

December 22, 2020

Mr. Scott Glabe
Office of Strategy, Policy, and Plans
U.S. Department of Homeland Security
Washington, D.C. 20528

Dear Mr. Glabe:

The Alliance for Automotive Innovation (“Auto Innovators”) appreciates the continued efforts of the Administration to protect consumers, intellectual property rights holders, businesses, and workers by curtailing the trafficking of counterfeit goods on e-commerce platforms. The *Memorandum on Stopping Counterfeit Trafficking on E-Commerce Platforms Through Fines and Civil Penalties* (“Memorandum”) that was issued on October 13th is another important step towards achieving this goal. We welcome the work that is underway at the Department of Homeland Security (“Department”) to develop a legislative proposal to advance the *Memorandum* and offer these comments to the Department for its consideration.

Auto Innovators represents automakers who build 99 percent of all cars and light trucks sold in the U.S. Our members use cutting-edge innovation, constant creativity, and investments in research and development to bring the next generation of breakthrough automotive and mobility technologies to market. Automakers spent more than \$125 billion globally on R&D in 2018 alone, and the Center for Automotive Research estimates that nearly 5% of all patents in the U.S. are awarded to auto companies each year.

Many of these patents are for innovative designs that have made the cars and trucks available to American drivers the most sophisticated, safest, and energy-efficient vehicles ever produced. It is critically important that we protect these innovations from the growing threat of counterfeit parts that are produced cheaply and can flood the U.S. market. As the 2019 U.S. Joint Strategic Plan on Intellectual Property Enforcement indicates, counterfeit auto parts – which can include vehicle components such as wheels, headlights, bumpers, brake pads, windshields and even airbags – are not made to the specifications of the original manufacturer, are not subject to the same quality control tests as the original manufacturer’s parts, and often fail to safely and adequately perform. These counterfeit parts give rise to serious public safety concerns with potentially fatal consequences. Even counterfeit parts that purport to meet guidelines or pass quality control tests are problematic if they infringe the valid intellectual property (i.e., brand names, design patents, and/or proprietary tooling) of the automotive innovations and mislead consumers that the products they are buying come from and are approved by the original manufacturer. These counterfeit parts do not incorporate research and development costs that were incurred by the auto companies, creating an unfair competitive advantage in the marketplace.

In the automotive space, online parts procurement platforms used by collision repair shops and insurance companies for sourcing replacement parts are also of increasing concern. These parts platforms often utilize nebulous terms such as “OE Surplus,” “Optional OEM,” or “OE Discount” to refer to OEM-branded automotive parts that may not have been sourced directly from the U.S. authorized OEM and, therefore, may include counterfeit parts or parts designed for non-U.S. markets.

Auto Innovators is committed to addressing this growing problem. In cooperation with the Automotive Anti-Counterfeiting Council (A2C2), an organization that is singularly focused on eliminating counterfeit automotive components that could harm U.S. consumers and their ability to rely on the reputation of the original manufacturers’ brands, our members continue to identify and implement proactive measures to combat counterfeit automotive parts. We look forward to continued collaboration with stakeholders, including the Department, to stop the sale of counterfeit products on e-commerce platforms. To that end, Auto Innovators offers the following policy recommendations for potential incorporation into the Department’s legislative proposal.

I. Increase E-Commerce Platform Accountability and Responsibility

a. Improve Vetting of Sellers, Suppliers and Products

The vetting of sellers, suppliers, and products by e-commerce platforms should be strengthened. This could be accomplished by implementing more stringent requirements that obligate e-commerce platforms to validate supplier or seller credentials, product authenticity, and manufacturing sources. For example, prior to allowing a potential seller to create an account, the e-commerce platform should collect and verify through government identification and other documents the seller’s contact and banking information. This information could then be used to link, track, and remove sellers of counterfeit products from the platform when issues are identified.

In addition, many sellers of counterfeit items are located outside the United States and utilize e-commerce platforms or drop-shipper locations as the importer of record or ultimate consignee. In these cases, enforcement becomes exceedingly difficult. We suggest that e-commerce platforms be required to verify a legitimate importer of record. In cases where the platform is unable or unwilling to verify a legitimate importer of record, we suggest that the platform itself be held responsible as the importer of record.

b. Enhance Information Sharing with Stakeholders and Consumers

Actionable information about sellers of counterfeit products gathered by e-commerce platforms must consistently be shared in a timely manner with law enforcement, government agencies (e.g., Customs and Border Patrol, Federal Bureau of Investigations, National Intellectual Property Rights Coordination Center), consumers, brand owners, and other stakeholders. We suggest that accountability standards and requirements be developed and implemented for information sharing with stakeholders, including law enforcement and government agencies. We also suggest that e-commerce platforms be required to notify consumers who may have purchased health- and safety-related counterfeit items, inform them of the potential associated risks, and provide clear information on what they can or should do. This should include a requirement to investigate other products sold by the same seller and, if they are determined to be counterfeit, also notify purchasers of those items. At the same time, e-commerce platforms should be

required to supply verified identity and contact information for all sellers on each listing and provide manufacturing information (identity, location) of the seller's goods.

c. Require Active Policing

Many anti-counterfeit programs offered by e-commerce platforms are reactive and require brand owners and consumers to find and report counterfeit products back to the platform. E-commerce platforms should be required to exercise their own due diligence in limiting and mitigating the sale of counterfeit products on their platforms. To this end, we suggest that e-commerce platforms be required to actively police their own sites, both independently and through in-depth investigations upon notice from consumers or brand owners to eliminate counterfeit products and sellers from the marketplace. In addition, e-commerce platforms should be required to police their own platforms when they have been notified about counterfeit sellers that are present or have been present on other e-commerce platforms.

d. Foster Adoption of Industry Best Practices

E-commerce platforms differ in how they handle reports of counterfeit goods, including enforcement procedures. As a result, brand owners and consumers are forced to navigate and manage each e-commerce platform separately. To foster harmonization, we propose that e-commerce platforms be required or otherwise incentivized to implement industry best practices related to the enforcement of counterfeit goods.

e. Promote Consumer Awareness about the Dangers of Counterfeits

Consumers are often unaware of the extent to which they are exposed to counterfeit products, and the dangers these products may pose, when shopping on an e-commerce platform. The Department has previously noted that approximately 25% of Americans have unknowingly purchased one of these counterfeit goods. Currently, there is very little - if any - information on e-commerce platforms promoting consumer awareness about counterfeits or informing consumers about how they can report counterfeit items to the platform, the brand owner, or law enforcement. To address this, we propose that e-commerce platforms be required to provide meaningful and readily available information to consumers about the potential for counterfeit products on the platform and to implement a clear and straightforward way for consumers to report sellers of counterfeit products to those who can take proper action.

II. Enhance Penalties for Counterfeits

Certainly, as reflected in the focus of the *Memorandum*, penalties are one important path to reducing the manufacture, importation, distribution, and sale of counterfeit products. We support the *Memorandum's* direction to impose the maximum fines and civil penalties permitted by law on any e-commerce platform that directs, assists with, or is any way concerned in the manufacture, importation, and distribution into the United States of counterfeit goods. However, we suggest that the e-commerce platform, the actual seller of the good, and anyone else knowingly in the supply chain be subject to such penalties. We further suggest that vigorous and strict penalties be enacted and enforced for sellers who provide false or misleading information about products, for repeat sellers of counterfeit products (particularly as it relates to health and safety products), for manufacturers of counterfeit goods, and for

sellers who attempt to evade detection by utilizing varying or fictitious identifiers within and across platforms.

III. Expand CBP Seizure Authority to Cover Design Patents

Under current law, Customs and Border Protection (CBP) has the authority to detect and seize goods that infringe trademark, trade dress, and copyright, but does not have similar authority with respect to goods that infringe design patents. For design patents, CBP's authority is limited to enforcing infrequent exclusion orders issued by the U.S. International Trade Commission. Savvy counterfeiters are aware that they can openly infringe U.S design patents as long as they deploy a variety of techniques to evade seizure of infringing products at the border, such as by obscuring a trademark until after it passes through CBP inspection or shipping "logos" separately from the product. Once the parts make their way into the U.S., the trademark (often times an emblem or badge) is applied to create an indistinguishable counterfeit. To close this loophole, we propose that CBP's seizure authority be extended to include design patents.

Once again, we appreciate the Department's efforts in this important area and look forward to continued collaboration to combat counterfeit products on e-commerce platforms.

Sincerely,



Hilary M. Cain
Vice President
Technology, Innovation, & Mobility Policy

cc: Automotive Anti-Counterfeiting Council