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March 24, 2023

The Honorable Darrell Issa
Chair
Subcommittee on Courts, Intellectual
Property and the Internet
Committee on the Judiciary
U.S House of Representatives
Washington, DC 20515

The Honorable Henry Johnson
Ranking Member
Subcommittee on Courts, Intellectual
Property and the Internet
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Issa and Ranking Member Johnson:

Thank you for your leadership to protect intellectual property (IP), fostering American innovation, supporting domestic jobs, fighting dangerous counterfeits, and deterring illicit use of IP.

On behalf of the member companies of the American Apparel & Footwear Association (AAFA)¹, we appreciate this opportunity to provide comments for the record for the Subcommittee on Courts, Intellectual Property and the Internet’s hearing, “Intellectual Property and Strategic Competition with China: Part I,” from March 8, 2023.²

AAFA is the national trade association representing apparel, footwear and other sewn products companies and their suppliers, which compete in the global market. Representing more than 1,000 world famous brands, AAFA is the trusted public policy and political voice of the apparel and footwear industry, its management, and shareholders, its more than three million U.S. workers, and its contribution of more than \$470 billion in annual U.S. retail sales.

Brand protection is a core strategic pillar for the association. AAFA’s Brand Protection Council is charged with advocating for the protection of IP; building awareness of the dangers of counterfeits to businesses, consumers, workers, and the environment.³ We hold bilateral conversations with a range of platforms and members to raise concerns with IP and counterfeiting issues, beyond those reported individually by brands in tools or in brand-to-platform conversations.

As discussed on March 8, leaving absent the roles of an Intellectual Property Enforcement Coordinator (“IPEC”)—and a chief innovation and intellectual property negotiator in the Office of the U.S. Trade Representative—in the Biden Administration⁴ handicaps the administration in not being able to lead a unified and coordinated approach to intellectual property protection and enforcement. We applaud Director Kathi

¹ American Apparel & Footwear Association <https://www.aafaglobal.org>

² The Subcommittee on Courts, Intellectual Property and the Internet will hold a hearing, “Intellectual Property and Strategic Competition with China: Part I,” on Wednesday, March 8, 2023, at 10:00 a.m. EST. <https://judiciary.house.gov/committee-activity/hearings/subcommittee-courts-intellectual-property-and-internet-intellectual>

³ AAFA’s Brand Protection Council: https://www.aafaglobal.org/AAFA/Priority/Brand_Protection.aspx

⁴ AAFA Encourages Pres. Biden to Appoint an IPEC https://www.aafaglobal.org/AAFA/AAFA_News/2022_Letters_and_Comments/AAFA_Encourages_Pres_Biden_to_Appoint_an_IPEC.aspx

Vidal's attention in the past year,⁵ as the Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office, to uncover illegal and bad faith marks, including sanctioning nefarious users and more. Auditing current partnerships that may enable the use of bad faith marks, including the use of pending trademarks, and encouraging comprehensive reviews of incoming applications would help rightsholders with much-needed reinforcements to protect domestic IP from bad faith operators.

These issues are core to American innovation and jobs at home. A study by the U.S. Global Value Chain Coalition stated that about 75% of the retail value of an apparel article imported from abroad and sold in the U.S. comes directly from American ingenuity.⁶ This means that despite being physically sewn overseas, most of the value found in a T-shirt, jeans, dress, or suit was created by Americans and supported American jobs such as quality assurance, social and import compliance, marketing, and web development.

Looking at counterfeits, we must do more to protect consumers from harmful counterfeit products. Online social commerce is expected to grow to \$80 billion in retail sales in the United States.⁷ AAFA member products remain at the top of the IPR most seized items by the U.S. Customs and Border Protection (CBP).⁸ Furthermore, the Congressional Research Service found in March 2022 that "79% of the U.S. population engaged in e-commerce, with clothing as the top category of online purchases," using 2021 figures.⁹

A 2021 Intellectual Property Rights Seizure Statistics report by the U.S. Customs and Border Protection (CBP) found that more than 13% of targeted shipments from China contain counterfeit goods or contraband items out of 420,000 parcels of mail from China each day.¹⁰ Furthermore, a 2021 Ghost Data report showed that about 65% of active counterfeiter accounts were based in China¹¹—researchers found 26,770 active counterfeiter accounts on one platform and more than 20,280 active counterfeiter accounts on another partner platform, in a June-October 2021 window.¹²

The Organisation for Economic Co-operation and Development (OECD) and the EU Intellectual Property Office (EUIPO) have estimated that 55% of dangerous fakes originate in China with counterfeiting moving in "complex trade routes and increasingly sophisticated and flexible criminal networks."¹³ The United States has an opportunity to lead with additional policies to go after the root of the counterfeiting issue. Online platforms

⁵ AAFA Welcomes Kathi Vidal as USPTO Director

https://www.aafaglobal.org/AAFA/AAFA_News/2022_Press_Releases/AAFA_Welcomes_Kathi_Vidal_USPTO_Director.aspx

⁶ The U.S. Global Value Chain Coalition https://img1.wsimg.com/blobby/go/f23cae5a-2434-44f6-91d1-3695bf2115a3/downloads/1btmo725c_680153.pdf

⁷ McKinsey "E-commerce: At the center of profitable growth in consumer goods"

<https://www.mckinsey.com/industries/consumer-packaged-goods/our-insights/e-commerce-at-the-center-of-profitable-growth-in-consumer-goods>

⁸ CBP "Intellectual Property Rights (IPR) Seizures" <https://www.cbp.gov/newsroom/stats/intellectual-property-rights-ipr-seizures>

⁹ Congressional Research Service "International Trade and E-Commerce"

<https://crsreports.congress.gov/product/pdf/IF/IF11194>

¹⁰ Intellectual Property Rights (IPR) Seizures

<https://www.cbp.gov/newsroom/stats/intellectual-property-rights-ipr-seizures>

¹¹ Reuters "Facebook, Instagram are hot spots for fake Louis Vuitton, Gucci and Chanel"

<https://www.reuters.com/technology/facebook-instagram-are-hot-spots-fake-louis-vuitton-gucci-chanel-2022-02-09>

¹² Ghost Data "The Meta Counterfeiting Empire"

<https://ghostdata.io/report/Upd-Meta-Counterfeit-Empire1221.pdf>

¹³ OECD/EUIPO "Dangerous Fakes"

https://euiipo.europa.eu/tunnelweb/secure/webdav/guest/document_library/observatory/documents/reports/dangerous-fakes-study/dangerous-fakes_study_en.pdf

must meet the same requirements, and face the same liabilities, as brick-and-mortar businesses when it comes to the restriction of counterfeit or illicit products that harm American consumers.

AAFA applauds the leadership in the passage of the INFORM Consumer Act as part of the 2023 Omnibus bill. However, more must be done beyond the verification of some third-party sellers. As brands work on diversification to long-term supply chains, investments in meeting sustainability benchmarks and workplace safety initiatives—counterfeiters, transnational criminal organizations, illicit users, and trade cheats introduce dangerous risks for consumers.

AAFA unveiled the results of a counterfeit testing study conducted in March 2022 – including tests on counterfeit clothing, footwear, and other accessories – showing the health and safety dangers that counterfeits present for consumers. Of the 47 counterfeit products tested, 17 products (or 36.2%) failed to comply with U.S. product safety standards. The study found dangerous levels of arsenic, cadmium, phthalates, lead, and more that have been shown to cause adverse health outcomes.¹⁴ AAFA’s study echoes previous government-issued counterfeit reports, which found similar percentages of dangerous counterfeits threatening the health and safety of American families.¹⁵ AAFA members go above and beyond to protect the health and safety of consumers; counterfeits put all that at risk.

Nefarious counterfeiters, masked behind the anonymity provided by online platforms due to little, or no, front-end verification, can take advantage of consumers. Never has the counterfeit problem been at the scale it is today, from dupe influencers¹⁶, fraudulent advertisements¹⁷, and fake websites to the actual counterfeit products being sold to unwitting consumers across platforms – this is a full online destructive digital value chain.

Thank you for your commitment to bringing awareness to these issues—and the work of your dedicated staff members. We have included supportive material from AAFA’s Special 301 Review comments to USTR from January 2023 after this cover note.

Sincerely,



Jennifer Hanks
Director, Brand Protection
American Apparel & Footwear Association

¹⁴ AAFA “Fashion Industry Study Reveals Dangerous Chemicals, Heavy Metals in Counterfeit Products”
https://www.aafaglobal.org/AAFA/AAFA_News/2022_Press_Releases/Fashion_Industry_Study_Reveals_Dangerous_Chemicals_Heavy_Metals_Counterfeits.aspx

¹⁵ GAO Report “Agencies Can Improve Efforts to Address Risks Posed by Changing Counterfeits Market”
<https://www.gao.gov/assets/gao-18-216.pdf>

¹⁶ AAFA “Dupe Influencers: The Concerning Trend of Promoting Counterfeit Apparel, Footwear, and Accessories on Social Media”
https://www.aafaglobal.org/AAFA/Solutions_Pages/Dupe_Influencers_The_Concerning_Trend_of_Promoting_Counterfeits.aspx

¹⁷ AAFA and TRACIT “Fraudulent Advertising Online Emerging Risks And Consumer Fraud”
[tracit_fraudulentadvertisingonline_july21_2020_final.pdf](https://www.aafaglobal.org/AAFA/AAFA_News/2020_Press_Releases/Fraudulent_Advertising_Online_Emerging_Risks_And_Consumer_Fraud.pdf)

AAFA submitted comments as part of USTR’s 2023 Special 301 Review; China highlights are below with¹⁸ additional context provided in March 2023 to USTR’s Special 301 Subcommittee of the Trade Policy Staff.¹⁹

CHINA

AAFA recommends USTR keep China on the Priority Watch List due to the overabundance of counterfeit products originating from the country. The 2021 Intellectual Property Rights Seizure Statistics report by the U.S. Customs and Border Protection (CBP) states, “On average, CBP processes more than 420,000 parcels of mail from China each day. Throughout Operation Mega Flex, CBP found that more than 13 percent of targeted shipments contain counterfeit goods or contraband items.” That equates to an estimated 54,600 counterfeit packages a day from China and over an estimated 19 million fake packages a year imported to consumers in the United States from China. AAFA member products continue to be at the top of CBP seizures; in Fiscal Year (FY) 2021 AAFA member products accounted for 71% of total CBP seizures, compared to 66% in FY 2020.

Furthermore, AAFA sourced a 2021 Ghost Data report in our 2022 Notorious Market comments.²⁰ This Ghost Data report looked at where counterfeiters operated across Meta platforms, finding 26,770 active counterfeiter accounts on Facebook and more than 20,280 active counterfeiter accounts on Instagram, in a June-October 2021 window, with WhatsApp named “a safe tool for counterfeiters” used 76.35% of the time over other online communication tools.²¹ Reuters noted, “...about 65% of the accounts found in 2021 were based in China, followed by 14% in Russia and 7.5% in Turkey.”²² This finding also supports the EU Intellectual Property Office’s (EUIPO) estimates that 55% of dangerous fakes originate in China with counterfeiting moving in “complex trade routes and increasingly sophisticated and flexible criminal networks.”²³ We understand the root of the issue mentioned here includes platforms based in the United States; AAFA offered a range of short-term and long-term solutions in AAFA’s NML comments to advocate for more action at home to help ensure the same checks and balances for online and offline purchases. Measures and policies in the U.S. could serve as a template internationally.

Attention to Bad Faith Marks and Defending Well Known Marks

An AAFA member shared that even if bad faith trademark applications and registrations in China outpace other regions, this brand believes that the Chinese Government recognizes this issue of concern and continues to explore new mechanisms to work with brand owners to address it. Even if these mechanisms are not always effective, and may create new obstacles, China should be recognized by the U.S. Government for focusing on this area.

¹⁸ 2023 301 Review Comments

https://www.aafaglobal.org/AAFA/AAFA_News/2023_Letters_and_Comments/AAFA_Files_2023_USTR_Special_301_Review_Comments.aspx

¹⁹ AAFA Answers Questions from USTR

https://www.aafaglobal.org/AAFA/AAFA_News/2023_Letters_and_Comments/AAFA_Answers_Questions_from_USTR.aspx?WebsiteKey=49c45f4d-69b3-4c66-823a-6d285960fed2

²⁰ AAFA Files 2022 Notorious Markets Comments to USTR

https://www.aafaglobal.org/AAFA/AAFA_News/2022_Letters_and_Comments/AAFA_Files_2022_Notorious_Markets_Comments_USTR.aspx?WebsiteKey=49c45f4d-69b3-4c66-823a-6d285960fed2

²¹ Ghost Data “The Meta Counterfeiting Empire” <https://ghostdata.io/report/Upd-Meta-Counterfeit-Empire1221.pdf>

²² Reuters “Facebook, Instagram are hot spots for fake Louis Vuitton, Gucci and Chanel”

<https://www.reuters.com/technology/facebook-instagram-are-hot-spots-fake-louis-vuitton-gucci-chanel-2022-02-09>

²³ OECD/EUIPO “Dangerous Fakes” <https://euipo.europa.eu/tunnel->

web/secure/webdav/guest/document_library/observatory/documents/reports/dangerous-fakes-study/dangerous-fakes_study_en.pdf

AAFA members are thankful for guidance from U.S. Government (USG) representatives, especially the Patent and Trademark Office, related to the Chinese Trademark Office's (CTMO) current application of Article 4 of the Trademark Law. We appreciate the dialogue the USG is able to have with the China National Intellectual Property Administration (CNIPA) and others to help ensure application of this article will remain a valuable tool against bad faith trademark applicants/registrants and avoid becoming a hindrance to legitimate brand owners.

Brands, however, continue to see numerous bad faith trademark applications despite China's 2019 Trademark Law amendments to provide explicit grounds to prevent and challenge bad faith trademark registrations. In 2021, to follow, China undertook a targeted "action plan" directed at bad faith trademark activity – and a recent overcorrection in 2022 related to Article 4, seems to negatively impact legitimate rights holders and businesses rather than helping them. We are appreciative of China's recognition that further action must be taken to address bad faith as a long-standing issue; however, we have not seen any measurable improvement resulting from this effort and would like to see more transparency moving forward.

The complexity of China's subclassification system and the ability for bad faith registrations to pass examination has required rightful trademark owners to either expand coverage to close off all sub-classes (at a significant expense) or to oppose a deluge of falsely claimed rights by third parties. Stronger cross-class protection is needed based on likely consumer confusion, including a stronger well-known marks (WKMs) system. Additionally, updates to China's WKMs system could go a long way in strengthening the ability of CNIPA and brand owners to prevent registrations of bad faith trademarks. We understand that in mid-January 2023, CNIPA published, proposed amendments to its Trademark Law, including updates to existing frameworks for bad faith and WKMs protection. AAFA is not yet in a position to suggest specific recommendations, but we appreciate CNIPA's ongoing efforts in these areas and encourage CNIPA to engage closely with domestic and foreign industries to create effective systems that reflect market and business realities.

AAFA members shared the following impacts as a result of the growing issue with bad faith marks:

- A company with multiple brands filed over 470 oppositions and more than 200 invalidation/cancellation actions in China, over the past year.
- From January through September (2022), one AAFA member filed just over 200 oppositions in China that involved an allegation of bad faith targeting one of its trademarks; this same member filed another 55 invalidations alleging bad faith.
- In 2022, a company with one brand filed 261 oppositions and 32 invalidations. The financial impact upon these brands to oppose and invalidate/cancel bad faith and infringing marks is enormous—hundreds of thousands of dollars, annually, are spent to file these actions.

The overwhelming number of bad faith and infringing trademarks in China not only result in a significant drain on resources for companies dealing in legitimate business but present a distraction from higher-level issues of infringement and counterfeiting in the Chinese market, online marketplaces, and in the exportation of goods from China. Infringers file trademark applications at record rates, making policing the register difficult—and resource intensive. Applications that make their way through to registrations then require invalidation or cancellation. Pending applications and issued registrations present an obstacle for the expansion of rights to the legitimate owner, especially when allowed for use across platforms for the sale of goods.

Deterrent to Illicit Actors

AAFA members shared that they believe China lacks a deterrent intellectual property rights system due to the structure of the administrative/criminal system and the inability to enforce successful civil cases. Brand owners must reach thresholds to qualify for criminal liability as infringing activity below this threshold may result in administrative enforcement activity and liability; illicit actors see liability as a "cost of doing business" with little to deter infringing activity.

Civil enforcement remains ineffective. One brand shared that it has been successful in obtaining *some* positive outcomes, including pursuing action through China’s Anti-Unfair Competition Law (AUCL); however, overall, success is inconsistent. Members look forward to sustained enforcement with consistent outcomes to deter illicit activity.

Due to weak systems for asset preservation and collection of awards, defendants are often able to hide assets, leaving brands with empty judgments, and unable to recover damages or recoup costs of enforcing their rights.

- One AAFA member reported that this brand worked with Chinese enforcement offices to conduct the following from January – September (2022) for one brand:
 - 31 Customs seizures, 48,579 items were seized.
 - 43 Administration raids, 62,538 items were seized.
 - 4 Criminal raids, 17,039 items were seized.
- Another brand seized 125,000 pairs of footwear at factory/warehouse sweeps and 50,000 pairs of shoes at the border in 2022.

Online enforcement of platforms

AAFA members reiterate many of the same concerns expressed in the association’s 2022 comments. Specifically related to online platforms, AAFA members continue to experience mixed results addressing online infringement of their intellectual property rights, as criminals exploit weaknesses in China’s IP and e-commerce legal systems with widespread online infringement. Often, Chinese e-commerce platforms are willing to engage with trademark holders only on listings that infringe a Chinese registration, confusing consumers, rewarding unfair trade practices, and harming the IP of a legitimate company. China’s e-commerce law does not limit its IP obligations to only those rights for which a Chinese registration has been secured.

AAFA members have unsuccessfully tried to rely on the AUCL to convince e-commerce platforms to refuse or remove listings that represent unfair commercial practices outside the strict bounds of infringement of a trademark registration. These members can use similar (unfair competition) laws in other jurisdictions to work with e-commerce platforms in those jurisdictions to broaden their scope of enforcement; while the laws in each jurisdiction are unique, Chinese e-commerce platforms could take a similarly broad approach. Brands have faced difficulty enforcing copyright on e-commerce platforms even with an active Chinese copyright registration; some e-commerce platforms have refused to recognize this registration, opining that one member’s logo may not constitute an “original work of authorship” under Chinese standards. AAFA members understand that the State Administration for Market Regulation (SAMR) solicited comments on proposed revisions to the e-commerce law in 2021; updating China’s framework is essential to the needs of all legitimate IP owners.

Additionally, we wanted to cross-submit comments from AAFA’s 2022 NML submission to USTR on October 7, 2022.²⁴

- Lazada: “Lazada allows many counterfeit sellers, namely those from China to operate on the platforms.”
- Amazon: On July 28, 2022, Amazon’s Chief Financial Officer stated that third-party sellers “represented 57% of all units sold on Amazon in Q2, the highest percentage ever”²⁵. This tells us that third-party sellers continue to grow on the platform. Further, some estimate that half of Amazon’s products come

²⁴ AAFA Files 2022 Notorious Markets Comments to USTR

https://www.aafaglobal.org/AAFA/AAFA_News/2022_Letters_and_Comments/AAFA_Files_2022_Notorious_Markets_Comments_USTR.aspx?WebsiteKey=49c45f4d-69b3-4c66-823a-6d285960fed2

²⁵ The Motley Fool “Amazon (AMZN) Q2 2022 Earnings Call Transcript” <https://www.fool.com/earnings/call-transcripts/2022/07/28/amazon-amzn-q2-2022-earnings-call-transcript>

from China.²⁶ Given this background, meaningful change cannot be only forward-looking to achieve real reform; more must be done with retroactive verification of the millions of third-party sellers already able to sell by verifying their ability to sell goods bearing trademarks.

- Shopee: “The quality of the counterfeit listings that originate in China is extremely high across all Shopee platforms.”
- Alibaba Cloud: AAFA’s comments around Alibaba Cloud come as AAFA members have shown that Alibaba Cloud *facilitates substantial trademark counterfeiting websites that infringe on U.S. IP* – as requested in USTR’s Docket Number USTR-2022-0010. AAFA members report that it can take at least 7-20 days to remove a fake website, if not longer. These fake websites deceive consumers and obtain personal and financial information and promote the sale of counterfeit goods. Since AAFA filed the NML comments in October 2022, members have continued to share that these problems have only grown with brands not being able to remove fake websites from the platform.

An AAFA member shared issues specific to the rise of the social “influencer” related to DHgate. This brand found that social media personalities acting as linking sites, often with a hidden link, connect followers to specific listings where a follower can purchase counterfeit products. As a result of DHgate’s social media influencer program, illicit sellers have social media influencers promote and link to counterfeit listings on DHgate. In many cases, these influencers are aware and make their audience aware that the product is counterfeit.

- This brand removed more than 60,000 counterfeit listings from DHgate between January to September (2022).
- The DHgate influencer vetting process does not consider the types of products the influencers link to and promote.
- DHgate has not created an effective brand protection program to prevent counterfeit listings from appearing on the live site and is not able to react to counterfeit notice submissions in a way that reduces the number of counterfeits offered on the platform.

AAFA shared in the association’s October NML comments, that the 2020 U.S./China Phase One agreement positions the United States to act—and not just with China, “The Parties shall combat the prevalence of counterfeit or pirated goods on e-commerce platforms by taking effective action with respect to major e-commerce platforms that fail to take necessary measures against the infringement of intellectual property rights.”²⁷ The agreement addresses counterfeits on all platforms, regardless of *where* a platform is headquartered. It even provides more detail in Section E, “Piracy and Counterfeiting on E-Commerce Platforms In order to promote the development of e-commerce, China and the United States shall strengthen cooperation and jointly and individually combat infringement and counterfeiting in the e-commerce market. The Parties shall reduce piracy and counterfeiting, including by reducing barriers, if any, to making legitimate content available in a timely manner to consumers and eligible for copyright protection, and providing effective enforcement against e-commerce platforms.”

²⁶ The Counterfeit Report “The Evil Side Of Amazon’s Unchecked Monopoly”

https://thecounterfeitreport.com/press_release_details.php?date=2022-02-03&id=962

²⁷ Economic and Trade Agreement Between the Government of the United States of America and the Government Of The People’s Republic Of China

https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/Economic_And_Trade_Agreement_Between_The_United_States_And_China_Text.pdf