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COVER NOTE

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signed by Mr Jordi AYET PUIGARNAU, Director

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Union

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AND THE COUNCIL on the functioning of the Memorandum of
Understanding on the Sale of Counterfeit Goods via the Internet

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**REPORT FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND
THE COUNCIL**

**on the functioning of the Memorandum of Understanding on the Sale of Counterfeit
Goods via the Internet**

(Text with EEA relevance)

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1. INTRODUCTION

This report evaluates the functioning of the Memorandum of Understanding on the Sale of Counterfeit Goods via the Internet (May 2011), hereinafter referred to as ‘the MoU’¹.

The sale of counterfeit goods over the internet is damaging and harmful to all legitimate stakeholders, including Internet Platforms and intellectual property Rights Owners and, most importantly, consumers. Online counterfeiting is **a dynamic phenomenon, which is constantly changing** and adapts to break into new business models. Illicit counterfeiting businesses are sophisticated; they react to anti-counterfeiting protection strategies.

The purpose of the MoU is to establish a code of practice in the fight against the sale of counterfeit goods over the internet and to enhance collaboration among its Signatories, so that they can effectively respond to this constant threat. There is collective recognition that **cooperation is much better than litigation**, which neither enhances market efficiency nor fosters consumer trust. The key aim is to instil trust in the market. The MoU promotes **trust in the online marketplace** by providing detailed measures against online offers of counterfeit goods as well as **enhanced protection for consumers** who unintentionally buy a fake.

The MoU covers leading e-commerce platforms as well as major brands in the field of fast-moving consumer goods, consumer electronics, fashion, luxury goods, sports goods, film, software, games and toys, all operating at both global and regional level².

During the assessment period³, Signatories met regularly. Summaries of these meetings have been published on the website of DG Internal Market and Services⁴.

This report analyses the progress, implementation and functioning of the MoU and takes stock of Signatories’ evaluation of its effectiveness in reducing the online sale of counterfeit goods within the EU. It is strictly limited to the MoU, and does not cover associated general policy issues.

It shows that the approach adopted by **the MoU works, but also highlights the need for Internet Platforms and Rights Owners to remain alert and vigilant**. The report concludes that the MoU should continue for another two years and that its membership should be extended. The Commission is considering further action to deal with the fight against counterfeiting more broadly and may propose an initiative later this year.

¹ As provided for under Article 41 of the MoU, http://ec.europa.eu/internal_market/iprenforcement/docs/memorandum_04052011_en.pdf.

² Signatories to the MoU are: the Adidas group, AIM (European Brands Association), the Allianz Deutscher Produzenten — Film & Fernsehen e.V, the Amer Sports group, the Anti-Counterfeiting Group (ACG), Amazon, the International Bureau of Societies Managing Recording and Mechanical Reproduction Rights (BIEM), Burberry, Business Action to Stop Counterfeiting and Piracy (BASCAP), eBay, the European Textile and Clothing Confederation (EURATEX), the Federation of Sports and Play Associations (FSPA), the Federazione Moda Italia, the Federation of the European Sporting Goods Industry (FESI), Gant AB, the Bundesverband der Schuhindustrie e.V., the Interactive Software Federation (ISFE), the International Video Federation (IVF), the Italian Association of Foreign Trade (AICE), Lacoste, the Lego group, the LVMH group, Mattel Inc, Microsoft, the MIH group, the Motion Picture Association (MPA) EMEA, Nike, Nokia, Price-Minister — Rakuten group, Procter & Gamble, Richemont, the Swedish Anti-Counterfeiting Group (SACG) and Unilever.

³ Article 40 of the MoU provides that the signature of the MoU (4 May 2011) will be followed by an assessment period of twelve months. While the initial assessment period had been fixed at twelve months, Signatories unanimously concluded to extend this period by an additional six months in order to allow for comprehensive testing of all the measures provided for in the MoU.

⁴ http://ec.europa.eu/internal_market/iprenforcement/stakeholders/index_en.htm.

2. THE MOU

2.1. A novel cooperative approach

In both its 2009 Communication on enhancing the enforcement of intellectual property rights in the internal market⁵ and its 2011 Communication on a single market for intellectual property rights⁶, the Commission highlighted the importance of voluntary and collaborative approaches by intellectual property Rights Owners and other stakeholders such as Internet Platforms, wholesalers, retailers and consumers as well as trade associations, to combat counterfeiting.

The 2009 Communication considered that **cooperation rather than litigation** should become the prevailing approach among stakeholders operating in a rapidly-evolving technological and commercial environment. **Stakeholder Dialogues** were proposed as a working method towards possible voluntary agreements, i.e. constructive dialogues focusing on concrete problems and workable and practical solutions that must be realistic, balanced, proportionate and fair for all concerned. Such a joint, inclusive and participative approach fits well with the Commission's Better Regulation agenda.

In the context of this MoU, the European Commission took on a novel function as facilitator of such Dialogues by providing administrative and logistic support and by safeguarding, where necessary, a fair balance among the different interests at stake, notably the legitimate rights and expectations of EU citizens.

The European Commission's facilitator role also ensures that such Stakeholders' Dialogues and possible subsequent agreements are transparent and fully compliant with the existing legal framework, scrupulously respecting fundamental rights and freedoms.

Both the European Parliament⁷ and the Council⁸ supported the Commission in this approach.

As a first example of the cooperative approach, the Commission launched a Stakeholders' Dialogue on the online sale of counterfeit goods, which resulted in a MoU involving 33 companies and trade associations, covering 39 different internet sites.

2.2. Scope and architecture of the MoU

Online trading offers unprecedented opportunities to businesses and consumers to buy and sell goods, nationally, across the internal borders of the internal market, and internationally. Within the internal market, the internet reduces cross-border barriers to trade.

Unfortunately, the internet has also become one of the major channels for counterfeits. Most e-commerce via Internet Platforms is completely legitimate. However, illicit or fraudulent commercial traders in counterfeits are also exploiting the advantages of e-commerce to offer counterfeit products directly to consumers. For example, Signatories point to a new generation of (small-scale) counterfeit sellers who acquire counterfeits cheaply from online sites or via more traditional distribution channels in modest quantities and subsequently offer

⁵ COM(2009) 467final of 11.9.2009: enhancing the enforcement of intellectual property rights in the internal market.

⁶ COM(2011) 287final of 24.5.2011: a single market for intellectual property rights — Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe.

⁷ European Parliament Resolution of 22 September 2010 on enforcement of intellectual property rights in the internal market;
<http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2010-0340>.

⁸ Council Resolution of 1 March 2010 on the enforcement of intellectual property rights in the internal market, OJ C56 of 6.3.2010, p. 1.

them for sale on internet sites. Neither the initial seller of the goods nor the counterfeit goods are necessarily located on EU territory. Legitimate internet platforms and rights owners offering services to sellers and buyers can thus fall victim to counterfeit dealers, to the detriment of consumers, Rights Owners, e-commerce service providers, the economy and society.

Prior to the MoU, Internet Platforms and Rights Owners were already taking action against online offers of counterfeit goods, but as a result of the Stakeholders' Dialogue starting up, a general awareness emerged that more could be achieved.

The MoU focuses on **disrupting and deterring the supply side of the counterfeit market**, i.e. it seeks to eliminate the online offer of counterfeit goods as quickly as possible. It provides for proportionate, dissuasive action against those who repeatedly try to sell counterfeits. In addition, it seeks to achieve better protection for consumers who unintentionally buy a fake, or for legitimate sellers of goods who may feel they are unduly restricted/delayed in presenting a product to sell online.

The MoU promotes a strategy based on three lines of defence. These seek to ensure that illicit offers do not appear online; and that if they do, they are taken down as quickly as possible, and, in any event, rapidly enough to prevent further transactions from taking place. The measures all operate simultaneously and in real-time.

First, it is very important that customers, i.e. sellers and buyers, **understand the counterfeiting phenomenon, its inherent risks for consumers and the detrimental effects on Rights Owners**. Customers can be active parties in the fight against counterfeiting. To this end, Internet Platforms are committed to making appropriate **information available to potential sellers and buyers**, in an easily accessible way and, where appropriate, in cooperation with the Rights Owners. They should explain that offering counterfeit goods is illegal, and suggest precautions that buyers should take to avoid buying them. Well-informed sellers on Internet Platforms should make a commitment not to offer such goods. Well-informed consumers should be aware of tools and procedures to follow if they have bought counterfeit goods. The MoU is fully in line with the Commission's recent Consumer Agenda, which encourages intermediaries and traders to move beyond mere compliance with legislation and to develop self-regulatory measures to enhance consumer protection⁹.

The **second line of defence** involves '**Pro-Active and Preventive Measures**' (PPMs) as a timely and adequate response to attempts to sell counterfeits, either before the offer being made available to the public or shortly after. By taking such measures, Rights Owners and Internet Platforms try to reduce online offers of fake goods. Such measures may be technical and/or procedural, and often require human intervention. They are often specific to the respective business models and the organisation of the Rights Owners and/or the Internet Platforms. One example of a PPM is the vetting of sellers prior to allowing them to sell on an Internet Platform and, in certain instances, the continual assessment of their performance. Effective PPMs are often sophisticated, requiring substantial resources and effective cooperation between rights owners and internet platforms. **PPMs seek to ensure that offers of counterfeit goods do not appear online.**

Third, despite customer information and PPMs, offers of counterfeit goods may still become available to the public on an Internet Platform. In such instances, rights owners and consumers can notify the Internet Platform concerned of the existence of such offers. This allows the Platform to take appropriate action, including taking down the offer from the site

⁹ Communication from the Commission 'A European Consumer Agenda. Boosting confidence and growth' COM(2012)225 final.

concerned. **Notice and Take Down procedures (NTD) seek to offer a simple, fair and expeditious procedure to remove online offers of counterfeit goods.**

The MoU complements these measures by providing better **consumer protection**, including the possibility of receiving a replacement product or a refund under certain conditions. The MoU also includes **dissuasive actions against repeat infringers**. The Signatories of the MoU have committed themselves to cooperate in the detection of repeat infringers. The Internet Platforms undertake to implement and enforce deterrents according to their internal guidelines. Repeat infringer policies have to be objective and proportionate and take full account of the circumstances. Information-sharing on repeat infringers under the MoU fully respects data protection laws.

Consumers should use all available information when purchasing on-line to avoid buying counterfeits, but may nevertheless suffer damage. They may have been misled and unintentionally bought counterfeit goods, resulting in economic or other harm. The MoU includes a minimum set of consumer protection provisions. Compensation for economic or other harm depends on the policies of the individual Signatories concerned. A consumer may also have made an offer to sell an alleged counterfeit good which was taken down, and may have suffered harm if such a take-down was proven to be unjustified.

Finally, the MoU ensures that, during the assessment period, Signatories do **not initiate new litigation against each other** concerning matters covered by the MoU. This moratorium on litigation is an important provision that emphasises the mutual commitment of Signatories to work together in good faith.

2.3. Self-regulation on the basis of the MoU

Voluntary cooperation by a large number of stakeholders with different interests and business models is often difficult to achieve. It takes time to build the trust necessary for such cooperation to work.

The process towards signing of the MoU as well as the signing itself have proven to be essential steps towards building a climate of mutual trust and confidence among Signatories. The structured dialogue enabled stakeholders to gain a better understanding of their respective concerns as well as technical, organisational and commercial limitations. **Mutual trust and confidence is the unifying factor**. Without it, voluntary cooperation is doomed to fail.

Other critical factors for success have been:

- A clear incentive for each Signatory resulting from the voluntary agreement;
- Safeguards in the agreement to protect the essential interests of each Signatory, to cater for different business models and commercial policies, and to ensure legal certainty to overcome resistance within the respective organisations;
- A clearly-focused voluntary agreement including a well-defined objective, combined with clearly formulated, realistic obligations, proportionately allocated to parties (smart enforcement);
- A high level of consent and commitment within the companies signing up to the agreement;
- Sufficient built-in flexibility to allow for adaptations due to changing circumstances, without having to renegotiate the agreement.

In addition, the **involvement of the European Commission’s ‘facilitating’ services** has structured and driven the dialogues and negotiations, as well as encouraging stakeholders to overcome obstacles. Political support from national authorities and parliaments may also be instrumental.

External transparency increases credibility and ensures accountability and responsibility towards stakeholders, national authorities and Parliaments as well as to society as a whole. It may also encourage new stakeholders to sign up to the voluntary agreement and the best practice it promotes.

3. THE FUNCTIONING AND IMPACT OF THE MOU

3.1. Making the MoU work

The MoU is limited to Signatories that provide services and goods in the EU/EEA. To clarify the scope of application of the MoU, Signatories identified the web sites and the brands covered by it (see Annex).

A list of **contact points** was drawn up to facilitate communication between the Signatories on policy matters related to the MoU as well as to enable direct operational contacts between the brand protection staff of Rights Owners in different Member States and the sites operated by the Internet Platforms.

The availability of this basic information in a readily available and regularly updated form has helped Signatories to apply the MoU under operational circumstances. It also made the local organisations of the Signatories aware of the MoU and its potential and capabilities.

Internet Platforms and Rights Owners took part in **bilateral meetings** to establish contact, exchange information and discuss operational issues. These meetings, combined with consistent use of the respective rights protection programmes of the Internet Platforms, enabled Signatories to pool knowledge, identify trends and, as a result, expedite take-down of suspicious offers, thus enhancing prevention.

In general, the parties to the MoU have signalled that it has significantly **improved communication** among Signatories, which has facilitated collaboration. In specific cases, there have been concerted actions, such as rapid reactions to cases of sudden increases in specific counterfeits.

3.2. Notice and Take Down procedures — a cornerstone of the MoU

All Signatories hold that notice and take-down procedures (NTD) are indispensable measures in the fight against the online sale of counterfeits. In the context of this MoU, NTD rules provide for:

- (i) a mechanism to remove individual offers of alleged counterfeit items from the sites of the Internet Platforms and
- (ii) a mechanism to notify Internet Platforms about counterfeit selling users (seller-based notifications).

This is the principal tool to apply when allegedly illicit offers have become available online. Further, Signatories noted that the MoU has shown it to be useful; NTD rules should not be too prescriptive and must include certain mechanisms to deal with abuses of the system. Companies have come up with their own tailor-made methods to address infringements on their online sites.

Signatories reported that Internet Platforms receive thousands of NTD requests per year, based on all kinds of grounds. In the context of the MoU, in line with the EU *acquis*¹⁰, the purpose of NTD procedures is to remove offers of alleged counterfeit goods from the sites of the Internet Platforms in a timely, efficient and effective way.

All Internet Platforms already had some NTD mechanism in place prior to the MoU, to enable/ allow Rights Owners and other persons and organisations affected to notify alleged counterfeits. While some were easy to find on the web sites, many other NTD systems were considered not to be functioning satisfactorily. Moreover, not all Rights Owners were even using the available NTD. Notifications were incomplete, not specific enough, difficult to process, sometimes targeting individual items, but also whole catalogues of products. Follow-up of notices varied across the Internet Platforms and were not always considered satisfactory by the notifying Rights Owners. Offers were not taken down at all, took too long to be taken down or re-emerged quickly after take down.

Since the introduction of the MoU, some Internet Platforms have reported that it takes them up to 24 hours to remove an online offer (also known as a listing), but occasionally up to 48 hours; for others, it takes 2 – 5 hours. Others say contested offers are removed the same day or early the following day. However, Rights Owners have reported differences in processing speed by the same Internet Platform across different Member States.

Further, the Internet Platforms have pointed out that they have recorded a wide variation in the average monthly number of notifications of counterfeit offers (ranging between one and several hundred) by given Rights Owners. Since the MoU entered into force, they very seldom reject removal requests and seldom need to ask for additional information to process a notification: requests for additional information usually relate to notifications from Rights Owners who are new to the NTD process. Some Rights Owners felt that unnecessary detail was required in certain cases. Once an allegedly illicit offer has been taken off-line, the Internet Platform *inter alia* informs the seller concerned, including the reasons for the take down.

Notifications about counterfeit selling users — as opposed to notifications about specific offers — have been relatively rare. Generally, seller-based notifications are seen as cumbersome, as they almost always require additional offer-by-offer investigation before a decision can be taken. As repeat infringers (identified bad faith sellers) will be sanctioned in any event (following offer-based notifications), seller-based notifications are not seen as offering significant benefits. By contrast, a Rights Owner reported that while the cooperation in NTD processes is working efficiently for item-based NTD, the extent to which Internet Platforms are taking measures in response to notifications on sellers involved in the sale of counterfeit goods is unclear.

The Terms and Conditions used by the various Internet Platforms clearly prohibit the sale of items that infringe third party rights. They also make it clear that infringing items are subject to deletion. Some Internet Platforms provide Rights Owners with forms to use for notifications, though these are basic and primarily designed for Rights Owners who are not members of the MoU. Although the actual processing of notices is an internal process, the larger Internet Platforms offer online explanations about the NTD procedure. These serve as a point of reference, especially for non-MoU Rights Owners. These explanations may also be part of the specific Internet Platform's rights protection programme or site's 'help' section.

Since the entry into force of the MoU, all Signatories have reported improvements in all of these NTD fields. Several Internet Platforms have reviewed and often streamlined their NTD

¹⁰ Directive 2000/31/EC, Chapter II, section 4; OJ L178 of 17.7.2000, p. 1.

tools and procedures. One Internet Platform re-engineered its NTD process and implemented a common procedure on all its European sites¹¹.

Rights Owners reported that by and large NTD is now working well on the sites of the Internet Platforms covered by the MoU¹². However, for Rights Owners, maintaining a monitoring programme is often expensive.

3.3. Pro-active and Preventive Measures — a critical measure for effectively fighting counterfeiting

Pro-active and Preventive Measures (PPMs) are the measures and procedures enabling Internet Platforms and Rights Owners to prevent illicit offers from becoming available online or limiting that availability to only a short period. These measures and procedures varied not only among Signatories, but sometimes even between the different sites of a particular Internet Platform.

According to the Signatories, **reactive NTD on its own appears to be insufficient** to address the issue of counterfeit sales on online marketplaces. Adequate proactive safeguards to prevent counterfeit goods from being offered for sale on online marketplaces are equally important in the fight against online counterfeiting.

PPMs are strongly linked to the individual business models and practices of the Internet Platforms and Rights Owners concerned. They are one of the ways Internet Platforms can differentiate themselves from their competitors on the market. They may significantly influence customer satisfaction and consumer trust in the offers available on a particular site. Several Internet Platforms are relatively transparent about their PPMs. Internet Platforms also indicated that, to remain effective, PPMs often have to be sophisticated and able to adapt rapidly to changing circumstances. Therefore, PPMs are often expensive to implement. For the Rights Owners, PPMs are part of their brand protection measures and are closely related to their brand protection strategies and operations.

All Signatories repeatedly emphasised that the **sharing of information between Rights Owners and Internet Platforms is critical to the effectiveness of PPMs**. Several Signatories noticed that the efficiency of PPMs seemed to fluctuate over time and over the different sites of the Internet Platforms, which is not surprising, given the agile and adaptive nature of those who try to sell counterfeits. It shows that Signatories have to stay permanently alert and highlights the need for continued cooperation.

One signatory reported that due to the signing of the MoU, investment in PPMs both increased and led to tangible results. One Internet Platform pointed out that it now voluntarily and proactively removes more potentially problematic listings than are removed reactively¹³.

PPMs range from technical measures, such as the ability for an Internet Platform to detect the use of certain keywords or on offers of pre-release content, to information-sharing with Internet Platforms on counterfeit product indicators and the modus operandi of counterfeit

¹¹ This common procedure enabled this Internet Platform to bring additional sites under the umbrella of the MoU.

¹² This conclusion is exclusively valid for NTD in the context of this MoU and is without prejudice to the functioning of NTD procedures for other fields of illegal content or for non-signatories of the MoU. In particular, it is without prejudice to the conclusions of the Commission in the context of the initiative on notice-and-action procedures (http://ec.europa.eu/internal_market/e-commerce/notice-and-action/index_en.htm).

¹³ Q3 2011: 65/35, i.e. 65 % of suspicious listings related to MoU Signatory brands removed proactively versus 35 % removed reactively.
Q3 2012: 80/20, i.e. 80 % of suspicious listings relating to MoU Signatory brands removed proactively versus 20 % removed reactively.

sellers. Some Internet Platforms reported that they use certain detection technologies and pre-emptive takedowns.

By taking proactive measures to prevent the sale of counterfeit goods, some Signatories were concerned that they could be held to have actual knowledge of the illegal activities that would put them outside the liability protection regime of the E-commerce Directive.

3.4. Repeat Infringers

Pursuant to paragraph 35 of the MoU, Internet Platforms are to take notifications on repeat infringers into consideration and implement and enforce deterrent repeat infringer policies.

The repeat infringers' policies of the various Internet Platforms generally envisage dissuasive action (for example, a temporary account suspension) targeted against the seller (and not simply the relevant offer) after the second infringement. More severe dissuasive action can be applied if a seller is found to be offering counterfeit goods again. All Internet Platforms have measures in place to prevent re-registration of banned sellers.

While dissuasive action is important and even essential, the Internet Platforms maintain that there are ways to remedy repeat infringements other than just the suspension of a user account, such as, for example, education, safety measures, disincentives, or restrictions.

The dissuasive action policy is outlined by the Internet Platform's terms and conditions on the website concerned. Some Internet Platforms additionally summarise the scheme in other sections of their websites, such as in the rights protection programme or 'help' sections.

Internet Platforms do not exercise their dissuasive action policy in an automatic fashion. Individual corrections are sometimes necessary and undertaken as seen fit. A seller obviously acting in bad faith may be banned right away, while a repeat infringer whose first low-scale infringement occurred long ago may be warned again before the account is suspended. Some Internet Platforms handle sanctions purely on a case-by-case basis, albeit with similar results and efficiency. **When it comes to deciding what dissuasive action to apply, several aspects are taken into consideration**, such as the severity of the policy violation, the number of alleged infringements, repeat infringement, period of time since prior infringement, seller feedback, language that indicates clear intent, scale of legitimate business as well as other more suspicious behaviour, such as efforts to avoid detection. **As a result, it has not been possible to adopt a single uniform definition of dissuasive action.**

Communication between the Rights Owners and the Internet Platforms is again key in implementing effective repeat infringer policies. Internet Platforms need information from the Rights Owners concerned; otherwise, their repeat infringer policies are less effective. Several Internet Platforms have developed specialised reporting tools and made these available to Rights Owners to facilitate the mutual exchange of information, including feedback to the notifying Rights Owner, while respecting the legitimate interest of the persons involved.

Dissuasive action has an immediate impact on sellers, be they justified or not: loss of sales opportunity for the particular item, time investment in mandatory training or additional security measures; loss of special trust status, leading to lowered consumer trust and, thus, to lower average selling prices; sales restrictions limiting business could lead to surplus stocks, lost investments, economic losses; permanent suspensions might put whole businesses (and therefore their employees and business partners) at risk. Consequently, **Internet Platforms apply dissuasive action reluctantly and with due care.**

Repeat infringer policies are very important for Rights Owners because repeat infringers are those that harm them most, particularly if they are able, by deceptive practices, to continue to trade in counterfeits. **Rights Owners continue to claim that there are repeat infringers**

that have been selling counterfeits on different Internet Platforms under a variety of names for quite some time. Rights Owners do notify the Internet Platforms of repeat infringers on the basis of their own investigations, including the re-appearance of offers previously taken down. However, it is not always possible for Rights Owners to detect, and subsequently identify, repeat infringers, for example, because the site concerned does not provide search facilities on sellers' data.

Internet Platforms are considered to be taking more vigorous action than before against repeat infringers, either on their own initiative or at the instigation of the Rights Owner(s) concerned, but they apply their own judgment and take account of all the specific circumstances of the case¹⁴. Therefore, not all notifications of repeat infringers are followed by an account suspension or termination. Since the entry into force of the MoU, Internet Platforms have become more transparent towards Rights Owners on their dissuasive actions policy and its application. On a bilateral basis, some Internet Platforms and Rights Owners exchange information on individual cases, but this does not seem to be the general practice.

All Internet Platforms have introduced technical and procedural measures to detect repeat infringers and to prevent banned repeat infringers from re-registering on their sites. Such efforts can only be successful to a certain extent due to the covert tactics of bad-faith sellers. Only more mutual information exchange and direct cooperation between Internet Platforms and Rights Owners can improve the situation.

Signatories are investing in tools and practices to combat repeat infringers. Over the last year, these joint efforts are progressively showing better results. In some instances, remarkable successes have been achieved¹⁵. Nevertheless, more effort to clarify practical implementation may be useful to improve operational performance of measures against repeat infringers.

3.5. Cooperation, including sharing of information

Cooperation and sharing of information is crucial to the effectiveness of PPMs. **All Internet Platforms have adopted and published their IPR policy on their respective sites.** All of them clearly communicate the details of their policies. These policies are also clearly reflected in the Terms and Conditions for the use of the sites concerned, as well in the contracts with sellers. All Internet Platforms enforce their IPR policy.

Several Internet Platforms have developed special rights protection cooperation programmes, which are often the basis for enhanced cooperation between the Internet Platform concerned and brand owners in general. Participation in these programmes by Rights Owners varies per site. **Since the entry into force of the MoU, several Rights Owners have joined these programmes, depending on their specific needs**¹⁶.

The MoU does not prevent Signatories from exchanging other or more detailed information, for example, on a bilateral basis and subject to additional conditions. Some Internet Platforms

¹⁴ An Internet Platform indicated in its Annual Report on its fight against counterfeiting that in 2011 it closed 1715 accounts, which in terms of numbers is an increase of 14% compared to 2010. Another Internet Platform closed or severely restricted several thousand sellers of goods of MoU Signatories during the third Quarter of 2012, also suggesting an increase compared to the same period the year before.

¹⁵ Several Rights Owners found a decrease of repeat infringers on a number of Internet Platforms. One Rights Owner even indicated that on a major Internet Platform the number of repeat infringers of its brands has been reduced by 50%.

¹⁶ For one Internet Platform, all Rights Owners have now joined the rights protection programme. For another Internet Platform, several Rights Owners seriously affected by counterfeits have joined since the entry into force of the MoU; others are using the NTD procedures without formally adhering to the rights protection programme itself; a minority is neither adhering to the programme nor using the NTD procedure.

have disclosed statistical analyses of offers removed (both proactively and on receipt of a NTD request) and this information has proved useful. Internet Platforms agreed to disclose, upon request, the identity and contact details of alleged infringers, as permitted by the applicable data protection laws. In only one case have issues been reported by Signatories regarding this aspect of the MoU¹⁷.

3.6. Consumer trust, information and protection

Consumer trust is a critical success factor for all Signatories. Consequently, all Signatories seek to protect consumers adequately against counterfeits and find ways to compensate bona fide consumers who unintentionally bought counterfeit goods.

All Internet Platforms inform consumers of best practice on how to use their services safely and to be aware of suspicious offers.

All major Internet Platforms have compensation schemes for damages. However, these Buyer Protection Schemes are all very different in terms of scope and procedures. For example, one Internet Platform offers a full Anti-Counterfeiting Guarantee and keeps the money in escrow until the transaction has been completed to the full satisfaction of the buyer. Other than reimbursement via the online payment scheme, Internet Platforms compensate consumers via their own buyer's protection programme or a comprehensive return policy. Several Internet Platforms assist consumers in getting a refund from the seller concerned. In this context, it should be noted that EU legislation includes minimum rules protecting consumers who purchase counterfeit goods from professional sellers. In instances where an Internet Platform acts as a professional seller, Directive 1999/44/EC on consumer sale of goods and associated guarantees gives the consumer the right to have the goods replaced by a genuine item or, if this is not possible, to obtain a refund.

Rights Owners not involved in a particular sale are often contacted by disappointed consumers who have bought counterfeit goods¹⁸. Clearly, Rights Owners do not have a general obligation to offer compensation or to assist the consumer to seek redress. However, several Rights Owners undertake special efforts.

Several Internet Platforms systematically encourage consumers to report counterfeits to the local law enforcement authorities. Some national authorities, such as competition surveillance and consumer protection agencies, also tend to report alleged consumer protection violations, including misleading advertising, unfair commercial practices and violation of labelling rules.

All Signatories agreed that one of the principal objectives of the MoU is to improve consumer protection. No negative feedback from consumers has been reported by the Signatories¹⁹. One Internet Platform even reported that the number of negative feedback reports on sellers and claims from dissatisfied buyers had dropped by 30% since early 2011.

3.7. External communication and awareness raising

Trade associations play an important role in achieving the objectives of the MoU. Several trade associations have been instrumental in building constructive relationships between Rights Owners and Internet Platforms. While some trade associations actually enforce rights

¹⁷ For more background, see also the EDPS comments of 13 September 2012 on DG MARKT's public consultation on procedures for notifying and acting on illegal content hosted by online intermediaries; http://www.edps.europa.eu/EDPSWEB/webdav/site/mySite/shared/Documents/Consultation/Comments/2012/12-09-13_Comments_DG_MARKT_EN.pdf.

¹⁸ Typical examples are failing consumer electronic devices or badly tailored sport shirts for which the buyer complains to the alleged manufacturer. After inspection, it shows that the product concerned has not been produced by the manufacturer, but is fake.

¹⁹ No consumer protection organisation signed up to the MoU.

on behalf of their members and all of them also represent the interests of their members and coordinate the joint positions to be taken on behalf of their members in relation to the MoU, trade associations play a pivotal role in disseminating the concepts underlying the MoU and in encouraging their members to respect its principles. Most of the trade associations have been advertising the progress of the MoU and promoting its benefits in updates via their website, e-circulars to members and informative sessions during their conferences.

Signatories recognised the importance of keeping national **authorities** involved in combating online counterfeiting and IPR agencies, as well as the Members of the European Parliament, fully informed about the MoU and associated developments. They all highlighted the benefit of stepping up such awareness-raising subsequent to the adoption of the current report.

At EU level, the MoU has been referenced in relevant policy communications²⁰. Also at the level of the Member States, similar initiatives have emerged²¹. At international level, the MoU is promoted in international fora such as WIPO²² and the WTO, as well as in discussions with the EU's main trading partners.

3.8. Benchmarking the effects of the MoU

Signatories have provided the Commission with a substantial amount of data demonstrating the functioning of the MoU and its impact on their business for this report. Most of the data are considered confidential due to their commercially sensitive nature and cannot therefore be directly quoted.

Despite all efforts, **all Internet Platforms still have offers of counterfeit goods on their sites**. Sellers of counterfeit goods have become more adept at presenting their offers in such a way that it is not always possible to tell from the online offer whether the product is fake or genuine. Given this, PPMs based on keywords or pictures as well as prices have shown their limitations.

Many Signatories have invested in developing appropriate indicators (so-called **Key Performance Indicators**) in an attempt to measure progress, implementation and functioning of the MoU in a reliable and transparent way. While such indicators have to take account of the particular characteristics of different business models, as well as the goods and sectors involved, it was not possible to use a single set of indicators for measurements by the different Signatories. Consequently, it has not yet been possible to generate headline figures as a quantitative vector for assessing and communicating the effects of the MoU.

To monitor trends in offers of counterfeit goods on the respective sites of the Internet Platforms, several Rights Owners have undertaken systematic **test purchase programmes**, which have been repeated several times under comparable circumstances. These have been valuable in identifying trends.

²⁰ COM(2012) 537final of 26.9.2012: Promoting cultural and creative sectors for growth and jobs in the EU
SWD(2012)286final of 26.9.2012: Competitiveness of the European High End Industries;
COM(2012) 582final of 10.10.2012: Industrial Policy Communication Update — A Stronger European Industry for Growth and Economic Recovery;
COM(2012) 784final of 18.12.2012: The Digital Agenda for Europe — Driving European growth digitally;
European Parliament Resolution on 11 December 2012 on completing the Digital Single Market . P7-TA(2012)0468, point 56.

²¹ For example, the French Charter on the fight against counterfeiting on the internet (2009), complemented by special Charters covering small adds sites and postal operators (2012).

²² http://www.wipo.int/meetings/en/2012/sct_info_net_ge_12/index.html.

One Internet Platform said that since mid-2011, it had observed a noticeable decrease (20%) in the number of **NTD** reports being filed by Rights Owners, which probably corresponds to a decrease in the number of suspicious listings visible on the Platform. Over the same period, it noticed that proactive removals of suspicious items by its PPMs had almost doubled. One Rights Owner reported that last year, its brands sent out nearly 120 000 notifications of infringing content to internet intermediaries, of which only 0.005 % were unjustified.

Another major Internet Platform reported that in the third quarter of 2012, over 8 600 sellers saw their **accounts blocked or severely restricted** after they were found to have posted suspicious listings of goods bearing MoU Signatories' brands. Though specific MoU signatory-related statistics for the same periods in previous years are not available, conservative extrapolation of these figures suggests an increase compared to previous years. One Rights Owner reported that since the start of the MoU, on a quarterly basis, the number of repeat infringers has halved. Another Rights Owner also mentioned a significant decrease in repeat infringers still active on the same Internet Platforms. In May 2012, 15.7% repeat infringers had been active, and by August 2012, only 5 % of repeat infringers were recorded.

The effect of the MoU on the actual presence of counterfeit offers on the sites of the Internet Platforms has been variable according to Signatories' reports. **One Rights Owner reported a decline from 40 % counterfeits for a specific product category to a consistent 0 % on a major Internet Platform.** The same Rights Owner reported a general decrease in counterfeits on the sites of another major Internet Platform. Another Rights Owner reported a 50% reduction in numbers of fraudulent sellers and a 30% reduction in illicit offers on the same Internet Platform. Yet another identified about 12 000 unique sellers of goods carrying its brand name being active on a particular Internet Platform during one week in Autumn 2012, of which an overall 9% were trading in counterfeits across five major EU markets. These results show that the sale of counterfeits tends to shift to Internet Platforms with a less strict enforcement policy (mostly not covered by the MoU), which may suggest that the MoU promotes good practice and needs to be extended to new Signatories to remain effective as a voluntary measure.

Only one Internet Platform communicated figures on **bad buyer experience** reports (30% decrease since early 2011).

Reports from the Signatories show that companies vary in the priority they attach to actively fighting counterfeits. The assigned **financial and human resources** reflect those priorities. Brand protection is expensive. A Rights Owner reported that it spends more than 3 million EUR per year on brand protection measures, including the monitoring of online services and the notification of infringing offers. An Internet Platform reported total human resource costs for its anti-counterfeiting programme of the same order of magnitude. Another major Rights Owner claimed an annual cost of 1 million EUR. At the other end of the spectrum, a Rights Owner said it only spent a few thousand euro a year on brand protection measures. Internet Platforms seem to invest a substantial amount of resources in anti-counterfeiting measures. More than one Internet Platform reported that about 40 staff members are involved in one way or another in anti-counterfeiting measures. One Platform has set up a dedicated Anti-Counterfeiting Operations team, which provides operational support to the Rights Owner relations team. All Internet Platforms continue to invest in additional computer functionalities in areas such as NTD reporting, PPMs, monitoring of and reporting on repeat infringers, and customer support. Obviously, the amounts spent are proportionate to the size and geographical coverage of the Platform. This applies mutatis mutandis to individual Rights Owners.

Several Platforms mentioned quite a substantial investment in **awareness raising** activities, such as anti-counterfeiting campaigns in cooperation with designers, educational workshops for small and medium size enterprises as well as an annual anti-counterfeiting conference. Trade Associations are also actively raising awareness among their members. Some individual Rights Owners have spoken about the MoU at public conferences.

4. THE WAY FORWARD

Online counterfeiting is a moving target. The technology and business models used by counterfeiters are constantly changing. Consequently, Internet Platforms and Rights Owners have to **stay alert and vigilant** to be ready to take immediate and appropriate action, whenever necessary.

The MoU has passed its probation period. It is operating satisfactorily due to the commitment of the Signatories to make it work. To date, there is **no apparent need to amend the text of the MoU**. The current provisions have been formulated in such a way as to accommodate swift actions against new phenomena. Nevertheless, improvements are still possible with regard to operational implementation if it is to become the recognised ‘best practice’ standard.

It appears that progress against the sale of counterfeits can best be achieved by consolidating achievements so far and making the MoU work even better. Consequently, Signatories envisage the following work streams:

Prolong the MoU and review it after a further two years

Based on the current version of the MoU, **Signatories are committed to continue applying it for another two years**²³. During this period, **Signatories wish to meet twice a year under the auspices of the European Commission**. During the spring, a plenary meeting would review general policy issues. At the autumn meeting, the emphasis would be on more operational issues²⁴.

MoU Signatories and the European Commission agree they should **periodically review** whether the MoU is still adequate to combat online offers of counterfeit goods. The Commission will therefore plan a second review on the lines of this one at the end of 2014. By that time, a **common framework on key performance indicators** should be fixed, which would measure the commitment of the Signatories.

The current assessment has shown there is still room for improvement in implementing the MoU. **Bilateral meetings** between Signatories should continue so that they can inform each other on specific issues and jointly seek practical solutions. In addition, and if the need arises, it could be effective to **extend the role of the Commission as facilitator** and let it evolve into a more **remedial mediation function** on specific issues. This might be useful on sensitive issues relevant for a limited group of Signatories.

Signatories and the European Commission will jointly develop an **enhanced communication strategy** that should help in reaping the full benefits of the MoU as an effort towards best practice for Rights Owners and Internet Platforms to curb online counterfeits.

Extend membership of the MoU

On the basis of their experiences so far, the Signatories agreed that it would be useful to **extend membership of the MoU** to include new Internet Platforms, distributors, Rights

²³ Pursuant to Article 44 of the MoU, each Signatory may at any time terminate its participation in the MoU by notification to the other Signatories and the European Commission.

²⁴ Article 42 of the MoU envisages a prolongation of the MoU, after the assessment period, for an indefinite period, combined with biannual meetings and a periodic Commission Report.

Owners and trade associations. Broadening the MoU by accepting new Signatories, particularly from additional sectors or territories willing and able to comply with its provisions is seen as an essential next step in making it more effective. The focus should be on companies and trade associations that are potentially instrumental for achieving the objectives of the MoU and that would add value to it.

To spread best practice and facilitate adherence to the MoU, Signatories and the European Commission will **endeavour to assist non-signatory Internet Platforms and Rights Owners** to adapt their business processes and support tools, where appropriate. The EU Observatory on the Infringement of IPR should also play a useful role in this.

To **continue improving the consumer protection dimension of the MoU and to ensure that its use rigorously protects fundamental rights**, the Commission will continue to seek the involvement, and preferably full participation, of representative consumer organisations and civil rights groups. Internet Platforms and Rights Owners should also seek new ways to improve consumer protection over and above what has already been agreed in the MoU.

Annex: List of sites and brand names covered by the MoU

Brands covered by the MoU

Adidas group

1. Adidas
2. Y-3
3. Reebok
4. Rockport
5. Taylor Made
6. CCM

Allianz Amer Sports group

1. ARC'TERYX
2. MAVIC
3. SALOMON
4. SUUNTO
5. PRECOR
6. ATOMIC
7. WILSON
8. BONFIRE

Burberry

1. Burberry

Gant

1. GANT
2. GANT RUGGER

Lacoste

1. Lacoste

Lego group

1. Lego

LVMH group

1. Louis Vuitton
2. Dior Couture

Mattel, Inc.

1. Barbie
2. Hot Wheels
3. Fisher-Price
4. Matchbox
5. Corolle
6. UNO
7. Scrabble

8. Monster High

Microsoft

1. Microsoft
2. XBOX
3. Microsoft Windows
4. Microsoft Office
5. Microsoft Windows Server

Nike

1. NIKE
2. CONVERSE
3. UMBRO

Nokia

1. NOKIA
2. CONNECTING PEOPLE
3. VERTU
4. V

Procter & Gamble

1. Gillette
2. OralB
3. Olay

Richemont

1. Alfred Dunhill
2. Azzedine Alaia
3. Baume Mercier
4. Cartier
5. Chloe
6. IWC
7. Jaeger LeCoultre
8. Lancel
9. Lange & Sohne
10. Montblanc
11. Panerai
12. Piaget
13. Purdey
14. Roger Dubuis
15. Shanghai Tang
16. Vacheron Constantin
17. Van Cleef & Arpels

Unilever

1. Dove
2. Axe/Lynx
3. Sure/Rexona
4. Vaseline
5. Pond's
6. Radox

7. Duschdas
8. St Ives
9. Persil (UK, Ireland, France only; owned by Henkel elsewhere)
10. Surf
11. Omo
12. Comfort
13. Cif
14. SunsilK
15. VO5
16. TRESemmé
17. Nexxus
18. Brylcreem
19. Knorr
20. Lipton
21. PG Tips
22. Slimfast
23. Signal
24. Close Up
25. Prodent
26. Mentadent
27. Pepsodent
28. Zwitsal
29. Fissan

Sites covered by the MoU

MIH group

1. allegro.pl
2. aukro.bg
3. aukro.cz
4. aukro.sk
5. osta.ee
6. qxl.dk
7. qxl.no
8. ricardo.ch
9. ricardo.gr
10. teszvesz.hu
11. tuktuk.lt
12. vatera.hu

eBay

1. ebay.at
2. ebay.be
3. ebay.ch
4. ebay.cz
5. ebay.de
6. eim.ebay.dk
7. eim.ebay.fi
8. ebay.fr (excl. Petites Annonces)
9. eim.ebay.gr

10. eim.ebay.hu
11. ebay.ie
12. ebay.it/classico (excl. classified ads)
13. ebay.nl
14. eim.ebay.no
15. ebay.pl
16. eim.ebay.pt
17. ebay.es/classico (excl. classified ads)
18. eim.eBay.se
19. ebay.co.uk

Price Minister/ Rakuten

1. <http://www.priceminister.com>
2. <http://www.priceminister.fr>
3. <http://www.priceminister.es>

Amazon

1. amazon.co.uk
2. amazon.fr
3. amazon.de
4. amazon.it
5. Amazon.es.