

SPEECH AT ASIA SOCIETY OF NORTHERN CALIFORNIA
“FACT OR FICTION IN THE US-CHINA IP TRADE WAR”

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I want to thank Executive Director Margaret Conley and the Asia Society, the great panelists here today and the audience for this great event.

For the next 20 minutes, I would like to bring you into my world of US-China IP relations.

US China relations are often viewed in black and white, of oppressor and oppressed, victim and infringer, those who want to collaborate and those who want to decouple.

Some of the more extreme steps that the United States has taken in the IP trade war - in areas of export controls, investment restrictions, and tariffs, also reflect *our* sense of China as an existential threat.

I hope to present some of the shades of gray in this complex area – drawn from a variety of academic, professional and trade perspectives.

I will do this in three steps:

First I will show you some of the positive developments in IP in China. Yes, there are positive developments.

Second, I will talk about some negative developments that are rarely discussed.

Third I will talk about some solutions for the future.

Whether you agree or disagree with my assessments, I hope that, by the end of this short lecture, I will have provided you with some new information to think about.

Regarding positive developments – the first topic-- I want to highlight the positive assessments of China’s IP regime by many IP lawyers, academics and practitioners. In fact, many of these people think that rather than criticize China, we have much to learn from China.

Their reasons are many. First, plaintiffs – including foreign plaintiffs -- win their cases, often more frequently than in the United States. They also get injunctive relief – and they get it about 100% of the time – also quite unlike the United States. Yes, damages are low – which is true of many civil law countries, but those injunctions against manufacturers or sales in China can be very valuable and can be critical in resolving a global IP dispute.

This first slide, below, shows only a sample of the various studies that discuss Chinese IP litigation data. Numerous studies, based on different data sources, reveal that foreigners also win more frequently than Chinese plaintiffs in Chinese IP cases, and they also get higher

damages. The lower graph is based on research for a doctoral dissertation at Berkeley by Dr. Bian Renjun, and was based on recently available comprehensive judicial databases.

PATENT WIN RATES

Table 5: Case Outcomes by Litigant Type

Plaintiff		Defendant					
		Foreign		Domestic/Private		Domestic/State-Owned	
		Infringement Found	No Infringement	Infringement Found	No Infringement	Infringement Found	No Infringement
Foreign	Infringement Found	80% (4)	20% (1)	70% (31)	31% (13)	-	-
	No Infringement	-	-	-	-	-	-
Domestic/Private	Infringement Found	67% (16)	33% (8)	57% (224)	43% (168)	27% (3)	73% (11)
	No Infringement	-	-	100% (1)	-	-	-
Domestic/State-Owned	No Infringement	-	-	-	-	-	-

Table 23: Case Results, by Residency of Plaintiff

	Decisions	Infringed	Injunction	Avg. Damages
Total	1,663 (100%)	1,333 (80.16%)	1,203 (90.25%)	¥75,942.39 (\$12,368.47) ¹⁹
Foreign P.	115 (6.92%)	97 (84.35%)	90 (92.78%)	¥201,620.45 (\$32,837.21)
Domestic P.	1,548 (93.08%)	1,236 (79.84%)	1,113 (90.05%)	¥66,217.93 (\$10,784.68) ²⁰

Sources: Brian Love (2016), Bian Renjun (2018).

In fact, studies show that a US company is *more* likely to win a patent suit in China than it would in the United States (where win rates averaged from 50-70%, depending on whether it is a bench or jury trial)

These are not outlier studies either. As I mentioned these are just a sample of many studies on this issue. Nor are they confined only to patents.

This second slide of sample studies show that high foreign IP win rates are not limited to patents. In some cases, such as for Microsoft in software copyright cases, the win rate was 100%, probably thanks to the work of the great lawyers like those on this panel.

Table 3: Comparison of win rates for selected foreign software copyright plaintiffs (1st instance, 2010-2019, N= 273)

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%

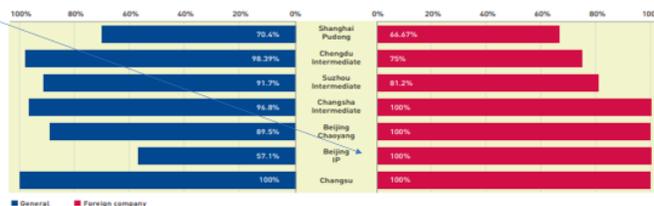
Company Name	Cases	Wins	Win rate
Siemens Product Lifecycle Management Software Inc	12	12	100.0%
Autodesk, Inc	10	10	100.0%
Dassault Systèmes	6	6	100.0%

OTHER WIN RATES

"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."

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

FIGURE 7: Comparison of foreign plaintiffs' chances of winning – 2019



Studies like these have been drawn from diverse sources over the years. Most of them greatly benefit from the increase in judicial transparency that has occurred in China since 2014 when China began compelling case publication. The Chinese government website now has 63 million civil case documents with nearly 50 billion visitors.

No, I am not responsible for a billion of those hits.

This database has made a huge difference to studies of Chinese law.

After looking at these high win rates and high injunction rates, the question to me is not whether foreigners win but why, if they do win, why do they bring as low as 1% of all lawsuits in China and why is it that political solutions rather than legal solutions are often sought by companies.

One reason for the high win rate may be that foreigners self-select their best cases. Another reason for the low utilization rate and political solutions may be that companies think a political resolution will deliver more efficient results to deliver social change. Microsoft may be an example of this, as they have long urged the US government to pressure China to implement self-auditing procedures to control software piracy, rather than rely solely on their own litigation program. The Phase 1 Trade Agreement, which includes a commitment to software legalization by the Chinese government reflects such an approach.

In addition to high win rates, there are also certain advantages of the Chinese court system compared to the US. The system is inexpensive. It lacks dilatory discovery procedures. Cases and appeals are concluded quickly. In addition, the judges are generally experts in IP, and the courts are devoted exclusively to IP. In short, you may have a fast, expert and low-cost trial.

One can say that the Chinese IP system overall has been designed to be fast. As an example, design patents are issued in about three months. In the United States, it takes about two years at the USPTO for a design patent to issue. The systems, to be fair are different. The Chinese system has more limited examination procedures. However, the earlier time to grant can be critical for design-dependent industries, such as fashion.

As with litigation, the IP registration system is also less expensive. Application fees for a trademark are about 1/8 the United States. The largest trademark law firm today, an Alibaba subsidiary, uses automated filing and searching technology. They also currently charge no fees. They filed 180,000 applications in the first quarter of 2020 alone. Perhaps a side effect of these low cost fees and low-cost procedures is that they contribute to low quality rights.

With these policies in place, it is no surprise that China has a large cohort of small companies and individuals that use the IP system. It has about 30 times the numbers of independent inventors than the United States --, a country that prides itself on being the home of garage inventors like Edison, Land and Goodyear.

To conclude this first section: the data suggests that China's domestic IP regime is quite different from what we might imagine. There are some aspects that we might actually learn from. The data I have referred to above, by the way is completely absent from the USTR report that launched the trade war regarding forced technology transfer and IP theft.

Now for Section 2: the problems that you may not have heard about.

In a sense we are looking in this section at dark clouds on the horizon, after having looked at some silver linings.

By almost any measure – patents, trademarks, litigation, China's IP system is huge and one with deep Chinese ownership and deep government involvement.

It is well beyond anything ever imagined in world history, and the numbers it generates today are often bigger than the rest of the world combined.

For example, China's patent office had 4.4 million applications in 2019, nearly 7 times the size of the United States. The trademark office with 12 times larger with 8 million applications. Its civil litigation docket (394,521) is also 30 times the United States docket (13,185) in 2019. China's influence has also spilled out beyond China's borders: it was the largest filer last year of international patents last year.

Dave Kappos, former Director of the USPTO, five years ago, called the smaller numbers at that time "mind-blowing"

China also has vast human and government resources committed to IP – it has bigger IP agencies with more officials and offices, more judges, more IP Courts, to name a few. It has IP-specific plans and its national annual five-year plan incorporates IP. IP is even part of the national college entrance exam or Gaokao 高考. Some of its IP leaders and judges, like former Vice Premier Wu Yi or Justice Luo Dongchuan, have also been promoted to the highest levels of state leadership – something that probably last happened in the US when Edwin Stanton, a great patent lawyer in his day, became secretary of war under Lincoln.

All these things may seem like positive developments and indeed they do have positive elements. However, as a state-managed system, China also actively intervenes in the market place, distorting opportunities for foreigners and Chinese alike. For example, it provides subsidies and other incentives for IP creating and filing, in addition to awards, tax breaks, and policies to facilitate commercialization or limit overseas competition.

We can see the outlines of the dark cloud already:

Many of the US accusations of IP theft derive from the incentives provided through the rich government programs to develop China's own IP, which can lead to theft and misappropriation of foreign IP rights to short-cut laborious and expensive R&D projects. It can also lead to other forms of abuse. US companies need to study these competitive risks and opportunities posed

by these plans, and I am increasingly hearing from leadership in many of America's companies that they are beginning to study industrial targeting and industrial policies by China.

To me, the issue today isn't whether China is committed to IP but whether China is over-committed – whether the state has intervened to such an extent that the courts and other institutions do not function independently, or that IP even ceases to be a private right – as the WTO requires.

Moreover, in this state-dominated environment, even judicial transparency needs to be recognized as a political act, as my former USTR colleagues may recall from an earlier effort when we tried together at the WTO to force China to publish its IP cases... and which has been evident in the cases that China has often not published. By the way, China refused to make its cases available to the United States in that proceeding, but it did voluntarily 2014 years later with the China Judgments Online database that I mentioned earlier.

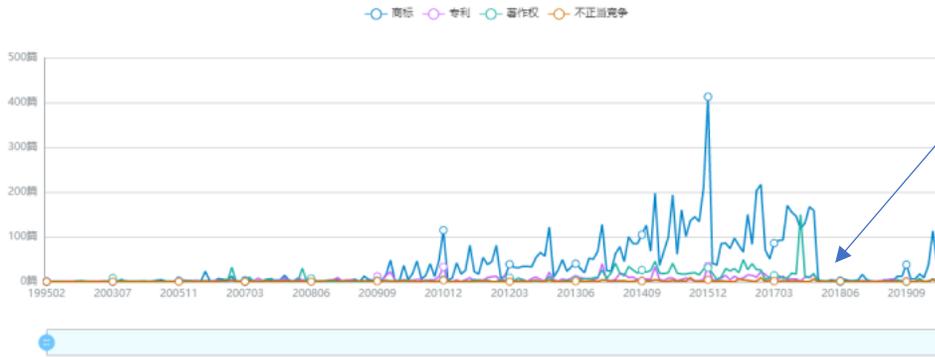
We often know what China's IP policy makers are up to by what they do not say, not by what they say. For example, to this day the largest patent judgment in China's history, which involved a foreigner losing, has never been published. There have also been some notable cases involving preliminary injunctions in the semi-conductor field that have also not been published.

As slide three shows, one of the earliest casualties of the trade war was a decline in publishing of foreign IP cases. This was also an issue not raised in the Phase 1 Agreement. Looking at the long arrow you can see that the number of cases of all times (patent, trademark and copyright) that were published essentially flatlined after January 1, 2018 – which was in the beginning of the trade war. Keep in mind that this is data on numbers of decided cases involving Americans, not published cases. Similar data is available for other foreign countries. The issue presented by this chart is the decline in public accessibility to case decisions involving foreigners during the trade war, which affects the ability to comprehensively understand China's legal system for IP as well as the ability to develop coherent strategies based on facts on the ground.

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案例时间 案例地区 案例类型 行政案由 裁判结果 裁判金额 诉讼时长 涉外情况 角色分析

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One common criticism of state interventions in IP creation is that China is just generating IP to fulfill metric goals. A further argument is that China is not necessarily innovating or creating IP value. My view is that China's huge IP filings should not be easily dismissed.

China is innovating in a range of areas. Some of it, but not all is incremental in nature. Incremental innovation by itself should not be dismissed as it can be critical to a product's success. I also believe that threats of China's pervasive technological dominance that are based solely on patent filings are also overstated. To me, there is a "middle way" between dismissing China's patent filings and outright dismissal of their value.

By itself, China's size in IP can lead to significant competitive threats. The owners of these rights expect some return on their investment, contributing to the high litigation environment. Competitors are burdened with costs of determining the extent of those risks. On a national level, countries with large IP portfolios like China may also increasingly believe that they have become a "strong IP country" as China does in its propaganda efforts. Judges in China also mistake the size of a portfolio for value, when they make decisions, and can thereby award big damages against foreigners.

In the first section, I mentioned that the data suggests that China's enforcement system does not discriminate against foreigners. There are important exceptions to this rule that are not being discussed, and they can help in isolating critical areas of concern. Much of this belongs to the "missing data" paradigm.

Bias by foreign patent offices is well documented in academic literature. With respect to China, several economists have pointed to bias when foreign companies seek IP rights in China's new and Strategic and Emerging Industries. "SEI" policy is a precursor to Made in China 2025, and it is also a set of industrial policies that are being revived. One economist has noted that foreign applicants were about four to seven percentage points less likely to receive a patent grant in an SEI filed than similar domestic applications in SEI's. A similar phenomenon exists with high value standard essential patents. Concerns about IP protection for SEI's have also been expressed by companies and trade associations in business surveys and in academic literature that has looked at forced technology transfer.

Based on data from the Darts-IP database and others, I believe there may be important sector-specific biases in the patent offices that need to be investigated, consistent with the concern of many economists. For example, I believe there may be a bias against Western pharmaceutical and medical diagnostic patents, as can be observed from this chart which shows foreign tech companies enjoying only a 9% change of seeing their pharma patent held valid by China's Patent Re-examination Board compared to 40% by Chinese.

Validity rates per technology field (2015-2019)
First instance, CNIPA PRB



In addition to bias against technologies, China may also disfavor certain rights, notably trade secrets, which may be more prone to political manipulation and they may also be more prone to bias against foreigners.

Based on limited data – due to transparency concerns - foreigners are being sued by Chinese nearly as often for trade secret infringement as Chinese are suing foreigners. Changes to China’s criminal trade secret law will also impose harsher penalties where trade secret theft occurs for the benefit of foreign actors. A recently published draft rule for administrative enforcement of trademarks only permits enforcement actions for Chinese owners of trademarks, not foreign owners. Finally, overall “win rates” for civil trade secret cases suggest that civil trade litigation is a significantly more difficult right to prosecute – with win rates as low as about 35%.

USTR’s investigation into China pointed out trade secret protection as a major area of concern, but failed to further elaborate on the nature of the concerns, including the technology sectors affected. This is not surprising. Trade secret cases may be the least published of any IP right in China. A major deficiency in the Phase 1 Agreement trade secret commitments, is that it does not require that such cases (with confidential data removed) are published.

My last point about the data you do not know concerns American frustration with the role of the WTO in addressing China’s technology transfer practices.

To quote a presidential candidate in a recent debate: here's the deal:

The United States has never filed a case against China on its civil or administrative enforcement of IP, nor on trade secrets or patent law, on China's approach to antitrust and IP, China's lack of independence in the courts, or that China's doesn't protect IP as a private property right.

In my view, we have not proven that the WTO, in Robert Lighthizer's recent words, "**is completely inadequate to stop China's harmful technology practices.**"

"Completely" is a particularly strong word.

The one case filed by the Trump Administration – DS542 was a long overdue case on China's technology transfer regime which discriminated against foreign licensors. The case was filed 17 years after the offending law was enacted. We effectively won that case when China quickly changed its law, but we lost the commercial significance of this issue by waiting 17 years.

We also never filed a case against China's enforcement of trade secret rules which decline to permit enforcement of trade secrets owned by foreigners (as the proposed new rules also now do), nor did we ask the WTO to rule on state-sponsored trade secret theft which has supposedly contributed to \$600 billion of US losses.

I believe USTR Lighthizer has already demonstrated during his tenure that there is some proof that the WTO may be adequate to address China's harmful technology practices, and that there is in fact no proof that the WTO may be completely inadequate to handle these issues.

This brings me to my last and final section of this lecture: "What can we do to improve the situation?"

Some people assume that because there is much theft going on, the Chinese IP system is simple.

This is a non-sequitur. It based a conclusion which is not supported by the original premise.

In general, in my limited experience, this non-sequitur ignores that thieves hide their tracks. They do not make proof of their conduct simple. Criminal IP activity in any country is no different.

Secondly, it assumes that if there is little compliance with law, the country has no laws. Often the reverse is true. As Stanley Lubman has noted, China is not so much a country of rule of law as rule by laws.

Finally, over-simplifying China's IP environment may mean underestimating the sophisticated challenges and opportunities that this system presents to the US and indeed to the global IP regime.

Although I opposed tariffs of the trade war, I believe that the tariffs have induced some useful legislative reforms. But we also need to be very thoughtful in ensuring that adequate benefits are derived from these costly retaliatory measures.

The Phase 1 Agreement did very little to address some of the systemic issues I have mentioned in this speech, including state interventions in the market and lack of transparency. It in fact reinforced some forms of state intervention, such as relying on China's opaque administrative IP enforcement system and not promoting increased judicial transparency. As with managed imports of agricultural goods to China, the Phase 1 Agreement overall is highly dependent on direct government intervention to achieve its goals and may be self-defeating in pursuing necessary IP reforms.

I have three suggestions to improve our engagement with China:

First, we **need to self-strengthen**. We need to improve our IP regime. We also need to ramp up on our science education and R&D policies.

One data point to highlight this: Today, China grants patents in a range of areas where the US has made it more difficult. Including medical diagnostics. One study identified 17,743 patent applications rejected by the USPTO due to our increasingly stringent patentability criteria, of which 1,310 were granted in China or Europe. We are rejecting diagnostic patents filed by our own inventors, that China and Europe is accepting, during a pandemic.

One may ask, as have several prominent IP practitioners, including former judges, "who is stealing IP from whom?"

Second, **we need to improve coordination and depth** in the US government and industry. We need more Chinese language, Chinese law and STEM talent and training in the government service, better use of available resources, and clear incentives for interagency coordination. My contribution of one Chinese IP survey class in the United States offered at Berkeley is not enough.

This effort is not only important to the United States. The United States may be the only country in the world that has the resources and talent to fully understand China's IP regime. The world needs American leadership in how to address and anticipate problems arising from China's increasing influence. This leadership needs to be thoughtful and strategic. It might include soft approaches like training and education, as well as research and analysis, strategic collaboration and confrontation. We need to put the teams together now.

Third, **we must never forsake our own values**. Our frustration with China does not mean that we should give up on Chinese courts or instruments of reform. We should not give up on market-based solutions. Nor should we abandon the WTO or other plurilateral mechanisms like TPP prematurely and with hyperbole.

If we do not engage in that struggle, we would not only be abandoning our own values and those of our allies, but we would also be abandoning the many creative individuals in China, who believe continue to see IP as critical to innovation but also economic and general legal reform.

In closing, Abraham Lincoln, the only US president who owned a patent, noted in his second lecture on Discoveries and Inventions that America and IP were two of the three major forces for innovation in the world. The invention of writing was the other one. We must strengthen these two first factors.

While the world is gray – I believe there is a critical role for the United States in addressing Chinese competitive challenges.

Thank you and I look forward to your questions and comments.

Speech delivered: October 8, 2020, revised October 15, 2020.

This written text differs from the speech as delivered.