

Questions for the Record from the Honorable David N. Cicilline, Chairman, Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary
Questions for David Barnett, Founder and CEO, PopSockets

1. In your written testimony, you state that “I would surmise that we are in the fortunate minority of young companies that are capable of surviving such turbulence.” Why do you think most young companies would have trouble surviving such difficulties with Amazon?

Most young companies would likely have a concentration of sales on Amazon.com, as most young companies do not have an extensive distribution and sales network outside of Amazon.com. There are only so many pegs at Target, Walmart, and other retailers, and few companies get an opportunity to have their products sold on these pegs. All companies have an opportunity to sell products online, yet online sales are increasingly concentrated on Amazon.com, which means that most young companies likely depend on Amazon.com sales to survive.

2. In its response to questions I sent Amazon last year, the company stated that it “goes to great lengths to assure the authenticity of products, preventing bad actors from opening selling accounts or selling counterfeit products in its stores.” You write in your testimony that Amazon itself has sourced counterfeit versions of your product to sell on its platform. Why do you think Amazon would not just sell but itself source counterfeit versions of your product? Amazon claims it is in the company’s interest to aggressively police counterfeits.

The simple answer is that Amazon makes money anytime there is a sale on its platform, regardless of whether that product is authentic or counterfeit. Evidently, Amazon’s motivation to make more money was greater than the motivation to operate within the laws of our country. Hopefully that changes.

3. In your written testimony, you described your initial challenges with Amazon relating to swarms of counterfeits and knockoffs that infringed your intellectual property, took your sales, harmed your brand, and led to unhappy consumers. And you further testified that Amazon was aware that large quantities of fakes were being sold every day on their platform. When you brought your counterfeit concerns to Amazon’s attention, what was their response?

Amazon referred us to their Brand Registry group, which deals with counterfeits and knockoffs. This group worked with us to remove a listing after we would place a test order and wait days or weeks to verify that the product was fake. By the time the target listing was removed, thousands of new listings would appear, often by the same people that had listed fakes in the past. It was a hopeless exercise. At the disposal of Amazon all along was the ability to “gate” our brand by requiring sellers to show proof of authenticity, but Amazon refused to use this tool (until we agreed to pay roughly \$1.8 million in retail marketing dollars for programs that my team deemed ineffective).

4. In your written testimony, you describe a situation where, “On top of requiring us to pay almost two million in marketing dollars in order to remove illegal product from the Amazon marketplace, the Amazon Retail team frequently lowered their selling price of our product and then ‘expected’ and ‘needed’ us to help pay for the lost margin.”

1. Is this type of behavior typical of other retail partners that PopSockets deals with?

No.

2. If it was not required by contract and it is not typical practice why did Amazon feel entitled to the additional funding and why did PopSockets agree to pay it?

PopSockets did not always agree to pay it, but when it did, it did so based on a simple cost/benefit analysis, on which the consequences of not paying for it, which included possibly losing the Amazon business, were worse than the consequences of paying for it. Amazon felt entitled to it because the relationship was asymmetric, and Amazon knew that its market dominance could be used to force us to pay it more money, essentially changing the terms of our contract—that is, it knew that the cost/benefit analysis would favor a decision to give into its demands.

5. In your written testimony you state that when PopSockets proceeded to end its relationship with Amazon Retail, in response, Amazon removed all of iServe’s PopSockets product listings, causing significant financial harm to PopSockets and iServe. Did PopSockets or iServe have any recourse to address the harm that Amazon’s conduct caused to your companies?

No.

6. Vox also reported that the “advantages to selling on the Marketplace include the ability to control the sale price of the goods, run price promotions and get more data about how products are performing and who’s buying them.”

- a. Why is it important for a seller to have control over pricing and promotional decisions?

Central to the idea of a free market economy is that buyers and sellers are free to set their terms for a transaction, including price. If buyers and sellers cannot agree on terms, they can move onto the next candidate participant in the economy to try to reach a deal. If sellers cannot control their pricing, they cannot control their business. Control over pricing affords a seller control over its margins and brand. A seller might for instance intend to reinvest profits into research and development, in which case the seller would want to factor that into its pricing. A seller might wish to establish a luxury

brand, in which case the seller would want to factor that into its pricing, as low-cost products do not typically comport with a luxury brand image. A seller might want to offer a range of products at different price points for different consumers, in which case the seller would want to factor this strategy into its pricing. These are just a few examples illustrating the value of control over pricing. Similar considerations favor control over promotional decisions.

To be sure, on paper, it would appear that sellers who sell to Amazon (and not merely on Amazon's 3rd-party platform) have control over pricing to Amazon (just not pricing on Amazon.com), but in practice that is not the case. First, due to Amazon's dominance, such sellers essentially have no choice but to sell to Amazon. Second, due to Amazon's dominance and practices of demanding funding whenever it elects to lower prices to the consumer, such sellers in practice sell to Amazon for whatever price Amazon dictates.

2. Why is it important for a seller to have access to the additional customer and product performance data that is available to Marketplace sellers, but not to wholesalers who sell to Amazon's Retail Group?

Data helps sellers to optimize their advertising, pricing, and offering.

3. Are there any other advantages to being able to sell on the Marketplace rather than as a wholesaler through Amazon's Retail Group?

Possibly. I do not know.

7. Despite resuming your relationship with Amazon Retail and noting that the Amazon team members you interact with seem to have sincere intentions, you note in your written testimony that you "have reservations as to whether they can overcome what seem to me to be systematic problems with Amazon due to the asymmetry in power between Amazon and its partners." In your view, what are these systematic problems and how does the asymmetry in power between Amazon and its selling partners contribute to these problems?

The Amazon machine appears ultimately to be driven by one goal: dominance. When a company with no real competition is driven primarily by the goal of becoming more dominant, it will inevitably use all resources available to it in attaining this goal, including the extant asymmetry in power between itself and its partners, which means that this goal will manifest in strong-arming tactics with its partners, as these tactics tend to work when one partner's arm is stronger than the other's. These tactics simply don't work in a free market economy, as participants will choose partners that do not attempt to strong-arm them over partners that do.

8. Experts have observed that large amounts of data can entrench dominant players in digital markets and cut out emerging competitors. Do you believe that Amazon's access

to and control of large amounts of data on sellers and consumers raise competition concerns?

Yes. Amazon strictly controls massive amounts of data to which only it is privy. It can use this data to further its dominance in all sorts of ways. After all, if one participant in the economy knows more about the behavior of the consumers in the economy than any other participant, this constitutes a significant competitive advantage.