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5 trends affecting luxury fashion IP in 2024

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From the catwalk to the courtroom, fashion brands are set for an interesting year ahead, find Lynda Zadra-Symes, Jeff VanHoosear and Talisha Faruk of Knobbe Martens.

The intersection between luxury fashion and IP is an ever-changing landscape, moulded by consumer preferences, technological advancements, supply-chain issues and legal developments.

In the realm of creativity and innovation, IP rights and their protection remain paramount for luxury fashion brands while counterfeit goods, replicas, and IP infringement cases continue to proliferate.

As e-commerce and related virtual experiences introduce new avenues for exploitation, there are five emerging trends that may impact the IP landscape in the luxury fashion industry this year.

Catwalk to the courtroom

Fast-fashion retailers like Shein, Fashion Nova, and Zara have gained massive popularity with a business model that allows them to design, manufacture, and distribute inexpensive replicas of designs by luxury brands before the original designs even hit the stores.

However, the success of these e-commerce retailers has led to a string of legal battles based on trademark and copyright infringement claims. In the first three years since its debut, Shein has been named as a defendant in at least 50 federal lawsuits in the US.

While it is suggested that Shein's projected revenue could reach $60 billion by 2025, infringement lawsuits against the Chinese retailer and other fast-fashion brands may also continue to expand in the coming year.

The numerous lawsuits against Shein include Dr. Martens allegation that Shein manufactured and marketed counterfeit footwear, Ralph Lauren's claim for trademark infringement and unfair competition over the alleged use of the brand's iconic polo player logo, and an action by eyewear brand Luxottica Group's for copyright infringement.

Most recently, three independent designers filed a lawsuit against Shein alleging the company sold "exact copies" of their works. Such copyright claims can be difficult for the plaintiff to prove, as clothing is deemed a utility item with limited copyright protection.

However, under the 'conceptual separability' doctrine of copyright law, it may be possible to protect graphic or sculptural designs which can be identified separately from the utilitarian aspect of the goods, as held in *Star Athletica v Varsity Brands* *580 U.S. 405* (2017).

In addition to copyright protection, clothing designers can consider a more comprehensive IP protection strategy by patenting non-functional design features, and registering trademark names, logos, and designs with the US Patent and Trademark Office (USPTO).

Rise of virtual goods

The convergence of luxury fashion and IP protection has also led to cases involving the rise of virtual goods. In a recent decision, Hermès sued artist Mason Rothschild, over the non-fungible tokens (NFT) 'MetaBirkins', a digital version of the brand's very famous (and very expensive) Birkin bag with an animation of a foetus inside it. Rothschild estimated that he earned $125,000 from the NFTs, including sales and royalties. The case involved the nature of digital assets and whether NFTs are commodities or art protected under the First Amendment.

Hermès argued that the NFT diluted its trademark, and that prospective customers would fall prey and falsely associate the brand with the defendant's virtual goods. After trial, the jurors found that the defendant's NFTs were not protected speech.

The jury found that 'MetaBirkins' were more similar to commodities, which are protected by trademark law, than they were to artistic expression, where appropriation may be considered protected speech. The jury concluded that Rothschild's NFTs infringed on Hermès trademark rights and constituted dilution and cybersquatting, and awarded $133,000 in damages to Hermès. This case provides guidance on the differentiation between artistic expression and commercial goods, which will be crucial as trademark disputes over NFTs continue.

Fashion as artistic expression

In another legal development in the fashion industry, the US Court of Appeals for the Second Circuit ruled in favour of Vans, determining that the 'Wavy Baby Sneakers' produced by the art collective MSCHF is likely to cause confusion among consumers and is not entitled to First Amendment protections that apply to artistic expressions under trademark law.

While the MSCHF sneakers incorporated a wavy sole, the court held that they mirrored Vans' 'Old Skool' product in colour scheme, material and general shape.

The court determined that the First Amendment did not protect MSCHF, as MSCHF used Vans' trademark not merely to advance artistic expression, but rather to 'brand their own products.' Moreover, the court held that "while the manifesto accompanying the shoes may contain protected parodic expression, the Wavy Baby shoes and packaging in and of themselves fail to convey the satirical message."

This decision is likely to have an impact on application of the parody doctrine, and emphasises the fine line creators must walk between homage and infringement. As the sneaker culture in the fashion industry continues to evolve, the protections afforded by the First Amendment and holdings in cases like MSCHF will shape the design elements and related protections sought by brands.

Heightened parody evaluations

Given the high status associated with luxury fashion brands, they are an easy target for parody. In the recent *Jack Daniels v Bad Spaniels* trademark dispute, the US Supreme Court held that the humorous use of a trademark will not always receive heightened First Amendment protection from infringement claims.

VIP Products sells a line of dog toys, one of which resembles a bottle of Jack Daniels liquor. Instead of 'Jack Daniels' and 'Old No. 7 Brand Tennessee Sour Mash Whiskey,' the words 'Bad Spaniels' and 'The Old No. 2 on your Tennessee Carpet' are emblazoned across the toy. Even though the toys include a disclaimer that the toys are not affiliated with the liquor brand, Jack Daniels argued the toys infringed upon its trademark, and that consumers would be led to believe the toys were affiliated with Jack Daniels. In addition, Jack Daniels argued that its famous trademark would be diluted.

The Supreme Court held that VIP's use of the mark should be evaluated using traditional trademark infringement analysis, and not receive the benefit of the heightened First Amendment protection afforded parodies under the *Rogers* Test. The court held that the *Rogers* Test was not applicable because VIP's trademark use was "in the way the Lanham Act most cares about: as a designation of source for the infringer's own goods". The takeaway is that companies marketing parody products need to be careful not to use the alleged parody as a trademark for their products.

More risks with influencers

The move towards the use of influencers in brand marketing has increasingly led to the rise of micro and nano-influencers. While their following may be small compared to recognised entertainment and sports celebrities, they may each still have considerable influence within their circle.

They have proven to be relatable triggers for consumers to comment, engage, and click the 'purchase' button. Given the low barriers to entry for such influencers, however, the use of influencer endorsements often leads to dilution, loss of integrity, and false advertising claims. The Federal Trade Commission (FTC) recognised this trend in its recent revisions to its endorsement guide. These revisions may greatly impact luxury fashion brands.

Under the FTC Act, advertising must be truthful and non-deceptive, advertisers must have evidence to back up their claims, and advertisements cannot be unfair. According to the FTC's Deception Policy Statement, an ad is considered deceptive if: "It contains a statement—or omits information—that is likely to mislead consumers acting reasonably under the circumstances, and is 'material'—that is, important to a consumer's decision to buy or use the product."

In line with the revisions, the FTC sent warning letters to two trade associations and 12 influencers for inadequately disclosing sponsored Instagram and TikTok posts promoting artificial sweetener aspartame and the sugar-containing products. All brands using influencer endorsements should be mindful of the FTC's requirements in this area.

These five emerging trends all suggest luxury fashion brands may derive a major benefit from diversifying their IP portfolios. This will provide brand owners with additional enforcement tools to combat infringement, imitations, and others trading off their goodwill.

Social media and virtual marketing add novel areas for infringers and imitators to exploit luxury brands and require brand owners to navigate a universe of ever-changing challenges. These challenges not only present novel legal issues, but also go to the core of the luxury fashion industry—preserving the authenticity of the brand.

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