

WORLD TRADE ORGANIZATION

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**Council for Trade-Related Aspects
of Intellectual Property Rights**

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TRANSITIONAL REVIEW MECHANISM OF CHINA

Communication from China

The following communication, dated 13 September 2002, has been received from the Permanent Mission of the People's Republic of China.

Hereby I have the honour to submit the information required under Annex 1A of the Protocol on the Accession of the People's Republic of China on the trade-related intellectual property regime.

**TRANSITIONAL REVIEW UNDER ARTICLE 18 OF THE PROTOCOL
OF ACCESSION – THE PEOPLE'S REPUBLIC OF CHINA**

INFORMATION REQUIRED IN ANNEX 1A

(a) Amendments to Copyright, Trademark and Patent Law, as well as relevant implementing rules covering different areas of the TRIPS Agreement bringing all such measures into full compliance with and full application of the TRIPS Agreement and the protection of undisclosed information

1. To fulfill the obligations under the TRIPS Agreement, China amended major laws and regulations governing the protection of intellectual property rights such as Copyright Law, Implementing Regulations of Copyright Law, Trademark Law, Implementing Regulations of Trademark Law, Patent Law, Implementing Regulations of Patent Law, and Regulations on Computer Software Protection. China also enacted new regulations such as Regulations on the Protection of Layout-Designs of Integrated Circuits. Furthermore, fulfilment of China's obligations under the TRIPS Agreement is also reflected in many other regulations such as Implementing Regulations of the Drug Administration Law.

I. AMENDMENTS TO COPYRIGHT LAW

2. To be in compliance with the requirements of the TRIPS Agreement, China amended Copyright Law and Implementing Regulations of Copyright Law in October 2002 and August 2002 respectively. The amendments include mainly the following aspects:

1. The category of rights protected enlarged

3. Article 10 of the amended Copyright Law stipulates the copyright owner's moral rights and property rights. According to the Article, the property rights include right of reproduction, right of issuance, rental rights, right of display, right of performance, right to project on screen, right to broadcast, right to spread on the information network, right to produce a film, right of adaptation, right of translation, right of compilation, among which the rental rights, right to project on the screen and the right to spread on the information network are newly added. Furthermore, compared with the previous Copyright Law, the definitions of right to performance and right to broadcast are broadened with the inclusion of live performance and mechanism performance to right of performance, and broadcast, rediffusion and communication to the public to right to broadcast.

2. Rights of performers and producers clarified

4. Article 37 and 38 of the amended Copyright Law clearly confirm performers' rights to authorize others to broadcast on the spot and publicly transmit their live performances and to get payment. The two Articles also stipulate the performers' rights to authorize others to reproduce and issue the fixation of their performances, to communicate their performances to the public through information network, and to get payment. Article 41 of the amended Copyright Law adds producers' rights to authorize others to rent their phonograms and videos and to spread these productions through information network. Article 44 of the amended Copyright Law stipulates that broadcasting organizations have the right to prohibit such acts taken without their authorization as fixation, reproduction of fixations, and rebroadcasting by wireless means of broadcasts. The terms of protection of the above mentioned rights are all 50 years.

3. Provisional measures of property and evidence preservation added

5. Article 49 of the amended Copyright Law stipulates that the copyright owners or holders of related rights may apply to the People's Court for injunctions ordering relevant party to desist from infringement-related acts and for property preservation before the institution of litigations, so long as they can supply reasonable available evidences indicating that the relevant party is infringing or about to infringe their legitimate rights and that any delay is likely to cause irreparable damages to their legitimate rights and interests.

6. Article 50 of the amended Copyright Law stipulates that in order to stop the infringing acts, the copyright owner or holders of related rights may apply to the People's Court for preservation of evidence before the institution of litigations so long as there is a demonstrable risk that the evidence will be lost or hard to obtain in the future.

4. Statutory damages provides

7. Article 52 of the amended Copyright Law stipulates that the People's Court has the authority, according to the specific circumstances of an infringement, to order the infringer to pay damages of no more than RMB 500,000 when the right holder's actual loss or the infringer's income from the infringement cannot be ascertained.

5. Administrative punishment for infringements harming the public interests aggravated

8. The amended Copyright Law stipulates that, for those infringements that do harm to the public interests, apart from the civil liabilities that the infringer shall bear, the copyright administrative authorities have the right to order the infringer to desist from infringing acts, to confiscate the infringer's income from the infringement, to confiscate and destroy the infringing reproductions, and to have the infringer fined. Under serious circumstances, the administrative authorities may confiscate materials, tools and equipments etc used in infringing production.

II. AMENDMENTS TO TRADEMARK LAW

9. Trademark Law came into force on 1 March 1983 and there was an amendment in 1993. In order to be consistent with the TRIPS Agreement, Trademark Law was amended once again in October 2001. The main amendments are as follows:

1. Protection of geographical indications added

10. There was no provision specifically for geographical indications in the previous Trademark Law. Complying with the provisions of the TRIPS Agreement, Article 16 of the amended Trademark Law stipulates that geographical indications are indications which identify a good as originating in a region or locality, where a given quality, reputation or other characteristic of the good is essentially attributable to the natural or artificial factors of its geographical origin... . It further stipulates that if a trademark containing geographical indication is to be used for goods not originating in the region indicated, or if use of the indication in the trademark for such goods is of such a nature as to misleading the public with respect to the true place of origin, the registration of such trademark shall be refused and the use of such trademark shall be prohibited. According to Trademark Law and Implementing Regulations of Trademark Law, indications that identify the place of origin of a good or a service can be registered as certification trademarks or collective trademarks.

2. Scope of protectable subject-matter enlarged

11. The amended Trademark Law stipulates that any visible indication capable of distinguishing the goods or services of one natural or legal person or other organization from those of another one, including words, logos, letters, numerals, colours, as well as any combination of such elements, can be registered as a trademark. Trademark Law further stipulates that indications which lack distinctiveness may also be registered as trademarks after acquiring its distinctiveness through use and are easy to be identified.

3. Protection of well-known trademarks added

12. Provisional Rules for Identification and Supervision of Well-known Trademarks, which was enacted in 1996, provided the protection of well-known trademarks. However, the protection was not included in the previous Trademark Law. In the amended Trademark Law, provisions relating to the protection of well-known trademarks were added. Well-known trademarks entitled to enjoy protection include both those that have been registered in China and those have not yet been registered in China. The amended Trademark Law also stipulates the criteria for identification of well-known trademarks. Article 5 of the Implementing Regulations of Trademark Law stipulates that in disputes where an interested party claims its trademark being well-known during the course of registration and examination of the trademark, this party may apply to the trademark administrative authorities for identification of the well-known trademark.

4. Provisions relating to right of priority added

13. There was no provision relating to right of priority in the previous Trademark Law. In 1985, Interim Rules Governing Right of Priority Claim during the Trademark Registration and Implementing Regulations of Trademark Law stipulated right of priority. However, these regulations did not include provisional protection with respect to exhibition. In order to perfect the provisions on right of priority, the amended Trademark Law added new provisions relating to right of priority and further stipulates right of priority for goods on an international exhibition.

5. Judicial review of administrative determinations added

14. According to the previous Trademark Law, the administrative authorities have the final say on such matters as the rejection of a trademark application, affirmation and cancellation of a trademark registration, the interested parties have no right to institute litigations before a court. The amended Trademark Law stipulates that any administrative determination made in relation to the acquirement and maintenance of an intellectual property shall be subject to judicial review.

6. Investigation and punishment against infringements enhanced

15. The amended Trademark Law authorizes the administrative authorities more means to investigate and punish infringing acts. Those means include inquiry, consultation, reproduction, investigation on the spot, sequestration and distraintment. The amended Trademark Law also stipulates property attachment and evidence preservation before the institution of litigations, and statutory damages.

III. AMENDMENTS TO PATENT LAW

16. The Patent Law was first enacted in 1984, and was amended for the first time in 1992 according to the draft TRIPS Agreement. The second amendment was in August 2000. The amended Patent Law, to be consistent with the TRIPS Agreement, stipulates provisions in relation to offering for sale, conditions for compulsory licensing of patents, provisional measures, and criteria for

calculating infringement damages. The amended Patent Law also affirms the right of patent applicants and patent owners to institute litigations against any administrative determination before a court. The amended Patent Law is now in full compliance with the TRIPS Agreement.

17. In respect of the term of patent, State Intellectual Property Office issued Decree No. 80 in 2001, extending the terms of patents to 20 years for those patents the protection of which became effective before 31 December 1992 (including) and that were still valid on 11 December 2001.

IV. PROTECTION OF UNDISCLOSED INFORMATION

18. In respect of protection of undisclosed information, Anti-unfair Competition Law has provisions in line with Article 39.2 of the TRIPS Agreement. According to the Law, State Administration for Industry and Commerce enacted Certain Rules for Prohibition of Business Secret Infringement. To implement Article 39.3 of the TRIPS Agreement, Article 35 of Implementing Regulations of the Drug Administration Law stipulates the protection of self-obtained, undisclosed test or other data submitted by those who are seeking approval for production or marketing of pharmaceutical products which utilize new chemical entities. In addition, there are other provisions in relation to protection of undisclosed information in the amended Regulations for Pesticide Administration, Regulations for Animal Remedy Administration, Regulations for Administration of Feeding Stuff and Feed Additive. Provisions for protection of undisclosed information as contained in all these laws and regulations are in full compliance with Article 39 of the TRIPS Agreement.

V. OTHER RELATED LAWS AND REGULATIONS

19. Apart from the above-mentioned laws and regulations for intellectual property protection, China also enacted other laws and regulations with the purpose to establishing a sound legal system for intellectual property protection which will fulfill the requirements of the TRIPS Agreement. These laws and regulations include Regulations on Protection of New Varieties of Plants, Regulations on Protection of Layout-Designs of Integrated Circuits, with which the protection of new plant variety and layout-designs of integrated circuits in China has met the requirements of the TRIPS Agreement.

20. It is fair to say that China, through the process of legislation and amendments to laws, has already fulfilled the requirements of the TRIPS Agreement.

(b) Enhanced IPR enforcement efforts through the application of more effective administrative sanctions as described in the Report

21. The amended Trademark Law provides the administrative authorities with more means to investigate and punish infringing acts. Those means include inquiry, consultation, reproduction, investigation on the spot, sequestration and distraintment. The amended Implementing Regulations of Trademark Law stipulates that the infringer, who has infringed the exclusive rights of a registered trademark, shall be imposed a fine no more than three times the amount of the infringing business value, where the infringing business value cannot be ascertained, the amount of the fine shall be no more than RMB 100,000. The amended Copyright Law stipulates that for infringements of copyright and neighbouring right that do harm to the public interests, such as pirate, pirate broadcasting, making of fake paintings, apart from civil liabilities that the infringer shall bear, the copyright administrative authorities have the right to order the infringer to desist from infringing acts, to confiscate the infringer's income from the infringement, to confiscate and destroy the infringing reproduction, and to have the infringer fined. Under serious infringing circumstances, the administrative authorities may confiscate materials, tools and equipments etc used in infringing production.

22. China has always attached great importance to the enforcement of intellectual property related laws and regulations. Administrative measures against infringements have been greatly enhanced. Governments at all levels are clearly aware of the contributions to economic development from the protection of intellectual property, and have effectively done away the protectionism for local infringing entities. They also launch trans-regional actions against infringements.

23. In respect of the enforcement of Trademark Law, there were 41,163 trademark law violation cases dealt with in total in 2001, among which 22,813 cases were trademark infringements and 18,350 cases were in relation to other violations. Administrative authorities confiscated 250,000,000 illegal trademark signs and 14,004 moulds, blocks and other tools directly used for infringing production. There were 2227.74 tons of infringing products destroyed in the year and the total value of fines amounted to RMB 210,000,000. Infringers were ordered to pay the right owners damages of RMB 3,343,400 in total and there were 86 cases transferred to criminal procedures, which involved 88 persons.

24. In respect of the enforcement of Copyright Law, copyright administrative authorities around China received 4,416 cases in total in 2001, with 4,306 cases concluded, among which, 3,607 cases were concluded with imposition of a fine upon the infringer and 633 cases concluded with mediation. 66 cases were transferred to criminal procedures.

25. In respect of border protection of intellectual property by the Customs, the Customs authorities around China investigated and dealt with 330 cases involving infringements by the end of 2001. The total value of all these cases amounted to RMB 134,900,000. Among these cases, 297 cases involved export and import goods bearing counterfeit trademarks. With these actions, the export and import of counterfeit goods have been effectively contained.
