

Statement of

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Before the

The U.S.-China Economic and Security Review Commission

Hearing on the Foreign Investment Climate in China:

Present Challenges and Potential for Reform

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I would like to thank the Congressional Security Commission for inviting the U.S. Patent & Trademark Office (PTO) to testify today on “The Foreign Investment Climate in China: Present Challenges and Potential for Reform”, particularly in this “Administration Panel: Assessing the Interface Between China’s Competition and Technology Licensing Policies.” My comments will focus on questions four and five raised of this group:

“How do China’s intellectual property (IP) policies impact its AML enforcement? And

How does the U.S. government handle the interface between IP and AML policy and enforcement? How do U.S. agencies monitor the economic impact of China’s IP policies, including the impact of these policies on AML enforcement?”

I will discuss, in particular, the relationship between the anti-monopoly law and the IP system in China generally; application of the anti-monopoly law to address IP abuse; problems in obtaining IP rights in China that may contribute to the anti-monopoly environment; difficulties in IP enforcement and licensing; and the role of the PTO with respect to these issues.

The Anti-Monopoly Law/IP Relationship in China

China’s experience in IP-related issues has deeply, and perhaps uniquely, informed its perspective on antitrust issues generally. There are jurisdictional, personnel and legislative overlaps. For example, China’s specialized IP tribunals and courts handle antitrust litigation. China’s State Administration for Industry and Commerce, which handles non-price-related abuse-of-dominance cases, also has jurisdiction over trademarks, trade secrets, consumer protection and trade-dress cases. MofCOM Director General Shang Ming, who currently handles mergers, was formerly in charge of IP matters when he was the Director General of Law and Treaties at the Ministry of Commerce where he defended China on an IP-related WTO case brought by the United States. Many of China’s antitrust related laws also built upon pre-existing laws, regulations, and rules, which have significant IP components. These laws include the Anti-Unfair Competition Law, which contains measures to protect trade secrets and trade dress and the Contract Law, which deals with “monopolization of technology.”¹ China is not unique in its building

¹ Article 329 of Contract Law

upon its IP experience to address antitrust issues. For example, the only World Trade Organization (WTO) treaty governing IP – the Agreement on Trade-Related Aspects of Intellectual Property Rights or TRIPs Agreement – is also the only WTO treaty that specifically addresses antitrust enforcement, particularly in the case of abusive practices in licensing of intellectual property.²

Like recently-enacted IP legislations, enactment of China’s Anti-Monopoly Law regime was considered a milestone in China’s efforts to develop a market economy. Unfortunately, China also has a rather long legacy of laws designed to “shake up” the economy – among them, the patent law, bankruptcy law, income tax law, property law, and now the Anti-Monopoly Law. Yet, each of these laws is also intended to implement China’s constitutional mandate to develop a “socialist market economy.”³ Many would view this as an oxymoronic concept. I, instead, view it as a restriction on the impact of these laws in having their intended effect, and a necessary instruction regarding how and why we engage China on these laws.

To those of us who have long been involved in IP, many of the concerns that we hear today – for example, involving transparency, representation of counsel at proceedings, and national treatment of foreigners – have a long history in IP-related issues.⁴ What is more important perhaps is that much as IP has informed China’s Anti-Monopoly Law development, it is likely to remain a significant part of China’s Anti-Monopoly Law enforcement activities in the years ahead.

IP Abuse and the Anti-Monopoly Law

Article 55 of China’s Anti-Monopoly Law addresses IP abuse. This article provides as follows:

This Law does not govern the conduct of business operators to exercise their intellectual property rights under laws and relevant administrative regulations on intellectual property rights; however, business operators' conduct to eliminate or restrict market competition by abusing (or misusing) their intellectual property rights are governed by this Law.

This article is puzzling, and has been the subject of considerable debate. For example, does this law provide a safe harbor? What constitutes “IP abuse”? How does this law affect other laws that regulate competition?⁵

Many observers may find China’s current political emphasis on “IP abuse” a bit hard to swallow. Whatever the definition of “IP abuse” in Article 55 of the Anti-Monopoly Law and related regulations and rules, another kind of “IP abuse” in China today that both Chinese and foreign companies face involves the difficulties they face in obtaining, enforcing, and commercializing one’s IP rights in a society with sometimes unpredictable legal norms and with what often appears to be undue political influence. In other words, an IP rights holder cannot abuse its IP rights unless the holder can have IP use. **Inability to commercialize license or enforce patents or other IP rights is IP abuse in a more fundamental sense.** What kind of abuse is \$10,000 worth of infringement damages? We have been encouraging China for 35 years

² See, e.g., TRIPs Agreement, Articles 8 and 40.

³ Constitution of the PRC, Article 15; See, also, also the relevant Chinese IP laws e.g., Patent Law, Art. 1, Trademark Law Article 1.

⁴ Mark A. Cohen, “How an IP Lawyer Sees China’s Progress in Competition Law”, in *International Antitrust Law & Policy* (2011 Competition Law Institute (pp. 537-555) (Fordham Competition Law Institute, 2012)

⁵ Harris, Wang, Zhang, Cohen and Evrard, Antimonopoly Law and Practice in China, at 216 (Oxford University Press, 2011).

to establish an IP system that is fully compatible with international norms and that protects IP as a private right. That task is unfinished, and the challenges that companies face in protecting their IP rights should necessarily inform China's antimonopoly policy makers.

Let me give you two snapshots of what this type of "IP abuse" means in current terms, and how it might relate to China's Anti-Monopoly Law efforts: (1) the low patent infringement damages and (2) the low royalty payments that the U.S. receives from China.

As shown in Chart 1 in the Appendix, in 2012, the last year for which relatively complete data is available, the average damage award in a patent-infringement law suit in China totaled about RMB ¥52,000 – roughly USD \$10,000. Initial data for 2013 suggests that patent-infringement damages will average around RMB ¥99,000 RMB – about USD \$20,000. The most cases were reported in 2011, with damages at ¥62,160. These are considerably less than average damages in either Europe or the United States. Most importantly, they are likely not enough to compensate an inventor for infringement of a valuable invention in the Chinese market.

This information is drawn from a private database of about 31,000 cases (www.ciela.cn); unfortunately, the Chinese Government does not release any similar data publicly. Higher damages in 2008 and 2009 were likely due in part to certain high-profile cases, and may be considered outliers. Many of the high profile judgments at this time were also against foreigners.

The second issue I would like to talk about is the difficulty in achieving legitimate sales of IP rights in China. Chart 2 in the Appendix shows total payments from China to the United States for royalties of various kinds.⁶ In 2012, this totaled approximately USD \$5 billion.

Chart 3 in the Appendix shows total royalty payments from Japan to the United States for the same period: about USD \$10 billion.

As these charts suggest, the U.S. receives only 50% of the revenue from China compared to that received from Japan. However, this is likely to change. The recently released Action Plan for Further Implementation of the National IP Strategy indicates that China has a goal of increasing its revenues from royalties and franchise fees for proprietary rights from 1.36 billion USD in 2013 to 8 billion USD in 2020.

Another data point to consider: According to the latest World Bank data, China exports four times more high-tech goods than Japan.⁷ Indeed, our understanding is that China today produces over 70% of the cell phones used worldwide.⁸ If one assumes that high-tech goods are a useful surrogate to measure a country's "consumption" of IP rights, it is easy to see that China is a severely under-licensed country. Indeed, China's dominance as a purchaser of technology has led at least one Chinese antimonopoly law

⁶ The licensing royalty data in the charts is based on US International Trade data released by Bureau of Economic Analysis (BEA). Specifically, the licensing royalty data is based on the International Trade of Services in the category of "Charges for the use of intellectual property" (<http://www.bea.gov/iTable/iTable.cfm?reqid=62&step=1#reqid=62&step=7&isuri=1&6210=4&6200=161&6211=168>). Older licensing royalty data (for the years of 2004 to 2008) is also referred to in the USITC's 2010 report on "China: Intellectual Property Infringement, Indigenous Innovation Policies, and Frameworks for Measuring the Effects on the U.S. Economy" (<http://www.usitc.gov/publications/332/pub4199.pdf>). The USITC's 2010 report, on page 2-11, also noted the low licensing royalty payments that the United States receives from China.

⁷ World Bank data on high-technology exports, <http://data.worldbank.org/indicator/TX.VAL.TECH.CD>

⁸ <http://www.theatlantic.com/china/archive/2013/08/chinas-dominance-in-manufacturing-in-one-chart/278366/>.

academic to note that in China's current IP transfer legislative regime "licensor's interests appear to be insufficiently taken into account."⁹

At the PTO, we often hear anecdotally and from surveys that US companies are reluctant to license in China due to its weak IP environment or restrictive licensing conditions. There is some empirical data that also supports this. For example, the US China Business Council recently ranked IP enforcement as its number two business concern facing US business in China.¹⁰ Moreover, survey data shows that foreign companies are reluctant to use Chinese law as a governing law for technology contracts, preferring instead to choose foreign law where possible, perhaps out of a similar concern over enforcement challenges and onerous statutory provisions.¹¹

For many years, industry and government officials have also expressed concerns about the Chinese government being actively engaged in forced technology acquisition, trade secret theft, and/or "indigenous innovation" policies that are intended to support China's industrial policies. These issues have further compounded U.S. concerns over IP infringement and difficulties in selling IP-intensive goods and services. Today many companies are concerned that they may be unable to manufacture or sell their products on competitive terms due to preferential policies of the Chinese government and/or state owned or supported enterprises that favor domestically innovated products. These concerns over industrial policies may also cause one to question whether foreign enterprises will be treated fairly in China based on market principles in Anti-Monopoly Law matters. Reflecting these concerns, USG has repeatedly asked Chinese authorities, in a variety of fora, to affirm that their antitrust efforts are intended to encourage competition and not protect individual competitors or industries.¹²

Obtaining IP Rights in China

China's patent office, the State Intellectual Property Office (SIPO), is the largest patent office in the world. In 2013, it received 2,377,061 patent applications. SIPO's application docket is also about four times the number of applications received by the Patent and Trademark Office. Most of the patents filed in China are of Chinese origin. Historically, China has had a more domestically oriented patent office in terms of origin of applications than the United States. In some areas, such as utility-model and design patents, well over 95% of its patent applications originate from Chinese applicants.

The PTO enjoys a good, cooperative relationship with SIPO. Both agencies share many common challenges such as handling increasingly complex patent applications; attracting and retaining talented examiners; and maintaining high patent quality. China has emerged as a critical stakeholder in the global IP system.¹³ Many foreign companies find that SIPO handles its patent applications expeditiously and

⁹ Wang Xiaoye, *Evolution of China's Antimonopoly Law*, at 227 (Edward Elgar Publishing, 2014).

¹⁰ See <http://uschina.org/reports/uscbc-2014-china-business-environment-survey-results>

¹¹ See <http://chinaipr.com/2014/06/19/choice-of-law-in-ip-contracts-with-china-a-sleeper-issue/>

¹² See, e.g., Joint Fact Sheet on 25th Joint Commission on Commerce and Trade, competition outcome (<http://www.commerce.gov/news/fact-sheets/2014/12/29/us-china-joint-fact-sheet-25th-joint-commission-commerce-and-trade>), and press release of the Sixth Strategic and Economic Dialogue "In response to concerns of U.S. companies and government officials regarding enforcement of China's Anti-Monopoly Law, China recognized that the objective of competition policy is to promote consumer welfare and economic efficiency, rather than to promote individual competitors or industries, and that enforcement of its competition law should be fair, objective, transparent, and non-discriminatory." (<http://www.treasury.gov/press-center/press-releases/Pages/j12563.aspx>).

¹³ See *China as an IP Stakeholder*, David Kappos, Under Secretary of Commerce for Intellectual Property and Director of the USPTO, 2012 (http://www.uspto.gov/blog/director/entry/china_as_an_ip_stakeholder

fairly. Of course, there are areas where we would like to see improvement. However, in general, except for patent practices in certain areas, such as those in the pharmaceutical sector, China does not show any unusual tendencies in this key IP “building block”, particularly in the high-technology sectors.

There is one area, however, where policies that support China’s patent system may have contributed to a kind of self-induced frustration on IP and technology-related issues. Unlike other more economically developed countries, China’s IP is perceived to have low commercial value. The Chinese national and local governments have adopted numerous policies to encourage domestic companies to obtain patents in China. These policies include the following: subsidies for patent-application filings; rewards or awards for patent grants; the granting of tenure (to a university professor) based on the number of patent filings; obtaining a valuable municipal residence permit (*a hukou* in Mandarin Chinese) based on patent filings; commutation of prison sentences for prisoners who file patents¹⁴; and promotion of government officials based on achieving numerical patent quotas. The result has been an explosion in patent applications and grants. Many of these patents, such as utility-model and design patents, are likely of low quality because they are not substantively examined. Some of these patents may even involve trade secrets misappropriated from a former employer, or copying of competitors’ designs or technology. These patents may not reflect market-driven innovation, but are responsive to government incentives. The data shows that China is aggressively patenting, but it may not always be innovating. This lack of demonstrable qualitative achievement in its IP system must be frustrating for Chinese leaders, who have failed to see commercial results from their IP policies, and may lead them to pursue policies in order to achieve greater commercial uptake of China’s patents and IP rights.

These kinds of policies can also lead to litigation problems for U.S. companies. While many of these patents are of low quality, they do have litigation value to Chinese patent “cockroaches” (similar to patent “trolls” in the United States) which have been filing abusive litigation lawsuits, often against U.S. companies, based on low-quality and subsidized patents, without concern for compensating victims for anti-competitive activity. Chinese regulators should address this issue by establishing mechanisms to disincentivize abusive patent litigation, if China desires fair IP and antitrust regimes.

IP Enforcement

The enforcement of IP rights is the second critical building block that has long been of concern in China. Damages in patent cases are too low to compensate most innovations. In fact, a remarkable disparity appears to be emerging between the damages awarded in antitrust investigations and the damages awarded in IP matters, which casts further doubt on how much China values IP rights (or how much it may overvalue antitrust). As noted, average damages from patent litigation in China range from USD \$10,000 to \$20,000 per year. But IP-related issues have been significant enough to cause major proposed mergers to fall apart (beverage makers Huiyuan and Coca-Cola), or have resulted in multimillion-dollar antitrust liability (e.g., Huawei/InterDigital, amongst others), and there is speculation that fines against Qualcomm could exceed one billion dollars,¹⁵ or more than 20% of total US technology exports in 2013,

¹⁴ See <http://www.scmp.com/news/china/article/1681850/how-get-out-jail-early-china-buy-inventors-idea-and-patent-it>

¹⁵ See, e.g., China Reportedly Wrapping Up Qualcomm Investigation; Hefty Fines Expected *San Diego Business Journal*: <http://www.sdbj.com/news/2014/dec/29/china-reportedly-wrapping-qualcomm-investigation-h/> (Dec. 29, 2014)

and as much as fifty thousand to a hundred thousand times average damages for patent infringement. This kind of disparity might easily encourage a prospective licensee in China in appropriate circumstances (such as involving a standards essential patent, discussed below) to consider the potential benefits of continuing to infringe and risk an adverse Chinese judicial decision while at the same time pro-actively launch a Chinese anti-monopoly law case for even greater damages than royalties that are being asked of by the prospective licensor.

As with China's Anti-Monopoly Law regime, administrative agencies have conducted most of China's IP enforcement, and they historically have not been transparent. However, significant improvements have been made in recent years.¹⁶ We hope that these experiences, including more comprehensive reporting on cases, compilation of case data, and publishing of model or guiding cases, can take place in the Anti-Monopoly Law context so that these cases can guide litigants. Our experience has also been that the IP tribunals and newly established specialized IP courts, which also have jurisdiction over AML cases, have demonstrated increasing professionalism and expertise in IP-related matters. However, the IP experience has also shown that both the courts and administrative agencies are not yet independent. Interference from Communist Party organs, local government, and the court's own "adjudication committees" have been concerns in IP matters. We hope that reforms recently announced in the Fourth Plenum and by Supreme People's Court President Zhou Qiang will help address some of these concerns.

Another key concern in enforcing IP rights in China is the problem of infringers' delays in taking licenses. This is particularly acute during the standards setting process. To explain this concern, let me first very briefly describe what standards are, why they are important, and the voluntary process used to develop standards that we use every day. Standards, and particularly voluntary consensus standards set by standards-developing organizations (SDOs), have come to play an increasingly important role in our economy. In much of the world, the development of a technological standard occurs according to a voluntary, consensus based process, in which participants select a set of technological solutions to a given problem, often including technologies protected by patents, which can be deemed "standards essential patents" when they are necessary to implement the standard. Standard setting participants typically agree in advance to general guidelines governing any obligations of participants to license any essential patents to parties wishing to implement the standard on F/RAND (or fair/reasonable, and non-discriminatory) terms. The main concern many U.S. companies face in China arises when Chinese companies delay in taking a license on FRAND terms, but the licensor has limited enforcement options because it is practically unable to obtain appropriate damages from IP courts in China. In addition there is the possibility that Chinese companies, usually implementers of the standard, delay in taking a license on FRAND terms and claim that the licensor is abusing its rights in violation of the FRAND commitment in high stakes Chinese anti-monopoly law litigation. . In other words, we are concerned that licensee Chinese companies view licensor foreign companies' willingness to license as unilateral – only restricting the terms of the license while not requiring the licensee to enter into timely good faith negotiation. Companies may seek to minimize these risks by bringing litigation outside of China. An example of this is a recent case in India involving a Chinese company, where the licensor took action outside of China, possibly to minimize these risks and that this problem described above.¹⁷

This delay is further exacerbated by China's patent law which has a two-year statute of limitations to initiate a patent infringement action. In the United States, we have a six-year period to initiate a patent

¹⁶ See, e.g., Through A Glass Less Darkly – China's March to Administrative Enforcement Transparency, at <http://chinaipr.com/2013/11/24/through-a-glass-less-darkly-chinas-march-to-administrative-enforcement-transparency/>. /

¹⁷ Xiaomi Face Phone Ban In India Over Erickson Patent Suit, <http://www.networkworld.com/article/2858554/xiaomi-faces-phone-ban-in-india-over-ericsson-patent-suit.html>

infringement action. Taiwan, Brazil, Japan, South Korea, and Germany all have longer periods. Unless another exemption applies, a U.S. company seeking to license its technology to China must initiate potentially costly litigation within that two-year period.

We believe that prospective Chinese licensees should negotiate FRAND licensing agreements in good faith. We have engaged our Chinese colleagues on this important issue, and will continue to do so.

Licensing of IP Rights

This brings me to the “licensing” of IP rights, the third building block of China’s Anti-Monopoly Law and IP regime. Like the Department of Justice and Federal Trade Commission, China’s antitrust regulators have statutory authority to investigate possible anticompetitive conduct, including that involving IP licensing transactions. However, the ability to license technology is an important trade-related concern, and which is of interest to the Department of Commerce, the Office of the U.S. Trade Representative, as well as the numerous U.S. government agencies that have cooperative research and development projects in China.

At the PTO, we encourage our other agency colleagues to support U.S. efforts to monetize technology in China’s markets. We are concerned about restrictions on U.S. companies’ ability to license their technology. Several of these restrictions already have been mentioned, for example: weak damages for infringement; short statutes of limitations; and excessive government interference in the market. One particular regulation is especially troubling -- China’s Technology Import and Export Regulations, which the Ministry of Commerce enforces, requires that a company licensing a foreign technology indemnify a Chinese licensee against third parties who sue for infringement. The specific language is as follows:

If the use of the technology provided by the licensor by the licensee of a technology import contract in accordance with the contract infringes upon the lawful rights and interests of another person, the responsibility shall be borne by the licensor.¹⁸

This provision is mandatory. Its violation, arguably, might entail a claim for “monopolization of technology” under Article 329 of the Contract Law. By comparison, licensors of Chinese technology are not subject to any explicit indemnification requirement.¹⁹

Consider this provision in the context of the current cell-phone patent “wars” that are occurring throughout the world. It would be foolish for a technology licensor to offer any kind of indemnity in these circumstances. However, Chinese law requires it for technology import. This provision effectively turns a license agreement into an insurance contract. As another example, consider the explosion of low-quality, unexamined utility-model patents in China. Today, very few companies can afford to undertake comprehensive freedom-to-operate analyses of all patents applied for or granted in China, due to sheer magnitude and thus may be reluctant to license their technology if they need to offer this type of indemnity.

China has other onerous provisions in its licensing regime. For example, it also requires that the licensee own improvements to any technology that is licensed, as part of these same technology-transfer

¹⁸ Article 24(3) of China’s Technology Import and Export Regulations.

¹⁹ Agreements regarding the export of Chinese technology are covered by Article 353 of China’s Contract Law, which allows parties to negotiate liability for third-party infringement claims.

regulations. There is no similar requirement under U.S. law. In essence, a foreign technology licensor is creating a competitor through this mandatory provision, in the form of a legalized forced technology transfer.

Another critical area involves the relationship between the state's involvement in licensing and IP. U.S. firms, for example, complain that they may be prohibited from participating in core aspects of standards-setting bodies in China. They also complain that certain Chinese State-owned or approved actors have severely decreased the value of their IP, through state-run monopolies that control the import or sale of copyright content, such as motion picture imports or music ring tones.²⁰

I would close now by responding to the Committee's questions about how we cooperate with other agencies.

The Role of the U.S. Patent and Trademark Office on Anti-Monopoly Matters in China

The Patent and Trademark Office (PTO) is very interested in intellectual property issues that involve antitrust, particularly those involving standards, intellectual property abuse and misuse, and licensing. From the authority granted under the American Inventors Protection Act²¹, the Director of the Office advises the President of the United States, through the Secretary of Commerce, on all matters involving intellectual property.

We are perhaps the agency with the longest history dealing with these IP issues. Our involvement with licensing and standards in an international context goes back to 1846 when a U.S. Patent Office representative helped Samuel F. B. Morse license his U.S. patents to the Austro-Hungarian Empire, thereby helping to establish the world standard for telegraphy in Europe.²²

Our "China Team" which I lead, consists of 21 lawyers and support personnel, located in Washington, D.C., and three cities in China: Beijing, Guangzhou, and Shanghai. We have negotiated agreements and

²⁰ See <http://beijing.usembassy-china.org.cn/ipindustry.html> ("The piracy problem is compounded by market access barriers including: A government monopoly on film importation [;] A theatrical distribution duopoly."); with regard to the ringtone duopoly in music, see <http://www.billboard.com/articles/6398489/chinas-mobile-providers-huge-problem-music-industry-ringtones> ("According to a 2011 report published in the industry journal Science-Technology & Publication, ...state-owned telecom operators -- including China Mobile, China Telecom and China Unicom -- siphon around 90-94 percent of the profit they make from value-added music subscriptions. ... This disparity in revenue distribution was also highlighted in a **China Daily** feature which reflects these figures: "If a song generates 100 yuan [\$15.70] in revenue, only 2 yuan [\$0.32] goes to music producers in the form of royalties... The rest goes to telecom operators such as China Mobile as well as Internet service providers... Here's the clincher: ..90% of total recorded music industry revenue is derived from these mobile music services.") Regarding discriminatory practices in standards setting, the report of Dan Breznitz and Michael Murphree to the Commission in January 2013 (*The Rise of China in Technology Standards: New Norms in Old Institutions*) (<http://www.uscc.gov/Research/rise-china-technology-standards-new-norms-old-institutions>): ("Technical committees under China's standards bodies such as CESI and CCSA have multiple categories of membership. At the most basic level, there are observing members and voting members. ...Foreign firms are not barred from voting membership. However, while able to vote and contribute technology, foreign enterprises still have no direct voice in the final direction and adoption of the standard or selection of individual technologies to incorporate into specific protocols.")

²¹ Public Law 106-113 and amended by the Intellectual Property and High Technology Technical Amendments Act of 2002 (Public Law 107-273) enacted November 2, 2002.

²² Silverman, *Lightning Man – The Accursed Life of Samuel F. B. Morse*, at 273 (2003).

Memoranda of Understanding to support cooperative activities with several Chinese agencies with authority over Anti-Monopoly Law-related issues, including the State Administration for Industry and Commerce, the Ministry of Commerce, and the State Intellectual Property Office.

While the PTO helps to develop IP policy, it has no enforcement authority. For this reason, we take an active role in exchanging views and coordinating with our sister agencies. We engage in many activities to encourage this kind of cross-coordination. For example, each year, we host a comprehensive, one-day training program on IP developments in China – kind of an IP boot camp – that is intended primarily for our diplomats going on to their posts abroad. We frequently invite industry and Hill staffers to this event. We also work with all U.S. IP agencies in organizing and supporting a range of training programs. A few years ago, we hosted the Minister from the State Administration for Industry and Commerce, inviting our antitrust colleagues to participate, as well as U.S.-based trade associations, such as the Licensing Executive Society, the Intellectual Property Owners Association, and the American Intellectual Property Law Association. This year, with funding from the U.S. Trade and Development Agency and support from USTR and others, we expect to host a program on China’s innovation, which will feature a strong Anti-Monopoly Law component. The PTO is also currently planning a joint program on IP licensing with China’s SIPO, where we hope to air some of these concerns. We expect to invite colleagues from the antitrust agencies to participate. Through these and other avenues, we hope that we can make a difference for our companies and for China

Through our China Resource Center, which we have just inaugurated, we collect data on all IP-related matters. The focus of this center is on IP rights, their protection, enforcement, and commercialization; it collaborates closely with the PTO’s Chief Economist to support more empirically-driven analysis of China’s intellectual property environment. As this effort grows, we hope that it can be a resource to the U.S. Government and business community, including our antitrust colleagues.

In Anti-Monopoly Law matters, we monitor the press and other media for signs of policy positions or shifts, and then work with our inter-agency colleagues to present a unified U.S. Government position and approach. We proactively reach out to U.S. companies that are encountering antitrust issues involving IP. A primary concern is to enable our companies to fairly monetize their IP rights with minimum regulatory burdens. When significant antitrust cases arise, we collaborate closely with the Departments of Commerce and Justice, the Office of the U.S. Trade Representative, the Federal Trade Commission, and others to determine the best strategy to pursue.

We also are an active participant in the Joint Commission on Commerce and Trade, and co-chair the IPR Working Group under that body. This past December, the JCCT included several bilateral outcomes on Anti-Monopoly Law, standards, licensing, intellectual property, legitimate sales of IP-intensive goods and services, abusive IP litigation, and judicial cooperation – all of which directly impact China’s Anti-Monopoly Law environment. I refer the Commission to the U.S. Fact Sheet and U.S.-China-Joint Fact Sheet from the JCCT for further information on the many important developments in these areas.²³

I hope that my observations will aid the Commission in understanding how the PTO views some of the building-block issues in China’s antitrust environment. While the antitrust issues are complex, we also believe that we should not lose sight of the significant IP-related “building-block” challenges that remain. We strongly support China’s efforts to develop an antitrust regime consistent with the practices of other market-economy countries. However, we are concerned that there are many aspects of China’s economy,

²³ <http://www.commerce.gov/news/fact-sheets/2014/12/29/us-china-joint-fact-sheet-25th-joint-commission-commerce-and-trade>

including in its IP regime, that are different from ours and may not be fully market driven, which need to be acknowledged and discussed.

Thank you for your time and attention.

Appendix: Charts

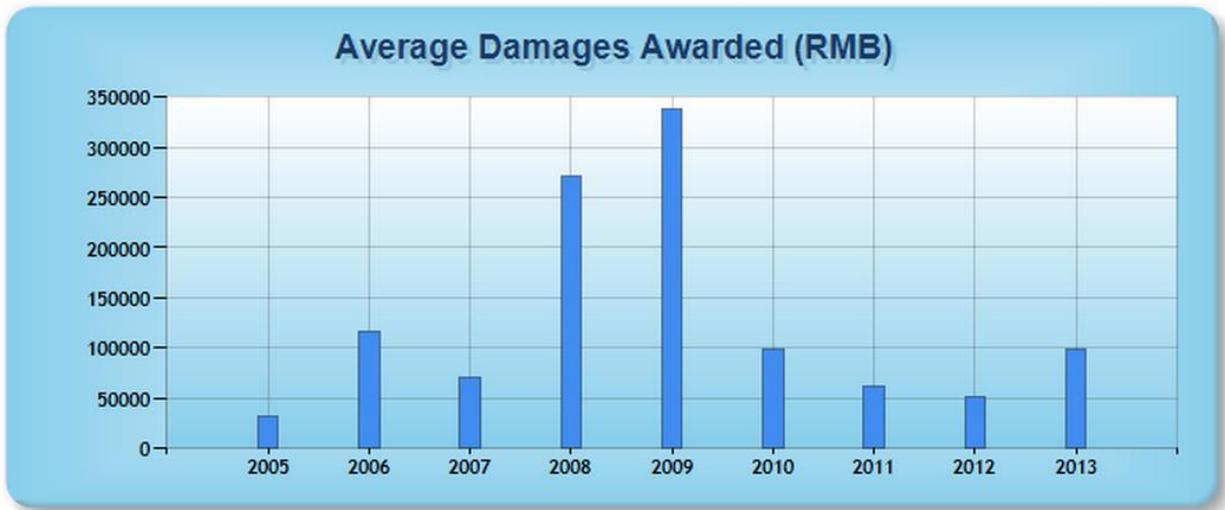


Chart 1:
Average Patent Infringement Damages Awards in China

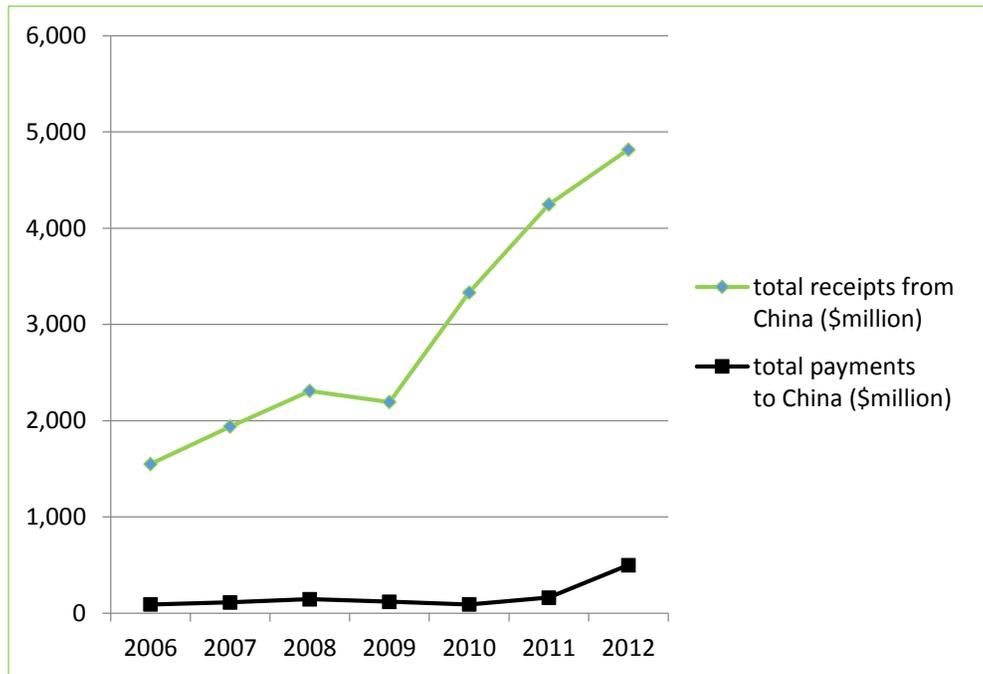


Chart 2:
Total Receipts from and Payments to China for Royalties of Various Kinds

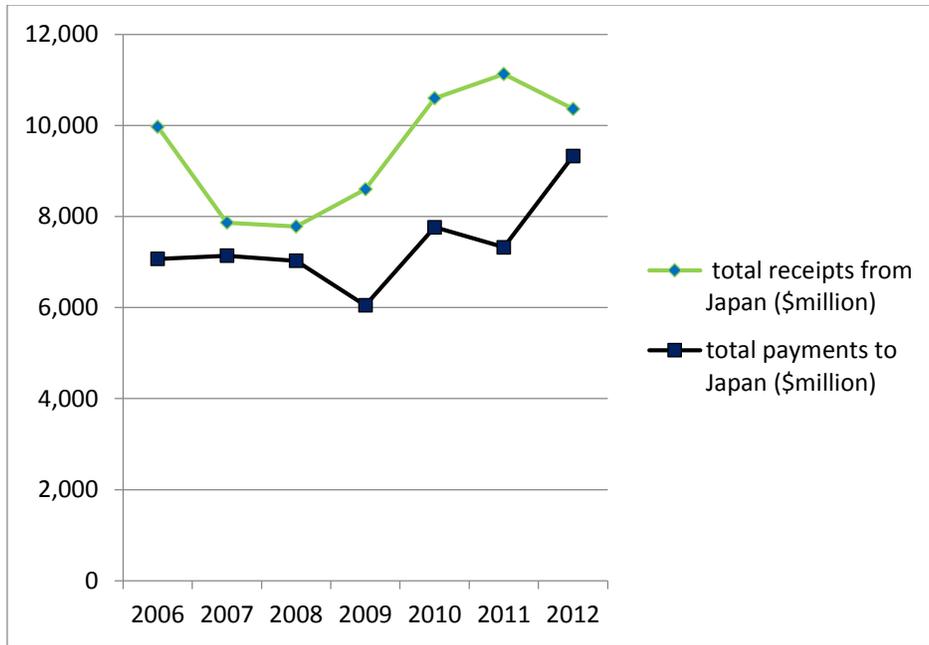


Chart 3:
Total Receipts from and Payments to Japan for Royalties of Various Kinds