



Author:  
**Lynn Lazaro**  
lynn.lazaro@bgl.kochhar.ocm

# COVID-19 : Counterfeit Products and Fake Goods - Indian Law Perspective

## Introduction

As misinformation on COVID-19 continues to spread, there is an equally serious threat being dispersed through back trade channels - that of counterfeit goods either for sale at exorbitant prices or fake goods proclaiming to cure or treat the virus. In 2018, Forbes announced that counterfeiting was the largest criminal enterprise in the world<sup>1</sup> and the sales of counterfeit and pirated goods totals \$1.7 trillion per year, which is more than drugs and human trafficking. This was before we were hit by COVID-19.

As the demand for cleansing supplies, hand sanitizers and face masks increase, it has also opened up a black market where bad actors are exploiting the situation to their benefit. The lockdowns have pushed people to make all their purchases through e-commerce sites and this is allowing counterfeiters to prey on the vulnerability of the purchasers. Sellers have increasingly claimed that their face masks, sanitizers and cleaning agents, have the capability to kill the virus, when these products are simply ordinary goods used for the routine prevention of germs. In order to gain repute, manufacturers and distributors deceptively claim to be affiliated with the World Health Organisation (WHO) and other such Centres. Amazon, in particular, has specifically informed sellers that they "prohibit the listing or sale of products that are marketed as unapproved or unregistered medical devices."<sup>2</sup> However, it has been to no avail and Amazon has been tasked with the onus to eliminate such sellers from the site. As of March 4th, 2020, Amazon reported that they removed more than one million counterfeit products with bogus corona virus claims and cures.<sup>3</sup>

Even more terrifying, is that Authorities have seized fake testing kits and antiviral medications that could leave the user with a false sense of security and facilitate the spread of the virus. Interpol member

countries have attempted to raise awareness and implored the general public to the dangers of purchasing drugs from unregulated online sources.<sup>4</sup> In one of many instances, an unlicensed company in Noida, was ready to ship spurious hand sanitizers and inferior quality face masks before they were shut down by the Authorities and over 10,000 of such sanitizer bottles were seized.<sup>5</sup>

The conglomerate 3M issued a statement that they were receiving "increasing reports of fraudulent and counterfeiting activities involving 3M products," and that they "strongly condemn any unethical actions taken to exploit the global pandemic." Essentially, counterfeiters are producing inferior quality masks, marking the 3M label on them and passing them off as genuine 3M masks.

## The Regulatory Regime in India

In India, we do not have specific laws relating to piracy and counterfeiting of goods. Under trademark laws in India, the rights holder or owner of the brand has rights under the law of "passing off". Passing off refers to the production of goods under the same or similar brand attempting to cash in on the goodwill of the true owner of the brand. India is also a member of TRIPS and under the TRIPS Agreement 'counterfeit trademark goods' are goods that bear, without authorisation, a trademark that is identical to, or which cannot be distinguished in its essential aspects from, a registered trademark.<sup>6</sup> Article 61 of TRIPS provides that member states need to provide for criminal procedures and penalties to be applied in cases of willful trademark counterfeiting or copyright piracy on a commercial scale.<sup>7</sup>

The Indian Customs Act 1962, read with the IP Rights (Imported Goods) Enforcement Rules 2007 allows trademark, designs, brand owners to record their rights with Indian Customs Authorities for the seizure of

imported counterfeit goods. Under the Customs Act, counterfeit goods are per se prohibited goods so the Authority will notify the rights holder of any imported goods and if found to be fake, the same will be destroyed in front of the rights holder. In some instances, the Authority will also notify the rights holder even if they haven't registered with the Authority. Counterfeit and piracy in India are cognizable offences, that is, law enforcement has search and seizure rights. In addition, criminal liabilities may be attached to offences under the Trademarks Act, Copyright Act and Geographical Indications Act.

Counterfeiters of spurious drugs in India are also accountable under the Drugs and Cosmetics Act 1940 (DCA). Spurious drugs here are defined as those that "deliberately and fraudulently mislabeled and manufactured to mislead patients by concealing their identity, source of manufacture and its content to profiteer on the popularity of fast-moving branded or generic medicines".<sup>8</sup> Substandard drugs refer to drugs that are deemed to be Not of Standard Quality (NSQ) or substandard if it fails to comply with the standards specified under the DCA. Under the DCA, offences are cognizable and violators of the Act may be processed through the Indian Code of Criminal Procedure, 1973. Law enforcement is permitted under the DCA<sup>9</sup> to inspect, seize and confiscate any spurious, adulterated and misbranded drugs.

Another interesting element is the definition of "drugs" under the DCA. The term 'drugs' has been very broadly defined under the act. It includes "*all medicines for internal or external use of human beings or animals and all substances intended to be used for or in the diagnosis, treatment, mitigation or prevention of any disease or disorder in human beings or animals...and substances intended to be used for the destruction of vermin or insects which cause disease in human beings or animals as*

<sup>1</sup>Meet The Man Fighting America's Trade War Against Chinese Counterfeits (It's Not Trump)", Forbes, March 29, 2018

<sup>2</sup><https://www.cnbc.com/2020/02/20/amazon-warns-sellers-on-listings-that-make-false-coronavirus-claims.html>

<sup>3</sup><https://www.forbes.com/sites/tedknutson/2020/03/04/marketplace-contagion-amazon-has-already-removed-a-million-fake-products-related-to-coronavirus/#6ed66ffa418c>

<sup>4</sup><https://www.interpol.int/en/News-and-Events/News/2020/Global-operation-sees-a-rise-in-fake-medical-products-related-to-COVID-19>

<sup>5</sup><https://www.indiatoday.in/mail-today/story/coronavirus-beware-fake-masks-sprays-going-viral-1655647-2020-03-15>

<sup>6</sup>Article 51, TRIPS Agreement - <http://www.cptech.org/ip/texts/trips/51.html>

<sup>7</sup>[https://www.wto.org/english/docs\\_e/legal\\_e/27-trips\\_05\\_e.htm](https://www.wto.org/english/docs_e/legal_e/27-trips_05_e.htm)

<sup>8</sup>Drugs and Cosmetics Act (1940), Section 17B, subsections (a) through (e)19, as amended by the Drugs and Cosmetics (Amendment) Act, 1982

<sup>9</sup>Drugs and Cosmetics Act (1940), second schedule, Section 5 (a) and (b), Chapter V.

---

may be specified from time to time by the Central Government by notification in the Official Gazette.<sup>10</sup> Therefore, this definition encompasses all quintessential drugs and medicines but also includes "any substance" that is intended to mitigate or treat any disease in human beings or animals. The definition further gives the central government the right to issue notifications to include any such substance within the definition of "drug" under the DCA and bring it within the scope of the DCA and its rules. For example, by notifications (S.O. 1335 dated 02.06.1961 and X.11013/2/72-D dated 09.07.1975) the Government of India stated that if the composition of the product possesses disinfectant properties or claim to possess disinfectant properties, these

products would be considered within the definition of "drugs" under the DCA. Thereby, including all disinfectants for fabric, surfaces, air and water, sterilants, pesticides, etc within the scope of the DCA. In addition, in light of the Covid-19 situation, the Government issued a recent notification that all medical devices will also be treated as "drugs" and will be regulated under the DCA<sup>11</sup> from April 1, 2020.

#### Conclusion

We can only imagine the exhausting task of the law enforcement agencies to seize and prosecute such counterfeiters, in addition to maintaining the peace and security in this time of crisis. Therefore, we can do our part by doing our due diligence and purchasing

products only by regulated sources, and by reporting any counterfeit product that we may come across. Online sites have their own procedures for reporting fake goods. Amazon, for example, has an Intellectual Property Right Infringement Report online form that can be accessed on their portal. Rights holders should register with the Customs Authorities and for any counterfeit product or spurious drugs we should contact the nearest law enforcement authority to initiate due process i.e. search and seizure remedies.

---

Lynn Lazaro is a Partner in the Intellectual Property law practice at Kochhar & Co.

---

<sup>10</sup>Sections 3(b)(i), 3(b)(ii) of the DCA.

<sup>11</sup><https://www.businesstoday.in/current/economy-politics/medical-devices-to-be-treated-as-drugs-from-april-1/story/399773.html>