



June 2nd, 2020

Sent via email

Ms Maria Martin-Prat
Director, Services and investment, Intellectual Property and Public Procurement, DG TRADE
European Commission

Mr Peter Kovacs
Head of Unit, Intellectual property and Public procurement, DG TRADE
European Commission

Re: CCIA's submission to the European Commission's report on the Counterfeit and Piracy Watch List

Dear Ms Martin-Prat,
Dear Mr Kovacs,

The Computer & Communications Industry Association (CCIA) respectfully submits the following comments to support DG Trade's work on the Counterfeit and Piracy Watch List report.

CCIA represents European and international technology products and services providers of all sizes, including computer hardware and software, electronic commerce, social media, telecommunications and Internet products and services. CCIA members employ together almost one million workers.

I. Introduction

The share of e-commerce to retail sales continues to rise. EU citizens increasingly buy online and cross-border. In 2019, 35% of e-buyers made some purchases from sellers in other EU countries, compared with 2% in 2014. Last year, 71% of EU internet users shopped online at least once¹. The most popular type of goods and services purchased online were clothes and sports goods (65 % of e-buyers)². Small and medium-sized enterprises (SMEs), as well as micro-businesses, are also hugely benefiting and growing thanks to digital services providers. For instance, 18% of business turnover in the EU comes from e-sales³.

According to the OECD and the EU's Intellectual Property Office, "imports of counterfeit and pirated products into the EU amounted to as much as EUR 121 billion"⁴ in 2016, "which represents up to 6.8 % of EU imports, against 5 % of EU Imports in 2013"⁵. A robust intellectual property (IP) framework is essential to enable innovation and the export of Internet-enabled goods and services⁶. Infringement of IP could lead to financial and job losses, but also, as we have seen with the recent/on-going COVID-19 crisis, it could potentially cause health and safety risks. CCIA members value intellectual property protection and have devoted significant resources to develop appropriate processes and tools to address counterfeit and online piracy.

¹ Eurostat, e-commerce statistics for individuals, consulted on 26 February 2020, available at: https://ec.europa.eu/eurostat/statistics-explained/index.php?title=E-commerce_statistics_for_individuals

² Idem

³ Eurostat, Online businesses & e-sales, consulted on 26 February 2020, available at: <https://ec.europa.eu/eurostat/cache/infographs/ict/bloc-2c.html>.

⁴ OECD/EUIPO, Trends in Trade in Counterfeit and Pirated Goods, Illicit Trade, OECD Publishing, Paris, March 2019, p. 11, available at: https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/reports/trends_in_trade_in_counterfeit_and_pirated_goods/trends_in_trade_in_counterfeit_and_pirated_goods_en.pdfhttps://doi.org/10.1787/g2g9f533-en

⁵ Idem.

⁶ See CCIA, Fair Use in the U.S. Economy: Economic Contribution of Industries Relying on Fair Use (2017), available at: <https://www.ccianet.org/wp-content/uploads/2017/06/Fair-Use-in-the-U.S.-Economy-2017.pdf>.



II. Current Practices to Address Counterfeits and Piracy Online

E-commerce services and online marketplaces work continuously to ensure their users' trust in their services. They take the challenge of addressing the sale of counterfeit and pirated goods online seriously. Firms across the Internet industry have invested heavily in programs to address this challenge and enforce company policies against counterfeits and pirated goods.

A. Online Marketplaces

Online marketplaces engage with rights holders and brand owners extensively and have established programs that encourage information sharing between stakeholders that allow online marketplaces to identify and remove counterfeit and pirated goods from their platforms. A collaborative approach that continues to bring together brand owners, online marketplaces, and policymakers will make these efforts most effective. Among other, one successful example of this collaboration is the [Memorandum of Understanding on the sale of counterfeit goods via the internet](#), in place since 2011, which also contributes to reducing counterfeits online.

We hope that this year's Commission report on counterfeit and piracy will take stock of "existing policies, procedures, or best practices" that have been effective in curbing the importation and sale of counterfeit and pirated goods, including those converted through online marketplaces. Existing measures taken by online e-commerce platforms include the following:

- **Brand registration programs:** Some e-commerce-focused firms allow brand owners to voluntarily enroll in brand registration programs, which provide the service with automated tools to identify and remove confirmed counterfeit products⁷. Through enrollment, the owners provide relevant information to the service about their products that better enables the service to proactively address counterfeits. Brands and digital services have also made joint referrals to law enforcement or launched co-litigation to address the counterfeiters that target both them and their customers.
- **Simplified notice and removal procedures:** Online marketplaces have worked to make their reporting processes as efficient and easy as possible to facilitate swift removal of content that violates company policy. Many online marketplaces have voluntary measures and provide verified rights holders priority access to tools for expeditiously flagging and removing potentially infringing products⁸.
- **Collaboration with brand owners:** Online marketplaces work with brand owners and rights holders through expanded programs that build upon tools like brand registration. For example, some programs grant more control to trusted and verified brand owners on the identification and removal of counterfeit goods⁹. Tools like "product serialization" have also recently been introduced, which allow manufacturers to attribute a unique code to each product which is then verified by the online marketplace intermediary to confirm authenticity¹⁰.
- **Transparency reports and information sharing:** Some services release reports regularly that detail removals on counterfeits, in addition to takedowns related to copyright claims¹¹.

⁷ See, e.g., Amazon Brand Registry, <https://brandservices.amazon.com/> (last visited April, 23, 2020); eBay Verified Rights Owners Program (VeRO) <https://www.ebay.com/help/policies/listing-policies/selling-policies/intellectual-property-vero-program?id=4349> (last visited 23 April, 2020)

⁸ See, e.g., Facebook's Commerce & Ads IP tool, available at: https://www.facebook.com/help/835772913244854?helpref=popular_topics (last visited 23 April, 2020)

⁹ See Amazon, Project Zero, <https://brandservices.amazon.com/projectzero> (last visited 23 April, 2020)

¹⁰ Dharmesh M. Mehta, Amazon Project Zero, DAY ONE (Feb. 28, 2019), <https://blog.aboutamazon.com/company-news/amazon-project-zero>. See also Amazon, Transparency, Frequently Asked Questions, <https://brandservices.amazon.com/transparency/faq> (last visited 23 April, 2020)

¹¹ See, e.g., Facebook, Transparency Report: Intellectual Property, <https://transparency.facebook.com/intellectual-property> (last visited 23 April, 2020); Google, How Google Fights Piracy (2018), available at: <https://www.blog.google/documents/27/How-Google-Fights-Piracy-2018.pdf>



- **Trust and certification programs:** Some services utilize certification and other indicator schemes that indicate to a user whether a seller has a history of customer satisfaction and complying with online marketplaces' policies¹². Consumer reviews are also widely used.
- **Other collaborative proactive measures:** In enforcing their strict prohibitions against counterfeiting, in many cases platforms will take more extensive action than merely removing content that is specifically reported to them, and many remove additional suspected counterfeit content on a proactive basis.
- **User education:** Online marketplaces provide information to users regarding counterfeits and intellectual property to help them avoid posting or sharing content that violates terms of service¹³. Online marketplaces also encourage law enforcement agencies, rights owners, and consumer protection organizations to directly educate users by creating participant profile pages and public service campaigns.
- **Coordination with law enforcement:** Many online marketplaces closely coordinate with domestic and international law enforcement agencies to better identify bad actors and to prevent illegal or infringing practices.

The tools listed above are often accompanied by processes to address abuse, as well as appeals procedure for sellers and users to register complaints and contest removals. Not all tools will be effective or relevant for all online marketplaces; there should be flexibility to develop appropriate measures targeted to the issues or problems observed as business models of online marketplaces vary greatly across platforms.

B. Internet Infrastructure service providers

Internet infrastructure services generally have no control over the content of websites using their services. In the case of a reverse proxy service for example, the service provider's IP addresses may appear in WHOIS and DNS records for websites using its services and, as such, they can be erroneously characterized by stakeholders as a hosting provider. However, reverse proxy services do not host the websites and therefore cannot remove their content from the Internet.

Internet infrastructure providers do, however, engage in good faith efforts to assist rights-holders with complaints about alleged IP infringements, by facilitating communication between rights-holders and the hosting providers and websites operators who are able to address their complaints. Typically, there will

be an abuse reporting process designed for this purpose, with additional pathways available through Trusted Reporter Programmes. It is also often the case that IP rights-holders use the services of Internet infrastructure providers such as cybersecurity companies to secure their sites from data scraping and cyberattacks. In this way, Internet infrastructure providers can assist IP rights-holders in other risk areas within their core competence.

III. Recommendations

As the European Commission considers possible recommendations for action to further address the sale of counterfeits and pirated goods online, CCIA encourages the Commission to build on existing measures and prioritise enforcement against bad actors that target customers, brands and service providers alike.

¹² See eBay Top Rated Program, <https://pages.ebay.com/seller-center/service-and-payments/top-rated-program.html> (last visited 23 April, 2020)

¹³ See Facebook & IP Protection (Dec. 2018), p.5-p.6, available at: <https://fbnewsroomus.files.wordpress.com/2018/12/facebook-ip-protection.pdf>



When considering Internet services and business models that exist in the ecosystem there needs to be a clear understanding of the capabilities of each online service and the EU legal framework that exists in terms of addressing illegal content such as counterfeit goods and online piracy. A web infrastructure business, for example, has different priorities and responsibilities to a marketplace. There is **no one-size-fits all solution**. More robust efforts should be made to understand what processes are available and indeed frequently used by rights-holders, which would result in a more accurate and balanced report.

CCIA also urges consideration of the impact that a number of mandated requirements would have on **smaller platforms**. There are around 10,000¹⁴ online platforms operating in Europe, today. While leading services have built out substantial programs, mandating that these practices be adopted by all online platforms would have significant consequences for smaller competitors.

CCIA also notes challenges for other kinds of platforms, such as where services facilitate **free expression** in addition to commerce. Further, in order to maintain and build out the programs and practices listed in the previous section, **existing liability regimes must be maintained under the e-Commerce Directive**.

On **small shipments**, a comprehensive data tracking system for the postal channel could help identify counterfeits for all packages shipped to Europe. As mentioned in the OECD report on trade in counterfeit pharmaceutical products, the risk assessment would greatly benefit from “information – on the shipper, product and receiving party – collected electronically, providing a potentially rich data source that, if available to customs authorities”¹⁵. For instance, as part of the seizures procedures, authorities should share tracking codes or order numbers as it could help particular parts of the supply chain to connect information which may not be matching other data like names and addresses that are presented on customs papers.

Given that over 90% of all goods in the EU are still sold offline¹⁶, the fight against counterfeit and piracy should be specific to the channel but taking into account the important **offline dimension of the supply chain**. Bad actors need to be deterred by law enforcement actions. IP crime should be a priority of the European multidisciplinary platform against criminal threats (EMPACT) and its policy cycle. Counterfeit and Piracy online should be tackled by the serious and organised crime threat assessment (SOCTA) report, developed by Europol, which comprises a set of recommendations based on an in-depth analysis of the major crime threats facing the EU.

To fight counterfeit and piracy effectively, the EU’s ambition should aim at addressing the root causes and actors of counterfeit and pirated goods in addition to identifying marketplaces. A specific scheme for ‘stand alone platforms’, especially for the ‘notorious websites’ for sale of counterfeit and pirated goods corresponds to the principle of proportionality while encouraging and acknowledging positive efforts by other marketplaces and intermediaries. If the measures are concentrated too much on marketplaces, an unintended consequence could be the **migration of illegal content and goods to smaller, less regulated platforms and networks (such as e.g. the dark web)**.

The EUIPO and OECD work on quantification and evidence on counterfeiting and piracy is an important contribution to wider understanding of the need to prioritise actions in this field. The inherent limitations in the data sets are noted in the reports, but are often not clear to this wider audience. We encourage the Commission to make these clear in all of their reports including the watch list. For example, .OECD estimates that “total trade in counterfeit and pirated products to the European Union amounted to as much as USD 134 billion

¹⁴ European Commission’s presentation, European Parliament IMCO workshop on “e-commerce rules, fit for the digital age”, 19 February 2020, 17:35:33-17:36:25, available at: https://www.europarl.europa.eu/ep-live/en/committees/video?event=20200218-1600_-COMMITTEE-IMCO

¹⁵ OECD/EUIPO, Trade in Counterfeit Pharmaceutical Products, Illicit Trade, OECD Publishing, Paris, March 2020, p. 45, available at: <https://doi.org/10.1787/a7c7e054-en>

¹⁶ European Commission, Inception Impact Assessment Proposal on contract rules for online purchase of digital content and tangible goods, July 2015, available at: https://ec.europa.eu/smart-regulation/roadmaps/docs/2015_just_008_contract_rules_for_digital_purchases_en.pdf



(EUR 121 billion) in 2016. This number implies that as much as 6.8% of EU imports in 2016 was in counterfeit and pirated products¹⁷. As described above, we recognise the seriousness of the issue. However, we are concerned that the value of IP infringement should not be based on the 'estimated retail value of the genuine product', but on the 'estimated retail value of the fake'. As EUIPO notes, the current system "may lead to an inflated estimated value of the detentions in respect to alternative choices, in particular in those subcategories of Luxury products where the retail value of the genuine product is much higher than that of the fake product in the secondary markets or that of its cost (e.g. luxury watches)."¹⁸ Given that 50% of the estimated value of overall detentions was for watches, bags, wallets and purses – i.e. luxury products – it follows that the EUR 12 billion in fake items may actually be closer to at most 6 billion. Any estimate of the overall value of fake items put into circulation in the EU which were to be based on the detention figures would correspondingly also be at most 50% true. Variations in the volumes of luxury items seized will also then affect year on year percentage changes when based on these values. Again, this is not to minimise the issue. As these issues take more prominence, it becomes more important to highlight the caveats, including that this data covers all IP infringements, not purely "fakes".

Finally, it is essential that in outlining the state of play on activity to address counterfeit and piracy online, due diligence forms part of the data collection and reporting process, in order to ensure accuracy.

We support the European Commission's ongoing efforts to tackle counterfeit and piracy online and believe that such work should remain evidenced-based and non political. To provide further technical explanations of the current ecosystem, CCIA and its members stand ready to engage in good faith with the Commission and other stakeholders to ensure that the final report stands up to scrutiny.

Thank you for considering these comments. We would be pleased to provide additional information and to meet with your services if useful.

Kind regards,

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¹⁷ OECD/EUIPO, Trends in Trade in Counterfeit and Pirated Goods, Illicit Trade, OECD Publishing, Paris, March 2019, p. 57, available at: <https://doi.org/10.1787/g2q9f533-en>

¹⁸ EU IPO, Report on enforcement of intellectual property rights, September 2019, p57, available at: https://euiipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/reports/2019_Report_on_Enforcement_of_IPR_at_EU_borders_and_in_MS_2013_2017/2019_Report_on_enforcement_of_IPR_at_EU_borders_and_in_MS_2013_2017_Full_en.pdf