

March 8, 2022

The Honorable Chuck Schumer  
Majority Leader  
U.S. Senate  
Washington, DC 20510

The Honorable Nancy Pelosi  
Speaker of the House  
U.S. House of Representatives  
Washington, DC 20515

The Honorable Mitch McConnell  
Minority Leader  
U.S. Senate  
Washington, DC 20510

The Honorable Kevin McCarthy  
Minority Leader  
U.S. House of Representatives  
Washington, DC 20515

Dear Majority Leader Schumer, Minority Leader McConnell, Speaker Pelosi, and Minority Leader McCarthy:

We are U.S. academics with expertise in trademark law. We write to express our opposition to the Stopping Harmful Offers on Platforms by Screening Against Fakes in E-commerce (SHOP SAFE) Act. The SHOP SAFE Act represents one of the most significant proposed reforms of trademark law that Congress has contemplated in years, and it will likely reshape e-commerce in unwanted ways. Due to these implications, the SHOP SAFE Act should not be included in the final version of any omnibus act, like the United States Innovation and Competition Act (USICA) or the America Creating Opportunities for Manufacturing, Pre-Eminence in Technology, and Economic Strength (America COMPETES) Act.\*

Rather than protecting consumers, the SHOP SAFE Act would curtail many existing online marketplace offerings that currently give consumers greater choices and spur price competition that reduces consumer costs. In a pandemic era with rising inflation, taking away options for consumers to shop at home and increasing consumer prices is the opposite of what constituents want Congress to do. The bill also puts many small online entrepreneurs, and the jobs they provide for Americans, at risk.

The SHOP SAFE Act would do this by fundamentally changing trademark law. For over a decade, trademark law has been clear that online marketplaces must honor takedown notices that trademark owners submit about specific listings. This well-settled rule balances the interests of trademark owners, online marketplace operators, online marketplace vendors, and consumers. The SHOP SAFE Act would overturn the existing rule in two critical ways. First, it would empower trademark owners to send broad takedown notices that aren't listing-specific, putting online marketplaces in an untenable position of trying to determine the legitimacy of individual listings without the benefit of the trademark owner's unique expertise. Second, it would create a brand-new statutory cause of action against online marketplaces that would hold them liable even in circumstances where trademark owners didn't send any takedown notices at all.

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\* Although the INFORM Act does not address directly trademark law, its provisions partially overlap with the SHOP SAFE Act. As a result, the INFORM Act also should not be included in any omnibus bills so it can be further evaluated alongside the SHOP SAFE Act.

As we have seen repeatedly over the past two decades, in both the trademark and copyright contexts, rightsowners routinely send illegitimate takedown notices and overclaim their rights. But current law allows services and other recipients of such demands to push back. SHOP SAFE removes the balancing approach of existing law. The SHOP SAFE Act will accelerate misbehavior—with the help of the act’s imprecise definitions for key terms such as “counterfeit,” “electronic commerce platform,” and “goods that implicate health and safety.” Trademark owners will misuse their new and extraordinary powers to broadly restrict legitimate competitive offerings on online marketplaces, such as non-infringing imitators and resellers of used goods. Furthermore, in the face of essentially unmanageable legal liability, online marketplaces would proactively restrict many legitimate marketplace activities. This will especially impact online merchants and the jobs they create.

Ironically, the changes by online marketplaces in response to the SHOP SAFE Act are likely to hurt trademark owners. First, the compliance and risk management costs imposed by the act will eliminate existing online marketplaces from the industry, consolidating e-commerce into a smaller number of marketplaces/retailers and enhancing their ability to dictate price and other terms to trademark owners. Second, the reduced activity in online marketplaces will eliminate distribution opportunities for trademark owners, decreasing their sales volume.

The SHOP SAFE Act represents a negative-sum policy, where it likely hurts every stakeholder and benefits none of them. Given that risk, this is not the kind of bill that should bypass Congress’ normal review procedures. The SHOP SAFE Act deserves thorough vetting by Congress so that the pitfalls can be fully understood and perhaps policy solutions that better balance the needs of all constituencies can emerge. Bundling the SHOP SAFE Act into an omnibus bill like USICA or America COMPETES prevents those dialogues from taking place, to the detriment of all of us.

Thank you for your attention to these important matters.

Prof. Eric Goldman  
Santa Clara Law

Prof. Betsy Rosenblatt  
Tulsa Law

Prof. Rebecca Tushnet  
Harvard Law

On behalf of the 26 signatories listed on the next page (all listed affiliations are for identification purposes only).

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