

Primer: USTR Special 301 report

An overview of the purpose,
process and key takeaways of
the annual Special 301 report

What is the Special 301 review?

Overview of the Special 301 report



Section 182 of the Trade Act of 1974 gives the United States Trade Representative the authority to identify foreign countries that do not adequately protect U.S. intellectual property rights (IPR)



Priority Foreign Country: the classification given to countries deemed to have inadequate intellectual property laws; these countries may be subject to sanctions



The Special 301 Report is prepared annually by the USTR and aims to help ensure US intellectual property owners are treated fairly in foreign markets



Priority Watch List: this classification indicates that the country has “serious intellectual property rights deficiencies”; these countries are the focus of increased bilateral attention



There are three categories of classification given to countries of concern: (1) Priority Foreign Country, (2) Priority Watch List, (3) Watch List



Watch List: this classification indicates that problems exist in the country regarding IP rights protection

2018 Special 301 review process and timeline

Feb. 8, 2018

Feb. 22, 2018

Feb. 27, 2018

March 2, 2018

Apr. 30, 2018

Deadline for submission of written comments, hearing statements and notices of intent to appear at the hearing from the public

Deadline for submission of written comments, hearing statements, and notices of intent to appear at the hearing from foreign governments

The Special 301 Subcommittee will hold a hearing at the Office of the USTR. If necessary, the hearing may continue on the next business day.

Deadline for submission of post-hearing written comments from persons who testified at the public hearing.

USTR will publish the 2018 Special 301 Report within 30 days of the publication of the National Trade Estimate Report

The Special 301 report involves many federal agencies

Members of the Special 301 Subcommittee



US Trade Representative
(Chair)



Department of
Commerce



Patent and
Trademark Office



Department
of State



Department of Health
and Human Services



Department of
Agriculture



Copyright Office



Council of Economic
Advisers

The Special 301 Subcommittee of the Trade Policy Staff Committee advises the US Trade Representative on which countries to include in watch lists or to designate as Priority Foreign Countries. The subcommittee is made up of various agencies, which include the ones listed above. Various US companies, foreign governments and embassies also submit comments, complaints, and testimony during the review process.

2017 watch lists

Priority Foreign Country



Countries:

- None

Priority Watch List



Countries:

- Algeria
- Argentina
- Chile
- China
- India
- Indonesia
- Kuwait
- Russia
- Thailand
- Ukraine
- Venezuela

Watch List



Countries:

- | | |
|----------------------|----------------|
| • Barbados | • Jamaica |
| • Bolivia | • Lebanon |
| • Brazil | • Mexico |
| • Bulgaria | • Pakistan |
| • Canada | • Peru |
| • Colombia | • Romania |
| • Costa Rica | • Switzerland |
| • Dominican Republic | • Turkey |
| • Ecuador | • Turkmenistan |
| • Egypt | • Uzbekistan |
| • Greece | • Vietnam |
| • Guatemala | |

USTR 2017 Special 301 executive summary

Key takeaways from 2017 Special 301 report

1

China remains on Priority Watch List

- China is home to widespread infringing activity, including trade secret theft, rampant online piracy and counterfeiting, and high levels of physical pirated and counterfeit exports to markets around the globe.
- China imposes requirements that U.S. firms develop their IP in China or transfer their IP to Chinese entities as a condition to accessing the Chinese market; China requires that mandatory adverse terms be applied to foreign IP licensors, and requires that U.S. firms localize research and development activities. Structural impediments to civil and criminal IPR enforcement are also problematic, as are impediments to pharmaceutical innovation.

2

India remains on Priority Watch List

- India has not made sufficient measurable improvements to its IP framework
- Longstanding IP challenges facing U.S. businesses in India include those which make it difficult for innovators to receive and maintain patents in India (particularly for pharmaceuticals and software), enforcement action and policies that are insufficient to curb the problem, copyright policies that do not properly incentivize the creation and commercialization of content, and an outdated and insufficient trade secrets legal framework.
- New and growing concerns, including with respect to draft policies that negatively affect the commercialization of biotechnology, and the positions that India supports and voices in multilateral forum on IP issues, continue to generate skepticism about whether India is serious about pursuing pro-innovation and creativity growth policies.

3

Indonesia remains on Priority Watch List

- Indonesia exhibits a lack of adequate and effective IP protection and enforcement. For example, revisions to Indonesia's patent law has raised serious concerns, including with respect to the patentability criteria for incremental innovations and computer implemented inventions and local manufacturing and use requirements.

USTR 2017 Special 301 executive summary

Key takeaways from 2017 Special 301 report

- 4 IP commitments**
 - The report highlights trading partners, including Chile and Colombia, that have not delivered on IP commitments to the United States.
- 5 Inadequate IP enforcement**
 - Many of the listed trading partners (including Canada, Egypt, Indonesia, Mexico, Turkey, Turkmenistan, and Uzbekistan) do not provide adequate or effective border enforcement against counterfeit and pirated goods; in addition, many listed countries' customs officials lack authority to take ex officio action to seize and destroy such goods at the border or to take such action for goods in-transit.
- 6 Copyright piracy**
 - Several countries including China, Mexico, Romania, Russia, Switzerland, Thailand, Ukraine and Vietnam have not addressed the continuing and emerging challenges of copyright piracy. Countries such as Argentina, Greece, Tajikistan, Turkmenistan, Uzbekistan, and Venezuela do not have in place effective policies and procedures to ensure their own government agencies do not use unauthorized software.
- 7 Risks and challenges**
 - U.S. innovators face challenges (e.g. restrictive patentability criteria), that undermine opportunities for export growth in countries such as Argentina, Canada, India, and Indonesia. Innovators also face (in China, India, Indonesia, Thailand, and Russia) a lack of adequate and effective protection for regulatory test or other data submitted by pharmaceutical and agricultural chemical producers.
 - Inadequate protection for trade secrets in a number of countries, notably in China and India, puts U.S. trade secrets at unnecessary risk.
- 8 Negative market access effects**
 - The report highlights negative market access effects of the European Union's approach to the protection of geographical indications in the EU and third-country markets on U.S. producers and traders, particularly those with prior trademark rights or who rely on the use of common food names.

FDRA 2016 testimony to Special 301 Subcommittee

Overview of IP challenges for the footwear industry

- 1 Inadequate counterfeiting penalties**
 - Often penalties are inadequate to deter criminal enterprises from engaging in trademark counterfeiting operations. In many countries, the penalties imposed on these enterprises are so low that they only add to the cost of doing business.
- 2 Express mail**
 - Illicit websites and e-commerce platforms, the vast majority of which are based in China, ship counterfeit goods in small packages from the United States primarily using express mail and international mail services, making it more challenging for enforcement officials to intercept these goods.
 - The sheer volume of small shipments makes it impossible for CBP to adequately screen or x-ray all incoming mail to detect such shipments. The tremendous acceleration in growth of e-commerce globally will only exacerbate this already troubling trend.
- 3 Trademark rights**
 - In many countries, legal and procedural obstacles exist to securing and enforcing trademark rights. For example, many countries need to establish or improve transparency and consistency in their administrative trademark registration procedures.
 - Judicial systems in developing nations lack transparency and independence, making it difficult for rights holders to pursue claims.
- 4 Domain names**
 - Counterfeiters now commonly register domains that advertise and sell counterfeit goods
 - Many of these counterfeiters use a country code top-level domain to avoid detection and to avoid the reach of the U.S. judicial system. FDRA member companies face significant trademark infringement and lose valuable internet traffic because of misleading and fraudulent domain names.

FDRA 2016 testimony to Special 301 Subcommittee

Country-specific challenges for the footwear industry



China

- Basic IP enforcement in China is grossly inadequate. China continues to be the number one source of counterfeit and pirated goods imported into the United States, accounting for 63 percent of the value seized, while Hong Kong rates second, accounting for more than 20 percent.
- Within China, knockoff footwear purportedly from American's best known sportswear brands is commonly found in brick and mortar stores and Chinese retailers, and in well-trafficked markets.



Russia

- Massive markets of counterfeit goods both physically and online continue to flourish in Russia.
- Enforcement procedures are generally slow and inefficient, a particularly negative sign in a country where infringing goods are not only imported but also domestically manufactured.



Canada

- Canada's IP regime falls short of standards maintained in the rest of the developed world.
- Despite Canada's passage of legislation granting Canadian customs authorities the power to seize imported counterfeit goods, Canada still falls short in sharing information between enforcement authorities and rights holders.



Turkey

- Turkey serves as a key shipment point for counterfeit goods manufactured in Asia and the Turkish government has shown inadequate results in cracking down on this illicit trade.
- Serious issues exist with regard to enforcement, not the least of which is Turkey's requirement that rights holders must pay for the storage of seized counterfeits.