

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

Questions for Aaron Muderick

1. Do online platforms offer any tools to help small or medium size businesses prevent counterfeits of their products sold online?

I am aware of some tools to help businesses attempt to remove counterfeit products from online marketplaces, for example take-down programs and the Amazon Brand Registry. We participate in the Amazon Brand Registry as well as similar brand-owner tools on Walmart.com, eBay, and other marketplaces. We have a part-time staff member who walks through every online marketplace each week sending takedown notices and making enforcement efforts to protect our brand. Additionally, we document non-compliant unsafe products we find on the marketplaces which do not violate our intellectual property. From time-to-time I have our staff reach out to marketplaces to inform them and educate them that these products which, while not counterfeit, are not legal for sale. It is a hamster wheel that does not seem to bring meaningful results.

However, in my experience, the burden of enforcement disproportionately relies on rights holders and consumers to police and report infringement. Rights holders are required to scour online marketplaces and investigate, report, and prove infringement to the marketplace before counterfeit items are removed. This problem is compounded by the fact that each marketplace has different processes and procedures in place for handling infringement claims, forcing rights holders to constantly navigate different, and often changing, marketplace enforcement procedures. My experience is that these tools are inconsistently implemented and are not uniform across marketplaces, forcing rights holders to navigate the different, and often changing, marketplace policies and procedures. In addition, many of these tools are highly burdensome, either requiring payment from the rights holder or sharing extensive amounts of data by the rights holder with the marketplaces.

I enclose the June 21, 2022 letter from The Toy Association that provides information from its members regarding the volume of counterfeits online and the resources expended to attempt to address those counterfeits.

I also enclose The Toy Association’s 2020 whitepaper [*Taking Fake Toys Offline: A 2020 Focus on Proactive Measures to Reduce Counterfeits and Unsafe Toys Sold on Online Marketplaces*](#) and 2019 whitepaper [*The Real Threat of Fake Toys: The Increase of Knockoff and Counterfeit Toys Sold Online and How to Fight Back*](#) that provide additional detail regarding the problems with disproportionately placing the burden on businesses rather than on the platforms and sellers.

2. What specific steps has your company taken to better educate consumers about the potential dangers of counterfeits, and in particular the potential harms to their health and safety?

Consumer education is critical in the fight against counterfeits. Online marketplaces are ubiquitous, and many have an established and trusted brand image equal to brick-and-mortar retailers due to their high volume of sales and extensive consumer exposure. As a result, consumers have developed a comfort with and trust in online marketplaces, just as they trust brick-and-mortar retailers. In my experience, consumers remain largely unaware of the scope of counterfeit or non-compliant product available on online

marketplaces, which can result in consumers unknowingly providing children with non-compliant and potentially unsafe toys.

It has also become increasingly difficult to differentiate between compliant and non-compliant product on the marketplaces because counterfeiters are adept at blending in and hiding on the sites, including by categorizing the product under a rights holder's brand name, piggybacking on legitimate listings, using keywords, and pricing at the same or even higher than legitimate products.

As a brand owner, my company regularly provides customer information to try to address this issue. We encourage customers to purchase from retailers they know, either in-person or online. We scout social media and if we see counterfeit or infringing product in videos posted by families, we ask that they be taken down. We also inform those families if we know the specific goods to be unsafe in some way.

I am also aware that the Toy Association has provided education to consumers. For example, in addition to releasing two comprehensive White Papers regarding online marketplace counterfeit issues, the association has also briefed members of state legislatures and Congress and done numerous media appearances where they urged consumer awareness of potential counterfeit products on online marketplace sites.

Platforms must also do their part to educate consumers to enable them to make sound purchasing decisions and avoid falling victim to counterfeit products. For example, consumer education can be accomplished by transparency and honest communication about products and sellers, including conspicuous identification of the sellers, such as location and contact information. Further, marketplaces should notify consumers who have or may have received counterfeit product. Once a marketplace is aware that a seller has sold counterfeit product, the marketplace should inform all consumers who have purchased that product from the seller that they may have received counterfeit and unsafe product. The marketplace should also investigate other products sold by that seller as part of their proactive measures, and if they are determined to also be counterfeit, notify consumers of those counterfeit products as well.

3. What's been your experience working with law enforcement to protect against counterfeits? What can be done to better improve law enforcement efforts?

While our products are often infringed on from a trademark and copyright standpoint, we have not dealt with true counterfeits which completely impersonate our legitimate products. As such, I have no direct counterfeit law enforcement experience to share.

4. How difficult, given the size of your company, is it to coordinate intellectual property protection around the world? What has been your experience with addressing counterfeiting problems with foreign law enforcement? Has your company ever worked with the USPTO to get assistance in enforcing your IP rights abroad?

The world is a large stage and it is very difficult for a company our size to truly establish brand control on a global scale. We do our best to register our trademarks in countries where we do business. We have never interacted with foreign law enforcement or with USPTO in regards to enforcing our rights abroad.

Senator Thom Tillis

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

Aaron Muderick, Founder and President, Crazy Aaron's

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

I truly appreciate your and others' efforts to advance bipartisan legislation to strengthen the competitiveness of American workers and businesses and curb the flow of counterfeit goods in ecommerce and I support all of the above listed legislation. In particular, I strongly support the SHOP SAFE Act and INFORM Consumers Act.

Currently, the burden of enforcement disproportionately relies on rights holders and consumers to police and report infringement. The current system places no responsibility on the seller or the marketplace and instead requires that rights holders scour online marketplaces and investigate, report, and prove infringement to the marketplace before counterfeit items are removed. This causes delay, allows sales of counterfeits to unsuspecting consumers, and puts the responsibility and expense on brand owners. This problem is compounded because marketplace processes vary, forcing rights holders to constantly navigate different, and often changing, marketplace enforcement procedures. SHOP SAFE would address many of these issues by incentivizing platforms to engage in a set of best practices for vetting sellers and goods, punishing repeat offenders, and ensuring that consumers have the best, most accurate information available to them when making purchases online.

Currently, online marketplaces lack an effective, proactive, transparent process for screening sellers or products that are offered by sellers and disclosing basic seller information to consumers, so they know the source of their product. Requiring online marketplaces to verify the identity of sellers and disclosure basic seller contact information to consumers and to businesses trying to protect their rights, are important steps in creating more transparency and accountability in ecommerce. Verification and disclosure make it easier to track, enforce rights, and suspend bad actors, and makes it easier for consumers to know who to contact if they receive a product that does not meet their expectations or even worse, causes harm. If there is no verified contact information, there is no ability for a business, consumer, consumer advocacy group, or law enforcement to trace and enforce at the source. I support the INFORM Consumers Act introduced with bipartisan support in both the Senate and House as a good first-line of defense in protecting consumers and

legitimate businesses from these illicit third-party sellers.

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

Everyone is an ecommerce customer and platforms should be held to the same standards as brick-and-mortar retailers for ensuring customer protection. Knowing the basics of ‘who am I doing business with’ is the most basic part of any transaction. It is personally frustrating that we are 25 years into internet commerce and consumers do not have the right to know from whom they are purchasing.

3. Are there voluntary steps and actions that platforms could take stop the distribution of counterfeit products to consumers?

Platforms could and should take all the steps laid out in the SHOP SAFE Act and INFORM Consumers Act voluntarily. That legislation requires that platforms take actions for screening sellers and products that brick-and-mortar retailers already take and should be common-place for platforms as well.

By law, legitimate toy manufacturers and brick-and-mortar retailers of children’s products must obtain safety certifications and comply with over 100 federal safety standards. Legitimate toy companies spend significant resources to bring new, fun, educational and safe toys to the U.S. market. Platforms should also ensure that products offered comply with these safety standards. By not doing so, platforms have created an ecommerce environment where third-party sellers can operate anonymously online and take advantage of consumer faith by selling counterfeit or stolen products that may not comply with federal safety standards and put our children at risk. In fact, these products often blatantly violate safety regulations on their face, yet are offered on popular mainstream online marketplaces and marketed as intended for children. *Any* business selling toys in the U.S must be held to the same high safety standards that apply to the toy brands and brick and mortar retailers’ consumers have come to know and trust.

4. What voluntary measures do you participate in to help keep online marketplaces safe from counterfeit goods?

I do participate in numerous measures to attempt to remove counterfeit products from online marketplaces. We participate in the Amazon brand registry as well as similar brand-owner tools on Walmart.com, eBay, and other marketplaces. We have a part-time staff member who walks through every online marketplace each week sending takedown notices and making enforcement efforts to protect our brand. Additionally, we document non-compliant unsafe products we find on the marketplaces which do not violate our intellectual property. From time-to-time I have our staff reach out to marketplaces to inform them and educate them that these products which, while not counterfeit, are not legal for sale. It is a hamster wheel that does not seem to bring meaningful results. This is the reason I support the SHOP SAFE, SANTA and INFORM Acts.

I enclose The Toy Association’s 2020 whitepaper [*Taking Fake Toys Offline: A 2020 Focus on Proactive Measures to Reduce Counterfeits and Unsafe Toys Sold on Online Marketplaces*](#) and 2019 whitepaper [*The Real Threat of Fake Toys: The Increase of Knockoff and Counterfeit Toys Sold Online and How to Fight Back*](#). These whitepapers explained that the burden of enforcement disproportionately relies on rights holders and consumers to police and report infringement. Rights holders are required to scour online marketplaces and investigate, report, and prove infringement to the marketplace before counterfeit items are removed. This problem is compounded by the fact that each marketplace has different processes and procedures in place for

handling infringement claims, forcing rights holders to constantly navigate different, and often changing, marketplace enforcement procedures. This process removes the initial burden from the seller and further gives the sellers the benefit of the doubt.

Some online marketplaces have begun offering more robust collaborative programs for rights holders to report and submit enforcement claims, but my own experience is that these programs are inconsistently implemented and are not uniform across marketplaces, forcing rights holders to navigate the different, and often changing, marketplace policies and procedures. In addition, many of these programs are highly burdensome, either requiring payment from the rights holder or sharing extensive amounts of data by the rights holder with the marketplaces.

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

In my experience, brand owners are forthcoming and transparent about harmful products and bad actors and share that information with each other, with the platforms and with law enforcement willingly and look for opportunities to do so. They do not need further incentives.

However, platforms do need incentives and it is apparent that legislation is necessary to require this because they are much less transparent in my experience unfortunately. Transparency of seller information is inadequate, resulting in a lack of information available to consumers making purchasing decisions, and to rights holders and law enforcement attempting to track and enforce against counterfeiters.

Some online marketplaces are beginning to increase access to seller information, such as through brand owner programs. However, access is often inconsistent across marketplaces, providing a variety of different information depending on the program. Further, even when marketplaces do offer such information that is necessary for subsequent enforcement actions, it is often incomplete or incorrect due to inadequate preliminary verification.

At a minimum, platforms must improve collection, verification, transparency, and information sharing regarding the sellers, including providing the verified identity, contact information, and location for all sellers on the face of the listing. This allows consumers to make more informed purchasing decisions and eases enforcement by rights holders and law enforcement.

6. Should brand owners be required to provide information to platforms for them to benefit from the provisions of the bill? What concerns do toy sellers like yourself have with a requirements that platforms would not have to act unless notified by the brand owner?

Brand owners have been carrying the disproportionate burden of enforcement for years. We spend millions of dollars a year to attempt to reactively stop counterfeiters and because of the ecommerce ecosystem created by platforms, counterfeiters remain one step ahead.

Platforms lack an effective, proactive, transparent process for screening sellers or products that are offered by sellers. Instead, the burden of enforcement disproportionately relies on rights holders and consumers to police and report infringement. The current system requires that rights holders scour online marketplaces and investigate, report, and prove infringement to the marketplace before counterfeit items are removed. This causes delay, allows sales of counterfeits to unsuspecting consumers, and puts the responsibility and expense on brand owners. By not adequately screening sellers or products, the platforms allow bad actors and sellers

to prosper and there is no amount of resources rights holders can expend to adequately neutralize bad actors if marketplace approaches are disproportionately reactive in nature.

Some platforms have argued that thorough verification of sellers and their products is not possible because of the volume of sellers or products on their platform. This volume of sellers and products is not inevitable though; rather, it is a business decision that platforms themselves make. If a marketplace is unable to verify the identity of its sellers or products because of the high volume, that is a result of its own creation.

I again reference the enclosed Toy Association whitepapers that provide more detail and context for why the burden must be shifted from rights holders to the platforms.

7. Should platforms be required to obtain and/or share information to address the seller's origin, such as where the goods are shipped from? Should it also include the country of manufacture? How should platforms address the issue of bad actors providing bad information?

In my opinion, platforms should be required to verify, gather and share this information. As shared above, transparency is key to the fight against counterfeits.

8. At the hearing, you mentioned that you lacked standing to challenge unsafe products similar to Crazy Aaron's branded thinking putty once sellers stopped infringing on the trademark, but those unsafe products continued to circulate. Tech platforms have publicly stated that they are not as well positioned as brand owners to distinguish counterfeit from genuine products.¹ Yet from your testimony it appears brand owners are not positioned to flag unsafe products that may not fit within the contours of trademark infringement. How should we best incentivize platforms to protect against stolen, counterfeit, and unsafe goods? Will a one-size fits all approach work? If not, how should we tailor solutions to different platforms – by industry, by size, by consumer base?

By law, legitimate toy manufacturers and brick-and-mortar retailers of children's products must obtain safety certifications and comply with over 100 federal safety standards. Legitimate toy companies spend significant resources to bring new, fun, educational and safe toys to the U.S. market. Platforms should also ensure that products offered comply with these safety standards. *Any* business selling toys in the U.S must be held to the same high safety standards that apply to the toy brands and brick and mortar retailers' consumers have come to know and trust.

At certain times I have posed as a commercial buyer for toy products I know to be unsafe and not meet US safety standards. I have requested the safety testing documentation from the overseas manufacturer and always received some form of documentation (PDF file) that verifies the toy which I know to be unsafe 'passes' safety testing. Sometimes the document is just a forgery. Sometimes it is a legitimate document but the toy sent to the lab is slightly different than what is actually sold. Sometimes the testing is incomplete so that not every federal standard was actually tested. The tests which would have failed are left off the documents so that at the top it says 'PASS' in big green letters. If you added in the tests which were skipped, it would say 'FAIL', in all red.

For example, I have seen illegal magnetic putty toys with passing test documents because the toy is sent to the test lab without the magnet included. The lab provides a passing certificate because no unsafe components

are detected. The seller then uses this certificate to list the product in the marketplace. When the product is actually shipped to consumers, the illegal magnet is added back to the product. Because the marketplace never compares the physical goods with the test certificate, this is not detected by the marketplace. When I have pointed this out I get a robotic answer, “The vendor provided 3rd party laboratory verification that their item meets safety standards”. No one is digging into the details to actually confirm that what is tested is the same as what is being sold. It is frustrating.

More rigorous work by the marketplace would assist in preventing this. For example, the marketplaces could connect with the laboratories to confirm whether a document is a forgery. They can cross-check the number on the certificate issued by the laboratory to confirm it is valid and is for the correct item. Item categories that are most prone to abuse could be vetted with additional layers of expertise instead of being highly automated. The tools exist to identify these problems. What is required is for the marketplaces to use them.

Why is this such a problem with online marketplaces and not for brick and mortar retailers? Because the marketplaces bear no risk of liability for selling these counterfeit, illegal, and dangerous items. Brick and mortar retailers do and you can see the positive result for the American consumer who shops in-person vs. online.

9. How many listings do Toy Association members flag annually for online platforms? What percentage of these listings are removed after an initial alert? What is the total number that are ultimately removed?

I enclose the June 21, 2022 letter from The Toy Association that provides information from its members regarding the volume of counterfeits online and the resources expended to attempt to address those counterfeits.

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

No, I do not agree with that assessment. In my experience, I and my fellow brand owners act reasonably and in good faith to submit takedown notices. If Brand owners truly acted spitefully or in bad faith, there are other legal avenues that sellers could take against those brand owners.

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