

**American Apparel & Footwear Association Statement for the Record**  
**“The SHOP SAFE Act: Stemming the Rising Tide of Unsafe Counterfeit Products Online”**  
**House Judiciary Committee; Subcommittee on Courts, Intellectual Property, and the Internet**  
**May 27, 2021**

On behalf of the member companies of the American Apparel & Footwear Association (AAFA), we appreciate this opportunity to submit a statement for the record for the Subcommittee’s hearing on the “Stopping Harmful Offers on Platforms by Screening Against Fakes in E-commerce Act of 2021” or the “SHOP SAFE Act of 2021.”

AAFA is the national trade association representing apparel, footwear, travel goods, and other sewn products companies, and their suppliers, which compete in the global market. Representing more than 1,000 world famous name brands, AAFA is the trusted public policy and political voice of the apparel and footwear industry, its management and shareholders, its nearly four million U.S. workers, and its contribution of more than \$400 billion in annual U.S. retail sales.

AAFA’s Brand Protection Council (BPC) vigorously pursues brand protection efforts, with a focus on the global war against counterfeit apparel, footwear, accessories, and other supplier products. Counterfeiting is a big business; a 2017 report forecast the global trade in counterfeit and pirated products to reach a possible \$2.81 trillion by 2022.<sup>1</sup> This represents an increase of almost 150% from the estimated \$1.13 trillion from 2013. As counterfeiters have shifted online, the BPC has similarly focused its attention on the proliferation of counterfeit goods found on e-commerce platforms, specifically online third-party marketplaces.

The growth of e-commerce<sup>2</sup> has connected consumers across the world to brands, platforms, marketplaces, and other consumers, which has many positive benefits. At the same time, the rise of e-commerce has connected U.S. consumers with an ever-growing network of criminal counterfeiters. Online marketplaces provide an ideal setting for counterfeiters— anonymity, easier distribution, a low cost of entry, and various ways to reduce exposure to legal liability.<sup>3</sup>

The foundation of our trademark system predates global, nearly instantaneous e-commerce and is not equipped to address the online counterfeiting issues experienced today. Under the current legal framework, online intermediaries are generally not liable for the products sold on their platforms by third parties. This often creates a disincentive for those intermediaries to proactively stop the sale of counterfeits and other harmful products. Instead, many online marketplaces have a huge financial

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<sup>1</sup> The Economic Impacts of Counterfeiting and Piracy: Report prepared for BASCAP and INTA, *available at* [https://www.inta.org/wp-content/uploads/public-files/perspectives/industry-research/2017\\_Frontier\\_Report.pdf](https://www.inta.org/wp-content/uploads/public-files/perspectives/industry-research/2017_Frontier_Report.pdf).

<sup>2</sup> An estimated 14% of all retail sales in the United States in 2020 took place online, an increase of 32% from 2019. See <https://www2.census.gov/retail/releases/historical/ecommerce/20q4.pdf>.

<sup>3</sup> DEPARTMENT OF HOMELAND SECURITY, COMBATING TRAFFICKING IN COUNTERFEIT AND PIRATED GOODS: REPORT TO THE PRESIDENT OF THE UNITED STATES (Jan. 24, 2020) [https://www.dhs.gov/sites/default/files/publications/20\\_0124\\_plcy\\_counterfeit-pirated-goods-report\\_01.pdf](https://www.dhs.gov/sites/default/files/publications/20_0124_plcy_counterfeit-pirated-goods-report_01.pdf).

incentive to allow these sales, while enjoying extremely low risk of legal liability— they make a profit off each sale and they benefit from the “network effect” of scale that discourages robust seller vetting.

It is readily apparent that there is a need for legislation to address the issue of counterfeit goods sold on e-commerce platforms. Online counterfeiting continues to be a growing issue for AAFA members, and the COVID-19 pandemic has only exacerbated this problem. The pandemic has disrupted supply chains worldwide and forced physical stores and markets to close repeatedly or for long periods of time, drastically driving consumer traffic to online channels. While we embrace the growth of e-commerce, unfortunately, counterfeiters have as well, taking advantage of these circumstances globally and flocking to sell their fake goods online.

The SHOP SAFE Act is a step in the right direction to level the online playing field and finally address the growing problem of counterfeits sold by third-party sellers on online marketplaces. Today, the burden of online enforcement disproportionately rests on trademark owners, who have to incur great cost to police a growing range of e-commerce sites. This creates a burden – felt particularly hard by small businesses – that does not exist in the brick-and-mortar retail environment. The SHOP SAFE Act would obligate online platforms to take greater responsibility for the products they sell by creating a set of best practices, including provisions on seller and individual product vetting, ensuring expeditious removal of counterfeit listings, and requiring termination of seller accounts repeatedly found to be selling counterfeit goods. Ultimately, these best practices would establish a floor that all e-commerce platforms would have in place to address the sale, offering for sale, distribution, and advertising of counterfeit goods online. Not only would this reduce burdens on small businesses, but it would establish parity of liabilities between brick-and-mortar and the online retail space.

Additionally, the SHOP SAFE Act would require that third-party sellers who sell into the U.S. market consent to jurisdiction in U.S. courts and designate an agent for service of process in the United States. A common defense among third-party sellers – especially foreign sellers – is that there is lack of personal jurisdiction and improper service of process. The SHOP SAFE Act would explicitly provide statutory clarity to defeat these defenses.

At present, the proposed scope of the SHOP SAFE Act is limited only to “goods that implicate health and safety.” However, by adopting this narrow approach, this distinction means some of the most often counterfeited products and some of the most prolific counterfeiters will remain beyond the scope of the law’s standards. Such a limitation not only overlooks potential but less obvious product safety and health risks of certain products, it also devalues the function of a trademark and signals a lack of willingness to protect all trademark owners and all consumers. Moreover, this would also impose more difficult judgement evaluations on platforms as to whether a particular product falls within the scope and what steps must be taken with regard to that particular product. For this reason, AAFA encourages the Subcommittee to consider broadening the scope of the bill beyond “goods that implicate health and safety.” AAFA also hopes to see the Subcommittee strengthen the preventive system outlined in proposed (§ 1114(4)(A)(viii)). Platforms should ensure that screening systems incorporate the type of information outlined in subparagraph “ix” that could give a platform “reasonable awareness” of use of a counterfeit mark. After all, an ounce of prevention is worth a pound of cure.

Thank you for your immediate attention to this important issue. AAFA looks forward to working with the Subcommittee on Courts, Intellectual Property, and the Internet to ensure that the SHOP SAFE Act not only sets standards for e-commerce, but that it also creates a more effective and balanced framework and promotes a culture of continuous improvement that is needed to stay one-step ahead of counterfeiters.

Passage of a properly structured SHOP SAFE Act presents the opportunity to ensure that the United States remains the global leader in protecting IP-intensive companies and their consumers; it is imperative that we get it right.

Sincerely,

*Christina Mitropoulos*

Christina Mitropoulos  
Director, Brand Protection & Manufacturing Initiatives  
AAFA