TESTIMONY OF MARK A. COHEN

BEFORE THE US ECONOMIC AND SEECURITY REVIEW COMMISSION

HEARING ON "RULE OF LAW: CHINA'S INCREASINGLY GLOBAL REACH"

PANEL III: "THE CCP AND FOREIGN LEGAL SYSTEMS"

ON CROSS-BORDER INTELLECTUAL PROPERTY LITIGATION

MAY 4, 2023

Members of the Commission, it is an honor and a privilege to appear before you again on the important topic of China's Global Legal Reach. This is indeed the season of hearings on China, and I have been especially privileged to have been afforded an opportunity to address China IP issues before the House Judiciary Committee, Subcommittee on the Courts, Intellectual Property and the Internet, Intellectual Property and Strategic Competition with China: Part I on March 8, 2023, where I spoke on Optimizing US Government Engagement on Chinese IP and Tech Issues[1] and before the Senate Judiciary Committee, Subcommittee on Intellectual Property on Foreign Competitive Threats to American Innovation and Economic Leadership, where I spoke on Engaging and Anticipating China on IP and Innovation on April 18, 2023.[2]

I have had the privilege of appearing before the Commission several times in recent years, including: on April 14, 2022, on "US Responses to China's Changing IP Regime";[3] on June 18, 2018 on "How to Engage on China's IP Regime"; and on January 28, 2015, on "The Foreign Investment Climate in China: Present Challenges and Potential for Reform."[4] I also testified before your sister Commission, the US China Congressional Commission on "Ownership with Chinese characteristics: Private Property Rights and Land Reform in the PRC" on February 3, 2003.[5]

The topic of this hearing is particularly germane to the work that I have done at Berkeley Law. For the past five years, we have conducted a joint program with Tsinghua Law School on

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[1] https://judiciary.house.gov/committee-activity/hearings/subcommittee-courts-intellectual-property-and-internet-intellectual .

[2] https://www.judiciary.senate.gov/committee-activity/hearings/foreign-competitive-threats-to-american-innovation-and-economic-leadership .

[3] https://www.uscc.gov/sites/default/files/2022-04/Mark_Cohen_Testimony.pdf .

[4] Hearing on the Foreign Investment Climate in China: Present Challenges and Potential for Reform" (January 28, 2015), https://www.uscc.gov/sites/default/files/Mark%20Cohen_testimony.pdf. Note all links to web pages in this testimony were viewed during May 2018.

[5] Mark Cohen, "Ownership with Chinese characteristics: Private Property Rights and Land Reform in the PRC" (February 3, 2003), https://www.cecc.gov/sites/chinacommission.house.gov/files/documents/roundtables/2003/CECC%20Roundtable%20Testimony%20-%20Mark%20Cohen%20-%202.3.03.pdf.

transborder IP litigation. The next such program is scheduled for May 22-23 in Beijing. I hope that members of the Commission and its staff can attend this program, as it will be available virtually the evenings of May 21-22 Eastern Standard Time.

A. Background to Cross Border IP Litigation

Cross-border IP litigation affords an important window into how the intellectual property rights of our country are protected in China and how Chinese IP rights are protected in the United States. In the US system, foreign rights have historically been protected fairly and without discrimination. Thoughtful observers have found, *based on available data,*[6] that foreigners are treated fairly in IP-related cases adjudicated in China.[7] Patent win rates for foreigners in China have been documented to show little relationship with local economic influences.[8] Chinese courts are also more likely to grant injunctive relief in a patent dispute than United States courts.[9] Moreover, the courts are also often inclined to render expert, well-reasoned opinions and can decide cases and resolve appeals quickly. Here is a graphic depiction of the conclusions drawn from a range of relatively recent studies, in such areas as business software piracy litigation, trademark litigation and litigation at the Beijing IP Court for 2015:[10]

Table 3: Comparison of win rates for selected foreign software copyright plaintiffs (1st instance, 2010-2019, N= 271)

Company Name	Cases	Wins	Win rate
Rhino Software Company	113	83	73.5%
Alt-N Technologies	67	58	86.6%
Microsoft Corporation	63	63	100.0%

Company Name	Cases	Wins	Win rate
Siemens Product Lifecycle Management Software Inc	12	12	100.0%
Autodesk, Inc	10	10	100.0%
Dassault Systèmes	6	6	100.0%

How Good?

"In 2015 (the most recent year that complete data is available) Plaintiffs in Civil IP infringement cases [at the Beijing IP court] won 72.34% of their cases, while the success rate for foreign plaintiffs was 100% across a total of 63 civil cases, prompting foreign firms to reevaluate their prospects in China's civil IP litigation environment." (Goldberg)

Trademarks

Sources: Bailey and Clark (2020), Goldberg (2017), Xia (2020).

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[6] https://www.iam-media.com/article/chinese-patent-litigation-data-what-it-tells-us-and-what-it-doesnt. In this study that this author conducted with the IP consulting firm Rouse, we estimated that about 50% of the patent case decisions in China are published.

[7] https://chinaipr.com/2020/07/13/an-update-on-data-driven-reports-on-chinas-ip-enforcement-environment/ .

[8] Brian Love, Christine Helmers, and Markus Eberhardt, *Patent Litigation in China: Protecting Rights or the Local Economy?* (2016). Available at: https://digitalcommons.law.scu.edu/facpubs/918 .

[9] https://btlj.org/data/articles2018/vol33/33_2/Bian_Web.pdf.

[10] https://elischolar.library.yale.edu/cgi/viewcontent.cgi?article=1005&context=ceas_student_work .

As I noted in my recent hearings, these analyses are based on available data from a government curated database. We can guess, but do not know for certain, what is in the unpublished cohort of cases. I personally know of several cases where foreigners lost major disputes to Chinese litigations. The curated data, while useful in developing strategies, is not comprehensive.

There is also a compelling body of literature that points to the risks that foreign companies may encounter when they litigate in areas of concern to the local government or national interests. The U.S. International Trade Commission ("ITC") has noted that "some non-Chinese firms reportedly find it more difficult to obtain patents in sectors that the Chinese government considers of strategic importance."[11] As all patents are published, patent prosecution data suffers from fewer selection biases than data drawn from the Chinese courts.[12] Three European scholars, Dr. Gaetan De Rasenfosse, Emilio Raitieri and Ruddi Bekkers, have documented bias in the examination by China's patent office of high value standards essential patents (SEPs) by analyzing several thousand of Chinese and foreign SEP applications and grants. They noted that foreign SEP applications disclosed as such before the entrance into substantive examination phase at the Chinese patent office are significantly less likely to receive a grant than a domestic applicant. In addition, if such foreign-owned applications do receive a grant, the grant decision arrives substantially later and the scope of the grant is significantly reduced from the original application. They came to these findings after controlling for several alternative explanations, including year effects, firm fixed effects, and patent attorney agency fixed effects, etc.[13] Profs. Rasenfosse and Emilio Raiteri have also separately noted bias in targeted industrial sectors in Chinese patent prosecution practices.[14]

The Example of ASIs

Attached to this testimony, I have also included a copy of a forthcoming article that I wrote on China's use of anti-suit injunctions (ASIs) to compel settlements in Chinese courts for licensing of SEPs Because of their close relationship and integration with Chinese industrial policy both SEP patent grants and SEP litigation can provide a useful window into how politics may affect IP protection outcomes in China.

When a court issues an ASI, it seeks to prevent or curtail litigants in a foreign country from pursuing legal remedies in that country through imposition of fines and other sanctions. While China's ASI practice generally paid lip service to notions of comity or minimizing friction with

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[11] USITC Inv. No. 332-514, "China: Intellectual Property Infringement, Indigenous Innovation Policies, and Frameworks for Measuring the Effects on the U.S. Economy" (2010) at p. xviii, https://www.usitc.gov/publications/industry_econ_analysis_332/2010/china_intellectual_property_infringement.htm.

[12] https://chinaipr.com/2016/03/10/patent-litigation-local-protectionism-and-empiricism-data-sources-and-data-critiques/

[13] "Discrimination in the Patent System: Evidence from Standards-Essential patents" (2017), https://www.oecd.org/site/stipatents/IPSDM17_6.4_bekkers-et-al.pdf.

[14] https://onlinelibrary.wiley.com/doi/10.1111/joie.12261.

foreign courts, in fact these cases often were highly intrusive of the sovereignty of foreign courts to adjudicate patent claims granted in their respective jurisdictions. As patents are territorial, only national courts generally adjudicate local patent claims, unless the parties have otherwise consented, which is rare. Beginning approximately three years ago, Chinese courts issued a spate of ASIs against foreign litigations, including a US district court case, Ericsson v Samsung. Judge Gilstrap in *Ericsson v. Samsung* imposed an indemnity on Samsung for any fine imposed by a Chinese court for Ericsson seeking relief in a US court.[15]

Many of the Chinese decisions in those cases have not been published. The EU has filed a WTO case involving China's non-transparent practices in granting these ASIs.

Not only courts in the United States, but also courts and officials in third countries have raised serious objections to China's lack of transparency in its ex parte ASI decisions and intrusions into their sovereign jurisdictions, including the failure to advise counsel of pending decisions. As one example, the Delhi High Court in *Interdigital Technology v. Xiaomi Corp & Ors*. (May 3, 2021), after reviewing six separate times when counsel for Xiaomi had appeared before the court without revealing that it was undertaking steps to take away the court's jurisdiction, stated that "the manner in which the defendants have acted borders on fraud, not only with the plaintiffs, but also towards this Court."[16] The Court also imposed a fine in the form of an indemnity against any penalty imposed by the Chinese court.[17]

Foreign counsel may also bear some responsibility for this lack of transparency and unwillingness to inform foreign courts of pending ASIs. In another U.S. case, Judge Sleet, in Delaware, on hearing that he had been misled by ZTE into granting an ex parte ASI against Vringo's global patent campaign by not being informed of an ongoing SEP case in the Southern District of New York in violation of the Federal Rules of Civil Procedure, R. 65, noted that Vringo could have been within its rights to "lay [the judge] low" for granting that motion based on these misrepresentations of counsel. Judge Sleet promptly retracted his prior ASI.[18]

Because of the complexity of these disputes and the manner in which they inevitably involve judges in issues of foreign policy, I believe that the Solicitor General should begin exercising a more active role in US domestic litigation that involves Chinese patent IP assertions, particularly

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[15] Ericsson Inc. v. Samsung Elecs. Co., No. 2:20-CV-00380-JRG, 2021 U.S. Dist. LEXIS 4392, at *23-24 (E.D. Tex. Jan. 11, 2021)

[16] Interdigital Tech. Corp. v. Xiaomi Corp., High Court of Delhi, I.A. 8772/2020 in CS(COMM) 295/2020 (May 3, 2021).

[17] *Id.* ¶ 119.

[18] Official Transcript of Teleconference held on Feb. 10, 2015, ZTE Corp. v. Vringo Inc., No. 1:15-cv-00132, ECF 29 (D. Del. Feb. 11, 2015).

in issues that implicate the jurisdiction of our courts (such as ASIs)[19] or the fairness of the Chinese legal system.

I appreciate the attention that the Commission paid to these ASI issues in its last report to Congress of November 2022.[20] Fortunately, China's granting of ASIs appears to have been suspended, perhaps due to the WTO case.

One of my reasons for discussing ASIs is that I believe that I share similar observations with Prof. Clarke and other testifying today that China's ASI practice is a kind of linguistic "false friend" intended to normalize bad behavior by adopting western nomenclature. [21] There are several key differences between Chinese ASIs and similar Western ASIs. Unlike common law countries, Chinese ASIs are exclusively extra-territorial in nature. Common law ASIs originated as a method of dealing with jurisdictional conflicts among courts of law in the United Kingdom. Chinese ASIs are part of a national effort to increase the role of Chinese courts in establishing global judicial norms that have been promoted and endorsed by the highest levels of China's political and judicial leadership. Western ASIs are rarely intended to promote the role of the courts in international disputes. Chinese ASIs have also precipitated other changes in the adjudication of SEPs to accommodate this more aggressive posture through creation of new causes of action, adoption of unique conflicts of law rules, etc., while the disruption caused by Western ASIs on domestic legal systems has been relatively minor.

Chinese ASIs are also an important of Chinese national goals to increase the influence of Chinese courts in international IP disputes, through China's International Commercial Court and other mechanisms, including legislative changes. Most importantly, Chinese ASIs are also part of long-term efforts by the Chinese government to increase the value of Chinese technology and decrease the value of foreign technology "monopolies." One such goal in information technology was to decrease "dependence on imported technology … to 30% or below" in the recently completed Medium and Long Range Scientific and Technology Plan (2006- 2020).[22] The

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[19] See Mark A. Cohen, *China's Practice of Anti-Suit Injunctions in SEP Litigation: Transplant or False Friend?,* forthcoming in Jonathan Barnett, ed, INTELLECTUAL PROPERTY AND INNOVATION POLICY FOR 5G AND IOT (2023), available at https://ssrn.com/abstract=4124618 or http://dx.doi.org/10.2139/ssrn.4124618

[20] https://www.uscc.gov/annual-report/2022-annual-report-congress .

[21] See Mark Jia, *Illiberal Law in American Courts*, 168 U. PA. L. REV. 1685 (2020).

[22] https://www.itu.int/en/ITU-D/Cybersecurity/Documents/National_Strategies_Repository/China_2006.pdf , at p. 11. See also https://www.uspto.gov/about-us/news-updates/statement-mark-cohen-house-committee-judiciary.

National Informatization Plan (2021) calls for increasing the number of patents per 10,000 people in *"new-generation information technology industry"* from 2.7 patents in 2020 to 5.2 in 2025.[23] This would result in a national patent portfolio in these SEP-intensive areas of approximately 728,000 patents.

We should look at Chinese ASIs exclusively in functional terms. Using Western nomenclature to describe unfair practices can lead to normalization and inappropriate acceptance of such practices.

What the Future Holds

To be candid, I believe that the United States and China are today embarked on a downward spiral in terms of how our courts and agencies protect each other's nationals.

There are currently several laws, bills and agency actions that demonstrate this downward spiral. Today, I would like to single out here just one: the Protecting American Intellectual Property Act, of 2022 (Public Law 117-336). This law imposes sanctions upon foreign persons that are accused of stealing American trade secrets. Sanctions similar to export and foreign assets control measures are imposed upon those companies found in violation of the Act. If a company is found in violation, the President must impose at least five sanctions from a comprehensive menu. The menu of sanctions includes property blocking sanctions, export prohibitions, the prohibition of loans from U.S. and international financial institutions, procurement sanctions, and prohibition of banking transactions. For any individual identified in the report to Congress, the President must also impose property blocking sanctions and must prohibit the individual's entry into the United States.

I completely sympathize with the view that if a company has been unfairly treated by the courts or agencies of a foreign country and if legal redress is not available, the government of the United States should consider addressing it through other means. As such, this law should be a last resort and part of comprehensive strategies to address these concerns. For example, I don't think that we should very carefully minimize violating any other international norms in using trade laws to address civil intellectual property concerns.

Importantly, this law does not require that a victim of trade secret misappropriation should first exhaust reasonable legal remedies before turning to the President for an administrative, export control-type sanction. The Act does not, for example, require that the President make his determination through any kind of judicial process. Nor does it provide rights of appeal. It would appear to violate our WTO obligations by suspending the type of due process obligations

[23] https://digichina.stanford.edu/wp-content/uploads/2022/01/DigiChina-14th-Five-Year-Plan-for-National-Informatization.pdf, (DigiChina - 14th Five-Year Plan for National Informatization [stanford.edu]), at p. 14. The Chinese original is available at: 任务一：（www.gov.cn)

required by the TRIPS Agreement for IP enforcement. By exclusively targeting foreign nationals, it also appears to violate national treatment obligations.

I am also concerned that this and other laws that are unilateral in nature, may cause retaliation and threaten to undermine over 150 years of reciprocal national treatment in intellectual property through international conventions such as the Paris Convention (1883), the Berne Convention 1996) and the TRIPS Agreement (1995) and others. I am also concerned that the law does not encourage United States companies to first exhaust available legal remedies in the United States, China or elsewhere. Currently, foreigners constitute about 1% of the Chinese civil trade secret docket. We do not yet know if the recent trade secret reforms implemented by China in response to the US-China Phase 1 Trade Agreement are being implemented. By creating a political remedy in lieu of a legal remedy, we are inviting a 'short-circuit' of legal process. Are we suggesting that they should stop litigating in China entirely because of this new political remedy?

I believe that a better approach with respect to trade secret protection and similar sources of frustration would be to encourage utilization of available legal remedies in China (including the improvements mandated by the US-China Phase 1 Agreement), closely monitor the outcome of these cases by the US government as well as non-governmental actors (such as a Track II Dialogue), require publication of decisions (which the Phase 1 Agreement does not explicitly require), provide for more effective US legal remedies, and encourage consultation with the Chinese government or the bringing of a WTO case when there is a miscarriage of justice. If the issue that concerns us is state-sponsored industrial espionage, we might file a WTO case under the TRIPS agreement. WTO members are required "to protect" trade secrets pursuant to Article 39 of the TRIPS Agreement, which is uniquely worded to impose an affirmative protective obligation on its members.

I similarly believe that the US de facto abandonment of the WTO on intellectual property matters was premature. We had initiated only two cases against China on IP issues at the WTO since China became a WTO member in 2001. One of them, filed during the Trump Administration, was a 100% success. The case was long overdue, involving a technology transfer regulation that successive Democratic and Republican administrations had refused to pursue for 17 years. There were many other cases that could have been filed and still might be filed.[24] Rather than blaming the WTO, we should recognize that we failed to pursue cases at the WTO. If the right cases were filed and we still failed, only then would we be justified in backing away from the WTO and using these extraordinary remedies.

Concrete Short and Mid-Term Steps

In the twenty years that I have been testifying on China's intellectual property regime before Congress, the Chinese IP system has become vastly more complicated in both its formal aspects

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[24] https://chinaipr.com/2020/12/11/the-wto-ip-cases-that-werent/; https://chinaipr.com/2020/12/14/some-additional-possible-trips-claims/.

and in the external industrial policy pressures and incentives that affect the implementation of its laws. China's increasingly complex IP regime demands concomitant changes from the US government in our laws and government structures.

In addition to the suggestions previously noted, including (a) ensuring that our courts can tackle the complex foreign policy issues raised by ASIs; (b) careful consideration of rule of law issues in our own trade remedies, and (c) filing WTO disputes, I have compiled here a supplemental list of action items to better support cross-border IP litigation involving Chinese parties:

1. We need to clear up the interagency alphabet soup.

Currently, intellectual property involving China is handled by several agencies, many of which have overlapping mandates and all of which have limited resources. These agencies include USTR, ITA, USPTO, the Copyright Office, USDOJ, and the State Department. Absent effective cooperation and coordination, each agency is not only condemned to redundancy but also, considering the increasingly complex environment of China, to superficiality.

2. We Need to Make the Necessary Appointments

We urgenly need an IP Enforcement Coordinator in the White House. We also need a Deputy USTR for Innovation and Intellectual Property. When I testified before the House and Senate on these long overdue appointments, I believed members of Congress from both sides of the aisle were in full support. These positions are waiting to be filled. I urge the Commission to weigh in as well.

I believe that we also need to create a new position of Deputy Director for International Affairs to assist the Director of the USPTO and elevate the importance of the USPTO in international negotiations involving intellectual property. Currently, the PTO Director is assisted by only one Deputy Director, which is not enough for the front office to focus on international concerns and to interact with the interagency at a sufficiently high political level. The position is critical as USPTO resources on Chinese IP issues far exceed those of other agencies, with staff in three Chinese cities and Alexandria, Virginia, and with a team of US- and China-admitted lawyers with collective experience of over 200 years. However, the individuals working on those issues are often not given an effective means to voice their concerns over emerging policy issues.

The administration should also promptly establish protocols for developing more informed assessments of the technology threats that China poses. I believe that USPTO, with its vast database and resources, is well positioned to assist other agencies in such a task.

3. We Need Better Data Tools

The US government should develop and implement tools, like those that our competitors are using, and that the Office of Technology Assessment (OTA) pioneered, to improve innovation

governance with regard to emerging technologies.[25] The adoption of Future Oriented Technology Analyses and related tools as applied to civil technologies can be especially critical where possible security threats are posed to the United States by the compressed development time frames of civil technology to a military application, or “civil-military fusion.” These analytical tools can also assess competitive risks from China in emerging technologies that are of concern to US economic and national security. USPTO, with the most extensive human and physical resources of any agency on all varieties of civil technology, is well positioned to make a significant contribution to such an effort.

If the Administration refuses to act in developing more informed technology policy, I believe that Congress itself should also reconstitute OTA, which operated in these halls from 1974 - 1995. OTA was created in 1972 by the U.S. Congress specifically to “provide early indications of the probable beneficial and adverse impacts of the applications of technology.” We continue to need that kind of support for our increasingly complex and important technology decision making.

Additional disclosure requirements regarding foreign government involvement in our IP system would be helpful in better addressing risks posed to our IP agencies and courts. I appreciate the Commission’s prior support for this suggestion and I believe it still needs to be driven home. Congress should direct the USPTO to require any applicants for patents or trademarks to disclose if they are receiving government subsidies or grants for the underlying R&D for the patent or the application itself. We currently require such disclosure of recipients of US government grants under the Bayh-Dole Act. We should require the same for foreign applicants. We also need to require disclosures for trademark applications due to their demonstrated ability to disrupt US government operations through subsidized applications.[26] This information is essential to anticipating threats posed by subsidization and other distortionary programs of foreign governments, including China.

Congress might also wish to consider requiring disclosures of foreign government involvement in IP litigation through declarations of real parties in interest and third-party litigation financing.[27]

4. We Need to Support Our Courts

Due to difficulties in securing evidence from China, US courts should be able to make adverse inferences if there are unnecessary delays in collecting evidence overseas through judicial channels. Responses to Hague Convention requests from China can taken a year or more.

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[25] Jeanne Suchodolski, Suzanne Harrison and Bowman Heiden, *Innovation Warfare*, 22 N. C. J. L. & TECH. 175 (2020).
[26] U.S.-China Econ. Sec. Rev. Comm’n, 2022 Report to Congress, at 177.
[27] Bob Goodlatte, *State Attorneys General Raise Concerns About Threats Raised by Litigation Funding,* Patent Progress (Jan. 18, 2023), https://www.patentprogress.org/2023/01/state-attorneys-general-raise-concerns-about-threats-posed-by-litigation-funding/.

However, in most cases China will have completed a domestic IP litigation within six months.[28] These expedited time frames in China provide a strategic advantage for Chinese litigants and can impair the effectiveness of a United States litigation. Chinese judicial rushes to judgment have often undermined the jurisdiction of the US courts, which take far longer to decide cases, as was the issue in Huawei v. Samsung (N.D. Cal. Apr. 13, 2018).

The United States should address non-reciprocal extensions of benefits to Chinese courts., including evidentiary assistance provided to Chinese courts, which threatens to expose US trade secrets overseas (28 USC Section 1782).

5. We Need to Strengthen our IP System

As I wind down on this three-part series of testimonies before Congress, I am encouraged to see that both the Senate and House are looking at the significant advances that China has made to its IP system and are considering whether additional reforms are necessary to ensure our domestic competitiveness. During recent years when the United States sought to better "balance" our IP system through restricting patent-eligible subject matter, China was taking nearly contemporaneous steps to strengthen its system through amendments to its examination guidelines and expand the scope of patents that it could grant. Patent applications have been refused by the USPTO but granted in China and/or Europe.[29] We need to have a better understanding on how the declining scope of patent eligible subject matter has affected US competitiveness with other countries, including China, by analyzing the impacts of those changes in US policy on entrepreneurialism, new product developments, technology licensing and labor mobility. Our complaints about Chinese "IP Theft" often ring hollow in the face of the obstacles that we have inserted into our own system.

We also need to seriously look at the impact of the declining available of injunctive relief in IP infringement cases, which compares to a nearly 100% rate of injunctive relief in Chinese IP infringement cases

We also need to address the increasing potential for fraudulent, short-term or low-quality trademark and patent filings from China. Trademark applications have been filed with fraudulent proof of use, or through use of fraudulent addresses and USPTO accounts. The trademarks appear to be primarily intended to satisfy e-commerce brand registry programs. Chinese applicants have occasionally appointed deceased or non-existent attorneys to prosecute these marks. Many of these trademarks benefited from trademark applications subsidies given by the Chinese government. Currently, USPTO appears to be primarily relying upon attorney discipline to deter this activity. USPTO needs a comprehensive program to

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[28] See MINNING YU, *Benefit of the Doubt: Obstacles to Discovery in Claims Against Chinese Counterfeiters*, 81 FORDHAM L. REV. 2987 (2013).

[29] KEVIN MADIGAN AND ADAM MOSSOFF, *Turning Gold to Lead: How Patent Eligibility Doctrine Is Undermining U.S. Leadership in Innovation*, 24 GEO. MASON L. REV. 939 (2017).

address these problems as they arise, which may also involve deeper cooperation with the Chinese government to address cross-border malevolent actors.[30]

Congress should encourage the USPTO to become more actively involved in assisting on trade and economic sanction determinations. As I previously noted, the USPTO is the only comprehensive civil technology agency in the US government. It is well staffed with STEM-educated and multilingual examiners, as well as a team of officials involved in international IP policy. Yet there are many areas where PTO is not consulted. Moreover, there is an increasing number of trade sanction matters where intellectual property knowledge is critical, such as in assessing proposed CFIUS decisions and understanding competitive threats from emerging technologies.

For the record, I would like to specifically note the potential for harm to the protection of US trade secrets that could be caused by adoption by the FTC of the proposed rule banning non-compete agreements in the FTC Notice of Proposed Rulemaking (the "NPRM").[31] The NPRM properly focused on the domestic impact of non-compete agreements, including their impact on poor and minority communities. However, the NPRM also completely ignores the impact this would have on protecting our technology from trade secret theft by other countries. Indeed, words such as "CHIPS Act", "international" or "China" do not appear in the NPRM. If implemented, this rule would legalize large-scale Chinese poaching of employees of US companies working in high tech industries, including the semi-conductor sector, by invalidating their existing non-compete agreements. US investment in new semiconductor fabs would become even more vulnerable to legalized Chinese poaching of US employees. It would also weaken the ability of US companies to protect themselves though the Chinese courts.[32] Why are we seeking to undermine the ability of our companies to protect their trade secrets

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[30] See my forthcoming article in the AKRON LAW REVIEW, *Parallel Play: How the United States and China Engaged in Simultaneous Professional Responsibility Campaigns Against Unethical IP Lawyers and Agents and What Lessons Can Be Learned* (2023).

[31] Non-Compete Clause Rule, 88 Fed. Reg. 3482 (proposed Jan. 5, 2023) (to be codified at 16 C.F.R. § 910).

[32] Chinese data demonstrates that a party seeking relief from trade secret misappropriation is more than twice as likely to win if the employee has signed a non-compete agreement. Success rates for enforcing non-compete clauses are 66% to 90%, while success rates for trade secret misappropriation cases were 32.4% and 44.3% of the cases decided, respectively, by first instance and appellate courts. *Compare* HUI SHANGGUAN, *A Comparative Study of Non-Compete Agreements for Trade Secret Protection in the United States and China*, 11 WASH. J. L. TECH & ARTS 405 (2016) (This article looked at all final judgments on non-compete cases decided by intermediate or higher courts from March 2014 to February 2015. It found that "[t]hirty-six of these cases were related to the validity of the non-compete; twenty-four of which were regarded by courts as 'valid and enforceable.' In other words, two out of three non-compete cases were held to be 'valid and enforceable' by Chinese courts.) ; "in nearly all of the cases where the plaintiff prevailed (89% [in trade secret litigation in China], … there [were] one or more protective agreements in place, such as NDAs and confidentiality clauses in employment contracts." CIELA, *Trade Secret Litigation in China*, Rouse, https://rouse.com/media/n5uadjtn/ciela-trade-secret-litigation-in-china.pdf; and Jyh-An Lee, Jingwen Liu and Haifeng Huang, *Uncovering Trade Secrets in China: An Empirical Study of Civil Litigation from 2010 to 2020*, 17 J. INTELL. PROP. L. & PRACTICE, Iss. 9, 761 (2022).

overseas, especially in China and also undercut our significant investment in semiconductor manufacturing?

6. We Need a Task Force

Chinese IP issues are now implicated in areas of increasing concern to the government and American people, including economic espionage, China's increasing role in our courts and IP system, the role of export controls and CFIUS in addressing technology transfer, China's use of civil technological developments in advancing military technology, and the challenge of navigating China's complex IP environment.

Through my work with the Day One Project,[33] which is now a part of the Federation of American Scientists, I urged the Biden Administration to take broad steps to improve our strategies and understanding on China and intellectual property by establishing an interagency China task force.[34] In closing, I repeat the recommendations that were made in the 2021 report of the Day One Project, which I believe still have the same urgency:

Reorganize China IP Engagement for Greater Depth, Coherence and Efficiency

There is a broad consensus that US-China relations cannot and should not return to their pre-2017 form. At the same time, in dealing with China, the next administration has to show both strength and more intelligent strategies.Intellectual property and innovation policy hold both the prospect for cooperation and the need to address Chinese initiatives that negatively impact US interests. Currently, engagement with China on IP and innovation is spread over several agencies, including State, USTR, ITA, DOJ (Antitrust/Counterintelligence/CCIPS), FTC, ITC, USPTO, OSTP, NIST, DOD (including the Defense Innovation Unit), CFIUS, BIS and the White House "IP Czar." Most of these offices lack the staff and resources needed to address increasingly complex and cross-disciplinary issues. While the USPTO "China Team" is the most deeply resourced (between 20-25 people in three Chinese cities, including several China-admitted attorneys and STEM-educated officials), the agency has often been excluded from the US-China negotiating table – and even clearance chains on tech issues.

An executive order should establish an inter-agency "task force" to address China in intellectual property and innovation policy, with the understanding that this task force will be long-term, if not permanent. The task force should include State/various Commerce constituent agencies/USTR and representatives of the various science agencies, DoD, as well as CFIUS and BIS. The task force should have concrete mandates on seconded staff from other agencies, and the percentage of task force staff who have Chinese language skills, STEM background and ideally, Chinese legal experience. The task force staff should leverage extensive database and analytic tools, currently housed in a China Resource Center at USPTO (but also found in our

[33] https://www.dayoneproject.org/.

[34] Day One Project, *Transition Document for the United States Patent and Trademark Office* (Jan. 15, 2021) https://www.dayoneproject.org/ideas/transition-document-for-the-united-states-patent-and-trademark-office/.

intelligence and other agencies) to provide active support for other agencies, such as law enforcement, BIS/CFIUS, and DHS. The task force should develop coordinated USG responses to China's model of state-dominated IP planning, anticipated disruptions caused by China's intervention in technology and IP markets, Chinese efforts to dominate global standards setting bodies, state-sponsored economic espionage or technology misappropriation, and even bad faith applications from China in both patents and trademarks.

Thank you for your invitation to speak here today, and I look forward to your questions.