



# INTERNATIONAL JOURNAL FOR LEGAL RESEARCH AND ANALYSIS

Open Access, Refereed Journal Multi Disciplinary  
Peer Reviewed Edition :

[www.ijlra.com](http://www.ijlra.com)

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INTERNATIONAL JOURNAL FOR LEGAL RESEARCH & ANALYSIS

ISSN

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# **THE RISE OF COUNTERFEIT GOODS AND THE CHALLENGES OF BRAND PROTECTION**

AUTHORED BY - DEVISHI SHARMA

## **ABSTRACT**

In the age when a new substitute product is launched in the market just after a new product is made, it is very essential for the inventors and makers of the product to pay due attention to the procedure to legally safeguard and protect the innovations. On the one hand, we see the benefits of digitalization; on the other hand, we see the repercussions of it. Today, counterfeit goods have flooded the marketplace and are appealing to the young generation and the lower strata of society. A reputed product is often taken as an opportunity by small manufacturers, who use the goodwill of the product to sell duplicates to consumers. This indeed violates the rights of consumers as well as damages the reputation and trust that the company has created.

## **INTRODUCTION**

With the rise in luxury brands and the societal connotation of associating a person's first impression with the products he have is creating a vicious circle for the need of every person to own a luxury product. Although luxury associations are now forming partnerships to address the concerns, the luxury industry has historically not taken a united approach to tackling counterfeiting. Historically, this reticence may stem from an inherent secrecy about design and production methods that pre-dates the emergence of the industry as a global economic force.<sup>1</sup> Counterfeiting is a crime involving the theft of someone's trademark. Businesses use trademark to help its prospective and existing consumers to identify and differentiate their products.

As per the International Trademark Association, "Counterfeiting is the illegal production and sale of goods (including packaging) bearing without authorization a trademark that is identical to a

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<sup>1</sup> (No date) Responding to the hidden threat: How luxury brands are fighting back ... Available at: [https://www.cov.com/~media/files/corporate/publications/2014/02/responding\\_to\\_the\\_hidden\\_threat\\_how\\_luxury\\_brands\\_are\\_fighting\\_back\\_against\\_counterfeiting.pdf](https://www.cov.com/~media/files/corporate/publications/2014/02/responding_to_the_hidden_threat_how_luxury_brands_are_fighting_back_against_counterfeiting.pdf) (Accessed: 13 January 2024).

validly registered trademark or that cannot be distinguished from such a trademark.<sup>2</sup>

Counterfeiting, in the Black's Law Dictionary, is defined as an act of producing or selling an item that looks like a reproduction of a trademark in order to deceive a consumer into thinking that they are buying the original trademark goods.<sup>3</sup>

One of the main goals of the luxury sector has been globalization, which has ushered in the emergence of global luxury companies with a global reputation. A sophisticated, networked generation of counterfeiters has emerged thanks in part to the Internet. These individuals adapt rapidly and distribute items in ways that are more difficult to identify and stop than those sold through more conventional channels.

Furthermore, a report found that counterfeit products found in Pharmaceuticals are up to 20 per cent, in Consumer Durables up to 17 per cent, and 16 per cent in Agrochemicals. Even after discovering that the product is fake, consumers take close to negligible action about reporting it.<sup>4</sup> Another report states that Counterfeiting is most prevalent in apparel (31%), FMCG (28%), and automotives (25%) are the top segments where consumers came across a counterfeit product, followed by Pharmaceuticals (20%), consumer durables (17%), and agrochemicals (16%)<sup>5</sup>. Counterfeiting is not just a financial loss. The substandard components and parts used in fake products also constitute a health and safety risk. Fake medicines, in particular, are potentially devastating to public health and put lives in danger.<sup>6</sup>

## LEGAL PERSPECTIVE

It is unethical and unlawful to practice counterfeiting. Owners of trademarks are entitled to take legal action against any instances of trademark or copyright infringement.

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<sup>2</sup> *Counterfeiting - International Trademark Association*. (2021, July 30). International Trademark Association. <https://www.inta.org/topics/counterfeiting/>

<sup>3</sup> *Black's Law Dictionary - Free Online Legal Dictionary*. (2022, August 3). The Law Dictionary. <https://thelawdictionary.org>

<sup>4</sup> Counterfeit Products 25 30 Of The Market In India Report. (n.d.). BW Defence. <https://bwhealthcareworld.businessworld.in/article/Counterfeit-Products-25-30-Of-The-Market-In-India-Report/24-01-2023-463110/>

<sup>5</sup> Anand, S. (2023, January 25). Almost 25-30% products sold in India spurious with counterfeiting: Report | Mint. Mint. <https://www.livemint.com/industry/retail/almost-25-30-products-sold-in-india-spurious-with-counterfeiting-report-11674655725574.html>

<sup>6</sup> India: counterfeiting remains a serious concern in both physical and online markets. (n.d.). World Trademark Review. <https://www.worldtrademarkreview.com/global-guide/anti-counterfeiting-and-online-brand-enforcement/2022/article/india>

**The Indian Penal Code,1860** defines 'counterfeit' who causes one thing to resemble another thing, intending by means of that resemblance to practise deception, or knowing it to be likely that deception will thereby be practiced. In other words counterfeiting into account, anti-counterfeiting may be step to prevent the counterfeiting of any goods/things.

Section 28 of the Indian Penal code,1860 mentions about counterfeiting, a person is said to counterfeit when he/she causes one thing to resemble another thing which will be causing deception and is most likely to deceive the user of the product. In addition to this, section 486 of the code describes the punishment when selling counterfeit products with imprisonment for one year, with fine or both. The section mentions proviso for the same in case the act is unintentional, that is there was no mens rea also, reasonable precautions were taken by the person to prevent any such issue.

Although the term 'counterfeit' is not defined in the Trademarks Act, the Act attempts to safeguard potential customers and provides remedies for trademark infringement. Trademarks are valid for ten years. Section 19<sup>7</sup> makes provision for the safety of registered marks in the case violated by anyone and insulates the rights of unregistered owners and includes the licensee also. Under section 102<sup>8</sup>, a person shall be deemed to have counterfeited a trade mark if he creates the mark or a similar misleading mark, or alters a valid mark by alteration, addition, etc., without the consent of the trade. The section mentions that the burden of evidencing the owner's assent in the condition of wrongfully or falsely applying for trademark untruthful is on the accused. The punishment for falsely or erroneously applying a trade mark on any goods and products, as expressed in Section 103, is detainment for a term that will not be under a half year yet may stretch out to 3 years and a fine that may not be not as much as INR 50,000 yet not surpass INR 2 lakhs. Furthermore, section 105 throws light on the fact that on subsequent illegal acts mentioned in the above sections, the imprisonment shall not be less than 1 year and can extend to 3 years, also the fine can exceed to INR 2 lakhs. Section 134 of the act mentions about the jurisdiction to file the suit.<sup>9</sup> Furthermore, the Supreme Court clarified about the question of jurisdiction with respect to technological conflicts, in case websites are copied particularly the URL when name of two

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<sup>7</sup> *Intellectual Property Attorneys Association v. Controller General of Patents, Designs, Trade Marks & Anr.*

<sup>8</sup> 102falsifying and falsely applying trade marks (no date) LAWGIST. Available at: <https://lawgist.in/trade-marks-act/102> (Accessed: 16 January 2024).

<sup>9</sup> *Indian Performing Rights Society Ltd v. Sanjay Dalia and Anr.*, Civil Appeal Nos. 10643-44/2010 (arising out of Civil Suit FAO (OS) No. 359/2007) and Civil Appeal arising out of SLP [C] No. 8253/2013

websites coincide or sound the same case can be instituted.<sup>10</sup>

Section 135 of the Trademark Act includes civil reliefs, which allow the court to grant an injunction, damages, and an account of profits in any complaint for trademark infringement or passing off, along with or without an order for delivery-up of the infringing labels and marks for destruction or erasing it.

It is pertinent to mention over here that trademark counterfeiting and trademark infringement though sound same for a layman by there is a thin line of difference between the two. Counterfeiting is a trademark deceptive infringement that is taking a Trademark that is registered with the trademark and patent work area and someone creates a false copy of that mark. Trademark infringement is a wide term and includes wide-ranging and more extensive idea up against counterfeiting.

The Copyright Act,1957 provides legal protection and the enforcement of copyrights in India. Section 13 throws light on what copyright includes, it shall include original literary, dramatic, musical and artistic work, cinematograph films, and sound recordings. The validity of a copyright is 60 years. In case of any infringement both civil and criminal remedy is available. The copyright offence is a strict liability offence. Section 63 of the act provides for punishment for the infringement, i.e, imprisonment which shall not be less than 6 months but can extend up to 3 years and can also include fine not less than INR 50,000 and can exceed upto INR 2 Lakhs.<sup>11</sup>

The Geographical Indications of Goods (Registration and Protection) Act,1999 aims to protect the geographical indications relating to goods. Geographical Indications are used on products that have a specific geographical origin and possess rare qualities. It cannot be registered by an individual but by any association of persons or producers, or any authority. Section 22 of the Geographical Indications of Goods Act provides provision for infringement of a registered geographical indication when the purpose of usage is to mislead people. Moreover, when there is an infringement, there shall be consequences as per section 38 of the act.

The Intellectual Property Rights (Imported Goods) Enforcement Rules,2007 aims to strengthen

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<sup>10</sup> Banyan Tree Holding (P) Limited vs A. Murali Krishna Reddy & Anr. on 23 November, 2009. (n.d.). <https://indiankanoon.org/doc/151685239/>

<sup>11</sup> Rastogi, A. (2013) Warner Bros. Entertainment Inc. and Ors. V. Santosh V. G., Indian Case Law. Available at: <https://indiancaselaw.in/warner-bros-entertainment-inc-and-ors-v-santosh-v-g/> (Accessed: 16 January 2024).

protection of intellectual property rights at the borders.

Also, The Drugs and Cosmetics Act, 1940 aims to regulate the import, manufacture, and sale of drugs and cosmetics. The act provides for cases when imitation of a product is done or there is illegal sale of the same. The Act defines a spurious drug as one that is created under a name that belongs to another drug or is an imitation or substitute for another drug, misrepresenting the product's provenance. Offering to sell contaminated pharmaceuticals is punishable by imprisonment for seven to ten years, but can be extended to life in certain cases, as well as a fine of at least one million rupees or three times the value of the narcotics confiscated. In *Drugs Inspector & Anr v M/s Fizikem Laboratories Pvt Ltd & Anr*, the Supreme Court ruled that Viagra is an allopathic medicine and cannot be considered Ayurvedic. Selling this medicine as one of the ingredients in the Ozomen pill and failing to show the name in the appropriate manner was a violation of the Drugs and Cosmetics Act, 1940. It was also determined that an inspector nominated by the national or state government via notification in the Official Gazette may inspect any premises where any drug or cosmetic is manufactured.<sup>12</sup>

## **BRAND PROTECTION**

In the business world, a brand is something other than a name or a logo; It is a representation of the identity, values, and reputation of a business. It is shielding a brand from abuse, encroachment, or pantomime is of central significance. Brand is a unique name or symbol by which prospective customers of a product are able to identify the product. A legally protected brand is one that has secured its intellectual property rights through legal means, ensuring that its distinctive aspects, such as its name, logo, slogan, and other distinguishing features, are protected against unauthorised use or infringement. This is achieved through trademark registration, copyright, patents, trade secrets, contractual agreements, etc. In order to combat infringement, companies must be vigilant to combat infringement.

Brand protection is the safeguarding of a company's intellectual property(IP) against bad actors seeking to illicitly profit from its IP, including its trademarks, domain names, design marks, trademarks and patents, regardless of where they are located online <sup>13</sup>

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<sup>12</sup> M/S. Fizikem Laboratories Pvt. Ltd. & Anr. v. The Drugs Inspector, Karimnagar & Anr., Andhra Pradesh High Court, Judgment, Law, casemine.com. (n.d.)

<sup>13</sup> What is Brand Protection? (2022, September 12). LexisNexis Intellectual Property Solutions. <https://www.lexisnexisip.com/solutions/brand-protection/what-is-brand-protection/>

In the digital age, counterfeiting for brands has emerged as one of the most serious brand violations. Brand imitation ranges from fraudulent product listings on e-commerce sites to copycat profiles on social media platforms. While some argue that imitation is the purest form of flattery, legitimate brands see it as a direct threat to their company reputation. Trademark infringement and copyright infringement are two of the most prevalent legal difficulties that firms encounter, particularly design-focused companies.

These infringements are frequently committed by high-profile infringers who operate in the shadows of the black market, supplying illicit market knowledge and counterfeit products.

Such abusive registration techniques have the potential to deceive consumers, leading them to hazardous websites rather than real products. Furthermore, the advent of social media platforms has made it simpler for counterfeiters to market and sell their phoney items, blurring the distinction between genuine and counterfeit goods for the typical consumer.

This not only impacts the sales of authentic businesses but also tarnishes their reputation, especially when people end up with inferior products, thinking they've acquired the real thing. While all businesses are vulnerable, those with a strong internet presence or items that are simple to reproduce are frequently hit the hardest. However, it is not all doom and gloom.

In today's increasingly competitive business market, trademark protection is critical to a company's long-term success. Trademark registration is an important technique for protecting brand identification, granting exclusive rights, nationwide and global protection, deterrent effects, strengthened legal remedies, and opening up licencing options. Businesses who register their trademarks exhibit a dedication to the integrity of their brand while also gaining crucial legal protections that assist sustain consumer trust, brand awareness, and long-term profitability. Investing in trademark registration is a proactive strategy that strengthens a company's position and secures its long-term success in the market.

Infringement of trademarks usually happens with luxury goods. The key concept to this fact is "credence goods". These are goods whose quality is difficult to assess before or after purchase and use. Many luxury products fall in this category. Technically unsophisticated consumers cannot be certain of their quality even after purchase. Their value is dependent on the credence

given to them by others.<sup>14</sup> There exists the problem of high quality counterfeits, where one is unable to identify whether it is original or not.

## CHALLENGES FACED IN BRAND PROTECTION

The challenge of protection brand in India is the main issue which the people and companies face. The concept lacks understanding even to the educated strata of the society. This lack of understanding helps the infringers to commit the crime by taking advantage of minute details which can be a loophole in the law. That in fact changing a letter or two doesn't lead to infringement by it surely becomes an opportunity for the one who is doing the deceptive act by knowingly but also showing that they are innocent, they use the goodwill, marketing efforts of the original company.<sup>15</sup> That there exists a void on the part of law as well which fails to clearly demarcate the line of boundary beyond which the act is considered a crime. Advancements in technology, notably the emergence of deepfake technology, pose a new challenge to trademark protection. Deepfakes can be used to generate realistic but wholly created content, which can harm a brand's reputation. Brands must remain ahead of technology changes by investing in tools and tactics for detecting and combating the spread of deepfake material. The digital era has brought about unprecedented opportunities for businesses to connect with consumers, but it has also given rise to new threats in the form of online infringement and cybercrime. Phishing, domain squatting, and social media impersonation are just a few examples of tactics employed by cybercriminals to exploit brand identities. Developing effective strategies to combat these threats requires constant vigilance and collaboration with cybersecurity experts. Furthermore, the concept of first copy, second copy is putting the reputed companies at stake, today the copies are so identical that a common man cannot identify the original product.

## CONCLUSION

To summarise, the proliferation of counterfeit goods poses a significant problem to brand protection in today's globalised and digitally driven marketplace. As we negotiate this complex landscape, it becomes evident that combating counterfeiting demands a multifaceted and proactive approach.

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<sup>14</sup> Hilton, B., Choi, C. J., & Chen, S. (2004, December 1). The Ethics of Counterfeiting in the Fashion Industry: Quality, Credence and Profit Issues. *Journal of Business Ethics*. <https://doi.org/10.1007/s10551-004-0989-8>

<sup>15</sup> Banyan Tree Holding (P) Limited vs A. Murali Krishna Reddy & Anr. on 23 November, 2009. (n.d.). <https://indiankanoon.org/doc/151685239/>

The increasing sophistication of counterfeiters, along with the ease of reaching a large consumer base via internet channels, necessitates a complete plan for organisations. Companies must invest in modern monitoring and detection systems, coordinate with law enforcement and regulatory entities, and conduct public awareness campaigns to educate customers about the risks of counterfeit products.

Furthermore, promoting collaboration within and between businesses is critical. Businesses can fight counterfeiters more effectively if they share intelligence, best practices, and resources. Furthermore, governments and international organisations play a critical role in developing and implementing legislation to promote intellectual property protection.

Brand protection initiatives must evolve in tandem with technological advancements. Embracing innovation, such as blockchain for supply chain transparency and artificial intelligence for counterfeit detection, can help keep one step ahead of counterfeiters. In the face of these problems, brands must not only secure their products, but also create a strong and trustworthy brand image. Consumers are increasingly valuing authenticity, and firms that demonstrate a commitment to brand protection develop long-term trust with their customers.

In the ongoing battle against counterfeit goods, perseverance, collaboration, and technological innovation are the keys to success. Brands that prioritize these elements will not only protect their intellectual property but also contribute to the creation of a marketplace where authenticity and integrity prevail.