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Contributory Infringement and Dupe Influencers

BY [ALBERT AINI](#)/ ON FEBRUARY 21, 2022



"No Fakes – counterfeiting is a crime" by Oleg Kr from *Flickr*

Influencers get paid a lot to advertise products on their platforms.¹ Companies realize an opportunity to advertise through influencers to reach their impressionable followers. Dupe influencers promote counterfeit goods by sharing links and or reviewing them.² Their marketing is effective—a report created by the United Kingdom Intellectual Property Office, which surveyed 1,000 females, indicated that approximately 17% purchased counterfeit goods in the previous year.³ Around 78% of the females who purchased counterfeit goods revealed that they were influenced by social media.⁴ Interestingly, 33% of the survey participants

believed that it was the manufacturers' fault for overpricing their products.⁵ While the people creating the counterfeits are definitely to blame, the dupe influencers might be at fault too.

Contributory infringement is liability for trademark infringement that is extended to those who "knowingly encourage or facilitate illegal and tortious activity."⁶ The doctrine is mostly judge based, and there is limited case law surrounding this issue.⁷ However, to have contributory infringement, "the defendant and the infringer [need to] have an apparent or actual partnership, [and] have authority to bind one another in transactions with third parties or exercise joint ownership or control over the infringing product."⁸ Additionally, the contributory infringer needs to have "(1) 'intentionally induced' the primary infringer to infringe, or (2) continued to supply an infringing product to an infringer with knowledge that the infringer is mislabeling the particular product supplied."⁹ The second prong of the test is implicated with the dupe influencers as many of them are actively supplying a product knowing it is infringement.¹⁰ However, an actual partnership might not exist. Although there is not much case law on the issue, it is clear that direct infringement is needed before a finding of contributory infringement.¹¹ Selling counterfeit products creates a risk for contributory infringement liability for dupe influencers.

Among the illegality of selling counterfeit goods, the American Apparel & Footwear Association (AAFA) released a report to educate influencers and consumers, among others.¹² The AAFA lists some of the risks of selling counterfeit goods, which include health risks, pollution, aiding criminal schemes, and job loss.¹³ The AAFA also warns that "facilitating the sale of unauthorized and counterfeit goods" is illegal under 18 U.S. Code § 2320.¹⁴ However, that law does not directly cover the promotion of counterfeit goods by a third party.

Tik Tok has played a large role in the rise of dupe influencers.¹⁵ There are many accounts run by dupe influencers creating content like unboxing videos or tutorial videos.¹⁶ While Amazon sued and settled with influencers involved in a scheme of selling counterfeits on Tik Tok and Instagram, litigation is generally scarce on this topic.¹⁷ Moreover, the defendants in that lawsuit were actively engaged in a scheme to sell the goods, which may be different from a user promoting a sale to their followers without taking profit from the sale itself.¹⁸

Some creators are young and possibly unaware that they are engaging in illegal conduct through their distribution of information online.¹⁹ However, influencers likely know what they are doing is wrongful but are uninformed of the legal consequences that stem from promoting these transactions to the public. The AAFA recommends that dupe influencers improve their disclaimers before showing any counterfeit goods on social media.²⁰ In general, dupe influencers should stop showing any illegal purchases online. While, with a disclaimer, their actions may not amount to contributory infringement or facilitation in the sale of counterfeit goods, promoting any illegal activity online is generally a bad idea.

AAFA's report offers five recommendations for this issue: (1) platforms should create policies that specify promoting counterfeits is wrongful; (2) platforms should block certain hashtags (like #designerdupes); (3) platforms should terminate accounts of known dupe influencers; (4) influencers should make it clear that they don't support purchasing counterfeit products; and (5) consumer awareness.²¹

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2. Dupe Influencers: The Concerning Trend of Promoting Counterfeit Apparel, Footwear, and Accessories on Social Media, AAFA, https://www.aafaglobal.org/AAFA/Solutions_Pages/Dupe_Influencers_The_Concerning_Trend_of_Promoting_Counterfeits.aspx [https://perma.cc/4D2S-L6ES] (last visited Feb. 7, 2022).
3. Influencers Are Driving Sales of Counterfeits, Per UKIPO Survey, TFL (Jan. 5, 2022), <https://www.thefashionlaw.com/influencers-are-an-important-channel-for-counterfeits-per-ukipo-study/> [https://perma.cc/U3F2-UM2N].
4. Id.
5. Id.
6. McCarthy on Trademarks and Unfair Competition § 25:17 (5th ed. 2019).
7. Id.
8. Perfect 10, Inc. v. Visa Int'l Serv. Ass'n, 494 F.3d 788, 807 (9th Cir.2007) (internal quotation marks omitted).
9. Id. (quoting Inwood Labs., Inc. v. Ives Labs., Inc., 456 U.S. 844, 855 (1982)).
10. Christina Mitropoulos, Op-Ed: A Growing Problem on Social Media? The Rise of the "Dupe Influencer", TFL (May 11, 2021), <https://www.thefashionlaw.com/op-ed-a-growing-problem-on-social-media-the-rise-of-the-dupe-influencer/>.
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13. Id.
14. 18 U.S. Code § 2320.
15. Tim Lince, 'Dupe Culture' Grows on TikTok; Why This Helps Counterfeiters and Harms Brands, WTR (Nov. 5, 2020), <https://www.worldtrademarkreview.com/anti->

counterfeiting/dupe-culture-grows-tiktok-why-helps-counterfeiters-and-harms-brands [https://perma.cc/4Q22-6AJS] (stating it is possible Tik Tok's younger audience plays a role in support of the increasing number of dupe influencer accounts).

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17. Annie Palmer, Amazon Settles With Influencers Who Allegedly Peddled Counterfeits on Instagram and TikTok, CNBC (Sep. 30, 2021), <http://www.cnbc.com/2021/09/30/amazon-settles-with-influencers-who-allegedly-ran-counterfeit-scheme.html>; Christina Mitropoulos, Op-Ed: A Growing Problem on Social Media? The Rise of the "Dupe Influencer", TFL (May 11, 2021), <https://www.thefashionlaw.com/op-ed-a-growing-problem-on-social-media-the-rise-of-the-dupe-influencer/>.
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20. Id.
21. Id.