

CHINA – INTELLECTUAL PROPERTY RIGHTS¹

(DS362)

PARTIES		AGREEMENT	TIMELINE OF THE DISPUTE	
Complainant	<i>United States</i>	<i>TRIPS Arts. 9, 41, 46, 59, 61</i>	Establishment of Panel	<i>25 September 2007</i>
			Circulation of Panel Report	<i>13 November 2008</i>
Respondent	<i>China</i>	<i>Berne Convention</i>	Circulation of AB Report	<i>NA</i>
			Adoption	<i>20 March 2009</i>

1. MEASURES AND INTELLECTUAL PROPERTY RIGHTS AT ISSUE

- Measures at issue:
 - (i) China's Criminal Law and related Supreme People's Court Interpretations which establish thresholds for criminal procedures and penalties for infringements of intellectual property rights;
 - (ii) China's Regulations for Customs Protection of Intellectual Property Rights and related Implementing Measures that govern the disposal of infringing goods confiscated by customs authorities; and
 - (iii) Article 4 of China's Copyright Law which denies protection and enforcement to works that have not been authorized for publication or distribution within China.
- IP at issue: Copyright and trademarks.

2. SUMMARY OF KEY PANEL FINDINGS²

Criminal thresholds

- TRIPS Art. 61: The Panel found that while China's criminal measures exclude some copyright and trademark infringements from criminal liability where the infringement falls below numerical thresholds fixed in terms of the amount of turnover, profit, sales or copies of infringing goods, this fact alone was not enough to find a violation because Article 61 does not require Members to criminalize all copyright and trademark infringement. The Panel found that the term "commercial scale" in Article 61 meant "the magnitude or extent of typical or usual commercial activity with respect to a given product in a given market". The Panel did not endorse China's thresholds but concluded that the factual evidence presented by the United States was inadequate to show whether or not the cases excluded from criminal liability met the TRIPS standard of "commercial scale" when that standard is applied to China's marketplace.

Customs Measures

- TRIPS Art. 59: The Panel found that the Customs measures were not subject to Articles 51 to 60 of the TRIPS Agreement to the extent that they apply to exports. With respect to imports, although auctioning of goods is not prohibited by Article 59, the Panel concluded that the way in which China's customs auctions these goods was inconsistent with Article 59, because it permits the sale of goods after the simple removal of the trademark in more than just exceptional cases.

Copyright Law

- TRIPS Art. 9.1 (Berne Convention Art. 5(1) and Art. 17), Art. 41.1: The Panel found that while China has the right to prohibit the circulation and exhibition of works, as acknowledged in Article 17 of the Berne Convention, this does not justify the denial of all copyright protection in any work. China's failure to protect copyright in prohibited works (i.e. that are banned because of their illegal content) is therefore inconsistent with Article 5(1) of the Berne Convention as incorporated in Article 9.1, as well as with Article 41.1, as the copyright in such prohibited works cannot be enforced.

¹ *China – Measures affecting the Protection and Enforcement of Intellectual Property Rights*

² Other issues addressed in this case: prima facie case; Panel's terms of reference; exhaustiveness of TRIPS Art. 59; information from WIPO.