

PUSHING BACK AGAINST COUNTERFEIT GOODS



ANTITRUST LAWS DON'T PRECLUDE COOPERATING AGAINST COUNTERFEITERS

By Wayne Mack

Trademark counterfeiting is rampant, and it costs businesses billions of dollars each year. Fueled by the dramatic rise in e-commerce, counterfeiting has spread from fake handbags and watches to virtually every type of product imaginable, including prescription medication, automotive and aircraft parts, cell phones and other electronic products, electrical components, software, cigarettes, wine, movies, music,

sporting goods, apparel and even food products.

Identifying the root of the problem is simple. Fighting it is challenging. The vast majority of counterfeit products are manufactured in China, where local protectionism can make enforcement difficult. The manufacturing process is often decentralized, with the fake product produced in stages by small teams in back-street shops and houses, specifically in Guangdong and Fujian provinces in southern China. Once manufactured, the counterfeit products are sold to retail and secondary-market distributors in wholesale markets throughout China.

After the counterfeit goods reach distributors, they are routinely marketed and sold through rogue Internet websites and auction sites that consumers frequent in search of bargains. The Internet is a haven for counterfeit goods because it allows faceless transactions in which the buyer cannot physically examine the product prior to the sale. It also allows counterfeiters to run their operations from China in relative anonymity, and at very low cost.

A recent study of 100 websites selling counterfeit goods found that these sites draw more than 53 billion visits per year – an average of nine visits for every man, woman and child in the world.

Any product manufacturer that ignores the harm to its business from brand thieves does so at its own peril.

INDUSTRY-WIDE SOLUTIONS

In order to combat counterfeiting, brand owners must address both the supply and demand sides of the economic equation. On the supply side, enforcement in China, where the counterfeit product in all likelihood originates, is key.

Unfortunately, counterfeiting is not considered a serious crime in many parts of China, and brand owners cannot depend on government officials to investigate and prosecute counterfeiters. Instead, it is often necessary to retain investigators to uncover evidence identifying the counterfeiter, and then lobby Chinese law-enforcement officials to raid, arrest, convict and sentence the counterfeiters.

For a single brand owner, the prospect of organizing and financing an effective enforcement program in China can be daunting. Brand thieves target entire industries, and raids of counterfeiters in China frequently turn up many types of counterfeit products at a single factory or workshop.

Industry members therefore need to respond jointly to see that these criminals are identified and prosecuted. A strong campaign can be waged against counterfeiters if a group of brand owners in an industry share intelligence, financial and other resources, while developing a comprehensive strategy to investigate and petition governmental officials to prosecute brand thieves.

Nonetheless, as long as consumers continue to buy counterfeit products, counterfeiters will be there to make them. Therefore, on the demand side, brand owners need to educate consumers about counterfeiting.

Many companies do that on their website, with information that helps consumers distinguish

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authentic products from fakes. In addition, some companies use various forms of overt, covert and forensic authentication technology, such as barcodes, security labels and holograms.

Unfortunately the anti-counterfeiting message can be inconsistent, and the wide variety of authentication devices within an industry can add to consumer confusion. Here too a unified industry-wide effort is far more effective. Many more consumers can be reached when industry members combine resources to launch

a unified public relations campaign, and consumers are far more likely to recognize and accept an authentication technology if it's adopted by a group of brand owners as an industry standard.

Put simply, counterfeiting is an industry-wide problem that requires industry solutions. Industry members need to work together to prevail against counterfeiting, rather than independently wage a series of expensive and uncoordinated efforts.

At present, there are very few industry-specific groups that are jointly pursuing enforcement action in China or that have adopted authentication technology as an industry standard. Typically leadership and organization are lacking. Moreover, competing brand owners are often reluctant to work together or to share resources. They need to keep in mind that counterfeiting is a real problem, and the enemy is not another legitimate competitor, but the brand thieves who are attacking the entire industry and competing unfairly by illegally misappropriating intellectual property rights.

ANTITRUST PROTOCOLS

Antitrust violations are a concern. Any time that competitors meet or discuss pursuing any activity collectively, antitrust considerations need to be addressed. However, it's important to keep in mind that while the antitrust laws prohibit competitors from engaging in price-fixing and other forms of anti-competitive activity, many other forms of joint conduct are permissible. Lobbying and pursuing litigation, for example, are immune from antitrust liability. Similarly, competitors are permitted to collaborate in ways that enhance efficiency and are beneficial for consumers.

Combating counterfeiting is clearly a pro-competitive activity. In a free-market economy, the amount that a firm invests in innovation depends on the perceived rewards from its investment. Typically the investment is greater when the perceived rewards are higher. If brand owners lose because of illicit uncompensated use of their creations and trade names, it reduces their incentive to innovate.

As a result they are likely to make fewer technological advances, competition is likely to be reduced, and consumers may face fewer choices and higher prices. Restricting the unauthorized use of inventions and trade names helps guarantee that inventors receive a return on their efforts. It promotes innovation and gives consumers and

firms access to inventions that otherwise might never have seen the light of day.

Still, even trade associations that are organized for legitimate purposes can become fertile ground for antitrust violations. Government regulators have made clear that competitors working together in activities that promote consumer protection must follow appropriate antitrust protocols.

Consequently, to minimize antitrust risk, an industry group organized to combat counterfeiting should have an up-to-date, written antitrust compliance policy, and it should be systematically distributed to group members. All group meetings should follow a strict written agenda that members can review in advance with legal counsel to identify potential issues of concern. To prevent discussion of inappropriate matters, legal counsel should be present at all meetings and participate in all discussions between competitors. It is also vital to record and retain accurate and complete minutes of meetings, and those minutes should indicate that the antitrust compliance policy was reviewed and followed.

Certain topics may, per se, be suggestive of unlawful agreement, and these topics should be off-limits to the industry group. Specifically, there

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should be no discussion of price-fixing, output restrictions, territorial or customer allocations,

and group boycotts.

In addition, members should not share sensitive information, including information about each other's past, present or future prices; terms and conditions of sale; business or marketing plans; sales or capacity information; production; technology; prices from suppliers; or sales practices. The group's focus should be to protect intellectual property rights in order to benefit competition and promote innovation, not on reducing competition and increasing profits for its members.

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The group should document and describe in writing all of the ways it benefits its members and consumers by providing education and training, and by monitoring legislative and judicial developments, setting professional standards and codes of ethics, conducting industry research, and lobbying and advocating for public policies that affect members. Finally, the group should take action only where there is a good-faith belief that counterfeiting is taking place.

Provided these antitrust protocols are adopted and followed, industry members can and should collaborate to investigate and prosecute counterfeiters, shut down rogue websites, finance public relations campaigns to educate consumers, adopt and promote industry standards that will assist consumers in recognizing counterfeit goods, and provide training to customs and other government officials.

By joining together to combat counterfeiting and protect intellectual property rights, competitors promote free and fair competition – and that is consistent with the underlying purpose of the antitrust laws. ■



Wayne A. Mack is a partner at Duane Morris LLP and co-head of the Commercial, Securities and Antitrust division of the firm's Trial Practice Group. He counsels manufacturers, suppliers, distributors and trade associations regarding antitrust aspects of product distribution and pricing, joint ventures, competitor collaboration, and other types of transactions. He also serves as counsel to the U.S. Golf Manufacturers Anti-Counterfeiting Working Group.
wamack@duanemorris.com

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