Can Amazon and its marketplace rivals fix their counterfeits problem?

Counterfeiting could soon be a $1 trillion criminal enterprise. As fakes proliferate online, the government is taking notice and brands are taking their arguments public — and to court.
Since Amazon first created the Marketplace to take on eBay, the e-tailer has brought into its fold and onto its website millions of third-party sellers.

By 2016, third-party goods accounted for half of all merchandise sold through the site. Credit Suisse has put Marketplace's sales at $135 billion, and that could expand $259 billion by 2020, according to figures cited in Entrepreneur magazine.

That's a lot of stuff. It's a massive river of stuff, as the company's name aspires to. And into that massive river of goods, by many accounts, pours a steady stream of counterfeits and knockoffs.

As attorneys for Daimler AG, owner of the Mercedes-Benz brand, said in an October suit against Amazon, "Amazon sells and/or facilitates the sale of an exorbitant number of counterfeit and infringing goods" because of the "lack of effective regulation."

Amazon has a strict anti-counterfeit policy and has recently taken new steps to address the issue. And its third-party platform certainly isn't the only one that has been infested with fakes. Investigators have long decried the problem on eBay, too, and Alibaba is famous for the problem — Jack Ma even acknowledged counterfeits were the "cancer" of the Chinese e-commerce site.

But Amazon has, by far, the largest marketplace domestically, with the biggest impact on commerce. As such, it has drawn fire from some of the world's most known brands, and plenty of small ones too, over what they say is a proliferation of counterfeits onto the site. Brands and investigators have long said Amazon and its fellow e-commerce marketplace operators do little to prevent counterfeit sales, leaving the brands to try protect themselves in an often sketchy online world.
Counterfeits are a booming business. Trade in pirated and counterfeited intellectual property accounted for $461 billion in 2013, or about 2.5% of all trade, according to the International Trademark Association. By 2020, the figure could reach nearly $1 trillion, the association said. (For comparison, the entire global apparel industry is currently worth about $3 trillion in sales, according to FashionUnited Group.)

Congress recently asked the Government Accountability Office to look into the flow of counterfeits into the country. The GAO found that "growth in e-commerce has contributed to a shift in the sale of counterfeit goods in the United States, with consumers increasingly purchasing goods online and counterfeiters producing a wider variety of goods that may be sold on websites alongside authentic products."

The agency conducted its own investigation, ordering branded shoes, travel mugs (namely the popular Yeti brand), cosmetics and phone chargers. Staff made nearly 50 purchases from among the online world's largest marketplaces for third-party sellers: Amazon, Walmart, eBay, Sears Marketplace and Newegg. The agency then verified the authenticity of those products with the manufacturers.

The sample size was modest, but the findings were striking: Nearly 43% of the products they bought were counterfeit, GAO said in a January report.

Policymakers took note. In March, Frank Pallone Jr., a House Democrat from New Jersey, who is a ranking member on the Energy and Commerce Committee, wrote to the companies running the sites GAO bought from requesting a briefing.

"I would like to better understand what measures your company is taking to prevent the sale of counterfeit products on your platform," Pallone wrote in his letter, which asked the companies how they investigated and vetted counterfeit goods on their platforms. The Senate also took up the issue, bringing witnesses to a March hearing of the Finance Committee to discuss the GAO report.
"[Counterfeiters] exploit third-party marketplaces to gain an appearance of legitimacy and access to consumers."

Government Accountability Office

Besides sheer size, the problem is difficult to control. Customs and Border Protection in 2016 seized nearly 32,000 shipments of goods — worth an estimated $1.4 billion — that infringed on intellectual property in one way or another, according to GAO. (In a single day in 2015, the CPB seized 1,378 hoverboards with fake batteries.) But the agency notes that capture amounts are not necessarily a full measure of the problem. A rise in seizures could just reflect the increased flow of fake goods entering the country.

Making it more difficult to stem the flow, counterfeits and their packaging are getting so sophisticated that it's even difficult for manufacturers — much less consumers — to identify them as fake, GAO said.

'Havens for counterfeits'

Importantly, the agency, citing a 2016 FBI report, also noted that counterfeiters "exploit third-party marketplaces to gain an appearance of legitimacy and access to consumers."

Of the goods it tested, the agency didn't say how many fakes came from which sites. The Counterfeit Report, a consumer watchdog that also works for brands to investigate fakes, notes it has removed 34,000 counterfeits from Amazon on behalf of the rights holders. Amazon's site accounts for 13% of the counterfeits according to the Report, while eBay accounts for a whopping 61%. An eBay spokesperson said in a statement that consumers can shop its marketplace with confidence, "knowing we have key partnerships and processes in place with rights owners, law enforcement and government officials to ensure a safe shopping experience."
"These sites are havens for counterfeiters," Craig Cosby, publisher of the Counterfeit Report, said in an interview with Retail Dive. He cited a "loophole in the law" that allows e-commerce venues to avoid liability for counterfeit goods sold through their sites. Given that Amazon is a direct retailer, a logistics provider and a third-party marketplace operator, Cosby said "it can be very confusing for a customer" trying to make sense of who is selling what on Amazon.

For its part, Amazon on its website says that the "sale of counterfeit products is strictly prohibited" by policy. The company threatens violators with possible loss of selling privileges as well as withholding of funds and the destruction of goods in Amazon's possession.

In March, Peter Faricy, vice president of Amazon Marketplace, told Reuters that the company has been testing a brand registry to help find and take down counterfeits, as well as offering brands a program called "Transparency," which can code package labels to allow consumers to check their purchase against official brand information.

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Amazon spokesperson

A spokesperson for Amazon said in a statement emailed to Retail Dive that more than 40,000 brands are enrolled in an existing brand registry, a free service that the company says has helped it investigate 93% of infringement notices through the registry within four hours.

"In order to detect bad actors and potentially counterfeit products, we make significant investments in machine learning and automated systems," the spokesperson said. The e-tailer's systems "automatically and continuously scan numerous data points" searching for potential counterfeits, and "99.9% of all Amazon page views by our customers landed on pages that did not receive a notice of potential infringement," the spokesperson added.
The company has also worked with brands, including recently, **Vera Bradley, to sue counterfeiters.**

Alan Behr, a partner with Phillips Nizer who also contributes to the Fashion Industry Law Blog, said that marketplaces, including Amazon's, are not at fault under the law as long as they take counterfeiters down when notified of their existence.

That principle has been reaffirmed in court several times, including in 2008, when a federal district court ruled that eBay, in a suit brought Tiffany & Company, didn't have legal responsibility to prevent users from selling counterfeit goods in its marketplace. More recently, last year an appeals court **cleared Amazon of responsibility** in a case brought by pillowcase maker Milo & Gabby. The brand had argued that Amazon made an "offer to sell" counterfeit goods even though it hadn't created the product listings, according to Geekwire.

However, as Amazon takes a more active role in the sale and distribution of products sold through the site, brands are taking different legal tacks in arguing the e-commerce giant's liability, and others are making their grievances public.

**A 'middle finger' to brands**

Birkenstock, among other brands, has tangled with Amazon publicly over counterfeits. Last year it **stopped deliveries to Amazon** in the U.S. and Europe, citing a "series of violations of the law on the Marketplace platform operated by Amazon which the platform operator has failed to prevent of its own accord." The footwear brand has also moved to block its retail partners from selling on Amazon.

Birkenstock CEO David Kahan has been blunt in speaking about the issue. He described the prevalence of counterfeits as "**modern-day piracy** on the high seas" to the Washington Post in an interview last summer. "This is a middle finger to all brands, not just Birkenstock."

Others are bringing their grievances to court. In its suit against Amazon, Daimler said Amazon Marketplace sales of unauthorized products had decreased sales of its own items and hurt its reputation "for quality and excellence."
Prompting the public fight, in October 2016 the company bought sets of Mercedes-Benz center caps from Amazon's site that were shipped via Amazon Fulfillment Services. Daimler confirmed in inspections that neither it, nor its licensees had made the products. They were knockoffs.

"CHEAP PLASTIC!!! STAY AWAY!!!"

Customer review of knockoff Mercedes-Benz product on Amazon

Online reviewers noticed the poor-quality products, too. In its suit, Daimler cited reviews calling the fake caps "CHEAP PLASTIC!!! STAY AWAY!!!" and another said they were "Garbage!!"

Daimler contends third-party sellers weren't solely responsible for the fakes, in this case. "Amazon is itself selling infringing products" through its "Sells from and Sold by Amazon.com," the brand said in its suit.

More broadly, the brand contends that "Amazon currently does not have in place a system for preventing infringement, and only has minimal processes in place for detecting infringement, which put the onus on the rights-holder, rather than Amazon, to detect infringement."

'It broke in a week'

Big brands aren't the only ones smarting from counterfeits. Plenty of businesses have spoken to the media about seeing their revenue, or even entire business, decimated after finding counterfeits of their brands on Amazon. Others have filed suit.

Electronics are among the more than 20 "open" categories on Amazon Marketplace, meaning that third-party sellers don't need permission from the e-tailer or manufacturer to sell their wares on the site. Since 2013, Fuse Chicken, a maker of high-end mobile charging products based near Cincinnati, has been among those sellers.
A little more than a year ago, employees with the company started noticing several counterfeit versions of its products being sold on Amazon. Not long after they discovered Fuse Chicken knockoffs on Amazon's Marketplace, employees came across a one-star review on the site of a Fuse Chicken car dock for iPhones.

The customer told the world the product "broke in a week" and was of "really bad quality," according to a lawsuit Fuse Chicken filed against Amazon last year.

Multiple complaints to Amazon about the counterfeits went unanswered, according to the suit, and the company had not removed the negative review by July. Fuse Chicken continued reporting various instances of knock-offs and counterfeits to Amazon and asked that the company refuse all product identification numbers tied to Fuse Chicken products that weren't sold by Fuse Chicken itself.

Again, they got no help from Amazon, and even learned that Amazon had purchased Fuse Chicken products directly from a third party "because the price was much lower." After months of lodging complaints, Fuse Chicken sent a 10-page cease and desist letter through a lawyer to Amazon's general counsel citing the issues with fakes and asking for help from the company. When they didn't hear back, the company sued.

"In my opinion, it is a smoke screen to make people think they're doing something about it."

Jon Fawcett
CEO, Fuse Chicken

Fuse Chicken CEO Jon Fawcett told Retail Dive in an interview that the company has been part of Amazon's brand registry for years, including during the period that it's been trying to get counterfeit and infringing products removed from the company's website and warehouses. Since registering their brand with Amazon, even sellers using the "Fuse Chicken" name — blatant trademark infringement, in other words — have sold products, Fawcett said.
"In my opinion, it is a smoke screen to make people think they're doing something about it," he said of the registry.

Fawcett's company has a trial date set for summer 2019 in its lawsuit with the company as it also tries to reach a settlement. Currently the brand doesn't allow resellers to sell through Amazon, but even that requires policing of some "bad actors" who don't comply with Fuse Chicken's policies.

Searches for two sample Fuse Chicken products on Amazon in early April each turned up sellers that Fawcett, when asked, said he had never heard of and didn't approve.

Even checking such vendors for counterfeits can be difficult because all sellers' products are mixed together in Amazon's fulfillment centers, Fawcett said.

Both of the unknown sellers offered Prime shipping and delivered through "Fulfillment by Amazon."

'You're not going to stop it'

With the onus on manufacturers, not marketplaces, to prevent counterfeit sales, the problem has little chance of resolution, the Counterfeit Report's Cosby said. "You're not going to stop it," he said. "It's enormously expensive for manufacturers to police these websites every day." He expects little to change until e-commerce companies bear some liability for counterfeit sales.

Another counterfeit investigator, Rob Holmes, CEO and founder of IP Cybercrime, ties the problem to online marketplaces, as well. "The bigger these tech companies get, the bigger Amazon and Alibaba get, the bigger the problem is going to get," he said. "All you have to do is create a website, and the guys in China will do the rest."

He added that the "logistics of it has increased exponentially," with Amazon playing a role now, too, as it moves more products through its own logistics operation and works more with Chinese manufacturers.
The latter is a development of recent years. As author and journalist Wade Shepard, writing for Forbes last year — in an article cited by Daimler in its complaint — noted, "When Amazon began pushing for more Chinese merchants to start selling on their U.S. and European marketplaces in 2015, they greased the pathways for manufacturers in the 'world's factory' to sell directly to end consumers in the West, but they also cleared the way for the counterfeiters and scammers that have long plagued Chinese e-commerce sites to not only rip off the intellectual property of Western brands but to compete directly against them in the same marketplace, often on the same pages."

But Phillips Nizer's Behr said Amazon and eBay are "really not that bad" as corporate partners for brands, and often take counterfeit posts from third-party sellers down quickly. Some sites, mainly operated overseas, "are not nearly as accommodating," he added.

For now, a responsive partner in taking down counterfeits once they're up might be the best brands can hope for. Meaning brands and manufacturers will likely have to keep shouldering the work load.

"If you are a brand owner, you have to be vigilant," Behr said. "Register copyrights, do your homework, have an investigator doing purchases, troll the web."