

**USTR INITIATES ANNUAL “SPECIAL 301” REVIEW OF COUNTRIES
LACKING ADEQUATE INTELLECTUAL PROPERTY RIGHTS
PROTECTION**

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On December 28, 2016, the Office of the U.S. Trade Representative (“USTR”) released its annual Special 301 notice seeking comments on countries that deny adequate and effective intellectual property protection or deny fair and equitable market access to U.S. persons who rely on intellectual property protection. Section 182 of the Trade Act of 1974, 19 U.S.C. § 2242, requires USTR to identify countries that lack effective intellectual property protection and to determine which countries, if any, should be designated as “priority foreign countries” that engage in the most egregious intellectual property rights violations. The Special 301 process will culminate in the release of USTR’s annual Special 301 Report on or around April 30, 2017. Comments and notice that a participant intends to testify at the public Special 301 hearing are due by February 9, 2017 for the general public and by February 23, 2017 for foreign governments. The Special 301 hearing is scheduled to take place on February 28, 2017. Post-hearing written comments are due by March 3, 2017.

The Special 301 review process serves to pressure U.S. trading partners to comply with international intellectual property norms and bilateral intellectual property commitments. The review provides a mechanism for USTR to identify “priority foreign countries” pursuant to Section 182 of the Trade Act, and to designate such countries on a “Watch List” or “Priority Watch List”—non-statutory tools used by USTR to call attention to IPR violators. U.S. trading partners placed on the Watch List and Priority Watch List are the focus of increased bilateral attention concerning problematic areas of intellectual property protection. The United States may seek dispute settlement, suspend the benefits of trade agreements, or pursue other retaliatory measures with respect to designated priority foreign countries.

In its 2016 Special 301 Report, USTR listed 11 trading partners on its Priority Watch List, including China, India, and Russia. USTR listed an additional 23 countries to its Watch List, including Colombia and Pakistan, and announced that it would be conducting an Out-of-Cycle Review (“OCR”) of both countries during the course of 2016 in order to ensure improvement of certain aspects of intellectual property protection and enforcement. The 2016 report also highlighted key substantive concerns, including: i) inadequacies in trade secret protection in China, India, and elsewhere; ii) troubling indigenous innovation policies among numerous trading partners that may unfairly disadvantage right holders in markets abroad; and iii) the continued growth of digital piracy.

Members of the incoming Trump Administration’s trade policy team have indicated that trade enforcement will be a top priority for the Administration. Moreover, throughout the 2016 presidential campaign, President-elect Trump expressed his belief that the Obama Administration was not aggressive enough in addressing intellectual property theft by U.S. trading partners, particularly China. Then-candidate Trump pledged to crack down on what he

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asserted as China's "outrageous theft" of U.S. goods, and further pledged to "use every lawful presidential power to remedy trade disputes if China does not stop its illegal activities, including piracy." Therefore, the 2017 Special 301 review process could provide the incoming Administration with an initial list of enforcement priorities.

As part of the Special 301 review, USTR seeks comments concerning foreign countries that deny adequate and effective protection of intellectual property rights or deny fair and equitable market access to U.S. persons who rely on intellectual property protection. USTR specifically requests that commenters:

- Provide specific references to problematic laws, regulations, policy statements, executive orders, and administrative or court determinations;
- Mention specific regions, provinces, states or other subdivisions of a country that warrant special attention;
- State whether a particular U.S. trading partner should be named as a priority foreign country or placed on the Watch List or Priority Watch List; and
- Include data, loss estimates, and information regarding the economic impact of weak intellectual property protections on the United States, U.S. industry, and the U.S. workforce.

Comments must be submitted electronically. Special 301 comments are considered public, though submitting parties may designate information as "business confidential" and request that such information be withheld from public disclosure.

Interested parties, including foreign governments, may also elect to testify before the interagency Special 301 Committee at its public hearing on February 28, 2017. The hearing provides a public forum for interested parties and foreign governments to share their concerns directly with USTR and the other agencies that sit on the Special 301 Committee. These other agencies include the Departments of State, Homeland Security (including U.S. Customs and Border Protection and U.S. Immigration and Customs Enforcement), Commerce, Labor, Agriculture, and Health and Human Services (including the Food and Drug Administration), as well as the U.S. Patent and Trademark Office, the Library of Congress, the U.S. Agency for International Development, and a number of other agencies. Interested parties must submit both a notice of intent to testify and a hearing statement by February 9, 2017 (or February 23, 2017 for interested governments).

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