

Before the Office of the United States Trade Representative (USTR)
Washington, D.C.

Comments of
UNITED STATES COUNCIL FOR INTERNATIONAL BUSINESS (USCIB)
Special Provincial Review of Intellectual Property Rights Protection in China

July 14, 2006

Introduction

The United States Council for International Business (USCIB) thanks the Office of the Trade Representative (USTR) for its tireless efforts in negotiating for stronger intellectual property protection globally and for affording the private sector the opportunity to submit comments in furtherance of its Special Provincial Review of Intellectual Property Rights Protection in China. We hope you find our comments useful.

USCIB advances the global interests of American business both at home and abroad. It is the American affiliate of the International Chamber of Commerce (ICC), the Business and Industry Advisory Committee (BIAC) to the OECD, and the International Organization of Employers (IOE). With a membership of 300 companies, industry associations, and law firms, USCIB is uniquely positioned to leverage the cross-sectoral experiences of its membership so as both to identify and address the greatest global challenges facing U.S. industry today.

Many USCIB member companies have a longstanding history of conducting business in China and are deeply invested in the development of adequate intellectual property laws and the vigilant enforcement of those laws in that country. In addressing USTR's request for comments regarding the adequacy of intellectual property protection in China on the provincial level, we reached out to both our China and Intellectual Property Committees in the form of a short confidential survey (see attached "Appendix A"). We recognize that this discussion is not by any means exhaustive, and that there may be significant issues that our members have not raised with us for various reasons. Similarly, the differences in length and detail provided in the following discussion of specific issues should not suggest that shorter entries are less important than longer entries with more details.

What follows is a narrative, organized by sector, of the input received.

Life Sciences/Biotechnology:

Companies in the life sciences/biotechnology sector reported a presence in the municipality of Beijing and in the Sichuan Province. At times, legal action has not been pursued within China but has been pursued outside of China with respect to patent and trademark infringement originating largely out of Sichuan Province and in the municipality of Beijing, and the city of Guangzhou. Companies have been most successful at stopping and destroying infringing product, working closely with Chinese authorities. Companies are also pursuing educational and outreach activities with the government and industry groups in China. Some problems cited include the current lack of Chinese translations of the bulk of Chinese patents and the lack of scholarly information that may have a bearing on a company's IP strategy in China. It was suggested that a reliable dispute resolution system that produces "objective, enforceable and enforced decisions" coupled with a public record of precedent would greatly enhance the IPR regime in China.

Pharmaceuticals:

Companies in this sector have reported doing business mostly in the municipalities of Shanghai and Beijing, and in Guangdong Province. Companies have pursued administrative, civil, and criminal actions against patent and trademark infringers. Companies have conducted raids with AIC, police, and customs officials, have recorded their patent and trademarks with customs, and have participated in education and outreach activities. It was noted that the weakness in China's IPR regime has always been the lack of coordination and cooperation between government agencies as well as the ambiguity inherent in its IP laws. Respondents discuss the difficulty in narrowing China's problems to one main issue, but mention anti-counterfeiting as a priority for the near future.

Media, Publishing, and Entertainment:

Significant business in the media/publishing/entertainment sector occurs in the municipalities of Shanghai and Beijing, and the provinces of Guangdong, Zhejiang, and Fujian. Guangdong and Fujian Provinces have been cited as "worst offenders." These companies have generally pursued legal actions concerning trademark, copyright, and unfair competition disputes, but have gotten mixed results. They have filed civil complaints in the city of Shenzhen in Guangdong Province as well as in the municipality of Beijing. Additionally, the industry has assisted the AIC in conducting numerous administrative raids in Shanghai and in Guangdong and Zhejiang. Customs actions include seizures in Guangdong, Zhejiang, and Jiangsu. The sector has worked with the Chinese government and industry groups on various outreach and educational initiatives, as well. Companies noted the lack of willingness to prosecute criminal actions (and the difficulty in bringing criminal actions altogether) in China as a major obstacle in deterring intellectual property theft. Local protectionism has been cited as a "big problem." Overall, companies would like China to increase *ex officio* criminal prosecution of copyright offenses and lower the thresholds that effectively prevent bringing criminal charges.

Information and Imaging Technology:

Most business activity in the Information Technology and Imaging Technology category historically has occurred in the municipalities of Beijing and Shanghai, and in the cities of Guangzhou, Wu Xi, Xiamen, and Chengdu. But post-2004, some companies have expanded their enforcement activities to include additional cities and provinces. Henan Province has also been identified as a problem location for this industry. Software companies reported enforcement efforts focused on corporate and end user piracy and relied on local Copyright Administrations for administrative actions. They have noted that Beijing, Shanghai, Jiangsu, Qingdao and Dalian have all been responsive to enforcement requests, whereas Guangdong remains a problem area for these companies. Other companies within the information technology/imaging technology sectors reported Shanghai and Beijing as more responsive jurisdictions than other places but noted that IP infringement is pervasive and still a severe problem everywhere in China. These companies have pursued many legal actions against IP infringers, in some cases for decades, but report seeing very little progress. Companies note that China's strength lies in the fact that it now has a legal framework and is working to perfect the system. They commend China for its adoption of domestic IP laws as well as international treaties and conventions. However, enforcement by local authorities and local protectionism has been mentioned by this sector as chronic problems within China's IPR regime. It was expressed that the fundamental weakness of China's legal system is the lack of an independent judiciary and the lack of legal training and experience of its judges. Judges in China, it was raised, are not required to have a legal background but rather possess a military background. If these companies could change China's

IPR regime, they would demand effective and consistent enforcement of IP laws that China has already adopted, decrease the bureaucracy in required registrations, address the problem of widespread protectionism, and educate the judiciary to better understand IP issues.

Apparel:

Beijing and Shanghai are municipalities and Guanzhou and Shenzhen are cities that have all been mentioned as areas where the apparel industry has significant business interests in China. Industry notes that there have been positive developments, such as the Supreme People's Court issuing specific objectives for intellectual property in 2004, government policies calling for stronger criminal remedies, and the government actions against landlords in markets where counterfeits are being sold. Still, counterfeiting is rampant and there is reportedly little improvement. Major weaknesses include problems with transparency, corruption, lax enforcement and ambiguous channels for brand owners to seek redress for intellectual property violations. It was explained that trademark holders are often not granted the opportunity to present their case in court or to appeal a judgment under Chinese law. Industry notes that what is needed are clear written rules and guidelines delineating the legal process, penalties, and associated fees, and that these guidelines be followed throughout China. It was also suggested that the rightsholders should be able to address grievances directly to the courts for proper remedy.

Conclusion:

From the active participation of USCIB members on both the Intellectual Property and China Committees, it is clear that the protection of intellectual property rights in China both on the national and local levels is of vital importance to the investment of American industry overseas. Once again, we appreciate the opportunity to express our concerns and trust that our comments will be useful in the Administration's on-going efforts to encourage China's compliance. USCIB stands ready to meet with U.S. agencies to discuss our recommendations and concerns at greater length; we look forward to continued dialogue on this important issue as this process unfolds.

APPENDIX A

USCIB CHINA IP SURVEY

June 2006

Please base your responses on your company's dealings with China during the past five (5) years:

- 1. How would you classify your company's business operations (i.e. what industry sector(s))?**
- 2. How long has your company been doing business in China?**
- 3. Which provinces constitute the bulk of your dealings (and if you have multiple products, please identify which lines of business pertain to which provinces)?**
- 4. Has your legal department pursued legal action against intellectual property infringement in China? If so, what type of alleged infringement, how many actions have been filed, where specifically in China have these alleged infringements occurred, and what has been the outcome?**
- 5. Has your legal department initiated any type of investigation or worked with Chinese authorities to combat intellectual property theft short of initiating a suit? If so, where has your company focused its efforts (i.e. working with Chinese officials to conduct raids, outreach activities, lobbying efforts, customs authorities, etc.)?**
- 6. What strengths and weaknesses can you identify from your work with China in protecting intellectual property? Are certain provinces or municipalities more responsive than others?**
- 7. If you could change one thing about China's IPR regime so as to ensure the protection of your investments in that country, what specifically would you change?**