

A close-up photograph of a white fabric garment, likely a shirt or jacket, featuring yellow ribbed trim. A printed label on the fabric shows the number '195' inside a square border. The background is dark and out of focus.

Countering Counterfeits: The Real Threat of Fake Products

How Fake Products Harm Manufacturers, Consumers and
Public Health—and How to Solve This Problem





Amid an unprecedented global health crisis, manufacturers have stepped up and taken the lead, working together and with national, state and local governments to fight the spread of COVID-19. Manufacturers deliver day-to-day necessities, lifesaving medical innovations and products that improve people's lives in countless ways. While the pandemic has demonstrated anew the importance of American innovation and ingenuity, it has also revealed a serious threat: counterfeit products that put lives and livelihoods at risk.

Counterfeiting is not a new problem; it has harmed manufacturers, American workers and consumers for years. But the problem is getting worse, and the COVID-19 pandemic has shown just how dangerous inaction can be. As part of the nation's critical response effort, manufacturers have been supplying health care workers and other Americans on the front lines of this crisis with vital goods, including personal protective equipment, hospital beds, ventilators, hand sanitizers, cleaning supplies and other critical health care and safety products. But while manufacturing men and women work long hours to ramp up production of desperately needed products to fight the spread of this deadly illness, counterfeiters have exploited the crisis to peddle fake tests, dangerous vaccines and ineffective protective gear. These counterfeits are harming American citizens and hindering manufacturers' efforts to protect their workers and communities.

The prevalence of counterfeits in the COVID-19 response has brought new urgency to this long-simmering issue. So the National Association of Manufacturers is leading the charge against fake and counterfeit goods, bringing together diverse stakeholders and driving innovative policy solutions to address these issues once and for all and to ensure the long-term success of our sector and the safety and security of the people who rely on our products.

Jay Timmons

President and CEO





National Association of Manufacturers

I. Counterfeits and the Threat to Manufacturers

Counterfeit goods are a threat to manufacturers and to the consumers they serve. Fake products have infiltrated everyday avenues of commerce, making their way into supply chains and consumers' homes. The problem is not limited to specific sectors: it affects a broad range of manufactured goods, from automotive parts and children's toys to medical devices and pharmaceuticals. The rise of counterfeits threatens manufacturers' competitiveness, undermines consumer confidence and poses a threat to individuals' health and safety.

By one estimate, global trade in counterfeit and pirated goods exceeded \$500 billion in 2016, which amounts to 3.3% of all global trade.¹ Even this number likely fails to capture the full scope of the problem. Attempts to understand the scale of counterfeit goods are tied to the data on counterfeit goods seized by officials at Customs and Border Protection. It is estimated that authorities in the United States catch less than 2.3% of the total volume of counterfeit goods.²

Commonly Counterfeited Products

 Water Filters	 Cosmetics	 Clothes	 Airbags/Automotive Equipment
 Drugs	 Helmets	 Children's Toys	 Electronics

China is the top global hub for counterfeiting. In 2019, more than 8 of every 10 counterfeit products seized at U.S. borders came from China or Hong Kong, dwarfing the volume of counterfeits from any other country or region.³ Chinese counterfeits challenge U.S. manufacturers not only in China and in the United States, but also in markets across Asia, Africa and the Americas. Tackling these problems requires working more closely with trading partners to enhance enforcement, capacity building and joint advocacy.

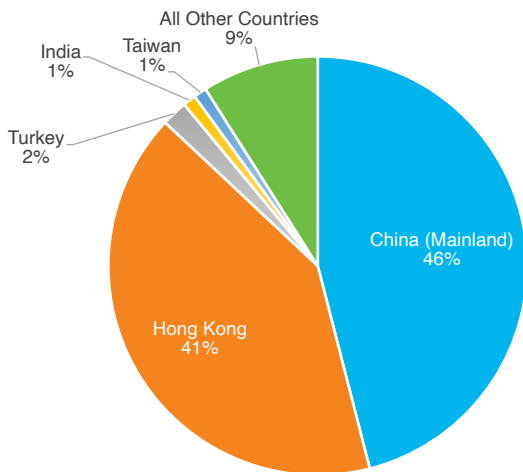
¹ *Trade in fake goods is now 3.3% of world trade and rising*, ORG. FOR COOP. & DEV. (Mar. 18, 2019), <https://www.oecd.org/newsroom/trade-in-fake-goods-is-now-33-of-world-trade-and-rising.htm>.

² COMM'N ON THE THEFT OF AM. INTELLECTUAL PROP., THE THEFT OF AMERICAN INTELLECTUAL PROPERTY: REASSESSMENTS OF THE CHALLENGE AND UNITED STATES POLICY, UPDATE TO THE IP COMMISSION REPORT 9 (2017) http://ipcommission.org/report/IP_Commission_Report_Update_2017.pdf.

³ U.S. CUSTOMS AND BORDER PROT. OFFICE OF TRADE, INTELLECTUAL PROPERTY RIGHTS SEIZURE STATISTICS: FY 2019 14 (2020), https://www.cbp.gov/sites/default/files/assets/documents/2020-May/FY%202019%20IPR%20Seizure%20Powerpoint%20FINAL%20PBRB%20APPROVED_0.pdf.

Customs and Border Protection Seizure Statistics by Country

Source: Office of Trade, U.S. Customs and Border Protection



FY 2018 TOTALS:

33,810 – NUMBER OF SEIZURES

\$1,399,873,842 – TOTAL RETAIL VALUE
(OF SEIZED GOODS)

E-Commerce: Captive to Counterfeits?

Counterfeiters have gained strength due to the growth of e-commerce platforms, which have transformed how companies connect with customers and changed the marketplace for selling goods. E-commerce sales now make up 10% of all retail spending, up from 3% of total sales in 2009.⁴ Pre-COVID-19 estimates predicted that global e-commerce sales would exceed \$4 trillion in 2020,⁵ with U.S. e-commerce spending to exceed \$1 trillion by 2025, doubling the volume from 2018.⁶ The spike in e-commerce during the COVID-19 pandemic has only pushed these numbers higher.⁷

While these platforms have created opportunities for manufacturers to sell their products and provided new conveniences for consumers, they have also created a pipeline directly to customers that bad actors can exploit. Millions of third-party sellers can easily access these platforms without providing basic information about their identity or location, and the platforms themselves exert little oversight over these sellers. Counterfeiters are therefore better able to pose as legitimate sellers to profit off of fake goods. Because bad actors are often able to hide their identities, it is difficult for the government and the private sector to hold them accountable even after they are discovered.

A surge in counterfeits accompanies a growth in e-commerce. E-commerce sales have grown and are expected to exceed \$4 trillion by 2020.⁸

Online platforms present unique challenges for manufacturers who must devote ever-increasing resources and time to monitoring search engine results, e-commerce channels, social media postings, payment providers and others who may all play a role in driving online traffic to counterfeit products.

4 Joe Kaziukenas, *U.S. E-Commerce Posts Fastest Growth in Seven Years*, MARKETPLACE PULSE (Nov. 20, 2019), <https://www.marketplacepulse.com/articles/us-e-commerce-posts-fastest-growth-in-seven-years>.

5 U.S. GOV'T ACCOUNTABILITY OFF., GAO-18-216, INTELLECTUAL PROPERTY: AGENCIES CAN IMPROVE EFFORTS TO ADDRESS RISKS POSED BY CHANGING COUNTERFEIT MARKET 12 (2018), <https://www.gao.gov/assets/690/689713.pdf> [hereinafter GAO-18-216].

6 Kaziukenas, *supra* note 4.

7 April Berthene, *Shoppers Buy More Online Compared To Before the Pandemic*, DIGITAL COMMERCE 360 (June 8, 2020), <https://www.digitalcommerce360.com/article/coronavirus-impact-online-retail/>.

8 GAO-18-216, *supra* note 5, at 12.

“Bosch like other manufacturers faces the dilemma in effectively dealing with counterfeiters present in online marketplaces. There are several key challenges to dealing with online counterfeits. Counterfeiters are able to market goods that appear to be legitimate, often using the brand owner’s own online content, making it difficult to identify counterfeits without a purchase. The sheer volume of listings can also pose a challenge to enforcement. Finally, the counterfeiters are able to effectively hide the true person or entity hidden behind the digital curtain separating them from the consumers in the online marketplaces. Even though some online marketplaces have tools to report sellers, the brand owner is unable to take measurable actions against the infringing seller without more knowledge of the seller’s identity. In the current environment, the brand owner’s ability to thoroughly defend its intellectual property is hampered.”

– Clayton Lindgren, Senior Manager, Country Approval and Brand Protection, Robert Bosch LLC

During the COVID-19 pandemic, counterfeiters—who have long preyed on vulnerable consumers to make a profit—have taken advantage of consumers’ increased anxiety and fear, the high demand for certain goods and the substantial increase in e-commerce necessitated by social distancing measures.⁹ COVID-19 has required manufacturers to adapt to new demands and innovate new products at record speeds, further complicating the challenges of fighting counterfeits.

Peddling Fakes During a Pandemic:

Counterfeit products have seriously complicated COVID-19 response efforts, with increasing reports of untested test kits, counterfeit pharmaceuticals and fake respirator masks. As legitimate manufacturers worked to develop and manufacture critical COVID-19 tests and test supplies, unscrupulous actors used the uncertainty to sell dangerous knockoffs. In April 2020, the Department of Homeland Security announced it “worked alongside U.S. Customs and Border Protection to seize over 225 shipments of mislabeled, fraudulent, unauthorized or prohibited COVID-19 test kits, treatment kits, homeopathic remedies, purported anti-viral products and personal protective equipment (PPE).”¹⁰ As CBP seized thousands of test kits entering the United States through International Mail Facilities, the U.S. Food and Drug Administration warned consumers about the fraudulent tests being sold online.¹¹ Amazon announced that it blocked or removed more than 1 million products that contained suspect claims about COVID-19 treatments and applications.¹²

Counterfeiters operating as third-party sellers on popular e-commerce platforms can undercut legitimate manufacturers’ sales because they are not subject to the same rules and standards. They can sell products for a fraction of the price because they have not invested in the research and development to create new

⁹ See, e.g., Jay Kennedy, *Buyer Beware: Counterfeit markets can flourish during a public health crisis*, THE CONVERSATION (Mar. 26, 2020), <https://theconversation.com/buyer-beware-counterfeit-markets-can-flourish-during-a-public-health-crisis-134492>; Europol, *How Criminals Profit From the Covid-19 Pandemic* (Mar. 27, 2020), <https://www.europol.europa.eu/newsroom/news/how-criminals-profit-covid-19-pandemic>; Daniel Bennett, *Covid-19 and Counterfeiting: How the Pandemic is Reshaping Brand Protection – Part 1* (Apr. 2, 2020), <https://www.corsearch.com/covid-19-counterfeiting-how-pandemic-reshaping-brand-protection/>.

¹⁰ ICE HSI Launches Operation Stolen Promise, U.S. IMMIGRATION & CUSTOMS ENFORCEMENT (Apr. 15, 2020), <https://www.ice.gov/news/releases/ice-hsi-launches-operation-stolen-promise>.

¹¹ 1,147 Prohibited Test Kits Seized by Chicago CBP in 45 Days, U.S. Customs & Border Prot. (May 1, 2020), <https://www.cbp.gov/newsroom/local-media-release/1147-prohibited-test-kits-seized-chicago-cbp-45-days>; Beware of Fraudulent Coronavirus Tests, Vaccines and Treatments, U.S. Food & Drug Admin. (Apr. 29, 2020), <https://www.fda.gov/consumers/consumer-updates/beware-fraudulent-coronavirus-tests-vaccines-and-treatments>.

¹² See, e.g., Catherine Thorbecke, *Amazon removes 1 million products for misleading claims, price gouging amid coronavirus outbreak* (Mar. 3, 2020), <https://abcnews.go.com/Business/amazon-cracks-million-misleading-price-gouged-products-amid-story?id=69357582>;

products. The products they are shipping have not gone through the same safety tests or been built to the same stringent standards as products made by the manufacturers who follow the rules.

E-commerce platforms unfortunately benefit from counterfeit products as well, making a profit from third-party sales of counterfeits just as they do from legitimate sales. Amazon made \$53.76 billion in revenue from third-party sales in 2019, up from \$42.75 billion in 2018.¹³

Without a level playing field, manufacturers face challenges competing and maintaining their technological edge. Without products subject to testing and standards, consumers face real threats to their health and safety.

Impact on Manufacturers: The Cost of Counterfeits

Counterfeits threaten manufacturers' investments in innovation and violate manufacturers' intellectual property rights. Manufacturers in the United States perform nearly two-thirds of all private-sector research and development, totaling \$271 billion in 2018.¹⁴ Safeguarding manufacturers' intellectual property rights is critical to manufacturers' continued ability to grow and innovate. Counterfeiting can slow economic growth and lead to job loss in IP-intensive industries.¹⁵

The Economic Costs:

With counterfeits making up 3.3% of total merchandise trade, the U.S. economic impacts are staggering. For 2019, counterfeiting would have subtracted nearly \$131 billion from the U.S. economy, including direct, indirect and induced economic impacts. That means \$22.3 billion of lost labor income, 325,542 fewer jobs, \$5.6 billion of lost federal tax revenues and nearly \$4 trillion less in state and local tax collections.¹⁶

In addition to misappropriating manufacturers' valuable IP, counterfeiters undermine the brand names and business reputations that manufacturers invested money and time to establish. Counterfeiters infringe on trademarks and confuse consumers as to the quality and origin of products and services. They undermine the confidence and quality that trademark laws are intended to support.¹⁷

Counterfeits force manufacturers to divert resources away from critical business operations and focus on policing platforms and protecting their brands. Companies spend huge sums to employ global networks of investigators, retain brand-protection experts and pursue enforcement against counterfeiters.¹⁸ Each dollar spent to fight counterfeits is a dollar not spent to improve products, develop new technologies, grow employee wages or create new American jobs.

Small and medium-sized manufacturers are likely to be harmed the most by the counterfeit market. These companies have fewer resources to invest in the personnel and technology to monitor illicit activity and protect their brands. Government enforcement efforts often rely on information provided by brand owners, and smaller manufacturers are less able to engage with government entities responsible for enforcing their IP rights. Smaller firms are also more at risk to be driven out of business by counterfeiters. They often offer fewer products than their larger counterparts, which means that harm from counterfeits cannot be easily offset. Smaller firms are less able to absorb the losses that come when counterfeiters siphon off their business.

13 J. Clement, *Third-party seller share of Amazon platform 2007–2020*, STATISTA (May 4, 2020), <https://www.statista.com/statistics/259782/third-party-seller-share-of-amazon-platform/>.

14 Nat'l Ass'n of Mfrs., *Facts About Manufacturing: Top 18 Facts You Need to Know*, <https://www.nam.org/facts-about-manufacturing/> (last visited June 16, 2020).

15 CONG. RESEARCH SERV., RL34292, *INTELLECTUAL PROPERTY RIGHTS AND INT'L TRADE* (May 12, 2020), <https://fas.org/sgp/crs/row/RL34292.pdf>.

16 Data from NAM Chief Economist Chad Moutray running global counterfeit totals through IMPLAN (on file with author).

17 J. THOMAS MCCARTHY, *MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION*, § 2:5 (4th ed. 2015).

18 GAO-18-216, *supra* note 5, at 18-19.

Impact on Consumers: The Dangers of Counterfeits

Consumers come in direct contact with some of the most common types of counterfeit products, including cosmetics, toys and pharmaceuticals. Many can pose real dangers to their health and safety. According to CBP, 16% of the 31,560 shipments of counterfeit goods they seized in 2016 contained products posing threats to consumer health and safety.¹⁹

The threats to individuals can be severe. Counterfeit products integrated into electronics such as chargers and hoverboards have caused fires and physical harm. Faulty components that make their way into critical auto safety products like airbags can undermine these lifesaving mechanisms. Items like helmets falsely claiming to meet government-approved safety standards have failed to perform their functions and resulted in deaths.²⁰

The COVID-19 pandemic has made the threat to consumers even more obvious. The appearance of fake testing kits, unsafe pharmaceuticals and counterfeit masks has caused confusion among anxious consumers and exacerbated public health risks in the current crisis.²¹ As families are staying home more often, they are going online to purchase toys to keep children entertained, desks and chairs to set up home offices, outdoor power equipment to tend to their homes and recreational equipment to stay in shape. Manufacturers of all these products have reported high levels of counterfeits that create serious, even fatal, risks to consumers.

“As the current COVID-19 pandemic has unfortunately illustrated, health care products will continue to be one of the most commonly targeted industries for counterfeiters. We are likely to continue to see illicit medical devices, drugs and personal care products entering legitimate supply chains. This is a problem that impacts patients and consumers in the U.S. and across the globe. At Johnson & Johnson, we invest significant resources to aggressively pursue this illegal activity but we believe businesses must join together and partner with governments to become a greater force in fighting the growing threat of counterfeits. Our ultimate goal always is to keep patients and consumers safe but we cannot do it alone.”

– **Rich Kaeser, Vice President of Global Brand Protection, Johnson & Johnson**

The Need for Action Now

The threats to manufacturers and consumers underscore the need for swift action against counterfeits. There is no silver bullet for tackling the diverse set of factors that have allowed counterfeits to proliferate. But the COVID-19 environment demonstrates the need for action and presents a new opportunity for the government to tackle this long-standing problem.

“Counterfeiting is a complex problem that requires unwavering commitment from the private and public sectors to solve. UL’s Project Centurion, an effort to reduce counterfeit products in the marketplace by leveraging a global safety network, led to over 270,000 counterfeit UL Marked products seized globally in 2019, valued at \$23 million. UL’s Anti-Counterfeiting Innovation Center combines expertise from law enforcement, retailers, e-commerce platforms, government officials and others to address complex counterfeiting challenges, reframe problems and implement innovative solutions. The Center aims to lead in anti-counterfeiting innovations that drive globally relevant, cost-effective solutions that advance public safety and build capacity within law enforcement and private sector organizations to combat IP crime.”

– **Brian H. Monks, Vice President and Chief Security Officer, UL**

¹⁹ *Id.* at 2.

²⁰ Alexandra Berzon, et al., *Amazon Has Ceded Control of Its Site. The Result: Thousands of Banned, Unsafe or Mislabeled Products*, WALL ST. J. (Aug. 23, 2019), https://www.wsj.com/articles/amazon-has-ceded-control-of-its-site-the-result-thousands-of-banned-unsafe-or-mislabeled-products-11566564990?mod=article_inline.

²¹ See, e.g., Jay Kennedy, *Buyer Beware: Counterfeit markets can flourish during a public health crisis*, THE CONVERSATION (March 26, 2020); *How Criminals Profit from the Covid-19 Pandemic*, EUROPOL (Mar. 27, 2020).

II. Policy Solutions and Call to Action

REQUIRE E-COMMERCE PLATFORMS TO REDUCE THE AVAILABILITY OF COUNTERFEITS

THE CHALLENGE

To reduce the harm caused by counterfeits, stakeholders must work to eliminate the availability of counterfeit goods for purchase. Fewer counterfeits on the market mean fewer consumers harmed by fake goods and fewer financial incentives for counterfeiters to operate. The challenge today is identifying and advancing policies and programs that policymakers, retailers, e-commerce platforms and brand owners can collectively adopt to limit the availability of as many counterfeit goods as possible.

Several key market factors drive counterfeiting, including the ability of counterfeiters to turn a profit, their access to global markets and a lack of accountability for bad actors.²² The most important of these, however, is profit. Indeed, the higher potential profitability of counterfeiting itself—based on their ability to free-ride with respect to research, development and marketing costs while accessing cheaper production processes and materials—creates the incentive for entities to engage in counterfeiting over legitimate production.²³ By using e-commerce platforms and selling directly to consumers, counterfeiters can cut out the middleman and further increase their profit margins.²⁴

The internet and e-commerce platforms have provided counterfeiters with access to global markets through easily accessible sales and distribution channels. A factory in China can quickly create an online account with a platform and begin selling directly to consumers around the world. These same channels also allow counterfeiters to avoid liability for the harm caused by counterfeit goods and continue to pursue their illicit operation. Counterfeiters can use false identities and addresses and then vanish at the first sign of trouble.²⁵

E-commerce platforms have democratized retail sales and enabled small, often remote, legitimate manufacturers to compete in the global marketplace. Tackling the problem of counterfeiters on e-commerce platforms should be done in a way that does not undermine the value these platforms provide to legitimate manufacturers, many of whom operate as good-faith, third-party sellers on these online marketplaces. Solutions should be crafted to target the parts of the system that counterfeiters can exploit, and they should increase the cost for counterfeiters by ensuring accountability for bad actors.

THE SOLUTIONS

- Congress should enact legislation to require e-commerce platforms to strengthen upfront screening of potential vendors. Congress should require e-commerce platforms to take the following key steps or face contributory liability for infringement due to vendor activities on their platforms:

22 Although limited, research shows that counterfeiting and piracy are driven by both demand- and supply-side factors embedded in institutional, behavioral and cultural environments. However, for purposes of limiting the *availability* of counterfeits, this paper focuses on the supply-side only. See Seung-Hee Lee & Boonghee Yoo, *A Review of the Determinants of Counterfeiting and Piracy and the Proposition for Future Research*, 24 KOREAN J. OF POL'Y STUDIES 1, 6 (2009), <https://pdfs.semanticscholar.org/ad71/3f727bc224ab79ffc8b999bdede50b0e8a26.pdf>.

23 See *id.* at 19.

24 See Jon Emont, *Amazon's Heavy Recruitment of Chinese Sellers Puts Consumers at Risk*, WALL ST. J. (Nov. 11, 2019), https://www.wsj.com/articles/amazons-heavy-recruitment-of-chinese-sellers-puts-consumers-at-risk-11573489075?mod=cx_picks&cx_navSource=cx_picks&cx_tag=collabctx&cx_artPos=1#cxrecs_s.

25 See, e.g., *id.* at 21 (citing ORG. FOR COOP. & DEV, THE ECONOMIC IMPACT OF COUNTERFEITING—COUNTERFEITING AND PIRACY OVERALL ASSESSMENT (2006)); Daniel Chow, *Alibaba, Amazon, and Counterfeiting in the Age of the Internet*, NW. J. INT'L L. & BUS., Forthcoming (August 22, 2019); Ohio State Pub. L. Working Paper No. 497 (2019), <https://ssrn.com/abstract=3441110>.

- Collect and verify key information (such as representative identity, address and contact information and bank account information) prior to vendor listing.
- Require potential vendors to attest, with appropriate proof, that the goods sold on the platform are authentic and authorized and have appropriate legal documentation required for sale in the United States where necessary.²⁶
- Maintain a current, verified set of the information referenced above for each vendor (through ongoing audits and reverification) or face the risk of contributory liability in the event of counterfeiting enforcement.
- Require a vendor to attest that it is only using images on its product listing sites that it is authorized to use and that accurately depict the goods being sold, and require it to conduct due diligence on submitted images to ensure that they appear to be accurate.
- Conduct due diligence, including use of appropriate technology, to screen for counterfeit products prior to offering the seller's goods for sale.
- Screen potential vendors and products prior to approval to ensure that previously terminated vendors, or previously delisted products, do not reappear on platforms under a different vendor or a different alias.
- Congress should enact legislation that requires e-commerce platforms to share information relevant for consumers to understand the risk of purchasing counterfeits and for brand owners to pursue effective enforcement actions against counterfeiters. Congress should require platforms to take the following key steps or face contributory liability for infringement due to vendor activities on their platforms:
 - Provide to the public the full name and contact information of the vendor.
 - Provide to the public information about whether the listed vendor is the manufacturer, importer, reseller and/or retailer of the product.
 - Notify the consumer prior to purchase of any given product if the vendor supplying a product is different from the vendor named on the product listing page.
- Congress should enact legislation that requires e-commerce platforms to remove promptly counterfeit vendors and products from their platforms. Congress should require e-commerce platforms to take the following key steps or face contributory liability for infringement due to vendor activities on their platforms:
 - Develop and use technology solutions to routinely screen for, and proactively remove, counterfeit products.
 - Implement a timely, accessible takedown process for removing listings of counterfeit goods.
 - Terminate sellers that have sold counterfeit goods on the platform.
- Congress should appropriate emergency funds to boost enforcement against fake and counterfeit versions of products urgently needed for COVID-19 treatment and care such as test kits, medicines, personal protective equipment and other health supplies:
 - Those funds should be routed through the National Intellectual Property Rights Coordination Center to ensure interagency sharing of real-time intelligence and coordinated ramp-up of enforcement efforts. The FDA should play a key role in providing up-to-date information to both consumers and

²⁶ Such information could include a chain of title or license (to demonstrate that their product sales are authorized), legal certifications such as a Children's Product Certificate (to meet requirements by U.S. safety certification bodies) or other demonstrations of conformity with appropriate U.S. standards.

government agencies on products requiring FDA approval and the status of approvals to ensure appropriate border enforcement against counterfeit products.

- Congress should strengthen the ability of key government agencies to protect American consumers from fake medical products by ensuring the FDA has full and clear statutory authority to destroy counterfeit medical products.

MODERNIZE ENFORCEMENT LAWS AND TACTICS TO KEEP PACE WITH COUNTERFEITING TECHNOLOGY

THE CHALLENGE

Fighting counterfeits requires a legal framework and robust enforcement to hold bad actors accountable. This means the government, brand owners and e-commerce platforms must work together to enforce IP, trade and consumer protection laws, which collectively protect brands from unfair competition and consumers from harm.²⁷

Despite the resources expended by these stakeholders to fight them, counterfeits continue to enter the U.S. marketplace at an increasing rate.²⁸ This problem has only been exacerbated as criminals look to capitalize on the need for essential items to address the COVID-19 health crisis.²⁹ The ineffectiveness of enforcement efforts against counterfeits is not due to a lack of effort³⁰ but to multiple factors combining to give counterfeiters a decided advantage against enforcement efforts.

Current U.S. law fails to appropriately hold e-commerce platforms accountable for their role in the rise of counterfeits, despite the evidence that fake goods have proliferated on the internet. By allowing counterfeiters unparalleled access to consumers worldwide and the ability to vanish into cyberspace at the first sign of trouble, e-commerce platforms offer counterfeiters the perfect avenue for selling fakes while avoiding liability.³¹ The immense revenue generated from third-party sales coupled with various gaps and safe harbors in U.S. laws have empowered e-commerce platforms to dispense with basic oversight responsibilities that would prevent counterfeits from being sold on them.

Gaps in current U.S. statutes and a lack of case law have enabled e-commerce platforms to avoid being held liable for contributory trademark liability, even where they fail to take sufficient actions to address counterfeits. Under the legal concept of contributory trademark liability, an entity may be held liable for selling counterfeits even though they do not actually engage in the actual counterfeiting activity.³² This is a legal

27 Esther A. Zuccaro, *Gucci v. Alibaba: A Balanced Approach to Secondary Liability for E-Commerce Platforms*, 17 N.C. J.L. & Tech. On. 144, 159 (2016) (citing J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION, § 2:2 (4th ed. 2015)).

28 A recent report by the Org. for Coop. & Dev and the European Union Intellectual Property Office, for example, shows that global trade in counterfeit and pirated goods has exploded in recent years, with the value of imported fake goods increasing from \$461 billion in 2013 (2.5% of world trade) to \$509 billion in 2016 (3.3% of all global trade). OECD, *supra* note 1.

29 See, e.g., Jay Kennedy, *Buyer Beware: Counterfeit markets can flourish during a public health crisis*, THE CONVERSATION (March 26, 2020), <https://theconversation.com/buyer-beware-counterfeit-markets-can-flourish-during-a-public-health-crisis-134492>; Europol, *How Criminals Profit From the Covid-19 Pandemic* (Mar. 27, 2020) <https://www.europol.europa.eu/newsroom/news/how-criminals-profit-covid-19-pandemic>.

30 As noted by the coheads of Venable's Copyright and Trademark Litigation Practice, "While rights holders scour online marketplaces and investigate and report counterfeits to the marketplaces, and some marketplaces have stepped up proactive enforcement, the sheer volume of listings and ease with which sellers can enter the e-commerce market mean that counterfeiters have the advantage. Meaghan H. Kent & Nicholas W. Jordan, *Congress Acknowledges Dramatic Shift Toward E-commerce with Bipartisan Bills Aimed at Reducing Counterfeits*, VENABLE (May 8, 2020), <https://www.venable.com/insights/publications/2020/05/congress-acknowledges-dramatic-shift-toward>.

31 As the Third Circuit recently recognized, the inability for customers to contact third-party sellers directly "enables third-party vendors to conceal themselves from the customer, leaving customers injured by defective products with no direct recourse to the third-party vendor." *Oberdorf v. Amazon.com Inc.*, 930 F.3d 136, 145 (3d. Cir. 2019). See also GAO-18-216, *supra* note 5, at 2.

32 Contributory trademark liability is a means by which an entity may be held liable for selling counterfeits even though they do not actually engage in infringing activities in certain instances, such as where "it knows or has reason to know" the product was fake. *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 847-850 (1982); see also 35 U.S.C. § 271(c).

concept created through the courts³³ and lacks the clear standards necessary for courts to adequately apply it to new and emerging situations or technologies—such as what legal obligations e-commerce platforms should have in preventing the sales of counterfeits on their platforms.³⁴ Without a clear legal standard or legislation that would offer clarity in such cases, courts are left struggling to clearly define when an e-commerce platform may be held liable for its role in the sale of counterfeits.

Because e-commerce and its role in the proliferation of counterfeits are relatively new, whether and to what extent contributory trademark liability applies in this context is unclear. As such, courts often sidestep the issue or parties are likely to settle out of court.³⁵ In other cases where courts do attempt to address the issue, laws that were not intended to protect e-commerce platforms from selling dangerous products are interpreted as providing them a legal safe harbor.³⁶ Both Congress and the administration have explicitly highlighted the need to assess liability for e-commerce under both contributory trademark infringement and product liability law to combat counterfeits,³⁷ steps that manufacturers generally support.³⁸ Such clarity is especially important to ensure courts can hold e-commerce platforms accountable when they are willfully blind and allow fake products to be falsely advertised as genuine.³⁹

Our law enforcement bodies lack modern legal authorities, resources and tools that are effective against counterfeiters. Policymakers have failed to update enforcement tools to keep pace with the increasingly sophisticated technologies and practices used by counterfeiters.⁴⁰ The effective enforcement against counterfeiters is throttled due to gaps in current U.S. counterfeiting laws, which define “counterfeiting” too

33 *Tiffany Inc. v. eBay, Inc.*, 600 F.3d 93, 103 (2d Cir. 2010) (“Contributory trademark infringement is a judicially created doctrine that derives from the common law of torts.”).

34 See Eric Goldman, *eBay Mostly Beats Tiffany in the Second Circuit, but False Advertising Claims Remanded*, TECH. & MKTG. L. BLOG (April 1, 2010), https://blog.ericgoldman.org/archives/2010/04/ebay_mostly_bea.htm (“In a subtle opinion with potentially significant implications, eBay has preserved most of its big 2008 district court victory in the long-running Tiffany v. eBay case. However, as seems to be the norm with federal appellate opinions, the opinion intentionally sidesteps some key open doctrinal questions squarely raised by the case—such as if the Second Circuit recognizes the nominative use defense, or the Second Circuit’s standards for contributory trademark infringement. As a result, we don’t get the clean and decisive doctrinal standards that help make a case truly precedent-setting...”).

35 See Paul Mozur, *In Fight Against Fakes, Alibaba and Owner of Gucci Go From Adversaries to Partners*, N.Y. TIMES (Aug. 3, 2017), <https://www.nytimes.com/2017/08/03/business/alibaba-kering-fakes-luxury.html>.

36 One such statute is Section 230 of the Communications Decency Act, which as intended to shield online platforms for *communication* on their platform, but not the sale of dangerous harmful goods. However, while Section 230 should not be interpreted to protect the sale of harmful goods, manufacturers still support its application to protect online social platforms from the speech of third parties. See, e.g., 47 U.S.C. § 230(c)(1); *Green v. American Online*, 318 F.3d 465, 471 (3d Cir. 2003) (providing that Section 230 of the CDA “precludes courts from entertaining claims that would place a computer service provider in a publisher’s role, and therefore bars lawsuits seeking to hold a service provider liable for its exercise of a publisher’s traditional editorial functions—such as deciding whether to publish, withdraw, postpone, or alter content.”); Beatrice Martinet & Reinhard J. Oertli, *Liability of E-Commerce Platforms for Copyright and Trademark Infringement: A World Tour*, AM. BAR ASS’N (2015). See also *Oberdorf*, 930 F.3d at 152.

37 See U.S. DEP’T OF HOMELAND SEC., COMBATING TRAFFICKING IN COUNTERFEIT AND PIRATED GOODS REPORT TO THE PRESIDENT OF THE UNITED STATES 33 (2020), https://www.dhs.gov/sites/default/files/publications/20_0124_plcy_counterfeit-pirated-goods-report_01.pdf; see also Kent & Jordan, *supra* note 30 (noting recently introduced legislation that would “amend the Trademark Act of 1946 to provide for contributory liability for e-commerce platforms for use of a counterfeit mark by a third-party seller unless the platforms satisfy certain statutory requirements.”).

38 While manufacturers support the need for legislation to ensure that e-commerce platforms cannot evade liability for the sale of counterfeits over their platform by being willfully blind, such legislation must be careful not to prescribe overly rigid requirements that may prevent e-commerce platforms from developing and utilizing innovative solutions to prevent the sale of counterfeits and assist in locating counterfeiters.

39 See *Tiffany Inc.*, 600 F.3d at 109 (holding that, with regard to eBay’s potential contributory liability for “facilitating” third parties’ infringing sales, the relevant standard to assess eBay’s liability was the Inwood test, which only required the court to determine whether eBay continued to supply its services to sellers when it *knew or had reason to know* they were engaging in trademark infringement, rather than whether it could have prevented it. In doing so, the court enabled e-commerce platforms to continue to avoid liability by being willfully ignorant).

40 See Christo Hall, *The need for sophisticated anti-counterfeit technology is ever-growing as the practises of counterfeiters become increasingly advanced*, PATHOG GLOBAL HEALTH (May 2012), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4001489/> (“Overt visible markers on a drug’s packaging have been commonly used to identify the genuine from the fake, but the holograms and distinguishing markers applied to the blister foil, film or paper substrates of the packaging are mimicked and imitated to a high level of accuracy. To the untrained eye, the genuine and fake examples can look identical.”).

narrowly,⁴¹ fail to account for the likelihood the counterfeit product may contribute to or cause death or physical injury and fail to appropriately assign liability and award remedies based on counterfeits' potential harm.⁴² As a result, a glaring disparity exists between the moral culpability and actual harm caused by counterfeiters and the penalties and remedies that arise from it.⁴³

Under both U.S. civil and criminal law, for a court to find a product to be a “counterfeit” and impose the severe penalties such a designation carries with it, the product must be a clear copy of a registered trademark.⁴⁴ But products that are almost identical and contain trademarks that differ by only a couple of letters are merely “infringing marks,”⁴⁵ which carries no threat of jail time or even monetary penalties. This means that a defendant selling unverified, fake COVID-19 test kits, for example, would not be considered a “counterfeiter” and would face no risk to penalty under IP laws because no patent exists for such test kits yet. Similarly, a defendant found guilty of selling fake, but generically labeled, pharmaceuticals will face no risk of prison or fines despite the fake drugs imperiling human life,⁴⁶ while a defendant guilty of counterfeiting identical fake handbags “may be required to pay thousands, if not millions, of dollars in damages and/or fines, and may be sent to prison.”⁴⁷

Finally, brand owners are left to fight counterfeiters alone since consumers who ingest fake drugs or buy lead-ridden toys, for example, are afforded no special avenue for relief under federal law,⁴⁸ despite the fact that the consumer is often the primary victim of counterfeiting and, in some instances, suffers serious physical injury.⁴⁹

THE SOLUTIONS

To address these issues and simultaneously strengthen effective enforcement efforts while minimizing ineffective enforcement efforts, manufacturers call for the following solutions:

- Congress should clarify the legal doctrine of contributory liability for trademark infringement by unambiguously defining the doctrine and its parameters by statute, including setting forth judicial review standards that encourage courts to develop critical fact-specific case law.

41 Under both civil and criminal U.S. law, a “counterfeit” trademark is defined as a “spurious mark” that is “identical with, or substantially distinguishable from a registered mark,” and whose use is “likely to cause confusion.” 15 U.S.C. § 1127. In practice, courts are also often reluctant to label a product a counterfeit unless the infringing defendant’s is a clear copy of the registered trademark. See Sandra L. Rierison, *Pharmaceutical Counterfeiting and the Puzzle of Remedies*, 8 WAKE FOREST INTELL. PROP. L.J. 433, 434 (2008) (citing *Colgate-Palmolive Co. v. J.M.D. All-Star Import and Export, Inc.*, 486 F. Supp. 2d 286, 291 (S.D.N.Y. 2007)).

42 See Rierison, *Pharmaceutical Counterfeiting*, at 445-448, 454 (noting that neither the Lanham Act nor the 1984 Trademark Counterfeiting Act—the two main federal statutes that create civil and criminal liability for trademark infringement—“explicitly considers the nature of the defendant’s counterfeiting—e.g., the type of goods being passed off [or the risk of harm posed by such good]—in fashioning his punishment or the extent of his liability”).

43 *Id.*

44 While injunctive relief, rather than damages, is all that is available in the form of relief in trademark infringement cases, when a defendant crosses into counterfeiting, courts “shall” award treble damages, or at the plaintiff’s election, statutory damages of up to \$100,000 per mark and \$1 million per mark if it is willful. 15 U.S.C. § 1117. In addition to these civil remedies, the Federal Trademark Counterfeiting Act of 1984 established criminal penalties for anyone who “traffics in” counterfeit goods intentionally, imposing a \$2 million fine and up to 10 years in jail for deliberate trademark counterfeiting and authorizing fines of up to \$5 million for repeat offenders. 18 U.S.C. §§ 2318-2320.

45 15 U.S.C. § 1114(1)(a) (defining trademark infringement as the unauthorized use of a trademark in connection with goods and/or services in a manner that is likely to cause consumer confusion about the source of the goods or services).

46 *Id.*

47 Rierison, *supra* note 41, at 454.

48 Congress did pass the Anti-counterfeiting Consumer Protection Act of 1996, but the law provided no remedies for consumers directly and only gave law enforcement agencies and trademark owners greater weapons. See Pub. L. No. 104-153, 110 Stat. 1386 (codified as amended in scattered sections of 18 U.S.C.).

49 Counterfeiters’ increasingly sophisticated manufacturing techniques have enabled them to use falsified markings on counterfeit medicines in connection with genuine medicine, which makes it almost impossible for the average consumer to differentiate between genuine and counterfeit medicine. Most alarming, these counterfeit pharmaceuticals and food products are not regulated, thus providing no certainty that the medicine contains the essential ingredients necessary to fight illness or even that its safe for human consumption. These products pose a significant threat to consumer health at both the individual and community levels, potentially resulting in critical treatment failure and community-wide increases in microbial resistance. See COUNTERFEIT PHARMACEUTICAL INTER-AGENCY WORKING GROUP REPORT TO THE VICE PRESIDENT OF THE UNITED STATES AND TO CONGRESS (2011), https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/IPEC/Pharma_Report_Final.pdf.

- Congress should update current laws to improve the definition of counterfeits and fill statutory gaps that prevent effective enforcement against counterfeiters. U.S. law must better recognize that the determination of whether a product is a “counterfeit” for purposes of liability should be based on more factors than simply whether the mark is “substantially indistinguishable” from a registered trademark.⁵⁰ Counterfeiters, for example, should not be able to avoid liability simply by changing a letter in a word or slightly altering a symbol, given the potential harm to consumers and brand owners.⁵¹ Necessary updates include the following:
 - Broadening the definition of a “counterfeit mark” to include not just those that are “identical” or “substantially indistinguishable,” but also those whose use is “likely to cause confusion, or to cause mistake, or to deceive” in relation to a registered trademark and where the infringing party “knowingly or willfully engaged in the action.” That broader definition would make statutory damages, not just actual damages, available to a wider range of counterfeiting victims.
 - Encouraging courts handling counterfeiting cases to consider additional factors beyond just similarity of marks, such as a defendant’s intent and risk of harm to consumers in determining whether a mark is a counterfeit and determining damages. Courts almost uniformly consider a defendant’s intent when determining whether a likelihood of confusion exists in the context of broader trademark infringement cases. Consideration of a defendant’s intent seems even more appropriate when determining whether to subject a defendant to the severe penalties associated with counterfeiting.
 - Adjusting available penalties and remedies according to type of counterfeit and nature and degree of deception to better reflect the danger to the public and degree of moral culpability associated with such conduct.
 - Providing consumers with an avenue for relief under federal law when, as is the case in many scenarios, the consumer is the primary victim of counterfeiting activity and suffers severe injury as a result.
- Congress and relevant federal agencies should hold e-commerce platforms to the same standards as brick and mortar retailers. Online virtual shelves should not escape regulators’ scrutiny for failing to closely monitor for fake and untested goods, while physical shelves face intense scrutiny and, in some instances, steep penalties. For example, Congress should revise the definition of “retailer” under consumer product safety laws to ensure e-commerce platforms are required to fulfill the same legal obligations as brick and mortar retailers, including having to report known product-related injuries to the Consumer Product Safety Commission.⁵²
- Congress and Customs and Border Protection should ensure full implementation and enforcement of the STOP Act of 2018, including requirements for the U.S. Postal Service to collect advanced electronic data for 100% of packages to track counterfeits.
- The State Department and the U.S. Ambassador to the United Nations should ensure that low terminal dues for foreign countries do not continue to allow counterfeiters to cheaply ship goods to consumers through the U.S. Postal Service.⁵³ They should closely monitor global implementation of the September 2019 agreement by parties to the Universal Postal Union to allow countries to self-declare postal rates and work with the White House on further actions to take if that implementation is insufficient.

50 15 U.S.C. § 1127.

51 “Another common scenario occurs when infringers register a similar mark and manufacture goods under this brand. The cost of registration is relatively low and such counterfeiting is rampant.” *How to combat counterfeiting*, WORLD TRADEMARK REVIEW (May 1, 2017), <https://www.worldtrademarkreview.com/anti-counterfeiting/how-combat-counterfeiting>.

52 Congress should revise the definition of “retailer” under the CPSA (15 U.S.C. § 2052(a)(13)) to explicitly include e-commerce platforms.

53 “Terminal dues is the system that posts use to pay one another for international deliveries of letters and small packages. The global terminal dues system, updated every four years by the Universal Postal Union (UPU), does not fully reflect actual domestic processing and delivery costs.” U.S. POSTAL SERVICE OFFICE OF INSP. GENERAL, TERMINAL DUES IN THE AGE OF E-COMMERCE (Dec. 14, 2015), <https://www.uspsioig.gov/sites/default/files/document-library-files/2015/RARC-WP-16-003.pdf>.

IMPROVE GOVERNMENT COORDINATION TO TACKLE COUNTERFEITS

No single federal government agency is primarily focused on, or primarily responsible for, addressing counterfeiting.

More than 20 federal agencies and numerous additional state and local government agencies have jurisdiction over some aspect of counterfeiting.⁵⁴ These agencies do not fully coordinate their activities, resulting in duplicative efforts, wasted resources and gaps that counterfeit products can slip through.

NIPRCC and the White House Intellectual Property Enforcement Coordinator are important players in attempts to better coordinate these efforts, but gaps persist. Counterfeiters have been able to probe weak spots in certain agencies—such as government procurement channels—to spread counterfeit goods.

Those government agencies also do not always effectively coordinate with industry. In a 2018 report, the U.S. Government Accountability Office identified coordination and information sharing between government enforcement agencies and private sector entities as critical to fighting counterfeits.⁵⁵ Manufacturers continue to see gaps in the ability and willingness of government entities to share enforcement intelligence with private sector actors.⁵⁶ Additionally, many manufacturers, particularly small and medium-sized firms, have not taken advantage of opportunities to train or partner with government agencies in order to more effectively block counterfeits. In some cases, they are unable to do so because of limited time and resources.

THE SOLUTIONS

To address these issues, manufacturers urge the U.S. government to take a number of key steps:

- Congress should establish and fund a new White House agency that holds primary responsibility for U.S. anti-counterfeiting efforts, including strategy, policy and enforcement. The new White House agency should serve as a central point of contact for the private sector and other stakeholders, and should:
 - Have a permanent staff to support its operations and dedicated funding for its operations, as well as to allow grants to other U.S. government agencies for anti-counterfeiting activities and programs.
 - Assume anti-counterfeiting responsibilities currently tackled by existing White House offices, including the Intellectual Property Enforcement Coordinator.
 - Have the authority to work with the director of the Office of Management and Budget and the heads of departments and agencies to identify programs that contribute to anti-counterfeiting efforts. It should advise OMB as to whether agency budgets for anti-counterfeiting activities are sufficient to meaningfully address the issues.
 - Head a newly created interagency task force consisting of representatives at the deputy secretary or deputy director level from key Cabinet agencies and independent agencies (such as the Federal Trade Commission and the CPSC). The task force should also include subgroups focused on anti-counterfeiting strategy, policy and enforcement.

54 See *Fake Imports Entering the U.S.: List of federal government agencies working to prevent the entry and distribution of counterfeit and pirated goods in the United States*, INT'L TRADE ADMIN. (last visited June 17, 2020), <https://www.stopfakes.gov/Fake-Imports-Entering-the-US>.

55 See, e.g., GAO-18-216, *supra* note 5, at 40 (recommending that “CBP, in consultation with ICE, should assess what, if any, additional information would be beneficial to share with the private sector and, as appropriate, take action to enhance information sharing”).

56 For example, despite language in the Trade Facilitation and Trade Enforcement Act of 2015 granting U.S. Customs and Border Protection (CBP) with explicit authority to share certain information with the private sector, CBP has not taken the necessary steps to implement that authority. See *id.* Similarly, CBP does not consistently share information with online platforms about counterfeit products seized at the border that are bound for the platform-run fulfillment centers or that may have been sold via their platforms. See Brian Huseman, VP, Public Policy, Amazon, Comment Letter to Dep’t of Commerce re Report on the State of Counterfeit and Pirated Goods Trafficking and Recommendations (Docket No. DOC 2019 0003) (July 29, 2019), <https://www.regulations.gov/document?D=DOC-2019-0003-0083>.

- U.S. government agencies, at the direction and under the oversight of the new White House agency, should expand informational resources to help manufacturers battle counterfeiting, equipping manufacturers and other private sector actors with better information on bad-faith actors as well as on trusted importers. These should include databases and tools to facilitate the exchange of risk assessment information and lists of known violators between government agencies, private sector actors and the general public. Specific efforts should include the following:
 - CBP development of a database and resource library on importers that CBP has vetted and deemed to be “trusted.”⁵⁷
 - CPSC use of its National Electronic Injury Surveillance System to identify product injuries and deaths from counterfeit products and report those trends to enforcement agencies.
 - CPSC establishment of a substantial product hazard list, as permitted under the Consumer Product Safety Improvement Act, that could provide critical tools to battle fake and counterfeit products that have spiked during the COVID-19 crisis.

- U.S. government agencies, at the direction and under the oversight of the new White House agency, should eliminate structural and practical barriers that limit government-industry information sharing:
 - CBP should fully and promptly implement the authorities granted to CBP under the Trade Facilitation and Trade Enforcement Act of 2015 to share information consistently with private sector actors on suspected counterfeit goods that have been seized or abandoned.
 - CBP should take steps to expand the level of information consistently shared with the private sector, such as more limited redaction of photographs of suspected seizures to better allow identification of counterfeit products.
 - CBP should revise internal procedures to make it easier for border agents to provide brand owners with samples of seized products. This would allow brand owners to more quickly take action and work with authorities to get the counterfeits out of circulation.⁵⁸
 - CBP and other U.S. government agencies should promote, facilitate and provide financial incentives for companies, particularly small and medium-sized companies, to share information with Customs officials on how to identify genuine manufactured products.
 - CPSC should improve procedures to improve the speed and effectiveness of processes to quickly share reliable counterfeit-related consumer safety incidents with CBP and other relevant agencies. CPSC should also prioritize hiring necessary staff in support of these efforts, which should improve the U.S. government’s ability to identify, track and ultimately seize counterfeit consumer goods.⁵⁹

57 Such a database was promised under Objective 4.2 (Explore technology options to increase the exchange of e-commerce information) in CBP’s 2018 strategy on e-commerce. See U.S. CUSTOMS AND BORDER PROTECTION, E-COMMERCE STRATEGY 9 (2018), https://www.cbp.gov/sites/default/files/assets/documents/2018-Mar/CBP-E-Commerce-Strategic-Plan_0.pdf.

58 Under current law, CBP will only release seized product samples to brand owners after they provide CBP with a cash bond intended to insulate CBP from liability. The CBP port director determines the value of the bond on a case-by-case basis. To expedite the process, CBP should streamline the process and allow brand owners to pay through alternative means, such as by credit card. See Bruce Leeds, *U.S. Customs & Border Protection Enforcement of Trademarks*, BRAUMILLER LAW GROUP (Oct. 7, 2018), <https://www.braumillerlaw.com/u-s-customs-border-protection-enforcement-of-trademarks/>.

59 Section 6(b) of the Consumer Product Safety Act requires the Commission to “take reasonable steps to assure, prior to its public disclosure thereof, that information from which the identity of such manufacturer or private labeler may be readily ascertained is accurate, and that such disclosure is fair in the circumstances and reasonably related to effectuating the purposes” of the CPSC. 15 U.S.C. 2055(b)(1). Manufacturers rely on the safeguards provided by section 6(b) and the Commission’s current information disclosure rules to ensure that information disclosed publicly is accurate and fair. Reasons for the public disclosure of information by the Commission include, but are not restricted to, responses to Freedom of Information Act and media requests. The CPSC also may seek to disclose information on its own.

- Congress should establish a fund, at the direction and with oversight of the new White House agency, to support development of new technologies, products and best practices to detect and block counterfeit versions of products needed for responding to COVID-19 and future pandemics.

IMPROVE PRIVATE SECTOR COLLABORATION IN THE FIGHT AGAINST COUNTERFEITS

THE CHALLENGE

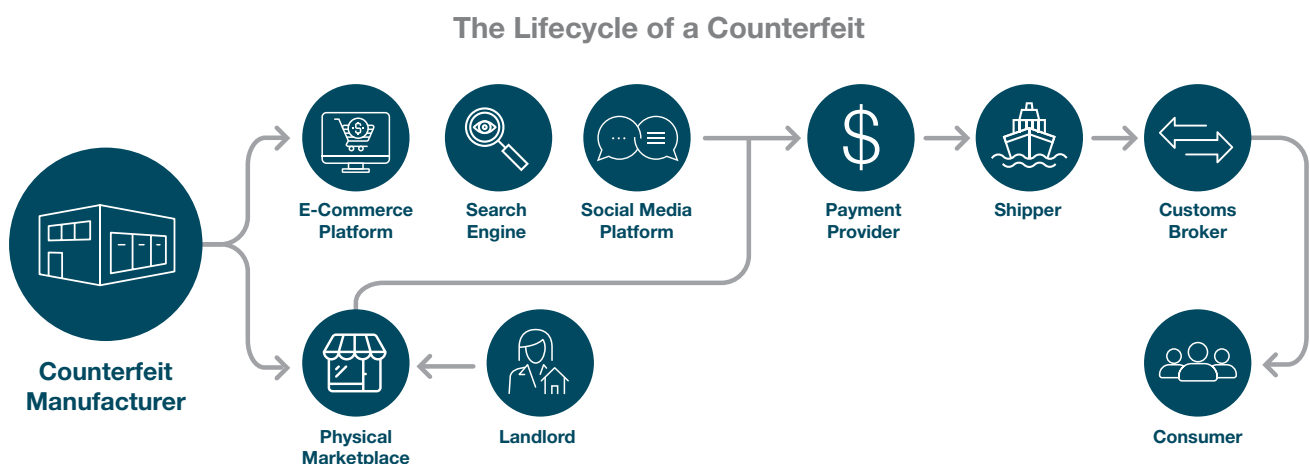
Private sector actors, including brand owners, online marketplaces, third-party search providers, shippers, customs brokers and payment providers, bear the brunt of the impact of counterfeiting activity. It is manufacturers' brands that are infringed, e-commerce platforms that are hijacked to support illicit activity and payment platforms that are misused to facilitate payments. While there is an important role for government entities to take action against counterfeiting, the private sector can also drive effective solutions to this growing challenge.

Despite the obvious need for robust private sector cooperation, multiple factors have made collective efforts to find solutions more challenging. Global counterfeiting has grown faster than the resources of individual private sector stakeholders, and new counterfeiting tactics have challenged the ability of individual stakeholders to adapt and develop new, common approaches to the problem.

A lack of information sharing among private sector entities, particularly brand owners and e-commerce platforms, has weakened the ability of all stakeholders to monitor and fight against fake products and detect bad-faith vendors that hide their real identity or move from platform to platform.

No single company or sector can fight counterfeiting alone. Legitimate manufacturers hold the information necessary to distinguish their products from the fakes on the market. E-commerce platforms hold information about the third-party sellers dealing in fake products. Search providers have a broad view of how actors can move across different platforms. Payment providers are a critical piece of tracing illicit gains to counterfeiters and cutting off their access. Input from each of these sources is necessary to allow both the government and private sector to have full insight into the paths of counterfeit goods and to track those responsible.

Manufacturers must collaborate with other legitimate companies to fight counterfeiting, seeking common approaches and sharing best practices. All private sector stakeholders must develop concrete mechanisms, including new standards, databases and programs, to share information directly and regularly about counterfeit products and bad-faith vendors. They must use that information to limit the supply of counterfeit products and to continually improve their strategies and mechanisms.



THE SOLUTIONS

To address these issues, manufacturers urge private sector stakeholders to take a number of key collaborative steps to better fight counterfeiting:

- Private sector actors should develop new mechanisms for collaborative information sharing on counterfeiting activity. These mechanisms should include data on counterfeiting activity and specific actors that can be used by platforms to improve vendor vetting and by legitimate manufacturers to pursue enforcement action against bad actors. Such mechanisms could take the form of databases, exchanges or dialogues, and they should make it easy for all stakeholders to share information, based on a common set of information, and to make that information fully searchable and accessible.
- Private sector actors should work collectively to improve platform brand protection programs, expanding the scale, accessibility and scope of action for these programs. In particular, the following actions are needed:
 - Improve the accessibility of existing brand protection programs for all manufacturers by expanding their scope and ensuring that the terms and conditions for participation do not effectively block out any group of brand owners, including small and medium-sized manufacturers.
 - Create new programs or certifications, such as “official” or “verified” product listings, and mark products and vendors that have fully verified that they are not counterfeit. For example, use of specific domain names such as the pharmacy domain, can distinguish legitimate e-commerce sources from fraudulent sources and provide consumers with access to verified online pharmacies.
 - Strengthen and streamline direct communication channels between platform providers and manufacturers, including by establishing consistent, easy-to-access contacts engaged with and knowledgeable of key industries.
 - Expand the scope of activity for these programs to include joint enforcement activities between platforms and brand owners.

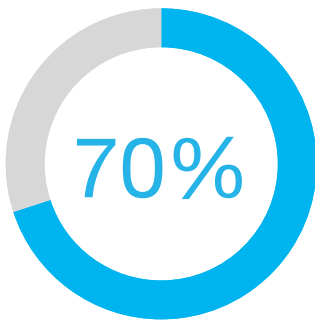
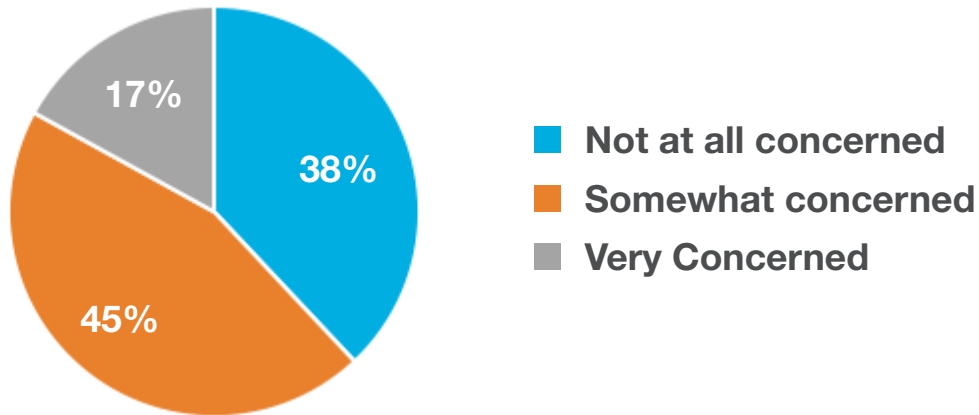
EMPOWER CONSUMERS TO AVOID COUNTERFEITS

THE CHALLENGE

In addition to new enforcement tools and brand protection programs, addressing the fundamental challenge of counterfeits requires all parties to equip consumers with the tools to avoid purchasing them in the first place.

Consumers are not sufficiently aware or concerned about the direct danger that counterfeit products can pose—not just to businesses, but directly to themselves. Even when customers are aware of the negative impacts of counterfeiting, they may not associate them with a direct personal risk to themselves and those around them.

Civic Science 2019 survey: How concerned are you about fake/counterfeit goods?⁶⁰



More than 70% of online shoppers in a recent survey expressed current or possible concern about the purchase of counterfeit products via Amazon.⁶¹

Even consumers aware of the risk of counterfeit products can fall victim to counterfeiting by unwittingly purchasing fake products online. Surveys indicate that consumers are more aware of, and concerned with, counterfeit products being sold online but are nonetheless worried about their ability to spot counterfeit products.

That task is only getting harder as counterfeiters get smarter. Not only are counterfeiters continuing to produce fake products that are closer matches to the original version, but they are also increasingly savvy in utilizing the online environment to make consumers believe they are buying genuine products. For example, a counterfeiter may advertise with pictures of the genuine product while shipping customers the fakes. Counterfeiters have also gotten smarter at removing “red flags” that consumers may use to tell a real from a fake product, including pricing discrepancies, online reviews or suspect language used to describe the product.

With a crowded media environment, increasing sophistication among counterfeiters and the rapid growth in e-commerce, the traditional playbook is not enough. Consumers expect everyone, including manufacturers, online marketplaces and social media platforms, to do more to protect them against the danger of fake products.⁶²

60 Danielle Commisso, *Men and High-Earners Are More Likely to Buy Counterfeit Goods*, CIVICSCIENCE (Aug. 13, 2019), <https://civicscience.com/men-and-high-earners-are-more-likely-to-buy-counterfeit-goods/>.

61 CPC STRATEGY, *THE 2019 AMAZON CONSUMER SHOPPING STUDY: HOW SHOPPERS BROWSE AND BUY ON AMAZON 14* (2019), <https://learn.cpcstrategy.com/rs/006-GWW-889/images/2019-Amazon-Shopper-Survey.pdf>.

62 For example, 63% of respondents in a private-sector survey of more than 2,600 global online shoppers indicated that they “didn’t think enough was being done by brands, social media platforms and online marketplaces to protect them from counterfeiters, fraud and cybercrime.” See MARKMONITOR, *SOCIAL MEDIA: INSIGHTS INTO CONSUMER SHOPPING BEHAVIOR 12* (2019), https://markmonitor.com/wp-content/uploads/dlm_uploads/2019/09/Global-Online-Protection-Business-Survey-Q3-2019.pdf.

Legitimate manufacturers and platforms alike must invest in new campaigns, technologies and tools to inform consumers about the direct harm that counterfeit products can have. They must not only educate consumers about the real and direct harm that counterfeits can cause but also provide practical tools to help consumers differentiate between real and fake products. They must increase and improve communication with consumers if they have purchased known or possible counterfeit products and warn potential buyers away from sellers or websites with a track record of selling or facilitating counterfeits.

THE SOLUTIONS

To lower demand for counterfeits, Congress should take action to help manufacturers and other stakeholders address these needs:

- Congress should pass legislation requiring platforms to notify online shoppers about actual or potential purchases of counterfeit goods. If they do not take such steps, they could face contributory liability for infringement due to vendor activities on their platforms. To avoid such liability, platforms should develop specific protocols based on consultation with private sector stakeholders. They should communicate directly with customers that have purchased known or suspected counterfeit products and develop specific warning signals to flag when directing customers to sellers or websites previously engaged in, or reasonably suspected to be engaging in, counterfeit activity.
- Congress should appropriate emergency funds to the Department of Health and Human Services to oversee a public campaign to educate consumers of the dangers of fake and counterfeit versions of products used for the treatment or prevention of COVID-19:
 - The campaign, run either directly by government agencies or through grants to private sector groups, should develop and disseminate content that is clear, focused, easily digestible and tailored to the online environment to reach those most likely to purchase fake COVID-19 products through online platforms and social media websites.
 - The campaign should include a dedicated, continually updated COVID-19 anti-counterfeiting resource developed in consultation with e-commerce platforms, brand owners and law enforcement agencies. This resource would rapidly inform consumers about the dangers of counterfeit products and how to identify, report and protect against fake products during the health crisis, and inform U.S. government responses to future health crises.



III. Conclusion

The current COVID-19 pandemic and the countless headlines about fake test kits, counterfeit face masks and fake drugs underscore the counterfeiting challenge. But this problem extends beyond health products. It also affects manufactured products that American households use every day, from auto parts to clothing to toys. Counterfeit versions of many products are widely available to American consumers, particularly through e-commerce platforms. These counterfeit goods pose a triple threat: harming the safety and well-being of consumers, limiting the competitiveness of manufacturers of all sizes and undermining American innovation.

Manufacturers need real, actionable, innovative policy solutions that reverse the rising tide of counterfeit products. This report provides a series of clear, decisive actions that all stakeholders can take, in government and in the private sector, to stop counterfeiters in their tracks.

The time is now. The solutions are clear. We must act.

