

Key Legal Findings and Implications of the US.-China Panel Report

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"Over the past several years China has taken tangible steps to improve IPR protection and enforcement. However, **we still see important gaps that need to be addressed.** We will pursue this legal dispute in the WTO and will continue to work with China bilaterally on other important IPR issues."

— U.S. Trade Representative

"For nearly 30 years and particularly since joining the WTO in 2001, China has spared no efforts to improve its IPR legislation, and now the legislation is in full accordance with WTO rules. . . . By initiating the case, the United States is actually trying to change the WTO legal structure on IPR protection, **with an attempt to impose extra obligations on developing members.**"

— PRC's Mission to the WTO

Parties

Complainant: United States

Respondent: China

Third Parties: Argentina; Australia;
Brazil; Canada; European
Communities; India; Japan; Korea;
Mexico; Chinese Taipei; Thailand;
Turkey

History

10.04.2007 — Request for Consultations

13.08.2007 — Panel Request

25.09.2007 — Panel Established

13.12.2007 — Panel Composed

04/06.2009 — Submissions

09.10.2009 — Interim Report Released

26.01.2009 — Final Report Published

Claims

1. Thresholds for criminal procedures and penalties
2. Disposal of goods confiscated by customs authorities that infringe intellectual property rights
3. Denial of copyright and related rights protection and enforcement to works that have not been authorized for publication or distribution within China

Claim #3: Copyright Law



"**Authors shall enjoy**, in respect of works for which they are protected under this Convention, in countries of the Union other than the country of origin, the rights which their respective laws do now or may hereafter grant to their nationals, as well as the rights specially granted by this Convention."

— Berne Article 5(1)

"The enjoyment and the exercise of these rights **shall not be subject to any formality**; such enjoyment and such exercise shall be independent of the existence of protection in the country of origin of the work. . . ."

— Berne Article 5(2)

China subjects the enjoyment
and exercise of copyright to the
formality of successful
conclusion of content review.

"Members shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit **effective action** against any act of infringement of intellectual property rights covered by this Agreement, including **expeditious remedies** to prevent infringements and remedies which constitute a deterrent to further infringements. . . ."

— TRIPS Article 41

Content Review

- Criminal Law
- Regulation on the Administration of Publishing Industry
- Regulation on the Administration of Broadcasting
- Regulation on the Administration of Audiovisual Products
- Regulation on the Administration of Films
- Regulations on the Administration of Telecommunication

"Works the publication or distribution of which is prohibited by law shall not be protected by this Law. Copyright owners, in exercising their copyright, shall not violate the Constitution or laws or prejudice the public interests."

— Article 4 of the PRC Copyright Law

"Works the publication and/or dissemination of which is prohibited by law shall not be protected by this Law. Copyright owners, in exercising their copyright, shall not violate the Constitution or laws or prejudice the public interests."

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Article 4(1) of the Copyright Law
is extremely limited in scope.

Like other countries, China bans
from publication and
dissemination works that consist
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immoral content.**

Like other countries, China bans
from publication and
dissemination works that consist
entirely of **unconstitutional,**
immoral, reactionary,
pornographic, or superstitious
content.

A denial of authority to publish is
different from a denial of
copyright.

There is a distinction between
"copyright" and "copyright
protection."

Article 4(1) does not remove
copyright, but denies the
particularized rights of private
copyright enforcement.

With respect to a work edited to pass content review, it would protect copyright in the edited version of the work.

However, it would not enforce
copyright against unedited,
prohibited copies of an unedited,
prohibited work that failed
content review.

All rights granted to authors under the Berne Convention are limited by Article 17 of that Convention.

"The provisions of this Convention cannot in any way affect the right of the Government of each country of the Union to permit, **to control, or to prohibit**, by legislation or regulation, the circulation, presentation, or exhibition of any work or production in regard to which the competent authority may find it necessary to exercise that right."

— Berne Article 17

Article 17 codifies the sovereign
right to censor, but is not an
exhaustive codification of such a
right.

Public prohibition preempts
economic rights.

Article 17 is drafted using very expansive language that effectively denies WTO jurisdiction in this area.

Reason: Such protection therefore is a "legal and material nullity," and copyright enforcement is meaningless in this context.

Public censorship renders private enforcement unnecessary, and China enforces content prohibitions seriously.

Outcome: The banned content will be removed from the public more securely than would be possible through copyright enforcement.

If an unprotected, prohibited work **later becomes legal**, it will protect copyright in the work **going forward**.

An entire ban on publication of a work is a form of "effective action" under TRIPS Article 41 and that "it is in a sense an alternative form of enforcement against infringement".

In addition, authors **have**
"access" to enforcement process
irrespective of whether they
have adequate evidence or a
valid right to enforce.



Members can prohibit the publication and distribution of work, but cannot deny copyright protection to them.

Copyright and government
censorship address different
rights and interests. Copyright
protects private rights, whilst
government censorship
addresses public interests.

Censorship will not eliminate
those rights entirely with respect
to a particular work.

China is unable to explain why
censorship interferes with
copyright owners' rights to
prevent third parties from
exploiting prohibited works.

China **failed to substantiate** its assertion that public censorship renders private enforcement unnecessary, **even if such assertions were relevant.**

The panel **rejected** China's suggested **distinction** between "copyright" and "copyright protection."

Reason: China has not explained how authors would be able to assert ownership of, license, or transfer copyright in their works.

... [Copyright under this scenario] would seem to be no more than **a phantom right.**

The enforcement procedures under TRIPS Article 41 are "far more extensive" than mere access to enforcement process.

Where a Member chooses to make available **other procedures** . . . that policy choice **does not diminish** the Member's obligation under Article 41.1 of the TRIPS Agreement.

Judicial Economy

Because the panel has already ruled on the claim under Article 5(1) of the Berne Convention, it is **unnecessary** for the Panel to rule on the claim under **Article 5(2) of the Berne Convention.**

Because the panel has already ruled on the claim under Article 5(1) of the Berne Convention, it is **unnecessary** for the Panel to rule on the claim under **Article 61 of the TRIPS Agreement**.

Caveats

The panel confirms that its conclusion does not apply to [1] works **never submitted** for or [2] **awaiting the results** of content review in China and [3] the **unedited versions** of works for which an edited version has been approved for distribution in China.

However, the Panel recognizes that the **potential denial** of copyright protection, in the absence of a determination by the content review authorities, **implies uncertainty.**

Additional Claims

TRIPS Article 14

The Panel observes that **at no point** has the United States actually asserted a claim under Article 14 of the TRIPS Agreement, which concerns performances and phonograms or sound recordings.

The Panel's findings concerning the claim under Article 5(1) of the Berne Convention **would appear to dispose of** the United States' underlying concern as regards Article 14 of the TRIPS Agreement.

National Treatment Claims

The Panel takes note that the United States has not pursued any **national treatment claims** in this dispute.

Claim #2: Customs Measures



"Without prejudice to other rights of action open to the right holder and subject to the right of the defendant to seek review by a judicial authority, competent authorities shall have the authority to order the destruction or disposal of infringing goods in accordance with the principles set out in Article 46. . . ."

— TRIPS Article 59

"Without prejudice to other rights of action open to the right holder and subject to the right of the defendant to seek review by a judicial authority, competent authorities shall have the authority to order the **destruction or disposal** of infringing goods in accordance with the principles set out in Article 46. . . ."

— TRIPS Article 59

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— TRIPS Article 59

"Without prejudice to other rights of action open to the right holder and subject to the right of the defendant to seek review by a judicial authority, competent authorities shall have the authority to order the destruction or disposal of infringing goods in accordance with the principles set out in Article 46. . . ."

— TRIPS Article 59

"In order to create an **effective deterrent to infringement**, the judicial authorities shall have the authority to order that goods that they have found to be infringing be, without compensation of any sort, disposed of outside the channels of commerce in such a manner as to avoid any harm caused to the right holder, or, unless this would be contrary to existing constitutional requirements, destroyed. . . ."

— TRIPS Article 46

"In order to create an effective deterrent to infringement, the judicial authorities shall have the authority to order that goods that they have found to be infringing be, without compensation of any sort, **disposed of outside the channels of commerce** in such a manner as to avoid any harm caused to the right holder, or, unless this would be contrary to existing constitutional requirements, destroyed. . . ."

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— TRIPS Article 46

". . . In considering such requests, the need for **proportionality between the seriousness of the infringement and the remedies ordered** as well as the interests of third parties shall be taken into account. In regard to counterfeit trademark goods, the simple removal of the trademark unlawfully affixed shall not be sufficient, other than in exceptional cases, to permit release of the goods into the channels of commerce."

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— TRIPS Article 46

"... In regard to counterfeit trademark goods, the authorities shall not allow the **re-exportation of the infringing goods in an unaltered state** or subject them to a different customs procedure, other than in exceptional circumstances."

— TRIPS Article 59

1. Regulations on Customs Protection of Intellectual Property Rights
2. Measures for the Implementation of the Customs IPR Regulations
3. Public Notice No. 16/2007 as notified by the General Administration of Customs

Customs IPR Regulations:

"Where the confiscated goods which infringe on intellectual property rights can be used for the social public welfare undertakings, Customs shall hand such goods over to relevant public welfare bodies for the use in social public welfare undertakings. . . .

"... Where the holder of the intellectual property rights intends to buy them, Customs can assign them to the holder of the intellectual property rights with compensation...."

"... Where the confiscated goods infringing on intellectual property rights cannot be used for social public welfare undertakings and the holder of the intellectual property rights has no intention to buy them, Customs can, after eradicating the infringing features, auction them off according to law...."

"... Where the infringing features are impossible to eradicate, **Customs shall destroy the goods.**"

1. Donation to public welfare bodies.
2. Sell to intellectual property rights holders.
3. Auction to the public **after eradicating the infringing features.**
4. Destroy those goods whose infringing features are impossible to eradicate.

Compulsory Sequence

Chinese authorities **lack the scope of authority** to order the destruction or disposal of infringing goods.

Where any of these three options is available, the authorities are not authorized to order destruction of the infringing goods.

The authorities should have the
power to choose among any
legitimate options for dealing
with these goods **from the
outset.**



Donation to social welfare bodies
and sale to the right holder
constitute disposal outside the
channels of commerce in such a
way as to avoid harm to the right
holder.

Article 59 must be read in conjunction with Article 1.1 of the TRIPS Agreement.

"... Members shall be free to determine the appropriate method of implementing the provisions of this Agreement within their own legal system and practice."

— TRIPS Article 1

Chinese law sets forth criteria that reflect an **official preference** for the use of **disposition methods** besides destruction.

Customs has the discretion to determine whether the criteria are met and therefore which disposition method is appropriate

China Customs chose to destroy
58 per cent of the total value of
infringing goods between 2005
and 2007.

The statistics prove that the putative **hierarchy** of disposition options **does not hinder Customs' ability** to order *destruction* of infringing goods.

TRIPS Article 59 does not mean that domestic agencies must have the **absolute power to order destruction** of infringing goods in any circumstance whatsoever.

China Customs fulfil its obligation
by removing **all** infringing
features, **not just the**
trademarks, and **solicit**
comments from the right
holders.

With respect to donations,
Customs has a duty to carry out
necessary supervision of such
use (Customs–Red Cross
Memorandum).

Customs **uses a reserve price** at auction to ensure that infringers do not have the opportunity to purchase the seized goods at **an unreasonably low cost** and reaffix counterfeit marks.

The word "release" in Article 46
("permit release of the goods
into the channels of commerce")
envisions a return to the
infringer.

The word "**sufficient**" in Article 46 ("sufficient, other than in exceptional cases,") indicates that release of goods into the channels of commerce is **permitted, and not only in exceptional cases.**

China's use of auction is
"exceptional" as it constitutes a
mere 2 per cent of disposition
outcomes.



Article 51 suggests that there is no obligation to apply the requirements of Article 59 to goods **destined for exportation.**

China's border measures provide a level of protection **higher than the minimum standard** required by the TRIPS Agreement.

The phrase "shall have the authority" **does not require** WTO Members to take **any action in the absence of an application or request.**

The protection granted is
generally the responsibility of
private right holders.

The United States has not established that the Customs measures on their face oblige Customs to order the auction of infringing goods.

The fact that there appear to be circumstances in which Customs **departs from the terms** of the measures indicates that the measures are **not "as mandatory"** as they appear on their face.

There appear to be no circumstances in which **donations** to public welfare organizations or **sale** to the right holder could **preclude any authority** required by Article 59.

The United States **has not established** that the authority to order **auction of infringing goods precludes authority** to order destruction of infringing goods.

Why did China Lose?

"In regard to counterfeit trademark goods, the simple removal of the trademark unlawfully affixed shall not be sufficient, other than in exceptional cases, to permit release of the goods into the channels of commerce."

— TRIPS Article 46

Eradication of the infringing
features under the China
Customs measures constitutes
"simple" removal of the
trademark.

There is no evidence that the prices established by the method used by China Customs are **so high that it is no longer economically viable** to purchase the goods and reaffix the trademarks.

The phrase "other than in exceptional cases" must be interpreted in light of the objective of that Article, namely, "to create an effective deterrent to infringement".

There **may well be exceptional cases** (e.g., an innocent importer who has been deceived into buying a shipment of counterfeit goods).

However, such cases must be narrowly circumscribed in order to satisfy the description of "exceptional".

Claim #1: Criminal Thresholds



"Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful trademark counterfeiting or copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. . . ."

— TRIPS Article 61

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— TRIPS Article 61

"Members shall provide for criminal procedures and penalties to be applied at least in cases of wilful **trademark counterfeiting or copyright piracy** on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity. . . ."

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"... Members **may** provide for criminal procedures and penalties to be applied in **other cases of infringement** of intellectual property rights, in particular where they are committed wilfully and on a commercial scale."

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"Whoever, without permission from the owner of a registered trademark, uses a trademark which is identical with the registered trademark on the same kind of commodities shall, **if the circumstances are serious**, be sentenced to fixed-term imprisonment of not more than three years or criminal detention and shall also, or shall only, be fined; **if the circumstances are especially serious**, the offender shall be sentenced to fixed-term imprisonment of not less than three years but not more than seven years and shall also be fined."

— Article 213 of Chinese Criminal Law

" . . . shall also, or shall only, be fined:

(1) the **illegal business operation volume** of not less than 50,000 Yuan or the amount of **illegal gains** of not less than 30,000 Yuan;

(2) in the case of counterfeiting two or more registered trademarks, the **illegal business operation volume** of not less than 30,000 Yuan or the amount of **illegal gains** of not less than 20,000 Yuan;

(3) other serious circumstances.

— Article 1 of Judicial Interpretation No. 19

"Whoever, for the purpose of making profits, reproduces [/] distributes, without permission of the copyright owner, a written work, musical work, cinematographic work, television or video works, computer software and other works of **not less than 500张 (份)** in total, [the offence] shall be deemed as 'there are other serious circumstances' under Article 217 of the Criminal Law. . . ."

— Article 1 of Judicial Interpretation No. 6

Significant quantities of retail sales of infringing product take place in China at levels below China's thresholds.

The criminal thresholds therefore
create a "safe harbour" for
pirates and counterfeiters.

Although China has additional administrative enforcement, **only criminal procedures and penalties** can fulfil the obligations in Article 61 of the TRIPS Agreement.

The concept of "commercial scale" extends to:

(1) those who engage in commercial activities in order to make a **financial return** in the marketplace, and who are, by definition, therefore operating on a commercial scale; and

(2) those whose actions, regardless of motive or purpose, are **of a sufficient extent or magnitude** to qualify as "commercial scale" in the relevant market.

"... Wilful copyright piracy on a commercial scale includes:

- (i) significant wilful infringements of copyright, that have no direct or indirect motivation of financial gain; and
- (ii) wilful infringements for the purposes of **commercial advantage or financial gain.**"

— US-Australia FTA art. 17.1.26 (a)

"Although downloading and uploading MP3 music files is not paradigmatic commercial activity, it is also not personal use in the traditional sense. . . . [T]he fact that Napster users **get for free something they would ordinarily have to buy** suggests that they reap economic advantages from Napster use. "

— *A&M Records, Inc. v. Napster, Inc.*



China employs thresholds across
a range of commercial crimes.

The thresholds reflect the significance of various illegal acts for overall public and economic order and China's prioritization of criminal enforcement, prosecution and judicial resources.

The criminal thresholds for counterfeiting and piracy are reasonable and appropriate in the context of this legal structure and the other laws on commercial crimes.

The Criminal Law on joint liability, criminal groups and accomplices to show that the Criminal Law recognizes certain non-quantitative factors, such as evidence of collaboration between infringers.

The thresholds are calculated
over a prolonged period of time.

The threshold is **flexible** enough to capture a **small number of high-value goods** or a **large number of low-value goods**.

Its system of administrative enforcement of intellectual property infringement that operates separately from its criminal enforcement system.

Public security authorities tend to focus more on infringement above the criminal thresholds, and copyright and commerce administrative authorities are more likely to target low-scale infringement.

China infringement on **any scale**
is subject to **administrative**
enforcement.

The United States bears a significantly higher burden than it would normally encounter because this claim concerns criminal law matters.

The Panel should treat **sovereign jurisdiction over police powers** as a powerful **default norm**.

Departure from such a norm can
be authorized only in light of
explicit and unequivocal consent
of State parties.

Article 61 contains a number of terms that are not defined by the Agreement and that this can affect the proper interpretation of the provision.

TRIPS Article 41(5) makes clear that none of the enforcement provisions can be read to require Members to set out low-scale, high-resource thresholds for criminalization.

Defining a crime with too low a threshold could unleash a large volume of private enforcement actions and impose a significant burden on the judicial system.



A total of **11 crimes out of 117 crimes** set out in these relevant Parts and this relevant Section of the Criminal Law are not subject to any specific threshold.

China's legal structure is capable
of criminalizing certain acts
without recourse to thresholds.

Part III of the TRIPS Agreement provides for the enforcement of those rights, to varying degrees.

Therefore, the Agreement
contains **substantive obligations**
that are **not simply matters of**
national discretion.

The term "commerce" may be defined as "buying and selling; the exchange of merchandise or services, esp. on a large scale."

Scale is a quantitative concept
whilst commercial is qualitative.

If "commercial" is **simply read as a qualitative term**, referring to all acts pertaining to, or bearing on commerce, this would **read the word "scale" out of the text**. Acts on a commercial scale would simply be commercial acts.

The word "scale" was a deliberate choice and must be given due interpretative weight.

"Scale" denotes a relative size,
and the negotiators intended
that the limitation on the
obligation depended on the **size**
of acts of counterfeiting and
piracy.

The panel rejected the United States' interpretation that everything is "commercial" with the exception of some trivial or *de minimis* activities.

The **negotiators could have** used words such as "except for minor or personal use" (as suggested by Article 60), **but they did not.**

Based solely on the measures on their face, the Panel cannot distinguish between acts that, in China's marketplace, are on a commercial scale, and those that are not.

The United States **did not**
provide data regarding products
and markets or other factors that
would demonstrate what
constituted "a commercial scale"
in the specific situation of
China's marketplace.

The Panel **does not ascribe any weight to the evidence in the press articles** and finds the information inadequate to demonstrate what is typical or usual in China for the purposes of the relevant treaty obligation, even if it considered them.

There may be helpful information in the exhibits, but it would not be appropriate for the Panel to **trawl them for evidence** to which the United States **did not refer to make the United States' case for it.**

Caveat

The Panel did not indicate any view as to whether TRIPS Article 61 applies to acts of counterfeiting and piracy committed **without any purpose of financial gain.**

Outcome and Reactions



"These findings are **an important victory**, because they confirm the importance of IPR protection and enforcement, and clarify key enforcement provisions of the TRIPS Agreement. . . . Having achieved this significant legal ruling, we will engage vigorously with China on appropriate corrective actions to ensure that US rights holders obtain the benefits of this decision."

— Acting USTR Peter Allgeier



Chinese commerce ministry spokesperson Yao Jian "welcomed" the verdict on criminal thresholds, reports Xinhua, the state news agency. Yao expressed "regret" about the unfavourable aspects of the ruling, and said that the government was "making a further assessment of the Dispute Settlement Body panel report."

— as reported by *Bridges*

Potential Benefits



Provide Detailed Description of
the Content Review Process
on Record

Provide Understanding of China's Legal Reasoning

Provide Momentum for Future
WTO Challenges in the IP Area

Send a Loud and Clear Message
to China About Its Willingness to
Use the WTO Process

Backfire on Other U.S. Policies

Copyright Pretext for Censorship

Discretion-induced Local Protectionism

Blindness to Human Rights
Problems in Correction
Institutions in China



Provide Certainty and Clarity Over China's WTO Obligations

Generate Momentum for WTO- based Reforms

Develop WTO know-how and
Learn the WTO Game (and
Become a Stronger Player)

Reshape International IP Laws "in
the shadow" of the WTO Rules

Developing Countries

Rejection of the use of FTAs to interpret TRIPS Article 61

Emphasis on Minimum Standards and Limitations on Obligations

Willingness to Look to Conditions
of the Local Marketplace to
Determine "Commercial Scale"

Insistence on Substantive Evidence, as Compared to Allegations in Press Articles

Second WTO Dispute Involving a Developing Country

Hope for the WTO Dispute Settlement Process

The Future

Non-violation Complaints

As applied Challenge on Enforcement Issues

Inter-relationship Between Related WTO Disputes

China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights (DS 362)

China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (DS 363)

The Role of the Third Parties

Argentina; Australia; Brazil;
Canada; European Communities;
India; Japan; Korea; Mexico;
Chinese Taipei; Thailand; Turkey

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