ABA-IPL Chair Scott Partridge testifies before USTR panel on Section 301 investigation concerning China

Earlier this week, ABA-IPL Section Chair Scott Partridge testified before a panel of U.S. officials in connection with the U.S. Trade Representative’s (“USTR”) Special 301 Investigation Concerning China’s Acts, Policies, and Practices Related to Technology Transfer, Intellectual Property, and Innovation. The hearing was chaired by representatives of USTR and attended by representatives from the Department of Commerce International Trade Administration, PTO China Office, DOJ Computer Crime and IP Section, State Department, Department of Treasury, Small Business Administration, Department of Labor and even the White House Council of Economic Advisors, who asked questions of the witnesses. His oral testimony can be found here: https://www.americanbar.org/content/dam/aba/administrative/intellectual_property_law/advocacy/advocacy-testimony-20171010.authcheckdam.pdf The ABA-IPL Section’s written submission to the USTR can be found here: https://www.americanbar.org/content/dam/aba/administrative/intellectual_property_law/advocacy/advocacy-20171927-comments.authcheckdam.pdf

To summarize his testimony on behalf of the Section, Mr. Partridge observed that the Chinese government has taken many actions in recent years to improve enforcement of IP rights in China, but that many concerns regarding the appropriation by Chinese entities of U.S. intellectual property remain. 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 of doing business in China. Trade secret theft is still a significant problem and the Chinese government could do so much more to improve trade secret protections. As to trademark laws, he testified that the Section has concerns that enforcement measures are inadequate, penalties are weak, bad faith registrations are a problem, and systemic counterfeiting and widespread piracy still needs to be addressed. While noting that the market for copyrightable works is improving, Mr. Partridge stated that key legal reforms and enforcement actions are still needed to address piracy, to strengthen copyright protections, improve enforcement, and further improve the marketplace for all sectors. Although damage awards for patent infringement by Chinese courts have increased some, damage awards are still relatively low and need to increase much further to be meaningful. Also, effective discovery mechanisms 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. He emphasized that SAIC’s application of its problematical compulsory license rules raise significant concerns for U.S. companies by undermining the fundamental right of patent holders to exclude others from using their inventions.

Some of the witnesses were extremely critical of the Chinese government. Richard Ellings, from the Commission on the Theft of American Intellectual Property and Stephen Ezell, from the Information Technology and Innovation Foundation, were the most vocal critics of the Chinese government’s forced technology transfer and its support of IP theft. They complained that China not only flouts its IP related WTO obligations but cheats across the board. Mr. Ellings argued that Chinese actors are the world’s most active and persistent perpetrators of economic espionage, most of it government directed, and that China forces foreign companies to disclose their technologies to the government or those companies are forced to enter into a joint venture with a Chinese company and share their secrets, and also pointed out that the vast majority of counterfeit goods come from China. Juergen Stein of SolarWorld described how his company invented a new type of solar cell which Chinese competitors could not replicate allegedly until after SolarWorld’s network was hacked by state sponsored hackers. Daniel Patrick McGahn of American Superconductor Corporation told the story of how his company had invented the circuits and software that serve as the most effective nerve system for new wind turbines, but lost all of its value allegedly when a Chinese partner bribed an employee to give them the latest software then refuse to pay $70 million worth of shipments already delivered.
Others were supportive of the Chinese government. For example, William Mansfield of ABRO argued “that brands who are failing to successfully protect their IP in China have primarily themselves to blame.” He said that, “[w]e are not the English Empire, the world doesn’t need another Treaty of Nanjing, and the time of gunboat diplomacy has long since passed.”