

III. TRADE POLICIES AND PRACTICES BY MEASURE

(4) MEASURES AFFECTING PRODUCTION AND TRADE

(iv) Intellectual property rights

1. China has become increasingly aware of the importance of IPR protection in facilitating innovation in the economy, and has been strengthening the administration of all main categories of IPR. For much of the past decade, China had double-digit annual growth in its use of the PCT system. Other areas of IP, such as trademarks, had similar growth levels, and the proportion of domestic use of the IP system is among the highest in the world. Such an increase in innovation can be expected over time to increase public awareness of the need to protect IPRs and to make effective use of the IP system as a tool for economic growth. In addition, better protected IPR could encourage technology transfers from those FIEs with more advanced technology. China has identified building an innovative country as a national development strategy. When, in June 2008, the State Council issued the Outline of the National Intellectual Property Strategy, it sought to enhance China's capability of creating, utilizing, managing and protecting intellectual property. The Outline identifies the strategic goal of China becoming, by 2020, "a country with a comparatively high level in terms of the creation, utilization, protection and administration of IPRs". In particular, over the next five years, China aims to promote the level of domestic applications of IPRs, increase the utilization of IPR-rich products, improve IPR protection, and promote the awareness of IPRs in the society. The authorities consider the issuance of the Outline as a landmark in China's history of IPR development and protection.¹

2. China has been progressively improving and updating its legislative framework on IPR protection. It formulated and promulgated major components of IPR related legislation, such as the Trademark Law, the Patent Law, and the Copyright Law, in the 1970s and 1980s. Since then, China has been revising its legislation in accordance with its emerging needs. For example, the Regulations on the Protection of the Right of Communication through Information Network (formulated in 2006) clarified the scope of copyright protection in the digital environment under the Copyright Law. Also, the third revision of the Patent Law was completed in December 2008, responding to emerging policy needs. China is also preparing to revise the Trademark Law, the Copyright Law, and the Anti-Unfair Competition Law.

3. China has also been intensifying the enforcement of IPR protection, for which it has a double-track system: administrative actions (consisting of mediation by the authorities), and judicial measures (including civil actions and criminal prosecutions through the courts) (Box III.2 and Table III.7). Regarding criminal penalties, the Supreme People's Court and the Supreme People's Procuratorate promulgated two judicial interpretations on the application of criminal law in IP Cases in 2004 and 2007, respectively. Since then, the number of intellectual property-related criminal cases has increased considerably. In addition, Chinese governments at different levels conduct special operations such as campaigns, targeting on specific areas of IPR protection, to increase the public awareness of IPR protection.

4. Supervision and coordination of IPR protection have been enhanced since 2006, through, *inter alia*, the annual IPR Protection Action Plans. China also set up reporting and complaint centres in 50 large and medium-sized cities, opened a hotline, "12312", and online reporting and complaint

¹ To facilitate the implementation of the Outline, in October 2008 the State Council approved the establishment of an inter-ministerial meeting mechanism involving 28 ministries (including MOFCOM), which coordinates the implementation of national IPR strategy.

windows. In addition, China participates in IPR-related activities in APEC, WIPO, and the WTO, and is a member of various multilateral IPR conventions (Table AIII.7).² China has set up IPR working groups and information-exchange mechanisms with various countries and regions to enhance IPR protection.

(a) Patents

5. The State Intellectual Property Office (SIPO) under the State Council is in charge of patent administration nationwide. The State Patent Office under SIPO is in charge of receiving patent applications and granting patents, while local IPR administrative offices are responsible for patent disputes.

6. Patent rights (for inventions, utility models, and industrial designs) are protected by the Patent Law, its Implementing Regulations, and rules promulgated by SIPO. Patent rights for inventions are granted for 20 years from the date of filing, and 10 years from filing for utility models and industrial designs.

² From October 2008, the WIPO Copyright Treaty, and the Performance and Phonographs Treaty, apply also to the Hong Kong SAR.

Box III.2: IPR enforcement

Protecting IPRs through administrative actions is an important feature of enforcement in China. Various authorities are involved: the SIPO for patents and layout designs of integrated circuits; the State Trademark Office for trade marks; the National Copyright Administration for copyright; the State Drug Administration for protected medicines; MOFCOM for agriculture-related chemicals; and the Ministry of Agriculture for new plant varieties. Some IPRs are enforced by several agencies: GIs are regulated by the State Trademark Office, AQSIQ, and the Ministry of Agriculture.

These agencies can begin administrative actions on the request of the IP right holder, a third party, or on their own initiative. Depending on the investigation results, the administrative authority conducts mediation among the parties. The administrative authority can impose fines on the infringing party, and/or confiscate/destroy the infringing goods or copies, and materials, tools, or devices used mainly for the infringement.

If mediation does not produce satisfactory results, the administrative authority may refer the case to the people's court. Criminal remedies include monetary fines based on either the value or volume of the counterfeited goods or both. Criminal prosecutions may be taken in certain cases in accordance with the Criminal Law. The public security body is in charge of carrying out criminal investigations concerning IPR infringement.

The number of cases settled through administrative actions remains high, although the number of cases dealt with by courts has increased faster; 24,406 first instance civil IPR cases were accepted by courts in 2008, and 23,518 were concluded, up by 36.5% and 35.2%, respectively (Table III.7).

Enforcing intellectual property rights at the border is the responsibility of Customs, which seizes imports and exports of goods infringing patents, trade marks, and copyright and related rights (*ex officio*). The process for Customs to protect IPRs at the border depends on whether the IPR has been filed or recorded at Customs. The number of cases handled by Customs has grown rapidly, from 2,475 cases in 2006 to 11,135 cases in 2008 (Table III.7).

Furthermore, although the TRIPS Agreement does not oblige Members to apply border measures in cases of the exportation of counterfeit trademark or pirated copyright goods, China has paid special attention to the intellectual property protection of exports. In this regard, China has cooperated with the United States, the EU, as well as with other Members, to strengthen enforcement regulations on counterfeit and pirated exports, improve cooperation with foreign customs, and educate domestic manufacturers and exporters of intellectual property protection.

At its meeting on 20 March 2009, the Dispute Settlement Body adopted a Panel report on *China - Measures Affecting the Protection and Enforcement of Intellectual Property Rights* (WT/DS362). On 15 April 2009, China informed the DSB of its intention to implement the recommendations and rulings of the DSB in connection with this matter. The dispute concerned measures relating to enforcement of IPRs, including: the Regulations of Customs Protection of Intellectual Property Rights, and the Implementing Measures of Customs for the Regulations of the People's Republic of China on Customs Protection of Intellectual Property Rights.

Following a Decision of the Standing Committee of the Eleventh National People's Congress on Amending the Copyright Law, adopted on 26 February 2010, China recently reported to the DSB that it has implemented the recommendations and rulings of the DSB with respect to the Copyright Law. On 17 March 2010, the State Council adopted the decision to revise the Regulations for Customs Protection of Intellectual Property Rights.

Source: WTO Secretariat.

Table III.7
Intellectual property enforcement, 2006-08

	2006	2007	2008
Intellectual property cases dealt with by administrative actions			
Patents			
Number of disputes	1,270	1,013	1,126
Number concluded	973	749	868
Copyright			
Number of disputes/administrative penalties	10,559	9,816	9,032
Number concluded	10,344	.. ^a	.. ^a
Imposition of fines (Y million)	7.6	19.1	14.2
Cases transferred to judicial agencies	235	268	238
Business inspected	..	548,646	782,670
Illegal operation units banned	..	13,170	36,601
Underground den detected	..	1,224	694
Trade marks			
Number of disputes	50,534	50,318	56,634
Trade mark infringements	41,214	42,314	47,045
Other	9,320	8,004	9,589
Cases transferred to judicial agencies	252	229	137
Value of fine (Y million)	398	417.6	467.4
IPR cases handled by Customs at the border	2,475	7,456	11,135
Value (US\$ million)	27.2	64.5	43.2
Intellectual property cases dealt with by courts			
First instance civil IPR cases accepted	14,219	17,877	24,406
First instance civil IPR cases closed	14,056	17,395	23,518
Patent cases accepted	3,196	4,041	4,047
Patent cases closed	3,227	3,847	4,132
Trademark cases accepted	..	3,855	6,233
Trademark cases closed	..	3,617	6,068
Copyright cases accepted	5,719	7,263	10,951
Copyright cases closed	5,751	7,226	10,255
Technical contract cases accepted	681	669	623
Technical contract cases closed	668	649	636
Unfair competition cases accepted	1,256	1,204	1,185
Unfair competition cases closed	1,188	1,230	1,210
Other IPR cases accepted	846	727	1,340
Other IPR cases closed	844	705	1,217
Second instance civil IPR cases accepted	2,686	2,862	4,759
Second instance civil IPR cases closed	2,652	2,870	4,699

.. Not available.

a The Chinese authorities changed their statistical methods in 2007 so the number of cases concluded regarding copyright is no longer available.

Source: Data provided by the authorities.

7. The Patent Law was first implemented in 1985, and has been revised three times; the last revision was completed in 2008 and the revised version entered into effect on 1 October 2009. Under

the revised Law, penalties now include the patent owner's expenditure in protecting the patent; and fines, as well as legal compensation, have been increased for patent counterfeit and infringement cases.³ Thresholds for granting patents are changed from "relative novelty" to "absolute novelty": a patent is granted only if the invention, utility model, or industrial design has not been publicized anywhere in the world.⁴ Further, the revision explicitly allows parallel imports regarding patents.⁵

8. The revision also includes further grounds on which a compulsory licence may be issued. Under the previous Patent Law, compulsory licences could be granted in the event of, *inter alia*, "national emergency", or "any extraordinary state of affairs occurs", or "in the public interest".⁶ The revised Law further enables the grant of compulsory licences in certain circumstances for patented pharmaceutical products. This amendment gives effect to the WTO General Council Decision on the Implementation of Paragraph 6 of the Doha Declaration on the TRIPS Agreement and Public Health and subsequent Decision on the Amendment of the TRIPS Agreement in providing for compulsory licensing to enable third parties to manufacture patented drugs for export to recipients under the WTO "paragraph 6" mechanism.

9. Moreover, it allows for a compulsory licence if the patent owner, without justification, has failed to "sufficiently" exploit patent rights for three years or uses the rights in a manner that eliminates or restricts competition. According to the authorities, this test of sufficiency of use will be explained in the implementing regulation (to-be-promulgated), and the test of "without justification" is provided in the Paris Convention. China has not granted any compulsory licences since the issuance of the Patent Law.

10. The revised Patent Law also requires patent applicants to disclose the direct and original source of genetic resources when the completion of an invention depends upon such genetic resources⁷, a measure implemented in the light of the Convention on Biological Diversity. For inventions depending upon genetic resources the access or use of which is against law and/or administrative regulations, the invention should not be granted patent rights.⁸

11. During the period under review, patent applications and grants continued to increase rapidly. In 2008, there were 828,328 applications, up 19.3% from 2007: domestic applications increased by 22.2%, and foreign applications by 3.5%. Most foreign applications were for inventions (85.7%),

³ For patent counterfeit, fines are increased from three times the illegal earnings to four times; for cases with no illegal earnings, fines are increased from Y 50,000 to Y 200,000. In the case of patent infringement, if neither the loss of the patent owner, nor the gains of the infringer, nor the licence fee of the patent can be fixed, the People's Court can order the infringer person to compensate between Y 10,000 and Y 1 million.

⁴ The previous Patent Law specified that if any invention or utility model had not been published anywhere (in or outside China), nor been used in public or known by public anywhere, it could be granted a patent right; any industrial design, if not published in or out of China, nor used publicly within China, could be granted a patent right.

⁵ See Article 69 of the revised Patent Law. The previous Law stipulates that, without the authorization of the right holder, no entity or individual may exploit, including import, the patent; that is, parallel import regarding patent was prohibited.

⁶ The previous Patent Law also stipulated that compulsory licences could be granted in other circumstances. For example, under Article 48, any entity qualified to use a patent and who had requested but not obtained permission to use it from the patent holder within a reasonable period of time, could apply for a compulsory licence.

⁷ See Article 26 of the revised Patent Law.

⁸ See Article 5 of the revised Patent Law.

while domestic applications were mostly for industrial designs (42%) and utility models (31%). In the same year, 411,982 patents were granted, an increase of 17% from 2007 (Table AIII.8).

(b) Trade marks

12. The State Trademark Office, under the State Administration of Industry and Commerce (SAIC), is in charge of the registration and administration of trade marks. Local enforcement authorities are responsible for administration at the local level.

13. Trade marks are protected under the Trademark Law, its Implementation Regulations, and various rules issued by the SAIC. The Trademark Law 1982 is being revised for the third time; the revision is to shorten the examination period and enhance trade mark protection. Trade marks are protected for ten years, renewable for ten years, indefinitely. Trade marks must be registered with the Trademark Office to be protected under the Trademark Law. Foreign applicants must file applications in accordance with any agreements concluded between their country of origin and China, or any international treaty to which both are parties, or on the basis of reciprocity. Trade marks may be registered through an agent recognized or designated by the SAIC.

14. In 2008, for the first time, the number of trade marks reviewed was higher than the number of applications, reflecting faster registration.⁹ The authorities noted that trade mark registration now takes 30 months down from around 36 months. If the Trademark Office refuses registration, appeal may be made to the Trademark Review and Adjudication Board, or further to a people's court.

15. Parallel imports are still not addressed in the legislation on trade marks, and it is not clear to the Secretariat whether they are prohibited/allowed.

(c) Copyright and related rights

16. The National Copyright Administration of China under the State Council administers copyright on a national scale. Local copyright registration and administration is carried out by local copyright administration offices.

17. Protection is granted under the Copyright Law, its Implementing Rules, and accompanying regulations.¹⁰ Protection for cinematographic and photographic works is for 50 years, and typographical designs for 10 years.¹¹ Protection for computer software is granted from the date on which its development was completed, and the term of protection varies.¹² The National Copyright

⁹ In 2007, there were 708,000 trade mark applications, and 405,000 were reviewed; in 2008, there were 698,000 applications, and 750,000 were reviewed (SIPO online information. Viewed at: http://www.sipo.gov.cn/sipo2008/zwgs/zscqbps/200904/t20090427_457166.html [08/05/09]).

¹⁰ These include, *inter alia*, the Regulations for the Protection of Computer Software, and the Regulation on the Collective Administration of Copyright, and the Regulations on Protection of the Right of Communication through Information Network.

¹¹ Article 21 of the Copyright Law specifies that cinematographic or photographic works are protected for 50 years after first publication; however, the work is not protected under this Law if it is not published within 50 years of completion of its creation.

¹² Software copyright exists from the date on which its development is completed. For a natural person, protection is for the lifetime of the person plus 50 years. For software developed jointly by two or more persons, protection expires at the end of the 50th year after the death of the last surviving developer. Copyright belonging to a legal entity or other body is protected for 50 years from first publication; however, if it has not been published within 50 years of its development, it is not protected.

Administration has been speeding up registration for computer software. In 2008, 49,087 items of computer software were registered, an increase of 91.25% from 2007.¹³

18. Parallel imports are not covered in the copyright legislation, and the authorities maintain they are not prohibited.

(d) Geographical indications

19. Geographical indications (GIs) are currently regulated by: the State Trademark Office, the AQSIQ, and the Ministry of Agriculture. Apparently, a law on geographical indication is to be issued in 2010.

20. From 2003, GIs can be registered as collective marks or certification marks with the State Trademark Office under the same procedures as for trade marks. From 2008, the Trademark Office accelerated its examination of applications for protection of GIs: from 1994 to 2007, the Trademark Office approved 301 GIs, while in 2008 and the first half of 2009, 321 were approved.¹⁴ Protection of GIs registered with the State Trademark Office is the same as for other trade marks, i.e., ten-year protection, renewable for ten years, indefinitely.

21. From 2005, GIs can also be registered with the AQSIQ. By the end of September 2009, 932 geographical indications had been approved by the AQSIQ. Once registered with the AQSIQ, these GIs are protected permanently.

22. From February 2008, GIs for agricultural products may also be registered with the Ministry of Agriculture. Agricultural products' GIs from foreign countries must be registered in China to be protected. At end-October 2009, 185 GIs had been approved by the Ministry of Agriculture. Once registered, these GIs are protected permanently.

(e) Other IPRs

23. Since the previous review of China, there has been no significant change to the legislation protecting other IPRs, including layout-designs of integrated circuits, plant varieties, and undisclosed information or trade secrets.

24. Layout-designs of integrated circuits are registered with and granted by SIPO. They are protected for 10 years from the date of filing or the date of first commercial exploitation anywhere in the world, whichever expires earlier; the maximum duration of protection is 15 years from the date of creation. In special circumstances (such as national emergencies), or to remedy unfair competition practices, a "non-voluntary" licence can be issued to exploit a layout design.¹⁵ So far, no "non-voluntary" licences have been issued.

25. Plant varieties are protected for 20 years from the date of authorization of vines, forest trees, and ornamental trees, and 15 years for other plants. Applications for the protection of new plant

¹³ SIPO online information: <http://www.sipo.gov.cn/sipo2008/zwgs/zscqbps/200904/t20090427457166.html> (in Chinese) [08/05/09].

¹⁴ SIPO online information: http://www.sipo.gov.cn/sipo2008/zwgs/zscqbps/200904/t20090427_457166.html (in Chinese) [08/05/09].

¹⁵ Special circumstances refer also to: any extraordinary state of affairs; for the purposes of public interest; or determination by the competent authority that there is a need to redress anti-competitive behaviour resulting from the protection.

varieties are made to the Ministry of Agriculture or the State Forestry Administration. Compulsory licences may be granted by the approval and examination authority for exploitation of the protected plant variety where it is in the national or public interest. No such compulsory licences have been granted.

26. Undisclosed information and trade secrets are protected by, *inter alia*, the Criminal Law, the Anti-Unfair Competition Law, the Labour Law, and regulations issued in accordance with these laws. The SAIC is in charge of protecting trade secrets, while the public security agency is responsible for criminal investigation in cases involving severe damage or criminal activity related to undisclosed information or trade secrets. According to the Implementation of the Law of Drug Control, China protects test data and other data that are self-obtained, undisclosed, and submitted by manufacturers or sellers to obtain an approval for manufacturing or selling a drug that contains new chemical entities. No one should use such undisclosed test data and other data for improper commercial purpose. Within six years from the date the manufacturer or seller obtains the approval for manufacturing or selling the drug, the drug supervision and administrative authorities should not grant another approval to others who apply for approval using the same data.