



October 21, 2016

Probir Mehta,
Assistant United States Trade Representative for Innovation and Intellectual Property
Office of the United States Trade Representative
600 17 Street NW
Washington, D.C. 20508

RE: 2016 Special 301 Out-of-Cycle Review of Notorious Markets
Docket Number: USTR-2016-2013
Submitted electronically at www.regulations.gov

Dear Mr. Mehta:

On behalf of the member companies of the American Apparel & Footwear Association (AAFA), we are offering these comments in rebuttal to the filing posted by Alibaba on October 7, 2016.

As previously noted, 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 name brands drawn from throughout the supply chain, AAFA is the trusted public policy and political voice of the apparel and footwear industry, its management and shareholders, its four million U.S. workers, and its contribution of \$361 billion in annual U.S. retail sales.

AAFA takes the issue of counterfeit and trademark theft very seriously. Stolen intellectual property, such as that which occurs through the notorious markets we describe below, costs our members billions in lost sales, damage to reputation, and substantial legal expenses. Ultimately, these costs lead to U.S. job losses and higher costs for U.S. consumers. Counterfeiting also hurts workers who are exposed to poor working conditions and other workplace hazards in the factories that make counterfeit goods, and to consumers by subjecting them to inferior quality or unsafe products.

We were pleased to see Alibaba file comments and reinforce the public commitments and statements Alibaba executives have made during the past year about reducing the number of counterfeits on its platforms. As we noted in our original filing this month, we have taken note of such statements. Real change cannot take place in the absence of such public declarations and the fact that Alibaba takes the Notorious Markets process seriously is indeed a step in the proper direction.

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In our rebuttal comments, we will address three elements we noted in the October 7 filing by Alibaba – scale, transparency, and its assessment of progress as measured against the 2016 Notorious Markets report.

Scale

The reality remains that (a) Alibaba platforms, in particular TaoBao, contain a disturbingly high number of counterfeits and (b) the systems and processes Alibaba has put in place to prevent this high number remain woefully inadequate to address this enormous problem. The October 7 Alibaba filing in fact acknowledges this deficiency, citing a novel “So Big It Fails” defense by pointing to the volume of merchants and listings on its platforms. We patently reject that defense, particularly since Alibaba continues to expand its reach and has announced plans to grow even more.

Such a defense also rings hollow, given the public statements that Alibaba executives have made. For example, in a *Wall Street Journal* op-ed published in June 2015, Alibaba Chairman Jack Ma notes,

“Counterfeit goods are absolutely unacceptable, and brands and their intellectual property must be protected. Alibaba is only interested in supporting those manufacturers who innovate and invest in their own brands. We have zero tolerance for those who rip off other people’s intellectual property.”

Yet, the October 7 filing suggests that there is in fact an acceptable or tolerable level of counterfeits, particularly for big companies like Alibaba.

Alibaba is one the largest and fastest growing global online marketplaces, and is one of the largest technology companies in the world. Citing its size as an obstacle to addressing a counterfeit problem it has enabled and unleashed is deeply troubling.

Transparency

We further note that the October 7 filing contains numerous redactions. For example, the first footnote contains a redaction on the number of counterfeits Alibaba believes is on its site. Is that a small percentage, or something large, such as the 67 percent figure that Chinese government authorities have estimated?

Such redactions are, of course, Alibaba’s right since these numbers were presumably shared with the U.S. government in a business confidential manner. But the redactions prevent the public and industry stakeholders from independently assessing the effectiveness of Alibaba’s efforts, including its own self-declared policing efforts.

Those numbers that are reported are not presented in context nor are they compared against time or scale benchmarks. For example, one cited statistic suggests that 380 million listings have been removed during the past twelve months, but it is unclear how this figure compares with the 1.5 billion total listings that were also cited. Are we to believe that at one point Alibaba found that 25 percent of its total listings were

counterfeit, or were those listings removed and possibly replaced by other counterfeit listings (which certainly reflects the experience many of our members report).

Other numbers are not even suggested through a redaction, but their absences speaks to a glaring omission. For example, the October 7 filing notes that Alibaba has spent resources on test buys but does not report what percentage of those buys showed counterfeits.

This lack of transparency raises numerous questions and unfortunately undermines Alibaba's credibility in making claims of its own progress.

2016 Notorious Market Benchmarks

The October 7 filing addresses the three substantive benchmarks that USTR enumerated in the December 2016 Notorious Markets report. As we noted in our earlier submission, USTR urged that Alibaba's efforts to address these concerns be "***undertaken without delay***" (emphasis added). We will comment on Alibaba's October 7 filing in each benchmark.

A. Simplifying Taobao's processes for rights holders to register and request enforcement action.

Although the October 7 filing details a number of actions that will be implemented this month, later this year, or at some point in 2017, it seems evident that – other than announcements, meetings, and hiring decisions – very little tangible program changes occurred during the past ten months. Again, while we look forward to swift implementation and evaluation of these changes, we must stress that they are proposed to occur in the future.

We note as well that some of these changes are ones that Alibaba executives had told us they had previously made. For example, full migration to a "three strikes" policy – one such future change – was the subject of a two-hour meeting AAFA and Alibaba executives discussed in Las Vegas on the margins of the MAGIC trade show in August 2014. At the time, we were assured that Alibaba already had in place a three strikes program, and our discussion was focused on whether Alibaba could move to a more rapid system that would penalize infringing merchants faster and keep them from reappearing under new identities. It is unclear if the new three strike alignment policy announced in the October 7 submission will address AAFA's concerns.

B. Making Taobao's good faith takedown procedures generally available.

While some AAFA members have reported they have been able to participate in the good faith takedown program, others have been unable to gain access. Companies still report difficulty in gaining designation as a good faith operator or in using the program itself, making the "good faith" claim suspect. Some members report that the program is still inconsistently applied from day to day.

The October 7 filing states that there are “900 brands” in the good faith program, an increase from the previous year. While that increase is on its face a welcome development, no information is given on whether these brands are able to make effective use of the program or whether they incur significant financial or other burdens to participate. Such burdens become a barrier to smaller brands.

C. Reducing Taobao’s timelines for takedowns and issuing penalties for counterfeit sellers.

On average, our members’ experiences during the past ten months have shown little change. While some have reported minor or modest improvements when they have been able to work intensively with Alibaba liaisons, others report exasperating delays – both within and outside the good faith program. Further, the section on the October 7 submission on this benchmark is incomplete and heavily redacted making independent review and analysis of the data impossible.

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In conclusion, we renew our nomination of Alibaba and its platforms for the 2016 Notorious Markets report. While we do welcome the various announcements that Alibaba has made during the past year, and which are echoed in its October 7 filing, those announcements alone are not enough to address the counterfeit menace that saturates Taobao and its sister sites. Moreover, marginal improvements, *even if they are occurring as is suggested by Alibaba’s October 7 filing*, must be viewed in the context of the size and scale of the Alibaba’s platforms themselves. They must also be viewed in the context of the past few years in which USTR and various stakeholders have been repeatedly frustrated at the very slow pace of change.

Thank you for your immediate attention to this important issue. I look forward to continuing this dialogue to protect American ingenuity and competitiveness abroad.

Please contact me if you have any additional questions at slamar@aafaglobal.org or via phone at 202.853.9347.

Sincerely,



Stephen Lamar
Executive Vice President