



February 8, 2018

The Honorable Elizabeth L. Kendall
Acting Assistant U.S. Trade Representative for Innovation and Intellectual Property
Office of the United States Trade Representative
600 17th Street Northwest
Washington, D.C. 20508

Re: 2018 Special 301 Review: Identification of Countries Under Section 182 of the Trade Act of 1974 (Docket No. USTR 2017-0024)

Dear Ms. Kendall:

On behalf of the Footwear Distributors and Retailers of America (FDRA) and pursuant to the scheduling notice published by the Office of the U.S. Trade Representative in the Federal Register,¹ I hereby submit the Footwear Distributors and Retailers of America's hearing testimony on the enforcement and protection of intellectual property rights by our trading partners as part of the United States Trade Representative's review under Section 182 of the Trade Act of 1974 (Special 301). FDRA, the national association of the footwear industry and its suppliers, appreciates the opportunity to comment on this issue.

If you have any questions or require additional information, please do not hesitate to contact me.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Matt Priest". The signature is written in a cursive, flowing style.

Matt Priest
President & CEO
Footwear Distributors and Retailers of America

¹ 2018 Special 301 Review: Request for Public Comment and Notice of Public Hearing, 82 Fed. Reg. 61363 (December 27, 2017).

Hearing Statement of the
Footwear Distributors and Retailers of America
To the
Office of the United States Trade Representative
Regarding the
2018 Special 301 Review
Docket No. USTR-2017-0024

Introduction

Founded in 1944, FDRA is governed and directed by U.S. footwear executives and remains the only U.S. trade association dedicated solely to footwear. FDRA serves the full footwear supply chain, from design and development to manufacturing to distribution and retail. Members range from small, family-owned businesses to global brands that sell to consumers around the world. Today, FDRA supports nearly 500 companies and brands, including the majority of U.S. footwear manufacturers.

FDRA member companies work hard to design, produce, and deliver shoes to U.S. consumers. Each year, the U.S. imports approximately 2.3 billion pairs of shoes or 7.2 pairs of shoes for every man, woman, and child in America. Many of these companies also sell brands that reach consumers in markets all over the world. These companies manage supply chains that span the globe, providing them with hands-on familiarity of the significance of intellectual property (IP) and innovation. Because our companies depend on vast global supply chains to produce and sell shoes, they are strongly aware of the need to aggressively challenge the failure of other nations to protect patents, trademarks, and copyright in both law and practice. Attention to these issues supports U.S. footwear jobs and communities nationwide. Protecting IP remains vitally important to our industry, as our members continue to incorporate cutting-edge designs and technology into their products.

As the Office of the United States Trade Representative (USTR) prepares its annual Special 301 report, FDRA would like to highlight several general global IP trends as well as important, country-specific issues of concern.

General Comments on Trends

FDRA supports USTR's efforts to fight counterfeiting and piracy across the globe. After all, the protection of IP is a cornerstone of the knowledge-based economy and establishes the conditions necessary for creativity, innovation, and development of the information society and digital economy. FDRA member companies devote significant resources to develop cutting-edge performance products and vigorously protect the value of their brands. These efforts support thousands of American jobs – jobs that are put at risk by counterfeiting and piracy.

The economic impact of counterfeiting and piracy has taken on a phenomenal global dimension in the past decade, and global trade in counterfeits increasingly targets American footwear and apparel brands. The World Customs Organization's (WCO's) 2016 Illicit Trade Report found that an astounding 35.8 percent of worldwide seizures involved the confiscation of clothing, footwear, and textiles other than clothing.² According to the WCO, many of the leading footwear brands are among the most counterfeited. The WCO's 2015 Illicit Trade Report identified Michael Kors as the second most counterfeited brand in the world by number of cases, second only to Apple.³

FDRA members have noted seven general concerns, or trends, globally, some of which have been noted by USTR in past Special 301 reports:

1. While the growth of e-commerce has dramatically increased choice for consumers and given U.S. footwear businesses new tools and channels to reach those consumers, it has also created countless new opportunities for bad actors. As footwear companies face counterfeiting on online platforms in other countries, they struggle with similar challenges even on U.S.-based online markets. For example, Birkenstock made headlines in 2017 when it pulled all of its products from Amazon in both the U.S. and Europe, citing concerns about rampant counterfeit sales on the platform. In order to address the evolving challenges of U.S.-based and foreign-based online marketplaces, efforts are needed to ensure companies have greater resources to reduce the unauthorized sale of IP-protected products and that there is increased cooperation and collaboration in this area between government authorities, platforms, and rights holders.
2. When Customs and Border Protection (CBP) seizes counterfeit products and alerts the rights holders, many cases never go further than the seizure of the product because of a lack of information. Additional information and processes for better information sharing could help track the real importer, increase enforcement actions, and reduce repeat counterfeit sellers and shippers.

² See World Customs Organization "Illicit Trade Report 2016" at page 140 (report found here: <http://www.wcoomd.org/-/media/wco/public/global/pdf/topics/enforcement-and-compliance/activities-and-programmes/illicit-trade-report/itr-2016-en.pdf?db=web>).

³ See World Customs Organization "Illicit Trade Report 2015" at page 78 (report found here: <http://www.wcoomd.org/-/media/wco/public/global/pdf/topics/enforcement-and-compliance/activities-and-programmes/illicit-trade-report/itr-2015-en.pdf?db=web>).

3. Over the last several years, the footwear industry has witnessed a growing trend whereby labels and tags are shipped separately from infringing products and are attached to the infringing products in the domestic market. Infringers apparently believe that shipping tags and labels in a separate consignment helps to avoid seizure by Customs officials. In many instances, Customs officials are unwilling or not trained to consider trade dress or design patent infringement as a basis for seizure.
4. 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.
5. Infringers often use express mail and postal services to deliver counterfeit goods in small packages, making it more challenging for enforcement officials to confiscate these goods. Illicit websites and e-commerce platforms, the vast majority of which are based in China, ship counterfeit goods into the United States primarily using international mail services, such as the China-based express mail service EMS or China Post. These shipments arrive at international mail facilities and are inspected for entry by U.S. Customs before being transferred to the postal service for delivery. Sellers often fraudulently report the contents or break shipments up into smaller packages to avoid detection. 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 and growth of e-commerce globally will only exacerbate this already troubling trend, not just in the U.S., but globally.
6. In numerous 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. Also, at times, the judicial systems in developing nations lack transparency and independence, making it difficult for rights holders to pursue claims.
7. Counterfeiters now commonly register domains that advertise and sell counterfeit goods. Many of these counterfeiters use a country code top-level domain (ccTLD) to avoid detection and to avoid the reach of the U.S. judicial system. Indeed, FDRA member companies face significant trademark infringement, and lose valuable Internet traffic because of misleading and fraudulent domain names. It can be hard for companies to find redress. A number of foreign registries do not make registration information publicly available and do little to assist aggrieved rights holders. A related concern is that ccTLDs lack transparent and predictable uniform domain name dispute resolution policies (UDRPs). Effective UDRPs should assist in the quick and efficient resolution of these disputes. FDRA would ask USTR to work with U.S. trading partners to provide procedures that allow for the protection of trademarks used in domain names and to ensure that dispute resolution procedures are available to prevent the misuse of trademarks.

In addition to the above-mentioned issues, FDRA notes that the theft of trade secrets has become an increasingly important issue for global brands. For U.S. companies to grow and compete globally, they must have confidence in the legal protections provided to trade secrets domestically and around the world. At times, foreign governments are complicit in, and even participate in, the theft of trade secrets.

In past Special 301 comments, FDRA raised concerns that current U.S. law did not allow companies to pursue a civil action against entities that have engaged in the theft of trade secrets. In 2016, Congress and the Obama Administration took action to address this clear enforcement gap, with the enactment of the Defend Trade Secrets Act (DTSA). The new law permits an owner of a misappropriated trade secret to bring a civil action in federal court if the trade secret is related to a product or service used in, or intended for use in, interstate or foreign commerce. FDRA believes that the DTSA serves as an important deterrent effect on overseas competitors who may otherwise engage in trade secret theft, and that it better equips the U.S. government to advocate for strong trade secrets protection with foreign governments, particularly through trade agreements.⁴

To this end, the U.S.-led Trans-Pacific Partnership (TPP) agreement – along with the many benefits it would have delivered to U.S. footwear companies, workers, and consumers – would have further strengthened the ability for the U.S. to deter trade secret theft in the Asia-Pacific region. In addition, it would have expanded IP protection for American companies and established new rules for e-commerce and digital trade. TPP demonstrates the usefulness of trade agreements in setting standards and creating new enforcement tools for the U.S. in many of the areas highlighted in past Special 301 reports.

While the U.S. has 20 free trade agreements with countries around the world, it does not have a free trade agreement in place with any of the countries highlighted by FDRA below. As the U.S. works to strengthen IP protection and enforcement for American workers and American businesses, FDRA encourages the Administration to enter into new bilateral or multilateral trade agreements that will benefit U.S. footwear companies and consumers.

Country Specific Issues

China and Hong Kong

Strengthening IP protection in China remains imperative, because it is both a dynamic and growing market of footwear consumers eager to buy U.S. brands as well as a key footwear production hub. China has also integrated the use of technology and e-commerce at an incredible pace and scope to deliver products to Chinese consumers, and today China represents a market that involves approximately one fifth of the world's population.

China has made a number of significant improvements in its protection and enforcement of IP rights over the last year. FDRA particularly values the work that the central government has

⁴ See *Key Trade Secret Developments Of 2017: Part 2*, LAW 360 (Feb 2, 2018), <https://www.law360.com/articles/1008628>.

done to raise the importance of IP, but more work needs to be done, especially at the local and regional level. FDRA remains hopeful that the Chinese government, both at the national and sub-national levels, will over time become increasingly aware of the value – both to Chinese consumers and to the Chinese economy – of vigorously protecting IP rights. Indeed, despite many improvements made over the past few years, China is still the leading source of counterfeit goods, including footwear. For this and other reasons, as outlined below, China should remain on the Priority Watch List. USTR should also note the rampant infringement of footwear IP in China in the 2018 Special 301 report.

Continued Rise in Counterfeit Goods

Basic IP enforcement in China is inadequate. China continues to be the number one source of counterfeit and pirated goods imported into the U.S., accounting for 52 percent of the value seized, while Hong Kong ranks second, accounting for 36 percent.⁵ The overall number of footwear units detained by U.S. Customs and Border Protection for IP violations doubled from FY2014 to FY2015 – reaching 10 percent in FY2015 – as footwear became the third most-seized product.⁶ The number grew to 12 percent in FY2016, the last reporting period.

Within China, local officials often turn a blind eye to counterfeiting activity. Knock-off footwear, purportedly from America’s best-known sportswear brands, is commonly found in “brick and mortar” Chinese retailers and in well-trafficked markets such as the Jin Long Pan Foreign Trade Garment Market in Guangzhou, the Luohu Commercial Center in Shenzhen, the Chenghai District in Shantou, the Qi Pu Market in Shanghai, and the Silk Market in Beijing. The Provinces of Guangdong, Zhejiang, and Fujian pose particular challenges for footwear brands, because all three are major footwear hubs, producing both legitimate footwear as well as counterfeit products. In FDRA’s view, input from the central government is needed to ensure that China’s IP laws and regulations are consistently applied.

An area that is particularly important to brands and consumers is increasing protection for designs and trade dress. In his report to the 19th Party Congress, President Xi emphasized China’s innovation-driven strategy and the government’s push for enhanced consumer protection. Ensuring adequate protection for designs and trade dress drives the innovation and entrepreneurship that will improve conditions for those living in China, and it will help prevent bad actors from defrauding consumers with similar-looking products. While some court rulings in China recognizing partial designs and trade dress have led to progress in this area, China should take additional proactive steps. For industrial designs, China should enhance the novelty grace period, adopt the Fourth Amendment to Chinese Patent Law, and join the Hague System.

⁵ See U.S. Customs & Border Protection, “Intellectual Property Rights: Fiscal Year 2016 Seizure Statistics.” Report may be found here: https://www.cbp.gov/sites/default/files/assets/documents/2018-Jan/FY2016%20IPR%20Seizure%20Statistics%20Book%20%28PDF%20Formatting%29_OT.pdf.

⁶ See U.S. Customs & Border Protection, “Intellectual Property Rights: Fiscal Year 2015 Seizure Statistics.” Report may be found here: <https://www.cbp.gov/sites/default/files/assets/documents/2017-Jan/2015%20IPR%20Annual%20Statistics.pdf>.

It should also improve registrability for 3D trademarks and clarify copyright law to more-clearly define “applied art” in order to ensure that industrial designs are protected.

Difficulties of the Legal Landscape

In addition to shortcomings in IP enforcement, China’s complex legal landscape poses many challenges for U.S. brands. Because China is a first-to-file jurisdiction, well-established U.S. brands may discover that an unrelated Chinese party has already registered their trademark, seeking to exploit the reputation of the U.S. brand or to force the American company to pay a fee to “buy back” the rights to its own trademark.

In fact, trademark filings rose nearly 56 percent last year, bringing China’s total filing to more than 27 million in 2017.⁷ FDRA member companies have expressed concerns about this record number of trademark filings. While there has been a reduction in both filing fees and the average time for the government to review these filings, this high volume makes it easier for bad-faith trademarks to register and gain approval, and this could consequently drive up cost for legitimate U.S. businesses that are forced to oppose infringing marks.

China’s 2014 trademark law amendments increase the risk that brand owners will be forced to combat pirates registering marks in bad faith. Under the law, for example, if an existing trademark owner opposes preliminary approval of a mark registered by another party and loses, the mark is deemed valid until and unless a special review board invalidates it. As a result, a bad-faith registrant may not only freely use a mark for years while waiting for a review board without infringing the brand owner’s rights, but also take enforcement action against the brand owner. These bad faith trademark filings need to be addressed more aggressively by the government. FDRA applauds the decision by the government to focus the last four months of 2017 on bad faith trademark filings. FDRA looks forward to seeing tangible improvements from that initiative.

Meanwhile, export companies in China are not held liable for facilitating the sale of counterfeit goods. There is a need to rebalance responsibilities among all actors, particularly with respect to secondary liability. Export companies should be required to carefully check the identity of consignors and consignees, and to retain records and disclose data when circumstances require.

Though China Premier Li Keqiang announced that China will impose “a large sum” of damages against IP infringers, penalties remain inadequate. When a rights holder is able to obtain judicial relief for an IP violation in the footwear and apparel sector, the average award is only in the tens of thousands of dollars, hardly high enough to deter infringers.

⁷ *China Trademark Registration Data Inventory: 2017 applications exceeded 5 million for 16 consecutive years*, BUSINESS INTELLIGENCE NETWORK (Jan. 22, 2018), <http://westdollar.com/sbdm/finance/news/1365,20180122824481939.html> (finding that the number of applications for trademark registration in China exceeded 5 million to 5.78 million, an increase of 55.7% over the previous year.).

U.S. rights holders that endeavor to “work within the system” by filing claims in Chinese court can sometimes face a difficult, unpredictable, lengthy, and costly process, especially if they seek protection from local courts. At times, local courts demonstrate a bias for the local defendant and a lack of understanding of IP matters. As civil actions increase, China should provide IP training to judges and court officials in order to facilitate more consistent application of the law across China. FDRA appreciates the government’s focus on creation of IP courts. This has been very helpful, and FDRA urges the government to consider creating a centralized IP appellate court, which would help create more consistent outcomes for IP rights holders. Hopefully, over time, the court system in China will be better equipped to manage complex IP matters and provide consistent, streamlined opportunities for IP litigants.

Despite FDRA’s hope that the government of China will provide guidance and training to judges and local officials, our member companies have noted a lack of commitment to IP enforcement at the central government level. The Government of China should increase funding and staff for criminal IP enforcement. FDRA member companies have noted that China customs has become less proactive in IP enforcement matters. China customs authorities undertook fewer self-initiated IP inspections in 2016 than 2015. Finally, customs cases are not directly transferred to the Public Security Bureau for criminal investigation, so criminal cases are commonly not pursued. Against this backdrop, it becomes increasingly important to ensure adequate resources to support enforcement of IP rights.

Current Challenges in Online Markets

Concerning IP enforcement online, China is working on issuing its new e-Commerce Law. The draft e-Commerce Law includes a counter-notice process that allows counterfeit sellers to easily defend themselves from notice and takedown actions, and places IP holders in a very disadvantageous position. FDRA is monitoring the legislation to be sure that IP rights holders’ interests are reflected in the new law (*e.g.*, online platforms should be required to take appropriate measures to protect consumers and IP rights holders against the promotion, marketing, and distribution of counterfeit products).

As mentioned, the rise of e-commerce poses evolving and unprecedented challenges for American companies, on both U.S.-based online platforms and global online platforms. This presents a particularly complex problem in China, because of the vast size of its population and the unbelievable growth and integration of technology and e-commerce platforms that reach consumers in China and around the world.

As noted in past FDRA Special 301 comments, Alibaba’s numerous e-commerce sites continue to serve as a significant and escalating source of counterfeit goods sold to U.S. and global consumers. The company has taken steps to address this issue, including the hiring of a well-respected executive in 2015 to tackle IP infringement challenges, bolstering its hiring of IP enforcement staff, and greater engagement with rights holders. However, much more needs to be done, considering the enormous size of these markets, the incredible potential for abuse, and the exponential growth in counterfeit goods sold on the platforms. Alibaba’s Taobao consumer-to-consumer marketplace platform is rife with offerings of counterfeit footwear and other consumer goods, and AliExpress is quickly becoming the number one source of e-commerce in many

countries around the world but lacks adequate procedures in place to screen counterfeit products. All Chinese e-commerce platforms need to take a more proactive approach to counterfeit products – an approach that requires filtering and removing illicit products, rather than relying on brands to trigger time-intensive and expensive takedown processes.

Overall, the adequate protection of IP benefits not only rights holders and their American workers, but also benefits legitimate Chinese manufacturers and Chinese consumers. Because of these shared benefits, FDRA and its member companies will continue to work with stakeholders within China to foster improvements in the IP regime.

Russia

Massive markets of counterfeit goods, both physical 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. This, along with an apparent reluctance by enforcement authorities to take action against large infringers and poorly-staffed IP economic crime police, have led to a deterioration in the level of enforcement. Though the legal system has been improved in certain respects, (*e.g.*, updated and more detailed IP legislation and the creation of IP specialized courts), court proceedings move slowly and judges remain reluctant to award damages. Meanwhile, enforcement bodies, particularly the police and customs officials, are not active in fighting counterfeiting.

Online piracy continues to plague the Russian market, and the government has not established an effective enforcement strategy to combat the growing array of pirate web sites located in the country. Considering the vast size of the Russian e-commerce market, and considering that sporting goods, clothing and footwear are the fastest growing categories, FDRA would suggest that USTR establish a dialogue with the Russian government and enforcement bodies to develop and implement a better strategy to fight against counterfeiting over the Internet. FDRA member companies face a persistent and growing threat of online counterfeiting in, and from, Russia. As Russia prepares for the 2018 World Cup, it is imperative that the country make commitments to address its significant counterfeit problems ahead of the games.

Brazil

Government support for IP enforcement is minimal, whether measured in terms of funding or personnel. In addition, a lack of IP expertise amongst judges and law enforcement authorities represents a major obstacle to address IP infringement. The legal system is less than efficient, to put it mildly. In the judiciary of the State of São Paulo, for example, IP owners have had difficulty obtaining injunctions to seize counterfeit products. For these reasons, several brand owners have stopped even trying to pursue IP infringement in Brazil, because such efforts commonly result in sustained costs with no tangible results.

FDRA also remains concerned that a dangerous precedent may be set in Brazil as it considers new regulations for Internet platforms. Following a similar law project initiated in Argentina, the potential rule would reduce an Internet platform's obligation to remove illegal and potentially IP-infringing products from its site. The law would only require a platform to take down content

after a judicial order, which would create substantial barriers for companies attempting to protect the integrity of their brands.

In addition, because of a complex customs and regulatory system, imported consumer goods in Brazil are often more highly-priced than in other markets. These high prices fuel the smuggling of counterfeit goods onto the black market. FDRA members, which are amongst the more popular consumer brands in Brazil, must often compete with a flourishing black market. In fact, markets for fake goods operate openly in Brazil, most notably the “Galeria Page” in São Paulo. These openly-operating fake goods markets are supplemented by a thriving network of counterfeit goods producers. A very high percentage of the counterfeit goods sold in Brazil are manufactured in Brazil. Nova Serrana city, Minas Gerais State, counts more counterfeit factories than legitimate ones. The United States should pressure Brazil to combat the flagrant manufacturing and selling of counterfeit merchandise throughout the country.

The government of Brazil also needs to provide adequate resources to address the extremely lengthy delays and backlogs in the processing of trademark registrations, design patents, and utility patents. This is critical for footwear companies that rely on trademarks and design patents to protect their innovative products. We applaud efforts by the National Industrial Property Institution to share information with USPTO to facilitate and expedite design patent and trademark registrations, but the process in Brazil remains far too slow and cumbersome.

The European Union

It is worth noting that FDRA member companies have partnered well with European Union-wide entities to coordinate IP policy and to more effectively crack down on trade in counterfeit goods. FDRA member companies have participated in the multi-stakeholder Observatory on Counterfeiting, established after agreement by EU member states in 2009. The Observatory makes recommendations on EU IP policy and legislation, data collection, and efforts to increase consumer awareness. Through the Observatory and other institutions, FDRA member companies have worked with member states such as France, Italy, the U.K. and the Czech Republic to improve IP enforcement.

Nevertheless, challenges still remain in the EU. First, at the Rotterdam Port, footwear companies have previously expressed concerns that counterfeiting is not considered a priority for Dutch law enforcement authorities (FIOD and Customs). The Rotterdam port and the logistics facilities of the Netherlands play a crucial role in the importation and distribution of counterfeit products throughout Europe, yet very few of the detentions at the Port are of U.S.-branded footwear, even though U.S. brands are among the most-infringed trademarks in the world.

In addition, the EU should work to modernize and reinforce its legal framework to better combat online counterfeiting. In past 301 comments, FDRA has recommended the introduction of a duty of care principle, applicable to all actors of the digital value chain. Online platforms should be obliged to act with diligence by taking proactive, reasonable, and appropriate measures in order to protect consumers and IP rights holders against the promotion, marketing, and distribution of counterfeit products. Online platforms should take preventive measures that aim to stop the placement online of counterfeit goods (*e.g.*, filters or measures to secure the traceability of

content providers); should take reactive measures to ensure the swift removal of counterfeit goods (e.g., efficient “notice and takedown” mechanisms); and should take follow-up measures to prevent repeated infringements (e.g., suspension of accounts of counterfeit sellers, and the imposition of sanctions from the first attempt to sell or advertise counterfeit goods).

India and Indonesia

India and Indonesia continue to grow in terms of footwear production for the U.S. market. Indonesia has become the third largest supplier of shoes to the U.S., and India has developed significantly in terms of its leather footwear market. In addition, India has the world’s second largest population and Indonesia the world’s fourth largest. With growing economies, both nations will continue to become increasingly important as key emerging markets of footwear consumers.

For these reasons, FDRA is concerned about the substantial lack of IP protection in both countries, as they continue to be identified on the Priority Watch List in the 2017 Special 301 report. Counterfeiting remains a significant problem in both India and Indonesia, and given the importance of these two countries to a growing number of U.S. companies that make and sell shoes, much more has to be done to strengthen IP protection and enforcement.

Conclusion

FDRA appreciates the opportunity to submit comments on the challenges faced by our member-companies around the world in the protection of their IP rights. As leading global innovators, our members are driving advancements in product design never before seen. Our industry stands on the cusp of innovations that will alter the way global footwear manufacturers produce footwear and consumers purchase footwear. Now more than ever it is vitally important that the U.S. government takes all action to protect these innovations, designs, brands, and images worldwide. We stand ready to work with USTR to bolster respect for, and enforcement of IP, by our trading partners. Doing so protects American jobs and benefits consumers.

Respectfully submitted,



Matt Priest
President & CEO
Footwear Distributors and Retailers of America