

February 6, 2020

The Honorable Daniel Lee
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: 2020 Special 301 Review: Identification of Countries Under Section 182 of the Trade Act of 1974 (Docket No. USTR 2019-0023)

Dear Mr. Lee:

On behalf of the Footwear Distributors & Retailers of America (FDRA), thank you for the opportunity to participate in the 2020 Special 301 Review.

FDRA is the footwear industry's trade and business association, representing more than 500 footwear companies and brands across the U.S. This includes the majority of U.S. footwear manufacturers and over 90 percent of the industry. FDRA has served the footwear industry for more than 75 years, and our members include a broad and diverse cross section of the companies that make and sell shoes, from small family-owned businesses to global brands that reach consumers around the world.

Our member companies work hard to design, produce, and deliver shoes to U.S. consumers. Each year, approximately 2.3 billion pairs of shoes cross U.S. borders (or 7.2 pairs of shoes for every man, woman, and child in America). Many of our footwear companies also sell brands that reach consumers in markets all over the world. These companies manage supply chains that span the globe, so they understand the importance of protecting IP and innovation. We must work to address the failure of other nations to protect patents, trademarks, and copyright in both law and practice. This supports footwear jobs and communities across the U.S.

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

General Comments on Global Trends

FDRA supports USTR's efforts to fight counterfeiting and piracy across the globe. The protection of IP is a cornerstone of the knowledge-based economy and establishes the conditions necessary for innovation. Footwear companies spend hundreds of millions of dollars each year to design, produce, and ship innovative footwear to Americans. Counterfeit footwear threatens jobs in our industry and puts our consumers' trust at risk.

Matt Priest, President & CEO

FDRA's concerns about global IP protection and enforcement trends fall into four categories:

1. **Challenges on E-Commerce Platforms:** With the significant rise of e-commerce, footwear companies have seen a substantial and troubling increase in both unauthorized sales and counterfeiting, as bad actors use popular e-commerce sites to target unsuspecting consumers in the U.S.

- Brands usually have little information on these offenders, because platforms generally do not share the information they have on these sellers with the rights holders.
- It is impossible for brands to get in touch with each and every online seller suspected of selling counterfeits to ask for additional information and pictures. In addition, FDRA member companies have discovered that individuals and entities selling counterfeit goods on these platforms often do so using false identifies, making it impossible for brands to take action.
- The Government Accountability Office (GAO) highlighted in its 2018 report to the Senate Finance Committee that 20 of the 47 products it purchased from third-party sellers on popular e-commerce sites turned out to be counterfeit. Every platform selected by GAO for the study yielded at least one counterfeit good.¹
- FDRA appreciates the Administration's efforts to address this key issue, including the release of recommendations by the Department of Homeland Security (DHS) in accordance with the President's April 2019 Memorandum on Combating Trafficking in Counterfeit and Pirated Goods. FDRA looks forward to working with the Administration on these efforts, including ways to increase enforcement as well as better inform consumers on the prevalence of counterfeit goods sold online.
- For the 2020 Special 301 Report, FDRA encourages the Committee to closely examine the ways in which these current e-commerce channels directly impact IP protection and enforcement globally.

2. **Inability of CBP to Seize Goods Based on Design Patent Infringement:** Bad actors currently take advantage of a loophole to evade U.S. Customs and Border Protection (CBP) and deliver counterfeit footwear to the U.S. market.

- Counterfeiters increasingly ship labels and trademark tags separately from infringing products and attach them to the infringing products once in the domestic market in order to avoid seizure by CBP.
- If the labels are seized by CBP, the more valuable fake shoes will still get in, because under current law, CBP is authorized to seize counterfeit trademarked shoes but

¹ See GAO Report to the Chairman, Committee on Finance, U.S. Senate, January 2018, "Intellectual Property: Agencies Can Improve Efforts to Address Risks Posed by Changing Counterfeits Market" (report found here: <https://www.gao.gov/assets/690/689713.pdf>)

cannot seize a shoe that is clearly a copy of a trademark shoe absent the presence of a logo or distinguishing tag.

- Bipartisan legislation (S. 2987, The Counterfeit Goods Seizure Act of 2019) has been introduced in the Senate that will directly address this issue by giving CBP authority to seize based on design patent infringement.
- A number of other countries, such as Mexico, Japan, South Korea, and the European Union (EU), already allow such design patent enforcement.
- We urge the Administration to work with Congress to enact this legislation as soon as possible to give CBP greater authority to address this critical issue for footwear companies and consumers.

3. **Additional Enforcement Gaps:** There are a number of other areas that contribute to the surge of counterfeit footwear entering the U.S. market.

- 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. The sheer volume of small shipments makes it impossible for CBP to adequately screen or x-ray all incoming mail to detect such shipments.
- 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.
- Customs officials may lack sufficient training or knowledge to consider trade dress as a basis for seizure. In today's 21st century retail environment, the way that a brand presents a shoe – from its appearance to packaging – is a critical part of the customer experience. Companies devote significant resources to innovation in this area, which directly impacts a brand's reputation and the relationship it has built with the consumer.

4. **Inadequate Protections for U.S. Companies in Foreign Markets:** In numerous countries, legal and procedural obstacles exist to securing and enforcing trademark rights.

- Penalties are often 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.
- 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.
- 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. FDRA member companies face significant trademark infringement and lose valuable Internet traffic

because of misleading and fraudulent domain names, and it can be hard for companies to find relief.

- 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.

Country Specific Issues

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 and include strong IP protections for a 21st century economy.

China

FDRA believes the Phase One trade agreement with China is an important first step, but the Administration should immediately work to negotiate a Phase Two agreement that fully eliminates footwear tariffs and further strengthens IP protection in China.

This is key for U.S. footwear companies because China has a dynamic and growing market of footwear consumers eager to buy U.S. brands and it serves 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. Today, this vast Chinese market involves nearly one fifth of the world's population.

China has made a number of significant improvements in its protection and enforcement of IP rights, and FDRA values the work that the central government has done to raise the importance of IP. More work still needs to be done, however, especially at the local and regional level. FDRA is 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. FDRA looks forward to seeing the implementation of commitments made by the Chinese government as part of the Phase One trade agreement that seek to address a number of key issues highlighted below.

Continued Rise in Counterfeit Goods

Basic IP enforcement in China is inadequate. China is still the number one source of counterfeit and pirated goods imported into the U.S. 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. 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.

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. FDRA member companies have expressed concerns about the significant increase 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.

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, and it should also increase funding and staff to ensure adequate resources are in place for criminal IP enforcement.

Current Challenges in Online Markets

The significant growth in e-commerce creates unprecedented challenges for American companies on both U.S.-based online platforms and global online platforms. Because of the vast size of its population and the integration of technology and e-commerce platforms to reach these consumers, this issue poses a particular challenge in China.

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. An apparent reluctance by enforcement authorities to take action against large infringers and poorly staffed IP economic crime police has contributed to the 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. FDRA is also concerned that the procedure for the destruction of seized counterfeit goods does not provide an obligation to inform the rights holders. Rights holders are not invited to participate in the process and to verify whether the goods are actually destroyed.

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 continue to face a persistent and growing threat of online counterfeiting in, and from, Russia.

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. The government of Brazil also needs to provide adequate resources to address 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.

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 downtown in São Paulo, where there have been more seizures but no effective impact on reducing distribution throughout the year. 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 European Union

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. This has included participation 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. FDRA members have also noted improvements in online enforcement and an increased focus on IPR issues in Communications and Recommendations published by the EU Commission.

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. 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 2019 Special 301 report. 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 work 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 U.S. consumers.

Sincerely,



Matt Priest
President & CEO
Footwear Distributors and Retailers of America