

## **Questions for All Witnesses**

### **E-Commerce and Intellectual Property Theft**

1. Based on your experience with e-commerce marketplaces, are there any companies that are rising to meet the challenge of protecting American intellectual property rights and working with you to do so? Which online retailers and marketplaces are leading in this space and why?

Some e-commerce marketplaces have adopted specific business practices and tools that assist intellectual property rights owners to effectively address the sale of unauthorized goods on their platforms.

These include platforms that thoroughly vet the credentials of sellers before allowing them to create an account by requiring multiple forms of identification and a valid credit card on file. Additionally, platforms that consistently enforce “zero tolerance” for

recidivists by terminating accounts for sellers who repeatedly offer unauthorized merchandise are more successful in eliminating bad actors from their platform.

Unfortunately, many platforms fail to consistently enforce such policies or do an inadequate job of preventing sellers who have had their accounts terminated from creating new accounts or from continuing to operate another accounts on the same platform.

Some platforms have begun to implement more sophisticated technological tools to help IP owners address counterfeit merchandise. Such tools include allowing brands and their vendors to access the platform's Application Programming Interface ("API") to allow for more efficient scanning and removal of unauthorized

products offered for sale on the platforms. Some platforms recently have announced machine learning functionality to proactively identify suspicious products being offered for sale. Although it is still too early to evaluate the overall effectiveness of such tools, machine learning tools of this nature have great potential to identify and block illegitimate listings before they are made available to consumers.

2. Are there any online retailers in particular who are unwilling to work with your organizations to address intellectual property theft?

Although many brands have developed working relationships with platform operators, IP owners continue to bear an enormous burden to adequately police marketplaces for unauthorized products.

This includes the expenditure of time and resources to scan large platforms for unauthorized products and report such products for removal. Unfortunately, even after these expenditures, it is all too common for the same unauthorized products to be quickly reposted by the same seller on the same platform. In addition, some platforms impose burdensome and unnecessary requirements on IP owners in order to effectuate takedowns, such as requiring scanned copies of trademark registrations, resulting in additional time, expense and inefficiencies in the takedown process.

Other challenges include platforms that refuse to provide information about sellers of counterfeit products (such as the seller's location and financial information) – even after the seller has engaged in numerous infringements - making it extremely

difficult for IP owners to take meaningful enforcement action beyond filing takedown notices with the platforms.

Although platforms often tell IP owners that improvements to IP systems are being developed, there is rarely a sense of urgency. This results in very slow progress by platforms in implementing meaningful technological improvements to combat the sale of unauthorized goods. The slow progress often combined with unreasonable terms of use to access such tools, results in brand owners being unable to fully realize the benefit of such improvements.

3.Can you discuss specifically the new challenges posed by the increased sales of counterfeit goods on social media platforms?

As social media platforms become more

commonly used to facilitate legitimate e-commerce activities, criminals also have increased their focus on using social media platforms as another distribution channel for counterfeit products. Since many social media platforms were not developed with e-commerce as a focus, these platforms are now behind the curve in trying to develop effective IP frameworks to address unauthorized goods being advertised and sold on their platforms.

One of the most significant challenges with counterfeit product enforcement on social media platforms is the difficulty in effectively monitoring the platform for these products. Given the volume of accounts on these platforms, it can be extremely challenging to monitor across an entire platform in real-time when the platform does provide powerful and effective search tools.

Adding to the challenge of discovering unauthorized merchandise on social media platforms is the fact that many advertisements for counterfeit merchandise are geo-targeted to consumers based on their location. As a result, it is extremely challenging for a brand to effectively monitor these platforms for counterfeit products on a global basis.

When searching globally across a platform is possible, many brands have discovered networks of fake social media accounts created for the sole purpose of promoting the sale counterfeit merchandise and, even when these networks are detected and dismantled, new networks are quickly formed to replace them.

## **Questions for Michael Potenza**

## **Vice President and Assistant General Counsel, Intellectual Property**

1. Mr. Potenza (PO-TEN-SA), so much of the focus of today's hearing has been on the negative impact that intellectual property theft has on American businesses and innovators. However, I think it's important that we also take a moment to realize that intellectual property theft—from counterfeit products to illegal streaming—also has a severe impact on individual players. Can you describe for us the economic impact that intellectual property theft has on the individual players?

NBA players, through the National Basketball Players Association (“NBPA”), have an active business licensing the right to use the players’ intellectual property, more specifically, rights



of publicity relating to player personas (names, likenesses, etc.). Intellectual property theft negatively impacts the NBPA's licensing business in the same way it impacts the licensing business of the NBA and other IP owners – the sale of unauthorized merchandise diminishes the revenue associated with the sale of legitimate product and devalues the underlying licensing rights. Unauthorized merchandise also diminishes the players' ability to control the use of their personas for commercial purposes.