

*Before the*  
**United States Department of Commerce**  
Washington, D.C.

*In re* Comment Request; Report on the  
State of Counterfeit and Pirated Goods  
Trafficking and Recommendations

Docket No. DOC-2019-0003

**COMMENTS OF  
THE COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION (CCIA)**

Pursuant to the request for comments published by the U.S. Department of Commerce in the Federal Register at 84 Fed. Reg. 32,861 (July 10, 2019), the Computer & Communications Industry Association (CCIA) submits the following comments regarding the preparation of the Report on the State of Counterfeit and Pirated Goods Trafficking.<sup>1</sup> CCIA represents technology products and services providers of all sizes, including computer hardware and software, electronic commerce, social media, telecommunications and Internet products and services. CCIA members employ more than 750,000 workers and generate annual revenues in excess of \$540 billion.

**I. Introduction**

The Internet has revolutionized the retail industry.<sup>2</sup> The share of e-commerce to retail sales continues to rise each year.<sup>3</sup> Retailers are increasingly digital, and are able to utilize Internet services to connect users and firms to new customers around the world. The Internet also empowers small businesses to reach new markets and even individual users to sell or resell goods. Research conducted by eBay shows that 97 percent of eBay-enabled small businesses export abroad, compared to only 1 percent of traditional businesses.<sup>4</sup> This is widespread, with 61

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<sup>1</sup> A list of CCIA members is available at <https://www.cciagnet.org/members>.

<sup>2</sup> eBay, Issues: Global Trade, <https://www.ebaymainstreet.com/issues/global-trade> (last visited July 29, 2019) (“Global platform-based marketplaces, online payment services, and affordable and efficient delivery solutions have all dramatically reduced the cost of distance and have made global trade a reality for businesses traditionally excluded from such activity. This model of trade is highly inclusive, and is empowering small businesses – both rural and urban -- to connect with customers all over the world.”). *See also* Shawn Xu, *How Pinterest Thinks About International Expansion*, MEDIUM (Jan. 25, 2018), <https://medium.com/@shawnxu/how-pinterest-thinks-about-international-expansion-113178f9bd>.

<sup>3</sup> Mary Meeker, Internet Trends Report 2019, *available at* <https://www.bondcap.com/report/itr19/#view/20>.

<sup>4</sup> eBay, Issues: Global Trade, <https://www.ebaymainstreet.com/issues/global-trade> (last visited July 29, 2019).

percent of these small sellers reaching customers on four or more continents.<sup>5</sup> Online services also offer tools to sellers and brand owners to better utilize the Internet to grow their brand and maximize value from using these services.<sup>6</sup> Indeed, data collected through the Future of Business Survey, a project between Facebook, the Organisation for Economic Cooperation and Development (OECD), and the World Bank, shows how social media platforms enable exports.<sup>7</sup>

These interactions are not possible without user trust in online services. Internet companies across the spectrum devote significant resources to maintaining trust in online purchases. Combating counterfeit and pirated goods online is central to these efforts. The outcomes of the Administration's study of this issue could help ensure that online sales are trusted environments, and that digital e-commerce can continue to grow and benefit sellers of all sizes.<sup>8</sup>

## II. Current Practices to Address Counterfeits Online

Firms across the Internet industry take the challenge of addressing the sale of counterfeit and pirated goods online seriously. These firms have invested heavily in programs to address this challenge and enforce company policies against counterfeits and pirated goods. Online services also engage with rights holders and brand owners extensively and have established programs that encourage information sharing between stakeholders that allow online services to identify and remove counterfeit and pirated goods from their platforms. A collaborative approach that continues to bring together brand owners, online services, and policymakers will

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<sup>5</sup> *Id.*

<sup>6</sup> See Facebook & IP Protection (Dec. 2018), *available at* <https://fbnewsroomus.files.wordpress.com/2018/12/facebook-ip-protection.pdf> at 6-7.

<sup>7</sup> The Survey data was collected through businesses' responses regarding their interactions on Facebook and perspectives on trade issues that affect their ability to export. The data shows that businesses, particularly small businesses, utilizing online platforms have a higher propensity to engage in international trade than traditional firms. 6.75 percent of U.S. small and medium-sized businesses (SMBs) on Facebook engage in international trade, compared to 4.33 percent of SMBs not on Facebook. OECD, Future of Business Survey, <http://www.oecd.org/sdd/business-stats/the-future-of-business-survey.htm> (last visited July 29, 2019).

<sup>8</sup> The Federal Register notice makes clear that in the preparation of this report, U.S. agencies will consult comments made in previous Special 301 reviews. CCIA has previously commented on claims made in the Special 301 Notorious Markets review process and encouraged USTR not conflate critical, general technologies with the actions of a small minority of users whose infringements have been identified by commenters. *See, e.g.*, Comments of CCIA, *In re* 2017 Special 301 Out-of-Cycle Review of Notorious Markets, Dkt. No. 2017-0015, filed on Oct. 16, 2017, *available at* <http://www.ccianet.org/wp-content/uploads/2017/10/CCIA-Notorious-Markets-OCR.pdf>; Comments of CCIA, *In re* 2015 Special 301 Out-of-Cycle Review of Notorious Markets, Dkt. No. 2015-0016, filed on Oct. 12, 2015, *available at* <http://www.ccianet.org/wp-content/uploads/2015/10/CCIA-Rebuttal-Comments-on-2015-Out-of-Cycle-Review-of-Notorious-Markets.pdf>.

make these efforts most effective. It is encouraging that the Presidential Memorandum recognizes this.<sup>9</sup>

As the Presidential Memorandum sets out, the Report should take stock of “existing policies, procedures, or best practices” that have been “effective in curbing the importation and sale of counterfeit and pirated goods, including those converted through online marketplaces.”<sup>10</sup> Existing measures taken by online e-commerce platforms include the following:<sup>11</sup>

- **Brand registration programs.** E-commerce-focused firms allow trademark or brand owners to voluntarily enroll in brand registration programs, which allow the service to better utilize automated tools to identify and remove confirmed counterfeit products.<sup>12</sup> Through enrollment, the owners provide relevant information to the service about their products that better enables the service to proactively address counterfeits.
- **Simplified notice and removal procedures.** Online services have worked to make their reporting processes as efficient and easy as possible to facilitate swift removal of content that violates company policy. Companies comply with requisite obligations under current law regarding trademarks and content protected by U.S. copyright law,<sup>13</sup> and many online services exceed these obligations with online tools providing verified rightsholders priority access to tools for expeditiously flagging and removing potentially infringing products.<sup>14</sup>
- **Collaboration with brand owners.** Online services work with brand owners and rightsholders through expanded programs that build upon tools like brand registration.

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<sup>9</sup> Memorandum on Combating Trafficking in Counterfeit and Pirated Goods (Apr. 3, 2019), <https://www.whitehouse.gov/presidential-actions/memorandum-combating-trafficking-counterfeit-pirated-goods/>, Section 1(e).

<sup>10</sup> *Id.*

<sup>11</sup> This is an illustrative list and does not purport to identify all tools and programs utilized by Internet and e-commerce services. Nor does it suggest that all services utilize every practice listed. Business models of all online services vary greatly across platforms.

<sup>12</sup> See Amazon Brand Registry <https://brandservices.amazon.com/> (last visited July 29, 2019); eBay Verified Rights Owners Program (VeRO) <https://pages.ebay.com/seller-center/listing-and-marketing/verified-rights-owner-program.html> (last visited July 29, 2019).

<sup>13</sup> See generally Facebook Help Center, What is a Counterfeit?, <https://www.facebook.com/help/962020680598166> (last visited July 29, 2019); Google Ads, Counterfeit Policy, <https://support.google.com/adspolicy/answer/176017> (last visited July 29, 2019); Google Shopping, Counterfeit Policy, <https://support.google.com/merchants/answer/6149993> (last visited July 29, 2019).

<sup>14</sup> See, e.g., Facebook’s Commerce & Ads IP tool, *available at* [https://www.facebook.com/help/835772913244854?helpref=popular\\_topics](https://www.facebook.com/help/835772913244854?helpref=popular_topics) (last visited July 29, 2019).

For example, some programs grant more control to trusted and verified brand owners regarding the identification and removal of counterfeit goods.<sup>15</sup> Tools like “product serialization” have also recently been introduced, which allow manufacturers to attribute a unique code to each product which is then verified by the online marketplace intermediary to confirm authenticity.<sup>16</sup>

- **Transparency reports and information sharing.** Some services release reports regularly that detail removals on counterfeits, in addition to takedowns related to copyright and trademark claims.<sup>17</sup>
- **Trust and certification programs.** Some services utilize certification and other indicator schemes that indicate to a user whether a seller has a history of customer satisfaction and complying with online services’ policies.<sup>18</sup> Consumer reviews are also widely used.
- **Other collaborative proactive measures.** In enforcing their strict prohibitions against counterfeiting, in many cases platforms will take more extensive action than merely removing content that is specifically reported to them, and many are exploring ways to remove additional suspected counterfeit content on a proactive basis.
- **User education.** Online services provide information to users regarding counterfeits and intellectual property to help them avoid posting or sharing content that violates terms of service.<sup>19</sup> Online services also encourage law enforcement agencies, rights owners, and

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<sup>15</sup> See Amazon, Project Zero, <https://brandservices.amazon.com/projectzero> (last visited July 29, 2019); Dharmesh M. Mehta, *Amazon Project Zero, DAY ONE* (Feb. 28, 2019), <https://blog.aboutamazon.com/company-news/amazon-project-zero>; Chaim Gartenberg, *Amazon’s Project Zero Will Let Brands Remove Counterfeit Listings of Their Products*, THE VERGE (Feb. 28, 2019), <https://www.theverge.com/2019/2/28/18244603/amazon-project-zero-counterfeit-listing-remove-products>.

<sup>16</sup> Dharmesh M. Mehta, *Amazon Project Zero, DAY ONE* (Feb. 28, 2019), <https://blog.aboutamazon.com/company-news/amazon-project-zero>. See also Amazon, Transparency, Frequently Asked Questions, <https://brandservices.amazon.com/transparency/faq> (last visited July 29, 2019).

<sup>17</sup> See, e.g., Facebook, Transparency Report: Intellectual Property, <https://transparency.facebook.com/intellectual-property> (last visited July 29, 2019); Google, *How Google Fights Piracy* (2018), available at [https://storage.googleapis.com/gweb-uniblog-publish-prod/documents/How\\_Google\\_Fights\\_Piracy\\_2018.pdf](https://storage.googleapis.com/gweb-uniblog-publish-prod/documents/How_Google_Fights_Piracy_2018.pdf).

<sup>18</sup> See eBay Top Rated Program, <https://pages.ebay.com/seller-center/service-and-payments/top-rated-program.html#what-is-top-rated-prog> (last visited July 29, 2019).

<sup>19</sup> This includes notification of repeat infringer policies. See *Facebook & IP Protection*, *supra* note 6 at 5.

consumer protection organizations to directly educate users by creating participant profile pages and public service campaigns.

- **Coordination with Law Enforcement.** Many online services closely coordinate with domestic and international law enforcement agencies to better identify bad actors and to prevent illegal or infringing practices.

The tools listed above are often accompanied by processes to address abuse, as well as appeals procedure for sellers and users to register complaints and contest removals. Not all tools will be effective or relevant for all online services; there should be flexibility to develop appropriate measures targeted to the issues or problem observed as business models of online services vary greatly across platforms.

### **III. Recommendations**

As the Administration considers possible recommendations for action to further address the sale of counterfeits and pirated goods online, CCIA encourages the relevant agencies to take into account all of the existing work and vigorous attention to this issue, as illustrated by the previous section, and that any policy efforts prioritize risks to health or safety. CCIA also urges consideration of the impact that a number of mandated requirements would have on smaller platforms. While leading services have built out substantial programs, mandating that these practices be adopted by all online platforms would have significant consequences for smaller competitors. CCIA also notes challenges for other kinds of platforms, such as where services facilitate free expression in addition to commerce. Further, in order to maintain and build out the programs and practices listed in the previous section, existing liability regimes must be maintained under U.S. law.<sup>20</sup>

Recommendations for further work might include better facilitation of information sharing between enforcement agencies including the Customs and Border Protection (CBP) and services to combat counterfeits. As pointed out in a GAO report, “restrictions on CBP’s information sharing limit the ability of rights holders and e-commerce websites to protect IPR.”<sup>21</sup> Information regarding packages seized for counterfeits by CBP could be shared with relevant e-

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<sup>20</sup> See 47 U.S.C. § 230; 17 U.S.C. § 512; *Tiffany Inc. v. eBay, Inc.*, 576 F. Supp. 2d 463 (S.D.N.Y. 2008), *aff’d*, 600 F.3d 93 (2d Cir. 2010).

<sup>21</sup> U.S. Government Accountability Office, *Report to the U.S. Senate Committee on Finance, Intellectual Property, Agencies Can Improve Efforts to Address Risks Posed by Changing Counterfeits Market* (Jan. 2018), available at <https://www.gao.gov/assets/690/689713.pdf> at 31.

commerce firms to better track and identify similar shipments in the future. On small shipments, a cohesive data tracking system could help identify counterfeits for all packages shipped to United States.<sup>22</sup>

#### **IV. Clarification Requested in the Federal Register Notice**

First, Commerce should offer clarity regarding some definitions set out the Presidential Memorandum. The definition of “online third-party marketplace” in Section 3(c) of the Memorandum (and cited in the Federal Register notice) could be misconstrued to include Internet infrastructure and other services that are outside the Administration’s intent in preparing this Report. The Memorandum includes “online third-party marketplaces” in the definition of “third party intermediaries” (in addition to carriers, customs brokers, payment providers and vendors). Section 3(d). “Online third-party marketplace” is then defined to include “any web-based platform that includes features primarily designed for arranging the sale, purchase, payment, or shipping of goods, or *that enables sellers not directly affiliated with an operator of such platforms to sell physical goods to consumers located in the United States*” [emphasis added]. Section 3(c). The latter clause of 3(c) could be construed to include any and all components in the Internet infrastructure stack (*i.e.*, a broadband provider or any general inquiry search engine) that enable transactions of physical goods in some attenuated fashion. This appears to be outside the scope of the consultation, as the Memorandum appears to focus on services that have a more direct relationship to online commerce such as carriers, customs brokers, payment providers, etc. The Federal Register notice contemplates recommendations to be made pursuant to the Report to include greater cooperation with brand owners, and targeted to the services that are in the best place to work with rights holders. As such, the definitions need revision and clarification.

With regard to the policies labeled by Commerce as “best practices” in the notice, CCIA notes that a number of policies presented in the notice are already applied by prominent platforms. While CCIA supports industry adoption of the practices identified in the notice where capabilities permit, promulgating regulatory “best practices” guidance independent from the standard notice-and-comment process would present procedural concerns. In addition, absent

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<sup>22</sup> The OECD identified lack of information/information quality for services to address counterfeits in small shipments. Governance Frameworks to Counter Illicit Trade (2018) at 96, *available at* <https://www.oecd.org/gov/governance-frameworks-to-counter-illicit-trade-9789264291652-en.htm>.

industry input regulators frequently lack the requisite information about prevailing practices within industry and lack mechanisms to keep current on what best practices in industry currently are. As a result, regulatory codification of current best practices may have the unintended effect of fixing in time practices of 2019, whereas actual best practices in industry are likely to evolve as new strategies and technologies are developed to confront the challenge.

**V. Conclusion**

As the Administration prepares its report on the State of Counterfeit and Pirated Goods Trafficking and Recommendations, CCIA encourages policymakers to utilize this opportunity to foster further growth of the e-commerce market and encourage further collaboration from all stakeholders in the process.

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Sincerely,

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