

THE DEVIL WEARS ZARA: WHY THE LANHAM ACT MUST BE AMENDED IN THE ERA OF FAST FASHION

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I. INTRODUCTION

In the age of cameras living in our pockets, it seems as though every moment demands us to be “picture-perfect.” This demanded perfection has greatly benefited the fashion industry, especially the niche industry of “fast fashion.”¹ From t-shirts and shoes to accessories, high-end companies have been known to set the trend for the season, and as of late, fast fashion companies have emerged as the low-budget stepsister. Fast fashion has taken over the industry in terms of speed, bargain, and marketing, however, these companies are not known for their innovative or groundbreaking designs, nor their ethical practices.² Higher-end companies have been known to create trends and fashion standards while still respecting the boundaries of other companies and their designs.³ Fashion companies, attempting to protect their designs and defend their use in court, have relied on the Lanham Act (hereinafter also referred to as “the Act”).⁴ This begs the question of how the Lanham Act serves to protect the fashion industry from their invasive intruders in fast fashion.

As the fashion industry provides limited avenues for innovative designs, considering there is a chance different companies will mirror similarities in products, there ought to be a protective line that guards the industry. This note will seek to address the protections of fashion company designs under the Act, why fast fashion brands infringe on the Act and should not be protected, and how the appropriation of designs is a clear violation of what the Act purports to protect; Part II introduces the fast fashion industry and

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¹ Adam Hayes, *Fast Fashion: What is Fast Fashion?*, INVESTOPEDIA, <https://www.investopedia.com/terms/f/fast-fashion.asp> [https://perma.cc/XLT9-P8PG] (Apr. 10, 2020).

² *Primark: Faster, Cheaper Fashion*, THE ECONOMIST, (Sep. 5, 2015), <https://www.economist.com/business/2015/09/05/faster-cheaper-fashion> [https://perma.cc/P258-YT52].

³ Hayes, *supra* note 1 (“Fast fashion competes with traditional fashion houses that continue to introduce new fashion lines on a seasonal basis.”).

⁴ Lanham Trademark Act of 1946, 15 U.S.C §§ 1051–1141n.

how its business model purports the very infringements that are intended to be protected under the Lanham Act; Part III will discuss the Act distinguishing trade dress and its role in the industry; Part IV shall dive into the lack of protections actually provided by the Act and how fast fashion companies exploit the lack of protections and consequences, as a main component of their business model; finally, Part V will propose an expansion of the Act to promote better business practices and industry standards.

II. FAST FASHION—WHAT IS IT?

Fast fashion is defined as, “an approach on design, creation, and marketing of clothing fashions that emphasizes making fashion trends quickly and cheaply available to consumers.”⁵ The appeal of the industry is that it provides individuals with an ability to stay up to date with trends without necessarily spending large sums of money as they would with higher-end brands.⁶ These fast fashion designs sometimes replicate, with minor differences, the designs of larger, more high-end designs.⁷ Often, they are exact dupes or inexpensive substitutes for the real thing.⁸ Namely, a custom jumpsuit by LaBourjoise, worn by Kylie Jenner for her twenty-first birthday, and retails for approximately \$8,000, was recreated by fast fashion company Fashion Nova and retailed for \$35.⁹

Fast fashion companies are able to mimic the luxury look for less, resulting in higher rates of consumerism, where an everyday consumer can purchase seemingly high-end clothing and shoes for less.¹⁰ Fast fashion consumers consist of a demographic of young adults between the ages of

⁵ *Fast Fashion*, Merriam-Webster.com, <https://www.merriam-webster.com/dictionary/fast%20fashion> [<https://perma.cc/EKN8-LJ6B>] (last visited Oct. 15, 2020).

⁶ Solene Rauturier, *What is Fast Fashion?*, GOOD ON YOU, (May 10, 2020), <https://goodonyou.eco/what-is-fast-fashion/> [<https://perma.cc/6FVV-9LTR>].

⁷ *Id.* (“These brands took the looks and design elements from the top fashion houses and reproduced them quickly and cheaply.”).

⁸ Hayes, *supra* note 1.

⁹ LaBourjoisie is an haute couture and semi-couture clothing company founded and based in Kuwait. LA MAISON BOURJOISIE, <https://secretcode-paris.com/en/our-designers/labourjoisie/> [<https://perma.cc/VR9J-8PXU>] (last visited Mar. 16, 2021); Marlen Komar, *There’s a \$35 Version of Kylie Jenner’s \$8,000 Birthday Romper Because You’re on a Budget*, BUSTLE (Aug. 14, 2018), <https://www.bustle.com/p/fashion-novas-kylie-jenner-21st-birthday-romper-look-alike-is-only-35-dollars-it-sold-out-immediately-10096468> [<https://perma.cc/JT8Y-B6DH>]; FashionNova (@fashionnova), INSTAGRAM (Aug. 10, 2018), https://www.instagram.com/p/BmUXT9GhC-M/?utm_source=ig_embed [<https://perma.cc/PV9M-ZF7L>].

¹⁰ Anamma Joy et al., *Fast fashion, Sustainability, and the Ethical Appeal of Luxury Brands*, 16 FASHION THEORY 273, 275 (2012).

fifteen and twenty-nine, who are active on social media.¹¹ Consumers actively seek out trendy clothing at a bargain price.¹² Fast fashion companies have imitated the distinctive looks of high-end companies, selling the products for a fraction of the price.¹³ Today's fashion market is marked by ever-changing trends.¹⁴ What is on trend one day may change instantly depending upon many factors such as social media platforms, influencers, celebrity couture looks, popular culture, and many more.¹⁵

An industry once hailed by four separate seasons of trends Spring, Summer, Fall, and Winter is now plagued by “52 seasons,” a concept created by fast fashion giants to represent the quick turnover of designs and products.¹⁶ First making its rise in the 1990s by fast fashion leader Zara,¹⁷ a Spanish-based company, fast fashion gained its reputation by delivering new clothing twice a week.¹⁸ Zara became the benchmark for fast fashion as it started creating its own-label clothing, mimicking the latest styles in fashion, and producing frequently.¹⁹ The method of production and retail focused on limited sale periods, where a product was designed and mass-produced quickly, and only sold for a short period of time.²⁰ This same business model was adopted by companies such as Forever 21 and H&M, yet altered to

¹¹ Shipra Gupta & James W. Gentry, *Evaluating Fast Fashion: Examining its Micro and the Macro Perspective*, in *ECO-FRIENDLY AND FAIR: FAST FASHION AND CONSUMER BEHAVIOUR* 15, 17 (Carolin Becker-Leifhold & Mark Heuer eds., 2018).

¹² Tracey Wallace, *New Report Proves Unanimous Agreement: Fast Fashion Spurs Need for Change in the Fashion Industry*, *BIGCOMMERCE*, <https://www.bigcommerce.com/blog/new-report-proves-unanimous-agreement-time-ripe-change-fashion-industry/#undefined> [<https://perma.cc/RVA2-GLWT>] (last visited Jan. 4, 2021).

¹³ Rauturier, *supra* note 6.

¹⁴ Vertica Bhardwaj & Ann Fairhurst, *Fast Fashion: Response to Changes in the Fashion Industry*, 20 *THE INTERNATIONAL REVIEW OF RETAIL, DISTRIBUTION AND CONSUMER RESEARCH* 165, 165–73 (Feb. 2010).

¹⁵ *Id.* at 165

¹⁶ ELIZABETH L. CLINE, *OVERDRESSED: THE SHOCKINGLY HIGH COST OF CHEAP FASHION* (2012).

¹⁷ Zara is one of the largest international fashion companies, founded in 1975, based in Galicia, Spain. About Zara, *see* ZARA, <https://www.zara.com/us/en/z-company-corp1391.html?v1=11112> [<https://perma.cc/A69R-RKGF>] (last visited Jan. 3, 2021).

¹⁸ Cline, *supra* note 16, at 15.

¹⁹ *Find Out How this Unique Business Practice has Benefited Consumers and Taken the Fashion Industry by Storm*, *EDOLOGY: FASHION & MEDIA*, <https://www.edology.com/blog/fashion-media/rise-of-fast-fashion/> [<https://perma.cc/H3UR-2E45>] (last visited Mar. 3, 2021).

²⁰ *Fast Fashion Strategy: How Zara Took Over the Fashion World*, *START BUSINESS JOURNEY: STORE SETUP* (Aug. 10, 2019), <https://startbusinessjourney.com/zara-fast-fashion-strategy/> [<https://perma.cc/TF27-S67N>].

introduce new clothing on a daily basis.²¹ These business practices became known as the “52 season” companies, whereas higher-end brands such as Louis Vuitton, Gucci, Yves Saint Laurent, and more were only releasing new designs four times a year.²²

While some fast fashion giants have a physical retail presence, much of fast fashion is known to dominate the e-commerce realm.²³ Fast fashion uses social media platforms such as Instagram and social media influencers as vehicles for their advertisement and inspiration of designs.²⁴ Fast fashion companies marketed their clothing and products through the use of social media influencers.²⁵ Influencers’ posts on social media present the perfect tool for fast fashion companies to target consumers.²⁶ Influencers merely promote a company’s products in a photograph, where thousands, if not millions, interact with the post and are able to purchase a product directly from the post.²⁷ Currently, the greatest focus in fast fashion is releasing clothing and various products to consumers quickly and at an extremely

²¹ CLINE, *supra* note 16, at 28.

²² Amy De Klerk, *Are We Seeing the End of Seasonality in Fashion?*, HARPER’S BAZAAR (Mar. 6, 2020), <https://www.harpersbazaar.com/uk/fashion/a31255947/end-of-fashion-seasons/> [<https://perma.cc/7MWR-FQXZ>].

²³ Hayes, *supra* note 1.

²⁴ Instagram is a social media platform used for sharing photos. Individuals are able to connect with friends, celebrities, brands, world leaders and more. *See generally* William Antonelli, *A Beginner’s Guide to Instagram, the Wildly Popular Photo-sharing App with Over a Billion Users*, BUSINESS INSIDER (Dec. 14, 2020, 12:14 PM), <https://www.businessinsider.com/what-is-instagram-how-to-use-guide> [<https://perma.cc/8YLQ-YYWH>]; *What is an Influencer?*, INFLUENCER MARKETING (Oct. 15, 2020), <https://influencermarketinghub.com/what-is-an-influencer/> [<https://perma.cc/FZ7P-QR78>] (“Influencers in social media are people who have built a reputation for their knowledge and expertise on a specific topic. . . . Brands love social media influencers because they can create trends and encourage their followers to buy products they promote.”).

²⁵ Josefin Dahlqvist & Samanta Preiksaite, *How Competing Brands are Being Communicated Through Influencer Marketing* (May 5, 2018) (bachelor thesis in business administration, Jönköping University) (“Through the popularity of [International Marketing] IM, influencers hold strong influential power since consumers feel a higher level of relatedness to them than traditional marketing efforts. The strong influential power enables influencers to communicate competing brands within a short period of time.”).

²⁶ *Id.* at 5.

²⁷ Susan Rose & Arun Dhandaudham, *Towards an Understanding of Internet-Based Problem Shopping Behavior: The Concept of Online Shopping Addiction and its Proposed Predictors*, J. BEHAVIOR ADDICTIONS 83 (Feb. 3, 2014), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4117286/> [<https://perma.cc/MWJ3-UL6G>] (A survey of shoppers in the UK concluded that the “new shopping experience” offered by e-commerce “may lead to problematic online shopping behaviour.”).

discounted price to create space for the next trend.²⁸ The price gap between the low-end and high-end companies is extreme and as such can better appeal to the everyday consumer who desires to be fashionable on a budget.²⁹ Not only are fast fashion companies able to turn over trends very quickly, but these companies are also able to provide consumers with a remarkably lower price tag, making the cost of pieces more desirable.³⁰ High-end companies set the trends for every season at a higher quality, ranging from prints, to colors, to certain materials, debuted at fashion shows during fashion month, such as at New York Fashion Week.³¹ While a high-end company will work to create a collection over a period of six months to sometimes a year, the fast fashion model functions symbiotically, waiting for high-end companies to debut their collections, copying, and producing similar designs and products within the month.³² Fast fashion companies can quickly turn around an extremely similar product at a fraction of the price, thus making them

²⁸ *Find Out How this Unique Business Practice has Benefited Consumers and Taken the Fashion Industry by Storm*, EDOLOGY: FASHION & MEDIA, <https://www.edology.com/blog/fashion-media/rise-of-fast-fashion/> [<https://perma.cc/CGB4-NACR>] (last visited Dec. 22, 2020) (“The concept has changed the industry dynamic with a quick response philosophy that has resulted in . . . quick turnover of merchandise for major retailers. . . collections are built around the latest fashion trends presented at spring and autumn fashion shows in New York, Paris and Milan, providing consumers’ high-end style at an affordable price.”).

²⁹ Hayes, *supra* note 1; Fast fashion giant, Zara, copied and produced sneakers of the viral “Speed Sock” sneaker valued at \$850, as well as the Adidas Yeezy Waverunner sneakers valued at \$400. Zara sold the products for forty dollars and sixty-five dollars, respectively. UNITY BLOTT, *Zara is Set to Spark a Sales Frenzy with £50 Trainers that are IDENTICAL to Balenciaga's £500 Version (So Can You Tell which is Which?)*, DAILY MAIL (Apr. 29, 2018, 2:44 PM) <https://www.dailymail.co.uk/femail/article-5665189/Zara-sneakers-IDENTICAL-Balenciaga-trainers.html> [<https://perma.cc/23HM-E72A>]; Jake Silbert, *Zara Made a Sneaker That Looks Like the YEEZY Boost Wave Runner 700*, HYPEBEAST (Oct. 24, 2017) <https://hypebeast.com/2017/10/zara-sneaker-yeezy-wave-runner-700> [<https://perma.cc/4GJ5-Y5BS>].

³⁰ Liz Barnes & Gaynor Lea-Greenwood, *Fast Fashioning the Supply Chain: Shaping the Research Agenda*, 10-3 J. FASHION MKTG. MGMT. 259, 263 (2006).

³¹ New York Fashion Week is the bi-annual event of runway shows used to introduce designer collections for the upcoming fashion season. Emily Farra, *Everything You Need to Know About New York Fashion Week*, VOGUE (Jan. 31, 2020), <https://www.vogue.com/article/new-york-fashion-week-preview-news> [<https://perma.cc/N4TR-CKX5>].

³² Katherine Saxon, *This is What Fast Fashion Really Means (Definition, Problems, Examples)*, WTVOX (Oct. 29, 2020), <https://wtvox.com/fashion/fast-fashion/> [<https://perma.cc/U6HW-NX4D>] (Fast fashion companies require less than a month to copy and replicate a high-end collection. From copying the latest trends and runway looks, producing over 10,000 pieces for sale, distributing and selling the products, this process sometimes takes as little as two to three weeks).

more desirable.³³ A prominent example is when the Italian luxury company, Gucci, released the “Double G” belt in 2015.³⁴ With huge success, fast fashion companies released similar belts with two gold circles imitating the “Double G” look as close as possible.³⁵

With the rise of popular culture influence, and instant access through social media platforms, the fashion industry has grown to greater relevance.³⁶ The industry of fast fashion is heavily influenced by celebrity and influencer style.³⁷ Celebrity posts seen on social media platforms such as Instagram, Twitter, and TikTok are instantly copied by fast fashion brands to give the luxury look for less.³⁸ A celebrity may post a photo on Instagram wearing a design by a high-end brand such as Gucci, Prada, Versace, etc., only for it to be replicated exactly a few days later by a fast fashion company.³⁹ This trend replication utilized by the fast fashion companies provides instant gratification to their consumers.⁴⁰ As with any on-trend items, several

³³ *Id.*

³⁴ Nicole Kliet, *How Gucci’s Iconic Logo Belt Has Become a Staple in Every Woman’s Closet*, THE ZOE REP. (Apr. 2, 2019), <https://www.thezoereport.com/p/how-guccis-iconic-logo-belt-has-become-a-staple-in-every-womans-closet-16999219> [https://perma.cc/FFK7-GHUY].

³⁵ Macy Cate Williams, *8 Belts to Wear if You’re Not Getting the Gucci One*, POPSUGAR (June 10, 2017), <https://www.popsugar.com/fashion/Affordable-Belts-Like-Gucci-Double-G-Belt-43609561> [https://perma.cc/5UXZ-9RNX].

³⁶ Barnes & Lea-Greenwood, *supra* note 30, at 7–8; Cline, *supra* note 16, at 28.

³⁷ Olivia Gecseg, *What is Fast Fashion and Why is it Still So Popular?*, THE SUSTAINABLE COLLECTIVE (Jan. 20, 2020), <https://www.the-sustainable-fashion-collective.com/2020/01/20/why-is-fast-fashion-still-popular-and-what-is-it-costing-our-planet> [https://perma.cc/3MAQ-4QRU].

³⁸ *What is an Influencer*, INFLUENCER MARKETING HUB (Oct. 15, 2020), <https://influencermarketinghub.com/what-is-an-influencer/> [https://perma.cc/3QPU-TX7X]; Twitter is a service for individuals to communicate and stay connected through the exchange of quick, short, and frequent messages, photos, videos, and links. *See generally* TWITTER, *What is Twitter?*, <https://help.twitter.com/en/new-user-faq> [https://perma.cc/HQL7-HZWY]; TikTok is the latest social media sharing application that allows users to create and share a 15–60 second video, on any topic. *See generally* INFLUENCER MARKETING HUB, *What is TikTok?—The Fastest Growing Social Media App Uncovered*, INFLUENCER MARKETING (Oct. 26, 2020), <https://influencermarketinghub.com/what-is-tiktok/> [https://perma.cc/7J8L-AYCL].

³⁹ Kim Kardashian West debuted a custom couture dress made for her by Versace on the social media platform Instagram; the next day, Missguided copied the exact design of the dress. West filed suit which was settled for \$2.8 million. Will Martin, *Kim Kardashian Won \$2.7 million in a Lawsuit Accusing Fast-Fashion Brand Missguided of ‘Knocking Off’ Her Clothes*, BUS. INSIDER, (July 4, 2019, 5:45AM), <https://www.businessinsider.com/kim-kardashian-missguided-lawsuit-awarded-damages-california-judge-2019-7> [https://perma.cc/F8RY-5K59].

⁴⁰ Audrey Stanton, *What is Fast Fashion Anyway?*, THE GOOD TRADE, <https://www.thegoodtrade.com/features/what-is-fast-fashion> [https://perma.cc/C8B9-A88D] (last visited Dec. 21, 2020).

companies will replicate the pieces at a lower cost to appeal to consumers, thereby creating a greater competitive field.⁴¹ This replication of items leads to multiple e-commerce companies selling similar products with little to no differences.⁴² Most of these companies are replicating anything from a social media trend, to a look from the catwalk as soon as it hits the runway.⁴³

This real-time replication is what distinguishes fast fashion from high-end fashion, with the former working swiftly to have clothing on the shelves before the pieces become off trend.⁴⁴ A side-to-side comparison of fast fashion websites from Zara, Forever 21, Missguided, etc. shows pages upon pages of similar looking products with minor differences.⁴⁵ These companies compete in a “race to the bottom” to see who can replicate or imitate the most on-trend products for the cheapest price.⁴⁶ These replicas are often created by infringing upon the designs and marks of established high-end companies.⁴⁷

Fast Fashion companies have focused on early deliveries, where they are able to capitalize on the business model of “see now, wear now” consumer trends.⁴⁸ These trends provide a quicker turnaround time than high-end companies where the release of new products is not only scheduled but also limited to maintain the exclusivity and desirability of a brand.⁴⁹ Fast fashion companies operate on a “Luxe for Less” business model, where consumers are able to purchase a high fashion look for a lower price and lesser quality.⁵⁰

⁴¹ CLINE, *supra* note 16, at 26.

⁴² Amy Lamare, *How Fast Fashion Became a Multi-Trillion-Dollar Industry*, THE BUS. OF BUS. (May 16, 2018), <https://www.businessofbusiness.com/articles/examining-fast-fashions-appeal-and-issues/> [https://perma.cc/AUN6-CSH7].

⁴³ CLINE, *supra* note 16, at 33.

⁴⁴ *Id.*

⁴⁵ Zara, *supra* note 17; Forever 21 is an American fast fashion retailer headquartered in Los Angeles, California. *About Us*, FOREVER 21, <https://www.forever21.com/us/aboutus/aboutus.html> [https://perma.cc/XU2M-53KM] (last visited on Jan. 4, 2021); Missguided is a New York fashion company founded in 2009. *About Missguided*, MISSGUIDED, <https://www.missguidedus.com/about> [https://perma.cc/XUA7-QBF2] (last visited Jan. 4, 2021).

⁴⁶ Bhardwaj & Fairhurst, *supra* note 14, at 169.

⁴⁷ Kal Raustiala & Christopher Sprigman, *The Piracy Paradox: Innovation and Intellectual Property in Fashion Design*, 92 VA. L. REV. 1687 (2006).

⁴⁸ Wallace, *supra* note 12.

⁴⁹ Joseph DeAcetis, *The Perfect Balance: How Luxury Brands can Maintain Exclusivity and Still be Relatable Online*, FORBES (Oct. 24, 2020), <https://www.forbes.com/sites/josephdeacetis/2020/10/24/the-perfect-balance-how-luxury-brands-can-maintain-exclusivity-and-still-be-relatable-online/> [https://perma.cc/4MBP-ZYEM].

⁵⁰ Marc Bain & Quartz, *The Neurological Pleasures of Fast Fashion*, THE ATLANTIC (Mar. 25, 2015),

The combination of easy access via online shopping and low prices makes fast fashion companies easy to buy.⁵¹ The “52 season” business model by these companies consistently leaves something to be desired by consumers.⁵²

The use of social media platforms as a means of advertisement has challenged the fashion industry by diminishing the perception of novelty.⁵³ Fast fashion companies capitalize from the advertisements or “sneak peaks” that have been used by high-end companies to entice their consumers, by imitating and releasing the designs far in advance.⁵⁴ As a result, trends can become out of date or old by the time they are released to retail stores at a price higher than what a fast fashion company offers.⁵⁵

While fast fashion companies have created several issues in the fashion industry, they can also be positively perceived for the disruption they have caused in the industry. Fast fashion companies have promoted competitive pricing, making fashion accessible to all individuals from all income backgrounds, changing the business model of the fashion industry.⁵⁶ There has been an increase in retailers for consumers to choose from, both in-store and online; this accessibility makes companies globally available to consumers.⁵⁷ Fast fashion companies have dominated the e-commerce realm, becoming more accessible to users through the utilization of various platforms from social media apps to online retail websites, allowing for their users to shop while they browse social media instantly.⁵⁸ Many fast fashion companies have come to be because of the ease and accessibility through these social media platforms, using the trends of influencers and other

<https://www.theatlantic.com/entertainment/archive/2015/03/the-neurological-pleasures-of-modern-shopping/388577/> [https://perma.cc/4PPA-UR8D].

⁵¹ *Id.*

⁵² Wallace, *supra* note 12.

⁵³ *Id.*

⁵⁴ Chavie Lieber, *Fashion Brands Steal Design Ideas All the Time. And It's Completely Legal*, VOX (April 27, 2018), <https://www.vox.com/2018/4/27/17281022/fashion-brands-knockoffs-copyright-stolen-designs-old-navy-zara-h-and-m> [https://perma.cc/M5Y9-6USD].

⁵⁵ Wallace, *supra* note 12.

⁵⁶ Deven Davis, *The Pros and Cons of Buying Fast Fashion Jewelry*, ROMA DESIGNER JEWELRY: BLOG, <https://www.romadesignerjewelry.com/blogs/education/the-pros-and-cons-of-buying-fast-fashion-jewelry> [https://perma.cc/ZSZ5-AEFH] (last accessed Mar. 2, 2021).

⁵⁷ *Fast Fashion Pros and Cons*, RAMPAGES (Mar. 20, 2017), <https://rampages.us/fastfashion/2017/03/20/fast-fashion-pros-and-cons/> [https://perma.cc/6WQQ-L3AP].

⁵⁸ *Introducing Instagram Shopping*, INSTAGRAM, <https://business.instagram.com/shopping> [https://perma.cc/2ZDW-RU93] (platform users account 70% of their purchase as coming from a post they saw or liked on the media platform).

celebrity like figures, to establish a consumer base.⁵⁹ This expansion of the industry has also paved the path for several smaller businesses burgeoning in the industry.⁶⁰

II. LANHAM ACT AND ITS EFFECT ON THE FASHION INDUSTRY

The artistry of the fashion industry has been overlooked by the legal system and intellectual property law as a whole, allowing infringements on design to run rampant.⁶¹ These infringements come from fast fashion companies blatantly adopting colors, designs, or even parody logos from high-end, established companies.⁶² These signifying marks are generally protected under the Lanham Act—the federal trademark law.⁶³ The Lanham Act serves to outline trademark and trade dress laws that companies and individuals alike can file to protect their products.⁶⁴ The Act seeks to, “secure the public’s interest in protection against deceit as to the sources of its purchases, [and] the businessman’s right to enjoy business earned through investment in the good will and reputation attached to a trade name.”⁶⁵ The Act aims to protect intellectual property while promoting competition.⁶⁶ The Act, however, has repeatedly been scrutinized for the difficulty it creates for companies to trademark their items.⁶⁷

A. *Trademark vs. Trade Dress*

Two distinguishing factors are relevant when it comes to the Lanham Act: trademark and trade dress. Trademark is the registered protection of the logo, symbols, phrase, word, name, or design of a

⁵⁹ Stephanie Symington, *Social Media is Fuelling Fast Fashion Fads*, BBC: THE SOCIAL (Aug. 25, 2020), <https://www.bbc.co.uk/programmes/articles/44rQcnNMDXz2vyvNzhfhXqf/social-media-is-fuelling-fast-fashion-fads> [https://perma.cc/8SSC-M2LH]; Elram Michaela & Steiner Lavie Orna, *Fashion Conscious Consumers, Fast Fashion and the Impact on Social Media on Purchase Intention*, 4 ACAD. J. INTERDISCIPLINARY STUDIES 173 (2015).

⁶⁰ Nikita Charuza, *42 Small Fashion Brands that Could Use Your Support Right Now*, POPSUGAR: FASHION (Jan. 14, 2021), <https://www.popsugar.com/fashion/small-fashion-brands-47319590> [https://perma.cc/4ZX3-2SG6].

⁶¹ Raustiala & Sprigman, *supra* note 47, at 1688, 1690.

⁶² Karina K. Terakura, *Insufficiency of Trade Dress Protection: Lack of Guidance for Trade Dress Infringement Litigation in the Fashion Design Industry*, 22 U. HAW. L. REV. 569, 618–19 (2000).

⁶³ Lanham Trademark Act of 1946, 15 U.S.C. §§ 1051–1127.

⁶⁴ *Id.* at § 1051.

⁶⁵ *Id.* at § 1115(b)(4).

⁶⁶ *Id.*

⁶⁷ *Id.*

product,⁶⁸ whereas trade dress is the physical appearance of the ready-for-market product and it is usually not registered.⁶⁹ For example, the iconic “Double G” of Gucci would be representative of trademark, whereas the use of green and red stripes, in a particular manner, would be relative to the trade dress of the company.⁷⁰ Trade dress, because it is unregistered and harder to define, is often the point of contention when applying the Lanham Act.⁷¹ Courts do not adequately protect against infringements because there are no safeguards in place for the innovation of the fashion industry as a whole. Rather, companies are forced to apply trademark law in a broader context.⁷²

It can be contested whether garment claims would be ruled by the laws of trade dress or trademark. Due to the constant turnover in the fashion industry, it would be impractical to trademark every design to ever hit the market. Trade dress, however, allows a company to protect its designs and revenue. While trade dress is not registered, it is still protected under the Lanham Act.⁷³ Under the Lanham Act § 1125(a), companies can file claims for infringements against unregistered marks; these unregistered marks fall under the category of trade dress.⁷⁴ Trade dress infringement falls upon three elements: (1) the trade dress is not primarily functional; (2) trade dress is inherently distinctive or distinctive because of its secondary meaning; (3) if companies were to use the trade dress it would confuse other consumers.⁷⁵

These distinctions are important to separate the issues of infringing and counterfeiting from higher-end products. When it comes to fast fashion, these companies are not blatantly using the trademark logos or names of high-end companies, rather they are imitating specific designs that are unique to the high-end brands.⁷⁶ Herein lies the issue, the designs specific to a high-end brand that are not registered are constantly

⁶⁸ Lesley Kim & Robert Roby, *Have You Been Duped?*, KNOBBE MARTENS: FASHION & BEAUTY BLOG (May 9, 2017), <https://www.knobbe.com/news/2017/05/have-you-been-duped> [https://perma.cc/N5BM-AXS7].

⁶⁹ *Id.* (“design patents also may be available to protect innovative packaging”).

⁷⁰ *Wide Leather belt with Double G Buckle*, GUCCI, <https://www.gucci.com/us/en/pr/women/accessories-for-women/belts-for-women/wide-belts-for-women/wide-leather-belt-with-double-g-buckle-p-400593AP00T1000>.

⁷¹ Kim & Roby, *supra* note 68 (“The uncertainty as to whether beauty products will be protected through trade dress may compel brands to rely on the strength of their brand names and the quality of their products.”).

⁷² Teruka, *supra* note 62, at 617.

⁷³ 15 U.S.C. § 1125(a)

⁷⁴ *Id.*

⁷⁵ *Jay Franco & Sons, Inc. v. Franek*, 615 F.3d 856, 861 (7th Cir. 2010).

⁷⁶ Counterfeiting refers to the mark being “identical with, or substantially indistinguishable from” a genuine trademark. 18 U.S.C. § 2320(f)(1)(a)(ii).

infringed upon and hindering upon the business practices of an established company who went through proper channels of creation. Benefiting from the backs of the knowingly profitable companies' designs, fast fashion companies can quickly profit without the same amount of effort or expense exerted by traditional, high-end fashion companies.

Fast fashion companies often replicate specific designs on garments. These design infringements are arguably trade dress, rather than trademark, issues under the Lanham Act, because the issues are not outright counterfeiting a product; they are imitating a company's inherent product design. Fast fashion companies infringe on high-end companies designs by adopting the same color patterns or specific designs; these colors and designs are unregistered marks and thus trade dress issues. While trade dress is protected in some instances by the Act, the proactive measure to protect a trade dress through registration is limiting because it does not allow exclusive rights for inherently useful products.⁷⁷ However, after the infringement occurs, little to no action is taken unless a lawsuit is filed and a court finds that the infringement follows a narrowly tailored analysis regarding trade dress. The United States, unlike its European counterparts, is relatively new to the fashion industry, and as a result, is far behind in providing protections to the fashion industry across the board.⁷⁸ Fast fashion companies are able to exploit the lack of Act protections not only because courts have developed a narrowly tailored test for the fashion industry, but also because the consequences are limited and do little for deterrence.⁷⁹

1. *The Three-Step Analysis*

When analyzing these fast fashion issues, the courts have used a three-step process, beginning with the first step of determining a "functionality" element to distinguish between trade dress and trademark issues.⁸⁰ "Functionality" is key to trade dress because it determines the legal protections assigned to an item outside of the protections of trademark in the use of a company's logo, symbols,

⁷⁷ Julia Brucculieri, *How Fast Fashion Brands Get Away with Copying Designers*, HUFFPOST (Sep. 4, 2018, 5:45AM), https://www.huffpost.com/entry/fast-fashion-copycats_n_5b8967f9e4b0511db3d7def6 [<https://perma.cc/NFQ9-RLTA>].

⁷⁸ Michele Woods & Miyuki Monroig, *Fashion Design and Copyright in the US and EU*, WORLD INTEL. PROP. ORG. (Nov. 17, 2015), https://www.wipo.int/edocs/mdocs/mdocs/en/wipo_ipr_ge_15/wipo_ipr_ge_15_t2.pdf [<https://perma.cc/XQA2-R75Y>] (comparing US trademark law in fashion design to EU trademark law).

⁷⁹ Sangeeta Singh- Kurtz, *Fast Fashion Exploits Everyone it Touches*, QUARTZ: SHADY BUSINESS (Jan. 20, 2019), <https://qz.com/quartz/1367669/fast-fashion-exploits-everyone-it-touches/> [<https://perma.cc/Q465-MQV6>].

⁸⁰ 15 U.S.C.S. § 1115(b)(8).

phrase, etc.⁸¹ Courts analyze items such as distinctive or unique shapes, purely ornamental features, a combination of colors that are specific to a company, etc.⁸²

Functionality has been addressed by the courts as taking two forms: *de facto* or *de jure*.⁸³ *De facto* implies the function the trade dress is proposed to implement and thus is not protected under the Act.⁸⁴ *De facto* functionality are the aspects of the product which are functional such as a buckle on a belt. Because it is necessary for the use of a belt, it is not unique to any one company, and thus not protected.⁸⁵ *De jure* on the other hand applies to whether the trade dress is necessary to promote good faith competition in the specific industry.⁸⁶ *De jure* functionality could also be deemed visually desirable, such as a specific color or combination of colors; it is not necessary for the use of the product, merely the appearance.⁸⁷ So long as the trade dress does not hinder competition through means of monopolization, it may be registered and protected.⁸⁸

The second element of trade dress is the item's distinctiveness. Two forms of distinction are regarded by a court: (1) inherently distinctive and (2) distinctiveness through a secondary meaning.⁸⁹ The inherent distinctiveness of a product requires the trade dress to be "unusual, memorable, fanciful, suggestive, arbitrary, separate from the product or service, or commonly regarded as being associated with the product or service."⁹⁰ High-end street wear company Off-White has built a brand on ironic recognition, where the only element of design is that

⁸¹ *Jay Franco & Sons, Inc.*, 615 F.3d at 858.

⁸² *Qualitex Co. v. Jacobson Prod. Co.*, slip op. at 6 (1995) (citing *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844, 850-51 (1982)); *Ciba-Geigy Corp. v. Bolar Pharmaceutical Co.*, 547 F. Supp. 1095, 1096, 1097 (D.N.J. 1982) ("reasoned that a product's appearance would not be copied if it had no value, and it is this value that translates to secondary meaning").

⁸³ *Qualitex Co.*, slip op at 6.

⁸⁴ *Id.*

⁸⁵ *Jay Franco & Sons, Inc.*, 615 F.3d at 857.

⁸⁶ *Inwood Laboratories*, 456 U.S. 844 (1982).

⁸⁷ *Jay Franco & Sons, Inc.*, 615 F.3d at 856.

⁸⁸ *Id.* at 856; see also Apostolos Chronopoulos, *Emerging Scholars Series: Trade Dress Rights as Instruments of Monopolistic Competition: Towards a Rejuvenation of the Misappropriation Doctrine in Unfair Competition Law and Property Theory of Trademarks*, 16 MARQ. INTELL. PROP. L. REV. 119 (2012), <http://scholarship.law.marquette.edu/iplr/vol16/iss1/6> [<https://perma.cc/FS7Y-M5NC>].

⁸⁹ *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763 (1992) (marks are used to identify a particular source of a product, if they are inherently distinctive or have secondary meaning, they ought to be protected).

⁹⁰ *Jay Franco & Sons, Inc.*, 615 F.3d at 855.

everything on the product is labeled with quotes around the word.⁹¹ The brand is recognized by the design alone—a black dress with type face on the side “Little Black Dress.”⁹² If a product’s distinctiveness is acquired through secondary meaning, this means that a consumer associates the trade dress only to a specific company.⁹³ Similar to the green and red stripes used by Gucci, they are inherently vital to the company’s garment design.⁹⁴ The ordinary consumer perspective is applied to truly determine the inherent distinctiveness of a trade dress. Does the trade dress in question lead the everyday consumer to know the product comes from a specific company? If the answer is yes, then it is entitled to be protected.

Lastly, a court addresses the likelihood a consumer will be confused by a company infringing on the trade dress. This element requires that, to prove infringement on trade dress, the reasonable consumer would have to be confused by the origin of a product.⁹⁵ This element need not be actual confusion, rather, show that there is a likelihood of confusion.⁹⁶ This element can prove difficult for the fashion industry, not specifically by the actual consumer but by potential consumers. Potential consumers may see an item believing it to be the product of a high-end company when, in actuality, it is the product of a fast fashion company, causing for potential consumers of a high-end company to purchase products from a fast fashion company.⁹⁷ When fast fashion companies imitate the distinctive qualities of a high-end company, it is perceived as a high-end product, confusing consumers into believing a fast fashion product is a high-end product. If a company is able to prove the first two elements of functionality and distinctiveness, confusion is not a necessary element.⁹⁸ However, when the elements of functionality and distinctiveness are not met, the court falls to confusion of a

⁹¹ Kaitlyn Tiffany, *The Hottest Fashion Brand in the World was Built on Irony and \$1000 Sweatshirts*, VOX (Oct. 30, 2018, 12:30 PM), <https://www.vox.com/the-goods/2018/10/30/18027074/off-white-timeline-history-luxury-streetwear-virgil-abloh> [<https://perma.cc/D6EK-EYD4>].

⁹² *Id.*

⁹³ *Two Pesos, Inc.*, 505 U.S. 763; *Ciba-Geigy Corp. v. Bolar Pharmaceutical Co.*, 547 F. Supp. 1095 (D.N.J. 1982), *aff’d*, 719 F.2d 56 (3d Cir. 1983) (“reasoned that a product’s appearance would not be copied if it had no value, and it is this value that translates to secondary meaning.”).

⁹⁴ In 2017, a court ruled that the stripes are vital to Gucci’s sales and income, the distinctive secondary meaning of the stripes proved the company to be distinguished through a specific design., *Gucci and Forever 21 Settle Battle over Stripes*, THE FASHION LAW (Nov. 21, 2018), <https://www.thefashionlaw.com/gucci-forever-21-settle-battle-over-stripes/> [<https://perma.cc/4W3J-K8W9>].

⁹⁵ *Two Pesos, Inc.*, 505 U.S. at 769.

⁹⁶ *Ciba-Geigy Corp.*, 547 F. Supp. at 1110.

⁹⁷ *Quicksilver, Inc. v. Kymsta Corp.*, 466 F.3d 749, 760 (9th Cir. 2006) (distinctiveness measures primary significance to the purchasing public).

⁹⁸ Kim & Roby, *supra* note 68.

reasonable consumer to determine the nature of the infringement.⁹⁹ Some non-exhaustive points of determination for the likelihood of confusion may include: (1) strength of the trade dress; (2) intentions of the use of the trade dress; (3) marketing channels; (4) even the selling channels of competitors; (5) the marketing channels used; or (6) proximity of the goods or the services.¹⁰⁰

By addressing this infringement issue, the federal government is better able to promote fair use and good faith competition in capitalism. This competition does not only include high end companies but also smaller companies that are affected by the infringing practices of fast fashion companies.¹⁰¹ The purpose of the Act is to ensure the government is promoting such competition is done in good faith and granting temporary monopoly to the owner to encourage creativity and innovative interest.¹⁰² This Act eliminates the unfair practices of companies that would otherwise be able to profit off the ethical practices of good faith actors. However, this proves to be an issue when companies, such as those in the fashion industry, are constantly changing and producing unique designs. Fast fashion practices have proven to be 52 seasons, with a weekly turnover of products.¹⁰³ Yet, high-end, more established, companies have a four-season system where years of effort and design are put into the final products.¹⁰⁴

2. *Distinction Between Parody and Infringement*

An important distinction for whether the Act's protections are awarded to companies is parody versus infringement.¹⁰⁵ If a product is a parody, then

⁹⁹ *Id.*

¹⁰⁰ Raustiala & Sprigman, *supra* note 47 (“In a market economy like ours . . . we depend on competition to keep the price of goods and services low and their quality high. And a lot of competition involves copying.”); *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th Cir. 1979), *abrogated by* *Mattel, Inc. v. Walking Mt. Productions*, 353 F.3d 792 (9th Cir. 2003) (evaluating the likelihood of confusion between related goods).

¹⁰¹ Fast fashion giants have been accused of stealing designs from small companies as well as independent artists, parties that more often than not are impacted by the lack of registration for artistic elements of their designs. Gabby Bess, *How Fashion Brands Like Zara Can Get Away with Stealing Artists' Designs*, VICE (July 21, 2016, 4:35 PM), <https://www.vice.com/en/article/nejwdz/how-fashion-brands-like-zara-can-get-away-with-stealing-artists-designs-tuesday-bassen> [<https://perma.cc/RGE6-4GF2>]; Tuesday Bassen (@tuesdaybassen), INSTAGRAM (July 19, 2016), <https://www.instagram.com/p/BIEGImxgFKe/>.

¹⁰² Morris Library, *Purpose of Copyright Law*, SOUTHERN ILLINOIS UNIVERSITY, <https://lib.siu.edu/copyright/module-01/purpose-of-copyright-law.php> [<https://perma.cc/R5BD-455V>] (last updated Nov. 13, 2020, 4:08 PM).

¹⁰³ CLINE, *supra* note 16, at 26.

¹⁰⁴ Bhardwaj & Fairhurst, *supra* note 14, at 167.

¹⁰⁵ 15 U.S.C. § 1125(c)(3).

it cannot serve as the basis for patent infringement.¹⁰⁶ A parody test provides that a parody must “convey two simultaneous—and contradictory—messages: that it is the original, but also that it is not the original and is instead a parody.”¹⁰⁷ My Other Bag (MOB) is a company that creates handbags that mirror the trademarked stamp design of Louis Vuitton.¹⁰⁸ The print produced by MOB is a clear replica of Louis Vuitton and is intentionally designed to look like it, however, the court ruled that because the bags sold by MOB are sold at an extremely low price and are marketed in a way that clearly “makes fun of and [is a] laughable design,” it is clear that MOB’s products are a parody, not a trademark infringement.¹⁰⁹

3. *Patents and Fashion*

Another way for designers to protect their creation comes from the United States Patent Office, through the option of a design patent, where a company can claim exclusive rights and ownership to a design for a certain period.¹¹⁰ These design patents, however, are specific to ornamental designs and do not allow for the protections on variations of designs.¹¹¹ According to the U.S. Department of Commerce Patent and Trademark Office, to patent a design “it must be a definite pattern of surface ornamentation, applied to an article of manufacture.”¹¹² The “definite” element of this specific patent eliminates the possibility for companies to patent their designs because they are not definite and can evolve as the seasons change. While the patent protects the “appearance” of an article, a fashion company will not have articles with one appearance only.¹¹³ Fashion companies will recycle and reuse design elements throughout seasons.¹¹⁴

i. *The United States Trademark Law and Fashion*

¹⁰⁶ Jeffrey A. Kobulnick & Michael A. Bernet, *Parody Products: When Should Brand Owners “Smile or Laugh” and When Should They Sue?*, 9 LANDSLIDE NO. 6 (2017),

https://www.americanbar.org/groups/intellectual_property_law/publications/landslide/2016-17/july-august/parody-products-when-should-brand-owners-smile-or-laugh-and-when-should-they-sue/ [<https://perma.cc/M6A5-UABF>].

¹⁰⁷ *Louis Vuitton Malletier v. My Other Bag Inc.*, 156 F. Supp. 3d 425, 434 (S.D.N.Y. 2016), *aff’d*, 674 Fed. Appx. 16 (2d Cir. 2016) (unpublished).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ 37 C.F.R. § 1.84.

¹¹¹ 37 C.F.R. § 1.153.

¹¹² UNITED STATE PATENT AND TRADEMARK OFFICE, https://ipassessment.uspto.gov/educate/educate_4.html [<https://perma.cc/E8MN-TVL9>] (last visited Mar. 12, 2021).

¹¹³ 35 U.S.C. § 132.

¹¹⁴ *See, e.g.*, THE FASHION LAW, *supra* note 94.

The United States Patent and Trademark Office (“USPTO”),¹¹⁵ where marks are patented or trademarked, upholds the Lanham Act and provides individuals and companies alike the opportunity to register their trademarks.¹¹⁶ The USPTO holds records of all trademarks for review should there be a possible infringement. The USPTO provides that:

A trademark or trade dress registered on the USPTO’s Principal Register is prima facie evidence of a trademark’s validity and distinctiveness, among other benefits. See 15 U.S.C. § 1057(b). Once a trademark or trade dress is registered, the trademark owner can utilize § 1114(b), but owners of unregistered marks can only file a claim for infringement under § 1125(a).¹¹⁷

However, trade dresses, because they are necessarily unregistered, are not commonly recorded. If the USPTO approves the registration of a trade dress, it usually follows the three-step test outlined above.¹¹⁸ Oftentimes the USPTO requires evidence of advertising to see how the trade dress is unique to a specific entity.¹¹⁹

ii. Europe Trademark Law and Fashion

Europe is the epicenter of fashion; from Paris to Italy, Europe is home to the most influential fashion companies of all time.¹²⁰ The European Union (hereinafter also referred to as the “EU”) has instituted registered and unregistered design rights that provide protections to a company’s products and designs.¹²¹ The European Designs Protection Directive (98/71/EC)

¹¹⁵ The USPTO is the federal agency for granting U.S. patents and registering marks. *About Us*, UNITED STATES PATENT AND TRADEMARK OFFICE (last updated Feb. 9, 2021, 5:15 PM), <https://www.uspto.gov/about-us> [<https://perma.cc/BAV4-38JY>].

¹¹⁶ *Trademark Process*, UNITED STATES PATENT AND TRADEMARK OFFICE (last updated Feb. 2, 2021, 11:31 PM), <https://www.uspto.gov/trademarks-getting-started/trademark-process#step1> [<https://perma.cc/J7PC-BSK7>].

¹¹⁷ USPTO, *supra* note 93.

¹¹⁸ *See supra* note 93.

¹¹⁹ USPTO, *supra* note 94.

¹²⁰ Cheyenne Buckingham & John Harrington, *30 Most Influential Fashion Designers of All Time*, MSN (Oct. 1, 2018), <https://www.msn.com/en-us/money/other/30-most-influential-fashion-designers-of-all-time/ar-BBNNj6y> [<https://perma.cc/BY5B-9UY8>].

¹²¹ Interview by John Zarocostas with Julie Zerbo, Editor-in-Chief, *The Fashion Law, The Role of IP Rights in the Fashion Business: a US Perspective*, WIPO MAGAZINE (Aug. 2018), https://www.wipo.int/wipo_magazine/en/2018/04/article_0006.html [<https://perma.cc/52KS-NMVY>].

required all members of the EU to protect fashion designs as a whole.¹²² To provide further protections to companies, the EU instituted Community Design to protect unregistered marks as well as registered.¹²³

III. THE ISSUE

The central issue for the fashion industry is that, in order to succeed on an infringement claim under the Lanham Act, a plaintiff must prove that it has a protectable ownership interest in the mark; however, this is difficult when the Act does not provide the means for a company to register its trade dresses.¹²⁴ The blatant infringements by fast fashion companies upon established companies with unique creations, and the inability of the original designers to protect their fashion designs, pose as violations of the Act. However, the Act does not extend proper protections to the innovators and creators within the fashion industry. While protection may be possible if companies register their marks, it is quite difficult and burdensome to do so due to the fashion industry's ever-evolving nature. Colors and specific designs may represent an iconic company; however, it is difficult for a company to register its marks because no two seasons are the same. Some fast fashion companies have been known to imitate the exact cut and style of a couture article and advertise it before the fast fashion company has even produced the piece.¹²⁵

While some established companies have an internal review board to ensure their latest pieces are designed in good faith, there is no broad coalition that protects companies against infringements.¹²⁶ Thus, begging the question, should these companies be able to protect these original, but unregistered designs? By protecting these marks, the competitiveness of an otherwise already competitive industry may be strengthened to a more ethical standard. This may be possible by amending the Lanham Act to allow the registration of trade dress, or rather by the creation of a specific coalition to

¹²² See Council Directive 98/71, art. 3, 1998 O.J. (L 289)29(EC). Designs are defined as “the appearance of the whole or a part of a product resulting from the features of . . . the lines, contours, colours, shape, texture . . . or its ornamentation.”

¹²³ Francesca Mantalvo Witzburg, *Protecting Fashion: A Comparative Analysis of Fashion Design Protection in the United States and Europe*, CARDOZO AELJ (Dec. 1, 2016), <https://cardozoaelj.com/2016/12/01/protecting-fashion-comparative-analysis-fashion-design-protection-united-states-europe/>[<https://perma.cc/J7MP-NJ63>].

¹²⁴ *Dep't of Parks & Recreation v. Bazaar Del Mundo Inc.*, 448 F.3d 1118, 1124 (9th Cir. 2006) (Under § 1114, a party must prove: (1) it has a protectable ownership interest in the mark; and (2) the defendant's use of the mark is likely to cause consumer confusion.).

¹²⁵ Martin, *supra* note 39.

¹²⁶ Roya Tabibi, “*Good Faith*” Trademark Infringement: *The Ninth Circuits Approach on the Tea Rose-Rectanus Doctrine*, 60 B.C. L. REV. E. SUPP. II-65 (2019), <https://lawdigitalcommons.bc.edu/bclr/vol60/iss9/7> [<https://perma.cc/YUN7-YRAK>].

monitor and govern an ever-growing industry. The fashion giants have their established trademarks yet are unable to protect themselves from fast fashion and trade dress issues. Due to the structure of the Lanham Act, this specific issue has not been subjected to scrutiny by the courts nor by Congress in a way that presents a solution.

A. *The Court's Response to the Fast Fashion Issue and Where They Fall Flat*

Other than monetary compensation, the courts have not been able to provide a bright line solution that would better protect company designs from infringement. With no guidance from courts besides these slaps on the wrist, there has been seemingly little-to-no impact on stopping companies from exact imitation of products and designs. Fast fashion companies are able to seemingly steal designs without repercussions because the Lanham Act does not extend protections to the fashion industry.¹²⁷

The courts have often analyzed the application of the fair use defense in these cases regarding trade dress infringement within the fashion industry.¹²⁸ “Fair use” in intellectual property within this industry can provide companies with semi-exclusive defenses.¹²⁹ A company may use the fair use defense to avoid liability for infringement on a trademark on either one of two forms: classic or nominative.¹³⁰ However, fair use in trademark does not protect the physical products, rather the descriptors of another company that refer to the infringing company's products.¹³¹ Fair use has been used as a defense by fast fashion companies, yet has been overlooked because the artistic realm of the fashion industry is not categorized by descriptions, rather the brand identifiers, such as the Gucci “Double G.”¹³²

Because little to no protections are afforded to the fashion industry, consumers encounter a marketplace that is overly saturated with much of the same product, diminishing the competitiveness of the fashion industry.¹³³

¹²⁷ Lieber, *supra* note 54.

¹²⁸ Xiyin Tang, *Against Fair Use: The Case for a Genericness Defense in Expressive Trademark Uses*, 101 IOWA L. REV. 2021, 2050 (2016).

¹²⁹ Maria Crimi Speth & Aaron K. Haar, *Fair Enough: The “Fair Use” Defense to Trademark Infringement*, JABURG WILK ATT'YS AT LAW (2015), <http://www.jaburgwilk.com/news-publications/fair-use-defense-to-trademark-infringement> [<https://perma.cc/K2GE-7MDZ>].

¹³⁰ J. Thomas McCarthy, *McCarthy on Trademarks and Unfair Competition* § 23:11, at 23–87 (4th ed. 2012).

¹³¹ Sunmark, Inc. v. Ocean Spray Cranberries, Inc., 64 F.3d 1055 (7th Cir. 1995); KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc., 543 U.S. 111, 124 (2004).

¹³² Tang, *supra* note 99.

¹³³ Wallace, *supra* note 10 (“The confusion of the fashion cycle, coupled with the increased importance and complexity of pre-collections, leaves less time for the creative process and artisanship and puts immense pressure on critical design and creative talent.”).

The Act's limited protections leaves courts to be the reactionary measure after an infringement has occurred, with little to no guidance from Congress. The issue of saturation comes into play when companies are fighting for recognition and relevance in the marketplace. A market becomes overly saturated when companies are consistently producing similar products and releasing them to the public for purchase. While the competitiveness of the industry is important to ensure the industry is not monopolized, there are a plethora of issues that arise from an overly saturated industry other than trademark.¹³⁴ The lack of regulation also leads to fast fashion companies being able to produce products at unimaginable speeds where they engage in environmental damage, modern day slave labor, and extreme waste.¹³⁵ The first step in fast fashion garment production is finding designs to copy, then mass producing.¹³⁶ There is little to no originality when several companies offer the same product; it merely becomes a competition to release a product first. Fast fashion companies have proven time and time again, they are

¹³⁴ Pheobe Young, *Fast Fashion: What's Wrong? Why is it so Bad for the Environment? Check Out Our Simple Guide.*, PEBBLEMAG (Aug. 11, 2020), <https://pebblemag.com/magazine/living/whats-wrong-with-fast-fashion> [<https://perma.cc/X5YL-T8TW>] (Fast fashion has created a long list of issues, beyond their unchecked copying of high end company designs, slowing the industry may slow the prominence of these issues.).

¹³⁵ The high speed of manufacturing required by the fast fashion business model leads to millions of tons of clothing in landfills, projected to be 150 million tons by 2060. The fast fashion industry also requires up to 200 tons of water to make a ton of fabric, more than any other industry. Marc Gunther, *Fast Fashion Fills Our Landfills*, JSTOR DAILY: SCIENCE AND TECHNOLOGY (Sept. 27, 2016), <https://daily.jstor.org/fast-fashion-fills-our-landfills/> [<https://perma.cc/GEV4-TADL>]. Fast fashion companies have consistently been slapped with lawsuits claiming the extreme and illegal wage gap of their factory employees. Caroline Wheeler et al., *Boohoo: Fashion Giant Faces "Slavery" Investigation*, THE SUNDAY TIMES (July 5, 2020), <https://www.thetimes.co.uk/article/boohoo-fashion-giant-faces-slavery-investigation-57s3hxcth> [<https://perma.cc/F2RH-JEFZ>]; The demanding nature of fast fashion companies is what makes the factory conditions more alarming than those of high-end companies. Because fast fashion companies have a "52 season" model, the production is more frequent and more demanding, thus more exploitative of factory environments. Victoria Stafford, *Factory Exploitation and the Fast Fashion Machine*, GREEN AMERICA (Aug. 8, 2018), <https://www.greenamerica.org/blog/factory-exploitation-and-fast-fashion-machine> [<https://perma.cc/38PE-S9S8>]; compare Alex Assoune, *13 Fashion Brands that Still Use Sweatshops in 2021*, PANAPRIUM (last accessed Mar. 2, 2021), <https://www.panaprium.com/blogs/i/fashion-brands-that-still-use-sweatshops> [<https://perma.cc/YZ5G-PANE>] (The list includes far more prominent fast fashion companies than other more high-end companies).

¹³⁶ Saxon, *supra* note 32 ("Once a new (unique) designer pieces land on social media, the scouts start the 'stealing' process. Designs are collected and sent for approval. If the style is deemed financially sound, the copying-replicating process begins. In less than a month, millions of copies are created and shipped all over the world.").

willing to forego ethical practices to capitalize off of the designs that high-end companies make trendy. The courts have shown that the Lanham Act has legal protections for companies but provides no bright-line rule as to what is and is not protected.

1. *The Supreme Court and the Attempt to Apply the Lanham Act*

The Supreme Court has often avoided questions regarding the extent of Lanham Act protections, merely providing clarification when the Act is not plainly understood, leaving the question to be juggled between the courts and Congress. The Court has provided that separate, creative elements of a design may be entitled to protection under trademark law, yet overlooked providing the extent a protection or the level of creativity required to subject such an element to protection.¹³⁷ This provides some insight as to the extent to what elements of design companies can seek to protect, separating the functionality element from the inherently distinct element.¹³⁸ Yet, because there have been no amendments to the Act to support this ruling, companies are still having to turn to the courts to determine if an infringement has occurred.

The Supreme Court held that willful infringement is not a required precondition for a plaintiff to receive damages from the infringing party.¹³⁹ The Court ruled that the mental state of the party is not an evidentiary burden on the Plaintiff; rather, its relevance is not given as much weight as lower courts have provided in the past.¹⁴⁰ Willfulness, under the Act, is not a requirement to provide a plaintiff damages for the infringement of a trademark.¹⁴¹ While the Court voiced its opinions on the damages a party may receive from an infringing defendant, it does not relay the discrepancies the Act has.

The Court has, however, released some tests which may be applied for trade dress infringements, rejecting any previously established tests by lower courts such as the three-step test of trade dress.¹⁴² In order to succeed in an infringement on trade dress claim, a plaintiff must prove that the particular

¹³⁷ *Star Athletic, LLC v. Varsity Brands, Inc.*, 137 S. Ct. 1002 (2017) (Elements of an overall design that are recognizable to a company, independent of the product to which they are attached, are subject to protections under trademark law.).

¹³⁸ *Id.*

¹³⁹ *Romag Fasteners, Inc v. Fossil, Inc.*, 140 S. Ct. 1492, 1497 (2020) (ruling on the requirement of a “mental state” of an infringing party to deem the liability the infringing party owes to a plaintiff).

¹⁴⁰ *Id.*

¹⁴¹ 15 U.S.C. § 1125.

¹⁴² *Wal-Mart Stores, Inc. v. Samara Bros.*, 529 U.S. 205, 216 (2000) (The court wrote and addressed its own issue, asking “[w]hat must be shown to establish that a product’s design is inherently distinctive for purposes of Lanham Act trade-dress protection?” *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 528 U.S. 808, 808 (1999)).

design has acquired a secondary meaning.¹⁴³ The Court claimed that the distinctiveness of a design must always be acquired, the idea of an item being “inherently distinctive” referred to the specific packaging of a product rather than the actual product design, establishing the novel idea of a product design as having a secondary meaning.¹⁴⁴ Thus, the evidence presented for a trade dress infringement claim must prove that a design has acquired secondary meaning.¹⁴⁵ Secondary meaning is derived from the consumer association of a design with a specific company.¹⁴⁶ The evidence, therefore, is required to be in the form of consumer documentation such as surveys, or direct testimony.¹⁴⁷

2. *The Act in the Eyes of the Supreme Court vs. Lower*

Courts

Circuit courts have construed the majority of decisions regarding the Act and its infringers. Lower courts have focused on the main components of trade dress infringement which are (1) functionality of the mark, trade dress is not a functional component of the product; (2) distinctive in secondary meaning; and (3) confusion brought to the consumer by infringement of the trade dress. These components have led to different tests subjectively applied to cases on an individual basis.¹⁴⁸ Circuit courts have focused on these three points of analysis to decide on trade dress infringement because there has been little to no guidance provided by either Congress or the Supreme Court as to how the Lanham Act addresses issues of trade dress infringement. The Ninth Circuit established that companies, in similar competitive markets, must act in good faith so as to not create confusion between market products.¹⁴⁹ Courts have over the years heard several cases brought forward regarding the infringement of fast fashion companies upon the trade dress of

¹⁴³ Wal-Mart, 529 U.S. at 216.

¹⁴⁴ *Id.* at 210–11; The Court referenced two precedential cases to establish the difference, where in *Two Pesos, Inc., v. Taco Cabanna, Inc.*, 505 U.S. 763, 768 (1992), the question was a matter of product packaging distinction, required to be inherently distinctive; *Qualtex Co. v. Jacobson Prods. Co.*, 514 U.S. 159, 162–63 (1995), however, established the secondary meaning evidence for color *per se*.

¹⁴⁵ *Qualtex Co.*, 514 U.S. at 162–64.

¹⁴⁶ *Id.*

¹⁴⁷ *See Ciba-Geigy Corp. v. Bolar Pharmaceutical Co.*, 547 F. Supp. 1095, 1105–06 (D.N.J. 1982).

¹⁴⁸ *See e.g.*, *Jay Franco & Sons, Inc. v. Franek*, 615 F.3d 856, 861 (7th Cir. 2010); *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d 341, 347, 349–50 (9th Cir. 1979); *Two Pesos, Inc.*, 505 U.S. at 770; *Quicksilver, Inc. v. Kymsta Corp.*, 466 F.3d 749, 759–60 (9th Cir. 2006).

¹⁴⁹ *KP Permanent Make-Up, Inc. v. Lasting Impression I, Inc.*, 408 F.3d 596, 607 (9th Cir. 2005).

their high-end counterparts.¹⁵⁰ These cases ruled on by the lower courts have ranged from color to specific product design trade dress infringements.¹⁵¹

Courts have seen several infringement cases in their court rooms, attempting to address the issues of trade dress. However, this may come too late when the product designs that have already been infringed and been placed in the market and profited from; therefore, there should be standard put in place to protect parties before they are harmed.

B. *Greater Scrutiny Required Under the Lanham Act*

The damaged parties are constantly awarded damages by the infringing parties, yet the infringements are not slowing down. Fast fashion companies are still infringing upon the designs of high-end companies unscathed by the Lanham Act. The Act is intended to protect companies while also providing a fair and competitive marketplace. The court system is efficient at identifying infringements and awarding damages to plaintiffs from infringing defendants; however, this system is reactive rather than proactive.

1. *Congressional Efforts to Protect the Fashion Industry*

While the Lanham Act provides individuals the ability to protect their intellectual property, the fashion industry has had minimal protections against infringement under the Act. While there have been efforts made to expand the Act to include the fashion industry specifically, all have failed due to minimal support.¹⁵² These attempts would have provided *sui generis* protections to fashion designs.¹⁵³ These potentially would have provided companies with the ability to protect their products as a whole as opposed to separate aspects of the company's brand.¹⁵⁴

2. *Technology Versus the Law*

Technology is ever evolving. It seems as though each day there is an upgrade to technology or the internet. The law, on the other hand, is lightyears behind modern day technology. Technology has allowed for copyright infringements to occur with ease because little effort is required through the use of technology.¹⁵⁵ Social media platforms provide fast fashion companies with direct access to fashion designs before high-end companies

¹⁵⁰ Martin, *supra* note 39; Forever 21, Inc. v. Gucci Am., Inc., No. CV 17-04706, 2018 WL 5860684 (C.D. Cal, 2018).

¹⁵¹ *Id.*

¹⁵² Design Piracy Protection Act, H.R. 2196, 111th Cong. (2009). The Act would have extended protections to fashion designs for a three-year period (“the appearance as a whole of an article of apparel, including its ornamentation.”); Innovative Design Protection and Piracy Prevention Act, H.R. 2511, 112th Cong. (2011); Innovative Design Protection Act of 2012, S.3523, 112th Cong. (2012).

¹⁵³ Zarocostas, *supra* note 121.

¹⁵⁴ *Id.*

¹⁵⁵ U.S. OFF. OF TECH. ASSESSMENT, OTA-CIT-302, INTELLECTUAL PROPERTY RIGHTS IN AN AGE OF ELECTRONICS AND INFORMATION CH. 4 (1986).

even release products for sale.¹⁵⁶ The access that technology provides, from viewing products to purchasing products, has widened the gap within the Act and shown that infringements are easier to commit with little to no repercussions.¹⁵⁷ Fast fashion companies mainly exist within the realm of e-commerce, relying heavily on technology to sell their products, promote their products, and design their products.¹⁵⁸

3. Possible Solution—Amending the Lanham Act

The Lanham Act provides protections for certain unregistered trade dress infringements but provides no form of guaranteed protections.¹⁵⁹ As outlined above, the elements required by trade dress issues are: (1) functionality of the mark, trade dress is not a functional component of the product; (2) distinctive in secondary meaning; and (3) confusion brought to the consumer by infringement of the trade dress, often requires for products to be on the market for long periods of time.¹⁶⁰ A newly introduced product may not necessarily meet two major components. The second element requires the trade dress to have a secondary meaning. A newly introduced product may not have been on the market long enough to have acquired a secondary meaning. This secondary meaning could be something as simple as a color that is associated with a specific brand.¹⁶¹ For the trade dress to have acquired a secondary meaning, the specific trade dress ought to be associated with a company, and it must be unique and identifiable to that company alone. The third element may go hand in hand with the second, in that if a trade dress has not been associated with a brand for a long period of time, it is unlikely that an infringement would cause any confusion amongst consumers.¹⁶²

However, in the case of fast fashion companies, the trade dress infringements are specific to high-end established companies, who are well-known among consumers, as well as outspoken independent and small

¹⁵⁶ Wallace, *supra* note 12.

¹⁵⁷ Rod Flavey & Neil Foster, *The Role of Intellectual Property Rights in Technology Transfer and Economic Growth: Theory and Evidence 1* (2006) (unpublished manuscript) (available online) https://www.unido.org/sites/default/files/2009-04/Role_of_intellectual_property_rights_in_technology_transfer_and_economic_growth_0.pdf [<https://perma.cc/496Y-N4UP>] (“If a new technology is valuable, it is therefore likely to be copied or imitated, reducing the potential profits of the original inventor and potentially removing the incentive to engage in innovative activities.”).

¹⁵⁸ Zarocostas, *supra* note 121.

¹⁵⁹ 15 U.S.C. § 1125(a).

¹⁶⁰ See discussion *supra* Part II.A.1.

¹⁶¹ *Forever 21 v. Gucci Am.*, No. CV 17-04706 SJO (Ex), 2018 U.S. Dist. LEXIS 238201, at *4 (C.D. Cal. Feb. 9, 2018).

¹⁶² George Mialoulis & Nancy D’Amato, *Consumer Confusion & Trademark Infringement*, 42 J. MARKETING 48 (1978).

companies.¹⁶³ Trade dress infringements committed by fast fashion companies serve to benefit the fast fashion companies monetarily, hindering the profits of high-end companies when a consumer could buy the same product for less.¹⁶⁴ These tests do not protect companies until after the infringements have been committed, thus presenting a gap within the Act.

The judicial system has found the gap and implemented a test to answer the question of trade dress and the protections afforded to companies for the unregistered marks. While Congress has made strides to provide fashion companies with *sui genesis* protections, they have been unsuccessful and have made the industry an even greater target of infringements without protections. Fast fashion companies have taken advantage of the lack of protections from the Lanham Act within the fashion industry, providing evidence of a necessary amendment. The compensatory damages provided to companies are based on any profit that arose as a result from the sale of the infringed trade dress.¹⁶⁵ Yet, this seems far from a solution if the companies have spent resources in design, marketing, and what projected profits may have been lost to the infringement.¹⁶⁶ The reactive approach of the courts is too far removed from when the infringement actually occurs, and the cases are often settled or decided years after the trade dress infringement.¹⁶⁷ Courts have identified unregistered marks as protectable, yet the language in the Act has failed to reflect the solution brought about by the courts.

VI. SOLUTION

The current Act, read plainly, does not protect companies' product designs unless they are clearly distinctive.¹⁶⁸ Thus, making adjudication a costly and often unnecessary response to a trade dress infringement. Courts have time and time again ruled in favor of plaintiffs' claims against trade dress infringements stating they are protected under the Lanham Act, yet there has been no response in creating a proactive force to the infringements. Perhaps, by expanding the Act to include registrations of some trade dress, there would not only be a solution of infringement but also a slowing of the other issues that arise from the fast fashion industry, as well, by slowing the production of products.¹⁶⁹

A. *Addressing the Gap in the Lanham Act*

¹⁶³ Lamare, *supra* note 42; Bess, *supra* note 101. Designers such as Tuesday Bassen have taken to social media to call out fast fashion companies for their blatant copying of designs.

¹⁶⁴ Barnes & Lea-Greenwood, *supra* note 30, at 8.

¹⁶⁵ Romag Fasteners, Inc v. Fossil, Inc., 140 S. Ct. 1492, 1493 (2020).

¹⁶⁶ CLINE, *supra* note 16, at 20.

¹⁶⁷ Wal-Mart Stores, Inc. v. Samara Bros., 529 U.S. 205, 208 (2000).

¹⁶⁸ William McGeeveran, *Rethinking Trademark Fair Use*, 94 IOWA L. REV. 49 (2008).

¹⁶⁹ See issues listed *supra* notes 134–35.

The purpose of trademark law is to protect companies and the consumer markets.¹⁷⁰ Consumers control the fashion market by deciding what company to purchase from, what designs or trend they follow, and more. Fast fashion companies prey on this by providing a low budget option to a luxury-seeming item.¹⁷¹ While courts have found that marks, and to some extent unregistered marks, are protected, there is still a gap that is unaccounted for, leaving companies vulnerable to the predatory practices of fast fashion companies.¹⁷² The Lanham Act ultimately protects “original works of authorship” in books, artwork, inventions and other intellectual property.¹⁷³ Addressing the lack of protections awarded to the creative designs of the fashion industry would include the marks that are unregistered, not just those that are registered, and create a more competitive industry.¹⁷⁴

With the industry shifting from brick-and-mortar retail to focusing more on e-commerce, the gap in the Act requires amending to create a new industry standard that would provide protections addressed by the courts but not legislatures.¹⁷⁵ The current reading of the Act only accounts for absolute distinctive cases.¹⁷⁶ If a mark is not distinct, it is not protected; if it is not marked and patented, it is also not protected.¹⁷⁷ The Act in its current state does not work to protect the persona and identity of a company. Product designs are distinctive through specific components, not the overall product. Amending the Act to expand the definition of trade dress would provide the creative and innovative components of the fashion industry to be better protected while simultaneously protecting its competitive nature. Providing succinct and shorter life for registrations, three to seven years depending on the importance of a trade dress, would allow for some design concepts to be protected, even for a short period of time.¹⁷⁸ Amending the Act would present a proactive rather than reactive solution. The consistent ruling of courts favorable to plaintiffs provides some insight that the current system does require protections to these plaintiffs that could avoid the current issues at

¹⁷⁰ McGeeveran, *supra* note 168, at 54.

¹⁷¹ See *START BUSINESS JOURNEY*, *supra* note 20.

¹⁷² See *Wal-Mart Stores, Inc.*, 529 U.S. at 215.

¹⁷³ 15 U.S.C. § 1125(a).

¹⁷⁴ Kim & Roby, *supra* note 68.

¹⁷⁵ Hayes, *supra* note 1.

¹⁷⁶ See, e.g., *Jay Franco & Sons, Inc. v. Franek*, 615 F.3d 856, 856 (7th Cir. 2010); *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d 341 (9th Cir. 1979); *Two Pesos, Inc. v. Taco Cabana, Inc.*, 505 U.S. 763 (1992); *Quicksilver, Inc. v. Kymsta Corp.*, 466 F.3d 749, 760 (9th Cir. 2006).

¹⁷⁷ McGeeveran, *supra* note 134, at 55.

¹⁷⁸ Dr. Fridolin Fischer, *Design Law in the European Fashion Sector*, WIPO (Feb. 2008), https://www.wipo.int/wipo_magazine/en/2008/01/article_0006.html (The EU has a five-year minimum protection for innovative designs, giving a short shelf life to protecting a nonfunctioning aspect of a product. This system works as a balancing test, requiring companies to decide on the importance and significance of a design prior to registering it.).

hand. Rather than arbitrary answers, the rules ought to be hard and fast, where the potential plaintiffs would be able to prevent litigation.

This expansion of the Act would however be limited to those designs that are innovative and exceptional designs not essential to the overall function; those that are expected to become long-lasting icons. Long-lasting icons would be the trade dress that are not essential to the function but are notably recognized by a specific brand such as: Louboutin's red sole, Gucci's red and green stripe.¹⁷⁹ Because the fashion industry is ever-evolving, this would limit the registrations to only those that are novel patterns from becoming monopolies while also promoting innovation and healthy competition.

1. *Monetary Compensation is Not Enough*

Fast fashion companies are not deterred by the damages they are ordered to pay by a court. Fast fashion companies have established their market by providing the luxury look for less. This business plan has not slowed down and has continued to be rampant in the industry since the conception of fast fashion.¹⁸⁰ It is clear that the revenue fast fashion companies acquire from the sale of infringed designs outweighs any punishments that result from those sales. The court systems and legislation alike have not created any other punishments for such practices, so the rewards tend to outweigh the risk. The turnover of profits often comes from a fraction of the revenue already made by fast fashion companies. Companies such as Forever 21, Missguided, and H&M have been at the center of much legislation resulting in these companies to compensate the damaged parties, yet the practice remains prevalent in their business models.¹⁸¹

2. *The U.S Lanham Act Versus France and Italy Trademark Protections*

The United States Lanham Act has been shown to provide little protections to the garment and accessory industry. European countries on the other hand tend to protect the fashion industry using the European Designs Directive.¹⁸² This directive protects designs specific to a company, giving exclusive rights of use to one company alone.¹⁸³ For example, in Europe, the iconic red sole used by Christian Louboutin is trademarked and protected, whereas in the United States it is not because the law, in its current state, does

¹⁷⁹ Louboutin is widely recognized for its red bottom sole, and as such filed registration for the Pantone No. 18.1663TP. *Christian Louboutin and "the War of the Red-Soled Stilettos"*, LEXOLOGY (Oct. 23, 2019), <https://www.lexology.com/library/detail.aspx?g=f7686993-f62b-48b4-a849-2b00ceb5f8c3> (EU expanded its trademark protections to include colors that are highly recognizable and unique to a company).

¹⁸⁰ CLINE, *supra* note 16, at 68.

¹⁸¹ Lamare, *supra* note 42.

¹⁸² See Council Directive 98/71, *supra* note 122.

¹⁸³ *Id.*

not allow for a specific pantone number that is assigned to the red sole.¹⁸⁴ The United States, in adopting a similar directive under the Lanham Act would expand the Act to garments and accessories, closing in on the gap. Protecting the integrity of designs as intellectual property creates an economic incentive and engages more competitiveness within the industry. Expanding the law to garments and accessories gives each company greater ability to promote individuality and distinctiveness within their brand by enhancing their protection rights prior to any infringements. The EU has created a definite term for the protection of trade dress, making it where a company must introduce an idea that is novel, such as a specific fabric, pattern, or item of clothing.¹⁸⁵

The current loopholes within the Lanham Act provide fast fashion companies with the ability to exploit and copy designs without permission or repercussions. With a high level of scrutiny regarding proof of infringement of the trade dress, fast fashion companies are able to claim ignorance and get away with one infringement, moving on to the next, a never-ending cycle.¹⁸⁶ With the modernization of the industry, it is imperative the law follows suit, albeit the legal realm tends to be steps behind the modernization of society. This initial amendment to the Act would lessen the gap by initiating a more regulatory concept within the industry the Act has overlooked for years.

3. *Beyond the Act*

The Fast Fashion model depends on the consumer's desire to get the latest trend for a fraction of the price.¹⁸⁷ By integrating celebrity likeness into the knocking off of big-name couture designs with ever so small changes, these companies are able to profit off the backs of high end, established companies.¹⁸⁸ These companies' rapacious practices hinge on consumers' desires. The everyday consumer is likely not looking at the law prior to making a purchase, thus, the law stops with the companies.¹⁸⁹

In addition to the Act, there ought to be a burden placed upon the due diligence of companies to limit the infringement of designs. Established higher end companies have legal departments that review any designs prior to manufacturing. The creation of a central network within the fashion industry could create such a burden.

4. *The Centralization of Due Diligence*

¹⁸⁴ Reuters, *Louboutin Wins EU Court Battle Over Trademark Red Soles*, BUSINESS OF FASHION (June 12, 2018),

<https://www.businessoffashion.com/articles/luxury/louboutin-wins-eu-court-battle-over-trademark-red-soles>.

¹⁸⁵ Dr. Fridolin Fischer, *supra* note 178.

¹⁸⁶ Lamare, *supra* note 42.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.*

¹⁸⁹ Reuters, *supra* note 184.

Due diligence of a company and its products is vital to the freedom of revenue. Some companies are scrutinized by their central legal teams for their designs prior to their production and sales.¹⁹⁰ A centralized network would create a communication basis between companies that would halt any potential infringing designs prior to them hitting the markets. This network may also establish a more competitive industry that would expand the fashion industry beyond what is already on the market. Enforcing the Act prior to anything hitting the market creates a proactive approach of enforcement as opposed to our reactive system that only applies when infringement issues are brought before a court. The courts have addressed infringement issues with no response by legislation, and as a result this has allowed for fast fashion companies to continue acting within their best interest and rather than the interest of the expanding the marketplace for consumers and companies alike.

Designers forming an unregistered community system, may function as a substitute for a formal registration system.¹⁹¹ This system would provide a three-year protection to certain elements that a designer deems necessary and unique to the company, giving ultimate protections to the owner of the design. The unregistered community system would merely require proof of design in the form of a drawing, photograph, or written description. Once it is on the market, the owner of the design can claim the design and prevent unauthorized use of the design by proving original and initial registration with the community system. Many companies already have legal departments reviewing designs prior to manufacturing and selling products to avoid any trademark issues and litigation. This network would be made up of attorneys and designers alike that would centralize the industry outside of individual companies, creating an unbiased approach toward the application of trademark law. This would not be a replacement for legal departments within the companies that review designs and potential infringements, but rather an extension of those departments. This centralization of unregistered designs would provide an accessible database to cross reference unique designs as a formality.

5. *Too Much Trademark Can Overwhelm an Industry*

The Lanham Act has long been instituted to provide rights to those who use the law to protect and register their marks. Often this system has been used by the established companies that have the resources to do so and to

¹⁹⁰ CLINE, *supra* note 16, at 46.

¹⁹¹ The Unregistered community system is modeled after the EU's unregistered community design, that does not require a formal trademark registration, merely documentation of the design being unique to the company/designer. The ownership of the design is known and is still protected without having to formally register with a trademark. Mewburn Ellis, *UK & EU Unregistered Designs- The Basics*, MEWBURN ELLIS, <https://www.mewburn.com/law-practice-library/uk-eu-unregistered-designs-the-basics> (last accessed Mar. 5, 2021).

follow up with litigation if necessary. The Act has provided options for both trademark and trade dress, allowing for some protections for companies within the fashion industry. Trademark, protects the overall trades of the company, the logos, the name, etc.¹⁹² Trade dress provides some insight to the protections of unregistered marks or those marks distinctive of a specific company.¹⁹³

i. *Trademarks are Finite and Exhaustive*

The Act allows companies to protect their brands in light of what they are recognizable for. With an ever-growing fashion industry, many companies emerge on a yearly basis, and seek protections under the Act.¹⁹⁴ An oversaturation of the industry may lead to the depletion of trademarks as companies seek to register many aspects of their brand in order to protect themselves.¹⁹⁵ The English language being used to fashion these trademark registrations may result in an exhaustion of terms available to be trademarked by companies, causing companies to revert to combining words to avoid this issue.¹⁹⁶ Companies may attempt to register everyday words to protect designs that may only be in trend for one season.¹⁹⁷ The oversaturation of the industry would lead to exhausting resources by a company to research and commit to researching for marks that have not been claimed by other industry giants.¹⁹⁸ This would shatter any possibility of a growing industry and newcomers into the industry simply because it would be far too costly to get off the ground after depleting resources to find possible markers to claim.

ii. *Registration is Far Too Costly*

Abiding by the Act and registering marks can become far too costly because it requires not only the research of what is available for use by companies, but it also often requires the force of a legal mind to aid in the navigation of intellectual property law.¹⁹⁹

iii. *Courts Regulate the Industry*

¹⁹² 15 U.S.C. § 1125(a).

¹⁹³ 15 U.S.C. § 1115(b)(4).

¹⁹⁴ Barton Beebe & Jeanne C. Fromer, *Are We Running Out of Trademarks? An Empirical Study of Trademark Depletion and Congestion*, 131 HARV. L. REV. 945 (2018).

¹⁹⁵ *Id.* at 947.

¹⁹⁶ *Id.* at 947–48.

¹⁹⁷ Brand Off-White has filed a patent to trademark the quotation (“For Walking”) for use on footwear, to which the USPTO has denied citing *In re Oppendahl & Larson LLP*, 373 F.3d 1171, 1173 (Fed. Cir. 2004) (“a mark may be merely descriptive even if it does not describe the ‘full scope and extent’ of the applicant’s goods or services.” Instead, “it is enough if a mark describes only one significant function, attribute, or property.”).

¹⁹⁸ Beebe & Fromer, *supra* note 194.

¹⁹⁹ Stephen L. Carter, Comment, *The Trouble with Trademark*, 99 YALE L.J. 759, 769 (1990).

As of today, there are no central agencies regulating the fashion industry. The judicial system has assumed the regulatory role of the Lanham Act protection and applications. When an issue of trade dress arises, it is adjudicated and resolved on a case-by-case basis. Courts, when assessing the protections under the Act regarding trade dress look to the arbitrary tests they have established in cases prior to decide the case before them.²⁰⁰ The courts have relied on eight distinctive factors to decide the trade dress infringement issue before them.²⁰¹ These factors include (1) the strength of a mark; (2) the degree of similarity between the original mark and the mark in question; (3) the proximity of areas of commerce; (4) evidence of actual confusion; (5) defendant's good-faith effort in adopting its own mark; and (6) the quality of the defendant's products.²⁰²

iv. *The Fashion Industry is Constantly Changing*

The ever-evolving nature of the fashion industry makes it difficult to regulate the market for that very reason. What is "in" one season is "out" the next. Fast fashion companies have adopted a 52-season model, where the more traditional fashion companies still follow a four-season model.²⁰³ The constant release of products makes for registration of marks difficult to keep up with the evolving industry.²⁰⁴ The influence of social media has expedited the fashion trend output, as celebrities and influencers are constantly debuting products, creating a demand for a celebrity look from purchasing consumers.

V. CONCLUSION: THE LAW OUGHT TO REFLECT THE COURTS' CONSISTENT DECISIONS

Courts have time and time again established that the purpose of trademark law is to protect both trademark and trade dress, going so far to create tests that establish what a trade dress protection would entail.²⁰⁵ Deriving two characteristics that would provide a company standing in court, from the Lanham Act, courts have proven that this is a valid issue. Focusing on the distinctive nature of a trade dress, such as the Gucci red and green or navy and red stripes, has been proven to be protected under the Act.²⁰⁶ As well as the secondary meaning of a trade dress, the importance of this trade

²⁰⁰ *Wal-Mart Stores v. Samara Bros.*, 529 U.S. 205 (2000) (A mark can be inherently distinctive or have acquired distinctiveness).

²⁰¹ *AMF, Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-49 (9th Cir. 1979); *Polaroid Corp. v. Polarad Electronics Corp.* 287 F.2d 492, 495 (2d Cir. 1961).

²⁰² *Sleekcraft Boats*, 599 F.2d at 348-49; *Polarad Electronics Corp.*, 287 F.2d 492 at 495.

²⁰³ CLINE, *supra* note 16, at 38.

²⁰⁴ *Barnes & Lea-Greenwood*, *supra* note 30, at 8.

²⁰⁵ *Wal-Mart Stores, Inc.*, 529 U.S. 205.

²⁰⁶ *Gucci and Forever 21 Settle Battle over Stripes*, THE FASHION LAW (Nov. 21, 2018), <https://www.thefashionlaw.com/gucci-forever-21-settle-battle-over-stripes/> [<https://perma.cc/H4AA-3R74>].

dress to a plaintiff company's revenue in addition to the recognizable nature of the trade dress to a consumer.²⁰⁷ These tests have been consistently used by the courts to decide trade dress issues, but have yet to be reflected in the Act.

The argument that trademarks are depleting quickly, comes with little to no evidence, rather, the issue arises from companies seeking to register the same trade, because it has been deemed profitable.²⁰⁸ While it may be that trademark is exhaustive, trade dress is the issue at hand. Trade dress is much less exhaustive because it relates back to the distinct designs and features of a brand. The specific designs associated with a brand can be protected because they are clearly distinct to that brand and company.²⁰⁹ Furthermore, the consumer does play a major factor in these decisions. Fast fashion companies have built their consumer market based off of the desires of purchasing luxury for less. They have monetized the infringement of designs by high end established companies, profiting and growing immensely.

The issue of "confusion" per say is not a matter of direct consumer response, but rather societal response to the Fast Fashion infringements. Customers of fast fashion companies are clearly aware of the purchases they make and are knowledgeable that the fast fashion designs are not the high-end designs but, the similarities are what draw these consumers in. By allowing these fast fashion companies to incessantly profit off the back of these high-end companies designs, the competitive nature of our marketplace is diminished, because little effort is being made by fast fashion companies to grow the industry.

Thus, begging the question of why the legislation has not reflected the courts consistent rulings. The adoption of these rules could ultimately lead to less infringement legislation resulting from Fast Fashion companies. While this amendment to the Act does not have to engulf all trade dress registrations, it would allow for major aspects of company revenue not protected under trademark, to be protected as registered trade dress.

The fast fashion business model has created a necessity for the expansion of the Lanham Act. The constant infringements examined, by various fast fashion companies has shown through litigation that there is a sufficient gap in the protections awarded to the garment and accessory industry. Expanding the Act to include courts' decisions would allow for companies to register trade dress under the factor test established by courts and may minimize litigation regarding the Act as well as provide a proactive approach to the issue. Creating a network that would centralize the fashion industries trade dress registration may also eliminate the cost of research and legal counsel for those looking to enter the fashion industry.

²⁰⁷ *Id.*

²⁰⁸ Beebe & Fromer, *supra* note 194.

²⁰⁹ Reuters, *supra* note 184.