

**Recording Industry Association of America Response to Comment Request;
Report on the State of Counterfeit and Pirated Goods
Trafficking and Recommendations
Docket No. DOC-2019-0003 [190703544-9544-01]
Submitted via regulations.gov**

The Recording Industry Association of America (RIAA) is the trade association that supports and promotes the financial vitality of the major record companies. Its members comprise the most vibrant record industry in the world, investing in great artists to help them reach their potential and connect to their fans. Nearly 85% of all legitimate recorded music produced and sold in the United States is created, manufactured or distributed by RIAA members. In support of its mission, the RIAA works to protect the intellectual property and First Amendment rights of artists and music labels; conducts consumer, industry and technical research; and monitors and reviews state and federal laws, regulations and policies.

The RIAA welcomes the opportunity to respond to the Department of Commerce’s request for comments on the state of counterfeit and pirated goods trafficking through online third-party marketplaces and recommendations for curbing the trafficking in such counterfeit and pirated goods.

I. Introduction

Music is a vital part of our nation’s culture. It drives consumers to various online platforms to access, engage with and consume the music they love, whether in terms of physical products, streaming services or merchandise featuring their favorite music, and contributes significantly to the U.S. economy and U.S. jobs. In 2018, U.S. sound recording revenues at retail were \$9.8 billion, with sales of physical products of music accounting for over \$1.1 billion in revenue.¹ And when we look at the broader music industry, including publishing, touring, education and musical instruments, the industry contributed \$143 billion to the U.S. economy in 2017, and supports employment for almost 2 million Americans.²

Unfortunately, several rogue actors attempt to capitalize on our nation’s love for music by selling counterfeit or pirated music products or merchandise through various online platforms or facilitated via online intermediaries. Rogue actors also use such online platforms and intermediaries to engage in other forms of infringement of our members’ music online, including unauthorized streaming and distribution of our members’ works. In essence, rogue actors engage in pirating our members’ works in both physical and digital formats, and often rely on online platforms and other online intermediaries to attract U.S. audiences to their pirated goods and services. The distinctive relationship of music to both consumers and to

¹ Source: riaa.com, see <http://www.riaa.com/wp-content/uploads/2019/02/RIAA-2018-Year-End-Music-Industry-Revenue-Report.pdf>.

² See Siwek, Steven, “U.S. Music Industries: Jobs and Benefits April 2018,” prepared for the Recording Industry Association of America (April 2018), available at <http://www.riaa.com/wp-content/uploads/2018/04/US-Music-Industries-Jobs-Benefits-Siwiek-Economists-Inc-April-2018-1-2.pdf>.

online platforms gives us a unique and important perspective in considering how to tackle the issues of trafficking in counterfeit and pirated goods.

II. Discussion

Music Creators and Owners are Negatively Affected by Counterfeit or Pirated Goods Sold or Imported Through Online Third-Party Marketplaces and Other Third-Party Intermediaries

Counterfeiting and pirating of physical music products facilitated by online platforms continues to cause harm to our members. In 2019, we conducted two studies to identify the amount of counterfeit offerings of music CDs on popular online platforms, including a study on the prevalence of high quality counterfeit box sets on certain platforms and a study on the prevalence of high quality counterfeits for a broad sample of current and evergreen album titles released by the major U.S. record labels. As further discussed below, each of these studies showed significant counterfeit activity on the noted online platforms, including findings that:

- A recent sample purchase program found 100% of new high quality box sets offered for sale through eBay or AliExpress in the U.S. were counterfeit; and
- A recent sample purchase program found 11% of new CDs offered for sale on Amazon were counterfeit, and 16% of new CDs sold on eBay were counterfeit.

For the study on box sets of music, we identified and made test buys on eBay and AliExpress's U.S. platforms of 10 well known artist box set titles released by major U.S. record labels. Each purchase was made after a search for "brand new" box sets of the titles selected, and a purchase of the 4 lowest priced box sets on each platform, without regard to seller location. We then examined the products that were shipped to us.³ On both eBay and AliExpress, 100% of the test buys of the box sets were counterfeit.⁴ This is of particular concern as box sets are premium physical music products designed for the superfan that often contain the most significant sound recordings in an artist's repertoire.

We also conducted a study making tests buys on Amazon and eBay of a broad sample of current and evergreen album titles released by major U.S. record labels. All of the purchases were for "new" or "brand new" listings from the 2 lowest priced listings for the titles in question. The CDs that were shipped to us were then examined to see if they were authentic or counterfeit. The study showed that 16% of the CDs purchased via eBay were counterfeit, and 11% of the CDs purchased via Amazon were counterfeit.⁵ Alarming, 25% of the purchased CDs that were "Fulfilled by Amazon" were counterfeit.

³ Not all attempted purchases resulted in a shipment to us.

⁴ On eBay, 40 box sets of 40 purchased were counterfeit. On AliExpress, 32 box sets of 32 purchased were counterfeit.

⁵ On eBay, 13 of 79 CDs were counterfeit, and on Amazon, 9 of 80 CDs were counterfeit. Also, note that the rate of infringement on Amazon has increased 5-fold from a low of 2% in a similar study conducted in January 2017.

In addition to the concerns noted above, we regularly see fake “best of” or “greatest hits” CDs or vinyl for major record label artists available on these platforms, even though the major record labels never released such a “best of” or “greatest hits” album, or never released the album on vinyl. We also continue to see a consistent stream of counterfeit merchandise infringing RIAA’s or our members’ logos or trademarks across a variety of platforms, including not only Amazon and eBay, but also Redbubble, Bonanza, and other similar merchandise platforms. We also see counterfeit Gold and Platinum record awards and plaques.

These infringements not only undermine revenues from legitimate sources to music creators and owners, they also harm the reputation and goodwill associated with the artists, brands or logos at issue. This harm is exacerbated by limited and inconsistent enforcement by online third-party marketplaces and other intermediaries to address counterfeit listings and sellers of counterfeit products. It is further exacerbated by the difficulty in getting accurate information from online third-party marketplaces and other online third-party intermediaries about the sources and sellers of the counterfeit items, and, in some cases, about the online third-party marketplaces themselves.

Factors that Contribute to Trafficking in Counterfeit and Pirated Goods through Online Third-Party Marketplaces

Some of the key factors that contribute to trafficking in counterfeit and pirated goods through online third-party marketplaces include:

- the high concentration of potential buyers on those marketplaces,
- the difficulty the third-party marketplaces create for legitimate third-party merchants on those marketplaces to differentiate themselves from other third-party merchants on the marketplace,
- the ease of entry for rogue sellers to sell on the marketplace due to lack of due diligence on the seller or the seller’s products or any meaningful onboarding steps,
- the ability for rogue sellers to create multiple accounts on an online marketplace to help obfuscate the scope of their illegal behavior,
- the anonymity or pseudo-anonymity that rogue sellers enjoy on those marketplaces,
- the ease of obfuscating or using third-party intermediaries to funnel payments or shipments, which impedes the ability by rights holders, law enforcement or the buyer to ascertain the identity of the seller or the origin of the goods in question, and
- the lack of strong enforcement and accountability mechanisms by marketplaces and other online intermediaries that permit infringing activity to go undetected and/or unaddressed.

If these factors are addressed by eCommerce platforms, it can dramatically impact the availability of unauthorized items. For example, during our first counterfeit study in August 2016, Amazon had a 23% counterfeit rate. After meetings with Amazon to discuss our concerns, they implemented several changes to their program to address some of the factors referenced above. Then, during our second counterfeit study in January 2017, their counterfeit

rate for test purchases dropped to 2%. This demonstrates the power sustained enforcement by an eCommerce platform can have on the availability of unauthorized goods on their platform. Unfortunately, Amazon changed practices again and, as noted above, the counterfeit rate for test purchases in our most recent survey has climbed significantly.

Technologies Exist that can Help Substantially Reduce the Sale and Importation of Counterfeit and Pirated Goods

Technologies exist that can help substantially reduce the sale and importation of pirated counterfeit goods. For example, there are visual detection technologies, such as LogoGrab, that can be employed to compare pictures of the product a third party desires to sell on a platform against the logos, trademarks and other distinctive, protectable elements on authorized goods by the brand holders. Use of such technologies could be used as a flag to identify potential suspect counterfeit product for further review.

In addition, where the online platform has negotiated deals with the rights holders to sell the rights holders' products and/or the platform has access to a listing of the rights holders' authorized goods, the online platform should be able to compare a third-party seller's goods with those of the rights holders to see if the third-party seller's goods are even authorized by the rights holders. For example, where the platform licenses a major record label's catalog, it should be able to check the title of a third-party seller's offering of a CD to see if a CD with the applicable artist and title was ever even released. If it wasn't, that is a clear signal that the third-party seller's CD is counterfeit.

It would also be useful to require and employ better tracking technologies to ensure the providence of the products in question and validate their authenticity, at least with respect to products that are often counterfeited or pirated, such as music. Similarly, it would be useful to require and employ better technologies that authenticate the third-party seller. Using existing databases and automating some of the due diligence with respect to products and third-party sellers would help increase the effectiveness of such diligence.

Finally, it would be useful if the online platforms employed a "staydown" technology so that once they know a product is unauthorized, such as for a fake "greatest hits" album, they ensure that all listings for that product are removed from all of their online storefronts in each jurisdiction (i.e., removed from the country code domain platforms as well as the .com platform). Rightsholders shouldn't be forced to separately police every country platform of an online marketplace for listings of an infringing unauthorized product after it has notified the online marketplace about the listing on one of its country platforms. In addition, online marketplaces should use some form of fuzzy matching technologies to ensure rogue sellers

don't game the system by slightly changing the description of a listing previously removed in order to relist the infringing product.

Expanded Collaboration Would Substantially Reduce Such Sale and Importation

We believe further collaboration among the stakeholders – rights holders, online platforms and intermediaries, and law enforcement – would substantially reduce the sale and importation of counterfeit and pirated goods. We have seen rogue sellers jump from one online marketplace to another as their listings are removed from an online marketplace and/or if the seller's account on the online marketplace has been terminated. We've also seen rogue sellers address the identified infringing activities on one online marketplace, but not make the same changes with respect to their listings on another online marketplace. This type of online platform forum shopping could be significantly reduced if the online platforms could share information, among themselves, and with law enforcement and rights holders, about known rogue actors who regularly engage in trafficking counterfeit or pirated products.

It would also be useful to have better collaboration and information sharing from other intermediaries, including payment processors and registrars and registries. Often we see that the rogue seller may have storefronts on one or more online marketplaces, and also have their own online storefront. Getting timely information about the rogue seller from the payment processor and shipper, and true registrant information from the registrar and registries, as well as information about what other domains the registrant has registered, would improve the quality of investigations into such unauthorized activity, and help identify the scope of the illicit operations.

Recommended Voluntary Best Practices to Reduce Such Sale and Importation

We believe there are several practical steps online marketplaces and other online intermediaries can take to help reduce the trafficking of counterfeit and pirated goods. We note that some of these steps have been taken by some players in the ecosystem, but more can be done. These best practices include:

Know Your Customer Requirements. Online marketplaces and other online intermediaries should take at least basic steps to ensure their potential customer is a real natural or legal person with a real, validated physical address, phone number and email address or other form of electronic communication. They should not permit anyone to create an account solely with an email address and no further identifying information. Too often, online intermediaries permit users to create accounts with no substantive identifying information, or in case of registrars, permit the registration of domain names with clearly false contact information. Preferably, such validation should include a requirement that the potential customer provide a government issued identity card, along with, if the customer is a legal

entity, corporate documents validating the existence of the corporation and its address. The online marketplace or online intermediary should also conduct separate validation checks to ensure the physical address provided is a valid address, and that the other contact details provided are valid and up to date.

Online marketplaces should be subject to stricter diligence onboarding requirements before permitting sellers to sell on their platforms generally, and particularly with respect to third-party products offered by the potential seller or products that impact health or safety or are at a higher risk of being counterfeited or pirated, such as drugs, batteries, personal care products, luxury brand goods or music (“high risk goods”). This enhanced diligence should include checks on other aliases used by the potential seller; whether the potential seller is affiliated with other accounts on the online marketplace or other online marketplaces; whether the seller or his/her/its affiliates have been terminated or suspended from using an online marketplace for fraud, counterfeiting, infringement, false advertising or other unlawful behavior; whether the seller or his/her/its affiliates have been placed on any infringement watch lists and/or have been convicted of engaging in fraudulent or infringing behavior; and checks that the seller’s business reasonably relates to the products the seller is listing.

Diligence on the Authenticity and Provenience of Goods. Online marketplaces should engage in due diligence on the origin and authenticity of goods sold by sellers on their marketplace generally, and particularly with respect to high risk goods. This should include checks into the origin of the goods, and the shipment path the goods have taken to get to the seller, and/or the buyer, as applicable. Where the seller is offering to sell third-party goods, the diligence should include checks into where and how the seller obtained the inventory of third-party goods. Where the seller is the purported manufacturer of the high risk goods, the diligence should include inquiries into the manufacturing facilities for those goods. The online marketplace should keep a “banned” products list of products previously identified as counterfeit or pirated products, and ensure no new listings are placed on its online marketplace for counterfeit or pirated products on the banned list.

Transparency. Online marketplaces should list the seller’s true name and physical address, or at least true name and state or province and country, in connection with each listing for a product on the marketplace, along with an indication as to the country of origin for the product in question. Online marketplaces should also provide a method for buyers, potential buyers or rights holders to contact the seller directly. Online marketplaces should also provide a true name and physical address for the online marketplace itself, and a method for the public to contact the online marketplace directly. If the seller is using other services provided by the online marketplace or its affiliates to facilitate the sale and delivery of the product, that information should be disclosed publicly as well. The public, including potential buyers and rightsholders, should at minimum have this amount of transparency to be able to make more informed buying decisions and to assess the authenticity of the products in question.

In addition, online intermediaries, such as registrars, registries, hosting providers, payment processors, etc., should make contact information about counterfeit sellers available generally, or at least to rightsholders, victims and law enforcement upon request where the registrar's, registry's, hosting provider's or payment processor's, etc., services have been used in connection with the sale, making available, advertisement or shipment of the counterfeit goods in question.

No Comingling or Substitutions. Where the online marketplace or its affiliates provide warehousing services for a particular product sold by multiple third-party sellers, the marketplace or its affiliate should only provide to the buyer the product the buyer purchased from the specific seller selected by the buyer. The online marketplace or its affiliates should not be able to ship to the buyer a substitute product sold from a different seller simply because it is more convenient or efficient for the online marketplace or its affiliate to do so.

Auditing/Ensuring Accountability. Due diligence on sellers should not stop at the onboarding stage. Rather online marketplaces and online intermediaries should conduct periodic audits of their customers to ascertain whether their customers that are engaged in commercial activity are doing so in a lawful manner and are not offering for sale, or facilitating the offering or sale of, counterfeit or pirated goods.

Actions Upon Notice of Infringement. Upon receipt of a good faith notice of infringement, online marketplaces should expeditiously take down the listing for the infringing item. Upon such notice, they should also check the other platforms they or their affiliates operate for an unauthorized listing for the same item, and remove those as well. The counterfeit or pirated item should then be put on a banned list, to ensure that the counterfeit or pirated item does not reappear in a listing from the same seller or a different seller other than the true rights holder or those expressly authorized by the true rights holder. Online marketplaces should include various checks against the banned list to ensure rogue sellers cannot game the system. The online marketplace should note the infringement against the seller in connection with all of the accounts associated with the seller. The online marketplace should also offer a dispute resolution mechanism to the seller in the event of a mistake or that the seller can show it is expressly authorized to sell the item in question.

Addressing Repeat Infringers. Online marketplaces should publicly state and enforce a repeat infringer policy in which they terminate a seller's accounts in the event the seller has engaged in repeated offers to sell or disseminate counterfeit or pirated product. When termination is warranted, all of the seller's accounts should be terminated. The online marketplace should implement checks to ensure that the terminated seller does not reappear on the site under a different name or account.

Cooperation with Rightsholders and Law Enforcement. In the event of a good faith notice that a seller is engaging in trafficking of counterfeit or pirated goods, the online marketplace or online intermediary that has provided a service to such seller that facilitates such seller's unauthorized activities - whether such facilitation is in the form of providing an online marketplace, payment processing, advertising, domain registration services, hosting or similar service – should provide all reasonable cooperation to the rights holder or law enforcement in connection with their investigation of such trafficking.

Possible Governmental Approaches to Reduce Such Sale and Importation

Shine the Light. The government could help deter the use of online platforms and intermediaries for trafficking by legislating transparency obligations in order to shine the light on sellers. Requiring sellers to disclose publicly their true name and address, as well as the true origin of the goods being offered for sale, and requiring online platforms to provide such transparency by third-party sellers using those platforms would likely help deter rogue sellers from using those platforms to engage in illicit activity. Similarly, obligating registrars and registries to disclose the name and contact information for the registrant of any domain used for commercial activity would similarly deter rogue actors from using such registrars and registries to facilitate unlawful behavior.

Diligence / Know Your Customer Requirements. The government could also consider legislation that obligates online marketplaces to engage in due diligence before permitting any seller to offer for sale items on that platform. The diligence obligations could vary based on the whether the product in question was a high risk good or not.

Clarification of the Online Marketplace and Online Intermediary Liability. The government could also clarify when online marketplaces or online intermediaries should be held liable for acts of sellers of counterfeit and pirated goods. Any safe harbors or limitations on liability for third-party marketplaces or other third-party intermediaries should be appropriately defined and limited to truly passive intermediaries. Others, such as those that profit from, induce, contribute to, or willfully blind themselves about such infringing activity should not be able to shield themselves from liability.

We note that, in other contexts, online marketplaces have been found liable for the acts of third party sellers on the marketplace. On July 3, 2019, the U.S. Court of Appeals for the Third Circuit found that Amazon was a “seller” under Pennsylvania law and, therefore, strictly liable for consumer injuries caused by a defective good purchased on the Amazon marketplace platform.⁶ The court noted that Amazon was the only member of the marketing chain available to the plaintiff for redress, that Amazon was fully capable of removing unsafe products from its

⁶ *Oberdorf v. Amazon.com, Inc.* 2019 U.S. App. LEXIS 19982 (3rd Cir. 2019).

website, and that the potential for continuing sales encouraged an ongoing relationship between Amazon and the third party seller. Just as these factors contributed to the finding that the online marketplace was the seller for purposes of Pennsylvania strict products liability law, these factors should also be considered in finding that an online marketplace should be liable for the sale of counterfeit or pirated goods via its platform.

Need to Address to Counterfeiting and Piracy of Digital Goods

The issues with infringing activity apply not only to the online sale of physical goods, but also to the unauthorized dissemination of digital goods. Any action that the government might take to increase transparency or require more diligence should also apply to online marketplaces and online intermediaries that are involved in the unauthorized reproduction, streaming, making available, distribution or other dissemination or infringement of digital goods, including music and music videos.

Similarly, any governmental action should also apply to mobile, kodi or browser apps, and to the storefronts that distribute such apps. As online commerce goes increasingly mobile and distributed, there shouldn't be different rules that apply to apps that can access the Internet via any connected device, as opposed to just the traditional website.

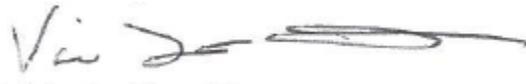
II. Conclusion

Thank you for the opportunity to submit our comments on this important topic. Trafficking of counterfeit and pirated goods, whether in the form of physical CDs, box sets or artist merchandise, as well as online infringement of music and music videos in digital form, continues to significantly impact the music industry. We believe more can be done, including implementation of voluntary measures as well as governmental action, to deter and reduce such activity, and create a healthier online ecosystem where all can thrive. If requested, we are happy to share with you our experience with specific online marketplaces, intermediaries and other facilitators of those that traffic in counterfeit and pirated music or music-related products.

We look forward to working with the Department of Commerce and the Department of Homeland Security in connection with the Administration's work on combatting trafficking in counterfeit and pirated goods.

July 29, 2019

Submitted by:



Victoria Sheckler
Senior Vice President, Legal Affairs and Deputy General Counsel
Recording Industry Association of America