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#### JUDICIAL AND ADMINISTRATIVE PROTECTION OF INTELLECTUAL PROPERTY IN CHINA

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Over the years, the Government of China has attached great importance to the protection of intellectual property. The Government considers that the intellectual property protection system is of great significance to the promotion of scientific and technological progress, cultural prosperity and economic development, both as an important system that ensures the normal operation of the socialist market economy, and as a fundamental condition for the promotion of international economic, cultural, scientific and technological exchange and cooperation. For China, intellectual property protection is an important component part of its reform and open policies and its efforts to develop a socialist legal system. Since the end of the 1970s, China has started with formulation of its laws and regulations on intellectual property protection, and has, in the mean-time taken an active part in the activities of relevant international organizations, and enhanced its communication and cooperation with all countries across the world in the field of intellectual property. China's modern intellectual property protection system only began to develop at the end of the 1970s, but at a high starting point, as it is oriented towards the world and takes the international standard of

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\* The views expressed in the Study are those of the author and not necessarily those of the Secretariat or of the Member States of WIPO.

protection as its benchmark. Stimulated by the reform and open policy, the intellectual property legislation in China has developed at an unprecedented speed.

## I. SETTING UP OF A SOUND LEGAL SYSTEM FOR INTELLECTUAL PROPERTY PROTECTION IN CHINA

In keeping pace with the reform and opening up efforts, China has made great progress in the protection of intellectual property. In view of its national conditions, China has put in place a mechanism for coordinated operation of judicial and administrative protection of intellectual property, while continuously developing and improving its laws and regulations on various aspects of intellectual property in accordance with the international development trend, which has resulted in a legal system for intellectual property protection with Chinese characteristics. Intellectual property protection in China has been gradually made in conformity with international practices both in terms of its coverage and degree of protection, and has become part of the common efforts of the international intellectual property community.

In order to further improve the situation of intellectual property protection in China and to make its intellectual property laws better coordinated with international norms, China has, since 2000, revised various laws and regulations, such as the Patent Law and its Implementing Regulations, the Copyright Law and its Implementing Regulations, the Trademark Law and its Implementing Regulations, the Regulations on Customs Protection of Intellectual Property Rights and its Implementing Regulations, the Regulations on the Protection of Computer Software, the Regulations on the Management of Audio-visual Products, the Rules for the Implementation of Copyright Administrative Punishment, and the Measures for Administrative Enforcement of Patent.

On October 27, 2001, at its twenty-fourth session, the Standing Committee of the Ninth National People's Congress adopted the Decision on the Amendment to the Copyright Law of the People's Republic of China. Comprehensive amendments have been made to the Copyright Law, comprising major modifications concerning the subject matter of protection, the contents, limitation, licensing and transfer of rights, and legal liabilities. The new revised Copyright Law has followed the provisions of the WCT and the WPPT on network communication, granting right holders the right of communication through information network, *i.e.* "the right of making available to the public of their works, by wire or wireless means, in such a way that members of the public may access them from a place and at a time individually chosen by them". A localized denomination of the right, however, has been used, which is referred to as "the right of communication through information network". In addition, legal remedies have been enhanced in the new Law, with the introduction of provisions concerning "presumption of fault", "conservation of evidence prior to litigation", and "statutory damages", as well as those concerning "the range and types of administrative punishments" and "technological measures and rights management information".

At its twenty-fourth session, the Standing Committee of the Ninth National People's Congress also adopted the Decision on the Amendment to the Trademark Law of the People's Republic of China to revise the existing Trademark Law. The new Trademark Law, which entered into effect on December 1, 2001, contains 64 articles, *i.e.* 21 more than the original Law, with 23 new articles added, 23 partially modified, 1 deleted, 1 merged into another article, leaving only 17 articles with no substantial modifications made. Accordingly, on

August 3, 2002, the State Council revised the Implementing Rules of the Trademark Law of the People's Republic of China, and renamed it as the Regulations for the Implementation of the Trademark Law of the People's Republic of China. The revised Regulations, which entered into effect on September 15, 2002, contain 59 articles, *i.e.* 9 more than the original Regulations, with 22 new articles added, 34 partially modified, leaving only 3 articles with no substantial modifications made. Recently, the State Administration for Industry and Commerce has revised, in accordance with the new Trademark Law and Regulations for its Implementation, two departmental-level rules: the Provisions for the Determination and Protection of Well-known Trademarks, and the Procedures for the Registration and Administration of Collective Marks and Certification Marks. It has also formulated Measures for the Implementation of the Madrid International Registration of Marks.

## II. LEGAL PRINCIPLES AND SUBJECT OF ADMINISTRATIVE ENFORCEMENT

As a distinctive characteristic of the intellectual property protection system in China, administrative enforcement has demonstrated the serious position and firm confidence of the Government of China in the protection of intellectual property rights. In 1996, the Administrative Punishment Law of the People's Republic of China was promulgated, providing the administrative organs with an important legal basis for administrative enforcement in China. The Administrative Punishment Law contains 64 articles in 8 chapters, and clearly sets out the types of administrative punishments and their establishment, organs administering administrative punishments, jurisdiction and application of administrative punishments, decisions on administrative punishments, procedures concerning administrative punishments, execution of administrative punishments, and legal liabilities. The enactment of the Administrative Punishment Law has a key role to play in standardizing the effective enforcement by administrative organs according to law, improving administration and management, strengthening the building of an honest and clean government, safeguarding the public interests and social order, protecting the legitimate interests of citizens, and promoting a sound development of the national economy.

### 1. Principles of Administrative Punishments

The Administrative Punishment Law sets out the principles of administrative punishments. The first is the principle of combination of punishments and education, as the very purpose of administrative punishments is nothing but to correct serious violations of the law so as to teach citizens, legal persons or other organizations to abide by the law consciously. The second is that of abiding by the law. Execution of administrative punishments by administrative organs must be based on the law and in strict compliance with legal procedures. The third is that of fairness and openness. Facts must be ascertained and become the basis for the establishment and administration of administrative punishments. Relevant rules concerning administrative punishments must be made public and known to citizens and organizations alike; administration of administrative punishments should be open to supervision by the public.

### 2. Establishment of Administrative Punishments

As administrative punishments relate to the rights of citizens, their establishment must follow statutory principles. In particular, first of all, what may be subject to administrative punishment is only the behavior of citizens, legal persons or other organizations in respect of

which the law expressly provides for such punishment; for a behavior in respect of which no law has provided for administrative punishment, no such punishment should be given. Secondly, administrative punishments shall be established according to law and to administrative regulations by designated State organs within their competence. Thirdly, execution of administrative punishments by administrative organs must be in strict compliance with the law. According to their nature, administrative punishments can be grouped into three types: (i) punishments resulting in specific actions, such as revoking permits of licenses, and ordering the suspension of production and operations; (ii) punishments involving property, such as fining and confiscation of illegal property; and (iii) punishments of an admonitory nature, such as warning. Needless to say, all these administrative punishments have different degrees of effect on the rights and interests of the parties concerned.

### 3. Procedures for Administrative Punishments

Procedures for administrative punishments are very important in ensuring the correct execution of administrative punishments. The Administrative Punishment Law has provided for such procedures according to the realities in China and the basic principles of administrative punishments.

(1) Simple procedures and general procedures. For an action where irrefutable facts can be produced and legal basis exists for its handling, and in respect of which a lesser punishment could be given, the simple procedures are followed and a decision is made on the spot by enforcement persons. For all other violations of the law, the general procedures are followed where punishment is established only after careful investigation is made and evidence taken.

(2) Pleading system, including that of hearing. According to this system, before making an administrative punishment decision, the administrative organ shall notify parties concerned of the violations, of the reasons and grounds for possible administrative punishments, and of their rights under the law. Parties concerned have the right to plea and to ask for a public hearing.

(3) Separation of personnel handling the cases from those making decisions on punishments. Such practice can enhance restriction and supervision, thus improving the quality of administrative punishments. According to the Administrative Punishment Law, it is the duty of the enforcement personnel to ascertain facts and to give an opinion on the disposition, for the consideration by the person in charge of the administrative department, who shall decide himself on cases concerning acts that merit lesser punishments, and shall conduct a collective discussion to decide a major administrative punishment in respect of a complicated case or an act of major violation of the law. The on-the-spot decision made by enforcement personnel shall be put on file with the administrative organs to which they belong.

(4) Separation of the administrative organs making decisions on fines from those collecting fines. The administrative organs that have made the decision on fines cannot collect the fines themselves. Fines could be paid by the parties concerned through banks designated for such purposes.

(5) More strict monitoring and controlling system. People's governments at or above county level are responsible for monitoring the administrative punishments. Complaints or reports concerning administrative punishments are reviewed by administrative organs. Erroneous administrative punishments, when found, shall be corrected.

#### 4. Subjects of Executing Administrative Punishments

Administrative punishments constitute an important authority of the State administration, and are executed by State administrative organs, hence a major feature distinguishing administrative punishments from criminal punishments. According to the Administrative Punishment Law, such punishments are administered by administrative organs having such authority within their statutory competence. In the first place, not all administrative organs have such authority for administrative punishments. Secondly, administrative organs having such authority can only administer administrative punishments within their own competence in respect of violations of the administrative order. Thirdly, the types of administrative punishments executed by each administrative organ are stipulated by relevant laws and regulations. For instance, departments of the central and local governments in charge of patent, trademark, copyright and customs have the authority for administrative punishments within their respective competence.

#### 5. Rights of Parties concerned

The Administrative Punishment Law provides for the rights of the parties concerned, which mainly include (i) the right to make statement and to plea, including the right to be heard; (ii) the right to ask for administrative review or institute administrative proceedings; and (iii) the right to request administrative compensation. Citizens, legal persons or other organizations are entitled to compensation for damages they suffer from administrative punishments executed by administrative organs in violation of the law.

#### 6. Legal Liabilities in the Administration of Administrative Punishments

Articles 55 to 62 of the Law provide for strict legal liabilities in relation to the abuse of the authority for administrative punishments by administrative organs and their enforcement personnel, thus ensuring that the administrative organs strictly abide by the provisions of the Administrative Punishment Law, preventing them from abusing their power, and protecting the legitimate rights and interests of citizens, legal persons or other organizations from violation. In case of any abuse of the administrative power against the law, persons in charge and other personnel held responsible are subject to administrative punishments or criminal charges according to law, depending on the seriousness of the circumstances.

### III. ENFORCEMENT SYSTEM FOR INTELLECTUAL PROPERTY PROTECTION IN CHINA

#### 1. Judicial Approach to Intellectual Property Protection in China

In China, any citizen, legal person or other organization holding intellectual property rights can institute a legal action with the people's courts when their rights are violated, and enjoy effective and efficient judicial protection.

Strict and serious enforcement constitutes the core of the judicial endeavor in China. The people's courts conduct their judgements and trials on the basis of facts and in accordance with the law. Cases are strictly handled pursuant to substantive laws and procedural laws by the people's courts, which follow the systems of collegiate discussion, challenge, open trial, the second instance being the final instance, and the supervision of trials. Judgements and trials by the people's courts are supervised by the People's Congress at all levels, the People's Procuratorates and the public according to law, thus ensuring their openness, fairness and seriousness.

Improving the juridical system by establishing sound adjudicatory institutions for intellectual property cases is an important guarantee for the people's courts to handle intellectual property case properly and to protect intellectual property effectively according to law. In view of the professional and technical nature of intellectual property cases, Intellectual Property Tribunals have been set up since 1982 in the higher people's courts in a number of provinces and municipalities, such as the municipalities of Beijing, Shanghai and Tianjin, and the provinces of Jiangsu, Guangdong, Fujian and Hainan, so as to meet the actual demands. Intellectual Property Tribunals have also been set up in the intermediate people's courts in the special economic zones as well as in Beijing and Shanghai. In other provinces, autonomous regions and municipalities, a specialized collegiate bench for intellectual property cases is set up in the intermediate people's courts of the cities where the people's governments are located. It is believed that handling of intellectual property cases in a centralized way is conducive to ensuring harmonization of enforcement efforts, accumulating experiences and improving judicial practices with respect to intellectual property cases.

## 2. Administrative Approach to Intellectual Property Protection in China

Within the intellectual property protection system of China, apart from the judicial approach as is adopted in conformity with international practices, an administrative approach is also provided for, based on the national conditions and realities, in the intellectual property laws of China, such as in the Patent Law, Trademark Law and Copyright Law.

The Patent Law provides that relevant competent departments of the State Council or local governments may set up administrative organs for patent. Currently, over 50 administrative organs have been set up by local governments in China, and over 20 such organs by various departments of the State Council. According to the Copyright Law, provincial local governments and certain municipal local governments have set up administrative organs for copyright. Administration of trademarks follows the principle of unified registration at the central level and decentralized administration in localities. Offices for the management of trademarks have been established within Administrations of Industry and Commerce at all levels ranging from the central to provincial, municipal, regional and county levels, whereas below the county level, trademark affairs are managed by administrative services for industrial and commercial affairs.

## IV. SITUATIONS CONCERNING INTELLECTUAL PROPERTY PROTECTION ENFORCEMENT IN 2003

In 2003, departments for the administration of intellectual property at all levels of the Government implemented a coordinated plan of the State Council for rectifying and standardizing the economic order in the marketplace, by combating against infringement and

piracy that are detrimental to the public interest, strengthening supervision and control, and improving services. Remarkable progress has been made in the encouragement of innovation, promotion of industrial development, standardization of the market order and deepening of the reform and opening up efforts.

In 2003, the administrative organs for copyright at all levels across China received 23,013 cases, or nearly 2.6 times more than in the previous year. In total, 22,429 cases have been settled, with a case winding-up rate of 97.46 percent, among which 21,032 cases ended with administrative punishments, and 1,173 cases were settled through mediation. Altogether, 67.97 million infringing or pirated products were confiscated.

In 2003, the National Copyright Administration organized three nation-wide focused campaigns against infringement and piracy. In March to April, in order to commemorate the World Intellectual Property Day on April 26, relevant departments of the Government carried out a spring nation-wide campaign focused on infringement and piracy in general; in August to September, the National Copyright Administration, the Ministry of Education and the National Office for Cracking Down Pornography and Piracy jointly launched an autumn nation-wide campaign against pirated textbooks and supplementary reading materials; and in September to November, the National Copyright Administration carried out another nation-wide focused campaign against pirated software. In the above-mentioned campaigns, a total of 150,000 enforcement persons have been mobilized by copyright enforcement agencies across the country, and 20,000 marketplaces have been checked, involving 67,000 vendor's stands, over 500 enterprises and 8,000 schools, with around 12.9 million pirated products of various kinds being confiscated; administrative punishments have been meted in respect of 2,542 infringing institutions, and 1,981 illegal business establishments have been banned.

In the same year, administrative organs for industry and commerce at all levels across the country continued to increase their efforts in trademark administrative enforcement by strictly investigating and prosecuting acts of trademark infringement and counterfeit, so as to effectively safeguard the lawful rights and interests of trademark holders and consumers. According to statistics, in total, there were 37,489 cases in that year in which various administrative organs for industry and commerce investigated and prosecuted acts of trademark infringement, among which 11,001 concerned general trademark infringement, and 26,488 concerned trademark counterfeit; 84.755 million items (sets) of illegal trade identifiers together with 15,597 molds, printing plates and other tools were confiscated and destroyed; the destroyed infringing items weighed 5,754.92 tons and fines amounted to 242 million RMB yuan; 45 cases were referred to the judiciary for criminal charges.

Also in 2003, various intellectual property offices across the country received 1,517 cases concerning patent disputes, with 1,237 settled. A total of 1,873 cases concerning passing off patent and 164 cases concerning passing off patent of a third party were placed on file for investigation and prosecution.

With the continuous enhancement of the workforce in the field of intellectual property law enforcement and judicial protection, various people's courts have increased their efforts in the judicial protection of intellectual property. According to statistics, in 2002, 6,201 first instance civil cases involving intellectual property were received, an increase of 17.8 percent over 2001, among which 1,824 related to copyright, which represented an increase of 54.35 percent; 2,080 concerned patent, an increase of 24 percent over the previous year; and 707 involved trademark, an increase of 46.68 percent. In the same year, 409 criminal cases

involving intellectual property were received by various people's courts, which represented an increase of 26.65 over 2001, with 235 persons sentenced to imprisonment. In addition to the above-mentioned cases involving the three main categories of intellectual property rights, the people's courts at various levels also received 771 cases involving production and distribution of forged and inferior products and illegal business, which represented an increase of 35.1 percent over the previous year, with 1,018 persons sentenced to imprisonment. A large part of those cases also involve intellectual property in one way or another.

These efforts have demonstrated the firm position of the Government of China to stringently fulfill its international commitments, to act in accordance with international rules, and to protect intellectual property home and abroad, as well as its strong leadership in this respect. They have also shown that the various judiciaries and public security organs, as well as administrative organs for intellectual property in governments at all levels, have gradually increased their efforts, built up their capacity and improved their effectiveness and efficiency in intellectual property law enforcement. The Government has been conscientious and has done solid work in protecting the lawful rights and interests of intellectual property rights holders as well as the vital interests of the general public.

## V. PROBLEMS IN THE ADMINISTRATIVE ENFORCEMENT IN INTELLECTUAL PROPERTY

1. The legal system for administrative enforcement in China is a special one, resulted from its history and tailored to its current situation. At present, it is playing a positive role in raising the awareness of the public on intellectual property, safeguarding the lawful rights and interests of right holders, and protecting intellectual property rights. However, as each country has its own specific realities, a model that is effective in one country may not be necessarily effective in all. Therefore, it should be a matter for each and every country to decide, according to its own situations, whether or not it should adopt a model of administrative enforcement.

2. The administrative enforcement system calls for the setting up of institutions for its administration, hence a massive enforcement contingent. By definition, members of this contingent are civil servants, which incurs huge expenses from the State budget. This problem becomes more evident for a developing country like China, which is populous and experiences imbalance in economic development among its different regions.

3. As is known to all, intellectual property is a private right, or a property right. In the information society of today with highly developed new technologies, one must conduct further theoretical research and practical exploration as to how to balance the interests of the public and those of intellectual property rights holders. As a general rule, administrative enforcement in China is pivoted on whether the public interest is violated. However, more research and exploration are needed in this regard.

4. Administrative enforcement personnel need be equipped with necessary legal and professional knowledge. The Government of China has made great efforts in training its enforcement personnel. We are very grateful to the World Intellectual Property Organization, the European Union and many other countries for their strong support and assistance in the training of our administrative enforcement personnel.



## CLOSING REMARKS

With the reform and opening policy, China is changing with each passing day. Today, great achievements have been made in the development and enhancement of the legal system and protection of intellectual property in China, which has contributed to the significant improvement in its situation of intellectual property protection. These are indisputable facts and have been highly comended by the great majority of countries and international organizations. According to some international opinions, China is among the world's advanced countries in the field of intellectual property. The time when China lagged behind in its development of intellectual property system is finished.

Nevertheless, we should not rest on our achievements made so far, but should continue to improve our intellectual property system, to further upgrade the protection level, and to actively promote international cooperation in the area of intellectual property protection. China will, as always, take an active part in the activities of relevant international organizations, and fulfill its obligations under various international treaties and agreements on intellectual property. We are ready to continue our cooperation with all countries across the world on the basis of five principles of peaceful co-existence and in accordance with the principles of equality and mutual benefit, to make joint efforts in, and positive contributions to, the improvement and development of the international intellectual property system.

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