



October 23, 2023

U.S. Patent and Trademark Office
Office of Policy and International Affairs
Ameen Imam
P.O. Box 1450
Alexandria, VA 22314

Re: Future Strategies in Anticounterfeiting and Antipiracy (Docket No. PTO-C-2023-0006, 88 Fed. Reg. 33872)

Dear Mr. Imam,

On behalf of the Center for Data Innovation (datainnovation.org), I am pleased to submit this response to the Patent and Trademark Office of Policy and International Affairs request for information on future strategies to combat counterfeiting and piracy.¹

The Center for Data Innovation studies the intersection of data, technology, and public policy. The Center formulates and promotes pragmatic public policies designed to maximize the benefits of data-driven innovation in the public and private sectors. It educates policymakers and the public about the opportunities and challenges associated with data, as well as technology trends such as open data, artificial intelligence, and the Internet of Things. The Center is part of the Information Technology and Innovation Foundation (ITIF), a nonprofit, nonpartisan think tank.

The Center commends the Patent and Trademark Office for recognizing the need for collaboration across government and with the private sector to address online counterfeiting and piracy. Addressing these problems requires a global, coordinated approach, with engagement from online platforms, rightsholders, law enforcement agencies, and policymakers, with a focus on developing technology and voluntary agreements from stakeholders.

Sincerely,

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¹ 88 Fed. Reg. 33872



2. Please identify the types of harms you have observed from sales of counterfeit and pirated goods.

Illicit trade, or the sale or production of an illegal good, has an enormous impact on the American economy and has become a half-trillion dollar industry.² In addition to eroding the competitiveness of American manufacturers, impacting American workers, and hurting American innovation, counterfeit and pirated goods threaten the health and safety of millions of American consumers. Without engagement, the impacts and costs of counterfeiting will continue to grow.

Some of the most dangerous counterfeit products that may enter the U.S. commerce stream are counterfeit medical products. Fake pharmaceutical medication, worth \$4.4 billion each year, can lead to serious medical complications and death.³ In 2020, INTERPOL seized 4.4 million counterfeit pharmaceutical units, including fake pain medications.⁴ In the same year, U.S. Customs and Border Protection seized more than 1,600 shipments of mislabeled, fraudulent, unauthorized or prohibited Covid-19 test kits and protective gear.⁵ Had these products reached the commerce stream, they could have led to significant illness and a widespread health emergency.

Fake pharmaceuticals are not the only products that threaten consumers' health and safety. More innocuous products like counterfeit cosmetics are untested and unregulated by the Food and Drug Administration and can lead to serious skin diseases or introduce new bacteria to the environment or user.⁶ Even a single counterfeit component in a larger, otherwise safe product can cause harm. Researchers in the UK estimated that counterfeit vehicle parts, made of unlicensed or substandard materials, are responsible for more than 30,000 car accidents each year.⁷

² U.S. Chamber of Commerce, "Back-to-School: Business and Law Enforcement Team Up to Protect Students, Parents, and Teachers from Counterfeit Goods"

³ Phillip Morris International, "Coronavirus worsens USD 4.4 billion global counterfeit medicine problem," May 22, 2020, <https://www.pmi.com/our-business/illicit-trade-prevention/blog/coronavirus-worsens-usd-4.4-billion-global-counterfeit-medicine-problem>.

⁴ INTERPOL, "Global Operation Sees a Rise in Fake Medical Products Related to COVID-19". <https://www.interpol.int/en/News-and-Events/News/2020/Global-operation-sees-a-rise-in-fake-medical-products-related-to-COVID-19>

⁵ U.S. Immigration and Customs Enforcement, "ICE pivots to combat COVID-19 vaccine fraud with launch of Operation Stolen Promise 2.0," November 25, 2020, <https://www.ice.gov/news/releases/ice-pivots-combat-covid-19-vaccine-fraud-launch-operation-stolen-promise-20>.

⁶ B. Morse and C. Repsha, "Pretty Poisonous: How Counterfeit Cosmetics Can Be Toxic to Student Skin." *NASN School Nurse* 36(1):58–61. doi: 10.1177/1942602X20921524.

⁷ David Shepherd et al., "The Impact of Deviant Social Media Influencers and Consumer Characteristics on Purchasing Counterfeit Goods," *Deviant Behavior*. June 30, 2023. doi: 10.1080/01639625.2023.2233041.



Beyond the threats to consumers, counterfeit products significantly impact the U.S. economy. Buy Safe America, a coalition fighting counterfeiting, estimated that U.S. retailers lost \$54.1 billion in sales and the federal government lost more than \$7 billion in tax revenue in 2020 due to counterfeiting.⁸ Counterfeit goods also impact American workers. More than 39,000 wholesaling and 280,000 retail jobs were lost in 2020 due to counterfeiting. This translates to more than \$13.6 billion lost in worker wages and benefits.⁹

4. Please describe current anticounterfeiting and antipiracy strategies that may be available, identifying which elements have proven successful and those that have not. Your answer should identify the targets of anticounterfeiting and antipiracy efforts, such as e-commerce platforms, physical markets, and social media.

Current anti-piracy strategies include voluntary agreements between search engines, hosting services, advertising networks, payment processors, content owners, and other stakeholders to combat digital piracy.¹⁰ Agreements aim to reduce piracy by targeting the services and processes that enable large-scale, commercially driven piracy sites to operate. Instead of targeting individual users engaged in online piracy, these efforts focus on addressing supply-side factors that hinder piracy operators' ability to profit from illegal content.¹¹ These agreements can deter consumers from illegitimate sites, reduce piracy, and increase legal sales.¹²

Similarly, counterfeiting spans multiple countries and occurs across many distribution channels, making it crucial for governments, businesses, and consumers to work together to combat this global issue effectively.¹³ Establishing a unified set of commercially reasonable and technically feasible practices to combat counterfeit goods will streamline compliance across platforms and create a united front to protect consumers from dangerous and unlawful counterfeit products.

⁸ Buy Safe America, "The Counterfeit Silk Road: Impact of Counterfeit Consumer Products Smuggled Into the United States,"

⁹ Ibid.

¹⁰ Nigel Cory and Jaci McDole, "Comments to the Attorney General of Australia Regarding Australia's Copyright Enforcement Review", Information Technology and Innovation Foundation, March 6, 2023, <https://itif.org/publications/2023/03/06/australia-copyright-enforcement-review/>.

¹¹ Ibid.

¹² Ibid.

¹³ Department of Homeland Security, "Combating Trafficking in Counterfeit and Pirated Goods," January 24, 2020, https://www.dhs.gov/sites/default/files/publications/20_0124_plcy_counterfeit-pirated-goods-report_01.pdf



There are a number of best practices among e-commerce marketplaces to reduce counterfeiting.¹⁴ In January 2020, the Department of Homeland Security (DHS) published a report that outlined 11 steps the U.S. government could take to thwart the spread of counterfeit goods and 10 best practices for the private sector.¹⁵ Many of these best practices overlap with best practices for online platforms recommended in the European Union’s “Memorandum of Understanding on the Sale of Counterfeit Goods on the Internet.”¹⁶ Best practices that overlap include establishing and enforcing policies to protect IP rights; creating notice and takedown procedures; assessing third-party sellers; enabling consumer reporting of counterfeits; addressing pervasive counterfeits proactively; preventing repeat offenders; providing redress to consumers; improving data sharing; and assisting law enforcement.¹⁷ These overlapping best practices have been endorsed by a multitude of representatives from the private sector and government and provide a starting point for future discussions on anti-counterfeiting initiatives in the United States and abroad. Continued work to establish global norms will also provide the groundwork for foreign governments to adopt similar policies, including similar voluntary best practices, and solidify the United States as a leader in anticounterfeiting.

Some e-commerce marketplaces go beyond these best practices with additional proactive measures to prevent counterfeit goods from entering the stream of commerce. For example, Amazon uses advanced machine learning technology to verify a seller’s identification and flag any connection to previously identified bad actors. According to Amazon, improved vetting has stopped bad actors from accessing the platform and deterred bad actors from continuing to target Amazon over time. The number of attempts by bad actors to create new seller accounts decreased from 6 million attempts in 2020 to 2.5 million attempts in 2021 to 800,000 in 2022.¹⁸

Innovations in automated moderating have also reduced the number of pirated or counterfeited goods from entering the commerce stream from third-party marketplaces. Automated moderation tools scan all products listed for sale and flag any potential counterfeit, fraud, or abuse, including any potential product changes. Platforms are also using the data gained by automated systems to continually advance and improve proactive measures. In 2022, Amazon’s continuous monitoring

¹⁴ Becca Trate and Daniel Castro, “Best Practices to Combat Online Sale of Counterfeits in the EU and US,” Center for Data Innovation, July 13, 2022, <https://datainnovation.org/2022/07/best-practices-to-combat-online-sale-of-counterfeits-in-the-eu-and-us/>.

¹⁵ Ibid

¹⁶ Ibid

¹⁷ Trate, “Best Practices to Combat Online Sale of Counterfeits in the EU and US,” <https://www2.datainnovation.org/2022-best-practices-combat-counterfeits-summary.pdf>.

¹⁸ Amazon, Brand Protection Report, Amazon, April 2023, <https://www.amazon-brand-registry.com/brand-protection-report-23>.



blocked 99 percent of fraudulent, counterfeit, or infringing listings before a brand was able to find and report the violation.¹⁹

To address this, governments should work with private sector partners, including retailers, online marketplaces, shippers, payment processors, social media platforms, online advertising networks, and search engines, to produce and refine voluntary best practices to reduce counterfeiting.

7. What patterns and trends have you observed in counterfeiting and piracy due to shifts in the economy? Do you anticipate that these patterns and trends will continue? And if so, what impact will they have on any current and future strategic plans to combat counterfeiting and piracy?

Social commerce is the integration of e-commerce shopping features directly into social media apps to create more opportunities for effective word-of-mouth marketing. Features like TikTok Shop, launched in September 2023, or Instagram Shopping, launched in 2016 and updated to feature in-app storefronts in 2020, offer consumers the ability to browse products and purchase directly from within social media apps. While innovation in social shopping has made online shopping and product discovery more seamless for consumers, it also creates new opportunities for counterfeiters to sell their products.²⁰

Social media and social media influencers spurred the rise of “dupe culture.” Dupes, short for duplicates, are items that are visually similar to other, more expensive consumer products. Some advertised dupes are legitimate products that do not rise to the level of being a counterfeit—for example, a brandless but visually similar water bottle, or a makeup product that serves essentially the same purpose as a more expensive version, may be called dupes, but do not represent IP infringement.²¹ However, some products advertised as dupes are not just visually similar items, they are counterfeit products that infringe on the IP rights of others.

Moreover, new research found that counterfeiters are using influencers and social media apps to advertise and sell their products. Influencers carry a high level of trust. Researchers in the UK found that influencer endorsements cause about one-third of consumers to infer that the influencers must

¹⁹ Ibid.

²⁰ Stephanie L. Jacobsen and Nora Ganim Barnes, “Social Media, Gen Z and Consumer Misbehavior: Instagram Made Me Do It,” *Journal of Marketing Development and Competitiveness*, Vol 14(3), 2020, http://t.www.na-businesspress.com/JMDC/JMDC14-3/5_JacobsenFinal.pdf.

²¹ CT Jones, “How ‘Dupe’ Culture Took Over Online Fashion, *Rolling Stone*, September 15, 2022, <https://www.rollingstone.com/culture/culture-features/dupe-culture-fast-fashion-tiktok-1234591964/>.



have evaluated the product and that the product must be safe, and that 22 percent of consumers purchased counterfeit products because of influencer endorsements.²² Of purchasers, more than 70 percent were aware they were purchasing counterfeit goods.²³

Social media platforms with commerce features have taken steps to mitigate counterfeit products on their apps. Instagram Shopping prohibits the sale of counterfeit goods.²⁴ TikTok Shop, the app's integrated e-commerce platform, prohibits several items from being sold, including counterfeit items.²⁵ TikTok uses technical and human content moderation to ensure that products listed on TikTok Shop meet TikTok's requirements.²⁶ However, banned products do appear. *Wired* reported "several examples of products prohibited by TikTok's terms being sold, including menstrual products and prenatal vitamins."²⁷ In 2019, researchers used logo recognition software to review four million Instagram posts. They identified more than 50,000 accounts engaging in counterfeit counterfeiting activity as a result.²⁸

Any strategic plans to address counterfeiting should include representatives from social media companies, due to the success of marketing counterfeit products through social media. As more companies move into the social commerce space, counterfeiters will have new opportunities to advertise and sell their products. However, social media and social commerce companies can offer solutions to help combat counterfeiting, and could use advanced technology like logo recognition to identify potential violations, and punish social media influencers who promote counterfeit products that violate their terms of service. These changes would decrease the promotion of counterfeit goods to an influencer's audience.

²² David Shepherd et al., "The Impact of Deviant Social Media Influencers and Consumer Characteristics on Purchasing Counterfeit Goods," *Deviant Behavior*. June 30, 2023. doi: 10.1080/01639625.2023.2233041.

²³ Ibid.

²⁴ Facebook, "Seller Agreement," July 30, 2021, https://www.facebook.com/legal/commerce_product_merchant_agreement.

²⁵ Amanda Hoover, "TikTok Shop Has a Snail Smile Problem," *Wired*, September 19, 2023, <https://www.wired.com/story/tiktok-shop-fake-scam-products/>

²⁶ Ibid.

²⁷ Ibid.

²⁸ Olivia Solon and David Ingram, "Scammers have turned Instagram into a showroom for luxury counterfeits," *NBC News*, April 24, 2019, <https://www.nbcnews.com/tech/tech-news/scammers-have-turned-instagram-showroom-luxury-counterfeits-n997256>.



8. Please indicate whether any strategic plans to combat counterfeiting and piracy might include collaboration with private or public parties, and if a strategic plan is not collaborative, please explain why not. If a strategic plan does include collaboration, please describe the anticounterfeiting and antipiracy strategies employed in the collaboration.

Counterfeiting does not exist in a single country or target a single e-commerce platform, retailer, or industry. Instead, counterfeiters work in large networks that span multiple countries and distribution channels, making it crucial for governments, businesses, and consumers to work together to combat this global issue effectively.²⁹ Strategic plans to reduce counterfeits in the commerce stream requires a global, collaborative approach between the public and the private sector.

Establishing a unified set of commercially reasonable and technically feasible practices to combat counterfeit goods will streamline compliance across platforms and create a united front to protect consumers from dangerous and unlawful counterfeit products. Fortunately, a global consensus to combat counterfeiting is starting to emerge.³⁰ Best practices that overlap include establishing and enforcing policies to protect IP rights; creating notice and takedown procedures; assessing third-party sellers; enabling consumer reporting of counterfeits; addressing pervasive counterfeits proactively; preventing repeat offenders; providing redress to consumers; improving data sharing; and assisting law enforcement.³¹

²⁹ Department of Homeland Security, “Combating Trafficking in Counterfeit and Pirated Goods,” January 24, 2020, https://www.dhs.gov/sites/default/files/publications/20_0124_plcy_counterfeit-pirated-goods-report_01.pdf

³⁰ Trate and Castro, “Best Practices to Combat Online Sale of Counterfeits in the EU and US,” Center for Data Innovation, July 13, 2022, <https://datainnovation.org/2022/07/best-practices-to-combat-online-sale-of-counterfeits-in-the-eu-and-us/>.

³¹ Trate, “Best Practices to Combat Online Sale of Counterfeits in the EU and US,” <https://www2.datainnovation.org/2022-best-practices-combat-counterfeits-summary.pdf>.