



SUMMARY: “COMBATING TRAFFICKING IN COUNTERFEIT AND PIRATED GOODS” REPORT

OVERVIEW

At the direction of the White House, the U.S. Department of Homeland Security (DHS) recently released a [report](#) on “Combating Trafficking in Counterfeit and Pirated Goods.” This report describes the growing prevalence of knockoff products and their risks to consumers, businesses, and national security. Declaring the current situation to be “intolerable and dangerous,” DHS sets forth a number of remedies it plans to pursue. In particular, the Trump Administration intends to ensure e-commerce marketplaces have more “skin in the game” in the fight against fakes.

WHY IT MATTERS

Trade in counterfeit goods is now a half-trillion dollar industry globally. The value of fakes seized in the U.S. alone was \$1.4 billion in 2018 (up from \$94 million in 2003). Counterfeits not only undermine legitimate business revenues and accompanying jobs and innovations, but these nefariously produced goods can also be dangerous to the health and safety of unsuspecting customers. Moreover, fakes that find their way into defense systems or that fund criminal networks are a threat to national security.

U.S. Customs and Border Protection (CBP) identifies footwear as one of the most commonly seized knockoffs. In [official comments](#) that helped inform this DHS report, FDRA expounded on the dangers of fakes, contrasting them with genuine products: “[T]he logo on a shoe represents more than just a brand name. That logo stands for a company’s reputation, its values, workers, product safety standards, chemical safety standards, and quality. It represents the enduring relationship a brand builds with its customers, often over many years and decades.”

ACTION COMING

Like FDRA, DHS sees a need for e-commerce platforms to assume more responsibility in battling counterfeits. Platforms like Amazon and eBay are not currently liable for fakes sold on their sites, so policing against infringing products ultimately falls to rights holders—a daunting if not impossible task for many businesses. Assessing this situation, DHS is very blunt: “It is not only the sellers of the counterfeit goods, but also the e-commerce platforms and other third-party intermediaries (e.g., shippers) that

facilitate their sale, that are profiting from the marketing and distribution of these illicit products to the American public.” To give those intermediaries more “skin in the game,” DHS plans to aggressively seek civil fines, penalties, and injunctive actions against those deemed to facilitate the import of counterfeits. It will also help brand owners seeking similar injunctive relief. In addition, platforms’ domestic warehouses will begin to be considered official consignees of certain imports and they will be encouraged to abandon fakes in their possession. Moreover, DHS intends to explore new applications of contributory and vicarious trademark infringement standards in relation to e-commerce platforms.

More broadly, the Trump Administration plans to reassess where it needs new data and new rules to combat furtive strategies of counterfeiters. In particular, CBP will increase attention on high risk shipments, repeat offenders, and advance data on incoming mail. DHS also seeks new government and industry collaboration, including a public-private consumer education campaign.

Pointing to the success of brick-and-mortar stores in battling illicit products, DHS declares, “We should expect the same level of care from online third-party marketplaces that we expect from the stores physically located in our communities.” Accordingly, the National Intellectual Property Rights Coordination Center will be tasked with encouraging and reporting on the adoption of 10 “best practices” by private entities. Aimed primarily at third party intermediaries, these recommendations include enhanced vetting of sellers, stronger indemnification and payment processing requirements for foreign sellers, more efficient notice and takedown procedures, and assistance to buyers and rights holders after they are defrauded. DHS also wants clear disclosure to consumers about when third parties are part of a transaction, who they are, and from where in the world their products will originate.

STAY TUNED

Key leaders in Congress have already signaled their commitment to “[fighting the fakes](#),” and FDRA-supported [legislation](#) to close importing loopholes is under consideration. Now the Administration is signaling a crackdown on counterfeiters and those judged to be their enablers. Dr. Peter Navarro, Director of the White House Office of Trade and Manufacturing Policy, declared that “all of the bad actors in e-commerce” are now “on notice.”