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Trademarks, Brands and Counterfeiting in Fashion Industry

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ABSTRACT

Brands constitute a very important part of trade and business in the current world. It is the symbolic representation of the quality, source and ingredients of the products. In the current scenario, with rise in globalization, people are more inclined towards high end luxury brands and fashion industry is one of the most demanded one across the world. The brands associated with high end fashion clothing and accessories influence the minds and choice of consumers to this extent that they are ready to purchase it at any cost and sometimes even ready to buy a substitute of lower quality of similar brand, just to have the pride of possessing a luxury brand. This is where the scope of counterfeiting develops and the competitors resort to unfair competition by free riding on the reputation of famous brands and deceiving consumers. Counterfeiters target luxury brands due to their reputation in the market and the consumer trust associated with it. Selling counterfeits of these famous brands become easier by deceiving consumers. Counterfeiting in fashion industry in many cases is injurious to health and interest of the consumers. Use of cheap quality of cosmetics, perfumes or clothing can severely damage skin and cause huge losses to both the consumers and the brand owners apart from increasing scope of organized criminal activities associated with counterfeiting. Such activities are most commonly seen in developing industries due to the consumer demand and also due to weak regulatory mechanism which facilitates the counterfeiters in many ways. Whether high end fashion brands are really affected by such activities or there is a need for strong enforcement of anti counterfeiting law is a matter of concern.

Keywords: Counterfeiting, luxury brands, deception, fashion industry, trademarks, consumers

I. INTRODUCTION

Brands constitute a very important part of trade and business in the current world. The value of a trademark as a marketing resource is due to its capacity to perform certain economic

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functions, but this capacity is based on its legal guarantee of trade origin along with the fact that it can be used as a reference point in communication and promotional activity. These attributes enable a trademark to acquire additional meanings and associations that can inform and influence consumer's perspective.² In the current world, with rise in globalization, people are more inclined towards high end luxury brands and fashion industry is one of the most demanded one across the world. The brands associated with high end fashion clothing and accessories influence the minds and choice of consumers to this extent that they are ready to purchase it at any cost and sometimes even ready to buy a substitute of lower quality of similar brand, just to have the pride of possessing a luxury brand. This is where the scope of counterfeiting develops and the competitors resort to unfair competition by free riding on the reputation of famous brands and deceiving consumers.

II. PROTECTING TRADEMARKS AS BRANDS

Generally, a brand is understood to have a value which transcends the product with which it is associated. According to one observer, the difference between products and brands is fundamental. A product is something made in a factory; a brand is something bought by a consumer. A product can be copied by a competitor; a brand is unique. A product can be quickly outdated; a successful brand is timeless. As a result, brands are often deemed to have a quality of 'transferability', in that they have the ability to transfer consumer loyalty between products, services and categories over time and to separate it from tangible production.³ The exclusive marketing identity that a trademark signifies and can confer on marked products roughly corresponds to the marketing concept of a brand.⁴

Goods turn into a brand when they come to embody a symbolic dimension to represent a certain meaning. For instance, the soap manufacturer Ivory, branded its goods to represent purity and cleanliness to differentiate their more expensive Ivory Soap from other cheaper soap products: what consumers bought was not a bar of soap but the idea of purity. Likewise, what draws the line between high fashion brands and non high fashion brands is whether the fashion house has successfully acquired symbolic meaning via a brand so that consumers come to believe purchased goods carry certain meaning within.⁵

² Andrew Griffiths, *An Economic Perspective On Trade Mark Law*, (Edward Elgar Publishing Limited, 2011), Vol. 1, Page 5

³ Lionel Bently, Jennifer Davis And Jane C. Ginsburg, *Trade Marks and Brands: An Interdisciplinary Critique*, (Cambridge University Press, 2008), Vol.1, pg 80

⁴ *Supra* note 1

⁵ Dayoung Chung, *Laws, Brands, and Innovation: How Trademark Law Helps to Create Fashion Innovation*, 17 J. MARSHALL REV. INTELL. PROP. L. [i] (2018)

III. COUNTERFEITING IN FASHION INDUSTRY:

Counterfeiting is an act of producing duplicate or identical goods with same brand name as original products. Counterfeit items are unlawfully forged, copied, or imitated item, without authorization and with the intent to deceive or defraud by presenting the item as genuine. This includes the production and sale of an item that displays a reproduction of a genuine trademark; usually to deceive buyers into thinking they are purchasing genuine merchandise. When a genuine trademark is attached to counterfeit product, it becomes a "spurious mark." A knock-off, is another concept where there is an "unauthorized copy of (another's product) usually for sale at a substantially lower price than the original. Knock-offs do not display the logo or mark of the originating company on the item.

Counterfeiting in fashion industry is a menace that is increasing at a large scale across the globe. Increase in international trade, globalization and technical advancements are providing opportunities to counterfeiters as well to expand the trade in counterfeit goods and penetrate the legitimate market. In this context, unfair competition refers to the infringement of a high-fashion designer's trade dress through imitation of the designer's fashion creations. The trade dress of a product is the overall image or appearance of the product.⁶ The fashion designer's trademark and trade dress are important factors in defining and distinguishing her style from her competitors.⁷

Counterfeiting is lucrative because counterfeiters find methods to manufacture their products in the least costly way. To do so they make inferior products and do not abide by labor regulations. They do not follow the standards and requirements of manufacturing consumer products as prescribed by the law. Neither do they maintain hygiene in some class of goods. Counterfeiters use toxic chemicals and dyes when producing garments that can burn and irritate the skin. Sunglasses, which make up a large portion of counterfeit fashion sales, are often not made with the required shatterproof lens and ultraviolet ray protection. Wearing sunglasses without ultraviolet ray protection may lead to cataracts, skin cancer around the eyes, and the burning of the front surface of the eye. When counterfeiting luxury perfumes, counterfeiters often use bacteria, antifreeze, and even urine as active ingredients. Since perfume is absorbed into the skin, these ingredients are life threatening.⁸

⁶ See Karina K. Terakura; The United States Supreme Court's 1992 decision in *Two Pesos, Inc. v. Taco Cabana, Inc.*² demonstrated that trade dress is an important category of intellectual property and deserves protection.

⁷ 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 (2000).

⁸ Erin Fitzgerald, *The Fashion Police: Criminalizing the Knowing Purchase of Trademark Counterfeit Fashion Items*, 47 NEW ENG. L. REV. 127 (2012).

As the counterfeiters in many cases, find it difficult to penetrate legitimate retail markets, they end up selling their products in open areas or places of less reputation. Counterfeit fashion items are typically purchased on the street, out of a car trunk, in back alleys, or in public markets. For instances, street vendors dealing in counterfeits often whisper designer names as people walk by, if the passerby is interested in viewing the merchandise they are often led to basements and back rooms where the illegal products are stored. In this case, common sense tells us that high fashion designers like Louis Vuitton, Chanel, or Burberry do not sell their luxury goods priced in the thousands in these places and manner. Authentic items are only sold by authentic dealers for the designer and official retailers such as department stores. Therefore, one who purchases goods in places like basements, back alleys, and car trunks either knew or reasonably should have known that the goods were counterfeit.⁹ This is mostly seen in developing countries where counterfeiting is high in demand among some class of consumers due to various obvious reasons. Satisfaction of possessing luxury brands at low price being the most common reason. In many such cases the original brand owners feel a sense of pride when their brands are copied as it indicates the extent of demand and being famous in the global markets. But that is not the case with other famous brands that are new in the markets or those who suffer from willful counterfeiting that is absolutely deception based.

IV. IMPACT ON CONSUMERS AND BRAND OWNER:

Counterfeiting of brands is not just a mere IP rights violation. It causes huge loss to various stakeholders of the markets. Consumers of counterfeit products are not the only people at risk, the health and safety of counterfeit manufacturers are also in danger. Anti counterfeiting investigators in Asia report that factories producing counterfeit products are kept in deplorable conditions that would boggle our minds. It is not uncommon to see children as young as four years old mixing dangerous and deadly chemicals for the production of the counterfeit item.¹⁰

Consumers who purchase counterfeits of high end fashion products, famous brands for cosmetics, perfumes etc in many cases suffer from allergic reactions, burn and in some cases serious injury due to inferior quality of the counterfeits. The brand owners on the other hand, suffer economically due to revenue loss apart from damage to their reputation and business. When an inferior quality product affects the consumer interest, the brand and the company is blamed, not the product manufacturer per se, which in such cases is the counterfeiter. Thereby counterfeiters rule the market by way of unfair competition and causing huge losses to different

⁹ *Supra* note 7

¹⁰ *Ibid*

stakeholders.¹¹

V. CONCLUSION

A counterfeiter targeting high end fashion industry is a common phenomenon in the current world. The brands associated with most demanded products such as clothing, accessories, footwear, perfumes and handbags are commonly seen as counterfeits of the original famous brands. Such duplicate products are easily available in the various shopping platforms in particularly in the virtual shopping platforms where counterfeiters easily target large number of consumers across the globe and manage to keep their identity hidden due to the advantages of virtual cyber space. Such counterfeits are easily available in the markets due to consumer demand. But one cannot ignore the fact, the amount of risk associated with these inferior quality products. Markets cannot be left unregulated by mere fact that such activities are carried out due to consumer demand or it is not causing injury to everyone. What is unjust cannot be justified by such notions. Counterfeiting when carried out at a large scale, anti-counterfeiting law enforcement in the country is effective enough or not is a matter of question.

¹¹ Daniel C. K. Chow, *Alibaba, Amazon, and Counterfeiting in the Age of the Internet*, 40 NW. J. INT'L L. & BUS. 157 (2020).