

# SHOP SAFE Is Another Attempt to Fix Big Tech That Will Mostly Harm Small Players and Consumers

[eff.org/deeplinks/2021/09/shop-safe-another-attempt-fix-big-tech-will-mostly-harm-small-players-and](https://www.eff.org/deeplinks/2021/09/shop-safe-another-attempt-fix-big-tech-will-mostly-harm-small-players-and)

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Congress is once again trying to fix a very specific problem with a broad solution. We support the SHOP SAFE Act's underlying goal of protecting consumers from unsafe and defective counterfeit products. The problem is that SHOP SAFE tackles the issue in a way that would make it incredibly difficult for small businesses and individuals to sell anything online. It will do little to stop sophisticated counterfeiters and will ultimately do consumers more harm than good, by obstructing competition and hindering consumers' ability to resell their own used goods.

Think about trying to sell something used online. Think about having a wool sweater that's still in great condition but just doesn't make sense for you anymore. Maybe you moved from Denver to Miami. So, as many of us do these days, you list your sweater online. You put it on eBay or Facebook Marketplace. Or a friend says they know someone who wants it and puts you in touch via email. You exchange the sweater for some cash, and everyone's happy.

Now imagine that before you can make that sale, you have to send eBay (or Facebook, or your email provider) a copy of your government ID. And verify that you took "reasonable steps," whatever that means, to make sure the sweater isn't a counterfeit. And state in your listing where the sweater was made, or if you don't know, tell the platform all the steps you took to try and figure that out. And carefully word your listing to avoid anything that might get it caught in an automated trademark filter. At this point, you might reasonably decide to just chuck the sweater in the trash rather than jump through all these hoops.

That's the regime SHOP SAFE threatens to create.

## SHOP SAFE Is Bad for the Little Guy

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It's easy, conceptually, to collapse the world of online selling to just Amazon. But that isn't the reality. Laws written with only Amazon in mind will *solidify* Amazon's dominance by imposing burdens that are onerous for small players to meet. And while the requirements of the bill are clearly geared towards large marketplaces like Amazon, the universe of platforms it would apply to is much broader. The current bill language could be interpreted to cover anything from Craigslist to Gmail—basically any online service that can play a role in advertising, selling, or delivering goods. This isn't just some reach reading that we came up with; at least two anti-counterfeiting organizations supporting SHOP SAFE have urged Congress to make sure it applies even to Facebook Messenger and WhatsApp.

SHOP SAFE would make all of these platforms liable for counterfeiting by their users unless they take certain measures. Technically the bill only creates liability for counterfeiting of products that “implicate health and safety,” but the definition of that term is so broad it could be read to cover just about anything. For example, it could arguably cover your wool sweater because some people have wool allergies. Sure, you could make a case that the definition should be read more narrowly. But platforms don't want to end up in the position of needing to make that case, so you can bet their legal departments will err on the safe side.

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.

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. We've written extensively about the problems with filtering mandates, including filters' inability to tell infringing from noninfringing uses and their prohibitive cost to all but the largest platforms. The same concerns apply here. For example, listings for genuine used goods could easily be caught by a filtering system, as could any listing that compares one product to another or identifies compatible products. Plus many trademarks consist entirely of one or two dictionary words—meaning any filtering technology could easily block listings as suspicious just because the product description included words that happen to be someone's trademark.

SHOP SAFE requires platforms to implement all of these measures “at no cost” to trademark holders. So either those costs will be passed on to the third-party sellers or absorbed by a platform that has money to burn. For smaller platforms that serve small businesses or individual sellers, either option would be untenable. If these platforms can’t survive, that means fewer choices for consumers.

## **Is SHOP SAFE a DMCA for Trademarks? No, It’s Worse.**

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In discussions of SHOP SAFE, some have compared it to the DMCA’s notice-and-takedown regime for addressing online copyright infringement. SHOP SAFE does share some features with the DMCA. Like the DMCA, SHOP SAFE would give rightsholders leverage to get content taken off the internet based only on their say-so. It also requires platforms to suspend—and then ban—sellers who have been “reasonably determined” to have repeatedly used a counterfeit mark. That doesn’t necessarily mean a court finding, just a determination by a platform. In the DMCA context, the fear of losing an account has been a powerful deterrent to asserting rights based on fair use or other defenses.

But 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.

We do want to protect consumers, but this isn’t the way to do it. Laws for holding marketplaces like Amazon accountable when consumers get hurt already exist. SHOP SAFE is an imprecise, destructive approach to preventing sales of dangerous products, and there’s little reason to think the benefits would outweigh the costs to competition and consumer choice. Let’s not hurt consumers with a law that’s supposed to help them.

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