

## How Companies are Responding to Unauthorized Online Sales, Product Diversion

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Many companies tell authorized retailers or distributors that they will exclusively sell their products through them. Such a company might also have a written policy against product diversion and unauthorized online sales. This looks good for purposes of marketing and trying to convince prospective retailers and distributors to distribute their products.

However, what companies say and what they actually do can vary — ranging anywhere from legitimately enforcing their anti-diversion policies (e.g. implementing a full-fled enforcement system of monitoring, investigating, and legal enforcement to shut down anyone who sells) to doing nothing at all.

Below is an overview of four different approaches that we have seen companies adopt in response to unauthorized sales and product diversion:

#### *Inaction*

Some companies simply do nothing to stop unauthorized sales.

They might communicate to their authorized distributors that they disapprove of product diversion and that they will enforce their policies. But they will never actually enforce their so-called policies.

Such companies might even have an anti-diversion policy displayed on their webpage. Yet they will do nothing about the hundreds of their products being sold on eBay; the purported commitment to stopping unauthorized sales might merely be a means to persuade distributors to sell their products.

Worse, some of these companies might even knowingly provide their products to online retailers in order to meet their numbers.

#### *Aiming to stop unlawful use of infringing images*

Some companies will hire a technology company to handle its monitoring. This approach involves locating various online sellers and then trying to get the products removed by requesting that the websites remove the products.

More specifically, these technology companies will locate product listings that unlawfully use the other companies' copyrighted images or trademarks, which they can use as a basis for demanding that the third-party websites remove the product listings.

There are several issues with this approach, however.

For example, these efforts often only result in the potential removal of the select products for which the unauthorized sellers are unlawfully using their copyrights and trademarks. In other words, these companies cannot remove the vast majority of the products (i.e. the products not infringing on their intellectual property).

Additionally, this approach typically results in, at best, an eBay communicating to the sellers that they cannot sell the products with the others' images. The sellers, thus, can simply change their listings to not include the images.

Accordingly, this can turn into a "Whac-a-Mole" situation in which companies might get certain product listings to come down, only to see them pop up again.

### *Pursuing a limited number of sellers*

Some companies will have a law firm sue a select number of unauthorized sellers to make an example out of them, perhaps as few as one or two.

In short, without expending significant money, this will not be effective if the sellers are "high volume" sellers.

### *Establishing a full scale enforcement system*

Some companies set up their business such that they can easily bring legal claims against unauthorized sellers.

For example, by establishing certain quality controls or making it difficult to sell genuine versions of the products, it will be easy for the companies to have legal claims against the unauthorized sellers.

As part of this process, it is helpful for these companies to utilize certain enforcement systems to monitor for unauthorized sales, identify the bad actors, and then take the necessary legal action against the sellers to stop the infringing activity.

Once the unauthorized sellers become aware of the potential liability—such as upon receipt of a cease and desist letter and potentially a copy of a draft complaint—they will generally cease diverting or otherwise selling the products without authorization.

### *Takeaways*

It is up to each company to decide what to do about the unauthorized selling of its products. Such a decision comes down to a number of factors, including a company's budget and the amount of products being diverted outside the authorized distribution channels.

For those companies that can afford it (and are seeing a high volume of its products being sold online, without authorization), the fourth category listed above is clearly the most effective approach

To be successful in stopping a high volume of unauthorized sales, a company cannot go part way; it must be both proactive and reactive, taking preventative up front, monitoring for unauthorized sales, identifying unauthorized sales, and going after those sellers and getting the products removed.

*For more information, contact Vorys' Illegal Online Seller Enforcement team at 877.545.6905. Read more about the practice at [services-648.html](#).*