



September 28, 2021

The Honorable Jerrold Nadler
Chairman
House Committee on the Judiciary
2141 RHOB
Washington, DC 20515

The Honorable Jim Jordan
Ranking Member
House Committee on the Judiciary
2141 RHOB
Washington, DC 20515

The Honorable Henry C. "Hank" Johnson
Chairman, House Judiciary
Subcommittee on Courts,
Intellectual Property, and the Internet
2141 RHOB
Washington, DC 20515

The Honorable Darrell Issa
Ranking Member, House Judiciary
Subcommittee on Courts,
Intellectual Property, and the Internet
2141 RHOB
Washington, DC 20515

Dear Representatives Nadler, Johnson, Jordan, and Issa:

We write to **raise concerns with the SHOP SAFE Act of 2021** (H.R. 5374) that is scheduled for markup on Wednesday, September 29, 2021. We previously wrote with our concerns on this bill in July, where we explained that **companies are already incentivized to combat counterfeit products on their platforms**, and that **the bill's requirements would harm smaller online marketplaces**. Our concerns still remain, and additionally we believe that the bill's definition of "electronic commerce platform" would extend the bill's terms beyond marketplaces to a broad array of online services.

Digital platforms that host third-party goods are already incentivized to remove counterfeit products. These platforms seek to provide the highest quality products to become a trusted resource for consumers to return to many times. Many of these platforms also have or seek commercial partnerships with major brands, who demand that marketplaces actively police counterfeits. To that end, they are already investing millions of dollars,¹ deploying advanced technologies to detect counterfeit products,² and partnering with rights holders to quickly identify products that potentially infringe on their intellectual property rights.³

¹ <https://www.aboutamazon.com/news/company-news/amazon-brand-protection-report>

² <https://blog.etsy.com/news/2021/our-commitment-to-the-trust-and-safety-of-the-etsy-marketplace/>

³ <https://pages.ebay.com/seller-center/listing-and-marketing/verified-rights-owner-program.html>



It's important to note that some companies have joined rights holders in bringing lawsuits against those third parties that attempt to sell counterfeit products.⁴ Imposing liability on platforms ignores their multipronged approach to address the issue and may interfere with their own efforts to remove counterfeit products.

The bill will also unfairly impact nascent online marketplaces. While the headlines are dominated by a handful of leading marketplaces, companies, there are millions of smaller companies that sell products produced by third parties online to consumers. As Engine reports, "proposals like SHOP SAFE would mean startup e-commerce platforms must learn many million trademarks and assess potential infringement without the benefit of input from mark owners who are best suited to know what is (and is not) counterfeit."⁵ The bill creates compliance burdens on startups by creating barriers to their growth and success.

The overly broad definition of what constitutes a sale will yield unintended consequences. The bill defines "electronic commerce platform" as any "electronically accessed platform that includes publicly interactive features that allow for arranging the sale or purchase of goods, or that *enables a person other than an operator* of the platform to sell or offer to sell physical goods to consumers located in the United States." By adding language around "enabling" the sale, the bill potentially includes cloud services, social media, search engines, advertising, and organic content. Pairing this with requirements designed for marketplaces that have a direct relationship with the seller and user create troubling results.

At best, the bill is duplicative of efforts being deployed by companies and, at worst, it will impede successful efforts currently utilized by companies to keep counterfeit products off digital platforms. Further, the broad definition outlined above opens the door to unintended harms. Even more consequential, fledgling companies will be negatively impacted by the bill's requirements. We urge you to consider these important points as you markup the bill.

Sincerely,

Koustubh "K.J." Bagchi
Senior Director, Federal Public Policy

⁴ <https://www.thefashionlaw.com/facebook-gucci-partner-to-file-counterfeit-suit-against-facebook-instagram-user/>

⁵ <https://www.engine.is/news/startup-news-digest-052821>