

**TRANSITIONAL REVIEW MECHANISM OF CHINA**

Communication from Japan

By means of a communication from the delegation of Japan, dated 4 November 2004, the Secretariat has received the following questions that Japan has posed to China in the context of the transitional review mechanism under Section 18 of its Protocol on Accession.

Japan welcomes that, in the third year after accession, implementation by China of its commitments on the TRIPS Council has progressed and entered into a cruising phase. In a transitional period of evolving regulations, the importance of regulatory transparency, predictability, stability and consistency is paramount; the value of market access commitments and efforts to implement them could be easily clouded out by a shortness of such elements either in regulations themselves or in their application. The transitional review mechanism could be useful for making those transitional efforts more efficient and productive, and it is a pleasure for Japan to contribute to this process.

In this context, China is further invited to take necessary steps to ensure regular and effective application of public comments procedures, well-in-advance publication of laws and regulations, avoidance of abrupt regulatory change, clear demarcation of departmental responsibilities, improvement in inter-departmental and central-provincial coordination and consistency, etc.

In accordance with Paragraph 18 of the Protocol on the Accession of the People's Republic of China, which states that "China shall provide relevant information to each subsidiary body in advance of the review" and in the spirit of cooperation to render the TRM process most efficient and effective, Japan requests China to provide in advance of the TRIPS Council responses and relevant information to the following questions and comments.

**A. COPYRIGHTS**

**Removal or alteration of electronic rights management information**

1. In relation to the Article 47(7) of the Chinese Copyright Law, removal or alteration of any electronic rights management information without authority is deemed to be infringement of copyright or related rights. We insist that it also should be provided as infringement of copyright or related rights to distribute, import for distribution, broadcast or communicate to the public works or copies of works with the knowledge that electronic rights management information has been removed or altered without authority. According to China's answer to the last question, the above was under consideration. Please inform us of the progress of discussion.

### **Interpretation of "infringing public interest"**

2. Regarding the administrative punishment procedure against infringing public interest, please tell us whether the evidence which the right holder submits for proving the fact that an illegal behaviour has infringed public interest in order to initiate the administrative punishment procedure is the same as that stipulated by Article 12 of the Implementation of Copyright Law on Administrative Punishment. It is very unclear when a right holder can make use of administrative punishment procedure since the criteria established by the copyright office is different from the decision of the court. It would be necessary to establish the complementary interpretation concerning what kind of act is regarded as "infringing public interest". Please provide us with comments of the Chinese Government on this point. Please also tell us whether the Chinese Government plans to consider such an interpretation.

### **Payment of royalties for copyrights**

3. Articles 42 to 45 of the Copyright Law regulate obligations to pay royalties for copyright use on broadcasting. However, royalties have not been paid to right holders since the State Council has yet to regulate criteria on royalties. At the meeting of the Mission of Government and private sector of Japan and China in May this year, the Chinese Government stated that this matter was under consideration. Please provide us the schedule and specific details.

### **Duration of prescription**

4. In relation to Article 9 of the Regulation for Copyright Administrative Punishment, the duration of prescription is two years since the criminal act occurred. Considering that the public administration cannot impose the infringement unfound for more than two years, we consider that the duration is too short. Especially, in a case where administrative procedures are initiated by reports from right holders, we consider that two years of prescription is not long enough. Please provide us with China's comment.

## **B. TRADEMARKS**

### **Protection of well-known marks**

5. In the case where foreign enterprises in China do not enjoy the same protection for their well-known marks as that enjoyed by domestic enterprises in China, we are concerned about an issue of consistency with the provisions of national treatment under the TRIPS Agreement in terms of this situation. We would like China to present a detailed description of the number of applications, approvals, and rejections, for well-known marks of domestic enterprises and foreign enterprises respectively, in order to illustrate the implementation status of the "Provisions on the Determination and Protection of Well-Known Marks", which has newly taken effect in June 2003.

6. With regard to the determination process for well-known marks, while examples of documentary evidence verifying that a mark is well-known are stipulated in the above-mentioned provisions, we see many cases in which applications are rejected because it is impossible to prove the mark to be well-known due to lack of supporting documentation, in actual instances of implementation. Disclosing of documents used in approved applications would be desirable from the perspective of improving transparency as well as the predictability of specific documents required for an application. Are there any plans for measures to address this issue? If so, please inform us of those plans in detail.

## **C. PATENTS**

### **Disclosure of information on the pendency of patent examinations**

7. At a past TRIPS Council review of legislation, China reported on the average pendency for examinations of patent applications from Japanese corporations, as well as on efforts to accelerate examinations, such as increasing the number of examiners. However, we are concerned that there has been no improvement in examination delays in some technical fields. Please provide us with the most recent data illustrating the degree of improvement in the pendency of examinations in each technical field. In addition, periodical release of examination pendency data could help to prevent misunderstandings in the Japanese business sector regarding examination delays in China. We would like to hear China's views on this matter.

### **Protection of plant varieties**

8. Please inform us if there is any specific plan to accede to the UPOV 1991 Act?

9. Regarding Plant Variety Right, please inform us if there is any plan to expand the number of genera and species to be protected under plant variety protection law in China. If there is any plan, please inform us of the details.

## **D. INDUSTRIAL DESIGNS/PATENTS**

### **Prevention of misappropriated applications**

10. There have been reports from Japanese companies concerning instances that occurred in China of misappropriated applications and registrations that have been usurped by a person or body other than the inventor of a patent invented overseas or the designer of a design created overseas. We would like to know what efforts China will be making in the future to improve this situation and avoid such occurrences.

## **E. UNDISCLOSED INFORMATION**

### **Protection of Undisclosed Information**

11. We are concerned about cases of continuing use of know-how which could not be prohibited after termination of contracts although the old regulations actually had been replaced by the "Regulations on Administration of Technology Introduction Contracts". It raises problems of protection of trade secrets. Please inform us of efforts to improve operations in this area.

## **F. ENFORCEMENT**

### **Judicial efforts: active pursuit of criminal prosecutions, strengthening of sanctions through changing of criminal prosecution standards**

12. Compared to the actual number of infringements of intellectual property rights that take place in China, the number of cases that lead to criminal prosecutions is extremely small. There is also concern that deliberate and commercial-scale intellectual property infringements are not being effectively prosecuted. Please inform us of the number of criminal prosecutions related to patent rights, trademark rights, industrial design rights and copyrights respectively to show the status of prosecution of intellectual property rights infringements in China.

13. According to the reply from China at the TRIPS Council review of legislation to date, deliberations are being advanced on changing the standards for criminal prosecutions by the end of 2004. We would like to know the direction in which such changes are being made. For example, minimum sales of goods currently exist as a criterion for prosecution. How much of the criteria is China reviewing to lower? In addition, it would be desirable to actively execute criminal prosecutions for deterring the recurrence of infringements. Is China reviewing the criteria in which criminal prosecutions should be prosecuted to persons with a record of falsely representing other's registered trademarks on more than two occasions in the past? If so, please inform us of the detail.

#### **Cost burden on right holders for infringing products stopped at the border**

14. As part of the procedure to suspend goods that are suspected to infringe intellectual property rights at customs in China, right holders have funds drawn from their deposits for the costs required for the suspension of goods, even when infringement has been recognized. We would like China to inform us of the operation of this procedure. We consider related provision in regulation of China needs to be improved so as to ensure that "unnecessary costs" are not imposed on the right holder, as stipulated in Article 41.2 of the TRIPS Agreement, and we would like to know what improvements China is planning.

#### **Thorough disposal of infringing goods stopped at the border**

15. In Article 27 of the Regulations on the Customs Protection of Intellectual Property of the Customs General Administration, which has been enforced in March of this year, it is stipulated that it is possible to auction products if their rights-infringing characteristics are removed. We would like China to inform us of the operation of this regulation. We would like to know whether there is further revision of the regulation in order to endeavour to thoroughly dispose goods infringing intellectual property rights.

#### **Elimination of "localism"**

16. One of the problems concerning the control of intellectual property rights infringements in China is the "localism" that encourages a soft approach to the manufacture of counterfeit or pirated goods by local firms. This attitude among local authorities is an obstacle to the swift and appropriate exercise of intellectual property rights in China and it is a major concern for us. At the TRIPS Council review of legislation to date, China provided a response concerning its efforts. We would like China to inform us what specific plans it has to eliminate "localism" in the future.

### **G. OTHERS**

#### **Improvements to licensing regulations**

17. The provision of Article 24 of the Technology Export and Import Administrative Ordinance states, "If the recipient party in a technology import contract uses the technology provided by the supplier according to the agreement in the contract, and such use results in the infringement of other legal rights or interests, then the supplier assumes responsibility," which encompasses the possibility that foreign licensor could be legally liable to third parties. The provision of Article 25 of the same Ordinance states, "the licensor must ensure that the technology provided is complete, correct, effective and able to fulfil the agreed technological goal," which encompasses the possibility that the licensing rights of the technology holder could be excessively limited. Accordingly, it is expected to improve these provisions to reflect Article 28.2 of the TRIPS Agreement, which recognizes the rights

of patent holders in concluding licence agreements, and we would like to know whether China has any specific plans to make such improvements.

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