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Reviewing Fashion Product Designs from an Intellectual Property Perspective

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Fashion moves quickly, and in-house design teams draw inspiration from a wide range of cultural reference points. To avoid infringement claims in connection with slogans, prints and other designs, many fashion companies seek legal guidance before approving new collections.

Any legal review, however, must combine a technical understanding of intellectual property with a more intuitive understanding of design — and a client's business.

Here, we outline some strategic considerations for any lawyer undertaking an intellectual property-centered review of fashion designs.

I. What Kinds of Intellectual Property Are Relevant to Fashion Product Designs?

Before analyzing a client's fashion design for potential legal risks, familiarize yourself with the types of intellectual property protection that may be relevant — and note that intellectual property rights may be registered or unregistered.

A. Copyright

Copyright protects “original works of authorship” fixed in a “tangible medium of expression,” such as literary and musical works, motion pictures, sound recordings, and pictorial, graphic and sculptural works, among other examples.¹

The key elements in a claim of copyright infringement are: (i) the plaintiff owns a valid copyright in a creative work, (ii) the defendant had access to, and copied, elements of the plaintiff’s work, and (iii) the elements the defendant copied were substantial, and therefore the copying was wrongful.²

Independent creation is a complete defense to copyright infringement: to prevail on a claim of infringement, therefore, a plaintiff must establish that a defendant copied the work, either through direct or circumstantial evidence (i.e., that the defendant had access to the plaintiff’s work and that the two works are substantially similar).³

The substantial similarity analysis requires the comparison of only the protectable elements of a plaintiff’s work to the defendant’s work.⁴ Under this lens, if a reasonable, ordinary observer who viewed the two works would conclude that the defendant had copied the protectable elements of the plaintiff’s work, a finding of substantial similarity is appropriate.⁵

Fashion products may contain copyrighted works. Apparel, shoes and handbags are commonly understood as “useful articles,” defined under the Copyright Act of 1976 as any article with “an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information.”⁶ Under the Copyright Act of 1976, the design of a useful article is considered a protectable pictorial, graphic, or sculptural work “only if, and only to the extent that, such design incorporates pictorial, graphic,

¹ 17 U.S.C. § 102.

² *Skidmore as Tr. for Randy Craig Wolfe Tr. v. Led Zeppelin*, 952 F.3d 1051, 1064 (9th Cir. 2020).

³ *Id.*

⁴ *Situation Mgmt. Sys., Inc. v. ASP. Consulting LLC*, 560 F.3d 53, 59 (1st Cir. 2009).

⁵ *Id.* at 58.

⁶ 17 U.S.C. § 101.

or sculptural features that can be identified separately from, and are capable of existing independently of, the utilitarian aspects of the article.”⁷

Of course, people have been combining form and function for thousands of years, from the ornate mosaics adorning ancient Roman temples and homes, to Japanese swords and Aztec ceremonial knives. And although clothing performs a utilitarian function — shielding us from the elements and allowing us to swim, hike, and work — people have long recognized the social messaging, self-expression and pure artistry involved in fashion. “Vain trifles as they seem, clothes have, they say, more important offices than merely to keep us warm. They change our view of the world and the world's view of us,” wrote Virginia Woolf in *Orlando: A Biography*, a story in which the protagonist traverses centuries, deftly changing attire across time, culture and gendered social expectations.⁸ Determining which aspects of a fashion product may be considered artistic works, and therefore, protectable under copyright law, requires careful examination.

In *Mazer v. Stein*, which examined the scope of copyright protection for artistic works with industrial applications, the United States Supreme Court considered whether certain porcelain statuettes used as the bases for electric lamps were protected by copyright.⁹ The case, the Court noted, “requires an answer not as to a manufacturer's right to register a lamp base, but as to *an artist's right to copyright a work of art intended to be reproduced for lamp bases*” (emphasis added). The Court held that the statuettes were protectable, emphasizing that copyright protects the original expression of ideas, not the ideas themselves: “respondents may not exclude others from using statuettes of human figures in table lamps; they may only prevent use of *copies of their statuettes as such or as incorporated in some other article*” (emphasis added).

Common fashion items that are eligible for copyright protection include belt buckles, jewelry, lace and knit patterns, and two-dimensional prints. In *Kieselstein-Cord v. Accessories by Pearl, Inc.*, the Second Circuit considered the copyright protection available to a maker of intricate belt buckles, ultimately holding that the “primary

⁷ *Id.*

⁸ VIRGINIA WOOLF, *ORLANDO: A BIOGRAPHY* ch. 4 (1928) (public domain), available at https://en.wikisource.org/wiki/Orlando:_A_Biography/Chapter_4.

⁹ *Mazer v. Stein*, 347 U.S. 201 (1954).

ornamental aspect of the Vaquero and Winchester buckles is conceptually separable from their subsidiary utilitarian function.”¹⁰

In *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, the United States Supreme Court cited *Mazer v. Stein* in its examination of the protectability of designs appearing on cheerleading uniforms, and distilled the question into two prongs: whether the design at issue “can be perceived as a two- or three-dimensional work of art separate from the useful article” and whether it “would qualify as a protectable pictorial, graphic or sculptural work — either on its own or fixed in some other tangible medium of expression — if it were imagined separately from the useful article into which it is incorporated.”¹¹ The Court reasoned that the surface decorations on Varsity Brands, Inc.’s uniforms possessed the requisite pictorial, graphic or sculptural qualities, and, further, that removing those decorations from the uniforms and applying them to another medium would not recreate the uniforms, meaning that the designs had artistic value and were not purely utilitarian. Even if they can be perceived as works separate from a useful article, certain widely used elements are unlikely to meet the originality threshold required for copyright protection. In *Rosenthal v. Kalpakian*, the plaintiff and defendant were both in the fine jewelry business.¹² The plaintiff owned a copyright registration for a pin in the shape of a gold bee encrusted with jewels and alleged that the defendant’s similar bee designs were infringing.¹³ The Court held that plaintiff’s claims were overly broad: “If plaintiff’s understanding of its rights were correct, its copyright would effectively prevent others from engaging in the business of manufacturing and selling jeweled bees.”¹⁴ Copyright, however, can only cover the tangible expression of an idea, not the idea itself.¹⁵

What is basically at stake is the extent of the copyright owner’s monopoly — from how large an area of activity did Congress intend to allow the copyright owner to exclude others? We think the production of jeweled bee pins is a larger private

¹⁰ *Kieselstein-Cord v. Accessories by Pearl, Inc.*, 632 F.2d 989 (2d Cir. 1980).

¹¹ *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 580 U.S. 405 (2017).

¹² *Rosenthal v. Kalpakian*, 446 F.2d 738 (9th Cir. 1971).

¹³ *Id.*

¹⁴ *Id.* at 740.

¹⁵ *See Feist Publ’ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. 340, 344–45 (1991), (affirming that authors cannot assert copyright ownership in ideas or facts).

preserve than Congress intended to be set aside in the public market without a patent. A jeweled bee pin is therefore an ‘idea’ that defendants were free to copy.¹⁶

Relatedly, in *Satava v. Lowry*, a Ninth Circuit case centering on glass jellyfish sculptures, the Court carefully noted that “something more than a ‘merely trivial’ variation, something recognizably the artist’s own” is required to meet the originality threshold under copyright law.¹⁷

Acclaimed Dutch photographer Jacobus Rentmeester sued Nike for copyright infringement in 2015, alleging that the sportswear company had copied his 1984 photograph of Michael Jordan in developing its “Jumpman” imagery representing the same basketball player in a mid-air dunk.¹⁸ Most notably, Rentmeester argued that the Nike imagery was substantially similar to his own because of the athlete’s pose, which was the result of the photographer’s artistic direction: “Mr. Rentmeester created the pose, inspired by a ballet technique known as a ‘grand jeté,’ a long horizontal jump during which a dancer performs splits in mid-air,” per the complaint.¹⁹ The Ninth Circuit recognized Rentmeester’s copyright in the photograph and that Nike’s access to the photograph, when combined with the apparent similarities between the Rentmeester and Nike images, could create a presumption of copying rather than independent creation.²⁰

However, the Court ultimately found that Rentmeester could not assert copyright in the pose captured in his photograph, which was more of an idea than an expression.²¹ Accordingly, his copyright covered only the way the pose was expressed, and he could not prevail on a claim of copyright infringement:

Without gainsaying the originality of the pose Rentmeester created, he cannot copyright the pose itself and thereby prevent others from photographing a person in the same pose. He is entitled to protection only for the way the pose is expressed

¹⁶ *Id.* at 742.

¹⁷ *Satava v. Lowry*, 323 F.3d 805 (9th Cir. 2003).

¹⁸ *Rentmeester v. Nike, Inc.*, 883 F.3d 1111 (9th Cir. 2018), overruled by *Skidmore as Tr. for Randy Craig Wolfe Tr. v. Led Zeppelin*, 952 F.3d 1051 (9th Cir. 2020).

¹⁹ *Rentmeester*, Complaint at 20.

²⁰ *Rentmeester*, *supra* at 1118.

²¹ *Rentmeester*, *supra* at 1119.

in his photograph, a product of not just the pose but also the camera angle, timing, and shutter speed Rentmeester chose. If a subsequent photographer persuaded Michael Jordan to assume the exact same pose but took her photo, say, from a bird's eye view directly above him, the resulting image would bear little resemblance to Rentmeester's photo and thus could not be deemed infringing.²²

In fashion, various designs are readily analogized to the *Satava* glass jellyfish sculptures and *Rosenthal* jeweled bees, or even the *Rentmeester* pose: while potentially similar — even substantially so — to other products on the market, such designs are not necessarily infringements of copyright, if the similarities lie in the general features of jellyfish and bees, or in a model's pose, rather than in the unique manner in which a single artist has expressed his or her design.

B. Trademarks and Trade Dress

Trademarks are symbols that identify a product's source.²³ Under the federal Lanham Act, a mark qualifies for trademark protection if it is used in commerce and it is distinctive; trademark owners can enforce their rights against similar marks if consumers are likely to be confused between the two as sources of goods and services.²⁴

A symbol's distinctiveness hinges on its ability to effectively signal that certain goods or services originate with a specific source.²⁵ Conversely, generic terms are ineligible for trademark protection because they do not, by their nature, identify a unique source.²⁶ To establish trademark infringement under the Lanham Act for either a registered mark or a common law mark, a plaintiff must demonstrate

²² *Id.*

²³ 15 U.S.C. §§ 1051 et seq.

²⁴ *Id.*

²⁵ *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763, 769 (1992) (“Marks which are merely descriptive of a product are not inherently distinctive. When used to describe a product, they do not inherently identify a particular source, and hence cannot be protected.”).

²⁶ *Patent and Trademark Office v. Booking.com B. V.*, 591 U.S. 549 (2020) (noting that “A generic name—the name of a class of products or services—is ineligible for federal trademark registration”).

ownership of a valid, protectable trademark, priority of use, and that the defendant's use of a similar mark in commerce causes a likelihood of confusion.²⁷

Trade dress commonly refers to all the combined visual cues that a product and its packaging give to consumers, identifying the source of the product.²⁸ The Lanham Act does not define trade dress, but the U.S. Supreme Court has held that trade dress constitutes a symbol or device within the Lanham Act's definition of a trademark.²⁹ The Supreme Court has also affirmed that a plaintiff asserting a claim of infringement of unregistered trade dress based on a product's design must prove that the design has acquired secondary meaning; in other words, that consumers recognize the product design as a symbol of the maker of the product.³⁰ Courts have held that the distinctive design of a product itself may constitute protectable trade dress under the Lanham Act.³¹

A wide range of symbols function as trademarks, from sounds — such as Law and Order's "dun-dun"³² and Darth Vader's heavy breathing³³ — to scents such as the Play-

²⁷ 15 U.S.C. § 1114 and 15 U.S.C. § 1125(a). For a discussion of likelihood of confusion analysis, see also *Polaroid Corp. v. Polarad Elect. Corp.*, 287 F.2d 492 (2d Cir. 1961) and *A&H Sportswear, Inc. v. Victoria's Secret Stores, Inc.*, 237 F.3d 198 (3d Cir. 2000).

²⁸ "Trade dress' involves the total image of a product and may include features such as size, shape, color or color combinations, texture, graphics, or even particular sales techniques." *John H. Harland Co. v. Clarke Checks, Inc.*, 711 F.2d 966, 980 (11th Cir. 1983).

²⁹ *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205, 209-10 (2000).

³⁰ *Id.* at 209-216.

³¹ "Section 43(a) has been held to encompass a broad spectrum of marks, symbols, design elements and characters which the public directly associates with the plaintiff or its product." *Warner Bros. v. Gay Toys, Inc.*, 658 F.2d 76, 78 (2d Cir. 1981).

³² See U.S. Trademark Reg. No. 3,137,680. The mark is described as consisting of two musical notes, a strike and a rapid rearticulation of a perfect fifth pitch interval, which in the key of C sounds the notes C and G, struck concurrently.

³³ See U.S. Trademark Reg. No. 3,618,322. The mark consists of the sound of rhythmic mechanical human breathing created by breathing through a scuba tank regulator.

Doh scent³⁴ and even colors. In *Qualitex Co. v. Jacobson Products Co.*, the U.S. Supreme Court held that the Lanham Act permits the registration of a trademark that consists solely of a color.³⁵ In its reasoning, the Court stressed that while a color “is unlike ‘fanciful,’ ‘arbitrary,’ or ‘suggestive’ words or designs, which almost *automatically* tell a customer that they refer to a brand,” a color is capable of developing secondary meaning and therefore identifying and distinguishing a particular brand.³⁶ In other words, if, over time, consumers learn to identify a color with the source of particular goods and services, then the color is shorthand for the source just like any other symbol.

In the fashion industry, “Tiffany Blue” is famous as a robin’s egg blue used by Tiffany & Co. in connection with jewelry, jewelry boxes and other merchandise; the company owns several related registrations.³⁷ The red-lacquered soles of Christian Louboutin pumps are also the subject of a federal trademark registration, having garnered attention in a lawsuit the designer brought against Yves Saint Laurent.³⁸ While in that case, the Second Circuit found that the Yves Saint Laurent brand was not infringing on Louboutin’s red-sole trademark — because the shoes at issue were monochrome, consisting of red “uppers” and matching red soles — the Court also recognized that Louboutin’s red sole was still enforceable as a trademark in “situations in which the red lacquered outsole contrasts in color with the adjoining ‘upper’ of the shoe.”

The configuration of pockets, and stitching on pockets and other product parts, can perform a trademark function. Wrangler Apparel Corp. owns a trademark registration for stitching in the shape of a W, which the company frequently applies to the back pockets of jeans.³⁹ “Levi Strauss & Co. has steadfastly enforced rights in its Tab trademarks, which consist of small markers or tabs with the Levi’s name affixed

³⁴ See U.S. Trademark Reg. No. 5,467,089. The mark consists of the scent of a sweet, slightly musky, vanilla fragrance, with slight overtones of cherry, combined with the smell of a salted, wheat-based dough.

³⁵ *Qualitex Co. v. Jacobson Products Co.*, 514 U.S. 159 (1995).

³⁶ *Id.* at 162-63.

³⁷ See, e.g., U.S. Trademark Reg. Nos. 5,176,498; 2,359,351; 2,184,128; and 2,416,794.

³⁸ *Christian Louboutin S.A. v. Yves Saint Laurent Am. Holding, Inc.*, No. 11-3303 (2d Cir. 2013).

³⁹ See U.S. Trademark Reg. No. 3,322,277.

to the hip pocket.”⁴⁰ Airwair International Ltd. owns registrations covering both the thick contrast stitching around the soles of Doc Martens boots, and, separately, the wording “WITH BOUNCING SOLES” in stylized lettering on a three-dimensional heel tab.⁴¹

Burberry’s tartan pattern is a registered trademark⁴², as is the Marc Jacobs “Standard Supply” logo commonly used as hardware on the brand’s handbags.⁴³ Indeed, the placement of certain decorative hardware can be an integral part of source indication for brands, as part of a layering of branded elements.

When used to identify the source of a product, rather than as mere ornamentation, slogans, too, serve as trademarks; Nike secured a registration for “Just Do It”⁴⁴. Brands also rely on logos, including distinctive typestyle and color combinations, to signal source. Chanel’s interlocking Cs, Lacoste’s crocodile, Ray-Ban’s slanted script and the Adidas three-stripe logo are well-known source indicators in fashion.

In *adidas Am., Inc. v. Skechers USA, Inc.*, Adidas sought to protect its popular green-and-white “Stan Smith” shoe with claims of trademark infringement, trade dress infringement, and trademark dilution against Skechers, which sold a green-and-white “Onix” shoe.⁴⁵ In siding with Adidas, the court found substantial evidence in the record that the Stan Smith shoe had acquired secondary meaning, emphasizing “the considerable amount of unsolicited media coverage praising the Stan Smith’s influence and iconic status as one of the most famous sneakers of all time.”⁴⁶

Adidas has not always succeeded, however. After several years of disputes, in 2021 the company sued designer Thom Browne for trademark infringement, trademark dilution and unfair competition, arguing that Browne’s four-bar design was likely to be confused with the famous Adidas three-stripe mark.⁴⁷ In 2023, a New York jury

⁴⁰ See, e.g., U.S. Trademark Reg. No. 775,412.

⁴¹ See U.S. Trademark Reg. Nos. 7,039,347 and 7,061,986.

⁴² See U.S. Trademark Reg. No. 3,529,814.

⁴³ See U.S. Trademark Reg. No. 7,280,488.

⁴⁴ See U.S. Trademark Reg. No. 4,764,071.

⁴⁵ *adidas Am., Inc. v. Skechers USA, Inc.*, 890 F.3d 747 (9th Cir. 2018).

⁴⁶ *Id.* at 754.

⁴⁷ *Adidas Am., Inc. v. Thom Browne Inc.*, 599 F. Supp. 3d 151 (S.D.N.Y. 2022).

found that Browne’s design did not create a likelihood of confusion, and the Second Circuit affirmed the verdict the following year.⁴⁸

Trademark cases can raise First Amendment questions, too. When footwear brand Vans sued Brooklyn-based art collective MSCHF for infringing its Old Skool trademark and trade dress,⁴⁹ MSCHF claimed that its “Wavy Baby” shoe was intended as a parody of Vans’ Old Skool shoe, and the Second Circuit considered “whether and when an alleged infringer who uses another’s trademarks for parodic purposes is entitled to heightened First Amendment protections, rather than the Lanham Act’s traditional likelihood of confusion inquiry.”⁵⁰ Applying the standards of the Supreme Court, the Second Circuit found that no special First Amendment protections were available to MSCHF, because it was “trading on the good will of the trademark owner to market its own goods.”⁵¹ In particular, “if a parodic use of protected marks and trade dress leaves confusion as to the source of a product, the parody has not ‘succeeded’ for purposes of the Lanham Act, and the infringement is unlawful.”

C. Design Patents

Design patents protect the ornamental appearance of a functional article of manufacture, that is, a product, or a component of a product, whether made by hand or machine.⁵² Fashion designers and companies often seek design patents to protect the distinctive shape of handbags and shoes.⁵³

⁴⁸ *Thom Browne Wins Two More Rounds in Court Battle With Adidas on the Use of Stripes*, *Women’s Wear Daily*, J. E. Palmieri (May 3, 2024).

<https://wwd.com/business-news/legal/thom-browne-adidas-stripes-lawsuit-appeal-1236352881/> .

⁴⁹ *Vans, Inc. v. MSCHF Prod. Studio, Inc.*, 88 F.4th 125 (2d Cir. 2023).

⁵⁰ *Id.* at 128.

⁵¹ *Id.* See also *Jack Daniel’s Properties, Inc. v. VIP Products LLC*, 599 U.S. 140, 156 (2023).

⁵² *Samsung Elecs. Co., Ltd. v. Apple Inc.*, 580 U.S. 53, 59-60 (2016).

⁵³ See, e.g., *WWD Law Review: From Design Patent Protection to Internet Influencers*, *Women’s Wear Daily*, J. Zerbo (Feb. 3, 2017), <https://wwd.com/business-news/legal/feature/wwd-law-review-from-design-patent-protection-to-internet-influencers-10777001/> .

Unlike utility patents, which protect new, nonobvious and *useful* products and other inventions⁵⁴, design patents protect new, original and *ornamental* designs of articles of manufacture.⁵⁵ Design patents permit their owners to prevent third parties from making or marketing products that embody the protected ornamental designs; replicating such a design is grounds for design patent infringement.⁵⁶

The novelty requirement means that to be patentable, a design, taken as a whole, “must produce a new impression upon the eye’, and upon the eye of the ‘ordinary or average observer, not the expert’.”⁵⁷ The ordinary observer test is a question of fact, to be resolved by a jury.⁵⁸ The originality of a design, meanwhile, is assessed from the perspective and skill of an “ordinary designer.”⁵⁹

Finally, to be eligible for design patent protection, a design must be primarily ornamental — in shape or surface decoration, for example — as opposed to functional.⁶⁰

Recently, a California jury issued a verdict that invalidated U.S. Design Patent D927,161 (the “*UGG Patent*”) owned by Deckers Outdoor Corporation (“**Deckers**”), owner of the UGG brand of soft boots, and covering one of the most popular UGG models.⁶¹ Though the jury agreed that an “Australian Shearing Mini Boot” by affordable fashion brand Quince (“*Quince*”) infringed the UGG Patent, the jury also found that the UGG Patent included features that were purely functional and certain design elements that were obvious, and therefore could not be the subject of exclusive

⁵⁴ 35 U.S.C. § 101.

⁵⁵ 35 U.S.C. § 171.

⁵⁶ 35 U.S.C. § 271(a).

⁵⁷ *Horwitt v. Longines Wittnauer Watch Co.*, 388 F. Supp. 1257, 1260 (S.D.N.Y. 1975).

⁵⁸ *See, e.g., Columbia Sportswear N. Am., Inc. v. Seirus Innovative Accessories, Inc.*, 942 F.3d 1119, 1131 (Fed. Cir. 2019) (district court improperly made findings of fact as to whether elements of the defendant’s design would give an ordinary observer a different visual impression than the plaintiff’s design).

⁵⁹ *Id.* at 1261.

⁶⁰ *See, e.g., Ethicon Endo-Surgery, Inc. v. Covidien, Inc.*, 796 F.3d 1312, 1328 (Fed. Cir. 2015).

⁶¹ *Deckers Outdoor Corporation v. Last Brand, Inc.*, 4:23-cv-04850-AMO (N.D. Cal. 2025–2026).

rights.⁶² Previously, the Northern District of California had ruled against Deckers' trade dress claims, finding that the designs at issue were generic and therefore unprotectable.⁶³ The court had also emphasized that if a design serves an aesthetic purpose unrelated to source identification, and assigning exclusive rights in the design would meaningfully disadvantage competitors, the design has aesthetic functionality and is not protectable as trade dress.⁶⁴ The case illustrates how layers of intellectual property rights can overlap — and also the challenges brands face in protecting their designs against “dupes,” or cheaper versions of recognizable fashion products.⁶⁵

D. Rights of Publicity

Rights of publicity prevent the unauthorized commercial use of an individual's name, image, likeness, voice or other distinguishing traits.⁶⁶ The First Amendment limits rights of publicity in the context of expressive works such as books, plays and movies.⁶⁷ However, individuals can enforce their rights against unauthorized uses of

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ See, e.g., *How Quiet Luxury Changed Dupe Culture*, *Vogue Business*, Vogue Business, J. Criales-Unzueta (Dec. 12, 2024), <https://www.vogue.com/article/how-quiet-luxury-changed-dupe-culture>.

⁶⁶ *Haelan Laboratories, Inc. v. Topps Chewing Gum, Inc.*, 202 F.2d 866 (2d Cir. 1953) (finding that “in addition to and independent of that right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph, *i. e.*, the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made ‘in gross,’ *i. e.*, without an accompanying transfer of a business or of anything else. Whether it be labelled a “property” right is immaterial; for here, as often elsewhere, the tag ‘property’ simply symbolizes the fact that courts enforce a claim which has pecuniary worth. This right might be called a ‘right of publicity.’”).

⁶⁷ *De Havilland v. FX Networks, LLC*, 21 Cal. App. 5th 845 (Cal. App. 2018) (noting that “Books, films, plays, and television shows often portray real people. Some are famous and some are just ordinary folks. Whether a person portrayed in one of these expressive works is a world-renowned film star — “a living legend” — or a person no one knows, she or he does not

their names and likenesses on apparel and other commercial products.⁶⁸ In some jurisdictions, rights of publicity continue post-mortem, meaning that use of the individual's name and likeness requires permission from the estate.⁶⁹

In 2024, two street artists filed a lawsuit in California, asserting that the unauthorized use of their names on certain items of clothing sold by the defendants harmed the artists' reputations by making them look like "corporate sellouts" who have "traded their artistic independence, legacy, and credibility for a quick buck."⁷⁰ The plaintiffs emphasized the artists' rights of publicity under California state law and related common law.⁷¹ The case ultimately settled, but it remains a powerful example of the myriad ways in which rights of publicity can be asserted (in this case, via unauthorized usage of street artist tags on apparel), and their potential intersection with claims of trademark infringement, false designation of origin and other intellectual property rights.

Rights of publicity are also at the heart of recent debates within the field of collegiate and even high school athletics, especially following the U.S. Supreme Court decision in *NCAA v. Alston*, a case that challenged the National College Athletics Association ("*NCAA*") restrictions on compensation for student athletes.⁷² Under the NCAA's original rules, student athletes were ineligible to receive compensation for use of their name, image and likeness, often called "NIL," though the NCAA was able to use the students' NIL in connection with marketing college sports. In a victory for

own history. Nor does she or he have the legal right to control, dictate, approve, disapprove, or veto the creator's portrayal of actual people.").

⁶⁸ See *Roberson v. Rochester Folding Box Co.*, 68 A.D. 528, 73 N.Y.S. 898 (1902). In this landmark case, the New York Court of Appeals rejected a plaintiff's claim for compensation where a flour company had used her portrait in an advertisement without her consent. The decision caused public outcry and led the state legislature to implement privacy laws.

⁶⁹ See, e.g., *Milton H. Greene Archives, Inc. v. Marilyn Monroe LLC, et al.*, No. 08-56471 (9th Cir. 2012). The case centered on whether California's post-mortem right of publicity applied to Marilyn Monroe, whose executors had argued that she was domiciled in New York at the time of her death in Los Angeles.

⁷⁰ *Patrick Griffin et al. v. Guess? Inc. et al.*, docket 2:24-cv-00318.

⁷¹ California Civil Code Section 3344.

⁷² *NCAA v. Alston*, 594 U.S. 69 (2021).

student athletes, the Court unanimously held that the rules were unnecessary to achieve the NCAA's stated goal of preserving the distinction between amateur and professional athletics.

Cultural Heritage and Traditional Cultural Expressions

The fashion industry has faced accusations of “cultural appropriation,” commonly understood as a form of intellectual property theft from marginalized communities, or disrespect toward their belief systems.⁷³ For example, in 2021, the Mexican Ministry of Culture sent letters to fashion brands Zara, Anthropologie and Patowl accusing them of cultural appropriation, specifically, using certain traditional Oaxacan textile designs without acknowledging or compensating the communities in which the motifs originated.⁷⁴ According to a statement from the Mexican Ministry of Culture, the letters were an invitation “to develop respectful work with indigenous communities, within an ethical framework that does not undermine the identity and economy of the peoples, and always in adherence to fair trade, which places indigenous creators, entrepreneurs and designers on an equal footing.”⁷⁵

The World Intellectual Property Organization (“*WIPO*”) defines “Traditional Cultural Expressions” or “Expressions of Folklore” (collectively, “*TCE*”) as “music, dance, art, designs, names, signs and symbols, performances, ceremonies, architectural forms, handicrafts and narratives, or many other artistic or cultural expressions.”⁷⁶

According to WIPO, TCEs may be protected by a combination of copyright and related rights, geographical indications, appellations of origin and trademarks, and

⁷³ See, e.g., *Is Fashion Finally Turning the Page on Cultural Appropriation?*, Vogue, C. Allaire (Aug. 18, 2023), <https://www.vogue.com/article/cultural-appropriation-appreciation-fashion-september-2023>.

⁷⁴ *The Ministry of Culture asks the brands Zara, Anthropologie and Patowl for an explanation for cultural appropriation in various textile designs*, Press Release, Mexican Ministry of Culture (May 28, 2021), <https://www.gob.mx/cultura/prensa/la-secretaria-de-cultura-pide-explicacion-a-las-marcas-zara-anthropologie-y-patowl-por-apropiacion-cultural-en-diversos-disenos-textiles>.

⁷⁵ *Id.*

⁷⁶ See World Intellectual Property Organization, <https://www.wipo.int/en/web/traditional-knowledge/traditional-cultural-expressions/index>.

certain states have implemented legislation protecting folklore.⁷⁷ Some legal scholars have argued for more uniform international intellectual property protection for TCEs, and WIPO is currently negotiating such protections through its Intergovernmental Committee on Intellectual Property and Genetic Resources, Traditional Knowledge and Folklore.⁷⁸

Others caution that many crafts and designs associated with one culture are, themselves, the result of external influences over time, making it difficult to assign rights to any one community.⁷⁹

In any event, cultural appropriation, and compliance with any applicable laws, should be considered during any review of fashion products.

II. Gathering Information from the Client

When reviewing a client's fashion product, consider what information the client has shared about the design process. For example, did the client specify, for new prints or other designs, whether they were developed internally by employees or externally by independent third parties? Did the client obtain a license to use a photograph or other artwork? Is a slogan to be used in a decorative manner, or does the client hope to use it as a trademark?

A. Who Created the Designs?

The United States Copyright Act defines a creative work as a “work made for hire” when the work is (i) “created by an employee as part of the employee’s regular duties,” or (ii) the result of “an express written agreement between the creator and a party specially ordering or commissioning it.” In each case, the hiring or commissioning party is considered the author and copyright owner of the work in question.⁸⁰

⁷⁷ See World Intellectual Property Organization, <https://www.wipo.int/en/web/traditional-knowledge/databases/tklaws/index?subject=4843831> .

⁷⁸ See World Intellectual Property Organization, <https://www.wipo.int/en/web/igc/> .

⁷⁹ For a discussion of the meaning of, and differing views of, cultural appropriation, see *What Does Cultural Appropriation Really Mean?*, T: The New York Times Style Magazine, L. Mishan (Sept. 30, 2022), <https://www.nytimes.com/2022/09/30/t-magazine/cultural-appropriation.html> .

⁸⁰ See Copyright Office, <https://copyright.gov/circs/circ30.pdf> .

It is especially important, therefore, to establish whether any independent third parties contributed to the creation of any prints or designs the client plans to incorporate into its products. If a third-party designer is involved, the next step is to review the agreement between the client and the designer in question. The agreement should ideally contain: (i) a representation that the designer is the original author of the print or design, (ii) an assignment of all intellectual property rights in and to the print or design, from the designer to the client, and (iii) an indemnification clause, specifying that the designer indemnifies the client for all third-party infringement claims arising in connection with the client's use of the print or design.

The absence of any agreement with an independent designer creates substantial risk for the client. If the client cannot obtain a confirmatory assignment from the designer, use of the design is not recommended.

If the client's employee developed the print or design, ask the employee to provide supporting information about his or her inspiration or mood board. Were any existing prints of inspiration? Again, close attention is due to any inspiration sources that originate outside the client's business, i.e., reference prints or designs that are owned by other individuals or companies. Compare the new design to the cited inspiration, basing your analysis on the "substantial similarity" test used in copyright infringement cases.⁸¹

Substantial similarity analyses are more art than science: As part of the traditional analysis, fact finders take into consideration whether material might be used in a manner that could constitute a "fair use".⁸² Assessment of the fair use factors includes evaluation of the degree to which the allegedly infringing work is transformative, the materiality of the original work to the allegedly infringing work, and the impact of the infringing work on the market for the original work.⁸³

In some cases, the client may provide very little information about its design team's sources of inspiration. If you have any familiarity with the fashion industry, leverage that as you consider whether a print or design reminds you of anything else you have encountered in the marketplace. Explore any associations you make via additional diligence, including reverse image searches on the web. If a print or design is evocative

⁸¹ *Arnstein v. Porter*, 154 F.2d 464 (2d Cir. 1946).

⁸² 17 U.S.C. § 107.

⁸³ *Id.*

of another brand in some manner, put yourself in the shoes of the counsel representing that brand and ask yourself: if you saw the client's product in a store, would you be inclined to take defensive action?

Finally, note that even when two prints are in a similar style, style on its own is more akin to an idea than to an expression, and therefore not protected by copyright.⁸⁴ It may, however, arguably be protectable as trade dress, depending on the constellation of elements that combine to identify a source for the goods.

B. Use of an Individual's Name or Likeness; Use of Third-Party Artwork

Use of *any* individual's image on a commercial product requires the express written permission of that individual. A t-shirt bearing the image of a famous musician or model is an obvious usage of celebrity likeness; a more subtle usage might combine a first name with a visual cue arguably evocative of a celebrity.⁸⁵

Photographs of individuals also present the potential for copyright claims, if the photographer did not provide consent to usage of the photograph. Note that the photographer's consent, and the consent of any individual depicted in the photograph, are two separate issues.

Any fashion product that incorporates third-party artwork — including through use of a photograph in which the artwork is visible — requires the artist's consent to such usage.

⁸⁴ See *Feist Publ'ns, Inc. v. Rural Tel. Serv. Co.*, 499 U.S. at 344–45, (affirming that authors cannot assert copyright ownership in ideas or facts).

⁸⁵ See, e.g., *Comedy III Prods., Inc. v. Gary Saderup, Inc.*, 25 Cal. 4th 387, 408, 21 P.3d 797, 810 (2001), a case regarding t-shirts bearing sketches of the Three Stooges. The plaintiff owned the rights to the deceased comedians' rights of publicity, while the defendant was a lithographer. The court held that “when an artist's skill and talent is manifestly subordinated to the overall goal of creating a conventional portrait of a celebrity so as to commercially exploit his or her fame, then the artist's right of free expression is outweighed by the right of publicity.”

C. Use of Slogans, Words and Logos

If a client's product design incorporates a slogan, word or logo, understanding the scope of the client's current and future use of the slogan, word or logo is crucial. For example, does the client own any trademark rights in the slogan, word or logo? Will the use be purely ornamental, or is the client contemplating the development of a new source indicator? Has the client ever used the slogan, word or logo in the past? What is the intended time frame of the client's present usage?

Any logo the client hopes to invest significant resources in developing for use across several seasons requires greater scrutiny.

D. Use of Artificial Intelligence

Increasingly, design teams are using artificial intelligence tools to develop ideas for fashion products. Note that artificial intelligence platforms, which function by processing massive amounts of data, may generate works that resemble existing products protected by intellectual property rights. Ask members of your client's design team for more information about their usage of any artificial intelligence tools.

III. Searching Slogans and Design Elements that Indicate Source

As noted above, some fashion collections incorporate use of words, phrases and logos. If these are not part of the client's own trademark portfolio, a scan of records of the United States Patent and Trademark Office (USPTO) is recommended. This can be an intimidating process, owing to the significant volume of trademark records, but if you approach the search in a strategic manner, you can home in on key areas of risk.

For slogans and words, start by searching narrowly: that is, search for the exact slogan the client intends to use, selecting as relevant trademark classes 25 (which covers apparel and shoes) and/or 18 (which covers handbags and leather goods) and/or 14 (which covers jewelry). If the search produces no results, gradually broaden your parameters to phonetic equivalents of words and conceptually close slogans.

Supplement your review of federal filings by running bracketed web searches for the slogan and close equivalents, adding descriptive terms such as "denim," "fashion" or "shoes" as relevant.

For logos, refer to the USPTO Design Search Code Manual.⁸⁶ The USPTO has a rather amazing classification system for logos, which allows you to review federal filings for marks featuring “stars and designs resembling stars, including shooting stars and asterisks” or “Rolling pins, spatulas, cooking and serving implements other than knives, forks and spoons,” to give just two examples. Here, too, you can supplement your research with reverse image searches on the web.

Once you have a sense of what slogans, words and logos are already in use, you will transition from a purely technical review to a more subjective analysis of the results. Any exact matches in relevant categories of goods are likely red flags — but, you will need to assess the strength of the mark, and your client’s intended use of the slogan, word or logo.

So, for example, if diligence reveals that a federal registration for a word exists, but also the existence of: (i) a significant number of other registrations for marks encompassing that word, and (ii) widespread usage of the word in connection with apparel in the marketplace by unrelated entities, then the registration, on its own, need not be a barrier to the client’s intended use of the word.

IV. Overlapping Intellectual Property

In your review, be mindful of the possibility that intellectual property rights may intersect or overlap. For example, a logo might be both a registered trademark and a copyrighted illustration, or a slogan might incorporate song lyrics protected by copyright. Consider that while the test for trademark infringement rests on likelihood of confusion, and the test for copyright infringement rests on substantial similarity, a low risk of one type of infringement does not preclude a higher risk of a different type of infringement.

V. Beyond Intellectual Property: Misleading Advertising Claims

In some instances, a client’s product may incorporate a phrase that might be interpreted as a claim about the product. The Federal Trade Commission Act (FTC Act) prohibits “unfair or deceptive” commercial acts or practices.⁸⁷

⁸⁶ See United States Patent and Trademark Office, <https://tmdesigncodes.uspto.gov/>.

⁸⁷ 15 U.S.C. § 45(a).

Be wary of phrases such as “100% cotton” or “Made in USA,” all of which require substantiation and compliance with specific frameworks.⁸⁸ Environmental and sustainability claims deserve special attention: the Federal Trade Commission (FTC) relies on the FTC Green Guides, first published in 1992 and periodically updated, to communicate the standards for evaluating such claims.⁸⁹ Marketers are discouraged from making any environmental benefit claims that are broad or unqualified and difficult to substantiate, such as “eco-friendly” or “green.”⁹⁰

While advertising law tolerates “puffery” (exaggerated claims about a product that are delivered with a figurative wink at consumers, who will not reasonably take them literally), misleading claims are a frequent source of costly litigation.⁹¹

VI. Don’t Just Say “No”: Providing Constructive Guidance

The internet abounds with memes about lawyers vetoing all manner of exciting business ideas. And while it’s true that lawyers are hired to think critically, remember the value of *constructive* criticism: before saying “no” to a proposed print or design, consider any alterations that would reduce the risks you have identified.

⁸⁸ See, e.g., *Calling It Cotton: Labeling and Advertising Cotton Products*, Federal Trade Commission, Business Guidance Resources, <https://www.ftc.gov/business-guidance/resources/calling-it-cotton-labeling-advertising-cotton-products-0> (July 2014). See also *FTC Announces “Made in the USA” Sweep, Including Three Law Enforcement Actions to Protect American Consumers and Businesses*, Federal Trade Commission, Press Release (April 14, 2026), <https://www.ftc.gov/news-events/news/press-releases/2026/04/ftc-announces-made-usa-sweep-including-three-law-enforcement-actions-protect-american-consumers>.

⁸⁹ 16 CFR Part 260 — Green Guides (Environmental Marketing Claims). See also Federal Trade Commission, <https://www.ftc.gov/sites/default/files/attachments/press-releases/ftc-issues-revised-green-guides/greenguides.pdf>.

⁹⁰ *Id.*

⁹¹ See, e.g., *Pizza Hut, Inc. v. Papa John’s International, Inc.*, 227 F.3d 489 (5th Cir. 2000). The case centered on whether the phrase “Better Ingredients. Better Pizza.” was false advertising or mere “puffery,” understood as “blustering, and boasting upon which no reasonable buyer would rely.”

- If designs are similar, might the similarities be lessened through a change in color or proportion?
- Are there any creative approaches that would preserve the spirit of the design team's initial idea, while limiting the client's exposure to infringement or other legal claims?

You need not provide a definitive solution, but clients appreciate receiving illustrative examples of edits to their proposals that reduce risk.

VII. Conclusion

In conducting a review of fashion designs:

- assess the nature of the products and the types of intellectual property rights likely at issue;
- request background information from the client about the origin of the designs and the identity of the creators;
- clarify the scope of the client's intended use of the designs;
- evaluate each design both for substantial similarity with other designs and for its inclusion of any words, slogans or logos that may resemble third-party trademarks;
- consider whether any design incorporates, at least arguably, any misleading claims, uses of an individual's likeness or third-party works; and
- when providing feedback to the client, don't just say no; instead, aim to provide constructive input that values the client's original idea and seeks to advance the client's goals while limiting legal risk exposure.

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