Good afternoon, thank you for inviting our organization to participate in the IP Attaché’s roundtable.

I am Mark Dickson, and I am the current Chair of the American Bar Association’s Section of Intellectual Property Law.

The ABA Section of Intellectual Property Law is the largest intellectual property organization in the world and the oldest substantive Section of the ABA.

Since 1894, we have advanced the development and improvement of intellectual property laws and their fair and just administration.

As the forum for rich perspectives and balanced insight on the full spectrum of intellectual property law, the Section serves as the ABA voice of intellectual property law — within the profession, before policy makers, and with the public.

I want to take a few moments summarize our high-level comments, and then will ask my colleagues who chair the substantive divisions to provide any more specific comments and answers to any questions that you may have. [Introduce ABA Reps]

I will address my comments to copyright piracy, trade secret theft, and trademark counterfeiting.

As an overarching comment – we’d like to applaud the IP Chapter of the recently concluded US-Mexico-Canada Agreement, including, among others:

- Robust Trade Secret Protection section,
- Upgrades in the enforcement of IP rights, including:
  - border measures that were not mandatory in the NAFTA text, requiring the inspection, detention and destruction of counterfeit trademark goods, whether imported or in transit, without a court order once customs officials determine that the goods are infringing;
  - requirements to prohibit camcording in cinemas and
  - to effectively impose liability for aiding and abetting infringement.

We hope that these can be replicated in the new trade negotiations that the Administration is launching.
Copyright Piracy

- As you are all aware, Internet-based streaming of copyrighted works (as compared with other delivery methods such as electronic downloading, over-the-air broadcasting, and embodiment on physical media like CDs, DVDs and Blu-ray Discs) has become an even more vital business model for the U.S. copyright industry than it was previously.
  - For example, it has become the dominant model for recorded music, with streaming services now providing 75% of the U.S. music industry’s revenues in the first half of 2018.\(^1\)
  - Similarly, U.S. streaming video subscription services (e.g., Netflix, Hulu, Amazon Prime Video, etc.) continue to grow rapidly compared to alternative delivery methods.\(^2\)
  - Consumers appreciate the wide selection of content, portability and ease-of-use these services offer, and their increased spending reflects that appreciation.

- As with these legitimate services, however, streaming-based pirate services are also becoming more popular with users, and for the same reasons.
- While long-established channels of piracy, such as peer-to-peer and cyberlocker downloading, remain popular,\(^3\) emerging threats such as illicit streaming to set-top boxes and apps, and stream-ripping services, have gained considerable ground.
  - One 2017 study estimated that six percent of North American homes had a Kodi-type set-top device configured to stream pirated content,\(^4\) and a consumer survey from the same year found that over one-third of all internet users (and over half of those 16-24) accessed infringing music via stream-ripping in the previous three months.\(^5\)
- Left unchecked, there is every reason to expect these consumer-friendly forms of piracy will continue to grow.

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• Internet piracy thrives where intellectual property protections are weak. For that reason, engaging with our trading partners and persuading them to adopt and enforce copyright protections that are equal to the task of combatting modern internet piracy will be a key strategic tool for addressing this problem.

Trade Secret Theft

• You are all aware of the devastating impact that Trade secret theft can have on US companies. I will not belabor those points.

• As you are all aware, engagement with our trading partners and their enforcement agencies is crucial to help stop trade secret theft.
  
  o Particularly where there are multiple parties involved in international supply chains, it may be difficult to obtain details about what information is taken and the extent of its misuse or dissemination without cooperation of other parties in the supply chain or local authorities for that matter.

• We encourage you to do all you can to support efforts to stem trade secret theft.

Trademark Counterfeiting

• With respect to trademark counterfeiting, there are two facets of the problem I’d like to highlight today – the impact on health and safety particularly of counterfeit medicines; and the impact of “predatory foreign websites”.

• On health and safety impact, I know that many of you are aware that intellectual property violations present a severe threat to public health and a high cost to the economy.
  
  o Medicines sold under counterfeit imitations of trademarks are a growing problem with an estimated 1% of the total market, 50% of medicines sold online, and 10–30% of medicines sold in emerging markets, such as Latin America, South East Asia, and Africa. The problem is not limited to foreign jurisdictions with increasing reports of counterfeit medicines in the United States.

• Beyond these considerations, intellectual property violations in the public health sector trigger economic costs – lost productivity of patients who take substandard counterfeit medicines, lost revenue of U.S. manufacturers and corresponding loss of jobs and R&D investment.  

6 The following additional references are representative resources on the issue: Food & Drug Administration, Counterfeit Medicine, https://www.fda.gov/Drugs/ResourcesForYou/Consumers/BuyingUsingMedicineSafely/CounterfeitMedicine/default.
• The Section recommends that the US Government continue efforts to encourage countries to improve their enforcement environment, particularly in the developing countries with a high level of counterfeiting (e.g., China, India, Pakistan, Canada and Mexico).

• In addition, the USG should engage with trading partners to tighten regulation of active pharmaceutical ingredients ("API"), particularly in China and India;
  o the USG should also leverage health regulations and drug approvals to stop infringing drugs, medical devices and biologics.

• There is also the issue of “Predatory Foreign Websites” (PFWs) which is our terms for foreign-originated websites engaged in large-scale counterfeiting of U.S. trademarks (in this case, intentional use of a spurious trademark that is identical to, or substantially indistinguishable from, an authentic trademark, in connection with products that are not authorized by the trademark owner or its agent).7

• In order to combat online counterfeiting, the Section recommends that the US Government should permit trademark rights holders to pursue civil remedies on their own behalf and prosecute criminally and/or undertake civil enforcement of trademark counterfeiting initiated or induced by PFWs and directed to U.S. end-users/customers.

• Also needed to effectively combat online trademark counterfeiting, the U.S. Government should establish and maintain effective border controls to prevent exportation of goods associated with counterfeit trademarks from manufacturing countries such as China and to prevent importation into destination countries.
  o China (and Hong Kong) continue to be the source of the largest percentage of counterfeit products seized by ICE and Customs and Border Protection;
  o 87% of all seizures emanated from these countries in 2017 continuing a decades long problem that has not improved. Greater efforts need to be placed on stopping exports of counterfeit products from China and Hong Kong. 8

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7 By way of further clarification, these comments do not attempt to pull within the definition of “Predatory Foreign Websites” any sites that are already subject to U.S. jurisdiction under existing U.S. law or other treaty obligations, and specifically excludes those sites from their analysis.