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**PRADA BAG OR FRAUD-A BAG: THE IMPACTS OF KNOCKOFFS
AND COUNTERFEITS ON THE FASHION INDUSTRY**

ABSTRACT

Fashion is both inherently utilitarian and ultra-creative at the same time and exists in a gray area in terms of legal protection. Some aspects of fashion are protectable by various aspects of intellectual property. For example, trademark law can protect the logo on a bag. However, fashion as a whole does not fit squarely in any intellectual property protection available in the United States, which allows knockoffs to be legally allowed. This Note provides a comprehensive analysis of the intellectual property protections available in the United States to certain aspects of fashion and what types of copying and inspiration-taking expands the world of fashion as opposed to hurting fashion designers and their ability to create. This Note argues that knockoffs promote the fashion industry while counterfeits hurt fashion overall by providing an overview of the types of intellectual property protection available in the United States and how they apply to different elements of fashion design.

INTRODUCTION

In the movie *The Devil Wears Prada*, there is an iconic scene between Miranda Priestly, the fashion mogul and editor of the fictitious *Runway* fashion magazine, and her intern, Andy Sachs, discussing the impact fashion has on the economy and popular culture. Priestly lectures Andy,

You go to your closet and you select out, oh I don't know, that lumpy blue sweater for instance, because you are trying to tell the world that you take yourself too seriously to care about what you put on your back. But what you don't know is that that sweater is not just blue, it's not turquoise, it's not lapis, it's actually cerulean. You're also blindly unaware of the fact that in 2002, Oscar de la Renta did a collection of cerulean gowns. And then I think it was Yves St. Laurent, wasn't it, who showed cerulean military jackets? And then cerulean quickly showed up in the collections of eight different designers. Then it filtered down through the department stores and then trickled on down into some tragic Casual Corner where you, no doubt, fished it out of some clearance bin. However, that blue represents millions of dollars and countless jobs, and so it's sort of comical how you think that you've made a choice that exempts you from the fashion industry when, in fact, you're wearing the sweater that was selected for you by the people in this room.¹

For some people, clothing is purely utilitarian, a means for keeping warm in the wintertime or for wicking sweat in the summertime; for others, it's a form of artistic expression.² The fashion industry creates trends based on economics, politics, climate considerations, and even current events like the COVID-19 pandemic.³ Trends are not chosen by a committee, nor the accredited musings of god-like designers, as suggested in the aforementioned *The Devil Wears Prada* "cerulean sweater" scene. Instead, trends evolve through an undirected process of copying, referencing, and reworking, coupled with communication with key retailers and commentary in the press.⁴ These trends get introduced on the fashion show catwalk, rise with trendsetters, peak when they have reached all consumers, decline when the market is oversaturated, and reach obsolescence when they are no longer fashionable.⁵

1. THE DEVIL WEARS PRADA (20th Century Fox 2006).

2. Tiffany din Fagel Tse, *Coco Way Before Chanel: Protecting Independent Fashion Designers' Intellectual Property Against Fast-Fashion Retailers*, 24 CATH. U. J.L. & TECH. 401, 424 (2015).

3. *How Do Fashion Trends Start*, GLAM OBSERVER (Dec. 13, 2022), <https://glamobserver.com/how-do-fashion-trends-start/> [https://perma.cc/2GQF-GZQF].

4. KAL RAUSTIALA & CHRISTOPHER SPRIGMAN, THE KNOCKOFF ECONOMY: HOW IMITATION SPARKS INNOVATION 47-49 (Oxford Univ. Press 2012).

5. GLAM OBSERVER, *supra* note 3.

As of 2022, fashion—encompassing designing, manufacturing, and consuming—is a \$1.7 trillion worldwide enterprise.⁶ In the United States, the fashion industry is valued at approximately \$343.70 billion.⁷ Out of the 3.4 billion people in the global workforce, approximately 430 million are employed in fashion accessories, shoes, clothing, and textile production.⁸ This means that about 12.6% percent of workers around the globe are involved in the manufacturing of the world’s clothes, shoes and accessories.⁹ Consumers buy over eighty billion new items of clothing every year.¹⁰ However, the measure of success for the industry focuses on the monetary gains for all—not just on independent designers and the individual impacts of knockoffs and counterfeits.¹¹ In fact, the success of the industry would not be as great without the proliferation of the copycat culture.¹²

Despite the overwhelming importance of the fashion industry, intellectual property laws of the United States afford fewer protections to the creations of fashion designers than they do for other inventors and creators.¹³ That said, looser protections in fashion have made budget friendly knockoffs of high-end items possible, creating the increasingly popular fast fashion subindustry.¹⁴ Prior to the industrial revolution, clothing was made by hand, and the market for “ready-to-wear” apparel—which today is essentially all clothes purchased in the United States—was very small.¹⁵ With the exception of the small market devoted to couture and custom suits in menswear, over the course of the twentieth century, handmade clothing essentially died out in North America.¹⁶ The rise of standardized sizing of ready-to-wear clothing and shoes made by mass production and fast fashion meant cheaper apparel.¹⁷

6. Sky Ariella, *28 Dazzling Fashion Industry Statistics [2023]: How Much is the Fashion Industry Worth*, ZIPPPIA (June 15, 2023), <https://www.zippia.com/advice/fashion-industry-statistics/> [<https://perma.cc/ZBP8-JH5L>].

7. *Id.*

8. *Id.*

9. *Id.*

10. *Global Fashion Industry Statistics*, FASHIONUNITED, <https://fashionunited.com/global-fashion-industry-statistics> [<https://perma.cc/6YJA-VC5E>].

11. *Why Knockoffs are Good for the Fashion Industry*, NAT’L PUB. RADIO (Sept. 10, 2012), <https://www.npr.org/2012/09/10/160746195/why-knockoffs-are-good-for-the-fashion-industry> [<https://perma.cc/R63V-9SAB>].

12. *Id.*

13. Leigh Willey, *Fashion Design & Intellectual Property*, 55 N.H. BAR J. 6, 6 (2014); see also Anne Theodore Briggs, *Hung Out to Dry: Clothing Design Protection Pitfalls in United States Law*, 24 HASTINGS COMM. & ENT. L.J. 169, 174, 176, 179 (2002).

14. Coco Kahn, *Are Knock-Off Fashion ‘Dupes’ Unethical? We Ask an Expert*, THE GUARDIAN (May 20, 2022), <https://www.theguardian.com/lifeandstyle/2022/may/20/are-knock-off-fashion-dupes-unethical-we-ask-an-expert> [<https://perma.cc/2AHE-RDTX>].

15. RAUSTIALA & SPRIGMAN, *supra* note 4, at 22.

16. *Id.*

17. *Id.* at 23.

Fast fashion is defined as cheap, trendy clothing that samples ideas from the fashion show catwalk or celebrity culture and turns them into garments sold in everyday stores at breakneck speed to meet consumer demand.¹⁸ This whole fast fashion process occurs within weeks of the original designer's runway show.¹⁹ Nowadays, the time between the initial creation by the designer to the knockoff's production has decreased significantly.²⁰ By creating daily fashion content featuring hauls, try-ons, and sponsored content, influencers on platforms like Instagram and TikTok have played a huge role in the growth of fast fashion, especially in retailers like Shein, Fashion Nova, Zaful, Boohoo, Zara, and Amazon.²¹ A Bottega Veneta Mini Jodie bag is sold on their website for \$2,650, but a knockoff can be found on Amazon for under twenty dollars with free expedited shipping.²² Someone that wants the status symbol of buying a Bottega bag for \$2,650 will still buy the authentic bag; luxury brands stay relevant and in high-demand by being exquisite, expensive, and exclusive.²³ This is just one example that illustrates the benefits of fast fashion for the average consumer: simplicity, efficacy, convenience, affordability, and accessibility.²⁴

In this note, I will discuss the protections fashion designers currently have and explain how knockoffs, unlike counterfeits, promote and further the fashion industry and the economy. It is important for consumers to understand the difference because counterfeits harm the industry, while knockoffs are the natural progression of fashion designs in the marketplace. In Part I, I discuss the intellectual property protections available in the industry. Part II discusses knockoffs. Part III explores counterfeits and compares how counterfeits are

18. Solene Rauturier, *What Is Fast Fashion and Why Is It So Bad?*, GOOD ON YOU (Aug. 7, 2023), <https://goodonyou.eco/what-is-fast-fashion/> [https://perma.cc/95XG-H5KS].

19. *Id.*

20. India Brown, *The Promotion of Fast Fashion from Influencers is Problematic and Unsustainable*, DAILY UTAH CHRON. (June 18, 2021), <https://dailyutahchronicle.com/2021/06/18/the-promotion-of-fast-fashion-from-influencers-is-problematic-and-unsustainable/> [https://perma.cc/9NJ7-G53M].

21. *Id.*

22. *Mini Jodie*, BOTTEGA VENETA, https://www.bottegaveneta.com/en-us/mini-jodie-parakeet-809940571.html?gclid=CjwKCAiA5Y6eBhAbEiwA_2ZWlcvRDtHIU4EaeSP5Bo_Jk2ZZtdciQLIHVUzJSqB-8oB9nXZr3tBoRoC3hkQAvD_BwE&gclsrc=aw.ds [https://perma.cc/U Y3V-28CF]; *Woven Handbag for Women, Handbag Clutch Purse Soft Leather Mini Ladies Hobo Bag Zipper Closure*, AMAZON, https://www.amazon.com/Handbag-Clutch-Leather-Ladies-Closure/dp/B0CLRP3FHZ/ref=sr_1_2?crd=FDFOPF8MUHQJ&keywords=Knot%2Bwoven%2BBags&qid=1703089953&prefix=knot%2Bwoven%2BBags%2CCaps%2C129&sr=8-2&th=1 [https://perma.cc/M946-R395].

23. Joseph DeAcetis, *The Perfect Balance: How Luxury Brands Can Maintain Exclusivity and Still Be Relatable Online*, FORBES (Oct. 24, 2020), <https://www.forbes.com/sites/josephdeacetis/2020/10/24/the-perfect-balance-how-luxury-brands-can-maintain-exclusivity-and-still-be-relatable-online/?sh=3e17faea7e44> [https://perma.cc/NX75-YMWP].

24. Alex Assoune, *Top 10 Reasons Why Fast Fashion is so Popular*, PANAPRIUM, <https://www.panaprium.com/blogs/i/fast-fashion-popular> [https://perma.cc/7529-YMRJ].

damaging while knockoffs occur naturally. This note concludes that knockoffs are a natural progression of fashion reaching a large population and ultimately benefit the fashion industry, while counterfeits are damaging to both fashion as a whole and individual designers.

I. COMMON INTELLECTUAL PROPERTY PROTECTIONS OF FASHION

This section discusses current copyright, trademark, patent, and trade secret protections available in the fashion industry.

A. *Copyrights In Fashion*

Copyrights protect “original works of authorship fixed in any tangible medium of expression.”²⁵ Works are original when they are independently created by a human author with a “spark” or a “modicum” of creativity.²⁶ The author of the work has exclusive rights to reproduce, distribute, perform, display, or create derivations of the copyrighted work,²⁷ and the copyright protection kicks in as soon as the author fixes it in a tangible medium.²⁸ However, copyright does not protect useful articles—that is, any utilitarian function of the work, such as clothing, which is used to protect the wearer’s skin and wick sweat, among other uses.²⁹

Clothing designs, including the shape, style, cut, and dimensions of the garment, are not protected by copyright because they are dictated by their function.³⁰ For example, to have copyright ownership on a cap sleeve would give the copyright owner a monopoly over a functional part of a shirt—to cover the shoulder of the wearer. One hundred years ago, the U.S. Copyright Office decided that fashion is functional, no matter how elaborate.³¹ There are

25. 17 U.S.C. § 102(a).

26. *What is Copyright?*, U.S. COPYRIGHT OFF., <https://www.copyright.gov/what-is-copyright/> [<https://perma.cc/XE6S-LG66>].

27. 17 U.S.C. § 106(1)-(6).

28. U.S. COPYRIGHT OFF., *supra* note 26. A work is fixed when it is captured in a sufficiently permanent medium. *Id.*

29. *Useful Article*, U.S. COPYRIGHT OFF., <https://copyright.gov/register/va-useful.html> [<https://perma.cc/WLF7-5FLC>]; *see also* 17 U.S.C. § 101.

30. Anne Kearns, *Copyright in the Fashion Business? It All Depends...*, MAKER’S ROW (Feb. 20, 2018), <https://makersrow.com/blog/2018/02/copyrights-in-the-fashion-business-it-all-depends/> [<https://perma.cc/W9CJ-DZZJ>]; *see also* *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 580 U.S. 405, 409 (2017) (“[A] feature incorporated into the design of a useful article is eligible for copyright protection only if the feature (1) can be perceived as a two- or three-dimensional work of art separate from the useful article and (2) would qualify as a protectable pictorial, graphic, or sculptural work—either on its own or fixed in some other tangible medium of expression—if it were imagined separately from the useful article into which it is incorporated.”).

31. Tyler McCall, *Copyright, Trademark, Patent: Your Go-To Primer for Fashion Intellectual Property Law*, FASHIONISTA (Nov. 14, 2017), <https://fashionista.com/2016/12/fashion-law-patent-copyright-trademark> [<https://perma.cc/C4P8-KQK5>].

exceptions.³² For example, copyrights do protect jewelry, original prints on fabrics, appliques, textiles, and novel combinations of elements used on apparel and accessories.³³ All of these are non-functional elements of an article of clothing. Unless the fashion designs include some pictorial, graphic, or sculptural non-useful feature that can be identified separately from, and is capable of existing independently of, the utilitarian aspects of the article, the fashion designs are not copyrightable.³⁴

However, the design sketch is copyrightable and making clothing based on the drawing would constitute a copyright infringement because it is an unauthorized reproduction of that drawing.³⁵ An example of this independent design was discussed by the Supreme Court in *Star Athletica v. Varsity Brands*, holding that the designs on cheer uniforms are copyrightable.³⁶ The cheer uniforms themselves are not copyrightable because they have a utilitarian function to cover the body, wick away moisture, and withstand rigors of athletic movement.³⁷ The Court held, however,

[A]n artistic feature of a useful article is eligible for copyright protection if the feature (1) can be perceived as a two- or three-dimensional work of art separate from the useful article and (2) would qualify as a protectable pictorial, graphic, or sculptural work either on its own or in some other medium if imagined separately from the useful article.³⁸

The court also clarified that this test will not render the shape, cut, or physical dimensions of the uniform eligible for copyright protection.³⁹ Nevertheless, because the designs on the surface of the cheerleading uniforms satisfied this test the Court set out, they can be copyrighted.⁴⁰

B. Trademarks In Fashion

Under the Lanham Act, trademarks are “any word, name, symbol, or device, or any combination thereof ... to identify and distinguish [the seller’s goods], including a unique product, from those manufactured or sold by others and to

32. *Id.*

33. Willey, *supra* note 13, at 10.

34. *Id.*

35. *Can You Copyright Fashion Designs?*, COPYRIGHT ALL., <https://copyrightalliance.org/faqs/copyright-fashion-designs/> [<https://perma.cc/G76F-ES63>].

36. *Star Athletica*, 580 U.S. at 424.

37. *See id.* at 410.

38. This decision did not decide whether the chevrons were copyrightable, only that they did not qualify under the useful article doctrine as not copyrightable. The Court was clear that it was not making a judgment on copyrightability, or whether the chevrons met the “originality” requirement for copyrightability. *Id.* at 424.

39. *Id.*

40. *Id.*

indicate the source of the goods.”⁴¹ Trademarks can protect a logo or a brand name but usually not a garment or accessory itself since trademark is used to identify the source of the product, and usually the source of garments cannot be identified without a logo or tag.⁴² Trade Dress, a subset of trademarks, can protect the non-functional aspects of a shape.⁴³ The functionality doctrine in trademark law is similar to the useful article doctrine in copyright law.⁴⁴ Examples of some quintessential fashion trademarks include Christian Louboutin’s red soled shoes,⁴⁵ Bottega Veneta’s woven pattern,⁴⁶ Burberry’s plaid print,⁴⁷ the shape of the Hermès Birkin bag,⁴⁸ Louis Vuitton’s “LV” logo,⁴⁹ Tiffany blue,⁵⁰ and Chanel’s double Cs logo.⁵¹

Trademarks are most valuable for well-known, recognized brands because of the reputation easily and recognizably associated with the mark.⁵² Trademark law is the central protection for brands like Chanel and Dior, given the relative unavailability of patent and copyright law for the fashion industry.⁵³ When a small or lesser-known designer gets copied, the copier will typically copy

41. 15 U.S.C. § 1127.

42. See McCall, *supra* note 31.

43. Cornell Law School, *Trade Dress*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/trade_dress [https://perma.cc/KL6A-5W2L].

44. U.S. COPYRIGHT OFF., *supra* note 26; see also *Purpose of Functionality Doctrine*, U.S. PAT. & TRADEMARK OFF., <https://tmep.uspto.gov/RDMS/TMEP/print?version=Oct2015&href=TMEP-1200d1e914.html> [https://perma.cc/SPJ5-Y5G4].

45. “The mark consists of a red lacquered outsole on footwear that contrasts with the color of the adjoining portion of the shoe.” U.S. Patent No. 3,361,597 (issued Jan. 1, 2008).

46. “The mark consists of a configuration of slim, uniformly-sized strips of leather, ranging from 8 to 12 millimeters in width, interlaced to form a repeating plain or basket weave pattern placed at a 45-degree angle over all or substantially all of the goods.” U.S. Patent No. 4,527,371 (issued May 13, 2014).

47. “The mark consists of a tan background, light tan vertical and horizontal lines, black vertical and horizontal lines, white squares, and red vertical and horizontal lines, forming a plaid pattern.” U.S. Patent No. 3,529,814 (issued Nov. 11, 2018).

48. “The mark consists of the configuration of a handbag, having rectangular sides a rectangular bottom, and a dimpled triangular profile. The top of the bag consists of a rectangular flap having three protruding lobes, between which are two keyhole-shaped openings that surround the base of the handles. Over the flap is a horizontal rectangular strap having an opening to receive a padlock eye. A lock in the shape of a padlock forms the clasp for the bag at the center of the strap.” U.S. Patent No. 3,936,105 (issued Mar. 29, 2011).

49. The mark consists of a capitalized “L” placed slightly to the left and to the bottom of a capitalized “V”. U.S. Patent No. 1,519,828 (issued Jan. 10, 1989).

50. “The mark consists of a shade of blue often referred to as robin’s-egg blue which is used on boxes.” U.S. Patent No. 2,359,351 (issued June 20, 2000).

51. “This mark is a three-quarter view of the Chanel CC monogram which is comprised of interlocking C’s.” U.S. Patent No. 3,025,934 (issued Dec. 13, 2005).

52. McCall, *supra* note 31.

53. See Dianna Michelle Martínez, *Fashionably Late: Why the United States Should Copy France and Italy to Reduce Counterfeiting*, 32 B.U. INT’L L.J. 509, 517 (2014).

everything but the trademark; the lesser known trademark is not as valuable as a status symbol or showing a reputable, well-known source.⁵⁴ Larger, more famous brands are usually copied for their reputation of being a luxurious brand which makes their trademark a badge of luxury.⁵⁵ Thus, a brand can avoid trademark infringement while copying a whole garment just by changing the logo.⁵⁶ In doing so, the copier has essentially made a “knockoff” of the original garment.⁵⁷

The enforcement of fashion trademarks demonstrates the strengths and limitations of marks in the fashion industry. In 2002, Louis Vuitton created a multi-colored print with the “LV” initials; in 2003, Dooney & Burke created the “It-Bag” with a multi-colored print of their interlocking “DB” initials as a repeated pattern.⁵⁸ Louis Vuitton sued Dooney & Burke for trademark infringement.⁵⁹ At trial, the District Court found no likelihood of confusion, and Louis Vuitton appealed.⁶⁰ In 2006, the Second Circuit vacated the holding of the district court and held that a print as basic as Louis Vuitton’s Multicolor initial print is original in the handbag market, is inherently distinctive, has acquired secondary meaning, and is protectable such that a junior user can be legally excluded from adopting a confusingly similar motif.⁶¹

In another example, in 2011, Yves Saint Laurent (“YSL”) began selling monochrome shoes—that is, shoes that were a single color all over, including monochrome red shoes.⁶² Christian Louboutin has famously painted the outsoles of women’s high heeled shoes with a contrasting high gloss red lacquer.⁶³ Louboutin registered the red lacquered outsoles as a trademark in 2008.⁶⁴ Louboutin sued YSL for infringement of their red shoe sole mark.⁶⁵ The district court found that the Louboutin trademark registration for the use of lacquered red on the outsoles of shoes did not merit protection under the Lanham Act.⁶⁶ On appeal, the Second Circuit concluded that a single color could serve as a trademark in the fashion industry, relying on the Supreme Court’s decision in

54. *Id.* at 518; McCall, *supra* note 31.

55. Martínez, *supra* note 53, at 518.

56. *Id.*

57. *Id.* at 510.

58. *Louis Vuitton Mattelier v. Dooney & Burke, Inc.*, 454 F.3d 108, 112-13 (2d Cir. 2006).

59. *Id.* at 113.

60. *Louis Vuitton Mattelier v. Dooney & Burke, Inc.*, 340 F. Supp. 2d 415, 440 (S.D.N.Y. 2004).

61. *Louis Vuitton Mattelier*, 454 F.3d at 116.

62. *Christian Louboutin S.A. v. Yves Saint Laurent Am. Holding, Inc.*, 696 F.3d 206, 213 (2d Cir. 2012).

63. *Id.* at 211.

64. *Id.* at 211-12.

65. *Id.* at 213.

66. *Christian Louboutin S.A. v. Yves Saint Laurent Am. Holdings, Inc.*, 778 F. Supp. 2d 445, 457 (S.D.N.Y. 2011).

the *Qualitex Company v. Jacobson Products Company Inc.*,⁶⁷ that “color alone, at least sometimes, can meet the basic requirements for use as a trademark. It can act as a symbol that distinguishes a firm’s goods and identifies their source, without serving any other significant function.”⁶⁸ The Second Circuit held that the contrasting red sole was protectable, but it was the contrast of the red with a different color on the upper part of the shoe that was the distinguishing, protectable trade dress owned by Louboutin.⁶⁹ The court held that YSL was not infringing by selling monochrome red shoes.⁷⁰

In the most recent litigation involving fashion industry trademarks, Adidas sued Thom Browne—a producer of luxury apparel—for trademark infringement of striped patterns on activewear.⁷¹ “[A]didas, which maintains trademark rights in its famed 3-stripe logo, is not the owner of all striped designs, and Thom Browne—which is particularly well-known for its high-end tailored pieces—is not looking to piggyback on the reputation of Adidas by way of its use of a striped mark on a growing array of leisure apparel and accessories.”⁷² Adidas owns twenty-four trademark registrations in the Three-Stripe Mark.⁷³ In 2018, Thom Browne filed applications to the U.S. Patent and Trademark Office to register a striped design on apparel, and in 2021 Adidas filed an opposition before the Trademark Trial and Appeals Board (“TTAB”) seeking to prevent registration of Thom Browne’s applications.⁷⁴ A jury found Thom Browne not liable for trademark infringement and trademark dilution.⁷⁵ Adidas has appealed the judgement.⁷⁶

This case highlights the risks of overly generous trademark enforcement in the fashion industry. Although Adidas owns a valid trademark, three stripes are

67. 514 U.S. 159 (1995).

68. *Christian Louboutin S.A.*, 696 F.3d at 213, 218, 228 (“[T]he mark held by Louboutin extends only to the use of lacquered red outsoles that contrasts with the adjoining portion of the shoe.” The court then held, “the red sole on YSL’s monochrome shoes is neither a use of, nor confusingly similar to, the Red Sole Mark” because it was monochrome and not contrasting to the rest of the shoe); see *Qualitex Co.*, 514 U.S. at 166.

69. *Christian Louboutin S.A.*, 696 F.3d at 228.

70. *Id.* at 229.

71. *Adidas Am., Inc. v. Thom Browne, Inc.*, No. 21-CV-5615 (JSR), 2022 WL 17736799, at *1 (S.D.N.Y. Dec. 16, 2022).

72. *Thom Browne Beats Out Adidas in Stripe-Centric Trademark Battle*, FASHION L. (Jan. 12, 2023), <https://www.thefashionlaw.com/thom-browne-beats-out-adidas-in-stripe-centric-trade-mark-battle/> [https://perma.cc/9Y3L-6GD4].

73. *Adidas Am., Inc. v. Thom Browne Inc.*, 599 F. Supp. 3d 151, 156 (S.D.N.Y. 2022).

74. *Id.*

75. Jessica Testa, *Sweatpants on Trial: How Thom Browne Beat Adidas in Court*, INT’L N.Y. TIMES (Jan. 19, 2023), <https://www.nytimes.com/2023/01/13/style/thom-browne-adidas-sweat-pants.html> [https://perma.cc/89NC-XSAR].

76. *Adidas Lodges Notice of Appeal Following Thom Browne Trademark Trial*, FASHION L. (Feb. 9, 2023), <https://www.thefashionlaw.com/adidas-lodges-notice-of-appeal-following-thom-browne-trademark-trial/> [https://perma.cc/SMK9-EF5S].

common and unoriginal in the fashion industry. It would be an absurd ruling if no one was allowed to use three stripes on clothing or other fashion because Adidas obtained a monopoly. Further, stripes are not generally used to indicate source; they are typically used as an ornamental design. Most people incorporating stripes use them for their style and dimension, not to exploit the goodwill and reputation of Adidas. Adidas should not get a monopoly on stripes because this would lead to a bizarre, unintended outcome of not allowing anyone else to use a basic and common pattern; therefore, the appellate court should affirm the district court's ruling.

To summarize, trademark protections afford sellers “the freedom and incentive to invest funds to develop a product without fear that the product will be imitated and sold” by competitors using a confusingly similar trademark.⁷⁷ Additionally, trademarks allow designers and brands to develop goodwill and the brand’s image without the threat of illegal copies.⁷⁸

C. *Patents In Fashion*

There are two types of patents that protect intellectual property within the fashion industry: utility patents, which protect “any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof,”⁷⁹ and design patents, which protect “any new, original, and ornamental design for an article of manufacture.”⁸⁰ While clothing is too functional to qualify for copyright or trademark protections, new fashion designs are often not useful or novel enough for utility patent protection.⁸¹ Clasps like zippers and Velcro were patented, along with Kevlar fabric,⁸² hazmat suits, and astronaut suits.⁸³ Athletic footwear and lingerie are fashion items that commonly are granted utility patent protection.⁸⁴ Particularly, sculptural or decorative elements added to a functional item can be protected by a design patent, such as

77. Casey Tripoli, *Fashion Forward: The Need for a Proactive Approach to the Counterfeit Epidemic*, 41 BROOK. J. INT’L L. 875, 883 (2016).

78. *Id.*

79. 35 U.S.C. § 101 (2000).

80. 35 U.S.C. § 171 (2012).

81. McCall, *supra* note 31. A utility patent is one that covers any new and useful process, machine, article of manufacture, or composition of matter, or any new and useful improvement thereof. A design patent covers only new, original, and ornamental design for an article of manufacture. The difference is essentially that a utility patent must be for something useful while a design patent cannot cover any useful aspect of a design. *Id.*

82. *Id.*; U.S. Patent No. 3,969,794A (issued July 20, 1976).

83. McCall, *supra* note 31.

84. *Id.* Nike is assigned a patent for an article of footwear with an internal and external midsole structure. U.S. Patent No. 9,661,893 B2 (issued May 30, 2017); lingerie that fastens itself around a bra support band is assigned a patent. U.S. Patent No. 2013/0225043 A1 (issued Aug. 29, 2013).

decorative hardware on a handbag or molded designs on a pump.⁸⁵ Nike and Alexander Wang hold a number of design patents for their decorative heels on shoes and for hardware on handbags, respectively.⁸⁶

Design patents may seem to be the most attractive form of intellectual property protection for fashion designers because they protect how something looks and the item's non-functional design. In order to be eligible for a design patent, the design must be new, nonobvious and ornamental.⁸⁷ One limitation of pursuing a design patent is that it usually takes the United States Patent and Trademark Office between eighteen and twenty-four months to issue a design patent;⁸⁸ in the era of fast fashion, this length of time just is not practical for the fashion industry. For fashion items that remain a staple in a person's wardrobe, like shoes or handbags, it may be worthwhile to apply for a design patent.⁸⁹

D. Trade Secret in Fashion

Trade secrets are intellectual property rights in confidential information.⁹⁰ To qualify as a trade secret, the information must be commercially valuable because of its secret, known to a limited group of persons, and subject to reasonable steps taken by the rightful holder of the information to keep it secret, including the use of confidentiality agreements in business.⁹¹ Examples of trade secrets in the fashion industry include "design and manufacturing processes, cost data, non-public marketing strategies, and customer and supplier lists."⁹² Trade secrecy does not prevent reverse engineering;⁹³ it only gives the trade secret holder a cause of action for misappropriation of the trade secret. Until the Defend Trade Secret Act ("DTSA") was enacted in 2016, all trade secret

85. McCall, *supra* note 31. U.S. Patent No. D712,654 S (issued Sept. 9, 2014) (design patent for hardware skeletal corners); U.S. Patent No. D734,003 S (issued July 14, 2015) (design patent for a pump with three dimensional designs assigned to Valentino).

86. McCall, *supra* note 31. U.S. Patent No. D783,250 S (issued Apr. 11, 2017) (design patent for a decorative heel of a Nike shoe); U.S. Patent No. D717,544 S (issued Nov. 18, 2014) (design patent for Alexander Wang's handbag with hardware feet).

87. 35 U.S.C. § 171 (2012).

88. Willey, *supra* note 13, at 8; *Patents Dashboard*, U.S. PAT. & TRADEMARK OFF. (June 2023), <https://www.uspto.gov/dashboard/patents/design.html> [<https://perma.cc/6B22-YME6>].

89. Willey, *supra* note 13, at 8. A staple piece will stay classic and timeless. It will be more worthwhile to protect it. A trendy piece will be in and out of style before the patent will protect the idea. *Id.*

90. *Trade Secrets*, WORLD INTEL. PROP. ORG., <https://www.wipo.int/tradesecrets/en/> [<https://perma.cc/8P5K-7M39>].

91. *Id.*

92. David I. Zalman & Alina C. Mejer, *Don't Let Your Competitor Wear it Better: Protect Your Fashion Trade Secrets*, RETAIL INFO. SYS. (Sept. 14, 2015), <https://risnews.com/dont-let-your-competitor-wear-it-better-protect-your-fashion-trade-secrets> [<https://perma.cc/Q6MR-334L>].

93. Cornell Law School, *Reverse Engineering*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/reverse_engineering [<https://perma.cc/P9A3-M4SB>].

misappropriation lawsuits were state court claims.⁹⁴ The DTSA does not preempt these state court claims, but adds the ability for a trade secret holder to file for an ex parte injunction against the alleged tortfeasor.⁹⁵

To prove that there has been a misappropriation of a trade secret, the plaintiff must prove the existence of a trade secret, the communication of that trade secret pursuant to a confidential relationship, the use of the trade secret in violation of that confidence, and harm to the plaintiff.⁹⁶

An early example of this claim is the case of *Dior v. Milton*.⁹⁷ The defendants in *Dior* “gained access to carefully guarded designs by concealing their association with a sketch-selling company and by fraudulently promising to hold the new designs in confidentiality.”⁹⁸ The court found in favor of Dior, emphasizing “Dior’s great expense and ongoing precautions to maintain the secrecy of its designs, which included showing them to the public under limited circumstances and requiring viewers to enter into confidentiality agreements before having access to them.”⁹⁹

Another example of trade secret misappropriation in fashion involves trade secret protection of wearable technology. In 2015, Jawbone sued Fitbit, alleging Fitbit hired former Jawbone employees for the purpose of bringing proprietary, confidential information regarding business plans, products, technology, and market research to Fitbit.¹⁰⁰

A different example of trade secret protection involves business information. Le Tote, a clothing rental service, sued Urban Outfitters after discussions of a merger fell through.¹⁰¹ Urban Outfitters started its own clothing rental service using the information disclosed in confidence by Le Tote.¹⁰² Most

94. Kurt A. Kappes, *The Defend Trade Secrets Act – One Year Later*, GREENBERG TRAURIG (May 11, 2017), <https://www.gtlaw.com/en/insights/2017/5/the-defend-trade-secrets-act-one-year-later> [https://perma.cc/64BC-NEDU].

95. *Id.*

96. *Almac Clinical Servs., LLC, et al. v. Aeri Park, et al.*, No. CV 16-4896, 2016 WL 5912708, at *6 (E.D. Pa. Oct. 11, 2016) (quoting *Moore v. Kulicke & Soffa Indus., Inc.*, 318 F.3d 561, 566 (3d Cir. 2003)).

97. 155 N.Y.S.2d 443 (N.Y. Sup. Ct. 1956), *aff’d*, 156 N.Y.S.2d 996 (N.Y. App. Div. 1956).

98. Denisse Garcia, *Trade Secrets: The Fashion Industry’s Trendiest Secret*, A.B.A. (Apr. 5, 2022), <https://www.americanbar.org/groups/litigation/committees/business-torts-unfair-competition/articles/2022/trade-secrets-fashion-industry/> [https://perma.cc/V4JE-H749]. In another example, in 2014, Nike sued three of its former designers for \$10 million, alleging they started negotiating with Adidas while they still worked at Nike, violating their non-compete agreements. The designers copied confidential documents, including drawings for an unreleased shoe for Nike-sponsored athlete and then attempted to erase the emails and texts on their work-issued phones and laptops. In 2015, Nike settled with the designers. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* The employees were also charged in an indictment for the unlawful possession of stolen trade secrets, but the charges were later dropped. *Id.*

102. *Id.*

recently, Cartier sued Tiffany & Co. for misappropriating trade secrets by enticing a former Cartier employee to share confidential business information, including stock lists, product assortments, pricing information, and product distribution strategies.¹⁰³

To summarize, trade secrets can be used to protect intellectual property from the inception of the design to the purchase of the clothing item.

I. KNOCKOFFS

A. *What is a Knockoff?*

The terms “counterfeit” and “knockoff” are commonly used as synonyms.¹⁰⁴ However, they are two very different concepts.¹⁰⁵ A counterfeit is an unauthorized lookalike of an original that is “substantially indistinguishable”¹⁰⁶ from the original—including using the original’s trademark—and seeks to exploit the goodwill of the original designer.¹⁰⁷ Making or selling counterfeits is illegal, involving the theft of one’s trademark to unfairly profit from the trademark owner’s reputation,¹⁰⁸ as well as the crime of counterfeiting.¹⁰⁹ Counterfeits can usually be found in black markets, where one can buy designer bags and products for an inexpensive price.¹¹⁰ Although the quality of counterfeits may be significantly lower than that of the original, the logos on the counterfeit are virtually indistinguishable from the original.¹¹¹

A knockoff, on the other hand, is a copy of an original design intended to be sold as a mimic of the original product.¹¹² A knockoff may have subtle differences from the original but is only copying the unprotectable parts of the original design, and the mark (or logo) on the knockoff is not confusingly similar to the original. While both copy the design of the original, unlike a counterfeit, a knockoff is not intended to pass off as the original.¹¹³ Because the knockoff is not attempting to trade on the goodwill of the original designer, they are legal in

103. *Id.*

104. Richard Stim, *Will You Get in Trouble for Selling Counterfeit Goods?*, NOLO, <https://www.nolo.com/legal-encyclopedia/what-counterfeiting.html> [<https://perma.cc/XT6Q-HLH3>].

105. *Id.*

106. 15 U.S.C. § 1127.

107. *Id.*

108. *What is Counterfeiting?*, INT’L ANTICOUNTERFEITING COAL., <https://www.iacc.org/resources/about/what-is-counterfeiting> [<https://perma.cc/5PBD-VRZW>].

109. 18 U.S.C. § 2320.

110. Margaret E. Wade, *The Sartorial Dilemma of Knockoffs: Protecting Moral Rights Without Disturbing the Fashion Dynamic*, 96 MINN. L. REV. 336, 340 (2011). A black market is any market where the transaction has some aspect of illegality.

111. *Id.*

112. Willey, *supra* note 13, at 7.

113. *Id.*

the United States.¹¹⁴ Designers react in a wide variety of ways to having their fashion copied: some are flattered by the reference and some file lawsuits and feel deprived of their credit to the originality and creativity.¹¹⁵

Thus, “copying functions as an important element of—and perhaps even a necessary predicate to—the apparel industry’s swift cycle of innovation.”¹¹⁶ The ability to legally create knockoffs stems from the gap in American copyright law for useful yet creative works.¹¹⁷ The demand for cheaper versions of an original show just how desired the original article remains, thus enhancing its value.¹¹⁸ Simon Collins, dean of fashion at Parsons The New School for Design, “likes the way fast fashion has brought a level of style to the masses.”¹¹⁹ Knockoffs, although often cheaper than the original in price and construction, have afforded a greater variety of style for virtually everyone.

B. *The Intersection of Knockoffs and Intellectual Property Law*

The intellectual property protections—or rather lack thereof—allow for quicker turnover in terms of trends and dissemination of those trends to the broader public.¹²⁰ If copying or even pulling inspiration from other clothing designs were illegal, the fashion cycle would move much slower.¹²¹ The current absence of protection in United States intellectual property law for useful yet creative designs allows for knockoffs to be produced legally, allowing trends to cycle through more rapidly.¹²² Knockoffs and quick trend changes motivate fashion moguls to seek new and original designs on a regular basis, creating a constant demand for high fashion and fresh trends.¹²³ Because of this cycle, knockoffs actually benefit designers by inducing more rapid turnover, additional sales, and a constant demand for fresh fashion.¹²⁴

There are several reasons for this benefit from knockoffs: first, fashion evolves through trends, which are a direct result of copying.¹²⁵ Copying causes

114. *Id.*

115. See Complaint at 28, *Kimsaprincess, Inc. v. Missguided USA (Fin.) Inc.*, No. 2:19-cv-01258, (C.D. Cal. Feb. 20, 2019); see generally Complaint, *Gianni Versace S.r.l. v. Fashion Nova, Inc.*, No. 2:19-cv-10074, (C.D. Cal. Nov. 25, 2019).

116. Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1691 (2006).

117. RAUSTIALA & SPRIGMAN, *supra* note 4, at 20.

118. Raustiala & Sprigman, *supra* note 116, at 1720.

119. Jim Zarroli, *In Trendy World of Fast Fashion, Styles Aren’t Made to Last*, NAT’L PUB. RADIO (Mar. 11, 2013), <https://www.npr.org/2013/03/11/174013774/in-trendy-world-of-fast-fashion-styles-arent-made-to-last> [https://perma.cc/2F4U-GZF8].

120. Raustiala & Sprigman, *supra* note 116, at 1722.

121. *Id.*

122. *Id.*

123. *Id.* at 1726.

124. *Id.* at 1722.

125. NAT’L PUB. RADIO, *supra* note 11.

trends to come in and out of style faster than purely individual designs, which in turn forces fashion designers to perpetually have new ideas.¹²⁶ Consumers grow weary of current fashion trends and are constantly looking for new looks.¹²⁷ Second, copying helps reduce the trend to something everyone can grasp, not just fashion-minded people.¹²⁸ Consumers want to distinguish and differentiate themselves through fashion choices.¹²⁹ Even as individuals strive for uniqueness through their fashionable ensembles, fashion is also a means of participating in a group movement, known as flocking.¹³⁰ Fashion styles boom because people want to engage in flocking in such a way that allows individual differentiation; they want to be part of a trend but not a replica of others.¹³¹ This interplay of wanting to fit in just enough but also wanting to stand out causes trends to occur.

In many ways fashion has a social value. Almost everyone participates in fashion, even if not everyone tries to follow it.¹³² For most people across the socioeconomic spectrum, clothes are far from mere necessity.¹³³ Knockoffs contribute to social inclusivity, and often result in less expensive versions of high-end designer goods, thus including consumers who would otherwise not be able to enjoy the design.¹³⁴ What was once elite and scarce becomes more available and widespread.¹³⁵ Furthermore, many people communicate or express themselves through fashion.¹³⁶ Because fashion is a means of differentiating oneself, it is valuable to have a large range of options available to find one that best suits one's personality and style.¹³⁷ Fashion provides an unspoken vocabulary.¹³⁸ A larger variety of fashion available to a consumer means a wider variety of unspoken words to express, so to speak.¹³⁹

Perhaps because much of fashion today comes from copying, there are more options in the marketplace than have ever been available.¹⁴⁰ Some people involved with the fashion industry lament the culture of fashion, namely high-end fashion, because of the pressure to constantly and quickly come up with new

126. *Id.*

127. *Id.*

128. *Id.*

129. C. Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion*, 61 STAN. L. REV. 1147, 1164 (2009).

130. *Id.*

131. *Id.* at 1165.

132. *Id.* at 1155.

133. *Id.*

134. Raustiala & Sprigman, *supra* note 116, at 1722.

135. *Id.*

136. Hemphill & Suk, *supra* note 129, at 1164.

137. *Id.*

138. *Id.*

139. *Id.*

140. RAUSTIALA & SPRIGMAN, *supra* note 4, at 21.

ideas and fresh designs.¹⁴¹ However, it is hard to argue that this fast fashion world today lacks clothing options or creativity.¹⁴² Thanks to the ability to quickly ship internationally manufactured goods combined with the ability to legally sell knockoffs, clothing is cheap and widely available.¹⁴³ In short, copying is ubiquitous in fashion, yet has not stifled innovation.¹⁴⁴ Some individual designers may suffer financially, but the industry as a whole thrives thanks to knockoffs.¹⁴⁵ In fact, the Council of Fashion Designers of America estimates that knockoffs represent a minimum of five percent of the \$181 billion American apparel market.¹⁴⁶ A reliable estimate of knockoffs, though, is near impossible because designers and retailers disagree about which clothes are copies and which are original.¹⁴⁷ Most designers, however, acknowledge inspiration from a trend is a normal part of the fashion food chain.¹⁴⁸

C. *The Benefits of Knockoffs to the Fashion Industry*

Not all knockoffs are the same; they often vary in scope, time, and quality. In addition, not all copying is copying the entire garment.¹⁴⁹ In many cases, only a minor design element may be copied, but that minor element may become a major trend.¹⁵⁰ For example, sleeves, necklines, and collars could be copied without copying the whole garment.¹⁵¹ These elements are usually familiar and recycled and not legally protectable because it would give one designer a monopoly on motif items that appear on a majority of clothing items.¹⁵² Sometimes, however, the design element is new.¹⁵³ The copying can be a derivative of the original design or an exact copy.¹⁵⁴ Some copying happens right away while the original is still new, while other copying happens with a “pronounced lag.”¹⁵⁵

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. Eric Wilson, *Fashion Industry Grapples with Designer Knockoffs*, N.Y. TIMES (Sept. 4, 2007), <https://www.nytimes.com/2007/09/04/business/worldbusiness/04iht-fashion.1.7373169.html> [<https://perma.cc/9UCP-74VS>].

147. *Id.*

148. *Id.*

149. RAUSTIALA & SPRIGMAN, *supra* note 4, at 37.

150. *Id.*

151. *The Ultimate Guide to Different Types of Necklines*, THE SHIFT (May 18, 2018), <https://rtrshift.com/types-of-necklines/> [<https://perma.cc/J9KJ-77ZP>].

152. RAUSTIALA & SPRIGMAN, *supra* note 4, at 37.

153. *Id.*

154. Kal Raustiala & Christopher Sprigman, *The Piracy Paradox Revisited Response*, 61 STAN. L. REV. 1201, 1214 (2009).

155. *Id.*

Styles also come back in fashion after a period. Corduroy, puff sleeves, bell bottom pants, and sweater vests have all had several eras of being the “it” trend.¹⁵⁶ Styles our parents and grandparents enjoyed often eventually come back in style. Short dresses of the 1920s reappeared in the 1960s;¹⁵⁷ jumpsuits from the 1970s are making a comeback in the 2020s.¹⁵⁸ Trends from decades prior often reemerge, slightly different, on the runways in Paris and New York.¹⁵⁹

At other times, copying is passed off as paying “homage” to other iconic designers.¹⁶⁰ It is not just new designers that copy famed designers; famous designers sometimes engage in referencing and copying too.¹⁶¹ Tom Ford, Marc Jacobs, Micuccia Prada, and designers for Balenciaga have all taken inspiration from other designers’ works.¹⁶²

The copying process can be a quick one. In order to make a modification of a fashion show runway garment, all that is needed is a photo of the clothing,¹⁶³ which is readily available through social media or smartphones. A factory can then contract thousands of workers who recreate the design from a digital image without the need to pull apart seams.¹⁶⁴ The factory can return finished samples in as short as fourteen days.¹⁶⁵ Stores like Bloomingdale’s and Macy’s contract with highly competitive factories like this to reproduce designer looks with impunity and speed.¹⁶⁶ Steve Madden is an example of a company dedicated to providing consumers with affordable knockoffs of designer shoes such as Valentino, Alexander McQueen, and Balenciaga.¹⁶⁷ In essence, Steve Madden’s success is largely due to copying legally unprotectable design elements of luxury shoes, while maintaining their own brand name.

156. *13 Fashion Trends That Came Back*, FASHIONTAG BLOG (Aug. 3, 2022), <https://the.fashiontag.com/13-fashion-trends-that-came-back/> [https://perma.cc/N9KA-9XUB].

157. *Fashion Flashback: Similarities Between Dresses in 1920s and 1960s*, CHARLESTON MUSEUM (Feb. 13, 2023), <https://www.charlestonmuseum.org/news-events/fashion-flashback-similarities-between-dresses-in-1920s-and-1960s/> [https://perma.cc/2J2F-Z6PH].

158. Elle Australia, *15 of the Most Chic Fashion Trends to Come from the ‘70s That We Still Love Today*, ELLE CAN. (July 22, 2022), <https://www.ellecanada.com/fashion/trends/70s-fashion-trends-women> [https://perma.cc/7QCD-2SH2].

159. RAUSTIALA & SPRIGMAN, *supra* note 4, at 37.

160. *Id.* at 38.

161. *Id.*

162. Cathy Horyn, *Is Copying Really a Part of the Creative Process?*, N.Y. TIMES (Apr. 9, 2002), <https://www.nytimes.com/2002/04/09/nyregion/is-copying-really-a-part-of-the-creative-process.html> [https://perma.cc/LRH6-BF8H].

163. Wilson, *supra* note 146.

164. *Id.*

165. *Id.*

166. *Id.*

167. Tariro Mzezewa, *An ‘It’ Bag Faces its Imitators*, N.Y. TIMES (Mar. 21, 2018), <https://www.nytimes.com/2018/03/21/fashion/steve-madden-cult-gaia-handbag-lawsuit.html> [https://perma.cc/V7H5-KXH4].

Copying in the form of knockoffs stimulate the cycle of fashion by constantly keeping fashion fresh and up to date while still sometimes referencing past trends.¹⁶⁸ Copying is part of the history of fashion, and today, has become quite commonplace.¹⁶⁹ Copying allows trends to spread to the broad public.¹⁷⁰ The result of knockoffs in America is a uniquely booming and quickly-evolving fashion industry.¹⁷¹ Knockoffs, as such, are a natural progression of the fashion industry and promote innovation.

II. COUNTERFEITS

A. *What is a Counterfeit?*

As discussed *supra*,¹⁷² counterfeit goods are different than knockoffs;¹⁷³ the former is illegal and harmful, while the latter is legally permissible. A nexus between luxury goods and social status has existed since the Greco-Roman era.¹⁷⁴ Those who could not afford luxury goods sought cheaper imitations in hopes of achieving higher social status by representing the imitations as the original luxury goods.¹⁷⁵ Over time, the nexus between luxury items and social status increased and created a large demand for counterfeit items.¹⁷⁶ In the present age, the internet has facilitated the growth of the counterfeit market, combining the appeal of cheap imitation luxury goods with the simplicity of online shopping, especially with avenues like Amazon and eBay.¹⁷⁷

To combat counterfeit production, successful designers try to quickly churn out new designs each season to not only compete with counterfeits but also stay ahead of their copying.¹⁷⁸ Today, counterfeit goods are not viewed by consumers as harmful or illegal but rather as normal, everyday purchases because they are so widely available, talked about, and purchased.¹⁷⁹ For seventy-eight percent of consumers, a major factor in purchasing a counterfeit good is the availability

168. RAUSTIALA & SPRIGMAN, *supra* note 4, at 55.

169. Horyn, *supra* note 162.

170. RAUSTIALA & SPRIGMAN, *supra* note 4, at 55.

171. *Id.*

172. *See supra* notes 103-113 and accompanying text.

173. *See supra* § II.

174. Katherine B. Felice, *Fashioning a Solution for Design Piracy: Considering Intellectual Property Law in the Global Context of Fast Fashion*, 39 SYRACUSE J. INT'L L. & COM. 219, 220 (2011).

175. *Id.*

176. *Counterfeiting: Imitating Property is Theft*, THE ECONOMIST (May 15, 2003), <http://www.economist.com/node/1780818> [<https://perma.cc/9DRV-WEZX>].

177. Tripoli, *supra* note 77, at 876-77.

178. Brian Hilton, Chong Ju Choi & Stephen Chen, *The Ethics of Counterfeiting in the Fashion Industry: Quality, Credence, and Profit Issues*, 55 J. BUS. ETHICS 345, 347 (2004).

179. Tripoli, *supra* note 77, at 885.

of the goods,¹⁸⁰ as well as not understanding the harm propagated by supporting the counterfeiters.¹⁸¹ Although it is not a hidden fact that counterfeit goods are typically lesser in quality than their authentic counterparts, some consumers, especially in the United States, may overlook the quality of the good in order to own a copy of a renowned designer piece, possibly believing it could be an original.¹⁸² Unknowing consumers may conclude that counterfeits are genuine and not worth the seemingly inflated price.¹⁸³ Even if the purchaser is aware they are purchasing a counterfeit good, there is the likelihood of secondary confusion by others who see the purchaser wearing or carrying the counterfeit good.¹⁸⁴ A trademark serves as a source indicator and an indication of the quality of the goods, so consumers who unknowingly purchase deceptive counterfeits could lose confidence in the genuine market.¹⁸⁵ Thus, poor quality counterfeits exploit the authentic brand's goodwill and hurt its reputation.¹⁸⁶

Consumers will fail to recognize what is authentic and what is counterfeit and will consequently stop purchasing and consuming, ultimately causing the brands to lose customers and income.¹⁸⁷ In addition, exclusivity is crucial to maintaining luxury markets.¹⁸⁸ If the brand is so widespread, either real or fake, it ceases to be exclusive and luxurious, and the market for such items diminishes.¹⁸⁹

B. Dangers of Counterfeit Goods

According to U.S. Customs and Border Protection, \$3.3 billion worth of counterfeit goods were seized in 2021.¹⁹⁰ Of the items seized in 2021, thirty percent were clothing, twenty-eight percent were purses and wallets, thirteen

180. See Mary Lambkin & Yvonne Tyndall, *Brand Counterfeiting: A Marketing Problem that Won't Go Away*, 20 IR. MKTG. REV. 35, 40 (2009).

181. See *infra* notes 201-208 and accompanying text; *How Fighting Fake Goods Tackles Terrorism*, ICAEW (Jan. 10, 2022), <https://www.icaew.com/insights/viewpoints-on-the-news/2022/jan-2022/how-fighting-fake-goods-tackles-terrorism> [<https://perma.cc/VW2P-RKS2>].

182. Jason M. Carpenter & Karen E. Edwards, *U.S. Consumer Attitudes Toward Counterfeit Fashion Products*, 8 J. TEXTILE & APPAREL, TECH. & MGMT. 1, 4 (2013).

183. Kurt M. Saunders & Gerlinde Berger-Walliser, *The Liability of Online Markets for Counterfeit Goods: A Comparative Analysis of Secondary Trademark Infringement in the United States and Europe*, 32 NW. J. INT'L L. & BUS. 37, 38 (2011).

184. See *id.*

185. Tripoli, *supra* note 77, at 882-83.

186. Christine Quilichini, *Haute Couture Legislation: Tailor Made High Fashion Design Protection in the United States*, 4 U. P.R. BUS. L.J. 228, 235 (2013).

187. *Id.*

188. *Id.*

189. *Id.*

190. *The Truth Behind Counterfeits*, U.S. CUSTOMS & BORDER PROT. (May 16, 2023), <https://www.cbp.gov/trade/fakegoodsrealdangers> [<https://perma.cc/S57W-STAV>].

percent were footwear, and twelve percent were jewelry and watches.¹⁹¹ This means fashion accounted for eighty-three percent of the seized counterfeits. This translates to lost profits and the loss of jobs in the United States over time.¹⁹² In other words, not only are counterfeit goods a real issue for the fashion industry, they are also an issue for jobs and income in the United States, in particular, United States based fashion designers.

In addition to the potential damage to the designer's goodwill and monetary damage to the fashion industry,¹⁹³ counterfeits can impact public welfare.¹⁹⁴ Profits from counterfeit goods helped fund the 1993 truck bomb attack on the World Trade Center and the 2004 train bombings in Madrid.¹⁹⁵ There is also a causal nexus between counterfeit purchases and unemployment.¹⁹⁶ Fake goods create unfair competition for genuine products by artisans and businesses, harming legitimate enterprises and increasing unemployment.¹⁹⁷ Additionally, human trafficking and child labor are major issues caused by counterfeit luxury fashion.¹⁹⁸ Over seventy percent of the world's counterfeit luxury apparel is made in China, where child labor primarily occurs.¹⁹⁹ Children and adults are smuggled into other countries with the shipped counterfeits to work in sweatshops to finish the production of the fake luxury goods.²⁰⁰

For these reasons, the selling of counterfeit goods is federally prosecuted under both civil and criminal law.²⁰¹ Both require a prima facie showing of (1) the ownership of a valid mark by the aggrieved party; (2) use in commerce by the defendant of a non-genuine but similar mark; and (3) in a way likely to cause

191. *Id.*

192. *Id.*

193. Haig Simonian, *Counterfeiting: Silence of the Brands Hides Fight Against Fakes*, FIN. TIMES (June 5, 2011), <http://www.ft.com/cms/s/0/89366414-8dad-11e0-a0c4-00144feab49a.html#axzz3GvauP2IH> [<https://perma.cc/5URG-CG4P>]; see also Kristi Ellis, *Designer vs. Vendor: Battle Over Copyright Issue Hits Congress*, WOMEN'S WEAR DAILY (Feb. 15, 2008), <http://www.wwd.com/business-news/government-trade/designer-vs-vendorbattleover-copyright-issue-hits-congress-465497> [<https://perma.cc/C4NR-3NB2>].

194. Tripoli, *supra* note 77, at 883.

195. Felice, *supra* note 174, at 223.

196. Tripoli, *supra* note 77, at 886.

197. *Too Good to be True: The Real Price of Fake Products*, EUR. COMM'N (Apr. 19, 2013), http://europa.eu/rapid/press-release_MEMO-13-346_en.pdf [<https://perma.cc/VK5M-L523>].

198. DANA THOMAS, DELUXE: HOW LUXURY LOST ITS LUSTER 287-88 (Penguin Grp. 2007).

199. *Id.*; UNITED NATIONS OFFICE ON DRUGS AND CRIMES, TRANSNATIONAL ORGANIZED CRIME IN EAST ASIA AND THE PACIFIC: A THREAT ASSESSMENT 124 (Apr. 2013), https://www.unodc.org/roseap/uploads/archive/documents/Publications/2013/TOCTA_EAP_web.pdf [<https://perma.cc/QB9C-CEGQ>].

200. THOMAS, *supra* note 198, at 278, 285.

201. 18 U.S.C. § 2320. The Lanham Act provides the civil actions for trademark infringement and dilution claims. Both the civil and criminal claims involve a likelihood to cause confusion among consumers regarding the genuine source of the product.

customer confusion, though the criminal statute also requires a showing of intent.²⁰² Under the Lanham Act § 43(a),

Any person who, on or in connection with any goods or services . . . uses in commerce any word, term, name, symbol, or device . . . or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact which, is likely to cause confusion . . . in commercial advertising or promotion, misrepresents the nature . . . of his or her or another person's goods, services or commercial activities, shall be liable in any civil action.²⁰³

This is known as “passing off” under unfair competition with trademarks, which can either be passing off or reverse passing off.²⁰⁴ Passing off is when a defendant claims that the product is from plaintiff.²⁰⁵ For example, a defendant claims that original shoes are Nike after slapping on a label. Reverse passing off is when a defendant removes the plaintiff's trademark on a good and claims the good as the defendant's own.²⁰⁶ Using the example above, the defendant would then take off the Nike swoosh and try to pass off the shoes as an original design of the reseller, taking advantage of the Nike quality but passing it off as their own.

The criminal offense of trafficking counterfeit goods is punishable by up to ten years in prison, statutory fines up to \$2 million, or both.²⁰⁷ Purchasing counterfeit goods is also illegal under 18 U.S.C. § 2320.²⁰⁸ However, the U.S. Department of Justice does not view purchasing counterfeit goods as a crime, even if the consumer knew the goods infringed on a trademark.²⁰⁹

Consumers who are proponents for counterfeit fashion argue that counterfeits help fashion brands and designers by acting as free marketing.²¹⁰ This only furthers the elitist argument that luxurious high fashion is exclusively for those who can afford it, and those who cannot afford it envy those who can.²¹¹ It further implies that people who cannot afford luxury designs desire to

202. Colleen Jordan Orscheln, *Bad News Birkins: Counterfeit in Luxury Brands*, 14 J. MARSHALL REV. INTELL. PROP. L. 249, 254 (2015); see 18 U.S.C. § 2320 (detailing provisions of the federal criminal law for counterfeiting); 15 U.S.C. § 1051 *et seq.* (detailing provisions of the federal civil law for counterfeiting).

203. Aaron Hall, *Trademark Unfair Competition: “Passing Off”*, AARON HALL ATT’Y, <https://aaronhall.com/trademark-unfair-competition-passing-off/> [<https://perma.cc/39TQ-YAYD>].

204. *Id.*

205. *Id.*

206. *Id.*

207. 18 U.S.C. § 2320(b)(1)(A).

208. *Is Buying Counterfeit Goods a Federal Crime?*, LAW OFFS. HAL M. GARFINKEL (Aug. 22, 2019), <https://www.garfinkelcriminallaw.com/chicagocriminalblog/buying-counterfeit-goods-federal-crime>.

209. *Id.*

210. Orscheln, *supra* note 202, at 258.

211. *Id.*

be like those who can so much that they willingly purchase fakes to emulate the elite, wealthy class.²¹² Some proponents of counterfeits also believe luxury brands cannot offer a lower quality, less expensive version of their clothing and accessories without taking away the exclusivity aspect of luxury items and cheapening the brands' image.²¹³ This idea was disproven by the late Karl Lagerfeld, the former designer for Chanel, who produced reasonably priced lines with stores such as H&M and Macy's without "cheapening" the prestigious brand of Chanel.²¹⁴ In fact, another famous fashion designer, Rei Kawakubo, as well as several other designers from luxury brands such as Versace, Balmain, Kenzo, and Moschino, created collections in collaboration with H&M and still remain well-respected and well-known in the fashion industry without ill effect to their brand.²¹⁵

III. CONCLUSION

Given the current protections for fashion designers available in intellectual property law, only a small percentage of designs can be protected from copying. Copying is popular in the fashion industry and has only gotten more popular with the rise of fast fashion. Trends are based on economics, politics, climate considerations, and current events, then they evolve through copying, reworking, referencing, and feedback from consumers. The ability for fast fashion companies to get inspiration from the catwalk and mass produce copies within weeks makes fashion trends widespread and less exclusive. The fashion industry as a whole would not be as successful without the copycat culture.

Although in everyday conversation the terms "knockoff" and "counterfeit" are used synonymously, they are two very different concepts with different impacts on the fashion industry. Knockoffs are the natural progression of the fashion industry, from the catwalk to the department store. Additionally, knockoffs are not intended to pass off as the original, only copying unprotectable elements of a design. Knockoffs promote social inclusivity of fashion by making trends more affordable and universal because couture and luxury brands are meant to be stay exclusive and expensive and symbolize status.

Counterfeits, on the other hand, harm the fashion industry. Counterfeits are substantially indistinguishable copies of the original and are actually meant to pass as the original. Counterfeits exploit the goodwill of other designers and brands. Counterfeits also are often confusingly similar to the original and steal

212. *Id.*

213. *Id.*

214. See Lynn Yaeger, *Chanel, H&M, Macy's, Diet Coke: What Should Karl Lagerfeld Design Next?*, VOGUE (Aug. 4, 2011), <http://www.vogue.com/vogue-daily/article/chanel-hm-macys-diet-coke-whatshould-karl-lagerfeld-design-next/#1> [<https://perma.cc/L9S8-JLAQ>].

215. Zue Wei Leong, *Karl Lagerfeld, Balmain and More: 10 Best H&M Collaborations with Fashion Designers*, TATLER (Mar. 15, 2021), <https://www.tatlerasia.com/style/fashion/sg-hm-iconic-fashion-designer-collaborations> [<https://perma.cc/GQ65-9YT2>].

the trademarks of other brands. Society condemns counterfeits to the point that it is a crime to sell counterfeit fashion, forcing counterfeits to be sold on black markets.

Since the ideas and original designs of fashion designers are not highly protected by law, copying is inevitable in the current climate of law and fashion. Knockoffs are bound to occur with the natural progression of trends and the availability of fashion to larger populations. This is a sign of homage and praise to the good ideas of designers without attempting to pass as original work. Knockoffs promote innovation. However, counterfeits only hurt the fashion industry and negatively impact the work of fashion designers.

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