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INTA Comments on Guidelines on e-Commerce for Protection of the Interests of the Consumers

Introduction

The International Trademark Association (INTA) thanks the Department of Consumer Affairs for the opportunity to provide comments on the draft Guidelines on e-Commerce for Protection of the Interests of the Consumers.

INTA is a membership association of more than 7,200 trademark owners and professionals from more than 191 countries. INTA's total membership collectively contribute almost US $12 trillion to global GDP annually. The Association's member organizations represent some 31,000 trademark professionals and include brand owners from major corporations as well as small and medium sized enterprises, law firms and nonprofits. INTA undertakes advocacy work throughout the world to advance trademarks and related rights, and offers educational programs and informational and legal resources of global interest. INTA's key objective is to support trademarks and related intellectual property (IP) to foster consumer trust, economic growth, and innovation.

INTA's 2018-2021 Strategic Plan is founded on three main pillars: I) Promote the Value of Trademarks and Brands; II) Reinforce Consumer Trust; and III) Embrace Innovation and Change. Under the second foundational pillar, "Reinforce Consumer Trust" INTA is committed to advocating for a safer Internet for consumers through its advocacy work, as well as its consumer awareness initiative, the Unreal Campaign. The Unreal Campaign is designed to educate young consumers (ages 14-23) about the importance of trademarks, brands, and the dangers of counterfeit products.

Understanding the relationship between consumers and counterfeit products is critical in paving the way for a safer Internet and a reduced demand for counterfeit products. A recent INTA report entitled *Gen Z Insights: Brands and Counterfeit Products (May 2019),* explores the relationship between Gen Zers and brands and their attitudes and perceptions of counterfeit products and unpacks the importance of different practical and ethical considerations influencing Gen Z's purchase of counterfeit products. Reports have shown that by 2020, Gen Z will comprise the most significant number of consumers globally. The study found that while 94% of Gen Z in India have respect for people's ideas and creations, 89% have purchased counterfeit products in the past year and 84% recognized that fake products are unsafe.

INTA appreciates your consideration of its comments on the draft guidelines. This document was prepared by the INTA Enforcement Committee and Anticounterfeiting Committees. If you have any questions or concerns, please do not hesitate to contact INTA Manager, Anticounterfeiting, Maysa Razavi at mrazavi@inta.org; INTA Manager, Enforcement, Iris Gunther at igunther@inta.org; or Advisor, Anticounterfeiting, Tiffany Pho at tpho@inta.org.

INTA Comments

4. Liabilities of E Commerce entity

vi) *Ensure that personally identifiable information of customers are protected, and that such data collection and storage and use comply with provisions of the Information Technology (Amendment) Act, 2008.*

INTA appreciates the need to protect sensitive data and identifying information and recognizes that all tools using data-rich communication bear the danger of misuse of data. Therefore, tools that gather sensitive data must be compliant with all applicable data protection laws and industry best practices. However, any drafting of data protection laws and best practices should account for access to information for legitimate purposes including the investigation and enforcement of anticounterfeiting, cybersquatting and trademark rights.

A number of studies released over the past few years strongly indicate that trade in counterfeit goods is on the rise. A large factor in this growth is the expansion of the Internet. With over 1.6 billion websites in existence, the Internet has provided counterfeiters with the ability to reach billions of consumers online, all while acting anonymously. Counterfeiters prefer to sell counterfeit products over the Internet because they can hide behind the anonymity of the Internet and reach millions of consumers globally, outside of the national limits of law enforcement.

The ability for counterfeiters to work anonymously through the Internet makes it extremely difficult for rights holders effectively stop counterfeiters. This is why access to identifying data from online counterfeit sellers is critical in stopping the proliferation of counterfeits on the Internet. Identifying information such as e-mail address, phone number, and physical address of the counterfeiter can be extremely valuable to a brand in combatting counterfeits and stopping dangerous goods from reaching innocent consumers.

ix) *if the ecommerce entity is informed by the consumer or comes to know by itself or through another source about any counterfeit product being sold on its platform and is satisfied after due diligence, it shall notify the seller and if the seller is unable to provide any evidence that the product is genuine, it shall take down the said listing and notify the consumers of the same.*

INTA recommends that e-commerce sites implement a strict repeat infringer policy to prevent infringing sellers from re-listing counterfeit products on the marketplace. While many sites have a “notice and takedown” procedure that will remove infringing sellers or postings, there is little to prevent bad actors from re-listing and selling the counterfeit products without penalty. Additionally, e-commerce sites should implement commercially reasonable, automated “know your customer” measures to verify the identities and addresses of sellers and make sure they are not operating under multiple false accounts. Other preventative measures include filters and identity verifications and improved customer screening. Without these measures, harmful products from these sellers could be reintroduced into the market without warning to innocent consumers.

Data gathered on infringing seller accounts should be shared between brand owners and e-commerce sites to ensure that data on infringing sellers is tracked and so that sellers cannot operate via multiple accounts. INTA is not aware of any online third-party marketplaces that notify customers when the marketplace receives information that a customer may have purchased a counterfeit product.

6. Consumer grievance redress procedure

ii) The Grievance Officer shall redress the complaints within one month from the date of receipt of the complaint

INTA believes that a one month timeline for the redress of complaints should be reduced in order to timely resolve and remove infringing seller accounts from the marketplace. E-commerce sites should complete notice and takedown procedures in a timely fashion and provide a simplified notice sending tool and process for good faith brand owners and/or their vendors, avoiding lengthy registrations and documentation. Platforms should provide clear and easy to locate guidelines and information on how to report businesses selling counterfeits.

INTA would like to recommend additional best practices for e-commerce sites through its best practices guide, "Addressing the Sale of Counterfeits on the Internet." This guide discusses practical ways for trademark owners and companies involved in online marketing, sales and distribution of goods, to cooperate in addressing the problem of counterfeit goods sold over the Internet. Recommendations were tailored for all stakeholders involved in online counterfeiting including:

1. Search Engines,
2. Online Marketplaces,
3. Payment Service Providers,
4. Trademark Owners,
5. Social Media Platforms,
6. Registrars and Registries, and
7. Logistics Companies.

Some key recommendations include:

1. **Search advertising services** should have a clear and effective complaint process publicly available to report counterfeit ads.

2. To the extent that there are legal frameworks applicable to removal of content on **search engines** and the legal grounds implicate behavior used by counterfeiters, search engines should provide an efficient process for parties to submit removal requests.

3. **Online trading platforms** should strengthen and streamline procedures for identifying and taking more effective action against repeat offenders, as well as tighten repeat offender policies.

4. **Payment service providers** should have in place policies prohibiting the use of their services for the purchase and sale of goods that are determined to be counterfeit under applicable law.

5. **Trademark owners** should take steps on an ongoing basis to educate online platforms, other intermediaries and the public about their trademarks, as well as to actively monitor offers on online marketplace, shopping and social media platforms, with the aim of identifying counterfeits and notifying the platforms and payment service providers if applicable.

6. **Social media sites** should have a clear and effective process publicly available to deal with the sale and offering of counterfeit products.

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7. **Registrars and registries** should adopt, publish and enforce IPR policies and effect appropriate due diligence to address and minimize misuse of their services, which they will clearly communicate and indicate on their sites and include in the contracts and terms of service that they conclude with their customers.

8. **Logistics companies** should have simple procedures in conformity with the applicable laws of the respective jurisdiction for the sharing of information with enforcement agencies and trademark owners investigating counterfeiting activities, as well as mechanisms in place for blacklisting consignors/consignees found to be involved in counterfeiting activities.

The full text of the guide can be found on INTA's website here. INTA is of the position that all stakeholders must work together in order to combat the growth of the counterfeit trade and to protect consumers from unregulated and dangerous counterfeit goods.