

Statement of Steve DelBianco

Executive Director

The logo for NetChoice, featuring the word "NetChoice" in a blue, sans-serif font. The "Net" is in a darker blue, and "Choice" is in a lighter blue. The letters are bold and modern.

Testimony before the

House Judiciary Committee

Subcommittee on Crime, Terrorism, and Homeland Security

H.R. 6713, the "E-fencing Enforcement Act of 2008"

September 22, 2008

Chairman Scott, Ranking Member Gohmert, and distinguished members of the Subcommittee: My name is Steve DelBianco, and I would like to thank you for holding this important hearing on the e-Fencing Enforcement Act and related legislation.

I serve as Executive Director of NetChoice, a coalition of trade associations and e-commerce leaders such as AOL, eBay, IAC, Overstock.com, and Yahoo!, plus 18,000 small online retailers. At the state and federal level and in international venues, NetChoice advocates against regulatory barriers to the expansion and integrity of e-commerce.

It's a NetChoice priority to improve consumer trust and confidence in e-commerce, so we naturally support efforts to pursue and punish criminals who pollute online marketplaces by selling stolen or counterfeit goods. Unfortunately, the measures proposed in HR 6491, HR 6713 and S 3434 go too far in two ways: imposing unprecedented liability and unworkable burdens upon online marketplaces.

The hearing record does not justify imposing harsh liabilities and burdens on online marketplaces.

We appreciate the chairman's efforts to gather substantial data and testimony on the issue of organized retail crime (ORC). However, nothing in the record thus far would justify imposing criminal liability, civil lawsuits, and new burdens on online marketplaces, especially when these impacts could be triggered by complaints from competing retailers.

In October 2007, this subcommittee heard testimony on ORC, and all witnesses made the case for enacting tougher federal penalties and additional law enforcement attention. As Maryland Police Detective David Hill told this subcommittee, "professional thieves are getting off with little more than a slap on the wrist because many jurisdictions are still treating ORC crimes as shoplifting cases."

In that same hearing, loss prevention officials from Safeway and Target said they needed more information about sellers and listings so they could convince law enforcement officials to investigate.

During Q&A, Target's Brad Brekke summed up with, "We're just looking for transparency." And Safeway's Mr. Langhorst said, "We want eBay to tell us who the seller is."

It's therefore understandable why ORC legislation would include tougher penalties for those convicted of crimes, and better transparency and information exchange between retailers and online marketplaces. However, these bills go much further, handing competing retailers a blunt instrument to harass online marketplaces they compete with. A stereo retailer, for instance, could tell Amazon or eBay, "*Those speakers are listed so cheap that I just KNOW they are stolen.*" Never mind that big-box retailers fill our weekend newspapers with ads offering deep discounts to draw shoppers into their stores, too.

These bills threaten online marketplaces with *criminal penalties* and even *forfeiture of assets* if they fail to interrogate people about how they acquired an item they want to list for sale. Imposing criminal penalties and asset seizure on an online marketplace is unprecedented at the federal or state level, and would be the harshest *anti* e-commerce law of any major industrialized country.

Specifically, HR 6713, the E-Fencing Enforcement Act, would require marketplaces to conduct investigations if a retailer provides a police report—dated anytime in the last year—claiming theft of goods matching the description of items offered in an online listing. A big-box chain could file a single police report for theft of an item, then use this report all year long to force any online marketplace to investigate every listing of similar items – without any involvement of law enforcement officials.

All three ORC bills would give retailers the power to force online marketplaces to interrogate sellers about where and how they obtained an item they're listing for sale. This would have the effect of presuming that sellers are listing stolen items – *unless they can prove their ownership*. But how would a seller prove ownership of items received as gifts, or something received in a trade? What about cash transactions, or purchases where original receipts were lost long ago?

The vast majority of online sellers are honest people trying to find the highest bidder for something they have legitimately acquired. Honest citizens and businesses will naturally resent the presumption that they acquired their goods through organized criminal activity. When sellers protest about having to prove their innocence, online marketplaces would surely reply that Congress passed a new law requiring this unprecedented interrogation. Your inboxes could be flooded with constituent complaints.

The cure for ORC should not become a tool for *Authorized Retail Harassment* of online marketplaces.

Forcing online marketplace operators to interrogate innocent sellers is just one aspect of what could become “authorized retail harassment”. A flood of new lawsuits is another potential for abuse by retailers.

Specifically, HR 6491 grants retailers the ability to sue online marketplaces in any district court for failing to “expeditiously investigate” a listing based on a retailer notification, even if no law enforcement official ever reviewed the actual listing. After challenging a seller’s honesty and reviewing his reply, a marketplace might reasonably conclude that the seller’s listing has no connection to organized retail crime. However, a retailer could *still* sue the marketplace for failing to remove a listing, based only on the retailer’s belief that the marketplace had “reasonable cause to know” that an item involved organized retail crime.

These ORC bills contain a “notice and take down” regime that’s markedly different from what Congress included in another law designed to help property owners stop online theft. The Digital Millennium Copyright Act (DMCA) includes safeguards to prevent abuse of the powers granted to content owners. DMCA notices are submitted under penalty of perjury and must specifically identify the location of allegedly illegal items. Neither of the two House ORC bills include any sanction whatsoever on retailers who could ‘game the system’ by providing incorrect notices.

The DMCA also includes a mechanism to contest incorrect allegations. Again, these ORC bills provide no such mechanism for online marketplaces to push-back on retailers who repeatedly use a single police report to harass multiple sellers of similar goods. Retailers can harass marketplaces with information requests about sellers – based on undocumented suspicion or a year-old theft of similar items.

The combined threat of legal action combined with customer data and interrogation requirements are burdensome enough on large marketplaces, but would effectively strangle small businesses. NetChoice member Dawdle.com is a small online marketplace for new and used videogames, with 5 employees operating out of Chicago. According to founder Sachin Agarwal, “I can’t imagine how I could afford to stay in this business if overzealous retailers swamped me with investigation and take-down requests.” Smaller companies simply do not have in-house attorneys or financial resources to conduct legal investigations and answer to multiple lawsuits.

Simply put, these ORC bills create too many opportunities for abuse by retailers who compete with online marketplaces.

States have rejected legislation that would blame e-commerce for retailers' ORC problems.

Legislation imposing these kinds of obligations on online marketplaces has been introduced in several state legislatures. Colorado, Maryland, New Jersey, New York and Wisconsin have seen retailer-backed bills targeting online resale of merchandise such as baby food, cosmetics, drugs, infant formula and batteries. In spite of intense lobbying by big-box chains, none of these states has passed any version of the retailers' preferred legislation.

In addition, the bi-partisan National Conference of State Legislatures (NCSL) has soundly rejected this approach. At its annual meeting in August 2007, the National Retail Federation (NRF) attempted to modify NCSL policy by adding language that effectively blamed online markets for theft by suppliers, employees, and shoplifters: *"the Internet also has become a tool of Organized Retail Crime gangs that may sell stolen merchandise and gift cards online."* The retailers' attempt to blame e-commerce for their theft problems was overwhelmingly rejected by state legislators at NCSL, by a vote of 45 - 0.

Does Congress really want to make websites liable for content and conduct provided by third parties?

A law that creates legal liability for online marketplaces for the wrongdoings of others violates the intent—if not the letter—of an existing federal law, Section 230 of the Communications Decency Act. Section 230(c) explicitly protects interactive computer services from liability for content provided by third parties.

When Congress passed Section 230, it decided to promote the continued development of the Internet and online services. Congress also sought to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." [47 U.S.C. Sect. 230(b)].

Legislation that creates new liabilities on Internet marketplaces for the bad actions of third parties chips away at the goals expressed by Congress in Section 230. The continued development of a competitive marketplace for online commerce would be at risk, as would long-established protections

for ISPs, online services, and the entire Internet community. The combined effect of new liabilities and affirmative obligations would result in an unacceptable chilling of online innovation and competition.

The House bills unfairly discriminate against online marketplaces.

Nobody doubts that shoplifting is a serious problem for retailers. And nobody faults retailers for doing whatever they can to deal with inventory losses. But trying to shift blame and burdens to online marketplaces is the wrong approach. It may be true that thieves are tempted to fence their stolen goods online, but shoplifting was a big problem for retailers long before the Internet ever appeared on the scene.

A witness in your October-2007 hearing quoted a 2005 report from this Committee, finding that stolen goods are fenced through multiple channels, including beauty shops, gas stations, flea markets, pawn shops, truck stops, newspaper classified ads, overseas buyers, plus several kinds of Internet sites. While the Senate bill applies to both online and offline resellers, both House bills impose obligations and liability *only* upon online marketplaces. Newspaper classifieds and the many off-line resale marketplaces are not covered by the two House bills.

While the two House bills discriminate against the online channel, all three ORC bills would foster state laws that could create compliance burdens on online businesses that usually serve customers in all 50 states. Different—potentially conflicting – new state laws could create impossibly complex investigation requests and a flood of retailer lawsuits. In last October’s hearing, several witnesses called for a federal solution to the ORC problem, yet none of these bills would preempt states from quilting a patchwork of different state laws.

There are better, less restrictive ways to stop online retail crime.

The National Retail Federation’s own commissioned surveys, conducted annually by the University of Florida, consistently show that two-thirds of retailer inventory losses are directly attributable to internal causes, including theft by their own employees and suppliers. Year after year, about half of all retail inventory losses are the result of employee theft. To put this in a national context, the retailers’ own study concluded that *“...there is no other form of larceny that annually costs American citizens more money than employee theft.”*

These are the retailers' own employees, people who are hired, managed, and paid by the retailers. With that kind of direct control, retailers are in the position to stop employee theft where it starts.

In last October's hearing, Rep. Forbes asked Safeway what they doing to prevent in-store theft, and Mr. Langhorst answered, "our associates are there to sell groceries, not to be police officers." Yet witnesses from both Target and Safeway stressed the importance of limiting and deterring theft "in the first place". The first place that theft occurs is in their own stores, most often by their own employees and suppliers. Rather than shifting blame and burdens to online marketplaces, retailers should improve their employee screening, inventory control measures, and store security systems.

Another essential step to combat ORC is to create better working relationship between crime prevention professionals at retailers and online marketplaces. In your hearing last October, Safeway's Karl Langhorst said, "In spite of Safeway's best efforts and unprecedented alliances with other retailers to combat ORC, we continue to suffer significant losses." Rather than continue to battle with eBay and others, Safeway should build 'unprecedented alliances' with online marketplaces, too. Working together, retailers and online marketplaces can raise the effectiveness of the "best efforts" they are now making individually.

Conclusion

These three ORC bills would impose extraordinary and discriminatory restrictions on Internet marketplaces that help millions of people to legitimately buy and sell products every day.

I understand that retailers feel frustrated about their efforts to stop ORC, but that does not justify shifting blame and burdens to online marketplaces. These ORC bills are intended for loss prevention, but they include dangerous tools for *competition prevention*—preventing online marketplaces from competing with big retailers.

I close by thanking the Committee for considering alternative views in this hearing, and I look forward to your questions.