

**UNITED STATES SENATE COMMITTEE ON THE JUDICIARY**

Hearing on

Counterfeits and Their Impact on Consumer Health and Safety

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**REVISION®**

Testimony of

**Gregory Maguire**

Senior Director, Legal & Governmental Affairs  
Revision Military

## **Introduction**

Good morning Chairman Grassley, Ranking Member Leahy, and Members of the Committee. Thank you for holding this hearing and inviting me to take part. I appreciate the opportunity to testify before you today about the important issue of Counterfeits and Their Impact on Consumer Health and Safety. My name is Gregory Maguire, and I am the Senior Director of Legal & Governmental Affairs for Revision Military.

In recent years, despite forceful measures taken to protect our intellectual property, Revision has seen a dramatic rise in counterfeit products across multiple distribution channels. We expect that this trend will continue as our brand awareness and product penetration grows. As a small business, Revision is deeply concerned about the rise in businesses using and manipulating our intellectual property to produce counterfeit goods. The emergence of this activity requires ever-larger and more aggressive efforts to offset the effects that put significant strain on our resources.

## **About Revision**

To understand the full scope of this problem, I'd like to first provide you with a bit of background about Revision. Revision Military was founded in 2001 with a singular mission: to produce cutting-edge protective eyewear that makes a real-world impact. Reports of eye and face injuries were increasing as the profile of the modern battlefield, specifically the proliferous use of improvised explosive devices (IED), drastically changed soldiers' protective needs. Revision developed technology for eyewear that provides ballistic and fragmentation protection as measured against strict military specification standards. By all accounts, this technology has made a significant and tangible impact. The protective eyewear industry is now a growing equipment sector in high demand. Revision has built a name on meeting or exceeding extremely stringent and comprehensive global military specifications for products used in hostile situations.

The U.S. Department of Defense has developed the Military Combat Eye Protection (MCEP) System which establishes not only ballistic performance, but also optical quality, protection from ultraviolet harm, weight, equipment compatibility, accommodation of prescription inserts, chemical resistance, luminous transmittance, field of view, resistance to fogging, resistance to scratching, resistance to abrasion, durability, climatic condition durability, and flammability.<sup>1</sup> The U.S. Army uses these standards in the development and maintenance of the Authorized Protective Eyewear List (APEL).<sup>2</sup> No other eyewear than that which is listed on APEL can be worn by a soldier while on duty.<sup>3</sup> Revision eyewear, particularly the Desert Locust goggle, has been listed on APEL since 2007.

Revision has over 440 employees, the majority of which are located in Vermont. Revision's flagship Sawfly<sup>®</sup> kit is now the issued eyewear for most NATO countries, including U.S., U.K., Swiss, and German forces, among others. Revision has since developed and released additional lines of ballistic spectacles, as well as a number of goggle lines, all of which are engineered for ballistic impact protection. Revision has produced and delivered approximately 7 million units of protective eyewear to military and tactical customers globally. Revision has diversified and is now a leader in armor, helmets, and head system protection products. Additionally, Revision has expanded into power management systems in response to the unmet needs of military and commercial markets to store, deliver, harvest, and share power in relatively lightweight configurations. Revision has successfully managed large scale contracts for the U.S. Army, Canadian Department of National Defence, German Armed Forces, Swiss Department of Defence, Dutch Ministry of Defence, and the Belgian Ministry of Defence.

Revision's facilities house state-of-the-art optics, ballistics, and laser laboratories equipped with over \$2.5 million of high-tech testing equipment. These laboratories are used for product development, but also for rigid quality assurance. Revision designs, develops and owns the intellectual property and the tooling that are fundamental to the delivery of the company's head, facial, and torso protective equipment. Revision's

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<sup>1</sup> MIL-PRF-32432, 9 Jan. 2013

<sup>2</sup> Policy for MCEP APEL, 19 June 2009

<sup>3</sup> Policy for MCEP APEL, 19 June 2009

lens production operation takes place in an environmentally controlled clean room with cutting-edge, custom-designed technology. All this experience, expertise, and investment has allowed Revision to establish a strong intellectual property portfolio, including many patents, trademarks, copyrights and trade secrets that expands across Revision's Optical, Armor and Power business segments.

### **Revision's Tactics for Combating Counterfeiting**

Revision has been battling counterfeit products and operations for years. We have found that Revision's Desert Locust<sup>®</sup> goggle, the company's original goggle line, is the item most frequently illegally replicated, but counterfeit versions of Revision's Sawfly spectacles have also surfaced. Additionally, Revision's brand names and photography are often used by sellers to support the sale of the counterfeit products. Counterfeiters will often use the company name Revision, the trademarked names Desert Locust, Sawfly, Revision logos, and will repurpose imagery that is displayed on Revision's website.

Revision has actively maintained an anti-counterfeiting strategy since 2009. We've deployed a litany of countermeasures to stop the sale of counterfeit eyewear in particular. Revision invests substantially in its intellectual property and goes to great lengths to protect it; filing for copyright, patent and trademark rights across numerous regions, including, but not limited to, the U.S., Canada, Europe, and China. As part of this strategy, Revision utilizes law firms to send Take-down notices and to issue Cease and Desist letters. Revision also takes any and all necessary steps to record the company's trademarks with U.S. Customs and Border Protection in order to track shipments and seize counterfeit products bearing Revision's trademarks entering the country. While this program has shown success, seizures occur only at Ports of Entry and not at the source.

E-commerce activity has been one of the most significant challenges to tracking and removing counterfeit products, and has required a great deal of time investment and additional human and financial resource allocation. Revision vigilantly monitors dozens of websites in the attempt to capture any and all counterfeit products. These websites consist of Business to Consumer (B2C) and Business to Business (B2B)

platforms, and many are websites for Chinese sourcing. We have identified counterfeit products for sale through most major global online retailers, including, but not limited to, Amazon.com, Ebay.com, Alibaba.com, Aliexpress.com, 1688.com, and Taobao.com. In searching these websites, Revision has identified over 4,500 Desert Locust counterfeit product listings. Out of necessity, based on the volume of counterfeit products we have witnessed in e-commerce channels, we began monitoring on a weekly, sometimes even daily, basis in December 2014. To be this aggressive, Revision has had to create a specialized job position and hire an individual fluent in Mandarin to support this anti-counterfeiting effort.

### **Revision's Experiences with Counterfeit Operations**

Because of Revision's sustained investment, and aggressive pursuit of these operations, we have been somewhat successful at constraining counterfeit listings posted by most major e-commerce retailers. However, the numbers continue to rise, as does the investment needed to keep pace. The prices for counterfeit products that we've encountered range from as low as 3% of the total retail price to 40%, luring consumers with attractive price points and false claims. I have here samples of seized counterfeit products side-by-side with authentic Revision eyewear. Seeing them together, it is clear how compelling these counterfeit products can be. Despite our vigilance in identifying counterfeit products across distribution channels, removing these clearly-inferior counterfeit products from the market, and keeping them off, can be a difficult and lengthy process.

While most online retailers acknowledge that infringement occurs through their websites, and, in most cases, have established policies and procedures at least for counterfeits, these are far from fool-proof. Often, the process of reporting and monitoring these listings places a significant burden on the company that owns the intellectual property rights. Upon reporting counterfeits to these websites, the online retailer is supposed to notify the seller and have the product listing removed. In our experience, however, removal of counterfeit product listings by online retailers is not an assured outcome. Additionally, lesser known online retailers lack any procedure for the rightful intellectual property owner to report counterfeit product listings. Ultimately, these efforts do little to inhibit offending suppliers from re-posting the same

counterfeit goods on the exact same online retailer website, whether under the same seller identity or re-posting the same product under a different title, tagline, or user name. Despite considerable resources devoted to combating these activities, the results of our efforts are considerably lessened by inconsistent and ineffectual policies. The consequences for those engaged in these illegal operations are very minimal, especially considering their potential impact. We have seen the same sellers repeatedly in the course of our efforts. Although some large online retailers have policies and procedures for dealing with counterfeits, these online retailers are the least responsive to our reports.

In response to this frustrating lack of oversight, Revision has recently taken much more aggressive action to thwart sellers of counterfeit products, with the hopes of also dissuading other retailers that have been conducting similar illicit business practices. This past January, Revision worked in conjunction with the Dearborn and Ohio County Prosecutor's Office in Indiana to enact a sting at the SnowSports Industries America (SIA) Snow Show in Denver, Colorado. The target was Guangzhou Botai Optical Visor Co., Ltd. (Guangzhou Botai), a company based in Guangzhou, China. Guangzhou Botai has been producing unauthorized counterfeit versions of Revision's Desert Locust goggle. The company's U.S. representative and part owner was arrested by local authorities on the showroom floor and arrest warrants were issued for two other co-owners and a sales associate for this company. The four are facing six felony charges, including counterfeiting, theft, and corrupt business practices, as well as conspiracy to commit for each. Even this successful action, which remains ongoing, was a difficult, costly and lengthy process.

This Guangzhou Botai case was the most recent and distinct case we've experienced, adding to Revision's now-lengthy track-record with counterfeit operations. Another significant experience occurred in 2014 whereby Revision submitted a bid under a Ukrainian eyewear tender for 1,500 protective goggles. Revision lost the tender to a competitor providing counterfeit versions of the Desert Locust product line. The company that produced the counterfeit products submitted Revision's test data with their replica products. In this particular case, not only was this a missed business opportunity for Revision, resulting in lost revenue, but a government body was the recipient of inferior, counterfeit products. More importantly,

soldiers receiving this product were exposed to inferior eye protection in the face of combat. This provides a sense of the prevalence and scale of this international problem.

### **The Consequences of Counterfeiting**

Revision Military is in the business of protecting those that put themselves in harm's way for our safety. To this end, Revision has invested significant resources making state-of-the-art ballistic protection available to its customers. Counterfeits which do not meet such standards endanger the soldier or law enforcement officers, and would lead to the possible maiming and/or blinding of the wearers, if not more serious injury, or death.

All of Revision's efforts to combat counterfeit operations take up valuable resources. Not only do these counterfeit activities cut into Revision's revenue, but the impact is even more considerable. For Revision, these operations erode Revision's reputation as a leader in protective equipment solutions and manufacturing, with an unequivocal record for producing products that more than exceed worldwide military-grade specifications and standards. The degree to which these counterfeit products diminish the Revision name and reputation is difficult to quantify. The resulting loss of value due to this exposure only grows over time. The time and money invested in marginally disputing these counterfeit businesses takes away from our vital mission: dedication to developing and manufacturing life-saving protective gear for military forces, law enforcement officers, and private citizens around the world who are seeking the highest level of ballistic and fragmentation protection available.

Even more severe and disturbing are the potential consequences to Revision customers. Over a decade-and-a-half of operations, Revision has received countless testimonials from users that report first-hand, the life-saving quality of Revision products. From soldiers in life-threatening combat situations to law enforcement officer protecting our homeland, we have consistently heard powerful stories of our product saving eyesight.

Counterfeit products are typically distributed under the pretense of providing military-grade ballistic protection. This false claim presents a danger to the safety of users expecting the high level eye protection of authentic Revision products. After extensive investigation and testing of counterfeit products obtained by Revision, these counterfeits have failed safety metrics conclusively across measures, including optical standards, anti-fog capability, abrasion resistance, and ballistic quality. Recent testing on seized counterfeit goggles established that these products fail to meet the standards set forth by the American National Standards Institute (ANSI Z87.1), Military Combat Eye Protection (MCEP) System standards (MIL-PRF-32432 (GL)), European Standards for Eyewear Protection (EN 166), and perform considerably lower under NATO procedures set forth under STANAG 2920 V50 than Revision's Desert Locust goggle. Simply put, counterfeit eyewear would not have withstood the high-projectile impact standards encountered in a combat situation and the wearer would be subject to severe injury. The severity of these ramifications is unique in Revision's case because we are invested in making premier protective products; any devaluation has potentially fatal consequences.

### **Opportunities of Improvement for Consideration**

Given our experience, Revision submits for consideration the following suggested initiatives:

- First, enable the Department of Homeland Security, namely U.S. Customs and Border Protection (CBP), to seize at the border imports that infringe U.S. design patents and enable the recording of design patents with the U.S. Customs and Border Protection, IPR Enforcement Program.
- Second, large online retailers need to be held more responsible and accountable for the sale of counterfeit goods on their websites.
- Finally, federal law needs strengthening along the lines of jurisdictions, such as in Indiana, with regard to enforcement of intellectual property rights.



Federal law enforcement, U.S. Customs and Border Protection (CBP) specifically, should be given the tools necessary to interdict all manner of counterfeit products. CBP allows holders of trademarks or copyrights to electronically submit proof so as to alert enforcers regarding counterfeiting.<sup>4</sup> The electronic record that is created alerts agents to monitor imports and to seize goods that violate Revision's intellectual property rights. Revision has used this service to register its Desert Locust trademark, which has led to successful seizures in five different enforcement actions.<sup>5</sup> Revision has found this tool to be both effective and easy to use and the enforcement personnel to be very cooperative. This is very much appreciated and it is our hope that such a program could be extended to holders of patents.

CBP should, at a minimum, allow for the enforcement of design patents. Design patents protect the look or appearance of a product, without regard to the underlying technology.<sup>6</sup> Counterfeiters market eyewear that closely resembles Revision's products to mislead consumers. Those counterfeit products do not meet ballistic resistance and other quality and performance standards inherent in Revision's eyewear. In determining whether a trademark or copyright is infringed, assessment of design patent infringement does not require technical skills or expertise to make a determination, which has always been the concern regarding any extension of patent enforcement.<sup>7</sup> Design patents, similar to trademarks and copyrights are visually observable.

Adding design patent enforcement would mirror authority already in existence in other jurisdictions. For instance, the European Union (EU) enforces Registered Community Designs through their analogous customs authority.<sup>8</sup> It would therefore represent the extension of equivalent enforcement to the holders of U.S. design patents.

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<sup>4</sup> 19 C.F.R. sections 133.1 et seq.; 19 C.F.R. 133.31 et seq.

<sup>5</sup> Jan. 31, 2012 seizure in Anchorage, Feb. 8, 2012 seizure in Cleveland, June 26, 2014 seizure in Anchorage, Jan. 9, 2015 seizure in Anchorage, and Jan. 9, 2015 seizure in Anchorage

<sup>6</sup> 35 U.S.C. sections 101, 171

<sup>7</sup> See, e.g., Timothy P. trainer & Vicki E. Allums, Protecting Intellectual Property Rights Across Borders, Patents, Customs Enforcement of ITC Exclusion Orders section 5.1 ("customs lack of authority to protect patents at the border is... primarily a result of the technical nature of patents and the expertise required to make infringement determinations.

<sup>8</sup> Council Regulation 1383/2003 O.J. (L 196/7)

Online retailers should be more responsive to properly documented requests to remove content by counterfeiters. Although the law is largely unresolved regarding the responsibility of online retailers for patent infringement under 35 U.S.C. section 271(a),<sup>9</sup> some online retailers are more responsive than others regarding our requests to remove offending product listings. The responsibility, under section 271 (a) rests upon “selling” and “offering to sell” liability, which does not make clear the liability large online retailers have, despite all of the activity they undertake to fulfill the meeting of customer and seller, shipping of product, and payment processing. In some court opinions, online retailers are not involved in the “selling” or “offering to sell,” as defined by the statute. Some online retailers have taken notice of such legal determinations and have been less than responsive regarding properly documented requests to remove content by counterfeiters. As large online retailers extend their reach to hundreds of millions of customers, more needs to be done to insure that there is a higher degree of responsibility that accompanies such a large business opportunity.

In lieu of any change to federal law regarding internet commerce, it is Revision’s recommendation that Congress encourage the internet retailing and reselling industry to oversee and remove counterfeit content. Much like past efforts by various industries to assure that standards of consumer confidence have been adopted, large online retailers should give consumers assurances that products listed are genuine. Present technology affords aggrieved parties to submit electronic proof, which is then subject to easy review and verification by the online retailer. The offending product can thus be easily removed, protecting consumers as well as the legitimate merchandise manufactures and retailers.

Federal criminal law should be enhanced in order to modernize the intellectual property rights that it protects. In many instances, there are distinct advantages to relying upon state law claims for intellectual property protection. For example, Indiana’s criminal code includes an expansive and comprehensive

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<sup>9</sup> The question is presently under consideration by the Federal Circuit Court of Appeals from the U.S. District Court matter *Milo v. Amazon*, U.S. District Court for the Western District of Washington, Case No. 2:13-cv-01932. See also *Tiffany Inc. v. eBay, Inc*, 600 F.3d 93 (2d Cir. 2010), in which eBay avoids liability. See also *Coach v. Goodfellow*, 717 F. 3d 498 (2013), in which flea market owner was held liable.

definition of property.<sup>10</sup> This definition of property, in turn, sets the stage for prosecutions against unauthorized takings of intangible property based upon Indiana's theft and conversion statutes.<sup>11</sup> This is contrasted with a much more limited and rigid approach as to what constitutes property worthy of similar protection under federal law.<sup>12</sup> Revision encourages the Committee to consider a similar scope of protection at the federal level.

In addition to the broader definition of property, Indiana prohibits a more expansive range of conduct with regard to the unauthorized taking or use of intellectual property. Indiana's counterfeiting and forgery statutes, for example, do not limit proscribed conduct simply to the sale of goods. Instead, the prohibited activity that is the focus of Indiana's counterfeiting and forgery statutes is the unauthorized "making or uttering" of a written instrument.<sup>13</sup> "Making" or "uttering" includes not only selling but also authenticating, transferring, publishing, delivering, transmitting, or presenting.<sup>14</sup> This more expansive definition of prohibited activities, allows for greater flexibility to address the myriad forms of intellectual property violations now conducted on the internet.

### **Closing Remarks**

Revision is committed to the continued protection of intellectual property rights of American manufacturers. We commend the Committee for holding this hearing to explore opportunities to protect American consumer health and safety from the dangers of counterfeit products.

Thank you for the opportunity to share our story and provide recommendations for improvements to intellectual property enforcement. I welcome any questions members of the Committee may have.

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<sup>10</sup> Indiana Code 35-31-5-2-253(a) which defines "property" as "anything of value" including intangibles.

<sup>11</sup> See, for example, *An-Hung Yao v. State*, 975 N.E. 2d 1273 (2012) in which the Indiana Supreme Court ruled that "encumbering" all manner of intangible property, including a trademark, amounted to theft.

<sup>12</sup> 18 USCA §2320

<sup>13</sup> Indiana Code section 35-31.5-2-345

<sup>14</sup> Indiana Code section 35-31.5-2-345