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ECTA Anti-Counterfeiting Committee Report October 2021 – FY 2020

I. Legal developments

1. *Next Investments, LLC v. Bank of China, No. 20-602 (2d Cir. 2021)*

In 2013, Nike, Inc. ("Nike") and Converse Inc. ("Converse") brought a trademark infringement action under the Lanham Act against hundreds of participants in Chinese counterfeiting networks. The district court entered five prejudgment orders, a default judgment, and one postjudgment order against defendants, who never appeared in court. Each order enjoined defendants and all persons acting in concert or in participation with any of them from transferring, withdrawing or disposing of any money or other assets into or out of defendants' accounts regardless of whether such money or assets are held in the U.S. or abroad. In 2019, Nike's successor-in-interest, Next Investments ("Next"), moved to hold appellees—six nonparty Chinese banks—in contempt for failing to comply with the asset restraining orders, requesting \$150 million in compensatory damages.

The District Court contempt motion, holding that the asset restraints did not apply to the Banks' Chinese branches. The court relied on New York's well-established "separate entity" doctrine, under which post-judgment asset freeze orders do not apply to foreign banks' branches even if they operate a New York branch.

On Appeal, Next argued that the separate entity rule shouldn't be a "get-out-of-jail-free card" for enabling counterfeiting, among other things. However, the Second Circuit found that the District Court did not abuse its discretion in denying sanctions because there were "fair ground[s] of doubt" as to whether: (i) the asset restraints bound the banks extraterritorially in light of New York's "separate entity rule" and principles of international comity given potentially conflicting Chinese law; and (ii) providing "routine financial services" constituted "active concert or participation" that "aided and abetted" the judgment debtors in violation of Rule 65(d).

2. *E.D.N.Y. Docket No. 21-CR-417 (SJ) (August, 2021)*

On August 11, 2021, four members of an international smuggling ring, were indicted in a Brooklyn Federal Court for allegedly trafficking over \$130M in counterfeit goods to the U.S. from China. According to the 14-count indictment, the defendants participated in a counterfeit goods scheme in which they imported generic goods into the United States from China, applied brand labels to those goods in workshops, some of which were controlled by the defendants, and then sold those counterfeit-branded goods to retail and wholesale purchasers. The charges

against the defendants include conspiracy to traffic and trafficking in counterfeit goods and money laundering. The government's case is being handled by the Office's General Crimes Section.

II. Legislative Updates and Developments Related to Counterfeit Issues

1. USTR – Phase One Agreement: U.S. and China (2021)¹

Under the Phase One agreement, which was signed on January 15, 2020 and took effect on February 14, 2020, China made a number of commitments, which include stronger Chinese legal protections for patents, trademarks, copyrights, as well as improved criminal and civil procedures to combat online infringement, pirated and counterfeit goods. However, USTR 301 Special Report (2021)² states that recent steps to reform IP-related laws and regulations “require effective implementation and fall short of the full range of fundamental changes needed to improve the IP landscape in China.” USTR also notes that large quantities of counterfeit supplies related to COVID-19 originated from China.

2. S.936 - INFORM Consumers Act (2020-2021)³

The INFORM (Integrity, Notification, and Fairness in Online Retail Marketplaces) Consumers Act was introduced in Senate on May 26, 2021. The INFORM Consumers Act directs online marketplaces to verify high-volume third-party sellers by acquiring the seller's government ID, tax ID, bank account information, and contact information. High-volume third-party sellers are defined as vendors who have made 200 or more discrete sales in a 12-month period amounting to \$5,000 or more. The online marketplace will also need to supply a hotline to allow customers to report to the marketplace suspicious marketplace activity such as the posting of suspected stolen, counterfeit, or dangerous products. The bill presents an exception for individual high-volume third-party sellers that permits them not to have their personal street address or personal phone number revealed to the public if they respond to consumers' questions over email within a reasonable timeframe. The bill's requirements would be implemented by the FTC and violations would be subject to civil penalties.

3. H.R.5374 - SHOP SAFE Act (2021-2022)⁴

On September 29, 2021 the House Judiciary voted, by 30-8, to pass the SHOP SAFE (Stopping Harmful Offers on Platforms by Screening Against Fakes in E-Commerce) Act. The legislation proposes to amend the Trademark Act of 1946 and establish contributory trademark liability for online marketplaces based on the sale of counterfeit products by third-party sellers on their platforms.

This legislation establishes that an electronic commerce platform shall be liable for trademark infringement by a third-party seller of goods that implicate health and safety unless the platform

¹https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/Economic_And_Trade_Agreement_Between_The_United_States_And_China_Text.pdf

²[https://ustr.gov/sites/default/files/files/reports/2021/2021%20Special%20301%20Report%20\(final\).pdf](https://ustr.gov/sites/default/files/files/reports/2021/2021%20Special%20301%20Report%20(final).pdf)

³<https://www.congress.gov/bill/117th-congress/senate-bill/1843?r=6&s=1>

⁴<https://www.congress.gov/bill/117th-congress/house-bill/5374>

takes certain actions. Specifically, the platform may be contributorily liable if the seller uses a counterfeit mark in connection with selling, offering, or advertising such goods on the platform. The platform may avoid such liability by taking certain actions, including (1) requiring the seller to be available for service of process in the United States, (2) verifying the seller's identity and contact information, (3) requiring the seller to agree to not use counterfeit marks with goods sold on the platform, (4) implementing technical measures to prescreen listings on the platform and remove listings for goods being sold with a counterfeit mark, and (5) implementing policies to remove and ban repeat offenders

III. Notable Recent Seizures (2020-2021)

- A. On October 12, 2021, CBP officers working at the Dallas Fort Worth International Airport intercepted a shipment manifested as pencil bags but instead were packed with various designer bags totaling a Manufacturer's Suggested Retail Price of \$314,000. The shipment originated in Vietnam and was destined for the Dallas. When CBP officers opened the boxes, they found 153 items bearing trademarked brands including Prada, Chanel, Gucci, Louis Vuitton, Dior, Burberry and Fendi. The shipment was turned over to CBP's Fines, Penalties and Forfeitures branch who will slate the shipment for destruction.⁵
- B. On September 10, 2021, 30 CBP officers assigned to the Port of Louisville, KY seized 66 separate shipments containing 3,345 counterfeit designer watches worth \$67.07 million, and the flow of counterfeit watches continue. On October 4 and 5, CBP officers made two seizures of 59 Rolex and three Audemars Piguet counterfeit designer watches. Had these watches been real, they would have been worth \$2.68 million. Historically, counterfeit watches and jewelry have been one of the top seized counterfeit products by CBP, with more than a quarter of the counterfeit goods coming from Hong Kong. Counterfeit watches and jewelry make up almost half of the total MSRP of seized goods (an average of \$650 million over the last two years).⁶
- C. CBP officers in Cincinnati recently seized two shipments containing a total of 500 pieces of counterfeit Cartier jewelry. If the jewelry—which came from China and Hong Kong—had been genuine, it would have been worth \$5.24 million. On August 16, officers inspected the first shipment containing 450 Cartier Love bracelets and rings, originating from China. Two days later, officers were inspecting freight from Hong Kong when they discovered a second shipment of counterfeit Cartier bracelets mixed among other various bracelets. The shipment contained 50 Cartier bracelets. All of the Cartier bracelets and rings were determined to be counterfeit.⁷

⁵ <https://www.cbp.gov/newsroom/local-media-release/cbp-seizes-fake-designer-handbags-wallets-worth-314k>

⁶ <https://www.cbp.gov/newsroom/local-media-release/louisville-cbp-continues-see-and-seize-counterfeit-designer-watches>

⁷ <https://www.cbp.gov/newsroom/local-media-release/52-million-worth-fake-cartier-jewelry-seized-cincinnati-cbp>

- D.** CBP officers assigned to the Los Angeles/Long Beach Seaport in coordination with import specialists from the Consumer Products and Mass Merchandising (CPMM) and Apparel, Footwear and Textiles (AFT) Centers of Excellence and Expertise seized 39,243 counterfeit designer products arriving in two containerized cargo shipments from China, on July 19 and July 30, respectively. CBP officers discovered sandals, handbags, sneakers, hats, wallets, backpacks, mobile phone cases, and belts bearing numerous registered and recorded trademarks, such as Gucci, Dior, Chanel, Yves Saint Laurent, Louis Vuitton, Prada, Yeezy, Versace, Fendi, Balenciaga, Burberry, Chrome Hearts, Nike, Air Jordan, and Ferragamo. If genuine, the seized merchandise would have had a combined estimated manufacturer's suggested retail price (MSRP) of \$53,745,802.⁸
- E.** CBP officers in Philadelphia seized a counterfeit Chinese cache of vehicle parts on July 14, 2021 that were destined to an address in Feasterville-Trevoze, Pa. The shipment consisted of 5,657 pieces that included vehicle door locks, hinges, powered mirrors, steering wheel switches, headlights and taillights, grills, rear bumpers, and paint kits. CBP officers suspected the auto parts to be counterfeit and detained them. Officers consulted with CBP's automotive experts at the agency's Centers of Excellence and Expertise who worked with trademark holders and confirmed that the automotive parts were counterfeit. The manufacturer's suggested retail price of the automotive parts is \$295,052.⁹
- F.** On June 21, 2021, CBP officers assigned to the Los Angeles/Long Beach seaport in coordination with import specialists from the Consumer Products and Mass Merchandising (CPMM); Apparel, Footwear and Textiles (AFT) and the Pharmaceuticals, Health and Chemicals (PHC) Centers of Excellence and Expertise (Centers) seized 57,607 counterfeit products arriving in a containerized cargo shipment from China. The seized items included 47,490 counterfeit Cialis pills and 10,117 pieces of wearing apparel and footwear in violation of the Christian Dior, Versace, Gucci, Givenchy, Louis Vuitton, Chanel, Nike Air and Swoosh designs and registered and recorded trademarks. If genuine, the seized merchandise would have had an estimated manufacturer's suggested retail price (MSRP) of \$12,709,782.¹⁰
- G.** On June 2, 2021, U.S. Customs and Border Protection (CBP) officers working at the Houston seaport intercepted over 70,000 various counterfeit Apple and JBL electronics, namely, various Apple products including Air Pod Pros, Apple Watches, Lightning Cables, protective cases and JBL speakers. Upon inspection, the items were deemed counterfeit, had they been genuine, the combined Manufactured Suggested Retail Price (MSRP) would have reached \$4,061,224.66.¹¹

⁸ <https://www.cbp.gov/newsroom/local-media-release/cbp-foils-attempts-smuggle-over-53-million-worth-fake-designer-products>

⁹ <https://www.cbp.gov/newsroom/local-media-release/philadelphia-cbp-seizes-nearly-300k-counterfeit-auto-parts-china>

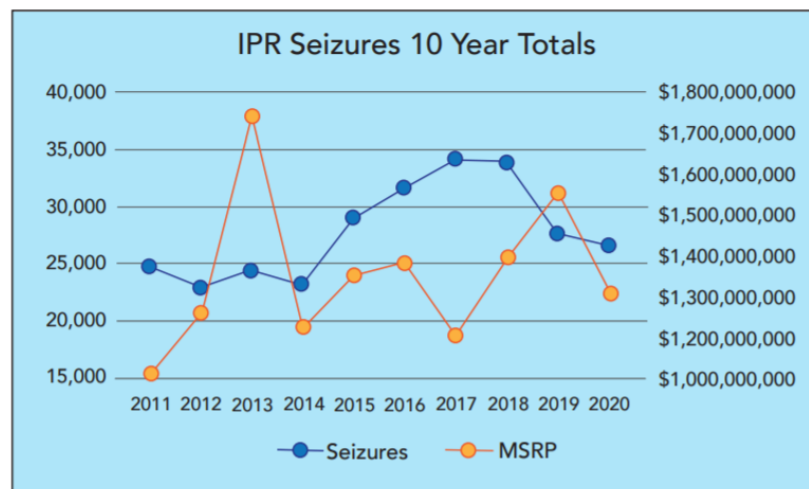
¹⁰ <https://www.cbp.gov/newsroom/local-media-release/fake-cialis-pills-footwear-and-wearing-apparel-worth-over-127-million>

¹¹ <https://www.cbp.gov/newsroom/local-media-release/cbp-seizes-4m-fake-apple-jbl-items>

- H. In May, 2021, CBP announced a new formal partnership arrangement with NIKE, Inc. today as part of the Donations Acceptance Program. Under its partnership with CBP, NIKE, Inc. is donating proprietary technology to aid in authenticating a variety of NIKE, Inc. merchandise and prevent counterfeit products from entering the United States. CBP and NIKE, Inc. will test the tool at a limited number of international mail and express consignment facilities.¹²
- I. On May 18, 2021, CBP officers in Indianapolis detained a shipment arriving from China that was heading to Arecibo, Puerto Rico. The shipment contained 4,550 counterfeit medical face masks from fashion designers such as Dior (1,150), Louis Vuitton (1,100), Gucci (1,400), Burberry (400), and Fendi (500). An import specialist determined the items were counterfeit. If these items were real, the total MSRP for these would have been more than \$1.36 million.¹³

IV. U.S. Customs Statistics Fiscal Year 2020¹⁴

Fiscal year (FY) 2020 was another successful year for intellectual property rights (IPR) enforcement. The total number of seizures decreased from 27,599 seizures in FY 2019 down to 26,503 in FY 2020. The total estimated manufacturer’s suggested retail price (MSRP) of the seized goods, had they been genuine, was over \$1.3 billion, down from \$1.4 billion in FY 2018.



¹² <https://www.cbp.gov/newsroom/national-media-release/cbp-and-nike-inc-partner-prevent-counterfeit-shipments-entering>

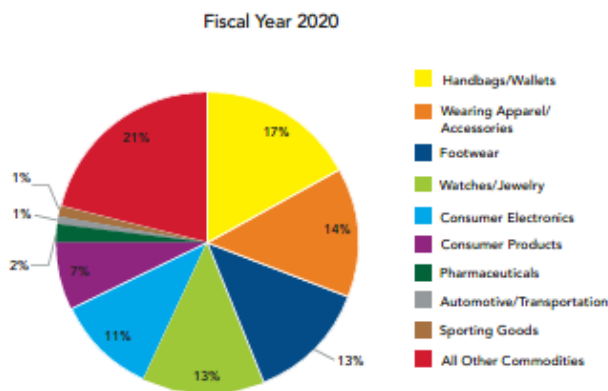
¹³ <https://www.cbp.gov/newsroom/local-media-release/13m-designer-face-masks-seized-cbp-indianapolis>

¹⁴ https://www.cbp.gov/sites/default/files/assets/documents/2021-Sep/101808%20FY%202020%20IPR%20Seizure%20Statistic%20Book%2017%20Final%20spreads%20ALT%20TEXT_FINAL%20%28508%29%20REVISED.pdf

In FY 2020, CBP saw a shift in certain product category seizures, including counterfeit, unapproved, or otherwise substandard COVID-19 related products that threatened the health and safety of American consumers, including: counterfeit face masks, prohibited COVID-19 test kits and prohibited Chloroquine tablets; roughly 51% originated from China.

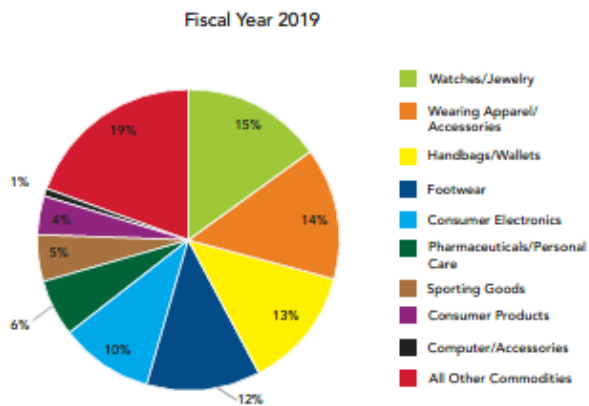
COVID-19 Related Seizures FY 2020		
Product	# of incidents	# of items seized
Counterfeit face masks	352	12.7 million
Prohibited COVID-19 test kits	378	180,000
Prohibited Chloroquine tablets	221	38,000

A. Seizures by Product



Number of Seizures: 26,503

2020		
Products	Seizures	% of Total*
Handbags/Wallets	4,597	17%
Wearing Apparel/Accessories	3,592	14%
Footwear	3,460	13%
Watches/Jewelry	3,460	13%
Consumer Electronics	3,024	11%
Consumer Products	1,932	7%
Pharmaceuticals	495	2%
Automotive/Transportation	299	1%
Sporting Goods	206	1%
All Other Commodities	5,438	21%
Number of Seizures	26,503	100%



Number of Seizures: 27,599

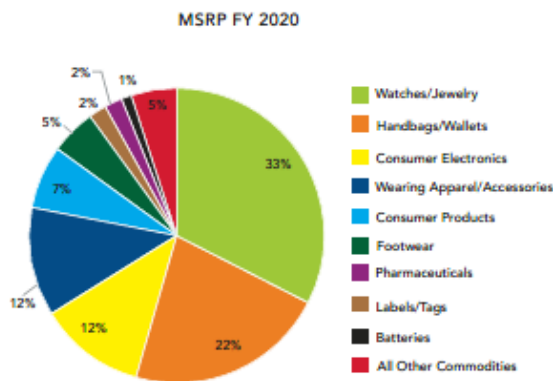
2019		
Products	Seizures	% of Total*
Watches/Jewelry	4,242	15%
Wearing Apparel/Accessories	3,841	14%
Handbags/Wallets	3,653	13%
Footwear	3,249	12%
Consumer Electronics	2,681	10%
Pharmaceuticals/Personal Care	1,779	6%
Sporting Goods	1,510	5%
Consumer Products	1,219	4%
Computers/Accessories	318	1%
All Other Commodities	5,107	19%
Number of Seizures	27,599	100%

*Seizures involving multiple product categories are included in the "All Others" category. Because the individual percentage figures are rounded, in some cases, the sum of the rounded percentages for a given fiscal year is slightly higher or lower than 100 percent.

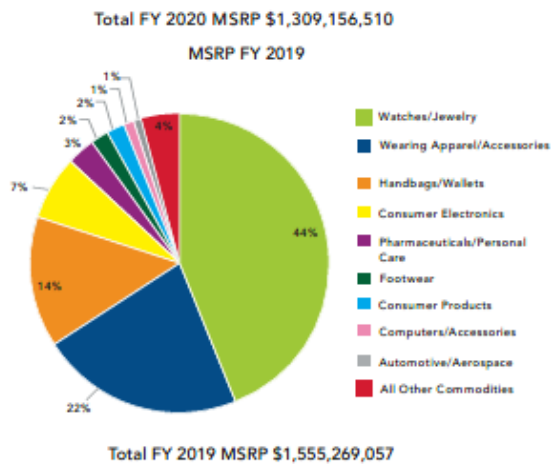
The above chart shows the total number of seizures by product. In FY2020, a total of 26,503 seizures were made, slightly less than the year before. Handbags and Wallets became the most seized product category in FY 2020, with 17% of all seizures. Wearing Apparel and Accessories, usually the most seized product category, took second place at 14%, followed by Footwear and Watches/Jewelry, which are head to head at 13%. In addition, while we see a rise in Consumer

Electronics from 2019, at 11% from 10%, significantly less products were seized in Pharmaceuticals, which decreased from 1,779 in FY 2019 to 495 in FY 2020.

B. Seizures by MSRP (Products)



FY 2020		
Products	MSRP	% of Total*
Watches/Jewelry	\$ 435,249,467	33%
Handbags/Wallets	\$ 282,702,448	22%
Consumer Electronics	\$ 162,234,924	12%
Wearing Apparel/Accessories	\$ 157,226,661	12%
Consumer Products	\$ 85,470,866	7%
Footwear	\$ 63,146,456	5%
Pharmaceuticals	\$ 20,414,897	2%
Labels/Tags	\$ 19,823,791	2%
Batteries	\$ 14,432,379	1%
All Other Commodities	\$ 68,454,621	5%
Total FY 2020 MSRP	\$ 1,309,156,510	100%
Number of Seizures	26,503	100%



FY 2019		
Products	MSRP	% of Total*
Watches/Jewelry	\$ 687,167,057	44%
Wearing Apparel/Accessories	\$ 343,732,063	22%
Handbags/Wallets	\$ 212,781,760	14%
Consumer Electronics	\$ 105,957,198	7%
Pharmaceuticals/Personal Care	\$ 48,771,870	3%
Footwear	\$ 37,994,046	2%
Consumer Products	\$ 27,907,721	2%
Computers/Accessories	\$ 13,216,628	1%
Automotive/Aerospace	\$ 12,142,621	1%
All Other Commodities	\$ 65,598,093	4%
Total FY 2019 MSRP	\$ 1,555,269,057	100%
Number of Seizures	27,599	100%

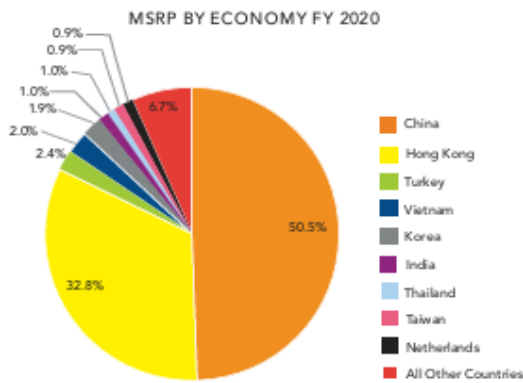
*Seizures involving multiple product categories are included in the "All Others" category. Because the individual percentage figures are rounded, in some cases, the sum of the rounded percentages for a given fiscal year is slightly higher or lower than 100 percent.

If the seized products were genuine, their Manufacturer Suggested Retail Price (MSRP) would have been \$ \$1,309,156,510 in FY 2020. Compared to FY 2019, their MSRP has decreased by 8%. The number of total seizures also decreased to 26,503 in FY 2020 from 27,599 in FY 2019. In FY 2020, the most seized product by MSRP remained Watches/Jewelry, but by a lesser

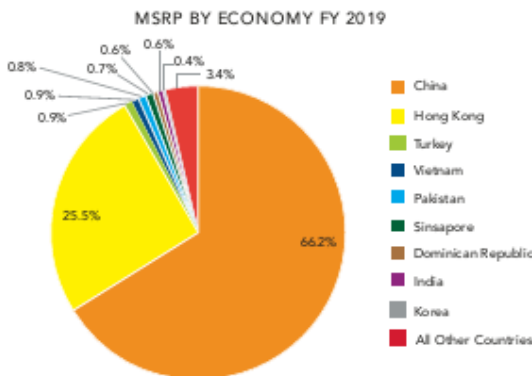
amount compared to FY 2019. A lower number of seized Handbags/Wallets, Consumer Electronics and Wearing Apparel/Accessories can also be seen in the MSRP.

Another notable difference compared to FY2019, is the absence of the Automotive/Aerospace category. Furthermore, a decrease in the seized value of Pharmaceuticals and Personal Care products is visible.

C. Seizures by MSRP (Country of Origin)



FY 2020		
Trading Partner	MSRP	% of Total*
China	\$ 660,767,476	50.5%
Hong Kong	\$ 428,961,694	32.8%
Turkey	\$ 31,237,035	2.4%
Vietnam	\$ 25,803,755	2.0%
Korea	\$ 25,282,668	1.9%
India	\$ 12,862,390	1.0%
Thailand	\$ 12,601,807	1.0%
Taiwan	\$ 12,143,980	0.9%
Netherlands	\$ 11,796,923	0.9%
All Other Countries	\$ 87,698,782	6.7%
Total FY 2020 MSRP	\$ 1,309,196,510	100%
Number of Seizures	26,503	



FY 2019		
Trading Partner	MSRP	% of Total*
China	\$ 1,030,181,869	66.2%
Hong Kong	\$ 397,276,566	25.5%
Turkey	\$ 14,240,890	0.9%
Vietnam	\$ 13,566,034	0.9%
Pakistan	\$ 12,157,097	0.8%
Singapore	\$ 10,452,581	0.7%
Dominican Republic	\$ 9,542,456	0.6%
India	\$ 9,539,580	0.6%
Korea	\$ 5,633,115	0.4%
All Other Countries	\$ 52,688,870	3.4%
Total FY 2019 MSRP	\$ 1,555,269,057	100%
Number of Seizures	27,599	

*The aggregate seizure data reflect the reported country of origin, not necessarily where the seized goods were produced. Because the individual percentage figures are rounded, in some cases, the sum of the rounded percentages for a given fiscal year is slightly higher or lower than 100 percent.

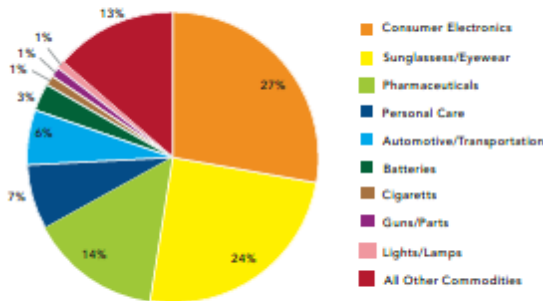
Note: the seizure data reflect the reported country of origin, which is not necessarily the country where the seized products were produced.

Unsurprisingly, most of the intercepted items originated in either China or Hong Kong, however, China’s share in the total MSRP has gone down by 44% in FY 2020. At the same time, although Hong Kong is the second largest region for seizures, after China, its total MSRP decreased from FY 2019 by nearly 8%.

Also, of notable importance, is the increase in the MSRP of items arriving from Korea, Turkey, Vietnam, Korea and India, which increased by 127%, 75%, 62%, and 30%, respectively. The MSRP of items arriving from Pakistan was dropped off the list in FY 2020, while Netherlands added to the list at 0.9% of the total MSRP.

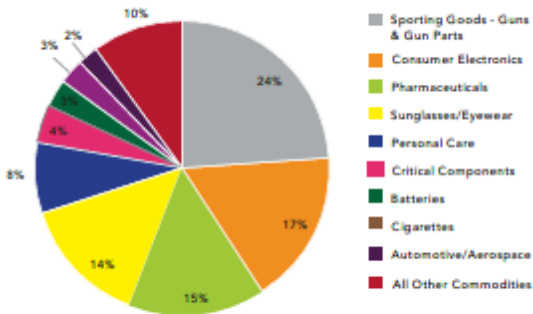
D. Health, Safety and Security Seizures

Health, Safety, and Security FY 2020



Number of Seizures: 3,487

Health, Safety, and Security FY 2019



Number of Seizures: 5,859

FY 2020		
Health, Safety, and Security	Seizures	% of Total*
Consumer Electronics	944	27%
Sunglasses/Eyewear	844	24%
Pharmaceuticals	501	14%
Personal Care	236	7%
Automotive/Transportation	216	6%
Batteries	88	3%
Cigarettes	82	2%
Guns/Parts	71	2%
Lights/Lamps	58	2%
All Other Commodities	447	13%
Number of Seizures	3,487	100%

FY 2019		
Health, Safety, and Security	Seizures	% of Total*
Sporting Goods - Guns & Gun Parts	1,428	24%
Consumer Electronics	989	17%
Pharmaceuticals	858	15%
Sunglasses/Eyewear	818	14%
Personal Care	490	8%
Critical Components	216	4%
Batteries	186	3%
Cigarettes	163	3%
Automotive/Aerospace	149	3%
All Other Commodities	562	10%
Number of Seizures	5,859	100%

*Shipments with multiple types of products are included in the "All others" category. Because the individual percentage figures are rounded, in some cases, the sum of the rounded percentages for a given fiscal year is slightly higher or lower than 100 percent

CBP also reported on seizures in the health, safety and security categories. In FY 2020 there has been an astonishing 51% decrease in seizures in this category from FY 2019. Consumer Electronics have risen as the top seized products in FY 2020, accounting for 27% of seized goods, replacing Sporting Goods - Guns & Gun products, which are no longer listed as a seized product category. Pharmaceutical seizures also decreased from 858 in FY 2019 to 502 in FY 2020, which represents 15% and 14% of total seizures, respectively.

V. 2021 Special 301 Report: Country Reports¹⁵

On April 30, 2021, The Office of the United States Trade Representative (USTR) released its annual Special 301 Report on the adequacy and effectiveness of trading partners' protection of intellectual property rights and the findings of its Review of Notorious Markets for Counterfeiting and Piracy (the Review), which highlights online and physical markets that reportedly engage in and facilitate substantial trademark counterfeiting and copyright piracy.

In this year's Report, trading partners on the Priority Watch List present the most significant concerns this year regarding insufficient IP protection or enforcement or actions that otherwise limited market access for persons relying on intellectual property protection. Nine countries — Argentina, Chile, China, India, Indonesia, Russia, Saudi Arabia, Ukraine, and Venezuela — are on the Priority Watch List. These countries will be the subject of particularly intense bilateral engagement during the coming year.

Twenty-three trading partners are on the Watch List, and merit bilateral attention to address underlying IP problems: Algeria, Barbados, Bolivia, Brazil, Canada, Colombia, Dominican Republic, Ecuador, Egypt, Guatemala, Kuwait, Lebanon, Mexico, Pakistan, Paraguay, Peru, Romania, Thailand, Trinidad & Tobago, Turkey, Turkmenistan, Uzbekistan, and Vietnam.

VI. Developments at United States Trade Representatives¹⁶

In August, 2021, President Biden nominated Chris Wilson as the Chief Innovation and Intellectual Property Negotiator at the Office of the United States Trade Representative. The position has not been filled since its creation in 2015, and was created via a provision in the Trade Facilitation and Trade Enforcement Act of 2015 with the task “to conduct trade negotiations and to enforce trade agreements relating to United States intellectual property and to

¹⁵ [https://ustr.gov/sites/default/files/files/reports/2021/2021%20Special%20301%20Report%20\(final\).pdf](https://ustr.gov/sites/default/files/files/reports/2021/2021%20Special%20301%20Report%20(final).pdf)

¹⁶ <https://www.whitehouse.gov/briefing-room/statements-releases/2021/08/10/president-biden-announces-ten-key-nominations/>

take appropriate actions to address acts, policies, and practices of foreign governments that have a significant adverse impact on the value of United States innovation.”

In his new role, Wilson will be responsible for conducting trade negotiations and enforcing trade agreements relating to US Intellectual Property.