


# Rep. Jerry Nadler Pushing New Bill That Will Destroy Online Commerce; Make Sure Only Amazon Can Afford The Liability

 [techdirt.com/articles/20210927/17301647644/rep-jerry-nadler-pushing-new-bill-that-will-destroy-online-commerce-make-sure-only-amazon-can-afford-liability.shtml](https://www.techdirt.com/articles/20210927/17301647644/rep-jerry-nadler-pushing-new-bill-that-will-destroy-online-commerce-make-sure-only-amazon-can-afford-liability.shtml)



Legal Issues

from the *how-does-this-help* dept

Tue, Sep 28th 2021 9:27am — Mike Masnick

'Tis the season for terrible, horrible, no good bills to destroy the open internet. First up, we've got Rep. Jerry Nadler, a close friend of the always anti-internet lobbying force that is the legacy copyright industries. Earlier this year he introduced the SHOP SAFE Act, which is due for a markup tomorrow, and has an unfortunately high likelihood of passing out of committee. The principle behind the Act (which Nadler has now updated with a manager's amendment) is that "something must be done" about people buying counterfeit goods online.

Not addressed, at all, is whether or not counterfeit goods online are *actually* a real problem. I know that industry folks always insist that counterfeiting is a scourge that costs billions, but actual research on this shows something different entirely. A GAO report from years back showed that most of the stats regarding counterfeiting are completely exaggerated and multiples studies have shown that -- far from "tricking" people -- most people who buy counterfeits know exactly what they're doing, and that for many buyers, buying a counterfeit is an aspirational purchase. That is, they know they're not buying the real thing, but they're buying the counterfeit because that's what they can afford -- and if they can afford the real thing at a later date, they will buy it. But nearly all of the public commentary on counterfeiting assumes that the public is clueless, and being "tricked" into buying "dangerous" counterfeits.

The second bad premise behind the SHOP SAFE Act is that the "real problem" is Section 230 (because everyone wants to assume that Section 230 can be blamed for anything bad online). So the core approach of the SHOP SAFE Act is to add liability to websites that allow people to sell stuff online. However, as EFF notes in its write up about the problems with this bill, if you try to sell something via Craigslist or even just via Gmail, the bill would effectively make those companies liable for your sale.

*One measure platforms would have to take under SHOP SAFE is verifying the identity, address, and contact information of any third-party seller who uses their services. Imagine if you had to provide a copy of your driver's license to Craigslist just to advertise your garage sale or sell a used bike. As over the top as that seems, it's even worse when you think about how this would apply to services like Gmail or Facebook. Should you really have to provide ID to open an email account, just in case you sell something using it? Requirements like this threaten not only competition but user privacy, too.*

I don't know why we need to keep explaining this, but **when you add more liability to internet platforms, you get fewer internet platforms.** This bill would effectively lock in Amazon and a few other giant companies as the only ones who could leap through the convoluted bureaucratic (and privacy-destructive) nonsense that this bill requires. Again, from EFF:

*Other provisions of SHOP SAFE put the burden of rooting out counterfeits on platforms, rather than on the trademark holders who are in the best position to know a real from a fake. Most concerning to us is the requirement that platforms implement "proactive technological measures" for pre-screening listings. This provision echoes calls for mandatory automated content filtering in the copyright context.*

Just a few months ago, I wrote about a trial regarding claims of counterfeit goods in an online marketplace, and just how much the lawyers leaned on the fact that the platform **must** know what's real and what's not (when even the trademark holder's own representative admitted she wasn't sure which products were real and which were counterfeit). Yet this bill, like so many other bad intermediary liability laws, presupposes that platforms -- which often have to handle millions of new product listings -- can magically stop all counterfeits from appearing.

It's disappointing (if not at all surprising) that the ABA's "Intellectual Property Law Section" is super thrilled with this bill (I mean, it's like a full employment act for IP lawyers) and claims that it will "facilitated robust e-commerce removal and reporting" in a manner that makes it sound similar to the DMCA's safe harbor provisions (which already have significant overblocking problems). But as EFF notes, this takes the entire principle of the safe harbor ("you're protected from liability if you take these steps") and flips it on its head.

*SHOP SAFE's requirements go far beyond the DMCA's, while lacking safeguards like a counternotice procedure and penalties for bad-faith takedowns. SHOP SAFE also takes the DMCA's safe harbor structure and flips it upside down. The DMCA incentivizes platforms to adopt certain policies and practices by providing a true safe harbor—that is, platforms that choose to satisfy the safe harbor requirements can be confident that they cannot be held liable for infringement by their users. SHOP SAFE doesn't work this way. Instead, it creates a new, independent basis for secondary infringement liability, and it directs that all covered platforms must implement a range of practices or else be held liable for any trademark infringement by their users. The DMCA's safe harbor framework is preferable because it incentivizes desired behavior while maintaining flexibility for different approaches by different platforms according to their unique characteristics.*

Everything about the SHOP SAFE Act seems designed to create problems for the open internet. I know that Rep. Nadler doesn't care about that, but you and I should. Anyone who regularly relies on the internet for buying and selling things should be concerned about this bill and what it will do to the internet. It will make it that much harder for you and I to buy or sell stuff. It will give **more** power to the giant e-commerce companies, such as Amazon, who can handle the regulatory burdens here, but it will make it nearly impossible for competitors to come along, and will make it effectively impossible for people to do more informal sales to each other using the internet as an intermediary.

It's a dangerous bill and it should not move forward in its current form.



Thank you for reading this Techdirt post. With so many things competing for everyone's attention these days, we really appreciate you giving us your time. We work hard every day to put quality content out there for our community.

Techdirt is one of the few remaining truly independent media outlets. We do not have a giant corporation behind us, and we rely heavily on our community to support us, in an age when advertisers are increasingly uninterested in sponsoring small, independent sites — especially a site like ours that is unwilling to pull punches in its reporting and analysis.

While other websites have resorted to paywalls, registration requirements, and increasingly annoying/intrusive advertising, we have always kept Techdirt open and available to anyone. But in order to continue doing so, we need your support. We offer a variety of ways for our readers to support us, from direct donations to special subscriptions and cool merchandise — and every little bit helps. Thank you.

—The Techdirt Team

Filed Under: counterfeiting, counterfeits, jerry nadler, liability, marketplaces, section 230, shop safe, shopping  
Companies: amazon