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## Trade Wars: A New Beginning?

Why is this year's [Special 301 Report](#) (the "Report") from USTR (April 29, 2019) different from prior reports? In prior years, this report often repeated materials found elsewhere, such as in the [National Trade Estimate Report](#) (March 2020). This year's Report reflects the Phase 1 Trade Agreement (January 15, 2020) (the "Agreement") and the subsequent Chinese [Action Plan](#) (April 20, 2020). More importantly, it also suggests how the US might wish to see the implementation of the Agreement and negotiate a Phase 2 Agreement. There are a number of welcome surprises that suggest a new beginning.

Most importantly, the Report demonstrates a renewed commitment to the rule of law and the role of markets in protecting IP. As noted in many of the [postings](#) of this [blog](#), these were areas that I found seriously deficient in the Agreement. The Agreement revitalized administrative campaigns and enforcement mechanisms and encouraged punitive mechanisms. It generally underemphasized compensatory damages and other civil remedies, including appropriate civil procedures, and did not adequately emphasize the need to let market mechanisms govern IP creation and commercialization.

The Report addresses issues that the Phase 1 Agreement did not, such as "poor quality patents", "the presence of competition law concepts in the patent law" and challenges faced in trademark prosecution. The Report also notes that there are "obstacles in establishing actual damages in civil proceedings," including a lack of "preliminary injunctive relief." These are useful statements, but even more important are the references to judicial procedures. The Report states that "Chinese judicial authorities continue to demonstrate a lack of transparency", including publishing only "selected decisions rather than all preliminary injunctions and final decisions." In addition, "administrative enforcement authorities fail to provide rights holders with information." The issue of transparency has been repeatedly reported on in this [blog](#) as key to effective oversight of the Agreement. The Report also notes that "[a] truly independent judiciary is critical to promote the rule of law and to protect IP rights." The Report mentions the need for transparency in China's IP system five separate times. By comparison, Chapter 1 of the Agreement mentions transparency once (with respect to Geographical Indications), and not once with respect to judicial or administrative proceedings.

The Report comes down particularly hard in favor of legal process in its discussion on the social credit system, particularly the CNIPA/NDRC et al, Memorandum of Cooperation on Joint Disciplinary Actions for Seriously Dishonest Subjects in the Field of Intellectual Property (Patent) [关于对知识产权（专利）领域严重失信主体开展联合惩戒的合作备忘录》](#) (the “Dishonesty Measures”) (December 5, 2018) by noting that “these measure lack critical procedural safeguards, such as notice to the targeted entity, clear factors for determinations, or opportunities for appeal.” The Report further concludes that “The United States objects to any attempt to expand the ‘social credit system’ in the field of IP.”

This statement suggests a further distancing of the administration from rhetoric and outcomes of December 2018-May 2019 when the primary goal appeared to be strong legal commitments to punish IP infringement without explicit consideration of due process. The Dishonesty Measures were likely enacted to appease US concerns on IP on the margins of the G-20 summit (November 30- December 1, 2018). The concern then appeared to be that they were not sufficiently well-codified, not that they lacked due process. Larry Kudlow [said](#) after the G-20 in 2019, that IP-related provisions (most likely the Dishonesty Measures) need to be “codified by law in China” and should not just be a “state council announcement.”

I am personally gratified to see the reintroduction of concerns over due process and rule of law into the Administration’s discourse of IP, although I believe the complexity of the relationship between IP protection and the social credit system may require further study. I suspect that it may be difficult for rightsholders commercializing their rights or seeking to enforce judgments to completely distance themselves from the social credit system.

The Report also notes that the US had initiated dispute resolution proceedings against China at the WTO regarding China’s technology licensing regime and that China revised the measures the US had challenged in March 2019. The Report concludes that “[t]he significance of these revisions is under review.” The Report does not note that the US had agreed to suspend the WTO case due to these legislative revisions, until [May 1, 2020](#), at which time (the date of writing of this blog) it needs to decide whether or not to reinstate this case. Perhaps USTR did not want to show its hand regarding what it would do effective May 1, 2020 – two days after the Report was issued. Presumably, the United States will seek an extension of time in light of the continuing “review.”

Whatever decision is made at the WTO, the US team deserves credit for the legislative changes in licensing, forced tech transfer and trademarks that were made in the spring of 2019 and for re-emphasizing due process, the market, and rule of law, in the Report and in United States advocacy for better IP protection in China.