

VERIFICATION OF THIRD-PARTY ONLINE MARKETPLACE SELLERS: PROTECTING CONSUMERS AGAINST COUNTERFEITS

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INTRODUCTION

It is likely that every reader of this comment has or knows someone who has purchased goods through internet stores or online marketplaces. Worldwide, approximately 1.5 billion people above the age of fifteen have made purchases online.¹ Three hundred and sixty million of these e-consumers have purchased goods from other countries, an increase of 38.4 percent in just two years.² These numbers are expected to grow as more people turn to online shopping and doorstep delivery in their efforts to social distance as a response to the COVID-19 outbreaks.³ Online shoppers typically select their online purchases based on written descriptions and photographs of the product.⁴ This method of

1. Org. for Econ. Co-operation and Dev. [OECD]/Eur. Union Intell. Prop. Off. (2021), *Misuse of E-Commerce for Trade in Counterfeits*, E-Commerce: The Economic Landscape, OECD PUBLISHING 2021, 21, <https://doi.org/10.1787/1c04a64e-en> [hereinafter *Misuse of E-Commerce*].

2. *Id.* at 21–22.

3. *Id.* at 22; see also, *In Five Days AxleHire Doubles Same Day Delivery Volume of Goods to Consumers*, BUSINESS WIRE, (May 13, 2020), <https://www.businesswire.com/news/home/20200313005524/en/In-Five-Days-AxleHire-Doubles-Same-Day-Delivery-Volume-of-Goods-to-Consumers>.

4. See *Cracking the Consumer Code*, SALSIFY, <https://www.salsify.com/hubfs/asset/ebook-cracking-the-consumer-code-2017.pdf>.

shopping makes it difficult to determine whether the product is an original manufacture or a counterfeit, made to look like an authentic brand-name product, using the manufacturer's logo and brand name without permission or authorization.⁵ While the purchase of counterfeit goods has always been a risk, the proliferation of e-commerce and unverified sellers entering these marketplaces increases that risk substantially.⁶

This comment will discuss the issue of counterfeit goods flooding online marketplaces⁷ and the role that legal anonymity plays in shielding the sale or distribution of counterfeit goods. This comment will (1) address the problems brand owners and marketplaces face when attempting to locate sellers responsible for sale of counterfeit products, as well as the plight of the consumer when the seller cannot be found or is located outside U.S. jurisdiction; (2) track the progression of laws in both the United States and other countries in their efforts to curb counterfeit sales, by imposing laws that require e-commerce platforms to adequately vet third-party seller identities or face penalties for failing to do so; (3) examine the how legal changes will benefit and disadvantage stakeholders and their businesses; and (4) conclude with potential solutions to the ongoing battle against counterfeits.

II. BACKGROUND

Recognition of counterfeit consumer products began as far back as the 18th century.⁸ Historically, brick-and-mortar store owners and managers were contributorily liable for crimes and

5. *Trademark Counterfeiting*, LEGALMATCH, <https://www.legalmatch.com/law-library/article/trademark-counterfeiting.html> (last visited Jan. 12, 2024).

6. See John H. Zacharia & Kari Kammel, *Congress's Proposed E-Commerce Legislation for Regulation of Third-Party Sellers: Why It's Needed and How Congress Should Make It Better*, 21 U.C. DAVIS BUS. L. J. 91, 94 (2021) [hereinafter Zacharia].

7. Also known as "e-commerce platforms" or "e-commerce marketplaces", this comment will use the term "online marketplace" to mean a website that brings together multiple third-party vendor product listings.

8. T.N. Ashok, *World of Counterfeits*, THE STATESMAN (May 16, 2019), <https://www.thestatesman.com/supplements/section/world-of-counterfeit-1502755730.html>.

injuries related to counterfeit products sold under their roof.⁹ In brick-and-mortar settings, there are tangible products to evaluate and seize, vendors who are physically present, and marketplace operators who are responsible for vetting the vendors and enforcing applicable laws.¹⁰ In other words, in physical settings, counterfeit products are easier to detect, and there is someone to hold accountable.

A. *The Rise of Online Marketplaces*

With the advent of online marketplaces,¹¹ dealers of counterfeit products have a new medium through which to sell fake products.¹² The abundance of counterfeit products in the marketplace correlates with a rise in e-commerce.¹³ Sales of counterfeit goods rose from \$200 billion in 2005 to \$509 billion in 2016¹⁴ and were projected to reach \$1.9 trillion to \$2.81 trillion by 2022.¹⁵ Shipments from China and Hong Kong are among the most notorious for containing illicit and counterfeit products.¹⁶

9. See, e.g., *United States v. Frison*, 825 F.3d 437, 439, 443 (8th Cir. 2016) (involving the owner of a flea market allowing vendors to sell what he knew to be counterfeit goods); see also *Luxottica Group, S.P.A. v. Airport Mini Mall, LLC*, 932 F.3d 1303, 1317 (11th Cir. 2019) (finding that notice letters to a shopping mall owner was sufficient notice to alert them of suspicious counterfeit activity).

10. See, e.g., *Frison*, 825 F.3d at 439, 443; see also *Luxottica Group*, 932 F.3d at 1317.

11. E-commerce sites include Amazon.com, eBay.com, Walmart.com, Rakuten.com, AliExpress.com, Tmall.com, Taobao.com, Mercadolibre.com, and many others. See generally *Members*, INTERNET ASS'N, <https://internetassociation.org/our-members> (last visited Mar. 4, 2022).

12. Zacharia, *supra* note 6, at 94 (growth of e-commerce has allowed for a new medium to be available to sell counterfeit goods causing an increase in sale of them).

13. *Id.*

14. Org. for Econ. Co-operation and Dev. [OECD]/Eur. Union Intell. Prop. Off. (2016), *Trade in Counterfeit and Pirated Goods: Mapping the Economic Impact*, OECD PUBLISHING, 68, <http://doi.org/10.1787/9789264252653-en>; see also Org. for Econ. Co-operation and Dev. [OECD]/Eur. Union Intell. Prop. Off. (2021), *Illicit Trade, Global Trade in Fakes*, 8, OECD PUBLISHING, <https://doi.org/10.1787/g2g9f533-en>.

15. FRONTIER ECONOMICS LTD., *THE ECONOMIC IMPACTS OF COUNTERFEITING AND PIRACY* 56–57, <https://iccwbo.org/content/uploads/sites/3/2017/02/ICC-BASCAP-Frontier-report-2016.pdf>.

16. U.S. CUSTOMS AND BORDER PROTECTION, *INTELLECTUAL PROPERTY RIGHTS SEIZURE STATISTICS: FISCAL YEAR 2020*, at 18 (map shows China makes up 44% of the world's seizures and Hong Kong makes up 35% of the world's seizures).

The response to the pandemic in 2020 led to a dramatic increase in the use of online marketplaces for basic shopping.¹⁷ The rise of online shopping increases the likelihood that consumers will fall prey to unintentional counterfeit purchases from “opportunistic” wrongdoers entering the marketplace.¹⁸

B. Third-party Sellers

To complicate matters further, many online marketplaces have shifted their market strategy to allow listings from independent third-party sellers to reach consumers.¹⁹ In theory, this is a win-win-win situation. Consumers benefit from greater product choice and pricing options, third-party sellers have access to a wider market and more visibility of their wares, and online marketplaces benefit from the sales fees without incurring costs for product procurement, storage, or shipping.²⁰ Traditional brick-and-mortar stores are increasing their use of third-party vendors to fulfill online orders; and, on Amazon.com, third-party sellers now outnumber direct sellers and account for most of the sales.²¹

Becoming a third-party seller in an online marketplace is relatively simple. There are many websites dedicated to helping individuals create accounts and create competitive listings.²²

17. *COVID-19 Has Changed Online Shopping Forever, Survey Shows*, U.N. CONF. ON TRADE AND DEV., Oct. 8, 2020, <https://unctad.org/news/covid-19-has-changed-online-shopping-forever-survey-shows>.

18. Laura Urquizu, *Counterfeiting Is a Billion-Dollar Problem: COVID-19 Has Made It Far Worse*, FAST COMPANY, May 04, 2020, <https://www.fastcompany.com/90500123/counterfeiting-is-a-billion-dollar-problem-covid-19-has-made-it-far-worse>, (last visited Aug. 3, 2023).

19. Zacharia, *supra* note 6, at 94–95.

20. *Id.* at 95–96; see also Danielle Zanzalari, *Advantages of E-Commerce*, THE BALANCE (Sept. 13, 2022), <https://www.thebalancemoney.com/advantages-of-ecommerce-1141610>.

21. See, e.g., Paul Capriolo, *Walmart Marketplace Statistics that Sellers Should Know*, ZENTAIL (March 31, 2023), <https://www.zentail.com/blog/walmart-marketplace-statistics>; Michael J. Kasdan & Chloe Booth, *What Amazon Sellers and IP Rights Owners Need to Know About Navigating IP Issues on the Amazon Platform*, WIGGIN & DANA LLP (June 13, 2022), <https://www.wiggin.com/publication/what-amazon-sellers-and-ip-rights-owners-need-to-know-about-navigating-ip-issues-on-the-amazon-platform/>.

22. See, e.g., Brian Edmonson, *How to Become a Profitable Amazon Seller*, LIVE ABOUT (May 14, 2021), <https://www.thebalancesmb.com/how-amazon-sellers-can-profit->

Unfortunately, setting up seller accounts with fraudulent information,²³ or “hijacking” listings to sell low-quality or fake products, is also fairly easy.²⁴ Falsifying identification is not a new phenomenon, and the constant battle between law enforcement and fraudsters requires more analysis than this comment can offer.

Anyone who has ever visited a mailing center knows a showing of valid ID is rarely required to ship a package, domestically or internationally. Because the U.S. Customs and Border Protection (CBP) is not required to administer duties and taxes on overseas imports of less than \$800 worth of product,²⁵ sellers can ship certain low-cost products directly to the customer or to fulfillment centers leaving these products unchecked by CBP.²⁶ Shipping products directly to the consumer has become commonplace, as seen by the dramatic rise in small package shipments in recent years.²⁷ The United States Postal Service saw an increase in packaged shipment volumes of 19% from FY2019 to FY2020.²⁸ Worldwide, both domestic and international “parcel traffic” rose by more than 70% from 2015 to 2019.²⁹ Due to the

4143331 (offering tips on how to set up an Amazon seller account and effectively market products to different countries).

23. See Daniel C.K. Chow, *Alibaba, Amazon, and Counterfeiting in the Age of the Internet*, 40 NW. J. INT'L. & BUS. 157, 186 (2020); see generally Lisa Lacy, *False Names and Fake Addresses: Inside Amazon's Seller Lawsuits*, ADWEEK (Aug. 6, 2020), <https://www.adweek.com/brand-marketing/false-names-and-fake-addresses-inside-amazons-seller-lawsuits/> (citing cases where injured plaintiffs discover third-party sellers using fake identification and false addresses).

24. Krystal Hu, *How Sellers Exploit Amazon's Loopholes to Sell Unsafe Products*, YAHOO! FINANCE (Sept. 6, 2019), <https://finance.yahoo.com/news/amazon-sellers-exploit-loopholes-to-sell-unsafe-products-144130664.html>.

25. Concerning Entry of Section 321 Low-Valued Shipments Through Automated Commercial Environment, 84 Fed. Reg. 40079 (Aug. 13, 2019)(to be codified at 19 C.F.R. §§ 10.151 and 10.153).

26. *E.g.*, *Bolger v. Amazon.com, LLC*, 53 Cal. App. 5th 431, 441 (2020) (finding that under Amazon's “Fulfilled by Amazon” program, a foreign third-party seller may ship a product directly to Amazon's warehouses).

27. See *Misuse of E-Commerce*, *supra* note 1, at 29 (explaining how small parcel shipping has not experienced a decline like other forms of traditional mail, and instead have become a source of big growth for distributors by allowing businesses to ship directly to customers).

28. *Id.*

29. *Id.*

rise in volume of such small, individual, “just-in-time” shipments, the U.S. Government has struggled to combat the problem³⁰ and large numbers of counterfeit products still make their way into the hands of the consumer.³¹

C. Harm to Brand Owners

The sale of counterfeit products harms brand owners through loss of product sales and taints a brand’s reputation.³² Consumers may leave critical reviews after receiving a product, attributing their dissatisfaction to the brand, rather than the responsible seller.³³ One in five consumers report that they would boycott an official brand if they were to experience dissatisfaction after receiving a counterfeit product purchased online.³⁴

Trademark law developed to prevent these harms.³⁵ However, without accurate seller information, brand owners’ only recourse

30. See *E-Commerce*, U.S. CUSTOMS & BORDER PROT., <https://www.cbp.gov/trade/basic-import-export/e-commerce> (last modified Feb. 23, 2023) (describing inspection challenges the CBP faces due to “small, just-in-time packages”); see generally U.S. DEP’T OF HOMELAND SEC., OFF. OF STRATEGY, POL. & PLANS, *COMBATING TRAFFICKING IN COUNTERFEIT AND PIRATED GOODS: REPORT TO THE PRES. OF THE U.S.* (Jan. 24, 2020) (describing a need to change policy to stem the growing tide of counterfeiting thereby implicitly stating the U.S. government is struggling with the issue) [hereinafter *COMBATING TRAFFICKING*].

31. See, e.g., Compl. for Trademark Counterfeiting, Trademark Infringement, Copyright Infringement, Patent Infringement, and Unfair Competition at 2, 27, 42, *Maglula, Ltd. v. Amazon*, No. 1:19-cv-1570-LO-IDD, 2020 U.S. Dist. LEXIS 257068 (E.D. Va. Apr. 9, 2020) (showing that merchant collected over 30 counterfeit versions of its product sold or shipped through Amazon, as well as other cases of counterfeit) [hereinafter *Compl. for Trademark Counterfeiting*].

32. *Id.*; see also Xuemei Bian & Cleopatra Veloutsou, *Consumers’ Attitudes Regarding Non-Deceptive Counterfeit Brands in the UK and China*, 14 J. BRAND MGMT. 211, 212 (Feb. 2007) (describing the negative effects of counterfeit products on a brand and the threat they pose to consumers).

33. Hu, *supra* note 24.

34. Victoria Arnold-Rees, *One in Five Consumers Would Boycott Brand After Mistaken Counterfeit Purchase, Report Finds*, WORLD TRADEMARK REV. (June 29, 2021), <https://www.worldtrademarkreview.com/anti-counterfeiting/one-in-five-consumers-would-boycott-brand-after-mistaken-counterfeit-purchase-report-finds>.

35. See, e.g., *HMH Publ’g Co. v. Brincat*, 504 F.2d 713, (9th Cir. 1974) (“The source of this difficulty is that each case involves an effort to achieve three distinct objectives which, to a degree, are in conflict. These are: (1) to protect consumers from being misled as to the enterprise, or enterprises, from which the goods or services emanate or with which they are associated; (2) to prevent an impairment of the value of the enterprise

is to notify the marketplace of the illicit listing. Celebration upon discovering and eliminating a counterfeit listing is often short-lived. Brand owners may succeed in having an illicit listing removed only to discover several more appear in its place.³⁶

D. Harm to Consumers

Trademark law also developed to safeguard consumers' pocketbooks.³⁷ Often the harm from purchasing a counterfeit good is simply a waste of money when the product falls short of expectations.³⁸ In other cases, customer reliance on the seller's claim of quality and genuineness has led to physical disfigurement or property loss.³⁹ In many instances, injured parties have little hope of recovery from the responsible seller. False names and false addresses used to create seller accounts lead to dead ends. Even with assistance from the online

which owns the trademark; and (3) to achieve these ends in a manner consistent with the objectives of free competition.").

36. See COMBATTING TRAFFICKING, *supra* note 30, at 37–38 (stating that notice and takedown is the most common recourse available, and becomes the only recourse when the counterfeiter is outside U.S. jurisdiction); Chow, *supra* note 23, at 186 (explaining how due to counterfeiters using false identities and addresses to be untraceable, brand owners must use the notice and takedown procedures); Kari Kammel et al., *Responsibility for the Sale of Trademark Counterfeits Online: Striking a Balance in Secondary Liability While Protecting Consumers*, 49 AM. INTELL. PROP. L. ASS'N Q.J. 201, 208 (2021) (explaining how the burden to remove counterfeiters on e-commerce sites falls on the brand owner, and how it is likely for every successful takedown to be undermined by several more replacements).

37. See, e.g., *Qualitex Co. v. Jacobsen Prods. Co.*, 514 U.S. 159, 163–64 (1995) ("In principle, trademark law, by preventing others from copying a source-identifying mark, reduces the customer's costs of shopping and making purchasing decisions . . . for it quickly and easily assures a potential customer that this item – the item with this mark – is made by the same producer as other similarly marked items that he or she liked (or disliked) in the past.").

38. HEMA VITHLANI, *THE ECONOMIC IMPACT OF COUNTERFEITING* 4, 23 (Org. for Econ. Co-operation and Dev. [OECD], 1998) (explaining that the ultimate victims of counterfeit goods are consumers, who are hurt by paying an excessive amount for inferior products).

39. *E.g.*, *Oberdorf v. Amazon.com Inc.*, 818 F. App'x 138 (3d Cir. 2020) (consumer blinded in left eye when a dog leash purchased through a third-party seller on Amazon broke and whipped back in her face); see also *Eberhart v. Amazon.com, Inc.*, 325 F. Supp. 3d 393–95 (S.D.N.Y. 2018) (coffee pot purchased through third-party seller was labeled as heat resistant shattered while being washed in hot water, causing permanent nerve damage).

marketplace, searches for the responsible seller often lead to unoccupied addresses or victims of identity theft.⁴⁰ If a seller resides in a foreign jurisdiction, the procedural requirements for serving process may be lengthy, cumbersome, and result in frequent rejected requests from designated authorities.⁴¹ One solution to the problem of serving an international defendant is available only to patent infringement complaints filed with the U.S. International Trade Commission (ITC).⁴² There, the patent holder may serve the process electronically via the seller profile contact link.⁴³ Currently, virtual service is not available for consumers with product liability claims.

E. Marketplace Accountability

Many experts believe the root of the problem lies with online marketplaces allowing third-party sellers to participate in the marketplace with little to no verification requirements.⁴⁴ They believe the onus is on the marketplace managers to thoroughly and regularly vet the sellers' identities to prevent fraudulent sales from happening in the first place.⁴⁵

40. See generally Lacy, *supra* note 23 (citing cases where injured plaintiffs had difficulty locating counterfeit sellers despite help from online platform).

41. Loni Sammons, *Protecting Consumers in an Age of Amazon: Amending the Hague Service Convention to Meet the Needs of the Virtual Consumer*, 15 OHIO ST. BUS. L. J. 296, 312–13 (2021).

42. Cf. H. Mark Lyon et. al., *ITC Section 337 Patent Investigations: Overview*, THOMPSON REUTERS PRAC. L. (2021), <https://www.gibsondunn.com/wp-content/uploads/2021/02/Lyon-ITC-Section-337-Patent-Investigations-Overview-Thomson-Reuters-Practical-Law-02-2021.pdf> (explaining how Section 337 ITC investigations are available to the owner of intellectual property rights or a victim of unfair competition, but is mostly used by patent holders); Adam Hess, *You've Been Served! – ITC Allows Service Through Respondents' Amazon.com Seller Profile Pages*, GLOB. IP & TECH. L. BLOG (June 4, 2021), <https://www.iptechblog.com/2021/06/youve-been-served-itc-allows-service-through-respondents-amazon-com-seller-profile-pages/> (explaining how patent holders can use electronic service).

43. Hess, *supra* note 42.

44. See, e.g., Kammel, *supra* note 36, at 210 (analogizing e-commerce platforms as “guardians” who can break the chain of counterfeit sales to unwary consumers).

45. *Id.* at 233.

Thus far, steps to combat the number of counterfeits sold through online marketplaces have mostly been reactive.⁴⁶ Brand owners who suspect counterfeit activity must follow burdensome notice-and-takedown procedures that can result in extreme delay.⁴⁷ Some complaints may receive no attention at all.⁴⁸

Where consumers and brand owners have failed to locate the third-party seller, they have sought to hold online marketplaces secondarily liable for the injuries.⁴⁹ For years, Section 230 of the United States Communication Decency Act has provided immunity to online marketplaces from civil liabilities stemming from publishing or hosting content created by third-parties.⁵⁰ Courts have upheld immunity for platform providers who merely host third-party publications in an effort to protect “the robust nature of Internet communication.”⁵¹ Under Section 230, only *sellers* may be held liable for false product claims and not the marketplaces hosting the content.⁵² For third-party content that

46. *Cleaning Up Online Marketplaces: Protecting Against Stolen, Counterfeit, and Unsafe Goods Before the S. Comm. on the Judiciary*, 117th Cong. (Nov. 2, 2021) (statement of Kari Kammel, Asst. Dir. Center for Anti-Counterfeiting and Product Protection, Mich. State Univ.) [hereinafter *Cleaning Up Online Marketplaces*].

47. Chow, *supra* note 23, at 186–87.

48. See, e.g., Compl. for Trademark Counterfeiting, *supra* note 31, at 7–8 (alleging the extensive time, money, and costs associated with monitoring Amazon.com for knock-offs and attempting to compel Amazon.com to take action on counterfeits of the plaintiff's product over the course of three years).

49. Oberdorf, 818 F. App'x at 140; see also, *Erie Ins. Co. v. Amazon.com, Inc.*, 925 F.3d 135, 143 (4th Cir. 2019) (holding that Amazon is an “entrustee” without title rather than a “seller” of a headlamp that caused \$313,166.57 worth of damage in a housefire); see also *Fox v. Amazon.com, Inc.*, 930 F.3d 415, 425 (6th Cir. 2019) (involving a housefire with children inside caused by a defective lithium battery inside a hoverboard wherein the held that a “seller” is anyone “exercising significant control” over a product in its journey to the customer but found that Amazon did not qualify because it did not fulfill the shipping and remitted the payment to the seller).

50. Communications Decency Act, 47 U.S.C. § 230.

51. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (concluding that “lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions — such as deciding whether to publish, withdraw, postpone or alter content — are barred”); see also *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 254 (4th Cir. 2009) (“Congress carved out a sphere of immunity from state lawsuits for providers of interactive computer services to preserve the vibrant and competitive free market of ideas on the Internet.”).

52. Christopher Boyd, *One Click Liability: Section 230 and the Online Marketplace*, 70 DEPAUL L. REV. 597, 605 (2021) (remarking that an early Section 230 case, *Gentry v.*

violates copyright protections, marketplaces are immunized from liability as long as they provide notice-and-takedown procedures required by the Digital Millennium Copyright Act (DMCA).⁵³ Even though the protections of the DMCA do not explicitly extend to trademark and intellectual property violations, many online marketplaces have instituted similar notice-and-takedown policies for such claims.⁵⁴ Rights-holders are responsible for notifying marketplaces of suspicious postings and must wait for the platform to remove the posting or disable the seller account.⁵⁵ For every minute that passes, these products continue to be purchased and shipped with a click or a tap.⁵⁶ For a time, because only “sellers” were considered liable for infringing content or injurious products, marketplaces were protected from even secondary liability.⁵⁷

Recently, an onslaught of lawsuits claiming marketplace responsibility for harm from goods purchased on their platforms have begun to poke holes in these protections. In *Erie Ins. Co. v. Amazon.com*, the 4th Circuit concluded that Section 230 of the Communications Decency Act only protected *publications* of third-party speech and did not protect against product liability claims.⁵⁸ However, the court went on to say that where the marketplace never possessed *title* to a product, they could not be

eBay, Inc. that held eBay was a platform not the seller and therefore it would inconsistent with the purpose of Section 230 to hold eBay liable for fraudulent or counterfeit product claims).

53. See 17 U.S.C. § 512(i) (requiring service providers to have notice-and-takedown procedures for illegal or infringing copyright content in order to get “safe harbor” from liability); see also U.S. COPYRIGHT OFFICE, SECTION 512 OF TITLE 17: A REPORT OF THE REGISTER OF COPYRIGHTS (May 2020) (further explaining the requirements of online service providers’ notice-and-takedown procedures under 17 U.S.C. § 512).

54. Scott A. Meyer, *Takedown Notices—Why Trademarks and Copyrights are So Valuable but can Lead to Damages for Infringers*, HOLMES FIRM P.C. (July 24, 2020), <https://theholmesfirm.com/takedown-notices-why-trademarks-and-copyrights-are-so-valuable-but-can-lead-to-damages-for-infringers/>.

55. *Cleaning Up Online Marketplaces*, *supra* note 46 (written statement of Aaron Muderick, Founder & President of Crazy Aaron’s Puttyworld).

56. *Id.* (statement of Dick Durbin, Senator & Sen. Judiciary Comm. Chair).

57. *Tiffany (NJ) Inc. v. eBay, Inc.*, 600 F.3d 93, 104–05 (2d Cir. 2010) (holding that online marketplaces hosting third-party sellers cannot be held liable for secondary liability trademark infringement if they are not aware of the infringing activity).

58. See *Erie Ins. Co. v. Amazon.com, Inc.*, 925 F.3d 135 (4th Cir. 2019).

considered a seller for the purposes of product liability.⁵⁹ The concurring opinion in *Erie* foreshadowed that the changing landscape of internet commerce might soon call for a change in the law or its interpretation.⁶⁰ The concurrence noted that the marketplace had, in fact, played a significant role in the possession, delivery, and sales transaction of the product, such that “the only thing Amazon did not do was hold title.”⁶¹

F. Strict Liability and Online Marketplaces

Currently, in the United States, there is no federally created cause of action for consumers to bring claims of secondary strict liability against online marketplaces when a third-party seller whose product caused injury cannot be located. Recent cases herald a change in holding marketplaces accountable for injuries caused by products sold via their websites,⁶² but none have yet made it to the U.S. Supreme Court. In 2019, a suit involving a defective dog leash which blinded the consumer-plaintiff made its way to the 3rd Circuit.⁶³ The 3rd Circuit Court reversed the trial court’s decision which held that Amazon.com was not a “seller” of the product. The 3rd Circuit Court claimed the marketplace *could* be held liable for injuries caused by products sold on its site because Amazon had failed to include necessary consumer information relating to the product’s seller and product origination.⁶⁴ Before the case could be remanded for judgment, Amazon settled with the plaintiff.⁶⁵

A recent wave of California cases has held that a marketplace *is* liable for product harm where a seller-defendant cannot be

59. *Erie Ins. Co.*, 925 F.3d at 142.

60. *Id.* at 145.

61. *Id.* at 144–45.

62. Michael Hoenig, *Is Products Liability Closing in on Amazon?*, N.Y. L. J. (Aug. 9, 2019), <https://www.law.com/newyorklawjournal/2019/08/09/is-products-liability-closing-in-on-amazon/> (noting that recent decisions in *Oberdorf* and *Fox* could signal that online marketplaces could be held liable for third-party sales in circumstances where they have substantial control over the product listings, fulfillment, or are aware of potential dangers of a product).

63. *Oberdorf*, 818 F. App’x at 140.

64. *Id.*

65. See Stipulation of Dismissal, *Oberdorf*, 818 F. App’x 138 (3d Cir. Sep. 23, 2020) (No. 18-1041).

found or served. This is because some marketplaces act as direct links in the distribution chain of the product, taking possession of the products and often delivering the goods in packaging bearing the marketplace's name and logo.⁶⁶ Amazon has responded to these decisions with a guarantee to compensate its customers for claims under \$1,000 not covered by insurance and to take over legal pursuit of the seller.⁶⁷ Noble as that promise may seem, critics fear that holding marketplaces liable may encourage the real offenders to increase their wrongful activity, as bad actors learn that someone else will bear the costs.⁶⁸ Other concerns include the ability of smaller marketplaces to keep up with similar guarantees.⁶⁹ Rather than budget or insure for liability costs, online marketplaces could choose to implement stricter standards for becoming a seller, which create barriers for legitimate vendors.⁷⁰ Finally, refunding the consumer the cost of the product is simply a refund. There is no evidence that guarantees the marketplace will take down the product listing or bar the seller from making further sales to others.

III. ANALYSIS

As illicit online sales of counterfeit goods continue to increase, harming businesses and consumers, governments in China and the EU are beginning to react. In 2014, the State Administration of Industry and E-Commerce in China enacted the Administrative Measures for Online Trading to better regulate the participation and identification of third-party sellers looking

66. See *Bolger v. Amazon.com, LLC*, 53 Cal. App. 5th 431, 464–66 (2020); see also *Loomis v. Amazon.com, LLC*, 63 Cal. App. 5th 466, 487–88 (2021).

67. See Amazon Staff, *A-to-Z Guarantee to Cover Property Damage and Personal Injury*, AMAZON (Aug. 9, 2021), <https://www.aboutamazon.com/news/how-amazon-works/new-a-to-z-guarantee-better-protects-amazon-customers-and-sellers>.

68. See Sujai Shivakumar, *Why States Should Not Make Online Marketplaces Liable for Defective Products*, INFO. TECH. & INNOVATION FOUND. (Apr. 1, 2021), <https://itif.org/publications/2021/04/01/why-states-should-not-make-online-marketplaces-liable-defective-products>.

69. See *id.*

70. See *id.*

to sell their wares on Chinese platforms.⁷¹ As the sections below will discuss, while this has been a step in the right direction, lax enforcement has precluded any significant crackdown on sellers creating accounts with false documentation and continuing to sell fake goods.⁷² As this comment was being written, the European Union Parliament had recently amended regulations regarding marketplace exemption for liability,⁷³ and the United States Congress was considering laws that would require marketplaces to continuously verify seller identification and respond promptly to notices of content that may violate site policy and trade agreements.⁷⁴ While many businesses and stakeholders applaud the efforts of legislators to do more to curb online sales of counterfeit goods,⁷⁵ online marketplaces worry that by taking on more of the legal responsibility to regulate sellers, brand owners, and others who currently participate in the fight against fakes will relax their efforts and leave the marketplaces with more than they alone can handle.⁷⁶

While there are counterbalancing opinions regarding the wisdom of the enacted and proposed regulations, the message is clear that what is currently being done is not enough.⁷⁷ Given the

71. See Measures for the Administration of Online Transactions (promulgated by Order No. 60 of the State Admin. of Indus. & E-Commerce, Jan. 26, 2014, effective Mar. 15, 2014), art. 23, 2014 ST. COUNCIL GAZ. (May 10, 2014) (China).

72. Chow, *supra* note 23, at 186.

73. See Rep. on the Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services. (Digit. Servs. Act) and amending Directive 2000/31/EC, A9-0356/202, amends. 15–16 (Dec. 20, 2021).

74. See Stopping Harmful Offers on Platforms by Screening Against Fakes in E-commerce Act of 2021, S. 1843 § 2, 117th Cong. (2021); see also Integrity, Notification, and Fairness in Online Retail Marketplaces for Consumers Act, S. 936 § 2, 117th Cong. (2021); Stopping All Nefarious Toys in America Act, S. 3073 § 2, 116th Congress (2019).

75. See Letter from Jeffrey P. Hardy, Dir. Gen. of Transnat'l All. to Combat Illicit Trade, to Dick Durbin, U.S. Sen. (Apr. 23, 2021); see also Michael Hanson, *Leading Retailers Encouraged by Hearings on COVID-19 Scams*, RETAIL INDUS. LEADERS ASS'N (Apr. 27, 2021), <https://www.rila.org/retail-works-for-all-of-us/ensuring-a-safe-sustainable-future/leading-retailers-encouraged-by-hearings-on-covid> (urging Congress to pass the INFORM Act to create better transparency and accountability).

76. See *Cleaning Up Online Marketplaces*, *supra* note 46 (statement of K. Dane Snowden, Pres. & CEO of the Internet Association).

77. See Cara Gagliano & Katherine Trendacosta, *SHOP SAFE Is Another Attempt to Fix Big Tech That Will Mostly Harm Small Players and Consumers*, ELEC. FRONTIER

rapid evolution of imposed liability on the platforms and currently successful best practices of certain online marketplaces, the laws regulating third-party seller participation on e-commerce platforms are likely to continue strengthening and evolving.

A. Regulation in China

China's counterfeit industry is a well-recognized problem,⁷⁸ exacerbated by China's weak legal system with a history of ineffective deterrence.⁷⁹ Under similar safe harbor statutes as those in the United States, Chinese online marketplaces are protected from civil liability for sales of counterfeit goods where they can show no knowledge of the listing and have created internal notice-and-takedown procedures.⁸⁰ Despite recent efforts to combat sales of counterfeit goods on their sites, China's largest e-commerce platform, Alibaba Group, has continued to find itself on the Notorious Markets List as a commerce platform that facilitates substantial counterfeiting and piracy.⁸¹ Although other Chinese-operated online marketplaces, such as DHGate, have reported "improving its seller vetting system to stop re-registration of banned sellers," rights holders "report encountering repeat [counterfeit sales] by the same seller on

FOUND. (Sep. 24, 2021), <https://www.eff.org/deeplinks/2021/09/shop-safe-another-attempt-fix-big-tech-will-mostly-harm-small-players-and>.

78. See EUROPEAN COMMISSION, REPORT ON THE EU CUSTOMS ENFORCEMENT OF INTELLECTUAL PROPERTY RIGHTS: RESULTS AT THE EU BORDER 2017 at 15 (2018), <https://op.europa.eu/en/publication-detail/-/publication/64dda5ad-c197-11e8-9893-01aa75ed71a1/language-en/format-PDF>.

79. DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, INTERNATIONAL TRADE LAW PROBLEMS, CASES, MATERIALS 643 (Rachel E. Barkow et al. eds., 3rd. ed. 2017).

80. See Trademark Law of the People's Republic of China, art. 68 (promulgated by the Nat'l People's Cong., adopted Aug. 23, 1982, rev'd Apr. 23, 2019, effective Nov. 1, 2019) (requiring industry authorities to offer timely rectification measures when marks are found to deceive customers); see also Anti-Unfair Competition Law of the People's Republic of China, art. 24 (promulgated by the Nat'l People's Cong., adopted Sept. 2, 1993, rev'd Nov. 4, 2017, effective Apr. 23, 2019) (requiring the marketplace to have knowledge of the "falsehood" of the advertisement).

81. OFF. OF U.S. TRADE REPRESENTATIVE, 2020 REVIEW OF NOTORIOUS MARKETS FOR COUNTERFEITING AND PIRACY 31 (2020), [https://ustr.gov/sites/default/files/files/Press/Releases/2020%20Review%20of%20Notorious%20Markets%20for%20Counterfeiting%20and%20Piracy%20\(final\).pdf](https://ustr.gov/sites/default/files/files/Press/Releases/2020%20Review%20of%20Notorious%20Markets%20for%20Counterfeiting%20and%20Piracy%20(final).pdf) (noting that despite improved notice-and-takedown processes, Taobao remains on the Notorious Market List for the fifth consecutive year) [hereinafter 2020 REVIEW].

numerous occasions”.⁸² Understanding that marketplaces can better control counterfeiting by verifying the sellers who enter the marketplace, the Chinese legislature enacted government regulations requiring more affirmative acts by marketplaces to combat the counterfeit problem. These requirements include examining and verifying the business licenses of third-party sellers, displaying the business license in an eye-catching location on the seller profile page, and verifying that a business proposing to sell trademarked products has proof of registration or licensing agreements.⁸³ Despite these requirements, officials have found individuals registering with false identification papers, many of which can be purchased through the marketplace’s own website.⁸⁴ China recently updated the regulations to prohibit online marketplaces from engaging in business with high-volume third-party sellers who do not possess a valid state-issued business license.⁸⁵ The regulations also require marketplaces to conduct verification and validate registration documents every six months.⁸⁶

Responding to the growth in disputes arising from intellectual property infringement, China has established a growing number of specialized Intellectual Property (IP) courts and tribunals.⁸⁷ To further strengthen IP enforcement and incentivize efforts to curb sales of counterfeit goods via online marketplaces, the State Administration for Market Regulation of China (SAMR) has proposed amendments to the existing

82. 2020 REVIEW, *supra* note 81, at 21.

83. See Chow, *supra* note 23, at 188–89 (explaining the provisions of Administrative Measures for Online Trading, art. 23).

84. *Id.* at 163–64 n.31 (citing reports from Gongshang Zongju (工商总局), Guanyu Dui Alibaba Jituan Jinxing Xingzheng Zhidao Gongzuo Qingkuang de Baipishu (关于对阿里巴巴集团进行行政指导工作情况的白皮书), translated in STATE ADMIN. OF INDUS. & E-COMMERCE, PEOPLE’S REPUBLIC OF CHINA, WHITE PAPER ON ALIBABA GROUP HOLDINGS ADMINISTRATIVE GUIDANCE WORK SITUATION (2015)).

85. See Measures for the Supervision and Administration of Online Trading (promulgated by Order No. 37 of the State Admin. for Market Reg., Mar. 15, 2021, effective May 01, 2021), ch. II § 1 art. 8, 2021 ST. ADMIN. FOR MKT. REGUL. (China).

86. *Id.* at ch. II § 2 art. 24.

87. EU-China Intellectual Property Rights (IPR) Working Group, INT’L TRADEMARK ASS’N (May 2021), <https://www.inta.org/wp-content/uploads/public-files/advocacy/testimony-submissions/20210517-INTA-Comments-EU-China-IP-Working-Group-2021.pdf>.

E-commerce Law.⁸⁸ The revised law would impose joint liability on marketplaces that knew or should have known of merchants selling counterfeit and infringing products, requiring the marketplace to compensate IP rights holders for any losses and risk revocation of its network business license.⁸⁹

However, regulations are only as effective as officials' willingness to enforce them. It is suspected that because e-commerce giants play such a large role in China's economy, government officials are reluctant to impose significant penalties that may limit the marketplaces' ability to do business and increase revenue.⁹⁰ It remains to be seen what measurable effect the new and updated laws will have on decreasing the sales of counterfeit goods through Chinese online marketplaces.

B. Regulation in the European Union

Selling products to and within the European Union requires additional documentation currently not required for purchases and sales to and within the United States.⁹¹ The European Union regulates imports by administering a value added tax (VAT) to all products purchased online.⁹² Beginning in 2021, VAT is now imposed on all goods.⁹³ EU member states must verify the identity

88. Decision on Amending the Electronic Commerce Law of the People's Republic of China (Draft for Comment) (关于修改《中华人民共和国电子商务法》的决定 (征求意见稿)), STATE ADMIN. FOR MKT. REGUL. (Aug. 31, 2021).

89. *Id.*; see Michelle Ferrante, *China's New E-commerce Law: Tools in the Fight Against IP Rights Infringement*, WORLD TRADEMARK REV. (Jan. 16, 2020), <https://www.worldtrademarkreview.com/global-guide/anti-counterfeiting-and-online-brand-enforcement/2020-obe/article/chinas-new-e-commerce-law-tools-in-the-fight-against-ip-rights-infringement>.

90. See Chow, *supra* note 23, at 184, 197 ("Beyond tolerating and supporting counterfeiting, Alibaba, in the words of PRC national authorities, views itself as above the law and unafraid of and not intimidated by PRC enforcement authorities.").

91. See *Import Requirements and Documentation*, INT'L TRADE ADMIN. (Aug. 11, 2022), <https://www.trade.gov/country-commercial-guides/eu-import-requirements-and-documentation> (explaining the requirements of a European Union Summary Declaration).

92. Council Directive 2006/112, tit. 1, art. 2, 2006 O.J. (L 347) 1 (EC) (explaining the transactions subject to VAT).

93. Directorate-General for Taxation & Customs Union, *New Form of Customs Declaration for Low Value Consignments*, EUROPEAN COMMISSION (July 11, 2019), https://ec.europa.eu/taxation_customs/news/new-form-customs-declaration-low-value-

of sellers who will be shipping goods to and within Europe for VAT purposes.⁹⁴ To obtain a VAT identification number, a seller must apply and register through a member-EU state's VAT identification system.⁹⁵ Registering for a VAT identification number in the EU requires more than submitting an online application, a common method for creating an account to fulfill sales and shipments in the U.S.⁹⁶ To register for a VAT number in Italy, for example, the seller must *physically* submit forms to the Italian revenue agency, including certified government-issued documents verifying the seller as a taxable entity within his or her own country.⁹⁷

Despite the extra hurdles to sell wares in the EU, counterfeit goods still make their way through.⁹⁸ In January 2022, the European Parliament accepted proposed amendments to the Digital Services Act (DSA).⁹⁹ While some applaud it as a step in the right direction for holding marketplaces accountable for maintaining databases with seller information required for locating and contacting, skeptics claim the DSA still leaves a lot

consignments-2019-07-11_en (indicating that existing VAT exemption for goods will disappear).

94. Council Directive 2006/112, tit. 9, ch. 4, art. 141, 2006 O.J. (L 347) 1 (EC).

95. *Id.*

96. See Steven Penn, *How to Become an Amazon Seller in 8 Simple Steps*, VIRAL LAUNCH, <https://blog.viral-launch.com/tips-for-selling-on-amazon/how-to-become-an-amazon-seller-in-8-simple-steps/> (last visited Dec. 22, 2021) (indicating that to create an Amazon seller account one must provide a name, address, bank account, and tax ID).

97. VAT Registration, MINISTRY OF ECONOMY AND FINANCE, <https://www.agenziaentrate.gov.it/portale/web/english/nse/business/vat-in-italy/vat-registration> (last visited Dec. 22, 2021) (explaining the VAT processes for both residents and non-residents).

98. *Global Trade in Fakes*, *supra* note 14, at 57 (showing sales of counterfeit optical, medical apparatuses, beverages and pharmaceuticals via online sales are prevalent in EU trade).

99. *Commission Proposal for a Regulation of the European Parliament and of the on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC*, at 1, COM (2020) 825 final (Dec. 15, 2020); see Dan Cooper et al., *European Parliament Agrees Draft Digital Services Act*, INSIDE PRIVACY (Jan. 26, 2022), [https://www.insideprivacy.com/european-union-2/european-parliament-agrees-draft-digital-services-act/#:~:text=On%20January%202022%2C%20the,about%20the%20Council's%20draft%20here\).](https://www.insideprivacy.com/european-union-2/european-parliament-agrees-draft-digital-services-act/#:~:text=On%20January%202022%2C%20the,about%20the%20Council's%20draft%20here).)

of room for marketplaces to do as little as possible to monitor their sellers and comply with the proposed regulations.¹⁰⁰

Under the e-Commerce Directive 2000/31/EC in the EU, marketplaces are protected from secondary liability of violations by third-party sellers if they act as a “mere conduit,” only hosting third-party content.¹⁰¹ The marketplace must refrain from modifying the third-party’s content in any way.¹⁰² This protection disappears when the marketplace becomes aware of, or should have been aware of, violations and infringing content and failed to initiate take-down procedures.¹⁰³ However, this liability exemption shall be called into question if the marketplace fails to clearly display seller identity and location of the goods for sale, as failure to do so creates an objectively reasonable belief on the part of the consumer that the marketplace has knowledge or control over the products information on display.¹⁰⁴ Any updates to the trend in European states’ case law dealing with marketplace liability or interpretation of 2000/31 will require further analysis outside of the breadth of this comment.

C. Regulation and Proposed Legislation in the United States

If one were to scrutinize the Notorious Markets List, they would notice an emphasis on foreign markets and a notable absence of U.S.-based sites. Amazon’s foreign domains have made the list, with rights holders citing concern that seller information displayed to customers is misleading and the seller vetting

100. See THE EUR. CONSUMER ORG., THE DIGITAL SERVICES ACT PROPOSAL: BEUC POSITION PAPER 4 (Apr. 9, 2021), https://www.beuc.eu/publications/beuc-x-2021-032_the_digital_services_act_proposal.pdf (noting both criticism and praise for the Digital Services Act).

101. Council Directive 2000/31, art. 12–14, 2000 O.J. (L 178) 43 (EC).

102. *Id.*; see also Case C-324/09, *L’Oréal SA et al. v. eBay International AG et al.*, [2011] E.C.R. I-6073 (U.K.) (finding that the marketplace modified the content by causing links to appear to the infringing content during Google searches for trademarked products).

103. Council Directive 2000/31, *supra* note 101, at art. 12; see also Case C-324/09, *L’Oréal SA et al.*, *supra* note 102 (finding that the marketplace had been notified for unlawful activity on its site and did not follow diligent take-down procedures).

104. See Regulation 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), 2022 O.J. (L 277) 7.

process is insufficient.¹⁰⁵ These concerns are not unique to the foreign domains, and rights holders are beginning to push for more federal regulation and liability of U.S.-based online marketplaces.

1. The SANTA Act

Proposed to Congress in December 2019, the Stopping All Nefarious Toys in America (SANTA) Act¹⁰⁶ is supported by the toy industry and toy brand owners whose research found that consumers are unsuspectingly purchasing counterfeit brand-name toys.¹⁰⁷ Brand owners' businesses suffer from blatant trademark infringement and find themselves unable to file suit for injunctions or damages due to the challenge of finding legitimate seller identities and addresses.¹⁰⁸

The SANTA Act proposes that marketplaces must disclose information regarding the sourcing, distribution, or manufacturing of the product in a conspicuous place on the product listing and verify the seller through various means.¹⁰⁹ Violations of the SANTA Act would be considered deceptive trade practices under the Federal Trade Commission Act, holding marketplaces liable for any lack of transparency of seller or product information.¹¹⁰ The bill, however, limited enforcement to products intended for children twelve years and under.¹¹¹

As of the publication of this comment, the SANTA Act is on hold in its progression through Congress. One reason may be that the products and parties protected by the SANTA Act would also

105. 2020 REVIEW, *supra* note 81, at 17.

106. Stopping All Nefarious Toys in America Act, S. 3073 § 2(d), 116th Cong. (2019).

107. *The Toy Association's Crusade to Fight Fake, Unsafe Toys*, TOY FAIR NEW YORK (Jan. 7, 2020), <https://toyfairny.com/PressRoom2/News/2020-News/toy-association-crusade-to-fight-fake-unsafe-toys.aspx>.

108. *Id.*; see also Zacharia, *supra* note 6, at 111–12 (citing various examples of companies claiming copyright and trademark infringement against third-party marketplace sellers).

109. Stopping All Nefarious Toys in America Act, *supra* note 106, § 2(d).

110. *Id.*

111. *Id.* ("To require online marketplaces to disclose certain verified information regarding sellers of children's products to inform consumers.").

be covered by the INFORM Consumers Act, making the provisions in the SANTA Act redundant.¹¹²

2. The INFORM Consumers Act

The Integrity, Notification, and Fairness in Online Retail Marketplaces for Consumers Act (INFORM) was signed into law in December 2022 as part of the Consolidated Appropriations Act of 2023.¹¹³ Enforced by the Federal Trade Commission (FTC), the requirements of INFORM went into effect on June 27, 2023.¹¹⁴ Marketplaces are to collect and verify basic contact information, a bank account number, and a tax ID within ten days of a seller qualifying as a high-volume seller.¹¹⁵ Marketplaces are required to verify this information annually.¹¹⁶ During initial and annual verification, notice of required certifications shall be sent to the seller.¹¹⁷ If marketplaces do not receive certification within ten days of sending the notification, the seller's account is to be suspended.¹¹⁸ For a subset of sellers with an annual gross revenue of \$20,000 or more, the INFORM Act also mandates that the marketplace require sellers to disclose in a conspicuous manner and location the seller's name, address, current working contact information, and, if the seller uses a different seller to supply the product, the listing must include the information of that subseller.¹¹⁹ If a seller does not have a business address, the

112. See Integrity, Notification, and Fairness in Online Retail Marketplaces for Consumers Act, S. 936, 117th Cong. (2021).

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

114. *Id.* (c); FTC, *Informing Businesses about the INFORM Consumers Act*, <https://www.ftc.gov/business-guidance/resources/informing-businesses-about-inform-consumers-act> [hereinafter "FTC"].

115. 15 U.S.C. §45 (f)(1), (f)(3)(A) (defining "high-volume third-party seller" as a third-party seller who "in any continuous 12-month period during the previous 24 months, has entered into 200 or more discrete sales or transactions of new or unused consumer products and an aggregate total of \$5,000 or more in gross revenues.").

116. *Id.* §45 (a)(1)(B).

117. *Id.*

118. *Id.* §45 (a)(1)(C).

119. *Id.* §45 (b)(1)(A).

listing must contain the seller's country and state.¹²⁰ Marketplaces must also offer a clear and conspicuous reporting mechanism to consumers for the purposes of reporting suspicious listings.¹²¹ Marketplaces must suspend sales activities from sellers whose listings are found to be fraudulent or who fail to respond to inquiries of the veracity of the seller's information within ten days of notice being sent.¹²²

Failure to comply with INFORM's verification requirements violates rules regarding unfair and deceptive trade practices under the Federal Trade Commission Act, resulting in possible civil penalties of up to \$50,120 per violation.¹²³ Under the INFORM Act, States' Attorneys General whose citizens are impacted by non-compliance with the Act are given the power to enforce compliance or seek civil penalties and damages.¹²⁴

As of the publication of this comment, the requirements of the INFORM Act had been effective only a few months. It remains to be seen how successful marketplaces will be at complying with the regulations and to what extent the FTC and Attorney General will seek enforcement and penalties. Nonetheless, the passage of the INFORM Act is a large step in the right direction in the battle against counterfeits and product transparency.

3. The SHOP SAFE Act

The Stopping Harmful Offers on Platforms by Screening Against Fakes in E-Commerce (the SHOP SAFE) Act of 2021 proposes an amendment to the Trademark Act.¹²⁵ The amendment would impose contributory liability onto e-commerce platforms and online marketplaces for harm caused by counterfeit "health and safety" products.¹²⁶ The SHOP SAFE Act would not only require marketplaces to verify seller identity and publish the

120. *Id.* §45 (b)(2)(A)(i).

121. *Id.* §45 (b)(3).

122. *Id.* §45 (a)(1)(C).

123. FTC, *Notices of Penalty Offenses*, <https://www.ftc.gov/enforcement/penalty-offenses>.

124. *Id.*

125. Stopping Harmful Offers on Platforms by Screening Against Fakes in E-commerce Act of 2021, S. 1843 § 2, 117th Cong. (2021) [hereinafter SHOP SAFE].

126. *Id.* § 2.

product origin in a conspicuous place on the listing, but it would also require marketplaces to limit registration of sellers' health and safety products only to those who "consent to the jurisdiction of the United States courts"¹²⁷ and sellers would be required to "designate an agent for service in the United States or a verified address for service of process in the United States."¹²⁸ The SHOP SAFE Act aims to ensure that online marketplaces only allow contributions from third-party sellers who guarantee their products' genuineness, including using their own images of the product for sale,¹²⁹ and who injured consumers are able to locate and bring sellers to court.¹³⁰

While proponents of the SHOP SAFE Act applaud the bill's strict proactive requirements, the criticisms for the bill lie in the language limiting its reach to "products that implicate health and safety."¹³¹ Within the language of the bill, the term "health and safety" product is quite broad, including products that "can lead to illness, disease, injury, serious adverse event, allergic reaction or death if produced without compliance with all applicable Federal, State, and local health and safety regulations and industry-designated testing, safety, quality, certification, manufacturing, packaging, and labeling standards."¹³² This language might describe many products, including lithium batteries and dog leashes, which have indeed led to physical injury suffered by online marketplace consumers or their family members.¹³³ Nevertheless, because the words "health and safety" call to mind goods such as skin products, vitamins, or work-safety

127. *Id.* § 2(a) (amending the Trademark Act of 1964, § 32 (4)(A)(iv)(II)).

128. *Id.* (amending the Trademark Act of 1964, § 32 (4)(A)(iv)(III)).

129. *Id.* (amending the Trademark Act of 1964, § 32(4)(A)(vii)).

130. *Id.* § 2(a)(4)(A)(iv)(I).

131. *The SHOP SAFE Act: Stemming the Rising Tide of Unsafe Counterfeit Products Online: Hearing on S. 1843 Before the Subcomm. on Cts, Intell. Prop., and the Internet of the H. Comm. On the Judiciary*, 117th Cong. 59–60, 72 (2021) (statement of Natasha N. Reed, Partner, Co-Chair, Trademark, Copyright & Unfair Compet. Prac., Foley Hoag LLP) [hereinafter Reed]; *The SHOP SAFE Act: Stemming the Rising Tide of Unsafe Counterfeit Products Online: Hearing on S. 1843 Before the Subcomm. on Cts, Intell. Prop., and the Internet of the H. Comm. On the Judiciary*, 117th Cong. 61 (2021) (statement of Meredith Simpson, Vice President, Federal Government Affairs and External Relations, Personal Care Products Council).

132. S. 1843 § 2(a)(4)(B)(iii).

133. *Fox*, 930 F.3d at 421; *Oberdorf*, 818 F. App'x at 140.

equipment, critics of the bill's language worry that determining whether the product is covered under the Act will lead to confusion, making it difficult for platform managers to know if they are complying with the Acts requirements.¹³⁴

4. Marketplace Responses to the Proposed Legislation

Unsurprisingly, representatives for various e-commerce platforms and marketplaces argue the proposed legislation is overbroad and imposes impossible standards for compliance.¹³⁵ Some concerns include the burden imposed on smaller marketplaces whose business models and resources may not support increased demand for product and vendor screening.¹³⁶ Another complaint is that the "one-size-fits-all" legislation is inappropriate for the variety of businesses that thrive on flexibility and creative solutions in the fast-paced world of digital innovation.¹³⁷

a. Increased Vetting of Seller Identity

Some believe that holding marketplaces liable for harm stemming from listings on their sites is appropriate because the marketplaces are the "guardians" of their sites and are in the best position to verify and police sellers and listings.¹³⁸ One of the ways that marketplaces can guard their platform against bad actors is to thoroughly verify seller identity, location, and address using more than a governmental ID.¹³⁹ Parties on both sides show concern with seller identification requirements, noting that it is

134. Reed, *supra* note 131, at 50.

135. *The SHOP SAFE Act: Stemming the Rising Tide of Unsafe Counterfeit Products Online: Hearing on S. 1843 Before the Subcomm. on Cts, Intell. Prop., and the Internet of the H. Comm. On the Judiciary*, 117th Cong. 38 (2012) (statement of Jonathan Berroya, Sr. Vice Pres. Internet Association) [hereinafter Berroya].

136. *Id.* at 45.

137. *Id.* at 45–46.

138. See e.g. Kammel, *supra* note 36, at 210, 241 (explaining that marketplaces are in the best position to guard its consumers and disrupt the "crime triangle").

139. See e.g. Zacharia, *supra* note 6, at 121–22 (suggesting that Congress enact one bill that includes rigorous requirements for marketplaces to verify and disclose seller identity).

still relatively easy to use false or stolen identification.¹⁴⁰ Moreover, the global participation model used by marketplaces means that platforms often have no way to physically inspect identification documents to verify legitimacy.¹⁴¹ Yet, despite the imperfections of current vetting processes, requiring marketplaces to increase their scrutiny of seller-provided documentation is seen by many as a step in the right direction.¹⁴²

Some small, individual business owners working out of their homes fear that requiring disclosure of seller names and addresses will endanger their personal lives.¹⁴³ Acknowledging privacy and personal safety concerns, the INFORM Act allows sellers who do not have a non-residential business address to display only their country or state of residence.¹⁴⁴ Personal contact information collected for the purposes of verifying seller identification, including residential addresses, is not to be displayed to consumers on the seller's listing and is required to be protected in a secured data bank.¹⁴⁵ Legitimate business operators support consumer disclosure requirements and the obligation to provide a business address, claiming that more transparency will deter bad actors who hide behind anonymity.¹⁴⁶

Information disclosure can only go so far to deter sellers of counterfeit goods. Even when online marketplaces verify seller identity and audit the products *before* they are offered for sale on the platform, sellers still have the opportunity to deal in fake goods after the initial marketplace entry requirements. It is

140. Reed, *supra* note 131, at 55; STAFF OF S. FIN. COMM., 116TH CONG., THE FIGHT AGAINST FAKES (2019) (Amazon's Letter to Orrin Hatch and Ron Wyden); STAFF OF S. FIN. COMM., 116TH CONG., THE FIGHT AGAINST FAKES (2019) (Alibaba Group's Letter to Orrin Hatch and Ron Wyden).

141. Berroya, *supra* note 135, at 47.

142. Juozas Kaziukenas, *Amazon Marketplace Is No Longer Anonymous*, MARKETPLACE PULSE (July 8, 2020), <https://www.marketplacepulse.com/articles/amazon-is-no-longer-an-anonymous-marketplace>.

143. Mike O'Brien, *Amazon Requiring Marketplace Sellers to Include Business Name, Address*, MULTICHANNEL MERCHANT (July 10, 2020), <https://multichannelmerchant.com/ecommerce/amazon-requiring-marketplace-sellers-include-business-name-address/>.

144. 15 U.S.C. §45(f)(b)(2).

145. *Id.* at (a)(4).

146. *Id.*

possible for a seller to send authentic products to the marketplace to pass audits and inspections, only to turn around and sell counterfeit products directly to the consumer.¹⁴⁷ To ensure that product standards and contractual agreements are met, marketplaces must continually audit sellers and their products.¹⁴⁸

b. Amazon's Transparency Program

Amazon has launched Amazon's Transparency Program, available to third-party sellers and brand owners as a way of ensuring that products reaching the customer are verified and genuine by using unique "transparency" barcodes that cannot be copied or forged.¹⁴⁹ Amazon distribution staff will scan the barcode before delivery to the customer, and if the code fails, the product will not be delivered, and the seller will be blacklisted.¹⁵⁰ The Transparency Program also provides a mobile app that customers can download and scan the products received to verify that the product is not counterfeit.¹⁵¹ Brand owners and sellers must register and pay to participate, pay between \$0.01 and \$0.05 per barcode, and the codes must be printed and physically attached to each product before shipping.¹⁵² Because of the cost and effort required to attach barcodes to individual products, the program appears reasonable only for sellers and brand owners of expensive luxury items.¹⁵³ The Transparency Program also does not keep bad actors from selling counterfeit products through other listings, and brand owners will still have to watch out for

147. See, e.g., STAFF OF S. FIN. COMM., 116TH CONG., THE FIGHT AGAINST FAKES (2019) (Overstock's Letter to Orrin Hatch and Ron Wyden) (explaining Overstock's audit process).

148. *Id.*

149. *Transparency*, AMAZON, <https://brandservices.amazon.com/transparency> (last visited Feb. 3, 2023).

150. Rusha Bhattacharjee, *Everything you need to know about the Amazon Transparency Program*, SELLERAPP (Jan. 10, 2023), <https://www.sellerapp.com/blog/amazon-transparency-program>.

151. Justeen David, *Amazon Transparency Program: Is It Worth It?* ECOMCREW (Nov. 24, 2022), <https://www.ecomcrew.com/amazon-transparency-program-is-it-worth-it/>.

152. Bhattacharjee, *supra* note 150.

153. *Id.*

infringers and raise IP concerns.¹⁵⁴ Currently, the Transparency Program is not so widely known or used to have an idea of how effective it is in deterring counterfeits, but it is a step in the right direction.

IV. PROPOSED SOLUTIONS

Ensuring that marketplace vendors act with integrity and fairness by creating seller accounts with true and accurate information has proven to be a challenge. The more thorough the seller vetting process, the more time-consuming, costly, and burdensome for the marketplace.¹⁵⁵ A more rigorous vetting process does not guarantee that bad actors will not find a way to slip through. Nor does it guarantee that a seller will inform the marketplace of any changes to their information or continue to sell verified and legitimate products. Some fear that forcing marketplaces to better regulate third-party sellers will force marketplaces to divert time and resources already being used to respond to illicit activity toward compliance with new laws.¹⁵⁶ There are, however, a number of solutions that do not severely increase the burden on marketplaces and are reasonable measures when one considers that the ultimate goal of the legislative measures is to offer more protection to online consumers and brand owners.

A. *Require a Business License or Business Tax ID to Participate in the Marketplace*

The INFORM Act requires marketplaces to verify only those sellers who qualify as “high volume” sellers, those who enter into at least 200 sales transactions in a 12-month period with a minimum total of \$5,000.¹⁵⁷ To ensure that consumers do not fall victim to sellers with new accounts or who have yet to meet the

154. David, *supra* note 151.

155. Daniel Castro & Sujai Shivakumar, *Mandatory Seller Verification Law Wrong Move to Improve Integrity of Online Marketplaces*, CTR. FOR DATA INNOVATION (May 19, 2021), <https://datainnovation.org/2021/05/mandatory-seller-verification-law-wrong-move-to-improve-integrity-of-online-marketplaces/>.

156. *Id.*

157. Integrity, Notification and Fairness in Online Retail Marketplaces for Consumers Act [INFORM], H.R. 7756, 116th Cong. §§ 2(a)(1)(A)(ii)(II)(aa), 2(e)(3) (2020).

minimum sale requirements, marketplaces should require *all* third-party sellers (not just “high volume” sellers) to provide some proof of identification when the seller creates their marketplace account. To ensure legitimacy, marketplaces should require sellers to provide a *business* tax ID or *business* license number as part of the seller registration process.¹⁵⁸ Requiring a business license or business tax ID would add an extra step easily met by current, legitimate business owners, and registering a new business is relatively simple and inexpensive.¹⁵⁹ Opponents of this requirement argue that the beauty of the online marketplace is that it allows any enterprising individual to participate and sell their wares, and by requiring a business license, the government is limiting who can sell.¹⁶⁰ This argument ignores the fact that both brick-and-mortar retailers, as well as online store retailers, must possess a valid business license. Why should a seller on a virtual marketplace be held to a different standard?

Admittedly, there is still a risk of sellers creating a false business and disguising themselves as a new, valid business entity to “circumvent [the] vetting process.”¹⁶¹ Assuring that seller accounts are accurate and trustworthy requires ongoing verification and auditing of seller accounts to ensure compliance.¹⁶² This is a best practice that many marketplaces currently implement and the INFORM Act now requires.¹⁶³ Requiring a business license or business tax ID for all sellers would ensure an extra layer of identity verification during the licensing process and add an extra deterrent to those who are looking for an easy way to access the market to sell fake goods.

158. STAFF OF S. FIN. COMM., *supra* note 147 (Walmart’s Letter to Orrin Hatch and Ron Wyden) (explaining that Walmart’s inclusion of third-party sellers is by invitation only and requires proof that the seller is a business entity and not an individual).

159. U.S. SMALL BUS. ADMIN., REGISTER YOUR BUSINESS, <https://www.sba.gov/business-guide/launch-your-business/register-your-business> (last visited Feb. 9, 2023) (explaining that for most small businesses, registering your business is as simple as registering your business name with state and local governments).

160. Berroya, *supra* note 135, at 8.

161. *Id.* at 6.

162. *Id.* at 8.

163. *See generally id.* at 2–5 (explaining Amazon, eBay, Etsy, and Facebook’s work addressing suspected counterfeit activity from its sellers).

B. Require Marketplaces to Disclose Seller and Product Location

The INFORM Act requires marketplaces to display the seller location (state, country) along with the product's shipping origination in a conspicuous place on the product listing, but only for sellers whose revenues through the marketplace total an annual aggregate of \$20,000.¹⁶⁴ Seller and product location should be displayed for *all* sellers wishing to participate in a marketplace, not just those who meet a statutory revenue minimum. Requiring this of all sellers provides consumers with more information about who they are buying from and where their products are coming from. For many consumers, it is important to avoid purchasing goods made or shipped from countries like China.¹⁶⁵ Others may want assurances that, if needed, the seller will fall under their state's jurisdiction and be capable of appearing in the local courts. For concerns to be met, it is not necessary to display the seller's name or full address. Displaying the state and country where the seller is located and where the product originates will protect seller privacy, while offering consumers choice on what they buy and who they buy from.

C. Create a Federal Cause of Action for the Consumer

The bills proposed in response to rising numbers of counterfeit sales via marketplaces (SANTA, INFORM, and SHOPSAFE) claim to be created for the protection of consumers.¹⁶⁶ However, none of the bills offer injured consumers

164. INFORM §§ 2 (b)(1)(A)–(B) .

165. See FTI CONSULTING, SHIFTING EXPECTATIONS II (2020), <https://fticommunications.com/covid-19/wp-content/uploads/2020/05/FTI-Shifting-Expectations-II-Topline-Results.pdf> (finding that 67% of U.S. residents surveyed would pay more for a product that they knew was made in America and 40% would not buy a product if they knew it was made in China); see also *I don't want to buy from China*, EBAY COMMUNITY, <https://community.ebay.com/t5/Buying/I-don-t-want-to-buy-from-china/td-p/29253415> (last visited Feb. 9, 2023).

166. *The Shop Safe Act: Stemming the Rising Tide of Unsafe Counterfeit Products Online: Hearing on S. 1843 Before the Subcomm. on Cts. Intell. Prop. & the Internet of the H. Comm. on the Judiciary*, 117th Cong. 25 (2021) (referencing statement of Representative Darrell E. Issa, Subcommittee Chairman).

a remedy when the responsible third-party seller cannot be found or is outside the court's jurisdiction. In this circumstance, responsibility should fall on a marketplace that fails to take basic steps to protect its consumers from harm caused by counterfeit goods. Congress should create a federally enacted consumer cause of action against online marketplaces for instances where the injury occurs from the purchase of counterfeit goods via the platform, making the marketplaces secondarily liable for damages if the marketplace fails to take clearly enumerated steps to verify the identity of the seller and disclose seller location to the consumer.

V. CONCLUSION

Online shopping is likely here to stay. It is important for marketplaces to build trust with brands and consumers by ensuring all sellers comply with laws and standards. Marketplaces can do their part to protect consumers and brand owners by conducting better screening of third-party sellers and disclosing seller and product information. Because of the global nature of online marketplaces, businesses, and governments should seek to collaborate internationally and share resources to enact more effective practices and legislation to ensure consumer safety and brand protection. Many consumers are unaware of the risks of purchasing goods through online marketplaces.¹⁶⁷ It is important that governments and marketplaces work to protect the consumer, ensuring that sellers are trusted and verified and disclose product and seller information to allow consumers to make more informed shopping choices.

167. See Arnold-Rees, *supra* note 34.