

Real News Update: White House Issues Memo Aimed at Online Fakes

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Counterfeiting is a large problem for consumer product companies. However, U.S. counterfeiting laws are difficult to enforce against many companies because they operate outside the United States, or the manufacturer of the products is unknown. Historically, many U.S. companies have not had effective enforcement mechanisms against counterfeiters. This is of particular relevance in light of the heightened trade tensions between the U.S.

and China, where counterfeiting was specifically cited by the U.S. government as a major issue between the countries. The White House recently issued a memorandum aimed at combating the sale of counterfeit and pirated goods on online marketplaces like eBay, Amazon, and China's e-commerce giant, Alibaba.

The memorandum states, "An estimate from the Organisation for Economic Co-operation and Development (OECD) indicates the value of trade in counterfeit and pirated goods to be approximately half a trillion dollars per annum, with roughly 20 percent of this trade infringing upon intellectual property belonging to United States persons." The memorandum also cites a 2018 Government Accountability Office report, which found that 40% of goods purchased by investigators from third-party vendors on various e-commerce platforms were counterfeit. The Department of Homeland Security must submit a report that analyzes the extent to which online marketplaces and other third-party intermediaries are used in the importation and sale of counterfeit and pirated goods within 210 days of the date of the memorandum. The report will also devise a plan to enhance efforts to combat trafficking in counterfeit and pirated goods, including identifying potential regulatory or legislative changes.

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There has been a rise in brand owners looking to enforce their intellectual property rights, especially against Chinese-affiliated entities. Companies involved in the supply chain within the jurisdiction of the United States are not immune from scrutiny, especially when the manufacturer or the seller cannot be located, is not subject to jurisdiction in the United States, or is otherwise deemed to be not worth pursuing. These supply chain companies include those in the United States that are involved in the products reaching U.S. consumers, such as e-commerce platforms and delivery companies.

On top of increasing pressures from brand owners, the White House memorandum demonstrates the government's commitment to combating the trafficking of counterfeit goods. Companies involved in the supply chain must be sure to have consistent and legitimate practices that avoid liability for intellectual property rights violations, including contributory trademark infringement. Many of the largest e-commerce companies have taken affirmative steps to combat counterfeiting. For example, eBay's Verified Rights Owner (VeRO) program allows IP owners to report possible counterfeit or other infringing goods, and then eBay promptly reviews the listing. Earlier this year, in addition to its already-existing Brand Registry, Amazon announced Project Zero, aimed to eliminate all counterfeit products by enabling Amazon's machine learning expertise and automated protections to detect and remove counterfeit listings. Similarly, Alibaba has a task force that utilizes big data to detect potentially infringing activity and supports local law enforcement agencies to stop online counterfeit sales. It is industry-standard for any e-commerce or logistics company to disclaim liability for counterfeiting, but as e-commerce companies become increasingly more aware of the identities, business practices, and sales histories of third parties who use their services—including counterfeiters or those who buy from counterfeiters—they must be ever more vigilant to avoid contributory liability.