



# Fighting Against Online Solicitations Of Counterfeits

— A Reflection Paper —

## About the Author of this Report

eBay is a broad platform for European eCommerce, with websites serving the entire European Economic Area, which makes eBay one of the most significant information society service providers in Europe. Globally, eBay has a local presence in 39 markets with 86.3 million active users worldwide. The gross merchandise volume of transactions carried out using eBay's services in 2008 was \$ 59.649 billion globally.

# About this paper

eBay provides online marketplaces that demonstrate many of the significant benefits of using the internet for commerce, namely choice, selection and value. eBay is not a retailer. Instead, eBay hosts content for third parties selling goods totalling millions of euros on a daily basis.

eBay is committed to promoting confidence in the internet, as the success of eCommerce depends on trust between sellers and buyers. eBay is therefore determined to fight against any abuse of its services, including attempted sales of counterfeits. Potential counterfeits represent only a miniscule proportion of total listings on our marketplaces. Nonetheless, eBay remains dedicated to combining its efforts with other responsible stakeholders to fight aggressively and effectively against counterfeiters.

This paper focuses on counterfeits, defined as non-authentic and non-genuine goods. To fight counterfeits effectively stakeholders must focus on the scale and focal points of the problem. They should not be confused with separate issues concerning wholly legitimate and authentic goods, such as parallel imports or selective distribution. These important subjects can be discussed in separate forums and should not be allowed to cloud efforts to promote effective measures against counterfeits.

eBay’s paper seeks to give further impetus to ongoing anti-counterfeit discussions, particularly the European Commission’s recently created Anti-Counterfeit Stakeholder Platform. Given our experience of successfully fighting counterfeits on our platform over the last ten years, we believe eBay is well-positioned to make recommendations in this area.

The paper has the following structure:

- I. Counterfeiting: a global disease with offline and online symptoms
- II. Why the symptoms of counterfeiting are more visible on the internet
- III. Counterfeiting harms rights owners, consumers, economies and internet companies
- IV. eBay’s commitment and contribution to fighting counterfeits
- V. How eBay’s measures can in part influence the supply and demand of counterfeits
- VI. How the EU’s anti-counterfeiting laws provide a strong antidote against counterfeiters
- VII. eBay’s recommendations to address counterfeiting

eBay remains a committed participant in stakeholder discussions and trusts that this document will be a useful contribution to those multi-stakeholder efforts.

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## Executive Summary

In this paper, eBay outlines the issue of counterfeiting, insofar as it is relevant to anti-counterfeit policy discussions and initiatives that impact our business. We explain eBay's motives for responding seriously to attempted abuse of its marketplace and illustrate our commitment to continuing and enhancing our efforts as necessary. Furthermore, we detail how our extensive actions, whilst de facto limited in their impact to the online marketplace we provide, give rise to cooperation with other stakeholders that facilitate their own actions against the perpetrators. eBay believes this is an impressive example of the effect of positive and constructive cooperation.

On the basis that eBay's authority is limited to the matters with which we work each day, this paper does not seek to be an exhaustive list of all the issues, but instead attempts to provide an additional perspective for policy discussions. To this end, we have outlined the following key considerations and main recommendations.

### I. Counterfeiting: a global disease with offline and online symptoms

- Counterfeiting predates the internet and comprehensive anti-counterfeit strategies must prioritise the fight against offline production of counterfeit goods and accompanying logistical operations by the counterfeiters.

- Statistics demonstrate that the internet remains a significantly less prominent channel for the sale and distribution of counterfeits than more established offline channels.
- The fight against counterfeiting needs a coordinated and global approach. Governments must work together with stakeholders in order to eradicate the roots of counterfeiting across all aspects of the counterfeiting supply chain.

### II. Why the symptoms of counterfeiting are more visible on the internet

- The same unique features of the internet that make it such a popular and transformational technology for society – its global footprint, easy access and reliance on intermediaries – appear to magnify the counterfeiting problem on the internet.
- This accessibility and visibility, at the same time, are opportunities. It has never been easier for rights owners to monitor a distribution channel for both lawful trade in their goods and the unlawful trade of counterfeits, thanks to the technological means available in the online world.
- The global nature of the internet and its technical structure require an even more cooperative approach in fighting unlawful activities than is needed in the offline world.

### III. Counterfeiting harms right owners, consumers, economies and internet companies

- Counterfeiting affects every part of society.

The harmful effects of counterfeiting threaten legitimate online businesses as much as legitimate offline businesses.

- Online service providers have a clear business incentive to act against attempts to use their services to sell counterfeits. Counterfeits destroy consumer trust and damage legitimate business.
- The notion that eBay profits from counterfeits sold on its marketplace does not correspond to the reality of the direct costs deployed by eBay against counterfeits, nor the significant lost revenues from the overall damage to our business, including our brand.

### IV. eBay's commitment and contribution to fighting counterfeits

- eBay employs a three step approach to reduce counterfeits – prevention, detection and enforcement – that eBay continues to develop according to technology advances and the data available about attempted abuses of its platform.
- Despite heavily investing in its anti-counterfeit efforts, eBay's ability to detect infringing listings is necessarily limited. eBay cannot be an expert on the staggering number and variety of products offered across its marketplaces. It needs the cooperation of rights owners to detect infringements. eBay offers rights owners best-in-class services for observation and notification to allow effective policing of their brands on the eBay marketplace.
- eBay's anti-counterfeit measures are necessarily

limited in their effects to the online world, specifically to just the eBay marketplace. eBay cannot remove illegal goods from circulation or prevent counterfeiters from using other distribution channels to sell their counterfeits, either on- or offline.

- Working with rights owners and law enforcement, to provide data that assists investigations or testimony to aid legal proceedings, are key commitments of eBay.
- Cooperation is a fundamental weapon in the fight against counterfeits and the cornerstone of any effective anti-counterfeit strategy.

### V. How eBay's measures can in part influence the supply and demand of counterfeits

- Only by disrupting the cycle of supply-and-demand will the spread of counterfeiting be curtailed rather than just hidden from view. Only rights owners and law enforcement agencies have the expertise, the resources and the legal tools to attack the illness before it spreads. Internet companies like eBay can and do support this, particularly by sharing intelligence, but they cannot be the main responsible actors in curtailing counterfeits.
- The 2008 OECD Report illustrated that there are some very important factors on the supply side for counterfeits, upon which the internet and eBay in particular have little or no influence. For other factors only a cooperative approach can help to influence them effectively.



- On the demand side, internet intermediaries such as eBay can play an important role in end-user education, by leveraging the reach they have to consumers. But it remains the rights owners, along with support from governments, who are best adept at developing the adequate messaging.

#### VI. How the EU's anti-counterfeiting laws provide a strong antidote against counterfeiters

- European anti-counterfeiting legislation is robust, and can be effective. The institutions working within this framework are cooperating at European and international levels and already concentrate on the sources of the problem.
- European frameworks for law enforcement cooperation, such as Europol and Eurojust, already exist and have made counterfeiting an appropriate priority issue.
- EU Institutions have set out various policy initiatives that clearly recognise the need to pursue anti-counterfeit measures. Accordingly, it is the implementation and enforcement of existing legislation and commitments upon which stakeholders should concentrate.

#### VII. eBay's recommendations to address counterfeiting

Based on the analysis in this paper and acknowledging the need for a global and holistic approach to the fight against counterfeiting with a clear focus on a better enforcement of existing laws, eBay presents

the five following recommendations for future action to address counterfeiting:

- There needs to be a clear definition of counterfeiting, i.e. that counterfeits are non-authentic, non-genuine goods. This will avoid parties being sidetracked by disputes concerning genuine goods and their distribution.
- To enable the most effective employment of resources, it is desirable to define the size and characteristics of the problem objectively. The planned EU Observatory on Counterfeiting and Piracy may play an important role here, if it involves all relevant stakeholders and ensures workability by focusing on the most salient issues.
- More cooperation between interested parties can be established by fostering open, constructive and broad-based stakeholder dialogues, by supporting the exchange and definition of best practices and by creating a European IP Network that pools and centralises resources and existing instruments for cross-border judicial cooperation.
- Stakeholders should be supported in eradicating counterfeiting at production and throughout the whole supply chain by facilitating information-sharing between stakeholders and by ensuring that rights owners are enabled to effectively remove counterfeited goods from circulation and to permanently prevent counterfeiters from continuing their activities.

- Last, but not least, stakeholders can help stem demand by raising consumer awareness of the negative impacts of counterfeiting and of the ways that consumers can protect themselves against buying fakes.

eBay looks forward to continuing its commitment to multi-stakeholder discussions where our expertise is valuable. As stated throughout this paper, eBay has developed its expertise on the basis of what can be done to fight against the abuse of our services. Combined with the complementary expertise from many constructive stakeholders among rights owners and law enforcement authorities, eBay is able to play its part in addressing the issue (i) where it directly involves our services and (ii) to the extent that our input can facilitate others' pursuit of appropriate action against counterfeits and counterfeiters.

Such cooperation is invaluable in the fight against the use of the internet to facilitate the spread and sale of counterfeits. Likewise collaboration is invaluable in the various offline initiatives that focus on the production and logistics of counterfeit items. eBay implores all responsible stakeholders to engage in their respective, complementary roles to focus on the underlying target – the elimination of the production, supply and demand of counterfeits.

*Venienti occurrere morbo – Confront disease at its onset*  
*Aulus Persius Flaccus (AD 34 – 62)*

*Counterfeiting is a global disease that requires governments and stakeholders to concentrate on its major causes, rather than concentrating on its visible symptoms. A focus limited to combating the symptoms of this disease - such as individual street vendors or online solicitations - will fail. Instead, we must tackle this problem at its source. Responsible online and offline stakeholders should cooperate with one another, rather than fighting each other, both to educate consumers and detect and prosecute counterfeiters, disrupt their supply chains and uproot their organisations.*

## I. Counterfeiting: a global disease with offline and online symptoms

### The roots of counterfeiting

Counterfeiting is a global disease. The Organisation for Economic Cooperation and Development (OECD) launched a project in 2005 to assess the impact and magnitude of counterfeiting and piracy. As part of this project, the OECD published a report in June 2008 on the Economic Impact of Counterfeiting and Piracy.<sup>(i)</sup> The report made clear that counterfeiting presents a challenge both in the physical world and the online environment. The comparison between counterfeiting and piracy shows that there is a significant difference between the two. Piracy has significantly changed as a consequence of digitisation, which allows the production of exact copies of a protected work and its distribution by electronic means in the virtual world. This is in contrast to counterfeit goods – whether solicited online or offline – which are never virtual

goods; they always exist in the physical world along with points of manufacture and physical distribution.

Counterfeit solicitations that appear on the internet, therefore, are just a reflection of a wider and more pervasive offline problem that will continue to grow until it is tackled at its source. This is not to say that the online symptoms of counterfeiting should not be addressed. eBay, as this report explains, already invests heavily in the fight against counterfeits.

Simply put, the internet has not created the problem of counterfeit. Indeed independent research indicates that the vast majority of counterfeited products are traded offline.

Statistics indicate that the internet has not substantially increased the scale of the counterfeiting issue; rather, it has simply changed some of the patterns of counterfeiting.

*“So what we’re seeing on the net is a reflection of the society that we live in... But you know, when you have a problem in the mirror, you do not fix the mirror, you fix that which is reflected in the mirror.”<sup>(ii)</sup>*

*Dr. Vint Cerf,*  
*considered one of the founding fathers of the internet*

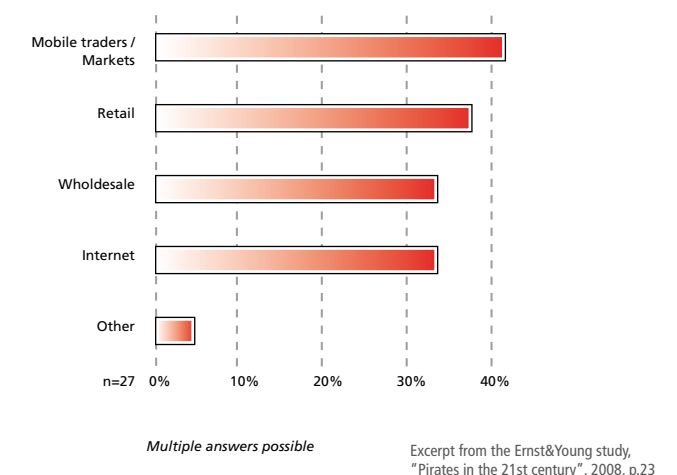
The 2008 OECD report estimates that globally counterfeiting may be a \$200 billion a year industry.<sup>(iii)</sup> Notably, in 1994 testimony before the Judiciary Committee of the US House of Representatives, the former President of the International Trademark Association, Catherine Simmons-Gill, cited a 1993 report in Forbes magazine that likewise estimated that counterfeiting was a similarly-sized \$200 billion a year industry. Counterfeit sales are a serious global problem that therefore predates the commercial use of the internet.

Counterfeiting exists wherever commerce exists – i.e., wherever there is supply and demand for goods, whether online or offline. Whenever something has a particular value attributed to it, people have historically tried to copy it – coins, for example, were counterfeited more than two thousand years ago.

However, the greater visibility of counterfeits online has led some commentators to focus on the internet as one of the major drivers in the alleged growth of counterfeits. Yet eCommerce represents a very small part of overall commerce, presently accounting for just 4% of global retail commerce.<sup>(iv)</sup> Even in its largest markets, eBay accounts for barely 20% of the value of this eCommerce – which is less than one percent of the overall retail market in these markets.<sup>(v)</sup>

Counterfeits occupy the online channel far less than many other offline channels. A recent study commissioned by the German Trademark Association, Markenverband, revealed that the internet as a channel for counterfeits ranks only fourth, after mobile traders/offline markets, traditional retail outlets and wholesale trade.<sup>(vi)</sup>

### What are the main distribution channels for counterfeit goods?



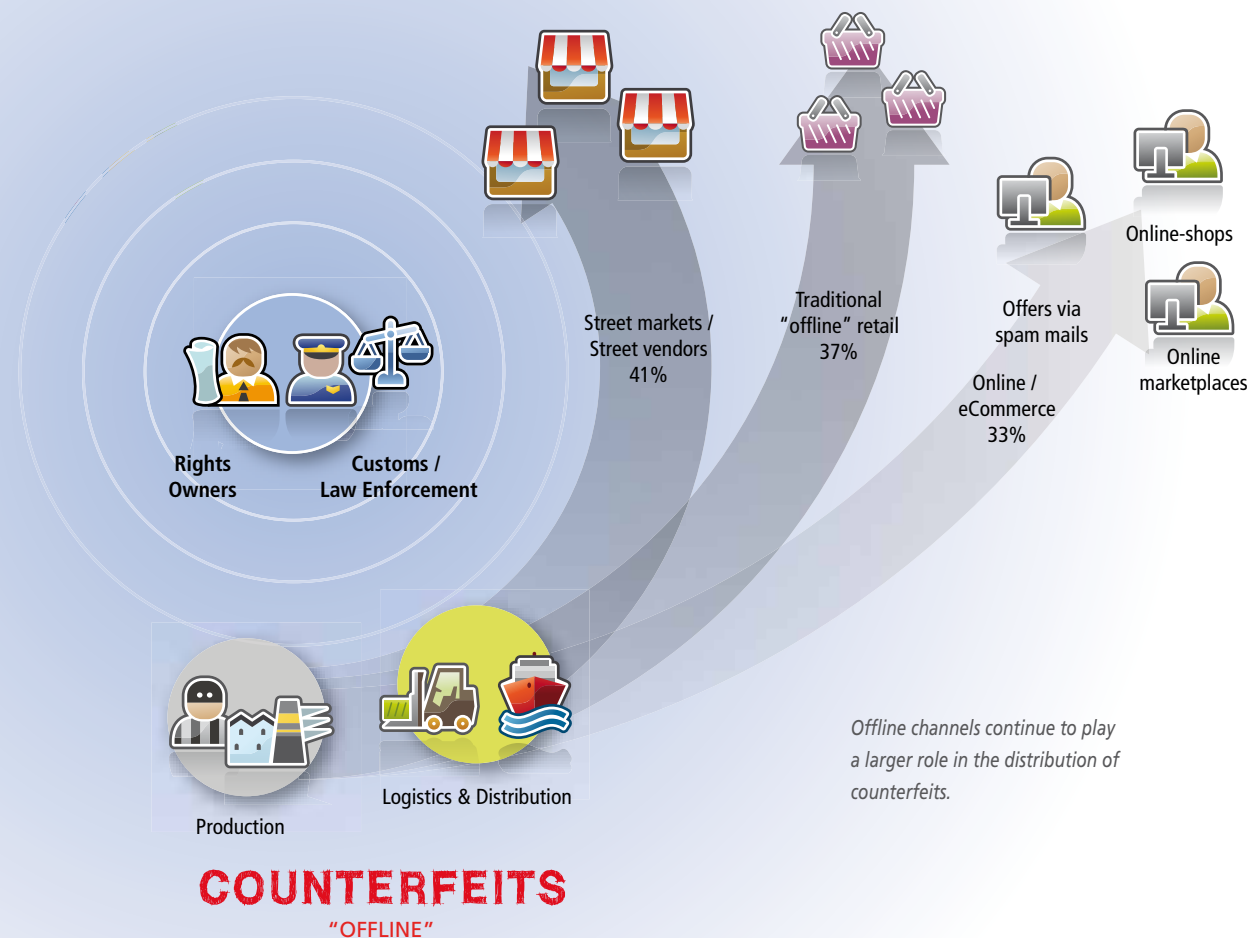
Not only do offline channels play a much larger role in the distribution of counterfeits, but the manufacture, production and demand for all counterfeited goods also have their roots in the offline world.

This does not mean we should ignore the internet: far from it. But it does demonstrate the need to tackle counterfeits across all distribution channels and that we need to address the problem from both a supply side and a demand side perspective.

### Spread across borders

Like all diseases, counterfeiting does not respect national boundaries. The 2008 OECD report concluded that counterfeits are produced and consumed in virtually all economies. Manufacturers understand that fake goods are often produced in one country, distributed into other countries and





then finally sold into yet more countries. The fight against counterfeiting therefore needs a coordinated and global approach involving government, industry and law enforcement to address every point in the counterfeiting supply chain. Each stakeholder has things they can do individually. But it is cooperation that helps each stakeholder be more efficient in how they deploy their resources and in ultimately reducing the problem.

Overall, counterfeiting is a long standing global problem that is more prevalent in the offline than online world. It is the goal of this paper to illustrate what internet companies can do to help advance the fight against counterfeiting.

## COUNTERFEITING: A GLOBAL DISEASE WITH OFFLINE AND ONLINE SYMPTOMS

### Key considerations:

- Counterfeiting predates the internet and comprehensive anti-counterfeit strategies must prioritise the fight against offline production of counterfeit goods and accompanying logistical operations by the counterfeiters.
- Statistics demonstrate that the internet remains a significantly less prominent channel for the sale and distribution of counterfeits than more established offline channels.
- The fight against counterfeiting needs a coordinated and global approach. Governments must work together with stakeholders in order to eradicate the roots of counterfeiting across all aspects of the counterfeiting supply chain.

## II. Why the symptoms of counterfeiting are more visible on the internet.

### The internet's powerful effect on society

The internet is an integral element in the lives of the majority of Europeans: communication, information, entertainment and shopping are regular online activities. One third of the population in Europe shops online and finds an unparalleled choice of products and services at competitive prices. Consumers enjoy the convenience and privacy of shopping from their own homes, or anywhere else.

The low fixed and marginal costs of building an eCommerce operation have opened up exciting new opportunities for Europe's businesses. This is especially true for entrepreneurs and small and medium sized enterprises (SMEs), which are traditionally more nimble and explore new opportunities to penetrate established markets and pioneer new ones. The internet's benefits and advantages are universally acknowledged across the EU.

No stakeholder would deny that these newly created opportunities can also be abused for a wide variety of unlawful activities, including the distribution of counterfeits – mirroring historical experience with all offline commerce. Societal and policy discussions recognise that the internet reflects the offline world with the same unfortunate examples of abuse that may appear to undermine its overwhelming positives. However, as illustrated above, the internet is not the only and, as statistics indicate, not even the major source of counterfeit physical goods.

The internet is a recent but highly visible symptom of the counterfeit problem despite the relatively small amount of counterfeits sold online. The reason for this somewhat distorted image of a huge online counterfeit problem lies in some characteristics of the internet itself. The same unique features of the internet – such as a global footprint, easy access and reliance on intermediaries - that make it such a popular and transformational technology for society, appear to magnify unjustly counterfeit problems on the internet.

### • Global footprint:

The internet is global. This allows consumers and businesses to access markets across the world at little or no cost. A single user from a single location can identify counterfeit solicitations all around the world on high profile sites. This can have the effect of concentrating and unduly magnifying the appearance of counterfeiting in one place whereas, all studies indicate, counterfeiting is a global multi-channel problem.

### • Easy access:

The internet makes content more visible and accessible and eCommerce provides sellers with access to a wider range and type of consumers. There are an estimated 182 million websites – thus providing a staggering freedom of communication and commerce. Again, this allows an individual from one computer to access on her/his screen hundreds of potentially illegitimate businesses, across the world, in a way that prior to the internet would have been impracticable, if not impossible.



• **Reliance on intermediaries:**

The structure of the internet, relying on many technical intermediaries, allows everyone to view all websites from all access points and to build a website or connect to internet users without making technological investments of their own. As a result it means that these technical intermediaries, such as those who provide search engines, provide access, caching and/or hosting services, are forced to “handle” information from all sources. To accept the colossal benefits of the internet’s structure of intermediaries is also to accept that those intermediaries in most cases are not in a position to distinguish whether the information they hold, host or pass on is good or bad. This is not a matter of resources and technological limitations, it is first and foremost a matter of expertise and unavailability of information: Intermediaries cannot be an expert of all the products on a marketplace, cannot speak all languages or know the details of every law, and they have neither access to additional information nor the legal competence to claim it from third parties with reliable expertise.

These specific characteristics of the internet create unparalleled new opportunities for commerce and societies – which can then be abused by wrongdoers. The very same characteristics also appear to magnify the problems, because all information and actions on the internet become more easily accessible and, thus, more visible than they would be in the physical world.

Accessibility and visibility, at the same time, are opportunities. It has never been so easy for rights owners to monitor a distribution channel for both lawful trade in their goods and unlawful trade in counterfeits, thanks to the technological means available in the online world.

The global nature of the internet’s structure and its technological characteristics require an even more cooperative approach than exists in the offline world. The split between the actual actors using the internet and the providers of its technological services not only enables more participation but also leads to a separation of knowledge, expertise, spheres of influence and powers. These must be recombined in a cooperative approach to effectively fight unlawful activities.

### WHY THE SYMPTOMS OF COUNTERFEITING ARE MORE VISIBLE ON THE INTERNET

Key considerations:

- The same unique features of the internet that make it such a popular and transformational technology for society – its global footprint, easy access and reliance on intermediaries – appear to magnify the counterfeiting problem on the internet.
- This accessibility and visibility, at the same time, is an opportunity. It has never been easier for rights owners to monitor a distribution channel for both lawful trade in their goods and the unlawful trade of counterfeits, thanks to the technological means available in the online world.
- The global nature of the internet and its technical structure require an even more cooperative approach in fighting unlawful activities than in the offline world.

### III. Counterfeiting harms rights owners, consumers, economies and internet companies

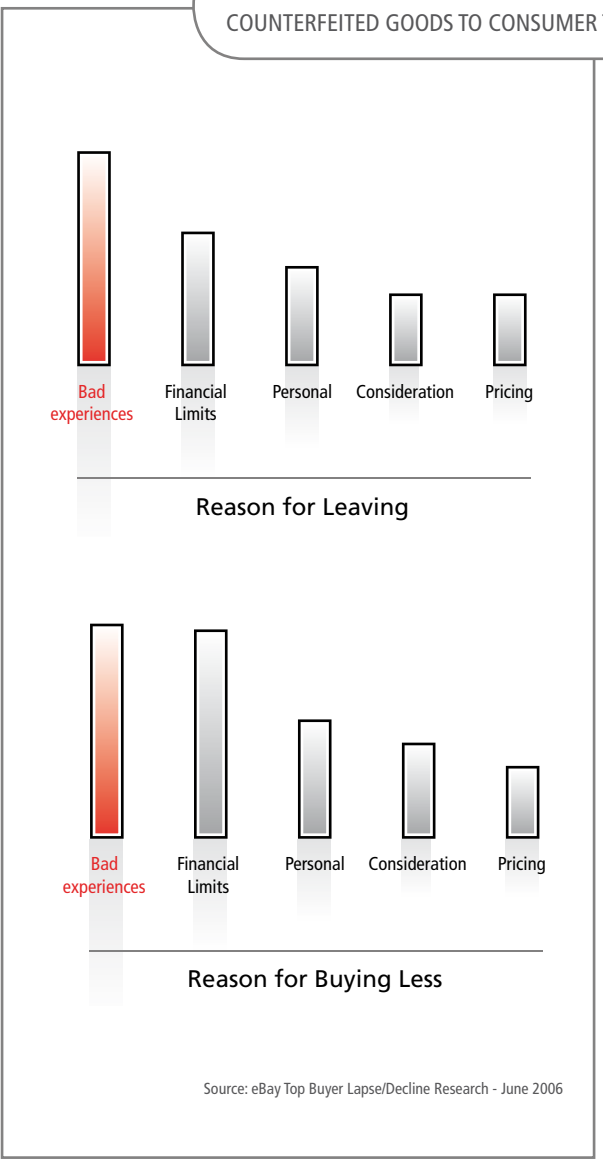
Like all diseases, counterfeiting affects every part of society: from the very poorest working on €1-a-day wages in illegal factories to the very richest billion euro companies who own the copied brands – and nearly everyone in between.

Brand owners face a deterioration of their brand image, a potential loss in revenues and high costs for enforcing their trademarks. Production of counterfeited goods may involve child labour and environmentally harmful production methods. Consumers – when unwittingly buying counterfeits – are defrauded and get less value for money. Even the knowing purchase of a counterfeited good can cause inadvertent harms, including potential health and safety risks. Furthermore, the loss in potential legitimate trade impacts all involved businesses’ revenue and will mean tax losses for states.

The harmful effects of counterfeiting threaten legitimate online businesses as they do legitimate offline businesses. Fake goods destroy trust, the linchpin that holds together commerce. Trust is just as important, indeed arguably more so, in an online environment. Traditional brands have had decades to develop consumer trust, whereas internet companies have developed comparably valued brands in a much shorter time. Consumers, though, might be less dedicated and more subject to abandon online brands as a consequence of a negative experience.

eBay’s marketplace provides a useful example of the damaging effect of counterfeits on online businesses.

CUSTOMER SURVEYS REVEAL THE HARM OF COUNTERFEITED GOODS TO CONSUMER TRUST <sup>(VII)</sup>







**Counterfeits erode consumer trust:**

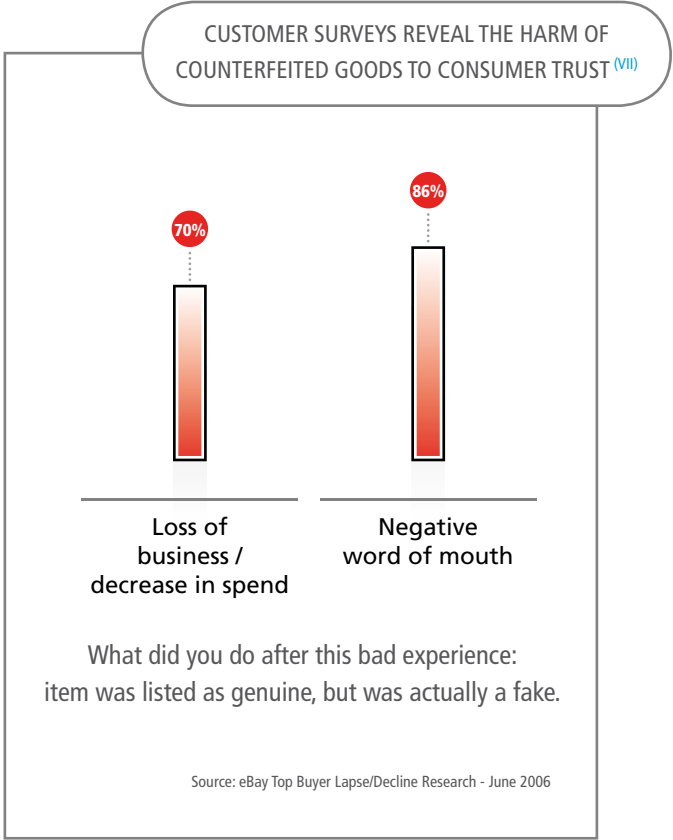
eBay’s business model is built on trust. All online businesses and eBay especially, need to convince users that their services are safe vehicles through which to purchase items without needing to first meet the sellers. If goods bought online turn out to be counterfeit, this is a negative experience for consumers, which drives them away from using the eBay marketplace or the internet in general for commerce. Survey data in 2006 clearly indicated that a user who is defrauded into purchasing counterfeit merchandise is unlikely to return to eBay.<sup>(viii)</sup>

**Counterfeit listings damage honest sellers:**

Any counterfeit that manages to make its way onto eBay damages the attractiveness of the marketplace to the vast and overwhelming majority of sellers who sell genuine goods. Their listings may appear more expensive compared to the fake listings, thereby reducing the attractiveness of the legitimate sellers’ listings, which in turn reduces the honest sellers’ revenues.

**Counterfeits damage eBay:**

The damage to the eBay marketplace for its user bases – sellers and buyers –, caused by counterfeit listings on the site, decreases the success of the eBay business model. The allegation that eBay “profits” from sales of counterfeit items on its site is wrong. There are huge direct costs for eBay’s business because of the appearance of counterfeit listings.



**Investment in technological and human resources:**

Counterfeiting produces significant costs for online markets and intermediaries. Services, such as those provided by eBay, are at a risk of becoming less attractive to consumers. Online markets must make significant investments in human and technological resources to pursue potential counterfeit postings and restore trust and reputation. The cost in extra customer support alone far outweighs any nominal extra revenue derived from counterfeiters. eBay alone invests tens of million euros every year in its anti-counterfeit efforts.

**eBay does not profit from illegal activities:**

eBay refunds fees paid to eBay by sellers when listings are removed for violations of eBay’s rules and policies prohibiting the sale of counterfeits and other illegal items. So despite hosting content in good faith, eBay voluntarily reduces its revenues when that content is removed. Moreover, bad sellers are far more likely to never pay fees or use fraudulent methods to avoid fees owed to eBay.

In addition, the eBay-owned online payment service PayPal offers buyers protection by reimbursing the sales price if an eBay transaction was paid for using PayPal and the purchased goods were either not delivered, or if what was received is significantly different from that described in the listing. This generally covers the case where an item turns out to be a fake.<sup>(ix)</sup>

eBay and most legitimate online businesses suffer financially, if sellers seek to abuse their services by offering counterfeits for sale. Thus, online service providers have a clear business incentive to act against this abuse.

eBay would certainly prefer that counterfeiting is halted before it reaches the internet – but eBay is realistic enough to know that it cannot achieve that result without cooperation from brand owners. The next section of this paper explains in more detail eBay’s comprehensive set of safety measures and its three-step approach to fighting counterfeit listings appearing on its sites. It shows where cooperation is needed to further increase the efficiency of the fight, especially by attacking and eradicating the roots of counterfeiting in the offline world.

**COUNTERFEITING HARMS RIGHT OWNERS, CONSUMERS, ECONOMIES AND INTERNET COMPANIES.**

**Key considerations:**

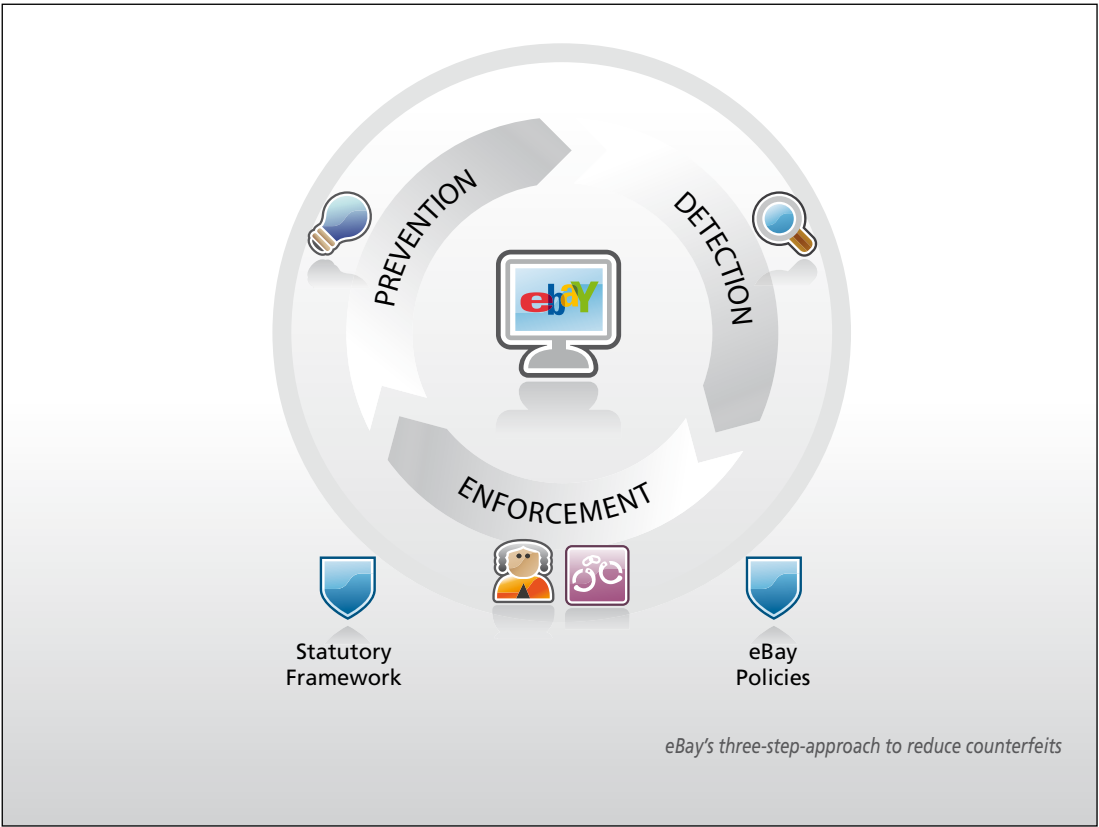
- Counterfeiting affects every part of society. The harmful effects of counterfeiting threaten legitimate online businesses as much as legitimate offline businesses.
- Online service providers have a clear business incentive to act against attempts to use their services to sell counterfeits. Counterfeits destroy consumer trust and damage legitimate business.
- The notion that eBay profits from counterfeits sold on its marketplace does not correspond to the reality of the direct costs deployed by eBay against counterfeits, nor the significant lost revenues from the overall damage to our business, including our brand.



# IV. eBay’s commitment and contribution to fighting counterfeits

eBay is itself a major intellectual property rights owner and is committed to combating infringing or otherwise fraudulent or illegal activity committed by users on its sites. Consistent with our legal obligations - in fact going well beyond them - eBay has implemented many measures to minimise and, ideally, eliminate such

activity on our sites. As explained earlier, eBay takes these steps not only as a responsible corporate citizen, but also because its business will be more trusted and, in turn, more profitable if counterfeiters are eliminated from its marketplace.



## eBay’s three step approach to reduce counterfeits

eBay has developed a three step approach to prevent counterfeits that have already been manufactured and distributed from then being visible on eBay. This aims

to prevent counterfeits appearing on eBay’s sites by both education and additional safety measures; eBay attempts to detect counterfeits at the earliest possible stage and enforce and act expeditiously against potential violations.

## A. PREVENTION

Prevention has two elements: First, users have to be educated against seeking to offer as well as knowingly or unknowingly buying counterfeits. Second, measures enhancing transparency and other safeguards against abuse can deter wrongdoers from misusing the marketplace.

### eBay sets clear rules

eBay has implemented clear policies prohibiting the listing of items that infringe upon intellectual property rights or are otherwise prohibited from being offered for sale on eBay. These policies, which ban not just counterfeit items but also, for instance, guns, are posted on eBay’s website and apply to all users, who must agree to abide by them as part of eBay’s User Agreement. An explicit policy clearly prohibits the sale of counterfeits, unauthorized replicas, unauthorized items or unauthorized copies. That policy further advises sellers that if they are selling a product bearing the name or logo of a company, but that product was not made or endorsed by that company, the sellers may not list the items on eBay. eBay warns that violations of this policy may result in a range of sanctions, including listing cancellation, limits to account privileges and account suspension. Examples of eBay’s policies in relation to counterfeits and authenticity are displayed below.

### eBay educates

eBay educates users with online tutorials and eBay’s online “Security Centre” which provides guidance on buying, selling, and paying for items on eBay. Additionally, eBay has newsletters aimed at both consumers and high-volume sellers known as “PowerSellers” that, among other things, provide information on trust and safety issues. Also, eBay educates its users about additional third-party, government, and law-enforcement resources addressing the specific needs of these parties.

### Replica, Counterfeit Items and Unauthorised Copies

Counterfeits, unauthorised replicas (such as counterfeit watches, handbags, or other accessories) or unauthorised copies (such as copies of software programmes, video games, music albums, movies, television programmes, or photographs) are not permitted on eBay. Unauthorised copies include (but are not limited to) copies that are pirated, duplicated, backed-up or bootlegged. It is illegal to sell unauthorised copies of media.

**Guideline:** If the product you're selling bears the name or logo of a company, but it wasn't made or endorsed by that company, don't list it on eBay.

Breaches of this policy may result in a range of actions, including:

- Listing cancellation
- Limits on account privileges
- Account suspension
- Forfeit of eBay fees on cancelled listings
- Loss of PowerSeller status

### Make sure your item is authentic

You should not list replicas, fakes, counterfeits, or other illegal copies on eBay. For example, you should avoid listing an item that bears the brand name or logo of a company that did not manufacture or authorise the product. Do not list homemade or otherwise unauthorised copies of music, movies, television programs, or software. Under the law, it is no excuse to say that you didn't know the item you were selling was a counterfeit. It's your responsibility to investigate your source for product and stand behind everything you sell.

Read more information about eBay's policy on unauthorised replicas, counterfeit items, and unauthorised copies.

Excerpt from eBay's policy on Replica, Counterfeit Items and Unauthorised Copies in the UK <sup>(X)</sup>

Excerpt from eBay's "Guidelines for Creating Legally Compliant Listings" on eBay.co.uk <sup>(XI)</sup>



Example of eBay Anti-Counterfeit Campaigns and Information Pages in UK and France



eBay cooperates with rights owners

As part of education, eBay also encourages rights owners to create an “About Me” webpage on the eBay website to inform eBay users about their products, intellectual property rights, and legal positions. The content of these pages is the sole responsibility of the rights owners. In effect, eBay provides a free

informational/advertising platform for them. Sellers that have listings removed from eBay are directed to the relevant rights owner’s “About Me” webpage for information about why their listings were removed and how they can avoid posting listings of infringing items in the future.



The About Me Page of Toys “R” Us

eBay’s systems act as a deterrent

eBay has a number of systems and processes to make it an unattractive place to sell counterfeit goods. eBay cannot dissuade users from selling counterfeits entirely. It is the role of rights owners, governments and other stakeholders to fight counterfeit goods and counterfeiters in all channels and down to the roots of the problem. However, eBay is already an inhospitable marketplace for counterfeiters in comparison to the offline world and most other parts of the internet.

eBay verifies users

eBay recognises the importance of reliably identifying its users and preventing suspended users (those users that eBay has taken action against after a previously committed or attempted serious abuse of the marketplace) from returning to eBay. Unlike a physical seller on a street corner or in some markets, eBay sellers must provide the following details: first name, last name, address, telephone, verifiable email address, and date of birth together with their bank account and/or credit card details to allow eBay to collect applicable selling fees. For this reason, rights owners usually have no difficulty in identifying an eBay seller of counterfeit goods, if they contact eBay and ask for those details (in accordance with data protection and privacy laws) – that ease, of course, is itself a deterrent to those unlawful sellers who wish to avoid detection. It is also valuable information to assist rights owners wanting to assert their rights in court.

eBay employs additional safety measures in specific areas

For areas that have historically been targeted by counterfeiters, eBay has developed additional innovative solutions to deter counterfeiters from abusing the eBay marketplace. First, listings for items traditionally favoured by counterfeiters are delayed before either becoming visible to the general public or accessible with our search engines, to allow fraud detection algorithms and teams more time to detect abuse.<sup>(XII)</sup> Second, eBay places additional restrictions on sellers wishing to sell these items, such as requiring verification of their identity through PayPal, placing volume restrictions on the number of these items they can sell, elimination of 1-day (and most 3-day) auctions, as well as limitations on cross-border sales. These additional levels of protection have already achieved positive results with a dramatic decrease in infringing listings being reported to eBay by some luxury goods rights owners.

At the same time, legitimate sellers of these items have seen their selling prices and conversion rates increase. This is in contrast to the offline world, where, in a market or even a shopping mall, there may be no greater restrictions placed on traders who are selling one type of good over another.

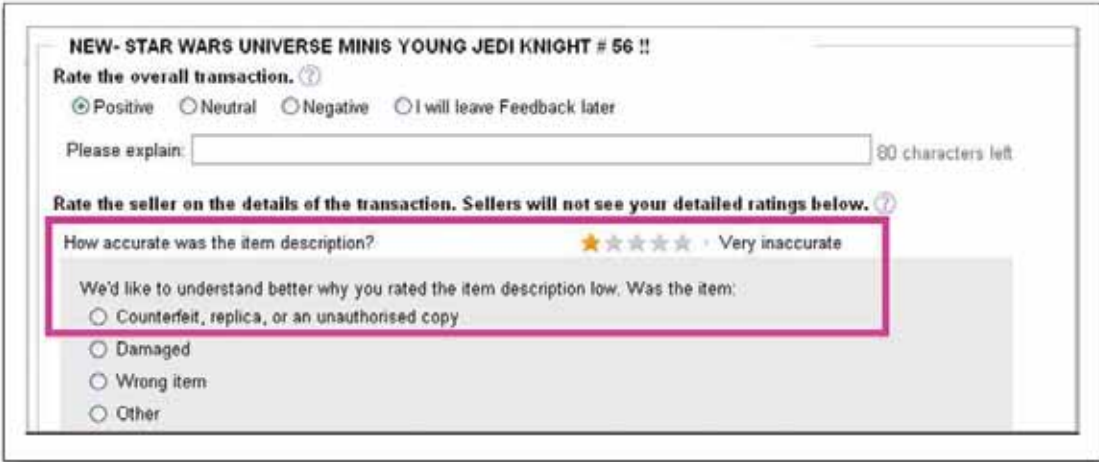




User feedback on eBay highlights problem sellers

The eBay Feedback system is designed to help ensure that buyers are transacting with reliable and trustworthy sellers. The feedback system is not required by law, but is a voluntary system that eBay uses to fight against illicit behaviour on its site. Buyers can provide Detailed Seller Ratings enabling them to rate a transaction experience on four specific criteria. Of particular relevance to this paper is the

“item as described” criterion which, if rated low, asks the buyer to provide additional information, including whether the item was a counterfeit. The publicity created by the feedback system for any bad seller behaviour acts as further deterrence to all potential wrongdoers. It is another safety measure consumers can rely on before making a buying decision. There is nothing comparable offline nor in other online distribution channels.

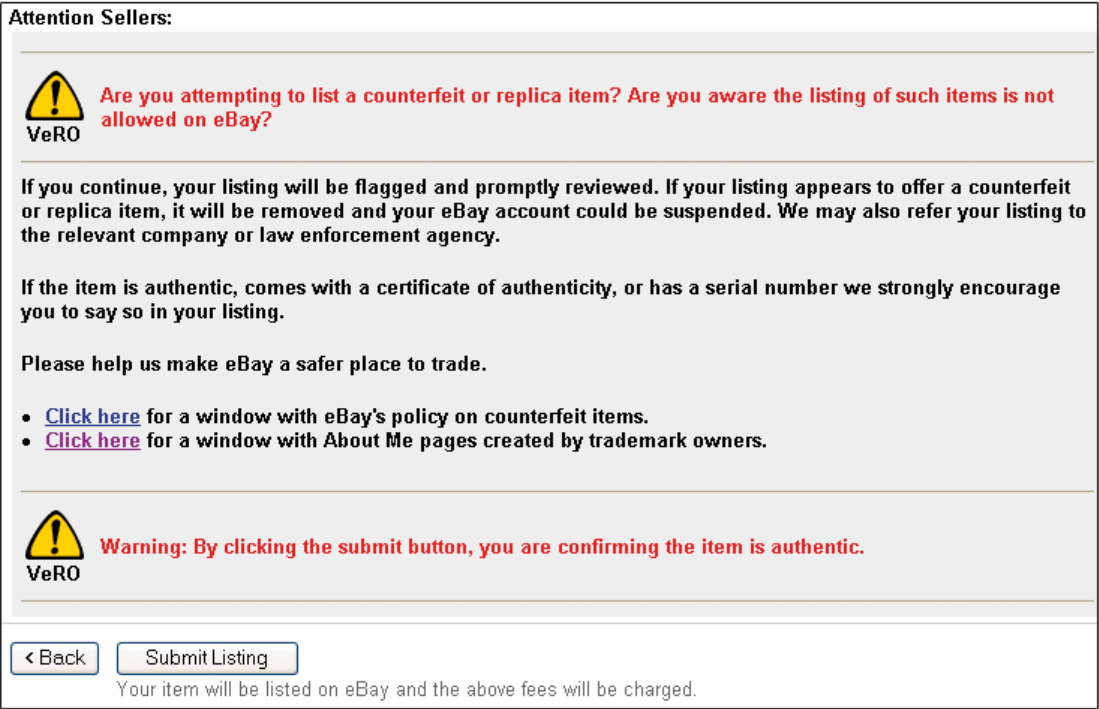


Screenshot of eBay's Detailed Seller Ratings process

Automatic warning messages guide sellers

Although eBay is not able to ascertain whether an item is counterfeit, eBay attempts to deter the listing of potentially infringing items through the use of special warning messages. For example, if a seller attempts to post a listing on eBay with the online “Sell Your Item” form and the listing triggers one of the rules in eBay’s anti-fraud technology, a warning message appears that states, among other possible

messages: “Warning: By clicking the submit button below, you are confirming that the item you are about to list is authentic.” The warning messages also typically include links to relevant eBay policies, such as those pertaining to the prohibition on counterfeit merchandise, and eventually to the “About Me” pages of rights owners on eBay. In the offline world, there is no such intervention by a third party prior to sale.



Screenshot of an eBay warning message

B. DETECTION

eBay invests heavily in measures designed to detect illegal activities and makes further attempts to stop such activity. In total, eBay spends tens of millions of euros each year on human and technological resources to reduce the incidence of unlawful listings on its platform. eBay successfully undertakes detection efforts on its own, but there are natural limits to the tools that can be employed when specific, detailed product knowledge is required to recognize a counterfeit good. To maximise their effectiveness, eBay’s detection efforts benefit from the cooperation of rights owners, who are in the best position to spot illegal goods.

Most supposed counterfeit listings are taken down thanks to eBay's own proactive efforts

eBay has no legal obligation to search its website proactively for infringing activity. Indeed, EU member states are prohibited by legislation from imposing such a general obligation on internet intermediaries

to police material posted on their services by third parties. Nonetheless, for the economic reasons described above, eBay undertakes proactive efforts within the limits of eBay’s business model and technical feasibility, including that checks have to occur in a “real time” environment involving hundreds of millions of listings.



eBay can only base its proactive efforts on the online activities of sellers on its site, as eBay never takes possession, custody or control of items sold by eBay users. As a natural consequence, eBay does not and cannot inspect, examine or authenticate any of the hundreds of millions of items offered for sale by third parties on its site. Thus, eBay has a very limited range within which to analyze the content and activity of third parties on the eBay site.

eBay uses technology, presently encompassed in eBay's anti-fraud engine, which operates rules and complex models to search automatically for activity that violates eBay policies. The engine contains more than 13,000 different search rules. The anti-fraud engine is designed in part to capture listings of goods that contain hints of counterfeiting apparent from words or terms used in the listings, which do not require detailed expertise about rights owners' brands or products. For example, eBay proactively searches its site for, and removes listings that expressly offer "knock-off," "counterfeit," "replica," or "pirated" merchandise.<sup>(XIII)</sup> The search models employed by the engine are in constant development because eBay seeks to adapt them to newly emerging threats and fraud patterns, once eBay learns about them, quite often from reports by rights owners. It is crucial for the system to maintain its flexibility so that resources are employed with maximum effectiveness.

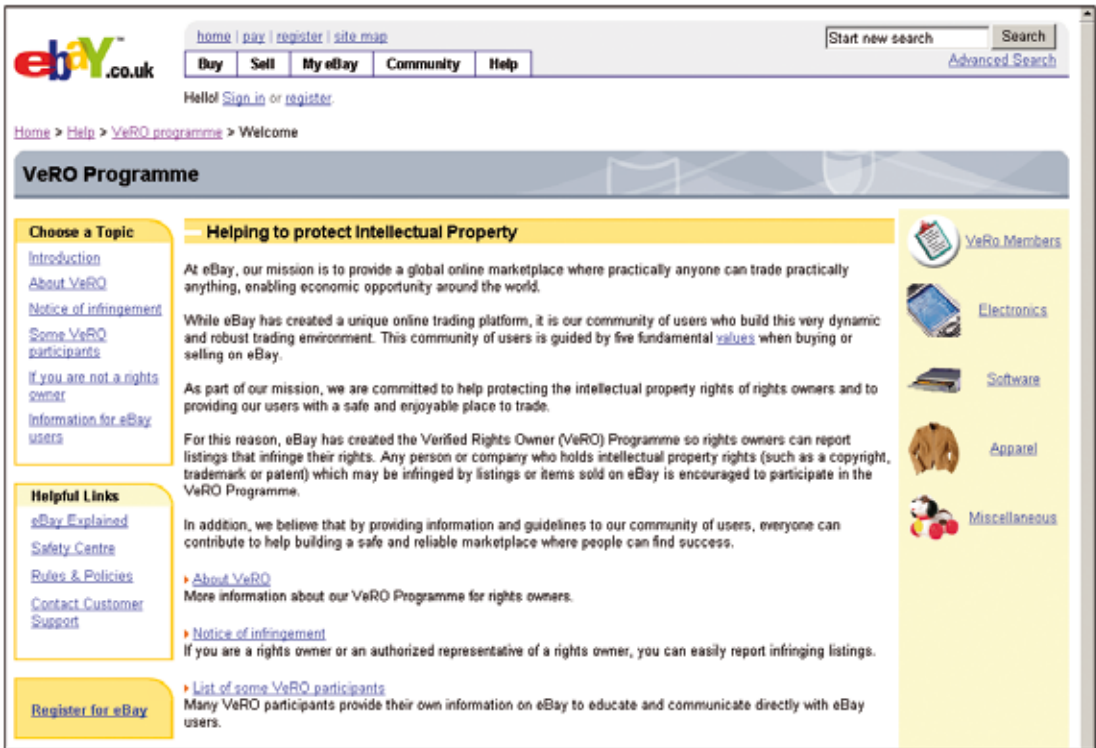
However, no technology can determine whether a listed item is actually counterfeit, and listings identified by the anti-fraud engine usually need to be reviewed manually by eBay personnel for "false-positive" filter hits, i.e., engine referrals that, upon

closer inspection, are perfectly valid, non-infringing listings from established, trusted sellers.

eBay removes thousands of listings per day based on its review of listings captured by the anti-fraud engine. Indeed, eBay typically removes as many listings proactively as it does through all rights owner reports ("notices") combined.

Notwithstanding these efforts for proactively detecting and deleting infringing listings, the cooperation of rights owners is an essential element as eBay tries to make its tools as effective as possible. This is not merely a matter of scale, although the figures are impressive: more than 7.3 million new listings are posted on eBay daily; at any given time, some 126 million listings appear on its sites in more than 50 000 different categories. There is no way eBay could determine for all these listings whether or not the items offered for sale are genuine. First and foremost it is down to an inevitable lack of expertise. eBay simply cannot be an expert on all the different goods put up for sale.

Faced with these limitations, eBay needs to work with rights owners - who possess intimate knowledge of their own merchandise - for assistance and notice of items listed for sale that may be counterfeit. The rights owners not only have the motivation, but the information to make this proactive analysis more targeted and effective. eBay's VeRO ("Verified Rights Owner") programme, a "notice and take down" system, allows rights owners a simple and effective way to participate in those efforts.



Landing page on eBay UK for the Verified Rights Owners (VeRO) program

### Rights owners help eBay to detect counterfeit sellers

eBay is eager to remove counterfeits from its site. However, due to the very nature of counterfeit goods, identification is seldom straightforward. Even with unlimited resources, detection of counterfeits requires knowledge of the rights held by the rights owner, and expertise in identifying those aspects of the goods which are different from the genuine article. In fact, it is not uncommon that one cannot identify a counterfeit without physically inspecting the goods - something that eBay never does as it does not warehouse goods, nor does it act as a physical auction house. Due to the gap in expertise required to detect conclusively counterfeits, eBay established its VeRO programme to boost the effectiveness and efficiency of its anti-counterfeit efforts.

The VeRO programme enables intellectual property rights owners - completely free of charge - to report listings of goods that potentially infringe their rights and request removal of such listings from eBay's

site. These rights include trademark, copyright, and other legal rights. The core of the VeRO programme is a "notice-and-takedown" system that embodies the appropriate respective roles to be played by intellectual property rights owners on the one hand, and eBay on the other, in rooting out infringements by third parties.

Underlying the creation of the VeRO programme was eBay's desire to encourage rights owners to report instances of potentially infringing listings. eBay, in turn, committed itself to developing a more efficient process for responding to such notifications and then to take down reported listings. More than 31,000 rights owners, ranging from Global 500 companies to industry trade associations to small businesses, currently participate in the VeRO programme.

eBay created a simple online reporting form, known as a Notice of Claimed Infringement ("NOCI"), and related online tools by which rights owners can report challenged listings directly to eBay. The NOCI is designed to enable eBay to identify correctly the



listing to be removed and to ensure that the rights owner reporting the listed item is authorised to file such a notice.

eBay also provides free-of-charge, sophisticated search and reporting tools, which are continually being refined and improved. eBay endeavours to minimise the reporting burden for rights owners through new innovations provided to rights owners. eBay’s VeRO Reporting Tool, for example, triggers the display of a “Report Listing” button on every listing relevant to the rights owner using the tool. The VeRO Bulk Reporting Tool even allows multiple reports from just a single search results page, to ensure we facilitate the submission of notices from rights owners in the most efficient way. All these reports are transmitted electronically to eBay’s VeRO team for a response.

The handling of the incoming reports is also highly efficient thanks to the sophisticated technology and the dedicated human resources employed by eBay. Virtually 100% of the listings reported to be counterfeit are removed. 90% of the reported listings are removed within 12 hours, the majority of them within four hours. 95% of the reported listings are removed before the listing ends and a transaction has been agreed.

Through the implementation of sophisticated technology and tools, eBay offers rights owners the best possible model for the policing of their brands. Governments, courts and policymakers all agree that intellectual property rights holders must continue to police their brands on- and offline. The means provided by eBay facilitate the work of rights owners and eliminate unnecessary cost burdens. eBay’s VeRO programme promotes efficiency and speed of action to remove listings that potentially infringe

intellectual property rights, which in turn promotes the key message that eBay refuses to tolerate the misuse of its platform for any such unlawful activity.

As a consequence of these combined efforts, eBay removed 4.2 million listings in 2008, which were detected or notified as possibly relating to counterfeit goods. Putting this into relation to the number of overall listings on the eBay sites in the same period – more than 2.7 billion – this still is a rate of only 0.15% of listings that have been detected or notified as being a suspicious listing that may offer counterfeit goods for sale.<sup>(xiv)</sup>

**eBay leverages its community of users**

There is one other powerful resource that eBay can rely on to identify any infringing activities happening on its marketplace. All members of the eBay community can also report unlawful activity by merely using a link provided on each listing page to report a potentially infringing or otherwise unlawful listing to the eBay customer support teams. eBay receives approximately 12 million such referrals every year.

**C. ENFORCEMENT**

**eBay does not limit itself to taking down infringing listings, but also seeks to change user behavior – or if not successful to ban those users not complying with eBay policies.**

**eBay employs a comprehensive set of sanctions for non-complying users, including permanent suspension from the marketplace**

Users face a broad set of sanctions when violating eBay policies. The measures range from warnings, temporary suspensions or selling restrictions to permanent suspension from eBay in cases of repeat infringements or other severe violations. eBay does not tolerate continued contempt of its policies that harms the eBay community, third parties and eBay itself.

Suspension from the eBay marketplace is a tough sanction, since a large number of users depend upon eBay as a primary or secondary source of income. Proportionality of sanctions has to be ensured. Indiscriminate use of suspensions would run the risk of impairing the livelihoods of legitimate users and SMEs across the community. At the same time, eBay does not shy away from invoking suspensions where circumstances warrant this penalty. As a general rule, eBay will not tolerate wilful sellers of counterfeits no matter what their level of dependence on eBay. Conversely, usually responsible sellers of good reputation may inadvertently run afoul of eBay policies.

eBay also employs a variety of measures in an effort to keep previously suspended users from returning to the site. Most notably, eBay has developed sophisticated tools that enable it to profile and detect patterns of fraudulent activity, including tools that allow eBay to identify previously suspended users and prevent them from re-registering even with different personally-identifying information.

In 2008, eBay suspended approximately 30,000 sellers and blocked 40,000 previously suspended sellers from re-registering.

However, all sanctions that eBay can impose are necessarily limited in their effects on the online world or even on the eBay marketplace. eBay can delete infringing listings and ban counterfeiters from using the eBay site. This cannot remove illegal goods from circulation or prevent counterfeiters from using other distribution channels to sell their counterfeits, either on- or offline. This is why eBay places such importance on cooperation with both rights owners and law enforcement: to allow effective prosecution of wrongdoers beyond the limits of the online world.





Data disclosure to rights owners

To allow rights owners to employ the legal means available to them against the seller of counterfeited goods, eBay – as part of the already described VeRO programme – discloses the contact details of the seller upon request of the rights owner. eBay ensures that this data disclosure complies with applicable data protection laws by asking all its users, before allowing them to use the marketplace services, to consent to an eventual data disclosure to rights owners under the VeRO programme.

Working with law enforcement

eBay is also committed to ensuring effective criminal prosecution of infringers. Along with joint investigations with rights owners, eBay works with law enforcement agencies to offer assistance and routinely refers potential matters to such agencies and provides them with information to enable them to “make cases”. Information that eBay provided has led to the conviction of suspected counterfeiters. eBay has built close relationships with law enforcement authorities around the world. eBay has created a Global Law Enforcement Operations team (GLEO) that is a worldwide organization consisting of investigators, security engineers and law enforcement relationship managers located in various cities and countries.

eBay does not merely provide data – it also actively supports law enforcement in its investigations and in later court proceedings by providing suitable evidence, and testimony. eBay’s active fight against fraud and

counterfeiting on its site includes regular proactive referral of cases to law enforcement. In certain cases, eBay’s Special Investigation Group investigates the matter and, where appropriate, prepares a detailed case which is presented to authorities. This type of cooperation facilitates the review by law enforcement personnel of fully documented cases and increases the chances the matter will be brought to court – one of the only ways that counterfeiters will be given an effective signal that their activities are not tolerated.

In 2008 the eBay GLEO team assisted law enforcement in 71,332 investigations (of all types, including counterfeits). The GLEO team proactively referred 505 cases to law enforcement. In addition, GLEO trained approximately 4,200 law enforcement officials around the world on our platforms and how we partner with law enforcement. Whilst eBay is pleased that this cooperation again resulted in the arrest or conviction of 567 individuals in 2008, eBay is delighted that – just to put things into perspective – another 86 million *other* users traded (xvi) on eBay in the same period without requiring any investigation.



The statistics show that eBay fortunately has relatively little illegal activity on its site, especially as a proportion of overall transactions. At the same time, the absolute numbers of listings that were taken down because they had been detected or reported as potentially infringing, shows that efforts are necessary and contribute to the overall fight against counterfeits. eBay is committed – well beyond and independent of any legal obligation – to continue and to further develop its already wide-reaching efforts in all three areas of anti-counterfeiting prevention, detection and enforcement. At the same

time, rights owners are encouraged to use the free services voluntarily provided by eBay to track and trap counterfeiters and to employ all legal means available against them.

eBay works well with the overwhelming majority of rights owners in addressing the common concern – counterfeiters – and looks forward to building on its work with rights owners to do more to identify counterfeits and counterfeiters, and to support rights owners in their direct actions against non-authentic goods.

EBAY’S COMMITMENT AND CONTRIBUTION TO FIGHTING COUNTERFEITS

Key considerations:

- eBay employs a three step approach to reduce counterfeits – prevention, detection and enforcement – that eBay continues to develop according to technology advances and the data available about attempted abuses of its platform.
- Despite heavily investing in its anti-counterfeit efforts, eBay’s ability to detect infringing listings is necessarily limited. eBay cannot be an expert on the staggering number and variety of products offered across its marketplaces. It needs the cooperation of rights owners to detect infringements. eBay offers rights owners best-in-class services for observation and notification to allow effective policing of their brands on the eBay marketplace.
- eBay’s anti-counterfeit measures are necessarily limited in their effects to the online world, specifically to just the eBay marketplace. eBay cannot remove illegal goods from circulation or prevent counterfeiters from using other distribution channels to sell their counterfeits, either on- or offline.
- Working with rights owners and law enforcement, to provide data that assists investigations or testimony to aid legal proceedings, is a key commitment of eBay.
- Cooperation is a fundamental weapon in the fight against counterfeits and the cornerstone of any effective anti-counterfeit strategy.



V. How eBay’s measures can in part influence the supply and demand of counterfeits

eBay will continue to dedicate financial, human and technical resources to tackle counterfeits. These measures, however, only have a limited impact on the overall spread of this disease, as the greatest demand for counterfeits is offline. Even online, eBay is merely one of many other internet intermediaries between rights owners and infringers. As stated before, a recent study revealed that the internet as a channel for counterfeits ranks only fourth, after mobile traders / offline markets, traditional retail outlets and wholesale trade<sup>(xviii)</sup>.

Counterfeiting is driven by the widespread demand over all these different distribution channels. This portion of the paper first tries to better understand the different elements and roles of the online and offline landscape in the supply of counterfeits. It then examines the underlying and interlocked factors of supply and demand, to analyse the role played by the internet in revealing (but not causing) the problem and the limited influence that internet companies in general, and eBay in particular, have in tackling the cause. Fake products do not exist because of eBay or even the internet. Fake products are offered for sale online because counterfeiters who manufacture and distribute their products offline were not caught before they were able to offer some of them online. Thus, the importance of tackling the manufacture of counterfeits cannot be underestimated.

How demand and supply drive and influence counterfeiting

Demand is present for a variety of reasons relating

to the attractiveness of the branded goods and their availability at the price willing to be paid by the consumer. Obviously, rights owners are successful when they develop brands and products that attract a premium price compared to their closest competitor product. Consumers either mistakenly (because the counterfeit is a compelling fake) or wittingly (usually for the same reason) want to own the product without paying the premium. Often the consumer is attracted to the genuine product being sold at a lower price in another country. For several reasons, the authentic product may not be available in his/ her country.

This unsatisfied demand is met by a supplier of counterfeits. This supplier, away from the internet, duplicates or counterfeits the genuine product. Manufacture, assembly, shipment, storage and distribution all take place in the physical world without any involvement of any internet company or marketplace. The supplier then might succeed in infiltrating his goods into legitimate distribution channels. These channels, ranging from street hawkers to single page websites, are used to supply the goods into the hands of the consumer.

Only by disrupting the cycle of supply-and-demand will the spread of counterfeiting be curtailed rather than be hidden from view. It is only the rights owners and law enforcement agencies, who have the expertise, the incentives, the resources and the legal tools to attack the illness before it spreads. Internet companies can do their part by sharing intelligence, but they are not and cannot be the main actors.

A. SUPPLY

How rights owners and law enforcement can throttle supply.

On the supply side, the 2008 OECD report on counterfeiting lists the following as factors which influence counterfeiters on what to produce and which markets to target:

Supply-influencing factors according to the OECD <sup>(xix)</sup>

Counterfeit or pirate supply	
Driving factors	
Market characteristics	High unit profitability Large potential market size Genuine brand power
Production, distribution and technology	Moderate need for investments Moderate technology requirements Unproblematic distribution and sales High ability to conceal operation Easy to deceive consumers
Institutional characteristics	Low risk of discovery Legal and regulatory framework Weak enforcement Non-deterrent penalties

Thus, counterfeiters are looking for:

- **High unit profitability** – The higher the potential unit profitability of counterfeiting, the higher is the incentive for infringers to enter the market.
- **Large potential markets** – The larger the size of a market for a particular product, the larger is the incentive to exploit the associated markets for infringements.
- **High level of brand recognition or popularity** – Closely linked to profitability and market size is the attention that the public pays to a brand. Generally, the more power a brand has among consumers, the greater the incentive to infringe that trade mark.

Counterfeiters are looking for the highest profit across the largest market with the highest brand recognition to speed sales and reduce the need for marketing. It is that greed that allows counterfeiting to proliferate. The factors listed above, however, have no connection to the internet. Rather, they are general issues that result in symptoms visible on- and offline.

There are several measures and factors that can inhibit the spread of counterfeiting. The internet and eBay in particular can have a limited impact as part of some of those measures.

1. Increase costs of production and technology requirements
2. Increase costs of logistics

The more advanced and costly the production required for counterfeiting, the more limited the number of parties that are willing or able to engage in infringing activities.<sup>(xx)</sup> This is an issue over which internet companies in general and eBay in particular have no control, nor any knowledge.

The management of both inbound and outbound materials, parts, supplies and finished goods is another factor in the ability to stop counterfeiting. Again, the costlier and more complex the logistical management structure for bringing illicit goods to the market, the lower the likely level of infringing activity.



Here border control plays an important role in preventing the spread of the disease across borders: however customs authorities, like eBay, require detection assistance from rights owners. Smart rights owners assist customs to enhance their effectiveness, thus increasing the risks and the costs of counterfeiting logistics. In addition, they can use information about the shipment to press their rights against the responsible infringers further up or down the supply chain. eBay, other than supporting legislative changes where needed, cannot materially impact the outcome.

3. Increase costs of marketing and sales

The easier it is to establish channels through which counterfeit products can be distributed and sold, the greater the scope for parties to engage in infringing businesses.

The costs of setting up in business are being driven lower and lower across the EU – it is an especially good way to encourage SMEs. The internet helps those businesses, once established, to reach a large audience. Unfortunately, the same low costs and low barriers that exist for legitimate businesses benefit counterfeiting businesses. There will be others who will run under the radar, lying about their identity and attempting to be untraceable. This is true both for online and offline operations. If, however, such individuals attempt to use the same evasion tactics on eBay they will face difficulties. Unlike sellers in some offline and online environments, eBay sellers need to identify themselves in some detail.

4. Increase risk of detection and prosecution

In order to operate, counterfeiters try to conceal their operations to reduce the risk of detection and prosecution. Here rights owners are able to work with law enforcement agencies, border control and with eBay to trap goods and prosecute those responsible. eBay, as described above, invests heavily in technical and human resources to detect infringing activities, both in its own proactive efforts and in cooperation with rights owners. These initiatives increase the risk of detection for counterfeiters. If it comes to prosecution, however, eBay’s reach is limited to its own online marketplace – by banning infringing items and users from the marketplace. It cannot extend such measures to the offline world. As mentioned above, eBay is eager to rid its site of counterfeiters and willingly assists rights owners and law enforcement agencies by providing contact details of suspicious sellers. Once rights owners have those details, and it is confirmed that the seller has indeed been attempting to sell counterfeit goods, it is within the rights owners’ control to prevent the counterfeiter from selling on any website or via any other on- or offline channel. And it is for law enforcement to assert their stronger rights of detention. The same is true when it comes to the seizure of the respective physical goods, to check if they are indeed counterfeits and to then ensure their destruction. Many online service providers, including eBay, work with law enforcement agencies to support their work and help them to be more successful in arrests and convictions. Adding to a counterfeiter’s risk of sanctions, through increased rights owner

litigation against them, will drive down supply even further.

5. Improve customer awareness to lower the ability for counterfeiters to deceive

In order to sell products to unknowing customers, counterfeiters need to deceive consumers into believing that the products they are selling are

genuine. Hence, the more difficult it is to deceive consumers, the less appealing it will be for counterfeiters to engage in infringement activity. It is a rights owner who is best placed to educate consumers about how to spot fakes. eBay willingly supports rights owners in spreading such information amongst its broad user base.

The OECD list shows that there are some very important factors on the supply side for counterfeits, upon which the internet and eBay in particular have little or no influence. And even for those factors where the internet has a role to play as one of many distribution channels for counterfeits, eBay has already implemented measures to influence these factors so that counterfeiters are deterred from using the eBay services. It is mostly in other channels or at other levels of the supply chain, where more could be done to discourage and hinder counterfeiters from pursuing their unlawful business. Therefore, eBay strongly encourages rights owners and law enforcement agencies not to concentrate solely or disproportionately on counterfeiting on the internet. Instead, cooperation is indispensable to ensure maximum effectiveness against counterfeiting networks across the board.

B. DEMAND

The other influential element of the market for counterfeited products is demand.

While the OECD report on counterfeiting only investigates the demand for counterfeited goods that are wittingly purchased by consumers, it must not be forgotten that the demand side also has an influence when buyers are duped into buying counterfeited goods or were simply unconcerned as to whether the goods that they are buying are authentic. While the ability to conceal the status or the risk of discovery and prosecution obviously only matter for consumers

Knowing demand for counterfeit or pirated products	
Driving factors	
Product characteristics	
Low prices	
Acceptable perceived quality	
Ability to conceal status	
Consumer characteristics	
No health concerns	
No safety concerns	
Personal budget constraint	
Low regard for IPR	
Institutional characteristics	
Low risk of discovery and prosecution	
Weak or no penalties	
Availability and ease of acquisition	
Socio-economic factors	

Demand-influencing factors according to the OECD (XXI)





Screenshot of eBay's  
Anti-Counterfeit  
Landing Page in UK

wittingly buying counterfeits, other factors, such as low prices, quality, safety, availability and ease of acquisition, have the same relevance for consumers looking for a genuine item.

Still, the difference between witting and unwitting purchase of counterfeits matters, when examining the different ways to influence the demand side of the problem:

1. Ensure availability of authentic goods at reasonable prices online

Many consumers simply want to buy products easily, at good prices and in convenient ways. One way to do this for many users is online shopping, but if legitimate products are not easily accessible on the web but copies are, they might end up buying copies – wittingly or unwittingly. So for those consumers who are looking to buy the genuine article, it has to be available online. By opening up their distribution networks, rights owners can embrace the internet – and ensure their genuine goods get into the hands of demanding consumers wishing to buy them.

2. Target consumers with specific educational messages

Of course, some consumers cannot afford the genuine product. These consumers may be tempted into buying counterfeit goods. But they will be tempted whether the fake goods are on or off the internet. So these consumers will need to be educated about counterfeits sold in all channels, not merely the internet. The education message for these consumers needs to be about counterfeits *per se*, not merely counterfeits through one channel. The best author of



these messages is the rights owner with cooperation of other stakeholders and state authorities, to make the message as comprehensive as possible and to spread it most widely.

Internet intermediaries such as eBay can play a role here due to their access to consumers. However it remains the rights owner, along with support from

governments, who is best adept at messaging the potential consumer base to reduce the demand in fake goods. Rights owners also are the entities best able to explain to an unsuspecting consumer how to spot fake goods and how and why to avoid them. eBay will continue to work with rights owners on awareness campaigns and allow rights owners to communicate their messages to consumers on the eBay marketplaces, for example with their own "About-Me-pages". In addition, multi-stakeholder campaigns can reach a broader audience with unified messaging, as is being done by the Authentics Foundation with support from eBay when linking to their websites from eBay UK's own Anti-Counterfeit information hub.<sup>(XXII)</sup>

In summary, implementing measures to reduce the supply and demand of counterfeit goods do not require significant modification to the legal structures

and bodies built to tackle counterfeits. Existing legislation, as shown below, addresses both supply and demand and does so across state authorities and across territories. What we conclude is that more can be done to encourage all stakeholders (rights owners, state authorities and intermediaries, including internet companies) to intensify their cooperation. Working against one another halts neither supply nor demand for counterfeits and diverts attention away from those who manufacture and distribute such items. Only by working together can all stakeholders throttle demand for counterfeits and undermine the motivation for their production.

The utmost importance of a cooperative approach was also stressed as a result of a study recently published by the French Ministry of Economics, Industry and Labour.<sup>(XXIII)</sup>

HOW EBAY'S MEASURES CAN IN PART INFLUENCE THE SUPPLY AND DEMAND OF COUNTERFEITS

Key considerations:

- Only by disrupting the cycle of supply-and-demand will the spread of counterfeiting be curtailed rather than just hidden from view. Only rights owners and law enforcement agencies have the expertise, the resources and the legal tools to attack the illness before it spreads. Internet companies like eBay can and do support this, particularly by sharing intelligence, but they cannot be the main responsible actors in curtailing counterfeits.
- The 2008 OECD Report illustrated that there are some very important factors on the supply side for counterfeits, upon which the internet and eBay in particular have little or no influence. For other factors only a cooperative approach can help to address them effectively.
- On the demand side, internet intermediaries such as eBay can play an important role in end-user education, by leveraging the reach they have to consumers. But it remains the rights owners, along with support from governments, who are best adept at developing the adequate messaging.



## VI. How the EU's anti-counterfeiting laws provide a strong antidote against counterfeiters

This section of this paper will show that European anti-counterfeiting legislation is robust and effective. The institutions working within this framework are cooperating at European and international levels and are already concentrating on the sources of the problem. Measures are being taken to combat counterfeiting by attacking the supply and distribution of counterfeit goods across every available channel.

Much is being done, in a coordinated manner, across territories to address the underlying problem. Nevertheless, it is our opinion that still more should be done and we propose solutions to fill current gaps in the final section.

### ELEMENTS OF THE LEGAL FRAMEWORK

The EU's anti-counterfeiting framework encompasses border control, enforcement of IP rights and the apportionment of legal liability in respect to eCommerce.

#### Border Detention Regulation

This harmonises the rules that govern the prevention of counterfeit goods from entering or leaving the EU. The Border Detention Regulation sets out the conditions under which the customs authorities may intervene in cases of suspected goods and the powers of the customs authorities when goods are found to be illegal.

#### IPR Enforcement Directive

This legislation harmonises and defines the measures, procedures and remedies that should be available in EU member states to rights owners for the enforcement of their rights. The Directive applies to infringements of IP rights. In particular, it provides for

far-reaching measures in relation to infringements carried out on a "commercial scale".

#### eCommerce Directive

This Directive was adopted to enhance consumer confidence by clarifying and harmonising the rules concerning online business. The Directive provides the basis for determining the legal liability for third party actions by information service providers acting as intermediaries. So long as the service provider has no knowledge or awareness of illegal third party activity and is not controlling the third party using its services, it is not liable for illegal information or material on its website.

The anti-counterfeiting legal framework described above, together with more substantive intellectual property legislation, accepts that counterfeiting is not limited to one sector, one country or one medium. The EU has correctly treated the problem as one needing a holistic approach. The Border Detention Directive and the IPR Enforcement Directive both target the counterfeiting supply-demand equation, increasing the chance of detection and restricting the ability of counterfeiters to distribute goods.

As with all legislation (and like all medicine), to be effective, the prescription must not only be available, it must be used. To eradicate the sickness, effective enforcement by the European institutions and rights owners, and cooperation between stakeholder groups to develop self-regulation and interparty agreements is necessary.

### GLOBAL INSTITUTIONAL COOPERATION

Counterfeiting is a global and universal challenge, far transcending the internet and the borders of

the EU. The distribution networks of counterfeiters increasingly span several countries within and outside the EU, with proceeds laundered within and between countries. The 2008 OECD Study observed that the scope of organised crime activities in counterfeiting is broad, with the groups involved being based throughout the world.

Therefore, there is a need for high-level political dialogue both within Europe and internationally. The G8 countries have demonstrated their commitment to the fight against counterfeit goods by convening a working group – the G8 Intellectual Property Experts Group – which has laid out plans to implement agreed actions against counterfeits.

In addition, the Anti-Counterfeiting Trade Agreement (ACTA) is a multilateral agreement which is in the process of being negotiated by the EU, Switzerland, the US, Canada, Australia, Japan, Republic of Korea, Mexico, New Zealand, Jordan, Morocco, Singapore and the United Arab Emirates. International cooperation between all stakeholders and coordinated enforcement efforts are important goals toward eliminating commercial-scale counterfeiting and piracy. ACTA is most likely to succeed with this goal if it concentrates on measures related to the enforcement of willful and intentional counterfeiting and pirating practices, rather than establishing new restrictions to legitimate trade in authentic goods.

Within Europe, EU institutions have played a role in tackling the sources of counterfeiting by improving the cooperation between member states. Europol and Eurojust constitute platforms for collaboration in the investigation and prosecution of organised cross-border crime including counterfeiting.

Europol seeks to ensure the effectiveness and cooperation of the competent authorities in the member states in preventing and combating serious forms of international organised crime. In 2007, counterfeiting was defined as a priority and Europol's mandate will soon be extended to include types of criminality which are not strictly related to organised crime, in order to ensure Europol is best placed to support cross-border investigations.

Eurojust acts to enhance the effectiveness of national authorities when dealing with the investigation and prosecution of serious cross-border and organised crime. Eurojust plays an important role in organizing coordination meetings and in preparing simultaneous police actions in several member states. For example, in April 2007, four simultaneous police actions took place in Sweden, the UK, the Netherlands and Denmark against an internet network selling counterfeited pharmaceuticals. Together, Europol and Eurojust run the Joint Investigation Team (JIT) Project. The purpose is to promote the use by member states of JITs. The JIT is a tool for facilitating joint criminal investigations by two or more member states into offences requiring difficult and demanding investigations or concerted actions.

In many cases, however, a huge proportion of counterfeit goods originate in countries outside the direct competency of the EU. Therefore, it is imperative that the EU should also use all available means to bring affected countries together to cooperate effectively in the fight against counterfeits.

Interpol also recognises the need for enforcement authorities to coordinate their efforts and cooperate with rights owners. Interpol has formed a public-private partnership, Interpol Intellectual Property Action Group (IIPACG), with representatives from



national law enforcement and customs authorities, cross-industry private sector representative bodies as well as companies. Interpol is also developing a database on International Intellectual Property Crime. The database is designed to identify links between multinational cross-industry organised IP crime activity and other types of organised crime. It also seeks to improve information flow between stakeholders and ensure a more systematic Interpol operational capability.

**FUTURE DEVELOPMENTS**

There are a number of European policy initiatives currently proposed, or in the pipeline. The 2005 Customs Action Plan envisages the use of the Customs Information System, which is currently used in relation to smuggling activities, in the fight against counterfeits. It also proposes systematic ways of improving information exchange between customs and rights owners.

In 2005, the EU set out a strategy for improving IP enforcement and protection in third countries. This strategy was put forward as a logical consequence of other initiatives, such as the IPR Enforcement Directive and the Border Detention Regulation. The strategy proposes to revisit the approach to the IPR chapter of bilateral agreements, including the clarification and strengthening of the enforcement clauses.

There is also a proposal to include IPR enforcement in the political dialogue. Further, the Communication on an Industrial Property Strategy for Europe published by the Commission on 16 July 2008 proposes several actions including cooperation between member states to analyse how the collection and documentation of information can be made more effective. Finally, there are proposals to bolster the sanctions for IP infringements with additional criminal penalties.<sup>(xxiv)</sup>

eBay does not see the need for more additional legislation within the EU. Now is the time to realise the full potential of the tools available against the counterfeiters who will always be the cause of the problem.

**HOW THE EU’S ANTI-COUNTERFEITING LAWS PROVIDE A STRONG ANTIDOTE AGAINST COUNTERFEITERS.**

Key considerations:

- European anti-counterfeiting legislation is robust, and can be effective. The institutions working within this framework are cooperating at European and international levels and already concentrate on the sources of the problem.
- European frameworks for law enforcement cooperation, such as Europol and Eurojust, already exist and have made counterfeiting an appropriate priority issue.
- EU Institutions have set out various policy initiatives that clearly recognise the need to pursue anti-counterfeit measures. Accordingly, it is the implementation and enforcement of existing legislation and commitments upon which stakeholders should concentrate.

**VII. eBay’s recommendations to address counterfeiting**

European legislation provides a coherent, balanced framework to tackle the sources of counterfeiting. But several guiding principles have to be taken into account to fight counterfeits effectively.

First, as counterfeiting is a global, multichannel issue, anti-counterfeit measures must not just address the internet, but the whole commercial supply chain. eBay is encouraged to note that all anti-counterfeiting legislation and bodies recognise this.

Second, for the fight against counterfeiting to gain more momentum and to succeed, there must be more cooperation between member states, state authorities and institutions, rights owners and, in so far as the internet is concerned, internet intermediaries. Effective stakeholder cooperation will help to ensure that rights holders and intermediaries benefit jointly from any action taken against counterfeiters. Cooperation allows stakeholders to develop flexible individualized solutions such as the VeRO system. Resources should be pooled and counterfeiting activity tackled at its source.

Third, the fight against counterfeiting cannot be successful without addressing consumer demand. Rights owners have to ensure that the value of their products is understood and appreciated.

The recommendations below follow from our observations in this paper on what is needed to complement actions currently undertaken by responsible stakeholders fighting the issue of counterfeits on- and offline. As emphasised above, eBay continues to treat any abuse of its services with the utmost importance, and will continue to develop its own policies and tools.

In addition, the recommendations do not outline in detail important issues that, despite companies like eBay offering their support, are more appropriately considered by governments. For example, this would include the possibility to use trade negotiations to encourage or force other countries to take the enforcement of intellectual rights more seriously. Added to this, there is a clear need to consider, especially in conjunction with law enforcement authorities, whether tougher penalties for counterfeiters would act as an increased deterrent. Likewise, eBay endorses increasing the resources available to law enforcement, and customs.

With these guiding principles in mind, eBay makes five broad recommendations to assist in addressing the counterfeiting challenge:

- DEFINE THE ISSUE OF COUNTERFEITING**
- DEFINE THE SIZE AND THE SCOPE OF THE PROBLEM OBJECTIVELY**
- ESTABLISH MORE COOPERATION BETWEEN INTERESTED PARTIES**
- ENCOURAGE RIGHTS OWNERS AND OTHER STAKEHOLDERS TO INCREASE DETECTION AND ANTI-COUNTERFEITING EFFORTS THROUGHOUT THE PRODUCTION AND DISTRIBUTION CHAIN**
- INCREASE CONSUMER AWARENESS TO STEM DEMAND**





DEFINE THE ISSUE OF COUNTERFEITING

Focus on true counterfeits, which are non-genuine goods

All parties committed to preventing counterfeits must focus on the fight against “real” counterfeiting, i.e., the sale of non-authentic items bearing a trademark without authorization of the trademark owner. Such counterfeiting not only damages brand owners, it also harms consumers and even economies and societies at large.

The issues concerning counterfeits should not be confused with separate issues that concern genuine, authentic goods, such as parallel imports or selective distribution. Genuine goods do not carry the same health and safety risks for consumers, nor do they involve exploitative activity, such as child labour, which is often prominent in the production of counterfeits.

Therefore, these other important subjects should be discussed in separate forums and should not be allowed to cloud efforts to promote effective measures against counterfeits.

The European Commission agreed that parallel imported genuine goods should not be in the same category as counterfeited, non-genuine goods. In its proposal for the regulation preceding the current Border Detention Regulation, it opposed the extension of the scope of the regulation to goods imported into the EU without the consent of the rights owner.<sup>(xxv)</sup> The European Commission based its position on (i) such parallel imported goods cannot be termed counterfeit; (ii) the IP owner merely has the option of contesting their importation, not an obligation; (iii) the difficult task of customs officials since the goods are physically identical to approved imports.

Such a focused definition of counterfeits should also provide the basis for all EU measures relating to counterfeits, both within the EU and in relation to third countries.<sup>(xxvi)</sup> This includes the ongoing negotiations for an Anti-Counterfeiting Trade Agreement (ACTA) described above.

DEFINE THE SIZE AND THE SCOPE OF THE PROBLEM OBJECTIVELY

Once the concept of a “counterfeit” is defined and understood, the scope and scale of the problem must be measured.

The 2008 OECD report observed:

“... available information provides only a crude indication of how widespread counterfeiting and piracy might be. What is not known overwhelms what is known ... For the most part, neither governments, nor industry were in a position to provide solid assessments of their respective situations. One of the key problems is that data

have not been systematically collected and evaluated by either of the stakeholders. In many instances, the assessments that parties have made rely excessively on fragmentary and anecdotal information; where data are lacking, unsubstantiated opinions are often treated as facts.”<sup>(xxvii)</sup>

In order to fight counterfeiting effectively, rights owners, customs officials, governments and intermediaries all require accurate data on precisely where the counterfeit problem originates, on how production of counterfeit takes place and to what extent counterfeiters are sharing facilities with lawful production. Statistics are also needed in relation to the size of the problem across all channels and all product types.

Such information will allow all parties involved to direct their energies and attention in the appropriate directions.

eBay therefore welcomes the Observatory concept suggested in the Council Resolution on a comprehensive European anti-counterfeiting and anti-piracy plan.<sup>(xxviii)</sup>

It is important that the Observatory involves all relevant stakeholder groups. If this is achieved, it will enable regular and objective assessments on the basis of data contributed from public and private sectors, on the extent of counterfeiting. In particular, we welcome the Observatory as a facilitator of cooperation between the relevant authorities across member states, especially in relation to information-sharing and access to up-to-date contact points. As discussed above, it is important the Observatory should concentrate on the most important issues first: the real causes of counterfeiting and the production and logistics associated with the goods offline.

To the extent that the Observatory’s tasks will cover internet-related issues, eBay looks forward to contributing its considerable expertise and experience in measures to combat the use of legitimate online platforms for the sale of counterfeit goods, to add to the expertise from other stakeholders, especially law enforcement authorities and manufacturers.

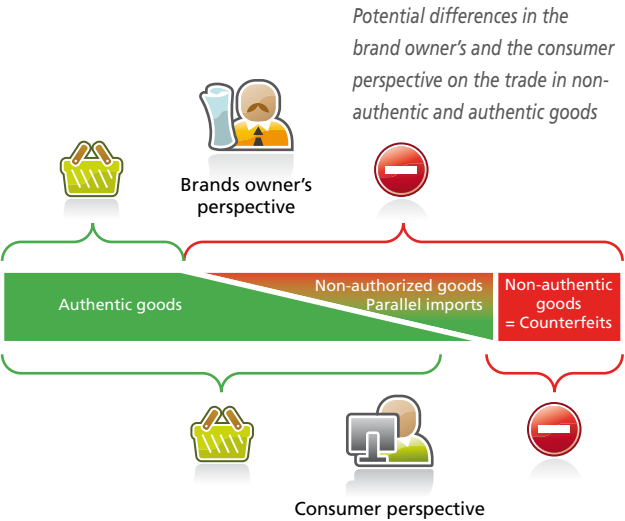
ESTABLISH MORE COOPERATION BETWEEN INTERESTED PARTIES

It is obvious that a parochial response to counterfeiting will not create an oasis of compliance in a particular territory. The scale of the overall problem means that it can only be tackled by a cross-border and multi-stakeholder approach. For this reason, there needs to be more coordination between governments and improved dialogue between all those caught up in the counterfeiting problem – including retailers, postal services, ISPs, search engines, trade bodies for markets, those who publish classified advertisements, online marketplaces, law enforcement bodies, customs bodies, rights owners, consumer groups and so on. A lack of coordination between stakeholders is currently the most significant ‘gap’ in the fight against counterfeits.

Foster stakeholder dialogues

The European Commission has recently expressed an intention to explore the extent to which inter-industry cooperation can be facilitated at the EU-level as a step towards eliminating the availability of counterfeit products online and offline.

Both the eCommerce Directive and the IPR Enforcement Directive encourage stakeholders to develop non-legislative arrangements.





The eCommerce Directive deals with what can reasonably be expected from service providers and on rapid and reliable procedures for removing inappropriate material. The IPR Enforcement Directive promotes ways in which the industry can take an active part in the fight against counterfeiting.

The European Commission should therefore encourage stakeholders to discuss and eventually agree on best practices to ensure efficient cooperation in combating counterfeits online and offline.

Any dialogue has to ensure the participation of not only the established stakeholders that are already cooperating. The dialogue should also include those who have not been in the centre of the attention so far, but could help to improve the situation by enhancing their contribution and adopting identified good practices.

Finally, such stakeholder dialogues must take place on the understanding of how they fit into wider stakeholder cooperation, namely the value they can add to the ultimate objective of stemming the production and supply of, and demand for, counterfeits. Ring-fencing issues of internet trade is unlikely to be helpful unless they are considered in the context of wider initiatives, because this – as consistently stated above – is a secondary, relatively minor element of the whole counterfeit issue.

### Collect best practices

One of the results of such stakeholder dialogue could be a collection of best practices. This could include actions that ensure the existence and development of safe, accessible and legitimate eCommerce, while at the same time enhancing efforts to fight against counterfeits. Some examples may be:

- Educating of consumers on IP law and the damage caused by counterfeiting and piracy;
- Empowering consumers with tools to avoid the purchase of counterfeits;
- Reviewing notice and takedown-procedures<sup>(xxviii)</sup> and establishing common understanding on how these procedures best work. This would optimize the effectiveness of such processes, including a swift reaction to rights holders' notifications about unlawful material. At the same time this would help to clarify what constitutes a potential abuse of such procedures, including "putback" procedures;
- Establishing drivers to increase proactive efforts by all internet stakeholders – from the largest search engines to the smallest ISP and eCommerce companies of all types;
- Cooperating on effective enforcement of anti-counterfeit laws focusing on pirates and the whole structures of production and distribution behind them.

### Create a European IP Network

The European Commission could create an operational structure, potentially within the Observatory, for the fight against organized and cross-border counterfeiting. This would build on the recently launched "Enforcement of Intellectual Property Rights Unit" within DG Internal Market and complement its work by linking it more closely with corresponding national authorities.<sup>(xxix)</sup> This would be comparable to the European Competition Network, in which the European Commission works with national competition authorities to exchange information and coordinate investigations.<sup>(xxx)</sup>

The purpose of the IP Network would be to facilitate cooperation between law enforcement authorities in the member states, and between those authorities and other stakeholders. The Network could pool and centralize resources and existing instruments for cross-border judicial cooperation, for example, by:

- Extending Europol's information system and tailoring it to investigations on counterfeiting;
- Creating strong communication links to, and profit from the resources of Europol, Eurojust and the Joint Investigation Teams (JIT) initiative,<sup>(xxxi)</sup> thereby, for instance, coordinating simultaneous police actions;<sup>(xxxii)</sup>
- Operating a system similar to the Rapid Alert System (RAPEX)<sup>(xxxiii)</sup>, allowing the exchange of information between the Commission's Enforcement of IPR Unit and national authorities;
- Establishing contact points for information to, and complaints by consumers, rights owners and other stakeholders, including service providers;
- Cooperating with the European Crime Prevention Network (EUCPN) to promote crime prevention activity in member states.<sup>(xxxiv)</sup>

Industry stakeholders should be involved in the sharing of data – in line with existing data protection laws – and in education and training measures for national and European law enforcement, for example in cooperation with Europol.<sup>(xxxv)</sup>

Customs measures could also be linked to the structure of a European IP Network. The next Customs Action Plan would be an ideal opportunity for implementing necessary elements.<sup>(xxxvi)</sup>

### ENCOURAGE RIGHTS OWNERS AND OTHER STAKEHOLDERS TO INCREASE DETECTION AND ANTI-COUNTERFEITING EFFORTS THROUGHOUT THE PRODUCTION AND DISTRIBUTION CHAIN

European legislators should consider supporting rights owners and other stakeholders to implement legislation designed to tackle counterfeiting.

#### Encourage information sharing between stakeholders

Rights owners perceive, rightly or wrongly, that the implementation of certain aspects of European data protection legislation hinders their ability to track and sue counterfeiters. Information Commissioners, through the EU Article 29 Working Party, should be directed to consider whether such blocks exist and report back, either dispelling any misperceptions or prompting the Commission to consider this issue more widely. eBay's terms of use and privacy policy with its users makes clear that where a user's personal details are required for prosecuting, infringing or other illegal activity, eBay will provide them both to law enforcement based on existing laws and to rights owners through our VeRO programme. Other online service providers should be similarly open with data when it will clearly support legitimate actions against counterfeiters.

#### Remove disincentives for rights owners to withdraw counterfeited goods from circulation and have them destroyed

With regard to the Border Detention Regulation, rights owners often complain about certain costs, including those associated with the destruction of seized goods. eBay believes that as counterfeit products affect not only the particular rights owner but society at large,



it should be considered under what circumstances it is justified that the rights owner has to pay for the destruction of counterfeit goods. Any unnecessary obstacles and disincentives for rights owners to care effectively about the elimination of counterfeits should be removed.

#### Encourage rights owners to do more

As discussed above, rights owners are in the best position to go after counterfeiters, to hinder their illegal activities and to make a lasting effect by withdrawing fakes from circulation. Some rights owners, for a variety of reasons, do not fully employ their means to eliminate counterfeiters and counterfeited goods. The Border Detention Regulation provides here an exemplary balance to ensure that while rights owners do not overreach, they do follow through on suspected cases of counterfeit goods. The rights owner must accept liability towards the persons involved in the event the goods are subsequently found not to infringe their IP rights. However, Customs officials will release the goods if the rights owner does not initiate proceedings within a certain period to establish whether the goods are in fact infringing goods.

The same incentives could help to drive rights owners to use their legal rights against counterfeiters instead of relying unduly on notice and takedown as a substitute. Notice and takedown is not a substitute, because it merely removes the visible signs of counterfeiting while leaving the counterfeiter unpunished and undeterred in the real, “offline” world. It does not ensure that the goods are withdrawn from circulation. The counterfeiter is able to sell his wares through another site or through another medium. Therefore, the problem must be tracked back to its roots whenever there is an opportunity.

Mirroring the terms from the Border Detention Regulation, the Commission could therefore consider allowing a service provider to re-instate content that was first taken down upon notification if the rights owner does not initiate proceedings within a certain period to establish whether the goods are in fact counterfeit. At a minimum, the Commission should consider adopting put-back provisions similar to those found within the US Digital Millennium Copyright Act (DMCA).

#### INCREASE CONSUMER AWARENESS TO STEM DEMAND

Lastly, measures could be taken by the EU to engage in more consumer education to influence the demand side of counterfeiting. This would help to prevent the witting and unwitting purchase of counterfeits, by disseminating more information about the risks and harms related to their production, distribution and use, as well as the criminal background of such activities.

Education is most effective if consistent messages come repeatedly from different actors, as this increases credibility and reception of the messages by consumers. Engaging in cooperative education measures or at least a coordination of messaging is helpful to achieve maximum effect. Again, the already mentioned European IP Network could play an important role here. Internet stakeholders with large customer bases can help to increase the reach of any such campaign.

A consumer-oriented awareness campaign on counterfeits would strengthen the perception of the European institutions as allies of the European consumers and citizens. eBay would be proud to support this kind of initiative, along with other campaigns already in place in several countries.

## eBay’s recommendations to address counterfeiting

Based on the analysis in this paper and acknowledging the need for a global and holistic approach to the fight against counterfeiting with a clear focus on a better enforcement of existing laws, eBay presents the five following recommendations for future action to address counterfeiting:

- There needs to be a clear definition of counterfeits, i.e. that counterfeits are non-authentic, non-genuine goods. This will avoid parties being sidetracked by disputes concerning genuine goods and their distribution.
- To enable the most effective employment of resources, it is desirable to define the size and characteristics of the problem objectively. The planned EU Observatory on Counterfeiting and Piracy may play an important role here, if it involves all relevant stakeholders and ensures workability by focusing on the most salient issues.
- More cooperation between interested parties can be established by fostering open, constructive and broad-based stakeholder dialogues, by supporting the exchange and definition of best practices and by creating a European IP Network that pools and centralizes resources and existing instruments for cross-border judicial cooperation.
- Stakeholders should be supported in eradicating counterfeiting at production and throughout the whole supply chain by facilitating information-sharing between stakeholders and by ensuring that rights owners are enabled to effectively remove counterfeited goods from circulation and to prevent counterfeiters permanently from continuing their activities.
- Last, but not least, stakeholders can help stem demand by raising consumer awareness of the negative impacts of counterfeiting and of the ways that consumers can protect themselves against buying fakes.





## Endnotes

- (i) "The Economic Impact of Counterfeiting and Piracy", 2008, OECD.
- (ii) 29 August 2007, BBC Radio 4, Today Programme.
- (iii) See: <http://judiciary.house.gov/Legacy/475.htm>.
- (iv) Even in the US, legitimate online retail accounts for less than 3.4% of total US retail sales (Census Bureau of the Department of Commerce, November 19, 2008, <http://www.census.gov/mrts/www/data/pdf/08Q3.pdf>). See also interview with eBay's CEO John Donahoe in German Manager Magazine on Dec 18, 2008: <http://www.manager-magazin.de/it/artikel/0,2828,597125,00.html>.
- (v) eBay gross merchandise revenues: \$7,331 million (Q4'07), \$7,183 million (Q1'08), \$6,983 million (Q2'08), \$6,609 million (Q3'08). US online retail gross revenues: 3rd quarter 2008 - \$34,356 million; 2nd quarter 2008 \$34,237 million; 1st quarter 2008 - \$33,645 million; 4th quarter 2007 - \$33,531 million. Census Bureau of the Department of Commerce, November 19, 2008. <http://www.census.gov/mrts/www/data/pdf/08Q3.pdf>.
- (vi) Ernst & Young study commissioned by the German trade mark association ("Markenverband"), "Pirates in the 21st century", 2008, p.23.
- (vii) eBay Top Buyer Lapse/Decline Research – June 2006.
- (viii) In research from 2006 on top buyers on eBay, 70% of them stated that they would reduce or even end their buying activity on eBay after an experience where goods listed as genuine turned out to be fake when delivered.
- (ix) Some rules apply. For details see the PayPal User Agreement (<http://www.paypal.com/uk/ua>), sec. 13.
- (x) <http://pages.ebay.co.uk/help/policies/replica-counterfeit.html>.
- (xi) <http://pages.ebay.co.uk/help/tp/compliant-listings.html>.
- (xii) <http://www2.eBay.com/aw/uk/200807.shtml#2008-07-29092415>.
- (xiii) eBay cannot disclose details of its filtering technology to prevent persons intent on committing fraud from over-riding or circumventing the systems.
- (xiv) 647 million new listings (Q1'08), 667 million new listings (Q2'08), 700 million new listings (Q3'08), 732 million new listings (Q4'08).
- (xv) 85.7 million global active users in Q3'08. Global active users are all users, excluding users of StubHub, Half.com and Internet Auction Co.(KO), who bid on, bought, or listed an item within the previous 12-month period.
- (xvi) Paisley People, UK, Dec 12, 2008, p.3.
- (xvii) Press & Journal (Aberdeen), UK, Dec 19, 2008, p. 6.
- (xviii) Ernst & Young study commissioned by the German trade mark association ("Markenverband"), "Pirates in the 21st century", 2008, p.23.
- (xix) "The Economic Impact of Counterfeiting and Piracy", 2008, OECD. Summary table in Executive Summary, page 11.
- (xx) It should be noted that in many instances, the act of counterfeiting may not involve production. For example, it may include marking a generic product falsely to indicate that the item is an authentic branded item, or adding without authorisation, a trademarked sticker to a product to indicate that the product conforms to an industry standard.
- (xxi) "The Economic Impact of Counterfeiting and Piracy", 2008, OECD, Summary table in Executive Summary, page 11.
- (xxii) <http://web.ebay.co.uk/safetycentre/againstcounterfeits/>.

- (xxiii) The study, "Evaluation de l'ampleur de la vente de produits contrefaisants sur Internet", commissioned by the French Ministry of Economics, Industry and Labour to the Compagnie Européenne d'Intelligence Stratégique (CEIS) states: "...les plateformes disposent de moyens techniques permettant de lutter efficacement contre les contenus illicites, sous réserve que la coopération de ces plateformes avec les ayants-droits ne pâtisse pas d'une méfiance réciproque. Il n'en reste pas moins que la détection de produits contrefaisants rencontre des limites liées à la malignité des contrefacteurs et à la nécessaire connaissance des faits. L'éradication de la contrefaçon ne peut dès lors s'effectuer que dans le cadre d'une action concertée entre acteurs publics, ayants-droits et responsables de sites Internet, en répartissant la charge de la lutte contre la contrefaçon." (p. 7). Translation: "...the platforms have technical means to fight against illegal content efficiently, provided that cooperation with rights owners does not suffer from reciprocal distrust. Nonetheless, the detection of counterfeit goods is limited by the malevolence of the counterfeiters and the necessary knowledge of the facts. Therefore, the eradication of counterfeiting can only be carried out in the framework of common action between the public sector, rights owners and the people responsible for the internet sites, by sharing the burden of the fight against counterfeiting. "Evaluation de l'ampleur de la vente de produits contrefaisants sur Internet", 2009, [http://www.industrie.gouv.fr/enjeux/etude\\_contref\\_0209.pdf](http://www.industrie.gouv.fr/enjeux/etude_contref_0209.pdf).
- (xxiv) [http://ec.europa.eu/internal\\_market/indprop/docs/rights/communication\\_en.pdf](http://ec.europa.eu/internal_market/indprop/docs/rights/communication_en.pdf).
- (xxv) COM (98) 25, paras. 7.9-7.10, available at: [http://aei.pitt.edu/5092/01/001460\\_1.pdf](http://aei.pitt.edu/5092/01/001460_1.pdf).
- (xxvi) In a Draft Opinion, the European Parliament Committee on Legal Affairs calls on the European Commission to define the term "counterfeiting" before proceeding with the negotiations of ACTA (2008 2133 (INI) 4.9.2008).
- (xxvii) 25 September 2008, [http://www.consilium.europa.eu/ueDocs/cms\\_Data/docs/pressData/en/intm/103037.pdf](http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/intm/103037.pdf).
- (xxviii) The eCommerce Directive refers to Notice-and-Takedown procedures ("NTD") as an effective tool for the fight against illegal content and activities. eBay's VeRO programme is a good example for a functioning notice-and-takedown procedure and has been acknowledged as an effective tool to combat counterfeiting in cooperation with rights owners.
- (xxiv) Unit D.3 Enforcement of Intellectual Property Rights.
- (xxx) See [http://ec.europa.eu/comm/competition/ecn/more\\_details.html](http://ec.europa.eu/comm/competition/ecn/more_details.html).
- (xxxi) As a comparison, in order to enhance the cooperation between Europol and Eurojust, a communication link has been established for the transmission of information between the two entities. A Memorandum of Understanding regulates the establishment, implementation and operation of this communication link between Europol and Eurojust. See Europol and Eurojust joint press release: <http://www.europol.europa.eu/index.asp?page=news&news=pr070607.htm>.
- (xxxii) For instance, four simultaneous police actions took place on 24, 25 and 26 April 2007 in Sweden, the UK, Netherlands and Denmark against an internet network selling counterfeited pharmaceuticals (see page 37 of Eurojust 2007 Annual Report, [http://eurojust.europa.eu/press\\_releases/annual\\_reports/2007/Annual\\_Report\\_2007\\_EN.pdf](http://eurojust.europa.eu/press_releases/annual_reports/2007/Annual_Report_2007_EN.pdf)).
- (xxxiii) RAPEX allows for the rapid exchange of information between Member State and the Commission of measures taken to prevent or restrict the marketing or use of products posing a serious risk to the health and safety of consumers. Both measures ordered by national authorities and measures taken voluntarily by companies are reported by RAPEX. Established by the General Product Safety Directive 2001/95/EC, OJ L 11 p. 4, 15.1.2002.
- (xxxiv) The EUCPN was set up in May 2001 by the Council decision 2001/427/JHA of 28 May 2001 creating a European Crime Prevention Network. See: <http://www.eucpn.org/> It seeks to, inter alia, (i) identify good practices in crime prevention and to share knowledge and experience gained between member states; (ii) improve the exchange of ideas and information within the Network; and, (iii) contribute to developing local and national strategies on crime prevention.
- (xxxv) Europol has developed a training curriculum together with European Police College. eBay is working in partnership with Europol to support law enforcement training in member states, in particular on cybercrime. eBay is also cooperating with police academies in specific member states.
- (xxxvi) The European Commission is in the process of evaluating the 2005 Customs Action Plan with the intention of launching a new action plan. The European Commission will seek to ensure full use by rights owners and customs officials of information-sharing tools in order to target high risk trafficking of counterfeits. See Section 5.2 of the Commission Communication on "An Industrial Property Rights Strategy for Europe" of 16 July 2008, available at: [http://ec.europa.eu/internal\\_market/indprop/docs/rights/communication\\_en.pdf](http://ec.europa.eu/internal_market/indprop/docs/rights/communication_en.pdf).



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