

January 27, 2021

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: 2021 Special 301 Review: Identification of Countries Under Section 182 of the Trade Act of 1974 (Docket No. USTR-2020-0041)**

Dear Mr. Lee:

On behalf of the Footwear Distributors & Retailers of America (FDRA), thank you for the opportunity to participate in the 2021 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. The U.S. must work to address the failure of other nations to protect patents, trademarks, and copyright in both law and practice, because this supports U.S. footwear jobs and communities.

IP enforcement is also essential to consumer protection, safety, and trust. As just one recent example, some FDRA Members have found bad actors making counterfeits of products that are designed and marketed as being made of recycled materials, one of the leading areas of innovation for the American footwear industry. This harms brands, damages consumer trust, and undermines important efforts to achieve greater sustainability in our industry.

Strengthening IP protection and enforcement is vital in 2021. With the COVID-19 pandemic, we are witnessing an unprecedented surge in e-commerce, and counterfeiting operations become more prevalent during times of economic uncertainty. As the Office of the United States Trade Representative (USTR) conducts its annual Special 301 Review for 2021, FDRA would like to highlight several global IP trends and country-specific issues of concern to our members.

## **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.

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 over the past few years, 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. During the COVID-19 pandemic, e-commerce shipments have grown exponentially.
  - For online platforms, the seller contact information is not consistently verified and often found to be inaccurate. Even when contact information is available, platforms often do not share full and detailed data on violators with rights owners.
  - Brands do not have the resources or ability to get in touch with every online seller suspected of selling counterfeit or infringing product to ask for additional information and pictures. FDRA member companies have also discovered that many individuals and entities selling counterfeit or infringing goods on these platforms use false identifies, making it impossible for brands to identify the bad actors. Since individuals often provide cover for commercial activity on platforms, all sellers should be verified rather than select entities with sales over a certain threshold.
  - Information provided or displayed by platforms may be misleading to consumers, including fulfillment services provided by platforms, the ranking of a good based on sales, or the advertisement of the good on the platform. For example, the product images, reviews, and seller information can be inaccurate and unrelated to the specific seller or product at issue, and references to "replicas" are often overlooked by consumers. Each of these techniques provides a false sense of legitimacy for counterfeit goods sold on platforms.
  - Under the current court-developed framework for notice and takedown procedures, platforms do not have sufficient motivation to detect and prevent counterfeiting and infringements. They often profit from both the individual sales and by the availability of a broad selection of third-party sellers' products, including counterfeit and infringing goods. In some cases, this encourages platforms to develop long and convoluted notice and takedown procedures for brand owners.
  - On an annual basis, FDRA member companies are forced to file trademark counterfeiting and infringement lawsuits against thousands of platform sellers alleging direct liability – not secondary liability – for selling counterfeit and infringing goods. These lawsuits are limited in their efficacy because (1) many of these sellers are located in China or other countries and have used false contact info to register with the marketplace; (2) these sellers almost never appear in court and

simply default; and (3) the sellers have limited funds in their platform accounts – usually just a fraction of the amount of the judgment our companies are awarded.

- For the 2021 Special 301 Report, FDRA encourages the Committee to closely examine the ways in which these current e-commerce challenges directly impact global IPR protection and enforcement.

**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 U.S. market in order to avoid seizure by CBP.
- If the labels are seized by CBP, the more valuable fake shoes will still enter the U.S. Under current law, CBP is authorized to seize counterfeit trademarked shoes but 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) was introduced during the 116<sup>th</sup> Congress. The bill would directly address the current loophole by giving CBP authority to seize based on design patent infringement.
- A number of other countries, such as Mexico, India, Japan, South Korea, and the European Union (EU), already allow such design patent enforcement.
- FDRA supports the re-introduction of this legislation during the 117<sup>th</sup> Congress, and 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. Almost two million small packages per day already entered the U.S. in 2019, before the COVID-19 pandemic exponentially increased the volume of shipments.
- The quality of information available to CBP on small parcels is as important as the process used by port authorities to communicate with rights holders. In order to increase the effectiveness of enforcement actions, the ability to track real importers and identify the bad actors, we recommend creating standards and automatization for information sharing between authorities and rights holders. One relevant operational advancement would be to migrate the Customs Notices from physical letters to electronic communication format. CBP should also define standards of the information allowed to be shared, like the details of the intermediaries involved in the

importation of the goods. This would facilitate how the IP holders collaborate with the intermediaries in preventing counterfeit goods being shipped from abroad.

- Customs officials may also lack sufficient training or knowledge to consider trade dress as a basis for seizure. In today's 21<sup>st</sup> 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. The judicial systems in many countries also lack proper specialization and training on IP rights.
- 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**

As the U.S. works to strengthen IP protection and enforcement for American workers, businesses, and consumers, 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 new 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. The Amendment to the Patent Law, approved in October 2020, included the passage of the Fourth Amendment, which will make the protection of partial designs available in China with the effective date of June 1, 2021. The term of a design patent has also been extended from 10 years to 15 years. In addition, the Implementation of Patent Examination Guidelines, in line with the Amendments, will strengthen the ability to protect and enforce designs in China.

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 continued progress on 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 addition, the current regulations related to export declaration by Customs make it difficult or almost impossible to trace back to the real owners when export counterfeits are seized.

In FDRA's view, input from the central government is needed to ensure that China's IP laws and regulations are consistently applied. IPR enforcement still does not represent a high priority for some local governments that might perceive it as an obstacle to boosting local economic development. The level of priority, awareness, and expertise of the law enforcement officials also varies in different provinces or cities, with opportunity to improve cross-territory enforcement.

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 costs for legitimate U.S. businesses that are forced to oppose infringing marks. There has been little progress on efforts to advance new regulations or legislation to contain bad faith trademark filers that continue to flood the trademark office.

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.

Collecting evidence and tracing back from online to offline to nail down the source has been a major challenge, with a heavy burden placed on the rights holders. The booming of social media

makes this issue even more difficult. As online IPR enforcement has increasingly become a priority, a large number of enforcement officials need to be trained.

The establishment of three Internet courts in Hangzhou, Beijing, and Guangzhou helps to reduce the rising number of online disputes between citizens in a time and cost-efficient way thanks to the admissibility of blockchain-backed online data as evidence. We look forward to the courts extending this work to trademark infringement cases soon.

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.

## **Vietnam**

Today, Vietnam is the second largest supplier of footwear to the U.S. market, providing the U.S. 20.4 percent of footwear by volume and 25.8 percent by value. Excluding China and Vietnam, the rest of the world provides the U.S. only 12.9 percent of footwear by volume and 24.4 percent by value. When the Trump Administration placed 301 tariffs on Chinese-made footwear, many companies moved production from China to Vietnam in an effort to avoid the new tariffs. This accelerated a sourcing shift that was already taking place, as Vietnam has become an increasingly important country for footwear and apparel production.

Concurrently, more counterfeiters are also moving manufacturing to Vietnam, where they manufacture not only pure counterfeits but also look-alike knockoffs. It has become even more important for Vietnam to strengthen the IP protections available and align with international practices. Vietnam has recently opened a public consultation to review and update its IP legislation. After years of deliberation, China recently added protection for partial designs into its new Patent Law. Vietnam now also has a key opportunity to include clear definitions for the protection for partial designs into its amendments. Equally important is to clarify definitions such as counterfeit trademark goods to consider trademarks or signs which are identical or hardly distinguishable from a trademark currently protected, without the permission from the trademark owner.

On the enforcement side, it is important to highlight that the Vietnamese government has in place an excellent program to control the transshipment of counterfeits from China via Vietnam to Laos, Cambodia, or Thailand. This has established an effective control of counterfeit goods in the South East region. The Vietnamese government also advanced its policies by publishing the Decree 98/2020/ND-CP on August 26, 2020 to address the definition of “quality counterfeit” under Article 192 of its Criminal Code, which was effective on October 15, 2020. This measure, long requested by rights holders, should allow for appropriate criminal prosecution. To this end, it is important to promote technical assistance to build the capabilities for law enforcement and help prosecutors better understand the legal changes and nature of IP rights.

## **Mexico**

Existing provisions in Mexico's Customs Law only give authorities *ex-officio* power to initiate boarder measures, but not to make determination, seize, and destroy IP infringing goods. For that reason, goods that are suspected of IPR infringement still must obtain an order from either the IMPI or the Attorney General's Office for inspection and detainment. The administrative action is usually helpful when the infringer is a well-established business and there is a way of finding a domicile for notifications. The downside is that, as the proceeding is executed as a trial, the costs are extremely high. As a result, the criminal option has become the preferred go-to action for IPR holders to enforce, especially through the AGO's Specialized Unit dedicated to investigating crimes against copyrights and industrial property. Nonetheless, recent budget cuts by the federal government have impacted the AGO's Specialized Unit activity, reflected in less action towards infringing goods.

FDRA encourages the Mexican government to advance its enforcement framework adding power for Customs to seize and destroy counterfeit goods independently. In addition, we encourage the government to work with online platforms for them to proactively i) implement registration requirements for third-party sellers that allow the authentication of both seller and product; ii) block offers for suspicious counterfeit products; iii) ban repeat offenders; and iv) prevent banned offenders from re-registering on the platform in order to reduce the pressure from the increasing volume of small parcels from e-commerce in the system.

## **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).

## **Indonesia**

Today, Indonesia is the third largest supplier of footwear to the U.S. market, accounting for 5.1 percent of U.S. footwear imports by volume and 6.6 percent by value. As the fourth largest country by population, it also serves as a key market for U.S. brands.

FDRA recommend that Indonesia review its trademark opposition proceedings. The Indonesian trademark office has a very narrow interpretation of trademark rights, and in opposition proceedings in general only decide cases in instances where the parties’ mark and goods are nearly identical. Since Indonesia is such a large source of manufacturing, machinery, and footwear production knowledge, improving the procedures is critical to preventing infringers and counterfeiters from obtaining “similar” but not quite identical trademark registrations. In addition, the trademark office should allow for the invalidation/cancellation/opposition appeal process. Today, once a decision is made in an opposition, the only additional recourse by the brand owner is to file costly and time-consuming civil litigation.

## **India**

India continues to grow in terms of footwear production for the U.S. market, particularly for leather upper footwear. In addition, India has the world’s second largest population. With a growing economy, India will continue to become increasingly important as a key market of footwear consumers. FDRA recommends that India work to effectively implement its IP laws and focus on increasing the number of dedicated officials trained in IP matters. India should also modernize manual procedures for IP protections with its trademark office and elevate protection for famous marks. In addition, the “Famous Mark Registry” would benefit from having rules, standards, and timelines established to allow for brands to in fact be able to participate.

## **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,

A handwritten signature in black ink, appearing to read "MPriest".

Matt Priest  
President & CEO  
Footwear Distributors and Retailers of America