

6-2012

## Note – Repercussions of China’s High-Tech Rise: Protection and Enforcement of Intellectual Property Rights in China

Emily Gische

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### Recommended Citation

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## Notes

# Repercussions of China's High-Tech Rise: Protection and Enforcement of Intellectual Property Rights in China

EMILY GISCHE\*

*China's growing technological prowess and role as a global economic player has vastly increased the number of U.S. and international companies doing business in China. Despite the country's continued building of a basic intellectual property infrastructure, IP violations remain a common complaint of foreign businesses. This Note analyzes China's developing IP policy in the context of World Trade Organization Dispute Settlement 362, which the United States initiated against China in 2007. The dispute concerned the protection and enforcement of IP rights and involved both copyright and trademark issues. This Note also examines subsequent national IP strategy pronouncements issued by both China's State Council and China's highest court, the Supreme People's Court, to assess the extent to which they remedy the issues that arose in the WTO dispute. In addition to these materials, this Note analyzes the likelihood that China will be able to implement its IP strategy. This Note concludes that although the Chinese government is shifting to a more proactive IP policy, the lack of effective law enforcement continues to serve as a major obstacle to implementation. Nascent pressure from domestic IP creators, international pressure, and most important, changes in China's domestic economy all act as counterbalancing forces to offset the enforcement problem.*

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## INTRODUCTION

Intellectual property rights (“IPRs”) in China have consistently been a priority for the United States in recent years. On April 10, 2007, the United States filed a complaint with the World Trade Organization (“WTO”), requesting consultations with China concerning the protection and enforcement of IPRs.<sup>1</sup> The complaint involved both copyright and trademark issues. The dispute, known as Dispute Settlement 362 (“DS362”), concerned: (1) the thresholds that must be met in order for certain acts of trademark counterfeiting and copyright piracy to be

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1. Panel Report, *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, ¶ 1.1, WT/DS362/R (Jan. 26, 2009). To ensure compliance with its agreements, the WTO operates a dispute settlement mechanism, which consists of a two-tiered international tribunal that determines if violations of WTO law have occurred and authorizes trade sanctions against those who do not remedy their violations. Jan Bohanes & Adrian Emch, *WTO-China IPR Case: A Mixed Result*, CHINA L. & PRAC., Mar. 16, 2009, at 19. If a WTO member believes that another member's conduct is in violation of WTO rules, that WTO member can bring its case to a panel of experts that adjudicates impartially on the basis of WTO law. *Id.*

subject to criminal procedures and penalties (the “criminal prosecution thresholds claim”); (2) goods that infringe IPRs and that are confiscated by Chinese customs authorities, particularly the disposal of such goods following removal of their infringing features (the “customs measures claim”); and (3) the denial of copyright and related rights protection and enforcement for creative works of authorship, sound recordings, and performances that have not been authorized for publication or distribution within China (the “copyright law claim”).<sup>2</sup> The first claim concerned criminal prosecution thresholds in both trademark and copyright matters, the second concerned mainly trademark infringement, and the third exclusively involved copyright protection.<sup>3</sup> On January 26, 2009, the Dispute Panel Report was made public.<sup>4</sup> Neither China nor the United States appealed.<sup>5</sup> China accepted the findings and negotiated with the United States to implement them by March 2010.<sup>6</sup>

After the United States filed its complaint in 2007, China issued several official pronouncements regarding its IP policy. On June 5, 2008, the State Council of the People’s Republic of China (“PRC”) issued the “Outline of the National Intellectual Property Strategy.”<sup>7</sup> The Outline covered a wide range of IPR issues, from encouraging the commercialization and utilization of IPRs to improving IP law enforcement.<sup>8</sup> After the Outline was issued, the Supreme People’s Court (“SPC”) of the PRC set forth several opinions, notices, and circulars relating to IPRs in 2009 and 2010.<sup>9</sup>

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2. Panel Report, *supra* note 1, ¶¶ 2.2–2.4.

3. *Id.*

4. *China—Measures Affecting the Protection and Enforcement of Intellectual Property Rights*, WORLD TRADE ORG. (May 26, 2010), [http://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds362\\_e.htm](http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds362_e.htm).

5. *Id.*

6. *Id.*

7. *Outline of the National Intellectual Property Strategy* (Issued by the State Council of the People’s Republic of China on June 5, 2008), CHINESE GOV’T’S OFFICIAL WEB PORTAL (June 21, 2008), [http://www.gov.cn/english/2008-06/21/content\\_1023471.htm](http://www.gov.cn/english/2008-06/21/content_1023471.htm) [hereinafter *Outline*].

8. *Id.*

9. Notice of the Supreme People’s Court on Issuing the Standards Concerning Jurisdiction of the Grassroots People’s Courts over Intellectual Property Civil Cases of First Instance (promulgated by the Supreme People’s Court, Jan. 28, 2010) (iSinoLaw) (China); Provisions of the Supreme People’s Court on the Division of Work in the Trial of Administrative Intellectual Property Cases Involving the Authorization and Determination of Rights over Patent, Trademark, etc. (adopted by the 1469th Meeting of the Judicial Committee of the Supreme People’s Court, June 22, 2009) (Lawinfochina) (China), available at <http://eng.chinalawinfo.com/NetLaw/display.aspx?db=law&sen=rLdDdW4drLdDdWrdhrdydWdd/Dd6dW4d9DdxWcdrLdGdWud/ddFdWhd/DdwdWudrhDdWdd9D7vdCrdId7Xdmrdsd7MdCydHD7FdWudrDd5dWLd/Ld+&Id=7724&>; Notice of the Supreme People’s Court on Issuing the Opinions on Several Issues Concerning Intellectual Property Trials Serving the Overall Objective Under the Current Economic Situation (promulgated by the Supreme People’s Court, Apr. 21, 2009) (Lawinfochina) (China) [hereinafter Apr. 21, 2009 SPC Notice], available at <http://www.lawinfochina.com/display.aspx?lib=law&id=7703>; Opinions of the Supreme People’s Court on Several Issues Regarding the Implementation of the National Intellectual Property Strategy (promulgated by the Supreme People’s Court, Mar. 29, 2009) (Lawinfochina) (China),

Using the issues in DS362 as a framework, this Note analyzes China's developing IP policy. This Note also examines the Outline and SPC materials in the context of DS362 to determine to what extent China's IP strategy and specific requirements remedy any of these issues. In addition to analyzing the Outline and SPC materials, this Note provides an analysis of how likely it is that the PRC will be able to implement these overall goals.

Examination of the Outline and related SPC materials indicates that China's IP policy is becoming more proactive and pro-innovation, especially with regard to its trademark policy, as the country focuses its efforts on creating a high-tech economy. Although the Chinese government is shifting to this proactive policy in terms of its national pronouncements, the lack of effective law enforcement continues to serve as a major obstacle to full implementation of its IPR goals. However, nascent pressure from domestic IP creators, international pressure (especially from the United States), and changes in China's domestic economy act as counterbalancing forces to help offset the enforcement problem. As China continues to grow and become an integral part of the world economy, it becomes increasingly important for China and the rest of the international community, especially the United States, to be able to do business together without rampant IP violations.

This Note is divided into five parts. Part I provides a brief background of China's IP law development. Part II discusses the three claims in DS362. Part III sets forth China's immediate and concrete implementation of the adopted WTO recommendations and reports. Part IV analyzes China's response and identification of the overall issues that DS362 raised. Finally, Part V examines the implementation—and potential roadblocks—of the goals set forth in the Outline and SPC materials.

## I. THE DEVELOPMENT OF INTELLECTUAL PROPERTY LAW IN CHINA

IP law and policy in China is, for the most part, a relatively recent development. Most of the relevant progress has occurred within the past thirty years.<sup>10</sup> Following China's reform and opening policy post-Mao, the country began developing its IP law system, resulting in the creation of the Trademark, Patent, and Copyright Laws.<sup>11</sup> China also joined all of

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available at <http://www.lawinfochina.com/display.aspx?lib=law&id=7546> [hereinafter Mar. 29, 2009 SPC Opinion].

10. Andrea Wechsler, *INTELLECTUAL PROPERTY LAW IN THE P.R. CHINA: A POWERFUL ECONOMIC TOOL FOR INNOVATION AND DEVELOPMENT* 32 (Max Planck Inst. for Intell. Prop., Competition & Tax L., Research Paper No. 09-02, 2008), available at <http://ssrn.com/abstract=1354546>.

11. See Trademark Law of the People's Republic of China (promulgated by the Standing Committee of the Fifth National People's Congress, Aug. 23, 1982) (last amended Oct. 27, 2001),

the major IPR conventions, including the World Intellectual Property Organization—a specialized agency of the United Nations—in 1980 and the Berne Convention in 1992.<sup>12</sup>

Scholars have posited several motivations on China's part for creating and developing a comprehensive IP protection system. One such motivation was to facilitate foreign investment.<sup>13</sup> China and the international community alike assumed that the introduction of IP protection standards would help boost economic growth within the country.<sup>14</sup> An additional motivation was external and foreign pressure that led to IP reform, namely the prospect of joining the international trade community through membership in the WTO.<sup>15</sup> Because China joined the WTO in 2001<sup>16</sup>—several years after its initial creation of IP laws—this prospect was a significant motivation for China to continue to develop and amend its IP system. In addition to possible WTO membership, the United States was a constant force in spurring increased protection of foreign IP interests in China.<sup>17</sup>

The prospect of WTO accession has resulted in concrete IP developments within China. China has made several efforts to ensure compliance with the Agreement on Trade-Related Aspects of Intellectual Property Rights (“TRIPS”) as a result of its WTO accession.<sup>18</sup> TRIPS provides a legal framework for protection of IPRs by incorporating the principles of other major international conventions and prescribing certain procedures and remedies that WTO members must make available to its domestic IPR holders.<sup>19</sup> In this vein, China made amendments to all of its major IP laws, including the Patent Law in 2000, the Trademark Law in 2001, and the Copyright Law in 2001.<sup>20</sup> For

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available at <http://www.chinaiprlaw.com/english/laws/laws11.htm>; Patent Law of the People's Republic of China (promulgated by the Fourth Meeting of the Standing Committee of the Sixth National People's Congress, Mar. 12, 1984) (last amended Dec. 27, 2008), available at [http://english.sipo.gov.cn/laws/lawsregulations/201101/t20110119\\_566244.html](http://english.sipo.gov.cn/laws/lawsregulations/201101/t20110119_566244.html); Copyright Law of the People's Republic of China (promulgated by the Fifteenth Session of the Standing Committee of the Seventh National People's Congress, Sept. 7, 1990) (last amended Oct. 27, 2001), available at <http://www.chinaiprlaw.com/english/laws/laws10.htm> [hereinafter Copyright Law 2001].

12. Wechsler, *supra* note 10, at 32.

13. Veronica Weinstein & Dennis Fernandez, *Recent Developments in China's Intellectual Property Laws*, 3 CHINESE J. INT'L L. 227, 228 (2004); Julia Ya Qin, THE IMPACT OF WTO ACCESSION ON CHINA'S LEGAL SYSTEM: TRADE, INVESTMENT AND BEYOND 20–22 (Wayne St. U. L. Sch. Legal Stud., Research Paper Series No. 07-15, 2007), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=985321](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=985321).

14. Wechsler, *supra* note 10, at 35.

15. *Id.* at 37; see Qin, *supra* note 13, at 20.

16. *Member Information: China and the WTO*, WORLD TRADE ORG., [http://www.wto.org/english/thewto\\_e/countries\\_e/china\\_e.htm](http://www.wto.org/english/thewto_e/countries_e/china_e.htm) (last visited May 1, 2012).

17. Wechsler, *supra* note 10, at 37.

18. Qin, *supra* note 13, at 21.

19. *Id.* at 20–21.

20. *Id.* at 21.

example, the Patent Law was modified to shift the burden of proof of infringement to the defendant, as required by TRIPS.<sup>21</sup> The Trademark Law was amended to protect prior rights in order to implement the corresponding TRIPS requirement.<sup>22</sup> The Copyright Law was modified to extend the owner's rights to include the right to limit online transmission of the copyrighted material.<sup>23</sup> Specific IP violations have been added to the criminal code, as have administrative and civil remedies, and a special IP adjudication division has been created in the People's Courts.<sup>24</sup>

Despite these developments and basic IP protection infrastructure, IP violations are still a major problem in China today. Such violations remain one of the most frequently cited complaints of foreign companies doing business in China.<sup>25</sup> Most recently, the U.S. clean energy company American Superconductor brought suit against Chinese wind turbine maker Sinovel for more than \$400 million in damages, alleging that Sinovel and its employees gained access to some of its wind turbine software codes and used them without authorization.<sup>26</sup> This case is only the latest in a series of lawsuits that American Superconductor has brought against Sinovel.<sup>27</sup>

Foreign businesses have identified several IPR enforcement problems, such as the lack of coordination among the agencies responsible for IP protection and enforcement, local protectionism, inadequate personnel training, and insufficient administrative, civil, and criminal thresholds for punishment.<sup>28</sup> In October 2005, the United States requested more information from China regarding IPR infringement levels and enforcement activities in order to evaluate China's efforts to improve IPR enforcement since its accession to the WTO.<sup>29</sup> China provided only limited information in response, and by April 2007 it became clear to the United States that bilateral discussions were not adequately progressing.<sup>30</sup> The United States then decided to file DS362, alleging that China had failed to protect IPRs according to TRIPS standards.

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21. Weinstein & Fernandez, *supra* note 13, at 228–29.

22. *Id.* at 229.

23. *Id.* at 230.

24. Qin, *supra* note 13, at 21.

25. *Id.*; OFFICE OF U.S. TRADE REP., 2010 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE 5 (2010) [hereinafter USTR 2010 REPORT TO CONGRESS]; OFFICE OF U.S. TRADE REP., 2010 SPECIAL 301 REP. 19 (2010) [hereinafter USTR 2010 SPECIAL 301 REPORT]; Rogier Creemers, *The Effects of WTO Case DS362 on Audiovisual Media Piracy in China*, 31 EUR. INTELL. PROP. REV. 568, 568–59 (2009).

26. Leslie Hook, *AMSC to Sue Sinovel in Beijing Court*, FIN. TIMES (Nov. 4, 2011), <http://www.ft.com/intl/cms/s/0/b5e190c8-05db-11e1-a079-00144feabdco.html#axzz1nWzK9xj1>.

27. *Id.*

28. Qin, *supra* note 13, at 21; see USTR 2010 SPECIAL 301 REPORT, *supra* note 25, at 20–21.

29. USTR 2010 REPORT TO CONGRESS, *supra* note 25, at 85.

30. *Id.*

## II. THE CLAIMS IN WTO DISPUTE SETTLEMENT 362

## A. CRIMINAL PROSECUTION THRESHOLDS CLAIM

The first claim in DS362 involved thresholds for criminal infringement. The United States argued that China's legal thresholds for considering infringement to be a criminal offense were too high, effectively creating a safe harbor for widespread "commercial scale" infringement.<sup>31</sup> The United States also alleged that the lack of criminal procedures and penalties for commercial-scale counterfeiting and piracy as a result of the thresholds was inconsistent with China's obligations under Articles 41.1 and 61 of the TRIPS Agreement.<sup>32</sup> Article 41.1 deals with enforcement of IPRs and mandates that TRIPS members have enforcement procedures in place to permit actions against IP infringement, including preventative and deterrent remedies.<sup>33</sup> Article 61, dealing with criminal procedures, provides in part: "Members shall provide for criminal procedures and penalties to be applied at least in cases of wil[li]ful trademark counterfeiting or copyright piracy *on a commercial scale*."<sup>34</sup> China established these thresholds through the Criminal Law of the PRC and subsequent interpretations by the SPC.<sup>35</sup> The trademark provisions dealt with the use of a counterfeit trademark, the sale of counterfeit trademark commodities, forgery of trademarks, and the sale of forged trademarks.<sup>36</sup> The copyright provisions involved thresholds for criminal copyright infringement and the sale of copyright-infringing reproductions.<sup>37</sup>

The WTO's findings were not a clear win for either country. The WTO Panel rejected the United States' claim because the United States did not provide sufficient data or evidence for products, markets, or other factors that would demonstrate what constituted commercial scale in China's marketplace.<sup>38</sup> This rejection illustrates the relatively high evidence threshold for WTO challenges under TRIPS Article 61.<sup>39</sup> Namely, the WTO has specified that Article 61 requires a product and market-specific demonstration of what constitutes an operation on a commercial scale.<sup>40</sup>

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31. Panel Report, *supra* note 1, ¶ 7.482.

32. *Id.* ¶ 3.1.

33. Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), 1869 U.N.T.S. 299 (Apr. 15, 1994), available at [http://www.wto.org/english/docs\\_e/legal\\_e/legal\\_e.htm#TRIPS](http://www.wto.org/english/docs_e/legal_e/legal_e.htm#TRIPS) [hereinafter TRIPS Agreement].

34. *Id.* (emphasis added).

35. Panel Report, *supra* note 1, ¶ 2.2.

36. *Id.* ¶¶ 7.399–407.

37. *Id.* ¶¶ 7.408–415.

38. *Id.* ¶ 7.617.

39. Bohanes & Emch, *supra* note 1, at 20.

40. Panel Report, *supra* note 1, ¶ 7.630.

## B. CUSTOMS MEASURES CLAIM

The second claim involved issues of trademark law and customs regulations. The United States argued that Chinese customs regulations did not give Chinese customs authorities the power to order disposal of infringing goods, which is required by TRIPS.<sup>41</sup> Specifically, the United States alleged that the requirement in the Chinese customs regulations that infringing goods be released into the channels of commerce under the circumstances set forth in the regulations is inconsistent with China's obligations under Articles 46 and 59 of TRIPS.<sup>42</sup> Articles 46 and 59 both deal with remedies and prohibit the removal of a trademark and subsequent sale of the confiscated counterfeit good by customs authorities.<sup>43</sup>

The WTO Panel found in favor of the United States on its customs claim. The Panel found that with respect to imports, the way in which China's customs authorities auctioned these goods was inconsistent with TRIPS because it permitted the sale of goods after the removal of the trademark in more than just exceptional cases.<sup>44</sup> While the Panel found in favor of the United States by deciding that the simple removal of a counterfeited trademark was inconsistent with TRIPS, this finding was limited to auctions of products and did not include donations.<sup>45</sup> Donation of infringing products to charitable organizations, however, is the most common disposal method used by Chinese customs authorities.<sup>46</sup> Because there is no requirement that Chinese customs authorities ensure that such donations do not eventually enter the stream of commerce, infringing products can re-enter the market.<sup>47</sup>

## C. COPYRIGHT LAW CLAIM

The third claim exclusively involved issues of copyright law. The claim concerned Article 4 of the Chinese Copyright Law, which the United States argued denied copyright protection to works prohibited for publication or distribution.<sup>48</sup> Copyright law in China is the result of many compromises among different factions within the legislature.<sup>49</sup> One such compromise reflected a desire by some within the Chinese Communist Party that the Copyright Law be used as a way to control

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41. *Id.* ¶ 7.197.

42. *Id.* ¶¶ 7.197, 7.254.

43. TRIPS Agreement, *supra* note 33, arts. 46, 59.

44. Panel Report, *supra* note 1, ¶ 7.393.

45. *Id.* ¶ 7.365; Leah Chan Grinvald, *Making Much Ado About Theory: The Chinese Trademark Law*, 100 TRADEMARK REP. 964, 1016 (2010).

46. Grinvald, *supra* note 45, at 1016.

47. *Id.*

48. Panel Report, *supra* note 1, ¶ 2.4.

49. Creemers, *supra* note 25, at 568.

content. This compromise resulted in Article 4, the first sentence of which reads: "Works the publication and/or distribution of which is prohibited by law shall not be protected by this Law."<sup>50</sup>

The claim and resultant WTO findings concerned China's review process for copyright protection, which determines whether the content of a work is prohibited under Chinese law on various grounds. Examples of such grounds are that a work is against fundamental principles established in the Chinese Constitution, that it is of a "superstitious" or "immoral" nature, or that it promotes gambling or violence.<sup>51</sup> Works or portions of works that fail this review process are denied protection under the Copyright Law.<sup>52</sup> China sought to justify its denial of copyright protection for works that did not pass this review process under Article 17 of the Berne Convention, incorporated in TRIPS by reference.<sup>53</sup> Article 17 entitles a government to "permit, to control, or to prohibit . . . the circulation, presentation, or exhibition of any work . . . in regard to which the competent authority may find it necessary to exercise that right."<sup>54</sup> The WTO Panel disagreed with China's defense, however, and stated that while a government's rights under Article 17 of the Berne Convention may interfere with the exercise of certain rights by the copyright holder, a government cannot eliminate all of those rights for a particular work via censorship.<sup>55</sup>

These conclusions led to a finding in favor of the United States on its copyright claim. The Panel found that China's failure to protect copyright in prohibited works that are banned because of their illegal content is inconsistent with the Berne Convention as incorporated in TRIPS.<sup>56</sup> Article 9(1) of TRIPS, which incorporates Article 5(1) of the Berne Convention, requires governments to grant copyright protection for qualifying works and to have procedures in place to enforce such protection.<sup>57</sup> The WTO Panel also rejected China's argument regarding a distinction between copyright and copyright protection.<sup>58</sup> The Panel stated that China did not explain how rights holders would assert any type of copyright if protection were denied, which could result in copyright becoming a "phantom right."<sup>59</sup> The Panel's findings in this regard pertained only to works that had failed content review and to the

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50. *Id.* (quoting Copyright Law 2001, *supra* note 11, art. 4).

51. Bohanes & Emch, *supra* note 1, at 19.

52. *Id.*

53. Panel Report, *supra* note 1, ¶ 7.120.

54. Bohanes & Emch, *supra* note 1, at 19.

55. Panel Report, *supra* note 1, ¶ 7.127.

56. *Id.* ¶ 7.191.

57. TRIPS Agreement, *supra* note 33, art. 9(1).

58. Panel Report, *supra* note 1, ¶ 7.67.

59. *Id.*

deleted portions of works that had been edited to pass content review.<sup>60</sup> The Panel did not find that the United States had made a successful case with regard to works that were never submitted for or were in the process of content review.<sup>61</sup> The Panel concluded by recommending that China bring the Copyright Law into compliance with TRIPS.<sup>62</sup>

### III. CHINA'S IMMEDIATE COMPLIANCE WITH WTO FINDINGS

China has largely complied with the specific findings of the WTO Panel, and the Office of the United States Trade Representative ("USTR") has acknowledged China's compliance with the WTO rulings.<sup>63</sup> According to the WTO, China provided notice on March 19, 2010, that it has successfully implemented the WTO Panel's recommendations and now conformed to WTO law.<sup>64</sup> No compliance proceedings have been initiated since this notification.<sup>65</sup>

China implemented the WTO findings by way of legislative reform. China reported that on February 26, 2010, the Standing Committee of the Eleventh National People's Congress approved the amendments to the Copyright Law.<sup>66</sup> Article 4 of the Copyright Law was amended to read, "Copyright holders shall not violate the Constitution or laws or jeopardize public interests when exercising their copyright. The State shall supervise and administrate the publication and dissemination of works in accordance with the law."<sup>67</sup> Additionally, on March 17, 2010, the State Council adopted the decision to revise the Regulations for Customs Protection of Intellectual Property Rights.<sup>68</sup> The WTO noted that China had therefore completed all necessary domestic legislative procedures for implementing the Panel recommendations and rulings.<sup>69</sup>

Although on its face it does not seem that the legislative amendment will change much in practice, the USTR seems to have accepted China's efforts to implement the Panel recommendations as satisfactory. Because China did not appeal and the WTO found in favor of the United States in the majority of its claims, the United States obtained at the very least a symbolic win. In its latest report, the USTR notes that it "continues to monitor China's implementation of the DSB recommendations and

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60. *Id.* ¶ 7.103.

61. *Id.*

62. *Id.* ¶ 8.4.

63. USTR 2010 REPORT TO CONGRESS, *supra* note 25, at 5.

64. WORLD TRADE ORG., *supra* note 4.

65. *Id.*

66. *Id.*

67. Copyright Law of the People's Republic of China (promulgated by the Standing Committee of the Eleventh National People's Congress, Feb. 26, 2010, effective Apr. 1, 2010), available at [http://www.wipo.int/clea/docs\\_new/pdf/en/cn/cn031en.pdf](http://www.wipo.int/clea/docs_new/pdf/en/cn/cn031en.pdf).

68. WORLD TRADE ORG., *supra* note 4.

69. *Id.*

rulings in this dispute,” but then launches directly into a discussion of a subsequent WTO dispute regarding market access barriers.<sup>70</sup> The United States made its views on these issues clear through this particular dispute settlement and then decided to pursue more pressing matters.

#### IV. CHINA'S IDENTIFICATION OF AND RESPONSE TO INTELLECTUAL PROPERTY RIGHTS ISSUES IN DS362

China's overall IPR development is more nuanced than just its legislative efforts in response to DS362. The WTO Panel itself noted that it was evaluating only whether certain Chinese measures violated the country's TRIPS obligations, and that it was not tasked with ascertaining whether or what level of piracy exists in China, nor reviewing the advantages and disadvantages of strict IPR enforcement.<sup>71</sup> The latest phase of China's IP development, predominantly occurring within the twenty-first century, demonstrates that China has realized that globalization requires the protection of its own IP on an international stage, in addition to the domestic protection of foreign IP.<sup>72</sup> This realization has also brought about a shift in China's IP policy and development, from one that was reactive to its international obligations to one that is now more proactive and pro-innovation in its approach to IP protection and enforcement.<sup>73</sup> This shift is likely due to China's move toward a high-tech economy.<sup>74</sup> A recent study stated that China is expected to pass both the United States and Japan in new patent applications.<sup>75</sup> Such reports are evidence of China's increase in research and development and the country's efforts to encourage innovation.

A prominent example of such a proactive, pro-innovation approach is the PRC's Outline of the National Intellectual Property Strategy, adopted in June 2008. The Outline comprehensively addresses issues of IP protection, enforcement, development, and public awareness of IPRs.<sup>76</sup> One of the driving motivations behind the Outline is to “improve China's capacity for independent innovation and aid in efforts to make China an innovative country.”<sup>77</sup> The following Subparts discuss ways in

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70. OFFICE OF THE U.S. TRADE REP., 2011 SPECIAL 301 REPORT 16 (2011).

71. Panel Report, *supra* note 1, ¶ 8.5.

72. Wechsler, *supra* note 10, at 3.

73. *Id.*

74. For a discussion of China's move toward creating a high-tech economy, see *infra* Part V.D; see also Keith Bradsher, *As China Surges, It Draws High-Tech Researchers from America*, N.Y. TIMES, Mar. 18, 2010, at A1 (“Companies—and their engineers—are being drawn [to China] more and more as China develops a high-tech economy that increasingly competes directly with the United States.”).

75. David Barboza, *China Poised to Lead World in Patent Filings*, N.Y. TIMES: ECONOMIX (Oct. 6, 2010, 12:14 PM), <http://economix.blogs.nytimes.com/2010/10/06/china-poised-to-lead-world-in-patent-filings/>.

76. Outline, *supra* note 7; see Wechsler, *supra* note 10, at 41–42.

77. Outline, *supra* note 7, ¶ 4.

which the Outline and subsequent SPC notices and circulars address the issues present in both DS362 and the broader IP fields.

A. CRIMINAL PROSECUTION THRESHOLDS: COPYRIGHT AND TRADEMARK

As discussed in Part II.A, there is a relatively high evidence threshold for WTO challenges under TRIPS Article 61 and what constitutes an operation on the level of commercial scale. There are several possible remedies to meet this evidence threshold. Scholars have suggested that companies in China keep records of IPR infringements and other possible WTO violations and provide input to industry associations and governments where appropriate.<sup>78</sup> Such actions would enable the government to better track infringement levels.

The Outline makes advances in this regard. The Outline calls for the development of a national public service platform for basic information on IP.<sup>79</sup> Furthermore, it calls for the strengthening of the role of industrial associations and support of their IP work.<sup>80</sup> The Outline devotes an entire section to developing IP human resources, calling for the establishment of an interdepartmental coordination mechanism and accelerated development of national and provincial IP expert databases and professional information networks.<sup>81</sup> These advancements may increase communication about IPRs and enable the PRC to meet its obligations post-DS362.

The SPC materials also make some advances on criminal prosecution thresholds. The March 2009 SPC circular, entitled “Opinions of the Supreme People’s Court on Several Issues Regarding the Implementation of the National Intellectual Property Strategy,” devotes part of its discussion to criminal infringement.<sup>82</sup> One goal stated in the circular is “[t]o strengthen the judicial protection of intellectual property, stringently crack down on criminal infringement on intellectual property in accordance with law and fully exert its functions of punishing and deterring the criminals.”<sup>83</sup> The circular notes that with regard to repeated infringements, class infringements, and large-scale piracy, the SPC should assist the relevant departments in carrying out “special activities” for focused protection.<sup>84</sup> Such special activities may include the SPC’s plans to unify and regulate conditions and standards for the application of criminal punishment. They may also include its aims to safeguard

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78. See, e.g., Bohanes & Emch, *supra* note 1, at 20.

79. Outline, *supra* note 7, ¶ 52.

80. *Id.* ¶ 56.

81. *Id.* ¶¶ 59–62.

82. Mar. 29, 2009 SPC Opinion, *supra* note 9, ¶ 21.

83. *Id.*

84. *Id.*

victims' rights to pursue criminal prosecution.<sup>85</sup> Such aims on behalf of the SPC, while not addressing criminal prosecution thresholds specifically, suggest a broader policy of continuing to enforce criminal prosecution of IP infringement.

Some scholars, however, are less optimistic about the effect that future development of criminal prosecution thresholds will have on piracy rates. As discussed in Part II.A, the WTO Panel did not consider the evidence sufficient to find in the United States' favor.<sup>86</sup> Moreover, even if the WTO Panel had considered the evidence sufficient, changing the thresholds might not have had the desired effect.<sup>87</sup> In 2007, for example, certain enforcement thresholds were halved, but this reduction did not cause a drop in piracy rates.<sup>88</sup> Furthermore, U.S. copyright holders estimate that losses in 2009 due to piracy were approximately \$3.5 billion for the music recording and software industries alone, and these figures indicate little or no overall improvement over the previous year.<sup>89</sup> Therefore, while national pronouncements may indicate intentions to improve in this area, actual improvement may take much longer, assuming such pronouncements are implemented and enforced and are not just a delay tactic.

#### B. CUSTOMS MEASURES: TRADEMARK

As opposed to the issue of criminal prosecution thresholds, the Outline does not focus on the PRC's customs measures to a great degree. The Outline does briefly discuss the issue in its section on improving IP law enforcement:

Customs law enforcement and border protection of intellectual property need to be strengthened to maintain order in import and export and improve the reputation of China's export commodities. International cooperation in customs law enforcement needs to be fully utilized in order to effectively crack down on cross-border illegal acts and crimes involving intellectual property. Customs need to have a[n] influence on international intellectual property protection.<sup>90</sup>

Thus, while the language in the Outline suggests China's customs law enforcement of IPRs needs to be improved, it does not specifically address China's TRIPS-related obligations or the particular problems with regard to confiscated counterfeit trademark goods. The PRC seems less concerned with this specific aspect of the United States' case. Although the Outline was issued before DS362 was officially decided,

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85. *Id.*

86. *See supra* Part II.A.

87. Creemers, *supra* note 25, at 572.

88. *Id.*

89. USTR 2010 REPORT TO CONGRESS, *supra* note 25, at 5.

90. Outline, *supra* note 7, ¶ 48.

the United States filed the complaint over a year prior, so China was aware of the specific IPR issues that the United States had raised. It is also possible that China chose not to address the TRIPS-related violation in the Outline because it feared that doing so might prejudice its position in the ongoing WTO dispute.

The Outline and SPC circulars, however, do devote substantial discussion to the overall improvement and enforcement of trademark protection. The April 2009 circular contains an entire section focused on trademark protection, entitled, “Enhancing the business logo protection, actively promoting the development of brand economy, regulating the market order, and protecting fair competition.”<sup>91</sup> This emphasis on promoting the development of a “brand economy,” in particular, is consistent with the more proactive, pro-innovation IP approach that China has been demonstrating recently. In this circular, the SPC praises the market value of well-known brands and pledges to strengthen the protection of these brands in accordance with the law.<sup>92</sup> The SPC also aims to improve judicial policies on trademarks, strengthen the protection of trademark rights, and further foster the creation of independent brands.<sup>93</sup> Additionally, the SPC discusses balancing the actual use of registered trademarks and assignments of civil liabilities to encourage greater trademark use.<sup>94</sup>

Although the Outline and SPC materials do not expressly address the customs measures claim from DS362, they do devote substantial attention to greater enforcement and protection of trademark rights. This significant attention is not only consistent with China’s proactive approach, but also bodes well for the future development of China’s brand economy and improvements in IP policy with respect to trademark rights.

### C. COPYRIGHT LAW

Remedying the copyright issue may take more effort than simply rewriting the law. Although the Copyright Law has been amended as a result of DS362, the amendment’s real effect on piracy in China may be quite small.<sup>95</sup> Agreements in the 1990s that resulted in stronger IPR legislation in China did not significantly reduce IPR infringement rates.<sup>96</sup> The USTR acknowledged that U.S. copyright holders continue to report severe losses due to piracy in China.<sup>97</sup> Specifically, trade in pirated optical discs is thriving, “[s]mall retail shops continue to be the major commercial

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91. Apr. 21, 2009 SPC Notice, *supra* note 9, § III.

92. *Id.* ¶ 5.

93. *Id.* ¶ 6.

94. *Id.* ¶ 7.

95. Creemers, *supra* note 25, at 572.

96. *Id.*

97. USTR 2010 SPECIAL 301 REPORT, *supra* note 25, at 19.

outlets for pirated movies and music,” and the theft of software, books, and journals remains concerning.<sup>98</sup> Nonetheless, remedying the inherent difficulties in Article 4 is important, at least symbolically, because that provision serves as the link between copyright law and media control by the Chinese government.<sup>99</sup>

The Outline takes a mixed approach to the copyright issue. Its copyright-specific language focuses on protection of China's domestic IP.<sup>100</sup> The Outline proposes to assist the development of copyright-related industries, but later curbs that general pronouncement by pledging to “support the creation of works with *clear national features* and characteristics of the times” and to “assist in the creation of excellent cultural works that have difficulties in market competition.”<sup>101</sup> Implicit in this latter language is China's continuing prioritization of works that pass its content-review process over works that do not. The Outline also discusses piracy and the improvement and promotion of the commercialization of copyrights.<sup>102</sup> With regard to piracy in particular, the Outline aims to increase the punishment for piracy and to curb the “large-scale production, selling and dissemination of pirated products.”<sup>103</sup>

Thus far, bringing Article 4 of the Copyright Law into compliance with TRIPS does not necessarily equate to a reduction in copyright infringement. This disconnect may be due mainly to enforcement problems, which will be discussed in Part V. Additionally, the Outline does not prioritize the Article 4 issue present in DS362, and it continues to prioritize works that pass its review process without discussion of those works that are otherwise prohibited. Finally, the language concerning copyright protection seems less nuanced and pronounced than the Outline's parallel language regarding trademark infringement.

#### V. CHINA'S IMPLEMENTATION OF IPR GOALS IN PRACTICE

Implementation of the IPR goals in the Outline and SPC materials is ongoing. Officials from various government bodies including the Ministry of Commerce, the State Intellectual Property Office, and the State Administration for Industry and Commerce jointly pledged at a recent news conference to make IPR protection a “long-term” national task.<sup>104</sup> He Hua, Vice-Commissioner of the State Intellectual Property Office, has stated that China has “achieved remarkable progress on the

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98. *Id.*

99. Creemers, *supra* note 25, at 572.

100. Outline, *supra* note 7, ¶ 25.

101. *Id.* (emphasis added).

102. *Id.* ¶¶ 26–27.

103. *Id.* ¶ 27.

104. *Improved IPR Protection to Support Innovation*, PEOPLE'S DAILY ONLINE (Mar. 14, 2011), <http://english.people.com.cn/90001/90776/90882/7318677.html>.

strategy during the past two years and more, but there is still much room for improvement” and that the country is “strongly committed to strengthening efforts on IPR protection to achieve China’s target of building itself into an innovation-oriented nation.”<sup>105</sup> It is unclear, however, to what extent these goals have actually been implemented rather than simply pronounced. Since 2008, sixteen departments in China have drafted IPR strategy guidelines, and ministries have launched more than 400 measures nationwide from 2009 to 2010.<sup>106</sup>

#### A. LAW ENFORCEMENT IN CHINA

A major obstacle to effective implementation of the IPR goals set forth in the Outline is the low quality of Chinese law enforcement. Long delays in enforcement actions, in addition to the oftentimes arbitrary and nontransparent nature of the actions, are a major complaint of foreign companies in China.<sup>107</sup> Additionally, local authorities are often the primary personnel in the enforcement efforts.<sup>108</sup> Because infringing enterprises are often an important local source of revenue and employment, local authorities may be reluctant to enforce new or more stringent IP laws for fear of jeopardizing this revenue source.<sup>109</sup> Finally, protectionist attitudes, especially among local authorities, can have a significant influence on enforcement of IPRs.<sup>110</sup> Such protectionist tendencies may take substantial time to change, despite the Outline and other efforts by the national government.

The quality of enforcement of IPRs also varies greatly by region. For example, Jiangsu Province recently recognized the importance of IPR protection by imposing a severe criminal sentence in a high-profile software piracy case.<sup>111</sup> This same province, which is home to many of the world’s leading exporters of electronic equipment, focuses on promoting high technology.<sup>112</sup> In Guangzhou Province, however, which is also one of China’s largest manufacturing regions, counterfeit manufacturing is prevalent.<sup>113</sup> Fines and penalties are not deterring criminals, and the number of criminal IPR cases that are initiated is too low to bring about any real improvement in the region.<sup>114</sup> The USTR has reported that IPR enforcement at the local level is “hampered by poor coordination among Chinese government ministries and agencies, local protectionism and

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<sup>105.</sup> *Id.*

<sup>106.</sup> *Id.*

<sup>107.</sup> Weinstein & Fernandez, *supra* note 13, at 234.

<sup>108.</sup> *Id.*

<sup>109.</sup> *Id.*

<sup>110.</sup> *Id.*

<sup>111.</sup> USTR 2010 SPECIAL 301 REPORT, *supra* note 25, at 22.

<sup>112.</sup> *Id.*

<sup>113.</sup> *Id.*

<sup>114.</sup> *Id.*

corruption, high thresholds for initiating investigations and prosecuting criminal cases, lack of training, and inadequate and non-transparent processes.”<sup>115</sup>

A case involving Baidu, the leading search engine in China,<sup>116</sup> is illustrative of this law enforcement roadblock. In 2010, Baidu was found guilty of violating copyright on music lyrics found on its service.<sup>117</sup> However, the fine was only \$8000.<sup>118</sup> Such a fine pales in comparison to those levied in the United States, such as the \$2.4 million fine levied against Jammie Thomas-Rasset for pirating twenty-four music tracks.<sup>119</sup> Assessing a mere \$8000 fine against a Chinese company that has the vast majority of the country's market share is unlikely to deter future IP violations. Thus, inadequate fines and penalties,<sup>120</sup> in addition to other factors noted above, make ineffective law enforcement a major obstacle to full implementation of China's IPR goals.

#### B. SIGNS OF NASCENT PRESSURE FROM DOMESTIC IP CREATORS

Despite problems with law enforcement, there are signs that domestic IP creators are beginning to exert some pressure in order to protect and enforce their IPRs. The case of Baidu and its e-book system is apposite here. Baidu Books<sup>121</sup> is a platform built and operated by Baidu, which allows web users to browse and download documents and other materials from a variety of sources.<sup>122</sup> It is similar to Google Books. Baidu Books has grown rapidly, and there are now almost 200 million different books and materials available.<sup>123</sup> The distribution of many of these works is not authorized by either the authors or the publishers.<sup>124</sup>

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<sup>115</sup> *Id.* at 23.

<sup>116</sup> Kit Eaton, *Baidu, Accused Globally of Aiding Piracy, Acts to Quash It in China*, FAST COMPANY (Mar. 24, 2011), <http://www.fastcompany.com/1742395/baidu-accused-globally-of-aiding-piracy-acts-to-quash-it-in-china> (“[Baidu] owns about 70% of China's search market and represents the online search connection for hundreds of millions of people.”).

<sup>117</sup> Kit Eaton, *China's Baidu Rips off Copyrighted Content, Fined Just a Tiny Bit*, FAST COMPANY (Feb. 23, 2010), <http://www.fastcompany.com/1559701/baidu-copyright-infringement-lyrics-music-legal-china-copyright-ip>.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> See Kristina Sepety & Alan Cox, *Intellectual Property Rights Protection in China: Trends in Litigation and Economic Damages 2* (NERA Econ. Consulting, Topics in Law and Economics in China, Jan. 20, 2009), available at <http://ssrn.com/abstract=1330619> (“We find that, under the administrative systems established in China, penalties and fines for IPR violations generally do not appear to provide adequate deterrence to would-be infringers. Fines are so low that they appear to allow infringers to earn an adequate profit, even if caught and fined. Consequently, most studies suggest that fines represent only a tiny fraction of the estimated sales revenue lost to IPR holders.”).

<sup>121</sup> Baidu Books, BAIDU, <http://wenku.baidu.com> (last visited May 1, 2012).

<sup>122</sup> Hu Yong, *Can We Tolerate Baidu's "Evil" Stand on IP Rights?*, CHINA MEDIA PROJECT (Mar. 25, 2011), <http://cmp.hku.hk/2011/03/25/11140>.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

Baidu Books' copyright violations, however, have not gone unnoticed. A "March 15 Letter by Chinese Writers" accused the service of violating the rights of writers, stating that Baidu has "stolen our works away. They have stolen our rights away. They have stolen our property. Baidu Books has become a market for stolen goods."<sup>125</sup> Han Han, China's most popular blogger,<sup>126</sup> wrote an open letter to Robin Li, the co-founder of Baidu.<sup>127</sup> Han Han reported Baidu's alleged response to complaints of copyright violations, stating:

[W]hen the discussions kicked off yesterday, it turned out you sent a few arrogant mid-level managers, who from start to finish denied that Baidu Library violated any intellectual property rights whatsoever. These guys claim that your 2.8 million archived documents, which include pretty much every single work ever published in this country, do not violate any copyright, that it is your users who upload the content and share it with everyone, and that you are merely a platform.<sup>128</sup>

Han Han asked Baidu Books to voluntarily respect and protect copyrights, so that one day, "Baidu Library will . . . become a source of livelihood for Chinese authors, unlike today, where [Baidu Library has] become the industry's enemy and target of public criticism."<sup>129</sup> Such organization by Chinese writers in opposition to Baidu, in addition to China's most popular blogger and published author voicing his disapproval, illustrate that there is at least some pushback by domestic IP creators in China.

Baidu's monopolistic market share, creates difficulties for domestic authors attempting to remedy these violations. The China Written Works Copyright Society has stated:

After rights violations by Baidu Books occurred, they might at least have come out with a proposal to resolve the issue, actively negotiating with Chinese copyright holders, but Baidu's attitude throughout has been cold and indifferent. Baidu has seized on the weakness that while China's copyright laws are in place, they are imperfect and incomplete. They are playing a game of words, but have a weak sense of social responsibility. They have also seized on this psychology among Chinese web users that it's great for everything to be free.<sup>130</sup>

Han Han has recognized the lack of influence that Chinese authors have, noting that "many Chinese authors are forced to give away their intellectual property for free on Baidu."<sup>131</sup> Furthermore, Han Han explains

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125. *Id.*

126. Joel Martinsen, *Han Han Seizes Blogging Crown from Xu Jinglei*, DANWEI BLOGS (Sept. 26, 2008), [http://www.danwei.org/blogs/han\\_han\\_seizes\\_the\\_blogging\\_cr.php](http://www.danwei.org/blogs/han_han_seizes_the_blogging_cr.php).

127. *Biography: Robin Li*, Baidu, <http://ir.baidu.com/phoenix.zhtml?c=188488&p=irol-govBio&ID=143589> (last visited May 1, 2012).

128. Han Han, *A Letter to Robin Li*, HAN HAN DIG.: CHINA'S #1 BLOGGER TRANSLATED (Mar. 26, 2011), <http://www.hanhandigest.com/?p=369>.

129. *Id.*

130. Hu Yong, *supra* note 122.

131. Han Han, *supra* note 128.

that these authors have never asked Baidu for a share of the profits and have “put up with the insults of Baidu supporters, and the contempt of Baidu employees during negotiations.”<sup>132</sup> Han Han concludes his plea to Robin Li: “You are now the country’s number one entrepreneur. As a role model for others, the time has come to make your position known on the damage done to the publishing industry by Baidu Library.”<sup>133</sup> Thus, even though domestic IP creators are beginning to voice their resistance, change is not automatic.

Signs of domestic pressure are apparent outside of the Baidu context as well. Chinese society may be becoming more litigious, especially with respect to IP,<sup>134</sup> and Chinese IP owners seem to be less hesitant than in the past to enforce their rights against other Chinese infringers.<sup>135</sup> One report stated that Chinese courts accepted 40% more IPR cases in 2010 as companies and individuals increasingly sought legal protection for patents, trademarks, and copyrights.<sup>136</sup> Interestingly, the same report noted that there was little change in the number of cases involving foreign entities.<sup>137</sup>

This increase in the amount of IP litigation in China is not due to the efforts of the United States or other Western countries. Instead, the vast majority of IP cases are brought by Chinese companies and individuals, not foreign entities.<sup>138</sup> For example, of the 23,518 first-instance IPR civil cases resolved by Chinese courts of law in 2008, only 1139 involved foreign parties, a rate of about 4.8%.<sup>139</sup> One scholar noted the “peculiar absence of foreign intellectual property owners as litigants among the tens of thousands of cases involving intellectual property rights in China.”<sup>140</sup> In 2006, of the 14,056 first-instance IPR civil cases resolved by Chinese courts of law, only 353 involved foreign parties (about 2.5%).<sup>141</sup> Therefore, while the percentage of IP cases brought by foreign entities is growing, many more cases on the whole are being brought by domestic entities: an increase of 8676 cases brought by domestic entities from 2006 to 2008, versus an increase of 786 cases brought by foreign entities during that time. Domestic IP owners

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132. *Id.*

133. *Id.*

134. Xuan-Thao Nguyen, *The China We Hardly Know: Revealing the New China's Intellectual Property Regime*, 55 ST. LOUIS U. L.J. 773, 774 (2011).

135. *Id.*

136. *China Court Hears More Intellectual Property Cases*, BLOOMBERG BUSINESSWEEK (Apr. 18, 2011), <http://www.businessweek.com/ap/financialnews/D9MMG4No2.htm>.

137. *Id.*

138. Nguyen, *supra* note 134, at 797.

139. *China's Intellectual Property Protection in 2008*, MINISTRY COM. P.R.C. (June 1, 2009), [http://www.chinaipr.gov.cn/policyarticle/policy/documents/200906/263973\\_5.html](http://www.chinaipr.gov.cn/policyarticle/policy/documents/200906/263973_5.html).

140. Nguyen, *supra* note 134, at 806.

141. *Report on China's Intellectual Property Protection in 2006*, MINISTRY COM. P.R.C. (June 5, 2007), [http://www.chinaipr.gov.cn/policyarticle/policy/documents/200706/236401\\_9.html](http://www.chinaipr.gov.cn/policyarticle/policy/documents/200706/236401_9.html).

continue to bring more cases each year, illustrating the increasing importance of IP and a growing recognition that the legal system can be an effective way to enforce their property rights.

Not only is the amount of IP litigation increasing, but plaintiffs in these cases have been more successful than in the past. A summary report analyzing trends indicated that for each year between 2006 and 2009, the plaintiff in an IP dispute could expect to win, at least partially, more than 75% of the time.<sup>142</sup> This figure includes both “Win Outcomes,” or judgments “where the court recogni[z]es some or all of the plaintiff’s claims and awards remedies in all of the categories of relief sought by the plaintiff (e.g., apology, injunction, damages and costs),”<sup>143</sup> and “Partial Win Outcomes,” or judgments “where the court recogni[z]es some or all of the plaintiff’s claims and awards remedies in some (but not all) of the categories of relief sought by the plaintiff (e.g., damages and costs, but no apology or injunction).”<sup>144</sup> This figure also includes all venues, IPRs, causes of action, and industries within the broader civil IP litigation field; it analyzes 5506 relevant judgments.<sup>145</sup> Therefore, such an increase is yet another sign of burgeoning domestic pressure in the IP context, in addition to hopefully stronger legal protections and greater awareness of IP law within China itself.

### C. INTERNATIONAL PRESSURE

International pressure, specifically from the United States, may also help to offset the enforcement roadblock and may ameliorate the state of IP enforcement in China. The United States took notice of Baidu’s IP violations and as a result, the USTR listed Baidu as a key member on its list of global counterfeit-assisting services.<sup>146</sup> Baidu reacted to these complaints and issued anti-piracy technology for Baidu Books shortly thereafter.<sup>147</sup>

Han Han has noted this discrepancy between Baidu’s IP violations—and the subsequent response within China—and the image it seeks to project externally, especially to the United States. Han Han explains in his letter to Robin Li:

[Y]ou must be aware what would happen if tomorrow you would launch “Baidu America”, and then make all books and music published in the US available for free. You won’t do that, and you

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142. *CIELA Summary Report: Trend by Year*, CIELA (Mar. 4, 2011) <http://www.ciela.cn/Search/TrendByYearResult.aspx?>. CIELA is a litigation database that provides statistical analysis of civil IP litigation cases in China. The service has analyzed and compiled key data from more than 10,000 published IP judgments and settlements across all major IP courts in China since 2006. *Id.*

143. *Id.* (scroll cursor over the “W” under “Outcome”).

144. *Id.* (scroll cursor over the “P” under “Outcome”).

145. *Id.*

146. Eaton, *supra* note 116.

147. *Id.*

won't tell the American people that you're merely a platform either, that it has nothing to do with you, that it's the users uploading the content, and that the spirit of the internet is sharing. It is precisely because you know this that today you have only set up shop in China. You also know who can be bullied, and who cannot.<sup>148</sup>

Even though Baidu has thus far been able to create and run a service within China that violates the rights of Chinese IP holders, presumably such a system would not thrive in the United States. In 2009, when Google Books was condemned by Chinese writers for the unauthorized scanning of Chinese works, the China Written Works Copyright Society held three separate discussions with Google to remedy the situation,<sup>149</sup> and Google issued a formal apology and proposed a mediation payment scheme.<sup>150</sup> Baidu Books could learn from Google's efforts to appease the demands of Chinese IP creators, and pressure from the United States may help to reduce IPR infringement problems.

The United States has pressured China in other IP-related contexts. In October 2010, the State Council launched a six-month campaign to reduce the number of pirated goods and to strengthen patent, trademark, and copyright protection on a range of goods made both in China and abroad.<sup>151</sup> This campaign began just before President Hu Jintao's state visit to the United States in January 2011 and was one of the government's most intensive IPR protection initiatives to date.<sup>152</sup> Regardless of China's motivations for launching the campaign, Chinese officials investigated over 45,000 cases of IPR violations.<sup>153</sup> While the campaign may not be strong evidence of systemic change or improvement, it did result in positive implications for the state of IPRs in China, at least in the short-term.

#### D. CHANGES IN CHINA'S DOMESTIC ECONOMY

China's move toward a high-tech economy might do more to foster IPR protection than could any international pressure that China faces. Politburo Standing Committee Member He Guoqiang recently called for "greater efforts to develop new high-tech industries . . . to accelerate the transformation" of China's economy.<sup>154</sup> In the past few years, Shanghai has intensified its efforts to develop high-tech industries, including developing nine specific high-tech sectors such as clean energy and civil aviation manufacturing.<sup>155</sup> He Guoqiang has stated that "enhancing

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148. Han Han, *supra* note 128.

149. Hu Yong, *supra* note 122.

150. *Id.*

151. PEOPLE'S DAILY ONLINE, *supra* note 104.

152. *Id.*

153. *Id.*

154. *Senior Chinese Official Calls for Efforts to Develop New High-Tech Industries*, PEOPLE'S DAILY ONLINE (May 26, 2011), <http://english.people.com.cn/90001/90776/90785/7392302.html>.

155. *Id.*

innovative capacity is the key to changing the way China's economy operates."<sup>156</sup>

Shanghai is just one example of increasing technological innovation throughout the country. U.S. companies are drawn to China as it develops a high-tech economy that increasingly competes with the United States; a few American companies are even making deals with Chinese companies to license Chinese technology.<sup>157</sup> China is the world's largest market for automobiles and desktop computers, and the country also has the most Internet users.<sup>158</sup>

This emphasis on greater technological innovation bodes well for China's IPR regime. As China innovates and develops its own domestic IP, the country will want to protect such innovation. A recent Chinese news article stated that "innovation and resulting IP will increasingly serve as core elements of China's economic development," and that "the rule of law is crucial to China's drive for greater scientific and technological innovation."<sup>159</sup> The article also outlined the view that China's current priority is research and development, and that China is committed to protecting its assets with its evolving IP system.<sup>160</sup> Recent statistics support such a view: In 2009, China spent 543.3 billion Yuan on R&D, a 17.7% increase over 2008; by the end of 2009, 1,193,000 of the 1,520,000 total patents registered in China were domestic.<sup>161</sup> China Law Blog listed "stepped up IP enforcement" as one of the top business law trends in China for 2010, explaining that for technology licensing agreements to have premium value to Chinese companies that enter into them, there must be adequate IPR enforcement within China.<sup>162</sup> President Hu Jintao has himself stressed the importance of IP protection for Chinese companies: "Nowadays, the competition in information technology is extremely fierce. I hope you, as a software company, will treasure technological innovation as your life. You need to own intellectual property rights for your products. I hope you will be pioneers in the development of our country's software industry."<sup>163</sup> As China innovates, its protection of IPRs will improve as well.

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156. *Id.*

157. Bradsher, *supra* note 74.

158. *Id.*

159. *Innovation, IP to Be Core Element of China's Economic Growth*, PEOPLE'S DAILY ONLINE (Sept. 29, 2010), <http://english.peopledaily.com.cn/90001/90778/90862/7154462.html>.

160. *Id.*

161. *Id.*

162. Dan Harris, *China Law 2010. Stepped Up IP Enforcement Is the Sixth Trend.*, CHINA L. BLOG (Jan. 6, 2010), [http://www.chinalawblog.com/2010/01/china\\_law\\_2010\\_the\\_sixth\\_trend.html](http://www.chinalawblog.com/2010/01/china_law_2010_the_sixth_trend.html).

163. *President Hu Stresses Importance of Technological Innovation in Zhuhai*, CHINA INTELL. PROP. MAG. (Dec. 23, 2009), <http://www.chinaipmagazine.com/en/news-show.asp?id=1495>.

## CONCLUSION

The PRC's Outline of the National Intellectual Property Strategy and subsequent SPC notices and circulars indicate that China has shifted to a more proactive and pro-innovation IP policy, beyond merely responding to WTO accession obligations. This overall shift is likely due to China's increasing emphasis on innovation and creating a high-tech economy.<sup>164</sup>

Although China has adopted the WTO Panel's findings in DS362, the Outline and SPC notices do not explicitly address all of the issues raised. In particular, the link between copyright protection and media control implicit in Article 4 of the Copyright Law is not adequately addressed in any of these materials. This is a contentious issue for China and is likely to cause much internal dissent. Additionally, implementation of the goals in the Outline and SPC materials still faces roadblocks, such as problems regarding law enforcement. Increasing pressure from domestic IP creators within China, in addition to continued pressure from the United States and continued changes in China's economy, may slowly remedy these IPR violations.

The United States' claims in DS362 were the result of extensive lobbying by U.S. copyright and trademark holders, who claimed that they were losing a substantial part of the potential Chinese market to pirated or counterfeited products.<sup>165</sup> Without substantial change in China, the U.S. government will continue to face pressure to initiate claims against China.<sup>166</sup> Hopefully, the implementation of the Outline and SPC notices will remedy many of the issues present in DS362 and will foster greater cooperation between the United States and China in the IP arena, especially as the two countries' economies become increasingly connected and China continues its high-tech rise.

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164. *See supra* Part V.D.

165. Creemers, *supra* note 25, at 572.

166. *Id.*

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