Trying to deal with infringing goods on the internet has been a problem as long as the internet has been around and can be frustrating for patentees. Typically, the circumstances of online marketplaces have required patentees to file direct infringement suits against potential infringers, and only after a court has determined infringement and issued an injunction does a listing for an item come off the marketplace page. As litigation is expensive, time consuming, and difficult to wield against whack-a-mole infringers (ofttimes located overseas), many patentees were left with few options. Some have attempted to avoid the federal courts by pursuing the alternate route of seeking a limited or general exclusion order through the International Trade Commission; however, securing an exclusion order through the ITC can still be prohibitively expensive for even large companies.

Enter Amazon. In an attempt to balance the rights and concerns of patent holders with the rights and concerns of its online retailers, Amazon has introduced a pilot program—the Utility Patent Neutral Evaluation Procedure—with the aim of providing a process for resolving patent infringement allegations against sellers on Amazon's online marketplace nearly as painless as submitting a DMCA takedown notice. Although access to this new program is currently by invitation only, the pilot program has already seen some success for patentees hoping to stem the flow of infringing goods. It works like this:

First, a patentee submits a takedown notice to Amazon, specifying a product listing and limiting the claim of infringement to a single claim of a utility patent. Upon receiving the notice, Amazon notifies the seller, who then has 21 days to contest the allegations. If the seller does wish to contest the allegations, they must agree to an arbitration-like proceeding which focuses solely on infringement. Additionally, the seller must submit $4000 to a neutral evaluator—currently, a patent practitioner selected by Amazon. If the seller chooses not to contest the allegation, Amazon delists the product.

Second, to initiate the arbitration, the patentee likewise submits $4000 to the evaluator. Over roughly 8 weeks, compact briefing occurs and the evaluator makes a decision regarding the infringement. Based on the decision, the product listing is either removed or allowed, and the "winner" of the arbitration receives back the $4000 they contributed. The other party's $4000 is used to pay the evaluator's fee. Additionally, if the product listing is removed, Amazon will use the decision as a quasi-precedential holding and will remove all future products that are identical to the removed product listing.

Overall, the strength of this program is in its speed and simplicity for patentees. However, this is also the program's weakness—patent infringement often cannot easily be boiled down to a simple question of infringement of one patent claim. Further, there appears to be no mechanism for an accused seller to challenge the validity of the patent directly to Amazon, or indeed to air any defenses other than noninfringement of the asserted claim.

Whether this private quasi-judicial approach ultimately gains traction may depend upon whether the decisions rendered by the evaluators are found to be reliable. Relatedly, how Amazon handles the interplay between this program and pending litigations and IPR proceedings remains to be seen.