FASHION, APPAREL & BEAUTY

The Laws of Fashion: What's Trending in 2025

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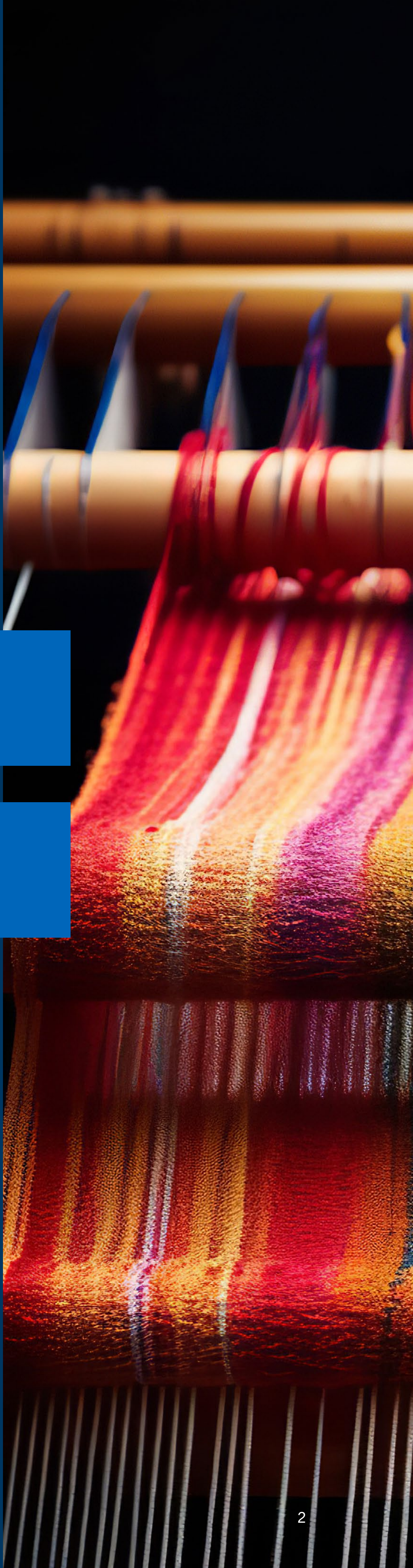

Head to Toe, Foley Has You Covered

As we make strides into 2025, the fashion, apparel & beauty landscape continues its dynamic evolution, marked by opportunities and challenges. Consumer preferences, technological breakthroughs, geopolitical shifts, and new legal frameworks continue to shape the industry's trajectory, presenting a rich tapestry of possibilities. We are excited to unpack fast-moving developments such as fashion and beauty regulations, trends in intellectual property litigation and mergers and acquisitions in the fashion industry, bankruptcy considerations, international trade concerns, and more.

Foley & Lardner's Fashion, Apparel & Beauty industry team examines case law and shares insights on cases to watch, impactful trends, and pressing issues to help guide your business through opportunities, challenges, and uncertainties. The Fashion, Apparel & Beauty industry team at Foley & Lardner remains at the forefront, attuned to the latest developments to navigate you through industry shifts. We hope you find this information insightful and encourage you to contact a member of our team if we can discuss any of these issues in greater detail or assist you with any of your business needs.

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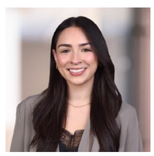

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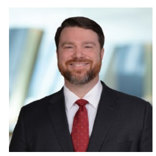

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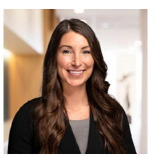

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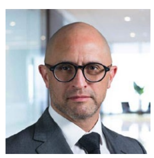

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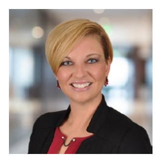

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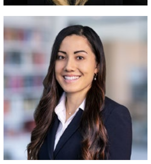

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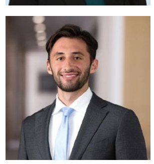

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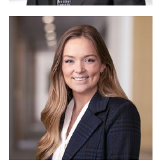

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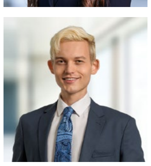

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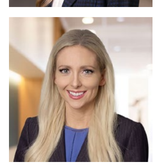

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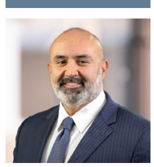

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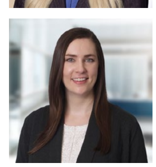

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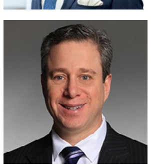

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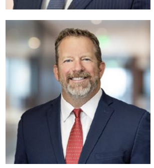

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FAB Cases to Watch in 2025

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The following cases and legal developments to watch in 2025 will continue to shape the future of the fashion, apparel, and beauty industry. Driven by innovation, sustainability, intellectual property, and consumer protection, businesses will need to navigate complex and ever-changing landscapes, regulations, and legal challenges.

This term, courts and regulatory bodies will confront pivotal issues, including antitrust enforcement in the accessible luxury market, heightened scrutiny of environmental marketing claims, and evolving biometric data privacy protections. Additionally, legal battles over intellectual property, fair competition, and ethical sourcing will continue to test boundaries and industry practices.

In an era of rapid technological advancement and shifting consumer expectations, these cases and legal developments will likely offer insights into how businesses must adapt to legal and regulatory frameworks.

FTC v Tapestry Inc. and Capri Holdings

In August 2023, Tapestry Inc., the parent company of Coach, Kate Spade, and Stuart Weitzman announced plans to acquire Capri Holdings Limited, owner of Michael Kors, Jimmy Choo, and Versace for $8.5 billion. The Federal Trade Commission (FTC) opposed this merger, arguing that it would substantially lessen the competition in the "accessible luxury" handbag market.

In October 2024, U.S. District Judge Jennifer Rochon granted the FTC's request for a preliminary injunction, putting the brakes on the merger. The court agreed with the FTC that combining Tapestry and Capri would eliminate direct competition between their respective brands, leading to higher prices and reduced innovation. In court, Tapestry and Capri argued that handbags were "nonessential." Consumers could simply not buy them if they became too expensive, but Judge Rochon countered that this line of reasoning ignores the importance of handbags to women, since they provide both a means of self-expression through fashion and a utility function. Following the court's decision, Capri's stock price dropped by nearly 50%, while Tapestry's rose by 14%. Tapestry and Capri appealed the ruling, asserting that the merger would be pro-competition and beneficial to consumers, but they faced an uphill battle, since that would mean another review by the FTC and the merger contract had a February 10th termination date. As of the date of this article, there has not been any indication that the merger contract has been renewed.

The aftershocks of the court's ruling were immediately felt across the fashion, apparel, and beauty industry where some argue that market realities and an existing competitive and global accessible luxury market already make it easy for consumers to choose, and that mergers like these serve to reinvigorate brands and actually create more competition, thereby ultimately benefiting consumers. Moreover, given the FTC's focus on a three-tier market —e.g., mass market, accessible, and high-end luxury — should or can product categories and markets be defined? If so, how? Either way, the outcome sends an important signal to the fashion, apparel, and beauty industry regarding the potential landmines in mergers and acquisitions, and the potential hurdles for brands to consolidate no matter what the industry or segment.

Gyani v. Lululemon Athletica Inc.,[1]

In July 2024, Amandeep Gyani filed a class action lawsuit against Lululemon Athletica Inc., and Lululemon USA, Inc. (collectively "Lululemon"), accusing it of engaging in deceptive marketing practices, or "greenwashing," through the use of its "Be Planet" campaign between 2020 and 2022. The Merriam-Webster dictionary defines "greenwashing" as "the act or practice of making a product, policy, activity, etc., appear to be more environmentally friendly or less environmentally damaging than it really is."[2]

The lawsuit, pending in the Southern District of Florida, alleges that Lululemon misled consumers by portraying itself as an environmentally friendly company with a minimal environmental footprint, thereby inducing customers to purchase its products under false pretenses. The plaintiff, suing on behalf of herself and a proposed class of similarly situated consumers who purchased Lululemon products for personal use and not for resale in the U.S since October 28, 2020, claims that Lululemon's representations were deceptive and that Lululemon's actual practices do not align with its advertised environmental commitments. Gyani cites to Lululemon's shareholder documents and annual reports to substantiate the claims. The proposed class, compiled of plaintiffs — who reside in various states across the country — are seeking relief under the Florida Deceptive and Unfair Trade Practices Act and common law unjust enrichment (a common legal claim that occurs when one party benefits at the expense of another and where there is no contract between parties). In addition to actual, compensatory, and punitive damages, the Plaintiffs seek disgorgement of Lululemon's profits from its Be Planet campaign.

Lululemon has denied the Plaintiffs claims and denies the Plaintiffs are entitled to any relief. On September 30, 2024, it moved to dismiss the lawsuit asserting that the Plaintiffs lack standing, the challenged statements are not deceptive, and that the Plaintiffs have failed to plead reliance or causation. As of November 18, 2024, Lululemon's motion has been fully briefed.

The case, coined the "Lululemon Greenwashing Case," highlights the growing concerns of corporate environmental claims and transparency in marketing practices.

1 Case No. 1:24-cv-22651 (S.D. Fla., 2024).

2 "Greenwashing," Merriam-Webster, available at https://www.merriam-webster.com/dictionary/greenwashing.

Marino v. Gunnar Optiks

On a certified question to the Illinois Court of Appeals in *Marino v. Gunnar Optiks LLC*, 2024 IL App (1st) 231826 (Aug. 30, 2024), the Illinois Appellate Court permitted a class action lawsuit under the Illinois Biometric Information Privacy Act (BIPA), 740 ILCS 14/10, to proceed past Defendants' attempt to dismiss the claim under the BIPA's health care exclusion.

Plaintiff Macaire Marino, on behalf of herself and a putative class of similarly situated plaintiffs, alleged that Gunnar Optiks' online platform's virtual try-on (VTO) software collected her facial geometry without consent when she tried on both prescription and non-prescription eyewear via their website.

Gunnar Optiks, a California-based eyewear retailer that sells eyeglasses and sunglasses online, moved to dismiss the complaint, claiming that collection fell under the BIPA's health care exclusion, which excludes from the definition of "biometric identifier" "information collected, used, or stored for health care treatment, payment, or operations." The lower court sided with Gunnar Optiks and partially dismissed the Plaintiff's complaint relating to her prescription glasses, finding that Gunnar Optiks' collection and resulting data fell under the health care exemption. However, it denied the motion regarding non-prescription eyewear, as the Plaintiff was not considered a "patient" within the scope of the exemption when using the VTO tool for non-prescription products.

Following the lower court's ruling, Marino sought clarification from the Illinois Court of Appeals, which reviewed the following question:

> "Pursuant to the health care exemption under the Biometric Information Privacy Act 740 ILCS 14/10, is an individual who tries on non-prescription sunglasses utilizing a virtual try-on tool that captures certain biometric information, considered a patient in a health care setting?"

The Illinois Court of Appeals found in the negative and upheld the lower court's decision, affirming that the health care exemption applied to prescription eyewear but not to non-prescription products, permitting the Plaintiff's claims to proceed against Gunnar Optiks.

Under BIPA, a plaintiff can seek statutory damages for *each* violation, including for negligent violation, liquidated damages of $1,000, or actual damages, whichever is greater, and for intentional or reckless violations, $5,000, or actual damages, whichever is greater.[3]

The ruling underscores the necessity for companies offering VTO experiences to carefully evaluate their compliance with biometric data privacy regulations of any state where it conducts business, as well as ensuring they comply with informed consent requirements.

3 740 ILCS 14/20. Right of Action.

Cohen v. Kering Americas, Inc., et al.

In June 2024, Tracy Cohen, a former employee of Gucci's Chicago store, filed a class action lawsuit against Gucci America (Gucci) and its parent company Kering Americas, Inc. (Kering), accusing them of violating the Illinois Deceptive Business Practices Act and the Consumer Fraud Act by falsely misrepresenting to consumers that Gucci's "exotic" skin products were ethically sourced.

Cohen, as a sales associate, was trained to tell customers that Gucci's exotic products were sourced ethically by shedding or as a byproduct of the meat industry, which she believed to be true. After learning of a news report asserting that Gucci's Thailand suppliers allegedly engaged in the abusive slaughter and skinning of pythons and crocodiles, Cohen decided to bring suit claiming that the defendants deceived her and other consumers into buying exotic skin products through false representations. Defendants Gucci and Kering moved to dismiss Cohen's claims for lack of personal jurisdiction and failure to state a claim.

In October 2024, U.S. District Court Judge Jeremy Daniel granted Kering's motion to dismiss for lack of personal jurisdiction but denied Gucci's motion to dismiss for failure to state a claim. The court agreed that none of the allegations were rooted in Kering's conduct, other than its role as Gucci's parent company. However, the court found that Cohen pleaded sufficient facts to state a claim against Gucci. The court stated that Cohen sufficiently pled an allegedly deceptive act and actual damages worthy of defeating a motion to dismiss.

The ongoing litigation highlights the need for transparency regarding the sourcing of products and growing consumer (and employee) concern over ethically sourced materials.

Adidas America, Inc. v. Aviator Nation, Inc.

Adidas and Aviator Nation have a long-standing history in the battle over Adidas's famous three-stripe trademark. Over the years, Adidas has raised multiple complaints over Aviator Nation's apparel designs. As a result, Adidas and Aviator Nation reached three settlement agreements, signed in 2012, 2014, and 2022. These agreements outline Adidas's prior rights in the Three-Stripe Mark, and state that Aviator Nation will stop selling, manufacturing, or marketing any product bearing the Three-Stripe Mark or any design confusingly similar to it.

In its current lawsuit filed in May 2024, Adidas alleges that Aviator Nation breached the settlement agreement by using a four and five stripe design on apparel items that is confusingly similar to Adidas's Three-Stripe Mark. In the Complaint, Adidas alleges trademark infringement, trademark counterfeiting, unfair competition, trademark dilution, injury to business reputation, unfair and deceptive trade practices, and breach of contract.

In its Answer, Aviator Nation presented numerous affirmative defenses including failure to state a claim, statute of limitations, unclean hands, and fair use.

This ongoing battle between two fashion companies over stripes raises important considerations for brands as they protect their intellectual property. This suit emphasizes the balance between protecting and preserving trademark rights while still allowing new designs and creativity in the marketplace. Is Adidas over-monitoring the use of stripes by third parties, or are they merely protecting their rights?

Products Aviator Nation Agreed To Stop Selling in 2022 Agreement

Products Aviator Nation Currently Continues To Sell

SHEIN v. Temu

In August 2024, the online retailer Roadget Business PTE. LTD., aka “SHEIN”, accused the U.S. online retail platform of foreign entity PDD Holdings Inc. (PDD), Temu (WhaleCo, Inc. d/b/a Temu), of engaging in deceptive marketing practices, including trade secret misappropriation, intellectual property infringement, false advertising, and unfair competition, thereby gaining an unfair advantage in the U.S. market. SHEIN also pursued claims of alter-ego liability against PDD for Temu’s actions, alleging that PDD “operates and controls the Temu website and app directly through agents and alter egos… including direct and indirect affiliates and subsidiaries.” This is not the first suit between these entities.

Specifically, SHEIN claims that Temu directs its suppliers to copy SHEIN’s designs and market them on Temu's platform. SHEIN claims that these suppliers are not “legitimate independent sellers” but rather entities directed or controlled by Temu. The lawsuit also alleges that Temu impersonates SHEIN on social media and in advertisements to divert SHEIN’s customers and deceitfully uses SHEIN’s brand name in paid ads. In support of many of its claims, SHEIN submitted evidence of nearly identical product images on both platforms. Additionally, SHEIN claims that a Temu employee stole SHEIN’s confidential and proprietary information on its bestsellers, suppliers, and pricing data.

In response, Temu and PDD, both represented by the same counsel, filed separate motions to dismiss the lawsuit, arguing respectively that SHEIN has not adequately stated its claims and that the court lacks personal jurisdiction over PDD. Temu further contends that SHEIN’s lawsuit is an attempt to stifle competition and disrupt Temu's operations in the U.S.

As of February 2025, both motions are fully briefed.

In a related lawsuit between Temu and SHEIN, also ongoing in the Federal District Court for the District of Columbia, Temu has asserted claims for copyright infringement, trade dress infringement, unfair and deceptive advertising, tortious interference, and antitrust violations. In addition to its complaint, Temu sought a preliminary injunction against SHEIN and its parent company, Roadget Business PTE. LTS. under the Digital Millennium Copyright Act (DCMA) asserting irreparable harm to its reputation, seller and customer relations, ability to compete, and market share.[4] On February 10, 2025, the U.S. District Court for the District of D.C. denied the injunction finding that Temu had not established that its alleged harms could not later be remedied with money damages, for which the DMCA expressly provides.

Both cases continue to move forward.

The outcome of these cases could have significant implications for the fast-fashion industry and e-commerce platforms operating in the U.S. by potentially impacting parties use of exclusive supplier agreements and social media advertising.

4 *Whaleco Inc. v. SHEIN Technology LLC, et al.*, Case No. 1:23-cv-03706 (D. D.C. 2023)

Van Cleef v. Richemont International SA

Richemont International SA (Richemont), the parent company of Van Cleef & Arpels, has filed a lawsuit against Silversmiths Inc. (Silversmiths) for allegedly infringing its iconic Alhambra jewelry collection. The lawsuit, filed in the U.S. District Court for the District of New Jersey, accuses Silversmiths of producing and selling counterfeit designs that closely mimic Alhambra's trademarked "quatrefoil motif" with beaded edges. Richemont claims Silversmiths ignored multiple cease-and-desist letters since 2020 and continued profiting from the luxury brand's reputation. The lawsuit seeks a permanent injunction, monetary damages, and the destruction of all infringing products. The case could set precedents regarding the scope of trademark protection, especially concerning designs that have become iconic over time and could have quite the impact on liability in third-party marketplaces that facilitate the sale of these fashion products.

Sydney Nicole LLC and Sydney Nicole Gifford v. Alyssa Sheil LLC and Alyssa Sheil, 1:24-cv-00423-RP (W.D. Tex. April 22, 2024).

In a novel suit, influencer Sydney Nicole Gifford filed a lawsuit against fellow content creator Alyssa Sheil alleging that Sheil copied her distinctive "neutral, beige, and cream aesthetic," which Gifford claims as her brand identity. The lawsuit encompasses claims of copyright infringement, trade dress infringement, and misappropriation. Sheil denies the allegations, attributing the similarities to coincidental trends rather than deliberate copying. An alternative dispute resolution report was filed on February 3, 2025, stating the parties are still in settlement talks and are in the process of selecting a mediator for this suit. This case could set a precedent for how unique online aesthetics are protected under intellectual property laws and could serve as the foundation for other influencer legal feuds.

Selling the Sizzle: Effectively Marketing FAB Products with Underlying IP

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To Brand or Not to Brand, That is the Question.

The difference between a commodity product and a brand name product is, of course, branding. Branding is defined as "the promotion of a particular product or company by means of advertising and distinctive design." In order to become a brand, a mindset and an intellectual property (IP) strategy need to be employed. Many commodity fashion, apparel, and beauty companies produce products that are every bit as fashionable and high-quality as the products that brand name companies produce – the difference is a branding strategy to create a brand name to distinguish the products from other commodity product producers. From an IP perspective, an iconic logo, name, or other distinguishing characteristic applied to the products can make all the difference in the world when marketed properly. With a strong brand comes increased profit margins. However, with a strong brand also comes increased competition from "copycats" and competitors, so the business strategy needs to integrate a robust IP enforcement strategy to minimize or eliminate commoditization of the product.

Selling the Sizzle

What makes your company or product so special? Just how good marketing tells an interesting story of a company or product, so too can the company's IP that protects the company and product. When applying for a patent application, for example, an applicant should strive to tell the interesting story through the application, describing what shortcomings are in the market and what makes the company's offering, which generally includes technology and/or ornamental design, special. This interesting story is then perpetuated — oftentimes, consumers want to buy a product because of a story shared through the marketing of the product. If the story in the marketing is related to the unique offering, consumers will become familiar with it. Consumers will seek out such offering in other brands, and when the consumers do not find the innovative offering in competitive products, the consumers will turn away from that brand and return to the brand that does have the offering. The "sizzle" is *YOUR* story, and the story is *YOUR* offering. To summarize: come up with an interesting story, market the story, and set higher margins for your unique or interesting product.

Many companies feel an innate desire to shy away from disclosing their IP. It is important to understand that if IP is properly protected, it can, and should, be shared. Trademarks grow in value through actual use in commerce, and patents become more valuable when they protect technical innovations that drive revenue, and more revenue is driven by marketing that distinguishes from other products. Hence, a well-placed trademark or copyright symbol or the words "Patent Pending" can signal to a consumer that there is something special in the product — something they want. If a company is not utilizing IP in its marketing, it is losing a great branding opportunity. In fact, trademark law quite literally requires actual use in the market for a trademark to exist at all.

The Competition Problem

Properly deployed, strong IP can help stifle competition. Competition in the consumer product industry has never been so fierce due to the proliferation of the global economy. Competition can include not only typical market competitors, but even former manufacturers and employees. With online marketplaces, competitors can be on any platform, such as social media, online sales sites, and their own websites.

No industry is faster and more aggressive than the fashion and beauty industries. To make matters worse, trends and style cycles are typically short, as short as one or two seasons. As such, the ability for competitors to impact a “hot” new design through copying or counterfeiting can be financially devastating to the bottom line of an originating company.

Historically, companies mainly faced competition within the United States, but the ease of transportation and marketing via the web makes anyone a potential competitor. While technology generally increases the speed of product development, technology, such as 3D laser scanners and mass spectrometry, can also increase the speed of reverse engineering or copying others’ products.

While knockoff products and competitors can come from anywhere, manufacturers, most notably non-U.S. manufacturers, will sometimes produce and sell a designer’s products to other distribution channels, even during a formal engagement with the manufacturer, and will continue to do so even after the designer switches to a new manufacturer. Even with proper agreements and security measures, producing counterfeit products from the actual production line of the real product does happen. There are many other real-world scenarios in which counterfeit products are produced without being able to identify the source.

Moreover, companies always face the challenge of current employees or contractor who leave the company. Employees often have access to designs, especially in current times where most are electronic, and sometimes even confidential or trade secret information.

Consumer Product Competition Challenges

As a result of the ease of copying, reverse engineering, and unscrupulous manufacturing partners, consumer product companies often find themselves with competitors shortly after releasing a new product, oftentimes within a few months. And, the more popular the brand, the faster the competitors enter the market with competing products.

Two defenses against competition include (i) having sufficiently strong intellectual property protection and (ii) out-marketing the competitor. Out-marketing can be challenging with today’s low-cost online marketing tools and fast-paced market, but combining marketing with a good IP strategy can be a winning defense. Intellectual property generally includes patents, trademarks, copyrights, trade secrets, trade dress, and know-how — each of which has its pros and cons for the fashion and beauty industries.

What Type of IP Protection is Right for You?

Different forms of IP have different value and infringement standards for protection. Utility patents protect the structure and function of an invention. Design patents protect the ornamental appearance of a product. Trademarks protect a name, symbol, or combination thereof that operates as a source identifier. Copyrights protect an artistic expression or work on a tangible media. In general, all types of IP, especially patents, can be helpful for marketing and customer confidence purposes.

As an example, a pair of jeans that has a unique shape, functional features, and logo stitching on rear pockets, can be protected with the following IP:

- Utility patent (unique shape, functional features, methods of manufacturing) [instant value when granted]
- Design patent (unique shape, logo stitching) [instant value when granted]
- Trademark (logo stitching, brand name) [value grows through actual use in commerce for both registered and common law trademarks]
- Copyright (logo stitching) [instant value when registered and in common law, but a registered copyright is required to assert a lawsuit]

In the event of a copycat or counterfeit product, one or more of your IP assets may be useful in taking down a competitor. It is important to work with the proper IP attorney(s) in forging a strategy prior to and after infringement or design-around occurs, to help improve scope of coverage, as needed.

The Flip Side

When preparing a marketing campaign, companies also need to be wary of IP owned by others. Companies must be careful not to draw too much on inspiration or influence from other brands whose ideas may be protected by IP. Violating IP owned by others isn't always malicious — sometimes it is inadvertently or subconsciously done. It is important to consult with the proper IP attorney(s) in this regard, as well, to avoid ending up on the wrong side of an IP dispute.

The Need for Speed

Because of the speed of competition with consumer products, IP assets need to be protected earlier in the product life cycle for maximum protection. As such, IP should be properly integrated during product development, and each IP asset should be considered and timely filed. If patent applications are filed using available expedited processes, they may grant before competition even shows up, greatly enhancing the ability to cost-effectively reduce competitors and remove infringing products from the market.

Out-Brand the Competition with Your IP

Make sure to develop an aggressive IP strategy, protecting your intellectual property early and quickly, and utilize your IP to "sell the sizzle" of your company and products through marketing. Doing so will position your company with strong branding, distinguishing it from the competition. While IP can operate as an "insurance policy" to maintain a competitive advantage in the market, the most successful companies focus on a strong branding campaign by "selling the sizzle" to win customers and increase margins.

A Slippery Catwalk: 2024 Fashion and Beauty Bankruptcy Woes

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2024 was a year of increased bankruptcy and insolvency activity,[1] and many well-known U.S. companies closed stores and eliminated jobs in efforts to stay in business. The fashion, apparel, and beauty industry was no exception, with prominent brands attempting to right-size or liquidate their operations through the bankruptcy process. The issues in three industry cases in particular — the Chapter 11 cases of Avon Products, Inc., Rue21, Inc., and Express, Inc. — offer a summary of certain challenges facing the industry in the post-COVID era and provide lessons to other companies in this space on how to navigate an ever-shifting marketplace.

Avon Products, Inc.

Avon Products, Inc. ("API"), the holding company for the Avon brand's non-U.S. operating entities, struggled with mounting debt resulting from two primary sources. First, API owed its new parent company, the Brazilian cosmetics company Natura & Co. Holding, SA ("Natura"), over $1.2 billion as of the filing date.[2] Second, API faced mounting legal costs from lawsuits brought by customers claiming that its talc-based products contained asbestos.[3] Although API claimed it "only uses cosmetic grade talc which has been tested to confirm that it does not contain asbestos," juries in various courts disagreed and issued verdicts against API, amounting to approximately $300 million in judgements, litigation expenses, and settlement costs.[4] Facing the grim prospect of hundreds of pending cases ahead, on top of its massive loan debt, API filed for bankruptcy under Chapter 11 in August of 2024.[5]

Throughout the process, Natura — seeking to protect its investment in API and diminish negative impacts to its business — played a key role in the bankruptcy proceedings. At the outset, it offered to contribute up to $43 million in debtor-in-possession financing to help API administer the bankruptcy cases.[6] Subsequently, Natura proposed a global settlement whereby, among other things, it would credit bid (or essentially forgive) a large portion of API's debts and assume certain liabilities and pay an amount of cash in exchange for substantially all of API's assets and API's releases of potential claims against Natura. The bankruptcy court for the District of Delaware approved this settlement in December of 2024[7] and required that a trust be set up for the benefit of the claimants in the talc cases.[8] As a result, API and its associated international operating companies will continue to operate under the Natura umbrella, an arrangement which significantly broadens Natura's scope of business. The case is a good example of how the Chapter 11 bankruptcy process can be used to insulate and "cleanse" parts of a global business from otherwise crushing liabilities, such as the talc lawsuits, through a bankruptcy sale.

Rue21, Inc.

Failure to adapt to changing marketplace realities in the fashion, apparel and beauty industries can also lead to insolvency. This was the case for Rue21, Inc. (“Rue21”), a mainstay of American shopping malls that filed its third (and final) Chapter 11 petition in May of 2024 — often colloquially called a Chapter 33. After a successful reorganization in 2002, Rue21 grew to 1,200 locations in shopping malls across the nation.[9] Fifteen years later, it faced a debt crisis driven by overexpansion, excessive debt from a leveraged buyout in 2013 by a private equity firm, and “a decline in in-store transactions due to online shopping."[10] In response, Rue21 shuttered over 400 locations and promised to pivot to a better online experience for shoppers.[11] Despite this stated intention, however, it kept a focus on brick-and-mortar retail and, “still at the peak of the pandemic when many retailers were downsizing, Rue21 began to expand its store fleet.”[12] Industry observers noted that Rue21’s brand lost market share amongst key demographic targets to competitors that focused more on their fast fashion online platforms.

This proved disastrous. As Rue21 stated in its initial 2024 bankruptcy filings, the post-pandemic period led to “operational losses resulting from, among other things, underperforming retail locations, increased industry competition and the uptick in online shopping, inflation and macroeconomic headwinds, and challenges raising capital.”[13] In fact, Rue21 had tried and failed to find a buyer to step in prior to filing, because it found no offers that would have exceeded its projected liquidation efforts.[14] With no buyer, Rue21 was forced to fully liquidate its inventory, lay off its 4,900 employees, and close all 540 of its remaining locations.[15] Unfortunately for Rue21, it could not overcome its delay in adapting its business to the current environment.

Express, Inc.

Express, Inc. (“Express”), which also owns the Bonobos and UpWest brands, also filed for Chapter 11 in 2024. Known for its working-professional attire, Express “made too little effort to adapt” when the post-COVID increase in work-from-home arrangements led to “the casualization of fashion.”[16] This reluctance to shift its offerings combined with its overarching dependence on physical retail spaces brought Express to the point of insolvency with over $1 billion in debt.[17]

Unlike Rue21, however, Express was able to execute a viable plan to restructure its debts in its Chapter 11 case. WHP Global (“WHP”) collaborated with Express to purchase the Bonobos brand in 2023. In light of the risk and opportunity presented by the Chapter 11 case, in an innovative solution, WHP invited retail landlords Simon Property, Brookfield Properties, and Centennial to form a joint venture acquisition entity called Phoenix Retail.[18] As indicated in its first-day bankruptcy filings, Express had a proposal from Phoenix Retail “to purchase a substantial portion of the Company’s assets.”[19] With the Bankruptcy Court’s approval, Phoenix took ownership of the troubled brand and kept over 450 of its stores open, while rejecting undesirable and burdensome leases and restructuring other leases for increased profitability.[20] Among other things, the Express case provides an example of the power of Chapter 11 to enable retailers to creatively incentivize and structure favorable deals with landlords to enable their restructuring.

Bankruptcy Alternatives

It is worth mentioning that Chapter 11 bankruptcies, including those discussed above in the fashion, apparel and beauty space, can be an expensive way to restructure or liquidate assets for very large companies with hundreds of millions or over a billion dollars of annual revenue. The cases discussed above were highly visible given their size and the public nature of the bankruptcy process. Bankruptcy may not be right for all companies. Companies that are facing financial distress which are seeking a less public and less expensive process have non-bankruptcy alternatives to use when facing difficult decisions about insolvency. These alternatives include out of court workouts or sales, assignments for the benefit of creditors, or Article 9 sales. Many of these processes can be conducted privately, without the wide scrutiny that could otherwise damage a brand, and these proceedings are often faster and cheaper for a company faced with liquidity and insolvency issues.

Conclusion

The prevailing trends toward e-commerce, and social media driven sales continue to accelerate, with large-scale fast fashion companies leading the way. As evidenced by the cases discussed above, fashion and beauty companies need to invest in e-commerce platforms and creative advertising to keep their brands and sales strong, and tailor their reliance on brick-and-mortar operations to compete in today's environment while avoiding or addressing financial problems, including those arising from litigation such as in the Avon case. Chapter 11 bankruptcy can provide a distressed company with powerful tools to restructure their business and obligations, including the ability to reject burdensome leases and contracts, sell their businesses, brands, and other assets free and clear of pre-existing liens and claims, cut debt from their balance sheets and even organize creditors to support the continuation of the business. But it is expensive and complex, and often is a last resort. In appropriate cases, other alternative insolvency procedures can be used strategically to achieve many similar benefits.

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The Ultimate Brand Collab: Fashion M&A Forecast for 2025

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As many of us have mourned the loss of some of our favorite boutique brands over the last few months, we have also seen other fashion houses get a breath of fresh air from industry heavy hitters. Fashion companies large and small are navigating uncharted waters as they traverse through 2025. And we have just made it to March! In the year ahead, we can expect that the fashion industry will continue to face a dynamic landscape when it comes to mergers, acquisitions, and general dealmaking, shaped by economic uncertainty, shifts in regulation in the United States and abroad, and evolving consumer preferences. This article explores what to expect from the industry and legal considerations guiding the business combinations among fashion companies this year.

1 Evolving Scrutiny of Public Markets and M&A Deals

While the anticipation for a robust rebound to the IPO market remains, fashion companies generally have not seen much momentum on this front. In fact, recent months have seen fashion conglomerates doing the exact opposite. More and more publicly listed companies are seriously contemplating going private, with a number of these go-private deals well under way. To restructure operations in a cost-effective way, going private offers these companies a way to do so while minimizing the effects of public market volatility, costs of compliance with reporting requirements, and heightened scrutiny from public investors.

Contrary to the IPO front, many expected public M&A activity to gain significant momentum in 2025. Fueled by changes in the regulatory landscape, such as the potential for a more business-friendly Federal Trade Commission (FTC), there has been a lot of optimism that this would promote a more nuanced approach to antitrust enforcement and lead to a more favorable environment for strategic acquisitions. However, domestic and international economic uncertainty and market pressures continue to slow the pace of the anticipated deregulation.

While we may see a more lenient gaze continue to develop over the year, any sort of mega-deal in the fashion space should still expect to face rigorous scrutiny. If other economic pressures subside, we may see that expected deregulation gains momentum and stimulates increased dealmaking for lower market cap companies. Nonetheless, fashion companies must remain cognizant of shareholder relations and maintain effective communications throughout the process. Companies that fail to align with shareholder priorities may encounter resistance, which can complicate deal closures, even in a favorable regulatory climate.

2 Continued Appetite for Private Dealmaking

Turning to the private market, 2024 saw some notable household names change hands, and we can expect that 2025 should tell a similar story. Fueled by ongoing economic uncertainty in the industry, this volatility has catalyzed a unique opportunity for larger companies in the industry to make strategic acquisitions of up-and-coming brands. Many early-stage companies face unique challenges of rising operational costs, inflationary pressures, and unpredictable consumer spending habits. Given their size, specialization, and greenness, these companies can't handle these market shifts as adeptly as more established brands. As a result, an acquisition by a larger company can provide a lifeline for survival. The creative fervor of a smaller brand lives on and a larger company can diversify its portfolio with niche brands that capture new market segments.

At the same time, we are also seeing a rise in established brands taking minority stakes in smaller, trendy companies. This often comes in conjunction with brands that are trying to diversify their own offerings — whether that be through new resale platforms, beauty products, hospitality services, or other novel ways to engage their existing consumer base.

In addition to fashion industry-specific acquisitions and investments, there has also been an increased willingness of private equity and venture capital firms to invest in earlier stage fashion companies. Firms are seeing increased potential to fund fashion brands that focus on sustainability, innovation, and direct-to-consumer models, as these objectives align with consumer demands for ethical and forward-thinking solutions. These investments, while potentially lucrative, often involve greater risk, necessitating rigorous due diligence to bridge certain knowledge gaps between the industries.

3 Effects of Potential Tariffs

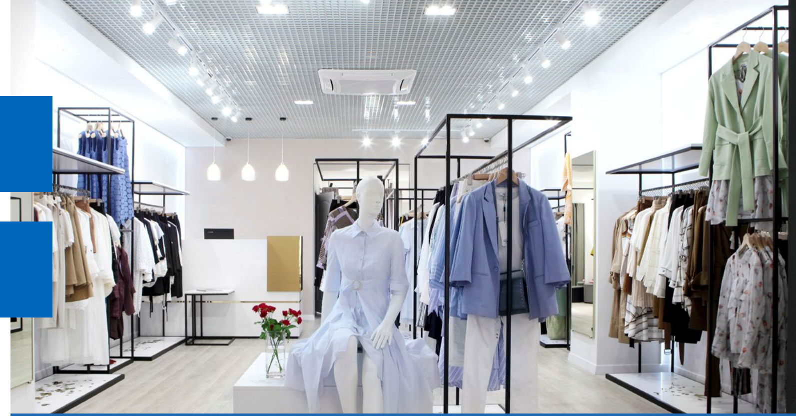
Global trade policies remain a wildcard for the ongoing operations and undoubtedly will continue to impact dealmaking this year and beyond. Potential tariffs on imported textiles, raw materials, and finished goods could reshape supply chain economics and influence deal valuations, effectively making it harder for parties to come to the table to discuss potential deals altogether. Brands that are heavily reliant on international production may see their profitability erode, making them less attractive targets for acquisition. For those deals that get over the initial barriers, the tariff risks will continue to provide a risk that parties will need to quantify through diligence and proper safeguarding.

At the same time, for many fashion companies, the threat of tariffs may also foster increased dealmaking when it comes to seeking out supply chain diversification. Companies may see a growing need to negotiate new supplier contracts or establish manufacturing operations closer to home. These strategies not only mitigate tariff risks but may also align with growing consumer demand for locally sourced and ethically produced goods.

Final Thoughts

The 2025 M&A outlook will be marked by a mix of hardships and opportunities for fashion companies. Dealmaking will undoubtedly persist, with private M&A providing prospects for both established and emerging brands. Similarly, public company M&A may gain from favorable regulatory shifts. Meanwhile, fashion startups could benefit from infusions of capital from venture investment and private equity. In a sector as fast-paced and innovative as fashion, brands have always needed to adapt and present something new to thrive in the market. 2025 will be no different.

Can Luxury Fashion Houses Join the Sustainability Discussion?



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Sustainability in fashion has become a pressing topic in recent years, as both the environmental impact of the industry and the growing concern for the environment have gained widespread attention. With the rise of climate change disasters on a global basis, eco-conscious consumers, who, today, drive more and more of the market, have shown increased interest in what changes can be made on an individual basis to benefit the environment and have seemingly determined that change must come from within. Specifically, from within one's closet. While thrifting presents a sustainable solution to lower and middle market shopping, what can be said for luxury fashion? Can the world of high-end, exclusive, and often resource-intensive fashion be reconciled with the growing demand for ethical and environmentally conscious practices, or is luxury fashion necessarily left out of the sustainability discussion?

By definition, luxury fashion and sustainability seem to be at odds. The luxury sector thrives on exclusivity, excess, and high-quality materials for items that are not a necessity, but a desire. A desire which stems from, in part, the lack of attainability for most consumers. Some of the most coveted luxury items on the market require significant amounts of resources, from rare animal skins and fine silks to the hundreds of hours of skilled craftmanship used to craft a single garment or handbag. Each element often translates to higher environmental costs.

Additionally, part of the appeal of luxury goods is the focus on uniqueness; luxury designers often release a limited number of items in a seasonal collection which are not to be repeated. This recognition of an item's season is reflective of a status symbol in and of itself. To keep up with the Joneses, you can't just have last winter's handbag — you need to have the current cruise collection bag fresh off the runway. Luxury fashion's constant product innovation, recognizable designs tied to specific seasons, and new collections can perpetuate overconsumption. The allure of owning something rare and limited, which is often a significant justification to spending luxury prices, can inadvertently promote a culture of excess, which contradicts sustainability.

A 2022 Deloitte survey found that 57% of luxury consumers factor in a brand's sustainability when considering whether to buy a new designer item.[1] In response to this call from consumers to shift towards more sustainable practices in an effort to continue earning their business, luxury brands can capitalize on their existing cultures of innovation to start exploring more environmentally friendly ways to design and produce their goods. By utilizing more sustainable materials in garment and accessory production, brands can reduce their environmental impact without sacrificing exclusivity or craftmanship.

1 BBC, *Can luxury fashion every be fully sustainable?* (Nov. 8, 2023)

While thrifting presents a sustainable solution to lower and middle market shopping, what can be said for luxury fashion?

Sustainable materials are by no means new to the fashion industry. For years, brands of all price points have utilized organic cotton, bamboo, hemp, and other plant-based textiles in production. In recent years, there have also been exciting developments in the intersection of fashion and technology, such as 3D printing and AI-driven design, which has helped allow designers across all price points to create new fashion with minimal waste and more efficient production techniques. The more recent and perhaps more relevant push to explore new materials becomes more interesting for luxury brands who rely on certain "heritage" designs, such as Chanel's flap bag, Hermès Birkin, or Gucci's Horsebit 1955 bag. Immediately recognizable by those who know these brands, these iconic silhouette bags are representative of the luxury brands themselves.

Each of these examples, as well as other luxury bags, are marked by very precise craftmanship and unique indicators of quality and design — elements which are essential in differentiating authentic bags from the ever-growing supply of "dupes" or counterfeit bags. As a result, deviating from the current materials used in the creation of these bags could have negative impacts on luxury brands by arguably diluting the brand's specific and recognizable designs. This challenge adds additional pressure to luxury brands to pursue sustainable materials of only the highest quality which can be incorporated into existing heritage designs with the most precise craftsmanship.

Given this inherent risk of modifying heritage designs, not many luxury brands have moved to substantially, let alone entirely, reproduce these products in sustainable ways. However, there have been more limited explorations into vegan leather and alternatives to animal products, including lab-grown leather and eco-friendly textiles, and even leather made entirely from mushrooms called "Mylo," in the case of Stella McCartney. In 2022, Stella McCartney announced that it would be commercially selling the first ever handbag made from Mylo in a limited-edition run, following the brand's longstanding partnership with Bolt Threads, the developer of Mylo as a renewable design textile, derived from mycelium, the root-like structures of fungi. Stella McCartney used Mylo in a limited run of approximately 100 "Frayme" handbags, touted as the world's first luxury bag created from mushrooms. The hardware on the Frayme bags is made from aluminum and zamak (an alloy that includes zinc, aluminum, magnesium, and copper), which is described by the brand as being "infinitely recyclable." Each bag is priced at $3,500. However, following Mylo's commercial debut, as well as smaller scale usage by other brands such as Lululemon and Adidas, it was announced in 2023 that Bolt Threads was ceasing production of the material, due to inability to scale on a larger commercial level thanks to rising inflation and a lack in funding opportunities.

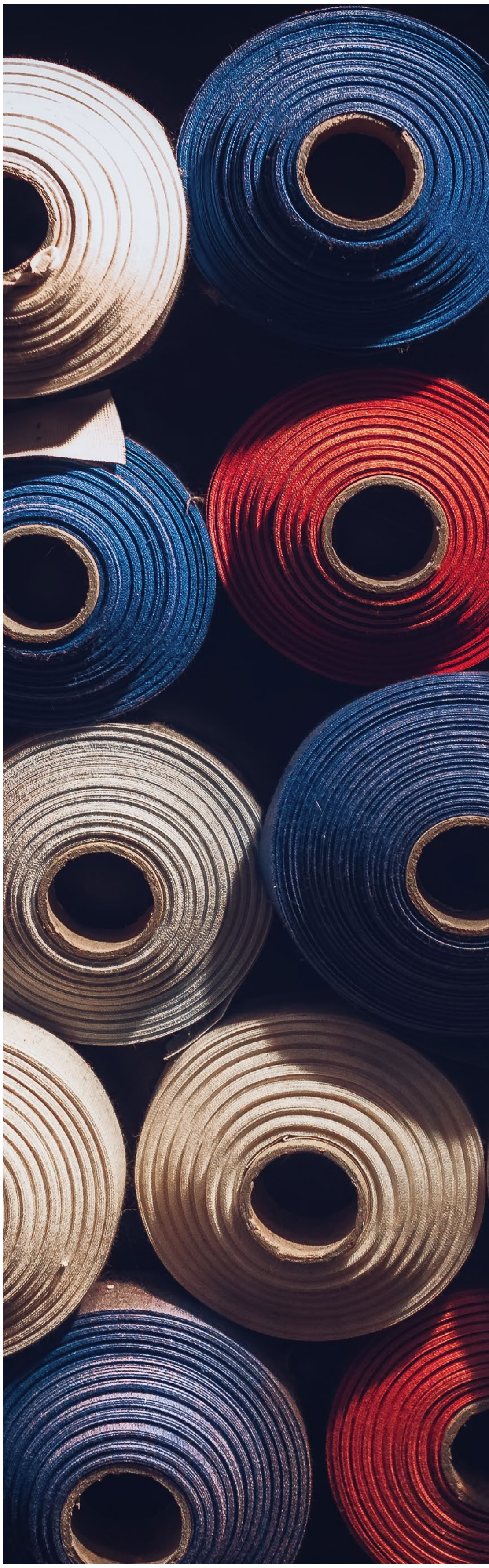
In 2023, Gucci collaborated with Gen-Z pop artist and proud vegan, Billie Eilish, to issue a fresh new take on Gucci's iconic Horsebit 1955 handbag — this time, made from biomaterials, rather than leather. Specifically, Gucci's team developed a new material called "Demetra," which is composed of 75% plant-derived raw materials, including bio-based polyurethane made from non-GMO wheat and corn, plant-based viscose, and wood pulp. Following its launch, the Demetra Horsebit 1955 sold out. However, the bag is no longer available on Gucci's website. Instead, a search for the Horsebit 1955 reveals only those made in leather, which is emblematic of part of luxury's sustainability problem: how much does a single launch or single product made sustainably offset the overall brand's production?

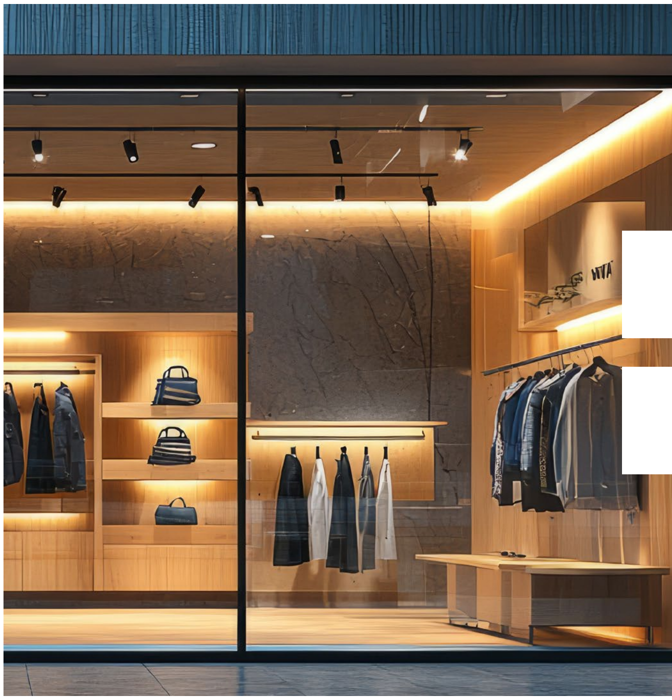
At the end of the day, luxury brands are businesses, and their goal is ultimately, to be profitable. The development of new and sustainable materials is not only risky in terms of consumer performance, but also requires a large up-front investment of time and resources into their development. This balance of costs is perhaps why the commercial launches of these products so far have been limited to short-term productions. However, to really make an impact, luxury brands must partner short-term sustainability accomplishments with authentic, long-term commitments to ethical and sustainable practices. They can do so by leaning into the call for transparency and proactively publish their sustainability standards and practices. Over the past few years, an increasing number of luxury brands have started to disclose the environmental and social impact of their production processes, offering consumers insight into how their products are made. These reports often include goals relating to measurable improvements, such as reaching net-zero greenhouse gas emissions by 2040, or only working with suppliers who are certified by third party sustainability programs across the supply chain.

A long-standing example of this commitment to sustainability is the Material Innovation Lab (the Lab) created by the Kering Group (Kering), which houses luxury brands including Gucci, Bottega Veneta, Balenciaga, and Yves Saint Laurent, and was notably one of only four fashion companies to invest in Bolt Threads' development of Mylo in 2013. While the Lab was founded over a decade ago, Kering continues to publicize the Lab's efforts through routine updates on Kering's website, reinforcing the Lab's accountability and visibility with consumers. Located in Milan, the Lab serves as both a library of sustainable fabrics, enabling the design teams of Kering brands to better understand sustainable materials, and a driver of change within the brands' complex supply chain. The Lab maintains a database for suppliers and their fabrics. Kering's brands have access to more than 8,000 samples of certified organic fabrics and fibers including alternative leather and sustainable fabrics as well as natural, cellulosic, and synthetic fibers. The fabrics are subject to an in-depth review and assessment, considering both external standards and certification before inclusion in the Lab's database.

It is worth noting that sustainable luxury goes beyond just the materials used; it also requires fair labor practices and respect for workers' rights. While it is largely on the brands themselves to determine which materials are used, there is increasing global interest in regulating labor practices. In 2024, Canada and the United Kingdom released two major reports pertaining to forced labor and child labor compliance in supply chains in connection with Canada's Fighting Against Forced Labour and Child Labour in Supply Chains Act and a reexamination of the UK Modern Slavery Act. While the Canadian Act requires responsive reporting for all companies within the scope of the Act, such as those based in Canada or those outside of Canada but above a certain threshold in exports and revenue, the review of the UK Act calls for stricter sanctions for non-compliance with existing supply chain requirements and updated legislation requiring companies to mitigate modern slavery risks. In the United States, fashion retailers are subject to historical federal legislation such as the Tariff Act of 1930 and the Trafficking Victims Protection Act of 2000, which both prevent the importation of goods made with forced labor, as well as specific state legislation, such as the California Transparency in Supply Chains Act, which requires companies with annual revenue exceeding $100 million to publicly report on supplier audits and efforts to verify their supply chains are without forced labor.

As a result of the increased interest in sustainability and ethical practices, many luxury fashion houses are now focused on ensuring that workers are paid fairly, working in safe conditions, and treated ethically, and are including these commitments on their public websites. As sustainability becomes more integrated into the culture of luxury fashion, it is crucial that these values are extended throughout the supply chain.



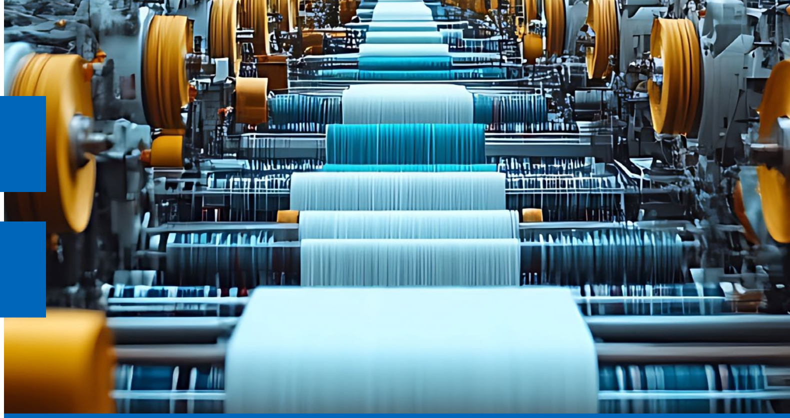


> Though the path forward is complex and requires significant investment and innovation, luxury fashion has the unique opportunity to redefine what it means to be both chic and responsible.

In conclusion, while sustainability and luxury fashion may seem diametrically opposed, luxury fashion, as an industry, has made strides to earn a seat at the table for the larger sustainability in fashion discussion. When it comes to sustainability, the players in the luxury fashion space are faced with different challenges than fashion retailers in the lower and middle markets due to the very essence of luxury as an excessive and exclusive industry, and because of the risks associated with deviating from the heritage designs these luxury houses are best known for. Luxury fashion is also not the best candidate for the circular fashion argument that often is suggested as fashion's "solution" to the sustainability question. Resale vendors, even those who claim to tout strict authentication processes, are often more risk than reward for consumers looking to purchase pre-loved luxury goods, and to date, the luxury fashion houses have been opponents rather than proponents of such third-party companies. For that reason, luxury brands need to stick to what they know best: innovation, craftmanship, and creating demand when it comes to their approach to sustainability. As the consumer becomes more interested in what these brands are doing to embrace sustainability and ethical labor practices, luxury brands must evolve in their own way to utilize sustainable materials and ethical production practices.

Though the path forward is complex and requires significant investment and innovation, luxury fashion has the unique opportunity to redefine what it means to be both chic and responsible. This budding combination of craftsmanship, exclusivity, and sustainability is poised to grow into something truly exciting in the luxury fashion space. And as it so often happens, once the luxury houses innovate, the rest of the fashion industry is sure to follow.

The Mexican Textile Industry: Another Victim of Economic Responses



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The current international trade landscape, especially in North America, is being shaped by a rapid and continuous flurry of economic policies. Governments are responding to the political climate by taking steps to protect local and regional economies, aiming to secure their position in the global market. As a result, various industries have been directly affected by these policies and have also become key players in a growing trade war.

This is the case with the Mexican textile industry, which, due to limited development, has most recently been shaped by a series of protectionist and procedural policies that aim to protect local production against imports of foreign products. The establishment of regulations such as import permits, estimated prices, registration of importers in Specific Sectors of the Importers Registry, the declaration of nominative or mixed trademarks upon customs clearance, and other economic protection practices, have made the Mexican textile market a highly regulated and protected sector.

Since China joined the WTO in 2001, public statistics show that the textile industry in Mexico has experienced decreasing average annual GDP rates, indicating a contraction of national production and an evident decline in local production across sectors and subsectors of the industry[1]. For this reason, the Mexican government has considered the import of both finished foreign textile products and components to produce materials for textile and clothing in Mexico as direct competition to local producers.

Recent Mexican Measures Impacting the Sector

As a direct result of the economic challenges facing Mexico's textile industry over the past two decades, and in an effort to balance the current position of the national market in the textile and clothing industry against foreign manufacturers and importers, the Mexican government issued a decree on December 19, 2024, that amended the tariffs established in the Law on General Import and Export Duties and the Decree for the Promotion of the Manufacturing, Maquiladora and Exportation Services Industry (IMMEX), through which the following measures were imposed:

1. Temporary importation duties (in effect starting December 20, 2024 through April 23, 2026) of:

   i) 15% on imports of goods classified under 17 tariff codes of the Mexican Tariff Schedule with an impact on textile imports; and

   ii) 35% on imports of fabrics and clothing classified under 138 tariff codes of the Mexican Tariff Schedule. Products originating in countries with which Mexico has free trade agreements, such as the United States and Canada through the USMCA, will continue to be exempted of importation duties.

2. The prohibition to import under a temporary basis through the IMMEX Program products identified in 302 tariff codes corresponding to chapters 61, 62, and 63, as well as subheadings 9404.40 and 9404.90 of the Mexican Tariff Schedule.

1 CF. *Getting to know the Textile and Clothing Industry.* National Institute of Statistics and Geography. 2024.

These trade measures have directly impacted Mexican companies involved in the textile and garment sectors, likely forcing them to modify their operations and estimated output due to the resulting increase in costs.

Due to the impact of these modifications and complaints from the sector, particularly from IMMEX-authorized companies that are used to deferring or exempting the payment of importation duties, the Mexican government issued a ruling on January 13, 2025, aiming to reduce the impact of the measures on IMMEX companies that can demonstrate reliability and compliance with their foreign trade and customs obligations.

The ruling establishes that IMMEX companies that meet a specific series of requirements outlined in the ruling, would be exempt from the prohibition on temporarily importing products under the IMMEX Program. These products correspond to the tariff codes mentioned above in bullet 2.

The Decree established by the Mexican government requires companies to:

a. Have a valid registration with the Business Certification Scheme[2] issued by the Mexican Tax Administration Service (SAT) which is not the subject of a suspension or a cancellation procedure.

b. Grant the authority online access to its automated inventory control system, referred to in Annex 24, section C of the General Foreign Trade Rules for 2025, issued by the SAT.

c. Submit a formal application with the Mexican Ministry of Economy proving compliance with the requirements in a) and b) above.

If authorized, IMMEX interested companies will only be allowed to carry out foreign trade operations of goods classified under the tariff items that they would have imported in 2024 only.

It is worth mentioning that the Mexican government established that this exemption/benefit will only be enforced for a period of six (6) months starting from the issuance of the ruling that occurred on January 13, 2025. Once this period has concluded, the exemption will lose validity and companies will be subject to the tariffs and prohibitions described in the December 19, 2024 Decree. There are no updates on whether the Mexican government will issue a new exemption period after the expiration of this one.

IMMEX companies in the textile and clothing sector should adequately evaluate the advantages and benefits that could be obtained if they decide to apply for an exemption with the Ministry of Economy.

2 Referring to VAT and IEPS and Authorized Economic Operator Certifications

Trade War in North America?

The measures mentioned above established by the Mexican government should be considered in the context of a trade war among USMCA members and other participants, stemming from the establishment by the President of the United States of America of a 25% tariffs on products from Canada and Mexico.

Companies should also consider that the international landscape at the North America regional level may experience constant changes across various industries. Naturally, textiles and clothing may be subject to higher duty rates and stricter regulations. Importers and manufacturers must be prepared to mitigate possible risks that could disrupt their businesses by implementing preventive actions such as the diversification of suppliers and sourcing.

Along with this uncertain landscape, companies must also consider the potential changes that may result from the renegotiation of the USMCA. As provided in the USMCA, the three countries are required to review and reauthorize the agreement in 2026. Changes in rules of origin could occur in different sectors, including textiles and clothing — keeping updated on developments with the renegotiation of the trade agreement will be important.

In summary, we strongly urge companies with foreign trade operations in specific sectors, such as the textile and clothing industry, to be alert for and anticipate possible changes in the foreign trade landscape that could impact their business. To that end, it is critical to review the terms and conditions of contracts regulating the supply and distribution of products or manufacturing services. Taking these proactive steps is essential to mitigate potential impacts from political developments in the coming months and years.

Game Changer: The Legal Landscape of Unlicensed Trademarks in Sports Apparel

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2024 was an eventful year for trademark law — particularly in the sports and athletic apparel space. Notably, on November 20, 2024, a Pennsylvania federal jury found that Defendant Vintage Brand infringed Penn State's trademarks by selling unlicensed goods containing designs associated with Penn State. Although the jury only awarded $28,000 in damages, the jury's finding of trademark infringement has meaningful implications for the clothing industry and should provide a sigh of relief to trademark owners.

Vintage Brand is an online retailer selling collegiate apparel. Although the merchandise sold by Vintage Brand is new, the designs on the products are "historic" and represent "the history and traditions of your favorite college football teams."[1] In Penn State's complaint, it alleged that Vintage Brand dedicated a page on its website to showcasing merchandise using designs that were similar to Penn State's registered design marks as well as using the PENN STATE and PENNSYLVANIA STATE UNIVERSITY word marks.

Below are some the examples of the asserted trademarks and accused products as depicted in the pleadings:

Asserted Trademark	Accused Product
	
	
	
	

1 *See* https://vintagebrand.com/site/collection/the/college/man/mascots?gad_source=1&gclid=CjwKCAiAh6y9BhBREiwApBLHCzUSr15_8s8U7buzPLMT3kvHCMESrYq-pU09sA2fbtbI2lF_ovkR-hoClLAQAvD_BwE (last accessed 2/11/2025).

The case has been closely followed by intellectual property law practitioners, brand owners, and apparel manufacturers due to Vintage Brand's defenses. Specifically, Vintage Brand argued that: (i) its use of "PENN STATE" and "PENNSYLVANIA STATE UNIVERSITY" is merely ornamental and does not serve a source identifying function and (ii) consumers purchased the merchandise because they were proclaiming their affection for Penn State, not because they believe that Penn State was the source of the goods. In a rather surprising decision, the trial court denied summary judgment to Penn State on trademark infringement and allowed the issue to be tried. The jury rejected Vintage Brand's defenses and found Vintage Brand liable for willful trademark infringement. This result provides trademark owners with some assurance that they still remain in control of how their trademarks are used and that they have recourse against unlicensed use, whether on "vintage" t-shirts or anything else.

Penn State fought a long battle to achieve this result. The university filed the case against Vintage Brand on June 21, 2021. After years of litigation and exchange of extensive expert reports including costly consumer surveys, the parties filed competing motions for summary judgment. The motions for summary judgment sought resolution of Penn State's trademark-related claims and Vintage Brand's affirmative defenses. The court began its summary judgment decision by observing that "[a]lthough the historical images indisputably incorporate Penn State trademarks, the images are visually distinct from those trademarks, and Vintage Brand provides numerous disclaimers on its website that disavow affiliation with any university."[2] Ultimately, the court entered summary judgment in Vintage Brand's favor with respect to Penn State's counterfeiting, dilution, and false advertising/endorsement claims.

The court denied the parties' competing motions for summary judgment on Penn State's trademark infringement claim and Vintage Brand's affirmative defenses. With respect to the trademark infringement claim, the court held that the evidence was insufficient to conclude that, as a matter of law, likelihood of confusion has been established. Therefore, the court declined to rule on the issue and deferred it to the jury. Specifically, the court held that several factual conflicts under the likelihood of confusion factors could not be reconciled by the court. For example, the court held that there is "some 'degree of similarity'" between Penn State's marks and the alleged infringing products, but Vintage Brand did not appear to "identically copy the Penn State" marks. *Id.* at 648. Therefore, a jury could conclude that the marks are not similar. With respect to actual confusion evidence, the court observed that the parties submitted competing expert surveys, with Penn State's expert survey indicating that consumers were confused about the source of the products, while Vintage Brand's expert concluded there was no likelihood of confusion. The court determined that the competing survey evidence, and challenges to the opposing parties' survey "must be left to the jury." *Id.* at 645

The summary judgment order also addressed Vintage Brand's defense that Penn State's claims were barred because Vintage Brand's use of the images is only in an ornamental fashion. The court was unwilling to adopt "the per se approach utilized by the Trademark Trial and Appeal Board, wherein the use

2 *Pennsylvania State Univ. v. Vintage Brand, LLC*, 715 F. Supp. 3d 602, 613 (M.D. Pa. 2024).

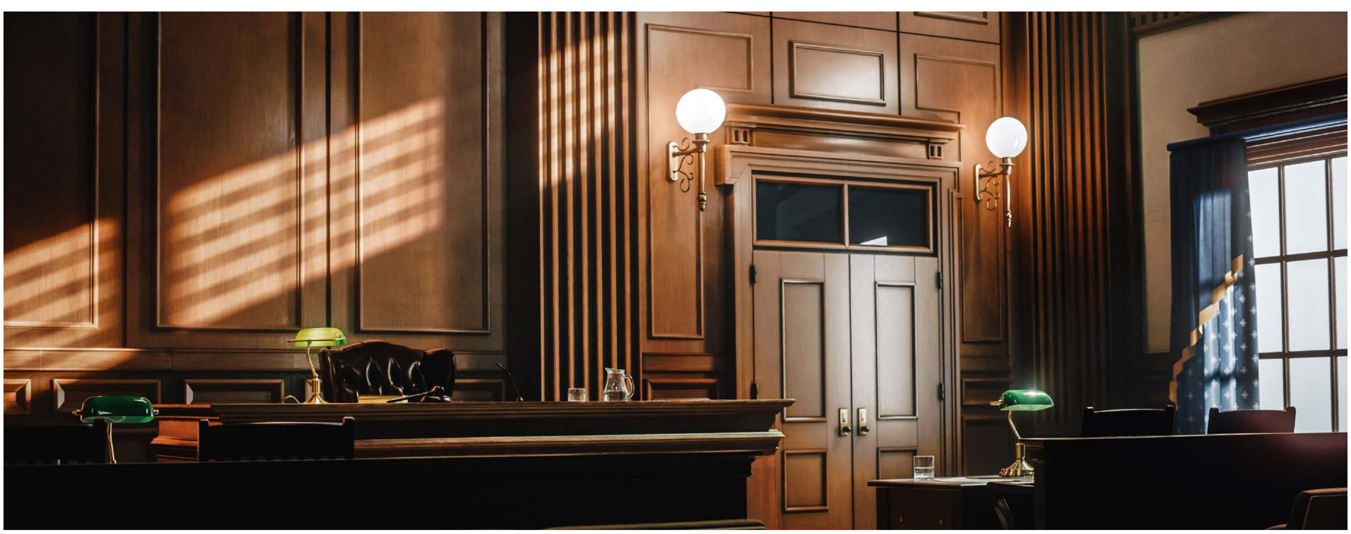
of a university's marks will always identify that university as a sponsor of the physical goods." *Id.* at 641. However, the court was also unwilling to adopt Vintage Brand's position: "that the use of a mark is ornamental unless it is perceived as indicative only of the source of the tangible product itself." *Id.* Instead, the court held that the plaintiff must demonstrate that the use of the mark "is likely to create consumer confusion as to origin, source, approval, affiliation, association, or sponsorship," not merely as to the source of the tangible good itself. Applying that test, the court held that it could not conclude that, as a matter of law, the use of Penn State's marks is merely ornamental.

The court also addressed Vintage Brand's aesthetic functionality affirmative defense. Ultimately, it held that there was a genuine issue of material fact as to whether the marks are aesthetically functional and denied summary judgment. As an aside, the court cautioned against the practical impact of any ruling that would find university marks aesthetically functional because consumers wear goods bearing those marks only to express support for the institution itself: **"This would essentially render those marks wholly unprotectable, even if use of the marks would lead to confusion regarding the source or sponsorship of the product."** *Id.* at 648. The court went on to observe that this **"would mean that no trademark for universities would ever be valid for tangible goods.**" *Id.* At trial, the court instructed the jury on the aesthetic functionality defense. In doing so, however, it did not adopt Vintage Brand's interpretation of the defense which would apply the defense when the purpose of buying such goods is to express affiliation with or affection for Penn State.

The court's recognition of the practical impact of adopting Vintage Brand's aesthetic functionality defense is important. Trademark owners should find comfort in the court's warning, and in the jury's ultimate decision, because it maintains brand owners' protections against unauthorized and unlicensed use. Had the court adopted Vintage Brand's reasoning, companies and individuals would be free to use trademarks to "express support" for various institutions through use of their marks without any quality control or approval by the brand owner itself. For example, a company might make a handbag incorporating Gucci's "GUCCI" word mark. Under Vintage Brand's interpretation of the aesthetic functionality defense, this would be proper because the company is not using "GUCCI" as a source identifier, but instead as a way of expressing support for the Gucci brand and heritage. Similarly, third parties may try to sell unlicensed professional sports memorabilia using registered trademarks and sell those to fans, without any limitations.

In fact, one day before the *Penn State* jury verdict, a plaintiff filed a lawsuit trying to do exactly that. Attorney Todd C. Bank, the plaintiff, filed a declaratory relief action against NFL Properties, LLC in the Southern District of New York seeking a judgment that he should be allowed to sell unlicensed National Football League (NFL) merchandise that features team designs and logos, because his use is "functional" and should be allowed without a license.[3] On December 13, 2024 and January 6, 2025, counsel for Defendant NFL Properties LLC filed letters with the court indicating that it would

3 *Bank v. NFL Properties LLC,* Case No. 1:24-cv-008814 (S.D.N.Y.).



move to dismiss the action, but sought an extension of time to do so. The court granted the requested extension observing: “Having read the complaint, I assume the response will be a motion to dismiss and possibly for sanctions.” One day later, the Plaintiff filed a letter with the court displeased with the court’s reference to sanctions: “I think it is inappropriate for the Court to give legal advice to a party,” and requested that the suggestion regarding sanctions be rescinded “so as to restore the appearance of impartiality.” On January 8, 2025, the court confirmed receipt of Plaintiff’s letter, indicating: “I look very much forward to reading your brief, to see whether you can convince me that my initial read of your complaint missed something - an exercise I am fully equipped to undertake in complete impartiality.” NFL Properties LLC filed its motion to dismiss on February 12, 2025, arguing, *inter alia,* that Plaintiff fails to state a claim as a matter of law because he does not plausibly allege a cognizable theory that the NFL Marks are functional and therefore unprotectable. *Id.* Dkt. 20, p. 9. The motion argues that the NFL Marks are not functional as (i) “traditional” or “utilitarian” or (ii) “aesthetic.” *Id.* Specifically, the NFL Marks are not functional in a utilitarian way because they are not essential to the functioning or quality of the product. *Id.* at 10. With respect to aesthetic functionality, the motion notes that parties have argued they should be free to use a sports team’s name or logo without a license because such use is aesthetically functional, but “[t]his defense has been consistently rejected.” *Id.* at 12 (quoting 1 McCarthy on Trademarks and Unfair Competition § 7:82 (5th ed.)). The briefing on the motion to dismiss is set to be completed by March 26, 2025.

These recent cases addressing the aesthetic functionality defense have meaningful implications for trademark owners, retailers, and manufacturers in the fashion and apparel industries. The *Penn State* decision reaffirms a trademark owner’s ability to control the manner in which its trademarks are used. Retailers and manufacturers should be careful to avoid any unlicensed use of trademarks on products given the limited application of the aesthetic functionality defense. As the trial court in *Penn State* made clear, courts will require that defendants do more than argue that use of the trademark was to express support for an alma mater or favorite team, or even favorite fashion house, for the aesthetic functionality defense to apply. Instead, defendants must prove that (i) the images that it used are essential to the use or purpose of the goods or affect the cost or quality of those goods or (ii) protection of the features as trademarks would impose a significant non-reputation-related competitive disadvantage on the defendant.

In other words, it’s *not* “Gucci” to show support for Guccio Gucci S.p.A. by using their trademark on apparel without permission. And manufacturers and retailers should think twice before making or selling t-shirts using popular sports teams’ trademarks — no matter how cute the mascot is.

Customizing Trademark Law: The Impact of the Shoe Surgeon Cases on Customizers and Brands

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The sneaker and luxury customization industry has pushed the boundaries of artistic expression and intellectual property rights. Two lawsuits, *Goyard St-Honore v. S2, Inc., et al.* and *Nike, Inc. v. S2, Inc. d/b/a The Shoe Surgeon, et al.* question the legality of modifying branded products for resale and the extent to which intellectual property owners can control secondary markets. At the center of these disputes is The Shoe Surgeon, a well-known sneaker customizer whose business involves deconstructing and modifying branded sneakers for resale.

Goyard St-Honore v. S2, Inc.

On June 11, 2024, the luxury fashion house Goyard sued The Shoe Surgeon and its associated entities for trademark infringement, false designation of origin and false descriptions, and unfair competition under both federal and California law.[1] The lawsuit alleged that The Shoe Surgeon unlawfully used the GOYARD trademark and distinctive monogram pattern to create customized sneakers causing consumer confusion and diluting the exclusivity of the brand.

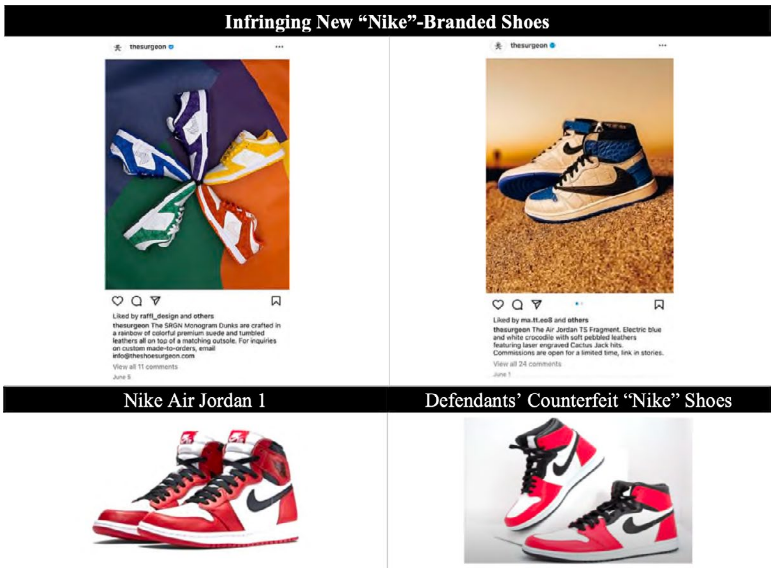
Goyard's Mark	U.S. Reg. No.	Reg. Date	Relevant Goods/Services
	4,036,898	10/11/11	025: Clothing for men, women and children, namely, dresses, skirts, petticoats, culottes, ladies' suits, trousers, shorts, Bermuda shorts, swimming drawers, shirts, ladies' shirts, blouses, tee-shirts, sweatshirts, waistcoats, jackets, cardigans, pullovers, sweaters, parkas, anoraks, coats, gaberdines, raincoats, furs, sashes for wear, shawls, scarf, gloves, neckties, belts, socks, stockings, tights, underwear, pajamas, dressing gowns, swimsuits, bathrobes; footwear, except orthopedic footwear, namely, shoes, sandals, boots, half-boots, boot liners, slippers; hats, berets, caps.

Goyard claimed that The Shoe Surgeon promoted and sold shoes as being made with "authentic" Goyard canvas without a clear disclaimer of affiliation and that the Shoe Surgeon's reputation in the sneaker industry and their legitimate collaborations with other famous brands increased the risk of false associations with Goyard. Goyard, which strictly controls its branding and has historically avoided licensing or collaborations, also objected to The Shoe Surgeon's "SRGN Academy" and "SRGN Studio" which teaches consumers how to construct their own infringing customized shoes. Goyard sought injunctive relief, monetary damages, and the destruction of all counterfeit products.

1 *See Goyard St-Honore v. S2, Inc., et al.*, 2:24-cv-04903 (C.D. Cal. 2024).

Nike, Inc. v. S2

Nike followed with its own lawsuit against The Shoe Surgeon on July 15, 2024, also alleging trademark infringement, counterfeiting, dilution, unfair competition, and injury to business reputation and dilution under New York law.[2] Similar to Goyard's complaint, Nike alleged that The Shoe Surgeon created and designed custom sneakers without authorization, using the Nike swoosh trademark and well-known Nike trade dress sneaker silhouettes, including the Air Jordan 1 and Air Force 1.



Nike expanded their complaint alleging that the business evolved from a one-off customization service into a mass-produced sneaker empire. Nike highlighted that The Shoe Surgeon offered for sale mass-produced custom Nike sneakers, sold sneaker-making kits, and offered workshops and online courses on deconstructing and rebuilding Nike sneakers for $3,000-$5,000 a session. Nike alleged that The Shoe Surgeon completely deconstructed and reconstructed the products while keeping Nike's trademarks and trade dress intact, effectively creating counterfeit shoes and diluting the brand's image, transforming the business from fair-use customization into unauthorized counterfeiting. Nike also sought injunctive relief, monetary damages, and the destruction of all counterfeit products.

2 *See Nike, Inc. v. S2, Inc. d/b/a The Shoe Surgeon, et al.*, 1:24-cv-05307 (S.D.N.Y 2024).

Fair Use

In response to both Goyard's and Nike's lawsuits The Shoe Surgeon took a consistent legal approach, relying on defenses rooted in Fair Use. Trademark Fair Use is a legal defense that allows for the limited use of another party's trademark without permission under specific circumstances. The three key types of Fair Use in brand ownership and customized fashion are Nominative Fair Use, Descriptive Fair Use, and the First-Sale Doctrine.

Nominative Fair Use

Nominative Fair Use allows a defendant to use a trademark to refer to the actual trademarked product or service as long as such use does not cause a likelihood of confusion about the source of the defendant's goods.[3] Non-commercial Nominative Fair Use is an affirmative defense that allows the use of a trademark in a way that does not involve commercial activity, financial gain, or competition with the trademark owner. Interpreted as a defense to the "use in commerce" requirement in the Lanham Act[4], courts have recognized this defense particularly in the context of using a trademark for expressive, educational, artistic, or informational contexts.

Descriptive Fair Use

Descriptive Fair Use as established by the Lanham Act[5] permits the use of a trademark when the defendant uses it merely to describe its own goods and/or services rather than as a brand identifier. For use to qualify as Descriptive Fair Use, courts generally require that the trademark is used in its descriptive sense rather than as a brand name, used in good faith and not intended to exploit the trademark owner's brand recognition, and necessary to describe the user's product or service without causing consumer confusion.[6] For example, in the landmark case *KP Permanent Make-up, Inc. v. Lasting Impression I, Inc.*, the Supreme Court held that the use of the MICRO COLOR trademark for make-up was protected under Descriptive Fair Use because it was used to describe a make-up pigment that had been finely ground, rather than referring to the trademark itself.

3 *See New Kids on the Block v. News America Pub., Inc.* 971 F.2d 302 (9th Cir. 1992) (holding that the use of a music group's NEW KIDS ON THE BLOCK trademark in connection with a newspaper's phone-in poll about the group was a non-infringing Fair Use because it described the trademark owner's product rather than associated the trademark as the newspaper's own trademark).

4 Trademark Act of 1946 (the "Lanham Act"), 15 U.S.C § 1125(a).

5 15 U.S.C. § 1115(b)(4).

6 *See generally* 3 McCarthy on Trademarks and Unfair Competition § 11:45 (5th ed.).

First Sale Doctrine

Under the First Sale Doctrine, once a trademark owner has sold a genuine product, it no longer retains control over the subsequent distribution of that product which in turn allows third parties to lawfully sell the product on the secondhand market.[7] This doctrine is essential in protecting secondary markets such as resale businesses.[8] However, the doctrine does not protect against material alterations or misrepresentations that could mislead consumers about their authenticity. For example, in *Davidoff v. PLD Int'l Corp.*, the 11th Circuit found that PLD's removal of the batch code from Davidoff perfume boxes was not protected under the First Sale Doctrine.[9] The court explained that removal of the batch code would lead a consumer to believe that the bottle had been tampered with and could adversely affect Davidoff's goodwill.

Considerations

As Goyard and The Shoe Surgeon discuss settlement and Nike awaits a court ruling, it is crucial to understand the balance between artistic expression and trademark infringement in customized fashion. The Shoe Surgeon claims Fair Use protection, but these defenses have limitations that companies should carefully consider.

The Shoe Surgeon claimed its use of Goyard and Nike trademarks, especially in the context of its academy, was protected as "artistic" under Nominative Fair Use. However, this may be considered unpersuasive because The Shoe Surgeon charged for customized shoes themselves and the academy courses. A stronger defense to consider is Descriptive Fair Use, which permits referring to trademarked products for identification without implying affiliation or endorsement. In sneaker customization, calling a base sneaker "Air Jordan 1" or a material "Goyard canvas" may be permissible because these references are necessary to accurately describe the original, unmodified products being customized.

7 *See* 3 McCarthy on Trademarks and Unfair Competition § 25:41 (5th ed.).

8 *See Hamilton Int'l Ltd. v. Vortic*, 13 F.4th 264 (2nd Cir. 2021) (holding that Vortic selling a refurbished Hamilton antique pocket watch using Hamilton trademarked watch parts did not constitute trademark infringement because Vortic fully disclosed in its marketing that the watches were refurbished and not affiliated with Hamilton).

9 *See Davidoff & CIE., S.A. v. PLD Int'l Corp.*, 263 F.3d 1297 (11th Cir. 2001).

Courts will likely scrutinize whether a brand name is used in a neutral and descriptive manner or as a strategic marketing asset. Nike and Goyard took issue with The Shoe Surgeon's use of their marks as it suggested an official relationship, particularly because its marketing showcased the original branding and lacked clear disclaimers. The Shoe Surgeon claimed that its website disclaimer clarified its business as a "customization service," thus dispelling any confusion of affiliation. Similarly, Rolex sued Jewelry Unlimited for selling modified Rolex watches with aftermarket accessories, such as diamonds, dial replacements, and bracelet swaps, all while lacking any clear disclaimers.[10] The Northern District of Georgia found Jewelry Unlimited liable, holding in its order for summary judgment that contradictory disclaimers advertising the watches as "100% Genuine Pre-Owned Rolex" followed by "Jewelry Unlimited is in no way affiliated with ROLEX...Diamonds placed on this authentic ROLEX watch are 100% aftermarket" did not clearly convey to consumers the extent of changes.

For businesses operating in this space, the lesson is clear: businesses must reference brand names factually and necessarily without emphasizing the names in a way that implies endorsement or artificially inflates the marketability of the product. A "customization service" disclaimer is subject to liability and businesses should adopt a clear disclaimer, such as "this product is not affiliated with Nike/Goyard." If the reference to "Goyard canvas" or "Nike base shoe" is used prominently in advertising to attract buyers rather than neutrally identifying components, it may exceed Fair Use protections.

Ordinarily the First Sale Doctrine generally allows businesses to resell branded products they have lawfully purchased, but its protection weakens with significant modifications to the product. The Shoe Surgeon claimed that it legally acquired Goyard canvas and Nike sneakers before modifying them, meaning its conversion into sneakers for resale was protected under the First Sale Doctrine. However, Nike contended that deconstructing and reconstructing sneakers transformed them into entirely new counterfeit products. Like the Ship of Theseus, replacing all parts of the Nike shoe with custom materials and designs created a new counterfeit product which no longer qualified for First Sale protections. Businesses should take note: modifications that significantly change a product while keeping the brand's protected trademarks and distinctive trade dress intact may expose them to legal risk.

Fair Use does provide some legal protections, but it is not a blanket. To operate within legal boundaries and mitigate risk of litigation, businesses should:

- Clearly disclaim affiliation with the original brand;
- Use trademarks and brand names sparingly and only when necessary for accurate identification rather than as a marketing tool;
- Ensure modifications do not fundamentally alter the product's identity while keeping trademarks intact; and
- Be wary of large-scale production and promotion of customized branded goods, as increased commercial success attracts higher scrutiny from brand owners.

While the effects of the Goyard and Nike lawsuits are still uncertain, it is crucial for customization businesses and brand owners to proactively review their current practices, ensuring that any trademark use remain within the guardrails of Fair Use.

10 *See Rolex Watch USA, Inc. v. Jewelry Unlimited, Inc.*, 1:23-cv-03391 (N.D. Ga. 2024).

What Cosmetic Companies Need to Know About the CPSC

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Cosmetics, including skin moisturizers, makeup, nail polish, shampoos, hair color, and deodorants, are primarily regulated by the Food and Drug Administration (FDA).[1] For those in the cosmetics industry, the Consumer Product Safety Commission (CPSC or Commission) may seem to be of little concern. However, social media is potentially altering the regulatory landscape. Specifically, as cosmetics companies partner with social media "beauty influencers" to market their products, they are arguably advertising to increasingly younger consumers, including children and "tweens" — groups that are a focus of CPSC regulation. This marketing strategy creates potential new issues and questions, including whether products could be considered "children's products" subject to further regulation and heightened scrutiny from the Commission.

As of now, the CPSC regulates several areas relevant to the cosmetics industry. For example, the CPSC maintains jurisdiction over child-resistant packaging requirements under the Poison Prevention Packaging Act (PPPA). Thus, if certain cosmetic products contain any hazardous substances, those products must comply with the PPPA and are subject to oversight from the CPSC. The CSPC also maintains jurisdiction over other product packaging and products relevant to the larger beauty industry (e.g., a hair drier that poses a shock hazard to consumers). As cosmetics companies target younger audiences and expand their offerings beyond products meant just for adults, this may open them up to greater compliance duties to, and regulatory oversight from, the CPSC.

1 15 U.S.C. § 2052(a)(5)(H) expressly exempts "drugs, devices, or cosmetics," from the definition of a "Consumer Product" under the Consumer Product Safety Act.

Who Regulates Cosmetics?

The Federal Food, Drug, and Cosmetic Act (the FD&C Act) grants the FDA nearly exclusive authority over the cosmetic industry. It defines cosmetics as "articles . . . applied to the human body . . . for cleansing, beautifying, promoting attractiveness, or altering the appearance."[2] The Modernization of Cosmetics Regulation Act of 2022 added the definition for "cosmetic product" to the FD&C Act, which is defined as "a preparation of cosmetic ingredients with a qualitatively and quantitatively set composition for use in a finished product."[3] Thus, the FDA promulgates safety guidelines for nearly all aspects of cleansers, makeup, nail polishes, lotions, deodorants, and more. However, as detailed below, the CPSC regulates a few areas relevant to the cosmetics industry, particularly for those entities that make products directed to children and/or products that may not be considered "cosmetics" under the Act.

The Poison Prevention Packaging Act and Federal Hazardous Substances Act

The PPPA, enacted in 1970, aims to prevent children from accessing and ingesting hazardous or toxic substances used in common household products, including cosmetics. It requires these products be sold in "special packaging," which is defined as packaging that is "significantly difficult for children under 5 years of age to open. . ."[4] These "toxic" or "harmful" household substances are defined under Section 2(f) of the Federal Hazardous Substances Act (FHSA) and Section 201 of the FD&C Act. The PPPA likewise provides for specific substances that must be contained in special packaging based on its concentration, medium of preparation, and other environmental factors.[5]

2 21 U.S.C. § 321(i).

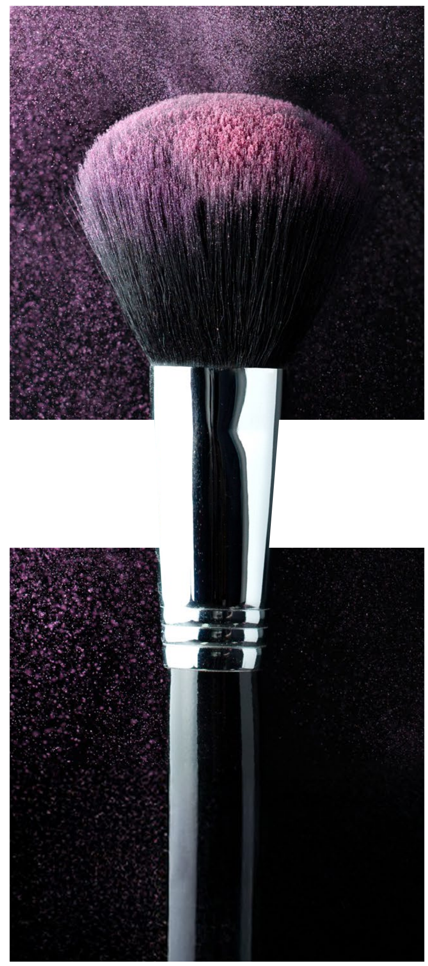
3 21 U.S.C. § 364(2).

4 16 U.S.C. § 1700.1(b)(4).

5 16 U.S.C. § 1700.14.

Moreover, the FHSA governs cautionary labeling of hazardous substances under the CPSC's jurisdiction. Although the FHSA exempts cosmetics from this jurisdiction, the CPSC has nonetheless made certain inquiries under the FHSA that concern the cosmetics industry.[6]

Companies that fail to meet standards under both the PPPA and FHSA face the risk of a potential CPSC recall. For example, a luxury cosmetics company recently recalled a bathroom deodorizing essential oil blend because it contained low-viscosity hydrocarbons and did not comply with the PPPA's packaging requirements. In the recall press release, the CPSC noted that the product posed a poison risk to children and additionally omitted mandatory information on the packaging under the FHSA. Additionally, the CPSC published a request for information (RFI) on consumer products' potential exposure to per- and polyfluoroalkyl substances (PFAS), and the potential effects those products could have on human health and safety.[7] In doing so, the CPSC noted that PFAS are commonly found in stain resistant clothing, fabrics, and cosmetics.



CPSC Recalls in the Beauty Industry

In addition to the child-safe packaging discussed above, the CPSC has recalled several cosmetic products for defects in the packaging that the CPSC believes create hazards or pose serious injury risk to consumers. Such recalls include over 200,000 units of a Peptide-C cream due to concerns that the packaging would break open over time and cause laceration hazards, roughly 1,000,000 cans of a spray mousse due to similar degradation concerns, and the recall of a small lip gloss key chain because the clasp contained high levels of lead.

Most beauty industry products recalled by the CPSC, however, are those that pose electrical shock and fire hazards. These include blow driers, hair curlers, and even a roll-on waxing kit. Though these products do not qualify as "cosmetics," they may nevertheless be manufactured and sold by cosmetics companies.

The Impact of Beauty Influencing

The CPSC has not signaled any immediate interest in revisiting regulations that directly impact cosmetics. However, it is no secret that child-safety standards are a major priority for the agency. The rise of social media platforms like TikTok and YouTube and "beauty influencers" on those same platforms has prompted increasingly younger consumers to buy and use makeup and skincare products. As aptly stated by beauty magazine, Allure: "The tweens have taken over."[8] Kids and tweens between the ages of 6-13 are now racing to purchase products with young, fun, vibrant packaging that contain anti-aging ingredients like retinol and hyaluronic acid — to the concern of many parents. While there have always been play makeup kits for kids that are regulated as

6 16 U.S.C. 1500.3(b)(4)(ii); the definition of hazardous substances that are subject to cautionary labeling expressly excludes food, drugs, and cosmetics that are regulated under the FD&C Act.

7 88 Fed. Reg. 64890.

8 Kara Nesvig, *A Sephora Employee Confirms the Tween Takeover is Real*, Allure (Jan. 12, 2024), https://www.allure.com/story/tweens-shopping-at-sephora-stores-tiktok.

toys, social media has seemingly created a new issue: kids and tweens are now interested in cosmetics and other beauty products originally intended for adults. Given the agency's long-standing focus on children's products, this trend may draw the attention of the CPSC.

The CPSC defines "Children's Product" as any product intended for a 12-year-old or younger. In making its assessment as to whether a product fits this definition, the CPSC considers the product's intended use and whether it is marketed to children. In combination with current trends, this definition could result in several new issues for cosmetics companies. For example, cosmetics companies partnering with social media influencers whose following includes children under 12 could be seen as marketing their products to children.

In this grey area, TikTok's implementation of the "TikTok Shop" could provide some unfavorable clarity. The TikTok Shop is an integrated e-commerce platform, marrying an Amazon-like supply chain with influencer-driven advertising — the likes of which the CPSC has yet to see. Although targeted advertising is commonplace on social media platforms, the TikTok Shop goes a step beyond through its use of beauty-influencing. In short, influencers post a video promoting a certain product along with a link where consumers can purchase that product directly on the TikTok application. Retailers often partner with these influencers by offering commissions for each product sold. Most common among these are cosmetic products. As noted by market research firm ecommerceDB, "TikTok Shop's approach includes building strong influencer partnerships, expanding content production studios, and enhancing logistics infrastructure to support high-quality live shopping experiences."[9]

Despite only launching in 2023, a handful of products sold through TikTok Shop have already been subject to CPSC recalls, including a popular hair drier due to shock hazards. Although TikTok maintains recall and verification policies that cite CPSC regulations, the TikTok Shop nevertheless places the company, its users, and its sellers on the list of many enforcement priorities for the CPSC.

9 Patrick Nowak, *TikTok Shop Expands Operation in the United States*, ECDB (Oct. 28, 2024), https://ecommercedb.com/insights/tiktok-shop-expands-operation-in-the-united-states/5022.

Oversight of Foreign Manufacturers Through Domestic Distributors

In November 2024, the CPSC approved its Operating Plan for Fiscal Year 2025.[10] Chief among the priorities listed in the Operating Plan is the regulation of e-commerce platforms and oversight of foreign manufacturers — both of which fall squarely upon the TikTok Shop.[11] This agenda closely follows the Commission's landmark ruling against Amazon in July 2024, where the CPSC ruled that Amazon is responsible for hazardous products sold through its "Fulfilled by Amazon" platform.[12] The Fulfilled by Amazon platform is markedly similar to TikTok Shop, the primary difference being that TikTok Shop's model depends almost exclusively on partnerships with influencers most popular among young audiences. *EMarketer* shows that over half (52.5%) of Gen Z consumers surveyed used TikTok Shop in the past month and 29.1% consider it a "go-to" for discovering products. Moreover, around 42% of surveyed Gen Z consumers reported to *Statista* that they occasionally purchased a beauty product based on an influencer's recommendation over the past year.[13]

At the very least, TikTok Shop and its use of beauty influencing is on the Commission's radar. The Commission's Operating Plan reiterated its targeting initiatives for such platforms, which includes reviewing listings and samples "from international e-commerce platforms that import, distribute, retail, or manufacture consumer products . . . for enforcement action."[14] The CPSC already maintains a team dedicated to reviewing online listings for possible violations. It is quite likely that this team reviews TikTok Shop listings and the promotional posts that coincide with them. In this regard, the CPSC may be forced to answer the question: Has beauty influencing thrust cosmetic products into the children's products space? If the answer is yes, the CPSC may join the FDA in becoming a prominent regulator of cosmetic products.

Key Takeaway

Regulation of cosmetics is rife with nuance. Technical knowledge of product formulas, packaging issues, and corresponding regulations is essential.

10 Note that, as of the date of this article, the CPSC's Operating Plan for Fiscal Year 2025 has since been removed from the Commission's website as part of its overall website content review pursuant to recent Executive Orders. While the Operating Plan may be subject to change, CPSC commissioners indicate they will continue to focus on international e-commerce retailers. *See* Statement from Commissioner Douglas Dziak concerning the *de minimis* exemption and international e-commerce platforms, https://www.cpsc.gov/About-CPSC/Commissioner/Douglas-Dziak/Statement/Statement-of-Commissioner-Douglas-Dziak-on-President-Trump%E2%80%99s-Closing-the-de-minimis-Exemption; *see also* Statement from Acting Commissioner Peter Feldman regarding *de minimis* exemption, https://www.cpsc.gov/About-CPSC/Chairman/Peter-A-Feldman/Statement/President-Trump%E2%80%99s-Strong-Stand-on-China-Will-Save-American-Lives.

11 *See* Adopted Amendments to CPSC FY2025 Operating Plan, https://www.cpsc.gov/s3fs-public/COPF%20FY%202025%20Op%20Plan%20Amendments.pdf.

12 Amazon, Inc., CPSC Docket No.: 21-2, (Commission Decision and Order July 29, 2024).

13 D. Petruzzi, *Share of Gen Z Consumers who Purchased Beauty Products Based on Influencers' Recommendations in the United States in 2024* (Dec. 10, 2024), https://www.statista.com/statistics/1478278/impact-of-influencers-on-beauty-products-purchases-among-us-gen-z/#statisticContainer.

14 Adopted Amendments to CPSC FY2025 Operating Plan, https://www.cpsc.gov/s3fs-public/COPF%20FY%202025%20Op%20Plan%20Amendments.pdf.

Art, AI, and the Law: Navigating New Frontiers in Creativity and Intellectual Property

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The art world is undergoing a profound transformation, driven in large part by advances in artificial intelligence (AI). From generating novel paintings to curating dynamic exhibitions, AI tools are redefining both the creative process and the management of art. The world of fashion is not immune to these changes either, as AI is beginning to influence design, styling, and fashion marketing. However, this evolution raises a host of complex legal questions: Who owns an AI-generated artwork? Can such creations be copyrighted? And how should we understand authenticity when a machine, rather than a human, is the primary creative force? These issues are at the forefront of debates about the intersection of art, fashion, technology, and intellectual property law.

The Emergence of AI in the Creative Process

AI's involvement in art and fashion creation is not entirely new, but its recent rapid development has brought it to the forefront of these worlds. Historically, AI was used in basic ways, such as creating algorithms that could replicate or imitate the styles of established artists. However, with the creation of advanced machine learning models, AI can now produce entirely original artworks that are difficult to distinguish from works created by human artists.

AI now composes music, generates literature, choreographs dance, and even contributes to film production. Platforms such as Artbreeder and DALL-E allow users to produce high-quality images from simple prompts, while AI models like OpenAI's GPT — currently in its fourth iteration — have demonstrated sophisticated capabilities in generating creative text. The fashion industry has embraced AI technology as well, with AI systems being used to predict trends, generate virtual clothing designs and virtual dressing rooms, and create fashion illustrations.

AI is also revolutionizing art curation. Museums, galleries, and auction houses increasingly use AI-driven analytics to manage collections, forecast art market trends, and design innovative exhibitions. In the fashion industry, AI-driven data is being used by brands and retailers to better understand consumer preferences, predict the next big trend, and streamline supply chains. These systems can process vast amounts of data in real time, uncovering hidden connections between works and enabling more dynamic curatorial practices.

Legal Implications of AI-Generated Art

As AI transforms art creation and curation, it also poses significant legal challenges. Intellectual property law, traditionally grounded in human creativity, is struggling to keep pace with these rapid technological developments. Key issues include:

1 Ownership of AI-Generated Works

A central question is the ownership of works created by AI. Under current U.S. copyright law, only works created by human authors qualify for protection. The U.S. Copyright Office has maintained that works generated by machines or non-human entities do not meet the criteria for copyright protection (88 Fed. Reg. 16190, Mar. 16, 2023). This raises the critical issue of whether the programmer, the user who inputs creative directives, or another party should hold the rights to an AI-generated work.

Some legal scholars advocate for assigning ownership to the human entities involved in directing the AI, much as a photographer is recognized for their role despite the camera being the tool. Others call for a radical rethinking of copyright law to accommodate the realities of AI-generated creativity. Until the law adapts, uncertainty remains, highlighting the urgent need for legislative reform and new legal frameworks.

2 Copyright and the Authorship Conundrum

Authorship is a cornerstone of copyright law, yet it is challenged by AI-generated art. Current legal frameworks require human authorship for copyright protection, leaving AI-generated works in a legal limbo. A landmark case illustrating this tension is ***Thaler v. Perlmutter*, No. 22-1564 (BAH), 2023 WL 5333236 (D.D.C. 2023)**. In this matter, the plaintiff sought copyright registration for an artwork produced by an autonomous "Creativity Machine." The Copyright Office rejected the claim, a decision recently upheld by the D.C. Circuit Court in March 2025, reaffirming that human authorship is indispensable. The plaintiff indicated his intention to appeal, suggesting that this question of authorship will likely continue to be reviewed and debated.

This ruling underscores the necessity for a nuanced approach: while AI is an invaluable tool, its increasing autonomy calls for a reconsideration of what constitutes authorship and creative ownership. An evolving legal perspective may eventually consider hybrid authorship models or alternative forms of protection tailored to AI-generated works.

3 Authenticity in the Age of AI

Authenticity has long been synonymous with the artist's identity and reputation. In an era where AI can autonomously produce art, traditional markers of authenticity are blurred. AI-generated works, especially those derived from extensive datasets that include pre-existing art, invite scrutiny regarding originality and derivative value.

To address these concerns, the art world may need to establish new standards and certifications — potentially leveraging blockchain technology — to verify the provenance and creative process behind each work. Such measures could distinguish between purely human-created art, AI-assisted projects, and entirely AI-generated pieces, preserving the integrity and market value of artworks.

4 Ethics, Fair Use, and the Digital Ecosystem

Beyond ownership and authorship, ethical considerations are paramount. AI models typically rely on vast datasets, often incorporating copyrighted material without explicit permission. This practice has ignited debates over fair use and the potential for infringement, with some critics contending that AI effectively "steals" creative input from human artists.

The call for ethical guidelines is growing louder. Industry leaders and legal experts alike are advocating for frameworks that ensure transparency, fair compensation, and respect for artists' rights. Additionally, the risk of bias in AI-generated content — stemming from training data that may be unrepresentative or prejudiced — necessitates active measures to promote diversity and inclusivity in the creative process.

Eyes Toward an Adaptive Legal Framework

AI's growing role in art creation and curation presents both exciting possibilities and complex legal challenges. As AI tools become more integrated into the art and fashion worlds, questions about ownership, copyright, authenticity, and ethics will continue to evolve. Current intellectual property laws are not fully equipped to address these issues, and new frameworks may be necessary to ensure that both human and AI creators are treated fairly.

For now, artists, technologists, designers, and legal professionals must work together to navigate these challenges and find solutions that balance innovation with protection. As AI continues to push the boundaries of creativity, the legal landscape must adapt to ensure that art remains a vibrant and protected domain for all creators — human and machine alike.

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