We thank the Office of the U.S. Trade Representative for the opportunity to provide comments in this Section 301 investigation. The views expressed in this testimony are presented on behalf of the American Bar Association Section of Intellectual Property Law, and should not be construed as representing the position of the entire ABA.

The Section is the largest intellectual property organization in the world and the oldest substantive Section of the ABA. As the forum for rich perspectives and balanced insight on the full spectrum of intellectual property law, the Section serves as a highly respected voice within the intellectual property profession, before policy makers, and with the public.

First, it is critically important to recognize that the Chinese Government has taken many actions in recent years to improve enforcement of IP rights in China. That said, many concerns regarding the appropriation by Chinese entities of U.S. intellectual property remain. Reports indicate that through the application of various laws, policies, and practices, the Chinese Government forces U.S. companies to transfer technology to Chinese entities as a requirement to doing business in China. One of the ways in which the Chinese Government mandates technology transfer is through its application of the Regulations on Technology Import and Export Administration, which impose mandatory licensing terms with respect to foreign technology licensed or transferred within China. Other forced technology transfer policies include requirements that foreign companies develop certain IP in China, others that require companies to transfer their IP to Chinese entities as a condition to accessing the Chinese market, and others that mandate that Chinese entities be granted ownership of any improvements made from licensed foreign technology. The USTR should urge the Chinese Government to amend the Technology Administration Regulations and other such laws, policies, and practices that the Chinese Government employs to facilitate the forced transfer of technology.
While the Chinese Government took a positive step in amending its General Provisions of the Civil Law to make clear that trade secrets are a subject of civil IP protection, as detailed in the USTR’s 2017 Special 301 Report, trade secret theft is still a significant problem. The Chinese Government must do much more to improve trade secret protections. We agree with the USTR’s recommendations, found in its most recent Special 301 report, that the Chinese Government should develop stand-alone trade secret legislation, issue judicial guidance to improve consistency in the application of trade secret laws, enact judicial reforms to promote a greater use of preliminary injunctions and evidence preservation orders, prevent the filing of baseless claims, and address obstacles to criminal enforcement while preserving the technology innovator’s secrets.

The U.S. Department of Homeland Security recently reported that 88% of counterfeit products seized in the U.S. during FY 2016 originated from China (52%) and Hong Kong (36%), and that the amount of counterfeit goods seized from both has remained in the 80-90% range for the past decade. As to trademark laws, the Section has concerns that enforcement measures are inadequate, penalties are too weak, bad faith registrations and the unauthorized use of well-known marks are a problem, and systemic counterfeiting and widespread piracy still needs to be addressed. China’s trademark registration system has enabled bad actors to misuse it, by granting priority to Chinese applicants over U.S. entities holding similar marks, even those well known in China. The Chinese Government should develop solutions to stop these abuses and the others described in our written submission.

For U.S. creators and producers of copyrightable works, the marketplace in China has been growing in recent years in certain important sectors, the film industry being a particularly good example. Chinese investment, the introduction of improved content protection technology, and an improved environment for filing legal actions and receiving larger awards are all positive signs. Increased administrative enforcement by the National Copyright Administration of China (NCAC) has also helped prevent unlawful copying. However, piracy remains unacceptably high, particularly in the digital marketplace, and more needs to be done to address Illicit Streaming Device (ISD) piracy, piracy of scientific, technical and medical (STM) journal articles, unfettered distribution of circumvention devices, as well as hard goods piracy. In addition, China’s copyright laws are in need of major reform. Copyright protection is needed for sports broadcasts, current criminal liability thresholds are either too high or unclear, the “for the purpose of making profits” standard is too difficult for prosecutors to prove, repeat infringers are not properly addressed, and civil damage awards are still too low to serve as a deterrent.

While Chinese courts have increased damage awards for patent infringement in several recent cases, damage awards are still relatively low and need to be increased significantly to be meaningful. Effective discovery mechanisms of reasonable scope must be made available, courts must increase the frequency with which they grant motions for preliminary injunction or for evidence preservation, and courts must apply the law consistently across China. Application of SAIC’s compulsory license rules and the significant discretion vested in the SAIC in applying those rules undermines the fundamental right of patent holders to exclude others from using their inventions. Those practices raise significant concerns for U.S. companies. The USTR should urge the Chinese Government to amend the SAIC’s IP Abuse Rules to limit the threat of and imposition of unnecessary compulsory licenses.

This is just a summary of our views on the matter. We refer you to our detailed submission for a fuller discussion of the issues and our concerns.

Thank you for the opportunity to share our concerns with you today.