

THE FIGHT AGAINST
FAKES

HOW STATUTORY AND REGULATORY BARRIERS PREVENT
THE SHARING OF INFORMATION ON COUNTERFEITS

Bi-partisan Staff Report

The Senate Finance Committee

United States Senate



Chairman Chuck Grassley
Ranking Member Ron Wyden

TABLE OF CONTENTS

I. Executive Summary 3

II. Findings of Fact and Recommendations 6

III. Introduction 8

 a. Current Legal Framework: The Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA) 10

 b. The GAO Report and Subsequent Committee Hearing 11

IV. Committee’s Investigation and Findings 14

 a. The Committee’s Investigation and Request for Information from Stakeholders 14

 b. When It Comes to E-Commerce, U.S. Businesses Have Difficulties Preventing the Sale of Counterfeit Goods Online 17

 c. E-commerce Platforms Provide Anti-Counterfeiting Tools, but the Burden of Policing and Enforcing IPR on E-Commerce Platforms is on the Right Holder 19

 d. Right Holders, E-commerce Platforms, and Common Carriers Want More Information From CBP; However, CBP is Limited in the Amount of Information It Can Share with Right Holders and Other Relevant Parties to the E-Commerce Transaction 21

 e. The Effects of Counterfeiting Are Damaging to Businesses and the U.S. Economy 25

 f. Counterfeits Can Pose a Serious Danger to the Health and Safety of Consumers 26

V. Investigation Challenges: Limited Data, Outdated Data 28

VI. Conclusion 29

Appendix A – Best Practices for the E-Commerce Platforms When Working with Right Holders 31

Appendix B – Letters from Right Holders 32

Appendix C – Letters from E-commerce Platforms 33

Appendix D – Letters from Common Carriers 34

Appendix E – Letters from Payment Processors 35

I. Executive Summary

The growth of e-commerce has fundamentally changed the way we shop. Gone are the days of long lines, traffic, and other daily inconveniences. Instead, e-commerce gives consumers the ability to compare hundreds of products online, the flexibility to buy products on-demand, and, in many cases, the option to select fast and affordable shipping. Many e-commerce websites also host third-party sellers who compete with each other to offer the lowest possible price to the consumer. However, unbeknownst to many, as the popularity of e-commerce has grown over the years, so has the trade in counterfeit goods.¹

In 2019, the Organisation for Economic Co-operation and Development (OECD) and the European Union Intellectual Property Office (EUIPO) issued a report on the trends in trade and counterfeit goods.² The OECD and EUIPO estimated that international trade for counterfeit goods in 2016 accounted for \$509 billion, or 3.3 percent, of world trade up from \$461 billion in 2013.³ The OECD also found that counterfeit goods follow complex trading routes, affect numerous industries, and are found in both physical and online marketplaces.⁴ According to the OECD, counterfeit goods are shipped by virtually every means of transportation, including by maritime containers, truck and rail, and small parcels via postal or express services.⁵ In response to our concerns regarding this trend, we asked the Government Accountability Office (GAO) to examine the risks posed by the changes in the counterfeits market.⁶ GAO found that the growth in e-commerce has contributed to a shift in the sale of counterfeits with counterfeiters producing a variety of goods that may be sold online.⁷ For example, GAO conducted test buys of certain popular brands on five of the largest e-commerce platforms from third-party sellers, and reported that over 40 percent of those targeted purchases were counterfeit.⁸

In addition to its effect on consumer shopping, e-commerce has also impacted businesses and the U.S. economy at large. Today, e-commerce is an essential retail method for businesses, including for small- and medium-sized enterprises (SMEs). In 2018, total e-commerce sales accounted for approximately \$514 billion, or roughly 10 percent, of total retail sales in the U.S.⁹ As the Finance Committee has primary jurisdiction over U.S. Customs and Border Protection (CBP), we felt that GAO's 2018 report warranted further investigation to better understand how

¹ In this report, "counterfeit goods" refers to any physical good that is found to violate a right holder's trademark or copyright. Also, in this report, "e-commerce platforms" refers to an online marketplace where products are sold by multiple third-party sellers.

² OECD/EUIPO, *Trends in Trade in Counterfeit and Pirated Goods, Illicit Trade*, OECD Publishing, Paris/European Union Intellectual Property Office, (Mar. 18, 2019), <https://doi.org/10.1787/g2g9f533-en>. The OECD is a 35-member international organization that provides a forum for governments to engage in, and collaborate on, a wide range of economic and social issues, including economic and trade developments.

³ *Id.* at 11.

⁴ *Id.* at 11, 19.

⁵ *Id.* at 20.

⁶ U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-216, INTELLECTUAL PROPERTY: AGENCIES CAN IMPROVE EFFORTS TO ADDRESS RISKS POSED BY CHANGING COUNTERFEITS MARKET (2018).

⁷ *Id.* at 10.

⁸ *Id.* at 15.

⁹ See U.S. Census Bureau News, *Quarterly Retail E-commerce Sales 4th Quarter 2018*, U.S. DEP'T COM. (Mar. 13, 2019), <https://www2.census.gov/retail/releases/historical/ecommm/18q4.pdf>.

U.S. businesses protect their intellectual property rights (IPR) online and to examine how CBP collaborates with its private sector partners when counterfeits are seized and/or detained at U.S. ports of entry.

Senator Grassley has a long history of investigating the issue of counterfeits, their impact on consumer health and safety, and the importance of public-private information sharing.¹⁰ He believes that the federal government must work closely with its private sector partners to ensure that U.S. IPR is enforced for the purposes of protecting e-commerce consumers. On April 27, 2016, in celebration of World Intellectual Property Day and as Chairman of the Senate Judiciary Committee, Senator Grassley held a hearing titled “Counterfeits and their Impact on Consumer Health and Safety” to educate consumers about the risks of counterfeits.¹¹ Senator Grassley, along with Senator Coons, also introduced a resolution, which was considered and agreed to on the Senate floor by unanimous consent, designating July as National Anti-Counterfeiting Consumer Education and Awareness Month.¹² In an accompanying statement on the Senate floor, Senator Grassley remarked:

Trademark-related crimes are growing rapidly and the devastating effects are far-reaching. These crimes impact not only whole industries, but economies as well where experts estimate that losses could be in the billions for any given industry. This is in addition to the health concerns with counterfeit products, and the financial boon that terrorists reap from selling imitation goods ... Increased education and awareness efforts are critical to helping to put a stop to counterfeit activity.¹³

The following year, Senator Grassley held another hearing to discuss the importance of intellectual property laws in fostering innovation and how counterfeiters steal U.S. intellectual property for their financial gain.¹⁴ The 2016 and 2017 hearings underlined the importance of public-private information sharing and highlighted that no single U.S. law enforcement agency alone can succeed in the fight against this type of crime. Rather, federal law enforcement agencies must coordinate with each other, with state, local, and international law enforcement agencies, and with the private sector.

Senator Wyden has also been a longtime advocate for greater trade enforcement, including combatting imports of counterfeit goods. As Ranking Member of the Finance Committee, Senator Wyden led the effort to write and pass the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA).¹⁵ TFTEA put in place important new tools for CBP to detect

¹⁰ See *Intellectual Property – Driver of Innovation: Making Our Lives Healthier, Safer, and more Productive: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (2017); see also *Counterfeits and Their Impact on Consumer Health and Safety: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. (2016).

¹¹ *Counterfeits and Their Impact on Consumer Health and Safety: Hearing Before the S. Comm. on the Judiciary*, 114th Cong. (2016).

¹² S. Res. 542, 114th Cong. (2016).

¹³ See Press Release, Chuck Grassley, Senator, U.S. Senate, Grassley Raises Awareness of Anti-Counterfeiting Efforts (July 15, 2016), <https://www.grassley.senate.gov/news/news-releases/grassley-raises-awareness-anti-counterfeiting-efforts>.

¹⁴ *Intellectual Property – Driver of Innovation: Making Our Lives Healthier, Safer, and more Productive: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (2017).

¹⁵ The Trade Facilitation and Trade Enforcement Act (TFTEA), Pub. L. No. 114-125, 130 Stat. 122 (2015).

and prevent counterfeit imports. Since TFTEA's passage, Senator Wyden has worked to ensure that CBP fully implements the legislation.

Senator Wyden believes that combatting counterfeits requires a modernized approach. In his opening statement during the Committee's March 2018 hearing, Senator Wyden declared, "It's up to the federal government to make sure our approach to combating counterfeits isn't stuck in the 20th century."¹⁶ During the hearing, he asked CBP to provide details on what additional authorities they would need to crack down on counterfeits.¹⁷ Like Senator Grassley, Senator Wyden also encourages cooperation between the federal government and its private sector partners to tackle this complex problem.

This report documents the Committee's seventeen month bipartisan investigation since the GAO report and subsequent Committee hearing in March 2018. We have identified counterfeits sold on e-commerce platforms as a serious problem for U.S. IPR enforcement efforts. Counterfeiters steal U.S. intellectual property for their financial gain and use e-commerce platforms as an additional, and significant, means to sell counterfeit goods. Based on the information collected for this investigation, we found that right holders take a number of measures to police e-commerce platforms including utilizing notice-and-take down procedures, conducting test-buy purchases, and initiating civil litigation against purported counterfeiters. E-commerce platforms provide further reactive and proactive measures to right holders to prevent the sale of counterfeits on their platform. Still, right holders are primarily responsible for protecting their IPR online. For SMEs, who otherwise do not have the resources to monitor hundreds of listings over multiple e-commerce platforms, these reactive measures can be particularly onerous.

This problem is further compounded by certain laws and regulations that prevent CBP from sharing information with their private sector partners on counterfeit and infringing goods seized and/or detained at U.S. ports of entry. The private sector plays an important role in enforcing U.S. IPR online. For example, right holders often engage directly with platforms and law enforcement to identify and report instances of counterfeiting and provide law enforcement with one-on-one training and access to product information to remove counterfeit goods from the stream of commerce. However, under existing law, CBP can only share limited information with right holders on suspected counterfeit imports.

As the retail marketplace has changed to reflect a 21st century global economy, so must our laws. Based on the information provided to us, we have offered two recommendations to Congress. We have also provided a list of best practices for e-commerce platforms to consider when working with right holders to prevent the sale of counterfeits on its platform.

¹⁶ *Protecting E-Commerce Consumers from Counterfeits: Hearing Before the S. Comm. on Fin.*, 115th Cong. 76 (2018).

¹⁷ *Id.* at 16.

II. Findings of Fact and Recommendations

Findings of Fact

- **When It Comes to E-Commerce, U.S. Businesses Have Difficulties Preventing the Sale of Counterfeit Goods Online.** According to a 2019 OECD report, international trade for counterfeit goods reached \$509 billion, or 3.3 percent, of world trade in 2016.¹⁸ The 2018 GAO report confirmed consumers face a risk of purchasing counterfeit goods online as well as through traditional physical marketplaces.¹⁹ For this investigation, right holders described the difficulties they face policing and monitoring e-commerce platforms for counterfeits. Right holders also explained that they have experienced a steady increase in the amount of infringing products sold online and highlighted that counterfeits are a serious and significant threat to their brand and to consumers.
- **E-commerce Platforms Provide Anti-Counterfeiting Tools, but the Burden of Policing and Enforcing IPR on E-Commerce Platforms is on the Right Holder.** E-commerce platforms have no duty to police counterfeit listings or proactively remove suspected counterfeits from their platform. This means that right holders must take responsibility for their own IPR enforcement. In order to protect their brand online, right holders may need to monitor up to hundreds of listings over multiple e-commerce platforms to prevent the sale of counterfeits. The breadth and variety of counterfeits sold online may make this task extremely difficult. E-commerce platforms can do more to help these entities police and enforce their IPR—especially for SMEs who otherwise do not have the resources to protect their brand online.
- **Regulatory and Statutory Barriers Prevent CBP from Sharing Information with Right Holders, E-commerce Platforms, and Common Carriers on Counterfeit Imports.** TFTEA does not provide sufficient authority to disclose information appearing on the *packing*, which CBP defines as all containers used in shipping the goods to the U.S. (excluding the retail packaging).²⁰ Additionally, the Trade Secrets Act prevents CBP from sharing information with e-commerce platforms and common carriers. According to respondents, receiving additional information from CBP would enhance their ability to curtail the sale of counterfeit goods online and help them warn unsuspecting consumers.
- **Counterfeits Pose a Serious Threat to the U.S. Economy.** Counterfeits are estimated to cost the U.S. economy \$29 billion to \$41 billion annually by diverting sales away from purchases of legitimate products.²¹ As a result, counterfeits result in

¹⁸ OECD/EUIPO, *supra* note 2, at 11.

¹⁹ U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 6, at 15.

²⁰ *Protecting E-Commerce Consumers from Counterfeits: Hearing Before the S. Comm. on Fin.*, 115th Cong. 61 (2018) (response to question for the record).

²¹ *The Theft of American Intellectual Property: Reassessments of the Challenge and United States Policy*, COMM'N ON THEFT AM. INTELL. PROP. 9 (2017),

http://www.ipcommission.org/report/IP_Commission_Report_Update_2017.pdf.

lost revenue for U.S. businesses, undermine innovation and growth, and shift jobs away from right holders to infringing parties.

- **Counterfeits Pose a Serious Health and Safety Threat to U.S. Consumers.** Counterfeit health products, pharmaceuticals, toys, and other consumer goods are not manufactured to established standards and may be produced with sub-par materials. For these reasons, counterfeit goods may be hazardous to consumers.

Recommendations

- **Congress Should Consider Amending TFTEA to Allow CBP to Share More Information with Right Holders.** According to CBP, TFTEA provides for the disclosure of information that “appears on the merchandise and its *packaging and labels*”, but does not provide CBP with the authority to disclose information included on the *packing*.²² Respondents to this investigation indicated that this additional information would help them in their own investigations and enforcement activities. For example, packing information would be helpful for identifying groups of counterfeit merchandise from the same seller.
- **Congress Should Consider Granting CBP the Authority to Share Information with E-commerce Platforms and Common Carriers on Counterfeit Imports.** According to CBP, the Trade Secrets Act prevents it from sharing information with these parties when goods are seized and/or detained at U.S. ports of entry. These parties are critical partners in the fight against the sale of counterfeits and can help right holders protect their IPR. For example, if CBP shared information on counterfeit goods with common carriers they could then use that information to create a more secure supply chain by blocking counterfeiters from their shipping networks. Therefore, Congress should consider granting CBP the authority to share information with these relevant parties once a counterfeit has been confirmed by a right holder.

²² *Protecting E-Commerce Consumers from Counterfeits: Hearing Before the S. Comm. on Fin.*, 115th Cong. 61 (2018) (response to question for the record).

III. Introduction

The growth of e-commerce has fundamentally changed the way we shop. Gone are the days of long lines, traffic, and other daily inconveniences. Instead, e-commerce gives consumers the ability to compare hundreds of products online, the flexibility to buy products on-demand, and, in many cases, the option to select fast and affordable shipping. As a result, consumers are increasingly turning to e-commerce to make their purchases. In 2018, total e-commerce sales were approximately \$514 billion, or roughly 10 percent, of total retail sales in the U.S.²³ This marks a noteworthy increase from the previous year when e-commerce sales accounted for 8.9 percent of total retail sales in the U.S.²⁴ However, unbeknownst to many, as the popularity of e-commerce has grown over the years, so has the trade in counterfeit goods.

According to a 2019 report issued by the OECD, in 2016 international trade for counterfeit goods reached more than \$509 billion, or 3.3 percent, of world trade up from \$461 billion in 2013.²⁵ The OECD explained that counterfeit goods follow complex trading routes, affect numerous industries, and are found in both physical and online marketplaces.²⁶ The top industries affected by counterfeits include footwear, luxury handbags, electrical machinery and equipment, and watches.²⁷ The pharmaceutical and toy industries have also been affected by counterfeits, putting the health and safety of consumers at direct and significant risk.²⁸ While counterfeits can originate from any country, the OECD highlighted that China and Hong Kong continue to be the largest exporters of counterfeit goods, and together export almost 60 percent of fake goods traded worldwide.²⁹

Trade in counterfeit goods continues to evolve in response to changes in the retail marketplace. Counterfeiters are now using online third-party marketplaces to sell counterfeits and use a variety of methods to seem legitimate and evade detection by consumers, right holders, and e-commerce platforms. They set-up seemingly legitimate vendor accounts and post images of genuine goods, but fulfill orders with counterfeit versions of the same product.³⁰ They may also misappropriate images of legitimate products or registered trademarks and advertise themselves as authorized sellers.³¹ Counterfeiters are also able to remain anonymous on e-commerce stores, as virtually every aspect of the sale can be performed using false or incomplete names.³²

²³ See U.S. Census Bureau News, *supra* note 9 (The Census Bureau of the Department of Commerce collects data on the growth of e-commerce by fiscal quarter).

²⁴ *Id.*

²⁵ OECD/EUIPO, *supra* note 2, at 11, 45.

²⁶ *Id.* at 15.

²⁷ U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 6, at 13 ("According to CBP and ICE officials . . . almost any product can be counterfeited."); see also OECD/EUIPO, *supra* note 2, at 30-32.

²⁸ U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 6, at 13.

²⁹ *Id.* at 12; see also OECD/EUIPO, *supra* note 2, at 46.

³⁰ U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 6, at 10-11.

³¹ *Id.* at 11.

³² *Id.*

Certain business practices may also allow counterfeiters to flourish.³³ Some e-commerce platforms commingle goods at their fulfillment centers to achieve fast and affordable shipping.³⁴ This means that when a consumer purchases a good online from a seller across the country, their purchase may be fulfilled with what the platform assumes to be an interchangeable product stocked in a local fulfillment center.³⁵ While this practice gets the product to the consumer faster and saves businesses time and money, it also provides counterfeiters with an opportunity to penetrate the platform's supply chain by commingling counterfeits with legitimate goods.

The transformation of the retail marketplace has also created challenges for the federal government's efforts to enforce U.S. IPR. CBP plays a critical role in IPR enforcement and is responsible for inspecting all international mail arriving at the border. However, the breadth and variety of counterfeits entering the U.S. complicates this effort.³⁶ Over 500 million packages are shipped through express and postal packages into the U.S. annually, not including the millions more shipped via maritime containers, truck, and rail.³⁷ In 2018 alone, CBP seized more than 33,000 packages containing approximately \$1.4 billion in suspected counterfeit goods.³⁸ The increasing sophistication of counterfeits also makes it difficult for CBP to distinguish between legitimate and counterfeit goods.³⁹ In order to identify counterfeit merchandise, CBP must have an in-depth knowledge of the various products and the know-how to identify them.⁴⁰ This often requires CBP to work with its private sector partners to test suspected counterfeits, underscoring the need for public-private information sharing.⁴¹

On May 30, 2018, the Committee launched a bipartisan investigation to better understand how U.S. businesses protect their IPR online and how CBP collaborates with its private sector partners when counterfeits are seized and/or detained at U.S. ports of entry. During this investigation, right holders, e-commerce platforms, common carriers, and payment processors detailed their efforts to curtail the sale of counterfeit goods online and presented us with possible solutions and ideas to address this growing problem. While the responses from these various

³³ Izabella Kaminska, *Amazon (sub)Prime*, FIN. TIMES (Mar. 20, 2019), <https://ftalphaville.ft.com/2019/03/20/1553085361000/Amazon--sub-Prime-/>; *The Pros and Cons of Commingling for Amazon Merchants*, DIGITAL COM. 360 (July 1, 2014), <https://www.digitalcommerce360.com/2014/07/01/pros-and-cons-commingling-amazon-merchants/>; Serena Ng and Greg Bensinger, *Do You Know What's Going in Your Amazon Shopping Cart?*, WALL ST. J. (May 13, 2014), <https://www.wsj.com/articles/on-amazon-pooled-merchandise-opens-door-to-knockoffs-1399852852>.

³⁴ *Id.*

³⁵ *Id.*

³⁶ U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 6, at 19-20; OECD/EUIPO, *supra* note 2, at 20.

³⁷ U.S. CUSTOMS & BORDER PROT., U.S. DEP'T OF HOMELAND SEC., INTELLECTUAL PROPERTY RIGHTS: FISCAL YEAR 2018 SEIZURE STATISTICS 6, 15 (Aug. 9, 2019), https://www.cbp.gov/sites/default/files/assets/documents/2019-Aug/IPR_Annual-Report-FY-2018.pdf.

³⁸ *Id.* at 6.

³⁹ U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 6, at 19-20.

⁴⁰ *Id.* In 2018, Congress passed the Synthetics Trafficking and Overdoes Prevention (STOP) Act in 2018 which requires USPS to provide advanced electronic data on incoming foreign shipments, including basic information on the name and address of the shipper and recipient. *See* Substance Use-Disorder Prevention that Promotes Opioid Recovery Treatment for Patients and Communities (SUPPORT) Act, Pub. L. No. 115-271, § 8003, 132 Stat. 3894 (2018). This advanced information is useful to target and prevent counterfeit goods.

⁴¹ *Id.*

industries were diverse and wide-ranging, one theme remained clear throughout their submissions: the need for better and more reliable data from CBP.

a. Current Legal Framework: The Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA)

TFTEA was signed into law on February 24, 2016. By passing TFTEA, Congress brought the country's antiquated trade regime into the 21st century to address the new challenges of a truly global economy.⁴² Provisions in TFTEA helped facilitate the flow of legitimate trade into and out of the U.S., improved enforcement of U.S. trade laws, and codified existing CBP efforts.⁴³ Most notably, TFTEA formally established CBP as the principal agency responsible for securing our borders and enforcing U.S. trade laws.⁴⁴

TFTEA includes a number of important provisions to strengthen enforcement efforts of U.S. trade laws. Some of those provisions target crucial information sharing between the federal government and its private sector partners. For example, section 302 of TFTEA authorizes CBP to share information "that appears on the merchandise and its *packaging and labels*" with right holders if it believes that the goods may infringe upon a registered copyright or trademark.⁴⁵ This information includes unredacted images as well as samples of the goods.⁴⁶ Congress included this section in TFTEA with the intent to "eliminate any doubt about CBP's ability to lawfully share information with a right holder . . . [for the purposes of determining] whether the goods are being imported illegally and therefore subject to seizure".⁴⁷ However, in identifying the parties eligible for such information, Congress did not authorize CBP to share information with e-commerce platforms or common carriers.⁴⁸

TFTEA also established within the U.S. Immigration and Customs Enforcement (ICE) agency the Intellectual Property Rights Coordination Center (the IPR Center) to combat intellectual property theft.⁴⁹ The IPR Center coordinates and investigates activities that infringe on IPR as well as collects and leverages the resources from approximately 23 other partner agencies to combat intellectual property theft.⁵⁰ For example, authorities in TFTEA have given the IPR Center the ability to coordinate joint-operations such as "Operation Pangea," which identify and prevent the sale of counterfeit medicines sold online.⁵¹ The successes of the IPR Center demonstrate that effective enforcement of IPR, especially preventing the flow of

⁴² H.R. Rep. No. 114-114, pt.1, at 50-51 (2015).

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ The Trade Facilitation and Trade Enforcement Act § 302 (emphasis added).

⁴⁶ *Id.*

⁴⁷ H.R. Rep. No. 114-114, pt.1, at 71 (2015).

⁴⁸ The Trade Facilitation and Trade Enforcement Act (TFTEA) § 302; H.R. Rep. No. 114-114, pt.1, at 73-74 (2015).

⁴⁹ The Trade Facilitation and Trade Enforcement Act (TFTEA) § 305. The IPR Center is a jointly led operation by CBP and ICE. *Id.*

⁵⁰ *Id.*

⁵¹ *Operation Pangea*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT (July 26, 2011), <https://www.ice.gov/factsheets/ipr-pangea>. According to ICE, Operation Pangea coordinates enforcement actions by law enforcement, customs, and drug regulators across the globe to target the advertisement, sale, and supply of counterfeit and illicit medicines. *Id.*

infringing goods crossing U.S. borders, requires federal law enforcement to coordinate with each other, with state, local, and international law enforcement agencies, and with the private sector.⁵²

b. The GAO Report and Subsequent Committee Hearing

In 2018, GAO published a report titled “Intellectual Property: Agencies Can Improve Efforts to Address Risks Posed by Changing Counterfeits Market.”⁵³ In this report, GAO conducted test-buys of four different types of consumer goods from five popular e-commerce platforms hosting third-party sellers.⁵⁴ GAO purchased Yeti travel mugs, Nike Air Jordan shoes, Urban Decay cosmetics, and UL-branded phone chargers because they were marketed as new brand-name items and were sold by highly rated third-party sellers.⁵⁵ GAO submitted these goods to right holders who tested these items for legitimacy.⁵⁶ In response to GAO, right holders confirmed that 20 of the 47 items purchased by GAO were counterfeit.⁵⁷

Counterfeits pose a unique challenge for e-commerce platforms and have contributed to a fundamental change in the retail marketplace. In the past, consumers could expect to be sold a counterfeit from a back alley shop or flea-market vendor. However, according to GAO, counterfeiters are now exploiting these platforms to make a profit and sell counterfeits to unsuspecting consumers.⁵⁸ GAO also highlighted that counterfeiters use e-commerce platforms to gain an appearance of legitimacy and access to consumers by posting pictures of authentic goods online or pseudonymous reviews of their products or businesses.⁵⁹ These practices make it increasingly difficult for consumers to differentiate between legitimate and counterfeit goods.

As part of its investigation, GAO also reviewed the federal government’s efforts to prevent counterfeits from entering the U.S.⁶⁰ GAO found that CBP and ICE conduct special operations at U.S. ports of entry and engage with other federal agencies as well as international partners.⁶¹ However, GAO learned that CBP has not completed an internal evaluation of its IPR enforcement efforts, so it was unclear whether CBP is working as efficiently as possible to combat counterfeit imports.⁶² GAO also found that, while CBP collaborates with its interagency partners, CBP is limited in the amount and types of information it can share with the private sector.⁶³ GAO also highlighted that CBP has not issued regulations to implement TFTEA and is further prohibited by law from sharing information with its private sector partners if they are not listed as the importer of record.⁶⁴

⁵² H.R. Rep. No. 114-114, pt.1, at 74 (2015).

⁵³ This reported was requested by then Chairman of the Finance Committee Senator Orrin Hatch and Senator Ron Wyden. See U.S. GOV’T ACCOUNTABILITY OFF., *supra* note 6.

⁵⁴ *Id.* at 15.

⁵⁵ *Id.* at 43-44.

⁵⁶ *Id.*

⁵⁷ *Id.* at 15.

⁵⁸ *Id.* at 10-11.

⁵⁹ *Id.*

⁶⁰ *Id.* at 23-27.

⁶¹ *Id.* at 23.

⁶² *Id.* at 28-30.

⁶³ *Id.* at 38-39.

⁶⁴ *Id.*

Following the issuance of the GAO report, the Committee held a hearing entitled, “Protecting E-Commerce Consumers from Counterfeits” on March 6, 2018.⁶⁵ The Committee heard from the U.S. Consumer Product Safety Commission (CPSC), CBP, GAO, and Underwriters Laboratories, Inc. (UL, Inc.).⁶⁶ During his opening statement, recently retired Senator Orrin Hatch highlighted:

Due to advancements in online purchasing, the agencies were being forced to adopt new tactics, work more closely together, and build up their public-private partnerships. Those have all been changes for the good ... As part of this process, GAO made purchases from five major e-commerce platforms, and, after using relatively narrow criteria, GAO received at least one counterfeit and one legitimate good from each of the platforms.⁶⁷

Senator Hatch further stressed that “with the rise of popular online marketplaces, counterfeiters have greater access to the market and can easily sell their phony products directly to consumers.”⁶⁸

Senator Wyden also noted that the opportunities of the internet for small businesses and others comes with challenges, and that the counterfeit problem highlighted in GAO’s report “is simply a matter of protecting American families from harmful products and making sure that we are fully mobilized to stop these rip-off artists from undercutting the American brand.”⁶⁹ Senator Wyden stressed that the government should “take the realities of our modern economy into account” in response to this threat.⁷⁰

During the hearing, the witnesses discussed the problem counterfeits pose to our economy as well as customs and trade barriers that prevent businesses from effectively enforcing their IPR online. Brenda Smith, the Executive Assistant Commissioner of Trade at CBP, discussed TFTEA and the significant cost savings it provides U.S. businesses and consumers.⁷¹ However, she explained that, due to the growth of e-commerce, the U.S. has seen a boom in packages being imported into the U.S. which has overwhelmed CBP and hindered its ability to identify counterfeits.⁷² According to Jim Joholske, Director of the Office of Import Surveillance at the CPSC, the rapid growth of e-commerce, direct-to-consumer shipments, and the limited amount of data required for small parcels also makes targeting difficult.⁷³

⁶⁵ *Protecting E-Commerce Consumers from Counterfeits: Hearing Before the S. Comm. on Fin.*, 115th Cong. (2018).

⁶⁶ *Id.*

⁶⁷ *Id.* at 2 (statement of Sen. Orrin Hatch, Chairman, S. Comm. on Fin.).

⁶⁸ *Id.*

⁶⁹ *Id.* at 6 (statement of Sen. Ron Wyden, Ranking Member, S. Comm. on Fin.).

⁷⁰ *Id.* at 76.

⁷¹ *Id.* at 9-10 (statement of Brenda Smith, Executive Assistant Commissioner, Office of Trade, Customs and Border Protection).

⁷² *Id.*

⁷³ *Id.* at 11-12 (statement of Jim Joholske, Director, Consumer Product Safety Commission).

The Committee also heard testimony from UL, Inc. a global independent-safety science company.⁷⁴ UL, Inc. partners with federal, state, and private sector entities to provide solutions to address counterfeits and the growing threat it poses to the global supply chain.⁷⁵ According to Terrence R. Brady, President of UL, Inc., the sheer volume of counterfeits offered for direct-to-consumer purchases make it extremely difficult to identify counterfeits.⁷⁶ He also explained that this issue is further aggravated by the fact that these counterfeiters regularly change their identity to avoid detection.⁷⁷

During the hearing, Senator Hatch focused his questions on GAO's recommendations as well as the difficulties CBP and ICE face when identifying and preventing the importation of counterfeit goods.⁷⁸ In response to Senator Hatch, Kimberly Gianopoulos, Director of the International Affairs and Trade Office at GAO, explained that, while TFTEA allows CBP to share some information with the private sector, CBP is limited in the types of information it can share.⁷⁹ Director Gianopoulos encouraged CBP to evaluate its current anti-counterfeiting activities and identify areas for improvement.⁸⁰ Executive Assistant Commissioner Smith explained that CBP is taking efforts to address GAO's recommendations and has charged its Commercial Customs Operations Advisory Committee (COAC) E-commerce Working Group to determine which information would be valuable to share with the private sector.⁸¹ President Brady stressed that companies need real-time data to pursue civil and criminal enforcement actions against counterfeiters.⁸²

Senator Wyden further pressed Executive Assistant Commissioner Smith to explain what authorities CBP needs to crack down on counterfeiters.⁸³ Executive Assistant Commissioner Smith made a commitment to provide him with information within 60 days on the types of authorities CBP requires to meet the challenges identified in GAO's report.⁸⁴ The GAO report and subsequent Committee hearing revealed that certain legal and regulatory barriers prevent CBP from sharing critical importation information with right holders, e-commerce platforms, and common carriers. However, at the time of the hearing, CBP could not identify what additional authorities it required to meet the challenges identified in GAO's report. It was also unclear from the hearing how right holders protect their IPR online or what gaps exist that inhibit public-private information sharing. We initiated a bipartisan investigation after the March 2018 hearing to better understand these issues.

⁷⁴ *Id.* at 12-14 (statement of Terrence R. Brady, President, Underwriters Laboratories, Inc.).

⁷⁵ *Id.* at 12-13.

⁷⁶ *Id.* at 14.

⁷⁷ *Id.* at 26.

⁷⁸ *Id.* at 14.

⁷⁹ *Id.*

⁸⁰ *Id.* at 15.

⁸¹ *Id.*

⁸² *Id.* 15-16.

⁸³ *Id.* at 16.

⁸⁴ *Id.* at 17. CBP submitted this get-back to Senator Wyden on May 17, 2018 which we used to form the basis of this report.

IV. Committee's Investigation and Findings

a. The Committee's Investigation and Request for Information from Stakeholders

The Committee has primary jurisdiction over U.S. customs, collection districts, and ports of entry and delivery, including jurisdiction over CBP, and thus has a responsibility to ensure that the U.S. has strong and enforceable trade laws. This jurisdiction includes not only the authority to draft and pass legislation on the matter, but also the authority to conduct oversight and investigations of these various processes and agencies.

On May 30, 2018, Senator Hatch and Senator Wyden called on right holders, trade associations, e-commerce platforms, common carriers, and payment processors to provide information on their efforts to curtail the sale of counterfeit goods online.⁸⁵ The hearing and subsequent investigation revealed that the CBP cannot share *packing* information with right holders without violating the Trade Secrets Act. Additionally, CBP believes that it cannot share information with e-commerce platforms and common carriers on counterfeits seized and/or detained at U.S. ports of entry. As a result, these parties do not have the necessary information and intelligence to effectively curtail the sale of counterfeit goods online. Specifically, the Committee found:

Findings of Fact

- **When It Comes to E-Commerce, U.S. Businesses Have Difficulties Preventing the Sale of Counterfeit Goods Online.** According to a 2019 OECD report, international trade for counterfeit goods reached \$509 billion, or 3.3 percent, of world trade in 2016.⁸⁶ The 2018 GAO report confirmed consumers face a risk of purchasing counterfeit goods online as well as through traditional physical marketplaces.⁸⁷ For this investigation, right holders described the difficulties they face policing and monitoring e-commerce platforms for counterfeits. Right holders also explained that they have experienced a steady increase in the amount of infringing products sold online and highlighted that counterfeits are a serious and significant threat to their brand and to consumers.
- **E-commerce Platforms Provide Anti-Counterfeiting Tools, but the Burden of Policing and Enforcing IPR on E-Commerce Platforms is on the Right Holder.** E-commerce platforms have no duty to police counterfeit listings or proactively remove suspected counterfeits from their platform. This means that right holders must take responsibility for their own IPR enforcement. In order to protect their brand online, right holders may need to monitor up to hundreds of listings over multiple e-commerce platforms to prevent the sale of counterfeits. The breadth and variety of counterfeits sold online may make this task extremely difficult. E-commerce

⁸⁵ Press Release, Senate Finance, Hatch, Wyden Call for Information to Educate Americans on Dangers of Counterfeit Goods (May 30, 2018), <https://www.finance.senate.gov/chairmans-news/hatch-wyden-call-for-information-to-educate-americans-on-dangers-of-counterfeit-goods->.

⁸⁶ OECD/EUIPO, *supra* note 2, at 11.

⁸⁷ U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 6, at 15-19.

platforms can do more to help these entities police and enforce their IPR—especially for SMEs who otherwise do not have the resources to protect their brand online.

- **Regulatory and Statutory Barriers Prevent CBP from Sharing Information with Right Holders, E-commerce Platforms, and Common Carriers on Counterfeit Imports.** TFTEA does not provide sufficient authority to disclose information appearing on the *packing*, which CBP defines as all containers used in shipping the goods to the U.S. (excluding the retail packaging).⁸⁸ Additionally, the Trade Secrets Act prevents CBP from sharing information with e-commerce platforms and common carriers. According to respondents, receiving additional information from CBP would enhance their ability to curtail the sale of counterfeit goods online and help them warn unsuspecting consumers.
- **Counterfeits Pose a Serious Threat to the U.S. Economy.** Counterfeits are estimated to cost the U.S. economy \$29 billion to \$41 billion annually by diverting sales away from purchases of legitimate products.⁸⁹ As a result, counterfeits result in lost revenue for U.S. businesses, undermine innovation and growth, and shift jobs away from right holders to infringing parties.
- **Counterfeits Pose a Serious Health and Safety Threat to U.S. Consumers.** Counterfeit health products, pharmaceuticals, toys, and other consumer goods are not manufactured to established standards and may be produced with sub-par materials. For these reasons, counterfeit goods may be hazardous to consumers.

Recommendations

- **Congress Should Consider Amending TFTEA to Allow CBP to Share More Information with Right Holders.** According to CBP, TFTEA provides for the disclosure of information that “appears on the merchandise and its *packaging and labels*”, but does not provide CBP with the authority to disclose information included on the *packing*.⁹⁰ Respondents to this investigation indicated that this additional information would help them in their own investigations and enforcement activities. For example, packing information would be helpful for identifying groups of counterfeit merchandise from the same seller.
- **Congress Should Consider Granting CBP the Authority to Share Information with E-commerce Platforms and Common Carriers on Counterfeit Imports.** According to CBP, the Trade Secrets Act prevents it from sharing information with these parties when goods are seized and/or detained at U.S. ports of entry. These

⁸⁸ *Protecting E-Commerce Consumers from Counterfeits: Hearing Before the S. Comm. on Fin.*, 115th Cong. 61 (2018) (response to question for the record).

⁸⁹ *The Theft of American Intellectual Property: Reassessments of the Challenge and United States Policy*, COMM’N ON THEFT AM. INTELL. PROP. 9 (2017), http://www.ipcommission.org/report/IP_Commission_Report_Update_2017.pdf.

⁹⁰ *Protecting E-Commerce Consumers from Counterfeits: Hearing Before the S. Comm. on Fin.*, 115th Cong. 61 (2018) (response to question for the record).

parties are critical partners in the fight against the sale of counterfeits and can help right holders protect their IPR. For example, if CBP shared information on counterfeit goods with common carriers they could then use that information to create a more secure supply chain by blocking counterfeiters from their shipping networks. Therefore, Congress should consider granting CBP the authority to share information with these relevant parties once a counterfeit has been confirmed by a right holder.

b. When It Comes to E-Commerce, U.S. Businesses Have Difficulties Preventing the Sale of Counterfeit Goods Online

Shortly after the Committee's March 2018 hearing, we sent letters to several trade associations that represent right holders to better understand how counterfeits are affecting their members.⁹¹ These groups included the American Apparel & Footwear Association (AAFA), U.S. Chamber of Commerce, Consumer Technology Association (CTA), Entertainment Software Association (ESA), Footwear Distributors & Retailers of America (FDRA), International Anti-Counterfeiting Coalition (IACC), International Trademark Association (INTA), and National Association of Manufacturers (NAM), Personal Care Products Council (PCPC), Sports & Fitness Industry Association (SFIA), and the Toy Association.⁹² We sent letters directly to these groups because they represent the top industries affected by counterfeits.⁹³ We also found that most right holders were hesitant, if not unwilling, to provide the Committee with information for fear that it would negatively affect their brand. By allowing right holders to submit information anonymously through their affiliated trade associations, we were able to balance these concerns while collecting key pieces of information for this investigation.

During this investigation, each respondent provided input on the challenges counterfeits pose to their businesses, industry, and the U.S. economy. U.S. IP supports good paying jobs for American families across a multitude of industries. However, these respondents explained that counterfeits are impacting U.S. business in a variety of sectors including the agricultural sectors, auto industry, consumer goods sector, pharmaceutical industry, and the video game sector.⁹⁴ Some of these respondents also provided examples to highlight the difficulties they face preventing the sale of counterfeit goods online. These examples highlight that the breadth and

⁹¹ Letter from Senator Hatch and Senator Wyden to Richard Helfenbein, President, American Apparel & Footwear Association (May 30, 2018) (on file with the Committee); Letter from Senator Hatch and Senator Wyden to David Hirschmann, President, U.S. Chamber of Commerce, Global Intellectual Property Center (May 30, 2018) (on file with the Committee); Letter from Senator Hatch and Senator Wyden to Gary Shapiro, President, Consumer Technology Association (May 30, 2018) (on file with the Committee); Letter from Senator Hatch and Senator Wyden to Michael Gallagher, President, Entertainment Software Association (May 30, 2018) (on file with the Committee); Letter from Senator Hatch and Senator Wyden to R. Matthew Priest, President, Footwear Distributors & Retailers of America (May 30, 2018) (on file with the Committee); Letter from Senator Hatch and Senator Wyden to Robert Barchiesi, President, International AntiCounterfeiting Coalition (May 30, 2018) (on file with the Committee); Letter from Senator Hatch and Senator Wyden to Tish Berard, President, International Trademark Association (May 30, 2018) (on file with the Committee); Letter from Senator Hatch and Senator Wyden to Jay Timmons, President, National Association of Manufacturers (May 30, 2018) (on file with the Committee); Letter from Senator Hatch and Senator Wyden to Lezlee Westine, President, Personal Care Products Council (May 30, 2018) (on file with the Committee); Letter from Senator Hatch and Senator Wyden to Thomas Cove, President, Sports & Fitness Industry Association (May 30, 2018) (on file with the Committee); Letter from Senator Hatch and Senator Wyden to Stephen Pasierb, President, Toy Association (May 30, 2018) (on file with the Committee).

⁹² *Id.*

⁹³ OECD/EUIPO, *supra* note 2, at 43-44.

⁹⁴ Letter from Linda Dempsey, Vice President of International Economic Affairs, National Association of Manufacturers, to Senator Hatch and Senator Wyden (June 29, 2018) (on file with the Committee); Letter from Stanley Pierre-Louis, Senior Vice President and General Counsel, Entertainment Software Association (June 28, 2018) (on file with the Committee); Letter from Etienne Sanz de Acedo, Chief Executive Officer, International Trademark Association, to Senator Hatch and Senator Wyden (June 28, 2018) (on file with the Committee).

variety of counterfeits sold make it difficult for right holders to prevent the sale of all counterfeits on e-commerce platforms on their own.

For example, we received confidential information from a major U.S.-based company detailing the difficulties it faces in policing and monitoring e-commerce platforms for counterfeits.⁹⁵ This company provided the Committee with evidence showing that roughly 72 percent of products sold through online marketplaces and marketed as genuine products purportedly originating from this company were in fact counterfeit. According to this respondent, these online platforms include Amazon, Alibaba, eBay, and DHGate. This company further explained that it removes roughly 600,000 infringing listings every year from well over 100 different online marketplaces around the world yet is unable to prevent the sale of all the counterfeit goods sold online.

Two U.S.-based manufacturers also submitted evidence of their enforcement efforts through their trade association.⁹⁶ The first company explained that it worked to have more than 3,000 listings removed from e-commerce platforms in 2018. The second company explained that, in their industry, companies working together had removed nearly 155,000 listings of counterfeit items from the internet and disabled more than 20,000 domains selling counterfeit products. That second company also explained that it participated in more than 900 raids around the world and supported customs officials in conducting more than 300 seizures resulting in the confiscation of nearly 1.3 million counterfeit items.

Other respondents indicated that some of their members submit thousands of notices for counterfeit and infringing listing to e-commerce platforms each year.⁹⁷ One respondent provided evidence that their organization detected over 7,491 possibly infringing goods for sale on e-commerce platforms and confirmed 2,440, or over 30 percent, to be counterfeit.⁹⁸ According to this respondent, it does not have the ability to warn each and every consumer about potential counterfeits and instead pays a brand protection service to protect its brand on e-commerce platforms.⁹⁹

These examples make clear that a business that has achieved any level of success in the marketplace is at risk of encountering counterfeit versions of their product online. While these entities have successfully prevented the sale of some counterfeits, the proliferation of counterfeits sold on e-commerce platforms can make it difficult for businesses to prevent the sale of all counterfeits. Evidently therefore, current enforcement efforts are not enough to prevent the sale of all counterfeit goods on e-commerce platforms.

⁹⁵ Confidential (on file with the Committee). This information was provided to the Committee on the condition that the respondent's identity remain anonymous.

⁹⁶ Confidential (on file with the Committee). This information was provided to the Committee on the condition that the respondent's identity remain anonymous.

⁹⁷ Letter from Etienne Sanz de Acedo, Chief Executive Officer, International Trademark Association, to Senator Hatch and Senator Wyden (June 28, 2018) (on file with the Committee).

⁹⁸ *Id.*

⁹⁹ *Id.*

c. E-commerce Platforms Provide Anti-Counterfeiting Tools, but the Burden of Policing and Enforcing IPR on E-Commerce Platforms is on the Right Holder

To better understand how e-commerce platforms collaborate with right holders to prevent the sale of counterfeits on their platform, the Committee sent letters to e-commerce platforms located both in the United States and in China.¹⁰⁰ These companies included Amazon, Alibaba, DHGate, Newegg, eBay, Etsy, Facebook, JD.com, Overstock.com, Sears, Walmart, and, Wish.¹⁰¹ We chose these companies because they are some of the largest e-commerce platforms in the world with sales up to hundreds of billions of dollars each year; and, together they account for millions of American jobs.¹⁰²

Many e-commerce platforms take proactive measures to prevent the sale of counterfeits as well as provide reactive tools to right holders when a counterfeit is identified on its platform. The largest e-commerce platforms surveyed for this investigation, Amazon and Alibaba, describe using machine learning and other technologies to help identify and remove suspected counterfeits.¹⁰³ Not all e-commerce platforms use these proactive measures, but almost all provide reactive measures for right holders to report counterfeits to their platform.¹⁰⁴ These reactive measures include brand registries, like eBay's Verified Rights Owner (VeRO) Program, which allow right holders to report suspected counterfeit listings to the platform.¹⁰⁵ Once a right holder reports a counterfeit, e-commerce platforms generally investigate the complaint, contact

¹⁰⁰ Letter from Senator Hatch and Senator Wyden to Michael Evans, President, Alibaba (May 30, 2018) (on file with the Committee); Letter from Senator Hatch and Senator Wyden to Jeffrey Bezos, Chief Executive Officer, Amazon (May 30, 2018) (on file with the Committee); Letter from Senator Hatch and Senator Wyden to Diane Wang, Chief Executive Officer, DHGate.com (May 30, 2018) (on file with the Committee); Letter from Senator Hatch and Senator Wyden to Devin Wenig, President and Chief Executive Officer, eBay (May 30, 2018) (on file with the Committee); Letter from Senator Hatch and Senator Wyden to Josh Silverman, Chief Executive Officer, Etsy (May 30, 2018) (on file with the Committee); Letter from Senator Hatch and Senator Wyden to Mark Zuckerberg, Chairman and Chief Executive Officer, Facebook (May 30, 2018); Letter from Senator Hatch and Senator Wyden to Michael Beckerman, President and Chief Executive Officer, Internet Association (May 30, 2018) (on file with the Committee); Letter from Senator Hatch and Senator Wyden to Liu Qiangdong, Chief Executive Officer, JD.com (May 30, 2018) (on file with the Committee); Letter from Senator Hatch and Senator Wyden to Danny Lee, Chief Executive Officer, Newegg (May 30, 2018) (on file with the Committee); Letter from Senator Hatch and Senator Wyden to Saum Noursalehi, President, Overstock.com (May 30, 2018) (on file with the Committee); Letter from Senator Hatch and Senator Wyden to Edward Lampert, Chairman and Chief Executive Officer, Sears (May 30, 2018) (on file with the Committee); Letter from Senator Hatch and Senator Wyden to C. Douglas McMillon, President and Chief Executive Officer, WalMart (May 30, 2018) (on file with the Committee); Letter from Senator Hatch and Senator Wyden to Peter Szulczewski, Chief Executive Officer, Wish (May 30, 2018) (on file with the Committee).

¹⁰¹ *Id.*

¹⁰² According to their SEC filings, these companies account for more than 2 million jobs in the U.S. *See also The World's Largest Public Companies 2019 Rankings*, FORBES, <https://www.forbes.com/global2000/list/3/#tab:overall> (last visited June 28, 2019).

¹⁰³ Letter from Michael Evans, President, Alibaba, to Senator Hatch and Senator Wyden (July 13, 2018) (on file with the Committee); Letter from Brian Huseman, Vice President of Public Policy, Amazon, to Senator Hatch and Senator Wyden (June 29, 2018) (on file with the Committee).

¹⁰⁴ *Id.*

¹⁰⁵ Letter from Cathy Foster, Vice President of Global Government Relations and Public Policy, eBay, to Senator Hatch and Senator Wyden (Aug. 27, 2018) (on file with the Committee); Letter from Etienne Sanz de Acedo, Chief Executive Officer, International Trademark Association, to Senator Hatch and Senator Wyden (June 28, 2018) (on file with the Committee).

the seller for more information, and if the product is identified as a counterfeit, remove the product from the platform and, in some cases, ban the seller.¹⁰⁶ For many e-commerce platforms, once a counterfeit is reported it is often removed from the platform.¹⁰⁷

However, in order to utilize some of these reactive measures, right holders must actively scan each listing to identify counterfeits and use procedures set out by the various platforms to report these listings and request their removal. Right holders also commonly use test buys as part of their investigations to help identify counterfeits and their sellers, and often use these findings to support their removal requests.¹⁰⁸ During this investigation, right holders explained that these reactive measures are often burdensome because there are hundreds of listings over multiple platforms which make it very difficult for brands to enforce their IPR online.¹⁰⁹

Even when right holders submit a request to remove a suspected counterfeit listing, e-commerce platforms may not remove all alleged counterfeits from their websites. During this investigation, we received confidential data from a global leader in online brand protection that protects and advocates for right holders by facilitating removal requests.¹¹⁰ As part of its services, it tracks assertions of IPR violations reported to e-commerce platforms. This company indicated that most platforms are responsive in removing alleged counterfeits from their websites, but that the rate of removal varies across platforms.

In 2018, this company tracked 839,796 removal requests submitted to e-commerce platforms. E-commerce platforms removed 744,345, or approximately 89 percent, of these removal requests issued against known and suspected counterfeiters. In 2019, however, e-commerce platforms removed 1,166,007, or approximately 95 percent, of these removal requests issued against known and suspected counterfeiters. This marks a significant increase in removal rates across e-commerce platforms from 2018 to 2019. In 2019, of the major e-commerce platforms, eBay, Amazon, Alibaba, Yahoo, and Craigslist International maintained the highest rates. Companies with lower rates include Craigslist US, Lazada, along with Avito (Russia), Souq (Middle East, currently merging with Amazon), and Rakuten (Japan).

In some cases, e-commerce platforms may receive removal requests that do not warrant removal. According to one platform, right holders sometimes submit requests which “improperly

¹⁰⁶ Letter from Michael Evans, President, Alibaba, to Senator Hatch and Senator Wyden (July 13, 2018) (on file with the Committee); Letter from Brian Huseman, Vice President of Public Policy, Amazon, to Senator Hatch and Senator Wyden (June 29, 2018) (on file with the Committee); Letter from Cathy Foster, Vice President of Global Government Relations and Public Policy, eBay, to Senator Hatch and Senator Wyden (Aug. 27, 2018) (on file with the Committee); Letter from Lance Lanciault, Senior Vice President and Chief Ethics and Compliance Officer, Walmart, to Senator Hatch and Senator Wyden (June 29, 2018) (on file with the Committee); Letter from Devang Shah, General Counsel, Wish, to Senator Hatch and Senator Wyden (June 29, 2018) (on file with the Committee); Letter from Christie Rugh, Senior Director of Merchant Operations, Sears, to Senator Hatch and Senator Wyden (June 29, 2018) (on file with the Committee); Letter from Kevin Martin, Vice President of Public Policy, Facebook, to Senator Hatch and Senator Wyden (June 29, 2018) (on file with the Committee).

¹⁰⁷ *Id.*

¹⁰⁸ Letter from Etienne Sanz de Acedo, Chief Executive Officer, International Trademark Association, to Senator Hatch and Senator Wyden (June 28, 2018) (on file with the Committee).

¹⁰⁹ *Id.*

¹¹⁰ Confidential (on file with the Committee). Right holders pay a fee to this company for brand protection services.

seek to limit distribution or reduce competition, misstate the underlying IPR, or are vague or overly broad.”¹¹¹ In some cases, counterfeiters may also attempt to pose as right holders to attack their legitimate competition.¹¹² Therefore, it is clear that the policing of listings not only places the burden on right holders to identify suspected counterfeits, but also burdens platforms to investigate the legitimacy of the requests to remove alleged infringing products.

Marketplace Group	# Enforced	# Complied	
		Ever	% Complied
Yahoo	335	334	100%
Craigslist - International	238	237	100%
eBay	132,700	129,673	98%
Amazon	137,320	133,735	97%
Alibaba	185,484	180,560	97%
Other	704,758	679,653	96%
Mercadolibre	22,253	21,209	95%
Kijiji	38	35	92%
Avito	4,783	3,098	65%
Lazada	27,082	15,731	58%
Rakuten	3	1	33%
Craigslist - US	9,987	1,735	17%
Souq	56	6	11%
Grand Total	1,225,037	1,166,007	95%

113

Based on the information collected for this investigation, it is clear that enforcement is burdensome for both right holders and e-commerce platforms. Proactive and reactive measures provided by the platforms are a step in the right direction, but largely rely on right holders to monitor hundreds of listings over multiple platforms to identify and report counterfeits. For SMEs, who do not have the resources to protect their brand online, these measures can be incredibly challenging. Therefore, e-commerce platforms should do more to help right holders protect their IPR on their platform—especially for SMEs who otherwise do not have the resources to protect their brand online.

d. Right Holders, E-commerce Platforms, and Common Carriers Want More Information From CBP; However, CBP is Limited in the Amount of Information It Can Share with Right Holders and Other Relevant Parties to the E-Commerce Transaction

Public-private information sharing is a crucial element to an effective IPR enforcement strategy. Often, anti-counterfeiting efforts undertaken by law enforcement overlap and intersect

¹¹¹ Letter from Brian Huseman, Vice President of Public Policy, Amazon, to Senator Hatch and Senator Wyden (June 29, 2018) (on file with the Committee).

¹¹² *Id.*

¹¹³ Confidential (on file with the Committee). These represent enforcement attempts that were submitted to online marketplaces by right holders from June 2018 through May 2019.

with those taken by right holders. Public-private information sharing is also critical to a right holder in their own investigations and enforcement efforts. However, we discovered that there are statutory and regulatory barriers in place that inhibit public-private information sharing regarding counterfeit goods seized and/or detained at U.S. ports of entry.

During this investigation, some right holders explained that they do not receive valuable importation information when a shipment is abandoned at a U.S. port of entry. Under its voluntary abandonment pilot program, CBP sends detention notices to common carriers (e.g., FedEx, UPS, DHL) when it identifies a suspected counterfeit and allows the importer on record to abandon the shipment voluntarily.¹¹⁴ According to these right holders, information pertaining to abandoned shipments could help them identify counterfeiters more effectively and allow them to take actions that could result in fewer counterfeit importations.¹¹⁵

In response to this and other criticism, CBP published a notice of proposed rulemaking to amend Customs Regulations and allow it to disclose details about abandoned infringing goods in the same manner that it currently discloses information about seized goods.¹¹⁶ If finalized, the amendment would allow CBP to disclose information to right holders such as the date of importation, port of entry, a description of the merchandise, and the country of origin.¹¹⁷ According to CBP, right holders could use this information to help CBP identify IPR violations and identify channels of counterfeit shipments.¹¹⁸ We applaud CBP's efforts to share more information with right holders on abandoned shipments and urge CBP to finalize this proposed rule.

The same right holders also explained that CBP's self-imposed seven-day waiting period prevents them from taking immediate action to enforce their IPR online.¹¹⁹ When merchandise is suspected of bearing a recorded trademark, CBP will notify the importer on record of the detention and request information to prove the authenticity of the good.¹²⁰ If the importer on record does not respond within seven days of notification, or does not provide enough proof that the merchandise is not counterfeit, CBP may release information to the owner of the mark to determine whether the merchandise is counterfeit.¹²¹ This information may include serial numbers, dates of manufacture, lot codes, batch numbers, or other identifying marks appearing on the merchandise or its retail packaging.¹²² However, according to right holders this delay damages their enforcement efforts, and often leads go cold.¹²³

¹¹⁴ Letter from Etienne Sanz de Acedo, Chief Executive Officer, International Trademark Association, to Senator Hatch and Senator Wyden (June 28, 2018) (on file with the Committee); Letter from Travis Johnson, Vice President of Legislative Affairs and Senior Counsel, International AntiCounterfeiting Coalition, to Senator Hatch and Senator Wyden (June 28, 2018) (on file with the Committee).

¹¹⁵ *Id.*

¹¹⁶ Disclosure of Information Regarding Abandoned Merchandise, 84 Fed. Reg. 44,790 (proposed Aug. 27, 2019) (to be codified at 19 C.F.R. pts. 127 & 133).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ 19 C.F.R. § 133.21(b)(1)-(2)(i).

¹²¹ 19 C.F.R. § 133.21(b)(2)(ii).

¹²² 19 C.F.R. § 133.21(b)(3).

¹²³ Letter from Etienne Sanz de Acedo, Chief Executive Officer, International Trademark Association, to Senator Hatch and Senator Wyden (June 28, 2018) (on file with the Committee).

Even when CBP releases information after the seven day waiting period, some right holders indicated that the information is often limited and heavily redacted. One major multinational company submitted examples of certain images shared by CBP once a suspected counterfeit is identified.¹²⁴ These images include the identifying marks of the merchandise and country of origin, but redact the packing information pertaining to the date of importation, port of entry, or the name and address of the importer. Right holders have indicated that this information would be helpful in identifying counterfeits sold by the same seller.¹²⁵

Example 1 – Fuel Pump



126

¹²⁴ Confidential (on file with the Committee). This information was provided to the Committee on the condition that the respondent's identity remain anonymous.

¹²⁵ U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 6, at 38.

¹²⁶ Confidential (on file with the Committee). This information was provided to the Committee on the condition that the respondent's identity remain anonymous.

Some e-commerce platforms and common carriers also expressed frustration with CBP over its lack of information sharing. Two e-commerce platforms explained that CBP does not share information on counterfeits seized and/or detained at U.S. ports of entry with any entity not listed as the importer of record.¹²⁷ Two common carriers also expressed the need for more information from CBP.¹²⁸ Common carriers have the ability to block counterfeit shipments from entering into and traveling within the U.S.¹²⁹ For example, one common carrier explained that more information and communication from CBP would allow it to identify repeat counterfeiters and help to prevent counterfeiters from using their shipping networks.¹³⁰ However, seizure data and alert information is not readily available to common carriers.¹³¹ According to one common carrier, if CBP granted them access to this data, it could assist in strengthening the integrity of their transportation networks.¹³²

During our discussions with CBP, the agency explained that the Trade Secrets Act prevents the agency from sharing information with right holders and other relevant parties because it is not otherwise authorized by law.¹³³ Under the Trade Secrets Act, an employee or officer of the U.S. government is prohibited from publishing, divulging, or disclosing any information that:

[C]oncerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association.¹³⁴

Based on its interpretation of the Trade Secrets Act, CBP believes that it is prohibited from sharing information appearing on the *packing*, which CBP defines as “all containers, exclusive of instruments of international traffic, and coverings of what-ever nature, used in placing the merchandise packed ready for shipment to the United States.”¹³⁵

¹²⁷ Letter from Brian Huseman, Vice President of Public Policy, Amazon, to Senator Hatch and Senator Wyden (June 29, 2018) (on file with the Committee); Letter from Lance Lanciault, Senior Vice President and Chief Ethics and Compliance Officer, Walmart, to Senator Hatch and Senator Wyden (June 29, 2019) (on file with the Committee).

¹²⁸ Letter from Kevin Coles, General Counsel and Secretary, DHL Express, to Senator Hatch and Senator Wyden (July 13, 2018) (on file with the Committee); Letter from Steven Tylor, Vice President of Legal and Regulatory Affairs, FedEx, to Senator Hatch and Senator Wyden (July 16, 2018) (on file with the Committee).

¹²⁹ Letter from Steven Tylor, Vice President of Legal and Regulatory Affairs, FedEx, to Senator Hatch and Senator Wyden (July 16, 2018) (on file with the Committee).

¹³⁰ Letter from Kevin Coles, General Counsel and Secretary, DHL Express, to Senator Hatch and Senator Wyden (July 13, 2018) (on file with the Committee).

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Protecting E-Commerce Consumers From Counterfeits: Hearing Before the S. Comm. on Fin.*, 115th Cong. 61 (2018) (response to question for the record); *see also* CBP Enforcement Related to E-Commerce, Import Safety, and IPR Threats, CBP (May 8, 2019).

¹³⁴ The Trade Secrets Act, 18 U.S.C § 1905 (2012).

¹³⁵ *Protecting E-Commerce Consumers from Counterfeits: Hearing Before the S. Comm. on Fin.*, 115th Cong. 61 (2018) (response to question for the record); *see also* CBP Enforcement Related to E-Commerce, Import Safety, and IPR Threats, CBP (May 8, 2019).

Under TFTEA, Congress authorized CBP to share information that “appears on the merchandise and its *packaging and labels*” if it believes that the merchandise infringes upon a record trademark or copyright.¹³⁶ This also includes the authority to share unredacted images of the merchandise and packaging, importer and exporter information, as well as other packaging information.¹³⁷ However, the phrase “appears on the merchandise and *its packaging and labels*” does not allow CBP to share information like the “fulfilled by Amazon” number, invoices, or bar codes appearing on the exterior box.¹³⁸ Without explicit authority from Congress, CBP believes that it would reveal trade secrets regarding an importer’s supply chain by divulging this information.¹³⁹ CBP also believes that the Trade Secrets Act prohibits it from sharing information with e-commerce platforms and common carriers because it is not otherwise authorized by law to share importation information with these parties.¹⁴⁰

Based on this information, Congress must consider amending TFTEA to allow CBP to share more information on suspected counterfeit imports with right holders. Congress must also consider granting CBP the authority to share information with e-commerce platforms and common carriers once a right holder confirms that a shipment bears a counterfeit mark. It is clear that CBP must balance the need to ensure that confidential information is not inappropriately shared. However, with more information, these parties will be able to use their combined resources to aid in the fight against the sale of counterfeit goods online and will have the ability to make more efficient IPR and safety determinations resulting in a more secure supply chain.

We also encourage CBP and ICE to pursue innovative programs to work with e-commerce platforms to share data on sellers who trade in counterfeit products. The private sector, including right holders and e-commerce platforms, may be reluctant to share information directly with their competitors. For example, a central database could collect information on seizures for a specific shipper, specific importer, or of a specific trademark owner’s products in order to identify patterns of illicit activity. This information could then be transmitted to law enforcement and the private sector to be used in their own investigations and enforcement efforts. The IPR Center’s E-Commerce Initiative is a good step in this direction.

e. The Effects of Counterfeiting Are Damaging to Businesses and the U.S. Economy

The detrimental impact of counterfeits extends well beyond the notions of theft and fair play. Counterfeits are harmful to businesses and the U.S. economy. The U.S. economy loses \$29 billion to \$41 billion each year due to counterfeits.¹⁴¹ Additionally, the intensity of counterfeits differs greatly between sectors and geographical areas. For example, the EUIPO estimated that the handbag and luggage industry lost €1.6 billion in revenue due to IPR infringement translating

¹³⁶ The Trade Facilitation and Trade Enforcement Act (TFTEA) § 302 (emphasis added).

¹³⁷ *Id.*

¹³⁸ *Protecting E-Commerce Consumers from Counterfeits: Hearing Before the S. Comm. on Fin.*, 115th Cong. 61 (2018) (response to question for the record).

¹³⁹ *Id.*

¹⁴⁰ CBP Enforcement Related to E-Commerce, Import Safety, and IPR Threats, CBP (May 8, 2019).

¹⁴¹ *The Theft of American Intellectual Property*, *supra* note 21.

into direct employment losses of approximately 12,100 jobs worldwide.¹⁴² In 2015, the EUIPO estimated that the toy and game industry lost approximately €1.4 billion due to IPR infringement translating into direct employment losses of approximately 6,150.¹⁴³ Furthermore, compared to other countries, the U.S. faces significantly more IPR violations than France, Italy, Switzerland, Germany, and Japan.¹⁴⁴

Counterfeits may also harm a business's reputation as a trustworthy brand. In some cases, consumers unwittingly purchase counterfeits and then may post negative reviews about the product. One story reported in the press is of Jon Fawcett, creator of Fuse Chicken, who developed a phone charger and built it to withstand an electric chain saw.¹⁴⁵ His company enjoyed quick success until they started selling their product on Amazon, which comingled his product with a counterfeit version.¹⁴⁶ In John Fawcett's case, the counterfeits were of poor quality causing customers to leave one-star reviews for Fawcett's product.¹⁴⁷ According to Fawcett, his company may have lost tens of thousands of dollars in sales because of negative customer reviews for a product that was not his.¹⁴⁸

Counterfeits are a direct and significant threat to businesses and the U.S. economy. When a counterfeit good is sold on an e-commerce platform, that sale infringes on a legitimate business's IPR and harms the brand's reputation. Counterfeits also have the potential to reduce a business's revenue which inhibits its ability to innovate, hire more workers, and expand or improve its product line.¹⁴⁹ Therefore, if the sale of counterfeits online continues to grow, it is likely that U.S. businesses will continue to lose revenue thereby harming the U.S. economy.

f. Counterfeits Can Pose a Serious Danger to the Health and Safety of Consumers

Respondents to the survey for this investigation agree that counterfeits pose a direct and significant threat to the health and safety of U.S. consumers. In FY 2017, apparel, watches, jewelry, footwear, and consumer electronics accounted for over 50 percent of goods seized by CBP for IPR violations.¹⁵⁰ However, CBP is also seizing an increasing number of

¹⁴² Nathan Wajzman et al., *The Economic Cost of IPR Infringement in Handbags and Luggage*, EUR. OBSERVATORY ON INFRINGEMENTS INTELL. PROP. RTS. 7 (Feb. 2016), https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/resources/research-and-studies/ip_infringement/study6/handbags_and_luggage_en.pdf.

¹⁴³ Nathan Wajzman et al., *The Economic Cost of IPR Infringement in Toys and Games*, EUR. OBSERVATORY ON INFRINGEMENTS INTELL. PROP. RTS. (Dec. 2015), https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/resources/research-and-studies/ip_infringement/study4/toys_games_en.pdf.

¹⁴⁴ OECD/EUIPO, *supra* note 2, at 33.

¹⁴⁵ David Pierson, *Extra inventory. More sales. Lower prices. How counterfeits benefit Amazon*, L.A. TIMES (Sept. 28, 2018), <https://www.latimes.com/business/technology/la-fi-tn-amazon-counterfeits-20180928-story.html>.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ Letter from Tom Cove, President and Chief Executive Officer, Sports & Fitness Industry Association, to Senator Hatch and Senator Wyden (June 28, 2018) (on file with the Committee).

¹⁵⁰ U.S. CUSTOMS & BORDER PROT., *supra* note 37, at 21.

pharmaceutical, personal care products, and children's toys.¹⁵¹ These counterfeits pose a serious health and safety concern for U.S. consumers.

In some cases, the counterfeits may even contain dangerous materials. During this investigation, one right holder reached out to us with information regarding counterfeit refrigerator filters sold online.¹⁵² According to this right holder, the online sales of counterfeit refrigerator water filters is a rapidly growing problem. These water filters are sold with fraudulent and misleading labeling, and often fail to remove toxic substances from the water.¹⁵³ This right holder also conducted test-buys to measure counterfeit water filters' performance and found that these filters failed to remove harmful lead and live cysts, and some even introduced harmful chemicals into household water.¹⁵⁴

Counterfeit vaping products are also being sold online. An investigation conducted by the Wall Street Journal revealed a thriving market for counterfeit vaping products on traditional e-commerce platforms such as Amazon, Alibaba, and DHGate, as well as social media sites such as Facebook, Instagram, and LinkedIn.¹⁵⁵ For instance, the Wall Street Journal's investigation revealed that counterfeiters on Alibaba and DHGate will contact potential buyers via direct message on Instagram and LinkedIn, directing consumers to their account on Alibaba or DHGate where their targets can purchase counterfeit vaping devices.¹⁵⁶ On Amazon, Alibaba, and DHGate, nefarious dealers bulk sell empty packaging for vaporizer products, which black-market dealers can buy and use to pass off their home-filled cartridges as legitimate products.¹⁵⁷ These cartridges are generally filled with homemade ingredients, such as THC oils, whose ingredients have not been tested.¹⁵⁸ Counterfeit vaporizer cartridges have also tested positive for pesticides and vitamin E acetate, the latter of which is thought to be a major cause of the recent spate of vaping-induced illnesses.¹⁵⁹

Another commonly counterfeited good sold online is children's toys.¹⁶⁰ With changes to the retail toy market, parents are turning to e-commerce platforms to purchase toys, to find the least expensive version of a toy, or to find a popular toy that is sold out in stores.¹⁶¹ However,

¹⁵¹ *Id.* at 20-21.

¹⁵² Letter from Sarah Faye Pierce, Director of Government Relations, Association of Home Appliance Manufacturers, to Senator Hatch and Senator Wyden (June 29, 2018) (on file with the Committee).

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Daniela Hernandez, *Sales of Illicit Vaping Products Find Home Online*, WALL STREET J. (Sept. 20, 2019), https://www.wsj.com/articles/sales-of-illicit-vaping-products-find-home-online-11568971802?mod=hp_lead_pos4.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* See also Brianna Abbott, *New York Identifies Vitamin E Oil in Vaping Samples*, WALL STREET J. (Sept. 5, 2019), https://www.wsj.com/articles/new-york-identifies-vitamin-e-oil-in-vaping-samples-11567739878?mod=article_inline.

¹⁶⁰ Meaghan H. Kent & Claire M. Wheeler, *The Real Threat of Fake Toys*, TOY ASS'N (2018), https://www.toyassociation.org/AppThemes/toyassociation_resp/downloads/research/whitepapers/intellectual-property.pdf.

¹⁶¹ Kim Souza, *The Supply Side: Post-Toys R Us Era, Toy Category Quickly Moving Online*, TALK BUS. & POL. (July 7, 2019), <https://talkbusiness.net/2019/07/the-supply-side-post-toys-r-us-era-toy-category-quickly-moving-online/>.

unbeknownst to many parents, lead paint and other toxic materials have been found in counterfeit toys.¹⁶² One right holder provided us with information that counterfeit children's toys may contain unexpected small parts, excess lead, and unsafe chemicals in the materials, coatings, and even packaging.¹⁶³ Counterfeit toys may also pose a serious choking threat in contrast to the real toy because the counterfeit toy is a lesser quality product.¹⁶⁴

Popular electronics have also been counterfeited and sold on e-commerce platforms. Counterfeit batteries are not as efficient as authentic batteries, and can leak corrosive acid and ignite fires.¹⁶⁵ Legitimate electronic goods purchased on e-commerce platform can also contain counterfeit batteries. In one example, a couple purchased a "hoverboard" on Amazon as a Christmas gift for their daughters.¹⁶⁶ However, a counterfeit battery installed in the hoverboard ignited, causing nearly \$4,000,000 in damage to the consumers' home and property.¹⁶⁷ The Amazon listing indicated that the hoverboard contained a "genuine Samsung battery package," but, unbeknownst to the consumers, it actually came installed with "a counterfeit Samsung battery package produced by a Chinese manufacturer."¹⁶⁸ Fortunately, no one was physically injured, but this case exemplifies the threat posed by counterfeit batteries hiding in otherwise legitimate electronic goods sold online.¹⁶⁹ By using counterfeit batteries, consumers reduce the effectiveness of a genuine electronic product and put themselves in danger of potential harmful outcomes.

During this investigation, we have confirmed that counterfeits are often made with low quality materials and may not meet federal or state health and safety standards. Consumers must be cautious when buying goods on e-commerce platforms. Counterfeits can be very dangerous and do not always come with guarantees of its safety and efficacy.

V. Investigation Challenges: Limited Data, Outdated Data

We would like to thank right holders, their affiliated trade associations, e-commerce platforms, common carriers, and payment processors for working with the Committee to provide us with information on their enforcement efforts to curtail the sale of counterfeit goods online. The purpose of this investigation was to collect information on counterfeit goods sold on e-commerce platforms and to identify the barriers that hamper efforts by respondents to this investigation to prevent the sale of these illicit goods. However, we found that it was difficult to gather current data and information. Many respondents expressed reluctance in sharing information with the Committee for fear that this information would negatively impact their brand's value. We were able to gather some data by allowing respondents to submit information

¹⁶² Kent & Wheeler, *supra* note 160.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ Kelli Grant, *Cheap Fakes: 10 Ordinary Items Now Counterfeited*, MKT. WATCH (Nov. 29, 2011), <https://www.marketwatch.com/story/cheap-fakes-10-ordinary-items-now-counterfeited-1322607984784>.

¹⁶⁶ *Great N. Ins. Co. v. Amazon.com, Inc.*, 1:19-CV-00684 (N.D. Ill. Aug. 20, 2019).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Cf.* U.S. GOV'T ACCOUNTABILITY OFF., *supra* note 6, at 8 ("[I]n December 2015, CBP reportedly seized 1,378 hoverboards with counterfeit batteries that carried a risk of causing fires.").

anonymously through their affiliated trade associations. However, the lack of cooperation in this inquiry limited the Committee's ability to fully understand the scope and nature of the challenges posed by counterfeits and impairs efforts to comprehensively address those challenges.

In addition, the scale and growth of e-commerce has made it difficult to understand the scale of the problem of counterfeits sold on e-commerce platforms. This investigation highlights data from 2017-2018, which only provides a partial picture. E-commerce sales in the U.S. have grown more than 10 percent each year since 2013.¹⁷⁰ Assuming this trend continues, it will only get more difficult to fully grasp the scope of the challenge. Nonetheless, the data provided to us shows that counterfeits pose a serious problem and warrant further effort by the federal government as well as the private sector.

VI. Conclusion

Our investigation confirms that counterfeits are harming businesses, consumers, and the U.S. economy. Public-private information sharing is a critical part of a U.S. enforcement strategy against the sale of counterfeit goods online. However, CBP is limited in its ability to share information with right holders, e-commerce platforms, and common carriers on counterfeits seized and/or detained at U.S. ports of entry. This is particularly concerning as the retail marketplace continues to evolve and consumers increasingly turn to e-commerce to make their purchases.

Congress passed TFTEA to provide CBP with the authority to share information with right holders on counterfeits seized and/or detained at U.S. ports of entry. However, TFTEA does not expressly authorize CBP to share *packing* information with right holders. As a result, CBP continues to share limited, and often heavily redacted, data with right holders. Right holders must have access to more importation information so that they can enhance their investigation and enforcement efforts. Without this information, right holders cannot effectively enforce their IPR online and will likely continue to suffer from the effects of counterfeits.

It is also clear e-commerce platforms and common carriers are an integral part of the U.S. enforcement strategy against counterfeits and must have access to importation information. Armed with this information, e-commerce platforms and common carriers can strengthen the integrity of the U.S. supply chain. For example, e-commerce platforms could use this information to identify and remove counterfeit sellers from their platform and warn unsuspecting consumers. However, at the moment, right holders are primarily responsible for identifying and reporting suspected counterfeit sellers to the platforms. Therefore, CBP must be allowed to share importation information with these parties once a right holder confirms that the shipment does indeed bear a counterfeit mark.

This report illustrates potential weaknesses in U.S. trade laws that inhibit public-private information sharing on counterfeit goods. Congress should explore options to enhance the authorities provided in TFTEA to protect businesses, consumers, and the U.S. economy. Just as our retail marketplace has fundamentally changed, so must U.S. laws and regulations. Therefore,

¹⁷⁰ See U.S. Census Bureau News, *supra* note 9 (The U.S. Census bureau collects data on the total amount of e-commerce sales in the United States).

we will continue our oversight efforts to identify any additional gaps in our laws which allow for the importation of counterfeits and will work with the CBP and the Administration to develop effective solutions to address this very important issue.

Appendix A – Best Practices for the E-Commerce Platforms When Working with Right Holders

During this investigation, it became evident that e-commerce platforms can do more to work with right holders to prevent the sale and distribution of counterfeit goods on their platform. While e-commerce platforms have increased the availability of reactive measures for right holders, we found that these measures rely heavily on right holders to monitor and enforce hundreds of listings over multiple e-commerce platforms. In addition, these measures vary from platform to platform, making it increasingly difficult to prevent counterfeiters from selling counterfeits on other platforms. We compiled a list of best practices for e-commerce platforms to consider based on the input from right holders.

1. **Simplify.** E-commerce platforms must simplify the process for right holders to report and request enforcement actions against suspected counterfeiters.
2. **Alert.** E-commerce platforms must do more to alert consumers and brands about potential counterfeit sellers. Armed with information, consumers are unlikely to make these types of purchases and brands can pursue enforcement actions where appropriate.
3. **Verify.** E-commerce platforms must consider using seller identification verification tools to combat counterfeits and improve the customer experience. Counterfeiters are able to avoid detection by posing as legitimate sellers online. By utilizing seller verification tools, e-commerce platforms can better protect right holders and ensure that only authorized sellers utilize their registered trademark or copyright.
4. **Respond.** Remove sellers or goods from the platform expeditiously when counterfeit or infringing goods are discovered. This will help protect consumers from inadvertently purchasing counterfeits while shopping online.
5. **Resources.** E-commerce platforms must provide additional resources for SMEs who cannot monitor hundreds of listings over multiple platforms. For example, convene a working group that identifies and develops strategies to work with SMEs. Or, designate a point of contact within the company for each industry affected by counterfeits. By designating a point of contact, this person will be current on new technologies and counterfeit threats within the industry and will be able to exchange information with right holders to better inform their investigation and enforcement efforts.

Appendix B – Letters from Right Holders



1111 19th Street NW > Suite 402 > Washington, DC 20036
t 202.872.5955 f 202.872.9354 www.aham.org

June 29, 2018

The Honorable Orrin Hatch
Chairman
Senate Committee on Finance
Washington, D.C. 20510

The Honorable Ron Wyden
Ranking Member
Senate Committee on Finance
Washington, D.C. 20510

Dear Chairman Hatch and Ranking Member Wyden:

On behalf of the Association of Home Appliance Manufacturers (AHAM), I am pleased to respond to the Committee's request regarding the involvement of associations in educating American consumers about the dangers of counterfeit goods and what activities are underway to curtail the illegal sale of counterfeits through e-commerce sites.

AHAM represents manufacturers of major, portable and floor care home appliances, and suppliers to the industry. AHAM's membership includes over 150 companies throughout the world. In the U.S., AHAM members employ tens of thousands of people and produce more than 95% of the household appliances shipped for sale. The factory shipment value of these products is more than \$30 billion annually. The home appliance industry, through its products and innovation, is essential to U.S. consumer lifestyle, health, safety and convenience. Through its technology, employees and productivity, the industry contributes significantly to U.S. jobs and economic security. Home appliances also are a success story in terms of energy efficiency and environmental protection. New appliances often represent the most effective choice a consumer can make to reduce home energy use and costs.

AHAM applauds the Committee for holding the March 6, 2018 hearing, which examined a Government Accountability Office (GAO) Report that was requested by the Chairman to evaluate the effectiveness of the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA). Specifically, the Committee looked at whether or not the law has provided the US Customs and Border Protection (CBP) and US Immigration and Customs Enforcement (ICE) with the proper means to restrict the importation and distribution of counterfeit goods sold through e-commerce.

The home appliance manufacturing industry has been hit particularly hard by counterfeit activity. AHAM strongly believes that better coordination and stronger enforcement across government agencies is needed to appropriately address this widespread problem, which only continues to grow. In late 2016, several major

brands that manufacture and sell refrigerators in the US contacted AHAM and reported surging on-line sales of counterfeit replacement water filters for refrigerators. According to industry statistics, more than 50 million refrigerators with installed water filters are in US homes, statistics indicate that at least 25 million replacement filters should be sold each year, yet sales estimates of certified filters were significantly less.

In response to this staggering reality, the industry combined its resources to identify the scope and magnitude of the problem of sales of counterfeits on-line. After a year's worth of consultation, purchasing filters on e-commerce sites and testing these filters through third party laboratories, AHAM and our member companies have estimated that nearly two million counterfeit replacement refrigerator water filters are sold on-line each year. The [Filter it Out](#) campaign was born out of the industry's examination of the issue. "Filter It Out"- is a campaign designed to educate consumers and stop the sale of counterfeit filters on-line. The goal of AHAM's campaign is to educate consumers about the importance of using filters that meet industry standards, and provide information and resources to find the right filter for consumers' refrigerators.

The following submission seeks to address the Committee's questions regarding AHAM's experience with counterfeit water filters for refrigerators and share with the Committee and the public, the efforts of home appliance manufacturers to ensure that consumers have access to certified replacement water filters sold by trusted brands.

AHAM has sought to provide answers to the questions that directly pertain to the Filter it Out campaign and industry experience in combating counterfeits.

Committee Questions

1. Do you warn consumers about the risk of counterfeits of your products, their availability, and/or how to avoid accidentally purchasing them, and if so, how?

YES.

As many as two million counterfeit and deceptively labeled water filters for refrigerators are flooding into U.S. markets from overseas and sold on-line each year. Consumers purchase the filters thinking they are buying genuine, certified filters, and for a cheaper price than brand-name products.

The truth is that these filters do not always meet the safety and structural standards that consumers, regulators and refrigerator manufacturers expect.

AHAM has found counterfeit replacement water filters containing:

- Scraps of newspaper– a concern that is intensified in cities like Flint, Michigan where proper water filtration is critical.

- Deceptive or faulty claims about fit and performance.
- Misleading designs – which include the illegal use of brand names, logos and product labels.
- Lacking claims of quality or assurance like the filters produced by refrigerator manufacturers and certified to NSF/ANSI Drinking Water Treatment standards.

Independent testing, as well as testing by manufacturers, shows that installing counterfeit filters into refrigerators can result in failure to remove impurities from consumers' drinking water, including lead, mercury, asbestos, pesticides, insecticides and pharmaceuticals. In addition, poor fit for individual refrigerators may damage the refrigerator and the kitchen, if leaks occur.

AHAM, in partnership with 17 home appliance brands and with support from water treatment system certifiers IAPMO R&T, NSF International & Water Quality Association (WQA), launched [Filter It Out](#), a public education campaign to inform consumers about the significant problem of counterfeit and deceptively labeled replacement water filters for refrigerators. Through this campaign, industry leaders are taking action to direct consumers to trusted products.

AHAM and our industry partners have made significant efforts through digital marketing tools, to identify consumers searching for replacement water filters for refrigerators about:

- The potential that a replacement filter they purchase online could be counterfeit;
- The dangers associated with using such a counterfeit product; and
- Resources to ensure they purchase a genuine filter.

There is a critical role for government to play in enforcing laws that prohibit the sale of counterfeit products, seizing counterfeit products when possible, and raising public awareness of the health and safety impacts of this issue. AHAM believes that efforts by US Customs and Border Protection (CBP), US Immigration and Customs Enforcement (ICE) and the Consumer Product Safety Commission (CPSC) should be intensified to appropriately curtail counterfeits.

a. Do you believe that your consumers understand the significance of purchasing counterfeit versions of the goods?

NO.

Counterfeit and deceptively labeled water filters for refrigerators are sold online every day. Consumers purchase these filters thinking that they are buying genuine certified replacement filters because the counterfeit products replicate, in many cases, exactly, the branding, fonts and graphics of the genuine product.

In the case of replacement water filters for refrigerators, there is significant health and safety consequences brought to bear if a consumer unwittingly uses the counterfeit product. In addition, manufacturers have received consumer claims of property damage and flooding from leaks and bursts due to lesser quality materials used in the production of counterfeit filters. The intention of these products is to mitigate impurities in water. Consumers expect that the filter they purchase properly purifies their drinking water. As we know too well, in some parts of the US drinking water contains impurities including lead, asbestos, pesticides, and insecticides—but the counterfeits may not be filtering these contaminants out of the water, or in the worst case scenario adding contaminants

Oftentimes consumers are misled because the counterfeiters steal the manufacturer's intellectual property, and use the certification body marks so that the counterfeit water filters may appear to be certified to safety standards. As discussed above, we hope that our website, <http://www.filteritout.org>, helps to educate consumers about the dangers associated with counterfeits as they search for replacement filters.

b. What challenges exist in informing consumers of the risks associated with the purchase of counterfeit goods?

With more than 50 million refrigerators with water filters installed in US homes, the home appliance industry has calculated that at least 25 million replacement filters should be sold each year. It is a significant undertaking to inform this many consumers that a product they purchase on-line may be counterfeit and that the counterfeit product is dangerous to use.

As described above, AHAM has made its best effort to intercept consumers while they shop on-line so they can learn about the risks associated with counterfeit water filters for refrigerators. AHAM is also working with regulators to get the message out and to attempt to stop these counterfeit goods from reaching consumer hands. Nevertheless, most counterfeit water filters for refrigerators either are shipped directly to the consumer or are sent via small shipments that escape review at the ports, which makes it challenging to prevent consumers from receiving counterfeit goods.

2. What tools do you provide consumers to verify the authenticity of their goods?

AHAM's <http://filteritout.org/> website aims to educate consumers on the types of standards and testing that are used to certify replacement water filters. In addition, the website teaches consumers to look for blurred graphics and fonts, stickers or over-labeling, and suspicious online sellers. The website also provides an easy way to purchase genuine filters by directing the customer directly to the refrigerator brand

owner. While it is tough to distinguish a genuine filter from a counterfeit one, the differences in quality and performance could not be more critical as discussed above.

5. Have you ever conducted test buys through online e-commerce platforms? If so, can you provide us with information on the outcome of the test buys?

YES.

In May 2018, AHAM released the results of a comprehensive testing study of counterfeit water filters. To conduct this study, counterfeit replacement water filters for refrigerators were purchased from a variety of websites. AHAM's study of counterfeit refrigerator water filters revealed an overwhelming failure to remove harmful contaminants from water and even showed that some counterfeit filters add contaminants to the water, some of which are carcinogens. The study sought to determine if counterfeit filters met industry standards for health and safety related claims. Tests were conducted at three independent laboratories to assess counterfeit filters' efficacy at removing lead, cysts and other contaminants.

The full study appears as Addendum 1 and the following highlights the results from tests of counterfeit replacement water filters that were randomly selected from e-commerce platforms:

- Of the 32 filters tested for removal of lead, **100% failed** to meet applicable certification standards to two times the life cycle (200% of the rated or specified capacity), which is notable because most consumers do not replace their filters every six-months as required and, instead, are using their water filters beyond the end of their intended life cycle. Almost all of the counterfeits also failed before the end of the intended life cycle.
- No counterfeit filter removed live cysts to the applicable standard level, despite lowering the testing threshold to account for the small test sample. (Cysts are microorganisms that live in water, feed off dust, and can cause health issues particularly for vulnerable populations).
- During the third test, the counterfeit filters **added ten separate harmful compounds to clean water** over the total allowable concentration limits that are considered safe. Two of the added compounds are known carcinogens, three are suspected carcinogens, and the remaining five are known to be toxic to humans above the total allowable concentration limit. This was perhaps the most surprising, and concerning, result of all.

6. In your view, what are the challenges in assisting consumers from inadvertently purchasing counterfeits and better targeting distributors of counterfeit goods?

There are many challenges in assisting consumers from inadvertently purchasing counterfeits and identifying the sources of counterfeit products. There are billions of products that are counterfeited and sold every day. Searching for counterfeit water filters at the ports, or through express consignment, is challenging.

There are extremely limited resources available to educate consumers to reduce the demand of counterfeit product sold online, and limited resources to search for and seize counterfeit products as they enter the United States.

It is incredibly difficult for consumers (and even experts at U.S. Customs and Border Protection) to spot counterfeit replacement refrigerator filters. The use of fraudulently copied trademarks (both manufacturer and certification body), branding and misleading claims make the filters look legitimate; and while the water may look, smell or taste fine, human senses cannot always detect microbial and organic contaminants lurking in the water that can seriously harm a consumer's health and wellbeing. Moreover, counterfeiters are no longer selling counterfeits at significantly lower prices—they are selling at prices similar to or the same as legitimate replacement filters. Thus, consumers can no longer use prices that are “too good to be true” as a reliable method for ensuring they obtain a genuine product.

It is challenging to target distributors of counterfeit products on a number of levels. Counterfeiters are becoming more sophisticated in their methods. For example, we know that counterfeiters often times will ship blank replacement refrigerator water filter cartridges to the United States and separately ship the labels that are then later affixed to the counterfeit in the United States. Once a company or the government identifies a counterfeit seller, the counterfeiter changes its name or address—it is essentially becomes a game of “whack-a-mole.”

a. What concrete steps can be taken to address these challenges?

Seventeen refrigerator manufacturers have banded together to more efficiently educate consumers through the Filter It Out program we discuss in detail in the preceding questions. In addition to consumer education, AHAM meets regularly with government officials to share experiences and learn the most helpful ways to work with the government to fight back against counterfeiters.

Training at the ports to assist border agents identify and seize counterfeit products is key, but given the large numbers of small shipments and direct shipments, even these efforts may not be enough. Coordination with government is also important. If firms

can provide specific details to the government regarding the counterfeit distributors, the relevant government agencies can put that information together with other information in their possession to attempt to get to the root source via enforcement actions. All of these efforts, however, are already ongoing. And though they help, more is needed if we are to eradicate the market of counterfeit water filters for refrigerators and other counterfeit goods.

A priority should be given to products that pose a health and safety risk to consumers such as water filters do.

Conclusion

Chairman Hatch and Ranking Member Wyden, thank you for the opportunity to educate the Committee further on the widespread issue of counterfeit goods being sold on-line and entering the US through our ports of entry. AHAM would be pleased to provide follow up information regarding the Filter it Out campaign or to discuss the findings of our research in-depth.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'Sarah Faye Pierce', enclosed within a large, loopy oval scribble.

Sarah Faye Pierce
Director, Government Relations

ADDENDUM



THE DANGER OF COUNTERFEIT FILTERS

FAKE FILTERS, REAL PROBLEMS

**FILTER
IT OUT**

FAKE FILTERS, REAL PROBLEMS

Online sales of counterfeit refrigerator water filters are a rapidly growing problem. These counterfeit water filters are sold with misleading and fraudulent labeling, often including the illegal use of brand names, logos and product labels. Although marketers of these counterfeit filters say they meet recognized standards for effectiveness, in reality they are untested and fail to remove toxic substances from water as the label claims. Yet consumers — and even experts at U.S. Customs and Border Protection — have difficulty identifying counterfeit water filters.

Buying from a trusted source is the only way to ensure a water filter is legitimate and safe for your family and appliance.

Often, counterfeit filters make deceptive or faulty claims about fit and performance, but they lack the technologies and components for proper water filtration and appliance functionality. These filters may not fit properly, causing leaks and even introducing pollutants into the water your family drinks. More importantly, these false filters make performance claims about removing impurities from water when in fact, they fail to do so.

Counterfeit filters can:

- Fail to remove contaminants from your drinking water such as lead, mercury, herbicides, pesticides, asbestos and pharmaceuticals
- Add contaminants to your drinking water
- Leak and damage your refrigerator and kitchen
- Violate your refrigerator's warranty, costing you additional time and money for repairs

Three independent labs conducted studies to measure counterfeit water filters' performance. The results reveal the hidden danger of counterfeit water filters.

Manufacturers, including LG, Electrolux, Samsung, Whirlpool, GE Appliances and Sub-Zero provided the Association of Home Appliance Manufactures (AHAM) with known counterfeit filters that were purchased online through popular websites.

We tested for performance and the presence of contaminants

AHAM used independent testing to support its hypothesis that counterfeit filters were dangerous. The data has been presented to the U.S. Consumer Product Safety Commission and U.S. Customs and Border Protection (CBP), and is being used to raise awareness with consumers.

	Lead Testing	Cyst Testing	Extraction Testing
Requirements to meet U.S. standards	NSF/ANSI 53 Cause 7.4.3	NSF/ANSI 53 Cause 7.3.2	NSF/ANSI 42/53 Cause 4.1
Methodology	Compare filter performance against certified standard	Compare filter performance against certified standard	Identify any extracted organic or inorganic compounds <i>[Note: Testing has not been finalized; Results based on partial data]</i>
Testing Organization	NSF International & The International Association of Plumbing and Mechanical Officials (IAPMO)	NSF International	Water Quality Association (WQA)
	 		

COUNTERFEIT FILTERS DON'T GET THE JOB DONE

LEAD TEST

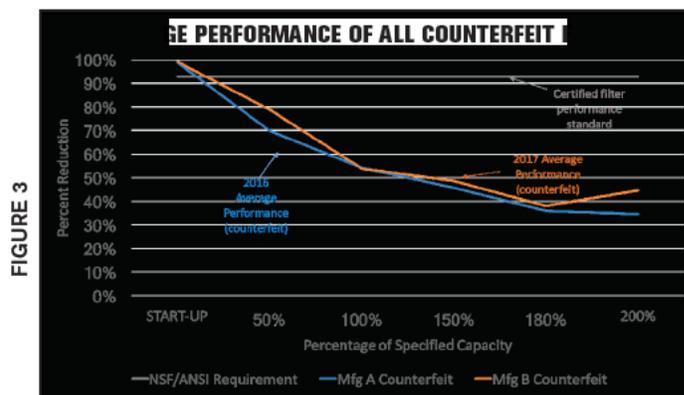
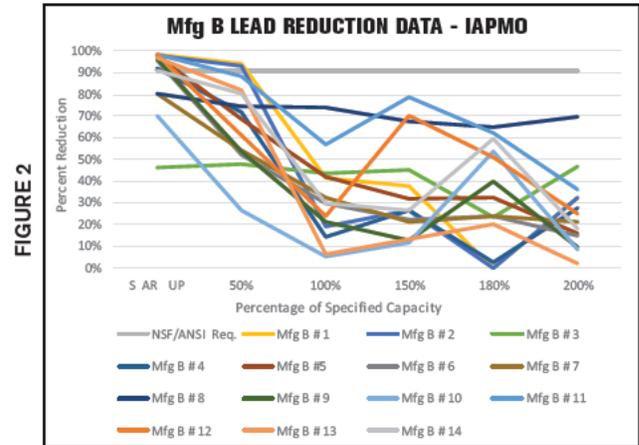
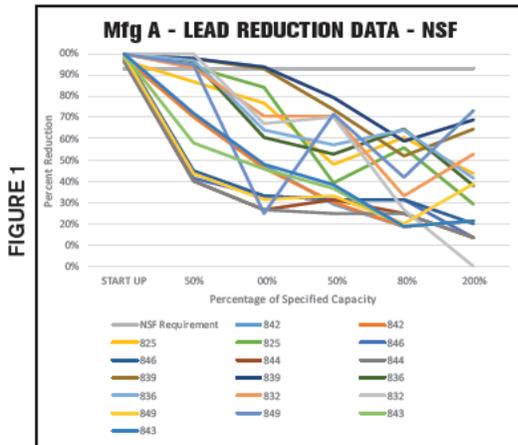
6.5 PH lead test pursuant to NSF/ANSI 53, clause 7.4.3.

Requirement:

NSF/ANSI standard requires lead reductions to less than 10 parts per billion (ppb).

Methodology:

- The filters were flushed with 1.5 gallons of water prior to testing. They were tested at the appliance manufacturer's specified flow rate on their representative cycle (for example 50 percent on, 50 percent off cycle).
- Samples were taken at 50, 100, 150, 180 and 200 percent of specified capacity, which is a requirement for genuine filters per NSF/ANSI 53.
- 100% of stated capacity is equal to 6 months.
- The filters were tested to 200 percent of the stated capacity since consumers rarely replace their filter in a timely manner, especially when they don't have an indicator on their refrigerator.
- A typical filter capacity range is from 350 to 700 gallons of water. The water that is run through the filters (influent) had an elevated level of lead in it, ranging from 140 to 189 ppb.



Findings:

- Of the 32 filters tested, 100% failed to meet NSF/ANSI standards to two times the life cycle (200% of the rated or specified capacity).
- Two counterfeit filters performed to the 100% mark before failing.
- Each of these filters are labeled with the promise of filtering harmful lead out of consumers' household water.
- Two counterfeit filters performed to the 50% mark before failing.
- Two studies, by two different labs, of two different manufacturers had the same result. (Figure 3)
- Every counterfeit filter tested failed to meet NSF/ANSI standards of less than 10 parts per billion for lead reduction.
- These filters were purchased from widely used websites. Each one — in addition to being counterfeit — made promises to consumers to remove lead from household water per NSF/ANSI 53. However, consumers who purchase these counterfeit filters are not receiving the health and safety benefits promised.

CYST TEST:

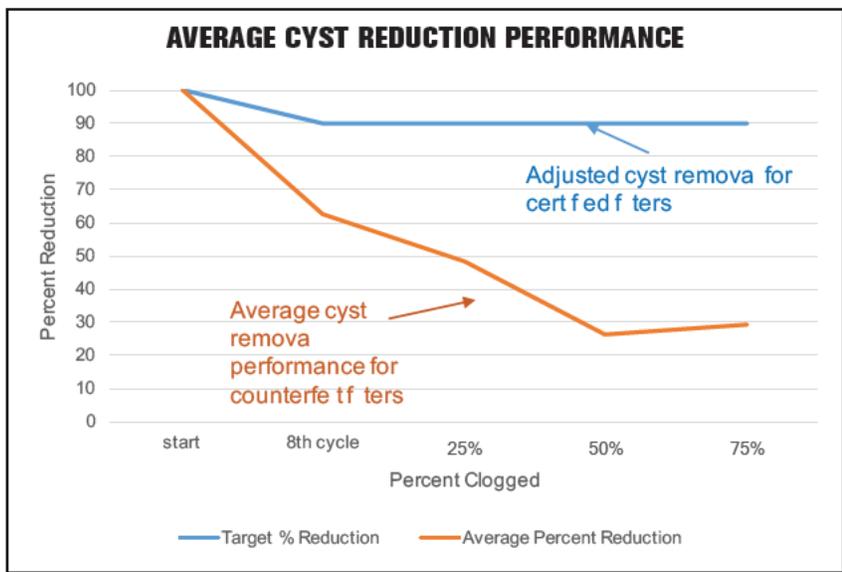
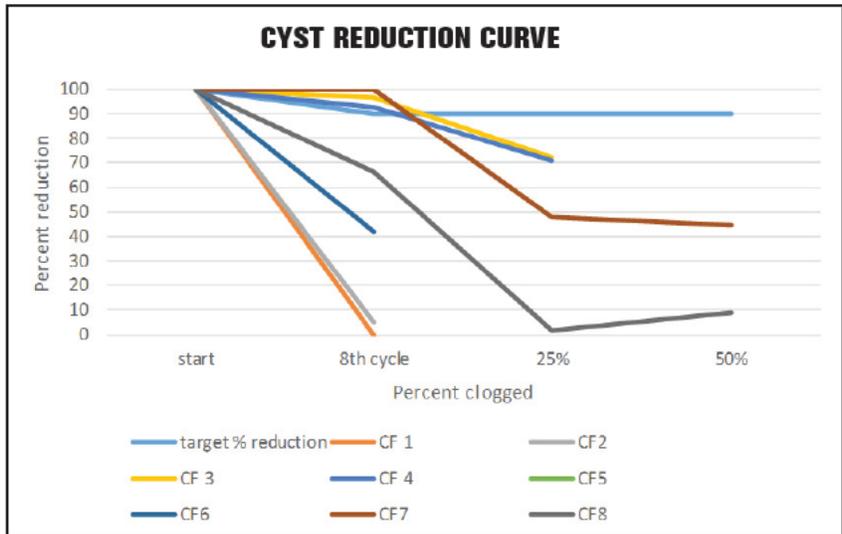
Cyst test pursuant to NSF/ANSI 53 clause 7.3.2

Requirement:

99.95 percent reduction in cysts, yet a lower evaluation point of 90 percent reduction was evaluated to provide a reasonable margin of error.

Methodology:

- Eight filters were tested.
- The test requirement of the system is to reduce the number of live cryptosporidium parvum oocysts from an influent challenge of at least 50,000 (5×10^4) oocysts per liter by at least 99.95 percent at every individual unit effluent sample point.
- The initial flow rate was tested at the start of the test, the 8th cycle, and at the 25 and 50 percent reductions in flowrate.
- Since the water had dust in addition to the oocysts, the filters are supposed to clog.
- Testing on one filter was stopped after the 8th cycle due to clogging; however, this filter had also already failed to remove 90 percent of the oocysts.



Findings:

- No counterfeit filters met standards for removing cysts through the 75% clogging rate.
- Three filters performed through the 8th cycle, but testing stopped after they became clogged.
- Every filter failed to remove live cysts by the 25% clogging point.
- CF5 was stopped at the 8th cycle because its companion filter had clogged. It is not known if it would have continued to perform or fail.
- No counterfeit filter removed live cysts to the standards of NSF/ANSI 53, despite lowering the testing threshold to 90% removal.
- The labeling from the original manufacturer that was fraudulently copied onto these counterfeits told consumers these filters were certified to remove cysts.
- Consumers who purchased these filters are likely not receiving the promised health and safety benefits.

EXTRACTION TEST:

Extraction test per NSF/ANSI 42/53 4.1 (evaluates materials in contact with drinking water)

Requirement:

Filters should not introduce contaminants into clean water.

Methodology:

The test assessed 159 different contaminants, including:

- Volatile Organic Compounds (91)
- Semi-Volatile Organics (PNA – 17)
- Other Semi-Volatile Organics (32)
- Regulated Metals (11)
- Nitrosamines (8)

- All filters were flushed with 3 gallons of exposure water according to the manufacturer's conditioning instructions.
- After conditioning, the outlets of the filters were closed so they could hold the exposure water for 24 hours. Filters were exposed for three separate 24-hour periods. Samples were collected after each period, with three samples for the final round.
- A portion of the exposure water was collected through a spare filter head at the same time as the filters were filled to use as the blank for comparison.

Findings:

- A total of 46 filters were tested. In total, 10 separate compounds were introduced into clean sample water by counterfeit filters that were over the total allowable concentration. Multiple sample groups were tested of each of the filter styles and 33-40% of sample water had contaminants.



Findings cont'd:

- At the start of the test of Manufacturer E, the water was free of contaminants. Fourteen counterfeit filters were sorted into three groups for testing, and of those, one of the groups showed contaminants — meaning the counterfeit filters actually added contaminants to the water.
- When 11 counterfeit filters from Manufacturer F were tested, they were sorted into three groups. One of these groups showed contaminants, meaning contaminants were added to the water.
- When 21 counterfeit filters from Manufacturer G were tested, in 10 different groups, four of the groups had contaminants. In one of these groups, the water had arsenic levels that exceeded the total allowable limit, which is required to be less than 5 ppb. The arsenic extraction exposure level was set under a settlement agreement pursuant to the California Safe Drinking Water and Toxic Enforcement Act of 1986.
- Fraudulent labeling assured consumers that these filters were certified not to leach contaminants into household water above acceptable levels. Unlike food grade materials used in certified filters that are tested and approved, these counterfeits likely used cheaper, non-food grade materials, which are known to leach these kinds of chemicals.



COUNTERFEITS POSE A PUBLIC HEALTH CONCERN

Water may look, smell or taste fine, but human senses cannot always detect microbial and organic contaminants lurking in the water that can seriously harm our health and wellbeing.

Of the randomly selected and tested counterfeit filters:

- Counterfeit filters failed to remove harmful lead from household water.
- Counterfeit filters failed to remove live cysts from household water.
- Some counterfeit filters introduced harmful compounds into household water.

[Note: based on partial data]

ONLY BUY FILTERS FROM TRUSTED SOURCES



With so much uncertainty about the quality of water filters available online, only choose one that is trusted and sold by a certified genuine source that stands behind its products.

For more information and a full list of trusted genuine sources, visit FilterItOut.org.

June 29, 2018

The Honorable Orrin Hatch
The Honorable Ron Wyden
U.S. Senate Committee on Finance
Washington, DC 20510

Dear Chairman Hatch and Ranking Member Wyden:

On behalf of the member companies of the American Apparel & Footwear Association (AAFA), we appreciate this opportunity to provide answers to the United States Senate Finance Committee as part of its ongoing work on the proliferation of counterfeit goods sold through e-commerce websites.

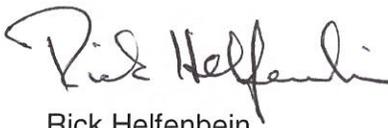
AAFA is the national trade association representing apparel, footwear, travel goods, and other sewn products companies, and their suppliers, which compete in the global market. Representing more than 1,000 world famous name brands, AAFA is the trusted public policy and political voice of the apparel and footwear industry, its management and shareholders, its nearly four million U.S. workers, and its contribution of \$384 billion in annual U.S. retail sales.

AAFA's Brand Protection Council (BPC) focuses its efforts on the global war against counterfeit apparel, footwear, accessories, and other supplier products. While there remains a focus on the physical marketplaces across the globe facilitating the sale of counterfeit goods, much of the focus of our Council has shifted to e-commerce.

We believe that conversing and collaborating on the issues that arise from the sale of counterfeit goods on e-commerce platforms is key—not just for those companies and suppliers in our own industry, but across all sectors. We applaud the work of the Senate Finance Committee on this important issue and look forward to continuing this dialogue to protect American ingenuity and competitiveness abroad.

Please contact [REDACTED] if you have any additional questions at [REDACTED]

Sincerely,



Rick Helfenbein
President
Attachment

1. Do you warn consumers about the risk of counterfeits of your products, their availability, and/or how to avoid accidentally purchasing them, and if so, how?

Many of our member brands have a dedicated, educational page on their corporate websites regarding counterfeit goods. This page typically provides general information on the issue of counterfeiting across the industry, what the brand does to fight this problem, as well as tips for customers to ensure they are purchasing genuine products from the brand.

a. Do you believe that your consumers understand the significance of purchasing counterfeit versions of the goods?

Some of our member brands believe that consumers generally understand the significance of purchasing counterfeits, while others do not think that many consumers fully understand the implications of their actions.

b. What challenges exist in informing consumers of the risks associated with the purchase of counterfeit goods?

Often, consumers may not even realize they are purchasing counterfeit apparel or footwear—for example, when purchasing from reputable retailers or e-tailers. This differs from traditional examples of certain consumers intentionally seeking out counterfeits. Moreover, member brands believe that consumers don't want to hear from big business and most consumers feel the burden lies on business to eliminate counterfeit goods. Ultimately, the demand drives the manufacturing of counterfeit product.

2. What tools do you provide consumers to verify the authenticity of their goods?

Our member brands supply consumers with information on the genuine locations where they can purchase authentic goods. Some brands also have a tip-line to answer any questions customers may have about a location selling their product.

3. Please describe how you coordinate with e-commerce platforms to curtail counterfeiters.

Some of our member brands work directly with e-commerce platforms to curtail counterfeiters and utilize third-party services to coordinate takedown notices. AAFA also plays an important role in coordinating with e-commerce platforms. We regularly communicate with major e-commerce platforms to bring to their attention the common intellectual property issues our members are having. In this way, not only are we able to act as a unified voice of the industry for our members, but we are also able to benchmark the progress made by e-commerce platforms as they address the collective concerns of our members.

4. Once you suspect that counterfeit goods are being distributed, by either an importer or by a distributor or distribution network within the U.S., what types of actions, including initiation of litigation, do you pursue? Please provide examples.

Members generally investigate all large-scale counterfeit distribution networks and either turn their cases over to law enforcement or pursue them in civil court if it makes sense strategically. Other actions taken by member brands include: investigations to gain information on targets, test purchases to gather evidence, demand letters, coordinating with law enforcement for raids/seizures, alerting Customs offices, initiating formal litigation for injunctive relief, and recovery of damages.

5. Do you participate in brand registration and verification programs provided by e-commerce platforms or any other intermediary? What features of such programs have been useful in identifying and removing counterfeit products?

Some of our member brands do participate in brand registration and verification programs provided by e-commerce platforms. Others do not participate because of the severe terms

and conditions to enroll in these programs. However, members are hopeful that these restrictions will be eased and, if they are, many will reconsider participating in such programs in the future.

6. What other services, tools, protections, and assistance do you provide?

Our members invest a significant amount of their resources in third-party web searches and listening tools. Additionally, brands register their marks with Customs, which helps in determining if product is genuine or counterfeit.

7. Have you ever conducted test buys through online e-commerce platforms? If so, can you provide us with information on the outcome of the test buys?

Some of our member brands regularly conduct test buys. The test purchases are utilized in cases that brands are continually building because they serve as the strongest possible evidence of infringement. Additional information on the infringer(s) may also be revealed via the order receipts and shipping documents. One brand notes that in more than ten years of making regular test purchases, not one test purchase has ever been seized and it has received all counterfeit purchases it has made to use as evidence.

Another brand notes, however, that it does not conduct test buys online because it is difficult to tell the number of units and whether a large-scale action is required. Additionally, there are manpower and cost considerations, including whether test purchases are the best use of a brand's resources. If there is an indication that the units involved are significant enough, a test purchase will be made.

In the past, AAFA has also conducted test purchases to validate our monitoring of e-commerce platforms. We bought various items and sent our purchases to members to verify their authenticity. This monitoring was to check sites for evidence of counterfeits on fifteen sample brands. We conducted test purchases for two years.

8. What do you do to remove counterfeits from the stream of commerce?

Our member brands work with Customs Offices to register their intellectual property so that counterfeit products being distributed across borders can be seized and destroyed. They also work with investigators and legal counsel around the world to locate, seize and destroy counterfeit goods that are already in the market (such as in brick-and-mortar retailers). Additionally, they might work with a dedicated team of enforcement specialists that continuously police the Internet and online marketplaces to stop the sale of counterfeits.

One brand also notes that, assuming it can locate the source of the counterfeit products, it will consider sending a cease & desist letter or take another form of legal action.

9. In your view, what are the challenges in assisting consumers from inadvertently purchasing counterfeits and better targeting distributors of counterfeit goods?

One of the main challenges is that trusted online retailers often sell counterfeits, but consumers don't even know the issue exists or that they should be concerned with that risk. The problem is exasperated by the safe-harbor that protects the online retailers, as there is no incentive for transparency or to fix the issue if there is no risk of liability and the retailers are benefiting from all sales (whether counterfeit or not).

a. What concrete steps can be taken to address these challenges?

Member brands believe that if online retailers face more risk of liability for the sale of counterfeits on their platforms, they would take more affirmative steps to prevent the sales to begin with. Additionally, members note that there should be more control at the borders as most of these counterfeits are not made in the USA.

10. Do you engage with U.S. federal and/or local authorities to remove counterfeits from the stream of commerce and to curtail their distribution in the United States? If so, what authorities and types of activities and coordination efforts have proven successful and are there gaps in such engagement.

Members work with federal agencies, specifically Customs, at ports of entry to act ex-officio on counterfeits entering the country. They also work with local law enforcement to effectuate raids and seizures. Local agencies are usually best equipped to respond efficiently and effectively to these types of cases. Southern California has set the standard for this type of intellectual property enforcement work, especially the Los Angeles Police Department (LAPD) and Los Angeles county.

Each year, the United States Trade Representative (USTR) publishes its Notorious Markets List, identifying notable online marketplaces that reportedly engage in and facilitate substantial trademark counterfeiting and copyright piracy. AAFA submits comments to the USTR on behalf of our member brands. Member brands have been able to identify and share common challenges with certain e-commerce platforms. We have found that members might not want to single out a platform on their own, in an attempt to maintain a good working relationship with the platform, and thus look to AAFA to give voice to their concerns. We have found that after being listed, e-commerce platforms are often more eager to engage in dialogue and remediation with us.

a. Have you initiated civil litigation for such activity? What are the barriers to such action?

Our members have initiated civil litigation. One of the biggest barriers is the cost of litigation and timing, so the focus is on the most strategic cases that provide significant value, such as recovery of damages or important precedential judgment.

11. Do you engage with foreign governments to curtail the proliferation of counterfeits? If so, what types of activities and coordination efforts have proven successful? What has not?

Our members engage with foreign governments to curtail the proliferation of counterfeits because their issues are more prevalent outside of the United States. Many of our brands train global law enforcement in their most valuable countries where they operate, and, in turn, foreign governments provide adequate support with raid actions when protectionism and/or corruption isn't in place. This usually depends on the jurisdiction and the size of the business involved. Members note that in some countries they register their brands with Customs and/or seek their assistance in conducting raids.

12. If you become aware of a counterfeit, either distributed to a consumer or otherwise within your control or stewardship, what, if any, actions can you take to prevent the sale of the good?

Member brands note that they will send a demand letter seeking surrender of the counterfeit. If an individual or entity is uncooperative, then the brand will seek more formal legal action.



June 29, 2018

Hon. Orrin G. Hatch, Chairman
Hon. Ron Wyden, Ranking Member
Senate Committee on Finance
Washington, DC 20510

Re: CTA Information To Help Stem The Proliferation of Counterfeit Goods

The Consumer Technology Association (CTA)¹ appreciates the invitation extended in the May 30, 2018 letter from the Chairman and the Ranking Member to share experience, information, and suggestions to combat counterfeit imports. This issue has long been an active concern of CTA. Indeed, in CTA's October 16, 2015 comments to the Intellectual Property Enforcement Coordinator (IPEC) on its Joint Strategic Plan, CTA addressed counterfeits first, and suggested that "enhanced measures against counterfeit products be a priority" for IPEC as well.

CTA represents a broad range of stakeholders including manufacturers, resellers, physical retailers and online marketplace platform companies, all ranging from small start-ups to leading global brands. Combating online sales of counterfeit goods is a shared priority due not only to the economic impact, but also because of the potential safety hazards associated with counterfeits. For example, Consumer Product Safety Commission has initiated numerous recalls of counterfeit batteries prone to cause over-heating.² More, counterfeit goods often lack warnings and instructions from the manufacturer which are necessary to ensure the product is used and operated safely.

In our work with our members and with IPEC, here are tools and approaches we have identified to reduce the online sale of counterfeit goods:

¹ CTA is the trade association representing the \$292 billion U.S. consumer technology industry, which supports more than 15 million U.S. jobs. CTA also owns and produces CES[®] – the world's gathering place for all those who thrive on the business of consumer technologies.

² See, e.g. *Sportsman's Warehouse Recalls Flashlights; Counterfeit Batteries Can Overheat, Posing a Fire Hazard* <https://www.cpsc.gov/Recalls/2007/sportsmans-warehouse-recalls-flashlights-counterfeit-batteries-can-overheat-posing-a>

- **Access to government data on counterfeiting.** A prime CTA recommendation has been that, in order to warn consumers, businesses should have ready access to warnings compiled by Customs and other authorities. As CTA advised IPEC, “government customs and enforcement officials must share information and analysis with the makers and sellers of legitimate products that are counterfeited, and vice versa.”³
- **Consumer, dealer, and law enforcement education:** CTA manufacturer members use a range of strategies to inform to consumers, dealers, repair professions and law enforcement about counterfeiting challenges. These include training sessions for customs and border officials, social media outreach, and the production of instructional videos.
- **Defensive product identification, authentication, and tracking.** New technologies such as blockchain create opportunities for protecting legitimate supply chains. Tools are available for tracking and identification, component analysis, and the mutual sharing of information with customs and enforcement officials, to avoid non-authentic components from infiltrating final product supply chains, and to avoid counterfeits invading retail streams of commerce.⁴
- **Worldwide enforcement as to goods in transit.** According to the French Association Against Counterfeiting, a 2009 European court decision has meant that “most customs regulations do not apply to goods, counterfeit or otherwise, in transit. . . . Since this case, there has been a 65 percent decrease in seizures of infringing goods as well as an increase of counterfeiting trade in and out of the European market (European Commission, 2014).”⁵
- **Consumer education and officials’ training.** According to the National Intellectual Property Rights Coordination Center, consumer education and awareness on intellectual property issues should focus more on counterfeit goods, and their potential for social and economic damage. Such training should include consumer awareness, as well as appreciation of harm. Similarly officials need to be trained to identify and take action, and consumer and official awareness programs need to be coordinated.⁶
- **Accurate CPSC product attribution:** Counterfeits are sometimes mistakenly attributed to the legitimate manufacturer when listed in the CPSC’s public database www.saferproducts.gov. Unfortunately, CPSC sometimes publishes consumer complaints even when product identification (i.e. counterfeit or legitimate) is highly questionable. Even when the legitimate

³ See, e.g., the compendium published by Jeremy M. Wilson, director of Michigan State University’s Center for Anti-Counterfeiting and Product Protection (“Wilson”), “Brand Protection 2020 – Perspectives on the Issues Shaping the Global Risk and Response to Product Counterfeiting” (hereinafter, “A-CAPP Symposium”), September, 2015, at 3.

⁴ *Id.*, e.g. at 4, 26.

⁵ *Id.* at 14 – 15, submission of Christian Peugeot, President, Union des Fabricants.

⁶ *Id.* at 16 – 17, 25 – 26.

manufacturer protests and asks that the report of counterfeit-caused harm be excluded, CPSC generally moves forward with publication if the manufacturer cannot definitively show that the counterfeit is another manufacturer's product. More, the CPSC sometimes publishes a report even where the evidence (e.g. the counterfeit itself) isn't preserved for examination.

- **Litigation against counterfeit sellers.** eCommerce requires new partnership strategies among brands, marketplace providers, and authorities. In a recent example,⁷ a product designer received notices from border agents, and notified the eCommerce marketplace provider, Amazon. The designer, Vera Bradley, sued the seller for infringement, whereas the marketplace provider, Amazon, sued the seller for breach of contract and impounded the goods still in warehouse. Similarly, Alibaba has instigated litigation against counterfeiters in connection with multiple brands on the grounds of breach of contract and harm to reputation. In one particularly noteworthy case in China, Alibaba successfully established that counterfeit sellers can be liable to the platform whose services they misuse in connection with the sale of counterfeit goods.⁸ However, as was noted at the Committee hearing referenced in the May 30 letter, there are presently restrictions on the amount of information that authorities can share with brand owners and e-Commerce companies.⁹ Congress and enforcement authorities should ensure that brands owners and e-Commerce companies have access to information to act quickly against counterfeiters.¹⁰
- **Brand registry and best practices.** Establishing best practices, such as a brand registry initiative, takes testing and balancing against drawbacks, such as additional burdens for private label sellers.¹¹ It also requires continuous private and public sector outreach.¹² More, it is important that online marketplaces providing third party sellers a platform for commerce also facilitate prompt and effective removal of products which enable unsafe use or abuse. In 2017, Amazon launched a Brand Registry service that provides rights holders with text- and

⁷ Monica Nickelsburg, *Amazon files lawsuits over counterfeit Vera Bradley purses and Otterbox phone cases*, Geekwire, March 8, 2018, <https://www.geekwire.com/2018/amazon-files-lawsuits-counterfeit-vera-bradley-purses-otterbox-phone-cases/>.

⁸ [Alexis Kramer](#), *Alibaba Wins Suit Over Allegedly Fake Cat Food*, July 21, 2017, Bloomberg Law, <https://www.bna.com/alibaba-wins-suit-n73014462276/>.

⁹ Statement of Kimberly Gianopoulos, Director, International Affairs and Trade, March 6, 2018, at 9.

¹⁰ Statement of Kimberly Gianopoulos, Director, International Affairs and Trade, March 6, 2018, at 9.

¹¹ *See, e.g.*, Kym Ellis, *JungleScout, Navigating the New Amazon Brand Registry*, July 11, 2017, <https://www.junglescout.com/blog/new-amazon-brand-registry/>.

¹² *See, e.g.*, Progress Report, <https://brandservices.amazon.com/progressreport>

image-based search capabilities and automated protections that use machine learning to predict and prevent future defects. The 60,000 brands already enrolled in this service are finding and reporting 99% fewer suspected infringements than before its launch.¹³

- **Cooperation with foreign governments.** The USTR 2017 Out-of Cycle Review of Notorious Markets¹⁴ noted as “positive developments” since the 2016 review that several foreign governments and registrars – UK, Netherlands, Spain, the EU – had taken positive steps as to online markets, and others – Argentina, Thailand – with respect to physical markets. This opens the door for enhanced private sector partnerships. Countries such as India have also set up registries and made tools available.¹⁵

CTA appreciates this opportunity to provide its views on this important issue.

Respectfully submitted,



Michael D. Petricone
Senior Vice President
Government Affairs

¹³ Amazon Brand Registry Progress Report <https://brandservices.amazon.com/progressreport>

¹⁴ USTR, Executive Office of the President, at 4 – 8, <https://ustr.gov/sites/default/files/files/Press/Reports/2017%20Notorious%20Markets%20List%201.11.18.pdf> .

¹⁵ Anurag, *10 Myths About India on Counterfeiting*, TradeVigil, Sept. 13, 2017, <https://www.-tradevigil.com/10-myths-india-counterfeiting/>.



June 29, 2018

The Honorable Orrin G. Hatch
Chairman
Committee on Finance
United States Senate
219 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Ron Wyden
Ranking Member
Committee on Finance
United States Senate
219 Dirksen Senate Office Building
Washington, DC 20510

Re: U.S. Senate Finance Committee - Counterfeit Investigations Letter

Dear Chairman Hatch and Ranking Member Wyden:

The Entertainment Software Association (“ESA”) welcomes the opportunity to participate in the Senate Finance Committee’s collection of information on the proliferation of counterfeit goods sold through e-commerce websites. Our response to the Committee’s letter will address the industry and its copyright and trademark concerns as well as our members’ experiences with e-commerce platforms as noted in the Committee’s questions.

ESA is the U.S. association exclusively dedicated to serving the business and public affairs interests of companies that publish computer and interactive games for video game consoles, handheld devices, personal computers, and the internet. It represents nearly all of the major video game publishers and gaming platform providers in the U.S. In 2017, the U.S. video game industry generated more than \$36 billion in overall revenue, with consumers spending \$29.1 billion on software, downloadable content and subscriptions, \$4.7 billion on game hardware, and \$2.2 billion on accessories. The industry added more than \$11.7 billion in value to U.S. GDP in 2017 and directly employed more than 65,000 people in the United States.

The video game industry is consumer-focused and at the forefront of both innovation and job creation. In this industry, innovation is buoyed by the strong protection and effective enforcement of intellectual property rights, which ensures that gamers have access to authentic games, services and hardware accessories. With this purpose in mind, the video game industry, individually and also through ESA, has fostered and maintained constructive relationships with U.S. law and border enforcement, e-commerce platforms and online intermediaries in several countries as a key part of its global content protection program. On behalf of its members, ESA conducts nationwide trainings and education for law and border enforcement personnel on the protection of video game software, hardware and accessories and, to date, our program has delivered free trainings to thousands of enforcement officers in the United States and around the world. ESA and its members also provide officials from U.S. Customs and Border Protection (“CBP”) with the support and tools required to accurately confirm the illegality of suspected infringing imports or devices designed to bypass technological measures put in place to protect

video game consoles. Given our positive history with CBP, ESA supported the Trade Facilitation and Trade Enforcement Act of 2015 (“TFTEA”), which called for heightened cooperation between U.S. government agencies as well as between the U.S. government and industry on intellectual property rights enforcement. Section 303 of TFTEA dealt specifically with the seizure of circumvention devices, including a directive that CBP notify affected companies not later than thirty days after seizure of information regarding the merchandise seized. Unfortunately, at least one of our member companies reports that communication between CBP and rights holders about seized merchandise at the border is not occurring despite the statutory mandate. In fact, CBP still has not promulgated regulations implementing Section 303. Although the focus of the Committee’s letter is not on Section 303, we encourage CBP to work with rights holders and the Committee to facilitate the intention of TFTEA in order to improve intellectual property rights enforcement.

Like many industries, the video game sector has to contend with copyright infringement of software, trademark counterfeiting of hardware, accessories and merchandise and, additionally, issues of security such as the hacking of games and game networks and account reselling. The most counterfeited items include accessories such as video game controllers that traditionally pair with game consoles and “plug-n-play”¹ devices like consoles that appear to be genuine. Although circumvention devices are not necessarily counterfeit items, they pose significant challenges to video game companies, especially console and accessories manufacturers, because these devices facilitate the mass infringement of intellectual property rights and other unauthorized uses of video game consoles.

To assist the Committee in understanding the nature of the problem, a brief description of what these devices are and do follows. A circumvention method or device—a computer program, microchip or electronic device—bypasses the technological protection measures employed by rights holders to protect legitimate software such as game discs or hardware such as a game console. Types of circumvention devices include modification chips and software modification computer programs. A modification chip is a semiconductor chip that contains a program that circumvents the technical protection measures of a console system. When a “mod chip” is affixed to the circuit board of a console, it allows the systems to run illegitimate copies of games. Software modification (or “soft modding”) uses software to modify the normal operation of game console hardware in a way that can unlock or disable security features used to prevent the play of illegitimate games. Once unlocked, users can circumvent copy protection on game discs and within a game console without the aid of a mod chip. Game copying devices (or “game copiers”) are designed to copy, in the greatest detail, the features (*i.e.*, shape, size, thickness, connections, sockets and pin configuration) of a game card, which fits into certain handheld consoles; they allow users to copy, download and play unlimited illegal copies of games.

Members’ wireless controllers designed to go with video game consoles, such as Microsoft’s Xbox or Sony PlayStation, are also targeted by sophisticated counterfeiters, who produce copies so close to the original that it can be difficult to tell legitimate from illegitimate

¹ A recent and troubling trend in the video game industry is the production of legacy game consoles that come pre-loaded with popular games (often referred to as “plug-and-play devices”). High nostalgia value and low manufacturing costs make certain popular consoles prime targets for scalping and counterfeiting that can result in plug-and-play consoles.

products. ESA produces a training manual for law enforcement that details some of the common elements of counterfeit controllers, such as the poor reproduction of trademarks, the lack of labels or labels with incorrect information. ESA members also encounter user-generated counterfeits/unlicensed merchandise, such as print-to-own t-shirts or other print-to-sell merchandise. Some prominent social media websites have become havens for counterfeits such as these but if they have no real search functionality, it is difficult to perform scanning of the platform by bots for unauthorized merchandise.

Responses to Survey Questions

1. Do you warn consumers about the risk of counterfeits of your products, their availability, and/or how to avoid accidentally purchasing them, and if so, how?

Although ESA does not interface with consumers specifically on the issue of counterfeits², it does run a content protection training program designed to provide law enforcement and border officials with the tools and support to combat mass infringement of entertainment software and hardware accessories. ESA provides law and border enforcement personnel with the support that they may require to confirm the illegality of any suspect software and hardware accessories as well as identify the specific rights being infringed as well as assist in the investigation and prosecution of the responsible parties.

Counterfeiting in the video game industry affects mainly hardware accessories like controllers, circumvention devices and merchandise, such as apparel. The highly specific nature of the issue, which can affect different ESA members differently, dictates how video game companies work with consumers on the issue. For example, one ESA member company addresses this concern by encouraging consumers to buy merchandise from legitimate vendors. This member believes that consumers understand the risk of purchasing counterfeit goods because they receive lots of inquiries from consumers who on their own identify merchandise that may infringe the company's intellectual property and alert the company to the problem. For members with counterfeit hardware accessory issues, they confront a wide range of unlicensed products on the market, and it can be extremely difficult to tell the difference between legitimate and illegitimate goods. If a product is not infringing trade dress or technology, a company may not focus on it.

2. What tools do you provide consumers to verify the authenticity of their goods?

As noted above, ESA provides trainings to U.S. law and border enforcement personnel on how to distinguish counterfeit game console controllers from the legitimate product, for game discs and cartridges, and SD cards, including through identifying seals and holograms. For some ESA members, because of the advancement of technology making burnable video game discs no longer common, authentication of software is not necessary. For those who manufacture hardware accessories, copy-resistant logos and seals on products assist in verifying authenticity, while others use serial numbers for authentication. One member company provides for direct and expert verification of its products. Its consumer service call center fields inquiries from

² ESA does provide a list of online marketplaces from where consumers may purchase legitimate copies of games: <http://www.theesa.com/purchasing-legitimate-digital-copies-games/>.

purchasers who may need assistance with the verification and authentication of suspected counterfeit and infringing goods. It also holds multiple public email accounts to which consumers may send inquiries surround the authenticity of goods, infringement as well as security of software and hardware.

3. Please describe how you coordinate with e-commerce platforms to curtail counterfeiters.

ESA and its members utilize brand protection partners as well as scanning and enforcement vendors to send takedown notices to websites and internet service providers (“ISPs”). ESA, member companies and vendors also participate in “trusted-notifier” programs offered by e-commerce platforms that allow rights holders to send a high volume of notices of infringing content or products to the platform for removal. A well-known example is eBay’s Verified Rights Owner (“VeRO”) Program. Member companies also have independent relationships with online marketplaces and maintain an ongoing dialogue to identify infringing listings and to provide background on emerging threats. One company notes that coordination between rights holders and platforms is extremely important to address infringement occurring on e-commerce platforms and commends platforms for engaging with rights holders to address issues of counterfeiting however, they may be some room for improvement.

ESA also participates in non-public and/or informal trusted-notifier programs with online intermediaries. Our relationships with e-commerce platforms have been largely positive over the past several years. We monitor most of the major online platforms for infringement and have found that the larger platforms generally remove unauthorized listings promptly. When new forms of infringement are identified, the major platforms have generally been responsive and collaborative in their approach to working with our association.

4. Once you suspect that counterfeit goods are being distributed, by either an importer or by a distributor or distribution network within the U.S., what types of actions, including the initiation of litigation, do you pursue?

ESA, on its own and through its vendors, constantly monitors the internet to detect and identify instances of online infringement its member company video games and hardware. The data gathered is used to serve takedown requests on ISPs, to pursue further investigations or to prepare the information either for possible litigation or for referral to law enforcement.

ESA members also send takedown notices to sites listing counterfeit items. Occasionally, they will send cease-and-desist letters to sellers and manufacturers of counterfeit items. While some may choose to pursue litigation, others may not do so given the high costs of litigation and limited recovery available from some of these sellers. Some companies can also perform a “technological lockout” of counterfeit controllers, especially when they detect that thousands of controllers with the same unique serial number are in circulation at the same time. These companies work with retailers to ensure that counterfeit/infringing products are not sold in legitimate stores. However, distribution under the radar, such as to individual buyers in small packages, can be difficult to detect.

5. Do you participate in brand registration and verification programs provided by e-commerce platforms or any other intermediary?

ESA participates in registration programs, such as eBay's VeRO program, as do some ESA members and their vendors. As noted earlier, ESA also participates in non-public as well as informal trusted-notifier programs with online intermediaries. In addition to the VeRO program, some ESA members also participate in Amazon's Brand Registry and Alibaba's Intellectual Property Protection ("IPP") program. They note that the benefits of these programs include a more streamlined process for identifying and removing counterfeit products, access to key points of contact at platforms for better support, and the enhanced capability to collect enforcement metrics to guide resource allocation.

6. What other services, tools, protections, and assistance do you provide?

ESA and its members rely on training and education to content and brand protection partners and vendors as well as to U.S. customs and border patrol personnel.

7. Have you ever conducted test buys through online e-commerce platforms? If so, can you provide us with information on the outcome of the test buys?

ESA members periodically conduct test buys to determine the authenticity of products. If a product turns out to be counterfeit, the members initiate a takedown through a removal notice to the relevant website or ISP. Some member companies find utility in making test buys to evaluate new counterfeit products that were not previously known or to identify targets or potential distribution networks. At least one member company finds it to be very difficult to track unauthorized sellers through test buys because much of the platform account information is false or hidden behind anonymous accounts. In addition, infringers employ shipping tactics to avoid detection such as shipping products via third party shipping agencies that are delivered via fulfillment centers to avoid tracing back to their distribution networks. One member company has found that European marketplaces have become more active for new types of counterfeit controllers than the United States. Another growing concern is the legitimate appearance of illegitimate products in listings on platforms. At least one member company has noted that on Amazon, for example, products of a similar type sold by different sellers are typically combined into one listing. This gives the buyer several purchasing options, which all appear to be legitimate.

8. What do you do to remove counterfeits from the stream of commerce?

As noted above, ESA operates a monitoring program which searches the internet to detect instances of online infringement and counterfeiting of member company video games and hardware. ESA uses the information from its monitoring program to serve takedown requests on ISPs, pursue investigations into specific matters or possibly make referrals to law enforcement. Some members monitor e-commerce platforms more regularly than others do and send takedown notices, participate directly in the training of border and law enforcement officials, education, trade policy processes (such as Special 301 and Notorious Markets administered by the Office of the U.S. Trade Representative). They also may work with payment processors to terminate

merchant accounts that are involved in the sale of counterfeit goods. Others rely on ESA to undertake any enforcement necessary. For one member for whom counterfeit controllers is a problem, products seized at the border by CBP are typically destroyed. Also, while in the U.S. counterfeit controllers tend to be unpackaged, disassembled units not ready for retail sale, in Latin America yet-to-be-assembled counterfeit controllers are paired with gray-market consoles and packaged for sale in the specific country market.

9. In your view, what are the challenges in assisting consumers from inadvertently purchasing counterfeits and better targeting distributors of counterfeit goods?

In some circumstances, ESA members feel that consumers are aware of what they are purchasing and that the item is unlicensed or otherwise unauthorized by the video game publisher. These tend to be print-to-own products where fans want to make apparel with logos or symbols of their favorite games or game characters. Sometimes consumers cannot tell that unlicensed merchandise is unauthorized and neither can the owner or licensor of the intellectual property. Others believe it is extremely difficult for consumers to differentiate between a genuine and counterfeit game controller until they find out it does not work as well with a console or at all. In the cases of print-to-own merchandise, consumers likely understand that they are purchasing inauthentic or unlicensed products. In the case of counterfeit controllers that bear a close resemblance to the legitimate versions, it can be much more difficult to tell for the consumer. However, there are indicia that can assist consumers in distinguishing between legitimate and illegitimate products such as: the low price of the product in the listing, missing casing or packaging or missing logos. At least one of our member companies reports that despite efforts to scan and remove counterfeit products from e-commerce platforms through cease-and-desist letters, litigation or law enforcement raids, the volume and availability of counterfeit goods, produced primarily in Asia, on online marketplaces poses a continuing challenge. Other platforms including social media networks provide unauthorized sellers with the ability to better target consumers through aggressive advertising and also sales of counterfeits.

10. Do you engage with U.S. federal and/or local authorities to remove counterfeits from the stream of commerce and to curtail their distribution in the United States? If so, what authorities and types of activities and coordination efforts have proven successful, and are there gaps in such engagement? Have you initiated civil litigation for such activity? Have federal or local authorities brought prosecution for such activity concerning your intellectual property?

ESA occasionally engages with federal law enforcement to address the issue of counterfeit products like the Department of Homeland Security's Office of Homeland Security Investigations ("HSI") and U.S. Immigration and Customs Enforcement ("ICE"). In addition, ESA members have supported and coordinated with U.S. law enforcement on counterfeit matters brought to their attention. One example might be authenticating suspected counterfeit merchandise as illegitimate. One member reports that its law enforcement outreach has focused on the hacking of consoles and on the illegal distribution of hacking software tools. Although more technologically-updated counterfeits appear first in Europe, the general problem is more prevalent in Latin America. On the issue of circumvention devices, one member has worked with federal and local law enforcement on the prosecution of counterfeiters; however, those cases are

rare. A major obstacle to enforcement is the lack of communication between rights holders and CBP, especially when CBP still does not send the required seizure notices as mandated by TFTEA. The best course of action is protecting a company's brands at the outset and developing and nurturing relationships with online marketplaces.

11. Do you engage with foreign governments to curtail the proliferation of counterfeits?

ESA engages with foreign governments through trainings and education. For example, ESA works with the U.S. Patent and Trademark Office's Global Intellectual Property Academy to educate foreign officials, including judges and prosecutors, on the video game industry, its enforcement challenges in a particular country and what can be done to improve laws and regulations governing intellectual property rights enforcement. ESA also supports constructive dialogue with foreign governments through its participation in U.S. trade policy on intellectual property, such as the Special 301 process and report and the related Notorious Markets List. Some ESA members have supported foreign law enforcement efforts in their individual capacities in regions of the world where infringement is most prevalent, such as in Latin America, China and Europe. In particular, some members have encouraged the U.S. Government to work closely with China to stem the tide of counterfeits and other infringing items, such as controllers and circumvention devices that are manufactured in and shipped from China.

12. If you become aware of a counterfeit, either distributed to a consumer or otherwise within your control or stewardship, what, if any, actions can you take to prevent the sale of the good?

As described above, ESA and its outside vendors scan e-commerce platforms and send takedown notices to the relevant websites, ISPs and other online intermediaries. ESA member companies also provide updated training materials and alerts to CBP and other federal law enforcement on counterfeit and other infringing goods. On occasion, an ESA member has licensed a copyrighted work or trademarked product to a third party who now bears the responsibility for enforcement; in such cases, the member company will refer cases of infringement to the relevant third party.

Conclusion

The video game industry faces serious challenges from infringers and counterfeiters who are making technologically sophisticated products that not only deceive consumers, but cut into revenue and endanger American jobs. In order to effectively combat the sale of counterfeit goods on e-commerce platforms, ESA and its members support collaboration, communication and information-sharing amongst stakeholders in e-commerce including state and federal law enforcement, platforms, rights owners, advertisers and payment processors. We would commend to the Committee the Office of the Intellectual Property Enforcement Coordinator's FY 2017-2019's Joint Strategic Plan, which may have helpful recommendations on intellectual property enforcement and stakeholder collaboration. Due to the sensitive nature of some of the data requested in the letter, ESA and its members would request that any additional background needed regarding specific examples or data be discussed with Committee staffers in camera.

Thank you for your leadership on this important matter. We are available to answer any additional questions the Committee might have.

Respectfully submitted,

A handwritten signature in blue ink, consisting of stylized initials and a long horizontal line extending to the right.

Stanley Pierre-Louis
Senior Vice President and General Counsel

June 29, 2018

The Honorable Orrin G. Hatch
Chairman
Senate Finance Committee
219 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Ron Wyden
Ranking Member
Senate Finance Committee
219 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Hatch and Ranking Member Wyden:

On behalf of the Footwear Distributors & Retailers of America (FDRA), we appreciate the opportunity to respond to the Committee's questions on the proliferation of counterfeit goods sold through e-commerce websites.

FDRA represents nearly 500 footwear companies and brands across the U.S., including the majority of U.S. footwear manufacturers. Leading U.S. footwear executives direct and govern FDRA, and the association enjoys a long history of more than 74 years serving the industry. Today, 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.

Below are FDRA's responses to questions raised by the Committee in its May 30, 2018 letter:

1. Do you warn consumers about the risk of counterfeits of your products, their availability, and/or how to avoid accidentally purchasing them, and if so, how? Do you believe that your consumers understand the significance of purchasing counterfeit versions of the goods? What challenges exist in informing consumers of the risks associated with the purchase of counterfeit goods?

FDRA believes a majority of consumers are seeking legitimate products and are genuinely disappointed when they purchase a good online and receive a counterfeit item. For most consumers, once they use the product, they are able to distinguish a difference in quality and performance. This is an extremely important issue for U.S. footwear companies because our members do not just sell shoes; they uphold, promote, and closely safeguard the integrity of their brands. When a consumer purchases a shoe, the name or logo on that shoe represents the company's reputation, values, quality, product safety standards, chemical safety standards, its workers, and the enduring relationship the brand has built with the consumer.

While e-commerce has provided unprecedented opportunities to reach consumers, FDRA believes many consumers do not fully understand the prevalence of counterfeit goods present on the online platforms they frequently use to buy an array of everyday products. For example, it is common for consumers to contact footwear brands or leave negative comments online regarding

the products they purchased on e-commerce sites, not knowing they purchased counterfeit items. Many U.S. consumers would be alarmed at the January 2018 Government Accountability Office (GAO) report findings that, of the 47 items GAO purchased from third-party sellers on popular e-commerce platforms, 20 turned out to be counterfeit, and every platform selected for the GAO study yielded at least one counterfeit product.

FDRA member companies support campaigns to increase awareness of counterfeits and the negative impacts these illegal goods have on innovation. One FDRA member company has pulled products entirely from a major platform in both the U.S. and EU, citing concerns about counterfeit goods. This has greatly increased awareness of this issue for U.S. consumers, but removing all products from these platforms does not provide a workable solution for the majority of U.S. footwear companies. One company has also established a dedicated webpage that discusses counterfeit items and the risk of purchasing products from unauthorized sellers. However, the company faces an additional challenge in communicating with consumers, because an increasing number of its consumers make their purchases through retailers or e-commerce sites rather than directly from the brand's websites.

In fact, in FDRA's annual National Spring Shoe Sales Survey, 35 percent of footwear shoppers planned to buy shoes online rather than in store this spring.¹ Of those 35 percent, 52 percent planned to purchase their shoes on Amazon, while only 15 percent plan to purchase footwear on the brand's own e-commerce website. The remaining purchasers planned to use other channels such as brick-and-mortar retailer websites. This goes to show that American online footwear consumers at the outset prefer the platforms that have the higher probability of carrying counterfeit goods.

Ultimately, the major challenge is often less about informing consumers about the risk, but rather, providing them with the information to be able to identify suspicious goods when shopping online. FDRA members would like to see platforms provide consumers with the information they need to determine if the goods they are buying are legitimate. This could include information such as who is selling the product, the seller's history, whether the seller has negative reviews for selling counterfeits, what the product looks like, whether the photograph is legitimate, and whether there are photos of the labels. These are relatively simple steps that can be used to help shoppers ascertain the legitimacy of the products they are purchasing.

2. What tools do you provide consumers to verify the authenticity of their goods?

Many leading U.S. footwear brands are adopting or currently testing forensic and tracking technologies to help verify the authenticity of their goods. These tools can include but are not limited to QR code or similar technology, RFID tools, and other real-time tracking tools.

¹ FDRA Spring 2018 National Shoe Sales Survey - <http://fdra.org/wp-content/uploads/2018/04/final-2018-spring-nat-poll-shoes.pdf>

3. Please describe how you coordinate with e-commerce platforms to curtail counterfeiters.

Many large U.S. footwear companies utilize a global monitoring program to enhance their brand protection worldwide. Digital brand protection teams and external vendors scrape, collect, analyze, and qualify all relevant offers and report counterfeits through notice and takedown systems. Footwear companies engage directly with e-commerce platforms on initiatives to enhance collaboration and remove counterfeits from the platforms. Through these initiatives, companies conduct intense and thorough monitoring campaigns and share analysis and detailed reports with the platforms, so that the platforms can establish or enhance proactive and preventive measures.

4. Once you suspect that counterfeit goods are being distributed, by either an importer or by a distributor or distribution network within the U.S., what types of actions, including the initiation of litigation, do you pursue? Please provide examples.

FDRA members identified a variety of actions they take to combat counterfeit goods: sending notices to platforms while continuing to monitor the marketplace; contacting platforms in multiple ways, if necessary, to have a suspected counterfeit item removed; asking platforms to monitor certain sellers (and multiple accounts, if any) and investigate and share information with law enforcement entities; conducting test buys; actively working with law enforcement at the local, state, and federal level for medium and large-scale operations and encouraging platforms to support these efforts; recording trademark registrations with U.S. Customs and Border Protection (CBP); working closely with CBP and helping to educate Customs officials on how to spot counterfeit footwear; hiring private investigators to assist CBP with inspections and risk assessment on counterfeit shipments; responding directly to requests from CBP to authenticate goods the agency has detained and suspects to be counterfeit; regularly sending cease and desist orders to importers and sellers of counterfeit items; and bringing litigation against counterfeiters who knowingly engage in the production, importation, and/or sale of counterfeits.

5. Do you participate in brand registration and verification programs provided by e-commerce platforms or any other intermediary? What features of such programs have been useful in identifying and removing counterfeit products?

Footwear companies participate in a number of brand registration programs but have also raised concerns that these programs vary from one platform to the other, have proven to be burdensome for companies, and make it very hard for brands to enforce their rights efficiently or in a timely manner. When platforms have a large number of listings, it is especially difficult to enforce on all the country-based platforms of the same group or to follow-up and keep track of the listings submitted by the brands using these protocols. Companies have expressed concern that many brand registration and verification programs have not been useful in identifying the source of counterfeit products because of a lack of information sharing, but that they have been helpful in removing specific counterfeit listings once identified through test buys.

6. What other services, tools, protections, and assistance do you provide?

To help consumers protect against counterfeiting, one FDRA member company described its inclusion of a search tool on its website that links to authorized distributors and a listing of known counterfeit/unauthorized sellers on its website. The company also informs consumers on its packaging of the risks of purchasing from unauthorized sellers.

7. Have you ever conducted test buys through online e-commerce platforms? If so, can you provide us with information on the outcome of the test buys?

U.S. footwear companies conduct regular test buys. However, implementing test purchase programs is often very burdensome and not feasible on platforms that have a large percentage of listings for which brands do not have sufficient information to even begin to authenticate the goods. Brands are not in the position to get in touch with each and every online seller suspected of selling counterfeits to ask for additional information and pictures.

One company utilizes test buys only after developing substantiated suspicion that a seller is engaging in the selling of counterfeit goods. These test buys are used to bolster a case just prior to sending a cease and desist letter.

8. What do you do to remove counterfeits from the stream of commerce?

FDRA member companies actively send notice and takedown requests; work directly with online platforms; work with law enforcement at the state, federal, and local levels; work with CBP; and hire investigators. Large companies also analyze global notice and takedown trends to identify patterns and indicate to platforms to have them improve their proactive and preventive measures.

8a. Can you provide us with statistical information regarding the frequency in which you have taken actions against suspected counterfeit products – either through investigations, destructions, abandonment, or otherwise?

If FDRA obtains additional data or statistical information on each of these specific actions, we are happy to provide it to the Committee, but we are unable to provide a statistical breakdown of each action at this time.

9. In your view, what are the challenges in assisting consumers from inadvertently purchasing counterfeits and better targeting distributors of counterfeit goods? What concrete steps can be taken to address these challenges?

The very nature of e-commerce has created an expectation of low prices for consumers. Counterfeit goods generally undersell legitimate goods, but a low-price item sold on a major online platform will not raise the same red flags as it would from a street vendor selling counterfeits. Consumers often have little information on third-party sellers online and many may assume the product has been evaluated for quality and legitimacy by the brand since it is allowed to be sold on a popular e-commerce website.

There are several concrete steps platforms can take to address these challenges. First, platforms could share full and detailed data with rights owners, such as listings that have been proactively and reactively removed, account information of sellers that have been suspended or banned from the platform, and account information of repeat infringers.

In addition, platforms should be using information they have for the purchase of legitimate goods to proactively identify suspicious listings. This includes suspiciously-low price levels, inordinate shipping times (over 14 business days), multiple products available (different sizes and colorways), negative sellers' history and feedback, lack of pictures (e.g. product pictures, pictures of labels, etc.), and lack of information in the listing description.

Third, platforms can use automated tools to proactively address this problem and prevent future occurrences. For example, platforms can proactively screen listings and use algorithms and machine learning to flag potential illegal content. Platforms can also adapt their existing anti-fraud systems to tackle the problem of online counterfeits.

Other potential action items include: timely takedowns when posts are flagged; banning repeat offenders; requesting proof of authenticity from third-party sellers; ensuring platforms confirm sales are from only manufacturers' authorized suppliers; increasing cooperation between platforms and law enforcement; notifying the consumer and using the profit to invest in anti-counterfeit measures, when platforms learn illicit items have already been sold; and engaging more systematically in collaboration with brands and law enforcement authorities when platforms encounter large syndicates of counterfeiters, identifiable trends, or repeat infringers.

10. Do you engage with U.S. federal and/or local authorities to remove counterfeits from the stream of commerce and to curtail their distribution in the U.S.? If so, what authorities and types of activities and coordination efforts have proven successful, and are there gaps in such engagement?

U.S. footwear companies regularly engage with CBP and Department of Homeland Security officials at the federal level to pursue the importing of counterfeit products as well as local and state authorities pursuing the domestic sale of counterfeits. When engaged, all authorities have been excellent partners with the industry. Unfortunately, companies have raised concerns that these cases are not often given high priority.

10a. Have you initiated civil litigation for such activity? What are the barriers to such action?

Footwear companies frequently initiate civil litigation against large targets in various countries. However, establishing that the defendants had knowledge they were engaged in counterfeit commerce can be a barrier to successful litigation. When companies are successful in these cases, the damages awarded are often so low they do little to deter bad actors. Damages can be difficult to collect, as counterfeiters are often located in countries where enforcing a judgment is complex, if not impossible, and bad actors can also hide behind shell companies. In addition, companies initiating these civil actions face significant costs.

10b. Have federal or local authorities brought prosecution for such activity concerning your intellectual property? What are the barriers to such action?

Unless companies are able to demonstrate a significant loss of business or ties to other crimes, the industry has found that prosecutors at all levels have generally not made pursuing cases involving counterfeit footwear a high priority. Many companies also have difficulty locating the parties responsible for importing and distributing the counterfeit goods.

11. Do you engage with foreign governments to curtail the proliferation of counterfeits? If so, what types of activities and coordination efforts have proven successful? What has not?

U.S. footwear companies are involved in various programs and activities internationally to address shortfalls in this area: awareness campaigns; domain name seizures; collaboration on investigations and actions against vendors active on social media, through websites, or selling platforms; and participation in the Memorandum of Understanding lead by the European Commission, which aims to facilitate collaboration between brands and several major selling platforms.

While these actions are important in helping to combat online sales of counterfeits, their impact has been limited for a number of reasons: platforms do not willingly and fully share the information they have regarding counterfeiters, law enforcement agencies have difficulties prioritizing the targets for which their action would have the biggest disruptive impact, brands do not have the capacity to easily identify targets or the most visible and active counterfeiters, and it remains very difficult for brands to identify counterfeits offered online without assistance from the platforms that have background information regarding their vendors (brands do not have access to this information). Some FDRA companies have also been unable to effectively engage with foreign countries, because they have been unable to locate the originating source of the counterfeit product.

12. If you become aware of a counterfeit, either distributed to a consumer or otherwise within your control or stewardship, what, if any, actions can you take to prevent the sale of the good?

In the case where footwear companies become aware of the movement of counterfeit goods through distribution of known channels, our members will actively engage with pertinent law enforcement agencies to try and seize the goods and remove them from commercial channels.

13. If there are any other pieces of information, details, or data you feel would be helpful to the Committee, we respectfully request that you submit them as part of your answers as well.

If FDRA gathers additional data on this important issue, we will provide it to the Committee.

American footwear consumer behavior is changing rapidly as shoppers are looking for more diverse product, competitive prices, and availability on a number of platforms both in-store and online. Our members are working expeditiously to meet the needs of these evolving consumers, pushing product out via a variety of different channels. This dynamic retail landscape increases the opportunities for bad actors to reach these same consumers, oftentimes on the same platforms used for legitimate merchandise. That is why we greatly appreciate the work the Committee is doing to combat the rise in counterfeiting on e-commerce platforms in order to better protect U.S. consumers and brands, which is a key priority for the industry. We look forward to continuing to work with the Committee on this vitally important issue.

Sincerely,

A handwritten signature in black ink, appearing to read "Matt Priest". The signature is fluid and cursive, with a large initial "M" and a long, sweeping tail.

Matt Priest
President & CEO
Footwear Distributors and Retailers of America

Statement of the U.S. Chamber's Global Innovation Policy Center

ON: Counterfeits and Their Impact on Consumer Health and Safety

TO: U.S. Senate Committee on Finance

BY: David Hirschmann, U.S. Chamber of Commerce's Global Innovation Policy Center

DATE: June 29, 2018

The U.S. Chamber of Commerce is the world's largest business federation, representing the interests of more than three million businesses of all sizes, sectors, and regions, as well as state and local chambers and industry associations. The Chamber is dedicated to promoting, protecting, and defending America's free enterprise system.

More than 96% of Chamber member companies have fewer than 100 employees, and many of the nation's largest companies are also active members. We are therefore cognizant not only of the challenges facing smaller businesses, but also those facing the business community at large.

Besides representing a cross-section of the American business community with respect to the number of employees, major classifications of American business—e.g., manufacturing, retailing, services, construction, wholesalers, and finance—are represented. The Chamber has membership in all 50 states.

The Chamber's international reach is substantial as well. We believe that global interdependence provides opportunities, not threats. In addition to the American Chambers of Commerce abroad, an increasing number of our members engage in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Intellectual property (IP) rights underpin economic growth in the innovative and creative sectors, driving U.S. competitiveness and creating high-quality American jobs. IP supports more than 45 million American jobs in 81 different industries. According to the Department of Commerce, IP-intensive industries make up more than half of all U.S. exports, or \$842 billion, and almost 40% of U.S. GDP.

Yet our intellectual property laws are only as effective as their enforcement. Facilitated by the increasingly speedy and affordable delivery of goods at the individual level, criminal actors have targeted online retailers. Thus, counterfeiting has transformed from a wholesale enterprise to a retail enterprise both simplifying the path of dangerous counterfeit and substandard goods to consumers, and complicating the work of law enforcement. We appreciate the emphasis the Committee is placing on counterfeit goods, their economic impact, and the inherent dangers they pose to consumers. The business community, law enforcement, and Congress must be vigilant in the fight against counterfeiting and piracy.

Over the years, the Committee has seen truly frightening counterfeiting cases, from counterfeit medicines and brake pads, to counterfeit air bags and infant toys and formula. In the last decade, the counterfeit problem has grown as criminals who used to traffic in other types of illicit trade have chosen to traffic in counterfeit consumer products due to the low risk, high reward model it represents.

Exorbitant profits attract criminals to the counterfeit trade. For example, a study conducted by Europol traced a \$1,000 investment within different crimes. An investment of \$1,000 in counterfeit money returned 330%, earning \$3,000.

Comparatively, \$1,000 invested in illicit pharmaceuticals yielded a 29,900% return on investment, with earnings totaling \$300,000.

Meanwhile, ease of doing business means minimal costs of entry into counterfeiting. Innovations in online shopping and delivery infrastructure have dynamic benefits for

consumers and our economy. However, these same changes to consumer shopping habits, coupled with the sophistication of criminal enterprises, make it harder than ever to ensure that goods are legal, authentic, and trustworthy.

These developments require a holistic response from governments, industry, and consumers. When counterfeiting is disrupted on multiple fronts, we create strategic and systematic improvements. Consumer awareness and education remain central components to a comprehensive strategy. It is critical that consumers remain vigilant, online retailers and brand owners work collaboratively, and law enforcement authorities have the tools, resources, and persistence to fight theft in both the online and physical environments.

The Scope of Global Counterfeiting

Recent studies demonstrate the scope of the challenge. In 2016, the Organisation for Economic Co-operation and Development (OECD) released the study, *Trade in Counterfeit and Pirated Goods: Mapping the Economic Impact*, which noted in 2013, the value of imported counterfeit goods worldwide was \$461 billion, while the total imports in world trade was worth \$17.9 trillion.¹ This figure is more than double prior estimates in 2005. It is also more than double the 2014 profits of the top ten companies in the world combined. In June of 2017, Frontier Economics released another figure citing the global economic value of counterfeiting and piracy could reach \$2.3 trillion by 2022.²

Following on the OECD report, the U.S. Chamber of Commerce's Global Brand Council conducted an analysis into the landscape of counterfeiting globally.³ China

¹ *Trade in Counterfeit and Pirated Goods*, http://www.keepeek.com/Digital-Asset-Management/oecd/governance/trade-in-counterfeit-and-pirated-goods_9789264252653-en.

² <http://www.frontier-economics.com/publication/frontier-presents-report-economic-impact-counterfeiting-piracy/>

³ The Global Brand Council (GBC) is a coalition of like-minded brands concerned with global counterfeiting and trademark protection, <http://www.theglobalipcenter.com/brand/>

and Hong Kong together are estimated as the source for 86% of global physical counterfeiting, which translates into \$396.5 billion worth of counterfeit goods each year.⁴

Recent Trends

Influx of Counterfeit Goods Found in Small Parcels

With the rise and convenience of e-commerce, and consumer preferences for on-demand delivery, a significant number of counterfeits are traveling through small parcels directly to consumers. This troubling trend requires increased attention from global customs agents and cooperation from online retailers and shipping providers. Even for rights holders, it is increasingly difficult to determine if products sold online are legitimate. Consumers and brand owners alike must examine online sellers closely.

Annually, more than 11 million maritime containers arrive at seaports, 10 million containers arrive by truck, 3 million containers arrive by rail, and an additional quarter billion containers arrive in cargo, postal, and express consignment packages in the U.S. The sheer volume of shipments creates a very challenging model for success.⁵ Of these shipments, agents seized more than \$1 billion in counterfeit goods, which unfortunately is estimated to be a small fraction of the counterfeit goods being sent into our country.

Even when counterfeit items are seized and the U.S. Customs and Border Protection (CBP) alerts the right holders, many cases never go beyond the seizure of the product due to lack of information. Additional information and processes for better information sharing could help track the real importer, increase enforcement actions,

⁴*Measuring the Magnitude of Global Counterfeiting: Creation of a Contemporary Global Measure of Physical Counterfeiting*, http://www.theglobalipcenter.com/wp-content/themes/gipc/map-index/assets/pdf/2016/GlobalCounterfeiting_Report.pdf

⁵ U.S. Customs and Border Protection https://www.cbp.gov/sites/default/files/assets/documents/2016-Jul/CBP%20IPR%20Division%20Issue%20Paper%20July%202016_0.pdf

and reduce repeat counterfeit sellers and shippers. In addition, because of a cumbersome 25-point seizure process, brand owners often have no details about presumed counterfeiters until the data is stale.⁶

CBP's limited resources can be maximized more effectively. Through some technological targeting solutions, the private sector and CBP can make steady improvements to the operational efficiencies within CBP's time-consuming seizure process. Customs agents need the authority to confiscate, seize, and destroy goods that are determined to be illicit, without undue requirements placed on right holders to prove that the seized goods are counterfeit and that all seized counterfeit goods, materials, and related manufacturing equipment pieces are swiftly and completely destroyed. Effective destruction procedures are essential to prevent counterfeit goods from returning to legitimate trade channels and manufacturing equipment from returning to illicit factories.

Criminals and remote sellers ship counterfeit physical goods into the U.S. often using international express mail services and airmail. As China is the largest source of counterfeit goods, the China-based express mail service (EMS) of the China Post is among the most popular pipelines for counterfeits traveling through international mail facilities. These shipments arrive at any of ten international mail facilities with U.S. Customs Service locations and are inspected for entry by CBP, before being transferred to the U.S. Postal Service (USPS) for delivery to U.S. consumers.⁷ Overseas remote sellers often fraudulently declare small individual mailings containing counterfeit goods to avoid detection by CBP agents.

⁶ *Supporting Innovation, Creativity & Enterprise*, U.S. Joint Strategic Plan on Intellectual Property Enforcement, 2017-2019 <https://obamawhitehouse.archives.gov/sites/default/files/omb/IPEC/2016jointstrategicplan.pdf> pg. 96

⁷ *Mailing Standards of the U.S. Postal Service, International Mail Manual*, § 711 (Aug. 11, 2011), incorporated by reference in the *Code of Federal Regulations*, 39 C.F.R. § 20.1.

Moreover, depending on the size of the order, many overseas websites will break up shipments into several small packages to avoid seizure or will offer refunds for seized products to attract U.S. consumers. The sheer volume of these small shipments create a very difficult task for CBP agents to vigorously screen or x-ray all incoming mail to detect such shipments.⁸

Once admitted undetected, these shipments then enter the U.S. postal mail stream from international mail facilities for delivery to U.S. consumers. The ability of the USPS to detect and inspect these packages is complicated by the fact that materials shipped domestically by first-class, priority, or express mail are closed to inspection without probable cause and advanced electronic data to help target illicit packages is often unavailable.⁹

Global Proliferation of Illicit Streaming Devices (ISDs)

ISDs are media boxes, set-top boxes, or other devices that allow users to stream or download unauthorized content from the Internet. These devices (and corresponding software programs) take many forms, and have become a significant means through which pirated motion picture and television content is accessed in consumers' homes around the world. China is a hub for the manufacture of these devices, which are not only distributed domestically, but also exported to overseas markets.

What was once a problem centered mainly in Asian markets has now proliferated worldwide. These illicit streaming devices are either pre-installed with apps that facilitate infringement or users themselves are easily able to obtain and install the apps required to access the infringing content.

⁸ The Association of Convenience & Petroleum Retailing. *Remote Sales of Tobacco* (Retrieved March 19, 2010). www.nacsonline.com/NACS/Government/Tobacco/Pages/RemoteSalesofTobacco.aspx.

⁹ USPS, "Basic Eligibility Standards for Priority Mail," available at <http://pe.usps.com/text/dmm300/123.htm> (November 1, 2010); www.discountcigarettesbox.com (last visited November 17, 2011) ("The parcels are sealed and cannot be opened for postal inspection").

For these reasons, the U.S. Chamber's Global Innovation Policy Center (GIPC) has commissioned [NERA Economic Consulting](#) to perform a study, expected fall 2018, into the economic impacts of illicit streaming piracy. GIPC looks forward to sharing the results of this study with the Committee.

Recommendations for Private Sector Collaboration with Online Retail Platforms

Counterfeit products can jeopardize the health, safety, and security of American citizens. For example, taking counterfeit medications can have serious, even deadly, consequences. Purchasing an illicit or substandard automotive part can render a vehicle useless, or worse, extremely unsafe. And when consumers purchase fake products bearing phony trademarks they believe to be legitimate, from reputable online retailers, this single purchase can erode consumer confidence in the brand forever. Beyond receipt of counterfeit goods, shopping on an illicit website can create vulnerabilities to malicious computer viruses. This brief contact may expose consumers to prolonged risk of identity theft and other cyber-security threats from criminal entities.

Companies describe an emerging challenge: providing consumers the information they need to be able to identify suspicious goods when shopping online. This is complicated by the fact that counterfeiters lurk on online retail platforms, but also prey on consumers through social media platforms such as Twitter, Instagram, and WeChat. Through these channels, counterfeiters can easily and directly sell to consumers and, due to the anonymity of social media, their identities and activities are often harder to track.

Some platforms have begun working with the private sector to adopt swift takedown procedures and information sharing. Such practices offer slight improvements to a complex environment. Many brand owners engage daily with platforms on

collaborative initiatives to remove counterfeits. Through these proactive efforts, brand owners share intelligence and detailed reporting, and attempt to create new preventative measures to curb counterfeits from online marketplaces. However, online retail platforms can continue to simplify processes for rights holders to register and request enforcement action, reduce timelines for takedowns, offer rating systems to the public to track seller history including IP violations, monitor high-risk sellers closely, suspend repeat offenders, and prepare to issue penalties for sellers of counterfeit goods.

Recently, many online retail platforms have instituted brand registry programs to allow for a direct line of communication between the platform and the brand owner. However, these programs still present challenges to brands when they try to enforce their rights efficiently. When thousands of listings are suspected to be counterfeit on a single online retail platform, it is burdensome to individually enforce on each listing without a streamlined process.

Online retail platforms can work to make important information available to consumers and rights holders alike. Online retail platforms could offer details to consumers including seller information, seller history, seller reviews, and clear product photos and specs. It is common for sellers to pose as a distributor of a well-known brand. However, if a seller is not an authorized distributor of a brand, this is a strong indication of phony products. Platforms could also offer information to brand owners, including listings that have been proactively and reactively removed, account information of sellers that have been suspended or banned from the platform, and the account information of repeat infringers. Automated tools, algorithms, and machine learning can be effectively used to proactively, and without many resources, address shortcomings in information sharing and prevent future bad actors from selling counterfeits on individual online retail platforms.

Education remains just as important as enhancing collaboration between brand owners and online retail platforms. The National Crime Prevention Council organized a public service announcement and coordinated an accompanying educational campaign through which GIPC offered its own consumer awareness tips.¹⁰ The public service announcement video is also used to help educate law enforcement officials about various industry sectors that are victims to counterfeit goods.¹¹

Annually, GIPC leads a [safe holiday shopping campaign](#) focused on raising public awareness of the spike in counterfeit activity surrounding the holiday shopping season and the potential harms of counterfeit products. The multimedia effort highlights the consumer and economic impacts of purchasing fake goods during the holiday shopping season.¹²

Information Sharing and International Collaboration

A collage of international laws and enforcement efforts invites the criminal enterprises behind online counterfeiting and piracy to shop for a forum in which they can evade the law. As a direct result, these enterprises are able to continue to exploit American consumers and businesses. This harm is precisely what has given rise to the widespread recognition of the need for tools to disrupt illegal enterprises.

Rights holders spend hundreds of millions of dollars in this effort annually and the U.S. government has had major victories, such as “Operation In Our Sites,” which has successfully acted against criminals using the Internet as their base of operations in over 1,600 instances. In one of the highlights of “Operation In Our Sites,”

¹⁰ <http://archive.ncpc.org/topics/intellectual-property-theft/resources.html>

¹¹ National Crime Prevention Council Take home Top honor, <http://ncpc.mediaroom.com/2016-04-19-National-Crime-Prevention-Council-Takes-Home-Top-Honor>

¹² *Shop Smart This Holiday Season*, <https://www.cnn.com/2015/11/27/opinions/hirschmann-holiday-season-counterfeit/index.html>, Count out Counterfeits this Holiday Season: GIPC’s Top Ten Tips to #ShopSafe, <https://www.theglobalipcenter.com/count-out-counterfeits-this-holiday-season/>

cooperation with certain foreign governments yielded action against criminals offering counterfeit medicine. That action underscores that international cooperation on IP enforcement is possible and, when it occurs, it is highly effective. However, such cooperation remains the exception rather than the rule. Counterfeiting occurs abroad, but the effects are felt here at home.

It is vitally important that Congress provide all the IP enforcement agencies, including CBP, the U.S. Immigration and Customs Enforcement (ICE), the National Intellectual Property Rights Coordination Center, and the Department of Justice (including FBI and the regional IP Law Enforcement Coordinators), with adequate funding. We appreciate the complexity of budgetary issues and the competition for limited resources. However, the dangers of under-resourced law enforcement to protect consumers and defend the IP rights of the business community are far too significant for us to pause. We must find a way to appropriate additional resources and staff to this growing threat.

The Chamber is thankful to the U.S. Senate Committee on Finance, the co-chairs of the Congressional Trademark Caucus, Senators Grassley and Coons, and established leaders Senators Hatch and Wyden, for continuing to prioritize counterfeits and their impact on consumer health and safety.

The Global Innovation Policy Center looks forward to working with the Committee to create improvements to anti-counterfeiting strategies that will create jobs, support innovation, and protect consumers in the United States and around the world.

IACC

INTERNATIONAL ANTI COUNTERFEITING COALITION

727 15th Street NW • 9th Floor • Washington, DC 20005 • USA • +1(202)223-6667 • iacc@iacc.org • www.iacc.org

June 29, 2018

The Honorable Orrin G. Hatch
Chairman
Committee on Finance
United States Senate
219 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Ron Wyden
Ranking Member
Committee on Finance
United States Senate
219 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Hatch and Ranking Member Wyden:

I write to you today on behalf of the International AntiCounterfeiting Coalition (IACC), in response to your letter dated May 30, 2018.

I thank you for your leadership on these important issues, and look forward to working with you and your colleagues on the Finance Committee as you move forward with your inquiry.

I am at your disposal should you require any further information or clarification of the attached responses.

Respectfully,

Travis D. Johnson
Vice President – Legislative Affairs, Sr. Counsel
International AntiCounterfeiting Coalition

1. Do you warn consumers about the risk of counterfeits of your products, their availability, and/or how to avoid accidentally purchasing them, and if so, how?

Consumers' safety and trust are at the heart of IACC members' brand protection programs. Historically, member companies have engaged in a wide variety of educational programs through which they seek to raise awareness among both consumers and distributors regarding the threats posed by counterfeit goods. Consumer-focused campaigns generally offer tips to assist consumers in avoiding fakes, and to ensure that they're purchasing authentic goods. Messaging frequently highlights the "3 P's – Price, Packaging, Place of Sale," or some variation thereof. See, e.g., <https://www.iacc.org/resources/about/what-is-counterfeiting>. Awareness programs may also seek to discourage the knowing purchase of counterfeits by consumers by highlighting the negative impacts of counterfeiting such as: the health and safety risks inherent in using illicitly-manufactured goods; connections between the trafficking of counterfeit goods and other forms of transnational organized crime, including forced and child labor, human trafficking, and the smuggling of weapons and narcotics; or the economic harms caused by the trafficking of counterfeits.

Many rights-holders provide relevant information to assist consumers on their company websites, often in multiple languages. They also frequently provide necessary training to retail and customer service representatives to aid consumers who have inadvertently purchased a counterfeit product, or who are trying to avoid doing so.

The IACC and its members have collaborated with local governments in New York, Los Angeles, and Mexico City on traditional advertising campaigns using posters, billboards, television and radio PSAs, flyers, and the like, to increase consumer awareness. In addition, a number of IACC members contributed to, and aided in the development of, an exhibit at the Alcatraz East Crime Museum (formerly known as the National Museum of Crime and Punishment).

a. Do you believe that your consumers understand the significance of purchasing counterfeit versions of the goods?

The consensus among respondents is that while some consumers do understand the significance of buying counterfeits, and that efforts to educate the public have aided in increasing that awareness, a large segment of the population remains unaware of the potential risks and harms that are associated with counterfeiting. In addition, many consumers are unaware of the breadth of the issue, or of the prevalence of counterfeit goods online. They may think of counterfeiting as an issue that affects only a small number of industry sectors, and as a result, consumers may be less likely to question whether the "great deal" that they found online is actually something more nefarious.

b. What challenges exist in informing consumers of the risks associated with the purchase of counterfeit goods?

IACC members highlighted several challenges they face in their engagement with consumers about counterfeits. In educating consumers (to aid in their determination of whether goods are authentic or counterfeit), rights-holders may also be providing a roadmap that enables counterfeiters to make more convincing fakes, in turn making it even more difficult for consumers to determine which products are authentic. Another concern involves the potential for reputational harm, and loss of sales, experienced by brands perceived as widely-counterfeited. Rights-holders are placed in the untenable position of warning consumers about risks associated with attempting to buy the brand's own goods, which could motivate a consumer to seek out another brand that – rightly or wrongly – is seen as less likely to be counterfeit.

In the e-commerce context, consumers and rights-holders face special challenges, because even where consumers are aware of the risks associated with counterfeiting, and are actively seeking to purchase authentic goods, they may have increased difficulty in making those determinations. Online sellers often seek to deceive consumers by using a brand's own marketing materials, e.g., product photos and descriptions, in connection with their counterfeit offerings. Because consumers do not have an opportunity to physically examine the goods or have any face-to-face interactions with the sellers, their ability to gauge the goods' authenticity or the legitimacy of the seller can be greatly reduced. As a result, they may believe that they're buying directly from the rights-holder or an authorized distributor when they're actually dealing with a counterfeiter.

One respondent noted that past research has shown that consumers are more likely to respond positively to information received by a neutral third-party (e.g., academics, non-profits, government agencies) than from the brands themselves.

2. What tools do you provide consumers to verify the authenticity of their goods?

The primary tool used by most IACC members to assist consumers in verifying the authenticity of their goods is the company's website. While the type of information provided differs among rights-holders, it may include some details to aid in authentication, the ability to register and check serial numbers, and lists of authorized distributors.

Rights-holders incorporate a variety of overt and covert features into their products and packaging that may aid in authentication, but as noted above, publicly identifying the full range of those features can be counter-productive. As a result, brands typically focus on educating their customers, and potential customers, about “red flags” that should raise suspicion or encourage deeper inquiry about the goods’ legitimacy.

3. Please describe how you coordinate with e-commerce platforms to curtail counterfeiters.

Every IACC member consulted in regard to this inquiry confirmed their regular submission of complaints to e-commerce platforms via the platforms’ established notice-and-takedown processes. In addition, rights-holders routinely engage with major e-commerce platforms directly and through industry associations to discuss emerging trends related to the trafficking of counterfeit goods online, opportunities to improve existing policies and procedures, sharing information on known counterfeiters, and the development and implementation of best practices by both rights-holders and platforms to combat the misuse of e-commerce infrastructure to facilitate illicit trade.

Some respondents reported working in partnership with Alibaba to further investigate online counterfeiters’ brick-and-mortar operations (i.e., physical retail and storage outlets) for criminal referrals and raids.

In addition to their direct engagement, brands also work collaboratively through their associations, including the IACC, to address broad-based concerns about trafficking on e-commerce platforms, to alert them to counterfeit sales, to educate them about counterfeiters’ tricks to avoid detection and evade enforcement, and to provide suggestions for eliminating or decreasing counterfeit sales, as described further in Answer #5 below. The IACC MarketSafe program, and MarketSafe Expansion program – both operated by the IACC in collaboration with Alibaba, have provided opportunities for this sort of engagement in recent years. More recently, the IACC signed a Memorandum of Understanding with Amazon to enhance collaboration between IACC members and the platform. The continuing development of relationships, and regular and consistent communication with e-commerce platforms is viewed as a key to effectively addressing the trafficking of counterfeits online.

4. Once you suspect that counterfeit goods are being distributed, by either an importer or by a distributor or distribution network within the U.S., what types of actions, including the initiation of litigation, do you pursue? Please provide examples.

There are a number of variables involved in a rights-holder's investigation of a suspected distribution operation. Once a target has been identified, investigators will gather as much information as possible about the operation. In most e-commerce cases, the first step will likely be the submission of a complaint via the relevant e-commerce platform's notice-and-takedown procedures. This may be followed by sending a cease-and-desist letter from outside counsel to the investigation target, and/or pre-litigation settlement. Depending on the response received, if any, and additional details learned during the course of the brand's investigation, civil litigation and law enforcement referral for criminal investigation and prosecution may be considered. Rights-holders take into account a number of factors to determine the appropriate route, including: venue; likelihood of prevailing in a civil suit and timeline for doing so; likelihood that law enforcement will take the matter and how quickly they will act; level of loss/damage to company; the duration of the counterfeiting operation, and others.

5. Do you participate in brand registration and verification programs provided by e-commerce platforms or any other intermediary? What features of such programs have been useful in identifying and removing counterfeit products?

Every IACC brand member consulted with regard to this inquiry confirmed their participation in brand registration and verification programs provided by the major e-commerce platforms, as well as many others offered by various social media platforms and other intermediaries. One respondent noted that they monitor over 100 e-commerce platforms in the United States and internationally, and that it participates in every such program offered.

While participation in these programs is widespread, rights-holders noted that the perceived usefulness and overall effectiveness of such programs varies widely. While many platforms promptly and consistently action takedown requests, these procedures are viewed as having little lasting impact – counterfeits remain widely available despite brands' submissions of tens or hundreds of thousands of takedown requests each year. Following their removal, listings frequently reappear, and many platforms fail to deter recidivist sellers or to permanently remove them from the platform despite repeated violations.

Rights-holders also noted a wide-disparity in platforms' rules and practices with regard to on-boarding and verification of sellers, sellers' ability to register multiple accounts (often used as a means to avoiding penalties for repeated violations of platform policies), pro-active enforcement, and willingness to provide enhanced metrics and data regarding identified sellers of counterfeits, their volume of sales, etc.

6. What other services, tools, protections, and assistance do you provide?

Both directly, and via industry groups like the IACC, rights-holders routinely engage with major e-commerce platforms, to provide information on emerging trends in online counterfeiting, to educate them regarding counterfeiters' strategies to avoid detection, and to provide suggestions for eliminating the sale of counterfeits on their platforms. Likewise, brands provide a range of support to law enforcement including training, and investigation and forensic support.

7. Have you ever conducted test buys through online e-commerce platforms? If so, can you provide us with information on the outcome of the test buys?

Test buys are commonly used by rights-holders in the investigation of online trafficking of counterfeits; each brand consulted during this inquiry confirmed that they have conducted test buys through e-commerce platforms as part of their investigations. In some cases, they are viewed as a necessary expense to confirm the sale of counterfeits, as individual sellers often use stock photos or images of authentic products in their listings. The results of such buys are said to depend on the platform, the time period of the buys, and other factors. It's also worth noting that because of the nature of the process – test buys are generally only conducted where the brand already has a suspicion that the goods on offer are not authentic – the percentage of test buys resulting in a confirmed counterfeit is not necessarily an indicator of the overall prevalence of counterfeits on the platform. Random test buys would have a stronger predictive value, though due to the costs involved, most brands do not regularly undertake such efforts. One respondent noted however that over the past three years, 70 – 90% of the test buys it conducted resulted in the purchase of a confirmed counterfeit. Another respondent reported a 100% confirmation rate. This includes products sold directly by the e-commerce retailers, and was not limited to third-party sellers.

8. What do you do to remove counterfeits from the stream of commerce?

Rights-holders employ a wide variety of measures including maintaining internal teams and using third-party service providers to assist in monitoring and enforcement on e-commerce platforms and in physical markets. Both independently, and through industry associations, brands work closely with customs and law enforcement agencies in the United States and abroad to provide training and enforcement support. As noted in other responses herein, rights-holders also engage with e-commerce platforms and other online, financial service, and logistics providers to address the trafficking of counterfeits online.

a. Can you provide us with statistical information regarding the frequency in which you have taken actions against suspected counterfeit products-either through investigation, destructions, abandonment, or otherwise?

N/A

9. In your view, what are the challenges in assisting consumers from inadvertently purchasing counterfeits and better targeting distributors of counterfeit goods?

IACC brands highlighted a number of challenges in assisting consumers, including the general perception among consumers that online platforms, particularly the largest and most well-known platforms, are generally free of counterfeits. That perception, in turn, is viewed as driving counterfeiters' efforts to infiltrate major platforms to reach greater numbers of unsuspecting consumers.

Rights-holders also cited the lack of transparency to both consumers and themselves, about the true source of products being offered on platforms, in part due to co-mingling of inventory from a variety of sources. Brands raised further concerns about the limited information provided by platforms about sellers who have been identified as trafficking in counterfeits. Existing procedures on many platforms are viewed as making it more difficult to undertake follow-up investigations and enforcement, including litigation or referral for prosecution, where appropriate.

The promotion of counterfeit goods through platforms' algorithms and their various services related to paid search results (sponsored posts, ads, etc.) are seen as

compounding these problems. Consumers trust popular e-commerce platforms and assume those platforms do more than merely act as an “intermediary.” This is particularly so where products are specifically highlighted by a platform as a popular choice or pick; consumers may falsely believe that the goods are authentic and safe, as they appear to be endorsed by the platform.

As previously noted, many platforms’ onboarding processes are viewed as insufficient to prevent the entry of bad actors.

Consumers also appear to be increasingly targeted on social media, where recommendations come from more trusted sources, and where they may be less wary of potential warning signs.

a. What concrete steps can be taken to address these challenges?

Greater transparency, including with regard to the disclosure of information about the identities of counterfeit sellers; the establishment of industry-wide best practices both for onboarding of sellers and with respect to remedying illegal sales; increased education of both sellers and consumers regarding the sale of counterfeit goods; and increased information sharing between rights-holders, e-commerce platforms, and relevant law enforcement agencies should all be considered to address these ongoing challenges.

10. Do you engage with U.S. federal and/or local authorities to remove counterfeits from the stream of commerce and to curtail their distribution in the United States? If so, what authorities and types of activities and coordination efforts have proven successful, and are there gaps in such engagement?

Rights-holders engage with federal and local authorities in a variety of ways in an effort to remove counterfeits from the stream of commerce. In the context of criminal investigations, brands invest significant time and effort to develop intelligence for referral to federal, state, and local police and prosecutors. The lack of sufficient customs, police, and prosecutorial resources is an ongoing challenge to these efforts. Similarly, and as with the general public, there is often a lack of recognition among prosecutors regarding the severity of the problems with which we’re dealing. As a result, prosecutions occur less frequently than is necessary. This may also be a result of the fact that higher-level offenders – e.g. large-scale manufacturers and distributors, as well as high-volume retail sellers – are often safely ensconced in foreign jurisdictions beyond the reach of easy prosecution.

Customs enforcement has traditionally been a bulwark of IP protection, and rights-holders have worked closely with their counterparts at CBP to prevent the entry of counterfeit goods into the consumer market. In recent years, those efforts have been hampered by the evolving distribution model for counterfeit goods, namely the increased importation of counterfeits by small-consignments, direct to consumers.

While rights-holders continue to engage with Customs, providing training in product identification and authentication assistance, the volume of shipments that CBP is tasked with examining is overwhelming. CBP has sought to address this in a number of ways, including its now-concluded Voluntary Abandonment Pilot Program. As documented in previous written submissions to the Committee and other relevant parties, the Voluntary Abandonment Program is not viewed by rights-holders as an effective solution to the growing problem. More robust sharing of data among all stakeholders – rights-holders, e-commerce platforms, shipping intermediaries, and CBP – is essential to addressing the trafficking of counterfeits. To this end, we encourage the prompt implementation of Section 302 of the Trade Facilitation and Trade Enforcement Act, as well as Executive Order 13785 of March 31, 2017.

a. Have you initiated civil litigation for such activity? What are the barriers to such action?

IACC members maintain extensive civil litigation programs to enforce their rights, but those efforts are expensive, and of mixed result. Litigation targets are frequently found in foreign jurisdictions where the available remedies are significantly lower than would be available for comparable offenses in the United States, or where enforcing judgments remains difficult.

b. Have federal or local authorities brought prosecutions for such activity concerning your intellectual property? What are the barriers to such action?

Rights-holders have reported mixed success with regard to criminal prosecutions. As noted previously, prosecutorial resources are a frequent concern. Prosecutions may also be limited as a result of the evolving dynamics of distribution – as the trafficking of small shipments has become more commonplace, even where shipments are seized and offenders identified, the level of the offenses serves to discourage prosecution absent data necessary to establish that the small consignments are part of a large-scale distribution operation.

IACC member brands are widely complimentary of their law enforcement counterparts at both the federal and state level, citing positive interactions and support from U.S. Customs and Border Protection, Homeland Security Investigations, the National IPR Coordination Center, the Federal Bureau of Investigation, the Computer Crime and Intellectual Property Section of the Department of Justice, the New City Police Department, the Los Angeles County Sheriff's Department -Piracy and Counterfeit Team, the Los Angeles Police Department IPR Division, the San Diego Police Department, the Baltimore County Police Department, the Philadelphia Police Department, the Chicago Police Department, the San Antonio Police Department, the Suffolk County, New York Police Department, the California Attorney General's Office and various U.S. Attorneys' Offices around the country, including, Utah, San Diego, Boston, San Francisco, Texas, Seattle, Missouri and Florida.

Rights-holders referenced notable successes in support of CBP resulting in approximately 1,000 seizures for one brand, and successful "mail blitzes" with CBP and HSI at various ports, which have resulted in large volumes of counterfeit goods being kept out of consumers' hands. HSI was also complimented for its efficiency in handling matters, and its efforts in coordinating with local prosecutors when federal prosecution was not an option. Over the past few years, one brand reported dozens of convictions or guilty pleas resulting in jail time and orders of restitution.

Finally, the Department of Justice's grant program to provide assistance to state and local agencies' IPR programs is seen as very helpful; many departments have relied on grants from the DOJ to provide essential resources for IPR enforcement.

11. Do you engage with foreign governments to curtail the proliferation of counterfeits? If so, what types of activities and coordination efforts have proven successful? What has not?

IACC members' engagement with foreign governments largely mirrors their engagement with domestic agencies; the success of those interactions varies by country however, and is greatly dependent upon the individual countries' resources and priority, and other factors including political priority and corruption.

Country-specific information regarding the challenges faced by IACC members around the world can be found in our annual Special 301 comments filed with the Office of the U.S. Trade Representative in February, available at:

https://www.iacc.org/downloads/key-issues/2018_IACC_Special_301_Report_Submission.pdf.

12.If you become aware of a counterfeit, either distributed to a consumer or otherwise within your control or stewardship, what, if any, actions can you take to prevent the sale of the good?

N/A

13.If there are any other pieces of information, details, or data you feel would be helpful to the committee, we respectfully request that you submit them as part of your answers as well.

As noted above in response to question 10, the IACC's member brands consider U.S. Customs & Border Protection a valued partner in their fight against counterfeiting. Given the Committee's oversight authority over the agency however, we would like to emphasize two significant issues that have impacted our efforts with CBP: (1) Customs' Voluntary Abandonment Program and (2) Customs' self-imposed seven-day waiting period to provide importer/exporter information to rights holders for detained shipments. Both make Customs' job harder, waste Customs' resources and weaken IPR enforcement.

Voluntary Abandonment Program

To help deal with increasing volume of small packages imported from China in recent years, Customs instituted a policy of actively encouraging importers to "voluntarily abandon" packages believed to contain counterfeit items. Under this program, the express carrier handling the shipment (including DHL and UPS) was provided notice of CBP's suspicion that the shipment contained counterfeit goods. That notice was in turn provided to the ultimate consignee (i.e., the intended recipient of the package) advising that the shipment had been detained, and that they could choose to abandon the shipment. If the shipment was abandoned, no further action would be taken (i.e., no penalties would be incurred, and there would be no prosecution pursued related to the importation).

As implemented however, CBP provided no information to the relevant rights-holder in such cases, in contrast to what the IP owner would receive pursuant to a formal seizure action. Since the program was initiated, rights-holders have also reported a significant decrease in the number of seizure notices they've received. Those notices have traditionally provided valuable information to rights-holders which helps to drive their own investigations and enforcement activity, which in turn can generate intelligence for use by CBP in their own targeting efforts.

It would be a simple step for the express carriers or Customs to provide that information to the rights-holder, but Customs has asserted that it lacks the authority to do so. We

strongly believe that CBP's interpretation of the applicable statutes is at odds with the authority provided by Congress by both the Trade Facilitation and Trade Enforcement Act ("TFTEA"), and pursuant to authority provided in the National Defense Authorization Act for Fiscal Year 2012, as well as direction from the Administration by Executive Order last March. In fact, CBP's interpretation appears to be at odds with (its partner agency) HSI's own interpretation.

While we have been informed that the Voluntary Abandonment Pilot Program has been terminated, we've also received word that CBP intends a full roll-out of the policy nationwide. Information regarding this intended expansion of the pilot, including the adoption of relevant regulations, has been slow to materialize. We're likewise troubled by the lack of opportunity for the rights-holder community to provide input on this issue.

The Seven-Day Waiting Period

Title III, Section 302 of TFTEA requires Customs to share with rights holders unredacted images of merchandise suspected of infringing trademark or copyright laws, if Customs determines that sharing such images will assist it in making an infringement determination. This includes importer and exporter information and other relevant information on the packaging. In the absence of revised regulations to implement Section 302, Customs continues to operate under a regulation adopted several years ago, requiring the importer to be contacted first to seek authentication of the goods in question. If the importer fails to provide sufficient evidence within seven days, only then is CBP permitted to send unredacted photos to the rights holder. The regulation, as adopted, provides no guidance with regard to the standards for determining sufficiency of the evidence or its evaluation. Moreover, how or why Customs saw fit to graft this requirement onto the law is unclear, has never adequately been explained. What is clear, however, is that it wastes Customs' resources and significantly slows rights-holders' enforcement efforts. Seizure notices can often take weeks or months to arrive and the leads often go cold. This is incredibly frustrating and damaging to our enforcement efforts. Customs should promptly adopt revised regulations to implement the authority set forth in Section 302 of TFTEA and withdraw the seven-day waiting period to streamline this process.



Etienne Sanz de Acedo
Chief Executive Officer

655 Third Avenue, 10th Floor, New York, NY 10017-5646, USA

t: +1-212-642-1776 | f: +1-212-768-7796

inta.org | [REDACTED] [REDACTED]

June 28, 2018

The Honorable Orrin G. Hatch
Chairman

The Honorable Ron Wyden
Ranking Member

United States Senate Committee on Finance
Washington, DC 20510-6200

Re: Senate Committee on Finance Questionnaire on the Proliferation of Counterfeit Goods Sold on the Internet

Dear Mr. Chairman and Senator Wyden,

The International Trademark Association (INTA) greatly appreciates the opportunity to provide answers to the questionnaire that the Senate Committee of Finance prepared on the proliferation of counterfeit goods sold on the Internet.

INTA is a not-for-profit membership association of more than 7,000 member organizations from more than 190 countries throughout the world. INTA is headquartered in New York, with offices in Washington D.C., Brussels, Santiago, Singapore and Shanghai. Its membership crosses all industry lines, including manufacturers and retailers, and is united in the goal of supporting the essential role trademarks play in promoting effective national and international commerce, protecting the interest of consumers, and encouraging free and fair competition.

As a not-for-profit, we surveyed our membership and are submitting answers that we have collected from eight of our U.S.-based Corporate Members who have chosen to remain anonymous. We sent the questionnaire to our Anticounterfeiting Committee Corporate members and received results from four pharmaceutical companies, two portable electronic devices companies, one toy company, one tobacco company, and one skincare and makeup company. As instructed, the answers are provided on a question-by-question basis.

INTA commends the ambitious work set forth by the Senate Committee on Finance to evaluate the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA). The Association looks forward to assisting your efforts to curtail the illegal sale of counterfeit goods on the Internet. We also are pleased with the recommendations set forth in 2018 Government Accountability Office Report entitled, "Agencies Can Improve Efforts to Address Risks Posed by Changing Counterfeits Market."

Anticounterfeiting is a top priority of INTA. As part of the Intellectual Property Rights Working Group of the Commercial Customs Operations Advisory Committee, we recently provided recommendations to the U.S. Customs and Border Protection (CBP) to increase their authority to address e-commerce, intellectual property rights (IPR), and import safety challenges. Incidental to enforcement work by various government authorities in counterfeiting cases, information is generated that can be useful for investigating the identity and role of other parties, including suppliers of goods and accessories. Due to limitations of resources, government enforcers are not always able to use such documents and information in the course of their

New York | Shanghai | Brussels | Washington, D.C. | Singapore | Santiago

PowerfulNetworkPowerfulBrands®

Chairman Hatch and Senator Wyden

June 29, 2018

Page 2

own investigations following an initial seizure of goods, documents or other evidence. However, trademark owners can utilize these documents and information in the course of private investigations and therefore need prompt access to information regarding counterfeits and the counterfeiter. Accordingly, INTA recommends that the CBP's rules and procedures be revised in order to provide prompt and reasonable access by trademark owners to relevant documents and information on counterfeiters for use in conducting private investigations or for filing of complaints to the courts or other government agencies.

Thank you for your consideration of our comments. If you have any questions or wish to discuss in more detail, please contact INTA's Anticounterfeiting Manager, [REDACTED]

Sincerely,



Etienne Sanz de Acedo
Chief Executive Officer
International Trademark Association



Linda Dempsey
Vice President
International Economic Affairs

June 29, 2018

The Honorable Orrin Hatch
Chairman
Senate Committee on Finance
219 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Ron Wyden
Ranking Member
Senate Committee on Finance
219 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Hatch and Ranking Member Wyden:

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing over 14,000 manufacturers small and large in every industrial sector and in all 50 states. Manufacturing employs nearly 12.6 million women and men across the country, contributing \$2.25 trillion to the U.S. economy annually. More than 90 percent of NAM members are small and medium-sized businesses.

The NAM welcomes the opportunity to provide input on the challenges that global counterfeiting pose to manufacturers in the United States in response to your May 30 letter. Innovation and intellectual property (IP) remain the lifeblood of our economy, and the foundation for a competitive manufacturing base that can compete successfully around the world in order to sustain and boost good-paying jobs. Strong IP protection and enforcement are also vital to promote broader U.S. interests, consumer health and safety.¹

The United States has spent decades both building a strong domestic legal framework to tackle counterfeiting and pushing for stronger global enforcement of trademarks and other IP rights abroad through both direct bilateral negotiation, robust investigations such as the Special 301 process and building a robust set of global rules and standards. Despite those efforts, U.S. IP remains a constant target for global counterfeiters and other criminal elements who seek to appropriate American IP and brands for their own goals. A 2016 report from the Organization for Economic Cooperation and Development (OECD) reported that global trade in counterfeit and other fake goods exceeded \$460 billion, or 2.5% of global trade, in 2013.² A February 2016 industry study reveals an even starker story, with estimates that the global economic value of counterfeit and pirated products could reach \$2.3 trillion by 2020.³

The growth of counterfeits is also having a growing and directly negative impact on the U.S. economy. A 2017 report by the Commission on the Theft of Intellectual Property found that

¹ White House Office of the Intellectual Property Enforcement Coordinator, "[Supporting Innovation, Creativity & Enterprise: Charting a Path Ahead: U.S. Joint Strategic Plan on Intellectual Property Enforcement, FY 2017-2019](#)," December 2016.

² OECD, "[Trade in Counterfeit and Pirated Goods: Mapping the Economic Impact](#)," April 2016.

³ International Trademark Association and Business Action to Stop Counterfeiting and Piracy, "[The Economic Impacts of Counterfeiting and Piracy](#)," February 2016.

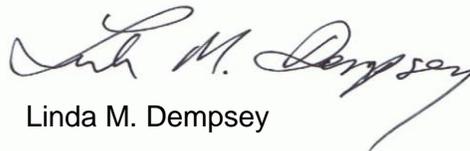
stolen ideas, brands and inventions drain up to \$600 billion from the U.S. economy, harming U.S. businesses, jobs, and workers in the process – an estimate nearly double that of its previous report four years before.⁴ Of that figure, counterfeit and pirated goods are estimated to cost the U.S. economy between \$29 billion and \$41 billion per year.

Such IP-infringing actions impact manufacturers across sectors, in all countries, and of all shapes and sizes, whether they primarily sell to businesses or directly to consumers. As one NAM member noted in response to this questionnaire, “No industry, market, product category or geography is immune.” Counterfeiting harms manufacturers in a wide variety of sectors, including agricultural chemicals, auto parts, consumer goods, industrial machinery, and pharmaceuticals. While these issues impact manufacturers large and small, counterfeiting is particularly impactful for small-and medium-sized manufacturers (SMMs). These firms often do not have in-house IP experts or investigators to monitor for theft of brands or the resources to track down and prosecute counterfeiters. As such, SMMs are particularly reliant on government actions – and clear government authorities such as those laid out in the Trade Facilitation and Trade Enforcement Act of 2015 – to stop international counterfeiting and piracy and trade in fakes.

Moreover, counterfeit products pose a direct threat to consumer health and safety. Many of the most commonly counterfeited goods are those used directly by consumers, ranging from personal care products to consumer electronics, that may be ingested or placed in direct contact with the body. Other products can pose a direct risk of serious injury, such as counterfeit batteries used in electronic products or counterfeit auto parts such as airbags. Such risks have been documented in a range of reports, including U.S. Customs and Border Protection campaigns.⁵

Based on member responses, we have provided the answers below to the survey questions provided below. We would be happy to discuss any of these further.

Sincerely,



Linda M. Dempsey

⁴ Commission on the Theft of American Intellectual Property, [“Update to the IP Commission Report,”](#) (Washington: National Bureau of Asian Research), February 2017.

⁵ U.S. Customs and Border Protection, [“Fake Goods, Real Dangers,”](#) Last accessed on June 28, 2018.

**Comments of the National Association of Manufacturers
for Senate Finance Committee Survey on the Proliferation of Counterfeit Goods
Sold through E-Commerce Websites**

June 29, 2018

- 1. Do you warn consumers about the risk of counterfeits of your products, their availability, and/or how to avoid accidentally purchasing them, and if so, how?**
 - a. Do you believe that your consumers understand the significance of purchasing counterfeit versions of the goods?**
 - b. What challenges exist in informing consumers of the risks associated with the purchase of counterfeit goods?**

NAM members take a range of steps to engage with consumers about the importance of genuine products and the risks that counterfeit products pose to health and safety, though education and engagement programs may differ from company to company. Examples include:

- Communicating regularly to customers that their companies' products are only available through official company sales teams, online vendors and facilities;
- Creating and publicizing clear channels –consumer education websites and hotlines, or designated customer relations or brand protection contacts – for customers that have questions on whether a given product is genuine or to report a suspected purchase of a counterfeit products;
- Working directly or with other stakeholders (such as industry associations and coalitions) to develop and release consumer advisories and other materials on the dangers of counterfeit products;
- Engaging traditional and social media platforms to prompt coverage and discussion of the dangers of counterfeit products.

Many of our members signaled their belief that the vast majority of consumers do not purchase counterfeit products intentionally, particularly when those products are easily linked to potential health and safety problems. Though most respondents indicated they believe customers are broadly aware of the dangers of counterfeit products, they argued that consumers may not be aware of just how prevalent counterfeit products are on well-known online marketplaces, or how specific products – such as counterfeit replacement parts – can damage an original product. Moreover, customers may not be aware of the distinctions between real, fake, grey-market and aftermarket goods.

Several members also noted that consumer education efforts are complicated by changes in the ways which products are sold, shipped, distributed. Some manufacturers do not sell their products directly to consumers, but instead sell their products through third-party sellers. Nor are e-commerce platforms the only intermediaries involved in the sales chain, as carriers, shipping companies, direct websites, online portals and payment processors all help to connect manufacturers and consumers. These new realities make it more challenging for manufacturers to educate consumers directly and require them to engage with a broader mix of stakeholders to carry this messaging.

NAM members face challenges, however, in informing consumers about the prevalence of counterfeit products on online platforms. For example, one respondent indicated that telling consumers about the prevalence of counterfeit products on online platforms can have

unintended effects. While manufacturers face the proliferation of counterfeit products on these platforms, they also seek to sell genuine versions of their products on these platforms to reach consumers. Manufacturers thus cannot simply tell customers that a given online platform is “safe” or “unsafe” without limiting their own ability to get legitimate products into the hands of customers. Even within a given platform, the diversity of third-party marketplace sellers, and the range of listings for any given product makes it difficult for a manufacturer to provide clear, up-to-date instructions to identify whether a given vendor is “safe.”

Moreover, manufacturers have to be careful about how they educate consumers, as such information can also serve as a “blueprint” for counterfeiters on how to fool customers. If manufacturers are overly specific about what critical features are used to distinguish real products from fake ones, counterfeiters will simply adapt their methods to incorporate those features.

2. What tools do you provide consumers to verify the authenticity of their goods?

While many companies look to integrate specific product design and packaging features – on top of the trademark itself – that allow them to tell real from fake products, such as holographic tags, QR codes and unique serial numbers, most respondents indicated that they request customers to reach out directly to company channels to determine whether a given product is real or fake. These manufacturers do not tell consumers how to identify directly the physical attributes that they use to identify counterfeit products because that information will likely become widely public once shared. As noted above, that provides an easy template for counterfeiters to replicate.

One company noted that even this method has been a challenge, as they have seen known counterfeiters call their customer support line in order to obtain information about which features are used to identify counterfeit products, and even to seek information about which company staff are responsible for submitting complaints to online marketplaces.

3. Please describe how you coordinate with e-commerce platforms to curtail counterfeiters.

NAM members work with e-commerce platforms in a variety of ways, with companies adopting various levels of engagement:

- At the most basic level, manufacturers that become aware of an instance of online counterfeiting contact the relevant e-commerce platform (either directly or through a third-party vendor) to file a complaint.
- Many manufacturers devote specific time and resources (again, either directly or on a contract basis) to monitor online platforms for potential counterfeit products and submit complaints to those platforms through the platform’s dedicated portal. In some cases, they may also send cease and desist (C&D) letters to individual counterfeit vendors.
- Many manufacturers also participate in brand registry or other dedicated programs designed to prevent counterfeit offerings more proactively, or engage in more detailed, regular communication with representatives of those platforms.
- Finally, some companies work directly with e-commerce platforms to develop and implement best practices to prevent counterfeiters from using their services or otherwise encourage platforms to take more proactive measures.

In addition to e-commerce platforms, manufacturers must increasingly work with a range of intermediaries, as carriers, shipping companies, direct websites, online portals and payment processors all help to connect manufacturers and consumers. Many of these other intermediaries have less developed programs to aid brand-owners to identify and eliminate counterfeit products.

4. Once you suspect that counterfeit goods are being distributed, by either an importer or by a distributor or distribution network within the U.S what types of actions, including the initiation of litigation, do you pursue? Please provide examples.

NAM members take a range of actions, depending on the scope of counterfeiting activity, the actors involved, the location of the importer, seller or distributor, and the quality of evidence collected. These tools can include:

- Sending a formal cease and desist (C&D) letter to the relevant importer, seller or distributor, requesting them to halt illegal use of trademarks and copyrights, sales of counterfeit products, and to remove counterfeit products and stolen trademarks from online sites;
- Contacting the relevant online marketplace (directly or via their brand protection organization) or Internet service provider to file a complaint and request removal of stolen trademarks and copyrights;
- Engaging Customs and Border Protection, including submitting the name of the counterfeiting importer or distributor to Customs and Border Protection for potential action;
- Working directly with appropriate law enforcement (local, state or federal authorities such as the National IPR Center, the Federal Bureau of Investigations, Homeland Security Investigations or specialized agencies responsible for their products such as the Food and Drug Administration), with cooperation ranging from simply providing case information and the names of identified counterfeiters up to cooperation on port seizures and undercover investigations; and
- Using the courts, either through civil litigation or, where possible, criminal prosecution.

Many of the government channels to engage can be contacted directly, or can be identified through the StopFakes portal.

While courts offer stronger penalties and actions to battle counterfeiters, respondents had different views and strategies for when and how they use the courts. One company, for example, indicates that they strongly support – and prefer – criminal prosecution versus civil litigation, as it allows better paths to “identify, prosecute, and bring counterfeiters to justice.” They, therefore, use criminal prosecution where possible, while also pursuing some civil litigation. Other companies focus on civil litigation as appropriate, while also noting that civil litigation has limitations: counterfeiters are often not based in the United States, or can default or disappear without paying damages. Moreover, civil litigation can become prohibitively expensive given the volume of counterfeiters that they face. One company, for example, noted that a recent civil case against a counterfeiter generated more than \$30,000 in expenses, even though it settled early. This is a challenge for companies of all sizes, but is particularly burdensome for SMMs.

5. Do you participate in brand registration and verification programs provided by e-commerce platforms or any other intermediary? What features of such programs have been useful in identifying and removing counterfeit products?

Respondents indicated that they used a number of brand registration and verification programs provided by e-platforms, with eBay VeRO, Amazon Brand Registry and Alibaba's Marketsafe Expansion program being the most common. Manufacturers' use of these programs depends in part on where their counterfeit products are being sold, but also the terms and conditions of use for each program.

Across the board, manufacturers indicated that they are seeking programs that ensure speedy resolution of complaints, are cost-effective for manufacturers of all sizes, are easy to use, and where staff are responsive to complaints and provide notice to sellers once listings have been removed. One member positively noted Alibaba's willingness to suspend listings for reportedly counterfeit products submitted through the Marketsafe Expansion program during the course of the platform's investigation, thus make it more difficult for counterfeiters to relist and sell the fake product.

At the same time, this member also suggested that the "off-the-shelf" capacity of these programs remains only partly effective. Instead, the company has sought to use participation in these programs as a means to build a better relationship with the platform to address emerging issues.

6. What other services, tools, protections, and assistance do you provide?

In addition to direct engagement with platforms and enforcement officials detailed above, manufacturers suggested various services and technologies that they use to monitor and report instances of counterfeiting, including:

- Software to "scrape" online marketplaces for potential counterfeits;
- Innovative programs and platforms with trade organizations and coalitions to engage e-commerce platforms on potential changes to those platforms' terms of service;
- Customized apps provided to customs and law enforcement officials to identify counterfeits more easily combined with direct training; and
- Expert testimony in civil and criminal cases involving counterfeiters.

Manufacturers also frequently engage directly with enforcement officials to provide one-on-one training and access to additional product information that assists in efforts to remove counterfeit goods from the stream of commerce.

7. Have you ever conducted test buys through online e-commerce platforms? If so, can you provide us with information on the outcome of the test buys?

Manufacturers routinely conduct test buys of potentially counterfeit products from online marketplaces, focusing efforts on listings that are suspicious for various reasons, including price. Respondents clearly indicated a significant number of test buys turn up counterfeits:

- "...approximately 95 percent [of our test buys] have produced counterfeit or diverted products."
- "Most of the time we receive counterfeits."
- "These test buys often confirm our suspicions [that these goods may be counterfeit]..."

Respondents also noted that in addition to counterfeit products, test buys can also turn up other illegal or infringing products, including grey-market products, generic or off-brand products different than those that were advertised, and genuine products that had been stolen or diverted somewhere along the distribution chain. Test buys triggered by low price can also turn up genuine product that was purchased on clearance or resold by a customer who no longer wanted it, though this is rare.

Respondents also offered some caution about test buys, noting that the heavy reliance on test buys to convince online platforms is problematic. Not only are repeated test buys of individual listings expensive and time-consuming, but they are not always effective.

One member noted that counterfeiters are often aware of the location of the manufacturer whose IP they are infringing, and sellers often cancel test buy orders based on the shipping address. Many manufacturers try to address those concerns by hiring staff in other locations to make test buys. Even this, however, may not be effective, as counterfeiters closely monitor for potential test buyers and can often identify them if too many shipments are sent to one address. Counterfeiters may cancel orders to perceived test buyers or may even maintain a limited stock of genuine products to fulfill those orders.

8. What do you do to remove counterfeits from the stream of commerce?
a. Can you provide us with statistical information regarding the frequency in which you have taken actions against suspected counterfeit products – either through investigation, destructions, abandon, or otherwise?

Manufacturers take a variety of actions to remove counterfeits from the stream of commerce, with a focus on the types of activities provided above in the answers to questions 3, 4 and 5. More broadly, manufacturing strategies to remove counterfeits from the stream of commerce involve efforts to:

- Improve products to make them more difficult to counterfeit while also making counterfeit products easier to detect;
- Frustrate counterfeiters' supply chains, including efforts to make it more difficult for counterfeiters to find distributors and online sales channels; and
- Influence and enable third parties (including intermediaries and enforcement officials).

Data on the frequency of action is hard to generalize across survey responses, but manufacturers generally noted that they take action as frequently as they are able, based on prioritizing time, resources, and the nature of the threat.

- 9. In your view, what are the challenges in assisting consumers from inadvertently purchasing counterfeits and better targeting distributors of counterfeit goods?**
- a. What concrete steps can be taken to address these challenges?**

In addition to the broader difficulty of reaching and continually educating consumers on the dangers of purchasing counterfeit goods, manufacturers face practical challenges that limit their ability to work with online platforms, distributors, and other intermediaries to stem the proliferation of counterfeits, including high burdens to prove that particular listings are counterfeit products. Online marketplaces generate substantial revenues from sales of counterfeit products, and need to work more proactively and responsively with manufacturers to take down fake products and warn consumers about the dangers of counterfeit products.

The high burden of proof placed on manufacturing brand-owners stems from a number of structural factors, including:

- Lack of clarity and consistency from platforms as to what information (short of a resource-intensive test buy) could be used to convince the platform to take action;
- Procedures that often allow known counterfeiters to relist products even when identical or similar products have been removed as counterfeit; and
- Limited or ineffective mechanisms for online platforms to notify individual customers who have purchased a product from a seller who has been reported for selling counterfeits of that item.

Efforts by online platforms to addressing these specific issues could go a long way in helping manufacturers large and small to better fight counterfeits being sold online. One company stated this clearly, saying that “it is essential that compliance be built into the overall e-commerce experience.”

In addition, respondents also pointed to additional areas of government action, including increased ability of CBP officials to share information on counterfeit goods and closer coordination between government agencies to raise awareness of the health and safety risks of counterfeits and reduce demand for these products. As the majority of counterfeit products being sold via these platforms come from a few countries (including China), several respondents explicitly recommended that the U.S. government negotiate stronger protections and enforcement against counterfeit trademarks, pirated copyrights, and false advertising in those countries.

- 10. Do you engage with U.S. federal and/or local authorities to remove counterfeits from the stream of commerce and to curtail their distribution in the United States? If so, what authorities and types of activities and coordination efforts have proven successful, and are there gaps in such engagement?**
- a. Have you initiated civil litigation for such activity? What are the barriers to such action?**
- b. Have federal or local authorities brought prosecution for such activity concerning your intellectual property? What are the barriers to such action?**

See question 4 for responses on these questions, particularly on civil litigation.

While the majority of survey respondents indicated they have had repeated, positive experiences partnering with law enforcement agencies, at least one member indicated that their efforts to engage federal and local law enforcement has not yielded meaningful results, with law

enforcement officials not always responsive or active even when they receive potential enforcement cases. Respondents also flagged additional barriers, including continued concerns about the weakness of available penalties and limited agency resources to pursue IP enforcement.

11. Do you engage with foreign governments to curtail the proliferation of counterfeits? If so, what types of activities and coordination efforts have proven successful? What has not?

Manufacturers regularly engage with foreign governments to address the proliferation of counterfeits, including trademark and copyright registration bodies, Customs officials, and law enforcement agencies at the local and national level. (In many companies, local company representatives may take the lead on engaging with these agencies.) Manufacturers do so in a variety of ways, including sharing information about counterfeit goods and trends, one-on-one training, market surveys, and case support.

Manufacturers noted that criminal prosecution is a particular challenge in some foreign countries, where IP theft is not treated as a criminal offense or does not result in meaningful penalties.

12. If you become aware of a counterfeit, either distributed to a consumer or otherwise within your control or stewardship, what, if any, actions can you take to prevent the sale of the good?

Respondents indicated that as soon as they become aware of a relevant counterfeit product, they take appropriate steps as laid out in responses to questions 4, 7, 8 and 10. In addition to test buys via online platforms, manufacturers also use other tools, including market sweeps, seizures, raids and engagement with law enforcement to seize evidence and prevent sales of goods to consumers.

13. If there are any other pieces of information, details, or data you feel would be helpful to the committee, we respectfully suggest that you submit them as part of your answers as well.

NAM members have noted a number of other issues that have an impact on their ability to fight counterfeiting, both via physical and online channels. These include:

- Significant loopholes in U.S. Postal Service (USPS) procedures that allow counterfeiters in China to ship to the United States without providing full advance electronic data (AED) and at a low cost (subsidized by USPS under the Universal Postal Union agreements).
- Limitations in federal trademark law that can allow counterfeit products in the country that may be clear copies of existing product design but are not direct copies of existing trademarks. Many of these products pose just as much of a risk to public health and safety as those that directly copy an existing trademark, but are very hard to prove to be counterfeit.

- Limited sharing of best practices across platforms, which can often result in the migration of counterfeit products from one platform to another. One respondent indicated that they battled counterfeits on successive iterations of a branded product on one major platform for several years. Those efforts were ultimately successful, but the counterfeiters simply migrated to another platform.

EXECUTIVE COMMITTEE

Chris Clawson
Chairman - SFIA

Bob Puccini
Independent Consultant
& Advisor to Mizuno, USA,
Inc.

Tom Cove
President & CEO
SFIA

Michael Savage
Secretary Treasurer
Empower Fitness

Jennifer Bendall
Nike, Inc.

Jim Weber
Brooks Running Company

Mike Zlaket
Rawlings Sporting Goods

BOARD MEMBERS

Brian Anderson
Former President - 2XU

Dan Arment
Riddell & BRG Sports

Jim Baugh
Jim Baugh Consulting

Melissa Dawson
Molten USA Inc.

Rawleigh Grove
PING Golf

Brian Jennings
National Hockey League

Sal LaRocca
National Basketball Association

Gene McCarthy
ASICS America Corporation

Scott McDonald
Body-Solid, Inc.

Fouzan Mansuri
Amazon.com

Neil Morton
ATA International

Jeff Padovan
Bite Tech Inc.

Nathan Pyles
Johnson Health Tech NA

Jonathan Ram
New Balance Athletic Shoe, Inc.

Matt Stanton
Underarmour, Inc.

Kurt Tandan
adidas America, Inc.

Marco Zambianchi
Technogym



June 28, 2018

The Honorable Orrin Hatch
Chairman
Committee on Finance
United States Senate
219 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Ron Wyden
Ranking Member
Committee on Finance
United States Senate
219 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Hatch and Ranking Member Wyden,

The Sports & Fitness Industry Association (SFIA) applauds the Committee's inquiry into the challenges presented by counterfeiting and efforts to reduce the number of fake products available on-line. SFIA members' products are targeted for counterfeits and our industry has taken a variety of steps to reduce the production and flow of counterfeit goods into the marketplace.

Thank you for the opportunity to provide insight from the sports and fitness equipment industry on preserving intellectual property rights. Please find background information on the issue from the sporting goods and fitness equipment industry perspective below followed by our responses to the Committee's specific questions.

On behalf of our members and corporate partners, SFIA is pleased to provide information to the Senate Committee on Finance regarding the on-going activities within our association with respect to informing American consumers on the dangers of counterfeit goods and how we assist our member companies in curtailing the illegal sale of counterfeits through e-commerce sites.

To fully appreciate the situation, it is important to recognize the size and scope of the problem in the United States and the types of illicit activity impacting the industry as a prelude to our responses to the committee's questions.

We tried to provide a more direct read on the barriers to entry for would-be counterfeiters, overt & covert forensic technologies & tools deployed by our members and future anti-counterfeiting direction for the SFIA in our response. The background is critical to inform the Senate Committee on Finance as to if/how/why this illegal trade is evolving, if/how/why the consumer needs are changing, and what that represents in terms of the current and future impact to the loss of American jobs. With these insights, the Senate Committee on Finance can confidently determine the strategic future course of action with regards to legislation.

Note: This response contains the latest anti-counterfeiting industry figures published by both the International Anti-Counterfeiting Industry Association (IACC) and Smithers Pira of Akron Ohio

Executive Summary

The Sports & Fitness Association for the past decade has watched closely the anti-counterfeiting efforts its member hard-goods manufacturers and professional sports leagues deploy daily to combat the sales of counterfeit goods and licensed products.

Both the golf and tennis manufacturers and major league sports properties such as the NFL MLB, NBA and the NHL were quick to recognize the threat to their revenues, brand equity and reputation brought upon them by the sale of counterfeit goods in the physical and digital marketplace. Each one of these entities has deployed robust and comprehensive anti-counterfeiting programs aimed directly at the consumer in both the physical and digital marketplaces.

The Sports & Fitness Industry Association after months of due diligence selected Surys to be our corporate partner to educate, inform and deploy for our members the latest physical and digital technologies designed to stop counterfeiters and give consumers “peace of mind” knowing they have purchased a genuine product.

Surys, Inc. a market leader in optical and digital security solutions for authentication, product protection and product identification was selected by the SFIA in 2014 to help our members combat counterfeits. During the past four years, Surys Inc. has presented to the general membership at its annual conferences, participated in roundtable discussions at SFIA. Legal Summits and met with dozens of member manufacturers on

a one-one one basis to raise the awareness of this problem and offer members comprehensive security solutions to protect their brands and intellectual property.

Industry Overview

Counterfeit goods, software piracy and the theft of trade secrets cost the American economy as much as \$600 billion a year according to the IACC. Counterfeit goods alone cost the U.S. economy \$41 billion and the main culprit is China, including Hong Kong, which represents over 85% of counterfeit goods entering the United States.

Sporting goods represents only 1% of counterfeit products seized in the United States. Luxury goods like handbags, shoes and accessories has for the first time in 2017 surpassed pharmaceuticals as the most counterfeited items coming into the U.S.

Threats to brand equity are in addition to counterfeiting, diversion, unauthorized use of the mark, tampering and theft. Most of our members are concentrated on brand creation, enhancement and maintenance and only a handful of industry groups inside of the SFIA invest in brand protection. Fighting counterfeiting, diversion and unauthorized use of the mark affect a company's budget and its cost of goods sold. Many of our newest members do not have the mechanisms or systems in place to even quantify their losses due to counterfeiting and diversion.

The North American security providers deployed in 2017 on behalf of all US brands the following expenditures for brand protection by function:

- Tamper evidence labels and sleeves... \$314M
- Supply chain Security..... \$183M
- Consumer confidence labels..... \$210M
- Internet monitoring services..... \$150M
- Loss prevention tags..... \$20.8M-

The U.S. is by far the largest consumer of fake goods consuming more than three times more than Mexico, the second largest. Counterfeit consumer electronics is by far the largest group followed by software, food, auto parts, toys, music and clothing.

The US together with the EU has taken the lead in developing standards and regulations to address the counterfeit problem. Here are just a few:

- IDEA –STD 2016....inspection processes for the Electronics Association that are merged into the TQM systems of the brand owner
- Food Safety Modernization Act...time, tempature and humidity seals designed to prevent food safety problems before they happen
- Drug Supply Chain Security Act (DSCSA) ...requirements to electronically track pharmaceuticals throughout the distribution system and mandates a national license program for wholesalers, distributors and third-party logistics providers.

The “internet of things” has created new opportunities for selling and advertising illegal goods to an ever-widening pool of potential customers. As a result, many of these counterfeit goods are being delivered directly into the home from China making it extremely difficult to interdict these counterfeit goods before they enter the United States. Pallet by pallet distribution has been replaced by box by box shipments directly from the counterfeiters to the consumer.

This shift to online distribution has raise a variety of difficulties for the SFIA members who seek to enforce their rights against individuals who are able to operate with relative anonymity and beyond the jurisdiction of U.S. courts or law enforcement. This proliferation of this illicit online trade poses a threat to consumer confidence in the legitimacy of the internet as a commercial platform.

The SFIA, working with its security partner Surys, is trying to raise the awareness of this growing problem among its members and present a business case endorsing both an on-line and physical security plan that protects the product, authenticates the product and tracks the product throughout the global supply chain.

Here are some of the developing technologies shared with our members over the past 24 months:

- Product authentication for consumers using smartphone. Consumer interaction and data analytics are already being deployed that allow consumers to read

encrypted digital chips and QR codes simultaneously to get a positive authentication with their smartphone cameras.

- Printed electronics...emerging serialization technology but with high unit price so adoption has been limited
- RFID tagging...tried and tested tool for inventory management but the unit cost is not acceptable to most if not all of our membership.
- Autonomous database...allows product ID and supply chain data on packaging and product in real-time.
- Internet monitoring and domain name management...digital enforcement services that have

well-established relationships with the major auction sites, B2B trade boards and marketplaces, domain registrars and domain hosts globally. This means that the team is able to affect fast, compliant takedown and enforcement actions. Expert analysts monitor auction sites, perform de-listings and seller shutdowns with compliance tracking.

Market Place Sites.

Infringing listing notifications shall be sent to the agreed B2C and B2B sites that infringe Client's Intellectual Property Rights.

Fraudulent and or Counterfeit Websites.

Deactivation requests shall be sent to hosting providers and domain registrars to affect the deactivation of fraudulent and or counterfeit websites. The result of

these actions will be that the domain is either suspended or the infringing website content is removed.

Infringing Websites.

Cease and desist communication shall be sent to the third-party registrant/owner of an infringing website requesting that the registrant/owner of an infringing website cease and desist the trade mark or copyright infringement.

In summary, while suppliers and security solutions companies that excel at developing overt, covert and digital elements which cannot be copied or forged, brand owners such as our membership are predominately interested in whether the investment they make in such technologies will result in the prevention of the counterfeit problem. As a result, the level of adoption has been slower than the growth of the problem. SFIA is committed to the on-going education of our members and will work with security providers on building a better business case.

Our specific responses to your inquiry are a collaboration of input provided by an internationally recognized optical and digital security specialist (**Red**), a firm who represents SFIA brands on anti-counterfeiting efforts in China (**dark blue**) and SFIA member companies (**light blue**). Please find our responses below:

Thank you for the opportunity to share the Sports and Fitness Industry's perspective on the counterfeiting problem in America. Please help American businesses combat counterfeits. Please let me know if you have any follow-up questions.

Sincerely,

A handwritten signature in cursive script, appearing to read "Tom Cove".

Tom Cove
President & CEO



Inspiring Generations of Play

1200 G Street NW • Suite 200 • Washington, DC 20005
t. 202.459.0354 • e. info@toyassociation.org

July 6, 2018

The Honorable Orrin Hatch
Chairman
Senate Committee on Finance
219 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Ron Wyden
Ranking Member
Senate Committee on Finance
219 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Hatch and Ranking Member Wyden:

Thank you for the opportunity to respond to your inquiry following up on the March hearing, “Protecting E-Commerce Consumers from Counterfeits.” We appreciate the Committee’s interest in this issue and look forward to working with the Committee to raise consumer awareness of the issue of intellectual property (IP) infringement online and identify viable solutions.

Our submission today provides an overview of our concerns. However, we will continue to work with our members to provide more specific information to submit to the Committee to help with the Committee’s report. The Toy Association IP Committee is working on a longer report related to this issue and we will supply it to the Committee once completed.

As background, The Toy Association is the national trade association representing the U.S. toy industry. From inventors and designers to toy manufacturers and importers, retailers and testing labs – The Toy Association represents all involved in creating and bringing toys and games to children. We represent over 950 members who produce and sell approximately 90% of the three billion toys sold in the United States each year. [REDACTED] supports an estimated [REDACTED] states generating more than \$35.1 billion in wages for U.S. workers.

Since the 1930s, The Toy Association has been a leader in the development of toy safety standards, and toy safety has long been the top priority for the association and its members. As your work on IP infringement continues, we encourage that there be a heightened focus on the lack of safety measures associated with counterfeit goods and the risk unsafe products bring to children and other unknowing consumers in this country.

U.S. toymakers have a long history of leadership in global toy safety initiatives. The Toy Association and several U.S. toy company experts created the first comprehensive toy safety standard nearly four decades ago. Congress and the President recognized this industry leadership by adopting the ASTM F963 U.S. toy safety standard as a mandatory consumer product rule under the Consumer Product Safety Improvement Act of 2008. This standard is frequently used as a model – or adopted outright – by other countries that are developing or improving their own safety measures.



Inspiring Generations of Play

1200 G Street NW • Suite 200 • Washington, DC 20005
t. 202.459.0354 • e. info@toyassociation.org

A significant and serious issue facing The Toy Association's members is the growing phenomenon of products offered online that infringe their IP. In the last several years, with the expansion of electronic commerce, and increased consumer comfort with e-commerce, rights holders have seen a steady increase in the quantity of infringing products online. Infringing goods include counterfeit products, trademark infringing products, unlicensed merchandise, and knock-off products. They can be found in all corners of the internet, including popular online marketplaces.

Consumers seek out and purchase toys for many reasons, including entertainment, education, quality, value, and safety. One way that consumers narrow the selection of toys is to purchase from a trusted source based on brand recognition. However, with counterfeits, trademark infringing products, and unlicensed merchandise, the true source of the product is not what the consumer is led to believe. Instead, a consumer buys a toy that likely does not meet their expectations for quality or safety; in essence, consumers are not getting what they pay for. This disappoints consumers who are unaware that the products they purchased are not authentic, which in turn affects future purchasing decisions, and may lead to consumers posting poor reviews of a legitimate product based on their experience with the infringing product.

This growing phenomenon negatively impacts consumers, legitimate companies, and the American economy as a whole. In February 2017, the International Trademark Association and the Business Action to Stop Counterfeiting and Piracy released a report finding that in 2013, the estimated value of international and domestic trade in counterfeit and pirated goods was \$1.13 trillion, an amount that was projected to grow. The toy industry has seen significant impact, and while safety is our top concern, IP infringement also causes direct harm to toy companies' core assets, company reputation, and financial health. The problem is disproportionately felt by small companies that have limited resources to fight what is seemingly becoming a never-ending game of whack-a-mole. For consumers, the proliferation of infringing and unregulated toys raises safety and health hazards impacting our nation's most vulnerable population – our children.

[REDACTED].S. must comply with very strict product safety requirements and must be tested by an accredited, independent testing lab to demonstrate compliance with the toy safety standard. These safety standards include small parts regulations, lead limiting regulations, and chemical component controls. In addition, under the Consumer Product Safety Improvement Act of 2008, toy companies must issue a Children's Product Certification stating that the toy is compliant with the applicable safety standards based on third party test results. Suffice to say, it is highly unlikely that an infringing seller has undertaken the same efforts to ensure the safety of their knock-off toy. As such, infringing toys, particularly counterfeit toys, may include unexpected small parts, excess lead, and unsafe chemicals in the materials, coatings, and even packaging.

The Toy Association has determined that there are three primary categories of contributing factors to this steady growth of infringing products online, particularly as it relates to online marketplaces: (1) e-commerce creates a low hurdle to sellers; (2) the burden of enforcement, under current law and practice, is disproportionately on the rights holder; and (3) consumers are largely unaware of the scope of infringing product offered on online marketplaces.



Inspiring Generations of Play

1200 G Street NW • Suite 200 • Washington, DC 20005
t. 202.459.0354 • e. info@toyassociation.org

We note that many online platforms have put into place brand protection programs in an effort to reduce the number of IP infringing products sold through their platforms. These programs have varied success with different companies reporting different experiences with each program. While these platforms are taking down more listings than before, often proactively, the core problem remains: IP infringing and unsafe toys remain online, and toy companies report significant challenges to removing them despite the developments in these programs.

The Toy Association and its members believe there are numerous potential solutions to combat these contributing factors if stakeholders work collaboratively. To that end, The Toy Association has been actively working with online platforms Alibaba and Amazon and are open to working with others to look for ways to increase communication, collaboration and continue to chip away at the problem. Amazon, having recently joined The Toy Association, has begun participating actively on The Toy Association's IP Committee and met with our members on June 14th to discuss updates to the platforms brand protection programs, hear about the challenges toy companies face with IP infringement and exchange information about possible solutions. Alibaba has spoken at numerous Toy Association events to inform our members of what they can do to protect their brands on Alibaba's platforms and has even invited Toy Association members to participate on the Alibaba Anti-Counterfeiting Alliance. These collaborative efforts are just the beginning, and both sides agree more needs to be done, and we look forward to continuing to work with our e-commerce partners to put into place effective solutions.

The Toy Association has also actively engaged with federal agencies such as the Consumer Product Safety Commission (CPSC) and Customs and Border Protection (CBP) as they expand enforcement efforts to adapt to the new flow of e-commerce goods. These agencies are critical to enforcing against counterfeit and unsafe toys imported into the country. However, the sheer volume of small parcel shipments has created unforeseen and massive challenges to effective enforcement at the borders. The significant increase to the de minimis threshold, coupled with online platform as storefronts and efficiencies in [REDACTED] to consumer sales from [REDACTED] countries. That said, we remain supportive of initiatives to improve enforcement and targeting of infringing goods by CBP and CPSC, especially for low-value shipments. The de minimis exemption cannot be an exemption from regulatory compliance and enforcement—intellectual property, safety or otherwise. Importantly, because the average cost of a toy is approximately \$10, the de minimis exemption value of \$800 is a considerable number of toys, allowing for shipments well beyond personal use.

As for consumer education, The Toy Association does year-round toy safety messaging through local media and our safety website www.playsafe.org. Through our media campaigns, we remind consumers the importance of being aware for knock off toys due to the safety concerns. We recommend consumers shop at retail outlets they know and trust, to read reviews, to inspect packaging and the product when received, and to be on the look out for deals that “seem too good to be true” as they probably are.



Inspiring Generations of Play

1200 G Street NW • Suite 200 • Washington, DC 20005
t. 202.459.0354 • e. info@toyassociation.org

Consumers have developed a comfort with and trust in online marketplaces. Unfortunately, it is our experience that consumers are largely unaware of the scope of infringing product available on online marketplaces and thus are unknowingly providing children with unregulated and potentially unsafe toys. Some toy companies also do individual consumer education efforts through social media and on their websites. However, many consumers do not go to the toy company's website when purchasing toys as most consumers purchase from online retailers that carry a wide range of toys and other products. Therefore, a company's ability to educate consumers about knockoffs is limited to the point-of-sale information which must also include product marketing information, safety warnings, instructions, etc.

Additionally, a brand owner does not have the ability to control how other similar (or illegitimate) products are displayed to the consumer which can create confusion. Counterfeiters are adept at blending in and hiding on the sites, including by using multiple accounts, piggybacking on legitimate listings, and pricing at same or even higher than legitimate products. The confusion can be exacerbated by the fact that the ultimate user is often not the purchaser so the person buying the toy may not be aware of what a "real" or "fake" toy looks like.

Clearly, more must be done to raise consumer awareness and The Toy Association appreciates the Committee's ongoing efforts in this area. Additionally, we feel that the burden of brand protection should not be left entirely to the brand owner when the brand owner has limited transparency and ability to control infringing sellers. Finally, while e-commerce has increased opportunities for legitimate sellers from around the world to access U.S. consumers, we believe these sellers must be beholden to the same U.S. laws and regulations that U.S. companies must comply with. On this, more must be done to reduce the number of sellers online that have made a business off of stealing U.S. intellectual property and ignoring safety requirements.

Thank you again for your interest in this matter. If you have any questions, comments or concerns, please contact [REDACTED]

Sincerely,

A handwritten signature in black ink that reads "Steve Pasierb".

Steve Pasierb
President & CEO
The Toy Association

Appendix C – Letters from E-commerce Platforms



June 29, 2018

Chairman Orrin Hatch
Ranking Member Ron Wyden
U.S. Senate Committee on Finance
219 Dirksen Senate Office Building
Washington, DC 20510-6200

Chairman Hatch and Ranking Member Wyden,

Thank you for your letter on May 30, 2018. We appreciate your continued work to assess federal agencies' efforts to protect American consumers and efforts to raise consumer awareness on the risks posed by counterfeit goods.

Amazon strives to be Earth's most customer-centric company where people can find and discover virtually anything they want to buy, with an emphasis on providing low prices, vast selection, and convenience. Each day, millions of consumers use Amazon's website to purchase a wide range of products across dozens of product categories from Amazon and third-party sellers. More than 1 million U.S.-based small and medium-sized businesses from every state in the country now sell on Amazon, and half of the items sold on Amazon worldwide are from small and medium-sized businesses that offer their products through the Amazon Marketplace.

We work hard to earn and maintain customer trust, and we strictly prohibit the sale of counterfeit products. We understand that customer trust is hard to win and easy to lose, and a single inauthentic purchase can turn a customer off of Amazon for life. To maintain this trust, we constantly innovate on behalf of our customers to improve the way we detect and prevent counterfeits from reaching our customers.

Our responses to your specific questions follow below.

1. What types of remedial measures do you provide U.S. consumers who may have unintentionally purchased a counterfeit good through your platform?

Products offered for sale on Amazon.com must be authentic. As a part of our customer focus, all products purchased from third-party sellers on Amazon.com are covered under our "A-to-z Guarantee." As part of that guarantee, Amazon will refund the purchase price of any product if the customer is dissatisfied with the product. Amazon offers this guarantee even if the original seller is unable or unwilling to pay for the refund.

2. What types of remedial measures do you provide to rights holders who find that counterfeit goods are being sold through your platform?

As a baseline, rights owners may submit notices of potential infringement at any time through

601 New Jersey Ave., NW
Washington, DC 20001

Amazon's publicly available notice form. Amazon employs associates around the globe who are available 24 hours a day, 7 days a week to respond to and take action on notices of potential infringement from rights owners; 95% of such notices are acted upon within 8 hours of receipt.

Amazon also employs a Global Brand Relations team to work directly with rights owners on potential infringement and other issues. Additionally, we offer Amazon Brand Registry, a service that provides rights owners with added functionality to more easily facilitate notice submissions and other powerful tools to prevent, monitor, and remove infringing items. Brands enrolled in Brand Registry are finding and reporting 99% fewer suspected infringements as compared with before the launch of Brand Registry.

3. In what circumstances does your organization come into physical contact with counterfeit products sold and delivered to consumers, including those sold by your organization directly or through second and third party merchants on your platform?

Products sold by Amazon itself and sold by third-party merchants using Amazon's fulfillment network reside in Amazon's fulfillment centers until an order is placed. Products sold and fulfilled by third-party merchants do not reside in Amazon's fulfillment centers. While the overwhelming majority of sellers on Amazon are honest entrepreneurs, unfortunately, a limited set of bad actors attempt to evade our vetting and detection systems. When our systems are evaded and counterfeits enter our supply chain, including our fulfillment network, we respond quickly to quarantine inventory, destroy inventory when confirmed as counterfeit, and take appropriate action against seller accounts. While those are effective reactive steps, our foremost priority is to be proactive by preventing risky seller accounts and listings of counterfeits before they are ever seen by a customer. Through these proactive efforts, over 99.9% of all Amazon page views by our customers landed on pages that did not receive a notice of potential infringement.

4. What services, tools, protections, and assistance do you provide consumers and rights holders with respect to preventing the sale of counterfeits?

Amazon invests significant resources in proactive measures to prevent counterfeit and other suspect listings from ever reaching our websites. In 2017, we employed over 3,000 employees and spent more than \$200MM to stop and take action on bad actors attempting to sell on Amazon. Amazon uses machine learning and data scientists to help devise better methods to screen third-party sellers and products for risk signals before sellers and products are ever shown to consumers. More than 99% of the actions we take to remove suspected listings from our websites are based on these proactive measures.

Amazon also offers Amazon Brand Registry, a free service to help rights holders protect their intellectual property on Amazon and improve the experience for our customers. Brand Registry provides powerful tools for searching and reporting trademark and copyright infringement, including the ability to search our catalog based on images and report issues in bulk. The information we gather through Brand Registry helps us build automated brand protections for rights owners, which in turn reduces the burdens of searching for and reporting suspected infringement. Our ultimate goal is to refine the proactive tools in Brand Registry to the point

that rights owners do not have to submit notices of infringement, and we are constantly iterating towards that goal. As part of our continued commitment to offer and improve tools for rights owners, we recently added new features to Brand Registry, including dashboards to see and track notices rights owners have submitted and the automated brand protection features that we have launched on their behalf. Brands can enroll in Brand Registry by going to <https://brandservices.amazon.com>, and to date more than 70,000 brands have successfully enrolled. As noted previously, on average, brands in Brand Registry are finding and reporting 99% fewer suspected infringements as compared with before the launch of Brand Registry.

We have also invested in a counterfeit track-and-trace solution, Transparency. Transparency is an item-level tracing service that allows Amazon to verify the authenticity of products before the products are shipped to the end customer. More than 100 brands are part of our early adopter program for Transparency, ranging from startups to Fortune 500 companies. Even with this initial enrollment, in Q1 of this year, we stopped nearly 30,000 suspected counterfeit units from being shipped to customers.

Additionally, we participate in a number of industry and government events that seek to raise awareness with consumers and other stakeholders on the risks of counterfeit products. As mentioned earlier, customers are protected by our A-to-z Guarantee and they can contact us through multiple avenues—including social media, reviews, and Customer Service—if they have any concerns about the product they've received. We monitor those channels regularly and take action to remove listings and suspend sellers (if appropriate) in response to those signals. Customer reviews can also provide warning signals to subsequent purchasers.

5. Please explain what you feel are some of the biggest risks counterfeit goods currently pose e-commerce consumers.

While there are numerous impacts from the sale of counterfeit goods (due to the organizations that attempt to profit from these activities), we see the largest direct risk being the potential safety risks that counterfeit goods pose to consumers. This risk is not specific to e-commerce, but rather to counterfeit goods in general.

6. What have you done to curtail those risks and what have you done to inform consumers of those same risks, which may not be known to the consumer?

In product categories that pose a potential health or safety risk, like lithium-ion batteries or toys, we require that sellers provide us additional information before they can be approved to sell products in those categories. This may include proof of testing to industry standards on the products they wish to sell and/or invoices to demonstrate these products have been purchased from a trusted source.

Additionally, we have automated tools to detect risk signals, whether it's a call to our customer service centers or a customer review that would indicate a potential safety risk. When these risks are identified, we act quickly to investigate the issue, remove the identified listing or product, take the appropriate enforcement actions on the seller, and have our automated systems learn how to prevent reoccurrences in the future.

7. Do you engage with foreign governments to curtail the proliferation of counterfeits? If so, what types of activities and coordination have proven successful? What efforts have not been successful?

We have engaged in collaborative efforts with government agencies around the globe. Our efforts with foreign governments focus on education and training, enforcement action against counterfeiters through formal legal process, and sharing information to better identify trends in counterfeiting.

For example, since 2011, we have participated in the European Commission's Memorandum of Understanding (MoU) on counterfeits with other e-commerce retailers and rights holder participants to promote better understanding of counterfeits and track efforts to prevent and remove infringing products online. The EU Commission's latest report on the functioning of the MoU from November 2017 showed that signatory marketplaces collectively removed 95.5% of listings through proactive measures, rather than in response to notices from rights holders. The Amazon preventative rate was higher than the aggregate of other marketplaces: we reported a 99.7% preventative action rate. Removing Amazon's data from the aggregate data would reduce the preventative action rate for all other marketplaces to 85.3%. This may be due to several factors, including our strong commitment to proactive takedown, including those outlined in response to question No. 9 below. Additionally in Europe, we have been engaging with Europol and have had successful cooperation recently with the Belgian Customs authorities and London Police.

8. To what extent do you facilitate delivery, storage, processing, and purchases of goods on your platform?

Amazon has created one of the most advanced fulfillment networks in the world, and small businesses can benefit from our expertise. With Fulfillment by Amazon (FBA), small businesses send their products to Amazon's fulfillment centers, and when a customer places an order, we pick, pack, ship, and provide customer service for those products. This allows Amazon to take on the logistics so small business owners can focus their time on growing their business, instead of stuffing and shipping boxes. By using FBA, sellers' products also become Prime-eligible, which means they are available for free two-day shipping, an important factor for driving customer delight and sales. More than half the items sold on Amazon are from small and medium businesses, many of whom choose to use FBA. In 2017 alone, FBA shipped billions of items on behalf of small and medium businesses worldwide, 20,000 of whom surpassed \$1M in sales on Amazon. Amazon estimates that these small and medium-sized businesses have created more than 900,000 jobs worldwide.

9. Which inflection points in the e-commerce purchasing/selling process have you found most critical to intervene in to prevent and/or curtail the distribution of counterfeit goods?

Amazon is focused on proactive measures to detect potential issues so we can take corrective action before we ever receive notification from a rights holder. We find two points in our proactive efforts most critical. First, at registration and before an offer is listed, we use sophisticated real-time tools that utilize predictive analytics, adaptive machine learning, and

other technology to automatically review a variety of data sources – all for the purpose of identifying signals that suggest a potential seller is suspicious and/or an offer may be for inauthentic goods. Based on these signals, we take immediate action to prevent registration or an offer. These technologies run 24/7 and because they are always learning, they also remove offers as new signals are received and suspicious products identified. These data sources include thousands of data points about the seller, products, reviews, contacts to our customer service team, buyer-to-seller communications and more.

The second point we find critical is our collaboration with rights holders. Our tools work most effectively when we receive accurate information from rights holders, including reporting of suspected infringement, details about their trademarks, and their product catalogues. When brands share this information with us through Brand Registry and our notice forms, our technology improves; we can implement automated solutions to strengthen our proactive actions and more quickly investigate and take action on any reactive escalations. Our collaborative engagements with brands and industry groups also help us understand trends and use cases with their products, further fortifying our proactive efforts. We recently signed a Memorandum of Understanding with the International AntiCounterfeiting Coalition (IACC), an industry organization that builds bridges between industries to protect IP rights. As a part of the IACC MoU, Amazon and IACC member brands are collaborating to assess potential infringement, understand new trends in counterfeit products, and help drive additional enforcement against bad actors.

- 10. Have there been instances where genuine goods sold on your platform are intermingled and/or comingled with counterfeit goods? Can you provide an example?**
- a. What is your company doing to prevent this from occurring/reoccurring?**

To increase the efficiency of our fulfillment operations and thereby reduce the cost and shipping times of our customers' orders, Amazon uses a unique stow process to place goods throughout our fulfillment centers, which can be more than 1 million square feet in size. The product stow process is purposely designed so that similar products are not placed next to or near each other. If similar products were placed next to each other, our associates would waste precious time trying to determine which product should be sent to a customer. Instead, by purposely keeping similar products apart, we reduce the potential for confusion and associates can more efficiently process, fulfill, and ship customer orders.

In conjunction with this process, we virtually track where units are located throughout our fulfillment network. When two exact items are available to fulfill an order, our virtual tracking will ship the item that is located closest to the customer. For example, if two identical items are located in California and in New York, a customer located in Virginia would receive the item from the fulfillment center in New York. This allows the customer to receive the item more quickly and reduces shipping cost and environmental impact. Because we virtually track the source or "provenance" of the inventory in our fulfillment centers, we are able to determine who supplied the product and quarantine that supplier's inventory in the event there is any concern with it. Identical or similar goods from different sources are not mixed within the same bins or racks within our fulfillment centers.

11. How do you coordinate with rights holders to verify whether goods sold over your platform are genuine?

- a. If you do not coordinate, please explain how or why you do not feel this is helpful or necessary.**

Rights holders play a key role in helping us prevent the sale of counterfeit and infringing goods as they uniquely possess knowledge regarding the qualities and characteristics of their products. As outlined above, they play a critical role in helping us strengthen our proactive enforcement technologies through Brand Registry and in identifying emerging trends. We continue to work closely with brands and industry organizations through one-on-one interactions, Brand Registry, joint litigation against bad actors, and industry events. We work closely with brands to understand their IP infringement concerns, the challenges they have on our marketplace, and the ways we can partner to overcome those challenges. We rely on the expertise of the brands to (1) determine their intellectual property rights, (2) report issues to us via our online infringement reporting tools, and (3) conduct test buys when they suspect there might be an issue. We promptly investigate and systematically respond to rights holder concerns, take enforcement action when appropriate, and improve our preventative tools to ensure that our automated systems can “get smarter” about detecting risk.

12. In what ways do counterfeiters evade actions you have taken to prevent counterfeits on your platform or using your services?

- a. Potential examples here might include reposting or creating new, virtually identical counterfeit goods seller accounts; submitting notice and take down requests against legitimate goods seller accounts; providing a mixture of authentic and counterfeit goods making it difficult to predict the authenticity of future sales.**

Counterfeiters are constantly innovating to evade our detection systems. They attempt to hide their identities, submit false information, try to use compromised accounts, attempt to re-open accounts, mask the description of their products, and use their own technology to test and try to break through our defenses. We continue to refine our technologies and processes to stay ahead of these bad actors and work with brands, industry organizations, and government agencies to hold these fraudsters accountable.

13. After a suspected counterfeit distributor has been identified—whether by your company or a third party—what steps do you take, if any, to verify the claims of counterfeit distribution?

Amazon investigates all suspected counterfeits, whether they are identified proactively by Amazon or by valid notices submitted by a rights owner asserting claims of counterfeits. If we suspect an item is counterfeit, we will suspend the listing and take appropriate disciplinary action against the seller, including suspension or termination of the seller’s selling privileges.

We also give sellers an opportunity to appeal notices of counterfeits. This is because our systems may create false positives and not all complaints received from rights owners are valid. Many of the complaints we receive from rights owners improperly seek to limit distribution or reduce competition, misstate the underlying intellectual property rights, or are vague or overly broad. In addition, bad actors attempt to pose as rights owners to attack their competition. If

we unquestioningly accepted every complaint from rights owners, it would negatively impact consumers, who benefit from the wide selection and low prices offered by competing sellers on our marketplace. It would also adversely impact the numerous honest entrepreneurs and small businesses using our services that could be irreparably damaged by improper enforcement actions. As a result, we are diligent in both efficiently investigating every notice, and in providing an opportunity for sellers to appeal.

14. What is the process, if any, for removing a suspected counterfeit distributor from your platform?

Whenever Amazon receives a valid notice of intellectual property infringement against a third-party seller, our notice-and-takedown team quickly processes the notice and removes the product or offending content. We also make a determination as to whether the account should be suspended, based on several considerations, including the seller's prior offenses (if any) and the seller's other risk factors. Our proactive enforcement tools also attempt to link related sellers and, as a result, we (a) block new seller accounts related to previously blocked accounts and (b) take action against any related accounts when suspending or blocking a current seller account.

15. After removal, what processes does your company have in place, if any, to prevent a suspected counterfeit distributor from regaining access to your platform and subsequently U.S. consumers?

Anytime a new seller account is registered, we use a proprietary system that analyzes hundreds of unique data points to identify potential counterfeit or infringement risk, including verifying whether the account is related to another account that was previously removed from selling on our marketplace.

16. If you become aware of a counterfeit good and/or distributor on your platform what actions including initiating legal action does your company have the power to take?
a. Can you provide us with statistical information regarding the frequency in which you have taken actions concerning suspected counterfeit products-either through investigation, destructions, abandonment, or otherwise?

If a seller sells counterfeit goods, we may remove selling privileges and destroy inventory in our fulfillment centers without reimbursement. In addition, if we determine that a seller account has been used to engage in fraud or other illegal activity, remittances and payments may be withheld or forfeited. The sale of counterfeit goods can also lead to legal action by Amazon, by rights holders, or in partnership together. We have pursued civil and criminal penalties in partnership with law enforcement. In conjunction with U.S. small and medium-sized businesses, we have filed lawsuits against bad actors engaging in abusing customer reviews and selling counterfeit products on our marketplace, including several lawsuits filed earlier this year in the U.S. in partnership with Vera Bradley and Otterbox.

Listings removed because of a notice of potential infringement represent less than 1% of all suspected bad listings that Amazon takes action on – in other words, our proactive prevention

efforts are more than 100 times as impactful as our reactive take downs due to notices from rights owners. However, when we receive a reactive notice of infringement, we investigate and take action on over 95% of these notices within 8 hours.

17. How have you coordinated with U.S. federal and local authorities to curtail the distribution and manufacture of counterfeit goods within the United States?

a. How have you coordinated with international authorities?

Industry collaboration, including partnership with law enforcement, plays an important role in combatting the sale of counterfeit and infringing goods on the marketplace. In addition to supporting law enforcement investigations by responding to formal legal process, Amazon proactively engages with international, federal, state, and local law enforcement agencies. In the U.S., we have engaged with the Department of Homeland Security (DHS), the Federal Bureau of Investigation (FBI), and Customs and Border Protection (CBP), to explore opportunities to collaborate on shared, customer-centric goals. These efforts focus on education and training, enforcement action against counterfeiters through formal legal process, and sharing information to better identify trends in counterfeiting. The National Intellectual Property Rights Coordination Center (IPRC), under DHS, has also been instrumental in bringing together different industry groups, including e-commerce competitors, to work collaboratively on efforts to fight counterfeiters. We have undertaken similar collaborative efforts with customs authorities and other enforcement agencies in international jurisdictions.

18. If there are any other pieces of information, details, or data you feel would be helpful to the committee, we respectfully request that you submit them as part of your answers as well.

As the Committee heard in its March 6th hearing on counterfeits, rights holders and e-commerce companies continue to seek additional information from CBP on counterfeits seized at U.S. ports of entry. Information on these seizures is vital for rights holders and e-commerce companies alike, as we pursue our shared goal of keeping counterfeits out of the U.S. supply chain. We look forward to continuing to discuss this issue with the Committee and potential remedies to address the issue.

Customer trust is of utmost concern, and we remain committed to ensuring that sellers offer legitimate, non-infringing products on Amazon. We look forward to working with you on this important issue. If you have additional questions, please do not hesitate to contact me.

Sincerely,



Brian Huseman
Vice President, Public Policy



July 29, 2019

Raquel Cohen
United States Department of Commerce
International Trade Administration
Office of Intellectual Property
1401 Constitution Ave NW
Washington, DC 20230

Re: Department of Commerce Request for Public Comments: Report on the State of Counterfeit and Pirated Goods Trafficking and Recommendations (Docket No. DOC-2019-0003)

Dear Ms. Cohen,

Marketplace services provide unrivaled selection, convenience, and value to consumers, as well as unprecedented opportunities for millions of small and medium sized businesses. But counterfeiters and other criminals are attacking the stores that offer those services. This is not new: counterfeiters have long attacked many types of stores, both online and offline. However, we are seeing counterfeiters attempting abuse at a previously unseen scale. Successfully repelling this attack requires significant investment, technological innovation, and—above all—collaboration from all interested parties.

Amazon strives to be Earth's most customer-centric company, where consumers can find and discover virtually any authentic, lawful product they want to buy. We know that customer trust is hard to win and easy to lose, and we view counterfeiting as an existential threat: if customers do not trust what they purchase through Amazon's stores, they can and will shop elsewhere. That is why we go well beyond our legal obligations and invest heavily in proactive efforts to prevent counterfeits from ever reaching our stores. In 2018 alone, we invested over \$400 million in personnel and employed over 5,000 employees, in order to fight fraud and abuse (including counterfeiting) in our stores. Our primary focus is on preventative, technology-driven tools built on machine learning and data science to proactively scan the more than 5 billion changes made to our worldwide catalog each day. We also stand behind the products sold through our stores even when third-party sellers do not. We willingly make these investments because they are good for our customers, good for the honest entrepreneurs who account for more than 58% of the physical gross merchandise sales made through our stores, and good for rights owners and brands that invent the hundreds of millions of products for sale in Amazon's stores. These investments are producing positive results: in 2018, our proactive efforts prevented over 1 million suspected bad actors from publishing a single product for sale in our stores, blocked over 3 billion suspected bad listings from being published on our stores, and ensured that over 99.9% of products that customers actually viewed on Amazon never received a complaint about a suspected counterfeit from a customer or rights owner.

601 New Jersey Ave., NW
Washington, DC 20001

Our investments include unique, industry-leading innovations to prevent counterfeits from being sold in our stores:

- **Brand Registry.** This service powers proactive brand protection on Amazon. Registration is free to any rights owner with a registered trademark, independent of any economic relationship with Amazon. Through Brand Registry, brands gain access to powerful tools including automated brand protections that use machine learning to predict and proactively protect brands' intellectual property. These tools grow more effective over time, and YTD in 2019 have proactively blocked over 400% more listings suspected of violating IP rights than during the same period in 2018. Brand Registry also provides enrollees a powerful "Report a Violation" tool that increases the accuracy of brands' notices of claimed infringement, and allows brands to search for potentially infringing products using state-of-the-art image search technology. More than 130,000 brands around the world are enrolled in Brand Registry, and they're finding and reporting 99% fewer suspected infringements than before the launch of Brand Registry.
- **Transparency.** This product serialization service effectively eliminates counterfeits on enrolled products. Amazon provides participating brands unique, 2D Data Matrix codes that brands place on every unit they manufacture of an enrolled product. Those codes allow Amazon, other retailers, law enforcement, and customers to determine the authenticity of each individual unit of that product in the industry supply chain, simply by scanning the codes with a mobile app. Since Transparency's launch in 2018, over 4,000 brands have enrolled, enabling Amazon to protect brands and our customers by detecting and preventing over 260,000 counterfeit products from being sold. To date, brands have not reported a single counterfeit notice of infringement for Transparency-enabled products.
- **Project Zero.** This new program empowers brands to help Amazon drive counterfeits to zero. It combines the breadth and power of Amazon's automated proactive brand protections, the complete coverage of unit serialization, and a new self-service tool that for the first time gives rights owners the power to remove suspected counterfeits directly from Amazon's stores. As of June 2019, over 3,000 brands are already enrolled in Project Zero.
- **A-to-z Guarantee and Customer Protection.** Amazon ensures its customers' satisfaction through our generous A-to-z Guarantee: if a customer suspects a defect—including inauthenticity—in any product they purchase from a third-party seller through Amazon's stores, Amazon will refund the purchase price if the merchant refuses to do so. Amazon also proactively notifies and refunds customers who purchase suspected counterfeits, even when those products are sold by third-party merchants using Amazon's stores. We also proactively scan our catalog for signals that a product might present a safety risk, remove those products, and proactively notify customers of those risks.
- **Tailored Seller Enforcement.** Amazon proudly supports the honest entrepreneurs who sell their products through our stores. Although we act swiftly to remove suspected counterfeits and suspend suspected bad actors, we know from experience that rights owners, sellers, and Amazon can make mistakes when assessing claims of counterfeits. Therefore, we strive to tailor our enforcement actions to align with the perceived risk and mitigate the impact of erroneous enforcement, and we always give selling partners notice of and the opportunity to appeal claims made against them.

We recognize these tools are not perfect and we work hard to continuously improve them based on feedback from rights owners, selling partners, and regulators. Such feedback depends upon collaborative relationships, which also include joint lawsuits, law enforcement referrals, and working with industry associations to create structured engagement for constructive feedback. Additional actions would strengthen this collaboration and improve the fight against counterfeits:

- ***Additional adoption of Amazon's tools.*** Amazon has built world-class tools to prevent counterfeiting. In particular, unit serialization effectively eliminates counterfeit products. Amazon offers these tools for free or at its marginal operating cost. But these tools do not work if brands do not use them, or if brands attempt to use them to control distribution instead of protecting their intellectual property.
- ***Improved information sharing among stores and other service providers.*** Amazon supports the creation of a private information exchange that will enable industry participants—stores, payment networks, payment service providers, banks, and shipping companies—to better identify and stop counterfeiters before they can reach consumers. Information aggregated from the exchange could then lead to more effective law enforcement referrals.
- ***Improved information sharing from Customs.*** Amazon encourages Customs and Border Protection (CBP) to facilitate mutually beneficial partnerships that will help provide increased visibility and transparency into shipments. Specifically, CBP should provide us with identifying information for every counterfeit-based seizure bound for an Amazon fulfillment center. When CBP seizes such packages, there might be similar products from the same bad actor sitting in Amazon's warehouses. Sending a picture of the "FBA number" found on the outside of each such package will help us protect our customers and the intellectual property of rights owners by removing related products and bad actors from our systems.
- ***Required Sharing of Pre-Arrival Data on All Small Packages.*** Amazon supports a requirement that every package imported into the United States provide advance electronic data to CBP to allow better targeting of suspected counterfeits. Currently, no cohesive data tracking system exists for postal shipments, and bad actors from outside the United States are able to hide their identities and avoid detection. Enforcement of these requirements, and the data derived from them, will help law enforcement identify bad actors and allow Amazon to protect brand owners and customers.
- ***Enhanced criminal prosecution.*** Amazon supports prioritizing prosecution of intellectual property crimes in order to deter perpetrators. In 2017, only 0.1% of filed federal criminal cases involved charges for trafficking in counterfeit goods, and 56% of counterfeiters sentenced that year received no jail time. As a result, there is often little disincentive to committing IP crimes. Increased criminal prosecution alone will not solve the problem of counterfeiting, but more funding for law enforcement and more severe penalties for convictions are essential to winning this fight.
- ***Preservation of current liability regimes.*** The current rules governing secondary liability for counterfeiting make marketplace services possible. Those services provide immense opportunity to millions of honest entrepreneurs. Those entrepreneurs in turn bring unprecedented selection, value, and convenience to consumers. Efforts to address counterfeiting should resist calls to upset this sensible balance.

Thank you for the opportunity to provide comments in this process. Amazon will continue to invest in, invent, and improve the tools needed to protect our customers and selling partners. However, we cannot wage this fight alone and welcome the opportunity to work with anyone who is committed to eradicating counterfeits from all stores.

Sincerely,

A handwritten signature in black ink, appearing to read "Brian Huseman". The signature is fluid and cursive, with a large initial "B" and "H".

Brian Huseman
Vice President, Public Policy



July 13, 2018

The Honorable Orrin G. Hatch, Chairman
The Honorable Ron Wyden, Ranking Member
United States Senate Committee on Finance
Washington, DC 20510-6200

Dear Chairman Hatch and Ranking Member Wyden:

I write in response to your letter dated May 30, 2018 requesting information about the efforts undertaken by Alibaba Group Holding Limited (“Alibaba”) to fight the sale of counterfeit goods on its marketplaces. We share the Committee’s concern with the sale of counterfeit goods, and maintain a rigorous, comprehensive program to protect the IP of brand owners in the United States and globally. We have publicly discussed our practices in a variety of settings and are pleased to respond to your letter and engage your committee in its important oversight work.¹

Background on Alibaba and Its IP Protection Programs

Alibaba is one of the largest retail ecommerce companies globally.² Our international cross-border retail platforms, which serve consumers in markets outside China such as Australia, Europe, Canada, Southeast Asia, South America, and the United States, had 83 million annual active consumers for the twelve months that ended March 2018. AliExpress is our primary B2C marketplace focused on international consumers, including those in the United States.

Alibaba’s principal business focus in the United States is centered on helping U.S. brands and small and medium-sized enterprises (“SMEs”), farmers, ranchers and fishermen reach the growing consumer base in China. Consumer demand for high-quality products from the United States is growing in China as its middle class expands. A top priority for Alibaba is to help U.S. businesses grow by exporting their products to the Chinese consumer. Seventy-five percent of consumer brands ranked in the Forbes Top 100 World’s Most Valuable Brands³ have established digital operations on our B2C marketplace in China.

¹ See, e.g., Alibaba’s 2017 IPR Protection Annual Report (May 2018), available at **Appendix B** and <https://ipp.alibabagroup.com/infoContent.htm?skyWindowUrl=news-20180110-en; Comments Submitted by Alibaba Group, 2017 Special 301-Out-of-Cycle Review of Notorious Markets, Docket No. USTR-2017-0015, dated Oct. 2, 2017, available at https://www.regulations.gov/document?D=USTR-2017-0015-0020>.

² Based on GMV in the twelve months ended March 31, 2018, on the basis of publicly available comparable transaction value data for the most recent fiscal year.

³ Based on ranking as of September 2017, “The World’s Most Valuable Brands” available at <https://www.forbes.com/powerful-brands/list/#tab:rank>.



In addition to our work with large brands, Alibaba has a longstanding commitment to supporting the growth of SMEs, and, we have intensified our efforts to support SMEs in the United States. The results of these and similar efforts have been dramatic. One of Alibaba's most significant outreach efforts to U.S. SMEs occurred in June 2017, when Alibaba hosted Gateway '17 in Detroit, Michigan. Over 3,000 U.S. small businesses and entrepreneurs attended and learned about opportunities to generate sales and create jobs in the United States by tapping into China's growing consumer economy. As part of Gateway '17, we invited the U.S. Patent and Trademark Office, and they gave a presentation entitled, "Empowering Innovation with the USPTO." Alibaba also provided an IP protection resource center at Gateway '17 which was staffed by our IP protection professionals. Following Gateway '17, Alibaba engaged OpenSky, a U.S.-based Alibaba company to take the lead on working with US SMEs who are interested in selling in China. In partnership with OpenSky and local governments, we have held additional events in Detroit and Columbus, Ohio. These events are tailored to assist SMEs interested in exporting to China by helping them understand the Chinese marketplace and identifying different approaches to access the market. Whether big or small, protecting the IP of our merchants is imperative.

Alibaba opposes IP-infringing activity because it hurts society, stymies innovation and economic growth, undermines consumer welfare, and—when our platforms are misused for the sale of IP-infringing products—damages trust in Alibaba itself. The success of our business depends on the trust of our customers. As such, Alibaba applauds the Committee's leadership on this issue and their continuing focus on how industry and government can partner together to better collaborate, share information where appropriate, increase transparency and improve the retail commerce ecosystem for all.

Alibaba strives to be an industry leader in protecting IP in China and around the world. Alibaba, and, separately, Alibaba Group's lead founder and Executive Chairman, Jack Ma, have publicly advocated for stronger IP laws and enforcement in China, including jail time for offenders, and actively support IP enforcement efforts globally.

Our basic policies are set forth in our Intellectual Property Rights Protection Principles and Policies, which apply across all Alibaba marketplaces.⁴ Alibaba's Intellectual Property Rights Protection Handbook⁵ also provides an easy to understand guide on how to use our IP protection systems and an overview of the procedures for protecting IP rights on Alibaba's platforms. These policies, however, are just a small part of our efforts to protect IP on our marketplaces. A more comprehensive summary of our recent IP protection activities is provided

⁴ Alibaba's Intellectual Property Rights Protection Principles and Policies are available at <https://ipp.alibabagroup.com/policy/en.htm#id2>.

⁵ The Handbook is available at <http://download.taobaocdn.com/freedom/37886/pdf/Alibaba-Intellectual-Property-Rights-Protection-Handbook-EN.pdf>.



in our Intellectual Property Rights Protection Annual Report (“IPR Protection Annual Report”).⁶ The IPR Protection Annual Report is an English-language publication, the most recent of which was issued in May 2018, that informs rights holders, industry stakeholders, and the general public about our efforts and results to protect IP worldwide. It includes an explanation of Alibaba’s programs and provides extensive statistical data on takedowns of infringing listings and the results of Alibaba’s work with law enforcement authorities. The table below highlights our most recent IP activities.

HIGHLIGHTS OF ALIBABA’S BRAND PROTECTION PROGRAM

Proactively Protecting Rights Holders and Consumers Through the Deployment of Cutting-Edge Technology. Alibaba’s own proactive measures contributed to a 42% decline in takedown requests from rights holders from 2016 to 2017.

Expedited Processing of Notice and Takedown Requests Submitted by All Rights Holders. From June 2017, when Alibaba launched its Express IPP notice and takedown mechanism, through the end of 2017, during business days we handled 95% of legitimate takedown requests within 24 hours.

Shutting Down Merchants That Sell Infringing Products. We implemented stricter policies for removing bad actors from our platforms, and use technology to prevent them from reopening stores on our platforms.

Smoother Experience for Rights Holders Submitting Notice and Takedown Requests. We launched a revamped user interface to provide a single point of entry and step-by-step instructions for registration, and clearly warned bad actors about penalties for selling pirated or counterfeit products.

Unprecedented Level of Cooperation with Law Enforcement to Conduct Offline Investigations. In 2017, we provided 1,910 leads to law enforcement in China, leading to the arrest of 1,606 suspects and the closure of 1,328 facilities.

Groundbreaking Successful Civil Litigation Against Counterfeiters. In 2017, we filed 12 civil suits against counterfeiters and prevailed in two, including one suit against a merchant infringing the IP of an American confectionary and pet food brand.

Making It Easier for Small Businesses. We implemented specific measures tailored for SMEs, including an easy-to-use online notice and takedown submission form.

⁶ The IPR Protection Annual Report is available at <https://files.alicdn.com/tpsservice/2c65370726ed855ff523d4416d7fce0.pdf>.



Industry-Leading Transparency. We have published annual reports on our results in IP protection and held open forums for rights holders.

Expanded Collaboration with Rights Holders and Associations. We established an anti-counterfeiting alliance that now includes 105 brands, including thirty U.S. brands. We also partner with additional rights holders and with associations, including the International Anti-Counterfeiting Coalition, the Motion Picture Association of America, and the automotive industry.

Based on these publications and other submissions we have provided the answers set forth in **Appendix A**. We have also attached at **Appendix B** a copy of our most recent IPR Protection Annual report.

Thank you again for the opportunity to engage with you on the important issue of intellectual property protection. I look forward to continuing our dialogue, and I hope the Committee will look to Alibaba as a resource. If you or your staff has any follow-up questions, please do not hesitate to contact [REDACTED]

Sincerely,

Michael Evans
President
Alibaba Group

APPENDIX A

Responses to U.S. Senate Finance Committee Questions

1. What types of remedial measures do you provide U.S. consumers who may have unintentionally purchased a counterfeit good through your platform?

AliExpress offers a “Guaranteed Genuine” program for certain purchases. For purchases under the program, if a product is found to be counterfeit, on top of the full refund offered by AliExpress, the participating sellers will compensate the customer by paying twice the cost of the product. For more information please see: https://sale.aliexpress.com/buyerprotection-seller_guaranteed.htm#4

2. What types of remedial measures do you provide to rights holders who find that counterfeit goods are being sold through your platform?

Alibaba provides a wide array of remedial measures, including: (a) working with rights holders and law enforcement authorities on criminal investigations and prosecution of counterfeiting rings; (b) providing expeditious proactive and reactive takedown mechanisms; (c) working with rights holders to pursue civil litigation and damages against merchants who sell counterfeit goods on Alibaba marketplaces; and (d) providing multiple channels for various collaboration with stakeholders.

Working with Rights holders and Law Enforcement Authorities on Criminal Investigations and Prosecutions: As explained further in the response to Question 7 below, Alibaba has assisted law enforcement authorities and brand owners from around the world such as Mars, Inc. and Louis Vuitton in investigating and prosecuting counterfeiting rings in China.

Expeditious Proactive and Reactive Takedown Mechanism: Alibaba has in place policies, procedures, and technology innovations that allow it to proactively identify and take down listings of potentially counterfeit products even before receiving a complaint from a rights holder. Although Alibaba works to curtail counterfeits at every stage in the e-commerce purchase/sale process, in our experience, the proactive system has been especially fruitful.

In addition, Alibaba has put in place an effective and efficient “reactive” takedown program that allows rights holders to request that Alibaba marketplaces take down listings of potentially infringing products. In 2017, Alibaba introduced new procedures which have substantially reduced processing times for notice and takedown requests from rights holders. Between June and the end of 2017, Alibaba’s major e-commerce platforms processed 95% of all legitimate takedown requests within 24 hours during business days. In 2017, the average processing time for takedown requests fell 68% compared to 2016.

Alibaba also allows the general public to report suspicious listings through a reporting portal, the link to which can be found in all listings on our platforms.

Civil Litigation: As explained in response to Question 16, Alibaba has litigated groundbreaking civil cases against counterfeiters. In 2017, we filed 12 civil suits in Chinese courts against counterfeiters. Alibaba has worked closely with rights holders—including Mars

Petcare (a division of Mars, Inc., an American global manufacturer of confectionery, pet food, and other food products)—to investigate and prosecute these suits. Through this litigation, Alibaba inflicts greater costs on individual counterfeiters, deters future counterfeiters, and paves the way for further litigation by e-commerce platforms against counterfeiters.

Channels for Collaboration: As explained further in response to Questions 11(a), Alibaba provides multiple fora for collaborating with rights holders on ways to improve enforcement of IP.

3. In what circumstances does your organization come into physical contact with counterfeit products sold and delivered to consumers, including those sold by your organization directly or through second and third party merchants on your platform?

A small portion of Alibaba's business comes from first-party online retail sales in which Alibaba sells to the customer. However, a much greater share of Alibaba's business comes from third-party sales on Alibaba platforms. For third-party sales on its platforms, Alibaba does not sell directly to customers or come into physical contact with products sold and delivered to consumers. The only exception is that Alibaba conducts test purchases, often working with rights holders to verify the authenticity of products and collaborating in instances where the products are confirmed to be counterfeit.

4. What services, tools, protections, and assistance do you provide consumers and rights holders with respect to preventing the sale of counterfeits?

In recent years, Alibaba has aggressively streamlined and simplified its notice and takedown process. Over the last two years, Alibaba rolled out its Express IPP and one-stop-shop portal ("the IPP Platform") to register IP and submit takedown notices across all major Alibaba e-commerce platforms. Rights holders can use the portal to track the progress of their takedown requests. In addition, we have (1) created clear, step-by-step English language account registration instructions and information for rights holders; (2) allowed rights holders who, for any reason, do not wish to use the IPP Platform to submit takedown requests through email; (3) created a special online form for SMEs to submit notice and takedown requests, which likewise does not registration on the IPP Platform; (4) allowed the submission of trademark registration information in multiple languages; and (5) standardized responses to takedown requests to ensure prompt, consistent and clear communication. The new procedures have achieved faster and more uniform responses for rights holders.

The aim is to make it as easy as possible for meritorious claims to result in the takedown of infringing content, and for that to occur as quickly as possible. Many of the programs are specifically designed with SMEs in mind, who may lack the resources and experience of larger

companies. The programs work in conjunction with Alibaba's proactive measures, which aim to block counterfeits before they are offered for sale.

5. Please explain what you feel are some of the biggest risks counterfeit goods currently pose e-commerce consumers.

Alibaba takes all potential sales of counterfeit goods very seriously because they damage confidence of consumers towards online business, and hinder innovation by businesses creating jobs in the online and offline space. Of paramount concern to Alibaba is the sale of counterfeit goods that may pose health and safety risks to consumers. For example, as described in response to Question 6 below, Alibaba has taken especially aggressive action in areas such as the sale of automotive parts, which pose particular concerns for consumer safety.

6. What have you done to curtail those risks and what have you done to inform consumers of those same risks, which may not be known to the consumer?

In addition to its IP enforcement procedures described above, Alibaba has taken additional steps to protect consumers against the sale of counterfeits that may pose a particular health or safety risk.

For example, defective automotive parts pose a significant safety risk to consumers. In 2014, Alibaba banned the sale of airbags on the Alibaba.com and AliExpress platforms. We believe that we were the first major e-commerce marketplace to do so.

In addition, in June 2017, we applied our data analytics technology to identify a lead for the Foshan Public Security Bureau ("PSB") of a suspected seller of fake auto parts. After further investigation, the PSB raided three locations in Guangzhou and Wenzhou, arrested 14 suspects, and seized goods valued at over RMB 10 million. More than 10 auto brands cooperated in the investigations, including Ford, GM, Volkswagen, Toyota, and others. An industry representative, Mr. Lin Zhang, senior manager of VDA (German Association of the Automotive Industry), said, "We appreciate the efforts made by Alibaba which demonstrated their strong determination and unremitting investment to combat counterfeit[ing]."¹

Alibaba also alerts consumers to the dangers of counterfeits through educational outreach. For example, Alibaba recently began to sponsor the Unreal Campaign, an International Trademark Association ("INTA") public awareness initiative designed to educate teenagers (ages 14-18) about the importance of trademarks, IP, and the dangers of counterfeit products.

¹ See http://m.cqn.com.cn/auto/content/2017-08/31/content_4810683.htm?from=groupmessage&isappinstalled=1 (available only in Chinese).

7. Do you engage with foreign governments to curtail the proliferation of counterfeits? If so, what types of activities and coordination have proven successful? What efforts have not been successful?

Alibaba's engagement with foreign governments is extensive and represents a critical part of Alibaba's global campaign to combat counterfeits. Alibaba's response to Question 17 below describes our engagement with the USPTO and American rights holders through a series of road shows, and our partnership with INTERPOL on anti-counterfeiting

Alibaba has also engaged with Chinese law enforcement authorities in offline enforcement operations that have yielded significant results. In 2017, Alibaba provided the PSB police with 1,910 leads. Based on those leads China's PSB arrested 1,606 suspects and closed 1,328 facilities.

8. To what extent do you facilitate delivery, storage, processing, and purchases of goods on your platform?

As explained above in response to Question 3, Alibaba is predominately a platform such that the buyer and seller transact directly, and Alibaba provides the infrastructure for the transaction (e.g., discovering the relevant product and facilitating delivery). The Alibaba.com and AliExpress platforms, which serve customers beyond China, provide ways for customers to place orders for goods with third-party suppliers, including by providing payment processing for the orders (either directly or by working with Alipay). Through Cainiao, Alibaba also provides a data platform that suppliers can use in managing their delivery, storage, and processing of goods. As explained in Alibaba's 2017 Annual Report: "Cainiao Network does not deliver packages itself. It operates a logistics data platform that leverages the capacity and capabilities of logistics partners to fulfill transactions between merchants and consumers at a large scale."

9. Which inflection points in the ecommerce purchasing/selling process have you found most critical to intervene in to prevent and/or curtail the distribution of counterfeit goods?

Alibaba believes that an effective IP protection policy must address each point in the manufacturing, sales, and distribution chain. All actors in the chain of commerce—brand owners, e-commerce marketplaces, merchants, manufacturers, and even consumers—have critically important roles to play, as do law enforcement authorities, regulators, legislatures, and other government bodies.

Alibaba's efforts have focused particular attention on three inflection points: (a) as discussed in the response to Question 7, Alibaba has assisted law enforcement in offline investigations of criminal counterfeiting rings; (b) as discussed in the response to Question 2, Alibaba has put in place proactive and reactive takedown mechanisms that remove listings of

counterfeit products on Alibaba marketplaces, and in many cases, proactive takedowns have resulted in the removal of a listing before a single sale took place; and (c) as discussed in the response to Question 16, Alibaba has pursued civil litigation against merchants who have sold counterfeit goods on Alibaba's marketplaces.

10. Have there been there instances where genuine goods sold on your platform are intermingled and/or comingled with counterfeit goods? Can you provide an example?

a. What is your company doing to prevent this from occurring/reoccurring?

Merchants on Alibaba platforms may have storefronts that comingle genuine and counterfeit goods. Alibaba's IP protection program is designed to identify and remove listings of counterfeit products. Specifically, as described in response to Questions 2 and 4 above, Alibaba maintains a proactive screening mechanism to remove such listings, and a notice and takedown procedure to remove any listings that elude proactive screening.

11. How do you coordinate with rights holders to verify whether goods sold over your platform are genuine?

a. If you do not coordinate, please explain how or why you do not feel this is helpful or necessary.

Alibaba's notice and takedown procedure depends upon the evidence supplied by rights holders. Alibaba also works with rights holders in offline investigations of suspected counterfeiters and in litigating civil cases against counterfeiters. Lastly, Alibaba works with thousands of rights holders through dozens of associations every year to identify ways to improve Alibaba's IP protection program overall.

Alibaba collaborates with industry associations in the automotive, digital content, apparel, electronics, luxury goods, pharmaceutical, food, and personal care sectors, among others. Recent examples of collaborations with rights holders are as follows:

- In January 2017 Alibaba established the Alibaba Anti-Counterfeiting Alliance ("AACA") to encourage collaboration among industry participants to develop and deploy more efficient proactive monitoring technologies and data analysis to assist IP protection efforts. 105 consumer brands (including several U.S. brands, such as 3M, Amway, Ford, Johnson & Johnson, Mars, Procter & Gamble, and Spalding) from multiple industries participate in the AACA. The goal is to encourage rights holders, e-commerce platforms, and law enforcement agencies to work collaboratively to fight counterfeiting through increased communication and the exchange of information. The AACA also shares best practices among the

members and engages in joint media outreach to educate the public and consumers about the damage counterfeit products cause, including with respect to health, the environment, and safety. In addition, the AACA set up an Advisory Board to create an efficient channel for rights holders to provide feedback on significant IP enforcement-related strategies and policies, and a leading industry forum to discuss new trends in online IP infringement activities, litigation, and platform practices.

- Alibaba has worked closely with Motion Picture Association of America (“MPAA”). For a number of years, Alibaba has worked closely with the MPAA to combat pirated content on Alibaba marketplaces, and to develop industry best practice for copyright protection.
- In May 2018, Alibaba held an IPR Protection Summit in Seattle, Washington. The Seattle summit was attended by more than 230 participants representing a wide range of stakeholders, including brand owners, IP experts, industry associations, government agencies, and law enforcement personnel. At the event, attendees learned about Alibaba’s latest IP protection initiatives and exchanged ideas about how jointly to improve online and offline IP protection.
- In August 2017, Alibaba and French luxury group Kering established a partnership to cooperate in their efforts to protect IP and take joint enforcement actions online and offline against infringers.
- Alibaba collaborates with vendors who specialize in working with rights holders to monitor websites for sales of potentially infringing goods. In July 2017, Alibaba hosted Vendors’ Day, an event aimed at the vendors used by many rights holders, from the most recognized brands to SMEs.
- Throughout the year, Alibaba held one-on-one meetings with brand owners and their representatives to support IP enforcement efforts, answer questions regarding IP protection on Alibaba platforms, and help address any challenges or difficulties that may arise.

12. In what ways do counterfeiters evade actions you have taken to prevent counterfeits on your platform or using your services?

- a. **Potential examples here might include reposting or creating new, virtually identical counterfeits goods seller accounts; submitting notice and take down requests against legitimate goods seller accounts; providing a mixture of authentic and counterfeit goods making it difficult to predict the authenticity of future sales.**

Merchants who have been banned from the Alibaba marketplaces have sometimes sought to open new storefronts using stolen, borrowed, or purchased identification. Alibaba has enacted rigorous measures to prevent banned merchants from opening new stores and to ensure that all new merchants are legitimate. Alibaba's big data technology proactively screens all new and existing Taobao accounts. Alibaba requires that, before opening a storefront, prospective sellers provide their national ID and submit to "dynamic real-person-identification" techniques, such as running a facial recognition program to match the person's photo to their national ID card. Alibaba has also deployed proprietary technology to identify and shut down efforts by banned merchants to re-access Alibaba's platforms by, for example, controlling stores through third parties.

13. After a suspected counterfeit distributor has been identified-whether by your company or a third party-what steps do you take, if any, to verify the claims of counterfeit distribution?

As explained in Alibaba's Intellectual Property Rights Protection Handbook,² once Alibaba received a takedown request, it processes the complaint and takes down the listing. The party receiving the complaint (*i.e.*, the merchant) has an opportunity to appeal the decision. If the appeal is accepted, the complaining party may withdraw the complaint. If the appeal is not accepted, the complaining party may request that Alibaba review the complaint and make a final decision. If there is a remaining dispute, Alibaba will recommend the parties resolve the matter via the court system.

14. What is the process, if any, for removing a suspected counterfeit distributor from your platform?

As of 2017, Alibaba adopted a three-strike penalty policy across its platforms. If a merchant is identified as selling any counterfeit or pirated products three times, Alibaba will permanently ban the merchant from the platform. The exception is Tmall which, because it is a curated platform where merchants much apply to be listed, follows a stricter one-strike policy.

15. After removal, what processes does your company have in place, if any, to prevent a suspected counterfeit distributor from regaining access to your platform and subsequently U.S. consumers?

See response to Question 12(a) above.

² The Handbook is available at <http://download.taobaocdn.com/freedom/37886/pdf/Alibaba-Intellectual-Property-Rights-Protection-Handbook-EN.pdf>.

16. If you become aware of a counterfeit good and/or distributor on your platform what actions including initiating legal action does your company have the power to take?

When Alibaba discovers the sale of counterfeit goods on one of platforms, it will remove the counterfeit and, pursuant to the three-strike policy described above, ban the merchant from Alibaba platforms.

In addition, Alibaba has litigated groundbreaking civil cases against counterfeiters. In 2017, Alibaba filed 12 such civil suits in Chinese courts. Through this litigation, Alibaba inflicts greater costs on individual counterfeiters, deters future counterfeiters, and paves the way for further litigation by e-commerce platforms against counterfeiters. For more information, please refer to Section 2-E “Precedent-Setting Lawsuits against Counterfeiters” of Alibaba Group 2017 IPR Protection Annual Report.

a. Can you provide us with statistical information regarding the frequency in which you have taken actions concerning suspected counterfeit products—either through investigation, destructions, abandonment, or otherwise?

Our 2017 Annual IPR Protection Report provides a wide range of statistical information regarding Alibaba IP protection efforts. For example:

- As noted in response to Question 7 above, in 2017, we provided 1,910 leads to law enforcement in China, leading to the arrest of 1,606 suspects and the closure of 1,328 facilities.
- In 2017, Alibaba filed 12 groundbreaking civil suits in Chinese courts.

17. How have you coordinated with U.S. federal and local authorities to curtail the distribution and manufacture of counterfeit goods within the United States?

- In July 2017, Alibaba participated in road shows coordinated by the U.S. Patent & Trademark Office’s (“USPTO”) Policy and International Affairs and China Team of Policy and International Affairs the China Intellectual Property Road Shows in Detroit, Grand Rapids, Denver, Salt Lake City, Indianapolis, Chicago, Portland, and Seattle. Alibaba participated in similar road shows with the USPTO in Las Vegas and Phoenix in May 2018. These opportunities afforded Alibaba the chance to meet and make our personnel available to U.S. businesses, including SMEs, and to present on Alibaba’s IP protection efforts and notice and takedown practices to a large range of businesses.

a. How have you coordinated with international authorities?

In addition to collaborating with foreign governments as discussed in the response to Question 7, Alibaba has coordinated with international authorities. Examples include:

- For three consecutive years, Alibaba has co-sponsored the annual International Law Enforcement Intellectual Property Crime Conference. In August 2017, Alibaba co-sponsored the conference, which was hosted by, among others, INTERPOL, U.S. Immigration and Customs Enforcement, and the Underwriters Laboratory (“UL”). Participants discussed initiatives to protect IP, including efforts to combat counterfeit pharmaceutical products and strengthen INTERPOL’s resources. We have several further engagements with INTERPOL planned for later in 2018 and beyond.

18. If there are any other pieces of information, details, or data you feel would be helpful to the committee, we respectfully request that you submit them as part of your answers as well.

Alibaba has sought to develop and deploy the most advanced technology to help identify and eliminate sales of counterfeit goods on its marketplaces. Over the last year, Alibaba has developed and applied more advanced technology to: (a) identify potentially infringing listings before they are posted to an Alibaba platform; (b) monitor for potentially infringing listings and proactively remove them; and (c) identify merchants who control multiple accounts, open accounts using fake IDs or business licenses, or otherwise engage in suspect activities.

On April 20th, 2018 Alibaba announced the founding of the Alibaba IP Research Institute. It facilitates experts from multiple disciplines to contribute to research, with a focus on the issue of IP protection in the era of e-commerce globalization. The IP Research Institute aims to promote regulation and laws which are conducive to protecting entities affected by the rise of e-commerce.

* * *

Appendix B



Alibaba Group 2017 IPR Protection Statistical Overview

Throughout 2017, Alibaba continued its consumer and IPR protection efforts by using technology to gain insight into platform activities and by partnering with rights holders, industry associations and law enforcement. Below are statistics that illustrate the success of those efforts.

Express IPP

Dramatically Reduced Takedown Processing Time



95%

of all takedown requests were processed within 24 hours during business days



68%

decline in processing time

In June 2017, Alibaba introduced Express IPP, which was a significant technological undertaking to increase the speed with which rights holder takedown requests were processed. Enhanced algorithms and data modeling allow for greater automation in the analysis and processing of submissions. As a result, during the second half of 2017 95% of legitimate IPR takedown requests submitted through the IPP Platform were processed within 24 hours during business days. This represented a 68% reduction in average processing time compared to 2016.

Remarkable Decline in Rights Holder Takedown Requests

Takedown Requests Decreased Even as Account Registrations Increased



17%

increase in the number of registered accounts through Alibaba's IPP Platform



42%

YoY decline in takedown requests

Alibaba's proactive efforts to identify and remove potentially problematic listings in 2017 contributed to a 42% decline, compared to 2016, in the number of notice and takedown requests submitted by rights holders. This decline is particularly striking given the 17% increase in accounts registered through Alibaba's IPP Platform during 2017.

Alibaba's Commitment to its Test-Buy Program

Robust Results from the Test-Buy Program

Expenditure on Test-Buy Program

RMB
100 Million

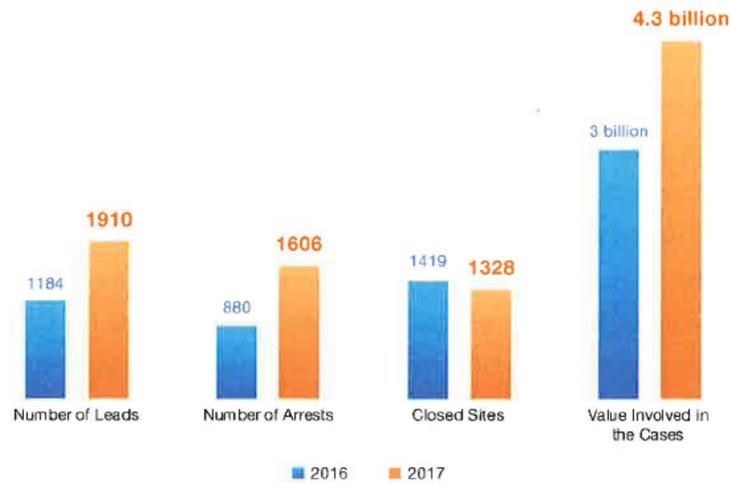
Number of Test-Buy Orders

100,000
Orders

Alibaba leverages technology to gain greater insight into activities on our platforms, including targeting potentially problematic products and sellers for its test-buy program. On average, Alibaba spends nearly RMB 100 million conducting more than 100,000 test purchases each year. Cases involving products confirmed to be counterfeit, or of otherwise inferior quality, result in immediate penalties imposed by Alibaba against the responsible sellers. In 2017, Alibaba closed 240,000 stores suspected of selling illicit goods.

Unprecedented Levels of Success Supporting Law Enforcement

2017 Alibaba Offline Results



In 2017, Alibaba supported local police in 23 provinces and cities throughout China in their efforts to crack down on the sale of counterfeit or otherwise inferior quality goods. During the year Alibaba referred 1,910 leads to law enforcement authorities that helped in the arrest of 1,606 suspects, the closure of 1,328 facilities and which involved a total of RMB 4.3 billion in estimated case values.

The pilot program was a success and Express IPP officially launched two months later. From June to December 2017, 95% of all legitimate IPR takedown requests were processed within 24 hours during business days, which represented a remarkable 68% reduction in average processing time compared to 2016. The overall IPP Platform improvements, and particularly the Express IPP enhancements, benefited rights holders and allowed for more efficient reporting and faster processing of IPR takedown requests.

“Alibaba’s IPP reform has made reporting faster and easier. Many of the complaints were processed within one day.” — Liu Zihan, Yellow Brand Protection, Asia Regional Operation Manager

Regarding the impact of Alibaba’s online reporting system, “You get fast, thorough results. Issues are very rare.” — Jon Azrielant, Director of Marketing at Jewelry.com

B. Cutting-Edge Technology for Proactive Monitoring

Alibaba’s state-of-the-art technologies remain an indispensable part of its success in IPR protection, including the significant reduction in rights holder takedown requests and processing time. Highlighted below are nine major technological tools used by Alibaba in 2017 for IPR protection:

Product Intelligence: Automatically learns from available information on Alibaba’s platforms and identifies, evaluates and processes potential IPR infringements from among nearly two billion product listings.

Screening Model: Relies on deep learning capabilities and conducts daily scans of Alibaba platforms to detect and remove potentially counterfeit and problematic product listings (the scope of this effort is equivalent to the workload of 5,000 virtual servers).

Image Recognition Algorithms: Applied each day to 600 million product images, the optical character recognition (OCR) functionality of the algorithms can scan over 23 million characters in images per second with an accuracy of 97.6%.

Semantic Recognition Algorithm: Utilizes vocabulary and product information to analyze and assess the meaning and context behind the characters identified by OCR.

Product Information Library: An enormous database that standardizes, redefines and structures the vast amount of complex information found in product listings into a more usable format that allows for faster execution by Alibaba systems.



In addition, the Cloud Sword Alliance is an IPR task force set up by Alibaba and a number of provincial law enforcement authorities to provide concentrated collaboration on investigations to better assist in the arrest of online merchants who infringe IPR. The Cloud Sword Alliance utilizes algorithms and insights into Alibaba's technological ecosystem to locate potentially unlawful transactions and, where possible, track leads upstream. The analysis by Alibaba is shared with law enforcement authorities to provide them with the necessary information to shut down illegal production facilities. Up from five provinces in the previous year, 13 government offices of the Office of the National Leading Group on the Fight Against IPR Infringement and Counterfeiting participated in the 2017 Cloud Sword Alliance. The government offices included the provinces of Anhui, Fujian, Guangdong, Guangxi, Guizhou, Hainan, Hunan, Jiangsu, Jiangxi, Sichuan, Yunnan, and Zhejiang as well as the municipality of Shanghai. In August 2017, the Cloud Sword Alliance met in Hangzhou to discuss plans and strategies to protect IPR.

Collaboration with law enforcement in 2017 involved support for online as well as offline cases. During the year, Alibaba's efforts to combat online counterfeit sales saw unprecedented success and were augmented by major efforts from China's Public Security Bureaus (PSB), Administrations for Industry and Commerce (AIC), the China Food and Drug Administration (CFDA), General Administration of Quality Supervision, Inspection and Quarantine (AQSIQ), among other law enforcement authorities. In 2017, Alibaba collectively provided the PSB, AIC, CFDA, AQSIQ and other agencies with 2,337 offline and online leads to aid enforcement efforts. "Red Shield Net Blade" was a 2017 cooperation between Alibaba and administrative law enforcement

Louis Vuitton Case Study: Offline IPR Enforcement

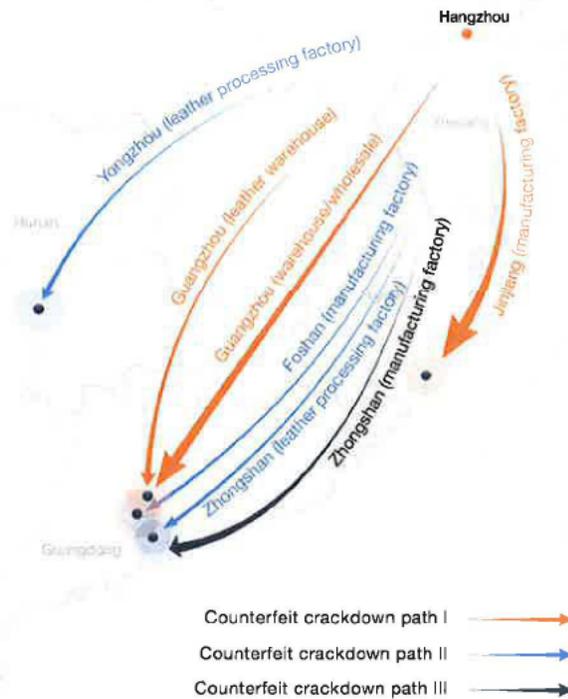


Illustration of offline crackdown on counterfeit LV series

Law Enforcement Case Study: International Case Involving Counterfeit Luxury Goods

In November 2017, the Chinese Ministry of Public Security announced that Sino-U.S. police successfully cracked an extremely large number of cross-border criminal IPR infringement cases. The success culminated a two-year investigation in which luxury brand owners sought assistance from Alibaba. The Alibaba Anti-Counterfeiting Special Task Force determined that the criminal enterprise had initially tried to sell counterfeit goods through a Taobao store. However, the online store was terminated so the criminal enterprise established an independent website, www.pursevalley.cn, to sell counterfeit goods to the U.S. and Europe. With the help of Alibaba, police discovered the domain name registrar was a Guangdong company, but the website server was located in the U.S. Law enforcement organizations in the Guangdong Province coordinated

Law Enforcement Case Study: Cracking Automotive Parts Counterfeiting

In August of 2017 the Foshan PSB announced it had successfully destroyed a counterfeit auto parts manufacturing and sales operation involving more than RMB 10 million and resulting in the arrest of 14 suspects. Through their investigation efforts police uncovered a warehouse in Guangzhou which prompted them to look upstream for a production source. With the help of Alibaba, authorities identified a manufacturing base in Wenzhou where the director of an automotive filter factory, in addition to producing filters for his own brand, manufactured counterfeit filters involving the brands of well-known companies. On July 14, more than 60 police officers were dispatched to Guangzhou and Wenzhou for coordinated raids and seizures. With the cooperation of local PSBs, police successfully seized a large number of counterfeit automotive parts, such as oil and air filters, as well as production tools.

“The success of this case demonstrates the zero-tolerance of Foshan law enforcement for inferior counterfeit automobile products. We also saw Alibaba's full commitment and tireless efforts to protect IPR.” -- Zhang Lin, Senior Manager of the China Representative Office, German Association of the Automotive Industry

D. Calls for Tougher Laws Against Counterfeiters

No single company or party can end counterfeiting and piracy on its own. All stakeholders - brand owners, manufacturers, merchants, e-commerce marketplaces, law enforcement authorities, legislators and other government officials, and even consumers - have critical roles to play.

While China has made significant progress in protecting IPR in recent years, current penalties remain insufficient to effectively deter criminal infringement. In February 2017, Alibaba issued a public appeal calling for tougher laws, stricter enforcement and stiffer penalties for sellers of counterfeit goods in China.

The following month, during the 2017 National People's Congress (NPC) and the National Committee of the Chinese People's Political Consultative Conference (CPPCC), Alibaba Group Founder and Executive Chairman, Jack Ma, appealed to Chinese legislators to strengthen laws and toughen penalties for counterfeiting, and he urged the representatives of the NPC and CPPCC to treat counterfeiting with the same urgency they did in successfully cracking down on drunk driving years earlier.

E. Precedent-Setting Lawsuits Against Counterfeiters

2017 Civil Lawsuits Filed Against Counterfeiters



These are the first legal actions brought in China by an e-commerce company against infringing sellers on its platform.

In conjunction with the public appeal for stricter enforcement of IPR laws in China, Alibaba was the first platform operator in China to bring civil lawsuits against merchants who misuse its services for the sale of counterfeit goods. Filing civil lawsuits against counterfeiters of brands such as Swarovski, Mars, Bioderma and Adidas, Alibaba Group's Taobao platform sued multiple counterfeit sellers on the grounds of breach of contract and harm to reputation.

In addition to being the first platform to file civil lawsuits against counterfeiters, Taobao was the first to successfully obtain a judgment in such a case. On March 8, 2017, Taobao filed a lawsuit against a merchant selling counterfeit Mars cat food based on a violation of Taobao's terms of use, which prohibit counterfeit sales, as well as harm to Taobao's reputation. Taobao requested RMB 2.67 million in compensation as well as a public apology. On July 20, the Shanghai Fengxian District People's Court issued its verdict in the first instance holding that the defendant had infringed upon the legal rights of Taobao by selling counterfeit products on the Taobao platform, thus reducing consumer trust and damaging Taobao's public image. The verdict established the precedent that counterfeit sellers can be liable to the platform whose services they misuse in connection with the sale of counterfeit goods. The presiding judge, the President of the People's Court, ordered the defendant to pay RMB 120,000 in damages to Taobao.

In recognition of the precedent-setting nature of the claims, the case was nominated as a 2017 Top 10 Civil Proceedings in the People's Court and included in the "2017 Top 10 Legal Advancement Cases" list compiled by the Supreme People's Court and China Central Television (CCTV).

“As a long-standing partner of Alibaba’s, I’m impressed with the technology upgrades to the platform we saw, and appreciate Alibaba’s openness about its processes and willingness to seek our input on how to better work together. As a brand, I learned a lot, which instills our continued trust in Alibaba to protect our IP.” — Jessica Guo, Senior Legal Manager, Spalding

“Cooperating with the China-Britain Business Council (CBBC) and Alibaba has made it quicker and easier for us to protect Dyson’s distinctive designs. Thanks to the CBBC-Alibaba collaboration on IP, we have been able to remove more fakes from e-commerce sites than ever before. Their support makes a real difference to our ability to protect consumers from poor quality imitation products.” — Gill Smith, Group IP Director at Dyson

H. Helping Small Businesses

Specific Measures Tailored for Small and Medium-sized Enterprises (“SMEs”)



Providing a simple online form for submitting takedown requests



Expediting takedown requests for all users



Making it easier to find the IPP Platform



Ensuring clear and consistent communications regarding takedown requests



Broadening the IACC MarketSafe® Expansion program to include more SMEs at no charge



Participating in U.S. Patent and Trademark Office Road Shows to educate SMEs on our IPR protection programs

In 2017, Alibaba implemented measures specifically intended to support the unique needs of SMEs. The following enhancements to Alibaba’s IPP Platform were implemented to help provide a positive overall experience with the IPP Platform and were tailored to help meet SME needs specifically:

I. Alibaba Anti-Counterfeiting Alliance



In January 2017, Alibaba and 30 other leading domestic and international brand owners founded AACA, a first of its kind anti-counterfeiting alliance. AACA combines brand and industry knowledge with Alibaba's e-commerce technology and platform insights in order to protect IPR more effectively.

Brands such as Procter & Gamble, Louis Vuitton, Mars, Adidas, Ford and Xiaomi (for the complete list of founding AACA brand members please refer to the infographic above) and Alibaba worked within AACA to foster communication and create a forum for coordinated and proactive IPR protection efforts. During AACA's first year, members focused on several areas including online protection, offline enforcement, litigation tactics and industry collaboration.

AACA is currently comprised of 12 industry working groups (IWGs) that share, among other things, best practices in IPR protection and needs specific to their respective industries. In September 2017, Alibaba and member companies established an AACA Advisory Board comprised of representatives from each of the 12 IWGs. The Advisory Board functions as a strategic think tank within AACA and provides members with an established channel to help influence Alibaba IPR policies and practices.





August 27, 2018

The Honorable Orrin G. Hatch, Chairman
The Honorable Ron Wyden, Ranking Member
Committee on Finance
United States Senate
Washington, DC 20510

Dear Chairman Hatch and Ranking Member Wyden,

On behalf of eBay and our CEO Devin Wenig, thank you for your letter regarding the sale of counterfeit goods on e-commerce platforms. We welcome the opportunity to discuss eBay's industry leading practices and our proactive coordination with rights holders, law enforcement agencies, and regulators to keep counterfeits off our platform.

Below, please find answers to the specific questions posed in your letter.

1. What types of remedial measures do you provide U.S. consumers who may have unintentionally purchased a counterfeit good through your platform?

In the rare case a buyer believes that he or she has purchased a counterfeit item, eBay's Money Back Guarantee applies to virtually all transactions and will cover them accordingly. Additionally, if a consumer believes an item may be counterfeit, we allow them to "Report a Listing" at any time. The listing will then be reviewed promptly by eBay.

2. What types of remedial measures do you provide to rights holders who find that counterfeit goods are being sold through your platform?

eBay's anti-counterfeit measures include the Verified Rights Owner Program (VeRO). Launched in 1998, VeRO allows brand owners to quickly and easily report possible counterfeits or other infringing goods. We promptly investigate each VeRO notification and take appropriate action on reported listings. More than 40,000 rights owners, ranging from Global 500 companies to industry trade associations to small businesses, participate in the VeRO program.

eBay does not rely solely on our VeRO partnerships to identify potentially infringing items. In fact, on average, eBay removes more than three times as many potentially infringing items, week over week, than are reported by rights owners through VeRO. Stated differently, eBay proactively removes more potentially infringing items than are reported by brand owners as allegedly infringing. To put this in perspective, eBay receives tens of thousands of reports through VeRO per week from rights owners. The vast majority of VeRO reports are reviewed within 24 hours, and typically, 100% are reviewed within 72 hours.

3. In what circumstances does your organization come into physical contact with counterfeit products sold and delivered to consumers, including those sold by your organization directly or through second and third party merchants on your platform?

eBay is a third party marketplace that connects buyers and sellers on our platform. We do not come into physical contact with goods sold on our platform.



4. What services, tools, protections, and assistance do you provide consumers and rights holders with respect to preventing the sale of counterfeits?

We utilize a combination of sophisticated detection tools, enforcement and strong relationships with brand owners, retailers and law enforcement agencies to combat counterfeits and present our customers with a safe, trusted shopping experience.

5. Please explain what you feel are some of the biggest risks counterfeit goods currently pose e-commerce consumers.

Counterfeits pose a risk to consumers and rights owners, which is why we're committed to aggressively combatting the sale of counterfeit goods and have consistently been referenced as an Internet industry leader in working to stop the online sale of counterfeit goods. eBay's success as a business depends on a climate of confidence and trust. Counterfeit items damage this trust and hurt eBay's community of legitimate sellers who trade authentic goods on eBay every day. eBay is fundamentally aligned with rights owners and law enforcement in working to fight counterfeits.

6. What have you done to curtail those risks and what have you done to inform consumers of those same risks, which may not be known to the consumer?

Consumers can shop eBay's 1.1 billion items with confidence, knowing we have key partnerships and processes in place with rights owners, law enforcement and government officials to ensure a safe shopping experience. We have also engaged in campaigns, such as the Unreal campaign, which is INTA's public awareness initiative designed to educate teenagers (ages 14-18) about the importance of trademarks, intellectual property, and dangers of counterfeit products.

7. Do you engage with foreign governments to curtail the proliferation of counterfeits? If so, what types of activities and coordination have proven successful? What efforts have not been successful?

We have strong existing relationships with various law enforcement agencies and regulatory bodies throughout the world. eBay's Global Asset Protection team trains law enforcement and retail loss prevention officials about our services and how to partner with us to carry out investigations. By taking a coordinated approach with rights owners and law enforcement, we have been able to develop lasting relationships that have produced tremendous results in combatting counterfeit goods.

8. To what extent do you facilitate delivery, storage, processing, and purchases of goods on your platform?

eBay is not a retailer, does not offer fulfillment services or otherwise hold stock on behalf of sellers, and does not otherwise possess items sellers list on its site.

9. Which inflection points in the ecommerce purchasing/selling process have you found most critical to intervene in to prevent and/or curtail the distribution of counterfeit goods?

As a marketplace, eBay does not have the knowledge, capacity, or right of access to monitor the supply chains of third parties selling on our platform.



10. Have there been instances where genuine goods sold on your platform are intermingled and/or commingled with counterfeit goods? Can you provide an example?

eBay is not aware of these kinds of purchases occurring on our platform.

11. How do you coordinate with rights holders to verify whether goods sold over your platform are genuine?

Rights holders can contact us directly. Our VeRO program allows brand owners to quickly and easily report possible counterfeits or other infringing goods. We promptly investigate each VeRO notification and take appropriate action on reported listings. We also launched eBay Authenticate in 2016 where sellers have an opportunity to opt-in to a service to verify certain high-end listings.

12. In what ways do counterfeiters evade actions you have taken to prevent counterfeits on your platform or using your services?

Criminals have attempted to sell counterfeits and evade punishment on eBay by using various deceptive listing practices:

- Using trial and error, “dark web” chat rooms, or purchasing illicit guides to learn how to evade filters, procedures, and policies eBay puts in place to prevent sellers from listing inauthentic goods and to circumvent measures eBay has in place to prevent suspended users from reregistering;
- Using false identities and/or multiple accounts designed to be difficult to link;
- Creating counterfeit products that are indistinguishable from originals;
- Using terms suggesting the item is refurbished or OEM so the buyer expects a lesser quality item when in fact it is inauthentic;
- Providing false or doctored documents when someone request proof of merchandise;
- Attempting to prevent buyers from leaving negative feedback or contacting eBay by promising refunds or bonuses to displeased buyers.

13. After a suspected counterfeit distributor has been identified -- whether by your company or a third party -- what steps do you take, if any, to verify the claims of counterfeit distribution?

eBay is not a retailer, does not provide fulfillment services or otherwise hold stock on behalf of sellers, does not otherwise possess items sellers list on its site, and consequently is not in a position to verify whether a brand’s assertion that a listing advertises counterfeit products is or is not correct. When a brand owner reports a listing as counterfeit, eBay removes it.

14. What is the process, if any, for removing a suspected counterfeit distributor from your platform?



eBay imposes a range of increasingly severe penalties and restrictions on problematic sellers, up to and including permanent suspension from the site.

15. After removal, what processes does your company have in place, if any, to prevent a suspected counterfeit distributor from regaining access to your platform and subsequently U.S. consumers?

eBay removes sellers from its site for a variety of reasons, not merely for advertising counterfeit products. These sellers harm buyers, undermine confidence in our marketplace, and are not welcome on eBay. eBay screens new accounts using the data available to attempt to determine whether a new account is linked to a previously suspended account. eBay also conducts its own investigations of accounts that it suspects are associated with fraudulent or illegal conduct and, as part of that review, determines whether these accounts are linked to others.

16. If you become aware of a counterfeit good and/or distributor on your platform what actions including initiating legal action does your company have the power to take?

When eBay becomes aware of a listing advertising counterfeit goods, it ends the listing and imposes a consequence on the seller, up to and including permanently removing the seller from the site. When the matter appears to be potentially interesting to law enforcement, eBay will refer the matter to the appropriate authority, including for example, Intellectual Property Rights Center, the U.S. Postal Inspection Service, state attorney general offices, and local police to aggressively prosecute repeat counterfeiters on our site – especially those that sell counterfeit health and safety items that pose a risk to our buyers.

17. How have you coordinated with U.S. federal and local authorities to curtail the distribution and manufacture of counterfeit goods within the U.S.?

Our Global Asset Protection team collaborates with local, national, and international law enforcement agencies to combat the sale of unauthorized goods on our platform, including counterfeit goods.

Again, I appreciate the opportunity to explain eBay's work to combat the online sale of counterfeit items. Please do not hesitate to contact me if we can provide any further information.

Sincerely,

Cathy Foster
Vice President
Global Government Relations and Public Policy



Etsy, Inc.
117 Adams Street
Brooklyn, New York
11201
ETSY.COM

July 18, 2018

The Honorable Orrin Hatch
Chairman, Committee on Finance
United States Senate
Washington, DC 20510

The Honorable Ron Wyden
Ranking Member, Committee on Finance
United States Senate
Washington, DC 20510

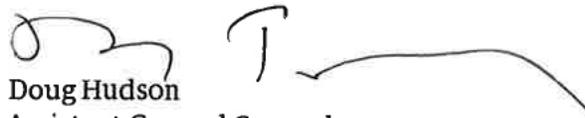
DEAR CHAIRMAN HATCH AND RANKING MEMBER WYDEN:

Thank you for the opportunity to respond to your inquiry on this important topic. Etsy is the global marketplace for unique and creative goods. Our mission is to keep commerce human, and we're committed to using the power of business to strengthen communities and empower people.

At Etsy, we are committed to operating a marketplace where 2 million Etsy sellers¹ can connect with 34.7 million buyers who value their creative wares. We take issues of intellectual property seriously, and work to protect our users from counterfeit goods. We strive to protect our community and share information when we can. That's why we publish our annual Transparency Report, which allows us to provide insights into how we approach legal requests and trust and safety matters on Etsy.com. We expect to publish our 2017 Transparency Report in the near future, and you can find our latest report [here](#).²

As members of the Internet Association, we provided input to the letter that was sent to your committee dated June 29, 2018. We are happy to continue the conversation and welcome any further questions you may have.

Sincerely,


Doug Hudson
Assistant General Counsel
Etsy, Inc.

¹ Active Etsy sellers as of March 31, 2018

² Etsy. "[2016 Transparency Report](#)," March 2017.

June 29, 2018

Hon. Orrin G. Hatch
Chairman
Committee on Finance
United States Senate
Washington, DC 20510

Hon. Ron Wyden
Ranking Member
Committee on Finance
United States Senate
Washington, DC 20510

Dear Chairman Hatch and Ranking Member Wyden:

Thank you for the opportunity to respond to your inquiry regarding our approach to tackling counterfeit goods on Facebook. We respectfully submit the following responses to your requests for information, dated May 30, 2018.

Facebook's mission is to give people the power to build community and bring the world closer together. One way people connect with their interests on Facebook is through interacting with brands and products they are interested in, including through Facebook Pages, Marketplace and sale groups. To ensure a safe and trusted platform for this and other activity, Facebook has built a variety of measures to help rights holders combat potentially counterfeit goods and otherwise protect their intellectual property rights on Facebook. These include a global notice-and-takedown program, a robust repeat infringer policy, and additional specialized features. We also work with a range of rights holders to seek their input and believe that a collaborative approach is paramount to address the challenges of counterfeiting online.

Strong anticounterfeiting initiatives are important for rights holders, our users and Facebook, and we prioritize the fostering of an online community that encourages the sharing of lawful content. These values are set out in our Terms of Service, our Community Standards, and our related policies such as our Advertising Policies and Commerce Policies (links to which are provided in response to Question 18 below).

1. What types of remedial measures do you provide U.S. consumers who may have unintentionally purchased a counterfeit good through your platform?

Facebook has numerous measures available to assist consumers even before they make a purchase of goods they have seen on Facebook. For example, we provide a robust Intellectual Property Help Center (https://www.facebook.com/help/intellectual_property) dedicated to providing education regarding IP issues, including concerning counterfeit goods. Additionally, within the Marketplace feature, users receive an educational notification telling them to be aware of potential counterfeits, including when they view a product in certain categories, or message a seller for the first time about products in certain categories. This notification also allows the buyer to follow a link to more "Marketplace Tips"

(<https://www.facebook.com/help/1156544111079919>) where we provide more detailed information about counterfeits. Finally, if a buyer believes an item on Marketplace may be counterfeit, they may also flag it for us, and that listing and/or seller will be reviewed against our Commerce Policies.

Facebook has been developing new programs to assist users of our features, based on feedback we've received. Recently, we began rolling out a new program through which, in certain cases, a person who bought a product on Facebook may be able to submit a claim under our Purchase Protection Policies (https://www.facebook.com/policies/purchase_protection). Under this program, if a buyer experiences an issue with their purchase on Facebook, such as the item not being received, or the item being damaged or significantly different than described, Facebook may review the dispute and issue a refund to the buyer if the claim is approved. This program currently applies to certain types of purchase experiences, and we are exploring options for rolling it out further.

2. What types of remedial measures do you provide to rights holders who find that counterfeit goods are being sold through your platform?

Facebook operates a comprehensive notice-and-takedown program under which we promptly remove content that is reported by rights holders as violating their intellectual property rights, including content that is promoting or selling counterfeit goods. All IP reports are processed by our Intellectual Property Operations team, a global team of specially-trained professionals who provide around-the-clock coverage in multiple languages. If the submitted report is complete and valid, the team promptly removes the reported content, typically within a day or less, and confirms that removal with the rights holder.

To facilitate reporting of potential IP violations, Facebook provides dedicated channels for rights holders to report content that infringes their rights. For items that a rights holder believes are counterfeit, we have developed a dedicated reporting form, available at: <https://www.facebook.com/help/contact/counterfeitform>. We have also built a specialized reporting tool – the Commerce & Ads IP Tool – to allow rights holders to search for and report infringements in commercial content in a streamlined and efficient portal. The Commerce & Ads IP Tool allows rights holders to search across all ads, Marketplace posts, and sale group posts on Facebook for instances of their registered word trademark, and to report any content that they believe infringes their IP rights.

Facebook has a strict policy against counterfeiting, so in many cases upon receipt of a single report from a rights holder, we may remove an entire Page or account if it appears to be dedicated to infringing activity. We also have a strict policy against counterfeit advertising on Facebook; when an ad is reported as promoting counterfeits, in addition to removing the specific ad, we can often take broader action against the responsible advertiser, where appropriate. Finally, we maintain a repeat infringer policy under which the accounts of repeat infringers (e.g., profiles, Pages, ad accounts) are terminated where appropriate.

In addition to these measures, Facebook's intellectual property teams work closely with teams specializing in other policy violations such as spam or malicious activity, which in many cases may also raise counterfeit issues, to take actions against bad actors on the platform, and

collaborates closely with rights holders to explore ways in which it can undertake additional measures (many of which are necessarily confidential) to help address counterfeits. These measures are specifically aimed at removing content that may be offering potentially counterfeit goods independent of, and even before, a rights holder's report.

3. In what circumstances does your organization come into physical contact with counterfeit products sold and delivered to consumers, including those sold by your organization directly or through second and third party merchants on your platform?

Facebook does not take possession of, deliver or store goods that are sold on our platform. All transactions are conducted directly between users; Facebook acts as an online intermediary through which users can buy and sell from each other, but does not act as a conduit for physical goods between users, and otherwise does not come into physical contact with any goods.

4. What services, tools, protections, and assistance do you provide consumers and rights holders with respect to preventing the sale of counterfeits?

We respectfully refer you to the answers to Questions 1 and 2.

5. Please explain what you feel are some of the biggest risks counterfeit goods currently pose e-commerce consumers.

Counterfeit goods are illegal in the U.S. and, among other things, may cause harm to consumers. Facebook takes a strong stance against counterfeit goods to safeguard users' economic and safety interests, as well as to protect the value of brands and our own platform from illegal products.

6. What have you done to curtail those risks and what have you done to inform consumers of those same risks, which may not be known to the consumer?

We respectfully refer you the descriptions of our anticounterfeiting measures contained throughout these responses.

7. Do you engage with foreign governments to curtail the proliferation of counterfeits? If so, what types of activities and coordination have proven successful? What efforts have not been successful?

Facebook engages with government agencies about IP issues to discuss and align best practices in relation to counterfeit goods, and to provide more information on both the Facebook service and our approach to tackling counterfeits. This engagement with governments focuses on broad themes related to counterfeit goods, and has been beneficial both to Facebook in understanding the trends and concerns regarding counterfeits around the world, and to government actors to understand Facebook's approach and commitment to these issues.

8. To what extent do you facilitate delivery, storage, processing, and purchases of goods on your platform?

As noted in response to Question 3, Facebook does not take possession of, deliver or store goods that are sold on our platform. We have partnered with third parties that offer merchant payment

processing – for example, Pages that want to sell items on their shops can register with third-party processors like Stripe to process their payments. Separately, we are aware that some users of Facebook’s Marketplace feature choose to send or receive money using peer-to-peer (P2P) payment tools, including Messenger’s P2P feature (which is offered by Facebook’s licensed payment subsidiary), Venmo or Paypal.

9. Which inflection points in the ecommerce purchasing/selling process have you found most critical to intervene in to prevent and/or curtail the distribution of counterfeit goods?

Facebook believes that a multi-layered, responsive and flexible approach is needed to have the greatest impact against counterfeit products. Please see our response to Questions 1 and 2 for further information, and broadly speaking this involves:

- Allowing rights holders to report counterfeit goods across the platform, and allowing Marketplace users to flag suspected counterfeit items.
- Maintaining a specialized Intellectual Property Operations team that reviews and acts on reports from rights holder quickly.
- Numerous measures and technologies that assist in the removal of counterfeit content without being reported by a rights holder or user.
- A robust policy that allows Facebook to terminate the accounts and/or Pages of bad actors.
- Educating Marketplace buyers and sellers about the dangers of counterfeits.
- Engagement with the rights holder community and government agencies to discuss best practice and key strategies.

10. Have there been instances where genuine goods sold on your platform are intermingled and/or commingled with counterfeit goods? Can you provide an example?

Not applicable.

a. What is your company doing to prevent this from occurring/reoccurring?

Not applicable.

11. How do you coordinate with right holders to verify whether goods sold over your platform are genuine?

a. If you do not coordinate, please explain how or why you do not feel this is helpful or necessary.

As noted in our introduction and response to Question 2, an important component of Facebook’s anticounterfeiting program is our close collaboration with rights holders to explore ways in which we can undertake measures aimed at combatting potentially counterfeit goods. This

collaboration includes frequent meetings and other daily interactions with rights holders across the globe. While, given the nature of our services, Facebook is not in a position to verify the authenticity of goods (including, for example, because Facebook does not take possession of, deliver or store goods that are sold on our platform), this collaboration is aimed at addressing particular instances of potentially infringing content on Facebook as well as broader anticounterfeiting efforts.

12. In what ways do counterfeiters evade actions you have taken to prevent counterfeits on your platform or using your services?

a. Potential examples here might include reposting or creating new, virtually identical counterfeits goods seller accounts; providing a mixture of authentic requests against legitimate goods seller accounts; providing a mixture of authentic and counterfeit goods making it difficult to predict the authenticity of future sales.

Facebook has several teams focused on users who may be abusing our platform, including by creating fake or multiple accounts that violate our policies. When Facebook becomes aware of any such policy violations, these accounts are removed. In our experience, some of these accounts have been connected to accounts previously disabled for IP reasons, including counterfeiting.

13. After a suspected counterfeit distributor has been identified -- whether by your company or a third party -- what steps do you take, if any, to verify the claims of counterfeit distribution?

We respectfully refer you to the answer to Question 2. Of particular note, whenever Facebook receives a complete and valid report of counterfeit goods from a rights holder, we remove the reported content (and take additional action as appropriate, including disabling the accounts of repeat infringers).

14. What is the process, if any, for removing a suspected counterfeit distributor from your platform?

We respectfully refer you to the answers to Questions 1, 2 and 13, including our notice-and-takedown program, the additional measures we have in place going beyond notice-and-takedown, our repeat infringer policy, and so on.

15. After removal, what processes does your company have in place, if any, to prevent a suspected counterfeit distributor from regaining access to your platform and subsequently U.S. consumers?

Facebook has several measures in place aimed at detecting new accounts created by previously-disabled users – including those disabled for IP-related reasons – and preventing them from returning to or continuing to misuse the platform. We are constantly identifying new ways that bad actors try to circumvent our systems, and we update our tactics aimed at recidivism accordingly.

16. If you become aware of a counterfeit good and/or distributor on your platform what actions including initiating legal action does your company have the power to take?

a. Can you provide us with statistical information regarding the frequency in which you have taken actions concerning suspected counterfeit products -- either through investigation, destructions, abandonment, or otherwise?

In certain circumstances, Facebook has engaged with law enforcement and/or government agencies who are investigating counterfeit activities offline. We are also aware that rights holders are frequently interested in taking action on real-world counterfeiters. In these situations, when requested by rights holders, we can provide available basic subscriber information upon personal service of a valid subpoena or court order and after notice to affected account holders, so that rights holders may investigate and take further action as they deem appropriate.

17. How have you coordinated with U.S. federal and local authorities to curtail the distribution and manufacture of counterfeit goods within the U.S.?

a. How have you coordinated with international authorities?

We respectfully refer you to the answers to Questions 7 and 16.

18. If there are any other pieces of information, details, or data you feel would be helpful to the committee, we respectfully request that you submit them as part of your answers as well.

Please see the following resources which provide more detail on the information that Facebook provides and the action it takes in relation to counterfeit products:

- Facebook Transparency Report: <https://transparency.facebook.com/intellectual-property>
- Intellectual Property Help Center: https://www.facebook.com/help/intellectual_property
- Counterfeit reporting form: <https://www.facebook.com/help/contact/counterfeitform>
- Marketplace Tips: <https://www.facebook.com/help/1156544111079919>
- Purchase Protection Policies: https://www.facebook.com/policies/purchase_protection
- Terms of Service: <https://www.facebook.com/legal/terms>
- Community Standards: <https://www.facebook.com/communitystandards/>
- Advertising Policies: <https://www.facebook.com/policies/ads/>
- Commerce Policies: <https://www.facebook.com/policies/commerce>

Respectfully submitted,

A handwritten signature in blue ink that reads "Kevin J. Martin". The signature is written in a cursive style with a long horizontal flourish extending to the right.

Kevin Martin
Vice President, Public Policy



June 29, 2018

Hon. Orrin G. Hatch
Chairman
Committee on Finance
United States Senate
Washington, DC 20510

Hon. Ron Wyden
Ranking Member
Committee on Finance
United States Senate
Washington, DC 20510

Dear Chairman Hatch and Ranking Member Wyden:

Thank you for the opportunity to respond on behalf of the internet industry to your letter dated May 30, 2018. Internet-based businesses take protecting consumers from counterfeit goods seriously and have a good story to tell. IA member companies have taken the lead to implement clear policies, have proactively partnered with enforcement entities, and have created transparent and innovative counterfeit reporting and prevention tools that allow third parties to identify and remove counterfeit items listed for sale on their platforms in a timely manner.

Internet Association¹ represents over 40 of the world's leading internet companies. IA's mission is to foster innovation, promote economic growth, and empower people through the free and open internet.

In the last two decades, U.S. internet platforms have become a significant driver of the U.S. economy. The internet industry represents an estimated 6 percent of U.S. GDP, totaling nearly \$967 billion, and accounts for nearly 3 million American jobs. Since the mid-90s consumers have increasingly been shopping online. In 2017, an estimated 1.66 billion people worldwide purchased goods online. During the same year, global e-retail sales amounted to \$2.3 trillion and projections show a growth of up to \$4.48 trillion by 2021. It is estimated that about 80 percent of internet users in the U.S. are expected to make at least one purchase online during the calendar year in 2019.

Internet platforms are facilitating growth for the rest of the economy. Businesses of all sizes have embraced internet platforms to effectively and efficiently sell their goods and services. Buyers and sellers from around the globe are now connected instantaneously through internet platforms. Small businesses and entrepreneurs are harnessing the power of the internet to reach new markets, connect with new customers, and increase their productivity. The internet is also having a dramatic impact outside the internet industry. A recent study found that more than 75 percent of the economic value created by the internet is captured by companies in traditional industries, many of them small businesses.

¹Internet Association members include Airbnb, Amazon, Coinbase, DoorDash, Dropbox, eBay, Etsy, Eventbrite, Expedia, Facebook, Google, Groupon, Handy, HomeAway, IAC, Intuit, Letgo, LinkedIn, Lyft, Match Group, Microsoft, Netflix, Pandora, PayPal, Pinterest, Quicken Loans, Rackspace, reddit, Salesforce.com, Snap Inc., Spotify, SurveyMonkey, Thumbtack, TransferWise, TripAdvisor, Turo, Twilio, Twitter, Uber Technologies, Inc., Upwork, Vivid Seats, Yelp, Zenefits, and Zillow Group.



Unfortunately, a small percentage of bad actors misuse online services to try to sell counterfeit goods. While reports vary on the quantity of counterfeit goods sold, the platforms that facilitate online sales are working to ensure consumers can feel safe buying online. The following are a few examples of some of the transparent and innovative practices that internet companies are undertaking.

More than 40,000 rights owners are able to quickly and easily report instances of alleged intellectual property infringement, including possible counterfeits, through eBay's Verified Rights Owner (VeRO) program. Through this program, which was launched in 1998, reports of alleged intellectual property theft are promptly investigated. Additionally, unlawful activity can be reported by any third-party to the eBay customer support team via links.

Etsy has also made addressing intellectual property infringement a priority. User-friendly tools allow rights holders to submit notices of intellectual property infringement and, upon receipt of the notice, Etsy's legal support team personally reviews each complaint and directs sellers to educational resources available on their platform. In 2016, Etsy responded to 18,857 properly submitted takedown notices, disabling access to 235,201 listings from nearly 60,000 sellers. In that same year, Etsy saw a 70 percent increase in intellectual property-takedowns from the previous year.

Under Amazon's Anti-Counterfeiting Policy, counterfeits are strictly prohibited and violation of the policy can result in a seller's loss of selling privileges, funds being withheld, and destruction of inventory. Amazon has a global team of investigators that is available 24 hours a day, 7 days a week to respond to and take action on notices of potential infringement. In 2017, Amazon launched Brand Registry, a service that gives rights owners advanced tools to protect their brands, including powerful text- and image-based search capabilities and automated protections that use machine learning to predict and prevent future infringement issues. Amazon has more than 60,000 brands around the world registered in Brand Registry, and on average, they're finding and reporting 99 percent fewer suspected infringements than before the launch of Brand Registry. Amazon investigates and takes action on more than 95 percent of all notices of potential infringement received from brands in Brand Registry within eight hours. Amazon's strict policies and innovative tools ensure that buyers can feel confident in their purchases on the site.

Search engines like Google continuously remove content from their services when rights holders or reporting organizations submit requests that infringing activities are occurring. Over the last three years, Google has shut down over 100,000 AdWords accounts for attempting to advertise counterfeit goods.

Internet platforms have created close relationships with law enforcement to combat counterfeit goods, including active engagement with U.S. Customs and Border Protection, the National Intellectual Property Rights Center, under the Department of Homeland Security, and other federal and state enforcement agencies. Platforms regularly report misconduct and help in supporting ongoing investigations. The platforms have proactively created training programs to ensure that law enforcement officials understand how the platforms work and to provide information about evolving investigative techniques on the web, and other emerging trends. IA member companies also encourage users to report illegal activities to appropriate authorities and have posted links to facilitate such reporting.



Innovative prevention and reporting tools created by internet companies and effective partnership with law enforcement and rights holders are vital to addressing the risks posed by counterfeit goods to consumers.

Thank you again for the opportunity to provide comments on behalf of our member companies and highlight some of the proactive policies these companies have implemented. Internet Association looks forward to continuing to engage with you on these matters in the future.

Sincerely,

A handwritten signature in black ink, appearing to read 'Michael Beckerman', with a long horizontal flourish extending to the right.

Michael Beckerman
President & CEO
Internet Association

June 29, 2018

The Honorable Orrin Hatch
The Honorable Ron Wyden
US Senate Committee on Finance
Washington, DC 20510

Dear Chairman Hatch and Ranking Member Wyden:

Thank you for your letter of May 30, 2018 to Mr. Liu Qiangdong of JD.com. We are grateful to have this opportunity to introduce ourselves to you. Due to our unique business model, we decided that it is better to give you a comprehensive description of our policy and our practices around combating counterfeit products, instead of answering individual questions on the list, as many of those questions do not apply to us.

JD.com started in 1998 as a brick-and-mortar store in Beijing. Since then, JD.com has grown to become the leading online direct sales company and one of the largest e-commerce businesses in China. The company's business model is similar to Amazon.com combined with FedEx in that we specialize in business-to-consumer ("B2C") transactions and we also handle delivery logistics. In 2016, JD.com is listed as the 3rd ranking internet company on the Fortune Global 500 list. JD.com's predominant revenue sources are online direct sales by JD.com itself.

What Makes Us Different

- Unique Business Mode

JD.com's business mode includes direct sales by JD.com and platform. For direct sales by JD.com, most of the goods are acquired by JD.com directly from the manufactures, which ensures the goods are authentic. Regarding suppliers to JD.com and third party sellers on JD.com platform, JD.com has strict rules in place. Those suppliers and third-party sellers are subject to mandatory background checks, during which time their business licenses, product qualification certificates, and brand reputation are all carefully reviewed and evaluated. JD.com also conducts on-site visits, and require suppliers and third-party sellers to affirm contractually that their goods are authentic, came from lawful sources, do not infringe the rights of any other third parties, and that they will pay liquidated damages in the event of any breach of the contract terms.

- Nationwide logistics in-house

JD.com is the only e-commerce company globally of our scale that does nationwide logistics in-house. JD.com started to establish self-owned logistics system from 2007. JD Logistics Business Group was established in 2017. Via 10-year of investment and continuous operation, our logistics network now covers 99% of China's population. After placing the order, 90%

of the deliveries can be completed same or next day.

Right now, JD logistics has established over 500 large-scale warehouses and operates 14 fully automated warehouses named “Asia No. 1 Logistics Center”. The automated warehouse can process 200,000 orders per day, reduce costs by 30%, and increase efficiency by 1000%. We also have three daily operations of unnamed technologies, including delivery drones, autonomous vehicles, and autonomous trucks.

The fact that the goods sold on the JD.com platform were handled by our own logistics system and our own employees helps ensure that those goods are authentic.

- Blockchain Technology

In addition to an advanced end-to-end logistics system, JD.com is also implementing other new technologies to further ensure that goods and products flowing through JD.com’s platform are authentic. Blockchain is one of the new technologies we are starting to use. With this technology, we can trace a product from its source of origin all the way to its delivery to the consumer. The technology ensures that no one can alter the record along the way, and the product remains authentic.

Our Strict “Zero-Tolerance” Policy towards Counterfeit Products

JD.com has a strict “zero-tolerance” policy towards counterfeit goods. Once a product is confirmed to be counterfeit, JD will immediately remove the seller from JD.com platform. Furthermore, the seller will be posted on a blacklist, and will not be allowed into JD marketplace in the future. If the value of counterfeit products reaches the criminal threshold, JD.com will work with the government authority for further investigation and potential raid action.

To prevent counterfeit products, we source products directly from world-leading global brands, and work tirelessly to eliminate counterfeits. We also have the following six measures to ensure quality:

- I. Strict criteria for approval
- II. Strict control of supply channels
- III. Random sampling inspection
- IV. Independent research
- V. Strict penalty system
- VI. Guaranteed return policy

To better protect IP rights, JD.com has taken a series of measures. First, when a distributor applies to enter our platform, our Quality Control Department will examine its qualifications carefully. Secondly, we continue to monitor those qualified distributors during daily operation with technical means in order to find out products with high infringement risks. JD.com

utilizes software filters that analyze huge streams of data to identify and block suspected offers of infringement products. When a product offered for sale is identified as likely to infringe a third-party's intellectual property rights, JD.com will investigate and take down the product if proven to be fake. Finally, we have established an online IPR Complaint Platform (i.pr.jd.com for Chinese version, en.i.pr.jd.com for English version) specifically for the IPR owners to file any complaints. IPR owners can file any complaints against counterfeit products through our online IPR Complaint Platform, and each complaint will be investigated and addressed by JD.com.

Collaboration with IPR Owners

JD.com collaborates directly with IPR owners. Additionally, JD.com also collaborates with other countries' embassies and their IP bureaus, such as U.S., UK, France, Japan, Korea and so on. Each year, various IPR owners, as well as organizations representing brand owners communicate with JD.com, not only to discuss the methods of better protecting their IP rights, but also to arrange training sessions, special protection actions, and so on.

JD.com highly values its relationship with brand owners and business partners, especially in the U.S. market.

Test-Purchase Program

Another part of JD.com's anti-counterfeit program is the test-purchase program in collaboration with IPR owners.

I. Selecting Suspected Products

We screen out those products with high risk index with our autonomous risk-control system, then select the samples with high risks for further investigation.

II. Sample Purchasing

We have a third party purchase the products anonymously and mail to IPR owner for identification. The above procedure is recorded and notarized. This guarantees that the sample purchasing and the identification result could be used as valid evidence in the future.

III. Follow-up after the Identification

If the sample is identified as counterfeit by the IPR owner, we conduct further investigations against the target store. Whenever the value of counterfeit products reaches the criminal threshold, we cooperate with the IPR owner and provide necessary support to the government authority for any off-line criminal raid action. Otherwise, we penalize the target store according to our established policy, such as taking down the products, shutting down the store, imposing fines etc.

Conclusion

JD.com is fully committed to protecting the intellectual property of rights holders, combatting counterfeit products, and bringing authentic goods to consumers in the United States and elsewhere. We view this as an imperative business priority for us, and the foundation of our long term success. We hereby extend our invitation to you and your honored colleagues to visit our company and see our advanced logistic system in China, including our fully automated warehouses. If you have any further questions, please do not hesitate to let us know.

Best regards,



Rain Long
CHO & General Counsel
JD.com
21/F, Block A, No.18 Kechuang 11 Street
Beijing BDA
P.R.China



Jonathan E. Johnson III
Board of Directors, Overstock.com, Inc.
799 W. Coliseum Way
Midvale, Utah 84047

Phone 801.947.3100

Via Electronic Submission to [REDACTED]

June 29, 2018

The Honorable Orrin G. Hatch
Chairman, Senate Committee on Finance
219 Dirksen Senate Office Building
Washington, D.C. 20510-6200

The Honorable Ron Wyden
Ranking Member, Senate Committee on Finance
219 Dirksen Senate Office Building
Washington, D.C. 20510-6200

Dear Senator Hatch and Senator Wyden:

Overstock.com, Inc. appreciates the opportunity to respond to the Senate Committee on Finance's request for information on e-commerce efforts to combat counterfeiting in light of the Trade Facilitation and Trade Enforcement Act of 2015. We also appreciate the Committee's efforts to inform U.S. consumers of prudent online shopping practices.

As Benjamin Franklin famously advised in 1735, "An ounce of prevention is worth a pound of cure." Overstock invests significant effort in vetting partners and verifying the genuineness of products using internal and third-party authentication services. Consequently, our experience in dealing with counterfeit goods on our website is quite limited.

Our responses to the Committee's questions are as follows:

1. What types of remedial measures do you provide U.S. consumers who may have unintentionally purchased a counterfeit good through your platform?

Answer: Refund offered upon return of the item.

2. What types of remedial measures do you provide to rights holders who find that counterfeit goods are being sold through your platform?

Answer: Removal of item from our website, reasonable cooperation as requested by rights holder.

3. In what circumstances does your organization come into physical contact with counterfeit products sold and delivered to consumers, including those sold by your organization directly or through second and third-party merchants on your platform?

Answer: Product audit, customer return of item.

4. What services, tools, protections, and assistance do you provide consumers and rights holders with respect to preventing the sale of counterfeits?

Answer: Sourcing Risk Management team authenticates product using internal and third-party authentication services, suppliers warrant by contract that product is authentic.

5. Please explain what you feel are some of the biggest risks counterfeit goods currently pose e-commerce consumers.

Answer: Diminished value to customer, poorer quality, unknown origin of counterfeit item, information security.

6. What have you done to curtail those risks and what have you done to inform consumers of those same risks, which may not be known to the consumer?

Answer: Vetting and removal of products, contractual requirements for supplier authentication.

7. Do you engage with foreign governments to curtail the proliferation of counterfeits? If so, what types of activities and coordination have proven successful? What efforts have not been successful?

Answer: No.

8. To what extent do you facilitate delivery, storage, processing, and purchases of goods on your platform?

Answer: We facilitate the purchase of goods, but in most cases, the delivery, storage, and processing is facilitated by our suppliers.

9. Which inflection points in the e-commerce purchasing/selling process have you found most critical to intervene in to prevent and/or curtail the distribution of counterfeit goods?

Answer: The most critical inflection point is in supplier and product vetting and onboarding, before the product even comes on site.

10. Have there been there instances where genuine goods sold on your platform are intermingled and/or comingled with counterfeit goods? Can you provide an example?

Answer: Yes, a supplier provided authentic products to our headquarters for auditing, but counterfeit products to other addresses, which we discovered as soon as we audited a product sent to another address.

- a. What is your company doing to prevent this from occurring/reoccurring?

Answer: Continued vetting and auditing of suppliers, including audits of products sent to outside addresses.

11. How do you coordinate with right holders to verify whether goods sold over your platform are genuine?

Answer: We do not coordinate with rights holders.

a. If you do not coordinate, please explain how or why you do not feel this is helpful or necessary.

Answer: We find some rights holders attempt to control their post-sale distribution channels in violation of the First Sale Doctrine.

12. In what ways do counterfeiters evade actions you have taken to prevent counterfeits on your platform or using your services?

a. Potential examples here might include reposting or creating new, virtually identical counterfeits goods seller accounts; submitting notice and take down requests against legitimate goods seller accounts; providing a mixture of authentic and counterfeit goods making it difficult to predict the authenticity of future sales.

Answer: Providing a mixture of authentic and counterfeit goods as described in Item 10.

13. After a suspected counterfeit distributor has been identified—whether by your company or a third party—what steps do you take, if any, to verify the claims of counterfeit distribution?

Answer: Product audit, analyze information about product, category, and supplier, work with third party authenticator, and reach conclusion.

14. What is the process, if any, for removing a suspected counterfeit distributor from your platform?

Answer: Products removed from website and vendor relationship terminated.

15. After removal, what processes does your company have in place, if any, to prevent a suspected counterfeit distributor from regaining access to your platform and subsequently U.S. consumers?

Answer: Vetting during onboarding process, analysis of known EINs.

16. If you become aware of a counterfeit good and/or distributor on your platform what actions including initiating legal action does your company have the power to take?

Answer: Initiating legal action, withholding payment, removal of product from site, termination of contract, report to FBI and/or Customs and Border Protection.

- a. Can you provide us with statistical information regarding the frequency in which you have taken actions concerning suspected counterfeit products-either through investigation, destructions, abandonment, or otherwise?

Answer: These are so rare that they are not statistically significant.

- 17. How have you coordinated with U.S. federal and local authorities to curtail the distribution and manufacture of counterfeit goods within the United States?

Answer: We have not coordinated with federal and local authorities at present because the instances are so rare and are resolved early in the process.

- a. How have you coordinated with international authorities?

Answer: Not applicable.

- 18. If there are any other pieces of information, details, or data you feel would be helpful to the committee, we respectfully request that you submit them as part of your answers as well.

Answer: Not applicable.

Overstock is grateful to the Senate Committee on Finance for its continued leadership in combatting counterfeiting. We welcome the opportunity to provide additional information as the Committee deems appropriate.

Sincerely,



Jonathan E. Johnson III
Board of Directors
Overstock.com, Inc.

cc

[Redacted list of recipients]

SEARS HOLDINGS

Christie Rugh
Senior Director, Merchant
Operations
Sears Holdings Corporation
3333 Beverly Road
Hoffman Estates, IL 60179

June 29, 2018

The Honorable Orrin G. Hatch
Chairman
The Honorable Ron Wyden
Ranking Member
Committee on Finance
United States Senate
Washington, DC 20510

Dear Chairman Hatch and Ranking Member Wyden:

Thank you for your inquiry dated May 30, 2018 regarding counterfeit goods found on e-commerce platforms.

Sears Holdings has a rich history in the United States, currently employing tens of thousands of people across the country – including approximately 141 in Utah and 668 in Oregon.

The retail landscape is changing rapidly and dramatically with online sales soaring in recent years. Sears Holdings continues to transform its business model and is working hard to connect the online and in-store shopping experience for our members and customers. We want to do all we can to remain a vibrant part of the communities in which we operate brick and mortar stores, while also competing effectively in a dynamic retail environment. Sears Marketplace is an important part of our transformation. It is an innovative community that allows sellers to sell products on Sears.com and provides our customers and members with millions of additional items and endless aisles of unique products.

Sears Marketplace, directly and indirectly - with over 5,000 third-party sellers, provides shoppers with a selection of approximately 65 million products. Sears Marketplace takes the customer and member experience and the intellectual rights of others very seriously; however, with this vast array of goods and sellers, problems can occur.

Below, please find our responses to questions included in your May 30, 2018 correspondence which apply to Sears Holdings. We have endeavored to be as forthcoming as possible in our response.

- **What types of remedial measures do you provide U.S. consumers who may have unintentionally purchased a counterfeit good through your platform?**

Sears Marketplace wants consumers to shop with confidence. We established the Sears Marketplace Guarantee, which protects customers who are dissatisfied with a Marketplace transaction. Customers are covered under the guarantee if they are erroneously sold counterfeit items. If necessary, Sears will resolve the matter by contacting the seller on the customer's behalf. If the seller does not provide a refund, Sears will give the customer the value of the purchased item up to \$2,500.

- **What types of remedial measures do you provide to rights holders who find that counterfeit goods are being sold through your platform?**

When any issue with a seller's listing comes to our attention (whether from a consumer, product manufacturer or law enforcement agency) we take prompt and appropriate action. We remove the listing from our site, ban the seller from offering that brand, and take any other action we deem appropriate under our Terms and Conditions. Sears, working with intellectual property counsel, makes every effort to involve the potentially counterfeited brand to foster dialog with an eye toward future prevention. When appropriate and necessary, we engage with appropriate law enforcement and customs authorities to that end.

- **What services, tools, protections, and assistance do you provide consumers and rights holders with respect to preventing the sale of counterfeits?**

As part of our onboarding process, we make reasonable efforts to track prior acts of third-party sellers to limit misconduct and repeat infringement. All third-party sellers are required to agree to and comply with the Sears Marketplace Terms of Use, which prohibit deceptive product listings and require sellers to comply with all applicable laws. Selling counterfeit items violates our Terms of Use.

When any issue with a seller's listing comes to our attention (whether from a consumer, product manufacturer or law enforcement agency), we take prompt and appropriate action. Sears may immediately terminate the agreement with the seller, remove all listings, and suspend or ban a seller from continued participation on the website.

- **To what extent do you facilitate delivery, storage, processing, and purchases of goods on your platform?**

The majority of our third-party sellers handle their own order fulfillment. A small number of sellers use our Fulfilled By Sears solution that is an end-to-end order fulfillment service from Sears that manages warehousing, picking, packing and shipping of customer orders.

- **How do you coordinate with right holders to verify whether goods sold over your platform are genuine?**

- **If you do not coordinate, please explain how or why you do not feel this is helpful or necessary.**

In-house and/or outside counsel confer with claimants and sellers to determine the basis of the claim, including determining why the claimant believes the product is counterfeit (e.g., differences between the claimant's and seller's products) and how the seller obtained the product at issue.

- **After a suspected counterfeit distributor has been identified – whether by your company or a third party – what steps do you take, if any, to verify the claims of counterfeit distribution?**

Upon receiving notification of a potential counterfeiter, Sears promptly investigates the claim to assess its merit. Typically, the potentially counterfeit product is taken down off the Sears site during this investigation. This investigation often includes in-house and/or outside counsel conferring with the claimant and seller to determine the basis of the claim, including determining why the claimant believes the product is counterfeit (e.g., differences between the claimant's and seller's products) and how the seller obtained the product at issue. Based on this investigation, Sears may take a variety of actions, including removing some or all of the seller's listings from Sears' Marketplace and/or suspending or banning the seller from continued participation on Sears's website.

- **What is the process, if any, for removing a suspected counterfeit distributor from your platform?**

If we are made aware of a counterfeit item, we remove the listing from our site, and ban the seller from offering that brand. We may also terminate the agreement with the seller, remove all listings, and suspend or ban a seller from continued participation on the website.

- **After removal, what processes does your company have in place, if any, to prevent a suspected counterfeit distributor from regaining access to your platform and subsequently U.S. consumers?**

As part of our onboarding process, we make reasonable efforts to track prior acts of third-party sellers to limit misconduct and repeat infringement.

- **If you become aware of a counterfeit good and/or distributor on your platform what actions including initiating legal action does your company have the power to take?**
 - **Can you provide us with statistical information regarding the frequency in which you have taken actions concerning suspected counterfeit products – either through investigation, destructions, abandonment, or otherwise?**

If we become aware of a counterfeit distributor on our platform, Sears may immediately terminate the agreement with the seller, remove all listings, and suspend or ban a seller from continued participation on the website.

If we become aware of a counterfeit good on our platform, we remove the listing from our site, ban the seller from offering that brand and, depending on the facts and circumstances, may take other action we deem appropriate under our Terms and Conditions.

- **How have you coordinated with U.S. federal and local authorities to curtail the distribution and manufacture of counterfeit goods within the United States?**
 - **Have you coordinated with international authorities?**

When we become aware of a counterfeit goods on our platform, working with intellectual property counsel and when appropriate and necessary, we have engaged with law enforcement and customs authorities in an effort to prevent the future production, marketing and sale of counterfeit merchandise.

- **If there are any other pieces of information, details, or data you feel would be helpful to the committee, we respectfully request that you submit them as part of your answers as well.**

Sears hopes to learn the specifics of the GAO's investigation on counterfeit goods so that we can take immediate action against the Marketplace seller(s) in question; however, unfortunately, we have been unable to receive that information to date.

Please feel free to reach out to Misty Redman in Government Affairs at Sears Holdings Corporation should you have further questions.

Sincerely,

A handwritten signature in black ink that reads "Christie Rugh". The signature is written in a cursive, flowing style.

Christie Rugh
Senior Director, Merchant Operations



850 Cherry Avenue
San Bruno, CA 94066
Phone 650.837.5000
Fax 650.837.5382
www.walmart.com

June 29, 2018

The Honorable Orrin G. Hatch
Chairman
Committee on Finance
United States Senate
219 Dirksen Senate Office Building
Washington, D.C. 20510

The Honorable Ron Wyden
Ranking Member
Committee on Finance
United States Senate
219 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Hatch and Ranking Member Wyden:

Thank you for your letter dated May 30, 2018 to Doug McMillon regarding counterfeit goods sold through e-commerce websites.

Walmart helps people around the world save money and live better - anytime and anywhere - in retail stores, online, and through their mobile devices. Each week, nearly 270 million customers and members visit our more than 11,700 stores under 65 banners in 28 countries and several eCommerce websites.

While others have built more globally open marketplaces, Walmart U.S. eCommerce has thoughtfully designed its Marketplace with a goal of maintaining our customer's trust in the authenticity of the products offered.

Walmart.com's Marketplace in the United States ("Walmart Marketplace") is an invitation-only marketplace where prospective sellers must satisfy a number of criteria to be approved to sell items on Walmart.com, including: having an existing online presence; being a business entity (not an individual); having operations in the United States (with one exception explained below); and having the ability to meet customer demand and provide customer support.

As a result of these criteria, Walmart Marketplace tends to have relatively larger, more established sellers than some of its competitors.

Additionally, we do not provide fulfillment or delivery services for third party sellers, meaning that these sellers' inventory is neither stored in nor shipped from Walmart's fulfillment centers.

Walmart Marketplace has a limited number of international sellers which are subject to additional vetting. With the exception of JD.com, in which Walmart is a greater than 10 percent shareholder, we require all international sellers to have business operations in the U.S.

As noted in the Government Accountability Office report entitled "Agencies Can Improve Efforts to Address Risks Posed by Changing Counterfeits Market," the marketplace model generally presents

unique challenges to e-commerce third party platforms in preventing and mitigating intellectual property infringement. (GAO 18-216, p. 22-23). It is difficult to identify and investigate individual counterfeit cases; platforms host extensive inventory from a large number of sellers; and platforms generally are not able to track counterfeit items through fulfillment and delivery. (*Id.*).

To address the marketplace challenges, Walmart has implemented a number of controls, as we explain further in response to your specific questions.

Below please find the responses to the Committee's questions.

1. *What types of remedial measures do you provide U.S. consumers who may have unintentionally purchased a counterfeit good through your platform?*

It is our general practice not to accept returns or provide refunds for items sold and fulfilled by third party sellers. However, if a customer is concerned that they may have purchased a counterfeit good from a third party seller, they typically contact our customer care toll-free number. We will complete due diligence with the customer and our Trust and Safety organization will investigate the complaint. If the item cannot be confirmed as authentic, our customer service team is directed to offer the customer a full refund.

Customers or any member of the public can also report any type of prohibited items, including suspected counterfeit items, through a webform on the help page on our website as follows:

<https://help.walmart.com/app/ask>

Our Trust and Safety organization reviews every report submitted through the web form and will remove the product and investigate the claim as discussed above.

2. *What types of remedial measures do you provide to rights holders who find that counterfeit goods are being sold through your platform?*

Walmart has established a Trust and Safety organization that includes a specific team dedicated to anti-counterfeit compliance. This team works to address, among other things, claims from rights holders that items sold on the Walmart Marketplace infringe intellectual property rights.

When such a claim is made, either by a customer or a rights holder, the item is promptly removed from the Walmart Marketplace, and the third party seller is notified of the claim and requested to provide additional documentation for the product in question.

If the seller does not provide sufficient documentation establishing the product's authenticity, the item will not be able to be re-listed on the site. The seller's account may also be terminated.

3. *In what circumstances does your organization come into physical contact with counterfeit products sold and delivered to consumers, including those sold by your organization directly or through second and third party merchants on your platform?*

Walmart's direct sale of branded items from Walmart.com or our stores and clubs, is completed following our purchase of the goods directly from the brand holder or an authorized supplier. The supplier most often delivers the product itself directly to one of our Walmart distribution centers for fulfillment.

In some instances, the supplier directly stocks the retail shelves or fulfills as a "direct-ship" vendor. In the case of a direct-ship product, the supplier delivers the product directly to the customer on behalf of Walmart.com. Suppliers are required to represent and warrant in their supplier agreements with Walmart that products sold to Walmart are genuine and not counterfeit and otherwise comply with laws.

Walmart Marketplace does not provide fulfillment or delivery services for third party sellers. This means that these sellers' inventory is never stored in or shipped from Walmart fulfillment centers and sellers must ensure that they have sufficient warehousing, fulfillment and delivery operations to ensure timely delivery of their products to customers.

4. *What services, tools, protections, and assistance do you provide consumers and rights holders with respect to preventing the sale of counterfeits?*

In addition to the processes outlined in response to Questions #2 and #3, as a result of the work done by the Trust and Safety organization over the past few years, we have developed a number of measures to reduce the risk of counterfeit items being listed on the site. A primary technology tool we use is to set up an automated "rule" to block specific products or brands that may pose higher risk of counterfeit, based on available information.

For example, the Trust and Safety organization identified the health and beauty products category as posing potentially higher risk of counterfeit. Using automated rules, the Trust and Safety organization is able to block all third parties from listing certain products in this category, and to require any seller seeking to sell products in this category to go through enhanced vetting.

Other higher risk categories that the Trust and Safety organization focuses on are cellphones, luxury brands, and software.

In addition to these efforts, we also regularly monitor counterfeit trends in general, including public reports provided by government agencies.

5. *Please explain what you feel are some of the biggest risks counterfeit goods currently pose e-commerce consumers.*

Walmart takes pride in offering online services trusted by customers. If counterfeit items are sold on Walmart Marketplace, that trust could be eroded if, for example, the customer receives an inauthentic, unsafe, or inferior product.

6. *What have you done to curtail those risks and what have you done to inform consumers of those same risks, which may not be known to the consumer?*

Please refer to the answer to Question #4. In addition, we have high expectations for the sellers on our Marketplace. We created our Trust and Safety compliance team, in part, to help ensure that items purchased from our platform would be authentic. We continuously review and strengthen our procedures.

We are committed to consumer protection but we have not broadly communicated about this type of risk with customers visiting our site.

7. *Do you engage with foreign governments to curtail the proliferation of counterfeits? If so, what types of activities and coordination have proven successful? What efforts have not been successful?*

We have recently participated in a meeting of the United States' Organisation for Economic Co-operation and Development (OECD) Task Force on Countering Illicit Trade, and remain engaged in a continuing dialogue with the group, which is largely focused on issues related to counterfeit goods.

We regularly engage with relevant U.S. law enforcement agencies on an array of issues and are open to engagement in relevant information sharing initiatives where we can share insights on higher-risk sellers, and/or products and categories.

8. *To what extent do you facilitate delivery, storage, processing, and purchases of goods on your platform.*

Walmart provides a platform for third party sellers to list items for sale to Walmart customers. The company vets those sellers as described above. When a customer purchases an item from a third party seller, Walmart collects payment from the purchaser and passes the amount owed to the seller, less a referral fee. The seller ships the item directly to the customer.

As noted previously, Walmart Marketplace **does not** provide fulfillment or delivery services for sellers. This means that sellers' inventory is never stored in or delivered from Walmart's fulfillment centers. Sellers must ensure that they have sufficient warehousing, fulfillment and delivery operations to ensure timely delivery of their products to customers.

9. *Which inflection points in the ecommerce purchasing/selling process have you found most critical to intervene in to prevent and/or curtail the distribution of counterfeit goods?*

In order to prevent and/or curtail the online distribution of counterfeit goods, there are a few inflection points where it is critical to intervene as a purchaser of goods for resale and as a platform provider for third party sellers:

- I. Before purchasing goods for resale to customers online, it is important to ensure that suppliers we work with meet our standards for suppliers, including that they are authorized to sell the goods to Walmart, whether as owner of the brand or as a distributor or other authorized reseller, and that they comply with laws applicable to the product.
- II. Similarly, for third party sellers, it is necessary to vet a seller and better understand what they plan to sell before they become active on the platform. Any seller that we select to sell on our platform is first qualified by our Business Development team who will assess the adequacy of their inventory to our needs. The Trust and Safety organization will then perform multiple checks to verify the seller identity, good standing (e.g. that the seller is not in bankruptcy) as well as the seller's online reputation;
- III. Once a seller is active and starts listing items for sale, it is important to monitor for any changes in the seller's business status (e.g. dissolution of the business) and for any deviation from expected selling behaviors (e.g. change in inventory) as well as negative feedback or product reviews received from customers.

10. Have there been instances where genuine goods sold on your platform are intermingled and/or comingled with counterfeit goods? Can you provide an example?

- a. *What is your company doing to prevent this from occurring/reoccurring?*

As described above, Walmart Marketplace **does not** provide fulfillment or delivery services for third party sellers. Therefore, these sellers' inventory is never stored in or delivered from Walmart's fulfillment centers.

11. How do you coordinate with right holders to verify whether goods sold over your platform are genuine?

- a. *If you do not coordinate, please explain how or why you do not feel this is helpful or necessary.*

The Trust and Safety organization has established a working relationship with many rights holders who submit reports of infringement to us. We communicate with selected rights holders on a regular basis to exchange and/or validate information about suspected counterfeit items, sellers, and their suppliers.

12. In what ways do counterfeiters evade actions you have taken to prevent counterfeits on your platform or using your services?

- a. *Potential examples here might include reposting or creating new, virtually identical counterfeit goods seller accounts; submitting notice and take down requests against legitimate goods sellers accounts; providing a mixture of authentic and counterfeit goods making it difficult to predict the authenticity of future sales.*

A common way for suspected counterfeiters to evade compliance measures is to attempt to circumvent our vetting process by, for example, attempting to disguise themselves as a new, valid business entity, unaffiliated with a suspected counterfeiter, to pass our vetting procedures.

Another tactic used by sellers to sell counterfeit goods is to omit the brand name and use a different but similar image or description which is close enough to the real one so that customers believe they are buying the authentic product.

13. After a suspected counterfeit distributor has been identified – whether by your company or a third party – what steps do you take, if any, to verify the claims of counterfeit distribution?

As noted above, when claims are received related to intellectual property rights, the item is promptly removed from Walmart Marketplace. The seller is notified of the claim and requested to provide additional documentation for the product in question. If the seller does not provide sufficient documentation establishing the product's authenticity, the item will not be allowed to be re-listed on the site. The seller's account also may be terminated.

14. What is the process, if any, for removing a suspected counterfeit distributor from your platform?

Once the Trust and Safety organization has confirmed that one or more item(s) sold by a third party seller are counterfeit items, the seller will be notified that its account is to be suspended until further notice. All active items sold by the seller will be removed. The seller will not be allowed to create a new account on our platform.

15. After removal, what processes does your company have in place, if any, to prevent a suspected counterfeit distributor from regaining access to your platform and subsequently U.S. consumers?

As part of seller vetting, we have a process in place to prevent terminated sellers from returning to the platform under a different identity. We are also continually improving our risk models to measure seller performance and flag suspicious seller behaviors.

16. If you become aware of a counterfeit good and/or distributor on your platform what actions including initiating legal action does your company have the power to take?

- a. *Can you provide us with statistical information regarding the frequency in which you have taken actions concerning suspected counterfeit products – either through investigation, destructions, abandonment, or otherwise?*

Once we become aware of a potential counterfeit item on our platform, we immediately block that item from sale on Walmart Marketplace and it remains blocked during the review process.

Depending on the outcome of the investigation, we may restrict selling privileges or terminate our relationship with the third party seller. In some instances of violation, we will forward information to our Global Investigations and Security Team who will then refer to law enforcement as appropriate.

As a snapshot of statistical information, in the month of May 2018, Walmart received a total of 1,048 complaints relating to intellectual property issues, including claims of trademark, patent, or copyright infringement; counterfeit items; and unauthorized sellers or diverted goods.

Of that total, 115 complaints alleged the products were counterfeit (including allegations that they were sold by unauthorized sellers or were diverted goods). The Trust and Safety organization reviewed all 115 complaints and concluded that six products could not be sufficiently substantiated as authentic, and consequently such items were removed permanently from the site.

17. Have you coordinated with U.S. federal and local authorities to curtail the distribution and manufacture of counterfeit goods within the United States?

a. How have you coordinated with international authorities?

Please refer to answers to Questions 7 and 16.

18. If there are any other pieces of information, details, or data you feel would be helpful to the committee, we respectfully request that you submit them as part of your answers as well.

We welcome more information sharing from regulatory agencies and law enforcement so we can improve our processes and models.

As noted previously, we regularly engage with relevant U.S. regulatory and law enforcement agencies on an array of issues and are open to engagement in relevant information sharing initiatives where we can share insights on higher-risk sellers, and/or products and categories.

Thank you again for allowing us to address these important issues. If you have further questions or need additional information please contact Jana Barresi (Jana.Barresi@walmart.com) or Sara Decker (Sara.Decker@walmart.com) with Walmart Federal Government Affairs.

Sincerely,



Lance Lanciault
Senior Vice President and
Chief Ethics and Compliance Officer, U.S. e-commerce
Walmart, Inc.

BY EMAIL ONLY:

[REDACTED]

June 29, 2018

United States Senate
Committee on Finance
Washington, DC 20510-6200

RE: U.S. Senate Finance Committee's Information Request Regarding Counterfeit Goods (Wish)

Dear Senator Hatch and Senator Wyden:

I am writing on behalf of ContextLogic d/b/a/ Wish ("Wish") in response to your May 30, 2018 letter to Wish's Founder and CEO, Peter Szulczewski.

Before providing responses to the specific questions asked of Wish, I want to provide some general background on the Wish platform and our efforts to prevent and remedy issues related to counterfeit listings.

Wish launched in 2011 as a "wish list" mobile app allowing users to save information regarding their most-wanted products. As the app became increasingly popular, Wish realized that the most frequently-saved items were low-priced goods. Wish then decided to approach Merchants to suggest that they sell directly to customers via the Wish mobile app.

Wish developed into its current form in 2013 and has grown into an e-commerce platform whereby businesses and manufacturers can sell their goods (which largely are generic and/or unbranded) directly to consumers. Wish's mission is to give everyone access to the most affordable, convenient, and effective shopping mall in the world.

Wish therefore is somewhat different from other large e-commerce companies. For example, Wish generally does not touch physical products as these are sent directly to consumers from Merchants. Moreover, although other e-commerce companies do offer low-priced goods among the full inventory of products on their sites, which is similar to Wish, Wish caters almost exclusively to a global cost-conscious market that values price over brand or speed of shipment. These consumers largely have been underserved to-date, and Wish prides itself on giving these consumers access to low-cost, quality products.

As a core part of its mission and the services it provides to its users, Wish has a zero-tolerance policy against counterfeit items and listings. Wish has instituted and enforces Merchant-facing policies that prohibit - among other things - content or listings that: are fraudulent or involve the sale of counterfeit or stolen items; violate a third-party's copyright, patent, or trademark rights; include false, inaccurate, or misleading content; and that violate any applicable law, statute, ordinance or regulation (including, but not limited to, those governing export control, consumer protection, unfair competition, anti-discrimination or false advertising).

Moreover, Wish's holistic "Merchant Policies" specifically address listing counterfeit products and the potential penalties that Wish may enforce. One such policy states:

2.2 Counterfeit products are strictly prohibited on Wish

Listing counterfeit products on Wish is not tolerated. If a merchant lists counterfeit products for sale, the products will be removed and their account will face fines and possible suspension.

2.3 Products and listings may not infringe on the intellectual property of others

Products and listings may not infringe on the intellectual property of others. This includes, but is not limited to: copyright, trademarks, and patents. Merchants are responsible for ensuring that their products and listings do not infringe and are encouraged to do an IP clearance check before listing products. If a merchant repeatedly lists products that infringe on others' intellectual property, the products will be removed and their account will face possible fines of \$500 USD or more and/or suspension.

Wish also takes various proactive steps, as described in more detail below, to screen for and prevent potential counterfeits from appearing on the Wish platform. And once Wish becomes aware of such products, Wish works diligently to remove these product listings.

Wish is happy to provide answers to the specific questions raised in the May 30 letter, and has set them out below on a question-by-question basis:

1. What types of remedial measures do you provide U.S. consumers who may have unintentionally purchased a counterfeit good through your platform?

If, despite Wish's efforts to prevent listings for counterfeit goods, a consumer unintentionally purchases a counterfeit good through the Wish platform, Wish will provide a refund to the

consumer. Details on Wish's refund program can be found at https://www.wish.com/return_policy and are summarized as follows:

- The user goes into his or her "Order History" page, chooses the relevant item(s) shown, and clicks on "Customer Support" to communicate directly with Wish's customer-support team. Users can "select problem with item" and then "counterfeit" as the problem. This allows Wish to process the request more efficiently.
- Customers may request a refund on any order within 30 days of the actual or estimated delivery date.
- Wish endeavors to respond to all requests within 72 hours or less.
- Wish also allows users to cancel orders before they are shipped, in the event the user changes his or her mind regarding the purchase.
- When a refund issues, the amount is processed back to the original payment method used to purchase the order; this usually happens within 14 business days.
- When a refund is issued due to a counterfeit good, the item is reported for review by the Content Curation Team, whose activities are described in more detail in our answer to question 4.

2. *What types of remedial measures do you provide to rights holders who find that counterfeit goods are being sold through your platform?*

Wish provides several resources and tools designed to help rights holders and Wish address listings for counterfeit goods quickly and efficiently.

As an initial step, Wish has several means by which a rights owner may contact Wish if it suspects that there may be counterfeit products on the Wish platform. These include complaints submitted through Wish's published Copyright Dispute Resolution Policy at <https://merchant.wish.com/copyright-dispute-policy>, and inquiries Wish receives at its brand-protection@wish.com address or other channels regarding other intellectual property concerns (including claims of counterfeiting).

Once Wish receives information about listings for counterfeit products from a rights owner, it reviews the complaint and verifies the documentation provided by the complainant. Where Wish has received sufficient documentation to establish that the rights owner has a valid intellectual property claim, Wish removes the listing from the platform - often within 24 hours. Depending on the nature of the counterfeit activity reported, Wish may take additional steps, such as adding keywords to a list of prohibited items that Merchants are prevented from listing or employing an image-matching tool that helps prevent previously tagged pictures from resurfacing on new listings. These measures have the effect of preventing content, whether terms or images known to be problematic from surfacing in new listings.

Through these and similar processes, Wish proactively has prevented the unauthorized listings of many potentially counterfeit products. As just two examples of this process in action, after previously being made aware of some potential counterfeiting issues, Wish was able proactively

to detect and prevent the sale of additional counterfeits of a world-famous sports-apparel company and well-known travel-container company.

Separately, Wish also encourages brand owners to join Wish's "Brand Owner Partner Program" through a link at <https://merchant.wish.com/brand-partner>. Although not required for Wish to take action against alleged counterfeits, Wish offers this program as a way for brand owners to streamline the overall notice-and-takedown process. If they opt into the program, brand owners can search for problematic listings through an advanced search feature otherwise not available to the public, submit their own takedown requests directly through the Wish platform, and review their brands' takedown histories and the status of any newly submitted takedown requests. When Wish receives takedown requests submitted through this channel, as with other means by which Wish receives notice of allegedly counterfeit products, Wish promptly reviews the requests and supporting documentation to ensure that valid reports of counterfeit products result in prompt and efficient removal. To date, over 800 brands already have taken advantage of this program.

3. *In what circumstances does your organization come into physical contact with counterfeit products sold and delivered to consumers, including those sold by your organization directly or through second and third party merchants on your platform?*

As a platform developed to support businesses and manufacturers ("Merchants") as they sell and ship goods directly to consumers, Wish does not generally come into physical contact with the goods sold or delivered to consumers (whether or not they are counterfeit). As discussed more fully in response to question 8 below, Wish is exploring ways to assist Merchants with timely fulfilling purchases and Wish currently has a very limited "white label" program and separately warehouses limited non-branded inventory. Wish is not aware of any such products constituting counterfeit goods.

4. *What services, tools, protections, and assistance do you provide consumers and rights holders with respect to preventing the sale of counterfeits?*

Wish provides various tools, protections, and assistance to prevent the sale of counterfeits.

As part of Wish's proactive efforts to prevent, detect and remove potentially counterfeit products from the Wish platform, two of Wish's internal teams - Content Curation and Brand Protection - play key roles.

Wish's Content Curation team is responsible for reviews of new items. The Content Curation team includes a full-time Content Manager, Content Specialists, and several Content Quality Assurance Analysts. It also engages more than 100 agents overseas to assist with anti-counterfeiting and related efforts. This team and its agents perform, on a monthly basis, a manual review of millions of pending and live listings in an effort to detect and ultimately remove listings that violate Wish policies, including potentially counterfeit products. As part of the manual review process, when the Content Curation team or its agents identify a listing that appears to be offering counterfeit items, the listing is tagged and removed. If the Merchant

offering the affected listing can demonstrate authorization to sell the item described by the listing, the listing may be restored. The Content Curation team uses an ever-growing list of brands (currently more than 450) to inform its reviews - if a listing includes one of the brands on the list, the listing is deemed counterfeit and removed unless the Merchant provides proof that it is legally allowed to sell the items (the Brand Protection team, discussed below, reviews Merchant authorizations to sell branded items). These brands include: personal care items, such as Aveda, BareMinerals, Benefit, Este Lauder, and Maybelline; non-designer clothing labels, such as American Apparel, esprit, Gap, and North Face; haute couture, such as Armani, Balenciaga, Issey Miyake, and Salvatore Ferragamo; jewelry and watch brands, such as Bulgari, Cartier, Rolex, and Tiffany, and; many niche brands, designers, or establishments, such as Moschino, Patek Philippe, Shovaba, Gorjuss.

The Content Curation team also employs technology to screen new items and flag issues, including potentially counterfeit products. As mentioned in response to Question 2, this team's technological measures include keyword filters (of more than 1,000 terms and brand names), and image-matching technologies.

When the Content Curation team has questions about a listing or a listing is reported as potentially counterfeit by another source, such as a brand or a consumer, Wish's Brand Protection Team responds. Wish's Brand Protection team is specifically focused on preventing the sale of counterfeits on the Wish platform. This team includes a full-time Brand Protection Manager and several Brand Protection Specialists located in San Francisco, California. Additionally, the Brand Protection team works with more than ten agents overseas further to assist with the Brand Protection team's efforts. Among other things, this team screens for trademarks, copyrighted images, and potential other issues within Wish's live listings; when these are detected, this team works to ensure that these types of inappropriate and/or infringing materials are removed from the Wish platform - often within 24 hours. In addition, the Brand Protection team trains other teams within Wish (including the Content Curation team) to monitor and detect potentially infringing materials, so that these also may be reviewed and, when appropriate, removed. The team also works with its Business Development partners so they may provide educational materials and instruction to Wish's Merchants in an effort further to prevent the listing of counterfeit products.

Through these and other efforts, the Content Curation and Brand Protection teams have prevented the potential sale of more than 275,000 counterfeit products since January 1, 2018 alone.

One of the proactive measures Wish employs is education. Wish provides Merchant-facing information to help them identify and prevent the sale of such items or the creation of problematic listings. For example, Wish publishes guidance for its Merchants at <https://merchantfaq.wish.com/hc/en-us/articles/204531768-What-constitutes-as-a-fake-or-a-counterfeit-item->. This page provides multiple examples of ways for Merchants to identify counterfeits and other products not allowed on the Wish platform. It also provides the following directives:

1. No items that directly mimic a brand or logo

2. No items that look like a brand or logo
3. No items that have been visually altered to conceal the brand or logo
4. No items that mimic brand designs or patterns
5. No items that display brand names in product photos

This link also includes an exemplary list of more than 800 brands that Wish will flag for review and may deem to be counterfeit unless the Merchant provides proof it is legally allowed to sell these brands.

In addition to these proactive efforts, Wish has several tools that it makes available for brand owners when - despite Wish's efforts - they detect potentially counterfeit materials on the Wish platform. These include the Copyright Dispute Resolution Policy, brand-protection@wish.com, and Brand Owner Partner Program detailed in response to question 2.

Finally, Wish has an escalating "notice, suspension, and termination" policy. When Wish acts on a valid take-down request alleging that a listing violates a third party's intellectual property rights, or Wish itself identifies such a listing, Wish informs the Merchant that the material has been taken down and provides the basis for the takedown. Wish also informs the Merchant that repeated violations may result in fines and in the Merchant's suspension or termination. Should there be multiple violations, Merchants may be removed from the platform entirely. More information on this policy can be found at <https://merchantfaq.wish.com/hc/en-us/articles/230055588-Account-Suspension-due-to-Intellectual-Property-Infringement>. As of June 14, 2018, Wish has suspended or terminated more than 3,000 Merchants due to violations of policies prohibiting counterfeit items.

5. Please explain what you feel are some of the biggest risks counterfeit goods currently pose e-commerce consumers.

Some notable risks posed to e-commerce consumers by counterfeit goods are: (1) not satisfying the consumer; (2) lost time and money associated with the purchase of non-genuine goods; and (3) consumers receiving goods of poor quality or that do not meet established safety standards. These risks may harm Wish to the extent that they result in dissatisfied customers and reduce consumer confidence in the Wish brand.

6. What have you done to curtail those risks and what have you done to inform consumers of those same risks, which may not be known to consumers?

Wish spends significant resources to prevent these risks from materializing in the first regard, and separately addresses these issues when Wish becomes aware of them through consumer complaints, communications from brands, or other channels. In that regard, Wish refers back to its answers to questions 1, 2, and 4 above.

7. Do you engage with foreign governments to curtail the proliferation of counterfeits? If so, what types of activities and coordination have proven successful? What efforts have not been successful?

Wish currently does not engage with foreign governments to curtail the proliferation of counterfeits.

8. *To what extent do you facilitate delivery, storage, processing, and purchases of goods on your platform?*

Wish provides a platform by which Merchants and buyers may consummate direct-sales transactions - i.e., Wish facilitates its consumers' abilities to purchase goods directly from the manufacturers or distributors. Except as described below, Wish does not generally participate in or facilitate the packaging, storage, delivery, or other processing of goods on the Wish platform.

Wish is exploring ways to assist Merchants with quickly fulfilling purchases. Wish has established a service called Wish Post (in English)- online at <https://wishpost.wish.com> - that connects Merchants with reputable shipping companies. When Merchants use Wish Post to facilitate shipping of purchased items, the shipping label will include the WishPost logo.

Wish has a nascent "white label" program, whereby Wish offers for sale Wish-branded product that it sources directly from a non-Wish supplier. Before these are sold, these are reviewed by Wish's Brand Protection and Content Curation teams to help ensure these do not violate the rights of any third parties.

Finally, Wish stores a small amount of inventory from various Merchants in warehouses Wish leases. These are almost exclusively generic or non-branded items that Wish understands do not violate any third-party rights. Notably, these account for well less than 0.5% of the total gross merchandise value of the items on the Wish platform.

9. *Which inflection points in the ecommerce purchasing/selling process have you found most critical to intervene in to prevent and/or curtail the distribution of counterfeit goods?*

Wish sees three main inflection points at which it may be able to detect, prevent, or curtail the distribution of counterfeit goods: (1) initial listing, (2) post-listing but pre-sale, and (3) post-sale.

Wish sees the first two inflection points as most critical. These are the points at which Wish can take the proactive and reactive steps described above to curtail the distribution of counterfeit goods. Wish has dedicated significant personnel and technological resources to help prevent these issues and will continue to do so.

Wish also sees the "post-sale" period as critical to remedy issues or concerns raised by its consumers and Wish works to address consumer concerns through Wish's Customer Service channel. As described in the answers to questions 2 and 4, Wish also takes steps to help ensure that previously identified counterfeiting issues do not resurface on the Wish platform. Wish nonetheless views the first two inflection points as more critical, as these help prevent the distribution of counterfeit products in the first instance.

10. Have there been instances where genuine goods sold on your platform are intermingled and/or commingled with counterfeit goods? Can you provide an example?

a. What is your company doing to prevent this from occurring/reoccurring?

There are times when certain Wish Merchants might be offering both genuine and counterfeit products through their various listings. In these circumstances, Wish employs the same processes noted above to remove counterfeit listings when it is made aware of them. Moreover, a member of Wish's Brand Protection team may communicate directly with certain brand owners to address these types of issues when Wish has been made aware of them.

11. How do you coordinate with right holders to verify whether goods sold over your platform are genuine?

a. If you do not coordinate, please explain how or why you do not feel this is helpful or necessary.

Wish often has direct communications with rights owners regarding the goods on the Wish platform. These entities reach out to Wish directly through email or phone to discuss their brands, products, and/or problematic listings they might have seen. In these cases, we ask brand owners to identify their rights at issue (often through government-issued intellectual property records or other details regarding their rights), and then work to remove materials they identify as counterfeit.

As part of these conversations, Wish also encourages brand owners to join its Brand Owner Partner Program. As noted in response to question 2 above, this program allows brand owners to conduct advanced searches for problematic listings, directly submit takedown requests through the Wish platform, and view their brands' takedown histories and statuses of their pending requests.

In addition to its direct communications with brand owners, Wish also coordinates with Merchants when a Merchant states that it has authorization to sell branded products. In these cases, Wish allows Merchants to submit documentation to verify that goods sold on the Wish platform are genuine. Wish then conducts a manual review of the submitted documentation on the rights owners' intellectual property rights, letters of authorization provided by the rights owners, the rights owners' contact information, letters or invoices further establishing such proof of authorization to sell the products at issue, or other types of proof that a Merchant has permission to sell the products at issue. Wish's internal Brand Protection team then evaluates the validity of these documents to help assess whether the Merchant has authorization from the brand to sell on the Wish platform. The Brand Protection team reviews thousands of such brand-authorization documents per year.

Notably, through this brand-authorization process, we regularly identify items that a rights owner or its representatives have reported as counterfeit, but is later shown to be legitimate. In these cases, Wish reverses the removal of the item or listing.

12. In what ways do counterfeiters evade actions you have taken to prevent counterfeits on your platform or using your services?

- a. Potential examples here might include reposting or creating new, virtually identical counterfeits goods seller accounts; submitting notice and take down requests against legitimate goods seller accounts; providing a mixture of authentic and counterfeit goods making it difficult to predict the authenticity of future sales.**

Wish has a strict policy aimed at preventing and remedying occurrences of counterfeits on the Wish platform, and Wish acts diligently to identify and remove such materials when it becomes aware of them. Despite these efforts, Wish has noticed some of its Merchants taking actions to try to evade Wish's efforts and policies. For example, some Merchants have created new listings for counterfeit items following a takedown, some have edited previously reviewed (and approved) product listings to focus on counterfeit items, and still others have edited photographs in a listing to suggest to a consumer that he or she might receive a branded item (even though not specifically identified in the listing). When Wish becomes aware of these types of evasive actions, it immediately removes the materials, fines the Merchants, and assesses whether their conduct makes them subject to suspension and/or termination.

13. After a suspected counterfeit distributor has been identified--whether by your company or a third party--what steps do you take, if any, to verify the claims of counterfeit distribution?

After Wish learns of a suspected counterfeit distributor (a "Merchant" on the Wish platform), Wish reviews the information tending to substantiate that an item is counterfeit, and should Wish conclude that the materials are counterfeit, Wish then removes the materials from the platform. Wish also refers to its responses to questions 4 and 11, above.

14. What is the process, if any, for removing a suspected counterfeit distributor from your platform?

As noted in response to question 4, Wish employs and enforces an escalating "notice, suspension, and termination" policy aimed at removing a suspected counterfeit distributor from the Wish platform. As of June 14, 2018, Wish has suspended or terminated more than 3,000 Merchants due to these types of repeated violations.

15. After removal, what processes does your company have in place, if any, to prevent a suspected counterfeit distributor from regaining access to your platform and subsequently U.S. consumers?

Wish recognizes that some Merchants will take corrective action and cease providing counterfeit products after receiving proper education on the subject and/or after receiving fines or suspension. When a Merchant is terminated, Wish's processes and tools prevent such a Merchant from later using the Wish platform if that Merchant signs up with the same credentials. However, if the Merchant uses different credentials, Wish's ability to detect the activity is limited.

Any Merchant on the platform is subject to the processes, controls, and penalties described more fully in response to questions 4, 11, 13, and 14 above.

16. If you become aware of a counterfeit good and/or distributor on your platform what actions including initiating legal action does your company have the power to take?

a. Can you provide us with statistical information regarding the frequency in which you have taken actions concerning suspected counterfeit products-- either through investigation, destructions, abandonment, or otherwise?

If Wish becomes aware of counterfeit goods on its platform, Wish has the ability to take various actions. These range from removing the listings from the Wish platform, to fining the Merchants who posted the listings, and suspending or even terminating their accounts.

As noted in response to question 4 above, Wish's Brand Protection and Content Curation team have prevented the potential sale of hundreds of thousands of counterfeit products since January 1, 2018. And as noted in response to question 14, Wish has already suspended or terminated thousands of Merchants due to these types of violations.

While such action would also constitute a breach of Wish's various policies (including its Merchant Terms of Service), thereby entitling Wish to other remedies and the ability to bring legal action, it has not brought any such actions to date.

17. How have you coordinated with U.S. federal and local authorities to curtail the distribution and manufacture of counterfeit goods within the United States?

Wish has not yet coordinated with U.S. federal or local authorities to curtail the distribution or manufacture of counterfeit goods within the United States.

18. If there are other pieces of information, details, or data you feel would be helpful to the committee, we respectfully request that you submit them as part of your answers as well.

Wish will maintain a focus on preventing and removing listings for counterfeit products. As part of its efforts, Wish will continue to develop and test solutions to address these and other issues. For example, Wish is exploring creation and implementation of new tools that would: streamline brand authorizations; support additional block lists for certain terms or materials, and; increase Merchant awareness and education by conducting additional Merchant-facing trainings to help educate them on international intellectual property rules. As a company, Wish will continue to support its various team members' efforts to benchmark with brand owners and peer groups, attend and speak at conferences aimed at these and other brand-protection efforts, and engage directly with rights holders to help address their concerns before issues arise.

Should you have further questions or require additional information, please feel free to contact me directly.

Very truly yours,

A handwritten signature in blue ink, appearing to read 'Devang Shah', with a long horizontal flourish extending to the right.

Devang Shah
General Counsel, Wish

cc: Peter Szulczewski, CEO, Wish

Appendix D – Letters from Common Carriers



Kevin Coles
General Counsel and Secretary



July 13, 2018

The Honorable Orrin G. Hatch
Chairman
Committee on Finance
U.S. Senate
Washington, DC 20510

The Honorable Ron Wyden
Ranking Member
Committee on Finance
U.S. Senate
Washington, DC 20510

Re: Information Collection Request on Proliferation of Counterfeit Goods in e-Commerce

Dear Sirs:

On behalf of DHL Express (USA) Inc. (hereinafter "DHL Express") we thank you for the opportunity to assist the Senate Finance Committee in its efforts to combat counterfeit goods in e-commerce, and are providing herein responses to each of the questions posed in our letter dated May 30, 2018. We appreciate the extension granted by your staff to July 13, 2018 to respond.

As an express delivery company, DHL Express is a common carrier and not the originator of shipment information. Nonetheless, we have developed systems that allow us to take a proactive role in the interdiction of contraband including counterfeit goods. We elaborate on those efforts herein.

1. Does your organization collect data on likely counterfeiters both in the US and abroad? If so, what information do you collect and from what sources?

In the U.S., DHL Express receives Custody Receipts for Seized Property and Evidence (Customs Form ("CF")-6051S) directly from U.S. Customs and Border Protection (CBP) once it detains or seizes a DHL shipment. In June 2017, DHL's US Security team began entering this shipment data into a proprietary database. This effort is extensive and ongoing with the intent of systematically utilizing data analytics. The data is reviewed and acted upon monthly to establish trends realized from detained and seized shipment data.



2. **Do you coordinate with e-commerce platforms to reduce the risk of consumers purchasing counterfeits unknowingly? If so, how?**

As a condition of doing business with DHL, shipping or attempting to ship counterfeit items is strictly prohibited, and e-commerce platforms are made aware of this prohibition. The following policy, found here, http://www.dhl-usa.com/en/country_profile/import_guidelines_express.html, is stated on DHL's website:

Counterfeit Goods are Prohibited

DHL's security policy states that it is not allowed to transport counterfeit goods via the DHL network. DHL does not want to be associated with counterfeit goods and upon suspicion of such goods being imported, Customs will be informed. It is prohibited in many countries to introduce counterfeit goods and where proven the Customs authority will seize the goods and penalize the buyer.

If you are offered very low prices for branded goods that are sold on shopping websites or via other channels, you can normally assume that the goods are counterfeit. High quality branded goods that are often copied are:

- Shoes
- Clothing
- Bags
- Expensive Watches
- CDs and DVDs
- Perfumes
- Electronics

In addition, Section 2 of DHL Express's Terms and Conditions of Carriage, found here: http://www.dhl-usa.com/en/express/shipping/shipping_advice/terms_conditions.html specifically identify counterfeit goods as Unacceptable Shipments, as follows:

A Shipment is deemed unacceptable if:

- no customs declaration is made when required by applicable customs regulations,



- it contains counterfeit goods, animals, bullion, currency, gem stones; weapons, explosives and ammunition; human remains; illegal items, such as ivory and narcotics,
- it is classified as hazardous material, dangerous goods, prohibited or restricted articles by IATA (International Air Transport Association), ICAO (International Civil Aviation Organization), ADR (European Road Transport Regulation on dangerous goods) or other relevant organization (“Dangerous Goods”),
- its address is incorrect or not properly marked or its packaging is defective or inadequate to ensure safe transportation with ordinary care in handling,
- it contains any other item which DHL decides cannot be carried safely or legally.

3. **Do you offer tools to rights holders to enforce and protect their intellectual property rights? If so, what are those tools?**

As a common carrier, the tools DHL can offer are limited to the extent that we do not have access, on our own, to the information that would allow us to identify an IPR infringement. Moreover, DHL does not have the authority to inspect for counterfeit shipments or remove or block such specific shipments as this can only take place by, or at the request of, law enforcement. DHL is not equipped or authorized to make determinations of infringement. However, DHL is a partner of various law enforcement agencies and works directly with them to address potential IPR violations at the request of the U.S. government (USG). DHL works with both the USG and right holders on specific investigations related to enforcing and protecting the IPR of the pertinent rights holder. This is done on a case-by-case basis. As part of these investigations, DHL will cooperate and coordinate with the pertinent law enforcement agencies and the rights holders by monitoring, holding specific shipments, and supporting inspections

4. **Describe your cooperation with CBP and other federal authorities in identifying and curtailing the distribution of counterfeit products in international shipments destined for the United States?**

DHL Express works with its federal law enforcement partners, including U.S. Customs and Border Protection (“CBP”), DHS’s Homeland Security Investigations (“HSI”), the National Intellectual Property Rights Coordination Center (“IPR Center”), and the Postal Inspection Service to combat counterfeiting and to prevent counterfeit products (and other illicit shipments) from entering the DHL network. DHL is continuously developing its



partnerships and routinely supports law enforcement efforts and requests for assistance (information, operational support) from each of its federal partners.

As an example, in a recent ongoing federal investigation, DHL was the sole party responsible for identifying suspicious trade activity, and this information was provided to CBP and HSI. Based on the information obtained by DHL, CBP and HSI, they were able to confirm that the merchandise was fraudulently entering the U.S. in violation of the law. On a routine basis, DHL supports various federal agency partners in these and other illicit trade investigations the best we can based on the information that is available to us.

As another example, DHL's Express Consignment Facilities have been a participant in CBP's Small Parcel Abandonment Program since 2015 at its hub and gateway facilities in Cincinnati, Ohio, Los Angeles/Long Beach, California, Miami, Florida, and New York City, New York. This CBP program is in partnership with the Express Association of America. It provides for an administrative process that allows for the voluntary abandonment of counterfeit goods imported in low value shipments. In lieu of a seizure, when detaining merchandise that may be inadmissible due to infringement upon a recorded trademark or copyright, CBP may issue a Detention Notice and Custody Receipt for Detained Goods to the importer of record (which, in many instances for small shipments, may be DHL as a nominal consignee). We, in turn, transmit and present options to the ultimate consignee. The options will include voluntarily abandoning the potentially infringing merchandise, and, even in cases where the ultimate consignee does not respond selecting any option, the merchandise will be considered abandoned and formal abandonment procedures will be initiated.

5. **Please explain your biggest difficulties in identifying counterfeiters and removing counterfeits from the global stream of commerce?**

Only the government, for example CBP, can make an enforceable determination as to whether merchandise is counterfeit. DHL does not have the authority or expertise to establish whether an item is counterfeit or legitimate. Moreover, as an express consignment company, DHL does not typically have access to the package contents that would otherwise allow observation of the merchandise for any suspicious markings, appearance, etc. Without this information, DHL has no ability to discern whether merchandise may be infringing or not.

Further, the government has access to seizure data and alert information that is not readily available to private carriers. Additional information sharing as well as increased lines of



communication may assist DHL in strengthening the integrity of its transportation network. It should also be noted that such shippers continually change names and contact information making it difficult for DHL Express to recognize them. More information and communication from CBP may also allow DHL to identify repeat offenders and to increase diligence in preventing counterfeiters from using our network.

6. **How do you coordinate with payment processors – if at all – to combat counterfeits?**

We do not coordinate with payment processors to combat counterfeits. The vast majority of IPR material moving into the US moves on established DHL customer accounts. As such, cash and credit card transactions used for this activity is a marginal component of this activity and has no meaningful data patterns.

7. **Can you broadly describe the tools – if any – you provide to consumers to verify, return, destroy, complain about, or seek recourse against counterfeits or their manufacturers.**

DHL Express provides its customers the list of restricted and prohibited items, also listed online, where we clarify that counterfeits are prohibited items. See at http://www.dhl-usa.com/content/dam/downloads/us/express/shipping/terms_and_conditions/prohibited_restricted_commodities.pdf It states that “Counterfeit or Pirated goods or material Any item(s), the carriage of which is prohibited by any law, regulation or statute of any federal, state or local government to or through which the shipment may be carried.”

In addition, as part of the Small Parcel Abandonment Program, for shipments that CBP has identified as possible counterfeit items, DHL Express will notify the consignee, and either upon agreement to abandon the shipment or in the absence of a response within 30 days of notice, the shipment will be deemed abandoned and subsequently destroyed at DHL’s expense.

8. **To what extent do you have the authority to remove or block counterfeit goods from the stream of commerce into or within the US?**

As noted above in response to Question 2, in accordance with Section 2 of the Terms and Conditions of Carriage, DHL Express must refuse carriage of items that have been identified as counterfeit. In addition, DHL Express provides unimpeded access to law enforcement as



soon as reasonably possible in accordance with its internal policy on CBP Seizures and Detentions. Once detained or seized by law enforcement, DHL Express will have the item removed from its network for processing.

As discussed above in the response to Question 4, DHL's Express Consignment Facilities also participate in CBP's Small Parcel Abandonment Program to help efficiently remove counterfeit goods from the stream of commerce.

For identification of violations and violators, DHL Express is largely dependent on the government and IPR rights holders, and regularly cooperates with investigations conducted by both parties. In addition, DHL may receive information from DHL's counterparts within the DHL global network about suspicious packages and notify CBP about such packages arriving into DHL facilities. Lastly, DHL Express can cancel the accounts of problematic shippers, e.g., a known or suspected IPR violator, thereby refusing service to that party.

9. **Are there different challenges with respect to purely domestic shipments and those that are international? If so, please explain.**

DHL Express only handles international shipments; it does not offer service for domestic shipments.

10. **What federal and local government agencies do you work with on domestic shipments to identify products or distributors of counterfeit products?**

DHL Express enjoys very strong partnerships with its U.S. federal law enforcement partners including CBP, HSI, FBI, U.S. Postal Inspection Service, as well as multiagency task forces such as the National IPR Center and the Interagency Trade Enforcement Center ("ITEC"). DHL Express routinely works with its law enforcement partners in identifying, targeting and removing counterfeit (as well as other types of illicit or contraband goods) from its global network.

11. **What services, tools, protections, and assistance do you provide consumers with respect to combatting counterfeits?**

As stated in DHL's US Customs Import Guide (found at http://www.dhl-usa.com/content/dam/downloads/us/express/local_other/dhl_us_customs_import_guide.pdf) DHL understands the importance of keeping our customers informed of IPR and the potential



consequences. While DHL and other express carriers do not have either the authority or the means to enforce IPR, DHL works proactively with Customs authorities and law enforcement agencies to address IPR violations.

12. Do you engage with international authorities and foreign governments to curtail the proliferation of counterfeit goods? If so what types of activities and coordination efforts have proven successful? What has not?

DHL Express USA only engages with U.S. authorities, but globally, DP DHL entities cooperate with local governments and international authorities as it does with U.S. authorities on enforcement of IPR policies and combatting IPR issues. For example, DP DHL has established a highly successful program with Hong Kong Customs to address smuggling and fraudulent activities. The global operations of Deutsche Post AG have supported and continue to support Hong Kong Customs on numerous interdiction efforts, some of which have resulted in the criminal conviction of shippers.

13. If you were to become aware of a counterfeit either already delivered to a consumer or that is already within your control or stewardship, what actions can you take to prevent the delivery of the good?

Upon becoming aware of a counterfeit shipment, DHL Express immediately notifies and consults with CBP or HIS, and can detain the shipment until law enforcement engages on the matter and provides further instruction. In addition, DHL Express will review whether the shipment is attached to an existing account and consider whether it would be appropriate to close the account.

14. If there are any other pieces of information, details, or data you feel would be helpful to the committee, we respectfully request that you submit them as part of your answers as well.

DHL Express is one of several DP DHL entities operating in the United States. This request was issued generally to DHL but given our understanding of the request in discussions with our trade association, Express Association of America, we believed it was most appropriate for DHL Express to respond. The Committee may take note that DHL e-Commerce is another U.S. entity involved in the movement of e-Commerce. However, this entity operates in conjunction with postal services, which serve as the front line; therefore, this request is best handled by Postal Service vis-a-vis DHL e-Commerce's operations.



We hope this satisfies your inquiries. Again, thank you for allowing DHL to participate in the Committee's information collection effort.

Best regards,

A handwritten signature in black ink that reads "Kevin Coles". The signature is written in a cursive style.

Kevin Coles
General Counsel and Secretary
DHL Express (USA), Inc.



July 9, 2018

The Honorable Orrin G. Hatch
Chairman
Committee on Finance
U.S. Senate
Washington, DC 20510

The Honorable Ron Wyden
Ranking Member
Committee on Finance
U.S. Senate
Washington, DC 20510

Dear Senator Hatch and Senator Wyden,

In reply to your letter of May 24th, the members of the Express Association of America (EAA), DP DHL, Federal Express, and UPS, support your efforts to improve interdiction of counterfeit goods sold through e-commerce channels.

Individual EAA members also received your letter and are in a better position to answer the list of questions it includes regarding specific anti-counterfeit activities. I understand the individual EEA members will provide or already have provided their responses directly to you.

For more information or to answer any questions, please have your staff contact me at [REDACTED]

Respectfully yours,

Michael Mullen
Executive Director



July 16, 2018

The Honorable Orrin G. Hatch
Chairman
Committee on Finance
U.S. Senate
Washington, DC 20510

The Honorable Ron Wyden
Ranking Member
Committee on Finance
U.S. Senate
Washington, DC 20510

Dear Senator Hatch and Senator Wyden,

Your letter of May 30, 2018 has been forwarded to me for response on behalf of Federal Express Corporation (FedEx or Express). We applaud and support the efforts of Congress and the Committee on Finance to protect American consumers from imported counterfeit goods.

FedEx does not tolerate the use of our networks for any illegal activity, and we have a long history of partnering with law enforcement throughout the country to prevent the importation and delivery of counterfeit goods. We cooperate with U.S. Customs and Border Protection (CBP), U.S. Immigration and Customs Enforcement (ICE) and customs officials in foreign countries to curtail activity by counterfeiters. While FedEx is not a law enforcement agency, we can and do assist efforts by U.S. agencies to enforce intellectual property rights.

Turning to the questions posed in your letter, FedEx responds as follows:

1. Does your organization collect data on likely counterfeiters both in the U.S. and abroad? If so, what information do you collect, and from what sources?

If we suspect shipments contain counterfeit goods, we notify local customs officials so they can conduct appropriate investigations and take action against illegal actors. We do not make determinations on whether an item is counterfeit or whether a shipper is a counterfeiter, and therefore we do not collect data on likely counterfeiters that differs from data collected on legitimate items tendered for transportation and delivery. Any information on counterfeit shipments would come directly from CBP or another government agency.

2. Do you coordinate with e-commerce platforms to reduce the risk of consumers purchasing counterfeits unknowingly? If so how?

We agree that e-commerce platforms play a unique role in the fight against counterfeits. We do not directly coordinate with e-commerce platforms on intellectual property rights issues.

However, we routinely meet with the U.S. Intellectual Property Rights (IPR) Center, and oftentimes the e-commerce platforms participate in those meetings as well.

3. Do you offer tools to rights holders to enforce and protect their intellectual property rights? If so, what are those tools?

In our role as an express carrier, we do not provide tools for rights holders to enforce or protect their intellectual property rights. We are aware of tools developed by the IPR Center and other governmental entities and encourage rights holders to engage with the appropriate agencies to enforce their rights.

4. Describe your cooperation with CBP and other federal authorities in identifying and curtailing the distribution of counterfeit products in international shipments destined for the United States.

If a shipment appears to violate any law or regulation, we provide the appropriate governmental agency access to the shipment. In the U.S., this includes interaction with CBP at the local level. Internationally, we notify local customs officials. As an express carrier, FedEx provides advance electronic data to CBP on all shipments coming into the U.S. from foreign countries. Additionally, we coordinate with CBP to facilitate its investigations by providing shipping documentation or other information as requested.

5. Please explain your biggest difficulties in targeting counterfeiters and removing counterfeits from the global stream of commerce.

As an express carrier, we must rely on information received from CBP and other law enforcement agencies in order to target potential counterfeiters and counterfeit goods shipments. There are restrictions on CBP's ability to share information with the private sector so we lack reliable information that can be used in targeting efforts. Further, identifying counterfeits requires in-depth knowledge and expertise on a broad range of products. FedEx does not possess such expertise and we cannot unduly burden the safe and efficient movement of the nearly 6 million shipments that Express handles each operating day.

6. How do you coordinate with payment processors – if at all – to combat counterfeits?

While payment processors have attended some recent meetings that were coordinated by the IPR Center, we have not directly coordinated with payment processors.

7. Can you broadly describe the tools – if any – you provide to customers to verify return, destroy, complain about, or seek recourse against counterfeits or their manufacturers?

The shipment of counterfeit goods is prohibited by the Terms and Conditions of the FedEx Service Guide. We are aware of U.S. efforts to encourage reporting of counterfeit goods and refer concerns by customers regarding potential IPR violations to the reporting portal on the IPR Center website or directly to CBP, as appropriate.

8. *To what extent do you have the authority to remove or block counterfeit goods from the stream of commerce into or within the U.S.?*

We have the ability to block shipments by known counterfeiters if advised by CBP. We have worked on special projects in the past that have resulted in blocking the import of counterfeit items, such as airbags, based on detailed information provided by CBP. The key to such efforts is detailed and actionable intelligence from CBP.

9. *Are there different challenges with respect to purely domestic shipments and those that are international? If so, please explain?*

Domestic shipments are not required to clear customs, so the data requirements for domestic shipments are less detailed than for international shipments. For both domestic and international shipments, however, valid data and intelligence from government agencies are necessary in order to target counterfeit goods and counterfeiters.

10. *What federal and local government agencies do you work with on domestic shipments to identify counterfeit products or distributors of counterfeit products?*

We are unaware of specific programs targeting U.S. domestic shipments.

11. *What services, tools, protections, and assistance do you provide consumers with respect to combatting counterfeits?*

We are aware of the IPR Center's activities for targeting counterfeits and would refer customers to them for information.

12. *Do you engage with international authorities and foreign governments to curtail the proliferation of counterfeits? If so, what types of activities and coordination efforts have proven successful? What has not?*

When requested by governmental agencies, both domestically and internationally, we engage and assist with investigations. Generally, this may include providing shipping records to law enforcement or facilitating government investigations by allowing access to shipments to/from a particular region, commonly referred to as "blitzes." While the government agencies retain statistical information on these blitzes, we believe these are an effective way of targeting counterfeit shipments.

13. *If you were to become aware of a counterfeit either already delivered to a customer or that is already within your control or stewardship, what actions can you take to prevent the delivery of the good?*

- a. Can you provide us with statistical information regarding the frequency in which you have taken actions against suspected counterfeit products – either through investigation, destructions, abandonment, or otherwise?

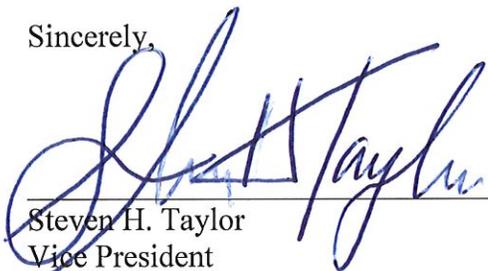
If we become aware that a counterfeit item is in our system or was delivered by us, we would coordinate with local CBP to determine how to proceed. As CBP is the enforcement agency best positioned to verify the existence of a counterfeit shipment, we defer to them for statistical information related to counterfeits, as well as investigation and enforcement issues.

14. If there are any other pieces of information, details, or data you feel would be helpful to the committee, we respectfully request that you submit them as part of your answers as well.

In addition to our efforts described above, FedEx participates in roundtable discussions with the International Anti-Counterfeiting Coalition and we work to address IPR-related issues through the Express Association of America (EAA).

Thank you for the opportunity to provide information in furtherance of this important effort.

Sincerely,



Steven H. Taylor
Vice President
Legal, Regulatory Affairs

#12888704



316 Pennsylvania Ave., SE
Suite 300
Washington, DC 20003
+1.202.675.4220 Tel

June 29, 2018

The Honorable Orrin G. Hatch
The Honorable Ron Wyden
United States Senate
Committee on Finance
Washington, DC 20510-6200

Dear Chairman Hatch and Ranking Member Wyden:

This letter is in response to your May 30, 2018 letter to Mr. David P. Abney, Chairman and CEO of United Parcel Service (UPS), regarding the proliferation of counterfeit goods sold through e-commerce websites. UPS understands the importance and urgency of protecting American consumers from imported counterfeit goods, and the important role of public-private partnerships in combatting intellectual property rights violations, as set forth in the Trade Facilitation and Trade Enforcement Act of 2015 (TFTEA). UPS is proud of its efforts to assist federal, state and local law enforcement authorities in combatting the importation of counterfeit goods, and of its particularly close working relationship with U.S. Customs and Border Protection (CBP).

In addition to the physical presence of CBP personnel at UPS's express consignment facilities, and in accordance with the customs regulations, UPS provides advanced electronic data about shipments to CBP when it acts as an express consignment carrier that facilitates the importation of merchandise into the United States, which enables CBP and all partner government agencies receiving Automated Commercial Environment (ACE) data to target high-risk inbound shipments. CBP uses this advanced electronic data to screen inbound shipments for counterfeit products. Further, as one of the first members of CBP's Air Cargo Advanced Screening (ACAS) pilot program, UPS voluntarily provided advanced data in addition to that which was required by law for extremely high-risk packages transported by air since 2010, prior to CBP's formalization of the ACAS data requirements this month. Not only does UPS supply the advanced electronic data to CBP, but we also apply technologically advanced network capabilities that enable us to locate suspect packages in our system. We often retrieve packages, which may be tendered to legal authorities for additional screening. Moreover, when CBP identifies shipments or shippers that should be blocked, UPS does its utmost to cooperate with CBP to assist in those efforts.

The following provides responses to the questions you posed in your letter:

Question 1: Does your organization collect data on likely counterfeiters both in the U.S. and abroad? If so, what information do you collect, and from what sources?

Response: In its role as an express consignment carrier subject to the customs regulations, UPS collects and logs information regarding seizures of counterfeit merchandise by CBP, U.S. Immigration and Customs Enforcement (ICE), and other customs authorities. Such information may include the commodity seized, the value of the commodity, the reason for seizure, the shipment identification number, the seizure notice number, issuing country, issuing agency, shipping mode, port of origin, exporting country, shipper/exporter name, port of destination, import country, and importer/consignee name. In addition, please see UPS's response to Question 3 below.

Question 2: Do you coordinate with e-commerce platforms to reduce the risk of consumers purchasing counterfeits unknowingly? If so, how?

Response: UPS collects package-level detail for international shipments, including shipments tendered by e-commerce platforms, from the parties that tender the shipment. UPS uses this information to conduct appropriate due diligence, consistent with its role as a nominal party-in-interest and an express consignment carrier, regarding whether the goods being shipped are admissible into the United States and to provide CBP with advanced electronic shipment information that CBP requires to perform risk assessment and target shipments for further examination.

In addition, at CBP's request, UPS participates in a Private Sector Partnerships and Enforcement initiative for the E-Commerce Working Group of the Trade Modernization Subcommittee of the Commercial Customs Operations Advisory Committee (COAC). COAC advises the Secretaries of the Department of the Treasury (Treasury) and the Department of Homeland Security (DHS) on the commercial operations of CBP and related Treasury and DHS functions. In connection with the Private Sector Partnerships and Enforcement initiative, UPS will work with e-commerce retailers such as Amazon and Walmart to address the proliferation of counterfeit goods that may be sold through their websites.

Question 3: Do you offer tools to right holders to enforce and protect their intellectual property rights? If so, what are these tools?

Response: UPS has implemented and maintains several channels for customers, employees, and other parties to report suspicious activities, including shipments of counterfeit goods. Such channels include the UPS Help Line, UPS's general 1-800 number, and UPS's internal fraud reporting line. UPS conducts an appropriate investigation into reports of suspicious activities and takes appropriate action when warranted. In addition, UPS also complies with applicable laws and complies with any court or administrative order issued within such entity's jurisdiction.

Question 4: Describe your cooperation with CBP and other federal authorities in identifying and curtailing the distribution of counterfeit products in international shipments destined for the United States.

Response: UPS works closely with the CBP and other federal law enforcement authorities. For packages destined to the United States, UPS, at its own expense, cooperates in the following ways:

- When authorities identify shippers that should be blocked from shipping due to illicit activities, including the shipment of counterfeit goods, UPS has procedures to add shippers to its Denied Party Screening system and to deny service or cancel accounts when applicable.
- UPS allocates facilities and equipment at our express consignment carrier premises to CBP which provide an optimum location to filter through and identify suspect shipments. UPS helps CBP to facilitate regular operations at our facility in Louisville, Kentucky to combat imports of counterfeit merchandise. At our Louisville facility, CBP processes over 40,000 parcels per night and interdicts a variety of contraband and prohibited merchandise including counterfeit checks, illegal drugs, illegal monetary instruments, fraudulent documents, and shipments of goods that may infringe the intellectual property of third parties. Examples of successful operations conducted at UPS's facilities and highlighted on CBP's website include the following:
 - [Operation Louisville Slugger](#), which ran from April 25-28, 2011, led to the initiation of 57 seizures of intellectual property rights infringing merchandise, including counterfeit iPads, jewelry, handbags, and cellphones.
 - In June 2011, CBP seized a shipment of [counterfeit watches](#) from China with a Manufacturer's Suggested Retail Price of \$933,318.
 - In February 2013, CBP seized more than \$3.4 million in counterfeit items including counterfeit 2013 NFL [Super Bowl team jerseys](#).
 - In 2018, CBP has conducted four operations at UPS facilities which in part focused on counterfeit goods.
- We employ "Track and Trace" technologies which allow a package to be removed from its normal processing flow and to be given to authorities for further examination if they identify the package as suspicious.
- UPS provides CBP with available, relevant, and legally disclosed information on shippers and consignees responsible for particular shipments identified as containing prohibited goods.
- We participated in CBP's pilot voluntary abandonment pilot program.
- UPS is also a member of CBP's Customs Trade Partnership Against Terrorism (C-TPAT), through which UPS cooperates with CBP, domestic and foreign port authorities, foreign customs administrations and others in the trade community, in advancing the goals of C-TPAT and the Container Security Initiative (CSI).

Question 5: Please explain your biggest difficulties in targeting counterfeiters and removing counterfeits from the global stream of commerce.

Response: UPS and other private express delivery service companies engage regularly with governments to address a variety of issues around products in our networks. With respect to customers, UPS's [2018 Tariff/Terms and Conditions of Service](#) and other contractual documents notify customers that they may not tender to UPS any shipment of any good that is "prohibited by applicable law or regulation of any federal, state, provincial, or local government in the origin or destination country." However, there are practical limits to what UPS and other express delivery service providers can do day-to-day. First, we are not the originators of information about shipments and we are dependent upon the information that shippers provide us about the shipments they tender. Second, UPS personnel involved in accepting and handling shipments are not in the best position to determine whether goods tendered for shipment infringe the intellectual property of a third party. Third, UPS must also comply with the data protection and commercial information confidentiality laws of the nations in which it operates. These limitations underscore the importance of collaboration with CBP and other federal agencies to prevent counterfeit goods from entering our system.

Question 6: How do you coordinate with payment processors—if at all—to combat counterfeits?

Response: Since 2012, UPS has attended several meetings at the Intellectual Property Rights Coordination Center (IPRC) in which counterfeit goods issues have been discussed. Payment processors, transportation providers, and e-commerce platforms have often participated in those meetings.

Question 7: Can you broadly describe the tools—if any—you provide to consumers to verify, return, destroy, complain about, or seek recourse against counterfeits or their manufacturers?

Response: See response to Question 3 above.

Question 8: To what extent do you have the authority to remove or block counterfeit goods from the stream of commerce into or within the U.S.?

Response: UPS recognizes that CBP has the legal authority to prevent the introduction of counterfeit goods into the stream of commerce of the United States. When UPS is notified by CBP or other law enforcement authorities that a shipment contains counterfeit merchandise, UPS undertakes diligent efforts to block counterfeit shipments. In addition, UPS will comply with any valid court or administrative order blocking the shipment of counterfeit goods.

Question 9: Are there different challenges with respect to purely domestic shipments and those that are international? If so, please explain.

Response: The challenges described above in the response to Question 5 are generally the same. However, for domestic shipments, UPS has less interaction with governmental agencies and less specific data about shipments. For example, when transporting goods domestically, as a common carrier, UPS has an obligation to provide service upon reasonable request to any member of the shipping public. 49 U.S.C. § 14101. These legal requirements result in UPS having to rely on law enforcement authorities and the courts to enable UPS to take action against shipments of counterfeit goods. While UPS does its utmost to cooperate with federal or state law enforcement authorities and to comply with court or administrative orders barring the shipment of counterfeit goods, UPS is simply not in a position to act on its own to interdict shipments of counterfeit goods given the obligations and requirements of being a common carrier of domestic shipments.

Question 10: What federal and local government agencies do you work with on domestic shipments to identify counterfeit products or distributors of counterfeit products?

Response: UPS cooperates with federal and local law enforcement agencies. If any such agency identifies a shipment containing counterfeit goods, UPS will cooperate with the agency to the extent possible and take such action as legally permitted to intercept the relevant shipment if it is within UPS's possession.

Question 11: What services, tools, protections, and assistance do you provide consumers with respect to combatting counterfeits?

Response: See response to Question 3 above.

Question 12: Do you engage with international authorities and foreign governments to curtail the proliferation of counterfeits? If so, what types of activities and coordination efforts have proven successful? What has not?

Response: In the event that an international authority or a foreign government directs UPS to block a shipper from its system or seize a shipment, it would undertake the same procedures as it does in the United States. UPS has various dialogues with foreign governments and international authorities such as the World Customs Organization regarding anti-counterfeiting measures and e-commerce.

Question 13: If you were to become aware of a counterfeit either already delivered to a consumer or that is already within your control or stewardship, what actions can you take to prevent the delivery of the good?

a. Can you provide us with the statistical information regarding the frequency in which you have taken actions against suspected counterfeit products—either through investigation, destructions, abandonment, or otherwise?

Response: Please see response to Question 4 for packages within UPS control. If CBP or another government agency requests redelivery of counterfeit merchandise in accordance with law, UPS will endeavor to reclaim the package. UPS does not maintain statistical information

June 29, 2018

Page 6

regarding actions taken by CBP or other agencies against suspected counterfeit products, and those statistics may be best obtained from CBP or other government agency.

Question 14: If there are any other pieces of information detail, or data you feel would be helpful to the committee, we respectfully request that you submit them as part of your answers as well.

Response:

UPS and other private express consignment carriers provide CBP with advanced electronic data (i.e., manifests) on a package-level basis and transmit these manifests to CBP. CBP then utilizes this data to screen shipments and, in some instances, shares data with other agencies. The requirement that information be electronically presented in advance allows CBP to effectively target any cargo that may need to be held for further examination after the arrival of the vessel, aircraft or other conveyance, which thereby enables legitimate cargo to move smoothly through the chain of commerce.

Advanced data is a cornerstone of effective risk assessment. UPS has been using electronic data for years, even before it was required by the Trade Act of 2002, to provide CBP with item-level detail about each and every shipment entering the country. This not only helps CBP reduce the potential for dangerous goods entering the United States, but also aids in meeting manifesting compliance requirements and expediting clearance through customs.

* * * * *

If you have any questions regarding these responses, please do not hesitate to contact me



Respectfully submitted,

A handwritten signature in cursive script that reads "Laura Lane".

Laura Lane
President
UPS Global Public Affairs

Appendix E – Letters from Payment Processors



American Express Company
801 Pennsylvania Avenue, N.W.
Suite 650
Washington, DC 20004

June 29, 2018

The Honorable Orrin G. Hatch
Chairman
Committee on Finance
United States Senate
Washington, DC 20510

The Honorable Ron Wyden
Ranking Member
Committee on Finance
United States Senate
Washington, DC 20510

Dear Chairman Hatch and Ranking Member Wyden:

Thank you for your letter dated May 30, 2018 on the issue of counterfeit goods. Please find below American Express's answers to the questions in your letter.

- 1) Our network policies provide a chargeback right for issuers of American Express® Cards ("Issuers") and holders of American Express® Cards ("Cardmembers") to pursue if a Cardmember purchases products or services that are defective or not as described. If the Cardmember receives goods or services that are different than the written description provided by the merchant at the time of purchase, or, the Cardmember receives damaged or defective goods or services, he/she may dispute the purchase transaction made on the American Express Card and the Issuer may charge back the transaction to the merchant.
- 2) Our Anti-Money Laundering, Screening, U.S. Sanctions, and Anti-Corruption policies provide that Issuers and acquirers of American Express Card-accepting merchants ("Acquirers") must establish Know Your Customer (KYC) procedures in order to establish the identity of existing and potential customers (Cardmembers and merchants, as applicable). Acquirers' KYC programs must be sufficient at all Points of Sale to determine and document each merchant's identity and source of funds, including collecting full legal name, merchant's trade name, and address information, in addition to other data points as available and applicable (e.g., date of birth, national ID, and beneficial ownership).

Under our Prohibited and Restricted Industry policy, the American Express Network prohibits Acquirers from contracting with merchants deemed prohibited, which includes merchants that engage in the sale of potentially infringing goods/services. Additionally, if a merchant is identified as selling potentially counterfeit goods/services, an Acquirer must report the violation (if identified by it) to the American Express Network and investigate it



within 30 business days. If a violation is confirmed, the Acquirer must correct the violation within 10 business days.

Lastly, the American Express Network requires Acquirers to include the following in all merchant agreements:

- The merchant must not engage in activities or practices that are deemed to be deceptive or misleading or that could reflect unfavorably upon the good name, goodwill, reputation, or image of American Express or any American Express entity, or that in any way are contrary to applicable law.
 - If the American Express Network has reasonable grounds to believe that a merchant is engaged in fraudulent, unlawful, or similarly objectionable activity that could create legal or financial risk to the American Express Network or reflect unfavorably on the American Express brand, the Network may require the Acquirer to cancel its agreement with that merchant.
- 3) Please refer to answer for question #1, as it is a global policy.
- 4) Please refer to answers for questions #1, #2, #5 and #11.

Additionally, our U.S. merchant regulations, which form a part of most of our contracts with U.S. merchants, prohibit American Express Card acceptance for: “unlawful/illegal activities, fraudulent business transactions or when providing the good or services is unlawful/illegal (e.g., sales of any good that infringe the rights of a Rights-holder under laws applicable to us, you, or the Cardmember)...”.

- 5) American Express has a number of processes and controls to detect and cancel merchants engaging in fraudulent, deceptive or unfair business practices. When a merchant account is terminated for “derogatory” reasons (e.g., for cause), American Express submits a report to the MATCH database. “MATCH” stands for the “Member Alert to Control High Risk Merchants,” a merchant database maintained by MasterCard that is used by acquirers and other industry players to evaluate merchants. Other American Express processes and controls include:
- **Merchant onboarding:** At account set-up, American Express performs the following: check against the MATCH list; duplicate account check; prior merchant derogatory check (i.e., prior cancellations due to fraud); high-risk industry check; and consumer bureau report (soft inquiry) pulls. Depending upon results, a “contract” review (i.e., manual review of applications pending due to the foregoing checks) is performed. Post-set up, American Express performs KYC checks (consisting of demographic validation, significant owner validation, bank validation, and internet URL validation) and screens against OFAC Sanctions and other Prohibited Persons Lists.
 - **Ongoing monitoring:** American Express also runs Early Monitoring System scanners to check for fraud, high risk IP, email, high risk bank accounts and submitters; early submissions from risky merchants; and bankruptcy. American



Express also uses web crawlers to identify websites operating in prohibited and high-risk industries; various types of transaction monitoring to identify activity that may be in violation of internal policies / regulations; additional processes to identify merchants selling infringing products; and daily media reviews to identify merchants involved in illegal activity.

- **Consumer Protection Monitoring Program:** investigation of merchants with frequent customer complaints and high levels of disputed charges and/or chargebacks, or as identified through regulatory or consumer advocate inquiries, or media coverage of a particular merchant and/or industry.
 - **Merchant Evaluation Cancellation Committee:** a committee comprised of vice-presidents representing American Express's merchant acquiring business and other relevant functions reviews escalations and makes decisions on the cancellation of merchants who may be engaging in fraudulent, deceptive or unfair business practices impacting consumers.
- 6) We work with the International AntiCounterfeiting Coalition (IACC) on their RogueBlock program. This is a collaborative effort among the IACC, law enforcement agencies, customs agencies, the payment industry and IP rights-holders. The IACC's "follow the money" approach aims on a global scale at impeding counterfeiters' ability to process online payments.
- 7) Generally, through our affiliation with the Center for Safe Internet Pharmacies (CSIP), there is an annual request for our participation in Operation Pangea, a coordinated effort by INTERPOL to collaborate with private sector partners to better understand the needs in countering illicit drug trafficking.
- 8) We have the following processes and controls in place:
- **Webcrawling:** We trace and conduct test transactions on websites which purport to accept American Express Cards while selling illegal / restricted / prohibited / counterfeit products and copyright violations/infringement. The process runs weekly, with an average of 120+ websites traced every month which includes various violations, counterfeit products being a part of it.
 - **Keyword Search:** The process aims at weeding out violating merchants on the American Express Network based on their transaction history and merchant names to identify possible violations. The process works by using various algorithms, stats and keywords to identify violating merchants.
 - **Cease & Desist:** We send out periodic Cease & Desist notifications to websites that use American Express trademarks without authorization while purporting to sell illegal/restricted/prohibited products, counterfeits included.
 - **Ad-Hoc Requests:** We also process all requests that come to us through various channels, such as third party coalitions, right holder complaints, and legal requests. For all such requests we conduct investigations using our processes (described above) to resolve the query.



The following are relevant statistics for 2018 year-to-date related to the processes described above:

- 86 websites investigated for copyright infringement/counterfeit claims
 - o 9 websites found to be associated with Amex merchant accounts
 - Merchants terminated – 2
 - No violation found – 4
 - Product no longer available – 3
 - o 77 websites found to not be associated with an Amex merchant account
 - Cease & Desist notification sent - 23 websites
 - No email address available to send Cease & Desist notification – 9 websites
 - Website inactive– 34 websites
 - Cease & Desist determined to be not required – 11 websites
- 9) We have registered our core trademarks with U.S. Customs, so that if any goods are entering the country with our mark included illegally, they can be stopped at the border.
- 10) Not applicable.
- 11) We have incorporated voluntary best practices to address copyright infringement and the sale of counterfeit products on the Internet.

Where an IP rights-holders submits a claim to us regarding an alleged infringement or sale of counterfeit products (see enclosed link to section 22 of the American Express website terms), we generally require the Acquirer (in most cases, American Express in the United States) to engage the merchant and use the evidence from the rights-holder to determine if the merchant is violating policy. This provides the merchant an opportunity to contest the claims of the rights-holder. In cases where a violation is found, the Acquirer may require that the merchant remove the infringing or counterfeit product from its online store, or cancel the merchant.

https://www.americanexpress.com/us/content/legal-disclosures/website-rules-and-regulations.html?inav=footer_Terms_of_Use

Thank you again for reaching out to American Express on this important issue. If you or your staff have any additional questions, please feel free to contact me or Chris Merida, Vice President of Federal Government Affairs, [REDACTED]

Sincerely,

Brett Loper
Senior Vice President
Global Government Affairs



John Verdeschi
Senior Vice President



June 29, 2018

The Honorable Orrin G. Hatch, Chairman
The Honorable Ron Wyden, Ranking Member
United States Senate Committee on Finance
Washington, DC 20510-6200

Dear Chairman Hatch and Ranking Member Wyden:

I write in response to your letter dated May 30, 2018 to Ajay Banga requesting information from Mastercard on our efforts to curtail the illegal sale of counterfeit goods through e-commerce websites. We prohibit the use of our payment system by merchants and others in furtherance of illegal activity, including intellectual property infringement, and strive to prevent such activity on our system. We share your concern regarding this important issue. Below, I provide responses to your questions with information on the steps that our company takes to prevent the sale of counterfeit goods and protect intellectual property rights holders.

Background on Mastercard

Mastercard does not issue payment cards, nor does it contract with merchants to accept those cards. In the Mastercard payment system, those functions are performed in the United States by numerous banks. Mastercard refers to the banks that issue payment cards bearing the Mastercard brands as “issuers.” Mastercard refers to the banks that enter into contracts with merchants to accept Mastercard-branded payment cards as “acquirers.” Mastercard provides the networks through which its customer banks can interact to complete payment transactions, as discussed below, and sets rules regarding those interactions. Mastercard also owns the Mastercard family of brands and licenses banks in the United States to use those brands in conducting payment transactions.

For e-commerce transactions, basic information about a card (*e.g.*, card number and expiration date) typically is captured by the merchant by prompting the cardholder to enter such information in an electronic form. This information is linked together with the dollar amount and date of the transaction, as well as basic information about the merchant. The message containing the information is then transmitted to the acquirer that signed up the merchant to accept the card. This is known as the “authorization message.”

The acquirer routes the authorization message to Mastercard, and Mastercard then routes the authorization message to the issuer. The issuer checks to make sure that there are sufficient funds or credit available in the cardholder’s account to cover the transaction and that the transaction does not appear to be fraudulent, and then sends to Mastercard a message authorizing the transaction. Mastercard then routes the message to the acquirer, which transmits the message back to the merchant to authorize the transaction. A second message, called the “clearing message,” generally is sent later in the day to confirm that the transaction has been completed and to initiate the movement of funds. The

clearing message follows the same route from the acquirer to Mastercard, and then back to the issuer. The issuer uses that record to post the transaction to the cardholder's account. The process of moving funds from issuers to acquirers is known as the "settlement" process.

Responses

1. What types of tools do you provide to U.S. consumers to be compensated for losses experienced when buying a counterfeit good?

Mastercard does not generally provide goods or services directly to consumers.

However, one feature of Mastercard's network is its process for the handling of so-called chargebacks. The Mastercard chargeback process enables a loss allocation between issuers and acquirers for credit card charges that a consumer disputes, as in the case of a purchase of counterfeit goods. As discussed below, the chargeback process makes it possible for banks to issue credit cards to consumers without bearing the costs of unlawful or wrongful merchant behavior. Without the chargeback process, credit cards would be more expensive and less available to consumers.

Regulation Z, which implements the Truth in Lending Act, contains a right for a cardholder to assert against a card issuer all claims (other than tort claims) and defenses arising out of a transaction in which a merchant that accepts a credit card fails to resolve satisfactorily a dispute as to property or services purchased in a consumer credit card transaction. Thus, under Regulation Z, a cardholder that discovers he or she has purchased counterfeit goods may withhold payment to the credit card issuer for the amount of the goods that gave rise to the dispute and any finance or other charges imposed on that amount.

The Mastercard Standards, which include all of the operating rules, regulations, policies and procedures of Mastercard, set for the process for the chargeback system. Essentially, under the chargeback system, the loss for a transaction is allocated between the issuer and acquirer to the party that is in the best position to oversee the merchant. This is the acquirer. The acquirer is able to pass the chargeback along to the merchant and, if a merchant engages in excessive chargebacks, terminate its relationship with the merchant.

In the absence of the chargeback system, issuers would have to bear the costs associated with consumer credit purchases of counterfeit good under Regulation Z and certain other merchant-related disputes. Over time, the costs would drive issuers from the credit card issuing business, result in higher credit card costs for consumers in the form of higher rates and fees or both. Thus, the chargeback system helps consumers.

2. What activities do you undertake to limit the availability of counterfeits accessible through e-commerce?

Mastercard's commitment to limiting the availability of counterfeit goods accessible through e-commerce is evidenced by our industry-leading Anti-Piracy Policy ("Policy"), which is publicly available at <https://www.mastercard.us/en-us/about-mastercard/what-we-do/anti-piracy-policy.html> and a copy of which is attached as Appendix A. In accordance with the Policy, Mastercard has established procedures that apply when a law enforcement entity or rights holder brings to Mastercard's attention the online sale of a product or service that allegedly infringes copyright or trademark rights of a party.

These procedures involve multiple constituents in the payments value chain, each of which has a role to play in an investigation. When a law enforcement entity is involved in the investigation and provides Mastercard with evidence of illegal activity, Mastercard will first endeavor to identify the acquirer that has the relationship with the alleged infringing merchant. Mastercard performs a test to determine whether the e-commerce site in question actually accepts Mastercard-branded payments and, if so, to identify the acquirer for the e-commerce site. The timing for completion of this process depends in part on the speed at which a merchant submits payment transactions into the system. Many times after conducting a test of payment acceptance, we determine that an e-commerce site that purports to accept Mastercard-branded payments, in fact, does not. If Mastercard believes that its brand is being used in connection with alleged illegal activity, we will require the relevant acquirer to conduct its own investigation and, within two business days, provide a written report to Mastercard setting forth the results of the investigation and any steps taken to address those results.

If the acquirer determines that the merchant was engaging in the sale of an infringing product or service, the acquirer must take the actions necessary to ensure that the merchant has ceased accepting Mastercard-branded cards as payment for an infringing product or service. If the acquirer determines that the merchant was not engaging in the sale of an infringing product or service, the acquirer must provide to Mastercard compelling evidence of this conclusion. If the acquirer decides to terminate the merchant, Mastercard will require that the acquirer add the merchant to a Mastercard database for terminated merchants, if applicable, and thereby afford other acquirers notice that the merchant has been terminated and of the reason code used by the acquirer for the termination.

When a law enforcement entity is not involved, a rights holder may notify Mastercard of its belief that an e-commerce sale of a product or service violates its intellectual property rights and request that Mastercard take action on such belief. Mastercard generally will also accept such notices from a rights holder's trade association. Significant collaboration with the rights holder community has led to the development of this notification process, and Mastercard is committed to maintaining an open dialogue with rights holders.

To facilitate a notification from a rights holder, Mastercard has established an email address for the submission of such requests and a set of information requirements for such requests. Additionally,

the International Anti-Counterfeiting Coalition (“IACC”) has a portal with Mastercard, which enables rights holders that are members of the IACC to provide Mastercard with notices.¹ The requests submitted with each notice must include a description of the alleged infringement, evidence that a Mastercard-branded payment card can be used to purchase the allegedly infringing product, a copy of the rights holder’s cease and desist letter or Digital Millennium Copyright Act notice or an appropriate attestation from the rights holder, and evidence that the rights holder owns the intellectual property in question.

Upon receipt of a notice that meets the information requirements, Mastercard will endeavor to identify the acquirer that has the relationship with the merchant. As noted above, the timeframe within which the acquirer is identified varies based on factors that may be beyond Mastercard’s control. Mastercard will require an identified acquirer to investigate the alleged illegal activity and, within five business days, provide a written report to Mastercard setting forth the results of the investigation and any steps taken to address those results. The measures required of an acquirer upon a determination that the merchant is engaged in the sale of an infringing product or service are the same for both rights holder and law enforcement notifications to Mastercard. Because rights holder notices do not carry the certainty that comes with a law enforcement notice, these investigations often require more time to complete. In some cases, it may be necessary to afford an acquirer additional time to complete its investigation and other obligations before an accurate assessment of the merchant’s activities can be made. Following receipt of the results of an acquirer’s investigation, Mastercard will inform the rights holder (or trade association) of those results.

3. What tools and protections do you provide to consumers outside of the United States to remedy losses from the purchase of counterfeit goods through e-commerce, and why might those differ from those offered within the United States—if at all?

Mastercard does not generally provide goods or services directly to consumers.

However, Mastercard makes the chargeback system described in the response to Question 1 above available to facilitate the issuance of credit cards by issuers located outside of the United States. The Policy also applies on a global basis.

4. What services, tools, protections, and assistance do you provide consumers with respect to preventing and remedying purchases of counterfeit goods?

Mastercard does not generally provide goods or services directly to consumers.

¹ The IACC is a non-profit organization with a membership of over 250 companies devoted solely to combating product counterfeiting and piracy. The IACC’s mission is to do this by promoting laws, regulations, directives, and relationships designed to render the theft of intellectual property undesirable and unprofitable.

5. Do you take proactive actions against potential counterfeiters? If so, can you please describe those actions?

As discussed in the response to Question 2 above, Mastercard requires acquirers to take certain measures upon a determination that a merchant is engaged in the sale of counterfeit goods. This involves an acquirer's ensuring that such merchant ceases accepting Mastercard-branded cards as payment for an infringing product or service, which may include terminating such merchant and adding such merchant to a Mastercard database for terminated merchants.

The same requirements are imposed on acquirers regardless of whether the online sale of a counterfeit product is brought to our attention via law enforcement or a rights holder.

6. What types of programs and coordination do you participate in to curtail counterfeit with rights holders, platforms, and/or shippers?

The Policy contains a process for a rights holder to notify Mastercard of its belief that an e-commerce sale of a product or service violates its intellectual property rights and request that Mastercard take action on such belief. This process is set forth in detail in the response to Question 2 above.

7. Do you engage with foreign governments to curtail the proliferation of counterfeits? If so, what types of activities and coordination have proven successful?

We do not engage with foreign governments to curtail the proliferation of counterfeits.

8. If you become aware of a counterfeit distributed to a consumer, what actions do you have power to take?

Mastercard does not receive information regarding whether counterfeits are distributed to consumers.

a. Can you please provide us with detailed statistics on the frequency with which you have taken actions with regard to suspected counterfeit products—either through investigation, destructions, abandonment, or otherwise?

We would be happy to provide information regarding this question in a private meeting with your staff.

9. How have you coordinated with government and local authorities to curtail the distribution and manufacture of counterfeit goods within the United States?

The Honorable Orrin G. Hatch
The Honorable Ron Wyden
June 29, 2018
Page 6

Mastercard has coordinated with government authorities using the process set forth under the Policy. We would be happy to provide further information in a private meeting with your staff.

10. How have you coordinated with U.S. federal and local authorities to curtail the distribution and manufacture of counterfeit goods internationally?

The Policy sets forth the ways in which Mastercard coordinates with U.S. federal and local authorities conducting investigations into counterfeit goods, whether those goods are manufactured and distributed domestically or internationally.

11. If there are any other pieces of information, details, or data you feel would be helpful to the committee, we respectfully request that you submit them as part of your answers as well.

The responses above describe Mastercard's efforts to curtail the illegal sale of counterfeit goods through e-commerce websites.

Conclusion

Mastercard is proud of the role we play and the successes we continue to achieve in combating Internet-related intellectual property infringement. With the collective efforts and commitment of all commercial participants in this fight, we believe that we can forcefully tackle the problem of online sale of counterfeit goods.

* * *

I look forward to continuing our dialogue, and I hope you and your staff will look to Mastercard as a resource. If you or your staff has any follow-up questions, please do not hesitate to contact me at

Sincerely,

A handwritten signature in black ink that reads "John Verdeschi". The signature is written in a cursive style with a large initial "J" and a long horizontal stroke at the end.

John Verdeschi
Senior Vice President

Appendix A

Mastercard Anti-Piracy Policy

[See attached.]

Mastercard Anti-Piracy Policy

The purpose of this document is to set forth Mastercard's policy for addressing the online sale by a Merchant of copyright-infringing products and counterfeit trademark products (the "Anti-Piracy Policy"). The Anti-Piracy Policy supports and is considered in conjunction with Mastercard's Business Risk Assessment and Mitigation ("BRAM") program. The BRAM program, among other things, prohibits a Merchant from submitting for payment, and an Acquirer from accepting from a Merchant for submission for payment, to the Mastercard network any transaction that is illegal, or is deemed by Mastercard in its sole discretion, to damage or have the potential to damage the goodwill of Mastercard or reflect negatively on the Mastercard brand. The following activities are prohibited under the BRAM program: the sale or offer of sale of a product or service other than in full compliance with all laws applicable to the Acquirer, Issuer, Merchant, Cardholder, Cards, or Mastercard (as these terms are defined in the Mastercard Rules).

Mastercard addresses intellectual property piracy as follows:

1 – Law Enforcement Involvement

When a law enforcement entity is involved in the investigation of the online sale of a product or service that allegedly infringes copyright or trademark rights of another party ("Illegitimate Product") by a Merchant and provides Mastercard with evidence of illegal activity for Mastercard's use in taking action under this Policy, Mastercard will endeavor to identify the Acquirer that has the relationship with that Merchant. If Mastercard determines that the Merchant is accepting Mastercard cards through an existing Acquirer relationship, Mastercard will require that the Acquirer investigate the alleged illegal activity and, within two business days, provide a written report to Mastercard setting forth the results of the investigation and any steps taken to address those results. If the Acquirer determines that the Merchant was engaging in the sale of an Illegitimate Product, the Acquirer must take the actions necessary to ensure that the Merchant has ceased accepting Mastercard cards as payment for the Illegitimate Product. If the Acquirer determines that the Merchant was not engaging in the sale of an Illegitimate Product, the Acquirer must provide to Mastercard compelling evidence demonstrating that finding. Mastercard may exercise discretion to afford the Acquirer additional time to complete the Acquirer's obligations set forth herein. If the Acquirer terminates the Merchant, Mastercard will require that the Acquirer list the Merchant in the Mastercard MATCH compliance system of terminated merchants, where applicable, and thereby afford all Acquirers in the Mastercard network notice that the Merchant has been terminated and of the Reason Code used by the Acquirer for the termination.

2 – No Law Enforcement Involvement

When there is no law enforcement involvement, an intellectual property right holder may notify Mastercard of its belief that the online sale of a product(s) violates its intellectual property rights and request that Mastercard take action upon such belief. Mastercard maintains the following email address for this purpose: ipinquiries@mastercard.com. The notification and referral (the “Referral”) must include:

(a) a description of the alleged infringement, including the specific identity of the site allegedly engaged in the sale of the alleged Illegitimate Product and compelling evidence substantiating the allegation. The notification must specifically identify any products alleged to be an Illegitimate Product and the location of the alleged Illegitimate Product(s) on the website (i.e., the specific URL path to the Illegitimate Product);

(b) evidence that the allegedly Illegitimate Products can be purchased using a Mastercard-branded payment card, for example, by providing a screenshot of the Mastercard logo appearing on the Merchant website. Test transactions are helpful, but not required to submit a complete notification;

(c) a copy of at least three of the right holder’s cease and desist letters or Digital Millennium Copyright Act (DMCA) notice notifying the website owner/Merchant that it is engaging in infringing activity, and an attestation that, to the best of the right holder’s knowledge, the site is not licensed or otherwise authorized to sell the alleged Illegitimate Products in question; and

(d) evidence demonstrating that the right holder owns the copyright(s) or trademark(s) in question.

Mastercard will accept a Referral from, and otherwise coordinate with, a trade association with legal authority to act on behalf of an intellectual property right holder. By the submission of the Referral, the submitter certifies that (i) the information set forth in the Referral is true and accurate to the best of the submitter’s knowledge, (ii) Mastercard may disclose the identity of the submitter and the contents of the Referral to any person Mastercard deems appropriate, and (iii) the submitter will cooperate in any judicial or other process concerning Mastercard’s receipt and use of the information set forth in the Referral. Mastercard may require the submitter (or if different, the intellectual property right holder) to defend, indemnify and hold Mastercard harmless against any claim by the Merchant, Acquirer, or other affected party made as a result of an investigation under this Policy, including, but not limited to, paying directly for, or reimbursing Mastercard and other affected parties for any attorneys’ fees, costs and damages they may arise from such claim.

When Mastercard receives a Referral, Mastercard will endeavor to identify the Acquirer that has the relationship with that Merchant. If Mastercard determines that the Merchant is accepting Mastercard cards through an existing Acquirer relationship, Mastercard will send the Referral to the Acquirer and require that the Acquirer investigate the alleged illegal activity and, within five business days, provide a written report to Mastercard setting forth the results of the investigation and any steps taken to address those results. If the Acquirer determines that the Merchant was engaging in the sale of an Illegitimate Product, the Acquirer must take the actions necessary to ensure that the Merchant has ceased accepting Mastercard cards as payment for the Illegitimate Product. If the Acquirer determines that the Merchant was not engaging in the sale of an Illegitimate Product, the Acquirer must provide Mastercard compelling evidence demonstrating that finding. Mastercard may exercise discretion to afford the Acquirer additional time to complete the Acquirer's obligations set forth herein. Following receipt of the results of the Acquirer's investigation, Mastercard will inform the right holder or trade association of those results. If the Acquirer terminates the Merchant, Mastercard will require that the Acquirer list the Merchant in the Mastercard MATCH compliance system of terminated merchants, where applicable, and thereby afford all Acquirers in the Mastercard network notice that the Merchant has been terminated and of the Reason Code used by the Acquirer for the termination.

3 – Other

If the Merchant is located in a country where the online sale of the alleged Illegitimate Product does not violate applicable country laws, the Acquirer must suspend or terminate acquiring sales by that Merchant to account holders of accounts issued in countries where the sale of the alleged Illegitimate Product is illegal or is otherwise prohibited by local law.

4 – Failure to Comply with this Anti-Piracy Policy

Mastercard has the right to limit, suspend, terminate or condition the Membership, Membership privileges, or both, of any Acquirer that Mastercard deems does not comply with applicable law or with this Anti-Piracy Policy. Mastercard has the sole right to interpret and enforce this Anti-Piracy Policy. Furthermore, Mastercard may assess any Acquirer that Mastercard deems does not comply with this Anti-Piracy Policy, as such Policy may be amended from time to time.



Robert B. Thomson III
Senior Vice President,
Head of U.S. Government Relations

June 27, 2018

The Honorable Orrin Hatch
Chairman
Committee on Finance
United States Senate
219 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Ron Wyden
Ranking Member
Committee on Finance
United States Senate
219 Dirksen Senate Office Building
Washington, DC 20510

Dear Chairman Hatch and Ranking Member Wyden:

Thank you for your recent letter seeking information about the steps Visa takes to help prevent the sale of counterfeit goods on our network.

We share your concerns about the proliferation of counterfeit goods sold through e-commerce websites and appreciate the Committee's longstanding efforts to address this issue. Visa is committed to ridding our system of merchants that engage in the sale of counterfeit goods. Over the last decade, Visa has voluntarily maintained anti-piracy procedures that support the legitimate claims of rights-holders against websites that engage in the sale of counterfeit products and or intellectual (IP) infringing materials.

As a global payments technology company, Visa connects consumers, businesses, financial institutions and governments, enabling them to use electronic payments to facilitate commerce. Visa does not directly bring merchants into the payments system. Rather, acquiring banks are responsible for onboarding merchants and providing them access to electronic payment acceptance.

Although Visa generally has no direct relationship with merchants, we are committed to ensuring that the Visa system is used for legal purposes. When a rights-holder identifies a merchant engaged in selling counterfeit goods, Visa assists in resolving the issue by identifying the bank that signed up the merchant and advising the bank of its contractual commitment to take appropriate action to address any unlawful activity.

There is no simple solution to eliminate the sale of counterfeit goods on the internet. However, Visa has worked diligently with stakeholders to develop processes that efficiently combat the problem. To address this threat, our Franchise Risk Management team operates a global compliance program specifically dedicated to this effort.

This compliance program enforces Visa's Rules prohibiting illegal transactions (such as the sale of counterfeit/pirated goods) from entering the Visa payment system. To accomplish this, we take great effort to work with (1) rights-holders, who are uniquely situated to verify that a product is counterfeit/pirated, (2) merchant acquirers, who effect the remediation of the merchant's illegal activities, or ultimately, the termination of rogue merchants, and (3) law enforcement and courts as needed, that prosecute rogue merchants and enforce the law.

In response to your request for information, please see the enclosed Appendix A that addresses your questions in more detail. We look forward to working closely with the Committee on this important issue and welcome the opportunity to have further discussions about the work Visa is doing to combat the sale of counterfeit goods on our network.

Sincerely,



Robert B. Thomson, III
Senior Vice President, U.S. Government Relations
Visa Inc.



Appendix A

1. What types of tools do you provide to U.S. consumers to be compensated for losses experienced when buying a counterfeit good?

Visa's Rules allow consumers to 'chargeback' or 'reverse' the full amount of a sales transaction if the related product was determined to be counterfeit. A chargeback occurs when the consumer contacts their card-issuing bank to dispute a transaction and request a refund. The card-issuing bank then submits a chargeback reversal into the Visa payment system, which reverses the sale back to the merchant's acquiring bank.

2. What activities do you undertake to limit the availability of counterfeits accessible through e-commerce?

Visa has taken a number of actions to address the risks presented by merchants selling counterfeit or IP infringing goods in an e-commerce environment. These actions include:

- *Implementing a global rule that requires transactions to be legal in both the buyer's and the seller's jurisdiction;*
 - *Partnering with the Office of the U.S. IP Enforcement Coordinator in the White House and other payment networks to develop Industry Best Practices for Payment System Operators to guide the investigation of rights-holder complaints;*
 - *Incorporating counterfeit and IP infringements into a global compliance program to investigate rights-holder complaints and remove bad actors from the payment system;*
 - *Joining the International Anti-Counterfeit Coalition (IACC) and forming a strategic alliance to investigate complaints from IACC members;*
 - *Establishing a web-portal for smaller rights-holders to report complaints directly to Visa for investigation; (See www.visa.com/reportbrandabuse)*
 - *Establishing a risk management program to improve the oversight of sales agents that sign e-commerce merchants on behalf of banks in countries where counterfeiting is widespread;*
 - *Implementing a rule that requires marketplaces to have procedures to manage rights-holder complaints;*
 - *Educating acquiring banks on counterfeit issues, who ultimately determined it was appropriate to terminate hundreds of merchant accounts globally; and*
 - *Imposing enforcement actions against banks with excessive rule violations.*
3. What tools and protections do you provide to consumers outside of the United States to remedy losses from the purchase of counterfeit goods through e-commerce, and why might these differ from those offered within the United States, if at all?

The protections offered to consumers outside the United States (described in item #1 and #2) are the same as those provided to U.S. consumers.

4. What services, tools, protections, and assistance do you provide consumers with respect to preventing and remedying purchases of counterfeit goods?

As a global payment system operator, Visa provides card issuing banks and their cardholders the ability to 'chargeback' or 'reverse' transactions tied to the sale of counterfeit goods. (See reply to item #1 above.) Financial institutions provide their cardholders with information and assistance in exercising their rights in the event of the purchase of counterfeit goods or if there is other fraudulent activity on their account.

5. Do you take proactive actions against potential counterfeiters? If so, can you please describe those actions?

Visa takes the actions described in item #2 to address merchants that sell counterfeit or IP infringing goods and services. Since rights-holders are best positioned to determine if merchants are selling counterfeit goods, we rely on their notices and attestations to identify and remove bad actors from the payment system.

6. What types of programs and coordination do you participate in to curtail counterfeit with rights-holders, platforms, and/or shippers?

As noted above, Visa has implemented a rule that requires marketplaces to have procedures to manage rights-holder complaints. In addition, Visa has formed a strategic alliance with the IACC to investigate and remediate complaints from IACC members. We also regularly participate in IACC industry events by speaking on panels to address rights-holder concerns. Visa is also a member of the Alliance for Safe Online Pharmacies (ASOP) and we employ a third party vendor to identify and help us remove illegal online pharmacies from the payment system.

7. Do you engage with foreign governments to curtail proliferation of counterfeits? If so, what type of activities and coordination have proven successful? What have not?

Visa is not currently in active discussions or programs with foreign governments. Our alliance with the IACC is global in nature and serves rights-holders across a number of markets. The global compliance program we operate to address rights-holder complaints applies in every market where we operate. Visa does interact regularly with foreign law enforcement agencies on a variety of issues relating to payment card fraud.

8. If you become aware of a counterfeit distributed to a consumer, what actions do you have power to take?

- a. Can you please provide us with detailed statistics on the frequency with which you have taken actions with regard to suspected counterfeit products – either through investigations, destructions, abandonment, or otherwise?

If Visa discovers a merchant is selling counterfeit goods we contact the financial institution that has a contractual relationship with the merchant and require that they investigate the allegations. If the merchant is confirmed to be selling counterfeit goods our Rules require

the responsible acquiring financial institution to remediate (remove infringing items from website), or terminate the merchant's acceptance privileges.

a. From CY 2015 through June 9, 2018, Visa has worked with acquiring banks to terminate more than 840 merchant accounts that were selling counterfeit goods.

9. How have you coordinated with government and local authorities to curtail the distribution and manufacture of counterfeit goods within the United States?

As a payment system operator, Visa is not in a position to curtail the physical distribution or manufacture of counterfeit goods. However, we continue to enforce our rules and policies to prevent counterfeiters from gaining access to the Visa payment system. (See response to #1 and #2.) Visa has on occasion supplied information to federal law enforcement agencies in response to subpoenas concerning the sale of pharmaceuticals and counterfeit goods.

10. How have you coordinated with U.S. federal and local authorities to curtail the distribution and manufacture of counterfeit goods internationally?

See reply to #9 above.

11. If there are any other pieces of information, details, or data you feel would be helpful to the committee, we respectfully request that you submit them as part of your answers as well.

Visa would be pleased to meet with staff of the Committee on Finance to discuss the role a payment system operator can play in combating the sale of counterfeit goods. We would also be happy to discuss the challenges we experience combating counterfeiters globally.