



## What Dietary Supplement Companies Can Do to Address Potential Counterfeiting of Their Products

By Steven Shapiro and Marc Ullman

**W**hen people think of counterfeit products, they envision high-end designers, such as Prada, Louis Vuitton, Gucci and Hermes, expensive accessories such as Rolex watches, and expensive fragrances. They also are likely to believe that such counterfeiting is obvious, as it occurs with products sold in “dark alleys” (or on blankets on big city streets) or on very obviously “sketchy” websites. And, finally, most believe that the purchasers are aware that they are knowingly purchasing counterfeits or knockoffs.

We have come to learn that this is no longer the case. These days, particularly on websites (but not always), purchasers are assuming that they are buying legitimate products and may not be aware of what they are receiving. So, what has changed? The counterfeit market is becoming “mainstream” and moving online to “legitimate” retail websites, including Amazon, where figuring out what is legitimate vs. what is counterfeit can be extremely difficult, if not impossible.

Additionally, counterfeiting is no longer limited to expensive luxury items—it has found its way down to common, everyday low-cost items. There was a time when

counterfeit food products and even counterfeit dietary supplements appearing on the shelves of “legitimate” retail outlets was unheard of. In the past, we knew that counterfeiting of dietary supplements occurred, but what we most often heard about was such products turning up in the Middle East, Asia and Africa, but not the United States.

Unfortunately, recent months have seen increasing reports in the trade press of prominent dietary supplement brands discovering that their products have been the target of online counterfeiters and are being sold in the U.S. In fact, the scourge of counterfeiting has become a pervasive problem affecting every industry and individual. According to the U.S. Chamber of Commerce, counterfeit products cost the global economy more than \$500 billion a year. Recent data shows that by August 2022, the U.S. Customs and Border Protection (CBP) had made almost 17,000 seizures of counterfeit goods worth an estimated \$2.4 billion, had the goods been genuine. These seizures included fake consumer electronics, footwear, apparel, pharmaceuticals and dietary supplements. Deputy Executive Assistant Commissioner for CBP’s Office of

Trade, John Leonard, advised that in such a climate, “While the lure of a great deal is tempting, the consequences simply aren’t worth the risk. Only shop from sources you trust, especially when shopping online.”

### Online Shoppers: Good for Business but Increased Risks

The internet has brought great opportunities for companies to market their products, with consumer online shopping increasing year to year and no doubt accelerated by the COVID-19 pandemic. But it has come with a cost; counterfeiters have discovered that e-commerce is rife with opportunities for their nefarious trade.

The European Union Intellectual Property Office (EUIPO) reported that 70 percent of Europeans bought something online in 2020. U.S. e-commerce sales, meanwhile, exceed \$1 trillion in 2022 and to make up nearly 22 percent of total retail sales by 2026. Easy access and the ability to bargain shop and compare prices at different outlets are obvious drivers of this trend. And counterfeiters have jumped into this market in full force. Reports by Statistica, a global provider of online and consumer data, state that the value of the global counterfeit

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goods market was already \$449 b in 2019—larger than the entire economy of Ireland—and many of these sales were started on the internet.

Bargain hunters searching the internet are often able to fulfill their desire to find brand name products at discount prices, especially in comparison to traditional brick-and-mortar retailers. Low overhead and the ability to quickly move products due to a virtually unlimited ability to reach consumers are two legitimate reasons the bargains exist. At the same time, however, internet shopping prevents consumers from handling the goods that they plan on purchasing. They cannot hold the product, check how it feels, closely examine product labels, or do any of the other things possible when not making a virtual purchase. Moreover, a counterfeiter online can use images of the legitimate product, which may not resemble the counterfeit product supplied.

The U.S. Immigration and Customs Enforcement publication Counterfeit Goods: A Danger to Public Safety supplies a variety of examples of counterfeit products available online and the risks that they pose:

- Counterfeit airbags and their components can cause severe malfunctions ranging from non-deployment, under inflation, over inflation to explosion of metal shrapnel during deployment in a crash.

- Counterfeit lithium-ion laptop batteries pose a significant risk of extreme heat, self-igniting and exploding.

- Counterfeit helmets and baby carriers can break and cannot provide the level of safety provided by legitimate products.

- Counterfeit prescription drugs may not contain the active ingredient or could lead to accidental overdose.

- Counterfeit cosmetics can cause severe skin reactions.

## Your Dietary Supplements Are Also at Risk

As with other consumer products sold on the internet, dietary supplements are now subject to attack by fraudsters. And, like the examples listed directly above, counterfeit dietary supplements can pose far greater harm than the mere loss of a few dollars. Counterfeit dietary supplements are unlikely to have the actual dietary ingredients consumers think they are purchasing, so they will not provide the benefits of the actual dietary supplement. But far more alarming is the likelihood that counterfeit dietary supplements, created with no concerns for good manufacturing practices, may be contaminated with pathogens and unknown adulterants, or have ingredients that are dangerous to certain populations, such as undeclared major allergens or chemical con-

taminants that may cause harm to anyone taking them.

Two recent high profile incidents involving sales on Amazon (where you would hope there might be guardrails to keep counterfeiters away) should bring the risks home to brand marketers of dietary supplements.

## NOW Foods

On April 13, 2023, Bloomington, IL-based NOW Foods issued a press release alerting consumers that it had discovered multiple fraudulent supplements sold on Amazon impersonating the NOW brand as well as another prominent supplement brand. NOW commenced its investigation after being notified by several consumers about suspicious NOW branded products they had purchased. Through its investigation, the company determined that one fraudulent company, operating under the name of A2X1, had been selling counterfeit versions of 11 different NOW supplements on Amazon for about two weeks. These products appeared to be bona fide, but the packaging, labels, and most importantly, the contents, were clearly falsified. It was reported that each product contained small white capsules with an odorless white powder.

NOW's analysis of the white powders in the capsules confirmed that they contain

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white rice flour with trace amounts of the pharmaceutical Sildenafil in some samples. The company immediately reported this to FDA (U.S. Food and Drug Administration); however, no recall has been issued by Amazon, the only entity with knowledge of the identity of the consumers purchasing the counterfeit product.

## Fungi Perfecti

Within weeks of NOW's press release warning of counterfeiting on Amazon, on April 23, 2023, Fungi Perfecti of Olympia, WA, issued a press release alerting consumers that it had discovered multiple fraudulent products being sold by various Amazon

sellers impersonating its Host Defense Mushroom brand. During its routine brand control efforts, Fungi Perfecti began investigating unauthorized sellers after noticing irregularities in both packaging and the contents inside the capsules of various products purchased online.

The company has confirmed that four Host Defense capsule products were imitated: MyCommunity 120-ct., Stamets 7 120-ct., Lion's Mane 120-ct., and Turkey Tail 120-ct. The company had the counterfeits it had purchased online tested noting in its press release that consumers should be advised that some of the counterfeit products tested positive for two known allergens:

soy and gluten. All authentic Host Defense Mushroom supplements are gluten free and not formulated with soy.

Fungi Perfecti's investigation identified 24 separate Amazon sellers confirmed to have sold counterfeit products claiming to be Host Defense. Consumers who have purchased any of the previously mentioned counterfeit products from any of the sellers identified by Fungi were advised to discontinue use immediately and contact Amazon customer service for a refund.


Fungi Perfecti reported each of the sellers to Amazon and FDA. While all have since been removed from Amazon, no recall has been initiated by the website seller of the counterfeit product, Amazon, nor is there any assurance that additional counterfeiters will not reappear on Amazon.

## Protecting Yourself and Your Business From Counterfeiters

It would be unreasonable to assume that NOW foods and Fungi Perfecti are isolated instances of counterfeiting. It is likely that many more branded company's products are being counterfeited and these initial reports may just be the tip of the iceberg. While NOW Foods and Fungi Perfecti continue their efforts to police the marketplace and protect their consumers, all brand owners must be concerned about potential counterfeiting of their products online and elsewhere.


## Tips for Brand Owners Looking for Potential Counterfeiters

- Identify "red flags" (e.g., discounted prices, typographical errors in advertising/marketing materials). Counterfeit products are frequently spotted by misspellings and poor grammar in advertising, use of poor graphics, or pricing that the brand owners know is too good to be possible.
- Carefully research consumer reviews. Is the use of English correct? Do the reviews repeat themselves? Are the reviews posted over a lengthy period, or were they all posted recently or at the same time?
- Make discreet purchases of suspected counterfeit products and upon receipt, scrutinize product labels, product packaging and the actual products themselves. Testing counterfeit products for potential safety hazards to warn your customers is recommended.
- Know your supply and distribution chains. Advise customers of your authorized sellers.
- When purchasing suspected counterfeit products, pay with credit cards that feature payment dispute protocols. Credit card transactions, unless made through an online retailer like Amazon, also make it more difficult for the counterfeiter to hide their identity.




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- Investigate online retailers selling your company's branded products that accept payment only with gift cards, by wire transfers through companies like Western Union or MoneyGram, or with cryptocurrency. Scammers often tell people to use those payment methods so they can get money quickly and it is harder to trace back.

- For retailers purchasing stock for their stores, ensure the pedigree of the products can be traced back to the manufacturers to ensure that you are not stocking your stores with potentially counterfeit products.

## Tips For Manufacturers to Combat Counterfeits

- Use anti-counterfeiting product packaging and labeling services (e.g., use custom QR (quick response) codes which direct consumers to websites which sell authentic products, use holographic foil which individually seals each product with a unique pattern).

- Take appropriate legal action against counterfeiters. Lawsuits can be brought for violation of the brand owners' trademarks and copyrights.

- Embrace technology (e.g., adding invisible cryptographic signature to packaging).

- Register intellectual property with the U.S. Copyright Office and U.S. Patent and Trademark Office.

- Record registered intellectual property with U.S. Customs and Border Protection (CBP). CBP will work to stop counterfeit products from entering the country.

- Draft strong indemnification agreements with business partners (e.g., suppliers, distributors, etc.).

- Report all instances of counterfeiting to the relevant authority (e.g., FDA) and to Amazon, if appropriate.

- Educate consumers on how to spot counterfeit products, the dangers associated with counterfeits and what to do if they encounter counterfeits.

## Conclusion

The days of counterfeiting being limited to consumers searching for cheap knock-offs of ultra-high priced fashion designer goods are long gone. Today, any type of consumer good is at risk of being counterfeit. The explosion of internet shopping at both the retail and distributor level where the purchaser often does not see the goods until they are delivered has helped create an environment in which fraudsters can thrive. Brand owners must be conscious of this fact and act with proper care to protect their brands and customers from the dangers posed by counterfeiters selling potentially dangerous supplements. **NIE**



Steven Shapiro is of counsel to Rivkin Radler LLP (rivkin.com) and a partner of Ullman, Shapiro & Ullman, LLP (usulaw.com). His practice focuses on the dietary

supplement/natural products industries with a particular emphasis on FDA and FTC compliance issues including labels, labeling and advertising claims.



Attorney Marc S. Ullman represents clients in matters relating to all aspects of Food and Drug Administration and Drug Enforcement

Administration matters, regulatory issues, Federal Trade Commission proceedings and litigation. He practiced with one of New York's leading white collar criminal defense firms for 10 years, where he represented clients in both federal and state prosecutions, as well as numerous related civil matters and other litigations.

He can be reached at [marc.ullman@rivkin.com](mailto:marc.ullman@rivkin.com).



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