



The Coalition to
Protect America's Small Sellers

DATE

The Honorable Jerry Nadler
Chairman, House Judiciary Committee
United States House of Representatives
Washington, DC 20515

The Honorable Darrell Issa
Ranking Member, Subcommittee on Courts,
Intellectual Property and the Internet
United States House of Representatives
2300 Longworth House Office Building
Washington, DC 20515
RE: SHOP SAFE ACT

The Honorable Hank Johnson
Chairman, Subcommittee on Courts, Intellectual
Property and the Internet
United States House of Representatives
2240 Rayburn House Office Building
Washington, DC 20515

The Honorable Ben Cline
United States House of Representatives
2443 Rayburn House Office Building
Washington, DC 20515

Dear Chairman Nadler, Chairman Johnson, Ranking Member Issa and Congressman Cline,

On behalf of the undersigned member companies of the Coalition to Protect America's Small Sellers (PASS), we write to provide our feedback to the SHOP SAFE Act, H.R. 3429. We greatly appreciate both the process that Members and staff have undertaken to better understand the complex issue of counterfeits and the opportunity to provide feedback and recommendations for how we believe the legislation can be improved.

About the PASS Coalition

The PASS Coalition is a policy-oriented coalition of third-party marketplaces and eCommerce platforms that have joined forces to educate policymakers on the benefits and variance of our eCommerce business models while also working collaboratively to find thoughtful solutions to consumer protection, competition, and economic development issues impacting eCommerce. Current Coalition members include eBay, Etsy, Mercari, OfferUp and Poshmark. As a collection of online marketplaces, above all else we value the trust of the consumers who buy and sell goods on our platforms, and we believe we have a strict responsibility to help protect consumers who utilize our marketplaces. We invest significant resources, including people and technology, to ensure that we remove potentially harmful or fraudulent goods and to ensure that marks are protected. However, our business models limit our ability to perform some of the obligations required within this legislation, and we hope our comments will further illustrate this reality. Central to the PASS Coalition and the core function of our member companies' operations are the millions of individual American entrepreneurs and American small businesses across the country that use our platforms to make a living honestly and legally. The millions of American sellers who power our marketplaces live in communities across our country. They are our neighbors, our friends, our family and provide a unique means of circular commerce that directly contributes to our most local communities. As we review policies or regulations which seek to address claims made by brands and rights holders, we

must also consider ways to avoid negatively impacting the millions of good sellers who should not be penalized, as we seek to holistically address bad actors – which exist in-person and online.

PASS Coalition Feedback on H.R. 3429

The members of PASS take preventing the sale of counterfeit goods very seriously and appreciate the intent of the SHOP SAFE Act in its effort to protect consumers and address the illegal sale of counterfeit goods on online platforms. How each marketplace takes action against counterfeits varies depending on its respective business model, capabilities, and size. We have made technology improvements, added more personnel to human review of our sites, entered partnerships with willing brands and rights holders, coordinated and partnered with law enforcement and regulators, all without being required to do so. We respectfully ask the committee to look beyond the approach of simply increasing liability on a single stakeholder - marketplaces, as it might provide only “half a solution” inadequate to address protecting consumers and fighting bad actors. Rather, we support incorporating all relevant stakeholders into the solution, in order to appropriately address the constantly evolving actions required to address bad actors without negatively impacting good sellers.

Moreover, we feel there has been a misrepresentation of perspective throughout the discussions with stakeholders as it relates specifically to counterfeits, with millions of rights holders disproportionately representing positions against a handful of marketplaces. The many small marketplaces and startups with limited resources, as well as the many small businesses that are both rightsholders and subject to potentially business-destroying overbroad enforcement, have not been part of the discussion. In the very practical sense, counterfeits are a moving target, which requires constantly evolving and adapting strategies, tools, partnerships, personnel, and resources.

No one-size-fits-all solution exists and it is impossible to design a static set of guidelines that will realistically accomplish our shared objectives of: (1) protecting consumers, (2) protecting rights holders; and (3) advancing a safe and transparent online buying process. Any solution should require a shared responsibility between marketplaces and rights holders. As presently written, SHOP SAFE is flawed: it singularly requires marketplaces to alter their business models but does not require good-faith cooperation from rights holders to provide the information necessary to fight bad actors, or follow best practices. The result could be – due to lack of shared obligations and information sharing – overenforcement against legitimate sellers, underenforcement against bad actors, and a potential increase in “troll” litigation over matters that should have been resolved via simple information sharing requirements.

While we support the general intent of the legislation (preventing the sale of counterfeits) and already actively combat bad actors, we would like to offer a few suggested changes, which would make the legislation more practical to implement for the practitioners – the marketplaces- and avoid undue harm and red tape for the vast majority of good sellers on our platforms. We do appreciate the feedback provided by rights holders who offer a helpful perspective, and we expressly recognize and appreciate the added flexibility of including “reasonable efforts” in the latest language. However, in order to avoid unnecessary and burdensome outcomes that could chill legitimate commerce, we respectfully request the following reasonable language accommodations:

PASS Coalition's Requested Modifications

1. Balance the inequity of requirements on rights owners and marketplaces

Rights holders shouldn't just be passive volunteers in this process, SHOP SAFE should include a section that requires rights holders to act in good faith by performing industry standard best practices for rights holders. As currently written, this legislation actually disincentivizes brand owners/rights holders to help marketplaces fight counterfeits: marketplaces are fully responsible for policing trademarks on behalf of rights holders without a requirement for notice or information from brands, but if marketplaces fail they can be sued, regardless of whether the rightsholder acted in bad faith by "hiding the ball" or in good faith by working with the marketplace to proactively address any issues. We understand the rights and responsibilities as rights holders. Our individual companies spend millions of dollars each year to maintain and protect our brands, and we recognize, and welcome, the responsibility to monitor and enforce our IP rights online. But charging marketplaces to "blindly" be brand police without putting any good faith obligations, including industry-recognized minimum standards on brands to participate in the process and work with marketplaces in good faith, simply isn't equitable. It fails to utilize and empower relevant stakeholders.¹

This legislation significantly increases the threat of liability on marketplaces without any obligation of good faith on rights holders. In a world of seeking to understand problems with all factors, stakeholders, and inputs considered, we urge not dwelling on the punishment as a means of accomplishing our shared objectives, but rather, empowering marketplaces to address any actual problems. There are many stakeholders involved in this conversation, obligating just one type of stakeholder to address a broader, more systematic problem is disingenuous, misguided, and creates a remarkably lopsided legal mechanism that can be abused by rights holders to chill legitimate commerce. By arguably reducing the obligations on rightsholders in protecting against counterfeits as compared to current law, the current draft oddly incentivizes withholding information and employing "troll" litigation instead of actually cooperating to reduce counterfeits.

In the effort of more effectively addressing all stakeholder feedback to SHOP SAFE, we suggest the inclusion of a set of industry-recognized best practices that trademark owners should seek to fulfill, to protect their IP rights and to collaborate with legitimate and legal channels of commerce – online marketplaces. A strong variation in how rights holders engage with marketplaces exists - some rights holders are more effective or active in their partnerships (informal or formal) with marketplaces than others. PASS members support partnering with brands and rights holders in the most effective fashion necessary to prevent the sale of counterfeits by requiring a universal standard that is enforceable, honest, and transparent.

¹ We live in a world where more than 80% of the most common 1000 words in the English language are trademarked (<https://www.worldtrademarkreview.com/brand-management/were-running-out-good-trademarks-groundbreaking-study-reveals-81-common-words>), and it is literally impossible for a marketplace to blindly enforce anti-counterfeiting policy without symmetric, reasonable obligations from brands.

The International Trademark Association (INTA) has established a widely-recognized set of [Brand Owner best practices](#) which should be used as a baseline in adding realistic requirements for rights holders into SHOP Safe. Those best practices specifically include the following requirements, which would accomplish the goals of the SHOP SAFE ACT without imposing an unwarranted, unique, and unprecedented additional mass of red tape that unfairly tilts the playing field to rights holders in this specific context.

1. “Trademark owners should take steps on an ongoing basis to educate online platforms, other intermediaries, and the public as to their trademarks.
2. Trademark owners should take steps to actively monitor offers on online marketplace, shopping, and social media platforms, with the aim of identifying counterfeits, and notify the platforms and PSPs if applicable.
3. Trademark owners should provide to online platforms and other intermediaries at their request a list of keywords commonly used by sellers for the purpose of offering for sale counterfeits, to assist such platforms and other intermediaries with their voluntary measures for addressing the sale of counterfeits on the Internet.
4. Before submitting a notice, trademark owners should take measures that are reasonable under the circumstances to verify that the material is not authorized by the trademark owner and preserve dated website documentation of such unauthorized material.
5. In working with platforms and other intermediaries on combating online sales of counterfeits, trademark owners should provide information such as the following:
 - a. Identification of the material alleged to be illegal;
 - b. Information identifying where the alleged illegal material is located;
 - c. Proof of ownership of a relevant trademark or other IP right, as applicable, in one or more applicable jurisdictions; and
 - d. A statement made under penalty of perjury that the notifier is the trademark owner or is authorized to act on the trademark owner’s behalf and a good faith belief that the use of the material in the manner complained of is not authorized by the trademark owner.”

2. Encourage rights holders and marketplaces to avoid unnecessary harm to ordinary Americans by working together.

PASS members support the facilitation of formal and informal agreements between trademark owners and marketplaces. There are significant operational and relationship benefits from such agreements, like the [EU Memorandum of Understanding \(MOU\) on Counterfeits](#). Pursuing such an MOU structure in the US would benefit trademark owners, marketplaces, sellers, and consumers. Realistically, EU and US legal and regulatory structures differ and thus a US MOU would and could be tailored to the US, and still derive significant benefit to consumers, rights holders, and marketplaces. A formal structure of an MOU allows for a formal convening of rights holders and marketplaces under non-disclosure agreements, who can work together to take action against bad actors without negatively impacting the vast majority of honest sellers that are ordinary Americans. An MOU would also provide a baseline for appropriately tracking the actual

problems and corresponding success of the policies of the MOU, without relying on anecdotal or hypothetical examples or concepts, again, that can have the unintended consequence of ensnaring good and otherwise innocent sellers that are simply looking to make a living and will not be able to overcome additional and unnecessary red tape.

3. Improve the definition of “Health and Safety”

We ask for further consideration as it relates to the definition and use of “health and safety” goods. In the very real, practical sense, there are material differences in threat to a consumer’s health and safety, between a sweatshirt and a medical product. To be clear, both and any form of counterfeit products are unwelcome on our marketplaces. SHOP SAFE should include language that clearly makes the distinction between health threats by limiting the scope of the definition to only apply to products which have material health and safety impacts to consumers, such as based upon a finding by a competent recognized authority, industry or consumer organization. Outside of the health and safety impacts to consumers, we wholeheartedly agree that IP rights should be protected, however an overly broad interpretation of “health and safety” is misguided and would have far-reaching, negative effects on legal and regulatory structures, but more importantly, will have a chilling and unwarranted effect on ordinary American sellers of basic goods, including even those that may have disputes with other rightsholders, that have nothing to do with health and safety.

4. We do not support a requirement that marketplaces participate in brand programs.

We do not support the mandatory participation of brands and rights holders in each marketplace’s respective anti-counterfeiting programs or marketing ploys. Nor should either brands or marketplaces be required to agree to specific contractual terms to participate in cooperation except by mutual agreement. As mentioned above, the challenges we are facing are not static, nor should our efforts to combat them be static. Allowing for appropriate flexibility for both rights holders and marketplaces to work together should exist and mandating or obligating the participation of a specific program is not productive, nor effective as all stakeholders should voluntarily work together to address relative needs of each rights holder and marketplace.

5. Removal of the “Country of Origin” language

We ask that you remove the requirement to display the country of origin and manufacture of the goods. This requirement will create a new liability for not just marketplaces, but also the individual and small business sellers which operate on our platforms. It would additionally create overlapping and conflicting statutory and regulatory standards. Fundamentally, compliance with country of origin labeling (COOL) obligations cannot be fulfilled by resellers of used or vintage products and is broadly opposed by retailers given the difficulty in compliance. One representative example: the seller of a hand crafted scarf that has materials purchased from local craft stores. It is simply impossible for that user to comply with the country of origin language, and this impossibility extends to a vast number of our online sellers. It fundamentally places ordinary Americans at a remarkable and unwarranted disadvantage versus sophisticated

businesses selling products on store shelves, powered by global supply chains where this online label would not be required. The country-of-origin information is affixed to the product by the manufacturer, which the consumer can see on the box or product label.

Conclusion

The PASS Coalition stands ready to work with you on a constructive dialogue around the issues described in this letter. As noted above, marketplaces, including our members, have worked diligently and expended significant resources to improve and increase their anticounterfeiting capabilities voluntarily, without imposing unnecessary requirements that would place an undue burden on the honest sellers that constitute a vast and overwhelming majority of our platforms. We have also taken the time to fully and impartially document our concerns with the proposed legislation in order to facilitate productive discussions while avoiding unintended harmful consequences. We look forward to your response and collaborating with you to address these important issues.

Sincerely,

