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IP Enforcement In China, a potential WTO case, and U.S.-China Relations

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INTRODUCTION

Hearing Co-Chairmen D'Amato and Houston, Members of the Commission, thank you for this opportunity to address the Commission in intellectual property (IP) issues in China and, in particular, the problems in IP enforcement in China.

In 1995, William Alford published a book on "intellectual property law in Chinese civilization" entitled *To Steal a Book is an Elegant Offense.* The title offered a sanguine, if not depressing, commentary of U.S. concerns in this area. By that year, the United States and China had already concluded three bilateral agreements in which China pledged improved protection of intellectual property. (In 1996, the parties would conclude yet another Sino-American IP agreement.)[1]

Yet if Alford's title seemed pessimistically accurate, Chinese society proved itself – as in so many areas – capable of amazingly fast change. I have had the pleasure of following that development at a distance, first as a government official and, now, as a legal academic.

In the last three decades, China has made enormous progress in developing a modern system of intellectual property law. Given the intellectual "distance" China has traveled – manifested by Alford's title -- its achievement in developing its intellectual property system may be unprecedented. This is not just a matter of the law as written on the statute books, but also in the impressive group of Chinese leaders, officials, business people, journalists, and academics who understand, support, and advocate on behalf of intellectual property law. Just ten days ago, I had the pleasure of meeting in New York with Mr. XING Sheng-cai, the Deputy Director of China's State Intellectual Property Office (SIPO) and a delegation of SIPO officials. I was struck with these officials' depth of knowledge about and commitment to China's intellectual property system. Over the years, I have consistently had the same positive impression of commitment and seriousness, whether in meetings with MOFTEC officials or Chinese academics.

At the same time, *enforcement* of intellectual property law remains very weak in China. Given the size of the Chinese population and the strength of it economy, total intellectual property infringement in that one country probably dwarfs ***all*** intellectual property violations in a dozen smaller countries – developed and developing -- combined.[2] As a 2005 report from the Chinese government concludes modestly – and realistically -- "a complete IPR protection system cannot be established overnight. China has a long way to go."[3] The problem is that persisting levels of intellectual property piracy in China has cost and continues to cost American companies billions of dollars.

It is for that reason that the United States is considering the steps it might take within the World Trade Organization (WTO) to press China to improve its IP enforcement. While bringing a WTO "dispute settlement" case against China for deficient IP enforcement needs to be explored fully, it is important to understand that such a WTO case against China could be *extremely* high stakes -- not just for international intellectual property legal norms, but for the entire system of international trade law and the future of the WTO.

Someone at these hearings may repeat the old saw that the Chinese character for "crisis" [which is "weiji" in Mandarin] means danger + opportunity. That is an inaccurate understanding of Chinese logographs: the meaning of "weiji" is actually closer to "dangerous turning point" without the silly spin about "opportunity."[4] We must accept that a WTO case against China for deficient IP enforcement would be weiji -- a moment when things could go awry in Sino-American relations. Because of the high stakes, both American and Chinese officials must make sure that any such WTO case is handled as a matter between friends – intent on settling a disagreement in a way that contributes to their growing friendship.

THE EXTENT OF INFRINGEMENT IN CHINA

Many of the people testifying before the Commission will lay out the available data on IP infringement in China. Commentators generally take the view that "[i]n China, commercial counterfeiting has reached epidemic proportions."[5] Indeed, "rampant" seems to be the favored word to describe the level of piracy in China;[6] it appears even one senior Chinese official has described patent infringement as "rather rampant."[7]

There are at least three things about our data on IP infringement in China that are important to remember.

First, despite substantially increased enforcement by Chinese authorities – and impressive numbers of reported cases, particularly for trademark infringement -- IP infringement does not seem to have diminished significantly. A 2005 survey by the U.S.-China Business Council of its membership found that a resounding majority (74%) thought that IP enforcement was unchanged or deteriorating in the previous 12 month period, while only 26% thought the situation had improved over the same time.[8] China continues to be not just the number one source of

counterfeit goods entering (or attempting to enter) the United States, but the source of the *majority* of counterfeit goods into the U.S.[9]

Second, we always knew that this could be a significant problem with China's rapid economic development and accession to the WTO. There have always been substantial doubts that the Chinese Government could ramp up IP law ***and*** IP enforcement quickly enough following the country's admission to the WTO.[10] Given the enforcement challenges faced daily in OECD countries, it is no surprise that we are in the situation we now face.

Third, lack of transparency in China makes it difficult to gauge fully the sufficiency or deficiency of Chinese IP enforcement. Again, creating WTO-mandated transparency within Chinese economic and governmental activities was always understood as a huge challenge for China. While the Chinese have made commendable progress in disclosure of their IP enforcement activities, continuing lack of transparency cannot help but affect any outsider's conclusions about whether China is meeting its TRIPS enforcement obligations. For this reason, the written request made by the United States, Japan, and Switzerland under TRIPS Article 63.3 is perfectly reasonable – and should be understood by Beijing as a constructive effort by Beijing's WTO partners. (I will address the problem of transparency, data gathering, and ***burden of proof*** below.)

Beyond these observations, there is little a law professor can add to the infringement data, but I can relate to you my own private indicator of IP problems in China. In 2000, walking from the U.S. Embassy toward Dongchag'an, I was surprised to be offered a wide range of pirate DVDs just outside the "Friendship Store," China's traditional (and official) flagship department store. Since then, on every subsequent trip, I've started at the U.S. Embassy and seen how many feet I have to walk before a street vendor offers me pirate DVDs. It's never very far. On the other hand, I have to acknowledge that a lot of street vendors can be seen on weekends selling designer handbags on the sidewalks of New York – and I suspect that they are not all licensed by Louis Vuitton and Kate Spade. IP enforcement is troublingly problematic in China, but also – occasionally – it is problematic in Chinatown as well as Main Street USA.

If anything, street vendor anecdotes from everywhere – from Madrid to Mumbai -- adds emphasis for the need for transparent, verifiable enforcement data from China, so that we can genuinely compare their enforcement activities to enforcement activities in jurisdictions like the United States, Japan, Hong Kong

SAR, Korea, Singapore, and New Zealand – all of whom have IP infringement levels far below China's.

THE OPTIONS FOR THE UNITED STATES

Because China is now a member of the WTO the United States' options are arguably more constrained than they were 10 years ago. The United States' Special 301 process only seriously threatens a trading partner with sanctions for lack of IP enforcement when that trading partner enjoys access to the U.S. market beyond what all WTO members enjoy under normal trade relations. Most everyone agrees that a Special 301 decision to suspend some of the trade access that China enjoys under NTR would be illegal under the WTO rules. So a case under the DSU is the proper mechanism to suspend market concessions or take other action in response to lack of IP enforcement in China: it is not just "proper" legally, it is appropriate in the sense that lack of IP enforcement deprives American intellectual property owners of meaningful access to the Chinese market.

> ***The legal theory of a WTO case would be straightforward, but there is no precedent for this kind of case***

So, the most straightforward question that members of the Commission may want answered is: what would be the basis of such a WTO case? ***What WTO rules related to IP protection is China currently violating?*** TRIPS has extensive provisions on what kind of IP enforcement system a WTO Member must provide, but many of these provisions are drafted in terms of what kinds of procedures or remedies must be created within a legal system, without clearly mandating that the procedures or remedies must be regularly used. For example, Article 50 governing "provisional measures" requires that "judicial authorities shall have the authority to order prompt and effective provisional measures" without laying out criteria for when such provisional measures should or must be used. Similarly, Article 46 requires that "judicial authorites shall have the authority" to order that infringing goods be disposed of outside normal "channels of commerce." without requiring such disposal. A country can probably be in compliance with all these provisions by giving police and judges these powers, even if the authorities infrequently use these powers.

Instead, a WTO case would probably depend largely on Articles 41 and 61 of the TRIPS Agreement. Article 41(1) provides as follows:

> Member shall ensure that enforcement procedures as specified in this Part are available under their law so as to permit effective action against any act of infringement of intellectual property rights covered by this Agreement, including expeditious remedies to prevent infringements and remedies which constitute a deterrent to further infringements.

Article 61 amplifies on this in regards to criminal enforcement, providing, in pertinent part:

> Members shall provide for criminal procedures and penalties to be applied at least in cases of willful trademark counterfeiting and copyright piracy on a commercial scale. Remedies available shall include imprisonment and/or monetary fines sufficient to provide a deterrent, consistently with the level of penalties applied for crimes of a corresponding gravity.

The legal argument based on these provisions would be straightforward *qua legal argument*: [1] that "enforcement procedures" are NOT "available" in China's legal system "so as to permit effective action" against infringements -- because "remedies which constitute a deterrent to further infringements" are not really "available" and, in particular, [2] that criminal prosecutions are simply not happening "in cases of willful trademark counterfeiting and copyright piracy on a commercial scale."

But a straightforward legal *theory* does not necessarily mean an *easy* case to win. At whatever level the case is formulated, it is important to understand that there is no precedent at the WTO for how to interpret these international treaty obligations to provide "effective" enforcement procedures for intellectual property.

There have only been a few WTO disputes concerning the TRIPS enforcement provisions and only one of these provides any meaningful guidance to the kind of case the United States would bring against China. The other disputes were, first, settled by mutual agreement – so there are no panel decisions that would serve as precedent – and, second, concerned very narrow enforcement issues. In the case of the United States' 1997 dispute with Denmark and Sweden, the problem was a specific deficiency in the Danish and Swedish civil enforcement systems.[11] In the case of the United States' 1998 dispute with Greece, the problem was a very specific kind of infringement – by television stations – that

Greek authorities were tolerating.[12] The kind of claims that the United States might bring against China for deficit IP enforcement would require much more interpretation of the TRIPS enforcement provisions – with a much greater range of possible outcomes and a concomitantly greater amount of political pressure on the Panel and Appellate Body [AB].

The WTO decision most relevant to the sort of argument the United States would need to make concerning Article 41 comes from the 2002 *United States – Section 211 Omnibus Appropriations Act of 1998* case.[13] Although the case focused on the substantive trademark obligations of TRIPS, the European Union argued that particular provisions of American law violated TRIPS Article 42 by, in essence, denying a foreign trademark holder his or her "day in court." The language of Article 42 has some parallels to Article 41 in that it provides that WTO "Members shall make available to [IP] right holders civil judicial procedures . . . ." While the decision was made concerning the U.S. statutory provisions "on their face,"[14] the Appellate Body made it clear that the TRIPS duty to "make available" civil judicial procedures extends to more than just the statutes and regulations as written:

> The first sentence of Article 42 requires Members to make certain civil judicial procedures "available" to rights holders. Making something *available* means making it "obtainable," putting it "within one's reach" and "at one's disposal" in a way that has sufficient force or efficacy. We agree with the Panel that the ordinary meaning of the term "make available" suggests that "right holders" are entitled under Article 42 to have *access* to judicial procedures that are effective in bringing about the enforcement of their rights covered by the Agreement.[15]

This same reasoning should apply to Article 41: the obligation to "ensure that enforcement procedures . . . are available" means that enforcement procedures described in TRIPS are "obtainable" and genuinely "within reach" of rights holders. But this language is, as far as I know the extent of existing WTO jurisprudence on the critical issue of interpreting Article 41.

Having served in the U.S. Government from 1997-2001, I should say that this lack of precedent on the TRIPS enforcement provisions is partly our own fault. Both the Clinton and Bush Administrations could have had a more concerted plan to develop interpretation of the TRIPS enforcement provisions through one or two carefully chosen, lower profile cases against countries that have egregiously

failed to enforce IP protection. But American industries have lobbied for specific WTO cases without thinking of the United States' overall needs to make WTO agreements work for our country's best benefit. Having failed to bring WTO cases against smaller economies where IP enforcement has been badly deficient, we now face the problem of a case against one of our principal trading partners, a case that, if it goes badly, could damage the WTO as well as what is now the globe's most important bilateral relationship. The folks at USTR and the rest of the Executive branch are well aware of this; if it seems they are moving quite cautiously, they have good reason.

What would be the precise claims about lack of IP Enforcement?

The TRIPS disputes that have culminated in WTO decisions have, on the whole, been decisions about the statutory law of WTO Members, i.e. how a country's statutory law fails to provide the proper term of patent protection or provides a statutory exception to copyright protection that unreasonably prejudices the legitimate expectations of copyright owners. As I said above, in its impressive development of a modern IP system, China has already addressed almost all issues to bring its statutory law into compliance with TRIPS.[16] While there may still be a few places where Chinese laws could be challenged as TRIPS-deficient "on the books," most of the cases the United States would bring concerning IP enforcement involve the actual, "on the ground" application of the statutory laws.

A narrow WTO case – either "on the books" or "on the ground"

Nonetheless, there are probably some narrow TRIPS cases that could target China's criminal laws *as they are written* as failing to criminalize all "cases of willful trademark counterfeiting and copyright piracy on a commercial scale" (Article 61), or failing to provide "imprisonment and/or monetary fines sufficient to provide a deterrent" (Article 61), or failing to provide "remedies which constitute a deterrent to further infringements" (Article 41). These kinds of cases would still be facial challenges to Chinese laws. The first example would be the easiest because a DSU Panel should not have an overly difficult time giving meaning to counterfeiting and copyright piracy "on a commercial scale." For example, ***if*** the statutory or regulatory thresholds (of seized counterfeit or pirate goods) for criminal prosecution are so high as to leave substantial amounts of obviously "commercial" activity invulnerable to criminal prosecution, then the law would be, on its face, incompatible with Article 61.[17] The other two

examples of facial challenges to existing laws or regulations would require a Panel – and probably the Appellate Body – to give specific meaning to the more general notion of sufficient "deterrence."

As to "on the ground" application of the laws, one type of WTO case would narrowly target specific practices of Chinese officials as producing a non-deterrent enforcement system. For example, when counterfeit goods are seized in China, they are valued at their "street value," not at the price for which corresponding authorized goods would sell.[18] One may quibble with the proper economic theory for the valuation of seized counterfeit goods, but the result of this practice is to keep most seizures below the statutory/regulatory threshold for criminal prosecution. Last year, this Commission received detailed testimony concerning this valuation issue.[19] The result of systematically low valuations on seized counterfeits appears to be that in many "cases of willful trademark counterfeiting and copyright piracy on a commercial scale" criminal penalties are not applied. While this sort of WTO case would address only one significant problem, it would still require a nuanced argument and carefully assembled evidence.

A broader case - Chinese IP enforcement compared to what?

A broader approach would focus on a wider, but still specifically identified set of Chinese administrative, police, and judicial practices as failing to provide TRIPS Article 41(1) "effective action" in the form of "remedies which constitute a deterrent to further infringements." With intellectual property infringement in China being "open and notorious,"[20] it would seem that the present enforcement system broadly fails this Article 41 standard. But the lack of precedent for this kind of WTO case would confront a Panel with the problem of interpreting these more general phrases; in other words, what would be the proper framework for considering the sufficiency or deficiency of a country's enforcement of IP laws? Let's consider at least three possibilities.

Inadequate enforcement compared to other countries. One comparative measure might be look at enforcement in other WTO Member jurisdictions. For example, Korea, Singapore, and Malaysia all appear to have much more vigorous and consistent IP law enforcement, as do the customs jurisdictions of Hong Kong SAR and Taiwan. But while this is good gist for our own thinking, such comparisons are politically problematic. More importantly, such comparisons are conceptually infirm for a simple reason: China is unique in its size and socio-

economic heterogeneity. Its situation just cannot be compared easily to other WTO members, developing or developed.

Inadequate enforcement compared to other aspects of Chinese legal system. One could reasonably propose that another measure of whether Chinese is providing insufficient IP enforcement is to compare IP enforcement with Chinese enforcement of other laws. But this kind of comparison can, in fact, make one more sympathetic to the Chinese government's situation. Simply put, Beijing has significant "command and control" problems with its provincial and local governments; those problems seem to afflict everything from environmental regulations to real property law. As the Chinese proverb goes, "the mountains are high and the Emperor far away."

Some might believe that comparing IP law enforcement to enforcement of other laws in China is foreclosed by TRIPS Article 41(5) which clarifies that TRIPS creates no "obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general."[21] But it is still interesting to ask whether a country should have greater obligations to enforce domestic laws that are constituent of its international legal obligations than domestic laws that, from an international legal perspective, are purely "elective." More importantly, despite Article 41(5), Article 61 requires that criminal remedies "be available" for IP violations "consistent with the level of penalties applied for crimes of a corresponding gravity." Thus, if the *United States – Section 211 Omnibus Appropriations Act of 1998* AB understanding of "make available" applies to Article 61, it is reasonable to compare penalties being applied in IP infringement cases with penalties being applied to burglary, common theft, and, arguably, a whole range of intentional torts subject to criminal prosecution. One useful thing about such comparisons is that they can be done at the provincial and local level, i.e. are intellectual property violations being prosecuted with the same vigor as similar crimes in the city of Wuhan? Are commercial scale counterfeiters being pursued with the same vigor as similar crimes in Shanxi province?

Lack of deterrence measured by counterfeiter recidivism. In addition to "internal" comparative measures to enforcement of other criminal laws, I think that one of the most unimpeachable ways to establish that a country's IP enforcement is insufficient to meet its TRIPS obligations is by measuring the recidivism of counterfeiters and infringers. Evidence of substantial recidivism in any legal system shows that that system is not applying "remedies which constitute a deterrent" to the illegal activity being targeted.

Everyone believes that counterfeiters regularly return to their activities after being brought before China's administrative or judicial authorities. One American general counsel describes apprehended Chinese counterfeiters as "essentially get[ting] slapped on the wrist and they're right back in business."[22] Earlier this year, Chris Israel, the Department of Commerce Coordinator for International Intellectual Property Enforcement, reported that Shanghai's Xiangyang Market – a prime location for counterfeit goods -- is being shut down, but Mr. Israel expects that the counterfeit vendors will just move to other markets "including one, southwest of the city, in Longhua."[23] Practically speaking, if fines for infringement are too low, they more resemble the price of local business permits than a society's sanction for illegal behavior. There is also concern that fines are often unpaid – another level of problematic enforcement[24] which could, if adequately documented, show lack of TRIPS-mandated deterrence.

A very broad "non-violation" case

Finally, mention should be made of an option that, at the moment, is not available to the United States. Under the TRIPS provisions, the United States could eventually bring a WTO claim against China **not** on the letter of the TRIPS Agreement but on the grounds that IP enforcement in China is so deficient that the United States has generally been denied the benefits of entering into the WTO with China.

Such "nullification and impairment" or "non violation" cases rely on the GATT, not the TRIPS Agreement itself. TRIPS Article 64(1) provides that GATT Articles XXII and Article XXIII apply to intellectual property matters; GATT Article XXIII:1, in turn, provides that a WTO Member can bring a dispute settlement case if it "consider[s] that any benefit accruing to it directly or indirectly under this Agreement is being nullified or impaired . . . as the result of "(*a*) the failure of another contracting party to carry out its obligations under this Agreement, or (*b*) the application by another contracting party of any measure, whether or not it conflicts with the provisions of this Agreement, or (*c*) the existence of any other situation."[25] In other words, regardless of a violation of express TRIPS provisions ("a" above), the United States might be able to show that its benefits as a WTO Member – access to the Chinese market – have been impaired by judicial regulations or practices ("any measure" under "b") or simply by the general non-enforcement of IP ("any other situation" under "c").

For the time being, there is a moratorium on such nullification and impairment cases – established at the fourth Ministerial Conference at Doha and reaffirmed at the last Ministerial -- until such times as the TRIPS Council gives recommendations for the scope of such cases.[26] Over the long term, the United States needs to work within the WTO bureaucracy to help craft scope limitations to address concerns that the nullification provisions are too open-ended for use with the TRIPS Agreement.[27] But even when the moratorium is eventually lifted, we have to recognize that a claim against deficient IP enforcement brought under GATT Article XXIII would be a profound gamble: in over fifty years of GATT experience, there have been no GATT/WTO decisions applying XXIII:1(c) and only a handful of narrow decisions applying XXIII:1(b).

EVIDENCE AND THE BURDEN OF PROOF IN SUCH A CASE

One of the most interesting and difficult aspects of WTO jurisprudence is how Panels and the Appellate Body allocate the burden of proof in cases; this aspect of WTO dispute settlement amplifies the importance of gathering reliable data on IP enforcement in China. The burden of proof issues are not difficult in facial challenges to national statutes – and that has been the general form of TRIPS disputes to date. But *who* bears *what* burden of proof when the claim is that a country judicial system is *failing* to provide adequate enforcement? This is an extremely important issue because any country challenging IP enforcement in another country is essentially asked to prove a *negative,* i.e. that there is no IP enforcement sufficient to "permit effective action" and so as to "constitute a deterrent to further infringements."

WTO jurisprudence needs to be culled and studied on this question. For example, in the 2002 *European Communities – Trade Description of Sardines* case (*EC – Sardines*), the Appellate Body explained at length how to allocate the burden of proof under Article 2.4 of the Agreement on Technical Barriers to Trade (TBT). While stating that the initial burden of proof – what one might call the 'burden of production' – always remains with the complainant,[28] the Appellate Body made it clear that the complainant need only establish a "prima facie" case which the respondent must rebut:

> To satisfy this burden of proof, Peru must, at least, have established a *prima facie* case of this claim. If Peru has succeeded in doing so, then a presumption will have been raised which the European Communities must have rebutted in order to succeed in its defence. If

> Peru has established a *prima facie* case, and if the European Communities has failed to rebut Peru's case effectively, then Peru will have discharged its burden of proof under Article 2.4.[29]

As described by the American Law Institute's annual report on WTO cases, the Appellate Body "put the burden on the complainant. *But at the same time the AB stipulated an extremely low evidentiary requirement for discharging that burden.*"[30] In other words, the initial burden of production of evidence may be with the complainant, but once that burden to produce *some* evidence is met, the "burden of persuasion" – the need to rebut the evidence – may be put on the shoulders of the respondent.

Although the initial burden of proof/production rests with the complainant, a complainant claiming that another WTO Member is not providing sufficient enforcement to meet TRIPS Articles 41 and 61 should argue that it has an especially low evidentiary requirement because the ultimate evidentiary burden – the burden of persuasion -- should fall mainly with (a) the better informed party, and/or (b) the party asserting the affirmative proposition.

On the first point, although the Appellate Body said in *EC – Sardines* that the burden of proof remains with the complainant, it did so while specifically finding that the TBT offered the complaining party the means to get enough information for its *prima facie* case. The Appellate Body concluded that the TBT Agreement has a "compulsory" mechanism for a potential complainant to obtain information about a potential respondent's compliance.[31] Thus, it would be important to establish whether TRIPS has similar *compulsory* requirements on disclosure about enforcement efforts. If it does not – or if a potential respondent simply does not provide the necessary information – this strengthens the argument that because of *information asymmetries* the potential respondent becomes the better informed party and the burden of proof on the complainant's *prima facie* case should be lower.

Finally, as I have said above, a WTO Member complaining that another WTO Member has failed to meet the Articles 41 and 61 standards is being asked to prove a "negative"; for that reason, the ultimate burden of persuasion should be with the country that does or does not provide enforcement procedures that "constitute a deterrent to further infringements." In *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*, the Appellate Body said the following about the burden of proof:

> … the burden of proof rests upon the party, whether complaining or defending, who asserts the affirmative of a particular claim or defence. If that party adduces evidence sufficient to raise a presumption that what is claimed is true, the burden then shifts to the other party, who will fail unless it adduces sufficient evidence to rebut the presumption.
>
> In the context of the GATT 1994 and the *WTO Agreement*, precisely how much and precisely what kind of evidence will be required to establish such a presumption will necessarily vary from measure to measure, provision to provision, and case to case. (footnote omitted)[32]

These words should guide the United States in crafting a careful argument about who bears what burden of production and what burden of persuasion over the sufficiency of IP enforcement pursuant to TRIPS Articles 41 and 61.

In understanding enforcement in China, we must recognize that China's court system is no more complicated – arguably less – than our own system of federal, state, and municipal courts. Civil actions for patent, copyright, and trademark infringement in China are brought before what are called "People's Intermediate Courts" – of which there are 346. Copyright and trademark infringement actions can also be brought in specially designated "Basic Courts," just below the Intermediate Courts.[33] But a major complicating factor in analyzing IP enforcement is China's system of administrative dispute resolution. "Administrative resolution of disputes is unique in China," says one Chinese legal scholar;[34] this elaborate administrative dispute resolution system makes it particularly – if not uniquely -- difficult for us to understand what is happening on the ground in China's IP enforcement.

To their credit, the Chinese authorities have made great progress in disclosure of case information in the past years; the State Council and various courts regularly issue aggregate data about IP administrative and judicial cases while the Supreme People's Court has launched a website with laws and case reports. For these improvements, the Chinese authorities deserve praise and thanks. But to my knowledge, there is still no centralized, publicly available, regularly updated set of full case decisions (for IP or more generally). Nor, obviously, is there yet a

system of independent, indigenous journalism that can provide a watchdog for court activities or government statistics.

For an outside observer like myself, the data from the Chinese government is often difficult to understand without additional information. For example, the Chinese government's 2005 *New Progress Report* states that in 2004, 1,455 patent cases were accepted by "local patent administration departments" of which 1,215 were "resolved" but without information on how those cases were resolved. For the same period, they report that administrative units "dealt with" or investigated 51,851 trademark cases of which 11,600 "were common violations of the trademark laws and regulations" – impressive numbers that, nonetheless, remain too ambiguous. (What were the other 40,000 cases?) Moreover, of these 51,000+ trademark investigations in 2004, only 96 cases were transferred to judicial organs for criminal enforcement. What happens with the remainder -- the administrative investigations -- is unclear. This goes directly to the issue whether these administrative units can really deliver on the deterrent effect required by TRIPS. In contrast, Malaysia "recorded 1,175 piracy offenses in 2005" with "nearly half of those cases hav[ing] been taken to court while the rest remain under investigation"[35] – information that is easier to understand *and* represents much more vigorous enforcement efforts per capita.

I am sanguine – as I think many government officials are -- about some of the losses reported by American companies and their trade associations, but the information they provide on their *enforcement* experiences working with Chinese enforcement agencies is usually easier to understand than the information from the Chinese government. This is not because the Chinese are trying to be opaque. I believe they are genuinely trying to be more transparent, but it is a slow learning curve – and one in which we Americans must also make big efforts to bridge the communications gap.

ANY CASE SHOULD BE CAREFULLY TIMED, DRAWN OUT, AND WITH COMPLETE TRANSPARENCY TOWARD BEIJING

If the United States decides to initiate a dispute settlement case against China, it must be carefully timed, drawn out, and with complete transparency towards – indeed, as close to *cooperation* as possible with – Beijing.

The first point seems obvious. The timing of a WTO case should be governed by diplomatic and strategic considerations beyond being "fed up" with the levels of infringement in China. While the issue is very serious for our trade relations, we

need to be honest: the profligacy of the American trade deficit with China means that even if every iota of IP infringement in China stopped, we would still have a long-term, intolerable trade imbalance. Bizarre as it may sound, the incredible size of the U.S. trade deficit with China makes IP infringement less urgent *relative* to other aspects of our bilateral relationship.

In considering any possible WTO case, it is very important that we look [a] at the amount of time reasonably needed by the Chinese to fulfill most of their recent commitments in the July 2005 meeting of the IP working group of the U.S.-China Joint Commission on Commerce and Trade (JCCT)[36] and [b] the amount of time it will reasonably take for increased enforcement efforts to reduce piracy.

Over the past few years, the Chinese government has announced a variety of effort to strengthen IP enforcement – so many that a person outside government circles has a hard time keeping track[37] -- as well as a hard time telling what is new from what is "repackaged" [in the sense that American politicians often re-label and recombine existing programs and announce them as new initiatives]. Any WTO case should be timed so as to allow the "dust to settle" on these initiatives, so that China's trading partners – and ultimately, if necessary, a Panel – could determine which enforcement initiatives have been implemented, to what degree and with what results. As to "b," we also have to remember that there may be a lag time between what constitutes effective enforcement and its deterrent effect.

The next two points may not be so obvious. Legal scholars rarely advocate that cases should be drawn out – that is usually what we do **not** want legal systems to do. There are also experts who think that *if* there is to be a WTO case against China on IP enforcement, it should be quick and to the point, both as a matter of political will in Washington and as to the thinly stretched resources of USTR. I am not sure that is the right approach. A long, drawn out case – or a long drawn out process in which the US makes it clear that it will initiate a series of cases on enforcement issues -- could help both sides address the transparency problem. A longer process would also give IP supporters within China leverage to show the rest of the country's officialdom and business community that inadequate IP enforcement could mean reduced trade access. It is common wisdom that IP enforcement will get better and better in the future because of the exponentially growing number of Chinese patent and trademark holders – a domestic constituency that will demand that piracy levels be curbed. But how much more quickly would IP enforcement improve if the Chinese manufacturers of textiles and consumer goods came to understand more clearly that in the WTO

framework access to the American market is directly linked to effective IP enforcement?

To be honest, a long drawn out case (or cases) is also likely to produce more evidence of deficient IP enforcement, both because of how the dispute settlement process is structured and for reasons specific to China's situation. As the Appellate Body noted in the *EC – Sardines* case:

> Indeed, the dispute settlement process itself also provides opportunities for the complainant to obtain the necessary information to build a case. Information can be exchanged during the consultation phase, and additional information may well become available during the panel phase itself. On previous occasions, we have stated that the arguments of a party "are set out and progressively clarified in the first written submissions, the rebuttal submissions and the first and second panel meetings with the parties", and that "[t]here is no requirement in the DSU or in GATT practice for arguments on all claims relating to the matter referred to the DSB to be set out in a complaining party's first written submission to the panel." Thus, it would not be necessary for the complainant to have all the necessary information about the technical regulation before commencing an action under the DSU. A complainant could collect information before and during the early stages of the panel proceedings and, on the basis of that information, develop arguments . . . that may be put forward during subsequent phases of the proceedings. [footnotes omitted][38]

A specific example of how a long, drawn out case could improve our information of IP enforcement in China is the 2008 Beijing Olympics. The 2008 Olympics pose all kinds of challenges for the Beijing government. Almost all these challenges will be met successfully, but when it comes to deficient IP enforcement – and evidence thereof – the 2008 Olympics confronts Beijing with what is looks to be a lose/lose situation. If rampant counterfeiting of Olympics logos *does* occur, it will demonstrate the continuing deficiency of their IP enforcement – with 15,000 journalists on hand to provide coverage. On the other hand, if rampant counterfeiting of Olympics logos does *not* occur it will show that the Chinese government can control infringement when it wants to.[39]

There is also a "transparency" on the American side: if it decides to embark on a WTO case over IP enforcement, the U.S. must make its good intentions clear. If it choses a narrowly drawn case intended to be ended

quickly, then it should be presented as part of what may be a multi-step, multi-case effort to crystallize the specific nature of IP enforcement obligations under the TRIPS Agreement. Regardless of whether it is a narrow or more broadly drawn case, we should have constant communications – a thick data stream -- with the Chinese about such a case. By a thick "data stream," I mean not just official trade representative channels, but American officials and non-governmental experts visiting China; Chinese officials and experts visiting the United States; orchestrated efforts for dissemination of detailed information to the Chinese business community; and a push for clear, explanatory coverage everywhere from the *Wall Street Journal* to *The South China Morning Post*, from Chinese language web blogs to Beijing's *Procuratorial Daily* (a newspaper for the legal profession in China).

Everyone needs to understand that a WTO case over IP enforcement in China would have very high stakes indeed. A case that produced a full condemnation of China's enforcement efforts seems politically unlikely, but if it happened, it could create difficulties within China – and great fears throughout the developing world. On the other hand, a failed case about IP enforcement in China coupled with what appears to be billions of dollars in ongoing piracy would fuel anti-WTO sentiments in the United States (and the question whether we would be better off with bilateral and pluri-lateral trade arrangements in lieu of the WTO). It is difficult to gauge the present strength of anti-WTO and anti-free trade opinion in the U.S., but it should be taken seriously.[40]

CONCLUSION

Much has been made about the Chinese concept of *guanxi*, personal relationships that are the basis on which people perform services or render favors to one another (in traditional logograph, in simplified logograph). In a sense, it is a Confucian notion of "social capital" – and quite different from Americans measuring market efficiency with arms-length transactions. As one of our modern sources of information, if not wisdom, says, "The relationships formed by *guanxi* are personal and not transferable."[41] One of the five kinds of classic personal relationships (*li*) described in Confucianism is the friend/friend relationship.

I began these remarks by noting that a "crisis" does not become a golden opportunity just because you think about it from a Chinese perspective or write it in Chinese logograph. We may be approaching a "dangerous turning point" in Sino-American relations because of the IP enforcement problems in China, but

this is a point that we can manage as friends. USTR Susan Schwab says that when dealing with China, "[i]t is best to call it where it is and not pull punches,"[42] but nonetheless our disagreement over IP enforcement must be handled as friends. Just as this will require understanding on the American side, it will also require understanding on the Chinese side.

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[1] For some background on these agreements, see Peter K. YU, *The Copyright Divide*, 25 CARDOZO L. REV. 331, 355 – 360 (2003).

[2] Although this provides only a very rough example, in their 2006 Special 301 Report, the International Intellectual Property Alliance's 2005 piracy estimates for copyright industry losses give a total loss in China of $2.4 billion and a combined loss in South American countries of $1.6 billion. According to the group's numbers we could add 2005 infringement in Canada, Costa Rica, and the Dominican Republic to the Americas totals and not equal copyright infringement in China. *See* http://www.iipa.com/pdf/2006SPEC301LOSS.pdf.pdf. Keep in mind these are only figures from copyright industries with different industries using different methodologies to calculate estimated loses.

[3] *New Progress in China's Protection of Intellectual Property Rights*, Conclusion, Part 10 (2005) ("a complete IPR protection system cannot be established overnight. China has a long way to go in this regard, and is faced with heavy tasks in IPR protection."). This part of the report (Part 10) is available at English.people.com.cn/whitepaper/ipr2005/ipr2005(10).html [hereinafter *New Progress* Report].

[4] Victor H. Mair, *How a misunderstanding about Chinese characters has led many astray*, available at http://www.pinyin.info/chinese/crisis.html. The character is:

危机

[5] Angela Gregory, *Chinese Trademark Law and the TRIPS Agreement – Confucius meets the WTO*, in CASS, WILLIAMS, AND BARKER, EDS., CHINA AND THE WORLD TRADING SYSTEM 321, 323 (2003)

[6] China-Britain Business Council, *IPR Abuse* (describing "rampant copying"), available at http://www.cbbc.org/market_intelligence/challenge/ipr.html; US-China Business Council, *China's WTO Implementation: An Assessment of China's Fourth Year of WTO Membership*, written testimony submitted to the USTR, 14 September 2005 (describing "the rampant piracy of films in DVD format throughout China"), available at http://www.uschina.org/public/documents/2004/09/tpsc_testimony.pdf; Editorial, *Windows of Opportunity*, LOS ANGELES TIMES, 18 April 2006 at 10 ("software piracy is rampant" in Chinese market); Mure Dickie, *CAV Warner trials film DVD priced at Rmb12*, FINANCIAL TIMES (LONDON), 22 April 2006 at 21 ("rampant piracy in the DVD market"); Shi Jiangtao, *Piracy crackdown not working, say US companies*, SOUTH CHINA MORNING POST, 17 May 2006 at 5 ("55 per cent of companies were negatively affected by rampant IPR violations and 41 per cent reported increased counterfeiting of their products."); Yu, *supra* note 1 at 360 (In the late 1990s, "software piracy remained rampant in China.")

[7] The official was reportedly Yin Xintian writing a commentary called *On the second amendment of the Patent Law*, Legal Forum, 2001, as reported by Antony S. Taubman, *TRIPS goes east: China's interest and international trade in intellectual property* in CASS, WILLIAMS, AND BARKER, EDS., CHINA AND THE WORLD TRADING SYSTEM 345, 345-46 (2003).

[8] Of those surveyed, 59% reported the situation "unchanged" with 11% reporting IP enforcement as "deteriorating" and 4% viewing IP enforcement as a "new problem." US-China Business Council,

American Companies Building Success in China; Significant Issues Remain, 30 August 2005, available at http://www.uschina.org/public/documents/2005/08/2005_membersurvey.pdf.

[9] Chris Israel, Coordinator for International Intellectual Property Enforcement, Testimony before the Senate Commerce, Science, and Transportation Subcommittee on Trade, Tourism, and Economic Development, March 8, 2006 at 2 ("In 2004, U.S. Customs reported that China was the number one source of counterfeit products that were seized at our borders, accounting for 63% of all seizures.") [hereinafter Chris Israel 2006 Testimony]

[10] Gregory, *supra* note 5 at 321. ("One of the most frequently aired concerns about China's accession to the WTO has been that China will not be able to implement the [TRIPS Agreement] so as to ensure that foreign IP holders will be able to enforce their rights effectively.")

[11] *Denmark – Measures Affecting the Enforcement of Intellectual Property Rights*, Dispute DS83, Request for Consultations on 14 May 1997 (The United States alleged that Denmark did not provide provisional measures in civil IP cases in violation of Denmark's obligations under TRIPS Articles 50, 63, and 65), summary available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds83_e.htm; *Sweden – Measures Affecting the Enforcement of Intellectual Property Rights*, Dispute DS86, Request for Consultations on 28 May 1997 (same as allegations against Denmark), summary available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds86_e.htm.

[12] *European Union - Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs*, Dispute DS124 and *Greece – Enforcement of Intellectual Property Rights for Motion Pictures and Television Programs*, Dispute DS125, Request for Consultations 30 April 1998 (United States alleged that a significant number of Greek television stations broadcast American audiovisual works without authorization in violation of TRIPS Articles 41 and 61), summary available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds124_e.htm

[13] Dispute DS176, Appellate Body Report circulated 2 January 2002, document WT/DS176/AB/R, available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds176_e.htm.

[14] *Id*. at para. 232.

[15] *Id* at para. 215 (emphasis in the original).

[16] As the Chinese report modestly, a "relatively complete system of law and regulations . . . in line with generally accepted international rules has been established" *New Progress* Report, Part 1, available at http://english.people.com.cn/whitepaper/ipr2005/ipr2005(1).html.

[17] For another example, articles 217 et seq. of the Chinese copyright law only seem to criminalize reproduction and distribution, while TRIPS Article 61 unambiguously requires criminalization of commercial scale copyright piracy, including, for example, unauthorized commercial scale public exhibition of films.

[18] *See* Nicholas Zamiska, *China Policy Lets Counterfeiters Off Lightly*, WALL STREET JOURNAL, 2 June 2006 at A13.

[19] Testimony of Timothy P. Trainer, President, International Anti-Counterfeiting Coalition, Inc. before the U.S.-China Economic and Security Review Commission, 4 February 2005, available at http://www.uscc.gov/hearings/2005hearings/written_testimonies/05_02_3_4wrts/trainer_timothy_wrts.php.

[20] The description comes from a U.S. Government official. In describing markets filled will unauthorized copies of copyrighted works and counterfeited trademarked goods, Chris Israel has noted that 5 "[t]hese illegal markets which exist all over China, continue to operate openly and notoriously." Chris Israel 2006 Testimony, *supra* note 9 at 5.

[21] Article 41(5) provides in its entirety that "It is understood that this part does not create any obligation to put in place a judicial system for the enforcement of intellectual property rights distinct from that for the enforcement of law in general, nor does it affect the capacity of Members to enforce their law in general. Nothing in this Part creates any obligation with respect to the distribution of resources as between enforcement of intellectual property rights and the enforcement of law in general.

[22] Zamiska, *supra* note 18 (Charles Jeffrey Duke, Zippo lighter company general counsel).

[23] Israel 2006 Testimony, *supra* note 9 at 5.

[24] W. HUANG, *China's accession to the WTO and its intellectual property rights protection*, in CAI, SMITH, AND XU, EDS., CHINA AND THE WORLD TRADE ORGANIZATION 204, 237 (1996).

[25] Article XXIII text available at http://www.wto.org/English/docs_e/legal_e/gatt47_02_e.htm.

[26] TRIPS Article 64(2) provides that "Subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994 shall not apply to the settlement of disputes under this Agreement for a period of five years from the date of entry into force of the WTO Agreement";that period ended in January 2001. But Article 64(3) also provides that during those five years the TRIPS Council was supposed to make recommendations to the WTO Ministerial Conference as to the "scope and modalities for complaints of the type provided for under subparagraphs 1(b) and 1(c) of Article XXIII of GATT 1994". Because this never happened, many countries argued that the Article 64(2) grace period should be further extended.

[27] For different statements that the nullification and impairment provisions – originally intended to address classic market access concerns – are too open-ended for TRIPS, see World Trade Organization, Council for Trade-Related Aspects of Intellectual Property, Communication from Canada, WTO Document IP/C/W/127, 10 February 1999, available at http://www.dfat.gov.au/ip/canada_nonviolation.rtf; Frederick M. Abbott, *Non-Violation Nullification or Impairment Causes of Action under the TRIPS Agreement and the Fifth Ministerial Conference: A Warning and a Reminder*, Quaker United Nations Office Occasional Paper Number 11, July 2003, available at http://www.geneva.quno.info/pdf/QP11-nv.pdf.

[28] *European Communities – Trade Description of Sardines*, Dispute DS 231, Appellate Body Report circulated 26 September 2002, document WT/DS231/AB/R. para. 281 ("There is nothing in the WTO dispute settlement system to support the notion that the allocation of the burden of proof should be decided on the basis of a comparison between the respective difficulties that may possibly be encountered by the complainant and the respondent in collecting information to prove a case.") [hereinafter *EC – Sardines*], available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds231_e.htm.

[29] *Id.* at para. 287.

[30] Henrik Horn and Petros C. Mavroidis, *Introduction*, THE WTO CASE LAW OF 2002 9 (ALI/Cambridge University Press, 2005).

[31] *EC – Sardines*, *supra* note 28 at para. 277 ("A complainant may obtain relevant information about a technical regulation from a respondent under Article 2.5 of the *TBT Agreement*, which establishes a *compulsory* mechanism requiring the supplying of information by the regulating Member.")

[32] Dispute DS 33, Appellate Body Report circulated 25 April 1997, document WT/DS33/AB/R, at 16-17, available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds33_e.htm.

[33] The hierarchy of courts in the PRC has the "Supreme People's Court" at the top with 31 "High People's Courts" directly beneath the Supreme Court. Immediately underneath the High Courts are 346 "Intermediate People's Courts" with 3135 "Basic People's Courts" below the Intermediate Courts. In each of the larger cities, 1-2 basic courts are usually designated to hear trademark civil cases by the High Court

for that area. The same seems to apply to copyright infringement civil actions for copyright infringement. *See* ZHU Lanye, East China University of Politics and Law, *The Resolution of Intellectual Property Disputes in China: Litigation, Arbitration, Mediation or Administrative Solution?*, PowerPoint presentation made at Fordham Annual Conference on International Intellectual Property Law and Policy, 21 April 2006. High People's Courts are generally appellate courts, but can, per some regulations, be courts of first instance for some types of cases.

[34] ZHU Lanye, East China University of Politics and Law, *The The Resolution of Intellectual Property Disputes in China: Litigation, Arbitration, Mediation or Administrative Solution?,* paper presented at Fordham at 4.

[35] Sean YOONG, Associated Press, *Malaysia Reassures U.S. on Property Rights*, The Houston Chronicle, 20 April 2006 (quoting Malaysian Domestic Trade Minister Shafie Apdal).

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[36] For a summary list of those commitment can be found, see Victoria Espinel, Assistant U.S. Trade Representative (Acting), Testimony before the House Subcommittee on Courts, the Internet, and Intellectual Property, December 7, 2005.

[37] *See, e.g.* China Knowledge, *China Commence Nationwide Anti-Piracy Campaign*, June 21, 2005 (China launches 2005 nationawide audio anti-piracy campaign), available at www.chinaknowledge.com/news-detail.aspx?cat=politics&ID=67; Siliconvalley.com, *China has new plan to protect intellectual property rights*, March 9, 2006 (Associated Press reports Chinese plan to "to intensify intellectual property protection this year"); Siliconvalley.com, *China claims progress in fighting software piracy*, April 19, 2006 (Chinese efforts against software piracy), available at www.siliconvalley.com/mld/siliconvalley/news/editorial/14378893.htm; China Knowledge, *China to fine Internet pirates*, May 30, 2006 (Associated press report on China announcing new lan to combat uploading and downloading copyrighted works without authorization), available at www.chinaknowledge.com/news-teails.aspx?id=3213

[38] *EC – Sardines*, *supra* note 28 at para. 280.

[39] China has passed special legislation on the protection of the Olympics logos. *See* Regulations on the Protection of Olympic Logos, State Council Order No. 345, approved by the State Council on 30 January 2005 and available at http://www.cnnic.cn/html/Dir/2005/08/02/3069.htm. The regulation appears to be backdated, with retroactive effect as of 1 April 2002. Of course, for non-Chinese journalists to find piracy of the Olympics logos, they will need to know what is licensed and what is not. If they are not told who is licensed and who is not – or if everyone is considered "licensed" – we will not be able to measure this piracy.

[40] As one professor at the London School of Economics recently wrote, "[I]t is probably only a matter of time before the US thumbs its nose at the World Trade Organization. In that event, trade will return to being a matter of bilateral negotiations among governments and blocs. The international system will revert to being a society of sovereign states." JOHN GRAY, AL QAEDA AND WHAT IT MEANS TO BE MODERN 58 (2003).

[41] "Guanxi," WIKIPEDIA, available at http://en.wikipedia.org/wiki/Guanxi. To put it in German sociological terms, an American's ideal market operates by "Gesellschaft" [self-interest] while Chinese society – and, to date, Chinese business – still operates with "Gemeinschaft," a community with strong personal relationships and loyalty.

[42] Alan Beattie, *White House trade nominee backs Doha*, THE FINANCIAL TIMES, 17 May 2006 at 6.