46] It also specifically requires members to provide their legislative, judicial, and administrative information to the Council for TRIPS upon request.[47] Presumably these provisions not only encourage transparent cooperation among member countries, but also allow the Council for TRIPS to evaluate whether each member country is complying with its TRIPS obligations.

Disputes arising under TRIPS[48] are governed by the GATT.[49] The GATT's dispute resolution procedures provide for three levels of response to a complaint against a member: first, to "secure the withdrawal of the measures" that conflict with a WTO member agreement; second, to provide compensation to a member claiming injury,[50] and finally, "as a last resort," to suspend "concessions or obligations . . . on a discriminatory basis" in favor of the complaining member.[51] In plain language, trade sanctions may be authorized against a WTO member that fails to comply with TRIPS provisions.

At first glance, China appears to be ready for WTO membership. Technically, TRIPS requires only that member countries have "enforcement

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43. *See generally* WTO Agreement, *supra* note 33, at 1146 (creating the Council for TRIPS and defining its reporting relationship to the General Council of the WTO).

44. TRIPS Agreement, *supra* note 37, at 1223.

45. *Id.* at 1221.

46. *Id.*

47. *Id.*

48. Presumably, such disputes include allegations of member failures to comply with TRIPS guidelines; TRIPS makes no other specific provision for penalizing member non-compliance.

49. The TRIPS Agreement refers the reader to "Articles XXII and XXIII of GATT 1994 as elaborated and applied by the [accompanying] Dispute Settlement Understanding." TRIPS Agreement, *supra* note 37, at 1223.

50. Compensation is an interim remedy until the offending measure may be withdrawn. *Id.* at 1227.

51. *Id.*

procedures . . . available" to protect intellectual property and to "constitute a deterrent to further infringements."[52] China's laws, courts, and government offices ostensibly meet this requirement. However, TRIPS also requires that WTO members effect measurable drops in their rates of software piracy. Thus, China's TRIPS compliance troubles will arise not from a dearth of laws, but from an apparent inability to apply them.

## V. CHINA'S ENFORCEMENT PROBLEM

If China is obligated to comply with TRIPS's standards for intellectual property protection, it will have to improve its legislation and its law enforcement. China's legislative drafting efforts, its law enforcement systems, and its government agencies have all been criticized for failing to meet the latest international standards.

First, China's existing laws and proposed amendments have garnered criticism. Arguably, China's existing laws do not adequately protect other nations' intellectual property rights.[53] The IIPA notes that even the latest revisions to Chinese legislation, while possibly TRIPS-compliant as drafted, will probably not meet TRIPS requirements as applied.[54] The USTR agrees, noting in a discussion of China's 1999 trade law reforms, "the vague wording of many Chinese laws and regulations often leads to conflicts with other laws or broader trade and investment policies, and makes compliance difficult."[55] Also, as one commentator succinctly observes, merely establishing copyright laws does not "automatically lead to their enforcement."[56]

China's present law enforcement is also inadequate. China's intellectual property courts report only spotty success in resolving copyright infringement cases. The court system has been criticized for inadequately training its judges and allowing itself to be used as a tool of the Communist Party.[57] Chinese courts have also been accused of slow claims handling time and a burdensome requirement that the complaining party produce evidence before a court will decide whether to hear a case.[58] One writer observes that it is "not a cost-

52. *Id.* at 1213-14.

53. For additional discussion of whether China's existing copyright laws adequately protect software, see Declet, *supra* note 11, at 70.

54. International Intellectual Property Alliance, *People's Republic of China*, *at* http://www.iipa.com/html/rbc_china_301_99.html (last modified Feb. 15, 1999) [hereinafter *People's Republic of China*] (providing excerpts from the IIPA's 1999 Special 301 Recommendations to the USTR).

55. 2000 NATIONAL TRADE ESTIMATE REPORT, *supra* note 31, at 42.

56. Endeshaw, *supra* note 27, at 314.

57. Declet, *supra* note 11, at 71-72.

58. Jenckes, *supra* note 17, at 556.

effective investment" to bring suit in China.[59] Although China has created government offices and departments to execute its new intellectual property protection policies, the international community and the United States are suspicious about whether these departments are able to, or wish to, perform their intended tasks. The USTR observes that, "[w]hile [establishing SIPO] is a positive step, SIPO has yet to establish that it can manage its responsibilities effectively."[60] In 2000, the United States Department of State reported that "[a]lthough China has revised its laws to provide criminal penalties for intellectual property violations, the United States remains concerned that penalties imposed by Chinese courts do not act as a deterrent."[61] The IIPA concurred, reporting that "actions by [government agencies] are too sporadic and the administrative fines are simply too low to deter piracy."[62]

## VI. THE INTERNATIONAL RESPONSE

In short, China's efforts do not appear to impress the United States or the international community as a whole. Even in the wake of this summer's trade accords that anticipate WTO backing from trading partners,[63] China is being asked to tighten its existing intellectual property protection practices. In a March 2000 report, the United States Department of State affirms that it intends to continue Section 306[64] monitoring to ensure that China is complying with its existing United States trade agreements.[65] In July of 2000, European Union officials called for better cooperation between China's government and law enforcement branches, presenting China with a list of 400 Chinese companies suspected of infringing on European Union member software copyrights.[66]

Though trading partners disapprove of China's *status quo*, China does not seem to be getting the international help it needs to correct its anti-piracy

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59. *Id.* at 569. Although Jenckes is discussing difficulties encountered by American businesses, the expense of proceeding in a Chinese court may be reasonably inferred to apply to other international plaintiffs.

60. 2000 NATIONAL TRADE ESTIMATE REPORT, *supra* note 31, at 50.

61. BUREAU OF ECONOMIC AND BUSINESS AFFAIRS, U.S. DEPARTMENT OF STATE, 1999 COUNTRY REPORT ON ECONOMIC POLICY AND TRADE PRACTICES - CHINA sec. 8 (2000) [hereinafter 1999 COUNTRY REPORT].

62. INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2000 SPECIAL 301 REPORT, *supra* note 16, at 31.

63. Agence France Presse, *EU Calls on China to Reign In Rampant Copyright Theft*, INSIDE CHINA TODAY, July 26, 2000, *at* http://www.insidechina.com/investorinsight/business.php3?id=182651 (last visited July 26, 2000) [hereinafter *EU Calls On China*]. *See also* Agence France Presse, *supra* note 18; *EU-China Agree Trade Deal*, *supra* note 19.

64. Section 306 is a trade status of continued monitoring. *See* IIPA LAUDS USTR'S CONTINUING PRESSURE, *supra* note 14.

65. 1999 COUNTRY REPORT, *supra* note 61, at sec. 8.

66. *EU Calls on China*, *supra* note 63.

enforcement problems. In its 1995 trade agreement with China, the United States made only vague promises of "technical assistance."[67] Although the European Union signed an intellectual property enforcement assistance agreement with China and opened a patent office in Beijing last year,[68] it still claimed that Chinese companies were infringing on its copyrights.

Nor is the WIPO providing focused assistance to China. Article 4(1) of the 1995 agreement between the WIPO and the WTO promises that "[t]he WTO Secretariat shall make available to Member States of the WIPO which are developing countries and are not WTO Members the same technical cooperation relating to the TRIPS Agreement as it makes available to developing country WTO Members."[69] However, China is not identified by the WIPO as a Least Developed Country (hereinafter "LDC"), and therefore presumably not a candidate for the specialized WIPO anti-piracy enforcement programs referenced in Article 4(1).[70]

## VII. THE POSSE COMES TO TOWN: UNITED STATES NON-GOVERNMENTAL ORGANIZATIONS

Given China's existing anti-piracy enforcement problems, other nations' failure to actively help China solve those problems, and China's ineligibility for the WIPO's LDC assistance, China will have to seek other allies in its war on software piracy if it accedes to the WTO. NGOs, experienced in anti-piracy lobbying and enforcement, can help China comply with the provisions of TRIPS. Two NGOs have taken a dedicated interest in China: the International Intellectual Property Alliance and the Business Software Alliance.

### A. *The International Intellectual Property Alliance*

Formed in 1984, the IIPA is an umbrella organization for seven private trade associations, "each representing a significant segment of the United States copyright community."[71] The IIPA works worldwide with governments and

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67. Endeshaw, *supra* note 27, at 328. Endeshaw also notes that the United States made no "substantial concessions" to China in this agreement, and that it is unclear whether the agreement is designed to assist China or merely protect the United States trade interests. *Id.*

68. Eubusiness, *EU - China Intellectual Property Rights Cooperation Programme*, *at* http://www.eubusiness.com/cgi-bin/item.cgi?id=9951&d=101&dateformat=%o-%B (last modified June 30, 1999).

69. Agreement Between the World Intellectual Property Organization and the World Trade Organization, Dec. 22, 1995, 35 I.L.M. 754, 758 art. 4 (1996).

70. *See generally* World Intellectual Property Organization, *Establishment of the Least Developed Countries Unit*, *at* http://www.wipo.org/eng/ldc/index.htm (last modified July 30, 2000) (identifying Least Developed Countries (LDCs) and outlining WIPO's intent to help the governments and industries in these countries create and maintain intellectual property protection systems).

71. International Intellectual Property Alliance, *International Intellectual Property Alliance* 1, *at*

private industries to deter copyright infringement in music recording and publishing, written publishing, computer software, computer gaming, videos, and motion pictures.[72] In the United States, the IIPA reports to House and Senate subcommittees on member activities in China.[73] The IIPA also makes recommendations to the USTR during the USTR's annual Super 301 trade review process and generates reports for the USTR's Special 301 trade review.[74] Internationally, the IIPA participated in TRIPS development for the WTO.[75] The IIPA is also a non-governmental organization participating in WIPO,[76] and it participates in "regional initiatives," notably the Asia-Pacific Economic Cooperation.[77] The IIPA actively monitors China's software piracy problem, and in February 2000 it wrote in support of United States congressional approval for permanent normal trade relations between the United States and China.[78]

While the IIPA gathers information, participates in international discussion, and reports on activities in China, one of its member organizations, the BSA, works at the local level in China to effect change.

### B. *The Business Software Alliance*

The BSA, a member of IIPA,[79] is a software industry trade organization with ten "worldwide members," all of which are software companies incorporated or headquartered in the United States.[80] The BSA Policy Council includes

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http://www.iipa.com/FACT_SHEET.PDF (last modified Aug. 2000) [hereinafter *International Intellectual Property Alliance*].

72. *Id.* at 2-3.

73. *See, e.g.*, Press Release, International Intellectual Property Alliance, IIPA Reports to Joint Senate-House Hearing That China Fails to Comply with the 1995 IPR Agreement (Mar. 7, 1996).

74. *See, e.g.*, USTR AGAIN NAMES CHINA AS A PRIORITY FOREIGN COUNTRY, *supra* note 12.

75. *International Intellectual Property Alliance*, *supra* note 71, at 1.

76. *Id.*

77. *Id.*

78. International Intellectual Property Alliance, *An Open Letter In Support of China PNTR From America's Creative Industries*, *available at* http://www.iipa.com/2000_CHINA_PNTR. PDF (last modified Feb. 23, 2000).

79. *International Intellectual Property Alliance*, *supra* note 71, at 2.

80. Business Software Alliance, *Business Software Alliance*, *at* http://www.bsa.org/tour/members/index.html (last visited Aug. 7, 2000) [hereinafter *Business Software Alliance*]. The BSA's membership list, provided in the BSA's online brochure, lists the following companies as "worldwide members": Adobe Systems, Inc. (www.adobe.com); Autodesk, Inc. (www.autodesk.com); Bentley Systems, Inc. (www.bentley.com); Corel (www.corel.com); Lotus Development Corporation (www.lotus.com); Microsoft Corporation (www.microsoft.com); Network Associates (www.nai.com); Novell, Inc. (www.novell.com); Symantec Corporation (www.symantec.com); and Visio (www.visio.com). The investor relations and legal information on each of these companies' websites reveals that, although many have transnational presence and transnational business partners, all of them are United States-based corporations or business entities and/or traded on United States stock exchanges.

all ten worldwide members, plus seven additional members, all of which are also incorporated or headquartered in the United States.[81]

Like the IIPA, the BSA participates in domestic and transnational policy discussions. It encourages legislative software protection efforts by promulgating its Cyber Champion awards in the United States.[82] Recently, United States Trade Representative Charlene Barshefsky received the award for her efforts to promote intellectual property protection agendas in China-United States trade matters.[83] BSA representatives testify before United States legislative bodies,[84] and in 1999 the BSA spent over $1 million on domestic lobbying activities.[85] The BSA was also active in WIPO's treaty organization[86] and maintains an ongoing presence in WIPO's regional initiatives.[87]

The BSA exists to stop software piracy. It employs a variety of tactics in the United States and in other countries to encourage piracy reporting and to enforce software anti-piracy laws. In the United States, the BSA brings suit against private companies and even government offices.[88] One source reports that "the [BSA] investigates an average of 500 cases a year [in the United States] and has collected more than $10 million in penalties."[89]

On its website, www.bsa.org, the BSA provides reading material, educational material, and downloadable freeware[90] to help United States

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81. The seven Policy Council members who are not also BSA "worldwide members" are Attachmate (www.attachmate.com); Apple Computer (www.apple.com); Compaq Computer Corporation (www.compaq.com); IBM Corporation (www.ibm.com); Intel Corporation (www.intel.com); Intuit Corporation (www.intuit.com); and Sybase, Inc. (www.sybase.com). *Business Software Alliance*, *supra* note 80.

82. Bryan Rund, *Legal Business - Honors and Appointments*, LEGAL TIMES, November 15, 1999, at 25.

83. *Id.* Although Rund does not specifically cite the Special 301 review process, the BSA publicly endorsed Barshefsky's decision to place China and other countries on the USTR Priority Watch and Watch lists. *See* Press Release, BUSINESS SOFTWARE ALLIANCE, STATEMENT FROM BSA PRESIDENT & CEO ROBERT HOLLEYMAN SUPPORTING USTR'S EMPHASIS ON TRIPS COMPLIANCE IN ANNUAL SPECIAL 301 DESIGNATION ANNOUNCEMENT (May 1, 2000) (on file with author).

84. *See, e.g.*, Press Release, Business Software Alliance, Leading Software Industry Expert Testifies Before Congress (June 29, 2000) (on file with author).

85. Center for Responsive Government, *1998 Data - Business Software Alliance, at* http://www.opensecrets.org/lobbyists/98profiles/3593.htm (last visited Aug. 7, 2000).

86. Brenda Sandburg, *High Tech Takes Center Stage In Washington*, THE RECORDER (San Francisco), Sept. 11, 1998, at 1.

87. World Intellectual Property Organization, *Governing Bodies of WIPO and the Unions Administered by WIPO* 34, *at* http://www.wipo.int/eng/document/govbody/wo_gb_ab/pdf/ab31_5.pdf (last modified Aug. 29, 1997).

88. *News*, J. RECORD, July 3, 1997, *available at* 1997 WL 14394866.

89. *Software Piracy Probe Nets Florida Firms*, MIAMI DAILY BUS. REV., June 27, 2000, at 3.

90. "Freeware," often distributed over the Internet, does not require users to pay a license fee to the developer as long as the freeware is used in the manner specified by the developer.

companies track software licenses and conduct internal licensing audits.[91] The BSA also provides transnational Internet resources. Its websites offer corporate educational materials and model corporate policies for the United States and United Kingdom.[92] Further, the BSA maintains a worldwide network of websites in member countries' native languages, offering e-mail piracy reporting forms, toll-free telephone numbers for software piracy reporting hotlines, and links to online BSA reports and resources.[93]

The BSA does not confine itself to the virtual world; it also works directly with law enforcement agencies worldwide to conduct undercover sting operations and raids on commercial software piracy operations. In 1997, BSA member Microsoft and the BSA conducted 51 raids on software pirates in Singapore, resulting in several jail sentences.[94] In 1998, the BSA filed over 750 lawsuits in Latin America on behalf of Microsoft.[95] In 1999, the BSA reported successful coordination with the Danish National Computer Crime Unit to break a European software counterfeiting ring.[96]

The BSA's current activities in China include filing lawsuits, conducting government and industry cooperative programs, and monitoring China's software market and piracy activity. In 1995, the BSA announced its first in-court legal victory when a Chinese court found in favor of BSA members Autodesk, Microsoft, and Novell against China's Juren Computer Company. The court held that Juren had illegally distributed BSA members' software.[97] As part of the 1995 United States-China trade agreement, the BSA was allowed to establish offices in China to help implement a "title verification system" that identifies original compact disc and laser disc products.[98] The BSA also works with the provincial offices of China's official Administration for Industry and Commerce (hereinafter "AIC"),[99] and this work has given rise to software licensing audits by the AIC and a letter-writing campaign to educate corporate

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91. Business Software Alliance, *BSA Freeware, at* http://www.bsa.org/freeware/ (last visited Aug. 7, 2000).

92. *Id.*

93. *Business Software Alliance, supra* note 80.

94. *U.S. Help Is Sought In Fight In Singapore Against Counterfeiters*, WALL ST. J., Mar. 9, 1998, at A11.

95. Jim Oliphant, *Booty and the Counterfeiting Beast - Microsoft Has Set Up a Unique Unit of Undercover Operatives and Specially Trained Investigators in Fort Lauderdale Devoted to Thwarting Software Piracy in South Florida and Latin America*, PALM BEACH DAILY BUS. REV., Oct. 1, 1999, at 12.

96. Wendy Leibowitz, *Lawyers and Technology*, N.Y.L.J., Feb. 16, 1999, at 5 col. 1.

97. *U.S. Software Makers Win Copyright Ruling in China*, WALL ST. J., Oct. 27, 1995, at B3.

98. Jenckes, *supra* note 17, at 556, (1995 testimony of Ambassador Michael Kantor and Eric Smith, IIPA President, before the House Ways and Means Subcommittee on Trade).

99. *People's Republic of China, supra* note 54.

end-users about software piracy.[100] In addition, the BSA offers computer hardware and technical assistance to Chinese law enforcement agencies.[101]

The BSA also coordinates efforts with the private sector. PricewaterhouseCoopers, working for the BSA, recently conducted a study of 100 Chinese software-related companies to evaluate the Chinese software industry.[102] In June of 2000, the BSA signed an agreement with Hong Kong Internet service provider Asia Online to crack down on software piracy via the Internet.[103] Finally, the BSA monitors China and strives to increase its presence and promote its image there. Although the BSA only reports two affiliated companies in Asia,[104] it publicly supports Chinese anti-piracy initiatives through its Internet outlets.[105] In 1999, the BSA openly announced that it "stands ready" to support the Chinese government in software anti-piracy efforts.[106]

## VIII. CAN NGOS FILL CHINA'S ENFORCEMENT GAPS?

United States non-governmental organizations are present and active in China, but if China accedes to the WTO, it will need to correct its software anti-piracy enforcement problems to comply with the outcome-based TRIPS provisions. At that point, NGO presence will only be relevant if those NGOs are helping China comply with TRIPS.

China will have to fight on multiple fronts to comply with TRIPS. It must improve its laws, effectively promulgate them, and consistently enforce them. It must also show meaningful cooperation among its governmental branches and private industries. It must reduce its measurable rate of software piracy enough to convince the WTO that it is creating the intellectual property infringement deterrents TRIPS requires. The international community, as a whole, has not offered much internal law enforcement help to China. NGOs are equipped to

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100. *Id.*

101. International Intellectual Property Alliance, *China*, *at* http://www.iipa.com/html/rbc_china_301_98.html (last visited Aug. 20, 2000) [hereinafter *China*] (containing excerpts from the International Intellectual Property Association's 1998 Special 301 Recommendations issued on Feb. 23, 1998).

102. *See* CONTRIBUTION OF THE SOFTWARE INDUSTRY TO THE CHINESE ECONOMY, *supra* note 5, at 20.

103. Press Release, Business Software Alliance, Asia Online Joins BSA in Fight Against Software Theft Amid Growing Threat of Internet-Based Piracy (June 12, 2000) (on file with author).

104. Business Software Alliance, *About BSA*, *at* http://www.bsa.org/hongkong/about/ (last modified 1998).

105. The BSA maintains a special website for its activities in the "Asia Region" at http://www.bsa.org/asiapr/ and another for Hong Kong at http://www.bsa.org/hongkong/.

106. Press Release, Business Software Alliance, Chinese Government Issues Decree Requiring All Government Entities to Clean Up Internal Software Piracy (Apr. 7, 1999) (on file with author). This 1999 decree expressed China's commitment to enforcing its 1995 official directive that Chinese government offices use only legal software.

fill some of these anti-piracy law enforcement gaps, but all NGO activity will rely on China's cooperation in deed as well as in word.

### A. *Drafting Laws*

China's 1990 "two-tiered" copyright laws are inadequate because they provide more protection to other nations' intellectual property than they provide for Chinese intellectual property.[107] TRIPS requires that each member provide to other nations a level of protection no less favorable than the protection the country provides to its own people.[108] The IIPA believes that TRIPS requires equal protection for nationals and non-nationals; it was allowed to review proposed amendments to the "two-tiered" laws in 1999.[109] It reported that the amendments were still inadequate, and that as of 2000 the Chinese government neither enacted the amendments nor provided a progress report to the IIPA.[110]

NGOs can help with legislative drafting. As discussed above, both the IIPA and the BSA have experience lobbying in, reporting to, and testifying before the United States government, governments in other countries, and the WIPO. WIPO and the Council for TRIPS already have a formal cooperative relationship,[111] and the IIPA is a WIPO participant. Therefore, the IIPA has access to the latest international trends in intellectual property enforcement and could provide specific information to help Chinese legislators tighten the gaps between existing law and TRIPS-compliant law.[112]

NGOs must note, however, that a Chinese commitment to drafting new laws does not guarantee that those laws are appropriate for the problems and the people affected by them.[113] The legislative drafting urged by the United States during trade negotiations and the values that NGOs bring to China's policymaking efforts may be in fundamental conflict with the social and legal structures formed by China's communist and imperial history. The political developments that led to China's current copyright laws reflect a blend of

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107. *See People's Republic of China, supra* note 54 (noting that China's latest laws provide more protection for "foreign rightholders" than for Chinese software developers).

108. TRIPS Agreement, *supra* note 37, at 1198-99.

109. *People's Republic of China, supra* note 54.

110. INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2000 SPECIAL 301 REPORT, *supra* note 16, at 34.

111. TRIPS Agreement, *supra* note 37, at 1223.

112. *See, e.g., People's Republic of China, supra* note 54. The section entitled "New Draft Copyright Law" contains a point-by-point IIPA analysis of potential TRIPS and Berne convention shortcomings in China's new laws. *Id.*

113. Endeshaw, *supra* note 27, at 308. Endeshaw observes that when a less-developed country enacts "borrowed legislation" that is ill-suited to its current industrial development status, there is little incentive to "work earnestly towards implementation" of the new laws. *Id.*

Marxism, Maoism, and Confucianism.[114] The BSA, however, is capitalistic to the point of jingoism. For example, the BSA urges in an online Special Focus report, "Let American ingenuity and creativity thrive. Deregulation, competition and entrepreneurship will foster our success. Regulation, government interference and managed competition will dash prospects and stunt progress."[115] These two sets of values stand in direct conflict. In a historical perspective, individual intellectual property ownership is a new concept for China,[116] and China's expressed willingness to change its law does not necessarily evince a cultural shift.[117]

If NGOs intend to help China with its legislative drafting, they will have to convince the Chinese government that the values embodied in TRIPS are appropriate for China's government and people. Despite the valid policy question of whether leading economic powers should impose their legal and social values upon other countries,[118] the fact remains that the WTO's present standards are not compatible with China's social values. China's ongoing failure to enforce its existing copyright laws with respect to United States software developers gives rise to a sneaking suspicion that China has adopted a "say anything" policy in the last two decades. If China is cheerfully redrafting its laws to secure desirable trade relationships but has no true interest in enforcing them; the best NGO efforts in the legislative drafting arena will be irrelevant to TRIPS-mandated outcomes.

### B. *Promulgating Laws*

Once China drafts adequate laws, they must be promulgated, and the people affected must be educated about their benefits. This is where NGOs will shine. The BSA already has excellent channels for Internet information dissemination. Via the Internet, the BSA promotes its software piracy reporting

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114. *See generally* Jenckes, *supra* note 17, at 552-55 (providing a concise overview of historical developments in Chinese legal ideology).

115. Business Software Alliance, *The Information Marketplace: The Perspective of the Software and Computer Industry, at* http://www.bsa.org/statistics/summary_c.html (last modified 1998).

116. Alexander C. Chen, *Climbing the Great Wall: A Guide to Intellectual Property Enforcement in the People's Republic of China*, 25 AIPLA Q.J. 1, 10-11 (1997).

117. The sociological impact of China's new trade policies is well beyond the scope of this Comment, but sources observe that these new international economic relationships will drive massive political reforms in China. *See, e.g.*, Jason Kindopp, *Trade with China Promotes Political Reform - Period*, CHINA ONLINE, *at* http://www.chinaonline.com/commentary_analysis/wtocom/currentnews/secure/c00072441.asp (last modified July 26, 2000). The USTR agrees, observing that "[b]y encouraging structural reform and the rule of law, [China's] accession to the WTO will . . . support China's own domestic reform process." 2000 NATIONAL TRADE ESTIMATE REPORT, *supra* note 31, at 41.

118. The WTO's intellectual property protection standards have been criticized for reflecting the values and enforcement capabilities of nations, primarily the United States, with mature technology industries. For a detailed analysis, *see* Endeshaw, *supra* note 27, at 304-05.

hotlines, provides real-time piracy reporting forms, posts model policies for corporations, and offers reports and educational materials for end users. These BSA educational tools are already in place in the United States and should not be difficult to implement in China. The BSA merely needs to create Internet sites for Chinese use and translate and customize its information for the local market. Although Internet-based initiatives rely on technological infrastructure, China is gradually improving its Internet access capabilities. For example, this summer the United States hardware giant Intel announced a co-operative effort with a major China telecom company to provide Internet hosting in south China.[119]

End-user education programs are not difficult to design or implement, but they will be challenged by the cultural gap discussed above. If consumers believe there is nothing really wrong with using pirated software, they are unlikely to curtail or report software piracy. For example, in response to a 1998 industry study, only 50% of Chinese software-related businesses responded that they believed software piracy "hampers the healthy development of [the] software industry."[120] In the same study, 51% of the responding businesses reported that they take no action to identify or control piracy by competitors or counterfeiting organizations.[121] If the concern over piracy is so low within the software industry itself, it is reasonable to infer that non-software companies in China, potential end-users of pirated business software, are similarly apathetic. This does not bode well for NGO educational efforts.

Again, NGOs face the task of changing China's cultural norms before they can implement a meaningful end-user anti-piracy education plan. Within the software industry, NGOs might have some success. Of the Chinese companies surveyed in 1998 that responded to a question about whether consumer education could help reduce piracy, 25% believed that it would.[122] Although this number is rather low, it indicates that China's software industry, at least, is aware of potential benefits from end-user education. The NGOs' best strategy in China would be an educational program to convince Chinese corporate end-users, both inside and outside the software industry, that they must actively protect intellectual property to attract and maintain transnational trade.

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119. Press Release, Intel Corporation, Intel Announces Internet Exchange™ Architecture Development Center in People's Republic of China (July 26, 2000) (on file with author).

120. CONTRIBUTION OF THE SOFTWARE INDUSTRY TO THE CHINESE ECONOMY, *supra* note 5, at 25 (presenting chart, "Software Piracy Impedes Market Development and Reduces Benefits").

121. *Id.* at 25.

122. *Id.* at 39.

C. *Promoting Legal Action*

Even good laws and an educated populace do not ensure that the laws will be applied. Sixty-six percent of Chinese software companies responding to a 1998 BSA-sponsored survey agreed that "limited risk for high profitability" is the primary reason that software is pirated in China.[123] Provided this is true, increasing piracy's risk or lowering its profitability should reduce the rate of software piracy in China.

NGOs could do in China what they have done in other countries: bring suit on behalf of interested software developers. The BSA's 1998 study of China's software industry speculates that Chinese software companies believe that current legal penalties do not deter piracy, and that legal action is too difficult or expensive to pursue.[124] NGOs and their members do not necessarily share this doubt and could lead by example in China, filing suit in Chinese courts for copyright infringement with respect to NGO members. The BSA has the financial resources to undertake high-profile litigation because its United States activities help finance transnational software anti-piracy efforts.[125]

If NGOs pepper China's courts with United States copyright infringement suits, they will probably improve Chinese pirates' awareness of piracy risk.[126] Securing fines and damages on behalf of NGO member companies will also lower pirates' profitability. However, these actions will also raise the question of whether NGOs are truly interested in helping China enforce its software anti-piracy laws and thereby comply with TRIPS, or merely interested in protecting NGO members' interests. Even in the United States, the BSA and its founding member Microsoft have been criticized for being too quick to act against alleged infringers.[127] Further, the BSA has garnered criticism in its own country for being a mouthpiece for its member Microsoft Corporation's policy decisions.[128]

Thus, NGOs have a difficult balancing test in China: they must support NGO members' interests while maintaining the image of a helping-hand organization. This might be difficult. In 1999, a United States company's piracy case against a Chinese corporation was dismissed; a report from the IIPA

123. *Id.* at 36 (presenting chart, "Reasons for Production and Sale of Pirated Software").

124. *Id.* at 26.

125. Oliphant, *supra* note 95.

126. Of course, this assertion presumes that Chinese media report and disseminate the litigation outcomes.

127. Oliphant, *supra* note 95.

128. *See generally* T. R. Goldman, *How Microsoft Gets Its Way in Washington*, N.J.L.J., Nov. 4, 1996, at 4 (discussing Microsoft Corporation's lobbying activities and its prominent position in the BSA). *Cf.* Robert W. Holleyman II, *Letters: Group Acts by Industry Consensus*, LEGAL TIMES, Nov. 18, 1996, (asserting in a letter to the editor that the BSA acts only by consensus, not in response to the influence of certain members).

implies the dismissal was due to "antiforeign sentiments" in the Chinese court system.[129] NGOs would have to conduct careful public relations campaigns to effectively raise piracy risk awareness. As discussed below, such an effort could require governmental cooperation that China is not ready to provide.

### D. *Securing Government Cooperation*

NGOs can provide critical market information to China's government. As discussed above, the IIPA and the BSA both have experience conducting industry surveys, creating reports and recommendations for legislators, testifying before domestic and international policymakers, and assessing software anti-piracy enforcement efforts.

However, NGOs cannot act in a vacuum. They need Chinese government cooperation and reliable sources for industry information, and at present both appear limited. The BSA has reported success in reducing software piracy rates in other Asian countries because "[Korean and Taiwanese] governments took the problem seriously and acted."[130] In China, however, the IIPA reports difficulty getting information from government sources about whether China's commitments to enforcement are working.[131] Some evidence indicates China does not even want enforcement help; for example, the IIPA reported in 1998 that local Chinese law enforcement agencies turned down an offer of donated computer hardware (designated for law enforcement activity) without any explanation.[132]

The BSA's studies rely on information provided by the CCID-MIC, the "R&D arm" of the China's Ministry of Industrial Information.[133] This is government-disseminated information, not market information. Market information is difficult to obtain. For example, the IIPA's 1999 Special 301 report notes that information about China's CD factories, requested by foreign market researchers, was withheld with the claim that those data were "national confidential documents."[134] A 1999 report from the United States Department of State summarizes another problem:

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129. INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2000 SPECIAL 301 REPORT, *supra* note 16, at 33.

130. Robert S. Greenburger, *Software Theft Extends Well Beyond China*, WALL ST. J., Oct. 20, 1996, at A1.

131. INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2000 SPECIAL 301 REPORT, *supra* note 16, at 26.

132. *China*, *supra* note 101.

133. CONTRIBUTION OF THE SOFTWARE INDUSTRY TO THE CHINESE ECONOMY, *supra* note 5, at 42-43.

134. INTERNATIONAL INTELLECTUAL PROPERTY ALLIANCE 2000 SPECIAL 301 REPORT, *supra* note 16, at 32.

> [Chinese regulations] require all foreign companies conducting market surveys in China to go through an annual registration process . . . [they] stipulate that all survey activities undertaken by foreign institutions, or domestic agencies employed by foreigners, must first be approved . . . Finished survey results must also be cleared with the approving agency. The regulations . . . will be expensive and time consuming to comply with . . . [and] have the potential to limit the freedom of legitimate firms to conduct market research. In addition, the potential for compromise of confidential business information is substantial.[135]

NGOs might not have direct influence over Chinese government offices, but they can continue work with WIPO and the Council for TRIPS to effect enforcement through trade pressure. NGO representatives can also work on a personal, local level to provide knowledge, experience, and advice to the Chinese agencies responsible for investigating piracy allegations.

### E. *Encouraging Industry Participation*

China's business community seems willing to cooperate with NGOs. A 1998 press release from the BSA was optimistic about the cooperative efforts between the BSA's survey designer and private industry in China.[136] Private industry could do much to further NGO educational efforts. Chinese companies could commit to eschewing pirated software in their own businesses, disseminate information about piracy and its risks in the workplace; create and enforce corporate policies against software piracy, and conduct self-audits to be sure that the software they are using is legal.

Unfortunately, these glowing proposals could be premature when over half of China's surveyed software companies have reported that the primary reason software is pirated in China is because consumers do not have the income to purchase legal software.[137] If legal software is simply not available, it is not realistic to expect Chinese companies to abandon any pirated software they are profitably using. Nor is it realistic to believe those companies will invite NGOs to enter their offices and conduct software licensing audits. NGOs will have to either offer these companies licensing amnesty or increase the companies' access to legal software that performs like the pirated software.

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135. 1999 COUNTRY REPORT, *supra* note 61, at Section 6.

136. Press Release, Business Software Alliance, New Study: Contributions of Software Industry to Chinese Economy BSA is Committed to Working with All Relevant Parties in China to Combat Piracy (Dec. 8, 1998) (on file with author).

137. CONTRIBUTION OF THE SOFTWARE INDUSTRY TO THE CHINESE ECONOMY, *supra* note 5, at 28.

## IX. CONCLUSION

China's existing problems with software anti-piracy enforcement will probably not keep China out of the WTO. China is already attempting to conform to a Schedule of Specific Commitments in keeping with its participation in the GATT.[138] Although the IIPA reports some ongoing problems with China's legislative drafting,[139] TRIPS itself does not pose a major barrier to China's accession. Despite IIPA's report to the contrary,[140] at least one commentator believes that China's laws already generally comply with TRIPS standards.[141]

If China accedes to WTO membership, its challenge will be improving its intellectual property rights enforcement, then maintaining that enforcement at the "actual deterrent" level required by TRIPS. If China fails to do so, it could be the subject of trade sanctions with respect to other WTO members.

NGOs can help China draft its laws and promulgate them. They can promote China's existing legal system and legal remedies, advise Chinese policymakers and government agencies, and work with private industry to ensure a commitment to preventing end-user software piracy. Although NGOs cannot fix all of China's enforcement woes, they certainly can help.

However, NGOs must do more than provide publicity or fill a law enforcement gap. They must fill a cultural gap as well. To do their jobs effectively, NGOs need cooperative commitments from the Chinese government. They also need cooperative commitments from China's business software end-users and the Chinese software industry. China has sought little hands-on law enforcement help from its international neighbors, and it does not seem to be doing so now. If China joins the WTO, only time will tell whether Chinese policymakers' desire for transnational software trade is strong enough for them to embrace TRIPS's value system and welcome NGO participation in its fight against software piracy.

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138. *See* WTO Agreement, *supra* note 33, at 1150-51.

139. *People's Republic of China*, *supra* note 54.

140. *Id.*

141. Cheng, *supra* note 25, at 2006.