



Chapter 4

Processes and Pitfalls in Fashion Design and Product Development

THE OBJECTIVES OF THIS CHAPTER ARE TO:

- Understand the role of fashion in the design inspiration and development process
- Differentiate from among the methods used for design inspiration and selection, and explore the role of ethics for each -
- Understand the definition and concept of intellectual property
- Explore the difference between design inspiration, creating knockoffs, and copyright infringement
- Compare and contrast the concepts of branding and brand representation with design and style
- Understand the relationship between developing intellectual property and participating in the fashion adoption process
- Examine the economic incentives for unethical behavior with respect to design and intellectual property

Fashion products are valued by consumers for their style to an extent that surpasses the item's ability to meet basic physiological needs. Fashions fulfill social and psychological needs rather than consumers' primary physiological needs of warmth, protection, and comfort. However, fashion apparel can meet these physiological needs as well. This functional element of fashion apparel introduces complications and controversy—ethical, artistic, and economic—with regard to owning and protecting design innovations.



FIGURE 4.1

Fashion exists when a critical mass of consumers select similar styles of apparel that fulfill desires to exhibit personal tastes, indicate membership in recognized groups, and/or demonstrate abilities to purchase exclusive or expensive merchandise. The fact that fashion is acquired out of desire, rather than necessity, lends conflict to the purpose of apparel and the role of design innovation presented through clothing. Fashion clothing, because of its functional body-covering role, is not protected by copyright law except in the case of specifically functional design features such as zippers, other fasteners, and unique patterns in fabrics and stitching (such as the Levi Strauss & Co. back pocket stitching). The roles of fashion apparel, footwear, and accessories as both functional and artistic items complicate the ethical perspectives of their fair use in the marketplace. Ongoing debates, often taking place in courtrooms, continually investigate whether design styles can or should be owned by copyright holders.

Design inspiration is complex, resulting from myriad influences. Completely new fashion products or styles are rare. Current fashions combine previous design ideas; they reflect historical, political, and technological influences and provide a combination of functional new style elements that generate consumer excitement while still exhibiting a certain level of comfort from familiarity. Essentially all "new" fashion styles are based on something that has been seen before. This concept was summarized by Donna Karan in the Foreword of Bonnie Young's (1998) *Colors of the Vanishing Tribes*: "As a designer, I am always asked where my inspiration

comes from. The answer lies in the advice my mentor, Anne Kleiit, gave me: 'God gave you two eyes. Use them!'"

Fashion can apply to many categories, including home appliances, architectural structures, automobiles, literature, food, leisure activities, and hairstyles. Among the most obvious examples of fashion items are apparel, footwear, and accessories. The fashion aspect of these items are most easily recognizable by the styles depicted through silhouettes but can also be identified through branding, logos, signature colors, patterns or prints, and other distinctive design elements. For example, Tommy Hilfiger apparel, denoted with the distinct flag logo, may be a particularly fashionable item. A similar example is the Louis Vuitton handbag, recognized by its signature fabric; those who value fashion might consider this item to be desirable. Alternately, a classic-line short suit jacket without lapels, inspired by Coco Chanel, might be a popular style and therefore in fashion.



FIGURE 4.2 It is difficult to identify the originator and/or classic designs and styles that reappear on a seasonal basis. *Good Housekeeping* (October 2005) offers examples of how simple it is to find fashions of similar styles offered by a variety of designer brands and retailers at prices ranging from budget to better.

FASHION THEORIES ON ADOPTION AND DIFFUSION

The democratization of fashion was observed by Edward Sapir (1931), who noted that the Industrial Revolution permitted the spread of fashion diffusion by enabling a greater number of people to afford the fashions that could finally be mass-produced. Thorstein Veblen (1899) introduced the concept of conspicuous consumption in his book *The Theory of the Leisure Class*. He observed that fashion apparel, because of its highly visible nature, is a historically popular way for people to advertise their wealth and status—whether real or perceived. He stated that people are willing to forgo other, less visible, needs and comforts in order to support a certain amount of wasteful consumption, such as purchasing fashion items. He theorized that the social good and psychological satisfaction of portraying consumption activities made conspicuous consumption a rational choice. Veblen was also aware of the economic and social effects of copying original fashion items, when he commented that “the aesthetic value of a detected counterfeit in dress declines somewhat in the same proportion as the counterfeit is cheaper than its original. It loses caste aesthetically because it falls to a lower pecuniary grade” (p. 120). Thus, the role of copying has long been recognized and accepted in the fashion process. In fact, acceptance of copying in the fashion industry has historically been differentiated from copying of other creative products (such as book authorship), as evidenced by the following comment from Arnold Plant, a British professor of economics, in 1934:

The leading twenty firms in the haute couture of Paris take elaborate precautions twice each year to prevent piracy; but most respectable “houses” throughout the world are quick in the market with their copies (not all made from a purchased original), and “Berwick Street” follows hot on their heels with copies a stage farther removed. And yet the Paris creators can and do secure special prices for their authentic reproductions of the original—for their “signed artist’s copies,” as it were (p. 172).

The fashion adoption process is familiar to apparel designers, product developers, sourcing specialists, and retailers. As styles go through a process of diffusion and are made readily available to consumers, fashion cycles, or trends, become established. Fashion is the prevailing style at the time. As previously mentioned, style can be depicted by silhouette, color, color combinations, print, fabric or other material, or specific design or pattern. Seasonal styles are conceived and presented by fashion designers who typically display their work through runway shows. These couture fashions are then worn by high-profile people who are often photographed for popular media outlets such as *Women’s Wear Daily*, *People*, and *InStyle*.

After the styles gain credibility as being fashionable, mainstream manufacturers and retailers modify them for potential adoption by large numbers of people. Widespread adoption transforms a style into an accepted and recognized fashion.

George Simmel, a German sociologist, wrote in 1904 about the two contrasting forces of fashion—conformity and individuality. He observed that “the elite initiates a fashion and, when the mass imitates it in an effort to obliterate the external distinctions of class, abandons it for a newer mode” (p. 5). In his essay on fashion he emphasized the role of imitation in the adoption process. He noted that without broad acceptance of a prevailing style, fashion would not exist, and observed that “the very character of fashion demands that it should be exercised at one time only by a portion of the given group, the great majority being merely on the road to adopting it” (p. 9). How are the masses of consumers who eventually validate a style able to acquire the merchandise? Obviously, it must be made widely available at affordable prices. When the demand for merchandise similar to a desirable, but often limited, fashion item is established, the market for imitation items is born. With great insight, Simmel stated, “The more an article becomes subject to rapid changes of fashion, the greater the demand for cheap products of its kind, not only because the larger and therefore poorer classes nevertheless have enough purchasing power to regulate industry and demand objects . . . [and] even the higher circles of society could not afford to adopt the rapid changes in fashion forced upon them by the imitation of the lower circles if the objects were not relatively cheap” (p. 15).

Historic references to fashion adoption theorize a trickle-down process, where the upper class sets the prevailing style by wearing the latest expensive fashions shown in the couture houses. Current fashion is typically initiated by and associated with high-profile individuals, groups, or cultures. Rather than exclusively emanating from the upper class (such as haute couture runway items worn by socialites and celebrities), we also look to popular events, television shows, movies, athletes, subcultures, musicians, or other entertainers for influence. The grunge look of the 1990s and the sweat suits and leggings of the 1980s exemplify trickle-up fashion, where casual clothing of the masses found its way into designer collections. Cultural influences that become popular across a wider consumer audience, such as Sean John apparel (inspired by the youthful, inner-city population), demonstrate the trickle-across fashion theory.

Another way to explain fashion adoption is through role theory. In *The Presentation of Self in Everyday Life*, sociologist Ervin Goffman (1959) described the way that people perform in their life roles as if they were players on a stage. Visual cues such as clothing choices are components of the roles being played. Role theory suggests that our outward appearances (e.g., clothing choices) are selected to explain our

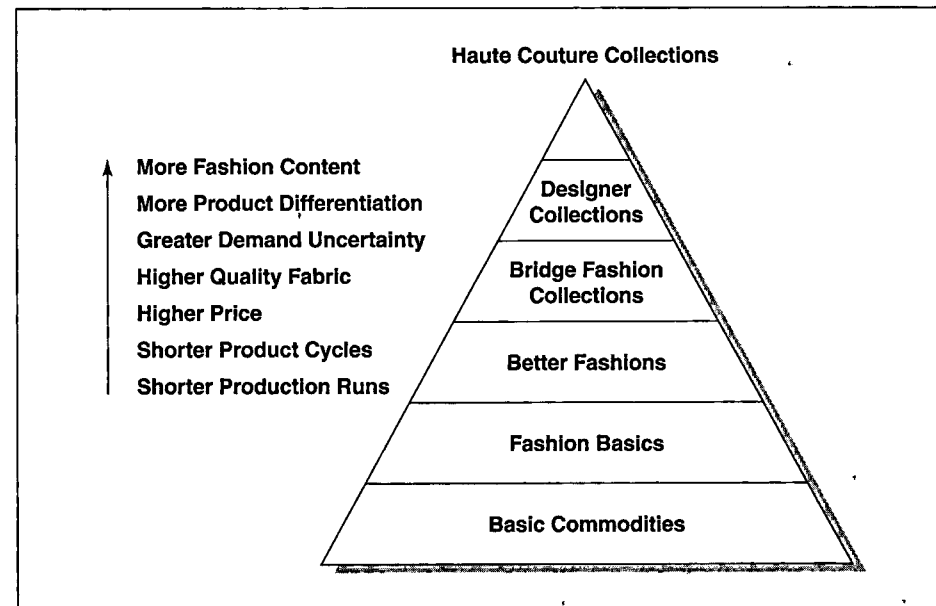


FIGURE 4.3 Doeringer and Crean's fashion pyramid

roles in society. In other words, we use fashions to express our place in the world. This concept is related to the concept of symbolic interaction, which was explored and presented by sociologist Herbert Blumer (1969) in his book *Symbolic Interactionism: Perspective and Method*. The theory of symbolic interaction expands on role theory to explain that the human process of social interaction creates meanings for the people involved through language and thought associated by and resulting from interactive communication. Role theory and the theory of symbolic interaction explain fashion adoption as a process of adapting one's appearance to better explain messages conveyed by the wearer.

The fashion pyramid (Doeringer and Crean, 2006) illustrates how fashion apparel typically originates in the elite setting of haute couture collections, where only a small group of consumers will adopt the items, and then increasingly greater volumes of apparel in fashionable styles are produced as the unique fashion content of the items are modified to reduce production costs, increase production speed, and yet still resemble the fashionable styles that consumers want. Generally, this "watering down" of fashion results in less distinguishing features in the apparel details (such as modified and diminished pockets, belts, and fasteners; finishing techniques, and fabrics) that enable production and retail costs to be reduced. These modifications can also change the new products enough from the originals to prevent lawsuits.

Because fashion evolves, generally building on recent trends rather than presenting entirely new style elements each season, merchandise for new lines and seasons rarely includes altogether unfamiliar styles. The "newness" of fashion often emerges by transforming familiar styles with new color combinations, hemlines, shoe heights, and silhouettes. Historic influences are incorporated along with new concepts as potential fashions are designed and introduced for consumer consideration. Director of Levi's brand presence, Amy Jasmer, described the typical process of fashion design when Victoria Lynford was tapped to serve as Designer for a Day with Levi's (Tucker, 2006b): "We told her to go out and see the denim trends, and then go to one of our stores and see what we do." Lynford reviewed the Levi's archives and discussed her design plans with a team. According to Jasmer, this helped lead to a "successful jean design" because Lynford was familiar with the styles of existing Levi's jeans and knew how she wanted to contribute to that. The new design was not created in a vacuum, nor did it differ substantially from the jean style familiar to Levi's customers.

FASHION BRANDS

The American Marketing Association (AMA) defines "brand" as a name, term, sign, symbol, or design, or a combination of them, intended to identify the goods or services of one seller or group of sellers and differentiate them from those of competitors (www.marketingpower.com). According to the AMA, the legal term for brand is "trademark." Copyrighted logos are also known as trademarks. A registered trademark (i.e., a trademark registered with the U.S. Patent and Trademark Office) is denoted by the symbol ®. An unregistered trademark, or one in which the registration is pending must use the ™ symbol; likewise a claimed service mark, to indicate ownership of intellectual property designating a service may use the symbol ℠ prior to official registration. Although these informal trademark or service mark designations do provide some protection in the marketplace, official registration ensures that the claim for ownership will be legally recognized. To be successfully registered by the United States Patent and Trademark Office, the trademark or service mark must clearly distinguish the product or service from others in commerce. Registration is important for fashion trademark owners, particularly when they seek to register surnames, which require establishing a secondary meaning for consumers. For example, in order to successfully register the name "Zac Posen" as a trademark, Zac Posen must be linked to a secondary meaning beyond that of a personal name. The trademark registration may be approved when

BOX 4.1

GLOSSARY OF INTELLECTUAL PROPERTY TERMS

Brand—A name, term, sign, symbol, or design, or a combination of them, intended to identify the goods or services of one seller or group of sellers and differentiate them from those of competitors (www.marketingpower.com).

Copyright—A registration of intellectual property ownership that protects artistic and literary work (www.uspto.gov).

Counterfeit—A product that bears the label or distinct copyrighted design feature of another designer or brand without having paid licensing fees or obtaining permission to copy the trademark.

Knockoff—A fashion item that is almost identical to a designer or brand name product in style, but does not bear false labeling to mislead the consumer into thinking that the garment is an object of the name brand itself.

Patent—A property right granted by the government of the United States to an inventor to “exclude others from making, using, offering for sale, or selling the invention throughout the United States or importing the invention into the United States” for a limited time in exchange for public disclosure of the invention when the patent is granted (www.uspto.gov).

Piracy—The act of illegally copying branded merchandise or protected intellectual property, named for the acts of maritime pirates who commit robbery for their own gains. Piracy in terms of intellectual property refers to the theft of copyrighted work, trademarks, service marks, and patents.

Zac Posen can establish that consumers recognize the name as a designer of fashion goods and not just the name of an individual person. Registered trademarks make it illegal for others to use or sell merchandise bearing the trademark without permission. Furthermore, trademarks are protected as part of the law prohibiting unfair competition.

Consumers often see a brand as a status symbol. Lack of possession or display of a certain brand may be seen by some as failure to achieve a desired status. For example, Lacoste is a longstanding brand with a recognizable logo—the crocodile—that has been a popular fashion item, especially among tennis players, since the 1930s. A polo shirt without a logo does not represent the level of prestige for its wearer that is associated with the Lacoste shirt. Other brands of similar shirts, such as Polo by

BOX 4.1 continued from page 84

GLOSSARY OF INTELLECTUAL PROPERTY TERMS

Service Mark—The same as a trademark, except that it identifies and distinguishes the source of a service rather than a product (www.uspto.gov).

Trade Dress—A product’s design, product packaging, color, or other distinguishing nonfunctional element of appearance (www.uspto.gov). The Trademark Manual of Examination Procedures (TMEP) §1202.02 states that, in an application for trade dress, distinctiveness and functionality are two separate issues, both of which must be considered by the examining attorney. Trade dress is an extension of trademark law that extends when the product brand achieves secondary meaning for consumers inasmuch that if it is copied, consumers will associate the copy mistakenly to be the original.

Trademark—A word, phrase, symbol, or design, or a combination of words, phrases, symbols, or designs, that identifies and distinguishes the source of the goods of one party from those of others. The owner of a registered trademark may pursue legal proceedings for trademark infringement to prevent unauthorized use of the trademark although registration is not required. Trademarks can be renewed forever as long as they are being used in commerce (www.uspto.gov).

Ralph Lauren (represented by a horse-riding polo player logo), are different from generic polo shirts and unique to their brand owners because their particular logos are copyrighted. Branded merchandise, evident by distinctive trademark features (such as the Nike “swoosh” or the word “PRADA” on a handbag), is often viewed as more desirable and more fashionable, than unbranded merchandise. Furthermore, branded merchandise is more expensive because (1) the law of supply and demand allows the market to bear higher prices associated with more desirable merchandise and (2) the costs associated with advertising brands and protecting copyrights are significant. Because logos are easy to recognize and potentially lucrative for anyone to sell, they are tempting to copy. Issues of ethics arise when those who do not own the trademarks are motivated to modify or copy popular logos, trademarks, or service marks and therefore benefit through sale of fake merchandise.

In addition to the concept of role theory previously discussed, Goffman (1959) also described the theory of symbolic interaction; a system where people portray behaviors and appearances that are interpreted by others as they negotiate social

situations. Fashions, particularly those associated with explicit symbols such as logos or signature patterns, are easily recognized and widely used in social situations to both provide and interpret information about the wearers' taste, interests, rank or status, wealth, and personality. Consider the sports fan decked out in Dallas Cowboys merchandise—cap, jersey, sweatpants, jacket, etc. The message is clear. At a glance we know (or at least assume) about the wearers' interest in professional football, and his or her passion for the Cowboys. Furthermore, if the items feature the trademark logo, we assume that this consumer is willing to spend hundreds of dollars on trademarked merchandise that is only legally available from licensed producers and through specified retailers. The Dallas Cowboys and the National Football League (NFL) own the trademark and have the authority to determine what merchandise will display the copyrighted logo. The producers and sellers of the merchandise pay for licensing rights, and the economy of trademarked merchandise is built—along with the opportunity and market for copies.

Because logos and signature patterns, prints, and colors are highly visible and recognizable, they are easy to modify into new, similar styles and to copy outright. Modern technology (e.g., Internet access to high-resolution logo images) and high-performance embroidery machines that can produce thousands of copied logos per hour further motivate counterfeit production. Intellectual property ownership and copyrighting become important issues when a design or style is recognizable, associated with a certain status, and popular enough to be demanded by consumers.

WHAT IS INTELLECTUAL PROPERTY?

Intellectual property is an idea of invention, such as a particular fabric print, apparel detail such as a stitching design, or name. Intellectual property recognizes exclusive ownership through copyrights, trademarks, and patents. As its name implies, copyrighting offers the owner of original creative work the sole right to reproduce and distribute the work. Others who want to reproduce the work must seek permission, and generally pay a royalty to the owner to do so. Names, symbols, pictures or words, unique packaging, color combinations, product styles, and overall presentations that are associated with intellectual property may be granted trademark status. The words "trademark" and "brand" are used interchangeably to signify protected intellectual property.

Patents, which are associated with intellectual property of inventions, have virtually no application to fashion products for two reasons. First, patents are only granted to new ideas. As previously mentioned, most fashion products include

some element of historic style. Second, the patent application process is prohibitively long. For a fashion style, the fashion window will have closed long before the patent has been granted. But patents do offer important protection for manufacturers with inventions related or contributing to the production of fashions. Patented fashion items include manufacturing processes to make pleats or other fabric variations, the manufacture of fibers, fabrics, and dye materials, and the processes to affix beads or sequins. Additionally, mechanical inventions, such as buckle and zipper fasteners, are often patented.

Brand owners create distinction for themselves in competitive markets when their advertising and other promotional techniques (coupled with customer experiences) lead consumers to associate status, success, prestige, improved quality of life, and other psychological and sociological benefits with the use of the particular branded product. Picture an image you associate with names such as Chanel, Nike, Calvin Klein, Sean John, Crocs, and Liz Claiborne. Chances are that you easily pictured images consistent with the advertisements and products of these brands because they are widely familiar to consumers, and distinctly different from one another. A brand that has built a strong association with a product category achieves great economic advantage in the marketplace. Consider the products associated with Kleenex, Xerox, Jell-O, iPod, Chapstick, and Under Armour. For these products, the brand defines the product. These products are so closely connected to their brand names that it is in the companies' best interests to spend significant time and money protecting their exclusive ownership. Tiffany spends over \$1 million each year just on tracking and ceasing counterfeit online auctions (Casabona, 2006). Lacoste spent \$5 million in lawyer fees in 2006, which resulted in the confiscation of three million units in 4,000 different actions (Thomas, 2007). Companies often budget funds specifically to educate consumers, retailers, and other brand owners that their identities should not be used to generically define styles or product categories.

In many instances, the corporate reputation of a company that creates and sells goods is established through its products (Fan, 2005). When consumers mistake imitation merchandise for authentic goods, the reputation of the brand—and the business behind it—is compromised. For this reason, certain distinguishing fashion elements are protected by copyright law. Copyright law enables brand owners to recover financial damages when it is proven that sales of infringing merchandise have confused consumers to an extent that they mistake the copy for the real thing. As mentioned previously, fashion products themselves rarely receive copyright protection because of the functional nature of the creative work. But copyright law does cover artistic elements applied to clothing (e.g., the pattern designs

A NOTE OF INFORMATION AND ENTREATY
TO FASHION EDITORS, ADVERTISERS,
COPYWRITERS AND OTHER
WELL-INTENTIONED MIS-USERS OF
OUR **CHANEL** NAME.

CHANEL was a designer, an extraordinary woman who made a timeless contribution to fashion.

CHANEL is a perfume.

CHANEL is modern elegance in couture, ready-to-wear, accessories, watches and fine jewelry.

CHANEL is our registered trademark for fragrance, cosmetics, clothing, accessories and other lovely things.

Although our style is justly famous, a jacket is not 'a CHANEL jacket' unless it is ours, and somebody else's cardigans are not 'CHANEL for now.'

And even if we are flattered by such tributes to our fame as 'Chanel-issime, Chanel-ed, Chanels and Chanel-ized', PLEASE DON'T. Our lawyers positively detest them.

We take our trademark seriously.

Merci,
CHANEL, Inc.

FIGURE 4.4 Chanel ad that shows ownership of a name

of Burberry fabrics). Branding and logos offer additional economic advantages to producers of fashion merchandise, as discussed in the preceding section. It is also important to brand owners that their intended brand image is widely recognized by consumers. This secondary meaning is a recognized component in the registration of trademarks and plays an important role in the validity of competitor challenges in trademark law.

The nature of the fashion industry, where constant change is needed to ensure job security and to fuel commerce, presents challenges to brand owners who are torn between protecting their intellectual property and taking part in the industry's inherent "sharing and borrowing" that creates consumer demand and generates sales. Virtually no designer can create a completely unique line of fashion merchandise that will sell in the market, yet all would like the profits resulting from a hot fashion trend. This is a long-standing controversy in the field of fashion; designers have sought to protect the ownership of their creations for nearly 100 years. The Fashion Originators Guild was formed in 1932 by a group of designers who urged retailers to boycott manufacturers of copied designs. But trying to make retailers the responsible filter for ethics in the fashion industry was ill-founded because retailers had little motivation to increase their costs of merchandise and correspondingly decrease their sales volume and markup. Furthermore, it has been—and continues to be—difficult for original designers to identify a specific trade infringement for styles that do not have copyrighted items such as trademark logos, unique embroidery, and surface patterns on fabrics. And sometimes the very designers who indignantly complain about being copied are often targets of intellectual property complaints themselves.

Over the years, the Federal government has sought to bring a certain degree of ethics to the marketplace via legislation. The Tariff Act of 1930 offers protection of trademarks. The Landham Trademark Act of 1946 put the obligation of responsibility on producers and made it possible for trademark owners to sue to protect their work from being copied. The Trademark Law Revision Act of 1988 introduced protection for intellectual property owners at the Federal level in the United States. More recently, House of Representatives Bill 32, known as the "Stop Counterfeiting in Manufactured Goods Act," was signed into law by President George Bush in 2006. This law, the U.S. Federal Trademark Dilution Act, calls for prison terms of up to 20 years, fines up to \$15 million, and mandatory forfeiture of merchandise, destruction of equipment used for manufacture, and restitution provisions to owners of intellectual property in response to counterfeiting. In addition to stiffer penalties, the new law criminalizes counterfeit trafficking regardless of whether the counterfeited products have counterfeit labels. This means that the styles themselves,

whether or not they have been actually labeled with counterfeit logos or brand names, are subject to intellectual property protection. This is important because counterfeit goods can be manufactured in one location, imported, and then labeled in the final stages of distribution.

The Design Piracy Prohibition Act was introduced in the U.S. Senate in August 2007 after being presented to the House of Representatives in April 2007. At his press conference in New York City's fashion district to support the act, Sen. Charles Schumer (sponsor of the legislation) was accompanied by notable fashion designers including Jeffrey Banks, Narciso Rodriguez, Nicole Miller, Marc Bouwer, Richard Lambertson, Yeohlee Teng, Dana Foley, and Susan Posen (CEO of Zac Posen), as well as the past president and current executive director of the Council of Fashion Designers of America (CFDA), Stan Herman and Steven Kolb (Ellis, 2007). The proposed legislation calls for fashion designs, defined as "the appearance as a whole of an article of apparel, including ornamentation," to be subject to protection under the law. Among other things, the bill would protect original fashion designs for three years from their date of registration with the U.S. government. At the time of this writing, this act had not yet become law.

The Intellectual Property Owners Association (IPO) is a nonprofit trade group established in 1972 and based in Washington, D.C., that has traditionally focused on patent issues, but recently added trademark issues and counterfeiting to its agenda. The IPO has a Counterfeiting and Enforcement Committee, whose charge is to "develop materials and programs to educate intellectual property owners and other members of the public about legal and practical developments and strategies with respect to counterfeiting and piracy" (www.ipo.org). In the United Kingdom, the Quality Brand Protection Committee (QBPC) is the IPO equivalent (www.qbpc.org). A nonprofit trade group based in Washington, D.C., the International Anti-Counterfeiting Coalition (IACC), is comprised of trademark owners and exists for the purpose of identifying trademark infringements and seeking recourse from those manufacturers. This watchdog group compiles information about counterfeit activities and advocates for stronger anticounterfeiting legislation and greater consumer knowledge of the effects of counterfeits.

Fashion items are particularly difficult to protect using intellectual property laws for several reasons. As previously mentioned, the process of fashion creation, with tendencies to modify existing styles and reuse historical influences, contributes to the difficulty designers have in copyrighting and protecting their creations. Therefore, determining the specific design to be copyrighted is difficult. Another even more intrinsic barrier to protecting apparel fashion is that the fashion items themselves, clothing, have usefulness beyond the style designs. Historically, only

BOX 4.2

THE INTERNATIONAL ANTICOUNTERFEITING COALITION (IACC)

The IACC website presented the following in 2007:

- Counterfeiting costs U.S. businesses \$200 billion to \$250 billion annually.
- Since 1982, the global trade in illegitimate goods has increased from \$5.5 billion to approximately \$600 billion annually.
- Counterfeiting has increased over 10,000 percent in the last two decades in part due to consumer demand.
- The World Trade Organization estimates approximately 5 percent to 7 percent of the world trade is in counterfeit goods.
- U.S. companies suffer \$9 billion in trade losses due to international copyright piracy.
- Counterfeit merchandise is directly responsible for the loss of more than 750,000 American jobs, according to the U.S. Customs and Border Protection (CPB).

Brand Owners That Are Members of the International AntiCounterfeiting Coalition (IACC)

Abercrombie & Fitch	Cisco Systems Inc.
Activision, Inc.	Coach
Adidas International Inc.	Columbia Sportswear Company
American Eagle Outfitters Inc.	Daimler Chrysler Corporation
Art In Motion	Deere & Company
Ashworth Inc.	Dickies® Brand Apparel and Accessories
Batmark Limited	Dolby Laboratories Inc.
BeBe	Electronic Arts Inc.
Blueholdings Inc.	Energizer
Burberry Ltd.	Estee Lauder Companies
Calvin Klein Inc.	Federal-Mogul Corporation
Chanel Inc.	Fila USA Inc.
Chrome Hearts	

BOX 4.2 continued from page 91

THE INTERNATIONAL ANTICOUNTERFEITING COALITION (IACC)

FM Approvals LLC	Paul Frank Industries Inc.
Ford Motor Company	Perry Ellis International Inc.
General Motors Corporation	Pfizer Inc.
Gucci America Inc.	Philip Morris International Inc.
Harley-Davidson	Philip Morris USA
Harman International	Procter & Gamble
Hit Entertainment	Puig USA
JT International SA	Quiksilver Inc.
Johnson & Johnson Healthcare Systems	Reebok International Ltd.
Kate Spade LLC	Richemont International Ltd. (Cartier)
LaCoste USA Inc.	Rolex Watch USA Inc.
Levi Strauss & Co.	Seven For All Mankind LLC
Lexmark International Inc. Limited Brands	The Collegiate Licensing Company
Liz Claiborne Inc.	The Gillette Company
Lorillard Tobacco Company	The Hearst Corporation/ King Features
Louis Vuitton Malletier	The Timberland Company
Lucasfilm Ltd.	The Walt Disney Company
Mars Incorporated	Tiffany & Company
Marvel Enterprises Inc.	Tommy Hilfiger USA Inc.
MGA Entertainment	Underwriters Laboratories Inc.
Microsoft Corporation	VF Corporation
Nike Inc.	Viacom Inc.
Nokia Inc.	Vivendi Universal Games Inc.
Oakley Inc.	YKK Corporation of America
Orange County Choppers	Zippo Manufacturing Company

SOURCE: <http://www.iacc.org>, reprinted with permission.

creative designs that have no secondary utilitarian function have been subject to copyright. This means that specific stitching or appliqué patterns that are applied to apparel can be copyrighted, but the cut of the garment itself cannot be protected. Designers are debating this issue, but must continuously weigh the cost of fighting

copyists with the need to move on and create the next season's fashions. Additionally, as has previously been mentioned, designers are apt to create rules that will actually target themselves as copyright offenders, as the inspiration for fashion styles and interpretation of trends is so vast, and the resulting fashion products often very similar.

Extent of Intellectual Property Dilemmas in the Fashion Industry

As the debate over knockoff styles and fashion copyrighting continues, the infringement of copyrighted and trademarked intellectual property is growing to unprecedented levels. Even with the legal protections offered to trademark holders (brand owners), the unlicensed production, distribution, and sale of branded products is rampant. Counterfeit merchandise is produced and sold worldwide. Why? Because these activities, seen by many as unethical, can nonetheless be profitable. But the greater the sale of counterfeits, the greater the loss for trademark owners. It is estimated that counterfeit goods cost U.S. companies \$200 billion to \$250 billion each year when consumers buy fake goods instead of the "real thing" (Clark, 2006b). Furthermore, the IACC estimates that more than 750,000 jobs in the United States are lost because of the counterfeit goods that are manufactured overseas. According to the IACC, estimated sales of counterfeit goods exceeded \$600 billion in 2006, with \$139 million worth of counterfeit goods seized by customs without reaching consumers. Counterfeit goods sold through unauthorized channels do not contribute taxes to the economy and as previously mentioned, jeopardize the product reputation of brand owners. This unethical practice is fueled by consumers' demands for branded and stylized merchandise coupled with their preferences for paying far-below-market prices. Liza Casabona (2006e) reported that Seven For All Mankind knocks 10,000 auctions off eBay every month using the Verified Owners Rights Program, an automated system (VERO) that enables brand owners to report suspected counterfeit auctions. Despite the vigilant monitoring, demand for the merchandise and potential for profit are so great that the number of reported and interrupted auctions does not decrease.

In his presentation to the IACC in October 2006, Ed Kelly, an intellectual property rights attorney, indicated that consumers are "partners in crime" with counterfeiters whenever they buy counterfeit goods. He noted that counterfeiters are often involved in drug trafficking, prostitution, and terrorism—activities that are supported by income generated through the sale of counterfeits. Designers of original merchandise and brands, many of whom are members of the IACC, claim that counterfeiting creates public health and safety hazards in addition to economic

BOX 4.3

FIVE REASONS YOU SHOULD NEVER FAKE IT

1. Counterfeiting is illegal and purchasing counterfeit products supports illegal activity.
2. Counterfeiters do not pay taxes meaning less money for your city's schools, hospitals, parks, and other social programs.
3. Counterfeiters do not pay their employees fair wages or benefits, have poor working conditions, and often use forced child labor.
4. The profits from counterfeiting have been linked to funding organized crime, drug trafficking, and terrorist activity.
5. When you purchase a fake, you become part of the cycle of counterfeiting and your money directly supports these things you would never want to support.

SOURCE: <http://IACC.org>, reprinted with permission.

harm. This is particularly true for industrial products such as bolts, screws, brake pads, and for pharmaceuticals. Susan Scafidi, a law and history faculty member at Southern Methodist University and author of *Who Owns Culture?* (2005), sponsors a blog that is dedicated to newsworthy counterfeit fashion activities (<http://counterfeitchic.com>). The volume of information on this blog alone offers testimony to the vast extent of the counterfeit fashion market.

THE FASHION DESIGN PROCESS: KNOCKOFFS VERSUS COUNTERFEITS. Copying in the fashion industry occurs over a wide spectrum—from deliberate deceit for illegal profit by counterfeiting trademarked logos, to deliberate style copying of runway garments for sale at moderate prices to mainstream customers, to unintentional or coincidental similarities in products that have been developed based on popular trends. Several authors (Green and Smith, 2002; Raustiala and Springman, 2006; Winograd and Tan, 2006) have contrasted the practice of design copying versus trademark counterfeiting and present arguments that support the legal freedom of designers to copy styles. For example, Kal Raustiala and Christopher Springman (2006) contend that without fashion copies, the fashion cycle would slow, prohibiting designers and retailers from reaping sales that currently result

from quickly changing seasonal merchandise. Hilton, Choi, and Chen (2004) note that it is difficult to ascertain the quality or monetary worth of fashion items unless value, or credence, is applied to them by others. This phenomenon, known as “credence goods” is associated with luxury goods and exists when value is connected to the brand or reputation of a designer, manufacturer, or retailer. Because consumers see value in popular brands and styles, copyists have clear motivation to produce fashions that resemble or might be mistaken for items that are credence goods. This critical issue—whether the goods are actually confusing to the consumer and genuinely mistaken for authentic branded merchandise—is the underlying difference between copyright and trade infringements. Copyrights do not have to be proven to be confusing to consumers, whereas lawsuits based on trade dress (or style) infringements do. Consider the situation where a “Tiffany-inspired” lamp is made from plastic and designed as a furnishing for a child’s doll house with a price of \$1.99. This design is unlikely to be mistaken for a real Tiffany lamp, as would be necessary for a trade lawsuit, but if the style itself is copyrighted, the sale of toy lamps in the copied style could be legally halted.

Cathy Horyn (2002) described the discovery of Balenciaga designer Nicolas Ghesquiere’s inspiration source for a vest presented in his 2002 spring collection: a little-known designer, Kaisik Wong, who had designed the original in 1973. The Balenciaga design offered identical patchwork shapes and placements and decorative tassels, admittedly copied from Wong by Ghesquiere. Horyn noted that “the freedom to copy is largely taken for granted at all levels of the fashion world,” and quoted Stanford University law professor Lawrence Lessig’s observation that “Copyright laws don’t cover fashion as they do publishing and music—nor should they. We borrow and change—that’s the creative process” (p. Bro). Raustiala and Springman (2006) suggested that copying actually promotes innovation and enhances opportunities for the fashion design originator to offer new products to consumers, a phenomenon they refer to as the “piracy paradox.” From this perspective, they explored and questioned the need for intellectual property protection in the fashion industry. Robert Green and Tasman Smith (2002) explored the measurement of the cost of counterfeit goods in the marketplace. They questioned whether copies really hurt the economy and brand owners. In their article, “Executive Insights: Countering Brand Counterfeiters,” they noted that the following criteria must be considered when weighing the costs of counterfeit merchandise: production cost of counterfeit goods, sales lost (opportunity cost) by association for brand owners, damages to brand equity, and total sales volume of counterfeit goods.

The speed of fashion change, often due to the quick market saturation of fashion products resulting from widespread copies, strengthens the economic well-being

of designers, manufacturers, and retailers. Traditionally fashions are introduced and trickle, and then flood, consumer venues at a pace that provides the design originator sufficient reward through sales and creative recognition. Technology complicates problems for design originators because others are able to reproduce the items and present them to consumers as fast as the original is rolled out. The extent to which the style of a fashion good is copied is an important distinction with respect to intellectual property rights. Intent to deceive either the wholesaler or the customer with a counterfeit is clearly an ethical violation, and in fact illegal. It is not as widely understood that creating an imitation, even if the intent of the manufacturer is clear, is also illegal. For example, in 2006, Burberry was awarded \$100,000 in damages by the U.S. District Court in Manhattan from Marco Leather which, the court determined, had infringed on Burberry's trademark rights (Jones, 2006). Marco Leather had imported merchandise that included wallets and handbags with the widely familiar Burberry check design.

By contrast, creating merchandise that is similar in style to an original design, known as a knockoff, is an important economic contributor to the fashion adoption and diffusion process. However, the extent to which the knockoff resembles or is passed off as the "original" design determines the legality, and therefore the ethics, of the copy. The fashion innovation process obviously raises the question: Is imitation the highest form of flattery for designers, or does it cut into their bottom lines? In 2005, The Norman Lear Center held an event titled "Ready to Share: Fashion and the Ownership of Creativity," which explored these issues. The resulting book, *Ready to Share: Fashion and the Ownership of Creativity* (edited by David Bollier and Laurie Racine, 2006), and accompanying DVD provide insights and perspectives regarding fashion and design ownership and creative processes. The scope of the global fashion marketplace presents high stakes for creators who are cheated out of earnings and for thieves who will go to great lengths to reap illegal gains.

Even when market saturation of fashion products is attributed to a given designer or company, where is the legal line between what is a counterfeit copy and what is an acceptable knockoff? There is no clear-cut answer in this situation. The question of authenticity is important for items to be differentiated from others sufficiently to be protected by intellectual property laws. For example, Victoria's Secret has filed a legal request against Aspen Licensing International (Casabona, Jan. 2, 2007) asking the court to declare that the lingerie company's ski-themed merchandise with the word "Aspen" and imagery of the Aspen environment does not infringe on Aspen Licensing International's trademark.

Authenticity is related to the seller's intent to deceive consumers. If a consumer buys something believing that the item is an authentic representation of the brand,

but later discovers it is a copy, the laws currently support removing that seller from the market. In their journal article on counterfeiting, Grossman and Shapiro (1998) discuss deceptive versus nondeceptive counterfeits, and note that both types of items can infringe on intellectual property rights to some degree. The authors also mention the fact that fashion items themselves are not protected. To win in court, brand owners must prove that their reputations are hurt as a result of fakes. For example, when a buyer on Canal Street in New York City knows the "Gucci"-looking watch is a fake, Gucci's reputation is not jeopardized, so there is no legal recourse against the style copier. Alternately, when the eBay buyer of a fake Louis Vuitton handbag—who believed the bag to be real—is disappointed with the poor quality; the brand reputation is put in jeopardy, supporting the legal right of Louis Vuitton to seek injunction against the manufacturer.

The range of intellectual property rights lawsuits is indicated by the news headlines shown in Box 4.4. Clearly, there is no simple solution to the intellectual property rights dilemma; companies must therefore consider ethical aspects of business decisions in addition to legal and reputation perspectives as designs are implemented.

Katherine Baumann, designer of high-end handbags, saw firsthand the effects of knockoffs, or imitations, on her business when her designs gained popularity among celebrities (Tucker, March 14, 2005). Frustrated by the copies of her intricate and expensive handbags, Baumann took it upon herself to interrupt her design and production time to investigate and track down copiers of her designs. Ross Tucker reported that Baumann spent over a year and a half canvassing stores, using shipping box labels and other investigative techniques to identify suppliers of her counterfeited merchandise. She even traveled to China to investigate a manufacturer, where she was able to buy copies of her own work! When she had gathered enough evidence, Baumann filed nearly a dozen lawsuits. Tucker quoted Baumann as saying, "You have to personalize this. The problem large corporations have is people look at them as a faceless entity that does not feel. We need people to understand this affects people's lives" (p. 19).

Most companies that rely on their brands for their existence employ firms specializing in the identification of counterfeit goods, or hire brand specialists within their companies for the same purpose. Brand specialists monitor the unauthorized use of a company's trademarks; the job entails reviewing Web sites, newspapers, magazines, and other media sources, even walking the streets of large cities such as New York, Chicago, and Los Angeles to locate and identify offenders. When identified, copyright offenders are told to cease their activities—and if they don't, they typically are turned over to litigation.

BOX 4.4

EXAMPLES OF RECENT HEADLINES

Cartier Sues Amazon.com over Alleged Counterfeit WatchesSOURCE: Tucker, R. (November 5, 2004). *Women's Wear Daily*, p. 1, 18.**Nike Sues Adidas**SOURCE: (February 21, 2006). *Women's Wear Daily*, p. 5.**Burberry Files Federal Suit versus Burlington Coat Units**SOURCE: Casabona, L. (June 7, 2006). *Women's Wear Daily*, p. 10.**Fendi Sues Wal-Mart on Counterfeiting**SOURCE: Scoha, M. (June 13, 2006). *Women's Wear Daily*, p. 2.**Lucky Brand Sues Target**SOURCE: Casabona, L. (October 9, 2006). *Women's Wear Daily*, p. 2.**Diane von Furstenberg Sues Forever 21 over Copyright**SOURCE: Casabona, L. (March 28, 2007). *Women's Wear Daily*, p. 3.**Reebok Files Suit versus Nike Alleging Patent Infringement**SOURCE: Casabona, L. (April 5, 2007). *Women's Wear Daily*, p. 15.**Levi's Files Suit against Polo**SOURCE: Ramey, J. (July 23, 2007). *Women's Wear Daily*, p. 2.**Levi's Sues A&F over Trademark**SOURCE: Ramey, J. (July 26, 2007). *Women's Wear Daily*, p. 10.**Aéropostale Files Trademark Suit**SOURCE: Casabona, L. (May 31, 2006). *Women's Wear Daily*, p. 13.**LVMH Files Suit against eBay Charging Counterfeit Sales**SOURCE: Marsh, E. (September 21, 2006). *Women's Wear Daily*, p. 3.

In some cases, powerful brands can leverage their resources to threaten smaller companies' existence when the issue of trademark infringement is murky. Raymond Flandez reported in the *Wall Street Journal* (November 28, 2006) that the U.S. Federal Trademark Dilution Act, passed in 1995, can create a barrier for companies that parody trademarks; citing Haute Diggity Dog's "Chewy Vuiton" dog toy as an example, because trademark owners need only to prove that there is a likelihood

that their trademark has been diluted by the offending product, rather than that it actually has. In this situation, LVMH Moët Hennessy Louis Vuitton sued the five-employee company Haute Diggity Dog for use of the name "Chewy Vuiton" on a purse-shaped chew toy for dogs. After incurring legal fees of more than \$200,000 and facing canceled orders by manufacturers that had been served cease-and-desist orders from LVMH, the owners of Haute Diggity Dog were exonerated when Judge James C. Cacheris wrote in his judgment, "The fact that the real Vuitton name, marks and dress are strong and recognizable makes it unlikely that a parody—particularly one involving a pet chew toy and bed—will be confused with the real product."

Similarly, Calvin Klein Inc. was the target of a complaint by Calvin Clothing Company Inc. in 2004 (Tucker, December 28 and January 3, 2005). The Calvin Clothing Company brand has manufactured boys' suits and tailored clothing since 1935. A mutual understanding between Calvin Klein and Calvin Clothing reportedly recognized that Calvin Clothing was distinct from the Calvin Klein label, which originated in the 1960s. The nature of the Calvin Clothing complaint emerged in 2002, when Phillips-Van Heusen purchased Calvin Klein and began opposing the Calvin Clothing Company's applications for certain Calvin trademarks. In response, Calvin Clothing sought a judicial declaration of its rights to the Calvin trademark and requested that all Calvin-branded merchandise manufactured for Calvin Klein be destroyed.

Trademark protection measures can also sometimes ensnare individual consumers. In 2006, crafters of embroidery products, who had purchased templates for their work, were informed that they would be sued for selling designs copyrighted by the distributors of the embroidery templates (Searcey, 2006). This has become such a rampant problem among embroidery hobbyists that the Embroidery Software Protection Coalition (ESPC), a nonprofit group of embroidery software and design manufacturers, was formed to defend the integrity and quality of embroidery products by promoting copyright compliance. Sara Meyer-Snuggerud, in a *Sew News* article (1998), presented a question-and-answer column about high-tech copyrights, with answers provided by the ESPC. One item noted that making unauthorized copies of intellectual property, even to share with friends, is akin to stealing. Sharing designs is not like loaning an object such as a car, which is not at your disposal if a friend is using it, but rather an act of piracy through duplication that results in both parties having the property at the same time.

DESIGNER AND MANUFACTURER RESPONSIBILITIES. Designers have an obligation to generate original work, and manufacturers have a responsibility to ensure that the items they produce are authentic and appropriately labeled.

The difficulty designers have in negotiating design inspiration and translating that into original designs is real, and will undoubtedly continue to be addressed by the industry.

The speed at which fashion changes in today's market—retailers strive to offer new merchandise on a continual basis rather than once a season—pressures designers to produce more new garments faster than ever before. Additionally, both vertical retailers and exclusive manufacturers want to reduce production costs in order to increase profit margins. This often means less investment in design teams and creative talent. Knocking off styles shown by fashion leaders enhances the bottom line by reducing design and development costs, and compressing the amount of time needed to bring items to the marketplace. Andrew Harmon and Brenner Thomas (2007) presented the following tips to help designers stay ahead of counterfeiters:

1. Register all brands and specific design motifs with the U.S. Patent and Trademark Office.
2. Work with U.S. Customs to counter foreign counterfeit shipments by showing officials where your goods are manufactured and what authentic products look like.
3. Register all trademarks in every country where business is conducted.
4. Select manufacturers that demonstrate tight control on inventory and manufacturing of hangtags, labels, and buttons.
5. Share services for intellectual property lawyers and private investigators with others in the marketplace, even your competitors.
6. Hire private investigators who are familiar with the territory under investigation.
7. Aggressively pursue counterfeiters. Brand owners who are vigilant about protecting their brands may be less likely to be counterfeited.

RETAILER RESPONSIBILITIES. Retailers should ensure that only authorized vendors supply their products and portray them in an honest manner. Furthermore, as retailers offer branded items, they are often under contractual obligation to merchandise the goods according to the policies of the brand owners. Retailers must familiarize themselves with the policies of the brand owners they represent and promote and sell those goods accordingly. Additionally, as the "front line" between the brands and the customers, retailers have opportunities to educate consumers regarding brand details so that consumers are better able to make informed decisions.

Retailers should offer choices to consumers so that their needs and desires are met. While doing so, retailers are obligated—both ethically and legally—to offer full information to their customers regarding the origin and brands of their merchandise.

QUESTIONS FOR DISCUSSION

1. What is the difference between a knockoff and a counterfeit?
2. How would the economy be affected if fashion copies were eliminated from the marketplace?
3. How can a person tell the difference between copying that harms the fashion industry and copying that stimulates the economy of the fashion industry?
4. Who is responsible for product authenticity in the case of secondhand sales and online auctions such as eBay—the seller, the auction house, or the retailer? Why and how can that responsibility be enforced or monitored?
5. In your experience, how prevalent are counterfeit items in the marketplace? What are the environmental factors—cultural, economic, etc.—that support this level of availability?
6. Discuss the most prevalent sources of design inspiration for current fashions. Is there anything related to these fashion inspirations that enhance or detract from potential infringements on the intellectual property related to the designs?
7. Investigate the Design Piracy Prohibition Act. What is your view about it? Should designs of apparel be protected by copyright? Why or why not?
8. What steps can manufacturers and designers take to protect their original styles and designs from being copied?

REFERENCES AND SUGGESTED READING

- American Marketing Association Web site: <http://www.marketingpower.com>
- Bagwell, L. S. and Berneim, B. D. (1996). Veblen effects in a theory of conspicuous consumption. *American Economic Review*, 86(3), 349–373.
- Barnett, J. M. (September 15, 2005). Shopping for Gucci on Canal Street: Reflections on status consumption, intellectual property, and the incentive thesis. *Virginia Law Review*, 91, 1381–1423.