

Fake + No Fake + regulating dangerous counterfeit goods

**This article is a summary of an article which first appeared in the Oxford University Journal of Intellectual Property Law & Practice, Volume 10, Issue 4, 1 April 2015, Pages 246–254, authored by James L. Bikoff, David K. Heasley, Valeriya Sherman and Jared Stipelman.*



Synopsis

Counterfeit products are a large and growing problem. Counterfeiting has negative effects from both an economic and a consumer perspective, yet the trade in dangerous counterfeit goods grows annually. The article uses survey data to analyze countermeasures enacted in four major international trading areas; enforcement issues in those same trading areas revealed by survey responses; and best practices for detecting and mitigating the risk posed by dangerous counterfeits. The paper concludes with suggestions for future action and specific enforcement activities in various countries.

Survey Model

Information via the European Communities Trade Mark Association was solicited from private and governmental representatives from 35 countries about the character and scope of their efforts to combat dangerous counterfeit goods. The questions were deliberately open-ended due to the subjective nature of opinions on best practices, demographics and political circumstances in the different jurisdictions.

The Industry

The trade in counterfeit goods accounts for 10% of all global trade and rakes in well over \$500 billion per year. The counterfeit market has now infiltrated a number of different fields, some of which pose a serious danger to human health and safety. Counterfeit or falsified drugs directly cause 100,000 annual deaths in Africa alone, while some place the number above one million worldwide.

Consumer groups, industry stakeholders, international organizations and governments have begun proactively combating dangerous counterfeit goods, although progress has been stalled by the rapid growth of the counterfeiting industry.

Countermeasures

The United States: The US has enacted a number of laws to combat dangerous counterfeit products entering the marketplace. The US has taken a multipronged approach, prosecuting counterfeiters under the Trademark Act, the Tariff Act, the Food and Drug Safety Innovation Act and individual state laws. These laws are enforced by both the federal government and local state law enforcement agencies. The combination of these efforts has created a well-integrated anti-dangerous-counterfeiting regime.

Europe: Europe has fought the counterfeit market through joint efforts via the European Union and its Member States. Anti-counterfeiting laws have converged significantly because of EU - membership and international treaties that have encouraged such alignment. The majority of EU States have laws providing for both criminal and private civil penalties for counterfeiting, targeting specific goods ranging from toys to pesticides. European countries have also harmonized enforcement efforts with agencies like Interpol, Europol and the United Nations.

China: The profitability of the massive counterfeiting market in China has disrupted the ability

for the Chinese government to crack down on the industry. Corruption of government officials has also hindered the ability to tackle the enormous counterfeiting business in the country. While the laws are in place to fight the problem, the motivation and authority to do so are not always. The demand for cheap products has created an environment where counterfeiting is regularly ignored, civil penalties are hard to attain, and criminal penalties are very difficult to prove. China's legal protection against counterfeit and dangerous goods-though improving- still lacks transparency, consistency and effectiveness.

India: While Indian anti-counterfeiting laws are widely praised, the enforcement of these laws is difficult due to the immense size of the country. India has enacted chain of supply laws that have helped decrease counterfeit imports, by, for example, requiring that specific types of dangerous cargo enter India only via certain ports where increased inspection measures are implemented. India also supplements its official procedures by inviting extensive involvement by the private sector and encourages self-regulation, which has led to industry wide standards that have reduced the risk of dangerous counterfeiting.



Prepared By: **Jim Bikoff**
member of the ECTA Anti-Counterfeiting Committee, Partner
Ethan Pickrell
Smith, Gambrell & Russell, LLP
jbikoff@sgrlaw.com &

The Next Step

International organizations should identify potential best practices and start a conversation as to how to best implement these practices across jurisdictional boundaries. The public health and safety consequences of the problem are simply too great to ignore.

Survey Insights and Best Practices



Verifier: **Joe Cohen**
Chair of ECTA Anti-Counterfeiting Committee, Consultant
Collyer Bristow
joe.cohen@collyerbristow.com