Debunking Peer-to-Peer Marketplace (and eBay/Etsy) Myths

**MYTH:** All “peer-to-peer” marketplaces are neutral platforms that do not otherwise control the entry of products into the stream of commerce.

**FACT:** The term “peer-to-peer” marketplace has no legal meaning. These marketplaces come in all shapes and sizes, from Craigslist.com and Nextdoor.com to the biggest online retailers, such as Amazon and eBay.

The term “peer-to-peer” marketplace (P2P) is a general term used by the technology industry that applies to virtually every online marketplace and has no legal meaning. According to Investopia, a “peer-to-peer (P2P) service is a decentralized platform whereby two individuals interact directly with each other, without intermediation by a third party.” (https://www.investopedia.com/terms/p/peertopeer-p2p-service.asp) But these platforms come in many forms and sizes (an infinite number, in fact). Investopedia explains that “some P2Ps may provide services such as search, screening, rating, payment processing, or escrow.”

These variations in *services and business practices*, rather than self-identification as a “peer-to-peer” platform, is what determines whether an online marketplace is subject to AB 3262.

**MYTH:** AB 3262 makes all “peer-to-peer” marketplaces strictly liable for defective products sold on their websites, which is unfair.

**FACT:** Whether an online marketplace is subject to AB 3262 depends on factors such as 1) the services they provide to buyers and sellers (i.e. whether they act like a “retailer”; 2) the products they sell (i.e. new versus used, handmade, etc.); 3) the type of sellers who sell products on their sites (individuals versus retailers); and 4) whether the marketplace obtains any “financial benefit” from the sale of the goods on its site.

*Services* -- If the marketplace merely acts as a platform for one individual to buy a product from another individual without being involved in the transaction in any way (other than prohibiting contraband), the marketplace is not “engaged in the business of placing products into the stream of commerce and is therefore not acting as a “electronic retail marketplace” Craigslist.com and online classified advertisements do this – and they are not subject to AB 3262.

But when the marketplace exerts more control over transactions and offers services similar to those of traditional retailers, the online marketplace may be subject to AB 3262. Examples of such services that a court
would consider in determining whether an online marketplace offered retail services include money back guarantees, standards for shipping, refunds, shipping standards, and authority to remove sellers. *Online retail marketplaces such as Amazon, eBay, and Etsy ALL do this, so are subject to AB 3262 (unless selling used, handmade, or auctioned goods).*

**Types of Products** – If the goods are used, handmade, or auctioned, they are exempt from AB 3262.

**Sellers of goods** – Under existing law, retailers that sell online are strictly liable for the damages caused by the defective goods they sell. It does not matter whether they sell in brick and mortar store or online. The California Chamber of Commerce acknowledges this in their letter of opposition to AB 3262. *Online marketplaces that sell a retailer’s products, under existing law, are also strictly liable for defects in the products sold on their sites because they facilitate those products entering the stream of commerce.*

**Financial Benefit** – If the marketplace does not obtain any financial benefit from the sale of the product, the marketplace is not subject to AB 3262. Craigslist.com, for example, does not charge any fee for listing of advertisements OR the sale of goods. *Amazon, eBay, and Etsy all receive a financial benefit from the sale of goods on their sites, so are therefore subject to AB 3262 (unless selling used, auctioned, or true homemade goods).*

**MYTH: eBay and Etsy are neutral facilitators of transactions between third parties.**

**FACT:** No, eBay and Etsy do many things that neutral marketplaces, such as Craigslist, would never do. All of the following would be considered evidence that eBay and Etsy are retailers under current law (except when used, handmade, and auctioned goods are involved).

- **eBay has touted the fact that it gives services to its customers that are like the services a retailer provides.**

  Devin Wenig, President and CEO of eBay from July 2015 to September 2019, said the following in 2013, when he was the head of global marketplaces at eBay:

  “What’s critical is we have retail standards” that give people confidence. “Any time something goes wrong, we have a rock-solid eBay guarantee, and they’ll call us up and they’ll get their money back, period, no questions asked.”

  “That’s been really important to turn eBay from in essence a peer to peer marketplace to a retail standard experience,” Wenig said. (Just last month we [blogged](https://www.ecommercebytes.com/2013/12/11/ebays-version-amazons-60-minutes-tv-special/) about this trend of online marketplaces moving away from a peer-to-peer experience.)

- **eBay helps market and promote certain listings.**

  “As it stands, more than 940,000 sellers are using eBay’s “promoted listings” feature on over 250 million listings (eBay, 2019). This helps sellers to boost their listings’ visibility and consequently, sales.

  “Using eBay’s prompted listings presents a win-win situation for both eBay and its sellers. Sellers can choose the rate they would like to apply to the listing and sellers are only charged for the promotion if the item is sold.
“Clearly, it’s a feature that’s worked extremely well. This has helped to generate $89 million in revenue for eBay from just the second quarter of 2019 alone, marking a year-over-year growth rate of over 130 percent.” (https://www.oberlo.com/blog/ebay-statistics)

- **eBay has a complex system of seller standards and ratings.**  

- **eBay has shipping standards – they track whether sellers ship and deliver products promptly.**

  To provide your buyers with great service, it's important to make sure you send your items on time. Late shipment rates are determined by the percentage of transactions that you sent after the handling time stated in your listing or that were not delivered by the estimated delivery date. We'll only consider a shipment late if: Tracking shows the item was delivered after the estimated delivery date, unless there's an acceptance scan within your dispatch time or there's confirmation from the buyer of on-time delivery.

- **eBay even has standards for defects in products**, so if sellers only sell a few defective products (or injure a few people?), they can keep selling on eBay.

- **Etsy provides tracking services for packages sent by their sellers.**  

- **Etsy issues gift cards that can be used to buy any item on their entire site.**  

- **Etsy provides their own payment system, advising buyers to “Keep your transaction on Etsy. We can’t verify or assist with payments made outside of Etsy Payments or PayPal.”**  

- **Etsy provides encryption services.**

  In some circumstances, Etsy may use a third-party encryption service, SendSafely, to securely request additional information to confirm a transaction, such as a copy of government-issued photo ID.

**MYTH:** eBay sells mostly used and auctioned items.

**FACT:** The vast majority of products that are sold on eBay are new, not used. “80 percent of all goods sold on eBay are new (PR Newswire, 2018). But in terms of sell-through rate, used items are actually outperforming new items.” (https://www.oberlo.com/blog/ebay-statistics) Only 10% of eBay sales are by auction. 90% are sold just as goods are sold on Amazon.com.

**MYTH:** Etsy sells only homemade and handmade items.

**FACT:** Etsy sells mass-produced, manufactured, and foreign-made products.

- Etsy’s definition of “homemade” includes machine-made products that are merely “designed” by the shop.

  The term “handmade” means a product or service:  
  (1) made or **designed** by a third party seller that is a commercial or non-profit enterprise that has **10 or fewer employees**, one or more of whom owns the enterprise;
made by hand or through **hand controlled machines** (including computer-assisted devices such as 3D printers) by the third party seller; or,

(3) that is a creative design (including art, jewelry, sculpture or clothing) created by the third party seller.

A handmade product or service may contain components *made by another party*, but may not be a product of another party merely resold by the third party seller.

- Etsy shops can hire as many other workers as needed to assist with production. In 2013, Etsy changed its policies about hiring outside workers to help crafters, allowing them to hire as many as they wanted/needed.

“At its core though, the policy change is about more than simply clarifying the definition of handmade. By entering the world of manufacturing, Etsy has positioned itself to grow far beyond the modest cut and sew roots of its sellers. Etsy hopes that by doing so, they can impact the way we make and sell things.

**Redefining Manufacturing**

“I think that our collective view of manufacturing is outdated,” Dickerson tells me one afternoon, sitting in his office at Etsy’s Brooklyn headquarters. Events like the Foxconn debacle and Bangladeshi garment factory fire have soured the public on manufacturing, and with good reason. But when Dickerson talks about manufacturing, he likes to steer the conversation towards Etsy users who have bootstrapped their own mini-factories, or craft-friendly communities like Manufacture NY, a 40,000 square-foot facility in Brooklyn that gives local designers space to manufacture their products.

... **Making Changes**

Etsy’s updated guidelines state that all Etsy users are eligible to use outside help, whether that be a clothing designer who outsources her sewing to a garment factory or a visual artist using Zazzle to print his work. The only stricture is that creative authorship has to rest with the seller.


- Foreign manufacturers:

  [Etsy relies] on sellers to make a judgment call on the type of manufactures they’ll employ, with *hope that the Etsy ideology will prevail*. That’s a big gamble for a company looking to build a better retail economy from the ground up, but Dickerson says so far more than 80 percent of sellers who have applied for outside manufacturing have opted to go with manufacturers in their own country. “When you build any sort of internet service in scale there will always been bad actors, people who don’t tell the truth or manipulate things,” he says. “But we trust our sellers to make the right decision.” [https://www.wired.com/2014/04/why-etsys-future-depends-on-leaving-behind-the-simply-handmade/](https://www.wired.com/2014/04/why-etsys-future-depends-on-leaving-behind-the-simply-handmade/)

**MYTH: eBay and Etsy are not giant retail marketplaces like Amazon.com**

**FACT: eBay and Etsy are large and highly profitable corporations doing business all over the globe, not scrappy startups.**

- eBay’s gross merchandise volume on its website in 2019 was $22 billion. ([https://www.oberlo.com/blog/ebay-statistics](https://www.oberlo.com/blog/ebay-statistics))

- EBay’s revenue is greater than J.C. Penny (before it declared bankruptcy—probably not a coincidence).

- Etsy is a profitable, publically traded corporation. For its third quarter of 2020, Etsy expects revenue in the range of $366 million to $426 million. That's well above estimates of $279 million.

- Etsy is branching out into new retail ventures (to be “like Amazon”). According to an article dated June 25, 2020 in Investor’s Business Daily:

  Just before the Covid-19 pandemic began to shake the rafters on Wall Street, Etsy stock hit a seven-month high of 63.24 on March 4. From that point, it plunged 52% to a low of 29.95, as stock markets plunged globally. Since then, the stock has leapt more than 200%.

  Among previous improvements made by the company, Etsy announced free shipping on orders of $35 or more. The other was a change to its advertising platform. Etsy made "meaningful strides" in search and discovery by making the homepage more personalized and dynamic. It also made progress improving its mobile app.

  In addition to the platform changes, Etsy last year acquired Reverb, a privately held online marketplace for new, used and vintage music gear. It paid $275 million in cash.

  ... For its second quarter [of 2020], Etsy expects gross merchandise sales in the range of $2 billion to $2.2 billion. That was above consensus of $1.34 billion, representing growth of about 90%. It expects revenue in the range of $310 million to $340 million, well above the consensus of $213 million.

MYTH: eBay is unable to control the quality and safety of its products because of the lack of “standard” product codes; accordingly, the reviews on our sites are for the seller, not the product.

FACT: The vast majority of goods sold on eBay (and a growing number on Etsy) are new and foreign made. They should have standard product codes and skew numbers. These sites, just like brick and mortar retailers, should control the quality and safety of the products they sell.

- More than 80% of the products sold on eBay are new. Maybe handmade goods sold on Etsy don’t and can’t have standard product codes, but Etsy has started allowing the sale of mass-produced goods. They should also have standardized product codes.

- Resellers and Mass-produced products are rampant on Etsy, making quality control impossible.

  That Etsy began allowing manufacturing partners in 2013 underscored the reseller issue that has plagued the site for years. The Marketplace Integrity, Trust & Safety team—which has the unenviable task of policing sellers for adherence to Etsy rules—is unable or unwilling to weed out sellers of mass-manufactured goods. And having sellers who are able to move nearly a million dollars of product a year is great for Etsy's bottom line.  https://www.wired.com/2015/02/etsy-not-good-for-crafters/

- Just because eBay and Etsy have chosen business models that make it difficult to ensure that products are safe does not mean that they should not be legally obligated to do so like brick and mortar retailers. If a court ruled that they were acting as retailers by facilitating products entering the stream of commerce (which a court easily could) a court would hold the strictly liable for the safety of products sold on the websites.
MYTH: eBay and Etsy are different from sites like Amazon because they allow prospective buyers to know the identity of sellers and allow communication between buyer and seller.

FACTS: Allowing prospective buyers to communicate with sellers does not mean that eBay and Etsy would not be found to be acting as retailers under existing law.

- The fact that Amazon does (or did—they recently changed their policy) not allow buyers to communicate with sellers has been used against Amazon (as evidence of their control over the transaction) in Bolger and Oberdorf, but no court has found that ability to identify the seller precludes strict products liability being imposed on another entity in the product’s chain of distribution.

- This does not make any difference if the seller is nowhere to be found if something goes wrong with the product. Unless the electronic retail marketplace is considered to be in the “stream of commerce,” consumers will always be left empty handed.

- Sellers on eBay (and Etsy) are likely to be unavailable when consumers are injured by their defective products because so many are overseas. Communication does not change that.

- Over 70% of eBay sellers are located outside the USA. 17% are in China. When something goes wrong with these Chinese products and consumers are injured, Chinese sellers and manufacturers are unlikely to appear in California courts (just as occurred in Bolger).

- eBay and Etsy (and other opposition groups) cannot answer this question: what happens if the (foreign) seller or manufacturer of a defective product can’t be found after that product injures a consumer?

- Communication between buyers and sellers: although some court decisions have discussed why strict liability should apply when communication is not allowed, there is no case law to support a lack of strict liability because communication with a seller is allowed on a sales platform like eBay or Etsy.

MYTH: An online marketplace must possess a product to be a retailer and cannot be a retailer if it does not possess (or package or ship) the product.

FACT: Retailers and other businesses in the stream of commerce do NOT need to possess (or package or ship) an item to be considered a “retailer” and be subject to strict product liability under existing law.

- Imposing strict liability under these circumstances is "an expression of policy that once an entity is instrumental in placing a defective product . . . into the stream of commerce, then liability [should] attach[] without regard to conduct (fault)." (Kasel v. Remington Arms Co. (1972) 24 Cal.App.3d 711, 733.)

- “[S]trict liability may attach even if the defendant did not have actual possession of the defective product or control over the manner in which the product was designed or manufactured.” (Bay Summit Community Assn. v. Shell Oil Co. (1996) 51 Cal.App.4th 762, 773-775 [emphasis added].)

MYTH: Buying goods on eBay (and Etsy and other online marketplaces) is safe when sellers are screened.

FACT: Unsafe and illegal goods are sold on eBay and screening sellers is no substitute for online retailers being held accountable for the safety of their products.
Documented problems with product safety and legality on eBay.


- The same group investigated charging cables and found numerous instances where the reviews were fake or misleading, the products were counterfeit, used products were advertised as new, and that the products could be dangerous. [https://www.companynewshq.com/company-news/personal-finance-utilities-company-news/how-ebays-review-system-is-promoting-fake-counterfeit-and-even-dangerous-products-which-news/](https://www.companynewshq.com/company-news/personal-finance-utilities-company-news/how-ebays-review-system-is-promoting-fake-counterfeit-and-even-dangerous-products-which-news/)


- 60 day notices have been filed at the AG’s office against eBay for Prop 65 violations. Additionally, mercury-containing face creams that originate in Mexico and China are sold on eBay.

- Congress is investigating the sale of fake, stolen, and unsafe goods on eBay and Amazon:
  

- According the EPA, eBay (and Amazon) have been selling products with dangerous chemicals, in violation of federal law, during the COVID-19 pandemic.

  Exposure to methylene chloride [can cause death](https://www.epa.gov/region4/pdfs/health/ara_ms_081310.pdf), but in one instance, eBay marketed and sold 55-gallon drums of methylene chloride as a coronavirus disinfectant and paint stripper, [according to the EPA press release](https://www.epa.gov/region4/pdfs/health/ara_ms_081310.pdf).

  Amazon was ordered by the EPA to stop selling over 30 products and eBay, more than 40, some of which falsely claimed to provide "Epidemic Prevention," "2020 Coronavirus Protection" and "complete sterilization including the current pandemic virus," according to an agency press release.


Regarding claims that screening sellers protects customers:

- eBay says they “screen sellers” and that buyers know who they are dealing with, but those things do not matter. But they cannot “screen” a fake corporation in China. And it does not matter if you know the identity of a seller who does not show up or vanishes when you try to sue them.

- This is a factor showing that eBay has control and influence over products entering the stream of commerce via its marketplace and would likely be considered by a court to be evidence that they are acting as retailers.
• Screening sellers does not make any difference if sellers are not available when something goes wrong with their product.

• Given that online marketplaces, like Amazon, eBay, and Etsy facilitate the entry of products into the stream of commerce AND gain a financial benefit from doing so, they are responsible for the goods that are sold under existing law.

MYTH: It’s unfair to treat online marketplaces such as eBay and Etsy as electronic retailer marketplaces under AB 3262 because their business models are different than Amazon’s “Fulfilled by Amazon” program that a California appellate recently found to be a retail enterprise, making Amazon strictly liable for product defects in Bolger v. Amazon (Aug. 13, 2020, No. D075738) ___Cal.App.5th___.

FACT: It would be unfair to exempt other sites from ever being considered to be electronic retail marketplaces given that they share many of the same features that were considered to be evidence of Amazon’s status as a retailer.

First, no business -- eBay, Etsy included -- is automatically liable under the bill. “The application of strict liability under this bill will continue to depend on the facts of the particular case before the court, which will ultimately make a holistic determination in view of the basic principles underlying strict products liability.” (Senate Judiciary Committee Analysis of AB 3262 (Stone), p. 18)

Second, one of the basic tests that the Bolger court used was a “but for” test. “But for Amazon’s own acts, Bolger would not have been injured. Amazon’s own acts, and its control over the product in question, form the basis for its liability.” (Bolger, p. 31) Other electronic retail marketplaces, including Etsy and eBay, would also meet the “but for” test.

Third, the pivotal factor is whether the marketplace helps bring the product to consumers. “Whatever term we use to describe Amazon’s role, be it “retailer,” “distributor,” or merely “facilitator,” it was pivotal in bringing the product here to the consumer.” (Bolger, p. 3.) Also, “Amazon was a link in the chain of product distribution even if it was not a seller as commonly understood.” (Id., at p. 23.) The same would be said of eBay and Etsy (except when selling used, auctioned, or handmade goods).

Finally, all of the following policy arguments used by the appellate court in Bolger to find Amazon strictly liable are equally applicable to other electronic retail marketplaces (like eBay and Etsy):

• Electronic retail marketplaces can pressure third parties to “enhance the safety of their products”:

  “Here, unlike a finance lessor, Amazon does have a continuing relationship with its third-party sellers. . . . Amazon can and does exert pressure on those sellers to enhance the safety of their products.” (Bolger, p. 34.)

  “Regarding product safety, Amazon primarily asserts that it does not have relationships with manufacturers of third-party products, so it cannot “directly” pressure the manufacturer. . . . Amazon, like a conventional retailer, can exert pressure on manufacturers indirectly through the parties with whom it does have ongoing relationships, i.e., third party sellers.” (Bolger, p. 37.)

• Consumers won’t necessarily have to pay more for safer products (although they may be willing to) because electronic retail marketplaces have the power to spread costs in other ways:
“Amazon also claims that strict liability would operate as a tax on “millions of faultless third-party sellers who have never sold a defective or dangerous product” and lead to higher prices for products sold on Amazon. This claim is somewhat tangential to the primary policy at issue. The primary policy of cost allocation is promoted where participants in the chain of distribution can adjust costs between themselves, i.e., for the products they handle in common.” (Bolger, p. 38.)

- **When upstream manufacturers and suppliers are not available to compensate injured consumers for injuries caused by defective products, the public policy goals of existing strict products liability law require that all businesses which gain a financial benefit from placing the product in the stream of commerce are responsible for defects:**

  “There is, of course, a risk that the upstream supplier and other entities in the chain of distribution will be insolvent or unavailable. But that circumstance is precisely why the doctrine of strict liability has been expanded to include the entire chain of distribution, including retailers, where the policies of the doctrine are otherwise served. (See Vandermark, supra, 61 Cal.2d at p. 262.) The risk of nonpayment, in such a circumstance, should fall on an entity that benefited from the sale of the product rather than the injured plaintiff. (Id. at pp. 262-263; Greenman, supra, 59 Cal.2d at p. 63.) Amazon can choose how to absorb that risk.” (p. 39 [emphasis added].) (Bolger, p. 39.)