

SYMPOSIUM

FALL 2015 CHINA FASHION LAW SYMPOSIUM

US & CHINA: PERSPECTIVES ON BRAND PROTECTION AND INTELLECTUAL PROPERTY

MODERATORS

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Cindy Yang, Partner, Schiff Hardin LLP

Jamie D. Underwood, Partner in Alston & Bird's IP Litigation Group

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Ling Zhao, CCPIT Patent and Trademark Law Office and Cardozo LLM Student

Lara Miller, Associate Counsel, International AntiCounterfeiting Coalition

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BIOGRAPHIES:*Geoffrey Sant:*

Geoffrey works on a broad range of commercial, corporate and banking litigation and transactions. He is a native English speaker, and is fluent in Mandarin Chinese, Japanese, and Spanish. Geoffrey is an adjunct professor at Fordham Law School, where he teaches the nation's only class on banking litigation. His publications have been cited by or to the United States Supreme Court, the Second Circuit Court of Appeals, the New York Court of Appeals (New York's highest court), and the First Department, just to name appellate courts.

Geoffrey's litigation representations include defending a major media company in a multibillion-dollar contract dispute; defending an international bank in a billion-dollar litigation; and winning a 12.6 million USD judgment on behalf of one of his clients. In addition, he defeated a class action litigation against one of his clients, successfully convincing the judge to impose money sanctions against the law firm that sued it. This remarkable result was featured in a South China Morning Post article, "US court order brings hope for Chinese firms."

Geoffrey's transactional matters include winning regulatory approval for a new US branch of a major Chinese bank; successfully helping a Chinese company to deregister and go dark; and representing a major Chinese real estate company in establishing a US subsidiary and making US acquisitions.

Geoffrey is a Director of the Chinese Business Lawyers Association. He is a frequent commentator on legal issues for major Asian media, including CCTV (1 billion total viewers); Phoenix Television (hundreds of millions of viewers), People's Daily (millions of readers); Global Times (millions of readers); and many others. In late 2014, the New York Court of Appeals cited to Geoffrey and adopted his public policy arguments in deciding a disputed point of New York law, in response to certified questions from the Second Circuit Court of Appeals. In a 2013 law journal article, he correctly predicted the 2014-2015 wave of bank de-risking. He is also credited with accurately predicting the 2010 wave of investigations and securities litigation against Chinese companies in a series of interviews in 2008 and 2009 on CCTV, Phoenix

Television, and Global Times.

Barbara Kolsun:

Barbara Kolsun, co-director of The Fame Center, is a leading fashion industry attorney, an adjunct professor of fashion law at Cardozo Law, and co-editor of the seminal text on the subject, *Fashion Law – A Guide for Designers, Fashion Executives and Attorneys* (Bloomsbury, 2nd Edition, 2014). She is a consultant to fashion companies and has taught at NYU and Fordham Law Schools. Barbara has served as General Counsel of Kate Spade, Stuart Weitzman and Seven for All Mankind, and was Assistant General Counsel of Westpoint Stevens and Calvin Klein Jeans. While in private practice, her clients included Ralph Lauren and Tommy Hilfiger. Kolsun currently consults with fashion companies on various issues, and was honored with lifetime achievement awards in 2015 by both the Luxury Summit in London and the World Trademark Forum at INTA. She has served as Chairman of the Board of the International Anticounterfeiting Coalition and has spoken and been published widely on fashion law around the world.

She is a consultant to fashion companies and has taught at NYU and Fordham Law Schools.

Kolsun started the legal departments and was the first General Counsel of Kate Spade, Stuart Weitzman and Seven for All Mankind, and was Assistant General Counsel of Westpoint Stevens and Calvin Klein Jeans. As outside counsel in several firms, she represented Ralph Lauren and Tommy Hilfiger. Kolsun currently consults with fashion companies on various issues, and was honored with two lifetime achievement awards in 2015 by the Luxury Summit in London and by the World Trademark Forum at INTA. She has devoted significant time and effort to the cause of enforcement of intellectual property serving as Chairman of the Board of the International Anticounterfeiting Coalition and has spoken and been published widely on fashion law around the world.

She has been the subject of stories in numerous publications, including the *New York Times*, and was a consultant in intellectual property to USAID's Start Vietnam program in 2002 and 2004.

Kolsun clerked for the Second Circuit after her graduation from Cardozo in 1982. She received her J.D. from Cardozo Law in 1982 and is a member of the Order of the Coif. She received her B.A. from Sarah Lawrence College in 1971 and her experience as a professional singer and actress continues to motivate her fierce

efforts to protect artists' and designers' intellectual property rights.

Cindy Yang:

Cindy is a partner in Schiff Hardin's Intellectual Property Group in New York. She focuses primarily on patent, trademark and copyright litigation; U.S. and foreign patent and trademark prosecution; inter partes review; licensing; due diligence investigations; opinion work; and client counseling regarding the procurement and enforcement of intellectual property rights worldwide. She has extensive complex multidistrict and litigation experience, and represents a broad spectrum of U.S. and foreign clients before courts throughout the United States.

Cindy has deep experience in prosecuting and managing complex U.S. and foreign pharmaceutical and life sciences patent portfolios for major universities, hospitals, companies and start-up ventures; handling inventor remuneration, licensing, collaboration and sale/acquisition issues related to intellectual property portfolios; and providing freedom-to-operate and competitive landscape analyses. She also has extensive knowledge in assisting U.S. and Asian-based companies in the LED lighting industry with their global intellectual property, corporate, and M&A needs, as well as assisting companies, non-profit organizations, and professional sports teams with their advertising and branding strategies.

Before her legal career, Cindy worked as a research associate at the Brain Tumor Research Center at the University of California, San Francisco. She researched the effects of seizures and ionizing radiation therapy on the hippocampal region of the brain. She also researched brain tissue repair modalities that promote neuronal stem cell proliferation and differentiation, and the migration of newly generated neurons toward damaged areas of the brain.

Jamie D. Underwood:

Jamie D. Underwood is a partner in Alston & Bird's IP Litigation Group, where she spearheads the firm's Section 337 practice. Ms. Underwood specializes in working with both complainants and respondents to resolve investigations before the U.S. International Trade Commission and related matters before Customs and the Federal Circuit. She also litigates in other appellate and trial courts, where she handles a variety of IP, antitrust, and complex commercial

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disputes. In addition, Ms. Underwood advises clients on legislative and policy issues before Congress, federal agencies and the Administration. Her expertise and leadership have been recognized by CHAMBERS and IAM PATENT 1000.

An active participant in IP field, Ms. Underwood serves on the Federal Circuit Bar Association's Board of Governors, on IPO's ITC Committee, and on the ITC Trial Lawyers Association's Executive Committee. She has lectured on ITC practice at Georgetown University Law School and is a regular speaker at conferences on Section 337, IP, and international trade. Ms. Underwood has contributed to the book entitled *A Lawyer's Guide to Section 337 Investigations Before the U.S. International Trade Commission*, as well as the "Year in Review" published in *The International Lawyer*. She has also participated in multiple World Trade Organization Ministerial Conferences as an NGO delegate.

Mark Cohen:

Mark rejoined the USPTO as Advisor to the Under Secretary and Director and later as Senior Counsel, China in 2012, after serving as a visiting professor at Fordham Law School (2011-2012). Prior to that time he served in such functions as: Director, International Intellectual Property at Microsoft Corporation; Of Counsel to Jones Day's Beijing office, Senior Intellectual Property Attaché at the U.S. Embassy in Beijing (2004-2008), general counsel to a mid-sized pharmaceutical company in Europe (1998-2000) and as a Fulbright Professor in Eastern Europe (1993-95). In total, he has 30 years private, public sector, in-house and academic experience in China and transition economies, with a principle focus on technology trade and monetizing intellectual property.

Mark has worked extensively on realigning public or corporate resources to meet the changing demands of China's intellectual property environment. For example, the programs Mark established while at the U.S. Embassy in Beijing (2004-2008) became models for U.S. government engagement on intellectual property worldwide. He was the first IPR Attaché posted by USPTO to handle IPR issues in a foreign country. In addition he launched the annual "Ambassador's IPR Roundtable" which he co-chaired for five years, devised IPR "toolkits", "roadshows", pro-bono programs, internal and external training programs, and helped bring China into various

multilateral fora, such as the “IPR-5”, consisting of the five largest patent offices in the world. While at the US Embassy, and later as co-chair of the AmCham IP Forum he also developed an innovative series of programs on innovation in China, as well as a program on public relations, public diplomacy and intellectual property. A program he co-organized with the Federal Circuit Bar Association was the largest international judicial training program in China, with over 1300 attendees.

Mark has trained, lectured and debated Chinese IP and competition law matters in person and in the media in English and in Chinese. Two separate Chinese language debates he engaged in while at the Embassy had a viewership of over 160,000,000 people each. Currently, Mr. Cohen currently leads a China team at USPTO consisting of 21 individuals in DC, Beijing, Shanghai and Guangzhou, China on all aspects of USPTO’s activities in China. One of his current projects involves setting up a China IPR Resource Center at the USPTO to help support a more empirical analysis of China’s IPR environment.

Among his book-length publications are *Antimonopoly Law and Practice in China* (Oxford University Press 2011, with Steve Harris et al.), *He was the editor of Chinese Intellectual Property Law and Practice* (Kluwer Law International 1999). He co-edited a book on China’s legal development in 1984 and has authored numerous articles on such issues on Chinese IP law, alignment of corporate resources to address IP challenges in China, international trade law and law firm market access in China. He also manages a personal blog www.chinaiprlaw.com.

Dan Harris:

Dan Harris is the founding member of Harris Moure, an international law firm that focuses on representing American companies in Asia from its offices in Seattle, Chicago, Beijing and Qingdao. Dan writes and speaks extensively on international law, with a focus on protecting foreign businesses in their China operations. He is also a prolific and widely-followed blogger, writing as the co-author of the award-winning China Law Blog.

A number of his articles on China law have been published in leading publications, such as the Wall Street Journal, Bloomberg Law Reports, Forbes Magazine, and the National Law Journal.

Dan received his B.A. from Grinnell College and his J.D. magna cum laude from Indiana University School of Law.

Cedric Lam:

Cedric has two decades of experience counseling multinationals on IP transactions and implementing IP protection strategies in Greater China, including a stint serving as Asia-Pacific regional legal counsel for the Motion Picture Association of America. During the past three years, he handled over 200 judicial, administrative and, criminal IP proceedings in China, from recovering the English and Chinese names of a legendary Hollywood actress in a series of actions in the People's Court, cancelling a handful of pirate trademark registrations for the world's largest online jewelry retailer, to challenging wrongful judgments for trademark infringement and unfair competition against a Fortune 500 company in the Supreme People's Court of China. Cedric is also known for his expertise in and pragmatic approach to anti-counterfeiting, IP fraud and other contentious and non-contentious IP matters.

In addition, Cedric leverages his pre-law experience as a licensed pharmacist, government pharmaceutical policy advisor and research scholar at a top-5 drug company and actively advises clients in the bio-pharmaceutical, medical device and other life sciences sectors on various patent, regulatory and compliance issues in Greater China. He has published more than 40 IP articles and book chapters, and speaks frequently on IP subjects.

Ling Zhao:

Ling joined CCPIT Patent and Trademark Law Office in 2000. She is a senior trademark specialist and practitioner, with over ten years' working experiences in trademark prosecution, trademark search and watch, administrative protection of trademark right, trademark administrative litigation; legal opinion on trademark infringement, licensing of trademark, trademark strategy.

Ling holds a Bachelor of Arts degree in English Literature from Beijing Second Foreign Language University. She received training of American Trademark Law and Practice in Birch, Stewart, Kolasch & Birch LLP in April, 2008, Washington D.C., USA.

Lara Miller:

Lara is Associate Counsel at the International AntiCounterfeiting Coalition and runs the IACC's online anti-counterfeiting programs. Lara Graduated from McGill University in 2008 where she studied psychology, behavioral neuroscience and marketing. She then went on to complete a Corporate Communications degree at Seneca College of Applied Arts & Design, interned in the Corporate Partnerships department of Maple Leaf Sports & Entertainment and managed internal operations and communications for Hariri Pontarini Architects. Lara earned her Juris Doctor at Fordham University School of Law where she competed and coached for Fordham's International Arbitration Team, served as a board member of the Dispute Resolution Society and acted as the Student Director of the Fashion Law Institute's Clinic. She was also a legal intern at the New York Kings County Supreme Court Criminal Division, the Samuelson Glushko Intellectual Property & Information Law Clinic, and PRADA USA Corp. Lara worked for a boutique firm focusing on intellectual property and corporate law matters before joining the IACC in April 2015.

Stephen Lamar:

As Executive Vice President, and as liaison to AAFA's Government Contracts Committee (GCC), AAFA's Government Relations Committee, and AAFA's Brand Protection Council (BPC), Steve Lamar is responsible for the design and execution of AAFA lobbying strategies on a series of issues covering government procurement, counterfeiting/intellectual property rights (IP), international trade, market access, customs, labor, environment, and product safety. In these roles, Steve also advises AAFA member companies on legislation and regulatory policies affecting the clothing and footwear industries.

In addition, Steve serves as the liaison to AAFA's Legwear Committee. Before joining the Commerce Department, Steve served for two years as a Peace Corps Volunteer in the southern African country of Botswana. Steve is President of the Washington International Trade Association. He holds a Bachelor of Arts Degree from Colgate University and a Master of Arts Degree in International Affairs (with a concentration on African politics and international trade) from George Washington University.

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PANEL 1: ISSUES IN THE U.S. FOR CHINESE BUSINESSES

MR. GEOFFREY SANT: I'm thrilled we have such a huge audience and so many media entities. We have People's Daily, Forbes, Xinhua News Agency. And we have China Daily, a lot of big media. And so the question is what drew so many people here today? And I think it's a testament to the topic and of course to the panelists that are involved.

After all we're competing today with Chairman Xi Jinping's visit and the Pope's visit. So if you think about it, the Pope and the leader of China at a fashion law conference, it sounds like the beginning of a joke, right? I don't know where it goes, but it should be really funny.

But seriously, though, we have really hot topics today. When people think about China and law I think they often first think about IP issues. You have things like copyright, trademark, counterfeiting, trade secrets.

And we'll talk about all of that in China in our second panel, which is going to be really exciting. But I just want to point out that people in China have the same concerns about the U.S. when it comes to IP issues. There's concerns going the other way.

And that's really what this first panel will focus on is U.S. issues that are important to international businesses, including Chinese businesses. And we're going to cover a lot of interesting topics.

The panelists I have today are really fantastic people. We have—I'm thrilled to have these people on the panel with me. First of all speaking will be Mark Cohen. And I'll introduce people before their remarks. So I'll just introduce Mark for now.

Mark is a fellow adjunct professor at a law school that will go nameless. He's also at the U.S. Patent and Trademark Office. He does an incredible amount of work with China in particular. He has served as an advisor to the undersecretary, a director, and senior counsel within the U.S. PTO.

And he's going to give a short presentation in just a few minutes about what's happening in litigation on IP in the U.S. and China. After he's done we'll introduce and have the other two panelists speak. And then I'll throw it open to questions.

And before Mark speaks, I just want to point out what always happens in these conferences is that when I throw it open for questions nobody wants to be the first one to ask a question. And so

then suddenly at the end of the conference you have 50 people are like, "Well you didn't get to me."

So don't be the person who waits till the end. If you have a question that you want to raise, raise it right away 'cause we have a lot of people here today. So with that I'll turn it over to Mark to talk about what's happening today in litigation in IP in the U.S. and China.

MR. MARK COHEN: Great. Well thank you, Geoff. It's been over 100 years since the U.S. and China first had patent engagements, IP litigation, the first case was in the late 1800's, adjudicated by the Shanghai Consulate between a British and an American company over infringement of a U.S. patent in China that applied American law.

But yes, I will speak louder. It's been over 100 years since there's been litigation. The environment today is probably anything but what you would expect. For example, only about 2% of the IP litigation in China involves a foreign element.

Americans are about 1% of that docket. We're a small player. We don't even own most of the rights, the foreign community. Utility model patents, about 1% are owned by foreigners; design patents about 1% by foreigners.

Administrative copyright litigation, the last time they had data it was .69% brought by foreigners. Yet we are probably the most vocal kvetchers, complainers about the IP environment in China.

So what's going on? At the same time Chinese now are complaining about all the litigation brought against them in the United States. They say they have a huge problem with patent trolls.

One Chinese official estimated 300 or so cases being brought against Chinese companies for patent infringement in China. And they say the system is not fair. And U.S. companies respond, well if you infringe, we sue you. We just don't want to sue you in China 'cause we think we'll lose.

Is that right? The answer is foreigners probably have a better chance of succeeding in litigation in China than they do—than Americans do in bringing a case to the United States. Success rates for patent, trademark, copyright cases vary from about 70 to 80, even 90%, very high success rates.

Is it because of perhaps expertise of the judges? Well unlike the U.S., the typical IP judge in China has a degree in IP law, whereas an Article 3 judge in the U.S. probably has an undergraduate degree in English or political science and a general law degree.

Okay, so knock that one out. What about deterrents? Damages

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are very low in China, very low. On the other hand, China had about 12,000 criminal IP cases last year. Ask a U.S. prosecutor how many criminal IP cases they brought? Probably in the whole country it's less than 200 or 300.

New York is an exception. New York State government brings a fair number of misdemeanor cases. So deterrents, the question of availability of injunctions, China is more likely to give an injunction than the United States.

China doesn't quite have an eBay doctrine yet. Success rates, I already mentioned. What about the difference in rights? Well particular if we're talking about brand protection, design, and fashion, China has some interesting rights available that may make it more interesting to do litigation in China than the U.S.

You can get a design patent in a week in China. You can get applied art, which would protect fashion elements, without registering anything. And some American companies have done it.

So why is there this discrepancy? Well one response may be that my data is all wrong. It's possible. It's possible that foreigners self-select and they don't bring cases 'cause they're too afraid; they only bring cases that they know they're going to win.

It may be because of a lack of information. It may be because people are just trying to exploit the system in ways that they're most familiar. But if you start going a little bit deeper you'll find that at this moment in time there are some really interesting developments going on.

The PTO, we try to monitor every month cases where there's a Chinese litigant in the federal or state courts. And we've found cases where American companies have lost in the U.S. and won in China on the same basic facts, perhaps a trade secret case where the company is located in China, the employees are located in the U.S.

We found patent cases where a U.S. company lost at the ITC and in district court and won in China. We found a Chinese company that brought a case in the United States on a right that it did not have in China involving sports broadcasting and won.

So it's not true that Chinese companies can't win in the U.S. even as a plaintiff. And we found one case, as another example of perhaps a future trend, where a U.S. company lost in China and the judgment was enforced against it in the United States.

So be careful if you think you're going to litigate in China and it won't have any impact on you in the United States. This is a much complicated, much more interesting environment than the media suggests and that even my data suggests.

MR. SANT: Thank you so much for that very thought-provoking introduction. And I did want to mention—I neglected to say—he is also the author of the China IP Blog, which is the blog on China IP.

MR. COHEN: I like to think so.

MR. SANT: We also have the other leading blog in the China field, which is the China Law Blog. Dan Harris will be speaking on the second panel. We're going to go now to Cindy Yang, who is a partner at Schiff Hardin, which is one of the leading law firms in the world and also especially in IP.

Cindy Yang not only is a partner focusing on patent, trademark, and copyright, but she also formerly worked—this blows me away—as a research associate at the Brain Tumor Research Center of the University of California at San Francisco.

So she's clearly far smarter than I am. Cindy is going to be talking about what she says to PRC companies when they're interested in protecting their IP rights here in the U.S. Cindy?

MS. CINDY YANG: Good afternoon. First off, thank you Geoffrey for putting this panel together. It's a pleasure and an honor. So when Geoffrey told me the topic on fashion IP and that I would be doing more on the side of when a Chinese company comes into the United States and has aspirations to set themselves here, as a practitioner all these things come to my head.

So in terms of why are they here, now obviously in China they have been stated, in terms of perhaps maybe manufacturers of counterfeit goods or things of that nature.

But as I go travel over to China, there is a whole host of people, designers, technologists, that are actually having a natural state of R&D that have an interest expanding their ideas, not only into China, but into the United States.

And as consumerism grows in China, as wealth grows in China, as they become more sophisticated, their reach goes towards travel. And through travel comes experience. And from experience comes an amalgam of all sorts of ideas in which they too believe that they should have a place in the international stage.

So this is a very ripe time to discuss these issues in terms of when Chinese companies want to expand their wings into the United States and to set forth here to demonstrate their creative prowess and to also make a mark as themselves as being a leader not a follower of ideas and innovation.

So when a Chinese company comes to me, their first and foremost impression is what do we have here? I've dealt with

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counterfeit goods -across- all over China. What kind of protections does the U.S. have?

And of course the U.S. government doesn't necessarily have a very welcoming—how should I say—feeling towards the fashion industry here, as we know looking at Diane von Furstenberg with her movements with the Council of Fashion Designers of America and trying to get legislation to deal specifically with fashion.

The most recent one I believe is the IDPA that was put—presented by Schumer in 2012 trying to make more of a presence of copyright connected directly to fashion instead of being a useful product or design.

But that of course was shot down. And so when I speak to them, the Chinese companies that come here, I'm just like, don't worry. We just have to be a little bit more creative.

There is a tapestry that we can weave. It just means, unfortunately, we can't rely on one statute. We're going to have to rely on a couple. So copyright, of course, as you know, has a narrow function in itself.

A lot of times people wonder if it actually protects a design, in which case in the statute it indicates that it does not. And mainly what I tell the clients is that if you're looking towards copyright protection, you look towards the fabric design in itself.

So Burberry comes first to mind. I used to represent Wal-Mart. And we had dealt with specific plaid designs and had used copyright—dealt with copyright infringement cases towards that and looking at the histories of plaid.

So that is one aspect where people are able to use copyright successfully in dealing with that situation. Another concept of course is dealing with trade dress. But trade dress is a little different here in the United States.

When you deal with product design issues, trade dress is really given to more of the popular brands, the more well-known brands because in the United States on product design, the design factor is not given inherent distinctiveness.

And so you have to demonstrate some sort of presence, some sort of knowledge with the consumers. Here in the United States that indeed, when I look at your particular design I'm going to associate it with your brand.

And that takes time. So sometimes trade dress, for those who are coming into the United States, may not be the best protection. We'll put it in, obviously, in a complaint. But it's usually not the way to go.

The other advent of course is on trademarks in itself. But trademarks is dealing with the words and marks. So when you think of fashion design in houses like Louis Vuitton or Gucci, even Burberry for itself, they do have distinctive product designs and marks that are associated.

And even as I sit here thinking also for my client, the Atlanta Braves, on sports designs, they have their own logos which are put onto fashion as well. So they are able, too, to use the trademark side of those things.

But it is not a place to protect yourself with represent of the design per say. So now lately, especially in the advent of Apple and Samsung, the hot topic right now is obviously design patents.

So the question becomes, well how does design patents really play a role in fashion? Because in essence it is dealing with the ornamentation, it has a bit of a connection, if you will, to copyright.

And so there is that separation between utility, which mainly is for utility patents here in the United States, versus the ornamentation aspect of it. And as you've seen probably time again with Gucci or Alexander Wang, for example, they have made this part and parcel of their arsenal in terms of their protection on brands and their designs.

There are many ways that we as practitioners try to parse out pieces of a design to give a broad spectrum in terms of what you can protect.

But in the advent right now of the inter partes review process, this has become a very interesting issue because design patents, at least from a practitioner's standpoint, you can get it within five months on an expedited procedural level or it will take about a year or so if you don't.

But mainly it almost seems in a way, not so much automatic, but it definitely does not have the higher standards of review as one would find in dealing with utility patents.

So in terms of the collecting all these design patents and understanding that in fashion there is a sense—a tradition of repetition, of inspiration, of borrowing if you will, of motifs.

So if you think about it in terms of the design patents where we look towards the prior art, design kind of gets smaller and smaller.

So when the assertion comes in and you try to protect it in that matter, the idea of this inter partes reexam, which was just established through the AIA, that procedure in itself gives people the opportunity to test your actual—your basis on design patents.

And it's a frightening proposition. The first design patent case

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came in last year—late last year. Of course it was dealing with a sippy cup. But that is not to say that that kind of tactic can't be extended over towards designs and fashions.

So I'm sure that as we sit here we will—and as time goes on we will see many cases in terms of whether they are being brought on by trolls, whether they're brought by U.S. companies, or whether by Chinese companies that have design patents and are asserting those patents.

Don't be surprised if they—if those patents go on to inter partes reexam and where they stay litigation cases and within 18 months we find out through the reasonable observer test that in essence there is no protection.

So it's something to bear in mind in terms of the strengths and weaknesses of the kind of tools we have. As I mentioned, it really depends when a client comes in whether they are a famous client or whether they are a client that is just starting off.

These are some of the tools that I know that I've discussed with them. And then more importantly, so not to determine folks in terms of getting IP at least right away because asserting them or doing enforcement is one way of looking at it.

But more—I look more towards brand building. I look more towards creating alliances. So licensing becomes a factor. And those kind of things can only really be brought up if you do pursue in an IP strain, you do pursue in the ideas of trademark or of copyright, or more importantly design patents.

And so you see that with a lot of companies now here in the United States in terms of trying to deal, not only with the counterfeit issue, but more on the—more of the knock-offs, which I think is a much harder issue than the counterfeiting just because I think in counterfeit there are mechanisms, at least on online.

For example, using the Digital Millennium Copyright Act in order to stop folks, in order to take them down. You've also got the—you've also got the police who can help you out as well. But—

MR. SANT: [Interposing] I think we'll save some more of your remarks for the question and answer session. You can see there's so much to talk about here.

MS. YANG: Yeah.

MR. SANT: But for now, let's jump ahead to Jamie. Now Cindy Yang, as you know, is from Schiff Hardin, which is not only a fantastic firm but a member of the CBLA. And we also have another wonderful firm represented, Alston & Bird, which everybody I think knows is a leading IP firm, and they are also a member of the CBLA.

Jamie Underwood is the head of Alston & Bird Section 33C—337 practice—excuse me. She works before the U.S. International Trade Commission. And she also works on customs and border protection issues.

She's going to focus her remarks right now on the Section 337 cases. And once she's done I'm going to throw it up into the audience. So as I mentioned, you should—you want to be the first one to raise your hand because I don't think everybody's questions will be reached today.

Okay, go ahead, Jamie.

MS. UNDERWOOD: Thank you. So thank you, Geoffrey. And thank you to Cardozo for hosting this wonderful event. I'm very happy and proud to be here among all of these panelists. I chose to go a little bit deeper and a little bit more granular into the ITC because there a lot of Chinese entities find themselves, mostly as respondents of the ITC.

And I think that this particular forum is something that people have a lot of concern about, given the sweeping remedies that are available at the ITC. Just for a 30-second thumbnail sketch here, I'm sure many of you in this room are 337 and ITC experts.

For those of you that are not, the ITC, the International Trade Commission, is an administrative body in Washington, D.C. They have a variety of responsibilities. But one of those responsibilities is to handle Section 337 investigations.

Section 337, which is just a shortened version of where you find it in the Code, 19 U.S.C. §1337, protects against different types of unfair competition. And the most popular type of competition that the ITC has been handling, certainly for the last decade, has been IP infringement and trade secret misappropriation.

And any type of IP that that you could bring in federal district court you can also bring at the ITC. I won't get into the weeds. There's a few unique aspects that one has to prove that go beyond the district court. But in any event it's relatively the same.

One can bring Section 337 cases and just—with regard to just about any type of product, which is also a reason that I thought it might be helpful to speak a little bit about this today.

I know we have a lot of folks in the fashion industry in our audience today. So in terms of examples that might be relevant to your world, there have been Section 337 investigations regarding Louis Vuitton handbags, Crocs, Teva sandals, dress shirts, particular methods to make denim look worn, Hawaiian jewelry, you name it.

Really the sky's the limit. So the ITC and Chinese entities have

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had sometimes a rocky relationship. I'm thinking in particular a few years ago with the TianRui decision from the federal circuit where Section 337, some would argue, was applied extraterritorially.

And I'm happy to talk that granularly. But what I'd like to do is just sort of offer three basic observations with regard to Chinese entities and their involvement or relationship with the ITC.

The first observation is that I think that there is a notion that the ITC doesn't treat Chinese entities very well. And in fact, when I looked at a sample, it seems like things are going fairly well for represented respondents.

And I don't think that's a surprise because whether you're an American company or a Chinese company, one will always do better when one is represented by counsel.

But just as an example, I took a look at cases from 2010 to 2015. And in that time span there were about 257 respondents from China, Taiwan, or Hong Kong. Of those 257 respondents, 92% came out with either a straight-up win, meaning no violation was found against them, or that the investigation was resolved through some voluntary mechanism like settlement.

Because the settlements are confidential it's difficult to make judgments as to whether settlements are good or bad. But that's—looking at the data from a 30,000 foot level, that's how we evaluated it.

So that means that only 8% of those respondents either had some sort of remedial measure lodged against it or somehow defaulted. And I think that's pretty great. That sort of leads me into my second observation.

And that is Section 337 in the ITC really is an equal opportunity forum. And the reason that I say that is because it did—if you look at the history of the statute, it's a trade statute.

There were some protectionist aspects many years ago. But that is well into the past. And you don't have to be an American company to be a complainant. You only have to demonstrate a domestic industry, which basically just means that you need to show that you've spent some money in the United States in certain statutorily delineated buckets.

And if you can do that, then you can avail yourselves of the very vast protections of Section 337. Now I will note that we have not seen too many Chinese complainants. And quite frankly, that surprises me.

I know that Cindy and others mentioned having gone to look at relief under a variety of statutes. And certainly the Copyright Act or

the Patent Act is applicable at the ITC. But it really is sort of a one-stop shopping. And you can bring one suit against a variety of companies all over the world.

And given the tremendous amount of investment in the United States that a lot of Chinese entities have done, I would posit to you that a lot of those companies probably already have enough investment to have a domestic industry.

And those that don't, many of them, with some slight modifications to their activities, could build one in a relatively short period of time.

So I would encourage those who think that the ITC is more one-sided to take a look at who is really availing themselves of the protections and encourage Chinese entities to look at the ITC as at least one possible avenue to protect their brand and their IP.

And the final observation I have is a little bit—has to do with a little bit of proactivity. And I'm flipping it to the other side with regard to a respondent.

And if you are a China entity who find yourself on the wrong side of an exclusion order, there are still a lot of things that one can do to mitigate the disruption in your U.S. market.

And I'm certainly not just picking on Chinese entities because I think generally across the board this is an area of Section 337 that people sort of forget about once the case is over.

And I would encourage, especially Chinese entities who have such robust manufacturing activities that affect a variety of different industries in the United States, to really look at post-order advocacy as a means to ensure that any order is read as narrowly as possible, possibly to get in some design-arounds without having to go back to the ITC but to go through customs, and for the products that everyone sort of agrees are not subject to the order to make sure that they are not waylaid unnecessarily.

So food for thought.

MR. SANT: Well this is fantastic 'cause those of you that know IP, they're blowing up a lot of conventional wisdom here and popular belief in each of these presentations. So this is really interesting.

I'm going to throw it open to questions in two seconds. But first I just want to say that this is the U.S. side. So if you have questions on China law or Chinese legal issues, that'll be the second panel.

All right. So if there's any questions, I'll start taking those now. Great. I will ask the first question then. Let me go to Jamie. You kind of touched on the issue of how foreigners fare within Section

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337 cases in recent years.

So let me do a combo question for you. I'm interested in Chinese respondents in particular. How have they done? You mentioned that 92% win or settle. But considering that settlements could be a loss, how many are actually winning?

And then the third component of the question is, what about fashion-related IP in particular? Is that different or the same?

MS. UNDERWOOD: So as I mentioned, it's really hard to tell because settlements are closed. So we can't say. The reason that I did it just—and this was a simplistic sample—was simply that a company would be able to control the outcome in some voluntary way as opposed to having something involuntarily placed upon them.

So it is hard to say. But my notion is, just anecdotally from my practice over the last 15 years, is that it's fairly even. They always say about a good settlement, if both parties are unhappy you know it's a good settlement.

And so I don't think that situations with Chinese entities and ITC settlements would be any different. It's a great question in terms of design patents and other soft IP, if you will.

Ninety percent of the cases of the ITC are patents. That does include design patents. But it's a much smaller percentage. I actually think—I don't have statistics at my fingertips, although I could get them if anybody is interested.

But I tend to think that both the administrative law judges and the commissioners are just—their mouths are watering for non-utility patents. Okay? They're tired of patent semi-conductor cases and cell phone cases and things of that nature.

And so my experience has been if you have a design patent, if you have a trademark, trade dress, things of that nature, trade secrets, I mean I think we saw that in TianRui and other places, you find every level really digging in, really becoming interested.

And I'll throw this out here too. If you're ever—if you ever think that you want to have more attention, that somebody's not thinking about it very carefully, at the commission level you can always ask for an open public hearing for public interest reasons. And nobody does that.

And I have been told by so many commissioners they love it. It's been many years. I think the Kyocera case was the last one where they did it. But they're very enthusiastic. So I think it's a positive outlook.

MR. SANT: Great. All right. I see a question, so I'll go to you, sir.

MALE VOICE 1: [Inaudible]. So there's—

MR. SANT: [Interposing] Let me just repeat the question. And so the question is whether or not we see an uptick in criminal enforcement of IP and specifically trade secret issues. Go ahead, Mark.

MR. COHEN: Actually your question begs a lot more questions. You can cut me off for reasons of time. But first of all, there seems to be this assumption in government, and to a certain degree in industry, that trade secrets are easy cases because there's willful activity to misappropriate someone's confidential information.

They're anything but. In both the U.S. and China, even civil cases are hard to succeed at in trade secret matters. The information may not be commercially valuable. You may not have taken appropriate measures, etc.

So that's a starting point, which actually a lot of prosecutors think they're too complicated, too difficult to succeed. But there's a lot of pressure on prosecutors also to bring trade secret cases.

If you look at the numbers of criminal trade secret cases, in New York I think last year there wasn't one. And there is a criminal trade secret statute in New York. On a federal level, there really aren't that many, perhaps several dozens.

China, we're probably up around 70 or 80, still not a huge number. But there is an increased interest. But they still remain quite difficult. The interesting thing is also, if you look at it in a cross-border perspective, Jamie just mentioned the TianRui case.

It's actually a fascinating case because they did win their 337 case. Some people said it was an extraterritorial application.

What many people don't know is that when the U.S. complainants went to the Chinese Ministry that was going to acquire the infringing product of—the product that infringed a trade secret, they said, look, we have a U.S. litigation ongoing.

Could you not purchase this product until our litigation is over? And the Chinese Ministry said yes. This would not happen in the U.S., I suspect. The other thing is China trade secret litigation, or IP litigation, is very short.

Statutory timeframes are six months for first instance litigation. It means you if you have cross-border trade secret litigation you really have to watch your timeframes very quickly.

Trade secrets once lost are gone forever, obviously. And I have frequently heard people complain about the U.S. system, both civil and criminal, because it takes too much time and the end game is frequently an injunction and not damages.

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MR. SANT: Thank you. Yes, ma'am.

FEMALE VOICE 1: I'm interested in- - . My question is - - how much - - service - - ?

MR. SANT: Do you guys—

FEMALE VOICE 1: [Interposing] - - .

MR. SANT: —follow the question?

MS. YANG: Can you repeat that again? Are you indicating that the painting in itself is separate even though it has the same—

FEMALE VOICE 1: [Interposing] - - .

MS. YANG: Oh, can you repeat the question again in terms of—I just want to make sure I understand this before.

FEMALE VOICE 1: - - identical - - replicas of - - one is not. - -

MS. YANG: Well I guess in that—

FEMALE VOICE 1: - - —[The exact question was inaudible on the recording, but generally asked about how copyright law dealt with the scenario where one work of art is based upon another.]

MS. YANG: Yeah, well thank you for repeating your questions. So I'm going to take a shot at this because it really depends upon Studaven's [phonetic] contract with the Lichtenstein. So if it is—if the permission is given to the fact that the painting is done, then the issue becomes a derivative work issue, like how much can you go beyond that, correct?

So it really is a contractual issue. Now if they are—if the idea is that the painting is done and that's what you get, then Studaven's rights are pretty much stopped.

And then Lichtenstein, they would actually be the ones who would go and pursue the royalties that are related to the incorporation of that design or the painting, if you will, into whatever piece of clothing or bag.

So without really looking at the contract but based on that premise, then that's really where one is kind of stopped just by contractual basis, the fact that they don't have a derivative work right that goes beyond just the fact that you can actually paint this.

FEMALE VOICE 1: - - .

MR. SANT: Okay. Well let's see. I'll go to the lady in the back first. So the question was to Mark Cohen to further give details about what he said when he mentioned that some plaintiffs in the U.S. have lost IP cases, then gone to China and actually won that same IP case and—where the plaintiff is a Western entity. Go ahead.

MR. COHEN: Well one—there are a number of cases that—and obviously every case depends on the individual facts. A company out in Long Island—this is public information—named Leviton, lost

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a series of 337 and domestic patent litigation cases. But it won a design patent case in China.

Another case, to give you an idea just of how the system works, was the TianRui case where they won in the U.S., but in essence they got the equivalent of a preliminary injunction in China when the Chinese Ministry said I'm not going to buy this product until this case is resolved.

So that's another case where they actually got a very favorable informal remedy, if you will. There are also other trade secret cases that I've heard anecdotally, non-public, where sometimes companies have won in China and lost in the U.S. or simply because of the length of time in U.S. proceedings the U.S. litigation has not had the value that the China litigation had for a trade secret matter.

MR. SANT: Thank you. Further questions? Yes, sir.

MALE VOICE 2: Yes. - - at what point in the process of - - market - - design - - has been a - - . [The exact question was inaudible on the recording, but dealt with the issue of when companies should file for patent protection considering that the very act of doing so may trigger imitators.]

MR. COHEN: Let me answer one part of it. Maybe I'll leave the second part to others. If you're, from a business perspective, looking at when you're going to discover, you're not asking the right question.

The question is, what can you do as early as possible in your manufacturing development stage to mitigate against risk? Trade secret theft is one, advance word of a product. But if you're offering a product or displaying a product in the U.S., someone copies it but you haven't filed for any rights in China, maybe you haven't gotten the trademark in China, you're going to launch a new brand you need to get that trademark registered in advance of product launch in China.

You're dealing, in China in particular, with a highly opportunistic market that can affect the value of your product in the U.S. market and in China at the same time. So it's not really at what point do you discover it.

It's at what point do you take steps to protect something that you're developing? That's the key question from a business person's perspective.

MR. SANT: Great. Cindy, do you want to add to that?

MS. YANG: Yeah. I also think that on a practical level with fashion itself, it is a fast-moving industry. It's not semi-conductor where someone's going to have to make tooling designs and you can

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kind of find out.

I mean, you watch the Oscars. You watch the lovely ladies go down. And then the next day, poof, you've got dresses galore in which you can shop.

So typically in the design world it's pretty much when you actually hit the market, mainly online, which is why it's important for any fashion house, whatever Chinese or otherwise, to be—to have good software, I guess, software ears if you will, or eyes to be looking for products that are definitely spot-on or at least passing off as being your product.

So I just wanted to put that out there as a more practical matter just because of the speed in which the industry works, relatively different from pharmaceuticals or semi-conductors.

MR. SANT: Okay. Further questions from the audience? Yes, in the back, sir.

MALE VOICE 3: - - .

MR. SANT: So the question is, essential the gentleman says that in his experience it seems there's perhaps a government bias in favor of the plaintiffs in these 337 cases, both because maybe they have a bias generally, but also because they work more closely with the plaintiffs in doing these things.

And the question was then, regarding your statistics what about the cases that either don't go forward, where they don't respond or they drop out or there's a consent order early on, how does that impact your analysis?

MS. UNDERWOOD: Sure. So I'm going to sort of break your question down into two parts to answer the second part first as directly as I can. The statistics that I provided specifically omitted those types of situations where there was default or simply no one showed up during the course of the investigation.

And the reason I did that—and I certainly agree with you that if you were to add in all of those other respondents that the numbers would be very different. But I would say that I don't think that there's anything special about that vis-à-vis Chinese entities.

If you've been sued and you don't do anything and you don't hire counsel, it's not going to go well for you. So but that's with regard to the statistics. It's very interesting your take on the OUII and the ALJ.

And I would say this. You're absolutely right that any attorney worth his or her salt on the complainants' side is going to meet with OUII, the Office of Unfair Import Investigations, which is a part of the ITC.

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It's a party to a case that represents the public interest in a lot of investigations. And so you can go to the OUII and vet your complaint. But at least in my experience, maybe other people have been luckier, but it's more of a checklist.

So those types of meetings are not as substantive. It's sort of do you have the licenses attached? And do you have all of the appendices and things of that nature? And you might be able to pick their brain about one little thing or the other little thing.

You're absolutely right as well that with regard to timing, complainants have a tremendous advantage in Section 337 because they can take a year to get ready. They can have their experts. They can have their discovery ready to go.

And as a respondent, it really puts you back on your heels. What I would say to that, though, again is how much of it is the system? How much of it is where you're from? And how much of it is proactivity?

So if I were representing a respondent, as soon as I'm hired I'm on the phone to OUII. And I'm going to be participating in the same manner that the complainant is participating in an appropriate ex parte way.

MR. COHEN: I might add—

MR. SANT: [Interposing] Sure.

MR. COHEN: -to that just another—not related to the 337 process so much but in general in terms of IP litigation and the United States, just a little interesting data point which is that on appeal to the Federal Circuit, the Federal Circuit acts in a slight way to correct what might exist as local bias, what Chinese might call - *difang baohuzhuyi*- local protectionism.

So there's a slightly greater chance that a foreigner will win on appeal at the Federal Circuit if they lost below. In China, actually the situation is the reverse. Generally foreigners fare far worse on appeal by a margin of about 20% in IP cases than in their first instance case.

And I think that's because of greater political influence on the appellate process in China. You're just closer to the center of gravity, whereas the Federal Circuit, our Federal Circuit has a very conscious sense that they're responsible nationally and internationally for the integrity of the IP system.

So there's a modest, very modest, bias correction to it.

MR. SANT: Thank you. I think we have time for one last question. And then we'll be moving on to the panel on China side issues. Yes, ma'am in the back.

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FEMALE VOICE 2: [The exact question is inaudible on the recording, but dealt with the impact of inter partes review upon 337 cases.].

MR. SANT: I think that's a question for Jamie.

MS. UNDERWOOD: Sure. So there's no direct connection. Inter partes review, a lot of people have tried to use that to stop 337 cases. They usually do not. So the ITC has this very long, very staunch history of no matter what we will go forward, no matter what.

And at least in the situations I have seen, if a party comes to the ALJ and says, hey, we want to stop the procedural schedule or slow it down because we have a patent in the inter partes review system, that's not going to look—be looked upon very favorably.

MR. COHEN: I might add one other thing again from the Chinese perspective to that. ITC cases are a bit of an IP rocket docket in the U.S. Slightly more than a year you get your case resolved.

First instance Chinese cases are six months. Appeals are three months. It has happened that there have been concurrent cases in the U.S. and China where a Chinese party brought a case involving the same facts and party as a 337 and not only had his first instance case decided but his appellate case decided before the ITC rendered its decision.

So and that's the InterDigital-Huawei case in particular. And so if you're looking at ways of gaming the system, it actually is a pretty complex environment. IPR is one factor.

Another factor is if you're a respondent, is there room to bring a case in China? Those cases move along quite quickly.

MR. SANT: All right. Well thank you so much for the great questions. And I'd like to thank my panelists: Mark Cohen from the U.S. PTO; Jamie Underwood with Alston & Bird, and Cindy Yang with Schiff Hardin. So thank you to each of our panelists.

I'll turn it over to moderator Barbara Kolsun to lead the China side discussion.

PANEL 2: ISSUES IN CHINA FOR U.S. BUSINESSES

MS. BARBARA KOLSUN: Hello and welcome to the second panel. I'm Barbara Kolsun, co-director of the FAME program here at Cardozo and professor of fashion law here, also the co-editor of—with Guillermo Jimenez from FIT and Brooklyn Law School who's here tonight, of the first Fashion Law Textbook, which we use in our course.

I've spent many, many years as in-house counsel for several fashion companies and dealt with the issue of counterfeiting with pretty much every company that I've worked with. And we're going to focus a lot on that in this panel.

I'd like to start by asking each of our panelists to briefly introduce themselves and tell us what he or she has done and is doing. And then we'll get to individual questions.

MR. STEPHEN LAMAR: Barbara, thank you. And thank you all for being out here. And thanks to the organizers for inviting us to this event. And I really appreciated the first panel. I very much enjoyed your contribution.

My name is Steve Lamar. I'm the executive vice president of the American Apparel and Footwear Association. A little bit about myself, after college I spent some time in the Peace Corp.

And then for the last three decades or so I've been a public policy advocate in Washington, D.C. I spent some time at the Commerce Department and then have spent some time in private practice.

Ultimately the last 17 years working with the Trade Association, the American Apparel and Footwear Association, where I represent the apparel and footwear industry in Washington, helping them advocate for a variety of issues, whether it's issues like trade, intellectual property and so forth.

The American Apparel and Footwear Association, a little bit about my organization, we have about 350 or so member companies representing about 1,000 brands, famous brands. Our members make and sell everywhere.

So we have U.S. manufacturers. We have foreign manufacturers. We have people that import, people that export, people that trade between other countries. So if you're in the fashion industry, you are related to the industry that we represent.

Our job in Washington is quite simply to tell the industry's story to the various policy makers, whether they're in Congress in the

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various agencies in the executive branch. And then we help communicate what they're doing back to our members.

So as they're going about their business, making and selling clothing, shoes, fashion articles, they can do that with the knowledge of kind of what does the policy environment look like?

And as I mentioned, we have a number of areas that we focus on, trade, product safety, social responsibility, and intellectual property. So this is right in our wheelhouse. So thank you for having us.

MS. KOLSUN: Thank you. Dan?

MR. DAN HARRIS: Thank you. My name is Dan Harris. I am a lawyer with Harris Moure. We're a small firm based in Seattle. And most of our work involves helping American companies go into and figure out China.

And within that, we represent all sorts of industries or companies from all sorts of industries, including shoe companies, clothing companies, software companies, gaming companies.

We do work for two or three of the Hollywood studios, consumer product companies. And all of those companies, as you might guess, have IP issues. What's interesting, I think, about our practice is that most of our clients are small and medium-sized enterprises.

And they might have anywhere from zero to let's say five or maybe ten in-house lawyers. And oftentimes they do not have any lawyer who has—is terribly well-versed in international IP.

So we oftentimes have to help these companies from the very beginning to deal with that.

MR. CEDRIC LAM: Thank you. My name is Cedric Lam. I am a partner from the law firm Dorsey and Whitney. It's an international law firm with offices in 25 jurisdictions—I mean cities.

For the last 20 years I've been counseling multinational clients mostly on China IP matters. And I cover everything from patents to copyright and designs. And I spent a short stint as—serving as the regional legal counsel for the Motion Picture Association of America, so serving all of the Hollywood studios on anti-counterfeiting matters across Asia Pacific.

And today I guess, you know, I have a team basically counseling clients facing IP issues when they're doing transactions and also enforcing the rights, protecting the rights or recovering the rights both online and offline when they're doing business in China.

MS. LING ZHAO: Good evening everyone. So I'm Ling Zhao. And I'm now working as a trademark attorney at CCPIT Patent and

Trademark Law Office in Beijing and also studying at your law school as an LLM student. The CCPIT Patent and Trademark Law Office is one of the largest and oldest full service intellectual property law firms in China.

We have over 278 patent and trademark attorneys and now whom 17 are qualified attorneys as - - . We provide consultation, prosecution, mediation of administrative enforcements in and litigation services relating to patent, trademark, and copyrights, domain names, trade secrets, trade dress and other intellectual property routine matters.

We have offices in Beijing, Shanghai, Tokyo, Munich, Hong Kong, Guangzhou, and Shanghai. Personally I handle trademark prosecution litigation mainly and particularly I handle trademark search, use authorization, opposition, innovation - -cancellation, appeals, and licenses on behalf of clients for the U.S., Japan, Korea, and Europe before the Trademark Office, Appeal Board, Beijing Intellectual Property Court, Beijing high courts, and the Supreme Court.

But as an IP practitioner, I think the biggest challenge now facing the brand owners is how to better enforce and protect their IP rights in China. It's not difficult to obtain the trademark rights in China by registration. They don't require use or - - at the - - stage.

But to enforce and to better protect it's more complicated now in China—

MS. KOLSUN: [Interposing] We'll come back to that in a second, okay?

MS. ZHAO: Okay.

MS. KOLSUN: All right.

MS. LARA MILLER: Hi there. I'm Lara Miller. I'm the associate counsel for the International Anti-Counterfeiting Coalition. We're the longest-standing organization of its kind dedicated almost entirely to combating counterfeiting here and abroad - - been around since 1979.

Our members run the gamut from luxury apparel, footwear, accessories to automotive, pharmaceutical, technology content and entertainment, consumer goods, what have you. We run—we do policy and advocacy work.

But we're a largely operational organization. We run a number of substantial training programs, United States, Latin America, and internationally beyond that as well. We also have two very aggressive online anti-counterfeiting programs which I head up.

And we do consumer awareness and other similar initiatives.

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We focus mainly on things like voluntary collaboration, which is the basis for our—one of our online anti-counterfeiting initiatives, which is a specific partnership with Alibaba to address the counterfeits on their platforms.

So it's a very unique partnership. It's taken a lot of effort and a lot of time. But it's something I'm very excited to talk to you guys about today.

MS. KOLSUN: Okay. Speaking of Alibaba, the big elephant in the room, my favorite topic, I'd like to begin by talking about them and spend a good part of this panel discussing counterfeiting in China.

And I think probably most of us in the luxury world would agree that Alibaba is definitely the big one. Steve, I know that the AAFA has been doing some very interesting and what I would call aggressive work on behalf of its members with respect to Alibaba.

Could you tell us a little bit about particularly your SEC USTR work in other projects?

MR. LAMAR: Sure. Thank you. So they are the elephant in the room, I guess. But just to provide context, it may come as news to no one, I don't know. But Alibaba has a counterfeit problem.

They've admitted this. Jack Ma said, "It's the cancer that we have to deal with." They have also said they want to fix it. And on these points we very strongly agree.

The Chinese government has done some documentation of the scope of the problem on Taobao, finding 67% of their purchases in a study they did about nine, ten months or so ago were counterfeit.

And that really gives some quantifiable kind of information about what's going on there. Our members tell us repeatedly on a daily basis about the problems that they encounter when they find—when they go online they're seeing evidence of counterfeits day after day after day.

And these are ones that are actively working to execute takedowns and are still finding evidence of it day after day after day. And anyone in this room can go on. You can go on right now.

On the train ride up this morning I typed in the names of about seven or eight of our brand names, of our member brand names and found in every instance—and these are some of the ones that have some of the most aggressive campaigns to really go after it—I found evidence of products that were being sold at absurdly low prices.

I mean absurdly low prices. And I'm not going to say for sure that that's counterfeit. But that's just certainly is very strong evidence that that product or those listings might be counterfeit.

So our perspective is that this is a problem that we see our members are reporting that—and even Alibaba agrees with it. So starting—well we've been working on and off with Alibaba for about four to five years.

And that effort really accelerated in the last 12, 13 months. We got to a point this past April where we really felt like we weren't making any progress. We were kind of spinning our wheels.

And so we contacted the SEC, the Securities and Exchange Commission. Why? Because Alibaba recently had an IPO. And so they're subject to the jurisdiction of the SEC. And we contacted the U.S. trade representative.

Why? Because the USTR is the agency that monitors international trade and the relationship with intellectual property rights. And so when—they meet with their counterparts in the Chinese government to identify problems and concerns and possible remedies from a policy, from a strategic basis.

And we reported our concerns with Alibaba and our desire to fix this. In July—again no further progress—we contacted Jack Ma directly. The president—our president wrote a letter to Jack Ma and laid out a request to develop a program, to develop a system that would be fast, comprehensible, easy to use for takedowns.

Ironically, fast, comprehensible, and easy to use is the way I would describe the ability to get counterfeits on the website. And we want actually the people that are trying to take counterfeits off the website to make it be fast, comprehensible, and easy to use.

And so we laid out a four-piece, a four-part concept. And I can describe that further when we have time to—what we thought a successful program would look like, something that would work. So that's kind of where we are.

MS. KOLSUN: I know that the USTR has the special 301 list. And also I think we talked earlier about an out-of-cycle notorious market report. Is Alibaba listed on that notorious market bad guy list?

MR. LAMAR: Right. So to make sure everyone's aware kind of the reports we're talking about—and this is again one of the reasons why we communicate with USTR on this. So once a year USTR publishes a report in April.

They refer to it as Special 301. That's another, I guess another shorthand for trade law, Special 301. And it's a report that identifies intellectual property rights, practices and enforcement on a country basis once a year in April.

MS. KOLSUN: And the information that goes into that report is

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often submitted from brand owners. The various brands that I've worked with always submitted—we always contributed to IACC's contribution to the Special 301 list.

But not—

MR. LAMAR: [Interposing] Yeah, you did to us.

MS. KOLSUN: Yeah.

MR. LAMAR: We got it from you as well. And so I was going to say, Lara, I bet you guys send it to this as well, it's an opportunity for individual companies, trade associations, stake holders, anyone in the public, any of you, to communicate your concerns about foreign country IPR practices, whether it's enforcement, whether the laws are good enough, whether they're being enforced you name it.

And U.S. government very much wants that input. It makes them smarter. And so every year they put out a request. They will put out a request for this report, I don't know, probably six or seven weeks from now.

And it will be over the course of the December/January time period is when they're really looking for information. They also put out a request for a related report, which is an out-of-cycle.

That's the term they use to mean not at the same time. So they do one a little earlier. And in that report they list—they ask for information on something they call "Notorious Markets."

And notorious markets are—they define as either online or physical markets that, again, have lots of counterfeiting problems, trademark problems and so forth. And so the question that Barbara was asking was, is Taobao—or I guess Alibaba—but I think Taobao is the one I think where the most focus is—are they currently listed?

And there's been four of these reports so far. I believe it's four. And they've been mentioned in every report. But they're actually listed as a notorious market in the first one.

And then they were removed as a notorious market for the second ones where the government said we're not going to list them as a notorious market, but we do expect to see certain kinds of things occur over the coming year or over the coming couple of years and so forth.

MS. KOLSUN: And that's obviously not based on their great improvement, I assume.

MR. LAMAR: Yeah, I don't know what was based on that. But they did—and again, this is really an opportunity is—they're looking for comments. And again, it's not just on Alibaba. But they are looking for comments on any online physical market.

But they will be—this will be an opportunity for folks to weigh

in on Alibaba as well.

MS. KOLSUN: Is it fair to say that Jack Ma has spent a significant amount of money on lobbyists to keep him off that list? Anybody on the panel can answer that.

MR. LAMAR: I'm not sure who has the answer to that, but. . .

MS. KOLSUN: So this is one way to deal with Alibaba. Cedric, I asked you earlier outside if you had any opportunity to litigate with Alibaba. And your answer was you have definitely represented clients who have had issues with Alibaba Taobao and that you have resolved all those issues because you know somebody there.

And you pick up the phone and it goes away. So tell us a little more about that.

MR. LAM: Well I guess anyone who's experienced dealing with a problem in China knows that if you get ahold of the right people, then you get the problem solved very quickly and efficiently. One of our former partners is now very high up in the IP food chain within Alibaba, and also one of my former colleagues in Hong Kong is also working in the in-house department.

So whenever we've got a problem, we'll just ring them up and say, tell me who is responsible for this case. We will direct specific, I guess, submissions to that person.

At the same time, we'll follow the prescribed procedures that we have online and follow everything that they require, basically putting together all the formality documents, power of attorneys, authorizations, and also the evidence that you are the right owner, all that sort of thing.

So we're not only trying to take the shortcut. We will follow the books. At the same time we will try to short-circuit the process by connecting with the right person and get it resolved ASAP because I mean, these sort of issues happen literally every day for all of my clients.

And one of the things that hasn't been mentioned is that there is a limit in terms of how many of these sort of actions you want to take from a cost perspective.

And most of our clients, especially the ones who are managing a lot of brands, they will be—develop a very sophisticated process in terms of prioritizing which brands or which products they want to sort of target as opposed to going all out because they know the reason why they have that problem because they are having a good product or a successful product.

You won't get any sort of counterfeit products if your product is not good or your name is not well-known. So basically they will set

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aside a certain budget every year and say, look, we'll spend X dollars for this product line.

And then they will follow through for that year. And they renew—basically re-prioritize the different product lines every year. And they budget it accordingly. So when we receive instructions to takedown, it's not just we'll take down everything.

We'll just do what the client thinks should be done, because otherwise it's not sort of the most cost-effective way to managing a problem, which is also something good to have because the marketing people will turn around and say look, we are doing really well in terms of publicizing and marketing, promoting the products in China.

MS. KOLSUN: Lara, I know the IACC has taken a—you started to describe earlier a very kind of friendly approach—

MS. MILLER: Uh-huh.

MS. KOLSUN: —and kind of sat down across the table. Could you tell us a little bit about that and how it's specifically led to good results, if so?

MS. MILLER: Absolutely. Well it's not always friendly, but it is very collaborative. We've basically tried to take Cedric's approach and broaden it and systematize it on a wide scale. So our motto is we help them help us attack this counterfeiting problem.

To do that we've built up an in-house portal for our participants, our brand participants, to submit very easy systematized takedown requests. We've negotiated a very strong MOU with them that expedites those takedown requests.

We have two in-house staff that speak Chinese that analyze the listing, that analyze the counter-notices, that create that easy flow of communication between our brands and Alibaba.

And as a result, over time we've built up a credibility with them and a relationship with them that's allowed a lot of broadening of our program and a lot of insight into what they're trying to do, the efforts they're making, and to provide guidance and help them in applying what we've learned from our program on a broader level to their entire company.

Currently the program is just for listings only the Taobao and Tmall platforms. However we are in the process of expanding to the Ali Protect group as well. So—

MS. KOLSUN: [Interposing] And is your experience that their efforts are sincere?

MS. MILLER: Yes, currently. I know that there was a lot of—you know there were a couple of road shows. They didn't really

have a grasp on the American market when they first started rolling things out, when they started making some of the statements that they made.

I think they've realized the damage that they did to their credibility at the beginning of their—at this game. And they've taken a lot of steps.

They've hired a lot of people stateside who are very aggressive about broadening their international scope and making sure that they do address the problems that people are bringing to their attention, people like the AFA and people like the IACC.

And I've seen very strong good-faith efforts on their part. It's a big machine. It's a relatively young machine. And it's—the various platforms are dictated by entirely disparate rules, entirely disparate onboarding processes, different management.

And they are making a strong effort to centralize and to address the problems.

MS. KOLSUN: So—

MS. MILLER: [Interposing] Rome was not built in a day, though.

MS. KOLSUN: Go ahead, Dan.

MR. HARRIS: I don't know whether Alibaba is insincere or just not terribly competent in terms of taking stuff down. And what I mean by that is just like everyone said, we have people in our firm who are friend—law school friends or whatever with people at Alibaba.

It's very easy, as Steve—Stephen said—I think he said he wanted something that was fast, easy, and comprehensive. I would say it's fast, easy, and comprehensive to get counterfeits taken down off of Alibaba.

What's so incredibly frustrating though, and you've heard a little bit about this from I think everyone who has spoken, is how new things constantly pop up again. So as an example, we represent a toy company with some very famous characters.

And we have—well it's very easy for us to get the counterfeits taken down once we see them. But Alibaba, or Taobao, seems to have very little capability of taking things down based on our saying, look, this is what our client makes.

When you see wrapping paper or tennis shoes or t-shirts, our client doesn't make those. Those should never go up there. And I have a very good friend who's very high up at jd.com. And JD.com is a big rival to Alibaba and it's actually growing quite quickly.

And they also oftentimes write op-ed pieces in U.S. newspapers.

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And their theme, which I am starting to buy into, is why do these things keep getting up there in the first place?

And what JD.com claims is that they do a much better job of vetting products before they go up. And JD.com definitely does. So why is Alibaba so bad at that? Is it because they're not sincere? Is it because they're not good at it?

I don't really know. I don't really care. They're just—it just keeps on happening.

MS. MILLER: So I'd just like to provide a little insight on that note. I think that there is a long—there's a large—a lot of room between insincerity and incompetence that you can fall into.

I can point to a lot of American platforms that don't do a much better job of screening their onboarding process. The different Alibaba platforms have different onboarding processes. And they lead to the ability to screen and to prevent onboarding in different ways.

I'm not here to defend them. I'm just here to talk about what I've seen. What I have seen is when we do have certain rights holders who are participants in our program who have a problem far outside the scope of our program, a licensing issue that went awry, a product that should never have been made that made it onto the market, we've been able to go to them.

We've been able to facilitate that conversation. And we've been able to get bans and sweeps of certain very specific products off of the marketplace. The issue is that it's because we've developed that kind of credibility with them.

And there's a lot of individual determinations and individual decisions that have to be made about a rights holder's product to kind of—to institute that kind of situation.

And if the rights holders or whoever represents them isn't putting the effort into to make sure that that process is clear-cut and available for them to make those decisions and to take those kinds of actions, then just saying I want it and I want it now isn't going to help anyone because they have a responsibility to do their business as well.

We've seen—

MS. KOLSUN: [Interposing] Well I'm not sure every brand would agree with you on that.

MS. MILLER: Yeah.

MS. KOLSUN: I think it's—I think there's a great deal of despair. I mean most of us lived through the eBay years. And certainly it was a lot easier communicating with eBay, which was

right here in the U.S.

And we had a long fight. And then of course Tiffany lost the case. But even having lost that case, eBay cleaned up its act quite significantly. I mean Alibaba really is the beast that just keeps on giving.

MR. LAMAR: Can I just make a—just a comment? I mean one of the things too that you have to remember about Alibaba is they're in many ways a company that's never existed before. I mean they're rewriting the rules of global commerce.

They're rewriting the rules of China commerce. And they're an amazing technology company. And so with all of that comes not only an opportunity but an obligation. And both that opportunity and that obligation is to do the right thing, is to not be known as the company that is associated with counterfeits.

I mean that's what they are. I made that comment at the beginning and I got a big laugh. That's because everyone knows this. I mean everyone admits—there's like complete consensus and agreement that this is a problem.

And why do you want your brand to be so sullied as a brand known as the purveyor of counterfeits. And it's going to get worse if it doesn't get fixed very, very soon. They are growing and they're expanding in a new market.

So they're going to be, not only associated with counterfeits in China, but associated with counterfeits all around the world. This is a proliferation of theft. That's what this is.

And unless it's fixed and stopped, that's what they're going to be carrying around the world. And I've heard some of my co-panelists talk about the special relationships. And we hear about that too that folks have been having the ability to either execute takedowns or solve problems.

But it's all built around special relationships. And I get that that's how a lot of commerce is conducted in China. And I'm not saying that you shouldn't avail themselves of that. But what we need here is a solution that doesn't require special relationships.

It's got to be transparent so everybody can see what's happening. And this is in Alibaba's interest. They should be, they should be proud of what they're doing here. And they should want there to be some kind of a transparency here.

And it should be comprehensible so you're able to understand what it is easily and that you're able to execute on it easily. These are all basic things. And this is a technology company.

And when I think of the most successful technology companies

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that we deal with, they all have these things. They're very transparent in what they're trying to do. They're very comprehensible once you actually understand the technology. And it's fast.

I mean the ability to conduct business with these organizations is lightning speed. So we should demand the same thing of this technology company because they're putting themselves out there that same way.

MS. KOLSUN: So how's that going to happen? And I want to ask the lawyers who work in China to respond to that. I mean, Cedric, you talked about the special relationship. But how—again, I think Steve makes a good point.

Everybody doesn't have that special relationship. The last company that I worked for, it took us, Stuart Weitzman what, a year just to get registered so that we could conduct the takedowns?

And we were a pretty big U.S.—I mean relative—you know, \$200 million U.S. brand, very well-respected. But it was a nightmare.

MR. LAM: I think everyone has to appreciate Alibaba is a big huge elephant. It's growing at a speed that they probably have difficulty managing. But I have to—I mean they are public enemy number one to many of my clients.

But then I have to give credit to their legal department at least they're actually quite flexible in terms of accepting proof of your rights. I mean I have many instances where my client has no rights whatsoever in China in terms of registered rights.

And the only thing that they can turn to is something from the U.S. And technically they don't have to basically give any credit to that. But they still, based on a U.S. right, take down something in China which otherwise would not be enforceable in the Chinese court or administrative tribunal.

So I think they are trying to do a good job. But it's the volume of cases that my contacts are telling me. They don't have any way in terms of prioritizing.

But a lot of the work that I think the IACC and other groups, including the other umbrella association like the MPA and all that, they do talk to them on a one-to-one basis trying to establish rapport so when their members are taking action they will be given some preference.

I know this is not ideal. But I mean when you're talking about a new—a relatively new organization growing at a very sort of speed of light, then there's some teething problems that you have to deal

with.

And for rights owners and us, those who are assisting them in terms of protecting the rights, we will have to sort of try and teach them or show them what is the proper way to do it, but at the same time trying to deliver by taking advantage of the best available route of enforcement.

MS. KOLSUN: Ling, do you have anything to add to that?

MS. ZHAO: Yes. In China to get protection first you need to register. It's very important. And register early to get—

MS. KOLSUN: [Interposing] Well we know that. We know we have to register our trademarks and we know we have to enforce our trademarks.

MS. ZHAO: Yes. Actually - - to the view that Alibaba has been trying hard to—you know it's difficult for trademark owners to file the complaints each time when they find a counterfeit piece online.

But that is the usual procedure. But in case of repeated infringements on counterfeiters by the same infringer, there is the possibility that Alibaba Taobao would be held liable to legal responsibility.

Actually that is indeed a case in the year of 2012 is an important case made by the Shanghai courts. In that case Taobao was held liable to - - co-infringement with the actual infringer.

And that shows that in case of repeated infringements, in that case it was some very special circumstances because the same infringers kept posting counterfeit goods on the same line and that the trademark owner filed a complaint to the Taobao company - - many times within the period of time of one month.

And - - issues that the Taobao should have known and could have known that the same infringements happening online so that they cannot take - - . So in that case the Shanghai court did hold that the Taobao company should be liable to the infringement.

I think this shows that we do not always have to go through the usual channels when fighting consistent infringement.

MS. KOLSUN: There is an interesting—just to call your attention—probably many of you are aware of it—an interesting case brought against Alibaba by Gucci. The Kering -Group actually on behalf of the Kering brands, Gibson drafted the complaint.

And that's actually a really interesting complaint to read in terms of the specific kinds of details which Steve referenced in terms of the information that we need to provide to the USTR, for example, quite, quite detailed analysis.

I know I spoke with my co-director of FAME, Michael Kors'

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general counsel Lee Spom who's—they're considering bringing in action in Europe because the litigation may be—I mean it's a whole forum decision.

We'll see what happens with this case. This is obviously a very expensive complaint. Preliminary injunction was granted. We'll see how it goes. But is—let me ask the lawyers on the panel, in terms of choosing forums, should brand owners choose to go it alone? And Kering obviously isn't going it alone because they've got a group of brands.

Is U.S. a better forum? Is Europe a better forum? Is China a better forum?

MR. HARRIS: I don't know that—for most of our clients, I don't know that any of those places are good forums because—

MS. KOLSUN: [Interposing] They cost money.

MR. HARRIS: —they cost a lot of money, right. And we've talked with a number of our clients about these things. We believe that they could win in China. They could win in Europe. They could win in the United States.

I've read the Gibson Dunn complaint. I believe it talks a lot about how Alibaba claims to be making an effort but they really have almost nobody—and they have very, very few people in the company that are really dealing with this issue.

I think they just recently hired their first lawyer in the United States. And he's very young and inexperienced. So they don't strike me as being all that serious about ending the problem.

They strike me as being very serious at trying to look like they're trying to end the problem. So yeah, maybe these are good lawsuits. But if you're a small toy company or even a fairly large toy company, is it really worth bringing the lawsuit? I don't know.

MR. LAM: I think the key determinant is to assess what rights your client has in a particular jurisdiction. If you have no rights that's enforceable through the courts, for example—

MS. KOLSUN: [Interposing] Well assuming this is—of course let's assume we have rights.

MR. LAM: Right. Well I mean the Chinese court is—I guess Mark has mentioned, a Chinese court can actually be a very efficient forum if you have all your formalities and documents in place and you have all the rights that's there and the case is usually clear, then a Chinese court is not a bad choice.

In fact, if you were to enforce a judgment, I mean at the end of the day what you are looking for is some sort of injunctive relief or maybe even damages. And if you get a U.S. district court judgment,

I don't know how useful that is going to be in terms of enforcing it in China.

It in and of itself is a very complicated and difficult question. So in most of the cases that we have worked on—civil cases—it's not prompted by online infringement, we would recommend clients to take action in China.

And we have gotten very good results, as Mark reported. The success rate for foreign litigants is actually much higher than you would have expected. But you have to be prepared because the litigation process in China is completely different from the U.S.

You basically have to prepare for it—it's a sort of top-heavy process. It's sort of like preparing a criminal case in the U.S. You have to have all your evidence in place before you even file a lawsuit.

There's no discovery effectively. So I mean a lot of brand owners are not prepared to sort of go through this process. They thought, wow, how—if I have to sort of spend that much in the beginning of the process, imagine down the road the cost is going to be.

But they are sort of misguided in - - .

MS. KOLSUN: Well let's talk a little bit about—so we have the time—both the domain name, the pirated domain name issue and also the plethora of rogue websites selling counterfeits of U.S. brands. Let's start with domain names 'cause I know, Cedric, you have worked on that.

I mean I can tell you that at Stuart Weitzman, my last job, as we were thinking and building more of a lifestyle brand and we attempted to register Stuart Weitzman in Class 3 for fragrance in China, of course we learned as pretty much every American brand does or global brand does, that a Chinese registrant had gotten there before us.

And it did not take three months to get that name back. It took three years and probably about 75,000 bucks at least. So it's not for—necessarily for your clients, Dan. I mean that was a big investment even for us because we were a small brand when we discovered that.

And we couldn't start shopping our name—we couldn't start shopping for licenses when we didn't own that brand. I mean that's happened in other places besides China. Calvin Klein didn't own its trademark in Chile when it started licensing the brand—the name for jeans in Chile. And it took years us for to get that name back and lots and lots of money.

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So I mean how do you, how do you advise a not-so-rich client to claw back its domain name?

MR. LAM: Well I guess setting up a presence in China maybe the first step is not getting your foot into China but do it online this day and age because you want to have your brand projected to the Chinese public before you even get there, especially for some of the smaller—relatively smaller like the designers and all that.

They don't usually have a lot of capital to start with, even for established brands in the U.S. So I guess our recommendation is always try to get some sort of domain name which is associated with China.

The most obvious ones are the .cn or the .com.cn or the Chinese equivalent and all that. But most of the time they will have been squatted. But I think the problem is actually much bigger on the trademark front.

There are a lot of domain name squatters in China that are targeting foreign brands, but the problem is a lot worse in the trademark sphere 'cause one of the ways to recover a domain name is you have to have prior rights.

And if you don't have a trademark registered in China, it would be very difficult to try to recover the name other than to sort of buy it off from the squatter. So we actually have a profession in China which does nothing but pirating domain names and try and wait for the rightful brand owner to come and give them a big paycheck.

MS. KOLSUN: And similarly pirates trademarks—

MR. LAM: [Interposing] Yeah.

MS. KOLSUN: —in classes that the brand—

MR. LAM: [Interposing] Yeah, I guess everyone remembers the iPad case. Apple fought tooth and nail till the last minute. But still, because of the first to register they had to sort of pay out big time.

Nobody knows exactly how much they paid for it, but they had a load of cash so nobody worries about it. But I guess the idea is still in addition to getting the trademark registered, like Ling mentioned earlier, domain name is one thing that people kept forgetting.

And the Chinese equivalent of the name is also very important because we got lots of instructions from clients saying file this trademark application. This is our house mark, very important. And then the next question we ask is do you have a Chinese name or the Chinese equivalent of your house mark?

The answer is no. Come up with one for us.

MS. KOLSUN: But even once you have the Chinese name, once you have the U.S.—the English version of the name, then suddenly

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there's StuartWeitzmanOutletStores.com. Stuart—

MR. LAM: [Interposing] Right.

MS. KOLSUN: —Weitzman—

MR. LAM: [Interposing] Yeah.

MS. KOLSUN: —perfume.com. I mean there are 50 that come out of the woodwork. And as you know, the domain name pirates reach out to the brand and say, would you like to buy this?

MR. LAM: Right. Well I guess as long as you have one primary site. When I said you register the domain name for your company or your business, you don't have to set up an all Chinese character website.

All you have to do is basically pay some very small money to a domain name register and then redirect all the traffic to your main site. That is it. And then you basically have a site from which you can operate your business.

Then, depending on budget, you can basically ignore all these sort of noises because there's an infinite number of combinations that you can do in terms of domain names. So where do you draw the line?

I basically tell the client you don't have to worry about all these sort of noises unless you have—you are very rich in terms of your litigation budget.

Just stick to one. And if the English .cn is not available, do a Chinese character because most of the time the pirate will not know what official Chinese name you have adopted, especially for a newer brand.

You basically create your own brand in one other way 'cause we have a client that only sells online. It's one of the biggest online retailers for a very—specialty products related to fashion.

I cannot name them because it's very obvious who they are. That's a problem that they have. The Chinese equivalent of the English name and the English name got squatted in all possible combinations you can think of, literal, transliteration, what not.

And the only mode of service that they operate is via online. So but the business people don't even know. So it's like a month before the launch they come to me and say, "Look, we want to register today and we want to operate the portal."

Me, the first thing I tell them is, "Don't do it in China or else you'll be sued basically front and center because all your name, Chinese, English, or otherwise has all been registered."

So what we ended up doing is to come up with a new Chinese name which identified them. And they basically started doing

business in this new Chinese name. So what I'm—I guess long story short, basically if you want to protect your identity, your brand in China, the very first thing you should do is to get a domain name registered.

Trademarks nowadays take a lot shorter time to get. It used to be like three years. Now you can get it within a year. It's still too long. For a domain name, you can do it in 15 minutes if you have all the documents ready.

So in terms of recovering the mark, unless you have—you do not have any way to operate online, this is something that you can sort of wait and plan. But remember, in China, for .cn domain there's a limitation period of two years.

So if you don't take action within two years you cannot do a UDRP-like proceeding. You have to go through the courts. And that costs money. And again, if you don't have any rights in China, good luck.

You can't take—sort of basically take back your own name. But I guess one of the points I want to sort of mention—I don't want to sort of monopolize the discussion here—is that the infringers are getting a lot more sophisticated in China.

So oftentimes they're—even for good platforms like JD.com where we do—I just got a case this morning. Basically our client is a U.S. client. They're selling goods. It's an accessory to iPhones and all that.

There is a Chinese lookalike put out the stuff on JD.com. And they tried to stop them. But to their surprise the infringer was able to produce a trademark registration for their name. And they claim the product is coming from Korea.

So JD.com, there's no way that they can verify that. They just look at the piece of paper and say look, wow, this is a brand—a legitimate brand. So they let that product go on to this relatively clean platform.

And our client is now scrambling, what's going on? So sometimes the problem is not just the platform but also Chinese infringers or copycats are getting a lot more sophisticated.

So this is something that we have to be careful with. And I don't know if anyone has mentioned the New Balance case yet. This is a sort of case that I predicted a few years ago in one of my papers.

I said foreigners—foreign brand owners keep on suing Chinese copycats. But the time will come when the Chinese copycat will sue the brand owners. And the New Balance case, which came out, I call it “The hunter became the hunted” in my paper.

And that happened in August this year. Basically New Balance is ordered to pay 16 million U.S. dollars damages in terms of using the Chinese name New Balance that New Balance has been using.

But this Chinese copycat actually registered their name like ten years ahead of time and selling shoes, not necessarily athletic shoes. But I mean mind you—so I mean if your client is not careful in terms of entering the market by getting all the trademark registration or the domain name registered and just walks in blind, they can be in for a very big surprise.

MR. HARRIS: That happened with a wine or champagne company recently as well.

MR. LAM: Yeah.

MR. HARRIS: Same thing.

MS. KOLSUN: Steve, is the AAFA doing anything with the rogue websites?

MR. LAMAR: Yeah, well this is something that we've spent a lot of time on over the years. And there was an effort to try and address this through legislation in the United States. It got wrapped up in the whole SOPA PIPA debacle I guess, or issue.

And that legislative effort kind of failed to go forward. In terms of drawing attention, one of the ways that we do this is through the notorious markets comments 'cause the ones that we file we'll mention a number of websites that are out there.

And in fact, we have a request out to our members right now, if any members are in the room and have that email from me please respond quickly so we can get your input in 'cause they are due in a couple weeks.

But the—you know this is an opportunity to—we draw attention this way. We will also have events where we will help companies.

We'll bring in experts such as the folks here—although we haven't had any of you in, so maybe this will be a future opportunity—to talk about the kinds of things you can do in terms of protecting your intellectual property, whether it's rogue websites or copyright trolls or one of the other issues that come up that are either more unique to our industry or where there is some special application that we can talk about.

But rogue websites are a huge problem. And it shows up in a lot of different ways. And again not just—if we were talking about other countries I can give you some examples, but certainly beyond China.

MS. KOLSUN: Lara, how about the IACC?

MS. MILLER: Yes, so I can add to that. Another voluntary

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collaboration that the IACC has is with all of the major payment networks—international payment networks. So we have what is called the “RogueBlock Program.”

We call our partnership with Alibaba the “Market Safe Program” for reference. The RogueBlock Program is essentially a follow the money approach. So we’ve created a similar automated porthole that our brands can easily submit their claims into, establishing—citing the sites, establishing the violations that have occurred on those sites.

We legally review them. We pass them on to our payment partners. And we facilitate terminations of the merchant accounts behind those websites. So while the domain space is still quite a challenge, we are trying to build up that enhancement with that as well.

But we also try and really just get them at the choke points essentially. We demonetize them. We dismantle their ability to profit from these operations in the interim while everyone is working on these other methods and taking more straightforward legal pathways to the resolution.

It’s a nice workaround in another voluntary collaboration that’s been—

MS. KOLSUN: [Interposing] One thing I want—

MS. MILLER: —effective - - .

MS. KOLSUN: —to point out with both—I mean it’s obvious. But just for those of you who don’t know, both American Apparel and Footwear Association and IACC are member organizations. And you have to pay to be members.

So that’s—you know, for smaller business—and it’s not cheap. So for smaller businesses like—

MR. LAMAR: [Interposing] It’s great value.

MS. KOLSUN: I know, you get great value. I agree.

MS. MILLER: It’s pretty cheap when you—

MS. KOLSUN: [Interposing] That’s why you’re on the panel.

MS. MILLER: —consider - - .

MS. KOLSUN: That’s why I called you. But for smaller businesses like Dan’s, and I’ve worked for many of those. I mean I’ve worked for a lot of startups, it’s not always—I mean it’s not always the most cost-effective way to go.

I mean it’s certainly—I think one thing we’ve learned tonight is that the kind of group approach through a trade organization and its lobbying is definitely helpful. But I think the IACC, in addition to dues—I used to be chairman of the board of the IACC so this is

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coming from love—but you also have to pay extra for the Visa/MasterCard program, don't you?

MS. MILLER: Absolutely. So our membership for small companies is about \$4,800 a year. And the RogueBlock Program is 12,500 for members which—

MS. KOLSUN: [Interposing] That's a lot of money if you're a small—I mean I manage little tiny budgets. Most of the companies I worked for, Kate Spade, Stuart Weitzman, 7 for All Mankind, when I started we had tiny little budgets. That would have been out of my price range.

MS. MILLER: It would have been when they started, yes. We do try and make our programs as accessible as possible. And honestly, we wish we had the resources to make them available to anybody who wanted in. It would—

MS. KOLSUN: [Interposing] Dan, could you recommend—

MS. MILLER: —be wonderful.

MS. KOLSUN: —that to any of your clients? Your bigger ones, I suppose.

MR. HARRIS: Well—

MS. KOLSUN: [Interposing] Be frank.

MR. HARRIS: —we don't usually talk to them about that sort of thing necessarily. But yes, I mean, a number—I know a number of our footwear clients are in Steve's group. And I view that almost more as a business decision than as a legal decision.

I don't know if it's necessarily our role to talk about that. They all seem to be pretty aware of those groups.

MS. KOLSUN: Okay. All right. Go ahead.

MR. LAMAR: If I can just say something, I mean I would say that A, the role of the trade associations is beyond intellectual—well you guys are counterfeiting. I mean you're focused on counterfeiting. So but—

MS. MILLER: [Interposing] Yes.

MR. LAMAR: —trade associations, they do for their members whatever different things that they have in front of them. We, for example, do intellectual property but also trade. So people will join us and expect activity or ask for activity on a range of issues, public policy issues.

MS. KOLSUN: Big—you were a big voice in the Bangladesh fire issues. And it's always—

MR. LAMAR: [Interposing] Bangladesh fire, a lot of the trade policies, they just came through. So there's a lot of stuff that goes on. But I will just call one attention—and since we were talking

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about Alibaba—so I pulled out the Special 301 section that talked about Alibaba and Taobao in the last three years.

And in each one of them the USTR mentions a particular focus on small and medium enterprises and their ability to deal with Alibaba. And so if you are a member of one of these trade organizations or other ones, use those to communicate.

It doesn't mean you have to rely only on them. You can communicate directly—and this is free. This is something that you can do as somebody that has access to regulations.gov, which is how you submit comments.

Comments are due October 5th. And if you've got a particular interest, especially if you're a small or medium-sized enterprise, U.S. government really wants to know. They really, really specifically—and in two of these three paragraphs they specifically call out, “We would like to hear the experience of small and medium-sized enterprises.”

And that's free.

MS. KOLSUN: And if you look at the Kering—the Gucci versus Alibaba complaint, it's a very good—it kind of lays out the facts in these kinds of cases in a very clear way if you, you know, if you're looking for kind of language as to how to frame these things.

All right. Before we take questions, really quickly would each of our panelists—I was going to ask you for five things but we don't have enough time. Let's say one thing U.S. businesses can do - - to prevent counterfeits besides—we're not counting registering trademarks or recording those trademarks with customs. That's off the table.

MR. LAMAR: Be a squeaky wheel. In Washington a squeaky wheel gets the grease. Raise your concerns. Raise it with policymakers. Raise it with the agencies that follow this. Raise it with your trade associations.

But make your voice known. No one can help you if they don't know you have a problem.

MS. KOLSUN: Dan?

MR. HARRIS: We always advise our clients to focus on the people they know, their manufacturers, their employees. Get contracts with them that include trade secret protection.

MS. KOLSUN: Cedric?

MR. LAM: Since we can't talk about registration. . . Which one piece of good news to share, I think the Chinese Trademark Office just lowered the registration fee today by 30 bucks U.S. So with that extra \$30, try to follow up with one of my recommendations earlier

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is to get a domain name registered.

MR. HARRIS: Somebody should ask if we're going to lower our fees \$30.

MR. LAM: Which I haven't made a decision yet.

MS. KOLSUN: Okay.

MR. LAM: - - .

MS. KOLSUN: Ling?

MS. ZHAO: Yes, it's good news that the registration fee is going down. And it's very important to get registration. And in the meantime we keep watching the trademark stats so the local contacts.

So that means be prepared to fight - -any violations against trademarks that are quite similar to our own brands and different classes because we have many classes and also subclasses at this time in China. -It's really complicated. So when doing registration you not only need to register our own mark and the English mark, the Chinese mark, you also need to register - -sufficient scope of classes of goods or services so that we can get protection properly.

And in the meantime I want to say that the trademark—the new Trademark Act, that was effective since last May, it seems to be more effective in offering protection to - - trademark. So for any famous brands we can always have the rights to get recognition of - - trademarks through the Trademark Office and also - - boards - - get better protected - - wider scope - - .

MS. KOLSUN: Thank you. Lara?

MS. MILLER: I would say never underestimate how important tight control of your licensing and distribution chain is. Here, abroad, have similar documents everywhere. Know where those distribution licensing agreements are going.

Even large companies can often lose sight of that. And it really can create a lot of problems down the line. Oh, and of course, join us. It works.

MS. KOLSUN: All right. Questions? Oh gosh. Okay. Go ahead.

MR. HARRIS: Oh, I'm not sure I'm really the right person for—okay, the question was how are the IP courts—the newer IP courts in China—how are they serving the needs of foreign companies?

And I guess what I would say—and I think we've heard a bit about this already from the people here—it is definitely possible to win these cases in China. I remember that one of the first cases we did in China was in Qingdao. And it was a long time ago.

And it was—I was almost embarrassed how the judge seemed to

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be bending over backwards almost to help us because we were foreigners. Those days are over to a certain extent. But I think that—one of our lawyers is always saying that American companies register in China and then think that's it.

And they do it almost perfunctorily because they've been told that they need to do it. And then they view doing it as everything. They don't monitor. They don't sue.

They think their chances are hopeless. I don't think that's true. But I think if there's someone on the panel who's been involved with a lot of cases in those courts they would definitely be better than I am to speak on this.

MS. KOLSUN: Why don't we talk—that's an answer we can probably cover outside at the reception. Go ahead.

VOICE: [Exact question is inaudible on the recording, but the question dealt with what outside influences can impact how a company such as Alibaba may deal with allowing possibly counterfeit goods to appear on their platform.

MR. HARRIS: Great question.

MS. MILLER: I'll try that one. I think that there's a lot of different kinds of external pressures that can influence how they respond to their onboarding processes. But I think the largest pressure is just going to be the voice of brands and organizations that speak out to them and time.

Scaling a process to Alibaba size is a little bit different. And they do take the advice of rights holders who suggest technologies. And I'm sure they will look to other organizations to guide their processes as well.

But it's impossible to say how they'll react overall.

MS. KOLSUN: I mean certainly those of you who were sparring with eBay a decade or so plus ago recall that once they started to sweet talk brand owners into opening stores on the eBay platform they started working a lot harder to eliminate counterfeits from their own platform. Joe?

MS. MILLER: That's - - .

MALE VOICE 4: - - [The exact question is inaudible on the recording, but the questioner described his frustration with what he believed were onerous requirements for rights holders attempting to take down counterfeit goods on Chinese e-commerce sites, and stated that he had difficulty providing the kinds of documents required. The questioner then asked for a reaction from the panelists.]

MR. LAM: I think the requirements are not particularly onerous in terms of Tmall or Taobao, although they are a lot more Chinese

compared to the other sites within the group. And what you described to me is actually a lot higher in terms of the standards that are actually required of them.

The person working on those cases within the group—actually the same group of people—they do not have a big legal team as some of the panelists already mentioned. They have a very small team.

And I think if you are regularly enforcing your rights—and I mean takedown on those platforms—have that set of formality documents ready. Basically they're not looking for anything more than who you are. Why do you think you have rights in a certain name or design or copyright work or whatnot?

And the specific hyperlink to a particular infringer. That's pretty much all they need. They are not trying to be demanding. But if you don't give them these exact—or maybe if you are an agent or service provider or a law firm or something, you need a formal authorization letter.

And in most cases you don't even have to have it notarized or legalized. So it's actually pretty simple. But if you read the English instructions, sometimes they describe it in such a way that makes you think it's something more—it's more onerous than what is in fact the case.

So I mean if you have done it a couple times, you probably will learn the ropes in terms of what they need. After submitting it, all you have to do is to wait for it. I mean sometimes you have to sort of give reminders and all that.

But in my experience, if your client's brand or your company's brand is not as well-known, they will have less priority. I think that's the sort of working rule that they have.

Will this sort of people give pressure to me or to my boss through one of the trade associations? Because they do care in terms of getting reminders or complaints from big, known lobbying groups or big companies.

But otherwise, just regular follow up and follow the rules. That is it. But I don't think you need to go—in terms of the quality of the documents, I don't think they are looking for that sort of proof.

I have never sort of gone into that sort of detail in terms of disclosing your rights. Maybe what they're looking for is some China-based rights as opposed to I'm one of the biggest brands of this industry, blah, blah, blah, these sort of generic descriptions.

MS. KOLSUN: I think we could have a whole panel just on that topic, how to make Alibaba happy. Okay—

MS. MILLER: [Interposing] No, sorry, I just would like to add

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to that quickly if you don't mind. We don't even see that level of requirement through our program. I don't know if I miscommunicated, but there is no—this proof that you speak of, that's not really an issue for us because we've established that.

We don't have—we never had friends there. We made friends there through our program. We speak with the CEO. We speak with this young lawyer, Eric - - on a regular basis.

We meet with Michael Evans. And we've established a program that doesn't require any actual documentation when we go in, no strong substantive requirements. Our brands are onboarded within a day usually.

Our takedowns happen within a couple. And it's been a really good streamlined process. So I think maybe it's—there seems to be a large disparity of experience. And I think that's probably the biggest program—the problem that needs to be examined.

MR. LAMAR: Yeah, and just one thing to say though is our members' experience, one of them, is that they have a disparate experience. Individual members will have that. And so somebody will have a good day on Monday and a bad day on Tuesday with the same people, exact same person they're talking to.

In some cases it's even sort of reestablishing identity and their right. And then an okay day on Wednesday, and then on Thursday the rules change. And this is what they experience. And these are their published procedures.

And I'm hearing kind of the comments about these are the things you have to do. And sometimes they'll even waive them and let you do something less than the full rigor. To me, that's part of the problem is that it's a constantly, constantly shifting environment.

And for something that has got such a large scale, they've got to come up with something that's really, really simple and easy to use and easy to use for small companies, for medium-size, for big companies.

And if they don't, we're just going to—we're going to invite this problem to get even worse.

MR. HARRIS: Except I'm not sure that would necessarily be good. And the reason I say that is—and Cedric keeps alluding to this and he's right—a lot of times you can get them to take down a lot more than they technically should.

And by that I mean let's say you have a company that has a trademark in three classes in China. And somebody's making product in four other classes where your client does not have a trademark.

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Once you've established a relationship with the people at Alibaba—and I think it's important—what you're describing I've never heard—we've never had to go through that sort of process.

And I think a lot of it is because our interactions with Alibaba are done by—all in Chinese. And I think it makes things go smoother.

And I don't want a situation where our clients—I may not care about other people's clients—but I don't want a situation where our clients cannot get these four classes of products taken down even though they don't have a trademark.

And you do reach a point with Alibaba where they start going along with what you want to do. And I'm worried that if they really started following the rules that it might actually get—overall be a lot tougher on people.

MS. KOLSUN: Ariel [phonetic]?

ARIEL: - - [The exact question is inaudible but it dealt with the issue of no-use cancellation of trademarks in China].

MR. LAM: I think Ling is the expert on this. She has a paper in the bundle that addresses this particular issue.

MS. ZHAO: Okay. So according to the Chinese - - Trademark Act so effective as of May for trademark you have been using the mark in the market by production? Yes, by production it's kind of used—we can use to defend against no-use cancellation.

So to defend no-use cancellation, production is enough. You can submit the evidence to the trademark office. And they will recognize that. And you will have your mark valid. Yes.

Or yes, it's very important to register mark in a wider scope. In the meantime if someone else registered your mark and used the registration to attack your mark they are according to the law when you want to claim damages based up on a registration you need to prove that - - has been used in the past three years.

Otherwise you can use no-use cancellation to defend against infringements. They cannot get damages. So that's one thing. And if they just register and they haven't been used for more - - you can also apply the cancellation against - - .

MS. KOLSUN: Two more questions?

VOICE: [The exact questions were inaudible, but the questioner raised two issues: first, whether there is a bias in Chinese government bodies against foreign companies with IP rights, and second, whether it made more sense to fight infringement in China through actions in the U.S., China, or in Hong Kong.]

MR. LAM: Well if I were to give you a definite answer to either

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question it would not be the right answers. The first question, whether there's a bias, it depends on the body, the government bodies. You're looking at Chinese government bodies, I mean.

We have seen Chinese trademark examiners, for example, a little tougher I guess if the application is filed by a foreign applicant. Not the case in terms of patents. As to Chinese courts, it depends on the locality.

So we can't sort of generalize in terms of whether there are sort of local preferences. But definitely it exists. But it—depending on the context. And I think you can talk to any of the old China hands like Mark and probably—

MALE VOICE: [Interposing] Yeah Mark.

MALE VOICE: Mark with all the statistics.

MR. LAM: Yeah. But in the second question it's—whether you—it's good to go through a firm in Hong Kong. Take our firm as example. We have offices in China as well, say Shanghai. But a lot of the IP function, it's coordinated through Hong Kong, most of it.

There is just a strategic decision in terms of where you put things. If you remember Google, they moved all their Chinese services to Hong Kong. There's a reason why. If you don't want your client information to be able to sort be examined in detail by the Chinese CIA, then there's a reason for operating out of Hong Kong.

But there's a limitation in terms of what foreign firms can do, including Hong Kong firms. Is that—we are like the English solicitor firms. There's a limit in terms of what we can do in terms of standing on our feet in Chinese court.

It's something that China has not opened to foreign service providers as yet. So you basically will be sort of working with two sets of service providers. But then depending on their skills and experience, the total cost may not be any higher, and definitely the results are—there are differences.

I mean I'm not trying to sort of say one is better than the other. But it's depending on the issue that you have. For example, I would definitely say in some cases it's better off if there's limited value for firms like us, the international firms and non-Chinese firms, to get involved because the value added is very low.

In fact, many of our clients, I will just tell them to go straight to some of these like CCPT team which is sort of a historical powerhouse in terms of prosecution of trademarks for example when there is very little value that we can add, i.e. it's a straightforward application; there's no chance of getting opposition and whatnot.

But I hope I answered your questions.

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MS. KOLSUN: One last question before we all go off to the reception.

FEMALE VOICE: - - [The exact question was inaudible, but dealt with the issue of the ownership of website names in China and pirated domain names].

MR. LAM: Well registering .cn domain name is becoming a lot easier these days. When it first became available you can only do it through a local agent. Now you can do it by paying any of the sort of GoDaddy or like—not trying to do any sort of ads here. Sorry. But it's very easy. It's less than the cost of a Starbucks coffee.

And you can—what I'm saying is that if your company's name or brand has already been pirated it takes a long time to recover it, if at all possible, because if you don't have any sort of prior trademark registration or other rights to support your claim there's no chance that you'll be able to sort of reclaim dominion short of buying it off from the pirates.

So instead of trying to sink your money into that and if you want to get into the market and make yourself known, register an alternative name and try to market through that particular one, either as an English character name.

You can call it brand China, something, .cn or what not or come up with a Chinese character equivalent, which is your official Chinese name and use that. And as I said, you don't have to create an all-Chinese website.

All you have to do is to redirect it to your main site. And when you have time and the budget to work on the Chinese site, do it. But at least you have a foothold. Things are getting very sort of globalized these days.

And if you don't get your name out there fast in China—it's a very fast-moving market—you will lose your name in no time. We have worked with brands which are 100 years old. And because they moved too slow the name got squatted and basically they lost a complete market, not only in terms of the core products but all the sort of ancillary products that goes along with it.

They lost the opportunity for licensing use of those, which they are doing for the rest of the world. So that's why I'm saying move fast. And because registration is not a recommendation we can give, I still would recommend that you do the domain name ASAP.

MS. KOLSUN: Okay, thank you to our wonderful panelists. We have a reception outside. So if you have questions that we didn't answer, please feel free to grab them there.

[Everyone exchanging thanks.]

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