

**CLEANING UP ONLINE MARKETPLACES:
PROTECTING AGAINST STOLEN,
COUNTERFEIT, AND UNSAFE GOODS**

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BEFORE THE
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CLEANING UP ONLINE MARKETPLACES: PROTECTING AGAINST STOLEN, COUNTERFEIT, AND UNSAFE GOODS

TUESDAY, NOVEMBER 2, 2021

UNITED STATES SENATE
COMMITTEE ON THE JUDICIARY
Washington, DC.

The Committee met, pursuant to notice, at 9:59 a.m., in Room 226, Dirksen Senate Office Building, Hon. Richard J. Durbin, Chairman of the Committee, presiding.

Present: Senators Durbin [presiding], Whitehouse, Klobuchar, Coons, Blumenthal, Hirono, Padilla, Ossoff, Grassley, Lee, Cruz, Hawley, and Blackburn.

OPENING STATEMENT OF HON. RICHARD J. DURBIN, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Chair DURBIN. The hearing will come to order. Today, the Senate Judiciary Committee will consider the challenge of stolen, counterfeit, and unsafe products sold to unsuspecting customers online.

I'd like to start by showing a brief video that highlights this issue.

[Video presentation.]

I've been working on this issue since 2008, and enlisted the support of Bill Cassidy, who has been cosponsor of major legislation on this subject. It was then that I'd met with representatives of Home Depot who told me about a problem they were facing. There were certain brands of power tools that they sold exclusively at Home Depot stores. They weren't supposed to be available anywhere else legally, but it turned out these tools were being offered for sale, new, still in the original box, by anonymous sellers on online marketplaces like Amazon.

It wasn't hard to figure out what was going on. These tools were being stolen from the original manufacturer and resold online. It wasn't just tools. It happened with all kinds of products as we'll hear. Cosmetics, electronics, clothes, over-the-counter drugs, toys, even baby formula. I see some on the table there as an example.

Third-party sellers were flooding the internet with products stolen and counterfeited. Often, these products posed serious health and safety risk to customers who thought they were buying the original product.

Back in 2008, I introduced my first bill to address the problem of illicit products sold online, and the marketplaces told me, "Don't worry. We're taking care of this. You don't need a legislation." Well,

here we are 13 years later, and this problem hasn't gone away. It's gotten much, much worse.

When you buy products from third-party sellers on online marketplaces, you're really rolling the dice. In 2018, the Government Accountability Office ran a test.

They bought a sample of 47 consumer products from third-party sellers on leading e-commerce websites to see how many just might be counterfeit. Out of 47, 20—20 of the 47 were counterfeit.

In January, the U.S. Trade Representative reported that, quote "The rapid growth of e-commerce platforms has helped fuel the growth of counterfeit, parted goods into a half trillion-dollar industry." Half trillion. Stolen goods continue to be offered online by sellers who pop up, disappear, and then pop up again. Retailers lose \$45 billion each year in these schemes.

My staff asked Home Depot if their tools are still being offered online as new by third-party sellers. They sent me nine postings that popped up just last week, and that was a small sample. Here's one of them.

A brand of lithium batteries that is only available at Home Depot being offered for sale in the box by a third-party seller on Amazon for 20 percent below the retail price.

After the fact, one-off investigations aren't stopping the problem. We need to take steps to deter shady sellers from using these marketplaces in the first place.

Consumers do better—deserve better than being deceived into buying sham products. Retailers are tired of how easy it is for organized groups of thieves to steal their goods and resell them online. Manufacturers are sick of seeing knockoffs of their products hocked on sites like Amazon. Congress needs to do something. That's what we were elected for. There are several principles that guide us.

First, if somebody's going to sell large volume of goods online on a marketplace, they should tell the marketplace who they are. Doesn't that sound pretty basic? The sellers should be verified.

Second, if a product sold online turns out to be a fake, or stolen, or dangerous, consumers should be able to report it and find the seller, and the marketplace must ensure that the seller can't just disappear and pop up later under a new account name.

Third, if a consumer orders a product from one seller online and the order is actually filled by another company, the marketplace should inform the consumer.

Verification, transparency, accountability. No more bait and switch. These are principles we should follow as we work to clean up online marketplaces.

I've introduced a bipartisan bill as I mentioned with Senator Bill Cassidy, Republican of Louisiana that promotes these principles. It's called the Informed Consumers Act. I'm honored to have as co-sponsors Senator Grassley, Senator Hirono, Coons, Tillis, Warnock, and Rubio. I thank them all.

In the House, our bill is sponsored by my friend, Representative Jan Schakowsky, Democrat from Illinois. She has been a consumer advocate all her life. Before she was ever elected to public office, she was a mom who was raising hell about expiration dates being printed on dairy products. We take that for granted now, but she was one of the originals in that fight. She's joined by Republican

Representative Gus Bilirakis from Florida. Her bill has been endorsed by a broad range of consumer groups, retailers, labor, and online marketplaces like Etsy and eBay. The day after we announced this hearing, Amazon endorsed it, too.

We've negotiated and worked hard on this bill to achieve consensus, and I hope we can make it the law, soon. There are other good bills out there, including the Shop Safe Act introduced by Senators Coons—thank you for being here—and Tillis, which addresses secondary liability for online marketplaces.

Today, we'll hear from a distinguished panel of witnesses who will talk about the scope of the problem. There is bipartisan support and momentum for addressing it. I hope we get it done.

I turn to my colleague and friend, Congressman, Senator. Did I cover every possibility? Chuck Grassley of Iowa.

**OPENING STATEMENT OF HON. CHARLES E. GRASSLEY,
A U.S. SENATOR FROM THE STATE OF IOWA**

Senator GRASSLEY. I thank you for your remarks, and thank you for calling this hearing. It's very important that we look into the roles of big tech in this area.

Americans increasingly rely upon the internet to purchase everything from healthcare products and infant formula to iPhone chargers and even automobile parts. Unfortunately, criminals are using the online platforms to sell counterfeit or stolen items that can be very dangerous to consumers. This hearing will explore the problem. We must stop this activity.

Thanks to the internet, we can now purchase nearly anything from nearly anywhere. Companies of all sizes can reach new customers all over the world. In the same way, counterfeiters and other criminals are exploiting online platforms. These activities threaten consumer safety and businesses' bottom lines.

Criminals can easily open online store fronts on e-commerce marketplaces. Criminals operate under fake names and stolen identities. They use false credentials. If a marketplace takes them down, these criminals simply resurface under a different storefront identity. All the while, their listings look authentic to unsuspecting customers.

Counterfeit products are usually substandard and often unsafe. Products often don't meet strict safety standards or comply with quality controls. For example, drug traffickers are using social media and other e-commerce platforms to market their products. We've also seen a spike in professional shoplifters of highly valued items to resell online.

According to a 2020 survey by the National Retail Federation, organized retail theft has increased nearly 60 percent since 2015. Brand owners, manufacturers, and retailers are doing their very best to fight this epidemic, but even our largest companies who can afford to have dedicated staff monitor online don't seem to be able to keep up.

Small businesses lack the necessary resources to pursue online counterfeiters. Law enforcement is also overwhelmed. That's why I introduced S. 1159, a bill that was included in the U.S. Innovation and Competition Act, so businesses can get more information to shore up the integrity of their supply chain.

Customers should have the same confidence buying online that they do if they went to a mortar and brick store. Consumers have to rely on the accuracy of online listings. If a product listing consists of misleading images or fake reviews, it's more likely that the consumer will be then tricked into purchasing a counterfeit or stolen goods.

It's clear that voluntary efforts by big tech companies, while a very good first step, are not enough. Online companies profit off of every sale on their platform, even if it's counterfeit or stolen.

Consumers need more accountability and transparency including who's operating online and selling these products. We should promote better screening, more transparent seller information, and increased collaboration and data sharing. It's very essential that businesses and platforms work with law enforcement to identify criminals selling counterfeits and stolen goods online.

Congress should consider legislation to protect consumers from criminal enterprises operating online. None of the proposed solutions is a silver bullet. There needs to be a multifaceted approach to addressing the problem.

Online shoppers deserve to have confidence that they're getting exactly what they're paying for, and that their purchases are safe and authentic. Thank you.

Chair DURBIN. Thanks, Senator Grassley. We have four witnesses this morning. I'm going to introduce three, and Senator Whitehouse will introduce the fourth.

The first witness is Aaron Muderick. Did I pronounce that right, Aaron?

Mr. MUDERICK. You did.

Chair DURBIN. Founder and president of Crazy Aaron's, a toy manufacturer in Norristown, Pennsylvania. He invented Thinking Putty. Thinking Putty, which is made here in America by his small business and 100 employees. His company is known for developing unique production methods to employ individuals with special needs. That's good.

Mr. Muderick is on the board of the Toy Association. He's a volunteer firefighter. He received his BS from University of Rochester. Glad you're here.

Kari Kammel is the Assistant Director for Education and Outreach and Senior Academic Specialist at Michigan State University Center for Anti-Counterfeiting and Product Protection and takes today's prize for the longest title. She also serves as an adjunct professor of law at Michigan State University College of Law, teaches intellectual property and trademark law.

Previously worked for DePaul University College of Law, including in the Iraq office of their International Human Rights Law Institute. Received her BA from University of Chicago, her MA from the American University in Cairo, and her JD from DePaul.

Dane Snowden, president, CEO of the Internet Association. That association represents global internet companies on matters of public policy, and the members include Amazon, eBay, Etsy, Facebook, and Google.

Prior to joining the association, Mr. Snowden was the chief operating officer at NCTA. That's the Internet and Television Association, and vice president of CTIA, the wireless association. He's also

served on the Federal Communications Commission as Chief of the Consumer and Government Affairs Bureau, BA from William and Mary.

Mr. Whitehouse. Senator Whitehouse.

Senator WHITEHOUSE. Thank you very much, Chairman. It's my great pleasure to introduce to the Committee Ben Dugan, who's the director of organized retail crime and corporate investigations for Rhode Island's CVS Health.

CVS Health is a great growing and successful Rhode Island company that has shown leadership in many issues including refusing to sell tobacco products as part of its commitment to its customers' health.

Chair DURBIN. Amen.

Senator WHITEHOUSE. Amen. Online marketplaces have been an important part of everyday life during the COVID shutdown, but they present convenient avenues for organized theft and crime. Orchestrated criminal schemes in online marketplaces flourished over the past year and a half.

Mr. Dugan is at the vanguard of investigating and combating these crimes. For three decades, he's fought retail theft from big box, catalog pharmacy, and specialty retailers. He's a national leader in retail loss prevention, particularly where it relates to e-commerce, and he's been featured in the news media as one of the foremost experts in dismantling organized retail crime.

He's a veteran of the United States Army Military Police, serves as president of the National Coalition of Law Enforcement and Retail, and I'm delighted to have him here.

I will say that as U.S. Attorney and Rhode Island Attorney General, it was my privilege to work with many skilled Rhode Island investigators, both in law enforcement and from the private sector, and Mr. Dugan continues our tradition of investigative excellence in Rhode Island. Delighted that he's here.

Chair DURBIN. Thanks, Senator Whitehouse. We're going to follow the customary hearing process. After they're sworn in, witnesses will have 5 minutes for opening statements, then Senators 5 minutes of questions.

Would the witnesses please stand to be sworn in. Please raise your right hand.

[Witnesses are sworn in.]

Let the record indicate that all answered in the affirmative. Mr. Muderick, your turn.

**STATEMENT OF AARON MUDERICK, FOUNDER
AND PRESIDENT, CRAZY AARON'S, NORRISTOWN, PA**

Mr. MUDERICK. Good morning. My name is Aaron Muderick. I'm the founder and president of Crazy Aaron's, a toy manufacturer based in Norristown, Pennsylvania.

Thank you for the opportunity to testify today. Chairman Durbin, Ranking Member Grassley, I applaud your commitment to protecting consumers from unsafe, unreliable, and unregulated products sold through these channels.

Curbing the flow of counterfeit and unsafe goods in e-commerce is critically important to me as a toy manufacturer and a small business owner.

I founded Crazy Aaron's in 1998 with a mission to create toys that inspired a sense of wonder and creativity. I quickly realized that to make my product right, I was going to have to build my own factory, so that's what I did. Today, our headquarters is part of the revitalization of Norristown, where Thinking Putty is proudly made in the United States. We employ over 100 people, and for over 18 years with the support of our customers, we have provided meaningful daily work to hundreds of additional individuals with disabilities in the Philadelphia area.

While my business has seen successes since the days of experimenting in my parents' basement, it has come with unanticipated challenges. As our Thinking Putty became more popular, I discovered a tidal wave of infringing products being sold online through third-party sellers.

We have spent significant time and resources policing these one by one. I have submitted to this Committee a list of hundreds of third-party sellers, many based outside the United States, across numerous marketplaces, who we identify as infringing our marks. Today, I appreciate the opportunity to share three serious concerns.

First, the enormous resources required from a small business to endlessly police these marketplaces for bad actors. Second, that due to many of these bad actors being outside the jurisdiction of the United States, our recourse to protect our intellectual property and reclaim damages is severely limited and, in many cases, is non-existent. Third, and most importantly, these bad actors often sell unsafe goods which do not meet the stringent Federal safety standards required of legitimate producers. These violations range from labeling requirements, illegal levels of regulated chemicals, and mechanical hazards which cause acute physical harm. Consumers visit online marketplaces assuming that the products they see meet safety standards.

I created the world's first magnetic putty. It's a putty toy that crawls over to a magnet as if it was alive, and it was a tremendous commercial success, and it differentiated us from competitors. We invested significant R&D to making it a reality and in making it a safe product.

As counterfeiters, infringers, and knockoffs flooded the marketplace, magnetic putty sales began to decline. I scrambled to dedicate resources to beating back infringers but became increasingly concerned that almost every one of the competing products did not comply with mandatory Federal safety standards.

Today, I have brought with me products I purchased last week from two of the largest online marketplaces in the U.S. I also have brought independent third-party laboratory results showing their noncompliance with mandatory Federal standards.

Our company has done this testing at our own expense and communicated this noncompliance to online marketplaces again and again, following up with them repeatedly. We have done this for years. Nonetheless, these products remain available for sale. They are purchased in the hundreds of thousands by unsuspecting consumers.

They contain loose as received, high-strength, hazardous magnets which are not legal in children's products. You will note that the product packaging and online listings for these products

include language like, “Safe for children ages 3 plus,” or, “Safety tested.” They include photos of children as young as toddlers playing with them. Accidental ingestion of these hazardous magnets can cause serious internal injuries, debilitating lifelong disability in some, and unfortunately, numerous fatalities have been documented. Their magnetic strength is so high, they destroy themselves when drawn to each other. You can see in the video and photo I have provided that when these magnets collide, they not only shatter into razor-sharp shards, but due to the nature of their materials, they will spark and have the capacity to start a fire.

If my words, demonstration, or laboratory results aren’t enough, you need only look at the consumer reviews of these products, which are publicly available in the marketplaces themselves. An example, quote, “The magnet broke apart while I was showing this off to a friend. He was pulling them apart, sliced open his finger. I do not recommend this to anyone.”

Thank you for the opportunity to share the story of one product, amongst a sea of millions, available in online marketplaces. I appreciate your efforts to secure consumers from counterfeit and unsafe goods, and I look forward to answering your questions.

[The prepared statement of Mr. Muderick appears as a submission for the record.]

Chair DURBIN. We appreciate your testimony and the fact that your business philosophy is embracing people with disabilities.

Mr. MUDERICK. Thank you.

Chair DURBIN. Thank you for doing that. Professor Dr. Kammel, you’re next.

**STATEMENT OF KARI KAMMEL, ASSISTANT DIRECTOR,
EDUCATION AND OUTREACH; SENIOR ACADEMIC
SPECIALIST, CENTER FOR ANTI—COUNTERFEITING
& PRODUCT PROTECTION, ADJUNCT PROFESSOR OF LAW,
COLLEGE OF LAW MICHIGAN STATE UNIVERSITY,
EAST LANSING, MICHIGAN**

Professor KAMMEL. Chair Durbin, Ranking Member Grassley, and Members of the Committee, thank you for inviting me to speak today.

My remarks draw on my research on online trademark counterfeiting, as well as my work with brand protection industry professionals.

At the ACAP center I focus on research, education, and outreach around trademark counterfeiting and brand protection with my colleagues. We work with both intellectual property rights owners and governments, as well as online marketplaces, social media platforms, and other industry experts across the field, giving us the unique ability to examine the significant problem holistically from a neutral academic perspective.

Today, I’ll give an overview of online counterfeit sales by third-party sellers and the current state of the law and make two recommendations. One, I support the Informed Consumers and Shop Safe bills, and two, I recommend continued and expanded data sharing and research on the trade and counterfeit goods and anti-counterfeiting responses.

I'd like to start by painting a picture of what is occurring with trademark counterfeiting on online marketplaces and the current state of the law. The sale of counterfeit goods online impacts national economies, companies of all sizes including small and medium-size enterprises, and consumers, and has exploded in the past decade, and even more so since COVID-19.

The financial impact of the sale of counterfeit goods is staggering, estimated roughly over \$460 billion worth of global sales in 2019.

Counterfeiters find success by using another company or brand owner's trademark on a product or package without authorization to sell a fake and usually substandard or even dangerous good. They also take advantage of the opportunity online marketplaces provide to reach often unsuspecting consumers who cannot examine the goods before purchase. Consumers struggle to be able to report suspected counterfeit or cannot find a third-party seller for service of process if they're injured or killed.

Online marketplaces have varying levels of proactive and reactive efforts. In order for a counterfeit to be sold to a consumer on an e-commerce platform, there must be a meeting and time and space of the consumer, the counterfeiter's posting, and the e-commerce platform. The most effective way to disrupt this is to remove one of these factors from the situation proactively before they ever reach that meeting and time and space on the platform.

In the brick-and-mortar space, the current state of the law requires service providers, such as flea markets or malls, to take steps to disrupt the sale of counterfeits and consumers. However, in the e-commerce space, we don't find the same parallel currently in the law. The current state of the law rests primarily on the 2010 Second Circuit case of *Tiffany v. eBay*, which notes that an e-commerce platform only needs to act if they have specific knowledge of a counterfeit posting from a brand known as the contemporary knowledge requirement. There is no proactive requirement for the prevention of counterfeit postings or monitoring of their own platforms for counterfeit, even though they have the most control over the platforms that they've created. Thus, an imbalance is evolved where brand owners attempt to take down counterfeit postings but cannot get at the root of the issue.

Tied into this is a lack of transparency about third-party sellers, details on vetting, takedown, repeat sellers, or any education awareness or reporting mechanisms for consumers.

While Informed Consumers and Shop Safe reflect the growing urgency on this topic and take different approaches, they both seek to require e-commerce platforms to proactively take measures to vet third-party sellers from selling counterfeits and provide multiple avenues for tackling this complex issue.

In my opinion, both pieces of legislation are essential to balance the obligation of brand owners and e-commerce platforms in the space due to the shift from brick-and-mortar environments to the current online e-commerce space that the law did not foresee, and importantly, to provide consumers with more education, protection, and avenues in which to report suspected counterfeit goods.

I also recommend continued and expanded data sharing and research on the trade and counterfeit goods and anti-counterfeiting responses.

Thank you again for the opportunity to participate in this hearing on this very important issue, and I look forward to answering your questions.

[The prepared statement of Professor Kammel appears as a submission for the record.]

Chair DURBIN. Thank you, Dr. Kammel. Mr. Snowden is next.

STATEMENT OF K. DANE SNOWDEN, PRESIDENT & CEO, INTERNET ASSOCIATION, WASHINGTON, DC

Mr. SNOWDEN. Chairman Durbin, Ranking Member Grassley, and Members of the Committee, on behalf of the Internet Association and the internet industry, thank you for the opportunity to appear before the Committee today to discuss the ways that online platforms are partners in the fight against illegal and counterfeit goods, retail theft, and protecting consumers from bad actors online.

IA represents over 40 of the world's leading internet companies on public policy. Our mission is to foster innovation, promote economic growth, empower people through the free and open internet.

Online marketplaces and platforms are the virtual main streets that enable us to purchase the things we want and need. Not all marketplaces are the same. Different items, different sellers, different audiences. In households across America, we use online marketplaces and platforms to get our groceries for the week, sell our children's old clothes that they grow out of too fast, and find hand-made goods and crafts to decorate our homes, all with the click or swipe on a screen.

As we continue to live through the COVID-19 global pandemic, online marketplaces and platforms have helped Americans by delivering the essential goods and products that consumers need to maintain their daily lives and keep our economy going.

While the vast majority of online sellers and goods sold online are legitimate, the internet industry recognizes that online systems have created new challenges for brand owners, rights holders, retailers, and consumers. However, counterfeiting, retail theft, and organized crime are not new problems, nor were they created by online platforms and marketplaces. It will take all of us, law enforcement, big box retail, brands and rights holders, State AGs, and online marketplaces to work together to combat the illegal activity by organized crime.

Online marketplaces have made this a priority and work every day to stop organized crime and counterfeiters. We recognize the responsibility and the important role we play in the ecosystem in stopping this activity. We continue to innovate and cooperate to ensure our marketplaces are safe and trusted by the consumers and sellers who use our stores. We are on the right path to addressing these issues.

It is important to stress internet companies do not permit illegal or counterfeit goods on their platforms. They have invested hundreds of millions of dollars in tools and deployed thousands of team members to implement clear policies. When they find something

that violates their terms of service, they take it down, or in other cases, never allow it up.

Online platforms and marketplaces vet sellers up front through the direct and indirect means. They use advance tools like image detection and machine learning, as well as reports from brand owners.

Rights holders and consumers continue monitoring for any issues. The partnership with brand owners and rights holders are critical, because they are in the best position to identify counterfeit goods. The investments the internet industry made in tools, teams, and partnerships is finding success.

Last year, Amazon enrolled more than 500,000 brands in its free reporting tool. Those brands reported a 99 percent reduction in suspected infringements, and less than .01 percent of products sold on Amazon last year received a counterfeit complaint from a customer.

eBay works with 40,000 individual right holders to identify intellectual property infringement, and Etsy's investments in trust and safety teams have led to a 58 percent increase in intellectual property-related takedowns.

Beyond these proactive efforts, we support the Chairman and Committee's goals of further minimizing the availability of counterfeit and other illegal goods online.

Internet Association encourages the Committee to consider two aspects when taking legislative action that impact sellers, consumers, and online marketplaces and platforms.

First, a national framework that clearly preempts a patchwork of states or local laws would ensure that Americans continue to receive a consistent internet experience nationwide. While states have an important law enforcement role to play in protecting consumers and stopping retail theft, Federal law should be the sole source of regulation for internet companies that operate across State lines.

Second, any information collection and disclosure requirements should be careful not to impose unnecessary burdens or barriers on small businesses. Many online sellers are very small homegrown operations. Information collection disclosure requirements should consider their challenges by establishing reasonable thresholds and timelines and protecting their privacy.

For these reasons, we recognize the changes made in the Senate version of the Informed Consumers Act, and we are encouraged by the version that was recently introduced in the House. The House bill sets natural expectations about the type of information online platforms or marketplaces should collect by high-volume sellers and disclose to consumers, we recognized—while recognizing burdens and risks to small businesses.

The internet industry are partners in the fight to protect consumers and rights holders from the threats posed by fake goods and bad actors. We hope that today's hearing will further discussion about clear, reasonable requirements within the national framework that can enable online platforms and marketplaces to continue providing convenient and safe opportunities to connect sellers and consumers. Thank you and I look forward to your questions.

[The prepared statement of Mr. Snowden appears as a submission for the record.]

Chair DURBIN. Thank you very much. Mr. Dugan.

**STATEMENT OF BEN DUGAN, DIRECTOR OF ORGANIZED
RETAIL CRIME AND CORPORATE INVESTIGATIONS,
CVS HEALTH, WOONSOCKET, RHODE ISLAND**

Mr. DUGAN. Good morning. Chairman Durbin, Ranking Member Grassley and Members of the Committee, my name is Ben Dugan and I'm the director of organized retail crime and corporate investigations for CVS Health. I also serve as the president of CLEAR. It's the Coalition of Law Enforcement and Retail, dedicated to reducing organized retail theft nationwide.

Thank you for the opportunity to testify today on the massive growth of organized retail crime and the impact it has on our consumers, our employees, and the communities that we service.

I want to share firsthand today what I've experienced over 30 years of working on this problem. Organized retail crime represents a massive and growing threat to the tune of \$45 billion a year. The internet is riddled with illegitimate sellers that hide behind the anonymity and the lack of transparency. These criminal organizations employ teams or crews of professional thieves that steal the products by any means necessary and sell them through online marketplaces.

Unfortunately, these means often include daytime retail thefts, threats, intimidation, violence, horrifying stories that play out in our stores every day, and which a lot of us see playing out in the media every day.

There's one thing I want to leave you with today, Senators, is that we're not talking about shoplifting. We're not talking about individuals that go into a store to steal something for personal use. These crimes are connected to organized crime, and carefully planned and controlled by large-scale criminal enterprises with serious economic and human implications.

These professional crews can victimize the same store over and over in the same day, or they can go to dozens of stores in the same day and travel over multiple states. This is all part of this national retail theft epidemic that we're in, and it's being all controlled by organized crime. It's fueled by an increase in demand and facilitated by unregulated online marketplaces.

Perhaps the most disturbing is the direct physical harm these retail crime organizations cause retail employees every day. Very recently, a CVS manager was assaulted and remains in serious condition. These incidents are not uncommon. Reported violent events at CVS have doubled in the last year. To give it some scale, Senators, there's an organized retail crime event reported from a CVS store every 3 minutes, and two-thirds of those involve threat of actual violence or weapon.

There are far less obvious dangers to this crime, including infant formula. This is a favorite target of these criminal organizations. In the investigations that I've worked, these criminals blatantly disregard all of the safety protocols for these products. They ignore or manipulate the expiration dates, and they're not storing it at

proper temperatures. It compromises the product integrity and is endangering the health of an infant.

Just last week, I received some disturbing photographs of a surveillance that my team had conducted where it showed criminals retrieving stolen baby formula from the basement of an abandoned home, cleaning it up, and then sending it off, repackaging it to appear as new for an online seller to sell to an unsuspecting consumer. These products go from the hands of criminals to the hands of families.

Our investigations involve illicit wholesale operations that recruit hundreds of professional thieves who steal up to a million dollars in product per month, just from CVS. Criminal organizations closely coordinate the movements of these crews. They provide specific instructions on what items and quantities to target, and purposely direct them to stores in urban and suburban neighborhoods in virtually every state.

These stolen products are repackaged, distributed, and distributed to the largest online marketplace sellers, and then eventually onto unsuspecting customers. We're talking about dozens of professional thieves, traveling to multiple states, heading to 20 to 30 retail stores per day, and stealing tens of thousands of dollars per store.

CVS Health has resolved over \$75 million in organized retail cases so far this year. The current law doesn't provide us or law enforcement with the tools we need to hold these people accountable. These criminal organizations are growing more sophisticated, more entrenched, and they do—the harm they do to consumers and businesses is only becoming more severe.

We work closely with law enforcement to address this in addition to try to educate our consumers. We are running out of tools, like Senator Grassley said in his opening statement, to keep up.

We need urgent action from this Congress. The Informed Consumers Act, championed by the leadership of this Committee and several of its Members, will make a meaningful difference for us. This bill will help protect the consumers. It will aid law enforcement, and it will prevent crime. Making it harder for criminals to easily dispose of stolen goods to online marketplaces is the most significant step that we can take to curtail retail theft and reduce the real harm the organized retail crime represents to our employees and our customers.

Chairman Durbin, Ranking Member Grassley, I appreciate your leadership on this issue and the entire Committee's commitment to combatting organized retail crime. Thank you again for this opportunity today, and I welcome your questions.

[The prepared statement of Mr. Dugan appears as a submission for the record.]

Chair DURBIN. Thanks, Mr. Dugan.

Mr. Muderick, you had a CNN interview a couple years ago, and you said that one of your employees was spending 15 to 20 hours a week submitting forms, asking Amazon and other e-commerce sites to remove products with your company's trademarks. Is that still going on?

Mr. MUDERICK. What has happened is the producers of these goods have realized that infringing our marks is more difficult for

them. They have changed to not infringe our marks, but it doesn't change the fact that they do not comply with safety standards and flood the marketplace at severely discounted prices.

The problem remains. We just no longer have standing to go to the marketplace through these brand-owner protection mechanisms and say please take this down.

Chair DURBIN. They aren't using your trademarks or identification.

Mr. MUDERICK. It is. It's dropped off significantly because we were so aggressive. They do use key words and other things that we can't enforce with our trademark to drive consumers toward purchasing these types of items rather than the legitimate product.

Chair DURBIN. Dr. Kammel, what I heard you say I think was that the controlling law case on this subject requires that the marketplace have knowledge of deception or counterfeit status. Is that true?

Professor KAMMEL. That is correct. They need to be notified, often by the brand owner, that—which is the notice and takedown procedure, that there is a counterfeit posting before they're required by the law to take it down. Many marketplaces of course, you know, still take down counterfeits beyond this, but in order for them to be held liable—secondarily liable for trademark counterfeiting, that's the standard for it. They only have to respond to specific knowledge of a counterfeit posting.

Chair DURBIN. Mr. Snowden, I guess the thing that has always mystified me is that these internet marketplaces which have grown in size, and all of us use them I think it's pretty safe to say. If they're going to maintain their reputation and integrity, they should be on our side in this battle. It took 8 years to bring them around to that point. Why?

Mr. SNOWDEN. I would say we are on your side. We're on the side of the consumer. If you look at our customer satisfaction reports, you'll see that consumers actually enjoy the online experience for the convenience, but also, they get good products.

What I think, as Ms. Kammel just said, is right in the sense that yes, when we have knowledge of something, we have to take it down, but we don't just wait for that. In 2020, Amazon took down over ten billion bad listings. This process was going on, online stores—we don't want this information on our marketplaces. It is not our goal. It hurts our reputation as online stores to have this type of activity on our store, so we want to get it off as fast as we can. It takes us working with retailers, rights owners, and law enforcement.

Chair DURBIN. I would say my observation, Amazon is late to the party, but we welcome them as a guest. They have said recently, quote, "We look forward to working with lawmakers to further strengthen the bill." The proposals that they've made over the years do not strengthen the bill. They strengthened Amazon's hand in avoiding the bill. I, for one, am not going to stand by and watch this water down any further. We need to move on this. We're going to test your statement that they're on our side.

Mr. Dugan, I asked a competitor of yours that happens to be located in my State of Illinois, and you can guess who I'm talking about.

Mr. DUGAN. Yes, sir.

Chair DURBIN. Why do you have these plastic flaps with keys necessary for underarm deodorant, for goodness sakes? What is going on here?

Mr. DUGAN. Senator, actually, that's actually a direct result of organized retail crime. Unfortunately, it varies sometimes in product by demographic or by city, or suburban neighborhood. We have to lock up those types of products to prevent organized retail crime groups from stealing them. Sorry.

Chair DURBIN. Let me pursue this for a second since we just have a minute left.

Mr. DUGAN. Yes, sir.

Chair DURBIN. They swoop in with some container and drag everything off the shelf. Where do they end up selling these products that they've stolen?

Mr. DUGAN. Online marketplaces are the No. 1 place for these professional crews to dispose of their products. Like to the Chairman's point, they don't come in and steal one or two of these. They steal all the deodorant in the store to maximize profits with their fence. Unfortunately, most of that product winds up on an online marketplace.

Chair DURBIN. Flea markets?

Mr. DUGAN. Flea markets are kind of a thing of the past, Mr. Chairman, quite frankly. I mean, they still exist. The online marketplaces and most flea market sellers also have an online presence, so they're not mutually exclusive from one another. They do both. Flea markets don't play the role that they used to because, quite frankly, the internet provides a much larger customer base that they can sell these products to.

Chair DURBIN. I'll just close by saying in 2019, the U.S. Customs and Border Protection reported that 83 percent of IP-based seizures of goods came from one country, and you can guess what it is, the equivalent of \$1.4 billion. We have retail theft at home being translated into the fencing of stolen goods and these internet marketplaces, and then we have the foreign suppliers of counterfeit goods, such as Mr. Muderick has referred to, that is another venue. There may be more, but those are the two that have been identified so far. Senator Grassley.

Senator GRASSLEY. Yes. To each of you, if you support legislation, what tools would you like to see in those legislations? What tools do you need?

Mr. MUDERICK. Thank you. A more formal process to identify product we know is unsafe or does not meet safety standards and communicate that to the marketplaces versus only having intellectual property protection as the channel to communicate to that marketplace that would be a tool that would be very useful.

Senator GRASSLEY. Ms. Kammel.

Professor KAMMEL. From my perspective, transparency is very important. We have a lot of statistics about takedowns and sellers, but not necessarily how many of those sellers had sold counterfeit prior to the takedown procedure, or what is happening on the backend beyond those initial statistics.

At least from my perspective, the ability to use some of that data for research to study the problem further.

Mr. SNOWDEN. I would say information sharing is very important among all parties. It is something critical for this particular issue to understand who's doing what. Also, reporting requirements for particularly small sellers. Right now, I think in your bill it's about two days, and I think it's important if we have a little longer, like the House bill has 10 days. I would encourage you to consider that as well.

Mr. DUGAN. I would say transparency, Ranking Member. Transparency equals accountability. We can hold people accountable. We've got to first figure out who they are, so we need that transparency first before any other remedy.

Senator GRASSLEY. Okay. To Mr. Muderick, Snowden, and Dugan, what collaborations or voluntary initiatives across or within stakeholder groups have you participated in? Have these been successful efforts? Are some marketplaces more cooperative than others?

Mr. MUDERICK. As a member of the Toy Association, we work with our members, many of whom are manufacturers. Some retailers and online marketplaces are also members and have come to the table to have conversations. I have seen progress over the probably 8-year period that I've been involved in that conversation, specifically around again intellectual property protection, but have not seen progress at the table regarding these unsafe products or products that don't meet safety standards.

Senator GRASSLEY. Mr. Snowden.

Mr. SNOWDEN. I think what we're seeing right now with attorneys general across the country, we have Utah, Illinois, Arizona, California, the AGs are setting up organized crime taskforce, which brings in all the parties, brings in retailers, brings in us, brings in rights holders. That's important, because they're looking at it in a holistic point of view, which is the way we need to go and tackle this issue.

This is organized crime. The key thing about them, they're organized. We have to make sure we get organized on our side as well, and that takes all of us.

Senator GRASSLEY. Mr. Dugan.

Mr. DUGAN. Yes, sir. Unfortunately, there hasn't been a lot of progress in that regard. There are some online marketplaces that do cooperate. eBay is a great example of a great partner on the investigative side.

I will tell you that none of the online marketplace currently have the transparency to the level we're looking for to actually prevent crime. The Attorney General's State taskforces that are being stood up, that we're working very closely with, that talk about increased penalties, tougher penalties. They talk about resources they want to add. They all say the same thing, right? The thing we need to make this work from the online marketplaces, which right now we don't have.

Senator GRASSLEY. What do each of you believe has been the most successful strategy to counter illegal activity? Start with you, Mr. Muderick.

Mr. MUDERICK. I think persistence. You know, our internal efforts nonstop to communicate this even when we feel like we're hitting a brick wall. I'm hopeful that one day we'll break through.

Senator GRASSLEY. Ms. Kammel.

Professor KAMMEL. Proactive approaches to dealing with the problem. Reactive approaches, such as the notice and takedown procedures, are very necessary, but when we see either marketplaces or brands really trying to take a proactive approach before it ever gets posted, we find those the most effective.

Mr. SNOWDEN. I would agree with the proactive nature, with the last thing she said. I would also add that it's important that what's been successful is being able to have the partnership with brands and rights holders. They know what's counterfeit and they know what's illegal. Working that angle and having us work together I think has been the most success.

Mr. DUGAN. What I've learned in my years investigating this crime is that we're not going to be able to arrest our way out of this problem. We do need proactive solutions to really stem the tide of this growth of organized retail crime.

Proactive measures, but preventative measures have been the most effective, and I think will be the most effective going forward, and I believe this bill does that.

Chair DURBIN. Mr. Dugan, I'm just going to jump in because I don't believe you've identified the percentage of the retail theft impact on a business, a drug store. Can you give a percentage of sales?

Mr. DUGAN. Unfortunately, Mr. Chairman, I'm unable to talk about specific retail shrink numbers, loss numbers to CVS. I will tell you this, Mr. Chairman; that it is pretty consistent across all retail, all types of retail. We're all seeing the crime affect us at a similar level, and it's higher than any other level it has been in history.

I know that there are some CEOs that have made public statements about how that ORC is affecting their overall profitability, so I think those are available to you. We could possibly get back to you, Mr. Chairman, if needed.

Chair DURBIN. Please do. Senator Klobuchar.

Senator KLOBUCHAR. Very good. Thank you very much, Senator Durbin, for your leadership, long-time leadership on this issue, and all of you for your work.

I want to focus on some bipartisan legislation that Senator Grassley and Durbin and others introduced with me, and that would prevent dominant digital platforms from engaging in behavior that unfairly harms competition like, relevant here, knocking off products sold on their platform.

Recent reports in places like The Wall Street Journal have documented how Amazon has created knockoff products based on the data that they get from innocent companies that are selling on their platform. And of course, it's the big platform in town, and then engages in self-preferencing of their own brands above other brands.

Mr. Snowden, do you support legislation in making it illegal to use special access to online seller data to create copycat versions of popular products?

Mr. SNOWDEN. Senator, this is an issue that I have members on both sides, so I have traditionally not taken a stance on the competition issues, and I don't plan to make news today.

Senator KLOBUCHAR. Okay. I just wondered. I knew that but I thought I'd ask. We have a lot of people on a lot of sides here, but just to be clear, I get this. At some point, this Congress has to take a side. Do you want to add anything, Mr. Dugan?

Mr. DUGAN. No, I'm sorry, Senator. This is the first I've heard of that, and I was kind of—

Senator KLOBUCHAR. You were nodding your head, so I thought you agreed with me.

Mr. DUGAN. I was learning something, Senator. You were teaching me something. I find it amazing. Thank you.

Senator KLOBUCHAR. Okay. Well, it's true. Mr. Muderick.

Mr. MUDERICK. Thank you. A few months ago, I was sent a link to a new product on Amazon, an Amazon Basics version of our product, and I was obviously concerned. Then I looked a little deeper and I saw that not only was it a knockoff of our product, but it violated a number of our trademarks, so someone did not do their homework. We were able to quickly get it taken down through the Amazon brand registry, which speaks to some of the progress they've made, but I think it speaks also to an underlying problem that you have brought up here.

Senator KLOBUCHAR. Very good, and I appreciate that. I think we're seeing so much more of it than—you know, you just happen to be on this panel. We've had people who have experienced this as we know from the reporting, and I think there's just a lot of it. My view is that we've got to update our laws, which is part of the work that Senator Durbin and Senator Grassley have been doing.

I'm also, of course, concerned about safety when consumers buy products online. Just last week in the Commerce Committee, I questioned SNAP about the heart-wrenching stories of young people in Minnesota who died after taking drugs that were purchased on SNAP. In one case, they didn't know that it was laced with fentanyl.

Mr. Dugan, what are some of the harm consumers can experience when they unknowingly purchase unsafe goods online?

Mr. DUGAN. Thank you for that question, Senator. There's a lot of harms. I will say that there's virtually no product integrity online, so I would caution buying sensitive products online unless you know that they're safe.

We spoke about infant formula. There's other cases that I've worked unfortunately involving organized crews that steal millions of dollars in diabetic test strips and sell them and store them at different temperatures, and then wind up counterfeiting the diabetic test strips, and then sell them to unsuspecting patients with diabetes across the country. There's a lot of harm across there. The effectiveness of over-the-counter drugs, they expire. They get less effective. It's really a domino effect on the type of safety hazards that are out there when there's no product integrity.

Senator KLOBUCHAR. Of course, the fentanyl example is an example of drugs that shouldn't be sold at all on a platform. You know, SNAP has pledged to take these down and do what they can to get, in the witness' words at the last hearing, "drug dealers off their platform." The truth is I continue to believe that when you have these new marketplaces with people making tons of money, that they have to start being responsible for taking this stuff down.

Ms. Kammel, in your experience when consumers are making purchases online, do they have enough information to decide for themselves whether a product might be unsafe?

Professor KAMMEL. No, they don't. Often, they are looking just at an image. Sometimes it's a copy of another brand's copyrighted image, and what information the seller decides to put on the site. One cannot tell what they're actually buying until they receive the product, even if it appears genuine at first glance.

Senator KLOBUCHAR. Whether it's counterfeit PPE on Amazon or advertisements for fake COVID-19 vaccines on Facebook, do you think that online platforms are doing enough to stop this conduct? What else should they be doing?

Professor KAMMEL. There were a lot of initiatives around fake PPE and counterfeit COVID-related products for sure, and I do applaud the marketplaces for looking at that. Across the board, we see counterfeits in almost every industry that we work with, almost every product line that's successful. I believe more should be done proactively.

Senator KLOBUCHAR. Very good. I really appreciate it, and again, thank you very much, Mr. Chairman, for all your work on this and for being a cosponsor of our bill, which I think is so timely given what we're talking about here today. Thank you.

Chair DURBIN. Thank you, Senator Klobuchar. Senator Lee.

Senator LEE. Thank you, Mr. Chairman. Thanks to all of you for offering your insights today.

We've all seen that e-commerce has revolutionized the marketplace. It's revolutionized the way we live and operate and do business, and it's given a lot of people opportunities that they wouldn't otherwise have.

There are some challenges that have of course accompanied this technological revolution and the corresponding social and economic revolution that it's occurred with it. As we seek to make the world a better place and the online experience to be better, we've got to be careful. Because any time we enact laws, those laws can have consequences. We want to make sure that any laws we enact and codify don't make things worse, or don't create one problem while purporting to solve another.

The legislation we're talking about today is something that we ought to scrutinize carefully to make sure that we've got it right. I do have some concerns with it.

Mr. Snowden, I'd like to start with you, if that's all right. The Inform Act has a laudable goal, one that I think all of us would share, of cracking down on counterfeit and stolen merchandise sales on the internet. Nobody wants that. Everyone wants to crack down on that, at least everyone in this room.

I wonder how difficult some of the requirements might be for some companies, especially smaller online marketplaces. By smaller online marketplaces I mean, to a degree, anything other than the largest—anything smaller than the largest among them could suffer.

For example, the bill requires verification of high-volume third-party sellers, and requires that within three business days, and then it also requires annual—continuous annual certification of all sellers. The threshold definition of a high-volume seller is set fairly

low. It's triggered once you pass the required sales of between 5 and 7 thousand dollars annually. It's pretty low. It would take in a lot of people.

Do you have any idea? I'm imagining that the combined sellers of your member companies can certainly be numbered in the many thousands, if not millions. Am I on track there roughly?

Mr. SNOWDEN. In the millions, yes.

Senator LEE. In the millions. We're talking about millions and millions of sellers. Amazon might, just might be able to do this verification with technology. It might be able to do it just fine. I'm not sure. I doubt all of your members would. I definitely worry about smaller platforms that might not be able to do this.

Could the bill—assuming that I'm right, that some really large online marketplaces, Amazon for example, might be able to do this, but smaller companies wouldn't, could the bill end up actually helping a company like Amazon while making it more difficult for smaller businesses to operate and do so in compliance with the law?

Mr. SNOWDEN. Senator, I think your characterization of sellers who use our online marketplaces is accurate. It can be someone, a mom who's working on handmade goods or something that she makes in her basement. She would fall to the verification process of having to do it every three days.

I think what happens in the House bill, which is about ten days, gives a little bit more time and flexibility. We don't want to have barriers that will limit sellers from being able to get online and sell their goods.

The beautiful thing about online marketplaces is that it opens up the door for more sellers, but also opens up the door for more buyers to see your products.

Senator LEE. Right.

Mr. SNOWDEN. I would say that—the 10-day threshold I think would be important, and also raising the limit to \$20,000. Right now I think it's, like you said, five or seven thousand dollars.

One of the issues is if you think about someone selling something, if it's \$5,000 over 200 sales, that's about \$13 a week selling the product. That's not a lot of money.

Senator LEE. Right. Right. Which gets to another concern that I've got. I do worry about language from the Inform Act, and in the Shop Safe Act, that would mandate the public disclosure of the platforms' sellers' names and contact information. This worries me for three independent reasons.

Number one, there are a lot of individuals, moms and dads out there who work from home, or at least partially from home, who operate out of their homes. If they have to provide their name and their address, that could present some privacy and safety and security issues for them. Some of them might be deterred from engaging in that line of work at all.

Number two, it could end up stifling competition by giving larger companies the ability to poach sellers, the sellers who have been affiliated with their smaller competitors. Number three, the sheer regulatory burden associated with this could itself create a natural barrier on entry, a natural restriction on entry, making it harder

generally for smaller competitors to compete. Am I right to be concerned about those three things?

Mr. SNOWDEN. I think you are. The one concern or one I would applaud the Chairman and Members of the Committee who have worked with us and others, particularly in the House side as well as the Senate side, to increase to allow consumers or sellers to be able to report their business information versus their personal information, because that is definitely a barrier. If I'm a single mom working, creating products out of my basement, I don't want everyone to know where my home address is. I would definitely say that we need to keep going down that path.

Senator LEE. Okay. Thank you very much. Thank you, Mr. Chairman.

Chair DURBIN. Senator Coons.

Senator COONS. Thank you, Chairman Durbin, Ranking Member Grassley for holding this important hearing. The Ranking Member and I have been Co-Chairs of the Trademark Caucus for a long time and have held a number of Caucus meetings and hearings over the last decade about the risk that counterfeit goods provide or pose to American consumers.

This testimony today is riveting and challenging. It reminds us that as the marketplace for the purchase of goods online has grown and grown, and particularly strongly during the pandemic, that the number of stolen and counterfeit goods that are now being stolen and fenced or produced and sold to American consumers has taken off dramatically.

We've heard about unsafe goods, whether they're cell phone batteries or bike helmets or spoiled baby formula or counterfeit drugs that have harmed Americans. They also ruin the trust built between brand owners and consumers, as Crazy Aaron—not-so-Crazy Aaron—pretty wise and capable Aaron—has demonstrated to us today.

I think we need to take stronger steps to address the online sale of these goods before they reach consumers' hands. There are some studies that suggest as much as a quarter of all Americans who have purchased goods online have unknowingly purchased a counterfeit good. That's why I'm proud, along with my colleague Senator Tillis, to have introduced the Shop Safe Act.

I was pleased to see a strong bipartisan vote over in the House Judiciary Committee to send Shop Safe to the floor. It will encourage electronic commerce providers to adopt anti-counterfeiting best practices in exchange for a safe harbor from contributory liability for trademark infringement. That bill will increase transparency, keep counterfeit goods with the health and safety impact out of consumer hands, and I think promote the health and safety of our country and continue to accelerate the growth of these innovative sales platforms.

There's also an urgent need to provide transparency to consumers. That's why I'm also proud to support the Informed Consumers Act. As Mr. Dugan made clear, there's a great need for greater transparency.

I think Shop Safe and Inform compliment each other to significantly increase transparency and accountability, and I urge my colleagues to support both of these important bills.

Let me turn to some quick questions, if I could. Mr. Muderick, my daughter's a satisfied customer, really loves putty and slime and so forth, and had commented on just how inventive your products are. I'm struck by your descriptions about how hard it has been to enforce your trademark, and how much time you've had to dedicate to it. Could you just briefly give us a little more detail? How many other competitors, how many other small business owners like you have had to dedicate enormous amount of resources to the whack-a-mole game of notice and takedown, notice and takedown, notice and takedown with the online platforms?

Mr. MUDERICK. We go to trade shows, at least pre-pandemic. So, us owners sit around, and we talk, and the toy industry in particular is a sort of started my life with something else, invented something, and landed here.

Imitation is the finest form of flattery, and I think many of us are very, very flattered. I think if we have a successful product, you are going to see these outright knockoffs, counterfeiters coming into the marketplace.

Senator COONS. You described how magnetic putty that has much lower safety standards poses a real threat to children and infants in particular. What would it mean to you and other small business owners if platforms took more proactive steps to combat counterfeit good sales?

Mr. MUDERICK. It would reduce, on the one side, the resources we need to spend sort of pounding against a wall trying to get someone to listen. It would also, I think, would help our brand integrity. It would help consumer confidence, and we would probably receive more of the legitimate sales of the product than the sales which are going to illicit product.

Senator COONS. Thank you. Mr. Dugan, how will the information that Inform would collect assist in combating the online sale of stolen goods?

Mr. DUGAN. Thank you for the question, Senator. I think it will do more to prevent these accounts from even being opened in the first place. It will definitely protect the consumers from these sellers. It will aid law enforcement. It'll enable us to identify the bad actors much quicker and will prevent the further expansion of the crime. I think right now, what's vital right now is that we're in the middle of an epidemic, that we take immediate action to slow this down.

Senator COONS. Thank you, Mr. Dugan. Mr. Snowden, some platforms have said they'd like to see affirmative requirements for brand owners in Shop Safe. Why isn't the current duty brand owners have to police their own trademarks as Mr. Muderick has enough to encourage them to assist platforms in policing counterfeit goods, and what requirements would platforms like to see of brand owners in the bill?

Mr. SNOWDEN. I think one of the things you're doing in the bill is changing the liability, so the contributory liability is going to put the burden on us and not on them. They have no responsibility in this.

It's important that they stay at the table as well. We cannot do this alone. It takes all of us. We have been proactive for many years working on this particular issue. I mean, when I look at the

retail side, eBay has a program for over 10 years working directly with retailers to help identify suspicious products. This is something we want to do, but we need retailers. We need rights holders to make sure that they are still at the table, and they have a responsibility to help us police their products, as well.

Senator COONS. Mr. Chairman, if I might have one final question. Professor Kammel, just help us understand how this balance works. If you would, describe the whack-a-mole problem experienced by brand owners. I've heard some argue Shop Safe is a handout to big tech, but it immunizes them from liability they already have in exchange for nothing meaningful. Is that accurate, or is it true that online platforms are not frequently broadly liable for trademark infringement?

Professor KAMMEL. Sure. To the first part of your question about the whack-a-mole approach, this is when, as has been described today, a counterfeit posting is up. A brand owner tries to react to it, and they spend hours searching for these counterfeit postings across multiple e-commerce platforms. An entire subindustry has actually sprung up to basically monitor these platforms to the best of their ability, verify with the brand owners, and then submit for notice and takedown, so hence the term whack-a-mole. Once you take down one, another 10 or 20 come up in its place.

The second part of your question would you please repeat?

Senator COONS. About contributory liability and whether this is just a handout to big tech, Shop Safe, that immunizes them from liability they already have in exchange for nothing meaningful. That's been one criticism after the House markup.

Professor KAMMEL. Sure. I don't believe that. I think it addresses what I've written about, which is law disruptive technology. This technology has been wonderful for all of us. Everybody—I'm sure almost everybody in this room uses e-commerce, but there still has to be a balance to it. We're sort of reaching that tipping point where we've seen all of these strict products liability cases being brought because people who are being injured cannot find the seller of the goods. To flip that back to the secondary liability, it creates the space where e-commerce platforms do have to proactively do something to prevent the postings from ever coming up. Brand owners still need to be involved to help identify what their trademarks are, but we find a more balanced meeting between them.

Senator COONS. Thank you. Thank you for indulgence, Mr. Chairman. I look forward to working with all of you to reform this further. Thank you very much.

Chair DURBIN. Thank you, Senator Coons. On the floor, we've started the first of three roll calls. I'm going to go make the first one, and Senator Blumenthal is going to preside after I recognize Senator Blackburn.

Senator BLACKBURN. Thank you, Mr. Chairman. Ms. Kammel, I want to come to you, if I may. Section 230. I know that some online sellers have used Section 230 as a shield to prevent them from liability. I come from Tennessee. Of course, we have aftermarket auto parts that copyrights have been infringed. We have things like Gibson guitars that have been infringed, and not to mention books that have been published, music.

You know, when you talk about the auto parts, the engines for boats and motorsports, things of that nature, what sometimes we've seen in these cases where online sellers really tried to hide behind Section 230.

Do you see that specific part of the law as something that is a potential obstacle to consumers who are trying to get recourse for having bought something that's a fraudulent product?

Professor KAMMEL. I'm very aware of Section 230. It's not an area that I've spent a significant amount of time researching, but I do know that the sellers of counterfeit goods will try to hide behind almost anything they possibly can.

Senator BLACKBURN. Oh, yes. Why don't you take a look at that, and then weigh back in with us?

Mr. Muderick, let me come to you. Country of origin labeling. I've heard from so many people that sell online that they think this is a good thing. Also, from people who buy online because specifically, they don't want to be buying products from China, because many times, they feel like they're an infringed or a knockoff. Certainly, in Tennessee with some of our toy inventors, we have had problems. I'm certain you've met with some of these guys. Talk to me about why that type disclosure and how it can be done so that people get the protection and the knowledge, but their privacy is protected. Why is it a good thing?

Mr. MUDERICK. Sure. I mean, when I was starting a business, I was making putty and selling it out of my home. When the time came that I felt like I needed some protection of my privacy of my home, I got a PO Box. At least there's a way to trace it back, right? Then eventually I got an office. There's ways to communicate to the customer, a place to go, especially if there's legal recourse, while maintaining personal privacy.

In terms of country of origin labeling, obviously it's required by law. It's important for consumers. When I look at these products, sometimes they have it, sometimes they don't. Sometimes it will be in the online listing, sometimes it won't. Often, it is in conflict with whatever the online listing says. It's absolute chaos.

Senator BLACKBURN. Mr. Snowden, I want to go back. Senator Klobuchar was asking you about protections. I think you might want to explain. It sounded, in your response, that you do not support intellectual property protections for U.S. innovators, and that's a protection to them under law. When you said you have members that are for disclosure, members that are against disclosure. Intellectual property protections are very important to this Committee.

Mr. SNOWDEN. I one hundred percent agree with you, and it's important to us as well. What I was referring to was Senator Klobuchar, she was mentioning her—the self-preferencing part of her bill, and that's the part that I said that I was not going to make a comment on today.

Senator BLACKBURN. Okay. I think that's it. Let's go to the country of origin labeling. Where are your members on that?

Mr. SNOWDEN. The country of origin is a challenge for us, because sometimes, we may not even know. We don't touch the product in some cases. In other cases, some of our—well, let me back up. It's important to recognize that online marketplaces aren't just

one company. I think someone said a moment ago, this is about big tech.

There are small tech online stores, as well. When we try to track country of origin, a lot of that's tied up with trade agreements. It's also enforced by Border Patrol.

Senator BLACKBURN. Do you think that everyone in the online marketplace has a responsibility to know what they're selling and what they're bringing to the marketplace? Would you agree with that?

Mr. SNOWDEN. What they're selling, yes, but the country of origin is very difficult.

Senator BLACKBURN. Okay. Mr. Dugan, you want to weigh in on that?

Mr. DUGAN. This is a 50-State problem, Senator. We have plenty of homegrown thieves and organized retail crime organizations to deal with. Transnational organized retail crime is part of this, but not a major factor as far as we can see right now.

Senator BLACKBURN. Okay. My time has expired. Ms. Kammel, I'm going to come back to you for a written answer on your comments on law disruptive technology. I think that that would be helpful as we look at how we're going to move forward on this issue and protect U.S. innovators, and protect a healthy, productive online place that consumers can feel and be certain that they know they're getting fraudulent, counterfeited products. Thank you.

Senator BLUMENTHAL [presiding]. Thanks, Senator Blackburn. I will preside while Senator Durbin is voting and recognize myself.

To all the witnesses, thank you for being here today. As the Chair of the Commerce Subcommittee on Consumer Protection, I've been focused on the role of the Consumer Product Safety Commission and our consumer product safety laws, particularly in the struggle to get online marketplaces to take seriously their responsibility to recall dangerous items.

We have a procedure now to protect people, recall dangerous products. All too often, the online marketplaces feel they have no responsibility to inform consumers or to in any way participate in recalls.

Just as one example, in April 2019, I wrote to Facebook Marketplace and Craigslist about the fact that they were not effectively preventing the sale of recall products, including Rock 'n Play sleepers that have been linked to 32 infant deaths. They have been laggard, slow inconsistent in taking on responsibilities that other sellers and retailers observe. I am now considering reforms that should be made that would strengthen the CPSC.

One of them is that we need to make sure online marketplaces are covered by the product safety and recall laws. Let me ask the witnesses, all of you, what role you think that the CPSC can have, along with the FTC, in enforcing these laws. I should just emphasize we have a lot of good laws. Often, they're unenforced. We've spent a lot of time making news laws that are then unenforced. Frustrating? Yes. Dangerous? Yes. We need to focus on enforcement and give the FTC and the CPSC the tools they need to assure that the law is more than just dead letter. Let me go down the panel.

Mr. MUDERICK. Thank you. I've had conversations with CPSC and shared my information about the products that we have and the infringers that we see. I think that CPSC does an effective job at looking at the ports and bulk shipments that are coming into the United States, but I think they are very challenged, as is the Postal Service, at the single parcels that come through third-party sellers into the United States. It's just a torrent of small envelopes, and it's very hard for them to develop a strategy to interdict them or prevent them from reaching consumers' hands. I don't know. It's sort of outside the scope of my knowledge what we might do about it, but to me, that's where I see a major problem.

Senator BLUMENTHAL. Ms. Kammel.

Professor KAMMEL. The areas that we research focus primarily on trademark counterfeiting, and then any overlap with consumer product safety issues. I think it's important for platforms or anyone who is in the business of providing a space for consumers to purchase product that whatever laws are in place, they uphold whether they're brick-and-mortar or whether they're an online space.

Mr. SNOWDEN. Senator, I think this is something I would like to come and talk to you about more. I will share that when we are notified of recalls or are made aware of recalls, we do pull the product down in most cases where we can, and also, we try to inform the consumer.

In some cases, when you're trying to inform the consumer, the product may have been bought two or three years ago, and the email address, whatever we may have for that particular consumer we may not have, or they may not be able to be contacted. That is something that we are working on, and we take it very seriously.

Mr. DUGAN. I apologize, Senator. That's beyond my role at CVS Health. I'm not familiar with some of the laws that you mentioned earlier, but I would assume that we would be in support of any action that helps protect consumers.

Senator BLUMENTHAL. Thank you. Let me ask one more question. You know, one of the obstacles to effective accountability currently is Section 230, which in effect creates broad immunity for the platforms. Let me ask you, Ms. Kammel, whether you're familiar with the impediments of Section 230 to effective accountability to consumers on the part of the platforms. I'm an advocate of reforming Section 230. We've managed in certain discreet areas to do it. We are proposing additional measures. Senator Graham and I have a proposal which we've introduced in past Congress. It's called the Earn It Act. It's bipartisan. It passed unanimously from the Judiciary Committee. Just one example of what we can do to impose greater accountability if we reform Section 230.

Professor KAMMEL. Thank you for the question. I'm very aware of Section 230. It's not part of my current research, but I'm happy to provide you with some follow-up afterwards.

Senator BLUMENTHAL. That would be great. Anyone else who wants to add any views on Section 230, I'd welcome it. Thank you. Senator Hawley.

Senator HAWLEY. Thank you, Mr. Chairman. Thanks to all the witnesses for being here. Mr. Dugan, I just want to start with you, if I could. I noticed something in your testimony that I thought was interesting. You said that much of the problem with counterfeit

goods online is due to organized crime in brick stores, in brick-and-mortar stores, and that organized criminals shoplift from those stores, and then they turn around and they sell the goods online. Have I got that right?

Mr. DUGAN. No, Senator. I don't think I commented on counterfeit goods. Probably stolen goods.

Senator HAWLEY. Yes, I'm sorry. Yes, stolen. I'm sorry. I introduced the word counterfeit. I mean, the goods online that are stolen, and then they steal them from brick-and-mortar stores and turn around and sell them online. Have I got that right?

Mr. DUGAN. Yes, sir.

Senator HAWLEY. Okay. The New York Times earlier this year had a story in which you were quoted, I think, as saying, quote, "Our security officers are assaulted on a pretty regular basis in San Francisco," and that San Francisco is one of the epicenters of organized retail crime. Have I got that right?

Mr. DUGAN. Yes, sir. You do.

Senator HAWLEY. Okay. Can you just say more about that? Because I think this is something that is—has not been widely reported. It is not widely understood that part of the problem that we're seeing and counterfeit, or in this case, stolen goods online. We've got a deluge of these goods and it's linked also, it now turns out, to this crime wave that we're also seeing across the country. Maybe say something more about that.

Mr. DUGAN. Yes, thank you for that question, Senator. I will start by saying that this is not a big-city crime, that this occurs in all 50 states. Thefts of organized retail crime occur just as much in low-crime suburban neighborhoods as they do in America's largest cities. I know that's probably news to a lot of folks, because it's not covered on the media as it in some of our major cities.

What I meant to say is, we were talking about San Francisco specifically. There's a lot of stolen product there that gets filtered to other states, specifically like Texas, North Carolina, and New Jersey. They get a lot of that stolen product from San Francisco. Like I said when I was trying to make a point was even though the product is stolen in one area, the problem is statewide. That's why we need Federal legislation.

Senator HAWLEY. Right. Like in other words, it could be stolen from one place, San Francisco, New York, St. Louis, whatever, wherever. Then it finds its way online. It shows up in online marketplaces in some context, and it's competing with legitimate goods, with goods that are entirely legal online. Then you've got competition that's making its way to these online marketplaces that's due to organized crime at the brick-and-mortar level, is that fair to say? Have I got that right?

Mr. DUGAN. That is fair to say, except I would add that it's unfair competition.

Senator HAWLEY. Right. Yes, exactly.

Mr. DUGAN. They're getting the products for much, much cheaper. That's what our team does. We track these investigations State to State, all across the country, and then ultimately, it leads us to the same place, which is an online marketplace, which is why we're looking for your help today.

Senator HAWLEY. What do you think is the best way for this body to address that phenomenon?

Mr. DUGAN. I think the swift passage of the Inform Act is a vital first step.

Senator HAWLEY. Very good. Thank you for that. I want to turn to the Amazon self-preferencing question here for a moment. Mr. Muderick, I think that you testified to Senator Klobuchar earlier that your product in particular, that Amazon for a while had an Amazon Basics knockoff of your product. Have I got that right?

Mr. MUDERICK. That's correct.

Senator HAWLEY. It's now been taken down. Is that right?

Mr. MUDERICK. It was taken down, only because it—I'll say accidentally infringed on some of our registered trademarks.

Senator HAWLEY. I see. I just want to highlight this problem because I think it's so central. Last year, The Wall Street Journal reported that Amazon collects detailed data about merchandise, so Amazon can create copycat products. They did that with your product, it sounds like. The Report—The Wall Street Journal report said this was standard operating procedure. Amazon denied that. They said they had procedures in place banning the practice. Has that been your experience, Mr. Muderick?

Mr. MUDERICK. I do not have any insight into how Amazon makes their decisions, but I was aware that the four-pack that they created, or six-pack that they created bore a striking resemblance to another unique item that we had on Amazon.

Senator HAWLEY. It doesn't seem that you're the only one. Employees in the same report said that the procedures that Amazon referenced weren't enforced, and in fact, Amazon encouraged employees to break those procedures. Then last month, Reuter's reported that Amazon's own internal documents reveal it's still doing the same thing. The Markup has reported evidence that Amazon is systematically rigging its search engine to return results for its copycat products over producers like you, Mr. Muderick.

I just want to drive home the point that we can talk all day about the problems of counterfeit goods, and those are significant, but that's not going to make a huge dent, I don't think, unless we do something about the self-preferencing on these platforms.

I've introduced legislation that would prohibit this self-preferencing. I've joined legislation by Senator Klobuchar and Senator Grassley that heads in the same direction, and I just want to underline that I think that is absolutely vital that we tackle this issue.

Last thing, Mr. Muderick, in my few remaining seconds here. As Senator Blackburn was asking about some of the country of origin issues, and I want to just highlight this. Your product, tell us about the problem of counterfeiters using high-strength magnets in some of the knockoffs of your product. I think that these were not goods that were not made in the United States of America, is that right?

Mr. MUDERICK. That's right. These samples I have here, which I ordered last week, were not made in the United States. Some of them do have producer markings. This one says made in China. This one says nothing at all. They do contain these high-strength magnets which cause significant hazard to children when they're playing with this product.

Senator HAWLEY. Absolutely. I just want to underline that we're talking a lot right now about supply chain and manufacturing issues, which is absolutely important given our supply chain crisis. I think what we're also seeing in this context is that when giant companies like Amazon help hock foreign counterfeits, these are counterfeits. They're made abroad. Parents don't usually have any way of knowing this. It's very difficult to find out. They're not only endangering children. They're also taking jobs away from people like you and your company that are made here in this country and putting American kids at risk, as well as our own economy.

We need to find ways to push back against this simultaneous problem of counterfeiting, of misrepresentation of goods, and also frankly offshoring. Thank you for bringing that to our attention, and thank you, Mr. Chairman.

Chairman DURBIN [presiding]. Thanks, Senator Hawley. Senator Hirono.

Senator HIRONO. Thank you, Mr. Chairman. I thank the panelists. Mr. Dugan, you mentioned that you think that the Inform Act should be passed as quickly as possible. My understanding is that the House version of this act changed the date when the consumer receives information about the product to after the point of sale. Do you support that change?

Mr. DUGAN. I support both the House legislation and the companion here in the Senate. I'm not an expert or legislator, so I'm going to kind of leave that to the legislators, if I could, Senator. I do support—

Senator HIRONO. Doesn't it make more sense to get the information to the consumer before the consumer purchases the item?

Mr. DUGAN. Yes. Yes. I prefer—I support that, yes.

Senator HIRONO. Since Mr. Dugan supports the passage of the Inform Act, do the other panelists also support the passage of this act? Please.

Mr. SNOWDEN. Senator, we have not weighed in with official support. Right now, we still want to work with the Committee to fine-tune some things in the bill, particularly the verification timelines and thresholds which are very important.

Senator HIRONO. It sounds as though you support the concept of disclosure information.

Mr. SNOWDEN. Correct, in any form.

Senator HIRONO. Yes.

Professor KAMMEL. Yes, I do.

Mr. MUDERICK. Yes, I do.

Senator HIRONO. Thank you. Mr. Muderick, you have brought to the attention of these online sellers, maybe Amazon that they have online unsafe products, and they don't take it down. You've been asked a number of questions relating to Section 230. I'm wondering where the online platform receives money for advertising the product, whether they should be exposed to a liability? What do you think? Any of you.

Mr. SNOWDEN. I'm not sure if I fully understand your question, Senator. Can you—

Senator HIRONO. Right now, Section 230 pretty much protects the online marketplace of Google and, you know, Amazon. Let's just use Amazon—that whatever is the content, they have no re-

sponsibility for monitoring or doing anything, disclosing anything. I am cosponsor of, what is it, the Safe Tech Act, which requires that in certain instances, these platforms will not have the benefit of liability protection. One of the instances would be if they actually receive money for that item to be advertised on their platforms.

Mr. SNOWDEN. Section 230 allows us to actually take down the content. That's why it's so vital that we have that liability protection. Anything that would harm or dilute that protection would be a concern of ours.

Senator HIRONO. Except that if the platform does not take down this product as was the case with Mr. Muderick, then shouldn't there be some liability attaching? Because right now, there's nothing that really requires these platforms to take those kinds of precautions. If they want to, they can. If they don't, they still get the liability protection.

Mr. SNOWDEN. No. Actually, ma'am, there is law now that says if we are notified of something we have to take it down, and that is required. We do that.

Mr. Muderick, I don't know all of his examples and I'm not familiar with everything. This is the first time I'm hearing about it, so I can't comment on exactly what he's saying. I can tell you that there is existing law that says if we're notified about something, we must take it down.

Senator HIRONO. That is surprising, because this Committee has had other hearings where certain video, for example, is very harmful, very—the platform is asked to take down a video. For example, a father whose daughter was shot and killed online, that video. He kept asking the platform to take down the video, and they never took it down. I don't understand your comment, that if you are requested, you have to take something down.

Mr. SNOWDEN. An example Mr. Muderick said was there were products that were infringing on his trademarks. In those cases, that information, once we're notified of that, there's precedence there. There's law there that says we have to take it down. That's notice and comment.

Mr. MUDERICK. If I may.

Senator HIRONO. Yes.

Mr. MUDERICK. On a monthly basis, we would send in lists of product which did not infringe our marks but were obviously in violation of Federal safety standards. On a monthly basis, we would follow-up with the same list of not only the same products, but even many cases, the same exact listing that had not been taken down.

Senator HIRONO. I am among the many Members of this Committee who are looking at the Section 230 immunity provisions to make some changes. I realize that every time we do that, I think there might be unintended consequences. The bill that I mentioned, Safe Tech Act, seeks to really define those instances when that immunity is not available. I'm going to continue to pursue that. I would ask the panelists to take a look at the Safe Tech Act. Thank you, Mr. Chairman.

Chair DURBIN. Thank you, Senator Hirono. Senator Cruz.

Senator CRUZ. Thank you, Mr. Chairman. Mr. Dugan, over the last several years, we've seen repeated efforts in Democrat-controlled cities and states to effectively decriminalize theft. California, for example, said that any theft under \$950 is no longer a felony. We won't arrest you if you're under that dollar figure.

A recent NBC News article stated that both CVS and Walgreens say shoplifting in San Francisco outpaces thefts at their stores across the country. Pretty common sense. If you remove or greatly reduce the penalty for stealing things, theft gets worse.

What exactly are the figures for nonemployee theft in CVS stores around the country. In particular, how do the rates of theft differ in jurisdictions with so-called progressive prosecutors who decline to prosecute shoplifting versus jurisdictions where law enforcement is enforcing laws against theft?

Mr. DUGAN. Thank you for that question, Senator. Unfortunately, I'm not going to be able to disclose CVS financial information about loss. If you'll allow me to comment. This is not a big-city problem, right? Decriminalization is contributing to the problem. You're right, sir.

Senator CRUZ. Is there more theft in San Francisco than elsewhere?

Mr. DUGAN. No, sir.

Senator CRUZ. There's not?

Mr. DUGAN. Relative to the amount of stores and market share that we have, it's higher, but—

Senator CRUZ. NBC News was wrong when they said that.

Mr. DUGAN. I can only speak to what I see every day in the ground center, and I follow these criminals day to day from State to State and city to city.

Senator CRUZ. CVS would support other jurisdictions legalizing shoplifting up to \$950?

Mr. DUGAN. CVS does not support legalizing shoplifting, Senator.

Senator CRUZ. Why not? Why not?

Mr. DUGAN. We're not going to endorse criminal activity.

Senator CRUZ. You're saying it has no effect.

Mr. DUGAN. I never said it had no effect.

Senator CRUZ. You said there's not worse shoplifting in San Francisco. I find that highly—

Mr. DUGAN. That doesn't mean no effect, Senator.

Senator CRUZ. Does it have an effect or not?

Mr. DUGAN. Yes, of course it does.

Senator CRUZ. What's the effect?

Mr. DUGAN. The effect is shoplifting is completely different than organized retail crime. If you're talking about shoplifting, that's a whole different dynamic than organized retail crime, or less retail crime—

Senator CRUZ. My question is what's the effect? You guys have the data.

Mr. DUGAN. I'm not sure I understand your question, Senator. Is there effect—do we take losses to shoplifting? Yes, like every other retailer, we take a loss.

Senator CRUZ. Are they greater in jurisdictions that effectively legalize it?

Mr. DUGAN. No, they're not.

Senator CRUZ. Then why would you oppose every jurisdiction legalizing shoplifting? Your answer's not making any sense, sir.

Mr. DUGAN. I respectfully disagree. I think I'm making perfect sense. What I'm saying, Senator, is this crime goes to all 50 States. It's not a big-city problem. Absolutely not.

Senator CRUZ. Why would you oppose every jurisdiction legalizing shoplifting? Sir, why would you oppose every jurisdiction legalizing shoplifting?

Mr. DUGAN. Why are we not going to oppose legalizing shoplifting?

Senator CRUZ. Why—yes.

Mr. DUGAN. No, we're not going to do that, Senator. We're not going to endorse criminal activity. Shoplifting is a different dynamic than organized retail crime, and what I'm here to testify about today is that organized retail crime effects every city including the major cities in Texas.

Senator CRUZ. All right. That's really quite remarkable. That's really quite remarkable. Let me ask a different question, which is you go into great detail about organized criminal organizations. I want to point to something in Ms. Kammel's testimony where she sites the work of J.P. Kennedy. He's written a lot on the subject of theft.

One scholarly article that Mr. Kennedy wrote, "Functional redundancy and response to employee theft within small businesses", has an interesting paragraph on the second page which is relevant to this discussion.

It says, quote, "It has been estimated that employee theft within the United States is ten times more costly than all forms of traditional street crime, and that it cost victimized businesses in the U.S. economy as much as \$400 billion a year. Furthermore, employee theft is estimated to cost victimized businesses significantly more than nonemployee theft within the same businesses."

In your experience, what is the relative magnitude of employee theft versus nonemployee theft for retailers?

Mr. DUGAN. My scope at CVS, Senator, is to investigate the external part of the theft. I don't have the internal figures necessarily at CVS.

I will say overall as a president of the Coalition of Law Enforcement in Retail that internal theft is down. I could certainly provide you a report with those figures attached to it, Senator, if you'd like me to.

Senator CRUZ. Do you have any judgment as to which is bigger, employee theft or nonemployee theft?

Mr. DUGAN. I might be a biased opinion there, Senator, because I'm on the street every day working out organized retail crime. I see the harm that it does every day, why we need this Federal legislation. So I see it. I see it—

Senator CRUZ. Sir, with all respect, I'd like you to answer my question. Do you have any judgment as to which is bigger, employee theft or nonemployee theft? In particular, Mr. Kennedy says employee theft is ten times larger.

Mr. DUGAN. No, I would disagree with that assessment.

Senator CRUZ. Okay. Do you have any judgment as to which is bigger, employee theft or nonemployee theft?

Mr. DUGAN. Most recently over the last spread of this epidemic, I would say nonemployee theft.

Senator CRUZ. Okay. Thank you.

Mr. DUGAN. You're welcome.

Chair DURBIN. I want to thank the witnesses for coming in today and testifying. It was an interesting panel and drew a large part of our Membership here on the Senate Judiciary Committee. We have Committee jurisdiction issues which suggest that the Senate Commerce Committee has jurisdiction over this issue. We have jurisdiction over Senator Coons' aspects of it. That's ours to worry about.

The problem is real, and we now have all the major players on board apparently toward doing something about it. I'm going to do my best, though not—it won't go through this Committee, to encourage the Commerce Committee to join with us in this effort.

I thank you for lending your voices to it. It's been 13 years for me since I first saw those Home Depot drills and realized what was going on out there. That's a long time to wait for an answer, maybe not by Senate standards, but by normal human standards.

Thank you for joining us today, and with that, the Senate Judiciary Committee stands adjourned.

[Whereupon, at 11:38 a.m., the Committee was adjourned.]

[Additional material submitted for the record follows.]

Witness List
Hearing before the
Senate Committee on the Judiciary

“Cleaning Up Online Marketplaces: Protecting Against Stolen, Counterfeit, and Unsafe Goods”

Tuesday, November 2, 2021
Dirksen Senate Office Building Room 226
10:00 a.m.

Aaron Muderick
Founder and President
Crazy Aaron's
Norristown, PA

Kari Kammel
Assistant Director, Education and Outreach, Senior Academic Specialist, Center for Anti-
Counterfeiting & Product Protection
Adjunct Professor of Law, College of Law Michigan State University
East Lansing, MI

K. Dane Snowden
President & CEO
Internet Association
Washington D.C.

Ben Dugan
Retail Crime and Corporate Investigations
CVS Health
Woonsocket, RI



TESTIMONY OF

**BRENDAN P. DUGAN, CFI
DIRECTOR OF ORGANIZED RETAIL CRIME
AND CORPORATE INVESTIGATIONS
CVS HEALTH**

BEFORE THE SENATE COMMITTEE ON THE JUDICIARY

HEARING ON

**"CLEANING UP ONLINE MARKETPLACES: PROTECTING AGAINST
STOLEN, COUNTERFEIT, AND UNSAFE GOODS"**

NOVEMBER 2, 2021

Chairman Durbin, Ranking Member Grassley and members of the Committee, thank you for the opportunity today to testify on the massive growth of organized retail crime and its impact on consumers, retail colleagues, and community retailers.

My name is Ben Dugan, and I am the Director of Organized Retail Crime and Corporate Investigations at CVS Health. In addition to our role as a retailer in thousands of communities across America, CVS Health is the leading health solutions company, delivering care and improving the health of communities across America through our local presence, digital channels, and 300,000 dedicated colleagues. Where and when people need us, we help them with their health by improving access, lowering costs and being a trusted partner for every meaningful moment of health.

I am certified as an expert in Organized Retail Crime and Diversion by the U.S. Department of Justice and hold additional certifications as a Law Enforcement Instructor, a Certified Forensic Interviewer (CFI), and in E-Commerce Investigative Methodologies. I have over 30 years of retail loss prevention experience in investigating organized retail crime offenders for large retail chains, catalog-based sellers, pharmacy, and specialty retailers.

I also currently serve as President of the National Coalition of Law Enforcement and Retail (CLEAR), a non-profit, non-partisan national association founded in 2008 by law enforcement and retail loss prevention professionals who saw the need for greater collaboration in the face of increased organized retail crime. The Coalition provides a forum for public and private sector members, with experience in a wide variety of public safety initiatives, to support collaborative efforts to improve the safety of our communities and advance retail loss prevention.

Over my 30 years of investigating organized retail crime and assisting prosecutors, I have provided expert testimony in dozens of high-profile criminal cases and led efforts to dismantle some of the largest organized retail criminal organizations ever apprehended in the United States. My job every day is to prevent organized retail crime in our stores to create a safe environment for our colleagues and customers.

In my testimony today, I will focus on key themes related to the size, scope, and impact of organized retail crime. I will provide some examples of how organized retail crime affects CVS Health and our efforts with law enforcement to curtail this activity. Finally, I will speak to actions Congress can take to assist retailers in our work to protect our colleagues and customers.

The sale of stolen goods via online marketplaces is increasing rapidly, representing a serious threat to legitimate businesses of all sizes and subjecting our colleagues and in person and online shoppers to real harm. Organized retail crime has been on the rise for more than a decade and has grown enormously in the last year and a half. Criminal networks have taken advantage of the COVID-19 pandemic and the steep rise in online purchases to prey on

unsuspecting consumers by peddling counterfeit, stolen, defective, harmful, and potentially dangerous products.

CVS Health alone has experienced a 300 percent increase in retail theft from our stores since the pandemic began. The ease with which online sellers can open and close their sites, essentially undetected, is directly related to this increase in criminal activity in our stores.

An organized retail crime-related event is reported in one of our nearly 10,000 CVS Pharmacy stores every three minutes. CVS Pharmacy alone loses more than **\$200 million each year** due to organized retail crime. The average professional thief targeting a CVS Pharmacy steals **\$2,000 in just 2 minutes.**

CLEAR estimates that organized retail crime accounts for \$45 billion in annual losses for retailers. It is estimated that more than \$500 billion in illicit stolen and counterfeit goods are sold on third-party marketplaces like Amazon each year.

These crimes have become more sophisticated and highly dangerous. The threat begins when a “booster” targets a retail store for theft. Boosters are the field operation for organized retail crime, and either commit the theft themselves or recruit others to steal for them. In recent years, boosters have become increasingly brazen and violent, placing retail colleagues and customers in danger.

The use of a weapon or physical violence during an organized retail crime theft has more than doubled in the last year and a half. As these crimes grow increasingly common, they pose a serious threat to the safety and well-being of our customers and colleagues, subjecting them to potential harm and distress.

Once a theft is completed, the booster turns in their haul to a nearby waiting “fence” who pays the booster in either in cash or drugs, usually 25 percent of the product’s true retail value. It is not unusual for a booster to hit multiple stores and even to hit the same store more than once a day. Higher level boosters connected to large scale criminal organizations travel across multiple states and ship the stolen product to a fence.

Fences typically have responsibility for collecting and transporting the stolen goods. They are involved in recruitment and usually are collecting stolen goods from several boosters a day. Fences may direct boosters on what goods to steal and set the payout based on the type and number of goods stolen.

The fence also may make multiple trips a day to a central site where the goods are sorted and cleaned. The cleaning of stolen retail product involves the removal of the retailer’s anti-theft devices and markings to make the merchandise look legitimate and disguise its origin. The central, or bundling, site may be a warehouse, but, depending on the scale, these organizations also operate out of residential homes. Fences are paid in cash, usually by a wire transfer from the larger criminal element that ultimately resells the product through an online marketplace.

From the consolidation site, the stolen goods can be sold directly online to unsuspecting customers, to other third-party sellers (some of whom know the goods are stolen or counterfeit) or distributed to the marketplaces themselves to fulfill orders. We also have tracked instances where goods stolen from our stores were shipped to other regions. For example, in a recent case, we identified a trade route for moving goods stolen in Chicago and sold to criminal organizations in New York City. In its simplest form, organized retail crime is a syndicate of sophisticated criminal networks consisting of professional thieves, fences, and illicit online sellers. The anonymity provided by internet marketplaces allows the movement of stolen goods to go virtually undetected by law enforcement.

Boosters are the most likely to be arrested for organized retail crime, but these arrests do little to impact or hinder the rest of the organization. A booster is easily replaced. A cooperative booster usually can only provide information one step up about the larger criminal organization. **To gain the most traction in curtailing the thefts and reselling, CVS Health works with law enforcement to focus on dismantling the larger organized retail crime organization behind the booster and the fence.**

When stolen goods make their way online, the unsuspecting customer has no idea the product they just purchased was stolen. The customer has no warning that the product may have been tampered with, had its integrity jeopardized through improper storage or other means, or that the product may be faulty. And, because sellers are not required to provide contact information to the buyer, the seller may be left with no recourse should they be harmed by or wish to return the product.

Criminal organizations responsible for organized retail crime thrive in the anonymity of online marketplaces to resell goods stolen from retail stores. Sellers operate fully knowing that most online marketplaces will protect them against law enforcement. Even when subpoenaed, some of the largest marketplaces refuse to disclose financial and other records that would strengthen the ability of prosecutors to bring cases to court and hold criminals accountable.

Let me just be clear about what organized retail crime is **not**. It is not everyday shoplifting. It is not individuals committing singular opportunistic thefts for personal reasons. It is organized, it is sophisticated, and it is massive in scale.

Last year, my team identified and resolved over \$40 million in e-commerce fraud across all online marketplaces. Our biggest case last year involved a business named *D-Luxe* that sold over-the-counter drugs on Amazon. *D-Luxe* was listed as one of Amazon's "Top Rated Sellers." The company was owned by a man named Danny Drago. He was known by boosters and fences as "The Medicine Man." CVS Health investigators were led to Mr. Drago after weeks of surveilling booster activity in the San Francisco area brought them to a warehouse in nearby Concord, California.

When CVS Health approached Amazon to assist with the investigation, Amazon refused to do so without a subpoena. When the San Mateo County Sheriff's Department issued a subpoena,

Amazon claimed to not possess any of the requested information. **It was only after the Sheriff's Department issued search warrants to banks associated with Mr. Drago that it became apparent the *D-Luxe* operation was much larger than initially thought and depended on Amazon.**

Mr. Drago and his wife were involved in a nearly \$40 million operation which operated at least two Amazon accounts, selling more than \$5 million a year in stolen goods on Amazon and through multiple other Amazon sellers. **Amazon suspended one of their accounts in 2019, but did not close the other accounts operated by Mr. Drago or the associated sellers until weeks after the CVS Health investigation resulted in his arrest and seizure of the stolen goods.**

This year we are on target to resolve more than 70 cases involving approximately \$104 million in fraud related to the reselling of stolen goods on Amazon. At least one of these cases will be larger than the Drago operation.

The examples I have provided here are a small sample of what retailers face with regard to organized retail crime. **This activity is not specific to CVS Health or to a single category of products.** Speaking in my role as president of CLEAR, I can verify that this problem impacts businesses of all sizes and virtually every category of retailer: pharmacies, grocers, home improvement, health and beauty, clothing, and department stores. No retail business or product is immune.

Retailers spend billions collectively each year on security and loss prevention, but we are being overwhelmed by criminal networks who know they can quickly, easily, and anonymously sell stolen products online for a huge profit.

State and local governments also are recognizing the problems created in their communities by organized retail crime. As an example, the City of San Francisco formed a task force following the San Mateo case. CVS Health is working closely with the city's Board of Supervisors and local law enforcement to address organized retail crime in the area going forward.

State Attorneys General have also come forward to discuss the link between organized retail crime and other criminal operations. Several state Attorneys General have announced task forces to bring together state and local resources, including law enforcement, to increase awareness and tackle these issues.

One example is Illinois where, in announcing the state task force, Illinois Attorney General Kwame Raoul stated, "Organized retail crime is a multibillion dollar per year industry, but more important than the financial cost is the danger organized retail crime poses to our communities. These brazen, violent crimes are committed by sophisticated criminal organizations that are involved in drug trafficking, human trafficking and other serious crimes." Attorneys General of other states, including Arizona, Florida, Georgia, New Mexico, Pennsylvania and Utah are also leading on this issue, as well as the Attorney General Alliance.

The International Criminal Police Organization known as INTERPOL also recognizes the direct link between organized retail crime and human trafficking, drug trafficking, corruption, bribery, and money laundering with ties to global terrorism.

The increase in the number of cases successfully prosecuted demonstrates that our collaboration with law enforcement is working. Our efforts are hampered by the lack of transparency and cooperation from the online marketplaces.

Legitimate sellers – both big and small, brick-and mortar and online – and consumers would benefit from enactment of the bipartisan Integrity, Notification, and Fairness in Online Retail Marketplaces (INFORM) for Consumers Act (S. 936) championed by the leadership of this Committee and several of its members.

The INFORM Consumers Act would require online marketplaces to collect and verify third-party sellers' information and require post-transaction disclosure of contact information to consumers who buy from high-volume third-party sellers. These basic transparency and accountability measures will help protect consumers from illicit goods, aid law enforcement in efforts to track organized crime, and make it harder for criminals to profit by selling stolen or counterfeit merchandise.

By making it harder for criminals to easily dispose of stolen and counterfeit goods, the INFORM Consumers Act would directly and immediately curtail theft in retail stores and the proliferation of counterfeit goods available in online marketplaces. Importantly, by increasing confidence in the integrity and safety of the products purchased online, the INFORM Consumers Act would also enhance the ability of legitimate sellers of all sizes to connect with customers. CVS Health supports the INFORM Consumers Act and encourages its swift passage.

I thank the Committee for the opportunity to testify, and I would be glad to answer any questions about my testimony today.

U.S. Senate Committee on the Judiciary

Hearing on Cleaning Up Online Marketplaces: Protecting Against Stolen, Counterfeit, and Unsafe Goods on November 2, 2021

Written Statement

Submitted by Kari Kammel

Assistant Director, Center for Anti-Counterfeiting and Product Protection
Michigan State University

Chair Durbin, Ranking Member Grassley, and Members of the Committee, thank you for inviting me to testify on the problem of the sale of counterfeit goods on online marketplaces. I am representing myself at today's hearing. The views I express are my own.

I am the Assistant Director for Education and Outreach and Senior Academic Specialist at the Center for Anti-Counterfeiting and Product Protection ("the A-CAPP Center") at Michigan State University and an adjunct professor of law at MSU College of Law, where I teach intellectual property courses, including one of the only classes in the country on trademark counterfeiting law. I research and publish about trademark counterfeiting, as well as work with brand protection practitioners in the field focusing on the Center's outreach and education. My remarks draw on our recent and ongoing research on trademark counterfeiting in the online space.

1. The Center for Anti-Counterfeiting and Product Protection at Michigan State University

At the A-CAPP Center, we focus our work upon the complex global issues of anti-counterfeiting and brand protection of products, across all industries, in all markets.¹

¹ Center for Anti-Counterfeiting and Product Protection, <https://a-capp.msu.edu>; We rely on our academic expertise with Michigan State University's College of Law, the School of Criminal Justice, the School of Packaging, the Department of Supply Chain, the Department of Engineering, the International Business Center, the Department of Advertising and Public Relations, the Forensic Chemistry lab, and the

We seek to provide multidisciplinary academic research on this ever-growing problem of trademark counterfeiting, of which there is little research. I also work closely with our industry advisory board, made up of multinational brands from a variety of industries, and a Homeland Security Liaison, the Director of the National Intellectual Property Rights Center (the IPR Center). In addition to intellectual property rights owners and government, I also work with online marketplaces, social media platforms, service and technology providers, law firms, investigators and other professionals in the field of brand protection with my colleagues so that we can examine the problem from a neutral academic perspective.

I also focus on the practical impact of the Center's research, translating it into best practices for industry, through outreach and education to enable the sharing of information with students, industry professionals and the public. I oversee our executive education training and the first online professional brand protection certificate.²

2. Problem of Trademark Counterfeiting on Online Marketplaces

The sale of goods in online marketplaces, both licit and illicit goods, has grown exponentially in the past decade.³ Particularly since the onset of COVID-19, consumers have increased online shopping.⁴ The U.S. leads the world in total e-commerce sales and B2B sales, and is second in the world in B2C.⁵ With virtual storefronts and online

Media, Advertising and Psychology lab at MSU, as well as academic partners across the country and world to research counterfeiting and its impact on brands and consumers.

² Brand Protection Professional Certificate, <https://a-capp.msu.edu/bp-certificate/>. We also run a digital industry journal highlighting best practices, Brand Protection Professional Journal, <https://a-capp.msu.edu/outreach/brand-protection-professional-bpp/>

³ Kari Kammel, Jay Kennedy, Daniel Cermak, and Minelli Manoukian, *Responsibility for the Sale of Trademark Counterfeits Online: Striking a Balance in Secondary Liability While Protecting Consumers*, 49 AIPLA Q. J. 221, 224 (Spring 2021); Saeed Fayyaz, *A Review on Measuring Digital Trade & E-Commerce as New Economic Statistics Products*, STATISTIKA (2019), https://www.czso.cz/documents/10180/88506450/32019719q1_057.pdf/37dfdc8-0aca-4859-b774-641d79e40f3?version=1.0

⁴ OECD, *Misuse of E-Commerce for Trade in Commerce* (October 2021) (noting that between 2018 and 2020, online retail sales, a subset of the B2C total, rose by 41% in major economies, compared to less than a 1% rise in total retail sales).

⁵ OECD, *supra* note 4 at Table 2.1. World e-commerce in 2019 (citing UNCTAD)

transactions, online marketplaces give businesses of all sizes the opportunity to achieve global profits and reach consumers they might not have been able to access previously, as well as giving consumers access to products delivered to their door that they would not have previously. Counterfeiters also take advantage of the opportunity online marketplaces provide them and they rely on the brands' goodwill and products to reach often unwitting consumers. Their sale of counterfeit goods remains low risk to the sellers--much lower risk than selling in a brick-and-mortar venue. Counterfeit items previously sold in flea markets and on the street or in bodegas are now sold in volume on online marketplaces, social media pages and the dark web.⁶

The volume of counterfeits is staggering but also difficult to measure for a variety of reasons. First, it is an illicit activity that is often focused on deception. Second, the most accurate data we have is from seizure data. The U.S. Customs and Border Protection's Intellectual Property Rights Seizure Statistics report for the 2020 fiscal year reported that "CBP made 26,503 seizures with an estimated manufacturer's suggested retail price (MSRP) of over \$1.3 billion."⁷ The size of the problem is often calculated based on seizure data, or takedown data, which does not reflect the universe of counterfeit goods.⁸ Third, data sharing between brands, platforms, law enforcement and academia has always been a struggle. Brands may have their own investigatory data; platforms may have their take down data; but this data is usually not shared, even with researchers. Additionally, many goods that are reported by consumers to e-commerce marketplaces that are or could be counterfeit instead are reported as a quality issue since there is no option to report counterfeits. However, we do know that the postings proliferate, as one major online marketplace reported that its proactive efforts have removed over one million suspected bad actors before these individuals could publish a listing for even a single product, while blocking an additional three billion suspected

⁶ Kammel et al, *supra* note 3, at 226; Jay Kennedy, *Counterfeit Products Online*, 1-24 in THE PALGRAVE HANDBOOK OF INTERNATIONAL CYBERCRIME AND CYBERDEVIANCE (eds. Thomas J. Holt & Adam Bossler 2019).

⁷ U.S. Customs and Border Protection's Intellectual Property Rights Seizure Statistics FY 2020 (posted September 21, 2020 and last modified September 30, 2021), available at https://www.cbp.gov/sites/default/files/assets/documents/2021-Sep/101808%20FY%202020%20IPR%20Seizure%20Statistic%20Book%2017%20Final%20spread%20ALT%20TEXT_FINAL%20%28508%29%20REVISED.pdf.

⁸ Jay P. Kennedy, Matthew R. Maher, and Asia Q. Campbell, *Citizens' Support for Local Law Enforcement Anti-Counterfeiting Activities*, 44 AM. J. CRIM. JUST. 914-937 (2020).

counterfeit listings.⁹ The recent OECD report, however, runs six qualitative exercises to show counterfeit customs seizures and using a regression analysis shows a positive correlation between “various e-commerce proxies and illicit trade indicators.”¹⁰

Still, counterfeiting remains a growing threat as consumers have been increasingly moving online, placing them at heightened risk for interacting with counterfeiters on third-party marketplaces.¹¹ Additionally, online marketplaces have varying and inconsistent levels of proactive and reactive efforts to deal with counterfeits as reported by marketplaces and brands who deal with counterfeits of their marks, in particular, Small and Medium-Size Enterprise (SME) brands.

Financially, counterfeit goods impact national economies, as well as companies of all sizes. Counterfeit and pirated goods in international trade have been estimated to amount to as much as USD 464 billion in 2019, or 2.5% of world trade that year.¹²

From a business standpoint, from the moment an intellectual property rights owner exposes itself to sales benefits of the online marketplace, the brand also faces increased challenges related to illicit online actors. Even if a brand owner does not intend to sell online or may be in the early stages of a start-up, it may find that its products or counterfeit versions of its products are already being sold online, filling consumer demand for their products. Online marketplaces can foster a perception of legitimacy from the consumer perspective, shielding, albeit possibly unintentionally, counterfeit goods from consumer scrutiny, removal, and punitive action.¹³

We are seeing this frustration manifested at the consumer level, as well. Consumers often are unaware that they are buying counterfeit, struggle to be able to report counterfeits to an online marketplace (as opposed to just general dissatisfaction with a purchased good or seller interaction), or cannot find the third-party seller for service of process for a lawsuit if they are injured or killed by a product, which has led to a series

⁹ Department of Homeland Security, *Combating Trafficking in Counterfeit and Pirated Goods: Report to the President of the United States* 5 (2020).

¹⁰ OECD, *supra* note 4 at Section 3.

¹¹ DHS Report 2020, *supra* note 9; Jay P. Kennedy, *Consumers should take notice: Counterfeiters don't take holidays!* *Forbes.com* (2020); Alliance for Safe Online Pharmacies, *New Survey Reveals Dangerous Disconnect in American Perceptions of Online Pharmacies: More Consumers Buy Medicine Online Despite Not Knowing the Risks of Illegal Internet Drug Sellers* (2020), available at <https://buysafely.pharmacy/oct-19-survey-release/>.

¹² Kammel, et al, *supra* note 3, at 225; OECD, *TRENDS IN TRADE AND COUNTERFEIT GOODS* (2019).

¹³ See Kammel et al, *supra* note 3, at 228; Kennedy, *supra* note 6, at 7, 14.

of strict liability cases being filed against marketplaces in the past 2 years.¹⁴ The risk of to consumers of the impact of using a counterfeit good varies widely, is unpredictable, and spans multiple industries and products.

For example, in the pharmaceutical industry a wide range of toxins and chemicals have been found in counterfeit pharmaceuticals purchased online.¹⁵ Counterfeit airbags, cosmetics, bike helmets, baby carriers,¹⁶ toys,¹⁷ and many other goods can have harmful or even deadly results.

Additionally, the impact of counterfeiting is not accurately reflected due to the lack of information and research on this phenomenon. A 2017 report estimated the retail value of the global illicit trade in counterfeit and pirated goods at \$923 billion to \$1.13 trillion; by comparison the global drug trafficking market was estimated at \$426 to \$652 billion.¹⁸ Despite this relative scale, there is a paucity of information and research on the issue of counterfeit goods and response efforts as compared to what is available on drug trafficking and other social and economic problems, resulting in policymaking and creation of best practices in an information-deficient environment.

¹⁴ See Kammel et al, *supra* note 3, at 256-61; John H. Zacharia & Kari Kammel, *Congress's Proposed E-Commerce Legislation for Regulation of Third-Party Sellers: Why It's Needed and How Congress Should Make It Better*, 21 U.C. DAVIS BUS. L.J. 91, 97-102 (discussing recent strict liability cases). John H. Zacharia is the Founder of Zacharia Law PLLC, a law firm dedicated to helping victims of intellectual property crimes and cybercrimes protect their rights and is a Professorial Lecturer in Law at the George Washington University Law School. He is also a member of the A-CAPP Center's Brand Protection Professional Editorial Board.

¹⁵ Association for Safe Online Pharmacies (ASOP), *Toxins Found in Counterfeit and Falsified Medicines*, <https://buysafetx.pharmacy/for-the-media/toxins-found-in-counterfeit-and-falsified-medicines/> (spanning toxins from concrete to car paint to rat poison).

¹⁶ ICE, *Counterfeit Goods: A Danger to Public Safety* (2020), <https://www.ice.gov/features/dangers-counterfeit-items>

¹⁷ The Toy Association, *The Real Threat of Fake Toys*, https://www.toyassociation.org/App_Themes/toyassociation_resp/downloads/research/whitepapers/intellectual-property.pdf

¹⁸ Channing May, *Transnational Crime and the Developing World* (Global Financial Integrity 2017) <https://gfin.org/report/transnational-crime-and-the-developing-world/>

3. Current State of Secondary Liability for Trademark Counterfeiting and Opportunity Structure

In an article I authored with Jay Kennedy,¹⁹ Daniel Cermak,²⁰ Minelli Manoukian,²¹ we discuss the legal landscape that currently exists in respect to secondary liability for trademark counterfeiting and why it does not apply to the current state of sales of counterfeit goods by third party sellers online.²² First, secondary liability for trademark infringement was initially created to address infringement in a brick-and-mortar setting. The current doctrine of secondary liability is based on *Inwood Labs v. Ives*²³ and was later applied to other cases involving “service providers”, such as flea markets.²⁴

Here, in our research, we introduce social science theory related to the opportunity structure of persistent risky activities to understand where secondary liability for trademark counterfeiting should apply.²⁵ Applying this theory, we explain how the opportunity structure for counterfeiting occurs when consumers and counterfeiters potentially interact in spaces where guardianship to protect the consumer, and by extension the brand, is weak.

a. Brick-and-Mortar Space: Guardians

In the brick-and-mortar space, the entity that is best suited for guardianship is the place manager, since they control the physical space of the flea/market or mall.²⁶ Others of

¹⁹ Jay P. Kennedy is the Assistant Director of Research for the Center for Anti-Counterfeiting and Product Protection and an Assistant Professor in the School of Criminal Justice at Michigan State University.

²⁰ Daniel Cermak, Esq. is Court Officer/Research Clerk for the 30th Circuit Court in Michigan and is a recent graduate of Michigan State University College of Law and previously worked as a Legal Researcher for the Center for Anti-Counterfeiting and Product Protection.

²¹ Minelli E. Manoukian, Esq., is a Deputy Prosecuting Attorney in Allen County Indiana, is a recent graduate of the Michigan State University College of Law, and previously worked as a Legal Researcher for the Center of Anti-Counterfeiting and Product Protection.

²² See Kammel et al, *supra* note 3 (acknowledging the research assistance of Deepu Karchalla (MSU, BA expected 2021); Joseph Longo (MSU, BA 2020), and Tyler Armstrong (J.D. expected 2022)).

²³ *Inwood Labs. v. Ives Labs.*, 456 U.S. 844 (1981) (discussing “if a manufacturer or distributor intentionally induces another to infringe a trademark, or if it continues to supply its product to one whom it knows or has reason to know is engaging in trademark infringement, the manufacturer or distributor is contributorily responsible for any harm done as a result of the deceit.” *Id.* at 854.

²⁴ Kammel et al, *supra* note 3, at 237 (discussing *Hard Rock Cafe Licensing Corp. v. Concession Servs., Inc.*, 955 F.2d 1143, 1143 (7th Cir. 1992)).

²⁵ Kammel et al, *supra* note 3, at 229.

²⁶ *Id.* at 239.

course can help educate consumers, or report counterfeiting, but secondary liability here should rest with the entity that should have the most responsibility for control in this space.

b. Brick and Mortar Space: Disrupting Opportunity

When viewed as an opportunity structure, disruption of a counterfeiting scheme requires that only one leg of the triangle be removed in order to substantially decrease the likelihood that the counterfeiter will be successful in their scheme.²⁷ Disruption can be done through guardians either protecting the consumer (through education/awareness), protecting the brick-and-mortar location such as the flea market/mall (through monitoring, walk throughs, surveillance, responses to complaints) or protecting against the counterfeiters (through pre-screening, monitoring for repeat counterfeiters, checking IDs or other activity).²⁸ However, in spite of high levels of guardianship, some motivated offenders will continue to persist with their schemes.²⁹

It does not mean that every instance of a counterfeit in a flea market or mall equates to secondary liability for trademark counterfeiting, but this concept sets a standard for the brick-and-mortar marketplace to take care to protect registered marks and consumers. The example of this application to the case law can be seen in *Hard Rock Cafe v. Concessions Services*.³⁰

c. The *Tiffany v. eBay* Case

In 2010, the Second Circuit decided the *Tiffany v. eBay* case.³¹ In *Tiffany*, the court noted the extension of the *Inwood* test to service providers, such as the flea market owners in *Hard Rock*, and then also noted that they were the first to apply this test to an online

²⁷ *Id.* at 239-240.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Hard Rock Cafe Licensing Corp. v. Concession Servs., Inc.*, 955 F.2d 1143, 1143 (7th Cir. 1992) (using the Restatement of Torts to note that the flea market owners would be liable for torts committed on their property when they knew or had reason to know that someone on the property was using it tortiously) at 1148-49 (citing RESTATEMENT (SECOND) OF TORTS § 877(c), cmt. d (AM. LAW INST. 1979)).

³¹ *Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93 (2d Cir. 2010); see also Kammel et al, *supra* note 3, at 241-44 (discussing *Tiffany v. eBay*).

marketplace.³² The standard set here for secondary liability for an online marketplace was if the service provider “[c]ontinues to supply its [service] to one whom it knows or has reason to know is engaging in trademark infringement” —and “[s]ome contemporary knowledge of which particular listings are infringing or will infringe in the future is necessary —”³³ otherwise known as the contemporary knowledge requirement.³⁴ The e-commerce platform eBay was found not liable for secondary trademark infringement.³⁵

d. Practical Impact of *Tiffany*

From a legal liability perspective under the current state of the law, there is no obligation on any party to proactively address sellers’ listings online. Some online marketplaces understand that there is a problem and remove postings that are reported to them or found through internal self-investigation by technology or otherwise, what we would refer to as a reactive response. A few may proactively vet sellers or postings, but these are not the majority, nor is this required by the law. However, under the *Tiffany* standard, they must only remove them reactively, or when they have “specific knowledge.”

A brand owner, however, does not want injury to its reputation, or injury to its consumers;³⁶ so, practically they must monitor and notify the online marketplace to remove a suspicious listing or a seller that could be selling an illicit or unauthorized product, even though the counterfeit product is not theirs. For every listing that a brand owner successfully petitions to have removed from an online marketplace, many more illicit listings will likely take its place³⁷—leading to what is called in the industry the

³² *Tiffany*, 600 F.3d at 105; Kammel, et al, *supra* note 3, at 243.

³³ *Tiffany*, 600 F.3d at 107; Kammel, et al, *supra* note 3, at 243.

³⁴ *Tiffany*, 600 F.3d at 106 (citing *Inwood Lab’ys, Inc. v. Ives Lab’ys, Inc.*, 456 U.S. 844, 854 (1982)), 108-09; Kammel, et al, *supra* note 3, at 243.

³⁵ *Tiffany*, 600 F.3d at 109.

³⁶ Kammel, et al, *supra* note 3, at 252 (citing See Stetanie Wood Ellis, *Brand Protection in the Digital World*, WORLD TRADEMARK REV. (Apr. 23, 2020), <https://www.worldtrademarkreview.com/anti-counterfeiting/brand-protection-in-the-digital-world> [<https://perma.cc/V8DY-7K4E>] (describing how counterfeit products can negatively affect a brand when an inferior product is thought to be the real product, and the lower quality is now associated with the brand or when an unsafe counterfeit hurts individuals).

³⁷ Kammel, et al, *supra* note 3, at 254 (citing Daniel C.K. Chow, *Alibaba, Amazon, and Counterfeiting in the Age of the Internet*, 40 NW. J. INT’L L. & BUS. 157, 161 (2020).

“whack-a-mole” problem. Because this has become so time consuming but needs to be addressed, an entire industry of online anti-counterfeiting providers selling their services and technologies to brands, as well as law firms expanding their practices, has developed to search the web, e-commerce sites, and social media platforms for counterfeits using artificial intelligence, machine learning, or other technologies and skills.³⁸ Finally, transparency is lacking in regard to seller identification and location, details on systems for vetting sellers, products, removals of listings, where counterfeits go after they have been reported or taken down, how repeat sellers of counterfeit are removed, how warehousing might work and other details that are important for both the intellectual property rights owner, law enforcement, and an informed consumer, as they have not been required by law.

Many platforms have created extensive tools for brands to register their marks, work to identify counterfeit listings for take down efforts, participate in joint efforts with the IPR Center and other law enforcement agencies, and some have even begun to partner in joint lawsuits and referrals for criminal prosecution.³⁹ These are all positive steps and should continue in conjunction with any legislation.

d. Disrupting Counterfeiting Opportunity in an Online Marketplace

We revisit the opportunity structure to see how it can apply to the online marketplaces and can shift given technology’s impact. The opportunity structure for trademark counterfeiting on an online marketplace consists of trademark counterfeiters in the role of motivated infringers, consumers in the role of suitable targets/potential victims, and the platform itself as the place wherein infringer and target meet and interact.⁴⁰ The motivated counterfeiter operates as an “unseen competitor” to legitimate companies,

³⁸ Kammel, et al, *supra* note 3, at 252.

³⁹ Zacharia & Kammel, *supra* note 14, at 107-109 (discussing recent initiatives IPR Center E-Commerce initiative, available at <https://www.iprcenter.gov/file-repository/ipu-e-commerce.pdf/view>; <https://press.aboutamazon.com/news-releases/news-release-details/ipr-center-amazon-launch-operation-fulfilled-action-stop>; Amazon Establishes Counterfeit Crimes Unit to Bring Counterfeiters to Justice, BUSINESS WIRE (June 24, 2020), <https://www.businesswire.com/news/home/20200624005161/en/Amazon-Establishes-Counterfeit-Crimes-Unit-Bring-Counterfeiters>).

⁴⁰ See generally Kammel et al, *supra* note 3, at 248.

using the e-commerce platform as a place to hide from detection and reap illicit economic benefits.⁴¹

In the opportunity structure triangle, e-commerce platforms have varying levels of influence over product counterfeiting schemes by de-motivating sellers of counterfeits on their sites, protecting consumers by deterring potential infringers or assisting consumers in protecting themselves from victimization, and controlling the conditions that allow illicit actors and consumers to come together and interact.⁴² As a result, when one or more of these three roles are not undertaken and fulfilled in an online marketplace, the opportunity for interaction between the counterfeiter and consumer increases, via the offered sale of a counterfeit good, thereby making counterfeit transactions more likely.⁴³

The operators of online marketplaces can significantly mitigate opportunities for the sale of counterfeit goods on their platforms by acting as guardians or controllers, engaging in proactive activities and implementing policies that target motivated sellers of counterfeit goods and suitable targets.⁴⁴ With regard to addressing motivated sellers of counterfeits, platforms have the ability to identify potentially infringing listings and proactively embargo or reject these listings.⁴⁵ These activities can disrupt the opportunity for third party sellers to sell counterfeits to consumers. See Figure 1.

⁴¹ Kammel et al, *supra* note 3, at 30 (citing Jeremy M. Wilson & Rodney Kinghorn, *A Total Business Approach to the Global Risk of Product Counterfeiting*, 10 GLOBAL EDGE BUS. REV. No.1, 1-6 (2016)).

⁴² Kammel, et al, *supra* note 3, at 231.

⁴³ *Id.*

⁴⁴ *Id.* at 248-249 (citing to John E. Eck et al., *Risky Facilities: Crime Concentration in Homogeneous Sets of Establishments and Facilities*, 21 CRIME PREVENTION STUDS. 225, 240 (2007); Jay P. Kennedy, *Sharing the Keys to the Kingdom: Responding to Employee Theft by Empowering Employees to Be Guardians, Place Managers, and Handlers*, 39 J. CRIME & JUST. 512, 519 (2015)).

⁴⁵ *Id.* at 249.

Figure 1. Disruption of Opportunity Structure for Counterfeit Goods in E-Commerce



However, these activities alone will not entirely prevent counterfeiters from listing their illegal goods online as many counterfeiters have adopted a strategy built around inundation – posting a large volume of listings to hedge against takedown efforts. It is not reasonable to expect a platform to possibly know every legitimate mark for every product of every brand possibly sold on the sites it operates. Accordingly, brands will need to be responsible for some type of recordation of marks in a way that is made available to the platform.

Consumers play a large part in the success of product counterfeiting schemes as well.⁴⁶ Because consumer decision making is something outside of the platform's full control, place management strategies designed to make websites less conducive to counterfeit trade are also essential.⁴⁷ Many of these strategies have been implemented in traditional brick and mortar stores or markets and can be adapted to e-commerce platforms. The challenge for e-commerce platform operators is to remain cognizant of, if not ahead of, the curve being set by trademark counterfeiters by taking active steps to protect consumers, engaging in place management strategies designed to make their sites less conducive to counterfeit trade, and remaining aware and ahead of the ever-changing curve set by trademark counterfeiters, which any legislation should seek to encourage.

⁴⁶ *Id.* at 255.

⁴⁷ *Id.*

4. Law Disruptive Technology

As I have described the online marketplace phenomena as law disruptive technology,⁴⁸ I believe it is important that proposed legislation needs to take this into account in several ways. First, we should anticipate rapid, exponential, technological growth and change. Second, sizes of online marketplaces will vary, grow, expand, and may even look very different ten years from now with what we see today. Their profits, access to technology and how much they proportionally decide to invest in it to deter counterfeiters will also vary widely. Most importantly, any new laws should take this into consideration, so online marketplaces can respond with iterative changes in protecting consumers and brands using appropriate current technology and other methods, as to not simply become a compliance check.

5. INFORM Consumers and SHOP SAFE Address Issues Regarding the Imbalance of Preventing 3rd Party Sales of Counterfeit Goods on E-Commerce

Three pieces of legislation have recently been introduced that reflect the growing urgency for Congress to address the issue of the sale by third party sellers of counterfeits on e-commerce: the INFORM Consumers Act (S. 936 / H.R. 5502), the SHOP SAFE Act (S. 1843 / H.R. 5374), and the SANTA Act (S. 3073 in the 116th Congress).⁴⁹ While all different, they all seek to require e-commerce platforms to proactively take action to stop third party sellers from selling counterfeits.⁵⁰ These bills should not be considered as competitive with each other, but as multiple avenues for tackling this complex issue.

For example, both INFORM Consumers and SHOP SAFE provide provisions for marketplaces to identify sellers and to share this information with consumers with

⁴⁸ Kari Kammel, *Examining Trademark Counterfeiting Legislation, Free Trade Zones, Corruption and Culture in the Context of Illicit Trade: The United States and United Arab Emirates*, 28 MICH. STATE INT'L L. REV. 210-235 (2020); William Sowers, *How do you Solve a Problem like Law-Disruptive Technology?*, 82 L. & CONTEMP. PROBS. 193-214 (2019); Zacharia & Kammel, *supra* note 14, at 121.

⁴⁹ See generally, Zacharia & Kammel, *supra* note 14.

⁵⁰ Zacharia & Kammel, *supra* note 14, at 93.

some limitations for size of sellers and privacy concerns.⁵¹ Additionally, both of these bills have protection of consumers in mind, but have different enforcement mechanisms.⁵² Both bills also have reporting mechanisms not now available for consumers to report suspected counterfeit product.⁵³ From my perspective, one of the single most important perspectives on both INFORM Consumers and SHOP SAFE is the proactive requirements, as the current state of the law only requires response to “specific knowledge” or a notice and takedown procedure,⁵⁴ which as stated above does not help to disrupt the opportunity triangle for the sale of counterfeit goods, but only reacts to it once that meeting in time and space has occurred.

While legislation is never the entire solution and a holistic, multi-pronged approach to dealing with this issue is required, legislation is essential to (1) balance the obligations of brand owners and e-commerce platforms in this space, (2) address “law disruptive technology”, or the imbalance due to the shift from brick and mortar environments to an online e-commerce space that the law did not foresee, and (3) provide consumers more protection and avenues in which to report suspected counterfeit goods.

Recommendations

My recommendations are to:

1. Support the INFORM Consumers and SHOP SAFE bills.
2. Support continued and expanded collaborations and method development regarding data sharing between academia and other stakeholders in this space to share the burden related to the exchange of information that support legislative initiatives; and

⁵¹ INFORM Consumers Act, H.R. 5502 (2021), at Sec. 1 (verification and disclosure requirements), Sec. 1(b)(2) (exceptions); SHOP SAFE Act of 2021, S. 1843, (2021), at Sec. 2(a) (verifying documentation).

⁵² INFORM Consumers, *supra* note 51 (providing a violation of Unfair and Deceptive Acts or Practices under the Federal Trade Commission Act (15 U.S.C. 57a(a)(1)(B)) to be heard before the Federal Trade Commission); SHOP SAFE, *supra* note 51, at Sec. 2 (providing a cause of action for contributory liability for trademark infringement as an amendment to the Lanham Act for e-commerce platforms to be litigated with civil suits).

⁵³ INFORM Consumers, *supra* note 51, at Sec. 1(b)(3) ; SHOP SAFE, *supra* note 51, at Sec. 2.

⁵⁴ See Kammel et al, *supra* note 3, at 254.

3. Expand knowledge on the trade in counterfeit goods, brand protection, and anti-counterfeiting responses in order to address the critical gap in research on the global trade in counterfeit goods, including the nature and scope of the sale of counterfeit goods on the online marketplace, to better inform policy.

Thank you for the opportunity to participate in this hearing on this very important issue for intellectual property rights holders and U.S. consumers.

WRITTEN STATEMENT OF AARON MUDERICK, FOUNDER & PRESIDENT
CRAZY AARON'S PUTTYWORLD

SENATE COMMITTEE ON JUDICIARY
"CLEANING UP ONLINE MARKETPLACES: PROTECTING AGAINST STOLEN,
COUNTERFEIT AND UNSAFE GOODS"

NOVEMBER 2, 2021

Good Morning. My name is Aaron Muderick. I am the Founder and President of Crazy Aaron's Puttyworld, a toy manufacturer based in Norristown, PA. Thank you for the opportunity to testify today on the problem of counterfeit and unsafe goods being sold through online marketplaces. Chairman Durbin and Ranking Member Grassley, I applaud your commitment to protecting consumers from unsafe, unreliable, and unregulated products sold through these channels.

Curbing the flow of counterfeit and unsafe goods in e-commerce is critically important to me as a U.S. toy manufacturer and small business owner. After a lot of experimenting, I founded Crazy Aaron's Puttyworld in 1998 and my first batch of Thinking Putty® was born. Our company mission is to create toys that inspire a sense of wonder and creativity. I quickly realized that this product was so unique and the creation process so sensitive to confidentiality, I was going to have to build my own factory to make it. So that's just what I did. Today, our headquarters in Norristown, PA, where Thinking Putty® is proudly made in the USA, employs over 100 people. Additionally, for over 18 years, with the support of our customers, we have provided meaningful daily work to hundreds of individuals with intellectual and physical disabilities in the Philadelphia area.

While my business has seen growth and success since the days of experimenting in my parent's basement, it has come with unanticipated challenges. As our Thinking Putty® became more popular, I discovered a tidal wave of intellectual property infringing versions of our products being sold online through third-party sellers. We have spent years and significant time and resources policing these infringing products one-by-one. I have submitted to this committee a list of hundreds of third party sellers, many based outside the United States, across numerous marketplaces, whom we identified as infringing our marks. Today I appreciate the opportunity to share three serious concerns:

First, the enormous resources required from a small business to endlessly police these marketplaces for bad actors which places an undue burden on us and negatively impacts the backbone of this country's economy. Second, that due to many of these bad actors being outside the jurisdiction of the United States, our recourse to protect our intellectual property and reclaim damages is severely limited and, in many cases, is nonexistent. Third, and most importantly, these bad actors often sell unsafe goods which do not meet the stringent federal safety standards required of legitimate producers. These violations of safety standards range from labeling requirements, product containing illegal levels of regulated chemicals, and mechanical hazards which can cause acute physical harm. Consumers visit online marketplaces assuming that products they see are vetted to meet all required safety standards. As you will see, in the example I am about to provide, this is not the case.

As background, legitimate toy manufacturers like myself and brick-and-mortar retailers of children's products must obtain safety certifications from independent third-party laboratories and comply with over 100 federal safety standards. Online marketplaces are not held to these same standards under current law. In today's world, these marketplaces often create an environment in which sellers are able to be anonymous and remain outside the reach of US jurisdiction. Opportunities are abundant, and

risks are few, to take advantage of consumer faith by selling counterfeit or unsafe products that may not comply with federal safety standards. When harm occurs, there is almost no recourse for consumers.

I created the world's first magnetic putty. It is a putty toy that crawls over to a magnet as if it was alive! It was a tremendous commercial success and differentiated us from competitors. They say imitation is the finest form of flattery, but I became extremely concerned as counterfeiters, infringers, and knock-offs flooded the marketplace. Around 2017 I noticed that magnetic putty sales began to decline precipitously coinciding with the appearance of many infringing and knock-off products offered in online marketplaces. In addition to my concern over lost sales, and my scramble to dedicate resources to beating back infringers of our trademarks and copyrights, I became increasingly concerned that almost every one of the competing products did not comply with mandatory federal safety standards.

After many years and significant resources expended, the number of products infringing our marks dropped significantly but not the sale of non-compliant similar products. The producers of competing products had learned a path of least resistance: sell products that don't infringe on our intellectual property but remain in violation of federal safety standards. While the number of illicit products in the marketplace did not change, we no longer had recourse against them as online marketplace systems are designed to focus on rights-holder issues but not issues related to non-compliance with safety standards.

Today, I have brought with me products I purchased last week from two of the largest online marketplaces in the United States. I also brought independent third-party laboratory results showing their non-compliance with mandatory federal safety standards. Our company has done this testing at our own expense, communicated this non-compliance to online marketplaces numerous times, and followed up with them repeatedly. Nonetheless, these products remain available for sale. They are purchased in the hundreds of thousands by unsuspecting consumers. Buying them online, for speedy delivery in time for this hearing, was no problem at all.

Our compliant product was developed through extensive investment in R&D. It contains a magnet of low strength considered safe by federal standards. The non-compliant products contain loose, as received, high-strength hazardous magnets which are not legal to sell in products for children below the age of 14. You will note that the product packaging and the online listings for these products, which I have provided to the committee, use language such as 'Safe for Ages 3+' or 'Safety tested'. The listings include photos of children as young as toddlers playing with the products.

Why you may ask are these magnets not considered safe? One reason is that accidental ingestion of these types of magnets causes serious internal injuries in many children, debilitating lifelong disability in others, and, unfortunately, numerous fatalities have been documented. Another hazard is that their magnetic strength is so high, they destroy themselves when drawn to each other. You can see in the photo and video I have provided that two of these magnets not only shatter into razor sharp shards when they collide, but due to the nature of their materials, will spark and have the capability to start a fire.

If my words, or my demonstration here, backed up by third-party laboratory results aren't enough, you need only look at the consumer reviews of these products which are publicly available in the online marketplaces. I have taken screenshots and submitted many of these to the committee.

An example: "The magnet broke while i was showing this off to a friend as he was pulling them apart! Sliced open his finger. I do not recommend this to anyone. "

This is the story of one product, amongst a sea of millions, available in online marketplaces. I encourage my colleagues in all industries to share with the committee their own stories of counterfeit, infringing, and non-compliant products. These dangerous goods exist, not only across children's products, but also across the entire universe of consumer goods.

Unfortunately, consumers remain largely unaware of the scope of counterfeit and non-compliant product being sold through some online marketplaces and are unknowingly bringing these unsafe items into their homes. Counterfeiters have become increasingly adept at blending in and hiding on these sites making it difficult for consumers to differentiate between counterfeit and legitimate products. They use tactics such as categorizing the product under a rights holder's brand name, piggybacking on legitimate listings, using keywords, paid advertising, and pricing at the same or even higher than legitimate products.

This creates a situation where the true source of the product is not what the consumer is led to believe. When that consumer receives a non-compliant or counterfeit putty believing it is legitimate Crazy Aaron's Thinking Putty® and that counterfeit product does not meet their expectations for quality and safety, the disappointed consumer may never buy from my company again based on that experience. Our customer service reports these incidents regularly but we will never know the true cost of this misappropriation because the vast majority of consumers do not reach out to us directly to express their disappointment.

Currently, online marketplaces lack an effective, proactive, transparent process for screening sellers or products that are offered by sellers. Instead, the burden of enforcement disproportionately relies on rights holders like me and consumers to police and report infringement or regulatory safety concerns. The current system places no responsibility on the foreign seller or the marketplace and instead requires that rights holders scour online marketplaces and investigate, report, and prove infringement to the marketplace selling platforms before illicit items are removed. This causes delay, allows sales of illicit goods to unsuspecting consumers, and puts the responsibility and expense on brand owners. If my team, organized and operating for years on a single product have had no success, what chance does a lone consumer have? It feels like a never-ending game of whack-a-mole – as soon as one listing is taken down, the seller pops back up under a different listing. This problem is compounded because marketplace processes vary, forcing rights holders to constantly navigate different, and often changing, marketplace enforcement procedures. This process removes the initial burden from the seller and without basis further gives the sellers the benefit of the doubt, to the detriment of rights holders and consumers.

Proactive procedures must be the first line of defense to protect consumers and businesses like mine from these illicit third-party sellers. Verifying the identity of sellers and disclosing basic seller information to consumers are good first steps in addressing this issue. Verification and disclosure make it easier to track and suspend bad actors and makes it easier for consumers to actually be able to contact them if they receive a product that does not meet their expectations or even worse, causes harm. If there is no verified contact information, there is no ability for a rights holder, consumer, or law enforcement to trace and enforce at the source.

Some opponents have argued that requiring sellers to provide information to verify their identity would be burdensome and impede their business growth. From my perspective, it would be much less burdensome to provide basic information like my government ID, address, and tax ID than spending countless hours and expending valuable resources to track down bad actors to protect my brand reputation from counterfeit versions. If I need to provide this information to the bank where the money

from my product sale is deposited, why is it so burdensome to share this information with the marketplace itself?

As it stands today, legitimate toy brands such as mine are playing by one set of rules and anonymous third-party sellers that exploit marketplaces are playing by another set of rules or are not playing by the rules at all. This harms both consumers and toy businesses large and small who are trying to bring safe, fun, and educational toys to market. More needs to be done to ensure that illicit third-party sellers are not able to take advantage of the current online marketplace environment and sell products that can pose serious health and safety risks.

Thank you for opportunity to share my experiences and perspective with you. I look forward to answering any questions.



Internet Association

Testimony of K. Dane Snowden

President and CEO

Internet Association

on

Cleaning Up Online Marketplaces: Protecting Against Stolen, Counterfeit, and
Unsafe Goods

before the

U.S. Senate

Committee on the Judiciary

November 2, 2021

Chairman Durbin, Ranking Member Grassley, and Members of the Committee, on behalf of Internet Association (IA)¹ and the U.S. internet industry, thank you for the opportunity to appear before the Committee today to discuss how online platforms are partners in the fight against illegal and counterfeit goods, retail theft, and protecting consumers from bad actors online.

Online marketplaces and platforms are the virtual main streets that have brought unprecedented choice to consumers, as well as a broadening market for entrepreneurs and small businesses. In households across America, consumers use online marketplaces and platforms to purchase essential goods without having to leave their homes, sell equipment, clothes, or electronics to someone who can put them to better use, and find new artists and vendors to decorate their homes—all with a click or swipe on a screen. The convenience and ease of access to goods that online platforms and marketplaces provide benefit everyone—consumers, small sellers, the creative community, big box retailers, and everyone in between.²

While the vast majority of online sellers and goods sold online are legitimate and have been a lifeline for people during the COVID-19 global pandemic, the internet industry recognizes that online systems have created new challenges for brand owners, rights holders, retailers, and consumers. Counterfeiting and retail theft are not new problems created by online platforms and marketplaces. As my testimony will demonstrate, we are on the right path to addressing these challenges on internet marketplaces and platforms.

Internet companies prohibit the sale of illegal or counterfeit goods on their online platforms and marketplaces. IA's member companies invest hundreds of millions of dollars in tools and

¹ IA represents over forty of the world's leading internet companies, and we exclusively represent global internet companies on public policy. Our mission is to foster innovation, promote economic growth, and empower people through the free and open internet. Members, Internet Association, <https://internetassociation.org/our-members/> (last visited Oct. 22, 2021).

² McKinsey Global Institute, *Internet matters: The Net's sweeping impact on growth, jobs, and prosperity*, May 1, 2011, <https://www.mckinsey.com/industries/high-tech/our-insights/internet-matters> (finding that more than 75 percent of the economic value created by internet is captured by companies in traditional industries, many of them small businesses).

deploy thousands of team members to implement clear policies and offer counterfeit reporting and prevention tools. For example, online platforms and marketplaces vet sellers upfront through direct and indirect means and use advanced tools, like image detection and machine learning, as well as reports from brand owners, rights holders, and consumers to continuously monitor for any issues. Internet companies' partnerships with brand owners and rights holders are critical because they are in the best position to identify counterfeit goods. When internet companies find sellers, listings, or products that violate their terms of service, they do not put them on or they will take them off their platforms and marketplaces.

Beyond these efforts, IA and its member companies support the Chairman and Committee members' goals of further minimizing the availability of counterfeit and other illegal goods online. Based on our member companies' experience, IA encourages the Committee to consider two aspects when taking legislative actions that affect marketplaces and platforms, sellers, and consumers.

First, a national framework that clearly preempts a patchwork of state or local laws would ensure that Americans continue to receive a consistent internet experience nationwide. While states have an important law enforcement role to play in protecting consumers and stopping retail theft, federal law should be the sole source of regulation for internet companies that operate across state lines. Further, a nationwide framework will minimize compliance burdens and provide a consistent experience for small businesses and consumers that use online platforms and marketplaces.

Second, any information collection and disclosure requirements should be careful not to impose unnecessary burdens or barriers on small businesses who rely on online marketplaces and platforms to reach a global market. For example, as many online sellers are very small, home-grown operations, requiring small sellers to disclose specific information about themselves and their businesses would discourage them from using online marketplaces and platforms, and pose privacy and security risks for everyone involved. In adopting information

collection and disclosure requirements, Congress should consider their challenges by establishing reasonable thresholds and timelines and protecting their privacy.

For these reasons, we are encouraged by the version of the INFORM Consumers Act (H.R. 5502, 117th Congress) that was recently introduced in the U.S. House of Representatives. H.R. 5502 would set national expectations about the type of information that online platforms and marketplaces should collect about high-volume sellers and disclose to consumers, while recognizing burdens and risks to small businesses. IA and our member companies hope that today's hearing can continue the discussion about clear, reasonable requirements within a national framework.

IA and its member companies are partners in the fight to protect consumers and rights holders from the threats posed by fake goods and bad actors. By striking the right balance through clear, reasonable requirements within a national framework, online platforms and marketplaces can continue to provide convenient and safe opportunities to connect online sellers and consumers.

FOSTERING SAFE AND TRUSTWORTHY ONLINE PLATFORMS AND MARKETPLACES THROUGH PROACTIVE EFFORTS AND COLLABORATION.

In the last two decades, U.S. internet platforms have become a significant driver of the U.S. economy,³ including online marketplaces and platforms that have brought unprecedented choice to consumers, as well as a broadening market for entrepreneurs, small businesses, and the creative community. In 2017, an estimated 1.66 billion people worldwide purchased goods online. During the same year, global e-retail sales amounted to \$2.3 trillion, and

³ The internet sector contributes 10.1 percent of the U.S. GDP and 4.0 percent of jobs (non-farm employment). IA estimates the internet sector supported another over 13.1 million indirect jobs and that the sector invested over \$60 billion into the economy. Internet Association, *Measuring The U.S. Internet Sector: 2019*, Sept. 26, 2019, <https://internetassociation.org/publications/measuring-us-internet-sector-2019/>.

projections showed a growth of up to \$4.48 trillion by 2021.⁴ 80 percent of internet users in the United States were estimated to make at least one purchase online in 2019.⁵

As we all live through the COVID-19 global pandemic, online marketplaces and platforms have helped Americans meet the moment by delivering the essential and healthcare goods and products that consumers need to maintain their daily lives and keep our economy going. The pandemic has shown that online marketplaces and retailers have earned the trust of consumers and small businesses—as a record number of consumers turned to online platforms for their goods and services at the height of the pandemic.⁶ A foundation of that trust has been removing millions of products from online marketplaces that were illegal, counterfeit or otherwise harmful. Consumers, businesses, and sellers must be able to trust the online systems they use to sell and purchase goods, and the internet industry is committed to fostering and solidifying that trust.

While the vast majority of online sellers and goods sold online are legitimate and have been a lifeline for people during the pandemic, the internet industry recognizes that online systems have created new challenges for brand owners, rights holders, retailers, and consumers. IA's member companies are addressing these challenges by investing hundreds of millions of dollars and deploying thousands of team members to implement clear policies and improve counterfeit reporting and prevention tools. Today, online platforms and marketplaces vet sellers with new tools like live-video and postcard verification, and they continue to monitor sellers using human reviewers and automated technologies, including image detection and

⁴ Nina Angelovska, Top 5 Online Retailers: 'Electronics and Media' Is The Star of E-commerce Worldwide, *Forbes* (May 20, 2019), <https://www.forbes.com/sites/ninaangelovska/2019/05/20/top-5-online-retailers-electronics-and-media-is-the-star-of-e-commerce-worldwide/>.

⁵ Pew Research Center, *About three-in-ten U.S. adults say they are 'almost constantly' online*, March 26, 2021, <https://www.pewresearch.org/fact-tank/2019/07/25/americans-going-online-almost-constantly/>.

⁶ Keith Nealon, *How Covid-19 Changed Retail – Probably Forever*, *Forbes* (Jul. 22, 2021), <https://www.forbes.com/sites/forbesbusinesscouncil/2021/07/22/how-covid-19-changed-retail---probably-forever/?sh=195f7c52145c> (highlighting that pandemic accelerated shift to e-commerce by about five years).

machine learning. Online marketplaces and platforms also ensure that consumers can flag concerns by prominently displaying links and buttons to report items that may not comply with their terms of use.

These efforts have helped to mitigate risks to consumers and block counterfeiters. Last year, Amazon's Transparency program helped to block more than ten billion suspected bad listings from ever being published. Similarly, eBay's Verified Rights Owner program works with 40,000 individual rights holders to identify intellectual property infringement.⁷ Etsy has also doubled the size of its Trust & Safety team to better detect and remove prohibited items—leading to a 58 percent increase in the number of intellectual property-related take downs as compared to 2019.⁸ More detail on these and other programs is provided in an Addendum to this testimony.

In the pandemic, the proactive and flexible efforts of online platforms and marketplaces has been essential to quickly acting against bad actors that are devising new schemes to defraud people online. These pandemic scams ranged from the offering of fraudulent COVID-19 vaccines and cures, to fake websites falsely claiming to provide customers with “pandemic essentials.”⁹ Online platforms and marketplaces reacted quickly—sometimes removing specific products and otherwise issuing broader warnings for buyers to be aware.¹ While scammers used the pandemic to prey on vulnerable Americans, the internet industry worked to protect the health and safety of American consumers during this unprecedented crisis.

⁷ Verified Rights Owner Program, eBay, <https://pages.ebay.com/seller-center/listing-and-marketing/verified-rights-owner-program.html> (last visited Oct. 27, 2021).

⁸ Etsy 2020 Transparency Report, <https://blog.etsy.com/news/2021/etsy-releases-2020-transparency-report/> (last visited Oct. 27, 2021).

⁹ FBI Urges Vigilance During COVID-19 Pandemic, FBI, <https://www.fbi.gov/coronavirus> (last visited Oct. 27, 2021); Lesley Fair, *Seven Coronavirus scams targeting your business*, FTC BUSINESS BLOG (Mar 25, 2020, 1:33 PM), <https://www.ftc.gov/news-events/blogs/business-blog/2020/03/seven-coronavirus-scams-targeting-your-business>.

¹ During one point in the pandemic, Google was blocking approximately eighteen million scam emails every day. See Joe Tidy, *Google blocking 18m coronavirus scam emails every day*, BBC News (Apr. 17, 2020), <https://www.bbc.com/news/technology-52319093>.

Along with pursuing their own initiatives, internet companies are working to keep online platforms and marketplaces safe and trustworthy by collaborating directly with brand owners, retailers and law enforcement. IA's member companies have invested heavily in developing collaborative and productive relationships with brands across industries and around the world. Our member companies rely on these partnerships because trademark holders are in the best position to know when a good is fake, unsafe or infringes on their rights based on the quality, design and product's specifications. Notably, online platforms may never possess the counterfeit goods, and cannot examine them for signs of counterfeiting, even if they knew what to look for. Further, online platforms and marketplaces may not know whether brand owners have authorized third-party sellers. For these reasons, cooperation with brand owners is fundamental to mitigating the threats of counterfeit listings and making the online environment as safe and trustworthy as possible for businesses and consumers.

The internet industry is also committed to partnering with federal, state and local law enforcement to minimize transactions involving counterfeit goods and combat retail theft and other organized retail crime that may utilize online platforms and marketplaces.² At the federal level, IA's member companies work closely with U.S. Customs and Border Protection, the National Intellectual Property Rights Center, as well as other state and federal agencies. State and local law enforcement have also set up inter-agency task forces that seek to combat the growing threat of organized retail crime. For example, Illinois Attorney General Kwame Raoul recently established the Organized Crime Retail Task Force to foster cooperation among retailers, online marketplaces, law enforcement agencies and state's attorneys dedicated to targeting organized retail crime enterprises.³ These partnerships are all important, as they allow law enforcement to share information to trace thefts to their source and minimize the

² In 2019, theft, fraud, and losses from other retail theft totaled \$61.7 billion—an increase of \$50.6 billion from 2018. See National Retail Security Survey 2020, <https://nrf.com/research/national-retail-security-survey-2020> (last visited Oct. 27, 2021).

³ Press Release, *Attorney General Announces Public-Private Partnership Aimed at Disrupting Organized Retail Crimes*, Office of the Illinois Attorney General (Sep. 3, 2021), available at https://illinoisattorneygeneral.gov/pressroom/2021_09/20210913.html.

threats that organized retail crimes pose to retailers, online platforms, and marketplaces and consumers.

THE CURRENT LEGAL REGIME APPROPRIATELY BALANCES OBLIGATIONS TO MAINTAIN SAFE ONLINE PLATFORMS AND MARKETPLACES WHILE PROTECTING RIGHTS HOLDERS.

Beyond the proactive efforts and collaborations that the internet industry undertakes on its own initiative, existing law appropriately incentivizes online marketplaces and platforms to readily collaborate with rights holders to protect intellectual property and prevent counterfeit or infringing products from being sold online.¹³ If a listing is uploaded by a third-party seller that violates intellectual property rights, such as with counterfeit products protected by a design patent, online marketplaces may not willfully turn a blind eye to this illegal activity.⁴ In the context of content, the Digital Millennium Copyright Act (DMCA) appropriately recognizes that rights holders are in the best position to protect their property by requiring them to notify online platforms of infringing content.¹⁵ Online marketplaces and platforms commonly adopt a precautionary policy of then removing the allegedly infringing content after receiving notice from the rights holder.⁵ Importantly, there is no one-size-fits-all solution to preventing the exchange of counterfeit and illegal goods. As brand owners, rights holders, and online marketplaces and platforms are working collaboratively, any new laws should maintain the careful balance afforded by existing laws to deal with evolving challenges.

¹³ See *Inwood Labs v. Inves Labs.*, 456 U.S. 844 (1982) (holding that liability for trademark infringement can extend beyond those who actually mislabel goods with mark of another, and recognizing that cause of action exists against intermediaries who induce others to infringe, or that have continued to supply while being aware of specific instances of infringement).

⁴ See *Glob.-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 766–68 (2011) (holding that willful blindness does not protect against claims that person or entity induced infringement of patent).

¹⁵ See Pub. L. No. 105-304, 112 Stat. 2860 (Oct. 28, 1998).

⁵ See, e.g., *Verified Rights Owner Program*, eBay, <https://pages.ebay.com/seller-center/listing-and-marketing/verified-rights-owner-program.html> (last visited Oct. 28, 2021) (describing eBay's policy of taking down listings after receiving complaint of patent infringement).

**ONLINE SELLER INFORMATION COLLECTION AND DISCLOSURE REQUIREMENTS SHOULD
ESTABLISH A CLEAR, REASONABLE, AND NATIONAL FRAMEWORK.**

As previously mentioned, IA and our member companies support further minimizing the availability of counterfeit and other illegal goods online. In the pursuit of legislative action, and based on its experience, the internet industry encourages the Committee to consider: (1) the importance of a national framework, set through the preemption of state or local laws, that maintains a consistent, nationwide internet experience for sellers and consumers;¹⁹ and (2) establishing clear, reasonable thresholds and terms for the type of information collected from sellers and disclosed to consumers. While the current versions of the SHOP SAFE Act (S. 1843, 117th Congress), INFORM Consumers Act (S. 936, 117th Congress), and SANTA Act (S. 3073, 116th Congress) under consideration in the Senate could better address these issues, we are eager to work with the Committee to establish clear, reasonable requirements within a national framework.

As IA noted in testimony before a U.S. House of Representatives Subcommittee on Courts, Intellectual Property and the Internet earlier this year,¹⁷ the SHOP SAFE Act could significantly burden and hinder online marketplaces and platforms by creating new legal liabilities based on broad and unworkable terms that run counter to the carefully balanced existing law. The SHOP SAFE Act would make an online platform liable for contributory trademark infringement by third-party sellers of goods that “implicate health and safety” unless the platform takes certain actions. The legislation defines goods that “implicate health and safety” as essentially anything that could cause an injury or illness if produced not in compliance with federal, state, and local law as well as industry standards. Such a broad definition could potentially cover any good available on online marketplaces and platforms and carry an expectation that online

¹⁹ See *Arizona v. United States*, 567 U.S. 387, 399 (2012) (“There is no doubt that Congress may withdraw specified powers from the states by enacting a statute containing an express preemption provision”).

¹⁷ Testimony of Jonathan Berroya Before the Subcomm. on Courts, Intellectual Property, and the Internet of the H. Comm. On the Judiciary 117th Cong (2021).

marketplaces and platforms know whether goods sold were produced in compliance with all applicable law and standards, which is a threshold to avoid liability that cannot be met.

Viewed from another angle, under a constant threat of liability, the SHOP SAFE Act would require online marketplaces and platforms to use “reasonable proactive” technological tools to scan nearly every third-party listing or advertisement that includes a trademark, and to rely on such automated processes to make determinations that brand-trained experts are expected to make in every other legal context. At the same time, by threatening platforms with legal liability if they fail to take action to remove potential “false positives,” the SHOP SAFE Act would incentivize over-enforcement at a potentially massive scale and risk undermining the convenient online experience that consumers expect. Further, the SHOP SAFE Act would mandate that companies impose punitive consequences on sellers and would not permit online platforms and marketplaces to afford due process to sellers who may be able to assert that their use of a trademark was valid.

The SHOP SAFE Act, the INFORM Consumers Act, and the SANTA Act would also require online marketplaces and platforms to investigate, periodically confirm, and publish information of third-party sellers to determine their veracity to sell goods. Despite exceptions in these bills, many entrepreneurs and small businesses would be forced to choose between listing personal information—like phone numbers, email addresses, and physical addresses—along with their online product listing, or avoid online marketplaces and platforms, drastically limiting their potential customer base.

Given our concerns with these bills and interest in clear, reasonable requirements within a national framework, the version of the INFORM Consumers Act that was recently introduced in the U.S. House of Representatives (H.R. 5502) is encouraging. Importantly, H.R. 5502 contains an express preemption provision—establishing a national framework to enable online platforms and marketplaces to identify bad actors and prevent them from harming consumers nationwide. As multiple states have either passed, or are considering, various INFORM

Consumers Acts,¹⁸ a patchwork of state approaches would cause inefficiencies and burdens for internet companies and sellers and undermine the consistent nationwide online experiences that consumers expect. H.R. 5502 also provides online marketplaces and small businesses with greater flexibility in the disclosure requirements for high-volume third-party sellers, as well as the timeframes for verifying sellers' information. Further, H.R. 5502's thresholds, collection, and reporting terms would enable online marketplaces and sellers to effectively meet the enumerated requirements of the legislation, while protecting the information of small businesses and entrepreneurs.

* * *

IA and its member companies are partners in the fight to protect consumers and rights holders from the threats posed by counterfeit goods and bad actors. The internet industry believes that clear, reasonable requirements within a national framework would best enable online platforms and marketplaces to continue providing convenient and safe opportunities to connect online sellers and consumers.

Thank you again for the opportunity to appear today. The internet industry looks forward to further discussions with the Committee on these matters.

¹⁸ Makers and Merchants Coalition, About INFORM and State Bills Page, *available at* <https://makersandmerchantscoalition.com/inform-act-and-state-bills-page/> (last visited Oct. 27, 2021).

ADDENDUM

IA would like to provide further details on specific actions that its member companies are taking to ensure a safe and legal online marketplace.

Amazon

Amazon strictly prohibits the sale of counterfeit products, invests heavily in prevention, and takes proactive steps to drive the number of counterfeits offered in Amazon's online stores to zero.

In 2020, Amazon blocked more than ten billion suspected bad listings before they were published in its stores. It invested over \$700 million to protect its stores from fraud and abuse, and employed more than 10,000 people for that same purpose. Previously, in 2019, Amazon's global proactive efforts successfully prevented over 2.5 million suspected bad actor accounts from offering a single product for sale in their stores, blocked over 6 billion suspected bad listings from being published, and blocked and suppressed more than 100 million suspected fake reviews. Its efforts have also ensured that 99.9 percent of all Amazon page views by customers landed on pages that have never received a valid counterfeit-related complaint from rights owners or other customers.

Amazon continuously monitors the more than 45 million pieces of feedback received from customers each week searching for any indication of an issue. Every claim of potential counterfeit is investigated thoroughly. In the rare instance where a bad actor is successful, Amazon takes action and (1) removes the allegedly infringing items, (2) permanently bans bad actors, (3) pursues legal action, and (4) works with law enforcement when appropriate.

Furthermore, in 2017, Amazon launched the Brand Registry, a free service that gives rights holders advanced tools to protect their brands. In 2020, more than 500,000 brands were enrolled in Brand Registry. On average, those enrolled brands reported 99% reduction in suspected infringements than prior to the launch of the service.⁶

In 2018, Amazon launched Transparency, which effectively eliminates counterfeits for enrolled products. This service relies on unit-level serialization, where brands apply a unique 2D code (similar to a QR code) to every unit they manufacture, allowing Amazon, other retailers, law enforcement, and customers to determine the authenticity of each unit of that product in the supply chain. In 2020, more than 15,000 brands were using Transparency. The service has enabled the protection of more than 500 million product units.

In 2019, Amazon announced Project Zero, a new program that empowers brands to help Amazon drive counterfeits to zero by combining Amazon's advanced technology with the sophisticated knowledge that brands have of their own intellectual property, including how

⁶ *Amazon brand registry*, Amazon, available at <https://brandservices.amazon.com/> (last visited Oct. 27, 2021).

best to detect counterfeits of their products.⁷ In 2020, there were more than 18,000 brands enrolled in Project Zero. For every listing removed by a brand through the self-service counterfeit removal tool, automated protections removed more than 600 listings through scaled technology and machine learning that proactively addresses potential counterfeits and stops those listings from appearing in the store.

Other programs like IP Accelerator, the Utility Patent Neutrality Program, and the Counterfeit Crimes Unit have also recently launched to attack the issue of counterfeiting from multiple angles. In short, Amazon's policies and innovative tools help customers feel confident in their purchases on Amazon stores.

eBay

As threats against consumers and rights holders evolve, eBay continuously seeks to improve its efforts to fight against counterfeiters and bad actors.

eBay invests millions of dollars annually to fight unlawful listings, proactively deploying sophisticated technologies and investing heavily in partnerships with rights holders and governments across the globe to help protect consumers and support rights holders against bad actors.

eBay partners with more than 40,000 rights holders through its Verified Rights Owner program, allowing rights holders to quickly and easily report instances of alleged intellectual property infringement.⁸ eBay also works closely with governments and law enforcement around the globe to help ensure the safety of consumers and protect rights holders.

In addition to those partnerships, eBay has multiple teams and tools in place focused on enforcing its policies and proactively identifying and addressing any generally suspicious or potentially harmful seller behavior. These efforts help eBay flag and remove potentially problematic sellers, including sellers of counterfeit goods, or prevent these harmful actors from obtaining an eBay account in the first place.

eBay's policies, teams, partnerships, and tools help create a global commerce platform that enables sellers, including hundreds of thousands of American entrepreneurs and small businesses, to sell their inventory, and buyers to find and purchase items, virtually anytime and anywhere.

eBay's core purpose, since its founding in 1995, is to safely connect buyers and sellers through its marketplace and help American entrepreneurs, including small and micro-businesses,

⁷ *Amazon projectZERO*, Amazon, available at <https://brandservices.amazon.com/projectzero> (last visited Oct. 27, 2021).

⁸ *Verified Rights Owner Program*, eBay, available at <https://pages.ebay.com/seller-center/listing-and-marketing/verified-rights-owner-program.html> (last visited Oct. 27, 2021).

reach markets around the world. eBay's commitments to consumer safety and rights owner protection are longstanding and are at the center of its corporate values.

Etsy

Etsy is committed to maintaining an environment that promotes trust and safety for its vibrant community of buyers and sellers. When sellers open a shop on Etsy, they agree to Etsy's Seller Policy,⁹ which outlines their rights as well as the platform's expectations. This includes adhering to the Prohibited Items Policy, which asks users to consider the safety of others when listing goods. Beyond Etsy's seller policies, it also seeks to reinforce appropriate product safety practices, which are reflected in its Product Safety Pledge.¹⁰

In 2020, Etsy received close to 4 million flags regarding potentially noncompliant listings, a 400% increase in flags from 2019 (breaches of its handmade policy were among the most commonly flagged violations). This increase is in large part due to the exponential growth of the marketplace last year. The vast majority of flags were generated by Etsy's internal automated systems and Etsy's enforcement scaled with the marketplace. In 2020, 20 percent of shop and listings flags came from users in comparison to the 80 percent generated from Etsy's tools—a proportion that remained consistent with 2019. Overall, Etsy saw a 58 percent increase in the number of intellectual property related takedowns compared to 2019.¹¹

In addition to upholding Etsy's commitment to transparency, it has worked to scale its policy enforcement resources, allowing it to better detect and remove prohibited items. In the last two years, Etsy has nearly doubled the size of its Trust & Safety team, adding more monitoring capabilities. This includes growing its Content Moderation team by five times and adding a new Handmade & Counterfeit team dedicated to fighting counterfeits and handmade violations.

Since the beginning of last year, Etsy has significantly increased its investments in Trust & Safety technology, including building a dedicated trust and safety machine learning engineering team and exploring computer vision technology, with the goal of using powerful algorithms to drive improvements in the precision of automated risk detection. Etsy has taken steps to ensure that Etsy sellers are positioned for success by making its policies easy to

⁹ *Etsy's Seller Policy*, Etsy, available at <https://www.etsy.com/legal/section/sellers> (last visited Oct. 27, 2021).

¹⁰ *Product Safety Pledge*, Etsy, available at <https://medium.com/etsy-impact/etsy-joins-eu-product-safety-pledge-46e22b608eea> (last visited Oct. 27, 2021).

¹¹ Corinne Pavlovic, *Etsy Releases 2020 Transparency Report*, ETSY NEWS (May 17, 2021), available at <https://blog.etsy.com/news/2021/etsy-releases-2020-transparency-report/>.

understand, refining its violation notification process, and providing resources so that sellers can get help when they have questions about their compliance.¹²

Facebook

Facebook is committed to protecting intellectual property rights and many U.S. businesses—large and small—choose to use its platforms every month to reach customers and grow their business. Facebook also shares the concerns of industry stakeholders that, in addition to harming user trust and safety, counterfeiting harms the economic interests of rights holders—many of whom are Facebook’s business partners and use its services to reach their audiences.

Facebook believes robust anti-counterfeiting enforcement is important for all stakeholders, which is why Facebook prioritizes the fostering of an online community that encourages the sharing of lawful content. Consequently, Facebook among other things, implements extensive measures and is transparent regarding the steps it takes to protect the intellectual property rights of others.¹³

As part of its IP protection program, Facebook has established dedicated channels for rights holders to report infringing content, including a specific counterfeit channel.¹⁴ Reports of alleged infringement are handled by a global IP Operations team that provides around-the-clock multilingual coverage, promptly removing reported content—often within minutes.

Facebook’s Brand Rights Protection goes further, offering enrolled rights holders a streamlined interface to easily identify and report infringing content. Built based on rights holder feedback, the tool provides the ability to search text and images and to report counterfeit, trademark, or copyright infringement in ads on Facebook or Instagram, Shops content, Instagram posts with product tags, Marketplace posts, and group sale posts.¹⁵

Facebook also maintains comprehensive repeat infringer policies to disable profiles, pages, and groups on Facebook, along with accounts on Instagram, where appropriate.

¹² Corinne Pavlovic, *Our Commitment to the Trust and Safety of the Etsy Marketplace*, ETSY NEWS (Apr. 29, 2021), available at <https://blog.etsy.com/news/2021/our-commitment-to-the-trust-and-safety-of-the-etsy-marketplace/>.

¹³ For more information, see *Protect Your Intellectual Property*, available at <https://www.facebook.com/business/learn/lessons/protect-intellectual-property-rights-manager> (last visited Oct. 27, 2021).

¹⁴ *Counterfeit Report Form*, Facebook, available at <https://www.facebook.com/help/contact/counterfeitform> (last visited Oct. 27, 2021); *Counterfeit Report Form*, Instagram (last visited Oct. 27, 2021).

¹⁵ *About Brand Rights Protection*, Facebook, available at <https://www.facebook.com/business/help/828925381043253?id=4533021280101097> (last visited Oct. 27, 2021).

Additionally, IP infringements are strictly prohibited in Facebook's and Instagram's respective Terms of Service and Terms of Use,¹⁶ as well as more specialized policies relating to ads and commercial posts.¹⁷

Consistent with these policies, Facebook has collaborated closely with rights holders and invested heavily to build numerous measures to combat counterfeits. This enforcement is done both in response to rights holders' IP reports as well as proactively—that is, before a rights holder ever needs to see an infringement and often before it even goes live.

As part of its commitment to making its platforms safer for people and businesses to connect, share, buy, and sell, in 2019 Facebook launched a new dedicated website¹⁸ describing its range of IP protection and anti-counterfeiting measures.

Facebook has also launched several other proactive measures that target counterfeits. These include a pre-publication review of ads and Marketplace posts, that uses technologies such as artificial intelligence and machine learning to identify suspicious indicators like keywords and discounts and, based on these indicators, to proactively block suspected counterfeits before they go live.

Facebook further takes measures proactively to disable and/or reduce the visibility of suspected counterfeits on its organic products as well, such as Facebook Pages and groups, and Instagram content, hashtags, and accounts.

In May 2021, Facebook published its semiannual Transparency Report, which for the first time included data relating to the amount of content it removes proactively as¹⁹ potentially infringing IP rights. Notably, the data show that from July to December 2020, the vast majority of content Facebook took action on for counterfeit-related violations was removed proactively.

¹⁶ *Terms of Service*, Facebook, (last visited Oct. 27, 2021); *Terms of Use*, Instagram, available at <https://help.instagram.com/581066165581870> (last visited Oct. 27, 2021).

¹⁷ *Commerce Policies*, Facebook, available at https://www.facebook.com/policies_center/commerce/ (last visited Oct. 27, 2021).

¹⁸ *How Facebook helps protect against counterfeits*, Facebook for Business, available at <https://www.facebook.com/business/tools/anti-counterfeiting/guide#:~:text=We%20have%20automated%20systems%20that,that%20may%20be%20selling%20counterfeits> (last visited Oct. 27, 2021).

¹⁹ *Intellectual Property Transparency Report*, Facebook, available at <https://transparency.fb.com/data/intellectual-property/> (last visited Oct. 27, 2021).

Written Questions of Ranking Member Charles Grassley for Senate Judiciary Committee Hearing, "Cleaning Up Online Marketplaces: Protecting Against Stolen, Counterfeit and Unsafe Goods," November 2, 2021

Questions for Ben Dugan

1. What's been your experience working with law enforcement to protect against online retail theft? What can be done to better improve law enforcement efforts?
2. What trends are you seeing in terms of the type of goods that are being counterfeited or shoplifted? Are certain goods preferred by these criminals?

Written Questions of Ranking Member Charles Grassley for Senate Judiciary Committee Hearing, "Cleaning Up Online Marketplaces: Protecting Against Stolen, Counterfeit and Unsafe Goods," November 2, 2021

Questions for Kari Kammel

1. Do you believe that the Administration has done enough to warn consumers about the adverse health and safety implications of counterfeit and stolen products?
2. Why are so many counterfeits coming from China?
3. What trends are you seeing in terms of the type of goods that are being counterfeited or shoplifted? Are certain goods preferred by these criminals?

Written Questions of Ranking Member Charles Grassley for Senate Judiciary Committee Hearing, "Cleaning Up Online Marketplaces: Protecting Against Stolen, Counterfeit and Unsafe Goods," November 2, 2021

Questions for Aaron Muderick

1. Do online platforms offer any tools to help small or medium size businesses prevent counterfeits of their products sold online?
2. What specific steps has your company taken to better educate consumers about the potential dangers of counterfeits, and in particular the potential harms to their health and safety?
3. What's been your experience working with law enforcement to protect against counterfeits? What can be done to better improve law enforcement efforts?
4. How difficult, given the size of your company, is it to coordinate intellectual property protection around the world? What has been your experience with addressing counterfeiting problems with foreign law enforcement? Has your company ever worked with the USPTO to get assistance in enforcing your IP rights abroad?

**Written Questions of Ranking Member Charles Grassley for Senate Judiciary Committee
Hearing, “Cleaning Up Online Marketplaces: Protecting Against Stolen, Counterfeit and
Unsafe Goods,” November 2, 2021**

Questions for K. Dane Snowden

1. How does the average consumer know if a product they’re looking at on Amazon or another online platform is a counterfeit or an authentic product? Do platforms display warnings that items found on the site may be counterfeit?
2. Many elderly individuals have turned to online shopping for the first time during the COVID-19 pandemic. What have online platforms done to protect the elderly from dangerous counterfeits and stolen goods?

**Questions for Professor Kari Kammel
Submitted by Senator Patrick Leahy
November 9, 2021**

1. In your testimony both in the Senate and in the House, you noted the critical need to support more research on the global trade in counterfeit goods. You also noted the overlapping interest in supporting this research for multiple government agencies. In 2008, I authored the PRO-IP Act, legislation that established the Intellectual Property Enforcement Coordinator (IPEC), which exists to help coordinate the efforts of multiple agencies across the Federal government to help stop the theft of American intellectual property.
 - a. **What role can the IPEC play in supporting or promoting the type of research that you view as critical to help gain further insight into the global trade in counterfeit goods?**
 - b. **Do you have any recommendations on how Congress or the Administration may be able to further leverage the coordination functions of the IPEC to address the global problem of counterfeit goods?**

Questions for K. Dane Snowden
Submitted by Senator Patrick Leahy
November 9, 2021

1. I've heard from small businesses in Vermont about problems they encounter in selling products online. One business recently explained the many expenses it incurs to combat the counterfeit products it sees being sold on major platforms, including spending on multiple analytics tools to police the platforms as well as on legal services. This is money that small businesses can't reinvest to grow and employ more Vermonters. I appreciate that many of the major platforms have tools available to assist these sellers in protecting their brands, but small businesses cannot always seem to easily access these tools on their own.
 - a. **What more can the industry do to ensure that online platforms find ways to work closely with small businesses so that if they bring to the platform's attention a counterfeit posting, they can easily navigate to talk to someone who has the power to address the problematic posting?**
2. Many small businesses these days sell products only on the large platforms like Amazon, eBay, and Etsy. Those small business owners' livelihoods depend on their ability to continue to sell products on the platforms.
 - a. **How can we be confident that the platforms will keep the interests of these small business owners in mind as they implement major changes to protect against counterfeit goods?**

SENATOR TED CRUZ
U.S. Senate Committee on the Judiciary

Questions for the Record for Mr. Brian Dugan, Director of Organized Retail Crime and Corporate Investigations, CVS Health

1. It is helpful to begin with a common understanding of terms. Please define the following, with an explanation of how they relate to one another:
 - a. Shoplifting or petty theft
 - b. Organized retail theft
 - c. Employee shoplifting or petty theft
 - d. Employee organized retail theft
2. In an NBC News articleⁱ, spokespersons for CVS and Walgreens were quoted as saying that thefts at San Francisco stores outpace those at stores in other markets. In an article with the San Francisco Chronicle, you were quoted as having said that: "At CVS, 42 percent of losses within the Bay Space got here from 12 shops in San Francisco, that are solely 8 percent of the market share."ⁱⁱ Additionally, in a New York Times article, you were quoted as saying that "San Francisco is one of the epicenters of organized retail crime."ⁱⁱⁱ In your sworn testimony, you stated that there is not more theft in San Francisco stores. You further asserted that relative to market share, San Francisco stores do not have higher instances of loss than stores in other markets. Finally, while you stated that CVS would not support laws that effectively decriminalize shoplifting, you did not provide a clear answer as to whether or not such laws have an impact on losses incurred by your stores.
 - a. Have thefts at CVS stores in San Francisco outpaced thefts at CVS stores in other markets?
 - b. What percent of losses do CVS stores in the San Francisco/Bay Area account for in proportion to your company's overall market share? In absolute terms?
 - c. Is there more organized retail crime in San Francisco relative to overall market share? In absolute terms? If so, how much more organized retail crime has occurred in San Francisco relative to CVS's overall market share since 2020?
 - d. Is there more shoplifting in San Francisco relative to overall market share? In absolute terms?

Please provide data to support your answers.
3. In an article entitled "Functional Redundancy as a Response to Employee Theft Within Small Businesses" by J.P. Kennedy, the author describes that employee theft has been trending upward and is ten times more costly to businesses than all forms of street crime and non-employee theft. In your testimony, you stated your opinion may be biased as a result of your role in working on the external part of the problem. Further, you stated that over the course of the pandemic, it has been non-employee theft that has been on the rise. Since 2014, thirteen states plus the District of Columbia have enacted so-called "ban-the-box" laws, which bar employers from asking prospective employees about their criminal background. In that same vein, the Obama Administration launched the Fair Chance Business Pledge inviting employers to adopt ban-the-box hiring practices. CVS Health signed on to that pledge^{iv}.
 - a. Since signing the Fair Chance Business Pledge, has CVS seen an increase or a decrease in losses incurred as a result of, or which CVS has attributed to, employee theft?
 - b. What percentage of losses does CVS attribute to employee theft compared to those incurred from external losses? In absolute terms?

SENATOR TED CRUZ
U.S. Senate Committee on the Judiciary

- c. For each year over the last five years, what cities or states experienced the highest rates of organized retail theft from non-employees? From employees? How has this changed over time by location?
Please provide data to support your answers.
4. In your testimony, you advocated for the INFORM Consumers Act in order to combat organized retail theft, despite the fact that the INFORM Consumers Act contains no provisions directly related to the criminal aspect of retail crime.
 - a. What position does CVS and CLEAR take regarding whether the Department of Justice should consider charges against these organizations under the Racketeer Influenced and Corrupt Organizations Act (RICO)?
 - b. What does position does CVS and CLEAR take regarding whether the Department of Justice should consider bringing criminal charges against organizations or individuals responsible for organized retail crime?
 - c. If CVS and CLEAR oppose bringing criminal charges or RICO charges, please explain the reasoning for these positions.
 - d. Why do CVS and CLEAR believe that the provisions under the INFORM Consumers Act would be more successful in combatting organized retail crime than law enforcement actions through criminal charges or RICO charges?
5. In your testimony, you explained how a network of so-called “boosters” sell stolen goods to “fences” for below market value in exchange for either money or drugs. According to the Department of Housing and Urban Development’s (HUD) most recent Annual Homeless Assessment Report (AHAR), the nation’s homeless population sits at roughly 580,000 and nearly 40% of that population is unsheltered^v. California accounts for more than half of all unsheltered people in the nation (about 113,660 people) and nearly half of that population (63,706 people) is in Los Angeles County.
 - a. Is there any correlation between an incidents of retail thefts and the prevalence of homelessness a city or state is dealing with? Using Los Angeles as an example, please provide comparative data as to the national average of thefts in CVS stores versus thefts in Los Angeles County stores.
6. According to the National Retail Federation (NRF), organized retail crime (ORC) is a serious problem—and it’s on the rise. Three in four ORC victims tell NRF they’ve seen an increase in the past 12 months. When asked why they believe this is happening, retail execs point to “relaxed law enforcement guidelines,” “shoplifting law changes, limited loss prevention in stores,” and “decreased penalties in shoplifting laws.”^{vi} In your testimony, you stated that criminal activity has overwhelmed efforts to engage in loss prevention.
 - a. A lot of focus has been placed on e-commerce platforms as it relates to halting the sale of goods that have already been stolen. What is CVS’s position on loss prevention and how much focus should be placed on preventing loss at the outset? Please provide a copy of any written loss prevention policies currently in use by CVS.
 - b. In the past 5 years, has CVS allocated more resources to loss prevention? What kinds of efforts have been undertaken? Please provide data to support your answer.

SENATOR TED CRUZ
U.S. Senate Committee on the Judiciary

- c. Why is the tax data that online platforms already collect for tax purposes insufficient for identifying third party sellers who use such platforms to engage in commerce?
 - d. How does CVS distinguish between organized retail theft and shoplifting or petty theft? Does CVS track products stolen and make a determination as to whether the incident is organized retail theft versus shoplifting on a case-by-case basis? Please explain your internal processes for making such determinations.
 - e. Over the past five years, how many incidents of organized retail theft investigated by CVS and charged by local, state or federal law enforcement utilized either a CVS employee or an employee of a CVS contractor, vendor, or supplier acting as an “inside man” as part of the criminal enterprise? How many total incidents of retail theft have local, state or federal law enforcement charged that involved the sale of stolen goods from CVS as part of organized retail theft?
 - f. How does CVS account for thefts that are not reported to law enforcement on its balance sheet?
 - g. What is CVS’s position on creating a registry of stolen products with SKU data in collaboration with online platforms and other retailers?
 - h. What has CVS done to collaborate with other retailers and online platforms to create a best practices guide with respect to organized retail theft?
7. Supporters of the INFORM Act have suggested that the INFORM Act will be effective in combatting organized retail theft, preventing the sale of counterfeit goods, and preventing the sale of unsafe goods. Please answer the following questions in relation to the provisions of the INFORM Act.
- a. Does the INFORM Act require a high-volume third-party seller to take action under the legislation (i.e., “a third-party seller shall.” or a “high volume third-party shall.”)? If so, please identify each instance of required action and describe with specificity how that required action will help combat organized retail theft.
 - b. Does the INFORM Act require an online marketplace to take action under the legislation (i.e., “an online marketplace shall.”)? If so, please identify each instance of required action and describe with specificity how that required action will help combat organized retail theft.
 - c. Does the INFORM Act impose a legal duty on a high-volume third- party seller to provide accurate information to an online marketplace?
 - d. The INFORM Act requires an online marketplace to “verify the information collected” from high-volume third-party sellers. Please describe the steps that an online marketplace is expected or required to take under INFORM in order to verify the accuracy of collected information.
 - e. Please identify any provisions in the INFORM Act that specifically operate to:
 - a. Prevent retail theft;
 - b. Prevent unsafe goods; and
 - c. Prevent counterfeit goods.
 - d.

SENATOR TED CRUZ
U.S. Senate Committee on the Judiciary

- f. The INFORM Act requires online marketplaces to collect certain information from high-volume third-party sellers and also to disclose such information to consumers, including “whether [a] high-volume third-party seller used a different seller to supply the consumer product to the consumer upon purchase...” and, in certain circumstances, the country and State where a seller (and different seller) is located. If the disclosure of this information – including the potential country of origin and State where items are sold from – is an important safety disclosure to protect consumers from purchasing unsafe or counterfeit goods, please explain whether all retailers who sell goods online, including CVS, should similarly be required to disclose the country of origin of each item the retailer sells to consumers from its website? If not, why not?

ⁱ Erik Ortiz & Jacob Ward, *After San Francisco shoplifting video goes viral, officials argue thefts aren't rampant*, NBC News (July 14, 2021), <https://www.nbcnews.com/news/us-news/after-san-francisco-shoplifting-video-goes-viral-officials-argue-thefts-n1273848>

ⁱⁱ Mallory Moench, *Out of control organized crime drives S.F. shoplifting, closes 17 Walgreens in five years*, San Francisco Chronicle (May 13, 2021), <https://www.sfchronicle.com/local-politics/article/Out-of-control-Organized-crime-drives-S-F-16175755.php>

ⁱⁱⁱ Thomas Fuller, *San Francisco's Shoplifting Surge*, N.Y. Times (May 21, 2021), <https://www.nytimes.com/2021/05/21/us/san-francisco-shoplifting-epidemic.html>

^{iv} The Obama White House Archive, *Take the Fair Chance Pledge* (Nov. 2, 2015), <https://obamawhitehouse.archives.gov/issues/criminal-justice/fair-chance-pledge>

^v U.S. Dep't of Housing & Urban Dev., *The 2020 Annual Homeless Assessment Report (AHAR) to Congress*, HUD (Jan. 2021), <https://www.huduser.gov/portal/sites/default/files/pdf/2020-AHAR-Part-1.pdf>

^{vi} National Retail Federation, *NRF 2020 Organized Retail Crime*, NRF (Apr. 2020), https://cdn.nrf.com/sites/default/files/2020-12/2020%20Organized%20Retail%20Crime%20Survey_0.pdf

SENATOR TED CRUZ
U.S. Senate Committee on the Judiciary

Questions for the Record for K. Dane Snowden, President and CEO, the Internet Association

1. The following questions examine the various positions your organization, the Internet Association, takes as it relates to protecting consumers from harmful and unsafe products.
 - a. What position does the Internet Association take as to whether voluntary collaboration between rights holders and e-commerce platforms is the preferred approach to tackle the sale, offering for sale, distribution, or advertising of goods that implicate health and safety?
 - b. Are there ongoing efforts that demonstrate such an approach yields positive results?
 - c. What position does the Internet Association take as to the contention that the voluntary approach simply has not worked and that online platforms are unresponsive to the concerns of retailers or brands whose goods are being counterfeited and sold illegally?
 - d. In your written testimony, you included an explanation of proactive measures the online platforms take to ban counterfeit products. However, counterfeit products continue to be sold online. What additional steps should be taken by the platforms to address this?
 - e. What role does government have to play? Would additional customs enforcement make a difference, or should the government consider targeting foreign counterfeiters with economic sanctions?
 - f. What role do rightsholders have to play to keep these products offline?

Senator Thom Tillis

Questions for the Record

Cleaning Up Online Marketplaces: Protecting Against Stolen, Counterfeit, and Unsafe Goods

Ben Dugan, Director of Organized Retail Crime and Corporate Investigations, CVS Health

1. Americans increasingly have turned to online marketplaces to purchase what they need on a day-to-day basis, especially the elderly who are more at risk and often cannot go to their local store like normal. Unfortunately, criminal actors, often from China, are taking advantage of this pandemic to sell dangerous counterfeit goods to unsuspecting Americans. I appreciate the proactive steps some companies have taken to prevent the sale of counterfeits and I am proud to work with my colleagues on both sides of the aisle to ensure safety and transparency in the online retail marketplace.
 - a. What are your views on *The Integrity, Notification, and Fairness in Online Retail Marketplaces for Consumers (INFORM Consumers) Act*
 - b. What are your views on the *Stopping Harmful Offers on Platforms by Screening Against Fakes in E-commerce (SHOP SAFE) Act*?
 - c. What are your views on the *Counterfeit Goods Seizure Act*?
 - d. What are your views on the *Stopping All Nefarious Toys in America (SANTA) Act*?
2. I believe the focus of the SHOP SAFE Act should remain on goods that impact health and safety. Do you agree that is the right approach? If not, what changes would you make to the scope of this definition, while maintaining the focus on health and safety?
3. Should brand owners be required to provide information to platforms for them to benefit from the provisions of the bill?
4. How should we best incentivize platforms to protect against stolen, counterfeit, and unsafe goods? Will a one-size fits all approach work? If not, how should we tailor solutions to different platforms – by industry, by size, by consumer base?
5. Are there any additional “know your customer” considerations that Congress should look at when considering how best to ensure that marketplaces protect against stolen, counterfeit, and unsafe goods?
6. Can you provide additional details about the scale and scope of the criminal networks which are selling stolen goods through online marketplaces? How vast are their financial transactions and how are they interconnected across the country?
7. How have efforts by online platforms improved in recent years to combat stolen goods? Are there ways in which voluntary cooperation could be improved in addition to legislative action?

8. How has CVS adapted to the theft of goods and resale online? Where have you been successful in removing stolen goods from online platforms? Where have you been unsuccessful in removing stolen goods from online platforms?
9. How many listings do you estimate CVS flags annually for online platforms? What percentage of these listings are removed after an initial alert? What is the total number that are ultimately removed after further review?
10. I understand from your testimony that increased, consistent vetting practices and reliable identification information for third-party sellers are critical pieces to identifying the sources of stolen goods being sold online. Although the overall focus of the SHOP SAFE Act is on unsafe counterfeit products, would the vetting and identification provisions in that bill be helpful in the stolen goods context as well?

Senator Thom Tillis

Questions for the Record
Cleaning Up Online Marketplaces:
Protecting Against Stolen, Counterfeit, and Unsafe Goods

Kari Kammel, Adjunct Professor of Law, Michigan State University College of Law

1. Americans increasingly have turned to online marketplaces to purchase what they need on a day-to-day basis, especially the elderly who are more at risk and often cannot go to their local store like normal. Unfortunately, criminal actors, often from China, are taking advantage of this pandemic to sell dangerous counterfeit goods to unsuspecting Americans. I appreciate the proactive steps some companies have taken to prevent the sale of counterfeits and I am proud to work with my colleagues on both sides of the aisle to ensure safety and transparency in the online retail marketplace.
 - a. What are your views on *The Integrity, Notification, and Fairness in Online Retail Marketplaces for Consumers (INFORM Consumers) Act*
 - b. What are your views on the *Stopping Harmful Offers on Platforms by Screening Against Fakes in E-commerce (SHOP SAFE) Act*?
 - c. What are your views on the *Counterfeit Goods Seizure Act*?
 - d. What are your views on the *Stopping All Nefarious Toys in America (SANTA) Act*?
2. I believe the focus of the SHOP SAFE Act should remain on goods that impact health and safety. Do you agree that is the right approach? If not, what changes would you make to the scope of this definition, while maintaining the focus on health and safety?
3. How should we best incentivize platforms to protect against stolen, counterfeit, and unsafe goods? Will a one-size fits all approach work? If not, how should we tailor solutions to different platforms – by industry, by size, by consumer base?
4. What are your thoughts on using technology to help improve consumer knowledge about the goods they are purchasing? For example, US Customs piloted a proof of concept “consumer portal” where a consumer, at the point of making a purchase on a public facing web page, can scan in a product code and get information about whether or not that specific product is a legitimate, licensed good.¹ A serialized Global Trade Identification Number (GTIN) was used to uniquely identify individual products with an automated legitimate goods checking service. Consumers would scan a QR code and either receive positive confirmation (along with information like a product image and country of origin) or an indeterminate result stating that no record is found. Would this be a valuable tool to help combat counterfeits?

¹CBP Intellectual Property Rights Blockchain Proof of Concept Digital Bazaar Final Report, pg. 5 (Mar. 2020), <https://www.cbp.gov/sites/default/files/assets/documents/2020-Mar/IPR%20POC%20Report%20-%20Final%20V2.pdf>

5. Are there any additional “know your customer” considerations that Congress should look at when considering how best to ensure that marketplaces protect against stolen, counterfeit, and unsafe goods?
6. Under current law, how would you describe the distribution of the burden between online platforms and brand owners when it comes to policing counterfeits? Do you believe this strikes the right balance, and if not, what do you believe is the right balance?
7. Should brand owners be required to provide information to platforms for them to benefit from the provisions of the SHOP SAFE Act?
8. What incentives do platforms or brand owners need to share data that they have about harmful products or bad actors with each other, with the public, and/or with law enforcement?
9. How many listings do you estimate are flagged annually for online platforms? What percentage of these listings are removed after an initial alert? What is the total number that are ultimately removed?
10. I have heard concerns that the SHOP SAFE Act could risk enabling bad faith takedown notices. Do you agree with that assessment? If so, do you have any recommendations for how best to tackle this issue?

Senator Thom Tillis

Questions for the Record
Cleaning Up Online Marketplaces: Protecting Against
Stolen, Counterfeit, and Unsafe Goods

Aaron Muderick, Founder and President, Crazy Aaron's

1. Americans increasingly have turned to online marketplaces to purchase what they need on a day-to-day basis, especially the elderly who are more at risk and often cannot go to their local store like normal. Unfortunately, criminal actors, often from China, are taking advantage of this pandemic to sell dangerous counterfeit goods, including children's toys, to unsuspecting Americans. I appreciate the proactive steps some companies have taken to prevent the sale of counterfeits and I am proud to work with my colleagues on both sides of the aisle to ensure safety and transparency in the online retail marketplace.
 - a. What are your views on *The Integrity, Notification, and Fairness in Online Retail Marketplaces for Consumers (INFORM Consumers) Act*
 - b. What are your views on the *Stopping Harmful Offers on Platforms by Screening Against Fakes in E-commerce (SHOP SAFE) Act*?
 - c. What are your views on the *Counterfeit Goods Seizure Act*?
 - d. What are your views on the *Stopping All Nefarious Toys in America (SANTA) Act*?
2. Are there additional "know your customer" considerations that Congress should look at when considering how best to ensure that marketplaces protect against stolen, counterfeit, and unsafe goods?
3. Are there voluntary steps and actions that platforms could take stop the distribution of counterfeit products to consumers?
4. What voluntary measures do you participate in to help keep online marketplaces safe from counterfeit goods?
5. What incentives do platforms or brand owners need to share data that they have about harmful products or bad actors with each other, with the public, and/or with law enforcement?
6. Should brand owners be required to provide information to platforms for them to benefit from the provisions of the bill? What concerns do toy sellers like yourself have with a requirements that platforms would not have to act unless notified by the brand owner?
7. Should platforms be required to obtain and/or share information to address the seller's origin, such as where the goods are shipped from? Should it also include the country of manufacture? How should platforms address the issue of bad actors providing bad information?

8. At the hearing, you mentioned that you lacked standing to challenge unsafe products similar to Crazy Aaron's branded thinking putty once sellers stopped infringing on the trademark, but those unsafe products continued to circulate. Tech platforms have publicly stated that they are not as well positioned as brand owners to distinguish counterfeit from genuine products.¹ Yet from your testimony it appears brand owners are not positioned to flag unsafe products that may not fit within the contours of trademark infringement. How should we best incentivize platforms to protect against stolen, counterfeit, and unsafe goods? Will a one-size fits all approach work? If not, how should we tailor solutions to different platforms – by industry, by size, by consumer base?
9. How many listings do Toy Association members flag annually for online platforms? What percentage of these listings are removed after an initial alert? What is the total number that are ultimately removed?
10. I have heard concerns that the SHOP SAFE Act could risk enabling bad faith takedown notices. Do you agree with that assessment? If so, do you have any recommendations for how best to tackle this issue?

¹ See, e.g. USPTO, *Secondary Trademark Infringement Liability in the E-Commerce Setting, Summary of Responses to Federal Register Notice PTO-T-2020-0035* at 8 (Aug. 2021), <https://www.uspto.gov/sites/default/files/documents/Secondary-TM-Infringement-Liability-Response.pdf>

Senator Marsha Blackburn
Questions for the Record to Ben Dugan
Director of Organized Retail Crime and Corporate Investigations, CVS Health

1. An obstacle to combating the rise in organized retail theft is getting some of the e-commerce platforms to cooperate with law enforcement. Retail and law-enforcement investigators say they struggle to obtain information about potentially illicit third-party sellers from certain online selling platforms, whereas others are more willing to cooperate. What kind of information sharing and collaboration do you think is necessary to effectively target these illicit sellers and reduce retail theft?
2. Which relevant stakeholders should be involved in a conversation about reforms regarding organized retail theft?
3. What kind of retail crime have you witnessed or experienced, e.g. walk-in theft during business hours, break-ins, or internal thefts committed by retail employees?
4. Are you seeing organized retail theft happen online, as well as in person in brick-and-mortar stores? For instance, some sellers might use bots to buy legitimate goods online, only to resell those goods for a profit. During the initial months of the pandemic, we know many consumers could only get products like hand sanitizer or Lysol wipes if they paid a premium for them on sites like Amazon or eBay. How do trends like this impact your approach to organized retail crime and your response?

Senator Marsha Blackburn
Questions for the Record to Kari Kammel
Senior Academic Specialist for the Center for Anti-Counterfeiting and Product Protection,
Michigan State University

1. How does products liability law factor in when consumers purchase products that are counterfeits and also dangerous? We have seen cases where online sellers attempt to use Section 230 to block products liability claims, though they aren't always successful. Please discuss whether you see Section 230 as a potential obstacle for consumers in getting recourse for unsafe goods they buy online.
2. You have mentioned the need to account for "law disruptive technology" due to changes in marketplaces that the existing law did not foresee. However, we have heard from other witnesses—namely the Internet Association—that retailers, not online platforms, are in a better position to know whether goods are counterfeits or unsafe. Please describe "law disruptive technology" further, as well as how specifically the law can account for that when considering how to protect consumers from counterfeits and unsafe products.

Written Questions of Ranking Member Charles Grassley for Senate Judiciary Committee Hearing, "Cleaning Up Online Marketplaces: Protecting Against Stolen, Counterfeit and Unsafe Goods," November 2, 2021

Questions for Ben Dugan

1. What's been your experience working with law enforcement to protect against online retail theft? What can be done to better improve law enforcement efforts?

CVS enjoys strong partnerships with local, state, and federal law enforcement agencies in the fight against organized retail crime (ORC). However, the success of law enforcement in these efforts is impaired by three major challenges:

Resources to address these crimes at the appropriate level. *We have heard that many law enforcement agencies do not have the manpower or tools they need to consistently investigate these crimes and keep pace with the rapidly growing number of bad actors and criminal organizations operating through the online marketplaces. Dedicated funding for investigators and analysts would be helpful.*

Education and Training. *Understanding among law enforcement, prosecutors and the online marketplaces of the severity and impact of ORC also can be limited. Unfamiliarity with the tactics used by these criminal organizations can impede or significantly delay enforcement actions that could reduce physical and financial harm. There is a continued need for specific ORC training to all levels of law enforcement and among the online marketplaces.*

Transparency and Intelligence Sharing. *Currently, intelligence on ORC criminal networks and activity is sporadic and scattered across the country by state. A federal center and/or database, manned by the appropriate representatives from law enforcement and retail, is needed. This center would act as a clearinghouse to collect and distribute field intelligence, including vital information on illicit sellers and stolen product trends from each of the online marketplaces.*

2. What trends are you seeing in terms of the type of goods that are being counterfeited or shoplifted? Are certain goods preferred by these criminals?

First, thank you for your co-sponsorship of S. 936, The INFORM Consumers Act. We appreciate your support to enact legislation to dissuade criminal actors who sell stolen and counterfeit goods to unsuspecting consumers while at the same time harming local businesses, families, and their communities.

The sale of stolen goods via online marketplaces is increasing rapidly, representing a serious threat to legitimate businesses of all sizes and subjecting our colleagues and in-person and online shoppers to real harm. Organized retail crime (ORC) has been on the rise for more than a decade and has grown enormously since 2017. In the last two and a half years, criminal networks have taken advantage of the COVID-19 pandemic and the steep rise in online purchases to prey on unsuspecting consumers by peddling counterfeit, stolen, defective, harmful, and potentially dangerous products.

In their 2021 report entitled, *The Impact of Organized Crime and Theft in the United States*, the Retail Industry Leader's Association and the Buy Safe America Coalition estimated that as much as US\$68.9 billion worth of products were stolen from retailers in 2019, representing about 1.5 percent of total retail sales. The report further estimates that retail theft costs federal and state governments nearly US\$15 billion in personal and business tax revenues, not including the lost sales taxes. It is estimated that more than \$500 billion in illicit stolen and counterfeit goods are sold on third-party marketplaces like Amazon each year.

These crimes have become more sophisticated and highly dangerous. The use of a weapon or physical violence during an organized retail crime theft has more than doubled in the last year and a half. As these crimes grow increasingly common, they pose a serious threat to the safety and well-being of our customers and colleagues, subjecting them to potential harm and distress.

The National Coalition of Law Enforcement and Retail categorizes ORC threat levels by product category. Different types of products are stolen and resold by divergent criminal networks and organizations. The chart below describes these threats and their impact.

ORC Activity	Targeted Product	Retail Victims	Level of Violence	Scope	Financial Impact (per case)	Collateral Crimes
Religious Offense Organized crime (armed/stealing merchandise with immediate intent)	OTC merchandise, liquor, tobacco, health and beauty aids	Pharmacies, big box, and grocery stores	Low Purposely non-violent	Transnational, national, interstate theft across large geographic areas (broader & commercial)	US\$10 - 200 Million	Interstate stolen goods, PLU wire fraud, international crimes, counterfeiting, large scale trademark fraud (gen), drug trafficking, human (labor) trafficking, human trafficking
1-Commerce High Level (not Resolved)	Tools, electronics, health and beauty aids	Home improvement, electronics, wine/grocery, pharmacies, big box	Moderate	Drifts/dish, regional, some state or neighboring states	US\$200k - 2 Million	Interstate stolen goods, narcotics trafficking, PLU wire fraud
2-Commerce Low Level (not Resolved)	Tools, electronics, clothing and accessories	Home improvement, electronics, wine/grocery, pharmacies, big box	Moderate	Product theft and auto theft	US\$25k - 100k	Interstate stolen goods, narcotics trafficking, PLU wire fraud
Lower ORC (High Potential, Small Retail, Business)	Luxury designer, hand and body items, personal hygiene and some clothing	Drug stores, big box, gift items, (pharmacy)	High probability for violence	Product stolen and sold locally in public forum	US\$10k - 200k	Interstate stolen goods, motor vehicle theft, narcotics trafficking, PLU wire fraud
Small and Online	High dollar designer goods, jewelry, clothing	High end, gift items, jewelry, small businesses	Very violent	Local gangs	US\$25k - 100k	Robbery/motor vehicle, burglary, narcotics trafficking
Total Theft (national data)	All retailers	All retailers	High potential for violence	Local networks or drug and theft	Low dollar	Narcotics, motor vehicle

Source: Chart provided by BlueChalk, Inc. (2021) © 2021 B.C.

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Questions for the Record for Mr. Ben Dugan, Director of Organized Retail Crime and Corporate Investigations, CVS Health

1. It is helpful to begin with a common understanding of terms. Please define the following, with an explanation of how they relate to one another:

The definitions provided below are commonly understood meanings of these phrases as used by organized retail crime investigation units and law enforcement.

Shoplifting or petty theft – *The act of stealing merchandise for personal use or consumption.*

Organized retail theft – *Repeated and/or large-scale theft of retail merchandise with the intent to resell for financial gain. In its simplest form, organized retail crime is a syndicate of sophisticated criminal networks consisting of professional thieves, fences, and illicit online sellers.*

Employee shoplifting or petty theft – *Employees involved in stealing merchandise for personal use or consumption.*

Employee organized retail theft – *Employees involved in collusion or a conspiracy with another employee or outside entity to repeatedly steal merchandise from their retail employer for resale or financial gain. These incidents are rare and normally involve listing or reselling stolen product through an online marketplace.*

2. In an NBC News article¹, spokespersons for CVS and Walgreens were quoted as saying that thefts at San Francisco stores outpace those at stores in other markets. In an article with the San Francisco Chronicle, you were quoted as having said that: “At CVS, 42 percent of losses within the Bay Space got here from 12 shops in San Francisco, that are solely 8 percent of the market share.”² Additionally, in a New York Times article, you were quoted as saying that “San Francisco is one of the epicenters of organized retail crime.”

In your sworn testimony, you stated that there is not more theft in San Francisco stores. You further asserted that relative to market share, San Francisco stores do not have higher instances of loss than stores in other markets. Finally, while you stated that CVS would not support laws that effectively decriminalize shoplifting, you did not provide a clear answer as to whether or not such laws have an impact on losses incurred by your stores.

- a. Have thefts at CVS stores in San Francisco outpaced thefts at CVS stores in other markets?
- b. What percent of losses do CVS stores in the San Francisco/Bay Area account for in proportion to your company’s overall market share? In absolute terms?
- c. Is there more organized retail crime in San Francisco relative to overall market share? In absolute terms? If so, how much more organized retail crime has occurred in San Francisco relative to CVS’s overall market share since 2020?
- d. Is there more shoplifting in San Francisco relative to overall market share? In absolute terms?

Please provide data to support your answers.

The statements quoted in the NBC News article were made on May 13, 2021 during a presentation to the San Francisco Board of Supervisors in response to questions about retail theft specifically in the Bay Area and across the state of California at that time, not in comparison to other cities or regions in the United

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States that are outside of California.

The statements made at the November 2, 2021 Senate Judiciary hearing also are true. CVS Health does experience greater "instances of theft" in areas other than San Francisco. If time had permitted, I would have explained that the nationwide increase in organized retail crime appears to be linked more closely to the expansion of the online marketplaces beginning in 2017 than any enactment of increased felony thresholds, which began to rise in 2000.

A May 28, 2018 article entitled "States Can Safely Raise Their Felony Theft Thresholds" by the National Conference of State Legislatures, stated that "at least 39 states have raised the felony threshold for property theft since 2000." More than half of states, including Texas, have a felony theft threshold of \$1,000 or more.

3. In an article entitled "Functional Redundancy as a Response to Employee Theft Within Small Businesses" by J.P. Kennedy, the author describes that employee theft has been trending upward and is ten times more costly to businesses than all forms of street crime and non-employee theft. In your testimony, you stated your opinion may be biased as a result of your role in working on the external part of the problem. Further, you stated that over the course of the pandemic, it has been non-employee theft that has been on the rise.

Since 2014, thirteen states plus the District of Columbia have enacted so-called "ban-the-box" laws, which bar employers from asking prospective employees about their criminal background. In that same vein, the Obama Administration launched the Fair Chance Business Pledge inviting employers to adopt ban-the-box hiring practices. CVS Health signed on to that pledge^{iv}.

- a. Since signing the Fair Chance Business Pledge, has CVS seen an increase or a decrease in losses incurred as a result of, or which CVS has attributed to, employee theft?
- b. What percentage of losses does CVS attribute to employee theft compared to those incurred from external losses? In absolute terms?
- c. For each year over the last five years, what cities or states experienced the highest rates of organized retail theft from non-employees? From employees? How has this changed over time by location?

Please provide data to support your answers.

CVS Health signed the Fair Chance Business Pledge in 2016 and maintains compliance with all applicable laws related to hiring of employees with a previous criminal background. In the past five years, 99.8% of the nearly 1500 cases that were investigated by the CVS Health ORC Team were related to ORC organizations not affiliated with or involving a company employee.

According to a 2022 joint report from the Association of Certified Anti-Money Laundering Specialists and U.S. Department of Homeland Security entitled "Detecting and Reporting the Illicit Financial Flows Tied to Organized Theft Groups (OTG) and Organized Retail Crime (ORC)," the top ten cities with the highest rates of ORC are (in order):

1. New York City
2. Los Angeles
3. Philadelphia
4. Chicago
5. Washington, DC/Baltimore

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- 6. *San Francisco*
- 7. *Houston*
- 8. *Miami*
- 9. *Dallas*
- 10. *Orlando/Tampa*

4. In your testimony, you advocated for the INFORM Consumers Act in order to combat organized retail theft, despite the fact that the INFORM Consumers Act contains no provisions directly related to the criminal aspect of retail crime.
- a. What position does CVS and CLEAR take regarding whether the Department of Justice should consider charges against these organizations under the Racketeer Influenced and Corrupt Organizations Act (RICO)?
 - b. What does position does CVS and CLEAR take regarding whether the Department of Justice should consider bringing criminal charges against organizations or individuals responsible for organized retail crime?
 - c. If CVS and CLEAR oppose bringing criminal charges or RICO charges, please explain the reasoning for these positions.
 - d. Why do CVS and CLEAR believe that the provisions under the INFORM Consumers Act would be more successful in combatting organized retail crime than law enforcement actions through criminal charges or RICO charges? –

CVS Health directly investigates and compiles information to assist law enforcement, but all decisions on whether to pursue criminal charges and how to prosecute a matter occur at the sole discretion of the prosecutors assigned to the case.

While CLEAR encourages cooperation between law enforcement agencies and business and private sector organizations with the goal of advancing security and protecting our communities, the organization also generally does not take positions related to the manner in which law enforcement pursues cases. CLEAR routinely educate and counsels law enforcement personnel on how to effectively pursue and investigate cases through its training programs.

By making it harder for criminals to easily dispose of stolen and counterfeit goods, the INFORM Consumers Act would directly and immediately curtail theft in retail stores and the proliferation of counterfeit goods available in online marketplaces. Importantly, by increasing confidence in the integrity and safety of the products purchased online, the INFORM Consumers Act would also enhance the ability of legitimate sellers of all sizes to connect with customers. Criminal investigations, while critical, are reactive in nature, occurring after the harm has been rendered.

5. In your testimony, you explained how a network of so-called “boosters” sell stolen goods to “fences” for below market value in exchange for either money or drugs. According to the Department of Housing and Urban Development’s (HUD) most recent Annual Homeless Assessment Report (AHAR), the nation’s homeless population sits at roughly 580,000 and nearly 40% of that population is unsheltered*. California accounts for more than half of all unsheltered people in the nation (about 113,660 people) and nearly half of that population (63,706 people) is in Los Angeles County.

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- a. Is there any correlation between an incidents of retail thefts and the prevalence of homelessness a city or state is dealing with? Using Los Angeles as an example, please provide comparative data as to the national average of thefts in CVS stores versus thefts in Los Angeles County stores.

CVS Health does not categorize or track theft data by homelessness or any other social demographic.

6. According to the National Retail Federation (NRF), organized retail crime (ORC) is a serious problem—and it's on the rise. Three in four ORC victims tell NRF they've seen an increase in the past 12 months. When asked why they believe this is happening, retail execs point to "relaxed law enforcement guidelines," "shoplifting law changes, limited loss prevention in stores," and "decreased penalties in shoplifting laws."³⁰ In your testimony, you stated that criminal activity has overwhelmed efforts to engage in loss prevention.
- a. A lot of focus has been placed on e-commerce platforms as it relates to halting the sale of goods that have already been stolen. What is CVS's position on loss prevention and how much focus should be placed on preventing loss at the outset? Please provide a copy of any written loss prevention policies currently in use by CVS.
- b. In the past 5 years, has CVS allocated more resources to loss prevention? What kinds of efforts have been undertaken? Please provide data to support your answer.
- c. Why is the tax data that online platforms already collect for tax purposes insufficient for identifying third party sellers who use such platforms to engage in commerce?

Federal law does not currently require online marketplaces to verify the accuracy of the information provided by the seller. The INFORM Consumers Act, by comparison, requires verification of seller information, including banking information, which frequently is essential to law enforcement when seeking evidence. Further, the marketplaces report a single aggregate sales amount to the IRS, not transactions that can provide evidence of fraudulent activity between various parties in the criminal organization.

7. How does CVS distinguish between organized retail theft and shoplifting or petty theft? Does CVS track products stolen and make a determination as to whether the incident is organized retail theft versus shoplifting on a case-by-case basis? Please explain your internal processes for making such determinations.
- a. Over the past five years, how many incidents of organized retail theft investigated by CVS and charged by local, state or federal law enforcement utilized either a CVS employee or an employee of a CVS contractor, vendor, or supplier acting as an "inside man" as part of the criminal enterprise? How many total incidents of retail theft have local, state or federal law enforcement charged that involved the sale of stolen goods from CVS as part of organized retail theft?
- b. How does CVS account for thefts that are not reported to law enforcement on its balance sheet?
- c. What is CVS's position on creating a registry of stolen products with SKU data in collaboration with online platforms and other retailers?
- d. What has CVS done to collaborate with other retailers and online platforms to create a best practices guide with respect to organized retail theft?

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Shoplifting differs from organized retail crime (ORC) in that ORC is the repeated and/or large-scale theft of retail merchandise with the intent to resell for financial gain. In its simplest form, ORC is a syndicate of sophisticated criminal networks consisting of professional thieves, fences, and illicit online sellers. ORC is organized, sophisticated, and massive in scale.

In the last five years, the CVS ORC Team has investigated and supported criminal prosecutions in nearly 1500 separate cases representing nearly \$175 million in inventory losses and resulting in nearly 5,000 individual arrests by local, state, and federal law enforcement. In the past five years, 99.8% of the nearly 1500 cases that were investigated by the CVS Health ORC Team were related to ORC organizations and not affiliated with or involving a company employee.

Like most retailers, CVS Health maintains an accounting of physical inventory for goods available for sale. Inventory discrepancies are reported as shrink, which is a component of gross margin.

SKU data does not act as positive identifier the way a serial number might, for example, identify a smartphone. This data alone would not have much value without relative intelligence and would not readily support investigations. Retailers rely upon other means of identifying stolen products.

CVS Health is a leader in the retail ORC industry and actively collaborates alongside other retailers and law enforcement to develop best practices for identifying ORC and conducting ORC investigations. CVS supports these efforts through the Retail Industry Leaders Association, the Coalition of Law Enforcement and Retail, state Organized Retail Crime Associations, and, more recently, state Attorney General ORC Task Forces.

8. Supporters of the INFORM Act have suggested that the INFORM Act will be effective in combatting organized retail theft, preventing the sale of counterfeit goods, and preventing the sale of unsafe goods. Please answer the following questions in relation to the provisions of the INFORM Act.
 - a. Does the INFORM Act require a high-volume third-party seller to take action under the legislation (i.e., "a third-party seller shall....." or a "high volume third-party shall.....")? If so, please identify each instance of required action and describe with specificity how that required action will help combat organized retail theft.
 - b. Does the INFORM Act require an online marketplace to take action under the legislation (i.e., "an online marketplace shall.....")? If so, please identify each instance of required action and describe with specificity how that required action will help combat organized retail theft.
 - c. Does the INFORM Act impose a legal duty on a high-volume third-party seller to provide accurate information to an online marketplace?
 - d. The INFORM Act requires an online marketplace to "verify the information collected" from high-volume third-party sellers. Please describe the steps that an online marketplace is expected or required to take under INFORM in order to verify the accuracy of collected information.
 - e. Please identify any provisions in the INFORM Act that specifically operate to:

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- a. Prevent retail theft;
 - b. Prevent unsafe goods; and
 - c. Prevent counterfeit goods.
- f. The INFORM Act requires online marketplaces to collect certain information from high-volume third-party sellers and also to disclose such information to consumers, including “whether [a] high-volume third-party seller used a different seller to supply the consumer product to the consumer upon purchase...” and, in certain circumstances, the country and State where a seller (and different seller) is located. If the disclosure of this information – including the potential country of origin and State where items are sold from – is an important safety disclosure to protect consumers from purchasing unsafe or counterfeit goods, please explain whether all retailers who sell goods online, including CVS, should similarly be required to disclose the country of origin of each item the retailer sells to consumers from its website? If not, why not?

The INFORM Consumers Act would require a series of interactions between the online marketplaces and high-volume third-party sellers to verify the business and contact information provided by the seller, similar to, but not as extensive as the process used by brick-and-mortar retailers to verify the information, credentials, and product standards of their suppliers.

My understanding of the legislation as an investigator is that high-volume third-party sellers would be required to do the following:

- *Provide the marketplace with a bank account number, contact information, a tax identification number, and a working email and phone number.*
- *Electronically certify their business and contact information and/or whether there have been any changes to the information when prompted by the marketplace to do so.*
- *Convey certain contact information to consumers in a clear and conspicuous manner if the seller meets or exceeds an aggregate threshold of \$20,000 or more in annual gross revenues.*

My understanding of the legislation as an investigator is that marketplaces would be required to do the following:

- *Attempt to obtain certain information from high-volume third-party sellers within 10 days of the seller being identified as a high-volume seller.*
- *Notify such sellers to keep any information collected current.*
- *Provide a means for the seller to electronically certify the information and notify of any changes to the information.*
- *Suspend a seller’s account(s) if the seller does not comply with the requirements above or if the seller provides false representations.*
- *Maintain in a clear and conspicuous manner an electronic and telephonic reporting system for consumers to report suspicious marketplace activity to the online marketplace.*

The INFORM Consumers Act would create transparency for consumers and accountability for online marketplaces and their sellers. The current lack of transparency and accountability is what allows criminals to steal from legitimate retailers and then sell those stolen goods.

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including over-the-counter drugs, baby formula, and beauty products, through the online marketplaces. When criminals can hide behind fake screen names and bogus business accounts, retail employees are placed in danger, and consumers and their communities are harmed.

According to the 2022 joint report from the Association of Certified Anti-Money Laundering Specialists and U.S. Department of Homeland Security, "in addition to defrauding retailers, threatening employees, reducing choice, and increasing costs to consumers, many of these organized retail crime syndicates use their ill-gotten gains to fund other criminal activities, such as labor, arms, and drug trafficking."

This, in my capacity as an investigator, is why the provisions in the INFORM Consumers Act are so important to law enforcement. It also is why the National Coalition of Law Enforcement and Retail (CLEAR) and the Fraternal Order of Police (FOP) support the INFORM Consumers Act.

ⁱ Erik Ortiz & Jacob Ward, *After San Francisco shoplifting video goes viral, officials argue thefts aren't rampant*, NBC News (July 14, 2021), <https://www.nbcnews.com/news/us-news/after-san-francisco-shoplifting-video-goes-viral-officials-argue-thefts-n1273848>

ⁱⁱ Mallory Moench, *Out of control organized crime drives S.F. shoplifting, closes 17 Walgreens in five years*, San Francisco Chronicle (May 13, 2021), <https://www.sfchronicle.com/local-politics/article/Out-of-control-Organized-crime-drives-S-F-16175755.php>

ⁱⁱⁱ Thomas Fuller, *San Francisco's Shoplifting Surge*, N.Y. Times (May 21, 2021), <https://www.nytimes.com/2021/05/21/us/san-francisco-shoplifting-epidemic.html>

^{iv} The Obama White House Archive, *Take the Fair Chance Pledge* (Nov. 2, 2015), <https://obamawhitehouse.archives.gov/issues/criminal-justice/fair-chance-pledge>

^v U.S. Dep't of Housing & Urban Dev., *The 2020 Annual Homeless Assessment Report (AHAR) to Congress*, HUD (Jan. 2021), <https://www.huduser.gov/portal/sites/default/files/pdf/2020-AHAR-Part-1.pdf>

^{vi} National Retail Federation, *NRF 2020 Organized Retail Crime*, NRF (Apr. 2020), https://cdn.nrf.com/sites/default/files/2020-12/2020%20Organized%20Retail%20Crime%20Survey_0.pdf

Senator Thom Tillis

Questions for the Record
Cleaning Up Online Marketplaces:
Protecting Against Stolen, Counterfeit, and Unsafe Goods

Ben Dugan, Director of Organized Retail Crime and Corporate Investigations, CVS Health

1. Americans increasingly have turned to online marketplaces to purchase what they need on a day-to-day basis, especially the elderly who are more at risk and often cannot go to their local store like normal. Unfortunately, criminal actors, often from China, are taking advantage of this pandemic to sell dangerous counterfeit goods to unsuspecting Americans. I appreciate the proactive steps some companies have taken to prevent the sale of counterfeits and I am proud to work with my colleagues on both sides of the aisle to ensure safety and transparency in the online retail marketplace.
 - a. What are your views on *The Integrity, Notification, and Fairness in Online Retail Marketplaces for Consumers (INFORM Consumers) Act*?
 - b. What are your views on the *Stopping Harmful Offers on Platforms by Screening Against Fakes in E-commerce (SHOP SAFE) Act*?
 - c. What are your views on the *Counterfeit Goods Seizure Act*?
 - d. What are your views on the *Stopping All Nefarious Toys in America (SANTA) Act*?

First, thank you for your co-sponsorship of S. 936, The INFORM Consumers Act. We appreciate your support to enact legislation to dissuade criminal actors who sell stolen and counterfeit goods to unsuspecting consumers while at the same time harming local businesses, families, and their communities.

CVS Health strongly supports the INFORM Consumers Act. This legislation brings transparency and accountability to online marketplace by requiring the verification of sellers by the online marketplaces and requiring sellers to provide contact information to consumers. These basic transparency and accountability measures will help protect consumers from illicit goods, aid law enforcement in efforts to track organized crime, and make it harder for criminals to profit by selling stolen or counterfeit merchandise.

By making it harder for criminals to easily profit from of stolen and counterfeit goods, the INFORM Consumers Act would directly and immediately curtail theft in retail stores and the proliferation of counterfeit goods available in online marketplaces. Importantly, by increasing confidence in the integrity and safety of the products purchased online, the INFORM Consumers Act would also enhance the ability of legitimate sellers of all sizes to connect with customers.

I am not as familiar with the other pieces of legislation. I can comment that, when conducting searches in conjunction with law enforcement of organized retail crime organization locations (warehouses, personal homes, storage unit), we often identify both stolen and counterfeit goods in their possession and for sale through their unchecked sites on online marketplaces.

2. I believe the focus of the SHOP SAFE Act should remain on goods that impact health and safety. Do you agree that is the right approach? If not, what changes would you make to the scope of this definition, while maintaining the focus on health and safety?

As an investigator, my focus is solving organized retail crime (ORC) incidents and disrupting ORC organizations for CVS Health. My job is centered around creating a safe environment for our colleagues and customers. I am not familiar with this legislation so am not able to knowledgeably respond to this question.

3. Should brand owners be required to provide information to platforms for them to benefit from the provisions of the bill?

As an investigator, my focus is solving organized retail crime (ORC) incidents and disrupting ORC organizations for CVS Health. My job is centered around creating a safe environment for our colleagues and customers. I am not familiar with this legislation so am not able to knowledgeably respond to this question.

4. How should we best incentivize platforms to protect against stolen, counterfeit, and unsafe goods? Will a one-size fits all approach work? If not, how should we tailor solutions to different platforms – by industry, by size, by consumer base?

The INFORM Consumers Act will help protect consumers against stolen, counterfeit, and unsafe goods. By making it harder for criminals to easily dispose of stolen and counterfeit goods, the INFORM Consumers Act would directly and immediately curtail theft in retail stores and the proliferation of unsafe counterfeit goods available in online marketplaces. It is the organized criminal organizations that need to be dismantled. Many of these organizations operate across a wide range of platforms, networks, and product types. A focus on a specific set of factors would fail to capture the intertwined aspects of how these criminal organizations are structured.

5. Are there any additional “know your customer” considerations that Congress should look at when considering how best to ensure that marketplaces protect against stolen, counterfeit, and unsafe goods?

In my opinion, the INFORM Consumers Act currently is the best approach for protecting consumers against stolen, counterfeit, and unsafe goods. This legislation brings transparency and accountability to online marketplaces by requiring the verification of sellers by the online marketplaces and requiring sellers to provide contact information to consumers. These basic transparency and accountability measures will help protect consumers from illicit goods, aid law enforcement in efforts to track organized crime, and make it harder for criminals to profit by selling stolen or counterfeit merchandise.

6. Can you provide additional details about the scale and scope of the criminal networks which are selling stolen goods through online marketplaces? How vast are their financial transactions and how are they interconnected across the country?

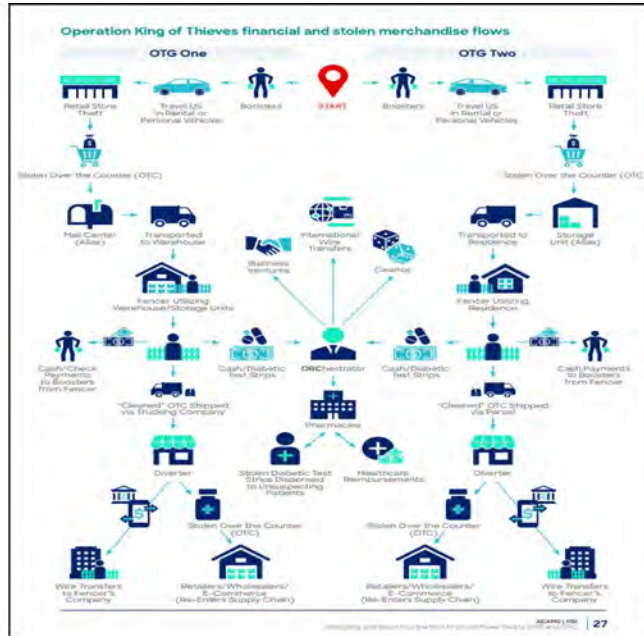
According to the 2022 joint report from the Association of Certified Anti-Money Laundering Specialists and U.S. Department of Homeland Security entitled "Detecting and Reporting the Illicit Financial Flows Tied to Organized Theft Groups (OTG) and Organized Retail Crime (ORC)," organized retail crime has vast economic costs to the global economy and exploits the formal financial system." The report states that these organized theft groups "are often linked to other heinous crimes like human trafficking, terrorism financing, and transnational organized crime including drug and weapons trafficking."

In their 2021 report entitled, The Impact of Organized Crime and Theft in the United States, the Retail Industry Leaders Association and the Buy Safe America Coalition estimated that as much as US\$68.9 billion worth of products were stolen from retailers in 2019, representing about 1.5 percent of total retail sales. The report further estimates that retail theft costs federal and state governments nearly US\$15 billion in personal and business tax revenues, not including the lost sales taxes. It is estimated that more than \$500 billion in illicit stolen and counterfeit goods are sold on third-party marketplaces like Amazon each year.

The size and scope of the criminal networks involved in selling stolen products through online marketplaces range from crews of professional thieves that sell the stolen product to local businesses such as convenience stores or pawn shops with an online presence to large scale transnational criminal organizations. The larger criminal organizations continuously monitor the online marketplace listings and contact the sellers of desired products directly to harvest stolen product from multiple states. They frequently utilize shell companies and international wire transfers to conceal their movements and launder their money.

The following example was included in the 2022 joint report from the Association of Certified Anti-Money Laundering Specialists and U.S. Department of Homeland Security and demonstrated the complexity and scale of these criminal operations. This particular case was worked by CVS Health in collaboration with the following enforcement agencies:

*U.S. Department of Homeland Security Investigations Unit
U.S. Department of Health and Human Services - Office of Inspector General
U.S. Food and Drug Administration - Office of Criminal Investigations
U.S. Federal Bureau of Investigations
Texas Attorney General's Medicaid Fraud Control Unit
U.S. Internal Revenue Services - Criminal Investigation Unit
Ohio's Medicaid Fraud Control Unit
Texas State Board of Pharmacy.*



Source: Association of Certified Anti-Money Laundering Specialists and U.S. Department of Homeland Security (2022). Detecting and Reporting the Illicit Financial Flows Tied to Organized Theft Groups (OTG) and Organized Retail Crime (ORC): A Comprehensive Educational Guide for Law Enforcement and Financial Crime Investigators. www.acams.org.

7. How have efforts by online platforms improved in recent years to combat stolen goods? Are there ways in which voluntary cooperation could be improved in addition to legislative action?

eBay was the first to set up a response team and system (named PROACT) in 2007 to collaborate with both retailers and law enforcement in detecting and preventing the sale of stolen goods. Since then, we have observed very little change by the online marketplaces to mitigate the sale of stolen products on their platforms.

Although there is significant opportunity for voluntary cooperation against these crimes, the online marketplaces (with a few exceptions like eBay) have been reluctant to partner with the retailers against known offenders. I believe the only way the online marketplaces will cooperate in providing the necessary transparency is through enactment of the INFORM Consumers Act. This legislation is a necessary step to compel the online marketplaces to provide much needed transparency and accountability.

8. How has CVS adapted to the theft of goods and resale online? Where have you been successful in removing stolen goods from online platforms? Where have you been unsuccessful in removing stolen goods from online platforms?

Retailers collectively spend billions of dollars each year on security and loss prevention, but they are being overwhelmed by criminal networks who know they can quickly, easily, and anonymously sell stolen products online for a huge profit. Like many retailers, CVS Health employs asset protection staff and invests in anti-theft measures to deter organized retail crime (ORC). We do not publicly disclose these investments or our specific loss prevention policies given the sensitive nature of these efforts to combat ORC and protect our colleagues and customers. However, according to a December 15, 2020 National Retail Federation survey, ORC costs retailers an average of US\$700,000 per US\$1 billion in sales, and three-fourths of retailers saw an increase in ORC in 2020. These numbers have increased substantially since then.

While our ORC team efforts are impactful, unfortunately our success rate is low in comparison with the massive scale of these criminal organizations. Our success rate of having a fraudulent site selling stolen good removed from an online platform is only about 10 percent. This is why we focus on getting to the top of these criminal organizations where we can have the most impact.

9. How many listings do you estimate CVS flags annually for online platforms? What percentage of these listings are removed after an initial alert? What is the total number that are ultimately removed after further review?

The CVS Organized Retail Crime Team flags approximately 1500 high volume sellers each year for online marketplaces. These sellers usually exceed \$100 Million dollars in listings. Approximately 150 of those accounts are closed administratively by the online marketplaces or through criminal prosecution. It is important to note that nearly all the administrative account closures facilitated by CVS Health are executed by eBay. CVS Health receives very little cooperation in this regard from the other online marketplaces, even when a subpoena had been issued by law enforcement.

10. I understand from your testimony that increased, consistent vetting practices and reliable identification information for third-party sellers are critical pieces to identifying the sources of stolen goods being sold online. Although the overall focus of the SHOP SAFE Act is on unsafe counterfeit products, would the vetting and identification provisions in that bill be helpful in the stolen goods context as well?

I am not familiar with this legislation so am not able to knowledgeably respond to this question. I can comment that the touchstone of the INFORM Consumers Act is creating transparency and accountability for online marketplaces and their sellers, which, as you know, is currently lacking. This lack of information is a major stumbling block to solving organized retail crime cases. When criminals can hide behind fake screen names and bogus business accounts the local retail storefront, retail employees, consumers and their communities are harmed.

Senator Marsha Blackburn
Questions for the Record to Ben Dugan
Director of Organized Retail Crime and Corporate Investigations, CVS Health

1. An obstacle to combating the rise in organized retail theft is getting some of the e-commerce platforms to cooperate with law enforcement. Retail and law-enforcement investigators say they struggle to obtain information about potentially illicit third-party sellers from certain online selling platforms, whereas others are more willing to cooperate. What kind of information sharing and collaboration do you think is necessary to effectively target these illicit sellers and reduce retail theft?

The first and most meaningful step that Congress and the online marketplaces can take is to support and pass the INFORM Consumers Act. In addition, the online marketplaces can provide details of the seller's online sales history including any transactions directly with the marketplaces themselves (such as fulfillment centers). The online marketplaces could also require high volume sellers of high-risk products to provide verifiable proof that they are sourcing their product from legitimate vendors.

2. Which relevant stakeholders should be involved in a conversation about reforms regarding organized retail theft?

The following stakeholders should be involved in discussions about reforms regarding organized retail crime:

*U.S. Department of Justice (DOJ)
 U.S. Homeland Security Investigations (HSI)
 State Attorney Generals
 Retail Industry Leaders Association (RILA)
 National Coalition of Law Enforcement and Retail (CLEAR)
 Retail Industry Experts
 Representatives from the online marketplaces*

3. What kind of retail crime have you witnessed or experienced, e.g. walk-in theft during business hours, break-ins, or internal thefts committed by retail employees?
4. *In my 30 years investigating organized retail crime, I have experienced, witnessed, or learned of in the course of an investigation a wide range of crimes ranging from human trafficking and assault to money laundering, Medicare fraud and gift card scams.*
5. Are you seeing organized retail theft happen online, as well as in person in brick-and-mortar stores? For instance, some sellers might use bots to buy legitimate goods online, only to resell those goods for a profit. During the initial months of the pandemic, we know many consumers could only get products like hand sanitizer or Lysol wipes if they paid a premium for them on sites like Amazon or eBay. How do trends like this impact your approach to organized retail crime and your response?

Digital organized retail crime (ORC) is known as “Triangular Fraud” because it affects three separate victims. Criminal organizations use the dark web to facilitate credit card account takeovers of vulnerable citizens (such as the elderly) and then use those accounts to make bulk purchases from retail e-commerce sites. The retailers then ship the ordered merchandise to unsuspecting customers across the country or to a drop shipment location (i.e., a warehouse) run by the criminal organization. These criminal networks often list product through the online marketplaces to attract customers. The cardholder, the retailer and buyer all fall victim to these schemes. This crime is growing exponentially as retailers expand their digital offerings. CVS Health has made significant investments in new technology and staffing to combat this type of crime and protect consumers.

Response to Written Questions from Ranking Member Charles Grassley, Senate Judiciary Committee

Responses from Kari Kammel, August 29, 2022

Written Questions of Ranking Member Charles Grassley for Senate Judiciary Committee Hearing, "Cleaning Up Online Marketplaces: Protecting Against Stolen, Counterfeit and Unsafe Goods," November 2, 2021

Questions for Kari Kammel

1. Do you believe that the Administration has done enough to warn consumers about the adverse health and safety implications of counterfeit and stolen products?

I do believe very few organizations have done enough to warn consumers about the adverse effects and health and safety implications of counterfeit products, whether that is the administration, consumer advocacy organizations, e-commerce platforms, or others. I also believe that an effective messaging campaign or appropriate warnings must be approached in a holistic, research-based manner. For example, we know now that consumers are buying counterfeit products in the online space at an incredible pace, and counterfeit sellers are reaching a much broader audience than before when consumers might have to go to a flea market or bodega to purchase something. Almost any consumer on any e-commerce platform or social media platform is being exposed to counterfeit if third-party selling is allowed.

In a study published by two A-CAPP Center academic fellows and their colleagues analyzing the behavior of consumers purchasing medicine on social media, they found the most common reason for purchasing medicine online was to get legitimate medicine, get a good deal and purchasing from a source recommended by people they know.¹ In all of the models looked at in this study,² consumer's favorable attitude toward social media positively predicted the odds of purchasing stimulants, narcotics and COVID-19 medicines or vaccinations online.³ From the results of this study, we can see that perhaps some of the existing frameworks for communicating to U.S. consumers will not effectively 1) reach consumers and more importantly, 2) have a chance to change their behavior.

I would suggest that a massive, coordinated effort where success can be measured is needed not only to educate, inform and warn consumers about counterfeit goods but also to study and address the issue of purchasing behaviors and patterns.

¹ Charlotte Moureaud, John Hertig, Yao Dong, Iago S. Muraro, & Saleem Allhabash, *Purchase of prescription medicines via social media: A survey-based study of prevalence, risk perceptions, and motivations*, 125 HEALTH POLICY, 1421-1429 (NOV. 2021). Profs. John Hertig and Saleem Allhabash are affiliated academic faculty with the A-CAPP Center. <https://a-capp.msu.edu/about-us/>

² The models examined in this study included: Sedatives (Xanax®, Valium®, Ativan®, etc.); stimulants (Adderall®, Ritalin®, etc.); narcotics (Vicodin®, Percocet®, Oxycontin®, fentanyl, etc.); and COVID-19 medicines or vaccines.

³ Moureaud, et al, *supra* note 1.

2. *Why are so many counterfeits coming from China?*

This is a complex question that would benefit from someone who focuses on China, which is not my area of expertise. However, what we do know comes from government and organizational studies, such as the U.S. Customs and Border Protection Annual Intellectual Property Rights Seizure Statistics for 2020, which shows seizures originating from China at 44% and Hong Kong at 35%, totaling 79%.⁴ Similar statistics exist in Europe, showing approximately 78% coming from China.⁵

3. *What trends are you seeing in terms of the type of goods that are being counterfeited or shoplifted?*

A very wide range of products across many industries are being counterfeited and continue to be, including, but not limited to: clothes, accessories and luxury goods, electronic/electrical devices, mobile phones and components, food and drink, perfumes and cosmetic products, pesticides, pharmaceutical products, tobacco products, toys, automobile products, consumers products,⁶ as well as products related to the COVID-19 pandemic, such as PPE.⁷ What we do know is that any trademarked product that has a legitimate demand can and most likely will be counterfeited. To if there is a demand for a product and the legitimate supply chain is disrupted, we can see counterfeiters try to fill that demand, a recent example being the baby formula shortage of this year and the quick posting and sale of counterfeit or diverted formula.⁸

Are certain goods preferred by these criminals? Because this is a financially motivated crime, any product where there is potential for profit we have seen counterfeited. Despite some legitimate products having greater costs to research and development, safety testing, regulatory approval and other necessary costs, the counterfeit versions of these products do not have any of these, making it relatively easy to counterfeit almost anything as long as it might at first glance resemble the authentic product. Studies by the A-CAPP Center have shown that financial incentives for counterfeiting are great and counterfeiting is lucrative, often funding other types of criminal activity.⁹

⁴ 2020 Annual Intellectual Property Rights Seizure Statistics (U.S. CBP) at 18, available at https://www.cbp.gov/sites/default/files/assets/documents/2021-Sep/101808%20FY%202020%20IPR%20Seizure%20Statistic%20Book%2017%20Final%20spread%20ALT%20T-EXT_FINAL%20%28508%29%20REVISED.pdf.

⁵ Intellectual Property Threat Assessment (EUIPO & EUROPOL March 2022) at 9, available at https://www.europol.europa.eu/cms/sites/default/files/documents/Report.%20Intellectual%20property%20crime%20threat%20assessment%202022_2.pdf.

⁶ See generally, EUIPO & EUROPOL 2022 Report, *supra* note 5; US CBP 2020 Annual IP Seizure Statistics.

⁷ See generally, Testimony of Jay Kennedy (former A-CAPP Center Assistant Director of Research) before the U.S. House of Representatives Select Subcommittee on the Coronavirus Crisis Hearing on Combating Coronavirus Cons and the Monetization of Misinformation November 17, 2021.

⁸ See FDA, Questions & Answers for Consumers Concerning Infant Formula, May 16, 2022, available at <https://www.fda.gov/food/people-risk-foodborne-illness/questions-answers-consumers-concerning-infant-formula>.

⁹ Jay Kennedy, A-CAPP Center Product Counterfeiting Database: Insights Into Converging Crimes (2019),

available at <https://a-capp.msu.edu/article/a-capp-center-product-counterfeiting-database-insights-into-converging-crimes/>.

**Questions for Professor Kari Kammel
Submitted by Senator Patrick Leahy
November 9, 2021**

1. In your testimony both in the Senate and in the House, you noted the critical need to support more research on the global trade in counterfeit goods. You also noted the overlapping interest in supporting this research for multiple government agencies. In 2008, I authored the PRO-IP Act, legislation that established the Intellectual Property Enforcement Coordinator (IPEC), which exists to help coordinate the efforts of multiple agencies across the Federal government to help stop the theft of American intellectual property.

a. What role can the IPEC play in supporting or promoting the type of research that you view as critical to help gain further insight into the global trade in counterfeit goods?

The coordination role of the IPEC is incredibly important and the last three joint strategic plans have recommended research through coordination,¹ as well as some of these potential topics. However, there may be an opportunity for the GAO to do a study on the need for further interdisciplinary research on this topic, but also importantly for funding for this research perhaps through agencies such as the NSF, NIH, NIJ and others in order for academics and other researchers to be able to fill this gap of research in this much needed space.

b. Do you have any recommendations on how Congress or the Administration may be able to further leverage the coordination functions of the IPEC to address the global problem of counterfeit goods?

I do not at this time.

¹ 2013 Joint Strategic Plan, Victoria

Responses from Kari Kammel
9/9/2022

Senator Thom Tillis

Questions for the Record
Cleaning Up Online Marketplaces:
Protecting Against Stolen, Counterfeit, and Unsafe Goods

Kari Kammel, Adjunct Professor of Law, Michigan State University College of Law

1. Americans increasingly have turned to online marketplaces to purchase what they need on a day-to-day basis, especially the elderly who are more at risk and often cannot go to their local store like normal. Unfortunately, criminal actors, often from China, are taking advantage of this pandemic to sell dangerous counterfeit goods to unsuspecting Americans. I appreciate the proactive steps some companies have taken to prevent the sale of counterfeits and I am proud to work with my colleagues on both sides of the aisle to ensure safety and transparency in the online retail marketplace.
 - a. What are your views on *The Integrity, Notification, and Fairness in Online Retail Marketplaces for Consumers (INFORM Consumers) Act*
 - b. What are your views on the *Stopping Harmful Offers on Platforms by Screening Against Fakes in E-commerce (SHOP SAFE) Act*?
 - c. What are your views on the *Counterfeit Goods Seizure Act*?
 - d. What are your views on the *Stopping All Nefarious Toys in America (SANTA) Act*?

I have articulated my views on INFORM, SHOP SAFE and SANTA in my law review article co-authored with John Zacharia.¹ In summary, these three acts are vital for the protection of U.S. trademarks and the businesses that own them, and for consumers who purchase the products that the trademarks are placed on. While I believe SANTA Act is limiting based on industry, I believe both INFORM Consumers and SHOP SAFE should be passed for different, but complementary reasons.² Both a creation of secondary liability for e-commerce platforms who do not do enough to prevent counterfeits from being sold on e-commerce platforms and a cause of action for unfair or deceptive acts under the Federal Trade Commission Act are necessary to help stem this rapidly growing problem in the online space. Additionally, I think the Counterfeit Goods Seizure Act expansion of Customs and Border Protection to design patents is appropriate and needed in the U.S.'s measures to combat counterfeit products from entering the supply chain and ending up in the U.S. market.

2. I believe the focus of the SHOP SAFE Act should remain on goods that impact health and safety. Do you agree that is the right approach?

I believe health and safety are important components of consumers' well-being to protect; although I would advocate for a different approach.

¹ See John H. Zacharia & Kari P Kammel, *Congress's Proposed E-Commerce Legislation for Regulation of Third-Party Sellers: Why It's Needed and How Congress Should Make It Better*, 21 U.C. DAVIS BUS. L.J. 91 (2020), available at <https://bji.ucdavis.edu/archives/vol-21-no-1/zacharia-and-kammel.html>.

² *Id.*; see also Kari Kammel, *INFORM Consumers Introduction into the America COMPETES Act: How potential changes could create too many loopholes for it to be useful or effective*, Feb. 11, 2022, available at <https://a-capp.msu.edu/article/inform-consumers-introduction-to-america-competes-act/>; Kari Kammel, *Revisiting SHOP SAFE after Markup*, 2021, available at <https://a-capp.msu.edu/article/revisiting-the-shop-safe-act-after-markup/>

Responses from Kari Kammel
9/9/2022

If not, what changes would you make to the scope of this definition, while maintaining the focus on health and safety?

In my testimony before the House Judiciary Committee and in some of my articles, I advocate for a harmonizing of goods. I believe that with the current language in the bill, it may cause some unintended consequences. Instead of only covering “goods that implicate health and safety”, I would suggest instead covering *all* counterfeit goods, but creating enhanced penalties, such as treble damages for goods that do implicate health and safety.

From my testimony, I believe there are a few issues with the current definition that would deter from its intended impact: 1) it is not clear from the language as to who will be the determiners of whether a good implicates health and safety,³ nor what goods exactly fall under this definition, which could cause an incredibly onerous process adding to an already large problem of identifying counterfeit goods,⁴ 2) create two classes of counterfeit marks under the Lanham Act, thus creating a system where not all marks are entitled to the same protection, potential prioritization system on e-commerce and drive counterfeiters to certain industries.⁵

- 3. How should we best incentivize platforms to protect against stolen, counterfeit, and unsafe goods?** While we have seen some improvements in some platforms in recent years due to pressure from public awareness and potential legislation, I believe this is an area where regulation with clear penalties can be effective. After all, the business of counterfeiting and any result from the sale of counterfeits whether in a legitimate or illegitimate supply chain, whether in a brick-and-mortar store or online, comes down to financial proceeds. Thus, the most effective deterrent to what amounts to a financial crime is a financial deterrent.⁶

Will a one-size fits all approach work?

Yes, if the language is inclusive enough in the bill and there is room for appropriate application to various industries and e-commerce platforms. In the same way that secondary liability for trademark counterfeiting in the brick-and-mortar space could, in theory, be applied to any size of company in the supply chain, secondary liability for trademark counterfeiting in the online space can be created to have appropriate, reasonable application to various sizes of platforms with various technological and non-technological capabilities.

³ Kari Kammel, Testimony, The SHOP SAFE Act: Stemming the Rising Tide of Unsafe Counterfeit Products Online Subcommittee on Courts, Intellectual Property, and the Internet, at 12, available at <https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=4567>

⁴ Kammel, House Testimony, at 12, citing Zacharia & Kammel, *supra* note 1, at 117

⁵ *Id.* at 12.

⁶ See generally, INTA Board Resolution, Proceeds of Counterfeiting, March 2021, available https://www.inta.org/wp-content/uploads/public-files/advocacy/board-resolutions/Proceeds-of-Counterfeiting-Resolution_Final.pdf

Responses from Kari Kammel
9/9/2022

If not, how should we tailor solutions to different platforms – by industry, by size, by consumer base?

What are your thoughts on using technology to help improve consumer knowledge about the goods they are purchasing? For example, US Customs piloted a proof of concept “consumer portal” where a consumer, at the point of making a purchase on a public facing web page, can scan in a product code and get information about whether or not that specific product is a legitimate, licensed good.¹ A serialized Global Trade Identification Number (GTIN) was used to uniquely identify individual products with an automated legitimate goods checking service. Consumers would scan a QR code and either receive positive confirmation (along with information like a product image and country of origin) or an indeterminate result stating that no record is found. Would this be a valuable tool to help combat counterfeits?

While technology is a useful tool, it is not and should not be the only tool used to help improve consumer knowledge. As mentioned above in your question, there are some examples of helping consumers to identify legitimate goods through QR codes or other technologies. Many brands have used some of these ‘overt’ tools for years to help consumers. However, companies also use a variety of other technologies not available to consumers, but only to the brand, or the Customs that are covert or require other devices to authenticate. I believe continued use of technologies by brands, law enforcement, platforms, and as appropriate consumers will help in the fight against counterfeits. However, and more importantly a comprehensive consumer education and awareness campaign would, in my opinion, be much more effective.

¹ CBP Intellectual Property Rights Blockchain Proof of Concept Digital Bazaar Final Report, pg. 5 (Mar. 2020), <https://www.cbp.gov/sites/default/files/assets/documents/2020-Mar/IPR%20POC%20Report%20-%20Final%20V2.pdf>

Responses from Kari Kammel
9/9/2022

4. Are there any additional “know your customer” considerations that Congress should look at when considering how best to ensure that marketplaces protect against stolen, counterfeit, and unsafe goods?

While our Center has previously researched best practices for anti-counterfeiting self-regulation in other industries, such as with ocean transportation intermediaries,⁷ I believe the biggest consideration will be the quickly changing technological mechanisms that can be used to verify identity of sellers as well as their postings and products. As we have seen in other countries, once a new technology is used for verification, it will not be long until counterfeiters will figure out how to evade it—the ever-evolving process that law enforcement has always dealt with. If the KYC considerations are flexible for technological growth and not centered around only technology that is being used today, the law can then avoid becoming irrelevant to “law disruptive technology.”⁸

5. Under current law, how would you describe the distribution of the burden between online platforms and brand owners when it comes to policing counterfeits? Do you believe this strikes the right balance, and if not, what do you believe is the right balance?

In my opinion the burden is not balanced and the SHOP SAFE Act in particular would rebalance that. Under the current law,

“there is no obligation on any party to proactively address sellers’ listings online. Some online marketplaces understand that there is a problem and remove postings that are reported to them or found through internal self-investigation by technology or otherwise, what we would refer to as a reactive response. A few may proactively vet sellers or postings, but these are not the majority, nor is this required by the law. However, under the *Tiffany* standard, they must only remove them reactively, or when they have “specific knowledge.”

A brand owner, however, does not want injury to its reputation, or injury to its consumers,⁹ so practically they must monitor and notify the online marketplace to remove a suspicious listing or a seller that could be selling an illicit or unauthorized product, even though the counterfeit product is not theirs. For every listing that a brand owner successfully petitions to have removed from an online marketplace, many more illicit listings will likely take its place¹⁰—leading to what is called in the industry the “whack-a-mole” problem. Because this has

⁷ See e.g. Jay Kennedy & Jeremy Wilson, *Liabilities and responsibilities: ocean transportation intermediaries (OTIs) and the distribution of counterfeit goods*, 19 MARITIME ECONOMICS & LOGISTICS, 182-87 (2017) (discussing the six steps of self-regulation of firms based on the non-economic criteria purchasing process outlined by I. Maiguan, B. Hillebrand, and D. McAlister, *Managing socially-responsible buying: How to integrate non-economic criteria into the purchasing process*, 20 European Management Journal 641–648 (2002)).

⁸ See Testimony of Kari Kammel, *supra* note 3, at 11.

⁹ Kammel, et al, *supra* note 3, at 252 (citing See Stefanie Wood Ellis, *Brand Protection in the Digital World*, WORLD TRADEMARK REV. (Apr. 23, 2020), <https://www.worldtrademarkreview.com/anti-counterfeiting/brand-protection-in-the-digital-world> [<https://perma.cc/V8DY-7K4E>] (describing how counterfeit products can negatively affect a brand when an inferior product is thought to be the real product, and the lower quality is now associated with the brand or when an unsafe counterfeit hurts individuals).

¹⁰ Kari Kammel, Jay Kennedy, Daniel Cermak, and Minelli Manoukian, *Responsibility for the Sale of Trademark Counterfeits Online: Striking a Balance in Secondary Liability While Protecting Consumers*, 49 AIPLA Q. J. 221, 254 (Spring 2021) (citing Daniel C.K. Chow, *Alibaba, Amazon, and Counterfeiting in the Age of the*

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become so time consuming but needs to be addressed, an entire industry of online anti-counterfeiting providers selling their services and technologies to brands, as well as law firms expanding their practices, has developed to search the web, e-commerce sites, and social media platforms for counterfeits using artificial intelligence, machine learning, or other technologies and skills.¹¹ Finally, transparency is lacking in regard to seller identification and location, details on systems for vetting sellers, products, removals of listings, where counterfeits go after they have been reported or taken down, how repeat sellers of counterfeit are removed, how warehousing might work and other details that are important for both the intellectual property rights owner, law enforcement, and an informed consumer, as they have not been required by law.¹²

The burden needs to be balanced in order to disrupt the opportunity structure for third party sellers of counterfeit online. As shown in Figure 1 and my research, the party who holds the most ability and control of that environment is the e-commerce platform, not the brand.¹³

Figure 1.¹⁴



6. Should brand owners be required to provide information to platforms for them to benefit from the provisions of the SHOP SAFE Act?

Yes. I believe they should. There should still be a duty to not only report, but also to

Internet, 40 NW. J. INT'L L. & BUS. 157, 161 (2020).

¹¹ Kammel, et al, *supra* note 3, at 252.

¹² Kammel, Testimony, *supra* note 3 at 8.

¹³ *Id.* at 8; see also Kari Kammel, Jay Kennedy, Daniel Cermak, and Minelli Manoukian, *Responsibility for the Sale of Trademark Counterfeits Online: Striking a Balance in Secondary Liability While Protecting Consumers*, 49 AIPLA Q. J. 221 (Spring 2021).

¹⁴ For a detailed discussion of this necessity for proactive disruption, see Kari Kammel, Jay Kennedy, Daniel Cermak, and Minelli Manoukian, *Responsibility for the Sale of Trademark Counterfeits Online: Striking a Balance in Secondary Liability While Protecting Consumers*, 49 AIPLA Q. J. 221 (Spring 2021).

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provide or verify trademarks and whether they are authentic. Historically, however, this is not where the crux of the problem has been—it has been with brands who are trying to constantly deal with the dated notice and takedown procedures and the necessary whack-a-mole approach, which removes postings after they are live but does nothing to deal with proactive prevention.

7. What incentives do platforms or brand owners need to share data that they have about harmful products or bad actors with each other, with the public, and/or with law enforcement?

The sharing of data has been a major problem in this space and continues to be. I can think of analogies to other types of serious criminal activity, when sharing of data regarding connection with criminal activity either with law enforcement, such as the PATRIOT Act,¹⁵ or sharing information of criminal activity with the public, such as the CLERY Act¹⁶ have had to be legislated in order to have compliance.

8. How many listings do you estimate are flagged annually for online platforms? What percentage of these listings are removed after an initial alert? What is the total number that are ultimately removed?

I cannot provide accurate numbers for several reasons. There are usually two sources of statistics—1) those that are released by the e-commerce platforms about their own takedowns, and 2) those that can be reported by brands or web-scraping technology companies who work for brands in the notice and take down procedure.

Regarding the first, we cannot independently verify those numbers. However, despite some of the reported take-down numbers by platforms that seem to be large, we do not know a) how long those postings were up, b) how many products were sold during the time those postings were up, c) who purchased those products and if there was a 'recall', and d) what happened to the revenue made from the sale of that product.

Regarding the second, most brands are trying their best to remove counterfeit postings but it is an imperfect process as they do not have behind the scenes access to the postings, only what they can see online.

9. I have heard concerns that the SHOP SAFE Act could risk enabling bad faith takedown notices. Do you agree with that assessment? If so, do you have any recommendations for how best to tackle this issue?

¹⁵ USA PATRIOT Act, Sec. 314(b), <https://www.fincen.gov/section-314b> (permitting financial institutions, upon providing notice to the United States Department of the Treasury, to share information with one another in order to identify and report to the federal government activities that may involve money laundering or terrorist activity). *Id.*
¹⁶ Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act of 1990, 20 U.S.C. §1092(f) (2018) (requiring public disclosure and reporting, timely warnings, and prevention education).

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I believe, yes, there is a small risk of bad faith takedown notices. However, I believe that is distracting from the larger issue of the massive sale of counterfeit goods. On one side, the risk to consumers is great if they purchase a counterfeit goods for injury, death, or a faulty cheap product. On the other side, the risk is that a seller may have to go through a civil process to prove that they were selling legitimate product, while this may be inconvenient, I believe is not in the same realm as the risk of counterfeit.

Senator Marsha Blackburn
Questions for the Record to Kari Kammel
Senior Academic Specialist for the Center for Anti-Counterfeiting and Product Protection,
Michigan State University

1. How does products liability law factor in when consumers purchase products that are counterfeits and also dangerous?

We have seen in the past three years, consumers who have been injured or killed by the purchase of counterfeit products online file products liability cases against e-commerce platforms, because no other legal remedy was available to them, and they could not find the seller.¹ In these cases, state courts have struggled to determine whether the e-commerce platform, in all these cases Amazon, was considered part of the supply chain if they were not the official ‘seller’ of the good.² States varied in the outcome of these cases. However, it is reflective to note that U.S. consumers are getting injured by counterfeit products and have no legal recourse in many cases for the harm caused to them.

We have seen cases where online sellers attempt to use Section 230 to block products liability claims, though they aren’t always successful. Please discuss whether you see Section 230 as a potential obstacle for consumers in getting recourse for unsafe goods they buy online.

My research has not included Section 230 and is outside the scope of my expertise.

2. You have mentioned the need to account for “law disruptive technology” due to changes in marketplaces that the existing law did not foresee. However, we have heard from other witnesses—namely the Internet Association—that retailers, not online platforms, are in a better position to know whether goods are counterfeits or unsafe. Please describe “law disruptive technology” further, as well as how specifically the law can account for that when considering how to protect consumers from counterfeits and unsafe products.

I first applied the concept of “law disruptive technologies” to e-commerce in my research in early 2020.³ In order for a technology to be ‘law disruptive, it must have three components: (1)

¹ John H. Zacharia & Kari Kammel, *Congress’s Proposed E-Commerce Legislation for Regulation of Third-Party Sellers: Why It’s Needed and How Congress Should Make It Better*, 21 U.C. DAVIS BUS. L. J. 91, 97-102 (2020) (discussing recent strict liability cases).

² *Id.*

³ Kari Kammel, *Examining Trademark Counterfeiting Legislation, Free Trade Zones, Corruption and Culture in the Context of Illicit Trade: The United States and United Arab Emirates*, 28 MICH. STATE INT’L L. REV. 210-235 (2020).

it must involve a new or improved technology; (2) it must have the potential to make a significant economic or societal impact; and (3) it does not fit into the current legal framework.⁴

Applying this to e-commerce, we see:

"[E-commerce is (1) new technology that allows consumers and retailers to meet anywhere in the world with no barriers to access; (2) e-commerce has had major economic and societal impacts; and (3) the laws that apply to trademark counterfeiting in brick and mortar situations do not fit into the e-commerce scenario in most of the current legal framework globally."⁵

While I do agree partially with my colleagues that the brand owners should play some role in sharing their trademarks and cooperating with platforms, I respectfully disagree that brands are in the best place to prevent counterfeiting from occurring on the platforms. The platforms control their marketplaces and spaces that they have created.

In my testimony before the House Judiciary Committee based on my research with my colleagues on the opportunity structure, I discuss that:

"e-commerce platforms have varying levels of influence over product counterfeiting schemes by demotivating sellers of counterfeits on their sites, protecting consumers by deterring potential infringers or assisting consumers in protecting themselves from victimization, and controlling the conditions that allow illicit actors and consumers to come together and interact. As a result, when one or more of these three roles are not undertaken and fulfilled in an online marketplace, the opportunity for interaction between the counterfeiter and consumer increases, via the offered sale of a counterfeit good, thereby making counterfeit transactions more likely.

The operators of online marketplaces can significantly mitigate opportunities for the sale of counterfeit goods on their platforms by acting as guardians or controllers, engaging in proactive activities and implementing policies that target motivated sellers of counterfeit goods and suitable targets.⁶ With regard to addressing motivated sellers of counterfeits, platforms have the ability to identify potentially infringing listings and proactively embargo or reject these listings.⁷ These activities can disrupt the opportunity for third party sellers to sell counterfeits to consumers. See Figure 1.⁸

Figure 1. Disruption of Opportunity Structure for Counterfeit Goods in E-Commerce

⁴ Kari Kammel, *Examining Trademark Counterfeiting Legislation, Free Trade Zones, Corruption and Culture in the Context of Illicit Trade: The United States and United Arab Emirates*, 28 MICH. STATE INT'L L. REV. 210-235 (2020) (applying the concept first discussed in William Sowers, *How do you Solve a Problem like Law-Disruptive Technology?*, 82 L. & CONTEMP. PROBS. 193-214 (2019)).

⁵ *Id.*

⁶ *Id.* at 248-249 (citing to John E. Eck et al., *Risky Facilities: Crime Concentration in Homogeneous Sets of Establishments and Facilities*, 21 CRIME PREVENTION STUDS. 225, 240 (2007); Jay P. Kennedy, *Sharing the Keys to the Kingdom: Responding to Employee Theft by Empowering Employees to Be Guardians, Place Managers, and Handlers*, 39 J. CRIME & JUST. 512, 519 (2015)).

⁷ *Id.* at 249.

⁸ Kari Kammel, *Testimony, The SHOP SAFE Act: Stemming the Rising Tide of Unsafe Counterfeit Products Online Subcommittee on Courts, Intellectual Property, and the Internet*, at 12, available at <https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=4567>

**DISRUPTING THE
OPPORTUNITY STRUCTURE
FOR COUNTERFEITING IN AN
ONLINE ENVIRONMENT**



Thus, because the platform has created the marketplace and has ultimate gatekeeping authority and control over its own creation, they should have the burden to determine who is selling and what products are being sold to consumers on their marketplace with some assistance from brands as to identification of trademarks and some continued notice and takedown.

Written Questions of Ranking Member Charles Grassley for Senate Judiciary Committee Hearing, "Cleaning Up Online Marketplaces: Protecting Against Stolen, Counterfeit and Unsafe Goods," November 2, 2021

Questions for Aaron Muderick

1. Do online platforms offer any tools to help small or medium size businesses prevent counterfeits of their products sold online?

I am aware of some tools to help businesses attempt to remove counterfeit products from online marketplaces, for example take-down programs and the Amazon Brand Registry. We participate in the Amazon Brand Registry as well as similar brand-owner tools on Walmart.com, eBay, and other marketplaces. We have a part-time staff member who walks through every online marketplace each week sending takedown notices and making enforcement efforts to protect our brand. Additionally, we document non-compliant unsafe products we find on the marketplaces which do not violate our intellectual property. From time-to-time I have our staff reach out to marketplaces to inform them and educate them that these products which, while not counterfeit, are not legal for sale. It is a hamster wheel that does not seem to bring meaningful results.

However, in my experience, the burden of enforcement disproportionately relies on rights holders and consumers to police and report infringement. Rights holders are required to scour online marketplaces and investigate, report, and prove infringement to the marketplace before counterfeit items are removed. This problem is compounded by the fact that each marketplace has different processes and procedures in place for handling infringement claims, forcing rights holders to constantly navigate different, and often changing, marketplace enforcement procedures. My experience is that these tools are inconsistently implemented and are not uniform across marketplaces, forcing rights holders to navigate the different, and often changing, marketplace policies and procedures. In addition, many of these tools are highly burdensome, either requiring payment from the rights holder or sharing extensive amounts of data by the rights holder with the marketplaces.

I enclose the June 21, 2022 letter from The Toy Association that provides information from its members regarding the volume of counterfeits online and the resources expended to attempt to address those counterfeits.

I also enclose The Toy Association's 2020 whitepaper [*Taking Fake Toys Offline: A 2020 Focus on Proactive Measures to Reduce Counterfeits and Unsafe Toys Sold on Online Marketplaces*](#) and 2019 whitepaper [*The Real Threat of Fake Toys: The Increase of Knockoff and Counterfeit Toys Sold Online and How to Fight Back*](#) that provide additional detail regarding the problems with disproportionately placing the burden on businesses rather than on the platforms and sellers.

2. What specific steps has your company taken to better educate consumers about the potential dangers of counterfeits, and in particular the potential harms to their health and safety?

Consumer education is critical in the fight against counterfeits. Online marketplaces are ubiquitous, and many have an established and trusted brand image equal to brick-and-mortar retailers due to their high volume of sales and extensive consumer exposure. As a result, consumers have developed a comfort with and trust in online marketplaces, just as they trust brick-and-mortar retailers. In my experience, consumers remain largely unaware of the scope of counterfeit or non-compliant product available on online

marketplaces, which can result in consumers unknowingly providing children with non-compliant and potentially unsafe toys.

It has also become increasingly difficult to differentiate between compliant and non-compliant product on the marketplaces because counterfeiters are adept at blending in and hiding on the sites, including by categorizing the product under a rights holder's brand name, piggybacking on legitimate listings, using keywords, and pricing at the same or even higher than legitimate products.

As a brand owner, my company regularly provides customer information to try to address this issue. We encourage customers to purchase from retailers they know, either in-person or online. We scout social media and if we see counterfeit or infringing product in videos posted by families, we ask that they be taken down. We also inform those families if we know the specific goods to be unsafe in some way.

I am also aware that the Toy Association has provided education to consumers. For example, in addition to releasing two comprehensive White Papers regarding online marketplace counterfeit issues, the association has also briefed members of state legislatures and Congress and done numerous media appearances where they urged consumer awareness of potential counterfeit products on online marketplace sites.

Platforms must also do their part to educate consumers to enable them to make sound purchasing decisions and avoid falling victim to counterfeit products. For example, consumer education can be accomplished by transparency and honest communication about products and sellers, including conspicuous identification of the sellers, such as location and contact information. Further, marketplaces should notify consumers who have or may have received counterfeit product. Once a marketplace is aware that a seller has sold counterfeit product, the marketplace should inform all consumers who have purchased that product from the seller that they may have received counterfeit and unsafe product. The marketplace should also investigate other products sold by that seller as part of their proactive measures, and if they are determined to also be counterfeit, notify consumers of those counterfeit products as well.

3. What's been your experience working with law enforcement to protect against counterfeits? What can be done to better improve law enforcement efforts?

While our products are often infringed on from a trademark and copyright standpoint, we have not dealt with true counterfeits which completely impersonate our legitimate products. As such, I have no direct counterfeit law enforcement experience to share.

4. How difficult, given the size of your company, is it to coordinate intellectual property protection around the world? What has been your experience with addressing counterfeiting problems with foreign law enforcement? Has your company ever worked with the USPTO to get assistance in enforcing your IP rights abroad?

The world is a large stage and it is very difficult for a company our size to truly establish brand control on a global scale. We do our best to register our trademarks in countries where we do business. We have never interacted with foreign law enforcement or with USPTO in regards to enforcing our rights abroad.

Senator Thom Tillis

Questions for the Record
Cleaning Up Online Marketplaces: Protecting Against
Stolen, Counterfeit, and Unsafe Goods

Aaron Muderick, Founder and President, Crazy Aaron's

1. Americans increasingly have turned to online marketplaces to purchase what they need on a day-to-day basis, especially the elderly who are more at risk and often cannot go to their local store like normal. Unfortunately, criminal actors, often from China, are taking advantage of this pandemic to sell dangerous counterfeit goods, including children's toys, to unsuspecting Americans. I appreciate the proactive steps some companies have taken to prevent the sale of counterfeits and I am proud to work with my colleagues on both sides of the aisle to ensure safety and transparency in the online retail marketplace.
 - a. **What are your views on *The Integrity, Notification, and Fairness in Online Retail Marketplaces for Consumers (INFORM Consumers) Act***
 - b. **What are your views on the *Stopping Harmful Offers on Platforms by Screening Against Fakes in E-commerce (SHOP SAFE) Act*?**
 - c. **What are your views on the *Counterfeit Goods Seizure Act*?**
 - d. **What are your views on the *Stopping All Nefarious Toys in America (SANTA) Act*?**

I truly appreciate your and others' efforts to advance bipartisan legislation to strengthen the competitiveness of American workers and businesses and curb the flow of counterfeit goods in ecommerce and I support all of the above listed legislation. In particular, I strongly support the SHOP SAFE Act and INFORM Consumers Act.

Currently, the burden of enforcement disproportionately relies on rights holders and consumers to police and report infringement. The current system places no responsibility on the seller or the marketplace and instead requires that rights holders scour online marketplaces and investigate, report, and prove infringement to the marketplace before counterfeit items are removed. This causes delay, allows sales of counterfeits to unsuspecting consumers, and puts the responsibility and expense on brand owners. This problem is compounded because marketplace processes vary, forcing rights holders to constantly navigate different, and often changing, marketplace enforcement procedures. SHOP SAFE would address many of these issues by incentivizing platforms to engage in a set of best practices for vetting sellers and goods, punishing repeat offenders, and ensuring that consumers have the best, most accurate information available to them when making purchases online.

Currently, online marketplaces lack an effective, proactive, transparent process for screening sellers or products that are offered by sellers and disclosing basic seller information to consumers, so they know the source of their product. Requiring online marketplaces to verify the identity of sellers and disclose basic seller contact information to consumers and to businesses trying to protect their rights, are important steps in creating more transparency and accountability in ecommerce. Verification and disclosure make it easier to track, enforce rights, and suspend bad actors, and makes it easier for consumers to know who to contact if they receive a product that does not meet their expectations or even worse, causes harm. If there is no verified contact information, there is no ability for a business, consumer, consumer advocacy group, or law enforcement to trace and enforce at the source. I support the INFORM Consumers Act introduced with bipartisan support in both the Senate and House as a good first-line of defense in protecting consumers and

legitimate businesses from these illicit third-party sellers.

2. Are there additional “know your customer” considerations that Congress should look at when considering how best to ensure that marketplaces protect against stolen, counterfeit, and unsafe goods?

Everyone is an ecommerce customer and platforms should be held to the same standards as brick-and-mortar retailers for ensuring customer protection. Knowing the basics of ‘who am I doing business with’ is the most basic part of any transaction. It is personally frustrating that we are 25 years into internet commerce and consumers do not have the right to know from whom they are purchasing.

3. Are there voluntary steps and actions that platforms could take stop the distribution of counterfeit products to consumers?

Platforms could and should take all the steps laid out in the SHOP SAFE Act and INFORM Consumers Act voluntarily. That legislation requires that platforms take actions for screening sellers and products that brick-and-mortar retailers already take and should be common-place for platforms as well.

By law, legitimate toy manufacturers and brick-and-mortar retailers of children’s products must obtain safety certifications and comply with over 100 federal safety standards. Legitimate toy companies spend significant resources to bring new, fun, educational and safe toys to the U.S. market. Platforms should also ensure that products offered comply with these safety standards. By not doing so, platforms have created an ecommerce environment where third-party sellers can operate anonymously online and take advantage of consumer faith by selling counterfeit or stolen products that may not comply with federal safety standards and put our children at risk. In fact, these products often blatantly violate safety regulations on their face, yet are offered on popular mainstream online marketplaces and marketed as intended for children. *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.

4. What voluntary measures do you participate in to help keep online marketplaces safe from counterfeit goods?

I do participate in numerous measures to attempt to remove counterfeit products from online marketplaces. We participate in the Amazon brand registry as well as similar brand-owner tools on Walmart.com, eBay, and other marketplaces. We have a part-time staff member who walks through every online marketplace each week sending takedown notices and making enforcement efforts to protect our brand. Additionally, we document non-compliant unsafe products we find on the marketplaces which do not violate our intellectual property. From time-to-time I have our staff reach out to marketplaces to inform them and educate them that these products which, while not counterfeit, are not legal for sale. It is a hamster wheel that does not seem to bring meaningful results. This is the reason I support the SHOP SAFE, SANTA and INFORM Acts.

I enclose The Toy Association’s 2020 whitepaper [*Taking Fake Toys Offline: A 2020 Focus on Proactive Measures to Reduce Counterfeits and Unsafe Toys Sold on Online Marketplaces*](#) and 2019 whitepaper [*The Real Threat of Fake Toys: The Increase of Knockoff and Counterfeit Toys Sold Online and How to Fight Back*](#). These whitepapers explained that the burden of enforcement disproportionately relies on rights holders and consumers to police and report infringement. Rights holders are required to scour online marketplaces and investigate, report, and prove infringement to the marketplace before counterfeit items are removed. This problem is compounded by the fact that each marketplace has different processes and procedures in place for

handling infringement claims, forcing rights holders to constantly navigate different, and often changing, marketplace enforcement procedures. This process removes the initial burden from the seller and further gives the sellers the benefit of the doubt.

Some online marketplaces have begun offering more robust collaborative programs for rights holders to report and submit enforcement claims, but my own experience is that these programs are inconsistently implemented and are not uniform across marketplaces, forcing rights holders to navigate the different, and often changing, marketplace policies and procedures. In addition, many of these programs are highly burdensome, either requiring payment from the rights holder or sharing extensive amounts of data by the rights holder with the marketplaces.

5. What incentives do platforms or brand owners need to share data that they have about harmful products or bad actors with each other, with the public, and/or with law enforcement?

In my experience, brand owners are forthcoming and transparent about harmful products and bad actors and share that information with each other, with the platforms and with law enforcement willingly and look for opportunities to do so. They do not need further incentives.

However, platforms do need incentives and it is apparent that legislation is necessary to require this because they are much less transparent in my experience unfortunately. Transparency of seller information is inadequate, resulting in a lack of information available to consumers making purchasing decisions, and to rights holders and law enforcement attempting to track and enforce against counterfeiters.

Some online marketplaces are beginning to increase access to seller information, such as through brand owner programs. However, access is often inconsistent across marketplaces, providing a variety of different information depending on the program. Further, even when marketplaces do offer such information that is necessary for subsequent enforcement actions, it is often incomplete or incorrect due to inadequate preliminary verification.

At a minimum, platforms must improve collection, verification, transparency, and information sharing regarding the sellers, including providing the verified identity, contact information, and location for all sellers on the face of the listing. This allows consumers to make more informed purchasing decisions and eases enforcement by rights holders and law enforcement.

6. Should brand owners be required to provide information to platforms for them to benefit from the provisions of the bill? What concerns do toy sellers like yourself have with a requirements that platforms would not have to act unless notified by the brand owner?

Brand owners have been carrying the disproportionate burden of enforcement for years. We spend millions of dollars a year to attempt to reactively stop counterfeiters and because of the ecommerce ecosystem created by platforms, counterfeiters remain one step ahead.

Platforms lack an effective, proactive, transparent process for screening sellers or products that are offered by sellers. Instead, the burden of enforcement disproportionately relies on rights holders and consumers to police and report infringement. The current system requires that rights holders scour online marketplaces and investigate, report, and prove infringement to the marketplace before counterfeit items are removed. This causes delay, allows sales of counterfeits to unsuspecting consumers, and puts the responsibility and expense on brand owners. By not adequately screening sellers or products, the platforms allow bad actors and sellers

to prosper and there is no amount of resources rights holders can expend to adequately neutralize bad actors if marketplace approaches are disproportionately reactive in nature.

Some platforms have argued that thorough verification of sellers and their products is not possible because of the volume of sellers or products on their platform. This volume of sellers and products is not inevitable though; rather, it is a business decision that platforms themselves make. If a marketplace is unable to verify the identity of its sellers or products because of the high volume, that is a result of its own creation.

I again reference the enclosed Toy Association whitepapers that provide more detail and context for why the burden must be shifted from rights holders to the platforms.

7. Should platforms be required to obtain and/or share information to address the seller's origin, such as where the goods are shipped from? Should it also include the country of manufacture? How should platforms address the issue of bad actors providing bad information?

In my opinion, platforms should be required to verify, gather and share this information. As shared above, transparency is key to the fight against counterfeits.

8. At the hearing, you mentioned that you lacked standing to challenge unsafe products similar to Crazy Aaron's branded thinking putty once sellers stopped infringing on the trademark, but those unsafe products continued to circulate. Tech platforms have publicly stated that they are not as well positioned as brand owners to distinguish counterfeit from genuine products.¹ Yet from your testimony it appears brand owners are not positioned to flag unsafe products that may not fit within the contours of trademark infringement. How should we best incentivize platforms to protect against stolen, counterfeit, and unsafe goods? Will a one-size fits all approach work? If not, how should we tailor solutions to different platforms – by industry, by size, by consumer base?

By law, legitimate toy manufacturers and brick-and-mortar retailers of children's products must obtain safety certifications and comply with over 100 federal safety standards. Legitimate toy companies spend significant resources to bring new, fun, educational and safe toys to the U.S. market. Platforms should also ensure that products offered comply with these safety standards. *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.

At certain times I have posed as a commercial buyer for toy products I know to be unsafe and not meet US safety standards. I have requested the safety testing documentation from the overseas manufacturer and always received some form of documentation (PDF file) that verifies the toy which I know to be unsafe 'passes' safety testing. Sometimes the document is just a forgery. Sometimes it is a legitimate document but the toy sent to the lab is slightly different than what is actually sold. Sometimes the testing is incomplete so that not every federal standard was actually tested. The tests which would have failed are left off the documents so that at the top it says 'PASS' in big green letters. If you added in the tests which were skipped, it would say 'FAIL', in all red.

For example, I have seen illegal magnetic putty toys with passing test documents because the toy is sent to the test lab without the magnet included. The lab provides a passing certificate because no unsafe components

are detected. The seller then uses this certificate to list the product in the marketplace. When the product is actually shipped to consumers, the illegal magnet is added back to the product. Because the marketplace never compares the physical goods with the test certificate, this is not detected by the marketplace. When I have pointed this out I get a robotic answer, "The vendor provided 3rd party laboratory verification that their item meets safety standards". No one is digging into the details to actually confirm that what is tested is the same as what is being sold. It is frustrating.

More rigorous work by the marketplace would assist in preventing this. For example, the marketplaces could connect with the laboratories to confirm whether a document is a forgery. They can cross-check the number on the certificate issued by the laboratory to confirm it is valid and is for the correct item. Item categories that are most prone to abuse could be vetted with additional layers of expertise instead of being highly automated. The tools exist to identify these problems. What is required is for the marketplaces to use them.

Why is this such a problem with online marketplaces and not for brick and mortar retailers? Because the marketplaces bear no risk of liability for selling these counterfeit, illegal, and dangerous items. Brick and mortar retailers do and you can see the positive result for the American consumer who shops in-person vs. online.

9. How many listings do Toy Association members flag annually for online platforms? What percentage of these listings are removed after an initial alert? What is the total number that are ultimately removed?

I enclose the June 21, 2022 letter from The Toy Association that provides information from its members regarding the volume of counterfeits online and the resources expended to attempt to address those counterfeits.

10. I have heard concerns that the SHOP SAFE Act could risk enabling bad faith takedown notices. Do you agree with that assessment? If so, do you have any recommendations for how best to tackle this issue?

No, I do not agree with that assessment. In my experience, I and my fellow brand owners act reasonably and in good faith to submit takedown notices. If Brand owners truly acted spitefully or in bad faith, there are other legal avenues that sellers could take against those brand owners.

¹ See, e.g. USPTO, *Secondary Trademark Infringement Liability in the E-Commerce Setting, Summary of Responses to Federal Register Notice PTO-T-2020-0035* at 8 (Aug. 2021), <https://www.uspto.gov/sites/default/files/documents/Secondary-TM-Infringement-Liability-Response.pdf>

The Real Threat of **FAKE TOYS**

The increase of knockoff and counterfeit toys
sold online and how to fight back



This report has been prepared by
Meaghan H. Kent and Claire M. Wheeler
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of The Toy Association and the members
of its IP Steering Committee.

INTELLECTUAL PROPERTY INFRINGEMENT AND TOY SAFETY ONLINE

The Toy Industry's Discussion of Contributing
Factors and Potential Solutions

the toy
association™
Inspiring Generations of Play

INTELLECTUAL PROPERTY INFRINGEMENT AND TOY SAFETY ONLINE

The Toy Industry's Discussion of Contributing Factors and Potential Solutions

EXECUTIVE SUMMARY

With the expansion of e-commerce, there has been a steady increase in the quantity of infringing and unregulated products offered online. Infringing goods include counterfeit products, trademark infringing products, unlicensed merchandise, and knock-off products. They can be found in all corners of the internet, including popular online marketplaces.

This growing phenomenon negatively impacts consumers, legitimate companies, and the American economy as a whole. The toy industry is no exception, with direct harm to toy companies' core assets, company reputation, and financial health. For consumers, the proliferation of infringing and unregulated toys raises safety and health hazards. As Senator Wyden said in the March 6, 2018 Finance Committee Hearing on Combating Counterfeit Goods, "this is a matter of protecting families from harmful products and preventing rip-off artists from undercutting the American brand."



The Toy Association has determined that there are three primary categories of contributing factors to this steady growth of infringing products online, particularly as it relates to online marketplaces:

1. E-commerce creates a low hurdle to sellers;
2. The burden of enforcement is disproportionately on the rights holder; and
3. Consumers are largely unaware of the scope of infringing product offered on online marketplaces.

The Toy Association and its members believe there are numerous potential solutions to combat each of these factors if stakeholders work collaboratively. These proposed solutions are described in this whitepaper.

To neutralize the low hurdle to sellers, The Toy Association proposes that online marketplaces take two core steps:

1

Proactively screen sellers and collect verified contact information for sellers

2

Proactively screen products by requiring that sellers demonstrate legitimacy of the products and provide Children's Product Certificates (CPC) to ensure safety.

To more appropriately balance the burden of enforcement, The Toy Association proposes that online marketplaces work collaboratively with industry organizations to create programs that give the presumption to rights holders, provide more streamlined removal processes, provide direct points of contact for the industry, provide trainings to industry groups on best practices, and provide more transparency to stop bad actors. The Toy Association also believes that legislative changes to the Digital Millennium Copyright Act (DMCA) may be necessary to account for misuse by infringers of the counter notification provision.

The Toy Association has been increasing communication with online platforms Alibaba and Amazon and we are open to working with these and other platforms to identify solutions that effectively address the problem. Amazon, having recently joined The Toy Association, has begun participating actively on The Toy Association's IP Committee and met with our members on June 14th to discuss updates to the platforms brand protection programs, hear about the challenges toy companies face with IP infringement and exchange information about possible solutions. Alibaba has spoken at numerous Toy Association events to inform our members of what they can do to protect their brands on Alibaba's platforms and has even invited Toy Association members to participate on the Alibaba Anti-Counterfeiting Alliance. These efforts are just the beginning, and both sides agree more needs to be done, and we look forward to collaborating with our e-commerce partners to put into place effective solutions.

Finally, to facilitate consumer awareness and education, The Toy Association proposes that online marketplaces better identify legitimate or verified products and sellers, and is considering developing a grading system of online marketplaces to allow consumers to better gauge risk.



INTRODUCTION TO TOY SAFETY AND INTELLECTUAL PROPERTY INFRINGEMENT ONLINE

1. The Toy Association and Its Members

Founded in 1916, The Toy Association, Inc. is the trade association representing businesses that design, produce, license, and deliver toys and youth entertainment products. With over 950 members, the organization has a long history of propelling the health and growth of the toy industry. The Toy Association's members drive the annual \$27 billion U.S. domestic toy market, which has an annual U.S. economic impact of \$110.9 billion.

The Toy Association advocates on behalf of its members, and for more than 40 years has been a global leader in toy safety. It helped develop the first toy safety standard¹ and remains committed to working with medical experts, government, consumers, and industry on

ongoing safety programs and outreach. The Toy Association is also the industry's voice on the developmental benefits of play, promoting play's positive impact on childhood development.

2. Intellectual Property Infringement Online

A significant and serious issue facing The Toy Association's members is the growing phenomenon of products offered online that infringe their intellectual property (IP). In the last several years, with the expansion of electronic commerce, referred to as e-commerce, and increased consumer comfort with e-commerce⁴, rights holders have seen a steady increase in the quantity of infringing products online.



Infringing products include counterfeit products, trademark infringing products, unlicensed merchandise, and knock-offs.

- Counterfeit products are look-alikes and claim to be legitimate, falsely leading consumers to buy an unregulated, "fake" product;
- Trademark infringing products use another company's name or brand, or confusingly similar marks, falsely leading consumers to believe the product is from the same trusted source and harming the brand owner;
- Unlicensed merchandise are products that use characters or content without license;
- Knock-off products, often infringe patents or other IP and copy the underlying product concept and offer it under the infringer's own brand, harming innovative companies.

Grey-market goods also pose problems for IP rights holders, as they are items manufactured abroad and imported into the United States without the consent of the rights holder. Such goods may be legitimately offered in one country, but may not meet all U.S. regulations, including labeling, and are thus not considered legitimate products within the U.S.

Infringing products can be found in all corners of the internet, including popular online marketplaces. Online marketplaces generally refer to websites with multiple retailers or sellers offering their products directly to consumers. This includes the commonly known online marketplaces, eBay.com, Amazon.com, the Alibaba.com family of sites, including Alibaba.com, Aliexpress.com, Taobao.com, Tmall.com, and 1688.com, as well as other large sites, including Facebook Marketplace, Newegg.com, buy.com, etsy.com, shopify.com, bigcommerce.com, jet.com, DHGate.com, Wish.com, and others frequently launching.

The content in this paper is intended to generalize the problems from the toy industry's perspective and not to single out any one platform. Some platforms already have policies and programs in place that address some of the toy industry's concerns detailed below. However, we note that the problem of IP infringement and unsafe toys is ubiquitous, and more must be done on all ecommerce platforms and marketplaces to adequately address the issue.



In January 2018, the U.S. Government Accountability Office (GAO) reported research findings regarding the current market for counterfeit goods and the frequency with which consumers may unknowingly encounter counterfeit products online. As part of its investigation, the GAO completed “test purchases” and found that 20 of 47 items that the GAO purchased from third-party sellers on popular online marketplaces were counterfeit.ⁱⁱⁱ

The U.S. economy is negatively impacted by online intellectual property infringement, which includes infringing products as well as pirated music, movies, and other creative content. In February 2017, the International Trademark Association and the Business Action to Stop Counterfeiting and Piracy released a report finding that in 2013, the estimated value of international and domestic trade in counterfeit and pirated goods was \$1.13 trillion and in 2022, the total estimated value of counterfeit and pirated goods including digital piracy is projected to be \$1.90-\$2.81 trillion.^{iv}

3. Impact of Infringing Products on the Toy Industry

The toy industry is no exception and has been directly harmed in several ways by the increase in infringing products offered online.



As to their core assets, toy companies are creators, innovators and brand owners, with intellectual property being one of their most important assets. Rampant infringement of that intellectual property—from creative and innovative new products to core brands—devalues their commercial performance. Innovative companies invest substantial resources in research and development, and the results of their expenditures are being misappropriated by infringers, counterfeits, and copycats. This impact is often heightened where a license relationship is involved, such as where an entertainment company licenses an important creative asset like a film or character on a toy, because both the toy and entertainment company are harmed, and the business relationship between the companies may be weakened as a result. Further, counterfeits and trademark infringing goods or listings harm the value of the company’s trademark, and where there is extensive unlicensed third party use, can increase the risk of the mark becoming generic.



As to toy safety and company reputation, toy companies invest in creating quality and safe products that meet or exceed regulatory standards, and their reputation among consumers and regulators is extremely important and valuable. The vast majority of infringements and counterfeits are lower quality products that are not bound to the company’s standards or do not comply with government regulations. When a consumer purchases a counterfeit product, trademark infringing product, or unlicensed merchandise believing it to be legitimate, and that product fails in quality, value or safety, the consumer associates that failure with the toy company, directly harming its reputation and goodwill.



As to their financial health, toy companies are losing sales to infringers and counterfeiters. This is in tandem with increased expenses, including internal and external resources being outlaid for monitoring and enforcement against these infringers and counterfeiters.¹

4. Impact of Infringing Products on Consumers and Their Safety

Consumers seek out and purchase toys for many reasons, including entertainment, education, quality, value, and safety. One way that consumers narrow the selection of toys is to purchase from a trusted source based on brand recognition. However, with counterfeits, trademark infringing products, and unlicensed merchandise, the true source of the product is not what the consumer is led to believe. Instead, a consumer buys a toy that likely does not meet their expectations for quality or safety; in essence, consumers are not getting what they pay for. This disappoints consumers who are unaware that the products they purchased are not authentic, which in turn affects future purchasing decisions, and may lead to consumers posting poor reviews of a legitimate product based on their experience with the infringing product.

Even more concerning is that many infringing products found online do not meet the same safety standards as legitimate products. These safety standards include small parts regulations, lead content regulations, and other chemical and mechanical requirements. As such, infringing toys, particularly counterfeit toys, may have unexpected small parts, excess lead, and unsafe chemicals in the materials, coatings, and even packaging.



5. Factors Contributing to the Growth of Infringing Products Offered on Online Marketplaces

After analysis and discussion with stakeholders in the toy industry, there appear to be three primary categories of contributing factors to the steady growth of infringing products online, particularly as it relates to online marketplaces.



First, e-commerce creates a low hurdle to sellers. While the ease of online marketplaces benefits legitimate companies of all sizes, and particularly growing companies and entrepreneurs, it also permits unscrupulous and illegitimate sellers to flourish.



Second, the burden of enforcement is disproportionately on the rights holder. This arrangement is ultimately highly inefficient, expensive and difficult because rights holders are required to scour online marketplaces. This constant monitoring of online marketplaces and listings requires significant outlay of resources, either with dedicated internal staff or retaining outside monitoring services. Indeed, 95% of U.S. toy companies are small businesses and in a company with only a handful of employees, diverting resources from key business functions may simply not be an

option. Once infringing product is discovered, however, the rights holder has limited information about the seller and does not have the power to remove the infringing product. Instead, the rights holder must then investigate, report, and prove the infringement to the marketplace, following the protocols of the online marketplaces. This report and removal process is inefficient because of numerous factors, including that there are different policies and protocols between platforms; there is a lack of access to decision makers at the platforms; there is a lack of transparency, including identity of the sellers and internal policies and take-down decision making at the platform; there is a lack of consistent enforcement or removal; and there are frequent delays in removal. Further, when an illegitimate seller disputes the removal, many marketplaces will relist the goods and require the parties to resolve the matter between themselves, leading to months of sales while an unscrupulous seller stalls and then vanishes.



Third, consumers are largely unaware of the scope of infringing product offered on online marketplaces, leading to increased purchase of the infringing product. This benefits only the infringers and harms the consumers, toy companies, ecommerce platforms themselves and the U.S. economy. Consumers have developed a comfort with and trust in online marketplaces and discerning infringing product is often increasingly difficult, particularly prior to purchase and receipt of the product.

The Toy Association and its members believe **there are numerous potential solutions to combat each of these factors if stakeholders work collaboratively.** This document will provide a detailed discussion of these three categories of contributing factors and potential solutions to combat the growth of infringing products online.



DISCUSSION OF CONTRIBUTING FACTORS AND POTENTIAL SOLUTIONS

1. First Contributing Factor: Low Hurdle to Sellers

While the ease of e-commerce and online marketplaces benefit legitimate companies of all sizes, and particularly growing companies and entrepreneurs, it also allows unscrupulous and illegitimate sellers to prosper. To neutralize the low hurdle to sellers, The Toy Association proposes that online marketplaces proactively screen sellers and proactively screen products.

a. Screening Sellers

Initial entry to online marketplaces is often as simple as setting up an account with a unique email address. While some marketplaces require additional credentials, often these are forged and not verified. As a result, sellers are difficult to identify and tracing the bad actor behind infringing activity is extremely burdensome and difficult. Further, because of the ease of establishing a seller's account, the same bad actors can have multiple accounts and simply switch accounts when one account is discovered to be offering infringing product or is ultimately removed from a site because of multiple instances of infringement or purchaser complaints.



One proposed solution is to increase the screening of potential sellers on online marketplaces and require collection and verification of contact information. This could include a program to proactively screen sellers similar to the way certain social media has proposed verifying authenticity and contact information for those seeking to run certain political or issue ads. Another possibility would be to require heightened screening of the products and the seller's authority to sell the products if certain red flags are raised, such as when the seller is offering branded third party goods or offering multiples of a product on an existing product page.

At a minimum, online marketplaces should collect and verify contact information for sellers prior to allowing an account, just as another retailer would require. Without verified contact information, there is no ability for anyone – rights holders, law enforcement, or consumers – to enforce their rights. Obtaining this verified information would also allow the online marketplace to decrease the chance of the same bad actor reappearing on the online marketplace under a new account.

b. Screening Products

Online marketplaces also largely lack proactive monitoring of the goods offered by the sellers on their sites. In some instances, the online marketplace is a venue to connect the seller and buyer, with the products never passing through the hand of the online marketplace. In other instances, the online marketplace will receive the sellers' goods to be held in the marketplace's warehouse and once ordered, the marketplace will ship the product to the purchaser from the marketplace's warehouse. Neither situation entails proactive monitoring by the marketplace as to whether the product is legitimate, whether it infringes intellectual property, or whether it meets regulations such as consumer product safety regulations. Instead, the marketplaces treat themselves as a "pass-through" for the products.

To counter this contributing factor, one proposal is for online marketplaces to proactively screen products by requiring that sellers demonstrate legitimacy and safety of the products and instituting improved tracking of products to sellers.

Additionally, to demonstrate legitimacy, online marketplaces can require that sellers provide evidence that a product they propose to offer through the online marketplace is authorized. This could be in the form of proof of chain of title or other appropriate license. In the current environment, this could be similar to the evidence provided for customs or required by brick and mortar retailers. In the future, this could be accomplished using technology for tracking supply chain, including block chain authentication, easing any burden on the online marketplaces.

To demonstrate safety, online marketplaces should require that sellers provide Children's Product Certificates (CPC) and set up a process to verify the legitimacy of the CPC. Pursuant to the Consumer Product Safety Improvement Act (CPSIA), retailers may request a CPC from any manufacturer, which includes citations to the tested safety regulations, the province and country of manufacturer, the importer, a contact person (who maintains test records), and the testing lab information. Brick and mortar retailers typically require CPCs or similar documentation and have robust product safety requirements in place that go well beyond statutory requirements. Online marketplaces should take it upon themselves to request these CPCs and take additional measures to ensure the authenticity of the CPCs and the safety of the toys offered through their marketplaces. This would allow for assurances as to regulatory compliance by the seller and the product being offered, and would provide extensive information about the particular product if there were claims of infringement or regulatory violations and safety concerns. Alternatively, the Consumer Product Safety Commission could consider revisions that would require online marketplaces be bound to the same product safety obligations under CPSIA as other brick and mortar retailers.

Once legitimacy and safety have been established, online marketplaces should improve the tracking and verification of products through their warehouses to the particular sellers. In member experience, the current tracking of products by online marketplaces is often surprisingly limited, even for products that they process through their warehouses. And physical verification of products once received in warehouses is non-existent. There are even some instances where a consumer purchases from "Seller A" but without any notice receives product that was in fact supplied by "Seller B" because that product is in a warehouse closer to the purchaser. This creates a significant problem with transparency and tracking infringing product.



One clear solution would be for all online marketplaces, particularly when processing merchandise through their own supply chains, to obtain more detailed product information from the sellers, to track which received product was sourced from a particular seller, and to clearly identify for consumers the seller supplying the product.

We note that any programs developed to improve tracking should not be done at the expense of the rights holder or require disclosure of the rights holders' confidential business information.

2. Second Contributing Factor: The Burden of Enforcement is Disproportionately Placed on the Rights Holder

Currently, the burden of enforcement is on the rights holder, which is highly inefficient, expensive, and difficult. Rights holders are required to scour online marketplaces and upon discovery of infringing products, must investigate, report, and prove the infringement to the marketplace. The presumption of legitimacy is given to sellers and the burden is on the rights holder. In the online marketplace context, this only benefits infringers and it overburdens the rights holders and ultimately harms consumers.

Monitoring and removal processes that place the presumption with the rights holder and the burden of proof on the seller will be more effective and efficient and will more appropriately balance the burden of enforcement. To that end, **The Toy Association proposes online marketplaces work collaboratively with industry organizations to create programs that give the presumption to rights holders, provide more streamlined removal processes, provide direct point of contact for the industry, provide trainings to industry groups on best practices, and provide more transparency to stop bad actors.** We appreciate that several online platforms have set up brand protection programs that seek to achieve these goals though more must be done to continue to shift the burden away from the rights holder.



The Toy Association also believes that legislative change to the Digital Millennium Copyright Act (DMCA) may be necessary to account for misuse by infringers of the counter notification provision.

a. *Collaborative Programs That Shift the Presumption and Streamline Removal*

The status quo results in undue burden on rights holders, delay in removal of infringing products, inconsistent removal of infringing products, and a lack of communication and collaboration with the rights holder.

Currently, even when there is clear infringement evidenced from the product listing, such as by photographs, product description, purchaser feedback in comments, or basic seller information, the burden is placed on the rights holder to prove the illegitimacy. Upon reporting a listing or seller, responses to the report typically take several days and often include form responses requesting additional information before removing the infringing product.

Once the requested additional information is provided, a follow up response again often takes several days. Further, the additional information is often burdensome and causes delay. For example, online marketplaces frequently require that the rights holder make a “test purchase” from the seller and then report that it is indeed counterfeit upon receiving the product. During the time that a rights holder is waiting for the test purchase to arrive, the infringing product is being sold to unsuspecting consumers. Frequently, this delay is many days or even weeks before the product is received, particularly when shipped from China. For seasonal products that have a short cycle of only a few months, such as toys sold during the holiday season or the summer season, this delay and offering of counterfeit products to consumers for weeks of that sales cycle has an even more drastic impact. In fact, 60% of U.S. toy sales occur during the fourth quarter and even a week delay can be a significant percentage of a company’s peak sales period.

The Toy Association proposes that online marketplaces work collaboratively with industry organizations to create programs that give the presumption to rights holders and provide more streamlined removal processes. In recent years, programs in which the online marketplace works collaboratively with industry organizations have been more successful in allowing for more effective communication and problem solving. On the other hand, toy industry stakeholders report that programs offered by online marketplaces where the industry is not consulted and communication is poor, do not appear to improve these issues and instead place additional burden on the rights holder without benefit. **The Toy Association has taken the initial steps in engaging with a small number of ecommerce platforms to identify and work towards viable brand protection solutions.**



A process that gives the presumption to rights holders and delists product upon notification of infringement would appropriately place the burden on the seller. For example, a potential solution would allow a registered rights holders to submit a simple and streamlined “challenge” to a particular seller or listing. Rather than requiring that the rights holder prove the infringement in response to such a challenge, the product listing would be removed until the seller demonstrated the product was legitimate, such as chain of title, license, or other documentation allowing sale of the product.

b. A Point of Contact to Improve Consistency, Transparency and Collaboration

Toy industry stakeholders who are sophisticated rights holders and send dozens of identical take-down notices have reported inconsistency even within one marketplace and one region. They report that responses frequently vary based on the person responding. Inconsistency between regions—such as Europe, Asia and the United States—and between online marketplaces, are even starker and make the take-down process even more challenging. For instance, while a DMCA take-down notice is many times responded to within two to three days and the copyright infringement is removed, there are other times where the notice response will take significantly longer and require substantial back and forth to reach the same result.

During the reporting and removal process, obtaining live support or a consistent contact is rare, particularly for new entrants and young companies, but even for established and large toy companies. This is especially distressing when a rights holder needs to escalate a particularly egregious infringement and is unable to receive consistent contact.

The Toy Association proposes that online marketplaces offer a point person (or people) for a particular industry. This would allow for a direct point of contact for the industry stakeholders, increase speed and consistency of enforcement, and ease the ability to escalate infringements. Furthermore, if a marketplace had personnel who focused on serving one industry, such as the toy industry, that personnel would become familiar with the industry and spot patterns in counterfeits and bad actors who target the industry, allowing for a better partnership amongst rights holders and online marketplaces. We note that The Toy Association has developed key point of contacts with a couple of ecommerce platforms and will continue to develop these relationships. In some cases, these points of contacts have resulted in marked differences for an individual's online infringement takedown experiences. In other cases, results are more mixed.



c. Training and Education to Industry Members

Following an online marketplace's report and removal process requires skills that must be honed. Many entrepreneurs, new entrants and growing businesses are at first unaware of the most effective means to enforce and are unaware of which intellectual property rights to acquire and enforce to best enable them to succeed in the removal process.

For example, asserting copyrights is often the most effective means of removal online because of the provisions of the DMCA that allow internet service providers (ISPs) a safe harbor so long as they remove infringing content expeditiously upon receipt of a DMCA notice asserting infringement. The provision does not apply to trademarks or patents, so although online marketplaces will often point to the safe harbor as covering all of their activities, they will not typically remove a listing or seller based on reports of trademark or patent infringement.

In addition, working with government agencies such as Customs and Border Patrol and the Consumer Product Safety Commission is effective but can be daunting for smaller companies or new entrants. Further, each online marketplace has its own policy and provisions for reporting and requesting removal of infringing product. The burden of learning the policies, keeping them straight, and keeping up to date with any changes to the policies, is again placed on the rights holder, requiring further outlay of resources.



One solution is for industry associations, like The Toy Association, to provide best practices, guidelines and trainings to members. This can include facilitating communication, including in person meetings, with online marketplaces and with government agencies and providing guides for identifying infringing products. Online marketplaces, in turn, can offer trainings to industry groups on best practices for monitoring and take-down on their sites. Government agencies can provide industry training sessions for identifying infringing and counterfeit products. Attendance by representatives from online marketplaces at industry tradeshows, speaking on panels, and engaging in meetings with stakeholders, is appreciated and effective.

d. Increasing Transparency to Seller Information

Even when the take-down process works, the seller can create a new listing, leaving the rights holder to continue the constant process of policing the same rights. Indeed, even when the seller is flagged or terminated because of multiple infringements, the seller can create a new seller account and continue their nefarious conduct. Ideally, rights holders would have access to the seller information that would allow them to investigate or contact the seller directly, but often that is unavailable and the infringement continues unabated.

While privacy protections may make it difficult to release seller information, the online marketplace, at a minimum, should collect and verify contact information for sellers prior to allowing an account, as discussed above. Without verified contact information, there is no ability to stop the bad actors. Once there is infringement, online marketplaces should work more collaboratively with rights holders to track and enforce against repeat infringers. One additional solution is for online marketplaces to enforce a repeat infringer policy whereby platforms provide the seller's verified contact information to enable investigation of the source of the infringing products.

e. *DMCA Revisions May Be Necessary to Account for Misuse by Infringers of the Counter Notification Provision*

The DMCA provides a safe harbor relied upon by ISPs, including online marketplaces, so long as they meet the requirements of the statute, which is designed to include an expeditious removal process upon receiving a proper DMCA take-down notification. The DMCA also allows for a counter-notification process whereby alleged infringers may submit a counter-notification and the allegedly infringing materials will be reposted unless the copyright owner files suit within 10 business days.

The counter-notification process historically had not been used by infringers. However, toy industry stakeholders and other rights holders report that there is an increased use of the counter-notification procedure by bad actors. Infringers appear to be unconcerned with the repercussions of submitting a false counter notification and as a result, rights holders are faced with the predicament of filing a lawsuit for every infringing listing to which a counter-notification is sent. That the only recourse to a counter-notification is to file a lawsuit is a significant barrier for companies, because preparing and filing a complaint for each such listing is resource-intensive, time-consuming, and costly, but has little to no adverse effect on unscrupulous sellers. As a result, unless a rights holder spends significant time and money filing suit against every listing, the infringement continues.

In addition, claims of reliance on the DMCA have become overbroad. Many websites and ecommerce outlets assert they benefit from safe harbors without legitimate basis, requiring DMCA-like take down procedures, and claiming safe harbors shield them from responsibility for their own content or product they themselves manufacture.

The Toy Association believes that revisions to the DMCA may be needed to account for these unfortunate trends. Otherwise, the DMCA may fail to serve rights holders and its anticipated purpose. Moving forward, it is recommended that stakeholders within and outside the toy industry study and propose potential revisions to the language of the DMCA to overcome these detrimental trends. **One possible revision could be to require that a counter-notification include proof of alleged right, such as trademark authorization forms, customs authorizations, license, chain of title, or other argument, as opposed to form language that places the burden back on the rights holder.**



f. Customs Enforcement Must Continue and Ideally be Enhanced

CBP is the front line at the border in preventing entry of infringing goods into the U.S. The Toy Association remains supportive of initiatives to improve enforcement and targeting of infringing goods by CBP, including for low-value shipments. The de minimis exemption cannot be an exemption from regulatory compliance and enforcement—intellectual property, safety or otherwise. Importantly, because the average cost of a toy is approximately \$10, the de minimis exemption value of \$800 is a significant number of toys.

3. Third Contributing Factor: Lack of Consumer Awareness

Consumers are largely unaware of the scope of infringing product available on online marketplaces, leading to increased purchase of the infringing product. This benefits only the infringers and harms the consumers, toy companies, and the U.S. economy.

Consumers have developed a comfort with and trust in online marketplaces. As a result, consumers frequently are unaware that many products on online marketplaces are infringing, counterfeit or grey market, and thus are unknowingly providing children with unregulated and potentially unsafe toys.

Further, discerning illegitimate product is difficult, particularly when an illegitimate seller is simply linked to a legitimate product listing. Counterfeiters are adept at blending in and hiding on the sites, including by using multiple accounts, piggybacking on legitimate listings, and pricing at same or even higher than legitimate products. Discerning infringing product is particularly challenging for many parents purchasing toys because the child consumer, as opposed to the parent purchaser, is the end consumer most familiar with how the product should appear.

To facilitate consumer awareness and education, The Toy Association proposes education of consumers so they can protect themselves from illegitimate products. If online marketplaces refuse to monitor sellers and products as proposed above, one option is to allow rights holders to create "official" product listings. Once created, for a seller to be permitted to list on the "official" product page, that seller would be required to submit evidence of chain of title or be approved by the rights holder. This would help identify for consumers the authentic product listings and consumers could then feel more confident that when purchasing from a seller on the "official" product page, that the product is authentic. Along the same lines, a "verified" stamp for sellers similar to the verified stamp as seen on many social media sites could be instituted whereby to obtain a "verified" stamp, a seller would be required to provide chain of title documentation to the online marketplace for the products offered for sale.



Another option is for industry groups, like The Toy Association, to implement and publish a grading system for online marketplaces based on different factors to be determined by the stakeholders, including how the platform monitors sellers and goods, and how well the marketplace responds to removal requests.

CONCLUSION

The significant and serious issue of infringing products offered online seems only to be growing, thereby harming consumers, legitimate companies, and the American economy as a whole. The Toy Association has determined that there are three primary categories of contributing factors to this growth, and that there are potential solutions to combat each of these factors if stakeholders work collaboratively. The Toy Association looks forward to working with online marketplaces, legislators, its members, and consumers to combat this detrimental phenomenon.

This report has been prepared by Meaghan H. Kent and Claire M. Wheeler of Venable LLP working with and on behalf of The Toy Association and the members of its IP Steering Committee.

¹ ASTM F963 was adopted into federal law as a mandatory consumer product safety standard for toys.

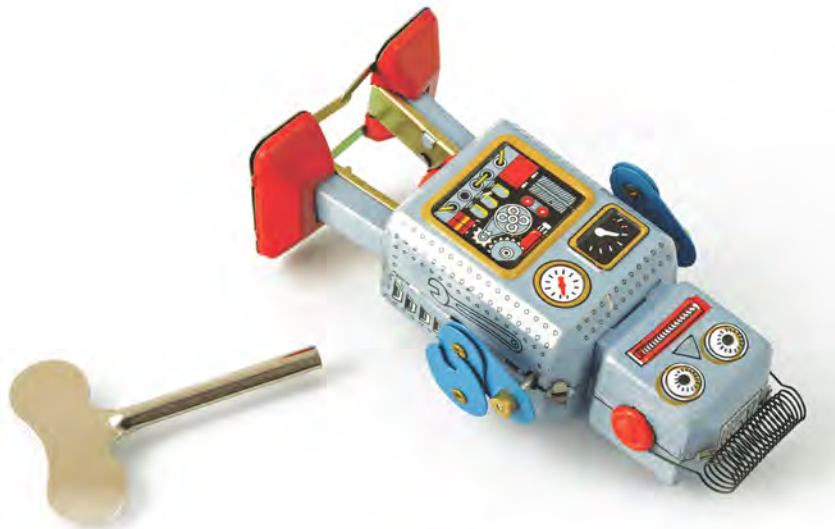
² In the U.S., the online toy category has grown rapidly, by over 55% in the past two years. The Toys eCommerce Market, CLAVIS INSIGHT. Available at: <https://www.clavisinsight.com/toys-ecommerce-market>.

³ *Intellectual Property: Agencies Can Improve Efforts to Address Risks Posed by Changing Counterfeits Market*, GAO-18-216, Report to the Chairman, Committee on Finance, U.S. Senate (Jan. 2018). Available at <https://www.gao.gov/assets/680/689713.pdf>.

⁴ *The Economic Impacts of Counterfeiting and Piracy*, Report prepared for BASCAP and INTA by Frontier Economics. Available at <https://cdn.iccwbo.org/content/uploads/sites/3/2017/02/ICC-BASCAP-Frontier-report-2016.pdf>.

Taking Fake Toys Offline:

A 2020 Focus on Proactive Measures to
Reduce Counterfeits and Unsafe Toys
Sold on Online Marketplaces



*This report has been prepared by Muzgan H. Kint of Vinsable LLP working with and on behalf of The Toy Association and the members of its IP Steering Committee.

TAKING FAKE TOYS OFFLINE:

A 2020 Focus on Proactive Measures to Reduce Counterfeits and Unsafe Toys Sold on Online Marketplaces

EXECUTIVE SUMMARY

Counterfeit and non-compliant toys sold through online marketplaces continue to threaten consumer health and safety. In 2020, Toy Industries of Europe (TIE) and the British Toy & Hobby Association (BTHA) published toy safety reports. TIE assessed 193 non-branded toys for compliance with the EU toy safety standard. Of these, 97 percent were non-compliant and thus illegal in the European market despite being purchased across seven EU member nations on four major platforms.¹ Similarly, for its latest toy safety study, BHTA purchased 100 randomly-selected toys from well-known online marketplaces and found that 60% were unsafe for children and that 86% of the toys were illegal to sell in the UK.²

International counterfeit trade has increased³, and online shopping has a widespread risk of counterfeits. In the U.S., the "growth in e-commerce has contributed to a shift in the sale of counterfeit goods in the United States, with consumers increasingly purchasing goods online and counterfeiters producing a wider variety of goods that may be sold on websites alongside authentic products. For example, 20 of 47 items [the Government Accountability Office] purchased from third-party sellers on popular consumer websites were counterfeit, according to testing by the products' rights holders, highlighting potential risks to consumers."⁴



Consumers, however, are largely unaware of this growing problem. The Toy Association conducted a study of 1,000 toy-buying parents in 2019 and found that nearly 1 in 3 incorrectly believed counterfeit toys are not sold on major online marketplaces, representing a blind spot through which non-compliant toys can slip into households.⁵

Consumers are shifting to online shopping at an accelerated rate. More than nine in 10 shoppers chose their retailer based on convenience, driving the consumer shift to online shopping⁶ and the events of this year have hastened the online shopping trend. The U.S. Census Bureau estimated that retail e-commerce sales during the second quarter were \$211.5 billion, representing a 44.5% increase from the same quarter a year ago.⁷ Indeed, U.S. toy sales experienced double-digit monthly growth from March through June 2020, despite lockdown restrictions, thanks in large part to the strength of the online channel during that time.⁸

In 2019, the Toy Association issued its White Paper, *The Real Threat of Fake Toys*,⁹ which discussed the three contributing factors and various potential solutions to this increasingly pervasive problem. While there has been some good progress in the last year, much more remains to be done to decrease unsafe and counterfeit toys online. This 2020 paper reviews the three factors contributing to counterfeit toys sold online and expands on the proposed solutions:

1. **There remains a low hurdle to sellers due to the lack of seller or product verification.** At a minimum, online marketplaces should collect and verify seller information through government identification and other official documents. Online marketplaces should also be required to implement proactive systems to verify whether product offered on their sites meets applicable regulations such as labeling requirements and consumer product safety regulations. Furthermore, online marketplaces should aggressively use and enhance their available proactive tools and filtering capabilities to prevent counterfeit product from being offered on their sites.
2. **Enforcement of counterfeits is a reactive process and the burden is disproportionately placed on rights holders and consumers.** More proactive procedures must be the first line of defense. Additionally, the reporting process must be streamlined, and the presumption shifted to rights holders.
3. **Consumers must be provided with information so they can make informed purchasing decisions.** It has become increasingly difficult to differentiate between legitimate and counterfeit product on marketplaces because counterfeiters are adept at blending in on the sites. Marketplaces must be more transparent with verified seller and product information to enable consumers to make informed purchasing decisions and avoid falling victim to counterfeit products. Consumers and brands should be notified when counterfeit products are identified on marketplace platforms.

These issues and proposed solutions continue to evolve as online shopping changes. Increased reliance on online shopping, the proliferation of social media marketplaces, targeted advertisements, and the growth of fake reviews and fake storefronts are new concerns that Association members have identified for future review. While some of the solutions identified may resolve some of these emerging trends, we anticipate an ongoing adaptive approach will be needed to fully address the prevalence of counterfeit toys sold online.



TOY ASSOCIATION AND ITS EFFORTS TO PREVENT COUNTERFEIT AND UNSAFE TOYS

1. About The Toy Association

Founded in 1916, The Toy Association, Inc. is the trade association representing businesses that design, produce, license, and deliver toys and youth entertainment products. With over 1,000 members, the organization has a long history of propelling the health and growth of the toy industry. The Toy Association's members drive the annual \$27 billion U.S. domestic toy market, which has an annual U.S. economic impact of \$98.2 billion. The toy industry supports an estimated 627,110 jobs (FTE) generating more than \$31.1 billion in wages for US workers. The toy industry generates \$13.2 billion in tax revenue each year.

The Toy Association advocates on behalf of its members, and for more than 40 years has been a global leader in toy safety. It helped develop the first toy safety standard and remains committed to working with medical experts, government, consumers, and industry on ongoing safety programs and outreach. The Toy Association is also the industry's voice on the developmental benefits of play, promoting play's positive impact on childhood development.

2. The Real Threat of Fake Toys

A significant and serious issue facing consumers and The Toy Association's members is the growing phenomenon of counterfeit and non-compliant products being sold online.






In 2019, The Toy Association issued a White Paper, *The Real Threat of Fake Toys*, which discussed contributing factors and potential solutions to this increasingly pervasive problem. Namely, the 2019 White Paper articulated three categories of contributing factors to this steady growth of infringing products online, particularly as it relates to online marketplaces:

- E-commerce creates a low hurdle to sellers;
- The burden of enforcement is disproportionately reactive and on the rights holder; and
- Consumers are largely unaware of the scope of infringing product offered on online marketplaces

This framework remains suitable for analyzing the continuing problem of counterfeit and non-compliant products sold on online marketplaces.

The 2019 White Paper articulated potential solutions to combat each of these factors.

-  **To neutralize the low hurdle to sellers,** The Toy Association proposed that online marketplaces proactively screen and collect verified contact information for sellers, and proactively screen products, requiring that sellers demonstrate legitimacy of the products and provide Children's Product Certificates (CPC) to ensure safety.
-  **To more appropriately balance the burden of enforcement,** The Toy Association proposed that online marketplaces work collaboratively with industry organizations to create programs that give the presumption to rights holders, provide more streamlined removal processes, provide direct points of contact for the industry, provide trainings to industry groups on best practices, and provide more transparency to stop bad actors.
-  **To facilitate consumer awareness and education,** The Toy Association proposed that online marketplaces better identify legitimate or verified products and sellers.

3. Toy Association Engagement and Advocacy

The Toy Association has been engaged with online marketplaces, including Amazon, Alibaba, Walmart, eBay and others, to work collaboratively on behalf of its members and consumers. The Toy Association has held meetings and calls connecting rights owners and e-commerce marketplaces to address specific and technical concerns. Amazon and Walmart are both Toy Association members and are on The Toy Association's IP Committee. The above-mentioned marketplaces have worked collaboratively with The Toy Association and its members during this process.

The Toy Association has also been engaged in extensive advocacy, including testifying before Congress, meeting with Administration officials, participating in roundtables, conducting regular meetings with legislators, and engagement in proposed legislation.



Since the 2019 White Paper, the Toy Association's engagement and advocacy has contributed to some important progress, including:

- Introduction of three bills that would implement requirements on marketplaces and sellers to address many of the problems identified by Toy Association members;
- Publication of the Department of Homeland Security Report, *Combating Trafficking in Counterfeit and Pirated Goods*, that echoed many of The Toy Association's proposed solutions;
- Most major online marketplaces have provided or committed to providing points of contact to help address Toy Association members' specific concerns and questions, and have increased resources to provide brand owners with additional tools to identify and remove counterfeits;
- Some marketplaces have begun to publicly share basic seller identifying information such as the seller's location;
- Some marketplaces have implemented or are considering the implementation of additional safety measures, such as requiring Children's Product Certifications for some toys sold on their respective marketplaces; and
- Amazon has committed to stop, for children's products, the shipping practice whereby it ships product from the warehouse closest to the consumer, regardless of whether that product is from the seller from which the consumer ordered the product.

CONTINUED PROLIFERATION OF COUNTERFEIT, NON-COMPLIANT AND UNSAFE TOYS

1. Safety of Toys Sold Online Continues to be a Growing Public Concern

Despite work by The Toy Association, heightened engagement by government, increased awareness by consumers, and somewhat improved removal procedures on many online marketplaces, there are still numerous examples of unsafe and non-compliant toys being sold through online marketplaces. While some of these products are counterfeit and others are knockoffs or infringe on other aspects of registered intellectual property, some are simply non-compliant. These offerings reflect what has become a manufacturing industry that seeks to fill consumer demand wherever it arises. Given the unregulated nature of online marketplaces and the lack of enforcement of products sold online, opportunities are abundant and risks are few for sellers who do not know how to comply with international toy safety standards or who see compliance with international toy safety standards as an unnecessary cost. The examples of non-compliant product are pervasive.

In 2020, Toy Industries of Europe (TIE) and the British Toy & Hobby Association (BTHA) published toy safety reports. TIE assessed 193 non-branded toys for compliance with the EU toy safety standard. Of these, 97 percent were non-compliant and thus illegal in the European market despite being purchased across seven EU member nations on four major platforms.¹⁰ Similarly, for its latest toy safety study, BHTA purchased 100 randomly-selected toys from well-known online marketplaces and found that 60% were unsafe for children and that 86% of the toys were illegal to sell in the UK.¹¹

More broadly, in August 2019, the *Wall Street Journal* presented an in-depth review of the counterfeit products sold on online marketplaces.¹² The investigation and article focused on Amazon, but the premise and outcome are applicable to most online marketplaces. The article states, "In practice, Amazon has increasingly evolved like a flea market. It exercises limited oversight over items listed by millions of third-party sellers, many of them anonymous, many in China, some offering scant information." The article explained that its investigation uncovered over 4,000 items for sale on Amazon that had been declared unsafe by federal agencies, many of which were toys and other children's products. This included items that had been specifically banned by the FDA as being unsafe for children.

Every day, there are examples of listings for unsafe and non-compliant toys being offered and sold on online marketplaces. Listings frequently include products with battery compartments without a locking mechanism, toys marketed to children under the age of three that pose choking hazards, or toys without small parts warning labels. On their face, these products blatantly violate safety regulations, yet they are ubiquitously offered on popular mainstream online marketplaces and marketed as intended for children. These products are not third-party tested and certified compliant as required by the Consumer Product Safety Improvement Act (CPSIA). Unlike legitimate toy brands that ensure the safety of their toys before they reach the market, without testing and certification, no such assurances exists and there is no way for a consumer to know whether the products are safe.

A recent example involves dangerous magnets being marketed to children. Federal toy safety standards prohibit the use of certain powerful magnets, known as rare earth magnets, in any toy part that is small enough to be swallowed and is intended for children under 14 years old. Rare earth magnets pose a serious risk to children if they are swallowed and they should never be given to young children, especially those under the age of three. However, many online listings for "toys" promote products to children that include rare earth magnets, increasing the likelihood of a child swallowing and being severely injured by these very powerful magnets.¹³ Below are examples from a search run in October 2020 on three mainstream e-commerce platforms, Alibaba, Amazon and Walmart, for "magnet putty." Notably, each of the listings from a third-party seller show a rare earth magnet on the face of the listing and each listing indicates that it is a children's toy, with one even suggesting an age range of "4 months and up."

Another recent example involves 3D printing pens marketed to children that reach temperatures that cause a burn risk. One Toy Association member produces the 3Doodler Pen, which provides complaint product that maintains a lower temperature to ensure it does not pose a burn risk to children. However, with the popularity of these pens, there are now numerous listings on popular online marketplaces for pens that heat and melt filaments made of the plastics ABS and PLA, which melt at temperatures of 190-230°C. To melt those plastics, the tip of those devices get as hot as 180-200°C, which could easily burn a child and is not suitable for children under the relevant safety regulations.



A compliance testing lab provided the following feedback on toys purchased through a popular online marketplace. All these products were still available online at the time of drafting:

- **Wooden Jigsaw Puzzle** FAIL. Item is being marketed as appropriate for children ages 1 year and older. There were small parts as received, which is not allowed in toys for children under 3 years of age.
- **Kanga Roo Flashing LED Light Up Toys** FAIL. During tension testing, the rings ripped open and exposed the battery compartment within. For all toys, batteries that are small parts cannot be accessible within the battery compartment without the use of a coin, screwdriver, or other common household tool.
- **Pull Back Trucks** FAIL. Components of the car released during use and abuse testing (specifically the torque test). These components revealed sharp points. The tire and axle released from the sample during tension testing. This resulted in sharp points on the axle, as well as a projection point (sharp point on axle still attached to one tire, with that tire acting as a sturdy base).
- **Black Magnetic Putty Slime** FAIL. Magnet toys such as this are typically appropriate for children at ages 8 years and older. This is being marketed as appropriate for all ages. The magnet is a small part as received, and has a flux reading of greater than 50 kG²mm² (617.2 kG²mm²), deeming it a hazardous magnet.

In the most tragic examples, these non-compliant products can result in severe injury and risk of death. In December 2018, a four-year-old boy broke knock-off Magformers magnetic building blocks and swallowed several loose magnets. As the magnets tried to connect to each other within his body, they caused significant intestinal damage and the incident resulted in hospitalization and surgery to repair and remove his damaged intestine.¹⁴ The genuine Magformers toys are subjected to regular safety testing to ensure the small magnets are encapsulated safely and will not come loose even with a reasonable level of abuse during play. This is not the case with the non-compliant products, which led to this tragic example.

2. The Criminal Connection to Counterfeit Products

In addition to the safety concerns raised by counterfeit products, numerous reports link counterfeit activity to criminal enterprises, including terrorist activity. The Department of Homeland Security highlighted this link in its 2019 report, *Strategic Framework for Countering Terrorism and Targeted Violence*, explaining that law enforcement efforts have identified links between terrorist groups and the sale of counterfeit goods and illicit material in e-commerce.¹⁵ The United Nations Security Council also identified the connection between organized crime, including counterfeiting, and terrorist activities.¹⁶



One study from Michigan State University aptly explained:

"Despite its outward appearance, product counterfeiting is far from being a stand-alone crime, and the large financial returns to be gained likely attract a host of illicit actors ... counterfeiting will likely be a supplementary criminal activity intended to generate a consistent flow of cash through relatively low-profile, yet, highly profitable activities."¹⁷

Indeed, officials report that many terrorist organizations and their activities are directly funded in part by sales of counterfeit product. In analyzing the funding of al Qaeda, the National Commission on Terrorist Attacks Upon the United States explained that the "list of purported al Qaeda funding sources is legion: counterfeit trademarked goods, consumer coupon fraud, drug trafficking, insider trading, support from Gulf-area governments, and conflict diamonds are the most common."¹⁸ A 2016 report prepared by the Union des Fabricants (UNIFAB) detailed this connection, specifically identifying terrorist organizations that have been shown to have funded their organizations by selling counterfeit product, including the IRA in Ireland, the Basque separatist group ETA, the Colombian guerilla group FARC, as well as Hezbollah, Hamas, al Qaeda, and others.¹⁹ The group responsible for the 2004 Madrid train bombings was also reported to have been funded in part by sales of pirated CDs and Hezbollah was reported to be funded in part by counterfeit Viagra.²⁰ It is reported that terrorists who attacked the French magazine Charlie Hebdo in 2015 financed their weapons partly by selling fake Nike sneakers.²¹

THE FACTORS CONTRIBUTING TO THE CONTINUING PROLIFERATION OF COUNTERFEIT AND NON-COMPLIANT PRODUCTS AND POTENTIAL SOLUTIONS

1. The Criminal Connection to Counterfeit Products

a. First Contributing Factor: Low Hurdle to Sellers

While e-commerce and online marketplaces continue to grow and provide significant benefits to legitimate companies looking to more easily reach consumers, these same marketplaces allow bad actors and sellers to prosper. Initial entry to online marketplaces can be as simple as creating a seller account with a unique email address, creating a low hurdle to entry and a high hurdle for stopping bad actors and sellers at the source. In order to neutralize the low hurdle to sellers that allows bad actors to thrive, The Toy Association proposed in its 2019 White Paper that online marketplaces proactively screen sellers.

i. There Remains Inadequate Seller Information Gathering and Verification

While some marketplaces require additional credentials, often these credentials are inaccurate, incomplete, and unverified. Based on seller information provided by some marketplaces, it is apparent that there is an inconsistent collection and verification of seller data. As a result, sellers can provide online marketplaces with inaccurate or fake information, making it impossible for online marketplaces to track and suspend bad actors, or for rights holders, law enforcement, or consumers, to enforce their rights. Indeed, if there is no verified contact information, there is no ability for a rights holder, consumer, or law enforcement to trace and enforce at the source.

Proactively screening sellers requires more than simply collecting more information from sellers. Seller information must also be verified prior to allowing an account, just as any other retailer would require, and marketplaces must improve their vetting of sellers, suppliers, and products by implementing more stringent requirements that validate seller credentials.

At a minimum, prior to allowing a seller account, online marketplaces should collect and verify through government identification and other official documents, the seller's contact information and banking information. This should include at a minimum: name, physical address, email address, phone number, business registration, bank account information, and W9 form or tax EIN, or another applicable unique government-issued identifier.

Admittedly, government identification and other official documentation can also be falsified, but that does not mean that marketplaces should not at least attempt to meet the threshold requirement to verify using the best means possible. Since verification and authentication are a moving target, continued evaluation of the best methods is encouraged.

Some online marketplaces have invested in verifying sellers through machine learning tools and innovative pilot programs, like picture and video conference verification. However, some have also argued that thorough verification is not possible because of the volume of sellers on their marketplaces. This volume of sellers is not inevitable though; rather, it is a business decision that online marketplaces themselves make. If a marketplace is unable to verify the identity of its sellers because a high volume of sellers are permitted into that marketplace, that is a result of its own creation.

Consumers and rights holders alike would benefit from a collective effort of all online marketplaces to expand the practice of collecting and verifying information. In addition to stopping the counterfeiters from providing non-compliant products to consumers in the first place, obtaining verified contact and banking information would allow the online marketplace to better track, triangulate, and decrease the reappearance of the same bad actors under new accounts.

Once seller information is appropriately gathered and verified, online marketplaces should also make certain information easily available to consumers and rights holders, as discussed in more detail below. Without transparency, counterfeits will only continue to increase.

II. Marketplaces Do Not Proactively Screen Products

Currently, most online marketplaces lack an effective, proactive process for screening products that are offered by sellers. All marketplaces play a direct role in providing and selling products to consumers, regardless of whether the online marketplace obtains physical control over the product being sold through fulfillment services or only connects a buyer and a seller. While marketplaces do not act as traditional brick-and-mortar retailers that curate goods to sell to consumers, this should not absolve the online marketplace from all responsibility for the goods from which they profit.

Online marketplaces should be required to implement a proactive system meant to verify whether a product being sold on its website is counterfeit and whether it meets regulations such as labeling requirements and consumer product safety regulations. In its 2019 White Paper, The Toy Association proposed that sellers should be required to demonstrate the legitimacy and safety of their products, and that a process should be instituted to improve tracking of products to sellers. However, it does not appear that there have been sufficient strides in increasing the seller burden to verify the source of products, or to authenticate or confirm the safety of products being sold. Because brick-and-mortar retailers are liable for the products sold in their stores, this level of due diligence is standard practice for them.

The 2019 White Paper proposed that online marketplaces should collect Children's Product Certificates (CPC) from sellers offering children's products. Marketplaces have indicated they can request the CPC from sellers, but to date, this has not been required of all sellers, contrary to what brick-and-mortar retailers require of their sellers. Instead, some online marketplaces have implemented proactive approaches, but only for those products that the marketplace deems riskier, such as those that pose a higher risk of non-compliance, are subject to more counterfeiting, or could pose a higher risk to health and safety.



Online marketplaces, like brick-and-mortar retailers, should collect and authenticate CPCs for all children's products to ensure the safety of the toys offered through their marketplaces. In addition, we propose the following best practices for CPC collection:

- Certification requests should be limited to just the certification and should not include the test reports, unless there is a reasonable suspicion that the certificate is invalid or has been altered or forged.
- Requesting test reports may also be a part of a periodic audit of certifications conducted by the marketplace.
- No amount of certification or testing can replace a vigorous screening program for sellers and products before the products are available for purchase online.
- For those products that have been verified compliant to the applicable safety requirements, we suggest the listing have a "verified seller" or "verified product" distinction. Any products that are recommended or promoted by the marketplace should be "verified."
- The product should be compliant with the product safety requirements that apply to the jurisdiction in which the consumer is located.
- The marketplace should conduct periodic test buys to ensure that the certification information correlates with the product that is being certified.
- Products manufactured outside of the mandatory certification document retention period do not need to have certification. The seller is required to prove that the product was manufactured out of the scope.
- Certification requests should be limited to and align with requirements in 16 CFR Parts 1107, 1109 and 1110. This includes allowing for certifications to be based on component part tests.
- A point of contact should be provided for safety concerns, whether with the product listing itself or with the description of the product, regardless of affiliation with the seller.
- Manufacturers and brands will provide certification only to the original purchaser; subsequent sale of that product (e.g. closeouts, overstocks, etc.) does not obligate the manufacturer to certify product to someone to whom they did not sell it and with which they have no business relationship or ability to verify the product identity.

- At the outset, certification asks should be done in phases over an extended period, focusing on product categories that pose the most risk.

Incorporating these best practices would allow for assurances about the regulatory compliance of the seller and the product offered and would provide extensive information about the product if there were claims of infringement or regulatory violations and safety concerns. At a minimum, online marketplaces should implement these practices when sellers hit a volume of sales that indicates the seller is a commercial seller, and for products that could present a greater safety risk to children if there is a violation, such as those products marketed to children under the age of three.

III. There is Inconsistent Application of Proactive Measures

Online marketplaces have touted the ability to implement different filters and rule systems to proactively block counterfeits. This includes rules that are set by price point, seller location, and brand name, or other markers that allow the marketplace to identify known or likely counterfeits. Using these filters, marketplaces can automatically block items and prevent counterfeit product from being offered on their sites.

Despite the apparent availability of these tools, they are not used with regularity or consistency. For example, certain tools are only made available to brands that have registered for particular marketplace enforcement programs that may have onerous terms; some are only available at a cost to the brand owner; and some may only be available to accepted brands after application to the marketplace. As a result, marketplaces are inconsistently filtering out counterfeit products.

Online marketplaces should use their proactive tools and filtering capabilities widely to block non-compliant items and prevent counterfeit product from being offered on their sites. The online marketplaces are developing sophisticated filtering and AI technology, and this technology can offer a clear benefit to consumers: identifying and eliminating counterfeit and non-compliant product. Once developed, that technology should be widely used by marketplaces to prevent counterfeit product and sellers from appearing on their sites.

b. Second Contributing Factor: The Burden of Enforcement is Disproportionately Reactive and Placed on the Rights Holder

i. The Process Remains Reactive, Disproportionately Relying on Enforcement by Rights Holders and Consumers

The burden of enforcement disproportionately relies on rights holders and consumers to police and report infringement. Rights holders are required to scour online marketplaces and investigate, report, and prove infringement to the marketplace before counterfeit items are removed. This problem is compounded by the fact that each marketplace has different processes and procedures in place for handling infringement claims, forcing rights holders to

constantly navigate different, and often changing, marketplace enforcement procedures. This process removes the initial burden from the seller and further gives the sellers the benefit of the doubt.

At the core, it is evident that reactive measures will never keep up with bad actors and more proactive measures are required. Indeed, proactive procedures must be the first line of defense. If the focus is on reactive efforts rather than proactive approaches, bad actors will continue to flourish. Importantly, there is no amount of resources rights holders can expend to adequately neutralize bad actors if marketplace approaches are disproportionately reactive in nature.

II. Brand Protection Programs That Shift the Presumption and Streamline Removal are Inconsistent

While some online marketplaces have begun offering new and more robust collaborative programs for rights holders to more easily report and submit enforcement claims, Toy Association member experience is that these measures are inconsistently implemented, with certain brand owners receiving preferential treatment depending on existing business relationships with the marketplace. Further, they are not uniform across marketplaces, forcing rights holders to navigate the different, and often changing, marketplace policies and procedures. Finally, many of these programs are highly burdensome, either requiring payment from the rights holder or sharing extensive amounts of data by the rights holder with the marketplaces.

A process that instead gives the presumption to rights holders and delists a product (even temporarily) upon notification of infringement would appropriately place the burden on the seller. As proposed in The Toy Association's 2019 White Paper, a solution that would allow a registered rights holder to submit a simple and streamlined "challenge" as to a seller or listing (rather than requiring that the rights holder prove the infringement in response to such a challenge) would more appropriately balance the burden of enforcement. Effectively, a product listing would be removed until the seller demonstrated that the product was legitimate, such as through a chain of title, license, or other documentation allowing sale of the product.

III. Fulfillment Methods Should Have Transparency

Marketplaces vary on their inventory and warehouse practices. Some take a "hands off" approach and do not at any point take possession of or facilitate the transfer of goods from the marketplace seller to the consumer. In other cases, marketplaces play a more involved role in shipping, warehousing, or transferring ownership of the goods. In the latter example, in order to speed shipping and reduce environmental impact, at least one marketplace that fulfills third party orders will ship product from the warehouse closest to the consumer, regardless of whether it is the seller from which the consumer ordered. This practice means that a consumer may purchase from one seller but receive product from a different seller.

While this practice may increase speed and efficiency in shipping, making it an attractive option for marketplaces to consider, it presents numerous problems for consumer protection as it allows for another layer of obfuscation by hindering seller identification, investigation, verification, and enforcement. For those investigating potential infringing products, it undermines the integrity of test buys that are critical to enforcement investigations. Purchasers have no idea whether they are receiving inventory from the target of their test buy and investigation, making it near impossible to track and identify bad actors. Any policies that add an additional layer of uncertainty in terms of identifying the sellers behind products is a step in the wrong direction and only serves to create additional burdens for rights holders.

To date, Amazon is the only marketplace that members are aware of that has used this process. Alongside the ongoing engagement with The Toy Association, Amazon has stated that it no longer conducts this practice for toy products sold worldwide. This was an important development and The Toy Association urges other marketplaces to exercise caution should they consider doing the same and also encourages Amazon to cease the practice for all products or, at the very least, ensure that the purchaser be conspicuously notified at the time of purchase that they will receive product from a different seller than the seller from whom they are purchasing.

IV. Transparency to Seller Identity and Contact Information Remains Inadequate

Transparency of seller information is inadequate, resulting in a lack of information available to consumers making purchasing decisions, and to rights holders and law enforcement attempting to track and enforce against counterfeiters.

Some online marketplaces are beginning to increase access to seller information, such as through brand owner programs. However, access is often inconsistent across marketplaces, providing a variety of different information depending on the program. Further, even when marketplaces do offer such information that is necessary for subsequent enforcement actions, it is often incomplete or incorrect due to inadequate preliminary verification.



Without complete or verified information, rights holders cannot take the necessary next steps and are often forced to expend time and valuable resources chasing dead ends. Unverified information and the existence of fake email addresses or physical addresses can also lead to stolen identity problems, which result in rights holders acting against the wrong individual or entity. Not only does this harm those who have mistakenly been tagged as bad actors, but any delay in the enforcement process benefits unscrupulous actors.

Marketplaces must improve transparency and information sharing regarding the seller. To start, marketplaces should collect, verify, and provide conspicuous identity, contact information, and location for all sellers on the face of the listing. This allows consumers to make more informed purchasing decisions and allows consumers to easily contact those sellers if any problem or question arises. It also eases enforcement by rights holders and law enforcement.

Additional seller information, such as an IP address, bank information and sales data, should be shared with rights holders and law enforcement. Information sharing about bad actors with law enforcement, U.S. Customs and Border Control, Homeland Security Investigation, brand owners, or other stakeholders is necessary to ensure that counterfeits are stopped at the source. Total sales information also allows rights holders and law enforcement to be better able to determine the more egregious infringers and where to focus time and resources when targeting the source of counterfeit products. Sales data should be made transparent for all sellers, with additional seller information to be provided to a rights holder following a successful take down notice. Marketplaces should make this information sharing part of their terms of service to which sellers agree to be bound.

Transparency should also be extended to the take-down appeals process. During the appeal of takedowns, marketplaces often shield correspondence with sellers, meaning that bad actors can correspond with the marketplace arguing why their products are not counterfeit without any input from rights holders or law enforcement. This allows for misrepresentations to go unchecked and frequently leads to counterfeit product being relisted. Further, some marketplaces withhold seller identity from rights owners during the appeal process, which can lead to enforcement delays.

Information sharing among marketplaces can also be extremely beneficial, allowing rights holders and law enforcement to act more proactively and target the source. The Intellectual Property Rights Center (IPR Center) has made great efforts and strides with information sharing and collaboration among marketplaces and such collaborative activity should continue and grow.

V. A Point of Contact with Specialized Knowledge of an Industry will Continue to Improve Consistency, Transparency, and Collaboration

In response to the 2019 White Paper, many online marketplaces now provide a point of contact to assist rights holders, which has improved the takedown experience. Expanding this practice whereby marketplaces employ personnel who are focused on an industry, such as the toy industry, would be beneficial not only for creating specialized knowledge and

spotting patterns of bad actors, but for strengthening partnerships between rights holders and online marketplaces.

c. **Third Contributing Factor: Consumers Remain Largely Unaware of the Scope of Infringing Product Offered on Online Marketplaces**

Online marketplaces are ubiquitous, and many have an established and trusted brand image equal to brick-and-mortar retailers due to their high volume of sales and extensive consumer exposure. As a result, consumers have developed a comfort with and trust in online marketplaces, just as they trust brick-and-mortar retailers. Consumers remain largely unaware of the scope of counterfeit or non-compliant product available on online marketplaces, which can result in consumers unknowingly providing children with non-compliant and potentially unsafe toys.

It has also become increasingly difficult to differentiate between compliant and non-compliant product on the marketplaces because counterfeiters are adept at blending in and hiding on the sites, including by categorizing the product under a rights holder's brand name, piggybacking on legitimate listings, using keywords, and pricing at the same or even higher than legitimate products. Some of these practices may be assisted by marketplace algorithms, search results, and other practices. Identifying counterfeit toys is particularly challenging as the purchaser is not the end user child and therefore may not have as much engagement with the product or brand.



Marketplaces must better educate consumers to enable them to make sound purchasing decisions and avoid falling victim to counterfeit products. Consumer education can be accomplished by transparency and honest communication about products and sellers, including conspicuous identification of the sellers, such as location and contact information.

Further, marketplaces should notify consumers who have or may have received counterfeit product. Once a marketplace is aware that a seller has sold counterfeit product, the marketplace should inform all consumers who have purchased that product from the seller that they may have received counterfeit and unsafe product. The marketplace should also investigate other products sold by that seller as part of their proactive measures, and if they are determined to also be counterfeit, notify consumers of those counterfeit products as well.

PROPOSED LEGISLATIVE AND GOVERNMENT-LED SOLUTIONS

There was an uptick in government involvement in 2019 to identify potential solutions to the problem of counterfeits sold online. Perhaps most significantly, at the direction of the White House, the Department of Homeland Security released a new report, “Combating Trafficking in Counterfeit and Pirated Goods,” calling for “prompt attention to illicit trade that erodes U.S. economic competitiveness and catalyzes compounding threats to national security and public safety.”⁷² The report concludes that current government enforcement efforts and private sector actions have thus far been insufficient to stem the flow of counterfeit products sold to U.S. consumers. It further identifies strengthened regulatory, legislative, and enforcement efforts, and marketplace best practices, echoing many of The Toy Association’s concerns and solutions raised in the 2019 White Paper and in comments submitted to the Department of Commerce.

While several bills have been introduced in the past targeting counterfeit enforcement efforts at ports of entry, at the end of 2019 and beginning of 2020, legislative proposals were introduced at the federal and state levels to attempt to address counterfeit products offered specifically on online marketplaces. Each includes one or more solutions also proposed by The Toy Association’s 2019 White Paper.

The Toy Association endorses all these bills as likely to reduce the number of counterfeits sold online.



a. [H.R. 6058 – SHOP SAFE Act](#)

The Stopping Harmful Offers on Platforms by Screening Against Fakes in E-Commerce (“SHOP SAFE”) Act was introduced by Rep. Jerry Nadler (D-NY) on March 3, 2020 to the House Judiciary Committee. The bill is cosponsored by Rep. Doug Collins (R-GA), Rep. Henry “Hank” Johnson, Jr. (D-GA), Rep. Martha Roby (R-AL), Rep. Theodore Deutch (D-FL), Rep. Ben Cline (R-VA), Rep. Greg Stanton (D-AZ), and Rep. W. Gregory Steube (R-FL). The bill would amend the Trademark Act of 1946 to provide for contributory liability for certain e-commerce platforms for use of a counterfeit mark by a third party on such platforms, and for other purposes.

This bill seeks to combat the proliferation of unsafe counterfeit goods for sale on e-commerce websites by incentivizing platforms to engage in a set of best practices for vetting sellers and goods, punishing repeat offenders, and ensuring that consumers have the best, most accurate information available to them when making purchases online. SHOP SAFE applies to goods with a health and/or safety impact, as counterfeit goods in this category pose the most serious consequences for consumers. Online retail platforms that follow SHOP SAFE's best practices may be immunized from contributory liability for trademark infringement.

b. S. 3073 – SANTA Act

Senator Bill Cassidy (R-LA), together with cosponsors Senator Thom Tillis (R-NC), Senator Robert Menendez (D-NJ), and Senator Dick Durbin (D-IL) introduced the Stopping All Nefarious Toys in America ("SANTA") Act on December 17, 2019. This bipartisan bill requires online marketplaces to verify and disclose the identity of a seller of children's products to consumers. An online marketplace must obtain a seller's bank account information, a government-issued photo identification, and business contact information. Online marketplaces must then disclose each seller's name, business address, phone number, and email address to consumers. Marketplaces must also disclose if they are shipping from a seller that is different from whom the consumer purchased.

c. S. 3431 – INFORM Consumers Act

The INFORM Consumers Act requires online marketplaces to disclose certain verified information regarding high-volume third-party sellers of consumer products. The bill was introduced by Senators Cassidy (R-LA), Durbin (D-IL), Perdue (R-GA), and Hirono (D-HI) on March 10, 2020. The bill will require certain disclosures from third parties that sell their goods on e-commerce platforms. In addition to providing increased transparency for consumers, the INFORM Consumers Act will allow law enforcement to better identify high-frequency sellers suspected of trafficking stolen and counterfeit goods. Consumers will be also provided information regarding whether a given seller is a manufacturer, retailer, importer, or reseller of consumer products. With greater volume of available information on online sellers provided under this scheme, informed consumers can better avoid purchasing goods from unscrupulous and criminal actors in the online marketplace and combat Organized Retail Crime (ORC).

CONCLUSION AND ADDITIONAL ISSUES

In addition to the concerns raised above, The Toy Association and its members are watching and aware of other ongoing and developing issues and encourage preemptive consideration of these issues as anti-counterfeiting policies are developed:

The increased reliance on online shopping in the age of COVID-19. As a result of stay-at-home orders, consumers' already growing reliance on online shopping has increased exponentially. This change in consumer buying behavior is not likely to be undone, particularly given the strain it has placed on traditional brick-and-mortar retailers, many of which have shuttered or transitioned to increased online sales.

The proliferation of social media marketplaces. As part of the growth and evolution of e-commerce, social media marketplaces are gaining in popularity. Social media marketplaces connect sellers and consumers from all over the world and allow counterfeiters direct access to unsuspecting consumers. From 2016 to 2019, counterfeit-goods listings on social media sites increased by about 171%.²³ These marketplaces are even more challenging to monitor than typical e-commerce marketplaces given the lack of vetting, the direct peer-to-peer connections and communications, and the prevalence of private groups on those platforms.

The increased availability of counterfeits through search engines. According to an INCOPRO study, when inputting a product name as a search term, up to 60 percent of the returned sites are either counterfeit or infringe upon intellectual property. The study reports that three in nine search results for a brand name baby teether included potentially harmful products that misuse the trademark.²⁴ Counterfeiters are using fake storefronts and the multitude of online marketplaces to compete with legitimate brands and put consumers in danger.

The increase of targeted advertisements. Targeted advertising is focused on certain traits so that the consumers who are likely to have a strong preference for a product will receive the message instead of those who have no interest and whose preferences do not match a product's attribute. These traits can be demographic (e.g., gender, economic status, age, education, or income level), psychographic (e.g., values, interests, lifestyle, personality), or behavioral (e.g., browser history, purchase history, and other recent activity). This allows counterfeiters to specifically target consumers with preference for the legitimate product or to target consumers more likely to be unsuspecting or susceptible to falsification.

The rise of fake reviews. Fake reviews are becoming more prevalent as sellers connect with individuals and offer them free product or other benefits for posting fake reviews. There are reports that there is now a vast black market of sellers offering free products, and in some cases commission, in exchange for fake five-star reviews.²⁵ Often the sellers use private social media groups to solicit potential reviewers with free product offers. This practice makes it even more challenging for consumers to vet the sellers from which they are purchasing.

The significant and serious issue of counterfeit and non-compliant products offered online seems only to be growing, thereby harming consumers, legitimate companies, and the American economy, while also encouraging criminal enterprise and funding terrorism. Despite the many challenges, The Toy Association has identified numerous potential solutions to combat each of these factors if stakeholders work collaboratively. The Toy Association looks forward to continuing its work with online marketplaces, legislators, its members, and consumers to combat this detrimental phenomenon.

*This report has been prepared by Meaghan H. Kent of Venable LLP working with and on behalf of The Toy Association and the members of its IP Steering Committee.

¹ Toy Industries of Europe, *EU Toy Safety: the problem of un reputable sellers on online marketplaces* (June 2020), <https://www.toyindustries.eu/wp-content/uploads/2020/06/Executive-Summary-Online-Marketplaces-6-1.pdf>

² BTHA, *Don't Toy with Children's Safety* (Oct, 2020), <https://www.btha.co.uk/wp-content/uploads/2020/10/Report-BTHA-Toy-Safety-Campaign.pdf>.

³ International counterfeit trade was \$509 billion in 2016, up from \$461 billion in 2013. OECD/EUIPO (2019), *Trends in Trade in Counterfeit and Pirated Goods, Illicit Trade*, <https://doi.org/10.1787/g2g9f533-en>.

⁴ GAO, *Intellectual Property: Agencies Can Improve Efforts to Address Risks Posed by Changing Counterfeits Market* (Jan. 2018), <https://www.gao.gov/assets/690/689713.pdf>.

⁵ The Toy Association, *1 in 3 Parents Don't Know that Counterfeit Toys are Lurking Online* (Nov. 2019) <https://www.prnewswire.com/news-releases/1-in-3-parents-dont-know-that-counterfeit-toys-are-lurking-online-300949751.html>.

⁶ National Retail Federation, *Consumer View Winter 2020*, <https://nrf.com/research/consumer-view-winter-2020>

⁷ U.S. Census Bureau, *Quarterly Retail E-commerce Sales: 2nd Quarter 2020* (Aug. 18, 2020), https://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf.

⁸ <https://www.npd.com/wps/portal/npd/us/news/press-releases/2020/the-npd-group-reports-on-first-half-2020-global-toy-industry-sales/>

⁹ Toy Association, *The Real Threat of Fake Toys: The increase of knockoff and counterfeit toys sold online and how to fight back*, <https://www.toyassociation.org/whitepapers/intellectual-property.pdf>.

¹⁰ Toy Industries of Europe, *EU Toy Safety: the problem of un reputable sellers on online marketplaces* (June 2020), <https://www.toyindustries.eu/wp-content/uploads/2020/06/Executive-Summary-Online-Marketplaces-6-1.pdf>

¹¹ BTHA, *Don't Toy with Children's Safety* (Oct, 2020), <https://www.btha.co.uk/wp-content/uploads/2020/10/Report-BTHA-Toy-Safety-Campaign.pdf>.

¹² Wall Street Journal, August 23, 2019, *Amazon Has Ceded Control of Its Site. The Result: Thousands of Banned, Unsafe or Mislabeled Products*, <https://www.wsj.com/articles/amazon-has-ceded-control-of-its-site-the-result-thousands-of-banned-unsafe-or-mislabeled-products-11566564990>.

¹³ Washington Post article, December 25, 2019, *Number of children swallowing dangerous magnets surges as industry largely polices itself*, https://www.washingtonpost.com/business/economy/number-of-children-swallowing-dangerous-magnets-surges-as-industry-largely-polices-itself/2019/12/25/77327812-2295-11ea-86f3-3b5019d451db_story.html

¹⁴ <https://fox6now.com/2018/12/28/mom-warns-others-after-boy-swallows-13-magnets-from-popular-kids-toy/>

- ¹⁵ Department of Homeland Security, *Strategic Framework for Countering Terrorism and Targeted Violence*, available at: https://www.dhs.gov/sites/default/files/publications/19_0920_plcy_strategic-framework-countering-terrorism-targeted-violence.pdf
- ¹⁶ UN Security Council, July 2019 Meeting Notes, *Cutting Off Access to Funds, Bolstering Criminal Justice Responses Key to Severing Terrorism-Organized Crime Link, Experts Tell Security Council*, <https://www.un.org/press/en/2019/sc13875.doc.htm>.
- ¹⁷ Michigan State University, A-CAPP Center Product Counterfeiting Database: Insights Into Converging Crimes, available at: <http://a-capp.msu.edu/a-capp-center-product-counterfeiting-database-insights-into-converging-crimes/>
- ¹⁸ National Commission on Terrorist Attacks Upon the United States, *Monograph on Terrorist Financing*, available at: https://govinfo.library.unt.edu/911/staff_statements/911_TerrFin_Monograph.pdf
- ¹⁹ *Counterfeiting & Terrorism*, 2016 Unifab Report, available at: https://www.unifab.com/wp-content/uploads/2016/06/Rapport-A-Terrorisme-2015_GB_22.pdf
- ²⁰ <https://www.nytimes.com/2007/02/12/business/worldbusiness/12iht-fake.4569452.html>
- ²¹ *Journal of Intellectual Property Law & Practice*, 2016, Vol. 11, No. 4, *Counterfeiting and Terrorism*, M. Schneider, available at academic.oup.com/jiplp/article-pdf/jpw022; see also <https://abcnews.go.com/Business/authorities-sale-counterfeit-sneakers-lead-terrorist-financing/story?id=49682960>;
- ²² https://www.dhs.gov/sites/default/files/publications/20_0124_plcy_counterfeit-pirated-goods-report_01.pdf
- ²³ ANDREA STROPPA ET AL., *INSTAGRAM AND COUNTERFEITING IN 2019: NEW FEATURES, OLD PROBLEMS* 41 (Apr. 9, 2019), https://ghostdata.io/report/Instagram_Counterfeiting_GD.pdf.
- ²⁴ INCOPRO, *How and why search engines must take responsibility for tackling counterfeits*, <https://www.incoproip.com/reports/how-and-why-search-engines-must-take-responsibility-for-tackling-counterfeiters/>.
- ²⁵ <https://www.kare11.com/article/money/consumer/five-fake-stars-inside-the-black-market-of-fake-amazon-reviews/89-999e39fc-658d-41ac-8e80-e0f07714752>



June 21, 2022

The Honorable Charles Schumer
Majority Leader
United States Senate
Washington, DC 20510

The Honorable Mitch McConnell
Republican Leader
United States Senate
Washington, DC 20510

The Honorable Nancy Pelosi
Speaker
U.S. House of Representatives
Washington, DC 20515

The Honorable Kevin McCarthy
Republican Leader
U.S. House of Representatives
Washington, DC 20515

RE: SUPPORT FOR SHOP SAFE & INFORM ACTS INCLUSION IN CHINA COMPETITION BILL

Dear Majority Leader Schumer, Republican Leader McConnell, Speaker Pelosi and Republican Leader McCarthy,

On behalf of the U.S. Toy Association, we write in strong support of your efforts to advance bipartisan legislation to strengthen the competitiveness of American workers and businesses and we urge you to ensure that the final competitiveness legislative package includes critical provisions from the America COMPETES Act to fight the growing threat of counterfeit products—the **SHOP SAFE Act** and the **INFORM Consumers Act**—both of which have garnered bipartisan and bicameral support.

The Toy Association, Inc. represents businesses across America that design, produce, and license toys and youth entertainment products. With over 900 members, the organization represents businesses of all sizes, from the smallest company just beginning its growth to the largest publicly traded companies. The annual \$38.2 billion U.S. domestic toy market with an annual U.S. economic impact of \$102.4 billion, supports an estimated 572,006 jobs (FTE) generating more than \$33.7 billion in wages for US workers.

Counterfeit products are an ongoing, growing and potentially devastating threat to the toy industry because of serious health and safety risks to children and families from the illicit trafficking of dangerous counterfeit toys¹ and significant financial harm to U.S. business. As the two largest publicly traded U.S.-based toy companies identified in their public filings, counterfeit products are a significant risk factor to their businesses because of the direct adverse effect of counterfeits on their financial condition and competitive position. Quite simply, U.S. businesses cannot compete with counterfeiters because of the

¹ As discussed in our 2020 white paper [Taking Fake Toys Offline: A 2020 Focus on Proactive Measures to Reduce Counterfeits and Unsafe Toys Sold on Online Marketplaces](#).

quality of materials, the cost of safety assurance testing, and other costs associated with bringing a legitimate and safe product to market.

The Volume of Counterfeits Online is Staggering and Growing

The current system places no responsibility on the seller or marketplace and has allowed for ever-growing numbers of counterfeit products offered on online marketplaces.

- A small toy company based in the Southeast, logs on average over 7,000 instances of products counterfeits monthly across at least 15 major platforms and numerous smaller platforms. They have shifted resources to dedicate three fulltime employees and three seasonal employees, who frequently spend nights and weekends in peak holiday shopping season, to searching online platforms and submitting take down notices.
- One small toy company based in the Northeast explained that it found 1,000 listings over six online marketplaces in a single week.
- A mid-size toy company with headquarters in the Midwest takes down hundreds of counterfeit products each week across 10 online marketplaces.
- A large toy company with its U.S. headquarters in the Northeast explains that it delisted approximately 160,000 items last year.
- A large toy company with U.S. headquarters in California explains that each month for a single brand, it takes down on average 1,000 counterfeit items from online marketplaces targeting the U.S. market. They explain that this is merely the tip of the iceberg because finding all counterfeits is cost prohibitive.

Fighting Counterfeits Takes Significant Resources and Causes Real Harm

The current system places no responsibility on the seller or the marketplace to prevent or police counterfeits. Instead, it requires that companies scour online marketplaces and investigate, report, and prove infringement to the marketplace. This requires significant resources that undercut businesses' financials, stifle growth, harm competitive positions, and thwart small business success.

- One small toy company based in the Northeast, explains that as a result of counterfeits, their sales have declined precipitously.
- A small toy company based in the Southeast, began "test purchases" from online marketplaces after receiving complaints from consumers that had unknowingly purchased counterfeits of one of their popular holiday gifts. Test purchases revealed contents of the counterfeits to include deteriorating and dirty pieces, possibly used hair accessories, and other items posing small parts/choking and sanitary hazards.
- A mid-size toy company based in the Midwest estimates that over the past six years, the cost to protect their brand and the negative impact on revenue, including damage to the brand reputation as consumers have bad experience with inferior counterfeit products, is millions of dollars. Indeed, in 2018, their business was severely jeopardized by an unsafe product sold online when a child was severely injured, and the knock-off product was falsely attributed to their company. The company worked tirelessly to clear their name and still address the damage to their brand from this incident today.
- A large toy company with its U.S. headquarters in the Northeast explains that it spends over \$2million annually on global online enforcement, with two full-time staff dedicated to working on the issue.

- A large toy company with U.S. headquarters in California dedicates two employees each spending 10-15 hours per week searching online platforms and submitting take down notices.
- A large toy company with U.S. headquarters in California shares that in addition to dedicating multiple staff, it must hire outside vendors at a cost of over \$150,000 per year and license software that facilitates monitoring for counterfeits at a cost of over \$100,000 per year.
- A mid-size toy company based in the Midwest explains that they have dedicated two employees each spending over 25 hours weekly to searching online platforms and submitting take down notices. They also hired an outside vendor specializing in online takedowns at significant cost.

Action Must be Taken

Unless action is taken to change the system, this problem will continue unabated. As one large toy company explained, if no action is taken, it can easily be forecast that in 5-10 years, generic unregulated products shipped from overseas will be the mainstay, leaving the U.S. consumer with no guarantees as to safety or quality, and U.S. companies without protection for their intellectual property, and the economy beholden to counterfeiters and foreign manufacturers.

The time for action to curb the flow of counterfeits and protect American businesses as well as the safety of children and families is now. On behalf of the more than 900 businesses represented by the Toy Association we urge the inclusion of INFORM Consumers and SHOP SAFE in the competitiveness package as a significant legislative step to combating this problem.

Sincerely,



Steve Pasierb
President & CEO



Chris Netram
Vice President, Tax and Domestic Economic Policy

Nov. 1, 2021

The Honorable Richard J. Durbin
Chair
Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Charles E. Grassley
Ranking Member
Senate Committee on the Judiciary
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Durbin and Ranking Member Grassley:

On behalf of the National Association of Manufacturers, I write in appreciation of your bipartisan efforts to address the growing tide of fake and counterfeit products that are impacting manufacturers, consumers and others. The NAM is the nation's largest industrial trade association representing nearly 14,000 manufacturers, large and small, in every industrial sector and in all 50 states.

Manufacturers are deeply concerned about growing sales of fake and counterfeit products, particularly online, which cost the U.S. economy nearly \$131 billion and more than 325,000 jobs in 2019 alone.¹ Counterfeiting has harmed manufacturers, American workers and consumers for years. The problem has only gotten worse with the explosive growth of e-commerce. The COVID-19 pandemic further highlighted the danger of counterfeit products, as bad actors abused online platforms to peddle fake tests, dangerous vaccines and ineffective personal protective equipment.

Although counterfeiting affects manufacturers of all sizes, this problem can be particularly devastating for small and medium-sized manufacturers, harming their ability to expand, hire and invest in their communities. These businesses, which actively use e-commerce platforms to reach customers, have fewer resources available to monitor illicit activity on a growing range of online platforms and are less able to absorb the blow when their signature products are targeted by counterfeiters utilizing these platforms. For these manufacturers, it is critical to ensure that e-commerce platforms take proactive steps to keep counterfeit products off of their platforms.

This growing problem is why the NAM has led the charge for manufacturers in their fight against fake and counterfeit goods. In its July 2020 white paper² the NAM laid out a series of specific policy solutions that the U.S. government should adopt to address the issue: (1) requiring e-commerce platforms to reduce the availability of counterfeits; (2) modernizing enforcement laws and tactics to keep pace with counterfeiting technology; (3) streamlining government coordination to tackle counterfeit items; and (4) empowering consumers to be aware of, and avoid purchasing, dangerous counterfeit goods.

As part of these efforts, the NAM has called repeatedly on Congress and the administration to require e-commerce platforms to take clear, specific steps to prevent the sale of counterfeits by third-party sellers and to better inform consumers about the risks of purchasing and using these products. The NAM has actively worked with key champions in Congress, including members of

¹ National Association of Manufacturers, Countering Counterfeits: The Real Threat of Fake Products (July 2020), <https://www.nam.org/wp-content/uploads/2020/07/CounteringCounterfeits.vF.pdf>.

² *Id.*

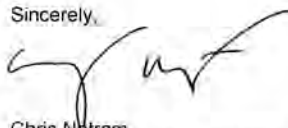
the Senate Judiciary committee, to craft strong, effective legislation to meet these goals, including:

- **SHOP SAFE Act (S. 1843 / H.R. 5374):** Manufacturers support the bill's approach of implementing a clear, broad liability framework for e-commerce platforms that would directly incentivize e-commerce platforms to utilize and continue to improve on best practices to prevent the entry of counterfeit products onto their platforms. Manufacturers also support steps to strengthen the legislation further to ensure that it: (1) provides clear actions that e-commerce providers must take to keep counterfeiters and their products off their platforms that are specific and implementable, while also ensuring sufficient flexibility to allow platforms and manufacturers to adapt to evolving counterfeiting tactics; (2) captures as broad a scope of potential products that may harm businesses and consumers as reasonably possible and works to ensure consistent implementation across platforms; (3) incorporates strong requirements for platforms to communicate with consumers on counterfeit products.
- **INFORM Consumers Act (S. 936 / H.R. 5502):** Manufacturers also support this bill's thoughtful, targeted approach, ensuring that online marketplaces that host third-party sellers verify annually the identity of high-volume sellers and disclose to consumers basic identification and contact information for these sellers. Manufacturers believe this legislation is, and must continue to be, strong and effective, and would further support additional improvements in the bill to ensure that it remains strong, including: (1) further lowering bill thresholds in ways designed to minimize loopholes for counterfeiters; (2) requiring high-volume sellers to attest affirmatively that their products are authentic and authorized for sale; (3) boosting retention of vendor records by platforms to enable good-faith enforcement efforts; (4) providing consumers with clearer information about who is fulfilling their orders; and (5) strengthening resources and tools for consumers to report suspicious or counterfeit activity and ensure that these provisions build on (and do not interfere with) implementation of existing platform programs and efforts to take action against counterfeits.

The threats posed by fake, dangerous and counterfeit goods underscore the need for swift Congressional action. Both of these pieces of legislation represent critical, and complementary, steps to help all parties better counteract that threat. Manufacturers look forward to working with your committee and other Congressional voices to advance and refine these legislative tools, as well as to pursue additional legislative actions that can effectively tackle the growing tide of online counterfeit products.

On behalf of the millions of men and women who make things in America, thank you for your attention to this important issue. We would welcome the opportunity to engage further with you to advance meaningful solutions to fight counterfeiting.

Sincerely,



Chris Netram
Vice President, Tax and Domestic
Economic Policy
National Association of Manufacturers



November 1, 2021

Senator Richard Durbin
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Senator Charles Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Re: Committee on the Judiciary Hearing on “Cleaning Up Online Marketplaces: Protecting Against Stolen, Counterfeit, and Unsafe Goods” on Tuesday, November 2, 2021

Dear Chair Durbin and Ranking Member Grassley,

Consumer Reports¹ (CR) is pleased the Committee is holding a hearing this week to examine the proliferation of unsafe counterfeit goods online. Current law governing online marketplaces broadly fails to provide sufficient incentives for platforms to design their products responsibly, to proactively reduce the sale of counterfeit goods, or to prevent further related abuses, such as artificial amplification and fake reviews that exacerbate the potential for harm to consumers. Effectively addressing this danger is crucial to consumer confidence and safety in the marketplace.

Counterfeits & Consumer Harms

Consumer Reports has been dedicated to keeping consumers safe and informed in the marketplace since our founding 85 years ago. Last year, the House Consumer Protection Subcommittee hearing (“Buyer Beware: Fake and Unsafe Products on Online Marketplaces”), at which CR testified, detailed many of the risks and harms that counterfeit products sold online

¹ Consumer Reports (CR) is a nonprofit membership organization that works side by side with consumers to create a fairer, safer, and healthier world. For 85 years, CR has provided evidence-based product testing and ratings, rigorous research, hard-hitting investigative journalism, public education, and steadfast policy action on behalf of consumers’ interests, including advocating for effective laws to ensure that products sold to consumers are safe. Unconstrained by advertising or other commercial influences, CR has exposed landmark public health and safety issues and strives to be a catalyst for pro-consumer changes in the marketplace. From championing responsible auto safety standards, to winning food and water protections, to enhancing healthcare quality, to fighting back against predatory lenders in the financial markets, Consumer Reports has always been on the front lines, raising the voices of consumers.

pose to consumers.² The year since has brought those issues into even sharper relief, and made it clear that more can and must be done to mitigate these harms.

As CR highlighted last spring, the sale of unsafe counterfeit goods online poses a demonstrable and unacceptable threat to consumer safety. A 2019 survey from Incopro and Sapio Research of more than 1,000 American consumers conducted just months before the pandemic revealed that more than one in four respondents “have been fooled into buying fake goods over the past 12 months”—and this was even before the boom of online shopping during the COVID-19 crisis.³

Counterfeits can harm consumers’ safety or health, rip them off financially, and otherwise fail to deliver on what consumers reasonably thought they were buying—all in one transaction. A CR nationally representative survey of more than 2,000 U.S. adults highlighted that during the earlier months of the pandemic, about nine in ten consumers agreed that “the internet makes it easy for today’s consumers to quickly find the products and services they need,” but more than one in three did *not* believe that “consumers today can trust that the products and services they buy will not cause physical harm to them or their family members.”⁴ Meanwhile, according to another CR survey conducted in June 2020, six in ten consumers said that, “Feeling a product or service is safe and will not cause you or any family members physical harm” was a top priority when deciding which products or services to purchase—and three in ten said it was their #1 top priority.⁵ Because consumers increased their online shopping during the COVID-19 pandemic, the fact that a significant portion of consumers do not feel they can trust the marketplace to be safe highlights a considerable concern.

In 2018, CR published a guide for consumers on how to avoid buying counterfeit products online, advising them to take several different steps to ascertain whether a product is legitimate or counterfeit. The steps we recommend—including researching the seller, being wary of discounts, scanning the customer reviews, examining the product’s packaging, and knowing the hallmarks of the real product—represent useful advice.⁶ These steps also can be

² CR’s March 4, 2020 testimony is available online here:

<https://advocacy.consumerreports.org/research/testimony-of-david-friedman-vice-president-advocacy-consumer-reports-for-u-s-house-hearing-on-fake-and-unsafe-products-on-online-marketplaces/>.

³ WWD, “Survey Reveals Number of Shoppers Buying Counterfeit Goods” (Dec. 6, 2019) (online at: wwd.com/business-news/retail/incopro-consumer-survey-1203388913)

⁴ May 2020 Consumer Reports American Experiences Survey

⁵ June 2020 Consumer Reports American Experiences Survey

⁶ CR, “How to Avoid Buying Counterfeit Products Online” (Dec. 7, 2018) (online at: www.consumerreports.org/online-shopping/how-to-avoid-buying-counterfeit-products-online).

time-consuming, and in the case of sophisticated sellers of counterfeits, ineffective. From the examples we share below it is clear that greater consumer awareness, alone, is inadequate.

The dangers that counterfeit products pose to consumers span a variety of goods: from airbags,⁷ car seats,⁸ and bicycle helmets⁹ designed to keep families safe on the road, to the phone chargers we use every day.¹⁰ However, the potential danger to consumer health from the proliferation of counterfeit goods online is made especially acute by the COVID-19 crisis. Since the beginning of the pandemic, *millions* of counterfeit N-95 masks have been seized¹¹—masks that, if worn but not functional as N-95s, would pose obvious and significant risks to the wearer and to those around them. A year into the pandemic, the New York Times *still* had to release a guide to buying real N-95 masks, highlighting dangerous counterfeits still available on Amazon (and potentially other online retailers) with the potential to harm consumers.¹² The pandemic makes clear that potential harms can come not just from the direct sale of counterfeit products directly to consumers, but also when duped employers and healthcare organizations supply counterfeit masks and personal protective equipment (PPE) to frontline workers.¹³

Such concerns are not limited to masks, hand sanitizer and PPE. Experts and even the Food and Drug Administration (FDA)¹⁴ have raised concerns about the proliferation of fraudulent COVID vaccines.¹⁵ The propagation of such schemes is supported by the advertisement of those schemes. Indeed, as CR reported last year, Facebook previously approved ads that would have spread COVID-19 misinformation.¹⁶

Intermediary Liability: Platforms Lack Sufficient Incentives to Address Consumer Harms

Tuesday's hearing can help highlight potential solutions to one of the main roots of the problem the Committee seeks to address: a lack of online platform accountability. Addressing the harms that online platforms contribute to and profit from will take the combined efforts of

⁷ NHTSA, "Traffic safety agency urges vehicle owners and repair professionals to use only certified, original equipment replacement parts," press release (Oct. 10, 2012) (online at: [www.vehiclehistory.gov/NHTSA%20Alerting%20Consumers%20to%20Dangers%20of%20Counterfeit%20Air%20Bags%20National%20Highway%20Traffic%20Safety%20Administration%20\(NHTSA\).pdf](http://www.vehiclehistory.gov/NHTSA%20Alerting%20Consumers%20to%20Dangers%20of%20Counterfeit%20Air%20Bags%20National%20Highway%20Traffic%20Safety%20Administration%20(NHTSA).pdf)).

⁸ <https://www.cnn.com/2019/12/20/tech/amazon-fake-kids-products/index.html>

⁹ CR, "Bike Helmets That Don't Meet Safety Standards Are Widely Available, Consumer Reports Finds" (July 1, 2019) (online at: www.consumerreports.org/bike-helmets/bike-helmets-that-dont-meet-federal-safety-standards-arewidely-available/).

¹⁰ <https://www.consumerreports.org/online-shopping/how-to-avoid-buying-counterfeit-products-online/>

¹¹ <https://www.cbsnews.com/news/n95-masks-fake-seized/>

¹² <https://www.nytimes.com/2021/02/17/technology/personaltech/buy-real-n95-mask.html>

¹³ <https://www.npr.org/2021/03/01/972597317/hospitals-struggle-to-steer-clear-of-counterfeit-masks>

¹⁴ <https://www.fda.gov/consumers/consumer-updates/beware-fraudulent-coronavirus-tests-vaccines-and-treatments>

¹⁵ <https://news.northeastern.edu/2020/12/03/how-to-spot-a-fake-counterfeit-covid-19-vaccines/>

¹⁶ <https://www.consumerreports.org/social-media/facebook-approved-ads-with-coronavirus-misinformation/>

Congress, federal agencies, and their state and local counterparts, in addition to much more serious efforts by online marketplaces to ensure consumer safety on their platforms.

Last year's introduction of the SHOP SAFE Act and this year's reintroduction of the INFORM Consumers Act demonstrate that lawmakers understand that online marketplaces lack sufficient incentives to address counterfeit products and accountability for third party sellers. Internet platforms clearly have the capacity to do more to combat counterfeits and other online harms. While they bear some goodwill costs for providing a bad experience to users, they do not shoulder their appropriate share of the societal and economic costs from the harms these products can cause. Online platforms still fail to do enough to prevent and combat unsafe counterfeits today, even though existing case law is *already* contingent upon some "reasonable" response and investment in mitigation.

More broadly, one prominent gap in online platform accountability for preventing and mitigating harms to consumers online is Section 230 of the Communications Decency Act. While Section 230 makes it possible for platforms to moderate content in the first place, it does nothing to actively *encourage* that moderation.¹⁷ Importantly, because intellectual property law (which includes trademark law) was specifically exempted from Section 230, the legal landscape of online commerce that the SHOP SAFE Act addresses is based on existing case law—most notably, *Tiffany (NJ) Inc. v. eBay Inc.*¹⁸ This precedent already holds platforms to a higher standard—one where they *could* be held liable if they fail to take appropriate or reasonable steps, once notified, to address the sale of counterfeits—than does Section 230, which, governing most of the rest of the internet, requires no such efforts at all.¹⁹

Section 230, in its present form, shields platforms from potential intermediary liability for most other harms, even while misinformation and harassment harming consumers both on and offline run rampant, often accelerated by the profit-driven and engagement-driven design of many online platforms.²⁰ Just as the current case law for contributory trademark infringement fails to incentivize enough action by online marketplaces to protect consumers from unsafe counterfeits, current case law under Section 230 also fails to protect consumers from broader online harms.

¹⁷<https://www.consumerreports.org/federal-laws-regulations/what-is-section-230-communications-decency-act/>

¹⁸ *Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93 (2d Cir. 2010).

¹⁹ 47 U.S.C. § 230(c)

²⁰ Munn, L., "Angry by design: toxic communication and technical architectures." *Humanit Soc Sci Commun* 7, 53 (2020). <https://doi.org/10.1057/s41599-020-00550-7>, see also Prerna Juneja and Tanushree Mitra, "Auditing E-Commerce Platforms for Algorithmically Curated Vaccine Misinformation" Proceedings of the 2021 CHI Conference on Human Factors in Computing Systems. Association for Computing Machinery Article 186, 1–27 (2021). <https://doi.org/10.1145/3411764.3445250>

We would further highlight that present Section 230 protections may have already contributed indirectly to the harms that the SHOP SAFE Act seeks to ameliorate. For instance, given Section 230 liability shields, platforms have had few legal incentives to remove millions of fake accounts—many of which may have been promoting or engaging with and amplifying counterfeit goods to artificially boost their visibility—or to handle the thoroughly documented proliferation of fake reviews—that boost counterfeit goods or denigrate legitimate ones.

Indeed, if anything, platforms today have material *disincentives* to moderate deceptive and harmful activity: investing in comprehensive platform moderation is expensive,²¹ while fake reviews, inflated view-counts, fake accounts, and other deceptive social engagement artificially amplify the metrics by which platforms are judged by the users, investors, and advertisers that drive platforms' bottom lines. Without strong counter-incentives, platforms cannot be trusted to govern themselves to standards adequate to protect their users from harm.

* * *

Legislative Components to Consider

We welcome the Committee's attention to these key issues for consumers. There are a few elements CR would recommend the Committee strongly consider as it evaluates legislative solutions—as proposed in the SHOP SAFE Act, the INFORM Consumers Act, and otherwise—seeking to address platform liability for counterfeits in online marketplaces.

First, that consumers shopping online require transparency in the origins of their purchases, consistent access to clear lines of communication with third party sellers from whom they purchase goods, and the ability to hold those sellers accountable for counterfeit goods—and platforms should ensure these safeguards when they connect third-party-sellers and consumers on online marketplaces.

Second, that any data that platforms or third-parties would need to collect for heightened transparency and accountability measures be limited to the discrete use-case for which it is collected and be protected with appropriate information security measures.

²¹ Paul M. Barrett, "Who Moderates the Social Media Giants? A Call To End Outsourcing" NYU Stern Center for Business and Human Rights (June 2020), <https://blhr.stern.nyu.edu/tech-content-moderation-june-2020>; Deepa Seetharaman, "Facebook Throws More Money at Wiping Out Hate Speech and Bad Actors" The Wall Street Journal (May 15, 2018), <https://www.wsj.com/articles/facebook-throws-more-cash-at-a-tough-problem-stamping-out-bad-content-1526393256>.

Third, that the degree of liability and accountability expected of platforms be commensurate with the impact on consumers, and with available resources, in order to ensure a competitive online marketplace for consumers to choose products and services from, and avoid further entrenching the most dominant players.

Fourth, that incentives toward platforms more proactively screening for counterfeit goods do not mandate that such screening take place prior to content being uploaded, as this may disproportionately over-moderate consumer products that are genuine and safe for consumers.

Fifth and finally, that any such legislation establishes strong counter-incentives for fraudulent or overreaching reporting of content as problematic when it is not, in order to prevent unintended abuses of systems intended to protect consumers.

* * *

The spread of dangerous counterfeit products, and the platform designs that accelerate and amplify the sale of these products, leads to consumer harm. Online platforms must be better held to account for the sale of harmful and dangerous products, and given effective incentives to prevent or mitigate these harms to the fullest extent feasible. Efforts like the SHOP SAFE Act and INFORM Consumers Act offer promising approaches to addressing some of these important concerns, and we look forward to working with this Committee and others to develop and implement effective solutions to meet this challenge of our time and ensure a safe online marketplace for American consumers.

Sincerely,

Laurel Lehman
Policy Analyst

cc. Members of the Senate Committee on the Judiciary


FENDER MUSICAL INSTRUMENTS CORPORATION

311 Cassia Circle, Corona, CA 92880 - U.S.A.
Tel 951-896-4000 / www.fender.com

November 2, 2021

Dear Senator(s),

Fender Musical Instruments Corporation (FMIC) is the world's leading manufacturer of guitars, basses, amplifiers and related equipment. An American icon, Fender was born in Southern California and has built a worldwide influence extending beyond the studio and the stage. A Fender is more than an instrument; it's a cultural symbol that resonates globally. With an illustrious history dating back to 1946, Fender has touched and transformed music worldwide and in nearly every genre: rock 'n' roll, country and western, jazz, hip-hop, R&B, soul, rhythm and blues, and many others. Fender manufactures and distributes everything guitarists and bassists need, from instruments, amplifiers, strings and accessories to professional audio products.

FMIC whose portfolio of owned and licensed brands includes Fender®, Squier®, Gretsch® guitars, Jackson®, EVH®, Charvel® and Bigsby®—follows a player-centric approach to crafting the highest-quality instruments and digital experiences across genres. Since 2015, Fender's digital arm has introduced a new ecosystem of products and interactive experiences to accompany players at every stage of their musical journey; this includes innovative apps and learning platforms designed to complement Fender guitars, amplifiers, effects pedals, accessories and pro-audio gear, inspiring players through an immersive musical experience. FMIC is dedicated to unlocking the power of musical expression for all players, from beginners to history-making legends. In 2021, Fender celebrates 75 years of giving artists "wings to fly," carrying on the vision of its founder, Leo Fender, and connecting players through a shared love of music.

Fender maintains corporate headquarters and studio production offices in Hollywood, with manufacturing facilities and the Fender Custom Shop in Corona, California. Fender corporate offices in Hollywood and Scottsdale, AZ coordinate its administration, marketing, advertising, sales and export operations in the United States and its international facilities in England, France, Germany, Japan, Mexico, Australia, Latin America, the Netherlands, Spain and Sweden. Within Fender global manufacturing, the company is focused on delivering operational excellence to the business and its customers by promoting collaboration, building trust, and setting high standards. Usually made from North American alder or maple, each instrument involves over one hundred pairs of hands in the shaping and smoothing processes.

Since 1987, the Fender Custom Shop and its esteemed builders have astounded players and collectors worldwide with marvels of creativity, ingenuity and artistry. From its humble beginnings, the Fender Custom Shop has grown to become the world's preeminent maker of highly collectible, custom instruments. Known as the "Dream Factory," the Fender Custom Shop is also home to an honored group known as the Master Builders – some of the most-skilled luthiers in the




FENDER MUSICAL INSTRUMENTS CORPORATION

311 Cassina Circle, Corona, CA 92880 - U.S.A.
Tel 951-898-4000 / www.fender.com

world – who craft Fender’s legendary instruments and push the boundaries of possibility. As the epicenter of innovation at Fender and the pinnacle of the brand, ideas and production techniques devised in the Fender Custom Shop for both Masterbuilt and Teambuilt guitars go on to inspire and influence Fender’s other production line models.

The COVID-19 pandemic highlighted many ways in which people have been able to communicate from a quarantined “stage”. According to the results of a study, “Fender’s New Guitar Player Landscape Analysis,” an incredible 7% of the U.S. population ages 13-64 (approx. 16 million people) started to learn guitar in the last two years, with 62% citing COVID-19 and the associated lockdowns as a major motivator. For many, social media and online video platforms allowed individuals and artists to share their music with the world. With these new online connections Fender has been introduced to so many new customers and has reignited a passion for music in those already a part of the Fender culture. This past year has seen tremendous growth for Fender online, through both our subscription-based guitar learning app, Fender Play and authorized Fender dealers. Yet, as we continue to grow, the attacks against our brand continue to mount, and like many other manufacturers, the cost is borne predominantly by the manufacturer.

In 2021 alone Fender, in conjunction with our third-party enforcement company, has flagged nearly 32,000 online listings of Fender products for potential trademark infringement, with nearly 70% of those believed to be counterfeit products. Most of these flagged listings come out of China.

Like many other iconic companies, Fender works proactively to prevent fraudulent or counterfeit products from entering the stream of brick and mortar and e-commerce. A counterfeited product robs the consumer of that authentic good, experience, and in this case, the authentic Fender sound that has been perfected and elevated through hard work and innovation. Moreover, the consumer who buys a counterfeited good is not receiving the safest products. Fender guitars and amps have many electrical components and use unique woods to craft the neck and body. Fender has undertaken years of testing, configurations, and sustainable material sourcing, all at a high expense as the manufacturer, an expense worth undertaking to ensure we put out the best products imaginable.

Fender supports congressional action for the prevention of counterfeit products and sales taking place in the online marketplace. As a small manufacturer, Fender works with online vendors for the sale of our goods. These online marketplaces provide a place for Fender-authorized dealers to sell Fender gear, and in some cases, for Fender to directly sell to the consumer. Both the consumer and the manufacturer place trust in the online marketplace to ensure community standards, trademark enforcement, and safety standards are reflected in the sellers on their website.




FENDER MUSICAL INSTRUMENTS CORPORATION

311 Cassia Circle, Corona, CA 92880 - U.S.A.
Tel 951-898-4000 - www.fender.com

Challenges facing manufacturers like Fender come in the way of trademark enforcement. Oftentimes it is difficult for Fender to get the third-party seller information when a good is flagged as potentially counterfeit. While many online marketplaces have mechanisms to flag products, from a manufacturers and trademark holder perspective the communication and length of time in which to remove these products is extensive. While Fender hires a third party to be a brand protection provider, it is only part of the puzzle. Fender cannot go after the counterfeit good if we cannot get information from the online marketplace as to who is selling those goods on their website. Often, these fraudulent sellers work anonymously through these online marketplaces, and as soon as one item is flagged, it pops up again with a minor change made to the listing. This becomes a lengthy and time-consuming matter to address, generally at the cost of the manufacturer. This lack of transparency becomes the biggest obstacle to counterfeit enforcement in the online marketplace.

In conclusion, Fender appreciates the attention that Congress has placed upon this issue. Protecting consumers starts with protecting the manufacturers who have built a name by putting out the best and safest products. By working together with online marketplaces, manufacturers and trademark-holders can proactively work toward preventing counterfeit goods from entering the stream of commerce, while also reactively working together to track down fraudulent sellers. When manufacturers and online marketplace vendors come together like this, the consumer is the ultimate winner.

We appreciate your support.

Sincerely,

Edward Magee
Executive Vice President, Operations
and Co-President Fender Play Foundation



Spice



Big-hy



Jonathan E. Johnson III
 Chief Executive Officer
 Overstock.com, Inc.
 799 W. Coliseum Way
 Midvale, UT 84047
 Phone: (801) 947-3100
johnson@overstock.com

October 28, 2021

The Honorable Senator Mike Lee
 United States Senator
 361A Russell Senate Office Building
 Washington, DC 20510

Via email

RE: Committee on the Judiciary Hearing, Tuesday, November 2, 2021 – Online Marketplaces: Protecting Against Stolen, Counterfeit, and Unsafe Goods/.

Dear Senator Lee:

Next Tuesday, the Judiciary Committee will hold a hearing to discuss and hear evidence concerning protecting against stolen, counterfeit, and unsafe goods sold online.

Overstock has been tracking the two bills now before Congress addressing these concerns. Their aim is good; however, in their current form, they fail to accomplish the targeted protections, and they lack necessary guardrails to assure they do not hit unintended targets.

Fortunately, the remedy to the current language of each bill is relatively simple and sensible amendments. We ask you to make this letter available to the Committee for serious consideration of its content.

The INFORM Consumers Act

The Need for a Safe Harbor for Curated Marketplace Platforms.

The INFORM Consumers Act (the "INFORM Act") aims to combat the online sale of stolen, counterfeit, and dangerous consumer products. This purpose is good; however, the Act's "one-size-fits-all-markets" approach is not.

It fails to recognize there are two distinct types of e-commerce platforms. As a result, the INFORM Act threatens to do more harm to online companies, like Overstock.com, which strongly vets sellers before they are ever allowed to sell on our platform. While there are

many other loosely constructed seller platforms, we are a “curated” online marketplace, meaning: We do not list or tolerate sellers engaged in the conduct targeted by the INFORM Act.

There are, of course, “non-curated” online marketplace models, and these, we believe, are problematic sources for consumers purchasing on these platforms, and they ought to be the principal focus of the remedies these bills suggest.

In other words, we believe that any bill aimed at these problems ought to distinguish between “curated” and “non-curated” markets and establish a “Safe Harbor” for curated marketplaces which follow identified, sound procedures in reviewing sellers before they are allowed onsite and then afterwards monitor and enforce seller-compliance.

To give you an idea of what we mean by “curated,” let me outline briefly the process Overstock.com follows before allowing a seller and the seller’s products on our platform:

1. We perform an Office of Foreign Assets Control check,
2. We verify the seller’s identity and resale certificates,
3. We confirm they have a U.S. presence, and a US federal tax ID number.

Many sites do some or all these things, but more do not.

In addition, Overstock.com also cultivates strong relationships with both its customers and sellers by assuring that all products we sell are first thoroughly curated by a vigorous product review, are subject to established supplier agreements, and that all consumer sales are backed by Overstock’s 24/7, U.S. based customer service team, with actual people on the other end of the line.

As a result, Overstock.com enjoys some of the highest customer satisfaction ratings in the industry. These are the characteristics and practices of “curated” online marketplace platforms.

Concerns with the Present INFORM Act Language Requiring Detailed Seller Information Disclosure

As drafted, the INFORM Act will have a decisive anti-competitive effect: it mandates public disclosure of our sellers’ names and contact information – meaning that we would be forced to provide our competition with a convenient list of all our suppliers and our pricing, including to those marketplaces the INFORM Act intends to target. Amazon’s press release supporting the unamended INFORM Act almost makes this point for us. We were not at all surprised to see Amazon, the largest online retailer, support any bill that would provide them with a competitor’s seller information. This provision alone would propel Amazon further into a de facto monopoly—pushing out smaller retailers by Amazon’s prompt use of this information.

We hope Congress finds no comfort in Amazon's enthusiastic support of this measure without first seeing to it that an amendment takes away the anticompetitive effects of the current language.

And setting the matter of Amazon's support aside, I cannot emphasize enough that this single provision, this forced disclosure of seller information by curated marketplaces will do more to advance questionable online businesses than any other provision suggested to the Committee in either of the two bills – it will diminish our investment in the high value we are currently providing customers on our site. Certainly, both sellers and consumers will be confused about which products are coming from curated, full-service marketplaces, and which are coming from someone's garage. These likely results are all anticompetitive, unacceptable, and unwise.

Accordingly, we strongly suggest avoiding the adverse, anticompetitive consequences of the current language in the INFORM Act, by establishing a "Safe Harbor" provision for curated marketplaces which follow sensible vetting and monitoring practices before allowing and keeping their sellers and their sellers' products onsite. This can be accomplished either through definitional changes or express safe harbor language outlining the minimum "best practices" which would allow a platform to avoid outright disclosure of their seller information and the resulting harms we have outlined. And still, the bill would achieve the aimed-at correction of problems about which the Committee is concerned. We would be pleased to provide suggested language.

Alternatively, though a Safe Harbor is the most practicable solution, we would be pleased to work with the Committee to find ways in which the current language of the bill would be less harmful and disruptive to curated marketplaces which already protect their customers from stolen, counterfeit, and unsafe goods.

The SHOP SAFE Act

There is commonality of some of these same concerns with the SHOP SAFE Act of 2021.

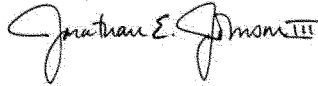
For example, the SHOP SAFE Act also requires the open disclosure of detailed seller information, and it also fails to distinguish between curated and non-curated marketplaces. I won't repeat here the concerns stated above, except to say that these same provisions in the SHOP SAFE Act will have the same clear anticompetitive effects we noted above – penalizing those curated marketplaces which do their homework, and police their ranks, while aiding those platforms that don't.

Second, we have concerns that the "health and safety" definition in the SHOP SAFE Act is unnecessarily broad and changes a trademark bill into a products liability bill. There are other very clear problems this overbroad language presents, and we would be pleased to work on refining the definition, so as not to cause the adverse and unintended effects of the present definition.

Third, some sections of the SHOP SAFE Act are vague, overbroad, and undefined. And to make things worse, the determination of what is meant in these sections, such as in the sections dealing with Artificial Intelligence counterfeiting, and the termination policy for repeat offenders and exclusionary screening, is left to the courts, which means that proper compliance will be left uncertain and unknown until a court, many years hence, might decide what these sections mean. These, and other sections, in the SHOP SAFE Act would benefit from more narrow, bright-line language, which will greatly decrease the uncertainty and unnecessary costs of drawn-out court battles.

At your convenience my staff and I are available to discuss these bills and the important changes we have outlined.

Sincerely,

A handwritten signature in black ink, reading "Jonathan E. Johnson III". The signature is written in a cursive, flowing style with a large initial "J" and a distinct "III" at the end.

Jonathan E. Johnson III
Chief Executive Officer



October 22, 2019

PRESIDENT

Jeff Landry
Louisiana Attorney General

PRESIDENT-ELECT

Tim Fox
Montana Attorney General

VICE PRESIDENT

Karl A. Racine
*District of Columbia
Attorney General*

IMMEDIATE PAST PRESIDENT

Derek Schmidt
Kansas Attorney General

EXECUTIVE DIRECTOR

Chris Toth

Scott Schenkel
eBay Interim Chief Executive Officer
2025 Hamilton Avenue
San Jose, California 95125

Mr. Schenkel:

Social media and digital platforms have become interwoven into the fabric of our society. Consumers have become increasingly dependent on the broad access to goods for sale through these mediums. Unfortunately, the near-unlimited access to goods has increasingly exposed consumers, including minors, to unlicensed sales of alcohol and counterfeit products. We are seeking your assistance to address some of the challenges to consumer protection associated with online marketplaces and to improve the legitimacy of these sales.

We are aware of the occurrence of unlicensed, unregulated, and untaxed alcohol sales through digital platforms. Some of the products sold in this manner may be counterfeit, mislabeled, or fraudulent. The consumer may not know that this method of alcohol sales is illegitimate, or that these black-market products could pose health risks. Bad actors may exploit the anonymity of a digital platform to evade regulation, law enforcement, taxation and responsibility.

The 21st Amendment to the U.S. Constitution firmly invests the right to regulate the sale of alcoholic beverages with each state. Each online content company operating within the United States has a legal obligation to comply with federal and state law. But that is simply a legal obligation. We believe that everyone has an ethical and moral responsibility to protect consumers, especially those who are most vulnerable to fraud. Self-regulation and self-policing to prevent illegal and unfair trade practices and ensure consumer safety are minimum responsibilities for your respective companies. You have the technical prowess and power to accomplish basic protections against illegal sales.

Today, we call upon you to join us in this shared responsibility to protect our youth, the Constitution and the integrity of the digital marketplace. Toward this goal, we ask your companies to undertake some initial steps to address this shared problem:

1. Review the current content posted to your companies' websites and remove illegal postings for the sales and/or transfer of alcohol products.

1850 M Street, NW
Twelfth Floor
Washington, DC 20036
Phone: (202) 326-6000
<http://www.naag.org/>

2. Develop and deploy programming to block and prevent your platform users from violating state law by posting content for the sale and distribution of alcohol products on your websites.

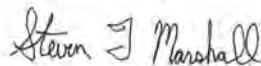
We also invite you to join with us to establish a workgroup with stakeholders from industry and government. Together, this group can discuss and establish realistic and effective protocols for internet platforms and content providers related to illegal and unlicensed alcohol sales via digital platforms.

Thank you for your prompt attention to this matter. We would appreciate hearing from you about the actions your company has taken, or will take, to protect consumers in the online marketplace. We know that by working together we can harness the great power of your platform and the great responsibility invested in our offices to address these harmful and illegal activities.

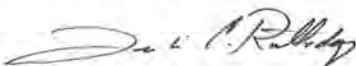
Sincerely,




Jeff Landry
Louisiana Attorney General



Steve Marshall
Alabama Attorney General



Leslie Rutledge
Arkansas Attorney General



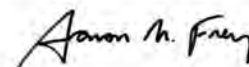
William Tong
Connecticut Attorney General



Karl A. Racine
District of Columbia Attorney General



Christopher M. Carr
Georgia Attorney General



Aaron M. Frey
Maine Attorney General



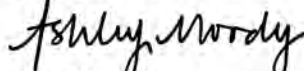
Talauega Eleasalo V. Ale
American Samoa Attorney General



Phil Weiser
Colorado Attorney General



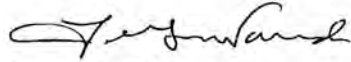
Kathleen Jennings
Delaware Attorney General



Ashley Moody
Florida Attorney General



Clare E. Connors
Hawaii Attorney General



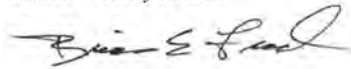
Lawrence Wasden
Idaho Attorney General



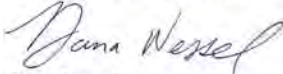
Curtis T. Hill, Jr.
Indiana Attorney General



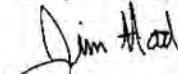
Derek Schmidt
Kansas Attorney General



Brian Frosh
Maryland Attorney General



Dana Nessel
Michigan Attorney General



Jim Hood
Mississippi Attorney General



Douglas Peterson
Nebraska Attorney General



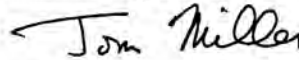
Gurbir S. Grewal
New Jersey Attorney General



Letitia James
New York Attorney General



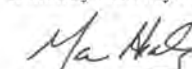
Kwame Raoul
Illinois Attorney General



Tom Miller
Iowa Attorney General



Andy Beshear
Kentucky Attorney General



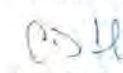
Maura Healey
Massachusetts Attorney General



Keith Ellison
Minnesota Attorney General



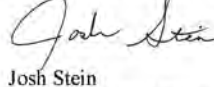
Tim Fox
Montana Attorney General



Aaron D. Ford
Nevada Attorney General




Hector Balderas
New Mexico Attorney General




Josh Stein
North Carolina Attorney General



Wayne Stenehjem
North Dakota Attorney General



Mike Hunter
Oklahoma Attorney General

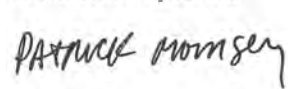

Josh Shapiro
Pennsylvania Attorney General

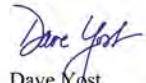

Peter F. Neronha
Rhode Island Attorney General

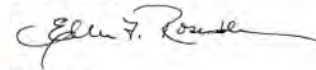

Jason R. Ravensborg
South Dakota Attorney General



Ken Paxton
Texas Attorney General

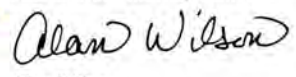

T.J. Donovan
Vermont Attorney General

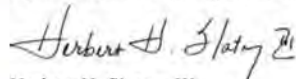

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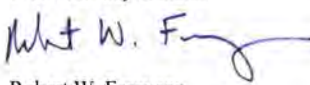

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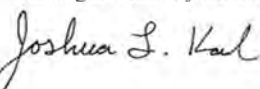

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Kansas Attorney General

EXECUTIVE DIRECTOR
Chris Toth

1850 M Street, NW
Twelfth Floor
Washington, DC 20036
Phone: (202) 326-6000
<http://www.naag.org/>

October 22, 2019

Mark Zuckerberg
Facebook Chief Executive Officer
1 Hacker Way
Menlo Park, CA 94025

Mr. Zuckerberg:

Social media and digital platforms have become interwoven into the fabric of our society. Consumers have become increasingly dependent on the broad access to goods for sale through these mediums. Unfortunately, the near-unlimited access to goods has increasingly exposed consumers, including minors, to unlicensed sales of alcohol and counterfeit products. We are seeking your assistance to address some of the challenges to consumer protection associated with online marketplaces and to improve the legitimacy of these sales.

We are aware of the occurrence of unlicensed, unregulated, and untaxed alcohol sales through digital platforms. Some of the products sold in this manner may be counterfeit, mislabeled, or fraudulent. The consumer may not know that this method of alcohol sales is illegitimate, or that these black-market products could pose health risks. Bad actors may exploit the anonymity of a digital platform to evade regulation, law enforcement, taxation and responsibility.

The 21st Amendment to the U.S. Constitution firmly invests the right to regulate the sale of alcoholic beverages with each state. Each online content company operating within the United States has a legal obligation to comply with federal and state law. But that is simply a legal obligation. We believe that everyone has an ethical and moral responsibility to protect consumers, especially those who are most vulnerable to fraud. Self-regulation and self-policing to prevent illegal and unfair trade practices and ensure consumer safety are minimum responsibilities for your respective companies. You have the technical prowess and power to accomplish basic protections against illegal sales.

Today, we call upon you to join us in this shared responsibility to protect our youth, the Constitution and the integrity of the digital marketplace. Toward this goal, we ask your companies to undertake some initial steps to address this shared problem:

1. Review the current content posted to your companies' websites and remove illegal postings for the sales and/or transfer of alcohol products.

2. Develop and deploy programming to block and prevent your platform users from violating state law by posting content for the sale and distribution of alcohol products on your websites.

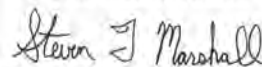
We also invite you to join with us to establish a workgroup with stakeholders from industry and government. Together, this group can discuss and establish realistic and effective protocols for internet platforms and content providers related to illegal and unlicensed alcohol sales via digital platforms.

Thank you for your prompt attention to this matter. We would appreciate hearing from you about the actions your company has taken, or will take, to protect consumers in the online marketplace. We know that by working together we can harness the great power of your platform and the great responsibility invested in our offices to address these harmful and illegal activities.

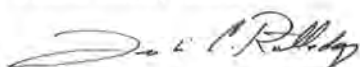
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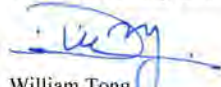
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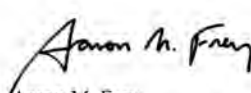
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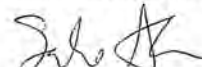
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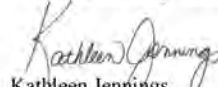
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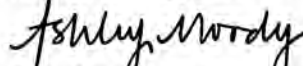
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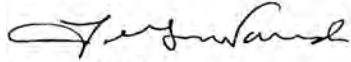
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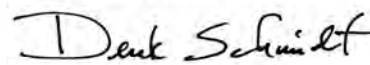
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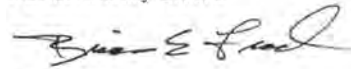
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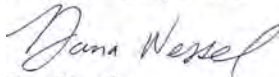
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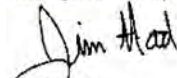
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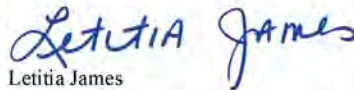
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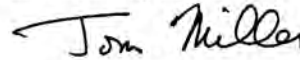
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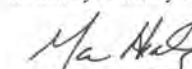
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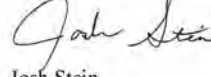
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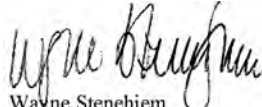
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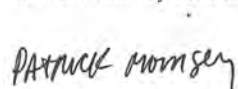

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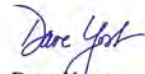

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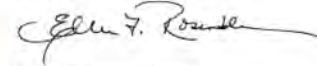

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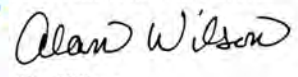

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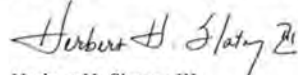

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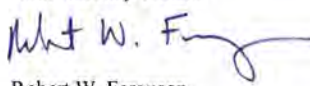

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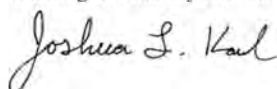

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October 22, 2019

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District of Columbia Attorney General

IMMEDIATE PAST PRESIDENT

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EXECUTIVE DIRECTOR

Chris Toth

Jim Buckmaster
Craigslist Chief Executive Officer
1381 9th Ave.
San Francisco, CA 94122

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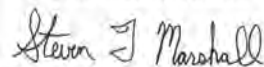
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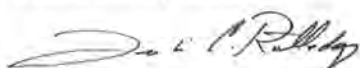
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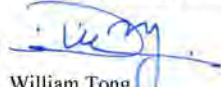
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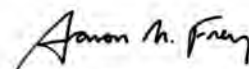
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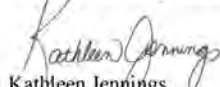
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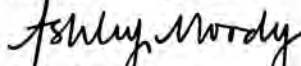
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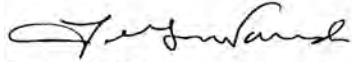
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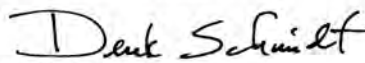
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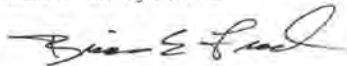
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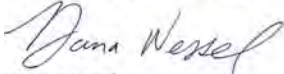
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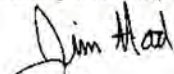
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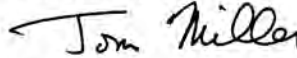
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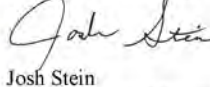
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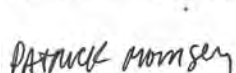

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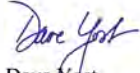

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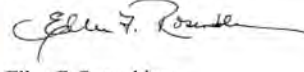

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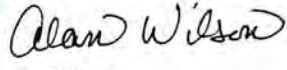

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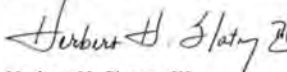

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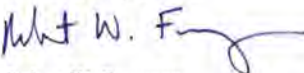

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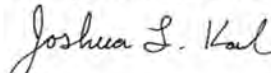

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Robert W. Ferguson
Washington Attorney General


Joshua L. Kaul
Wisconsin Attorney General



November 1, 2021

The Honorable Dick Durbin
Chairman
U.S. Senate Committee on the Judiciary
Washington, DC 20510

The Honorable Chuck Grassley
Ranking Member
U.S. Senate Committee on the Judiciary
Washington, DC 20510

Dear Chairman Durbin and Ranking Member Grassley:

We write in advance of the November 2 hearing, "Cleaning Up Online Marketplaces: Protecting Against Stolen, Counterfeit, and Unsafe Goods," to share the views of the retail industry on this critical topic. In sum, the National Retail Federation commends Chairman Durbin and the committee for your attention to the burgeoning problem of retail theft, and the infrastructure that organized retail crime provides for the sale of stolen and counterfeit products. Solutions to this endemic problem, which threatens the health and safety of consumers as well as the millions of retail employees throughout the country, are in reach, and they require a multi-stakeholder approach. We explore them in more detail, below.

NRF's members engage in commerce through all channels – in-person and online, through traditional sales as well as through marketplaces and drop-shipping models. To that end, NRF, the world's largest retail trade association, passionately advocates for the people, brands, policies and ideas that help retail thrive. From its headquarters in Washington, D.C., NRF empowers the industry that powers the economy. Retail is the nation's largest private-sector employer, contributing \$3.9 trillion to annual GDP and supporting one in four U.S. jobs — 52 million working Americans. For over a century, NRF has been a voice for every retailer and every retail job, educating, inspiring and communicating the powerful impact retail has on local communities and global economies.

This letter focuses primarily on the relationship between loss prevention and marketplace transparency. We have previously [expressed](#) our views on how to curb the sale of counterfeits, and continue to work with our members to develop best practices for identifying counterfeits before they make it to market, to exercise inventory control, and to help law enforcement intercept counterfeit goods at US entry points.

Loss prevention is a continuous source of concern for retailers, and NRF surveys its members annually to examine the state of loss prevention through theft and fraud from all angles. Our 2021 survey showed that members are increasingly concerned about not just the prevalence of organized retail crime, but about the steady pace of "shrinkage" as a whole and the impact that COVID-19 has had on the risk vectors for retailers.

NATIONAL RETAIL FEDERATION
1101 New York Avenue, NW, Suite 1200
Washington, DC 20005
www.nrf.com

While more than two-thirds of the survey's respondents (69 percent) said the pandemic resulted in an increase in overall risk for their organization, respondents specifically mentioned the impact on workplace violence (61 percent) and organized retail crime (57 percent).

Moreover, mandated store shutdowns and other shopping restrictions that occurred throughout 2020 had an impact on where fraudulent activity occurred. More than one-third (39 percent) of respondents said they saw the greatest increase in fraud in multichannel sales channels such as buy online pick up in store, up from 19 percent the year before. In contrast, just 28 percent said the greatest increase in fraud came from in-store-only sales, down from 49 percent the year before. The percent of those who pointed to online-only sales fraud remained flat.

The survey found that while the overall shrink rate remained relatively steady compared with 2019, it remains above the average of the last five years. Respondents reported an average shrink rate of 1.6 percent, unchanged from last year's high.

Other observations include:

- Apprehensions and prosecutions of dishonest employees are down compared with last year and with the five-year average. However, the cost per dishonest employee case is increasing. Half (50 percent) of respondents reported an average dollar loss of at least \$1,000 compared with 29 percent in 2019.
- As additional threats emerge, retailers are investing in more resources to safeguard their customers, employees and operations. Half (53 percent) of retailers said their companies are allocating additional technology resources and another 50 percent said they are allocating additional capital specific to LP equipment. In a shift from the last few years, there was a significant increase in those reporting they would dedicate additional staffing resources.
- Robberies are delivering tremendous windfalls to criminals. The average robbery costs a retailer \$7500 – a figure not seen since 2015.

As for ORC in particular, the majority of retailers (65 percent) agree that ORC gangs are exhibiting higher levels of aggression and violence than they did the year before. Retailers cited COVID-19, policing and changes to sentencing guidelines, and the growth of online marketplaces as top reasons behind the increase in ORC activity.

ORC gangs target a variety of stolen items including designer clothing (reported by 22 percent of retail respondents), laundry detergent (17 percent), designer handbags, allergy medicine, razors and high-end liquor (tied at 15 percent each), pain relievers (13 percent) and infant formula and teeth whitening strips (tied at 11 percent each).

The top five cities for ORC in the past year in order were Los Angeles, San Francisco/Oakland, Chicago, New York and Miami.

With the size and scope of these threats continuing to grow, it is clear retailers need support from additional external resources, including lawmakers and law enforcement.

One fruitful avenue to address the rising incidence of organized retail crime is the INFORM Act (“Integrity, Notification, and Fairness in Online Retail Marketplaces for Consumers Act”). NRF is in strong support of transparency in marketplace sales, and our members are in favor of a tailored approach that provides consumers and law enforcement with verified information about high-volume sellers. We believe that the House bill, introduced by Representatives Schakowsky and Bilirakis (H.R. 5502), strikes the appropriate balance between requiring marketplaces to verify the identities of their biggest sellers, without impeding the flow of legal and legitimate commerce. The House bill provides more time for marketplaces to verify the identity of high-volume sellers once such a seller is covered by the Act, and allows marketplaces to verify the identity of individual high-volume sellers in ways other than asking for a government-issued ID. The House bill also provides privacy protections for high-volume sellers, while maintaining the goal of increased transparency. Finally, and most important to NRF members, H.R. 5502 provides for federal preemption of conflicting state laws. As more and more of NRF’s members use marketplaces as one of many channels through which they provide consumers with innovative goods, it is critical that both marketplaces and sellers are subject to a uniform and predictable set of rules. Conflicting rules from multiple jurisdictions are simply not workable for a marketplace that allows its sellers to reach consumers in every state in the nation.

But marketplace transparency alone will not curb the incentive for organized criminals to take expensive goods by force and resell them, either on marketplaces or, more frequently, on the street. Organized crime is, by definition, sophisticated and highly responsive to attempts to thwart it. Without more, regulating marketplaces will result in a cat-and-mouse game, in which, for example, organized sellers of stolen goods could structure their sales to fall below the high-volume seller threshold, and sell across multiple marketplace platforms. Consequently, NRF believes that increased enforcement – to include data-sharing across law enforcement agencies and increased resources to fight the scourge of robbery – is critical to reducing the incidence of organized retail crime.

NRF has been working to develop new policy options to help address the challenge of organized retail crime. Our recommended policy focuses on remediating three key challenges associated with national efforts to counter organized retail crime:

- The lack of prioritization of organized retail crime within federal law enforcement – there is no single agency that has this as a high-priority mission, with respect to investigative coordination, developing intelligence on ORC groups, and engagement with state, local and tribal law enforcement;

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- The lack of coordination among federal law enforcement agencies that have authorities related to organized retail crime – include the FBI, ICE Homeland Security Investigations, CBP, the Secret Service, and the US Postal Inspection Service; and
- That state, local and tribal law enforcement agencies frequently have insufficient resources and training to engage effectively in ORC investigations – to work with retailers and build complex cases that District Attorneys will take for prosecution.

To address these challenges, NRF is in favor of Congressional action that would accomplish the following:

- Establish a new federal Organized Retail Crime Coordination Center, located within ICE Homeland Security Investigations and staffed by other key federal law enforcement partners. Our initial assessment is that this is the best fit, given their trade and customs enforcement authorities and the fact that the Intellectual Property Rights Center – which has a related mission – is located within ICE HSI. State, local and tribal law enforcement agencies could detail officers to the Center, and they and the private sector would also have formal roles as advisors with respect to the Center
- Give the Center clear responsibilities to lead on ORC activities, including by developing national-level ORC intelligence picture, coordinating information-sharing and cross-agency investigations, and serving as a center of expertise for training and technical assistance
- Establish regional federal, state, local and tribal law enforcement task forces at several ICE HSI field offices, as a pilot project before considering whether to expand more broadly
- Require DHS and DOJ to leverage and expand the focus of existing law enforcement grant, training and technical assistance programs so that they more actively prioritize organized retail crime

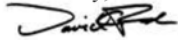
NRF believes that legislation like this – if appropriately funded and implemented – could make a significant difference in the fight against organized retail crime. Namely, such legislation would make it easier to move upstream and build cases against the leaders of the organized crime groups. And, importantly, the legislation would also improve understanding of the linkages between ORC and other types of organized crime.

NRF looks forward to continuing to work with the INFORM Act sponsors, the committee, and all interested lawmakers in both chambers, to address this very important issue and make sure that marketplaces remain safe for consumers to take advantage of the innovation, speed, and selection that the marketplace shopping experience continues to provide.

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Thank you very much for your attention to this issue and your continued support for legitimate retailers.

Sincerely,



David French
Senior Vice President
Government Relations

cc: The Honorable Frank Pallone, Jr.
The Honorable Cathy McMorris Rodgers
The Honorable Janice D. Schakowsky
The Honorable Gus M. Bilirakis



November 2, 2021

Dear Chairman Durbin, Ranking Member Grassley, and distinguished members of the Senate Judiciary Committee:

Sazerac respectfully submits this statement for the record to the Senate Judiciary Committee regarding the November 2 hearing, "Cleaning Up Online Marketplaces: Protecting Against Stolen, Counterfeit, and Unsafe Goods." Sazerac is one of America's oldest family owned, privately held distillers with U.S. operations in Louisiana, Kentucky, Indiana, Virginia, Tennessee, Maine, New Hampshire, South Carolina, Maryland and California.

Social media platforms and online marketplaces are woven into the fabric of our society and consumers have become increasingly dependent on the near-unlimited access to myriad goods available virtually. However, these digital marketplaces pose risks and challenges to consumer protection, particularly when sales are direct to the consumer, across state lines, and consist of products that are regulated by states and the federal government for the protection of the buyer; and more importantly the protection of minors. Access to unlicensed sales of alcohol and counterfeit alcohol products are of particular concern.

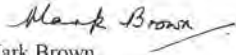
There are daily occurrences of unlicensed and unregulated alcohol sales via online platforms. Without proper permits and licenses, bad actors may produce fake or otherwise counterfeit products and sell their goods to unsuspecting consumers. The buyer may be unaware that products sold in this manner could be counterfeit, mislabeled or fraudulent. Youth access to online products is extremely difficult to monitor since the transaction occurs outside the regulatory framework provided in federal and state law. Not only are these transactions illegal and dangerous to consumers, sales outside the regulatory framework result in tax evasion and create an unfair burden for businesses that operate within the parameters of the law.

Sazerac spends significant money and time fighting counterfeit product offered for sale on social media platforms and online marketplaces. We also partner with federal and state enforcement agencies by providing evidence of illegal activity. To date these activities have been futile due to current laws and regulations. As such, Sazerac urges you to consider legislation that would establish realistic and effective protocols for content providers related to illegal and unlicensed alcohol sales via digital platforms. Counterfeit products, regardless of their sale or delivery method, constitute a major health threat and economic loss to our population.

We look forward to working with you, as well as the forty-six Attorneys General who signed the attached letter, to address the challenges to consumer protection associated with online

marketplaces. We know that by working together we can stop those who would exploit the anonymity of online platforms to evade regulation, law enforcement, taxation and responsibility.

Sincerely,

A handwritten signature in black ink that reads "Mark Brown". The signature is written in a cursive style with a horizontal line extending from the end.

Mark Brown
President/CEO
Sazerac Company



Advocacy that fits.
740 6th Street, NW • Washington, DC 20001 | P: 202-853-3080 | www.aafaglobal.org

American Apparel & Footwear Association Statement for the Record
"Cleaning Up Online Marketplaces: Protecting Against Stolen, Counterfeit, and Unsafe Goods"
 Senate Judiciary Committee
 November 2, 2021

On behalf of the member companies of the American Apparel & Footwear Association (AAFA), we appreciate this opportunity to submit a statement for the record for the Senate Judiciary's hearing on the "Cleaning Up Online Marketplaces: Protecting Against Stolen, Counterfeit, and Unsafe Goods." AAFA strongly supports legislation that holds online marketplaces accountable for the sale of counterfeit goods on their platforms and that sheds light on the sellers of those counterfeit goods on those online marketplaces.

AAFA is the national trade association representing apparel, footwear, travel goods, and other sewn products companies, and their suppliers, which compete in the global market. Representing more than 1,000 world famous name brands, AAFA is the trusted public policy and political voice of the apparel and footwear industry, its management and shareholders, its three million U.S. workers, and its contribution of more than \$350 billion in annual U.S. retail sales.

AAFA's Brand Protection Council (BPC) vigorously pursues brand protection efforts, with a focus on the global war against counterfeit apparel, footwear, accessories, and other supplier products. Counterfeiting is a big business; a 2017 report forecast the global trade in counterfeit and pirated products to reach a possible \$2.81 trillion by 2022.¹ As counterfeiters have shifted online, the BPC has similarly focused its attention on the proliferation of counterfeit goods found on e-commerce platforms, specifically online third-party marketplaces.

The growth of e-commerce² has connected consumers across the world to brands, platforms, marketplaces, and other consumers, which has many positive benefits. However, some online marketplaces also provide an ideal setting for counterfeiters—anonymity, easier distribution, a low cost of entry, and various ways to reduce exposure to legal liability.³

At this point, it is clear that there is a need for legislation to address the potential for counterfeit goods sold on e-commerce platforms, including the very real problem that has emerged on many third-party marketplaces. Online counterfeiting continues to be a growing issue for AAFA members, and the COVID-19 pandemic has only exacerbated this problem. The pandemic has disrupted supply chains worldwide and temporarily forced physical stores and markets to close, drastically driving consumer traffic to online

¹ The Economic Impacts of Counterfeiting and Piracy: Report prepared for BASCAP and INTA, available at https://www.inta.org/wp-content/uploads/public-files/perspectives/industry-research/2017_Frontier_Report.pdf.

² An estimated 14% of all retail sales in the United States in 2020 took place online, an increase of 32% from 2019. See <https://www2.census.gov/retail/releases/historical/ecomm/20q4.pdf>.

³ DEPARTMENT OF HOMELAND SECURITY, COMBATING TRAFFICKING IN COUNTERFEIT AND PIRATED GOODS: REPORT TO THE PRESIDENT OF THE UNITED STATES (Jan. 24, 2020) https://www.dhs.gov/sites/default/files/publications/20_0124_plcy_counterfeit-pirated-goods-report_01.pdf.

channels. While we embrace the growth of e-commerce, unfortunately, counterfeiters have as well, taking advantage of these circumstances globally and flocking to sell their fake goods online.

The 117th Congress is exploring legislation – namely, the SHOP SAFE Act and INFORM Consumers Act—that would institute common-sense requirements to incentivize platforms to engage in best practices to curb the presence of counterfeits on their sites and to provide consumers with transparency about who they are purchasing from. We look forward to working with the 117th Congress and the Biden Administration to help see these requirements are enacted at the earliest possible opportunity.

SHOP SAFE Act (S. 1843)

AAFA supported the introduction of the “Stopping Harmful Offers on Platforms by Screening Against Fakes in E-commerce Act of 2021” or the “SHOP SAFE Act of 2021.” AAFA members believe that this is a step in the right direction to hold online platforms accountable. For far too long, many online marketplaces have ducked from their responsibilities to brand owners and to consumers, while directly profiting from the promotion, sale, and distribution of counterfeit goods through their platforms. This proposed bill signals long-awaited action to address the growing problem of counterfeits sold by third-party sellers on online marketplaces. The burden of online enforcement disproportionately rests on trademark owners and this bill would shift responsibility back to these platforms, to make sure they online environment has the same accountability for what consumers encounter in physical stores.

Marketplaces must have some accountability in order to create pressure to effectively address the counterfeiting activity taking place on their sites. There is room to establish the particular standards and factors that would lead to liability, and to find the right compromise between the interests of the marketplaces and brand owners. It is time to take the steps necessary to protect American consumers and American businesses from the many harms of counterfeit sales online. AAFA looks forward to working with the Senate Judiciary Committee to work on strengthening the bill language to provide for greater online marketplace accountability.

INFORM Consumers Act (S. 936)

AAFA also supported the introduction of the “Integrity, Notification, and Fairness in Online Retail Marketplaces for Consumers Act” or the INFORM Consumers Act. While this bill does not focus on platform liability, it is significant because it directs online platforms to authenticate the identity of high-volume third-party sellers, which will provide consumers with much-needed information.

Many third-party online marketplaces need stronger verification and accountability measures that would empower consumers and law enforcement with information, making it harder for unscrupulous sellers and criminals to profit from these illicit transactions.⁴ Removing the anonymity unscrupulous sellers enjoy on these platforms by creating basic accountability measures will protect consumers from illicit goods, aid law enforcement in their efforts to track organized crime, and make it harder for bad actors to build an illegal business and profit by selling stolen or counterfeit merchandise.⁵

Conclusion

Thank you for your immediate attention to this important issue. AAFA looks forward to working with the Senate Judiciary Committee to develop standards for e-commerce, specifically a more effective and

⁴ Buy Safe America Coalition, THE INFORM CONSUMERS ACT OF 2020, <https://www.buysafeamerica.org/informed-consumers-act>.

⁵ *Id.*

balanced framework that promotes a culture of continuous transparency and responsibility, a culture much needed to stay one-step ahead of counterfeiters. Passage of properly structured bills presents the opportunity to ensure that the United States remains the global leader in protecting IP-intensive companies and their consumers; it is imperative that we get it right.

STIHL

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536 Viking Drive
Virginia Beach, Virginia 23452
Telephone: (757) 486-9100

November 9, 2021

The Honorable Richard J. Durbin
Chair
Senate Committee on the Judiciary
152 Dirksen Senate Office Building
Washington, DC 20510

Re: Letter of Support for SHOP SAFE Act and INFORM Consumers Act

Dear Chairman Durbin:

As a member of the National Association of Manufacturers (NAM) anti-counterfeiting task force, I write on behalf of STIHL Incorporated of Virginia Beach, Virginia to express our appreciation of your bipartisan efforts to address fake and counterfeit goods that are affecting manufacturers, consumers and American businesses.

STIHL Incorporated takes seriously the threat that fake and counterfeit goods represent to the U.S. economy and the safety of our citizens. We join NAM in fully supporting the need to increase enforcement, transparency, and protect consumers from the potential dangers of counterfeit goods through the SHOP SAFE Act and INFORM Consumers Act.

Thank you for your attention to this important topic and we stand ready to support you and your colleagues in any further opportunities to promote safety as well as fight counterfeiting and other criminal activity in the marketplace.

Sincerely yours,

Michael L. Camp
STIHL Incorporated



Statement for the Record of

Krissy Mashinsky
Chief Executive Officer

USA Strong, Inc.'s Statement for the Record
Senate Judiciary Committee Hearing on "Cleaning Up Online Marketplaces: Protecting Against Stolen,
Counterfeit, and Unsafe Goods."

Submitted November 11, 2021
Dirksen Senate Office Building
Room 226
Washington, D.C. 20002

My name is Krissy Mashinsky and I am the founder and CEO of USA STRONG, Inc., and the operator of usastrong.IO. USA Strong (usastrong.IO) is marketplace dedicated to U.S. made goods controlled and driven by the community. I appreciate the opportunity to provide a statement for the record following the Senate Judiciary Committee's hearing on "Cleaning Up Online Marketplaces: Protecting Against Stolen, Counterfeit, and Unsafe Goods." As part of this letter, USA Strong (usastrong.IO) offers the Committee perspective on the value proposition underlying our marketplace, which is purpose built to create a transparent marketplace where consumers, manufacturers and sellers come together for a verified Made in the U.S. e-commerce experience.

We also encourage the federal government to adopt these same principles as part of the marketplace that it controls - the federal acquisition and contracting ecosystem - to provide leadership to the private sector. The Federal Acquisition Regulatory Council (FAR Council), for instance, recently took comment on a series of proposal designed to strengthen existing Buy American regulations. USA Strong filed comments in that proceeding urging the FAR Council to adopt rules encouraging federal contractors to utilize technology solutions for verification purposes, which will improve transparency in the supply chain for products and services the U.S. government acquires or contracts for.

USA Strong believes that these commonsense solutions will improve supply chain security and improve compliance with Buy American regulations. But importantly, adoption of these policies will send a signal to the retail marketplace that supply chain verification is a priority, and adoption of those practices can and will reduce the proliferation of counterfeit goods online. We urge the FAR Council to adopt these proposed solutions, and we look forward to working with this Committee to secure that policy objective.

In today's online marketplace, consumers do not have access to the information needed to make informed purchasing decisions. Instead, even when consumers try to make informed decisions, it is often unclear where products are made or shipped from until after the purchase is complete, if at all. Trying to verify the authenticity of goods purchased through online marketplaces can be nearly impossible, in part because sellers are often able to easily sell as retailers and resellers, in many cases without verifying the authenticity of the goods being sold. As a consumer, it can be frustrating when you cannot figure out where the products you buy are being made or whether you are buying an authentic product.

These frustrations lead us to create the usastrong.IO community, a new marketplace driven by the community rather than the digital marketplaces that dominate the American shopping experience. The usastrong.IO marketplace brings transparency to the American supply chain and reinvigorates local U.S. manufacturing and local sourcing with a simplified way to find suppliers, providing unique incentives that do not exist in other digital marketplaces. We are creating a wide portfolio of features and functionalities, all with one purpose—to create a transparent system to both consumers and producers. Our focus is on providing an easy way to find and support local products and services, and to create an easy way to bring back empathy, responsibility, and quality to our daily buying habits.

Using blockchain technology, USA STRONG (usastrong.io) currently validates the content threshold for all goods sold by over 250 vendors on usastrong.io through our two-step verification models: seller-self-certification and community-driven STRONG verification. Data provided during the self-verification process are authenticated with third-party databases and provided to supply chain vendors and stored

USA STRONG INC. • 140 East 63rd Street • New York • New York • 10065 • cs@usastrong.IO

on the blockchain; a publicly available and immutable record, which holds every vendor accountable for provided and marketed information. Upon the verification of a component's origins, sellers must provide video and process documentation on how assembly and manufacturing is done in the U.S. The data represents the location, ingredients, manufacturing process, and supply chain information for each product. This information empowers customers and allows them to know where each part of their purchase came from and what part of the domestic supply chain is supported with their purchase.

In addition to the self-verification process, our sellers can request STRONG verification from the usastrong.io community. Sellers reward the community for helping and vetting the verification process using STRONG tokens, which is a utility token used to power the usastrong.io platform's core functionalities. Proceeds from the utility tokens are used to cover all costs and membership growth, with most of the proceeds distributed back to the community in a not-for-profit model to empower local communities and encourage local buying and manufacturing. Our verification process ultimately provides a unique opportunity for sellers with made in America goods and for consumers to have full transparency in origin of their purchases. With our blockchain-powered verification method, usastrong.io aims to give confidence back to the ecommerce community and increase transparency for the benefit of all of sellers, manufacturers, and consumers. Verification tools -- like those USA Strong (usastrong.io) offers -- can help build trusted online ecosystems where participants have confidence in the goods they buy and sell.

While getting online ecosystems to buy into the need for supply chain verification will take time, the Federal government has a unique opportunity to effectuate change in the market that it controls; the federal procurement and contracting arena. The FAR Council is currently considering updating domestic content requirements for federal contracts.

As part of this effort, we urge this Committee to work with the FAR Council to adopt regulations to include external verification in the federal contracting process to ensure federal contractors meet domestic content requirements. Once the federal government recognizes the importance of verification, online ecosystems will adopt similar mechanisms, and we can build trusted online ecosystems where there is lower risk for the proliferation of counterfeit goods.

I would like to thank Chairman Durbin, Ranking Member Grassley, and the members of the Senate Judiciary Committee for holding this important hearing and for their leadership and commitment to protecting U.S. consumers through verification, accountability, and transparency. We appreciate the opportunity and would be pleased to provide any additional information that could be of help to the Committee.

Sincerely,

DocuSigned by:

Krissy Mashinsky

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Krissy Mashinsky

CEO of USA STRONG, Inc. (usastrong.io)

USA STRONG INC. • 140 East 63rd Street • New York • New York • 10065 • cs@usastrong.io