

TRANSITIONAL REVIEW MECHANISM OF CHINA

Communication from Japan

By means of a communication from the delegation of Japan, dated 20 October 2003, the Secretariat has received the following questions that Japan has posed to China in the context of the transitional review mechanism under Section 18 of its Protocol on Accession.

Comments and questions from Japan to the People's Republic of China

1. Japan welcomes that, in the second year after accession, implementation by China of its commitments on intellectual property has progressed and is entering into a cruising phase. It appreciates efforts by China for developing and improving necessary regulatory framework and smoothly implementing phase-in commitments. In a transitional period of evolving regulations, the importance of regulatory transparency, predictability, stability and consistency is paramount; the value of intellectual property commitments and the efforts to implement them could be easily clouded out by a shortness of such elements either in regulations themselves or in their application. The transitional review mechanism could be useful for making those transitional efforts more efficient and productive, and it is a pleasure for Japan to contribute to this process.

2. In this context, China is further invited to take necessary steps to ensure regular and effective application of public comments procedures, well-in-advance publication of laws and regulations, avoidance of abrupt regulatory change, clear demarcation of departmental responsibilities, improvement in inter-departmental and central-provincial coordination and consistency etc.

3. In accordance with Section 18 of the Protocol on the Accession of the People's Republic of China, which states that "China shall provide relevant information to each subsidiary body in advance of the review" and in the spirit of cooperation to render the TRM process most efficient and effective, Japan requests China to provide in advance of the meeting of the Council for Trade-Related Aspects of Intellectual Property Rights responses and relevant information to the following questions and comments.

4. Questions

A. COPYRIGHT

- (i) According to the Article 47(7) in the Copyright Law of China, removal or alteration of any electronic rights management information without authority is deemed to be infringement. We insist that it also should be provided as infringement to distribute, import for distribution, broadcast or communicate to the public works or copies of

works knowing that electronic rights management information has been removed or altered without authority. Please provide us with your perspective on our insistence.

We appreciate that your Government established the administrative procedure concerning copyright clearer by establishing the regulation for copyright administrative punishment this September. The following questions concern this regulation.

- (ii) Please explain how the establishment of this regulation alleviates the burden of proof on right holders?
- (iii) We presume that the most of the administrative procedures are to be started with reports from right holders. Please explain how many administrative procedures have been started without the reports from right holders?
- (iv) Regarding Articles 6 and 7, please provide us with concrete criteria in deciding the level of administrative department to deal with a case.
- (v) Regarding Article 9, please explain what the definition of "find infringement" is. Considering the provision of administrative punishment cannot be imposed on the infringement unfound for two years after the infringement day, we cannot consider two-year is enough length especially in the case that the administrative procedures start from the report from right holders. How do you consider this perspective?
- (vi) Regarding Article 12, please explain how much proof right holders should submit as "proof of right holder identification" when they apply to administrative procedures. Is our interpretation correct that the copyright registration is not required to apply to administrative procedure? Or does Article 11.4 of the Copyright Law cover the proof?
- (vii) Regarding Article 12.2, does "parties name" mean infringer's name? If it is correct, do you recognize our concern that the provision would force right holders to take much time and cost to identify the infringer's name, location and so on without legal prosecution power?
- (viii) Regarding Article 13, is it possible that an administrative department refuses to accept the application because the department is not the one in charge.
- (ix) Regarding Article 16, please explain who is supposed to be "a person who has a burden of proof"? And how long is "the duration the copyright administrative department specifies"? We are afraid that the heavy burden on "a person who has a burden of proof" would hamper the effective administrative procedures.
- (x) Regarding Article 27, does "parties" mean both of right holders and infringers? It should be very difficult for foreign right holders to give statements and submit claims within seven days from the notified day.
- (xi) Regarding Article 29, please explain what the criterion is to consider an infringement as illegal activity that does slight infringement.
- (xii) According to Article 39.3, administrative department confiscates the facilities mainly used for making infringed goods and brings them to auction and distributes them again. How can you consider the possibility that re-distributed facilities can hamper the deterrent effect of the administrative procedures?

B. TRADEMARKS

Protection of well-known marks

- (xiii) If foreign companies are not able to enjoy in your country the same sufficient protection for their well-known marks as companies of your country, there is concern that it might not be consistent with the provision on national treatment of the TRIPS Agreement. Please provide the number of domestic well-known mark approvals and foreign well-known mark approvals respectively to illustrate the status of operation of the new regulations that went into effect in June this year.

C. PATENTS

Eliminating delays in granting patents

- (xiv) At the TRIPS Council review of legislation to date, your country presented the average pendency of examination of patent applications from Japanese corporations and efforts to accelerate the examination such as increasing the number of examiners. However, there are concerns that in some technical fields there has been no improvement to the delays of examination. Please provide us with the recent data showing improvement status in the pendency of examination for each technical field. It can also be considered that periodical release of pendency data of examination will eliminate any misunderstanding in Japanese business sectors about delays of examination in your country. We would like to hear your country's views on this.

D. ENFORCEMENT

Judicial efforts: aggressive pursuit of criminal prosecutions, strengthening of sanction measures through changes to criminal prosecution standards

- (xv) Compared to the actual situation of infringements upon intellectual property rights that take place in your country, the number of cases that lead to criminal prosecutions is extremely small, and there is concern that deliberate and commercial-scale intellectual property infringements are not being effectively prosecuted. Please provide the number of criminal prosecutions related to patent rights, trademark rights, industrial design rights and copyrights respectively to show the status of prosecution for infringing upon intellectual property rights in your country.
- (xvi) According to the reply from your country at the TRIPS Council review of legislation to date, the judicial authorities have been advised that changes ought to be made to the standards for criminal prosecutions related to copyright infringements. Please explain to us what the advice was, especially whether a specific direction of changes was recommended in the advisory or not. Furthermore, are the judicial authorities in fact currently considering standards for applying criminal penalties based on the advisory? If they are, please tell us what sort of changes they are planning.

Cost burden of disposal of infringing goods

- (xvii) In response to the question "Who bears the cost for confiscation and disposal (including storage) of trademark infringing goods undertaken by enforcement agencies including the Customs?" that was posed by Japan about the cost of confiscation and disposal of trademark infringing goods at the TRIPS Council review of legislation to date, you replied as "the cost for confiscation and disposal of trademark infringing goods undertaken by the administrative authorities for industry

and commerce shall borne by the State (government)". However, some Japanese corporations have reported that in the procedure to suspend the goods that are suspected to be infringing upon intellectual property rights at customs in your country, even when they are recognized as being in violation, the rights holders have had funds drawn from their deposits for the costs required for the suspension of goods. This contradicts the previous reply made by your country. Please provide us with the related regulations and notifications to make customs and other enforcement bodies informed who bear the disposal costs of the infringing products.

Eliminating "localism"

- (xviii) One of the problems concerning the control of infringements upon intellectual property rights in your country is the "localism" that encourages a soft approach to the manufacture of counterfeit or pirated goods by local firms. This attitude among local authorities is an obstacle to the swift and appropriate exercise of intellectual property rights in your country and it is a major concern for Japan. At the TRIPS Council review of legislation to date, your country replied that the State Council had published the Provisions on Prohibiting Local Blockade in Market Economy Activities, which strictly prohibits local protection in various form. Would you please tell us what those rules are and what specific efforts have been made to eliminate "localism"?

Measures against pirated software

- (xix) We appreciate the endeavour of your Government to crack down pirated software by establishing "the activity plan for fighting against pirated software" published in this June. Please explain concrete policies for implementing this plan. And does the government establish the activity plan in the other pirated goods but software? And please explain how the legal responsibility of Internet Service Provider (ISP) is provided.

Regulation of export of counterfeits and pirated goods

- (xx) There is concern about export of counterfeits and pirated goods made in your country. Please provide the status of operation of regulating such export in your country according to "Regulations on the Customs Protection of Intellectual Property Rights" with providing the concrete result with statistics.

E. OTHERS

- (xxi) It is said that your Government had been considering a regulation about "the right of communication through information network". Is the interpretation made to public? If so, please provide us with the interpretation. And if not so, please tell us when your Government makes it public?
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