

**TRANSITIONAL REVIEW MECHANISM OF CHINA**

Communication from the United States

By means of a communication from the Delegation of the United States, dated 9 October 2008, the Secretariat has received the following contribution in the context of the transitional review mechanism under Section 18 of China's Protocol on Accession.

**QUESTIONS FROM THE UNITED STATES TO CHINA  
CONCERNING INTELLECTUAL PROPERTY RIGHTS**

**I. TRADEMARKS AND GEOGRAPHICAL INDICATIONS**

1. Based on China's response to Question 24 of Document IP/C/W/502, the United States understands that "famous brands," "famous trademarks," "renowned brands" and "export brands" reflect measures created to enhance the overall quality level of brand products and competitiveness in China. However, it is still not clear what criteria must be met to obtain the status of "famous brands," "famous trademarks," "renowned brands" or "export brands" or what level of protection is afforded to these brands in the area of intellectual property rights. To gain better understanding, the United States began posing questions to China in this area in connection with the transitional review before this Council in 2005. However, many questions previously posed remain unanswered.

2. The United States would ask that China respond to the following previously posed questions concerning the *Measures for Administration of Chinese Famous-Brand Products*, issued by the General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ), which establish criteria for awarding the "Chinese Famous-Brand Product" quality mark displayed on a wide range of Chinese consumer products.

- (a) Article 10 states that products or enterprises "using foreign (overseas) trademark" may not apply to become Chinese Famous-Brand Products. Please explain the scope and meaning of the terms "foreign (overseas) trademark" and "using" in Article 10.
- (b) What criteria are used to determine whether a trademark is a "foreign (overseas) trademark" within the meaning of Article 10?
- (c) Does Article 10 prevent an enterprise that uses a "foreign (overseas)" mark on one of its products from obtaining "famous-brand product" designation for a different product that only bears a domestic Chinese trademark?

- (d) How is Article 10 applied to marks owned or used by foreign-invested enterprises in China? How is Article 10 applied to marks owned or used by foreign companies selling to China?
- (e) Article 24 specially exempts Chinese Famous-Brand Products from quality supervision and examination by governmental departments at all levels, including export inspection. Please identify the precise measures from which Chinese Famous-Brand Products are exempt.
- (f) Article 25 provides for special listing of Chinese Famous-Brand Products in the scope of activities for cracking down on fake goods. Please identify and describe these activities, and describe the effect of being on this special listing with respect to these activities.
- (g) China appears to maintain a number of similar "famous-brand product" measures at the sub-national level (e.g., the *Measures of Hunan Province for Supervision of Hunan Famous-Brand Products* (2002); the *Measures of Liaoning Province for Cognizance and Protection of Liaoning Famous-Brand Products* (2003)). Please provide a list of all such sub-national measures, and indicate how WTO Members may obtain copies of these measures.

3. The following questions, also previously posed, concern the Ministry of Commerce's *Announcement No. 2005-3*, releasing the *2005-2006 List of Leading Export Brands Nurtured and Developed by the Ministry of Commerce*, as well as the *Instruction Opinion on Supporting Famous-Brand Export Products*, issued by the Ministry of Commerce and seven other agencies on 7 June 2005.

- (a) Has China issued updates to the *2005-2006 List of Leading Export Brands Nurtured and Developed by the Ministry of Commerce* or new lists? If so, please identify them and explain how WTO Members can obtain copies of them.
- (b) Please identify the criteria used for selecting brands for inclusion in the *2005-2006 List of Leading Export Brands Nurtured and Developed by the Ministry of Commerce* and any updated or new lists, and describe in particular criteria related to trademarks or other intellectual property rights associated with selected brands. Are the criteria set out in a written measure or measures? If so, how can WTO Members obtain copies of the measure or measures?
- (c) Would it be correct to state that the *2005-2006 List of Leading Export Brands Nurtured and Developed by the Ministry of Commerce* and any updated or new lists consist of only brands (with intellectual property rights) owned or used by Chinese companies? If not, please explain.
- (d) *Announcement 2005-3* states that listed brands and enterprises "may enjoy all supporting policies." Please identify and describe all such supporting policies. Are they the same as the policies described in the *Instruction Opinion on Supporting Famous-Brand Export Products*?
- (e) Section VI of the *Instruction Opinion on Supporting Famous-Brand Export Products* (titled "Strengthen publicity and protect intellectual property rights to create a sound market environment for the development of famous-brand export products") appears to require intellectual property rights administrative departments, such as Administrations of Industry and Commerce and the Customs Administration, to list intellectual property rights associated with famous-brand export products as

"important content" and make them eligible for "special activities of protecting the said rights." Please describe these special enforcement activities.

- (f) Sections IV and V of the *Instruction Opinion on Supporting Famous-Brand Export Products* appear to require that Chinese agencies at all levels give certain "preferential policies" to famous-brand export products. The *Instruction Opinion on Supporting Famous-Brand Export Products* mentions, among other things: sale in demonstration shops free of fake goods; cultivation of domestic markets; preferential loans; export and overseas investment preferences; exemption from quality inspection; convenient customs clearance; and preferential banking and insurance practices. Please describe these preferences and identify any measures setting them out in greater detail.

4. In addition to recognizing well-known trademarks at the national government level, China also maintains measures at sub-national (i.e., provincial, regional and municipal) government levels for recognizing "famous trademarks." The following questions, again previously posed, concern these sub-national measures:

- (a) Are foreign enterprises and/or users of "foreign" trademarks eligible to become "famous trademarks" under all of these sub-national measures?
- (b) Please describe any special protection afforded by these measures, including any protection related to the characteristic packaging and decoration of products bearing a designated "famous trademark," and protection against disparagement of such products.
- (c) Please describe how Administrations of Industry and Commerce give effect to provisions requiring them to provide strengthened enforcement for these "famous trademarks."
- (d) Please provide a list of all such sub-national measures, and indicate how WTO Members may obtain copies of these measures.

5. With regard to the use of the *Similar Goods and Services Differentiation Table*, issued by the China Trademark Office (CTMO), in making a determination as to likelihood of confusion, is this table merely a guide, or is the examiner bound by the table? Also, would this table be considered determinative during an opposition or cancellation proceeding? In other words, is the standard set by this table merely a presumption used in preliminary examination which may be overcome through evidence during an opposition or cancellation proceeding?

6. In the event that there is a conflict between a geographical indication (GI) registered with the AQSIQ and one registered to another party with the CTMO, is there a system in place at the AQSIQ for the owner of the trademark, certification mark or collective mark registered at the CTMO to oppose or seek cancellation of the GI at the AQSIQ? With regard to priority rights, has the Chinese legislature or any judicial authority provided interpretations for conflicts involving GIs protected under the *Trademark Law* and GIs registered with the AQSIQ?

7. In February 2008, the *Measures for the Administration of Geographical Indications of Agricultural Products* went into effect. What are the differences between this registration system and the registration systems at the AQSIQ and CTMO? How would conflicts between registrations of GIs with the Ministry of Agriculture be resolved with registrations at the AQSIQ or CTMO?

8. With regard to the *Measures for the Administration of Geographical Indications of Agricultural Products*, Article 12 notes that there is an opportunity for an entity to object to the approval of the GI. What are the possible grounds for objection?

9. Article 13 of the *Measures for the Administration of Geographical Indications of Agricultural Products* indicates that the registration certificate shall be valid permanently. Can a third party seek cancellation of the GI on priority grounds once it is registered? Are there any maintenance or renewal requirements for registered GIs?

10. Is there a published database for GIs at the Ministry of Agriculture, such as the one that exists for trademarks?

11. Please explain whether national treatment is applied for foreign GIs at the Ministry of Agriculture. Article 24 of the *Measures for the Administration of Geographical Indications of Agricultural Products* indicates that specific measures for registration of GIs of agricultural products from foreign countries shall be worked out in another initiative. Is this initiative in place and is it publicly available?

## **II. UNDISCLOSED INFORMATION**

12. Please advise whether the State Food and Drug Administration has provided pharmaceutical companies with the six years data protection required under China's *Drug Registration Regulation*. If so, please provide information as to how many foreign and how many domestic companies received data protection.

## **III. ENFORCEMENT**

13. The United States posed several questions to China with regard to enforcement in connection with last year's transitional review before this Council. However, some of those questions remain unanswered. To gain better understanding, the United States would appreciate China's responses to the following questions on enforcement during this year's transitional review.

14. 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.

15. 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 programmes more comprehensive? If so, please explain.

16. 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 about any further efforts in that area.

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

18. The United States appreciates that China has provided a summary of enforcement priorities in China's 2008 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?

19. United States customs data shows that China is by far the largest source of counterfeit goods seized at the United States 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?

#### IV. COPYRIGHT

20. 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*, adopted by the National People's Congress on 7 September 1990, and amended according to the *Decision on the Revision of the Copyright Law*, adopted by the 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.

21. 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 against Internet Service Providers (ISPs) who do not engage in immediate takedowns under the *Internet Regulations* and whether any such remedies have been imposed to date against ISPs who have failed to engage in immediate takedowns;
- (c) all remedies available to suspend or terminate the accounts of repeat infringers and the consequences of recidivism; and
- (d) the legal steps necessary for right holders or their representatives to obtain information about direct infringers.

22. 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.

23. The *Regulations for the Protection of the Right of Communication through Information Network* appear to limit implementation to the interactive "right of making available" which results in a lack of clarity as to whether other forms of transmission in an online environment such as real-time and P2P streaming, are covered. Please clarify whether these other forms of transmission are intended to be covered within these regulations and whether in the regulations will be amended to clarify that other forms of transmission in an online environment are covered by these regulations.

24. 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.

25. For each provision of law under which criminal copyright infringement, including criminal copyright infringement on the Internet, may be prosecuted, please provide information on the number of prosecutions that have been initiated in 2007 and the first six months of 2008. Please indicate: (a) when the criminal complaint was filed; (b) with which court; (c) the identities of the defendant(s); (d) the provisions of law alleged to have been violated; (e) current disposition; (f) if concluded, whether the case resulted in acquittal or conviction; (g) if it resulted in conviction, the sentence, and whether the sentence was suspended; and (h) whether the case involved a foreign work.

26. Please clarify whether software end-user piracy is subject to criminal penalties and if so under what circumstances and pursuant to which laws.

27. It is our understanding that China has or will be undertaking revisions to its copyright law. What is the projected timeline for this work and what are the steps involved? Will foreign governments and other stakeholders have the opportunity to provide input into and comment on the drafts and if so at what stages?

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