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The Private Sector Combats Products Counterfeiting

I. INTRODUCTION

"Product counterfeiting is nothing less than the theft for profit of a firm's reputation and product through the use of deception."¹ In 1983, the United States International Trade Commission (USITC) began an investigation² of foreign product counterfeiting and its effects on U.S. industries.³ The primary goals of the investigation were: (1) to identify U.S. industries being affected by foreign product counterfeiting; (2) to measure the effects of such counterfeiting on U.S. industry and exports; and (3) to accumulate data on the methods employed by U.S. firms to counteract this illegal activity.⁴

The companies responding to USITC questionnaires stated that generally the counterfeit items are inferior in quality as compared to the authentic products.⁵ The companies complain that when an unsuspecting consumer buys a counterfeit and learns of its inferior quality, he becomes biased against the bona fide product and its manufacturer.⁶ Moreover, even consumers who knowingly buy a counterfeit because of its reduced price still expect it to be of comparable quality to the authentic item. Once the imitation fails to meet the buyer's expectations, his attitude towards the real product is adversely affected.⁷ Consequently, the consumer shies away from buying the real product notwithstanding the fact that his experience with that prod-

1. *The Effects of Foreign Product Counterfeiting on U.S. Industry*, 82 PAT. & TRADE-MARK REV. 471, 472 (Nov. 1984) [hereinafter cited as *Effects of Foreign Counterfeiting*].

2. The investigation was conducted pursuant to the Tariff Act of 1930 § 332(b), 19 U.S.C. § 1332(b) (1980). *Effects of Foreign Counterfeiting*, *supra* note 1, at 471.

3. *Effects of Foreign Counterfeiting*, *supra* note 1, at 471.. The investigation took place during 1983. The sources used in gathering data for the investigation included fieldwork, private individuals and organizations, and the U.S. and foreign governments. Questionnaires were sent to all U.S. producers believed or known to have been affected and threatened by foreign product counterfeiting. *Id.* at 471-72. The major industries affected the most include: wearing apparel and footwear; chemicals and related products; transportation parts and accessories; records and tapes; sporting goods; and miscellaneous metal products, machinery and electrical products. *Id.* at 476.

4. *Id.* at 471.

5. *Id.* at 482.

6. *Id.* at 483.

7. *Id.*

uct is based on an imitation.⁸ Counterfeiting, therefore, adversely affects the goodwill of many companies.⁹ Trademarks of high-priced items are often devalued when their corresponding counterfeits are sold at greatly reduced prices.¹⁰ Additionally, once the goodwill of one product becomes tainted, a snowball effect often occurs resulting in damage to the company's overall image and affecting other unrelated items it markets.¹¹ American workers are also experiencing the pains of counterfeiting. "Approximately 131,000 jobs were lost in 1982 due to foreign product counterfeiting. . . ."¹²

However, companies are fighting back. Responses to the USITC questionnaires indicated that the money expended in detecting and fighting product counterfeiting in 1982 totaled \$12.1 million as compared to \$4.1 million in 1980.¹³ The companies that responded indicated the following step-by-step approach to combat product counterfeiting:

The process begins with the detection of the existence of a counterfeit. Detection is followed by investigation into the origins and principals of the counterfeit product and is in turn followed by attempts to prevent further production. The process ends with enforcement action undertaken by the legitimate manufacturer or trademark holder against the counterfeiter. Each step is dependent upon the success of the previous step. Investigators face [a] myriad [of] obstacles in tracing the source of counterfeits and enforcing their trademarks. The typical counterfeiter is reported to be a shrewd and elusive businessman, quick on the move when pursued by a legitimate trademark owner.¹⁴

Those companies responding to the questionnaires have developed various methods to counteract product counterfeiting, such as: private investigation by either in-house counsel or outside services; registering trademarks with U.S. Customs; training sales forces, distributors, and licensees to detect counterfeiting in the field and at trade shows; using anti-counterfeiting devices (electronic labeling); registering trademarks with the appropriate authorities in foreign countries; raising consumer awareness of product counterfeiting;

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* at 484.

13. *Id.* at 484-85.

14. *The Effects of Foreign Product Counterfeiting on U.S. Industry*, 82 PAT. & TRADE-MARK REV. 518 (Dec. 1984) (continued from Nov. 1984 issue).

working with industry associations and coalitions to promote Government action; and maintaining full-time, in-house legal and investigative staffs.¹⁵

To enforce their legal rights, companies are also bringing civil and criminal actions against counterfeiters and their associates, including the middleman and the ultimate retailer. Furthermore, companies issue "cease and desist" warning letters and seek judicial search and seizure orders, police raids, and temporary restraining orders.¹⁶

Many companies take affirmative action against product counterfeiting and thereby help to diminish its staggering effects on U.S. industry. However, they report that unless counterfeiting becomes less profitable, the risks of detection increased, and the penalties made more severe, no amount of industry action will succeed in eliminating the problem.¹⁷

In fact, product counterfeiting has grown by such immense proportions that counterfeiters have set up "elaborate corporate structures and sophisticated distribution systems."¹⁸ In some cases, an illegal organization's system of production and distribution is even more complex than that of the company whose product it is copying. The chairman of Levi Strauss & Co. noted that his company is currently trying to dismantle "the largest and most sophisticated worldwide ring [Levi has] discovered."¹⁹ Furthermore, over the past several years, U.S. industry has seen a great change in the types of products copied.²⁰ Luxury items, such as expensive watches and designer blue jeans, no longer stand alone as victims of this activity. A variety of industrial, consumer, and health products are also being copied.²¹ Many of these fake products threaten the safety of the unwitting consumer who buys the goods.²²

Consequently, the sheer magnitude and overwhelming adverse

15. *Id.*

16. *Id.* at 518-19.

17. *Id.*

18. Walker, *A Program to Combat International Commercial Counterfeiting*, 70 TRADE-MARK REP. 117, 118 (Mar.-Apr. 1980).

19. *How Levi's Cracked A Ring of Counterfeiters*, BUS. WK., Sept. 5, 1977, at 27 (quoting Walter A. Haas, Jr., Chairman of Levi Strauss).

20. Kiesel, *Battling the Boom in Bogus Goods*, A.B.A. J., Mar., 1985, at 60.

21. See *Effects of Foreign Counterfeiting*, *supra* note 1, at 476, 482.

22. See Foltz, *A Plague of Counterfeit Goods*, NEWSWEEK, Dec. 17, 1984, at 68-69. G.D. Searle had to recall over one million birth control pills when pharmacists detected irregularities in shipments of the pills they had received. *Id.*

impact of product counterfeiting has made the detection and eradication of counterfeits extremely important to U.S. companies.

II. GLOBAL COUNTERFEITING

An important obstruction many companies face in detecting the source of the counterfeit items is that product counterfeiting is no longer centrally located. Historically, Eastern Asia was the primary location where counterfeiters set up their manufacturing plants. Eastern Asia is still a problem area, since the number of countries with product counterfeiting plants in that area has made it difficult to track down the culprits.²³ Today, many countries throughout the world have become prime sites for producing counterfeit goods. Mexico, Turkey and Canada contain a large number of counterfeiting facilities.²⁴ Moreover, the Middle East, Africa, and Latin America are all areas in which the manufacture and sale of counterfeit goods has been detected.²⁵

According to some sources, Italy is currently the largest production center for the illegal trade in Europe,²⁶ and possibly the world.²⁷ It is estimated that 20-25 percent of Italy's gross national product is made up of the turnover resulting from product counterfeiting.²⁸ According to the Rome attorney for Bausch & Lomb Inc., Italy is the leading production and distribution center of fake Ray-Ban sunglasses—a trademark owned by Bausch & Lomb.²⁹ In view of the fact that legitimate businesses are suffering from low investment levels, high unit labor costs, and endless strikes,³⁰ product counterfeiting may well be the reason that Italy's otherwise failing economy is surviving.³¹ It is estimated that over 2.5 million Italians work in the factories producing counterfeit goods.³² These mini-factories "can change their product lines the same day the owners change their minds about

23. *The World War Against Phony Trademarks*, U.S. NEWS & WORLD REP., Jan. 15, 1979, at 52 [hereinafter cited as *Phony Trademarks*]. The East Asian countries with counterfeiting plants include Taiwan, South Korea, Singapore, Thailand, the Philippines, and Hong Kong.

24. *Id.*

25. *See Effects of Foreign Counterfeiting*, *supra* note 1, at 479.

26. *Phony Trademarks*, *supra* note 23, at 52.

27. Hansen, *The Capital of Counterfeiting*, DUN'S REV., Oct. 1978, at 68.

28. *Id.*

29. *Id.* at 72.

30. *Id.* at 70.

31. *Id.*

32. *Id.*

what they want to make,"³³ thus hindering any efforts at detection by U.S. firms. Furthermore, Italy's unrestricted borders do not present any threat to the illegal operators.³⁴ Therefore, even if counterfeiters are detected in Italy, they can immediately transport the fake goods to another country for distribution.

III. THE INFLUENCE OF ORGANIZED CRIME

The sophisticated forces behind foreign product counterfeiting allow the counterfeiter to react quickly once he fears detection is imminent. Private and government investigators believe the financing and development of counterfeiting operations is the work of organized crime.³⁵ Vincent M. Carratu, a former Scotland Yard detective turned private investigator,³⁶ claims that the chance for enormous profits is the appealing factor which has resulted in the increased participation by organized crime in the field of product counterfeiting.³⁷ The director-general of the British phonographic industry anti-piracy squad stated:

We have good reasons to believe that the big racketeers in America—who are also into drugs, prostitution, and other crimes—are also in the music business.

But the trouble is that a hasty investigation invariably results in injunctions, writs and possibly orders to search premises—all excellent measures to let the world know that something is being done—but they don't identify the source of the problem.

In my experience, if you act precipitately, the trail goes cold and the operation is driven underground until it is safe to start again.³⁸

IV. METHODS USED TO COMBAT PRODUCT COUNTERFEITING

A. Introduction

The aforementioned problems of detection have led many of the

33. *Id.*

34. *Id.*

35. Seeger, *Fake Brands: All That Glints Is Not Gucci*, L.A. Times, Feb. 22, 1980, at 10, col. 2. See also Hansen, *supra* note 27, at 72 ("There are persistent reports of an unauthorized, black-market factory in the Naples [Italy] area that manufactures fake Marlboro Cigarettes without ever . . . [obtaining] a license from Philip Morris, the trademark's owner.").

36. Seeger, *supra* note 35, at 1.

37. *Id.* at 10.

38. *Id.* (quoting John Deacon, director-general of the British phonographic industry anti-piracy squad).

larger U.S. companies to devise creative strategies to prevent and combat product counterfeiting before investing time and money in litigation.³⁹ Many companies feel they are being forced to take these measures because the government is not making a strong enough effort to combat counterfeiting.⁴⁰ However, in rebuttal, government officials argue that the firms themselves are often to blame for the alleged ineffectiveness of the government agencies.⁴¹ They claim that because many companies do not equip customs personnel with any information regarding their trademarked goods, seizing the counterfeits of those companies' products becomes virtually impossible.⁴² Nevertheless, by combining the laws the government has to offer with a firm's own ingenuity and desire to confront the problem, several companies have recently begun to feel optimistic, or at least less pessimistic, about the possible elimination and eventual decline of product counterfeiting.

B. Hands-Off Approach

Companies have taken a stand both individually and collectively in dealing with product counterfeiting. Nevertheless, there are also many corporations who take a hands-off approach to the problem.⁴³ Although nonchalance does not typify the attitude of these companies, they hesitate to take overt action because of the publicity generated from investigation and resulting litigation. The fear is that any

39. See generally Rakoff and Wolff, *Commercial Counterfeiting: The Inadequacy of Existing Remedies*, 73 TRADE-MARK REP. 493 (1983) (The article deals with the inadequacy of various federal and state laws available to a company in its effort to combat product counterfeiting. The authors pinpoint the problems attributable to each law and recommend specific improvements and reconstruction of the laws to make them more effective. For instance, most state criminal statutes merely proscribe product counterfeiting as a misdemeanor and, therefore, usually impose a "theoretical maximum prison term of only a few months." *Id.* at 523. Additionally, since the maximum penalties are rarely imposed, the only threat of these statutes is small fines. Their effectiveness as deterrents is therefore nominal at best.).

40. Foltz, *supra* note 22, at 69. Patrick O'Brien, assistant regional commissioner for U.S. Customs in New York, stated that identifying and seizing copied items is "not [U.S. Customs'] No. 1 priority." *Id.* According to O'Brien, it is number four on the list behind narcotics, technology exporting and illegal arms sales. *Id.* Pasquale A. Razzano, counsel for Ideal Toy Corporation's Rubik's Cube Division, states that "our own judicial system . . . has not taken counterfeiting seriously enough and has not imposed sufficient sanctions or penalties against the counterfeiter." Razzano, *The Pragmatic Approach to Prevention of Product Counterfeiting of Counsel for Rubik's Cube*, 2 MERCHANDISING REP. 10 (Feb. 1983).

41. Foltz, *supra* note 22, at 69.

42. *Id.*

43. Kaikati and La Grace, *Beware of International Brand Piracy*, HARV. BUS. REV., Mar.-Apr. 1980, at 52, 58.

adverse publicity regarding the proliferation of counterfeiting would cause the company's customers to switch to competing brands in order to avoid purchasing one of the copied products that might be inferior in quality. This publicity endangers a corporation's reputation.⁴⁴ According to the president of the Automotive Parts and Accessories Association, "when the product fails to perform, the customers blame Champion Spark Plug, AC-Delco, Ford . . . They go by the name of the product . . . and vow never to buy another product from the company."⁴⁵ He concluded that because of the fear of endangered reputation, the companies disregard the fact that the product is a counterfeit and try to do everything to satisfy a complaining customer.⁴⁶ This includes the repair and maintenance of these less-than-quality goods which is an added, unnecessary, and unexpected cost to operations.

Lengthy and costly private investigations, which are needed to acquire conclusive evidence against counterfeiters, inhibit some legitimate manufacturers from pursuing their own actions against counterfeiters.⁴⁷ Additional problems facing companies threatened by product counterfeiting include the ineffectiveness of present remedies,⁴⁸ and the inherent difficulties of dealing with foreign officials and foreign courts.⁴⁹ For the past five years, Cartier, Inc. has tried unsuccessfully, and with little cooperation from the Mexican courts, to close down plants in Mexico City known to be involved in product counterfeiting.⁵⁰ Finally, a legitimate manufacturer is faced with the

44. Moore, *U.S. Firms Losing Billions to Foreign Auto Parts Counterfeiters*, *Automotive News*, Mar. 31, 1983, at 20, cols. 3-5.

45. *Id.* at 20, 48 (quoting Julian C. Morris, President of the Automotive Parts and Accessories Association). See also Kiesel, *supra* note 20, at 61. Peter Phillips, Associate General Counsel of Levi Strauss, stated: "There are a number of injured parties [where counterfeiting is concerned]. The company is injured in terms of its name, its reputation and lost sales—from the counterfeiter directly and from the consumers who got a poorly made counterfeit product [with the company's name on it] and switches to another brand." *Id.*

46. Moore, *supra* note 44, at 48.

47. Kaikati and La Grace, *supra* note 43, at 58.

48. *Id.* See also Rakoff and Wolff, *supra* note 39 and accompanying text; Walker, *supra* note 18, at 119.

49. Kaikati and La Grace, *supra* note 43, at 58. See Sheils, *Swindles: Knocking It Off*, *NEWSWEEK*, Feb. 27, 1978, at 69:

Even when the counterfeiters can be found, any crackdown on their operations is dependent upon the sometimes Byzantine workings of local law. In Italy the Roman police tell angry legitimate manufacturers to call paramilitary *carabinieri* who refer the complaints to the Italian Ministry responsible for enforcing financial laws, who in turn pass the buck back to the police.

Id.

50. See Sheils, *supra* note 49, at 69.

risk that even if it pursues expensive investigations and litigation, it may lose the case and be sued for malicious prosecution.⁵¹

Fortunately, despite these problems, many companies feel it is important to make attempts to frustrate the operations of the counterfeiters. The more companies assuming this task, the more effective the effort will become in combatting the illegal practice.

C. Private Investigation

Before a company decides to prosecute, it can take certain measures that will aid the litigation process or possibly even enable a company to resolve the problem prior to litigation. One such measure is private investigation. Private investigation can be used as a warning to future offenders.⁵² It has also been the starting ground for a new development in this area—private sting operations that have received approval from the courts.⁵³ Finally, evidence gathered during an investigation can help the plaintiff present his case favorably during a subsequent trial.

Vincent M. Carratu believes he is the only private investigator in the world specializing in the detection of product counterfeiters.⁵⁴ His headquarters are located in Manchester, England and he has branches in Hong Kong and Taiwan. He operates with a work force of seventy-six.⁵⁵ His job involves essentially two tasks—to locate product counterfeiters and their places of business and to monitor markets to detect whether fake goods are being distributed.⁵⁶ Once Carratu or

51. *Kaikati and La Grace*, *supra* note 43, at 58. See also 2 R. NORDHAUS, *PATENT, TRADEMARK AND COPYRIGHT INFRINGEMENT* § 69(11) (1979):

When issuing an infringement notice, or filing an infringement suit, it is extremely important that good faith be exercised. The issuance of an infringement warning, or the filing of a suit, in bad faith—eg [sic], without any intent to implement the notice with suit, without ascertaining *prima facie* infringement, or with knowledge that the right being asserted is invalid—may subject the party asserting the right in bad faith to liability for unfair competition or violation of the antitrust laws.

Id.

52. *How Levi's Cracked a Ring of Counterfeiters*, *supra* note 19, at 27. Regarding Levi's recent success in exposing an international ring of counterfeiting, Chairman Walter Haas states "it was 'particularly important to expose the large ring to discourage other imitators' and to warn the growing number of Levi Strauss customers who are diverting their supplies to other markets, where they are often discounted." *Id.*

53. See *United States ex rel. Vuitton et Fils S.A. v. Karen Bags, Inc.*, 592 F. Supp. 734 (S.D.N.Y. 1984); *Musidor B.V. v. Great American Screen*, 658 F.2d 60 (2d Cir. 1981), *cert. denied*, 455 U.S. 944 (1982).

54. *Seeger*, *supra* note 35, at 1.

55. *Id.*

56. *Id.* He simply surveys likely places known to carry fraudulent goods including discount stores, open markets and street peddlers.

one of his employees spots a counterfeit item, he pursues the ultimate infringer. If successful, the trail will lead him from the retailer to the distributor and to the manufacturer and, finally, to the identity of the organizer and developer of the entire illegal scheme.⁵⁷ Carratu states that at the end of the hunt he often finds himself in Italy where many counterfeiting factories are situated.⁵⁸

Anthony Hoffman, a British attorney specializing in litigation in the area of product counterfeiting, supports the use of private investigators.⁵⁹ He feels it is extremely important that once infringement is detected, immediate measures be taken to stop any future production and distribution of the counterfeits.⁶⁰ Such measures include thorough investigation and accumulation of concrete evidence. According to Hoffman, the evidence an investigator gathers is often powerful and overwhelming enough to induce the infringer to settle the case long before the trial.⁶¹

According to James Bikoff, President of the International Anti-Counterfeiting Coalition, many large companies are investing their resources into investigation departments.⁶² Bikoff feels private investigators play an important role in the effort to combat product counterfeiting.⁶³ Because of the in-depth investigations conducted, the product owner can "establish a prior pattern of counterfeiting activity."⁶⁴

Levi Strauss & Co. of San Francisco is frequently the victim of product counterfeiting. Fortunately, in September, 1977, Levi was able to crackdown on an international counterfeiting scheme of grand proportions.⁶⁵ Former agents from the Secret Service, FBI, and Brit-

57. *Id.*

58. *Id.* See also Hansen, *supra* note 27.

59. Seeger, *supra* note 35, at 10.

60. *Id.*

61. *Id.*

62. *An Interview with James Bikoff—Head of International Anti-Counterfeiting Coalition*, 2 MERCHANDISING REP. 4, 6 (Oct. 1983) [hereinafter cited as *An Interview with James Bikoff*].

63. *Id.*

64. *Id.* This strong evidence can become a very useful ingredient in a successful lawsuit or in attempting to acquire a temporary restraining order against the counterfeiter. See *infra* notes 123-32 and accompanying text.

65. *How Levi's Cracked a Ring of Counterfeiters*, *supra* note 19, at 27. Recently, Levi Strauss & Co. was involved in a lawsuit in Indonesia against a counterfeiter who was planning to produce 70,000 pairs of fake Levis and ship them to Holland. Kiesel, *supra* note 20, at 63. The company learned of the plot through one of its sources and, by working with Netherland authorities, was able to confiscate the first shipment made during 1983. *Id.* The confiscated goods were returned to Indonesia as evidence. *Id.* Levi Strauss & Co., with the help of the

ish Intelligence constituted Levi's eight-man security force. The force traveled from the Far East, through Europe and back to San Francisco in an effort to break the worldwide network of illegal counterfeiting.⁶⁶ The investigation resulted in five lawsuits filed in five countries, and the arrests of the major conspirators behind the entire operation.⁶⁷

It all began in January, 1977, when a Taiwanese businessman, a British businessman, and an ex-Levi employee set up a company called Levi Strauss & Co., Taiwan.⁶⁸ By that time, because of Levi's "excellent contacts in the industry,"⁶⁹ Levi had already heard rumors regarding the illegal operation.⁷⁰ Levi's corporate security staff involved in detecting this type of illegal operation costs the company in excess of \$500,000 annually.⁷¹ Thomas Nagle, a former Secret Service counterfeiting specialist, presently serves as director of Levi's corporate security department. To perform his job more effectively, Nagle involved himself in the manufacturing aspects of Levi's operation. In doing so, he was able to learn exactly what to look for to identify a fake pair of Levi jeans.⁷² Enlisting the aid of police departments in various countries and using connections developed by him and his co-workers in their prior lines of work, he established a trail that eventually led to the detection and raid of a Taiwanese plant in which 30,000 pairs of counterfeit jeans and 35,000 fake Levi components were

U.S. Embassy in Indonesia, was able to insure vigorous prosecution by the local authorities. *Id.* The National Prosecutor's Office in Indonesia handled the litigation. *Id.*

66. *How Levi's Cracked a Ring of Counterfeiters*, *supra* note 19, at 27.

67. *Id.*

68. *Id.*

69. *Id.* These contacts are an essential aspect of any investigation and should be acquired as soon as a company develops a security or investigative team. Levi Strauss & Co. receives this "contact" information from competitors (through an informal network of information exchange), suppliers and paid informants. *Id.*

70. *Id.*

71. *Id.* See also *Phony Trademarks*, *supra* note 23, at 52 (Levi's Security Operations for counterfeiting cost the corporation over one million dollars per year back in 1979).

72. *How Levi's Cracked a Ring of Counterfeiters*, *supra* note 19, at 27. Certain elements he looks at in determining whether a pair of Levi's is authentic are: "[T]he smoothness of the double-arc stitching on the hip pocket, how solid the buttons are, the crispness of the gold-over-red printing on the paper label, and the weight of the denim." *Id.* The imitation goods found during the Taiwanese raid were made of lighter weight denim and the stitching material greatly differed from that used in the real product. *Id.*

When a company has become a target of product counterfeiting, it should supply its investigators with samples of the legitimate product. It should also pinpoint those particulars of the product that are hard or impossible to reproduce. Equipped with this information, investigators will find it easier to monitor the market for counterfeits.

seized.⁷³ It also led to a "beautiful trail of documents" that allowed Nagle to trace the counterfeit goods and sales through a stream of banks, trading companies, and fictitious corporations.⁷⁴ That particular investigation cost Levi over \$200,000 but Nagle's assistant felt the money spent was worth it compared to the revenues that are lost when counterfeiters are able to operate successfully.⁷⁵

Jordache Enterprises of New York is another apparel manufacturer that has been plagued by counterfeiting problems. However, according to Jordache's general counsel Rob Spiegelman, the company made remarkable progress in its effort to combat product counterfeiting during 1983.⁷⁶ Spiegelman claims that 99 percent of fake Jordache jeans are imported into the U.S. principally from Hong Kong, Japan, Taiwan, and Korea.⁷⁷ Detection of the imitations begins with the information received from Jordache licensees, sales personnel, and several in-house investigators located throughout the U.S.⁷⁸

Spiegelman summed up Jordache's investigative system as follows:

We have various cases started and, from these cases, we get information regarding other sources. [The investigator] will generally follow that up and he will also obtain new information from various informants, people in the security business, people from other companies who come across our [products] and they find out it's counterfeit, people who just call up and say "I have a pair of jeans here and they look funny to me," that type of thing.⁷⁹

Jordache's investigations have led to over eighty actions between November, 1982 and November, 1983 and identification of over 115 defendants.⁸⁰ Although none have actually gone to trial because of the lack of any factual issue,⁸¹ the majority of the cases have been

73. *Id.* Over 78,000 counterfeit jeans have also been seized from raided locations in the Netherlands, Switzerland and Belgium. *Id.*

74. *Id.*

75. *Id.*

76. *An Interview with Jordache's Rob Spiegelman*, 2 *MERCHANDISING REP.* 4 (Nov. 1983).

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.* at 5.

81. *Id.* Most defendants appear in court and admit selling the items in question, but thereafter contend that they bought the counterfeits with cash from a stranger in a flea market. Moreover, they have a memory lapse when asked for a physical description or name of this "stranger." *Id.*

settled.⁸² Spiegelman feels product counterfeiting is still a problem for Jordache, but the company has begun to deal more effectively in eliminating it.⁸³ He feels counterfeiting is not as flagrant as it used to be because the counterfeiters, aware of how aggressive Jordache and similar companies have become in fighting the problem, are more restrained in their activities.⁸⁴

1. Private sting operations and court appointment of special federal prosecutors

The federal courts have exhibited their support of private investigations by approving private sting operations.⁸⁵ One case involved luggage maker Louis Vuitton. In 1981, Vuitton, after bringing suit for trademark infringement and unfair competition against Sol Klayminc and various corporations run by Klayminc for selling fake Louis Vuitton products,⁸⁶ sought and won a permanent injunction against the defendants.⁸⁷

In April, 1983, Kanner Security Group, a Miami-based private investigation firm operated by former FBI agents, contacted various owners of prestigious trademarks, including Vuitton, with the idea of finding and apprehending counterfeiters through a "sting" operation.⁸⁸ Vuitton agreed to the plan and appointed its attorney, Joseph Bainton, to oversee the operation.⁸⁹ Essentially, the sting operation involved employees of the security firm who posed as merchants interested in buying and selling counterfeits in large quantities. Two of the operatives who played prominent roles in the operation were Gunnar Askeland, a former FBI agent, and Melvin Weinberg, who had also

82. *Id.*

83. *Id.*

84. *Id.*

85. *See Vuitton*, 592 F. Supp. 734; *Musidor*, 658 F.2d 60; cf. Gelman, *A Plague of Counterfeit Goods*, NEWSWEEK, Dec. 17, 1984, at 70. (In addition to approving sting operations, federal courts have granted private investigators the authority to search businesses and private dwellings if they are able to proffer strong evidence that counterfeits are produced or stored there. These investigators have also been given the power to seize any fakes items found).

86. *Vuitton*, 592 F. Supp. at 737.

87. *Id.* at 738.

88. 'Private Abscam' Trial Set in N.Y., NAT'L L.J. May 21, 1984, at 3, col. 1 [hereinafter cited as *Private Abscam*]; *See also Attorney Could Take Part in Sting Operation Against Counterfeiters*, 28 PAT. TRADEMARK & COPYRIGHT J. (BNA) 129 (1984); *Putting Teeth In The Trademark Laws*, BUS. WK., Oct. 8, 1984, at 79; Kohn, 'Bagscam' Case Will Offer Some 'Deja Vu' Overtones, 191 N.Y. L.J. 1 (1984) [hereinafter cited as *Deja Vu Overtones*].

89. *Vuitton*, 592 F. Supp. at 738.

participated in the "Abscam" operation of recent memory.⁹⁰

Alleged criminal contemner Nathan Helfand became the middleman between the defendant, Klayminc, who in 1981 consented to the issuance of a permanent injunction,⁹¹ and Weinberg and Askeland.⁹² Several meetings were held in which Klayminc and another alleged defendant, George Cariste, established their desire to deal with Weinberg and Askeland.⁹³ Before the final meeting, Bainton moved the Federal District Court of the Southern District of New York to appoint himself and co-counsel Robert Devlin as special Federal Prosecutors⁹⁴ under rule 42(b) of the Federal Rules of Criminal Procedure.⁹⁵ Bainton also requested that he and Devlin be allowed to "continue the investigation and, in due course, the prosecution of what appear[ed] to be a massive international conspiracy to violate [the] Court's permanent injunction."⁹⁶

According to one of the affidavits filed by Bainton, Klayminc planned on establishing a factory in Haiti to produce counterfeit Vuitton bags in which Klayminc could potentially net almost \$38 million a year in profit.⁹⁷

Weinberg's tactics, similar to those used during the Abscam operation,⁹⁸ included enticing Klayminc into a deal whereby Weinberg would lead Klayminc to believe that he (Weinberg) would be able to arrange financing for the Haitian project.⁹⁹

Bainton informed the court that based on the assumption that the court would grant his applications, he had Weinberg set up a meeting between Askeland, Klayminc and Weinberg for April 5, 1983, in New York City which was to be video-taped for evidentiary purposes.¹⁰⁰

In its Order, the court granted the appointments of Bainton and

90. *Id.*

91. *Id.* at 737.

92. *Id.* See also *Deja Vu Overtones*, *supra* note 88, at 2.

93. *Vuitton*, 592 F. Supp. at 738.

94. *Id.*

95. FED. R. CRIM. P. 42(b). The rule states in pertinent part: "A criminal contempt . . . shall be prosecuted on notice The notice shall be given orally by the judge in open court in the presence of the defendant or, on application of the U.S. Attorney or of an attorney appointed by the Court for that purpose. . . ." (emphasis added).

96. *Vuitton*, 592 F. Supp. at 738.

97. *Private Abscam*, *supra* note 88, at 44.

98. *Id.* In Abscam, Weinberg offered former New Jersey Senator Harrison Williams, Jr. financing for a titanium mine. *Id.*

99. *Id.*

100. *Vuitton*, 592 F. Supp. at 738.

Devlin to investigate and eventually prosecute the action.¹⁰¹ After the Order was handed down, Bainton's investigation produced several video and audio recordings involving conversations held between the alleged contemnors and the investigation team.¹⁰² Based on these recordings, the court issued an Order to Show Cause for Civil and Criminal Contempt against Klayminc, his son and four other defendants.¹⁰³ The court ordered the seizure of the counterfeit Vuitton items as well as the equipment and promotional materials used for the manufacture and distribution of the counterfeits.¹⁰⁴

The defendants made numerous pre-trial motions including the Motion to Revoke the Special Prosecutors' Appointments.¹⁰⁵ The court denied defendants' motions and specifically upheld the appointments.¹⁰⁶ The defendants contended that Bainton and Devlin behaved improperly in supervising the video and audio-taped meetings.¹⁰⁷ Further, they maintained that Bainton and Devlin should not enjoy immunity from state regulations concerning illegal wiretapping because that immunity is extended to individual federal government agents when performing their respective duties.¹⁰⁸ They based this contention on the grounds that since Bainton and Devlin were compensated by a private party, and not by the government, they should therefore not be raised to the status of a federal agent.¹⁰⁹

The court, in rejecting this argument, stated that once Bainton¹¹⁰ was appointed special prosecutor, he was "protected by the same im-

101. *Id.* at 739.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

106. The Court based its approval of the appointments on the rationale of two New York cases: "'Criminal prosecutions . . . are prosecuted either by the United States or by the Court to assert its authority. . . . [As to the latter], the judge may prefer to use the attorney of a party, who will indeed ordinarily be his only means of information when the contempt is not in his presence.'" *Vuitton*, 592 F. Supp. at 739-40 (quoting *McCann v. New York Stock Exchange*, 80 F.2d 211, 214 (2d Cir. 1935)).

Neither Rule 42 [Federal Rules of Criminal Procedure] nor the Due Process Clause requires the Court to select counsel from the staff of the United States Attorney to prosecute a criminal contempt. The practicalities of the situation—when the criminal contempt occurs outside the presence of the Court but in civil litigation—require that the Court be permitted to appoint counsel for the opposing party to prosecute the contempt

Id. at 740 (quoting *Musidor*, 658 F.2d at 65).

107. *Vuitton*, 592 F. Supp. at 747-48.

108. *Id.*

109. *Id.* at 748.

110. It is assumed that the court was referring to Devlin as well.

munity that federal officials enjoy in carrying out their duties, regardless of the source of his compensation."¹¹¹

The defendants also contended that Bainton and Devlin should be disqualified because of their purported pecuniary interests in the matter and resulting inability to be objective prosecutors.¹¹² The court rejected this argument as well, stating that if it disqualified counsel on this basis, it would have to do so in every trademark case in which a civil plaintiff's attorney seeks injunctive relief against a defendant since those cases are also financed by civil clients.¹¹³

In response to defendants' various due process arguments, the court assured them that throughout all future proceedings, they would be afforded the same procedural protections due them as other criminal defendants and that the appointments of Bainton and Devlin as special prosecutors would not give them "any letters of marque or reprisal against the defendants."¹¹⁴

This sting operation and others like it have elicited strong criticism from the defense bar. An attorney with Washington Square Legal Services who represented Klayminc's son in *Vuitton* felt these private investigations pose serious problems.¹¹⁵ He stated: "We just can't have cowboys, which is essentially what these people [such as Weinberg] are, running around and doing these kinds of things."¹¹⁶ Moreover, he claimed that Weinberg was permitted to conduct the sting operation in a way that no government employee would be permitted to do.¹¹⁷ He alleged that during one of the video-taped meetings, Weinberg advised one of the defendants to refrain from informing his lawyer about the meetings he was attending.¹¹⁸

Lawyers for defendants in a case in which a sting operation was conducted involving Polo of Warner/Lauren, Ltd., similarly argue that these criminal contempt prosecutions "set a dangerous precedent by allowing lawyers for interested parties to fill the prosecutor's role

111. *Vuitton*, 592 F. Supp. at 748.

112. *Id.* at 745-46. Defendants argued that because *Vuitton* bankrolled the litigation and Bainton's fees, it was highly likely that his behavior would be totally subjective and that he would disregard the prosecutor's duty to be objective. *Id.*

113. *Id.* at 746.

114. *Id.*

115. *Private Abscam*, *supra* note 88, at 3 (quoting James A. Cohen, an attorney with Washington Square Legal Services).

116. *Id.*

117. *Id.*

118. *Id.*

normally reserved for a government lawyer.¹¹⁹ They contended that in theory the prosecutor's job is not one for personal gain or to only seek conviction, but to insure that justice is furthered.¹²⁰ These critics, therefore, question whether counsel for private clients, when appointed special prosecutor, will strive to accomplish these goals.¹²¹

Attorneys for Vuitton and Polo responded that:

[T]hey are well aware of their special obligations to the defendants. But each also acknowledges that the news of counterfeiters facing incarceration, the only punishment that may be meaningful to them, could be invaluable to trademark owners. Counterfeiters, says Bainton, [Vuitton's attorney] 'are folks who, as a general rule find the thought of going to jail abhorrent.'¹²²

Regardless of the criticism concerning private investigation and sting operations, they appear to be beneficial tools for a company to utilize in warning counterfeiters of the probable consequences of their future illegal activity and to thwart present counterfeiting operations.

2. Evidence gathered during private investigations

Evidence gathered during private investigations often turns out to be the deciding factor during trial.¹²³ According to Pasquale Razzano, counsel for Ideal Toy Corporation, complete preparation, in-

119. *Putting Teeth In The Trademark Laws*, *supra* note 88, at 79.

120. *Id.*

121. *Id.* Again, it is important to note that it is the corporate client, and not the government, who is compensating the private attorney/special prosecutor and whose goal is not necessarily to promote justice but is more compatible with seeking severe penalties and incarceration for the trademark infringers.

122. *Id.*

123. 8 AM. JUR. TRIALS *Trademark Infringement* § 15 (1965).

With the intentional, malicious infringer, preliminary strategy is of critical importance [T]he efforts of plaintiff's counsel should be directed mainly to the important task of accumulating evidence. Where the defendant has intentionally sought to infringe, plaintiff's investigation may uncover, through unguarded statements by defendant or its sales representatives, evidence of actual consumer confusion and of malice or palming off.

It is of critical importance to plaintiff's case to collect such evidence as early as possible. Where there is consumer confusion initially, it frequently diminishes and may ultimately disappear within a few months, because purchasers tend to become educated as to the respective products. Furthermore, where defendant is making false representations in palming off its products as those of plaintiff, these representations may become more guarded and less susceptible to discovery once defendant is warned by a notice of infringement. Therefore, the best policy for plaintiff is to avoid pointless discussions with an unscrupulous defendant and collect evidence for use in litigation.

Early investigative efforts have another advantage. One of the most effective techniques available to plaintiff's counsel is to follow the filing of its complaint with a well-documented motion for a preliminary injunction. Evidence of intentional mis-

cluding collection of all essential facts, is mandatory before entering the courtroom.¹²⁴ Razzano states that this information will help in determining: "(1) the nature and magnitude of the offense; (2) the identities of [all] responsible individuals; (3) the scope of the operations; and (4) the relations between potential defendants."¹²⁵ He advises that a company should acquire all the financial data it can concerning all potential defendants and try to discover whether these individuals or entities have been involved in any other trademark infringement suits or similar actions.¹²⁶ Razzano states:

A good investigator can find out incredible amounts of information in a short time that an attorney might take months to develop by discovery. Investigators can be used to make purchases of counterfeit products for use as evidence and they can serve as unbiased witnesses. They should be sent to tradeshows to investigate what wholesalers or distributors are importing and selling. Using their experience and guile, they will be able to befriend potential defendants and gain information about companies further up the chain of distribution which might otherwise be impossible to obtain from the typical purveyor of counterfeit merchandise whose litany to lawyers and judges alike is 'I bought for cash from a peddler I never saw before whose name I don't remember.'¹²⁷

Other measures that Razzano recommends a company undertake before trial include the following: checking the records of the U.S. Patent and Trademark Office to determine whether the defendants hold any trademark registrations or patents;¹²⁸ setting up "sting" operations to penetrate the counterfeiter's operations; preparing for any potential counterclaims (e.g., antitrust violations); and cease and desist letters.¹²⁹ Razzano concludes that the perception a court receives

conduct presented in support of such a motion can be overwhelming to the defendant and may well result in immediate capitulation.

As soon as an effective program of investigation has been completed (preferably, a period not to exceed a month), plaintiff may either send a notice of infringement or file suit without warning. If a notice is sent, it should be followed within a few days with a request for a personal conference. Partial disclosure of the results of plaintiff's meticulous investigation is often very effective in such a conference, but, if early cooperation is not received from defendant, plaintiff should promptly file its complaint and should not be drawn into pointless and time-consuming negotiations.

Id. at 387-88.

124. Razzano, *supra* note 40, at 12.

125. *Id.*

126. *Id.*

127. *Id.* at 12-13. See *supra* notes 54-75 and accompanying text.

128. Razzano, *supra* note 40, at 13. However unlikely it is, some defendants may hold prior rights to the trademark and counterclaim infringement by the plaintiff. *Id.*

129. *Id.* However, many infringers are not threatened by such letters and once warned,

concerning the trademark owner's view of the case, including confidence in one's claims and reasonableness of the relief sought—all established by laying a concrete foundation of highly probative evidence—permeates product counterfeiting cases more than most other types of lawsuits.¹³⁰ He states: "[T]he law in this field is in such flux that each case is truly *sui generis* and the perceptions conveyed to the court may be more important than the actual status of the law."¹³¹ Thus, investigative techniques, whether conducted by attorneys or specialists, and by whatever means appropriate for the particular situation, are vital to the company that desires success in its effort to combat product counterfeiting.¹³²

D. Modern Technology

In conjunction with conducting private investigations, owners of trademarks and patents tackle the problem of counterfeiting by using modern technological devices to determine whether a product is genuine or not.¹³³ An optical system called "Confirm," designed by 3M Corporation, uses a label which contains a hidden logo that can only be seen under a special viewer.¹³⁴ Under the special light, if the hidden symbol does not appear, the viewer knows he has obtained a counterfeit product.¹³⁵ "Polarproof" is an optical system developed by Polaroid in which a "lenticular lens system is inserted into the label."¹³⁶ The authenticity of the item is revealed if the logo changes

will destroy the counterfeit goods and all records, if any, concerning them. Hence, cease and desist letters might be counterproductive if they result in the destruction of good evidence. Further, the letter might put the counterfeiter on notice whereby he can simply change one minor aspect of the product and make it different from the genuine product. He will thus "succeed in changing a clear infringement into a legally debatable one which can be even more dangerous to plaintiff's ultimate chance of success." *Id.*

130. *Id.* at 14.

131. *Id.*

132. See 8 AM. JUR. TRIALS *Trademark Infringement* §§ 4-5 (1965) (The authors set out an excellent checklist for a potential plaintiff in a trademark infringement suit to follow in compiling evidence for trial.); R. NORDHAUS, *supra* note 51, §§ 69-70. (The author gives an informative overview of specific measures a company should undertake during its investigation phase of litigation.); *An Interview With James Bikoff*, *supra* note 62, at 5-8. (Bikoff, President of the International Anti-Counterfeiting Coalition, outlines procedures to be followed during an investigation and the type of evidence to be acquired).

133. *An Interview With James Bikoff*, *supra* note 62, at 6.

134. *Id.*

135. *Id.*

136. *Id.* See also Kiesel, *supra* note 20, at 63. The Chicago Transit Authority spends approximately five thousand dollars each month to use the Polarproof process on its commuting passes. *Id.*

color when the product label is rotated.¹³⁷ "Fingerprinting" is another process that is often used. Light Signatures, a Los Angeles electronics company, "uses a laser to scan the fibers in a specific portion of each product; the patterns (uniquely different for each) are recorded in a computer."¹³⁸ This process enables the user to track the distribution network of a counterfeit good from the manufacturer all the way to the consumer.¹³⁹ Other systems include the use of heat and labels containing magnetic fibers that can be detected by a magnet.¹⁴⁰

These ingenious technological devices have been specifically developed in response to the increasing problem of product counterfeiting.¹⁴¹ If a patent or trademark owner institutes one of these systems into its manufacturing process, that alone is a positive step towards alleviating the problem. The use of technology, although not a cure-all, can, like private investigations, be used as a warning to counterfeiters that their activities and the products they produce can be easily detected, as well as provide the means for such detection.

E. Use of Advertising

Some companies faced with product counterfeiting employ advertising to either warn the consumer or build prestige for its product or trademark.¹⁴² Apart from prosecuting, Louis Vuitton withdrew its often copied line of plastic Louis Vuitton "Speedy" travel bags from the Italian market.¹⁴³ The purpose for withdrawal was to turn the counterfeiting problem into an "image builder"; its campaign read: "Louis Vuitton is at least as upset as you are that such a bag won't be sold anymore in Italy. But Louis Vuitton is as sure as you are that those who buy his luggage want, above all, an exclusive article."¹⁴⁴

Other companies such as Cartier, Inc. have informed the public

137. *An Interview With James Bikoff*, *supra* note 62, at 6.

138. Foltz, *supra* note 22, at 70. Ocean Pacific Sunwear uses this process. *Id.* See also Kiesel, *supra* note 20, at 63; Dobson, *Light Signatures—A Technological Approach to Combating Counterfeiting*, 2 MERCHANDISING REP. 9 (Oct. 1983). This article deals specifically with Light Signature's technique, its value to companies faced with the problem of counterfeiting, and specific companies that have used the device and their success with it.

139. *An Interview with James Bikoff*, *supra* note 62, at 6.

140. *Id.*

141. *Id.*

142. Kaikati and La Grace, *supra* note 43, at 58.

143. *Id.*

144. *Id.* No other company has ever gone this far, probably because of the drastic effect of a withdrawal on all phases of the corporation's operations.

to beware of counterfeits and at what stores they can purchase genuine Cartier products.¹⁴⁵ Another approach, taken by Harley-Davidson and Dr. Scholl's, uses flattery in advertising campaigns to make light of the problem.¹⁴⁶

F. *International Anti-Counterfeiting Coalition*

Finally, along with the many strategies a company can employ to combat product counterfeiting, it is useful to be a part of trade associations or coalitions to receive and exchange valuable information and to participate in a supportive group that is striving to achieve the same goals. One such group is the International Anti-Counterfeiting Coalition (IACC). According to IACC President James Bikoff, the Coalition has three major goals:

The first is to seek both domestic and international legislation and regulations, and their enforcement in order to curtail counterfeiting. Secondly, in the area of information exchange, it serves as a facility for members to exchange information on their experiences and to help each other fight the problem. The third goal is education and representation of the interests of the consumer. We try to educate the trade and consuming public to make them aware of the economic and safety risks associated with commercial counterfeiting with the aim of helping them to avoid the unintentional purchase of counterfeit products.¹⁴⁷

The Coalition's membership includes The Coca Cola Co., Levi Strauss & Co., Cartier, Inc., Atari, Inc., Polaroid Corp., IBM Corp., Black and Decker Manufacturing Co., Procter & Gamble Co., Samsonite Corp., and Walt Disney Productions.¹⁴⁸

Because litigation is not always effective in abrogating the problem,¹⁴⁹ one of the chief priorities of the Coalition is to lobby for new legislation that will stiffen civil and criminal penalties and, in turn, provide stronger incentives to refrain from counterfeiting.¹⁵⁰ Further,

145. *Id.* See also *How To Avoid The Dangers Of Counterfeit Auto Parts*, U.S. NEWS & WORLD REP., Mar. 17, 1986, at 17.

146. Kaikati and La Grace, *supra* note 43, at 58. The Harley-Davidson Division of AMF Corp. in advertisements promoting one of its motorcycles proclaims: "Harley-Davidson gives the competition yet another chance to imitate." *Id.* Dr. Scholl's advertisements for its sandals read: "Once you climb to a Dr. Scholl's, you will never sink to an imitation." *Id.*

147. *An Interview With James Bikoff*, *supra* note 62, at 4.

148. Trigoboff, *Corporate Coalition Wages War On Counterfeiters*, Legal Times, Feb. 6, 1984, at 2, col. 1.

149. *Id.* at col. 3.

150. *Id.*

the Coalition encourages its members to put pressure on the retailer who is known to sell counterfeit goods.¹⁵¹ According to Norman Adise of JCA Corp., the retailer is the weak link in the counterfeiting chain.¹⁵² Adise's "nice guy" approach includes informing the retailer that his merchandise is counterfeit and permitting him to cooperate and surrender what he has.¹⁵³ Adise states: "Strip the retailer of his traditional defense, the claim of innocence . . . and he stands fully available to penalties. Threat of imposition can produce much; including disclosure of the chain and identification of the next higher level, the distributor."¹⁵⁴

V. CONCLUSION

Foreign product counterfeiting is an enormous headache for many trademark owners who have expended a great deal of time, money, and effort to create and market a unique product and then have to share the benefits of their hard labor with elusive and unscrupulous counterfeiters. Furthermore, counterfeiting would not be so successful if there were not a market for cheap, imitation goods. Bikoff claims that "[p]eople are hungry for bargains and are much more tempted to buy them at times, like now, when money is tight."¹⁵⁵ And Adise concedes:

a 'grudging admiration' for the counterfeiter, who is, he [admits], 'an intelligent being and has the highest admiration for you and your company. Why not? He makes his living . . . a damned good one at that . . . from your brand, product design, your advertising and reputation. *Whether he has a similar respect for your anticounterfeiting program pretty much depends on the extent and vigor of your efforts to impose hardship upon him personally.*'¹⁵⁶

Companies are attacking the counterfeiters on three levels. First, they are going after counterfeiters directly through court action. Second, they are lobbying for more stringent laws and enforcement. Finally, they have chosen to use their own private resources to curtail product counterfeiting as opposed to awaiting successful action by the government. As more companies become involved, and the network within the private sector gains strength, it should become harder for

151. *Id.* at col. 4.

152. *Id.*

153. *Id.*

154. *Id.*

155. Kiesel, *supra* note 20, at 63.

156. Trigoboff, *supra* note 148, at 2, col. 4 (emphasis added).

counterfeiters to operate without detection and reprisal. The ultimate winners in this private battle against counterfeiters are not only the manufacturers, but consumers as well.

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