

Outcome of the Second EU-CHINA IP Working Group and Visit of Commissioner Mandelson to China

Week of 5 June 2006

The second session of the EU-China IP Working Group took place on 6 June 2006 in Beijing. As the first meeting in October 2005, it was co-chaired by Mrs Li Ling (Inspector, Chinese Ministry of Commerce) and Mr Luc Devigne (Head of Unit, External Trade, European Commission). It involved all agencies and Ministries concerned by the points on the agenda. This second Working Group was immediately followed by Commissioner Mandelson's visit to China, during which IP was high on the agenda.

Some positive developments happened at the Working Group and during Commissioner Mandelson's. Most of them will however require follow-up action:

1. **Fake markets (trade mark issue) – Progress made on 7 June at the “IP event” concluded with Commissioner Mandelson's closing speech and signature of a Memorandum of Understanding on the protection of certain trade marks in market places, between landlords of fake markets and foreign trade mark owners:**

The major positive sign on this issue of “fake markets” comes from the “private enforcement mechanism” envisaged by trade mark holders to follow-up on Beijing Court decisions of 19 April 2006 holding Silk Market's landlord liable for counterfeit activities taking place at his premises. This very important decision opened the way for more legal cases being taken against “facilitators” – not direct infringers of IP rights, but indirect infringers, providing the means for infringement.

The mechanism envisaged is a co-operation between trade mark owners and major market landlords (in particular Silk Market, Hongqiao and 3.3 Sanlitun, 3 of Beijing's biggest fake markets).

This cooperation takes the form of a [Memorandum of Understanding \(MoU\) signed on 7 June 2006](#) and [sponsored by both Commissioner Mandelson](#) and Vice-Minister of Commerce Madame Ma (this event received broad press coverage, both in the EU and in China), in which landlords commit to insert clauses in their lease contracts with vendors, providing that when first caught with counterfeit goods, the vendor will be suspended from the market for a definite period of time and then excluded from the market if caught a second time.

This mechanism relies on market landlords' goodwill to implement it and the Commission will continue supporting this initiative and monitor closely the implementation of this agreement on the spot. The Commission in particular seeks support for the implementation of this Memorandum of Understanding from Beijing authorities.

2. **Payment of broadcasting rights to copyright holders (copyright issue) – Progress made at the EU-China IP Working Group on 6 June 2006:**

Currently, in conformity with international rules, the Chinese legislation (copyright law of 2001) provides that copyright owners shall be remunerated for broadcasting of their works. However, no tariff rates were adopted by the State Council to implement

this rule. Therefore Chinese broadcasters such as CCTV do not pay royalties at all when they broadcast works protected by copyright, among which European works. This issue had been raised several times by the EU side over the last EU-China meetings on IP.

At the IP Working Group of 6 June, the Chinese side indicated that a text will be adopted to fix tariff rates and thus allow payment of their rights to copyright owners for the broadcasting of their works. This draft text should be submitted to the State Council by the end of 2006 but difficulties remain with Chinese broadcasters.

3. Adoption of a “supplementary protection” beyond patent life for pharmaceutical products – Progress made at the EU-China IP Working Group on 6 June 2006:

Following the 1st EU-China IP Working Group on 18 October 2005 and technical assistance provided by the EU in this field, China said it was now seriously considering to extend protection of a pharmaceutical inventions beyond patent life, in the form of a patent restoration term or supplementary protection mechanism as exists in Europe or in the US.

Such a supplementary protection aims at compensating drug innovators for the time spent, during patent life, on development of the product and marketing authorization processes, which result in the product being available on the market only several years after the patent is applied for.

4. Complaint Centers for IP infringements – Progress made on 7 June at the Meeting between PM and Minister of Commerce Bo Xilai:

As announced in the Chinese National Action Plan of February 2006, Minister of Commerce Bo indicated to Commissioner Mandelson that 50 complaint centers for IP enforcement problems would be set up throughout China, opened to IP right holders' complaints.

This mechanism remains to be defined (in particular as far as follow-up to complaints is concerned) but the EU agreed to provide the Ministry of Commerce with its assistance in this respect, in particular through the input of the EU Chamber of Commerce in China (EUCCC).

5. Trade Fair Regulation's implementation:

Despite the adoption by China of Regulations on IP infringements at Trade Fairs in December 2005 – that took effect on 1st March 2006 – the EU side stressed that the situation of intellectual property at these Fairs in China remains worrying.

The Chinese Ministry of Commerce indicated that it had launched a special campaign in order to train officials on the proper implementation of this Regulation (“Blue Sky” campaign). The EU Commission will follow-up on this issue to monitor progress made.

6. Offering for sale of design patents:

Among the difficulties that EU companies have to face on the ground in contexts such as Trade Fairs, one is related to the extent of rights conferred by design patents. The lack of legal means to stop the offering for sale of products infringing design patents makes it impossible for design holders to stop booths from displaying their production of fakes on catalogues – instead of directly selling the product during the Fair.

This would require a change in legislation, that the Chinese indicated could take place in the context of the ongoing 3d Revision of Patent Law. This will also have to be monitored closely.

The main pending “priority issue” that remains without an answer at this stage are “technology related” matters and problems related to criminal sanction of IP infringements:

1. Technology related matters:

Several issues related to the use of technologies in China are still pending:

- the lack of payment of royalties for the use of European technologies in sectors where Europe is highly innovative and competitive is worrying. The Commission is seeking support from the Chinese authorities in the form of a positive statement made in common that all companies should play by the rules of IP and accept negotiating the price for using others' technologies. However, no agreement on such declaration or explicit support to fair market rules in the context of technology exploitation was found so far and the EU Commission will therefore go on requesting it;
- the above mentioned issue is also linked with various threats to use compulsory licensing of patents in a growing number of situations, using competition or the setting up of standards arguments;
- problems related to transfers of technology, including forced disclosure of confidential in diverse contractual processes or mechanisms of certification / authorization, remain.

As this issue is among the most pressing and important ones for the EU, it was high on the agenda of the [EU-China 9th Summit in Helsinki on 9 September 2006](#), which closed down with a [Joint Statement](#) in which IP plays a key role. In this Statement, both sides (EU and China) made it very clear, in particular, that IP protection is crucial to boost technology and that its exploitation shall be based on contractual freedom, meaning that in most cases it has to be decided between private parties at stake.

Paragraph 26 of this Joint Statement reads as follows:

"Leaders reiterated the importance of protecting intellectual property rights (IPR). In particular, both sides agreed on the need for appropriate deterrence against piracy and to the effective enforcement of IPR legislation. Both sides expressed their satisfaction over the communication and cooperation of the past year under the EU-China IPR Dialogue and the IPR working group and stood ready to further the exchanges and cooperation in this field. Both sides also reiterated that they would strengthen the cooperation and exchanges in the field of geographical indications.

The two sides recognised the importance of technology for their economic development and expressed the willingness to strengthen exchanges and co-operation on IPR protection in this area and support the contractual freedom between enterprises in the field of technology transfers under the condition of fairness, reason and non-discrimination."

2. Review of Judicial Interpretation of December 2004 on several points related to the thresholds to be met for criminal prosecution of IP infringements:

Despite the adoption of Judicial Interpretations on Criminal sanction of counterfeiting and piracy by the Chinese Supreme People's Court and Supreme People's Procuratorate in December, criminal prosecution and penalties are too scarcely used by the Chinese authorities against counterfeiting and piracy. IP Right holders still complain about the high level of thresholds that makes it too difficult to put a case before criminal courts.

The fact that these activities entail almost no risk to be caught, fined and/or jailed makes it a highly profitable one.

Unfortunately, no reply was provided by the Chinese side at the Working Group on previous EU Commission suggestions to improve this mechanism of thresholds. Therefore it seems that the Chinese side has no intention to change this system. This problem remains an important one for the Commission.

3. Other IP enforcement issues:

Other reasons for lack of deterrence, also discussed at the Working Group and not solved so far, range from the complexity of the "dual track" for IP enforcement – administrative / judicial, the difficulties of civil procedure, the lack of staff to enforce IP on the ground and lack of technical knowledge of these staffs, local protectionism, bad or restrictive implementation of existing text – including recently adopted "Fair Trade Regulations", etc.).

The EU Commission will continue to monitor closely progress made on the issues raised with the Chinese side, as well as the legislative evolutions and development of concrete actions to improve IP protection and the fight against IP infringements. It will follow-up on all the points made on IP and cases raised with the Chinese side so far, in particular in the context of the two first IP Working Groups and the IP Dialogue. It will also actively participate in the debate related to the third Revision of Patent Law, with a particular attention to measures that would tend to restrict the rights conferred by patents and commitments taken by the Chinese side at previous occasions.