Trends in IP counterfeiting — Confusion about confusion

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Counterfeiting is a major business. Counterfeit goods average 2 to 3% of total global imports and consistently top $450 billion in trade value.

It is also a developing — even maturing — business. Cheap and obvious knockoffs still exist, at scale. But the rise of more minimalist designs has blurred the lines, both on the scope of the protection, and whether consumers know they are buying a substitute and intend to do precisely that. On a parallel track, the quality of many fakes has become so good that even trained professionals often cannot readily distinguish them from genuine goods; distribution channels also often overlap, further blurring the lines between legitimate and counterfeit goods.

The scope of counterfeiting has also broadened from more "traditional" fashion and consumer goods to foods and even pharmaceuticals. Counterfeit goods have always presented safety risks, because they undergo no testing to screen out substandard materials and loose parts. But counterfeit drugs threaten more than brands and commercial interests; they can be outright dangerous (even deadly) and can be exceedingly difficult to detect visually.

These new trends in the "business" of counterfeiting present new legal challenges, which are pushing brands to break new ground in their countermeasures, and courts to do the same in addressing them.

'Dupe' litigation: When minimalist design is the similarity, and consumers already know

"Dupes" and "Dupe Culture" pit brands against retailers. Driven by inflation and other economic pressures, generic brands, store brands, and private-label products appear more frequently on store shelves. Unlike "traditional" counterfeit knockoffs, these products may not copy the word or design marks outright, but instead mimic the packaging, appearance, taste, or design of higher-priced and well-known brands.

That similarity can create confusion in the marketplace as to their source; but a savvy consumer might not be confused at all, and might intentionally want to buy the "dupe" precisely because it is similar but cheaper. There can also be overlap with genericism, especially where a legitimate product's own packaging and labels have more minimalist, spare designs.

Recent suits between household brands and national retailers illustrate the trend.

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In May 2025, Mondelez sued Aldi in the Northern District of Illinois over Aldi's private-label cookies and crackers, alleging they imitate the trade dress of Oreo, Chips Ahoy, Wheat Thins, Nutter Butter, Nilla Wafers, and Ritz. The claim is that Aldi sells look-alike versions of Mondelez's well-known products under confusingly similar packaging, advertising itself as a "discount" market and, in Aldi's own words, "like brands, but cheaper." Aldi generally denied the allegations at the pleading stage, and the case is now in discovery with no substantive motions or merits rulings yet.

Lululemon sued Costco in the Central District of California in June 2025, claiming that Costco sold activewear dupes of Lululemon's Define, Scuba, and ABC designs. Costco is, in many ways, unique in this. The company typically does not disclose sourcing of the Kirkland Signature private label, but there are exceptions — for example, in a 2016 interview, Costco's then-CEO Craig Jelinek confirmed that Duracell makes the Kirkland Signature batteries. "Costco CEO shares tips with Clark Howard to help you save money," published November 11, 2016 by WSB-TV Atlanta.

The real question may be whether Costco's products, even if not Lululemon-branded, come from the same factory and supplier as "genuine" Lululemon apparel. Costco has not yet

confirmed that either way in the case — and with the claims now narrowed to a single jacket, it may not.

And in October 2025, J.M. Smucker sued Trader Joe's in the Northern District of Ohio, alleging that Trader Joe's crustless peanut-butter-and-jelly sandwiches copy the trademarks (all design marks) and the trade dress of Smucker's UNCRUSTABLES line. Trader Joe's is contesting the case vigorously, disputing, among other things, that the asserted design marks are sufficiently famous for a dilution claim.

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These cases are all in early stages, with no merits rulings to date. But there is precedent rejecting a claim against copycat mascara: In *Benefit Cosmetics LLC v. E.L.F. Cosmetics, Inc.*, the Northern District of California ruled in 2023 that consumers were not actually confused, and that an admitted intention to mimic is not an intention to deceive as to source.

As the examples above illustrate in part, confronted with such rulings, some brands have turned to other theories, such as trade dress, design patents, false advertising, or combinations thereof — each of which, of course, presents its own challenges. Meanwhile, a key question to watch is the role of consumer confusion — whether consumers were actually confused, or knowingly chose the "dupe," and if the latter, with what consequence for the claims.

'Superfakes': A detection and secondary market challenge

"Superfakes" present another variation on traditional consumer confusion — effectively shifting the risk from the counterfeit seller to the platform that vouches for the goods.

"Superfakes" are meant to be exact copies with quality commensurate with the originals — using high-quality materials, stitching, hardware, and even packaging and phony "authentication" markers, all with a level of accuracy that can make detection difficult even for trained professionals. "Superfakes" thus require a different calculus than more "traditional," low-quality, cut-rate knockoffs.

Brands may defend themselves by restricting their own distribution channels — rendering any product offered outside those channels suspect. But secondary markets are an inevitable reality, with multiple platforms specializing in secondhand designer goods. Many invest heavily in authentication processes, but they too can be fooled.

Nike, Inc. v. StockX LLC (in the Southern District of New York) established that an authentication program does not shield the platform from liability; the court denied summary judgment on willfulness but granted partial summary judgment against the platform for selling 37 pairs of counterfeit Nike sneakers that had passed its own authentication.

Consumer attitudes toward "superfakes" also vary widely. Pricing generally runs below full retail, but not substantially less. Some consumers may be genuinely confused and think they are getting a good deal on a real product. Others may suspect — or know — that they are buying fakes, but hope to save money while still being perceived as having a genuine product.

For consumers, this raises ethical as well as practical questions. For platforms, and even brands, it complicates enforcement strategies and raises questions about who bears responsibility for identifying counterfeits and countering them.

Pharmaceuticals: The most dangerous counterfeits

The term "counterfeit" typically calls to mind fashion items like watches and handbags. But counterfeiting pharmaceutical products is a big — and perhaps even bigger — criminal business. Web-based drug merchants are pervasive, and an astounding **67 to 75%** of them are illicit.

Recognizing the growing threat, the United States Trade Representative featured counterfeit pharmaceuticals as a new focus in its 2024 Notorious Markets Report. As USTR recounts, the popularity of online pharmacies had already been growing and then surged during the COVID-19 pandemic, as millions of consumers ordered both over-the-counter and prescription medicines for delivery to their doorsteps — delivering life-saving care to some, but dangerous products to others.

And these products are indeed dangerous. Counterfeit medicines may be "dummy" pills without the active ingredients, or contain the right ingredient but inaccurate dosages — in either case depriving the patient of the accurate treatment they need. Worse, they can have unsafe substitutes, present unknown allergy or drug-interaction risks, or carry contamination risks that genuine products do not.

Drug companies have gone to court to protect themselves and their patients. In *Gilead Sciences, Inc. v. Safe Chain Solutions, LLC*, for example — a civil suit filed in the Eastern District of New York — Gilead identified 85,247 counterfeit bottles of its branded HIV medications Biktarvy and Descovy (worth more than $250 million at wholesale) sold to pharmacies across 13 states through a buyback model that bought empty or near-empty bottles from vulnerable patients, refilled them with other substances, including painkillers, and supplied falsified documentation.

In February 2024, Safe Chain Solutions and its co-founders settled for $2.7 million in forfeited assets and a permanent injunction — a settlement that resolved the claims against only one of more than 150 defendants.

Criminal actions have also become more widespread, as pharmaceutical counterfeiting merges with narcotics trafficking. In *United States v. Lopez Reyes*, for example — a criminal case in the Southern District of New York — a U.S. Army veteran died of acute fentanyl intoxication in February 2024 after buying what she believed was oxycodone; prosecutors charged the case as a narcotics conspiracy carrying a maximum sentence of life imprisonment, and a jury convicted the defendant in June 2026.

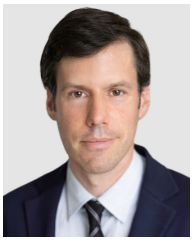
More broadly, the Drug Enforcement Administration's OD Justice Task Force filed 20 federal cases in the first five months of 2025 against dealers whose sales caused at least one death, and has charged 163 defendants since 2018.

Conclusion

At bottom, each of these trends puts pressure on the question trademark law was built around — whether consumers are confused about a product's source. The dupe buyer often knows exactly what she is getting. The superfake buyer may be fooled, but the remaining question is who should have caught the fake: the marketplace that vouched for it, or the brand.

And with counterfeit medicine, the harm runs past brand equity to the patient whose physical health (and even life) can be at risk. Counterfeiters have grown more sophisticated; brands are getting more sophisticated in response; and the courts will be doing their part as these cases develop.

About the author



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