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U.S. House of Representatives, Committee on the Judiciary
Subcommittee on Courts, Intellectual Property, and the Internet

“Counterfeits and Cluttering: Emerging Threats to the Integrity of the Trademark System and the Impact on American Consumers and Businesses”

July 18, 2019

On behalf of The Toy Association, thank you Chairman Johnson, Ranking Member Roby, full committee Chairman Nadler and full committee Ranking Member Collins for the opportunity to testify before this Subcommittee to share our concerns with counterfeit toys sold through ecommerce marketplaces. We appreciate your attention to this important matter and willingness to explore possible solutions.

As background, The Toy Association represents more than 1,100 businesses – toy manufacturers, importers and retailers, as well as toy inventors, designers, licensors and studios – all involved in bringing safe, fun and educational toys and games for children to market. With an annual positive U.S. economic impact of \$110.9 billion, the U.S. toy industry supports 691,263 U.S. jobs and generates \$14.98 billion in state and federal tax revenue each year. Approximately 3 billion toys are sold in the U.S. each year, totaling \$27 billion at retail, and our members account for approximately 90% of this market. Importantly, over 95% of toy manufacturers, wholesalers, distributors in the United States are small businesses.

Curbing the flow of counterfeit goods in ecommerce is an issue of critical importance to the U.S. toy industry due to the safety concerns of counterfeit toys. Consumers have come to rely on ecommerce platforms to provide discounted pricing and wide selection of name-brand quality toys also found at brick-and-mortar retail. However, under the current third-party marketplace system, illicit sellers with little or no accountability take advantage of this consumer faith by offering inferior and unsafe counterfeit toys that put our children at risk. Meanwhile, intermediaries are making substantial profit from these sales with zero risk. *Any* business selling toys in the U.S must be held to the same high safety standards that apply to the toy brands and brick and mortar retailers consumers have come to know and trust.

By law, all toys sold in the U.S. must be compliant with mandatory product safety requirements, must be tested by an accredited, independent testing facility and must have a children’s product certification. Legitimate toy companies spend significant resources to bring new, fun, educational and safe toys to the U.S. market. Suffice to say, counterfeit toys do not submit to any of these safety and testing regulations and there is no assurance that they comply with these safety requirements. For these sellers, bypassing US safety and testing regulations is a competitive advantage to provide toys cheaper and quicker.

Unfortunately, enforcement efforts and platform initiatives have thus far been insufficient to stop the flow of IP infringing goods sold in the U.S. In fact, the problem has gotten worse, not better. According to a March report from the Organization for Economic Co-Operation and Development (OECD) and the European Union's Intellectual Property Office (EUIPO), trade in counterfeit and pirated goods continue to rise steadily year over year with 2016 worldwide customs seizures valued at \$509 billion in 2016 up from 461 billion in 2013. Toys were the eighth top seized counterfeited category of goods accounting for 3% of the total dollar amount.¹

Put simply, the counterfeit business on ecommerce is flourishing and without significant changes to the existing framework, brands will continue to lose the war on fake toys putting our children at risk. This hearing is timely as the all-important holiday season is right around the corner during which around 50% of the toy industry's annual sales are conducted. When I asked one of our larger member companies with a robust IP team for their overall thoughts on the "state of play" of counterfeits, their response was "We're gearing up to be run over in the fall."

The Toy Association's IP Committee has been working with ecommerce platforms and members to improve communication and discuss our concerns. Toy Association members Amazon and Walmart and nonmember Alibaba have been directly engaged with our members to learn more about what we are seeing in an effort to reduce the number of unsafe counterfeit toys on their marketplaces. In January of this year, The Toy Association released a paper, [The Real Threat of Fake Toys](#), submitted for the record as part of our testimony, exploring the factors contributing to the rise in counterfeit goods sold through ecommerce platforms and some possible solutions. Specifically, the white paper explored the following:

- Ecommerce creates a low hurdle to sellers giving illicit sellers near unfettered access to U.S. consumers. More must be done to ensure the legitimacy of the sellers and to provide transparency into who is selling on marketplaces. And more must be done to prevent identified illicit sellers that have been taken down from reappearing on marketplaces selling the same products. Increased and improved vetting of sellers prior to joining marketplaces, consistent data requirements across platforms and information sharing among platforms, brand owners and enforcement agencies would all be possible solutions to reduce the number of infringing goods sold online.
- The burden of enforcement is disproportionately placed on the rightsholder who must register with each ecommerce platform to do takedowns – a costly and time intensive process. As I mentioned, 95% of the toy industry is made up of small businesses and these small businesses are at a significant disadvantage when it comes to tackling counterfeits. While platforms have established programs to help brands remove counterfeit listings, many of these programs are reactive and require the constant vigilance and engagement of the brand owner to identify counterfeit listings. Moreover, some platforms offer more protection to "more important brands" than they offer to others putting small businesses at a further disadvantage. We encourage Congress to explore whether marketplaces should have greater liability to ensure the authenticity and the safety of the

¹ "Trade in fake goods is now 3.3% of world trade and rising" <https://www.oecd.org/newsroom/trade-in-fake-goods-is-now-33-of-world-trade-and-rising.htm>

products they sell. Without liability, the incentive for platforms to police their own marketplace is weak as they are profiting from the sales of counterfeit goods with little to no risk.

- Finally, consumer awareness is a critical component to reducing the prevalence of counterfeits as consumers are largely unaware of the scope of the problem and they are often unable to distinguish between known sellers and illicit sellers on marketplaces. Some suggestions to solve this problem include increasing transparency into the identity of the seller and educating consumers on smart online shopping.

We appreciate that platforms have been willing to engage with us on these concerns and have taken some meaningful steps in a positive direction. However, as it stands today, legitimate toy brands selling through local toy stores are playing by one set of rules and foreign sellers that exploit marketplaces are playing by another set of rules or are not playing by the rules at all. And without significant changes to level the playing field, we will continue to be fighting a losing battle. We welcome the opportunity to explore these concerns and potential solutions with the Subcommittee and others. Thank you again for the opportunity to participate in this hearing. We look forward to continuing to work with you on this important issue.

