INTELLECTUAL PROPERTY AND ENVIRONMENTAL CHALLENGES IN THE FASHION INDUSTRY: TAKING A STAND AGAINST THE COUNTERFEIT GOODS MARKET

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I. INTRODUCTION

Is imitation really the sincerest form of flattery? Intellectual property (IP) laws are evolving to meet the needs of designers whose work is being stolen, as the protections currently available do not suffice. Copyright, patent, and trademark laws exist to protect designers' unique identities and creations. A trademark is a sign or symbol that helps distinguish one's brand, like the famous Nike swoosh. Many designers trademark their names and use them as brand names (e.g., Tory Burch or Calvin Klein).[1] Every aspect of the design process can be patented, from stitching on a handbag to the box it is shipped in; copyrights are used to protect fabric designs, such as the shapes, patterns, lines, and colors seen on clothing or accessories.[2] However, other brands like Shein and Temu are able to copy expensive designs and sell them for a fraction of the price. Nevertheless, by reforming current IP laws and protections to include heightened specificity in what is protected and more stringent punishments for IP infringement, fashion designers and brands can protect their creations from the expanding counterfeit market, maintain their financial and artistic statuses, and protect the environment.

This paper argues that current laws are not adequate to protect designers and their goods against the growing counterfeit market. The first section of this comment discusses the background of IP in fashion and what protections are currently available to designers by elaborating on trademark, copyright, and patent laws. It then explores the current challenges designers face in protecting their work, and the remedies currently available for them. The next section discusses fast fashion—companies that utilize famous designs and sell them for a fraction of the price. The paper then highlights fast fashion's effects on the integrity of the fashion industry as well as the disastrous environmental effects that fast fashion companies are responsible for. Lastly, the paper outlines how brands can protect themselves and the environment moving forward, and new, innovative ways to use IP to their advantage.

II. A HISTORICAL OVERVIEW OF IP AND FASHION

The U.S. Copyright Office historically excluded fashion design from its protection and left designers to fend for themselves when it came to design piracy claims.[3] Therefore, to assist with piracy protection, designers created the Fashion Originators' Guild of America (FOGA) in

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1. *Intellectual Property in Fashion: Case Studies*, LEGAMART (2023), https://legamart.com/articles/intellectual-property-in-fashion-cases/.

2. *Id.*

3. Kimberly Ann Barton, *Back to the Beginning: A Revival of A 1913 Argument for Intellectual Property Protection for Fashion Design*, 35 J. CORP. L. 425, 429 (2009).

1932.[4] FOGA registered member designs and made deals with retailers who promised not to sell copied designs.[5] Eventually, courts realized that more protection was necessary, and the scope of IP law was expanded to include some elements of fashion design.[6] IP represents "creations of the mind. . . used in commerce."[7] It is only logical that IP should include fashion designs, as they are physical interpretations of creations of the mind. As fashion houses grew, they began using their trademarks as a tool for brand recognition, representing not just products but entire lifestyles.[8] For instance, Chanel's interlocking C's or the classic Gucci stripes must be safeguarded by IP laws or else they will be knocked off. Designers can choose from various IP options to protect specific elements of their designs.

A. Copyright

The Copyright Act of 1976 was initially interpreted to protect only "artistic" works, which include "original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, with the aid of a machine or device."[9] Original works of authorship encompass musical, dramatic, literary, choreographic, pictorial, graphic, sculptural, audiovisual works, and sound recordings.[10] The Architectural Design Amendment of 1990 expanded the Copyright Act's protection, adding "architectural works" to the above list.[11]

In the U.S., the term of a copyright is seventy years from the author's death, and for works of corporate authorship, ninety-five years from the date of publication or 120 years from the date of creation, whichever period ends first.[12] In a case of copyright infringement, a plaintiff bears the burden of showing that, (1) the defendant "had access to" the plaintiff's work, and (2) the two works are "substantially

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4. *Id.*

5. *Id.*

6. *See, e.g.*, Chitra Sahay, *Fashion Law: A Window into Globalisation*, FASHION & LAW JOURNAL, https://fashionlawjournal.com/fashion-law-a-window-into-globalisation/ (last visited Oct. 26, 2024) (Fashion laws were expanded due to globalization of the industry and the necessity for protections across countries. Different elements of a creation could come from different countries, and thus require global protection).

7. Barton, *supra* note 3, at 427 (quoting *What is Intellectual Property?*, WORLD INTELLECTUAL PROP. ORG., http://www.wipo.int/about-ip/en/).

8. *Growing Importance of Intellectual Property in the Fashion Industry*, ABOU NAJA (last updated March 16, 2024), https://abounaja.com/blogs/intellectual-property-in-fashion-industry.

9. M.C. Miller, *Copyrighting the "Useful Art" of Couture: Expanding Intellectual Property Protection for Fashion Designs*, 55 WM. & MARY L. REV. 1617, 1638 (2014) (quoting 17 U.S.C. § 102(a) (2006)).

10. *Id*. at 1638.

11. *Id.*

12. Michael K. Friedland, Lauren Keller Katzenellenbogen & Melissa Chen, *Choosing the Right IP to Protect Fashion Goods*, 14 Landslide 5, 7 (2022).

similar."[13] Artwork on garments or accessories is generally protected by copyright law, along with the design of jewelry.[14] Copyright law does not exist to monopolize or protect the base item itself—for instance, the concept of a handbag. Rather, it protects the design features that can be separated from the garment.[15] This includes textiles, patterns, and even the overall aesthetic arrangement.[16] "Separability" is a prerequisite for a garment to be protected under U.S. copyright law.[17] *Star Athletica, LLC v. Varsity Brands, Inc.* clarified the standard for separability:

> A feature incorporated into the design of a useful article is eligible for copyright protection only if the feature can be perceived as a two- or three-dimensional work of art separate from the useful article, and it would qualify as a protectable pictorial, graphic, or sculptural work, either on its own or fixed in some other tangible medium of expression.[18]

Further, lines, shapes, and other patterns are eligible for copyright protection as separable features, because physical and conceptual separability do not need to be distinguished.[19] If the design could theoretically stand on its own, like a particular graphic on a T-shirt, it is eligible for copyright protection.[20] The concept of separability poses challenges to designers, as only certain parts of their garments or designs are protected, not the garment as a whole.[21]

B. Patents

A designer may seek a design patent for "any new, original and ornamental design for an article of manufacture."[22] Unlike copyright laws, a patent can protect the ornamental or aesthetic aspects of an item—the unique visual aspects of a design that make the garment distinctive from others.[23] The visual design of the article—not the physical article itself—is protected by IP; the design need not be separable from the article because patent laws do not protect a stand-alone design.[24] Unlike copyright laws, a separability test is not required.

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13. Smith v. Jackson, 84 F.3d 1213, 1218 (9th Cir. 1996).); *see also* Friedland, *supra* note 12.
14. Friedland, *supra* note 12.
15. *Id.*
16. ABOU NAJA, *supra* note 8.
17. John Zarocostas, *The Role of IP Rights in the Fashion Business: a US Perspective*, WIPO MAGAZINE (August 2018), https://www.wipo.int/wipo_magazine/en/2018/04/article_0006.html.
18. Star Athletica, L.L.C. v. Varsity Brands, Inc., 580 U.S. 405, 424 (2017).
19. *Id.* at 418 (2-dimensional art applied to the contours of an article [of clothing] is protected by statute, and it does not matter whether that art was applied before the final article was made or after).
20. Friedland, *supra* note 12, at 8.
21. Zarocostas, *supra* note 17.
22. 35 U.S.C. § 171(a).
23. ABOU NAJA, *supra* note 8.
24. Jyh-An Lee & Jingwen Liu, *A Tale of Two Fashion Nations: Comparative Fashion IP Laws in the United States and China*, 47 COLUM. J. L. & ARTS 207, 238 (2024).

Patent law examines a design in its entirety.[25] The potential to infringe upon an existing patent is immense since design is subjective to the viewer, and counterfeit companies might claim that their design is different from the original inspiration.[26]

C. Trademarks and Trade Dress

A trademark is "any word, name, symbol, or device" used to identify and distinguish a good from another in the global market.[27] Designers can protect their work from counterfeits by using trademarks, governed by the Lanham Act in the U.S.[28] Under the Lanham Act, a counterfeit good is defined as "a spurious mark, which is identical with, or substantially indistinguishable from, a registered [trade]mark."[29] To bring a case of trademark infringement in the U.S., there must be an unauthorized use of the trademark, and the plaintiff may receive an injunction or monetary damages.[30] Further, the trademark must be registered with the U.S. Patent and Trademark Office (USPTO).[31] To have a viable claim, the trademark holder must show that: (1) another party used the trademark without the holder's consent,(2) in connection with the sale, distribution, or advertising of any goods or services, and (3) that the unauthorized use is likely to cause confusion, mistake, or deception.[32]

If the trademark is similar enough to cause confusion about the source of the good, then the complainant has a viable claim.[33] The trademark must be "protectable", meaning that it is "distinctive."[34] Trademarks are categorized by increasing levels of distinctiveness: generic, descriptive, suggestive, arbitrary, or fanciful.[35] Fanciful, arbitrary, and suggestive marks are considered distinctive enough to be trademarks on their own.[36] Descriptive marks can only be considered trademarks if they have developed a secondary meaning.[37] This means consumers recognize the mark as indicating a particular source or

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25. *Id.*

26. ABOU NAJA, *supra* note 8.

27. Lanham Act, 15 U.S.C. § 1127 (1946).

28. Casey L. Tripoli, *Fashion Forward: The Need for A Proactive Approach to the Counterfeit Epidemic*, 41 BROOK. J. INT'L L. 875, 880-82 (2016); *see also* 15 U.S.C. § 1127 (1946).

29. *Id.* at 882; *see also* 15 U.S.C. § 1127 (1946).

30. Tripoli, *supra* note 28.

31. Roy Banerjee, *How to Prove Trademark Infringement*, KPPB LAW (Nov. 25, 2019), .https://www.kppblaw.com/how-to-prove-trademark-infringement/.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Strength of Trademarks*, BITLAW, https://www.bitlaw.com/trademark/degrees.html (last visited Oct. 6, 2024).

37. *Id.*

function.[38] Examples of famous descriptive trademarks include Sharp., Digital, and Windows. To the average consumer, the mark of Windows clearly signifies its function: windowing software. Generic marks and devices are never trademarks.[39] Therefore, it is important for designers to ensure that their marks are at the very least distinctive and have a secondary meaning.

Trade dress is the overall commercial image (i.e., look and feel) of an article, which distinguishes it from the work of other designers.[40] It can include the configuration of a product, the packaging of a good, or the aesthetic look and environment where the item is sold.[41] To succeed on a claim of trade dress infringement, a claimant must show that their design is distinctive or has a secondary meaning like a trademark, and that consumers may confuse their product with that of another.[42] Although registration is not a requirement of protection under the Lanham Act, it offers an advantage in an action for trade dress infringement.[43] Trade dress is valuable when the primary purpose of a product is to identify the source of the product itself.[44] For example, the unique shape of the Coca-Cola bottle, without any text or the signature logo, is reminiscent of the brand and qualifies for trade dress protection.[45]

There is a distinct difference between trademark litigation in counterfeit and knockoff goods: a counterfeit good is one that seeks to appropriate the product of another with the intention of deceiving the consumer.[46] A knockoff generally features a competitor's trademark, and prosecuting the designer comes down to an important question: are they trying to plagiarize another's work, or are they just inspired by it?[47] Knockoffs are not supposed to cause customer confusion like counterfeits, and are thus harder to prosecute under trademark infringement claims.[48]

Legislation exists in most countries and copycats have been persecuted for design infringement. Surface-level disagreements over stealing designs or imitating others' work are pervasive. However, there

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38. *Id.*

39. *Id.*

40. *Trade Dress*, INTERNATIONAL TRADEMARK ASSOCIATION, https://www.inta.org/topics/trade-dress/ (last visited Oct. 6, 2024).

41. *Id.*

42. Barton, *supra* note 3, at 430.

43. N. Elizabeth Mills, *Intellectual Property Protection for Fashion Design: An Overview of Existing Law and A Look Toward Proposed Legislative Changes*, 5 SHIDLER J. L. COM. & TECH. 24, 19 (2009).

44. Barton, *supra* note 3, at 430.

45. *Trade Dress*, SIERRA IP LAW, PC, https://sierraiplaw.com/trade-dress/ (last visited Oct. 6, 2024).

46. Lee & Liu, *supra* note 24, at 212–14.

47. *See id.* at 214.

48. *Id.* at 214-215.

are other channels in which counterfeit goods are sold, like the Dark Web. The Dark Web is difficult to access and a specific browser is necessary. It is not recommended to visit the Dark Web without adequate protection of your digital assets and IP address.[49] Brands who can afford to do so or are worried about counterfeits are recommended to work with third-party companies that can monitor the sale of goods and potential trademark infringement on the Dark Web.[50] It is further recommended to work with law enforcement officials if a brand suspects counterfeit goods being sold; in 2019, "Wall Street Market," a prolific Dark Web marketplace, was taken down by U.S. and European authorities for the sale of narcotics, counterfeit products, and hacking software.[51] Although sellers of counterfeit fashion goods are likely to use regular retail channels, it is plausible that they may turn to the Dark Web for more protection, warranting protective measures to be taken by designers.[52]

D. Unfair Competition

Unfair competition is not recognized as an independent body of law, but it often accompanies trademark infringement claims.[53] It is embedded into the protections provided by the Lanham Act, which is the main source of trademark protection in the U.S.[54] The purpose of the act still remains to protect consumers and safeguard against unfair competition.[55]

III. CURRENT CHALLENGES DESIGNERS FACE IN PROTECTING THEIR CREATIONS

Counterfeiting is fueled by unclear IP laws, limited protection, and the high costs designers face in safeguarding their creations.[56] It is costly to litigate claims in court, especially for burgeoning brands or independent designers. Since different IP elements protect different parts of a design, it is difficult to know if a brand is infringing upon

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49. *See* WORLD INTELL. PROP. ORG., *Madrid System Members*, https://www.wipo.int/en/web/madrid-system/members/index.; *see* Lee & Liu, *supra* note 24, at 213; Peter S. Sloane & Chelsea A. Russell, Christina M. Sauerborn, *Trademark Vigilance in the Twenty-First Century: An Update*, 30 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 1197, 1217-1218 (2020).

50. *See* Sloane, *supra* note 49, at 1218.

51. *Id.* at 1218-1219.

52. Pierluigi Paganini, *Intellectual Property Crimes in the Dark Web*, INFOSEC (Dec. 12, 2017), https://www.infosecinstitute.com/resources/threat-intelligence/intellectual-property-crimes-dark-web/.

53. Lee & Liu, *supra* note 24, at 244.

54. *Id.*

55. *Id.*

56. Esmee Blaazer, *Plagiarism in Fashion: Why is There So Much Counterfeiting, and Is It Even Allowed?*, FASHIONUNITED (Feb. 29, 2024), https://fashionunited.uk/news/background/plagiarism-in-fashion-why-is-there-so-much-counterfeiting-and-is-it-even-allowed/2024022974359.

another. The scope of protection is another hurdle designers face: the shape of a high-end skirt could be protected by trade dress, but the floral design on the front of the skirt could be protected by copyright.[57] If each element of a design is not protected (which is costly in itself), it can be knocked off by another brand. Moreover, the cost of litigating IP infringement claims may outweigh the potential damages available, and fashion trends evolve so quickly that designers must prioritize staying ahead.[58] Fast-fashion houses like Zara and H&M will take inspiration from high-end brands, and their creations will often be available to the public before they are shown in the original designer's store.[59]

Protecting designs is further constrained by the fact that most articles of clothing fall under the category of "useful item" whose protection is limited by statute.[60] A useful article is an article having "intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information."[61] The statute elaborates further on graphic, pictorial, and sculptural works, necessitating that fashion designs having an original aspect can be separated from the primary (or "useful") function of the item, which is to cover the human body.[62] It is difficult to make an article of clothing that has a function other than covering the body, therefore copyright protection is very slim, as most elements of clothing (e.g., zippers, sleeves) are used by every designer.[63] In other words, there is a "generally useful nature of clothing and apparel."[64]

A. Key Players in the Counterfeit Market

Knock-off goods have put serious financial strain on U.S. markets, with some speculating as much as $250 billion in losses annually.[65] From manufacturing to end-customer distribution, both designers and the government are losing money due to lost imports and tax revenue.[66] This is a serious issue that needs to be remedied: America's economy and its citizens need to be protected domestically and internationally. Moreover, most companies outsource labor to other countries, like

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57. *See id.*

58. *Id.*; *see* Lee & Liu, *supra* note 24, at 239.

59. *See* Blaazer, *supra* note 56.

60. Kevin V. Tu, *Counterfeit Fashion: The Interplay Between Copyright and Trademark Law in Original Fashion Designs and Designer Knockoffs*, 18 TEX. INTELL. PROP. L.J. 419, 427 (2010).

61. 17 U.S.C. § 101.

62. Tu, *supra* note 60, at 427.

63. *Id.* at 428.

64. *Id.*

65. Whitney McGuire, *Fast Fashion May Be Killing Us, but Is Intellectual Property Also To Blame?*, MEDIUM (July 29, 2020), https://medium.com/@whitneyrmcguire/fast-fashion-may-be-killing-us-but-is-intellectual-property-also-to-blame-5b6f93b1a0a3.

66. *Id.*

China, where there is less respect for U.S. IP laws.[67] The U.S. Digital Millennium Copyright Act requires websites to take down content that has been reported as infringing on IP,[68] but protective legislation like that is not something seen in many other countries.[69]

Some of the main culprits behind designer knockoffs are online brands like Shein and Temu. Shein is a Chinese retailer worth over $100 million.[70] They sell clothes, home goods, accessories, sports gear, and more at a fraction of the regular price. Shein has been known to make cheap versions of expensive designs, knocking off designers' artistry around the world without their consent. For example, a YouTuber was marketing heart earrings with an "angel" inscription on the inside.[71] Her followers alerted her to that same heart design found in a bulk pack of stickers on Shein, along with a replica of the earrings at a much lower price.[72] A niche brand like hers does not have the funds to prosecute a huge conglomerate like Shein, and smaller designers are stuck with no recourse against this thievery.

Three artists and designers allege that Shein's business model is built on knocking off the designs of others.[73] They claim that instead of human designers, Shein uses artificial intelligence to scan popular designs and recreate them, "knowingly accept[ing], tolerat[ing] and even encourag[ing] and facilitat[ing] such misappropriation."[74] A plaintiff made a unique art piece that was quickly copied and sold in print form on Shein; the company offered her a minimal settlement offer, and she had to join a group of similarly-situated plaintiffs in an attempt to seek justice.[75] As of 2023, Shein has over fifty pending lawsuits due to this repetitive cycle of behavior.[76]

Temu, like Shein, is a Chinese e-commerce platform that sells a myriad of products at steeply discounted prices. Temu offers free merchandise and further discounts to those who join their platform.[77]

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67. Marcella Ballard, *IP Protection for the Fashion Industry*, *in* NAVIGATING FASHION LAW: LEADING LAWYERS ON PROTECTING CLIENT BRANDS AND FOLLOWING INDUSTRY TRENDS 3, 8 (2016).

68. *Id.* at 9.

69. *See List of Countries That Earned Failing Grades In IP Protection,* SCARINCI HOLLENBECK LLC (May. 23, 2016), https://scarincihollenbeck.com/law-firm-insights/ip-protection-grades.

70. Tanya Chi, *Fast Fashion's Ugly Secret. Numerous Brands in Legal Trouble Over Intellectual Property Theft.*, HARBINGER'S MAG. (Dec. 8, 2023), https://harbingersmagazine.com/articles/fast-fashions-ugly-secret-numerous-brands-in-legal-trouble-over-intellectual-property-theft-by-tanya-chi/.

71. *Id.*

72. *Id.*

73. Cyrus Farivar, *Fast-Fashion Giant Shein's Rise Built on 'Systematic' IP Theft, New Lawsuit Claims*, FORBES (July 14, 2023, at 09:51 EDT), https://www.forbes.com/sites/cyrusfarivar/2023/07/14/fast-fashion-giant-sheins-rise-built-on-systematic-ip-theft-new-lawsuit-claims/.

74. *Id.*

75. *See id.*

76. *See* Chi, *supra* note 70.

77. Andrew R. Chow, *The Truth About Temu, the Most Downloaded New App in America*, TIME (Dec. 29, 2022, at 09:32 CT), https://time.com/6243738/temu-app-complaints/.

Users can receive credits for inviting friends to join, many amassing enough to receive merchandise for free without ever having to input credit card information.[78] Temu, like Shein, emulates the designs of brands nationwide. Furthermore, Temu's sister company, Pinduoduo (marketed to Chinese consumers), has allegedly sold illegal goods, counterfeit products, and other items that do not match what was advertised online.[79]

This issue is not limited to international online retailers: companies like URBN (makers of Urban Outfitters, Anthropologie, and Free People) have come under fire for copying designs.[80] URBN was accused of copying a design from a Cambodia-based brand that focused on reusing old materials and clothing and turning them into new fashion pieces.[81] Like the previous examples, a small brand—much less one with a good purpose—will be swallowed by a major retailer like Free People that can afford more expensive marketing tactics and already has a wide reach.

Moreover, an unfortunate instance of exploitation occurred with a local designer in west Africa.[82] A woman and her husband went to Burkina Faso and learned a specific textile weaving technique native to the area, took it back to the U.S., and started manufacturing shirts employing the same technique.[83] Using the artwork and techniques of these artisans exploits their IP rights: the couple even named their company after the woman who taught it to them, "Lalabu."[84] The couple donated a part of their proceeds to the village to help fund female entrepreneurs,[85] but it does not take away from the fact that they stole Lalabu's unique design. People in small tribal communities like this may not have access to the same Internet and marketing services, and they may not be aware people are appropriating their designs.

B. Judicial Precedent Regarding Fashion and IP

There have been several cases regarding fashion and IP law in recent decades. Judicial precedent has been both helpful and harmful: succeeding in an IP infringement case is a challenge. It establishes rules that those seeking to take inspiration from designs must follow, but those rules are not always clear. In *Chanel, Inc. v. RealReal, Inc.*, plaintiffs sued for trademark infringement and counterfeit claims under the

78. *Id.*
79. *Id.*
80. Chi, *supra* note 70.
81. *Id.*
82. Clovia Hamilton, *Appropriation of Artisans' Intellectual Property in Fashion Design Accessories: Piracy Disguised As Giving Back?*, 25 U.S.F. INTELL. PROP. & TECH. L. J. 127, 127 (2021).
83. *Id.*
84. *Id.*
85. *Id.* at 128.

Lanham Act.[86] The court described what are known as the *Polaroid* factors which determine whether a trademark infringement is likely to cause confusion:

> (1) strength of the trademark;
>
> (2) similarity of the marks;
>
> (3) proximity of the products and their competitiveness with one another;
>
> (4) evidence that the senior user may "bridge the gap" by developing a product for sale in the market of the alleged infringer's product;
>
> (5) evidence of actual consumer confusion;
>
> (6) evidence that the imitative mark was adopted in bad faith;
>
> (7) respective quality of the products; and
>
> (8) sophistication of consumers in the relevant market.[87]

Further, wrongful intent is not a necessary requirement for a trademark infringement claim under the Lanham Act, and "good faith is no defense."[88] These standards are unfortunately very subjective; Chanel did not prevail in their trademark infringement claim as they could not show that The RealReal's advertisement and sale of their products were likely to cause confusion with the real brand.[89]

Likewise, in *Steven Madden Ltd. v. Yves Saint Laurent*, YSL accused Steve Madden of selling sandals that imitated their unique designs, alleging trademark and patent infringement claims.[90] For the trademark claim, the court asked whether an ordinary customer would be deceived by the imitation article, believing it was the patented design.[91] The court included images of the offending sandal, but they held that the designs are not similar enough to cause confusion.[92] However, it is likely that Madden took inspiration from YSL, as many brands do, providing an alternative that looks high-end, but is much less expensive.

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86. Chanel, Inc. v. RealReal, Inc., 449 F. Supp. 3d 422, 429 (S.D.N.Y. 2020); Miller, *supra* note 9, at 1638.

87. *Chanel*, 449 F. Supp. 3d at 436–37.

88. *Id.* at 438.

89. *Id.* at 439.

90. Steven Madden, Ltd. v. Yves Saint Laurent, No. 18-CV-7592 (VEC), 2019 WL 2023766, at *1-2(S.D.N.Y. May 8, 2019).

91. *Id.* at *5.

92. *See id.* at *3 (images comparing YSL's patented shoe and Madden's sandal show distinct differences between the designs, namely that one is a heeled sandal, and one is a flat).

To prevail on their trade dress claim, YSL had to show that the claimed infringement was "(1) distinctive in terms of identifying the source of the product, and (2) not functional."[93] YSL was granted recourse on their trade dress claim: they were able to show that the toe-bed design on the sandal was distinctive and not functional and was thus eligible for protection under the Lanham Act.[94] This case highlights the functionality doctrine of a trademark claim, mainly that a functional product is not eligible for trademark protection under the Act.[95] If trademarks protected functionality, it would limit competition in the market; "it is the province of patent law, not trademark law, to encourage invention by granting inventors a monopoly over new product designs or functions for a limited time."[96]

Chanel has succeeded in several claims against Amazon. In 2017, Chanel hired private investigators that discovered Amazon-based retailers were selling fake versions of their products.[97] The court awarded Chanel three million dollars in damages, making an important statement to other counterfeit sellers everywhere.[98] Chanel stated:

> While of course we will continue to pursue this kind of action, we are calling for a reinforced collaboration from the Internet marketplace operators and all other intermediaries involved to take proactive, proportionate and effective measures to ensure traceability and prevent the promotion and distribution of counterfeit goods over the Internet and, in this manner, lower the risks for consumers.[99]

Amazon pulled the offending listings, images, and sellers from the website.[100] This is just one example of brands across the world calling for the entire community to band together and stop this practice.

Similarly, in *Forever 21, Inc. v. Gucci America, Inc.*, Gucci accused Forever 21 of using its trademarked "blue-red-blue" striped pattern on two bomber jackets, a choker, and a sweater.[101] The court noted that "[b]ecause trademark rights derive from prior, continuous, and exclusive use of a mark, a trademark holder is not prevented from alleging that a sweater infringes on a mark simply because 'sweaters' are not included in the description of a trademark's international

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93. *Id.* at *11 (internal quotation marks omitted).

94. *Id.* at *10; *see also* Barton, *supra* note 3, at 430.

95. Qualitex Co. v. Jacobson Prods. Co., 514 U.S. 159, 164 (1995).

96. *Id.*; *see also* 35 U.S.C. §§ 154, 173 (patent statute grants the right to exclude others for a time).

97. Dhwani Sharma, *Chanel v Amazon*, FASHION & L. J. (July 30, 2024), https://fashionlawjournal.com/chanel-v-amazon/.

98. *Id.*

99. *Id.*

100. *Id.*

101. Forever 21, Inc. v. Gucci Am., Inc., No. CV 17-04706 SJO (EX), 2018 WL 5860684, at *1 (C.D. Cal. Feb. 9, 2018).

class."[102] Although a company's trademark may not pertain to a certain class (e.g., it only lists stripes on "sweaters"), if one of their other trademarked classes is being infringed upon (e.g., stripes on denim jackets), a court may be able to protect the denim jackets if the trademarked design is substantially similar. Therefore, the court found that because the pending trademarks were substantially identical to the registered ones, they were able to exercise jurisdiction over the pending applications (despite their being in different classes).[103]

C. Comparing U.S. and International IP Laws

Various IP laws, namely trademarks, vary across country lines. There are two different types of jurisdictions: "use" and "first to file."[104] The U.S. is a use jurisdiction, meaning that trademark rights are acquired when a brand begins to use an identifier during production and distribution of their goods,[105] like the Levi's logo on the back of their jeans.[106] Whereas countries like Brazil use the first to file system, meaning that whoever files the trademark first gets the rights to it, even if their goods are not yet circulating in commerce.[107]

The U.S. prosecutes unfair competition under a trademark infringement framework and uses trade dress concepts to address product shapes and packaging.[108] China's legislation has separated unfair competition and trademark claims: 3D product shapes are protected under its trademark law while product packaging is protected by the Anti-Unfair Competition Law (AUCL).[109] Moreover, the standards of influence differ between the two countries. China has ruled that while a design may not meet their acquired distinctiveness test, if the design bears "certain influence," (e.g., Van Cleef & Arpels' "Alhambra" design) the AUCL may still be able to protect it.[110] The Lanham Act in the U.S. requires a "source-identifying function" for a trademark or trade dress case;[111] the different levels of infringement are inherently subjective and should mean the same things universally. Designers sell their goods worldwide, and they deserve the same amount of protection everywhere.

IV. FAST FASHION'S ROLE IN THE COUNTERFEIT GOODS MARKET AND

102. *Id.* at *3.
103. *Id.*
104. Ballard, *supra* note 67, at 2.
105. *Id.*
106. *Id.*
107. *Id.*
108. Lee & Liu, *supra* note 24, at 245.
109. *Id.* at 247.
110. *Id.* at 248.
111. *Id.*

ADVERSE EFFECTS ON THE ENVIRONMENT

Fast fashion is a highly profitable industry that will continue to proliferate unless administrative and legal action is taken. Fast fashion is marketed towards a demographic that wants to buy high-end clothes but cannot afford them.[112] Brands like Zara, H&M, Shein, and more have all been accused of promoting fast fashion.[113] While cheap versions of beautiful designs might benefit the end-consumer's wallet and wardrobe, the economic, environmental, and social ramifications are severe.[114]

A. Inner-workings of the Fast Fashion Market

In order to keep up with the trends, fast fashion companies must adapt quickly and analyze market behaviors to stay relevant and popular among their consumer bases. Each piece of clothing is handmade by one of sixty million workers worldwide, each worker a cog in a vast supply chain that encompasses countries like India, Indonesia, Vietnam, China, and Bangladesh.[115] It is crucial to analyze which brands we purchase from and do a deep dive into whether their production processes are humane. International labor standards are promulgated by the International Labour Organization (ILO), but it is up to local governments to enforce and promote proper labor conditions.[116] It is costly to finance this type of regulatory infrastructure, and many developing countries would rather prioritize economic growth over labor oversight and keeping a close eye on how their working class is doing. Highlighting these problems is the Rana Plaza disaster, one of many factory catastrophes responsible for needlessly ending the lives of factory workers.[117] Much like the Triangle Shirtwaist Factory fire,[118] working conditions were subpar, and administrators did not address structural inadequacies in the building; 1,134 workers were killed and thousands more injured when Rana Plaza collapsed on April 24th, 2013.[119] Large structural cracks had been discovered the day before the incident and the lower floors closed, but upper floor factory owners ordered their workers to return the next day anyways.[120] Further, both the Rana Plaza disaster and the Triangle Shirtwaist Factory fire

112. McGuire, *supra* note 65.

113. *See id.*

114. *See id.*

115. Mykhail Helm, *Beneath the Seams: The Human Toll of Fast Fashion*, EARTHDAY.ORG (Sep. 12, 2025), https://www.earthday.org/beneath-the-seams-the-human-toll-of-fast-fashion/.

116. *Id.*

117. *Id.*

118. *Triangle Shirtwaist Fire*, AFL-CIO, https://aflcio.org/about/history/labor-history-events/triangle-shirtwaist-fire (last visited Feb. 2, 2026).

119. Helm, *supra* note 115.

120. *Id.*

disproportionately affected women, as they now comprise 75% of the garment factory population.[121]

B. Environmental and Sociocultural Effects

Not only do fast fashion companies affect IP rights, but they have also been scrutinized by the media for employing underage workers for lengthy stretches of time in unsafe and exploitative conditions.[122] Images of factory workers unconscious on concrete floors, children behind sewing machines, and mountains of waste are commonplace in the media.[123] This may be a cost-effective business decision for the brand, but it leads to millions of pounds of waste and substandard living conditions for entire populations.[124] Another issue is greenwashing: where companies use terms like "eco-friendly" and "sustainable" to convince consumers their manufacturing processes are environmentally friendly.[125] Brands like Patagonia have ceased using these terms and have instead turned their marketing efforts towards "rais[ing] awareness about how unsustainable the clothing industry really is."[126] They aim to show that these terms are dishonest, as no one brand is truly sustainable, but that they are working to remedy the problem.[127] Fast fashion may be the worst of the polluting companies, but the fashion industry overall is responsible for a significant portion of the world's environmental issues. For example, the fashion industry consumes a tenth of all water used in running factories worldwide.[128] Further, toxic chemicals are used to dye textiles and fabrics, which end up being circulated in oceans and other bodies of water.[129] The water cannot be treated to remedy the pollution, affecting marine species and coasts.[130] On top of these issues, landfills are overflowing with unused textiles, garments, and factory waste, as clothing is discarded at

121. *Id.*; AFL-CIO, *supra* note 118.

122. *Inhumane Working Conditions*, SUSTAIN YOUR STYLE, https://www.sustainyourstyle.org/en/working-conditions (last visited Feb. 9, 2025).

123. *Id.*

124. *Id.*; *Fashion's Environmental Impacts*, SUSTAIN YOUR STYLE, https://www.sustainyourstyle.org/en/environmental-impacts (last visited Feb. 9, 2026).

125. Danny M. Awdeh, *A Stylish Direction: How IP Can Support Ethical Fashion*, WORLD INTELL. PROP. REV. (April 1, 2022), https://www.worldipreview.com/a-stylish-direction-how-ip-can-support-ethical-fashion; *see also* Brianna Wren, *Sustainable Supply Chain Management in the Fast Fashion Industry: A Comparative Study of Current Efforts & Best Practices To Address the Climate Crisis*, 4 CLEANER LOGISTICS AND SUPPLY CHAIN, July 2022.

126. Awdeh, *supra* note 125; see also Wren, *supra* note 125, at 1.

127. Awdeh, *supra* note 125; see also Wren, *supra* note 125, at 10.

128. Ngan Le, *The Impact of Fast Fashion on the Environment*, PRINCETON STUDENT CLIMATE INITIATIVE (July 20, 2020), https://psci.princeton.edu/tips/2020/7/20/the-impact-of-fast-fashion-on-the-environment [https://perma.cc/LRL7-U3GE].

129. *Id.*

130. *Id.*

alarming rates, regardless of its cost.[131] Most fashion consumers choose to throw away old clothing rather than donating it: these garments end up being incinerated when the landfills are full, releasing further chemicals and toxins into the air.[132] There are many levels to the fashion supply chain:

(1) design and development;

(2) the sourcing of raw materials;

(3) manufacturing;

(4) transportation and logistics;

(5) distribution and storing finished products;

(6) retail; and

(7) consumption.[133]

It is necessary to implement sustainable practices throughout all levels of the supply chain, although the most change is needed in the raw materials and manufacturing sectors. Sustainable supply chain management (SSCM) is a concept that fast fashion companies may say they are implementing, but their current efforts are clearly unsatisfactory.[134] In order to implement SSCM, brands should focus on upstream and downstream activities, and take a closer look at more sustainable garment designs.[135] If a company wants to fix its upstream production, employing more ethical factory owners and creating textiles without harsh chemicals would be a great place to start. Many brands are turning to more sustainable materials, like recycled materials, organic cotton, and other environmentally-friendly fabrics.[136] Fashion houses are also moving towards "zero-waste" design systems, in which they aim to use every last piece of fabric during the manufacturing process.[137] Other innovations like "smart textiles" will eventually be

131. Beth Porter, *What Really Happens to Unwanted Clothes?*, GREEN AM., https://www.greenamerica.org/unraveling-fashion-industry/what-really-happens-unwanted-clothes (last visited Feb. 9, 2025); *see also* McGuire, *supra* note 65.

132. Le, *supra* note 128.

133. Oleksandra Baukh, *Ultimate Guide to Fashion Supply Chain*, TECHPACKER (January 4, 2024), https://techpacker.com/blog/design/ultimate-guide-to-fashion-supply-chain/#what-are-the-key-stages-of-the-fashion-supply-chain.

134. See Wren, *supra* note 125, at 8.

135. *Id.* at 9; *see also Upstream Supply Chain: How Upstream and Downstream Differ*, MASTERCLASS (Aug. 30, 2022), *https://www.masterclass.com/articles/upstream-supply-chain* (describing upstream stages like raw materials and production; downstream includes post-manufacturing and distribution).

136. *What Global Influences Are Expected to Impact Apparel Design in 2024?*, STATELESS (Dec. 30, 2023), https://blog.stateless.nyc/what-global-influences-are-expected-to-impact-apparel-design-in-2024/.

137. *Id.*

introduced to the market: smart textiles actively respond to environmental stimuli, changing properties like color and fit or detecting changes in the wearer's health.[138] Discussions of 3-D printed clothes are also circulating in the media; fabric scraps and waste would be eliminated and raw materials would be used more efficiently.[139]

Focusing on carbon emissions is another key element in practicing sustainable fashion: direct emissions are created by sources that a company owns or controls, and indirect emissions are associated with a brand's operations but are not one of their personal facilities.[140] It is easier to focus on direct emissions as companies have more control over their physical assets, but they must look at the entire supply chain when trying to improve SSCM efforts.[141]

Many fashion companies aim to keep production costs low by sourcing their production to developing countries, purchasing inexpensive materials, and using cheap labor.[142] While lowering operating costs is obviously key to higher income, environmental impacts must be considered before it is too late. Certain aspects of the design process should be protected by IP, but the accessibility and use of green materials and manufacturing processes should be freely accessible.

C. Fashion's Economic Impact

As IP helps brands protect their names, logos, and designs, this directly correlates to their place in the industry overall.[143] When fashion houses put out a new line, they directly influence trends and market prices in a worldwide domino effect.[144] IP can increase a brand's valuation, which is highly relevant if investors and buyers are in the equation. IP also affects a brand's competitive advantage in the market due to design exclusivity, logo protection, and more. Income is generated from licensing IP, like royalties from branded merchandise or collaborations, and this income is subject to taxation. If there is a decline or increase in a brand's valuation, it directly impacts their taxes.

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138. *Id.*

139. *Id.*

140. *See* Wren, *supra* note 125.

141. *See id.* (noting that brands like H&M focus on direct emissions but do not detail what they are doing to regulate emissions from their entire supply chain).

142. *See id.; see also* Mykhail Helm, *Beneath the Seams: The Human Toll of Fast Fashion,* EARTHDAY.ORG (September 12, 2025), https://www.earthday.org/beneath-the-seams-the-human-toll-of- fast-fashion/.

143. *See generally* M.C. Miller, *Copyrighting the "Useful Art" of Couture: Expanding Intellectual Property Protection for Fashion Designs,* 55 WM. & MARY L. REV. 1617, 1645 (2014).

144. *Id.* at 1618-20.

Consumers directly dictate the fashion economy: when purchasing power increases, demand for high-end or luxury goods also increases.[145] Government regulations like tariffs, quotas, or embargoes can also dictate from where and when consumers will be purchasing pieces.[146] With the international political climate changing, customers may be more inclined to purchase products from different areas around the world or even support local designers, impacting the global economy and domestic revenue.[147] Brands must keep up with political, legislative, and environmental trends to stay relevant and competitive in the market.

V. HOW TO PROTECT FASHION BRANDS GOING FORWARD

Although legislation like the Lanham Act and China's Trademark Law exists to protect brands, they do not encompass everything, nor are their penalties severe enough in many cases. To remedy counterfeiting and protect designers, countries must enact stronger legislation. The U.S. has done so through various statutes. The first supplemental act was the Trademark Counterfeiting Act of 1984 followed by two statutes, the Stop Counterfeiting in Manufactured Goods Act (SCMGA), and the Prioritizing Resources and Organization for Intellectual Property (PRO-IP) Act of 2008, which both worked to increase trademark protection.[148] The SCMGA specifically "prohibit[ed] the trafficking of labels, tags, and various types of packaging bearing counterfeit marks," as sellers could previously import goods without counterfeit tags and attach them later.[149] SCMGA now penalizes the equipment used to make counterfeit goods, and it requires forfeited goods to be destroyed.[150] The Pro-IP Act heightened civil and criminal penalties for IP infringement offenses and established committees and grant programs to educate law enforcement on risks to IP.[151] Designers seeking to take action against an offender can pursue both federal and state remedies, with civil and criminal sanctions available.[152] All fifty U.S. states have anti-counterfeiting statutes that provide for monetary remedies and civil injunctions.[153] Since remedies in each state differ, it is important to analyze the protections each may afford if a designer chooses to litigate at the state-level rather than in federal court. The European Union

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145. *See* C. Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion*, , STAN L. REV. 1147, 1155 (2009).

146. *Id.*

147. *Id.*

148. *See* Chelsea R. Feagle, *Fighting the Faceless Foe Known As the Online Trademark Counterfeiter: Forum Shopping Tactics in the Digital Age*, 26 J. INTELL. PROP. L. 303, 309–10 (2019).

149. *Id*. at 310.

150. *Id*.

151. *Id.* at 310-11.

152. *See id.* at 311.

153. *Id.*

provides specific protection to fashion designs, and American lawmakers should follow suit and amend copyright, patent, and trademark laws to include fashion designs too.[154]

When companies emulate and copy high-end designs, it results in copyright scandals and legal enforcement problems. IP is essential for protecting creativity, maintaining competitive advantage, and ensuring that designers and brands can reap the rewards of their innovations. Legislatures must be diligent going forward about specific language in enacting new statutes and protections for fashion designers. Since different forms of IP protect different elements of designs, using a combination of devices (e.g., trademark and copyright) will increase protection and diminish the likelihood that one's design will be copied. However, protecting a brand is costly, and burgeoning designers might need to weigh the pros and cons of investing in these protective devices. There are other ways to enhance IP protection under the law: for example, working to establish consumer familiarity with a designer's creations is important for ensuring adequate protection under trade dress.[155] It is important that consumers "associate the design with the designer,"[156] like associating interlocking Cs with Chanel or the overlapping L and V with Louis Vuitton. These brands are recognized all over the world, and spotting design infringement is much easier because of their market presence.

VI. CONCLUSION

The counterfeit goods market has changed the way the fashion and arts industries look today. Providing affordable alternatives to high-end designs may seem like a positive way to expand access to certain pieces, but at what cost? Many brands, from high-end fashion houses to fast fashion retailers like Temu, are responsible for environmental pollution and poor working conditions. Retailers who sell counterfeit goods lessen the inherent value in original artistic expression and damage the reputations of established brands.

By formulating more specific IP laws and remedies for designers whose pieces are copied, legislators can protect the fashion economy and oversee the hopeful decline of the counterfeit and fast fashion markets. Lessening the prevalence of counterfeit goods will contribute to environmental health, human safety, and establish more stable market positions for designers.

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154. M.C. Miller, *Copyrighting the "Useful Art" of Couture: Expanding Intellectual Property Protection for Fashion Designs*, 55 WM. & MARY L. REV. 1617, 1645 (2014).

155. *See* N. Elizabeth Mills, *Intellectual Property Protection for Fashion Design: An Overview of Existing Law and a Look Toward Proposed Legislative Change*s, 5 SHIDLER J.L. COM. & TECH. 24, ¶19 (2009); *See* C. Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion*, 61 STAN. L. REV. 1147, 1175-80 (2009).

156. *Id.*

"Fashion is very important. It is life-enhancing and, like everything that gives pleasure, it is worth doing well." – Vivienne Westwood