Computer & Communications Industry Association (CCIA Europe)
Submission to the call for evidence on the EU toolbox against counterfeiting
02 March 2022

1. Introduction

The Computer & Communications Industry Association Europe (CCIA Europe) welcomes this opportunity to provide feedback to the European Commission's call for evidence on the EU toolbox against counterfeiting.[1] We welcome the objective of the EU toolbox to "set out coherent, effective and coordinated action against counterfeiting, both online and offline".[2]

CCIA Europe represents European and international technology products and services providers of all sizes, including computer hardware and software, electronic commerce, social media, telecommunications, and Internet products and services.

While over 90% of all goods in the EU are sold offline, the share of e-commerce retail sales has been steadily rising over the past decade and the COVID-19 crisis has accelerated this trend. European citizens increasingly shop online and from other countries. In 2021, 74% of European Internet users shopped at least once online, while 32% of e-shoppers bought or ordered goods from sellers in other EU countries.[3] Small and medium-sized enterprises (SMEs), as well as micro-businesses, are largely benefiting from this growth: 17.5% of European SMEs sell online, amounting to 11.7% of their turnover in 2020.[4]

According to the Organisation for Economic Co-operation and Development (OECD) and the EU's Intellectual Property Office (EUIPO), the "total trade in counterfeit and pirated goods destined to the EU amounted to as much as USD 134 billion (EUR 119 billion)" in 2019, implying "that as much as 5.8% of EU imports were in counterfeit and pirated products". Importantly, they note that the COVID-19 crisis has affected trade in fake goods with an impact "smaller than initially expected".[5] The prevention of infringements of intellectual property rights (IPR) nonetheless, remains crucial. In that regard, CCIA Europe has welcomed the European Commission's Action Plan on Intellectual Property.[6] CCIA Europe's members value intellectual property protection and have continuously devoted significant resources to develop processes, programs, and tools to address counterfeit.[7]

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[1] European Commission, Have your say - EU toolbox against counterfeiting, 3 February 2022, available here.

[2] European Commission, Have your say - EU toolbox against counterfeiting, op. cit., p. 3.

[3] Eurostat, e-commerce statistics for individuals, consulted on 25 January 2022, available here.

[4] European Commission, Digital Economy and Society Index (DESI) 2021, 12 November 2021, available here.

[5] OECD/EUIPO, Global Trade in Fakes: a Worrying Threat, OECD Publishing, 22 June 2021, available here.

[6] CCIA, Feedback on the European Commission's roadmap on the Intellectual Property Action Plan, 13 August, 2020, available here.

[7] CCIA, Submission to the European Commission's 2022 Counterfeit and Piracy Watch List, 11 February 2022, available here.

2. Current Practices to Address Counterfeits Online

As the European Commission is developing the EU toolbox against counterfeiting, CCIA Europe would like to offer a perspective on the current practices developed by its members. We welcome the support of the proactive and proportionate voluntary actions of intermediaries as part of their guiding principles and good practices. Online marketplaces and other e-commerce services are working continuously to ensure their users' trust and protection in their platforms. The challenge of online sale of counterfeit is a serious issue that CCIA Europe's members have tackled through significant investments.

Online intermediaries engage with right holders extensively and have established programs that encourage information sharing between stakeholders that allow online services to identify and remove counterfeit goods from their platforms. A collaborative approach that continues to bring together brand owners, online services, and policymakers will make these efforts most effective. The EU Memorandum of Understanding on the sale of counterfeit goods on the Internet, in place since 2011, is a successful example of collaboration that contributes to reducing counterfeits online.[8] The work in the EUIPO, such as the Expert Group on cooperation with intermediaries, or the project Enhancing IP Protection on e-Commerce marketplaces are other examples of the ongoing efforts of all the stakeholders.[9] During the COVID-19 crisis, several online platforms collaborate with the Commission and national consumer protection authorities to act rapidly to fight scams related to the pandemic.[10]

The tools listed below are often accompanied by processes to address abuses, as well as appeals procedures for sellers and users to register complaints and contest removals. Not all tools will be effective or relevant for all online intermediaries. The European Commission rightly pointed out the variety of online intermediaries in its call for evidence. There should be flexibility to develop appropriate measures targeted to the issues or problems observed as business models of online services vary greatly across platforms. There is also a diversity of business models within marketplaces, acting as an intermediary, retailer, a mix of both, or even as an e-commerce infrastructure service. Therefore, there is no one-size-fits-all solution. The European Commission should take into account the processes available and indeed frequently used by right holders to ensure that the EU toolbox against counterfeiting is balanced and efficient.

a. Online marketplaces and other e-commerce services

Online marketplaces and other e-commerce services have already taken measures, such as:
- Brand registration programs: E-commerce-focused firms allow trademark or brand owners to voluntarily enrol in brand registration programs, which allow the service to better utilise automated tools to identify and remove confirmed counterfeit products.[11] Through enrolment, the owners provide relevant

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[8] European Commission, Memorandum of understanding on the sale of counterfeit goods on the internet, 21 June 2016, available here.

[9] EUIPO, Expert Group on cooperation with intermediaries, available here; Enhancing IP Protection on e-Commerce marketplaces, January 2021, available here.

[10] European Commission, Scams related to COVID-19, 3 April 2020, available here.

[11] *See* Amazon Brand Registry here; eBay Verified Rights Owners Program (VeRO), available here.

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 the swift removal of content that violates company policy.[12] Many online services have developed online tools providing verified right holders priority access to tools for expeditiously flagging and removing potentially infringing products.[13] Other services have adapted their tools and procedures together with national authorities.[14]

● Collaboration with brand owners: Online services work with brand owners and right holders through expanded programs that build upon tools like brand registration. For example, some programs grant more control to trusted and verified brand owners regarding the identification and removal of counterfeit goods.[15] Tools like "product serialisation" 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.[16]

● 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 and takedowns undertaken proactively.[17]

● Trust and certification programs: Some services utilise 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.[18] Consumer reviews are also widely used.

● Other collaborative proactive measures: In enforcing their prohibitions against counterfeiting, in many cases, platforms will take more extensive action than merely removing content that is specifically reported to them. Many are exploring ways to remove additional suspected counterfeit content on a proactive basis, implement repeat infringer policies and additional measures aimed at tackling recidivism, and develop machine learning tools to identify and remove content.[19]

● User education: Online services provide information to users regarding counterfeits and intellectual property to help them avoid searching for, posting, or sharing content that violates terms of service.[20]

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[12] *See generally* Facebook Help Center, What is a Counterfeit?, available here; Google Ads, Counterfeit Policy, available here; Google Shopping, Counterfeit Policy, available here.

[13] *See*, Meta for Business, Introducing Brand Rights Protection: Helping Protect Brands and Consumers from Counterfeits, 21 October 2021, available here.

[14] *See* Amazon, How we are protecting Italian artisanal food and wine and ensuring a safe shopping experience, 29 October 2021, available here.

[15] *See* Amazon, Project Zero, available here; Dharmesh M. Mehta, Amazon Project Zero, DAY ONE, 28 February, 2019, available here; Case study: Project Zero offers an anti-counterfeit solution for Arduino's many markets, available here.

[16] *See* Amazon, Transparency, Frequently Asked Questions, available here.

[17] *See* Facebook, Transparency Report: Intellectual Property 2021, available here; Google, How Google Fights Piracy, 2018, available here; Amazon, Brand Protection Report, May 2021, available here.

[18] *See* eBay Top Rated Program, available here.

[19] *See* Meta, How We're Proactively Combating Counterfeits and Piracy, May 19, 2021, available here.

[20] *See* Comments to Dep't of Commerce, In Re Comment Request: Report on the State of Counterfeit and Pirated Goods Trafficking and Recommendations, filed 29 July 2020, available here.

Online services also encourage law enforcement agencies, rights owners, and consumer protection organisations 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.[21]

b. Internet infrastructure service providers

Internet infrastructure services generally have no control over the content of websites using their services. In the case of a reverse proxy service, for example, the service provider's Internet Protocol addresses may appear in WHOIS and DNS records for websites using its services and, as such, they can be erroneously characterised by stakeholders as a hosting provider.[22] However, reverse proxy services do not host the websites and therefore cannot remove their content from the Internet. Many of these types of service providers — including Content Delivery Networks (CDNs), security providers, and Virtual Private Networks (VPNs) — follow a similar model of routing Internet queries to locations other than the original host to improve security and privacy.

Internet infrastructure providers do, however, engage in good faith efforts to assist right holders with complaints about alleged intellectual property infringements, by facilitating communication between right holders and the hosting providers and websites operators who are able to address their complaints.[23] Typically, Internet infrastructure providers would put in place an abuse reporting process designed for this purpose. This enables right holders to have a way to report alleged infringement to those with the capability to remove the content from the web (i.e hosting service providers and/or owners of the domain in question). There are often also additional pathways available through Trusted Reporter Programmes.

It is also often the case that intellectual property right holders use the services of Internet infrastructure providers such as cybersecurity companies to secure their sites from data scraping and cyberattacks. In this way, Internet infrastructure providers can assist intellectual property right holders in other risk areas within their core competence.

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[21] In 2020, Amazon launched the Counterfeit Crimes Unit (CCU) to help hold counterfeiters accountable through the courts and law enforcement. *See* Amazon, A Blueprint for Private and Public Sector Partnership to Stop Counterfeiters, Oct. 18, 2021, available here.
[22] WHOIS is a widely used Internet record listing that allows the identification of the domain owner. DNS (Domain Name System) translates domain names to IP addresses so browsers can load Internet resources.
[23] *See* Cloudflare, Our approach to abuse, available here, and Assisting copyright holders, available here.

3. Recommendations for the EU toolbox against counterfeiting

We welcome the objective of the EU toolbox to "set out coherent, effective and coordinated action against counterfeiting, both online and offline".[24] CCIA Europe supports the European Commission's approach to clarify the role and responsibilities of all the stakeholders involved in the fight against counterfeit. We believe that the deepening of the cooperation between right holders, intermediaries and law enforcement authorities, as well as innovative tools and techniques are crucial to achieving the common goal of reducing counterfeiting in the EU.

CCIA Europe welcomes that the European Commission is seeking to build on existing legislation and prioritise improving the enforcement of the current legislative framework on counterfeit goods. We would like to point out in that regard that the European Commission should carefully consider other areas of legislation, such as data protection or competition. The General Data Protection Regulation needs to be taken into due consideration when encouraging data sharing between stakeholders.[25] We also note that the ongoing and upcoming transformation of the legislative landscape will impact the online economy, the e-commerce sector, and the fight against counterfeiting. The Digital Services Act, currently under negotiations between the Council of the EU and the European Parliament, will set out a new framework to counter illegal goods online, including counterfeited ones.[26] The European Commission should ensure the coherence and articulation between all these initiatives.

When considering stakeholders involved, the EU toolbox needs to take into account the specificities and role of each online service and intermediaries in terms of addressing counterfeiting. An Internet infrastructure business, for example, has different capabilities and responsibilities than a marketplace or an online platform, as these technical services do not have control over the online sale of goods. The first point of call for tackling counterfeit goods should therefore be those services that can take the most proportionate action by removing specific pieces of content from the Internet.

Improving the collaboration between intermediaries, right holders and authorities is the cornerstone to better fight counterfeit. We welcome the objective of the EU toolbox that all involved parties should "fulfil their responsibilities in a spirit of mutual cooperation and information sharing". The various initiatives previously mentioned where CCIA Europe and its members are active have demonstrated that the efficiency of intermediaries' voluntary measures greatly depends on the collaboration of right holders. While intermediaries are developing innovative tools, it is important that right holders participate by sharing their knowledge of their own products. For example, the identification of counterfeits is useful information for intermediaries when processing allegedly IPR infringing goods.[27] The development of existing tools would be beneficial to support the collaboration between stakeholders.[28]

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[24] European Commission, Have your say - EU toolbox against counterfeiting, op. cit., p. 3.

[25] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC, available here.

[26] European Commission, Proposal for a Regulation on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, 15 December 2020, available here.

[27] European Commission, Report on the functioning of the Memorandum of understanding on the sale of counterfeit goods on the internet, 14 August, 2020, available here, p. 24.

[28] EUIPO, IP Enforcement Portal, available here.

CCIA Europe also urges consideration of the impact that some good practices would have on smaller online intermediaries, such as appointing a single contact point for IP enforcement. Today, more than 10,000 online platforms are operating in Europe, "over 90% of which are small and medium-sized enterprises".[29] While leading intermediaries have built substantial programs, incentivising that these practices are adopted by all online platforms would have significant consequences for smaller competitors. The EU's ambition should aim at addressing the root causes and bad actors of counterfeit goods in addition to identifying large actors and marketplaces. If the measures are concentrated too much on online intermediaries, an unintended consequence could be the migration of illegal content and goods to smaller, less regulated platforms and networks.

Priority should also be on supporting SMEs to better protect their intellectual property. The European Commission has rightly pointed out in its Action Plan on Intellectual Property that boosting the uptake of intellectual property by SMEs was a priority.[30] While less than 9% of small European businesses own intellectual property rights, the firms that do have 68% more revenue per employee than firms that do not.[31] Online marketplaces and other e-commerce services have started to build programs to support SMEs.[32] Increasing the knowledge of European SMEs of their intellectual property rights will support the overall fight against counterfeiting

Given that over 90% of all goods in the EU are still sold offline, the fight against counterfeit should be specific to the channel but also consider the important offline dimension of the supply chain. Bad actors need to be deterred by law enforcement actions. IP crime became one of the ten priorities of the European multidisciplinary platform against criminal threats (EMPACT) for its 2022-2025 policy cycle.[33] Online counterfeit is tackled by the serious and organised crime threat assessment (SOCTA) report, developed by Europol, which comprises a set of recommendations based on an in-depth analysis of the major crime threats facing the EU.[34]

Finally, it is essential that in outlining the state of play on activity to address counterfeit online, due diligence forms part of the data collection and reporting process, to ensure accuracy. The EUIPO and OECD work on quantification and evidence on counterfeiting is an important contribution to the wider understanding of the need to prioritise actions in this field. The inherent limitations in the data sets are noted in the reports but are often not clear to this wider audience. We encourage the Commission to make these clear in all of their initiatives, including the EU toolbox against counterfeiting. For example, the OECD and EUIPO estimate that "in 2019, imports of counterfeit and pirated products into the EU amounted to as much as EUR 119 billion (USD 134 billion), which

[29] European Commission, Europe fit for the Digital Age: new online rules for platforms, available here.

[30] European Commission, Action Plan on Intellectual Property, 25 November, 2020, available here.

[31] EUIPO/EPO, Intellectual property rights and firm performance in Europe: an economic analysis, Feb 2021, available here.

[32] *See e.g.* Amazon, Amazon Launches IP Accelerator in Europe to Help Small Businesses Protect Their Brands and Tackle Counterfeit, Nov. 25, 2020, available here.

[33] Council of the European Union, Council conclusions setting the EU's priorities for the fight against serious and organised crime for EMPACT 2022 - 2025, May 12, 2021, available here.

[34] Europol, European Union Serious and Organised Crime Threat Assessment (SOCTA) 2021, Dec. 7, 2021, available here.

represents up to 5.8 % of EU imports."[35] As described above, we recognize the seriousness of the issue. However, we are concerned that the value of IP infringement should not be based on the 'estimated retail value of the genuine product', but on the 'estimated retail value of the fake'. As EUIPO notes, the current system "may lead to inflated estimated values of the goods detained, compared to alternative methods for valuing them. Indeed, in these subcategories (e.g. luxury watches), the retail price of the genuine good is much higher than that of, for instance, the fake product in the secondary markets or than, alternatively, its cost."[36] Variations in the volumes of luxury items seized will then affect year-on-year percentage changes when based on these values. This is not to minimise the issue. As these issues take more prominence, it becomes more important to highlight the caveats, including that this data covers all IP infringements, not purely "fakes".

4. Conclusion

CCIA Europe supports the European Commission's ongoing efforts to tackle counterfeit online and the EU toolbox against counterfeit. We believe that such work should remain evidence-based and non-political. CCIA Europe and its members will continue to engage in good faith with the European Commission, the EUIPO and other stakeholders to ensure that the EU toolbox against counterfeiting proposes an efficient framework for the cooperation of all stakeholders. We stand ready to provide additional information.

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[35] OECD/EUIPO, Global Trade in Fakes: a Worrying Threat, op. cit., p.9
[36] EUIPO, EU enforcement of intellectual property rights, Overall results of detentions 2019, June 25, 2021, p.12, available here.