

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 2009, 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. TRADEMARKS AND GEOGRAPHICAL INDICATIONS

1. In past transitional reviews before this Council, the United States has submitted a number of questions regarding the status of the *2005-2006 List of Leading Export Brands Nurtured and Developed by the Ministry of Commerce* measure. The United States appreciates the responses previously provided by China on this topic. However, China has not yet provided responses to certain questions relating to "famous brands," "famous trademarks," and "export brands," and what level of protection is afforded these brands in the area of intellectual property rights.

- (a) Please explain whether foreign enterprises and/or users of "foreign" trademarks or brands are eligible to become "famous trademarks," "export brands" and "famous brands." Please also describe the special protections afforded owners of these distinctions.
- (b) Please identify all provincial and local measures relating to "famous trademarks," "export brands" and "famous brands" and the special protections afforded owners of these distinctions.

2. Previously, China has indicated that it has established its own geographical indication (GI) protection system based upon its national conditions and is working to constantly improve the system's effectiveness. The United States appreciates China's stated willingness to share experiences and actively cooperate with Members regarding GI protection systems. To that end, could China please describe its GI protection system as it currently operates and outline the measures it has taken to improve its effectiveness?

3. In connection with last year's transitional review before this Council, the United States submitted several questions regarding China's GI system, but China did not answer them. Please provide responses to the following questions at this year's transitional review:

- (a) In the event that there is a conflict between a 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?

- (b) 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?
- (c) 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?
- (d) 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?
- (e) Is there a published database for GIs at the Ministry of Agriculture, such as the one that exists for trademarks?
- (f) Please explain whether the Ministry of Agriculture will provide national treatment for foreign GIs. 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?

4. Article 16 of the Trademark Law states that if a trademark contains a geographic mark for goods that do not come from that region, and the trademark misleads the public, the trademark shall not be registered or used. However, the Article states that trademarks that have been registered in good faith shall continue to be valid. It is not clear how this provision operates in practice. Can China please clarify whether the prior rights of a trademark owner are grounds for refusing protection during examination, opposition and cancellation of a later in time and confusingly similar geographical indication? Presumably, if the trademark has priority rights in China that pre-date the GI, the trademark owner should be given its full set of rights under Article 16.1 of the Trademark law, without requiring the mark to coexist with the later in time GI.

II. UNDISCLOSED INFORMATION

5. Please confirm whether the State Food and Drug Administration is providing pharmaceutical companies with six years of data protection pursuant to China's *Drug Registration Regulation*. If that is the case, please provide information as to how many foreign and how many domestic companies have received data protection.

III. ENFORCEMENT

6. The United States has posed several questions to China regarding enforcement issues in connection with past transitional reviews before this Council. However, some of those questions remain unanswered. To gain a better understanding of China's enforcement regime, the United States would appreciate China's responses to the following questions during this year's transitional review.

7. 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.

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

9. 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 learning about further efforts in that area.

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

11. 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 optical disks containing pirated movies and music; and (d) acts of unfair competition involving the intentional registration of infringing company names and the misuse of such registrations in China?

12. We note that US customs data shows that China is by far the largest source of counterfeit and pirated goods seized at US borders. In that respect, 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 and pirated goods across China's borders?

IV. COPYRIGHT

13. The United States posed several questions to China regarding copyright issues in connection with last year's transitional review before this Council. However, all of those questions remain unanswered. The United States asks that China provide responses to those questions, which are reproduced below, at this year's transitional review

14. 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.

15. 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) the types of 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) the types of 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.

16. 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.

17. The *Regulations for the Protection of the Right of Communication through Information Network* appear to limit implementation of Article 8 of the WIPO Copyright Treaty (WCT) 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 within an exclusive right under China's law as required by Article 8 of the WCT, as noted above. Please clarify whether these other forms of transmission are intended to be covered within these regulations and whether the regulations will be amended to clarify that other forms of transmission in an online environment are covered by these regulations.

18. 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 digital environment.

19. 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 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.

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

21. 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?
