



MEMORANDUM

February 28, 2020

To: Subcommittee on Consumer Protection and Commerce Members and Staff

Fr: Committee on Energy and Commerce Staff

Re: Hearing on “Buyer Beware: Fake and Unsafe Products on Online Marketplaces”

On Wednesday, March 4, 2020, at 10 a.m. in the John D. Dingell Room, 2123 of the Rayburn House Office Building, the Subcommittee on Consumer Protection and Commerce will hold a hearing entitled, “Buyer Beware: Fake and Unsafe Products on Online Marketplaces.”

I. BACKGROUND

U.S. consumers increasingly use the internet to purchase goods. In 2016, 79 percent of Americans reported making a purchase online that year, compared to just 22 percent in 2000.¹ The rise of e-commerce has also facilitated the flow of counterfeit products into the commercial mainstream.² While counterfeits were once largely limited to underground markets and street vendors, they are now pervasive on popular e-commerce sites.³

Third-party marketplaces provide a range of services to sellers, including connecting them with buyers, facilitating purchase and payment process, and even storing, packaging, and shipping products on behalf of the seller.⁴ Some online operators, such as Amazon and Walmart, act as both a seller and a platform for third-party sellers. Others, like eBay and Craigslist, act purely as a platform.

¹ Pew Research Center, *Online Shopping and E-Commerce* (Dec. 19, 2016) (pewresearch.org/internet/2016/12/19/online-shopping-and-e-commerce/).

² Government Accountability Office, *Intellectual Property: Agencies Can Improve Efforts to Address Risks Posed by Changing Counterfeits Market* (Jan. 2018) (GAO-18-216).

³ *Id.*

⁴ U.S. Department of Homeland Security, *Combating Trafficking in Counterfeit and Pirated Goods* (Jan. 24, 2020) (www.dhs.gov/sites/default/files/publications/20_0124_plcy_counterfeit-pirated-goods-report_01.pdf).

The unwitting purchase by consumers of illegitimate products is becoming increasingly common. A recent survey found that 26 percent of American consumers have unintentionally purchased at least one counterfeit product in the past year.⁵ An investigation by the U.S. Government Accountability Office found that counterfeit goods are available on a variety of popular e-commerce websites frequented by U.S. consumers.⁶

Counterfeit products pose real risks to consumer health and safety. According to the U.S. Customs and Border Protection, 16 percent of counterfeit products seized in Fiscal Year 2018 posed a direct risk to health, safety, and security.⁷ A *CNN* investigation found a number of fake and dangerous kids products available on Amazon, including a knock-off car seat that failed U.S. crash test standards.⁸

II. SELECTED ISSUES WITH ONLINE THIRD-PARTY MARKETPLACES

A. Fake Reviews and Fake Sales

A proliferation of fake reviews on online third-party marketplaces has made it more challenging for consumers to distinguish legitimate products from illegitimate products.⁹ Unscrupulous sellers may provide payments, discounts, or free gifts to reviewers in exchange for favorable reviews that do not disclose these payments and other forms of valuable consideration, even when doing so violates seller guidelines.¹⁰

Unscrupulous sellers may also engage in a practice known as “review hijacking” whereby they exploit a platform’s system to make positive customer reviews from another product listing

⁵ Incopro, *Is Fake the New Real? Living in a Fake Society—US* (Dec. 2019) (www.incoproip.com/reports/living-in-a-fake-society-us/).

⁶ See note 2.

⁷ U.S. Customs and Border Protection, *Intellectual Property Rights Fiscal Year 2018 Seizure Statistics* (Aug. 9, 2019) (www.cbp.gov/sites/default/files/assets/documents/2019-Aug/IPR_Annual-Report-FY-2018.pdf).

⁸ *Fake and Dangerous Kids Products Are Turning Up for Sale on Amazon*, CNN (Dec. 23, 2019) (www.cnn.com/2019/12/20/tech/amazon-fake-kids-products/index.html).

⁹ *Inside Amazon’s Fake Review Economy*, BuzzFeed News (May 7, 2018) (www.buzzfeednews.com/article/nicolenguyen/amazon-fake-review-problem); *5-Star Phonies: Inside the Fake Amazon Review Complex*, The Hustle (Apr. 13, 2019) (thehustle.co/amazon-fake-reviews); *Her Amazon Purchases Are Real. The Reviews Are Fake.*, BuzzFeed News (Nov. 20, 2019) (www.buzzfeednews.com/article/nicolenguyen/her-amazon-purchases-are-real-the-reviews-are-fake).

¹⁰ *Id.*

appear as though they were their own.¹¹ Since platforms allow product listings to have multiple sellers and variations for different sizes and colors, illegitimate sellers can hijack an established product listing with high ratings duping consumers into purchasing their product.¹²

To boost sales numbers, illegitimate sellers may send unsolicited packages to random consumers in the United States and then post fake reviews fraudulently using the recipients' name, a practice known as "brushing."¹³ Similarly, fraudulent sellers send empty packages to accomplices in the United States who then post positive reviews.¹⁴

B. Vetting of Sellers

Online third-party marketplaces generally have policies governing third-party sellers and the products they sell, but the degree to which they vet or curate third-party sellers varies.¹⁵ Some marketplaces allow sellers to set up a seller account with little identifying information or even fictitious information.¹⁶ On such platforms, sellers can easily set up a new storefront when an existing account is shut down by the platform or by law enforcement—undermining any efforts to stop bad actors.¹⁷

C. Confusing User Interfaces

On e-commerce sites in which a platform sells its own products as well as products from third-party sellers, determining whether a product is sold directly by the platform or by a third-

¹¹ *Hijacked Reviews on Amazon Can Trick Shoppers*, Consumer Reports (Aug. 26, 2019) (www.consumerreports.org/customer-reviews-ratings/hijacked-reviews-on-amazon-can-trick-shoppers/).

¹² *Id.*

¹³ *Couple Swamped by Amazon Deliveries That They Didn't Order*, CBS News (Feb. 9, 2018) (www.cbsnews.com/news/amazon-brushing-scam-couple-receives-packages-they-didnt-order/); *Americans Are Still Receiving Unordered Packages from Asian E-Criminals*, Forbes (Oct. 25, 2019) (www.forbes.com/sites/wadeshepard/2019/10/25/americans-are-still-receiving-unordered-packages-from-asian-e-criminals/); *7 Myths About Counterfeit Products, Debunked*, Wirecutter (Feb. 11, 2020) (thewirecutter.com/blog/myths-about-counterfeit-products-debunked/).

¹⁴ *How Sellers Trick Amazon to Boost Sales*, Wall Street Journal (July 28, 2018) (www.wsj.com/articles/how-sellers-trick-amazon-to-boost-sales-1532750493).

¹⁵ See note 4.

¹⁶ *Amazon May Have a Counterfeit Problem*, The Atlantic (Apr. 20, 2018) (www.theatlantic.com/technology/archive/2018/04/amazon-may-have-a-counterfeit-problem/558482/); see note 4.

¹⁷ See note 4.

party seller can be especially challenging.¹⁸ For example, the name of the seller may not be listed prominently.¹⁹ Or, a single product listing may have multiple sellers, further obfuscating the real seller.²⁰

On Amazon, many consumers do not realize that products with the “Amazon Prime” badge—indicating free two-day shipping—may not be shipped and sold by Amazon and could just be a third-party seller using Amazon’s fulfillment services.²¹ Similarly, many consumers do not realize the “Amazon’s Choice” badge does not mean the product has actually been endorsed by Amazon.²² While Amazon does not disclose exactly how Amazon’s Choice products are selected, it is believed that the badge is awarded to products algorithmically based on reviews, pricing, and shipping time.²³ Accordingly, some sellers try to game this algorithm using unscrupulous tactics.²⁴

D. Commingled Inventory

Some platforms that warehouse and ship products on behalf of sellers link inventory for a single product together regardless of the actual seller, known as “commingling.”²⁵ With commingling, customers purchasing a product directly from a retailer or a specific third-party seller may unknowingly receive the product from a different seller if products are commingled or if products from a different seller are in a warehouse closer to the buyer.²⁶ Commingling can tarnish the reputation of authentic brands since customers may have no way of knowing they had actually received the product from a counterfeiter.

¹⁸ *Amazon Shoppers: This Is How to Safety-Proof Your Order*, Wall Street Journal (Aug. 23, 2019) (www.wsj.com/articles/amazon-shoppers-this-is-how-to-safety-proof-your-order-11566564957).

¹⁹ *Id.*

²⁰ *Welcome to the Era of Fake Products*, Wirecutter (Feb. 11, 2020) (thewirecutter.com/blog/amazon-counterfeit-fake-products/).

²¹ *See* note 18.

²² *‘Amazon’s Choice’ Isn’t the Endorsement It Appears*, Wall Street Journal (Dec. 22, 2019) (www.wsj.com/articles/amazons-choice-isnt-the-endorsement-it-appears-11577035151); *Id.*

²³ *Id.*

²⁴ *“Amazon’s Choice” Does Not Necessarily Mean A Product Is Good*, BuzzFeed News (June 14, 2019) (<https://www.buzzfeednews.com/article/nicolenguyen/amazons-choice-bad-products>).

²⁵ *Do You Know What's Going in Your Amazon Shopping Cart?*, Wall Street Journal (May 11, 2014) (www.wsj.com/articles/on-amazon-pooled-merchandise-opens-door-to-knockoffs-1399852852).

²⁶ *Id.*

III. WITNESSES

The following witnesses have been invited to testify:

Dharmesh Mehta

Vice President of Worldwide Customer Trust and Partner Support
Amazon

Amber Leavitt

Associate General Counsel and Head of IP
eBay

Jeff Myers

Senior Director for Intellectual Property
Apple

Andrew Love

Head of Brand Security / Investigations / Global Enforcement
Specialized Bicycles

David Friedman

Vice President, Advocacy
Consumer Reports

Lori Wallach

Director, Global Trade Watch
Public Citizen