



COMMITTEE REPORT
Designs Committee

INTA Best Practice Guide for Online Marketplaces to Protect Design Rights

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Executive Summary

The growth of e-commerce over the past twenty years has provided a tempting arena for bad faith sellers to offer infringements and outright “knockoffs” of the designs of successful products, sometimes (but not always) bearing infringements of other IP rights such as trademarks and copyrights.

INTA has taken steps to address trademark counterfeiting in an online context, including the development of recommended best practices for brands and online marketplaces¹, many of which also apply to protection of design rights.

This Best Practice Guide (“Guide”) supplements previously identified best practices by providing Online Marketplaces with recommended best practices to protect design rights on their platforms.

Recent research by INTA’s Anticounterfeiting Committee found that online enforcement procedures should accept takedown requests for additional forms of IP right infringements “including copyrights and design rights”, because as trademark takedown procedures become more effective, “counterfeiters shift away from using discernible trademarks in their listings in order to avoid takedown.” See INTA’s Report [Addressing the Sale of Counterfeits on the Internet](#) at page 16.

The Designs Policy Subcommittee’s additional research for this Guide included a survey of members of the entire INTA Designs Committee on their experiences with current notice-and-takedown procedures in various jurisdictions. The results are summarized in the “Survey Summary” attached as Appendix 1 to this Guide. The Survey Summary highlights the complexities of online design rights enforcement and the need for greater clarity and consistency in Online Marketplaces’ practices. Improved communication and collaboration between rights holders and Online Marketplaces are crucial for developing more effective and equitable mechanisms for addressing online design infringement, which now leads to this Best Practice Guide.

In addition, many design rights owners face enforcement challenges when trying to use Online Marketplaces existing notice-and-takedown procedures, since these procedures tend to cover copyrights alone or copyrights and trademarks. Research by the Designs Policy Subcommittee, including specific requests to Online Marketplaces to comment on their policies, shows that many Online Marketplaces takedown policies do not expressly cover design rights.

Considering the foregoing, INTA supports the following best practices for online marketplaces to protect design rights to help legitimate owners of design rights protect those rights in online and digital environments, and to provide a balance between obligations of Online Marketplaces and design right owners in their joint fight against the sale of infringing products:

¹

For purposes of this Guide, the term “Online Marketplaces” has the same definition as contained in the INTA Board of Directors Resolution dated November 14, 2023, entitled *Establishing a Framework for Protecting Consumers from Third-Party Sales of Counterfeit Goods via Online Marketplaces*.

Best Practices

1. An Online Marketplace should allow for submission and review of design right infringement claims in its existing notice-and-takedown procedures or add a new notice-and-takedown procedure to cover claims of design rights infringements of products or portions thereof.
2. An Online Marketplace's design rights notice-and-takedown procedure should, at a minimum, include design rights that (a) are registered with a national or regional intellectual property office (IPO), including international design registrations when according to the relevant jurisdiction, and (b) are in force at the time that a design rights holder initiates the procedure.
3. An Online Marketplace should provide easily accessible information, to brand and design rights owners, and to sellers and buyers, of products via Online Marketplaces, explicitly identifying the Online Marketplace's policies against intellectual property infringements, including design rights, and the mechanisms in place for reporting such infringements offered on the Online Marketplace.
4. An Online Marketplace's design rights takedown procedure should adhere to the same or equivalent evidentiary requirements as existing platform takedown procedures for other forms of IP rights, and should permit, but not require, submission of a comparison between the registered design right and the accused product, if necessary or advisable to meaningfully assess a claim. The Online Marketplace is entitled to rely on complete, accurate, and timely information submitted by design right owners.
5. An Online Marketplace's mandatory user agreement or seller guidelines should (a) require sellers and buyers to refrain from engaging in violating intellectual property rights, and the policies of the Online Marketplace, (b) specify the consequences for offers or sales of infringing products or articles, and (c) require that sellers use images that accurately depict the products sold on the Online Marketplace.
6. An Online Marketplace's responsible administration of a design rights notice-and-takedown procedure should balance (a) the ability of brand and design rights owners, and/or their appointed representatives, to submit good faith notices of design infringements, with (b) the ability of a seller to provide good faith counternotices. Online marketplaces are entitled to act upon suspected bad faith or abusive notices based on alleged design right infringements. The counternotice or appeal may also include arguments that enforcement of the asserted design registration is inappropriate in the circumstances or made in bad faith.
7. Due to the nature of design rights, it is foreseeable that one infringing product may be sponsored or listed by multiple sellers on an Online Marketplace. Therefore, an Online Marketplace's design rights notice-and-takedown procedure should permit a design rights holder to list multiple sellers of the same infringing product in a single takedown notice or complaint.
8. An Online Marketplace's design rights protection policy should provide consequences, such as suspension or permanent removal, for sellers who have repeatedly offered for sale or sold design rights infringements via the Online Marketplace.

Final considerations

Whether substantively-examined and unexamined design registrations deserve the same level of protection and enforcement via a notice-and-takedown procedure has been debated among the Designs Committee. The Designs Policy Subcommittee has taken the position in this Guide that all registered design rights should be enforceable on Online Marketplaces, as stated in Best Practice no. 2 above. It is understood that an unexamined design registration may require more substantiation of the scope of protection than a substantively-examined design registration (which has a prosecution history to help understand the scope of protection.²) For example, the level of detail to be provided by the design rights owner may differ between examined and unexamined design registrations in order to clarify the scope of protection of the design registration, and why the accused product is an infringement. But since the design rights owner is solely liable for the submitted takedown notice, the design rights owner also has the responsibility to provide the Online Marketplace with sufficient information to make an informed decision on the takedown notice, including consideration of prior art where appropriate.

This Guide is not intended to advocate for strict liability for Online Marketplaces.

² Regarding unregistered design rights, enforceable in some but not all jurisdictions, the Designs Policy Subcommittee has intentionally not addressed in this Resolution the enforcement of unregistered design rights in the context of Online Marketplaces.



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