

United States Senate Committee on the Judiciary
Subcommittee on Intellectual Property

Testimony of Matt Priest
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Chairman Tillis, Ranking Member Coons, and Members of the Subcommittee:

My name is Matt Priest, and I am President and CEO of the Footwear Distributors & Retailers of America (FDRA). On behalf of our members, thank you for the opportunity to testify at today's hearing.

FDRA serves as the footwear industry's trade and business association, representing nearly 500 footwear companies and brands across the U.S. This includes the majority of U.S. footwear manufacturers and athletic brands. This year marks our 75th year representing the industry, as our members include a broad and diverse cross section of the companies that make and sell shoes, from small family-owned businesses to global brands that reach consumers around the world.

We appreciate the subcommittee holding this key hearing around World Intellectual Property (IP) Day. IP protection is absolutely critical to deliver sports and performance shoes and orthotics to global consumers. Athletic footwear has become the leading category in the U.S., and many companies are incorporating new styles, designs, trade dress, innovations, and technologies into these shoes. Today's performance footwear is often highly innovative and adaptive and has a product development cycle that can take 18 to 24 months.

Because IP is the foundation for these products, which drive and enhance sports around the world, we are deeply concerned that counterfeit sales have grown rapidly with the rise of e-commerce. Now more than ever, counterfeit footwear is readily available on U.S. platforms such as Amazon, eBay, and Reddit, just to name a few.

These illicit goods put U.S. consumers at risk of potential injuries, exposure to harmful chemicals, and misrepresented and fraudulent sales. It can be almost impossible for consumers to determine a legitimate good from a counterfeit product. As just one example, these Merrell shoes look almost identical, but one is an actual Merrell shoe and the other is a counterfeit. If you look closely you can see that there are inconsistencies in the sock liner and the color of the upper, and the tongue label is from a completely different shoe with a different colorway. It was sold on an unauthorized website incorporating the brand's name. Merrell had to go through a lengthy investigation and a Uniform Domain-Name Dispute-Resolution Policy (UDRP) process and actually gain control of the domain name – a process that lasted nearly two years – in order to stop the sale of these knock-off shoes. There is no way to know how many counterfeit Merrell shoes were sold to unsuspecting U.S. consumers through the unauthorized site.

As another example, we all know how important orthotics can be to athletes dealing with plantar fasciitis, overpronation, and other footwear conditions. Remington Products makes these Powerstep orthotic supports at a U.S. factory in Wadsworth, Ohio. They employ 100 manufacturing workers at this factory. Both of these examples say “Made in the USA” but this one is an illegal counterfeit bought on a U.S.-based online platform and most likely made in China, and this one is the real product. The packaging and product are extremely similar but the counterfeit uses inferior material. To a new user, it would be impossible to tell that your new orthotic is not genuine. An existing Powerstep customer might only be able to tell when the product starts breaking down quickly.

Even though these products may appear to be similar, they are not the same. An athlete relying on orthotics to address a medical condition that buys a knock-off could be faced with a product that does not work, is unsafe, hurts their performance, or worsens their condition. With a counterfeit good, there is no way to know what kind of labor practices went into making the product. And the counterfeit shoe could include harmful and toxic chemicals. This challenge is made even more difficult by the fact that many customers may incorrectly assume the product has been evaluated for quality and legitimacy by the brand since it is allowed to be sold on a popular e-commerce platform, and there are often indications on the selling page that can create confusion.

These counterfeit goods significantly harm U.S. companies as well, because the 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. When an unsuspecting consumer buys a knock-off shoe imitating that logo, that counterfeit can damage the integrity and reputation of the brand, lead to negative reviews, and cause companies to lose customers and jobs.

Companies devote considerable time and resources to this issue, but they often have little information on these bad actors, since platforms do not share the information they have on these sellers with the rights holders. It is impossible for brands to get in touch with each and every online seller suspected of selling counterfeits to ask for additional information and pictures. FDRA member companies have also discovered that some individuals and entities selling counterfeit footwear on these platforms do so using false identities and bots.

In addition, counterfeiters increasingly ship labels and trademark tags separately from infringing products and attach them to the infringing products once in the domestic market in order to avoid seizure by U.S. Customs & Border Protection (CBP). If the labels are seized by Customs, the more valuable fake shoes will still get in, because under current law, Customs is authorized to seize counterfeit trademarked shoes but cannot seize a shoe that is clearly a copy of a trademark shoe absent the presence of a logo or distinguishing tag. Here are shoes from two different brands—Fila and NIKE—that have been imported in without logos, with the intent of adhering a logo onto the shoe after importation. These examples highlight the growing challenge we face in this area.

The economic impact of counterfeiting has taken on a phenomenal global dimension in the past decade. According to the U.S. Chamber of Commerce's Report "Leverage Intellectual Property in the Global Sports Economy," the economic impact of counterfeiting on global sporting goods and sportswear is nearly \$50 billion each year and \$84 billion when you count the indirect impact on related services. Moreover, the World Customs Organization's (WCO's) most-recent Illicit Trade Report found that clothing and footwear were among the top three seizure categories by number of reporting countries. In fact, of the 61 countries reporting a seizure of illicit goods, 43 countries reported seizing counterfeit footwear.

As we confront this global problem, FDRA greatly appreciates the April 3rd Presidential Memorandum on Combating Trafficking in Counterfeit and Pirated Goods. This is a critical first step in addressing this issue, and we believe Congress can build on this initiative. When considering potential regulations or legislative efforts, we would encourage you to look at ways to increase proactive and preventative measures by platforms and other players. This could include: 1) reducing suspicious sellers by requiring upfront screening 2) ensuring clear labeling and accurate displays for consumers 3) considering the role and responsibility of shipping, distribution, and fulfillment and 4) increasing information sharing with rights holders. Also, to prevent more counterfeits from entering the U.S. market, Congress could give Customs the authority to seize products based on design infringement and push for increasing information sharing by Customs with rights holders.

In addition, while legitimate brands have to compete with counterfeits and knock-offs on open marketplaces, there is also a growing concern about how open marketplaces are unfairly advantaging their own business offerings over competing brands. More information and potential rules on how sensitive business information and consumer data is being used by platforms could help address this issue.

We are in the golden era of footwear innovation and design. As our industry works to create and deliver new and exciting performance and sports products for consumers, we take very seriously the role of Congress and the Federal Government in protecting IP. Today there are more than 350,000 U.S. jobs in our industry that depend on the ability to vigorously protect this IP. Efforts to send counterfeit shoes to the U.S. market directly threatens these jobs and the communities they support.

That is why we appreciate the opportunity to testify today and we stand ready to work with the Committee on this important issue.