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Optimizing US Government Engagement on Chinese IP and Tech Issues

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the Judiciary hearing on

Intellectual Property and Strategic Competition With China: Part 1

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Chairman Issa, Ranking Committee Member Johnson, distinguished members of this Subcommittee, it is an honor and a pleasure to appear before you again today on the important issues confronting the US government in addressing intellectual property protection in China.

I applaud the initiative of this Subcommittee to focus on China-related IP issues in its first hearing. I also applaud the creation of the new Select Committee on China under Rep. Gallagher's leadership.

I believe that my last appearance before many of you was in 2016 on the topic of "International Antitrust and China."¹ At that time I was working for the US Patent and Trademark Office as Senior Counsel for China.

My topic today is on Optimizing USG engagement on China IP and Tech Issues. This is not a new topic for me and is based on the challenges that I encountered while working in the United States government. I believe you will be hearing from other speakers who will address national and economic security concerns posed by China. These issues are is not the principal focus of my testimony, although I am happy to answer questions on these topics.

From my years of experience working with both parties, engaging with many governments, and spending time on detail to the Commerce and State Departments, I believe that I have come to understand the challenges that we face in the US government in creating a whole of government approach to the challenges posed by China and its intellectual property regime.

During my tenure at USPTO, I helped to restructure many aspects of how the USPTO engages with China. These included establishing a USPTO presence at the US Embassy in China (where I served for four years), creating a position of Senior Counsel for China in the Office of Policy and

¹ Press Release, *Hearing Advisory: Regulatory Reform Subcommittee to Hold Hearing on International Antitrust Enforcement with a Focus on China*, House of Representative Judiciary Committee (June 2, 2016), <https://judiciary.house.gov/media/press-releases/hearing-advisory-regulatory-reform-subcommittee-to-hold-hearing-on>.

International Affairs, establishing an IP Resource Center to provide empirical research support for policy initiatives, and participating in nationwide China IP roadshows to educate US businesses. Outside of the US government, I also established a Track II Dialogue with China on IP issues, which continues to be in effect to this day. I am a recipient of the Meritorious Honor award from President Trump for my work on technology transfer with China, which is the highest award in the civil service.

After leaving the USPTO in 2018, I joined the law faculty at the University of California at Berkeley as Distinguished Senior Fellow and Director of its Asian Intellectual Property and Technology Project. In that capacity, I have continued to teach the only comprehensive class in North America on intellectual property law in China, in addition to organizing courses and conferences on international trade, technology transfer, antitrust and related issues. My research concerns the intersection of international trade, intellectual property, and China.

In short, I believe that the only way that the United States can effectively compete or collaborate with China is through better strategic management of our own resources.

China today does present a peer-level economic and security threat in terms of its ability to innovate and its military and economic strength. Concerns over economic espionage, hacking and other forms of IP Theft are real. However, the risks they pose have often been misapprehended. I leave the subject of these risks principally to other speakers today.

Part of my message today is that we need to recognize that the United States faces new challenges that have little to do with “IP Theft.” Many of these challenges reflect China’s willingness to leverage its own IP system and command economy in order to surpass the United States in intellectual property matters. In some cases, opportunities have been presented to China by a weakening of the United States system in key areas, such as patent eligible subject matter or availability of injunctive relief.

China’s efforts to develop a leading-edge IP regime have resulted in a national system of IP tribunals and courts, with over 2,000 IP judges, many of them trained at specialized IP faculties, and a nationwide annual court docket of 600,000 civil cases last year. The Chinese patent and trademark office also receive applications that are several multiples of the USPTO. IP has also been incorporated into industrial planning, including a national IP strategy, but also in metrics and expectations for a wide range of industrial policies. China has undertaken major revisions several times over the past 20 years to all its IP legislation, including to related laws such as the Civil Code, Criminal Code and Civil Procedure Law. Two of China’s major IP institutions are modeled on US practice. In 2018, China combined its patent and trademark office into one agency, much like our own USPTO. In that same year, China established a nationwide appellate IP court with jurisdiction over patent and other complex IP cases that is modeled on our US

Court of Appeals for the Federal Circuit.² At the same time, China moved its copyright administration from the executive branch into the party propaganda bureau. This may signal less independence of the copyright administration from party policies, particularly those regarding propaganda and market access.

Many of the developments in recent years have been helpful to the foreign community, including to Americans. Business surveys also generally show that most US companies are satisfied with China's IP regime, with only a minority claiming unfair treatment.³ There have been significant improvements in civil enforcement in many areas. For example, Microsoft achieved "win rates" of 100% in the 63 software piracy cases filed between 2010-2019.⁴ Many academics and professionals have also reported high win rates in trademarks and patent litigation. Prof. Bian Renjun estimated that the "win rate" in the overall *published* civil patent docket for foreign patent litigants was 80%, while the injunction rate was 90%; these win rates are higher than for Chinese litigants in China. Damages for foreign patent litigants in China during the period that she studied, although small, were three times higher than for domestic litigants.⁵ I emphasized "published" since, as discussed later, the unpublished docket is often more important than the published one.

The balance of my testimony is divided into four parts: (a) learning from the past; (b) examples of mistakes from the past; (c) balancing IP theft with other policies; and (d) concrete steps in the mid- and long-term.

A. How We Got Here

In the last two decades our views on China's interests in protecting IP and becoming an innovative economy have evolved to the near opposite of where they began. These changes in perception have accelerated since the Trump Administration.

1. We began with China joining the WTO in 2001. There was tremendous idealism about how the "open and rules-based trading system" in the WTO would affect economic and social change in China.

² Mark A. Cohen, *A Federal Circuit with Chinese Characteristics? – The Launch of China's New National Appellate IP Court 中国特色的联邦巡回上诉法院?*, China IPR (Jan. 4, 2019), <https://chinaipr.com/2019/01/04/a-federal-circuit-with-chinese-characteristics-the-launch-of-chinas-new-national-appellate-ip-court/>.

³ See AmCham China, 2023 China Business Climate Survey Report, fig. 40 (19% of respondents claimed unfair treatment by China's IP regime); fig. 57 (21% of respondents claimed that insufficient protection of intellectual property is a barrier to innovation); fig. 60 (36% of respondents report an improvement in intellectual property); fig. 61 (49% of tech and R&D respondents report that intellectual property concerns are limiting their investments in China).

⁴ Mark A. Cohen, *An Update on Data-Driven Reports on China's IP Enforcement Environment*, China IPR (July 13, 2020), <https://chinaipr.com/2020/07/13/an-update-on-data-driven-reports-on-chinas-ip-enforcement-environment/>.

⁵ *Id.*

2. After China joined the WTO, the United States expressed its desire for China to become a “responsible stakeholder,” in the words of former World Bank President and US Trade Representative Robert Zoellick.

3. Our view of China’s innovative capacity until about 10 years ago was that China was only capable of making “undifferentiated, incremental improvements” because of cultural handicaps as well as the limitations posed on Chinese society by the Communist Party.⁶ As one example, an article in the *Harvard Business Review* noted, “the problem, we think, is not the innovative or intellectual capacity of the Chinese people, which is boundless, but the political world in which their schools, universities, and businesses need to operate, which is very much bounded.”⁷

4. Most recently, we have recognized China as a peer-level competitive threat with a capacity to out-innovate the US in key areas. As but one example, a recent, empirically grounded report of the Australian Strategic Policy Institute noted that, compared to the United States, “China’s global lead extends to 37 out of 44 technologies ... covering a range of crucial technology fields spanning defense, space, robotics, energy, the environment, biotechnology, artificial intelligence (AI), advanced materials and key quantum technology areas.”⁸ There are numerous other studies from national and international organizations which point to similar developments. The WIPO’s Global Innovation Index, for example, reports that China today is the 11th most innovative global economy.⁹

5. Looking forward, I believe that China will become increasingly confident of its alternative model of state planned and controlled intellectual property rights. In addition, China may further weaponize its judiciary in response to US trade sanctions, increasing isolation or declining bilateral relations. Whatever steps China may take, its managed approach has also become increasingly inimical to fundamental concepts that the United States advanced in the TRIPS agreement, thereby posing a pressing ideological challenge to the global IP system of which the United States has been a major architect.

China’s state-subsidized or state-inspired efforts have already caused and will continue to cause severe strains in our trademark system, impose difficult challenges on our courts, and overwhelm our agencies. The USPTO has been struggling for several years now with a flood of fraudulent, low-quality trademark applications from China. (Many IP agencies, including WIPO, have had to deal with patent application surges, including end-of-year patent surges from China

⁶ Gordon Orr and Erik Roth, *A CEO’s guide to innovation in China*, McKinsey Quarterly (Feb 1, 2012), <https://www.mckinsey.com/featured-insights/asia-pacific/a-ceos-guide-to-innovation-in-china>.

⁷ Regina Abrami, William Kirby, and F. Warren McFarlan, *Why China Can’t Innovate*, Harv. Bus. Rev., Mar. 2014.

⁸ Dr. Jamie Gaida, Dr. Jennifer Wonog Leung, Stephan Robin, and Dantelle Cave, *ASPI’s Critical Technology Tracker*, Australian Strategic Policy Institute (Mar. 2, 2023), <https://www.aspi.org.au/report/critical-technology-tracker>.

⁹ Press Release, *Global Innovation Index 2022: Switzerland, the U.S., and Sweden lead the Global Innovation Ranking; China Approaches Top 10; India and Türkiye Ramping Up Fast; Impact-Driven Innovation Needed in Turbulent Times*, WIPO, (Sept. 29, 2022), https://www.wipo.int/pressroom/en/articles/2022/article_0011.html.

that were filed to utilize end-of-year subsidies or other government incentives.) The consequences of China's embrace of intellectual property may also be felt in our courts. To date, China has principally been a defendant in foreign proceedings, but certain companies such as Huawei have also become active in initiating lawsuits or licensing their portfolios to patent aggregators. There have also been increasing concerns over Chinese-funded non-practicing entities in our judicial system.¹⁰

With this increased self-confidence, Chinese courts and its IP agencies will no longer want to be just a "follower of property rights rules" but rather to become a global "guide of international intellectual property rules."¹¹ Consistent with its growing power, China has also sought to expand its influence in Belt & Road countries and in international organizations. Chinese courts will also continue to promote policies and institutions to attract international litigation.¹² China will advance its vision of intellectual property and international trade through the Regional Comprehensive Economic Partnership Agreement and its proposed accession to the CPTPP. In 2021, China also established a specialized IP court in the Hainan Free Trade Port in anticipation of an expanded role in resolving cross-border IP disputes.

Chinese courts also have an explicit goal of "promoting the extraterritorial application of their IP laws and regulations," as set forth in the five-year judicial protection plan.¹³ These goals are not dissimilar to the expansive jurisdictional reach of the antitrust agencies to exert greater foreign influence and lower foreign valuations of IP, about which I testified before, in 2016.

Today Chinese courts are also handling challenging technical issues in such diverse areas as the use of molecular markers in plant variety protection, IP protection of AI-created inventions and creative works, platform liability for patent, trademark and design infringements, and compensation for bad faith patent and trademark application activities. These cases, if well-

¹⁰ States Attorney Generals have also been raising concerns over these threats, including litigation financing involving Chinese entities. See 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/>; ILR Briefly, *A New Threat: the National Security Risk of Third Party Litigation Funding*, U.S. Chamber of Commerce Institute for Legal Reform (Nov. 2022), <https://instituteforlegalreform.com/wp-content/uploads/2022/11/TPLF-Briefly-Oct-2022-RBG-FINAL-1.pdf/>.

¹¹ 2020 Nian Zhongguo Fayuan 10 Da Zhishi Chanquan Anjian He 50 jian Dianxing Zhishi Chanquan Anli, Faban [2021] Yi Si Liu Hao (2020 年中国法院 10 大知识产权案件和 50 件典型知识产权案例, 法办【2021】146 号) [Top 10 Intellectual Property Cases and 50 Typical Intellectual Property Cases in Chinese Courts in 2020, No. 146 [2021]] (promulgated by the General Office of the Sup. People's Ct. Apr. 22, 2021) Sup. People's Ct., <https://www.court.gov.cn/zixun-xiangqing-297991.html> (China).

¹² See Mark A. Cohen, *Three SPC Reports Document China's Drive to Increase Its Global Role in IP Adjudication*, China IPR (May 5, 2022), <https://chinaipr.com/2021/05/05/three-spc-reports-document-chinas-drive-to-increase-its-global-role-on-ip-adjudication/>.

¹³ Renmin Fayuan Zhishi Chanquan Sifa Baohu Guihua (2021 – 2025 Nian) (人民法院知识产权司法保护规划 (2021-2025 年)) [The People's Court Intellectual Property Judicial Protection Plan (2021-2025)] (promulgated by the Sup. People's Ct., Apr. 22, 2021), Sup. People's Ct., <http://www.court.gov.cn/zixun-xiangqing-297981.html> (China).

reasoned, may also increasingly exert a soft influence on other courts and legal systems in the world.

The historic reluctance of the United States to recognize China's rise as a science and IP superpower is on a par with other major United States intelligence failures of my lifetime, including the exile of the Shah of Iran and the collapse of the Soviet Union. Our mistakes likely arose from many factors, including bureaucratic myopia, intransigence and hubris; poor organizational structures within the US government; inexpert handling of complex technical and legal issues involving China; and a reluctance to use the numerous multilateral and unilateral tools that we have available to advocate intelligently for our nation's interests with China. Today, we should not only be concerned with the economic and security risks faced by the United States in managing our relationship with an increasingly powerful China, but also the impact that China's rise will have on the global IP system.

B. Learning from the Past

The following is one example of US missteps in judging China's rise as a technology power, based on the public record:

China joined the WTO in December 2001. One month prior to accession, China's State Council enacted a regulation that discriminated against foreign licensors seeking to license technology to China by imposing mandatory licensing terms upon them that domestic licensors or Chinese technology exporters were not bound to follow. The regulation was the Administration of Technology Import/Export Regulations, or "TIER." In addition to affecting private licensing of intellectual property, it also prohibited sharing of improvements to technology licensed as part of government technology collaboration. Article 27 of the TIER required that "an achievement made in improving the technology concerned belongs to the party making the improvement."

Due its late enactment, the TIER was never reviewed as part of China's WTO commitments. The TIER entered into force January 1, 2002,¹⁴ or about three weeks after China joined the WTO on December 11, 2001. It appears to have escaped the scrutiny of the WTO accession process.

In those early years, the focus of US government engagement in China was on counterfeiting, piracy and Chinese export of infringing goods. Despite the apparent violation of most favored nation treatment for foreign licensors in the TIER, there was no interest in elevating this technology transfer issue to a higher priority.

During the ensuing 16 years after the TIER's entry into force, the US government also continued to sign bilateral science and technology agreements with China in a range of technology areas. These agreements required sharing of technological improvements. The agreements were

¹⁴ Regulations on Technology Import and Export Administration of the People's Republic of China (promulgated by the St. Council on Dec. 10, 2001, effective Jan. 1, 2002) <https://wipolex-res.wipo.int/edocs/lexdocs/laws/en/cn/cn125en.html>.

inconsistent with Chinese law, which prohibited such sharing arrangements pursuant to Article 27 of the TIER.

This issue surfaced again when the United States Government Accountability Office (GAO) prepared a report on clean energy cooperation with China. At that time GAO was advised by another US government agency to reach out to me, as I had voiced my concern about the legality of bilateral science agreements. I noted my concerns about the legality of US-China science cooperation. My concerns were thereafter downplayed in a published 2016 GAO report,¹⁵ which euphemistically noted that the USPTO had identified a “potential discrepancy” in “defining how IP may be shared or licensed in each country,” and that the USPTO was “discussing” the matter with other agencies. No further action was taken by GAO or any other government agency in response to those concerns.

The conditions imposed on US licensors were, however, consistent with the position of the Trump administration that China was forcing Americans to transfer technology against their will. On March 23, 2018, 17 years after the TIER enactment, the United States filed a WTO dispute on the TIER with China. China subsequently amended the law on March 18, 2019,¹⁶ and the case has since been suspended presumably due to China enacting conforming legislative changes.¹⁷

Why did it take 17 years to bring a case which discriminated against foreigners in technology transfer, and where the United States government itself was a victim? In fact, we never initiated a WTO case on patent infringement or trade secret protection in China.¹⁸ Were there other cases that the United States could have brought? We also hardly had a “whole of government” approach, despite numerous bilateral dialogues during previous administrations.

Very little has changed since then to address these problems. United States government agencies continue to choose to ignore the role that China plays in high-tech manufacturing, innovating and infringement. The most recent example of this is the FTC Notice of Proposed Rulemaking banning the use non-compete agreements by United States employers (the “NPRM”).¹⁹ 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

¹⁵ U.S. Gov’t Accountability Off., GAO-16-669, U.S.-China Cooperation: Bilateral Clean Energy Programs Show Some Results but Should Enhance Their Performance Monitoring (2016), at 27.

¹⁶ Mark A. Cohen, *The TiER is Revised...*, China IPR (Mar. 18, 2019), <https://chinaipr.com/2019/03/18/the-tier-is-revised/>.

¹⁷ Dispute Settlement, *China-Certain Measures Concerning the Protection of Intellectual Property Rights*, WTO Doc. WT/DS542 (authority for panel lapsed on June 9, 2021). https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds542_e.htm.

¹⁸ There were also many more WTO disputes that could have been brought regarding China’s IP system when the WTO still had an functioning appellate body. Mark A. Cohen, *The WTO IP Cases that Weren’t*, China IPR (Dec. 11, 2020), <https://chinaipr.com/2020/12/11/the-wto-ip-cases-that-werent/>.

¹⁹ Non-Compete Clause Rule, 88 Fed. Reg. 3482 (proposed Jan. 5, 2023) (to be codified at 16 C.F.R. § 910).

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 through the Chinese courts. 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.²⁰ Certain alternative means of protecting technology, such as through patents, may not be a viable alternative due to the need to protect proprietary information, and/or low grant rates that may exist for patents in technologies that China considers critical to its industrial policies.²¹

C. Balancing “IP Theft” with Other Policies

According to the FBI, IP Theft “focuses on the theft of trade secrets and infringements on products that can impact consumers’ health and safety, such as counterfeit aircraft, car, and electronic parts.” This definition would exclude copyright and patent infringement, as well as other actions by the Chinese government that could force technology transfer.²² In addition, the definition fails to take into account other mechanisms used by governments such as China to reduce the value of intellectual property, such as by restricting market access for copyrighted content, restricting insurance reimbursements for innovative medicines, aggressive use of antitrust, and licensing or regulatory barriers.

The current focus on “theft” of IP also does not align well with how intellectual property is formally enforced in China, the United States and throughout the world. Intellectual property,

²⁰ 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).

²¹ See, e.g., ee Gaetan de Rassenfosse, and Emil Raiteri, *Technology Protectionism and the Patent System: Evidence from China*, J IND. ECON., 70: 1-43 (2022). <https://doi.org/10.1111/joie.12261>.

²² FBI, Intellectual Property Theft, <https://www.fbi.gov/image-repository/ipr-500.jpg/view#:~:text=It%20specifically%20focuses%20on%20the,%2C%20car%2C%20and%20electronic%20parts.>

as a private property right, primarily relies upon civil remedies.²³ Criminal trade secret protection is not required by the TRIPS Agreement (Art. 61). Criminal prosecution of trade secret cases also remains difficult both in the United States and in China.

Looking at China's achievements in IP and the challenges it poses to the United States, it is important to keep in mind that autocratic advanced legal systems such as China's typically work fairly most of the time.²⁴ Due to a lack of systemic transparency, however, it is difficult to assess objectively how much foreign companies may be disadvantaged by China's IP regime. Transparency in China's IP regime was also not a significant part of the Phase 1 Trade Agreement. Although bias against foreigners and techno-nationalism are major concerns, another issue that is hardly noticed is low foreign utilization of this inwardly facing Chinese IP system. For example, only about 5 of 621 reported trade secret cases involved a foreigner as plaintiff.²⁵ In recent years, less than 1% of the IP court cases have been initiated by foreigners. Low utilization by foreigners, coupled with low transparency, also makes it very difficult to judge the extent of any bias in the courts. We therefore also have little insight into how many of the key deliverables of the Phase 1 Trade Agreement, such as improved trade secret protection and a patent linkage regime, are being implemented.²⁶

In order to craft effective strategies to protect IP from the United States, the stories about China's IP regime that we often hear in the press and from our companies also need to be balanced against successful outcomes. As the data suggest, many US companies have also won significant cases in recent years. As one recent example, Emerson Electric for many years encountered bad faith trademark squatting activity on its InSinkerator trademark. In a path-breaking decision, the Chinese government required the squatter to pay civil damages to Emerson. China is also in the middle of a multiyear campaign intended to address bad faith trademark and patent registrations. Michael Jordan has also achieved considerable success in the courts in dealing with bad faith trademark registrations from archrival Qiaodan. New Balance also achieved success in addressing trademark squatter Xin Bailun. Many companies report that judgments have also become easier to collect after the judgments have been

²³ See Mark A. Cohen, *The Criminal Bias in US Intellectual Property Diplomacy*, the National Bureau of Asian Research (July 22, 2021), <https://www.nbr.org/publication/the-criminal-bias-in-u-s-intellectual-property-diplomacy/>.

²⁴ Kathryn Hendley, *Legal Dualism as a Framework for Analyzing the Role of Law Under Authoritarianism* (October 1, 2022), 18 Ann. Rev. of L. and Soc. Sci. 211 (2022).

²⁵ 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. INTELLECTUAL PROP. L. & PRACTICE, at p. 21 (2022), available at: <http://dx.doi.org/10.2139/ssrn.4225187>, at p. 21.

²⁶ Mark A. Cohen, *The Phase 1 IP Agreement: Its Fans and Discontents*, China IPR (Jan. 21, 2020), <https://chinaipr.com/2020/01/21/the-phase-1-ip-agreement-its-fans-and-discontents/>.

reported to China's social credit system. There are numerous other positive examples that are well-documented from both big companies²⁷ and small.²⁸

Conversely, what we don't know about is what is not reported. Understanding Chinese law today is very similar to understanding pictures of Soviet Leaders in Red Square during the Soviet period: what matters most is not who is there, but who is missing or blurred out of the picture.²⁹ Certain major cases, such as the largest patent judgment in China involving Schneider Electric as a defendant, have never been reported. Another major decision that was not reported involved the granting of a preliminary injunction in a patent dispute against Veeco, a United States semiconductor manufacturing equipment supplier, at the request of AMEC, a pillar of China's efforts to achieve independence in the semiconductor sector.³⁰ China's vast administrative enforcement system, which authorizes its IP agencies to issue fines and order a cessation of infringement, is also highly opaque. Most of the patent linkage litigation in China to date has been through that opaque administrative system. In addition, unreported extra-legal threats to employees of foreign companies engaged in law suits in China have occasionally been reported.³¹ As bilateral relations have become more tense, there are increasing concerns over use of Chinese courts to advance industrial policy.³² Occasionally, Chinese judges and officials have openly advocated legal strategies to pursue foreign companies, implicitly suggesting that such cases will be successful.³³

These politically driven actions by China have often had the impact of driving out any good news about the improvements in China's IP regime. For most of my legal career I have had to

²⁷ See statement of Sharon Barner in "Fact and Fiction in US-China Intellectual Property Trade War" (Oct. 8, 2020) <https://asiasociety.org/northern-california/events/webcast-fact-and-fiction-us-china-intellectual-property-trade-war>. Ms. Barner is Vice President and Chief Administrative Officer of Cummins, Inc., and was the former Deputy Director of the USPTO.

²⁸ See Marketplace, Episode 900: The Stolen Company (March 15, 2019), concerning Abro Industries, Inc. <https://www.npr.org/sections/money/2019/03/15/702643451/episode-900-the-stolen-company>.

²⁹ Benjamin Liebman, Margaret Roberts, Rachel Stern, and Alice Wang, *Mass Digitization of Chinese Court Decisions: How to Use Text as Data in the Field of Chinese Law*, 8 J.OF L. AND COURTS 177 (2020).

³⁰ Mark A. Cohen, *Semiconductor Patent Litigation Part 2 – Nationalism, Transparency and Rule of Law*, (July 4, 2018), <https://chinaipr.com/2018/07/04/semiconductor-patent-litigation-part-2-nationalism-transparency-and-rule-of-law/>.

³¹ See, e.g., Chris Carr, Chris and Dan Harris, *Commercial Hostages in International Business Disputes*, 63 THUNDERBIRD INTL. BUS. REV. 523 (2021) (compiling data on detention of foreigners in China in civil disputes).

³² Mark A. Cohen, *Are Chinese Courts Out to Nab Western Technology – An Inconclusive WSJ Article* (Feb. 24, 2023), <https://chinaipr.com/2023/02/24/are-chinese-courts-out-to-nab-western-technology-an-inconclusive-wsj-article/>.

³³ See Renmin Fayuanbao (People's Courts Newspapers), Kuayue Taiping Yang to Jiaoliang[跨越太平洋的较量] (The Contest Across the Pacific Ocean) (Oct. 29, 2013), http://rmfyb.chinacourt.org/paper/html/2013-10/29/content_72138.htm?div=-1 ("QIU Yongqing, the chief judge, believes that Huawei's strategy of using anti-monopoly laws as a countermeasure is worth learning by other Chinese enterprises. QIU suggests that Chinese enterprises should bravely employ anti-monopoly lawsuits to break technology barriers and win space for development.").

grapple with the questions of what is missing in China's IP regime and the impact of what is not published.

D. Concrete short and mid-term steps

In the twenty years that I have been testifying on China's intellectual property regime before Congress,³⁴ the Chinese IP system has become vastly more complicated in both its formal aspects and in the external 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. 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.

1. We Need to Make the Necessary Appointments

We need an IP Enforcement Coordinator in the White House. We also need a Deputy USTR for Innovation and Intellectual Property. I believe that we also need a 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.

Congress should also reconstitute the Office of Technology Assessment (OTA), which operated in these halls from 1974 - 1995. OTA was once a key institution in understanding China's technology plans. It also has an illustrious alumni group. Its publication "Technology Transfer to China" (July 1987) was prescient.³⁵

2. We Need Better Data Tools

a) The US government should develop and implement tools, like those that our competitors are using, and that the Office of Technology Assessment pioneered, to improve innovation governance with regard to emerging technologies.³⁶ The adoption of Future Oriented Technology Assessments 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."

³⁴ Ownership with Chinese Characteristics: Private Property Rights and Land Reform in the PRC: Roundtable Before the Cong.-Exec. Comm. on China, 108th Cong. 1 (2003) (statement of Mark A. Cohen, Attorney-Advisor, U.S. Patent and Trademark Office).

³⁵ U.S. Cong. Off. Tech. Assessment, *Technology Transfer to China*, OTA-ISC-340 (1987).

³⁶ Jeanne Suchodolski, Suzanne Harrison, and Bowman Heiden, *Innovation Warfare*, 22 N. C. J. L. & Tech. 175 (2020).

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 resources on all varieties of civil technology, is well-positioned to make a significant contribution to such an effort.

Congress may also wish to consider whether a standard nomenclature for classifying technology could be developed for use by all technology agencies. This classification system might be based on the USPTO's Cooperative Patent Classification system. This could facilitate improved understanding of how to assess trends and risks in such areas as export controls, CFIUS, patent grants, technology transfer and scientific research, and help in developing tailored responses.

b) 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. 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.³⁷ 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.³⁸

c) Our BEA statistical reporting on technology transfers with foreign countries is unreliable. BEA categorizes technology licenses as "industrial processes." This data may omit important areas such as IP that are not related to industrial process (including designs), as well as licenses entered into as part of settlements of lawsuits.

3). We Need to Support Our Courts

³⁷ U.S.-China Econ. Sec. Rev. Comm'n, 2022 Report to Congress, at 177.

³⁸ 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/>.

a) The Solicitor General should begin exercising a more active role in US domestic litigation that involves Chinese patent IP assertions, particularly in issues that implicate the jurisdiction of our courts (such as anti-suit injunctions)³⁹ or the fairness of the Chinese legal system.⁴⁰

b) 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 take a year or more. However, in most cases China will have completed a domestic IP litigation within six months.⁴¹ These expedited timeframes 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).

c) The Judiciary Committee may wish to reconsider the risks posed by non-reciprocal extensions of benefits to Chinese courts. These could include recognition of Chinese judgments (pursuant to the Uniform Foreign Money Judgments Recognition Act), or evidentiary assistance provided to Chinese courts by amending 28 USC Section 1782.

4. We Need to Strengthen our IP System

a) I encourage this Subcommittee to investigate the impact of Section 101 jurisprudence on international competitiveness. During the 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. Patent applications have been refused by the USPTO but granted in China and/or Europe.⁴² 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.

b) We 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

³⁹ 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).

⁴⁰ See Mark Jia *Illiberal Law in American Courts*, 168 U. PA. L. REV. 1685 (2020).

⁴¹ See Minning Yu, *Benefit of the Doubt: Obstacles to Discovery in Claims Against Chinese Counterfeiters*, 81 *FORDHAM L. REV.* 2987 (2013).

⁴² 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).

upon attorney disciplinary efforts to deter this activity. USPTO needs a comprehensive program to address these problems as they arise, which may also involve deeper cooperation with the Chinese government to address cross-border malevolent actors.⁴³

c) Congress should encourage the USPTO to become more actively involved in assisting on trade and economic sanction determinations. 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.

5. 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,⁴⁴ 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.⁴⁵ 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

⁴³ See my forthcoming article in the Akron Law Journal, *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).

⁴⁴ <https://www.dayoneproject.org/>.

⁴⁵ 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/>.

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 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.

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