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7A Competition & Four Concurrent Sessions. IP in China

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**TWENTY-EIGHTH ANNUAL CONFERENCE
INTERNATIONAL INTELLECTUAL PROPERTY
LAW & POLICY**

Friday, April 9, 2021 – 8:00 a.m.

**SESSION 7: COMPETITION & FOUR CONCURRENT
SESSIONS**

7A. IP in China

Moderator:

Mark Cohen

University of California, Berkeley, School of Law, Berkeley

Speakers:

Elaine Wu

U.S. Patent and Trademark Office, Alexandria

***New Developments at China's National IP Administration Regarding Patent
Subsidies and Abnormal Patent Applications***

He Jing

Gen Law Firm, Beijing

China IP Reforms – What the Patent Law Amendment Tells Us?

Jill (Yijun) Ge

Allen & Overy LLP, Shanghai

Patent Linkage in China – Protecting Innovation or Accelerating Patent Cliff?

Guan H. Tang

Queen Mary University of London, London

Social Media, Copyright and Censorship: Will Technology be the Savior?

Panelist:

Boya Yin

Lung Tin IP, Beijing

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MARK COHEN: We have a great group of people. We have had many years of these IP in China sessions, typically in the morning, at Fordham. This year I'm particularly gratified to be joined by a number of great practitioners, as well as academics and one of my former students, Jill Ge, my former colleague Elaine Wu, and others. We're going to try to cover as much as possible, if we can, of what has been really a dramatic set of changes in the past year to two years in China, with every major IP law being amended, a specialized appellate court, a new intermediate court in Hainan Island, and new international agreements.

There were some very interesting cases that have also been decided — all showing a new direction for China in the years ahead and opportunities or challenges for foreign companies, as well as for the Chinese. Without further ado, we're going to begin with copyright. We're going to be joined by Professor Tang, who will introduce us to some of their most recent developments. Professor Tang.

GUAN H. TANG: Thank you Mark. And many thanks to Hugh and the team. It's a great event, which I enjoyed ever since I was a student back many, many years ago. Today, as you can see from the original proposal, I wanted to talk about social media copyright and censorship to examine if technology will be the savior for all the legal issues. However, I received an assignment from Mark, consisting of three big and very interesting questions, and they will be answered as analogies.

Mark wanted to know about the 2020 Copyright Law Amendments,¹ specifically, why did they take so long to come into effect? The second question was what got left out and what got put in? The last question was, what would be the future of copyright protection and its role in light of pervasive censorship? Below is my personal interpretation.

I would say that the issue of the 2020 amendments actually is not a long period of time and it could have taken even longer. The 2020 amendments rushed into enactment because of the Sino-U.S. trade war and the relevant negotiations. In order to understand why it has taken so long and should have taken longer, I would like to recall very briefly the history of copyright law in China. As many of you may well know that copyright is the last instrument of IP legislation enacted in 1990 and was first revised in 2001 and then revised for the second time in 2010. The first revision was done to meet the international treaty's minimum standard. And the second revision consisted of one article only, Article Four, which was the implementation of the DS362 decision² by WTO DSB.³ This amendment of 2020 was the first time China looked into its national IP strategy, which was issued in 2008, and started to initiate its own agenda regarding copyright protection in particular. Such legislative initiatives were also very much influenced by China's five-year plan. As you recall, when they initiated the current amendments, it echoed the 12th five-year plan and then went through the 13th five-year plan. Currently, we are at the 14th five-year plan. However, the 2020 amendments did not wait until the 14th five-year plan was issued to the public but rushed to be enacted in

¹ The Copyright Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Sept. 7, 1990, rev'd Nov. 11, 2020, effective June 1, 2021) (China).

² Panel Report, China — Measures Affecting the Protection and Enforcement of Intellectual Property Rights, WTO Doc. WT/DS362/R (adopted Mar. 20, 2009).

³ World Trade Organization Dispute Settlement Body.

November 2020. Though I think, the Sino-U.S. trade war may have promoted the enactment, China's third copyright amendment has dealt with more complicated policy issues, legal issues as well as various stakeholders' interests. We also must note that, in 2015, when China started to write a civil code, there was a huge debate regarding if copyright should also be included in the civil code, together with other IP instruments. In short, the third revision has taken a lot of years due to the needs of national development and will come into force in June this year.

Compared with the 2012 proposal, the third amendment sets aside some contentious issues. One of them being the statutory licensing on sound recordings. The 2012 draft proposed to have a statutory licensing on sound recording after three months from the first publication, which was deleted from the 2020 amendments, and which reflected the consideration of interests of various stakeholders. What else was left out? Many, including artist's resale rights, extended collective management, and an open clause of exception and limitations, of which the latter was proposed as a quasi-U.S. fair use provision under the 2012 draft.

Some clauses were brought in, including the sound recording producers' right to remuneration, which is significant to the industry.

My time is running out and I should follow the organizer's time rule. If you have any questions, I would be delighted to answer.

MARK COHEN: Thank you Professor Tang. Please, if you have questions, chime in. We're going to try to keep close to the time schedule. Interesting observation, and perhaps we're going to hear something different from He Jing since I think the Phase One Agreement⁴ had very little on substantive copyright law, other than proof of copyright litigation and also some special campaigns to deal with pirated materials. Perhaps we'll have a greater discussion around that. He Jing, tell us a bit about what has been happening in patents, particularly on patent linkage.

HE JING: Thank you. I thought that Jill would talk more about the patent linkage. My points are really about using the patent law amendment to explore something probably deeper about what's really going on. What are the contexts, and what are the underlying dynamics behind all the changes? The reason the patent law amendments were done last year is what we call fourth-time amendments which have taken around 10 years, which is a little bit longer than before. Our patent law was enacted back in 1985, so this is the fourth time. If you look at it, there are some exciting things happening like design patents being beefed up to over 50 years with the partial design. I think Elaine contributed a lot to that.

Also punitive damages, the 5 million RMB is in and also five times. Not triple damages, five times the damage is imposed as punitive damages. The biggest stuff is what we call patent linkage, but the trick is that it's not really referred to as patent linkage. It's more generally referred to as early-stage patent dispute resolution mechanism. That's something that really follows on through the U.S.-China Phase One Trade Agreement. What is there, which we all hope to be there, is the concept of artificial infringement.

⁴ Economic and Trade Agreement Between the Government of the United States of America and the Government of the People's Republic of China, Jan. 15, 2020.

I guess that Jill will speak more about it, but the point is that for a while we're hoping that infringement which was in the Hatch-Waxman Act⁵ in the U.S. will be borrowed or learned in the Chinese patent law but somehow it never got in. Instead, China took on something similar to the Korean system. Not exactly, but the concept looks more like a Korean system that really gives the court the power to make a ruling or make a finding that whether the generics fall within the scope of claims of originator's patents. That kind of confirmatory action or declaratory action is quite new in China.

We have a non-infringement declaration action, but this is the first time we have the "confirmatory action" about a claim falling into a scope of action. It's never made clear whether this counts as infringement. That may cause some subtle [issues] but could be big trouble down the road when originators are trying to figure out, trying to get some predictability in the future Chinese version of a patent linkage case. One big question that I personally think is worth some attention is, why can't the artificial infringements get in?

Even though semantically it looks pretty straightforward, just to acknowledge that the application for the market launch of generics with the regulatory authority can constitute infringement. Why can that never get in? I think that puts us in some very interesting thinking. The second thing I want to really make a point here is the U.S.-China Phase One Trade Agreement. One thing that we were hoping is that China could have actually initiated some of the changes that were in the U.S.-China Phase One Trade Agreement even before the agreement was concluded.

In fact, the patent linkage or the early-stage patent dispute resolution system was actually in the top government policy even back in 2017, way before all this trade war stuff happened. Also, the trade secret things have been discussed for years, and also the technology transfer rules amendment reforms have been talked about for decades. Actually, many stakeholders thought this should have been abolished a long time ago but somehow we all waited until the U.S.-China Phase One Trade Agreement, then all these reforms being implemented all of a sudden in one year. This has actually caused what Mark just said, that probably, for the very first time in my 30-years-or-so China IP career this is probably the busiest year in the last 12 or 24 months.

To be honest, I thought that probably we missed great opportunities and I really hope that a lot of these reforms were initiated not in a context of the trade agreement. The big point I really want to say here is that we are actually facing something tremendous right now. Traditionally China's IP system was strongly shaped by the trade negotiation, especially the U.S.-China trade agreement. In fact, the reason I got into this IP business is really because of the U.S.-China trade negotiation back in the early 1990s. I don't know whether Mark can contribute to that. Elaine, probably not. Now, the world has really changed a lot.

MARK COHEN: We're over on time. You want to add three sentences to close out?

⁵ Drug Price Competition and Patent Term Restoration Act, 21 U.S.C. §§ 301, 355, 360 (1984).

HE JING: Sure. The point is that we are moving from the trade-based IP time to this probably strength-based IP time. There is a lot of uncertainty ahead.

MARK COHEN: I totally agree with that assessment and what that means. China's emergence for both internal norm-setting and international norm-setting will be something well worth watching. Jill, I got a little bit confused. Anyway, you're the linkage person, and if you could drill down a little deeper and other observations on that system?

JILL (YIJUN) GE: I fully agree. Patent linkage is one of the most closely watched patent or IP developments in China in recent years, but it is not necessarily just an IP topic. It has been part of ongoing healthcare reform discussion in China for several years. From the government's perspective, one mandate is to speed up access to innovative drugs. At the same time, the overarching goal is to push down the sky-high drug price. On a more micro-level for regulators in China, the difficulty has always been that it is only possible to sue a generic after actual generic entry.

The difficulty has been compounded by the fact that in recent years Chinese generics have been very aggressively filing invalidations against innovators' patents. According to statistics, the invalidation has been really high and is as high as 70%. There's a need of systemizing a procedural framework for resolving disputes between generics and innovators.

As He Jing mentioned, China made this one of its commitments in the Phase One deal it signed with the United States. It formally adopted patent linkage through the Fourth Amendment of the Patent Law.⁶

The law will enter into force in two months' time, so a patent linkage system is likely up and running. For that, a new court action has been created under Article 76,⁷ while judicial interpretation and implementing rules are still in the process of making and need to be finalized and issued. What's quite significant here is that the Beijing IP Court and CNIPA,⁸ the patent authority in China, have been conferred with concurrent jurisdiction to hear patent linkage disputes. This means that the parties can either go to the court or go to the patent office. This smells like a power-grab between the judiciary and administration.

For the specific Article 76 action, as He Jing mentioned, it's not a patent-infringement action and the concept adopted is indeed borrowed from Korea and its so-called scope confirmation action. What is to be determined is whether the drug, the generic, is seeking marketing authorization and falls within the scope of the innovator's patent. I personally believe that it may not be necessary to qualify artificial infringement here, the reason being that there's no infringement to begin with, while preliminary injunction as contemplated by the Supreme Court's judicial interpretation will be available if there's an immediate manufactured sale of the generic product.

⁶ Patent Law of the People's Republic of China, (promulgated by Standing Comm. Nat'l People's Cong., Mar. 12, 1984, rev'd Oct. 17, 2020, effective June 1, 2020) (China).

⁷ Patent Law of the People's Republic of China, (promulgated by Standing Comm. Nat'l People's Cong., Mar. 12, 1984, rev'd Oct. 17, 2020, effective June 1, 2020), art. 76 (China).

⁸ China National Intellectual Property Administration.

This declaratory determination could be sought by either the innovator or the generic. As was typical of this type of broad legislation in China, the devil will be in the details. Given the complexity and particularly the interplay among scope confirmation, patent realization and regulatory approval, there are a vast amount of details or an answer of questions that need to be worked out. As I mentioned, the Supreme Court has issued rules for the Beijing IP court to hear patent linkage disputes and the IPA has also issued its draft rules for its administration of patent disputes. Yet the key piece of rulemaking here will be the draft patenting measures to be issued by the patent office and drug authority.

Unfortunately, the draft we have for now is just the September 2020 version, which was issued before the patent law amendment. To highlight here, the reason why is that the regulatory state period contemplated is just a nine month stay. This means that after a nine-month period, if the parties were not able to resolve their dispute, the drug authority is free to go ahead and approve the generic drug. This then begs the question, will nine months be sufficient for the parties to resolve the patent linkage dispute, even at first instance?

Another highlight is that clearly an evidence like the generic is afforded with a quite significant incentive.

The first generic that successfully challenges an innovator's patent will be given a 12-month exclusivity period. However, what constitutes a successful challenge is yet to be defined, and this may also be something that needs to be resolved through litigation. In any event, generics will be incentivized to file litigations against the compound patents, as well seven to eight patents, and invalidation could well occur while the innovators patents still have a number of years remaining before expiry. This changing dynamic will say that from innovators' perspective, every innovator may have to go through this patent linkage option litigation, otherwise there will be no stay at all for generic drug approval.

From the generics' perspective, the patent linkage system, at least the current proposed system, seems to provide a pathway for them to create a hurdle to early generic entry, particularly where the innovator's patterns are susceptible to patent invalidation. In other words, patent linkage litigation, by all means, will be accelerating the patent cliff in China. Our prediction for this is that it might be useful to use Korea just as a benchmark. I was saying that for the first year, the courts, and CNIPA⁹ may have incentive to resolve a few disputes in a very efficient way, this is to show that the system actually works.

After year one, we probably will also see a significant uptake of cases filed in China for this type of patent linkage disputes. There for sure will be a lot of details we'll need to think through.

MARK COHEN: Great, thank you, Jill. Interesting to compare thus far with Professor Tang and He Jing's comments. Patent Linkage was really the only patent-related reform identified in the Phase One Trade Agreement, although it was pre-existing, as He Jing noted. Something else I think you alluded to was this competition between the courts and the administrative agencies. I think something that is concerning to me may also be a positive development, as the rise of CNIPA—

⁹ China National Intellectual Property Administration.

HE JING: Actually, a big topic right now in this patent linkage world is the CNIPA published rules, draft rules for administrative procedure to deal with pattern linkage systems. This is something quite interesting, the patent law amendments actually gave the CNIPA our patent office to deal with those significant infringement disputes at the national level. Some friends outside China might think, "Well, sounds good," but the people here are, or lots of companies here, are concerned that this basically creates a second separate track. There's one that is the courts dealing with patents. Then now we have this administrative type of courts dealing with the patent infringement, and even dealing with the patent linkage. How can these be consolidated? To be honest, I don't really think anybody has figured it out. Maybe some generics will chat it out with the patent office for this paneling action. That's going to create a lot of confusion. I think China's been making lots of progress on the IP enforcement side, given the strength of innovation, the local interest. However, the trap or maybe the things that we're stumbling on could be the type of turf fight between the courts and administrative law enforcement or between the CNIPA.

That makes things unnecessarily complicated. This is something I think we may feel the confusion and then uncertainty and the challenge years ahead. That's all the point I want to make.

MARK COHEN: Thank you, He Jing.

Something I'd like to come back to if time permits, actually, is what you mentioned about the rulemaking. I'm not so sure that CNIPA is making rules. They're coming out with something that looks like normative documents. The parent agency should be making rules. I think what we saw from the Phase One Agreement, just interjecting my own opinion briefly, is a reinforcement of the role of administrative agencies in resolving IP disputes, whether through special campaigns or through this dual-track linkage regime, or simply through Xi Jinping trying to improve the overall enforcement environment.

That's going to raise some interesting questions going forward. I think someone who could reflect a bit on the role of the courts and CNIPA is Boya Yin who will tell us about developments and trademarks as well.

BOYA YIN: China has revised the trademark law at the end of 2019.¹⁰ After implementing the Fourth Amendment of the trademark law, the CNIPA also issued other regulations to attack bad faith trademark filings. Like the "rules for standardizing trademark applications" and "special action applied to attack bad faith filing." In these regulations, the CNIPA gives a detailed explanation of determining bad faith application by giving relative factors to be considered and enumerating many situations that should be deemed as abnormal filings. The "special action" was just published this March. It gave very complex situations to illustrate what bad faith applications are. For example, the application marks should not resemble the names of celebrities, the names of significant projects of the country.

We also think the newly issued "judicial interpretation on the application of punitive damage" is aligned with the purpose of the revised trademark law. The

¹⁰ Trademark Law of the People's Republic of China, (promulgated by Standing Comm. Nat'l People's Cong., Aug. 23, 1982, rev'd Apr. 23, 2019, effective Nov. 1, 2019) (China).

trademark law also means strengthening the punishment for trademark infringement cases. At this point, let me say something about the Michael Jordan case.¹¹

That case, judged by the Supreme People's Court, told us that even if you successfully registered a mark and used it for quite a long time, all of this couldn't cure the bad faith of the mark at the beginning. When this case came to the Supreme People's Court, the court considered three points reflecting the bad faith:

1. The company's shareholders not only pre-emptive registered Michael Jordan's name but also registered Jordan's children's names.
2. This bad company already had its business name but suddenly changed the name to Jordan.
3. They already knew the risk of using a similar name with Michael Jordan when disclosing the prospectus but still insisted on doing this.

MARK COHEN: I think the Michael Jordan case also offers a really interesting example of trying to get back to the big picture of the role of the civil code and general civil law, which we really didn't hear much about in years past. People talked about bad faith, it was in the trademark law, obviously, it is in the general principles of Civil Code, but its actual implementation in practical IP terms was a little bit uncertain. I think that's another really interesting development of the past year or two.

To pick up a little bit of the bad faith and other issues, let's turn it over to Elaine. Elaine, we've heard a lot about the US government driving the whole Chinese IP system. I am now of the opinion that you are the most powerful person in the U.S. government in bilateral relations. Correct me if I'm wrong, although I don't want to be corrected, please.

ELAINE WU: Right, exactly. Well, Mark, I never want to correct you, but I think you are wrong. However, I'll try my best to at least talk about some of the IP issues that we hear most about from our companies, which is what I plan on doing today. A lot of that was already discussed, but I'll just wrap that up. Then some of the things the PTO¹² is doing looking ahead and also a paper we recently issued on filing trends from China. That has been published and may be of interest to this group.

Anyway, a quick introduction to the China team at the PTO. We are a dedicated group of China IP experts with 11 U.S.-based lawyers. Three IP attachés in the U.S. Embassy and consulates in Beijing, Guangzhou, and Shanghai, and five China-based lawyers. As everyone knows, Mark was our very first IP attaché in Beijing in 2003, 2004 and of course, Mark was in my place, in our office a number of years ago and has moved on to bigger and better things right now.

We do a lot of outreach to companies as well. We are trying to be in touch with specialists, small companies to gauge what is the biggest issue for them and to

¹¹ Maiker Jiefuli Qiaodan Yu Guojia Gongshang Xingzheng Guanli Zhongju Shangbiao Pingshen Weiyuanhui, Qiaodan Tiyu Gufen Youxiangongsi “Qiaodan” (迈克尔·杰弗里·乔丹与国家工商行政管理总局商标评审委员会、乔丹体育股份有限公司“乔丹”) [Michael Jeffrey Jordan v. Trademark Review and Adjudication Board of the State Administration for Industry and Commerce and Jordan Sports Co., Ltd.], Sup. People's Ct. 2020 (China).

¹² United States Patent and Trademark Office.

try to advocate on behalf of them to make the China IP environment a better one for all companies and particularly small ones.

What are the three big groups of concerns for U.S. companies and foreign companies in China? Very generally, of course, protecting brands, as Boya has discussed. The issue, of course, the biggest one, particularly for small companies is bad faith trademarks. She has talked a little bit about some of the issues, the Michael Jordan case, and also some of the changes in the trademark law. It is a big issue that we hear particularly when we talk to small companies and we're actually trying to do a lot of work with CNIPA to improve their examination practices. We do think that the bad faith trademark filing is a combination of high volume of trademark filings — we'll talk about that in a minute — weak examination practices and weak enforcement with inadequate remedies to address the problem. We're trying to work with CNIPA on trying to address those issues.

Widespread counterfeiting and piracy — everyone forgets that that's still a big issue. A big problem in the U.S. Looking at the volume of counterfeits that are seized at the border in the U.S. in 2019, 92% of counterfeits were from China and Hong Kong. It's also been estimated that 70% of all global trade counterfeit products are with products that were manufactured in China.

Second big category is the whole category of safeguarding technology. One of the biggest concerns certainly for U.S. companies in China is both protecting and enforcing technology and of course, issues concerning forced tech transfer. The concerns about protecting technology using the patent system in China is one big issue. This leads me to discuss really briefly the report that we issued, entitled, *Trademarks and Patents in China: The impact of non-market factors on filing trends and IP systems*.¹³

I think a lot of people do know these numbers, but just to reiterate, in 2019 CNIPA received 7.8 million trademark applications, and 1.5 million invention patent applications, accounting for nearly half of global totals.

Our report found that beyond the usual market factors that drive such applications, a number of non-market factors influenced Chinese filings, subsidies, government mandates, bad faith trademark applications in defense of countermeasures have all influenced these numbers. For rights-holders, there are some practical implications for these filings, particularly for the patent side. U.S. companies and rights-holders are often compelled to complete a freedom to operate analysis before filing for patent applications in China, which can add considerably to costs of obtaining protection.

Of course, these high filing numbers are difficult for CNIPA, which has to have the resources to deal with examinations. Two weeks after the PTO published its report, CNIPA issued a notice to eliminate all local patents subsidies awards, except those awards for the grant of invention patterns. The measures do not apply to the central level subsidies or trademarks from what we understand. We are currently studying measures to get more details.

¹³ U.S. PATENT AND TRADEMARK OFF., TRADEMARKS AND PATENTS IN CHINA: THE IMPACT OF NON-MARKET FACTORS ON FILING TRENDS AND IP SYSTEMS (2021), <https://www.uspto.gov/sites/default/files/documents/USPTO-TrademarkPatentsInChina.pdf>.

Also, CNIPA just issued some measures about abnormal patent applications and how to deal with them. CNIPA has said that a third of their applications are that they may be considered abnormal. We're looking at this a little more carefully to see what all that means. Second, there's a big problem of forced tech transfer, which has made big news of course, in recent years. U.S. companies also complain about the requirement to disclose sensitive technical information. Some of it may be trade secrets in exchange for necessary administrative approvals and regulatory approvals.

Of course, there's the issue of tech transfer regulations, or TIER, that Mark, in particular, was involved in when he was at PTO. These imposed burdensome non-negotiable requirements on foreign licensors of technology in China. These rules have since been revoked but there was a lot of work on PTO, particularly Mark, on trying to deal with those regulations. Of course, there's also the mix of technology concerns, problems with pharma companies on patent linkage, and lack of effective regulatory data protection which other speakers have talked about earlier.

Third biggest group, of course, is IP enforcement, administrative enforcement. Main vehicle for enforcement for bulk of rights holders in China for most IP rights, and it can be a big problem because of local protectionism and local bias. Judicial enforcement — there's a lot of activity in that area, as others have mentioned. We are somewhat hopeful that this is a way for rights holders to deal with IP enforcement and hope to see that there are some improvements in that system.

What are the biggest problems for U.S. companies in general enforcement — difficulties in establishing a case. The Chinese judicial system, of course, does not have the process of discovery that the U.S. has. Plaintiffs must generally collect all evidence in a case before it's filed and one of the problems remains a burdensome notarization requirement, legalization requirements and so on that make it difficult to provide evidence to the court. High-cost low reward is still an issue for low damages. Damages are getting higher, increase in damages in the patent law amendments, as He Jing has mentioned, but still the problem is lack of deterrence in that area. Preliminary injunctive relief is deficient, particularly in trade secret cases. Diminished private rights to enforce IP. Rise of an administrative enforcement system particularly in patents. Big problem because of lack of transparency, local bias, and so on.

Social credit system and public shaming system. A system of enforcement that's outside the administrative and civil judicial system that seems to be on the rise, and now being applied to IP cases and that is also a problem that we're looking at. It's a problem that rights holders do talk about probably not in great detail right now, but we are concerned about it being a bigger system in the future. Then finally, inconsistent application of the law. Not all cases are published and while the judiciary has improved, there are still questions about the publication of cases or the selective, or what we call selective transparency that Mark, of course, you have mentioned many times before. Of course, independence of the judiciary, are judges truly independent, that remains to be seen.

Finally, infringers are adopting new techniques to evade enforcement, such as shifting from e-commerce to social media platforms, which is a big challenge for us in the future. Looking ahead, what are we focusing on in the future? Well, we are focusing on implementation, the Phase One Agreement, U.S.-China business. We are focusing on implementation, trying to see how they implement all the changes that they've made. Finally, on the CNIPA front, as far as the PTO is concerned, we do plan on working more on bad faith trademark filing, and also on other things including accession to the Hague Design Treaty,¹⁴ which I think is one of the good things that has happened in the patent law events. We're working with the CNIPA on accession to the treaty. That's it. Thank you, Mark.

MARK COHEN: Thank you, Elaine. I want to just give back a little bit of time, and I think it's probably an appropriate way to conclude our discussions, talking about punitive damages, which is an issue that has appeared in all of the IP reforms, particularly from the courts, and what that means if you could just give us a quick summary of where punitive damages are heading in the trademark context perhaps.

BOYA YIN: Okay, sure, this judicial interpretation is significant. The earliest punitive damage provision was embodied in the 2013 Trademark Law,¹⁵ further by the Anti-unfair Competition Law in 2019.¹⁶ Until last year, 2020, we had our own first Civil Code, which means the general establishment of the punitive damage system. After that, the newly revised Patent Law and Copyright Law also adopted punitive damage into their systems. However, as each of these laws is different from each other in wording or content to some extent, there should be a newly launched regulation to make them coincident, so the judicial interpretation is a must one.

It gives explicit guidelines on applying for punitive damage. For example, it stipulates that "intentional" mentioned in the copyright law and patent law is equal to bad faith in the trademark law and anti-unfair competition law.

Secondly, the court also clarified the timing to claim punitive damage. The plaintiffs may argue that when initiating the case but before the end of debate during the court hearing, but if the plaintiff wants to claim punitive damages in the second instance, the court will first require mediation between the parties. If the mediation fails, the plaintiff has to file another lawsuit. The purpose of this regulation is to avoid the defendants' loss of the benefits in procedure remedy.

Also, the judicial interpretation regulates what conditions belong to serious circumstances and what situation belongs to intentional, which two are the composing elements to establish punitive damage.

My last point is the reversal of the burden of proof. In most conditions, the plaintiff takes the responsibility to provide evidence supporting their claim, while in certain conditions, if the court thought that the plaintiff had already finished their

¹⁴ Geneva Act of the Hague Agreement Concerning the International Registration of Industrial Designs, July 2, 1999, WIPO Lex No. TRT/HAGUE/006.

¹⁵ Trademark Law of the People's Republic of China, (promulgated by Standing Comm. Nat'l People's Cong., Aug. 23, 1982, rev'd Aug. 30, 2013, effective May 1, 2014).

¹⁶ Anti-Unfair Competition Law of the People's Republic of China, (promulgated by Standing Comm. Nat'l People's Cong., Sept. 2, 1993, rev'd Apr. 23, 2019, effective Apr. 23, 2019).

preliminary responsibility and the evidence is under the control of the defendant's party, the court will order the defendant to provide the material, like the accounting book or other relative material. If the defendant refused to do so, they might take disadvantaged results.

MARK COHEN: Thank you. Perhaps we can just go around the table and if everybody can give me their sense about whether things are getting better for foreigners or worse in light of what we've just heard. Will foreigners be able to leverage a lot of these changes in their interest or is the situation getting more ominous? I say this in advance of IP week, April 26. There is going to be a flood of data from agencies coming out. There have been some interesting cases. We've heard about the burden of proof reversals and punitive damages and uptake in the administrative regime.

Foreigners, we've heard about an influence of the United States especially on China's evolution, is this going to continue or we're going to continue to see improvements that particularly benefit foreigners, or is this a switching — a migration to China becoming a strong economy for IP, and whatever that means where “the chips will fall” for the foreign business community? Maybe I'll ask He Jing to respond to that quickly first, and then we'll go around the room.

HE JING: I just came back from a hearing about standard essential patents. I found that great. Like I said, it's really a strength-based context now. I guess the market knows where the strengths were coming from, say in the Alaska data conference. Lincoln said he says something about speaking from experience. Then our State Councilor said no. The most popular word right now in China in terms of geopolitical context is a pink shirt, the flat view or look into eyes in that equal height. Probably before that, when the trade, we probably looked up to the West. Now, I think the official policy view is a flat view. What this really means is that if something triggers our Chinese system in a way that we think that you are looking down on us, we — when I say we it's — anyway, you know what I mean. We have a benchmark view. I think that's probably the best way to say it. That's not really bad news. It does not mean only bad news, it's really for foreign companies for IP owners, or the other side if you know how to use a system, you could actually benefit from it. I have to say this system progresses a lot and a lot more resources, a lot of better systems. It depends on whether you trigger it, whether you somehow stumbled on and we think that you don't know, there's a flat view.

MARK COHEN: Good. Thank you. Let's turn to Professor Tang, perhaps to circle back. If you want to focus on copyright, that's fine.

GUAN H. TANG: Thanks Mark. I teach IP, and I'm interested in different areas of IP. I liked it a lot when He Jing said, “If you know how to use the system, actually it's a great improvement.” I think the key is that as a foreign right holder you must know the system, which means that you need to study. I think that China really has switched its approach: from the passive reaction to the international pressure in the past, to the proactive approach. It is moving towards encouraging more national creativities, which means the system can provide China to an IP strong nation and enable China to move from “made in China” to “created in China.” The IP system, no matter which instrument we are talking about, is moving towards that direction. I think that if a clause, no matter how beautifully it is written or how

mature it is, if China thinks it's not beneficial for the national right holders, China will not adopt it under any pressure; the extended collective management may be a perfect example.

MARK COHEN: Thank you. Jill, you can chime in either from pharma and patents or the IP system generally.

JILL (YIJUN) GE: Mark, before I answer your question, perhaps I have to lean on someone who understands the Korea and China-U.S. rivalry. When we look at things, especially on the ground, I don't think everything is rosy, especially when we think about the patent-linkage system.

It's not just for China to implement commandments in the Phase One deal, it's also to pave the way for Chinese generics to launch for earlier generic launch and to pave the way for them to more aggressively invalidate rights owners' patents. I think the trend will continue and will accelerate. We absolutely have to deal with new issues and even in the trademarks side, I think in the recent months, one issue practitioners have been grappling with is how the Chinese Trademark Office has invoked the unhealthy social influence as grounds to reject trademark applications.

We have seen very interesting or arbitrary cases, and also difficulty in patent cases or trade secret cases, especially where you have to deal with a judicial appraisal which remains to be a black box process then it will be extremely difficult for rights owners. These are the things I think will continue to be difficult, but I at least will see the bright side of things and also as Professor Guan said, we have to understand that system and to figure out how we can better navigate the system. Still, this is a massive country and there are new interests and new ways to deal with things.

MARK COHEN: Thank you. Elaine, you've already pretty much addressed the question, although I think it seems to me, perhaps you agree the era that we're trying to even when it had a patent or trademark office that was several times the size of the United States or a docket, that was several times the size of the United States will still be modest and say, "No, you're our big brother. We need to learn from you."

Maybe drawing to a close and perhaps we didn't take enough advantage of that modesty whether it was a false modesty or a real modesty enough. If you have anything to add to that, great. If not, we have one question from the audience as well as what are the practical differences between adjudication and CNIPA versus the courts. If you want to take an initial stab at that, that would also be helpful.

ELAINE WU: Just really quickly about the whole CNIPA issue. I do agree that CNIPA learning from the U.S. may be drawing to a close, I do think on certain practical levels, technical levels, there are still areas of collaboration. I think everyone probably may have heard of the IP5, the five largest patent offices in the world which is a framework of discussion.

There's a Trademark Five, there's an ID5, a Design Five, the five largest patent trademark and design patent offices in the world. I think there's technical collaboration still to be had in those areas and CNIPA is very much at the table. They were quiet in the beginning and now they have become much more vocal, much more willing to share on a technical basis, so I think that's probably still a good thing.

Session 7A

I agree with you. We also of course realize that CNIPA has widened its influence certainly on a whole host of the Belt and Road, a bunch of offices worldwide. That's something that we are observing very carefully and how it is widening its influence in all these areas and people there and so on and so forth and training IP officials. Now, when we first started this business, Mark, the idea of CNIPA training IP officials in various parts of the world just didn't happen and they're doing that. It was certainly doing it. The influence on Southeast Asia is vast.

These are all things that we are watching very carefully. I think I would agree with your assessment. On administrative and civil judicial enforcement, I'm going to let my colleagues talk about this a bit too because they're the practitioners. Administrative enforcement is widely used and has some benefits for certainly some rights holders because it is very quick, it is very inexpensive.

Although enforcement is limited and you only have fines, you don't have damages. Civil judicial enforcement is the route to go, particularly if you have complex invention patents. That is the route that they will go, especially in a system where China has really beefed up its judicial enforcement system.

We like to think that China should continue down that route in beefing up the system and making it even stronger so that our rights holders, particularly those with invention patents can utilize it to their best advantage. I'll leave it to other colleagues who have a lot more experience in litigating in those areas to chime in.

MARK COHEN: Anybody else on the practical differences between CNIPA adjudication and the courts, particularly for patents?

HE JING: Well, we had some success but it's really not very consistent. Most of the time it's the local office trying to mediate rather than doing the real job if you're lucky, get something done very quickly. So far, I would say it's a little bit hollow. What's really concerning is how it's going to really interfere with the patent linkage cases because lots of originators lost their patents with CNIPA, so they are their concerns.

Anyway, this is not really tested yet. Generally speaking, someone, including myself, thought it would be good to have one patent court system rather than having two. I'm surprised Elaine, that you said — I don't know if that is the U.S. government perspective — you're saying it's good to have a patent administrative enforcement system?

ELAINE WU: I think that we have certainly continued to say, particularly all comments to the Patent Law amendments and so on, that beefing up the administrative system is really not the way to go. I think many of our rights holders, certainly patent rights holders and particularly those with invention patents, will think that way as well. We have continuously been saying, "Hey, look, as you know, the Patent Law amendments have increased and beefed up the administrative enforcement system." We don't think that's the best route to go either.

MARK COHEN: I think we're out of time here, but I wanted to thank you all for a lively discussion. I wish we had more time and I look forward to the next event together. Thank you very much.