



November 1, 2021

Senator Richard Durbin
Chairman
Committee on the Judiciary
United States Senate
Washington, DC 20510

Senator Charles Grassley
Ranking Member
Committee on the Judiciary
United States Senate
Washington, DC 20510

Re: Committee on the Judiciary Hearing on “Cleaning Up Online Marketplaces: Protecting Against Stolen, Counterfeit, and Unsafe Goods” on Tuesday, November 2, 2021

Dear Chair Durbin and Ranking Member Grassley,

Consumer Reports¹ (CR) is pleased the Committee is holding a hearing this week to examine the proliferation of unsafe counterfeit goods online. Current law governing online marketplaces broadly fails to provide sufficient incentives for platforms to design their products responsibly, to proactively reduce the sale of counterfeit goods, or to prevent further related abuses, such as artificial amplification and fake reviews that exacerbate the potential for harm to consumers. Effectively addressing this danger is crucial to consumer confidence and safety in the marketplace.

Counterfeits & Consumer Harms

Consumer Reports has been dedicated to keeping consumers safe and informed in the marketplace since our founding 85 years ago. Last year, the House Consumer Protection Subcommittee hearing (“Buyer Beware: Fake and Unsafe Products on Online Marketplaces”), at which CR testified, detailed many of the risks and harms that counterfeit products sold online

¹ Consumer Reports (CR) is a nonprofit membership organization that works side by side with consumers to create a fairer, safer, and healthier world. For 85 years, CR has provided evidence-based product testing and ratings, rigorous research, hard-hitting investigative journalism, public education, and steadfast policy action on behalf of consumers’ interests, including advocating for effective laws to ensure that products sold to consumers are safe.. Unconstrained by advertising or other commercial influences, CR has exposed landmark public health and safety issues and strives to be a catalyst for pro-consumer changes in the marketplace. From championing responsible auto safety standards, to winning food and water protections, to enhancing healthcare quality, to fighting back against predatory lenders in the financial markets, Consumer Reports has always been on the front lines, raising the voices of consumers.

pose to consumers.² The year since has brought those issues into even sharper relief, and made it clear that more can and must be done to mitigate these harms.

As CR highlighted last spring, the sale of unsafe counterfeit goods online poses a demonstrable and unacceptable threat to consumer safety. A 2019 survey from Incopro and Sapio Research of more than 1,000 American consumers conducted just months before the pandemic revealed that more than one in four respondents “have been fooled into buying fake goods over the past 12 months”—and this was even before the boom of online shopping during the COVID-19 crisis.³

Counterfeits can harm consumers’ safety or health, rip them off financially, and otherwise fail to deliver on what consumers reasonably thought they were buying—all in one transaction. A CR nationally representative survey of more than 2,000 U.S. adults highlighted that during the earlier months of the pandemic, about nine in ten consumers agreed that “the internet makes it easy for today’s consumers to quickly find the products and services they need,” but more than one in three did *not* believe that “consumers today can trust that the products and services they buy will not cause physical harm to them or their family members.”⁴ Meanwhile, according to another CR survey conducted in June 2020, six in ten consumers said that, “Feeling a product or service is safe and will not cause you or any family members physical harm” was a top priority when deciding which products or services to purchase—and three in ten said it was their #1 top priority.⁵ Because consumers increased their online shopping during the COVID-19 pandemic, the fact that a significant portion of consumers do not feel they can trust the marketplace to be safe highlights a considerable concern.

In 2018, CR published a guide for consumers on how to avoid buying counterfeit products online, advising them to take several different steps to ascertain whether a product is legitimate or counterfeit. The steps we recommend—including researching the seller, being wary of discounts, scanning the customer reviews, examining the product’s packaging, and knowing the hallmarks of the real product—represent useful advice.⁶ These steps also can be

² CR’s March 4, 2020 testimony is available online here: <https://advocacy.consumerreports.org/research/testimony-of-david-friedman-vice-president-advocacy-consumer-reports-for-u-s-house-hearing-on-fake-and-unsafe-products-on-online-marketplaces/>.

³ WWD, “Survey Reveals Number of Shoppers Buying Counterfeit Goods” (Dec. 6, 2019) (online at: www.wwd.com/business-news/retail/incopro-consumer-survey-1203388913)

⁴ May 2020 Consumer Reports American Experiences Survey

⁵ June 2020 Consumer Reports American Experiences Survey

⁶ CR, “How to Avoid Buying Counterfeit Products Online” (Dec. 7, 2018) (online at: www.consumerreports.org/online-shopping/how-to-avoid-buying-counterfeit-products-online).

time-consuming, and in the case of sophisticated sellers of counterfeits, ineffective. From the examples we share below it is clear that greater consumer awareness, alone, is inadequate.

The dangers that counterfeit products pose to consumers span a variety of goods: from airbags,⁷ car seats,⁸ and bicycle helmets⁹ designed to keep families safe on the road, to the phone chargers we use every day.¹⁰ However, the potential danger to consumer health from the proliferation of counterfeit goods online is made especially acute by the COVID-19 crisis. Since the beginning of the pandemic, *millions* of counterfeit N-95 masks have been seized¹¹—masks that, if worn but not functional as N-95s, would pose obvious and significant risks to the wearer and to those around them. A year into the pandemic, the New York Times *still* had to release a guide to buying real N-95 masks, highlighting dangerous counterfeits still available on Amazon (and potentially other online retailers) with the potential to harm consumers.¹² The pandemic makes clear that potential harms can come not just from the direct sale of counterfeit products directly to consumers, but also when duped employers and healthcare organizations supply counterfeit masks and personal protective equipment (PPE) to frontline workers.¹³

Such concerns are not limited to masks, hand sanitizer and PPE. Experts and even the Food and Drug Administration (FDA)¹⁴ have raised concerns about the proliferation of fraudulent COVID vaccines.¹⁵ The propagation of such schemes is supported by the advertisement of those schemes. Indeed, as CR reported last year, Facebook previously approved ads that would have spread COVID-19 misinformation.¹⁶

Intermediary Liability: Platforms Lack Sufficient Incentives to Address Consumer Harms

Tuesday’s hearing can help highlight potential solutions to one of the main roots of the problem the Committee seeks to address: a lack of online platform accountability. Addressing the harms that online platforms contribute to and profit from will take the combined efforts of

⁷ NHTSA, “Traffic safety agency urges vehicle owners and repair professionals to use only certified, original equipment replacement parts,” press release (Oct. 10, 2012) (online at: [www.vehiclehistory.gov/NHTSA%20Alerting%20Consumers%20to%20Dangers%20of%20Counterfeit%20Air%20Bags%20National%20Highway%20Traffic%20Safety%20Administration%20\(NHTSA\).pdf](http://www.vehiclehistory.gov/NHTSA%20Alerting%20Consumers%20to%20Dangers%20of%20Counterfeit%20Air%20Bags%20National%20Highway%20Traffic%20Safety%20Administration%20(NHTSA).pdf)).

⁸ <https://www.cnn.com/2019/12/20/tech/amazon-fake-kids-products/index.html>

⁹ CR, “Bike Helmets That Don't Meet Safety Standards Are Widely Available, Consumer Reports Finds” (July 1, 2019) (online at: www.consumerreports.org/bike-helmets/bike-helmets-that-dont-meet-federal-safety-standards-arewidely-availabl e).

¹⁰ <https://www.consumerreports.org/online-shopping/how-to-avoid-buying-counterfeit-products-online/>

¹¹ <https://www.cbsnews.com/news/n95-masks-fake-seized/>

¹² <https://www.nytimes.com/2021/02/17/technology/personaltech/buy-real-n95-mask.html>

¹³ <https://www.npr.org/2021/03/01/972597317/hospitals-struggle-to-steer-clear-of-counterfeit-masks>

¹⁴ <https://www.fda.gov/consumers/consumer-updates/beware-fraudulent-coronavirus-tests-vaccines-and-treatments>

¹⁵ <https://news.northeastern.edu/2020/12/03/how-to-spot-a-fake-counterfeit-covid-19-vaccines/>

¹⁶ <https://www.consumerreports.org/social-media/facebook-approved-ads-with-coronavirus-misinformation/>

Congress, federal agencies, and their state and local counterparts, in addition to much more serious efforts by online marketplaces to ensure consumer safety on their platforms.

Last year’s introduction of the SHOP SAFE Act and this year’s reintroduction of the INFORM Consumers Act demonstrate that lawmakers understand that online marketplaces lack sufficient incentives to address counterfeit products and accountability for third party sellers. Internet platforms clearly have the capacity to do more to combat counterfeits and other online harms. While they bear some goodwill costs for providing a bad experience to users, they do not shoulder their appropriate share of the societal and economic costs from the harms these products can cause. Online platforms still fail to do enough to prevent and combat unsafe counterfeits today, even though existing case law is *already* contingent upon some “reasonable” response and investment in mitigation.

More broadly, one prominent gap in online platform accountability for preventing and mitigating harms to consumers online is Section 230 of the Communications Decency Act. While Section 230 makes it possible for platforms to moderate content in the first place, it does nothing to actively *encourage* that moderation.¹⁷ Importantly, because intellectual property law (which includes trademark law) was specifically exempted from Section 230, the legal landscape of online commerce that the SHOP SAFE Act addresses is based on existing case law—most notably, *Tiffany (NJ) Inc. v. eBay Inc.*¹⁸ This precedent already holds platforms to a higher standard—one where they *could* be held liable if they fail to take appropriate or reasonable steps, once notified, to address the sale of counterfeits—than does Section 230, which, governing most of the rest of the internet, requires no such efforts at all.¹⁹

Section 230, in its present form, shields platforms from potential intermediary liability for most other harms, even while misinformation and harassment harming consumers both on and offline run rampant, often accelerated by the profit-driven and engagement-driven design of many online platforms.²⁰ Just as the current case law for contributory trademark infringement fails to incentivize enough action by online marketplaces to protect consumers from unsafe counterfeits, current case law under Section 230 also fails to protect consumers from broader online harms.

¹⁷<https://www.consumerreports.org/federal-laws-regulations/what-is-section-230-communications-decency-act/>

¹⁸ *Tiffany (NJ) Inc. v. eBay Inc.*, 600 F.3d 93 (2d Cir. 2010).

¹⁹ 47 U.S.C. § 230(c)

²⁰ Munn, L., “Angry by design: toxic communication and technical architectures.” *Humanit Soc Sci Commun* 7, 53 (2020). <https://doi.org/10.1057/s41599-020-00550-7>, see also Prerna Juneja and Tanushree Mitra, “Auditing E-Commerce Platforms for Algorithmically Curated Vaccine Misinformation” Proceedings of the 2021 CHI Conference on Human Factors in Computing Systems. Association for Computing Machinery Article 186, 1–27 (2021). <https://doi.org/10.1145/3411764.3445250>

We would further highlight that present Section 230 protections may have already contributed indirectly to the harms that the SHOP SAFE Act seeks to ameliorate. For instance, given Section 230 liability shields, platforms have had few legal incentives to remove millions of fake accounts—many of which may have been promoting or engaging with and amplifying counterfeit goods to artificially boost their visibility—or to handle the thoroughly documented proliferation of fake reviews—that boost counterfeit goods or denigrate legitimate ones.

Indeed, if anything, platforms today have material *disincentives* to moderate deceptive and harmful activity: investing in comprehensive platform moderation is expensive,²¹ while fake reviews, inflated view-counts, fake accounts, and other deceptive social engagement artificially amplify the metrics by which platforms are judged by the users, investors, and advertisers that drive platforms’ bottom lines. Without strong counter-incentives, platforms cannot be trusted to govern themselves to standards adequate to protect their users from harm.

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Legislative Components to Consider

We welcome the Committee’s attention to these key issues for consumers. There are a few elements CR would recommend the Committee strongly consider as it evaluates legislative solutions—as proposed in the SHOP SAFE Act, the INFORM Consumers Act, and otherwise—seeking to address platform liability for counterfeits in online marketplaces.

First, that consumers shopping online require transparency in the origins of their purchases, consistent access to clear lines of communication with third party sellers from whom they purchase goods, and the ability to hold those sellers accountable for counterfeit goods—and platforms should ensure these safeguards when they connect third-party-sellers and consumers on online marketplaces.

Second, that any data that platforms or third-parties would need to collect for heightened transparency and accountability measures be limited to the discrete use-case for which it is collected and be protected with appropriate information security measures.

²¹ Paul M. Barrett, “Who Moderates the Social Media Giants? A Call To End Outsourcing” NYU Stern Center for Business and Human Rights (June 2020), <https://bhr.stern.nyu.edu/tech-content-moderation-june-2020>; Deepa Seetharaman, “Facebook Throws More Money at Wiping Out Hate Speech and Bad Actors” The Wall Street Journal (May 15, 2018), <https://www.wsj.com/articles/facebook-throws-more-cash-at-a-tough-problem-stamping-out-bad-content-1526393256>.

Third, that the degree of liability and accountability expected of platforms be commensurate with the impact on consumers, and with available resources, in order to ensure a competitive online marketplace for consumers to choose products and services from, and avoid further entrenching the most dominant players.

Fourth, that incentives toward platforms more proactively screening for counterfeit goods do not mandate that such screening take place prior to content being uploaded, as this may disproportionately over-moderate consumer products that are genuine and safe for consumers.

Fifth and finally, that any such legislation establishes strong counter-incentives for fraudulent or overreaching reporting of content as problematic when it is not, in order to prevent unintended abuses of systems intended to protect consumers.

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The spread of dangerous counterfeit products, and the platform designs that accelerate and amplify the sale of these products, leads to consumer harm. Online platforms must be better held to account for the sale of harmful and dangerous products, and given effective incentives to prevent or mitigate these harms to the fullest extent feasible. Efforts like the SHOP SAFE Act and INFORM Consumers Act offer promising approaches to addressing some of these important concerns, and we look forward to working with this Committee and others to develop and implement effective solutions to meet this challenge of our time and ensure a safe online marketplace for American consumers.

Sincerely,

Laurel Lehman
Policy Analyst

cc. Members of the Senate Committee on the Judiciary