

EDiMA position on the sale of counterfeit goods¹ over the Internet

The development of e-commerce offers unprecedented opportunities to increase European consumers' choice and access in the Internal Market. However, even if the vast majority of e-commerce that takes place online is legitimate, Internet and e-commerce services can also be abused by some who seek to distribute counterfeit goods. Just like in the off-line retail environment, the sale of counterfeit goods over the Internet is damaging and harmful to all legitimate stakeholders including providers of e-commerce services, Intellectual Property rights owners, manufacturers, and most importantly, consumers.

Stakeholders across the value chain are working to address this issue in its overall context, particularly with respect to the problem of production and circulation of counterfeit goods, and all have an interest in promoting the development of legitimate e-commerce offers. In tackling the sale of counterfeit goods over e-commerce services, therefore, stakeholders must take due account of the extent of the issues, the specificities of the Internet and work to develop appropriate and proportionate measures respecting fundamental EU principles such as privacy, quiet enjoyment of property, freedom of establishment, expression and access to information, as well as the free movement of goods.

Recommendation: The EDiMA² position as outlined below sets out the views of the new media and Internet sector on how best to tackle the issue of the sale of counterfeit goods over e-commerce services. EDiMA suggests that market-driven action and cooperation between stakeholders across the value chain, based on the existing legal framework, which takes into account the points and principles as outlined below, represents the most effective approach to tackling the sale of counterfeit goods over e-commerce services.

EDiMA recommends that policy-makers continue their engagement with all relevant stakeholders affected by the sale of counterfeit goods over the Internet. Such engagement should focus on exchange of best practices, reasonableness and proportionality, for tackling the sale of counterfeit goods over e-commerce services and also take into account the wider benefits of promoting such services in Europe.

¹ As used in this document, Counterfeit Goods are expressly limited to fake and imitation products not manufactured by the brand owner or its representatives, and do not include so-called "gray market goods", "parallel imports" or other legitimately manufactured goods which are sold outside authorized or traditional distribution networks.

² The European Digital Media Association (EDiMA) is an alliance of Internet companies whose members include Amazon-EU, Apple, eBay, Google, Microsoft, Music Choice, Nokia, Yahoo! Europe, Orange and others. EDiMA's members provide new media platforms offering European consumers a wide range of online services, including e-content, media, e-commerce, communications and information/search services.

As a starting point, EDiMA advocates that all stakeholders in the value chain should respect a set of general principles on tackling the sale of counterfeit goods over the internet, including:

- Respect and protection of intellectual property rights (IPR) in the online environment; stakeholders across the value chain do not condone the sale of counterfeit goods over the internet.
- The recognition that no action, system or tool alone is or will be perfect in the fight against the sale of counterfeit goods over e-commerce services.
- Actions to address the sale of counterfeit goods on e-commerce services must strike a balance between all stakeholders and can help contribute to creating a better online experience for all.

In the context of achieving an appropriate balance in terms of addressing the problem while also meeting consumer demand and supporting legitimate e-commerce businesses, EDiMA believes stakeholders should:

- Develop balanced and reasonable measures to tackle the sale of counterfeit goods over e-commerce services which do not undermine the development of legitimate e-commerce businesses across Europe.
- Work toward meeting consumer demand and ensuring availability of genuine products throughout the Internal Market, promoting online and cross-border sales and engagement with legitimate e-commerce services and to support the continued development and growth of e-commerce in Europe.

Given the rapid technological developments in the online environment and the variety of existing business models, a variety of different approaches, focused on results, to address the sale of counterfeit goods should be accommodated.

- Stakeholders recognize that with regard to e-commerce services there are a range of effective approaches to tackling the sale of counterfeit goods and these differing approaches should be valued and respected. The focus of stakeholders' engagement should be on adopting effective approaches in line with and adapted to their respective business models.

Consumer confidence, education, information and protection must factor in the development of any approaches to address the problem.

- EDiMA believes that stakeholders must take into account the need to promote online consumer confidence and the interest of consumers.
- Rights owners should recognize that consumers have an interest in gaining online access to legitimate goods at competitive prices, and therefore efforts to unreasonably limit distribution of authentic products in the name of anti-counterfeiting efforts should be avoided.
- Stakeholders should recognise that there is a risk that certain counterfeit goods may result in health and safety risks for the consumer.
- Rights owners also have a vital role to play in terms of providing information to support consumers in avoiding the purchase of counterfeit goods as well as support in the case of an actual purchase of such goods.

In developing pro-active and preventative measures and appropriate sanctions, it must be recognised that:

- E-commerce services have developed appropriate and proportionate measures to discourage counterfeit goods from being made available for sale over the Internet as well as sanctions for sellers they identify as intentionally and repeatedly selling counterfeit goods

over the Internet. Any such measures should be commercially reasonable and technically feasible.

- In order to avoid a risk of circumvention, EDiMA believes it may be appropriate for stakeholders to keep the exact nature of some of these measures confidential.
- A strong evidence base that identifies and details the exact nature and scale of a demonstrated substantial and serious problem of specific cases of the sale of counterfeit goods over e-commerce services is an important step in order to focus consideration of limited resources on appropriate and balanced solutions and adapting them over time.

Information to and about sellers

- EDiMA believes that stakeholders should use commercially reasonable endeavours to provide appropriate information to sellers that the sale of counterfeit goods is improper and that stakeholders should consider transparency with regard to seller identification while respecting applicable law on data protection and the legitimate interest, in particular of private users to protect their anonymity.

Notice and take down procedures

- E-commerce services have put in place and promote effective and efficient notice and take down processes enabling rights owners to easily send notices concerning the listings they allege offer counterfeit goods. Rights owners should also undertake to actively monitor e-commerce services and consistently use the notice and take down processes exclusively for their intended purpose and in good faith.
- Rights owners should also ensure that infringement notices issued comply with applicable law as well as the e-commerce service's requirements, are valid, and, where this is not the case, rights owners must recognise that they may be subject to liability. E-commerce services should not be liable for sending such notices or taking other action at a rights owner's request.
- E-commerce services use best endeavours to remove listings that have been notified as counterfeit and rights owners should agree to communicate and deal in good faith with reported sellers to address any feedback (e.g. questions, protests).
- When sending notices and making claims of alleged infringement, rights owners should, in each instance, proceed on the basis of objective evidence and in good-faith to assert the allegation of counterfeit goods avoiding unjustified, unfounded, overreaching, or abusive notifications.

Cooperation between Stakeholders should be promoted, and focus on exchange of best practice

- EDiMA believes that all stakeholders should continue to work to ensure an appropriate and ongoing dialogue and, to this end, establish clearly identified contact points and reconvene from time to time to review and discuss appropriate developments that can contribute to tackling the sale of counterfeit goods over e-commerce services.

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