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**COMMISSION STAFF WORKING DOCUMENT**

**Overview of the functioning of the Memorandum of Understanding on the sale of counterfeit goods via the internet**

**Accompanying document to the**

**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL AND THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE**

**A balanced IP enforcement system responding to today's societal challenges**

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## 1. INTRODUCTION

Counterfeiting and piracy are growing problems. Trade in counterfeit and pirated goods amounted to up to 2.5 % of world trade in 2013 (compared with 1.9 % in 2009), and to up to 5 % of imports (EUR 85 billion) in the EU context<sup>1</sup>.

While online marketplaces are strong drivers of innovation and growth as they offer new business opportunities, they are also increasingly used as a distribution channel for counterfeit and pirated goods<sup>2</sup>.

As part of its overall efforts to fight intellectual property infringements, the Commission facilitates stakeholder dialogues that promote collaborative approaches and voluntary, practical solutions to better enforce intellectual property rights in an evolving technological and commercial environment. In this context, to prevent the sale of counterfeit goods online, the Commission invited internet platforms, rights owners and associations to sign a Memorandum of Understanding on the Sale of Counterfeit Goods via the internet ('MoU').

The MoU was concluded in May 2011 and brought together major internet platforms and rights holders for products for which counterfeit and pirated versions are sold online (e.g. fast-moving consumer goods, consumer electronics, fashion and luxury products, sports goods, films, software, games and toys), operating at regional and global level. The intellectual property rights covered by the scope of the MoU are registered trade marks, registered design rights and copyright set out in applicable Member State or EU law<sup>3</sup>.

The voluntary agreement has been the basis for building cooperation and trust between signatories, and contributed to preventing offers of Counterfeit Goods<sup>4</sup> from appearing in online marketplaces. The first report on the functioning of the MoU adopted by the Commission in 2013<sup>5</sup> provided a detailed assessment of best practices and practical measures that help prevent the sale of Counterfeit Goods online, and therefore protect consumers who are looking for genuine products on the digital internal market. It also showed that, when used alongside legislation, voluntary cooperation can usefully contribute to curbing online counterfeiting and piracy. It can also provide the flexibility to quickly adapt to technological developments and deliver efficient solutions.

However, this first report also underlined that more practical ways of measuring the effects of the MoU were needed. It was therefore subsequently agreed that a set of key performance indicators ('KPIs') would be used as an objective, reliable and transparent way of measuring the MoU's effectiveness. As a result, a set of KPIs was added to the text and an updated version of the MoU was signed in June 2016. So far, this renewed version has been signed by

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<sup>1</sup> *Trade in Counterfeit and Pirated Goods*, OECD-EUIPO, 2016.

<sup>2</sup> *Situation Report on Counterfeiting and Piracy in the European Union*, EUIPO and Europol, 2017.

<sup>3</sup> See paragraph 2 of the MoU.

<sup>4</sup> The terms in capital letters are terms that are defined in the MoU. For the purposes of the MoU 'counterfeit goods', are defined as non-original physical goods manufactured without the consent of the Rights Owner which infringe IPR, pursuant to applicable Member State or EU Law.

<sup>5</sup> 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, COM(2013) 209.

five Internet Platforms,<sup>6</sup> eight Rights Owners<sup>7</sup> and six associations ('Signatories'). The current list of Signatories is attached as Appendix 1.

This document provides an overview of how the MoU functioned between 21 June 2016 and 21 June 2017, in line with paragraph 41 of the MoU. The overview is based on:

(i) results of two data collection exercises – data based on the KPIs collected every six months during two monthly data collection exercises; the data used for this overview comes from the first two such exercises, carried out from 15 November to 15 December 2016 and from 15 May to 15 June 2017, and

(ii) feedback provided by Signatories during the plenary meetings held on 26 October 2016, 13 February 2017, 11 May 2017 and 16 October 2017, as well as feedback from a survey of Signatories in August/September 2017.

This document aims to present a factual overview of experiences of the MoU so far, based on the information provided by the Signatories. It does not reflect any legal or policy views or intentions of the Commission in respect of the issues under consideration, including any possible further developments related to the MoU.

## 2. RESULTS OF THE DATA COLLECTION EXERCISES

As agreed by the Signatories<sup>8</sup>, data based on the KPIs is to be collected every six months, during two monthly periods starting on 15 November and 15 May. During these periods, the parties collect data for the three KPIs and subsequently discuss them during bilateral meetings and plenary meetings.

In order to ensure the confidentiality of individual submissions and a neutral, non-discriminatory evaluation process, the data are then sent to the European Observatory on Infringements of Intellectual Property Rights ('the **Observatory**'). The Observatory aggregates and analyses the data reported by the Signatories, and then sends the results of this analysis to the Commission.

For the two data collection exercises that took place thus far, data were provided by respectively eight and seven Rights Owners<sup>9</sup> and five Internet Platforms.

The data presented in this assessment have been collected only for specific categories of products and in relation to a limited number of listings. It should therefore only be referenced in the context of the specific case studies presented in this document and should in no way be interpreted as general results nor as a complete overview of the Signatories' work to tackle counterfeit and pirated goods online.

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<sup>6</sup> For the purposes of the MoU 'Internet Platform' means any information society service provider whose service is used by third parties to initiate online the trading of physical goods, and which is operated by a signatory of the MoU, to the extent so indicated by the service provider.

<sup>7</sup> For the purposes of the MoU 'Right Owner' means signatory of the MoU who holds a registered trade mark, design right or copyright (hereinafter referred to as "IPR"), pursuant to applicable Member State or EU law, for goods covered by this MoU, including exclusive licensees of such IPR.

<sup>8</sup> See Annex I of the MoU.

<sup>9</sup> Luxottica Group Spa did not provide data during the 15 May to 15 June 2017 data collection due to internal restructuring.

**2.1. Case study: KPI No. 1 – Amount of offers of alleged Counterfeit Goods**

The first KPI measures the number of search results that link to an Offer<sup>10</sup> of alleged Counterfeit Goods appearing within the first 100 unique listings per platform per country obtained for a limited number of categories of product per brand, as specified in Annex I of the MoU. The search criteria determined should make sure that those products that will still be present on the market in a few years’ time are included<sup>11</sup>, as these are the most vulnerable products, most affected by counterfeiting.

Rights Owners carry out these searches on the relevant Internet Platforms, for all EU Member States in which these Platforms operate<sup>12</sup>. They first analyse one hundred ‘unique listings’ that appear in the search results. In cases where less than one hundred unique listings are found, the analysis is performed on the number of listings available<sup>13</sup>. Subsequently, the Rights Owners determine how many of the listings include Offers of counterfeits of their original products. The results should be subsequently discussed and agreed between the Rights Owners and the Platforms prior to being sent to the Observatory, where all data received are compiled for analysis.

A new feature introduced in the second data collection period was the ‘unable to determine’ category, which was used by five out of seven Rights Owners to single out the listings where information was insufficient to ascertain a product’s authenticity.

It should be noted that the division per category of product is not shown in this overview so as to respect the confidentiality of individual submissions. Therefore, the data are presented only for the total number of searches in all categories of product.

Aggregate data for the first KPI are presented below for both data collection periods.

*Figure 1 — Results for KPI no.1 – Amount of offers of alleged Counterfeit Goods*

May — June 2017			November — December 2016	
Total searches	Alleged Counterfeit Goods	Unable to determine	Total searches	Alleged Counterfeit Goods
100 %	14.3 %	21.0 %	100 %	12.3 %

According to the results reported, the total number of searches carried out in the November-December period is slightly higher compared to the total number of searches carried out in the May-June period. In the May-June period, a minor increase in the percentage of alleged Counterfeit Goods was observed (14.3 % compared to 12.3 % six months earlier).

<sup>10</sup> For the purposes of the MoU ‘Offer’, means a specific proposal for the sale of (a) good(s), entered by a seller on the system of the Internet Platform established in the EU/EEA.

<sup>11</sup> The so-called ‘future proof’ product categories, for example ‘Adidas trainers’, ‘Nike football shirts’, ‘Louis Vuitton handbags’.

<sup>12</sup> The territorial coverage varies between the Internet Platforms. Also, while some Platforms use different domains for different Member States, others use a universal .com domain that is available throughout the EU. It was therefore decided that the territorial scope of the exercise should be decided based on bilateral arrangements between each Internet Platform and Right Owner.

<sup>13</sup> E.g. for a certain product on a certain platform there could be only 80 results/unique listings.

The results also show that the ‘unable to determine’ category amounts to 21 % of the total number of searches, which is higher than the percentage of alleged Counterfeit Goods (14.3 %). This reflects the difficulty that is sometimes encountered when assessing a product’s authenticity. Signatories provided further feedback on the ‘unable to determine’ category in their responses to the survey (section 3.6).

The Rights Owners explained that the KPI no. 1 result showing 14.3 % of alleged Counterfeit Goods in the May-June period should not be interpreted as the rest (85.7 %) being necessarily genuine (i.e. non-counterfeit) products. In their view, this is because, firstly, 21 % of total searches in this time period fall under the ‘unable to determine’ category, meaning that the Rights Owners were unable to determine whether the product is genuine or counterfeit. Furthermore, according to the Right Owners, some types of misleading or suspicious behaviour should also be taken into consideration. For instance, Rights Owners’ trade marks are sometimes used by sellers on online platforms in order to advertise products not manufactured by the Rights Owner. These cases can be examples of intellectual property rights' infringement but, for the purposes of this exercise, they do not fall under the ‘alleged Counterfeit Goods’ category. Some Signatories have asked that such suspicious behaviour be taken into consideration within the framework of this MoU, as will be further discussed in section 3.6.

**2.2. Case study: KPI No 2 – Amount of listings removed**

The second KPI quantifies the number of listings<sup>14</sup> that were removed as a result of an alleged infringement of the Right Owners' IPR. Distinction is made between the number of listings removed as a result of PPMs put in place by Internet Platforms (as defined in paragraphs 24-27 of the MoU), and the number of listings removed as a result of notification from Rights Owners.

Under the MoU, Rights Owners can send justified notices concerning Offers they firmly consider to be counterfeit to the Internet Platforms on which they found them; the Internet Platforms then take appropriate action (paragraphs 15-17 of the MoU).

The aggregate data for the second KPI are presented below for both data collection periods.

*Figure 2 — Results for the KPI no.2 – Amount of listings removed*

	May — June 2017	November — December 2016
Number of listings removed proactively by the Internet Platforms	97.4 %	86.3 %
Number of listings removed as a result of notices sent by Rights Owners	2.65 %	13.7 %
Total number of listings removed	100%	100%

<sup>14</sup> Regarding the exact definition of a ‘listing’ it has been agreed that the distinction between a ‘private seller’ and a ‘business seller’ will not be taken into account for the purposes of the data collection exercise.

In sheer numbers (not reflected in Figure 2), both the amount of listings removed as a result of measures taken by Internet Platforms and as a result of notices sent by Rights Owners have increased between December and June. It is worth noting that the number of listings removed as a result of PPMs taken by Internet Platforms increased almost tenfold.

**2.3. Case study: KPI No 3 – Amount of seller restrictions imposed**

The third KPI measures the amount of permanent and temporary seller restrictions imposed by Internet Platforms. The seller restrictions being measured are those linked to the alleged infringements of Rights Owners’ IPRs and expressed as a percentage of total restrictions imposed by Internet Platforms for any alleged infringement of such rights. What is measured in practice is the number of actions against repeat infringers<sup>15</sup> initiated by Rights Owners following the application of the MoU, against the total number of such actions.

The data below include both permanent and temporary restrictions, since only one Internet Platform was able to provide separate data by type of restriction.

The aggregate data for KPI no. 3 are presented below for both data collection periods.

*Figure 3 — Results for the KPI no.3 – Amount of seller restrictions imposed*

	May — June 2017	November — December 2016
Total number of permanent and temporary seller restrictions linked to any alleged IPR infringement	100 %	100 %
Number of permanent and temporary seller restrictions linked to alleged infringement of the IPR of an MoU Signatory	2.7 %	4.5 %

In sheer numbers (not reflected in Figure 3), according to the reported results, the total number of restrictions has increased significantly, from December to June. The same trend – in absolute terms - can be observed for the restrictions linked to alleged infringement of the rights of a MoU Signatory.

**3. RESULTS OF FEEDBACK RECEIVED THROUGH REPLIES TO THE QUESTIONNAIRE**

Apart from the results of the two data collection exercises, the present assessment compiles the Signatories’ responses to a questionnaire on the functioning of the MoU, circulated amongst them in August 2017.

The aim of the survey was to gather feedback from Signatories regarding their experiences with the application of the MoU provisions and their functioning. An overview of different measures provided for by the MoU is presented below. It is based on the replies received.

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<sup>15</sup> For the purposes of the MoU ‘repeat infringers’ are understood especially, but not limited to, as those selling high volumes, dangerous, pre-release or obvious Counterfeit Goods.

### 3.1. Notice and Take-Down procedures

The MoU includes a number of commitments on Notice and Take-Down procedures ('NTD')<sup>16</sup>. Most of the Signatories agreed that NTD procedures are an important tool in the fight against online sale of counterfeit goods. NTD procedures aim to remove Offers of Counterfeit Goods from websites in a timely, efficient and effective way. However, in the view of the Signatories, since their impact is by nature limited (they are applied only after the Offer is already available online), they should be complemented by strong preventive measures.

In the context of the MoU, as reported by the Signatories, NTD procedures make it possible for:

- a) Rights Owners to notify Internet Platforms about alleged Counterfeit Goods being offered on their sites, and
- b) Internet Platforms to remove individual offers of alleged Counterfeit Goods from their sites.

Even though all Internet Platforms already had some NTD procedures in place before signing the MoU, Signatories reported that they noticed an improvement in the use of these procedures since signing the MoU and believe that this has been an effective way of ensuring the swift removal of Offers of Counterfeit Goods.

Most Signatories reported that all notifications concerning the Offer of Counterfeit Goods are being submitted through the established NTD procedures. However, some Rights Owners said that they do not always use the reporting tools created by Internet Platforms, because, in the Rights Owners' view, these are not adapted to report higher numbers of notifications. For this reason, some Rights Owners prefer to send a list of infringing URLs by email, or to use other automated solutions.

The Signatories recognised that NTD procedures by nature can only have a limited impact as they are only used once the goods have been advertised online, reached customers and often even been sold several times. Even if enforcement is immediate, it is still too late since it does not prevent those purchases made by consumers in the time between the publication of the item and the removal of the listing. Furthermore, sometimes the listing has already expired by the time the NTD report is filed. All this causes harm to a brand's reputation and uniqueness.

Another issue that came up in the questionnaire responses is that counterfeiters are now moving to different internet platforms, in respect of which no or less effective NTD Procedures exist, or where the requirements to set up an account and have it suspended are more flexible. For these reasons, the Signatories considered that it is important to work together to see how best to complement NTD procedures with strong preventive mechanisms, ensuring that Counterfeit Goods do not reach the market place in the first place, as well as with follow-up measures that prevent repeated infringements. It should however be noted that even though the Internet Platforms have tools and procedures in place that aim to prevent an Offer from reaching the market in the first place, it is an objective very difficult to achieve

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<sup>16</sup> For the purposes of the MoU 'Notice and Take-Down Procedures' mean any procedure, including the associated processes, by an Internet Platform, that enables a Rights Owner to notify efficiently to an Internet Platform any relevant Offer, including closed Offers, of an alleged Counterfeit Good made publicly available using the relevant services of that Internet Platform, in order to allow the Internet Platform to take appropriate action, including making the Offer unavailable to the general public through the Internet Platform. See paragraphs 11-19 of the MoU.

Also, some Platforms have underlined that such technical preventive solutions are not only very costly but could also result in too many false positives (i.e. identifying also many offers that could not be seen as infringing IPR).

Furthermore, although the Signatories stated that NTD procedures have helped reduce the visibility of Counterfeit Goods online, Rights Owners pointed out differences in the number of Counterfeit Goods on offer depending on whether the data collection exercise is ongoing or not.

### **3.1.1. Rights Owners' experience with using Notice and Take-Down procedures**

All Rights Owners mentioned the additional expenditure of time and resources associated with following the different NTD procedures required by each Internet Platform, especially in terms of different notification tools, language settings and reasoning obligations. The ability to report infringing content 'in bulk' seems to be the most important functionality for Rights Owners and most Internet Platforms already offer this possibility. Due to the amount of work required, some Rights Owners hire an external service provider to monitor and take down counterfeit listings from Internet Platforms. Some Rights Owners suggested that establishing a harmonised NTD reporting system for all Internet Platforms would help. However, some Internet Platforms explained that standardising NTD procedures is not possible due to the fact that each platform is built based on different technical solutions. In addition, the effectiveness and the rapidity of dealing with the notifications is due to the standardized procedures in place therefore a harmonized NTD procedure for all the Platforms would not be an efficient solution. In any case, Internet Platforms have already invested in developing specific tools that make it possible for Rights Owners to submit multiple notifications, sometimes specifically in the context of the MoU.

Rights Owners affirmed that most Internet Platforms make it possible to either report multiple offers from the same seller or multiple sellers of the same product. The majority of Rights Owners surveyed estimated that the percentage of cases in which reporting an Offer of Counterfeit Goods led to its takedown is often as close to 100 %.

Under paragraph 18 of the MoU, Internet Platforms commit to handling notifications received from Rights Owners in an efficient and comprehensive way, without undue delay. They should ensure that the correct reporting of Offers of Counterfeit Goods leads to the Offer being removed or disabled. Rights Owners reported that Internet Platforms that take part in the MoU generally deal with notifications without undue delay. However, they suggested that takedown periods should ideally be reduced further, to a few hours. This should not deprive Internet Platforms of the possibility to verify the content.

Rights Owners reported that all Internet Platforms usually send out automatic e-mails in response to notifications, to either confirm the takedown or request more information before proceeding further.

### **3.1.2. Internet Platforms' experience with using Notice and Take-Down procedures**

Under the MoU, Rights Owners commit to avoiding unjustified, unfounded and abusive allegations when notifying Internet Platforms of Offers of Counterfeit Goods. Some Internet Platforms have reported that they do receive such notifications and that these cases amount to approximately 5 % of the overall number of notifications.

While some Internet Platforms said that nearly all Rights Owners' notifications they receive contain sufficiently clear information on the infringement, the Offer and the notifying party, others have reported that Rights Owners often do not back up their claims of counterfeit products with test purchases. Furthermore, Internet Platforms reported that they often have to ask for additional information to process the notification, for example in cases of 'grey zone' products where Rights Owners' knowledge is necessary to determine whether the products are really counterfeit.

According to the Internet Platforms, some of the most common issues encountered when dealing with a NTD request are (i) a mismatch between the listing notified and the intellectual property documents filed, (ii) insufficient evidence to demonstrate infringement, and (iii) lack of response from the brand's representatives when additional information is required.

Lack of evidence to prove the infringement is a particular issue for the Internet Platforms as some have contacted certain sellers based on a Rights Owner's notification and the Offers turned out to be genuine. Internet Platforms stressed that such unfounded notices have a negative impact on their reputation as some merchants get upset when their integrity is in doubt.

Internet Platforms also suggested that a better way for Rights Owners to back up their claims would be the introduction of tracking systems for genuine products, with electronic tags that would make it possible to identify fake items with more certainty.

### **3.2. Pro-active and Preventive Measures**

The MoU includes commitments on pro-active and preventive measures<sup>17</sup>. PPMs enable Internet Platforms and Rights Owners to prevent illicit offers from appearing online in the first place or, if they do become available online, to take them down as soon as possible.

In particular, as part of putting in place PPMs, Rights Owners commit to taking commercially reasonable and available steps to effectively fight counterfeiting at its source, including at points of manufacture and initial distribution, and to actively monitor Offers on the websites of Internet Platforms (paragraph 20 and 21 of the MoU). On the other hand, Internet Platforms commit to taking appropriate, commercially reasonable and technically feasible measures to pro-actively identify and/or prevent the sale of Counterfeit Goods, and to prevent such goods from being offered or sold through their services (paragraph 27 of the MoU).

Signatories agree that NTD procedures are by nature reactive measures and as such are not sufficient to effectively address the issue of counterfeit goods on online platforms. This is why the MoU also includes pro-active and preventive measures.

General feedback showed that ongoing active cooperation between the parties is crucial for the effective use of PPMs. The practice of sharing monitoring methodology and information with the Internet Platforms has led to more counterfeit offers being taken down.

Signatories report that appropriate technology, such as filters, and monitoring programmes have been put in place to detect illegal content. In a fast changing digital environment, technology needs to be able to adapt to new trends and counterfeiting tactics. Currently it still has shortcomings, for example, the fact that filter technologies often produce high numbers of false positives.

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<sup>17</sup>See paragraphs 20-27 of the MoU.

Furthermore, according to the feedback received, all of the Internet Platforms have rights protection programmes in place, and these are used by many rights owners.

Some Rights Owners have shared their monitoring methodology and information with the Internet Platforms. This includes: lists of keywords commonly used by sellers of counterfeit products; lists of monitored platforms and current trends on those platforms; commercial-scale sellers identified based on the number of items advertised; repeat infringers; and URL listings. Signatories agree that when Internet Platforms and Right Owners work together in this way, it becomes easier to spot Counterfeit Goods being offered online.

In parallel to these online monitoring activities, some Rights Owners organised trainings for Internet Platforms on key products and items particularly susceptible to counterfeiting in order to help them identify counterfeit items and to raise awareness of certain brands and their specificities. These training sessions included information on the most frequent counterfeited models, items that the Rights Owners never produced, specific details of certain products, and the security elements currently applied to certain items.

Signatories have recognised that the MoU has facilitated closer bilateral relationships between Right Owners and Internet Platforms and opened a much-needed dialogue between them. Since the Internet Platforms have technical tools, expertise and relevant background information (seller's location, contact details) that is not available to the Right Owners, and the Right Owners have the necessary specialist knowledge of their brand that is essential in identifying counterfeit products, the efforts undertaken on both sides through a combination of NTD procedures and PPMs need to be complementary.

However, most Rights Owners have stated that it is difficult for them to monitor the efficiency of PPMs in place as they do not receive appropriate feedback from the Internet Platforms. Consequently, Rights Owners suggested that more transparency in the criteria used for these measures be introduced, to enable them to help Internet Platforms improve the measures they take. For example, Rights Owners consider that if they could revise the PPMs in place for each Internet Platform they would be able to evaluate the efficiency of the filters used and, where needed, improve them with their specific experience and knowledge. Some Rights Owners also suggested that a common system of pro-active and preventive measures be established; it would require a real identification of sellers by name, address, ID number and bank account details. They believe that these kinds of requirements would prevent the creation of computer-generated seller accounts. Furthermore, Rights Owners stated that obliging sellers to upload only real images of products would reduce the 'unable to determine' cases as a product's authenticity could be identified with more certainty.

Signatories stated that despite these joint efforts counterfeit listings continue to reappear on most of the Internet Platforms. Further cooperation is therefore needed to improve the results.

### **3.3. Repeat Infringers**

Under the MoU, Internet Platforms and Rights Owners commit to working together to detect repeat infringers by implementing deterrent repeat infringer policies (paragraph 34 of the MoU). These policies can include, for example, temporary or permanent suspension of an account, restriction of seller accounts, imposing a ban on selling activities or depriving sellers of their special account status. Some Internet Platforms have policies which allow sellers to open only one store (one ID). Therefore, once that store is shut down, the ID is blocked from opening a new store. Also, once a seller is banned, they are put on a blacklist. Technical measures, such as putting in place certain keywords that would make it difficult for

an infringer to reappear with a different identity, aim to prevent infringers from opening new accounts on the same platform.

However, Internet Platforms have reported that blocking an account is not sufficient as infringers often then register on another platform, and therefore legal action should follow. In view of the Internet Platforms, Rights Owners normally have more knowledge on repeat infringers as they are in a position to compare various sources of information, from other platforms, custom seizures, court actions and law enforcement proceedings.

All Right Owners identify repeat infringers mainly based on their own NTD request records as well as public information they collect online outside of the NTD procedures. Based on this, Rights Owners usually report repeat infringers to the Internet Platforms and/or take action involving law enforcement authorities. However, they consider this monitoring procedure as very time-consuming and demanding, especially when one repeat infringer uses several accounts on different internet platforms. For example, some Rights Owners have reported that certain repeat infringers have been seen to reappear during the second KPI data collection exercise even though they were identified and reported to Internet Platforms during the first one. In light of this perceived information gap, all Rights Owners suggested that Internet Platforms give more information on repeat infringers, including IP addresses, email addresses, phone numbers and bank account details as Rights Owners do not have the access or capacity to obtain this information themselves.

### **3.4. Bilateral relations between Signatories**

Signatories agree that the MoU has made it easier to initiate new and strengthen existing cooperation between parties. This is important because issues such as online counterfeiting in a fast changing digital environment require constant and careful attention, trend tracking, exchange of information and ongoing contact between Internet Platforms and Rights Owners. In addition, in the view of the Signatories, regular meetings with counterparts allowed for fruitful discussions, which made it possible to identify common issues and challenges, and exchange best practices.

Some Signatories reported that, although excellent partnerships have been established with most Signatories, there are still some who do not take part in the dialogue. Some Internet Platforms reported that only a few Rights Owners have contacted them. In addition, some Rights Owners did not provide listings of Offers under the first KPI for the purposes of data collection.

Rights Owners stated that there is a need to clarify the data submitted by Internet Platforms and to frame the exchange of information through a more detailed protocol. One Rights Owner pointed out that this constitutes the core of the current agreement as the MoU seeks to 'establish a code of practice in the fight against the sale of counterfeit goods over the Internet ...'<sup>18</sup>.

Signatories believe that the efficiency of cooperation and bilateral relations between Rights Owners and Internet Platforms can only be properly assessed after several KPI collection exercises, when the methodology applied by both parties has been shared and established, and the evolution of the visibility of counterfeit offers online over time has been confirmed.

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<sup>18</sup> Recital of the MoU on the sale of counterfeit goods via the internet.

### **3.5. Consumer protection**

Signatories recognise that consumers, both buyers and sellers, are active parties in the fight against counterfeiting. Therefore, it is essential that they are provided with the appropriate means that help them easily identify and report offers of counterfeit goods (paragraph 31).

Rights Owners have repeatedly highlighted the fact that it is sometimes very difficult even for them to identify original products sold online with certainty, as sellers often post only a few pictures of the product, post low-quality pictures or hide the authentication part of the product.

As a result, Right Owners have developed dedicated services through which consumers can easily reach them to report suspected counterfeit listings or ask for assistance in determining whether a purchased item is counterfeit or not. In addition, some Rights Owners have installed anti-counterfeiting labels on their items with a unique code that can be easily verified by the consumer. Also important are campaigns that promote anti-counterfeiting culture and create awareness of the negative impact that illegal market activity has on brands' intellectual property and innovation.

Similarly, Internet Platforms have enabled a 'report' button on the page of each listing or contact form that allows consumers to report an offer that violates intellectual property rights or the Internet Platform's policies. All Platforms have introduced a possibility for consumers who unintentionally purchased a counterfeit product to initiate a procedure to be compensated or refunded. Before deciding to purchase an item, buyers are also entitled to contact the seller and request more pictures or further information on the product, which often helps the buyer assess the product's authenticity. The buyer may also consult the seller's feedback rating in order to see their selling history.

### **3.6. Suggestions for improvement**

Based on the responses received from the Signatories, the 2016 MoU has in their view clearly brought positive results regarding cooperation between Rights Owners and Internet Platforms. However, it also appears that despite the increased efforts by both sides, all of the Internet Platforms still struggle with Offers of Counterfeit Goods on their sites.

When asked about suggestions for further improving the MoU, most Signatories underlined the importance of involving other participants of the e-commerce ecosystem in the MoU process, including social media, price-comparison websites and classified websites. In addition, Rights Owners stated that the Internet Platforms that are currently Signatories should join the MoU with all the platforms belonging to them. It was stressed that at the moment the MoU's impact is limited due to the low number of Signatories. More parties should therefore join the initiative.

Signatories agreed that it is important that the MoU is applied as agreed and that the balance of commitments between Rights Owners and Internet Platforms is respected. This balance should be maintained even if there are any changes to the MoU.

Furthermore, Signatories suggested that specific measures should be introduced to deal with situations where some Signatories do not cooperate, in order to make sure that all parties are fully committed to applying the MoU provisions in the fight against counterfeiting. They consider that there should be an established system that would require those who do not wish to cooperate to leave the MoU.

Opinions were divided on whether the MoU should be amended. On the one hand, some Signatories believe that the MoU is functioning well and that at this stage there is no need to change the text. On the other hand, other Signatories consider that the MoU would benefit from amendments regarding certain issues. The reactions were similar as regards the need to introduce procedural provisions in the MoU. Half of the respondents considered that procedural issues could be agreed on in meetings and that adding them to the current text would be burdensome. The other half considered that, provisions on the accession procedure for new signatories should be introduced, more clarification on the data to be submitted to Internet Platforms is needed, and the bilateral exchange of information should be framed with a more detailed protocol.

Overall, Rights Owners have called for more transparency of data collected by Internet Platforms, as part of PPMs and NTD procedures, as well as on the systems used to gather the data. Most Signatories underlined that the bilateral exchange of information needs to be framed by a more detailed protocol. One Rights Owner suggested that an independent third party (e.g. the Observatory) should analyse and compare the data submitted by both Rights Owners and Internet Platforms at the end of the monitoring period. In the view of Signatories this would make it possible to: (i) avoid duplication of efforts and notices which would result in a more efficient removal process, (ii) evaluate whether a better use of data gathered is possible.

As mentioned in section 4.2., several Rights Owners reported that there is not enough transparency as regards the PPMs implemented by Internet Platforms and suggest further harmonisation of these measures. Further to this, obliging sellers to upload only real, quality images of products would decrease the use of computer-generated images or images taken from the rights owners' image banks and websites. Computer-generated images make it difficult for Rights Owners to identify and report certain listings as the indicators are confusing or misleading; many listings therefore end up in the 'unable to determine' category.

Rights Owners have called for common minimum standards for account suspension, either temporary or permanent, to be applied by all Internet Platforms.

Signatories agreed that a coherent application of KPIs is crucial for measuring effectiveness as different approaches could undermine KPI credibility.

In this regard, some Signatories underlined that the MoU should cover only agreed counterfeit infringements and therefore any other intellectual property rights violations should not be included without Signatories' prior discussion and unanimous decision, as changing the methodology during the ongoing data collection process can impair results.

Some Rights Owners have welcomed the introduction of the 'unable to determine' category which has allowed them to cover cases where they don't have sufficient information to ascertain an Offer's authenticity. Some reported that they have benefited from this category and believe it should be officially included as a criterion under KPI no. 1, however further clarification is needed so as to avoid that too many Offers fall within the 'unable to determine' category. According to some Rights Owners, Internet Platforms could establish specific criteria that sellers would have to meet in order to upload their offers; this could include real product images and complete information.

Several Rights Owners pointed out that it would be useful if KPI no. 1 would not only measure counterfeit listings but would also identify other listings based on misleading behaviour. Currently, for example, among the counterfeit products measured there are also

products entirely unrelated to the Rights Owner or products advertised with the Rights Owner's trade mark.

With regard to KPIs no. 2 and 3, almost all Right Owners have called for more transparency in the data sharing process. They consider that aggregate data is not useful for the collaboration process the MoU aims to set up. For instance, it would be more efficient if data for KPI no. 2 showed a more detailed and complete breakdown of figures per Internet Platform and Rights Owner. In the Rights Owners' view efforts would be more targeted and overlaps would be avoided if listings proactively removed by Internet Platforms would be shared and discussed with Rights Owners during bilateral consultations.

With regard to KPI no. 3, most Rights Owners considered that information on the criteria used to determine a temporary or permanent suspension should be shared with them. Further to this, Rights Owners requested that Internet Platforms share with them details such as name, IP address and bank account for repeat, suspended and banned infringers during bilateral negotiations. This would improve their monitoring activities and help them identify infringers.

An initial discussion on the issues presented in this document took place during the plenary meeting with signatories on 16 October 2017. Such discussions are expected to continue in upcoming meetings.

## **APPENDIX 1 — MoU SIGNATORIES (as on 16 October 2017)**

### **Rights Owners**

1. Adidas International Marketing BV
2. Chanel SAS
3. Gant AB
4. Lacoste SA
5. Luxottica Group Spa
6. Moncler Spa
7. Nike Inc.
8. Procter & Gamble

### **Internet Platforms**

1. Alibaba Group Inc.
2. Amazon Services Europe Sarl.
3. eBay
4. Priceminister Rakuten
5. Grupa Allegro sp. z o.o

### **Associations**

1. ACG UK
2. AIM European Brands Association
3. BASCAP — Business Action to Stop Counterfeiting and Piracy
4. Federation of the European Sporting Goods Industry — FESI
5. International Video Federation — IVF
6. Toy Industries of Europe