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WORLD TRADE ORGANIZATION ADOPTS PANEL REPORT IN *CHINA – INTELLECTUAL PROPERTY RIGHTS DISPUTE*

WASHINGTON, D.C. – In one of his first announcements, U.S. Trade Representative Ron Kirk announced today the World Trade Organization (WTO) formally ruled that several aspects of China’s legal regime for protecting and enforcing intellectual property rights are inconsistent with China’s obligations under the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement). The United States brought this dispute against China because of concerns that Chinese law does not adequately provide for the protection and enforcement of copyrights and trademarks on a wide range of products.

“Today, the membership of the WTO agreed that China must bring its intellectual property rights enforcement regime into conformity with its WTO obligations,” Ambassador Kirk said. “As this dispute demonstrates, the United States will not hesitate to use all appropriate tools at our disposal to ensure that our industries, authors and artists are protected – and that our trading partners observe their WTO commitments.”

Ambassador Kirk added, “China has consistently repeated its intentions to abide by WTO rules. In that spirit, I look forward to China’s prompt compliance with the WTO’s rulings in this dispute as a positive step toward addressing the continuing challenges of counterfeiting and piracy in China. We also look forward to continuing bilateral discussions with China on these and other important IPR matters. A great deal of work remains for China to improve its IPR protection and enforcement regime. The United States stands ready to assist constructively in those efforts.”

BACKGROUND

The United States initiated this WTO dispute in April 2007, after bilateral discussions spanning several years failed to resolve U.S. concerns. A panel was established to examine the matter in September 2007. The panel circulated its report on January 26, 2009.

In this dispute, the United States sought to eliminate three significant structural barriers in China’s IPR enforcement laws. The WTO agreed with the United States on two of these, but found there was not enough evidence concerning the third.

First, the WTO ruled that the Chinese Copyright Law does not protect copyrighted works that do not meet China's "content review" standards. This blanket denial of protection deprives certain copyright owners of vital enforcement tools to prevent unauthorized copies from being produced in China and distributed there or exported to other markets. This denial of protection is inconsistent with TRIPS Agreement rules requiring copyright protection to be afforded to these works and enforcement procedures to be available to permit effective action against their infringement.

Second, China's rules for disposing of IPR-infringing goods seized at the border provide for counterfeit goods to be auctioned subject only to the condition that the infringing trademark be removed. Returning these goods to the marketplace with only the infringing mark removed, however, could confuse consumers and harm the reputation of the legitimate product, facilitating – rather than deterring – further acts of infringement involving these goods. The WTO ruled that China's disposal rules are inconsistent with the TRIPS Agreement, which does not normally permit trademark-infringing imports seized at the border to be released into the channels of commerce after simply removing the infringing trademark.

Third, China's laws provide for criminal prosecution of counterfeiting and piracy only when the trademark counterfeiting or copyright piracy exceeds specified legal thresholds (expressed in terms of the volume or value of infringing goods, e.g., 500 copies of a pirated DVD or approximately \$7,000 worth of counterfeit goods). The TRIPS Agreement requires criminal penalties and procedures to be available for all "commercial scale" copyright piracy and trademark counterfeiting. The United States pointed out that this provision means China has an obligation to establish standards for prosecution and conviction that capture all commercial-scale activity, and it cannot create thresholds so high as to be divorced from market realities. The United States also argued that China's specific thresholds fall short of these standards. (Immediately before this case was filed, China dropped its criminal copyright threshold from 1000 to 500 infringing copies.)

The WTO largely accepted the U.S. arguments concerning the appropriate construction of TRIPS Agreement provisions concerning WTO Members' criminal enforcement obligations. The WTO agreed with the United States that the term "commercial scale" in one key provision means that China cannot set its thresholds for prosecution of piracy and counterfeiting so high as to ignore the realities of the commercial marketplace. Importantly, the WTO also clarified that whether acts of counterfeiting or piracy are "on a commercial scale" depends on factors such as the product at issue – whether it is a designer watch, DVD, or a software title – and the particular market in which the product is sold. The WTO also made clear that determining what constitutes "commercial scale" must take into account the impact of technological developments. These include the Internet, as well as the evolution of marketing practices that can enable pirates and counterfeiters to flourish with lower costs and in more pervasive ways. However, the WTO found that it would need additional evidence to determine whether China's particular thresholds are set too high under these standards.

In accordance with WTO rules, China has 30 days to announce its intentions with respect to bringing its measures into compliance.

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