



eBay Inc.  
2145 Hamilton Avenue  
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March 24, 2010

**VIA E-MAIL**

[intellectualproperty@omb.eop.gov](mailto:intellectualproperty@omb.eop.gov)

The Honorable Victoria Espinel  
United States Intellectual Property Enforcement Coordinator  
The Office of Management and Budget  
725 17th Street, NW  
Washington, DC 20503

Re: Coordination and Strategic Planning of the Federal Effort Against Intellectual Property Infringement: Request of the Intellectual Property Enforcement Coordinator for Public Comments Regarding the Joint Strategic Plan

Dear Ms. Espinel:

Thank you for this opportunity to share our thoughts as you set out on a landmark effort to enforce our nation's intellectual property laws and promote technology, innovation and entrepreneurship in a manner that promotes consumer welfare, job growth and economic advancement.

Having one of the most valued brands in the world, valued over \$7 billion<sup>1</sup>, eBay understands the importance and value of protecting intellectual property rights. Toward this end, eBay actively supports a number of intellectual property-focused organizations including the International Trademark Association (INTA), the Global Intellectual Property Center (GIPC), the Industry Trust and Creative Commons. At the same time, we see firsthand the power of the Internet to promote consumer interests and entrepreneurship and believe that the overall economy, consumer welfare and job creation is best promoted by sensible balance in the application of intellectual property rights, which is in the best tradition of U.S intellectual property law.

<sup>1</sup> Interbrand 2009 rankings:  
[http://www.interbrand.com/best\\_global\\_brands.aspx](http://www.interbrand.com/best_global_brands.aspx)



## I. eBay as an Economic Driver

eBay provides a platform for users to meet, negotiate and transact in a myriad of product categories.<sup>2</sup> Serving as a model for successful online commerce, eBay has driven innovation and provided a platform for entrepreneurs and small businesses to flourish. By providing ready access to an online marketplace eBay promotes greater competition among online retailers as well as “brick and click” retailers who combine national store networks with major web operations. A 2009 report by the Allen Consulting Group commissioned by eBay found that worldwide, in 2007 eBay contributed nearly \$60 billion of merchandise trade, and sellers in the United States alone sold items valued at more than \$26.2 billion.<sup>3</sup>

As the study found, not only does the eBay platform promote the sale of goods, enhance consumer choice and reduce research costs, but it also provides *direct* economic benefits to consumers and small and mid-sized businesses through:

- “increased price competition — an average price saving of 9.39 per cent for all new items sold on eBay compared with the next best price source (other online or bricks and mortar retailers) in 2007. This direct saving is a result of eBay’s contribution to price competition equals a total saving to eBay users of \$1.76 billion. This relates to a saving of \$68.80 per eBay buyer in 2007.
- *economy-wide benefits* as a result of induced price competition — *in addition to the direct economic benefits*, price savings from eBay stimulates further competition between online and bricks and mortar retailers, leading consumers to spend more on everything — not just products on eBay. These economy wide benefits (in 2007) include an increase in GDP of \$4.96 billion, and an increase in real income of around \$23 for the average American worker — in other words, household income was \$42.75 higher per household in 2007 due to the economy-wide benefits of eBay.”

In an economic study commissioned for eBay, the research of Frontier Economics similarly concluded that buyers in the UK, Germany and France can obtain savings of approximately 17% for a range of new products by purchasing on eBay rather than in an offline store.<sup>4</sup> Frontier Economics estimated that eBay buyers in the UK, France and Germany benefit from total savings of approximately €987 million per year in relation to purchases of new products in the twelve categories included in the study. Frontier Economics likewise found that eBay enhanced consumer choice, reduced search and transaction costs for buyers, and reduced marketing costs for sellers.

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<sup>2</sup> There are certain product categories, such as prescription pharmaceuticals, which eBay users are prohibited from listing or offering for sale.

<sup>3</sup> Allen Consulting Group 2009, *The Economic Impact of eBay in the United States*, Melbourne, Australia.

<sup>4</sup> Frontier Economics Ltd. London, *Economic study of the consumer benefits of eBay*.

In this time of economic challenge, eBay significantly enhances consumer choice and economic benefit by providing an extensive range and depth of products. Through online sites such as eBay consumers can also obtain improved product information without incurring costs common in brick and mortar retail research. In short, eBay contributes to the creation, development and sustainability of small businesses by providing a technology-based solution to the challenge that small retailers face in trying to remain competitive in an increasingly global market led by massive “brick & click” retailers in particular offering a low-cost solution to the challenge of overcoming geographic limitations to allow sellers to reach a broader customer base.

## II. eBay in the Fight Against Counterfeit Goods.

The economic and consumer benefits that eBay provides in no way conflict with the fight against counterfeit or pirated goods. In fact, eBay’s commitment to fighting counterfeits and other frauds is clear and long-standing. Over the course of a year, eBay hosts roughly 2.7 billion live listings globally with over 7 million new listings every day. While the overwhelming majority of offerings are listed by honest and law abiding citizens, eBay invests tens of millions of dollars each year in human and technical resources to protect its community of users, and fight counterfeit and other infringing goods. eBay is fully committed to identifying and eliminating listings from the dishonest few.

Trust is at the heart of eBay’s success, and our company’s dedication to listening to consumers and engendering a culture of trust has resulted in eBay being rated one of the most trusted brands in the world for privacy (2009 ‘Most Trusted Brand for Privacy’ in an annual survey conducted jointly by TRUSTe and the Ponemon Institute<sup>5</sup>). The presence of counterfeit goods threatens trust between buyers and sellers, the eBay brand, and our credibility with consumers, rights owners and law enforcement. eBay’s success as a business depends on a climate of confidence, and any counterfeit goods which evade our extensive counterfeit detection measures damage our brand and our business.

As described more fully below, eBay’s efforts are extensive and industry leading and our deep commitment to anti-infringement efforts reflects our commitment to the protection of intellectual property rights. At the same time, we are deeply concerned that efforts are underway by rights owners to undermine consumer and small business benefits derived from open commerce on the Internet. We look forward to you championing a balanced intellectual property rights environment that brings about the greatest long-term consumer value.

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<sup>5</sup>Last viewed March 24, 2010 at:

[http://www.truste.com/about\\_TRUSTe/pressroom/news\\_truste\\_2009\\_most\\_trusted\\_companies\\_for\\_privacy.html](http://www.truste.com/about_TRUSTe/pressroom/news_truste_2009_most_trusted_companies_for_privacy.html) (may need to navigate to the page from search engine results).

### III. The Need to Support Innovation, Consumer Welfare, Small Business Commerce and the Development of the Internet.

The U.S. has carefully crafted laws which were thoughtfully developed and designed to encourage innovation and investment, such as the Digital Millennium Copyright Act (DMCA) and Section 230 of the Communications Decency Act (CDA). These laws were expressly enacted to enhance free speech, protect intellectual property rights and provide critically needed limitations on the liability of Internet companies, which promote the ongoing development of the Internet and have enabled U.S. companies to take places of prominence in technology and innovation.

As is discussed more fully below, eBay's investments and demonstrated cooperation with law enforcement and commitment to the protection of intellectual property rights provide us with a unique and valuable perspective regarding the use, and in some cases misuse, of intellectual property rights. For example, while eBay respects the rights of third parties, and we expect our users to do the same, there are certain entrenched intellectual property rights owners who exercise intellectual property rights for the purpose of maintaining artificially high prices to the detriment of consumers. For example, last year third party online enforcement services acknowledged to the *Wall Street Journal*:

NetEnforcers acknowledges that it uses the VERO program to remove violators of minimum-pricing terms, arguing that it's an appropriate under the Digital Millennium Copyright Act, a 1998 law designed to help copyright-holders control access to digital copies of their works.<sup>6</sup>

Against this background, eBay believes that there are concerted efforts from an increasing number of rights owners to restrict online commerce in legitimate products, with the assertion of alleged claims against eBay and/or other online platforms, as well as the sellers themselves, as a way of controlling the market for authentic products. In fact, such intellectual property enforcement efforts need to be viewed in the broader context of rights owner efforts to police the Internet. Expanded retail price fixing practices, in many cases aimed at policing online sales by small and mid-size retailers, have prompted the U.S. Senate Judiciary Committee, to vote to approve a bill (S. 148) which would effectively overturn the 2007 Supreme Court decision in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, and would prohibit a manufacturer from setting a minimum price on what products could be sold as harmful to consumers. The Judiciary Committee of the U.S. House of Representatives has also favorably reported similar legislation (H.R. 3190) related to retail price fixing.

Moreover, in working with other countries to reduce intellectual property crimes eBay encourages your office to use those opportunities to advocate for the benefit of U.S.

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<sup>6</sup> December 4, 2008, *Wall Street Journal* 'Discounters, Monitors Face Battle on Minimum Pricing' (last visited March 24, 2010 at: <http://online.wsj.com/article/SB122835660256478297.html>)

companies and help guard against the extraterritorial application of European trademark law and selective distribution controls to the Internet generally. Enforcement of intellectual property rights for the purpose of suppressing legitimate channels of commerce in order to artificially maintain higher prices harms U.S. consumers, and we look forward to your leadership in protecting against such harms.

### **Responses to Additional Federal Registry Notice Questions**

In response to the additional Federal Registry Notice Question, eBay offers insight into its own practices and experience in the hope that they will provide useful information and insights on what ecommerce platforms can do to combat infringing activity.

3. Identify specific existing processes involving cooperation between stakeholders and the U.S. Government (or between stakeholders and other governments) that have been particularly effective at curtailing or preventing infringement.

eBay has the most extensive partnerships with law enforcement of any Internet company and plays an active role in investigations by the authorities. Through communication, cooperation and training, eBay works alongside law enforcement authorities and regularly contributes to police investigations. For example, the Global Law Enforcement Organization (GLEO) assists law enforcement officials in investigations and prosecutions, and also trains officials on how to use eBay's sites, tools and information. It is a truly global group with dedicated members in not only North America, but also in countries and regions including Europe, Australia, China, Singapore and India.

eBay regularly participates in successful prosecutions. For example, in 2008 alone eBay assisted in 71,332 investigations, proactively referred 505 cases to law enforcement and assisted law enforcement in the arrest or conviction of 567 individuals.

4. Provide examples of existing successful agreements, in the U.S. or abroad, that have had a significant impact on intellectual property enforcement, including voluntary agreements among stakeholders or agreements between stakeholders and the relevant government.

eBay and PayPal (along with other companies such as Yahoo!, Google, American Express, MasterCard, Visa Discover) participated in a task force organized by INTA to explore ways in which trademark owners and online service providers could work cooperatively to address the sale of counterfeits over the Internet. The task force resulted in the exchange of contact information and suggested practices for the purpose of disruption and take-down of counterfeit offerings on the Internet. More information is available at:  
[http://www.inta.org/index.php?option=com\\_content&task=view&id=2012&Itemid=142&getcontent=3](http://www.inta.org/index.php?option=com_content&task=view&id=2012&Itemid=142&getcontent=3)

14. Suggest specific methods to limit or prevent use of the Internet to sell and/or otherwise distribute or disseminate infringing products (physical goods or digital content).

eBay works in partnership with law enforcement, intellectual property rights owners and the eBay community of users to combat the sale of counterfeit goods. eBay has done this since its inception and is fully committed to continuing that cooperative effort. Through eBay's own proactive efforts and reactive efforts in response to reports from members of the eBay community and intellectual property rights owners, eBay removes listings for counterfeits, suspends and blocks counterfeit sellers from our sites and constantly looks for new ways to ensure that counterfeit goods do not appear on our sites. Our policies and technology are constantly evolving to stay ahead of counterfeiters trying to avoid detection and circumvent our efforts.

#### A. User Education

The eBay User Agreement explicitly prohibits the violation of any laws, including intellectual property laws. By integrating laws and respect for third party rights into the User Agreement eBay preserves the discretion to impose contractual sanctions (e.g. cancel listings, suspend accounts, etc.) in cases where eBay determines users may have violated those laws and third parties' rights. In addition, there are dedicated resources regarding intellectual property rights, which explain the concept of infringement and provides details about pertinent intellectual property rights. These policies govern what users may list and sell on eBay (overview: <http://pages.ebay.com/help/policies/intellectual-property-ov.html>).

Additional policies are integrated that constitute an integral part of the User Agreement and are likewise binding on eBay users. eBay policies also contain many restrictions that go beyond what is prohibited by law. For example, recognizing that some (but certainly not most or all) listings that disown authenticity may involve infringing items, eBay created a policy prohibiting authenticity disclaimers (e.g., 'received this as a gift, not sure if it is authentic'). This allows eBay to take action against certain listings even in the absence of rights owner reports. Since eBay users have been informed that certain additional requirements govern such listings, eBay can remove such items on a policy basis.

Furthermore, eBay has created interactive tutorials designed to educate users about eBay policies and relevant laws. The online tutorial concerning intellectual property policies and the eBay VeRO program may be accessed at the following page:

<http://pages.ebay.com/help/policies/tns-tutorials.html>. In order to help users to understand laws or policies that involve complex concepts, the tutorials provide:

- An overview of the topic and specific examples;
- Questions to test the user's understanding of the subject; and
- A summary of key lessons.

Such educational efforts are designed to encourage user awareness of intellectual property rights, inform users how they can help protect the rights of intellectual property owners and prevent violations of eBay policies or laws.

eBay also conducts onsite campaigns to educate its users. For example, eBay has worked with the Authentics Foundation and the Industry Trust in their attempts to stigmatize the purchase of counterfeit goods (<http://web.ebay.co.uk/safetycentre/againstcounterfeits/>; <http://pages.ebay.com/againstcounterfeits/>) and raise public awareness about the dangers of counterfeit products.

## B. Detection

For more than a decade eBay has offered its VeRO program, which provides a framework for listing “notice-and-takedown.” Under the VeRO Program, rights owners that identify a listing which they have a good faith belief infringes their copyrights or trademark rights can submit a Notice of Claimed Infringement (“NoCI”) and request removal of the listing. Upon receipt of such a notice, eBay personnel verify that the NoCI contains the necessary information and has indicia of accuracy. Provided the necessary criteria are satisfied, eBay promptly removes the challenged listing and notifies the seller and any bidders of the action. eBay also informs the seller as to the reason for the removal and provides relevant educational information in an effort to prevent the seller from later committing the same violation. If bidding has ended, eBay cancels the transaction retroactively, removes the listing, and informs both the winning bidder and the seller that they should not complete the transaction. eBay also refunds associated fees and reviews the seller’s account and routinely takes further remedial action, including, where appropriate, restricting or suspending the seller’s services.

With this critical cooperation between eBay and intellectual property rights owners the VeRO has been a success:

- 100% of listings reported to be counterfeit are removed;
- Over 70% of the reported listings are removed within 12 hours (and 75% of these within 4 hours); and
- Tens of thousands of intellectual property rights owners act as registered participants in the VeRO program, in partnership with eBay.

In order to further meet the needs of intellectual property rights owners and in order to facilitate the prompt removal of allegedly infringing items, eBay constantly invests in new functionality to simplify the rights owners’ search and notification obligations and effectiveness. For example, by using eBay’s VeRO Reporting Tool a “Report Listing” button will appear on every eBay listing viewed by the intellectual property rights owner. In order to report the listing to eBay, a rights owner need only ‘click the button,’ select the appropriate code associated with the claimed infringement and send the report. The report is automatically sent to the VeRO team and directed into

the right working queue – which facilitates the prompt processing and removal of reported listings.

We very much look forward to meeting with you during your upcoming visit to Silicon Valley. The information detailed above naturally describes only a portion of eBay's efforts, and we would welcome the opportunity to host you for a tour of eBay's facilities in order to provide you with an opportunity to experience eBay's anti-counterfeiting efforts first-hand. In addition, we look forward to discussing with you how the U.S. Government can work to promote greater consumer welfare and entrepreneurial competition in ecommerce by guarding against the self-interested efforts by some to police legitimate commerce on the Internet. We hope that you will find the practices of our company and our support for consumers and small business retailers as a help as you work to develop enforcement strategies that effectively protect intellectual property rights while ensuring the ongoing viability and success of U.S. Internet companies and the consumers they serve.

We very much look forward to working with you and your office.

Very truly yours,

A handwritten signature in black ink, appearing to read "Dan Dougherty", written in a cursive style.

Dan Dougherty  
Global Head of Intellectual Property  
eBay Inc.