

TRANSITIONAL REVIEW MECHANISM OF CHINA

Communication from the United States

By means of a communication from the delegation of the United States, dated 7 October 2007, the Secretariat has received the following contribution in the context of the transitional review mechanism under Section 18 of China's Protocol on Accession.

I. GENERAL

1. The United States appreciates China's efforts to improve the transparency of its legislative and rule making process. Please explain how China implements its system for "ensuring the participation of the people in lawmaking" under the Law on Legislation in the intellectual property (IP) context. The United States would particularly be interested in an explanation as to whether China requires that the public be formally provided with draft IP-related laws and regulations for comment, and how China takes comments from the public into account before it finalizes and implements those laws and regulations.
2. Please provide details about the notice and comment periods used by the Legislative Affairs Office of the State Council and other Chinese agencies during the past year as they relate to draft IP-related laws and regulations.
3. Please explain how China seeks to avoid inconsistencies among the different IP-related agencies as to when and from whom they solicit comments, and how they take into account comments, when more than one agency is drafting and issuing a particular measure.
4. Please explain whether the public will have the opportunity to comment on IP-related laws such as the recent draft amendments to the patent and trademark laws.

II. LEGISLATION

5. We appreciate that China has provided a summary of legislative priorities in China's 2007 Action Strategy on intellectual property rights (IPR) protection. Could China provide an update on the progress of its legislative initiatives, particularly with regard to reform of patent, trademark and copyright measures? Is China considering any further new IPR measures not mentioned in the Action Strategy?

III. ENFORCEMENT

6. With regard to case initiation standards for criminal IP investigations, are there uniform guidelines/procedures applicable to Public Security Bureaus (PSB) throughout the whole country? If so, please identify them.

7. We understand that in certain jurisdictions the PSB and the Procuratorates have adopted case initiation standards that allow for a certain latitude in investigating potential crimes, such as by investigating on suspicion or on the basis of statistical sampling. One such example is Jiangsu province. Is China considering making these pilot programs more comprehensive? If so, please explain.

8. Has there been any further discussion of clarifying the role of private investigators in obtaining evidence to be used in civil court proceedings? We note that there has been a trial effort in Shenzhen to compel exchange of evidentiary material in intellectual property cases and we are interested in knowing of further efforts in that area.

9. Are there any legislative proposals under discussion that would enhance the power of Chinese judges to enforce judicial orders?

10. The United States appreciates that China has provided a summary of enforcement priorities in China's 2007 Action Strategy on IPR protection. Could China provide further information on specific enforcement initiatives that are under way or under development regarding (a) counterfeit products that pose health and safety threats, such as fake pharmaceuticals, agricultural chemicals, electronics, etc., (b) piracy and counterfeiting on the Internet, (c) commercial production and sale of pirated optical disks, and (d) acts of unfair competition involving the intentional registration of infringing company names and the misuse of such registrations in China?

11. US customs data shows that China is by far the largest source of counterfeit goods seized at US borders. The United States is pleased to have reached a bilateral customs agreement with China to enhance cooperation in this area. Could China identify any new efforts that it is undertaking to reduce the outbound flow of counterfeit goods across China's borders?

12. On 1 March 2006, China provided the following data on criminal cases in 2005, broken down by article of the Criminal Law. Please fill in the missing information and provide the corresponding data for 2006 and, to the extent available, for 2007.

China 2005 Criminal Enforcement Data

Article of Criminal Law	Court cases initiated	Court cases resolved	Persons convicted or acquitted	Persons receiving suspended sentences	Persons receiving imprisonment less than 5 yr	Persons receiving imprisonment more than 5 yr
213 (manufacture of counterfeit TM goods)	221	213	324	*	149	9
214 (sale of counterfeit TM goods)	93	94	124	*	54	3

Article of Criminal Law	Court cases initiated	Court cases resolved	Persons convicted or acquitted	Persons receiving suspended sentences	Persons receiving imprisonment less than 5 yr	Persons receiving imprisonment more than 5 yr
215 (manufacture of counterfeit TM labels)	134	128	214	*	110	1
217 (reproduction and distribution of pirated copyright works)	28	25	29	*	8	1
218 (distribution of pirated copyright works)	6	6	8	6	2	0
219 (violation of trade secrets)	41	38	41	*	28	0
142-149 (offenses relating to fake and shoddy goods)	1117	1121	1942	*	1074	174

** data to be provided by China*

13. On 25 October 2005, in document IP/C/W/461, the United States requested certain information regarding specific cases that China has identified through statistics as reflecting its application of criminal, administrative, and civil remedies for IPR infringement in China for the years 2001 through 2004. On 22 December 2005, we received a letter from China (IP/C/W/465) concerning our request. On 20 January 2006, in document IP/C/W/461/Add.1, the United States replied to China's letter and indicated that the United States looked forward to China's full response to our request for information. To date, the United States has received no further response from China. The United States takes this opportunity to reiterate the US request for information contained in document IP/C/W/461, and requests that China also provide information for the years 2005, 2006 and, to the extent available, for 2007.

IV. PATENTS

14. Because the State Intellectual Property Office (SIPO) does not provide for the substantive examination of utility model and design patent applications, many companies have complained that their utility model or designs have been misappropriated by unscrupulous entities that take the models and designs, file for and obtain patent rights, and then use these rights to bring infringement actions against them. Please explain how the recently issued administrative rule on the Standardization of Patent Applications and other actions undertaken by SIPO and other relevant IP agencies will alleviate these concerns.

15. With regard to Article 48(2) of the draft third amendments to the Patent Law of the People's Republic of China, what will be the standards used to determine when the exercise of a patent is conduct that "eliminates [or] restricts competition" that would justify the issuance of a compulsory license?

16. Is consideration being given to any changes to the scope of patentability of software inventions? Please explain.

V. COPYRIGHT

17. Have there been any court decisions, judicial interpretations, judicial notices or guidance, law enforcement guidance, State Council regulations, administrative rules, including local legislative enactments or regulations, or other legal documents interpreting Article 4 of the Copyright Law of the People's Republic of China, which was adopted at the 15th Session of the Standing Committee of the Seventh National People's Congress on 7 September 1990, and amended according to the Decision on the Revision of the Copyright Law of the People's Republic of China, adopted at the 24th Session of the Standing Committee of the Ninth National People's Congress on 27 October 2001? If so, please identify them, and indicate whether China has made translations of them available to WTO Members in accordance with China's commitment in paragraph 334 of the Working Party Report accompanying China's Protocol of Accession.

18. With regard to copyright piracy on the Internet, please provide a detailed description of:

- (a) the legal steps necessary to expeditiously take down infringing content and/or links after receiving proper notice from recognized right holders' representatives;
- (b) all remedies available to suspend or terminate the accounts of repeat infringers and the consequences of recidivism; and
- (c) the remedies available to provide identifying information about direct infringers to right holders or their representatives.

19. Please provide examples of cases where copyright piracy on the Internet has been addressed using the above-referenced legal procedures, including specific efforts taken to protect foreign right holders and the results of those efforts.

20. With regard to internet piracy, please clarify how, if at all, the criminal prosecution/conviction thresholds established in the judicial interpretations issued in 2004 and 2007 apply to copyright infringements committed or taking place in the Internet environment.

21. Right holders have noted that recent guidance from the National Copyright Administration of China (NCAC) suggests that notices of claimed infringing material on the Internet be sent in hard copy rather than electronic form. Right holders are concerned that this procedure is less timely and efficient than electronic notices. Could China clarify the acceptability of electronic notices of claimed infringement under Chinese law?

22. Please describe any campaigns currently under way or planned to combat textbook piracy on university campuses that might augment actions by NCAC, the General Administration of Press and Publication and the Ministry of Education in Shanghai and Wuhan. Will responsible authorities undertake other enforcement efforts timed to coincide with the start of university terms? Please provide concrete examples of these campaigns and other enforcement efforts, including specific steps taken to protect foreign right holders against textbook piracy.

23. Please describe what remedies, if any, are available, or will be available, for unauthorized internet retransmissions and/or transmissions of coverage of 2008 Summer Olympic events in Beijing?

VI. TRADEMARKS/GEOGRAPHICAL INDICATIONS

24. The United States notes that China has not yet fully responded to questions posed by the United States in connection with last year's transitional review before this Council regarding programs of SAIC, AQSIQ, and MOFCOM that appear to provide certain benefits to designated Chinese trademarks, which are variously termed "famous trademarks," "famous brands," "renowned brands," "export brands," etc. The United States would appreciate full responses to these questions, including China's position regarding their compliance with China's TRIPS Agreement national treatment obligations.

25. There have been reports of an increasingly large number of abusive trademark applications filed by unauthorized entities for other companies' recognized brands, particularly in the case of well-known brands and up-and-coming brands. Please describe the steps the State Administration for Industry and Commerce is taking to address this issue at the examination and opposition and cancellation stages.

26. The United States appreciates China's response to question 18 of document IP/C/W/482. The United States would like to clarify that response. Would a trademark for "gloves" (in group 2510) be cited against an application for the identical trademark for "scarves" (in group 2511)? If not, is it because "gloves" and "scarves" fall into two separate groups? Please explain.

27. In accordance with China's Trademark Law, a geographical indication (GI) can be protected as a certification trademark or collective trademark. The China Trademark Office (CTMO) therefore is the regulatory agency in charge of registration and management of GIs. However, according to the Regulations on the Protection of Geographical Indication Products, issued by the State Administration of Quality Supervision, Inspection and Quarantine (AQSIQ) effective 15 July 2005, AQSIQ is the government agency in charge of GIs, which should examine and confirm the registrations of GIs. With regard to this type of situation, Article 87 of the Law on Legislation of the People's Republic of China prescribes in relevant parts that:

If any of the following circumstances occurs concerning a law, administrative regulation, local regulation, autonomous regulation, special rule, administrative rule or local rule, the relevant body shall amend or repeal it in accordance with the authority specified in Article 88 of This Law: ...

(ii) *A law on a lower level contravenes the law on a higher level;*

(iii) *Discrepancies exist between different rules concerning a similar matter, and one of the rules should be amended or withdrawn pursuant to a ruling made by the relevant body; . . .*

As an administrative rule, it would appear that AQSIQ's Regulations on the Protection of Geographical Indication Products conflict with the higher level law, the Trademark Law. When will this administrative rule be amended or repealed to conform with the higher level Trademark Law, or will appropriate harmonizing legislation be adopted to reflect AQSIQ's concerns and interests in this area?

28. What exactly are the GIs that should be registered? Is it a certification/collective trademark at the CTMO or other distinguishing indication of source at the AQSIQ? What are the differences

between these two types of registrations, especially in respect of enforcement, i.e., administrative (including Customs) enforcement, civil enforcement and criminal enforcement?

29. Due to the different administrative management procedures between the CTMO and AQSIQ, there exist conflicting GIs at CTMO and AQSIQ because they were registered by different registrants. Under the co-existence of China's Trademark Law and the AQSIQ Regulations on the Protection of Geographical Indication Products, how can the problem of conflicting registrants be solved? Which right takes priority and under what circumstance?

30. Is it necessary for a registered GI (certification trademark or collective trademark) to be registered at the AQSIQ?

31. Is it necessary for a licensed GI (certification trademark or collective trademark) user to register the license with the AQSIQ?

32. Please explain whether national treatment is applied for foreign GI's?

33. Is there a public database for GIs at the AQSIQ, such as the one that exists for trademarks?

VII. DATA EXCLUSIVITY

34. Please advise how China's drug registration regulation is administered and what are the requirements of SFDA for clinical test data to be afforded data exclusivity.

35. Please advise the manner in which data exclusivity is granted including if there are forms to complete, and if there is a record of an administrative decision where data exclusivity has been granted. Please provide copies of any such forms or approvals.

36. Please advise of the total number of data exclusivity grants provided by SFDA including the numbers of data exclusivity grants provided to foreign and domestic companies.
