

Holiday Hacks: Quick Tips on Protecting Your Brand from Counterfeiting During the Holiday Shopping Season

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On December 2, 2020, the International Trademark Association (INTA) and the Global Innovation Policy Center (GIPC) co-sponsored the 5th Annual Congressional Trademark Caucus Briefing. During this virtual event, Philip Warrick, a Counsel Detailee with the U.S. Senate, moderated a panel of speakers comprised of Michael Moore, Assistant General Counsel at Mattel, Carolina Giuga, Director, Government & Public Affairs, Americas, The LEGO Group, and Robert Diznoff, Senior Manager of Public Policy at Amazon. Each panelist discussed the highlights and perils of this year's predominantly virtual holiday shopping season and how their companies are addressing the resultant uptick in counterfeit sales in the online marketplace.

This presentation was timely given the success of this year's "Cyber Monday," which fell on November 30. During this year's Cyber Monday, consumers spent a record-breaking \$10.8 billion on their online holiday purchases, a 15.1% increase over Cyber Monday spending in 2019.¹

Market experts speculate that this year's increase in online shopping for the holidays likely will be exacerbated by the pandemic, but project that the trend is here to stay. This year, consumers and companies alike have begun adjusting to the new normal of social-distancing mandates caused by the pandemic. Companies are making it easier to complete online purchases, and consumers are growing more familiar with the online marketplace. So, while this uptick in online shopping began out of necessity, it likely will continue.

Kasie Brill, GIPC's Executive Director of Brand Protection, noted that in 2020, 80% of all consumer goods were purchased online, which reduced consumers' opportunities to inspect products before purchase. Reduced opportunity to interact with the product coupled with the anonymity offered by the online marketplace creates the perfect circumstances for bad actors to sell imitation goods.

Under the Lanham Act, the term "counterfeit" means a "spurious mark which is identical with, or substantially indistinguishable from, a registered trademark." 15 U.S.C. § 1127. Most trademark counterfeiting cases involve a knockoff product that is made to imitate the genuine product, for purposes of deceiving consumers into buying what they believe is the real thing. Although online shopping increases convenience for consumers, it also increases opportunity for would-be counterfeiters to sell fake goods in the online marketplace.

Although counterfeiting in the online marketplace is a year-round problem for brand owners, these three quick tips may help minimize risk this holiday season:

- **Provide a tip line.** Consumers are more likely to come into contact with potential counterfeit goods than brand owners. Consider creating and prominently displaying a dedicated email address or phone number where consumers can easily alert you of suspected counterfeiting activity or knockoffs.
- **Prepare and educate consumers.** Depending on the product, it may be appropriate to include on your website information about how to distinguish a real product from a knockoff. Companies can also display a list of authorized retailers on their websites for consumers to review.
- **Partner with government agencies.** There has been an increase in executive and legislative support in preventing counterfeit products from entering the U.S. marketplace. Staying up to date on governmental anti-counterfeiting measures may help government agencies, such as Customs and Border Patrol, help you. Additionally, consumer protection agencies also have helpful resources that brand owners can share with consumers. For example, the U.S. Chamber of Commerce created a “Shop Smart Toolkit” as a resource for educating consumers.^[2]

Brand protection is a year-round and intensive undertaking, but with this year’s boom in online shopping, companies should be especially vigilant during this holiday season.

^[1] <https://www.forbes.com/sites/shelleykohan/2020/12/01/cyber-monday-sales-hit-108-billion-black-friday-weekend-by-the-numbers/?sh=671c07b46eb0>

^[2] <https://www.uschamber.com/shop-smart-toolkit>

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