

May 3, 2022

The Honorable Chuck Schumer
Majority Leader
U.S. Senate
Washington, DC 20510

The Honorable Nancy Pelosi
Speaker of the House
U.S. House of Representatives
Washington, DC 20515

The Honorable Mitch McConnell
Minority Leader
U.S. Senate
Washington, DC 20510

The Honorable Kevin McCarthy
Minority Leader
U.S. House of Representatives
Washington, DC 20515

*Re: Civil Society and Industry Opposition to SHOP SAFE in the Final COMPETES
Legislation*

Dear Majority Leader Schumer, Speaker Pelosi, Minority Leaders McConnell and McCarthy:

The 38 undersigned civil society organizations, trade associations, and companies write to share our collective opposition to H.R. 5374, the Stopping Harmful Offers on Platforms by Screening Against Fakes in E-commerce (SHOP SAFE) Act.¹ While we support the goals of the SHOP SAFE Act—to promote consumer welfare, health, and safety—the bill as-drafted is not narrowly tailored to achieve those goals without risking substantial and negative unintended consequences. It marks a fundamental change to how individuals and businesses across the country communicate, engage, and conduct business online, and threatens to undermine free speech, innovation, and consumer choice. As Congress negotiates a final bill based upon the United States Innovation and Competition Act (USICA) and the America Creating Opportunities for Manufacturing, Pre-Eminence in Technology, and Economic Strength (COMPETES) Act, we note that the Senate-passed version, USICA, which was sent over to the House, did not contain SHOP SAFE. We urge the House and Senate conferees to exclude SHOP SAFE from any final version of the bill that comes out of conference.

SHOP SAFE represents a seismic shift in law and policy around contributory trademark infringement. Yet, it has not received anything close to sufficient attention and vetting. Among other things, SHOP SAFE would effectively require digital services to monitor their users' posts for potential trademark infringement²—creating barriers to entry for smaller services, making it harder for American small businesses to reach their customers, and limiting creative expression by encouraging the over-removal of non-infringing posts.³ Due to the overbreadth of the bill,

¹ See also Eric Goldman, *26 Trademark Academics Oppose the SHOP SAFE Act* (Mar. 8, 2022), <https://blog.ericgoldman.org/archives/2022/03/26-trademark-academics-oppose-the-shop-safe-act.htm> (letter of opposition from 26 trademark academics).

² See, e.g., Nicholas Garcia, *SHOP SAFE Act: The Trademark Timebomb Masquerading as Consumer Protection*, Public Knowledge (Feb. 15, 2022), <https://publicknowledge.org/shop-safe-act-the-trademark-timebomb-masquerading-as-consumer-protection/> (addressing the bill's broad definitions).

³ See, e.g., Sonia K. Katyal & Leah Chan Grinvald, *Platform Law and the Brand Enterprise*, 32 Berkeley Tech. L.J. 1135, 1149-50 (2017) (quoting E. Jordan Teague, *Promoting Trademark's Ends and Means through Online Contributory Liability*, 14 Vand. J. Ent. & Tech. L. 461, 491 (2012) ("Requiring "mom and pop" online brokers to

consumers could be negatively impacted because smaller services and smaller sellers may cautiously err on the side of removing legitimate listings or even shut down due to compliance burdens.⁴ This runs counter to COMPETES’ stated goals of enhancing American competitiveness, by severely limiting the opportunities for American small businesses to offer their goods and services to consumers.

The Senate has not had an opportunity to properly consider SHOP SAFE and discuss how best to balance major policy changes to protect consumers while avoiding harming legitimate American small businesses.⁵ Additionally, the House Judiciary Committee failed to fully consider the concerns stakeholders raised with the Committee at various roundtables preceding the markup or even concerns raised by members of Congress at the markup. Indeed, at the markup of H.R. 5374, numerous House Judiciary members voiced bipartisan concerns about the bill’s broad reach and negative impacts on consumers and small businesses. Unfortunately, while Committee leadership publicly agreed to continue work to address the concerns of the diverse stakeholders affected by this proposal, instead, as Rep. Lofgren observes, “we now find SHOP SAFE has been inserted without improvements”⁶ into COMPETES.

Congress should not shoehorn this kind of dramatic policy change into the final version of COMPETES that results from the House and Senate conference or other “must-pass legislation.” Instead, IP legislation should be carefully and separately considered by Congress with a transparent legislative process that accounts for full stakeholder participation to allow consideration of these complex issues. Since the bill’s pervasive flaws remain, they are not the sort of problems that can be resolved in conference and SHOP SAFE should be altogether excluded from the final package. Allowing SHOP SAFE to proceed, as-is and tacked-on to unrelated legislation, would set a dangerous precedent for policymaking that is fundamentally connected to our economy, innovation, competition, and free speech.

We urge Congress to remove SHOP SAFE from consideration in the final version of COMPETES that results from the House and Senate conference and to keep it from being added

wage a million-dollar war against counterfeiting would likely drive these retailers out of business, undesirably narrowing consumer choice.”)).

⁴ Daphne Keller, *Empirical Evidence of Over-Removal by Internet Companies Under Intermediary Liability Laws: An Updated List*, The Center for Internet & Society at Stanford Law School (Feb. 8, 2021), <https://cyberlaw.stanford.edu/blog/2021/02/empirical-evidence-over-removal-internet-companies-under-intermediary-liability-laws>.

⁵ A November 2, 2021 Senate Judiciary Committee hearing on “Cleaning Up Online Marketplaces: Protecting Against Stolen, Counterfeit, and Unsafe Goods” focused primarily on an alternative bill, the Integrity, Notification, and Fairness in Online Retail Marketplaces (INFORM) Consumers Act. *See* Durbin Questions Witnesses in Senate Judiciary Committee Hearing on Cleaning Up Online Marketplaces (Nov. 2, 2021), <https://www.judiciary.senate.gov/press/dem/releases/durbin-questions-witnesses-in-senate-judiciary-committee-hearing-on-cleaning-up-online-marketplaces>.

⁶ *See* Rep. Lofgren, Extension of Remarks, H.R. 4521, the America COMPETES Act of 2022 (Feb. 2, 2022), available at <https://lofgren.house.gov/sites/lofgren.house.gov/files/2.2.22%20-%20Extension%20of%20Remarks%20on%20H.R.%204521.pdf> (“These concerns came up during the Judiciary Committee’s markup of the SHOP SAFE Act last fall. Members, including several who voted to advance the bill, called for further work on the bill. Based on public discussion at the markup, it was expected a committee-driven process to make changes to the SHOP SAFE Act would happen before it moved forward. Regrettably, given that the ordinary legislative process toward the Floor did not occur, we now find SHOP SAFE has been inserted without improvements into this much larger legislation.”).

to future, unrelated legislation. In the meantime, we look forward to working with Congress as it advances competitiveness and consumer protection issues.

Sincerely,

Automattic
Center for Data Innovation
Center for Democracy & Technology
Chamber of Progress
Coalition to Protect America's Small Sellers
Computer & Communications Industry Association
Copia Institute
Craigslist
Creative Commons
eBay
Electronic Frontier Foundation
Electronic Transactions Association
Engine
Etsy
hobbyDB
IP Justice
Mercari
National Association for the Self-Employed
NetChoice
OfferUp
Organization for Transformative Works
Patreon
Pinterest
Poshmark
Public Knowledge
R Street Institute
Re:Create
Redbubble
Reddit
Shopify
Small Business & Entrepreneurship Council
Software & Information Industry Association
Squarespace
TechFreedom
TechNet
TechNYC
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Cc: House and Senate Members of Conference Committee