

CHECKLIST OF ISSUES ON ENFORCEMENT¹

Responses from China

Civil and Administrative Procedures and Remedies

(a) Civil judicial procedures and remedies

1. Specify the courts which have jurisdiction over IPR infringement cases.

According to the Interpretations of the People's Republic of China Civil Procedure Law made by the People's Supreme Court, patent cases of first instance are heard by the intermediate courts of the municipalities where the People's Governments of the Provinces, Autonomous Regions and the municipalities directly under the central government are located, and those intermediate courts designated by the People's Supreme Court.

Trademark cases of first instance are heard by the people's courts of intermediate level and above. The high courts can, according to the circumstances in its jurisdiction and subject to approval of the People's Supreme Court, designate 1-2 basic courts of large cities to hear the trademark cases of the first instance.

The cases involving new varieties of plants of first instance are heard by the intermediate courts of the municipality where the People's Governments of the Provinces, Autonomous Regions and the municipalities directly under the central government are located, and the intermediate courts designated by the People's Supreme Court.

The cases involving layout-designs of integrated circuits of first instance are heard by the intermediate courts of the municipality where the People's Governments of the Provinces, Autonomous Regions and the municipalities directly under the central government are located, the intermediate courts of the special economic zone and the intermediate courts of Dalian Qingdao, Wenzhou, Fuoshan and Yantai.

2. Which persons have standing to assert IPRs? How may they be represented? Are there requirements for mandatory personal appearances before the court by the right holder?

The intellectual property right holders and interested parties can claim their civil rights before the people's courts, and be represented according to the provisions of the General Principle of Civil Law and the Civil Procedure Law of the People's Republic of China. There are no mandatory requirements for personal appearance before the court by the right holder.

¹ Document IP/C/5.

3. What authority do the judicial authorities have to order, at the request of an opposing party, a party to a proceeding to produce evidence that lies within its control?

A party could apply for perpetuation of evidence according to the Civil Procedure Law, as well as Article 58 of the Trademark Law, Article 50 of the Copyright Law and the Interpretation by the People's Supreme Court Regarding the Application of Law in the Circumstance of Ceasing Infringement of Exclusive Right of Trademark before Litigation and Perpetuation of Evidence.

4. What means exist to identify and protect confidential information brought forward as evidence?

The confidential information submitted will be protected according to Article 66 of the Civil Procedure Law and the Regulations by the People's Supreme Court Regarding the Evidence in Civil Procedure promulgated on 1 April 2002.

5. Describe the remedies that may be ordered by the judicial authorities and criteria, legislative or jurisprudential, for their use;

- **injunctions;**
- **damages, including recovery of profits, and expenses, including attorney's fees;**
- **destruction or other disposal of infringing goods and materials/implements for their production;**
- **any other remedies.**

The remedies and the relevant criteria are provided as follows:

Injunction can be issued either pre or during the course of litigation or in the course of decision according to Article 134 of the General Principle of the Civil Law, Article 61 of the Patent Law, Article 57 of the Trademark Law, or Article 40 of the Copyright Law.

Compensation is provided in the Patent Law, Trademark Law and Copyright Law; the losses covered include the loss of profit, costs arising in relevant actions, and an appropriate amount of attorney's fee.

Seizure of infringing goods and the materials and equipment used in producing infringing goods is provided in the General Principles of the Civil Law.

6. In what circumstances, if any, do judicial authorities have 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 goods of services found to be infringing and of their channels of distribution?

According to Article 64 of the Civil Procedure Law, if, for objective reasons, a party and his agent *ad litem* are unable to collect the evidence by themselves or if a people's court considers the evidence necessary for the trial of the case, the people's court shall investigate and collect it.

7. Describe provisions relating to the indemnification of defendants wrongfully enjoined. To what extent are public authorities and/or officials liable in such a situation and what "remedial measures" are applicable to them?

The defendant wrongfully enjoined can get compensation according to the State Compensation Law of the People's Republic of China.

8. Describe provisions governing the length and cost of proceedings. Provide any available data on the actual duration of proceedings and their cost.

The time limit for cases of first instance shall be 6 months, and those of second instance shall be 3 months. The cases involving foreign element shall not be subject to the above restriction.

Any party filing a civil lawsuit shall pay court costs according to the rules. For property cases, the party shall pay other fees in addition to the court costs.

(b) *Administrative procedures and remedies*

9. Reply to the above questions in relation to any administrative procedures on the merits and remedies that may result from these procedures.

The administrative procedure is parallel to that of the courts. The competent authorities are the local as well as central intellectual property right administrations, i.e. the Administrations of Industry and Commerce, the Copyright Offices and the Patent Offices of local and central level. All the decisions by those authorities are subject to judicial review.

Remedies that can be awarded by administrative authorities include fines, injunctions, and in cases of trademark or copyright infringements, confiscation of infringing goods or equipments.

Provisional Measures

(a) *Judicial measures*

10. Describe the types of provisional measures that judicial authorities may order, and the legal basis for such authority.

The provisional measures which courts may order include the order for ceasing infringing action before filing a suit and the preliminary injunction during litigation.

11. In what circumstances may such measures be ordered *inaudita altera parte*?

According to the interpretations of the Supreme People's Court, the measures shall be carried out immediately after the adoption of which has been ordered. The people's courts shall promptly notify the person against whom the application for the measures are made, within a maximum of 5 days.

12. Describe the main procedures for the initiation, ordering and maintenance in force of provisional measures, in particular relevant time-limits and safeguards to protect the legitimate interests of the defendant.

A right holder or interested party may file application to the people's courts for the initiation of provisional measures. The people's courts would then examine the application and for those that fulfil legal requirements, the courts would issue an order for ceasing infringing action, which shall be implemented immediately. The opposite party could apply for reconsideration of such order, and the implementation of the order does not suspend during the course of reconsideration. If the applicant does not bring an action in 15 days from the date the court ordered the provisional measures, the court shall cancel such measures. If the applicant failed to bring an action, or cause losses to the opposite party by its wrongfully made application, the opposite party could sue for compensation.

13. Describe provisions governing the length and cost of proceedings. Provide any available data on the actual duration of proceedings and their cost.

For those applications for provisional measures fulfilling legal requirements, the people's courts must make an order within 48 hours after receiving the application from a right holder or interested party. The fees shall be paid according to the rules issued by the Supreme People's Court.

(b) *Administrative procedures*

14. Reply to the above questions in relation to any administrative provisional measures.

The competent authority can make an order for ceasing infringing action, and can seal up or detain the infringing goods in trademark cases. Applicants of provisional measures in an administrative procedure do not need to pay any fees.

Special Requirements Related to Border Measures

15. Indicate for which goods it is possible to apply for the suspension by the customs authorities of the release into free circulation, in particular whether these procedures are available also in respect of goods which involve infringements of intellectual property rights other than counterfeit trademark or pirated copyright goods as defined in the TRIPS Agreement (footnote to Article 51). Specify, together with relevant criteria, any imports excluded from the application of such procedures (such as goods from another member of a customs union, goods in transit or *de minimis* imports). Do the procedures apply to imports of goods put on the market in another country by or with the consent of the right holder and to goods destined for exportation?

According to the Regulations on Customs Protection of Intellectual Property Rights (the Regulations), the intellectual property rights protected by the Customs include right of trademark, copyright and patent. So, the right holders can apply to the Customs for suspension of any export and import of goods infringing trademark, copyright (including related rights), and patent (including inventions, industrial designs and utility models). Except for the above-mentioned circumstances, according to the Regulations on the Protection of Olympic Symbol promulgated on 4 February 2002, the Customs can also suspend the import and export of goods infringing the Olympic Symbol.

According to Article 33 of the Regulations, the border measures will not apply to the goods carried or posted across the border by an individual within the reasonable amount for self-using.

All border measures apply to export goods.

16. Provide a description of the main elements of the procedures relating to the suspension of the release of goods by customs authorities, in particular the competent authorities (Article 51), the requirements for an application (Article 52) and various requirements related to the duration of suspension (Article 55). How have Articles 53 (security or equivalent assurance), 56 (indemnification of the importer and of the owner of the goods) and 57 (right of inspection and information) been implemented?

The main elements of the procedures: (1) competent authorities: according to the regulations, to have their intellectual property rights protected by the Customs, the right holders shall first record their intellectual property rights at the Customs General Administration, and apply for suspension to the local Customs when they discover importation or exportation of the suspected infringing goods. (2) requirements for an application: according to the Regulations, the right holders

shall file a written application when recording their intellectual property rights or seeking suspension of infringing goods. The written application for recording shall include information regarding the right holder, the intellectual property rights applied for protection, the license regarding the intellectual property rights, and the suspected infringing goods. And, the written application for suspension shall include the name of the infringing goods, the importer and exporter, the port and date of the importation and exportation, and relevant evidence of the infringement. (3) Duration of suspension: in cases where the right holder needs to file a suit in a court or apply for action of other administrative authorities, the duration of suspension is 15 days; in cases where the Customs take action on their own initiative, the duration of suspension is 3 days. (4) Security or equivalent assurance: the right holder applying for suspension of infringing goods by the Customs shall deposit security of equal value to the suspected goods. (5) Indemnification of the importer and the owner of the goods: where the court or other competent administrative authorities find no infringement, the 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. (6) Right of inspection and information: the right holder can inspect the infringing goods. The Customs shall notify the right holder in cases of suspending, releasing, confiscating or destroying infringing goods.

17. Describe provisions governing the length and cost of proceedings. Provide any available data on the actual duration of proceedings and their cost. How long is the validity of decisions by the competent authorities for the suspension of the release of goods into free circulation?

The length and costs of proceedings: (1) length of recording procedure: the Customs General Administration shall make decision within 30 days from the date of acceptance of the application for recordation; (2) costs: when applying for recording, the right holder shall pay 800 RMB (approximately 100 USD). In applying for suspension of goods to the local Customs, the right holder shall pay for the costs of storing and disposing of goods.

18. Are competent authorities required to act upon their own initiative and, if so, in what circumstances? Are there any special provisions applicable to *ex officio* action?

According to Article 18, the Customs shall be entitled to make detention on their own initiative where they discover import or export goods suspected of infringing the intellectual property rights which have been recorded. This often happens in cases involving infringement of trademark and copyright.

19. Describe the remedies that the competent authorities have the authority to order and any criteria regulating their use.

According to Article 23 of the Regulations, the suspected infringing goods detained shall be confiscated by the Customs where the infringement is determined. According to Article 24 of the Regulations, the confiscated goods infringing copyrights shall be destroyed, those infringing trademark shall be destroyed where any removal or obliteration of the infringing trademarks is impossible; or be subject to some specified application where the infringing trademark can be removed or obliterated.

According to the Customs Law and the Regulations, for the exporter and importer of the infringing goods, the Customs shall levy a fine not exceeding the value of the infringing goods; for the importer and exporter not declaring the relevant intellectual property information on the import or export goods, the Customs can also levy a fine not exceeding the value of the goods.

Where there's any criminal offence, the case shall be transferred to the police.

Criminal Procedures

20. Specify the courts which have jurisdiction over criminal acts of infringement of IPRs.

The people's courts of the first instance have jurisdiction over criminal acts of infringement of intellectual property rights.

21. In respect of which infringements of which intellectual property rights are criminal procedures and penalties available?

According to the Criminal Law of the People's Republic of China, the infringements that are subject to criminal penalty include, imitation of registered trademark, sales of products with faked trademarks, manufacturing and sales of copies of illegally made registered trademarks, imitation of patents, infringement of copyrights, sales of infringing copies, and infringement of commercial secrets.

22. Which public authorities are responsible for initiating criminal proceedings? Are they required to do this on their own initiative and/or in response to complaints?

The procuratorial body is responsible for initiating criminal proceedings. They are required to do so on their own initiative.

23. Do private persons have standing to initiate criminal proceedings and, if so, who?

Except for the intellectual property right crimes that seriously injure the society orders or national interests, the victim of an intellectual property right crime can initiate criminal proceedings in the courts.

24. Specify, by category of IPR and type of infringement where necessary, the penalties and other remedies that may be imposed:

- **imprisonment;**
- **monetary fines;**
- **seizure, forfeiture and destruction of infringing goods and materials and implements for their production;**
- **other.**

Imprisonment may be imposed in cases of all seven kinds of intellectual property right crimes, with a maximum term of 7 years.

Monetary fines may be imposed concurrently or independently in all seven kinds of intellectual property right crimes, and can also be imposed on units that committed intellectual property right crimes.

Seizure, forfeiture and destruction of infringing goods and materials and implements for their production are not listed as punishments in the Criminal Law of the People's Republic of China.

25. Describe provisions governing the length and any cost of proceedings. Provide any available data on the actual duration of proceedings and their cost, if any.

The people's courts shall pronounce the judgement on a case of public prosecution within one month or no later than one and a half months after accepting it for trial. The people's courts of second instance shall conclude the trial of an appellant or protested case within one month or no later than one and a half months.

No fees are charged in a criminal procedure.
