



FLEA MARKET OPERATOR HIT FOR OVER \$5 MILLION FOR PERMITTING SALE OF COUNTERFEIT PRODUCTS

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The Sixth Circuit, in a case of first impression, held that a flea market operator can be contributorily liable for counterfeiting carried on by vendors renting stalls at his market. The case illustrates that contributory infringement can be a valuable tool against counterfeiting when the primary infringers are small, numerous, anonymous or (individually) commercially insignificant.

In *Coach, Inc. v. Goodfellow*, 2013 WL 2364091 (6th Cir. May 31, 2013), the appellate court affirmed a jury award of over \$5 million dollars in damages, and a grant of \$186,666.61 in attorneys' fees against Goodfellow, the operator of a flea market at which counterfeit goods were sold. The district court had granted summary judgment on liability, which Goodfellow failed to contest. While Goodfellow technically had forfeited his ability to appeal the liability ruling, the court nonetheless used its discretion to render an opinion on liability.

Goodfellow received a letter from Coach in January, 2010, from the district attorney in March, and was served with the complaint in June. Police raided the market in April, March and June. In response, Goodfellow distributed pamphlets telling vendors not to counterfeit, and held a voluntary meeting with some vendors, many of whom did not speak English. He also posted signs saying "counterfeit is prohibit," but these were meant to address counterfeit currency. While he claimed to have ejected 16 vendors over a one year period, the court held that "this effort, if believed, is hardly compelling evidence of a reasonable response...." Goodfellow claimed to believe other counterfeit goods were genuine, but did not check. He did not train his employees to recognize counterfeits. Vendors did not sign any agreements that they would not sell counterfeit goods.

The court found that Goodfellow's remedial measures fell short. It approved the district court's conclusion that Goodfellow had engaged in "ostrich-like practices." According to the court, Goodfellow "continued to supply flea market resources to vendors with knowledge of and willful blindness toward ongoing infringing activities, thereby facilitating continued infringing activity." This supported the court's finding that Goodfellow was contributorily liable.



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Goodfellow equated his anti-counterfeiting efforts with those of eBay, which the court found acceptable in *Tiffany (NJ) Inc. v. eBay, Inc.*, 600 F.3d 93 (2d Cir. 2010). There Tiffany sued eBay for contributory liability for sale of counterfeit Tiffany jewelry on the eBay website. Perhaps the most important distinction between the flea market bricks-and-mortar contributory infringement standard and that imposed on eBay is the speed with which items are listed and the sheer number of them. The court in *Tiffany* held that eBay's general knowledge that counterfeiting was occurring on its site did not create liability. Specific knowledge (which Goodfellow had, but eBay did not) was required. It didn't hurt that eBay spent millions on anti-counterfeiting and had a sophisticated program for dealing with it.

Courts impose contributory liability on those who know about and facilitate counterfeiting, as well as those who would simply "stick their heads in the sand," refusing to recognize or police it. Increasingly, liability applies not only to those who sell goods, but also those that offer services. Manufacturers and licensors suffering from numerous small scale counterfeits would do well to add actions for contributory counterfeiting and trademark infringement to their arsenals.

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