

TRANSITIONAL REVIEW MECHANISM OF CHINA

Communication from the European Communities

By means of a communication from the delegation of the European Commission, dated 25 July 2005, the Secretariat has received the following contribution in the context of the transitional review mechanism under Section 18 of China's Protocol on Accession.

The European Communities (EC) acknowledges the true efforts, as well as important legislative and practical improvements of the Chinese intellectual property (IP) system since the 1980s, in particular in the context of its accession to the WTO in 2001.

Still, a number of EU companies suffer from a vast counterfeiting and piracy activity in China that affects their markets on a large scale. To be fully integrated in the world trading system, to continue to attract foreign investment and to become a knowledge-based economy, China has to implement all its international obligations, in particular the ones related to Intellectual Property Rights and their Enforcement.

Building upon the long and fruitful cooperation that the EC and China have on this matter and considering the recent evolutions in the IP field in China, the EC would like to take the opportunity of the Transitional Review Mechanism 2005 to complement its information on the Chinese IP framework and ask questions on remaining sources of concern.

I. IP PROTECTION

1. Patents and undisclosed information

(a) Licences of patents

Article 28.2 of the TRIPS Agreement clearly states that the rights conferred by a patent include the right to grant licences. Could China explain how it addresses the issue of patent licences and the payment of royalties in the framework of open standards, notably when the technology at stake is detained by a foreign company?

(b) Additional protection for products the marketing of which requires an authorization

Does China plan to grant additional protection – in the form of patent restoration or supplementary protection certificates – to products that can not be marketed before a specific authorization has been given (such as pharmaceutical products)?

- (c) Protection of confidential data, in particular test data
 - (i) There are still reports of problems related to disclosure of confidential information and know how. Could China specify how it addresses these problems in practice?
 - (ii) In particular, could China explain how it ensures that test data given in the course of applying for marketing approval of new drugs can neither be relied on by other companies than the drug originator, nor be disclosed by the Chinese authorities? In the context of TRM 2004, China underlined that Article 72 of the Method on Administration of Registration for Drugs punishes the leakage of unreleased experimental data (paragraph 25 document IP/C/34). Could China give details about penalties incurred and examples of cases before the courts based on this provision?
 - (iii) Articles 11 and 13 of the Drug Registration Regulation provide that market approval shall not be granted to a generic until the patent has expired and that a generic drug applicant shall guarantee that there is no patent infringement. Could China explain how these provisions are applied by the administrations and courts? In particular, is the drug initiator who owns the patent informed about the application for market approval of the generic, how and when?

2. Trademarks

- (a) Well-known trademarks

Could China update information about the status of foreign well-known trademarks: how many were protected since TRM 2004, both by the State Administration for Industry and Commerce (SAIC) and courts?
- (b) Counterfeit products are still easily found in Chinese retail markets. Does China intend to adopt specific measures to discourage fake goods to be sold at the retail level, such as, for instance, more frequent and systematic police raids on markets where counterfeiting is rampant, confiscation of illegal income, closure of retailers or even withdrawal of business licences in case of repeat offences?
- (c) How does China intend to allow a direct access to the general public to the trademark office Registry?

3. Designs

- (a) Could China give details on how it protects the imitation of the shape of a product and the imitation (not identical reproduction) of designs? What is the applicable law and how is it implemented in practice, notably in the automobile sector – please cite examples of courts or administrative cases where such imitation was convicted and condemned?
- (b) What protection is available in China for products with short life cycles, such as notably fashion products? Is there any "fast track" for registered designs, allowing for quicker registration of such designs, at a lower cost?

4. Copyrights and related rights

(a) Internet related piracy

The Administrative Measures on the Protection of the Rights to Communication through Information Network, drafted jointly by the National Copyright Administration (NCAC) and the Ministry of Information Industries, took effect on 30 May 2005. Could China:

- (i) Explain the liability of Internet service providers in the context of these measures and how it works in practice?
- (ii) Give indications about accession to WIPO treaties: MOFCOM announced in a document dated March 2005 that accession to the WIPO Treaties of 1996 (the WIPO Copyright Treaty and the WIPO Performances and Phonograms Treaty) was seriously envisaged. Does the new legislation include provisions in line with such treaties and could China give more information on the timeframe for its accession to these treaties? In particular, does the new legislation include provisions on broadcasting and performance rights of performers and producers of phonograms?
 1. If the answer to the previous question is "yes", please give details on the scope of these rights.
 2. If the answer is "no", could China indicate when it intends to include such a provision in Chinese law?

- (b) Following the adoption of the Regulations on the Collective Management of Copyright (that took effect 1 March 2005), could China explain how these rules are implemented in practice, if rights have already been collected or when they are expected to be collected and by which organizations?

II. ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

5. Even though some of the IP protection rules need clarification or improvement, as seen in the paragraphs above, enforcement of intellectual property rights in China remains the most important source of concerns for EU companies. Coordination between different bodies in charge of IP enforcement could be enhanced, procedures should be simplified and penalties imposed on pirates made more deterrent, so that pirates can not regard them merely as the cost of doing business.

6. Coordination

The EC notes with satisfaction that there is an growing awareness of the importance of a better level of IP enforcement from the Chinese Government, in order to both develop a knowledge based economy and attract foreign investment. The Government therefore undertook to increase coordination between the numerous bodies in charge of enforcing these rights on its territory. A State IPR Protection Work Team was established under Vice Premier Wu Yi's supervision in 2004, in order to handle this matter.

- (a) Could China report on the concrete actions taken by this Working Group in 2004 and their impact on the ground?

- (b) Could China explain how the different bodies cooperate on cases of infringement? For instance, how and how frequently do IP agencies transfer cases to the police?

7. Information on infringement cases

- (a) Could China communicate statistical information on:
 - (i) the number of IPR infringement cases brought before administrative bodies and/or courts (breakdown by administrative/civil/criminal case and by the type of IPR);
 - (ii) the number of decisions taken; and
 - (iii) the sanctions passed and executed?
- (b) Decisions on IP cases are currently rarely published, though publication is a valuable source of information for right holders and has educational merits. Does the Chinese Government intend to make judicial and administrative decisions on IP infringements available to the public through a bulletin and the Internet?

8. IP Enforcement Staff

Could China please sum up the situation of different IP teams in different bodies in charge of IP enforcement (Customs, Ministry of Public Security, IP agencies, Courts, etc.): are they specialized in IP, has the staff expanded over the last years, how are they trained?

9. Procedures

- (a) Does China intend to suppress burdensome requirements for foreign IP right owners willing to put their infringement cases before the courts, such as legalization/notarization of powers of attorney and authentication of evidence? If yes, could China please give details on the timeframe for such a modification?
- (b) Could China explain how recourse to technical expertise before courts is organized and inform about the effectiveness, length and costs of such expertise where it has been used?

10. Deterrence of sanctions

One of the main complaints received from IP right holders is the lack of deterrence of sanctions against counterfeiting and piracy. Certain Chinese rules provide a set of deterrent sanctions for their infringement, including confiscation of illegal income to withdrawal of business licences. Could China explain if these punishments are available for all types of IPR infringements and how it could ensure that these sanctions are decided more often by enforcement bodies (IP agencies and courts)?

11. Criminal enforcement

On 21 December 2004, the Supreme People's Court and Procuratorate adopted Judicial Interpretations on several issues of concrete application of laws in handling criminal cases of infringing intellectual property. The EC would welcome information on the implementation of these Interpretations since they took effect:

- (a) Could China give details on the number of cases that were submitted to criminal prosecution in application of these Interpretations?
 - (b) Difficulties are reported on the practical use of thresholds provided in these Judicial Interpretations, considered too high in a number of cases and the calculation of which is not based on the price of the legitimate goods. Could China explain:
 - (i) the reasons why such thresholds are considered necessary to allow criminal prosecution;
 - (ii) how it ensures a uniform application of these; and
 - (iii) if there is any possibility to prosecute IPR infringements that may constitute a threat for public health or safety regardless of any such thresholds of sales volume?
 - (c) Could China clarify the situation of natural and legal persons with respect to these Judicial Interpretations: are different threshold levels applied for being criminally prosecuted, as well as different level of criminal sanctions?
 - (d) Could China clarify the criminal rules applicable to repeated offences (prosecution and sanctions)?
-