



COUNTERFEITING HEADACHES AREN'T JUST FOR HIGH FASHION RETAILERS AND DESIGNERS ANYMORE

By Marc Ullman

There was a time, not all that long ago, where counterfeiting of consumer goods was largely a problem afflicting high fashion designers, such as Prada, Gucci and Versace. Expensive high-end accessories such as Rolex watches, Hermes handbags and ties, and Dior fragrances were also at the top of the list of targets for fraudsters looking to make a quick buck by deceiving consumers into spending their hard-earned money on something that was not what it appeared to be. Also, quite frequently, counterfeiting was obvious, such as in circumstances where what may have appeared to be legitimate designer products were displayed for sale on blankets in the street that could be rolled up when law enforcement came by.

So, what has changed? The counterfeit market has moved online to various website, even Amazon, where determining what is legitimate vs. what is counterfeit can be extremely difficult, if not always possible. Additionally,

we have found that counterfeiting is no longer limited to expensive luxury items—it has now found its way to common, everyday, relatively low cost items. And the dietary supplement industry is not immune. In recent months, the dietary supplement trade press has seen increasing reports of prominent supplement brands discovering that their products have been the target of counterfeiters online.

We also know that the dietary supplement industry is not the only affected industry. The scourge of counterfeiting has become a pervasive problem affecting almost every industry and individual. According to the U.S. Chamber of Commerce, counterfeit products cost the global economy more than \$500 billion a year. Recent data indicates that by August 2022 the U.S. Customs and Border Protection (CBP) had made almost 17,000 seizures of counterfeit goods worth an estimated \$2.4 billion, had the goods been genuine. These seizures included fake included consumer electronics, footwear, apparel,

pharmaceuticals and (yes) dietary supplements. Deputy Executive Assistant Commissioner for CBP's Office of Trade, John Leonard, advised that in such a climate, "While the lure of a great deal is tempting, the consequences simply aren't worth the risk. Only shop from sources you trust, especially when shopping online."

Online Shopping: Better Deals But Increased Risks

The internet has brought great opportunities for consumers and retailers alike, but it has come with a cost: counterfeiters have discovered that the e-commerce area is rife with opportunities for their nefarious trade.

Shopping for consumer goods on the internet has been on the rise for years, and the global COVID-19 pandemic accelerated that trend. The European Union Intellectual Property Office (EUIPO) reported that 70 percent of Europeans bought something online in 2020. U.S. e-commerce sales, meanwhile, exceeded \$1 trillion in 2022 and are to

make up nearly 22 percent of total retail sales by 2026. Easy access and the ability to bargain shop and compare prices at different outlets are obvious drivers of this trend. And counterfeiters have jumped into this market in full force. Reports by Statista, a global provider of online and consumer data, the value of the global counterfeit goods market was already \$449 billion in 2019—larger than the entire economy of Ireland, and many of these sales were initiated on the internet.

Bargain hunters searching the internet are frequently able to fulfill their desire to find brand name products at discount prices, especially in comparison to traditional brick-and-mortar retailers. Low overhead and the ability to quickly move products due to a virtually unlimited ability to reach consumers are two legitimate reasons the bargains exist. At the same time however, internet shopping prevents consumers from actually handling the goods that they plan on purchasing. They cannot hold the product, check how it feels, closely examine product labels, or do any of the other things possible when not making a virtual purchase. Moreover, a counterfeiter online can use images of the legitimate online, which may not resemble the actual counterfeit product supplied. The U.S. Immigration and Customs Enforcement Publication Counterfeit Goods: A Danger to Public Safety provides a variety of examples of counterfeit products available online and the risks that they pose:

- Counterfeit airbags and their components can cause severe malfunctions ranging from non-deployment, under inflation, over inflation to explosion of metal shrapnel during deployment in a crash.
- Counterfeit lithium-ion laptop batteries pose a significant risk of extreme heat, self-igniting and exploding.
- Counterfeit helmets and baby carriers can break and not provide the level of safety provided by legitimate product.
- Counterfeit prescription drugs may not contain the active ingredient or could lead to accidental overdose.
- Counterfeit cosmetics can cause severe skin reactions.

Your Dietary Supplements Are Also at Risk

Like any consumer product sold on the internet, dietary supplements are subject to attack by fraudsters looking to “make a killing” selling counter-

feit product. Two recent high profile incidents involving sales on the Amazon Marketplace (where you would think there might be guardrails to keep counterfeiters away) should bring the risks home to consumers and retailers alike.

Now Foods

On April 13, 2023, Bloomington, IL-based NOW Foods issued a press release alerting consumers that it had discovered multiple fraudulent supplements sold on Amazon impersonating the NOW brand as well as another prominent supplement brand. NOW began investigating after being notified by several consumers about suspicious NOW branded products they had purchased. Through its investigation, the

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company determined that one fraudulent company, operating under the name of A2X1, has been selling counterfeit versions of 11 different counterfeit NOW supplements on Amazon for about two weeks. At first glance, these products looked like bona fide product, but the packaging, labels and contents are clearly falsified. Each product contains small white capsules with an odorless white powder. (Remember, you cannot see the actual product you are purchasing through the internet; only a picture of which might be the legitimate product).

NOW's analysis of the white powders in the capsules confirmed that they contain white rice flour with trace amounts of the pharmaceutical Sildenafil in some

samples. The company immediately reported this to FDA (U.S. Food and Drug Administration), however no recall has been issued by Amazon, the only entity with knowledge of the identity of the consumers purchasing the counterfeit product.

Fungi Perfecti

Less than two weeks after NOW published its warning to Amazon consumers, on April 23, 2023, Fungi Perfecti of Olympia, WA issued a press release alerting its consumers that it had discovered multiple fraudulent products being sold on Amazon impersonating its Host Defense Mushroom brand. During routine brand control efforts, Fungi Perfecti began investigating unauthorized sellers after noticing irregularities in both packaging and the contents inside the capsules. They have confirmed that four Host Defense capsule products are being imitated: MyCommunity 120-ct., Stamets 7 120-ct., Lion's Mane 120-ct., and Turkey Tail 120-ct. The press release warned that consumers should be advised that some of the counterfeit products tested positive for two known allergens: soy and gluten. All authentic Host Defense Mushrooms supplements are gluten-free and not formulated with soy.

Fungi Perfecti identified 24 Amazon.com sellers confirmed to have sold counterfeit products claiming to be Host Defense. Consumers who have purchased any of the previously mentioned counterfeit products from any of the sellers identified by Fungi were advised to discontinue use immediately and contact Amazon.com customer service for a refund. Fungi reported each of the sellers to Amazon and FDA. While they have since been removed from the Amazon site, no recall has been initiated by the website seller of the counterfeit product, Amazon.

Protecting Yourself and Your Business From Counterfeiters

While brand owners like NOW and Fungi continue their efforts to police the marketplace and protect their consumers, and we clearly urge other brand owners to investigate potential counterfeiting of their products, there are any number of commonsense steps that consumers and small businesses owners/retailers alike can take to ensure that they are not victimized by counterfeiters selling fake, and potentially dangerous goods:

- Carefully research consumer

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reviews. Is the use of English correct? Do the reviews repeat themselves? Have they been posted over a lengthy period of time, or have they all been posted recently or at the same time?

- Identify "red flags" (e.g., discounted prices, typographical errors in advertising/marketing materials). Many counterfeit products can be spotted by misspelling on labels or advertising, use of poor graphics or pricing that is "too good to be true."

- Upon receipt of the product, scrutinize product labels, product packaging, and the actual products themselves. While this may be somewhat more difficult for the online shopper, most companies that have been victimized by counterfeiters like NOW and Fungi have made efforts to educate potential purchasers on key areas that might be tip offs that products are not legitimate.

- Deal only with authorized retailers, licensed distributors or manufacturers directly. This may result in a reduced opportunity for both store owners and consumers to purchase products at steep discounts, it also can decrease of being victimized by a counterfeiter.

- Pay with credit cards which feature payment dispute protocols. Most coun-

terfeiters will bear the cost of working through a credit card clearing house and opening a vendor account with the credit card company itself. Credit card transactions, unless made through an online retailer like Amazon, also make it more difficult for the counterfeiter to hide their identity.

- Never buy anything from online sellers that accept payment only with gift cards, by wire transfers through companies like Western Union or MoneyGram, or with cryptocurrency. Payments you make that way are nearly impossible to trace and reverse. Scammers often tell people to use those payment methods so they can get money quickly.

- For retailers purchasing stock for their stores, ensure the pedigree of the products can be traced back to the manufacturers to ensure that you are not stocking your stores with potentially counterfeit product.

Conclusion

The days of counterfeiting being limited to ultra-high fashion designer goods are long gone. Today, virtually any type of consumer goods are at risk of being counterfeit. The explosion of internet

shopping at both the retail and distributor level where the purchaser frequently does not see the goods until after they are delivered as helped create an environment in which fraudsters can thrive. Consumers and small brick-and-mortar retailers all must be conscious of this fact and act with appropriate care to protect themselves and their customers from the dangers posed by counterfeiters selling potentially dangerous supplements. **VR**



Attorney Marc S. Ullman represents clients in matters relating to all aspects of Food and Drug Administration and Drug Enforcement Administration mat-

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