

# The Real Threat of **FAKE TOYS**

The increase of knockoff and counterfeit toys  
sold online and how to fight back



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## **INTELLECTUAL PROPERTY INFRINGEMENT AND TOY SAFETY ONLINE**

The Toy Industry's Discussion of Contributing  
Factors and Potential Solutions



Inspiring Generations of Play

# INTELLECTUAL PROPERTY INFRINGEMENT AND TOY SAFETY ONLINE

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## EXECUTIVE SUMMARY

With the expansion of e-commerce, there has been a steady increase in the quantity of infringing and unregulated products offered online. Infringing goods include counterfeit products, trademark infringing products, unlicensed merchandise, and knock-off products. They can be found in all corners of the internet, including popular online marketplaces.

This growing phenomenon negatively impacts consumers, legitimate companies, and the American economy as a whole. The toy industry is no exception, with direct harm to toy companies' core assets, company reputation, and financial health. For consumers, the proliferation of infringing and unregulated toys raises safety and health hazards. As Senator Wyden said in the March 6, 2018 Finance Committee Hearing on Combating Counterfeit Goods, "this is a matter of protecting families from harmful products and preventing rip-off artists from undercutting the American brand."



The Toy Association has determined that there are three primary categories of contributing factors to this steady growth of infringing products online, particularly as it relates to online marketplaces:

1. **E-commerce creates a low hurdle to sellers;**
2. **The burden of enforcement is disproportionately on the rights holder; and**
3. **Consumers are largely unaware of the scope of infringing product offered on online marketplaces.**

The Toy Association and its members believe there are numerous potential solutions to combat each of these factors if stakeholders work collaboratively. These proposed solutions are described in this whitepaper.

To neutralize the low hurdle to sellers, The Toy Association proposes that online marketplaces take two core steps:

1

Proactively screen sellers and collect verified contact information for sellers

2

Proactively screen products by requiring that sellers demonstrate legitimacy of the products and provide Children's Product Certificates (CPC) to ensure safety.

To more appropriately balance the burden of enforcement, The Toy Association proposes that online marketplaces work collaboratively with industry organizations to create programs that give the presumption to rights holders, provide more streamlined removal processes, provide direct points of contact for the industry, provide trainings to industry groups on best practices, and provide more transparency to stop bad actors. The Toy Association also believes that legislative changes to the Digital Millennium Copyright Act (DMCA) may be necessary to account for misuse by infringers of the counter notification provision.

The Toy Association has been increasing communication with online platforms Alibaba and Amazon and we are open to working with these and other platforms to identify solutions that effectively address the problem. Amazon, having recently joined The Toy Association, has begun participating actively on The Toy Association's IP Committee and met with our members on June 14<sup>th</sup> to discuss updates to the platforms brand protection programs, hear about the challenges toy companies face with IP infringement and exchange information about possible solutions. Alibaba has spoken at numerous Toy Association events to inform our members of what they can do to protect their brands on Alibaba's platforms and has even invited Toy Association members to participate on the Alibaba Anti-Counterfeiting Alliance. These efforts are just the beginning, and both sides agree more needs to be done, and we look forward to collaborating with our e-commerce partners to put into place effective solutions.

Finally, to facilitate consumer awareness and education, The Toy Association proposes that online marketplaces better identify legitimate or verified products and sellers, and is considering developing a grading system of online marketplaces to allow consumers to better gauge risk.



## INTRODUCTION TO TOY SAFETY AND INTELLECTUAL PROPERTY INFRINGEMENT ONLINE

### 1. The Toy Association and Its Members

Founded in 1916, The Toy Association, Inc. is the trade association representing businesses that design, produce, license, and deliver toys and youth entertainment products. With over 950 members, the organization has a long history of propelling the health and growth of the toy industry. The Toy Association's members drive the annual \$27 billion U.S. domestic toy market, which has an annual U.S. economic impact of \$110.9 billion.

The Toy Association advocates on behalf of its members, and for more than 40 years has been a global leader in toy safety. It helped develop the first toy safety standard<sup>i</sup> and remains committed to working with medical experts, government, consumers, and industry on

ongoing safety programs and outreach. The Toy Association is also the industry's voice on the developmental benefits of play, promoting play's positive impact on childhood development.

## 2. Intellectual Property Infringement Online

A significant and serious issue facing The Toy Association's members is the growing phenomenon of products offered online that infringe their intellectual property (IP). In the last several years, with the expansion of electronic commerce, referred to as e-commerce, and increased consumer comfort with e-commerce<sup>ii</sup>, rights holders have seen a steady increase in the quantity of infringing products online.



Infringing products include counterfeit products, trademark infringing products, unlicensed merchandise, and knock-offs.

- **Counterfeit products are look-alikes and claim to be legitimate, falsely leading consumers to buy an unregulated, "fake" product;**
- **Trademark infringing products use another company's name or brand, or confusingly similar marks, falsely leading consumers to believe the product is from the same trusted source and harming the brand owner;**
- **Unlicensed merchandise are products that use characters or content without license;**
- **Knock-off products, often infringe patents or other IP and copy the underlying product concept and offer it under the infringer's own brand, harming innovative companies.**

Grey-market goods also pose problems for IP rights holders, as they are items manufactured abroad and imported into the United States without the consent of the rights holder. Such goods may be legitimately offered in one country, but may not meet all U.S. regulations, including labeling, and are thus not considered legitimate products within the U.S.

Infringing products can be found in all corners of the internet, including popular online marketplaces. Online marketplaces generally refer to websites with multiple retailers or sellers offering their products directly to consumers. This includes the commonly known online marketplaces, eBay.com, Amazon.com, the Alibaba.com family of sites, including Alibaba.com, Aliexpress.com, Taobao.com, Tmall.com, and 1688.com, as well as other large sites, including Facebook Marketplace, Newegg.com, buy.com, etsy.com, shopify.com, bigcommerce.com, jet.com, DHGate.com, Wish.com, and others frequently launching.

The content in this paper is intended to generalize the problems from the toy industry's perspective and not to single out any one platform. Some platforms already have policies and programs in place that address some of the toy industry's concerns detailed below. **However, we note that the problem of IP infringement and unsafe toys is ubiquitous, and more must be done on all ecommerce platforms and marketplaces to adequately address the issue.**



In January 2018, the U.S. Government Accountability Office (GAO) reported research findings regarding the current market for counterfeit goods and the frequency with which consumers may unknowingly encounter counterfeit products online. As part of its investigation, the GAO completed “test purchases” and found that 20 of 47 items that the GAO purchased from third-party sellers on popular online marketplaces were counterfeit.<sup>iii</sup>

The U.S. economy is negatively impacted by online intellectual property infringement, which includes infringing products as well as pirated music, movies, and other creative content. In February 2017, the International Trademark Association and the Business Action to Stop Counterfeiting and Piracy released a report finding that in 2013, the estimated value of international and domestic trade in counterfeit and pirated goods was \$1.13 trillion and in 2022, the total estimated value of counterfeit and pirated goods including digital piracy is projected to be \$1.90-\$2.81 trillion.<sup>iv</sup>

### **3. Impact of Infringing Products on the Toy Industry**

The toy industry is no exception and has been directly harmed in several ways by the increase in infringing products offered online.



**As to their core assets**, toy companies are creators, innovators and brand owners, with intellectual property being one of their most important assets. Rampant infringement of that intellectual property—from creative and innovative new products to core brands—devalues their commercial performance. Innovative companies invest substantial resources in research and development, and the results of their expenditures are being misappropriated by infringers, counterfeits, and copycats. This impact is often heightened where a license relationship is involved, such as where an entertainment company licenses an important creative asset like a film or character on a toy, because both the toy and entertainment company are harmed, and the business relationship between the companies may be weakened as a result. Further, counterfeits and trademark infringing goods or listings harm the value of the company’s trademark, and where there is extensive unlicensed third party use, can increase the risk of the mark becoming generic.



**As to toy safety and company reputation**, toy companies invest in creating quality and safe products that meet or exceed regulatory standards, and their reputation among consumers and regulators is extremely important and valuable. The vast majority of infringements and counterfeits are lower quality products that are not bound to the company’s standards or do not comply with government regulations. When a consumer purchases a counterfeit product, trademark infringing product, or unlicensed merchandise believing it to be legitimate, and that product fails in quality, value or safety, the consumer associates that failure with the toy company, directly harming its reputation and goodwill.



**As to their financial health**, toy companies are losing sales to infringers and counterfeiters. This is in tandem with increased expenses, including internal and external resources being outlaid for monitoring and enforcement against these infringers and counterfeiters.<sup>1</sup>

#### 4. Impact of Infringing Products on Consumers and Their Safety

Consumers seek out and purchase toys for many reasons, including entertainment, education, quality, value, and safety. One way that consumers narrow the selection of toys is to purchase from a trusted source based on brand recognition. However, with counterfeits, trademark infringing products, and unlicensed merchandise, the true source of the product is not what the consumer is led to believe. Instead, a consumer buys a toy that likely does not meet their expectations for quality or safety; in essence, consumers are not getting what they pay for. This disappoints consumers who are unaware that the products they purchased are not authentic, which in turn affects future purchasing decisions, and may lead to consumers posting poor reviews of a legitimate product based on their experience with the infringing product.

Even more concerning is that **many infringing products found online do not meet the same safety standards as legitimate products**. These safety standards include small parts regulations, lead content regulations, and other chemical and mechanical requirements. As such, infringing toys, particularly counterfeit toys, may have unexpected small parts, excess lead, and unsafe chemicals in the materials, coatings, and even packaging.



#### 5. Factors Contributing to the Growth of Infringing Products Offered on Online Marketplaces

After analysis and discussion with stakeholders in the toy industry, there appear to be three primary categories of contributing factors to the steady growth of infringing products online, particularly as it relates to online marketplaces.



**First, e-commerce creates a low hurdle to sellers.** While the ease of online marketplaces benefits legitimate companies of all sizes, and particularly growing companies and entrepreneurs, it also permits unscrupulous and illegitimate sellers to flourish.



**Second, the burden of enforcement is disproportionately on the rights holder.** This arrangement is ultimately highly inefficient, expensive and difficult because rights holders are required to scour online marketplaces. This constant monitoring of online marketplaces and listings requires significant outlay of resources, either with dedicated internal staff or retaining outside monitoring services. Indeed, 95% of U.S. toy companies are small businesses and in a company with only a handful of employees, diverting resources from key business functions may simply not be an

option. Once infringing product is discovered, however, the rights holder has limited information about the seller and does not have the power to remove the infringing product. Instead, the rights holder must then investigate, report, and prove the infringement to the marketplace, following the protocols of the online marketplaces. This report and removal process is inefficient because of numerous factors, including that there are different policies and protocols between platforms; there is a lack of access to decision makers at the platforms; there is a lack of transparency, including identity of the sellers and internal policies and take-down decision making at the platform; there is a lack of consistent enforcement or removal; and there are frequent delays in removal. Further, when an illegitimate seller disputes the removal, many marketplaces will relist the goods and require the parties to resolve the matter between themselves, leading to months of sales while an unscrupulous seller stalls and then vanishes.



**Third, consumers are largely unaware of the scope of infringing product offered on online marketplaces, leading to increased purchase of the infringing product.** This benefits only the infringers and harms the consumers, toy companies, ecommerce platforms themselves and the U.S. economy. Consumers have developed a comfort with and trust in online marketplaces and discerning infringing product is often increasingly difficult, particularly prior to purchase and receipt of the product.

The Toy Association and its members believe **there are numerous potential solutions to combat each of these factors if stakeholders work collaboratively.** This document will provide a detailed discussion of these three categories of contributing factors and potential solutions to combat the growth of infringing products online.



## DISCUSSION OF CONTRIBUTING FACTORS AND POTENTIAL SOLUTIONS

### 1. First Contributing Factor: Low Hurdle to Sellers

While the ease of e-commerce and online marketplaces benefit legitimate companies of all sizes, and particularly growing companies and entrepreneurs, it also allows unscrupulous and illegitimate sellers to prosper. To neutralize the low hurdle to sellers, The Toy Association proposes that online marketplaces proactively screen sellers and proactively screen products.

### *a. Screening Sellers*

Initial entry to online marketplaces is often as simple as setting up an account with a unique email address. While some marketplaces require additional credentials, often these are forged and not verified. As a result, sellers are difficult to identify and tracing the bad actor behind infringing activity is extremely burdensome and difficult. Further, because of the ease of establishing a seller's account, the same bad actors can have multiple accounts and simply switch accounts when one account is discovered to be offering infringing product or is ultimately removed from a site because of multiple instances of infringement or purchaser complaints.



**One proposed solution is to increase the screening of potential sellers on online marketplaces and require collection and verification of contact information.** This could include a program to proactively screen sellers similar to the way certain social media has proposed verifying authenticity and contact information for those seeking to run certain political or issue ads. Another possibility would be to require heightened screening of the products and the seller's authority to sell the products if certain red flags are raised, such as when the seller is offering branded third party goods or offering multiples of a product on an existing product page.

At a minimum, online marketplaces should collect and verify contact information for sellers prior to allowing an account, just as another retailer would require. Without verified contact information, there is no ability for anyone – rights holders, law enforcement, or consumers – to enforce their rights. Obtaining this verified information would also allow the online marketplace to decrease the chance of the same bad actor reappearing on the online marketplace under a new account.

### *b. Screening Products*

Online marketplaces also largely lack proactive monitoring of the goods offered by the sellers on their sites. In some instances, the online marketplace is a venue to connect the seller and buyer, with the products never passing through the hand of the online marketplace. In other instances, the online marketplace will receive the sellers' goods to be held in the marketplace's warehouse and once ordered, the marketplace will ship the product to the purchaser from the marketplace's warehouse. Neither situation entails proactive monitoring by the marketplace as to whether the product is legitimate, whether it infringes intellectual property, or whether it meets regulations such as consumer product safety regulations. Instead, the marketplaces treat themselves as a "pass-through" for the products.

To counter this contributing factor, one proposal is for online marketplaces to proactively screen products by requiring that sellers demonstrate legitimacy and safety of the products and instituting improved tracking of products to sellers.

Additionally, to demonstrate legitimacy, online marketplaces can require that sellers provide evidence that a product they propose to offer through the online marketplace is authorized. This could be in the form of proof of chain of title or other appropriate license. In the current environment, this could be similar to the evidence provided for customs or required by brick and mortar retailers. In the future, this could be accomplished using technology for tracking supply chain, including block chain authentication, easing any burden on the online marketplaces.

To demonstrate safety, online marketplaces should require that sellers provide Children's Product Certificates (CPC) and set up a process to verify the legitimacy of the CPC. Pursuant to the Consumer Product Safety Improvement Act (CPSIA), retailers may request a CPC from any manufacturer, which includes citations to the tested safety regulations, the province and country of manufacturer, the importer, a contact person (who maintains test records), and the testing lab information. Brick and mortar retailers typically require CPCs or similar documentation and have robust product safety requirements in place that go well beyond statutory requirements. Online marketplaces should take it upon themselves to request these CPCs and take additional measures to ensure the authenticity of the CPCs and the safety of the toys offered through their marketplaces. This would allow for assurances as to regulatory compliance by the seller and the product being offered, and would provide extensive information about the particular product if there were claims of infringement or regulatory violations and safety concerns. Alternatively, the Consumer Product Safety Commission could consider revisions that would require online marketplaces be bound to the same product safety obligations under CPSIA as other brick and mortar retailers.

Once legitimacy and safety have been established, online marketplaces should improve the tracking and verification of products through their warehouses to the particular sellers. In member experience, the current tracking of products by online marketplaces is often surprisingly limited, even for products that they process through their warehouses. And physical verification of products once received in warehouses is non-existent. There are even some instances where a consumer purchases from "Seller A" but without any notice receives product that was in fact supplied by "Seller B" because that product is in a warehouse closer to the purchaser. This creates a significant problem with transparency and tracking infringing product.



One clear solution would be for all online marketplaces, particularly when processing merchandise through their own supply chains, to obtain more detailed product information from the sellers, to track which received product was sourced from a particular seller, and to clearly identify for consumers the seller supplying the product.

We note that any programs developed to improve tracking should not be done at the expense of the rights holder or require disclosure of the rights holders' confidential business information.

## **2. Second Contributing Factor: The Burden of Enforcement is Disproportionately Placed on the Rights Holder**

Currently, the burden of enforcement is on the rights holder, which is highly inefficient, expensive, and difficult. Rights holders are required to scour online marketplaces and upon discovery of infringing products, must investigate, report, and prove the infringement to the marketplace. The presumption of legitimacy is given to sellers and the burden is on the rights holder. In the online marketplace context, this only benefits infringers and it overburdens the rights holders and ultimately harms consumers.

Monitoring and removal processes that place the presumption with the rights holder and the burden of proof on the seller will be more effective and efficient and will more appropriately balance the burden of enforcement. To that end, **The Toy Association proposes online marketplaces work collaboratively with industry organizations to create programs that give the presumption to rights holders, provide more streamlined removal processes, provide direct point of contact for the industry, provide trainings to industry groups on best practices, and provide more transparency to stop bad actors.** We appreciate that several online platforms have set up brand protection programs that seek to achieve these goals though more must be done to continue to shift the burden away from the rights holder.



The Toy Association also believes that legislative change to the Digital Millennium Copyright Act (DMCA) may be necessary to account for misuse by infringers of the counter notification provision.

### ***a. Collaborative Programs That Shift the Presumption and Streamline Removal***

The status quo results in undue burden on rights holders, delay in removal of infringing products, inconsistent removal of infringing products, and a lack of communication and collaboration with the rights holder.

Currently, even when there is clear infringement evidenced from the product listing, such as by photographs, product description, purchaser feedback in comments, or basic seller information, the burden is placed on the rights holder to prove the illegitimacy. Upon reporting a listing or seller, responses to the report typically take several days and often include form responses requesting additional information before removing the infringing product.

Once the requested additional information is provided, a follow up response again often takes several days. Further, the additional information is often burdensome and causes delay. For example, online marketplaces frequently require that the rights holder make a “test purchase” from the seller and then report that it is indeed counterfeit upon receiving the product. During the time that a rights holder is waiting for the test purchase to arrive, the infringing product is being sold to unsuspecting consumers. Frequently, this delay is many days or even weeks before the product is received, particularly when shipped from China. For seasonal products that have a short cycle of only a few months, such as toys sold during the holiday season or the summer season, this delay and offering of counterfeit products to consumers for weeks of that sales cycle has an even more drastic impact. In fact, 60% of U.S. toy sales occur during the fourth quarter and even a week delay can be a significant percentage of a company’s peak sales period.

The Toy Association proposes that online marketplaces work collaboratively with industry organizations to create programs that give the presumption to rights holders and provide more streamlined removal processes. In recent years, programs in which the online marketplace works collaboratively with industry organizations have been more successful in allowing for more effective communication and problem solving. On the other hand, toy industry stakeholders report that programs offered by online marketplaces where the industry is not consulted and communication is poor, do not appear to improve these issues and instead place additional burden on the rights holder without benefit. **The Toy Association has taken the initial steps in engaging with a small number of ecommerce platforms to identify and work towards viable brand protection solutions.**



A process that gives the presumption to rights holders and delists product upon notification of infringement would appropriately place the burden on the seller. For example, a potential solution would allow a registered rights holders to submit a simple and streamlined “challenge” to a particular seller or listing. Rather than requiring that the rights holder prove the infringement in response to such a challenge, the product listing would be removed until the seller demonstrated the product was legitimate, such as chain of title, license, or other documentation allowing sale of the product.

### ***b. A Point of Contact to Improve Consistency, Transparency and Collaboration***

Toy industry stakeholders who are sophisticated rights holders and send dozens of identical take-down notices have reported inconsistency even within one marketplace and one region. They report that responses frequently vary based on the person responding. Inconsistency between regions—such as Europe, Asia and the United States—and between online marketplaces, are even starker and make the take-down process even more challenging. For instance, while a DMCA take-down notice is many times responded to within two to three days and the copyright infringement is removed, there are other times where the notice response will take significantly longer and require substantial back and forth to reach the same result.

During the reporting and removal process, obtaining live support or a consistent contact is rare, particularly for new entrants and young companies, but even for established and large toy companies. This is especially distressing when a rights holder needs to escalate a particularly egregious infringement and is unable to receive consistent contact.

**The Toy Association proposes that online marketplaces offer a point person (or people) for a particular industry. This would allow for a direct point of contact for the industry stakeholders, increase speed and consistency of enforcement, and ease the ability to escalate infringements.** Furthermore, if a marketplace had personnel who focused on serving one industry, such as the toy industry, that personnel would become familiar with the industry and spot patterns in counterfeits and bad actors who target the industry, allowing for a better partnership amongst rights holders and online marketplaces. We note that The Toy Association has developed key point of contacts with a couple of ecommerce platforms and will continue to develop these relationships. In some cases, these points of contacts have resulted in marked differences for an individual's online infringement takedown experiences. In other cases, results are more mixed.



### ***c. Training and Education to Industry Members***

Following an online marketplace's report and removal process requires skills that must be honed. Many entrepreneurs, new entrants and growing businesses are at first unaware of the most effective means to enforce and are unaware of which intellectual property rights to acquire and enforce to best enable them to succeed in the removal process.

For example, asserting copyrights is often the most effective means of removal online because of the provisions of the DMCA that allow internet service providers (ISPs) a safe harbor so long as they remove infringing content expeditiously upon receipt of a DMCA notice asserting infringement. The provision does not apply to trademarks or patents, so although online marketplaces will often point to the safe harbor as covering all of their activities, they will not typically remove a listing or seller based on reports of trademark or patent infringement.

In addition, working with government agencies such as Customs and Border Patrol and the Consumer Product Safety Commission is effective but can be daunting for smaller companies or new entrants. Further, each online marketplace has its own policy and provisions for reporting and requesting removal of infringing product. The burden of learning the policies, keeping them straight, and keeping up to date with any changes to the policies, is again placed on the rights holder, requiring further outlay of resources.



**One solution is for industry associations, like The Toy Association, to provide best practices, guidelines and trainings to members. This can include facilitating communication, including in person meetings, with online marketplaces and with government agencies and providing guides for identifying infringing products.** Online marketplaces, in turn, can offer trainings to industry groups on best practices for monitoring and take-down on their sites. Government agencies can provide industry training sessions for identifying infringing and counterfeit products. Attendance by representatives from online marketplaces at industry tradeshow, speaking on panels, and engaging in meetings with stakeholders, is appreciated and effective.

#### ***d. Increasing Transparency to Seller Information***

Even when the take-down process works, the seller can create a new listing, leaving the rights holder to continue the constant process of policing the same rights. Indeed, even when the seller is flagged or terminated because of multiple infringements, the seller can create a new seller account and continue their nefarious conduct. Ideally, rights holders would have access to the seller information that would allow them to investigate or contact the seller directly, but often that is unavailable and the infringement continues unabated.

While privacy protections may make it difficult to release seller information, the online marketplace, at a minimum, should collect and verify contact information for sellers prior to allowing an account, as discussed above. Without verified contact information, there is no ability to stop the bad actors. Once there is infringement, online marketplaces should work more collaboratively with rights holders to track and enforce against repeat infringers. One additional solution is for online marketplaces to enforce a repeat infringer policy whereby platforms provide the seller's verified contact information to enable investigation of the source of the infringing products.

*e. DMCA Revisions May Be Necessary to Account for Misuse by Infringers of the Counter Notification Provision*

The DMCA provides a safe harbor relied upon by ISPs, including online marketplaces, so long as they meet the requirements of the statute, which is designed to include an expeditious removal process upon receiving a proper DMCA take-down notification. The DMCA also allows for a counter-notification process whereby alleged infringers may submit a counter-notification and the allegedly infringing materials will be reposted unless the copyright owner files suit within 10 business days.

The counter-notification process historically had not been used by infringers. However, toy industry stakeholders and other rights holders report that there is an increased use of the counter-notification procedure by bad actors. Infringers appear to be unconcerned with the repercussions of submitting a false counter notification and as a result, rights holders are faced with the predicament of filing a lawsuit for every infringing listing to which a counter-notification is sent. That the only recourse to a counter-notification is to file a lawsuit is a significant barrier for companies, because preparing and filing a complaint for each such listing is resource-intensive, time-consuming, and costly, but has little to no adverse effect on unscrupulous sellers. As a result, unless a rights holder spends significant time and money filing suit against every listing, the infringement continues.

In addition, claims of reliance on the DMCA have become overbroad. Many websites and ecommerce outlets assert they benefit from safe harbors without legitimate basis, requiring DMCA-like take down procedures, and claiming safe harbors shield them from responsibility for their own content or product they themselves manufacture.

The Toy Association believes that revisions to the DMCA may be needed to account for these unfortunate trends. Otherwise, the DMCA may fail to serve rights holders and its anticipated purpose. Moving forward, it is recommended that stakeholders within and outside the toy industry study and propose potential revisions to the language of the DMCA to overcome these detrimental trends. **One possible revision could be to require that a counter-notification include proof of alleged right, such as trademark authorization forms, customs authorizations, license, chain of title, or other argument, as opposed to form language that places the burden back on the rights holder.**



#### *f. Customs Enforcement Must Continue and Ideally be Enhanced*

CBP is the front line at the border in preventing entry of infringing goods into the U.S. The Toy Association remains supportive of initiatives to improve enforcement and targeting of infringing goods by CBP, including for low-value shipments. The de minimis exemption cannot be an exemption from regulatory compliance and enforcement—intellectual property, safety or otherwise. Importantly, because the average cost of a toy is approximately \$10, the de minimis exemption value of \$800 is a significant number of toys.

### **3. Third Contributing Factor: Lack of Consumer Awareness**

Consumers are largely unaware of the scope of infringing product available on online marketplaces, leading to increased purchase of the infringing product. This benefits only the infringers and harms the consumers, toy companies, and the U.S. economy.

Consumers have developed a comfort with and trust in online marketplaces. As a result, consumers frequently are unaware that many products on online marketplaces are infringing, counterfeit or grey market, and thus are unknowingly providing children with unregulated and potentially unsafe toys.

Further, discerning illegitimate product is difficult, particularly when an illegitimate seller is simply linked to a legitimate product listing. Counterfeiters are adept at blending in and hiding on the sites, including by using multiple accounts, piggybacking on legitimate listings, and pricing at same or even higher than legitimate products. Discerning infringing product is particularly challenging for many parents purchasing toys because the child consumer, as opposed to the parent purchaser, is the end consumer most familiar with how the product should appear.

**To facilitate consumer awareness and education, The Toy Association proposes education of consumers so they can protect themselves from illegitimate products.** If online marketplaces refuse to monitor sellers and products as proposed above, one option is to allow rights holders to create “official” product listings. Once created, for a seller to be permitted to list on the “official” product page, that seller would be required to submit evidence of chain of title or be approved by the rights holder. This would help identify for consumers the authentic product listings and consumers could then feel more confident that when purchasing from a seller on the “official” product page, that the product is authentic. Along the same lines, a “verified” stamp for sellers similar to the verified stamp as seen on many social media sites could be instituted whereby to obtain a “verified” stamp, a seller would be required to provide chain of title documentation to the online marketplace for the products offered for sale.



Another option is for industry groups, like The Toy Association, to implement and publish a grading system for online marketplaces based on different factors to be determined by the stakeholders, including how the platform monitors sellers and goods, and how well the marketplace responds to removal requests.

## CONCLUSION

The significant and serious issue of infringing products offered online seems only to be growing, thereby harming consumers, legitimate companies, and the American economy as a whole. The Toy Association has determined that there are three primary categories of contributing factors to this growth, and that there are potential solutions to combat each of these factors if stakeholders work collaboratively. The Toy Association looks forward to working with online marketplaces, legislators, its members, and consumers to combat this detrimental phenomenon.

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This report has been prepared by Meaghan H. Kent and Claire M. Wheeler of Venable LLP working with and on behalf of The Toy Association and the members of its IP Steering Committee.

<sup>i</sup> ASTM F963 was adopted into federal law as a mandatory consumer product safety standard for toys.

<sup>ii</sup> In the U.S., the online toy category has grown rapidly, by over 55% in the past two years. The Toys eCommerce Market, CLAVIS INSIGHT. Available at: <https://www.clavisinsight.com/toys-ecommerce-market>.

<sup>iii</sup> *Intellectual Property: Agencies Can Improve Efforts to Address Risks Posed by Changing Counterfeits Market*, GAO-18-216, Report to the Chairman, Committee on Finance, U.S. Senate (Jan. 2018). Available at <https://www.gao.gov/assets/690/689713.pdf>.

<sup>iv</sup> *The Economic Impacts of Counterfeiting and Piracy*, Report prepared for BASCAP and INTA by Frontier Economics. Available at <https://cdn.iccwbo.org/content/uploads/sites/3/2017/02/ICC-BASCAP-Frontier-report-2016.pdf>.