

March 8, 2022

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: 2022 Special 301 Review: Identification of Countries Under Section 182 of the Trade Act of 1974 (Docket No. USTR-2021-0021)

Dear Mr. Lee:

On behalf of the Footwear Distributors & Retailers of America (FDRA), please find responses to the following questions raised by the Special 301 Subcommittee of the Trade Policy Staff Committee:

1. Regarding China, on page 7 of your submission you note that: “Customs enforcement in China needs to do more inspection on the small parcels and share information with rightsholders. FDRA recommends increased investigation in this space, including greater collaboration and information sharing between law enforcement authorities and rightsholders.” Can you provide some examples of the types of information that would be most useful for China’s General Administration of Customs (GACC) to share with rights holders? Have these categories of information been requested and refused?

Examples of information that would be useful for rights holders include:

- Seizure number of counterfeit small parcels
- Brands (trademarks) of counterfeited items
- Information of both the sender and the receiver, particularly the repeated and frequent names and addresses
- Waybill number (tracking number)
- Courier company’s info

Rights holders are also interested in understanding how the GACC is going to tighten the postal regulations of small parcels. FDRA Members have been addressing the importance of having access to the categories of information highlighted above in order to tackle the sources of counterfeits more effectively with GACC, and we understand that they are working on it.

2. On China, your submission identified concerns regarding the prevalence of bad faith trademarks and difficulties for U.S. right holders that endeavor to “work within the system.” Are there any specific recommendations that you have to address these concerns?

FDRA has two specific recommendations:

- a. Amend filing requirements to require overt identification of when an application claims a Stylization of letters/numbers to make it easier to identify problems or issues both by CNIPA and third parties. FDRA Members are seeing a trend of applications for word marks that are stylized in such a way that they are infringing designs/logos. Because CNIPA's current system does not require tagging with respect to Stylizations (they just go in a plain word marks), it makes searching and identifying these infringements very difficult.
- b. More active support from CNIPA at the application exam stage to combat bad faith/infringing applications before they are published for opposition (i.e., the point at which the cost and time burden of enforcement then shifts to the brand owner).

3. Regarding the local production of counterfeit goods in Brazil, are you aware of any other locations in Brazil beyond Nova Serrana where such goods are being manufactured?

Nova Serrana remains the main critical location for footwear manufacturing. The city of Franca, in the countryside of São Paulo state, has also been emerging on the production of counterfeit footwear. Apucarana city in the north of Paraná state is a critical location for apparel (mainly for t-shirts and hats). In the metropolitan region of São Paulo, one can find several small manufactures of t-shirts.

a. To your knowledge, are Nova Serrana's counterfeit products are being sold exclusively in Brazil, or in other countries as well?

The footwear manufactured in Nova Serrana is distributed to neighboring countries – such as Paraguay, Bolivia, Uruguay, and Argentina – through the borders.

b. Has FDRA or its members engaged the Federal Highway Police, State Police, or others in Brazil to conduct an operation in Nova Serrana to target these hubs of counterfeit manufacturing?

FDRA members have engaged the Federal Highway Police (PRF) to seize products manufactured in Nova Serrana in the Brazilian roads. There are several cases of trucks inspect by PRF in the North and Northeast regions' roads, resulting in thousands of footwears seized. Some FDRA Members have already organized raids in factories in Nova Serrana supported by judicial orders. PRF has also tried to organize raids in Nova Serrana by request of FDRA members; however, local enforcement agencies in charge of the jurisdiction lack interest and engagement.

4. Your submission states that Indonesia's customs system "lacks a thorough processes for detaining suspicious products and seizing counterfeits." Can you further explain your concerns with Indonesia's customs system and how the Indonesian government could improve intellectual property enforcement at the border?

The customs system in Indonesia is costly and lengthy, posing a huge burden on the rights holders and judicial system. Currently, regardless of whether the interception of a suspicious shipment is initiated by customs or per the request of the brand owner, the brand owner is required to pay a fee equivalent to \$7,233 USD and file a court order to withhold the shipment.

In addition, courts require a bank guarantee for which value is not pre-determined. Although the official fees could be refunded in full at a later stage, this process is costly and time consuming, posing an unnecessary burden on both the brand owner and the authorities.

Practices already implemented by countries such as Japan, Korea, Taiwan, the Philippines, and China – where brand owners are called in to authenticate suspicious shipments as an expert witness – could significantly increase the efficiency and reduce the workloads for courts and customs. In cases where the suspicious products are confirmed to be counterfeits, customs could proceed with the seizure process without having to rely on the courts being able to detain and seize counterfeit products without depending on other authorities.

5. Your submission notes that Brazil’s Council against Piracy and Intellectual Property Crimes (CNCP) released two nonbinding guides: (i) Best Practices Guide for Internet Platforms; and (ii) Guidelines for the implementation of anti-piracy measures by the Government, Right Holders, Payment Service Providers, and Intermediaries.

a. How have companies and platforms responded to these guides?

Relevant platforms acting in the Brazilian marketplace recognize the Guide of Best Practices in E-commerce and are implementing better tools for notice and taken downs. Brand owners have joined mostly through sectoral trade associations. Brand owners and trade associations have also engaged and joined the Guidelines for Payment Service Providers. However, just a few service providers recognize the guidelines, and therefore, there are no measures being implemented.

b. Does compliance with Brazil’s guides afford companies and platforms with any legal presumptions in the context of an allegation of piracy, counterfeiting, or other form of intellectual property infringement?

No; there is no legal presumption or change in the liability scheme for platforms that comply with the guidelines. The guidelines offer several best practices that are voluntary and non-binding. The knowledge of a product being a counterfeit good or a suspicious counterfeit also does not generate an obligation for the platform to remove either the offer or the seller from the marketplace.

6. Your submission states that, in India, “the 10-year trademark backlog at the courts effectively prevents brands from filing utility patents and trademarks in the country.” Please elaborate on this statement and explain how a trademark backlog has affected your members in terms of patent filings.

a. These are IP assets that need to be used for deterrence and enforcement. It takes so long to grant that, in many cases, the subject matter of the filing is no longer relevant by the time the Patent Office starts its exam and/or grants rights. The content has long been surpassed by newer designs/tech.

b. There is no current feedback from the Patent Office on how it views the applications. Filers have no idea if their submissions properly meet Office requirements for grant or not. Continuing

to file without feedback from the Patent Office could result in a huge expense in the long term-filing fees, with added office action fees to work through issues. Timely feedback (i.e., exam/Office Action/grant) from the Patent Office would provide much-needed feedback so filers can address issues and tailor further applications accordingly while hopefully minimizing time and resources spent on examination.

Conclusion

FDRA appreciates the opportunity to respond to questions on footwear raised during this Special 301 Review, and we stand ready to work with USTR to protect footwear IP globally.

Sincerely,

A handwritten signature in black ink, appearing to read "Matt Priest". The signature is fluid and cursive, with the first name "Matt" being more prominent than the last name "Priest".

Matt Priest
President & CEO
Footwear Distributors and Retailers of America