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A Golden Opportunity: Supporting Up-and-Coming U.S. Luxury Designers Through Design Legislation

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A GOLDEN OPPORTUNITY: SUPPORTING UP-AND-COMING U.S. LUXURY DESIGNERS THROUGH DESIGN LEGISLATION

INTRODUCTION

The luxury industry has played an important part in the cultural evolution of contemporary societies, growing rapidly in sales and global reach over the last two decades.¹ Sales of personal luxury goods have tripled in the past twenty years, ballooning to €253 billion in worldwide retail sales value in 2015.² Clothing in particular has been an imperative element of the personal luxury goods industry, accounting for 24 percent of all global luxury market sales.³ Events celebrating the more creative and often decadent aspects of fashion like “Fashion Week” now occur on most continents.⁴

The United States and the emerging market of China⁵ are currently the biggest players in the personal luxury goods market. The United States is the largest global market for personal luxury goods, accounting for approximately 31 percent of all sales

1. Haochen Sun, *Reforming Anti-Dilution Protection in the Globalization of Luxury Brands*, 45 GEO. J. INT'L L. 783, 786 (2014).

2. CLAUDIA D'ARPIZIO ET AL., LUXURY GOODS WORLDWIDE MARKET STUDY FALL-WINTER 2015, A TIME TO ACT: HOW LUXURY BRANDS CAN REBUILD TO WIN 5–6 (2015) [hereinafter BAIN STUDY FALL-WINTER 2015], http://www.bain.com/Images/BAIN_REPORT_Global_Luxury_2015.pdf.

3. Other personal luxury goods include accessories (shoes and leather goods, including bags), hard luxury (jewelry and watches), and beauty products. *Id.* at 21–22.

4. The term “Fashion Week” is used to describe a string of presentations, occurring in the same city over a course of days, where designers show their newest collections. The presentations began as a way for retail buyers to view and then order the newest clothes for their storefront locations. As will be discussed later in this Note, these shows have now moved beyond the function of retail efficiency and have become a way for consumers and fashion celebrities to imbue certain brands with cultural capital. Fashion Week occurs in the European Union, North and South America, Asia, and Africa; including cities like New York, Paris, Milan, London, Hong Kong, São Paulo, Tokyo, Moscow, Cape Town, and Istanbul. See MERCEDES-BENZ FASHION WK., <http://mbfashion-week.com> (last visited Sept. 7, 2016); S. AFR. FASHION WK., <http://www.safashionweek.co.za> (last visited Aug. 23, 2016); *The Ultimate Calendar of Every Fashion Week*, VOGUE (Feb. 1, 2016), <http://www.vogue.com/13396393/fashion-week-dates-schedule-calendar/>.

5. Sun, *supra* note 1, at 787–88.

worldwide—greater than the next four markets combined.⁶ In fact, in 2015, retail sales of personal luxury goods in New York City alone brought in €7 billion more than in the world's second-largest global market, Japan.⁷ Recently, there has been a decrease in international touristic shopping growth in the United States due to currency fluctuations that has made the weaker euro a more attractive spending option for those traveling to make luxury purchases.⁸ In contrast, in 2014, the majority of luxury goods purchases made in the European Union were made by tourists not from the region.⁹

Upper-middle and emerging middle classes in emerging consumer markets consistently support retail market growth.¹⁰ China, as an emerging market that is invested particularly in the cultural implications of clothing and decadence, has quickly become the third-largest personal luxury goods market as a result.¹¹ Over the last three decades, the unprecedented growth of China's economy and the simultaneous urbanization taking place throughout mainland China has changed the nation's economic focus from manufacturing goods to consuming them.¹² China's gross domestic profit (GDP) has grown nearly 10 percent per year since the late 1980s—the fastest sustained expansion

6. These countries, in order of largest market to smallest, are Japan, Italy, France, and China. BAIN STUDY FALL-WINTER 2015, *supra* note 2, at 10.

7. *Id.* at 11.

8. See CLAUDIA D'ARPIZIO, WORLDWIDE LUXURY MARKETS MONITOR: 2015 SPRING UPDATE 8–9 (2015) [hereinafter BAIN SPRING UPDATE 2015], http://cn.cnstudiodev.com/uploads/document_attachment/attachment/682/bain_luxury_study_spring_2015_update.pdf.

9. *Id.* at 15.

10. CLAUDIA D'ARPIZIO ET AL., LUXURY GOODS WORLDWIDE MARKET STUDY FALL-WINTER 2014: THE RISE OF THE BORDERLESS CONSUMER 28 (2014) [hereinafter BAIN STUDY FALL-WINTER 2014], http://www.bain.com/bain-web/PDFs/Bain_Worldwide_Luxury_Goods_Report_2014.pdf [hereinafter BAIN STUDY FALL-WINTER 2014].

11. BAIN STUDY FALL-WINTER 2015, *supra* note 2, at 9–10.

12. The rapid growth of China's economy has not come without its downsides—for example, persisting high income inequality and the strain economic growth has placed on China's environment. For a comprehensive overview on present-day Chinese society and strategies for reform and stabilization over the next decade, see WORLD BANK, CHINA 2030: BUILDING A MODERN, HARMONIOUS, AND CREATIVE SOCIETY (2013), <http://documents.worldbank.org/curated/en/781101468239669951/pdf/762990PUB0china0Box374372B00PUBLIC0.pdf>.

by a major economy in history—and has since become the world's second largest economy.¹³ The economic expansion greatly developed China's emerging middle class, who enthusiastically purchase luxury goods and use luxury clothing and luxury accessories as a way to enhance their way of life.¹⁴

Western luxury brands are adapting to accommodate the changes in China's economic focus from manufacturing-based growth to consumption habits and have refined their branding strategies accordingly by diversifying how to reach this new Chinese market. While some brands are finding inroads through personalization and the new modes of presenting their wares, other brands are showcasing the sociohistorical importance of their products and production processes to attract the emerging middle class in China. As the market for personal luxury goods amongst the Chinese middle class expands and as the socioeconomic impact of branding development becomes more global, there are ongoing concerns with the enforcement and protection of the intellectual property (IP) rights owned by luxury clothing designers and the fashion houses (referred to in French as "maisons")¹⁵ for which they work.¹⁶

The more popular a particular brand is, the more likely it is that the particular brand will be counterfeited. When the quality of counterfeit goods is less than the original versions, the counterfeits damage the reputation and brand image of a fashion company¹⁷ because traditional luxury goods consumers may find the genuine items less desirable if there is a proliferation of the

13. *Id.* at 79–80.

14. See ECONOMIST INTELLIGENCE UNIT, THE CHINESE CONSUMER IN 2030, at 9 (2016); Sun, *supra* note 1, at 788.

15. Designers specializing in high-end or couture fashions use the term "maison," French for "house," as a term for their business. Designers are thus called "the head of the house." LESLIE DAVIS BURNS ET AL., THE BUSINESS OF FASHION: DESIGNING, MANUFACTURING AND MARKETING 138 (4th ed. 2011); see, e.g., *Maisons*, in LVMH 2015 ANNUAL REPORT (2016), https://r.lvmh-static.com/uploads/2016/03/ra2015_complet_gb.pdf.

16. See DEANNA TANNER OKUN ET AL., U.S. INT'L TRADE COMM'N, CHINA: INTELLECTUAL PROPERTY INFRINGEMENT, INDIGENOUS INNOVATION POLICIES, AND FRAMEWORKS FOR MEASURING THE EFFECTS ON THE U.S. ECONOMY 2–5 (Nov. 2010).

17. ORG. FOR ECON. CO-OPERATION & DEV., THE ECONOMIC IMPACT OF COUNTERFEITING AND PIRACY 18 (2007) [hereinafter OECD ECONOMIC IMPACT EXECUTIVE SUMMARY], <http://www.oecd.org/sti/38707619.pdf>.

counterfeit versions.¹⁸ Further, the costs of combating counterfeiting necessarily disincentivizes creative innovation by young designers who do not have the financial resources to monitor and litigate counterfeit channels. Without the ingenuity of up-and-coming designers, there will be a lack of cultural innovation to propel economic growth and draw Chinese consumers into the U.S. personal luxury goods market.¹⁹

Thus, when a brand's logo or signature design becomes a valuable commodity for the fashion house, domestic laws and international agreements should treat the intellectual property as any other internationally valuable asset, protecting the creative investments made by the designers and the multinational financial investments made by corporate backers.²⁰ Luxury fashion brands have the potential to remain present and lauded for many years.²¹ To be successful in the personal luxury goods market for decades or centuries, clothing brands must utilize the IP protection available to them to deter others from copying their designs and to distinguish their brand's image.²²

International IP agreements provide basic guidance and uniformity for nations in the creation of effective IP enforcement regimes. While the international IP treaties and conventions set appropriate standards for IP regimes, the regulations are somewhat limited, as they must meet a lowest common denominator. Distinctively, the European Union affords comprehensive IP protection for clothing, accessory, and footwear design with EU regional and national rights for both registered and unregistered designs—the appearance of a product, its “lines, contours, colours, shape, texture and/or materials.”²³ Additionally, there are also recently developed IP harmonization regimes,²⁴ constructed

18. *Id.*

19. *Id.*

20. *See infra* Part II.

21. For example, Chanel was founded in 1912, and Louis Vuitton was founded in 1854. *See* Jennifer Darcy, *Under-Regulated or Under-Enforced: Intellectual Property, the Fashion Industry and Fake Goods*, 35 EUR. INTELL. PROP. REV. 82, 83 (2013); *see also* *Maisons*, *supra* note 15, at 31, 39.

22. *See* Darcy, *supra* note 21, at 83, 85.

23. Directive 98/71/EC of the European Parliament and of the Council of 13 October 1998 on the Legal Protections of the Design, art. 1, 1998 O.J. (L 289).

24. Harmonization regimes are legal frameworks implemented by regional bodies to make the various laws of a region more cohesive or similar. This Note will only briefly discuss the role of design protections under international law. For an examination of international IP harmonization, see Daniel J. Hemel &

pursuant to the formation of the European Union, for trademarks and copyright that provide protection for other structural facets of and identifiers on clothing, accessories, and footwear items, including brand logos and creative works that may be included in product advertising.²⁵ European courts have often looked to long-held legal traditions regarding design rights.²⁶ For fashion designers, these protections are especially significant for countries like France, where fashion has been heralded as an art form important for economic and cultural growth.²⁷ European Union culture, and therefore EU regulations, support extensive IP rights protection for all fashion-related creations, benefitting both large and small houses and fashion businesses.

By comparison, the United States has a serious lack of legal protection for the U.S. fashion industry. The current U.S. IP regime grants copyright for patterns on fabric, patent for technologically advanced textiles, and trademark protection for logos.²⁸ There is no protection, however, for the cut of an item of clothing. Instead of making a determination on the creativity of a design, U.S. courts often make determinations for protectability on the usefulness of particular items and whether the designer should be allowed an exclusive right for what are considered utilitarian goods.²⁹ Moreover, courts only grant trademark protection to words and marks, not the design itself, and often base trademark and trade dress protection on a brand's notoriety.³⁰ This is problematic for designers just starting production—often with little notoriety and fewer resources for advertisement and product exposure.

Lisa Larrimore Ouellette, *Knowledge Goods and Nation-States*, 101 MINN. L. REV. 167 (2016).

25. See Council Regulation 207/2009, art. 15(1), 2009 O.J. (L 78) 52 (EU Community Trademark Regulation); Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L 167) (EU Copyright Regulation).

26. See *infra* Part II.C.

27. See *id.*

28. See *infra* Part I.C.

29. See *infra* Part II.D.

30. *Fall 2015 China Law Symposium, US & China: Perspectives on Brand Protection and Intellectual Property*, 24 CARDOZO J. INT'L & COMP. L. 457, 469–70 (2016).

Specific design legislation needs to be enacted in the United States to protect smaller luxury designers. The lack of institutional support, both by the U.S. government and U.S. courts, is matched by the lack of independent financial support from luxury conglomerates, unlike the luxury industry in the European Union. Luxury designers attract Chinese middle-class consumers for founded cultural reasons, and U.S. designers should be able to enter and profit from this new market. Establishing design legislation as part of the U.S. IP regime is the best way to help these up-and-coming luxury designers.

Part I of this Note will discuss the current IP protection regimes of creative expression and brand ownership as they pertain to the fashion industry and clothing design. This Part will first look at how international agreements may provide general harmonization strategies for trademark protection but leave up-and-coming brands and designers out of their frameworks. It will also provide a brief overview of the persistence and prevalence of counterfeit luxury goods. Part I will then analyze the IP regimes and case law concerning luxury fashion from the European Union and the United States. Part II will first present a brief history of modern luxury clothing, with its origins found in France. This Part will then provide a summary of the current malleable state of the fashion industry, the changing branding strategies and retail habits in the luxury goods market, and what holes the U.S. IP regime has left for fast fashion to profit off young designers' creativity. It will then take an in-depth look at the current fashion industries in the two most influential personal luxury goods markets: France and the United States. Part III will examine the socioeconomic growth of China over the last three decades. This Part first will analyze how the expansion of the Chinese middle class has increased demand for luxury goods both domestically and through shopping tourism. It will then look at how the ritual of gift giving in Chinese culture has affected the intersection between law and the luxury goods market. Part IV will explain further challenges young fashion designers face beyond the lack of design protection in the United States, while Part V will argue that U.S. law needs to provide what protection it can to these designers with so many uncertainties in the luxury goods marketplace.

I. CURRENT LAW WITH RESPECT TO FASHION

Innovation, “the development of products and processes,” is the main catalyst for economic growth.³¹ The personal luxury goods industry has long held IP protections as imperative to their brands’ success³² because they enable the brands to “recoup their investments in the creation and dissemination of their copyrighted works, trademarked logos, or patented designs.”³³ Without proper protections in place, however, brands may lose economic and social value and their distinctiveness to counterfeits and copyists—i.e., those that copy another brand’s design for a garment but do not necessarily use the other brand’s logo.³⁴ Creative expressions in their many evolving forms throughout history have been protected across changing boundary lines through international and regional treaties. International agreements deliver some uniform protection, but, as the brands expand their reach across the globe, domestic laws need to provide similar comprehensive protections for fashion designs.

This Part will overview the established international regimes used for trademark as a demonstration of its importance in global commerce. It will focus on counterfeiting as one detrimental problem facing fashion designers as a pervasive form of IP piracy. It will then survey the IP harmonization regimes of the European Union for trademark and design protection. This Part will conclude with an at-length inspection of U.S. legal protections available to designers.

A. International Intellectual Property Organizations, Systems, and Agreements

Trademark protections grant the strongest internationally recognized form of IP rights to luxury fashion brands. Trademarks designate the source of a product.³⁵ Many countries in their applicable IP legislation, including in the United States and the European Union, require trademarks to be distinctive

31. OECD ECONOMIC IMPACT EXECUTIVE SUMMARY, *supra* note 17, at 17.

32. Sun, *supra* note 1, at 788.

33. *Id.* at 789.

34. *Id.*

35. Charles E. Colman, *An Overview of Intellectual Property Issues Relevant to the Fashion Industry*, in NAVIGATING FASHION LAW: LEADING LAWYERS ON EXPLORING THE TRENDS, CASES, AND STRATEGIES OF FASHION LAW 113 (2012).

signs “capable of distinguishing the goods or services of an undertaking from the goods or services of another undertaking.”³⁶ This mandatory distinction acts to prevent “a likelihood of confusion” for consumers.³⁷ Thus, a brand that clearly identifies the source of its goods or services with a logo allows for informed consumer choices³⁸ because the source certifies the quality of the clothing and helps to promote brand awareness.³⁹ In the context of fashion, designers and fashion houses are afforded trademark protection to incentivize the production of new, high-quality apparel and the often risky financial investment in creative ventures.⁴⁰

In order to receive protection, a mark must be able to be graphically depicted on its application and in use, and, in some countries, the mark may only be a single color.⁴¹ The trademark owner gains the exclusive right to utilize their mark in any way they choose. For example, U.S. luxury designer Ralph Lauren uses the image of a polo player riding a horse as the trademark for his brand “Polo”—which is embroidered into polo shirts, sweaters, and on the breast pockets of blazers.⁴² The exclusive trademark right attempts to ensure the association between value and quality—the “goodwill” of the brand—with that particular mark.⁴³ Clarity in a product’s origin leads to less consumer confusion, ultimately maintaining the product’s value. While apparel may have basic value due to its textile composition or the item’s exclusivity in the marketplace, the source of an item can also impart a great deal of value.⁴⁴ When consumers

36. Standing Comm. on the Law of Trademarks, Industrial Designs and Geographical Indications, Summary of Replies to the Questionnaire on Trademark Law and Practice, WIPO Doc. WIPO/STrad/INF/Rev.1, at 6, 7 (Jan. 25, 2010), http://www.wipo.int/export/sites/www/sct/en/meetings/pdf/wipo_strad_inf_1_rev_1.pdf.

37. See Agreement on Trade-Related Aspects of Intellectual Property Rights arts. 15–16, Apr. 15, 1994, 1869 U.N.T.S. 299 [hereinafter TRIPS Treaty].

38. *Id.*

39. Darcy, *supra* note 21, at 85.

40. Colman, *supra* note 35, at 25.

41. *Id.* at 19, 25–27.

42. U.S. Polo Ass’n, Inc., v. Polo Fashions, Inc., 1984 U.S. Dist. LEXIS 21908 (S.D.N.Y. Nov. 19, 1984).

43. See Robert G. Bone, *Hunting Goodwill: A History of the Concept of Goodwill in Trademark Law*, 86 B.U. L. REV. 547 (2006).

44. Colman, *supra* note 35, at 23.

trust a particular registered trademark for high-quality garments, a loyalty to the brand is fostered, adding to its social and cultural value.⁴⁵ Thus, the use of a similar trademark on a product of lower quality can damage the reputation of the company that created the original, high-quality product.⁴⁶

International organizations have also developed and valued IP rights for more than a century now. Created in 1967 as an agency of the United Nations, the World Intellectual Property Organization (WIPO),⁴⁷ administers twenty-six treaties that facilitate the protection of IP rights in its Member States and registers international trademarks.⁴⁸ Signed in 1883, amended 1979, and now one of the treaties the WIPO administers, the Paris Convention for the Protection of Industrial Property (“Paris Convention”) is the earliest treaty on IP still in force that laid the groundwork for future international IP agreements by defining policies and procedures to be reasonably followed by Member States.⁴⁹ The majority of the articles in the Paris Convention focus on “marks” (i.e., trademarks) and industrial design protection.⁵⁰ Industrial design consists of both the artistic and utilitarian elements of an object, and are thus implicated in the protection of fashion.⁵¹ International industrial design law exists in the Paris Convention,⁵² the Berne Convention for the Protection of Literary and Artistic Works,⁵³ and the Hague Agreement Concerning the International Registration of Industrial Designs⁵⁴—which are all administered by the WIPO—but there is

45. *Id.*

46. Darcy, *supra* note 21, at 83, 86.

47. Convention Establishing the World Intellectual Property Organization, July 14, 1969, 828 U.N.T.S. 3.

48. *WIPO-Administered Treaties*, WORLD INTELL. PROP. ORG., <http://www.wipo.int/treaties/en/> (last visited Nov. 7, 2015).

49. See Convention of Paris for the Protection of Industrial Property arts. 1–3, Mar. 20, 1883, 828 U.N.T.S. 107 [hereinafter Paris Convention]; see also TRIPS Treaty, *supra* note 37, arts. 15–16.

50. See Paris Convention, *supra* note 49, arts. 1–3.

51. Anna Kingsbury, *International Harmonisation of Designs Law: The Case of Diversity*, 32 EUR. INTELL. PROP. REV. 382, 382. (2010).

52. Paris Convention, *supra* note 49, art. 1(2).

53. Berne Convention for the Protection of Literary and Artistic Works, July 14, 1967, 828 U.N.T.S. 221.

54. Geneva Act of the Hague Agreement Concerning the International Registration of Industrial Designs, July 2, 1999, 2279 U.N.T.S. 3.

a lack of harmonization between the Member States in implementing the treaties' minimal standards for design protection.⁵⁵ The diversity exists in the granted subject matter of protection, the scope of protection, and the term of protection.⁵⁶

From the Paris Convention came the international protection of trademark, eventually developing into the Madrid Agreement Concerning the International Registration of Contracting Parties ("Madrid System"), which was concluded in 1891, and whose protocol was concluded in 1989.⁵⁷ The Madrid System provides for registration of a trademark in all of its ninety-seven contracting party states with one application.⁵⁸ To begin the application process of registration, an applicant must secure national or regional registration of their mark through the trademark office of a contracting party.⁵⁹ Then, if approved, within a twelve to eighteen month window,⁶⁰ the international registration effectively

55. For an argument against the international harmonization of design law, see Kingsbury, *supra* note 51.

56. *Id.* at 382–83.

57. WORLD INTELLECTUAL PROP. ORG. [WIPO], THE MADRID AGREEMENT CONCERNING THE INTERNATIONAL REGISTRATION OF MARKS AND THE PROTOCOL RELATING TO THAT AGREEMENT: OBJECTIVES, MAIN FEATURES, ADVANTAGES 4 (2012), http://www.wipo.int/edocs/pubdocs/en/marks/418/wipo_pub_418.pdf; Paris Convention, *supra* note 49, arts. 1–3; Madrid Agreement Concerning the International Registration of Marks arts. 15–16, *as amended* Sept. 28, 1979, 828 U.N.T.S. 389 [hereinafter Madrid Agreement]; Protocol Relating to the Madrid Agreement Concerning the International Registration of Marks art. 14, *adopted* June 27, 1989, 828 U.N.T.S. 1185 (entered into force Dec. 1, 1995).

58. *Application for International Registration Governed Exclusively by the Madrid Protocol (MM2)*, WORLD INTELL. PROP. ORG., http://www.wipo.int/export/sites/www/madrid/en/forms/docs/form_mm2.pdf (last visited Sept. 13, 2016). The United States, France, and China are among the 97 states constituting the Madrid Union. *Members of the Madrid Union*, WORLD INTELL. PROP. ORG., http://www.wipo.int/export/sites/www/treaties/en/documents/pdf/madrid_marks.pdf (last visited Mar. 22, 2017). On October 31, 2015, Algeria became the last of the contracting states to put the Madrid Protocol into force. *Single Form for All Madrid System Applications*, WORLD INTELL. PROP. ORG. (Oct. 31, 2015), http://www.wipo.int/madrid/en/news/2015/news_0021.html.

59. *See* WORLD INTELLECTUAL PROP. ORG. [WIPO], GUIDE TO THE INTERNATIONAL REGISTRATION OF MARKS, PART B, CHAPTER 11: THE INTERNATIONAL PROCEDURE sec. 01.01, <http://www.wipo.int/export/sites/www/madrid/en/guide/pdf/partb2.pdf>; Madrid Agreement, *supra* note 57, arts. 5–6.

60. *See* WORLD INTELLECTUAL PROP. ORG. [WIPO], THE MADRID SYSTEM FOR THE INTERNATIONAL REGISTRATION OF MARKS: OBJECTIVES, MAIN FEATURES, ADVANTAGES 6, para. 25 (2016), http://www.wipo.int/edocs/pubdocs/en/wipo_pub_418_2016.pdf; *see also* *Madrid Goods & Services Manager*,

replaces the national or regional mark and protects the mark for ten years, with renewal available for further periods of ten years.⁶¹

Another organization imperative to the administration of international IP rights, (especially trademark protections) is the World Trade Organization (WTO). Since its inception in 1995, the goal of the WTO has been to regulate trade between nations and to recognize the movement of IP through international commerce.⁶² Attached as an annex to the Marrakesh Agreement Establishing the World Trade Organization, which formed the WTO, is the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).⁶³ With 164 contracting parties, TRIPS provides international minimum standards for IP protection in patents, copyright, industrial design, and trademarks.⁶⁴ Section 2 specifically deals with trademarks and outlines national and international IP law requirements, the potentially infinite renewability for registered trademarks,⁶⁵ and the granting to registering authorities the discretion to refuse or cancel the registration of a mark if it is so similar to a well-known and already public trademark as to create confusion.⁶⁶

Trademark laws currently provide the broadest and most harmonized form of IP protection for luxury clothing brands. Trademark laws attempt to protect designers and shareholders' financial and creative investments by preventing infringement through, namely, counterfeiting.⁶⁷ Fashion generates self-referencing works, as copying styles, and even sometimes designs, is a recurring problem in the industry.⁶⁸ Trends and references

WORLD INTELL. PROP. ORG., <https://webaccess.wipo.int/mgs/> (last visited Mar. 5, 2017).

61. WIPO, *supra* note 60, at 11, para. 45.

62. *Understanding the WTO: Agreements, Intellectual Property – Protection and Enforcement*, WORLD TRADE ORG., https://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm7_e.htm (last visited Nov. 7, 2015).

63. See Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, 12.

64. See TRIPS Treaty, *supra* note 37; *Other IP Treaties: TRIPS Contracting Parties*, WORLD INTELL. PROP. ORG., http://www.wipo.int/wipolex/en/other_treaties/parties.jsp?treaty_id=231&group_id=22 (last visited Sept. 7, 2016).

65. TRIPS Treaty, *supra* note 37, art. 17.

66. *Id.* art. 16.

67. Colman, *supra* note 35, at 23.

68. FRÉDÉRIC GODART, UNVEILING FASHION: BUSINESS, CULTURE, AND IDENTITY IN THE MOST GLAMOROUS INDUSTRY 71 (2012).

may be made without necessarily stealing another's designs.⁶⁹ Further, there is a distinction between imitation or copying and counterfeiting.⁷⁰

Imitation or copying, which is problematic in its own right, does not involve the appropriation of another's trademark; rather, goods are sold under another trademark, but have appropriated the designs of the originator.⁷¹ The fast-fashion business model, which includes imitation or copying, is dependent on large-scale, low-cost production and relies on quickly changing consumer trends.⁷² Copied clothing designs may seem beneficial as a means of making fashion accessible to the masses, but there are a host of problems stemming from so-called "fast fashion." First, working conditions in the factories producing low-priced clothing brands are often reprehensible.⁷³ Second, consumers of fast fashion often do not consider the ecological implications of mass, low-cost production.⁷⁴ In addition, copyists, like Forever 21, also weaken the value of the original garment, creating an association of lower-quality products with the same or similar fashion designs.⁷⁵ Consequently, the profitability of the original luxury garment is reduced, which necessarily curbs designers' incentive to produce new, original designs. Thus, clothing and accessories copying the design of another's directly goes against the purpose of IP protection by ultimately curtailing innovation.⁷⁶

Counterfeiting, on the other hand, is broadly defined by the WTO as the unauthorized use of a registered trademark that is used "to deceiv[e] the purchaser into believing that he or she is

69. See C. Scott Hemphill & Jeannie Suk, *The Law, Culture and Economics of Fashion*, 61 STAN. L. REV. 1147, 1152–53 (2009).

70. *Id.*

71. Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687, 1701 (2006).

72. Greg Petro, *The Future of Fashion Retailing: The Zara Approach (Part 2 of 3)*, FORBES (Oct. 25, 2012), <http://www.forbes.com/sites/gregpetro/2012/10/25/the-future-of-fashion-retailing-the-zara-approach-part-2-of-3/>.

73. See Vishal Sharma, *Imperfect Work Conditions in Bangladesh RMG Sector*, 57 INT'L J. L. & MGMT. 28 (2015).

74. Erin Cho et al., *Style Consumption: Its Drivers and Role in Sustainable Apparel Consumption*, 39 INT'L J. CONSUMER STUD. 661, 667 (2015).

75. Hemphill & Suk, *supra* note 69, at 1174.

76. *Id.*

buying the original goods.”⁷⁷ In 2014, more than twenty-nine million pieces of counterfeit clothing and footwear were seized by customs officials worldwide.⁷⁸ During the 2014 to 2015 fiscal year, the number of U.S. Customs and Border Protection (CBP) seizures for the enforcement of intellectual property rights increased by 25 percent, from 23,140 to 28,865 total seizures in 2015.⁷⁹ Forty-nine percent of those goods (14,164 seizures) were sourced from China.⁸⁰ Of the CBP’s 2015 seizures, “wearing apparel and accessories,” “handbags and wallets,” and “footwear” constituted 39 percent of the goods seized.⁸¹

Counterfeiters attempt to obfuscate customs authorities by developing new strategies to import products. Sometimes, a brand’s logo is imported separately from blank products, like wallets and sunglasses, and are attached later on in the counterfeiting process.⁸² Counterfeiters also fabricate a broad range of luxury products, with some being marketed as “high-grade replicas.”⁸³ In July 2015, at the CBP Los Angeles/Long Beach seaport complex, officers seized nearly four thousand high-quality counterfeit leather belts, which were engraved with the trademark from French luxury accessories maison Hermès into the back of each belt buckle, and stamped on the back of each belt and the accompanying boxes in the maison’s signature orange color.⁸⁴ The belts, if sold at the suggested retail price, would have totaled an estimated \$3,227,400 USD.⁸⁵ Aside from large

77. *Counterfeit*, WORLD TRADE ORG. GLOSSARY, https://www.wto.org/english/thewto_e/glossary_e/counterfeit_e.htm (last visited Nov. 13, 2015).

78. WORLD CUSTOMS ORG., ILLICIT TRADE REPORT 2014, at 62 (2015).

79. U.S. CUSTOMS & BORDER PROTECTION, INTELLECTUAL PROPERTY RIGHTS: FISCAL YEAR 2015 SEIZURE STATISTICS 6 (2016) [hereinafter 2015 SEIZURE STATISTICS].

80. *Id.* at 14.

81. *Id.* at 20.

82. WORLD CUSTOMS ORG., ILLICIT TRADE REPORT 2013, at 69 (2013). In 2013, the customs administration in Chile seized about three hundred thousand plastic Ray Ban logos alongside sunglasses not carrying logos. *Id.*

83. OECD ECONOMIC IMPACT EXECUTIVE SUMMARY, *supra* note 17, at 11.

84. *CBP Seizes \$3.2 M of Fake Hermès Belts in L.A.*, U.S. CUSTOMS & BORDER PROTECTION (July 23, 2015), <https://www.cbp.gov/newsroom/local-media-release/cbp-seizes-32-m-fake-herm-s-belts-la>.

85. *Id.* Just later that month, CBP officers at the Miami seaport seized 10,788 high-quality counterfeit handbags, all prominently bearing trademarks from Italian luxury brand Gucci and U.S. luxury accessories company Coach, with the manufacturer’s suggested retail price totaling approximately \$4,000,000 USD. *CBP Seizes 10,000 Counterfeit Designer Handbags at Miami*

shipments, counterfeiters also try to bring in smaller loads in checked luggage as a means of avoiding customs regulations.⁸⁶ Further, sellers of the counterfeits peddle the wares in inconspicuous locations—such as out of the back of a van or temporary commercial rental spaces—or discreetly through online channels like eBay, both of which cause their own unique problems for IP rights enforcement.⁸⁷

The WIPO and WTO provide some mechanisms for IP registration and guidance to their Member States, but there is still a lack of comprehensive protection for up-and-coming fashion designers in the United States. International IP treaties do not necessarily cover clothing design; rather, the treaties attempt harmonization but do not provide more than minimum guidance. New designers in the United States receive neither domestic protection for their clothing designs nor international protection unless they were to register in every country they wished to have protection. Though the filer of an international trademark through the WIPO must also pay for registration in each country,⁸⁸ the administrative costs are much less when there is only one application to file. Further, the depth to which marks are defined and the scale to which they are protected against infringement in the international harmonization regimes grants more uniform rights.

In these ways, the scope of international IP protections benefit trademark owners more than design owners. The international IP scheme does grant global protections for trademark through

Seaport, U.S. CUSTOMS & BORDER PROTECTION (July 31, 2015), <https://www.cbp.gov/newsroom/local-media-release/cbp-seizes-10000-counterfeit-designer-handbags-miami-seaport>.

86. In April 2015, CBP officials at Dallas Fort Worth International Airport seized 220 pieces of counterfeit clothing, including sixty-five fake Chanel pieces. *CBP Seizes Counterfeit Clothes in Luggage*, U.S. CUSTOMS & BORDER PROTECTION (Apr. 8, 2015), <https://www.cbp.gov/newsroom/local-media-release/cbp-seizes-counterfeit-clothes-luggage>. For statistics on the means of counterfeit goods transportation, see 2015 SEIZURE STATISTICS, *supra* note 79, at 26.

87. For a day-in-the-life account of the counterfeit trade on New York City's famous counterfeit destination, Canal Street, see Alice Hines, *Knockoff: Another Day at the Office—On Canal Street with Counterfeit Vendors*, VILLAGE VOICE (May 18, 2016), <http://www.villagevoice.com/news/knockoff-another-day-at-the-office-on-canal-street-with-counterfeit-vendors-8626379>.

88. See *International Registration of Marks – Fee Calculation*, WORLD INTEL. PROP. ORG., <http://www.wipo.int/madrid/en/fees/calculator.jsp> (last visited Mar. 5, 2017).

a relatively straightforward administrative process. There remains, however, a vast number of counterfeit goods that enter the commercial market. Moreover, the enforcement of trademark rights often depends on how well-known a trademark may be. This leaves small fashion companies with limited protections internationally.

B. Fashion Protection in the European Union

The European Union's IP regime for trademark and design rights, as with many of its other regimes, focuses its directives and regulations on the harmonization of laws within Member States. Created by the European Parliament and the Council of Europe,⁸⁹ the European Union Intellectual Property Office (EUIPO) is the organization of the European Union responsible for registration of EU trademarks and Community design.⁹⁰ The EUIPO views trademarks as symbolic of a brand's "philosophy, its values, its know-how, its staff, [and] its products," similarly becoming an important creative asset representative of economic investment for a company.⁹¹ The registration of marks with the EUIPO provides EU "Community trade mark" protection: meaning, a trademark will be protectable in all twenty-eight Member States of the European Union.⁹² Community design protections work in the same manner, providing design

89. Regulation (EU) 2015/2424 of the European Parliament and the Council of 16 December 2015 Amending Council Regulation (EC) No 207/2009 on the Community Trade Mark and Commission Regulation (EC) No 2868/95 Implementing Council Regulation (EC) No 40/94 on the Community Trade Mark, and Repealing Commission Regulation (EC) No 2869/95 on the Fees Payable to the Office for Harmonization in the Internal Market (Trade Marks and Designs), 2015 O.J. (L 341) 21.

90. *The Office*, EUR. UNION INTELL. PROP. OFFICE, <https://euipo.europa.eu/ohimportal/en/the-office> (last visited Dec. 1, 2016).

91. Beginning March 23, 2016, the office controlling the registration of intellectual property changed from the Office for the Harmonization of the Internal Market to EUIPO. This was pursuant to Regulation (EU) No 2015/2424, which amended the Community trade mark regulation. *Trademark Basics: Brands*, EUR. UNION INTELL. PROP. OFF., <https://euipo.europa.eu/ohimportal/en/brands> (last visited Sept. 13, 2016); *Trademark Basics: Value*, EUR. UNION INTELL. PROP. OFF., <https://euipo.europa.eu/ohimportal/en/value> (last visited Sept. 13, 2016).

92. After Regulation (EU) 2015/2424 of the European Parliament and the Council amending the Community trademark regulation entered into force on March 23, 2016, the Community trade mark was renamed the "European Union trade mark." The EU trade mark, however, grants the same intellectual

rights in each Member State of the EU community.⁹³ In contrast, design rights protections, though allowed in several countries including Japan,⁹⁴ do not have any uniform international registration requirements and protections.

Marks under the EU harmonization structure may take several forms: a word mark, which contains words or numbers; a figurative mark, which is represented by graphics or pictures; a three-dimensional mark, which is often the product itself or distinctive packaging that has a three-dimensional shape; or a color per se mark, which is “used only to register an actual colour to distinguish products or services.”⁹⁵ Ownership of an EU trademark imposes certain requirements for its use and nonuse.⁹⁶ The mark must be put to genuine use in the European Union within five years of its registration, and the use must continue for five years following registration.⁹⁷ The European Court of Justice (ECJ) has set forth principles for assessing “genuine use” of a trademark: actual and “not merely token [use], serving solely to preserve the rights conferred by the mark”⁹⁸; “use of the mark on the market for the goods or services to be protected by that mark and not just internal use”⁹⁹; and “whether commercial exploitation of the mark is real,” i.e., “whether such use is viewed as warranted in the economic sector concerned to maintain or create a share in the market for the goods or services protected by the mark.”¹⁰⁰ A mark may also be challenged by a third party,

property rights as the Community trade mark. *Strategy – Use*, EUR. UNION INTELL. PROP. OFF., <https://euipo.europa.eu/ohimportal/en/strategy> (last visited Sept. 13, 2016).

93. Council Regulation 6/2002, tit. II, sec. 1, art. 3(a), 2002 O.J. (L 3) 1 (EC). If a EU trademark owner wishes to receive international registration through the Madrid Protocol, the application must be filed directly with the EUIPO. See Council Regulation 207/2009, *supra* note 25, art. 145. See generally *id.* tit. XIII.

94. Japan External Trade Org., *Investing in Japan: Laws & Regulations on Setting Up Business in Japan*, JETRO § 5.7.1, http://www.jetro.go.jp/en/invest/setting_up/laws/section5/page7.html (last visited Dec. 26, 2016).

95. *Trade Mark Definition*, EUR. UNION INTELL. PROP. OFF., <https://euipo.europa.eu/ohimportal/en/trade-mark-definition> (last visited Aug. 25, 2016).

96. Council Regulation 207/2009, *supra* note 25, arts. 15(1), 42(2)–(3).

97. *Id.* art. 15(1).

98. Case C-40/01, *Ansul BV v. Ajax Brandbeveiliging BV*, 2003 E.C.R. I-2439, ¶ 36.

99. *Id.* ¶ 37.

100. *Id.* ¶ 38.

who must file a request for a cancellation action against the alleged infringer within three months of the trademark's registration and subsequent publication.¹⁰¹

The ECJ requires a burden of proof lower than U.S. courts' for its trademark infringement analysis, stating that "unfair advantage of the distinctive character or repute of a mark . . . does not require that there be a likelihood of confusion or a likelihood of detriment to the distinctive character or the repute of the mark or, more generally, to its proprietor."¹⁰² Instead, the complainant must show that the third-party is utilizing a mark similar to its own and, in essence, must be "rid[ing] on the coat-tails of the mark" to benefit from its "power of attraction" and reputation "without paying any financial compensation" for which the complainant may have expended to maintain the mark's image and policing the rights of the mark.¹⁰³ The court thus requires the complainant to show only that the third-party's mark be similar and that the third-party receive some kind of benefit from this similarity. This creates a lower burden for trademark owners in the European Union to prove an infringement of rights because courts do not need to undertake the extensive analysis required to determine the similarities and differences between the two marks.¹⁰⁴

The ECJ has even been willing to provide protections beyond the mark's source-identifying function to brand values that are symbolized in the trademark.¹⁰⁵ Under EU trademark law, any shape marks that give substantial value to goods are excluded from trademark registration to prevent a monopoly on the available aesthetic characteristics of a product.¹⁰⁶ The provision relates both to goods and the packaging for the goods.¹⁰⁷ The ECJ has not set forth a standard for determining when an aspect of a good gives "substantial value" to the good.¹⁰⁸ For guidance, one may look to the Benelux courts, who frequently hear cases on

101. Council Regulation 207/2009, *supra* note 25, art. 41(3).

102. *See, e.g.*, Case C-487/07, L'Oréal SA v. Bellure NV, 2009 E.C.R. I-5185, ¶ 50.

103. *Id.*

104. *See infra* Part II.C.

105. *See* Case C-206/01, Arsenal Football Club Plc v. Reed, 2002 E.C.R. I-10273.

106. Council Regulation 207/2009, *supra* note 25, art. 7(1)(e)(iii).

107. Alison Firth, *Shapes as Trade Marks: Public Policy, Functional Considerations and Consumer Perception*, 23 EUR. INTEL. PROP. REV. 86, 88 (2001).

108. *Id.* at 93.

the national iteration of this trademark provision.¹⁰⁹ In 2014, French luxury footwear company Christian Louboutin lost its registered Community trademark of a red-lacquered shoe sole in the Benelux countries when the Benelux court ruled that, because the red sole was a selling point for the shoe, it gave the shoe substantial value.¹¹⁰ Further, the judge invalidated the mark because the prevalence of red-soled shoes on the market prevented the Louboutin shoes from having distinctive character needed to show trademark infringement.¹¹¹ Thus, although EU courts give trademark owners a low burden to meet in asserting infringement against their marks, the courts also balance the need to protect trademark owners against their exclusive control of the artistic elements incorporated into trademarks.

Along with the Community trademark, the EUIPO oversees protections of Community designs.¹¹² Specifically created to incentivize designers in developing new products,¹¹³ Community designs grant design ownership rights over the appearance of a product, whether or not they are registered.¹¹⁴ Under EU law, “design” is defined as the appearance of a product as a result of the features of its “lines, contours, colours, shape, texture and/or materials of the product itself and/or its ornamentation.”¹¹⁵ A design will only receive legal protection if it is novel and has “individual character,” determined by considerations of the designs’ visible features and not simply the features’ technical functions.¹¹⁶ While registered designs confer more safeguards in the

109. *Id.*

110. The Benelux judge found that the red sole should be taken into account when analyzing the shoe itself but held that the Community trademark in question was a shape mark rather than a color mark. Thus, the red sole was to be considered as part of the shoe as a whole. Jeff Sistrunk, *Belgian Court Invalidates Louboutin Red Sole Trademark*, LAW360, <http://www.law360.com/articles/523464/belgian-court-invalidates-louboutin-red-sole-trademark> (Mar. 31, 2014, 8:30 PM) (citing *Christian Louboutin v. Van Dalen Footwear BV*, Tribunal de Commerce [Comm.] [Commerce Tribunal] Brussels, Mar. 20, 2014, A.R. 2013-6154 (Belg.)).

111. *Id.*

112. *See Designs*, EUR. UNION INTELL. PROP. OFF., <https://euipo.europa.eu/ohimportal/en/designs> (last visited Jan. 15, 2016).

113. *Designs: Value*, EUR. UNION INTELL. PROP. OFF., <https://euipo.europa.eu/ohimportal/en/rcd-value> (last visited Mar. 28, 2017).

114. Council Regulation (EC) No 6/2002, *supra* note 93, tit. I, art. 1(2)(a)–(b).

115. *Id.* tit. II, sec. 1, art. 3(a).

116. *Id.* tit. II, sec. 1, arts. 4(2), 8(1).

context of litigation—such as providing de facto evidence of the date and place of a design’s first disclosure to the public—both registered and unregistered designs shield against the incorporation of a protected design without the consent of the rights holder.¹¹⁷ For example, unregistered Community designs (UCD) confer design protection for three years beginning on the date when the design is made publicly available.¹¹⁸ Comparatively, registered Community designs (RCD) protect the rights holder for five years but can be extended to a total of twenty-five years from the date of filing if the rights holder submits a request for renewal and a renewal fee to the EUIPO office.¹¹⁹ Applications may be approved in as little as two days’ time, allowing the filer to receive protection for their designs quickly—which is important in the continuously evolving fashion industry, where trends rapidly fade.¹²⁰

The implementation of the design directive on a national level may be exemplified through the French IP civil code. The code grants specific protection for the subject matter of fashion designs, unambiguously referring to them as “the creations of seasonal industries of dress.”¹²¹ The statute explicitly identifies that the fashion industry demands frequent renewal of product and thus requires its own unique form of IP protection.¹²² A distinctive feature of French IP protection generally is that moral rights attach to each work, allowing designers a greater degree of control because their IP rights are considered part of the rights of their personhood.¹²³ This type of legal system supports

117. *Id.* tit. II, sec. 4, art. 19(1)–(2).

118. *Id.* tit. II, sec. 2, art. 11.

119. *Id.* tit. II, sec. 2, arts. 12–13.

120. The registration fee for one design is €350. *Designs*, *supra* note 112.

121. Loi 92-597 du 1 juillet 1992 relative au code de la propriété intellectuelle [Law 92-597 of July 1, 1992 for the Intellectual Property Code], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], art. L 112-2 (Fr.), http://www.legifrance.gouv.fr/content/download/1959/13723/version/3/file/Code_35.pdf.

122. Protection is explicitly provided for “the making of dresses, furs, underwear, embroidery, fashion, shoes, gloves, leather goods” and “the manufacture of fabrics of striking novelty,” among other things. *Id.*

123. *Id.* art. L 121-1.

luxury designers by granting comprehensive legal rights for the designs of the clothing.¹²⁴

The EU trademark regime confers certain privileges to marks being used in commerce, which protect a brand or a logo. In addition, designers have the option of filing for design protection. Designs can receive protection throughout the Member States fairly easily; and, even if a design has not been registered with the EUIPO, it still receives certain benefits. The combination of trademark and design legislation allows for designers to comprehensively protect their brand name and their creative works. The EU's regional protection of designs and trademarks confers privileges and provides incentives for young designers to engage in commerce, develop new designs, and expand their global influence.

C. The Lack of Trademark and Fashion Protection in the United States

In the United States, trademarks serve as the most protective form of IP rights for the fashion industry because most aspects of clothing, including a garment's cut, are not protectable under U.S. copyright or patent law.¹²⁵ Copyright law in the U.S. requires the protectable aspects of a fashion design to be "identified separately from, and . . . capable of existing independently of, the utilitarian aspects of the article."¹²⁶ Judges have categorized clothing and specific accessories as utilitarian and thus not copyrightable.¹²⁷ Courts do, however, allow for certain elements of clothing design to be protected if they are considered physically or conceptually "separable" from the utilitarian elements.¹²⁸ Patterns on fabric are copyrightable images belonging

124. See Irina Oberman Khagi, *Who's Afraid of Forever 21?: Combating Copycatting Through Extralegal Enforcement of Moral Rights in Fashion Designs*, 27 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 67 (2016).

125. Colman, *supra* note 35, at 22–23.

126. Copyright Act of 1976, 17 U.S.C.S. § 101 (LEXIS through Pub. L. No. 115-9).

127. *Jovani Fashion, Ltd. v. Cinderella Divine, Inc.*, 808 F. Supp. 2d 542, 547 (S.D.N.Y. 2011); see also *Chosun Int'l, Inc. v. Chrisha Creations, Ltd.*, 413 F.3d 324 (2d Cir. 2005).

128. *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989, 991–94 (2d Cir. 1980) (discussing the conceptual separability of a signature belt buckle as sculptural and ornamental).

to the general catalogue of the public domain notwithstanding.¹²⁹ Patent protections exist for designs that are novel, ornamental, and of a nonobvious nature.¹³⁰ But, the turnaround for design patent applications can be costly and may take up to two years.¹³¹ By the time a designer receives patent protection, copyists may have already profited immensely from the designer's work. Thus, designers are left with limited rights to assert against counterfeiters and copyists.

1. Copyright as Applied to Clothing

Litigants utilizing U.S. law for illegal copying in fashion must bring actions under antitrust laws or as copyright and trademark violations.¹³² Early jurisprudence in the United States provided protections to copied clothing designs based on the proprietary value of a newsflash, also called "the hot news doctrine": the ephemeral protection granted to intellectual property where multiple businesses may be producing similar, potentially copyrightable works stemming from the same noncopyrightable idea.¹³³ In *INS v. Associated Press*, the U.S. Supreme Court, created the "hot news doctrine" to grant quasi-property rights to journalists for information on current events that was obtained through enterprise and the investment of skill, which ultimately

129. See *Folio Impressions, Inc. v. Byer California*, 937 F.2d 759, 762–63 (2d Cir. 1991).

130. 35 U.S.C.A. §§ 101–03 (Westlaw through Pub. L. No. 114-219).

131. For a non-electronic application, the USPTO charges \$400 USD as an "entity fee." *USPTO Fee Schedule*, U.S. PATENT & TRADEMARK OFF., <http://www.uspto.gov/learning-and-resources/fees-and-payment/uspto-fee-schedule#PCT%20Nat%20Fee> (last visited Jan. 19, 2016). For a standard twelve-piece collection, the cost of applying for patents for each design would be at least \$4,800 USD each season. *Id.* As of February 2017, there are 547,418 unexamined patent applications that are filed with the USPTO but are awaiting processing. *Data Visualization Center: February 2017 Patents Data*, U.S. PATENT & TRADEMARK OFF., <http://www.uspto.gov/dashboards/patents/main.dashxml> (last visited Mar. 15, 2017).

132. See *Aldridge v. The Gap, Inc.*, 866 F. Supp. 312 (2d Cir. 1994).

133. See *Cheney Bros. v. Doris Silk Corp.*, 35 F.2d 279 (2d Cir. 1929); *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 235–36 (1918).

gave the information-gatherer temporary ownership over the information.¹³⁴ This doctrine effectively protects the original creator of news content while allowing competitors at a later point in time to inform the public by disseminating information.

As applied in the context of clothing, the plaintiff corporation, Cheney Brothers, raised the hot news doctrine in *Cheney Brothers v. Doris Silks*, where the Cheney Brothers argued that the doctrine protected the patterns used on the silks they manufactured.¹³⁵ Every “season,” (which was about eight or nine months) the Cheney Brothers created a variety of new and novel patterns of silk to sell.¹³⁶ The Copyright Office denied the Cheney Brothers’ request for copyright protection.¹³⁷ As a result, competitor manufacturers were able to easily copy the successful silk patterns each season.¹³⁸ When the Cheney Brothers corporation raised the hot news doctrine in support of their argument that clothing design protections were analogous and ephemeral against pirating designs, Judge Learned Hand dismissed the claim and held: “To exclude others from the enjoyment of a chattel is one thing; to prevent any imitation of it, to set up a monopoly in the plan of its structure, gives the author a power over his fellows vastly greater a power which the Constitution allows only Congress to create.”¹³⁹ As a result, *Cheney Brothers* established clothing as utilitarian and thus not protectable under copyright.

2. Trademark Protection Under the Lanham Act

The Trademark Act of 1946 (“Lanham Act”) may provide fashion brands with trademark and trade dress protection rights for

134. *Int'l News Serv.*, 248 U.S. at 239–41; see also *Fox News Network, LLC v. TVEyes, Inc.*, 43 F. Supp. 3d 379 (2d Cir. 2014); *Barclays Capital, Inc. v. Theflyonthewall.com, Inc.*, 650 F.3d 876, 885–87, 894–907 (2d Cir. 2011); *Nat'l Basketball Ass'n v. Motorola, Inc.*, 105 F.3d 841, 845, 850–52 (2d Cir. 1997); *Fin. Info., Inc. v. Moody's Inv'rs Serv., Inc.*, 808 F.2d 204 (2d Cir. 1986); *Jack Daniel Distillery, Inc. v. Hoffman Distilling Co.* 190 F. Supp. 841 (W.D. Ky. 1960); *Cheney Bros.*, 35 F.2d at 280.

135. *Cheney Bros.*, 35 F.2d at 279.

136. *Id.*

137. The Second Circuit recognized that registering design patents for all of the designs would be a “very onerous” process and likely unsuccessful. *Id.*

138. *Id.*

139. *Id.* at 280.

their logos and for the overall look or packaging of a product.¹⁴⁰ Trademark rights under the Lanham Act allow for exclusive rights to use that mark and to prevent others from using any mark so similar as to cause consumer confusion between the owner's mark and a third-party mark.¹⁴¹ In order to prove trademark infringement under the Lanham Act, a plaintiff "must show that [the] defendant (1) without consent, (2) used in commerce, (3) a reproduction, copy or colorable imitation of plaintiff's registered mark, as part of the sale or distribution of goods or services, and (4) that such a use is likely to cause confusion."¹⁴² Marks may use words and images and may be divided into trademarks, service marks, or sound marks.¹⁴³ Trademarks are ultimately filed with the United States Patent and Trademark Office (USPTO), whereby the mark owner files a "Declaration of Continued Use"—a signed statement that the mark is currently being used in commerce.¹⁴⁴ This provides the rights holder with certain benefits. For example, a registered mark remains in force for ten years and may subsequently be renewed for ten-year periods.¹⁴⁵ Absent federal registration, one may still assert "common law" rights over a trademark if there is actual commercial use of said mark.¹⁴⁶

The U.S. Court of Appeals for the Second Circuit ("Second Circuit") applies a two-prong test to determine the legitimacy of infringement claims.¹⁴⁷ First, it assesses whether the plaintiff's

140. Trademark Act of 1946, 15 U.S.C.S. § 1051 (LEXIS through Pub. L. No. 115-9).

141. Rebecca Tushnet, *Gone in Sixty Milliseconds: Trademark Law and Cognitive Science*, 86 TEX. L. REV. 507, 517 (2008); see *Wendt v. Host Int'l, Inc.*, 125 F.3d 806 (2d Cir. 1997) (discussing the likelihood of a confusion trademark infringement claim under the Lanham Act).

142. *Gruner + Jahr USA Publ. v. Meredith Corp.*, 991 F.2d 1072 (2d Cir. 1993) (citing 15 U.S.C. § 1114(1)(A)).

143. 15 U.S.C.S. § 1053; *Trademark "Sound Mark" Examples*, U.S. PATENT & TRADEMARK OFF., <http://www.uspto.gov/trademark/soundmarks/trademark-sound-mark-examples> (last visited Jan. 17, 2016).

144. *Trademark FAQs*, U.S. PATENT & TRADEMARK OFF., <http://www.uspto.gov/learning-and-resources/trademark-faqs> (last visited Jan. 17, 2016).

145. *Id.*

146. 15 U.S.C.S. § 1051(c), (d)(1).

147. *Louis Vuitton Malletier v. Dooney & Bourke, Inc.*, 454 F.3d 108 (2d Cir. 2006); *Gruner + Jahr USA Publ.*, 991 F.2d.

mark, registered or not, merits protection.¹⁴⁸ Here, the court considers the strength of the mark in the marketplace and the degree of protection to which the mark is entitled, based on the degree of the mark's distinctiveness.¹⁴⁹ The court then determines whether the defendant's mark will likely cause consumer confusion (commonly known as "the likelihood of confusion").¹⁵⁰ In order to determine the likelihood of confusion between two similar marks, the Second Circuit established an eight-factor analysis in 1961, nicknamed the "*Polaroid* test."¹⁵¹ Referring to the mark first used in commerce as the "senior mark" and the mark later used in commerce as the "junior mark," the court scrutinizes possible trademark infringement under considerations such as the strength of the mark, the quality of the junior mark users' products, and the similarity between the two marks.¹⁵²

In *Louis Vuitton v. Dooney & Bourke, Inc.*, plaintiff Louis Vuitton filed a trademark in 2004 in the U.S. District Court for the Southern District of New York alleging that Dooney & Bourke's

148. *Gruner + Jahr USA Publ.*, 991 F.2d.

149. The degree of distinctiveness of a mark categorized in ascending order: (1) generic: common name describing the product associated with the mark, most often not entitled to trademark protection; (2) descriptive: communicating something about the product, its qualities, characteristics, etc.; (3) suggestive: suggests something about the product, though does not outright describe it, thus requiring the consumer to use their imagination in determining the nature of the product; (4) arbitrary or fanciful: utilizing a term that has little to no relation to the kind of good or service it represents. *Id.* at 1075.

150. Trademark Act of 1946, 15 U.S.C.S. § 1125(a) (LEXIS through Pub. L. No. 115-9).

151. *Polaroid Corp. v. Polarad Elecs. Corp.*, 287 F.2d 492 (2d Cir. 1961).

152. The eight factors include:

- (1) the strength of the mark, (2) the similarity of the two marks, (3) the proximity of the products, (4) actual confusion, (5) the likelihood of senior mark user bridging the gap, (6) the junior mark user's good faith in adopting its mark, (7) the quality of junior mark user's products, and (8) the sophistication of the consumers.

Louis Vuitton Malletier, 454 F.3d at 116. Analyzing the marks from the perspective of a prospective consumer in the relevant market, the court determines the similarity between the junior and senior mark within the context of the other seven factors. *Louis Vuitton Malletier v. Burlington Coat Factory Warehouse Corp.*, 426 F.3d 532, 537 (2d Cir. 2005) (applying *Gruner + Jahr USA Publ. v. Meredith Corp.*, 991 F.2d 1072 (2d Cir. 1993)).

unregistered color combination monogram print constituted a “false designation of origin” under the Lanham Act § 43(a).¹⁵³ The Second Circuit utilized the *Polaroid* test to determine trademark infringement between two competing luxury accessories brands.¹⁵⁴ Louis Vuitton is an international luxury fashion firm headquartered in France, having sold accessories in the United States since 1893.¹⁵⁵ The firm registered several trademarks in the United States,¹⁵⁶ including their most utilized motif, the “Toile Monogram” (“Monogram”), which contained simple shapes with the initials “LV” intertwined.¹⁵⁷ The company introduced a multicolored version of the Monogram in October 2002 that used thirty-three colors and was set on white or black leather handbags and accessories but neglected to register this new colored version of the Monogram.¹⁵⁸ With extensive marketing and promotion of the new Monogram iteration,¹⁵⁹ nearly seventy thousand Louis Vuitton handbags and accessories featuring the new print were sold in four years’ time, generating \$40 million USD in sales.¹⁶⁰ Starting in late July 2003, U.S. accessories manufacturer Dooney & Bourke began to sell leather handbags featuring a “D&B” monogram pattern, similar to that of Louis Vuitton’s Monogram print, but at a lower price.¹⁶¹

The court in its opinion first noted that a while a handbag “may serve as a practical container of needed items,” it also could

153. *Louis Vuitton Malletier v. Dooney & Bourke, Inc.*, 454 F.3d 108, 112–13 (2d Cir. 2006). Plaintiff Louis Vuitton asserted likelihood of consumer confusion, claiming initial-interest and post-sale confusion. *Id.* at 117. The plaintiff also claimed Dooney & Bourke’s use of a similar mark diluted its mark under the Federal Trademark Dilution Act. 15 U.S.C.S. § 1125(c)(1); *Louis Vuitton Malletier*, 454 F.3d at 118.

154. *Louis Vuitton Malletier*, 454 F.3d at 108.147

155. *Id.* at 112.

156. U.S. PATENT & TRADEMARK OFF., <http://tmsearch.uspto.gov/bin/gate.exe?f=tess&state=4801:unt3jv.1.1> (last visited Dec. 27, 2016) (search “Louis Vuitton”).

157. *Louis Vuitton Malletier*, 454 F.3d at 112.

158. *Id.* at 112, 115.

159. The Louis Vuitton firm spent more than \$4 million USD promoting the famous team of then-Louis Vuitton creative director Marc Jacobs and artist Takashi Murakami, who generated the print. *Id.* at 112.

160. *Id.* at 112–13.

161. Beginning in 2003, the Dooney & Bourke monogram handbags began to feature the DB print in multicolored patterns over white or black backgrounds, and sold for between \$125 and \$400 USD. The new Louis Vuitton Toile Monogram handbags sold for between \$360 and \$3,950 USD. *Id.* at 112–13.

act as “a reflection of its owner’s personality.”¹⁶² The court held that the continuous and exclusive use of the Monogram designs made the Monogram trademark the “incontestable” property of Louis Vuitton.¹⁶³ Further, in its analysis of trademark dilution, the court held that the Monogram trademark qualified as a “famous mark” because the Toile pattern “has been a famous indicator of Louis Vuitton for over a century.”¹⁶⁴

The Second Circuit determined that the district court had erred in performing a side-by-side comparison of the two marks, stating that, instead, the lower court ought to have viewed the similarity of the marks “sequentially in the context of the market-place.”¹⁶⁵ This case is one example of how protecting trademark rights is much easier for famous brands like Louis Vuitton, whose trademark strength, through decades of advertising and billions of dollars’ investment, is “incontestable.”¹⁶⁶ While the benefits of such a regime enable larger brands the legal means to shield against infringement, smaller, up-and-coming brands are left to look for other routes to defend their investments.

3. U.S. Common Law Trade Dress Rights

Under the Lanham Act, trade dress, or the overall look of a product, may also be protected.¹⁶⁷ The Second Circuit defines trade dress as “the total image of a good as defined by its overall composition and design, including size, shape, color, texture, and graphics.”¹⁶⁸ In evaluating the protection granted to trade dress, courts analogize with the protection analyses utilized for unregistered trademarks.¹⁶⁹ The Lanham Act protects trade dress if it is a distinctive and nonfunctional element of a good, but it must also show a secondary meaning, acquired through commercial

162. *Id.* at 111.

163. *Id.*

164. *Id.* at 116.

165. *Id.* at 117.

166. *Id.* at 112.

167. Trademark Act of 1946, 15 U.S.C.S. § 1125(a) (LEXIS through Pub. L. No. 115-9).

168. *Coach Leatherware Co. v. AnnTaylor, Inc.*, 933 F.2d 162, 168 (2d Cir. 1991).

169. *Wal-mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 210 (2000).

use.¹⁷⁰ Secondary meaning is acquired when consumers associate the trade dress with a particular producer and that producer's goods or services.¹⁷¹

Distinctiveness for trade dress can be found in similar ways to distinctiveness for trademarks.¹⁷² Trade dress may be distinctive "if its intrinsic nature serves to identify a particular source."¹⁷³ As it relates analogously to unregistered word marks, courts apply the commonly used test formulated by Judge Friendly for marks, categorizing "arbitrary," "fanciful," or "suggestive" trade dress as "distinctive" and thus able to receive protection under the Lanham Act.¹⁷⁴ Individual colors or basic geometric shapes may be granted trade dress protection if it is recognized overall as a "source-identifier" by being capable of identifying the source of the goods or services.¹⁷⁵ The U.S. Supreme Court, however, has held that a product's color in and of itself does not automatically identify a product's source.¹⁷⁶ Distinctiveness for trade dress is not inherent and is found only where it has developed a secondary meaning: when, "in the minds of the public, the primary significance of a [mark] is to identify the source of the product rather than the product itself."¹⁷⁷ Because conferring exclusive rights to a single color or simple shape may seriously inhibit market competition, such basic elements of aesthetic design must acquire a secondary meaning before courts will grant trademark or trade dress protection to them.

Analogous to trademarks, trade dress must be "any matter that as a whole is not functional."¹⁷⁸ The functionality doctrine under U.S. trademark law disallows granting exclusive trademark rights to a useful product feature as a means to prevent the "inhibiting [of] legitimate competition"; instead, patents are

170. *Id.* at 212; *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 174 (1995).

171. 15 U.S.C.S. § 1052(f).

172. *Wal-mart Stores, Inc.*, 529 U.S. at 210.

173. *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 768 (1992).

174. *See Abercrombie & Fitch Co. v. Hunting World, Inc.*, 537 F.2d 4, 10–11 (2d Cir. 1976).

175. *Louis Vuitton Malletier v. Dooney & Bourke, Inc.*, 454 F.3d 108, 116 (2d Cir. 2006).

176. *Qualitex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 163 (1995).

177. *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 851, n.11 (1982).

178. Trademark Act of 1946, 15 U.S.C.S. § 1091(c) (LEXIS through Pub. L. No. 115-9).

to act as the form of IP promoting invention by granting a limited monopoly to the inventor.¹⁷⁹ Thus, the nonfunctional nature of trademark, and by extension trade dress, is a necessary form of delineation between what may and may not be protected under the Lanham Act. This creates problems for designers since clothing is considered utilitarian or essentially functional. Trade dress may provide protection to the distinct overall look of a retail store or an ensemble; but there are hurdles that small fashion houses may not be able to clear. While trade dress grants protections for the overall look or packaging of a product if the look is a source-identifying design, a secondary meaning must also be acquired. This can be difficult for smaller fashion companies to prove, as it requires time and market exposure for consumers to gain familiarity with a brand's specific designs and style, and new businesses often have limited capital.

Intellectual property rights that exist under U.S. law offer little protection for small fashion companies. As discussed above, U.S. design patents only provide protection to novel, ornamental, and nonobvious designs, but require the applicant to wait around two years and pay expensive registration fees.¹⁸⁰ In addition, while copyright may provide protection for the patterns on clothing, it does not afford protection to the cut and shape of the clothing itself because the clothing is considered to be utilitarian, thus making judges hesitant to grant protection to fashion designs that will ultimately grant the applicant a monopoly over a utilitarian item. Litigating trademark infringement may be easier for a historic and commercially successful brand like Louis Vuitton¹⁸¹ because courts look to whether a consumer recognizes a brand to make its infringement determination. But, over 85 percent of the members of the U.S. fashion industry are small businesses and may not have the means to bring high-cost

179. *Qualitex Co.*, 514 U.S. at 164–65.

180. *See supra* Part I.C.

181. As of January 17, 2016, more than two hundred dockets were filed by Louis Vuitton Malletier as a party with respect to trademark infringement and can be found through a search of dockets on *Bloomberg Law*. *See generally* *Louis Vuitton Malletier, S.A., v. My Other Bag, Inc.*, 156 F. Supp. 3d 425 (S.D.N.Y. 2016); *Louis Vuitton Malletier S.A. v. Warner Bros. Entm't, Inc.*, 868 F. Supp. 2d 172 (S.D.N.Y. 2012); *Louis Vuitton Malletier S.A. v. Haute Diggity Dog, LLC*, 507 F.3d 252 (4th Cir. 2007); *Louis Vuitton Malletier v. Burlington Coat Factory Warehouse Corp.*, 2006 WL 1424381 (S.D.N.Y. May 23, 2006); *Louis Vuitton Malletier & Oakley, Inc. v. Veit*, 211 F. Supp. 2d 567 (E.D. Pa. 2002).

litigation for IP rights infringement.¹⁸² Although the U.S. fashion industry contributes a great deal to culture and global economies, the protections afforded fashion designers are lacking.

II. THE CURRENT STATE OF FASHION

Luxury fashion today is in a state of flux. The luxury market has developed over time along with technology to become a global phenomenon, firmly planting clothing beyond its utilitarian function and utilizing it for its social function—to denote attitudes of an individual, their values, beliefs, and, most notably in a capitalist society, socioeconomic status.¹⁸³ This Part will first present a brief history of Western luxury fashion industries. It will then delineate the contemporary issues facing the Western luxury clothing and accessories markets as a result of the progression of Internet technologies, changing consumer tastes, and the rise of fast-fashion companies. This Part will also describe the structural support French institutions give to the luxury clothing industry. Then, it will examine the contemporary luxury clothing market in the United States and its intersections with governmental institutions.

A. The Beginnings of Luxury Fashion

The history of Western luxury fashion as we know it today began in France during the reign of Napoleon III (1851–1870 CE) with a man named Fredrick Worth.¹⁸⁴ While there was already a number of high-quality dressmakers in Paris at the time, they filled orders from styles chosen by the customer.¹⁸⁵ Worth was the first not to copy the designs of others and “insisted on the

182. H.R. 2511, 112th Cong. 4 (1st session 2011).

183. See Keith Wilcox, Hyeong Min Kim, & Sankar Sen, *Why Do Consumers Buy Counterfeit Luxury Brands?*, 46 J. MARKETING RES. 247 (2009) (discussing the “self-presentation” and “self-expression” functions of luxury goods consumption, in the context of the appeal of counterfeit luxury goods for consumers).

184. Solange Montagné Villette & Irene Hardill, *Paris and Fashion: Reflections on the Role of the Parisian Fashion Industry in the Cultural Economy*, 30 INT’L J. SOC. & SOC. POL. 461, 461, 464 (2010).

185. *Id.* at 464–65.

couturier as a ‘creator’”—the creative mind behind the business.¹⁸⁶ Rather, four times a year, he presented his customers with model dresses of his own design, which were exhibited on live models.¹⁸⁷ Worth developed the model system for haute couture (i.e., “the production of ‘designer’ clothes”)¹⁸⁸ that still acts as the model today for couture clothing production: offering customers “meticulous fit,” opulent fabrics, and garments that are hand sewn by different ateliers (skilled artisans).¹⁸⁹

Paris became the epicenter for haute couture and attracted young designers hoping to dress their own bourgeois clientele.¹⁹⁰ Although the Parisian couture houses did not, and still do not, make many garments, their creative ideas in design and production techniques have had a global impact on fashion trends, from high-end markets to mall brands.¹⁹¹ Using Worth as an example, Coco Chanel began her haute couture business, House of Chanel, in Paris, expanding in the 1920s to include perfumes.¹⁹² In the post-World War II era, the standard business operation for couture maisons developed to include subsidiary product lines because the post-war economic depression moved consumers’ focus away from haute couture and toward bargain, ready-to-wear clothing.¹⁹³ Even today, couture clothing brands sell a diversified base of prêt-à-porter¹⁹⁴ as well as made-to-measure clothing and beauty products to meet the demands of customers for quality and value, which requires generous backing from corporate conglomerates.¹⁹⁵

186. Diana Crane, *Globalization, Organizational Size, and Innovation in the French Luxury Fashion Industry: Production of Culture Theory Revisited*, 24 *POETICS* 393 (1997); Villette & Hardill, *supra* note 184, at 465–66.

187. Villette & Hardill, *supra* note 184, at 465–66.

188. *Id.* at 465.

189. *Id.* at 466.

190. *Id.* at 466–68.

191. *Id.* at 468.

192. *See id.* at 467. The perfume was Chanel No. 5, a product which continues today to be profitable for the House. Crane, *supra* note 186, at 393.

193. *See* Villette & Hardill, *supra* note 184, at 468.

194. Meaning “ready-to-wear” in French.

195. *See* Villette & Hardill, *supra* note 184, at 468; BURNS ET AL., *supra* note 15, at 20. Most recently, luxury clothing brands have been expanding into luxury clothing collections of children’s wear. *See* Miles Socha, *Riccardo Tisci Delivers Givenchy Collection for Babies, Kids*, *WOMEN’S WEAR DAILY* (Dec. 2, 2016), <http://wwd.com/fashion-news/designer-luxury/kardashian-riccardo-tisci-givenchy-kanye-launch-babies-kids-10716679/>.

Ready-to-wear clothing began in the early eighteenth century in the United States as a way for tailors to meet the demand for cheap, ready-made clothing for slaves, miners, and sailors.¹⁹⁶ In the early-to-mid-nineteenth century, the invention of the sewing machine allowed for the mechanization of clothing production.¹⁹⁷ This coincided with the expansion of the middle-class, who wanted quality clothing but could not afford expensive couture or custom-made clothing.¹⁹⁸ Utilizing the incoming immigrant populations to spur the labor-intensive “mass production of apparel,” there were an approximately five hundred women’s shirt-waist factories in New York City by 1900.¹⁹⁹ New York City continued to be the hub for the women’s fashion industry, and by 1923, 80 percent of U.S. women’s apparel was made there.²⁰⁰ At the end of World War II, the city grew into its position as an international fashion capital, inventing and developing the concepts of ready-to-wear clothing and sportswear.²⁰¹ While New York is no longer the center of clothing manufacturing, it remains a nerve center for fashion design and the U.S. fashion industry.²⁰²

As the fashion industry has grown and globalized, luxury clothing brands have had to find a way to promote their multiple lines of clothing and accessories and garner consumer attention, often appealing to customers’ sensibilities. Modern fashion can act as an identifier of one’s economic standing and social status because it communicates symbolic meanings that identify with fine quality, style, and wealth.²⁰³ Brand literacy is the consumer’s ability to navigate and understand the coded meanings

196. See BURNS ET AL., *supra* note 15, at 6.

197. *Id.* at 6, 9.

198. *Id.* at 6. In certain clothing industries, custom-made, tailored clothing is referred to as bespoke clothing. See Vidya Ram, *Savile Row Cut Down a Notch by ‘Bespoke’ Ruling*, FORBES (June, 20, 2008), http://www.forbes.com/2008/06/20/savile-row-bespoke-life-style-cx_vr_0620lifesavile.html.

199. As the cotton gin had taken advantage of the cheap or free slave labor of the U.S. South, immigrants worked in the sewing factories of New York City, “primarily on the Lower East Side of New York City, [which] were notorious for their poor working conditions.” BURNS ET AL., *supra* note 15, at 5, 11. From these poor conditions came the term “sweatshop.” *Id.* at 11.

200. *Id.* at 15.

201. GODART, *supra* note 68, at 56.

202. *The Fashion Capital of the World*, N.Y.C. ECON. DEV. CORP. (Feb. 13, 2015), <https://www.nycedc.com/blog-entry/fashion-capital-world>.

203. GODART, *supra* note 68, at 19–20.

in a brand's advertising, retail spaces, and packaging.²⁰⁴ Brand literacy develops over time, starting with general consumer knowledge that is stratified by brand distinction and price.²⁰⁵ This evolves into "sophisticated literacy," where consumers create their own brand experiences by attaching emotions, personal values, and lifestyle choices to a brand.²⁰⁶ This process of consumer acculturation, whereby individuals are indoctrinated into a particular kind of consumer culture, has important implications because the monetary and social value of a brand can grow if the consumer understands messages imparted by brand communication.²⁰⁷ These brand communications, which are sent primarily through marketing and advertising, convey values and social distinction and allow for greater personal association and the development of loyal brand relationships.²⁰⁸

Trademarks play an imperative role in creating a strong brand identity.²⁰⁹ As producers of styles and designs, fashion houses create products imbued with cultural meaning and market value beyond the raw materials used.²¹⁰ Brand logos are a distinctive visual signifier, representing a defined consumer experience and a set of cultural meanings shaped by fashion companies and the public.²¹¹ In developing consumer cultures, individuals rely on brand signifiers, like the logo, to assist in consumer acculturation and to distinguish brand cultures.²¹² Consumers buy luxury goods to receive external, social affirmation, predominantly making purchasing decisions on the social elements of consumption and emotional values rather than the utilitarian value of products.²¹³ Logos, as conspicuous indicators of wealth, become

204. Laura R. Oswald, *Developing Brand Literacy Among Affluent Chinese Consumer: A Semiotic Perspective*, 37 *ADVANCES CONSUMER RES.* 413, 413 (Oct. 2010).

205. Gachoucha Kretz, *Evolution of Luxury Brand Love Intensity Over Time*, in *CONSUMER BRAND RELATIONSHIPS: MEANING, MEASURING, MANAGING* 55, 71 (Marc Fetscherin & Tobia Heilmann eds., 2015).

206. *Id.*; Oswald, *supra* note 204, at 413–14.

207. Oswald, *supra* note 204, at 415.

208. For a discussion on the semiotics of luxury advertising in the emerging Chinese consumer culture, see *id.* at 415, 417–18.

209. See *JA Apparel Corp. v. Abboud*, 682 F. Supp. 2d 294 (S.D.N.Y. 2010).

210. GODART, *supra* note 68, at 39.

211. David Tan, *The Semiotics of Alpha Brands: Encoding/Decoding/Re-coding/Transcoding of Louis Vuitton and Implications for Trademark Laws*, 32 *CARDOZO ARTS & ENT. L.J.* 225, 230–31, 243 (2013-2014).

212. See Oswald, *supra* note 204.

213. Kretz, *supra* note 205, at 71; Tan, *supra* note 211, at 228.

socially significant because they act as the most immediate visible tool for the communication of self-identification.²¹⁴ Thus, luxury trademarks act as source-identifying, appreciable cultural signs symbolizing status, prestige, and desirability.²¹⁵

B. The Rise of Fast Fashion

One of the most globally influential elements of Worth's business model has been the presentation of fashion on live models through runway shows. Into the early twenty-first century, runway shows for high-end clothing brands have been part of "Fashion Week," which is "a monthlong twice-yearly four-country treadmill to see clothes six months before they reach stores."²¹⁶ For about a month's time every spring and fall, each one of the world's four fashion capitals—New York City, London, Milan, and Paris—host, for one week at a time, the biggest luxury brands' seasonal runway shows.²¹⁷ The shows allow designers the opportunity to present their collections as a cohesive experience for the major retailers, the press, and fashion editors traditionally on the guest list.²¹⁸ After seeing a collection, retailers place orders for the clothes that are then manufactured and shipped to retail locations²¹⁹ within four to six months of the presentation time.²²⁰ Fashion magazines then run spreads with the new collections three to four months before the clothes arrive in stores.²²¹

This arrangement worked from the time of the first Fashion Week in the New York in 1943 (then titled "Press Week")²²² until the advent of Instagram, Facebook, and other social media became an instantaneous means of spreading culture through the fashion shows and new clothing and accessory designs.²²³

214. Kretz, *supra* note 205, at 71; Hemphill & Suk, *supra* note 69, at 1156; Tan, *supra* note 211, at 233.

215. Tan, *supra* note 211, at 238.

216. Vanessa Friedman, *Stepping Off the Runway*, N.Y. TIMES, Feb. 11, 2016, at D1.

217. *Id.*

218. C. H., *The Economist Explains: How Technology Made Fashion Week Passé*, ECONOMIST (Mar. 8, 2016), <http://www.economist.com/blogs/economist-explains/2016/03/economist-explains-5>; Friedman, *supra* note 216.216

219. Friedman, *supra* note 216.

220. C. H., *supra* note 218.

221. *Id.*

222. Ruth La Ferla, *The First Shows*, N.Y. TIMES, Sept. 8, 2016, at D4.

223. Friedman, *supra* note 216; C. H., *supra* note 218.

Around the same time in the mid-2000s, fashion became more and more of a mainstream obsession, with celebrities and fashion bloggers becoming mainstays of the now-coveted front row of the runway shows, turning Fashion Week into an all-out spectacle.²²⁴ As a result of greater press coverage,²²⁵ what has developed in the last couple of years is “product fatigue”²²⁶: customers see the images from runway shows instantaneously and ad campaigns and behind-the-scenes media material after the show across social media platforms.²²⁷ Once the clothes have made it from the runway show to the retail location—four to six months later—customers are already seeking the next trend.

To keep up with changing modes of communication and consumer habits, the fashion world has tried different approaches during the last few years. One new way of appealing to the buying public is the “see-now-buy-now” model, whereby designers present collections that are available immediately in stores

224. *Ciao, Milano! Vogue.com's Editors Discuss the Week That Was*, VOGUE (Sept. 25, 2016), <http://www.vogue.com/13483417/milan-fashion-week-spring-2017-vogue-editors-chat/>; La Ferla, *supra* note 222.

225. Guy Trebay, *Street Style at a Crossroads*, N.Y. TIMES, Oct. 6, 2016, at D8.

226. Anna Collinson, *How Social Media Has Changed the Fashion Industry*, BBC NEWSBEAT (Sept. 24, 2015), <http://www.bbc.co.uk/newsbeat/article/34312805/how-social-media-has-changed-the-fashion-industry>; Friedman, *supra* note 216; C. H., *supra* note 218.

227. Emilia Petrarca, *How Instagram Stories is Putting the “See Now” in Fashion Month*, W MAG. (Sept. 19, 2016), <http://www.wmagazine.com/story/how-instagram-stories-is-putting-the-see-now-in-fashion-month>.

and/or online.²²⁸ Diverging in another way in 2016, Gucci,²²⁹ Calvin Klein,²³⁰ and, luxury label-of-the-moment, Vetements²³¹ presented their men's and women's collections together.²³² Other brands have opted out of the traditional runway setting altogether for more creative presentations and more control over media coverage—a harkening to the roots of haute couture fashion and the Parisian standard of legal protection afforded to high fashion.²³³ In July 2016, Givenchy designer, Riccardo Tisci, presented his women's couture collection and his men's collection

228. Vanessa Friedman, *Revising the Designer Playbook*, N.Y. TIMES, Sept. 8, 2016, at D2; Elizabeth Paton, *Awaiting a Verdict on the See-Now, Buy-Now Model*, N.Y. TIMES, Feb. 9, 2017, at D9. In 2016, luxury clothing brands like Alexander Wang, Tom Ford, and Burberry tried the see-now-buy-now approach. See Jessica Iredale, *Alexander Wang Takes See-Now-Buy-Now Approach to Resort 2017*, WOMEN'S WEAR DAILY (May 25, 2016), <http://wwd.com/fashion-news/fashion-scoops/alexander-wang-see-now-buy-now-resort-10436839/>; Ariel Foxman, *Tom Ford Wants to Change the Way We Shop*, TIME (Feb. 11, 2016), <http://time.com/4217076/tom-ford-fashion-design/>; Vanessa Friedman, *Burberry Turns the Page*, N.Y. TIMES, Sept. 22, 2016, at D7.

229. Steff Yotka, *Gucci Will Shake Up the Fashion System with a Single Men's and Women's Runway Show*, VOGUE (Apr. 5, 2016), <http://www.vogue.com/13423157/gucci-unify-mens-womens-runway-show/>.

230. Susan Chira, *Mixed Signals on the Runway*, N.Y. TIMES, Feb. 16, 2017, at D1.

231. Sarah Mower, *Vetements Has a Unilateral Plan to Shake Up the Shows*, VOGUE (Feb. 5, 2016), <http://www.vogue.com/13395461/vetements-schedule-change/>.

232. Lisa Lockwood, *Calvin Klein to Show Women's and Men's Collections Together in New York*, WOMEN'S WEAR DAILY (Nov. 29, 2016), <http://wwd.com/fashion-news/fashion-scoops/calvin-klein-to-show-womens-and-mens-collections-together-in-new-york-10713484/>. While several designers and brands have decided to show men's and women's collections, others are taking a firm stand against it for creative reasons. Donatella Versace, creative head of Versace has said, "I don't believe in gender mixing. There are women and men; my fashion is totally different, with the same mentality [behind the design process], but different." Luisa Zargani, *Donatella Versace Talks Creativity and Men's Wear*, WOMEN'S WEAR DAILY (June 15, 2016), <http://wwd.com/fashion-news/designer-luxury/donatella-versace-versus-mens-wear-10456280/>.

233. In February 2016, Kanye West presented his luxury streetwear line Yeezy at Madison Square Garden as an amalgam fashion presentation, performance art piece, and record listening party; and Diane Von Furstenberg, head of the eponymous brand and chairwoman of the CFDA, presented a cocktail-party-cum-play at her company headquarters where guests moved through two floors of vignettes featuring models wearing her new collection. Friedman, *supra* note 216.

together as a runway show during the couture Fashion Week—the same week as the other men’s runway shows—and, after the show, shot a series of high definition images that were distributed to major press outlets for publication.²³⁴ During that same week, retailers and clients were able to view the pieces by appointment in the Givenchy showroom²³⁵—a nod to Worth’s original style of running a couturier business. Some brands are even pulling out of Fashion Week altogether, like German luxury brand Hugo Boss²³⁶ and U.S. women’s designer Vera Wang.²³⁷

Exacerbating tensions in the changing fashion industry, fast-fashion companies are filling consumers’ demand for new, fashion-forward clothes at affordable prices. Photos from the ready-to-wear shows are available globally within hours to low-cost manufacturers through the Internet.²³⁸ The rapid transmission of ideas, coupled with inexpensive clothing manufacturing and shipping costs, allows for copies of high-end designs to be made in approximately six weeks or less.²³⁹ In contrast to the usual months-long turnaround for the more expensive ready-to-wear collections, fast fashion fills the time and cost gap. Fast-fashion giant Zara²⁴⁰ makes deliveries twice a week to its two thousand

234. Sarah Mower, *Givenchy Fall 2016 Couture Collection*, VOGUE (July 6, 2016), <http://www.vogue.com/fashion-shows/fall-2016-couture/givenchy>.

235. *Id.*

236. Kyle Munzenrieder, *Hugo Boss Pulls Out of Fashion Week, But Is Still Sticking With Jason Wu*, W MAG. (Nov. 18, 2016), <http://www.wmagazine.com/story/hugo-boss-pulls-out-of-fashion-week-but-is-still-sticking-with-jason-wu>.

237. Bridget Foley, *Vera Wang to Receive Legion of Honor, Skip Fall Show in N.Y. for Film*, WOMEN’S WEAR DAILY (Nov. 21, 2016), <http://wwd.com/fashion-news/fashion-features/vera-wang-to-receive-legion-of-honor-skip-fall-show-in-n-y-for-film-10709788/>.

238. Hemphill & Suk, *supra* note 69, at 1171.

239. *Id.* at 1171–72.

240. Producing high-fashion-inspired designs, Zara is a Spanish multinational clothing retailer founded in 1975. The company was created and is still owned by Inditex, SA, the world’s largest retail group. As of December 2015, Inditex’s market value is more than €100 billion, and its founder Amancio Ortega, the second richest person in the world. Rodrigo Oriheula, *Inditex Sales Rise at Fastest Pace in Three Years on Spain*, BLOOMBERG BUS. (Dec. 10, 2015), <http://www.bloomberg.com/news/articles/2015-12-10/inditex-nine-month-earnings-rise-as-spanish-consumption-rebounds>; *About Us: Our History*, INDITEX, http://www.inditex.com/en/our_group/our_history (last visited Aug. 29, 2016). As of 2016, Zara has 7,000 stores open worldwide. Sheila Shayon, *Zara Fashions an Expanded Online Growth Strategy*, BRANDCHANNEL (Sept. 21,

stores in eighty-eight countries and can fully integrate a new item of clothing—from the design studio to retail stores—in only fifteen days.²⁴¹ This efficient model allows copyists to wait and see which original designs succeed, even waiting until “after the product reaches the stores, and customers have begun to buy”²⁴² to begin producing their copied versions. Copyists are thus able to reproduce simplified versions of the most successful designs while styles are still popular.²⁴³ While these imitations are not counterfeit, the copyists do financially benefit off the investments made by ready-to-wear brands.

C. *Luxury Clothing in France*

Europe, and France in particular, has long set the bar for luxury clothing design, production, and merchandising.²⁴⁴ Most major luxury brands and luxury goods conglomerates started, and remain headquartered, in Europe.²⁴⁵ Conglomerates, like Kering SA,²⁴⁶ LVMH Mœt Hennessy Louis Vuitton SE (“LVMH”),²⁴⁷ and Hermès International,²⁴⁸ are all based primarily in France.²⁴⁹ Additionally, these powerful business groups hold an immense amount of influence over the business and design industries because of the scope of the financial investments they put forth into growing and maintaining luxury companies.²⁵⁰

2016), <http://www.brandchannel.com/2016/09/21/zara-fashions-growth-strategy-092116/>.

241. An estimated ten thousand new designs are shipped into stores each year. Petro, *supra* note 72; *Brands: Zara*, INDITEX, <http://www.inditex.com/en/brands/zara> (last visited Aug. 29, 2016); BURNS ET AL., *supra* note 15, at 35.

242. Hemphill & Suk, *supra* note 69, at 1171.

243. *Id.*

244. Sun, *supra* note 1, at 787. See generally Villette & Hardill, *supra* note 184.

245. Sun, *supra* note 1, at 787.

246. Kering SA owns luxury clothing and accessories brands like Gucci, Bottega Veneta, Balenciaga, Saint Laurent, and Brioni. DELOITTE, GLOBAL POWERS OF LUXURY GOODS 2016, at 18 (2016), <https://www2.deloitte.com/content/dam/Deloitte/global/Documents/Consumer-Business/gx-cip-gplg-2016.pdf>.

247. LVMH owns luxury clothing and accessories brands like Louis Vuitton, Bulgari, Donna Karan, Marc Jacobs, Loewe, and Fendi. *Id.*

248. Hermès International owns luxury leather and silks accessories brands Hermès and John Lobb. *Id.*

249. *Id.*

250. GODART, *supra* note 68, at 72–73, 132–33.

The significance of luxury conglomerates can be seen in the scale of their revenues and distribution. For example, LVMH earned more than €37.5 trillion in revenue in 2016.²⁵¹ Through 2015, the conglomerate operated 1,566 stores worldwide for its fashion group²⁵² and owned roughly 1,100 international trademarks filed with the WIPO under the Louis Vuitton brand name alone.²⁵³ Customers in emerging markets, like China, are attracted to a brand like Louis Vuitton because its storied history and substantial presence in the luxury market has translated into global influence.²⁵⁴ More than fostering an emotional attachment to heritage, the conglomerate has also stayed relevant by becoming more digitally oriented and user-centric.²⁵⁵

Luxury clothing companies in France have strong social, governmental, and legal support protecting their brands. France has had a resilient economic incentive to continue fortifying its apparel retail market as it becomes more globalized. Nearly 3 percent of the French GDP is generated by the fashion industry,²⁵⁶ with €150 billion in direct sales²⁵⁷—Paris Fashion Week accounting for €10.3 billion in commercial transactions.²⁵⁸ While

251. BERNARD ARNAULT, LVMH, 2016 ANNUAL RESULTS (Jan. 26, 2017), https://r.lvmh-static.com/uploads/2017/01/lvmh_ra_2016_va.pdf.

252. *Business Review*, in LVMH 2015 ANNUAL REPORT 14 (2016), https://r.lvmh-static.com/uploads/2016/03/ra2015_complet_gb.pdf.

253. GLOBAL BRAND DATABASE, <http://www.wipo.int/branddb/en/> (last visited Sept. 13, 2016) (search: “Louis Vuitton”; holder: “Louis Vuitton”).

254. Frédéric Godart & Yue Zhao, *Drivers of China's Desire for Luxury and Consequences for Luxury Brands*, in LUXURY BRANDS IN EMERGING MARKETS 120–21 (Glyn Atwal & Douglas Bryson eds., 2014).

255. See Rebecca Robins, *Keeping Long-standing Brands Relevant in the Digital Age*, GUARDIAN (Oct. 9, 2015), <http://www.theguardian.com/media-network/2015/oct/09/brands-relevant-digital-age>. In its 2015 LVMH annual business review, the company identified specific goals for business development, including offering in-store shoppers a “unique experience” and providing “[d]ifferentiation, personalization and digitization.” *Maisons*, *supra* note 15, at 36. In 2013, the conglomerate introduced a ten-week program at the New York Parsons the New School of Design entitled “Fundamentals in Luxury Retail,” a course designed to teach immigrated Chinese-Americans luxury retail skills to enhance customer service to Mandarin-speaking clientele. Sarah Jones, *LVMH Shows Dedication to Chinese Consumers with Training Program*, LUXURY DAILY (Dec. 13, 2013), <http://www.luxurydaily.com/lvmh-proves-importance-of-chinese-consumers-with-training-program/>.

256. INSTITUT FRANÇAIS DE LA MODE, KEY FIGURES OF THE FASHION ECONOMY 6, 23 (Oct. 4, 2016).

257. *Id.* at 4, 12.

258. *Id.* at 8.

the French apparel industry declined by 2.5 percent in 2014, its market value was a notable \$48.7 billion USD.²⁵⁹ The French government is now pushing for increased competitiveness within the market, after a decline in recent years, provoking companies to strengthen brand consciousness and expand advertising.²⁶⁰

The Fédération Française de la Couture, du Prêt-à-Porter des Couturiers et des Créateurs de Mode (“Fédération”) is the official trade association and governing body of the French luxury fashion industry, with approximately ninety-two member companies.²⁶¹ Founded in 1973, the Fédération consists of three separate trade associations that regulate fashion houses and designers producing men’s and women’s ready-to-wear and haute couture clothing.²⁶² In addition, the Fédération organizes the schedule for the three hundred fashion shows²⁶³ that occur during the four Paris Fashion Weeks every year.²⁶⁴ In addition to the regulation of clothing design and manufacture, the Fédération also manages the photographers who attend the Fashion Week presentations.²⁶⁵ It is a long-standing tradition in the French fashion industry that photographers sign agreements with the Fédération, whereby the photographer may only present photos of the collections to specific publications—an attempt to maintain the integrity of legally protected fashion designs.²⁶⁶ Under

259. APPAREL RETAIL IN FRANCE 8–9 (Marketline, May 2015).

260. *Id.* at 13.

261. See *Federation Historical Background and Composition*, FÉDÉRATION FRANÇAISE DE LA COUTURE, DU PRÊT-À-PORTER DES COUTURIERS ET DES CRÉATEURS DE MODE, <http://www.modeaparis.com/2/federation/Historical-background-and> (last visited Oct. 3, 2015); see *Couturiers and Designers*, FÉDÉRATION FRANÇAISE DE LA COUTURE, DU PRÊT-À-PORTER DES COUTURIERS ET DES CRÉATEURS DE MODE, <http://www.modeaparis.com/2/members/> (last visited Oct. 3, 2015).

262. *Federation Historical Background and Composition*, *supra* note 261.

263. INSTITUT FRANÇAIS DE LA MODE, *supra* note 256, at 28.

264. Two Fashion Weeks are for haute couture presentations and two are for ready-to-wear presentations (prêt-à-porter in French). *Federation Historical Background and Composition*, *supra* note 261.

265. The database of accredited photographers can be found on the Fédération website. See *Accreditation*, FÉDÉRATION FRANÇAISE DE LA COUTURE, DU PRÊT-À-PORTER DES COUTURIERS ET DES CRÉATEURS DE MODE, <http://www.modeaparis.com/2/accreditation/> (last visited Jan. 14, 2017).

266. EUR. COURT OF HUMAN RIGHTS [ECTHR], INFORMATION NOTE ON THE COURT’S CASE-LAW NO. 159, at 21 (Jan. 2013), http://www.echr.coe.int/Documents/CLIN_2013_01_159_ENG.pdf.

French IP law, products of seasonal industries, including clothing design, may be copyrighted.²⁶⁷ The unauthorized dissemination of the couture presentation photographs infringes on the rights of the fashion houses.²⁶⁸ Thus, accredited photographers can incur legal repercussions for not following the Fédération's rules.²⁶⁹

Le Chambre Syndicale de la Haute Couture ("Chambre"), one of the trade associations governed by the Fédération, was created by the French Ministry of the Economy, Finance, and Industry in 1868 to prevent the high fashion designs of the heads of the houses (like Frances Worth and his peers) from being copied.²⁷⁰ Couture is custom-fitted, high-quality clothing produced in small quantities using illustrious hand-sewn techniques²⁷¹—expensive and with great artistic flair.²⁷² The Chambre approves and regulates the use of "haute couture" as a legally protected

267. Protection is explicitly provided for "the making of dresses, furs, underwear, embroidery, fashion, shoes, gloves, leather goods" and "the manufacture of fabrics of striking novelty," among other things. Loi 92-597 du 1 juillet 1992 relative au code de la propriété intellectuelle [Law 92-597 of July 1, 1992 for the Intellectual Property Code], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], art. L 112-2 (Fr.), http://www.legifrance.gouv.fr/content/download/1959/13723/version/3/file/Code_35.pdf.

268. ECHR, *supra* note 266, at 21; *see also* Re Marcio X..., Roberts Y... A... and Olivier Z..., Re Infringement of Copyright in Fashion Designs, Cour de cassation [Cass.] [supreme court for judicial matters] crim., Feb. 5, 2008, Bull. crim., No. 319 (Fr.) (three professional photographers disseminate unauthorized photos taken at a number of Paris fashion shows, paying heavy fines for copyright infringement).

269. *See* Bernd Justin Jütte, *The Beginning of a (Happy?) Relationship: Copyright and Freedom of Expression in Europe*, 38 EUR. INTELL. PROP. REV. 11, 14 (2016).

270. *Federation Historical Background and Composition*, *supra* note 261; BURNS ET AL., *supra* note 15, at 138; Bridie Wilkins, *The History of Haute Couture*, HARPER'S BAZAAR UK (July 10, 2014), <http://www.harpersbazaar.co.uk/fashion/fashion-news/the-history-of-haute-couture>. In fact, Gaston Worth, the son of Frederick Worth, was integral in the creation of the Chambre, thus creating the first professional coalition for designers. Mary Lynn Stewart, *Copying and Copyrighting Haute Couture: Democratizing Fashion, 1900-1930s*, 28 FRENCH HIST. STUD. 355 (2005).

271. BURNS ET AL., *supra* note 15, at 137.

272. GODART, *supra* note 68, at 40–41.

designation for a designer's clothing, subject to specific qualifications.²⁷³ The designation of haute couture also requires that original designs be registered to protect against copying.²⁷⁴

Official membership in the *Chambre* requires great effort and cost, but the couture designation is one that imbues a brand with exclusivity and conveys high quality and a long-standing history of excellent craftsmanship.²⁷⁵ Once a designer becomes a confirmed member of the *Chambre*, their fashion company is referred to as a "couture house."²⁷⁶ The number of couture houses has decreased over time: from 106 couture houses in 1945²⁷⁷ to 14 houses as of May 2015.²⁷⁸ One reason for this decline is the high cost of creating haute couture and the related, but contradicting, goal of contemporary fashion companies and their financial backers to produce high profits.²⁷⁹ Due to the incredible expense required for the brands in textiles and labor, large corporations or luxury conglomerates now finance many of the couture houses.²⁸⁰ While the financial burden of creating haute couture may lead some newcomers to shy away from such a venture, the general cultural and legal importance France places on fashion as a form of expression and as an industry fundamental to the French economy incentivizes up-and-coming designers to

273. These requirements include the following: (1) designs must be made-to-measure for private clients and must include one or more fittings; (2) the presentation of fall/winter and spring/summer collections each year, which includes formal evening and daytime wear; and (3) a full-time workshop (*atelier* in French) in Paris with at least twenty staff members. Charlotte Core, *Haute Couture Fact File*, TELEGRAPH (Jan. 26, 2015), <http://fashion.telegraph.co.uk/article/TMG10147014/Haute-Couture-fact-file.html>; *Federation Historical Background and Composition*, *supra* note 261; BURNS ET AL., *supra* note 15, at 138; Wilkins, *supra* note 270.

274. BURNS ET AL., *supra* note 15, at 138.

275. GODART, *supra* note 68, at 40–43.

276. BURNS ET AL., *supra* note 15, at 138.

277. GODART, *supra* note 68, at 43.

278. The houses that currently have the prestigious haute couture appellation are: Adeline André, Alexandre Vauthier, Alexis Mabille, Bouchra Jarrar, Chanel, Christian Dior, Franck Sorbier, Giambattista Valli, Givenchy, Jean Paul Gaultier, Maison Margiela, Maurizio Galante, and Stéphane Rolland. Corinne Jeammet, *Paris Offers a Rich Autumn-Winter 2015-16 Haute Couture Program*, FRANCE TV (May 7, 2015), <http://culturebox.francetvinfo.fr/fashion-week/haute-couture-automne-hiver-2015-2016/paris-soffre-un-copieux-programme-haute-couture-automne-hiver-2015-16-223507>.

279. GODART, *supra* note 68, at 43.

280. BURNS ET AL., *supra* note 15, at 138.

pursue careers in the field and encourages powerful financial backing from business groups capable of shouldering the financial burdens.

D. The Fashion Industry in the United States

Unlike the French luxury industry, the United States does not have a central governing authority for fashion design. Federal and state governmental support comes in the form of initiatives for and general studies of the fashion industry.²⁸¹ Further, the personal luxury goods market in the United States, though lacking in conglomerates comparable to LVMH or Kering, does have a robust luxury clothing industry.²⁸² The four, annual New York Fashion Weeks bring in a total of \$532 million USD in direct tourist spending.²⁸³ The United States does have trade associations for designers of ready-to-wear luxury clothing. The largest of those organizations is the Council of Fashion Designers of America (CFDA), with more than five hundred members.²⁸⁴ Membership is by invitation only, but aside from basic application requirements (designer portfolio and letters of recommendation) and as long as the applicant has been designing for at least three years, there are no production or presentation requirements.²⁸⁵ The CFDA is primarily responsible for the schedule for New York Fashion Week—organizing approximately 150 shows in a seven-day span.²⁸⁶

281. See U.S. CONGRESS JOINT ECON. COMM., THE ECONOMIC IMPACT OF THE FASHION INDUSTRY (Sept. 2016), https://www.jec.senate.gov/public/_cache/files/66dba6df-e3bd-42b4-a795-436d194ef08a/fashion—september-2016-final-090716.pdf; U.S. CONGRESS JOINT ECON. COMM., THE NEW ECONOMY OF FASHION (Feb. 2016), https://www.jec.senate.gov/public/_cache/files/01498736-4605-4715-a894-4a04f65b01fc/the-new-economy-of-fashion—joint-economic-committee-final-lp-.pdf; *Spotlight on Statistics*, U.S. DEP'T LABOR, <https://www.bls.gov/spotlight/2012/fashion/home.htm> (last visited Mar. 29, 2017); *Fashion*, N.Y.C. ECON. DEV. CORP., <https://www.nycedc.com/industry/fashion> (last visited Mar. 29, 2017).

282. Vanessa Friedman, *Remaking Fashion's Business Model*, N.Y. TIMES, June 9, 2016, at D6.

283. STEVEN STRAUSS ET AL., N.Y.C. ECON. DEV. CORP. FASHION NYC 2020, at 10 (2015).

284. *CFDA Members*, COUNCIL FASHION DESIGNERS AM., <https://cfda.com/members> (last visited Mar. 8, 2017).

285. *Membership Information*, COUNCIL FASHION DESIGNERS AM., <https://cfda.com/members/membership-information> (last visited Mar. 8, 2017).

286. La Ferla, *supra* note 222.

There is only one large conglomerate headquartered in the United States and operating similarly to the European-luxury business model, which is PVH, owner of Calvin Klein and Tommy Hilfiger among others.²⁸⁷ In 2015, PVH made over \$8.5 trillion USD in revenue.²⁸⁸ The entity's sole luxury brand, Calvin Klein, sold \$8.2 billion USD of products globally in 2015.²⁸⁹ PVH spent over \$230 million USD that same year "in connection with the advertising, marketing and promotion" of Calvin Klein as part of a stratified retail and wholesale merchandising system.²⁹⁰ Even with strong sales, in 2016, PVH brought in European creative leadership to act as the brand's "one creative visionary,"²⁹¹ hiring Belgian designer, Raf Simons, formerly of French luxury and couture brand Christian Dior, to be Calvin Klein's chief creative officer.²⁹²

European fashion culture has clearly influenced how the industry functions in the United States. Following in the footsteps of Coco Chanel, the diversified brand structure for luxury clothing companies has enabled U.S. luxury companies to increase brand awareness while funding the expensive pursuit of luxury fashion production. Until recently, U.S. luxury beacon Ralph Lauren had a stratified business structure, with six separate brands operating under the Ralph Lauren Corporation, including diffusion brands, activewear, and handbags.²⁹³ By the end of 2015, the corporation announced that it would be streamlining

287. PVH, PVH ANNUAL REPORT 2015, at 6, https://www.pvh.com/~/-media/PVH/Files/2015_pvh_annual_report.ashx.

288. *Id.* at 4.

289. *Id.* at 42.

290. According to PVH's statement to stockholders, "approximately 50% of these expenses [for advertising related costs] were funded by Calvin Klein's licensees and other authorized users of the brands." *Id.* This kind of diversified financial backing strengthens the corporate structure and also increases brand exposure.

291. Lauren Sherman, *Raf Simons Starts at Calvin Klein, Marking Strategic Shift*, BUS. FASHION (Aug. 2, 2016), https://www.businessoffashion.com/articles/news-analysis/raf-simons-calvin-klein-pvh?utm_source=Subscriber&utm_campaign=0075d7f33b-&utm_medium=email&utm_term=0_d2191372b3-0075d7f33b-419619517 (quoting the CEO of Calvin Klein, Inc., Steve Shiffman).

292. *Id.*

293. Trefis Team, *Here's Why Ralph Lauren Could See Better Days*, FORBES (Sept. 23, 2015), <http://www.forbes.com/sites/greatspeculations/2015/09/23/heres-why-ralph-lauren-could-see-better-days/#2715e4857a0b26fb76a94007>.

these six brands into one label for men and one for women, allowing for production and marketing efficiency.²⁹⁴ Simplifying advertising strategy has not diminished the company's capacity to merchandise its products. Operating online, the brand has over fourteen thousand items available, with 50 percent of those items considered ready-to-wear clothing.²⁹⁵

France's institutional structures supporting the luxury fashion industry do not have equivalents in the United States. Litigation may solve disputes for the handful of designers who can afford it.²⁹⁶ The United States Congress has received proposals for design protection laws but has failed to act on them. The latest iteration of specific design legislation was the Innovative Design Protection and Piracy Prevention Act ("ID3PA") in 2011.²⁹⁷ With the assistance and support from the CFDA, the act was drafted to amend the Copyright Act of 1976 and allow protection for "the appearance as a whole of an article of apparel."²⁹⁸ The protections would have lasted a term of three years²⁹⁹ and would have granted rights to sue for infringement.³⁰⁰ The law has yet to be presented to the U.S. House of Representatives and Senate for approval.³⁰¹ As a result, while the U.S. fashion industry contributes a great deal to culture and global economies, the protections afforded fashion designs are still lacking.

294. *Id.*

295. Doug Nathman, *High Tech Innovation Wears Well at Ralph Lauren*, FORBES (Jan. 8, 2016), <http://www.forbes.com/sites/dougnathman/2016/01/08/hi-tech-innovation-wears-well-at-ralph-lauren/#27115e4857a0b4fab1dec397a>. The company is, regardless, in financial trouble. See John Kell, *Ralph Lauren to Slash 1,000 Jobs, Shutter Stores*, FORTUNE (June 7, 2016), <http://fortune.com/2016/06/07/ralph-lauren-job-cuts-stores/>.

296. Over 85 percent of the members of the U.S. fashion industry are small businesses that may not have the means to bring high-cost litigation for IP rights infringement. *The Innovative Design Protection and Piracy Prevention Act, Hearing on H.R. 2511 Before the Subcomm. on Intellectual Prop., Competition, & the Internet of the H. Comm. on the Judiciary*, 112th Cong. (2011).

297. See H.R. 2511, 112th Cong. 4 (1st session 2011).

298. *Id.* § (a)(1).

299. *Id.* § (d).

300. *Id.* § (e).

301. See *Actions Overview: H.R. 2511*, CONGRESS.GOV, <https://www.congress.gov/bill/112th-congress/house-bill/2511/actions> (last visited Mar. 29, 2017).

III. CHINA'S CONSUMER MARKET

China is now the world's second largest economy and represents one of the largest consumer markets due to its recent economic expansion.³⁰² For the last thirty years, China's GDP has grown rapidly, averaging about a 10 percent increase each year.³⁰³ It is estimated that, by 2030, over two hundred cities in China will have populations of one million or more.³⁰⁴ China's urbanization has allowed for economic growth and spurred an expanding upper-middle class, simultaneously increasing demand for luxury goods and services.³⁰⁵ The retailers and financial backers of the global luxury goods market are now transforming their brand strategies to factor in China's influence.³⁰⁶

This Part will explore the growth of the luxury consumer market in China. As consumers become more sophisticated or knowledgeable about luxury brands and the luxury market, consumer tastes become more refined and subtle.³⁰⁷ High-end brands should thus appeal to Chinese consumers in a way that highlights the substance of their brand—the values, the authenticity, and craftsmanship.³⁰⁸ It will discuss the sociocultural basis of this growth as the role luxury goods have played in China's history and as a prominent way to show respect. These circumstances create the growing, but firmly grounded, market to which U.S. designers must appeal.

A. China's New Luxury Consumers

Current estimates from the World Bank suggest that the Chinese upper middle-income bracket—whose members have

302. Alexandra Gibbs, *China Slowdown: The Ripple Effects of Burberry*, CNBC (Oct. 15, 2015), <http://www.cnbc.com/2015/10/15/chinas-economic-slowdown-the-ripple-effects-for-burberry-and-luxury-brands.html>; Serena Rovai, *The Evolution of Luxury Consumption in China*, in LUXURY BRANDS IN EMERGING MARKETS 131 (Glyn Atwal & Douglas Bryson eds., 2014).

303. *China: Overview – Context*, WORLD BANK (Apr. 6, 2016), <http://www.worldbank.org/en/country/china/overview#1>. While growth within the country has been rapid for the country as a whole, it has been uneven between regions, as China remains a highly fragmented country. WORLD BANK, *supra* note 12, at 4; Rovai, *supra* note 302, at 131.

304. Godart & Zhao, *supra* note 254, at 122.

305. Rovai, *supra* note 302, at 131–32.

306. Godart & Zhao, *supra* note 254, at 120.

307. Rovai, *supra* note 302, at 133.

308. TOM DOCTOROFF, WHAT CHINESE WANT 48 (2012).

roughly \$11,000 to \$32,000 USD in annual disposable income³⁰⁹—will increase to include an approximately 180 million new consumers by the year 2030, creating “significant demand” for “high quality consumer goods and services.”³¹⁰ Upper-middle-income consumers will then make up nearly 20 percent of China’s total population.³¹¹ Additionally, the number of high-income consumers—individuals with more than \$32,000 USD of annual disposable income³¹²—will increase to approximately 14.5 percent of the country’s total population,³¹³ creating more demand for “overseas travel and high-end goods and services.”³¹⁴

For foreign brands hoping to win favor with new luxury consumers in China, the country’s shifting consumer culture and government control of the economy has caused fluctuating currency and significant regulatory challenges.³¹⁵ In spite of occasional economic downturns,³¹⁶ private consumption continues to expand because of “[s]ustained income growth, the introduction of e-commerce and the increased sophistication of consumers.”³¹⁷ In 2015, Chinese consumers constituted approximately 31 percent of the global market for all personal luxury goods sales³¹⁸—a market of more than 350 million consumers.³¹⁹ The growing middle class is expected to continue this trend of growth to make up 34 percent of global luxury consumers by the year 2020.³²⁰

309. ECONOMIST INTELLIGENCE UNIT, *supra* note 14, at 5.

310. *Id.* at 6.

311. *Id.* at 5.

312. *Id.*

313. *Id.* at 6.

314. *Id.* at 5.

315. Gibbs, *supra* note 302.

316. Hurun Research Inst., *Hurun Best of the Best Awards 2015*, HURUN REP. (Jan. 20, 2015), <http://www.hurun.net/en/articleshow.aspx?nid=9604>; Kevin Yao & Shaloo Shrivastava, *China Economic Growth Seen Slowing Despite Policy Easing*, REUTERS (Oct. 15, 2015), <http://www.reuters.com/article/2015/10/15/us-economy-poll-china-idUSKCN0S90J220151015>.

317. ECONOMIST INTELLIGENCE UNIT, *supra* note 14, at 5.

318. BAIN STUDY FALL-WINTER 2015, *supra* note 2, at 2, 9.

319. DEBORAH WEINSWIG, FUNG BUS. INTELLIGENCE CTR., GLOBAL CHINESE SHOPPERS: THE \$200 BILLION OPPORTUNITY 24 (Sept. 22, 2015); Sarah Jones, *Chinese Consumers Will Double Overseas Spending by 2020: Chinese Luxury Advisors*, LUXURY DAILY (Sept. 17, 2015), <http://www.luxurydaily.com/chinese-consumers-will-double-overseas-spending-by-2020-china-luxury-advisors/>; BAIN SPRING UPDATE 2015, *supra* note 8, at 16.

320. Bain & Co., *The Global Personal Luxury Goods Market in 2016 Will Mirror Last Year’s Low Single-Digit Real Growth, Even as Geopolitical Turmoil*

Personal luxury goods play an important part in Chinese culture since China's economy has shifted to a more capitalist-friendly model.³²¹ The growing middle class in China now takes advantage of their new elevated financial status to travel abroad and purchase luxury clothing and accessories in their country of origin,³²² including in the United States. In 2014, 80 percent of the luxury goods bought by Chinese consumers were made outside of the mainland.³²³ Shopping tourism arises out of Chinese culture not only as a means to display wealth but also because the few national holidays in China construct the prime opportunity for such an activity. For example, one national holiday³²⁴ celebrated every year is "Golden Week," a week-long celebration surrounding October 1st, Chinese National Day, honoring the founding day of the People's Republic of China (PRC).³²⁵ Chinese tourists use this rare opportunity for far-reaching travel and to purchase personal luxury items.³²⁶ For example, in 2016, an estimated six million Chinese tourists traveled during Golden Week³²⁷ and spent an estimated \$7.2 billion USD abroad.³²⁸

and Luxury Brands' Emerging Strategies Reshuffle Internal Market Dynamics, BAIN (May 24, 2016), <http://www.bain.com/about/press/press-releases/spring-luxury-update-2016.aspx>.

321. For a discussion on institutional capitalism and the organizational structures of state-owned entities in China, see Li-Wen Lin & Curtis J. Mihaupt, *We Are the (National) Champions: Understanding the Mechanisms of State Capitalism in China*, 65 STAN. L. REV. 697 (2013).

322. See Rovai, *supra* note 302, at 133.

323. WEINSWIG, *supra* note 319, at 24; Jones, *supra* note 319; BAIN STUDY FALL-WINTER 2014, *supra* note 10, at 15.

324. Janice Williams, *What Is Chinese National Day? Facts, Photos As China Celebrates Their Country's Founding*, INT'L BUS. TIMES (Sept. 30, 2016), <http://www.ibtimes.com/what-chinese-national-day-facts-photos-china-celebrates-their-countrys-founding-2424747>.

325. *Id.*

326. Tiffany Ap & Casey Hall, *Six Million Chinese Tourists Head Overseas for Golden Week*, WOMEN'S WEAR DAILY (Oct. 4, 2016), <http://wwd.com/business-news/retail/golden-week-chinese-tourists-10617635/>.

327. *Id.*

328. As of November 20th, 2016, the estimates on how much Chinese tourists spent abroad on luxury clothing specifically are still being tallied. Tiffany Ap, *Golden Week in China Rings Up \$180 Billion*, WOMEN'S WEAR DAILY (Oct. 11, 2016), <http://wwd.com/business-news/marketing-promotion/china-golden-week-domestic-spending-10660181/>. While concerns have been raised regarding slowing and unstable state of the Chinese economy, sales in China's retail and catering sectors grew to the approximately \$178 billion USD in 2016 from

Even with major Western brands scaling back their operations in mainland China to account for a slight slowdown in Chinese economic growth, Chinese tourists spent approximately \$200 billion USD on retail overseas by the end of 2015.³²⁹ The average retail spending for luxury goods by Chinese visitors to Europe and the United States in 2014 was \$2,548 and \$2,555 USD per trip respectively.³³⁰ Travelers are spending more the farther they travel,³³¹ which mostly include clothing, footwear, and accessories.³³²

Travel to advanced consumer societies plays a substantial role in the development of brand literacy.³³³ In the aggregate, Chinese tourists are the world's biggest overseas spenders.³³⁴ Instead of purchasing clothing from fast-fashion retailers like Zara or H&M, where they may be able to purchase a greater quantity of clothing, Chinese shoppers travel to purchase luxury goods of quality, thereby promoting the creative endeavors of fashion designers as opposed to opting for imitations.³³⁵ In 2014, more than 40 percent of goods sold online in China were counterfeit or of

\$170 billion USD in 2015, per statistics from the Chinese Ministry of Commerce. *China 'Golden Week' Retail Sales Growth Slows to 11 Percent Year-on-Year*, REUTERS (Oct. 9, 2015, 3:29 AM), <http://www.reuters.com/article/us-china-economy-retail-idUSKCN0S30LF20151009>.

329. See *Global Chinese Shoppers Carry Spending Momentum Into 2016*, FUNG GLOBAL RETAIL & TECH. (Aug. 29, 2016), <https://fungglobalretailtech.com/research/global-chinese-shoppers-carry-spending-momentum-2016/>. Overseas travel is highest among 25 to 44-year-olds: the same age group that is the emerging upper-middle class of the newly urbanized areas in China. WEINSWIG, *supra* note 319, at 7; Rovai, *supra* note 302, at 133. Many Western luxury retailers have even said they have not seen the impact of the economic downturn. Astrid Wendlandt, Clare Baldwin, & Siddharth Cavale, *Insight – Out with the Old, as Chinese Chase New Luxury Labels Abroad*, REUTERS (Oct. 12, 2015), <http://uk.reuters.com/article/uk-luxury-china-insight-idUKKCN0S626420151012>.

330. That is double the spending total of a visit to Hong Kong. WEINSWIG, *supra* note 319, at 11.

331. *Id.*

332. *Id.* at 14.

333. Oswald, *supra* note 204, at 415.

334. WEINSWIG, *supra* note 319, at 4.

335. Sarah Jones, *How Should Luxury Retailers Prepare for Golden Week?*, LUXURY DAILY (Sept. 28, 2015), <http://www.luxurydaily.com/how-should-luxury-retailers-prepare-for-golden-week/>.

bad quality.³³⁶ By travelling to where the authenticity of the luxury goods is more likely guaranteed, Chinese purchasers are ensured high-quality goods,³³⁷ imparting social connotations of status and success.³³⁸

Another reason for the popularity of shopping tourism is the consumers' enhanced awareness of price differentials across markets—import tariffs and taxes increase the cost of luxury goods in China in comparison to Europe or the United States.³³⁹ For example, a handbag can cost up to 30 percent more in Beijing than it would cost in Paris.³⁴⁰

Chinese retail tourism is also fueled in part by the Chinese consumer's desire for the distinguishing, in-store experiences offered by brands in the country of origin and the availability of hard-to-find or limited edition merchandise.³⁴¹ In turn, brands encourage shopping tourism by marketing their goods directly to Chinese consumers, offering personalized and exclusive services to foster brand loyalty, and highlighting the exclusivity of their products.³⁴² Retailers hire staff who speak Mandarin and market merchandise in a culturally relevant way for Chinese shoppers during Chinese national holiday weeks, like Golden Week, when many of these shoppers travel to the West.³⁴³

336. Adam Jourdan, *Over 40 Percent of China's Online Sales Counterfeit, Shoddy: Xinhua*, REUTERS (Nov. 2, 2015), <http://www.reuters.com/article/us-china-counterfeits-idUSKCN0SS02820151103>.

337. S. N., *The Economist Explains China's Addiction to Luxury Goods*, ECONOMIST (Apr. 30, 2014), <http://www.economist.com/blogs/economist-explains/2014/04/economist-explains-17>.

338. See Wilcox, Kim, & Sen, *supra* note 183 (discussing the “self-presentation” and “self-expression” functions in luxury goods consumption and the appeal of counterfeit luxury goods for consumers).

339. S. N., *supra* note 337; BAIN SPRING UPDATE 2015, *supra* note 8, at 16.

340. S. N., *supra* note 337. In addition, unexpected currency fluctuations in China can create a price difference of up to 60 to 80 percent. WEINSWIG, *supra* note 319, at 24; BAIN SPRING UPDATE 2015, *supra* note 8, at 14–15.

341. WEINSWIG, *supra* note 319, at 19; Jones, *supra* note 319.

342. Jones, *supra* note 335.

343. See *id.*

B. How Chinese Culture Plays a Part

Despite Chinese culture having a disparate history with luxury items in general,³⁴⁴ China's economic expansion provides fertile soil for Western luxury brand expansion, especially because of the strong cultural role that luxury goods play in China's history. China has welcomed luxury goods into its culture as a means of showing socioeconomic status, as a sign of respect, and as a tool for business development through luxury gift giving.³⁴⁵ New Chinese luxury customers' purchasing habits are evolving through brand communication that imparts cultural values. The rise of new luxury customers occurred in conjunction with the development of the Internet and, specifically, social media.³⁴⁶ Social media platforms allow companies to increase brand awareness and their influence on consumer practices.³⁴⁷ Chinese luxury consumers also rely on a product's country of origin as an indicator of certain characteristics related to the country.³⁴⁸ For example, China's consumers relate U.S. brands with the idea of individualism.³⁴⁹ Brand narratives attempt to appeal to particular consumer attitudes by building around the concept of brand heritage to impart a sense of reliability, credibility, and prestige to the luxury brand.³⁵⁰

The concept of luxury has an ambivalent history in China. Though the imperial period of the Ming and Tang dynasties established a fixed sociocultural concept of luxury with fine textiles and ceramics,³⁵¹ the Maoist-Communist regime of the mid-twentieth century suppressed any cultural attachment to the past.³⁵² Young consumers today have attained disposable income

344. Chinese culture disparate treatment of luxury goods includes regaling in the fine silks and pottery of the ancient Ming dynasty, to the Maoist rebuking of luxuries in favor of communist minimalism of the late twentieth century. Rovai, *supra* note 302, at 130–32.

345. *See supra* Part III.B.

346. *See* Godart & Zhao, *supra* note 254, at 122.

347. *See id.*

348. *See* Rovai, *supra* note 302, at 132–33.

349. *See* Casey Hall, *U.S. v. China: Gauging the Trump Impact*, WOMEN'S WEAR DAILY (Nov. 24, 2016), <http://wwd.com/business-news/government-trade/us-china-donald-trump-trade-10706472/>.

350. *See id.* at 133.

351. *See* Rovai, *supra* note 302, at 130–32.

352. During the reign of Communist leader Mao Tse Dong, rich property owners were tortured and banished to rural, remote areas, and their luxury possessions were destroyed. Oswald, *supra* note 204, at 413.

and cosmopolitan lifestyles—thanks to the urbanization of China in the last decade of the twentieth century—but their awareness of luxury brand remains limited because, up until recently, such extravagances were unavailable to them.³⁵³ By purchasing luxury goods, Chinese consumers want to “distinguish and affirm” themselves as individuals in the hierarchal structure of social status.³⁵⁴ These relatively inexperienced consumers are motivated to purchase luxury clothing and accessories as a symbol of status in the evolving upper-middle class and thus rely on the appeal of a brand’s logo³⁵⁵ to buy such luxury goods.

Moreover, the tradition of giving expensive gifts in business and familial relationships further affirms an expectation for consistent luxury purchases by Chinese consumers. The significance of gift giving goes back to the time of Confucius (551–479 BC), who wrote that gift giving is virtuous ritual and in line with the observance of “propriety.”³⁵⁶ From this idea comes the notion in Chinese culture that “the amount of gifts a person receives and gives is a sign of privilege and status.”³⁵⁷ Gift giving is “necessary for doing business today” and fosters “familial ties among business partners that lead[s] to trust.”³⁵⁸ Gifts also are imperative for paying respect to familial ancestors³⁵⁹ and for the celebration of certain holidays, like Chinese New Year.³⁶⁰

There has been concern that luxury gifts to government officials and other businesspeople are in fact bribes, causing issues for international anticorruption governance. While anticorruption and antibribery laws have been in place for decades,³⁶¹ it was not until 2012 that the Chinese government took considerable strides to curb such corruption.³⁶² Along with the Chinese

353. See Rovai, *supra* note 302, at 130–32.

354. *Id.* at 130.

355. *See id.* at 133.

356. Mary Szto, *Chinese Gift-Giving, Anti-Corruption Law, and the Rule of Law and Virtue*, 39 *FORDHAM INT’L L.J.* 591, 609–10 (2016).

357. *Id.* at 611.

358. *Id.*

359. *See id.* at 612–13.

360. *See id.* at 618–20.

361. *See* Criminal Law of the People’s Republic of China (promulgated by Standing Comm. Nat’l People’s Cong., July 1, 1979, effective Oct. 1, 1997), arts. 164, 385–86, 389–90, *CLI.1.17010(EN)* (Lawinfochina).

362. *See* Patrick M. Norton, *Anti-Corruption Risks: Complying with the United States Foreign Corrupt Practices Act in China*, in *CORPORATE COUNSEL’S*

government pushing for domestic consumption, all key actors in the Chinese luxury market are still feeling the negative impact of the crackdown.³⁶³ Thus, personal luxury goods having a distinct style or that are recognizably luxury—watches, leather goods, etc.—“but without big logos” become best-selling items for luxury brands.³⁶⁴

United States regulations should take this into consideration when contemplating protections for luxury designers trying to appeal to this market. While trademarks do help luxury brands appeal to Chinese middle-class consumers, there is also a profitable and sustainable market for luxury goods that do not explicitly belie their brand. More global luxury brands have entered into China's domestic market.³⁶⁵ The top-selling luxury brands for gift giving—a prominent way to show respect—include Louis Vuitton, Chanel, Gucci, Dior, and Hermès.³⁶⁶ That all of the companies are EU-based speaks to the high social value Chinese luxury consumers place on a strong brand heritage, a brand's prestige and quality. Currently, however, up-and-coming U.S. designers are unable to compete with European brands in the expanding luxury market.

IV. PROBLEMS FOR WESTERN LUXURY BRANDS

International IP regimes grant up-and-coming designers minimal rights in the promotion of their brands, and regional and national regimes have not implemented harmonized design protection to be able to develop a system similar to the Madrid System. International trademark does provide some protection for luxury designers expanding their business while defining their business in the market. As developed as trademark enforcement is as an international protection scheme against counterfeit, there remains a large number of counterfeits physically crossing borders. Counterfeits are a pervasive problem for customs and mark owners, especially well-known brands whose global reach creates greater exposure for the brand, thus providing greater opportunity for copying and IP infringement. Even so, interna-

GUIDE TO DOING BUSINESS IN CHINA (Kenneth Cutshaw, Michael Burke, & Christopher Wagner eds., 3d ed. 2016); Wendlandt, *supra* note 329.

363. BAIN SPRING UPDATE 2015, *supra* note 8, at 12.

364. Godart & Zhao, *supra* note 254, at 122.

365. *Id.*

366. Hurun Research Inst., *supra* note 316, at 2–3.

tional trademark registrants still attain a minimal form of protection. Designs, however, are not protected in the same way on the international scale. Industrial design—though present as a tool for fashion design protection in specific countries—does not have a harmonized enforcement scheme. Thus, regulation of design IP currently must occur on a more localized level.

The EU regimes for trademark and design rights create ample incentives for designers to enter the luxury market because of the strong legal rights granted to protect their artistic investments. The harmonization directives in place present a more clearly defined enforcement system than at the international level. They also support young designers more than the U.S. regimes because EU courts require a lower standard for plaintiffs to prove trademark infringement, relying simply on whether one mark user rode on the coattails of the goodwill of another's mark. Even when certain shapes come to symbolize brand values and give the goods value, the European courts protect those brand-identifying signs at the risk of allowing a monopoly over the sign.

Current IP protections in the United States do little to safeguard new designers in their efforts to develop a brand with not only recognizable trademarks but also distinguishing designs. Legislation that would have amended the Copyright Act of 1976 has died in U.S. Congress, and patents do not provide timely protection for the ever-increasing speed of clothing production and changes in consumer tastes. Further, courts only grant trade dress protection if exposure and longevity of a particular look on the market then turns into a secondary meaning, the process of which could take years. During that time, season after season and runway show after runway show will have taken place, giving copyists the opportunity to steal the creative work of individuals without the means to litigate. Additionally, trade dress does not specifically cover the cut and design of clothing. It only speaks to the general form or look.

Trademark rights afford some modicum of protection and add cultural value to a brand. The trademark regimes of the United States and the European Union are similar in many of the basic protections they provide statutorily. In both regions, even unregistered trademarks are protectable as a means of supporting emerging luxury designers. These schemes, however, favor brands with the resources to police their mark—protecting against infringing or unauthorized use by third-parties. Prominent luxury brands with recognizable trademarks and greater

financial backing are better able to combat knock-offs and imitations through litigation than smaller luxury designers.

In comparison to the strong design protections granted in the European Union, the United States does not adequately shield fashion designers from design copyists. Unless a U.S. designer has “substantial non-U.S. business, the entire market is subject to copyists.”³⁶⁷ For example, U.S.-based fast-fashion company Forever 21 sells nearly identical copies of on-trend products by utilizing by-the-minute online updates from the runways to knock-off designer clothing.³⁶⁸ Further, because Forever 21 has no stores in Europe, it is thus not subject to EU design protections.³⁶⁹ In comparison, the strict design protections in the European Union, specifically the protections afforded to the cut and shape of fashion designs, have forced fast-fashion companies to innovate, to some degree. European fast-fashion firms Zara and H&M avoid close copying by using in-house designers to adapt to current trends.³⁷⁰ Even the companies that thrive off stealing others’ designs must work that much harder in the European Union to get away with copying.

Adding to the trouble of lacking design protection under U.S. law and counterfeit sales, U.S. fashion designers do not have the assurance that their rights will be protected because of how disparately courts handle IP protection due to the intersection of other legal regimes. Even such similar regimes as the European Union’s and United States’ for trademark put varying responsibilities on mark owners. While the trademark rights of one company are protected in the European Union, the same rights under the same circumstances may not be protected in the United States.³⁷¹ A fashion institution the size of Louis Vuitton may have the capacity to police its mark with all of the legal particularities in varying jurisdictions, but up-and-coming designers do not have the same resources of time and money available. There must be a more uniform manner in which these smaller luxury designers can receive brand protection.

367. Hemphill & Suk, *supra* note 69, at 1190–91.

368. *Id.* at 1171–73.

369. *Id.* at 1171, 1191–92.

370. *Id.*

371. See SA Louis Vuitton Malletier v. eBay, Inc., Tribunal de grande instance [TGI] [ordinary court of original jurisdiction] Paris, B ch., June 30, 2008 (Fr.); Tiffany (NJ) Inc. v. eBay Inc., 600 F.3d 93, 106 (2d Cir. 2010).

Protection for designs is needed because there are already many other factors which can harm a brand, and IP design rights could provide a minimum protection for up-and-coming designers. The future of U.S. luxury in China is subject to fluctuations in the Chinese economy³⁷² and developing political relations.³⁷³ Even with a potentially slowing economic growth,³⁷⁴ however, salaries will continue to rise for certain Chinese citizens, allowing the middle class to spend less on “basic necessities,” and have the freedom to emanate their elevated social status through “branded and premium” clothing and accessories purchases.³⁷⁵ Higher levels of income also allow for tourism to far-off destinations to become “commonplace.”³⁷⁶ Whether emphasizing their historical significance or playing to the changing tides of instantaneous digital culture, luxury clothing brands are working to reach these new customers. Thus, the United States should do what it can to support innovation in the luxury clothing and accessories market and take advantage of this economic opportunity.

V. SOLUTION

As the world becomes more interconnected, the largest luxury goods markets should have similar regulations. The United States should create intellectual property regulations for fashion design that align with the laws of the European Union, which will spawn innovation and design necessary to lure new Chinese luxury consumers, both in China and in the United States.³⁷⁷ Ultimately, “[p]iracy can wipe out young [designers’] careers in a single season.”³⁷⁸ If only “large corporations with wide recognized trademarks [can] afford to absorb these losses caused by copying,” there is little incentive for designers without such massive financial backing and notoriety “to compete with those who

372. WORLD BANK, *supra* note 12, at xiii.

373. Press Release, Presidential Memorandum Regarding Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement (Jan. 23, 2017), <https://www.whitehouse.gov/the-press-office/2017/01/23/presidential-memorandum-regarding-withdrawal-united-states-trans-pacific>.

374. WORLD BANK, *supra* note 12, at 8.

375. ECONOMIST INTELLIGENCE UNIT, *supra* note 14, at 9.

376. *Id.* at 5.

377. See WEINSWIG, *supra* note 319, at 24.

378. *Id.* at 4.

steal their intellectual capital.”³⁷⁹ Thus, stricter protections must be implemented in the United States if U.S. luxury designers are to be incentivized to compete with historic EU legacy brands. When a brand needs to assert its IP rights, a company with more capital has a greater capacity to take litigious action than a new, smaller designer. By capitalizing on the expansion of urbanization and the middle-class in China, the United States should create IP rights that are consistent with those in the European Union because enacting stronger legal protections will further enhance the creative productivity of the U.S. luxury fashion industry.

The United States should implement design legislation that mirrors Community design rights of the European Union. Allowing for short-term protection of three to five years and an expedited approval process for new designs will afford up-and-coming designers the necessary shield to prevent fast-fashion copyists from stealing and profiting off of these designers’ innovations. Strengthening legislation would be “a measured response to the modern problem of fashion design piracy,”³⁸⁰ correcting the “weak link of international IP protection” for design.³⁸¹

Further, greater IP protection in the United States is needed to foster a cultural shift to better support up-and-coming designers and create the kinds of heritage legacies found in the European Union. By the end of 2015, China became the largest trading partner with the United States,³⁸² a status that continued into late 2016.³⁸³ Even with the seemingly positive association of individualism with U.S. brands, a U.S. country of origin is not currently considered a selling point with Chinese consumers compared to a French country of origin.³⁸⁴ This gap needs to be

379. *The Innovative Design Protection and Piracy Prevention Act, Hearing on H.R. 2511 Before the Subcomm. on Intellectual Prop., Competition, & the Internet of the H. Comm. on the Judiciary*, 112th Cong. 5 (2011) (statement of Lazaro Hernandez, designer and co-founder, Proenza Schouler) (internal citations omitted).

380. *Id.* at 9.

381. *Id.* at 4.

382. *Foreign Trade: Top Trading Partners – December 2015*, U.S. CENSUS BUREAU, <https://www.census.gov/foreign-trade/statistics/highlights/top/top1512yr.html> (last visited Mar. 22, 2017).

383. *Foreign Trade: Top Trading Partners – September 2016*, U.S. CENSUS BUREAU, <https://www.census.gov/foreign-trade/statistics/highlights/top/top1609yr.html> (last visited Mar. 22, 2017).

384. Hall, *supra* note 349.

filled with strong IP legislation in line with sponsoring a greater appreciation for fashion design in its contributions to arts and culture and to the economy. Luxury brands from the European Union have been the most successful with Chinese consumers because luxury shoppers recognize the history and reputations of European brands.

Without the financial support of conglomerates in the United States, institutional effort must be made to protect the integrity of the fashion industry. As the *Fédération* and the *Chambre* do in France, the United States must ensure there are the proper administrative agency efforts on the part of either an entity, like the U.S. Department of Labor, or with trade associations, like the CFDA. There have been efforts made to further legislative assistance to smaller luxury designers. Those efforts now must be solidified to properly assist luxury design entrepreneurs.

The U.S. courts have a prime opportunity to shift their legal analysis of fashion design. With the relevant consumer market already in place for U.S. luxury brands to be successful in emerging markets, fashion regulation in the United States must adapt to the changing global luxury goods market. With copyists moving quickly to replicate luxury clothing, designers cannot afford to lose time waiting. The United States needs design-specific legislation to provide relevant legal protections for fashion. The courts also need to shift their view of clothing as being merely utilitarian. The economic potential of advancing a strong luxury market can be seen in the already swarming droves of Chinese tourists coming to Western countries to buy high-end goods.

New strategies need to be developed to capture the attentions and purchases of the new flood of Chinese consumers in China and abroad.³⁸⁵ With Chinese shoppers already travelling for luxury purchases, the United States should enforce greater design protections to incentivize creative production, thereby strengthening the U.S. luxury goods market. Guarantees of high-quality products may be given with the strong trademark laws already in place in the United States. The trademark and trade dress protections in place, however, are not enough for up-and-coming designers who do not have the resources to sue counterfeiters and protect their designs. Safeguards should be in place not only for renowned companies but also for small luxury designers. Further, as Chinese consumers become more sophisticated, they

385. BAIN STUDY FALL-WINTER 2014, *supra* note 10, at 28.

will look beyond the appeal of the logo and will look toward refined style and design. Soon, luxury designers will no longer be able to rely so heavily on trademark protections. As a result, design-specific legislation in the United States is needed to adequately assist up-and-coming luxury designers.

CONCLUSION

Social and institutional interests in the United States must match creative interests if independent U.S. luxury designers are to compete with EU luxury conglomerates in the international personal luxury goods market. The global luxury clothing industry is in flux, attempting to exploit new technological advancements and changing consumer attitudes while maintaining well-worn traditions. The more U.S. brands stratify their clothing lines and the more far-reaching their distribution, the more they risk overexposure—vulnerability to counterfeiters and to product fatigue. Powerful institutions must encourage smaller designers to participate in designing for and influencing the salability of the luxury clothing. As it has in the European Union and in France, legal protection for clothing design in the United States will reinforce the social and cultural attraction to clothing of high quality and moral integrity as an original creation and will lessen the appeal of knock-offs. The current U.S. IP regimes do not comprehensively safeguard designers' creative efforts. Even the centuries-old international trademark regime cannot adequately protect designers who enter the Chinese market. The United States must effectuate short-term, design-specific protections that would prevent the fast-fashion copying of luxury clothing designs and incentivize up-and-coming designers to risk their IP internationally.

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