

A man in a dark blue suit and tie is pointing his right index finger towards the viewer. The background is a dark blue grid of hexagons, each containing a white padlock icon. The word "UNAUTHORIZED" is written in large, bold, white, sans-serif capital letters across the top of the image.

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## How to Maximize Profits on Today's Most Popular eCommerce Marketplaces

Without Losing Control of Pricing  
and Damaging Your Brand

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## The Positive Trends in eCommerce Are Too Significant to Simply Ignore

U.S. retail eCommerce sales totaled an estimated \$97.3 billion in the second quarter of 2016, according to an August 16, 2016 release from the U.S. Census Bureau.<sup>1</sup>

This is an increase of more than \$13 billion since the second quarter of 2015 and \$71 billion greater than the estimated total from the Census Bureau's second quarter data 10 years ago.

Further, according to a November 3, 2016 article from Business Insider, U.S. consumers are forecasted to spend \$385 billion online this year and an estimated \$632 billion in 2020.<sup>2</sup>

No matter how you slice the numbers, it is clear that eCommerce has been rapidly growing and this trend will continue into the future.

Much of the growth in the last decade-plus can be attributed to the success of a growing number of third-party online marketplaces, led by a few major e-retailers but also many other successful marketplaces that have emerged in recent years.

Many companies have been selling products through online marketplaces and no longer solely on their own websites, and there are certainly a number of benefits that companies can reap from these marketplaces. Companies can increase sales and their customer bases through these third-party forums.

It is critical that companies that are selling — or thinking of selling — through these marketplaces also figure out how to control their pricing and stop the almost inevitable unauthorized third-party selling of their products. A failure to do either can potentially cause major harm to companies' brands and their bottom lines.

This whitepaper will discuss both how to maximize profits as well as how to control pricing and maintain brand reputation.

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<sup>1</sup> [www.census.gov/retail/mrts/www/data/pdf/ec\\_current.pdf](http://www.census.gov/retail/mrts/www/data/pdf/ec_current.pdf) (estimate adjusted for seasonal variation)

<sup>2</sup> <http://www.businessinsider.com/e-commerce-online-retail-monetization-strategy-planning-2016-11>

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## How to Maximize Profits on the Major eCommerce Marketplaces

In other words, top online marketplaces function like powerful product search engines that offer brands access to new customers more effectively than ever.

Today's most popular eCommerce websites are ideally positioned to help consumers search for products that meet their needs, research the quality of these products, and then make their purchases — all with a few mouse clicks and a never-before-seen level of convenience.

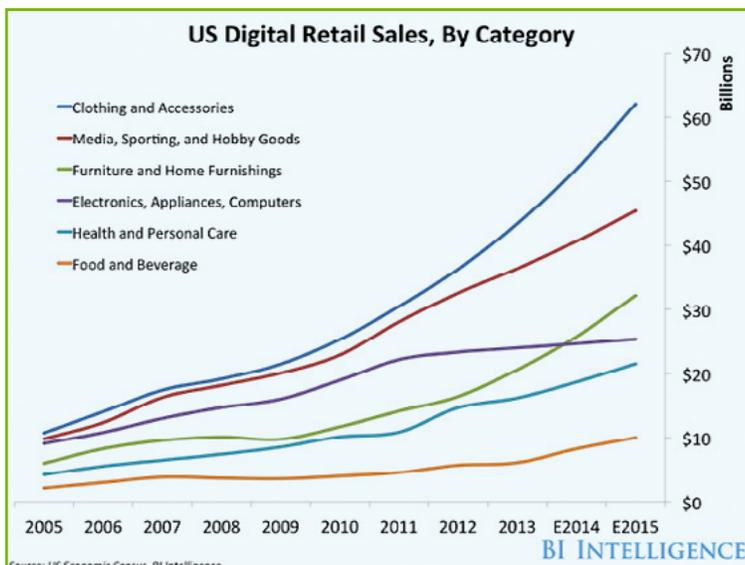
In other words, top online marketplaces function like powerful product search engines that offer brands access to new customers more effectively than ever.

The success of these marketplaces has also brought about a significantly greater level of competition for the consumer's attention, and as a result, brands that are not leveraging every marketing opportunity possible are simply being ignored.

There are five key elements brands must address in order to maximize profits from online marketplaces:

1. Product listing optimization;
2. Product reviews;
3. Customer service;
4. Promotions and advertising; and
5. Number of third party sellers

Online marketplaces function like search engines designed to help buyers discover products that are a match for their search terms.



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## Product Listing Optimization

To maximize profits, a brand must optimize each and every product listing to ensure the maximum visibility possible because, unlike a brick and mortar store where buyers can stroll through the aisle, in the virtual world, the only products displayed on the screen are products that are relevant to the search term used.

To maximize profits, product listings should have the following items optimized:

1. Product title
2. Product images
3. Bullet points and description
4. Customer reviews
5. The search terms you target

A highly optimized product listing should include the following attributions: 1) a descriptive title that contains the main search term a company is trying rank highly for; 2) images that both clearly display the product, as well as address key benefits of the product; 3) bullet points that describe additional features and benefits, while simultaneously targeting additional search terms that consumers would use to find the particular product; and 4) plenty of positive reviews and answered questions.

### **KEY TAKEAWAY:**

**BRANDS MUST ENSURE EACH AND EVERY PRODUCT LISTING IS FULLY OPTIMIZED TO TARGET ALL THE RELEVANT SEARCH TERMS USED BY CONSUMERS TO FIND THAT PRODUCT, AND THEN INCREASE THE CONVERSION RATE ONCE THE CONSUMER HAS DISCOVERED THE PRODUCT.**

...unlike a brick and mortar store where buyers can stroll through the aisle, in the virtual world, the only products displayed on the screen are products that are relevant to the search term used.

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## Product Reviews

If a company wishes to generate the highest conversion rate possible, it is critical that they lawfully and within the rules of the particular website(s) generate positive product reviews and respond when possible to negative product reviews. The number and quality of product reviews, combined with the recency of those reviews, is also a signal that can have a major influence on a product's organic search ranking. Higher search rankings, lead to increased product visibility and sales.

As important as generating positive reviews is, responding to negative reviews in a professional manner is equally important, as it speaks volumes about how much a brand cares about its customers.

In the example (above right), notice the brand's thoughtful response to a one-star review left by an unhappy customer.

*Thank you for your review and I'm sorry to hear that you feel the blades are not lasting as long as previously. We have numerous quality checks throughout our manufacturing process, so this is not something we would expect. It may be helpful to know that the item fading is just a guideline and we recommend changing the cartridge when it begins to feel dull.*

*If you would like, give us a call at 1-800-\_\_\_\_\_*

**KEY TAKEAWAY:  
BRANDS MUST ENSURE THAT  
A REVIEW GENERATION AND  
MANAGEMENT SYSTEM IS IN  
PLACE FOR EACH OF THEIR  
MARKETPLACES.**

As important as generating positive reviews is, responding to negative reviews in a professional manner is equally important,

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## Customer Service

A key performance indicator tracked by every marketplace is the speed of seller response to customer service inquiries. Shorter response times have the power to positively affect a brand's reputation and revenue potential.

**KEY TAKEAWAY: BRANDS MUST CREATE SYSTEMS AND PROCESSES TO ENSURE THAT CUSTOMER SERVICE INQUIRIES ARE RESPONDED TO IN THE LEAST AMOUNT OF TIME POSSIBLE.**

## Promotions and Advertising

Getting to the top of the organic search results in a competitive niche is no easy task. Products that do not appear on the top half of the first page of search results receive significantly fewer sales than the competitive listings above.

In addition to having a highly optimized listing that targets relevant search terms, brands should expect to invest resources into creating and managing effective advertising campaigns and promotions.

When done correctly over a period of time, the sales generated via these campaigns will demonstrate to the organic search algorithm that a given product converts well for the search terms used. As a result of this sales velocity, the product will steadily rise in the organic search results, leading to more organic sales and greater profits.

**KEY TAKEAWAY: FOR BRANDS WHOSE PRODUCTS ARE NOT YET SHOWING UP ON THE TOP HALF OF THE FIRST PAGE OF THE ORGANIC SEARCH RESULTS, TARGETED PROMOTIONS AND ADVERTISING CAN BE A POWERFUL TOOL TO DRAMATICALLY INCREASE PRODUCT VISIBILITY.**

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## The Number of Third Party Sellers

Many brands today have come to the realization that it is more of a hindrance than a benefit to have a large number of third party sellers on a given marketplace. This is largely because the more sellers, the more likely it will be for these sellers to use lower prices as their primary means of increasing their share of the buy box.

In other words, larger volumes of sellers increase the likelihood of a race to the bottom on price — and of minimum advertised pricing (MAP) violations.

Instead of allowing more sellers, smart brands are handpicking a single or select few sellers that will add value to their brand partners in the ways we have described here: <http://tlksourcing.com/3rd-party-seller-value-add/>

In fact, a compelling case can be made that having fewer third party sellers will actually increase sales: <http://tlksourcing.com/why-having-fewer-sellers-will-increase-sales/>

**KEY TAKEAWAY: HAVING A SELECT FEW DISTRIBUTION PARTNERS IS A HIGHLY EFFECTIVE WAY TO ELIMINATE MAP VIOLATIONS, IMPROVE CUSTOMER SERVICE, AND INCREASE SALES.**

In other words, larger volumes of sellers increase the likelihood of a race to the bottom on price.

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## Regaining Control of Your Brand's Pricing

### BY STOPPING PRODUCT DIVERSION AND UNAUTHORIZED SALES

Many companies today are implementing MAP policies to prevent price erosion. To enforce these policies, these companies are typically performing MAP monitoring and punishing and even terminating authorized distributors who violate the policies.

However, when companies are focusing solely on MAP agreements to control price, they are failing to account for *unauthorized* sellers — those who do not fall under authorized distribution agreements. And this is a problem because unauthorized sellers are much more prone to violating MAP policies than authorized distributors.

According to recent research, 53 percent of unauthorized sellers violate MAP policies, compared with 15 percent of authorized retailers.<sup>3</sup> Therefore, it is critical that companies that have adopted MAP policies work to stop unauthorized sellers, as they can cause significant damage, both directly and indirectly.

We recommend that companies adopt a two-step approach to stop unauthorized sellers: 1) establish legal claims that enable them to enforce their trademarks; and 2) implement a graduated enforcement system designed to efficiently and effectively eliminate unauthorized sales (and deter future impermissible sales).

### Step 1: Establishing Legal Claims

To effectively stop unauthorized sellers, companies must begin by reviewing and revising their existing policies, procedures and authorized distribution agreements to be able to support their enforcement efforts — in particular trademark infringement claims.

Ordinarily, unauthorized sellers can rely on what is known as the “First Sale Doctrine” to justify their selling activities. The First Sale Doctrine generally provides that a person who purchases a trademarked product acquires the right to resell that product — including on online marketplaces.

The First Sale Doctrine does not protect those who offer for sale trademarked goods that are “materially different” from those actually sold by a trademark owner.<sup>4</sup> Thus, companies can distinguish the products sold through their authorized distribution channels from diverted products by offering certain benefits that unauthorized sellers likely cannot or will not be able to offer.

Courts have found that there is a low “threshold” for establishing a material difference, and just a single material difference can give rise to a trademark infringement claim.<sup>5</sup> Moreover,

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material differences need not be “physical” to establish trademark infringement, and the list of non-physical differences can include a warranty, money-back guarantee or certain post-sale services.<sup>6</sup>

Courts have also found that sellers who do not follow a company's established quality controls can be liable for trademark infringement.<sup>7</sup>

For a company seeking to assert its right to control the quality of its product distribution, it must be able to demonstrate three things: that

1. It has established legitimate substantial, and nonpretextual quality control standards
2. It abides by these procedures
3. The non-conforming sales will diminish the value of [its] mark.”<sup>8</sup>

Thus, companies should establish legitimate quality control measures (which could include packaging and storing instructions, specialized training for authorized distributors and/or monitoring of authorized distributors and

products); memorialize them in their policies, procedures and agreements; and actually ensure that they are being followed.

In addition to potential trademark infringement claims to overcome the First Sale Doctrine, companies might consider adopting language that will support tortious interference with contract claims against potential third-party unauthorized sellers.

With such a provision in place, if a company prohibits its authorized distributors from selling products to people who intend to resell those products, a bad actor who purchases products from authorized distributors and resells them has arguably induced a breach of the company's contract with its distributor.

Moreover, if a company notifies the unauthorized seller of the breach, but that bad actor continues to sell the products, the company might also have a claim that the unauthorized seller is knowingly causing a breach of contract.<sup>9</sup>

<sup>4</sup> *Beltronics USA Inc. v. Midwest Inventory Distribution LLC*, 562 F.3d 1067, 1072 (10<sup>th</sup> Cir. 2009) (quoting *Davidoff & CIE, S.A. v. PLD International Corp.*, 263 F.3d 1297, 1302 (11<sup>th</sup> Cir. 2001)).

<sup>5</sup> *Id.* (holding that “any difference” between the trademark owner’s product and the allegedly infringing product “that consumers would likely consider to be relevant when purchasing a product creates a presumption of consumer confusion sufficient to support a Lanham Act claim.”)

<sup>6</sup> See *SKF United States Inc. v. ITC*, 423 F.3d 1307 (Fed. Cir. 2005) (holding that differences in post-sale services can be material); *Beltronics USA*, 562 F.3d at 1073 (holding that warranties and service commitments can constitute material differences).

<sup>7</sup> See, e.g., *Shell Oil Co. v. Commercial Petroleum Inc.*, 928 F.2d 104, 107 (4<sup>th</sup> Cir. 1991) (“A product is not truly ‘genuine’ unless it is manufactured and distributed under the quality controls established by the manufacturer.”)

<sup>8</sup> *Warner-Lambert Co. v. Northside Dev. Corp.*, 86 F.3d 3, 6 (2d Cir. 1996).

<sup>9</sup> See e.g. *Australian Gold, Inc. v. Hatfield*, 436 F.3d 1228, 1235-38 (10<sup>th</sup> Cir. 2006) (affirming trial court’s finding of tortious interference where defendants acquired products in violation of corporation’s agreements with its distributors and continued to resell the products after being notified that their actions violated the distribution agreements).

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## Step 2: Implementing a Graduated Enforcement System

Based on our experience, to more efficiently and cost-effectively reduce the number of unauthorized sellers and the number of products they are diverting outside authorized distribution channels, we recommend implementing a graduated enforcement system based on the following steps:

1. locate the illegitimate sellers;
2. send them cease and desist letters through the messaging portals on the relevant online marketplace(s);
3. determine the identities of the non-compliant sellers;
4. send cease and desist letters to the physical addresses of the identified non-compliant sellers; and
5. engage in escalated legal enforcement as to any still non-compliant sellers.

Once a company has revised its policies, procedures and authorized distributor agreements to strengthen its legal claims against potential unauthorized third-party sellers, it is almost ready to implement its enforcement system.

Before rolling out an enforcement program, a company must work with technology developers to create a customized software aimed at

locating and tracking unauthorized online sales. The objective is for the software to be able to locate the various instances of unauthorized selling and package the critical information such as a list of screen names/storefronts and the number of products each is selling (including the percentage of which are below the MAP policy-set price).

It is important to be able to decipher which screen names/storefronts are selling the most products in order to be able to target the greatest offenders.

When a company has its software up-and-running and it determines with its enforcement team which unauthorized sellers to target, the next phrase is sending “electronic” cease and desist letters (“eC&Ds”). Online marketplaces generally have private messaging forums or portals, through which companies or their counsel can send eC&Ds.

Strongly-worded eC&Ds from outside counsel, which explain the illegality of the sales and potential consequences of non-compliance, are generally most effective.

A critical component of this step is tracking seller responses in order to determine which contacted sellers do and do not comply. From there, a company can work with cyber investigators to obtain the identities of the non-compliant sellers in order to target them with cease and desist letters to their physical addresses (which communicate to the sellers

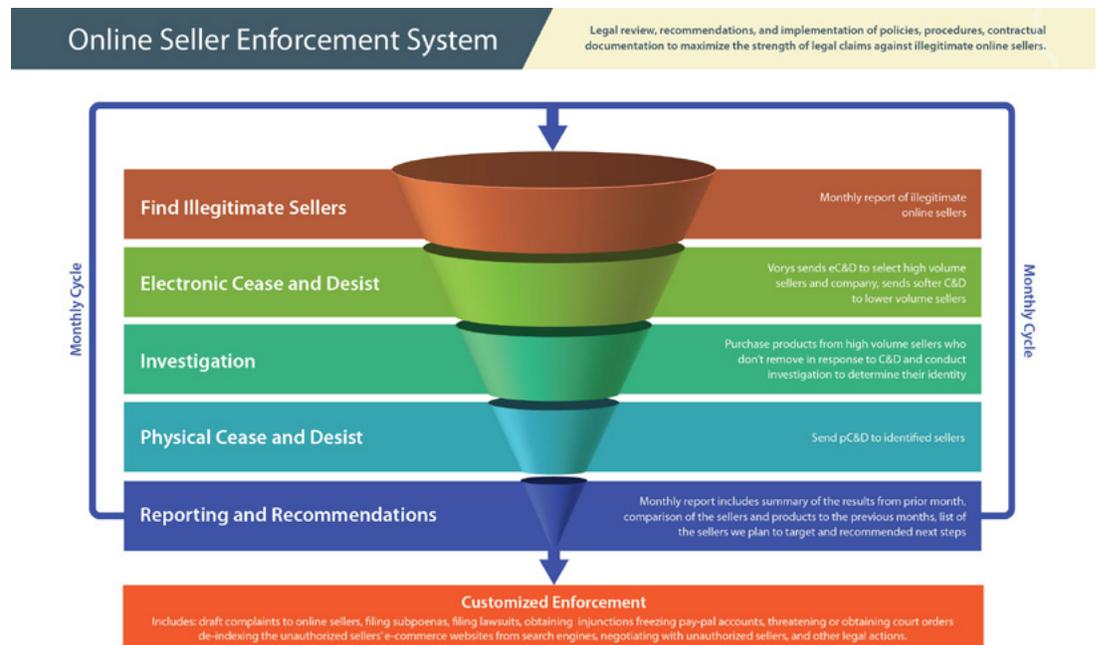
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that they are not anonymous and that the companies have put in the time and effort to determine their identities and locations). After sending the “physical” cease and desist letters, the companies’ attorneys can target any remaining non-compliant sellers, potentially threatening to file a lawsuit (by sending a draft complaint) or actually filing the complaint.

Our recommended version of this graduated enforcement program best runs on a monthly cycle. At the end of each month, companies and their enforcement teams can determine which non-complaint sellers to target through escalated enforcement tactics, as well as which new sellers have emerged and should be sent eC&Ds.

This graduated enforcement system is not only aimed at efficiently and effectively reducing the number of unauthorized sellers, but is also designed to deter others from engaging in future unauthorized sales, improving the morale of the authorized distributors.

It is critical that companies keep the authorized distributors happy and assure them that they are aggressively pursuing unauthorized sellers; otherwise, the authorized distributors will go rogue and disrupt the companies’ pricing and potentially harm their brands.



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## Conclusion

Third party marketplaces are a significant contributor to eCommerce revenues, and their influence continues to increase. Brands must have a strategy to maximize profits from these marketplaces, while at the same time protecting themselves from marketplace sellers who are acting against the brand's interests.

Without effective marketing, your products very well may not be discovered by marketplace consumers and sales figures could remain low. Without proper policies in place to eliminate

sellers who are acting outside of authorized distributor agreements, there can be a resulting price erosion and damage to your brand.

To maximize profits on today's most popular third party eCommerce marketplaces, brands should focus on improving marketing. At the same time, brands should also establish effective policies, monitoring systems, and management processes to ensure that the brands' products are only sold by approved sellers who will add value to the brand and abide by MAP policies.

Without effective marketing, your products very well may not be discovered by marketplace consumers and sales figures could remain low.

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Whitney Gibson is a partner at Vorys, Sater, Seymour and Pease LLP, where he leads the firm's Online Seller Enforcement Group. Whitney has developed custom programs for companies confronting unauthorized sales, grey market sales, counterfeit sales, Minimum Advertised Price (MAP) violators, and other illegal sales on the internet, combining legal, technological and investigative tools and services. Whitney frequently presents at conferences and other events on tactics and strategies for solving internet problems, including efficient and effective strategies for addressing unauthorized sellers online. For more information, contact Whitney at (513) 723-4823 or [wcgibson@vorys.com](mailto:wcgibson@vorys.com). Read more about strategies for stopping unauthorized sales at [www.onlinesellerenforcement.com](http://www.onlinesellerenforcement.com).



Trent Dyrsmid is a Managing Partner at TLK Sourcing, an eCommerce company that sells a wide variety of health and nutrition products on today's major eCommerce marketplaces — while simultaneously helping these brands to eliminate many of the most common problems caused by predatory 3rd party marketplace sellers. For more information, contact Trent at (208) 272-9379 or [trent@tlksourcing.com](mailto:trent@tlksourcing.com). Read more about strategies for eCommerce growth at <http://tlksourcing.com/>.