

Remarks by U.S. Trade Representative Susan C. Schwab

Announcement of Requests for Consultations with China on IPR and on Certain Market Access Issues for Copyright Intensive Industries

April 9, 2007

Good afternoon and thank you all for coming.

Every year, intellectual property rights violations cost businesses and their employees billions of dollars and deceive hundreds of millions of consumers around the world. This is more than a handbag here or logo item there; it is often theft on a grand scale. It is not fair and we must thwart the pirates and counterfeiters who are responsible.

Today, I am announcing that the United States is taking two important new steps in our wide-ranging efforts to crack down on the intellectual property violators in China who are doing so much damage today.

First, we are requesting formal WTO consultations over China's inadequate protection of copyrights and trademarks – these key intellectual property rights are critical to products, brands and technologies in businesses large and small, ranging from machine tools to consumer goods.

Second, we are asking for separate WTO consultations over serious Chinese market barriers to products that are prime targets for pirates -- movies, home entertainment DVDs, music and publications. Impeding trade in legitimate versions of these products exacerbates the problems we face with the pirates in China's marketplace. We need to open China's markets to legitimate commerce and eradicate this IPR theft and profiteering.

We have been working with Chinese officials for years to address our concerns about IPR and market access issues. We recognize that China's leadership has made the protection of intellectual property rights a priority and has taken active steps to improve IPR protection and enforcement. China has made some important progress in enacting new laws and in stepping up actions such as raids on factories and stores producing and selling pirated and counterfeit goods. In fact, China took another step in the right direction just last week in recognizing that its quantity thresholds for allowing criminal prosecutions are too high and in issuing a Judicial Interpretation that seems designed to tighten up a loophole in China's laws. We have been talking to China about both of these problems for a long time.

We now also have in place – through our Strategic Economic Dialogue – a forum to pursue together some of the longer term, underlying strategic issues associated with the promotion and protection of innovation in both countries. We hope to continue working with China on major improvements in IPR protection through the SED and the Joint Commission on Commerce and Trade.

Right now, however, we see specific, significant WTO related problems that bilateral dialogue has not been able to resolve: current Chinese laws impede effective attacks on piracy and counterfeiting, and legitimate audiovisual products and publications continue to face serious problems with market access. We hope the initiation of these two WTO actions will, first, encourage changes to laws and other measures that have stood in the way of effective protection of IPR in China for a wide range of products, and, second, tear down the legal barriers that keep legitimate copyrighted products from competing effectively in the Chinese marketplace.

We of course remain open at any time to the possibility of a comprehensive settlement of these cases that addresses our longstanding concerns about China's market access barriers and IPR enforcement.

The U.S. request for consultations on IPR protection rests on three basic points.

One, thresholds. At the back of the room, you see 500 DVDs and CDs. If Chinese authorities raided a business and found that many pirated products, they could send people to jail. If I took just one DVD off the pile back there, leaving 499 still there, and there was a raid, the most Chinese authorities could do would be to seize the goods and impose an administrative fine. The proprietor could resume business within a short period of time, without fear of criminal prosecution.

Why? Under current Chinese law, the lowest threshold – that is, the lowest amount of piracy that can potentially lead to criminal prosecution – is five hundred infringing works. Now, I need to give China credit here. Just a week ago the threshold was 1,000, but we understand China's Supreme People's Court has just dropped the threshold to 500. That is clearly a step in the right direction, but it does not go far enough to solve the fundamental problem. The pirates know the threshold is 500, just as they knew the threshold used to be 1000. It is not surprising, therefore, when police in China raid a business suspected of distributing infringing works, the pirates always work to ensure that the raid nets a haul that comes in just below the thresholds.

In other words, the thresholds create a safe harbor for the pirates, and the pirates are only too willing to take shelter there. The thresholds also block legitimate, good faith efforts by China's police and prosecutors to take real, tough action against pirates and counterfeiters, leaving the vast bulk of enforcement in the hands of the administrative bureaucracy. Those administrative officials typically hand out penalties, such as small fines, that have as little deterrent effect as a parking ticket. This approach is clearly not working. The key to improvement is to open the door wide to criminal enforcement, with its real deterrent impact.

Two, enforcement at the border. Under WTO rules, when customs authorities catch someone trying to bring counterfeit goods into a country, they can't just remove the label or other infringing mark and then release the goods into the channels of commerce. But the rule in China appears to be just the opposite. If Chinese customs authorities seize fake spark plugs, for example, typically all they have to do is remove the infringing logos, and the spark plugs are then sold to the highest bidder, regardless of the confusion in the market, consumer risk, or other harm to legitimate rights holders that may result. That is fundamentally unfair and it appears to be contrary to WTO rules.

Three, the fact that China's copyright law denies copyright protection to works while they are waiting for censorship approval. In China, before censorship approval is granted, the copyright law gives no right to complain about copyright infringement. Pirates, of course, don't wait for approval – they just put the fake copies on the street. In other words, a major IPR enforcement tool goes missing just as a newly released product is rolling out in the global marketplace. This creates a hot market for pirates in China and leaving only the leftovers for the legitimate property rights owner.

In addition to these three problems, an additional problem may exist -- a hole in China's criminal law that may only allow prosecution for unauthorized reproduction of a copyrighted work if it is accompanied by unauthorized distribution. That means, for example, someone could potentially make any number of fake DVDs but

not be subject to criminal prosecution unless he is caught distributing them. Now, as I mentioned, we understand that China may just have corrected this problem with a judicial interpretation announced last week. That would be very good news, since we have been talking to China about this concern for some time. We will look forward to hearing from China on this issue during consultations.

The U.S. request for consultations on the market access barriers facing our film, music and publishing industries focuses on two additional problems that give the IPR pirates, rather than legitimate products, preferred access to Chinese consumers.

One, trading rights: When China joined the WTO, it promised to eliminate the monopoly enjoyed by its state-run import companies, which were the only entities allowed to import goods into China. While China did dismantle these monopolies for most imports, to this day, only specially authorized state-owned companies are permitted to import movies, DVDs, music, books, journals, and other publications. That means our exporters can't shop around for the best way to get their products into China. Instead, state-run import companies can impose high costs and build in delays that give IPR pirates and counterfeiters a leg up in the marketplace, all to the detriment of our exporters and China's consumers.

Two, distribution barriers: China's WTO commitments included promises under the General Agreement on Trade in Services to dismantle barriers to distribution of both publications and home entertainment video products, so that U.S. companies could operate in an efficient and open market, as they do in most of the rest of the world. However, China's laws still flatly prohibit some distribution activities, curtail other rights, and discriminate against foreign companies. Trying to compete, or to protect your intellectual property rights under these conditions, is an uphill struggle.

Protection of intellectual property rights is a vital responsibility in modern commerce. All countries must take protection of these rights seriously.

Anyone who has ever rented a movie in the United States knows the first thing you see is an FBI anti-piracy warning. It leaves little room for interpretation.

Certainly, music and films are the most high-profile examples of the IPR theft that has become too common in China. But these cases are not only about protecting the rights of musicians and movie makers. They are a broader statement about the value placed on the labor of individuals when they create, design and build, and about their right to benefit from their hard work. This is as true for world class cellists like Yo-Yo Ma as for assembly line workers in Ohio making machine components.

Counterfeiting and piracy affect our daily lives – from the safety of food, pharmaceutical products and auto parts, to the quality of personal care items like shampoo and cosmetics, or accessories like watches and handbags.

WTO commitments to open markets also have an important impact on us. When companies have confidence their rights are protected, and they can compete on a level playing field, they will invest in creative, lower cost, higher quality, innovative products and services that enhance our world.

As serious as the problems I have described in China are, I want to underscore that the WTO actions I am announcing today should not be viewed as hostile actions against China. The United States and China have discussed these issues at length, and we see formal dispute settlement as the normal way for mature trading partners

– and Members of the WTO – to compartmentalize differences and take advantage of neutral arbiters to settle disputes after they have tried other, less formal options. We will continue to move forward in our important dialogues with China on the full range of trade matters on which we are working, from IPR to trade in environmental goods to a successful outcome in the Doha Round. We also remain open to any comprehensive settlement China may offer on these particular cases. This approach is fully consistent with the strategy outlined in our February 2006 Top to Bottom Review of U.S. - China trade relations.

The United States believes we have a strong case on IPR protection and a strong case on the market access problems facing our audiovisual and publications industries, and we will vigorously pursue our rights as a WTO Member.

I want to end by making it very clear that it is in every country's self interest to protect intellectual property rights. China has an obvious and growing interest in stopping piracy and counterfeiting as China itself becomes an innovator. Several key Chinese leaders have made strong and convincing comments to this effect and have noted China's own plan to address such interests over time. It is likewise in every WTO Member's interest to live up to its WTO commitments, whether on intellectual property rights, market access or other disciplines. For the rules-based trading system to flourish, consumers, farmers, manufacturers, artists and inventors in the United States and all trading nations must have confidence that the rules are fair and applied evenly.

I am confident the steps we are taking today will help move us forward in the fight against intellectual property theft and will help to strengthen the rules-based trading system. They will also contribute to the health and sustainability of our bilateral economic relationship with China. Thank you.