

**BACK TO SCHOOL WITH THE SHOP SAFE ACT:
PROTECTING OUR FAMILIES
FROM UNSAFE ONLINE COUNTERFEITS**

HEARING

BEFORE THE
SUBCOMMITTEE ON INTELLECTUAL PROPERTY
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CONTENTS

OPENING STATEMENTS

	Page
Coons, Hon. Christopher A.	1
Tillis, Hon. Thom	3

WITNESSES

Kammel, Kari	5
Prepared statement	32
Responses to written questions	46
Lamar, Steve	8
Prepared statement	50
Responses to written questions	54
Schruers, Matt	10
Prepared statement	64
Responses to written questions	73
Shapiro, Daniel	7
Prepared statement	79
Responses to written questions	89

APPENDIX

Items submitted for the record	31
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**BACK TO SCHOOL WITH THE SHOP SAFE
ACT: PROTECTING OUR FAMILIES
FROM UNSAFE ONLINE COUNTERFEITS**

TUESDAY, OCTOBER 3, 2023

UNITED STATES SENATE,
SUBCOMMITTEE ON INTELLECTUAL PROPERTY,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The Subcommittee met, pursuant to notice at 2:34 p.m., in Room 226, Dirksen Senate Office Building, Hon. Christopher A. Coons, Chair of the Subcommittee, presiding.

Present: Senators Coons [presiding], Hirono, Ossoff, Tillis, and Blackburn.

**OPENING STATEMENT OF HON. CHRISTOPHER A. COONS,
A U.S. SENATOR FROM THE STATE OF DELAWARE**

Chair COONS. This hearing will come to order. I'd like to thank our witnesses for participating today. I'd also like to thank Ranking Member Tillis and his staff for working in a collaborative way to put this hearing together. And I'd like to welcome Senator Hirono.

This is our fifth hearing of the IP Subcommittee of this year. And Senator Tillis, you and your team continue to be great partners in moving forward.

Just to set the stage more broadly on the focus of this hearing, online shopping has expanded dramatically, has exploded in recent years.

Last year, U.S. e-commerce sales exceeded a trillion dollars for the first time as millions and millions of Americans turned to online platforms, from eBay to Amazon, to find the brands they trust at prices they could afford.

Counterfeiters, unfortunately, have moved online right alongside American consumers, and their tools are becoming far more sophisticated. Counterfeiters are no longer selling fake handbags or watches on a street corner or a flea market. New, modern online counterfeiting delivers products that look real with listings featuring images that show the real product and fake reviews that make their knockoffs seem authentic.

Online counterfeiting efforts are so successful that, according to one recent report, two-thirds of American consumers surveyed had unknowingly bought a counterfeit product online last year.

This isn't just a matter of tricking consumers into spending their money on harmlessly fake products. As the CBP, the Customs and

Border Patrol, warned earlier this year, fake goods can pose real dangers that put the health and safety of all Americans at risk.

Fake lithium batteries, for example, batteries that power laptops, can explode or catch fire. They cause 70 deaths and 350,000 serious injuries in one recent year alone. Counterfeiters are also targeting airlines trying to sell fake engine parts that have been demonstrated to increase the chances of a crash. And counterfeit prescription drugs sold to consumers online are at best ineffective and at worst, in some cases, deadly to those who purchase them.

Now, if I unknowingly bought a fake laptop at my local Best Buy up on Concord Pike, and it then caught fire in my home, Best Buy would be liable for the harm to me, and liable to the brand owner for contributing to trademark infringement. This framework for liability incentivizes brick and mortar stores to thoroughly and proactively vet their supply chains to keep counterfeit products out of consumers' hands.

Now, that same counterfeit battery bought online is met with a different liability framework. Platforms don't have the same proactive obligations. In fact, they need not remove a listing until a brand owner tells the platform specifically that the listing is counterfeit. The weight, the onus for policing online counterfeits is principally on brands, not platforms.

Under this structure, brand owners have to play a never ending game of "whack-a-mole" as they monitor a multiplying number of online marketplaces for counterfeit listings. Platforms know they have a counterfeit problem, and many have undertaken laudable anti-counterfeiting efforts.

But current efforts are neither effective nor sufficient because the problem hasn't gone away. In fact, it is dramatically increasing. That's why I was proud to reintroduce the SHOP SAFE Act last week with Senator Tillis—a bill that works to try and balance the rights of brand owners and the obligations of online platforms to intercept and stop the sale of harmful counterfeit goods.

The Act opens platforms to liability if counterfeit goods affecting health and safety are sold on the platforms, the same liability brick and mortar retailers have been subject to for decades.

It requires brand owners to provide platforms with notice of their trademarks and a critical point of context so platforms can proactively implement an articulated list of best practices to keep unsafe counterfeits out of consumers' online shopping carts. Those best practices include better vetting before goods are listed, quickly removing counterfeit listings, terminating repeat counterfeiters, and requiring accurate images of the products sold.

Platforms that follow best practices will have a safe harbor from liability. In other words, platforms making genuine and good faith efforts to clean up their sites have and should enjoy a liability shield.

Our reintroduction last week came after a fair amount of work in the last Congress, hearings in both 2019 and 2021 that highlighted the rise in anti-counterfeiting. It is not my anticipation that the bill introduced is perfect or final. And part of this hearing, those who both support and oppose this bill, is to welcome input both critiques and compliments in an effort to try and sharpen and shape the bill into something worthy of enactment.

Since Senator Tillis and I first introduced SHOP SAFE, we've heard from stakeholders who would be impacted by the bill. I appreciate their efforts and the work we've done to make changes to the bill based on the feedback we've received so far. And I look forward to continuing to work with a broad range of stakeholders as we try to move this bill forward this year.

With my Ranking Member's cooperation, we've assembled a panel today with a diverse range of views, and I'll introduce them in a moment. But first, let me turn to Ranking Member Tillis.

**OPENING STATEMENT OF HON. THOM TILLIS,
A U.S. SENATOR FROM THE STATE OF NORTH CAROLINA**

Senator TILLIS. Thank you, Chairman Coons. Thank you for really just a series of great hearings on strengthening intellectual property rights and addressing many of the challenges. We have a lot of good with our intellectual property system. We have a lot of opportunities to make it even better.

And I think when you're talking about counterfeit goods, it's really the worst of both worlds. Number one, somebody is ripping off intellectual property. Number two, they're doing it in a way that could be very dangerous. Which is why I'm glad we're having this hearing and taking concrete steps to actually address the problem.

You know, I was—I can't get it out of my mind, I've mentioned this story before. I'm an avid mountain biker. Actually, it's the reason why I got into politics, accidentally. I just went on a mountain bike trail and next thing you know, I'm in the State House.

But in this very room just a few years ago—I have Specialized products. You know, people have, depending upon your background, it's kind of like Chevy or Ford. So I'm a Specialized consumer. And I saw a Specialized helmet, clearly counterfeit, break under the weight of about 180-pound person only jumping about a foot off the ground.

Well, as somebody who's had two serious accidents in a Specialized helmet, that helmet did what it was supposed to do. It cracked, but it didn't—it prevented me from getting a concussion or having any serious injuries. So I think that's just the one example of several examples. We hear about them in automobile parts, in airplane parts. You see this in children's toys, that the official version may be safe, the counterfeit version is very dangerous.

There's no question that we've got to fix this problem. And I think that the bill that we've—that we're going to have the hearing on today is a good first step, but it's never going to end.

And we also have a lot of the same problems that we have with general intellectual property theft. It's falling on the back of the rights holder to figure out who is ripping off their intellectual property, what platform are they selling it on, and if you tell us, we'll take it down.

That model does not work with the scale and the number of transactions that we're talking about. I wish that it could, but it simply doesn't work.

So today, I hope this hearing gives us some more—gives us additional information to get the stakeholders together so that we can come up with a reasonable compromise.

I do know that there are some consequences that we want to avoid, and that's why we're going through the very thoughtful process that we go through today.

But I'd find it hard to believe, but Senator Coons, before you came down, I went and thanked the witnesses. I told them one of the reasons why I like this Subcommittee so much is you don't really expect the witnesses to go after each other because they're so far apart. The nature of our hearings are more about how do you weave together a reasonable legislative fix that addresses some of the concerns that may exist on either side.

So in this hearing today, I hope that we get that, that productive feedback. And I hope that those who are out there to kill this bill need to understand, I want you at the table to make it better.

But if there's anyone out there that thinks that they're going to slow this down, then they probably need to think again. And if all you're here to do, and if all you're doing is watching to figure out how you stop this effort, then you're not at the table that may put you on it.

So let's work together. Recognize the public safety, the intellectual property infringement, challenges we have to deal with, and come together and work with us. And Senator Coons, again, I appreciate the years that you and I have worked together. And I especially appreciate how frequently Senator Hirono shows up for these Subcommittee hearings no matter what day it's on.

Senator HIRONO. Go figure.

[Laughter.]

Senator HIRONO. No, you're doing—both of you are doing a good job. Thank you very much.

Chair COONS. Senator, thank you for your persistent interest and engagement on the topics of this hearing. Ranking Member Tillis, thank you. I appreciate that introduction. I'll now briefly introduce our witness panel.

We've assembled a panel to talk about strategies for protecting American families from unsafe counterfeit products sold in online platforms, and specifically to discuss the SHOP SAFE Act we just reintroduced.

Our first witness is Kari Kammel, adjunct professor and director for education and outreach at Michigan State University, the Center for Anti-Counterfeiting and Product Protection, or A-CAPP, if I'm not mistaken. Professor Kammel has written extensively on legal issues pertaining to counterfeiting on e-commerce platforms.

Next, we have Daniel Shapiro, senior VP of Brand Relationships at Red Points, a service business that helps brands police counterfeit goods offered for sale on online platforms, and who I think had a memorable weekend. Congratulations.

Next, we have Steve Lamar, president, CEO of the American Apparel & Footwear Association—also a Delawarean—a trade association, the AAFA, representing more than a thousand brands in the footwear and apparel industries, an industry at the top of the CBP's counterfeit seizure list.

And last we'll hear from Matt Schruers, president of the Computer & Communications Industry Association, a trade association representing many different significant players. But in particular,

online platforms including well-known and frequently—in my home—used platforms like Amazon and eBay. Welcome.

So after I swear in these witnesses, each of you will have 5 minutes to provide an opening statement to the Committee. Then we'll proceed to questioning, each Senator having 5 minutes. And I would expect we'll take two, maybe three rounds, given lots of things we need to talk about. So if you'd please stand, raise your right hand, and repeat after me.

[Witnesses are sworn in.]

Chair COONS. Thank you. Let the record reflect the witnesses have been sworn in. Professor Kammel, you may proceed with your opening statement.

STATEMENT OF KARI KAMMEL, DIRECTOR AND SENIOR ACADEMIC SPECIALIST, CENTER FOR ANTI-COUNTERFEITING AND PRODUCT PROTECTION, ADJUNCT PROFESSOR OF LAW, MICHIGAN STATE UNIVERSITY COLLEGE OF LAW, EAST LANSING, MICHIGAN

Professor KAMMEL. Chair Coons, Ranking Member Tillis, and Members of the Subcommittee, thank you for inviting me to testify this afternoon on the SHOP SAFE Act, protecting families from counterfeits.

I'm representing myself at today's hearing and the views I express are my own. My remarks draw on my work at the A-CAPP Center, engaging with over 500 organizations and brand protection professionals on trademark counterfeiting, as well as leading multidisciplinary research teams, education, and outreach to examine this issue from an academic yet practical perspective.

We know that the sale of counterfeit goods online impacts national economies, companies of all sizes, in particular small and medium-sized businesses, and consumers, and has exploded in the past decade. And particularly, more since COVID-19.

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 rely on the good will and reputation of that brand in order to make an illicit profit. Often counterfeiters are tied to other criminal activities, such as online fraud and organized crime.

Many trademark owners struggle to get some platforms to respond to notice and take down requests, or if they do, many find the whack-a-mole effect occurring with more postings taking their place. Particularly impacted are small and medium-sized businesses with their own products who do not have a dedicated brand protection team or department, and have limited resources to commit to protecting their trademarks online.

According to our multidisciplinary research, 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 one, the consumer, two, the counterfeiters posting, and three, 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 place on the platform.

Although the legal liability in the brick and mortar space provides contributory liability for trademark counterfeiting for service

providers such as flea markets or malls when they haven't taken the steps to disrupt the sale of counterfeits to consumers in their space, we don't find the same parallel in the law in the e-commerce space.

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, not constructive knowledge.

There is no proactive requirement for platforms' 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 has evolved where brand owners and brand protection service providers attempt to take down counterfeit postings. But they cannot get at the root of the issue, and are constantly chasing counterfeit postings online. Well-informed consumers will give some basic transparency to who is listed as a seller. In these online transactions, more is needed.

The results of a 17-country consumer survey that we completed last month note that, in our study, nearly 66 percent of U.S. consumers surveyed bought counterfeits unintentionally. And 13.4 percent experienced a negative health effect after using a counterfeit product. And 15.6 percent experienced personal injury. Sixty-eight percent of those surveyed said they'd bought counterfeits on either e-commerce or social media platforms.

And additionally, our findings show that the consumers do not see a clear mechanism on what to do when they discover they have bought a counterfeit. These findings reflect what I know from my engagement with IP rights holders across industries, companies, and even product lines. The number one challenge right now relates to third-party sellers of counterfeit online.

On a personal note, despite working in this field for some time, even my family is impacted by counterfeit goods. Just a few weeks ago in September, my mother, who is a 72-year-old retired public school teacher, was informed that a vitamin that she ordered on an e-commerce platform that allows third-party sellers was counterfeit. And she had been taking it for several months and experienced negative health effects.

While she did get a refund, the communication from the platform was confusing. And she was told conflicting messages that she could dispose of it, or even give it away, or donate it.

My mother's experience is reflective of what I've heard from IP rights holders in regard to their consumers and others in the risks of third-party sellers of counterfeit, and it's not limited to one particular platform or product.

So my recommendations are to continue to address the ever-growing sale of counterfeit goods by third-party sellers in online marketplaces through the SHOP SAFE Act, and to support continued and expanded collaborations between academia and other stakeholders. Thank you, and I look forward to your questions.

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

Chair COONS. Thank you, Professor Kammel. Mr. Shapiro.

**STATEMENT OF DANIEL SHAPIRO, SENIOR VICE PRESIDENT,
BRAND RELATIONSHIP AND STRATEGIC PARTNERSHIPS,
RED POINTS, SALT LAKE CITY, UTAH**

Mr. SHAPIRO. Thank you, Chairman Coons, and Ranking Member Tillis, and the esteemed Members of the Committee for inviting me to be here today.

A quick overview of Red Points. We are a technology company that's helping making the internet safer for both brands and consumers. We use AI technology to detect and remove hundreds, if not thousands, of marketplaces around the world. I began working in this space some 13 years ago while working at eBay, specifically working with some of the world's largest brands to combat this problem, which is obviously significant.

In recent years, we have witnessed an unprecedented rise in e-commerce offering consumers convenience and variety like never before. This, like everything, brings life into life, both opportunities and challenges, that this boom has attracted counterfeiters who exploit these platforms, endangering consumer safety, tarnishing brand reputation, and causing considerable economic loss.

Contrary to popular belief, online counterfeit is not restricted in luxury goods. Counterfeiters do not discriminate when selling fake product online. They can target industries and they can target any brand regardless of their size. We are talking about everything from baby products, cosmetics, automotive, fashion, and even industrial equipment like wind turbines get counterfeited.

In the context of back-to-school shopping, students and parents are particularly vulnerable to counterfeit electronics, backpacks, clothing, footwear, as these are essential for the upcoming academic year. Some of these products may not be harmful, but rather extremely poor quality, which takes hard-earned money out of families because they have to rebuy these products before the end of the academic year.

As a testament to this, Red Points, we witnessed over 1,000 percent increase in the detected counterfeit incidences for the brands in which we represent over the year 2022 versus 2021.

For a reference, Red Points today serves over 1,200 brands who rely on our platform to combat online fraud, which provide us with a vast amount of valuable information.

Last year alone, we processed over 35 million links per day, and safeguarded over \$2.2 billion in potential revenue loss for our clients. These statistics underscore the depth and challenge before us.

The sophistication of online scams continues to evolve with fraudsters harnessing technologies, creating websites, mastering social engineering. And the battle against these ever-adapting threats resembles the well-known—as Chairman Coons mentioned, the well-known game of whack-a-mole.

As we delve into the complexities of counterfeiting in the digital age, it is crucial to consider the existing response of online platforms, marketplaces, brands, legislative actions, and even third-party providers like Red Points.

Are all of us aligned? Are we collaborating well enough to combat this sort of greater evil? After all, the target here is, in fact, the criminals who are exploiting both the marketplaces and the consumers.

Now, many e-commerce platforms have been ramping up their anti-counterfeiting initiatives in recent years in efforts to rid their sites of knockoffs. However, scammers are continually looking for bigger audiences to sell to. The rapid year-over-year growth of e-commerce users has offered a unique opportunity for bad actors to expand their operations and further challenge of combating counterfeits as they persist to do to the adaptability and persistence of criminal organizations.

Brands, regardless of their size, find it challenging to address all the infringing images of their intellectual property. To effectively combat online counterfeits, brands must prioritize, must invest, and implement a clear online brand protection strategy.

Not having an online brand protection strategy today has grave consequences for both its brand itself and its consumers, particularly in the area of detection and enforcement. This can be made even more challenging based on the distribution decisions made by their companies' business teams.

However, when it comes to the fight against counterfeits, in our opinion, the path forward is collaboration. This is not an issue that can be solved by one stakeholder. It's a shared responsibility and needs a united front of industries, marketplaces, third-party providers, and legislative action to ensure a secure e-commerce environment.

Collaboration amplifies our resources, amplifies our data and expertise, and our response is greater than the sum of its parts. It is our hope that the legal system will continue to hold sellers liable for the sale of counterfeit product online as they do for brick and mortar retailers. And we welcome ongoing dialogue in the brand protection community and legislation to find the best practices to tackle this online counterfeiting problem. Thank you.

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

Chair COONS. Thank you, Mr. Shapiro. Mr. Lamar.

STATEMENT OF STEVE LAMAR, PRESIDENT AND CHIEF EXECUTIVE OFFICER, AMERICAN APPAREL & FOOTWEAR ASSOCIATION, WASHINGTON, DC

Mr. LAMAR. Thank you Chairman Coons, Ranking Member Tillis, and Members of the Subcommittee.

Nobody wants to buy clothes, shoes, or accessories that will sicken their kids, or that were made by forced labor, or that were produced in sweatshops, or that destroy the environment. But that's exactly what happens when consumers are duped into buying counterfeit fashion. And that's why the SHOP SAFE Act is so important for Congress to consider and pass.

The members of AAFA invest millions to build, train, and inspect supply chains to ensure that the clothes, shoes, and accessories bought and worn by American families are not only fashionable and affordable, but are also ethically and sustainably sourced and made, and are safe for consumers.

This is an area of continuous improvement as each day we're looking further back in our supply chains and implementing increasingly complicated transparency, traceability, and product safety requirements to make sure that the clothes, and shoes, and ac-

cessories used by everybody in this room, and everybody in this country, are responsibly made.

On top of their considerable investment in social and ethical compliance, U.S. brands and retailers of all sizes spend considerable resources to police third-party marketplaces, try to remove shady websites, take down fraudulent ads in a mission to address the growing counterfeit problem and protect consumers.

Counterfeit products not only harm our members' reputations and hurt their sales, but they also put our members' customers in harm's way with fake products that could sicken them or create other risks.

We're part of a broad industry coalition supporting the SHOP SAFE Act, spanning diverse sectors of the economy that have been raising alarms about the growing danger posed by counterfeits that are too easily allowed into our front steps and into our living rooms.

While headlines scream about the dangers of counterfeit airbags, batteries, and prescriptions, the dangers posed by counterfeits are everywhere, including apparel, footwear, accessories, toys, personal care products, and more.

In 2022, AAFA commissioned a study of 47 counterfeit clothes, shoes, and other accessories. These were everyday items that we would wear or use daily. And we found that 17 of these products, just over 36 percent, had dangerously high levels of poisonous materials like lead, arsenic, and phthalates.

Not only did these items fail U.S. safety rules, but they also could have made consumers seriously ill if they had bought or used them. To say that counterfeits kill is not an exaggeration.

Counterfeiters have a different view of the world. Their entire business model is based on stealing somebody else's innovation and identity. So it's with little remorse that they exploit workers, engage in wage theft, employ shoddy factories, dump hazardous waste in the rivers and lakes, and use dangerous chemicals.

When they lure folks into buying their fake products, they often dabble in more thievery, exposing consumers to financial scams. The fact that authentic brands invest so much in social and ethical effort only widens the profit margins of counterfeiters since they are often able to score sales without paying for any of the compliance that they're duping customers into believing that has occurred.

What happens to the profit of these ill-gotten gains? They become the seed capital for organized crime, terrorist activities, and yet more counterfeit activity. Protecting consumers, businesses, and American jobs from counterfeits has been and should be a bipartisan issue.

And like many, we celebrate the growth of the e-commerce environment and cherish the opportunities the internet has created to enable consumers to interact with our industry, and to enable our industry to thrive, especially during the pandemic.

With great opportunity comes great responsibility, and that's why the accountability and proactive measures required by SHOP SAFE are vital. U.S. law contains many guardrails to make sure brick and mortar retailers of all sizes do not sell counterfeit items.

Authentic brands don't have to visit every store across the country to make sure that these brick and mortar locations are only selling legitimate goods. They don't have to go through lengthy take-down fights with these physical stores only to find fake goods pop up again, shielded by a new name.

In the online world, things are very different. Brands must monitor every platform out there, with new platforms popping up every day. And when brands find counterfeits, fake websites, dupe influencers, or fraudulent ads promoting these websites, they must beg and fight the platforms to get those products, ads, and websites removed. If the platform removes them at all, it can be weeks or months, all the time allowing the counterfeiters to profit. And often, the infringers pop up within days.

We can't think it's simply okay to let brands and retailers shoulder the burden and monitor these websites. Inefficient at best and Sisyphean at worse, this is likened to a game of whack-a-mole because counterfeiters are a wily bunch.

They're pioneers in the latest technology and are constantly developing creative approaches to evade detection, knowing also that the legal framework that is deployed to stop them has been rapidly outpaced by the internet itself. They also know that many third-party marketplaces can hide within that framework, avoiding responsibility for the fake goods they allow to be sold.

Interestingly, some of the same platforms that end up hosting counterfeiters are themselves pioneering amazing technological advancements. They can put up more effective roadblocks against illicit actors. Many of them talk about zero tolerance for counterfeits, a value that is commendable. But we've been hearing that for years while the counterfeit epidemic has been allowed to flourish.

While these actions now are insufficient, it's now time to update and create stronger Federal incentives appropriate for the e-commerce ecosystems and consistent with what we have in the physical world.

So SHOP SAFE will do just that: holding third-party online platforms accountable so they will be incentivized to make the necessary changes. And if these platforms take commonsense, easily achievable steps, like asking sellers for key pieces of needed information, implementing proactive measures for screening listings before displaying the goods, and denying the platform to repeat infringers, they will clean up their own sites and achieve safe harbor from the legislation's tough liability provisions—not provide safe harbor for dangerous fake goods.

Thank you for inviting us to testify today, and I look forward to your questions.

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

Chair COONS. Thank you, Mr. Lamar. Mr. Schruers.

STATEMENT OF MATT SCHRUEERS, PRESIDENT, COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION, WASHINGTON, DC

Mr. SCHRUEERS. Chairman Coons, Ranking Member Tillis, Members of the Subcommittee, thank you for your time today.

My name is Matt Schruers. I'm president of the Computer & Communications Industry Association. CCIA has advocated on technology policy for over 50 years. I'm pleased to be here today to talk about protecting consumers online.

Keeping consumers and communities safe online and safe from dangerous products is a broadly shared goal. Responsible services, including CCIA members, invest significant resources in protecting users from illegal and unsafe goods, while engaging extensively with brand owners to identify and report to law enforcement counterfeit products.

This is why CCIA, and many online marketplaces and retailers, jointly endorsed and supported the INFORM Consumers Act that was passed last year. This law has been in effect for less than 100 days. We should give time for INFORM to work before judging whether or not additional legislative interventions are required.

CCIA has concerns about S.2934 of the recently reintroduced SHOP SAFE Act. This concept was previously opposed by dozens of civil society groups, businesses, associations, and legal scholars for good cause. Fighting counterfeits requires substantial cooperation between brand owners and retailers.

Existing law recognizes that trademark owners are in the best position to accurately and efficiently identify counterfeit goods from authentic goods. But SHOP SAFE places major new burdens and liabilities on sellers of all sizes while requiring no significant new contribution from brand owners.

In fact, the new version of SHOP SAFE deletes a section from the previous version that would've cracked down on bogus trademark challenges. And the legislation's public notice requirements actually burden smaller retailers more than large ones.

And shifting these legal responsibilities through new liability rules is not going to prevent counterfeiting. But it would stifle legitimate commerce and innovation, and reduce ongoing cross-sector cooperation.

Marketplaces and the vast majority of small sellers operate legitimately. And we should not place unreasonable compliance burdens on businesses of any size, but particularly not small and medium-sized businesses.

These sellers lack the bandwidth and the resources to spend multiple days investigating putative concerns from brands when the trademark owner is in possession of the information that will help them identify counterfeits. That definition, incidentally, turns on non-public information about whether or not a good was manufactured under license.

The burdens of SHOP SAFE fall broadly. The scope of the statute's definitions is incredibly expansive. It defines electronic commerce platform as far broader than marketplaces, encompassing virtually every online forum where people could connect. And the bill presumes that any such site is liable for infringement and requires it to prove its innocence by mandating compliance with prescriptive requirements to escape what is effectively strict liability.

SHOP SAFE also employs an expansive definition of good that implicates health and safety. That definition would encompass virtually every product in today's consumer household.

And finally, while the bill is framed as a safe harbor, it is, in fact, an unsafe harbor. It flips on its head standard notions of liability in favor of a novel, strict contributory liability scheme whereby if a service does not adhere to a set of obligations that are not accurately characterized as best practice, then they will be held liable.

So in summary, we recommend that the Senate seek updated data on the efficacy of INFORM before moving forward on an unbalanced proposal that is not going to solve the problem it purports to address, but would place substantial regulatory burdens on small businesses, on e-commerce providers, and on retailers.

Ultimately, we recommend that Congress approach retail regulation in its totality. Brick and mortar, e-commerce, big-box, bodega, mom and pop stores, all the same should be regulated under a coherent model that applies to businesses equally. And this, we believe, will provide a better path forward.

I thank you for the invitation today. Thank you for your time, and I look forward to your questions.

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

Chair COONS. Thank you. Thank you, Mr. Schruers, and thank you to all of the witnesses.

Let me just open where we concluded there. Professor Kammel, you testified that there's a different liability standard, different approach for brick and mortar stores versus online platforms. Mr. Schruers concluded by saying we should have one approach. One common approach to how we regulate commerce online, large, small, brick and mortar.

Help me understand. Square that circle for me. Doesn't SHOP SAFE try to apply a similar liability standard online as already exists in brick and mortar, or do I misunderstand?

Professor KAMMEL. So, in my opinion, it does attempt to do a similar contributory liability in the e-commerce space. So in the brick and mortar space—and we've seen that through several cases starting back in 1992 with *Hard Rock v. Concession Services* before the Seventh Circuit—that people who were running flea markets or landlords, they were considered service providers. They were responsible for reasonable—reasonably looking around their property to determine if counterfeiting was taking place or other activities.

So what happened with the *Tiffany v. eBay* case, and a few other cases, too, is the court decided at that time—which, again, is about 13 years ago—that it was unreasonable for an e-commerce platform to be able to look through their own platform to find these postings.

And I think we've seen through the changes in technology, particularly AI and machine learning, that that has shifted. And it's no longer unreasonable for a platform to be able to see what's on its own platform, but also to vet proactively sellers, and those postings, and the images that are going up to make sure once something's posted that it's actually safe for the consumer to purchase.

Chair COONS. Mr. Lamar, one of the things that SHOP SAFE would do, one of the attempts at definitions for sort of best practices to define a safe harbor would be to have a standardized set of, "If you do these things you would avoid any contributory liability."

Your members sell their products on all different platforms. All different sizes. You have small, medium, and very large companies selling on platforms of all different sizes.

Each of these platforms have different rules, different programs, different approaches to addressing counterfeiting. Some laudable and very sophisticated, engaged. Some virtually not at all.

Would it benefit brand owners to have a standardized menu that says this is the kind of cooperation you need to provide to platforms?

Mr. LAMAR. Yes, I think you hit the nail on the head, Senator. There is a lack of consistency about what exists. We've actually created tools to kind of tell people, our members, when you go to this platform, here are the things you can experience. When you go to this platform, here are the things you can experience.

And it'll be much better if there were very clear, simple Federal guidelines. If you want to do business in this country, here's the way you need to approach the U.S. consumer and create that very common sense set of proactive. Right now, it is reactive. It is after the fact, and it is inconsistent.

So something that actually creates a very common, central approach is exactly what we need.

Chair COONS. Mr. Schruers, you said SHOP SAFE—you have a number of criticisms of it. One is that it puts no new obligations on brands. What would you suggest as, in your view, one of the most important things we could do to achieve a better balance of responsibilities and liabilities online?

Mr. SCHRUEERS. Thanks for that. The bill, as it stands, indicates that information sharing should occur. But then states that it's not necessary, effectively, if information about trademarks is publicly available online, which is effectively every trademark by virtue of the fact that all of this information is available through the Patent and Trademark Office website.

So the statute, as it presently stands, creates a null set. It's a—it regulates zero companies. What we would want to see is an obligation on brand owners to share more granular information about products, and provide information about, for example, new products being introduced, imagery that they have that's legitimate, that—and whether or not that's been licensed.

But it's important to sort of step back and recognize that the Trademark Act currently defines counterfeit as products—it requires the definition, that is whether or not the product has been manufactured under license. And that is information that only the brand owner has.

And so having availability to that information would go a long way toward allowing e-commerce platforms to implement the kinds of take-down requests that they're getting.

Chair COONS. Thank you, Mr. Schruers. Mr. Shapiro, uniquely, you sit sort of in the middle of all this, mediating oceans of data going back and forth between brands and platforms. I think you said 35 million incidents a year.

Mr. SHAPIRO. A day.

Chair COONS. A day.

Mr. SHAPIRO. A day.

Chair COONS. Right. A day.

So it's only today with modern technology, with AI, with incredibly capable technology that we can begin to examine and process things like whether this image is a trademarked and protected image of the actual product, or it is something fake.

How would you strike the balance here between putting more obligations on trademark holders, licensors, and putting more obligations on platforms?

Mr. SHAPIRO. Yes. I think it's a combination—thank you, Chairman. I think it's a combination of a lot of challenges coming together today—today in the marketplaces around the world.

My former company I worked with—somewhere, I read online recently that there was 1.7 billion listings currently available. Amazon is probably double or triple that. Alibaba is probably adding close to a billion items a day in a conference that I was at not too long ago in terms of suggesting that's how many listings. I certainly can't verify about it. That's just what I heard. But at that volume, the ability for brands to monitor that—monitor that on their own, impossible.

Today, unless you deploy some level of technology, you can't get there. And with platforms today with that many listings on their sites, and with brands having two and three million SKUs—there are some very big brands with lots of SKUs—there probably isn't one person in the company that knows every product in which they make.

And so when we deal with brand protection teams at a particular brand, they're often an IP legal counsel, very sophisticated in the world of IP, but they work for a company with a million SKUs. They don't know which items are authentic and which are counterfeit. If they've only been there a year, they might not even know of the product previously that—

Chair COONS. Understood.

Mr. SHAPIRO [continuing]. Was out.

Chair COONS. What suggestions might you have for us about how to better balance—

Mr. SHAPIRO. Well—

Chair COONS [continuing]. The obligations of brands and platforms?

Mr. SHAPIRO [continuing]. Yes. So I think to answer your question, then, I think that there has to be an investment from the brands to help. Right? There's the unwillingness today to share too much information with platforms because there's a lack of trust with the platforms. That if they told them their intellectual property, that maybe somehow that would get to a counterfeiter. So if today we could get—

Chair COONS. In other words—

Mr. SHAPIRO [continuing]. The brands—

Chair COONS [continuing]. If brands are required to get well into the granularity of how to make their product, not just have we registered the trademark—

Mr. SHAPIRO. Yes.

Chair COONS [continuing]. And are we making it under license, but exactly, all the schematics, and the details, and—

Mr. SHAPIRO. Yes. And that's how we work.

Chair COONS [continuing]. There are, in fact, actions against some platforms for manufacturing.

Mr. SHAPIRO. Exactly. And that's how we work. They share with us their IP, we use that IP to crawl and find that product. And we keep that. We don't share that with the platform, but we have that. Right?

So that's the first step of trying to solve this is, a bit more comfortable level of sharing that IP and sort of trusting one another that we could do this together if we think about a good common-place on how to do it.

Chair COONS. Thank you. I need to yield to my Ranking Member, Senator Tillis.

Senator TILLIS. Thank you, Mr. Chair. Mr. Chair, I hope you don't take or didn't take my comments earlier about people who are opposed to the bill we're talking today as being bad people. I just see a bad pattern of behavior here that we need to fix.

Chair COONS. Yes.

Senator TILLIS. And I hear your comments about the INFORM Act. But let's assume that INFORM Act performs at 100 percent of its wildest expectations. Is the problem solved?

Mr. SCHRUEERS. Well, I think this problem will never be solved—

Senator TILLIS. Right.

Mr. SCHRUEERS [continuing]. It is a ongoing process by which—

Senator TILLIS. But, bend the curve—

Mr. SCHRUEERS. I—

Senator TILLIS [continuing]. To me, it just seems like it's indisputable that this is growing and bad actors, particularly China—I should have mentioned that in my opening comments.

Look, there are a variety of strategic economic, health, and safety reasons why we need to be attacking this. China being first among them. I've seen far too many instances of North Carolina-based companies where they've been victims of counterfeit goods.

I'm not here to attack you, but I am here about that—because we are going to go to a second round, I'm going to yield to Senator Blackburn here, fairly quickly, so that she can ask, and then I'll come back around.

I want to find out more about the 35 million links a day—the methodology being used for that, what the trending is. I also want to understand a little bit more about the 17-country survey. I think Professor Kammel, you may have mentioned that. I'll get back to specific suggestions, but right now I'm going to defer to Senator Blackburn, if I may.

Chair COONS. Of course. Senator Blackburn.

Senator BLACKBURN. And thank you, Mr. Chairman. And I thank Senator Tillis. Welcome. We are delighted that you all are here.

I represent Tennessee. And in Tennessee, we have looked at this issue of copyright and patent infringements for years. And it doesn't matter if it is auto parts or aftermarket auto parts. It doesn't matter if it is guitars, or clothing, or shoes, baseballs, ink pens.

Those are all items that have come to us, and they've been knocked off by a factory over in China. And then they are—that

brand name is grabbed, and that brand—this counterfeit merchandise is sold under that brand name.

And Mr. Shapiro, you mentioned how difficult it is to track, and how difficult it is to find these, and that due diligence needing to be done as you crawl the web and try to search out these items.

Mr. Schruers, let me come to you. Senator Tillis was talking about the impact of the INFORM Act. So answer that in a more fulsome way. As we look at SHOP SAFE, should we wait for the INFORM Act and see what we're going—how far we're going to get there?

Because, you know, this issue has been around for a long time. And it started out and it was knocking off designer clothing, and handbags, and music, and videos, and movies. And then you saw it creep into other areas. So let's talk about what you think the merit and the impact of the INFORM Act could be, or should be.

Mr. SCHRUEERS. Yes. Thank you for that. So we have had INFORM in force for barely 3 months, and we have yet to see its full effect. Retail, of course, is seasonal and cyclical. And so we would want to spend some time collecting data before we can see its full impact and assess whether or not it's doing what we need it to do.

But we know that a lot of counterfeiters and bad actors online operate by obscuring information. And, of course, INFORM creates greater transparency, encourages and compels platforms to collect, and verify, and disclose information from high-volume sellers. It also creates a mechanism for individuals to report suspicious transactions. These mechanisms have barely been available to the public, and we should give them time.

I think we should also acknowledge that what is best practice is an evolving standard. Right? And from which we should determine by talking to the practitioners. And we can see that technology is regularly being deployed in this place where it can.

But at the end of the day, we need cooperation. We need brand owners and platforms working hand in glove because—

Senator BLACKBURN. Well, and I think we need platforms to be more diligent in pulling things that they suspect are counterfeit.

Mr. SCHRUEERS. I think we should acknowledge that there are millions of legitimate transactions online every day. And the vast, vast majority of platforms of e-commerce providers and small sellers are legitimate actors engaged in lawful commerce.

That being said, there is a very small sliver of bad actors out there who we need to take action against. And online platforms don't want to be associated with these transactions any more than brand owners want them to happen. These are bad experiences for consumers, and nobody wants to be associated with selling a dangerous good.

The question is how do we get there? And we need to get there through cooperation. Because as the bill currently stands, the parties who have the obligation to act actually have the least information in this transaction. And we need to fix that problem.

Senator BLACKBURN. I was talking with someone in Tennessee. And they were talking about using Etsy, and putting something that they had created on Etsy. And they were trying to get a patent on this, and they said, "My concern is I'm going to put it up, and

then it's going to be knocked off before I have the ability to actually commercialize on this."

So how do we use the INFORM Act? How do we fight this proliferation of counterfeit goods and not harm these small manufacturers, these small entities that have a great idea or a great product? They're trying to move it into commercialization, but they're afraid of what will happen if they go online.

Mr. SCHRUERS. I think that's a great question. And obviously, different platforms provide different services, and so I can't speak to any one specific platform.

But I think it's—bears noting that these platforms are often the first vehicle by which small sellers and entrepreneurs, like this constituent you're referring to, are able to reach a worldwide audience. And, but for access to a platform that allows them to ship across the country and around the world, they simply wouldn't have the ability to scale beyond their community.

And so we don't want to impose obligations on either the platform or these individuals that cannot be sustained, and that might have the effect of driving someone like this small entrepreneur out of the marketplace.

Senator BLACKBURN. Yes. And thank you for that. And I see my time's expired. Thank you.

Chair COONS. Thank you, Senator Blackburn. Senator Hirono, are you prepared to question, having just returned from an important—

Senator HIRONO. Having just—

Chair COONS [continuing]. Ceremony?

Senator HIRONO [continuing]. Sat down.

Chair COONS. I'm happy to ask a question if you'd like for a moment while you—

Senator HIRONO. It's okay. Thank you very much.

Chair COONS. Please proceed.

Senator HIRONO. So this is for Ms. Kammel. Am I pronouncing your name—

Professor KAMMEL. Yes.

Senator HIRONO [continuing]. Correctly? So this has to do with some definitions. So your research center has a helpful glossary on its website that defines the action of counterfeiting generally as, and I quote, "To forge, copy, or initiate something without a right to do so, and with the purpose of deceiving or defrauding," end quote. And the Federal definition is different, but starts with a spurious mark, meaning, one that is not genuine or authentic.

So as we deal with this issue of counterfeiting, do we need to have a better definition of what constitutes counterfeiting? Because we're not talking about those instances where someone goes and buys something at a discount, a genuine article at a discount, and then proceeds to sell that item for a lesser price. That is not counterfeiting. Is it?

Professor KAMMEL. That's correct. I do not believe it is. And thank you for your question. While that definition under the glossary is meant to be descriptive, I would refer back to the definition in the Lanham Act or in the Trademark Counterfeiting Act about the spurious mark. We believe that is what legally defines what a counterfeit mark is.

Senator HIRONO. So the focus of this bill, I think, has to do with items that can be deemed that can compromise the health and safety of the user. And I think the definition of the bill is very broad. Isn't it? Have you had a chance to review the bill?

Professor KAMMEL. I have. Yes. You're referring to the health and safety provision?

Senator HIRONO. Yes. And doesn't the bill pretty much refer to those kinds of items that compromise or could endanger health and safety—that that's what we're getting at? But the bill's definition is quite broad. It could be anything, pretty much from what I read. So do we need to better define what we mean by the compromising or whatever—the health and safety?

Professor KAMMEL. Thank you for that question. So my understanding is that it implicates a counterfeit good which in itself would impact health and safety. And as we know, and as several of my colleagues here have testified, we know that goods, that if they're legitimate, may not implicate health and safety, but if they are counterfeit they can.

And a lot of people are often surprised by that when—I mean, we get asked the question, you know, what's the harm in purchasing this counterfeit? You know, there's nothing wrong with it. And we know from a lot of testing, for example, that there can be lead or, you know, poisonous—poisonous materials that were made in these products.

So from my perspective, the fact that it says that a good that implicates health and safety would encompass a counterfeit that could endanger a person's health and safety. And we see that across industries, across product lines.

Senator HIRONO. Well, the definition is really broad, and that's why I have some concerns about just about anything can compromise or endanger someone's health and safety.

For Mr. Lamar, you testified that over a third of the counterfeit clothes that you tested in a case study contained dangerous substances. Did you get into what kind of substances these are?

Mr. LAMAR. Yes. Thank you for the question, Senator. They contained high levels of dangerous chemicals like cadmium, and lead, and phthalates. They also had other product safety failures that have been associated with injuries: buttons coming off, other kinds of things—draw strings—that the industry that is pushing for compliance go to great lengths to make sure that they meet those requirements.

And so counterfeiters that are not going through, in addition to creating products that do have a health and safety issue even though you might not think of it with an article of clothing, they do have a very obvious one.

They also get a—those counterfeiters get a benefit because they're selling something at roughly the same price even though the—they don't have to go through the expenditure of the expense of compliance and testing and so forth.

Senator HIRONO. Which leads me to question where these counterfeit products are coming from. Are they associated with certain countries that do not have to abide by health and safety considerations?

Mr. LAMAR. Many of them come from China. And interestingly in China, a lot of those same health and safety considerations exist as well. We lead compliance programs in China to educate factories on that, as well.

What's happening is the counterfeiters are ignoring everyone's health and safety. They're not putting anyone's first. So they're ignoring the U.S. laws, they're ignoring Chinese laws, they're ignoring laws in other countries, as well.

Senator HIRONO. So does the bill that the Chair and Ranking Member filed—will they help to get at these counterfeit products that are made in foreign countries such as China?

Mr. LAMAR. Absolutely. Yes.

Senator HIRONO. How so?

Mr. LAMAR. We definitely think it'll put any counterfeiter on notice. It will also create a set of very proactive steps that will be taken to make sure that the goods don't even get offered to U.S. consumers in the first place. So we deny the market to the counterfeiters. So the financial incentive for the counterfeiters to even start down the path immediately dries up.

Senator HIRONO. Just one more question, Mr. Chairman. So how do we get at these counterfeiters if they're not even in our country? I assume that these goods are somehow—that they're being sold by entities that are in China, for example. How do we even get jurisdiction over those folks?

Mr. LAMAR. One of the proactive measures—a set of proactive measures that's in SHOP SAFE talks about establishing jurisdiction for these individual companies through the platform. So that's a measure that we don't have right now that would be a huge improvement.

Senator HIRONO. Does a country have to—a country of origin, i.e. China, have to accept our jurisdiction over their people?

Mr. LAMAR. No, but the entities that are doing business with these platforms would.

Senator HIRONO. Okay. Thank you.

Chair COONS. Thank you, Senator Hirono. Let me, if I could just, Professor Kammel, could you just briefly and concisely summarize the difference between the INFORM Act and SHOP SAFE, and why both might be necessary, and what impact it would have on the contours of SHOP SAFE if we let INFORM go for a couple of years and then sort of see what the impact is?

Professor KAMMEL. Sure. Thank you for the question, Senator. From my perspective, they're complimentary but they are—they are not the same.

So the INFORM Act briefly requires e-commerce platforms to get seller information, and to verify that in advance, and to share some of that information with the consumer at the latest time—at the point of receipt of purchase so that they can get that information.

That's very helpful because currently, some platforms do not even share seller information at all. And that's kept sort of behind the wall that the e-commerce platform can see, but the consumers cannot.

Chair COONS. So in the case of your mother who purchased counterfeit or faulty vitamins online that actually harmed her, she'd

now have some information on record on the online platform about where it came from?

Professor KAMMEL. She has a name and an address. Correct.

Chair COONS. And that's it.

Professor KAMMEL. That's it.

Chair COONS. Okay. And then what's the difference in the bill we're discussing today?

Professor KAMMEL. So with SHOP SAFE, we are talking about reasonable measures that platforms can take that my colleagues here have already been discussing, particularly proactively.

So from our perspective, at least with our research, this is one of the important things to really disrupt the sale of goods online, is that proactive measures need to take place. And those are listed throughout the SHOP SAFE bill.

And if those proactive measures take place, and that's reasonable, depending on the size of the e-commerce platform, and the resources, and technology, then they have a safe harbor. If they're not willing to do that proactively, then they can be liable for secondary liability for trademark counterfeiting in a similar way that a brick and mortar store might, such as a shopping mall or a flea market, which we've talked about.

Chair COONS. And one other thing, all—one issue all of you have raised is the potential impact on small businesses. There's a threshold below which a potential company's not covered a platform.

Professor KAMMEL. Correct.

Chair COONS. A platform.

Professor KAMMEL. So, \$500,000, from my understanding. And I think it's important to point out, too, we're talking in some ways about small businesses. But from two different perspectives, I believe.

So there's the small business who is selling others' products, and then there's the small business who's the intellectual property rights holder, which I believe Senator Blackburn was referring to.

That they work really hard, they get this great idea, they go to register their IP, and e-commerce is a great place for them to start a business and sell, particularly if, you know, they're in a small town or somewhere where they might not have access to a lot of consumers.

Many of them find very quickly that their products are being counterfeited. And because they're a small company, maybe one to two people, that they don't have brand protection resources to do massive amounts of searching the web looking for the counterfeiters.

Chair COONS. One last question to you and then I'll yield to my Ranking Member. There's a difference on this panel about how big an issue this is. You took—A-CAPP took a survey of thousands of consumers and came up with the conclusion that two-thirds of all American customers had unwittingly purchased a counterfeit item online.

Given the volume of online transactions, I think it was a trillion dollars last year, that's an enormous dollar value and number. CBP reports roughly \$3 billion in interdicted counterfeits. That's a relatively small number compared to the volume.

Help me understand. How big of an issue do you think this is? Mr. Schruers has said a very small sliver in a sea of otherwise completely legitimate transactions. The truth, I suspect, is somewhere in between. And I don't mean to mischaracterize, Mr. Schruers, I'll give you a chance to also share.

How big a problem is this? Why is it deserving of legislative attention?

Professor KAMMEL. So this is a great question, and it is challenging to get an exact number. And you pointed out a lot of the sources for data that we know that we can get ahold of from customs, to takedowns on the brand side, or such as my colleague, Mr. Shapiro's side. They see how many counterfeit postings are out there.

We also know from organizations such as the OECD, the Organisation for Economic Co-operation and Development, give a lot of estimates ranging in 2.5 percent of global GDP is counterfeit sales. Some other organizations such as Frontier Economics have also published studies saying now that the problem of counterfeit goods financially has surpassed that of the global drug trade and human trafficking. So we know it's a major problem.

Chair COONS. Let me just—

Professor KAMMEL. Yes.

Chair COONS. I'm just going to hang on a second. More money, according to this source, is generated in the sale of counterfeit goods than in drugs, or selling and moving people.

Professor KAMMEL. That is what this study says. Yes.

Chair COONS. Okay. Interesting. Mr. Schruers.

Mr. SCHRUERS. Thank you for the opportunity to address this. Let me start by saying there's no dispute that this is a problem that needs attention.

Chair COONS. Right.

Mr. SCHRUERS. We're just talking about the scale of the problem. And I would note that all of these statistics that we're looking at are by their own terms wildly inflated relative to the problem that we're talking about.

So, first of all, many of them are the upper range. And so we get a site of between X and Y, and Y is the top figure, and then Y becomes the figure. So we need to realize that—that the outer bound is not the median figure.

Second, most of these figures apply and include copyright piracy, patent infringement. And I'll be the first to acknowledge that infringement in foreign markets that have weak rule of law is a serious policy problem. That is not the problem that we're talking about here.

This bill is not going to do anything about pirated software in China. It's not going to prevent patent infringement. It's not going to prevent the sale—a physical sale of a bootleg handbag on the streets of Moscow. Right? This is just about regulating online platforms, and those numbers are wildly over-inclusive based on what we're talking about here. So I think we have to take these numbers with many grains of salt.

Chair COONS. Could—

Mr. SCHRUERS. Having said that, we—

Chair COONS [continuing]. You speak to Professor Kammel's study suggesting two-thirds of American consumers may have unwittingly purchased a counterfeit item?

Mr. SCHRUEERS. Yes, I—well, I don't want to speak specifically about the methodology of that study. I think what I would say is we know the vast majority of these transactions are legitimate by legitimate businesses who just want to make consumers happy with their products.

And so the question is how do we—how do we do that? How do we facilitate all of these lawful transactions while dealing with this small sliver of bad actors?

Chair COONS. Mr. Shapiro, to close out this round, is Red Points a very small startup with a handful of customers?

Mr. SHAPIRO. No.

Chair COONS. No. Your reference to 35 million, was 35 million what?

Mr. SHAPIRO. New listings a day we bring into our platform on behalf of the brands we represent.

Chair COONS. Thirty-five million new listings of—

Mr. SHAPIRO. Well, listings that are—need to be reviewed for being suspicious of counterfeits.

Chair COONS. And what percentage of them do you ultimately conclude have any basis to be deemed counterfeits?

Mr. SHAPIRO. Well, it's a small—

Chair COONS. Purveyors of counterfeit.

Mr. SHAPIRO. Yes. It's a small number. Today—well, it's not a small number. But I'll tell you today, we send out somewhere—

Chair COONS. That's exactly my question. Is it a small number?

Mr. SHAPIRO. Three to four hundred thousand notices and take-downs per month on behalf of our customers. So we represent 1,200 customers. We're sending out almost 400,000 notices every single month on behalf of those customers.

Chair COONS. To wrap this up, you have 1,200 customers?

Mr. SHAPIRO. Correct.

Chair COONS. How many members do you have, Mr. Lamar?

Mr. LAMAR. About 350 representing between 1,000 to 1,200 famous brands.

Chair COONS. And you are one small segment of every industry that sells online?

Mr. LAMAR. The SHOP SAFE Coalition. If you can, you know, if you can make it, you can counterfeit it. And it represents all sectors of the economy.

Chair COONS. Mr. Shapiro, any general observation about whether the scale of counterfeit activity online is increasing, stable, or decreasing?

To the point my colleague made, how do we bend the curve—

Mr. SHAPIRO. Yes.

Chair COONS [continuing]. Without killing what is one of the most popular, and efficient, and—I mean, if it weren't for Amazon, my household would cease to function. A truck pulls up every day and—

Senator TILLIS. And I'd have a lot—

Chair COONS [continuing]. Disgorges more profits.

Senator TILLIS [continuing]. More money in my bank account.

[Laughter.]

Mr. SHAPIRO. Yes, it is growing. I mentioned in my testimony that year over year, our counterfeits have increased. Our detections on behalf of our customers, they're up 1,003 percent—excuse me, 103 percent. I said 100 percent. But it's about 103 percent growth over 1 year. It is growing at a substantial rate, without question.

Chair COONS. Let me conclude this round by just saying, and then defer to Senator Tillis, I hear across all four of you that cooperation and collaboration between platforms and brands is critical.

Our proposed legislation shifts the incentives in a way that tries to come up with a liability framework that is common across brick and mortar and online platforms. I recognize differences of opinion about whether it underperforms or over performs. I look forward to active engagement as we move forward. Senator Tillis.

Senator TILLIS. Yes. Mr. Shapiro, I was actually going to follow up along the same lines that Senator Coons did.

I think—you know, it's amazing. I bought a counterfeit good. The minute I opened the box, I threw it away. It turned out to be like a Dremel ripoff, but it looked like something that was going to suit the task that I had for the weekend.

My daughter thought she bought a pair of Nikes that looked like crap when she opened up the box. It took her forever to get a refund.

Your mother [points to Professor Kammel].

I get, because of the sheer volume of transactions, it looks pretty small. But it's touched more than half of probably the consumers in the United States today. So it's a problem that touches all of us.

It's bad enough when you're ripping off intellectual property. It's worse when you get into the health and safety factors. We've got to—we've got to do something to fix it. So I'm going to move into like a debate round here, which I do from time to time. That's another reason why I love this Committee.

Number one, is there any jurisdiction that's gotten this right? Should we just be filling in the blanks by saying do just what—fill in the blank—country has done? Are there any emerging best practices out there that we should follow? Or the converse, is there an overreach that's been very, very disruptive to your members, CCIA members?

I mean, who's getting it right? Who's gotten it wrong, and what do we need to learn from it? And we'll start with you, Professor Kammel.

Professor KAMMEL. Thanks for the question. So in my perspective, so far no one has it exactly right. I think a lot of different areas are grappling with this—

Senator TILLIS. Has anybody gotten it kind of wrong—

Professor KAMMEL [continuing]. Similar issue.

Senator TILLIS [continuing]. Mr. Schruers?

Mr. SCHRUEERS. Well, I think what I would say is the approach that we have had thus far is as close to getting things right as we can see. And the fact of the matter is that the thriving e-commerce sector is located in the United States, and that's not an accident.

And it's quite possible that a ill-considered policy decision could dry up that marketplace. Right? And that means impacting not only U.S. businesses, but all the small businesses——

Senator TILLIS. Exactly. And nobody——

Mr. SCHRUERS [continuing]. That rely on them.

Senator TILLIS [continuing]. Wants that to happen.

Mr. SCHRUERS. Right.

Senator TILLIS. Mr. Shapiro, the business that you're engaged in, you made a very important point that a part of the way that you're able to identify potential infringements is because proprietary data is shared with you all, that you use in order to crawl—crawl the internet, find potential suspicious offerings.

Mr. SHAPIRO. Correct.

Senator TILLIS. And how long has it been in business?

Mr. SHAPIRO. We've been operating since 2014.

Senator TILLIS. So with the fundamental technology absent, the data that your customers, 1,200 or so customers are willing to share with you, is that the only difference between the analytics you can do and the analytics that most of these platforms should be doing anyway?

Mr. SHAPIRO. Well, I would—I came from a platform. So I know there's——

Senator TILLIS. Yes——

Mr. SHAPIRO [continuing]. Technology there.

Senator TILLIS. That's why I was——

Mr. SHAPIRO. I know that they're doing things every single day. I'm assuming it's a lot better since I left 6 years ago. I can tell you ours is a lot better today than it was 6 years ago. So certainly, the technology is allowing us to find things.

Here's the challenge. There are—I've been at this thing for 13 years. Sometimes when we have a new customer sign up and I look at what they just—what we're going to protect, I look at it and go, "Are you kidding me? They're counterfeiting that?"

Most people who work for platforms don't have a very big brand breadth of knowledge. And so if you've never seen this pen before, you may never know that it's actually a brand. Right? So it's a challenge for platforms to think about how to protect that when they didn't know it was a brand. And you might argue someone in the company might know it's a brand, but not everybody knows it's a brand.

So for us, when brands hire us and share that intimate intellectual property knowledge, we can deploy all sorts of technology from logo recognition, image recognition, image fingerprinting, machine learning. And we take those tools, now that we have that knowledge, and we're able to scale at a very high speed of actually finding and removing.

And with our partnership with big platforms like Amazon, eBay, Alibaba, Facebook, Instagram, Twitter, we're able to take those down in hours. Right? That's how we help brands.

Senator TILLIS. Why wouldn't the industry be naturally incented to develop the reputation of being the one platform that doesn't really allow much counterfeit to get through?

In other words, why wouldn't Amazon just own this space by saying, "Don't believe any of the upstarts because we spend billions of

dollars a year identifying counterfeit, potentially counterfeit transactions, and we've got the seal of approval." Why isn't the industry already doing that, or are they and they just haven't caught up yet?

Mr. SHAPIRO. Well, I think they are doing it for the brands in which they probably know, and some of the things they don't know they can't do. Right?

Senator TILLIS. I know. But it is—I'm going to finish so Senator Hirono can go to another line of questioning.

But guys, we are talking about the titans of technology. We are talking about people who have been proud to identify through analytics, anticipating your next purchase before you even make the decision to do it.

So seriously, we can't figure out a way to take the edge off of some of this problem. Not all of it. I mean, I can give you countless examples of data analytics where—and let me just back up.

I'm not going to—I came from the high-tech sector. I worked in artificial intelligence in the late 1980s. It was a lot less smart back then, but it was still artificial intelligence.

It's just remarkable to me—even when I get into this discussion about notice and take down of creators' content—guys, this has to be a part of your business model. Amazon didn't exist until it became an online book retailer. Now, it's just an enormously important, consequential American business. But you've got to take care of some of the ill effects of the very model that made you a billionaire, Mr. Bezos.

So, I mean, a part of what I'd like to see here are some industry-led solutions. Mr. Schruers, let me tell you, I don't like doing heavy regulation. I don't even like regulations. I've probably been responsible for repealing more regulations than I've ever voted for in my 16, 17 years in public office.

But the industry needs to find a role to play here. And it can't be that let's wait for the INFORM Act, and then maybe we'll come back with feedback on the next tranche if it's not safer.

We need industry-led solutions in collaboration here, because I do believe most of the people—all the people represented at this table are good people. But we've got bad people, particularly the Communist Party of China, who is taking advantage of our lack of progress in this space. And it's costing us economically. And I actually think it's costing us in terms of health and safety.

But you have my commitment. My door is wide open. Let's come up with the leanest, most effective approach to protect consumers and hold what I think the historic counterfeiter, is China, accountable. Thank you, Mr. Chair.

Chair COONS. Thank you, Senator Tillis. Senator Hirono.

Senator HIRONO. Thank you. So this is yet again a very, very interesting situation. So I am trying to grasp the need for regulation and what that would look like versus the how we're going to enforce such legislation.

So for Mr. Schruers, I know you oppose this legislation, at least in his current form. And as I understand, the previous versions of this bill included a mechanism to hold accountable brands that abuse the process by filing multiple false infringement claims. Can

you speak a little more about those provisions and whether you would support something like that?

Mr. SCHRUEERS. So thank you for that. The previous version of the bill in previous years did acknowledge the fact that we've seen in other contexts, that when you create a mechanism to suppress information online——

Senator HIRONO. Mm-hmm.

Mr. SCHRUEERS [continuing]. And there is no accountability for misuse of that mechanism, it gets abused.

Senator HIRONO. Mm-hmm.

Mr. SCHRUEERS. And right now, SHOP SAFE has no accountability mechanism for misuse of its notice provision, and that is a recipe for disaster.

We've seen in other contexts, in here, in Europe, that these mechanisms get misused both by nominally good actors who just don't know what they're doing and bad actors who want to suppress the information that they're complaining about.

And here, you could easily imagine competitors filing notices about their competitors in a hope to knock them offline. And we don't——

Senator HIRONO. Yes.

Mr. SCHRUEERS [continuing]. Want to see that happening. We want to have an accountability mechanism in any kind of system like this.

Senator HIRONO. So what kind of accountability system would you suggest——

Mr. SCHRUEERS. Well——

Senator HIRONO [continuing]. In the SHOP SAFE Act?

Mr. SCHRUEERS. Right. So for starters, we want to ensure that brands and platforms are cooperating hand in glove and working together, sharing the information that's needed to eliminate problematic transactions.

And that's everything from the who is the licensed manufacturer to what are common product configurations that is Mr. Shapiro is describing, or it's often non-public information. And so knowing we don't put the stripes on our product in this fashion is valuable information that platforms often simply can't get.

And unfortunately, the bill actually affirmatively discourages inter-platform brand collaboration——

Senator HIRONO. Mm-hmm.

Mr. SCHRUEERS [continuing]. By saying you cannot have a mechanism that requires brands to participate. And obviously, the how we structure that can vary, but what we don't want to do is undermine existing brand platform collaboration that's going on today.

Senator HIRONO. Can any of the rest of the panelists talk about the concern about collaborating among brands so that we can get to one of the concerns that Mr. Schruers has?

Mr. LAMAR. I think if SHOP SAFE were to become law, I think you would still have very, very robust brand platform collaboration and cooperation—that's been going on for a number of years, that will continue to go on regardless of the shifting of the liabilities. Because it's in the brand's own interest to continue to make sure that their platform partners are educated.

At the same time, the platforms need to avail themselves of the public information that's out there. For example, trademarks are filed with the Patent and Trademark Office, which is what the legislation talks about.

So, you know, relying on a U.S. Government body that is the central repository of trademarks in the United States, I don't think is a difficult ask and certainly something that platforms with their incredible technological prowess, I think, would be able to do.

I think that the key thing and—you know, we keep talking about should we allow INFORM more time to work, INFORM's been around for 100 days. The beautiful part about the internet is we already know right now whether INFORM is working and bending the curve. And clearly it's not. I mean, I think Mr. Shapiro gave some numbers that have already suggested that that's not the case.

And, you know, what we, I think, probably need to ask ourselves the question, you know, what is an acceptable level of counterfeits? What's an acceptable level of dangerous counterfeits? How many more people do we want to see injured before we are able to take action? And I think the answer all of us would say is none.

We have an opportunity to change the dynamic. Right now, we're at a reactive process. We are waiting for bad stuff to happen and hoping the brands can discover the bad things before the consumers get their hands on them. That's literally the mechanism that we have right now. We have to change that. That's not working. It hasn't worked for 20 years. It's not going to work over the next 20 years.

SHOP SAFE, I think, is a very, very reasonable approach to try and change the dynamic to bend that curve. And, you know, we look forward to working to see it enacted or, you know, modified if necessary to——

Senator HIRONO. So the way that SHOP SAFE would change that dynamic is by placing the burden, some level of burden, on these e-platforms?

Mr. LAMAR. Correct. A level of burden on e-platforms——

Senator HIRONO. Yes.

Mr. LAMAR [continuing]. To make sure the dangerous products don't get on the platforms and marketed.

Senator HIRONO. Well, I'm for that.

[Laughter.]

Senator HIRONO. Thank you.

Chair COONS. And let me just make a brief comment and then turn to my Ranking Member for any concluding comments.

There is a campaign underway now in partnership between the USPTO and the National Crime Prevention Council. It's called the Go for Real campaign, which is trying to protect trademarks and recognize the scale of it. And their comment, in launching the next phase of this campaign, was that "the sale of counterfeit products is a \$2 trillion criminal enterprise that affects every industry. Causes fires, skin rashes, and even death." And international organized criminals use counterfeits to fund illegal activities like gang violence, child labor, human trafficking.

We can debate whether that scope and scale, that number is accurate. But one of the things Mr. Lamar laid out was that many of the products coming from a wide range of countries, but in par-

ticular the PRC, that are faulty, that don't perform the way branded products would, but that actually take advantage of forced labor, sweatshops, and that are laced with harmful content, are getting into American households through an intersection between brands and online platforms that is not yet as tightly interwoven as we would like it to be.

It's exceptionally rare to go to a mall, walk into a DICK's Sporting Goods, and buy a bicycle helmet that is fake and that doesn't actually protect you. That almost never happens.

We want to figure out a way that doesn't crush innovation, that doesn't shut down the American role in online innovation, but that also realigns some of the incentives in a way that is clear, balanced, and fair. And that provides defensible, articulated, safe harbor standards that are in fact safe harbors that are not overbroad, that are not unreasonable.

But I was grateful for the articulation of his posture by my colleague, Senator Tillis. He's not a fan of regulation. I'm a Democrat. We're typically fans of regulation. In this space, I want to make sure that we are not overregulating, but that we are protecting consumers.

Both of our households have experienced purchasing counterfeit goods through online platforms. My hunch is if we surveyed every Senator, we'd probably find that a significant majority of Senators, their own families, have purchased defective goods.

The question is, as you put it, Mr. Lamar, how much of this is acceptable—an acceptable tradeoff for the remarkable convenience, breadth, and affordability of product offerings that online platforms provide?

So with that, I want to say we conducted this as a hearing with genuine interest in your input, both critical and supportive. And I'll read before we conclude a list of the different organizations that have also offered input in writing, in advance of this hearing. But before I do so, I want to invite my Ranking Member to make any concluding comments. Senator Tillis.

Senator TILLIS. Yes, I'll be very brief. I don't think we're as far apart as the—and really, I don't think we're that far apart even based on the face of the discussion here. It's all in the details.

And anytime you get into something like this, you could overreach. We don't want to overreach. But for anybody to take the position it isn't broke or INFORM may fix it in the face of the growing numbers and the growing thread, it just doesn't seem rational to me.

So the reason that I continue to use the “get on the”—“get to the table so that you're not on the table” in so many of these intellectual property discussions is that I think the sweet spot is usually somewhere in the middle. You don't want to slow down, and you don't want to hamper our country's dominance in so many areas of innovation.

And I mean, we're the innovators in online retailing back in the day, now it seems old. We want to stay ahead of it, and the only way that we do stay ahead of it is to stay ahead of these threats. And the only way that we're going to make progress is to have everybody at the table to inform us of maybe some of the unintended

consequences if we go too far. But then, maybe also to inform the industry of the real consequences if we don't go far enough.

So this is an iterative process. We're going to continue to get people to work together in hearings and in work groups. And we hope that everyone—thanks to the witnesses today who participated and those who are watching.

But I invite everybody on either side of this equation to come work with an honest commitment to improving the situation. The status quo is unacceptable. The status quo is going to get worse. We've got to sit here and do something about it. Thank you, Mr. Chair.

Chair COONS. Thank you, Senator Tillis. And I would welcome more input, and we, in particular, need and would value specific and concrete input about how to improve this legislation.

Before we conclude, I'll submit for the record without objection seven letters we've received from a wide range of stakeholders, both in opposition to the legislation and in support of it, from the PASS Coalition, from Joy Woodruff of Sound of Tri-State—I think that's a Delaware concern—the Association of Home Appliance Manufacturers, the Alliance for Safe Online Pharmacies, the Vehicle Suppliers Association, the Personal Care Products Council, and the National Association of Manufacturers.

[The information appears as submissions for the record.]

I'd like to thank my colleagues who joined us today and asked questions. I'd like to once again thank Ranking Member Tillis and his staff. This is our fifth IP Subcommittee hearing of this year. It says, I think, one of the most active and purposeful Subcommittees in the entire Senate.

I think we've reviewed the fact that the rapid growth of counterfeiting on e-commerce platforms, which matches the very rapid growth in online commerce, raises the challenge of harms of counterfeiting, harms to brands, harms to consumers. And that that precipitated our discussion about how the current liability framework does not adequately address the situation.

We do not have a final solution yet, or a path forward that we can all embrace. But I think SHOP SAFE is moving us in a good direction, and I look forward to more specific and concrete input from today's witnesses, and the other organizations I referenced.

If any Member wants to submit a question for the record for the witnesses, they must do so by a week from today, by October 10th by 5 p.m. Let me thank, again, our witnesses for participating in everyone who watched here and online. With that, today's hearing is adjourned.

[Whereupon, at 3:37 p.m., the hearing was adjourned.]

[Additional material submitted for the record follows.]

A P P E N D I X

Submitted by Chair Coons:

Alliance for Automotive Innovation, et al., letter	93
Alliance for Safe Online Pharmacies (ASOP Global), letter	96
Association of Home Appliance Manufacturers (AHAM), letter	98
Communications Cable & Connectivity Association (CCCA), news release	100
Council for Innovation Promotion (C4IP), letter	102
Footwear Distributors & Retailers of America (FDRA), letter	104
Intellectual Property Owners Association (IPO), letter	106
MEMA. The Vehicle Suppliers Association, letter	107
National Association of Manufacturers (NAM), letter	108
Personal Care Products Council (PCPC), letter	110
Protect America's Small Sellers Coalition (PASS Coalition), letter	111
Sound of Tri-State, letter	113
Transnational Alliance to Combat Illicit Trade (TRACIT), letter	115

Submitted by Ranking Member Tillis:

Alliance for Safe Online Pharmacies (ASOP Global), letter	96
Association of Home Appliance Manufacturers (AHAM), letter	98
Council for Innovation Promotion (C4IP), letter	102
Intellectual Property Owners Association (IPO), letter	106
MEMA. The Vehicle Suppliers Association, letter	107
National Association of Manufacturers (NAM), letter	108

U.S. Senate Committee on the Judiciary
IP Subcommittee Hearing

Back to School with the SHOP SAFE Act: Protecting Our Families from Unsafe Online Counterfeits

October 3, 2023

Written Statement

Submitted by

Kari Kammel

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

Chair Coons, Ranking Member Tillis, and Members of the Sub-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 Director of the Center for Anti-Counterfeiting and Product Protection ("the A-CAPP Center") at Michigan State University, where I oversee and run the Center's research, education and outreach programming, which is focused on meeting practice with research. I also research and publish about trademark counterfeiting, teach trademark counterfeiting law, and have worked with hundreds of companies and organizations with brand protection practitioners in the field focusing on the A-CAPP Center's work. My remarks today are based on my work, and that of the Center, on the problem of the sale of counterfeit goods by third parties in the online space.

1. The Center for Anti-Counterfeiting and Product Protection ("A-CAPP Center") at Michigan State University

At the A-CAPP Center, we research the complex global issue of trademark counterfeiting and brand protection of products, across multiple industries and markets.¹ We provide multidisciplinary academic research on the exponentially growing problem of trademark counterfeiting, as well as education and outreach on the topic. 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 working with intellectual property rights owners, government, and

¹ Center for Anti-Counterfeiting and Product Protection, <https://a-capp.msu.edu>; We have academic expertise with faculty partners across Michigan State University's various departments and programs, as well as academic partners across the country and world to research counterfeiting and its impact on brands and consumers.

law enforcement, I also work with other brand protection professionals and stakeholders, including online marketplaces, social media platforms, service and technology providers, law firms, investigators and other professionals with my colleagues so that we can examine the problem from an academic, yet practical, perspective.

In the Center's portfolio, in addition to multidisciplinary research, we 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, including our executive education training and the first online professional brand protection certificate, Brand Protection Professional Magazine, and Brand Protection Stories Podcast and student internship/mentorship program in brand protection.²

2. Problem of Trademark Counterfeiting on Online Marketplaces

While trademark counterfeiting has been around for many years, the scope of the problem has changed dramatically with the advent of online shopping. The sale of goods in online marketplaces, both licit and illicit goods, has grown exponentially in the past decade;³ and particularly since the onset of COVID-19, consumers have increasingly shopped online.⁴

The United States leads the world in total e-commerce sales and business to business sales, and is second in the world in business to consumer sales.⁵ With virtual storefronts and easy online transactions, online marketplaces give businesses of all sizes the opportunity to achieve global profits and reach previously inaccessible consumers, and also give consumers access to products delivered to their door that they might not be able to find in local markets.

However, counterfeiters also take advantage of the opportunity online marketplaces provide them and rely on the brands' goodwill and reputation to create counterfeit products to reach often unwitting consumers. The sale of counterfeit goods remains low risk to the counterfeit 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, apps, and the dark web.⁶

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-bppj/>

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).

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 business to consumer sales 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)

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).

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 2021 fiscal year reported that CBP had 102,490 seizures with an estimated manufacturer's suggested retail price (MSRP) of over \$3.3 billion.⁷ The size of the problem is often calculated based on seizure data, or takedown data, which does not fully reflect the universe of counterfeit goods.⁸ Third, data sharing between brands, platforms, law enforcement and academia has always been a struggle. However, despite these limitations, estimates of counterfeiting profits globally by Global Financial Integrity state that it is financially the largest criminal enterprise in the world, approximately \$923 billion to \$1.13 trillion a year—a higher amount than either drugs (\$426-652 billion) or human trafficking (\$150.2 billion).⁹ Financially, counterfeit goods impact national economies; 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.¹⁰

Brands may have their own investigatory data, and platforms may have their take down data. This data, however, is usually not shared beyond some cursory statistics, 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.

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.¹¹ 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.

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

⁷ U.S. Customs and Border Protection, Intellectual Property Seizure Statistics, FY 2021, available at <https://www.cbp.gov/document/annual-report/fy-2021-ipr-seizure-statistics>.

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).

⁹ Transnational Crime and the Developing World (March 2017), available at https://gfinetegrity.org/wp-content/uploads/2017/03/Transnational_Crime-final.pdf

¹⁰ Kammel, et al, *supra* note 3, at 225; OECD, TRENDS IN TRADE AND COUNTERFEIT GOODS (2019).

¹¹ Channing May, *Transnational Crime and the Developing World* (Global Financial Integrity 2017) <https://gfinetegrity.org/report/transnational-crime-and-the-developing-world/>

marketplaces.¹² 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.

While INFORM Consumers requirement of e-commerce platforms to get basic identifying information for high-volume third-party sellers on their sites,¹³ providing seller information will create some transparency for consumers and others. However, transparent seller information will not in and of itself will not stop proliferation of sales of counterfeits by third party sellers, nor will it balance the burden of disrupting the meeting of consumers and counterfeit listings.

From a business standpoint, from the moment an intellectual property rights owner exposes itself to sales benefits of the online marketplace, they also face increased challenges related to illicit online actors. Even if an intellectual property rights 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.

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

In a research paper I authored with former A-CAPP Center colleagues,¹⁴ we discussed the legal landscape that currently exists in respect to secondary liability for trademark counterfeiting and why it should not apply to the current state of sales of counterfeit goods by third party sellers online.¹⁵ First, secondary liability for trademark infringement was initially created to address infringement within the a brick-and-mortar setting by a manufacturer or distributor within the brick-and-mortar supply chain. The current doctrine of secondary liability is based on *Inwood Labs v. Ives*,¹⁶ which referred to manufacturers and distributors in the supply chain and was later applied to other cases involving “service providers,” such as flea markets.¹⁷

¹² 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://buysaferx.pharmacy/oct-19-survey-release/>.

¹³ Consolidated Appropriations Act of 2023, H.R. 2617, 117th Cong. Div. BB, Title III, § 301 (2022), <https://www.govinfo.gov/content/pkg/BILLS-117hr2617enr/pdf/BILLS-117hr2617enr.pdf> (“INFORM Consumers Act”).

¹⁴ Kammel et al, *supra* note 3.

¹⁵ See Kammel et al, *supra* note 3.

¹⁶ *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.

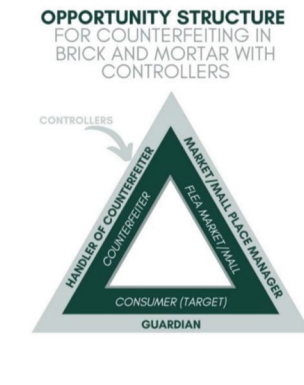
¹⁷ Kammel et al, *supra* note 3, at 237 (discussing *Hard Rock Cafe Licensing Corp. v. Concession Servs., Inc.*, 955 F.2d 1143, 1143 (7th Cir. 1992)).

In our research paper, we combined the social science theory related to the opportunity structure of persistent risky activities to understand where the legal doctrine of secondary liability for trademark counterfeiting should apply in the online supply chain.¹⁸ Applying this theory to the doctrine, we explain how the opportunity structure for counterfeiting occurs when consumers and counterfeiters interact in online marketplaces where guardianship to protect the consumer, and by extension the brand, is weak in the online shopping experience.

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.¹⁹ Guardianship of the physical space can mean protecting shoppers, preventing counterfeit sellers from setting up shop and generally protecting the physical marketplace.²⁰ Others of 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. The opportunity structure is seen as a meeting in time and place of the potential infringer (the counterfeit seller) and the consumer.²¹ See Figure 1.

Figure 1: Opportunity Structure for Counterfeit Sales, Brick and Mortar



¹⁸ Kammel at al, *supra* note 3, at 229.

¹⁹ *Id.* at 239.

²⁰ *Id.* at 219-220.

²¹ *Id.* at 219.

b. Brick and Mortar Marketplaces: 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 sale of the counterfeit goods to the consumer.²² See Figure 2.

Figure 2: Disruption of the Opportunity Structure for the Sale of Counterfeit Goods, Brick and Mortar²³



Disruption can be done by guardians either protecting the consumer (through education/awareness), protecting the brick-and-mortar location through proactive activities 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).²⁴

It does not mean that every instance of a counterfeit sale 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*, a case before the 7th Circuit in 1992 where the court found 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.²⁵

²² *Id.* at 239-240.

²³ *Id.* at 220 (citing to Figure 4. The disruption of triangle by owners and manager in a brick-and-mortar setting).

²⁴ *Id.* at 219, 228.

²⁵ *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

The case law thus reflects that in the brick-and-mortar marketplaces, the owner of the market is the appropriate entity that bears responsibility for protecting their marketplaces, protecting consumers in their marketplace and preventing counterfeit sellers.

c. Online Marketplaces: Lack of Guardians

However, we do not see this theory being applied in the online marketplace space. Instead, the current case law leaves a gap by not requiring e-commerce marketplaces to take responsibility for guardianship and protection of consumers on their sites.

i. The *Tiffany v. eBay* Case

In 2010, the Second Circuit in the *Tiffany v. eBay* case²⁶ noted the extension of the *Inwood* test to service providers, such as the flea market owners in *Hard Rock*,²⁷ and then also noted that they were the first to apply this test to an online marketplace.²⁸ The standard set here for secondary liability for an online marketplace was that 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—”²⁹ otherwise known as the contemporary knowledge requirement.³⁰ The e-commerce platform eBay was found not liable for secondary trademark infringement because they had responded to specific suspected counterfeit postings reported by Tiffany and they had no onus to search proactively for counterfeit postings.³¹

ii. Practical Impact of *Tiffany*

From a liability perspective under the current state of the law, there is no obligation on any party to proactively address online counterfeit postings. Some online marketplaces understand that there is a massive problem with counterfeit postings and remove some counterfeit postings that are reported to them (notice and take down) or found through internal self-investigation by technology or otherwise (before the intellectual property rights holder reports the posting)—what I would refer to as a reactive response.

RESTATEMENT (SECOND) OF TORTS § 877(c), cmt. d (AM. LAW INST. 1979)); *see also* *Coach v. Gata Corp.*, No. 10-cv-141-LM, 2011 WL 2358671, at *6-8 (D.N.H. June 9, 2011 (finding the flea market contributory liable because they exercised “substantially more control over potential direct infringers than the defendants in *Tiffany*, *Inwood*, *Sony*.” *See* Kammel, et al, *supra* note 3, at 225.

²⁶ *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*).

²⁷ *Hard Rock*, *supra* note 227.

²⁸ *Tiffany*, 600 F.3d at 105; Kammel, et al, *supra* note 3, at 243.

²⁹ *Tiffany*, 600 F.3d at 107; Kammel, et al, *supra* note 3, at 243.

³⁰ *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

³¹ *Tiffany*, 600 F.3d at 109.

A few may proactively vet sellers or postings, but these are not the majority. Under the recently passed INFORM Consumer act, e-commerce platforms must collect basic information from high-volume third-party sellers,³² but platforms are not required to vet sellers' postings, nor to proactively monitor their own platform for counterfeit goods. Further, this is not required by the law. Under the *Tiffany* standard, they must only remove them reactively, or when they have "specific knowledge."

An intellectual property rights owner, however, does not want injury to its reputation, or injury to its consumers,³³ so, practically that owner tries to monitor and notify the online marketplace or social media platform to remove a suspicious listing, counterfeit listing, or a seller that is selling an illicit, counterfeit, or unauthorized product, even though the counterfeit product does not belong to the intellectual property rights owner. For every listing that a brand owner successfully petitions to have removed from an online marketplace, many more illicit listings will likely take its place³⁴—leading to what is called in the industry the "whack-a-mole" problem.

Because the search for online counterfeit listings has exploded, an entire industry of online anti-counterfeiting providers and law firms selling their services and technologies to intellectual property rights holders 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.³⁵ While "law disruptive technology,"³⁶ such as artificial intelligence, or even online sales of goods, continues to expand, new laws addressing the continued expansion of counterfeiting should take into consideration the impact and rapid change in technology to expand with technological improvement. Many platforms use artificial intelligence or machine learning to remove counterfeit postings. We do know however, that bad actors are also using AI and machine learning to either increase the number of postings or evade detection by intellectual property rights owners, platforms, vendors and law enforcement.³⁷ Most importantly, new legislation should allow for online marketplaces to respond with iterative changes in protecting

³² Consolidated Appropriations Act of 2023, H.R. 2617, 117th Cong. Div. BB, Title III, § 301 (2022), <https://www.govinfo.gov/content/pkg/BILLS-117hr2617enr/pdf/BILLS-117hr2617enr.pdf> ("INFORM Consumers Act").

³³ 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).

³⁴ 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)).

³⁵ Kammel, et al, *supra* note 3, at 252.

³⁶ See 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).

³⁷ Intellectual Property Rights Center, HSI, Working Group on AI, roundtable held jointly with A-CAPP Center September 2023

consumers and intellectual property rights owners using appropriate current technology and other methods, so as to not simply become a compliance check.

Finally, while INFORM Consumers should give consumers and intellectual property rights holders some transparency regarding seller self-reported identification and location, numerous other critical details remain missing. These include details on systems for vetting products by platforms, how consumers and intellectual property rights owners are contacted upon a discovery of a counterfeit and how many counterfeit products were actually sold, process for removal of listings, where counterfeits go after being reported or taken down if they have been warehoused or returned, 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 consumers, as they have not been required by law.

Many platforms have created extensive tools for brands to register their marks (a type of recordation), work to identify counterfeit listings for take down efforts, and collaborate with law enforcement agencies and intellectual property rights owners.³⁸ While I referred to these activities in 2020 and 2021, we have not seen a decrease in counterfeit sales online, but the opposite with intellectual property rights owners' frustrations growing and more consumers in the U.S. being exposed to the purchase and sale of counterfeit goods.

d. Online Marketplaces: Disrupting Counterfeiting Opportunity

Revisiting the opportunity structure for trademark counterfeiting in brick-and-mortar marketplaces and how it applies to e-commerce platforms, using online counterfeit sellers in the role of motivated infringers, online consumers in the role of suitable targets/potential victims, and the e-commerce platform itself as the place wherein infringer and target meet and interact.³⁹ The motivated counterfeit seller operates as an "unseen competitor" to legitimate companies, using the e-commerce platform as a place to hide from detection and fool consumers, while reaping illicit economic benefits.⁴⁰

In the opportunity structure triangle for trademark counterfeiting, e-commerce platforms should have varying levels of influence over counterfeiting schemes by 1) de-motivating sellers of counterfeits on their sites, 2) protecting consumers by deterring potential infringers or assisting consumers in protecting themselves from victimization, and 3) controlling the conditions that

³⁸ 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>.

³⁹ See generally Kammel et al, *supra* note 3, at 248.

⁴⁰ 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)).

allow illicit actors and consumers to come together and interact.⁴¹ As a result, when an e-commerce platform fails in one of more of these three activities, and the counterfeit seller and consumer meet on their platform, counterfeit sales on the platform are more likely.⁴²

The operators of e-commerce platforms 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 counterfeit sellers and consumer targets.⁴³ With regard to addressing motivated sellers of counterfeits, platforms have the ability to identify potentially infringing listings and proactively embargo or reject these listings.⁴⁴ These activities can disrupt the opportunity for third party sellers to sell counterfeits to consumers. See Figure 1.

Figure 3. Disruption of Opportunity Structure for Counterfeit Goods in E-Commerce⁴⁵



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. While platforms cannot know every possible trademark worldwide, they have access to publicly registered marks through the USPTO and should be aware of high selling products on their platform, particularly those of which the counterfeit version can impact health and safety.

⁴¹ Kammel, et al, *supra* note 3, at 231.

⁴² *Id.*

⁴³ *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)).

⁴⁴ *Id.* at 249.

⁴⁵ *Id.* at 229 (citing to Figure 6).

Consumers can play a large part in the success of trademark 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.

Finally, educating consumers of the risk of counterfeits, what a counterfeit is, and how to report a counterfeit on a platform remains paramount to have consumers be empowered to protect themselves as well on the platform.

e. Impact on Consumers

In addition to the impact on IP rights holders, we are seeing the impact manifested at the consumer level as well. 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.⁴⁸

Consumers often are unaware that they are buying counterfeit goods, 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 they or their estate cannot find the third-party seller for service of process for a lawsuit if they are injured or killed by a product. This has led to a series of strict liability cases being filed against marketplaces in recent years.⁴⁹

A recent A-CAPP Center research study launched in September of 2023 examining consumer behavior and responses in 17 countries when online shopping and encountering counterfeits is

⁴⁶ *Id.* at 255.

⁴⁷ *Id.*

⁴⁸ See Kammel et al, *supra* note 3, at 228; Kennedy, *supra* note 6, at 7, 14.

⁴⁹ 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.

telling.⁵⁰ In the U.S., our study noted that: nearly two-thirds (66%) bought counterfeits without knowing it.⁵¹

More than one in 10 participants (13.4%) of the US sample in our survey expressed that they have experienced a negative health effect after using a counterfeit product and 15.6% said they experienced a personal injury.⁵² Other negative consequences included loss of money and compromising of personal information.

About a third of participants in our survey indicated they have purchased counterfeits through e-retail platforms, and 35% did so on social media.⁵³ Though nearly half of the U.S. sample bought counterfeits for personal use, with about 55% of them having shared their counterfeit purchase with others, including gifting behavior.⁵⁴

Finally, our findings in the U.S. market show that consumers see no clear mechanism for what to do with products bought online after they find out they are counterfeit.⁵⁵ A quarter of consumers in our survey (27%) kept the product, 25% returned to the seller, and 20% returned to the manufacturer, and only 16% disposed of the counterfeit product.⁵⁶

The risk to consumers of using a counterfeit good varies widely, is unpredictable, and spans multiple industries and products, including but not limited to clothing and apparel, shoes, watches, electronic, medical devices, pharmaceuticals, pet care products and food, toys, computers, personal care products, automobile parts, airplane parts, and numerous other consumer facing products.

For example, in the pharmaceutical industry a wide range of toxins and chemicals have been found in counterfeit pharmaceuticals purchased online.⁵⁷ Counterfeit airbags, cosmetics, bike

⁵⁰ Saleem Alhabash, Anastasia Kononova, Pat Huddleston, Jeijin Lee, and Moldir Moldagaliyeva, Global Anti-Counterfeiting Consumer Survey 2023 (A-CAPP Center Report 2023).

⁵¹ *Id.* Around 55% non-deceptively bought counterfeit goods and collectively, 71% of U.S. consumers indicated they bought counterfeits online in the past year, knowingly and/or unknowingly.

⁵² *Id.*

⁵³ *Id.* The top social commerce platforms where they purchased counterfeits were Facebook (27%), YouTube (20%), WhatsApp (18.3%) and Instagram (22.1%); three of which are Meta-owned platforms. *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 40. Other strategies consumers used focused on electronic word of mouth (writing social media reviews and online reviews) were not pervasive.

⁵⁷ Association for Safe Online Pharmacies (ASOP), Toxins Found in Counterfeit and Falsified Medicines, <https://buysafely.pharmacy/for-the-media/toxins-found-in-counterfeit-and-falsified-medicines/> (spanning toxins from concrete to car paint to rat poison).

helmets, baby carriers,⁵⁸ toys,⁵⁹ and automotive parts, clothing and apparel, and many other goods can have harmful or even deadly results.

On a personal note, despite working in this field for some time, even my family is impacted by counterfeit goods. My mother is a 72-year-old retired public school teacher. Three weeks ago she was informed that a vitamin that she ordered on a well-known e-commerce platform that allows third party sellers was counterfeit and she had experienced some health side effects for months while taking the product. While she did get a refund, the notification and subsequent communications from the platforms were confusing to the average person, let alone someone who had a family member who works in anti-counterfeiting— she could not get access to what was in the counterfeit, and had difficulty getting the contact information from the platforms for the seller. She was told by customer service at the e-commerce platform that she would get a refund and could dispose of it, *give it away or donate it*. Despite listing a local U.S. address, the counterfeit sale of this product continued for some time. This is just a brief personal example of what consumers and intellectual property rights owners are facing on a daily basis and the ongoing threat of the sale of counterfeits by third party sellers.

4. SHOP SAFE Addresses Issues Regarding the Imbalance of Preventing 3rd Party Sales of Counterfeit Goods on E-Commerce Platforms

From my perspective, a proactive requirement for e-commerce platforms that allow third party sales and responsibility for “constructive knowledge” of counterfeit sales will help balance the burden between intellectual property rights owners and platforms.

to pursue those who have created an online supply chain but for the sale on their e-commerce platform a counterfeit of their goods would have not reached a consumer. An e-commerce platform’s reactive efforts after the sale of a counterfeit is not enough to stop the proliferation of sales of counterfeit goods by third party sellers.

A holistic, collaborative approach to dealing with this issue is required and legislation is part of this approach and essential to (1) balance the obligations of intellectual property rights 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.

⁵⁸ ICE, Counterfeit Goods: A Danger to Public Safety (2020), <https://www.ice.gov/features/dangers-counterfeit-items>

⁵⁹ The Toy Association, The Real Threat of Fake Toys, https://www.toyassociation.org/App_Themes/toyassociation_resp/downloads/research/whitepapers/intellectual-property.pdf

Recommendations

My recommendations are to:

1. Continue to address the ever-growing sale of counterfeit goods by third party sellers in online marketplaces through legislation and other means.
2. Support continued and expanded collaborations and method development regarding data sharing between academia and other stakeholders, including e-commerce platforms, that support legislative initiatives; and
3. Expand research and 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.

Responses to Questions from Senator Tillis for Kari Kammel
October 17, 2023

Witness for the Senate Committee on the Judiciary Subcommittee on Intellectual Property
Hearing “Back to School with the SHOP SAFE Act: Protecting Our Families from Unsafe
Online Counterfeits”

**1. How are product liability and trademark liability for platforms being treated globally?
How does the U.S. compare with other countries?**

Compared to the EU, which is more progressive than the U.S. in regard to intellectual property rights owners’ ability to pursue action against a platform for an IP violation, The European Enforcement Directive ensures that rights holders can apply for an injunction against intermediaries whose services are used by third parties to infringe intellectual property rights.¹ Additional EU cases have shown that EU court are willing to extend secondary liability to e-commerce platforms when they go beyond a neutral role of just providing a space for third party sellers to sell.²

2. Do online marketplaces profit from the sale of counterfeits? What are the incentives for online marketplaces to remove counterfeits?

Theoretically, yes, I believe that they can, depending on their revenue system and refund policy. If they receive a portion or percentage of a sale from each transaction on their platform, and the posting of a counterfeit good was to make a sale, then by the logic of their normal business

¹ Corrigendum to Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights (European Enforcement Directive), Art. 23 (stating: “Without prejudice to any other measures, procedures and remedies available, rightholders should have the possibility of applying for an injunction against an intermediary whose services are being used by a third party to infringe the rightholder’s industrial property right. The conditions and procedures relating to such injunctions should be left to the national law of the Member States.”). *See e.g.* SA Louis Vuitton Malletier v. eBay Inc., Cour de cassation [Cass.] [supreme court for judicial matters], May 3, 2012, aff’g, Cour d’appel [CA] [regional court of appeal] Paris, Pole 5, ch. 2, Sept. 3, 2010, and Tribunal de commerce [TC] [court of trade] Paris, June 30, 2008 (Fr.) (noting that eBay was liable for a violation of LVMH’s exclusive rights, because they played an essential role in the commercialization and profit from the sale counterfeit products).

² *See e.g.* CJUE, 22 décembre 2022, Christian Louboutin c. Amazon, C-148/21 et C-184/21: curia.europa.eu (noting: “the operator of an online sales website integrating, in addition to its own offers for sale, an online marketplace, is likely to be considered as itself using a business sign identical to a European Union trademark of a third party for goods identical to those for which this trademark is registered, where third-party sellers offer for sale, on this marketplace, without the consent of the owner of the said trademark, such products bearing this business sign, if a normally informed and reasonably attentive user of this site establishes a link between the services of this operator and the sign in question, which is particularly the case when taking into account all the elements characterizing the situation in question, such a user could have the impression that it is the said operator who markets itself, in its name and for his account, the products bearing the said sign. In this regard, relevant are the facts that this operator uses a uniform method of presentation of the offers published on its website, displaying at the same time the advertisements relating to the products which it sells in its name and for its account and those relating to products offered by third-party sellers on the said marketplace, as well as the fact that the operator displays its renowned distributor logo on all of these advertisements and offers to third-party sellers, within the framework of the marketing of products bearing the sign in question, additional services consisting in particular in the storage and dispatch of these products.”). *Id.*

model, they would receive revenue for each transaction (whether counterfeit or not). I have not heard of any online marketplace acknowledging this or taking what they know to be revenue from the sale of these goods and for example, putting it in a fund to educate consumers. If they give acknowledge that the good is a counterfeit and notify the consumer and give them a full refund, it would seem in this case they would not profit from the sale of the counterfeit.

3. Why is it important for foreign sellers to be subject to jurisdiction in the U.S? What would happen if a foreign seller was not subject to U.S. jurisdiction?

It is important for a foreign seller to be subject to U.S. jurisdiction so both an IP rights holder and a consumer can serve process to them if there is an issue that needs to be addressed legally (i.e. sale of counterfeit, injury, etc). This was an issue in a series of strict liability cases filed by plaintiffs against Amazon, when they or their property were injured and they could not find the seller of the goods they purchased on Amazon, so the only entity left in the supply chain that they could sue was Amazon, with varying results.³ If the foreign seller is not subject to U.S. jurisdiction, it will continue to be difficult for IP rights holders as well as consumers to reach them for legal enforcement or tort claims.

4. Once a brand owner notifies an online marketplace of a counterfeit sale and a listing is removed, does the online marketplace return the profits of the illicit sale to the brand owner? Who keeps the profit?

I do not have specific information on this practice for platforms as it is not made public.

5. To your knowledge, are there any practices that are more current than the practices listed in the SHOP SAFE Act or that should be sufficient to avoid secondary liability that are not covered by the bill?

I do not know of any.

6. Should platforms be required to notify consumers when they remove a listing because it appeared to be selling counterfeit products?

In my opinion, yes, they should, particularly to consumers who have already purchased that good. A similar standard on notification should be made, similar to other types of criminal activity in other venues, as the sale of counterfeit goods is a criminal activity in the U.S. under both federal and state law.

³ See 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).

7. Should any revisions be made to the definition of “goods that implicate health and safety?”

The current language in the bill reads:

“(iv) The term ‘good that implicates health and safety’ means a consumer product, the use which can lead to illness, disease, injury, serious adverse event, allergic reaction, or death, if the consumer product is produced without compliance with all applicable Federal, State, and local health and safety regulations and industry-designated testing, safety, quality, certification, manufacturing, packaging, and labeling standards.”

I believe this current version of the definition encompasses a good, counterfeit or genuine, that implicates health and safety if it not produced in compliance, which could cover all counterfeits. This is important, because often a genuine good may not implicate health and safety, but the counterfeit of it will.

8. Are there any additional best practices platforms should implement to help prevent infringing use by third party sellers on their platforms?

One additional best practice is transparency about criminal activity occurring on the platform and perhaps a required reporting mechanism for this type of activity on the platform that is available to the public, focused on statistics and not the release of personal information, but so consumers and others can see what the type, scope and size of the sale of counterfeit goods is occurring on a given marketplace.

9. Are there any additional changes that you would like to see made to the SHOP SAFE Act and why?

- a. I would recommend a narrowing of the definition of Third-Party Seller.

Currently it reads:

“(v) The term ‘third-party seller’ means any seller, independent of an electronic commerce platform, that sells, offers to sell, or contracts to sell a consumer product in the United States through an electronic commerce platform.”

This definition would seem to encompass even the manufacturer in it, since it is “anyone” that is not the platform. I would recommend that it be narrowed down to a seller of the product that is “not the manufacturer.”

- b. I would expand and separate information regarding reporting and transparency in this section, which currently states:

“(iii) Provided accessible electronic means by which a registrant and consumer can notify the electronic commerce platform of suspected use of a counterfeit mark.”

Here, I would suggest that:

- 1) there is an accessible electronic means by which a registrant can notify the e-commerce platform of suspected use of a counterfeit mark, and

2) there is an accessible electronic means by which a consumer can notify the e-commerce platforms of a suspected use of counterfeit mark that is not conflated with other consumer complaints about product. Further, it should be easy for consumers to understand what and how they can report this and is obvious in consumer complaint spaces. Additionally, the e-commerce platform should be transparent about the risk of counterfeit goods and be required to report how many complaints they receive and how many they take action on (since this is suspected criminal activity). In consumer messaging about counterfeit postings that have been removed, consumers should be notified that the good they purchased is counterfeit, what exactly that means, and that they should dispose of it immediately. Such messaging should be clear to the consumer.

10. What more can Congress do to help stem the sale of counterfeit goods online?

Congress can continue to support research and knowledge expansion 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.



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Advocacy that fits.

**Written Testimony of
Steve Lamar, American Apparel & Footwear Association President and CEO
“Back to School with the SHOP SAFE Act: Protecting Our Families from Unsafe Online Counterfeits”¹
U.S. Senate Committee on The Judiciary, Subcommittee on Intellectual Property
October 3, 2023**

Thank you for inviting our industry to testify this afternoon.

Nobody wants to buy clothes or shoes that will sicken their kids, or that were made by forced labor, or that were produced in sweatshops, or that destroyed the environment. But that’s exactly what happens when consumers buy counterfeit fashion.

And that’s why the SHOP SAFE Act is so important for Congress to consider and pass quickly.

My name is Steve Lamar. I’m proud to serve as the President and CEO of the American Apparel & Footwear Association, the national trade association for the apparel and footwear industry, and other sewn products companies, and their suppliers. We represent more than 3.2 million U.S. workers and more than \$490 billion in annual U.S. retail sales.²

Our members invest millions to build, train, and inspect supply chains to ensure that the clothes, shoes, and accessories bought and worn by American families are not only fashionable and affordable but are also ethically and sustainably sourced and made, and are safe for consumers. This is an area of continuous improvement as each day we are looking further back in our supply chains and implementing increasingly complicated transparency, traceability, and product safety requirements to make sure that the clothes and shoes worn by everybody in this room, and everybody in this country, are responsibly made.

On top of their considerable investment in social and ethical compliance, U.S. brands and retailers of all sizes spend considerable resources to police third party marketplaces, try to remove shady websites, and take down fraudulent ads in a mission to address the growing counterfeit problem and protect consumers.³ Counterfeit products not only harm our members’ reputations and hurt their sales, but they also put our members’ customers in harm’s way with fake products that could sicken them or create other risks.

It is beyond dispute that counterfeits cause grave harm to innovation and our economy. The National Association of Manufacturers estimates that counterfeits sucked \$131 billion (about \$400 per person in the U.S.) from the U.S. economy in 2019, and in the process destroyed more than 300,000 U.S. jobs and wiped away nearly \$10 billion in

¹ “Back to School with the SHOP SAFE Act: Protecting Our Families from Unsafe Online Counterfeits”
U.S. Senate Committee on The Judiciary, Subcommittee on Intellectual Property
<https://www.judiciary.senate.gov/committee-activity/hearings/back-to-school-with-the-shop-safe-act-protecting-our-families-from-unsafe-online-counterfeits>

² AAFA <https://www.aafaglobal.org>

³ AAFA submitted 2022 comments to the U.S. Trade Representative quantifying the abundance of counterfeits across platforms and detailing the resources brands reallocate to police marketplaces across the destructive counterfeiting value chain.
https://www.aafaglobal.org/AAFA/AAFA_News/2022_Letters_and_Comments/AAFA_Files_2022_Notorious_Markets_Comments_USTR.aspx

federal, state, and local tax revenues.⁴ This is an issue for governments and businesses of all sizes. The burden of constantly monitoring websites – while tough for an external observer – is particularly rough for small businesses, especially if they derive their entire livelihood from the internet. While nobody has the resources to be everywhere all at once, this is particularly the case for small businesses that have limited means to stop illicit actors from illegally selling their innovative product.

Counterfeits expose consumers to unconscionable risks. We are part of a broad industry coalition supporting the SHOP SAFE Act,⁵ spanning diverse sectors of the economy that have been raising alarms about the growing danger posed by counterfeits that are too easily allowed onto our front steps and into our living rooms. While headlines scream about the dangers of counterfeit airbags, batteries, and prescriptions, the dangers posed by counterfeits are everywhere, including apparel, footwear, accessories, toys, personal care products and more. In 2022, AAFA commissioned a study of 47 counterfeit clothes, shoes, and other accessories – items that we would wear daily. We found that 17 of those products – just over 36 percent – had dangerously high levels of poisonous materials, like lead, arsenic, and phthalates.⁶ Not only did these items fail U.S. safety rules, but they also could have made consumers seriously ill if they had bought and used them. To say that counterfeits kill is not an exaggeration, as Congress' own watchdog noted in a 2018 GAO report.⁷

You can see why stopping the explosion of counterfeits remains one of our top priorities.

Counterfeiters have a different view of the world. Their entire business model is based on stealing somebody else's innovation and identity, so it is with little remorse that they exploit workers, engage in wage theft, employ shoddy factories, dump hazardous waste into rivers and lakes, and use dangerous chemicals.⁸ When they lure folks into buying their fake products, they often dabble in more thievery, exposing consumers to financial scams.⁹ The fact that authentic brands invest so much in social and ethical effort only widens the profit margins of counterfeiters since they are often able to score a sale, without paying for any of the compliance that they are duping customers into believing has occurred. What happens to the profit of these ill-gotten gains? They become the seed capital for organized crime, terrorist activities, and yet more counterfeit activity.¹⁰ This is exactly why the U.S. Department of Homeland Security under former President Trump issued the "Combating Trafficking in Counterfeit and Pirated Goods" report¹¹ and why President Biden has called for more to be done to verify third-party sellers' information and to impose liability on online marketplaces.¹² Protecting consumers, businesses, and American jobs has been – and should be – a bipartisan issue.

⁴ The National Association of Manufacturers: Countering Counterfeits: The Real Threat of Fake Products

https://www.nam.org/wp-content/uploads/2020/07/CounteringCounterfeits_vF_.pdf

⁵ Cross-Industry Letter Calls on Congress to Pass Legislation to Stop the Sale & Promotion of Dangerous Counterfeits Online

https://www.aafaglobal.org/AAFA/AAFA_News/2022_Press_Releases/Cross_Industry_Letter_Congress_Stop_Sale_Counterfeits.aspx

⁶ AAFA Fashion Industry Study Reveals Dangerous Chemicals, Heavy Metals in Counterfeit Products

https://www.aafaglobal.org/AAFA/AAFA_News/2022_Press_Releases/Fashion_Industry_Study_Reveals_Dangerous_Chemicals_Heavy_Metals_Counterfeits.aspx

⁷ GAO: INTELLECTUAL PROPERTY "Agencies Can Improve Efforts to Address Risks Posed by Changing Counterfeits Market"

<https://www.gao.gov/assets/gao-18-216.pdf>

⁸ TRACIT: The Human Cost of Illicit Trade <https://www.tracit.org/human-cost-of-illicit-trade.html>

⁹ IACC: What is Counterfeiting / Intellectual Property (IP) Theft? <https://www.iacc.org/resources/about/what-is-counterfeiting#:~:text=It%20Could%20Cost%20You%3A%20Purchasing%20from%20counterfeit%20websites,can%20steal%20your%20personal%20or%20credit%20card%20information.>

¹⁰ OECD: Global Trade in Fakes <https://www.oecd.org/publications/global-trade-in-fakes-74c81154-en.htm>

¹¹ DHS Combating Trafficking in Counterfeit and Pirated Goods

https://www.dhs.gov/sites/default/files/publications/20_0124_plcy_counterfeit-pirated-goods-report_01.pdf

¹² The White House FACT SHEET: President Biden's Safer America Plan <https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/01/fact-sheet-president-bidens-safer-america-plan-2/>

Like many, we celebrate the growth of the ecommerce environment, and cherish the opportunities the internet has created to enable consumers to interact with our industry and to enable our industry to thrive, especially during the pandemic. But with great opportunity comes great responsibility. That is why the accountability and proactive measures required by SHOP SAFE are vital.

U.S. law currently contains many guardrails to make sure brick and mortar retailers of all sizes do not sell counterfeit items. Authentic brands don't have to visit every store across the country to make sure these brick-and-mortar locations are only selling legitimate goods. They don't have to go through lengthy takedown fights with these physical stores, only to find fake goods pop up again shielded by a new name.

In the online world, things are very different. Brands must monitor every platform out there, with new platforms popping up every day. And when brands find counterfeits, fake websites, dupe influencers,¹³ or fraudulent ads¹⁴ promoting those websites, they must beg and fight the platforms to get those products, ads, and websites removed. If the platform removes them at all, it can be weeks or months later, all that time allowing the counterfeiters to profit. Often, the infringers pop back up within days.

We can't simply think it is okay to let brands and retailers shoulder the burden of monitoring these websites. Inefficient at best and Sisyphean at worse, this task is likened to a game of "whack-a-mole" because counterfeiters are a wily bunch. They are pioneers in the latest technology and are constantly developing creative approaches to evade detection, knowing also that the legal framework that is deployed to stop them has been rapidly outpaced by the internet itself. They also know that many third-party marketplaces can hide within that framework, avoiding responsibility for the goods they allow to be sold.

Interestingly, some of the same platforms that end up hosting counterfeiters are themselves pioneering amazing technological advancements that can put up more effective roadblocks against illicit actors. Many of them talk about their zero tolerance for counterfeits – a value that is commendable. But we've been hearing that for years while this counterfeit epidemic has been allowed to flourish. We are past the time to talk, and it is now time to update and create stronger federal incentives appropriate for the ecommerce ecosystem – and consistent with what we have in the physical world. We must now convert those words into actions.

Last year, Congress took the first step to tighten our anti-counterfeit defenses and protect consumers by passing the INFORM Consumers Act, which requires third party platforms to disclose more information to consumers about large volume sellers on their sites. We celebrated that measure as it helps take away the ability of criminals to sell counterfeits by unmasking them.¹⁵ But it was only a first step in what is now needed to help bring our anti-counterfeit tools into the age of ecommerce. We now need proactive measures to make sure the counterfeits don't get on to these third-party marketplaces in the first place.

SHOP SAFE will do just that, holding third-party online platforms accountable so they will be incentivized to make the necessary changes. They will need to meet the same requirements, and face the same accountability, as brick-and-mortar retailers, your mom-and-pop store down the street, when it comes to stopping the sale of counterfeit or illicit products. If they take commonsense, easily achievable steps like asking sellers for key pieces of needed information, implementing proactive measures for screening listings before displaying the goods to the public, and denying their platform to repeat infringers they will clean up their own sites and achieve safe harbor from the legislation's tough liability provisions. And if they don't, they expose themselves to liabilities that will make hosting counterfeits more than just a cost of doing business.

¹³ AAFA: Dupe Influencers <https://www.aafaglobal.org/DupeInfluencers>

¹⁴ AAFA & TRACIT: FRAUDULENT ADVERTISING ONLINE EMERGING RISKS AND CONSUMER FRAUD
https://www.tracit.org/uploads/1/0/2/2/102238034/tracit_fraudulentadvertisingonline_july21_2020_final.pdf

¹⁵ AAFA Applauds Passage of INFORM Consumers Act with Omnibus Spending Package
https://www.aafaglobal.org/AAFA/AAFA_News/2022_Press_Releases/AAFA_Applauds_INFORM_passage_Omnibus.aspx

Earlier in my testimony I talked about a destructive vicious cycle that allows counterfeits to flourish. Sadly, we are locked in a vicious policy cycle we must break as well. In a few days, as we do every year, our association will submit comments to the Office of the U.S. Trade Representative (USTR), presenting the online platforms that our members have identified as Notorious Markets. In a few months, USTR will issue a report that discusses the problems associated with these and other marketplaces.¹⁶ Around that same time, Customs and Border Protection (CBP) will publish statistics showing the alarming amount of counterfeit clothes, shoes, accessories, electronics, auto parts, jewelry, and toys they stopped last year, noting ruefully that it was only a fraction of what enters into the U.S. With these and other studies, the record is clear that counterfeits are a growing scourge, especially for our members with over 70% of the products seized by CBP.¹⁷ This all causes more acute damage to our economy, our workers, and our citizens. And every year, we keep preparing these reports, and every year they get more dire.

We have before us legislation that can break this cycle and change the narrative of those reports and those statistics and finally deny the ability of counterfeiters the ability to prey on our population.

It is time to pass the SHOP SAFE legislation now.

Thank you. I look forward to your questions.

¹⁶ USTR Releases 2022 Review of Notorious Markets for Counterfeiting and Piracy <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2023/january/ustr-releases-2022-review-notorious-markets-counterfeiting-and-piracy>

¹⁷ CBP: Intellectual Property Rights Seizure Statistics (FY 2021) <https://www.cbp.gov/sites/default/files/assets/documents/2022-Sep/202994%20-%20FY%202021%20IPR%20Seizure%20Statistics%20BOOK.5%20-%20FINAL%20%28508%29.pdf>



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Advocacy that fits.

November 7, 2023

The Honorable Dick Durbin
Chair
Committee on the Judiciary
U.S Senate
Washington, DC 20510

The Honorable Chris Coons
Chair
Subcommittee on Intellectual Property
Committee on the Judiciary
U.S Senate
Washington, DC 20510

The Honorable Lindsey Graham
Ranking Member
Committee on the Judiciary
U.S Senate
Washington, DC 20510

The Honorable Thom Tillis
Ranking Member
Subcommittee on Intellectual Property
Committee on the Judiciary
U.S. Senate
Washington, DC 20510

Dear Chairs Durbin, Coons, and Ranking Members Graham and Tillis:

Thank you for holding the important "Back to School with the SHOP SAFE Act: Protecting Our Families from Unsafe Online Counterfeits"¹ hearing before the U.S. Senate Committee on The Judiciary, Subcommittee on Intellectual Property on October 3, 2023. I was honored to testify and look forward to remaining engaged on behalf of our members.

Please find answers to several questions that were posed since the hearing outlined below.

Let me reiterate that we have an opportunity to build on the momentum of the INFORM Consumers Act with the passage of SHOP SAFE this Congress. As you know, the INFORM Consumers Act now requires third party platforms to disclose more information to consumers about high volume sellers. AAFA celebrated the Congressional passage of INFORM,² and we continue to call for strong enforcement, as INFORM helps take away the ability of criminals to sell counterfeits by unmasking them. But this was only a first step in what is now needed to help bring our anti-counterfeit tools into the age of ecommerce. We still need proactive measures to make sure counterfeits do not get listed on third-party marketplaces in the first place. SHOP SAFE will hold third-party online platforms accountable so they will be incentivized to make the necessary changes that will keep counterfeits and other unsafe goods off their ecommerce markets. Platforms will need to meet the same

¹ Back to School with the SHOP SAFE Act: Protecting Our Families from Unsafe Online Counterfeits
<https://www.judiciary.senate.gov/committee-activity/hearings/back-to-school-with-the-shop-safe-act-protecting-our-families-from-unsafe-online-counterfeits>

² AAFA Applauds Passage of INFORM Consumers Act with Omnibus Spending Package
https://www.aafaglobal.org/AAFA/AAFA_News/2022_Press_Releases/AAFA_Applauds_INFORM_passage_Omnibus.aspx#:~:text=American%20Apparel%20%26%20Footwear%20Association%20President%20and%20CEO,part%20of%20the%202023%20omnibus%20spending%20package%20today.

requirements and face the same accountability, as brick-and-mortar retailers, and your mom-and-pop store down the street, when it comes to stopping the sale of counterfeit or illicit products.

We thank you for your efforts and strong commitments to American jobs, American IP, and American consumers.

Sincerely,

A handwritten signature in black ink, appearing to read "Stephen Lamar", with a stylized flourish at the end.

Stephen Lamar
President and CEO
American Apparel & Footwear Association

Q: DO BRANDS/RIGHTS HOLDERS CURRENTLY PARTNER WITH PLATFORMS TO ADDRESS ISSUES WITH COUNTERFEITS AND INFRINGING PRODUCTS?

- Yes, AAFA members of all sizes spend considerable resources to police third party marketplaces, try to remove shady websites, and take down fraudulent ads with a mission to address the growing counterfeit problem and protect consumers.³
- However, the current reactive status-quo is not working to catch the dangerous counterfeits because it places an imbalance on brands to identify, flag for the platform, follow-up again and again.
- AAFA has chronicled the growing challenges our members face in the last five Notorious Markets for Counterfeiting and Piracy (NML) comment rounds to the Office of the U.S. Trade Representative (USTR), where some members found 100% of the items searched with a brand keyword as being *all* counterfeit items.
 - a. 2023:
 - i. Nominated Meta (all Meta platforms), Alibaba Cloud, Shopee, DHgate, and Lazada.⁴
 - b. 2022:
 - i. Nominated Shopee and all Meta platforms.
 - ii. Identified platforms of concern: Alibaba Cloud and Lazada – they were not formally named in 2022.
 - iii. Noted concerns raised by our members related to Amazon.
 - c. 2021:
 - i. Nominated: Facebook (including Instagram, and WhatsApp), Bukalapak, Shopee, Tokopedia
 - ii. Comments on other online markets: Alibaba, Amazon⁵
 - d. 2020:
 - i. Nominated: Amazon, Facebook, (Instagram) Redbubble (Australia), Allegro (Polish), Avito.ru (Russia), Bigl.ua and Prom.ua (Ukraine), VK (Russia), WeChat, Bukalapak, Tokopedia, Carousell, and Shopee⁶
 - ii. USTR names Amazon on the NML for the first time⁷
 - e. 2019: Nominated: Amazon, Bukalapak, Lazada, OfferUP, Shopee, Tokopedia, Wanelo, WeChat⁸

³ AAFA submitted 2022 comments to the U.S. Trade Representative quantifying the abundance of counterfeits across platforms and detailing the resources brands reallocate to police marketplaces across the destructive counterfeiting value chain.

https://www.aafaglobal.org/AAFA/AAFA_News/2022_Letters_and_Comments/AAFA_Files_2022_Notorious_Markets_Comments_USTR.aspx

⁴ AAFA Files 2023 Notorious Markets Comments to USTR

https://www.aafaglobal.org/AAFA/AAFA_News/2023_Letters_and_Comments/AAFA_Files_2023_Notorious_Markets_Comments_USTR.aspx

⁵ AAFA submitted 2021 comments to USTR

https://www.aafaglobal.org/AAFA/AAFA_News/2021_Letters_and_Comments/AAFA_Comments_to_USTR_on_Notorious_Markets.aspx?WebsiteKey=49c45f4d-69b3-4c66-823a-6d285960fed2

⁶ AAFA submitted 2020 comments to USTR

https://www.aafaglobal.org/AAFA/AAFA_News/2020_Letters_and_Comments/AAFA_Comments_to_USTR_on_Notorious_Markets.aspx

⁷ 2020 Review of Notorious Markets for Counterfeiting and Piracy

[https://ustr.gov/sites/default/files/files/Press/Releases/2020%20Review%20of%20Notorious%20Markets%20for%20Counterfeiting%20and%20Piracy%20\(final\).pdf](https://ustr.gov/sites/default/files/files/Press/Releases/2020%20Review%20of%20Notorious%20Markets%20for%20Counterfeiting%20and%20Piracy%20(final).pdf)

⁸ AAFA submitted 2019 comments to USTR

- The U.S./China Phase One agreement⁹ positions the U.S. to take action with U.S. based platforms.
 - a. "The Parties shall combat the prevalence of counterfeit or pirated goods on e-commerce platforms by taking effective action with respect to major e-commerce platforms that fail to take necessary measures against the infringement of intellectual property rights."
- Lastly, AAFA included the below section in the association's 2022 comments to show the direct cost to brands to police platforms, including an almost impossible task for smaller or recently launched brands.

Monetary Resources Lost

- *Annually, one brand spends \$300,000 alone on vendors to help monitor and address the problem as each platform typically employed a reactive, nuanced process for notice and takedown. For another AAFA member, the legal costs in enforcing against counterfeiters and the destructive value chain (i.e., the supply chain of digital counterfeiting from the fraudulent ads to the fake websites and the listing of counterfeit goods across platforms) equals at least \$2 million per year.*
- *A third AAFA member shared that the company spends close to \$1 million per year as the number of enforcements against counterfeiters has increased yearly by at least 100,000 reported products.*
- *A fourth AAFA member, a small business with approximately 18 employees, estimated allocating at least \$50,000 towards brand protection efforts yearly.*
- *A fifth AAFA member shared that this brand allocates \$300,000 per year to online monitoring and enforcement across three key vendors to combat global counterfeiting, resulting in the removal of over 170,000 infringing e-com shops, social media profiles, fraudulent paid ads, and third-party websites in 2021. Additionally, this same brand allocates \$1.7 million annually towards its global brand protection efforts to combat counterfeit goods both online and offline.*

Loss in Revenue Estimated and Hours Reallocated

- *Year-to-date the loss to one AAFA member is estimated at \$3 million with some members devoting at least one full time in-house staff member per brand to monitoring anti-counterfeiting efforts.*

Additionally, given that it is impossible to effectively enforce across all infringing platforms, AAFA members have needed to prioritize enforcement as each platform mandates a time and resource-intensive nuanced, reactive process. Resources are diverted from growing companies to monitoring illicit activities.

Based on intel from AAFA members, there is a clear disconnect between what many platforms say is being done to address the current range of the counterfeiting problem and what brands see in the reactive day-to-day notice and takedown regimes across the digital devalue chain to address and remove counterfeits.¹⁰

https://www.aafaglobal.org/AAFA/AAFA_News/2019_Letters_and_Comment/AAFA_Comments_to_USTR_on_Notorious_Markets.aspx

⁹ USTR: Economic and Trade Agreement Between the Government of the United States of America and the Government of the People's Republic Of China

https://ustr.gov/sites/default/files/files/agreements/phase%20one%20agreement/Economic_And_Trade_Agreement_Between_The_United_States_And_China_Text.pdf

¹⁰ regulations.gov Docket: USTR-2021-0013: <https://www.regulations.gov/search/comment?filter=USTR-2021-0013%20%20>

Q: WOULD BRANDS CONTINUE TO HAVE LEGAL OBLIGATIONS OR OTHER INCENTIVES TO PARTNER WITH PLATFORMS AND SHARE INFORMATION IF SHOP SAFE WERE ENACTED?

- It is in a brand's interest to continue to make sure that platform partners are educated. Brands have and will continue to have a duty to police marks;¹¹ anything else is costly and harmful to a brand.¹²
- Policing trademarks across online platforms is an almost impossible task for small businesses, especially brands that only sell directly to consumers—not on a platform.
 - From the DHS report: “These rights holders must invest significant resources to scour millions of listings across multiple platforms to identify potentially counterfeit listings and notify the third-party marketplace or e-commerce platform. This kind of comprehensive policing of e-commerce often is not possible for smaller enterprises.”
- AAFA members share that there is a large business concern with sharing business confidential information with many platforms also making like products.¹³

Q: IS THERE A HIGHER BAR FOR SELLING PRODUCTS THROUGH A BRICK-N-MORTAR RETAILER THAN THERE IS TO SELL DIRECT TO CONSUMERS ON A PLATFORM?

- U.S. law currently contains many guardrails to make sure brick and mortar retailers of all sizes do not sell counterfeit items. Authentic brands do not have to visit every store across the country to make sure these brick-and-mortar locations are only selling legitimate goods. They do not have to go through lengthy takedown fights with these physical stores, only to find fake goods pop up again shielded by a new name. In the online world, things are very different. Brands must monitor every platform out there, with new platforms popping up every day. And when brands find counterfeits, fake websites, dupe influencers,¹⁴ or fraudulent ads¹⁵ promoting those websites, they must beg and fight the platforms to get those products, ads, and websites removed. If the platform removes them at all, it can be weeks or months later, all that time allowing the counterfeiters to profit. Often, the infringers pop back up within days.
- Our members invest millions to build, train, and inspect supply chains to ensure that the clothes, shoes, and accessories bought and worn by American families are not only fashionable and affordable but are also ethically and sustainably sourced and made, and are safe for consumers. This is an area of continuous improvement as each day we are looking further back in our supply chains and implementing increasingly complicated transparency, traceability, and product safety requirements to make sure that the clothes and shoes worn by everybody in this room, and everybody in this country, are responsibly made.

¹¹ A-CAPP Guide to Brand Protection for Small & Medium Sized Enterprises <https://a-capp.msu.edu/guide-to-brand-protection-for-small-and-medium-sized-enterprises/>

¹² USPTO: Registration Maintenance/Renewal/Correction Forms <https://www.uspto.gov/trademarks/maintain>

¹³ CNBC: How Amazon's big private-label business is growing and leaving small brands to protect against knockoffs <https://www.cnbc.com/2022/10/12/amazons-growing-private-label-business-is-challenge-for-small-brands.html>

¹⁴ AAFA: Dupe Influencers <https://www.aafaglobal.org/DupeInfluencers>

¹⁵ AAFA & TRACIT: FRAUDULENT ADVERTISING ONLINE EMERGING RISKS AND CONSUMER FRAUD https://www.tracit.org/uploads/1/0/2/2/102238034/tracit_fraudulentadvertisingonline_july21_2020_final.pdf

Q: TO YOUR KNOWLEDGE, ARE THERE ANY PRACTICES THAT ARE MORE CURRENT THAN THE PRACTICES LISTED IN THE SHOP SAFE ACT OR THAT SHOULD BE SUFFICIENT TO AVOID SECONDARY LIABILITY THAT ARE NOT COVERED BY THE BILL?

- We appreciate all the work, the process, and the compromise across so many stakeholders to reintroduce SHOP SAFE 2023. Some brands would argue we need more and that SHOP SAFE does not go far enough, but that is the art of compromise.
- What is outlined in SHOP SAFE (as of October 2023) is a minimum floor to help address the current situation. We would like to understand why the steps outlined now are so impossible, for example,
 - Why is it not possible to require images from sellers that accurately depict goods or,
 - Why is it such a problem to have sellers consent to the jurisdiction of U.S. courts when selling to U.S. consumers.
- Platforms should meet the same requirements, and face the same accountability, as brick-and-mortar retailers, and your mom-and-pop store down the street, when it comes to stopping the sale of counterfeit or illicit products. If they take commonsense, easily achievable steps—like asking sellers for key pieces of needed information, implementing proactive measures for screening listings before displaying the goods to the public and denying their platform to repeat infringers—they will clean up their own sites and achieve safe harbor from the legislation’s tough liability provisions. If they do not, they expose themselves to liabilities that will make hosting counterfeits more than just a cost of doing business.
- The accountability and proactive measures required by SHOP SAFE are vital.
- As we discussed during the hearing, technological solutions are available now. Most platforms are now making extensive use of data and algorithms for business purposes: to adjust the price of items based on demand (dynamic pricing) or to suggest the most relevant product to a buyer when there are multiple sellers for a similar product or to dynamically change the order or relevance of listings. This same technology could be put to good use in the fight against illegal content to remove illegal products once they have been posted, but also, more efficiently, to prevent such products from being posted on their platforms in the first place. Platforms are much better equipped to act efficiently against illegal goods than any other stakeholder.
- SHOP SAFE will put counterfeiters on notice and the steps will make sure that counterfeit goods do not even get offered to U.S. consumers in the first place. Thus, we deny the market to the counterfeiters, so the financial incentive for the counterfeiters to even start down the path immediately dries up.
- As the U.S. Department of Homeland Security stated “... listing goods on well-known platforms provides an air of legitimacy”¹⁶ we must go further than the *status-quo* of today to protect consumers.

Q: SHOULD PLATFORMS BE REQUIRED TO NOTIFY CONSUMERS WHEN THEY REMOVE A LISTING BECAUSE IT APPEARED TO BE SELLING COUNTERFEIT PRODUCTS?

- Yes, we would advise alerting all related as soon as possible.
- In addition, clear mitigation steps are needed to alert previous consumers, alert the brand, and develop clear standard operating procedures for the return of the item when removing the counterfeit products from the supply chain. We would also include going further to ensure the counterfeiter’s full profile and

¹⁶ DHS: Combating Trafficking in Counterfeit and Pirated Goods
https://www.dhs.gov/sites/default/files/publications/20_0124_plcy_counterfeit-pirated-goods-report_01.pdf

footprint across all platforms is immediately reviewed with firm repeat infringer mitigation measures in place.

- Brands continue to ask for transparency around this process, including how counterfeits are destroyed.
- Additionally, brands have issues with seeing reporting data after reporting a counterfeit within platform reporting tools on certain platforms. These issues with transparency hinder the ability of a brand to package a case with all the details needed for law enforcement consideration. AAFA has discussed these issues in our NML comments and with platforms. Brands continue to voice concerns when brands are not able to see information submitted the same week or after 90-days.

Q: SHOULD ANY REVISIONS BE MADE TO THE DEFINITION OF “GOODS THAT IMPLICATE HEALTH AND SAFETY?”

- To answer this question, we need to first ask ourselves the question: What is an acceptable level of counterfeits? What is an acceptable level of dangerous counterfeits?
- Even one fake counterfeit – particularly if it harms an unsuspecting consumer – is one too many.
- It is for this reason, that Congress should make sure the definition of goods that implicate health and safety is seen as the most expansive possible.
- In 2021, we shared that “the proposed scope of the SHOP SAFE Act is limited only to “goods that implicate health and safety.” However, adopting this narrow approach will mean that some of the most often counterfeited products and some of the most prolific counterfeiters will remain beyond the scope of the law’s standards. Such a limitation not only overlooks potential but less obvious product safety and health risks of certain products, it also devalues the function of a trademark and signals a lack of willingness to protect all trademark owners and all consumers. Moreover, this would also impose more difficult judgment evaluations on platforms as to whether a particular product falls within the scope and what steps must be taken with regard to that particular product. For this reason, AAFA encourages the Subcommittee to consider broadening the scope of the bill beyond “goods that implicate health and safety.”¹⁷
- Counterfeits expose consumers to unconscionable risks.
 - AAFA is part of a broad industry coalition supporting the SHOP SAFE Act in 2023,¹⁸ in 2022 and previous years,¹⁹ spanning diverse sectors of the economy that have shared concerns about the growing danger posed by counterfeits that are too easily allowed onto our front steps and into our living rooms. While headlines scream about the dangers of counterfeit airbags, batteries, and prescriptions, the dangers posed by counterfeits are everywhere, including apparel, footwear, accessories, toys, personal care products, and more.

¹⁷ AAFA Submits Statement for the Record for the House Judiciary Committee’s Subcommittee on Courts, Intellectual Property, and the Internet hearing on the “Stopping Harmful Offers on Platforms by Screening Against Fakes in E-commerce Act of 2021” (SHOP SAFE Act of 2021).

https://www.aafaglobal.org/AAFA/AAFA_News/2021_Letters_and_Comments/AAFA_Submits_Statement_for_the_Record_on_SHOP_SAFE_Act.aspx

¹⁸ AAFA Leads Cross-Industry Letter to Advocate for SHOP SAFE

https://www.aafaglobal.org/AAFA/AAFA_News/2023_Letters_and_Comments/AAFA_Leads_Cross_Industry_Letter_to_Advocate_for_SHOP_SAFE.aspx

¹⁹ Cross-Industry Letter Calls on Congress to Pass Legislation to Stop the Sale & Promotion of Dangerous Counterfeits Online

https://www.aafaglobal.org/AAFA/AAFA_News/2022_Press_Releases/Cross_Industry_Letter_Congress_Stop_Sale_Counterfeits.aspx

- In 2022, AAFA commissioned a study of 47 counterfeit clothes, shoes, and other accessories – items that we would wear daily. We found that 17 of those products – just over 36 percent – had dangerously high levels of poisonous materials, like lead, arsenic, and phthalates.²⁰ Not only did these items fail U.S. safety rules, but they also could have made consumers seriously ill if they had bought and used them. To say that counterfeits kill is not an exaggeration, as Congress' own watchdog noted in a 2018 GAO report.²¹
- We would argue that all counterfeits are dangerous, including the intersection of counterfeits with all the dangers related to the illicit economies²² and financial risks posed to consumers.²³

Q: ARE THERE ANY ADDITIONAL BEST PRACTICES PLATFORMS SHOULD IMPLEMENT TO HELP PREVENT INFRINGING USE BY THIRD PARTY SELLERS ON THEIR PLATFORMS?

- Yes, many; however, we know that SHOP SAFE has encountered wide-ranging feedback in the process to today. We are agreeable with the floor on what we have set in the bill now. If opportunities open as the process continues, we would be open to providing additional measures to strengthen and expand where we are in October 2023.
- To position some further best practices for wider consideration:
 - We have covered some suggestions in our NML comments over the years, including AAFA's dupe influencer report²⁴ and fraudulent advertising report²⁵ with TRACIT.
 - Brands share that they have seen platforms are able to do more, specifically in pilot projects.
 - Moreover, platforms could do far more with the information they already have from existing brand partnerships. For example, they can cross-reference what a verified legitimate brand provides against those listed in the system now and going forward. Platforms can also cross-check email addresses to ensure emails are from a legitimate brand and more.
 - Additional protocols could start with strong anti-counterfeiting, IP infringement education for all sellers (in and outside the United States) before each seller is able to list a product. Sellers should opt-in that each seller understands and agrees with the terms and conditions before the first sale.
 - Stronger repeat infringer policies are a must. For example, as we shared in our 2023 NML comments, "...one seller recreated an Instagram account 11 times using the following [username], [same username]2, [same username] 3, etc. This was the same seller, with the same pictures promoting the same counterfeit goods that the brand needed to continue to

²⁰ AAFA Fashion Industry Study Reveals Dangerous Chemicals, Heavy Metals in Counterfeit Products
https://www.aafaglobal.org/AAFA/AAFA_News/2022_Press_Releases/Fashion_Industry_Study_Reveals_Dangerous_Chemicals_Heavy_Metals_Counterfeits.aspx

²¹ GAO: INTELLECTUAL PROPERTY "Agencies Can Improve Efforts to Address Risks Posed by Changing Counterfeits Market"
<https://www.gao.gov/assets/gao-18-216.pdf>

²² Meridian: INTERNATIONAL DIALOGUES TO FIGHT ILLICIT ECONOMIES
<https://www.meridian.org/diplomacy/fighting-illicit-economies/>

²³ IACC: What is Counterfeiting?
<https://www.iacc.org/resources/about/what-is-counterfeiting#:~:text=It%E2%80%99s%20Dangerous%3A%20Counterfeit%20goods%20are%20often%20made%20using,you%20provide%20a%20counterfeit%20merchant%20with%20your%20information.>

²⁴ Dupe Influencers on Social Media <https://www.aafaglobal.org/DupeInfluencers>

²⁵ AAFA & TRACIT: FRAUDULENT ADVERTISING ONLINE EMERGING RISKS AND CONSUMER FRAUD
https://www.tracit.org/uploads/1/0/2/2/102238034/tracit_fraudulentadvertisingonline_july21_2020_final.pdf

report in all the ways required by Meta across all channels and all infringements. After seven rounds of enforcing, the seller made his account private, and the team had to privately follow the seller to collect evidence before submitting.” More can be done with existing reports and all the information, data, and learnings that platforms hold from brands right now. A seller should not be allowed to use the same username 11 times and it is on the brand to devote large resources to find, flag, and plea for enforcement.

- Anti-counterfeiting work should reflect the size and scale of the platform. Given that many in the tech sector with platforms are seeing large projected increases,²⁶ brand protection resources should reflect the size and technical capabilities of platforms. Many are responsible for large technical advancements from cloud computing, running almost every device in a connected home to breakthroughs in AI.²⁷
- Finally, platforms should also avail themselves of the existing public information relating to trademark and copyright databases.
- We would be happy to continue this discussion.

Q: ARE THERE ANY ADDITIONAL CHANGES THAT YOU WOULD LIKE TO SEE MADE TO THE SHOP SAFE ACT AND WHY?

- As mentioned above, we know SHOP SAFE has encountered wide-ranging feedback in the process, so we are agreeable to the floor we have set in the bill as of October 2023.
- If there is a time as the process continues, we would be open to providing additional measures to strengthen and expand ways to protect brands and consumers.
- Nobody wants to buy clothes or shoes that will sicken their kids, or that were made by forced labor, or that were produced in sweatshops, or that destroyed the environment. But that’s exactly what happens when consumers buy counterfeits.

Q: WHAT MORE CAN CONGRESS DO TO HELP STEM THE SALE OF COUNTERFEIT GOODS ONLINE?

- We recommend passing SHOP SAFE immediately.
- This committee has shown a commitment to raise awareness of the dangers of counterfeits. We would ask for additional hearings across the range of issues discussed above. As work across Congress continues to hold platforms accountable for disinformation and misinformation, among other things relating to kids and national security, the same arguments can be made with counterfeiting and IP infringements. All are illegal and have dangerous consequences.
- Additionally, where checks and balances are made to address misuse across platforms, we would also ask these reinforcements be made to the sale of products and IP infringements as this is a danger to U.S. jobs and economic development. It is beyond dispute that counterfeits cause grave harm to innovation and our economy. The National Association of Manufacturers estimates that counterfeits sucked \$131

²⁶ Forbes: Big Tech Stocks: Q3 Earnings Preview

<https://www.forbes.com/sites/bethkindig/2023/10/19/big-tech-stocks-q3-earnings-preview/?sh=6907c5ed2290>

²⁷ White House: Biden-Harris Administration Secures Voluntary Commitments from Leading Artificial Intelligence Companies to Manage the Risks Posed by AI

<https://www.whitehouse.gov/briefing-room/statements-releases/2023/07/21/fact-sheet-biden-harris-administration-secures-voluntary-commitments-from-leading-artificial-intelligence-companies-to-manage-the-risks-posed-by-ai/#:~:text=As%20part%20of%20this%20commitment%2C%20President%20Biden%20is,safe%2C%20secure%2C%20and%20transparent%20development%20of%20AI%20technology.>

billion (about \$400 per person in the U.S.) from the U.S. economy in 2019, and in the process destroyed more than 300,000 U.S. jobs and wiped away nearly \$10 billion in federal, state, and local tax revenues.²⁸ Reports²⁹ and law enforcement groups³⁰ continue to raise red flags about the funding of counterfeit financing “funneled back to support a broad range of illegal crimes,” according to the National Intellectual Property Rights Coordination Center.

- We, and all cross-industry groups backing SHOP SAFE, welcome the opportunity to be a resource on this issue and many others that cross with our top member priorities.

²⁸ The National Association of Manufacturers: Countering Counterfeits: The Real Threat of Fake Products
https://www.nam.org/wp-content/uploads/2020/07/CounteringCounterfeits.vf_.pdf

²⁹ OECD: Global Trade in Fakes
<https://www.oecd.org/governance/global-trade-in-fakes-74c81154-en.htm>

³⁰ National Intellectual Property Rights Coordination Center
<https://www.iprcenter.gov/>

Statement of

Matt Schruers

President

Computer & Communications Industry Association

**“Back to School with the SHOP SAFE Act:
Protecting Our Families from Unsafe Online Counterfeits”**

Subcommittee on Intellectual Property

Committee on the Judiciary, U.S. Senate

October 3, 2023

Chairman Coons, Ranking Member Tillis, and Members of the Subcommittee, my name is Matt Schruers, and I serve as President of the Computer & Communications Industry Association (“CCIA”), which represents Internet, technology, and communications firms.¹ CCIA was founded in 1972 to promote open markets, open systems, and open networks in the computer and telecommunications industry. Today, the Association continues to champion the same principles across these increasingly diverse and important sectors of the global economy.

I. Introduction

Keeping consumers and communities safe online, and safe from dangerous products, is a universally shared goal. That is why CCIA and many online marketplaces and retailers supported the Integrity, Notification, and Fairness in Online Retail Marketplaces for Consumers Act (“INFORM”), enacted last year and codified at 15 U.S.C. § 45f.

S. 2934, the recently reintroduced Stopping Harmful Offers on Platforms by Screening Against Fakes in E-commerce Act (“SHOP SAFE”), however, is a highly flawed proposal that is widely opposed by industry and dozens of civil society groups, companies, associations, and trademark scholars, most of whom opposed a virtually identical bill last year.²

Fighting counterfeits is a shared mission and we advise Congress to regulate the retail market in its totality, including e-commerce, traditional brick-and-mortar, and small businesses, using a coherent regulatory approach that applies to everyone. However, American small businesses should not be expected to shoulder a disproportionate burden. Instead, the regulatory approach should also be proportional to the scale, and the scale of the problem is far from clear. A popular figure that is frequently invoked (\$500 billion) is a four-year-old, worst-case scenario that sweeps in estimated copyright and patent infringement and precedes recent legislation, and is thus not useful for this policy discussion.³

¹ CCIA is an international, not-for-profit trade association representing a broad cross section of communications and technology firms. For more than 50 years, CCIA has promoted open markets, open systems, and open networks. CCIA members employ more than 1.6 million workers, invest more than \$100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. For more, visit www.cciainet.org.

² CCIA, 37 Other Companies, Organizations Ask Congress To Protect U.S. Consumers, Companies Rather Than Foreign Luxury Brands (Mar. 8, 2022), <https://ccianet.org/news/2022/03/ccia-37-other-companies-organizations-ask-congress-to-protect-u-s-consumers-companies-rather-than-foreign-luxury-brands/>; Letter to Congress Opposing SHOP SAFE Act on Behalf of 26 Trademark Academics (Mar. 8, 2022), <https://digitalcommons.law.scu.edu/cgi/viewcontent.cgi?article=3634&context=historical>.

³ OECD/EUIPO (2019), Trends in Trade in Counterfeit and Pirated Goods, Illicit Trade, OECD Publishing, Paris/European Union Intellectual Property Office, <https://doi.org/10.1787/g2g9f533-en> (“Consequently, the results presented in this study refer to the upper possible limit of trade in counterfeit and pirated goods.”).

II. SHOP SAFE Is Not Needed

a. Give INFORM Time to Work

Like SHOP SAFE, INFORM aimed to reduce the sale of counterfeit, stolen, and dangerous consumer products with updated transparency requirements and verification of third-party sellers online along with contact information for consumers. INFORM was designed to help build more trust online by providing consumers additional transparency about third-party sellers online and because CCIA supports this goal we endorsed INFORM.

This law went into effect only three months ago on June 27, 2023. The recently reintroduced SHOP SAFE contains largely the same provisions that were proposed before INFORM passed. The 117th Congress simultaneously debated both bills and Congress ultimately reached consensus around INFORM, with broad cross-sectoral support from the private sector.

Advocacy for the newly reintroduced SHOP SAFE advances the same pre-INFORM figures, lacking any learnings or conclusions about the impact of INFORM. Rather than relying on outdated numbers, Congress should obtain updated information that takes into account this newly enacted and implemented law before rushing to pass new legislation that could destroy many legitimate small businesses operating online.

The best course of action is to allow INFORM time to work. We need to see and understand its impact in the real world to judge if additional legislative responses or course corrections are required.

b. Services Are Already Combating Counterfeits

The digital sector shares the sponsors' goals of preventing unsafe counterfeit products from spreading online. Responsible services invest significant resources in protecting users from illegal or unsafe goods, enforcing their terms of service and existing law to combat unsafe products and protect consumers online. Many online intermediaries engage with brand owners extensively and have established programs that encourage information sharing to enable the identification of and enforcement against counterfeit and infringing goods.⁴ Industry also works with law enforcement to find and hold bad actors accountable and protect consumers.

⁴ See CCIA Comments to the Department of Commerce, Report on the State of Counterfeit and Pirated Goods Trafficking and Recommendations, Docket No. DOC-2019-0003 (July 29, 2019), <https://www.cciainet.org/wp-content/uploads/2019/07/DOC-2019-0003-0001-CCIA-Comments-Counterfeiting-Pirated-Goods-Trafficking-Report.pdf>, at 2-5 (discussing current practices to address counterfeits online including examples of collaboration with brand owners); CCIA Comments to the U.S. Patent & Trademark Office, In re Future Strategies in Anticounterfeiting and Antipiracy, Docket No. PTO-C-2023-0006 (Aug. 23, 2023), <https://cciainet.org/wp-content/uploads/2023/08/CCIA-Comments-to-USPTO-on-Anticounterfeiting-and-Antipiracy.pdf>.

Some major e-commerce providers voluntarily provide legal tools for trademark or brand owners. These brand registration programs allow the service to better utilize automated tools to identify and remove confirmed counterfeit products. Through enrollment, brand owners provide relevant information to the service about their products that better enables the service to proactively address counterfeits, and to streamline brand owners' reporting process. In enforcing their strict prohibitions against counterfeiting, in many cases services will take more extensive action than merely removing content that is specifically reported to them, and are exploring ways to remove additional suspected counterfeit content on a proactive basis, with some already doing so 99% of the time.⁵ Some sites voluntarily publish data in their recurring transparency reports that detail removals on counterfeit goods, in addition to takedowns related to trademark claims.⁶

c. These Efforts Are Made Possible by Existing Trademark Law

Existing law correctly recognizes that trademark owners are in the best position to accurately and efficiently distinguish counterfeit products from authentic goods. Shifting legal responsibility to e-commerce sites, online marketplaces, or other third-party intermediaries through new liability rules would stifle innovation, reduce cooperation, and fail to prevent counterfeiting.

The current doctrine of secondary liability in trademark law achieves the proper balance, fostering a diverse ecosystem of online marketplaces that benefits small businesses and consumers. When intermediary services fail to act on specific knowledge of infringement (for example, when a brand owner has notified an online service of a counterfeit product), courts have generally held services liable. The existing regime has helped provide the legal framework to grow a robust secondary market for safe, genuine goods at competitive prices. Consumers derive enormous value from secondary markets, where they have the opportunity to resell products they no longer need, or purchase genuine products at a discount.

Historically, premium brands have disliked secondary markets because they do not afford brandowners total control over the pricing or images of their merchandise. Yet U.S. law has never afforded that. The U.S. approach to trademark is one that acknowledges your personal property rights in the goods you buy. Many brands would prefer consumers not resell what they lawfully own. To respect property rights means honoring the principle that if you bought it, you own it. If consumers buy a legitimate, lawfully manufactured luxury good, they have the right to

⁵ Amazon, Brand Protection Report, <https://brandservices.amazon.com/progressreport>; Meta's IP Transparency Report: Proactive Enforcement, <https://transparency.fb.com/reports/intellectual-property/proactive-enforcement/facebook>.

⁶ See, e.g., Google Search, Content delistings due to counterfeit, https://storage.googleapis.com/transparencyreport/report-downloads/counterfeit-delistings_2021-6-1_2022-5-31_en_v1.pdf; Meta, Transparency Center, Intellectual Property: Proactive enforcement, <https://transparency.fb.com/reports/intellectual-property/proactive-enforcement/facebook/>; Amazon, Brand Protection Report, <https://brandservices.amazon.com/progressreport>.

do whatever they want with their property, including reselling that good online. Even if some prominent foreign brand owner would rather not compete against that resale market.

We must ensure that any new legislation does not undermine personal property rights, or harm the valuable resale market for consumers. Changing secondary liability rules could encourage trademark owners to engage in anticompetitive practices and pursue secondary market goods that may not be counterfeit but may be competing with the trademark owner's products. In fact we're already seeing evidence of this.⁷ Aggravating this phenomenon would result in the diminution of the secondary market, harming consumers; to avoid increased liability, e-commerce sites would allow only sellers authorized by the trademark owner.

Additionally, changes would not eliminate counterfeit goods. Infringement analysis is often too fact-specific to permit wide-scale removal by services while maintaining a fair and robust marketplace. Liability for e-commerce sites and marketplaces would instead incentivize trademark owners to go after intermediaries instead of the actual bad actors: the counterfeiters.

III. Concerns with SHOP SAFE

CCIA has significant concerns with SHOP SAFE including broad, ambiguous definitions, prescriptive and inflexible requirements to escape automatic liability, and lack of meaningful responsibilities on the brand side, which mean the bill will not successfully accomplish what it seeks to address.

a. Lack of Rightsholder Participation

SHOP SAFE's new regulatory responsibilities place enormous burdens on small businesses, of which the vast majority are operating legitimately. We should not impose an unreasonable compliance burden on small U.S. sellers, particularly if the principal beneficiaries are to be overseas luxury brands that don't care for pro-consumer retail practices in the first place.

In order for digital services to effectively protect consumers from unsafe counterfeit goods, brand owners must be required to provide detailed information to digital services about the scope of their trademark rights and licensing. "Counterfeit mark," as defined by statute,⁸ turns on non-public information about when manufacture occurred and whether it was licensed at the time. With no way of proactively determining whether a seller was licensed to manufacture a particular product at a point in the past, digital services cannot plausibly administer this definition without possessing up-to-date and comprehensive information controlled by brand owners.

⁷ Eric Goldman, *A SAD New Category of Abusive Intellectual Property Litigation*, Colum. L. Rev. Forum (forthcoming 2023), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=438182.

⁸ 15 U.S.C. § 1116.

Everyone in the retail ecosystem has an important role to play. If there are data gaps that can only be populated with non-public information then this legislation should ensure that brandowners share this data. Unfortunately SHOP SAFE does not balance burdens between digital commerce sites and brands.

Notably, the revised version also removed the cause of action for “material misrepresentations,” aimed at abusive takedown notices provided by brands.⁹ Unfortunately, this continues to demonstrate the unbalanced nature of SHOP SAFE that places all significant burdens on sellers and not brands who are best positioned to accurately identify and report counterfeit items.

The new version appears to attempt to add one new minimal obligation on brands to provide a notice of their mark and point of contact in advance of electronic commerce platforms adopting proactive measures. However, Paragraph 4(B)(iv)(III) removes any obligation of the registrant to participate. Under this language, if information about their marks is publicly available, they don’t have to participate, and information about all registered marks is publicly available through the USPTO. In addition, the legislation prevents registrants from being required to participate in any program designed by the electronic commerce platform to crack down on counterfeiting. To truly combat trademark infringement we need significantly more cooperation on the brand side.

Small and medium-sized businesses simply do not have the bandwidth and resources to spend multiple days investigating such claims and could be forced out of business for an incorrect challenge from a brand. Unfortunately SHOP SAFE does not contain any small seller exception ensuring that all sellers, no matter how small, will be bound by the terms of the law.

Under existing trademark law, it is the brand owner’s duty to police their own rights and services cannot and should not be solely responsible for enforcing rights. In order to obtain any benefit such as enhanced remedies, brand owners must be required to provide detailed information to digital services about the scope of their trademark rights and licensing. Ultimately, brand owners are best-placed to know what goods are authentic and what goods are counterfeit.

b. Compliance Burdens

SHOP SAFE is very prescriptive and inflexible, with numerous mandates to escape automatic liability (“shall be contributorily liable”) — a drastic change to existing U.S. trademark law.

⁹ Compare Eric Goldman, *The SHOP SAFE Act Is a Terrible Bill That Will Eliminate Online Marketplaces*, Technology and Marketing Law Blog (Sept. 28, 2021), <https://blog.ericgoldman.org/archives/2021/09/the-shop-safe-act-is-a-terrible-bill-that-will-eliminate-online-marketplaces.htm> with Eric Goldman, *SHOP SAFE Act Reintroduced, Because Some Congressmembers Really Want to Kill Online Marketplaces*, Technology and Marketing Law Blog (Sept. 29, 2023), <https://blog.ericgoldman.org/archives/2023/09/shop-safe-act-reintroduced-because-some-congressmembers-really-want-to-kill-online-marketplaces.htm>.

These requirements include “proactive measures for screening listings”, a three-strikes repeat infringer policy, and to “expeditiously disable or remove from the platform any listing for which the platform has actual or constructive knowledge of the use of a counterfeit mark.”

1. Requiring proactive screening measures before listings go live would take an untold amount of technological and human resources, both for smaller firms and larger services operating at scale. Under existing intellectual property law, there is no obligation on the part of online service providers to proactively monitor users for potential infringements. Rather, this is a matter of discretion and policy for each service, and should remain that way because, as discussed above, sellers are not in a good position to identify potentially infringing activity. Specifically, Paragraph 4(B)(iv)(I) should be clarified to better understand the burdens on registrants and online service providers. For example, the legislation is ambiguous as to whether online services are expected to provide screening capabilities to the registrants, and whether these provisions apply to the seller’s own goods, or goods being transacted under the first-sale doctrine. Under this regime, existing digital services would likely be disincentivized from developing new and innovative brand protection strategies, instead conforming solely to what the law required. This would benefit neither consumers nor brands. In addition, the monitoring contemplated under these provisions unnecessarily undermines user privacy.

2. Repeat infringer policies are heavily service-dependent. Any ‘repeat infringer’ policies should be left flexible for each service to apply reasonably. Requiring termination of a third-party seller for “repeated use of a counterfeit mark,” broadly defined as “three separate listings within one year,” is onerous for businesses of all sizes, and draconian given the enormous volume of goods sold or offered for sale online. This provision could invite costly, time-consuming litigation or burdensome investigations over what is considered “mitigating circumstances” and decisions about whether to reinstate.

3. There are many other provisions in the bill that explicitly invite litigation over fact-intensive decisions, several times contemplating “any other factor considered relevant by a court”. The provision on reinstating previously banned sellers includes a “verified decision” — how does a decision become verified? Another mentions “efforts the third-party seller takes to refute or resolve disputes once notified of a concern” — what constitutes “a concern” or its notification? How does one perform an “investigation” and how often must it be “periodically confirmed”?

c. Overbroad and Ambiguous Definitions and Scope

The bill’s broad, ambiguous definitions will disadvantage small and medium-sized sellers. The bill proposes an extremely ambiguous definition of “electronic commerce platform” that is far broader than traditional marketplaces, and would encompass virtually every online forum where people connect to buy and sell goods. In addition to traditional online marketplaces, the bill

would regulate all of these websites, and mandate compliance with prescriptive requirements to escape strict contributory liability.

1. The revised definition of “electronic commerce platform,” in addition to being a circular definition, now broadly covers those that “facilitate or enable” transactions. While a \$500,000 dollar value threshold appears to animate the scope of the bill, the expansion of the definition of “electronic commerce platform” to include facilitation means SHOP SAFE could cover local listservs and message boards, from Reddit to Ravelry, a knitting site. As revised, the bill no longer requires the provision of transactional infrastructure like payment processing or logistics. This is critical, because a listserv that merely facilitates transactions would not know its sale volume — the only way to acquire this information with certainty would be to process payments. In addition, the ramifications of the sub-\$500,000 threshold are also unclear. Electronic commerce platforms that facilitate less than this amount may be swept in if they receive ten notices. Does this amount reset after a period of time, or once ten notices are received a site is covered forever?

2. In addition, this legislation disadvantages small and medium-sized services in particular by shifting the burden of proof to legitimate businesses, presuming any entrant into the market is contributorily liable, and requiring it to prove its innocence. This creates a difficult upfront constraint for new services that will be forced to expend limited resources on disproving guilt merely for operating a business. As explained above, many of the proposed requirements are functionally impossible to comply with.

3. SHOP SAFE also employs an expansive definition of the term “good that implicates health and safety.” The definition includes “a consumer product, the use of which can lead to illness, disease, injury, serious adverse event, allergic reaction, or death, if the consumer product is produced without compliance with all applicable Federal, State, and local health and safety regulations and industry-designated testing, safety, quality, certification, manufacturing, packaging, and labeling standards.” This broad definition would encompass millions, and perhaps the majority, of products of everyday use in consumers’ homes. We appreciate the goal of the sponsors to keep Americans safe and our companies share this goal, but let’s be clear about how expansive SHOP SAFE really is. This would apply to an enormous swath of products sold online today, and large overseas brands can easily use this standard to impede the resale of luxury goods.

4. The revised version of the bill removed some of the more than a dozen “reasonable” or “reasonably” standards, but the language still lacks sufficient legal or regulatory certainty about services’ obligations. For example, the bill’s revised knowledge standard fails to describe the bounds of “constructive knowledge.” Paragraph 4(B)(v)(II) states it may be inferred by, among other things, “other circumstances, as appropriate.”

d. Inherently Flawed Structure

The liability framework under this legislation is structured backwards. Notwithstanding the claim that a genuine ‘safe harbor’ exists in SHOP SAFE, the bill cannot in any meaningful way be called a ‘safe harbor.’ Safe harbors operate by limiting liability if certain conditions are met — not presuming liability *unless* a list of obligations are satisfied. SHOP SAFE is better understood as an *unsafe* harbor, a provision that creates uncertainty and new liability by flipping intermediary liability concepts on their head in favor of a novel and untested strict contributory liability scheme if a service does not adhere to a set of legislative requirements that proponents incorrectly assert to be ‘best practices’. Determining which ‘practices’ are ‘best’ is not a question of normative preference, and requires consulting with the practitioners who implement them.

IV. Conclusion

Our members are committed to cracking down on the misuse of intellectual property under their terms of service and existing law and they are spending time and significant resources in doing so. We agree with the goal to ensure products sold are safe and the industry is continuing to work to innovate solutions. Our members want to keep their customers safe, and do not want their services to be used in transactions involving counterfeit or dangerous goods. This is why industry supported INFORM. Congress should allow time for this new law to take effect before legislating again in the same context.

**Questions from Senator Tillis
for Matthew Schruers**

**Witness for the Senate Committee on the Judiciary Subcommittee on Intellectual Property
Hearing “Back to School with the SHOP SAFE Act: Protecting Our Families from
Unsafe Online Counterfeits”**

1. What challenges do platforms face when it comes to screening products before these products are allowed to be offered for sale to consumers?

Not all platforms and services are alike. While some marketplaces sell physical goods and may have the ability to screen products, not all services play the same role. Many services do not directly sell these products to consumers nor do they have direct access to the third-party sellers. Even among marketplaces, no company is the same and each has its own unique business model. These mechanisms vary from site to site, including whether pre-screening products is even possible. It's important that websites maintain the flexibility to implement measures that work for a particular business model versus having a one-size-fits-all approach.

Furthermore, while some marketplaces may already have proactive tools for screening, these programs are most effective when brands are participating and offering information. Many brands have so many products and variations that sites would need information about all of the products in granular detail to effectively screen products. Proactive automated screening will not have 100% success, and may lead to incidental false positives, including non-infringing fair uses that automated tools are not in a position to make determinations on, as well as stifle legitimate businesses, and occasionally miss counterfeit products.

Additionally, unless a listing is explicit about offering counterfeits or there are other fairly clear signals the product is a knockoff, screening is by no means a complete solution. In most cases listings will look facially valid as it doesn't behoove a seller to suggest they're selling fakes. That's why confirmation or input from the brand owner remains critical to helping combat counterfeits, which SHOP SAFE undermines.

2. Consumers may choose one product over another because they viewed an ad and assumed that the ad or methods platforms use to spotlight certain products mean that the product has been verified as legitimate. How do platforms approach product ads? Is there any vetting done to ensure that counterfeiters aren't buying ads to increase their visibility over legitimate products?

Companies that advertise on e-retail sites also sell goods on the same sites. Under the INFORM Consumers Act (INFORM), “high-volume third party sellers” — who are the vast majority of advertisers — are verified on the front end.

3. When a product order is “fulfilled by” a platform does the platform take extra steps to ensure those products are legitimate? Why should a platform not be held liable for their actions?

Many marketplaces do not offer fulfillment services. Marketplaces that are 100% third-party sellers almost never touch the actual goods themselves and sometimes only touch them for authentication purposes. But the fulfillment method shouldn't be the area of focus here. What's important is that marketplaces have proactive and reactive measures in place, and most established marketplaces do have that. The same legal standard of *Tiffany v. eBay* governs and the independent third-party businesses remain responsible.

4. How have online platforms implemented the INFORM Consumers Act? Have platforms placed new requirements on sellers who use their platforms?

Online marketplaces and sellers have invested significant time and resources to implement the INFORM Consumers Act. It will take time to understand how INFORM impacts both marketplaces and especially small and medium-sized sellers. Lawmakers should give INFORM time to work before pushing legislation that is more burdensome and harmful to online sellers.

Because of INFORM, covered “online marketplaces” have placed additional identification, verification, and disclosure requirements on sellers. This will help prevent bad actors from selling through online marketplaces and give stakeholders improved tools against repeat offenders. In addition, INFORM will help boost collaboration between digital services, industry stakeholders across the online ecosystem, and with law enforcement.

INFORM will also help protect small business sellers who are running legitimate businesses online by helping to weed out bad actors and give consumers more confidence online.

5. If SHOP SAFE were enacted, would platforms place new requirements on sellers to assist with enforcement? If so, what kind of requirements might be implemented?

CCIA's testimony outlines the many outsized and unbalanced burdens the bill would place on small sellers, which are often operating with no overhead and limited resources.

For example, SHOP SAFE would not only require “electronic commerce platforms” to place burdensome new requirements on sellers, but it would also force covered businesses to permanently ban sellers who have had three counterfeit notices in one year with no clear mechanism for reinstatement. This is particularly problematic because many platforms have already seen that brands are abusing notice and takedown regimes to report products that are perfectly legitimate and are often sourced directly from the brands via outlets or clearance sales.

Under SHOP SAFE, there is no recourse for sellers or platforms who fall victim to fraudulent or abusive rights owners. As currently structured, SHOP SAFE will put legitimate sellers at risk of losing their livelihood. Once blacklisted with three reports there are no mechanisms for small sellers to remove themselves from SHOP SAFE's reporting requirements — or for them to be

reinstated given inflexible provisions — which are ironically more extensive for small sellers than for large sellers.

SHOP SAFE also gives brands more power to erroneously report listings as a means to control distribution channels, which will eliminate competition and lead to fewer choices and higher prices for consumers.

6. To your knowledge, are there any practices that are more current than the practices listed in the SHOP SAFE Act or that should be sufficient to avoid secondary liability that are not covered by the bill?

Regulations enshrined in statute that deal with fast-moving technologies should be flexible and technology-neutral. Best practices today may be obsolete in just a few years with new technological advances. The list in the bill is highly prescriptive and would freeze innovation in 2023.

However, one practice that can and should be enshrined is encouraging collaborative relationships between rights owners and e-retailers. Because rights owners are the experts of their own brands and products, they are the most equipped to identify counterfeit products. The more the rights holders share details of their products, the better sellers can combat fakes. Unfortunately, SHOP SAFE lacks any obligations on brands to share this important information and has the unintended consequence of discouraging brands from sharing information with online marketplaces.

Many sites have invested heavily in AI and machine learning to identify and remove counterfeits. These technologies and capabilities are evolving quickly and policymakers should make sure any regulations are flexible enough to consider evolving standards and avoid overly prescriptive measures. The best measures used today may be obsolete tomorrow and Congress should instead consider referencing practices that take into account, for example, size and capabilities of sellers.

7. Should platforms be required to notify consumers when they remove a listing because it appeared to be selling counterfeit products?

Many services do this already, but any requirements would need to be carefully calibrated to accommodate different business models and the different definitions of listings across platforms. At a minimum, if a service is compelled to repeat to consumers a claim that a merchant trafficked in counterfeit goods, the alleging party should be required to make their allegation under penalty of perjury.

8. Should any revisions be made to the definition of “goods that implicate health and safety?”

The definition of the term “good that implicates health and safety” in SHOP SAFE is incredibly broad and would likely encompass millions, and perhaps the majority, of products of everyday use in consumers’ homes.

The definition currently includes “a consumer product, the use of which can lead to illness, disease, injury, serious adverse event, allergic reaction, or death, if the consumer product is produced without compliance with all applicable Federal, State, and local health and safety regulations and industry-designated testing, safety, quality, certification, manufacturing, packaging, and labeling standards.”

A witness in the hearing postulated that the presence of “buttons” on a product might implicate health and safety. The broad language should be cabined to legitimately dangerous and unsafe products. Traditional luxury brand items such as purses, clothes, and similar products should not be considered to legitimately impact health and safety.

9. Are there any additional best practices platforms should implement to help prevent infringing use by third party sellers on their platforms?

E-retailer anti-counterfeiting best practices are constantly evolving with new innovative solutions being proposed regularly by sellers. Such new practices include serialization of products, improved scanning of products, and some retailers even allow trusted brands who share detailed information with sellers to strike counterfeit products off of sites directly and independently of sellers.

However, since the size and capacity of e-retailers are fundamentally different, there should not be a one-size-fits-all best practices regime as currently exists in SHOP SAFE. Each online marketplace is unique and knows best how to build systems that work with their unique business models. This will encourage sites to innovate and adapt without being required to implement prescriptive programs that could be ineffective depending on the business model.

It would be a mistake for Congress to impose statutory best practices that may significantly change and evolve over the next ten years, as they have certainly changed over the last ten years. Instead Congress and courts should evaluate retailer practices based on published industry baseline standards.

Finally, rights owners should be encouraged to avoid material misrepresentations and only submit notices for known violations, with penalties for fraudulent notices.

10. Are there any additional changes that you would like to see made to the SHOP SAFE Act and why?

CCIA’s testimony outlined the Association’s significant concerns with SHOP SAFE that would create secondary liability where none exists today, undermining current trademark law and the *Tiffany v. eBay* precedent.

CCIA has serious concerns with the bill’s broad and ambiguous definitions, which would seemingly include any and all products for sale on e-commerce, and any and all websites where they are sold. Refining the definitions, including at a minimum harmonizing them with INFORM, could reduce confusion about who is covered in these very similar pieces of

legislation and ensure it only covers marketplaces with legitimate knowledge of customers, merchants, and products.

As previously discussed, the structure of SHOP SAFE creates enormous new burdens on e-commerce sellers without any new requirements for brand owners. If stopping counterfeiting is the goal, brand owners must be required to share relevant and detailed information about their marks. E-retailers will use this information to improve their automatic filters and train personnel to better identify counterfeit listings.

The legislation places prescriptive and inflexible requirements on sellers and lacks a true safe harbor, instead requiring sellers to meet specified conditions or they are held liable. These conditions are not based on an investigation or understanding of current anticounterfeiting industry practices by sellers.

The lack of a true safe harbor will incentivize endless litigation and would lead large brands to sue both online services and sellers of all sizes including small businesses with only a few employees. The Digital Millennium Copyright Act (DMCA) provides clear steps in the event of a copyright takedown notice and if the online service provider complies, there is little threat of litigation. Conversely, under SHOP SAFE sites would have to affirmatively prove they reasonably implemented the requirements. While SHOP SAFE allows a reasonableness defense, such an expensive defense would require in each case full discovery and fact finding by a jury.

Congress also must ensure that sellers that are operating in good faith are not overly burdened by new regulations. Companies that only have a few employees could be put out of business by improper demands by brand owners whereby legitimate products on sale are reported by brand owners who seek to control the distribution channels for their goods. As currently written, SHOP SAFE would empower brands to erroneously report listings that would eliminate competition and lead to fewer choices and higher prices for consumers.

We also oppose the three-strikes policy that would require covered platforms to permanently ban sellers as especially small businesses should be given opportunities to cure and brand owners should be punished for bad-faith takedown requests. Instead SHOP SAFE should include a small seller exception for casual sellers and microbusinesses and the thresholds in SHOP SAFE should align with thresholds in INFORM for consistency.

It also lacks proportionality for sellers of all sizes. For example, some sellers may be quite large with a huge inventory and have a track record for being a responsible player for an extended period of time. Three strikes with no recourse would cause them true commercial harm. On the flip side, in some instances a one-strike policy may be more suitable if a seller's inventory appears to be dedicated to counterfeits. It may not make sense to give such sellers three chances. This is another downside of the bill's current rigid and prescriptive approach.

11. What more can Congress do to help stem the sale of counterfeit goods online?

Fighting counterfeits is a shared mission and policymakers should consider the retail market in its totality, including e-commerce and traditional brick-and-mortar stores, while ensuring that

American small businesses do not shoulder a disproportionate burden. Everyone in the retail ecosystem has an important role to play and the problem of counterfeiting should be examined holistically by Congress including issues such as 1) consumer demand for counterfeit goods, 2) improved enforcement globally through engagement with our trading partners, and 3) information sharing between stakeholders, including brands, marketplaces, law enforcement, and consumer groups.

INFORM entered into force only a few months ago and shares many of the same goals as SHOP SAFE without many of the harmful impacts on sellers. We continue to encourage lawmakers to give INFORM more time to work while taking the time to collaborate, perhaps through roundtables with stakeholders to garner suggestions, feedback, and additional solutions to combating counterfeits. Such collaboration could develop workable and targeted solutions that could combat counterfeits without hurting small sellers.

SHOP SAFE must place affirmative obligations on trademark owners if additional progress is going to be made in anti-counterfeiting. Brand owners are best-placed to ultimately know what goods are authentic and what goods are counterfeit. SHOP SAFE does away with trademark owners' critical role in identifying counterfeits, assigning little to no role for them, such as providing sellers detailed information on their marks, including licensing agreements, in the same granular detail as they provide anti-counterfeiting actors like Red Points. If there are data gaps that can only be populated with non-public information then Congress should ensure that brand owners share this data. Unfortunately SHOP SAFE does not balance burdens between digital commerce sites and brands.

Policymakers should also encourage trademark owners to participate in programs designed by sellers to stop counterfeits because with information sharing and close cooperation, even more counterfeits will be stopped. Some sellers have announced plans to serialize branded products and if trademark owners join and cooperate with these efforts it could eliminate much existing counterfeiting.

In addition, lawmakers should include penalties on bad-faith takedown requests, as earlier versions of SHOP SAFE included, so brands cannot intimidate small sellers for legal resale of goods. Small and medium-sized businesses simply do not have the bandwidth and resources to spend multiple days investigating such claims and could be forced out of business for an incorrect challenge from a brand.

Lastly, Congress should also increase resources for law enforcement that would help finance additional legal action to put more bad actors out of business.



Written testimony

**U.S. Senate Committee on the Judiciary
Subcommittee on Intellectual Property**

Hearing on

“Back to School with the SHOP SAFE Act: Protecting Our Families from Unsafe Online Counterfeits”

**Written Testimony of
Daniel Shapiro
Senior Vice President, Brand Relationships and Strategic Partnerships,
Red Points**

Chair Coons, Ranking Member Tillis and members of the Committee:

Thank you for the opportunity to appear before you today. My name is Daniel Shapiro and I am the Senior Vice President for Brand Relationships and Strategic Partnerships at Red Points.

Daniel Shapiro’s background

Before introducing Red Points, I would like to introduce myself and explain why my expertise can provide value in today’s hearing.

I initially started my career on the retailers’ side. I worked at Macy’s for 5 years, first as a Merchandise Manager and later as a Senior Buyer of Athletic Shoes. This experience provided great value, including learning about consumer behavior, consumer trends, and retailer-provider relationships. These learnings were enhanced by my second professional experience as CEO and President of Shapiro Luggage Corporation, a family-owned business. This experience lasted almost 28 years, and I am proud to say it increased the sale of high-end stores expanded into multiple states by 30%. I then got into the world of brand protection by joining eBay as the Global Asset Protection Manager. Helping eBay create its first proactive Brand Protection Team. My role at the platform pivoted throughout the almost 8 years that I was there, providing me with a 360

picture of the issue of counterfeiting and what it meant for brands, legit sellers, marketplaces, and ultimately how it impacted end-consumers.

For the past six years, I have been part of the Red Points team leading the company operations in North America. During this tenure, I have been instrumental in expanding our brand relationships and have made significant strides in both enhancing and fortifying our ties with marketplaces. For Red Points, maintaining a harmonious relationship with these marketplaces and adhering strictly to their guidelines is paramount. This, together with our AI-driven platform ensures our success in the automatic detection and enforcement of online fraud.

Red Points' background

Red Points is the most widely used solution to recover digital revenues. More than 300 software engineers and industry experts have built it together with some of the world's largest companies for the past decade, and today it offers the most advanced and customizable suite of products in the market.

As of today, over 1,200 companies rely on our platform to combat counterfeiting, piracy, and brand impersonation allowing them to maintain control, improve their brand value, and increase revenue. This number shows no signs of slowing down. Every month, we onboard approximately 20-25 new customers, which would not be feasible if we weren't using technology. Just last year, at Red Points we processed 35 millions new links per day, enforced 4.6 million infringements during 2022, and potentially safeguarded \$2.2 billion in revenue for our customers¹. Currently, we send approximately between 300k to 400k cease and desist notices a month, this number truly highlights the scale of the issue.

With a workforce of 300 employees spread across offices in Europe, North America, and Asia, Red Points is dedicated to delivering exceptional brand protection solutions. Our software consistently removes over 4.6 million instances of illegal products and unauthorized content from the web on a yearly basis, covering a wide range of global marketplaces and social networks.

Red Points' key to success is our investment in technology and product to make our solution incredibly intuitive, effective, and easy to use. Additionally, our client base includes some of the world's largest brands spanning all five continents, with several Fortune 100 companies among them, and represent various industries like toys, sports, cosmetics, fashion, electronics, and CPG (consumer packaged goods) among others.

¹ Based on enforced listings' stock & selling price.

The company was founded in 2011 by an Intellectual Property lawyer. In 2014, Laura Urquizu, Red Points' CEO and President, joined the initial founding team and has led the company to an incredible growth. The company's vision has always been focused on intellectual property and copyright protection. Over the years, Red Points services have evolved to protect our customers from new intellectual property threats. Online criminals have become incredibly sophisticated with the use of technology, and so have we.

At Red Points, there are four pillars that set us apart from other service providers: scalable technology, Intellectual Property expertise, Innovation, and a holistic service. By leveraging these, we support brands all over the world so they can effectively identify infringements on marketplaces, websites, social media, apps and NFT platforms, and act upon them in an effortless, cost-efficient manner.

E-commerce growth and its impact on consumers' safety

It's undeniable that the rapid growth of e-commerce has brought convenience and accessibility to consumers worldwide. But there's a flip side to all this progress, primarily related to the proliferation of counterfeit goods. In fact, a report released by the OECD in 2021 titled *Misuse of E-Commerce for Trade in Counterfeits*² shows that the trend towards online shopping is expected to continue, especially in light of the COVID-19 pandemic, with an ever-increasing number of people buying products using mobile devices.

With this in mind, without the implementation of new, innovative and effective measures to create a secure and trustworthy online environment, the unchecked growth of e-commerce can lead to serious consequences.

As we have witnessed at Red Points when monitoring hundreds of marketplaces daily, counterfeit products infiltrating the e-commerce landscape pose a significant danger to consumers. What's more, due to the nature of online counterfeiting, virtually no market is safe and almost no brand is safe. Many people think luxury goods are counterfeiters' main targets, when in fact, these products are estimated to account for no more than five to ten percent of all counterfeit goods. According to the OECD, fakes are found in every category, from handbags and perfume to machine parts and chemicals. People are often surprised when they find out that at Red Points we protect a very diverse set

²OECD/EUIPO (2021), *Misuse of E-Commerce for Trade in Counterfeits, Illicit Trade*, OECD Publishing, Paris, <https://doi.org/10.1787/1c04a64e-en>

of brands from baby products and cosmetics, to software and wind turbine manufacturers.

In the context of back-to-school shopping, students and parents are particularly vulnerable to counterfeit electronics, backpacks, clothing, and footwear, as these items are essential for a successful academic year. When consumers cannot trust the authenticity of the products they purchase online, they are exposed to various risks, including substandard quality, potential health hazards, and financial losses.

Moreover, the unbridled expansion of e-commerce without equally evolving and robust anti-counterfeiting measures threatens the integrity of online marketplaces. Legitimate businesses suffer when counterfeiters flood these platforms with fake products, eroding consumer trust in e-commerce as a whole. This erosion of trust affects not only businesses operating online but also the broader e-commerce ecosystem.

The dangerous rise of online counterfeiting

The landscape of Intellectual Property protection has experienced seismic shifts in recent years, largely driven by the surging popularity of e-commerce platforms. Concurrently, the sophistication of counterfeiting techniques has reached unprecedented heights, blurring the line between genuine products and their counterfeit counterparts. It's no exaggeration to say that some counterfeits now exhibit a level of replication that makes them indistinguishable from the authentic items they imitate. As an anecdote, at Red Points we have even seen bad actors online create false authentication letters certifying the product they are selling online is genuine, when in fact it is not.

The proliferation of online sales channels has exacerbated the challenge of detecting and combating counterfeits. Unlike traditional brick-and-mortar retail, where physical inspection can be a safeguard against counterfeit products, the digital realm offers counterfeiters an ideal playground to operate with impunity. The sheer volume of products and transactions in the online space makes it increasingly difficult to discern genuine items from their fraudulent duplicates.

This surge in counterfeit goods on e-commerce platforms presents a host of complex challenges, touching on critical facets of our modern economy and society:

1. **Consumer Safety:** At the forefront of these challenges is the safety of consumers. Counterfeit products, which have proliferated in categories like fashion, toys, and electronics, pose substantial risks. Substandard quality,

potential health hazards, and unverified safety standards characterize these counterfeits, endangering the well-being of unsuspecting buyers, particularly in high-demand seasons like back-to-school shopping.

2. **Brand Integrity:** Legitimate businesses face dire consequences as counterfeiters infiltrate e-commerce platforms with deceptive listings. This infiltration not only leads to financial losses but also tarnishes the integrity of established brands. Counterfeits erode consumer trust, as unsuspecting buyers may associate subpar counterfeit products with genuine brands, ultimately damaging the reputation businesses have worked tirelessly to build.

3. **Fair Competition:** The counterfeit market thrives on unfair competition. Counterfeiters frequently price their fake products lower than genuine ones, leveraging deceptive tactics to gain an edge. This undermines fair competition and places legitimate businesses at a disadvantage, struggling to compete with counterfeit offerings.

4. **Trust in the Online Marketplace:** There are growing concerns with consumer trust in online marketplaces. As counterfeit products become increasingly available, and as new marketplaces continue to open, consumers are becoming more and more skeptical about the authenticity and safety of items purchased online. This erosion of trust affects both individual businesses and also the broader integrity of e-commerce platforms overall.

To underscore the severity of this issue, a recent examination of our client data at Red Points revealed a staggering increase in detections of counterfeit products in industries such as fashion, toys, and electronics. Comparing the year 2022 to 2021, we witnessed a remarkable surge of over 100% in detected counterfeit instances. This surge starkly underscores the scale and gravity of the problem we face.

Protecting consumers against new sophisticated online scams

At Red Points, we've been acutely aware of the evolving landscape of online fraud. Over the years, we've observed a concerning trend where fraudsters continually enhance their tactics, leveraging cutting-edge technologies and strategies. With the proliferation of AI and automation, these malevolent actors can now orchestrate more convincing and large-scale scams, manipulating data and exploiting vulnerabilities in unprecedented ways.

Furthermore, fraudsters have refined their social engineering techniques, adept at deceiving individuals into revealing sensitive information or engaging in actions detrimental to their interests. Phishing attacks, where fraudsters masquerade as trusted entities on social media, and the creation of counterfeit websites have become increasingly sophisticated, making them exceptionally challenging to detect.

This evolving landscape has transformed the battle against fraudsters into a dynamic challenge akin to a game of "whack-a-mole." Effective solutions demand the integration of advanced brand protection technology, collaborative efforts across sectors, innovative strategies, and access to expertise. It is our collective responsibility to stay ahead of these evolving threats and ensure the continued safety and trust of consumers in the digital world.

Are online platforms and marketplaces' existing responses to infringers' growing threat adequate?

As we delve into the complexities of counterfeiting in the digital age, it is crucial to consider the existing responses of online platforms and marketplaces to the escalating threat posed by infringers. E-commerce platforms play a central role in shaping the landscape of counterfeit goods distribution, and their actions can significantly impact the prevalence of counterfeit products in the marketplace.

Recently, the counterfeit problem has gained even more global momentum with the launch of new initiatives among key stakeholders. In 2020, in the US, The Department of Homeland Security (DHS) released its first report on Combating Trafficking in Counterfeit and Pirated Goods³. This first-ever report outlines a series of recommendations and actions that can be taken by both the federal government and industry partners to combat this illicit trade epidemic.

Meanwhile, one of the pillars of the SHOP SAFE Act is to combat the sale of unsafe counterfeit goods by incentivizing platforms to engage in best practices for screening and vetting sellers and goods, addressing repeat counterfeiter sellers, and ensuring that consumers have relevant information available to them when they make their online purchases.

It goes without saying that over the years many online platforms have implemented measures to address counterfeit listings and sellers, the effectiveness of these responses varies. Some platforms have made commendable strides in enhancing their anti-counterfeiting efforts by employing advanced algorithms and technology to detect

³ US Homeland Security (2020), Combating Trafficking in Counterfeit and Pirated Goods

and remove infringing listings promptly. Others have established partnerships with brand protection solutions like Red Points to strengthen their defenses against counterfeiters.

In fact, as a leading industry infringement reporter, with over 4.6M enforcements per year in top platforms, we are proud to be official partners and have certifications with:

- Amazon Engagement Program
- Cloudflare Trusted Reporter
- Facebook Rights Management
- Google Trusted Copyright Removal Program
- LinkedIn Safe Brand
- Youtube Certified Multi Channel-Network

These programs are essential to ensure synergies between platforms and industry stakeholders. Additionally, it is worth noting that many e-commerce platforms including Amazon, Alibaba and eBay have been ramping up their anti-counterfeit initiatives in recent years in an effort to rid their sites of knock-offs. However, with scammers continually on the lookout for bigger audiences to sell to, the rapid year-on-year growth of ecommerce users has also offered a unique opportunity for them to further expand their operations and the challenge of combating counterfeits persists due to the adaptability and persistence of infringers. Counterfeiters continually evolve their tactics to circumvent detection and enforcement measures, making it a constant game of cat and mouse.

On one hand, online marketplaces often face a daunting challenge in nurturing relationships with the vast multitude of brands that utilize their platforms. One potential solution to enhance this protection involves introducing an additional layer of security, where new users provide additional personal information. This information can prove invaluable for future authentication and swiftly identifying potential infringers.

On the other hand, it's crucial to acknowledge that even the largest and most established brands may find it challenging to address all instances of infringement targeting their intellectual property. To effectively combat this issue, brands must prioritize and invest in implementing clear mechanisms to streamline their online brand protection strategy, particularly in the detection and enforcement processes. This proactive approach is essential for ensuring the safeguarding of their intellectual property rights and preventing bad actors from targeting them in the future.

This leads me to the importance of working towards a collaborative and comprehensive solution that combines the strengths of both industry-led initiatives, marketplaces, third-party providers like Red Points and legislative actions, to create a secure and trustworthy e-commerce environment for consumers and businesses alike.

Cracking down on fakes through collaboration and shared accountability

One fundamental element in the fight against counterfeits and online scams is the imperative need for collaboration and shared accountability across various sectors. The rising sophistication of infringers and fraudsters necessitates a collective response that transcends individual efforts.

Collaboration serves as a force multiplier in this ongoing battle. By pooling resources, expertise, and intelligence, businesses, online platforms, law enforcement agencies, and technology providers like Red Points can more effectively identify, mitigate, and ultimately deter counterfeiting and fraudulent activities. Sharing insights and best practices enhances our collective ability to stay ahead of evolving threats and finally get rid of the whack-a-mole effect

Shared accountability reinforces the commitment to combat counterfeits and online scams. Businesses and online platforms must adopt rigorous measures to prevent counterfeit listings and fraudulent activities on their platforms. This includes proactive monitoring, swift takedowns of infringing content, and the implementation of robust verification processes for sellers and listings.

Legislation like the SHOP SAFE Act plays a pivotal role in promoting shared accountability. It sets clear expectations for online platforms and incentivizes them to take proactive measures against counterfeits. The act encourages collaboration between all stakeholders, emphasizing that we each have a part to play in creating a secure and trustworthy digital marketplace.

As we continue to explore strategies and solutions to address these challenges, the emphasis on collaboration and shared accountability remains paramount. Together, we can build a safer, more reliable online environment for consumers and businesses while actively working to eradicate counterfeits and online scams.

Technology as the only approach to scale things up

In confronting the pervasive issue of online counterfeiting, it has become increasingly evident that technology stands as the pivotal approach to scale our efforts and effectively combat this modern menace. The challenges posed by counterfeiters have evolved in lockstep with technological advancements, making it imperative that we harness technology to stay ahead in this ever-evolving battle.

Counterfeiters have demonstrated a remarkable ability to adapt to changing circumstances and exploit technology to their advantage. Their utilization of advanced techniques has allowed them to create counterfeit goods that are virtually indistinguishable from genuine products.

In response to these challenges, we find that technology offers us a multifaceted path forward:

1. **Advanced Detection Tools:** Technology-driven solutions, including AI and machine learning algorithms, have proven instrumental in detecting counterfeit products. These tools can rapidly analyze vast datasets, identifying subtle patterns and anomalies that would be impossible to discern through manual inspection. By harnessing the power of technology, we can enhance our ability to identify counterfeit listings swiftly and accurately.
2. **Real-time Monitoring:** Technology enables real-time monitoring of online marketplaces, allowing for the immediate identification and removal of counterfeit listings as they appear. This proactive approach prevents counterfeit products from gaining traction and reduces their potential impact on consumers.
3. **Data Analytics:** Technology-driven data analytics provide valuable insights into counterfeiting trends, enabling businesses and enforcement agencies to anticipate emerging threats. By leveraging data, we can develop proactive strategies to combat counterfeiting effectively.
4. **Automation and Efficiency:** The sheer scale of e-commerce and the volume of online transactions necessitate automation and efficiency. Technology can streamline the enforcement process, ensuring that counterfeit listings are promptly removed and enforcement actions are taken consistently.
5. **Continuous Innovation:** As counterfeiters continually evolve their tactics, it is essential that we keep pace through continuous innovation. Leveraging emerging technologies such as blockchain and digital watermarking can provide new layers of protection and traceability.

In light of the daunting challenges posed by online counterfeiting and the dynamic nature of the digital marketplace, technology emerges as the linchpin of our strategy to scale up our efforts. It empowers us to proactively combat counterfeit products, protect consumers, preserve brand integrity, and promote fair competition.

Moreover, technology transcends traditional boundaries, enabling collaboration across sectors and geographies. It facilitates the sharing of intelligence, best practices, and insights, fostering a collective approach to combating counterfeiting.

As we navigate the complex terrain of counterfeiting in the digital age, we recognize that technology is not merely an option but a necessity. It is the primary means by which we can scale our efforts, stay ahead of counterfeiters, and create a safer and more trustworthy digital marketplace for consumers and businesses alike.

**Questions from Senator Tillis
for Daniel Shapiro**

**Witness for the Senate Committee on the
Judiciary Subcommittee on Intellectual
Property Hearing “Back to School with the
SHOP SAFE Act: Protecting Our Families from
Unsafe Online Counterfeits”**

Thank you Ranking Member Tillis for the questions below. We would be more than happy to participate in legislative groups to further shape legislation and protect American consumers and companies from counterfeit products.

1. Is there reliable data captured on how many counterfeits were found on any given marketplace in a year? If not, should there be?

Major marketplaces such as Amazon, eBay, Alibaba or Shopee release annual reports sharing proactive measures undertaken throughout the year to actively combat online counterfeiting.

There are multiple ways in which counterfeits are identified on any given marketplace:

- There are internal signals that create risk for Marketplaces and are proactively removed.
- User feedback and user reports.
- External reports from Brands and service providers.

There is also the case for brands that may not be aware of their products being counterfeited or are unable to actively participate in the reporting of counterfeit issues to ecommerce platforms.

Reliable data across all marketplaces should be available to multiple stakeholders for transparency purposes.

2. Brand owners are currently required to police their brands on hundreds of online marketplaces. How much of a burden is this, especially for small business owners?

In today's digital landscape, brands, regardless of their size, are challenged by the vastness and complexity of policing their intellectual property. Brands are in fact responsible for defending their IP in order to protect its value.

The size, speed and scale of global marketplaces, social media platforms and stand-alone ecommerce websites make it almost impossible for brands to do this with human capital.

Our extensive experience working with brands has demonstrated that placing the responsibility solely on one party can be daunting, especially in this 24/7 fast-paced e-commerce world.

3. To your knowledge, are there any practices that are more current than the practices listed in the SHOP SAFE Act or that should be sufficient to avoid secondary liability that are not covered by the bill?

Red Points believes that creating a standardized vetting process for best practices among online marketplaces is a good business approach especially for products where health and safety are of concern.

However, marketplaces are not aware of the distribution practices of brands and without mandatory collaboration only brands who participate with marketplaces should be considered for liability.

4. Should platforms be required to notify consumers when they remove a listing because it appeared to be selling counterfeit products?

Red Points supports the notification to consumers who have previously purchased an item, and said item has now been removed. This notice should allow the consumer to reach out to the marketplace for a return. A fair and reasonable time frame between the consumer purchase and the listing removal should be considered.

5. Should any revisions be made to the definition of “goods that implicate health and safety?”

In the general definition included in the SHOP SAFE Act, it seems to encompass many industries, verticals, and products. It is also true that counterfeiters often use hazardous chemicals in very basic products like clothing, bedding, and sleepwear that could cause significant health issues.

Perhaps providing further details within the concept of ‘goods that implicate health and safety’ on specific categories and products might be a better starting point.

6. Are there currently any standard practices across platforms for vetting sellers or screening products? If so, how effective do you find those practices to be? What would you improve?

To our knowledge, the vetting practices of marketplaces are preparatory and not shared with brands or service providers like Red Points.

7. Are there currently any standard practices across platforms for removal of known counterfeit or infringing products?

It is our experience that when notifying platforms across the globe that an item is infringing on a brands’ intellectual property, the item is quickly removed with very few exceptions.

Every ecommerce platform may have varying forms, portals, document collections process, but in the end response to the notification is swift.

8. Are there any additional best practices platforms should implement to help prevent infringing use by third party sellers on their platforms?

While we are not apart or fully aware of the vetting process used by marketplaces, we hope it includes the following:

1. How has the seller obtained the inventory?
2. Has the seller authenticated the inventory?
3. Ongoing monitoring of consumer reviews.

9. Are there any additional changes that you would like to see made to the SHOP SAFE Act and why?

It is our position that the SHOP SAFE Act be a balanced approach between marketplaces, brands, and service providers. We would welcome the opportunity to participate in the working group to advance the bill.

10. What more can Congress do to help stem the sale of counterfeit goods online?

Besides legislation, we believe consumer education is key. Having a nation-wide campaign across schools would be extremely beneficial to raise awareness of the dangers of counterfeits, not just health and safety, but how it can damage the reputation of brands, loss of jobs, and hazard to the environment.

Moreover, continued rigorous training at the country's entry points is crucial to prevent counterfeit goods from entering the market. Customs and enforcement agents must be adept at identifying counterfeits, particularly in commodities from high-risk regions.



October 10, 2023

The Honorable Chris Coons
Chair
Subcommittee on Intellectual Property
Committee on the Judiciary
U.S. Senate
Washington, DC 20510

The Honorable Thom Tillis
Ranking Member
Subcommittee on Intellectual Property
Committee on the Judiciary
U.S. Senate
Washington, DC 20510

Dear Chairman Coons and Ranking Member Tillis:

On behalf of thousands of manufacturers, businesses, and other organizations across the nation, we write in appreciation of your leadership and in strong support of your reintroduction of The SHOP SAFE Act of 2023.¹ This important anti-counterfeiting legislation will protect consumers, businesses and American workers from the harmful effects of counterfeit products sold online.

Proactive measures are needed before products are listed—with accountability when policies don’t match practice, as counterfeits often do not meet product safety standards, cause environmental risks, and evade social responsibility and sustainability requirements. The current imbalance is disproportionately a reactive system focused on what brands provide to platforms and more is needed, including keeping repeat infringers from setting up new accounts to sell counterfeits after being removed from a platform. Platforms already hold a great deal of information based on the brand partnerships of today within current individual systems to address the problem; however, without accountability there is little incentive for platforms to address the issue.

Furthermore, small businesses are hurt by the non-responsiveness of platforms and the need for small businesses needing to constantly police platforms – they don’t have the time and resources to address, especially when they don’t sell on platforms and only exclusively via their omnichannel offerings. The time for parity is now to ease this burden on businesses of all sizes; online platforms and sellers should

¹ Senators Coons, Tillis introduce SHOP SAFE Act to crack down on harmful counterfeit e-commerce goods
<https://www.coons.senate.gov/news/press-releases/senators-coons-tillis-introduce-shop-safe-act-to-crack-down-on-harmful-counterfeit-e-commerce-goods>

have parity with what is required of brick-and-mortar retailers and small mom and pop shops up the street in our communities.

Law enforcement has said that if it can be made the illicit actors can counterfeit it for profit. This means that addressing dangerous counterfeits is a cross-industry concern, including counterfeit toys, car seats, cosmetic products, electronics, bicycle helmets, car parts, footwear, apparel, accessories, apparel, water filters, cable cords and more – not to mention identity theft and financial crimes.²

As discussed in the October hearing,³ the SHOP SAFE Act has been crafted with bipartisan, bicameral feedback and received input from a wide spectrum of stakeholders through meetings, roundtables, and legislative hearings. More work is ahead to finalize; the passion and concerns you each share is unmistakable to propel this forward. We thank you—and each of your dedicated staff members—for the work behind moving this forward. This has also been an issue of concern across Administrations. The other half of what President Biden asked for—the liability on online marketplaces⁴—resides in the pending SHOP SAFE Act;⁵ the U.S. Department of Homeland Security issued the “Combating Trafficking in Counterfeit and Pirated Goods” during the Trump Administration⁶ to address counterfeiting as a national security concern with best practices outlined in the report.

The size and scale of counterfeiting is growing. There are several figures and studies, including comments submitted on Friday, October 6, by those in the SHOP SAFE Coalition to the United States Trade Representative’s (USTR) request for Notorious Markets List (NML) feedback,⁷ two key figures to position now:

- The Congressional Research Service issued an Intellectual Property updated in September and sourced this figure: “Globally, trade in counterfeit and pirated goods reached an estimated \$464 billion, or 2.5% of global trade in 2019 (Organization for Economic Cooperation and Development/European Union [EU]).”⁸
- The National Association of Manufacturers detailed, “With counterfeits making up 3.3% of total merchandise trade, the U.S. economic impacts are staggering. For 2019, counterfeiting would have subtracted nearly \$131 billion from the U.S. economy, including direct, indirect and induced economic impacts. That means \$22.3 billion of lost labor income, 325,542 fewer jobs,

² IACC: About Counterfeiting What is Counterfeiting / Intellectual Property (IP) Theft?

<https://www.iacc.org/resources/about/what-is-counterfeiting>

³ Back to School with the SHOP SAFE Act: Protecting Our Families from Unsafe Online Counterfeits

<https://www.judiciary.senate.gov/committee-activity/hearings/back-to-school-with-the-shop-safe-act-protecting-our-families-from-unsafe-online-counterfeits>

⁴ FACT SHEET: President Biden’s Safer America Plan | The White House. <https://www.whitehouse.gov/briefing-room/statements-releases/2022/07/21/fact-sheet-president-bidens-safer-america-plan/>.

⁵ Senators Coons, Tillis introduce SHOP SAFE Act to crack down on harmful counterfeit e-commerce goods (senate.gov) <https://www.coons.senate.gov/news/press-releases/senators-coons-tillis-introduce-shop-safe-act-to-crack-down-on-harmful-counterfeit-e-commerce-goods>.

⁶ DHS: Combating Trafficking in Counterfeit and Pirated Goods

<https://www.dhs.gov/publication/combating-trafficking-counterfeit-and-pirated-goods>

⁷ 2023 Review of Notorious Markets for Counterfeiting and Piracy: Comment Request

<https://www.regulations.gov/docket/USTR-2023-0009>

⁸ Congressional Research Service: Intellectual Property Rights (IPR) and International Trade

<https://crsreports.congress.gov/product/pdf/IP/IP10033>

\$5.6 billion of lost federal tax revenues and nearly \$4 billion less in state and local tax collections.”⁹

We appreciate your unwavering commitment to reintroduce and lead the SHOP SAFE Act in 2023 to address the abundance of dangerous counterfeits across platforms, protecting consumers, jobs and bringing parity to offline and online commerce. Thank you for protecting national security, domestic jobs and innovation and working to keep consumers safe from online counterfeits.

Thank you,

Alliance for Automotive Innovation
 American Apparel & Footwear Association (AAFA)
 Association of Home Appliance Manufacturers (AHAM)
 Automotive Anti-Counterfeiting Council (A2C2)
 Communications Cable & Connectivity Association (CCCA)
 Consumer Healthcare Products Association (CHPA)
 Footwear Distributors & Retailers of America (FDRA)
 Halloween & Costume Association
 MEMA, The Vehicle Suppliers Association
 Personal Care Products Council (PCPC)
 The Alliance for Safe Online Pharmacies (ASOP)
 The Toy Association
 Transnational Alliance to Combat Illicit Trade (TRACIT)

⁹ NAM Countering Counterfeits: The Real Threat of Fake Products How Fake Products Harm Manufacturers, Consumers and Public Health—and How to Solve This Problem
https://www.nam.org/wp-content/uploads/2020/07/CounteringCounterfeits.vF_.pdf



October 2, 2023

Chair Chris Coons
Subcommittee on Intellectual Property
Judiciary Committee
United States Senate
Washington DC, 20510

Ranking Member Thom Tillis
Subcommittee on Intellectual Property
Judiciary Committee
United States Senate
Washington DC, 20510

Statement for the Congressional Record in Support of the SHOP SAFE Act

Dear Chair Coons and Ranking Member Tillis,

On behalf of the [Alliance for Safe Online Pharmacies' \(ASOP Global\)](#), thank you for holding a hearing on "Back to School with the SHOP SAFE Act: Protecting Our Families from Unsafe Online Counterfeits." ASOP Global supports the SHOP SAFE Act and urges Congress to expeditiously seek its passage in order to ensure transparency, accountability and consumer safety online.

ASOP Global, a nonprofit organization headquartered in Washington, D.C. with activities in U.S., Canada, Europe, Latin America and Asia, is dedicated to protecting consumers, ensuring safe online access to medications, and combating illegal online drug sellers. With more than 75 participating organizations worldwide, ASOP Global prioritizes efforts to promote a safe and legitimate online environment for patients, caregivers, and healthcare providers.

To date, U.S. policy has failed to protect Americans from the widespread internet drug sellers who profit at the expense of patients' safety. Roughly [95 percent](#) of the over [35,000 online pharmacies worldwide](#) operate illegally, selling medicines without a prescription and offering fake and dangerous medicines in violation of state and federal law as well as pharmacy practice standards. The COVID-19 pandemic exacerbated the crisis, with online criminals preying on consumers by peddling counterfeit products and treatments and increasing [consumer comfort with online shopping](#). By establishing trademark liability for online marketplace platforms when a third-party sells a counterfeit product that poses a risk to consumer health and safety, the SHOP SAFE Act is an important step toward ensuring online marketplaces are a safe place for consumers to shop for products. If enacted, it will incentivize platforms to adequately vet sellers and products, shut down repeat offenders, and provide consumers with vital information to make informed purchases.

ASOP Global has advocated for policies that put online patient safety first, including [increasing internet accountability](#) through targeted reforms to Section 230 of the Communications Decency Act, safeguarding online transparency by restoring access to accurate WHOIS data, [social media corporate responsibility to report](#), and stopping domain name registries and registrars from facilitating online crime by requiring them to [lock and suspend suspicious sites](#).

While more must be done at the federal level to protect Americans from criminals peddling dangerous drugs online through marketplaces, social media, and websites, ASOP Global is proud to support the bipartisan SHOP SAFE Act's policy goals. We believe it is time to take a comprehensive approach to

Alliance for Safe Online Pharmacies (ASOP)

www.BuySafeRx.pharmacy

Page 1



ensure consumers' safety and well-being in this online ecosystem and the SHOP SAFE Act is a substantial leap in the right direction.

Thank you for your continued leadership in Congress and for introducing the SHOP SAFE Act. Please know that ASOP Global stands ready to work with you to ensure that federal policies that safeguard public health, like the SHOP SAFE Act, become law along with other internet policies that are aimed at curbing the ongoing opioid and fentanyl crises.

Respectfully,

Carrie Harney, J.D.

Board President, ASOP Global Board of Directors
Vice President, US Government and Regulatory Affairs
US Pharmacopeia

cc:

Chairman Dick Durbin, Senate Judiciary Committee
Ranking Member Lindsey Graham, Senate Judiciary Committee



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WASHINGTON, DC 20036
AHAM.ORG

October 2, 2023

The Honorable Chris Coons
Chair
Senate Committee on the Judiciary
Subcommittee on Intellectual Property
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Thom Tillis
Ranking Member
Senate Committee on the Judiciary
Subcommittee on Intellectual Property
224 Dirksen Senate Office Building
Washington, DC 20510

Dear Chair Coons and Ranking Member Tillis:

The Association of Home Appliance Manufacturers (AHAM) supports the SHOP SAFE Act and thanks you for your consideration of practical solutions to combat the sale of counterfeit goods sold on third-party marketplaces while simultaneously protecting consumers, families, local businesses, and communities.

The SHOP SAFE Act is a pragmatic approach to keeping consumers safe from purchasing counterfeit goods, while simultaneously protecting legitimate American businesses by bringing transparency and accountability to third-party marketplaces. AHAM is concerned with the sale and availability of counterfeit merchandise sold on online marketplaces, especially with a record number of consumers flocking to e-commerce platforms amid the COVID-19 pandemic. AHAM's Filter It Out campaign is a public education drive to inform consumers about the significant problem of counterfeit and deceptively labeled replacement water filters for refrigerators. And especially during the pandemic, consumers, now more than ever rely on these and other home appliances and parts like rechargeable batteries, room air cleaners and their filters, replacement toothbrush heads, and replacement vacuum bags for a healthy and efficient home. The problem is that counterfeit versions of these products present a risk to human health and safety and consumers often have no idea.

Although e-commerce platforms have provided Americans with a convenient shopping option, they also have turned into a hub for illicit merchandise. Despite efforts to mitigate the proliferation of counterfeit products, counterfeit appliances, and replacement parts such as counterfeit refrigerator water filters, air filters for air purifiers, replacement batteries, replacement toothbrush heads, and vacuum bags, and other service parts are widely available on leading online marketplaces.

An AHAM study of counterfeit water filter replacements for refrigerators showed that all counterfeit filters failed to perform and, therefore, pose significant health and safety risks to consumers. Counterfeit water filters failed to remove lead from water and to reduce the presence of cysts. In fact, ten separate compounds—many of them cancer-causing—were introduced into clean water by counterfeit water filters.

The problem stems directly from a glaring lack of strong verification and disclosure requirements on these platforms, allowing criminals and unscrupulous individuals to pose as legitimate sellers. This

has resulted in record numbers of consumers being duped into buying counterfeit goods. The U.S. Customs and Border Protection reports that “Over 90 percent of all counterfeit seizures occur in the international mail and express environments which are channels that small, e-commerce packages destined for U.S. addresses travel through. Many of these shipments contain counterfeit goods that pose the same health, safety, and economic security risks as large, containerized shipments.”

A substantial number of these items come directly from China-based sellers, who have flooded online marketplaces, looking to profit from the sale of counterfeit products. According to a recent report by the U.S. Department of Homeland Security, eight out of every 10 contraband items seized by U.S. Customs and Border Protection officials came from China and Hong Kong. For example, in February 2022, CBP officers in Baltimore, Maryland seized a shipment of 29,000 counterfeit water purifier filters from China.

Legitimate businesses and unwary shoppers suffer the most unless concrete policies are implemented to support marketplace transparency. These bipartisan measures are carefully and thoughtfully crafted to modernize consumer protection laws and protect consumers and legitimate businesses. It simply requires an online marketplace to verify the people selling on their platform and makes basic business contact information available to any consumer. It gives consumers more transparency to who they are buying from, while simultaneously making it easier to track criminals looking to profit from the sale of knockoffs and dangerous goods.

Ensuring the well-being of American consumers is a bipartisan issue that we should all be able to get behind. We thank you for your work to protect American consumers and businesses from counterfeit goods.

Sincerely,



Heidi R. King
Policy Advisor



NEWS RELEASE

CCCA Applauds Introduction of SHOP SAFE Act of 2023

Bipartisan bill will significantly decrease online sales of counterfeits by increasing accountability of online marketplaces to vet third party sellers, remove unsafe counterfeit products, ban repeat counterfeiters.

Washington, DC, October 9, 2023 – The Communications Cable & Connectivity Association (CCCA) applauds the bipartisan Stopping Harmful Offers on Platforms by Screening Against Fakes in E-Commerce (SHOP SAFE) Act of 2023, introduced by Senators Coons (D-DE) and Tillis (R-NC).

"CCCA calls on Congress to quickly pass the SHOP SAFE Act to enhance consumer protection for e-commerce purchases," said David Kiddoo, CCCA Executive Director. "For the first time, the Bill will hold e-commerce platforms liable for selling counterfeit and illicit products that harm consumers, if they don't adhere to a set of prescribed best practices."

"Cable and connectivity products are mission critical in all aspects of our evolving connected society," continues Kiddoo. "Safety and performance are paramount to assuring that electrification, artificial intelligence and all other connectivity infrastructure to support SMART buildings and communities is being deployed."

The pandemic-driven escalation of e-commerce continues to be fueled by the convenience of online shopping for practically anything anywhere, along with the nearly instant gratification of quick deliveries and the ease of returns. E-commerce sales exceeded \$1 trillion last year.

"Shady sellers have set up shop in online marketplaces and sell counterfeit products to consumers," stated Kiddoo. "These are substandard products that are either in violation of US trademark laws or they are manufactured to look like legitimate products without adhering to safety standards, environmental controls or fair labor laws. Consequently, American consumers are unknowingly buying unsafe products and funding criminal activity."

Illicit products coming from China and Hong Kong accounted for 75% of the value of counterfeited and pirated goods seized by US Customs and Border Patrol in 2021.

- Press Release: [Senators Coons, Tillis introduce SHOP SAFE Act to crack down on harmful counterfeit e-commerce goods](#)

"As Americans have increasingly turned to e-commerce for convenience, selection, and safety, some third-party sellers have begun to exploit consumers' trust in established online marketplaces to trick them into purchasing dangerous counterfeit goods," **said Senator Coons**. "These counterfeit goods pose health and safety risks, damage the reputations of legitimate brands, and line the pockets of organized crime. The bipartisan SHOP SAFE Act is an important step that will protect consumers and encourage greater transparency and accountability."

E-commerce and social platforms like Amazon, Facebook and Instagram are prime hotspots for counterfeiters because they have not taken sufficient steps to secure their infrastructure from sellers who are eager to exploit platform system weaknesses to list unsafe counterfeits and other illicit products.

The SHOP SAFE Act will require platforms to (1) engage in best practices for screening / vetting sellers and goods, (2) address repeat counterfeiter sellers, and (3) ensure that consumers have relevant information available to them. Failure to comply with the SHOP SAFE regulations, the platforms will be held liable for the sale of counterfeit and illicit products that harm consumers. This is complementary to the INFORM Consumers Act, which took effect on June 27 of this year and requires online marketplaces to collect, verify, and disclose certain information about "high-volume third-party sellers". Together, these policies will begin to stem the influx of illicit products and safeguard consumers from the alarming health, safety and performance dangers of counterfeits that extend across all industries.

"It is time for Congress to pass SHOP SAFE," urged Kiddoo. "Introducing liability provisions should provide platforms with strong incentives to operate their businesses more responsibly and do a better job scrutinizing third-party sellers, removing unsafe counterfeit listings and banning repeat offenders from selling harmful counterfeits again and again."

CCCA joins with other businesses across multiple industries in the SHOP SAFE Coalition to support SHOP SAFE.

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About CCCA

CCCA is comprised of leading manufacturers, distributors and material suppliers who are committed to serving as a major resource for well-researched, fact-based information on the technologies and issues vital to the structured cabling industry. CCCA is proactive at codes and standards bodies and other trade, industry, and governmental organizations in communicating and influencing policy and decisions affecting the quality, performance and societal needs of the structured cabling infrastructure.

CCCA member companies are Accu-Tech; Alphagary; Anixter; Belden; Berk-Tek, a Leviton Company; Cable Components Group; Chemours, comCables, CommScope; Daikin America; Dow; Graybar; Legrand; Leviton; Optical Cable Corporation (OCC); Proterial Cable America; Prysmian Group; Quabbin; Reelex; Sentinel Connector Systems; Superior Essex; VoltServer, Wesco, Westlake Global Compounds, Wonderful High Tech / ABA Cables.

Headquarters: 1001 Pennsylvania NW, Washington, DC, 20004. For further information, visit the CCCA website www.cccassoc.org or contact David Kiddoo, Executive Director at dkiddoo@cccassoc.org or by phone at 410.353.3989.



October 3, 2023

The Honorable Chris Coons
218 Russell Senate Office Building
Washington, D.C. 20510

The Honorable Thom Tillis
113 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Coons and Ranking Member Tillis,

The Council for Innovation Promotion is a bipartisan coalition dedicated to promoting strong and effective intellectual property rights that drive innovation, boost economic competitiveness, and improve lives everywhere. As such, we applaud your recent introduction of the SHOP SAFE Act of 2023, S. 2934, and for quickly scheduling today's hearing to consider the bill and the serious problem of counterfeits being sold through online platforms.

Protecting brands through meaningfully enforceable trademark rights protects consumers and improves the American economy. Sales of counterfeits not only hurt consumers but deprive legitimate businesses of revenue and the ability to invest in future research and development. C4IP supports the SHOP SAFE Act and urges its swift passage.

Unsuspecting consumers may not even realize they have purchased a counterfeit, given the growing sophistication of counterfeiters in imitating a company's trademarks and packaging. But counterfeiters, unlike trademark holders of genuine brands, do not have an incentive to invest in quality and adhere to safety standards. There are reports of fake toys breaking apart too easily and being swallowed by children, fake electronics malfunctioning or catching on fire, and fake cosmetics containing unsafe compounds. Consumers are hurt, and genuine brands suffer reputational damage in addition to lost sales.

The current legal regime does not put enough accountability on online platforms to clean up their marketplaces, leading trademark owners to bear the considerable



cost and burden of policing the platforms themselves to stem the tide of fake products. The SHOP SAFE Act would achieve a more equitable balance by requiring that platforms take reasonable measures themselves to better monitor their marketplaces, such as removing repeat counterfeiters and proactively policing for suspected counterfeits. This is a straightforward approach that should lead to a significant reduction in the number of counterfeits reaching consumers.

We thank you both for continuing to tackle this difficult problem with the thoughtful, bipartisan legislation that is the subject of today's hearing. Please let us know if we can be of assistance as you work to pass this bill.

Sincerely,

A handwritten signature in black ink, which appears to read "Frank Cullen". The signature is fluid and cursive, with a long horizontal stroke at the end.

Frank Cullen
Executive Director
Council for Innovation Promotion



October 10, 2023

The Honorable Chris Coons
Chairman
Subcommittee on Intellectual Property
U.S. Senate Judiciary Committee
218 Russell Senate Office Building
Washington, DC 20510

The Honorable Thom Tillis
Ranking Member
Subcommittee on Intellectual Property
U.S. Senate Judiciary Committee
113 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Coons and Ranking Member Tillis:

On behalf of the Footwear Distributors & Retailers of America (FDRA), thank you for introducing the SHOP SAFE Act. This legislation is a critical step in the fight against counterfeits.

FDRA is the footwear industry's trade and business association, representing more than 500 footwear companies and brands across the U.S. This includes the majority of U.S. footwear manufacturers and over 95 percent of the industry. FDRA has served the footwear industry for more than 75 years. Our members include a broad and diverse cross section of the companies that make and sell shoes, from small family-owned businesses to global brands that reach consumers around the world.

Counterfeits threaten jobs in our industry and put U.S. consumers at risk. This is particularly concerning when it comes to the potential risk of health and safety implied in counterfeits:

- Footwear companies must comply with multiple laws and regulations – at both the federal and state level – to ensure that dangerous chemicals are not found in shoes, including those directed to children. This includes a federal lead content ban.
- The U.S. footwear industry's commitment to use non-hazardous chemicals in materials and final products requires significant investment. Companies maintain robust chemical safety programs and undertake time consuming and expensive product testing.
- Counterfeiters show a disregard for the law when they steal the intellectual property (IP) of U.S. brands. These same illicit entities do not follow the numerous federal and state chemical safety rules. They do not have chemical safety programs in place. There is no way to know whether a counterfeit shoe contains a chemical that could harm consumers, including a child.
- The U.S. has also put in place safeguards to protect U.S. consumers from buying goods made with forced labor, including the Uyghur Forced Labor Prevention Act (UFLPA). Counterfeiters operate outside of this legal system, and there is no way to ensure a counterfeit product is free of forced labor.

MATT PRIEST, President & CEO

200 Massachusetts Ave, NW, Suite 700, Washington, DC 20001 | p 202.737.5660 | f 202.638.2615 | www.fdra.org

- In addition, it is often impossible for footwear customers to distinguish a legitimate product from an illicit good due to the sophistication of today's counterfeiting operations.
- Many consumers are unaware that popular e-commerce sites contain counterfeits as well as legitimate goods. These consumers assume a third-party seller has been thoroughly vetted before a platform grants them permission to sell on the platform.

SHOP SAFE will help address these key challenges facing brands and consumers. It will incentivize e-commerce platforms to implement best practices to prevent bad actors from selling counterfeit goods on their sites. These best practices include common-sense steps like screening and vetting sellers, banning repeat offenders, removing counterfeit listings, and requiring sellers to use accurate product images on the site. In considering and defining these steps, the legislation should ensure clarity, so as to avoid unintended loopholes that might undermine the effectiveness of this proposal.

These reforms are needed now more than ever. E-commerce has grown exponentially over the past decade, and the COVID-19 pandemic accelerated this trend. SHOP SAFE will create a stronger e-commerce environment and better protect consumers.

FDRA looks forward to working to help advance this critical legislation through the Senate and the House.

Sincerely,



Matt Priest
President & CEO
Footwear Distributors and Retailers of America



September 28, 2023

The Honorable Chris Coons
Chair, Senate IP Subcommittee
United States Senate
218 Russell Senate Office Building
Washington, DC 20510

The Honorable Thom Tillis
Ranking Member, Senate IP Subcommittee
United States Senate
113 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Coons and Ranking Member Tillis,

Intellectual Property Owners Association (IPO) appreciates your concern about the proliferation of harmful counterfeit products that are sold online and writes to applaud your sponsorship of the Stopping Harmful Offers on Platforms by Screening Against Fakes in E-Commerce (SHOP SAFE) Act to protect consumers. IPO supports this bill in principle, including amending the Lanham Act to permit contributory liability against electronic commerce platforms that permit improper use of a trademark by a third party on or in connection with goods that implicate health or safety.

IPO is an international trade association representing a “big tent” of diverse companies, law firms, service providers, and individuals in all industries and fields of technology that own, or are interested in, intellectual property rights. IPO membership includes over 125 companies and spans over 30 countries. IPO advocates for effective and affordable IP ownership rights and offers a wide array of services, including supporting member interests relating to legislative and international issues; analyzing current IP issues; providing information and educational services; supporting and advocating for diversity, equity, and inclusion in IP and innovation; and disseminating information to the public on the importance of IP rights.

IPO’s vision is the global acceleration of innovation, creativity, and investment necessary to improve lives. The Board of Directors has adopted a strategic objective to foster diverse engagement in the innovation ecosystem and to integrate diversity, equity, and inclusion in all its work to complement IPO’s mission of promoting high quality and enforceable IP rights and predictable legal systems for all industries and technologies.

Recently IPO submitted a letter to the USPTO in response to a request for comments on “Future Strategies in Anticounterfeiting and Antipiracy,” noting our support in principle for SHOP SAFE. The sale of counterfeit goods results in a multitude of harms suffered by intellectual property owners and their customers, including risks to public safety and health along with competitive harms for intellectual property owners coupled with unfair advantages for counterfeiters who can unfairly compete by operating outside regulated commerce.

Thank you for your leadership and we look forward to assisting in any way we can.

Sincerely,

Jessica K. Landacre
Executive Director

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The Boeing Co.
Mike Geise
General Mills, Inc.
Robert Giles
Qualcomm, Inc.
Laura Ginkel
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Paul Saraceni
Nike, Inc.
Matthew Sarberia
Oracle Corp.
Derek Scott
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Thomas Smith
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Phyllis Turner-Brim
HP Inc.
Mark Vallone
BMW Corp.
Stuart Watt
Amgen, Inc.
Bryan Zielinski
Pfizer Inc.

General Counsel
Lauren Leyden
Alvin Omp Strauss Hauer & Feld LLP

Executive Director
Jessica K. Landacre



October 2, 2023

The Honorable Chris Coons
Chairman
Subcommittee on Intellectual Property
Committee on the Judiciary
United States Senate
Washington, D.C. 20510

The Honorable Thom Tillis
Ranking Member
Subcommittee on Intellectual Property
Committee on the Judiciary
United States Senate
Washington D.C. 20510

Dear Chairman Coons and Ranking Member Tillis

On behalf of MEMA, The Vehicle Suppliers Association, I write to offer support for the Stopping Harmful Offers on Platforms by Screening Against Fakes in E-commerce Act of 2023 (SHOP SAFE Act). MEMA welcomes congressional efforts to address the sale of counterfeit products in the United States.

Motor vehicle suppliers made significant investments in innovation in the United States to improve the safety of vehicles for consumers. Counterfeit motor vehicle parts fail to meet the robust testing and quality standards that vehicle manufacturers and suppliers follow, ultimately putting drivers and other road users at risk. Counterfeit products threaten the health and safety of consumers due to the likelihood that a counterfeit part will not perform as intended or could even fail and threaten businesses by impacting their revenue and damaging their brand image.

Consumers should be confident that online replacement vehicle part and component purchases are genuine. Bad actors should not have a platform to distribute counterfeit goods online. The SHOP SAFE Act would protect consumers and businesses from counterfeit motor vehicle parts components sold in the United States.

MEMA applauds the reintroduction of the SHOP SAFE Act in the Senate and thanks the subcommittee for holding this important hearing. We urge Congress to take up and pass the SHOP SAFE Act.

Sincerely,

A handwritten signature in black ink that reads "Catherine Boland".

Vice President, Legislative Affairs



Charles Crain

*Vice President,
Domestic Policy*

October 3, 2023

The Honorable Chris Coons
Chairman
Committee on the Judiciary
Subcommittee on Intellectual Property
United States Senate
Washington, DC 20510

The Honorable Thom Tillis
Ranking Member
Committee on the Judiciary
Subcommittee on Intellectual Property
United States Senate
Washington, DC 20510

Dear Chairman Coons and Ranking Member Tillis:

The National Association of Manufacturers commends the Judiciary Committee for holding today's hearing on "Back to School with the SHOP SAFE Act: Protecting Our Families from Unsafe Online Counterfeits."

The NAM is the largest manufacturing association in the United States, representing manufacturers in every industrial sector and in all 50 states. Manufacturing employs nearly 13 million men and women, contributes \$2.91 trillion to the U.S. economy annually, pays workers over 18% more than the average for all businesses and has one of the largest sectoral multipliers in the economy. Taken alone, manufacturing in the United States would be the eighth-largest economy in the world.¹

Counterfeiting has been a threat to manufacturers, workers and consumers for decades, but the problem has gotten significantly worse with the explosive growth of e-commerce. Counterfeiters and other bad actors have taken advantage of e-commerce platforms to expand their reach, as was clearly seen during the COVID-19 pandemic, when bad actors abused online platforms to peddle fake tests, dangerous vaccines and ineffective personal protective equipment. Small and medium-sized business are particularly at risk, as counterfeiters target their core products. Broadly, counterfeit products harm American consumers, support criminal activity, threaten manufacturing investment and put American jobs at risk: industry estimates show fake and counterfeit goods cost the U.S. economy nearly \$320 billion including direct, indirect and induced economic impacts and put nearly 1.1 million American jobs at risk in 2021 alone.²

Fighting this growing challenge requires strong, practical solutions that curb the availability of counterfeit goods on online platforms and provide better information to consumers and businesses so that they can protect themselves. Manufacturers strongly support the SHOP SAFE Act (S. 2934), bi-partisan, legislation that will create important new safeguards in the fight against counterfeiting.

The SHOP SAFE Act will hold e-commerce platforms liable for counterfeit products sold on their platforms—just like their brick-and-mortar retail counterparts—unless they follow a specific set of common-sense, preventative measures. The legislation combats the sale of counterfeits by

¹ <https://www.nam.org/facts-about-manufacturing/>

² Data from NAM Chief Economist Chad Moutray running global counterfeit totals through IMPLAN (on file with author)

illegitimate sellers by requiring platforms to quickly take down bad listings and terminate repeat offenders, use technology to screen for counterfeit goods and ensure that sellers have a U.S. address or agent to ensure they cannot avoid legal liability. If a platform fails to take action against counterfeits that cause harm to consumers' health and safety, they can be subject to contributory liability in civil action. These commonsense reforms will protect consumers from harmful counterfeit products, prevent identity theft, safeguard American workers, innovation, and competitiveness and undermine criminal organizations that benefit from the sale of illicit goods.

The threats to consumers and manufacturers in the United States posed by counterfeit goods underscore the need for swift action. The NAM appreciates your leadership on this critical issue, and we look forward to working with you to advance the SHOP SAFE Act.

Sincerely,

A handwritten signature in black ink that reads "Charles P. Crain". The signature is written in a cursive, flowing style.

Charles Crain
Vice President, Domestic Policy
National Association of Manufacturers



October 2, 2023

The Honorable Chris Coons
Chair
U.S. Senate
Washington, DC 20510

The Honorable Thom Tillis
Ranking Member
U.S. Senate
Washington, DC 20510

Dear Chair Coons and Ranking Member Tillis,

On behalf of the Personal Care Products Council (PCPC), the voice and advocate for 600 member companies representing the \$529.3 billion global cosmetics and personal care products industry, we applaud the reintroduction of the Stopping Harmful Offers on Platforms by Screening Against Fakes in E-Commerce (SHOP SAFE) Act of 2023 and strongly support its passage.

Counterfeit products are fraud: they damage businesses, disregard regulatory protections and, more importantly, threaten consumers' health and safety. The cosmetics and personal care products industry loses more money to counterfeit products each year than any other industry, with annual losses of approximately \$5.4 billion to fraudulent sellers.

Counterfeit cosmetics, including products indicated for children's use, can be tampered with, expired or contain materials not of cosmetic grade, which means consumers may be applying adulterated or impure ingredients directly to the skin, lips, eyes and other sensitive areas. This is unsafe to consumers and undermines our industry's measures to ensure the safety of all personal care products.

The SHOP SAFE Act would incentivize e-commerce platforms to address the sale of counterfeits online and protect unsuspecting consumers from unsafe products. E-commerce platforms would be incentivized to establish a screening and vetting system for the sellers and their goods to ensure they follow applicable U.S. laws and regulations. The current structure is vulnerable to exploitation and contributes significantly to the rise in counterfeit products being sold online. Consumers deserve to know sellers' basic identifying information and trust that information is correct. They should also have a way to contact a seller in case a product appears to be counterfeit.

We urge passage of this critical legislation and stand ready to serve as a resource.

Sincerely,

A handwritten signature in black ink that reads "Mallika Vastare". The signature is fluid and cursive, with the first name being more prominent.

Mallika Vastare
Vice President, Government Affairs
Personal Care Products Council



October 2, 2023

The Honorable Chris Coons
Chair
Senate Judiciary Subcommittee on
Intellectual Property
Washington, DC 20510

The Honorable Thom Tillis
Chair
Senate Judiciary Subcommittee on
Intellectual Property
Washington DC 20515

Dear Chairman Coons and Ranking Member Tillis;

On behalf of the Protect America's Small Sellers Coalition (PASS Coalition), we are writing to inform you of our opposition to the SHOP SAFE Act. The PASS Coalition represents small businesses, entrepreneurs, casual e-commerce sellers, and U.S. consumers who sell new and used goods through our online marketplaces. Ultimately, we are the entities that will be tasked with implementing this legislation and we implore you to consider what we view to be several critical issues regarding this proposed legislation. Our concerns reflect the potential adverse impact it may have on U.S. businesses, particularly small enterprises, and consumers across the nation.

Counterfeits have no place on our platforms, and PASS Coalition members dedicate substantial resources to prevent counterfeit listings, combat bad actors, and protect consumers. Trust and safety are of utmost importance to our companies, and we are committed to working in good faith to address issues around the availability of counterfeits online, as well as broader systemic issues surrounding the manufacture and consumer demand for infringing goods.

The PASS Coalition was proud to support passage of the The INFORM Consumers Act, which was just enacted into law last year and only went into effect on June 27, 2023, a mere three months ago. This important legislation had the sole purpose of protecting consumers and deterring criminals from selling stolen, counterfeit or unsafe goods online. This legislation went a long way to improving transparency for consumers, and the PASS Coalition was proud to endorse this legislation. We strongly believe the seller identification, verification, and disclosure requirements under the INFORM Act will help keep bad actors offline and will improve ongoing engagement between online marketplaces, law enforcement, and other industry stakeholders. We believe this law should be given time to do its job as Congress intended.

Additionally, we are concerned that as drafted, the SHOP SAFE Act would undermine the existing partnerships our platforms maintain with rights-holders that are critical in keeping consumers safe and combating counterfeits. Information sharing between marketplaces and rights-owners is an essential element of our anti-counterfeiting efforts, but as written, the legislation actually disincentivizes brands from engaging with marketplaces. Marketplaces depend on rights owner input and expertise on their own IP to develop proactive measures and inform tools like AI, machine learning, and filters. Without rights owner engagement, these tools will be ineffective at proactively removing infringing listings before they are visible, increasing the likelihood of counterfeits reaching consumers.

Finally, SHOP SAFE is a one-sided bill that will enable large global brands to stifle competition, and lead to countless lawsuits against small sellers who utilize our marketplaces. We see this most clearly in the section of the bill that would require that marketplaces obtain "constructive knowledge" about all goods being sold. Under existing US IP case law there is little precedent for such a standard and this lack

of precedent and definitional clarity would only result in uncertainty and litigation when the goal of this legislation should be to foster collaboration. Some rights owners already abuse anti-counterfeiting programs and policies in place to eliminate non-infringing listings, and many IP disputes occur between legitimate competitors. As written, this law would incentivize rights owners to pursue pre-litigation relief, even with a baseless claim, and marketplaces would be forced to be over inclusive in policing listings- resulting in the removal of legitimate sellers, many of which are small businesses. On the other hand, cooperation between rights owners and marketplaces facilitates the development of tools necessary to stop infringing items from being listed in the first place, identify bad actors proactively, and protect consumers.

In conclusion, our members are responsible companies that take proactive measures and invest heavily in trust and safety measures to protect the health and safety of our community - both our buyers and sellers. We hope that Congress will allow the INFORM Consumers Act to work before layering additional laws on small businesses across America and breaking the existing partnerships that are essential in keeping consumers safe.

Thank you for your consideration of our concerns with SHOP SAFE. We look forward to working with your Subcommittee as it advances competitiveness and consumer protection issues.

Sincerely,

Members of the PASS Coalition:

eBay, Etsy, Mercari, OfferUp, Poshmark, Pinterest, Redbubble

October 2, 2023

Dear Senator Coons,

My name is Joy Woodruff, I am the Ecommerce Director for Sound of Tri-State, a small family owned and operated consumer electronics company in Delaware. We have four stores, three in Delaware and one in Pennsylvania and we employ around 30+ people. We are dedicated to our community and hold many motorcycle & car shows and charity events such as Toys for Tots. Our business is not solely conducted online, but we do rely heavily on our online business to help us move out older aging merchandise to get the new products into our local stores. It's vital we have a healthy online presence, especially since we are from a small state with only so many consumers to walk into our stores for a purchase.

I would like to discuss the challenges that the SHOP SAFE Act presents for us. **We purchase all of our products directly from the manufacturer or an authorized distributor.** Currently, some brand owners have **employed third party vendors to help them to report counterfeit violations**, trademark violations, and MAP violations. Because it is a third party and not the brand, we get caught up in many false claims made to marketplaces regarding counterfeit, and trademark. **We have also noticed that some brand owners have decided to sell their products online themselves and have been clearing the marketplaces of any competition by falsely claiming counterfeit or trademark infringement.** Our small business has been caught up in both types of reports to the online marketplaces and has had to submit receipts and contracts as proof that we are a legitimate retailer and that we are not selling counterfeits. It has only gotten worse as more and more brands put the squeeze on smaller businesses.

With the passing of the "INFORM Consumers Act" the brands and their third parties should know that it is us (one of their trusted partners) that is selling the product, and if they have any issues, they could contact us directly.

My ask is simple: I would like to have some guardrails in place for legitimate sellers like us to have some sort of mediation process if our items are falsely flagged as counterfeit or as a trademark infringement—without fear of constantly being sued by large brands with endless litigation resources. In the bill as it stands today, the language we find most concerning is the "three strikes" provision that would essentially require online platforms to permanently ban sellers. I'm worried about what this would mean for my business—especially given brands are already making erroneous claims about completely legitimate products. Many of the requirements in the bill are unrealistic and need to be revisited. We all want a safe place to shop, and sell, that is free from counterfeiters and still allows for healthy competition. Since 1999, eBay has been a wonderful partner and has helped us to grow our business. They have tools in place that teach sellers about counterfeits and IP rights. **It is my hope that the brands will work with eBay and the other online marketplaces on a workable and collaborative solution to increase safety of online marketplaces.**

We stand with the brands we carry, and we want them to be able to protect their value and their authenticity, but we do **need some language that helps protect legitimate sellers as well.**

Sincerely,

A handwritten signature in black ink, appearing to read "J. Woodruff", enclosed within a light gray rectangular border.

Joy Woodruff
Sound of Tri-State
Wilmington, Delaware



October 9, 2023

The Honorable Christopher Coons
Chairman, Senate Intellectual Property Subcommittee

The Honorable Thomas Tillis
Ranking Member, Senate Intellectual Property Subcommittee

Dear Senators,

The Transnational Alliance to Combat Illicit Trade (TRACIT) strongly supports the bipartisan *Stopping Harmful Offers on Platforms by Screening Against Fakes in E-Commerce of 2023 (SHOP SAFE) Act* as introduced. We appreciate your leadership and pledge to support you to achieve passage of this legislation.

SHOP SAFE is important because it will for the first time hold ecommerce platforms liable for facilitating and profiting from the sale of counterfeit and illicit products – if they don't adhere to a set of prescribed actions including screening third party sellers, disclosing more information about sellers to online shoppers, removing counterfeit and stolen product listings, and barring bad actors from selling on their platforms.

Given the pandemic-driven escalation in online shopping, which exceeded \$1 trillion last year, SHOP SAFE also builds on America's legacy of ensuring the world's most meaningful and comprehensive body of consumer protection measures worldwide.

Shady sellers have set up shop in online marketplaces and sell unsafe counterfeit products to consumers. These are substandard products that are either in violation of US trademark laws or they're manufactured to look like legitimate products without adhering to safety standards, environmental controls or fair labor laws. Consequently, American consumers are unknowingly buying unsafe products and bringing them into their homes, all while funding criminal activity. Illicit products coming from China and Hong Kong accounted for 75% of the value of counterfeited and pirated goods seized by US Customs and Border Patrol in 2021.

Ecommerce and social platforms like Amazon, Facebook and Instagram are prime hotspots for counterfeiters because they have not taken sufficient steps to secure their infrastructure from sellers who are eager to exploit platform system weaknesses to list unsafe counterfeits and other illicit products.

Transnational Alliance to Combat Illicit Trade
9 East 8th Street #201, New York, NY 10003
www.TRACIT.org; email to info@TRACIT.org

It is past time to stop relying on voluntary policies that vary by platform and are inadequately enforced. It is time for Congress to pass SHOP SAFE.

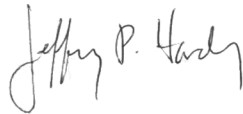
The liability provisions should provide platforms with strong incentives to operate their businesses more responsibly and to proactively do a better job scrutinizing third-party sellers, removing unsafe counterfeit listings and banning repeat offenders from selling harmful counterfeits again and again.

TRACIT strongly supported passage of the INFORM Consumers Act in the last Congress because it requires online marketplaces to perform a more rigorous third-party seller vetting process. Beyond INFORM, online marketplaces and social media platforms must continue to do more as prescribed by SHOP SAFE to protect consumers.

Unfortunately, counterfeiters have exploited many industries to create and sell unsafe products that end up in Americans' homes and businesses. Attached to this letter is a lengthy list of such products along with the specific potential dangers associated with their production outside of our legal and regulatory system.

TRACIT joins with other businesses across multiple industries in the SHOP SAFE Coalition to support SHOP SAFE. Brand owners are and will continue investing significantly in human and technology resources to monitor their brands online, work with platforms when counterfeit products are found, and work with law enforcement to pursue bad actors.

Warm regards,



Jeffrey P. Hardy
Director-General
Transnational Alliance to Combat Illicit Trade

cc: Senate Subcommittee on Intellectual Property

About TRACIT

The Transnational Alliance to Combat Illicit Trade ([TRACIT](#)) is a US-headquartered, independent, private sector initiative to mitigate the economic and social damages of illicit trade by strengthening government enforcement mechanisms and mobilizing businesses across industry sectors most impacted by illicit trade.

Counterfeit Products with Potential Health and Safety Risks

All counterfeits present an absolute product safety risk. They are manufactured outside legal frameworks, are unregulated and do not comply with safety standards that are prescribed either internationally or locally within a country. If a counterfeit product is ingested, applied to the body or used as a safety device, the risks become even greater. The list of products presenting exposure to health and safety risks is endless, starting with the products listed here:

Product Categories	Examples of Product Types	Associated Risks
Beauty Products	Shampoo, conditioner, cosmetics, hair styling products, soaps, lotions, moisturizers, deodorants, perfume, razors (manual and electric)	Bacterial contamination; inadequate or missing preservative systems; toxic/hazardous ingredients (chemical and biological hazards, heavy metals); non-disclosed or high levels of allergens; presence of banned ingredients; presence of mold; absence or decreased levels of drug and/or sanitizing/disinfectant active ingredients; electrical and/or burn hazards
Disinfecting/sanitizing Products	Liquid hand sanitizers, wipes, surface sprays, etc.	
Feminine Care Products	Tampons, Menstrual cups, sanitary pads, adult incontinence products	
Food and Beverages	Groceries, fresh products (cheese, eggs, etc.), hard liquor	
Medicines	Prescription and over-the-counter drugs, supplements, vaccines, products containing sunscreens	

Oral Care Products	Toothpaste, teeth whitening, mouth rinse, denture adhesives and/or cleaners, dental floss, toothbrushes (manual and electric)	
Pet Products	Food, toys, medications, grooming items, etc.	
Children's Products	Diapers, car seats, strollers, mattresses, toys, bedding, cribs, bottles, rattles, etc.	Noncompliance with safety standards; toxic/hazardous/flammable ingredients
Cleaning/Laundry products	Detergents (laundry, dish), hard surface cleaners, etc.	Toxic/hazardous/banned ingredients
Construction Products	Power tools, building supplies (supports, engineered joists, flooring, plumbing, etc.)	Fire/electrical hazards; critical engineering failures
Digital/Communication Products, Replacement Parts/Equipment or Networks	Laptops, cell phones, digital device chargers, batteries (rechargeable, alkaline, lithium, etc.), routers, modems, cabling (HDMI, VGA, LAN, indoor/outdoor), software	Fire/electrical hazards; noncompliance with manufacturing/safety standards; failure at critical moments
Electrical appliances/equipment and replacement parts	Refrigerators, water filters, ovens, dishwashers, microwaves, water heaters, washing machines, dryers, clothing irons, fire detectors, home safety/security equipment, etc.	Noncompliance with manufacturing/safety standards; fire/electrical hazards; toxic/hazardous chemicals

Furniture	Tables, chairs, mattresses, sofas, shelving, etc.	Noncompliance with manufacturing/safety standards; toxic/hazardous/flammable ingredients
Jewelry, Luxury Goods, Textiles	Clothing, belts, accessories, purses, jewelry, etc.	Allergic reactions; treated with chemicals that can be hazardous, flammable, toxic
Nicotine containing products	Cigarettes, cigars, pipe tobacco, chewing tobacco, e-cigarettes/vaping	Toxic/hazardous/banned ingredients
Office supplies	Printer ink/toner cartridges	Toxic/hazardous chemicals; equipment damage
Health Care Equipment, Medical Devices	Wheelchairs, hospital beds, thermometers, blood pressure monitors, in-vitro diagnostic kits, bandages, etc. Pacemakers, artificial joints, stents, breast implants, laser hair removal equipment, syringes, surgical utensils, etc.	Noncompliance with safety standards; fail at critical moments; long term health effects due to toxic/hazardous/flammable ingredients (chemical, biological, bacterial, heavy metals)
Personal Protective Equipment (PPE)	Face masks, eye protection, gloves, gowns, ear plugs, respirators, etc.	
Product Packaging	Tubes, jars, cans, buckets, cartons, tubs, bottles, etc.	
Pesticides	Bug sprays (crop maintenance, home usage)	Toxic/hazardous chemicals; environmental impact
Sports equipment	Footwear, protective gear (helmets, safety pads/guards, life jackets, etc.), camping gear, golf clubs, sports balls	Noncompliance with safety standards; fail at critical moments; toxic/hazardous ingredients

	(baseball, basketball, softball, golf, etc.), hiking gear, etc.	
Transportation and replacement parts	Automobiles, planes, trains, hoverboards, pedestrian powered modes of transportation (Bikes, scooters, skates, skateboards, etc.)	Fire hazards, system severely impacted; compromised data transmission of confidential/critical, Personal identifiable, healthcare related, educational, military information

