

August 13, 2007

H.E. Mr. Bruce Gosper
Chairperson
Dispute Settlement Body
World Trade Organization
Centre William Rappard
Rue de Lausanne 154
1211 Geneva 21

Dear Mr. Chairman:

On April 10, 2007, the United States requested consultations with the Government of the People's Republic of China pursuant to Articles 1 and 4 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* ("DSU") and Article 64 of the *Agreement on Trade-Related Aspects of Intellectual Property Rights* ("TRIPS Agreement") (to the extent that Article 64 corresponds to Article XXII of the *General Agreement on Tariffs and Trade 1994*) with respect to certain measures pertaining to the protection and enforcement of intellectual property rights in China.¹ The United States held consultations with China on June 7-8, 2007. Those consultations provided some helpful clarifications but unfortunately did not resolve the dispute.

I. Thresholds for Criminal Procedures and Penalties

The United States considers that China has not provided for criminal procedures and penalties to be applied in cases of willful trademark counterfeiting or copyright piracy on a commercial scale that fail to meet certain thresholds. China has established these thresholds through the following measures:

- 1) the Criminal Law of the People's Republic of China (adopted at the Second Session of the Fifth National People's Congress on July 1, 1979 and revised at the Fifth Session of the Eighth National People's Congress on March 14, 1997) ("Criminal Law"), in particular Articles 213, 214, 215, 217, 218, and 220;

¹ WT/DS362/1.

- 2) the Interpretation by the Supreme People’s Court and the Supreme People’s Procuratorate on Several Issues of Concrete Application of Law in Handling Criminal Cases of Infringing Intellectual Property (adopted at the 1331st Session of the Judicial Committee of the Supreme People’s Court on November 2, 2004 and the 28th Session of the Tenth Procuratorial Committee of the Supreme People’s Procuratorate on November 11, 2004 and to be effective as of December 22, 2004) (“the December 2004 Judicial Interpretation”); and
- 3) the Interpretation by the Supreme People’s Court and the Supreme People’s Procuratorate on Several Issues of Concrete Application of Law in Handling Criminal Cases of Infringing Intellectual Property (II) (adopted on April 4, 2007, at the 1422nd Session of the Judicial Committee of the Supreme People’s Court and the 75th Session of the Tenth Procuratorial Committee of the Supreme People’s Procuratorate, and to be effective on April 5, 2007) (“the April 2007 Judicial Interpretation”);

as well as any amendments, related measures,² or implementing measures.

Articles 213, 214, and 215 of the Criminal Law describe certain acts of trademark counterfeiting that may be subject to criminal procedures and penalties. However, under Article 213, criminal procedures and penalties are available only “if the circumstances are serious” or “if the circumstances are especially serious.” Under Article 214, criminal procedures and penalties are available only “if the amount of sales [of commodities bearing counterfeit registered trademarks] is relatively large” or “if the amount of sales is huge.” Under Article 215, criminal procedures and penalties are available only “if the circumstances are serious” or “if the circumstances are especially serious.”

Articles 217 and 218 of the Criminal Law describe certain acts of copyright piracy that may be subject to criminal procedures and penalties. However, under Article 217, criminal procedures and penalties are available only “if the amount of illegal gains is relatively large, or if there are other serious circumstances” or “if the amount of illegal gains is huge or if there are other especially serious circumstances.” Under Article 218, criminal procedures and penalties are available only “if the amount of illegal gains is huge.”

Article 220 of the Criminal Law provides for the availability of procedures and penalties when the crimes described in Articles 213 through 219 are committed by a “unit,” as opposed to by natural persons.

² Such other related measures include the Explanation on Certain Questions Related to the Concrete Application of Law in Hearing Cases of Crimes of Illegal Publication, Fa Se (1998) No. 30 (adopted by the Adjudication Committee of the Supreme People’s Court at its 1032nd meeting on December 11, 1998, effective as of December 23, 1998) and the Prosecution Guidelines for Criminal Cases Jointly Issued by the Supreme People’s Procuratorate and the Ministry of Public Safety (April 18, 2001).

The Criminal Law does not contain definitions for the thresholds “serious,” “especially serious,” “relatively large,” and “huge” as used in the above-referenced articles. However, the December 2004 Judicial Interpretation and the April 2007 Judicial Interpretation do contain such definitions, which use thresholds that are stated as minimum “illegal business volumes” (stated in terms of minimum values of products produced, stored, transported or sold), minimum “illegal gains”, or minimum numbers of “illegal copies.”

Acts of trademark counterfeiting and copyright piracy that fail to meet the statutory and judicial interpretation thresholds described above thus are not subject to Articles 213, 214, 215, 217, 218, and 220 of the Criminal Law.

Consequently, it appears that, as a result of the thresholds described above, there are cases of willful trademark counterfeiting and copyright piracy on a commercial scale in which China has not provided for criminal procedures and penalties to be applied. It also appears that, as a result of the thresholds described above, there are cases of willful trademark counterfeiting and copyright piracy on a commercial scale for which the remedies of imprisonment and/or monetary fine sufficient to provide a deterrent are not available in China. Furthermore, it appears that, as a result of the thresholds described above, China fails to ensure that enforcement procedures as specified in Part III of the TRIPS Agreement are available under its law so as to permit effective action against any act of willful trademark counterfeiting or copyright piracy on a commercial scale.

China’s measures thus appear to be inconsistent with China’s obligations under Articles 61 and 41.1 of the TRIPS Agreement.

II. Disposal of Goods Confiscated by Customs Authorities That Infringe Intellectual Property Rights

The United States considers that China’s measures for disposing of confiscated goods that infringe intellectual property rights appear to be inconsistent with China’s obligations under the TRIPS Agreement. In this regard, the measures at issue are:

- 1) the Regulations of the People’s Republic of China for Customs Protection of Intellectual Property Rights (adopted at the 30th Ordinary Meeting of the State Council on November 26, 2003, published by the State Council on December 2, 2003, and effective from March 1, 2004) (“Customs IPR Regulations”), in particular Chapter 4 thereof;
- 2) the Implementing Measures of Customs of the People’s Republic of China for the Regulations of the People’s Republic of China on Customs Protection of Intellectual Property Rights (adopted at an Administration Affairs Meeting of the General Administration of Customs on April 22, 2004, issued by the General Administration of Customs with Order No. 114 on May 25, 2004, and effective from July 1, 2004) (“Customs IPR Implementing Measures”), in particular Chapter 5 thereof; and

3) General Administration of Customs Announcement No. 16 (April 2, 2007);

as well as any amendments, related measures,³ or implementing measures.

Article 27 of the Customs IPR Regulations and Article 30 of the Customs IPR Implementing Measures set forth a hierarchy of requirements for the disposal of goods that infringe intellectual property rights and that are confiscated by Chinese customs authorities. Under that hierarchy, the Chinese customs authorities are required to give priority to disposal options that allow such goods to enter the channels of commerce (for instance, through auctioning the goods after removing their infringing features). Only if the infringing features cannot be removed must the goods be destroyed.

The release of infringing goods into the channels of commerce under the circumstances set forth in the measures at issue appears not to constitute destruction or disposal of infringing goods in accordance with the principles set out in Article 46 of the TRIPS Agreement. Consequently, the requirement in the measures at issue that Chinese customs authorities release infringing goods into the channels of commerce under the circumstances set forth in those measures appears to mean that Chinese customs authorities lack the authority to order destruction or disposal of infringing goods in accordance with the principles set out in Article 46 of the TRIPS Agreement. The measures at issue therefore appear to be inconsistent with China's obligations under Article 59 of the TRIPS Agreement.

III. Denial of Copyright and Related Rights Protection and Enforcement to Works That Have Not Been Authorized for Publication or Distribution Within China

The United States considers that China appears to be acting inconsistently with its obligations under the TRIPS Agreement by denying the protection of its Copyright Law to creative works of authorship (and, to the extent Article 4 of the Copyright Law applies to them, sound recordings and performances) that have not been authorized for, or are otherwise prohibited from, publication or distribution within China. In this regard, the measures at issue are:

1) the Copyright Law,⁴ in particular Article 4;

³ Such other related measures include the Law of the People's Republic of China on Administrative Penalty (adopted at the Fourth Session of the Eighth National People's Congress on March 17, 1996, promulgated by Order No. 63 of the President of the People's Republic of China on March 17, 1996, and effective as of October 1, 1996) and in particular Article 53 thereof.

⁴ Adopted at the 15th Session of the Standing Committee of the Seventh National People's Congress on September 7, 1990, and amended according to the Decision on the Revision of the Copyright Law of the People's Republic of China, adopted at the 24th Session of the Standing Committee of the Ninth National People's Congress on October 27, 2001. *See Main Dedicated Intellectual Property Laws and Regulations Notified under Article 63.2 of the Agreement: China*, IP/N/1/CHN/C/1, circulated 8 July 2002.

- 2) the Criminal Law; the Regulations on the Administration of Publishing Industry; the Regulations on the Administration of Broadcasting; the Regulations on the Administration of Audiovisual Products; the Regulations on the Administration of Films; and the Regulations on the Administration of Telecommunication;⁵
- 3) the Regulations on Administration of the Films Industry⁶;
- 4) the Administrative Regulations on Audiovisual Products⁷;
- 5) the Administrative Regulation on Publishing⁸;
- 6) the Administrative Regulations on Electronic Publications⁹;
- 7) the Measures for the Administration of Import of Audio and Video Products¹⁰;
- 8) the Procedures for Examination and Approval for Publishing Finished Electronic Publication Items Licensed by a Foreign Copyright Owner¹¹;
- 9) the Procedures for Examination and Approval of Importation of Finished Electronic Publication Items by Electronic Publication Importation Entities¹²;
- 10) the Procedures for Recording of Imported Publications¹³;

⁵ As noted by China in reply to a question in *Review of Legislation: China*, IP/Q/CHN/1, circulated 10 December 2002, section V.A.3.

⁶ State Council Order No. 342, adopted at the 50th executive meeting of the State Council on December 12, 2001, promulgated on December 25, 2001.

⁷ State Council Order No. 341, adopted at the 50th executive meeting of the State Council on December 12, 2001, promulgated on December 25, 2001.

⁸ State Council Order No. 343, adopted at the 50th executive meeting of the State Council on December 12, 2001, promulgated on December 25, 2001.

⁹ Order No. 11 of the General Administration of Press and Publication (December 30, 1997).

¹⁰ Decree No. 23 of the Ministry of Culture and the General Administration of Customs (April 17, 2002).

¹¹ General Administration of Press and Publication (December 27, 2005) (Basis of Establishment: Decision on Establishing Administrative Licensing for Items Necessary to be Maintained for Administrative Examination and Approval by the State Council [State Council Order No. 412]).

¹² General Administration of Press and Publication (December 27, 2005) (Basis of Establishment: Decision on Establishing Administrative Licensing for Items Necessary to be Maintained for Administrative Examination and Approval by the State Council [State Council Order No. 412]).

¹³ General Administration of Press and Publication (December 27, 2005) (Basis of Establishment: Article 45 of the Administration Regulations on Publication [State Council Order No. 343]).

- 11) the Interim Regulations on Internet Culture Administration¹⁴; and
- 12) the Several Opinions on the Development and Regulation of Network Music¹⁵;

as well as any amendments, related measures, or implementing measures.

Article 5(1) of the *Berne Convention for the Protection of Literary and Artistic Works (1971)* (the “Berne Convention”) provides that foreign authors of protected works shall enjoy all the rights granted to domestic authors, as well as all the rights specially granted by the Berne Convention.¹⁶ Moreover, these rights may not be made subject to any formality (Berne Convention Article 5(2)). Article 9.1 of the TRIPS Agreement requires all WTO Members, *inter alia*, to comply with Articles 1 through 21 of the Berne Convention.¹⁷

China’s Copyright Law provides the legal basis for copyright protection within China of the works of Chinese and foreign authors, and it provides an array of rights to such authors (*e.g.*, rights of reproduction, translation, and adaptation). In addition, the Copyright Law provides specific statutory protections to performers, producers of sound recordings, and broadcasting organizations. However, the first sentence of Article 4 of the Copyright Law provides as follows: “Works the publication or distribution of which is prohibited by law shall not be protected by this Law.” Therefore, authors of works whose publication or distribution in China is prohibited (such as those works whose publication or distribution has not been authorized in China¹⁸) appear not to enjoy the protection specially granted by the Berne Convention in respect of those works (and, it appears, may never enjoy such protection if the work is not authorized, or is not authorized for distribution or publication in the form as submitted for review). By causing this denial of copyright protection, Article 4 of the Copyright Law appears to be inconsistent with China’s obligations under Article 9.1 of the TRIPS Agreement. In addition, the copyright rights of authors of works whose publication or distribution is required to undergo pre-publication or pre-distribution review appear to be subject to the formality of successful conclusion of such review. By subjecting copyright protection to this formality, Article 4 of the Copyright Law appears to be inconsistent with China’s obligations under Article 9.1 of the TRIPS Agreement.

¹⁴ Promulgated in Order No. 27 of the Ministry of Culture (May 10, 2003), amended by Order No. 32 of the Ministry of Culture (July 1, 2004).

¹⁵ Ministry of Culture (November 20, 2006).

¹⁶ The rights specially granted by the Berne Convention include, *inter alia*, the right of reproduction (Berne Convention Article 9(1)), the right of adaptation (Berne Convention Article 12), and the right of translation (Berne Convention Article 8).

¹⁷ However, WTO Members do not have rights or obligations under the TRIPS Agreement in respect of the rights conferred under Article 6*bis* of the Berne Convention or of the rights derived therefrom.

¹⁸ *See, e.g.*, the Regulations on Administration of the Films Industry, articles 24 and 42, and the Administrative Regulations on Electronic Publications, articles 58-59 and 72.

In addition, Article 14 of the TRIPS Agreement requires China to give performers, *inter alia*, the possibility of preventing certain acts, and to give producers of phonograms (sound recordings) the right to authorize or prohibit the direct or indirect reproduction of their sound recordings (collectively, the “related rights”). To the extent that Article 4 of the Copyright Law also denies protection of related rights with respect to performances (or their fixations) or sound recordings, the publication or distribution of which has not been authorized or is otherwise prohibited in China, Article 4 of the Copyright Law appears to be inconsistent with China’s obligations under Article 14 of the TRIPS Agreement.

Furthermore, it appears that the measures at issue establish different pre-distribution and pre-authorization review processes for Chinese nationals’ works, performances (or their fixations) and sound recordings than for foreign nationals’ works, performances (or their fixations) and sound recordings.¹⁹ These different processes, taken together with Article 4 of the Copyright Law, appear to result in earlier and otherwise more favorable protection and enforcement of copyright rights for Chinese authors’ works than for foreign authors’ works. Further, to the extent Article 4 applies with respect to related rights, these different processes, taken together with Article 4 of the Copyright Law, appear to result in earlier and otherwise more favorable protection and enforcement of related rights for Chinese performers’ performances (or their fixations) and Chinese producers’ sound recordings than for foreign performers’ performances (or their fixations) and foreign producers’ sound recordings. The measures at issue therefore appear to be inconsistent with China’s obligations under Article 3.1 of the TRIPS Agreement, which provides that, subject to certain exceptions and qualifications, each Member shall accord to the nationals of other Members treatment no less favorable than that it accords to its own nationals with regard to the protection of intellectual property. Additionally, because Article 4 of the Copyright Law, in conjunction with the nationality-dependent pre-authorization and pre-distribution review processes established by the other measures at issue, causes foreign authors of works whose publication or distribution has not been authorized or is otherwise prohibited not to enjoy the rights granted to Chinese authors, the measures at issue appear to be inconsistent with China’s obligations under Article 9.1 of the TRIPS Agreement (with respect at least to China’s obligations under that article of the TRIPS Agreement to comply with Articles 5(1) and 5(2) of the Berne Convention).

In addition, Article 4 of China’s Copyright Law, both independently and in conjunction with the other measures at issue, appears to make it impossible to enforce copyrights (and, to the extent covered by Article 4, related rights) with respect to works, performances or sound recordings whose publication or distribution in China has not been authorized or is otherwise prohibited. It therefore appears that, as a result of the measures at issue, China fails to ensure that enforcement procedures as specified in Part III of the TRIPS Agreement are available under its law so as to permit effective action against infringements (including expeditious remedies to prevent infringement) of those copyrights and related rights in such circumstances, and that

¹⁹ See, e.g., the Administrative Regulations on Audiovisual Products, articles 16, 28 and 36, and the Administrative Regulations on Electronic Publications, articles 28, 33, and 58-59.

China does not provide for criminal procedures and penalties to be applied in certain cases of copyright piracy. The measures at issue thus appear to be inconsistent with China's obligations under Articles 41.1 and 61 of the TRIPS Agreement.

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Accordingly, the United States respectfully requests, pursuant to Article 6 of the DSU, that the Dispute Settlement Body establish a panel to examine these matters, with the standard terms of reference as set out in Article 7.1 of the DSU.

Sincerely,

Rachel Shub
Chargé d'affaires, a.i.

cc: H.E. Mr. Sun Zhenyu, Permanent Mission of the People's Republic of China