

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

Reponses from Kari Kammel, August 29, 2022

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

Questions for Kari Kammel

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

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

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

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

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

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

³ Moureaud, et al, *supra* note 1.

2. Why are so many counterfeits coming from China?

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

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

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

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

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

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

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

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

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

⁹ Jay Kennedy, A-CAPP Center Product Counterfeiting Database: Insights Into Converging Crimes (2019), available at <https://a-capp.msu.edu/article/a-capp-center-product-counterfeiting-database-insights-into-converging-crimes/>

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

1. In your testimony both in the Senate and in the House, you noted the critical need to support more research on the global trade in counterfeit goods. You also noted the overlapping interest in supporting this research for multiple government agencies. In 2008, I authored the PRO-IP Act, legislation that established the Intellectual Property Enforcement Coordinator (IPEC), which exists to help coordinate the efforts of multiple agencies across the Federal government to help stop the theft of American intellectual property.

a. What role can the IPEC play in supporting or promoting the type of research that you view as critical to help gain further insight into the global trade in counterfeit goods?

The coordination role of the IPEC is incredibly important and the last three joint strategic plans have recommended research through coordination,¹ as well as some of these potential topics. However, there may be an opportunity for the GAO to do a study on the need for further interdisciplinary research on this topic, but also importantly for funding for this research perhaps through agencies such as the NSF, NIH, NIJ and others in order for academics and other researchers to be able to fill this gap of research in this much needed space.

b. Do you have any recommendations on how Congress or the Administration may be able to further leverage the coordination functions of the IPEC to address the global problem of counterfeit goods?

I do not at this time.

¹ 2013 Joint Strategic Plan, Victoria

Senator Thom Tillis

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

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

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

I have articulated my views on INFORM, SHOP SAFE and SANTA in my law review article co-authored with John Zacharia.¹ In summary, these three acts are vital for the protection of U.S. trademarks and the businesses that own them, and for consumers who purchase the products that the trademarks are placed on. While I believe SANTA Act is limiting based on industry, I believe both INFORM Consumers and SHOP SAFE should be passed for different, but complementary reasons.² Both a creation of secondary liability for e-commerce platforms who do not do enough to prevent counterfeits from being sold on e-commerce platforms and a cause of action for unfair or deceptive acts under the Federal Trade Commission Act are necessary to help stem this rapidly growing problem in the online space. Additionally, I think the Counterfeit Goods Seizure Act expansion of Customs and Border Protection to design patents is appropriate and needed in the U.S.'s measures to combat counterfeit products from entering the supply chain and ending up in the U.S. market.

- 2. I believe the focus of the SHOP SAFE Act should remain on goods that impact health and safety. Do you agree that is the right approach?**

I believe health and safety are important components of consumers' well-being to protect; although I would advocate for a different approach.

¹ See John H. Zacharia & Kari P Kammel, *Congress's Proposed E-Commerce Legislation for Regulation of Third-Party Sellers: Why It's Needed and How Congress Should Make It Better*, 21 U.C. DAVIS BUS. L.J. 91 (2020), available at <https://blj.ucdavis.edu/archives/vol-21-no-1/zacharia-and-kammel.html>.

² *Id.*; see also Kari Kammel, *INFORM Consumers Introduction into the America COMPETES Act: How potential changes could create too many loopholes for it to be useful or effective*, Feb. 11, 2022, available at <https://a-capp.msu.edu/article/inform-consumers-introduction-to-america-completes-act/>; Kari Kammel, *Revisiting SHOP SAFE after Markup*, 2021, available at <https://a-capp.msu.edu/article/revisiting-the-shop-safe-act-after-markup/>

If not, what changes would you make to the scope of this definition, while maintaining the focus on health and safety?

In my testimony before the House Judiciary Committee and in some of my articles, I advocate for a harmonizing of goods. I believe that with the current language in the bill, it may cause some unintended consequences. Instead of only covering “goods that implicate health and safety”, I would suggest instead covering *all* counterfeit goods, but creating enhanced penalties, such as treble damages for goods that do implicate health and safety.

From my testimony, I believe there are a few issues with the current definition that would deter from its intended impact: 1) it is not clear from the language as to who will be the determiners of whether a good implicates health and safety,³ nor what goods exactly fall under this definition, which could cause an incredibly onerous process adding to an already large problem of identifying counterfeit goods,⁴ 2) create two classes of counterfeit marks under the Lanham Act, thus creating a system where not all marks are entitled to the same protection, potential prioritization system on e-commerce and drive counterfeiters to certain industries.⁵

- 3. How should we best incentivize platforms to protect against stolen, counterfeit, and unsafe goods?** While we have seen some improvements in some platforms in recent years due to pressure from public awareness and potential legislation, I believe this is an area where regulation with clear penalties can be effective. After all, the business of counterfeiting and any result from the sale of counterfeits whether in a legitimate or illegitimate supply chain, whether in a brick-and-mortar store or online, comes down to financial proceeds. Thus, the most effective deterrent to what amounts to a financial crime is a financial deterrent.⁶

Will a one-size fits all approach work?

Yes, if the language is inclusive enough in the bill and there is room for appropriate application to various industries and e-commerce platforms. In the same way that secondary liability for trademark counterfeiting in the brick-and-mortar space could, in theory, be applied to any size of company in the supply chain, secondary liability for trademark counterfeiting in the online space can be created to have appropriate, reasonable application to various sizes of platforms with various technological and non-technological capabilities.

³ Kari Kammel, Testimony, The SHOP SAFE Act: Stemming the Rising Tide of Unsafe Counterfeit Products Online Subcommittee on Courts, Intellectual Property, and the Internet, at 12, available at <https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=4567>

⁴ Kammel, House Testimony, at 12, *citing* Zacharia & Kammel, *supra* note 1, at 117

⁵ *Id.* at 12.

⁶ *See generally*, INTA Board Resolution, Proceeds of Counterfeiting, March 2021, available https://www.inta.org/wp-content/uploads/public-files/advocacy/board-resolutions/Proceeds-of-Counterfeiting-Resolution_Final.pdf

If not, how should we tailor solutions to different platforms – by industry, by size, by consumer base?

What are your thoughts on using technology to help improve consumer knowledge about the goods they are purchasing? For example, US Customs piloted a proof of concept “consumer portal” where a consumer, at the point of making a purchase on a public facing web page, can scan in a product code and get information about whether or not that specific product is a legitimate, licensed good.¹ A serialized Global Trade Identification Number (GTIN) was used to uniquely identify individual products with an automated legitimate goods checking service. Consumers would scan a QR code and either receive positive confirmation (along with information like a product image and country of origin) or an indeterminate result stating that no record is found. Would this be a valuable tool to help combat counterfeits?

While technology is a useful tool, it is not and should not be the only tool used to help improve consumer knowledge. As mentioned above in your question, there are some examples of helping consumers to identify legitimate goods through QR codes or other technologies. Many brands have used some of these ‘overt’ tools for years to help consumers. However, companies also use a variety of other technologies not available to consumers, but only to the brand, or the Customs that are covert or require other devices to authenticate. I believe continued use of technologies by brands, law enforcement, platforms, and as appropriate consumers will help in the fight against counterfeits. However, and more importantly a comprehensive consumer education and awareness campaign would, in my opinion, be much more effective.

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

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

While our Center has previously researched best practices for anti-counterfeiting self-regulation in other industries, such as with ocean transportation intermediaries,⁷ I believe the biggest consideration will be the quickly changing technological mechanisms that can be used to verify identity of sellers as well as their postings and products. As we have seen in other countries, once a new technology is used for verification, it will not be long until counterfeiters will figure out how to evade it—the ever-evolving process that law enforcement has always dealt with. If the KYC considerations are flexible for technological growth and not centered around only technology that is being used today, the law can then avoid becoming irrelevant to ‘law disruptive technology.’⁸

5. Under current law, how would you describe the distribution of the burden between online platforms and brand owners when it comes to policing counterfeits? Do you believe this strikes the right balance, and if not, what do you believe is the right balance?

In my opinion the burden is not balanced and the SHOP SAFE Act in particular would rebalance that. Under the current law,

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

A brand owner, however, does not want injury to its reputation, or injury to its consumers,⁹ so practically they must monitor and notify the online marketplace to remove a suspicious listing or a seller that could be selling an illicit or unauthorized product, even though the counterfeit product is not theirs. For every listing that a brand owner successfully petitions to have removed from an online marketplace, many more illicit listings will likely take its place¹⁰—leading to what is called in the industry the “whack-a-mole” problem. Because this has

⁷ See e.g. Jay Kennedy & Jeremy Wilson, *Liabilities and responsibilities: ocean transportation intermediaries (OTIs) and the distribution of counterfeit goods*, 19 MARITIME ECONOMICS & LOGISTICS, 182-87 (2017) (discussing the six steps of self-regulation of firms based on the non-economic criteria purchasing process outlined by I. Maignan, B. Hillebrand, and D. McAlister, *Managing socially-responsible buying: How to integrate non-economic criteria into the purchasing process*, 20 European Management Journal 641–648 (2002)).

⁸ See Testimony of Kari Kammel, *supra* note 3, at 11.

⁹ Kammel, et al, *supra* note 3, at 252 (citing See Stefanie Wood Ellis, *Brand Protection in the Digital World*, WORLD TRADEMARK REV. (Apr. 23, 2020), <https://www.worldtrademarkreview.com/anti-counterfeiting/brand-protection-in-the-digital-world> [<https://perma.cc/V8DY-7K4E>] (describing how counterfeit products can negatively affect a brand when an inferior product is thought to be the real product, and the lower quality is now associated with the brand or when an unsafe counterfeit hurts individuals).

¹⁰ Kari Kammel, Jay Kennedy, Daniel Cermak, and Minelli Manoukian, *Responsibility for the Sale of Trademark Counterfeits Online: Striking a Balance in Secondary Liability While Protecting Consumers*, 49 AIPLA Q. J. 221, 254 (Spring 2021) (citing Daniel C.K. Chow, *Alibaba, Amazon, and Counterfeiting in the Age of the*

become so time consuming but needs to be addressed, an entire industry of online anti-counterfeiting providers selling their services and technologies to brands, as well as law firms expanding their practices, has developed to search the web, e-commerce sites, and social media platforms for counterfeits using artificial intelligence, machine learning, or other technologies and skills.¹¹ Finally, transparency is lacking in regard to seller identification and location, details on systems for vetting sellers, products, removals of listings, where counterfeits go after they have been reported or taken down, how repeat sellers of counterfeit are removed, how warehousing might work and other details that are important for both the intellectual property rights owner, law enforcement, and an informed consumer, as they have not been required by law.¹²

The burden needs to be balanced in order to disrupt the opportunity structure for third party sellers of counterfeit online. As shown in Figure 1 and my research, the party who holds the most ability and control of that environment is the e-commerce platform, not the brand.¹³

Figure 1.¹⁴



6. Should brand owners be required to provide information to platforms for them to benefit from the provisions of the SHOP SAFE Act?

Yes. I believe they should. There should still be a duty to not only report, but also to

Internet, 40 NW. J. INT'L L. & BUS. 157, 161 (2020).

¹¹ Kammel, et al, *supra* note 3, at 252.

¹² Kammel, Testimony, *supra* note 3 at 8.

¹³ *Id.* at 8; see also Kari Kammel, Jay Kennedy, Daniel Cermak, and Minelli Manoukian, *Responsibility for the Sale of Trademark Counterfeits Online: Striking a Balance in Secondary Liability While Protecting Consumers*, 49 AIPLA Q. J. 221 (Spring 2021).

¹⁴ For a detailed discussion of this necessity for proactive disruption, see Kari Kammel, Jay Kennedy, Daniel Cermak, and Minelli Manoukian, *Responsibility for the Sale of Trademark Counterfeits Online: Striking a Balance in Secondary Liability While Protecting Consumers*, 49 AIPLA Q. J. 221 (Spring 2021).

provide or verify trademarks and whether they are authentic. Historically, however, this is not where the crux of the problem has been—it has been with brands who are trying to constantly deal with the dated notice and takedown procedures and the necessary whack-a-mole approach, which removes postings after they are live but does nothing to deal with proactive prevention.

7. What incentives do platforms or brand owners need to share data that they have about harmful products or bad actors with each other, with the public, and/or with law enforcement?

The sharing of data has been a major problem in this space and continues to be. I can think of analogies to other types of serious criminal activity, when sharing of data regarding connection with criminal activity either with law enforcement, such as the PATRIOT Act,¹⁵ or sharing information of criminal activity with the public, such as the CLERY Act¹⁶ have had to be legislated in order to have compliance.

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

I cannot provide accurate numbers for several reasons. There are usually two sources of statistics—1) those that are released by the e-commerce platforms about their own takedowns, and 2) those that can be reported by brands or web-scraping technology companies who work for brands in the notice and take down procedure.

Regarding the first, we cannot independently verify those numbers. However, despite some of the reported take-down numbers by platforms that seem to be large, we do not know a) how long those postings were up, b) how many products were sold during the time those postings were up, c) who purchased those products and if there was a ‘recall’, and d) what happened to the revenue made from the sale of that product.

Regarding the second, most brands are trying their best to remove counterfeit postings but it is an imperfect process as they do not have behind the scenes access to the postings, only what they can see online.

9. I have heard concerns that the SHOP SAFE Act could risk enabling bad faith takedown notices. Do you agree with that assessment? If so, do you have any recommendations for how best to tackle this issue?

¹⁵ USA PATRIOT Act, Sec. 314(b), <https://www.fincen.gov/section-314b> (permitting financial institutions, upon providing notice to the United States Department of the Treasury, to share information with one another in order to identify and report to the federal government activities that may involve money laundering or terrorist activity). *Id.*

¹⁶ Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act of 1990, 20 U.S.C. §1092(f) (2018) (requiring public disclosure and reporting, timely warnings, and prevention education).

I believe, yes, there is a small risk of bad faith takedown notices. However, I believe that is distracting from the larger issue of the massive sale of counterfeit goods. On one side, the risk to consumers is great if they purchase a counterfeit goods for injury, death, or a faulty cheap product. On the other side, the risk is that a seller may have to go through a civil process to prove that they were selling legitimate product, while this may be inconvenient, I believe is not in the same realm as the risk of counterfeit.

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

1. How does products liability law factor in when consumers purchase products that are counterfeits and also dangerous?

We have seen in the past three years, consumers who have been injured or killed by the purchase of counterfeit products online file products liability cases against e-commerce platforms, because no other legal remedy was available to them, and they could not find the seller.¹ In these cases, state courts have struggled to determine whether the e-commerce platform, in all these cases Amazon, was considered part of the supply chain if they were not the official ‘seller’ of the good.² States varied in the outcome of these cases. However, it is reflective to note that U.S. consumers are getting injured by counterfeit products and have no legal recourse in many cases for the harm caused to them.

We have seen cases where online sellers attempt to use Section 230 to block products liability claims, though they aren’t always successful. Please discuss whether you see Section 230 as a potential obstacle for consumers in getting recourse for unsafe goods they buy online.

My research has not included Section 230 and is outside the scope of my expertise.

2. You have mentioned the need to account for “law disruptive technology” due to changes in marketplaces that the existing law did not foresee. However, we have heard from other witnesses—namely the Internet Association—that retailers, not online platforms, are in a better position to know whether goods are counterfeits or unsafe. Please describe “law disruptive technology” further, as well as how specifically the law can account for that when considering how to protect consumers from counterfeits and unsafe products.

I first applied the concept of “law disruptive technologies” to e-commerce in my research in early 2020.³ In order for a technology to be ‘law disruptive, it must have three components: (1)

¹ John H. Zacharia & Kari Kammel, *Congress’s Proposed E-Commerce Legislation for Regulation of Third-Party Sellers: Why It’s Needed and How Congress Should Make It Better*, 21 U.C. DAVIS BUS. L. J. 91, 97-102 (2020) (discussing recent strict liability cases).

² *Id.*

³ Kari Kammel, *Examining Trademark Counterfeiting Legislation, Free Trade Zones, Corruption and Culture in the Context of Illicit Trade: The United States and United Arab Emirates*, 28 MICH. STATE INT’L L. REV. 210-235 (2020).

it must involve a new or improved technology; (2) it must have the potential to make a significant economic or societal impact; and (3) it does not fit into the current legal framework.⁴

Applying this to e-commerce, we see:

“[E-commerce is (1) new technology that allows consumers and retailers to meet anywhere in the world with no barriers to access; (2) e-commerce has had major economic and societal impacts; and (3) the laws that apply to trademark counterfeiting in brick and mortar situations do not fit into the e-commerce scenario in most of the current legal framework globally.”⁵

While I do agree partially with my colleagues that the brand owners should play some role in sharing their trademarks and cooperating with platforms, I respectfully disagree that brands are in the best place to prevent counterfeiting from occurring on the platforms. The platforms control their marketplaces and spaces that they have created.

In my testimony before the House Judiciary Committee based on my research with my colleagues on the opportunity structure, I discuss that:

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

The operators of online marketplaces can significantly mitigate opportunities for the sale of counterfeit goods on their platforms by acting as guardians or controllers, engaging in proactive activities and implementing policies that target motivated sellers of counterfeit goods and suitable targets.⁶ With regard to addressing motivated sellers of counterfeits, platforms have the ability to identify potentially infringing listings and proactively embargo or reject these listings.⁷ These activities can disrupt the opportunity for third party sellers to sell counterfeits to consumers. See Figure 1.⁸

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

⁴ Kari Kammel, *Examining Trademark Counterfeiting Legislation, Free Trade Zones, Corruption and Culture in the Context of Illicit Trade: The United States and United Arab Emirates*, 28 MICH. STATE INT’L L. REV. 210-235 (2020) (applying the concept first discussed in William Sowers, *How do you Solve a Problem like Law-Disruptive Technology?*, 82 L. & CONTEMP. PROBS. 193-214 (2019)).

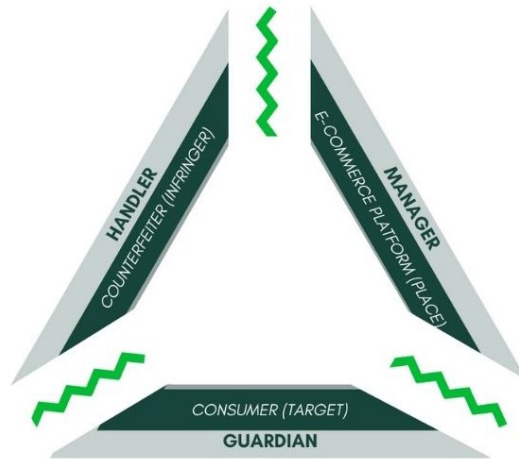
⁵ *Id.*

⁶ *Id.* at 248-249 (citing to John E. Eck et al., *Risky Facilities: Crime Concentration in Homogeneous Sets of Establishments and Facilities*, 21 CRIME PREVENTION STUDS. 225, 240 (2007); Jay P. Kennedy, *Sharing the Keys to the Kingdom: Responding to Employee Theft by Empowering Employees to Be Guardians, Place Managers, and Handlers*, 39 J. CRIME & JUST. 512, 519 (2015)).

⁷ *Id.* at 249.

⁸ Kari Kammel, *Testimony, The SHOP SAFE Act: Stemming the Rising Tide of Unsafe Counterfeit Products Online Subcommittee on Courts, Intellectual Property, and the Internet*, at 12, available at <https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=4567>

DISRUPTING THE OPPORTUNITY STRUCTURE FOR COUNTERFEITING IN AN ONLINE ENVIRONMENT



Thus, because the platform has created the marketplace and has ultimate gatekeeping authority and control over its own creation, they should have the burden to determine who is selling and what products are being sold to consumers on their marketplace with some assistance from brands as to identification of trademarks and some continued notice and takedown.