

The global trade in counterfeit goods may be worth as much as \$200 billion a year.

False promises

Despite a considerable increase in the amount of counterfeit goods being seized along Europe's borders, the EU is still hesitant to impose blanket anti-counterfeiting legislation. **Nigel Ash** reports on the need for consistent measures within European courts, more pressure on foreign governments and why the global economic slowdown poses an entirely new headache for victims and law enforcement agencies alike.

While the passing off of goods has been a long established issue, particularly in developing markets where packaging design will closely resemble that on the imitated product, counterfeiting in packaging that is effectively indistinguishable from the real thing is a more recent issue. The Organisation for Economic Co-operation and Development has suggested that the global trade in counterfeit goods may be worth as much as \$200 billion a year. With that sort of money in play, criminals are well able to purchase their own machinery and invest considerable sums in the duplication of product designs and even contents. Alternatively, counterfeiters have the cash to entice managements at legitimate packaging manufacturers to do extra production runs, this time inserting fake product.

In 2005, some 75 million individual counterfeit goods were seized by EU Customs. Two years later those seizures had come close to doubling: 128 million items, 80% of which had originally been produced in China, were intercepted within EU territory.

Despite this assault on European markets by counterfeiters, many of whom are ripping off European brands, Brussels has been reluctant to pass anti-counterfeiting legislation. The approach instead has been talk to the Chinese and Russian governments in an effort to get them to act against their own pirates. The then EU Trade Minister Peter Mandelson said last year that he detected a 'sea change' in Beijing's approach to its brand pirates and asserted that the Chinese were recalculating the impact counterfeiting was having upon its EU trade.

This has been met with deep scepticism by many brand managers. One UK analyst comments: 'When China was booming, the best that was happening was the odd action against counterfeiters. They did a bit of a clean up for



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presentation's sake before the Olympics, but it was half-hearted. For whatever reason, local officials have always seemed reluctant to really grapple with the issue and it is only getting worse. Now that China is in downturn, the counterfeiters will have extra capacity to

call upon and businesses that have previously played within the rules will be under real pressure to keep their lines going. My guess would be that in the current climate, the authorities are likely to be even less inclined to act. So there is real brand protection pressure ahead.'



WTO RULES AGAINST CHINA

This January the World Trade Organisation upheld a 2007 claim by the United States, backed by the EU and Japan, accusing the Chinese of deficiencies in their intellectual property rights laws. China was found in breach of its obligations as a WTO member. The US was also successful in its complaint that the Chinese authorities had auctioned seized counterfeit goods locally after simply removing the fake trademarks.

Acting US Trade representative Peter Allgeier said after the ruling: 'These findings are an important victory, because they confirm the importance of Intellectual Property Rights protection and enforcement, and clarify key enforcement provisions.'

The US now intends to engage vigorously with the Chinese to ensure that US rights holders 'obtain the benefits of the decision'.

The bad news, however, was the WTO's conclusion that it needed more evidence before making a decision on the US's claim that the Chinese authorities set such high thresholds in criminal law that commercial scale counterfeiting was allowed to go unpunished. Immediately after the US case was filed, the Chinese dropped their volume limit from 1,000 to 500 units and value yardstick from \$15,000 to \$7,000.

TEMPTED CONSUMERS

It is also likely that consumers will play into the counterfeiters' hands. As belts tighten people may be prepared to pay for fakes, such as the archetypical 'Gucci' handbag, in the knowledge that they are not buying the real thing. In such circumstances the issue of consumer education seems nugatory. If somebody wants to flash a fake Rolex on their wrist, it will be for appearance's sake and the fact that the watch cost a fraction of the price of the real thing is likely only to add to their satisfaction with the purchase.

However with fast-moving consumer goods (FMCG) and pharmaceuticals the issue of consumer safety comes to the fore. Fake cosmetics may contain banned and dangerous substances. Fake drugs on which a patient is relying to ease life-threatening symptoms may contain no active ingredients. Given the full range of packaging and converters available to the criminals, some security features, such as tamper-proof designs, are rendered nugatory. The tamper-proof packaging may be counterfeit packaging around a counterfeit product.

Consumers therefore need to be made more aware of the extent of the danger facing them. The use of the internet is a no-brainer for the fakers. Online discussions are full of bargain purchases of genuine items on auctions such as eBay. This only encourages other users to go look for their own unbelievable deal. The problem is too many of such trades are unbelievable but all too often the low price lure will still clinch the purchase. The auction sites, which will at best only seek to guarantee payment and delivery and offer a profile of the trading record of vendors and purchasers, all seek to deny any responsibility for the provenance of the goods that pass through them.

A VARIETY OF VIEWS

European courts have a mixed record in dealing with disputes. Luxury goods manufacturers LVMH and Hermès both won actions in the French courts, claiming that the online auctioneer ought to have done more to prevent the marketing of fake goods. Meanwhile in the Belgian courts, eBay triumphed in similar action brought by L'Oreal. This March L'Oreal was trying again with a similar action against eBay in the British



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courts. It is seeking to overturn eBay's contention that it is simply a trading platform and that the responsibility for L'Oreal's brand security rests entirely with itself.

Tight control of the supply chain is seen as one way of keeping the fakes out. This does not work for EU pharmaceutical companies, however. They see EU anti-monopoly rules being used by unscrupulous manufacturers and packagers to repackage legitimate drugs with completely new expiry dates. The racket arbitrages the different prices paid for the same drugs. Low-cost pharmaceutical supplies to Greece are diverted, removed from their original packaging – occasionally even from their blisters – and completely re-boxed in the German language with German internal documentation, ready for the German or central European markets. The integrity of the supply chain in being broken because legally there is nothing to stop this arbitrage, despite the considerable risk it poses to consumers and pharma brands.

The variety of views held by judges across Europe has led to pressure from some leading brands outside the FMC sectors for better control of supply chains through dictating the outlets where their goods may be sold. This is currently against EU competition rules, but even if Brussels were prepared to go against the EU's underpinning single market principles, the 'selective distribution' being sought by these brands would probably not work. EU Consumer Commissioner Meglena Kuneva points out that 150 million people, fully a third of Europe's consumers, now shop online and that the transactional use of the internet is seen by Brussels as a way of boosting internal EU trade.

The solution for brand security remains an issue that will not be easily packaged. **pci**