



February 11, 2008

Ms. Jennifer Choe Groves  
Director for Intellectual Property and Innovation  
Chair of the Special 301 Committee  
Office of the United States Trade Representative

Special 301 Submission

Dear Ms. Choe Groves:

Thank you for the opportunity to provide input for the U.S. Trade Representative's 2008 Special 301 Review. Intellectual property protection and enforcement remains an important issue for members of the National Association of Manufacturers (NAM). As globalization brings enormous benefits to the U.S. economy and businesses, it is essential that U.S. manufacturing remain competitive and healthy. Protection of intellectual property goes to the heart of U.S. competitiveness and innovation. As U.S. companies invest in research and development into new technologies and methods of production, there must be confidence that the rule of law will be enforced with respect to the fruits of that R&D.

**China**

There are a number of countries that require attention for the weakness or outright lack of intellectual property right (IPR) protection, but none comes to the attention of the NAM more than China. This is not new – the problem with product counterfeiting and piracy in China is long-standing and has been the subject of attention on the part of the Administration and Congress for a number of years.

NAM President John Engler took a delegation to China in the fall of 2007, visiting Beijing, Chengdu and Shanghai. In each of these cities he met with government officials and U.S. companies doing business in China. IPR protection was one of the major themes of the trip and figured prominently in all of the meetings.

Chinese officials all acknowledged the problem and assured the delegation that steps were being taken to correct the problem. They also recognized the importance of intellectual property (IP) protection to the development of indigenous Chinese industries and brands. Central government officials especially seemed to reflect these views.

Unfortunately, the feedback from U.S. companies in China is that the problem is not getting better. In fact, a number of them indicated that the problem is getting worse.

And this is happening in spite of increased public attention, Chinese central government pronouncements, U.S.-Chinese government talks and initiatives, and private efforts to work behind the scenes to build capacity and strengthen enforcement. A number of companies expressed the view that the situation is quite discouraging and the effort to protect their IP is a constant struggle that requires ongoing efforts and expenditures that, if anything, are only increasing. They did not express optimism that Chinese leadership was able or willing to control product counterfeiting or piracy.

Some companies stated that the Chinese government at all levels still did not have enough at stake to increase enforcement efforts. These companies feel that, lacking the incentive of Chinese brands or other IP to protect, Chinese officials are simply not giving IP enforcement the priority they should. Laws are on the books, but the minimum sentences are handed down, if any at all. Narrow interpretation of the law on the destruction of equipment used to counterfeit goods leads to court judgments that require the destruction of only a minimum amount of counterfeiters' equipment. Complying with these court rules becomes merely a "cost of doing business" rather than any serious disincentive.

Lawyers operating in China also indicated that although there has been considerable effort in recent years to develop judicial awareness and expertise in intellectual property jurisprudence, it is still a relatively new concept for the Chinese system and there remain significant gaps in understanding on the part of Chinese judges and courts. Gov. Engler was told by IP specialists that in many provinces, judges have no training whatsoever, drawing from the army, police, local businesses, in one case even from the janitorial staff.

Conversations in China made clear that a significant part of the problem with IPR protection lay in the imperfect fit between the commitments made by the central government and the follow-through by regional and local governments. The performance of provincial government leaders is still measured on economic growth and job creation. The 17<sup>th</sup> Party Congress, held in November 2007, added an environmental requirement, which is likely to result in positive moves in terms of highly polluting production and equipment. But the Congress missed the opportunity to drive greater IPR enforcement by not including it as a measure of performance. Until the central government is willing to put more teeth behind its calls for IP protection at the provincial and local levels, there will continue to be an epidemic of counterfeit production in China.

As noted, many U.S. companies in China expressed the view that China does not yet have enough stake in the IPR system. As a greater number of Chinese brands achieve domestic and international recognition, legitimate Chinese producers will want protection and the government will have incentive to do more. This is also a key element in China's desire to encourage "indigenous innovation." The State Intellectual Property Office (SIPO) of China recognizes that enforcement of IP will be essential to reach the current goal of reducing China's dependency on foreign technology to below 30 percent from its current level of over 50 percent<sup>1</sup>,

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<sup>1</sup> Liu Jian, division director of the International Cooperation Department of SIPO in China.

The NAM understands that China's National IP Strategy is slated for publication within the next few months. It is hoped that this will produce greater awareness throughout the country and succeed in its goal of coordinating IP initiatives and enforcement among the various government departments with responsibility for IP protection.

US companies operating in China have been resourceful in developing strategies to at least limit the damage done by counterfeiters. But it is a continuous struggle, and this option is only available to larger companies with the resources to pursue such strategies. The burden falls especially heavily on the many small and medium-sized companies that simply do not have the resources to combat the theft of their IP.

The NAM supports the Administration's extensive engagement with China on IPR protection and enforcement. USTR's filing of a dispute settlement case in the WTO against China is a good example of using available remedies when engagement fails to produce the necessary compliance with obligations. It is regrettable that the Chinese government has chosen to pull back on cooperation on IP issues as a result of the dispute settlement case. This is very disappointing and we support USTR's efforts to make the Chinese government aware that WTO cases are the way mature trading partners resolve disputes, but this should not prevent further engagement through other channels.

### **Recommendations**

Going forward, every effort at negotiation, consultation and capacity building should be continued. Given the current state of IP enforcement in China, however, the NAM believes that China should remain on the Priority Watch List and, if circumstances warrant it, other WTO cases should be developed to bring China's enforcement into line with its commitments. Every effort should be made to multilateralize cases as this problem is not unique to U.S. companies.

The information provided to industry in USTR's 2007 IPR Provincial Review of China is very helpful. The NAM commends USTR and the various trade agencies that contributed to it. It can also act as incentive to provinces to maintain high standards for IP enforcement to attract foreign investment. The NAM encourages USTR to update this review as resources permit.

The NAM also applauds the Administration for the recent announcements by the United States, Japan, and the European Union of negotiations for a new multilateral Anti-Counterfeiting Trade Agreement (ACTA) to fight against counterfeiting and piracy. Raising the bar on intellectual property protection globally is a laudable goal for the future development of new technologies and products.

Respectfully submitted,  
Patricia Mears  
National Association of Manufacturers