



July 29, 2019

Ms. Raquel Cohen
The Office of Intellectual Property Rights
International Trade Administration
U.S. Department of Commerce
1401 Constitution Ave. NW, Room 21028
Washington, DC 20230

VIA Federal eRulemaking Portal at <http://www.regulations.gov>

**Re: Report on the State of Counterfeit and Pirated Goods Trafficking
and Recommendations (Docket No. DOC-2019-0003)**

Dear Ms. Cohen:

Intellectual Property Owners Association (IPO) appreciates the opportunity to provide comments on the state of counterfeit and pirated goods trafficking through online third-party marketplaces and recommendations for curbing such trafficking.

IPO is an international trade association representing companies and individuals in all industries and fields of technology who own, or are interested in, intellectual property rights. IPO's membership includes about 200 companies and close to 12,000 individuals who are involved in the association either through their companies or as inventor, author, law firm, or attorney members. IPO membership spans over 30 countries.

IPO advocates for effective and affordable IP ownership rights and offers a wide array of services, including supporting member interests relating to legislative and international issues; analyzing current IP issues; providing information and educational services; and disseminating information to the public on the importance of IP rights.

The *Federal Register* notice of July 10, 2019 requested feedback on (a) the state of counterfeit and pirated goods trafficking through online third-party marketplaces and (b) recommendations for curbing the trafficking in such counterfeit and pirated goods. IPO's comments that follow are responsive to questions 1 through 4 and questions 6 through 8 as posed in the notice.

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1. How are your interests affected by counterfeit or pirated goods imported through online third-party marketplaces and other third-party intermediaries as those terms are defined in the Presidential Memorandum?

Product innovation and brand management are important factors in the U.S. economy and the global economy. IPO wants to ensure that companies value investment in these forms of intellectual property. Companies invest significant resources in creating new products and services, developing brand awareness, and building goodwill with consumers, all of which collectively fall under the “intellectual property” umbrella. Counterfeit and pirated goods unfairly copy innovations, piggyback on brand recognition, and erode consumer trust and confidence. As such, these illegitimate products devalue investment in intellectual property and disincentivize companies from creating new products and building or managing brands.

In addition to devaluing and disincentivizing investment in intellectual property, counterfeit and pirated goods negatively impact IPO members in other ways.¹ Because counterfeiters and pirates receive the benefits of product innovation and brand development without the costs, these illegitimate goods can be sold at a lower price and still achieve the same margin, or can be sold at the same price as the genuine product with higher margins. Online marketplaces unfortunately can help make the sale of counterfeit goods easier, as dealers in counterfeits can deliberately blur the lines online by tailoring their product listings and keyword purchases to secure favorable placement for counterfeit products. As such, when these products enter the marketplace, whether it be online or through other means, they unfairly drive down prices, reduce market share, and diminish brand goodwill.² Even more important, counterfeits and pirated goods are of inferior quality that violate consumer confidence and trust, and expose the public to harm.³

Thus, although the total global trade in counterfeit products is approaching \$2B per year, the damage to intellectual property owners and the public vastly exceeds lost sales when all impacts are taken into account.

2. What factors contribute to trafficking in counterfeit and pirated goods through online third-party marketplaces or other third-party intermediaries, and what market incentives and distortions may contribute to the use of

¹ See e.g., The White House, “U.S. Joint Strategic Plan on Intellectual Property Enforcement,” (FY 2017–2019) (describing counterfeiting techniques and the various ramifications).

² *Id.* at 32-33.

³ *Id.* The “Joint Strategic Plan” reported on the risk to consumer health and safety posed by counterfeit versions of personal care products, consumer electronics, and automotive parts, all of which are often protected by design patents. According to the report, counterfeit personal care products (e.g., sunscreen, cosmetics, and perfume) often include dangerous contaminants (e.g., carcinogens and urine) or lack the effective ingredients (e.g., SPF); counterfeit consumer electronics (e.g., power adapters, chargers, and devices) often fail or overheat leading to fire and electrocution risks; and counterfeit automotive parts (e.g., wheels, headlights, and windshields) often have higher failure and malfunction rates than genuine parts.

online third-party marketplaces and other third-party intermediaries to traffic in counterfeit and pirated goods?

Counterfeiters increasingly depend on the reputation of established online marketplaces as sources of legitimate products. By enabling the direct fulfillment of orders in smaller shipments, these platforms shift shipments of counterfeit goods from large containers to smaller parcels and even mailing envelopes. The speed with which these marketplaces fulfill orders also creates an obstacle for brand enforcement.

As discussed in the response to Question 1, counterfeiters are incentivized by the fact that they can make the products more cheaply (because they do not invest in product innovation and brand management or follow the rigorous quality control provisions of the genuine products, and because they may use slave labor and avoid taxes). They therefore make huge margins on the products, which are garnered much more easily by selling the products online.

3. Are there effective technologies, the use of which—by the private sector and/or law enforcement agencies—could substantially reduce the sale and importation of counterfeit and pirated goods through online third-party marketplaces and/or enable more effective law enforcement regarding the trafficking in such goods?

Various technologies exist that can help reduce the sale and importation of counterfeit and pirated goods. Which technology is most effective often varies depending on the nature of the product and the marketplace for that product. Given the diversity of IPO's membership, we cannot suggest a one-size-fits-all technology solution.

That said, use of online monitoring and enforcement platforms may permit more cost-effective removal of counterfeit product listings, particularly those programs that utilize AI to identify counterfeiters based on the nature of the online product listing. However, not all trademark owners can afford to use such platforms. Moreover, the effectiveness of these online tools depends, at least in part, on information sharing between the online third-party marketplaces and other intermediaries, intellectual property rights holders, and other stakeholders (so that the platforms can more effectively identify counterfeit products and/or particular infringers). Product labeling and tracking programs can help, but may be challenging to implement in a cost affordable way, particularly for companies that make a significant number of products and parts.

4. To what degree can expanded collaboration and information sharing among online third-party marketplaces, other third-party intermediaries, intellectual property rights holders, other private-sector stakeholders and/or U.S. law enforcement organizations substantially reduce trafficking in

counterfeit and pirated goods and/or enable more effective law enforcement regarding the trafficking in such goods?

As discussed above, information sharing among online third-party marketplaces, other third-party intermediaries, intellectual property rights holders, and other stakeholders can assist in reducing the sale of counterfeit and pirated goods. By sharing information regarding the features of genuine goods, the hallmarks of counterfeit products or particular infringers, and other similar information (information that is often dispersed among the various stakeholders), the online third-party marketplaces, intellectual property rights holders, customs officials, and other U.S. law enforcement agencies can more effectively identify infringers and remove listings of infringing products.

Online marketplaces could improve their screening processes when it comes to onboarding sellers. For example, they could demand proof of product origin in cases that give rise to suspicion, such as high quantities or unusually low prices. The online marketplaces could then either refuse to allow the posting in clear cases of counterfeiting, or share the provided origin information with the relevant intellectual property rights holders or law enforcement agencies and delay the posting for a certain period of time to allow them to investigate the origin information.

Requiring online marketplaces to take such additional steps before allowing the sale of suspicious products is in-step with older U.S. legal precedent involving flea markets, swap meets, and other venues where unaffiliated sellers would congregate to sell product. In those cases, the proprietors of such venues were held to have a duty to proactively police the sellers and address counterfeit and pirated merchandise once given notice of counterfeit activity. Today's online marketplaces, by contrast, make it easier for sellers to gain access to the platforms, and shift the burden to rights holders to do the work of targeting individual sellers. In effect, the platforms are a giant flea market with little oversight.

6. What existing policies, procedures or best practices of online third-party marketplaces, other third-party intermediaries, intellectual property rights holders, and/or other private-sector stakeholders have been effective in curbing the importation and sale of counterfeit and pirated goods, including those conveyed through online third-party marketplaces?

The actual processes online marketplaces use are often opaque. Given this, the actual effectiveness of currently existing programs is hard to measure. Increased information sharing by the online marketplaces regarding the practices they are currently using to combat the sale of counterfeit goods, as well as data regarding how effective those practices are, would be an important first step in refining existing measures or designing new measures.

7. What additional policies, procedures or best practices of online third-party marketplaces, other third-party intermediaries, intellectual property rights holders, and/or other private-sector stakeholders can be effective in curbing the importation and sale of counterfeit and pirated goods, including those conveyed through online third-party marketplaces? What would it cost for industry to adopt such practices?

As discussed above, increased screening practices by online marketplaces, as well as increased information sharing between the marketplaces and relevant private stakeholders regarding potentially suspicious postings and measures being taken to combat those postings, could be effective in curbing the importation and sale of counterfeit and pirated goods. Although additional information sharing and screening would create an added expense for the online marketplaces, the largest online marketplaces may have automated computer systems in place already (or could relatively easily develop such systems) that track the prices and average quantity sold for certain products. This would enable automatic flagging of listings with prices well below the average or quantities well above average. Most, if not all, of these marketplaces also already have systems in place for automatically communicating with users. It would likely not add a significant burden to (1) send an automated email requiring origin information from the seller, or (2) send a second automated email flagging suspicious postings and sharing gathered origin information to relevant intellectual property rights holders who sign up for these notifications.

8. What policy remedies, including administrative, regulatory, or legislative changes by the Federal Government (including enhanced enforcement actions) could substantially reduce the trafficking in counterfeit and pirated goods and/or promote more effective law enforcement regarding the trafficking in such goods?

Design patent enforcement by U.S. Customs and Border Protection (CBP) could substantially reduce the trafficking in counterfeit and pirated goods. Design patent rights protect the appearance of a product embodying the design even when a trademark is not attached.⁴ Under the current system, CBP has the ability to seize products at the border bearing infringing trademarks and copyrights that have been recorded with CBP; however, the same enforcement mechanism is not available for design-patent rights. Instead, as a general rule, CBP can only enforce design patents in the form of exclusion orders issued by the U.S. International Trade Commission (ITC).⁵

⁴ NAT'L INTELLECTUAL PROP. LAW ENFORCEMENT COORDINATION COUNCIL, REPORT TO THE PRESIDENT AND CONGRESS ON COORDINATION OF INTELLECTUAL PROPERTY ENFORCEMENT AND PROTECTION 144 (2006). For further information on U.S. Customs and Border Protection's intellectual property border enforcement program, see generally Debra D. Peterson, *Seizing Infringing Imports of Cinderella's Slippers: How Egyptian Goddess Supports U.S. Customs and Border Protection's Enforcement of Design Patents*, 90 J. Pat. & Trademark Off. Soc'y, 888 (Dec. 2008).

⁵ 19 U.S.C. § 1337 (2008).

Counterfeiters have become more clever in the 21st century in working around the current CBP enforcement framework. For example, illegitimate manufacturers and sellers have recognized that counterfeit products bearing infringing trademarks are potentially at-risk to seizure by agents at the border, but the very same products not bearing the infringing trademarks generally evade seizure. Counterfeiters increasingly ship counterfeit and pirated products into the U.S. without the trademarks/labels and apply the trademarks/labels after these goods have cleared customs. In many cases, the trademarks/labels are shipped into the U.S. separately because the risk of loss is small.⁶ The CBP reports that the total market value for labels/tags seized in 2017 was just over \$80 million,⁷ which represents an almost 200% increase since 2013.⁸ In 2017, the total market value of labels/tags had the fourth highest market value of any category of goods seized, trailing only watches/jewelry, handbags/wallets, and consumer electronics. After evading customs, the sale of these goods, now counterfeit with labels applied, translate to significant lost revenue for U.S. companies. As just one example, in 2018, federal authorities arrested a group of counterfeiters who had imported over \$70 million in fake Nike shoes—specifically Jordan brand shoes—by omitting labels to evade customs officials.⁹ Another technique used by counterfeiters is to cover or obscure the trademark and later remove the cover or the obscuring element after the goods clear customs in order to complete the counterfeiting process.¹⁰

Other counterfeiters simply knock off a product design without ever applying the trademark to the product. These knockoffs look the same (or very similar to) the authentic goods of an innovating company, but otherwise do not infringe the trademark rights of the innovating company. An example is provided on the following page, showing the legitimate “Crocs Classic Clog” (left) with a trademark on the hinge and a knockoff product without any trademark (right).

⁶ “9 Most Counterfeited Products in the USA,” www.USATODAY.com (Mar. 29, 2014).

⁷ “Intellectual Property Rights – Fiscal Year 2017 Seizure Statistics,” U.S. Customs and Border Protection Office of Trade (posted Feb. 26, 2018 and last modified April 16, 2019) (reporting MSRP of Labels/Tags of \$80,951,055).

⁸ “Intellectual Property Rights – Fiscal Year 2013 Seizure Statistics,” U.S. Customs and Border Protection Office of International Trade (reporting MSRP of Labels/Tags of \$41,768,528).

⁹ “They allegedly imported \$70M of fake Nike Air Jordans. Then the feds dunked on them,” www.NJ.com (Aug. 7, 2018).

¹⁰ *Joint Strategic Plan, supra* at 26-27.

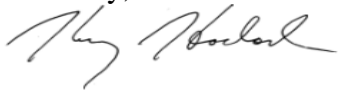
	
<p>Crocs Classic Clog (note trademark on hinge)¹¹</p>	<p>Knock off Sandals (missing trademark)¹²</p>

Stopping unlawful knockoffs at the border is in many cases the only practical way to prevent them from reaching consumers. Once they clear customs, the knockoffs are commonly sold in single or small units on websites where enforcement is difficult, time consuming, and costly. Even cautious consumers looking for visual signs of authentic goods are easily deceived, since fraudulent websites often copy pictures of legitimate products to make merchandise appear genuine.

By implementing a procedure for CBP to seize products infringing design patents, trafficking in counterfeit and pirated goods could be substantially reduced. This enforcement option could address many increasingly common shipping schemes used by counterfeiters and pirates to get around traditional trademark enforcement by CBP. In addition, this change could help stop knockoffs at the earliest, and often only, stage of possible detection before entering the marketplace.

We again thank you for permitting IPO to provide comments and would welcome any further dialogue or opportunity to provide additional information.

Sincerely,



Henry Hadad
President

¹¹ <https://www.zappos.com/p/crocs-classic-clog-neon-purple-1/product/7153812/color/797275>.

¹² <https://poshmark.com/listing/Knock-Off-Crocs-56188fa8b5643e23c6011e32>.