



CACP

Secure supply chain best practices tool kit: Protecting businesses, consumers, and brand integrity

The growing problem of counterfeiting threatens businesses and consumers in nearly every region of the world. Fake products deprive legitimate businesses of revenue and undermine consumer confidence in their brand names. The damage affects both the brand and domestic and foreign subcontractors that supply materials, components, and finished products to the brand owner. Consumers are also adversely affected because they are deceived into buying fake products that don't meet the brand owner's standards and can pose health and safety hazards.

Governments have a particularly critical role to play in this effort. They must create the necessary legal infrastructure to protect trademarks and copyrights effectively and enforce intellectual property laws to deter fraudulent behavior. Businesses, however, must also do their part to prevent the production and sale of counterfeit products.

Many aspects of the counterfeiting problem are beyond the control of businesses. But one important area over which businesses can exert a large measure of control is the security of their supply chain. Lax security creates opportunities for counterfeit and stolen goods to make their way into legitimate production, wholesale, and retail channels. Globalization, the Internet, and advanced technology have made it easier for counterfeiters to infiltrate fake products into the supply chain and increase the availability of these products in markets around the world. Yet many businesses, particularly small and medium-size companies, do not fully appreciate the bottom-line cost of lax supply chain security and the adverse impact it has on brand value.

To assist businesses and raise awareness of the importance of supply chain security, the Coalition Against Counterfeiting and Piracy (CACP)¹ has developed a tool kit of best practices that companies in a variety of industry sectors are using to improve their internal systems and coordinate with other stakeholders, including subcontractors and government authorities. The CACP recognizes that supply chain requirements vary from industry to industry. There is not one set of best practices effective for all businesses. However, there are lessons that can be learned from businesses that take the security of their supply chains seriously.

The following tool kit provides a useful guide for businesses to assess the effectiveness of their supply chain practices and consider new options for improving performance. In addition, this tool kit includes 11 case studies highlighting companies who are employing successful strategies to help protect their products from counterfeiters and modern-day pirates.

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¹ The Coalition Against Counterfeiting and Piracy (CACP) is a Washington based business coalition co-chaired by the U.S. Chamber of Commerce and the National Association of Manufacturers. With close to 200 members, the CACP seeks to strengthen U.S. and international efforts in the fight against counterfeiting and piracy. For more information, go to www.thecacp.com.

Supply Chain Best Practices

I. Secure Legitimate Inputs

Companies should be vigilant to ensure that raw materials and parts are authentic and meet company standards. Increased scrutiny of exports and imports at borders is essential for policing international supply chains. The following are a variety of methods that companies use to better police their inputs:

A. Ensure the authenticity of raw materials and component parts

- Purchase materials and equipment used in manufacturing from company authorized suppliers only.
 - Where possible, source from fully auditable vendors that source exclusively from original manufacturers, franchised distributors, or the first owners of the goods.
- Utilize risk management procedures to identify businesses that have a high probability of engaging in trade of counterfeit products.
- Qualify vendors through periodic audits of facilities and documents.
 - Consider reducing sourcing base to enhance auditing ability.
- Control and audit the receipt of product ingredients and components to ensure that they meet company specifications.

B. Employ the concept of "strict liability" for failure to deliver authentic components and parts in contracts with suppliers

- Include provisions in purchasing contracts to hold sellers responsible for fraudulent goods.
 - Include financial penalty provisions for suppliers that fail to comply.
 - Consider legal remedies if suppliers provide inferior goods.
 - Develop options for rehabilitating suppliers that don't currently use good practices.
 - Develop options for delisting supplier as trusted source of raw materials and components for repeated failures to comply.

C. Institute shipping policies to protect the integrity of raw materials and component parts

- Develop guidelines to ensure the physical security of overseas factories in the supply chain (e.g., like those for the U.S. Customs-Trade Partnership Against Terrorism/C-TPAT).
- Use seals on all containers and note seal numbers on shipping manifests to protect containers from being opened and resealed.

- Fully inspect carrier documents.
- Develop partnerships with customs authorities to exchange information and target shipments suspected of containing counterfeit products.

II. Verify Legitimacy of Customers and Distributors

Counterfeiters prey on weaknesses in the legitimate supply chain. Often they pose as legitimate businesses and seek to purchase products in bulk in order to blend fake products and maximize returns and launder resources. Manufacturers should be vigilant in ensuring that they only sell to legitimate distributors or retailer outfits. The following are some best practices businesses use to verify the legitimacy of customers and distributors:

A. Utilize risk management procedures to verify legitimacy of customers

- Develop guidance for the sales force on how to assess the legitimacy of customers.
 - Has the customer ordered an unusually large volume for normal needs?
 - Is the customer willing to pay cash for very expensive orders?
 - Does the customer have an appropriate business background?
 - Do the product capabilities fit the customer's line of business?
 - What do financial institutions say about the company's credit?
 - Are delivery dates vague or are deliveries planned for out-of-the-way destinations?
- Educate and train the sales force on guidelines. Develop incentives and penalties for adherence to guidelines.
- Employ investigators to track customer history and refuse to do business with organizations that have been found to trade in counterfeit goods.

B. Ensure that subcontractors only produce authorized merchandise

- Perform audits to make certain that subcontractors are not running "third shifts" to replicate product for distribution in the illegitimate market.
- Delist suppliers that routinely produce surplus supply.

"Counterfeiters prey on weaknesses in the legitimate supply chain."

III. Manage Production Waste and Damaged or Unusable Inventory

Individuals engaged in counterfeit trade often prey on scrap yards, waste repositories, or reclamation centers to obtain inferior goods. Companies have employed the following policies to deter theft and diversion of these goods:

A. Institute policies to certify that production waste and damaged and unusable products are destroyed or appropriately disposed of

B. Select one or two trusted charities for product donation to ensure that goods are not diverted to the gray market and blended back into the legitimate supply chain

IV. Ensure Legitimacy of Purchased Products at Retail Level

Retailers employ a variety of tools to ensure the legitimacy of purchased products. The following are some of the methods they use:

A. Verifying product authenticity

- Audit shipments from all sources (especially those that do not come directly from manufacturers) to verify authenticity of packaging, case markings, pallet configurations, etc.
- Open product cases to confirm that units have the same batch numbers, expiration dates, and uniform product codes (UPC).
- Employ track and trace methodologies with bar codes or RFID.
- Audit products on the shelves for consistency of packaging, quality, and freshness.

B. Authenticating distribution partners

- Institute procedures for authenticating distribution partners and ensuring their legitimacy.
- Establish through contract provisions the requirement that products be original and unadulterated.
 - Products must be in manufacturer cartons, cases, or shippers.
 - Repackaged or recycled materials should raise suspicion.
 - Original carton case seals (or unit packaged when totes are used) must be sealed and unaltered.

V. Monitor Brand Integrity

It is incumbent upon rights holders to monitor the retail space and report intellectual property infringements. Brand owners employ a variety of strategies to enhance protection for products and to route out fakes in the system.

A. Collaborate with local customs authorities

- Register trademarks with customs authorities. Provide samples of legitimate products and train authorities and law enforcement to recognize contraband.
- Provide information about "bad actors" with local customs authorities so that they can increase scrutiny of shipments from particular facilities or importers.
- Develop procedures with customs authorities to permit sharing of information on the source of counterfeit products seized and the names of businesses and individuals involved.

B. Enhance market intelligence

- Utilize "mystery shopping" techniques to gather random samples of products and monitor the marketplace environment.
- Test and certify product authenticity.
- Use results to tailor necessary action plan.

C. Monitor sales of brand name products on the Internet

- Monitor Internet auction sites carefully and pursue appropriate legal remedies if necessary.
 - Employ tactics such as mystery buys to verify authenticity of products sold on the Internet.

D. Consider using technology to ensure product security

- Examine options for applying simple, low-cost solutions that could help differentiate authentic products from counterfeit products.
 - Examples of low-cost options include deliberate packaging flaws and covert product design flaws.
- Consider the applicability of new technologies that offer more technically advanced features. Examples include:
 - Bar code symbologies, such as Reduced Space Symbology (RSS) and other globally recognized 2D Composite symbologies.
 - Radio Frequency Identification (RFID) tags.
 - Holograms and watermarks.
 - Anti-counterfeiting printing ink technologies.
 - Covert features on products.

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E. Vigorously pursue legal remedies to deter trademark infringements

- Employ litigation strategy to deter future infringements.
 - Seek out additional information about suppliers through legal process (e.g., the "discovery" process in U.S. courts).
 - Consider taking legal action, even on small counterfeiting cases, to demonstrate to those engaged in counterfeiting activities that they are at risk no matter what the level of sales activity.
 - Utilize Ex Parte Temporary Restraining Orders, Orders of Seizure, and Asset Seizures where possible.
 - Use creative civil enforcement efforts such as Facility/Venue Permanent Injunctions and Orders of Seizure; National Preliminary Injunctions and Orders of Seizure; suits against Secondary Infringers (contributory and vicarious liability) such as services, financiers, and landlords.

F. Partner with retailers

- In areas where there is a high degree of counterfeiting, consider adopting certified retailer programs.
 - Work on a signpost or slogan for consumers to guarantee authenticity of products (e.g., "No trade in fakes").

VI. Outreach to Law Enforcement and Regulatory Officials

Businesses can reap big dividends from a strong outreach program to educate federal, state, and local law enforcement as well as regulatory officials and support their efforts to enforce laws against fraudulent activities. Law enforcement officials, in particular, need industry help in understanding how counterfeiters and their accomplices carry out illegal activities and what the impact is on business, consumers, and law enforcement priorities (e.g., collecting tax revenue; fighting organized crime; and enforcing consumer health, safety, and environmental regulations). Some will also appreciate the opportunity to share information that will help them in their enforcement work. Possible initiatives include:

A. Develop informational materials that explain the harm that counterfeit products cause businesses, consumers, and governments, giving specific examples and providing economic data and statistics

B. Meet with key federal, state, and local officials and customs authorities to personally brief them and learn more about their priorities. Help them understand legitimate distribution channels in an industry and how counterfeiters abuse this system

C. Establish procedures for sharing information that can be used in law enforcement investigations and offer to provide legitimate products, under appropriate conditions, to assist in investigations

D. Provide a counterfeit product destruction service to ensure that seized counterfeit products are properly disposed of

E. Monitor court dockets on counterfeiting cases to gauge enforcement trends and improve outreach efforts

Conclusion

In the following pages of the tool kit, you will find real world case studies from companies who employ the aforementioned methods to protect their supply chains from counterfeiting and piracy. It is our hope that this document and the case studies that follow will serve as a resource to businesses in their fight against counterfeiting and piracy.

About the U.S. Chamber of Commerce

The U.S. Chamber of Commerce is the world's largest business federation representing more than 3 million businesses of all sizes, sectors, and regions. It includes hundreds of associations, thousands of local chambers, and more than 100 American Chambers of Commerce in 91 countries. Our mission is to advance human progress through an economic, political, and social system based on individual freedom, incentive, initiative, opportunity, and responsibility. For more information, visit www.uschamber.com.

About the Chamber's Anti-Counterfeiting and Piracy Initiative

In 2004 the U.S. Chamber launched a multi-million dollar global initiative to thwart the growing threat of counterfeiting and piracy, protect public health and safety, defend the rights of business, and establish fair competition throughout the global marketplace. The efforts of the initiative and the Chamber led Coalition Against Counterfeiting and Piracy (CACP), a coalition of nearly 200 businesses and associations, promote key partnerships between government and industry. Through education and increased detection and enforcement, the Chamber and the CACP continue to combat this problem and make it a top priority for the global community. For more information, visit www.uschamber.com/counterfeiting.

About the Coalition Against Counterfeiting and Piracy

To fight the growing threat of counterfeiting and piracy to the economy, jobs, and consumer health and safety, the business community organized itself through a broad-based business coalition, the Coalition Against Counterfeiting and Piracy (CACP). Currently, the CACP has nearly 200 members, including associations and businesses, both small and large, representing a wide range of industry sectors and interests. The CACP is committed to increasing the understanding of the negative impact of counterfeiting and piracy by working with Congress and the administration to drive greater government-wide efforts to address this threat. For more information, visit www.thecacp.com.



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Bendix Commercial Vehicle Systems LLC, a member of the Knorr-Bremse Group, develops and supplies leading-edge active safety technologies, air brake charging and control systems, and components under the Bendix brand name for medium- and heavy-duty trucks, tractors, trailers, buses, and other commercial vehicles. Employing more than 2,200 people, the company is headquartered in Elyria, Ohio, near Cleveland.

"Millions of dollars in Bendix look-alike valve and brake products reach the automotive aftermarket—putting drivers at risk with low durability, poor fit, and inferior workmanship. The sophistication of counterfeit operations has improved to the point where it is difficult for consumers to discern the real from the copy."

Anthony C. LaPlaca,
Vice President and
General Counsel,
Bendix

Several industries, including automotive, take a particularly dire view of counterfeiting and piracy because of the effect of these activities on consumer safety. According to Anthony C. LaPlaca, Bendix vice president and general counsel, "Millions of dollars in Bendix look-alike valve and brake products reach the automotive aftermarket annually—putting drivers at risk with low durability, poor fit, and inferior workmanship. The sophistication of counterfeit operations has improved to the point where it is difficult for consumers to discern the real from the copy." However, in terms of performance, quality, and actual costs, the differences are huge. "We've actually seen air dryers that were filled with kitty litter instead of desiccant."

Beyond safety, counterfeiting clearly undermines brand equity. When fake products fail prematurely, there is a natural perception that the (supposed) Bendix products have not performed as expected. Genuine products "leaked" from the supply chain also have revenue and share consequences. But this is less of a problem for Bendix, and not one that severely impacts consumer safety.

For Bendix, counterfeit-related safety problems usually aren't the result of customers looking to save a few dollars. In fact, people frequently return failed products to Bendix, and only then discover that these "under-warranty" items are fakes. Real Bendix products have a logo cast into them, but unless customers look closely, they may fail to notice a missing logo or detect a counterfeit one. Manufacturing codes are also attached to legitimate Bendix parts; but these are easily duplicated by counterfeiters. Moreover, makers of fake products can always claim that codes are "their own."

In some industries, the knock-off problem can be mitigated with distinctive or tamper-resistant packaging. Unfortunately, heavy truck parts—which usually are sold through distributor outlets and repair facilities—often are removed from the packaging before the final sale, or are installed without the customer ever seeing them. So despite the fact that Bendix parts arrive in boxes with the Bendix name and trademark on them, the package and the customer may never "meet."

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The bottom line is that most—but not all—customers are unwilling or unknowing participants when it comes to counterfeit or knock-off parts. Unlike apparel, digital entertainment, and a score of other counterfeitable products, vehicle parts that undermine safety are undesirable. But what about the rest? A portion of the buying public may simply be convinced that paying extra for the genuine article is a waste of money. It is also common for sellers to believe that "off-brands" on their shelves and in their warehouses do not represent a safety hazard to the end user or the general public.

So who are the offenders? Mostly they are manufacturers, distributors, repair services, and retailers of deliberately identical, nonbranded, or illegally branded parts that are intentionally misrepresented as Bendix. The part or the packaging doesn't even have to have the Bendix logo, name, or part number on it to be fraudulently marketed as genuine Bendix. On the manufacturing end, Asia is the most common source of counterfeit products. Quality control and manufacturing consistency in Asian facilities is largely, if not completely, lacking. Also absent is the warranty and service support that accompanies each genuine Bendix product. The counterfeiters' sole mission is margin—just like the mostly independent distributors, retailers, and repair services that import and sell the fake products.

Bendix has taken numerous actions to protect itself and its customers. The heart of these efforts is its Intellectual Property Protection and Enforcement Program, activities of which include:

- Instituting patent- and trademark-infringement actions against companies that sell or distribute knock-off parts that infringe on Bendix patents and trademarks.
- Circulating Bendix trademark usage guidelines to distributors and dealers.
- Providing ongoing training to the sales force and customer service personnel.

- Implementing customer- and industry-awareness campaigns.
- Meeting with senior management at distributors to discuss intellectual property compliance.
- Working closely with industry and trade associations, as well as with groups concerned with legal and governance issues, such as brand protection and intellectual property.
- Maintaining an active trade show presence, with literature and side-by-side displays of inferior (knock-off) products and genuine Bendix products. Bendix also works with trade show sponsors to have infringing products and literature removed from offending parties' booths.

Bendix knows the problem is ubiquitous. Still, Anthony LaPlaca is pleased with the results that his company's efforts have produced. Even simple cease and desist communications have been effective—probably due to litigation successes Bendix has experienced with trademark infringement cases. To date, the company has made few attempts to "go to the source"—the (largely Chinese) manufacturers of bogus products.

Fortunately, stateside government has been more receptive—offering, among other things, immigration and customs training through the National Intellectual Property Rights Coordination Center. Working in this manner has helped Bendix form useful relationships with government agencies and understand government intervention programs. For example, after attending a Coordination Center seminar, Bendix was spurred to accelerate its process of registering common law trademarks. The hope now is that lawmakers will extend intellectual property protection to industrial designs of safety-related products such as air brakes and components. The entire automotive industry and other key U.S. sectors would benefit from this type of legal protection.

However, to really make a dent, La Placa says that it will be necessary to intervene at the source: getting to the overseas manufacturers by expanding intellectual property protection where products are produced. Ever-higher levels of ongoing consumer education will also be necessary—not only helping end users recognize fake parts but giving them the tools and the fortitude to make sure they're protecting themselves by acquiring the genuine article.

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Established in 1891, *Merck & Co., Inc.*, is one of the world's leading pharmaceutical companies. Its mission is to discover, develop, manufacture, and market vaccines and medicines to address unmet medical needs. Merck is headquartered in Whitehouse Station, New Jersey.

"Naturally, counterfeiting and piracy undermine the pharmaceutical industry's profitability and market integrity."

Counterfeiting and piracy mean different things to different companies and industries. But to Merck, these transgressions are particularly egregious because they threaten public health. Dangers associated with phony products are obvious—particularly since more than 10% of all drugs sold worldwide are believed to be counterfeit.¹ However, authentic Merck products that have been diverted from the company's supply chain can also become unreliable or unsafe. Such items may have been stored at temperatures that compromise their effectiveness, are marketed past their expiration dates, or have been repackaged in ways that compromise sterility or misrepresent their purpose or dosage.

Naturally, counterfeiting and piracy undermine the pharmaceutical industry's profitability and market integrity. Fake and diverted products cost tens of millions of dollars every year. But the priority of every pharmaceutical entity, including Merck, is to eliminate the dangers that illegitimate products pose to the health of consumers.

What makes this task so challenging is that bogus pharmaceuticals can reach consumers in myriad ways. Stolen or counterfeit items are sold on the black market—direct to consumers on the

street corner or through unscrupulous retailers. And bogus Internet pharmacies—slick and professional as those of a *Fortune* 500 company—are a fact of 21st century life. Outside the U.S., it also is common for expired products that intermediaries should have destroyed to turn up at bazaars and flea markets.

But illegitimate products can reach the consumer via the legitimate supply chain as well. Ted Fahy, Merck's Latin America regional director of global security, explains that distributors, on occasion, purchase products from secondary wholesalers. And those wholesalers have been known to acquire, and pass on, stolen, fake, or diverted products. In effect, purchasing products outside the intended channel of trade inadvertently exposes the legitimate supply chain to unauthorized (stolen or fake) products.

Key Responses

Because the problem is so diverse and its consequences so severe, Merck has developed an aggressive, holistic approach that combines legal and law enforcement resources; technology innovations; business alliances; partnerships with international agencies and governments; quality management initiatives; educational programs with distributors, retailers, and consumers; and numerous levels of physical supply chain security.

¹World Health Organization Fact Sheet #275 "Counterfeit Medicines," February 2006.

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A key facet of this approach is an Anti-Counterfeiting Technology Team led by scientists from Merck's research laboratories. In recent years, this group has analyzed and categorized every technology for manufacturing and packaging pharmaceuticals. These efforts have helped Merck:

- Develop better methods of designing and packaging pharmaceuticals.
- Create new ways to recognize counterfeits.
- Identify how and even where fake products and packages are being made.
- Understand the consumer health impacts associated with illegitimate products.
- Formulate a consistent process for identifying and reporting supply chain breaches and instances of bogus products.

The Anti-Counterfeiting Technology Team has also helped Merck develop plans and policies for improving quality management, formulating legal strategies, securing its manufacturing and supply chain processes, and enhancing consumer- and physician-education efforts. A good example is legal recourse—vigorous brand enforcement measures taken in every country where Merck products are sold. Since new products, new policies, and new criminals arise constantly, it's critical that intervention is equally rapid.

In addition, Merck is studying the potential of Radio Frequency Identification (RFID) systems to enhance, track, and trace activities; reduce theft and shrink; and generally improve inventory management effectiveness. It has joined a consortium of large pharmaceutical manufacturers, wholesale distributors, and major chain drug stores that are working to determine how RFID can optimize:

- Returns management, e.g., by improving expiration date management, lot and batch tracking, and recall expediting.
- Operational productivity, e.g., by helping to monitor and control shipping and receiving accuracy.
- Product security and consumer safety, e.g., by supporting anti-counterfeiting measures and theft and shrink management.

"Classic" supply chain improvements also play a big part in Merck's efforts to remediate counterfeiting and piracy. For example, consistent, documented distribution, labeling, and packaging approaches help distributors, retailers, and consumers quickly recognize legitimate Merck products and discern that those products are in their proper and original packaging. Another cornerstone is exceptional supply chain visibility—understanding where every case and shipment is going, ensuring its integrity, confirming how it is getting there, and determining when receipt notifications are expected. Key to all these objectives is embracing new technologies and developing excellent working relationships with each supply chain partner—from the suppliers of packaging and manufacturing machinery to distributors, retailers, and customers.

Looking Ahead

Because the pharmaceuticals business will always be attractive to lawbreakers, there will never be a time when remediation efforts can fully relax. But despite the problem's permanence, Merck executives are pleased with their efforts to date and with the commitment shown by supply chain partners and governments. On one level, for example, Ted Fahy is confident that the FDA "gets it"—that the agency understands the problem and is committed to working with private industry. Legislators at the federal and state levels have been somewhat slower to get with the program. However,

lawmakers in Washington and in a growing number of states—notably California, Florida, and Texas—have recently enacted new consumer protections and passed laws to curb black marketeering and manufacturing.

Counterfeiting and piracy of pharmaceuticals—like crime in general—will always be with us. But with so much at stake, Merck is determined to stay ahead of the curve.

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Headquartered in Boston, Massachusetts, *New Balance* is one of the world's most well-known and respected manufacturers of performance footwear and athletic apparel. The company employs more than 2,600 people around the globe, and in 2005 reported worldwide sales of \$1.54 billion.

"Footwear counterfeiters aren't just making a fake product; they're diluting the brand, damaging the company's reputation, and undermining the worldwide salability of the product."

Ed Haddad,
Vice President,
Intellectual Property
and Licensed Products,
New Balance

New Balance's success is closely tied to the integrity and visibility of its brand. This is true of most footwear and apparel companies: Quality and fit comprise the value proposition, but marketing, image, and identifiability often make the sale. This is why trademark infringement is a concern to companies like New Balance. According to Ed Haddad, vice president for intellectual property and licensed products at New Balance, footwear counterfeiters aren't just making a fake product; they're diluting the brand, damaging the company's reputation, and undermining the worldwide salability of the product.

Most of New Balance's products are manufactured along the Pacific Rim, specifically in China and Vietnam. These are also the largest black markets for counterfeit footwear, as well as the places where assistance from local and national authorities is least forthcoming. In addition, Far-East production makes it harder to monitor the flow of raw materials and to ensure the conduct of the company's contract-manufacturing facilities. In the late 1990s, for example, New Balance severed relations with a Pacific Rim manufacturer but subsequently discovered that the company was continuing to make and ship now-illegal products. This

behavior is a real problem; however, fly-by-night factories and unreliable supply chain partners are the biggest challenge.

Interestingly, many overseas consumers of counterfeit footwear know they are not purchasing the real thing. For them, value is tied to the image, not to the quality. For a fraction of the retail price, they're happy to obtain the former and sacrifice the latter. This further complicates a company's efforts to control counterfeiting, since awareness building at the consumer level is difficult and not always productive. Also, foreign patent and trademark offices are often lax about permitting the registration of nearly identical logos. The net effect is that even well-intended consumers can become black market buyers.

Counterfeiting clearly costs New Balance money and market share. However, the damage in this context is relatively small since consumers of illegitimate products do not markedly reduce the pool of legitimate buyers. Legitimate buyers also covet the brand; but quality and fit—only available with the genuine article—are usually too important to settle for a knock-off. The real danger is erosion of brand impact—confusing and alienating consumers and retailers that can no

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longer tell what is real and what isn't. Over time, of course, these problems become more income- and share-related.

Responses That Fit

So how is New Balance responding to these threats? To keep fakes out of the U.S. (the company's largest market), it emphasizes "going to the source." A full-time team of investigators constantly monitors Pacific Rim regions known for counterfeit shoemaking and regularly conducts raids on factories and distributors. Once products reach the open market, it's often too late.

New Balance also recognizes the importance of proactively managing its supply chain—monitoring the flow of materials as well as the conduct of finished goods production. Strong material controls, carefully worded trademark authorizations, and highly detailed, unambiguous contracts, purchase orders, and license agreements are key. New Balance also supplies its factories with difficult-to-copy labels with an embedded code. Because labels must be attached to every shoe, this is an effective way to control production integrity and spot fakes or unauthorized overruns. In the near future, New Balance may also assign a unique number to every item—making it possible to determine where and when every article was made. Efforts like these help create a strong legal foundation—critical in a country like China, where the system is not overly inclined to back you up.

This two-part strategy has been quite successful. Comparatively few counterfeit items have made it into the U.S. and counterfeiting activity has receded somewhat, since black market producers seem less inclined to copy the products of companies that are constantly breathing down their necks.

Nevertheless, New Balance executives know that the problem won't go away. Like most counterfeiting enterprises, it is simply too lucrative. One solution, therefore, is to put constant pressure on the sources of manufacturing and supply and make diligent efforts to protect key markets from contamination. This requires buy-in and support from the top of the organization. Dollars and resources must be made available. Tight, respectful relationships with legitimate factories are also essential. As Ed Haddad says, "The better they know you, the less likely it is that they will steal from you."

Another important step to brand protection is comprehensive documentation. Supply agreements, for example, need to address issues relating to order quantities, payment terms, delivery requirements, quality inspections and standards, liability, pricing, currency specifications, cost fluctuations, seconds, subcontractors, raw material suppliers, conditions warranting termination of the relationship, inspection parameters, and audits. Trademark usage—e.g., authorizing the use of logos or protected copy by suppliers and customers—is another area that is frequently under-documented, as are codes of conduct or compliance. The latter could include human rights, working conditions, and environmental issues such as the use of hazardous chemicals.

Finally, it's critical that companies work to develop local relationships and understand how local systems work. Without these efforts, any attempt to "leverage the system" will likely be ineffective. New Balance is proud that consumers covet the brand. And its leaders are confident that—as more and more consumers come to recognize the importance of quality and fit—counterfeiting will begin to abate.

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The U.S. Chamber of Commerce is the world's largest business federation, representing more than 3 million businesses of all sizes, sectors, and regions. It includes hundreds of associations, thousands of local chambers, and more than 100 American Chambers of Commerce in 91 countries. Our mission is to advance human progress through an economic, political, and social system based on individual freedom, incentive, initiative, opportunity, and responsibility. For more information, visit www.uschamber.com.

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Torys LLP is an international business law firm with 300 New York and Toronto lawyers. The firm's areas of specialization include mergers and acquisitions, corporate finance, and major litigation. Torys attorneys have helped numerous companies protect themselves from product piracy and counterfeiting by minimizing vulnerabilities in clients' supply chains and assisting with the identification and prosecution of offending parties.

"In a legal sense, 'willful blindness' (e.g., a retailer that ignores the potential for counterfeit merchandise) may be construed by the courts as 'deliberate intent.'"

Lou Ederer,
Attorney,
Torys

Speaking from "deep and dark" experience, Torys New York intellectual property department chair Louis Ederer strongly emphasizes the importance of addressing counterfeiting and piracy problems on the world stage and in a company's own backyard. Counterfeits, he says, can enter the market wherever there is a breakdown in the authorized chain of distribution. Unauthorized distribution channels—whether the secondary market, the gray market, or the black market—provide perfect cover for counterfeiting activity. Thus, while lax oversight and rogue markets are usually associated with overseas venues, such as Eastern Europe and the Pacific Rim, the most critical steps toward remediation are frequently closer to home.

"As a civil litigator, I get no greater pleasure than going after counterfeiters in the courts, shutting down their operations, and obtaining monetary recoveries for my clients," states Lou Ederer. "I recognize, however, that civil litigation is time-consuming and expensive and clients would rather be focusing their attention on their business. Accordingly, I counsel clients to do everything they can to try to limit the potential for counterfeiting in the first instance by addressing weaknesses in the supply chain."

The Secondary Market

Consider, for example, the secondary market, where goods are sold to unauthorized channels by "consolidators" that purchase from authorized retailers looking to off-load unsold merchandise and overstocks. The consolidators then resell these goods to retail outlets that have not been authorized by the brand owner to sell the goods. Unscrupulous consolidators, who are often selling to retailers with insatiable appetites for the branded goods, may mix counterfeit items into their shipments. The new retail customer ends up with a hybrid buy of legitimate and illegitimate goods. It's not uncommon for goods to change hands many times, thereby providing frequent opportunities for bogus products to enter the mix.

In this scenario, the brand owner (the manufacturer) loses control of its products once they reach their authorized destination—effectively sacrificing control of the supply chain that carries its goods. However, that brand owner can regain some level of control by developing tighter retail contracts that require all unsold merchandise to be returned, or that identify specific (approved) secondary buyers to which the goods can be resold. These terms then must be enforced—something brand owners often fail to do.

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Purchasers from the secondary market must also take steps to ensure the legitimacy of all products being acquired and (re)marketed. Failure to heed the warning signs regarding the potential for counterfeits will be at their own peril. "In a legal sense," explains Lou Ederer, "'willful blindness' (e.g., a retailer that ignores the potential for counterfeit merchandise) may be construed by the courts as 'deliberate intent.'" This is why it is important for retailers to be educated about the hazards and likelihood of illegitimate goods infiltrating the secondary market supply chain. More and more, the onus is on the retailer to perform acceptable levels of due diligence.

The Black and the Gray

Other permutations of the problem include black- or gray-market activity. Black market goods are simply those that have been stolen or are possessed unlawfully. Gray market goods are items intended by their manufacturer for one national market, but instead are exported and resold by territorial licensees or authorized distributors into another market.

Black and gray issues clearly must be addressed on an international scale, since overseas manufacturing and distribution operations are frequently the culprits. Yet it is just as important to begin at home—with a comprehensive analysis of supply chain vulnerabilities. Lou Ederer says that virtually all companies would benefit by "mapping" their supply chain processes to identify linkages and handoffs, and therefore determine where the infiltration or unintended dispersion of bogus goods is most likely to occur. Not only can this behavior reduce the incidence of counterfeiting and product diversion, it also demonstrates to the courts that reasonable efforts to avert problems have been undertaken—that poor oversight was not the cause of the problem. Too often, Ederer states, the brand owner only learns about breakdowns in its supply chain in the midst of a civil litigation—which can

give the counterfeiter ammunition and put the brand owner on the defensive. According to Ederer, every counterfeiter that Torys has ever sued 1) claimed to be a secondary or gray marketer, rather than a counterfeiter and 2) accused the manufacturer of being partly responsible due to apathy or lax oversight.

In the extreme, supply chain security enhancements go further than just helping prevent counterfeiting, theft, or diversion. Such efforts could reduce brand owner liability. Ederer points to the case of a pharmaceutical company that, along with a retailer, was sued by a consumer who became ill after ingesting a bogus drug. The case against the pharmaceutical company was that it had not done enough to keep fake or diverted products out of its supply chain.

As a precaution, however, notes Ederer, a brand owner engaging in such searching self-analysis should involve counsel to help ensure that the results are adequately protected from being exposed and will not be used against the brand owner in the future.

The tide of bogus or diverted goods may also be combated with better documentation, i.e., standardized and better controlled paperwork that is easily recognizable and, ideally, more difficult to copy. Electronic transmission of these materials may also be desirable, since sources can be readily identified, transmissions dated, versions compared, and copies circulated to relevant parties. Of course, it is always easy to alter printed or electronic documents, which is why diligent tracking and tight version control are essential regardless of media. Lou Ederer adds that there is even a market for sanitized (altered) invoices. "It's not uncommon for the same paperwork to be used over and over, with only dates and quantities altered from use to use."

Clearly, there is no silver bullet that will eliminate the problem of counterfeiting, theft, or diversion. In Torys' view, however, two actions can make a particularly large contribution. The first

is to send a clear message to employees, sales forces, distributors and authorized retailers that this is a far more serious problem than they might realize, and your company is proactively committed to rooting out bogus product and prosecuting offenders—ideally with dedicated professionals trained in supply chain management and criminal investigation.

The second action is to maximize supply chain control and awareness. Explains John Maltbie, "Counterfeiters and gray marketers often know a manufacturer's supply chain weaknesses better than the manufacturer does. Knowledge is power, regardless of which side you're on. Closing supply chain gaps and tightening oversight may not solve every problem, but it may help to avoid unpleasant surprises and attacks on the integrity of the supply chain when trying to prosecute counterfeiters in the courts."

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