



2022 Special 301 Review

USTR-2021-0021

To: Mr. Daniel Lee, Assistant U.S. Trade Representative for Innovation and Intellectual Property
Office of the United States Trade Representative

600 17 Street NW, Washington, D.C. 20508

RE: 2022 Special 301 Review: Identification of Countries Under Section 182 of the Trade Act of 1974

Date: January 31, 2022

Docket Number: USTR-2021-0021

Submitted electronically at: www.regulations.gov

Dear Mr. Lee,

IP Justice appreciates this opportunity to submit comments to the United States Trade Representative as part of its 2022 Special 301 Annual Review to assess the adequacy of other countries' laws regarding intellectual property rights.

Founded in 2002 and based in San Francisco, IP Justice is an international civil liberties organization that promotes the public interest and human rights in technology laws and policies. We focus on important tech issues such as Internet freedom, innovation policy, and balanced intellectual property rights. IP Justice participates in a number of international law and Internet policy venues which impact digital rights including the Internet Corporation for Assigned Names and Numbers (ICANN), the UN World Intellectual Property Organization (WIPO), and the UN Internet Governance Forum (IGF). IP Justice has held an accredited consultative status with ECOSOC, the Economic and Social Council of the United Nations, since 2003.

In the comment below, we encourage the recognition of broader policy goals and note countries where intellectual property issues were previously identified by the USTR and measures were subsequently taken in those countries to address those concerns. We appreciate this opportunity to raise these issues and look forward to working with the United States Trade Representative to address the following comments.

Thank you for your consideration in this matter. Please feel free to contact IP Justice at +1 415-349-0863 or info@ipjustice.org if you would like any additional information.

Sincerely,

Robin Gross
IP Justice Executive Director



USTR 2021-0021

UNITED STATES TRADE REPRESENTATIVE

IN THE MATTER OF 2022 SPECIAL 301 REVIEW:

IDENTIFICATION OF FOREIGN COUNTRIES UNDER SECTION 182 OF THE TRADE
ACT OF 1974



I.	GENERAL COMMENT.....	4
II.	PRIORITY WATCH LIST COUNTRIES.....	5
	<i>(i) Creation of the Intellectual Property Chamber within the Supreme People's Court of the People's Republic of China</i>	
	<i>(ii) Creation of the National Committee for the enforcement of intellectual property rights in Saudi Arabia</i>	
III.	WATCH LIST COUNTRIES.....	7
	<i>(i) First ASEAN countries to establish MoUs on the protection of intellectual property rights on the Internet</i>	
	<i>(ii) USMCA's approach to intellectual property rights and U.S trade policy</i>	
IV.	CONCLUSION.....	9



I. GENERAL COMMENT

In its yearly Special 301 Review process, the Office of the US Trade Representative (USTR) identifies foreign countries where intellectual property protection and enforcement has not been adequately strengthened to the USTR's satisfaction. The annual review process also aids in setting US foreign policy objectives for intellectual property protection in foreign countries. Within its report, the USTR has created a *Priority Watch List* and a *Watch List*. Placement of a foreign country on the Priority Watch List or Watch List indicates the USTR's dissatisfaction with that country's handling of US intellectual property protection and can lead to US trade sanctions against that foreign country.

While protection of intellectual property is an important goal, so is balancing that protection with other equally important policy goals such as promoting technological innovation, fair use, economic development, openness, and freedom of expression. The USTR should incorporate these broader policy goals into its annual review process so as to get a more complete picture of the impact from ever-increasing intellectual property rights around the globe. Additionally, efforts to extend intermediary liability for IP infringement to online platforms and marketplaces in the US as well as overseas should be discouraged by the USTR, as such measures tend to create a chilling effect on speech, limit consumer choice, and stifle technological innovation and economic development.

In this comment we further note that a number of foreign countries on these USTR lists, have indeed made the requested changes in their legal systems and increased protection and



enforcement efforts in their countries, and so those changes should be taken into consideration regarding the appropriateness of those countries remaining on the offending USTR lists in 2022.

The following is the comment on specific countries that are under consideration for the USTR's 2022 Special 301 Report and efforts undertaken to increase the rights afforded to intellectual property in those countries.

II. PRIORITY WATCH LIST COUNTRIES

The USTR placed the following countries on its 2021 Priority Watch List: Argentina, Chile, China, India, Indonesia, Russia, Saudi Arabia, Ukraine, and Venezuela. IP Justice highlights the following Priority Watch List countries' efforts to increase the protection and enforcement of intellectual property rights abroad.

(i) Creation of the Intellectual Property Chamber within the Supreme People's Court of the People's Republic of China

The creation of the Chamber of Intellectual Property (“**IP Chamber**”) is part of China's stated desire to modernize the functioning of justice in its territory. China is now the country in which the largest number of intellectual property cases are tried each year. According to the *Annual Report of the Supreme People's Court for 2019*, 418,000 cases related to patents, trademarks or copyrights were tried in the year. China also features one of the fastest case processing times in the world. In the same year, the IP Chamber accepted 1945 cases, of which 1433 were concluded, with an average processing time of 73 days. In the majority of the cases concluded in the second instance, the first instance decisions were upheld (62.3% of the cases) and among the concluded cases, the right holders won the case in 61.2% of the cases. As for the



share of cases involving foreign parties, it amounts to only 8.9% of the cases accepted by the IP Chamber. As for processing times, they are longer when the cases have a foreign element, which can be explained by different procedural rules, delays related to difficulties in notification abroad, or legalization procedures that are imposed on these foreign parties.

In order to participate in the harmonization of the application of law throughout China, the Supreme Court publishes every year its top 10 exemplary civil and administrative cases. The IP Chamber has also established a system to unify judicial standards, notably by allocating cases involving the same IP titles to the same judges or the same panels.

In its two years of operation, the IP Chamber has become a key player in the world of intellectual property, further strengthening the role of the Supreme People's Court in this area. Its decisions and guidelines are an indicator to be followed closely in order to detect future trends and orientations in the Chinese intellectual property landscape. The creation of the IP Chamber and its swift and smooth operation favoring IP holders demonstrate that China has taken significant steps to acquiesce to US demands to increase intellectual property protection and enforcement in China.

(ii) Creation of the National Committee for the enforcement of intellectual property rights in Saudi Arabia

The Saudi Authority for Intellectual Property (“SAIP”) announced in January 2021 the establishment of the National Committee for the Enforcement of Intellectual Property Rights (“NCEIP”). The NCEIP will be responsible for the enforcement of intellectual property rights in Saudi Arabia. It will also be responsible for the creation and development of local intellectual property legislation and the issuance of appropriate implementing regulations. In addition, this



committee will be required to publish reports and case studies to continuously evaluate and improve the local legal framework. Following the signing of Patent Prosecution Highway (“PPH”) agreements with the United States Patent and Trademark Office (“USPTO”), the Japan Patent Office (“JPO”) and the Korean Intellectual Property Office (“KIPO”), the SAIP has also signed a PPH agreement with the Chinese IP Office (“CNIPA”). PPH agreements consist of collaborative agreements between two IP offices with the objective of expediting the processing and granting of patents filed with these offices and relating to the same invention. Thus, PPH agreements will certainly increase patent rights in Saudi Arabia as the USTR has called for.

SAIP represents a significant response to the USTR’s goal of increasing intellectual property rights overseas. IP Justice notes, however, that increasing rights for IP holders without balancing those increases with other important policy goals such as freedom of expression and other human rights can create harmful impacts for society at home and abroad.

III. WATCH LIST COUNTRIES

The USTR placed the following countries on its 2021 Watch List: Algeria, Barbados, Bolivia, Brazil, Canada, Colombia, Dominican Republic, Ecuador, Egypt, Guatemala, Kuwait, Lebanon, Mexico, Pakistan, Paraguay, Peru, Romania, Thailand, Trinidad and Tobago, Turkey, Turkmenistan, Uzbekistan, and Vietnam. IP Justice notes the significant efforts of the following countries to increase the protection afforded to intellectual property right holders in their countries.

(i) First ASEAN countries to establish MoUs on the protection of intellectual property rights on the Internet



As online commercial exchange has increased in recent years, and even more so with the Covid-19 pandemic, initiatives allowing to engage in dialogues between stakeholders, notably e-commerce platforms and right holders have taken hold. It is important that such initiatives not only protect intellectual property rights but also to preserve consumers' rights.

On January 11, 2021, an MoU on the protection of IP rights on the Internet was signed between the Thai authorities, IP rights holders or their representatives, and Internet platform operators. Thus, the Intellectual Property Office of Thailand, the Department of Business Development and the Department of International Trade Promotion signed the text with the platforms *Shopee*, *Lazada* and *Central JD Commerce* and about 20 IP rights holders or representatives of IP rights holders. On March 1, 2021, another MoU was signed, in the Philippines, by *Lazada* and *Shopee* with several local and international trademark holders and business associations. These MOUs define codes of conduct and the signatories commit to work together to stop online sales of counterfeits. Other initiatives may be developed in other ASEAN countries in the coming months. IP Justice believes that it will be advisable to be attentive to the next initiatives in order to ensure the adequate protection of consumers' rights in such initiatives.

(ii) USMCA's approach to intellectual property rights and US trade policy

Canada took significant steps towards heightened protections for intellectual property rights through its signing of the United States - Mexico - Canada agreement ("USMCA"). Canada's agreement to extend the term of copyright protection from 50 to 70 years after the life of the author was a significant concession to the US in the trade agreement. The USMCA also significantly raised the legal protection available to pharmaceutical companies over biologic



drug data in Canada. It also extended trademark protection and enforcement in Canada and imposed criminal penalties and procedures for trade secret theft. The agreement included safe harbor provisions similar to existing US law, limiting liability for Internet intermediaries for the acts of their users. These Internet service providers' safe harbor provisions will generally promote free expression and are balanced with intellectual property rights. Moreover, the USMCA requires ex officio authority for customs officials to stop suspected counterfeit goods. Given the significant changes in local law that Canada agreed to implement pursuant to the agreement, the USTR should reconsider Canada's inclusion on its Special 301 lists.

IV. CONCLUSION

IP Justice appreciates this opportunity to submit comments in this important annual review process. We urge the USTR to consider broader social and policy goals in its analysis of the US' interest and in line with the global public interest. Recognizing that different economies have different interests and that heightening intellectual property rights is not always in every country's best interest could bring greater understanding to the USTR and US policy regarding intellectual property. Allowing flexibilities to better suit local circumstances should be considered in its analysis and final annual report. We also urge the USTR to consider the significant changes that countries have already made in response to US pressure to increase the rights granted to IP holders in other countries. To not do so makes the Special 301 lists appear to be arbitrary political tools rather than serious policy analysis.

The USTR should recognize the important contributions to the economy and society brought on by the growth of the Internet and should work to protect intermediaries and online marketplaces from legal liability for the infringing activities of third parties. Taking



humanitarian interests into account, such as providing affordable access to medicines, especially in countries that are least developed economically, is appropriate in the determination of US foreign policy regarding drug patents or proprietary data about medicine. We urge the USTR to consider broader societal goals such as promoting development and innovation and the free flow of information in its analysis.

IP Justice welcomes an opportunity to engage with the USTR further in this important annual review process and stands ready to provide any additional information requested. Thank you.