

WORLD TRADE ORGANIZATION

IP/Q/CHN/1/Add.1
IP/Q2/CHN/1/Add.1
IP/Q3/CHN/1/Add.1
IP/Q4/CHN/1/Add.1
9 June 2004

(04-2482)

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

Original: English

REVIEW OF LEGISLATION

CHINA

Addendum

The present document reproduces further responses by the delegation of China to the questions put to it in the review of China's legislation at the Council's meeting of 17-19 September 2002.¹

I. REPLIES TO QUESTIONS POSED BY THE EUROPEAN COMMUNITIES AND THEIR MEMBER STATES

A. TRADEMARKS

1. Well-known marks: (i) what is the actual status regarding the review of the Interim Rules on the Determination and Administration of Well-known Marks? (ii) Article 5 of the Implementing Regulations only permits a trademark owner to submit an application for recognition of a well-known mark when a dispute arises (when he pursues oppositions or cancellations). Is there any provision that would permit the trademark owner to apply directly for well-known status? (iii) Apparently, there exists a list of all the trademarks which were recognised as well-known in China (your reply to question 9 raised by the United States is not unequivocal). If so, may we receive a copy of such a list and please specify how the list was elaborated (i.e. whether all trademarks enlisted were recognised as such after an application for recognition was filed).

(i) The Rules on the Determination and Administration of Well-known Marks, issued by the State Administration for Industry and Commerce in 1996, is an administrative rule and it is under revision in an attempt to implement the relevant provisions under the Trademark Law and its Implementing Regulations. (ii) Article 5 and Article 45 of the Implementing Regulations under the Trademark Law respectively provides that an interested party may apply, in the procedure of trademark registration, review and adjudication and trademark use, for the determination of his mark to be protected as a well-known mark. There is no such provisions as that a trademark owner may directly apply for the determination of a well-known mark. (iii) Since China became a member of the Paris Convention, at the request of the interested parties, the Trademark Office under the State Administration for Industry and Commerce has, according to relevant provisions, determined some

¹ The minutes of this meeting have been circulated as documents IP/C/M/37 and IP/C/M/37/Add.1.

well-known marks in succession. But up to now, the Trademark Office under the State Administration for Industry and Commerce has never published such a list.

2. Transliterations: Which procedure does the Chinese Trademark Law foresee for the protection of transliterations of foreign marks into Chinese? Would a foreign trademark owner be able to successfully oppose a trademark application filed in Chinese characters of his earlier trademark written in roman characters? Would the owner of a registered mark in roman characters be successful in opposing the use of his mark in Chinese characters?

In the practice of trademark examination in our Trademark Office, pronunciation is an element that is taken into consideration when determining whether marks are similar or not. Therefore, the procedure of examination, opposition, review and adjudication may provide protection for transliterations of foreign marks into Chinese. As for the issue whether a foreign trademark owner be able to successfully oppose a trademark application filed in Chinese characters of his earlier trademark written in roman characters, the following factors shall be comprehensively taken into account: whether the earlier trademark in roman characters is registered in China; whether the mark in Chinese characters is the formal transliteration of the mark in roman characters; whether the foreign owner of the mark has used the mark in Chinese characters; the bad faith of the interested parties and other specific circumstances of the case etc. It is very complicated and cases should not be treated as the same. Similarly, if an owner of a registered mark in roman characters opposes the use of the mark in Chinese characters, all the above mentioned factors should also be considered and different cases should not be treated as the same.

B. GEOGRAPHICAL INDICATIONS

3. In reply to EC question 22, it is mentioned that "at the level of law adopted by the People's Congress and the regulations promulgated by the State Council, GIs are protected mainly under the Trademark Law and the Anti-Unfair Competition Law". Please clarify whether there are other tools that may serve to adequately protect GIs in China (i.e. the so-called *GI Act* - General requirements for products of designations of origin or geographical indications GB 17924-1999 - of 7 December 1999, in force since 1 March 2000 and issued by the State Administration for Quality Inspection, Supervision and Quarantine).

In the present laws and regulations in China, Trademark Law, Anti-unfair Competition Law and the Implementing Regulations under the Trademark Law provide protection for GIs. There is no other law or regulation that provides protection for GIs.

4. In reply to question 14 posed by the United States it is mentioned that "if a GI is protected under the Trademark Law, the scope of its protection is limited to the mark that has been approved for registration and to the goods in respect of which the use of the trademark has been approved" and "this kind of protection for GIs is identical with that for registered trademarks". Such a reply seems to confirm that the Trademark Law does not provide in an enlarged protection for GIs for wines and spirits (such GIs should be protected according to Article 23.2 TRIPS regardless whether or not they mislead the public). Please clarify.

Yes, the reply to question 14 posed by the US only goes to prove that the Trademark Law provides an enlarged protection for GIs for wines and spirits, because Article 52.1 of the Trademark Law provides: it is an infringement of the exclusive right to use a registered trademark if anyone uses a trademark that is identical with or similar to a registered trademark in respect of the same or similar goods without the authorization of the proprietor of the registered trademark. This provision neither exclude the GIs that are registered as collective marks or certification marks nor put confusion as a condition.

C. PATENTS

5. The reply to EC question 30 states that for compulsory licences granted for reasons of "public interest" the requirement of prior negotiations with the patent holder does not apply. Could you please explain how this fits into the wording of Article 31(b) which stipulates that the obligation that efforts must be made to obtain authorisation from the right holder prior to the granting of a compulsory licence can only be waived by a Member in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use. What is the basis to interpret Article 31(b) as waiving the obligation to have prior negotiations with the patent holder also in cases where an authorisation is granted for reasons of "public interest"?

Although the term used in Article 49 of the Chinese Patent Law is not identical with that in Article 31(b) of TRIPS Agreement, the meaning of "public interest" used in Article 49 of the Chinese Patent Law is just the same as that of "public non commercial use" in Article 31(b) of the TRIPS Agreement.

D. UNDISCLOSED INFORMATION

6. According to Article 35 of the Implementing Regulations of the Drug Administration Law of 4 August 2002, the undisclosed test and other data submitted in support of applications for marketing approval of pharmaceutical products which utilises new chemical entities, are protected, conform Article 39.3 TRIPS, against unfair commercial use (6 years as from the date of marketing approval, no disclosure and no reliance by the marketing authorisation body for second applicants). (i) Please confirm that data exclusivity over 6 years would be available even in cases where the drug concerned is not patent protected. (ii) Please indicate whether the marketing authority will have an obligation to verify (i.e inform with the Patent Office), prior to the granting of an authorisation, whether the drug concerned is patented or not. (iv) Finally please specify whether your legislation "links" the term of data exclusivity protection to, where appropriate, the term of the underlying patent, i.e. if the drug concerned is also patented, would the term of data protection be linked to the term of the patent in such a way that the data protection term eventually may be shortened in case the patent expires before the 6 year data exclusivity term?

The pharmaceuticals that are not patent protected can still enjoy the 6 years' protection of undisclosed information according to the Implementation Rules of Drug Administrative Law. But this kind of protection is not exclusive according to our understanding. The State Drug Administration is not obligated to verify with the patent authorities whether the products applied for marketing approval are patent protected or not. However, According to Article 11 of the Rules on Administration of Drug Registration issued by the SDA on December 1, 2002, the applicant are required to provide information on patent protection of the products applied and commit to undertake liability for any infringement of third person's patent that may exist so as to ensure that patent disputes will not arise. The 6 years' protection of undisclosed information will not be affected by the expiration of patent protection.

E. ENFORCEMENT

7. In the replies received, China communicated statistical information regarding counterfeiting and piracy. It appears that for the year 2001, of the initial copyright claims (4,416) 66 were transferred to criminal procedure and of the initial counterfeiting cases (22,813) only 86 were transferred to criminal procedure. Such figures demonstrate that the prosecution standards are indeed very tough. We understand that recommendations have been made by

relevant administrative authorities to the judicial authorities in order to lower the thresholds for initiating criminal investigations. Please specify when and how the State Council's Regulation "Provisions on the Transfer of Susceptible Criminal Cases by Administrative Law Enforcement Bodies" and the Supreme People's Procurator "Standard for Criminal Prosecution in Economic Offences" will be modified in order to lower the prosecution standard.

The Supreme People's Procurement and the Ministry of Public Security is studying the problem of the appropriate level of threshold of initiation of criminal procedure according to the situation of IPR infringement in China taking into account the recommendation from MOFTEC made according to China's commitment in accession to WTO.

8. Many different administrative governmental bodies (Customs, SAIC, AQSIQ, AIC) are in charge of the enforcement of the laws against IP infringement and more precisely counterfeiting and piracy. Please briefly indicate which procedure a right holder is to take should he desire to undertake action against the infringement of his rights. How is he to initiate the action before each of the administrations? On what grounds precisely can the right holder ask either one of the named bodies to intervene? Who will give him a helping hand in the investigation? What are the rules to be respected for determining which administration has jurisdiction both administratively and territorially? What legal or administrative actions can be undertaken by the respective governmental bodies?

The administrative enforcement of IPR is provided in Article 52, 53, 54, 55, 56 of Trademark Law; Article 50, 51, 52, 53 of Implementing Regulations of Trademark Law; Article 47 of Copyright Law; Article 36, 37 of Implementing Regulations of Copyright Law; Article 57 of Patent Law. The administrative authorities will deal with IPR infringement cases according to the authorization provided by those provisions.

9. In China's communication regarding the Transitional Review Mechanism (IP/C/W/382) it is mentioned that customs authorities around China investigated and dealt with 330 cases involving infringements by the end of 2001. Please give details as whether any of these cases lead to criminal prosecutions. Please indicate whether there is an increase of investigations for the year 2002 so far.

No cases dealt by customs were transferred for criminal prosecution. Up to 31 October 2002, China Customs has handled 517 cases involving IPR infringement.

F. BORDER MEASURES

10. From the response to question 26 of the United States it appears that the Custom Regulations of 1995 are under review, please specify whether the modified Regulation would (i) lower the security that is requested to the applicant when he requests to detain suspected infringing goods (actual Article 14); (ii) whether the modified version will explicitly foresee that both the applicant and the consignee or consignor will have the right to inspect the suspected infringing goods according to Article 57 TRIPS; (iii) whether "ex-officio actions" would be instituted even in cases where the rights were not recorded with the General Administration of Customs, that is to say in flagrant cases of infringement, ex. obvious cases of counterfeiting well-known marks or drugs counterfeiting.

(i) It has not yet been decided whether to lower the amount of security required for an application of detainment on goods suspected infringing IPR; (ii) The modified Regulations would provide that the applicant and consignee or consignor be entitled to inspect the suspected infringing goods; (iii) The provisions concerning ex-officio action against the shipment suspected infringing

IPR that have not been recorded with the General Administration of Customs is still under consideration.

II. REPLIES TO QUESTIONS POSED BY JAPAN

A. COPYRIGHT

Follow-up to additional question 2:

Please explain who decides whether each cases apply to "justifiable extent" stipulated in Article 22(7) of the Copyright Law in line with the so-called "three-step test". Furthermore, please provide clear interpretation and criteria of "justifiable extent".

The Courts will decide the application of 'justifiable extent' according to the 'three step text' on a case by case basis.

Follow-up to additional question 3:

Concerning Article 22(9) of the Copyright Law, if a "free-of-charge live performance of a published work, where fees are not charged on the public, and nor are payments made to the performers" is performed for profit (such as a performance at a department store to attract consumers where fees are not charged from the consumers, and nor are payments made to the performers), does this article apply to such performance? (We consider such case exceeds the scope of the "three-step test".)

The circumstances of fair use provided in Article 22 are all limited to non-commercial use.

Follow-up to additional question 4:

Concerning Article 39.3 of the Copyright Law, please explain how to declare "that such exploitation is not permitted".

Article 39.3 of China's Copyright Law is about an exception of copyright protection, e.g., the 'statutory exception'. According to the second sentence of this provision, a producer of sound recordings shall not make use of statutory exception provision in producing sound recordings by using a music work that has been legally recorded as audio work, if the copyright holder has declared that such use is not allowed.

Follow-up to the above question:

Concerning Article 39.3 of the Copyright Law, please explain with concrete examples how copyright holders should express their intention (like "notice on CD jacket"), in case they do not want to permit any exploitation of their works.

Article 31 of the amended Regulation for the Implementation of the Copyright Law of China provides "where a copyright owner declares in accordance with the third paragraph of Article 39 of the Copyright Law that no making of sound recordings of his work is permitted, he shall make such a declaration when his work is legally recorded". According to this article, if copyright owners of musical works do not want to permit any exploitation of their works under the statutory licence provisions for making sound recordings, they should announce at the first completion of the recording. The Copyright Law does not limit how to announce, "notice on CD jacket" is only one of

announcing forms. The protection standard of the article mentioned above theoretically is higher than the minimum protection standard required by the Article 13 of Berne Convention.

Follow-up to additional questions 5 and 6:

Please explain following questions referring to the concrete contents of regulation:

- (1) Is there any government authority which is in charge of dispute arbitration between broadcasting organizations and right holders over the payment of remuneration? If so, does the State Council play such role?**
- (2) When will the regulation of the remuneration come into effect?**
- (3) How do broadcasting organizations distribute the remuneration to right holders?**

The State Council will issue Regulations on the royalty criteria for broadcasting and television organizations. The disputes relating to royalty payment can be resolved through arbitration according to China's Arbitration Law, or through litigation before the courts. Government authorities will not be in charge of such arbitration.

Follow-up to the above question:

The answer clearly states that the State Council will issue Regulations on the royalty criteria. Please specify when it will certainly be made public, and also, please describe the detailed system in terms of royalty distribution from broadcasting organizations to individual right holders. How royalty goes from broadcasting organizations to individual right holders? Is there any intermediary institution involved between them? If it is the case, please provide us with a detailed description of such institution.

The Legal Office of the State Council has listed Regulations on Royalty Criteria for Broadcasting and Television Organizations in its 2003 plan for legislation.

Follow-up to additional question 12:

Please provide the "recommendation" referred in the response 12. Please explain what measures have been taken in response to the recommendation. (How much has the Supreme People's Court decreased the amount of damages to which criminal procedure is applicable?)

The Supreme People's Procurement and the Ministry of Public Security is studying the problem of the appropriate level of threshold of initiation of criminal procedure according to the situation of IPR infringement in China taking into account the recommendation from MOFTEC made according to China's commitment in accession to WTO.

Follow-up to the above question:

More than one year has already passed since China became a Member of the WTO. Even though there is a clear commitment by the Chinese Government, there seems to be little progress on the issue of "criminal procedures threshold". Please let us know what relevant authorities (the Supreme People's Procurement and the Ministry of Public Security) have done in this past year with respect to this issue. Also please provide the specific date by which the Chinese Government can execute its commitment.

China has carried out its commitment in this regard by sending a recommendation from the former Ministry of Foreign Trade and Economic Cooperation to the relevant authorities. The latter, including the Supreme People's Court, the Supreme People's Procuratorate and the Ministry of Public Security are working on this issue, but there's no timetable available for when the work will be finished.

B. TRADEMARKS

Follow-up to question 11:

- (i) **In the Trademark Law Implementing Regulations, Article 5.1, it is written that in determining whether a trademark is well-known, any objection in registering the trademark or appeal for a retrial is taken into account. Please explain the relationship between this Article 5.1 of the Trademark Law Implementing Regulations and Article 16.2 of the TRIPS Agreement.**
- (ii) **Please explain the time schedule of the specific procedural rules on determination of the well-known trademarks.**
- (iii) **According to Answer 9 to the United States, information on the list of well-known trademarks and the website mentioned in the question are not accurate, and the Trademark Office does not have an official website. Does China plan to make an accurate reference list of well-known trademarks including those of foreign companies?**
- (iv) **And Japan would like to confirm whether the requirements stipulated in Article 14 of the Trademark Law are limited only to the situation in China or are applied to the situation in the countries other than China as well.**
- (i) Article 5.1 of the Implementing Regulations provides that if there is any dispute in the procedure of trademark registration and trademark review and adjudication, an interested party may apply for the determination of his mark as a well-known mark. The second paragraph of the same Article provides the Trademark Office and the Trademark Review and Adjudication Board determine, according to provisions of Article 14 of the Trademark Law, whether a mark is well-known or not. Article 14 of the Trademark Law includes the content of Article 16.2 of TRIPS.
- (ii) At present, the State Administration for Industry and Commerce is revising the Rules on the Determination and Protection of Well-known Marks. It is expected the revision will be released soon.
- (iii) At present, China does not plan to make an accurate reference list of well-known trademarks. But one point is sure that if China is going to make such a list in the future, it will include foreigners' or foreign enterprises' well-known marks determined in China.
- (iv) Chinese law only protects marks that are well-known in China. But this does not exclude that the interested part may provide other relevant proofs that prove his mark is well-known in countries other than China, e.g. materials concerning the mark once protected as a well-known mark in countries or regions other than China, for the reference of the relevant competent authorities when determining whether the mark is well-known in China or not.

Follow-up to question 12:

Please indicate the goods prescribed by Article 6 of Trademark Law and please explain the relationship between Article 6 and Article 11.2 of Trademark Law (e.g. whether Article 11, which stipulates the register of trademark having acquired distinctiveness through use, is applied to the goods prescribed by Article 6).

The goods provided under Article 6 of the Trademark Law currently only refer to tobacco products provided under the Law of the People's Republic of China on Tobacco Monopoly. Article 11.2 also applies to the goods provided under Article 6.

D. PATENT

Follow-up to question 15:

In Japan, the government does not designate agents, nor do Japan believes it to be international practice. Please explain whether or not the fact that in China, foreign applicants must carry out procedures through an attorney designated by the Chinese government is in compliance with Article 3 of the TRIPS Agreement on National Treatment.

We'd like to first clarify here that in our first answer, what we said was that it is a international practice that foreigners shall appoint a domestic patent agent to file patent application and not that foreigners shall appoint an agent designated by the government.

It is true that Article 3.1 of TRIPS Agreement has provided for the principle of national treatment, but it is also provided in the same paragraph that this principle is subject to exceptions under Paris Convention, Berne Convention and Rome Convention. According to Article 2.3 of Paris Convention, 'The provisions of the laws of each of the countries of the Union relating to judicial administrative procedure and jurisdiction, and to the designation of an address for service or the appointment of an agent, which may be required by the laws on industrial property are expressly reserved'. Article 3.2 of TRIPS Agreement also provides explicitly that Members may avail themselves of the exceptions permitted under paragraph 1 in relation to judicial and administrative procedures, including the designation of an address for service or the appointment of an agent within the jurisdiction of the Member. From those provisions, we can see that the Article 19.1 of China's Patent Law is in full compliance with the national treatment principle provided by Article 3.1 of TRIPS Agreement. In order to provide good service for foreign clients, a competent agent needs to have technical background as well as legal knowledge, and needs to be excellent in foreign languages. At the beginning of the establishment of China's patent system, very few patent agents can meet the above requirements. To guarantee the quality of service provided by patent agents to foreign clients and to protect the interests thereof, the first Patent Law of China of 1984 provided that foreigners shall appoint designated patents agencies in filing application in China. And this kind of provision was necessary at that time. Along with the development of China's patent practice, the number of designated agencies has increased to 60 from 3 at beginning. The Chinese government will further enlarge the list of designated agencies at appropriate time.

Follow-up to question 16:

Japan's question concerns the actual average length of period for obtaining rights, not time limits. Please provide some statistical or other information, if any, that explains the length of period for the grant of patent right in China is reasonable.

According to a research made by SIPO on the 26876 applications filed by Japanese nationals, the average time needed for examination is 36.8 months and such period will be further shortened due to efforts made by SIPO including recruiting 700 new examiners. Compare the statistics of SIPO with that of other patent offices, for example 24.7 months in the USPTO, 27.7 months in the JIPO and 46.1 months in the EPO in 2001, we can see that the average time needed for examination in China is reasonable.

Follow-up to the above question:

The average time needed for examination of patent applications filed by Japanese nationals is currently 36.8 months and is being shortened. Japan also understands from discussions between the Japan Patent Office and SIPO (State Intellectual Property Office) that the total average time needed for examination of patent applications (filed by all applicants) is 46 months. Please advise if there have been recent changes to these time periods. Please provide the average time needed for examination of patent applications filed by Chinese nationals, if available.

We do not have new statistics on average time needed for examination. The average term of 46 months is also true for Chinese nationals.

The average time needed for examination of patent applications filed by Japanese nationals is currently 36.8 months and is being shortened. Even if the average time period is 36.8 months, does China agree that any time period that far exceeds 36.8 months might not be considered "a reasonable period of time" under Article 62.2 of the TRIPS Agreement?

The term of 36.8 months and 46 months all refer to average time used and this means that sometimes the time needed is shorter and sometimes longer. Therefore, it is possible for a certain case to exceed the average time of 36.8 months or 46 months.

E. UNDISCLOSED INFORMATION

Follow-up to question 22:

Please confirm that the definition of undisclosed information (trade secrets) of Article 39.2 of TRIPS and the definitions of Article 10 of the Anti-unfair Competition Law can be regarded the same. In addition, Japan would appreciate statistical or other information about the violation of undisclosed information protection.

The definition of undisclosed information of Article 39.2 of TRIPS and the definition of Article 10 of China's Anti-unfair Competition Law can be regarded as the same.

F. ENFORCEMENT

Follow-up to question 24:

Please provide information on who bears the cost for confiscation and disposal (including storage) of trademark infringing goods undertaken by enforcement agencies including the Customs.

The cost for confiscation and disposal of trademark infringing goods undertaken by the administrative authorities for industry and commerce shall borne by the State (government).

Follow-up to the above question:

Please confirm that the cost for confiscation and disposal of patent infringing goods concerning patent right for inventions, utility models and designs, undertaken by enforcement agencies including the Customs, is also borne by the State government.

The administrative authorities for patent enforcement do not do confiscation so there is no cost involved on the part thereof. In case of the customs, there is no provision in China's Laws and Regulations providing that government shall bear the cost for confiscation and disposal of infringing goods undertaken by the customs. This modus operandi is consistent with the TRIPS Agreement.

Follow-up to question 25:

Please provide information on the recommendation to judicial authorities regarding the threshold (under paragraph 304 of China's TRIPS Commitment (WT/L/432)) and the progress of this recommendation, in detail.

Please refer to answer to question 5 above.

Follow-up to question 28(ii):

Regarding Article 56 of the Trademark Law and Article 48 of the Copyright Law, please explain why China sets a limit for compensation (500,000 yuan in RMB) and how this amount can be justified under Articles 41.1 and 45 of the TRIPS Agreement.

In order to understand Article 56.2, we should put it together with Article 56.1, which provides: the amount of damages for infringement of the exclusive right to use a registered trademark shall be the profit that the infringer has earned through the infringement during the period of the infringement or the losses that the infringer has suffered through the infringement during the period of the infringement, including any reasonable expenses the infringer has incurred in its effort to stop the infringement. Usually, the exclusive trademark right owner may get sufficient protection under this Article. But sometimes the amount of the profit that the infringer has earned through the infringement or the losses that the infringer has suffered through the infringement can not be determined. As a result, in order to adequately and effectively protect the legal interests of the trademark registrant, the second paragraph of the same Article provides that under this circumstance, the people's court shall decide an amount of damages not more than 500,000 RMB, depending on the circumstances of the infringing acts. This provision is in full compliance with the requirement of Article 41.1 of TRIPS.

Follow-up to question 30(i):

Please explain in detail China's activities against local protection and its developments.

The Chinese governments agencies at all levels understand the role of intellectual property right protection in promoting economy development and has exploded the local protectionism. Regional cooperation on cracking down counterfeiting has been launched. Trademark enforcement cooperation network has been established in the Pan Huaihai Economic Development Zone, the region of Three Provinces and One Municipality in Eastern China, as well as the Three Provinces in North-East China. These networks have been helpful for government enforcement inter-regional cooperation and coordination.

Follow-up to additional question 13:

The National Copyright Administration requires the person who allege his/her right is infringed to produce evidence to establish location of factories producing pirated goods and the amount of damage in order to apply administrative penalty prescribed in Article 47. (Unless such evidence is produced, National Copyright Administration will never apply administrative penalty). Please explain the reason imposing such heavy burden on right holders is consistent with Article 41(2) of the TRIPS Agreement stipulating "procedures concerning the enforcement of intellectual property rights shall not be unnecessarily complicated or costly". (Such burden on right holders seems to be too heavy that they must establish location of the factories and the amount of damage in order that National Copyright Administration order the infringing act to be ceased, confiscate unlawful income, confiscate or destroy the infringing copies, and impose a fine, even though Article 11.4 of the Copyright Law is taken into account.)

As in most other countries in the world, copyright is mainly protected through judicial means in China. Apart from this, copyright can also be protected through administrative way, which is rarely seen in other countries. This shows that China's protection of copyright has exceed the minimum requirement of TRIPS Agreement. "The party who claims shall bear the burden of proof" is a basic principle of judicial procedure, which is also the case in administrative enforcement. So the party who alleges that his copyright is infringed shall provide information about the infringer.

Follow-up to the above question:

In application of administrative procedure, Chinese authority requires right holders to establish not only the infringement but also the precise amount of damage caused by that infringement. Unless right holders establish these two things, the Chinese authority does not initiate the administrative procedure. However, the object of "administrative procedure" is not to recover the damage of right holders. It is clear that mandating the establishment of precise damage to right holders would impose unreasonable burden on the right holders, despite it can be done through the investigation of relevant authority. This situation might not be consistent with Article 41 of TRIPS Agreement. Please explain why the Chinese authority does not initiate the administrative procedure even though there is a clear infringement, until the right holders establish the precise amount of damage. Does the Chinese authority have any intention of helping right holders to establish the amount of damage in order to facilitate the administrative procedure?

There is no legal requirement that right holders must establish the precise amount of damage caused by infringement for application of administrative procedure. The Patent Law (Article 57), the Trademark Law (Article 53) does not require right holders to make a clear claim of their damage. As to the Copyright Law, although there is requirement according to Article 47 that right holders must provide evidence, including the amount of damage, the amount of damage shall be understood as the damage that can be proved and the purpose of the requirement is to make sure that the infringement alleged by the right holder really exists.

Follow-up to additional question 14:

Japan's original question is to make clear "why" Article 217 of the Criminal Law is consistent with Article 61 of the TRIPS Agreement. Supreme people's Court's notification of 17 December 1998 limits the scope of infringement extremely. Due to this notification, even though intentional copyright piracy on a commercial scale occurs, it is almost impossible to apply criminal penalties. Please explain the reason "why" such situations are consistent with Article 61 of the TRIPS Agreement stipulating "Members shall provide for criminal procedures and penalties to be applied at least in cases of copyright piracy on a commercial scale"?

In 1998, the Supreme People's Court issued an Interpretation on Several Questions in Application of Law in Criminal Cases Involving Illegal Publications, which clarified the standard for sentencing and punishment of crime for infringement of copyright provided in Article 217 of China's Criminal Law. According to the Interpretation, it will constitute criminal infringement of copyright if the unlawful earning surpasses 50 thousand RMB in case of individuals or 200 thousand RMB in case of units. The Interpretation also provided that it will also constitute criminal infringement of copyright if the following circumstance exist, practicing actions infringing copyrights listed in Article 217 of China's Criminal Law within two years of being punished administratively or civilly for reason of copyright infringement; or the unlawful turnover surpasses 200 thousand RMB in case of individuals and 1 million RMB in case of units; or other serious results exist. The above provisions interpreting the standards for sentencing and punishment enabled the judicial authorities to apply the provisions of Article 217 of China's Criminal Law in cases involving copyright piracy of commercial scale. Therefore, instead of 'limit the scope of infringement extremely', the Interpretation issued by the Supreme People's Court explicitly clarified the standard for sentencing and punishment. And the China's Criminal Law and its Interpretation issued by the Supreme People's Court are fully in compliance with the requirements of Article 61 of TRIPS Agreement.

As far as criminal procedure is concerned, according to China's Criminal Procedure Law and the Interpretation on Several Questions of Implementation of Criminal Procedure Law issued by the Supreme People's Court, cases for criminal infringement of IPR can be filed before the court by the right holder whose rights were infringed through private prosecution as well as by public prosecution by the people's procuratorate. The people's courts should entertain the lawsuits filed by right holders as far as the relevant legal requirements are satisfied. Therefore, the requirements of Article 61 of TRIPS Agreement are fully complied with in China.

Follow-up to the above question:

According to the Supreme People's Court's notification (17 December 1998) which is mentioned in the answer, criminal penalty is applied to the individual who earned more than RMB 50,000 in infringement activities for commercial purpose and to the organized persons who earned more than RMB 200,000. That is, criminal penalty would not apply to the infringement on copyright whose illegal earnings is not quite high, even though it is in commercial scale. For example, it can be understood that the organized persons who sold off 10,000 copies of pirated CDs (RMB 10/CD) earning RMB 100,000, is not liable for any criminal penalty, if this notification is applied (pirated CDs are sold at around RMB 5-15 per copy in some market place). Such situation indicates that the Criminal Law and its interpretation might hardly work as deterrent against copyright infringement at all. Please explain why the Chinese Government believes that such a situation is consistent with Article 61 of the TRIPS Agreement.

According to Article 13 of the Criminal Law, crime is an act that seriously endangers the society and is in violation of and punishable according to Criminal Law. An illegal act will be

deemed as crime and be imposed punishment according to Criminal Law only when that act endangers society to a certain extent. The Criminal Law provides a standard taking into account of both the nature and the extent of the harm caused by an act in deciding whether the act is a crime or not and this standard is identical with the standard of "commercial scale" used in the TRIPS Agreement. The notification of the Supreme People's Court referred to in this question is for the purpose of clarifying the relevant articles of the Criminal Law so as to provide a clear legal basis for imposing criminal penalty on piracy cases of commercial scale.

Comparing the standard for criminal penalty of piracy cases applied in countries such as Japan, Germany and France with that applied in China, it is true that the former is lower and does not have the requirement of "for purpose of making profit" or "the amount illegal earning is large or existence of other severe circumstances". However, the highest criminal penalty for piracy in China is a seven-year fixed term imprisonment, much heavier than the three-year fixed term imprisonment applied in the above mentioned countries. Moreover, in addition to criminal penalty, China also has civil and administrative penalties against piracy, and some of the non-criminal penalties are similar to the minor crime penalties in other countries. Therefore, China has a complete enforcement system for copyright, which is fully in compliance with the requirement of the TRIPS Agreement.

Follow-up to additional question 15:

Concerning Article 47 of the Copyright Law, what kind of acts are considered to be the subject of the administrative or criminal penalty? Please explain relevant articles of the Criminal Law and their judicial interpretation as well as a couple of instances thereof.

It has been made clear in Article 47 of China's Copyright Law that the eight kinds of actions provided in that Article are subject to civil liabilities and those injure public interests at the same time may also be administratively punished. And when the circumstances provided in Article 217 of China's Criminal Law exist and the standard for sentencing and punishment issued by the Supreme People's Court further clarifying the provisions of Criminal Law are met, the acts will be subject to criminal punishment.

Additional question:

Japan understands that the administrative procedure would be initiated after the right holder's claim to an administrative organization. Please explain why such a claim is necessary, where the "injury of public interest" is the essential reason which justifies administrative punishment. Moreover, in the case of infringement over the Internet, please explain whether or not it is possible to apply effective administrative punishment on such infringement as the act of "injuring public interest".

Such problems do not exist in case of patent infringement, because the administrative authority does not impose administrative penalties. In case of trademark, the administrative procedures are not necessarily initiated by the right holder's application, the administrative authority can act on its own initiative according to Article 54 of the Trademark Law.

G. OTHERS

Follow-up to question 58:

If the Technology Import/Export Control Regulation is related to discrimination between foreign licensors and Chinese licensors on the Enforcement of IPRs, Japan considers that this regulation is not consistent with Article 3.1 of the TRIPS Agreement. Please confirm

whether the restriction on a foreigner's licensor under this Regulation, including the restriction under Article 24 and that of a domestic licensor under the Civil Law is the same.

First of all, we would like to emphasize is that Technology Import/Export Control Regulations are relating to liabilities of the parties of a technology import/export contract, which are not covered by Article 3.1 of TRIPS Agreement. So China does not have any obligations under TRIPS Agreement with that regard. Secondly, Article 24.3 of those Regulations is to the effect that, Where a licensee used a technology licensed by a licensor according to the provisions of a technology import contract between the two parties and where a legitimate interest of a third party was infringed as a result of use of that technology by the licensee, the licensor is to be held responsible. This kind of provision is consistent with that of Article 353 of China's Contract Law, so there's no discrimination against foreign licensor in the Technology Import/Export Administration Regulations. (Questions from 16-18 are based on the responses from China dated 19 September 2002 in document IP/C/W/374/Add.2).

Follow-up to above question:

Article 24 of the Technology Import/Export Control Regulation prescribes responsibility of surety for a third party. However, Article 353 of the Civil Law not only stipulates responsibility of surety for a third party but also explicitly allows parties to agree otherwise in their contracts. Please explain if Article 24 likewise allows parties to agree responsibility of surety for a third party in a manner different from what Article 24 explicitly provides. In other words, please confirm that the licensor shall not be responsible for surety for a third party under Article 24 of the Technology Import/Export Control Regulation if the contract between the parties provides that the licensor shall not be responsible for surety for a third party. If this is correct, please make this interpretation known to the public.

Article 353 of China's Contract Law lays down the principle for allocation of liability between licensee and licensor in general terms and Article 355 of the same Law further provides that "where laws or administrative regulations provide otherwise to contracts of technology introduction or contracts of patent and patent application, the said provisions shall apply accordingly". Therefore, it can be understood that Article 24 of the Technology Import/Export Control Regulation, instead of Article 353 of the Contract Law, shall apply in case of contract for technology import or export.

III. REPLIES TO QUESTIONS POSED BY KOREA

1. Article 10 of the Trademark Law stipulates that foreign geographical names that are well-known to the public shall not be used as trademarks but may be used exclusively as certification marks. Does this indicate that geographical names registered as certification marks have distinctiveness? Also, do certification marks give the kind of protection to geographical indications as stipulated in Article 22.1 of the TRIPS Agreement?

The provisions in Article 10 doesn't necessarily mean that geographical names registered as certification marks have distinctiveness. The purpose of this article is to allow geographical indications to be registered as certification marks. Based on the provisions in Article 16, a geographical name in the sense of geographical indications is usually inseparable to a particular goods in respect of which it is used. In this sense, there is no doubt that the geographical indication has distinctiveness. In addition to the specific provisions in the Trademark Law, in China, the Anti-unfair Competition law and some other laws can also be used for the protection of geographical indications. China's protection for geographical indications through these provisions meets the requirement in Article 22.1 of the TRIPS Agreement.

2. How does the Chinese Trademark Law implement Article 23.2 of the TRIPS Agreement?

Articles 3, 28 and 41 provide the kind of protection stipulated in Article 23.2 of the TRIPS Agreement.

3. Concerning Article 13 of the Trademark Law, how do the terms "liable to create confusion" and "misleading the public" differ from each other? How is this provision implemented in practice?

In Article 13, the term "liable to create confusion" refers to the situation, in which a trademark application is filed for registration in identical or similar goods or services and the mark is a reproduction, an imitation or a translation of another party's well-known mark which is not registered in China. Under this situation, it will cause consumers to misunderstand the supplier or deliverer of the goods or service. Whereas the term "misleading the public" refers to the situation, in which A trademark is applied for registration in non-identical or dissimilar goods and it is a reproduction, an imitation or a translation of a well-known mark which is registered in China. Under this situation, it may not necessarily cause consumers to misunderstand the supplier or deliverer of the goods or service. But it may mislead consumers into thinking that there is a particular relationship between the specific supplier or deliverer of the particular good or service and the owner of the well-known mark. In practice, we implement the provisions on the basis of these standards.

4. With regard to the conditions for the recognition of well-known marks stipulated in Article 14 of the Trademark Law, is it required that trademarks be known both to consumers and in the relevant sectors? Or would it be sufficient for a trademark to be known only in the relevant sectors?

Whether a trademark can be considered as well known shall be decided on a case by case bases, so it can not be said generally if it be sufficient for a trademark to be known only in the relevant sectors.

5. Article 44 of the Trademark Law stipulates that a trademark's registration will be cancelled if the trademark is not used for 3 consecutive years. Does China recognize any circumstance that may arise independently of the will of the trademark owner, that may constitute an obstacle to the use of the trademark? Could such circumstances provide valid reasons for non-use, as stipulated in Article 19 of the TRIPS Agreement? And under what situations would the use of a trademark by another person be considered by China as meeting the requirements of the use of the trademark for the purpose of maintaining the registration?

Yes, we recognize there are circumstances that may arise independently of the will of the trademark owner that may constitute an obstacle to the use of the trademark. Such circumstances provide valid reasons for non-use as stipulated in Article 19 of the TRIPS Agreement. Any use of a trademark by the registrant or a licensee for the purpose of distinguishing his goods or service from others', in the manner prescribed in Article 3 of the Implementing Regulations under the Trademark Law, is considered in China as meeting the requirements of the use of the trademark for the purpose of maintaining the registration.

14. Please explain how the meaning of "practicality" (in Article 10 of the Unfair Competition Prevention Act) compares with that of "commercial value" (as stipulated in Article 39.2 of the TRIPS Agreement).

The term "practicality" in Article 10 of the Unfair Competition Prevention Act refers to the fact that a trade secret must be able to bring practical or potential interest or advantage in competition. The meaning of "practicality" is identical to that of "commercial value" stipulated in Article 39.2 of the TRIPS Agreement.

As to the different versions of answer to *question 2*² to the effect that "How does the Chinese Trademark Law implement Article 23.2 of the TRIPS Agreement?", both are correct. In fact, the two answers were made regarding different methods under China's Trademark Law that can implement the requirement under Article 23.2 of TRIPS Agreement. A more clear and complete answer can be provided as follows:

"Under the new Trademark Law, Article 16 and 41 provide that a trademark application shall be refused or a registered trademark be cancelled where conflict with an eligible geographical indication exists. At the same time, according to Article 3 of China's Trademark Law, a geographical indication can also be registered as a certification trademark, and an application of a trademark that conflicts with a geographical indication that has been registered as a certification trademark shall be refused by the Trademark Office on its own initiative according to Article 28, or upon request according to Article 30 of China's Trademark Law."

17. Please explain in detail the contents of the 'Regulations of the People's Supreme Court regarding the Evidence in Civil Procedure' promulgated on 1 April 2002.

The Regulations of the People's Supreme Court regarding the Evidence is a binding judicial interpretation that will be applied by the people's courts of each level. The main points of the Regulations include:

- (i) A party shall provide evidence regarding the facts upon which the claims raised by that party rely and will bear the negative consequence for failing to do so. If a party can not collect evidence by itself due to objective reasons, it can apply to the court for investigating and collecting such evidence. If the burden of proof can not be decided due to lack of specific provisions in laws or regulations, the people's courts can decide burden of proof according to principle of fair and good faith taking into account of the ability of the parties to provide evidence.
- (ii) The parties need not provide evidence for the following facts, (a) facts known by general public; (b) the order of natural; (c) facts that can be reasoned from legal provisions or facts already known; (d) facts that have been found true by effective decisions of people's courts; (e) facts that have been found true by effective arbitration decisions; (f) facts that have been evidenced by effective notary documents. The facts stated in (a) (c) (d) (e) (f) above can be objected by evidence to the contrary provided by relevant party.
- (iii) If an evidence provided by a party originated outside the territory of People's Republic of China, such evidence shall be notarized by competent institutions of the originating country and certified by embassy or consulate of People's Republic of China to that country, or be

² See documents IP/C/W/374/Add.2 and 3.

certified through procedures agreed in relevant treaties between the People's Republic of China and the originating country.

- (iv) The people's courts shall specify the time limit for providing evidence at the time the notice of acceptance of case or notice of response is served. The time limit for providing evidence can also be decided by agreement between the parties subject to certification of the people's court. The parties shall abide by the time limit and will be deemed as waive the right of providing evidence when failing to do so. The evidence provided after the expiration of the time limit will not be debated before the court unless agreed by the opposite party. The people's court will not accept the evidence provided after the expiration of the time limit unless it is new evidence. The application by the parties to the people's court for investigation and collection of evidence and preservation matters shall be filed 7 days before the expiration of the time limit.
- (v) With application of the parties, the people's court can arrange the parties to exchange evidence before hearing. For the complex and difficult cases, the people's court should arrange the parties to exchange evidence after the expiration of the time limit for response and before the hearing. The time for exchange of evidence can be agreed by the parties subject to certification of the people's court or be designated by the people's court. The time limit for providing evidence is expired on the day of exchanging of evidence.
- (vi) All the evidence shall be showed on before the court and be debated by the parties. The evidence that have not been debated by the parties shall not be accepted as the foundation for facts finding. The evidence that are acknowledged during the course of exchange of evidence and recorded in the files can be the foundation of facts finding after illustration by the judge in hearing. The evidence in which national secrete, business secrete or individual privacy are involved and the evidence that shall be kept confidential according to law or regulations shall not be publicly debated before the court.
- (vii) The parties can apply to the court for one or two experts with specific knowledge to appear before the court to illustrate on specific problems. The judge and parties can inquire the experts and the experts of the two side of parties can debate after agreed by the court.
- (viii) The judges shall examine the evidence objectively and decide the capacity of the evidence, and shall publish the results and reasoning thereof.
- (ix) The acknowledgement made by the parties regarding the facts of the case involved in the compromise made by the parties for the purpose of reaching settlement agreement in the course of litigation, shall not be accepted as evidence negative to the party making such acknowledgement.

18. Is it possible to seek injunction under Article 44 of the TRIPS Agreement against a person responsible for IPR infringement case, even if that person is able to prove that he or she did not have knowledge of the relevant infringement?

Yes, the right holder can get the injunction even if the infringer do not have the knowledge of infringement.

19. Please clarify whether, by way of investigating and collecting evidence, the People's Court has the authority to order the infringer to inform the right holder of the identity of third persons involved in the production and distribution of the infringing goods or services and of their channel of distribution.

According to Article 13 and 15 of the Regulations of the People's Supreme Court regarding the Evidence in Civil Procedure, the people's court can collect evidence by its own initiative. The people's court can also order the relevant party to provide evidence when national, social or a third party's interests are involved, but the evidence so provided are not information needed to be provided to the right holder. The right holder can get the information provided during the course of debating of such evidence before the court.

20. What is the approximate rate of the provisional measure filings that are affirmed by the People's Courts?

There is no statistics for such rate. The application by the parties for ordering provisional measures will be approved if the requirement of the relevant laws and regulations are satisfied.

21. Has Paragraph 2, Article 53 of the TRIPS Agreement been accommodated in the domestic regulations?

Yes. Article 19 of the Regulations of the Customs Protection of Intellectual Property Rights of the People's Republic of China provides that the consignee or consignor of goods may apply, with depositing a security in 2 times the value of the goods, for release of their goods by the Customs, if they regard their goods as legal and have delivered objections to the Customs detention. Since China Customs are empowered to examine the objections mentioned above and reject any ungrounded application for such release, any counterfeit or pirated goods may not benefit from such arrangement.

22. Please describe in detail, the types of IPR infringement cases and possible criminal punishment as stipulated in the relevant law.

Please refer to answers to question 2 of the Enforcement part of Japan's question.

23. According to paragraph 15 of China's "Checklist of Issues on Enforcement", it is stated that the Customs authorities suspend the release of counterfeit trademark or pirated copyright goods and right holders can apply to the Customs for suspension of any export and import of goods infringing trademark and copyright infringement, who is eligible on behalf of the right holders to lodge an application for the suspension of release ?

The right holders, excluding those stationed outside Mainland China, can lodge the application to China Customs for the suspension of release. For those stationed outside Mainland China, they need to entrust representatives stationed in Mainland China to lodge the application on their behalf. The entrust representatives can be natural as well as legal person.

24. According to paragraph 16(5) of China's "Checklist of Issues on Enforcement", regarding the indemnification of the importer and the goods owner, it is stated that 'where the court or other competent administrative authorities find no infringement, Customs shall, at the requirements of the court or the competent authority, submit the security deposited by the right holder to the court to compensate for the losses of the relevant party arising from the improper application.' In such cases, what is the coverage of compensation payment for damages resulting from the deposited security and wrongful detention or detention of goods in accordance with Article 55 of the TRIPS Agreement?

The compensation of payment varies from case to case according to the judgement of the court. It commonly covers the cost of storage of the goods detained by the Customs, the damages of the goods during Customs detention due to their nature, the compensation payment arises from delayed consignment of goods.

IV. REPLIES TO QUESTIONS POSED BY SWITZERLAND

A. PATENTS

Follow-up to question 1:

You mention that according to your law, plant varieties shall be excluded from patent protection. Please explain how your legislation provides for protection of plant varieties. Is it by a *sui generis* protection as referred to in Article 27.3(b) of the TRIPS Agreement? If so, please describe that *sui generis* protection more in detail.

Please explain the scope of the exclusion of "substances obtained by means of nuclear transformation" in your law from patentability and how this exclusion complies with Article 27 of the TRIPS Agreement?

As mentioned in the answer to question posed by Australia, plant varieties are protected by "Regulations on Protection of New Plant Varieties" came into force on October 1, 1997, which is a *sui generis* protection referred to in Article 27.3(b) of TRIPS Agreement. For detailed information, please refer to the Regulations notified to TRIPS Council.

It is provided in China's Patent Examination Guidance that 'substances obtained by means of nuclear transformation primarily refer to various radioisotopes manufactured and produced by accelerator, reactor or other nuclear reaction apparatus. The patent right may not be granted for such isotope. However, the applications of the said isotope and the device or equipment used for producing such isotope are qualified for patent protection.'

According to Article 27.2 of TRIPS Agreement, Members may exclude from patentability inventions, the prevention within their territory of the commercial exploitation of which is necessary to protect *ordre public* or morality, including protecting human, animal or health or to avoid serious prejudice to the environment. It is our understanding that the provision of China's Patent Law excluding substances obtained by means of nuclear transformation from patent protection is to protect *ordre public* or morality and to protect human, animal or plant life or health or to avoid serious prejudice to the environment. Therefore, it conforms to Article 27.2 of TRIPS Agreement.

Follow-up to question 3:

When describing China's compliance with Article 31(l) of the TRIPS Agreement, no reference is made to the non-assignability of the compulsory licence granted to the owner of the second patent (as provided for in Article 31(l)(iii) of the TRIPS Agreement). Please explain whether your law is in compliance with that obligation and cite the relevant provision of Chinese law.

Article 53 of Chinese Patent Law states that 'Any entity or individual that is granted a compulsory license for exploitation shall not have an exclusive right to exploit and shall not have the right to authorize exploitation by any others'. It is indicated in this provision that any entity or individual that is granted a compulsory license, including the entity or individual that is granted a

compulsory license for exploitation of the second patent, shall not assign the said compulsory license. Therefore, this provision is in full compliance with Article 31(d) and (e), as well as 31 (l) (iii) of TRIPS Agreement. We think the misunderstanding maybe caused by the fact that we only referred to Article 31(d) and (e) and did not refer to Article 31 (l) (iii) of TRIPS Agreement in the first answer to your question.

C. ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS

Follow-up to question 7:

According to Article 46 of the TRIPS Agreement the judicial authorities of Members "shall have the authority to order that goods that they have found to be infringing be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to avoid any harm caused to the right holder, or, unless this would be contrary to existing constitutional requirements, destroyed. The judicial authorities shall also have the authority to order that materials and implements the predominant use of which has been in the creation of the infringing goods be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to minimise the risks of further infringements". Please describe the implementation of these remedies into Chinese law and cite the relevant provisions of law.

The legal remedies stipulated in Article 46 of the TRIPS Agreement can be implemented by a series of statues enacted by the Chinese Government, which include The General Principle of Civil Law of The People's Republic of China, intellectual property legislations and other relevant provisions contained in the administrative regulations. These legislations meet the requirements of Article 46 of TRIPS in every respect. Concerning provisions are quoted as follows:

- (i) Article 134 paragraph 3 of The General Principles of Civil Law of The People's Republic of China (adopted at the Forth Session of the Sixth National People's Congress on 12 April 1986) states:

When hearing civil cases, a People's Court, in addition to applying the above stipulations, may serve admonitions, order the offender to sign a pledge of repentance and confiscate the property used in carrying out illegal activities and the illegal income obtained therefrom. It may also impose fines and detentions as stipulated by law.

- (ii) Article 47 of The Copyright Law of The People's Republic of China (adopted at the Fifteenth Session of the Standing Committee of the Seventh National People's Congress on 7 September 1990, and revised at the Twenty-fourth Session of the Standing Committee of the Ninth National People's Congress on 27 October 2001) states:

Anyone who commits any of the following acts of infringement shall bear civil liability for such remedies as ceasing the infringing act, eliminating the effects of the act, making an apology or paying damages, depending on the circumstances and may, in addition, be subjected by a copyright administration department to such administrative penalties as ceasing the infringing act, confiscating unlawful income from the act, confiscating and destroying infringing reproductions and imposing a fine; where the circumstances are serious, the copyright administration department may also confiscate the materials, tools, and equipment mainly used for

making the infringing reproductions; and if the act constitutes a crime, the infringer shall be prosecuted for his criminal liability:

- (1) Reproducing, distributing, performing, showing, broadcasting, compiling or communicating to the public on an information network a work created by another person, without the permission of the copyright owner, unless otherwise provided in this Law;
- (2) Publishing a book where the exclusive rights of publication belongs to another person;
- (3) Reproducing and distributing a sound recording or video recording of a performance, or communicating to the public his performance on an information network without the permission of the performer, unless otherwise provided in the Law;
- (4) Reproducing and distributing or communicating to the public on an information network a sound recording or video recording produced by another person, without the permission of the producer, unless otherwise provided in the Law;
- (5) Broadcasting and reproducing a radio or television program produced by a radio station or television station without the permission of the radio station or television station, unless otherwise provided in this Law;
- (6) Intentionally circumventing or destroying the technological measures taken by a right holder for protecting the copyright or copyright-related rights in his work, sound recording or video recording, without the permission of the copyright owner, or the owner of the copyright-related rights, unless otherwise provided in law or in administrative regulations;
- (7) Intentionally deleting or altering the electronic right management information of a work, sound recording or video recording, without the permission of the copyright owner or the owner of a copyright-related right, unless otherwise provided in law or in administrative regulations;

or

- (8) Producing or selling a work where the signature of another is counterfeited.

- (iii) Article 24 paragraph 1 of The Regulations on the Protection of Computer Software of the People's Republic of China states:

Except for the situations described in The Copyright Law of The People's Republic of China, the Regulations and other law or administrative regulations, without the permission of the software copyright holder, anyone who commits any of the following acts of infringement shall bear civil liability for such remedies as ceasing the infringing act, eliminating the effects of the act, making an apology or paying damages, depending on the circumstances and may, in addition, be subjected by a copyright administration department to such administrative penalties as ceasing the infringing act, confiscating unlawful income from the act, confiscating and destroying infringing reproductions and imposing a fine; where the circumstances are serious, the copyright administration department may

also confiscate the materials, tools, and equipment mainly used for making the infringing reproductions; and if the act constitutes a crime, the infringer shall be prosecuted for his criminal liability:

- (1) Reproducing software, in whole or in part;
 - (2) Distributing, renting or communicating to the public on an information network the software of the copyright holder;
 - (3) Intentionally circumventing or destroying the technological measures taken by the copyright holder for protecting the copyright in his software;
 - (4) Intentionally deleting or altering the electronic right management information of software;
 - (5) Transferring or permitting others to use the software copyright of the right holder.
- (iv) Article 55 of The Trademark Law of The People's Republic of China (adopted at the Twenty-Forth Session of the Standing Committee of the Fifth National People's Congress on 23 August 1982; first amended according to the Decision on the Revision of the Trademark Law of the People's Republic of China adopted at the Thirtieth Session of the Standing Committee of the Seventh National People's Congress on 22 February 1993; last amended according to the Decision on the Revision of the Trademark Law of the People's Republic of China adopted at the Twenty-Forth Session of the Standing Committee of the Ninth National People's Congress on 27 October 2001) states:
- According to the acquired evidence or report of a suspicious infringement, in the course of investigating or taking actions on the activities which suspiciously infringe the exclusive right to use a registered trademark of another person, the administrative authority for industry and commerce at county level or above may exert the following authorities:
- (4) Inspecting any material related to the infringing activities; sealing up or seizing any material which is evidenced to infringe the exclusive right to use a registered trademark of another person.
- (v) Article 31 of The Regulations on the Protection of layout-Designs of Integrated Circuits of the People's Republic of China (adopted at the 36th Executive Meeting of the State Council on 28 March 2001) states:

Where a dispute arises as a result of the exploitation of a layout-design without the authorization of the holder of the right of layout-design, that is, the infringement of the exclusive right of layout-design, it shall be settled through consultation by the parties concerned. Where the parties are not willing to consult with each other or where the consultation fails, the holder of the right of layout-design or any interested party may bring a law suit before the people's court, or request the intellectual property administration department of the State Council to handle the matter. When the intellectual property administration department of the State

Council handling the matter considers that the infringement is established, it may order the infringer to stop the infringing act immediately, and confiscate or destroy the infringing products or articles.

- (vi) Article 40 of The Regulations on the Protection of the New Varieties of Plants of the People's Republic of China (promulgated by the State Council on 20 March 1997) states:

Where any new plant variety is counterfeited, the administrative departments of agriculture and forestry of the People's Governments at county level or above shall order the party concerned to stop the counterfeiting act, confiscate the unlawful earnings and the propagating material of the plant variety, and punish him with a fine at least one but not exceeding five times more than the unlawful earnings; where the circumstances of the case are so serious as to constitute a crime, the party concerned shall be subjected to criminal liability investigation in accordance with the law.

In order to ensure that the People's Court could implement the aforementioned provisions correctly when hearing intellectual property civil cases, the Supreme People's Court of China has made special provisions in its relevant judicial explanation of the law. For example, Article 21 paragraph 1 of the Supreme People's Court's Explanations on Certain Questions Concerning Implementation of the Law When Hearing Trademark Civil Cases (adopted by the Judicial Committee of the Supreme People's Court on 12 October 2001) states:

In the course of hearing disputed cases on registered trademark infringement the People Court, according to Article 134 of The General Principles of Civil Law, Article 53 of The Trademark Law and the facts of the cases, may rule that the infringer shall bear civil liability for such remedies as ceasing the infringing act, removing the encumbrance, eliminating the hazards, paying damages and eliminating the effects of the act. It may also issue civil sanction decisions to impose a fine, confiscate the infringing materials, the counterfeit trademark signs and materials, implements and equipments mainly used for making the infringing goods. The amount of a fine can be decided in the light of the relevant provisions in The Regulations on the Implementation of the Trademark Law of the People's Republic of China.

Article 29 paragraph 1 of the Supreme People's Court's Explanations on Certain Questions Concerning Implementation of the Law When Hearing Copyright Civil Cases (adopted by the Judicial Committee of the Supreme People's Court on 12 October 2001) states:

In relation to the infringing acts stipulated in Article 47 of The Copyright Law, on the request of the parties concerned, apart from civil liability, the People's Court may also impose civil sanctions on the infringer according to Article 134 paragraph 1 of The General Principle of Civil Law. The amount of a fine may be decided in the light of relevant provisions in The Regulations on the Implementation of the Copyright Law of The People Republic of China.

In sum, in the course of hearing intellectual property cases, the People Courts in China are empowered to order the infringing goods, the materials, implements and equipments mainly used for the creation of the infringing goods be disposed of outside the channels of commerce. Consequently, the legal remedies stipulated in Article 46 of the TRIPS Agreement can be implemented by the Chinese national legislation.
