

**REQUEST FOR INFORMATION PURSUANT TO ARTICLE 63.3
OF THE TRIPS AGREEMENT**

Communication from Japan

The following communication addressed to the Delegation of China, dated 25 October 2005, is being circulated at the request of the Delegation of Japan. It was circulated as an advance copy for the Council's October 2005 meeting.

The Government of Japan recognizes and appreciates China's progress and ongoing efforts toward stronger enforcement and greater transparency in the area of the protection of the intellectual property right ("IPR") in China. In the interest of facilitating further transparency, my authorities have instructed me to request clarifications in the attached list, regarding specific judicial decisions and administrative rulings ("cases") of IPR enforcement that China has identified for the years 2001 through the first half of 2005 in various public statements, pursuant to Article 63.3 of the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights ("TRIPS Agreement"). We consider that these cases affect rights of Japan and other Members under the TRIPS Agreement.

The purpose of this request is to further enhance our understanding of IPR enforcement in China. The requested information in the attached list is consistent with what we asked China to provide several times based upon "Field Survey for Infringement of Intellectual Property Right in China (Final Report)" released by the Ministry of Economy, Trade and Industry in June, 2005. In the event that any of the requested information does not exist or cannot be provided, we would welcome the opportunity to discuss those difficulties and work together to examine alternatives. In addition, for greater convenience, we invite China to consider providing clarifications in the form of supplemental statistical data covering the requested information, rather than on a case-by-case basis.

The Government of Japan would like to have China's written response on or before 23 January 2006. If additional time is needed, please contact us so that we may reach some understanding. We would like to express our wish for the continuation of our dialogue for better cooperation in this field. We look forward to receiving your reply.

Clarifications requested by Japan
concerning IPR enforcement in specific cases in China

We would appreciate clarification of the following details with respect to the identified cases:¹

1. Legal Basis: To enhance our understanding of the various cases that China has identified as reflecting the application of remedies for IPR infringement, please identify the precise legal basis for any finding of IPR infringement(s) in the identified cases.² Please clarify how many of the identified matters were resolved on a basis other than IPR infringement (e.g., violation of a licensing measure, illegal business operations, fake and shoddy goods, pornography, or other basis).
2. Remedies, Provisional Measures, and Repeat Infringers: To our knowledge, China has not previously provided comprehensive information about remedies (e.g., criminal penalties, civil damages, injunctions ordering parties to desist from infringements) and provisional measures (e.g., to prevent an infringement or preserve relevant evidence) that its authorities have imposed in judicial and administrative IPR infringement cases. Please clarify the precise nature and amount of all the remedies and provisional measures imposed, if any, in the identified cases.³ In addition, please provide any information that would assist in identifying matters that involved one or more repeat infringers.

¹ By the "identified cases", we mean the specific cases that China itself has previously identified through statistics as reflecting its application of criminal, administrative, and civil remedies for IPR infringement in China for the years 2001 through 2004. See, e.g., State Council Information Office, New Progress in China's Protection of Intellectual Property Rights, 25 April 2005, available at <http://www.chinaun.ch/eng/bjzl/t193102.htm> (referring to, among others, (a) administrative cases of copyright infringement; (b) administrative cases of trademark infringement and counterfeiting; (c) IPR-related civil cases of first instance and criminal cases of first instance involving IPR infringement; and (d) cases of IPR infringement in import and export handled by Chinese customs); Transitional Review under Section 18 of the Protocol on the Accession of the People's Republic of China, IP/C/34, paras. 6, 52-55, 62, and 75-76 (9 December 2004) (also identifying cases); Transitional Review under Section 18 of the Protocol on the Accession of the People's Republic of China, IP/C/31, paras. 49, 54, 56 (10 December 2003) (same); Review of Legislation, IP/Q/CHN/1, section I.C (10 December 2002) (same).

To the extent that China has also identified comparable cases in the first half of 2005, or any additional concluded or pending IPR cases that reflect the application of criminal, administrative, and civil remedies during 2001-2004, we would also appreciate clarification of the details of those cases. For purposes of this request, please treat any such cases as part of "the identified cases".

² For criminal cases, please clarify the specific article(s) of the Criminal Law that the defendant was charged with violating, and whether the defendant was convicted of that charge. For civil or administrative matters, please clarify the infringement(s) found according to the relevant specific provisions of law. (For example, in trademark matters, please refer if possible to the specific sub-paragraph(s) of Article 52 the Trademark Law.) The goal of this request is to understand the correspondence, if any, between the categories of cases that China has previously identified (for example, the category of cases involving trademark, copyright, patent or design infringement) and the relevant provisions of China's law.

³ Please refer to the following categories as relevant: (a) the amount and value of infringing product confiscated and the disposition of confiscated products (e.g., amounts destroyed, resold, turned over to the right-holder, given to charitable organizations etc.); (b) the amount of materials and implements confiscated (e.g., because of their use in the creation of infringing goods) and the disposition of those materials and implements (e.g., amounts destroyed, resold, given to charitable organizations, etc.); (c) the amount of monetary fine, restitution, and/or damages imposed; (d) the term of imprisonment imposed; (e) any other remedy imposed (e.g., closure of business, including length of closure; public apologies); (f) the amount of any enhancement of remedies imposed on repeat infringers; and (g) any injunction ordering the infringer or others to desist from an infringement or related activity, whether imposed under Article 49 of the Copyright Law, Article 57 of the Trademark Law, or any other relevant provision of law. Please also clarify whether the remedy was actually imposed or was suspended, reversed, modified, or for other reasons not fully executed.

3. Location, Year, and Competent Authority: China has sometimes provided information on IPR enforcement matters broken down by location, year, and competent authority. (The 2004 statistics published by the National Copyright Administration and the 2004 annual report on China's trademarks by the State Administration of Industry and Commerce are one example.) We find this helpful, and request similar clarification for each of the identified cases. In particular, we request the name of the authorities responsible for handling and resolving the matter;⁴ the year in which the matter was commenced and resolved; and the province, municipality, region, or other subdivision in which the matter was handled.⁵
4. Transfer of Cases to Criminal Authorities: China has previously informed the TRIPS Council of the aggregate numbers of trademark and copyright cases transferred to criminal authorities for certain years. Please provide the details of these and any other identified cases that involved transfers to criminal authorities. In particular, please identify the transferring administrative authority (e.g., copyright administration, Ministry of Culture, Administration of Industry and Commerce, customs), the amount of illegal business volume and illegal gains, and whether criminal authorities in fact investigated and prosecuted.⁶
5. Nationals of Other Members/Countries: We note that China has provided some statistics that separately identify cases involving foreigners.⁷ For all of the identified cases where such information exists, please clarify whether the right holders are nationals of other WTO Members or other countries, and if possible identify the Member/country.⁸
6. Product: We would appreciate clarification of the specific type(s) of product(s) and operations (retail/manufacturing/distribution) involved in all of the identified cases where such information exists.⁹

⁴ Wherever possible, please refer to the specific authority involved (e.g., the Beijing Municipal People's Procuratorate). For matters resolved by courts, please refer to the court and division.

⁵ If such information exists, please provide, or explain how one can obtain from public records, a list of the identified cases for each authority and jurisdiction.

⁶ By "details", we mean the various information requested in items 1-3 and 5-6. In particular, please provide information on the offence charged and convicted; the scope of operations (retail/manufacturing/distribution); the amount of illegal business volume, illegal gains or other indicators used for prosecutions; involvement of foreign right holders (and if so whose); whether rights holders were informed of these criminal cases, and penalties imposed, including any civil compensation afforded to rights holders.

⁷ For example, this was true of recently published statistics on administrative copyright infringement cases and civil IPR infringement cases.

⁸ In matters involving multiple right holders, please clarify the numbers of Japan, other foreign, and domestic right holders, and if possible the amount of infringing product attributable to each.

⁹ If copyright and/or related rights are involved, please clarify as far as possible the specific type(s) of goods involved in the infringement (e.g., sound recordings, motion pictures, business software, entertainment software, books, journals, databases or other types of products) and the number of copies of each involved. In other matters, please clarify as far as possible the specific type(s) of goods involved in the infringement (e.g., items of consumer electronic devices, cars, motorcycles, industrial equipment, apparel, sporting goods, toys, pharmaceuticals, cigarettes). If possible, please identify these by nationality of the right holder.