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Earl Comstock
Director of the Office of Policy and Strategic Planning
Department of Commerce
1401 Constitution Ave NW
Washington, DC 20230

3PM Solutions Comments Regarding Presidential Memorandum on “Combating Trafficking in Counterfeit and Pirated Goods” (Docket # 190703544-9544-01)

Dear Director Comstock:

3PM Solutions (3PM) would like to thank you for your engagement on the issue of trafficking in counterfeit and pirated goods through online third-party marketplaces. We appreciate the opportunity to submit comments and provide recommendations for mitigating this problem.

3PM is a Chicago-based technology and data company that is focused on marketplace websites like Amazon, eBay, Walmart and many others. Founded in 2013, 3PM took a holistic data approach to identifying counterfeits being sold on marketplaces by collecting data across sellers, listings and customer experience. The 3PM team consists of PhDs and recognized experts in the fields of databases, machine learning, and eCommerce; including an ex-Amazon third-party marketplace manager.

Trafficking in counterfeit and pirated goods is a problem that 3PM is uniquely positioned to scope and solve. Our proprietary technology enables us to continuously collect, organize, transform, and analyze billions of data points from online third-party marketplaces and elsewhere, and, in turn, generate high confidence predictions as to what products are counterfeit and who is selling them.

These capabilities are important because, part of the counterfeit problem is a matter of scoping. While groups like the Organisation for Economic Co-operation and Development have estimated the global financial impact of counterfeit goods, more precise estimates are needed to truly inform prevention, detection, and enforcement efforts. Online marketplaces have compounded the scoping problem by their lack of transparency and, in some cases, deliberate understatements as to the extent of the counterfeit problem on their marketplace.

Consider, for instance, that Amazon has stated publicly that only a “small number of bad actors” get through its automated protections. We find such statements to be misleading, based the following data points that 3PM has collected across industries:

- **Apparel:** In March 2018, Amazon and Vera Bradley jointly a complaint in the US District Court in the Western District of Washington against multiple defendants for alleged selling counterfeit Vera Bradley products on the Amazon marketplace. Vera Bradley is also one of the members of

Amazon’s “Project Zero,” which supposedly empowers brands to drive the number of counterfeit goods on Amazon to zero. Despite legal proceedings and Amazon’s latest anti-counterfeiting program, 3PM estimates that there are 1k+ counterfeit listings still on Amazon today.

- **Baby Food:** On Amazon, countless third-party sellers offer baby formula and baby food products, and many of these third-party sellers are domiciled outside of the United States, raising the question of whether the products they are selling have been approved the Food and Drug Administration or meet manufacturing standards.
- **Electronics:** In June 2019, Amazon and Nite Ize jointly a complaint in the US District Court in the Western District of Washington against multiple defendants for alleged selling counterfeit Nite Ize products on the Amazon marketplace. Similar to what we observed with Vera Bradley, despite this lawsuit, counterfeit Nite Ize products still exist on Amazon.
- **Media and Publishing:** In the Media and Publishing industries, which generally don’t rely on third-party distributors, we have identified over 200k third-party sellers of pirated books and media content.

The following sections reflect 3PM’s input to the questions that appeared in the Federal Register:

1. How are your interests affected by counterfeit or pirated goods imported through online third-party marketplaces and other third-party intermediaries as those terms are defined in the Presidential Memorandum? (Specific examples and/or data would be helpful, including on the origins of counterfeit and pirated goods and the types of counterfeit and pirated goods that are trafficked. Information that is not publicly available can be submitted as “business confidential” in accordance with the instructions in the ADDRESSES section).

3PM has technology that enables us to collect, organize, transform, and analyze marketplace and other eCommerce data. We serve brands and other intellectual property (IP) rights holders that dedicate substantial time and financial resources toward monitoring use and misuse of their IP on online third-party marketplaces. We estimate that our clients spend, on average, 80% less time policing their IP on online marketplaces through the use of our products.

The exponential growth of online marketplaces over the last decade has made IP protection an increasingly burdensome, and nearly untenable, function for many of our clients. While our products help our clients to monitor the use of their IP on online marketplaces, and automate the reporting of any violations to online marketplace operators, we find that online marketplace operators do not always (properly) action the IP violations reported by our clients. This adversely affects 3PM’s brand.

2. What factors contribute to trafficking in counterfeit and pirated goods through online third-party marketplaces or other third-party intermediaries, and what market incentives and distortions may contribute to the use of online third-party marketplaces and other third-party intermediaries to traffic in counterfeit and pirated goods?

Online marketplaces are attractive targets for counterfeiters because 1) the marketplace business model benefits from limited oversight, 2) counterfeiters have direct access to consumers, and 3)

counterfeiters are able to easily arbitrage consumers' trust in marketplaces. Furthermore, U.S. courts have currently sided with the online marketplaces and have not found marketplaces liable for facilitating the sale of counterfeit products; therefore, it may not be in their best interest to invest time and capital into this problem.

The above incentives for counterfeiters to target online marketplaces are closely linked to the market distortions that allow counterfeiters to operate effectively (and offer with impunity). Notably:

Seller Anonymity. While online marketplaces purport to vet third-party sellers and collect identifying information, countless examples have merged that indicate that online marketplaces often know very little about their third-party sellers.¹ Additionally, consumers have little information about third-party sellers beyond a storefront name and, in some cases, a general location of operation and brief description of the business. This is not nearly enough information to give consumers visibility into with whom they are conducting business.

Low Barriers to Entry. Online marketplaces have made it easier than ever for individuals or small/medium businesses to open new third-party seller accounts, and to create product listings. The low barriers to entry to create a third-party seller account, coupled with continuous improvements by marketplaces to remove "friction" from the selling process, aid counterfeiters in rapidly scaling up their illicit activities.

Imperfect Detection. Online marketplaces tout their investments in counterfeit detection technologies but, again, evidence exists demonstrating that such detection technologies have incomplete coverage and/or are inaccurate in identifying counterfeit goods.

Little or No Consequences. Counterfeiters exploit the fact that, in most cases, the maximum downside they face is expulsion from a particular online marketplace and withholding of their illicit funds. It is rare for online marketplaces to be able to recover funds that have already been disbursed to offshore bank accounts or take legal action against counterfeiters.

3. Are there effective technologies, the use of which—by the private sector and/or law enforcement agencies—could substantially reduce the sale and importation of counterfeit and pirated goods through online third-party marketplaces and/or enable more effective law enforcement regarding the trafficking in such goods? Please reference and provide copies of any available studies that demonstrate the efficacy of such technologies, or any available data that may be used to do so.

Reducing counterfeits on online marketplaces will require advancements in technologies for both the physical *and* digital realms.

¹ See <https://3pm.ai/wp/2019/07/21/how-serious-is-amazons-counterfeit-problem-3-things-to-take-away-from-its-latest-lawsuit/> for more detail.

3PM has extensive experience building, using, and deploying *databases, image recognition, machine learning, natural language processing, neural networks and other forms of artificial intelligence* to detect counterfeits at scale.²

These digital capabilities matter for two reasons. First, as some stakeholders to the counterfeit problem have previously noted, they do not have the resources to look, nor enforce, everywhere. We do. In fact, we were purpose-built to detect counterfeit across all web properties and we deploy the aforementioned technologies to not only automate detection, but also to improve detection accuracy over time. Second, while certain marketplace operators are deploying the same technologies to detect potential counterfeit goods and prevent them from ever being listed, these marketplace operators are only drawing on their own, much smaller, data pool. While this can be effective in reducing counterfeit at the *local* level (i.e., that particular marketplace), it simply pushes the counterfeit elsewhere. 3PM takes a *global* approach, both in the data we collect and the recommendations that our products surface to our clients, so that reporting counterfeit on, for example, Amazon, doesn't simply push that counterfeit listing to Walmart.

4. To what degree can expanded collaboration and information sharing among online third-party marketplaces, other third-party intermediaries, intellectual property rights holders, other private-sector stakeholders and/or U.S. law enforcement organizations substantially reduce trafficking in counterfeit and pirated goods and/or enable more effective law enforcement regarding the trafficking in such goods?

We believe that expanded collaboration is both a necessary and sufficient precondition for reducing trafficking in counterfeit goods. As previously stated, local actions by individual online marketplaces, IP rights holders, and other stakeholders simply push counterfeit goods elsewhere. Trafficking in counterfeit goods is a global problem that requires coordinated action by multiple stakeholders. This sentiment has been echoed by many stakeholders already, so we would like to propose the following specific ways that stakeholders can collaborate and share information.

Central Seller Registry. Improved third-party seller vetting and tighter “Know Your Customer” controls are common refrains among stakeholders and, while we agree with such recommendations, we note that they need to be done centrally and consistently in order to have any effect. We propose a central registry for anyone selling online (ideally, managed by a highly secure, disinterested party or industry group) that would not only physically and digitally verify a seller’s identity upfront, but also continuously monitor the seller’s digital activity for counterfeit risk signals. 3PM has already created a central seller registry that could be deployed for this purpose; or, alternatively, we believe that FINRA's Central Registration Depository could be a model for this.

Shared Risk Database. As some stakeholders have noted, there are disparate, and often confusing, mechanisms for consumers to report counterfeit goods or Bad Actors to online marketplaces. In addition, as previously stated, combating counterfeit goods or Bad Actors on one marketplace simply pushes them to another marketplace. For this reason, it is critical that an

² See our Google Cloud Case Study (<https://cloud.google.com/customers/3pm/>) for an overview of how we have been deploying advanced technologies to detect counterfeit goods on online marketplaces at scale.

individual marketplace’s investigations and/or actions vis-à-vis a product listing or third-party seller get propagated throughout the online marketplace ecosystem.

We propose a Shared Risk Database consisting of all third-party sellers and all third-party product listings, from all online marketplaces. The Shared Risk Database could be used by online marketplaces to supplement their own internal third-party seller information or get early signals around high risk products or sellers; or it could be used by the Federal government to get greater visibility into the volume of counterfeit goods being sold on online marketplaces. It would include a counterfeit reporting service or portal that would both simplify/standardize consumer counterfeit reporting as well as disseminate relevant information on the seller(s)/product(s) to all online marketplaces so that the unaffected marketplaces could take preventative measures.

5. Are there Federal agency data collection or standardization practices, or practices involving provision of data to parties, that could promote more effective detection, interdiction, investigation or prosecution of underlying violations of U.S. customs laws and of intellectual property rights?

While we believe that Federal agencies can play a role in fighting counterfeit goods, we also believe that certain of the competencies required for the fight are outside the Federal government’s expertise or would be prohibitively expensive (in both time and money) to develop and, in turn, would be better left to a private sector partner. For example, 3PM has spent the last six years developing technology to collect data from marketplaces and other sources at scale. If a Federal agency were to attempt to develop similar technology, it would cost millions of taxpayer dollars and likely take several years, which is time that we don’t have in the fight against counterfeit.

We believe that the best roles for Federal agencies to play in the fight against counterfeit goods are in the area of consumer awareness and education as to the risks of doing business with certain third-party sellers as well as the risk of purchasing certain products. We propose that the Federal government maintain a “notorious third-party seller” list, fed by information from the different online marketplaces. We also propose that the Federal government publish data collected from online marketplaces regarding counterfeiting “hot spots” so that consumers can more accurately assess the risk of purchasing certain brands or product types, and so that the efforts that online marketplaces are making to curb trafficking in counterfeit goods can be audited.

6. What existing policies, procedures or best practices of online third-party marketplaces, other third-party intermediaries, intellectual property rights holders, and/or other private-sector stakeholders have been effective in curbing the importation and sale of counterfeit and pirated goods, including those conveyed through online third-party marketplaces?

Based on 3PM’s experience working with online marketplaces, those that have engaged with external stakeholders have seen success in reducing the volume of counterfeit goods. This external engagement takes two forms: 1) Empowering IP rights holders to promptly take action against any potentially counterfeit listings and 2) Leveraging the expertise of third-party software development companies to supplement internal detection and investigation tools and resources.

As an example of good collaboration between private sector stakeholders and online marketplaces, we are currently working with a major online marketplace and deploying our technology to identify potential counterfeit goods that slipped through the marketplace’s internal detection systems. We are connected to the marketplace via application programming interface (API) and empowered to directly remove potential counterfeit goods. Our experience is that counterfeiters are sophisticated and clever, and, no matter how “advanced” an online marketplace’s detection systems claim to be, there will always be gaps. In light of this truism, our view is that, the more eyes on a marketplace, the better.

As an example of bad collaboration, from 2014 to 2017, we worked on and off with Amazon. After building a technology platform to detect counterfeit that showed promising early results, we anticipated that Amazon would welcome our contributions and, in turn, provide us access to their API. Not only did they not provide access to their API, but they restricted our activities via their Terms of Service, did not provide any transparency, and only inconsistently acted on the risk signals that we identified.

7. What additional policies, procedures or best practices of online third-party marketplaces, other third-party intermediaries, intellectual property rights holders, and/or other private-sector stakeholders can be effective in curbing the importation and sale of counterfeit and pirated goods, including those conveyed through online third-party marketplaces? What would it cost for industry to adopt such practices?

There is general consensus among stakeholders as to the need for better verification of third-party sellers on online marketplaces. We agree with this recommendation and propose the that any verification system consists of the following components:

- a) Financial disclosures that can be corroborated by third parties (e.g., bank statements)
- b) Physical location information that can be supported by government records or trusted third parties
- c) Digital certificates that match a third-party seller to particular devices and servers

We note that such verifications should not only be performed upfront, but on a recurring basis (e.g., through the Shared Risk Database). Continuous, or random, identity checks should be performed to ensure that a Bad Actor hasn’t co-opted the identify of an otherwise known/verified third-party seller.

3PM believes the cost to create and maintain both a Central Seller Registry and Shared Risk Database could easily be paid for by way of a nominal “per order tax” borne by online marketplaces.

8. What policy remedies, including administrative, regulatory, or legislative changes by the Federal Government (including enhanced enforcement actions) could substantially reduce the trafficking in counterfeit and pirated goods and/or promote more effective law enforcement regarding the trafficking



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in such goods? Please reference any available analyses that shed light on the efficacy and potential impacts of such proposed remedies.

Online marketplaces are currently shielded from legal liability arising from the actions of third-party sellers on their marketplaces. While online marketplaces do make substantial investments to prevent fraudulent and criminal activity in their virtual store, these investments stem from commercial interests, not legal ones. An online marketplace is incentivized to invest up to the point needed to maintain customer trust, but no further. Binding legal obligations and financial consequences for failure to exercise due care in preventing the online sale of counterfeit goods are critical to creating incentives for marketplaces to step up their investments.

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We look forward to continuing to work with the Department of Commerce Department and other federal agencies toward developing an anti-counterfeiting regulatory framework suited to protecting consumers and IP rights holders in the 21st century. If we can provide additional input, please feel free to contact us.

Sincerely,

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About the Contributors

Rob Dunkel

Rob is a leader, entrepreneur, and visionary that looks for problems that affect a large number of people. The growth of online counterfeits is large and getting larger. As the founder and CEO of 3PM, he focuses on building a better eCommerce future. He is a leading eCommerce expert that is trusted by brands, sellers, and marketplace operators. Prior to 3PM, Rob was a co-founder and senior trader of an algorithmic trading group. Rob started in eCommerce and international business in the early 2000s when he founded a gaming company that manufactured in China and distributed globally. Rob began his career working for a three-person investment manager that was acquired by Neuberger Berman. He received his Bachelor of Arts from Spring Hill College.

Jon Derkits

Jon is responsible for setting 3PM's product vision, developing strategic partnerships, and overseeing 3PM's customer success team. Prior to joining 3PM, Jon served as the third-party marketplace leader for Consumer Electronics on Amazon.ca. In that capacity, he was in charge of category strategy, catalog quality, and third-party seller recruitment and account management. He also served as the Amazon.ca leader for customer trust and fraud prevention. Jon holds a Master's Degree in Quantitative Finance from the University of London, and Bachelor's Degrees in Economics and Business Administration from the University of North Carolina at Chapel Hill, where he graduated summa cum laude.