

March 5, 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), please find responses to the following questions raised by the Special 301 Subcommittee of the Trade Policy Staff Committee:

1. Your submission states: “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.” Can you provide the estimated loss in dollar value to American workers and American businesses in the footwear industry due to the proliferation of counterfeit goods?

In fiscal year 2019, U.S. Customs and Border Protection (CBP) seized more than \$1.5 billion worth of counterfeit goods, based on the manufacturer’s suggested retail price (MSRP) had the goods been authentic. CBP seized counterfeit footwear totaling nearly \$38 million, representing two percent of the MSRP of total seizures. In fiscal year 2018, CBP seized counterfeit footwear totaling \$77.5 million, representing six percent of the MSRP of total seizures.¹ In our written testimony, FDRA highlights current enforcement gaps that allow goods to enter the U.S. market undetected, including the volume of small shipments and the ability for bad actors to ship labels and tags separately. FDRA believes that the loss to American workers and American businesses is therefore significantly greater and difficult to fully realize.

2. Your submission states that China is the number one source of counterfeit and pirated goods imported into the United States, with best-selling knock-off footwear from best-selling American brands. Your submission identifies the provinces of Guangdong, Zhejiang, and Fujian as posing particular challenges for footwear brands, because all three are major footwear hubs, producing both legitimate footwear as well as counterfeit products. With respect to the production of counterfeit products, can you provide, either by percentage or dollar value, of the losses your members have faced from counterfeit footwear coming from these three provinces and from China as a whole?

¹ See *Intellectual Property Rights Seizure Statistics, U.S. Customs & Border Protection, 2019, at page 20 and 21* (<https://www.cbp.gov/sites/default/files/assets/documents/2020-Sep/FY%202019%20IPR%20Statistics%20Book%20%28Final%29.pdf>)

China accounted for 48 percent of CBP’s 27,599 nationwide seizures in fiscal year 2019, roughly 13,293 seizures. In fiscal year 2019, China accounted for 66 percent of the \$1.555 billion in MSRP of seizures, or \$1.03 billion. In fiscal year 2018, China accounted for 54 percent of \$1.4 billion in MSRP of seizures, or \$761 million.² Based on these figures, FDRA estimates that China accounted for \$25.1 million in counterfeit footwear seizures from China in 2019 and \$51.2 million in 2018. This number is only a small share of the total amount of counterfeit footwear coming from China, given the clear enforcement gaps highlighted in our written testimony.

3. Please elaborate on the request in your submission for India to “elevate protection for famous marks.” How, in particular, would you suggest India elevate this protection?

FDRA believes that India could elevate its protection for famous marks by advancing its “Famous Mark Registry” from pilot to broader implementation. This should be done in conjunction with establishing clear rules, standards, and timelines that allow for brands’ participation.

4. Your submission states that, while Indonesia will continue to become increasingly important as key emerging markets of footwear consumers, FDRA is concerned about the “substantial lack of IP protection” in Indonesia and that “much more has to be done to strengthen IP protection and enforcement” in Indonesia. Can you further explain you and your members’ intellectual property concerns in Indonesia and how the Indonesian government could improve its intellectual property protection and enforcement?

Indonesia is a developing country that may largely benefit from increasing IP protection to grow its domestic economy. In general, FDRA believes IP protections should be prioritized in all government instances and promoted as an important tool to sustainable growth, including efforts related to protecting the IP rights of domestic brands and small and mid-size enterprises.

From a trademark perspective, we recommend the government revise the exam rules and procedures and then consistently apply them. A number of countries have procedures that can be referenced as a benchmark against international practices and standards, including the United States, South Korea, Canada, the European Union, the United Kingdom, Mexico, and Peru. In Southeast Asia, Singapore is the preeminent model.

In this context, relevant to the footwear sector, the Trademark Office has an opportunity to raise its standards to protect famous marks as well as to improve the process around finding likelihood of confusion more in line with international norms. The Indonesia TMO has, for the most part, extremely high standards for finding likelihood of confusion in opposition proceedings (typically the offending mark must be nearly identical and for nearly identical goods to succeed), even in cases of a famous mark (which under international norms, are typically accorded an even wider scope of rights).

² See *Intellectual Property Rights Seizure Statistics, U.S. Customs & Border Protection, 2019, pages 22-25* (<https://www.cbp.gov/sites/default/files/assets/documents/2020-Sep/FY%202019%20IPR%20Statistics%20Book%20%28Final%29.pdf>)

On the enforcement side, we recommend reducing barriers for brands to use the trademark recordation system implemented by Customs in 2018 and also reducing the complexity of requirements for rightsholders to prove goods are counterfeit. Very few brands have registered their trademarks with Customs authority so far, as the process is costly and presents complex registration procedures.

5. In 2019, the Russian government issued Resolution No. 860 “On the approval of rules for the mandatory labeling of shoes” establishing a mandatory labeling regime for footwear. In 2020, Resolution No. 216 amended Resolution No. 860 to extend the implementation deadline until mid2020. One of the labeling regime’s goals is to combat counterfeit goods in the Russian market by issuing unique tracking identifiers utilizing QR codes, RFID chips, and other technologies.

a. Does this mandatory labeling regime address some of the concerns expressed in your submission about the high level of counterfeit goods in Russia?

From the rightsholder’s point of view, the mandatory labeling regime does not serve the purpose to control counterfeits, and the new labeling system should not be an obligation. The measure which is identified by the government as a procedure to prevent counterfeits entering the market has no effect in reducing the availability of counterfeits accessing the Russian markets. Its implementation has in fact presented new issues that make brands even more vulnerable to counterfeits. Besides that, the requirement risks imposing new trade barriers for original/legal products.

The system’s operator, which is a private company appointed by the Russian government, has not up until now implemented a control mechanism to verify and authenticate IPR ownership of brand’s registrations. Any company could register with the labeling operator, pay money, and receive the QR codes. The codes could be applied on any products, including counterfeits, without control. There is no system of verification of the codes or products with brands and IPR owners. Currently the markets where wholesale of counterfeit products are taking place already offer counterfeit products with QR codes. For instance, counterfeit footwear with QR codes can be found on sale on Sadovod, one of the largest markets near Moscow. The QR codes de-facto legalized large numbers of counterfeit products in the marketplace.

Also, there is no enforcement of the labeling requirement beyond Customs. The labeling operator is not authorized by the government to conduct the checks as their purpose is to collect money from businesses and issue the QR codes. Neither police nor Rospotrebnadzor (the consumer watchdog) are conducting the checks with QR codes readers. However, if an original brand owner might make a technical mistake in the customs declaration, or the labeling operator IT system is not properly functioning, Customs stops the shipments, and the importer is unable to move the goods and shipment until the bug is fixed. Some of the cases can take up to four weeks to resolve, and as a result, the importers lose seasonal sales in the market. No compensation mechanism is in place to address such cases.

b. Do you have concerns about the breadth of product-specific data that must be provided in order to obtain the labels?

Footwear companies remain concerned with sensitive data being requested and collected by the labeling operator in order to issue the codes and track and trace the labeled goods. This information, as well as the records of how the goods are moved and where the labeled goods are sold, is proprietary and commercially sensitive. The data operator being a private and commercial company now has access to all sales information of U.S. footwear and apparel companies in Russia. The data operator collects data on which model, color, size, quantity, and which retail locations footwear and apparel are sold. The operator could easily leverage this data to compete on an unlevel playing field selling this information to competitors of U.S. footwear and apparel companies including counterfeiters.

Additionally, the labeling operator very often experiences technical issues maintaining the availability of the QR codes database necessary to access every point of movement of goods. As a result, very often the wholesale deliveries and shipments are stuck until the technical issues are corrected. This results in significant cost increases in operations and lost sales.

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,



Matt Priest
President & CEO
Footwear Distributors and Retailers of America