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June 29, 2020

The Honorable Jerrold Nadler
United States House of
Representatives
2132, Rayburn House Office
Building,
Washington, DC 20515-3210

The Honorable Darrell Issa
United States House of
Representatives
2300, Longworth House Office
Building
Washington, DC 20515-0550

The Honorable Hank Johnson
United State House of
Representatives
2240, Rayburn House Office
Building
Washington, DC 20515-1004

The Honorable Ben Cline
United States House of
Representatives
2443, Rayburn House Office
Building
Washington, DC 20515-4606

VIA EMAIL

Re: SHOP SAFE Act Questions Ahead of Roundtable

Dear Representatives Nadler, Johnson, Issa and Cline

Etsy respectfully submits the following comments pertaining to the SHOP SAFE Act.
Thank you for the opportunity to review and share feedback.

Etsy believes that marketplaces have a responsibility to help protect consumers. As a business, it's in our best interest to offer consumers a trusted place to find their favorite independent shops. That's why we continue to [invest](#) in the people and technology that underpin our marketplace trust and integrity functions, and move quickly to identify and remove potentially harmful content. Notwithstanding our [commitment to promoting safety online](#), we believe that any new obligations placed on marketplaces should be proportionate to their capabilities, knowledge, and the role they play in the market. Etsy does not take physical possession, inspect, design, set prices, warehouse or distribute products, and our buyers understand they are purchasing goods directly from individual sellers who market their goods and their businesses on our platforms. Policymakers should also avoid imposing overbearing compliance burdens on small businesses, in particular microbusinesses, and ideally would focus on providing them with important education and tools. Enabling small businesses to sell online is crucial, especially as part

of our nation's post-COVID recovery. These businesses contribute significantly to economic recovery and growth in the United States.

Any updates to public policy impacting marketplaces must carefully consider the responsibilities of all stakeholders: regulators, sellers, online retailers and marketplaces, rights holders, and consumers. Each has an important role to play in ensuring a safe ecosystem, and has a duty to provide information, support and fast action for the others. However, absent careful balancing, SHOP SAFE would depart from decades of established law seeking balance between parties and could cause significant unintended consequences. Unless rights holders have a balanced obligation to provide necessary information to platforms and regulators in good faith the bill could actually impede competition in the retail platform space, harm the growing circular economy, and fail to address the growing influx of erroneous or baseless takedown requests which are harming legitimate small businesses under existing laws.

Introduction

Since 2005, Etsy has been the global destination for unique and creative goods, a two-sided online marketplace that connects millions of passionate and creative buyers and sellers around the world. Buyers come to Etsy to be inspired and delighted by 90 million unique items that are crafted and curated by creative entrepreneurs. For our 4.7 million sellers, we offer a range of tools and services that address key business needs.¹ Etsy's mission is to keep commerce human, and we're committed to using the power of business to strengthen communities and empower people.

Etsy has long functioned as a pathway to entrepreneurship, by creating opportunities for people who might not have started a business otherwise. 81% of our sellers are women. The majority of our sellers sold their goods for the first time on Etsy. Most are businesses of one working out of their homes, often in rural communities. For 30% of Etsy sellers, their creative business is their sole occupation. For the rest, it provides an important source of supplemental income. While Etsy operates a global platform, the majority of our sellers are from the United States. Our sellers pursue their passions, work for themselves, and define success on their own terms. Yet despite their small size, their economic impact is considerable. Together, sellers on Etsy's marketplaces sold \$10.3 billion in goods in 2020 alone.

As a third-party marketplace, Etsy's primary function is to connect buyers and sellers and to facilitate trusted transactions. Unlike some large platforms, we do not hold physical inventory or manage fulfillment. Sellers build their shops and brands, and talk directly to buyers every day. Everything Etsy knows about an item is supplied by our sellers via product descriptions, tags, and images. Our insight into transactions is largely provided via third parties (buyers, sellers, payment processors, shipping carriers, etc.). On Etsy, sellers may only list items that fall into one of three categories: handmade items, vintage items, and craft supplies.

¹ As of May 31, 2021

Our House Rules define what may or may not be sold on Etsy, including our [Handmade Policy](#), [Prohibited Items Policy](#) and [Intellectual Property Policy](#), among others. Our Trust and Safety team enforces these policies through several processes, including notice and action, automated detection tools, community flags, information from trusted partners and regulators, and human review. We believe that publicly reporting on our enforcement efforts builds trust in our marketplace and demonstrates our commitment to transparency and accountability. Etsy publishes data on these efforts through its [annual Transparency Report](#).

Intermediate Liability and the SHOP SAFE ACT

Intermediary liability laws work best when they balance the responsibilities and benefits brought by platforms with the information and duties of rights holders to provide the information necessary to protect their brands. Platforms need the specifics to identify and fight bad actors in their ecosystem, and rights holders need information from platforms to find and eliminate them at scale.

When Congress passed Section 230 of Communications Decency Act and the Digital Millennium Copyright Act (DMCA), it sought to balance the dual goals of providing legal certainty and safe harbors to online platforms to enable them to grow, while protecting rights holders from online infringement. This parallels judicial requirements in other areas of law, including *Tiffany v. eBay* for trademark law (requiring reasonable measures including responses to takedown requests), *MGM v. Grokster* for copyright law (the knowledge requirement for indirect infringement by a platform), and *GEB v. Global-Tech* for patent law (specific intent requirement for indirect patent infringement). Indeed, in Etsy's case, the main beneficiaries of these rules have been millions of small creators who have built businesses on Etsy's platform.

These intermediary liability safe harbor provisions enable platforms like Etsy to operate at scale and offer opportunities to entrepreneurs around the globe. Without such protections, Etsy could be forced to screen items before allowing them on our site, a resource-intensive activity that would be nearly impossible to automate in many circumstances, given the diversity of products (including many handmade items), shops, and seller locations on Etsy. Both automated and manual screening may be ineffective without the cooperation of and information from rights holders and regulators about the many technical, non-obvious issues involved in effective anti-counterfeiting.

Any changes to intermediary liability including the establishment of "best practices" to avoid liability should take into account important corner-cases like handmade and vintage physical goods, especially those made and sold by small businesses. As a reminder, most of the 90 million items for sale on Etsy are handmade or vintage items, not mass market goods. Moving to a curated business model would unnecessarily curtail the opportunities we currently provide to over 4.7 million microbusinesses, most of which are run by women. For example, systematically reviewing handmade products that Etsy does not possess or control would not be feasible in a global context, especially given the limitations of traditional keyword matching or image detection for physical and non-mass produced products in our unique marketplace. While machine learning solutions offer opportunities for our industry, they require cooperation from rights holders to function.

Since these new technologies require large technological investments and significant amounts of data, they should not be required in a manner that unintentionally creates competition issues, where it could result in only the largest marketplaces being able to meet newly-created legal requirements.

Additional liabilities would reduce our ability to offer services in multiple markets, undermining the goals of intermediary liability protections for marketplaces. Finally, liability protections are especially important for startup platforms and smaller platforms like Etsy, who rely on them to start, grow and compete with larger actors. Curated, pre-screening models may unfairly favor the largest actors that have resources and technologies not available to smaller and startup platforms.

Intermediary liability safe harbor protections also play an important role in encouraging entrepreneurship, creativity and the growth of commerce online. If platforms were subject to contributory liability for trademark infringement for every product they would be strongly incentivized to err on the side of caution and block more content than less, likely preventing legitimate, legal items from being sold. For instance, we have seen both trademark and DMCA copyright takedowns used to remove legitimate content, including fair use reviews and political content, as a form of blocking speech unfavorable to a content owner rather than to protect legitimate intellectual property rights. Both in e-commerce and social media, there has been a dramatic increase in erroneous or bad faith trademark and DMCA takedowns, whether intended to stifle political speech, opposing viewpoints, e-commerce competitors during the height of holiday season, or in an attempt to wrongfully obtain personal information on a small seller. Increasingly, the bad actors that proposed laws like SHOP SAFE are intended to fight are using strict requirements as a sword of their own: the U.S. Patent & Trademark Office has been flooded with questionable—or outright false—registrations in order to block legitimate businesses. For this reason, we suggest that any SHOP SAFE **safe harbors should explicitly require brands and registrants to take reasonable good-faith steps to help validate the identity of the reporter and validity of the rights.**

Congress should also consider developing safe harbor requirements that are proportionate to the size, form, market dominance, and risk of a particular platform. A singular exemption based on a low sales threshold is inadequate to protect new market entrants and instead will limit competition by favoring the largest platforms. Without changes recognizing the differences between mass-produced versus handmade, creative, and vintage works, Congress risks entrenching the largest, most dominant marketplaces and preventing new market entrants. A focus on neutral information clearinghouses and industry best practices that recognize the difference in scale and product type are critical for this effort to succeed.

We believe building a reasonableness standard for proactive measures based on the process established by the marketplace and based on information provided by regulators and rights holders would preserve the ability of platforms to account for the specific circumstances on their platforms, while enabling them to increase proactive measures. Similar frameworks exist in the financial services industry, and could serve as a model for this framework.

Any proposed best practices should not include a general obligation to monitor or filter content in order to avoid an overbroad impact on lawful content and stifle the entrepreneurial opportunities platforms create. If, as some have suggested, the balance were to shift to require platforms like Etsy to filter or block more content, the direct result would be censorship of our most creative makers and the repression of their businesses and livelihoods. For handmade goods, filtering and blocking do not have a ready analog to mass-produced packaged goods, and the risk of overblocking could cause significant harm to small businesses. These are the businesses and creators we want to protect and support—far more than massive rights holders with deep pockets who have little economic incentive, or legal incentive under the current regime, to narrow their requests to mitigate harm to small, legitimate businesses.

Etsy Considerations related to the Committee Questions

1. Should verification under (4)(A)(ii) require government identification? If not, what “other reliable documentation” would there be?

Stringent government issued ID requirements would disproportionately and negatively impact many communities with lower prevalence of holding those forms of identification including communities of color, the elderly, and the undocumented. While we support the majority of the bill’s vetting requirements, we have strong reservations about the requirement that marketplaces always collect government IDs from sellers in order to sell online. Etsy already engages in robust “Know Your Customer” vetting requirements as part of our marketplace’s approach to trust and safety. We believe requiring mandatory government IDs would disproportionately impact these communities who rely on marketplaces to earn vital supplemental or primary income. In particular, stringent government ID efforts will not deter bad actors, who constantly seek to find ways to circumvent established identification processes, while creating unnecessary hurdles to small businesses—particularly in underserved areas. The bill should recognize the importance of allowing alternative forms of ID based on a reasonableness standard.

2. Should the definition of “electronic commerce platform” be revised, such as to remove the “payment, or shipping of goods” language? Why or why not?

The definition should not be broadened, as it must recognize that a platform’s information and ability to take action is tied to what functions the platform provides.

3. Should any revisions be made to the definition of “goods that implicate health and safety”?

This term should have a clear meaning in order to avoid ambiguity that could be used for misuse of the tools provided by this bill. In particular, this should specifically be defined as a finding by a recognized regulatory body, court or government agency that a product violates a health and/or safety requirement with enough specificity to identify the product on the platform.

4. Should the Act require platforms to have a mechanism for consumers to contact them if they suspect they have received a counterfeit product?

Etsy provides users the ability to flag products on its marketplace. As a marketplace where our sellers hold inventory and ship products directly to buyers, we enforce our policies based on reports from our community, third parties, and our internal Trust and Safety systems. All Etsy sellers commit to adhering to our Seller Policy, which outlines our marketplace criteria and customer service expectations. Our Trust and Safety team is dedicated to educating the Etsy community about our policies, screening potential content violations, and taking enforcement actions against items and member accounts when they violate our policies. Our team employs a combination of automated systems, proactive review by specialists, and flags from members to alert us of potential policy violations. We strive to consistently enforce our policies to hold all members accountable to the same standards, to strengthen trust in our community, and to maintain the integrity of our platform.

5. Generally, should we be concerned about bad-faith use of the notice-and-take-down process? Does the SHOP SAFE Act incentivize bad-faith use of the take-down process more than the current legal structure? Why or why not? If there is a concern, how would you propose addressing it?

Additional protections are needed to protect small creators from abuse. While we appreciate the Committee's efforts to combat bad-faith engagement by requiring registrants to have a "bona fide belief that a seller has used a counterfeit mark" when seeking to contact a seller, equivalent protections to combat false or abusive take down notices are lacking in the bill's provisions concerning notice and takedown. This again goes to mutuality of responsibility: platforms and rights holders have an obligation to verify information and share data to protect their ecosystems. Etsy has observed a significant uptick in DMCA and trademark notices of infringement that appear to be fraudulent, unauthorized by the rights holder, contain invalid contact information, sent in bad faith, or are otherwise abusive use of our infringement reporting tools. Such abusive notices are complex and difficult to investigate, and often Etsy must request additional information beyond what is required by the DMCA, such as identification verification and/or documentation that supports the ownership of the original work. While the DMCA states that parties knowingly making material misrepresentations will be liable for damages for the removal of such content, it is often difficult to properly identify the bad actor if invalid contact information is provided. Moreover, for malicious trademark notices, there is no counter-notification process nor is there a specific statutory provision for relief. For this reason, we recommend that marketplaces expressly have the authority to validate the identity of a reporter and the reported IP rights using reasonable means, particularly when a marketplace has reason to believe the report is inauthentic. For example, we welcome the opportunity to require rights holders to register with a platform to validate their identity (such as by establishing an account prior to submitting a notice, or via a rights holder portal), which would enable us to take action on bad actors and reduce fraud.

Another type of potentially abusive notice involves bullying and abuse from large rights holders who make overly broad claims via the Section 512 notice and takedown process,

or via overbroad trademark takedowns. Often, we see sweeping takedown requests based on simple keyword usage that upon examination appear to reach completely unrelated small businesses, and lack a good faith assessment. Some reforms to help small creators include developing a SHOP SAFE counter notice framework, while also increasing the responsibility of the reporting rights holder to consider in good faith if the material constitutes fair use, is legitimate recommerce or vintage material, or is nominative fair use (such as a material used in a handmade item). An added mandate that governmental organizations develop educational materials and partnerships with the small creator community could also help provide small creators with the materials and knowledge they need to appropriately exercise their fair use creative rights.

Beyond considering the impact of reform on small platforms and businesses, it is critical to take into account the growing concentration of power in a few very large rights holders and platforms over small businesses and creators. Care should be taken not to allow SHOP SAFE to foster further concentration of this power. The persistent abuse of small creators by large platforms or rights holders not only negatively impacts creative expression, but if coupled with reforms that require a notice and stay down (three strikes) framework, could chill creative expression across the internet. A version of this bill that would permit rights holders to consolidate information sharing with only the largest platforms would further solidify that competition concern.

6. Should platforms be required to notify consumers when they remove a listing because it appeared to be selling counterfeit products?

Excessive notification would place unnecessary friction in a platform's enforcement process. Platforms that understand the context for any given enforcement action taken against a seller should be allowed to develop a reasonable notification framework to most appropriately match consumer benefit. This can be based on existing regulatory frameworks, industry best practices, or reasonable platform policies.

7. Are there any points you would like us to consider with respect to the country of origin identification requirement in paragraph (vi)?

Online country of origin should apply to the seller, not the product. With the vast majority of the makers, crafters, and designers that make up Etsy's 4.7 million sellers located in the United States, Etsy supports enhanced country of origin disclosure to better enable American small businesses to flourish. Without appropriate consideration for the creative, unique, and vintage products available on marketplaces like Etsy, our concern is that the existing country of origin labeling regime designed for mass-produced items imported to this country may have adverse consequences for this country's creative class. In Etsy's case it may be challenging for a seller to verify this information for vintage items of unknown origin. Conspicuously displaying a seller's country of origin including where the item is shipped from provides many of the same consumer benefits without necessarily negatively impacting American sellers.

8. Is the three strikes presumption in (4)(A)(x) helpful for ease of compliance with the repeat infringer policy requirement? Considering both the three-infringing-listing threshold

and “reasonable mitigating circumstances” language, is the presumption overly strict, overly permissive, or neither?

A “three strikes presumption” is overly punitive especially in an environment where brands lack a “good-faith” reporting requirement. Etsy has a [Repeat Infringers policy](#), so if any individual seller repeatedly receives notices of infringement, they will be refused access to our services in appropriate circumstances. However, platforms must be able to retain the ability to weigh contextual information when determining whether it is appropriate to permanently terminate a user. It’s appropriate to give violators the chance to resolve violations, and we want to avoid immediately closing down shops where a single instance of infringement was likely inadvertent or unintentional, or where the claim is questionable in merit and legitimacy. For this reason, we encourage the Committee to establish a reasonableness standard for any Repeat Infringers policy, which would allow platforms to take this essential contextual information into account when enforcing such a policy.

Overtly punitive requirements like a “three strikes” policy may interfere with legitimate artistic self-expression where allegations are not always clear or appropriate. Unfortunately, as noted above, we have experienced a substantial increase in false or unauthorized takedowns or IP demands by non-owners or those attempting to suppress legitimate competition (e.g. cyberbullying, trolling), and blanket demands that are overbroad on their face (such as demands to take down all listings with common terms unrelated to a rights holder’s IP). Where counter-notifications are not available (such as for trademark claims), this can be misused to take down competitors or for other malicious purposes before a victim can meaningfully respond.

In Etsy’s experience, there are extremely limited instances where a high degree of certainty is possible on our marketplace, for example when a keyword used to populate our search function is only associated with the brand, is never used differently, and has virtually no non-infringing uses. Most often, the nature of items listed on Etsy requires a more nuanced human review to determine whether the keyword is linked to violating content or qualifying content. For instance, human review may be required to determine whether an item is a fake luxury brand bag or a painting of a luxury brand bag, which may be fair use, or a vintage luxury bag, which qualifies for sale on Etsy.

Additionally, we believe this requirement should be enforced under a reasonableness standard, as proposed above, which would evaluate the process platforms put in place to implement such a standard.

9. Should brand owners be affirmatively required to provide information to platforms in order to avail themselves of the provisions of the SHOP SAFE Act?

Brand owners and registrants should also have a strong requirement to work collaboratively with platforms to mitigate “bad-faith” claims. SHOP-SAFE cannot be effective unless there is a mutual information sharing requirement. As a third-party marketplace without access to physical products offered by its sellers, Etsy is heavily reliant on information outside of our direct physical control in the detection of trademarked products—expertise only rights holders themselves have. Therefore,

collaboration with rights holders is critical as a marketplace cannot become an expert in every trademarked work. To facilitate more efficient and effective collaboration between platforms and rights holders, we support a reasonable cooperation requirement between rights holders and platforms. This could be made more effective via a neutral information clearinghouse to allow rights holders and platforms to coordinate anti-counterfeiting campaigns.

10. Is there any other feedback that you would like to provide on the bill?

The microbusinesses who sell on Etsy do not have the resources to find, appoint, or pay a representative based in the US to manage their compliance obligations. When faced with this requirement, we believe that most will choose to no longer sell goods into the US, reducing choice for US consumers. The Etsy community, including non-US sellers, fully supports efforts to ensure that consumer protections function in the global marketplace. However, such an obligation is simply not designed with home-based microbusinesses in mind with the likelihood of discouraging them from selling online altogether. Enabling Etsy sellers to comply with US legislation in a simplified manner will help these small businesses grow - all of which is more important than ever given the global pandemic, and the role that these microbusinesses can serve to help rebuild local economies.

Disclosure of personal information creates privacy, safety and security risks for sellers.

Requiring the disclosure of the full name and physical address of the seller poses significant safety and privacy risks for millions of small sellers. Sharing an individual seller's full name provides little consumer benefit and exposes that seller to privacy, safety, and security concerns. With a simple google search someone could essentially dox or physically harass or intimidate a seller—a non-trivial risk particularly for Etsy's diverse community of sellers, the majority of whom operate their businesses from their homes. Fundamental to many platforms within the industry, seller names, user names, business name disclosure, and other representations of the seller exist in variety and should continue to be able to exist with variety, according to the desire of the seller. With current seller vetting and data collection, the marketplace is aware of who each seller is. Depending on the platform, this information is shared for some sellers, at their discretion. From the buyer's perspective, knowing the state or region, and country of the seller is sufficient to understand that a seller is a third-party seller and not the marketplace, and whether they are a US seller.

Best practices must be flexible and cognizant of different platforms, types of products, and sellers. We welcome the development and publications of industry best practices for online IP enforcement. However, we encourage Congress to set a reasonableness standard for any new proposed requirements, to account for very different business models, risks, and capacities of platforms. As noted above, failure to establish such a standard could mean that new rules and "best practices" may only be feasible for large marketplaces to operationalize, concentrating the market power and dominance of these platforms at the expense of smaller ones.

Additionally, any such best practices must be developed in collaboration with all stakeholders in the ecosystem, and preserve an appropriate balance of responsibility across all parties, including platforms, users, rights holders, law enforcement, and third

parties. Ultimately, any support given to large rights holders to protect their rights should be built with all the millions of small creators in mind as well. Cooperation and information from rights holders—beyond mere identification of IP—is critical to improve automated and manual systems, and to make proposed “best practices” work.

Small rights holders are often subject to theft—including by larger entities and copycat entities located in difficult-to-reach jurisdictions, who may at times file their own reverse complaints against the small legitimate rights holder . Access to cross-platform tools and processes used by larger brands, and serious consideration of takedown requests and counter-notifications from these small rights holders (particularly by large platforms) are critical for them to effectively protect their rights. False notice and punitive “three strikes” style policies may be fatal to these small businesses. It’s crucial that these stakeholders have the opportunity to advocate for their own needs and concerns in any process set out to define industry best practices.

Conclusion

Etsy remains committed to building a more trusted marketplace for our sellers and buyers around the world, and to being a collaborative partner as Congress seeks to develop pragmatic platform reforms. We are hopeful our experiences and suggestions are useful as policymakers consider these difficult and complex problems, and offer ourselves up as a resource and partner in developing new solutions to foster a more creative internet for all. We look forward to working with you, your staff, and members in both chambers and across the aisle on addressing these critical measures.

Sincerely,

A handwritten signature in black ink, appearing to read 'J. Zubricki', with a stylized, flowing script.

Jeffrey Zubricki
US Government Relations
Etsy, Inc.